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OF OKLAHOMA

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

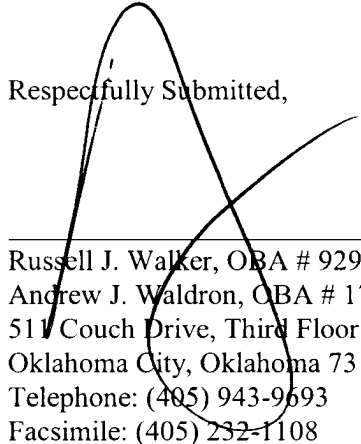
APPLICANTS: HONORABLE SODY CLEMENTS,)
an Individual and Oklahoma Resident on behalf of)
herself and others similarly situated; LT. GENERAL)
(Ret.) RICHARD A. BURPEE, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated; JAMES PROCTOR, an Individual and)
Kansas Resident on behalf of himself and others)
similarly situated; RODD A. MOESEL, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated; RAY H. POTTS, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated; BOB A. RICKS, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated.)
)
)
RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA)
CORPORATION COMMISSION ORDER NO. 341630)
CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
FOLLOWING INTRINSIC FRAUD)

CAUSE PUD NO.
201500344

**APPLICANTS' SUPPLEMENT TO RESPONSE TO MOTIONS TO DISMISS OF
SOUTHWESTERN BELL TELEPHONE COMPANY AND ATTORNEY GENERAL**

COME NOW the Applicants and hereby supplement their Response in Opposition to the
Motions to Dismiss with the Affidavit of James M. Proctor and exhibits thereto, attached to this
filing.

Respectfully Submitted,



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ATTORNEYS FOR APPLICANTS

BEFORE THE CORPORATION COMMISSION
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RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA)
CORPORATION COMMISSION ORDER)
No. 341630 CAUSE No. PUD 260; AND)
REDETERMINE ISSUES FOLLOWING)
INTRINSIC FRAUD.)

AFFIDAVIT OF JAMES M. PROCTOR

I, JAMES M. PROCTOR, of lawful age and being of sound mind, do hereby state under oath the following facts personally known to me to be true and correct.

INRODUCTION AND SUMMARY

1. I traveled to Room 301, Jim Thorpe Office Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105 from Lawrence, Kansas to appear and be heard before the Oklahoma Corporation Commission (“Commission”) at a “Special Meeting” held at 10:00 a.m., Tuesday, November 3, 2015. The purpose of the meeting was, in part, to conduct an “Initial Screening Conference and Hearing” for PUD 201500344 to consider matters that assist in disposition of the Cause and the Motions by the Attorney General and Southwestern Bell Telephone Company (*See*

Exhibit No. 1, "Notice of Hearing" filed October 2, 2015 by the Oklahoma Corporation Commission, attached hereto). As an Applicant in Cause No. PUD 201500344 ("PUD 344") and as a former Director of the Public Utility Division of the Commission, I am an interested person in this Cause with relevant information that may be beneficial and helpful to the Commission.

2. For the reasons stated on the record, the Commission did not entertain public comments at its November 3, 2015 meeting. This affidavit is thus submitted by the Applicants in order to provide the Commission with certain additional important information that may be helpful with regard to this matter. The Applicants have by motion requested a full evidentiary hearing with the Commission pursuant to Oklahoma Constitution Article 9, Section 22 (this matter raising certain Constitutional issues); it is intended that at that time additional evidence, exhibits and other information not included with this Affidavit would be presented, if allowed and proper.

3. I have a BBA from Washburn University (1978) and an MBA from the University of Kansas (1984). I have over thirty years of experience in utility regulation matters, including experience in regulating public utility companies for two state utility commissions and as a regulatory consultant to state regulatory agencies; and, as a consultant to regulated utilities and utility subsidiaries, affiliates and partnerships.

4. From 1990 to 1993, I served as the Director of the Public Utility Division, Oklahoma Corporation Commission. Because of my role and involvement in the regulatory matters before the Commission, I have extensive knowledge of events, circumstances, details and complexities of the Causes No. PUD 860000260 ("PUD 260") and No. PUD 890000662 ("PUD 662") which pertain to Southwestern Bell Telephone Company ("SBTC") rates. I was directly involved in these matters. As Director of the Commission's Public Utility Division, I was the person most responsible for preparing

testimony on policy and significant regulatory issues, directing and supervising the preparation of Public Utility Division Staff ("Staff") testimony, the preparation of legal briefs, advising the Commissioners in their deliberative process, preparing proposed findings, conclusions and proposed orders and preparing the Commission Orders in relation to these matters including the Final Commission Order in PUD 662.

5. Based on my extensive knowledge gained from working on the issues, I can affirmatively state that the original determination in the PUD 260 case was fundamentally flawed, unreasonable and unfair to SBTC's Oklahoma ratepayers. On August 26, 1992, after extensive discovery, 37 days of witness testimony and lengthy hearings, the Commission unanimously approved its rate making Order in PUD 662, Order No. 367868, which established SBTC's revenue excess to be approximately \$100.6 million, annually, based upon the complete historical test year 1989. That (unanimous) determination was based on an extensive record of evidence and actual historical data (not estimates, unlike PUD 260) and was fairly determined by an unbribed Commission. **The \$100.6 million annual revenue excess based on a 1989 test year in PUD 662 is well more than twelve (12) times higher than the 1989 "excess revenue" determination of approximately \$7.8 million made in the (bribed and flawed) PUD 260 Order, which itself was based on incomplete data and estimates.**

6. **A stipulation adopted by the Commission in Order No. 313853 requires excess revenues to be refunded to SBTC's customers rather than invested in its telecommunication infrastructure.** The PUD 260 Order did not enforce Order No. 313853's requirement to refund excess revenues to SBTC's ratepayers. **It is noteworthy that under SBTC's and the Attorney General's current legal contentions (arguing for the finality of legislative determinations), and based on my experience in utility ratemaking, the PUD 260 Order itself would amount to a**

collateral attack on the Commission's earlier Order No. 313853. As such, from my analysis the (bribed) PUD 260 Order was certainly unfair to SBTC's Oklahoma customers who are rightfully owed the return of the excess revenues based on the Commission's Order No. 313853. The Commission may and should correct that error now (as sought by this Application, PUD 344) by re-determining the PUD 260 matter and issuing a valid and untainted order in PUD 260. Depending upon the Commission's ultimate determination of certain specific issues, I believe the Commission should find, based on my calculations, that SBTC's Oklahoma ratepayers are due a calculable and determinable total sum of between \$8.4 billion and \$16.0 billion as of October 31, 2015. Such total refund amount could provide between \$8,000 and \$16,000, on average, for each Oklahoma SBTC telephone number, accumulated over the period beginning in 1987 and continuing on until the date refunds are implemented by the Commission upon issuing a valid order in PUD 260. Again, the range of damages results only from various issues that the Commission should determine; once these issues are determined, the exact amounts owed are easily mathematically calculable.

7. In my professional opinion, it is highly likely, if not a near certainty, that upon the Commission's (unbribed) determination of PUD 260, SBTC's Oklahoma ratepayers will be found to be entitled to a substantial "refund" of SBTC's excess revenue collections. At a minimum, the correct revenue excess must be determined in a valid order and should be refunded to SBTC's ratepayers. The result in the Commission's PUD 662 case plainly evidences that PUD 260 was not fairly, justly or reasonably determined for Oklahoma telephone ratepayers.

BACKGROUND

8. On October 23, 1986, the Commission's Staff filed application PUD 260 initiating, in part, an

investigation into the impact on regulated utilities in Oklahoma of the then recently enacted Tax Reform Act of 1986 ("Tax Act"). The Tax Act, among other effects determining corporate income tax liabilities, decreased the corporate federal income tax rate from 46 percent to 34 percent effective July 1, 1987.

9. Certain Oklahoma utilities, including SBTC, were identified as respondents to the Staff filing. A review of the impact of the Tax Act on SBTC's revenue requirement was thus undertaken. The primary objective of the investigation into SBTC's regulated earnings was to determine whether the changes in the tax law, most notably the significant decrease in the tax rate, increased SBTC's earnings such that the company's then current rates permitted the recovery of excess revenues from its customers.

10. On June 23, 1987, a Stipulation Between Staff and Southwestern Bell Telephone Company ("Stipulation") was presented at hearing before the Commission en banc. In the Stipulation, the parties, including SBTC, agreed that if the Commission determines, after hearing, that a rate reduction is appropriate for SBTC, that such reduction will be effective as of July 1, 1987, the effective date of the Tax Act. The Stipulation requires that said reduction be effective July 1, 1987 in order to allow the full benefits of the Tax Act to accrue to the Respondent's customers. Specifically, the Stipulation establishes SBTC's consent to refund, pursuant to a Commission order for it to do so, any excess revenues collected as a result of over-earnings determined in PUD 260. **The Stipulation requires excess revenues to be refunded to SBTC's customers rather than invested in its telecommunication infrastructure.** The Commission issued Order No. 313853 ("Stipulation Order") approving the Stipulation the same day as its hearing on the Stipulation. On page 3 of the Stipulation Order, the Commission ordered "that if the Commission ultimately determines that a rate reduction is

required for Respondent, Southwestern Bell Telephone Company, that said reduction **shall** be effective July 1, 1987". (Emphasis Added.) Based on my more than thirty years experience in public utility finance and public utility regulatory matters generally, I assert that the only way for the Commission to fulfill the Stipulation Order's requirement that said **rate reduction shall** be effective July 1, 1987, is for excess revenues collected by SBTC subsequent to July 1, 1987, be calculated and refunded in cash to its customers.

11. On January 25, 1989, Staff filed an application with the Commission to investigate certain ratemaking issues specifically identified in Order 292337 issued January 29, 1986 in Cause No. PUD 29321 and any other aspects concerning SBTC's expenses, accounting methods, investment tax credits, rate design, rate of return as the Commission Staff deemed appropriate. That cause, PUD 662, evolved into an extensive and protracted examination of SBTC's full revenue requirement and rate design culminating in a lengthy hearing beginning October 7, 1991 and continuing through January 31, 1992. During that four month period, the Commission's Administrative Law Judge held 37 days of witness testimony and cross-examination. The test year for the revenue requirement examination in PUD 662 was the calendar year 1989 for which actual historical data was available and analyzed.

12. On September 20, 1989, after the filing of testimonies, the conduct of hearings and the issuance of the Hearing Officer Report, but prior to the extensive evidentiary proceedings had in PUD 662, the Commission issued Order Regarding Rates of Southwestern Bell Telephone Company, Order No. 341630 ("260 Order") concerning findings and conclusions with respect to the impact from the Tax Act on SBTC's earnings. The 260 Order, among other findings, found from January 1, 1987 until September 30, 1989, a revenue excess of \$27,479,480. The Commission ordered SBTC to use that amount, with accrued interest in the amount of \$3,197,687, to fund a "Party Line Elimination

Program” and invest in “Central Office Service Upgrades” **instead of enforcing the Stipulation Order’s requirement to refund excess revenues to SBTC’s ratepayers. That is, the Commission’s (bribed) 260 Order did not enforce the Stipulation Order’s requirement to refund excess revenues to SBTC’s ratepayers. In that regard, under the Respondents’ arguments, and based on my experience in utility ratemaking, the bribed 260 Order amounted to a collateral attack on the Commission’s prior Order No. 313853.** (The Commission should read the Commission’s Response filed at the Supreme Court of Oklahoma on June 14, 1991 in Case No. 77,521 attached hereto as Exhibit No.2, for a thorough discussion of permissible verses impermissible retroactive ratemaking.) Also, the Commission ordered SBTC to decrease certain of its rates to implement a prospective \$7,847,172 revenue decrease.

13. The 260 Order was signed by Vice Chairman Bob Hopkins and Commissioner James B. Townsend. Chairman Bob Anthony dissented and voted against the 260 Order. Therefore, when the 260 Order was issued on September 20, 1989, it was believed to have been decided by a 2 – 1 vote, and, thus, met the Oklahoma Constitution’s requirement for a Commission majority. However, on February 14, 1996 the United States Court of Appeals for the Tenth Circuit in Denver, Colorado, upheld a ruling convicting Bob Hopkins for receiving a bribe related to his vote in the 260 Order. From that point in time, Bob Hopkins’s vote was proven tainted and should be considered void, thus leaving the 260 Order with only one valid supporting vote.

14. On October 19, 1989, the Commission issued Order Regarding Motions For Modification, Reconsideration And To Stay And Abate Order Number 341630. That order, Order No. 342343, amended the 260 Order by changing the rate of interest applied to the revenue excess for the period from July 1, 1987 to October 1, 1989 to the rate of 11.589%, compounded annually. Order No.

342343 was signed by Vice Chairman Bob Hopkins and Commissioner James B. Townsend. Chairman Bob Anthony concurred in part and dissented in part. In a signed separate opinion, Chairman Anthony agreed with applying an 11.589% interest rate to refunds and with certain requirements placed on Staff to report on SBTC's use of funds for service and central office upgrades. However, he dissented from the remainder of the majority's order because, as stated in his dissenting opinion filed September 27, 1989, he believed some or all of the excess revenues should be refunded to the broad base of telephone customers.

15. On January 9, 1991, in PUD 662, Robert H. Henry, Attorney General of Oklahoma ("Attorney General Henry") filed Brief In Support Of Motion To Place Southwestern Bell Telephone Company's Rates Subject To Refund And To Compel Discovery. Attorney General Henry's brief stated that absent placing SBTC's rates subject to refund, SBTC will be permitted to enrich itself at the expense of its Oklahoma customers by a sum of \$40 million a year, and if an order cannot issue prior to July 1, 1991, then SBTC's overearnings will grow to \$70 million a year. In Attorney General Henry's brief, Assistant Attorney General Robert A. Butkin argued that a Commission order placing SBTC's rates subject to refund pending a decision in PUD 662 would clearly not constitute retroactive ratemaking. More specifically, **Assistant Attorney General Butkin argued in Section I, Part C of the brief that the placing of SBTC's rates subject to refund is necessary to protect SBTC's ratepayers and is an appropriate exercise of the Commission's jurisdiction.**

16. On March 7 and 8, 1991, a Commission hearing regarding Attorney General Henry's motion to place SBTC's rates subject to refund was heard before the Commission's Administrative Law Judge, Robert E. Goldfield. I was the Commission Staff's witness at the hearing regarding matters related to placing SBTC's rates subject to refund. I also provided testimony that SBTC's return on equity should

be set at 11.41% for purposes of determining any refund in PUD 662. Judge Goldfield adopted my recommendations and issued his report concerning said hearing on March 14, 1991. SBTC filed its appeal to Judge Goldfield's Report on March 25, 1991. On April 12, 1991, the Commission heard the arguments of Counsel concerning SBTC's appeal to Judge Goldfield's Report and the responses thereto of Staff and Attorney General Henry.

17. On April 19, 1991 the Commission issued Order No. 356271 in PUD 662 adopting Judge Goldfield's Report and ordering among other requirements that: (1) the authorized return on equity of SBTC shall be 11.41 percent (as I recommended) until December 31, 1991 or until further order of the Commission unless the date is extended by order of the Commission; (2) the earnings of SBTC shall be subject to refund, with interest, to the extent they exceed 11.41 percent return on equity, from the date of its order until December 31, 1991 or until further order of the Commission, whichever shall occur first, unless the date is extended by order of the Commission; and, (3) that in determining whether a refund is due, consideration will be given to the pro forma impact of the full amortization of the depreciation reserve imbalance effective July 1, 1991. The December 31, 1991 deadline above was extended three times by Commission order. The third order, Order No. 367460 issued on August 6, 1992, extended the previous Interim Order until September 4, 1992 or until a final order issues in the PUD 662, whichever is earlier.

18. On May 16, 1991, SBTC filed a Petition in Error with the Supreme Court of Oklahoma (Case No. 77,563). SBTC was appealing the Commission placing its currently approved rates subject to refund. Further, SBTC filed another Petition with the Supreme Court of Oklahoma (Case No. 77,521) requesting that the Court assume original jurisdiction.

19. Subsequent to May 16, 1991 and before June 14, 1991, I contacted Attorney Scott Hempling, a

colleague and expert in regulatory law, to represent the Commission in addressing SBTC's arguments before the Court involving Cases 77,521 and 77,563. Mr. Hempling and I developed conceptual and legal arguments based on economics, utility regulation and the law to address these Oklahoma Supreme Court cases.

20. On June 14, 1991, the Commission filed Amended Response of Oklahoma Corporation Commission ("Commission's Response") (See Exhibit No. 2 attached hereto) to SBTC's arguments in Case No. 77,521. The Commission's Response was drafted and argued before the Court by Mr. Hempling. The Commission's Response comprehensively explained and defended the Commission's placing SBTC's rates subject to refund with Commission Order No. 356271 issued on April 19, 1991. Basically, the Commission's Response explained why placing SBTC's rates subject to refund was not impermissible retroactive ratemaking.

21. On June 20, 1991, the Court denied SBTC's request to assume original jurisdiction, Case No. 77,521. On September 9, 1991, the Court dismissed Case No. 77,563, indicating that the appeal was premature because it was an appeal to an Interim Order.

22. On August 26, 1992, the Commission issued its ratemaking order in PUD 662, Order No. 367868 ("662 Order"), finding SBTC's then present rates produced an annual revenue excess of \$100.6 million. SBTC appealed the 662 Order to the Supreme Court of Oklahoma where it languished for several years.

EXCESS REVENUES MUST BE REDETERMINED

23. The Commission should find that, pursuant to the Stipulation Order, the period for which SBTC's excess revenues are subject to refund spans the period of July 1, 1987 through the date the Commission ultimately issues and implements a constitutionally valid order in PUD 260. In PUD

260 Order No. 342343, the Commission ordered the rate of interest applied to the revenue excess should be 11.589%, compounded annually. That means interest should be charged SBTC on the accumulated balance of excess revenues beginning July 1, 1987 and continuing until PUD 260 is resolved with a constitutionally valid order.

24. SBTC's excess revenues, determined in the unanimously adopted 662 Order, were based on an historical 1989 test year. SBTC, Staff and Attorney General Henry all filed audit findings for calculating SBTC's earnings for 1989. A substantial amount of testimony was filed by each of these parties and other participants. Witness testimony in PUD 662 was subject to extensive examination during a lengthy hearing process. Taking all of the evidence under consideration, the Commission issued a unanimous decision finding SBTC's excess revenues exceeded \$100 million, annually.

25. SBTC's estimated excess revenues for 1989 determined in the tainted 260 Order were based on an historical test year ending September 30, 1987. In the tainted 260 Order, the Commission (based upon primarily estimated data, not actual data) estimated the amount of SBTC's excess revenues were approximately \$7.8 million for 1989.

26. The amount of SBTC's 1989 excess revenues of \$7.8 million found in the tainted 260 Order were based on an outdated test year ending September 30, 1987. Further, the new income tax rates established in the Tax Act had been in place only three months as of September 30, 1987. Thus, in the tainted 260 Order, the Commission based its conclusions about the impact of the Tax Act on SBTC's rates on only three months of actual data after the Tax Act went into effect.

27. SBTC agreed that basing its revenue requirement for 1989 on a September 30, 1987 test year yields unreliable figures. On January 20, 1989, T. D. White, Chief Accountant for Southwestern Bell Telephone Company, filed testimony in PUD 260 criticizing the September 30, 1987 test year. On

Pages 8-9 of his testimony, Mr. White testifies that he feels very strongly that it is not only wrong, but also inconsistent with the way this Commission has regulated in the past, to recommend a prospective rate adjustment starting sometime in 1989 based upon 1987 data. He explains the 1987 data is simply too old to use for prospective rate changes in 1989 and beyond, with no consideration for the major changes which have occurred since the 1987 test year.

28. On June 15, 1989, SBTC filed in PUD 260 Southwestern Bell Telephone Company's Appeal From Report Of Hearing Officer. Therein, SBTC argues against basing its revenue requirement for 1989 on a September 30, 1987 test year. On Page 8, SBTC explains the Commission Staff used a test year ended September 30, 1987 as the basis for determining revenue requirements not only for 1987, but also for 1988 and 1989 (a prospective period). SBTC argues the test year, which included only three months of actual tax data under the new Tax Act rate, is clearly inappropriate. SBTC explains the Hearing Officer's inappropriate use of the Commission Staff's September 30, 1987 test year amounts to a calculation for three separate test periods and beyond based on only three months of actual data under the new tax rate.

29. The Commission's estimate of \$7.8 million for SBTC's excess revenues for 1989 and beyond is not a reliable measure of the actual excess revenues. SBTC clearly agreed basing its revenue requirement for 1989 on a September 30, 1987 test year is wrong. An accurate and reliable measure of SBTC's actual excess revenues for 1989 can be found in the evidentiary record of PUD 662. Instead of using the \$7.8 million estimated figure for 1989 presented in the tainted 260 Order, the Commission should base a calculation for SBTC's excess revenues for 1989 and beyond on the evidence presented in PUD 662. That evidence demonstrates that SBTC's excess revenues for 1989 and beyond exceed \$100 million per year, as opposed to the grossly understated \$7.8 million found in the tainted 260

order.

30. The Commission should base a calculation for SBTC's excess revenues for 1989 and beyond on the evidence presented in PUD 662. Not only does basing the calculation for SBTC's excess revenues for 1989 and beyond on the PUD 662 evidentiary data produce more accurate and reliable figures, but according to Attorney General W. A. Drew Edmondson ("Attorney General Edmondson") it is legal to do so. On June 10, 1996 Assistant Attorneys General Rick D. Chamberlain and Mickey S. Moon filed on behalf of Attorney General Edmondson Brief In Response To Commissioner Anthony's May 1, 1996 Request For Legal Briefs. On page 17 of Attorney General Edmondson's legal brief he explains that evidence from PUD 662 may be recognized and incorporated into the record of PUD 260 to the extent the evidence is relevant. He further explains the Oklahoma Evidence Code, which the Commission follows, generally only allows the admission of relevant evidence. Attorney General Edmondson explains relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Clearly, for the Commission to base a calculation of SBTC's excess revenues for 1989 and beyond on the evidence presented in PUD 662 satisfies the relevant evidence hurdle set forth above. That is, from the arguments above, the Commission's estimate of \$7.8 million for SBTC's excess revenues for 1989 and beyond is not a reliable measure of the actual excess revenues. SBTC agrees basing its revenue requirement for 1989 on a September 30, 1987 test year is wrong. An accurate and reliable measure of SBTC's actual excess revenues for 1989 can be found in the evidence from the historical and actual 1989 test year used by the Commission in PUD 662.

31. Here, the Commission's PUD 260 Order must be re-determined for the reason that the bribed order directly violated the Oklahoma Constitution. *See* Oklahoma Constitution, Article 9, Section 18

and 40.

EXCESS REVENUES SHOULD BE REFUNDED

32. On June 23, 1987 the Commission issued the Stipulation Order, Order No. 313853. The Stipulation Order requires the excess revenues be refunded to SBTC's ratepayers rather than invested in its telecommunication infrastructure. That is, by signing the Stipulation, the parties, including SBTC, agreed that if the Commission determines, after hearing, that a rate reduction is appropriate for SBTC, such reduction will be effective as of July 1, 1987, the effective date of the Tax Act. Specifically, on page 3 of the Settlement Order, the Commission states and requires "that if the Commission ultimately determines that a **rate reduction** is required for Respondent, Southwestern Bell Telephone Company, that said reduction **shall** be effective July 1, 1987". (Emphasis Added.) Based on my more than thirty years of experience in public utility finance and public utility regulatory matters, generally, I assert the only way for the Commission to fulfill the Stipulation Order's requirement that said **rate reduction shall** be effective July 1, 1987, is for SBTC's rates to be decreased as of July 1, 1987 and for excess revenues collected by SBTC subsequent to July 1, 1987 be calculated and refunded in cash to its customers. Clearly, the Stipulation Order requires any excess revenues collected as a result of over-earnings determined in PUD 260 **must be refunded in cash** to SBTC's customers. Otherwise, said rate reduction would **not** be effective July 1, 1987. Instead, the rate reduction would only be effective prospectively from the date a final order is issued in PUD 260. Obviously, such was not the intent of the Stipulation Order. The Stipulation Order would be meaningless if it was the Commission's intent for the rate reduction to be effective only prospectively from the date a final order is issued in PUD 260.

33. Testimony filed by a witness on August 12, 1988 for Attorney General Henry in PUD 260

supports refunding the excess revenues. On page 10 of witness Jack Tallon's testimony, he testifies that the Commission should refund any excess revenues to SBTC's ratepayers on a per access line basis consistent with the testimony of Staff witness Mary J. Steel filed July 29, 1988. Mr. Tallon further explains Ms. Steel's second alternative for use of the excess revenues to upgrade all existing multi-party lines to one party service was **never intended** to fall within the scope of PUD 260. Mr. Tallon goes on to explain that the evidence points to a significant revenue excess, and he urges the Commission to flow the excess back to ratepayers in the form of a refund.

34. On April 14, 1989 Assistant Attorney General Butkin filed Statement Of The Attorney General on behalf of Attorney General Henry. Assistant Attorney General Butkin argues the Attorney General has throughout this case sought to identify the maximum dollar refund and prospective rate reduction that SBTC's Oklahoma customers should receive. He further explains the Attorney General believes the final result would be a refund for 1987 and 1988 (combined) of approximately \$50 million and a prospective reduction of approximately \$30 million. Mr. Butkin also discusses the Commission Staff's recommendation that the excess revenues be used for an upgrade program instead of a cash refund to SBTC's ratepayers. He explains that on January 9, 1989, less than three weeks before the hearing, the Commission Staff filed testimony describing, for the first time, its proposal to use the refund for an upgrade program, rather than a cash distribution to SBTC's customers.

35. On August 23, 1989 the Staff filed Brief of the Commission Staff Concerning Interest on the Southwestern Bell Refund. The Staff explained its position concerning refunding excess revenues therein. The Commission Staff agrees with the Applicants in PUD 344 (this Application) that the Stipulation Order provides the legal authority for the Commission to order refunds in PUD 260. The Staff also agreed with the Applicants' contention here that the legal basis for the Commission ordering

a cash refund of the excess revenues is not Title 17, Oklahoma Statutes, Section 121, et seq. Staff argued in its brief the Commission has jurisdiction to require a refund of the revenues in question pursuant to the stipulation signed by SBTC on June 23, 1987. Further, Staff explained that absent the Stipulation Order, the Commission would be unable to order a refund because SBTC was charging their authorized tariffed rates at all times in question.

36. On December 24, 1991, the Supreme Court of Oklahoma issued its decision regarding the appealed 260 Order. SBTC, Attorney General Henry and the American Association of Retired Persons (“AARP”) had appealed certain findings of the 260 Order to the Court. Both Attorney General Henry and AARP argued to the Court that the Commission should have required refunds of the excess revenues to the ratepayers. Specifically, Attorney General Henry and AARP contended that the over \$30 million in surplus funds should be treated as an overcharge within the meaning of 17 O.S. 1981 § 121 and hence refunded to Oklahoma ratepayers. The Court ruled that § 121 does expressly require that overcharges be refunded, but the Court stated the relevant question is whether the surplus cash in controversy resulted from charges in excess of the lawful rate. The Court held it did not. The Court did not address whether the Commission could order refunds pursuant to its Stipulation Order, such issue not being one raised by the Henry appeal.

REFUNDING EXCESS REVENUES IS NOT IMPERMISSABLE RETROACTIVE RATEMAKING

37. On October 2, 2015 SBTC and E. Scott Pruitt, Attorney General of Oklahoma (“Attorney General Pruitt”) filed Attorney General’s Motion To Dismiss And Brief In Support (“Pruitt Motion”) and Motion To Dismiss Of Southwestern Bell Telephone Company d/b/a AT&T Oklahoma (“SBTC Motion”), respectively.

38. On pages 2, 3 and 8 of the SBTC Motion, SBTC argues that the Commission has no legal

authority to require excess revenues be refunded to SBTC's ratepayers. Basically, SBTC makes the argument no overcharges can be refunded because the Oklahoma Supreme Court found no overcharges were collected by SBTC. SBTC also argues that the same refund Applicants of PUD 344 now seek was expressly rejected by the Court in Henry. In support of its position that the Commission cannot award the refund Applicants seek, SBTC refers to the Court's finding denying Attorney General Henry and AARP's contention that the excess revenues should be treated as an overcharge within the meaning of 17 O.S. 1981 § 121 and hence refunded to Oklahoma ratepayers.

39. On pages 8 (footnote 3) and 13 of the Pruitt Motion, Attorney General Pruitt argues that the Commission has no legal authority to require excess revenues be refunded to SBTC's ratepayers. Just like counsel for SBTC, Attorney General Pruitt cites the Court's finding that no overcharges were collected by SBTC pursuant to 17 O.S. 1981 § 121. Attorney General Pruitt also states the excess revenues cannot now be refunded to SBTC's ratepayers due to there being no statutory authority to do so. Attorney General Pruitt argues requiring the refunds as the Applicants seek amounts to impermissible retroactive ratemaking.

40. The arguments of SBTC and Attorney General Pruitt regarding the Commission's lack of jurisdiction and current authority to order the refund of the excess revenues are erroneous and disingenuous. Further, the arguments made by Attorney General Pruitt about the Commission's authority to refund excess revenues, when rates are subject to refund by Commission order, are inconsistent with prior reasoned arguments made by Attorney General Henry and Assistant Attorney General Butkin.

41. It is absolutely clear from the Applicants' arguments in PUD 344 that the asserted basis of the Commission's authority to order refunds of the excess revenues collected by SBTC is the Stipulation

Order. Surely SBTC and Attorney General Pruitt understand that is the Applicants' position, yet they still make the disingenuous argument that 17 O.S. 1981 § 121 is the relevant point of contention and repeat it in their rebuttal. Amazingly, SBTC and Attorney General Pruitt do not provide any argument refuting that the Stipulation Order grants the Commission authority to require refunds of the excess revenues collected by SBTC.

42. In late December 1990 or early January 1991 Assistant Attorney General Robert A. Butkin visited my office at the Commission to discuss the SBTC rate case that is identified herein as PUD 662. At the time I was the Director of the Public Utility Division of the Commission. Mr. Butkin shared with me that he was having significant problems with SBTC, specifically regarding his office's failure to receive timely and sufficient responses to discovery from SBTC. Mr. Butkin further explained that his expert accounting witnesses had initial findings indicating SBTC's rates were significantly excessive. Mr. Butkin explained he was preparing a motion that would ask for the Commission to place SBTC's rates subject to refund, and he wanted to discuss the motion with me to have the benefit of my experience in utility ratemaking and gain my support for it. We discussed the matter on more than one occasion, and I told him I fully supported his motion.

43. Subsequent to my discussions with Assistant Attorney General Butkin, on January 9, 1991, in PUD 662 Attorney General Henry filed Brief In Support Of Motion To Place Southwestern Bell Telephone Company's Rates Subject To Refund And To Compel Discovery ("Henry's PUD 662 Brief"). Henry's PUD 662 Brief stated that absent placing SBTC's rates subject to refund, SBTC will be permitted to enrich itself at the expense of its Oklahoma customers. **In Henry's PUD 662 Brief, Assistant Attorney General Butkin argued that a Commission order placing SBTC's rates subject to refund pending a decision in PUD 662 would clearly not constitute impermissible**

retroactive ratemaking. More specifically, Mr. Butkin argued in Section I, Part C of Henry's PUD 662 Brief that placing SBTC's rates subject to refund is necessary to protect SBTC's ratepayers and is an appropriate exercise of the Commission's jurisdiction.

44. Henry's PUD 662 Brief clearly demonstrates that Attorney General Henry's office believed the Commission had the jurisdiction to place a public utility's rates subject to refund to protect ratepayers' interests when the Commission finds the circumstances and evidence demonstrate the public utility's rates are excessive. Henry's PUD 662 Brief further argued that placing a public utility's rates subject to refund to protect ratepayers' interests does not constitute impermissible retroactive ratemaking. The Commission can see that the reasoned arguments in Henry's PUD 662 Brief are striking in their disagreement with the arguments in the Pruitt Motion filed in PUD 344 by Attorney General Pruitt regarding Commission jurisdiction and retroactive ratemaking. That is, on page 13 of the Pruitt Motion, Attorney General Pruitt argues the Commission lacks jurisdiction to order SBTC to make refunds of excess revenues, and if the Commission did so, it would be engaging in prohibited retroactive ratemaking.

45. On page 13 of the Pruitt Motion, Attorney General Pruitt further argues that absent express statutory authority to adjust rates retroactive to the effective date of the final order of the Commission establishing the rate in PUD 260, no such power exists. There are two flaws in Attorney General Pruitt's argument. First, no constitutionally valid final order has been issued in PUD 260 due to the 260 Order being tainted by bribery. Second, as I explain herein, his argument is illogical and inconsistent with arguments made by Attorney General Henry and in Commission orders in PUD 662, and with the Commission's Response, drafted and argued by Scott Hempling before the Supreme Court of Oklahoma in Case No. 77,521 – that argument being that the Commission has authority to

place SBTC's rates subject to refund pursuant to its ratemaking authority as set forth and fully supported in the Commission's Response filed June 14, 1991 in Supreme Court Case No. 77,521. The Commission should examine the Commission's Response attached hereto as Exhibit No. 2.

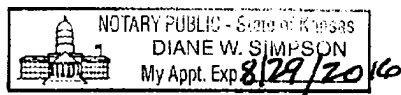
46. Attorney General Henry argued in his PUD 662 Oklahoma Supreme Court Brief that the Commission may upon its own initiative take steps to place SBTC's rates subject to refund. Clearly, SBTC voluntarily agreed to allow their rates to be subject to refund pursuant to the Stipulation it signed. Such Stipulation was adopted by the Commission in the Stipulation Order. Surely, if the Commission, upon its own initiative, can take steps to issue an order placing SBTC's rates subject to refund, as it did in PUD 662, then it must possess the authority to issue an order placing SBTC's rates subject to refund when SBTC agrees to do so, as it did when it signed the Stipulation adopted by the Stipulation Order in PUD 260.

FURTHER AFFIANT SAYETH NAUGHT!

James M. Proctor
James M. Proctor

State of Kansas)
) ss
Douglas County)

Sworn before me as true and correct this 23rd of November, 2015.



Diane W. Simpson
Notary Public

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

APPLICANTS: HONORABLE SODY CLEMENTS,)
 an Individual and Oklahoma Resident on behalf of)
 herself and others similarly situated; LT. GENERAL) CAUSE NO. PUD 201500344
 (Ret.) RICHARD A. BURPEE, an individual and)
 Oklahoma Resident on behalf of himself and others)
 similarly situated; JAMES PROCTOR, an Individual and)
 Kansas Resident on behalf of himself and others)
 similarly situated; RODD A. MOESEL, an Individual and)
 Oklahoma Resident on behalf of himself and others)
 similarly situated; RAY H. POTTS, an Individual and)
 Oklahoma Resident on behalf of himself and others)
 similarly situated; BOB A. RICKS, an Individual and)
 Oklahoma Resident on behalf of himself and others)
 similarly situated.)
)
 RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA)
 CORPORATION COMMISSION ORDER NO. 341630)
 CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
 FOLLOWING INTRINSIC FRAUD)

FILED
 OCT 02 2015
 COURT CLERK'S OFFICE - OKC
 CORPORATION COMMISSION
 OF OKLAHOMA

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that Southwestern Bell Telephone Company d/b/a AT&T Oklahoma ("Southwestern Bell") filed on October 2, 2015, a Motion for Initial Screening Conference and Hearing before the Commission *En Banc*.

NOTICE IS FURTHER GIVEN that this Motion shall be set for hearing before the Commission *en banc* on Tuesday, November 3, 2015, at 10:00 a.m., at the Oklahoma Corporation Commission in Courtroom 301, Jim Thorpe Office Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma.

NOTICE IS FURTHER GIVEN that all interested persons may appear and be heard and the Commission shall, after hearing, issue such orders and grant such relief as it deems fair, reasonable, necessary, proper and equitable in the premises, whether or not specifically prayed for in the motion. For further information concerning this action, contact Attorney for Southwestern Bell, Curtis M. Long, 321 South Boston, Suite 800, Tulsa, Oklahoma 74103, Telephone (918)599-0621.



PUD 201500344
Notice

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

J. Todd Hiatt

J. TODD HIETT, Commissioner

DONE AND PERFORMED THIS 2 DAY OF October, 2015.

BY ORDER OF THE COMMISSION:

Peggy Mitchell

PEGGY MITCHELL, Commission Secretary

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

APPLICANTS: HONORABLE SODY CLEMENTS,)
an Individual and Oklahoma Resident on behalf of)
herself and others similarly situated; I.T. GENERAL) CAUSE NO. PUD 201500344
(Ret.) RICHARD A. BURPEE, an individual and)
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similarly situated; JAMES PROCTOR, an Individual and)
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FOLLOWING INTRINSIC FRAUD)

FILED
OCT 02 2015

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that Southwestern Bell Telephone Company d/b/a AT&T Oklahoma ("Southwestern Bell") filed on October 2, 2015, a Motion to Dismiss this Cause without further proceedings.

NOTICE IS FURTHER GIVEN that this Motion shall be set for hearing before the Commission *en banc* on Tuesday, November 3, 2015, at 10:00 a.m., at the Oklahoma Corporation Commission in Courtroom 301, Jim Thorpe Office Building, 2101 North Lincoln Boulevard, Oklahoma City, Oklahoma.

NOTICE IS FURTHER GIVEN that all interested persons may appear and be heard and the Commission shall, after hearing, issue such orders and grant such relief as it deems fair, reasonable, necessary, proper and equitable in the premises, whether or not specifically prayed for in the motion. For further information concerning this action, contact Attorney for Southwestern Bell, Curtis M. Long, 321 South Boston, Suite 800, Tulsa, Oklahoma 74103, Telephone (918)599-0621.

PUB 201500344
Notice

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

J. Todd Hiatt

J. TODD HIATT, Commissioner

DONE AND PERFORMED THIS 2 DAY OF October, 2015.

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CORPARTION COMMISSION ORDER NO. 341630)
CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
FOLLOWING INTRINSIC FRAUD)

FILED
OCT 02 2015

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

CAUSE NO. PUD 201500344

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Attorney General of the State of Oklahoma, E. Scott Pruitt, has filed a Motion for Initial Screening Conference and En Banc Hearing in the above-referenced cause.

NOTICE IS FURTHER GIVEN that this Motion shall be set for hearing before the Administrative Law Judge on the **3rd day of November, 2015, at 10:00a.m.**, Courtroom 301, Third Floor, Jim Thorpe Building, 2101 N. Lincoln Boulevard, Oklahoma City, OK 73105.

NOTICE IS FURTHER GIVEN that for information concerning this action, contact Abby Dillsaver, Assistant Deputy Attorney General; Jerry J. Sanger, Assistant Attorney General; and C. Eric Davis, Assistant Attorney General, Oklahoma Attorney General's Office, 313 Northeast 21st Street, Oklahoma City, Oklahoma 73105, Phone: (405) 522-5316.

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

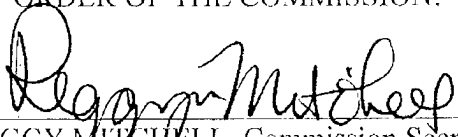
J. Todd Hiatt

J. TODD HIETT, Commissioner

PUD 201500344
Notice of Hearing

DONE AND PERFORMED THIS 2 day of October, 2015.

BY ORDER OF THE COMMISSION:



PEGGY MITCHELL, Commission Secretary

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

APPLICANTS: HONORABLE SODY CLEMENTS,)
an Individual and Oklahoma Resident on behalf of)
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CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
FOLLOWING INTRINSIC FRAUD)

FILED
OCT 02 2015

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

CAUSE NO. PUD 201500344

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Attorney General of the State of Oklahoma, E. Scott Pruitt, has filed a Motion to Dismiss in the above-referenced cause.

NOTICE IS FURTHER GIVEN that this Motion shall be set for hearing before the Administrative Law Judge on the **3rd day of November, 2015, at 10:00a.m.**, Courtroom 301, Third Floor, Jim Thorpe Building, 2101 N. Lincoln Boulevard, Oklahoma City, OK 73105.

NOTICE IS FURTHER GIVEN that for information concerning this action, contact Abby Dillsaver, Assistant Deputy Attorney General; Jerry J. Sanger, Assistant Attorney General; and C. Eric Davis, Assistant Attorney General, Oklahoma Attorney General's Office, 313 Northeast 21st Street, Oklahoma City, Oklahoma 73105, Phone: (405) 522-5316.

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

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DANA L. MURPHY, Vice Chairman

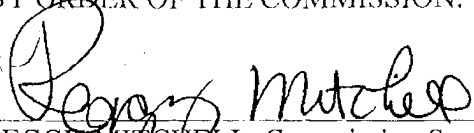
J. Todd Hiatt

J. TODD HIETT, Commissioner

PUD 201500344
Notice

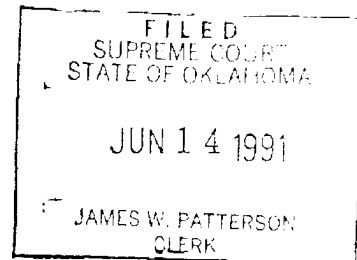
DONE AND PERFORMED THIS 2 day of October, 2015.

BY ORDER OF THE COMMISSION:



PEGGY MITCHELL, Commission Secretary

CASE NO. 77,521



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

AMENDED RESPONSE OF OKLAHOMA CORPORATION COMMISSION

Scott Hempling
1819 H Street, N.W.
Suite 500
Washington, D.C. 20006

Lindil C. Fowler, OBA #3069
Lu Willis, OBA #11570
Oklahoma Corporation Commission
2101 North Lincoln Boulevard
Jim Thorpe Building, Room 400
Oklahoma City, Oklahoma 73105

ATTORNEYS FOR RESPONDENT

June 14, 1991

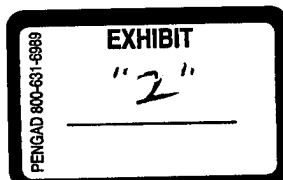


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ADMINISTRATIVE PROCEEDINGS

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Tax Reform Act of 1986, Docket No. M-100, 88 P.U.R.4th 111, 136 (N.C. Util. Comm. 1987) 6

This case presents an important challenge to the Oklahoma Corporation Commission's ("Commission") authority to protect ratepayers. On April 19, 1991, the Commission found that Southwestern Bell Telephone Company's ("SWBT") actual cost of equity was 11.41%.¹ That figure was well below SWBT's authorized return on equity ("ROE") of 14.25%.²

Because the Commission was in the midst of a multipart proceeding to review SWBT's rates, it chose not to lower rates immediately. The Commission instead made SWBT's current rates conditional rates as of April 19. Should the rate review reveal post-April 19 earnings exceeding 11.41%, the Commission explained, it would issue a permanent rate order refunding the excess above 11.41% and setting new rates.

SWBT objects. SWBT insists that the Commission's broad constitutional duty to protect ratepayers disappears when there is a lag between (a) the Commission's identification of an excessive ROE and (b) its determination of the precise rates necessary to prevent such excessive ROE. But the complexity of the ratemaking process makes that lag inevitable, thereby guaranteeing systematic subsidization of excess earnings.

¹ Order No. 356271 (Cause Nos. 000662, 000837) (the "April 19 Order"). The Commission concluded that the return on equity ("ROE") recovered from SWBT's telephone customers should not reflect the unusual risks associated with the entry into unregulated ventures of SWBT's parent, Southwestern Bell Corporation. *Id.* at 3. Cf. Turpen v. Okla. Corp. Com'n, 769 P.2d 1309, 1331 (Okla. 1988). For a general discussion of ROE, see Lone Star Gas Co. v. Corp. Com'n, 648 P.2d 36, 39-40 (Okla. 1982).

² The 14.25% figure had been authorized by the Commission in a 1986 order issued in SWBT's last general rate case. See Order No. 292337 in Cause No. 29321 (Jan. 29, 1986).

Under SWBT's theory, the Commission may never establish an effective date for new rates before issuing a permanent order specifying those rates. But that theory would outlaw interim rate increases, which SWBT has obtained many times.

The April 19 Order fell squarely within the Commission's constitutional duties. It produced neither retroactive ratemaking nor confiscation. It protected SWBT's customers from subsidizing excessive earnings during the interim period. Because of the importance of this issue, the Court should assume original jurisdiction, both to confirm the Commission's authority and to deny the writ.

I. THE COMMISSION'S PROSPECTIVE ORDER FULFILLED ITS CONSTITUTIONAL RESPONSIBILITY TO PROTECT RATEPAYERS

A. The Prospective Return On Equity Protected Ratepayers From Excessive Rates

Under OKLA. CONST. Art. IX, Sec. 18, the Commission has the duty of ... regulating ... all ... transmission companies doing business in State, in all matters relating to ... their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies.

The Commission must "prevent a public utility from making excess monopoly profits and ... assure fair prices." Turpen v. Corp. Com'n., 769 P.2d 1309, 1316 n.7 (Okla. 1988).

On April 19, when the Commission found that the ROE should be 11.41%, Commission saw more months ahead of discovery, trial and deliberation before reaching a decision on the actual rates necessary to produce that ROE. Had the Commission waited until the

actual rate decision to act, SWBT could have charged existing rates in the interim and kept any excess revenues.³

To prevent this overearning, the Commission could have taken stricter measures. On finding that the cost of equity had dropped from 14.25% to 11.41%, the Commission could have ordered an immediate rate reduction on an interim, conditional basis. No one could have contested the Commission's jurisdiction to do so. Indeed, the Commission took such action in Lone Star Gas Co. v. Corp.Com'n., 39 P.2d 547, 550 (Okla. 1934) ("Temporary [rate reduction] orders are proper ... 'The legislative power of the Corporation Commission over rates is not confined to prescribing permanent rates'....") (quoting other authorities). At the end of the rate case, the Commission then could have ordered refunds if those interim rates had produced a ROE exceeding 11.41%. If the Commission could reduce rates on April 19, it could take the milder approach of making existing rates conditional rates.

The Commission did not say explicitly "We hereby make existing rates conditional rates." But that statement is the necessary inference from the Commission's actions. To implement a ROE of 11.41%, one must change rates previously designed to produce a ROE of 14.25%. The Commission did not change rates on April 19 because it still was investigating SWBT's other costs. Yet to await those results and then change rates back to April 19, with no notice,

³ Since the rates would have been unconditional, the Commission could not have refunded excess earnings to ratepayers without violating the ban on retroactive ratemaking. See Part II.A, infra.

would have been prohibited retroactive ratemaking. The only avenue left was to make existing rates conditional rates on April 19. The absence of specific language does not alter this logic. ⁴

B. The Order Was the Logical Equivalent of "Interim Rate Increases" Often Obtained by SWBT

Rate proceedings take time. When a utility seeks a permanent rate increase, the Commission often grants an "interim" increase to protect utilities from underearning during the deliberations. Absent such interim relief, the Commission could protect utilities from this "regulatory lag" only by adjusting rates retroactively when the proceeding ends. That practice is prohibited. ⁵

The April 19 Order parallels the interim rate increase procedure completely. ⁶ As with interim rate increases, the Commission here established an effective date for the implementation of interim rates with the issues of the appropriateness of those rates and the need for a refund, if any, to determined later. The decision therefore avoided the

⁴ As one Court declared, in upholding the FCC's prescription for a new ROE for AT&T: "[T]he Commission need not explicitly announce its action as a prescription to have that effect.... [W]e are at a loss to explain the effect of the Commission's ... decision if it was not intended to have a prospective effect." Nader v. FCC, 520 F.2d 182, 202 (D.C. Cir. 1975).

⁵ See Southwestern Bell Telephone Co. v. State, 214 P.2d 715, 718 (Okla. 1949). SWBT has sought and received interim rate relief on a number of occasions. See, e.g., Turpen, supra, 769 P.2d at 1316 (during 20-month period, SWBT received "interim relief" on three separate occasions, for a total exceeding \$210 million).

⁶ The Supreme Court of Florida has recognized this parallel. See United Telephone Co. of Florida v. Mann, 403 So.2d 962, 966 (Fla. 1981) ("no logical reason for distinguishing between rate increase proceedings and rate decrease proceedings").

retroactivity problem while prejudicing no one. If at the close of the pending rate case, the Commission ultimately determines that there were no overearnings (i.e., earnings exceeding 11.41%) since April 19, 1991, there will be no refunds to ratepayers. If the Commission had not made April 19 the effective date for the new rates, but instead declared in December 1991 that lower rates should have been in effect in April 1991, the Commission would have engaged in retroactive ratemaking. The Commission carefully avoided that error.⁷

C. Absent An Express Legal Bar, This Court Should Defer to the Commission's Exercise of Its Broad Authority

SWBT argues that "[n]owhere does the Constitution, any statute, or any rule promulgated by the Commission authorize an order placing rates subject to refund or requiring a refund of revenue collected under approved rates." Br. at 7. But neither do the Constitution or statutes authorize interim rate increases.

SWBT asks the wrong question. The question is not whether there is any specific authority, but whether there is any specific bar.⁸ There is none. Our Constitution grants the Commission

⁷ Had SWBT believed its rates too low during this period, it would have requested a temporary rate increase. If the Commission had granted this request, it would have declared interim rates, using the declaration date as the effective date for any adjustment to those interim rates ordered at the end of the proceeding. See, e.g., In the Matter of the Application of Kansas Power and Light Company, Order No. 346303 in Cause No. PUD 000708 (Apr. 9, 1990). Here the Commission, concerned about excessive rates, similarly set an effective date for new rates.

⁸ Draper v. State, 621 P.2d 1142, 1146 (Okla. 1980) ("If there is any doubt as to the Legislature's power to act in any given situation, it should be resolved in favor of the validity of the action."). The Commission's ratemaking authority is essentially

powers necessary and appropriate to the satisfaction of its duties.⁹
 Under these circumstances, judicial deference is appropriate.¹⁰

II. AN ORDER REQUIRING A NEW RETURN ON EQUITY, AND MAKING EXISTING RATES CONDITIONAL, IS NEITHER RETROACTIVE RATEMAKING NOR CONFISCATION

A. The Order Was Not Retroactive Ratemaking

1. The Commission's April 19 Order Did Not Reach Back To Correct Past Mistakes

Retroactive ratemaking is "accounting [in new rates] for mistakes in past rates."¹¹ The Commission did not use current rates to account for past mistakes. SWBT's rates may have produced a ROE exceeding 11.41% before April 19, but the Commission ordered no refund. The Commission said only that principles applied up to April 19 no longer would apply after April 19.

legislative authority. Minnesota Rate Cases, 230 U.S. 352, 433 (1913); Turpen, supra, 769 P.2d at 1317. Draper deference therefore applies here.

⁹ See Lone Star Gas Co. v. Corp. Com'n, 39 P.2d 547, 550 (Okla. 1935) (Commission may structure appropriate remedies, guided by "broad equitable principles," as the "exigencies of the times and changing conditions demand"); Southwestern Public Service Co. v. State, 637 P.2d 92, 101 (Okla. 1981) (deferring to the "expertise indigenous to the work of the Commission"). Cf. 17 O.S. sec. 153 (in regulating public utilities, Commission has "all additional implied and incidental powers ... proper and necessary to carry out [enumerated] ... powers"). Section 153 was enacted as part of a bill to "extend" the Commission's existing jurisdiction over telephone companies to water, heat, light and power utilities. See Okla. Session Laws, ch. 93 (1913).

¹⁰ Other courts have reached the same result. See Pueblo Del Sol Water v. Arizona Corp. Com'n, 772 P.2d 1138 (Ariz. App. 1988); Tax Reform Act of 1986, Docket No. M-100, 88 P.U.R.4th 111, 136 (N.C. Util. Comm. 1987) (establishing provisional rate reduction to reflect federal Tax Reform Act).

¹¹ Turpen supra, 769 P.2d at 1332.

The April 19 Order therefore took existing permanent lawful rates and made them conditional lawful rates. At the close of the pending rate proceeding, the Commission will "true up" two things: (1) the revenues actually recovered from the conditional rates in place on April 19, with (2) the revenues that would have been recovered during the interim period had SWBT charged, beginning on April 19, rates designed to earn a ROE of 11.41%. Because the April 19 rates are conditional rates instead of permanent rates, the forthcoming permanent rate order will not be retroactive ratemaking.

The key difference between the Commission's order, and the order SWBT claims to be attacking, is notice. Compare two hypothetical permanent rate orders issued December 31, 1991:

In 1987, we had authorized rates designed to recover a ROE of 14.25%. In April 1991 we expressed no dissatisfaction with those rates. Now we are changing our mind. Your rates should have been designed to recover a ROE of 11.41%. We hereby order you to refund the difference.

In 1987, we had authorized rates designed to recover a ROE of 14.25%. On April 19, 1991 we notified SWBT that 14.25% no longer reflected the actual cost of equity, authorized a new ROE of 11.41% and made existing rates conditional. Now we have completed our rate review. We have calculated the lower rates which, if in effect on April 19, would have produced a ROE of 11.41%. We hereby order you to refund the difference.

The first order is retroactive ratemaking because it gave no notice of the change in ROE. The second order, which is what the Commission will do here, did provide the requisite notice.¹²

¹² Cf. Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791, 796-97 (D.C. Cir. 1990) (no retroactive ratemaking where Commission placed first sellers of natural gas on notice that the "rates they

SWBT argues the Commission "could avoid the limits on its authority, and effectively overrule this Court's holdings, simply by including a subject to refund provision in every rate order." Br. at 10-11. SWBT is boxing at shadows. The Commission did not "simply ... include[] a subject to refund provision" on April 19. The Commission held a major proceeding on ROE: discovery, expert witnesses, briefs, and an ALJ decision. Only then did the Commission take action, prospectively.

2. The Commission's Order Specifying A Prospective ROE Is Not Invalidated By The Deferral Of Findings On SWBT's Other Costs

SWBT asserts that on April 19, the Commission reached no conclusions as to SWBT's expenses, revenues, rate base or taxes. SWBT Brief at 3. The Commission's crime, according to SWBT, was to set an effective date for new rates before it made all the findings necessary to specify those new rates. We plead guilty. But precisely the same thing happens when the Commission grants interim rate increases: the rates go into effect first; then, at some point in the future, the Commission determines the actual costs and sets the precise rates. If the interim rates exceeded actual costs, the Commission orders a refund. That is what the Commission is doing here. An effective date which precedes the final decision cannot be lawful only when the result is a rate increase.

are paying are subject to retroactive adjustment at a later date;" such notice "changes what would be purely retroactive ratemaking into a functionally prospective process" (emphasis added).

This practice was reasonable under the circumstances. Return on equity issues, while complex, are less time-consuming than other cost of service issues.¹³ The Commission therefore investigated SWBT's ROE first. Upon discovering that the authorized ROE was too high, the Commission made current rates conditional, and declared that day the effective date for new rates to be determined subsequently. Then the Commission turned to the more time-consuming matters, in order to determine what precisely the new rates should be. This procedure protected ratepayers from excessive rates at the earliest possible point.¹⁴

3. The Commission's Action Does Not Conflict With SWBT's Obligation to Adhere To "Approved" Rates

SWBT says it may lawfully charge only those rates "approved" by the Commission, which it says are the 1986 rates. SWBT Br. at 5-6. Therefore, it says, it must charge those rates and no others.

¹³ Litigation on ROE examines industry-wide data that is generally available. In contrast, litigation on other cost issues requires discovery of company records and cross-examination of company officials, a process that can take many months.

¹⁴ Cf. Nader v. FCC, 520 F.2d 182, 203-04 (D.C. Cir. 1975). There the FCC had prescribed a ROE (including an effective date) for AT&T, before mandating the specific rates. The Court upheld this procedure, explaining (520 F.2d at 204):

Obviously, reaching a decision on each of the components that make up a rate is a time-consuming task....If the Commission can effectuate its decision as it adjudicates each component of the rate, the public more rapidly receives the benefit of the protection....

... [S]ince the rate of return is one component of a charge, and the charges prescribed must properly reflect the allowable rate of return, the prescription of a rate of return is fully consistent with the prescription of charges....

A refund order in December, SWBT says, would violate this requirement. SWBT has constructed a false syllogism:

1. A utility may lawfully charge only those rates approved by the Commission.
2. The only rates approved for SWBT are its 1987 rates.
3. Therefore, the Commission may not designate rates after April 19 as conditional rates.

This syllogism does not work. We agree that SWBT, at any point in time, may charge only those rates on file at that time. But that rule in no way detracts from the Commission's authority to designate existing approved rates as conditional approved rates.

SWBT's 1986 rates have been "approved," and SWBT must charge them. But on April 19, the Commission conditioned its previous approval, prospectively. Today, the 1986 rates are approved interim rates. At the end of the rate proceeding, the Commission will determine the adjustments necessary to produce appropriate rates, effective April 19. This same logic applies to interim rate increases.¹⁵

Assume SWBT were a brand new utility, entering Oklahoma to replace an existing utility. The Commission might choose not to fix permanent rates for the new service until it gained some operating experience. The Commission thus would make the initial rates conditional and interim. But they would be no less

¹⁵ An Arizona court rejected an argument identical to SWBT's. Pueblo, supra, 772 P.2d at 1140) ("The interim rates were imposed pending a formal hearing. Since there has not yet been a rate hearing regarding the new situation, there are no final rates and therefore no retroactive rate making could have possibly occurred.").

"approved" than other rates. After gaining operating experience, the Commission would set rates, effective on the date service began. This is not retroactive ratemaking.¹⁶

B. There Is No Confiscation Of Capital If There Is No Interference With Expectations

SWBT argues that the Commission's order "has the effect of notifying Bell that its property is subject to confiscation without due process of law." Br. at 13. We do not understand this argument.

There is confiscation of capital only when there is interference with expectations -- legitimate expectations.¹⁷ SWBT can have no legitimate expectations of a ROE exceeding 11.41% after April 19 when the Commission has ordered a ROE equalling 11.41%. Had the Commission issued no April 19 order, but on December 31 said that the ROE back to April would be reduced from 14.25% to 11.41%, there would have been no notice. Those are not the facts.¹⁸

SWBT argues that "[o]nce regulated telephone service has been provided and revenues collected under lawful tariffs, a refund of such revenues is deprivation of property without the process of

¹⁶ Cf. Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 241 (Okla. 1922). No case cited by SWBT (Br. at 8-10, 13) can save its argument. These cases involved only "lawfully established rates;" not "lawfully established conditional rates."

¹⁷ Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

¹⁸ The issue before the Court now is not whether an ROE of 11.41% is confiscatory. That issue will come to the Court in SWBT's petition in error from either the interim or final order. See Southwestern Bell Telephone Company v. Oklahoma Corporation Commission, Case No. 77563 (petition filed May 16, 1991).

law." Id. SWBT again confuses "lawful tariffs" with "lawful conditional tariffs," see Part II.A.3, supra, and again uses an argument that would doom interim rate relief.

SWBT next complains that "[t]he fixing of a return on equity alone provides no meaningful ability to calculate any potential refund obligation." Br. at 12. That uncertainty, SWBT continues, makes business planning difficult. SWBT's statement has no record basis, and is inaccurate to boot: SWBT's refund liability will be limited to the amount determined to be overearnings. Refunds or supplements may not be known with precision; but the authorized ROE is. In contrast, when the Commission sets interim rates, everything is uncertain: refunds, supplements, costs and ROE. ¹⁹

III. SWBT'S PROPOSED SOLUTION WOULD VIOLATE THE OKLAHOMA CONSTITUTION

SWBT's solution to overearnings is this: The Commission must make ratepayers pay for overearnings until the Commission determines precisely how large the overearnings are. Then the Commission can prevent overearnings; but only future overearnings. SWBT's approach creates a double violation of the Oklahoma Constitution.

A. SWBT Would Grant Utilities A Constitutional Right To Excess Rates

This case involves a time lag between (1) the date on which the Commission determined that the authorized ROE underlying

¹⁹ The Commission then reduced SWBT's uncertainty further by establishing a deadline for itself (Order at 4): December 31, 1991, unless there is good cause to extend.

existing rates was excessive; and (2) the date on which the Commission specified the rates necessary to produce an appropriate ROE. SWBT is asserting a constitutional entitlement to the excess earnings produced by that lag. No such right exists.

SWBT is entitled to avoid losses from regulatory lag. That is why the Commission sometimes orders interim rate relief.²⁰ But SWBT is seeking to profit from regulatory lag. There may be a constitutional right to nonconfiscatory rates. But there is no constitutional right to excessive rates.

The Commission is bound to prevent "excess monopoly profits." Turpen, supra, 769 P.2d at 1316. But excess monopoly profits are precisely what SWBT seeks from this Court. In a competitive market, SWBT's position never would survive. Assume that the cost of equity in a competitive market dropped from 14.25% to 11.41%. At least one competitor could lower its prices. The others would have to follow, or lose customers (all else being equal). Only a monopolist could sustain prices exceeding competitive costs.

SWBT refuses to accept this logic. SWBT prefers to price anticompetitively, retaining a ROE of 14.25% even as the cost of equity declines to 11.41%. But the difference is "excess monopoly profits." The Commission's duty is to remove such profits, not to sustain them.

SWBT's views contrast sharply with its own duties. The utility-customer relationship is a trust relationship, with an

²⁰ See, e.g., Southwestern Bell Telephone Co. v. State, 214 P.2d 715, 718 (1949).

overriding duty to keep rates reasonable.²¹ SWBT should be lowering its rates now, not strategizing to delay the inevitable.

B. SWBT's Approach Would Make It Impossible For The Commission to Comply With Its Constitutional Responsibilities

The Commission's approach protects both ratepayers and shareholders during the interim period. SWBT's approach guarantees excess returns to the shareholders and leaves the ratepayers unprotected. As an Arizona Court found (Pueblo, supra at 1140):

[The utility] would have the Commission's power limited to imposing interim rates that are only subject to increases. It appears that appellant wants to have its cake and eat it too. We cannot condone such a result.

SWBT nowhere acknowledges the Commission's constitutional obligations. SWBT's position invites indefinite procedural delays while SWBT enjoys an excessive ROE. The Constitution's drafters would not have barred excess returns, while simultaneously entitling SWBT to excess returns. SWBT's approach contradicts this Commission's very reason for being.

[The Commission may not] act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.²²


²¹ Consumers' Light & Power Co. v. Phipps, 251 P. 63 (Okla. 1926). The common law, from which the utility's trust obligation springs, remains in effect in Oklahoma unless altered by the Constitution, statute or judicial decisions. Hull v. Sun Ref. and Mktg Co., 789 P.2d 1272, 1278-79 and n.13 (Okla. 1989) (citing 12 O.S. sec. 2). The Legislature has recognized this common law obligation of "public businesses," expressly. See 79 O.S. sec. 4.

²² Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965) (case involving Federal Power Commission), cert. denied sub nom., Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

CONCLUSION

A petitioner for a writ of prohibition bears a heavy burden. Draper v. State, 621 P.2d 1142, 1147 (Okla. 1980). SWBT has not met it. For all the foregoing reasons, we respectfully urge this Court to assume original jurisdiction and deny the writ. If SWBT objects to the specific ROE, it has an adequate remedy on appeal.

Despite the adequacy of appeal, this Court still should assume original jurisdiction to confirm the Commission's authority. The Commission's authority to protect ratepayers by making existing rates conditional is of "immediate concern"; it is publici juris, or "of public right."²³ If the Commission lacks that authority, it needs to know now, so it can set a new rate immediately.



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²³ State ex rel. Howard v. Oklahoma Corp. Com'n, 614 P.2d 45, 51 (Okla. 1980) ("application of a credit to the utility bills of public utilities' Oklahoma customers and citizens is properly of legislative concern and publici juris"); State of Oklahoma ex rel. Poulos v. State Bd. of Equal., 552 P.2d 1134, 1137 (Okla. 1975) (original jurisdiction assumed where the matter is "of immediate concern to all taxpayers").

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 10th day of June, 1991, to:

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