



# ORIGINAL

FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
SEP 26 2024

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TOM GANN; KEVIN WEST; RICK WEST, )

Petitioners, )

vs. )

TODD HIETT, Commissioner of the Oklahoma )  
Corporation Commission, )

Respondent. )

JOHN D. HADDEN  
CLERK

Sup. Ct. Case No. 122,513

Received:	9-26-24
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**RESPONDENT'S OBJECTION AND RESPONSE TO PETITIONERS'  
APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR  
WRIT OF PROHIBITION WITH BRIEF IN SUPPORT**

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JOE E. WHITE, JR., OBA #12930 KATE C. WHITE, OBA #30930 WHITE & WEDDLE, P.C. 630 N.E. 63rd Street Oklahoma City, Oklahoma 73105 405-858-8899 Telephone 405-858-8844 Facsimile <a href="mailto:joe@whiteandweddle.com">joe@whiteandweddle.com</a> <a href="mailto:kate@whiteandweddle.com">kate@whiteandweddle.com</a>	MELISSA S. HEDRICK, OBA #30102 HEDRICK LAW FIRM 630 N.E. 63 <sup>rd</sup> Street Oklahoma City, Oklahoma 73105 405-361-7844 Telephone 405-254-5132 Facsimile <a href="mailto:Melissa.S.Hedrick@gmail.com">Melissa.S.Hedrick@gmail.com</a>  <i>Attorneys for Respondent, Todd Hiett, Commissioner of the Oklahoma Corporation Commission</i>
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September 26, 2024

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COMES NOW, Respondent, Todd Hiett, Commissioner of the Oklahoma Corporation Commission, and respectfully submits his Response to Petitioners' Application to Assume Original Jurisdiction and Petition for Writ of Prohibition. Hiett would request this Court deny Petitioners' request for the extraordinary remedy they seeks, as their request for a writ of prohibition, which would effectively remove Commissioner Hiett from his position as a duly elected Corporation Commissioner, is not supported by law.

**I. SUMMARY OF THE BASES FOR PETITIONERS' APPLICATION**

Petitioners ask this Court to assume original jurisdiction and grant the extraordinary relief of prohibition to effectively prevent Commissioner Hiett from performing his duties as prescribed by the Oklahoma Constitution. In support of their Application to this Court, Petitioners direct this Court's attention to unproven and salacious allegations, rumors, and inuendoes to argue that Commissioner Hiett is required by law to "disqualify himself" from further proceedings of the Corporation Commission – namely, all "judicial cases involving Oklahoma Natural Gas Company ("ONG"), Oklahoma Gas and Electric Company ("OG&E"), and Public Service Company of Oklahoma ("PSO")." In support, Petitioners rely on anonymous statements, unproven allegations, classic hearsay, and rank speculation. For instance, Petitioners allege and insinuate that some individuals have not reported any alleged wrongdoing by Commissioner Hiett because they are using this information to have some sort of hold over Commissioner Hiett. They provide no support for this argument other than mere *ipse dixit*, which should be held insufficient to remove a duly elected Commissioner from performing the duties prescribed to him by the Constitution.

Simply put, Petitioners cannot establish their entitlement to the extraordinary relief requested, as Commissioner Hiett's votes were a proper application of the powers granted to

him by Oklahoma's Constitution, and the fact that additional votes will issue in the future does not provide an appropriate basis upon which a writ of prohibition should issue. Thus, Petitioners' Application should be denied.

## II. ARGUMENT AND AUTHORITIES

### Proposition I: GENERAL STANDARDS APPLICABLE TO WRITS OF PROHIBITION.

A writ of prohibition is "an extraordinary proceeding, and a power that should be cautiously assumed and used...." *State v. Dist. Court of Marshall County*, 1915 OK 377, ¶3, 149 P. 240, 241. A writ of prohibition requires Petitioner to demonstrate: (1) the Respondent "has or is about to exercise judicial...power;"<sup>1</sup> (2) "the exercise of said power is unauthorized by law; and (3) the exercise of that power will result in injury for which there is no other adequate remedy." *Id.* (Citations Omitted). "If petitioner fails to establish any of [these] elements, the writ must be denied." *Cannon v. Lane*, 1993 OK 40, ¶12, 867 P.2d 1235, 1239 (Citation Omitted).

### Proposition II: COMMISSIONER HIETT IS EXERCISING POWERS GRANTED TO HIM BY THE CONSTITUTION.

Petitioners cannot show that Commissioner Hiett has or will exercise a power unauthorized by law because the exact power for which they seek this Court to involuntarily disqualify Commissioner Hiett – participation in fuel cost proceedings - was a power prescribed to him by the Oklahoma Constitution. Specifically, Article 9, §18 grants Corporation Commissioners the following powers and duties:

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their

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<sup>1</sup> Commissioner Hiett does not dispute that he acts in a quasi-judicial function when he votes on fuel costs.

public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published one time in substance in one or more of the newspapers of general circulation published in

the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed general order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, in the next annual report of the Commission. The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

*See Okla. Const. Art. 9, §18.* Here, Commissioner Hiatt is exercising the powers granted to him by the Oklahoma Constitution. Therefore, Petitioners cannot satisfy this required element in seeking this extraordinary relief.

Petitioners, however, argue that Commissioner Hiatt is required by law to voluntarily disqualify himself under the Code of Judicial Conduct based on the Petitioners' belief that Commissioner Hiatt's impartiality might be questioned. *See Application to Assume Original Jurisdiction and Brief in Support at 9.* However, this Court has made clear that where disqualification is sought, the moving party must provide some **actual evidence** that the judge – or here, Commissioner acting in a quasi-judicial function – “is not a fair and objective jurist.”

*Tigges v. Andrews*, 2017 OK 9, ¶10, 390 P.3d 251, 254. Absent such a showing, “any request for disqualification must be denied.” *Id.*

Here, other than unproved allegations, hearsay, and anonymous statements of third parties (as well as the rank speculation of the Petitioners that others may exist who would accuse Commissioner Hiett), Petitioners have failed to offer this Court any showing of bias, or that Commissioner Hiett cannot be fair and objective. In fact, although the Petitioners point to specific votes where they allege Commissioner Hiett cast the deciding vote, Petitioners do not even attempt to provide this Court with any argument whatsoever that Commissioner Hiett’s votes could not be “sustained by the law and substantial evidence” – a showing they would have to make had they filed an appeal of these votes. *See Clements v. Southwestern Bell Telephone*, 2017 OK 107, ¶12, 413 P.3d 539, 542, citing Okla. Const. Art. 9, §20.

If Commissioner Hiett’s votes were somehow affected by Petitioners’ unproven but assumed bias, one would think Petitioners could articulate some argument that his votes cannot be sustained by the law and evidence. The fact that Petitioners not only fail but do not even attempt to make such an argument makes clear the insufficiency of their Application to Assume Original Jurisdiction. Commissioner Hiett, along with another Commissioner of the Corporation Commission, cast votes to approve fuel costs – a vote with which the Petitioners apparently do not agree. This is an insufficient basis on which to base a disqualification requirement under the Code of Judicial Conduct, as no showing has been made of actual bias.

As a result of the foregoing, Petitioners have wholly failed to show that Commissioner Hiett has exercised or will exercise a power unauthorized by law. Having failed to prove each element necessary for the extraordinary writ of prohibition to issue, Petitioners’ Application must be denied.



**Proposition III: PETITIONERS CANNOT SHOW ITS REMEDY AT LAW IS INADEQUATE.**

Petitioners must also show that they have no other adequate remedy at law. This Court has stated that original jurisdiction is “intended primarily as a ‘stand by’ service which it will exercise only when, from the exigencies of the case, great injury will be done by its refusal to do so. A different rule would so flood this court with original action as to destroy its efficiency as an appellate court.” *Kitchens v. McGowen*, 1972 OK 140, 503 P.2d 218, *Syllabus by the Court*. Thus, the rule in this Court “is plain and cannot be misunderstood. If the applicant for a writ of prohibition has a remedy by appeal, the writ will not issue.” *Marshall County*, 1915 OK 377, ¶8, 149 P. at 242. The remedy of appeal “will not be declared inadequate merely because inconvenience, expense, or delay will be occasioned by such appeal.” *Southwestern Nat’l Gas Co. v. Vernor*, 1936 OK 790, ¶¶31-32, 62 P.2d 1262, 1265 (Citations Omitted).

First, Petitioners do not seek any review (as they admit they cannot) of the prior votes cast by Commissioner Hiatt. Instead, they ask this Court to “disqualify[] [Commissioner Hiatt] from and forbidding his participation in [future] judicial cases at the Corporation Commission...” See Application to Assume Original Jurisdiction and Brief in Support at 1. As such, Petitioners’ own brief discloses that they, in fact, have an adequate remedy of appeal for those future cases for which they ask this Court to involuntarily disqualify Commissioner Hiatt. In fact, Petitioners site the Constitutional section which permits such an appeal. Article 9, section 20 of Oklahoma’s Constitution allows “any party affected” by, or “any person deeming himself aggrieved” by specific actions of the Commission to appeal such action. Petitioners, however, simply do not want to appeal any such future votes because of their complaint that the Oklahoma Constitution requires any person affecting such an appeal to post a supersedeas bond. See Okla. Const. at Art. 9, §21. However, as this Court has stated the

cost, or the time of an appeal does not render such remedy ineffective. *Southwestern Nat'l Gas Co.*, 1936 OK 790, ¶¶31-32. The fact that Petitioners simply do not want to post such a bond also does not render such remedy ineffective.<sup>2</sup>

Similarly, Petitioners advise this Court that they filed formal complaints at the State Ethics Commission and the Council on Judicial Complaints, alleging Commissioner Hiett violated State Ethics Rules and the Code of Judicial Conduct. Their claim that these procedures are ineffective also fall short. Specifically, Petitioners complain that “the complaint procedures of both are time-consuming and confidential. Complainants have no right to know what, if anything is being or will be done in response to their filed complaints or when.” See Application to Assume Original Jurisdiction and Brief in Support at 12. Of course, Petitioners’ real complaint is that they do not get to interfere with and affect Commissioner Hiett’s due process rights. Again, this argument is wholly insufficient to show that Petitioners have no other adequate remedies than this extraordinary writ.

As a result, Petitioners fail to make any showing (1) that they have no adequate remedy at law, or (2) that this matter presents one of those rare and unique instances where such extraordinary relief should be granted. Therefore, the Application should be denied.

**Proposition IV: THE RULE OF NECESSITY REQUIRES THAT COMMISSIONER HIETT NOT BE DISQUALIFIED.**

Petitioners rely on this Court’s decision in *Southwestern Bell Telephone Company v. Oklahoma Corporation Commission*, 1994 OK 38, 873 P.2d 1001 to argue that “[t]his Court recognized its authority to grant the relief requested...” See Application to Assume Original

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<sup>2</sup> Additionally, the supersedeas bond is only required if the Petitioners “request[]” that the Commission “suspend the effectiveness of the order complained of...” Okla. Const. Art. 9, §21. Thus, Petitioners could appeal any order of the Corporation Commission without having to post the bond of which they complain so long as they do not request that the Commission suspend the effectiveness of the order while the appeal is pending.

Jurisdiction and Brief in Support at 13. Petitioners go on to cite the following from the *Southwestern Bell* case:

We recognize that an argument could be made that the provisions of Art. 9, §20 which grant this Court the power to issue writs of mandamus and prohibition to the Commission in a proper case, support the power of this Court to disqualify a corporation commissioner, if he were sitting in a *judicial* capacity.

*Southwestern Bell*, 1994 OK 38, ¶26. That, however, is not all this Court said on this issue, and Petitioners fail to advise this Court followed this statement by noting the outcome – refusal to grant a writ to require disqualification – would be the same.

Indeed, this Court made the statement upon which Petitioners rely when it noted that some of the cases for which *Southwestern Bell* asked this Court to require Commissioner Anthony's disqualification might include instances where he would act in his judicial capacity and disqualification could be sought. This Court went on, however, to explain:

In an attempt to conserve judicial resources, as well as the resources of the rate payers, we observe in passing that while an attempt to disqualify Anthony in a proceeding involving a judicial function might arguably be cognizable, **it would likely lead to the same result reached in this legislative function decision today: Commissioner Anthony would not be disqualified but would be allowed to continue to hear the matter despite assertions of bias and prejudice. This is so because the "rule of necessity", which would undoubtedly be held applicable, would require that Anthony not be disqualified because the concurrence of a majority of the Commissioners is necessary for a decision, and there is no mechanism in the law for appointment of a replacement commissioner.** The rule of necessity is a common law rule recognizing that a judge should not be disqualified where his jurisdiction is exclusive or there is no provision for appointing a replacement so that his disqualification would deny the constitutional right to a forum. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). The rule has been held applicable to state administrative proceedings where the administrative body was acting in an adjudicatory capacity. *Barker v. Secretary of State's Office of Missouri*, 752

S.W.2d 437 (Mo.App.1988); *First American Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509 (N.D.1974), *cert. denied*, 419 U.S. 1026, 95 S.Ct. 505, 42 L.Ed.2d 301 (1974). It operates on the principle that “a biased judge is better than no judge at all” and the disqualification of a judge cannot be allowed to “bar the doors to justice or to destroy the only tribunal vested with the power” to hear the matter. *Barker*, *supra*, at 440.

*Southwestern Bell*, 1994 OK 38, ¶29 (Emphasis Added).

This analysis and conclusion remain the same as it did when argued by Commissioner Anthony. This Court has noted that the Corporation “Commission is created by Article IX of our state Constitution **and consists of three members elected by the people at a general election. A concurrence by a majority is required to exercise the authority of the state...”**

*Clements v. Southwestern Bell Telephone*, 2017 OK 107, ¶16, 413 P.3d 539 (Emphasis Added).

Thus, the Commission cannot act without acting as a body. As this Court also noted in *Southwestern Bell*, there is no mechanism for temporary replacement of a Commissioner; there is only a mechanism to permanently replace a Commissioner. Replacement, therefore, cannot occur unless the Commissioner’s office becomes vacant. Specifically, this Court stated:

In addition to establishing his powers and duties, the constitution and statutes fix Commissioner Anthony's term of office. He is the legal incumbent and, pursuant to 51 O.S.1991, § 8, his office will not become vacant unless he should resign, die, move from the state, be convicted of certain offenses or be lawfully removed from office. *State. ex rel., Blankenship v. Freeman*, 440 P.2d 744 (Okla.1968). The law does not recognize “bias” as creating a vacancy and, as no vacancy established by law exists, there is none to fill. *Carpenter v. Carter*, 167 Okla. 238, 29 P.2d 83 (1934).

Under Okla. Const. Art. 9, § 15 and 51 O.S.1991 §10, the power to fill a vacancy in the office of Corporation Commissioner is placed in the governor. The law does not recognize a “temporary” vacancy as would result from a disqualification, however, as section 15 directs that the governor shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out the unexpired term.

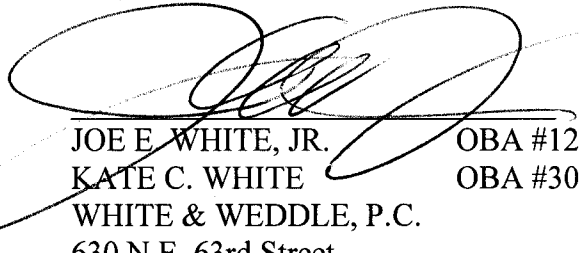
*Southwestern Bell*, 1994 OK 38, ¶¶21-22. As a result of the foregoing, the rule of necessity requires that Commissioner Hiett not be disqualified, as the Commission must act as a body to exercise the authority of the state – something it cannot do without Commissioner Hiett’s participation in the proceedings in question. As this Court noted in *Southwestern Bell*, if an appeal of any vote occurred, those affected by the vote could be protected by any alleged bias through the application of “a heightened appellate scrutiny or implement[ation] [of] some other procedure to reach a just resolution of the competing interests involved...” *Id.* at ¶33. Therefore, Commissioner Hiett requests this Court deny Petitioners’ Application under the rule of necessity.

#### CONCLUSION

Petitioners have wholly failed to demonstrate any of the criteria necessary for this extraordinary proceeding. Therefore, this Court should not assume original jurisdiction, or it should deny the writ requested by Petitioners because their request is not supported by the law.

Dated: September 26, 2024

Respectfully Submitted,



JOE E. WHITE, JR. OBA #12930

KATE C. WHITE OBA #30930

WHITE & WEDDLE, P.C.

630 N.E. 63rd Street

Oklahoma City, Oklahoma 73105

(405) 858-8899

(405) 858-8844 FAX

[joe@whiteandweddle.com](mailto:joe@whiteandweddle.com)

[charles@whiteandweddle.com](mailto:charles@whiteandweddle.com)

[kate@whiteandweddle.com](mailto:kate@whiteandweddle.com)

and

MELISSA S. HEDRICK OBA #30102

Hedrick Law Firm

630 N.E. 63<sup>rd</sup> Street

Oklahoma City, Oklahoma 73105

(405) 361-7844

(405) 254-5132 FAX

[Melissa.S.Hedrick@gmail.com](mailto:Melissa.S.Hedrick@gmail.com)

*Attorneys for Respondent*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of September, 2024, a true, correct, and exact copy of the above and foregoing instrument was mailed certified mail to the parties via USPS as follows:

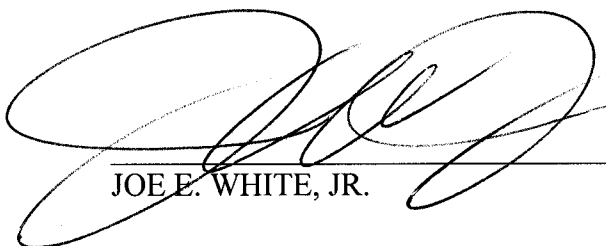
State Representative Tom Gann  
2300 N. Lincoln Blvd., Room 334  
Oklahoma City, OK 73105

State Representative Kevin West  
2300 N. Lincoln Blvd., Room 332  
Oklahoma City, OK 73105

State Representative Rick West  
2300 N. Lincoln Blvd., Room 330  
Oklahoma City, OK 73105

Oklahoma Corporation Commission  
c/o Office of General Counsel  
2401 N. Lincoln Blvd.  
Oklahoma City, OK 73105

Gentner Drummond  
Oklahoma Attorney General  
Office of the Oklahoma Attorney General  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, OK 73105

  
\_\_\_\_\_  
JOE E. WHITE, JR.