THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONE GAS, INC., FOR A FINANCING ORDER APPROVING SECURITIZATION OF COSTS ARISING FROM THE FEBRUARY 2021 WINTER WEATHER EVENT PURSUANT TO THE "FEBRUARY 2021 REGULATED UTILITY CONSUMER PROTECTION ACT"	)	**CASE NO. PUD 2021-000079**

Filed 30 August 2022
Re: Order No.723033

<u>DISSENTING OPINION OF COMMISSIONER BOB ANTHONY</u> – Part 2

New $483 Million Hit to ONG Ratepayers Makes $813 Million Extra and Counting!

More catastrophic financial harm to Oklahoma's utility ratepayers is coming. ONG customers will soon start paying a new monthly "WES" charge for the ratepayer-backed bonds just sold to cover the utility's February 2021 Winter Storm costs. The company reports its customers owe $1.28 billion in principal for the natural gas they used (inexplicably, the most expensive in the country). However, that debt will now cost ratepayers $2.25 billion over 25 years, thanks to an ill-advised "securitization" scheme defined by political back-scratching, regulatory negligence, special interest giveaways, reckless risk-taking, inept execution, and a deplorable disregard for the best interest of Oklahoma ratepayers.

In a March 2021 advocacy letter to Gov. Kevin Stitt, Corporation Commission Chairman Todd Hiett touted securitization as "a solution" to the prior month's extraordinary winter storm costs and a "win-win" because it "not only provides for potential customer savings in the magnitude of $600 million to $1 billion, but also minimizes financial risks to our Oklahoma utilities."

But instead of hundreds of millions of dollars in "customer savings" that the bond scheme's misguided and misinformed proponents promised – to the governor, the public and the Oklahoma Supreme Court – ONG's winter storm bonds alone have resulted in almost HALF A BILLION DOLLARS of extra financing cost. This so-called "win-win" was decidedly one-sided. Once again for ratepayers: The insiders gambled, and you lost. (But don't worry about them – they took their fees off the top!)

When combined with the $330 million in similarly-unexpected extra interest costs for OG&E's ratepayer-backed bonds issued in July, ONG's $483 million excess now makes more than $813 million in under-estimated interest that will be paid entirely by ONG and OG&E customers. A lot of things are still murky, but one thing is now crystal clear: those wild, irresponsible claims of "savings" used to promote these bond schemes have turned into a horrible injustice for Oklahoma ratepayers.

FACTS:

- The "low" 2.35% bond interest rate misleadingly advertised by the two commissioners who approved the bond financing order for ONG actually came in at *more than twice* their expectations – specifically, 4.714% near the end of the bonds' absurdly-long 25-year term.

- The bogus, conceptually-flawed predictions of bond "savings" for ONG customers utterly collapse when contrasted with the actual total, $898 million in interest expenses – some $483 million *more* than was so confidently forecast.

- Those households that are customers of both OG&E and ONG, whose original average winter storm obligation was about $1800 total, now owe over $3,500 in total monthly payments for the ratepayer-backed bonds – payments that will be with their families for the next quarter of a century and could easily increase.

The sad truth is that no one should be surprised by these catastrophic results. They follow naturally from the fact that the Oklahoma Corporation Commission's (OCC) open-ended bond financing orders amounted to blank checks written to the utilities for ratepayers to pay. They immorally put all the downside risk on consumers while utility shareholders and bond buyers remain overwhelmingly protected. And the worst may not be over. Risks from higher interest rates, a decreasing customer base, or a decline in the use of natural gas resulting from environmental regulations, greater efficiencies or technological advances could result in *even higher* monthly charges to residential ratepayers in the future because of an innocent-sounding "true-up" provision that means the ratepayers will make up any shortfall, regardless of the cause.

Putting the risk on consumers, instead of utility company shareholders, is already a central feature of Oklahoma's statutory fuel adjustment charge and purchased gas mechanisms that automatically pass those costs through to ratepayers, leaving little incentive for the utilities to control them. As discussed in detail elsewhere, that is bad enough. But what right do the OCC, the Legislature, or the monopoly utilities have to put hundreds of millions in additional financing risk on the backs of ratepayers without their consent – obligating them for decades of "true-up" payments to ratepayer-backed bond holders, regardless of the ultimate cost?

Again, taking an outside chance with the ratepayers' money has already cost ONG and OG&E customers collectively more than $800 million, and there are more Oklahoma utility bond deals still to go!

How has all this happened? Easy. The public utilities were allowed to bypass many of our state's mechanisms for consumer protection against abuses by monopoly utilities. With the help of

Corporation Commissioners Dana Murphy and Todd Hiett, the utilities used an order segregating the winter storm costs into a "regulatory asset" to say some of the usual rules the Commission uses to determine whether fuel costs were "reasonable" and "prudent" no longer applied, even though the regulatory asset order was preliminary and specified it was "for accounting purposes only."

As a result, the OCC's Public Utility Division did not follow the OCC's own rules or the state statutes governing purchased gas, fuel adjustment and rate investigations (Okla. Admin. Code 165:50-5-3 and Okla. Stat. tit. 17 §§ 252 and 263). Among other things, this meant no one was given their customary opportunity to object to these extraordinary fuel "costs" or to file a complaint.

"I can tell you, absolutely, positively, there is no way those prices represented the cost to get that gas to these utilities," said Tom Seng, former natural gas trader, now director of the University of Tulsa's School of Energy Economics, Policy and Commerce last week. "It was price-gouging." (quoted in *The Frontier* 8/24/2022)

At the time I argued, "Extraordinary costs deserve extraordinary scrutiny!" But Commissioner Dana Murphy disagreed. In a January 26 interview with KOCO Channel 5, Murphy denied it was even the Corporation Commission's job to scrutinize those costs! "So if you look at who's supposed to investigate, and look into price-gouging or things that were inappropriate, … that is not in the purview of the Corporation Commission," she told viewers. Since she and Hiett had just voted to declare more than $2 billion in winter storm costs "fair, just, reasonable and prudently incurred" *without* following the Commission's own rules to examine them, you can see why she might be trying to pass the buck.

Commissioners Hiett and Murphy also cavalierly used that preliminary regulatory asset order to permit an unconstitutional "waiver" of the utilities' filed tariffs (that do not provide for non-consensual ratepayer-backed bond interest charges and fees) in violation of customers' contractual rights.

And these were not the only laws designed to protect consumers that were heedlessly bypassed or violated. It turns out neither the OCC nor the Oklahoma Development Finance Authority (ODFA) were required to follow the state's basic Central Purchasing contracting rules when they hired an outside "financial advisor" to advise on the securitization applications. The financial advisor and its counsel also assisted with drafting the bond final financing orders. These orders detailed how the ratepayer-backed bonds would be structured, marketed, issued and paid for. Astonishingly, the same firm was hired to work both ends of the deal!

That's right. The same outside financial advisor was paid (by ratepayers) both to write the guidelines for the bond sale and then to follow them when it came time to sell the bonds. And what did those guidelines leave out? You guessed it – the ratepayer protections! It seems that <u>none</u> of the parties involved in the issuance of these ratepayer-backed bonds signed a certification letter ensuring that the structure, marketing, pricing and sale of the bonds would be conducted in the best interests of the ratepayers. You'd be forgiven for thinking this sounds like Swadley's special deal all over again – just a billion dollars worse!

Sickening as they are, with so many consumer protections violated or bypassed, the continuing catastrophic results of these ratepayer-backed bond sales should have been anticipated – and yet, these are beyond the pale. When questioned at an August 4 status hearing after the OG&E bond issuance why those bonds ended up costing ratepayers some $330 million more than had been forecast, the financial advisor's own representative told the Commission that a delay from March to July resulted in a $120 million increase due to the intervening change in market interest rates. Okay… but what about the other $210 million in cost overruns?!? And how much of this newest $483 million in cost overruns for the ONG bonds will the financial advisor similarly attribute to this spring's change in market interest rates (from which the financing orders *they wrote* failed to protect the ratepayers)? How much more will conveniently go unexplained?

An independent post-transaction analysis of these bond sales should be conducted as quickly as possible. In addition to the aforementioned political back-scratching, regulatory negligence, special interest giveaways, reckless risk-taking, inept execution, and a deplorable disregard for the best interest of Oklahoma ratepayers, a full investigation should look at shirked duty and abrogation of responsibility by the Oklahoma Attorney General (including his failure to address public corruption at the Corporation Commission), ongoing conflicts of interest, and obvious violations of state law and the Oklahoma Constitution.

There are more of these bond sales still to go! Oklahoma ratepayers have a right to know if they are being cheated or if their tariff rights have been violated. They deserve to know why and how essential consumer protections were bypassed. The politicians who inflicted this costly and unnecessary bond scheme on the ratepayers need to understand the true consequences of their irresponsible actions. And wrongdoers – whether duplicitous or naïve – must be held accountable.

Corporation Commissioner Bob Anthony

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONE GAS, INC., FOR A FINANCING ORDER APPROVING SECURITIZATION OF COSTS ARISING FROM THE FEBRUARY 2021 WINTER WEATHER EVENT PURSUANT TO THE "FEBRUARY 2021 REGULATED UTILITY CONSUMER PROTECTION ACT"	)	**CAUSE NO. PUD 202100079**

Filed 25 January 2022
Re: Order No. 723033

DISSENTING OPINION OF COMMISSIONER BOB ANTHONY- Part 1

Once again Commissioners are being asked to vote on a Winter Storm 2021 debt package worth well over $1 BILLION to Oklahoma ratepayers. Artificial 180-day deadlines imposed by the legislature are no excuse for rushing through bad policy, and the more I study and consider the details of these deals, the more devils I find. AARP has expressed legitimate concerns about so-called "securitization" and has called for more transparency. Especially if utility company management is found to have acted imprudently, utility shareholders should share in a portion of the extraordinary costs, instead of automatically being "made whole."

In my opinion, these stipulated Ratepayer-Backed Bond proposals are ill-conceived, unconstitutional, and bad for residential ratepayers. Worse, they also appear to be an attempt to prevent thorough and open examination of questionable, possibly negligent utility management decisions and imprudent fuel/service purchases made during the storm, as well as an excuse to line the pockets of special interests on Wall Street and their local counterparts.

For those under the false impression there are no other or better options, note that the Oklahoma Municipal Power Authority (OMPA) adopted a Winter Storm 2021 plan without using "securitization." OMPA will amortize new debt over 7 years and did not increase wholesale rates for 2021 or 2022. Similarly, Cotton Electric Coop, without using "securitization" or Ratepayer-Backed Bonds, has adopted a 5-year plan with an average $4.50 monthly increase. Furthermore, without "securitization" or Ratepayer-Backed Bonds, this OCC unanimously ordered a 5-year plan for Panhandle Natural Gas, Inc. Even more noteworthy, for several different utilities seeking to charge ratepayers Winter Storm 2021 expenses, the Minnesota Public Utility Commission ordered, **"Recovery of any financing costs is denied."**

Some essential questions regarding the constitutionality of today's Order and the February 2021 Regulated Utility Consumer Protection Act ("Act"), 74 O.S. Sections 9070 – 9081, have been raised by the protests to the OG&E Winter Storm Bond package now pending before the Supreme Court. Indeed, there are many reasons to question the constitutionality of these black-box settlement based Ratepayer-Backed Bonds.

- They appear to be retroactive ratemaking prohibited by Okla. Const. Art. II, Section 23, because, by imposing a new debt burden on ratepayers without compensation and consent, the orders retroactively change the Purchase Gas Adjustment or Fuel Adjustment Clause (PGA/FAC) tariff in effect when the utilities' storm-related purchases were made. This retroactive ratemaking also likely violates customers' constitutionally-protected contractual rights under their Commission-approved Service Agreement with the utility.

- The above-mentioned retroactive ratemaking also likely violates the "fixed rate doctrine" (Okla. Const. Art. IX, Sections 18 and 24) whereby a gas distribution utility is prohibited from charging more than the Commission-approved tariff amount. Again, forcing customers to take on untold hundreds of millions of dollars in opened-ended interest obligations, financing charges and fees *more than is owed* under the PGA/FAC in effect changes the Commission-approved tariff after the fact. If the Commission is going to allow retroactive changes in gas costs, then it must do so by offering the customers the option of paying their bills in full without interest.

- With limited exceptions, today's Order provides that it is irrevocable and not subject to amendment, modification, or termination by the Commission. But according to *State ex rel. Wright v. Oklahoma Corp. Com'n*, 2007 OK 73, ¶27, "[i]t is a well-known principle of statutory and constitutional construction that one Legislature cannot bind another". It is my understanding that no two Commissioners can issue an order that binds all future OCC Commissioners, yet that appears to be what is attempted here. What if conditions change? Is the Order not subject to modification?

- Today's Order delegates decisions impacting ratepayers to the Oklahoma Development Finance Authority (ODFA), such as the interest rate on the bonds, the term of the bonds, and possible credit enhancements. While today's Order sets upper limits on the interest rate and term, there are no limits regarding possible credit enhancements. Article IX, Section 18a, of the Oklahoma Constitution provides that, "A majority of said Commission shall constitute a quorum, and the concurrence of the majority of said Commission shall be necessary to decide any question." In light of this requirement, how can the Commission delegate to the Oklahoma Development Finance Authority key decisions related to the Ratepayer Backed Bonds that are the Commission's responsibility?

- Compelling arguments have been made that these Ratepayer-Backed Bonds do not qualify as "self-liquidating" (since a future Commission could cut off their funding) and yet also try very hard for the sake of obtaining a low interest rate <u>not</u> to be unenforceable "appropriation-risk or moral obligation bonds," since Section 9079 of the Act states explicitly: "… the bonds so approved and the revenues pledged to their payment shall be incontestable in any court in this state." This appears to leave them instead "debts contracted by ... this State" (Art. 10, § 25) and "constitutional debt [subject to] the budget balancing amendments of Okla. Const. Art. 10, §§ 23, 24 and 25" (*Fent v. OCIA*, 984 P.2d 200). If this is the case, they are obviously unconstitutional because <u>the provisions of Okla. Const. Art. 10, §§ 23, 24 and 25 clearly have not been followed</u>.

- Citizens will likely be outraged when they realize the "February 2021 Regulated Utility Consumer Protection Act" attempts to overcome these violations of the Oklahoma Constitution by simply <u>bypassing the Constitution and amending it without a vote of the people</u>! Section 9081 of the Act states,

> "If this act, or any provision hereof is, or may be deemed to be, in conflict or inconsistent with any of the provisions of Section 18 through Section 34, inclusive, of Article IX of the Constitution of the State of Oklahoma, then, to the extent of any conflicts or inconsistencies, it is hereby expressly declared this entire act and this section are amendments to and alterations of such sections of the Constitution of the State of Oklahoma, as authorized by Section 35 of Article IX of the Constitution of the State of Oklahoma."

As Justice Opala made clear in his concurring opinion in *Southwestern Bell Telephone Company v. Oklahoma Corp. Com'n*, 1994 OK 142 (Opala, J., concurring), "Unlike a statute, the Constitution *cannot* be *amended or repealed by implication*." (*Id.* at ¶3). When considering similar language to that in Section 9081, Justice Opala stated that the language would be "ineffective" to amend or repeal the Constitution. (*Id.* at ¶4). Justice Opala further stated, "…*nothing* in the Constitution can *safely* be cast aside by implication. Legislative amendment or repeal *must explicitly and narrowly* target the changes intended, leaving nothing to speculation or conjecture." (*Id.* at ¶5.)

In *Oklahoma Gas & Electric Co. v. Corporation Com'n,* 1975 OK 15, ¶25, the Oklahoma Supreme Court stated " . . . if additional powers are conferred upon the Corporation Commission which are inconsistent with the Commission's constitutional powers, compliance with the provisions of Art. IX, § 35, of the Oklahoma Constitution is mandatory." The Court further stated, " . . . without compliance with Article IX, § 35, of the Constitution, the Legislature may not vest in the Corporation Commission, duties which are inconsistent with its constitutional duties." (*Id.* at ¶29). In my view, binding future Commissions and delegating decisions to the Oklahoma Development Finance Authority would be inconsistent with the Commission's constitutional duties absent an effective amendment to the constitution. To declare "this entire act" an amendment to the Constitution, per Section 9081, is either lazy lawmaking or clandestine chicanery. One way or another, the Supreme Court is unlikely to allow the Oklahoma Constitution to be circumvented in this way, nor should it.

Constitutionality aside, these bonds are quite simply bad for residential ratepayers.

- It is irresponsible and a dereliction of duty for this Commission to allow public utilities to bypass our mechanisms for consumer protection against abuses by monopoly utilities by adopting a Settlement Agreement that simply declares the Winter Storm 2021 costs in question to have been "reasonable and prudently incurred" without a formal, open and transparent prudence review. **"Extraordinary" costs deserve extraordinary scrutiny!** The ratepayers have a right to know why and how these costs were incurred and who is getting rich as a result of them.

- The ongoing failure of parties involved with these settlements to disclose corporate relationships and conflicts of interest, including the extent to which the costs in question were incurred through transactions with the utilities' own *unregulated* affiliates and subsidiaries, or the fees the parties and their associates stand to make from the evaluation, issuance, underwriting, servicing, holding or trading of such bonds, is an affront to the honesty, integrity, due process, ethics and total transparency ratepayers deserve from a transaction of this size – indeed from *any* transaction that involves ratepayer monies.

- The 17 O.S. Section 250, et seq. statutory scheme for the PGA/FAC contemplates that a customer pays for what he consumes. But this securitization plan arbitrarily and capriciously changes that to require the customer pay a share of what his *customer class* purportedly owes, according to the allocations agreed upon in the Joint Stipulation and Settlement Agreement. It also makes future new customers, some of whom may not even be alive yet, pay for consumption by their predecessors. In other words, present and future customers both may ultimately have to pay for gas they did not consume. How is that "reasonable," let alone equitable?

- In today's Order, ONG very generously exempts the "Low Income" customer class from paying any portion of the Winter Storm 2021 costs or any Termination Fee related to the February 2021 Winter Weather Event. BUT, instead of assuming those costs itself at the expense of its own shareholders, the company instead reallocates the Low Income share to be paid by its other classes of customers. Oklahomans are generous people, but is it "reasonable" to allow a public utility to pick the pockets of one group of customers without their knowledge or consent in order to give a free ride to another? Once again, customers are being required to pay for gas they did not consume through yet another abusive misuse of the PGA/FAC mechanism.

- Beyond the unreasonableness and imprudency of these costs, the idea that ratepayers will somehow be "saving" money by paying untold millions more than the principal in interest and fees is increasingly indefensible. Because the interest rate at which these bonds will be issued is unknown, so too are the hundreds of millions in ongoing financing costs and servicing fees over the projected 25-year term of the bonds. And yet, today's Order finds "savings" in the difference between the unknown interest rate plus costs and fees and the 8.88% rate of ONG's "traditional utility financing." This ignores that in the absence of this securitization plan, those interest costs could instead be zero. Even many modern Buy-Now-Pay-Later providers (like Afterpay, Affirm, Klarna and Paypal) offer zero-interest installment payment options to retail customers to enable larger-than-usual retail purchases. Zero-interest installment payment plans are a market reality and have been adopted both by other states and by other (coop or consumer-owned) energy providers here in Oklahoma, yet they are not even considered here. As a result, this self-described "$1.35 billion" Financing Order could end up costing ratepayers upwards of $2 billion.

A case in point is the August 30, 2021 Order of the Minnesota Public Utility Commission (PUC) (Docket Numbers CI-21-135, M-21-138 and M-21-235). In it, the Minnesota PUC addresses February 2021 Winter Storm costs of over $500 million for several Minnesota public utilities. Instead of "securitization" or ratepayer-backed bonds, Minnesota ordered:

- "The burden to prove a rate is just and reasonable is on the utility … and any doubt as to reasonableness will be resolved in favor of the customer." Further, it "will refer issues of prudence to the Office of Administrative Hearings for contested-case proceedings." Specifically, "In incurring costs necessary to provide service, utilities are expected to act prudently to protect ratepayers from unreasonable risks. Utilities that fail to do so will not be allowed to recover the costs of those failures."

- The Minnesota PUC decided it "will authorize impacted utilities to recover extraordinary costs over a 27-month period … pending prudence review …" and "will deny recovery of financing costs and require the impacted utilities to exempt certain customer groups from extraordinary-cost surcharges."

- The Minnesota PUC found "… a need for further investigation …" because, among other things, utilities "… acted unreasonably in not fully deploying available storage gas …", "… utilities should have diversified their natural gas purchasing …" and "… utilities imprudently failed to fully deploy mitigation measures …".

Oklahoma's residential ratepayers are entitled to those same protections under Oklahoma law and deserve no less than their Minnesota counterparts.

- According to Appendix "C," today's Order will require ONG's customers to pay an estimated $18,866,378 in issuance costs, including fees of: $8,145,500 to the State's own Council of Bond Oversight; $6,268,878 to unnamed "Underwriters," and $2,000,000 to rating agencies. But once again, these are only "Estimated Issuance Costs" – the real numbers could be substantially higher and will be passed through to ratepayers regardless. There are no incentives to control costs anywhere in this Order. Once again, the attitude appears to be, "Just put it on the ratepayers' tab."

Further, these bonds, formulated under a black-box settlement, are fundamentally ill-conceived.

- According to the prefiled testimony of ONG witness Cory Slaughter, the estimated impact to Option A residential customers using less than 50 Dth of natural gas per year approaches $5 per month, and the estimated impact to Option B residential customers using more than 50 Dth per year approaches $8 per month. These charges must be paid every month for the next 25 years.

- The 25-year duration of these bonds assumes that there will be enough customers to pay off the bonds throughout that 25-year period. However, the future economics of carbon-based fuels are not so easily foreseeable. In the United States most natural gas is now consumed by electricity generation. Yet ever increasing climate concerns could easily lead to new environmental legislation like a federal carbon tax or tightened drilling and air quality restrictions that could make gas-fired generation prohibitively expensive. Demand could also fall as appliances and machinery become more efficient, building methods improve, and competing renewable energy sources like rooftop solar become less expensive. As demand falls, the burden of these long, drawn-out Winter Storm 2021 costs on the company's remaining customers will only increase. If gas-fired generation were to end, ONG customers could be stuck with substantial stranded costs for under-depreciated facilities. Since the company was unable to accurately predict demand in preparation for the 2021 Winter Storm, knowing the size of its customer base and the forecasted temperatures some two weeks in advance, I have a hard time trusting any projection that might be made a decade or two into the future.

- Today's Order "finds that a termination fee is not preferable" (p. 34), but in effect it assigns to ongoing customers the allocation amount departing customers are bypassing. Therefore, it is again worth noting that new allocations, fees and costs, including interest charges, imposed through the PGA/FAC mechanism likely constitute further retroactive ratemaking and violate customers' constitutionally-protected contractual rights under their Commission-approved Service Agreement with the utility existing in February 2021.

- Financially, on top of a $1.357 billion principal amount of ratepayer-backed bonds, ONG itself calculates at least $415 million in interest for a 25-year period if the interest rate is 2.35%. But today's Order potentially allows up to 6.0% for the "interest rate of the Bonds"

> (p. 46) which would result in more than $1 BILLION in interest obligation for ONG ratepayers. **Thus, astonishingly the principal amount plus interest could even total a staggering $2.4 BILLION.**

Once again, this Winter Storm 2021 debt package leaves fundamental questions unanswered and commits Oklahoma ratepayers to pay unlimited, uncapped financing costs for the privilege of being able to extend the payment of essentially uninvestigated, potentially imprudent costs out over an absurdly long 25-year term, at the end of which ONG may no longer be providing natural gas service, but its former customers will still be paying off their nonconsensual bonded indebtedness from the 2021 Winter Storm. Since the bonds themselves likely run afoul of the Oklahoma Constitution in multiple respects, and the "savings" to ratepayers are completely illusory, I am left to conclude these securitization plans built on murky Settlement Agreements are actually efforts (1) to prevent a comprehensive and transparent examination of utility management decisions and fuel/service purchases made before and during the storm, (2) to protect utility company shareholders from bearing any of the costs that might be associated with possible poor, negligent or even imprudent decisions by their company's management which exacerbated the Winter Storm costs, and/or (3) to line the pockets of special interests and anyone else enterprising enough to wrangle a fat financing fee at the expense of Oklahoma ratepayers.

Corporation Commissioner Bob Anthony
Part 1 Filed 25 January 2022