

**FILED**

MAR 28 2016

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

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CORPORATION COMMISSION  
OF OKLAHOMA

**IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR )  
DETERMINATION OF THE CALCULATION )  
OF LOST NET REVENUES AND SHARED )  
SAVINGS PURSUANT TO THE DEMAND )  
PROGRAM RIDER OF OKLAHOMA GAS )  
AND ELECTRIC COMPANY )**

**CAUSE NO. PUD 201500153**

HEARING: June 30, 2015, and July 1, 2015, Courtroom B  
2101 N. Lincoln Blvd., Oklahoma City, Oklahoma 73105  
*Before* Jacqueline T. Miller, Administrative Law Judge

APPEARANCES: Natasha M. Scott, Deputy General Counsel, *representing* the Public Utility  
Division, Oklahoma Corporation Commission;  
William J. Bullard, Patrick D. Shore, Kimber L. Shoop, and  
Stephanie G. Houle, Attorneys, *representing* Oklahoma Gas and  
Electric Company;  
Jack G. Clark, Jr. and Ronald E. Stakem, Attorneys, *representing* OG&E  
Shareholders Association;  
Jerry J. Sanger, Assistant Attorney General, *representing* the Office of the  
Attorney General, State of Oklahoma  
Thomas P. Schroedter and Jennifer H. Castillo, Attorneys, *representing*  
Oklahoma Industrial Energy Consumers

**REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**

**SUMMARY**

The Administrative Law Judge supports the PUD Staff's position in this cause and recommends those positions be applied to matters at issue herein which arise only on a prospective basis following the issuance of a Commission Order in this cause.

**I. PROCEDURAL HISTORY**

On April 14, 2015, the Public Utility Division ("PUD") filed its Application in this cause, along with the Direct Testimony of Kathy Champion.

On April 16, 2015, an Entry of Appearance was filed by Oklahoma Industrial Energy Consumers ("OIEC").

On April 16, 2015, PUD filed a Motion for Order Prescribing Notice and a Notice of Hearing. On that date, PUD also filed a Motion for Order to Establish Procedural Schedule and a Notice of Hearing.

On April 17, 2015, an Entry of Appearance was filed by the Oklahoma Attorney General (“AG”).

On April 17, 2015, an Entry of Appearance was filed by the OG&E Shareholders Association.

On April 23, 2015, PUD’s Motion for Order Prescribing Notice was heard and recommended. PUD’s Motion for Order to Establish Procedural Schedule was also heard on that date and was continued to April 30, 2015.

On April 30, 2015, PUD’s Motion for Order to Establish Procedural Schedule was heard and recommended.

On May 12, 2015, the Commission issued an Order Establishing Procedural Schedule (Order No. 640562).

On May 13, 2015, OG&E filed the Responsive Testimonies of Philip R. Bartholomew, Donald R. Rowlett, Ahmad Faruqui, and Angela M. Nichols.

On May 21, 2015, OIEC’s Statement of Position was filed.

On May 21, 2015, the OG&E Shareholders Association’s Statement of Position was filed.

On June 2, 2015, the AG filed the Rebuttal Testimony of Edwin C. Farrar.

On June 4, 2015, the Commission issued an Order Granting Motion for Order Prescribing Notice (Order No. 641492).

On June 5, 2015, PUD filed the Rebuttal Testimony of Kathy Champion.

On June 11, 2015, the AG filed the Attorney General’s Objections and Responses to Data Requests and Motion for Protective Order and a Notice of Hearing.

On June 15, 2015, the AG filed the Summary of the Rebuttal Testimony of Edwin C. Farrar On behalf of the Attorney General and the Attorney General’s Exhibit List.

On June 15, 2015, the Exhibit List of the OG&E Shareholders Association was filed.

On June 15, 2015, PUD’s Exhibit List was filed.

On June 15, 2015, the Oklahoma Gas and Electric Company Witness and Exhibit List was filed.

On June 15, 2015, PUD filed the Summary Testimony of Kathy Champion.

On June 15, 2015, OG&E filed the Testimony Summaries of Philip R. Bartholomew, Donald R. Rowlett, Ahmad Faruqui, and Angela M. Nichols.

On June 16, 2015, the AG filed the Attorney General's Objections and Responses to Data Requests and Motion for Protective Order and a Notice of Hearing.

On June 18, 2015, the Attorney General's Objections and Responses to Data Requests and Motions for Protective Order, filed June 11 and June 16, 2015, were heard and continued to June 23, 2015.

On June 23, 2015, a pre-hearing conference was held. An announcement was made regarding service of notice in this cause, and the Administrative Law Judge ("ALJ") determined that notice was proper. Counsel for the AG and PUD also announced that an agreement had been reached with respect to the Attorney General's Objections and Responses to Data Requests and Motions for Protective Order, filed June 11 and June 16, 2015, and no arguments were heard on those objections or on the motions.

On June 26, 2015, OG&E filed a Proof of Publication of notice of this cause in the *Tulsa World*. On that date, OG&E also filed an Affidavit of Publication of notice of this cause in *The Oklahoman*.

On June 29, 2015, OG&E filed its Response.

On June 30, 2015, record was opened at the hearing on the merits at 10:30 a.m. The hearing on the merits continued to July 1, 2015, and resumed at 8:30 a.m. The hearing on the merits concluded on July 1, 2015, the cause was taken under advisement and a date was set for the filing of proposed findings of fact and conclusions of law and post hearing briefs.

Proposed Findings of Fact and Conclusions of Law and Post Hearing Briefs were filed August 5, 2015. During the pendency of this proceeding, in addition to the existing caseload of the undersigned Administrative Law Judge, the ALJ added a series of contested telecommunications causes; in addition thereto, the undersigned ALJ heard contested statutory causes including contested rate cases; in addition thereto, the undersigned ALJ processed an extensive forty-one witness contested EPA rate case, hearings on that cause concluded December 2015, proposed findings of fact and conclusions of law were submitted in 2016. Also during the pendency of this proceeding, the brother of the undersigned ALJ, suffered an intracranial brain hemorrhage undergoing two brain surgeries, hospital and specialized rehabilitation and continued home health care.

## **II. SUMMARY OF EVIDENCE**

Summaries of the prefiled testimony and statements of position are attached hereto as Attachment "A" and incorporated by reference. Attachment B attached hereto also sets forth

legal briefs and responses of the parties incorporated herein by reference. The Report and Recommendation of the ALJ is based on the entire record.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the ALJ's review and evaluation of the pleadings, testimony of witnesses, and evidence in the record of this cause, and upon full and final consideration thereof, the ALJ finds as follows:

#### **A. Jurisdiction**

OG&E is an electric public utility incorporated in the State of Oklahoma. OG&E owns and operates plant, property and other assets dedicated to the generation, transmission, distribution, and sale of electric power in the State of Oklahoma. The Commission has jurisdiction over this cause by virtue of the provisions of Article XI, Section 18 of the Constitution of the State of Oklahoma and 17 O.S. §§ 151, *et seq.*

#### **B. Notice**

The ALJ finds that notice is proper in this cause and is in compliance with Order No. 641492 and with the requirements of OAC 165:5-7-51.

#### **C. Introduction**

##### **1. Origin of OG&E's Demand Program Rider**

On February 27, 2008, OG&E filed an application initiating Cause No. PUD 200800059. The application proposed implementation of a portfolio of Quick Start Demand Programs. This portfolio consisted of the following seven (7) energy efficiency programs: (1) Weatherization Residential Assistance Program; (2) Energy Efficiency Education Program; (3) LivingWise® Program; (4) Customized Energy Report Program; (5) Compact Fluorescent Lights Program; (6) Commercial Lighting Program; and (7) Motor Replacement Program.<sup>1</sup> The application also requested recovery of program costs and lost net revenue through the Demand Program Rider ("DPR tariff" or the "tariff"). A Joint Stipulation and Settlement Agreement was entered in the cause, whereby the stipulating parties agreed that the Demand Program Rider would be approved and that certain program costs and associated lost net revenue would be recovered through the tariff.<sup>2</sup> The Joint Stipulation and Settlement Agreement was incorporated into Commission Order No. 556179, issued on July 2, 2008. This is the order initially approving OG&E's Demand Program Rider.

On July 2, 2012, OG&E filed an application initiating Cause No. PUD 201200134. The application sought an order of the Commission approving OG&E's 2013 Demand Portfolio and authorizing recovery of the costs of the associated demand programs through the DPR tariff. On

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<sup>1</sup> Application, filed February 27, 2008, Cause No. PUD 200800059.

<sup>2</sup> Joint Stipulation and Settlement Agreement, Exhibit "A" to Order No. 556179 issued in Cause No. PUD 200800059; p. 1.

July 16, 2012, OG&E filed an amended application.<sup>3</sup> In both the original and the amended applications, OG&E's Demand Portfolio proposed the following ten (10) demand programs: (1) Weatherization Residential Assistance Program; (2) Commercial Lighting Program; (3) Home Energy Efficiency Program; (4) Positive Energy-New Home Construction Program; (5) Geothermal Heating, Cooling and Water Heating Program; (6) Commercial Energy Efficiency Program; (7) Education Program; (8) Industrial Energy Efficiency Program; (9) SmartHours Program; and (10) Integrated Volt Var Control Program.<sup>4</sup> The proposed program cycle for the Demand Portfolio was January 1, 2013 through December 31, 2015.

The Demand Portfolio proposed in Cause No. PUD 201200134 was the first to include demand response programs, such as the SmartHours and Integrated Volt Var Control programs. Prior to 2013, OG&E's portfolio consisted of only energy efficiency programs.<sup>5</sup> Consequently, that cause also marked OG&E's initial request for recovery of lost net revenue for the SmartHours program.

A Joint Stipulation and Settlement Agreement was entered in Cause No. PUD 201200134, whereby the stipulating parties agreed that the DPR tariff would be approved and that OG&E would recover lost net revenue for the SmartHours program through the tariff.<sup>6</sup> This Joint Stipulation and Settlement Agreement was incorporated into Commission Order No. 605737, issued on December 12, 2014.

## 2. PUD's Application

On April 14, 2015, PUD filed its Application in the present cause seeking a determination of the calculation of lost net revenue and shared savings pursuant to OG&E's DPR tariff. PUD's Application sets forth certain pertinent provisions of the Joint Stipulation and Settlement Agreement resulting from Cause No. PUD 201200134, including the agreement that lost net revenue would be recovered pursuant to OG&E's DPR tariff approved in that cause, and that PUD would perform reviews to verify the claimed lost net revenue, actual calculated shared savings, and actual program costs.

PUD's Application states that pursuant to the DPR tariff, PUD began its review of OG&E's claimed lost net revenue for the 2013 program year in March of 2014. OG&E claimed approximately \$11.2 million in lost net revenue for its SmartHours program. PUD's initial calculation resulted in approximately \$4.9 million in lost net revenue. However, a correction to PUD's calculation with respect to kilowatt hour ("kWh") savings, yielded a total of \$4.3 million, approximately \$6.9 million less than OG&E's claimed total.<sup>7</sup> The Application states further, and

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<sup>3</sup> The purpose of the amendment was to address OG&E hiring a third party expert witness to evaluate the Peak Time Rebate program. The amended application also included reference to OG&E's approved return on equity of 10.2%, approved in the Company's most recent rate case, Cause No. PUD 201100087.

<sup>4</sup> Amended Application, filed July 16, 2012, Cause No. PUD 201200134.

<sup>5</sup> Rowlett Resp. Test. 4: 6-8.

<sup>6</sup> Joint Stipulation and Settlement Agreement, Attachment "A" to Order No. 605737 issued in Cause No. PUD 201200134; p. 2-3.

<sup>7</sup> Champion Reb. Test.; 13:15-19. While this error affects the total lost net revenue; it does not affect the calculation methodology or the dispute arising therefrom.

OG&E admits,<sup>8</sup> that the Company arrived at its claimed lost net revenue by applying a revenue difference calculation. The calculation is a projection of revenues that would have been collected had customers remained on the standard residential tariff, less revenues actually generated from customers participating in the SmartHours program.<sup>9</sup> PUD contends that the DPR tariff does not permit this method of calculation of lost net revenue, rather the DPR tariff provides that lost net revenue is to be calculated by multiplying the demand program total energy savings by the embedded fixed cost factor. PUD asserts that it utilized the methodology provided in the tariff to arrive at the total lost net revenue. The Application also outlines differences in PUD's and OG&E's calculations of shared savings for OG&E's energy efficiency programs. PUD's Application seeks an order of the Commission determining the proper calculation of lost net revenue and shared savings pursuant to OG&E's DPR tariff.

#### D. Analysis and Findings

##### 1. PUD's Calculation of Lost Net Revenue

OG&E's DPR tariff sets forth the DPR rates "by which [OG&E] will recover the costs for the specific programs plus the lost revenue and incentives from energy and demand reduction as approved by the Commission in its final order in Cause No. PUD 201200134."<sup>10</sup> Specifically, the tariff states that lost net revenue is to be calculated pursuant to the following formula:

$PPLNR = PPTES * EFC + PPTDS * DC$ , where:

Prior Period Lost Net Revenue (PPLNR) is the revenues associated with volumetric Prior Period Total Energy Savings (PPTES) and Prior Period Total Demand Savings (PPTDS)

PPTES = Prior Period Total Energy Savings

EFC = Embedded Fix Cost per kWh

PPTDS = Prior Period Total Demand Savings

DC = Demand Charge reflected in current tariffs<sup>11</sup>

The above calculation provides that lost net revenue be determined by identifying the total energy and demand savings. Those savings are multiplied by the embedded fixed cost

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<sup>8</sup> OG&E's Response; p. 3, ¶ 7.

<sup>9</sup> Application, filed April 14, 2015, Cause No. PUD 201500153.

<sup>10</sup> OG&E Demand Program Rider, Sheet No. 51.70; Attachment 2 to Order No. 605737 issued in Cause No. PUD 2012000134.

<sup>11</sup> OG&E Demand Program Rider, Sheet No. 51.72; Attachment 2 to Order No. 605737 issued in Cause No. PUD 2012000134.

factor, which is determined “using the class revenue requirement established in the most recent Cost of Service study less any fixed customer charge recovery, divided by the kWhs in each class.”<sup>12</sup> OG&E reported total energy savings for its SmartHours programs to be approximately 39 million kWh.<sup>13</sup> PUD multiplied the total energy savings, or the PPTES from the SmartHours programs by the embedded fixed cost factor for each SmartHours customer class and arrived at total lost net revenues of \$4.3 million.<sup>14</sup> The following chart outlines the kWhs saved, embedded fixed cost factors, and the lost net revenues for each of the SmartHours customer classes:

Comparison of OGE and PUD Lost Revenue Calculation (corrected)				
	SmartHours KWh Saved	ECF Factor*	PUD Lost Revenue	
Res-VPP Plus	29,355,210	0.0636	\$ 1,866,991	
Res-VPP Plus	7,971,777	0.0707	\$ 563,605	
R-Tou	426,592	0.0799	\$ 34,085	
Total Residential	37,753,579	0.0645	\$ 2,464,681	\$ 4,314,681
GS_VPP Plus	582,978	0.0619	\$ 36,086	
GS-Vpp	596,855	0.0843	\$ 50,315	
Gs-Tou	611,791	0.0999	\$ 61,118	
Total GS	1,791,624	0.0824	\$ 147,630	
Total Savings	39,545,203	0.0649	\$ 2,566,484	
EE LNR			\$ 1,850,000	
Total PUD LNR			\$ 4,416,484	
	Estimated Standard Revenue	SmartHours Revenue	OGE Lost Revenue	
Res-VPP Plus	\$ 33,930,510	\$ 26,273,864	\$ 7,656,646	
Res-VPP Plus	\$ 19,167,688	\$ 15,973,485	\$ 3,194,203	
R-Tou	\$ 1,349,085	\$ 1,127,058	\$ 222,027	
Total Residential	\$ 54,447,283	\$ 43,374,407	\$ 11,072,876	
GS_VPP Plus	\$ 802,202	\$ 757,512	\$ 44,690	
GS-Vpp	\$ 960,345	\$ 899,491	\$ 60,854	
Gs-Tou	\$ 1,170,037	\$ 1,139,825	\$ 30,212	
Total GS	\$ 2,932,584	\$ 2,796,828	\$ 135,756	
Total Savings	\$ 57,379,867	\$ 46,171,235	\$ 11,208,632	
EE LNR			\$ 3,300,000	
Total OGE LNR			\$ 14,508,632	

This chart highlights the significant differences in the total lost net revenue calculated by PUD using the methodology provided in the DPR tariff and those calculated using OG&E’s methodology. The Company reaches a substantially higher total for lost net revenue in applying an enlarged calculation.

<sup>12</sup> Champion Reb. Test.; 7:7-11.

<sup>13</sup> Bartholomew Resp. Test.; 6: 30; 7 :1.

<sup>14</sup> Champion Reb. Test.; 13: 19; 14: 1.

## 2. OG&E's Calculation of Lost Net Revenue

Much of the disagreement between PUD and OG&E in this cause relates to the interpretation of embedded fixed costs ("EFC"), a component of the formula in the DPR tariff. OG&E Witness Rowlett asserts that the term "EFC" is treated generically in the tariff and not mathematically defined for purposes of calculating lost net revenue for several different OG&E programs.<sup>15</sup> However, the term is clearly defined within the tariff as "embedded fix cost per kWh."<sup>16</sup> PUD's interpretation gives literal and proper effect to the tariff language and applies the EFC factor as developed using the embedded costs for the customer classes from the most recent embedded cost of service study.<sup>17</sup>

OG&E has applied a liberal interpretation of the EFC that uses rates instead of the embedded fixed costs. The use of rates in the place of embedded fixed costs is an attempt to match recovery of costs to the embedded cost of service study.<sup>18</sup> This practice is problematic because while rates are based upon embedded fixed costs, rates can also vary from the embedded fixed costs. During cross-examination, OG&E Witness Bartholomew acknowledged that this variance can occur.<sup>19</sup> This possibility is of particular concern with regard to the Variable Peak Pricing ("VPP") rates within the DPR tariff. The VPP tariff provides hourly rates, with on-peak pricing that varies within four pricing tiers (low, standard, high and critical).<sup>20</sup> These prices are closer to marginal costs, are not based upon the embedded fixed costs, and their insertion in place of embedded fixed costs does not conform to the definition of the term EFC within the DPR tariff.

Also raising concern is that the 2013 program year is the first year that lost net revenue was calculated and submitted by OG&E for review. As explained by Witness Rowlett, prior to 2013, OG&E's demand portfolio included only energy efficiency programs.<sup>21</sup> Demand response programs, including the SmartHours program, were introduced and approved for the first time in Cause No. PUD 201200134 for the 2013 through 2015 program cycle.<sup>22</sup> The newly introduced SmartHours program had an effective date of January 1, 2013. Because lost net revenue had not been previously calculated for the program, the ratepayer impact of OG&E's calculation and liberal interpretation of the DPR tariff is unmeasured and unknown. The testimony of Witness Bartholomew that the tariff language "has sufficed us very well for five years prior to this 2013 evaluation"<sup>23</sup> ignores this concern. This concern is heightened by PUD's anticipation that the differences in PUD's and OG&E's lost net revenue numbers will continue to increase in coming years.

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<sup>15</sup> Rowlett Resp. Test.; 8: 18-21.

<sup>16</sup> OG&E Demand Program Rider, Sheet No. 51.72; Attachment 2 to Order No. 605737 issued in Cause No. PUD 2012000134.

<sup>17</sup> Champion Reb. Test.; 7: 3-4.

<sup>18</sup> Champion Reb. Test.; 7: 9-11.

<sup>19</sup> Tr. 6/30/15; 101:19-25; 102: 1.

<sup>20</sup> Nichols Resp. Test.; 3: 8-10.

<sup>21</sup> Rowlett Resp. Test. 4: 6-8.

<sup>22</sup> Rowlett Resp. Test. 4: 11-14.

<sup>23</sup> Tr. 6/30/15; 99:17-18.

i. Lost Net Revenue and Revenue Difference

OG&E has presented a revenue difference calculation of lost net revenue. Witnesses Bartholomew and Rowlett testified that the Company believes lost net revenue and revenue difference to be the same.<sup>24</sup> PUD disagrees with this notion, and the Commission's Demand Program rules do not support the Company's association of lost revenues and revenue difference. The Commission rules define lost net revenue as follows:

“Lost net revenue” means income from the retail sale of electricity forgone by a utility directly resulting from the success of its demand portfolio, less expenses the utility was not required to pay by forgoing the sales.<sup>25</sup>

The Company's revenue difference calculation is the result of baseline revenues (a projection of revenues that would have been collected had customers remained on the standard residential tariff) less actual revenues generated from customer participation on the SmartHours tariff. OG&E claims all of this difference in revenue as lost net revenue. As outlined above, lost net revenue is determined by identifying the total energy and demand savings and multiplying those savings by the embedded fixed cost factor. OG&E's claim of all revenue difference as lost net revenue overstates the lost net revenue.

Additionally, Witness Bartholomew admits that he “expand[s] the formula using the distributive property . . . .”<sup>26</sup> This expansion involves the distribution of two different EFCs to the baseline revenues and the actual revenues, with the EFC for baseline revenue being the standard residential tariff price and the EFC for actual revenue being the SmartHours tariff price.<sup>27</sup> Applying Witness Bartholomew's additions to the formula results in the following:

$$PPLNR = \text{Baseline Sales} * EFC_1 - \text{Actual Sales} * EFC_2$$

The DPR tariff defines “EFC” as “embedded fix cost per kWh.” The tariff does not permit inclusion of two separate EFCs in the calculation of lost net revenue as OG&E has done, nor does the tariff permit inclusion of the distributive property principle as a component of the calculation. It is also important to note that Witness Bartholomew inadvertently applies the distributive property. Correct application of distributive property would require distribution of the same EFC to both the baseline revenue and the actual revenue.<sup>28</sup> With regard to this issue, Witness Bartholomew's live testimony appears to demonstrate a reluctance to acknowledge his deviation from the distributed property standard as stated in his filed responsive testimony. This is illustrated in the following exchange during cross-examination of Witness Bartholomew by counsel for PUD:

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<sup>24</sup> Bartholomew Resp. Test.; 5: 23-24; Rowlett Resp. Test.; 10: 26-27.

<sup>25</sup> OAC 165:35-41-3.

<sup>26</sup> Bartholomew Resp. Test.; 5: 18.

<sup>27</sup> Bartholomew Resp. Test.; 5: 19-21.

<sup>28</sup> Champion Reb. Test.; 18: 23-24.

Q: [by Ms. Scott] Well, wouldn't that principle require the use of only a single EFC to distribute?

A: [Witness Bartholomew] And that's all I did. If you look at the mathematics right there, it just says baseline times EFC – actual times EFC.

Q: Well, but I believe your testimony is that you applied two values for EFC. I asked you that question and I believe your response was yes. Did I misunderstand?

A: No.<sup>29</sup>

The following example from the rebuttal testimony of PUD Witness Champion illustrates the different lost net revenue calculations that result from a formula applying a single EFC in comparison to a formula applying two EFCs.

Distributive Property Application Example:

Assume: baseline energy = 100 kWhs; actual = 90 kWhs; EFC = \$0.10

Results:  $(100-90) * \$0.10 = \$1.00$

Witness Bartholomew's example:

Assume: baseline energy = 100 kWhs; actual = 90 kWhs  
EFC<sub>1</sub> = \$0.10; EFC<sub>2</sub> = \$0.09

Results:  $(100 * \$0.10) - (90 * \$0.09) = \$1.90$

While Witness Bartholomew claims that his application of the distributive property does not diverge from the standard, the examples above clearly show otherwise. He arbitrarily includes an additional EFC, and arrives at a different, and larger, total of lost net revenue. Additionally, Witness Bartholomew offered the above-quoted live testimony claiming to have used only a single EFC, though in his filed testimony he states that “[t]he EFC for Baseline Sales is the standard tariff price. The EFC for Actual Sales is SmartHours tariff price.”<sup>30</sup> Upon further, cross-examination Witness Bartholomew was specifically asked to identify the provision in the DPR tariff that permits use of the distributive property principle. His response was “. . . I cannot do that . . . [i]t's because it is not there.”<sup>31</sup> When asked if the tariff allowed him to “expand the formula” as he admits to doing in his responsive testimony,<sup>32</sup> Witness Bartholomew was again unable to provide any reference within the tariff that would allow this.

OG&E's revenue difference calculation, and the expansions upon and additions to the tariff formula, are impermissible and result in overstatements of lost net revenue. OG&E's claimed lost net revenue will likely continue to increase in future program years. This is shown by the \$11.2 million in lost net revenue claimed by OG&E for SmartHours program year 2013 and the \$14.2 million in lost net revenue claimed for program year 2014. The difference in the

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<sup>29</sup> Tr. 6/30/15; 98: 20-25; 99: 1-3.

<sup>30</sup> Bartholomew Resp. Test.; 5: 20-21.

<sup>31</sup> Tr. 6.30/15; 98: 20-25; 99: 1-3.

<sup>32</sup> Bartholomew Resp. Test.; 5: 18.

results of PUD's calculations and that of the Company are also likely to continue to increase in future program years.

ii. Change in Rates and Change in Load Shape

The purpose of demand response programs, such as SmartHours, is demand reduction. The Commission's Demand Programs rules define "demand response" as "any load management program in which a utility offers electricity users payments or other inducement to reduce their demand for electricity for specified periods of time."<sup>33</sup> The Commission rules further state "[t]he goals of energy efficiency and demand response programs are to: (1) [m]inimize the long-term cost of utility service, and (2) [a]void or delay the need for new generation, transmission, and distribution investment."<sup>34</sup> The Commission's definition provides the purpose of demand response programs, as well as the gauge for success of such programs.

OG&E Witness Faruqui testified that "[t]he definition of LNR involves two elements" – one element being revenue lost due to customers switching from the standard residential rate to the SmartHours rate (change in rates) and the other being revenue loss attributable to change in customer load shape in response to SmartHours tariff incentives (change in load shape).<sup>35</sup> Witness Faruqui refers to this concept as a "conceptual reconstruction."<sup>36</sup> However, when he was asked at least three times during cross-examination to identify the language in the DPR tariff that allowed this "conceptual reconstruction," he was never able to do so.<sup>37</sup> He asserts that both elements, change in rates and change in load shape, should be considered in determined lost net revenue. However, the Commission's rules define "lost net revenue" as "income from the retail sale of electricity forgone by a utility directly resulting from the success of its demand portfolio."<sup>38</sup> The Commission rules do not support Witness Faruqui's two-part description.

The issue with Witness Faruqui's definition is its measure of the success of demand response programs. The purpose of demand response programs is to reduce demand for electricity, especially during targeted periods of higher pricing. Commission rules have established that lost net revenue is the income forgone by a utility "directly resulting from the success of its demand portfolio . . ."<sup>39</sup> Thus, the success of the programs should be measured by changes in load shape or reduction in peak demand. Customers could migrate from the standard residential tariff to the SmartHours tariff and make no reductions to their load. If peak demand is not reduced, the program has not achieved its purpose and has not accomplished the measure of success intended by the Commission rules.

During cross-examination, Witness Faruqui acknowledged that demand program success is measured by load reduction when he testified as follows:

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<sup>33</sup> OAC 165:35-41-3. (Emphasis added.)

<sup>34</sup> OAC 165:35-41-2.

<sup>35</sup> Faruqui Resp. Test.; 6: 23-28.

<sup>36</sup> Tr. 6/30/15; 34: 3.

<sup>37</sup> Tr. 6/30/15; 34: 10-14; 34: 15-18; and 35:17-20.

<sup>38</sup> OAC 165:35-41-3.

<sup>39</sup> OAC 165:35-41-3.

The success of the program is measured by how much of a load reduction it brings about in megawatts, and that absolute megawatt reduction from the program as a whole is a product of how many customers take the program, and how much they reduce their load on a per customer basis.<sup>40</sup>

The latter portion of Witness Faruqui's above-quoted testimony references consideration of customer participation in demand response programs as an element of gauging success of the program. Success is not measured by large numbers of customers participating in demand response programs. This notion is not supported by Commission rules, and the reality of customers switching to the SmartHours tariff and not changing their use remains. So while participation levels may be high, participant load could remain unchanged. This would produce no system benefits and would not serve the goals of demand response programs stated in the Commission's rules. Further, when asked during cross-examination to identify the provision in OG&E's DPR tariff permitting consideration of a change in rates for determining lost net revenue, Witness Faruqui was unable to do so.<sup>41</sup> It should be noted that Witness Rowlett was also unable to identify any provision in the tariff that allowed for consideration of change in rates in the lost net revenue formula. Specifically, Mr. Rowlett admitted that "[t]he language change in rates is not in the tariff."<sup>42</sup>

Witness Faruqui also suggests that because of the high participation in the SmartHours programs, the DPR tariff should not be changed. This suggestion does not consider the regulated rate setting process. Regulated rates are established based upon the costs allocated to each customer class; rates are not based purely upon customer participation in a program. This process highlights the importance of setting rates based on cost of service to a customer class so that customers are not enticed to join lower rate demand programs without also changing their demand.

### iii. Change in Rates Should be Addressed in a General Rate Case

OG&E's insistence that change in rates and customer participation be considered in determining lost net revenue draws focus to the need for a more comprehensive evaluation of the SmartHours program and other factors. A general rate case is needed to properly examine rate and revenue concerns expressed by both OG&E and PUD in this cause.

As explained by Witness Champion, rates are designed to ensure that a utility collects its revenue requirement.<sup>43</sup> "The total revenue requirement is . . . allocated to customer classes and priced to recover that allocated amount through the class rates."<sup>44</sup> A class may not perform as projected due to weather conditions, customer migration in and out the utility's service territory, or changes in expenses.<sup>45</sup> If these differences in performance and projection cannot be

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<sup>40</sup> Tr. 6/30/15; 32: 3-8.

<sup>41</sup> Tr. 6/30/15; 33: 22-25.

<sup>42</sup> Tr. 7/1/15; 46: 16-18.

<sup>43</sup> Champion Dir. Test.; 11: 17-19.

<sup>44</sup> Champion Dir. Test.; 12: 2-3.

<sup>45</sup> Champion Dir. Test.; 12: 4-6.

reconciled, and there is a change in the utility's earned rate of return, then reconciliation is addressed in a general rate case.

It is important to note that a rate review must look beyond just revenues – the review must examine “all revenues collected, minus expenses, plus approved rate of return.”<sup>46</sup> Witness Champion testified that OG&E's method of calculating lost net revenue “would allow the Company to collect more revenues based just on a review of only one component of the revenue equation” and “does not even consider all revenues in determining whether the Company is experiencing “lost revenues”, just the revenues received from one class of customers.”<sup>47</sup> Thus, OG&E's methodology does not provide sufficient information to determine whether the Company is experiencing any actual revenue loss.

Exhibit “KJC-2”, attached to the Rebuttal Testimony of Witness Champion, is a good illustration of the need to examine all revenues to determine if there is an actual revenue loss. The exhibit is a document prepared and presented by OG&E as a possible alternative for resolving the lost net revenue calculation difference. The exhibit shows that two OG&E residential riders, the 2014 Crossroads Rider and the 2014 SmartGrid Rider, have over recovered in the amounts of \$4.9 million and \$6.7 million, respectively. The Company proposed potentially transferring the over recovery balances from these riders to the DPR tariff to reduce the lost net revenue recovery. It should be noted that both of these riders were to be closed with the filing of a rate case in 2013, which OG&E agreed to file as part of stipulations in cause numbers PUD 201000029 (Order No. 576595), PUD 201000037 (Order No. 577371), and PUD 201000146 (Order No. 583894). OG&E has not filed the agreed upon and ordered rate case (see current rate case of OG&E, Cause No. PUD 201500273); thus several issues, including some presented in the current cause, remain unresolved. As testified by Witness Champion, “OG&E recognizes some riders have over-recovered”<sup>48</sup> and “there are many items that could be considered in determining whether the Company would see a real loss in overall recovery”<sup>49</sup> based upon consideration of revenues from only one class. PUD believes that “other items, total revenue recovered from other customers, cost reductions, etc. are also items that should be factored into whether this interpretation results in a real loss to OG&E.”<sup>50</sup>

When questioned about the over recovery of the Crossroads and SmartGrid Riders, Witness Rowlett acknowledged that “if we've under recovered from a particular tariff, then we're entitled to recover by adjusting the rate in the future.”<sup>51</sup> If the Company insists that a change in rates be considered and if under recovery is occurring, then proper examination of rates should be undertaken within the context of a general rate case.

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<sup>46</sup> Champion Dir. Test.; 12: 1-2.

<sup>47</sup> Champion Dir. Test.; 12: 15-20.

<sup>48</sup> Champion Reb. Test.; 25: 19-20.

<sup>49</sup> Champion Reb. Test.; 25: 17-19.

<sup>50</sup> Champion Reb. Test.; 25: 20-22.

<sup>51</sup> Tr. 7/1/15; 104: 23-25; 105: 1.

iv. Net-to-Gross Factor and the Evaluation, Measurement, and Verification Plan

The Commission's Demand Programs rules state that "[u]tilities are responsible for timely evaluation, measurement, and verification of their energy efficiency and demand response programs."<sup>52</sup> Evaluation, measurement, and verification "means a systematic, objective study conducted periodically to authenticate, assess, and report how well a program is achieving its objectives, including identification and quantification of inputs, outputs, outcomes, and unintended effects."<sup>53</sup> The rules further state:

- (b) The intent of the evaluation, measurement, and verification process is:
  - (1) To provide a reliable calculation of the net savings produced by energy efficiency and demand response programs;
  - (2) To assess the effects of programs on the market for energy efficient products and services and products and services that support demand response programs; and
  - (3) To assess the effectiveness of the administration and implementation of energy efficiency and demand response programs.<sup>54</sup>

Additionally, the rules require that "[a]ssumptions with any supporting research about the ratio between gross savings in energy consumption by utility customers and net savings attributable to energy efficiency and demand response programs will be included in the evaluation, measurement, and verification plan."<sup>55</sup> PUD's review found that OG&E has not been calculating the net-to-gross factor to reflect actual program performance. Both Witnesses Rowlett and Bartholomew acknowledge that OG&E has not been applying a net-to-gross factor in calculating lost net revenue.<sup>56</sup> OG&E is instead using unadjusted savings to calculate lost net revenue and shared savings, which overstates lost net revenue.<sup>57</sup> This does not conform with Commission rules. As explained by Witness Champion in response to inquiry by the Court, "[w]hen the utilities implement their energy efficiency programs, they estimate savings and they estimate participation."<sup>58</sup> The unadjusted savings are the assumption that a certain amount of demand reduction will occur.<sup>59</sup> Free riders must be eliminated to remove customers who were planning to implement reduction measures notwithstanding the demand response programs. The adjustment should also eliminate customers who were motivated by the demand response program but never install the demand response measure. These adjustments occur for the net-to-gross adjustment factor.<sup>60</sup>

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<sup>52</sup> OAC 165:35-41-6(a).

<sup>53</sup> OAC 165:35-41-3.

<sup>54</sup> OAC 165:35-41-6(b).

<sup>55</sup> OAC 165:35-41-6(f).

<sup>56</sup> Rowlett Resp. Test.; 11: 20-25.

<sup>57</sup> Champion Reb. Test.; 11: 3-5.

<sup>58</sup> Tr. 6/30/15; 24: 20-25.

<sup>59</sup> Tr. 6/30/15; 25: 1-3.

<sup>60</sup> Tr. 6/30/15; 25: 4-20.

Witness Bartholomew testified that the free ridership portion of the net-to-gross calculation can be difficult to gauge.<sup>61</sup> Specifically, he states that with respect to free riders, there is uncertainty as to when a customer who was planning to implement a reduction measure might actually do so. He goes on to state that “. . . if it hadn’t been for the Company bringing forward the measure and the program, the customer would not have followed through on it.”<sup>62</sup> However, such a definitive statement about customer behaviors and intentions cannot be accepted without substantiation. Witness Bartholomew offered no evidence to support his conclusion, and neither he nor the Company can foretell the actions of customers in the absence of demand response programs.

Witness Bartholomew testified that “about 45 states in the Union . . . have some form of net-to-gross calculation or I should say a loss [sic] net revenue calculation to which net to gross may apply. Only 35 percent of those actually apply a net to gross. The remainder of them either allow for gross energy or they use some various form of net-to-gross and gross.”<sup>63</sup> This testimony, be it an accurate reflection of industry practices or not, does not remove the Company’s obligation to abide by this Commission’s demand program rules.

Citing the California Standard Practice Manual (“CSPM”), Witness Bartholomew continues efforts to explain OG&E’s failure to apply a net-to-gross factor. The CSPM sets forth the cost and benefit components and cost effectiveness calculation procedures.<sup>64</sup> The CSPM identifies five tests for measuring cost effectiveness of demand programs: the Participant Test, the Ratepayer Impact Measure Test, the Program Administrator Cost Test, the Total Resource Cost Test, and the Societal Test, which the CSPM treats as a variation of the Total Resource Cost Test.<sup>65</sup> Witness Bartholomew testified that “. . . net-to-gross only comes into play in one of the cost-effectiveness tests. This one is called the RIM [Ratepayer Impact Measure] test.” This is inaccurate pursuant to the CSPM.

A net-to-gross calculation is used in all of the CSPM tests, with the exception of the Participant Test.<sup>66</sup> The CSPM describes gross savings and net savings as follows:

Gross energy savings are considered to be the savings in energy and demand seen by the participant at the meter. These are the appropriate program impacts to calculate bill reductions for the Participant Test. Net savings are assumed to be the savings that are attributable to the program. That is, net savings are gross savings minus those changes in energy use and demand that would have happened even in the absence of the program. For fuel substitution and load building programs, gross-to-net

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<sup>61</sup> Tr. 6/30/15, Vol. II; 81: 1-6.

<sup>62</sup> Tr. 6/30/15, Vol. II; 81: 12-15.

<sup>63</sup> Tr. 6/30/15, Vol. II; 81: 19-25.

<sup>64</sup> California Standard Practice Manual: Economic Analysis of Demand Side Programs and Projects, October 2001; p. 4.

<sup>65</sup> California Standard Practice Manual: Economic Analysis of Demand Side Programs and Projects, October 2001; p. 4.

<sup>66</sup> California Standard Practice Manual: Economic Analysis of Demand Side Programs and Projects, October 2001; p. 8.

considerations account for the impacts that would have occurred in the absence of the program.<sup>67</sup>

With respect to use of the net-to-gross calculation within the cost-effectiveness tests, the CSPM provides as follows:

### **Ratepayer Impact Measure Test**

The benefits calculated in the RIM test are the savings from avoided supply costs. These avoided costs include the reduction in transmission, distribution, generation, and capacity costs for periods when load has been reduced and the increase in revenues for any periods in which load has been increased. The avoided supply costs are a reduction in total costs or revenue requirements and are included for both fuels for a fuel substitution program. The increase in revenues are also included for both fuels for fuel substitution programs. Both the reductions in supply costs and the revenue increases should be calculated using net energy savings.<sup>68</sup>

### **Program Administrator Cost Test**

The benefits for the Program Administrator Cost Test are the avoided supply costs of energy and demand, the reduction in transmission, distribution, generation, and capacity valued at marginal costs for the periods when there is a load reduction. The avoided supply costs should be calculated using net program savings, savings net of changes in energy use that would have happened in the absence of the program. For fuel substitution programs, benefits include the avoided supply costs for the energy-using equipment not chosen by the program participant only in the case of a combination utility where the utility provides both fuels.<sup>69</sup>

### **Total Resource Cost Test**

The benefits calculated in the Total Resource Cost Test are the avoided supply costs, the reduction in transmission, distribution, generation, and capacity costs valued at marginal cost for the periods when there is a load reduction. The avoided supply costs should be calculated using net program savings, savings net of

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<sup>67</sup> California Standard Practice Manual: Economic Analysis of Demand Side Programs and Projects, October 2001; p. 8, footnote 1. (Emphasis in original.)

<sup>68</sup> California Standard Practice Manual: Economic Analysis of Demand Side Programs and Projects, October 2001; p. 13. (Emphasis added.)

<sup>69</sup> California Standard Practice Manual: Economic Analysis of Demand Side Programs and Projects, October 2001; p. 23. (Emphasis added.)

changes in energy use that would have happened in the absence of the program. For fuel substitution programs, benefits include the avoided device costs and avoided supply costs for the energy, using equipment not chosen by the program participant.<sup>70</sup>

In light of the above-quoted provisions of the CSPM and the applicable provisions of the Commission's demand program rules, Witness Bartholomew's statement that only one of the cost-effectiveness tests include a net-to-gross calculation while "[n]one of the other tests have any other net-to-gross factors applied to them" is strikingly incorrect, and this Court cannot give credence to them.

### 3. Lost Net Revenue Recovery Period

Pursuant to the Commission's rules, "'demand response" means any load management program in which a utility offers electricity users payments or other inducement to reduce their demand for electricity for specified periods of time."<sup>71</sup> OG&E's SmartHours program is a demand response program, and as such, seeks a response from customers during on-peak hours or "smart hours," a specified period of time. OG&E Witness Nichols testified that peak hours are "2:00 p.m. to 7:00 p.m. Monday through Friday"<sup>72</sup> during the summer. Witness Nichols also testified that "[t]he SmartHours program integrates technology and pricing to help customers reduce energy usage at peak times when electricity costs the most."<sup>73</sup>

While PUD acknowledges that the SmartHours program is included as a demand response program, PUD also recognizes that the programs are a hybrid, as they include both energy efficiency and demand response program attributes.<sup>74</sup> Specifically, the SmartHours program includes a customer education component,<sup>75</sup> provides weatherization kits, installs programmable communicating thermostats,<sup>76</sup> and provides plenum sealing heating and air systems for SmartHours customers. These measures are typical of energy efficiency programs, but the same is not true of demand response programs.<sup>77</sup> As part of PUD's lost net revenue calculation, PUD used all energy savings and then split the total – attributing summer on-peak savings to demand response and all other savings to energy efficiency.<sup>78</sup> Though Witness Rowlett alleges that Witness Champion "uses this separation to support the computation of lower LNR,"<sup>79</sup> Witness Champion explains that the separation "was *only* intended to more accurately report on the EE and DR aspects of the SmartHours programs, as required by the Demand

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<sup>70</sup> California Standard Practice Manual: Economic Analysis of Demand Side Programs and Projects, October 2001; p. 18. (Emphasis added.)

<sup>71</sup> OAC 165:35-41-3 (Emphasis added.)

<sup>72</sup> Nichols Resp. Test.; 3: 6-7.

<sup>73</sup> Nichols Resp. Test.; 3: 2-3.

<sup>74</sup> Champion Dir. Test.; 9-11.

<sup>75</sup> Nichols Resp. Test.; 5: 2-3.

<sup>76</sup> Nichols Resp. Test.; 3:12-14.

<sup>77</sup> Champion Reb. Test.; 8: 17-20.

<sup>78</sup> Champion Reb. Test.; 9: 1-3.

<sup>79</sup> Rowlett Resp. Test.; 9: 28.

Programs rules, which states “Energy efficiency program results and demand response program results will be reported separately.”<sup>80</sup>

Witness Rowlett contends that the rule intends only to “classify a program as either energy efficiency or demand response . . .”<sup>81</sup> This is incorrect. The title of the referenced rule, OAC 165:35-41-7(b), is “Reporting.” The language of the rule requires separate reporting of “energy efficiency program results and demand response program results.” (Emphasis added.) Neither Subsection (b) nor any other portion of OAC 165:35-41-7 establishes a requirement or direction with regard to classification of programs. The focus of the rule is reporting on the performance of energy efficiency and demand response programs, as stated in Subsection (a) and as is obvious from review of the remainder of the rule. It should also be noted that the definition section of the Commission’s Demand Programs rules includes definitions of “demand response,” “energy efficiency” and “program”<sup>82</sup> -- Witness Rowlett’s program classification argument would find better support in those provisions.

In continuing to assert that PUD is attempting to reduce lost net revenue recovery, Witness Rowlett alleges that Witness Champion “arbitrarily designates “peak hours””<sup>83</sup> as 2:00 p.m. to 7:00 p.m. during weekdays of the summer months.<sup>84</sup> During cross-examination, Witness Rowlett testified: “[p]eak hours for OG&E, two to seven.”<sup>85</sup> As already noted, OG&E Witness Nichols testified that “peak hours are from 2:00 p.m. to 7:00 p.m. Monday through Friday.”<sup>86</sup>

PUD’s separation of the energy efficiency and demand response savings brought to light another concern. OG&E could potentially double count the energy savings from customers participating in both the SmartHours program and energy efficiency programs. This concern is heightened because OG&E is including energy savings for all hours in all months, contrary to the Commission’s definition of demand response, which limit the programs “to specified periods of time.” Because the purpose of demand response is to reduce electricity demand during “specified periods of time,” it is necessary that the savings from these programs be separate from those of energy efficiency programs to prevent double counting and overstatement of lost net revenue. Witness Rowlett testifies that “OG&E believes the potential for double counting does not significantly impact the 2013 LNR but may be of consequence in 2014.”<sup>87</sup> In making this statement, Witness Rowlett acknowledges there has been double counting for purposes of the 2013 program year lost net revenue but provides no evidence that the impact is not significant. Though the Company agrees to address the issue in the future, the proper adjustments should have been made for the double counting effecting program year 2013.

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<sup>80</sup> Champion Reb. Test.; 9: 3-6 (Emphasis in original.) See also OAC 165: 35-41-7(b).

<sup>81</sup> Rowlett Resp. Test.; 10: 9-10.

<sup>82</sup> OAC 165:35-41-3.

<sup>83</sup> Rowlett Resp. Test.; 9: 15-16.

<sup>84</sup> Champion Dir. Test.; 9: 1-2.

<sup>85</sup> Tr. 7/1/15; 35: 24-25..

<sup>86</sup> Nichols Resp. Test.; 3: 6-7.

<sup>87</sup> Rowlett Resp. Test.; 10: 19-21.

#### 4. The Parties' Filed Positions in Cause No. PUD 201200134

OG&E Witness Bartholomew references the testimony of PUD Witness Nicholas Fiegel in Cause No. PUD 201200134 to support OG&E's contention that the Company's calculation has been adopted as part of Order No. 605737. In the present cause, Witness Bartholomew alleges to have had discussions with Mr. Fiegel regarding lost net revenue calculation and claims that the alleged discussions aided Mr. Fiegel in understanding OG&E's calculation methodology.<sup>88</sup> Witness Bartholomew stated that the alleged discussions "led to [Mr. Fiegel's] statement, "[t]hat he found the mechanism for calculating the shared net benefit and lost net revenues to be acceptable."<sup>89</sup>

Witness Bartholomew cannot speak to the comprehensions or mental impressions of another, and this Court cannot accept Witness Bartholomew's attribution of any particular perception to Mr. Fiegel. It is also noted that Witness Bartholomew offered no evidence substantiating the alleged conversations with Mr. Fiegel or confirming what Mr. Fiegel may have understood. Furthermore, it is beneficial to offer the complete statement of Mr. Fiegel referenced in the paragraph immediately above, which Witness Bartholomew only partially quotes at page 5, lines 1-3 of his Responsive Testimony. More thoroughly quoted, Mr. Fiegel's statement within his testimony summary attached to Order No. 605737 was as follows:

He also asserted that he found the mechanism for calculating the shared net benefit and lost net revenues to be acceptable. However, he stated that PUD only recommends recovery of the lost net revenue and shared net benefits and incentives for programs related to energy efficiency. He also explained that PUD believes that the two demand response programs to be in effect part of the Phase III of OG&E's Smart Grid application and that PUD does not recommend lost net revenue and shared net benefits or incentives for these two programs.

Mr. Fiegel also testified that PUD recommends approval of OG&E's portfolio of energy efficiency and demand programs and the associated program costs with the modifications proposed by PUD to exclude recovery of lost net revenue and shared net benefits associated with the Company's SmartHours and IVVC demand response programs.<sup>90</sup>

Witness Bartholomew also testified that no party to Cause No. PUD 201200134 stated objection to OG&E's proposed lost net revenue calculation.<sup>91</sup> However, concerning PUD, any objection would have only been relevant to the calculation of lost net revenue for energy

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<sup>88</sup> Bartholomew Resp. Test.; 4: 11-16; 5: 1.

<sup>89</sup> Bartholomew Resp. Test.; 5: 1-3.

<sup>90</sup> Summary of Filed Testimony and Statements of Position, Attachment "B" to Order No. 605737 issued in Cause No. PUD 201200134; p. 14.

<sup>91</sup> Bartholomew Resp. Test.; 5: 3-4.

efficiency programs, as PUD opposed recovery of lost net revenue for demand response programs.

In essence OG&E, specifically Witness Bartholomew, attempts to supplement the provisions of the 201200134 Joint Stipulation with the Company's filed testimony from that cause and alleged conversations with Mr. Fiegel. This is counter to Commission practice and conflicts with the terms of the Joint Stipulation. Section II of the Joint Stipulation, titled "Stipulated Facts," consists of three (3) numbered paragraphs, none of which reference OG&E's lost net revenue methodology.<sup>92</sup> Section III, titled "Agreement of the Stipulating Parties," consists of 18 numbered paragraphs and is also void of any reference to OG&E's lost net revenue methodology.<sup>93</sup>

Section IV of the Joint Stipulation sets forth the "General Reservations." In pertinent part, this section provides as follows:

1. **Negotiated Settlement.** This Joint Stipulation represents a negotiated settlement for the purpose of compromising and resolving the issues presented in this Cause.

3. **Balance/Compromise of Positions.** The Stipulating Parties stipulate and agree that the agreements contained in this Joint Stipulation have resulted from negotiations among the Stipulating Parties. The Stipulating Parties hereto specifically state and recognize that this Joint Stipulation represents a balancing of positions of each of the Stipulating Parties in consideration for the agreements and commitments made by the other Stipulating Parties in consideration therewith . . . .

4. **Admissions and Waivers.** The Stipulating Parties agree and represent that the provisions of this Joint Stipulation are intended to relate only to the specific matters referred to herein . . . . In addition, none of the signatories hereto shall be deemed to have approved or acquiesced in any ratemaking principle, valuation method, cost of service determination, depreciation principle or cost allocation method underlying or allegedly underlying any of the information submitted by the parties to this Cause and except as specifically provided in this Joint Stipulation, nothing contained herein shall constitute an admission by any Party that any allegation or contention in this proceeding is true or valid or shall constitute a determination by the Commission as to the merits of any allegations or contentions made in this proceeding.

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<sup>92</sup> Joint Stipulation and Settlement Agreement, Attachment "A" to Order No. 605737 issued in Cause No. PUD 201200134; p. 1-2.

<sup>93</sup> Joint Stipulation and Settlement Agreement, Attachment "A" to Order No. 605737 issued in Cause No. PUD 201200134; p. 2-5.

5. . . . The Stipulating Parties further agree and represent that this Joint Stipulation (and any Commission Order approving the same) shall not constitute nor be cited as precedent nor deemed an admission by any Stipulating Party in any other proceeding except as necessary to enforce its terms before the Commission or any state court of competent jurisdiction. The Commission's decision, if it enters an order consistent with this Joint Stipulation, will be binding as to the matters decided regarding the issues described in this Joint Stipulation, but the decision will not be binding with respect to similar issues that might arise in other proceedings.<sup>94</sup>

On its face, the 201200134 Joint Stipulation clearly establishes its purpose, the parameters of its governance, and its effect upon the signatories. The Joint Stipulation memorializes the negotiated settlement and agreement of the parties and, as stated in paragraph 4 quoted above, is "intended to relate only to the specific matters referred to" within the document. The Joint Stipulation does not refer to OG&E's lost net revenue calculation. OG&E's claim that PUD acquiesced or agreed to OG&E's calculation by not voicing objection is refuted by paragraph 4's requirement that approval or acquiescence in any methodology "be specifically provided in this Joint Stipulation." At paragraph 5, the Joint Stipulation further recognizes that its binding effect extends only "to the matters decided regarding the issues described in this Joint Stipulation . . . and will not be binding with respect to similar issues that might arise in other proceedings."

#### 5. OG&E's Reliance on Cost Effectiveness Studies

In support of its lost net revenue calculation, OG&E witnesses reference studies related to cost effectiveness rather than to cost recovery. Cost effectiveness and cost recovery are very different things. The Commission rules define cost effectiveness as "utilizing a specified amount of money, in a way that delivers the most benefit from available alternative uses, so long as the benefit's value exceeds the money spent."<sup>95</sup> Cost effectiveness tests evaluate program performance, determine which programs to include in a portfolio, and also determine if the programs are meeting performance projections after implementation.<sup>96</sup> Cost recovery addresses how utilities recover program costs for demand programs, whether through a rider or base rates, what items will be allowed for recovery, and how recoverable costs will be calculated.<sup>97</sup>

Witness Faruqi first references the California Public Utilities Commission 2010 Demand Response Cost-Effective Protocols ("CPUC Protocols"). This document was admitted as Hearing Exhibit "5," and if it is not already apparent from the title of the study, its contents make clear that its focus is cost effectiveness, not cost recovery. The "Basic Information" section of the CPUC Protocols includes an introduction that reads as follows:

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<sup>94</sup> Joint Stipulation and Settlement Agreement, Attachment "A" to Order No. 605737 issued in Cause No. PUD 201200134; p. 5-6.

<sup>95</sup> OAC 165:35-41-3.

<sup>96</sup> Champion Reb. Test.; 20: 15-17.

<sup>97</sup> Champion Reb. Test.; 20: 18-21.

### Introduction

These 2010 Demand Response (DR) Cost-Effectiveness Protocols (2010 Protocols) provide a method for measuring cost-effectiveness of demand response programs. These protocols are intended for ex ante evaluations of demand response programs which provide long-term resource value.<sup>98</sup>

Along with measuring cost effectiveness, the Introduction also states that the protocols are intended for “ex ante” demand program evaluations. The “ex ante,” or beforehand, evaluations of demand response programs are indicative of cost effectiveness reviews conducted by utilities during demand response portfolio development. The CPUC Protocols further state “[t]he purpose of these cost-effectiveness protocols is to: [i]dentify all relevant quantitative and qualitative inputs that are important for determining the cost-effectiveness of DR . . . and [d]etermine a useable overall framework and methods for evaluating the cost-effectiveness of each of the different types of DR activities.”<sup>99</sup> The CPUC Protocols “are not intended to address . . . [d]emand response program rates and tariffs.”<sup>100</sup>

Witness Faruqi references a second cost effectiveness report in trying to find support for OG&E’s revenue difference approach. The contents of “A Framework for Evaluating the Cost-Effectiveness of Demand Response,” prepared by a cost-effectiveness working group and admitted as Hearing Exhibit “7,” speak directly to its purpose. The introductory provisions state:

### Objective

The objective of this report is to develop a framework of assessing the cost-effectiveness of ratepayer-funded demand response programs, to be used by regulators, program administrators, and other stakeholders. The two key questions that the report addresses are:

- What framework should be used to evaluate the cost-effectiveness of ratepayer-funded demand response programs?

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<sup>98</sup> California Public Utilities Commission (2010). “Decision Adopting Method for Estimating the Cost-Effectiveness of Demand Response Activities,” Attachment 1: 2010 Demand Response Cost-Effectiveness Protocols, December 16, 2010; p. 4.

<sup>99</sup> California Public Utilities Commission (2010). “Decision Adopting Method for Estimating the Cost-Effectiveness of Demand Response Activities,” Attachment 1: 2010 Demand Response Cost-Effectiveness Protocols, December 16, 2010; p. 5.

<sup>100</sup> California Public Utilities Commission (2010). “Decision Adopting Method for Estimating the Cost-Effectiveness of Demand Response Activities,” Attachment 1: 2010 Demand Response Cost-Effectiveness Protocols, December 16, 2010; p. 5.

- What are the key costs and benefits to account for in evaluating the cost-effectiveness of demand response programs?<sup>101</sup>

The authors write that “the purpose of our report is to offer utility regulators and related stakeholders a framework for evaluating the cost-effectiveness of rate-payer-funded retail demand response programs . . . .”<sup>102</sup>

To boot, in an e-mail communication with Witness Champion dated April 15, 2015, one of the authors of the report, Tim Woolf, provided the following confirmation of the purpose of the report:

The purpose and scope of the report was to provide guidance on evaluating the cost-effectiveness of demand response programs. The report addressed the standard tests that are used in the US to review the cost-effectiveness of energy efficiency and demand response, including the Ratepayer Impact Measure test. The RIM test includes estimates of the lost revenues from energy efficiency and demand response programs.

Our report does not address whether or how utilities should recover the lost revenues from energy efficiency or demand response programs. Therefore, one should not draw any inferences from that report about whether or how utilities should recover lost revenues from energy efficiency or demand response programs. In sum, the Company has . . . the information in our report.<sup>103</sup>

During the hearing on the merits, OG&E introduced Hearing Exhibit No. “4,” which included another e-mail communication between Mr. Woolf and Witness Champion, dated May 20, 2015, to suggest that Mr. Woolf changed his opinion after the April 15, 2015 e-mail. While in the later e-mail Mr. Woolf indicates that he has more clarity regarding the issue in the present cause, he states that he “do[es] not support recovery of such lost revenues in the way that it’s proposed here.”<sup>104</sup> In a signed and notarized affidavit dated May 28, 2015, Mr. Woolf reaffirms his statements made in the April 15, 2015 e-mail. The statements in the affidavit are virtually identical to those made in the April e-mail. As testified by Witness Champion:

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<sup>101</sup> “A Framework for Evaluating the Cost-Effectiveness of Demand Response” Prepared for the National Forum on the National Action Plan on Demand Response: Cost-effective Working Group; Tim Woolf, Erin Malone, Lisa Schwartz, and John Shenot, February 2013; p. 1. (Emphasis added.)

<sup>102</sup> “A Framework for Evaluating the Cost-Effectiveness of Demand Response” Prepared for the National Forum on the National Action Plan on Demand Response: Cost-effective Working Group; Tim Woolf, Erin Malone, Lisa Schwartz, and John Shenot, February 2013; p. 2.

<sup>103</sup> Exhibit KJC-1 (Tim Woolf e-mail 4/15/2015) to Champion Reb. Test. (Emphasis added.)

<sup>104</sup> Hearing Exhibit No. “4”. Tim Woolf e-mail 5/20/2015 at 10:05 a.m.

The affidavit comes after both of those memos in which he still reaffirms that the calculation of Mr. Faruqui for recovery is not appropriate, that the paper covers the calculation for cost effectiveness and he does not support recovery for lost revenues calculated the method that Mr. Faruqui has calculated them . . . The calculation for cost effectiveness that is included in all of these cites is used in one of the California Standard Practice Tests, the RIM test, the Ratepayer Impact Test. And he supports the calculation for that test, although he does not support the RIM test for evaluating programs.<sup>105</sup>

But he essentially held the same belief. What he's saying is that he agrees with the calculation of lost net revenues provided by Mr. Faruqui for cost effectiveness. He has no problem with that calculation for calculating cost effectiveness. But he does not agree that that calculation should be used for cost recovery. They are different animals.<sup>106</sup>

Upon inquiry by the Court as to whether it was her opinion that the affidavit and the April 15 e-mail contained the same statements by Mr. Woolf, Witness Champion responded: "Yes. Essentially we took the information in the memo and pasted it into an affidavit format and asked Mr. Woolf if he would affirm that that was still his opinion about this cause and the representation of cost recovery. And he sent it back to us with very few changes."<sup>107</sup> The record reflects that prior to the hearing on the merits, counsel for OG&E requested and was provided a copy of Mr. Woolf's affidavit.<sup>108</sup>

This evidence - the content of the cost effectiveness studies relied upon by OG&E, the sworn affirmations of an author of one of the reports, and the noted misrepresentations made by OG&E - makes apparent that the Company's reliance on the cited studies is misplaced. As explained by Witness Champion, cost effectiveness and cost recovery are very different and are evaluated differently. OG&E did not dispute this portion of Witness Champion's testimony, and the words of Mr. Woolf regarding the purpose and scope of his published work cannot be challenged by those who had no hand in the development of the work. PUD does not dispute that OG&E's calculation is appropriate for gauging cost effectiveness, but OG&E's references to studies clearly focused on cost effectiveness are in error and misleading.

## 6. Recovery of Lost Net Revenue as Inducements

Both OG&E and the AG propose recovery of lost net revenue as inducements. In supporting OG&E's revenue difference methodology, AG Witness Farrar testified that whether

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<sup>105</sup> Tr. 6/30/15; 14:22-25; 15: 1-10.

<sup>106</sup> Tr. 6/30/15; 16: 18-24.

<sup>107</sup> Tr. 6/30/15; 17: 15-22.

<sup>108</sup> Tr. 6/30/15; 17: 2-14.

identified as inducements or lost net revenue, utilities should recover the difference in pricing between the standard residential tariff and the SmartHours tariff. The concern this causes is that if all changes in rate and load shape are claimed as lost net revenue, program costs could increase to levels such that the programs are no longer cost effective. Witness Champion testified that PUD has not performed analysis to inform itself of the possible effect, and neither Witness Farrar nor any OG&E witness offered any such analysis. Because of the unknown impact, PUD does not believe that recovery of lost net revenue as inducements should be determined in the present cause. The ALJ agrees.

#### 7. Legality of PUD's Application and OG&E's Arguments

In its Response, filed June 29, 2015, OG&E challenges the legality of PUD's Application. In support of its challenge, OG&E asserts the collateral attack, detrimental reliance, retroactive ratemaking, and filed rate doctrines.

OG&E's Response invokes principles of contract interpretation in asking the Court to deny PUD's Application. Specifically, OG&E pleads that the DPR tariff should be considered in its entirety, "giving effect . . . to every word clause and sentence" and with the words being given the meaning "generally used, understood, and accepted."<sup>109</sup> As discussed above, PUD's application of the DPR tariff formula reflects proper consideration of and deference to the formula as outlined in the tariff. By its own admission, OG&E has departed from the bounds of the tariff. Witness Bartholomew took the liberty to "expand" upon the lost net revenue formula by adding his version of the distributive property of mathematics and by incorporating a revenue difference methodology.

OG&E also refers to the 'four corners' doctrine in pleading that the Court should look first to the tariff in interpreting its provisions. OG&E cites *Pennzoil Co. v. FERC*, 645 F.2d 360 (5<sup>th</sup> Cir. 1941), as authority for this Court to consider not only the four corners of the tariff, but also the circumstances surrounding execution of the document. If the Court was to avail itself of this allowance, it was incumbent upon OG&E to bring forth substantial evidence outside of the tariff in support of the Company's contentions. The Oklahoma Supreme Court has described substantial evidence as that which "possesses something of substance and of relevant consequence fit to induce conviction and may lead reasonable men fairly to differ on whether it establishes a case."<sup>110</sup> Oklahoma's high court has also held that "substantial evidence means something more than a scintilla of evidence . . . ." <sup>111</sup>

In filed and live testimony, OG&E makes references to conversations with Mr. Fiegel, during the pendency of Cause No. PUD 201200134 regarding OG&E's proposed lost net revenue calculation.<sup>112</sup> Witness Bartholomew offers his opinion of Mr. Fiegel's understanding of the calculation;<sup>113</sup> but Witness Bartholomew's opinion as to what another may have

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<sup>109</sup> OG&E Response; p. 4, ¶17.

<sup>110</sup> *Turpen v. Oklahoma Corp. Comm.*, 769 P.2d 1309

<sup>111</sup> *Valliant Telephone Co. v. Corp. Comm. Oklahoma*, 656 P.2d 273, 275; 1982 OK 159, citing *Central Oklahoma Freight Lines v. Corp. Comm.*, 484 P.2d 877.

<sup>112</sup> Bartholomew Resp. Test.; 4: 11-16; 5: 1.

<sup>113</sup> Bartholomew Resp. Test.; 5: 1-3.

understood does not meet the evidentiary standard. Any notion that Mr. Fiegel or PUD acquiesced in OG&E's proposed calculation by not voicing objection or by joining in the Joint Stipulation is flawed in that it fails to recognize the "General Reservations" in Section IV of the 201200134 Joint Stipulation. The pertinent portions of Section IV are quoted above and outline the negotiated nature of the parties' agreement, as well as the attendant compromises of each party.

OG&E's Response alleges that PUD's Application is a collateral attack and cites *In the Matter of MoGas Pipeline, LLC's Application and Complaint*, 2011 Mo. PSC LEXIS 110, which held that a "challenge" to an order "is an improper collateral attack." *Union Texas Petroleum v. Corporation Commission*, 651 P.2d 652 (Okla. 1969), is also referenced for its holding that modification to a prior order must be supported by substantial evidence of a change in conditions arising subsequent to the prior order. These citations are not entirely representative of the collateral attack doctrine. The Oklahoma Supreme Court held that:

A collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial.<sup>114</sup>

PUD has not presented a challenge to an order of the Commission in the present cause. PUD's Application in this matter seeks a determination of the proper calculation of lost net revenue pursuant to OG&E's demand program rider. The record does not reflect any indication that PUD seeks to avoid, defeat, or evade the order or to deny its force and effect.

OG&E's admitted actions are more indicative of collateral attack. Company witnesses admit to expanding the tariff formula beyond the tariff language<sup>115</sup> and to adding components to formula that are not found in the tariff. Thus, it appears that it is OG&E that attempts to avoid or evade the formula and to deny its force and effect.

OG&E further alleges that PUD's Application amounts to retroactive ratemaking. This Court does not read PUD's Application to attempt or request to review or adjust OG&E's rates. As required by Order No. 605737, PUD's review in this cause was to "verify the lost revenues, actual calculated shared savings and actual program costs in the Demand Portfolio True-up balance contained in the Demand Program Rider."<sup>116</sup> PUD is obligated by the Commission's order to conduct such a review, and there is no evidence in the record suggesting that PUD's review exceeded the order.

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<sup>114</sup> *Nilsen v. Ports of Call Oil Co.*, 711 P.2d 98, 101, 1985 OK 104. See also *State of Oklahoma on Relation of the Commissioners of the Land Office of said State v. Corporation Commission, Amoco Production Co., Lyons Petroleum, Inc., and Charles R. Walbert*, 590 P.2d 674, 677, 1979 OK 16.

<sup>115</sup> Bartholomew Resp. Test.; 5: 18.

<sup>116</sup> Joint Stipulation and Settlement Agreement, Attachment "A" to Order No. 605737 issued in Cause No. PUD 201200134 p. 5, ¶16.

OG&E also alleges detrimental reliance but cites no authority supporting this claim and does not state the detriment allegedly suffered by the Company. Detrimental reliance does not stand alone, as it is an essential element of the promissory estoppel doctrine. The following four elements are necessary to establish promissory estoppel:

- (1) a clear and unambiguous promise,
- (2) foreseeability by the promisor that the promisee would rely upon it,
- (3) reasonable reliance upon the promise to the promisee's detriment, and
- (4) hardship or unfairness can be avoided only by the promise's enforcement.<sup>117</sup>

OG&E asserts that an agreement was reached with PUD with regard to the calculation of SmartHours lost net revenue. PUD responds that the parties were able to agree to a number of items with respect to energy efficiency cost recovery, but "the parties were not able to agree on the SmartHours LNR."<sup>118</sup> Witness Champion testified that after several months of discussion, the parties agreed to allow a certain amount of SmartHours lost net revenue for program year 2013 but did not agree as to the method of calculation.<sup>119</sup> Witness Champion explained that:

PUD and OG&E reached this agreement because of the need to begin recovery of the new DPR factors, which were delayed from April to September, and to acknowledge the Company had made claims in Security and Exchange Commission ("SEC") and other financial reports about the LNR levels. However, as part of that agreement, the parties agreed to clarify the intent of the calculation on a going forward basis.<sup>120</sup>

The parties were unable to develop a solution that would not require revision to the tariff. PUD had concerns about possible implication of OAC 165:35-5-1 and filed the Application in this cause for a Commission determination. OAC 165:35-5-1 provides as follows:

- (a) It shall be unlawful for a utility to furnish, charge for, or receive payment for electric service, except strictly in accordance with a tariff, special contract, or rate schedule approved by and on file with the Commission.
- (b) No jurisdictional tariff or rate schedule shall be instituted, added, deleted, changed, closed, or discontinued except pursuant to order of the Commission upon application, and after such notice and hearing as may be ordered by the Commission.

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<sup>117</sup> *Garst v. University of Oklahoma and University of Oklahoma Health Sciences Center*, 38 P.3d 927, 931, 2001 OK CIV APP 144.

<sup>118</sup> Champion Reb. Test.; 4: 20-21; 5: 1.

<sup>119</sup> Champion Reb. Test.; 5: 2-5.

<sup>120</sup> Champion Reb. Test.; 5: 3-9.

The primary element essential to establish promissory estoppel, the existence of a clear and unambiguous agreement, is lacking. Absent an agreement, the remaining elements are inconsequential. However, the Court does note that the record in this cause contains no evidence that OG&E suffered any detriment due to reliance upon the alleged agreement. OG&E makes this claim for the first time in its Response filed the day before commencement of the hearing on the merits, but the Company made no attempt to demonstrate detriment during the hearing.

If the Company wished this claim to be given consideration by the Court, evidence of same should have been presented prior to or during the hearing on the merits. This Court will not consider any post-hearing attempt to show a detriment. This would be inappropriate and prejudicial to the other parties, as they will have been unfairly denied the opportunity to test any such evidence through cross-examination or other means.

Further, OG&E has not shown, or attempted to show, that the Company will suffer hardship or unfairness if the alleged agreement is not enforced. The 201200134 Joint Stipulation and the DPR tariff allow OG&E to recover lost net revenue for the SmartHours program, and the purpose of PUD's Application is not to deny the Company that recovery. However, recovery of SmartHours lost net revenue is only permitted pursuant to the terms of the DPR tariff language. OG&E's interpretation of the tariff formula produces a substantially larger amount of calculated lost net revenue for the SmartHours program than does proper application of the formula. PUD's witness noted that, "while the LNR may not provide all of the revenue the Company would prefer to receive, the LNR as calculated by PUD does not put the Company at risk or deny them from earning their authorized return."<sup>121</sup>

#### Other Positions Regarding Legality

*Oklahoma Industrial Energy Consumers.* In Cause No. PUD 201200134, the parties entered into a Joint Stipulation and Settlement Agreement ("Stipulation"), approving OG&E's implementation of energy efficiency and demand response programs for a program cycle of January 1, 2013 through December 31, 2015, approving the recovery of the costs associated therewith through a Demand Program Rider tariff, and agreeing that OG&E would recover the net revenues lost resulting from the success of those programs through that tariff, less the expenses that OG&E was not required to pay for the foregone sales. The lost net revenues were to be recovered through OG&E's Demand Program Rider tariff ("DPR"), which was attached to the Stipulation. The Commission, on December 20, 2012, entered Order No. 605737, approving and adopting the Stipulation.

The Stipulation provides for the Oklahoma Corporation Commission Public Utility Division ("PUD") to review and verify the lost net revenues, shared savings, and program costs. Specifically, the Stipulation provides:

The Public Utility Division shall review and verify the lost revenues, actual calculated shared savings and actual program

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<sup>121</sup> Champion Reb. Test.; 25: 23; 26: 1-2.

costs in the Demand Portfolio True-Up balance contained in the Demand Program Rider.

Stipulation, p. 5, ¶ 16, attached to Order No. 605737. The Stipulation requires OG&E to continue to report by June 1 of each year on the performance of energy efficiency and demand response programs for the preceding program year, as well as to report the cumulative program performance, as required by OAC 165:35-41-7. Stipulation, p. 4, ¶ 11.

In March 2014, PUD undertook a review of OG&E's claimed lost net revenues and shared savings for the 2013 program year. PUD's calculations disagreed with those of OG&E by millions of dollars. Therefore, PUD filed its Application in this cause on April 14, 2015, stating that PUD did not believe that OG&E's calculation methodologies comported with the calculation formulae set forth in the DPR, and requesting that the Commission issue an order determining the proper calculation of OG&E's lost net revenues and shared savings pursuant to the DPR.

It is not clear whether OG&E is arguing that the Commission's Order and the DPR are ambiguous. OG&E first argues that the tariff is to be read as a whole and, if unambiguous, is to be construed without consideration of extrinsic evidence. OG&E's Response, p. 4, ¶ 17. OG&E then argues that if the tariff is ambiguous, it must be construed against the author of the tariff, citing a Federal Energy Regulatory Commission ("FERC") decision.

*Attorney General of Oklahoma.* OG&E has met the goals set forth in OAC 165:35-41-1 *et seq.* It's SmartHours Program has, for the time period at issue, lost money, "net revenue" as a result of decreasing the standard rate that customers participating in the program pay. This lowered standard rate for SmartHours Program participants has promoted and increased participation in the Program, thereby assuring the success in the Program with the result of minimizing the long-term cost of utility service and avoiding or delaying the need for new generation, transmission, and distribution investment. The Attorney General respectfully requests that the Commission find that OG&E has properly calculated lost net revenues.

*OG&E Shareholders.* The OG&E Shareholders adopt the methodology and positions of OG&E taken in this proceeding.

## 8. Findings and Recommendations

The ALJ finds that Commission is vested with "general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business . . . ." <sup>122</sup>

The ALJ further finds that "[i]n addition to the powers enumerated, specified, mentioned or indicated in this act, the Commission shall have all additional implied and incidental powers which may be proper and necessary to carry out, perform and execute all powers herein enumerated, specified, mentioned, or indicated . . . ." <sup>123</sup> 17 O.S. § 153.

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<sup>122</sup> 17 O.S. § 152(A).

<sup>123</sup> 17 O.S. § 153.

The ALJ further finds that OG&E's demand response programs, including the SmartHours program, are subject to the provisions of the Commission's Demand Programs rules, found at OAC 165:35-41.

The ALJ further finds that PUD's Application, and the relief requested therein, were properly and lawfully submitted, and the Application is not barred by operation of the legal principles asserted in OG&E's Response.

The ALJ further finds that to avoid legal challenges presented, such as retroactive ratemaking, application of PUD's positions should be applied on a prospective basis.

The ALJ further finds that recovery of lost net revenue for OG&E's SmartHours program is governed by the Joint Stipulation, incorporated into Commission Order No. 605737 issued in Cause No. PUD 201200134. The Joint Stipulation sets forth the agreement of the stipulating parties that lost net revenue is to be recovered through, and pursuant to, OG&E's DPR tariff.

The ALJ further finds that the Joint Stipulation resulting from Cause No. PUD 201200134 does not include an agreement of the stipulating parties regarding OG&E's proposed calculation methodology for SmartHours lost net revenue.

The ALJ further finds that the DPR tariff sets forth the formula by which lost net revenue is to be calculated on 4<sup>th</sup> Revised Sheet No. 51.72, specifically:

$PPLNR = PPTES * EFC + PPTDS * DC$ , where:

Prior Period Lost Net Revenue (PPLNR) is the revenues associated with volumetric Prior Period Total Energy Savings (PPTES) and Prior Period Total Demand Savings (PPTDS)

PPTES = Prior Period Total Energy Savings

EFC = Embedded Fix Cost per kWh

PPTDS = Prior Period Total Demand Savings

DC = Demand Charge reflected in current tariffs

The ALJ further finds that the DPR tariff formula should be utilized to calculate lost net revenue for OG&E's SmartHours program until such time as the DPR tariff is amended by order of the Commission.

The ALJ further finds PUD's application of the tariff formula during its review of OG&E's submissions for the 2013 program year to be proper, however its application will be

applied to matters at issue herein which arise only on a prospective basis following the issuance of a Commission Order in this Cause.

The ALJ further finds that OG&E's interpretation of the DPR tariff does not comport with the provisions of the tariff. The tariff language does not permit expansion of or addition to the lost net revenue formula.

The ALJ further finds that OG&E's interpretation and expansion of the tariff formula would constitute a change to the tariff. Pursuant to OAC 165:35-5-1, a tariff may only be changed by order of the Commission.

The ALJ further finds that "EFC" should be applied as defined in the DPR tariff, and the EFC factor should be the embedded costs for each customer class from OG&E's most recent embedded cost of service study.

The ALJ further finds that OAC 165:35-41-6 requires a net-to-gross calculation for inclusion in the evaluation, measurement, and verification plan. The ALJ recommends that the Commission order OG&E to apply a net-to-gross factor in calculating SmartHours lost net revenue to reflect actual program performance for all program years of OG&E's 2013-2015 Demand Portfolio to be applied to matters at issue herein which arise only on a prospective basis following the issuance of a Commission Order in this Cause.

The ALJ further finds that the Commission's Demand Programs rules state that demand response programs are intended to reduce demand for electricity for specific periods of time. For OG&E's SmartHours program, this specific period of time is 2:00 p.m. to 7:00 p.m., Monday through Friday, during the summer months, and the ALJ recommends that the Commission issue an order limiting recovery of lost net revenue to this period.

The ALJ further finds that OAC 165:35-41-7 requires separate reporting of energy efficiency program results and demand response program results. This rule does not direct or instruct utilities with regard to classification of programs.

The ALJ further finds that the effects of recovery of lost net revenue as inducements have not been analyzed, and recovery in this form should not be determined in the present cause.

The ALJ recommends that the Commission issue an order adopting and incorporating the above findings of the ALJ.

Respectfully submitted, this 28<sup>th</sup> day of March, 2016



Jacqueline T. Miller  
Administrative Law Judge

Attachment "A"

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF )  
 BRANDY L. WREATH, DIRECTOR OF THE )  
 PUBLIC UTILITY DIVISION, FOR )  
 DETERMINATION OF THE CALCULATION )  
 OF LOST NET REVENUES AND SHARED )  
 SAVINGS PURSUANT TO THE DEMAND )  
 PROGRAM RIDER OF OKLAHOMA GAS )  
 AND ELECTRIC COMPANY )

CAUSE NO. PUD 201500153



**FILED**  
 JUN 15 2015

COURT CLERK'S OFFICE - OKC  
 CORPORATION COMMISSION  
 OF OKLAHOMA

SUMMARY TESTIMONY OF

KATHY CHAMPION

JUNE 15, 2015

**DIRECT TESTIMONY**

1 Kathy Champion is employed by the Public Utility Division ("PUD") of the  
2 Oklahoma Corporation Commission (OCC). Ms. Champion filed Direct Testimony  
3 on April 14, 2015. The purpose of her Direct Testimony was to provide a  
4 recommendation concerning the calculation of Lost Net Revenues ("LNR")  
5 associated with the implementation of Oklahoma Gas and Electric Company's  
6 ("OG&E" or "Company") SmartHours programs and the LNR recovered through  
7 its Demand Program Rider ("DPR").

8 In reviewing this Cause, PUD read the annual true-up submission  
9 provided by the Company as required by Order No. 605737, issued in Cause No.  
10 PUD 201200134. PUD also reviewed the Joint Stipulation and Settlement  
11 Agreement attached to and approved as a part of Order No. 605737 and the  
12 testimony filed by both the Company and PUD. PUD also requested and  
13 reviewed additional information provided by the Company and held discussions  
14 with Company personnel.

15 OG&E's DPR allows for recovery of program costs, lost revenues, and  
16 incentives associated with the Company's Demand Programs. PUD found and  
17 recommended corrections to the calculation of the LNR and Shared Savings  
18 ("SS") specifically for the Energy Efficiency ("EE") programs, PUD and the  
19 Company were able to reach agreement on the proposed changes for this  
20 program. Essentially, PUD found that the Company had provided estimates of  
21 energy savings, instead of actual savings to calculate the LNR and SS for the EE  
22 programs. The Company made those corrections when the data was available  
23 and PUD recommended that if OG&E is unable to provide actual data in  
24 February, that the DPR rider true-up be moved to June to accommodate the use

1 of actual data.

2 However, PUD and OG&E were not able to come to agreement on the  
3 calculation of LNR for the SmartHours programs. PUD found the following  
4 issues with OG&E's proposed calculation of the LNR:

5 **1. Calculation inconsistent with the DPR tariff:** OG&E has proposed a  
6 calculation that reflects the revenue difference between projected  
7 standard tariff billing and billing under the SmartHours tariff. PUD has  
8 proposed the calculation in the tariff which uses the annual energy savings  
9 from the program times and embedded cost factor.

10 **2. Proposed lost revenue recovery period not limited to peak hours:**

11 In developing the energy savings for the SmartHours programs, the  
12 Company has used all hours, and not limited the savings to the hours  
13 related to the demand reduction sought through the price signals.

14 **3. Double counts customers:**

15 OG&E has not taken steps to identify and exclude the energy savings of  
16 customers that participate in both the SmartHours programs from the  
17 energy savings also claimed by those participants in other EE programs.  
18 OG&E has stated that the Company will identify and correct this in future  
19 submissions.

20 **4. Lost Revenues vs. Revenue Difference.**

21 Claiming the total revenue difference, which allows for both energy  
22 savings and the rate change difference, exceeds the definition of lost  
23 revenues both in the Commission's Demand Rules and the tariff.  
24 Revenue loss in the manner calculated by OG&E is better reviewed in the

1 context of a full base rate case.

2 Ms. Champion recommends:

3 1. The use of the existing DPR tariff calculations and limiting the LNR  
4 collection to the revenue loss directly associated with demand and energy  
5 savings as calculated by PUD.

6 2. OG&E should track participants in both the EE and DR programs to isolate  
7 the savings of each program and prevent double counting of savings.

8 3. The use of actual net energy savings in the calculation of LNR and shared  
9 savings for their DPR programs. If actual data is not available by  
10 February, then PUD recommends the DPR true-up be moved to June to  
11 accommodate the use of actual data.

12 4. Finally, in its next rate case, OG&E should resolve the additional revenue  
13 loss issue, if any, in the future rate design.

### **REBUTTAL SUMMARY**

14 Ms. Champion, in her Rebuttal Testimony, addresses the issues raised by  
15 OG&E and the Attorney General ("AG") witnesses: Specifically, Ms. Champion  
16 addresses the following areas:

- 17
- 18 • SmartHours program success – witness Angela Nichols;
  - 19 • Calculation issues - witness Philip Bartholomew;
  - 20 • Policy and definition issues – witness Donald Rowlett;
  - 21 • Lost Revenue recovery - witness Dr. Ahmad Faruqui.
  - Lost Revenue recovery – witness Edwin Farrar.

#### **Champion Rebuttal: Angela Nichols**

22 Ms. Nichols' testimony supports the success of the SmartHours programs

1 from both a customer and industry perspective. Ms. Champion does not question  
2 the success of the SmartHours programs. However, as stated by Ms. Champion,  
3 PUD has a responsibility to review the submission provided by OG&E for cost  
4 recovery through its DPR for accuracy and adherence to OG&E's Commission-  
5 approved tariff. The dispute over cost recovery should not reflect negatively on the  
6 success of the program or PUD's perception of the program. The dispute has no  
7 impact on the recovery of the program costs as approved in the SMART Grid rider  
8 related to investments, expenses, and other program costs. PUD's Application  
9 seeks to clarify and/or make necessary tariff changes to resolve the recovery  
10 issues for future submissions.

**Champion Rebuttal: Donald Rowlett**

11 Ms. Champion responds to Mr. Rowlett's claim that OG&E modified its LNR  
12 calculation in order to acquiesce to PUD's concerns. As stated by Ms. Champion,  
13 PUD and OG&E agreed to an amount to be recovered for the LNR in 2013. That  
14 agreement was conditioned upon the parties agreeing to clarify the intent of the  
15 calculation on a going-forward basis.

16 Ms. Champion testified that PUD and the Company met many times and  
17 could not identify a solution that did not require a change in tariffs; thus, PUD  
18 initiated this Cause.

19 Specifically, PUD was concerned with OAC 165:35-5-1, which states:

- 20 165:35-5-1. Filing of rate schedules, contracts, agreements,  
21 and rules  
22 (a) It shall be unlawful for a utility to furnish, charge for,  
23 or receive payment for electric service, except strictly  
24 in accordance with a tariff, special contract, or rate  
25 schedule approved by and on file with the  
26 Commission.  
27 (b) No jurisdictional tariff or rate schedule shall be

1                   instituted, added, deleted, changed, closed, or  
2                   discontinued except pursuant to order of the  
3                   Commission upon application, and after such notice  
4                   and hearing as may be ordered by the Commission.

5           Second, Ms. Champion addresses the definition of embedded fixed cost  
6    raised by Mr. Rowlett. PUD's interpretation of the EFC is literal; the factor shall  
7    be developed using the embedded cost from the embedded cost of service  
8    study. OG&E has taken a liberal definition that has moved from embedded costs  
9    to rates. While rates are based on embedded costs, they can vary from  
10   embedded costs for many reasons.

11           Ms. Champion also addresses the definition concern raised by Mr.  
12   Bartholomew concerning the use of prices in certain periods instead of  
13   embedded costs. The use of prices is not true to the tariff definition, but attempts  
14   to match the recovery of costs to the embedded cost of service study. For the  
15   SmartHours program and the Variable Peak Price ("VPP") tariff, those prices are  
16   closer to marginal costs and are not based on embedded costs. The use of the  
17   VPP prices does not meet the current definition of the EFC in the DPR tariff.

18           Ms. Champion states that the DPR tariff should be modified to include a  
19   mathematic formula for calculating EFC.

20           The third issue rebutted by Ms. Champion is Mr. Rowlett's discussion of  
21   separating the SmartHours savings into Demand and Energy savings. Mr.  
22   Rowlett misinterprets Ms. Champion's reason for the classification of the  
23   SmartHours program as a hybrid – part EE and part Demand Response ("DR").  
24   As stated by Ms. Champion, in calculating the LNR for SmartHours, PUD used all  
25   of the energy savings in their calculation. The split between DR and EE only

1 affects the reporting of the savings.

2 Ms. Champion and Mr. Rowlett appear to agree on the issue of double  
3 counting of energy savings that is currently occurring with OG&E's demand  
4 programs. Ms. Champion recommends that for those participants in both  
5 programs, OG&E provide documentation that the Company is not double  
6 counting its savings and correct future submissions to address this overlap in  
7 participation.

8 Another issue of rebuttal related to Mr. Rowlett's testimony is the use of a  
9 net to gross ("NTG") adjustment factor to calculate net energy savings. Mr.  
10 Rowlett states that Ms. Champion's correction represents a departure from  
11 previous PUD positions. PUD disagrees, as the Demand Program Rules require  
12 an NTG factor be calculated as a part of evaluation, measurement, and  
13 verification ("EM&V")<sup>1</sup>. Ms. Champion found that OG&E was not using the NTG  
14 factor to determine their total energy savings.

15 Ms. Champion's review this year is not a departure from reviews in  
16 previous years; it is part of PUD's ongoing review process. Further, PUD  
17 believes that its review is an efficient and effective way to review this program  
18 within the limited 30-day time period. In order to complete a more rigorous  
19 review, PUD recommends that the Commission order a change in OG&E's tariff  
20 that reflects the 60-day review as contemplated in the Demand Program Rules<sup>2</sup>  
21 instead of the 30-day review that PUD has performed in the past.

22 Finally, in response to Mr. Rowlett, Ms. Champion reiterated her direct  
23 testimony, that the setting of rates is handled in a base rate case. Ms. Champion

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<sup>1</sup> OAC 165:35-41-6(f)

<sup>2</sup> OAC 165:35-41-7(d)(2)

1 also points to a presentation provided by OGE, titled "LNR Recovery  
2 Alternatives", as indicative of the many items that should be reviewed before  
3 determining the Company is losing revenue.

4 The presentation shows that there were several riders that are now over-  
5 recovering revenues that could be used to mitigate the revenue loss as  
6 calculated by OG&E. This suggestion recognizes there are many items that  
7 could be considered in determining whether the Company would see a real loss  
8 in overall recovery due to just the calculation of this item. OG&E recognizes  
9 some riders have over-recovered, and PUD holds that other items, total revenue  
10 recovered from other customers, cost reductions, etc. are also items that should  
11 be factored into whether this interpretation results in a real loss to OG&E.

12 As stated by Ms. Champion, the LNR may not provide all of the revenue  
13 the Company would prefer to receive; the LNR as calculated by PUD does not  
14 put the Company at risk or deny them from earning their authorized return.

#### **Champion Rebuttal – Philip Bartholomew**

15 Ms. Champion agrees with Mr. Bartholomew's identified error in the  
16 calculation of PUD's LNR due to the reported kWh savings. However, accepting  
17 this correction does not affect the dispute regarding the DPR tariff language and the  
18 calculation of the LNR according to the tariff. The error affects the total energy  
19 saved through the SmartHours program and correcting the savings from 74 million  
20 kWhs to 39 million kWhs, lowers the overall LNR calculation for the SmartHours  
21 program from \$4.9 million to \$4.3 million.

22 Next, Ms. Champion addresses the confusion of Mr. Bartholomew and Mr.  
23 Rowlett with regard to the outcome of Cause No. PUD 201200134. Order No.

1 605737 does provide that OG&E will get LNR for their SmartHours program, but  
2 it also provides OG&E will use the existing tariff language to get that recovery.  
3 The approved DPR tariff does not include the language allowing OG&E to  
4 interpret the EFC as they have in this submission nor do the Order and attached  
5 Joint Stipulation and Settlement Agreement defer to the Company's calculation  
6 from their Direct Testimony in Cause No. PUD 201200134. Neither PUD nor  
7 OG&E can make changes to the tariff or recovery without an order of this  
8 Commission.

9 Ms. Champion also noted that while Mr. Bartholomew highlighted  
10 similarities in their proposed LNR calculation with the calculation proposed in  
11 Cause No. PUD 201200134, there were also several differences between the  
12 recommendations in that Cause and the calculations proposed now by OG&E.  
13 Those differences include the recommendation of Mr. Nicholas Fiegel, PUD's  
14 witness, of no LNR or shared savings for the SmartHours program; the total  
15 estimated LNR by OG&E for the period 2013 to 2015; and the method described  
16 by OG&E for calculating the SmartHours energy savings.

17 Finally, Ms. Champion addresses both Mr. Bartholomew's representation  
18 of the tariff and his interpretation of the Distributive Property of Multiplication.  
19 The LNR is determined by identifying the savings from the Demand Programs  
20 multiplied by an EFC factor or  $(\text{Baseline energy} - \text{actual energy}) * \text{EFC} = \text{LNR}$ .

21 Mr. Bartholomew incorrectly expands the formula to:

22  $(\text{Baseline energy} * \text{EFC} 1) \text{ minus } (\text{actual energy} * \text{EF}2) = \text{LNR}$

23 As stated by Ms. Champion, Mr. Bartholomew's interpretation of both the  
24 tariff and the distributive property are in error. The distributive property would

1 require the use of the same EFC for both the Baseline energy and the Actual  
2 energy.

3 Also as stated by Ms. Champion, the differences in Mr. Bartholomew's  
4 math and interpretation of the tariff illustrate why PUD filed this Cause and is  
5 seeking a determination of the proper calculation methodology of LNR and  
6 shared savings pursuant to the DPR.

**Champion Rebuttal: Philip Bartholomew and Ahmad Faruqui**

7 Ms. Champion also addresses the concern raised by Mr. Bartholomew  
8 and Dr. Faruqui related to PUD's evaluation of the SmartHours energy savings.  
9 Ms. Champion highlighted the review of the hours related to the price signals, or  
10 peak hours, as appropriate to gauge the success of the demand response  
11 sought. Ms. Champion also stated that it was appropriate to include the hours  
12 ahead and behind of the SmartHours time frame to allow for review of any pre-  
13 cooling or rebound which may occur by customers after an event or high price  
14 signal.

15 However, this review did not limit PUD's calculation of total energy savings  
16 to just those high price hours. As stated in Ms. Champion's Direct Testimony,  
17 PUD used the total energy savings provided by OG&E as an output of their  
18 statistical model to calculate the LNR.

19 Next, Ms. Champion addresses the issue of cost effectiveness versus cost  
20 recovery. PUD does not dispute how the energy savings are calculated to  
21 evaluate the effectiveness of the SmartHours program. However, Ms. Champion  
22 explains that cost effectiveness and cost recovery are very different items and to  
23 cite the studies that discuss program evaluation as also supporting the

1 Company's proposed cost recovery is incorrect and misleading.

2 Cost effectiveness tests are used to evaluate the performance of a  
3 program. They are used to determine what programs to include in a portfolio  
4 and, after implementation; they are used to determine if they are performing as  
5 projected. Cost recovery for DR programs represents how the Company recovers  
6 its costs for implementing or managing its Demand Programs. How a company  
7 recovers its costs, whether through a rider or base rates, and what items are  
8 allowed to be included, as well as how those are calculated, are all issues related  
9 to cost recovery. Clearly, cost recovery and cost effectiveness are not the same  
10 and studies that direct cost effectiveness reviews do not direct how utilities are to  
11 receive cost recovery.

12 Ms. Champion also shared information received from Tim Woolf, who co-  
13 authored, "A Framework for Evaluating the Cost-Effectiveness of Demand  
14 Response." February 2013, prepared for the Department of Energy and the  
15 Federal Energy Regulatory Commission, which was cited by Dr. Faruqui. In  
16 response to a question from Ms. Champion, Mr. Woolf responded that his paper  
17 is intended to address the cost effectiveness calculations, not cost recovery. He  
18 also stated, "The Company has misrepresented the information in our report."<sup>3</sup>

19 Ms. Champion also takes issue with the statement made by Dr. Faruqui<sup>4</sup>  
20 in which he states that the participants *may* change their load shape. He states  
21 this as proof that PUD should review both change in price and change in load.

22 As Ms. Champion points out, the purpose of the SmartHours program is  
23 to gain a demand reduction in the specific high price hours the Company has

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<sup>3</sup> Exhibit KJC-1, Mr. Woolf's email 04/15/2015

<sup>4</sup> Faruqui Responsive page 13, lines one (1) through eight (8)

1 targeted with their price signals. If customers do not change load but are merely  
2 rewarded by switching to the SmartHours tariff, the switch does not provide a  
3 system benefit, nor can it be cost effective. This can be a benefit to the  
4 participants, but it will not benefit other customers who are being asked to make  
5 up the difference in revenue recovery.

6 Ms. Champion also notes the Demand Program rules define lost revenues  
7 as "... income foregone...from the *success* of its demand portfolio".<sup>5</sup> Success for  
8 demand programs is not merely having participants. Success should be  
9 reflected in their load shape, through a reduction in the energy or peak demand,  
10 and not just through the number of participants or the bill savings they have  
11 achieved by switching to a different rate.

12 Ms. Champion also questions Dr. Faruqui's claim that a change to the  
13 SmartHours tariff could result in price changes which would make the offer less  
14 attractive and cause customers to leave the tariff. Ms. Champion raises the  
15 concern that participation at any cost may not be appropriate and causes other  
16 customers to subsidize participation.

17 Finally, in addressing the participation issue raised by Dr. Faruqui, Ms.  
18 Champion agrees that given the significant participation in the SmartHours  
19 programs, the best solution for evaluating the effectiveness of the SmartHours  
20 program is with a general rate case. A base rate review would help OG&E to  
21 accurately price the SmartHours tariff and eliminate the need for LNR, and the  
22 potential for creating a subsidy between participants and non-participants.

**Champion Rebuttal: Edwin Farrar**

23 Ms. Champion disputes several issues raised by Mr. Farrar. First Mr.

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<sup>5</sup> OAC 165:35-41-3

1 Farrar appears to agree with the Company's calculation of the LNR<sup>6</sup> and  
2 opposes PUD's interpretation. For reasons already addressed, PUD is  
3 opposing Mr. Farrar's interpretation of the tariff.

4 Second, while Mr. Farrar agrees that the revenue loss associated with the  
5 rate change component of the SmartHours program was not addressed in  
6 Cause 201200134, he still holds that the final order allows for all lost revenues  
7 to be recovered. Ms. Champion responds that the tariff allows for total energy  
8 savings to be multiplied by the EFC. This does not include recovery of the  
9 revenue claimed by either OG&E or Mr. Farrar.

10 Third, Mr. Farrar points to a previous Cause, PUD No. 200900200, in  
11 which David W. Smith provided testimony on behalf of PUD supporting LNR for  
12 Energy Efficiency programs as proof that PUD has now changed their position.  
13 Ms. Champion responds that this is simply not a meaningful comparison. Mr.  
14 Smith did support LNR, Ms. Champion supports LNR – the difference is not in  
15 whether the Company should receive LNR but how it should be calculated.

16 Finally, Mr. Farrar points to future decisions about recovery of LNR for  
17 SmartHours and recommends the Commission allow LNR either through a rider  
18 or through recovery of inducements. Ms. Champion raises concerns this solution  
19 would simply move costs from LNR to program costs and may make the  
20 programs no longer cost effective. Ms. Champion recommends this discussion  
21 be best handled in future dockets with evidence to be weighed by all parties.

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<sup>6</sup> Farrar Rebuttal testimony, page 4 lines six through lines 12

### RECOMMENDATION

1 Ms. Champion's Rebuttal testimony reiterates PUD's recommendation and  
2 asks that the Commission accept the following:

3 1. Use actual net energy savings in the calculation of LNR and Shared Savings  
4 for OG&E's DPR programs. If actual data is not available in February then  
5 PUD recommends the DPR true-up be moved to June to accommodate the  
6 use of actual data.

7 2. Accept the LNR calculation and tariff interpretation by PUD. The EFC  
8 calculation should be limited to the embedded cost from the base rate case,  
9 and/or from the tariff prices resulting from embedded costs. Revise the existing  
10 DPR tariff to clarify the EFC definition and include a mathematical calculation of  
11 the EFC.

12 3. OG&E should track participants separately in both the EE and DR programs to  
13 isolate the savings of each program and prevent double counting of savings.

14 4. The Commission order should include a 60-day review for the DPR true-up,  
15 as contemplated in the Demand Program Rules<sup>7</sup> instead of the 30-day review  
16 period currently allowed.

17 5. Resolution of the additional revenue loss issue (rate change revenue loss) in  
18 the future rate design for the SmartHours tariffs in OG&E's next base rate case.

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<sup>7</sup> OAC 165:35-41-7(d)(2)

**CERTIFICATE OF SERVICE**

This is to certify that on June 15, 2015, a true and correct copy of the above and foregoing, was sent via electronic mail and/or United States Postal Service, postage fully prepaid thereon to the following interested parties:

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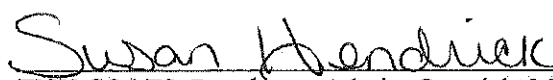
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OKLAHOMA CORPORATION COMMISSION

**FILED** Page 47 of 108  
JUN 15 2015

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF	)	
BRANDY L. WREATH, DIRECTOR OF THE	)	
PUBLIC UTILITY DIVISION, FOR	)	
DETERMINATION OF THE CALCULATION	)	CAUSE NO. PUD 201500153
OF LOST NET REVENUES AND SHARED	)	
SAVINGS PURSUANT TO THE DEMAND	)	
PROGRAM RIDER OF OKLAHOMA GAS	)	
AND ELECTRIC COMPANY	)	

**Testimony Summary of Philip R. Bartholomew**

Mr. Bartholomew filed Responsive Testimony on May 13, 2015 to explain how OG&E's lost net revenue calculation is consistent with the Demand Program rider. He also described OG&E's methodology to calculate lost net revenues for the SmartHours program and the basis for the amount of lost net revenues submitted by OG&E for 2013. In addition he responded to PUD witness Kathy Champion's allegation that OG&E has confused recovery of lost revenues with revenue difference.

Mr. Bartholomew testified as to how he approached calculating lost net revenue for the SmartHours program in the 2013 Demand Program case. My approach to calculating lost net revenues for the SmartHours program was a two-step process. First, I calculated the Base Revenues that customers would have paid had they remained on OG&E's standard residential tariff. Base Revenues are the revenues allowed through a tariff to recover the class revenue requirement. Next, I calculated Base Revenues actually paid by customers billed on either VPP or TOU tariffs (the SmartHours tariffs). The difference between these two Base Revenue values results in the amount of lost net revenues for SmartHours.

He also testified that other regulatory entities use the same process for calculating lost net revenue. The Department of Energy ("DOE") and the California Public Utilities Commission support calculating lost net revenues using the same approach.

During the 2013 Demand Program Case, Mr. Bartholomew had interactions with PUD Staff regarding OG&E's projected lost net revenue. Specifically, these conversations consisted of how OG&E would develop baseline information and how that information would be used to calculate lost net revenues. These discussions included how OG&E would calculate lost net revenues for the 12-month program year and use of price-day information which resulted in the

\$3.5 million projection. Notably, neither Mr. Fiegel, nor any other party to the case, objected to the lost net revenue calculation proposed by OG&E or the projected amount of lost net revenue.

Mr. Bartholomew testified that the Demand Program Rider provides the formula for calculating prior period lost net revenue.<sup>1</sup> That formula is:  $PPLNR = PPTES \times EFC + PPTDS \times DC$ . SmartHours customers do not have a demand charge; therefore PPTDS and DC are not applicable in calculating SmartHours lost net revenues and can be eliminated from the formula. The formula to calculate SmartHours lost net revenues becomes:  $PPLNR = PPTES \times EFC$ . Total Energy Savings (PPTES) is the difference between base line energy sales and actual energy sales. Referring back to Table 1, the difference between Q and Q<sub>DR</sub> is Total Energy Savings. Substituting the difference between baseline sales and actual sales for PPTES in the formula results in:  $PPLNR = (Baseline\ Sales - Actual\ Sales) \times EFC$ . Next, I expand the formula using the distributive property so that the EFC is distributed to both terms (Baseline Sales and Actual Sales). This results in the formula:  $PPLNR = Baseline\ Sales \times EFC - Actual\ Sales \times EFC$ . The EFC for Baseline Sales is the standard tariff price. The EFC for Actual Sales is SmartHours tariff price.

Mr. Bartholomew testified that OG&E has not confused recovery of lost revenues with a revenue difference. He believes it is clear that lost net revenue and revenue difference are the same for the SmartHours program.

Mr. Bartholomew identified three differences between his process and Ms. Champion's process for calculating SmartHours lost net revenue. First, Ms. Champion calculates the lost net revenues for SmartHours as if SmartHours were an energy efficiency program. Second, Ms. Champion applied the incorrect tariff to derive her EFC values. Finally, he identified a mathematical error in Ms. Champion's calculation of summer total baseline energy.

In elaborating on the three differences, Mr. Bartholomew stated that SmartHours is a demand response program as defined by the DOE and CPUC. Therefore, the lost net revenues attributed to the SmartHours program are calculated by taking into account changes in rates, time of use and seasonal differences. This is the method I used. Regarding the second difference, EFC values are based on the tariff under which the customer saved energy. This means SmartHours customers, when they saved energy, were either on the Variable Peak Pricing ("VPP") or Time of Use ("TOU") tariffs. Therefore, their EFC should be derived from those

<sup>1</sup> See Fourth Revised Sheet, No. 51.72 approved March 1, 2013 (Order No. 605737).  
Testimony Summary of Philip R. Bartholomew  
Cause No. PUD 201500153

tariffs. Although Ms. Champion's testimony states she used the EFC factor for each SmartHours class<sup>2</sup>, my review of her model indicates she derived an EFC from the standard tariff. Using the EFC derivation supported by the Company, Ms. Champion's modeled lost net revenues increases from \$4.9 million to \$9.3 million. Regarding the mathematical error, after reviewing Ms. Champion's model, I observed that Ms. Champion's total energy savings calculation was nearly double what OG&E reported. Ms. Champion estimated total energy savings of approximately 75 million kWh, while OG&E reported total energy savings of approximately 39 million kWh. Applying both OG&E's EFC derivation and OG&E's reported total energy savings calculation, Ms. Champion's modeled lost net revenues would be \$4.3 million. This result occurs because Ms. Champion doubled the actual total energy savings which indicates a flaw in her lost net revenue model.

Mr. Bartholomew testified that there are four factors that caused the actual 2013 lost net revenue calculation to be higher than the projected amount—cooler weather in 2013; tariff changes; greater participation in SmartHours; and increase in average energy use by SmartHours customers. The projected lost net revenues was based on the 2010 Norman Pilot Study. Calendar year 2010 was very hot (20% above normal). The higher temperature resulted in a lower projection of lost net revenues. However, in calculating the actual lost net revenues, I used weather data from the actual year the lost net revenues were accrued, which was 2013. 2013 was cooler (1% below normal)<sup>3</sup> which resulted in higher lost net revenues. There is an inverse relationship between lost net revenues and the price-day value. This means that the Company's lost net revenue is higher when the price-day values are lower and, conversely, the Company's lost net revenue is lower when the price-day values are higher.

When I calculated the projected lost net revenues in the 2013 Demand Program case, I used the current applicable standard tariffs at that time, which were the tariffs approved in OG&E's rate case, Cause No. PUD 200800398. OG&E initiated new tariffs resulting from its rate case, Cause No. PUD 201100087 after the Company completed its 2013 Demand Program case. To calculate actual lost net revenue, I used the new tariffs which increased the projected lost net revenue.

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<sup>2</sup> Champion Direct, p. 7, lines 13-16

<sup>3</sup> National Oceanic Atmospheric Agency (NOAA)

My projection was based on 41,500 SmartHours customers. Due to the success of the program, participation increased to approximately 74,000. When I calculated the actual amount of lost net revenues, I used the actual number of participants.

The SmartHours customers in 2013 used more energy than the customers in the 2010 Norman pilot. The average residential 2010 SmartHours pilot customer's annual baseline energy use was 11,906 kWh. In 2013, the average residential SmartHours customer's annual baseline energy use increased to 14,631 kWh. This resulted in higher lost net revenue.

Mr. Bartholomew testified that he believes his process for calculating lost net revenue follows the Demand Program Rider. The Demand Program rider provides the basis for which OG&E can calculate and request recovery of lost net revenue from its SmartHours program. My process follows the tariff and accurately calculates lost net revenues based on the facts presented through the 2013 Demand Program year. My results are an accurate representation of lost net revenue and lost net revenue is not overstated.

**FILED**

JUN 15 2015

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR )  
DETERMINATION OF THE CALCULATION )  
OF LOST NET REVENUES AND SHARED )  
SAVINGS PURSUANT TO THE DEMAND )  
PROGRAM RIDER OF OKLAHOMA GAS )  
AND ELECTRIC COMPANY )

CAUSE NO. PUD 201500153

**Testimony Summary of Donald R. Rowlett**

Mr. Rowlett filed Responsive Testimony on May 13, 2015 to provide the Company's position on the issues raised by PUD witness Champion regarding lost net revenue calculations for the Company's SmartHours energy demand response program and responds to the recommendations made by Ms. Champion. He testified that the Company believes the correct interpretation of the DPR tariff would recognize that the success of the SmartHours program in 2013 resulted in \$11.2 million in lost net revenue ("LNR") for OG&E. Staff contends OG&E should recover only \$4.9 million. He also testified that the Commission's determination in this matter will impact the LNR in the remainder of the 2013-2015 Demand Program cycle. The Company experienced a LNR impact of \$13.6 million for calendar year 2014. Staff's approach would limit recovery in a similar fashion to the 2013 calculation. Of course, the LNR calculation for 2015 won't be known until early 2016.

In 2014, consistent with the terms of the DPR, OG&E submitted to the PUD the costs from the Demand Programs utilized by our customers in 2013 and asked that the DPR rider factor for 2014 be adjusted so we could receive the under recovered balance from 2013 going forward. At that time, PUD raised questions concerning our calculations, largely related to our calculation of \$11.2 million in lost net revenues ("LNR") for the 2013 SmartHours program. After considerable discussion with PUD, the Company agreed to apply the LNR recommendation to only the 2013 summer months (June-October) and, consistent with what we believed to be the acquiescence of PUD, adjusted the DPR factor in January, 2015 to reflect a 2013 LNR amount of \$10.1 million. Staff subsequently filed this application asking the Commission to address the appropriate definition of lost net revenues.

Mr. Rowlett testified that the distinction between energy efficiency programs and price response programs is not recognized by staff in their proposed calculation methodology for LNR associated with the SmartHours program. In OG&E's Demand Programs portfolio, SmartHours customers switch rates from the standard rate to a SmartHours rate, which is generally lower than the standard rate. This pricing mechanism entices customers to shift usage from peak periods to lower cost off-peak periods; and those benefits are enhanced if customers accept a programmable communicating thermostat ("PCT"). Staff witness Champion calculates LNR only for a change in energy and omits the first step of changing to a SmartHours rate. Consequently, witness Champion's calculation understates the LNR impact on the Company.

Mr. Rowlett testified that OG&E disagrees with Ms. Champion's assertion that OG&E's calculation is inconsistent with the DPR tariff. The Company's calculation is consistent with the DPR tariff and is the calculation methodology presented in Cause No. PUD 201200134. The application of embedded fixed cost ("EFC"), as that term is used in the DPR tariff, is where the Company and Staff diverge in the interpretation of the tariff. The EFC term in the DPR tariff sheet 51.72 is defined as "embedded fixed cost per kWh". The EFC term is treated as a generic term and therefore not defined mathematically, since it is used to calculate LNR for many different programs authorized for recovery by the Commission. Ms. Champion introduced an alternate definition<sup>1</sup> for the EFC term that is inconsistent with the methodology described in Cause No. PUD 201200134. The definition proposed by Ms. Champion is not supported by the DPR tariff, Commission rules, or Dr. Faruqui's "best practices" methodology. Ms. Champion then discards her alternate EFC definition in her calculation of SmartHours LNR and substitutes yet a third definition. This new EFC definition is also contrary to the methodology described in Cause No. PUD 201200134, Commission rules, and Dr. Faruqui's recommended methodology. This EFC issue is addressed in more detail by OG&E Witness Bartholomew.

Mr. Rowlett testified that OG&E has two fundamental concerns with Witness Champion's position on peak hours and the proposed LNR recovery for SmartHours. First and foremost, the calculation for LNR during the periods Ms. Champion arbitrarily designates "peak hours" and ignores the incentive value provided to customers during all other hours, resulting in a much lower LNR. Second, Ms. Champion's categorization of the SmartHours program as part demand response program and part energy efficiency savings is inconsistent with industry

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<sup>1</sup> Champion Direct at p.7, ln. 9-11.  
Testimony Summary of Donald R. Rowlett  
Cause No. PUD 201500153

standards: the Department of Energy (“DOE”), in their 2006 report to Congress, defines a dynamic pricing program (e.g. the SmartHours VPP tariff) as a demand response program; Attachment 1 2010 Demand Response Cost Effectiveness Protocols, clearly defines price response programs, like OG&E’s SmartHours, as a demand response program. Ms. Champion’s contends that the separation of the SmartHours program into energy efficiency and demand response categories is required by the Demand Programs rules.<sup>2</sup> She then uses this separation to support the computation of a lower LNR. The contention that a separation of energy efficiency savings from demand response savings for a program is required by the rules is not accurate.

Mr. Rowlett testified that OG&E understands the issue posed by PUD witness Ms. Champion that the Company is double counting the energy savings and the lost net revenues for those customers that participate in SmartHours in addition to one or more Energy Efficiency program. OG&E believes the potential for double counting does not significantly impact the 2013 LNR but may be of consequence in 2014. The staff witness correctly states that OG&E has agreed to address this issue in the future.<sup>3</sup>

He explained that OG&E believes that revenue differences and lost net revenues are the same. Income is the residual after expenses are subtracted from revenues. Since fixed costs (expenses) do not change as a result of demand program, “income foregone” is mathematically the difference in revenue.

Mr. Rowlett testified that OG&E is willing to discuss the most efficient process for submitting information to the Commission. The current approved process for submission of the DPR factor update is OG&E submits revised factor and supporting documentation before March 1 of each year with the revised factor to become effective April billing.<sup>4</sup> The Evaluation, measurement, and verification (“EM&V”) of the Demand Programs is performed by a third party and the report is submitted to PUD staff by June 1 of each year. As a result, OG&E submits projected components where needed to comply with April 1 factor update filing date. OG&E revises the factor and incorporates a true up for the actual data in the next factor update submission. Customers are protected in this process through the true-up provisions and through a carrying charge applied to any balance.

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<sup>2</sup> Champion Direct at p.9, ln. 7-22.

<sup>3</sup> Champion Direct at pg. 10, ln. 4-12.

<sup>4</sup> DPR tariff sheet 51.76, Annual Redetermination.

Mr. Rowlett testified that OG&E has a concern with Ms. Champion's application of net-to-gross factors and current TRC ratio to the Company's energy efficiency programs. Ms. Champion's recommendation is inconsistent with the Staff position over the life of the energy efficiency programs. However, it is also consistent with the language of the 2016 Demand Program rules. OG&E voluntarily adopted this change in the calculation of the factor update implemented for January 2015 billings.

Mr. Rowlett testified that OG&E believes Ms. Champion has interpreted the DPR tariff incorrectly. OG&E is following the tariff and the methodology submitted in Cause No. PUD 201200134. The Company's methodology is consistent with the Commission rules and industry standard practices for demand response programs. He recommends that the Commission reaffirm OG&E's SmartHours LNR calculation methodology as consistent with the DPR tariff and reject Ms. Champion's recommendations.

**FILED**  
Page 55 of 103  
JUN 15 2015

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF	)	
BRANDY L. WREATH, DIRECTOR OF THE	)	
PUBLIC UTILITY DIVISION, FOR	)	
DETERMINATION OF THE CALCULATION	)	CAUSE NO. PUD 201500153
OF LOST NET REVENUES AND SHARED	)	
SAVINGS PURSUANT TO THE DEMAND	)	
PROGRAM RIDER OF OKLAHOMA GAS	)	
AND ELECTRIC COMPANY	)	

**Testimony Summary of Dr. Ahmad Faruqi**

In my view, the calculations of Lost Net Revenue (LNR) for OG&E's SmartHours program should account for both the change in load shape and change in rates as the customers switch from standard tariff to the SmartHours program. Not accounting for the change in rates, as is proposed by the PUD, will lead to significant losses for OG&E. If OG&E is not compensated for loss in revenues due to change in rates, then due to the high losses, it might be forced to redesign the rates for the SmartHours program. The rate redesign can lead to reduced incentives for customers to participate in the program, and the customer dropout will erode the SmartHours program benefits such as reduced peak demand and energy savings that are being realized and are projected to increase in the future.

I recommend that the Commission commend OG&E for running SmartHours, a very fine dynamic pricing program. During the past few months, I have spoken on dynamic pricing and demand response at events around North America and most recently in Australia. I am also in regular email contact with pricing experts throughout the globe. The SmartHours program compares very favorably with best industry practices and has garnered the highest praise in all of those interactions. It is a very customer friendly and the high enrollment rate it has elicited is proof of that. Even non-participating customers benefit from the fact that the program avoids the need for building expensive new capacity. The Commission should let OG&E continue with the program by ensuring that the Company recovers the lost net revenues associated with the program. I have reviewed the literature on recovering lost net revenues and the Company's approach to recovering them. I have found that the Company's methodology is consistent with the literature. Therefore, I recommend that the Commission approve the Company's estimate of LNR.

**FILED**  
Page 56 of 103  
JUN 15 2015

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF	)	
BRANDY L. WREATH, DIRECTOR OF THE	)	
PUBLIC UTILITY DIVISION, FOR	)	
DETERMINATION OF THE CALCULATION	)	CAUSE NO. PUD 201500153
OF LOST NET REVENUES AND SHARED	)	
SAVINGS PURSUANT TO THE DEMAND	)	
PROGRAM RIDER OF OKLAHOMA GAS	)	
AND ELECTRIC COMPANY	)	

**Testimony Summary of Angela M. Nichols**

Angela M. Nichols filed Responsive Testimony on May 13, 2015 to describe the SmartHours program, address the benefits to customers from SmartHours and explain the success and acceptance from customers and the industry of the program.

Ms. Nichols described the SmartHours program and explained who was eligible to participate in the program. The SmartHours program integrates technology and pricing to help customers reduce energy usage at peak times when electricity costs the most. SmartHours includes both Variable Peak Pricing (VPP) and Time-of-Use (TOU) tariffs. SmartHours also gives customers reduced rates during the off-peak hours. SmartHours pricing is divided between on-peak and off-peak hours. Peak hours are from 2:00 p.m. to 7:00 p.m. Monday through Friday and off-peak hours are all other times, including evenings, weekends, July 4<sup>th</sup> and Labor Day. Residential and small commercial customers, including public schools, may voluntarily participate in the SmartHours program by subscribing to either the VPP tariff or the TOU tariff.

Ms. Nichols testified that the Company has seen a positive response to the program. As of December 31, 2014 there were over 100,000 participants being billed on the company's VPP or TOU tariffs. These strong enrollment numbers demonstrate customer acceptance of the program. As these numbers grow, the potential lost net revenue also increases.

Ms. Nichols testified that an important aspect of the SmartHours program is customer education. Educating customers about available options is only the initial step in the program; ongoing customer education is provided to help customers become more aware of energy costs and learn how to be successful in reducing on-peak demand. Customers are provided with education, rates and technology as a part of the SmartHours program. Customers are empowered to make informed choices about the level of comfort and savings that works best for their

individual situation. Another powerful education tool is myOGEpower, which provides customers with access to energy use and price information in incredible detail. Customers can understand how and when they use power and they can compare their usage to their neighbors.

She testified that the Company has measured customer satisfaction with SmartHours and based on OG&E's research, OG&E customers are very satisfied with this program. In addition, she described outside recognition of the program as related to customer satisfaction and recognition of the implementation and innovation of the SmartHours program.

Ms. Nichols testified that customers are benefitting from the program by saving money when compared to what they would have been billed on the standard tariffs. Customers receive benefits year-round, not just in the summer months. Along with the benefit of reduced usage, customers also gain greater empowerment over the usage and experience increased convenience year-round. During the summer months residential and small commercial customers participating in the Company's SmartHours program receive a daily price notification providing them with the following day's on-peak price. Those customers with a PCT can program the thermostat to react to varying prices. This configuration allows for a set-and-forget functionality, which allows minimal interaction from the participant. The temperature settings can be re-programmed at any time allowing for quick and easy temporary overrides. She also testified that nonparticipants benefit from SmartHours since construction of additional generation is deferred by the reduction in peak demands of participants. Non-SmartHours customers can also benefit from activating their myOGEpower account. The website provides all residential and small commercial customers with a rate comparison tool allowing them to identify the rate that is best for them. This tool allows a customer to compare the billing of their historical usage on rates applicable to them.

Ms. Nichols concluded that SmartHours is a beneficial program for customers. Customers have embraced the program and are saving money. In addition, the industry has also recognized the strength of the SmartHours program. Helping customers lower usage at peak times is a critical part of the Company's goal to reach 2020 without building any incremental fossil-fueled generation. She believes the SmartHours program is in the public interest and it is important that the program remain as an integral part of OG&E's effort to protect our customers' bills.

**FILED** Page 58 of 100  
JUN 15 2015

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR )  
DETERMINATION OF THE CALCULATION )  
OF LOST NET REVENUES AND SHARED )  
SAVINGS PURSUANT TO THE DEMAND )  
PROGRAM RIDER OF OKLAHOMA GAS )  
AND ELECTRIC COMPANY )

CAUSE NO. PUD 201500153

**Summary of the Rebuttal Testimony of Edwin C. Farrar  
On behalf of the Attorney General**

Mr. Edwin C. Farrar pre-filed rebuttal testimony on behalf of the Attorney General of the State of Oklahoma. He testified as to his educational and professional background as a Certified Public Account. He has testified previously before the Oklahoma Corporation Commission and his qualifications as an expert have been accepted.

Mr. Farrar provided testimony which discussed the definition of Lost Net Revenue ("LNR") as it relates to the Smart Hours demand side management program, and recommended the full recovery of LNR. Mr. Farrar testified that Staff interpreted LNR narrowly to include only the reduced energy sales multiplied by the embedded cost factor. Mr. Farrar stated that OG&E defined LNR to also include revenue lost from the difference in rates between the Smart Hours tariff and the Standard residential tariff and had requested the recovery of these additional lost revenues from the existing Demand Program Rider ("DPR"). Mr. Farrar explained that the calculation supported by Ms. Champion was included in the formula in the DPR tariff and was described in OG&E's testimony in their demand program case in Cause Number PUD 201200134 in which that DPR tariff was approved. Mr. Farrar expressed the opinion that the lost revenue from the reduced rates under the Smart Hours tariff was the result of the Smart Hours program being new and the impact and the success of its attractive pricing provisions was simply

*Cause No. PUD 201500153**Summary Testimony of Edwin C. Farrar On behalf of the Attorney General*

not anticipated during the DPR case. He also explained that it was known that LNR would result from the program and a provision was made in the stipulation and adopted by Order No. 605737 that 100% of the LNR would be recoverable. Mr. Farrar also cited the definition of LNR in the Commission's rules at OAC 165:35-41-3, which states:

“Lost net revenue” means income from the retail sale of electricity forgone by a utility directly resulting from the success of its demand portfolio, less expenses the utility was not required to pay by forgoing the sales.

Mr. Farrar stated that this definition clearly allowed for the LNR recovery that OG&E had requested. Mr. Farrar argued that a utility should be made whole for revenue lost from the implementation of demand and conservation programs or the utility would be forced to support less detrimental programs. Mr. Farrar also noted that the definitions of LNR and “inducement” have been modified in the Commission's rules and that the Commission should expressly state in their orders that the respective utility is to recover the revenue lost as a result of the tariff pricing differences for their demand or conservation programs. Mr. Farrar expressed the concern that OG&E's next rate case would reset rates, and if OG&E ceased tracking the revenue difference related to participation levels in the Smart Hours program the Company would realize a windfall if they reduced their support of the program. Finally, Mr. Farrar recommended that OG&E be allowed to recover all net revenue lost from the implementation of the Smart Hours program, but if the Commission finds that the tariff should be strictly followed, the tariff should be amended to clearly state that all net revenue lost from the implementation of the Smart Hours program is to be recovered.

*Cause No. PUD 201500153*

*Summary Testimony of Edwin C. Farrar On behalf of the Attorney General*

**CERTIFICATE OF SERVICE**

On this 15<sup>th</sup> day of June, 2015, a true and correct copy of the above and foregoing *Summary Testimony of Edwin C. Farrar on behalf of the Oklahoma Attorney General*, was sent via electronic mail to the following interested parties:

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BEFORE THE  
CORPORATION COMMISSION OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR DETERMINATION )  
OF THE CALCULATION OF LOST NET REVENUES )  
AND SHARED SAVINGS PURSUANT TO THE )  
DEMAND PROGRAM RIDER OF OKLAHOMA GAS )  
AND ELECTRIC COMPANY )

CAUSE NO. PUD 201500153

**FILED**  
MAY 21 2015

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CORPORATION COMMISSION  
OF OKLAHOMA

OG&E SHAREHOLDERS ASSOCIATION'S  
STATEMENT OF POSITION

OG&E Shareholders Association ("OG&E SH") submits this Statement of Position in lieu of responsive testimony pursuant to the Procedural Order entered in this cause.

This cause was brought by the Public Utility Division of the Oklahoma Corporation Commission ("PUD") in the belief that OG&E had miscalculated Lost Net Revenues ("LNR") and Shared Savings under its Demand Program Rider ("DPR"). To the contrary, PUD has misinterpreted the LNR calculation methodology and has substantially undervalued the amount of recovery to which OG&E is entitled.

OAC 165:35-41-2 sets forth the "goals of energy efficiency and demand response programs." These are "(1) Minimize the long-term cost of utility service, and (2) Avoid or delay the need for new generation, transmission, and distribution investment." In furtherance of these goals, OG&E has

instituted, among other programs, the SmartHours program. LNR is defined in the Commission's rules at OAC 165:35-41-3 as: "'Lost Net Revenue' means income from the retail sale of electricity forgone by a utility directly resulting from the success of its demand portfolio, less expenses the utility was not required to pay by forgoing the sales." The formula contained in OG&E's tariff to calculate LNR is:  $PPLNR = PPTES \times EFC + PPTDS \times DC$ . Because SmartHours customers do not have a demand charge, the second half of the formula does not apply and the formula, as it applies to the SmartHours program is:  $PPLNR = PPTES \times EFC$ . There is no question between the parties that this is the formula. However, there is a disagreement in how the formula is interpreted and therefore the inputs to be used in the formula to calculate LNR.

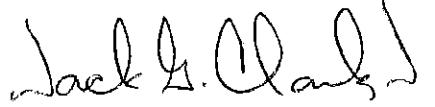
PUD's witness, Kathy Champion, asserts that the Embedded Fix Cost ("EFC") "is determined using the class revenue requirement established in the most recent Cost of Service study less any fixed customer charge recovery, divided by the kWhs in each class." (Direct Testimony of Kathy Champion, April 14, 2015, p. 7, ll. 9-11) This approach does not account for the price variation between the normal tariff rate and the SmartHours tariff rate. That price differential should be considered. It is that price differential which makes the program attractive to consumers who, in turn, create the energy reductions which further the goals sought by the Commission. Thus, the proper method for calculating LNR is that discussed by OG&E witness Philip R. Bartholomew. (Responsive Testimony of Philip R. Bartholomew, May 13, 2015, p. 5, ll. 9-24) This methodology accounts for both the lost revenue experienced through the consumer reducing their energy usage as well as the lost revenue due to the price differential between the two rates as explained by OG&E witness Ahmad Faruqui. (Responsive

Testimony of Ahmad Faruqi, May 13, 2015, p. 6, ll. 23-29) Witness Faruqi cites the California Public Utilities Commission demand response Protocols and the Synapse-RAP report as indicating that industry best practices “specify that LNR should account for both Part A (consumers switching from standard rate to SmartHours rate) and Part B (consumers changing their load shape).” (Id., p. 7, ll. 3-5) To only account for a portion of the LNR serves as a substantial disincentive to OG&E to promote and sustain one of the most effective and highly regarded demand response programs of its type in the country. It is the recovery of the LNR that provides incentive to OG&E to offer the SmartHours program and it is the reduced tariff rate that provides incentive to the customer to sign up for the SmartHours program and to change their behavior.

OG&E witness Philip R. Bartholomew’s prior testimony in PUD 201200134 fully explained the intended methodology which OG&E would use to calculate LNR. PUD’s change to an unintended methodology that is contrary to best practices should not be approved. Instead, the OG&E Shareholders Association recommends that the Commission approve the LNR calculation methodology used by OG&E.

The OG&E Shareholders Association notes that the procedural schedule allows for additional discovery and the filing of rebuttal testimony, and, therefore, reserves the right to fully participate in the remainder of this proceeding as scheduled, including cross-examination of witnesses on all issues at the hearing on this matter. OG&E Shareholders Association reserves the right to amend this Statement of Position should circumstances change or if information not previously known becomes available in the course of this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of May, 2015 a true and correct copy of the above and foregoing document was sent via electronic mail to:

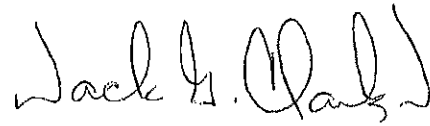
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Jack G. Clark, Jr.

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

IN THE MATTER OF THE APPLICATION OF )  
 BRANDY L. WREATH, DIRECTOR OF THE )  
 PUBLIC UTILITY DIVISION, FOR ) CAUSE NO. PUD 201500153  
 DETERMINATION OF THE CALCULATION )  
 OF LOST NET REVENUES AND SHARED )  
 SAVINGS PURSUANT TO THE DEMAND )  
 PROGRAM OF OKLAHOMA GAS AND )  
 ELECTRIC COMPANY )

**OKLAHOMA INDUSTRIAL ENERGY CONSUMERS'**  
**STATEMENT OF POSITION**

Oklahoma Industrial Energy Consumers (OIEC) submits this Statement of Position in response to the Application of the Public Utility Division of the Oklahoma Corporation Commission for determination of the calculation of lost net revenues and shared savings pursuant to the demand program of Oklahoma Gas and Electric Company.

OIEC reserves the right to cross-examine witnesses in this matter on all issues and to fully participate in all aspects of this proceeding. OIEC also reserves the right to amend this Statement of Position should circumstances change or if information not previously known becomes available in the course of conduct of this proceeding.

Respectfully submitted,



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**FILED**  
MAY 21 2015

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**CERTIFICATE OF MAILING**

This is to certify that on this 21st day of May 2015 a true and correct copy of the above and foregoing Entry of Appearance was e-mailed, addressed to:

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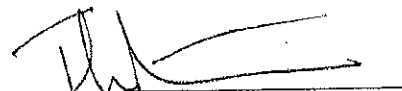
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Thomas P. Schroedter

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**  
CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR )  
DETERMINATION OF THE CALCULATION ) CAUSE NO. PUD 201500153  
OF LOST NET REVENUES AND SHARED )  
SAVINGS PURSUANT TO THE DEMAND )  
PROGRAM RIDER OF OKLAHOMA GAS )  
AND ELECTRIC COMPANY )

**RESPONSE**

COMES NOW Oklahoma Gas and Electric Company ("Respondent", "OG&E" or "Company") by and through its undersigned counsel and pursuant to OAC 165:5-9-1 hereby responds to the Application filed by Brandy L. Wreath, Director of the Public Utility Division.

I. Parties.

Respondent is represented for the purpose of these proceedings by the following named individuals:

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II. Allegations of Fact.

I. OG&E admits that on July 2, 2012 OG&E filed an Application and on July 16, 2012 filed an Amended Application in Cause No. PUD 201200134 seeking an order of the Commission approving OG&E's 2013 Demand Portfolio and authorizing recovery of the costs of the associated Demand Programs through the Demand Program Rider ("DPR").

2. OG&E admits that OG&E proposed a program cycle of January 1, 2013 through December 31, 2015, and the Demand Portfolio was implemented in January 2013. OG&E further admits that the Demand Portfolio is comprised of the ten Demand Programs as described in Paragraph 2 of the Application.

3. OG&E admits that as reflected in Commission Order No. 605737, issued on December 20, 2012 and the Joint Stipulation and Settlement Agreement (“Stipulation”) attached thereto, the Stipulating Parties in Cause No. PUD 201200134 agreed that OG&E would recover 100 percent of the lost net revenues resulting from the success of the Demand Programs, less expenses that OG&E was not required to pay for the foregone sales. OG&E further admits that the Stipulation states that these lost net revenues were to be recovered through OG&E’s DPR and that the PUD was to review and verify the lost net revenues, actual calculated shared savings and actual program costs in the Demand Portfolio true-up balance in the DPR. OG&E admits that the Stipulation also states that OG&E would not recover any lost net revenues associated with IVVC.

4. OG&E admits that in March 2014, PUD undertook its review of OG&E’s claimed lost net revenues and shared savings for the 2013 program year. OG&E admits it requested to recover approximately \$14.3 million in lost net revenues for its Demand Programs. OG&E denies it requested approximately \$3.03 million in lost net revenue for its Energy Efficiency programs and states it requested approximately \$3.05 million. OG&E admits it requested \$11.2 million in lost net revenues for its Demand Response SmartHours program. OG&E admits it requested \$3.3 million in shared savings from its Energy Efficiency Programs.

5. OG&E admits it filed projections of lost revenues and shared savings for the energy efficiency programs in 2013 and 2014. In addition, actual lost revenues and shared savings are available in June of each year at which time a true-up occurs and is reflected in the following year’s factor redetermination.

6. OG&E admits that for energy efficiency programs, net kWh savings are to be used for both the lost revenue and shared savings calculations. OG&E denies that the Company’s lost revenues using actual net kWh savings is \$3.03 million. OG&E states that its lost revenues using actual net kWh is \$3.05 million. OG&E admits the Company’s calculation of shared savings is \$3.3 million. OG&E denies that the total difference between PUD’s

calculation and that of the Company for the lost revenue and shared savings is \$2.05 million and states that the difference is \$1.89 million.

7. OG&E admits that for the Demand Response SmartHours tariff programs in 2013 and 2014, OG&E provided a revenue difference calculation deriving from a baseline set of revenues in support of its lost net revenues calculation. OG&E further admits this calculation includes a projection of what OG&E customers would have paid had those customers remained on OG&E's standard tariff, less revenues actually derived from customer participation in OG&E's SmartHours program and the resulting difference between the projection and the actual SmartHours revenues is claimed by OG&E as lost net revenues.

8. OG&E denies that its calculation methodology does not comport with the calculation formula outlined in the DPR. OG&E states that its calculation methodology is consistent with the methodology proposed by the Company in Cause No. PUD 201200134 and with an appropriate reading of the tariff.

9. OG&E admits that OG&E's calculation of Demand Response SmartHours programs produces lost net revenues totally approximately \$11.2 million.

10. OG&E admits that PUD requests an order from the Commission determining the proper calculation of OG&E's lost net revenues and shared savings pursuant to the DPR, but denies that PUD is entitled to the relief requested by Ms. Champion's testimony in this cause.

#### **ADDITIONAL FACTS**

OG&E hereby asserts the following additional facts to PUD's Application which are necessary and appropriate to support Respondent's position. Further, the relief requested in PUD's Application is barred, in whole or in part, by the doctrine of collateral attack, detrimental reliance, retroactive ratemaking and the filed rate doctrine.

11. OG&E's Demand Program portfolio from 2008-2012 consisted exclusively of energy efficiency programs. In the 2013-2015 Demand Program portfolio, OG&E modified the energy efficiency programs and, for the first time, added demand response programs, including OG&E's SmartHours program. The Commission issued an order in Cause No. PUD 201200134 approving the programs and the extension of the Demand Program Rider through 2017.

12. The Demand Program Rider is the cost recovery mechanism for OG&E's demand side management programs. The DPR was first approved by this Commission in Cause No. PUD 200900200 and modified by the Commission's order in Cause No. PUD 201200134.

13. In Cause No. PUD 201200134, no party challenged OG&E's proposed methodology for calculating lost net revenue for SmartHours nor proposed an alternative methodology.

14. PUD witness Nick Fiegel's testimony summary, attached to the Final Order issued in Cause No. PUD 201200134 stated that "he found the mechanism for calculating the shared net benefit and lost net revenues to be acceptable," however he only recommended "recovery of the lost net revenue and shared net benefits and incentives for programs related to energy efficiency."

15. On February 27, 2014, OG&E submitted its 2013 DPR factors to PUD as required by the tariff.

16. Prior to the filing of this Application, PUD and OG&E reached an agreement that the SmartHours calculation for 2013 and 2014 would be based on the methodology presented in the spreadsheet attached to Mr. Phil Bartholomew's testimony in the DPR case [Cause No. PUD 201200134], but only using the five summer peak period months. In January 2015, the DPR factor was updated utilizing a factor agreed to by PUD Staff and OG&E.

### III. Legal Authority.

17. In construing what a tariff means, certain general principles apply. One looks first to the four corners of the entire tariff, considers the instrument as a whole, giving effect so far as possible to every word, clause and sentence, and attributes to the words used the meaning which is generally used, understood, and accepted. Where the language used is clear and unambiguous, its interpretation needs no extrinsic evidence as to intent, previous interpretation, or history. Only where an ambiguity is established under the foregoing analysis do extrinsic factors come into play. Then, the language should be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results, and should conform to the intentions of the framers of the document. In such a case, great weight will be placed upon prior interpretation of the ambiguous language by those who wrote the document, and any ambiguity or reasonable

doubt must be resolved against the author of the language. *Columbia Gas Transmission Corporation, et. al.*, 27 FERC ¶61,089, 61,166.

18. In any dispute involving the interpretation of a contract the ‘four corners’ of the contract must be the initial point of departure. However, modern contract law principles allow reference not only to the ‘four corners’ of the contract, but also to the circumstances surrounding the execution of the contract. *Pennzoil Co. v. FERC*, 645 F. 2d, 360, 388 (5<sup>th</sup> Cir. 1941). The entire tariff must be examined as a whole, not just the disputed language by itself. *Vreeland v. F.P.C.*, 528 F.2d 1343, 1351 (5<sup>th</sup> Cir. 1976).

19. In determining whether a utility’s interpretation of its tariff is correct or should be applied in particular instance, it is helpful to consider whether the utility has consistently communicated and enforced such interpretation. *Complaint of Shoreline Ventures Limited Against Central Power and Light Company*, 1995 Tex. PUC LEXIS 174. Fundamental rules of statutory construction require interpretation of ambiguous tariff language consistent with intent underlying tariff provision. (*Id.*).

20. *In the Matter of MoGas Pipeline, LLC’s Application and Complaint*, 2011 Mo. PSC LEXIS 110 (The portion of MoGas’ Application and Complaint that seeks to challenge the Commission’s decision in its Revised Report and Order issued in the cause is an improper collateral attack on that conclusive order); *National Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission*, 811 F. 2d 1563 (The Commission’s reading of the agreement is not only consistent with what the parties *purported* to do in the settlement, but it is strongly supported by what they *actually* did); and *Natural Gas Clearinghouse v. Federal Energy Regulatory Commission*, 965 F.2d 1066 (in reviewing agency interpretation of contract provision, court asks whether the interpretation is “amply supported both factually and legally” and court acknowledged that the agency’s interpretation of section of agreement is reasonable as grounded in coherent theory set forth in the testimony of witness who participated in negotiation).

21. The Filed Rate Doctrine forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate regulatory authority. Under the Commission rules, a utility is governed by its Commission-approved tariffs and it may not charge for service except pursuant to an authorized tariff. OAC 165: 35-5-1(a).

22. The Commission may not collaterally attack a prior order and any modification of a prior order “constitutes a collateral attack on a prior order where that modification is not based on substantial evidence showing a change of conditions or knowledge of conditions arising since the last order.” *Union Texas Petroleum v. Corporation Comm’n.*, 651 P.2d 652 (Okla. 1981); See *Phillips Petroleum Co. v. Corporation Comm’n.*, 461 P.2d 597 (Okla. 1969). The Commission has the authority to clarify and interpret its orders, having been granted “all additional implied and incidental powers which may be proper and necessary” to carry out its duties. 17 O.S. §153. The Commission may clarify or supplement its orders, but it may not collaterally attack a prior order. *Kaneb Production Co. v. GHK Exploration Co.*, 1989 OK 11, 789 P.2d 1388. The clarification and interpretation of orders as a means to illuminate their meaning rather than to assail them is permissible and does not constitute a collateral attack. *Amarex, Inc. v. Baker*, 1982 OK 155, ¶31; 655 P.2d 1040.

23. Oklahoma law prohibits the practice of retroactive ratemaking. See *Turpen v. Corp. Comm’n.*, 769 P.2d 1309, 1332 (Okla. 1989). Charges made in compliance with a prior Commission order are immune from retrospective review and change. *Southwest Public Service Co. v. State*, 637 P.2d 92 (Okla. 1991).

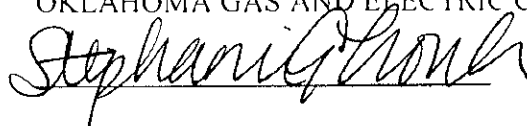
24. The Commission has jurisdiction in this matter pursuant to Article IX, Section 18 of the Constitution of the State of Oklahoma and Title 17 O.S. §§ 151 *et seq.*

IV. Relief Sought:

WHEREFORE, Respondent OG&E requests that the Commission issue an order: (i) interpreting the Demand Program Rider to calculate lost net revenues for the SmartHours program pursuant to the methodology agreed to by PUD and applied by OG&E; (ii) clarifying Order No. 605737, issued in Cause No. PUD 201200134, to reflect that the SmartHours lost net revenue is calculated pursuant to OG&E’s methodology presented in that Cause; and (iii) approving the recovery of lost net revenue and shared savings as calculated and submitted by OG&E for years 2013 and 2014.

Respectfully submitted,

OKLAHOMA GAS AND ELECTRIC COMPANY



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Attorneys for Respondent

**CERTIFICATE OF SERVICE**

On this 29<sup>th</sup> day of June, 2015, a true and correct copy of the above and foregoing Response, was sent via electronic mail to the following:

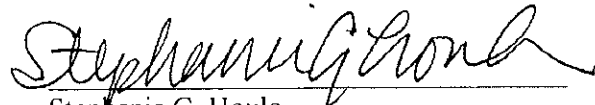
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**BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA**

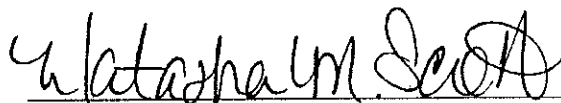
**IN THE MATTER OF THE APPLICATION OF )**  
**BRANDY L. WREATH, DIRECTOR OF THE )**  
**PUBLIC UTILITY DIVISION, FOR )**  
**DETERMINATION OF THE CALCULATION ) CAUSE NO. PUD 201500153**  
**OF LOST NET REVENUES AND SHARED )**  
**SAVINGS PURSUANT TO THE DEMAND )**  
**PROGRAM RIDER OF OKLAHOMA GAS )**  
**AND ELECTRIC COMPANY )**

**THE PUBLIC UTILITY DIVISION'S REPLY TO OG&E'S RESPONSE**

**FILED**  
AUG 05 2015

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

Respectfully submitted,



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August 5, 2015

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

**IN THE MATTER OF THE APPLICATION OF )**  
**BRANDY L. WREATH, DIRECTOR OF THE )**  
**PUBLIC UTILITY DIVISION, FOR )**  
**DETERMINATION OF THE CALCULATION ) CAUSE NO. PUD 201500153**  
**OF LOST NET REVENUES AND SHARED )**  
**SAVINGS PURSUANT TO THE DEMAND )**  
**PROGRAM RIDER OF OKLAHOMA GAS )**  
**AND ELECTRIC COMPANY )**

**THE PUBLIC UTILITY DIVISION’S REPLY TO OG&E’S RESPONSE**

COMES NOW the Public Utility Division (“PUD”) of the Oklahoma Corporation Commission (“Commission”), by and through the undersigned counsel and pursuant to OAC 165:5-9-2, submits its Reply to Oklahoma Gas and Electric Company’s (“OG&E” or the “Company”) Response filed herein on June 29, 2015. In support of its Reply, PUD alleges and asserts the following:

On April 14, 2015, PUD filed its Application in this cause seeking a determination of the calculation of lost net revenue and shared savings associated with OG&E’s SmartHours program. Among other assertions, PUD’s Application sets forth certain pertinent terms of the Joint Stipulation and Settlement Agreement (“Joint Stipulation”) incorporated into Order No. 605737, issued in Cause No. PUD 201200134. The Joint Stipulation provides that OG&E will recover lost net revenue for its SmartHours program pursuant to OG&E’s Demand Program Rider (“DPR tariff” or “tariff”) approved in Cause No. PUD 201200134 and that PUD would perform reviews to verify the claimed lost net revenue (“LNR”), actual calculated shared savings, and actual program costs submitted by OG&E.

In its Response, OG&E invokes the principles of collateral attack, detrimental reliance, retroactive ratemaking, and filed rate doctrines and asserts that PUD’s Application is barred, in whole or in part, by these principles. OG&E’s Response also cites general principles applicable to contract interpretation, including the “four corners” doctrine.

**INTERPRETATION OF THE DEMAND PROGRAM RIDER**

To begin, OG &E’s Response states that the DPR tariff should be considered in its entirety, “giving effect . . . to every word, clause and sentence” and with the words therein being given the meaning “which is generally used, understood, and accepted.”<sup>1</sup> PUD submits that the DPR tariff was considered in its entirety, and OG&E’s lost net revenue calculation finds no support within any portion of the tariff. During cross-examination at the hearing on the merits, OG&E witnesses were asked on at least eight separate occasions to identify language in the DPR tariff that permitted the lost net revenue calculation methodology proposed by the Company, and these witnesses were unable to do so each time.<sup>2</sup> At various times, OG&E witnesses admitted

<sup>1</sup> OG&E Response; p. 4, ¶17.

<sup>2</sup> Tr. 6/30/15, Vol. II, p. 91, l. 20-22; p. 98, l. 20-22; p. 99, l. 4-6; and

that they could not identify any supporting provisions within the DPR tariff because “[t]he language . . . is not in the tariff”<sup>3</sup>, because “there’s not a specific language”<sup>4</sup>, and “because it is not there.”<sup>5</sup>

In contrast, PUD applied the lost net revenue formula as stated in the DPR tariff. The tariff states that lost net revenue is to be calculated pursuant to the following formula:

$PPLNR = PPTES * EFC + PPTDS * DC$ , where:

Prior Period Lost Net Revenue (PPLNR) is the revenues associated with volumetric Prior Period Total Energy Savings (PPTES) and Prior Period Total Demand Savings (PPTDS)

PPTES = Prior Period Total Energy Savings

EFC = Embedded Fix Cost per kWh

PPTDS = Prior Period Total Demand Savings

DC = Demand Charge reflected in current tariffs<sup>6</sup>

The DPR tariff calculation requires lost net revenue to be determined by identifying the total energy and demand savings. Those savings are to be multiplied by the embedded fixed cost factor, which is determined “using the class revenue requirement established in the most recent Cost of Service study less any fixed customer charge recovery, divided by the kWhs in each class.”<sup>7</sup> As required by the tariff, PUD multiplied the total energy savings, or the PPTES, from the SmartHours programs, as reported by OG&E, by the embedded fixed cost factor for each SmartHours customer class.

The embedded fixed cost, or EFC, is defined within the DPR tariff as “embedded fix cost per kWh.” PUD applied the EFC as it is defined, giving literal and proper effect to the tariff language. Specifically, PUD applied the EFC factor as developed using the embedded costs for the customer classes from the most recent embedded cost of service study.<sup>8</sup>

OG&E has applied a liberal interpretation of the EFC by using rates instead of the embedded fixed costs from the Company’s cost of service study. OG&E Witness Rowlett admits that the Company’s calculation is a departure from the tariff definition of EFC in

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Tr. 6/30/15, Vol. III, p. 33, l. 25 - p. 34, l. 1-2; p. 34, l. 10-11; p. 34, l. 15-17; p. 35, l. 19-20.

<sup>3</sup> Tr. 7/1/15; 46: 18.

<sup>4</sup> Tr. 7/1/15; 50: 11-12.

<sup>5</sup> Tr. 6/30/15, Vol. II, 99: 3.

<sup>6</sup> OG&E Demand Program Rider, Sheet No. 51.72; Attachment 2 to Order No. 605737 issued in Cause No. PUD 2012000134.

<sup>7</sup> Champion Reb. Test.; 7: 7-11.

<sup>8</sup> Champion Reb. Test.; 7: 3-4.

testifying that the EFC is treated generically.<sup>9</sup> However, the term is clearly defined within the DPR tariff as “embedded fix cost per kWh.”<sup>10</sup> OG&E’s approach to applying the EFC does not give effect to the tariff definition and impermissibly exceeds the tariff provisions.

OG&E further urges that where interpretation is necessary, “the language should be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results.”<sup>11</sup> OG&E Witness Bartholomew took the liberty to “expand”<sup>12</sup> largely upon the lost net revenue formula set forth in the DPR tariff by adding an altered version of the distributive property of mathematics, which applies two separate EFC values. The DPR tariff does not provide for use of two separate EFC values, nor does the tariff contain any provision allowing insertion of the distributive property of mathematics into the tariff formula. Further, the method that Witness Bartholomew identifies as the distributive property is not a true application of that principle. Witness Bartholomew further expands the formula by using a revenue difference calculation to arrive at lost net revenue. Witness Bartholomew admits that the tariff does not permit any of these applications.<sup>13</sup> Expanding upon the lost net revenue formula in this way leads to an overstatement of lost net revenue and is unfair to the ratepayers from whom these revenues will be collected. Reading the plain language of the tariff would not lead one to the result proposed by OG&E and is contrary to the principle that interpretation of the tariff should not lead to “unfair, unusual, absurd or improbable results” as asserted by the Company.

Citing *Pennzoil Co. v. FERC*, 645 F.2d 360, OG&E references the ‘four corners’ doctrine in stating that “the circumstances surrounding the execution of the contract” should be considered in interpreting the contract.<sup>14</sup> It should be noted that the language quoted from *Pennzoil* by OG&E is followed by the court’s statement that “[i]n short, the court looks to the language of the contract and its commercial (or in this case, regulatory) context.”<sup>15</sup> Consideration of all circumstances leading to the Joint Stipulation resulting from Cause No. PUD 201200134 reveals that PUD recommended that no lost net revenue be recovered for the SmartHours program,<sup>16</sup> that the record in PUD 201200134 is void of any evidence that PUD agreed to OG&E’s proposed calculations, and that the DPR tariff does not support OG&E’s proposed calculation.

*Pennzoil* also holds that “[w]hen interpreting a contract, the question is what was the parties’ intent, since courts are compelled to give effect to the parties’ intentions.”<sup>17</sup> The

<sup>9</sup> Rowlett Resp. Test.; 8: 19.

<sup>10</sup> OG&E Demand Program Rider, Sheet No. 51.72; Attachment “2” to Order No. 605737 issued in Cause No. PUD 201200134.

<sup>11</sup> OG&E Response, p. 4, ¶17.

<sup>12</sup> Bartholomew Resp. Test.; 5: 18.

<sup>13</sup> Tr. 6/30/15, Vol. II; 98: 20-25; 99: 1-3.

<sup>14</sup> OG&E Response at p. 5, ¶18.

<sup>15</sup> *Pennzoil Co. v. FERC*, 645 F.2d 360, 388.

<sup>16</sup> Summary of Filed Testimony and Statements of Position, Attachment “B” to Order No. 605737 issued in Cause No. PUD 201200134; p. 14.

<sup>17</sup> *Pennzoil Co. v. FERC*, 645 F.2d 360, 388.

intentions of the parties to Cause No. PUD 201200134 are memorialized in Section III of the Joint Stipulation, titled "Agreement of the Stipulating Parties." This section consists of paragraphs numbered 1 through 18, and none state agreement of the parties to OG&E's proposed lost net revenue calculations.<sup>18</sup>

In a similar vein, OG&E cites *Natural Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission*, 811 F.2d 1563, for the holding that interpretation of an agreement should "not only be consistent with what the parties *purported* to do in the settlement . . ." but should be "supported by what they *actually* did."<sup>19</sup> It should also be noted that the court pointed out that the Petitioner in that case explicitly included certain provisions in the agreement at issue to preserve certain rights and opportunities.<sup>20</sup> OG&E had the opportunity to do the same in Cause No. PUD 201200134, but did not. What the parties *purported* to do and *actually did* was agree to the 18 enumerated terms stated within the Joint Stipulation. No other agreements or settlements were entered into in Cause No. PUD 201200134 nor incorporated into Order No. 605737.

Citing *Complaint of Shoreline Ventures Limited Against Central Power and Light Company*, 1995 Tex. PUC LEXIS 174, OG&E asserts that consideration be given to whether a utility has "consistently communicated and enforced" the proposed interpretation. However, as explained by OG&E Witness Rowlett, in 2012 OG&E filed its application initiating Cause No. PUD 201200134 and proposing programs for the 2013 through 2015 program cycle. OG&E's prior program portfolios had been made up exclusively of energy efficiency programs.<sup>21</sup> The 2013 through 2015 portfolio introduced demand programs, including the SmartHours program, and took effect on January 1, 2013.<sup>22</sup> Consequently, program year 2013 was the first for which OG&E made a submission for claimed lost net revenue for the SmartHours program. The recent introduction of SmartHours to OG&E's demand program portfolio provides no historical context to gauge whether there has been consistent interpretation.

#### **PUD'S APPLICATION IS NOT A COLLATERAL ATTACK**

OG&E's Response cites authority forbidding collateral attack on a prior order. OG&E cites *In the Matter of MoGas Pipeline, LLC's Application and Complaint*, 2011 Mo. PSC LEXIS 110, for the premise that a "challenge" to an order "is an improper collateral attack." *Union Texas Petroleum v. Corporation Commission*, 651 P.2d 652 (Okla. 1969), is referenced in OG&E's Response for its holding that modification to a prior order must be supported by substantial evidence of a change in conditions arising subsequent to the prior order. However,

<sup>18</sup> Joint Stipulation and Settlement Agreement, Attachment "A" to Order No. 605737 issued in Cause No. PUD 201200134; p. 2-5.

<sup>19</sup> *Natural Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission*, 811 F.2d 1563, 1573 (1987) (Emphasis in original).

<sup>20</sup> *Natural Fuel Gas Supply Corporation v. Federal Energy Regulatory Commission*, 811 F.2d 1563, 1573 (1987).

<sup>21</sup> Rowlett Resp. Test.; 4: 6-8.

<sup>22</sup> Rowlett Resp. Test.; 4: 11-15.

the excerpts of these cases offered by OG&E do not provide this Court with the full breadth of the collateral attack doctrine. The Oklahoma Supreme Court has long held as follows:

A collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial.<sup>23</sup>

PUD has not challenged an order of the Commission in the present cause. As stated in the caption of this cause, the relief PUD requests in this matter is a determination of the proper calculation of lost net revenue pursuant to OG&E's demand program rider. The record reflects no indication that PUD questions or impugns Commission Order No. 605737 or the attached DPR tariff, nor is there any indication that PUD seeks to avoid, defeat, or evade the order or to deny its force and effect. In fact, PUD applied the lost net revenue formula precisely as stated in the DPR tariff. As Witness Champion testified "Order No. 605737 and the approved tariff govern what PUD reviews and approves in the subsequent DPR submissions."<sup>24</sup> Witness Champion further acknowledged that "PUD and OG&E should both be bound by the DPR tariff. OG&E should be bound by the tariff with its submissions and PUD should be bound by the tariff in its review."<sup>25</sup>

Though OG&E alleges a collateral attack by PUD, Company witnesses admit to expanding the tariff formula beyond the bounds of the tariff language.<sup>26</sup> It is this action by OG&E that is indicative of collateral attack, rather than PUD's request for a determination of the proper lost net revenue calculation. OG&E's admitted additions to the tariff formula indicate an attempt to avoid or evade the formula and to deny the tariff force and effect. Furthermore, if PUD's requested determination is a collateral attack, so too is OG&E's request for clarity and for an order of the Commission adopting the Company's methodology as stated in the "Relief Sought" portion of the Company's Response.<sup>27</sup> OG&E attempts to distract from the true nature of its requested relief by citing case law holding that "clarification and interpretation of orders . . . is permissible and does not constitute a collateral attack."<sup>28</sup> However, the testimony of Company witnesses, wherein they admit to deviating from the tariff formula, reflects an obvious intention to avoid and evade the tariff formula by expanding upon it and not giving proper effect to the tariff terms.

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<sup>23</sup> *Nilsen v. Ports of Call Oil Co.*, 711 P.2d 98, 101, 1985 OK 104. See also *State of Oklahoma on Relation of the Commissioners of the Land Office of said State v. Corporation Commission, Amoco Production Co., Lyons Petroleum, Inc., and Charles R. Walbert*, 5902 P.2d 674, 677, 1979 OK 16.

<sup>24</sup> Champion Reb. Test.; 14: 11-12.

<sup>25</sup> Champion Reb. Test.; 17: 12-14.

<sup>26</sup> Bartholomew Resp. Test.; 5: 18.

<sup>27</sup> OG&E Response; p. 6.

<sup>28</sup> OG&E Response; p. 6, ¶22.

**PUD'S CALCULATION OF OG&E'S LOST NET REVENUE  
IS NOT RETROACTIVE RATEMAKING**

OG&E cites authority prohibiting retroactive ratemaking and makes an unsubstantiated claim that PUD's actions in this cause violate that prohibition. These citations serve no purpose, as PUD's Application makes no attempt or request to review or adjust OG&E's rates. As stated in Order No. 605737, PUD's review in this cause was to "verify the lost revenues, actual calculated shared savings and actual program costs in the Demand Portfolio True-up balance contained in the Demand Program Rider."<sup>29</sup> Witness Champion explained that "PUD has a responsibility to review the submission provided by OG&E for cost recovery through its DPR for accuracy and adherence to OG&E's Commission approved tariff."<sup>30</sup>

In conducting its review of OG&E's submission, PUD was mindful of the parameters established by the Commission's order and did not exceed those limits nor those of OG&E's DPR tariff. PUD has not looked retrospectively at rates established in the past, rather PUD performed its Commission-ordered review of the calculation of OG&E's claimed lost net revenue and applied the tariff formula in doing so. The intention of PUD's review is not to establish rates, nor will that be the result. Witness Champion testified:

The DPR and several other riders are submitted to PUD with 30 days to review. This is a limited amount of time with a voluminous amount of information to verify. Among the items to be reviewed are [sic] for the DPR are:

- 12 months of spending by each program;
- 12 months of revenues collected by class versus the class revenues projected to be collected;
- The calculation of the new factors using the budget for the new year;
- The true-up between projected collections and actual collections;
- The cost effectiveness tests by program and for the Demand Program portfolio;
- The actual performance of each program as compared to the projections of performance, how many participants, rebates, appliances, etc.;

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<sup>29</sup> Joint Stipulation and Settlement Agreement, Attachment "A" to Order No. 605737 issued in Cause No. PUD 201200134 p. 5, ¶16.

<sup>30</sup> Champion Reb. Test.; 4: 4-6.

- The energy and demand savings achieved by program, which are also compared to the projections of energy savings achievement;
- Tariff language and calculations;
- Previous orders; and
- Commission rules.<sup>31</sup>

Given this lengthy list of items to review, it would be impossible and illogical for PUD to attempt a review for purposes of rate adjustment within such a narrow review window. Witness Champion further testifies that “[i]n this review, PUD focused on the calculation of the LNR and shared savings for both the EE programs and for the SmartHours program . . . PUD’s review this year is not a departure from reviews in previous years,”<sup>32</sup> where no claim of retroactive ratemaking was asserted. The above demonstrates a pointed review centered on OG&E’s Demand Program Portfolio and attendant matters, as opposed to a more generalized examination of SmartHours program rates or other rates. This also affirms that PUD’s requested relief and its review in this cause are lawful and bear no semblance to ratemaking of any sort. OG&E agreed to this review as shown by the signature of its counsel on the Joint Stipulation. It is disingenuous that OG&E would now claim that PUD’s review is unlawful.

**OG&E’S CLAIM OF DETRIMENTAL RELIANCE IS NOT  
SUPPORTED BY THE EVIDENTIARY RECORD**

OG&E’s Response asserts that detrimental reliance bars PUD’s Application in this cause. However, OG&E cited no law supporting its assertion, provided no analysis of the detrimental reliance principle or its applicability to this cause, and failed to articulate any detriment suffered by the Company. Detrimental reliance is part and parcel of the promissory estoppel doctrine and claim of the former invokes discussion of the latter.

Four elements are necessary to establish a cause of action for promissory estoppel:

- (1) a clear and unambiguous promise,
- (2) foreseeability by the promisor that the promise would rely upon it,
- (3) reasonable reliance upon the promise to the promisee’s detriment, and

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<sup>31</sup> Champion Reb. Test.; 12: 5-21.

<sup>32</sup> Champion Reb. Test.; 12: 25-27.

(4) hardship or unfairness can be avoided only by the promise's enforcement.<sup>33</sup>

OG&E alleges that an agreement was reached with PUD with regard to the calculation of SmartHours lost net revenue. This is incorrect. The parties were able to agree to a number of items with respect to energy efficiency cost recovery, but as stated by Witness Champion, "the parties were not able to agree on the SmartHours LNR."<sup>34</sup>

The parties engaged in several months of discussion in an effort to resolve the issues that are now at the center of this cause. The parties agreed to allow a certain amount of SmartHours lost net revenue for program year 2013 but did not agree as to the method of calculation.<sup>35</sup> Witness Champion explained that:

PUD and OG&E reached this agreement because of the need to begin recovery of the new DPR factors, which were delayed from April to September, and to acknowledge the Company had made claims in Security and Exchange Commission ("SEC") and other financial reports about the LNR levels. However, as part of that agreement, the parties agreed to clarify the intent of the calculation on a going forward basis.<sup>36</sup>

The parties were unable to develop a solution that would not require revision to the tariff. Mindful of OAC 165:35-5-1, PUD filed the Application in this cause for a Commission determination. OAC 165:35-5-1 provides as follows:

- (a) It shall be unlawful for a utility to furnish, charge for, or receive payment for electric service, except strictly in accordance with a tariff, special contract, or rate schedule approved by and on file with the Commission.
- (b) No jurisdictional tariff or rate schedule shall be instituted, added, deleted, changed, closed, or discontinued except pursuant to order of the Commission upon application, and after such notice and hearing as may be ordered by the Commission.

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<sup>33</sup> *Garst v. University of Oklahoma and University of Oklahoma Health Sciences Center*, 38 P.3d 927, 931, 2001 OK CIV APP 144.

<sup>34</sup> Champion Reb. Test.; 4: 20-21; 5: 1.

<sup>35</sup> Champion Reb. Test.; 5: 2-5.

<sup>36</sup> Champion Reb. Test.; 5: 3-9.

In light of this rule, PUD could not enter into any agreement with OG&E that would result in changes to the DPR tariff or charges not permitted by the tariff. Therefore, the first and most significant element of the promissory estoppel doctrine, the existence of a clear and unambiguous agreement, has not been established.

The absence of an agreement obviates any need to address the remaining elements. However, assuming arguendo that an agreement as to the lost net revenue calculation methodology did exist, the record in this cause is void of any evidence that OG&E suffered any detriment in reliance upon the alleged agreement. The Company has not attempted to describe any detriment in filed testimony, in live testimony during the hearing on the merits, or in its Response. If a detriment had befallen OG&E, evidence of same should have been presented prior to or during the hearing on the merits. Any post-hearing claim or attempt to show a detriment would be inappropriate and should be disregarded by this Court, as the other parties will have been unfairly denied the opportunity to test any such evidence through cross-examination or other means.

Further, OG&E has not shown, or attempted to show, that the Company will suffer hardship or unfairness if the alleged agreement is not enforced. The Joint Stipulation issued in Cause No. PUD 201200134 and the DPR tariff allow OG&E to recover lost net revenue for the SmartHours program, and the purpose of this cause is not to deny the Company that recovery. However, recovery of SmartHours lost net revenue is permitted only pursuant to the terms of the DPR tariff language. OG&E's creative liberties with the tariff formula produce a substantially larger amount of calculated lost net revenue for the SmartHours program than does proper application of the formula. PUD's witness noted that, "while the LNR may not provide all of the revenue the Company would prefer to receive, the LNR as calculated by PUD does not put the Company at risk or deny them from earning their authorized return."<sup>37</sup> There is no evidence in this cause satisfying any element of the promissory estoppel doctrine; thus, OG&E's claim is unsupported.

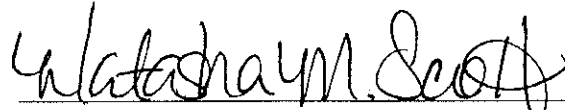
#### CONCLUSION

WHEREFORE, Applicant respectfully asserts that pursuant to the laws of the State of Oklahoma, Respondent OG&E has not sufficiently pled grounds to bar any portion of Applicant's Application in this cause. Applicant further asserts that its Application is lawful and that the Commission is vested with the authority to grant the relief requested in the Application. Applicant requests that the Commission issue an order finding that the Application is lawful and granting the relief requested therein.

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<sup>37</sup> Champion Reb. Test.; 25: 23; 26: 1-2.

Respectfully submitted,



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CERTIFICATE OF ELECTRONIC SERVICE

I, the undersigned, do hereby certify that on the 5<sup>th</sup> day of August, 2015, a true and correct copy of the above and foregoing was sent electronically, addressed to the following:

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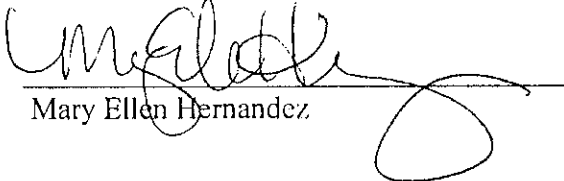
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Mary Ellen Hernandez

**BEFORE THE CORPORATION COMMISSION OF OKLAHOMA**

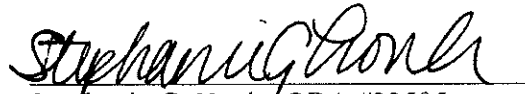
IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR )  
DETERMINATION OF THE CALCULATION )  
OF LOST NET REVENUES AND SHARED )  
SAVINGS PURSUANT TO THE DEMAND )  
PROGRAM RIDER OF OKLAHOMA GAS )  
AND ELECTRIC COMPANY )

CAUSE NO. PUD 201500153

**FILED**  
AUG 05 2015

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CORPORATION COMMISSION  
OF OKLAHOMA

**POST HEARING BRIEF**  
**OF OKLAHOMA GAS AND ELECTRIC COMPANY**



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*Attorneys for Oklahoma Gas and Electric Company*

## INTRODUCTION

On April 14, 2015, the Public Utility Division filed its Application requesting that the Commission issue an order determining the proper calculation methodology for lost net revenue pursuant to the Demand Program Rider of Oklahoma Gas and Electric Company approved in Cause No. PUD 201200134. On June 29, 2015, OG&E filed a Response to PUD's Application. OG&E hereby provides its post-hearing brief on the legal issues raised in its Response, as directed by the ALJ.

### **I. OG&E has properly applied the Demand Program Rider tariff to calculate lost net revenue for the SmartHours program.**

In interpreting the intent of a tariff, the Commission can be guided by the established principles for interpreting a contractual arrangement. In any dispute involving the interpretation of a contract, the 'four corners' of the contract must be the initial point of departure. However, modern contract law principles allow reference not only to the 'four corners' of the contract, but also to the circumstances surrounding the execution of the contract. *Pennzoil Co. v. FERC*, 645 F.2d, 360, 388 (5<sup>th</sup> Cir. 1941). In addition, the language should be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results, and should conform to the intentions of the framers of the document. *Columbia Gas Transmission Corporation, et al.*, 27 FERC ¶61,089, 61,166. When presented with a dispute concerning the interpretation of a tariff, the Commission looks first to the tariff itself, and only if it cannot discern the meaning of the tariff from its language, will the Commission look to extrinsic evidence. *Nicole Gas Prod. Ltd.*, 105 FERC ¶61,371 at p. 10. Such evidence is only considered to ascertain the intent of the parties when the intent has been imperfectly expressed. *Id*

The Commission issued Order No. 605737, in Cause No. PUD 201200134, approving a Settlement Agreement that provided "OG&E shall recover 100% of the lost net revenues resulting from the success<sup>1</sup>" for its SmartHours program through the Demand Program Rider. The Order also approved the Demand Program Rider tariff which contained the formula to calculate lost net revenue. Under the factual circumstances which gave rise to this language, there is no doubt that the lost net revenue formula was intended to calculate 100% of the lost net revenues resulting from the success of SmartHours in the manner applied by OG&E. OG&E was

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<sup>1</sup>Joint Stipulation and Settlement Agreement, Section III(3)

the only party to propose a calculation methodology in Cause No. PUD 201200134. Notably, no party to that proceeding objected to OG&E's calculation methodology during the cause or proposed an alternative methodology during settlement negotiations leading up to the Settlement Agreement. Indeed, the record shows that the Company met with the PUD witness in that cause, Nicholas Fiegel, and described the intended methodology and the estimated revenue impact of that methodology in great detail. The record also shows that Mr. Fiegel subsequently testified in support of the Stipulation adopting the Company's proposed tariff and never privately or publically expressed an objection to OG&E's proposed approach. The absence of any objection or presentation of an alternative interpretation supports the conclusion that the Stipulating Parties' understood that recovery of lost net revenues for the Demand Response Programs would be calculated pursuant to OG&E's calculation methodology. It is logical and reasonable to conclude that when the Stipulating Parties agreed to 100% recovery of the SmartHours lost net revenues using a particular methodology demonstrated by OG&E when no other way to obtain 100% of the lost net revenues from SmartHours was proposed or discussed in the record of the cause.

OG&E recognizes that PUD's initial testimony in Cause No. PUD 201200134 recommended a disallowance of lost net revenue for SmartHours<sup>2</sup>. However, PUD did not object to OG&E's proposed calculation methodology; instead, PUD proposed disallowing lost net revenue recovery because their witness believed the SmartHours program was more appropriate considered in a future, Phase III of OG&E's prior Smart Grid filing. During settlement negotiations, PUD agreed to the recovery of 100% of lost net revenue for SmartHours. After PUD's change in position as to the recovery of lost net revenue, PUD did not challenge OG&E's calculation methodology or propose a calculation methodology. Ms. Champion's approach to calculating lost net revenue was never discussed in Cause No. PUD 201200134 or presented by PUD. It is clear that the intent and understanding of the Stipulating Parties was to recover lost net revenues according to OG&E's calculation methodology. Therefore, OG&E has properly applied and calculated the lost net revenues for its SmartHours program.

Finally, at the hearing on the merits in the present cause, OG&E witness Donald Rowlett testified to a demonstrative exhibit he had created to illustrate the intent and understanding of the parties at the time the Settlement Agreement was executed. This exhibit, marked Hearing

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<sup>2</sup> Cause No. PUD 201200134, Responsive Testimony of Nicholas Fiegel, p. 17, ln. 3-17

Exhibit 9, shows OG&E's projected lost net revenue as provided in testimony in Cause No. PUD 201200134 compared with the lost net revenue result using Ms. Champion's calculation methodology under the same inputs. This exhibit is compelling evidence as it shows the drastic difference in estimated lost net revenue between the only methodology in the record at the time of the DPR approval and the methodology witness Champion's advocated some 11 months after the DPR Tariff went into effect. As shown in Hearing Exhibit 9, OG&E projected \$3.5 million in lost net revenue in 2013, however, if Ms. Champion's methodology had been used the lost net revenue in 2013 would have been \$836,000. With such disparity in the lost net revenue under the two calculation methodologies, it would have been imprudent for the Company to agree to the Settlement Agreement as 100% of the lost net revenues would not have been recovered. OG&E's calculation methodology follows the expectation, intent and understanding of the Settlement Agreement as to how lost net revenues would be calculated under the DPR Tariff.

## **II. OG&E should be allowed to conduct its business in reliance upon Commission approved orders and tariffs.**

The Company should not be denied full recovery of the lost net revenues attributed to its SmartHours program. OG&E relied upon the final order approving the Settlement Agreement in the 2013 DPR Case and the clear intent of how to calculate lost net revenue when it began actively promoting participation in SmartHours. In *Whitehorse v. Johnson*, 156 P.3d 41, ¶9 (Okla. 2007), the Court concluded that a Stipulation agreement, like a contract, "includes not only the promises set forth in express words, but all such implied provisions as are indispensable to effectuate the intent of the parties and as arise from the language of the contract and the circumstances under which it was made." *Id.*

Detrimental reliance is part of Oklahoma's common law. *Roxana Petroleum Co. of Oklahoma v. Rice*, 235 P.2d 502 (Okla. 1924). *Black's Law Dictionary*<sup>3</sup> defines detrimental reliance as "reliance by one party on the acts or representations of another, causing a worsening of the first party's position." For purposes of detrimental reliance, the promise may be shown by words, deeds, conduct, representations or omissions. Restatement (Second) of Contracts § 90.

A detriment suffered by a party in reliance on the promise of another is ample consideration to enforce a promise. *Matter of Estate of Hoobler*, 925 P.2d 13, citing,

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<sup>3</sup> 8<sup>th</sup> Edition

*Commodore Home Systems, Inc. v. Citicorp Acceptance Co., Inc.* 780 O.2d 674, 678. *Schulte v. Apache Corp.*, 1995 OK 148, discussed the Restatement (Second) of Contracts and the meaning of “promise.” The Court noted that in a Reporter’s Note to Comment “a” of § 90, promise is defined as “a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made.” *Schulte* at 299. The Court continues that the comments “are clear that a promise includes ‘acts,’ and those acts may arise from written and oral assurances as well as conduct.” *Id.*

As evidenced in the record in the present cause, OG&E has calculated lost net revenues of \$11.2 million for 2013 and \$13.6 million for 2014, while Ms. Champion has limited OG&E’s lost net revenue recovery to \$4.3 million. PUD’s current position on the calculation for lost net revenue is inconsistent with the plain language of the Settlement Agreement, DPR tariff and prior intent of how to calculate lost net revenue.

Given that PUD changed its position on whether OG&E should recover lost net revenue for SmartHours in the Settlement Agreement, but did not object to the calculation methodology presented in the cause or propose an alternative methodology on how to calculate lost net revenue, OG&E rightfully assumed that its calculation methodology would be applied to the DPR tariff. Following the issuance of the final order in the 2013 DPR Case, OG&E actively promoted the SmartHours program to encourage customer participation with the expectation and understanding that 100% of the lost net revenue would be recoverable pursuant to the Company’s methodology, which accounts for both the change in rates and energy savings by customers. OG&E presented evidence in the present cause of the strong enrollment numbers in 2012-2014 which demonstrates customer acceptance of the program<sup>4</sup>. There is a correlation between the participants in SmartHours and the potential for lost net revenue. As participation increases, so does the lost net revenue to the Company.

It would not be economically viable for OG&E to continue increasing participation in the program under the calculation methodology Ms. Champion proposes as she neglects to account for the change in customer rate, which is an integral part of the SmartHours program. Dr. Faruqui acknowledges this point in his testimony stating, “[i]f OG&E is not compensated for loss in revenues due to the change in rates, then due to the high losses, it might be forced to

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<sup>4</sup> Responsive Testimony of Angela Nichols, p. 4, Table 1

redesigned the rates for the SmartHours program.<sup>5</sup> The final order in Cause No. PUD 201200134 approved the Settlement Agreement providing 100% recovery of lost net revenues for SmartHours and OG&E relied upon that order in making decisions regarding the SmartHours program.

### III. PUD has collaterally attacked Commission Order No. 605737.

PUD's calculation methodology proposed in the present cause does not allow for 100% recovery of lost net revenues from the SmartHours program as authorized in a prior Commission order which results in the consequence of an impermissible collateral attack.

The law is well established that while the Corporation Commission may clarify or supplement its orders, it may not collaterally attack a prior order, and that any modification of a prior order "constitutes a collateral attack on a prior order where that modification is not based on substantial evidence showing a change of conditions or knowledge of conditions arising since the last order." *Union Texas Petroleum v. Corporation Comm'n*, 651 P.2d 652, 659 (Okla. 1981).

In *Nilsen v. Ports of Call Oil Co.*, the court stated that a collateral attack is an attempt to avoid, defeat, evade or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari or motion for new trial. 711 P.2d 98, 101. The Oklahoma Court has also defined the term "modify" as follows:

"Modify" means to change or alter an existing administrative order. A modification order adjudicates matters outside the original order, or contradicts some portion of the previous order. *Forest Oil Corp. v. Corporation Comm'n of Okla.*, 807 P.2d 774,785 (Okla. 1991).

Simply put, modification of an order without substantial evidence showing a change of conditions or knowledge of conditions is impermissible. The circumstances have not changed in any material way that would justify the modification PUD is proposing. Ms. Champion's calculation methodology is contrary to, alters and contradicts the existing order which approved the Settlement Agreement authorizing 100% recovery of lost net revenue from SmartHours as it is not possible to recover 100% of lost net revenue under Ms. Champion's methodology. Ms. Champion's calculation only accounts for the energy savings from the SmartHours program and also limits recovery to the summer on-peak hours, instead of all hours for 12 months.

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<sup>5</sup> Responsive Testimony of Ahmad Faruqui, p. 16, ln. 19-21.

The findings of the Court in *Phillips Petroleum Co. v. Corporation Commission*, 461 P.2d 597 (Okla. 1969) are applicable to the facts of the present cause. In *Phillips*, the Court found that the modification was not based on new evidence discovered since the prior order, but was instead based on a different analysis of the evidence that existed at the time the prior order was entered. *Id.* at 599, 600. The Court noted that the comparative analysis could have been made and submitted at the prior hearing; therefore, the Court found that the new analysis and interpretation of the facts that were already known did not constitute a change in conditions or in knowledge of conditions. *Id.* at 600. Ms. Champion's modification to the calculation methodology is based on her interpretation and opinion on how to calculate lost net revenue. There is no new evidence to support the modification Ms. Champion suggests, and as stated in *Phillips*, a new analysis does not constitute a change in conditions.

As discussed above, the intent and understanding of the Stipulating Parties as to the recovery of lost net revenues in the Settlement Agreement is clear. It is impossible, using Ms. Champion's calculation methodology, for the Company to recover 100% of the lost net revenues from SmartHours as provided in the Settlement Agreement. In fact, Ms. Champion acknowledges that the lost net revenue calculated by PUD does not provide 100% recovery stating, "[w]hile the LNR may not provide all of the revenue the Company would prefer to receive, the LNR as calculated by PUD does not put the Company at risk or deny them from earning their authorized return." (Champion Reb. 25:23-26:1-2). Ms. Champion's modification to the calculation methodology is contrary to the plain reading of the Order and the Stipulation, the intent of the Settlement Agreement and results in a lost net revenue recovery less than the approved 100% recovery. No other party to the Settlement Agreement has joined to support the Staff in its position in this cause. That alone is strong evidence that the position of PUD lacks substantial merit and should not be adopted by the Commission.

#### CONCLUSION

OG&E is following the tariff and the only lost net revenue methodology presented in Cause No. PUD 201200134 which allows for "recovery of 100% of the lost net revenues resulting from the success" of the SmartHours program. In addition, the Company's methodology is consistent with industry standard practices for demand response programs. The Commission should reaffirm OG&E's SmartHours lost net revenue calculation methodology as

*Cause No. PUD 201500153; OG&E's Post Hearing Brief*

consistent with the DPR tariff and reject Ms. Champion's modification to the calculation methodology for lost net revenue for SmartHours as an impermissible collateral attack.

**CERTIFICATE OF SERVICE**

On this 5<sup>th</sup> day of August, 2015, a true and correct copy of this document was sent via electronic mail to the following:

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**FILED**  
AUG 05 2015

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR )  
DETERMINATION OF THE CALCULATION )  
OF LOST NET REVENUES AND SHARED )  
SAVINGS PURSUANT TO THE DEMAND )  
PROGRAM RIDER OF OKLAHOMA GAS )  
AND ELECTRIC COMPANY )

CAUSE NO. PUD 201500153

**ATTORNEY GENERAL'S PROPOSED  
FINDINGS OF FACTS, CONCLUSIONS OF LAW AND BRIEF IN SUPPORT**

COMES NOW, the Attorney General of the State of Oklahoma, E. Scott Pruitt, appearing by and through Assistant Attorney General Jerry J. Sanger, and hereby submits the following proposed findings of fact, conclusions of law and brief in support thereof in this Cause:

1. On April 14, 2014, the Director of the Public Utility Division ("PUD") filed an Application seeking an order of the Commission "determining the proper calculation methodology for lost net revenue pursuant to the Demand Program Rider of Oklahoma Gas and Electric Company approved in Cause No. PUD 201200134."

2. PUD attempted to narrowly tailor the issue in its Application to avoid the obvious deficiencies in its request. Namely, that PUD's "methodology" for calculating lost net revenue pursuant to OG&E's Demand Program Rider approved in PUD 201200134 is contrary to the order issued in that cause, contrary to the definition of lost net revenues set forth in the Commission rules governing this issue and contrary to the interest of rate payers in Oklahoma. PUD asks the Commission to determine a "methodology" for calculating lost net revenues without considering the Commission's rules and the all the terms of the final order and settlement agreement in Cause No. PUD 201200134.

*Cause No. PUD 201500153 – Attorney General’s Proposed FOF, COL and Brief in Support*

3. Pursuant to Oklahoma Administrative Code (“OAC”) 165:35-41-3, “Demand response” means any load management program in which a utility offers electricity users payments or other inducement to reduce their demand for electricity for specified periods of time.”

4. Pursuant to Oklahoma Administrative Code (“OAC”) 165:35-41-3, “Lost net revenue” means income from the retail sale of electricity forgone by a utility directly resulting from the success of its demand portfolio, less expenses the utility was not required to pay by forgoing the sales.”

5. Pursuant to OAC 165:5-41-2, the goals of energy efficiency and demand response programs are to minimize the long-term cost of utility service and avoid or delay the need for new generation, transmission, and distribution investment.

6. OG&E’s SmartHours Program is one of the most successful programs of its kind in the country.

7. The success of OG&E’s SmartHours Program has meant that OG&E has met the goals set forth in OAC 165:35-41-2 in that it has minimized the long-term cost of utility service and avoided or delayed the need for new generation, transmission, and distribution investment. This is in the best interest of rate payers in the State of Oklahoma.

8. Pursuant to OAC 165:35-41-5, in reviewing demand portfolios, the Commission will consider, among other things, the quality of the programs in all their elements relative to their program objectives, the degree to which programs include innovative ways of increasing savings, *increasing participation in programs, or promote participation*; and forecasts of utility plant that would be required absent savings from the energy efficiency and demand response programs.

*Cause No. PUD 201500153 – Attorney General's Proposed FOF, COL and Brief in Support*

9. OG&E has met the goals set forth in OAC 165:35-41-1 *et seq.* Its SmartHours Program has, for the time period at issue, lost money, “net revenue” as a result of decreasing the standard rate that customers participating in the program pay. This lowered standard rate for SmartHours Program participants has promoted and increased participation in the Program, thereby assuring the success in the Program with the result of minimizing the long-term cost of utility service and avoiding or delaying the need for new generation, transmission, and distribution investment.

10. The Attorney General supports all electric utility programs that minimize the long-term cost of utility service and avoid or delay the need for new generation, transmission, and distribution investment.

11. The Attorney General supports the assertions set forth in OG&E’s response filed in this cause on June 29, 2015.

12. The Attorney General believes that the relief requested by PUD is not in the best interest of rate payers and will have the long term effect of discouraging the success of all electric utility energy efficiency and demand response programs.

13. The Final Order Approving Joint Stipulation and Settlement Agreement, Order No. 605737, ordered, among other things, that the Settlement Agreement attached thereto as Attachment A was adopted by the Commission.

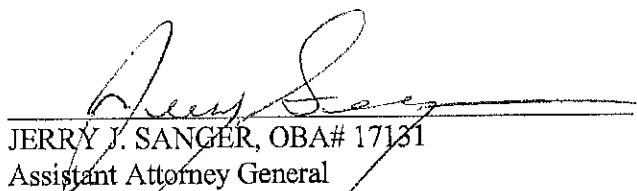
14. The Settlement Agreement (Attachment A to the Order) at page 2 of 8, section III, paragraph 3, states that OG&E shall recover 100% of the lost net revenues resulting from the success of the programs in OG&E’s Demand Portfolio, which at that time included the SmartHours Program.

*Cause No. PUD 201500153 – Attorney General’s Proposed FOF, COL and Brief in Support*

The Attorney General respectfully requests that the Commission find that OG&E has properly calculated lost net revenues and that PUD’s methodology of calculating lost net revenues is not consistent with Commission rules, is not consistent with the final order entered in Cause No. PUD 201200134 and is not in the interest of rate payers.

Respectfully Submitted,

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA



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*Cause No. PUD 201500153 – Attorney General’s Proposed FOF, COL and Brief in Support*

**CERTIFICATE OF SERVICE**

On this 5<sup>th</sup> day of August, 2015, a true and correct copy of the above and foregoing *Attorney General’s Findings of Fact, Conclusions of Law and Brief in Support*, was sent via electronic mail to the following interested parties:

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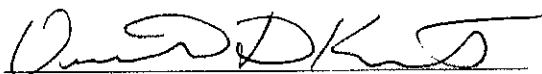
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**FILED**  
AUG 05 2015

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF )  
BRANDY L. WREATH, DIRECTOR OF THE )  
PUBLIC UTILITY DIVISION, FOR )  
DETERMINANTION OF THE CALCULATION )  
OF LOST NET REVENUES AND SHARED )  
SAVINGS PURSUANT TO THE DEMAND )  
PROGRAM RIDER OF OKLAHOMA GAS AND )  
ELECTRIC COMPANY )

CAUSE NO. PUD 201500153

**OKLAHOMA INDUSTRIAL ENERGY CONSUMERS' REPLY  
TO OKLAHOMA GAS AND ELECTRIC COMPANY'S RESPONSE**

Oklahoma Industrial Energy Consumers ("OIEC") submits this Reply to the Response filed in this cause on June 29, 2015, by Oklahoma Gas and Electric Company ("OG&E"). OIEC responds to the legal arguments raised in OG&E's Response.

**BACKGROUND**

In Cause No. PUD 201200134, the parties entered into a Joint Stipulation and Settlement Agreement ("Stipulation"), approving OG&E's implementation of energy efficiency and demand response programs for a program cycle of January 1, 2013 through December 31, 2015, approving the recovery of the costs associated therewith through a Demand Program Rider tariff, and agreeing that OG&E would recover the net revenues lost resulting from the success of those programs through that tariff, less the expenses that OG&E was not required to pay for the foregone sales. The lost net revenues were to be recovered through OG&E's Demand Program Rider tariff ("DPR"), which was attached to the Stipulation. The Commission, on December 20, 2012, entered Order No. 605737, approving and adopting the Stipulation.

The Stipulation provides for the Oklahoma Corporation Commission Public Utility Division ("PUD") to review and verify the lost net revenues, shared savings, and program costs. Specifically, the Stipulation provides:

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Cause No. PUD 201500153  
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The Public Utility Division shall review and verify the lost revenues, actual calculated shared savings and actual program costs in the Demand Portfolio True-Up balance contained in the Demand Program Rider.

Stipulation, p. 5, ¶ 16, attached to Order No. 605737. The Stipulation requires OG&E to continue to report by June 1 of each year on the performance of energy efficiency and demand response programs for the preceding program year, as well as to report the cumulative program performance, as required by OAC 165:35-41-7. Stipulation, p. 4, ¶ 11.

In March 2014, PUD undertook a review of OG&E's claimed lost net revenues and shared savings for the 2013 program year. PUD's calculations disagreed with those of OG&E by millions of dollars. Therefore, PUD filed its Application in this cause on April 14, 2015, stating that PUD did not believe that OG&E's calculation methodologies comported with the calculation formulae set forth in the DPR, and requesting that the Commission issue an order determining the proper calculation of OG&E's lost net revenues and shared savings pursuant to the DPR.

The day before the hearing on the merits of this cause, OG&E filed a Response in which it makes certain legal arguments. This Reply addresses OG&E's legal arguments.

### ARGUMENTS AND AUTHORITIES

- I. **If the Commission determines that Order No. 605737, including the Stipulation adopted as a part of the Order, is unambiguous, it is to be enforced as written.**

It is not clear whether OG&E is arguing that the Commission's Order and the DPR are ambiguous. OG&E first argues that the tariff is to be read as a whole and, if unambiguous, is to be construed without consideration of extrinsic evidence. OG&E's Response, p. 4, ¶ 17. OG&E then argues that if the tariff is ambiguous, it must be construed against the author of the tariff, citing a Federal Energy Regulatory Commission ("FERC") decision.

If the Commission determines that the DPR is clear and unambiguous, as argued by OG&E, the language in the four corners of the document governs its interpretation and extrinsic evidence regarding the meaning of the order is not admissible.<sup>1</sup> *See also Grace Petroleum Corp. v. Corporation Commission of Oklahoma*, 1992 OK CIV APP 4, ¶ 6, 839 P.2d 195, 197 (Commission has authority to construe or clarify its previous orders, but it “may not consider extrinsic evidence to create ambiguity in or to construe its previous orders.”). This same rule applies to legislative enactments, such as a rate order.<sup>2</sup> *Cf. Justus v. State ex rel. Dep't of Public Safety*, 2002 OK 46, ¶ 4, 61 P.3d 888, 889 (“A cardinal precept of statutory construction is that where a statute’s language is plain and unambiguous . . . no justification exists for the use of interpretative devices to fabricate a different meaning.”) (citation omitted); *Wyllie v. Chesser*, 2007 OK 81, ¶ 19, 173 P.3d 64, 71 (Unambiguous legislation “will be accorded the meaning expressed by the language used.”).

Contrary to its first argument that extrinsic evidence is not admissible to construe an unambiguous tariff, OG&E next argues that under “modern contract law,” extrinsic evidence relating to the circumstances under which even an unambiguous contract is made is admissible. OG&E’s Response, p. 5, ¶ 18. OG&E’s argument is contrary to Oklahoma law. *See, e.g., Mercury Investment Co. v. F.W. Woolworth Co.*, 1985 OK 38, ¶ 9, 706 P.2d 523, 529 (“But where a contract is complete in itself and, as viewed in its entirety, is unambiguous, its language is the only legitimate evidence of what the parties intended. The intention of the parties cannot

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<sup>1</sup> The mere fact that the parties urge different interpretations of the DPR does not make it ambiguous. *See, e.g., Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 14, 63 P.3d 541, 545.

<sup>2</sup> The Commission, in the prior proceeding that resulted in Order No. 605737, was approving rates and, therefore, was acting in a legislative capacity. *Wiley v. Oklahoma Natural Gas Co.*, 1967 OK 152, ¶ 3, 429 P.2d 957, 958. Thus, its Order in the prior proceeding “is a legislative enactment and not a judgment of a Court.” *Id.*

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be determined from the surrounding circumstances, but must be gathered from a four-corners' examination of the contractual instrument in question."') (emphasis added).

If the DPR is determined to be unambiguous, it must be enforced as written.

**II. If the Commission finds the DPR to be ambiguous, the meaning of the DPR is for the Commission to determine based upon the evidence presented.**

If the DPR is considered to be ambiguous, then the Commission may consider extrinsic evidence relating to the circumstances existing at the time the DPR was approved in construing the DPR tariff. *Cf. Tenneco Oil Co. v. Oklahoma Corporation Commission*, 1985 OK 104, ¶ 2, 775 P.2d at 297-298 (Commission has jurisdiction to construe its prior orders and to determine compliance therewith); *Swindall v. State Election Bd.*, 1934 OK 259, ¶ 22, 32 P.2d 691 ("Where the language of a statute is ambiguous, it is proper to consider the conditions with reference to the subject-matter that existed when it was adopted, the occasion and the necessity for the law, and the causes which induced its enactment, or, in other words, the mischief sought to be avoided and the remedy intended to be afforded."').

As previously stated, OG&E argues that if the DPR is ambiguous, it must be construed against the author of the DPR. OG&E does not state who is the supposed author of the DPR. However, the DPR is a part of Commission Order No. 60573. The DPR was specifically approved by the Commission and it is attached to the Stipulation, which was adopted as the Commission's order.<sup>3</sup> OIEC is not aware of any law in Oklahoma under which the DPR is to be construed against the Commission, which approved the DPR and adopted the Stipulation to which it is attached as a part of its Order. The burden is on the utility to show that its calculations are in compliance with the tariff. *See In re Request for Service in Qwest's Tofte*

<sup>3</sup> By analogy, a judgment by confession has the same legal effect as a judgment entered after a trial. *Wieland v. Danner Auto Supply, Inc.*, 1984 OK 45, ¶ 19, 695 P.2d 1332, 1334.

*Exchange*, 666 N.W.2d 391, 395-396 (Mich. App. 2003) (where case involved “the allocation of costs under existing tariffs,” court held that the utility had the burden of proving the reasonableness of its rates and: “In any investigation, action or proceedings arising under, or growing out of, an action initiated by the commission upon its own motion, the burden of proof shall be upon the telephone company to establish the reasonableness of the existing rates.”); *Hausam v. Public Utilities Com.*, 751 P.2d 627, 628 (Colo. 1988) (when the public utilities commission brings a proceeding to review a tariff, “the utility bears the burden of proving that the proposed rates are reasonable.”). *Cf.* OAC 165:35-35-1(b) (utility bears the burden of proof as to prudence of all fuel and generation expenses in proceedings for review of those costs by the Commission).

**III. PUD's Application does not violate the filed rate doctrine, is not a collateral attack on Order No. 605737, and does not constitute retroactive ratemaking.**

OG&E argues that the relief requested by PUD in this cause constitutes a collateral attack on the prior Stipulation, violates the filed rate doctrine, and constitutes retroactive ratemaking. OG&E's argument is without merit. A collateral attack on a Commission order has been defined as “an attempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial.” *Woods Petroleum Corp. v. Sledge*, 1981 OK 89, n. 4, 632 P.2d 393, 396. Oklahoma applies a doctrine similar to the federal filed-rate doctrine under which public utilities are forbidden from charging a rate that differs from a rate set forth in their filed tariffs. *Satellite Systems, Inc. v. Birch Telecom of Oklahoma, Inc.*, 2002 OK 61, ¶ 6, 51 P.3d 585, 586-587. Retroactive ratemaking occurs when the Commission changes a rate from that specified in a prior order and applies that change retroactively. *See Turpen v. Oklahoma Corporation Commission*, 1988 OK 126, ¶ 76, 769 P.2d 1309, 1332.

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A collateral attack, retroactive ratemaking, and the filed-rate doctrine all require that the proceeding be one in which PUD seeks to change the methodology for calculating lost net revenues and shared savings from that set forth in the DPR, and to apply those changes retroactively. However, it appears to OIEC that PUD does not seek to change the terms of the DPR, as shown by the face of its Application in this cause and by its testimony presented in this cause. Instead, PUD seeks to comply with the provisions of the Stipulation, which requires it to review and verify lost revenues, calculated shared savings, and actual program costs. PUD seeks to apply and enforce the terms of the Stipulation, including the DPR. The Commission clearly has the power to enforce its orders. Okla. Const. art. 19, § 19; *State ex rel. Henry v. Southwestern Bell Tel. Co.*, 1991 OK 134, ¶ 35, n. 43, 825 P.2d 1305, 1317. *Cf. St. Louis & S.F.R. Co. v. State*, 1925 OK 541, 244 P. 440, 442, *cert. denied*, 273 U.S. 779 (1927) (Commission has the authority to determine whether rates charged were in accordance with a prior established legal rate and, if not, to order a refund).

**IV. The Commission has the authority and duty to oversee public utilities' compliance with rate schedules and tariffs, such as OG&E's DPR.**

The Commission has the duty of "supervising, regulating, and controlling" public utilities in all public service matters. Okla. Const. art. 9, § 18. The Commission's duty includes the duty to safeguard the public's interest with regard to a public utility's rates and to ensure that the rates charged by the utility are the lowest reasonable rates. *State v. Oklahoma Gas & Electric Co.*, 1975 OK 40, ¶ 20, 536 P.2d 887, 891. Thus, the Stipulation properly provided for PUD to review and verify the correctness of OG&E's calculations of lost revenues, shared savings, and program costs. Moreover, this proceedings is proper under the Commission's constitutional duty to ensure that rates are just and reasonable. Okla. Const. art. 9, § 18; *Satellite Sys., Inc. v. Birch Telecom of Oklahoma*, 2002 OK 61, ¶ 10, 51 P.3d 585, 589; *Public Service Co. of Oklahoma v.*

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*State ex rel. Corporation Commission*, 1997 OK 145, ¶ 24, 948 P.2d 713, 717. Cf. *Lease Lights, Inc. v. Public Service Company of Oklahoma*, 849 F.2d 1330, 1334 (10th Cir. 1988), cert. denied, 488 U.S. 1019 (1989) ("Furthermore, the Commission must periodically conduct detailed rate investigations and continually oversee public utilities' compliance with rate schedules which include fuel adjustment clauses.").

### CONCLUSION

For the above reasons, OIEC respectfully requests that the Commission review OG&E's DPR and determine OG&E's compliance with the same and approve lost net revenues and shared savings that are calculated in accordance with the DPR. OIEC further requests that the law, as set forth above, be applied to the facts and evidence in this case.

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,  
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INDUSTRIAL ENERGY CONSUMERS**

OIEC's Reply to OG&E's Response  
Cause No. PUD 201500153  
Page 8 of 8

### CERTIFICATE OF SERVICE

On this 5th day of August, 2015, a true and correct copy of the above and foregoing instrument was sent via electronic mail and/or regular U.S. Postal Service, postage fully prepaid there on to the following interested parties:

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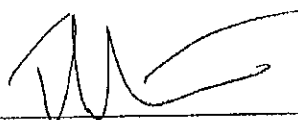
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