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.	)	**CAUSE PUD NO.** 201500344
RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA CORPORATION COMMISSION ORDER NO. 341630 CAUSE NO. PUD 260; AND REDETERMINE ISSUES FOLLOWING INTRINSIC FRAUD	)	

FILED
JAN 22 2016
COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

APPLICANTS' SECOND 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 Second Supplemental Affidavit of James M. Proctor and exhibits thereto, attached to this filing.

Respectfully Submitted,

Russell J. Walker, OBA # 9293
Andrew J. Waldron, OBA # 17362
511 Couch Drive, Third Floor
Oklahoma City, Oklahoma 73102
Telephone: (405) 943-9693
Facsimile: (405) 232-1108

ATTORNEYS FOR APPLICANTS

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.	)

SECOND SUPPLEMENTAL 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

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 Cause No. PUD 201500344 ("PUD 344") 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 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 comment at its November 3, 2015 meeting. This second (supplemental) 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. The determination as set forth in Commission Order No. 341630 ("SBTC PUD 260 Order") issued September 20, 1989 is tainted and should be declared void by the Commission in accordance with the comprehensive amount of extrinsic evidence of SBTC's use of fraudulent actions to influence the Commission's decision in the SBTC PUD 260 case. This assertion is fully supported through the Applicants' filings of documents, exhibits and affidavits in PUD 344. Further, based on my extensive knowledge gained from working on the issues, I can affirmatively state that the original determination in the SBTC PUD 260 case was fundamentally flawed, unreasonable and unfair to SBTC's Oklahoma ratepayers from a utility ratemaking point of view. That original determination must be replaced with a constitutionally valid order which is reasonable and fair to SBTC's Oklahoma ratepayers.

6. The Commission may and should correct that error now (as sought by this Application, PUD 344) by re-determining the SBTC PUD 260 matter and issuing a valid and untainted order in the SBTC PUD 260 case. **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 will be due, as of January 31, 2016, a calculable and determinable total sum of between $8.7 billion and $16.5 billion. Such total refund amount could provide between $8,000 and $16,000, on average, for each Oklahoma SBTC telephone number.**

BACKGROUND

7. On October 23, 1986, the Commission Staff filed an application as 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 the many other changes to the factors determining corporate income tax liabilities, decreased the corporate federal income tax rate from 46 percent to 34 percent effective July 1, 1987.

8. Certain Oklahoma utilities, including SBTC, were identified as respondents to the Staff filing. A review of the impact of the Tax Act on each of these Oklahoma utilities' revenue requirements was thus undertaken. The primary objective of the investigations into each utility's regulated earnings was to determine if the changes in the tax law, most notably the significant decrease in the tax rate, would increase regulated earnings such that the utility's then current rates would result in the recovery of excess revenues from its customers.

9. On June 23, 1987, a Stipulation Between Staff and Southwestern Bell Telephone Company ("SBTC Stipulation") (see SBTC Stipulation attached hereto as Exhibit No. 2) was presented at hearing before the Commission en banc. In the SBTC Stipulation, the parties to SBTC PUD 260, 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 SBTC Stipulation requires that said reduction be effective July 1, 1987 in order to allow the full benefits of the Tax Act to accrue to SBTC's customers. Specifically, the SBTC 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 SBTC PUD 260. The Commission issued Order No. 313853 ("SBTC Stipulation Order") (see SBTC Stipulation Order attached hereto as

Exhibit No. 3) approving the SBTC Stipulation the same day as its hearing on the SBTC Stipulation.

10. As stated above, the Commission Staff's PUD 260 application initiated investigations into the impact of the Tax Act on the regulated earnings of other Oklahoma utilities. Several of those other utilities being audited by Staff also had their rates placed subject to refund by the Commission pending the outcome of their respective earnings reviews. Specifically, on June 23, 1987, the regulated earnings of General Telephone Company of the Southwest ("GTSW"), KPL Gas Service Company ("KPL") and Arkansas Louisiana Gas Company ("ARKLA") were placed subject to refund pending their respective earnings reviews under PUD 260. On June 26, 1987 the regulated earnings of Public Service Company of Oklahoma ("PSO") were also placed subject to refund pending its earnings review under PUD 260. I will address the PUD 260 investigations for each of these Oklahoma utilities separately.

11. It is important to discuss here the Commission's PUD 260 investigations into the effect of the Tax Act on the regulated earnings of GTSW, KPL, ARKLA and PSO. This is because on October 2, 2015, E. Scott Pruitt, Attorney General of Oklahoma ("Attorney General Pruitt") and SBTC 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, into the record of PUD 344. In the Pruitt Motion, Attorney General Pruitt argues that the Commission has no legal authority to require excess revenues be refunded to SBTC's ratepayers. Similarly, in the SBTC Motion, SBTC argues that the Commission has no legal authority to require excess revenues be refunded to SBTC's ratepayers.

12. In the affidavit that I filed in PUD 344 on November 25, 2015, I fully debunked the arguments by SBTC and Attorney General Pruitt that the Commission has no legal authority to require excess revenues be refunded to SBTC's ratepayers. The Commission should read that affidavit in connection

with this current affidavit to fully appreciate these points. In short, in my November 25, 2015 affidavit I explain how it is absolutely clear that the basis of the Commission's authority to order refunds of the excess revenues collected by SBTC flows from the SBTC Stipulation Order. Furthermore, to this date, SBTC and Attorney General Pruitt have not provided any arguments that the SBTC Stipulation Order is relevant, or irrelevant, to the Commission's authority to require refunds of the excess revenues collected by SBTC. Indeed, they have not even acknowledged it.

13. Further, in my November 25, 2015 affidavit, I fully explain that the Supreme Court of the State of Oklahoma ("Supreme Court") did not rule in its December 24, 1991 decision regarding the appealed SBTC PUD 260 Order as to whether the SBTC Stipulation Order permitted or even required SBTC's excess revenues be refunded to Oklahoma ratepayers. Robert H. Henry, Attorney General of Oklahoma ("Attorney General Henry") and the American Association of Retired Persons ("AARP") argued to the Supreme Court that in the SBTC PUD 260 Order the Commission should have required refunds of SBTC's excess revenues to the ratepayers per statute. Specifically, instead of citing the SBTC Stipulation Order, Attorney General Henry and AARP contended only that the excess revenues should be treated as an "overcharge" within the meaning of 17 O.S. 1981 § 121 and thence refunded to Oklahoma ratepayers. The Supreme Court held 17 O.S. 1981 § 121 did not apply to the facts of the SBTC PUD 260 Order, but it never considered whether refunds of SBTC's excess revenues were required pursuant to the SBTC Stipulation Order since that argument was never made. The Supreme Court has simply never ruled as to whether the SBTC Stipulation Order requires SBTC's excess revenues be refunded to Oklahoma ratepayers.

14. My discussion of the Commission's PUD 260 investigations into the effect of the Tax Act on the regulated earnings of GTSW, KPL, ARKLA and PSO illustrates that SBTC was not the only

Oklahoma utility having its rates placed subject to refund by the Commission in 1987. These other Oklahoma utilities' excess revenues were also subject to refund pursuant to stipulations and Commission orders issued in PUD 260 in the same manner as SBTC's.

OTHER OKLAHOMA UTILITIES HAVING RATES SUBJECT TO REFUND

General Telephone Company of the Southwest

15. On June 23, 1987, the Commission issued Order No. 313854 ("GTSW Refund Order") placing the rates of General Telephone Company of the Southwest subject to refund pending the outcome of Staff's GTSW PUD 260 audit.

16. Unlike SBTC, GTSW did not enter into a stipulation with Staff voluntarily placing its rates subject to refund. Staff initiated an action seeking the Commission to place GTSW's rates subject to refund during the period of the GTSW PUD 260 audit. As explained on page 2 of the GTSW Refund Order, Ms. Dixie Linnenbrink, Manager of the Accounting Department of the Public Utility Division of the Commission, testified that Staff was requesting the Commission order that the effective date of any rate reduction the Commission ultimately determines appropriate for GTSW be July 1, 1987, in order to accomplish an effective tax rate of 40% for 1987 and a 34% tax rate prospectively. She further testified that Staff intends to consider all known and measurable changes in GTSW's business in determining its recommendation for rate decreases and refunds in the GTSW PUD 260 case.

17. On pages 2 and 3 of the GTSW Refund Order, the Commission found Staff's recommendation fair, reasonable and equitable and that it should be adopted. Therefore, upon its own initiative and without agreement from GTSW, the Commission ordered that if the Commission ultimately determines that a rate reduction is required for GTSW that said reduction shall be effective July 1, 1987.

18. On January 15, 1992, after the completion of Staff's extensive audit of GTSW's regulated earnings, I, as the Director of the Public Utility Division of the Commission, entered into a stipulation with General Telephone Company of the Southwest ("GTSW Stipulation"). The terms of the GTSW Stipulation accounted for the effect of the Tax Act on GTSW's rates. On January 16, 1992, I testified at a hearing of the Commission en banc in support of the GTSW Stipulation. Under the GTSW Stipulation, GTSW was required to refund $8.0 million to its customers and lower its rates prospectively by $1.1 million in order to appropriately account for the effect of the Tax Act on the Company's rates. On January 16, 1992, the Commission issued Order No. 362677 ("GTSW PUD 260 Order") adopting the GTSW Stipulation and thereby ordering the refund and rate reduction.

KPL Gas Service Company

19. On June 23, 1987, the Commission issued Order No. 313855 ("KPL Stipulation Order") approving the KPL Stipulation agreed to between Staff and KPL Gas Service Company in the KPL PUD 260 case. The Staff and KPL agreed the KPL Stipulation appropriately accounted for the effect of the Tax Act on the Company's rates when taking into account known and measurable changes in KPL's business. On page 2 of the KPL Stipulation Order, the Commission found the terms of the KPL Stipulation fair, reasonable and equitable and that it should be adopted. Hence, the Commission adopted said KPL Stipulation and ordered that if the Commission ultimately determines that a rate reduction is required for KPL that said reduction shall be effective as necessary, but no earlier than June 23, 1987.

20. The Commission issued Order No. 346233 ("KPL PUD 260 Order") on April 4, 1990 finding, based on the testimony of Staff witness Edwin C. Farrar at the hearing on the merits of the KPL PUD 260 case, that because KPL had a revenue deficiency for the years of 1987 and 1988, that no rate

adjustments were necessary to account for the effect of the Tax Act on the Company's rates.

Arkansas Louisiana Gas Company

21. On June 23, 1987, the Commission issued Order No. 313856 ("ARKLA Stipulation Order") approving the ARKLA Stipulation agreed to by Staff and Arkansas Louisiana Gas Company in the ARKLA PUD 260 case. The Staff and ARKLA contended the ARKLA Stipulation appropriately accounted for the effect of the Tax Act on the Company's rates when taking into consideration known and measurable changes in ARKLA's business. On pages 2 and 3 of the ARKLA Stipulation Order, the Commission found the terms of the ARKLA Stipulation fair, reasonable and equitable and that it should be adopted. Hence, the Commission adopted said ARKLA Stipulation and ordered that if the Commission ultimately determines that a rate reduction is required for ARKLA that said reduction shall be effective as necessary, but no earlier than June 23, 1987.

22. On April 8, 1992, after the completion of Staff's extensive audit of ARKLA's regulated earnings, I, as the Director of the Public Utility Division of the Commission, entered into a stipulation with ARKLA regarding the effect of the Tax Act on the Company's rates. In the stipulation, the Staff and ARKLA agreed that AKLA should refund $3,546,985 to customers in order to take into account the Tax Act's effect on the Company's rates and comply with the ARKLA Stipulation Order.

23. On April 20, 1992, the Commission issued Order No. 364790 ("ARKLA PUD 260 Order") adopting the stipulation and ordering that ARKLA should refund $3,546,985 to Oklahoma ratepayers.

Public Service Company of Oklahoma

24. On June 26, 1987, the Commission issued Order No. 314007 ("PSO Stipulation Order") approving the PSO Stipulation agreed to by Staff and Public Service Company of Oklahoma in the PSO PUD 260 case. The Staff and PSO believed the PSO Stipulation appropriately accounted for the

effect of the Tax Act on the Company's rates when taking into consideration known and measurable changes in PSO's business. On page 2 of the PSO Stipulation Order, the Commission adopted said stipulation and ordered that if the Commission ultimately determines that a rate reduction is required for PSO that said reduction shall be effective as necessary, but no earlier than July 1, 1987.

25. On September 28, 1987, the Commission issued Order No. 317294 ("PSO PUD 260 Order") in order to account for the Tax Act's effect on PSO's rates and to comply with the PSO Stipulation Order. On page 14 of the PSO PUD 260 Order, the Commission ordered that PSO should: (1) decrease rates by $4,277,911 for the last three months of 1987; (2) implement a prospective rate decrease of $13,536,053 beginning in 1988; and (3) refund $961,053 to ratepayers.

REFUNDING SBTC's EXCESS REVENUES IS REQUIRED BY THE SBTC STIPULATION ORDER AND IS CONSISTENT WITH OTHER COMMISSION ORDERS

26. In addition to the fraudulent inception of the SBTC PUD 260 Order by bribery, and unlike the PUD 260 Orders for KPL, ARKLA and PSO, the SBTC PUD 260 Order did not fulfill the requirements of the SBTC Stipulation Order issued by the Commission on June 23, 1987 in the SBTC PUD 260 case.

27. More specifically, the Commission's (bribed) SBTC PUD 260 Order did not enforce the SBTC Stipulation Order's requirement to refund excess revenues to SBTC's ratepayers. In that regard the bribed SBTC PUD 260 Order amounted to a collateral attack on or disregard of the Commission's prior Order No. 313853, the SBTC Stipulation Order. (The Commission should read the Commission's Response filed at the Supreme Court on June 14, 1991 in Case No. 77,521, attached hereto as Exhibit No.4, for a thorough discussion explaining retroactive ratemaking, collateral attacks on utility ratemaking orders and the Commission's authority to place SBTC's rates subject to refund pursuant to

its ratemaking authority.)

28. In 1991, Attorney General Henry agreed the Commission has 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; and, he further argued that placing rates subject to refund under such conditions does not constitute impermissible retroactive ratemaking. (The Commission should study arguments filed at the Commission as 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"), on January 9, 1991 by Attorney General Henry in the PUD 662 case, attached hereto as Exhibit No. 5). Henry's PUD 662 Brief explains that absent placing SBTC's rates subject to refund, SBTC will be permitted to enrich itself at the expense of its Oklahoma customers.

29. Attorney General Henry argued in Henry's PUD 662 Brief that the Commission may upon its own initiative take steps to place SBTC's rates subject to refund. The Commission can see from above that the GTSW Refund Order, Order No. 313854, placed General Telephone Company of the Southwest's rates subject to refund pending the results of the GTSW PUD 260 audit without a stipulation agreed to and signed by GTSW. Also, in another Commission matter involving SBTC, without a stipulation agreed to and signed by SBTC, on April 19, 1991 the Commission issued Order No. 356271 in the PUD 662 case ordering (among other requirements) the earnings of SBTC be subject to refund, with interest, to the extent they exceed 11.41 percent return on equity (as I recommended in testimony filed March 1, 1991 in the PUD 662 case), 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.

30. Clearly, in the SBTC PUD 260 case, SBTC voluntarily agreed to allow their rates to be subject to refund pursuant to the SBTC Stipulation it signed. The SBTC Stipulation was adopted by the Commission in the SBTC Stipulation Order. Surely, if the Commission can, upon its own initiative, take steps to issue an order placing SBTC's rates subject to refund, as it did in the PUD 662 case, then it clearly possesses the authority to issue an order placing SBTC's rates subject to refund when SBTC itself agrees to do so, as it did when it signed the SBTC Stipulation adopted by the SBTC Stipulation Order in the PUD 260 case. Further, as the Commission can see from above, similar stipulations in the PUD 260 matters were agreed to and signed by KPL Gas Service Company, Arkansas Louisiana Gas Company and Public Service Company of Oklahoma. In their respective PUD 260 Orders, the commission ordered and KPL, ARKLA and PSO all adhered to and fulfilled the obligations of the stipulations they each signed.

FURTHER AFFIANT SAYETH NAUGHT!

James M. Proctor

James M. Proctor

State of Kansas)
) ss
Douglas County)

Sworn before me as true and correct this 20th of January, 2016.

NOTARY PUBLIC - State of Kansas
DIANE W. SIMPSON
My Appt. Exp. 3/29/2016

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 (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.	)	
	)	CAUSE NO. PUD 201500344
RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA CORPORATION COMMISSION ORDER NO. 341630 CAUSE NO. PUD 260; AND REDETERMINE ISSUES FOLLOWING INTRINSIC FRAUD	)	

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 Hiett

J. TODD HIETT, Commissioner

DONE AND PERFORMED THIS 2 DAY OF October, 2015.

BY ORDER OF THE COMMISSION:

Peggy Mitchell

PEGGY MITCHELL, Commission Secretary

#50347-v1

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 (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.	) CAUSE NO. PUD 201500344
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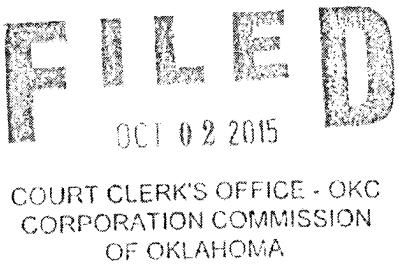

NOTICE OF HEARING

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.

PUD 201500344
Notice

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony
BOB ANTHONY, Chairman

Dana L. Murphy
DANA L. MURPHY, Vice Chairman

J. Todd Hiett
J. TODD HIETT, Commissioner

DONE AND PERFORMED THIS 2 DAY OF October, 2015.

BY ORDER OF THE COMMISSION:

Peggy Mitchell
PEGGY MITCHELL, Commission Secretary

#50343-v1

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 (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.	)
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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 Hiett
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 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.	)
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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

Dana L. Murphy
DANA L. MURPHY, Vice Chairman

J. Todd Hiett
J. TODD HIETT, Commissioner

PUD 2015003444
Notice

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 THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF)
HOWARD W. MOTLEY, JR., FOR AN)
INQUIRY INTO THE EFFECT OF THE 1986)
TAX REFORM ACT ON OKLAHOMA UTILITIES.) CAUSE PUD NO. 000260

STIPULATION BETWEEN STAFF AND
SOUTHWESTERN BELL TELEPHONE COMPANY

Howard W. Motley, Jr., Applicant, on behalf of the Public Utility Division (Staff) of the Oklahoma Corporation Commission and Southwestern Bell Telephone Company (Respondent), hereby stipulate and agree as follows:

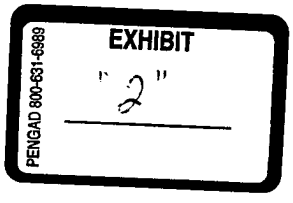
1. The 1986 Tax Reform Act which was signed by the President of the United States on October 22, 1986, lowered the corporate income tax rate from 46% to 34%, effective July 1, 1987. Respondent's currently authorized rates and charges are based on a 46% income tax rate.

2. Applicant filed an application herein requesting that the Commission quantify the effect of the 1986 Tax Reform Act on certain public utilities, including Respondent.

3. An investigation and audit must be conducted by the Staff in order for Staff to make a final recommendation in this cause. Respondent and Staff further acknowledge that Staff's investigation and audit will not be completed for several months due to the number of utilities being investigated and the limited resources of Staff.

4. In order to allow the full benefits of the 1986 Tax Reform Act to accrue to the benefit of Respondent's Oklahoma customers, Respondent and Staff agree that if the Commission, after hearing, ultimately determines a rate reduction is appropriate for Respondent, taking into account all known and measurable changes in Respondent's business, that said reduction will be effective as of July 1, 1987.

5. All parties to this Stipulation will cooperate in seeking its acceptance and approval by the Commission. If this Stipulation is not accepted and approved by the Commission without modification or condition, then it shall not be binding



on either party, and both parties shall in that event be deemed to have reserved all their respective rights and remedies in this proceeding.

6. It is agreed that nothing in this Stipulation shall constitute an admission by any part of the correctness or applicability of any claim, defense, rule or interpretation of law, allegation of fact, principle or method of ratemaking or cost of service determination. It is also agreed that, except as stated herein, the parties shall not be considered as necessarily agreeing with or conceding the applicability of any principle, method of ratemaking, cost of service determination, accounting method, design of rate schedule, terms and conditions of service, or the application of any rules or interpretation of law that may underlie, or may be thought to underlie, this Stipulation. It is further agreed that in any further negotiation or proceeding, other than any proceeding involving the honoring, enforcement or construction of this Stipulation, the parties shall not be bound or prejudiced by this Stipulation.

Dated this 23rd day of June, 1987.

PUBLIC UTILITY DIVISION
OF THE CORPORATION
COMMISSION OF OKLAHOMA

By: Jane P. Olson

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Oklahoma City, OK 73105
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Attorney for Howard W. Motley, Jr., on behalf of the Public Utility Division Staff

SOUTHWESTERN BELL TELEPHONE COMPANY

By: G. Michael Bauer

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Attorney for Southwestern Bell Telephone Company

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF HOWARD W. MOTLEY, JR., FOR AN INQUIRY INTO THE EFFECT OF THE 1986 TAX REFORM ACT ON OKLAHOMA UTILITIES.) CAUSE PUD NO. 000260) ORDER NO. 313853

HEARINGS: June 23, 1986, before the Commission en banc.

APPEARANCES: Jane P. Olson for the Commission Staff, G. Michael Bauer for Southwestern Bell Telephone Company, Robert Butkin for Attorney General Robert Henry.

BY THE COMMISSION:

The Corporation Commission of the State of Oklahoma being regularly in session and the undersigned Commissioners being present and participating, this Cause comes on for hearing.

Procedural History

On October 23, 1986, Applicant filed an application in PUD Cause No. 000260 requesting that the Commission quantify the effect of the 1986 Tax Reform Act on certain public utilities, including Respondent.

Respondent Southwestern Bell Telephone Company (Bell) and the other Respondent utilities participated in a Technical Conference conducted by the Commission Staff on November 10, 1986.

On June 10, 1987, Notice of Setting Hearing on the Rates of SWB was issued.

The Staff and Respondent entered into a Stipulation on June 23, 1987, whereby they agreed that if the Commission ultimately determines that a rate reduction is appropriate for Respondent, that said reduction would be effective as of July 1, 1987, in order to allow the full benefits of the Tax Reform Act to accrue to Respondent's customers.

Summary of Evidence

Dixie Linnenbrink, Manager of the Accounting Department of the Public Utility Division, appeared on behalf of the Commission Staff. Ms. Linnenbrink testified that the 1986 Tax Reform Act reduced the corporate income tax rate to 34% effective July 1, 1987 which equates to a 40% tax rate for the calendar year 1987. Ms. Linnenbrink further testified that the authorized rates of Respondent were based on an

income tax rate of 46%. Ms. Linnenbrink further testified that Staff and Respondent had entered into a Stipulation, wherein they agreed if the Commission ultimately determines a rate reduction is appropriate for the Respondent that the reduction would be effective July 1, 1987, in order to accomplish an effective tax rate of 40% for 1987 and a 34% tax rate prospectively. She further stated that due to the number of utilities being investigated and the limited resources of Staff it would be at least two or three months before Staff could complete an audit and investigation of Respondent's books and records and make a recommendation in this cause. She speculated that a hearing could be held in September or October on Respondent's rates. Ms. Linnenbrink testified that she therefore supported the Stipulation and recommended its adoption by the Commission.

Findings of Fact and Conclusions of Law

Upon full and fair consideration of the evidence and record in this cause, and being well and fully advised in the premises, the Corporation Commission makes the following findings and conclusions:

The Commission has jurisdiction in this Cause by virtue of the provisions of Article IX, Section 18 of the Oklahoma Constitution, 17 Okl. Stat. §131 et seq., and the Corporation Commission Rules and Regulations Governing and Regulating the Operations of Telephone Companies and Telecommunications in Oklahoma.

The Commission finds that the terms of the Stipulation are fair, reasonable and equitable and that it should be adopted. In accordance with the Stipulation, rates ultimately authorized in this case should reflect an income tax rate of 34% as of July 1, 1987, in order to allow the benefits of the 40% income tax rate for 1987 and a 34% tax rate prospectively to flow to the customers of Oklahoma. Therefore, a copy of the Stipulation is attached hereto, marked Attachment A, and incorporated by reference.

ORDER

IT IS THEREFORE THE ORDER OF THE CORPORATION COMMISSION that the Stipulation, attached hereto as Attachment A, be and the same is hereby adopted.

IT IS FURTHER 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.

CORPORATION COMMISSION OF OKLAHOMA

JAMES B. TOWNSEND, Chairman

BOB HOPKINS, Vice Chairman

NORMA EAGLETON, Commissioner

DONE AND PERFORMED this 23 day of JUNE, 1987.

BY ORDER OF THE COMMISSION:

BERDEE S. HOLT, Secretary

BRC:kg

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

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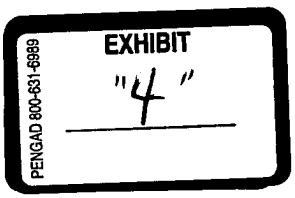
ATTORNEYS FOR RESPONDENT

June 14, 1991



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ADMINISTRATIVE PROCEEDINGS

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.

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[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,

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[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

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[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

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[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.

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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]

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[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.

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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.

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[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

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[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

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[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

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[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

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[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]

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[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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BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

18

IN THE MATTER OF THE APPLICATION OF)
HOWARD W. MOTLEY, JR., FOR AN)
INQUIRY INTO THE RATES AND CHARGES)
OF SOUTHWESTERN BELL TELEPHONE)
COMPANY,)
)
IN THE MATTER OF THE APPLICATION OF)
SOUTHWESTERN BELL TELEPHONE COMPANY)
FOR APPROVAL OF TELESTATE/21,)
A PROPOSAL FOR RATE STABILITY,) PUD-000837
NETWORK MODERNIZATION, AND PRICE) PUD-000662
REGULATION.)

BRIEF IN SUPPORT OF MOTION TO PLACE SOUTHWESTERN BELL TELEPHONE COMPANY'S RATES SUBJECT TO REFUND AND TO COMPEL DISCOVERY

INTRODUCTION

COMES NOW Robert H. Henry, Attorney General of Oklahoma (Attorney General) and respectfully moves that this Commission enter an order 1) placing Southwestern Bell Telephone Company's rates under bond and subject to refund and 2) requiring Bell to respond to all data requests within 20 days of issuance by the Attorney General.

The Attorney General is filing today testimony demonstrating that Southwestern Bell Telephone Company (Bell or SWBT) is currently overearning in excess of $40.2 million a year. Unless Bell's rates are placed subject to refund, Bell will be permitted to enrich itself at the expense of its Oklahoma customers by a sum of at least $3.3 million per month. In addition, if an order cannot issue prior to July 1, 1991--when a $30 million a year annual reserve deficiency charge expires--Bell's overearnings will grow to $70 million a year, approximately $6 million per month.

By placing Bell's rates under bond and subject to refund, this Commission will provide the same protection to utility ratepayers that it provides to utilities in interim rate proceedings. In fact, when the Attorney General's evidence demonstrates that Bell is currently overearning $3.3 million per month, the Commission's failure to place Bell's rates subject to refund will confer a windfall to Bell at the expense of Bell's customers.

Overearning $3.3 million per month, Bell has no incentive, absent a Commission order, to respond to the Attorney General's data requests in a timely fashion, or to expedite this proceeding. As demonstrated below, Bell is taking almost three months on average to respond to our data requests, an unprecedented delay for a utility proceeding in this State. Thus, to further protect Bell's ratepayers from the harm posed by additional delays, we are asking this Commission to issue an order requiring Bell to respond to our data requests within twenty (20) days. In addition, we seek an order (1) requiring Bell to provide copies of certain documents that must be provided under the terms of a non-disclosure agreement executed with the Attorney General; and (2) requiring Bell to respond to certain requests to which it has made unfounded objections. Bell's refusal to provide these copies and responses only compounds the harm to Bell's customers caused by Bell's excessive response time.

Bell's Amended Telestate Plan Still Exposes Oklahomans to Excessive Rates of $40-70 Million Per Year Pending the Completion of Cause PUD 000662.

As this Commission will recall, the Attorney General opposed Bell's initial Telestate application on the grounds that it would freeze rates, and settle "all pending and future rate cases" before correct rates could be established in the first place. Given the dramatic reductions of $2.7 billion nationwide in intrastate phone rates over the last three years, and rate reductions for Southwestern Bell ranging from $30 million a year (Kansas) to $200 million a year (Texas), we advised the Commission not to enter an order freezing rates that might deny Oklahomans an opportunity to participate in these rate reductions. The testimony we present today shows that our concerns were well-founded and that the adoption of Bell's original Telestate proposal would have cost Oklahomans $40 million to $70 million in rate savings.

Bell has filed an amended Telestate proposal which recognizes that rates should be adjusted as a result of the pending Bell rate case in Cause PUD 000662. We appreciate Bell's amendment, but it

does not solve the critical problem addressed in this motion. The pending Bell rate case was filed two years ago. Further delays caused largely by Bell's lag in responding to our data requests could, if not remedied by this Commission, cause additional delays of many months, if not years. When the evidence submitted today shows that Bell is overearning $3.3 million per month, every month of delay will, absent Commission action, cost Oklahomans $3.3 million. Bell's concession that rates can be adjusted sometime in the future as a result of the pending case does nothing to protect the ratepayers from excessive rates prior to the time that an order issues in the case. Accordingly, the Attorney General is requesting that rates be placed subject to refund, effective immediately.

Bell's Pending Telestate Plan Should be Considered in the Rate Design Portion of PUD 000662.

The Attorney General reiterates today his view that the merits of any Telestate-type proposal should be examined in the rate design part of the pending Bell rate case, Cause PUD 000662. In fact, only by a thorough examination of Bell's current and projected future revenue requirements can the public and this Commission know whether Telestate is a good deal. We have publicly urged Bell to upgrade its telecommunications system in our state where economically feasible. Bell does not need a rate freeze to engage in such upgrades, and we would urge the Commission once again to very closely examine any proposal which couples an upgrade program to a freeze of rates at levels that may deprive Bell's customers of future rate savings. In addition, we reiterate our previous position that any order which limits the Commission's jurisdiction to conduct a rate investigation whenever it wishes is unconstitutional. We note that the Texas Public Utility Commission has recently modified a rate order to make clear that the proposal to "freeze" certain rates would be clarified to reflect that Bell would not affirmatively seek rate increases. Final Order in Dockets No. 8585 and 8218, p. 2 (November 29, 1990).

Further, we note with concern that Bell's amended Telestate application still contemplates automatic rate increases, and fails to include any provisions for sharing increased profits resulting from price-cap regulation with Bell's ratepayers. If we are to permit Bell to obtain higher profits, it seems only fair that ratepayers should share in these profits through rate reductions and refunds. Such a sharing provision has been an integral part of the experimental incentive rate programs that have been adopted in other Southwestern Bell states.

For the purpose of the instant motion, however, there is no doubt that ratepayers will benefit by an order placing Bell's rates subject to refund, and requiring Bell to expedite discovery. The relief we seek today will insure that Bell's ratepayers see the benefits of rate savings of $40 to $70 million a year. We would urge this Commission to protect Bell's ratepayers by granting the relief we seek today on an expedited basis. The more difficult issues raised by Telestate can be thoroughly examined in the pending rate case.

I.

IN ORDER TO PROTECT BELL'S RATEPAYERS FROM PAYING EXCESSIVE RATES PENDING THE COMPLETION OF THE PENDING RATE CASE, THE COMMISSION SHOULD ENTER AN ORDER WHICH PLACES BELL'S RATES UNDER BOND AND SUBJECT TO REFUND.

A. Bell is Currently Overearning At Least $40.2 Million a Year

The Attorney General's expert witnesses, Michael Brosch and Michael Ileo, filed testimony today demonstrating that SWBT is currently overearning in excess of $40.2 million a year. The starting point of their revenue requirement analysis is Bell's own "minimum filing requirements" filing showing intrastate results for test year 1989. A.G. Ex. 1, Brosch testimony (hereafter "Brosch"), pp. 12-27; A.G. Ex. 2 (Ileo Testimony).

Due to the unprecedented and unexplained delays in Bell's responses to our data requests, the Attorney General has not been able to provide a completed overview of Bell's current intrastate revenue requirement. For example, Mr. Brosch has not yet

formulated a recommendation as to the appropriate dollar level imputation of a "royalty" payment to Bell's regulated customers for the use of the name "Southwestern Bell Telephone Company". Moreover, the Attorney General has not yet made specific adjustments to Bell's reported affiliate transactions to prevent Bell from unfairly subsidizing its entry into untested competitive ventures with excess revenues from its basic monopoly telephone services. Both these adjustments are authorized in the landmark Oklahoma Supreme Court opinion, Turpen v. Corporation Com'n, 709 P.2d 1309 (Okla. 1989). These adjustments when made will increase Bell's level of overearnings and result in an even greater rate reduction than $40.2 million a year.

B. Bell's Overearnings Will Grow to More than $70 Million After July 1, 1991

Mr. Brosch's testimony demonstrates that Bell is currently overearning $40 million a year. Mr. Brosch also testifies that, upon the expiration of the four-year $30 million a year reserve deficiency amortization on July 1, 1991, Bell's overearnings absent Commission action will grow to greater than $70 million a year.

In Order No. 341630, dated September 20, 1989, this Commission authorized Bell to amortize a $120 million intrastate reserve deficiency over a four-year period beginning July 1, 1987 and expiring July 1, 1991. The annual added charge to the ratepayers is $30 million. Mr. Brosch points out that the company's minimum filing requirements filing failed to reflect the rate impact of the expiration of this charge, as well as the $45 million growth in depreciation reserve resulting from the remaining 1 1/2 years of amortization between December 31, 1989 and June 30, 1991. Brosch, p. 27.

Given the average delay of almost three months in Bell's response to our data requests, and Bell's total failure to respond at all to the 340 data requests that are still outstanding, there is no assurance that a final order setting rates for Bell will

issue in Cause PUD 000662 prior to July 1, 1991. Thus, we face a situation similar to that experienced in Case No. 000260, where, when the Commission realized that it might not be able to issue a final order prior to the effective date of the Tax Reform Act, the Commission placed Bell's rates subject to refund.

C. The Placing of Bell's Rates Subject to Refund is Necessary to Protect Bell's Ratepayers and is an Appropriate Exercise of the Commission's Jurisdiction

This Commission has frequently awarded interim rate increases, when it appears that rate applications will consume a "considerable length of time" and that current rates do not yield a fair return on investment. See e.g., "Application of Kansas Power & Light Co.", Order No. 346303, Cause No. PUD 000708, April 9, 1990 citing Southwestern Bell Telephone Co. v. State, 214 P.2d 715, 718 (1949). No utility has more frequently sought interim rate increases than Southwestern Bell Telephone Company. In fact, the Oklahoma Supreme Court has recognized that in a relatively short time frame of just twenty months, Bell sought interim rate relief on three occasions. Turpen v. Corporation Com'n, 769 P.2d 1309, 1316 (Okl.1989).

Rate regulation in Oklahoma is not just intended to permit a utility to earn a fair return on its investment. This Commission's constitutional duty under Article IX, Section 18 also includes a duty "to prevent a public utility from making excess monopoly profits and to assure fair prices . . . to consumers." Turpen, supra, 769 P.2d at 1316 n. 7. Just as a utility may obtain interim rate relief when regulatory delays put it in a position where it is not earning a fair return on its investment, so interim relief is appropriate when delays permit a utility to obtain excess monopoly revenues at the expense of its ratepayers.

The order we seek would clearly not constitute retroactive ratemaking that is prohibited by Southwestern Public Service Co. v. State, 637 P.2d 92, 102 (1981). In that case, the Commission attempted to reach back to a prior rate order and to correct mistakes made in the determination of rates in that order. Here,

in contrast, we seek an order that has no effect on rates for past use, but places Bell's rates prospectively subject to refund during the pendency of a full rate investigation. In these circumstances, the courts and regulatory commissions have authorized interim rate decreases. Thus, in United Telephone Co. of Florida v. Mann, 403 So. 2d 962 (Fla. 1981), the Supreme Court of Florida upheld an interim rate order placing a telephone utility's rates subject to refund upon a preliminary showing that it was earning excessively, stating:

> Since there is no logical reason for distinguishing between rate increase proceedings and rate decrease proceedings, we find that the Commission is authorized to order interim rate decreases upon finding that a company is earning revenues in excess of its maximum allowable rate of return.

Id. at 966. Accord: Re: Tax Report Act of 1986, Docket No. M-100, 88 PUR 4th 131, 136 (North Carolina Utilities Com'n, November 17, 1987) (not prohibited retroactive ratemaking where Commission issues a prospective order establishing provisional rate reduction to reflect impact of Tax Report Act). More recently, the staff of this Commission has filed an application to place the current rates of a gas utility under bond and subject to refund upon a preliminary finding that the utility is overearning. See "Application. . . For An Adjustment of Rates Charged by Felt Water Development Co. and To Have Its Current Rates Placed Under Bond and Subject to Refund," Cause No. PUD 000997, filed October 30, 1990.

The instant case presents even more compelling reasons for placing Bell's rates subject to refund than are present when utilities normally seek interim rate relief. First, the delays experienced in this case have already exceeded those that have led this Commission to award interim rate increases to utilities in the past. In Order No. 273137, issued February 13, 1985, this Commission approved Bell's request for interim rate relief upon a finding that a hearing on Bell's permanent rate increase application would probably not take place for eleven months. In contrast, twenty months have already passed since the Commission staff commenced this rate proceeding. Second, Bell itself is

largely responsible for creating a situation that requires that their rates be placed subject to refund. Bell has apparently decided to avoid timely responses to our discovery requests. The result is that Bell's customers are denied timely rate reductions of $40 million to $70 million a year.

Third, we emphasize that the requested relief will still not place Bell's Oklahoma customers on a level playing field with the utility. When this Commission authorizes interim rate increases to Bell, it permits the utility to begin immediate collection of higher rates, although subject to refund. In the instant case, we are not asking to have Bell's rates immediately reduced, but placed subject to refund pending the completion of the case. Should we continue to experience the kind of discovery delays we have encountered thus far, however, it may be necessary to seek an actual interim rate reduction.

II.

THE COMMISSION MUST DIRECT BELL TO RESPOND TO THE ATTORNEY GENERAL'S DATA REQUESTS IN A TIMELY FASHION SO AS TO PERMIT THE ATTORNEY GENERAL TO PREPARE HIS CASE AND TO AVOID AN UNJUST ENRICHMENT OF BELL AT THE EXPENSE OF THE RATEPAYERS.

A. Bell's Average Response Time of Two and a Half Months Is Excessive, And The Commission Should Direct Bell to Respond to Data Requests Within Twenty Days.

Southwestern Bell has taken in excess of 78 days, on average, to respond to the Attorney General's data requests. Approximately half of our data requests have gone unanswered by Bell even after the lapse of more than three (3) months. See Attorney General's Data Request Log, Ex. 3. Bell's delays are greater than indicated by this figure, as our log includes only the lag in response time for requests to which Bell has responded, and does not include accrued time on requests for which no response has been provided. When the cumulative lag time on requests for which no response has yet been provided by Bell is considered, the delays are appalling. As of today's date, there are nineteen data requests that Bell has not answered more than six months after their issuance by the

Attorney General. Bell has failed as of today's date to answer 124 data requests that have been outstanding for sixty days or more. Brosch, p. 30.

There are 340 data requests to which Bell has failed to provide any response as of this date. In fact, discovery in this proceeding has ground to a virtual halt, as no response has been received to any data request since October 16th, eleven weeks ago.

These delays are extremely excessive. As Mr. Brosch testifies, his firm encountered initial discovery delays of 35 days in a recent Arizona rate case involving Mountain Bell. Brosch, p. 30. Yet, even the delay of 35 days were considered excessive by the Arizona Commission, which entered an order requiring responses within ten days. Brosch, Appendix B.

In our neighboring states, Southwestern Bell has demonstrated its ability to respond to discovery requests on a more timely basis. In a case involving the reclassification of competitive services before the Missouri Commission, Bell achieved a turn-around time of less than 30 days. Brosch, pp. 31-32. Bell's turnaround time in the recent Tele-Kansas case was approximately 11 days. Brosch, p. 32 and Appendix C (Ostrander Affidavit) And, in a recent Texas rate proceeding, Bell was able to respond to several thousand data requests within 20 days. See A.G. Ex. 4 (Affidavit of L. Cooper, Assistant Public Counsel, Office of Public Utility Counsel.) Bell's average turn around in the instant case is approximately 8 times that experienced in the recent Kansas proceeding, approximately 4 times that experienced in the Texas proceeding, and more than 2 1/2 times the lag experienced in Missouri.

These discovery delays cause serious harm to Bell's ratepayers. As Mr. Brosch testifies:

> The timeliness of SWBT's discovery turnaround is critical to the efficient and effective discharge of the Commission's regulatory oversight responsibilities. SWBT maintains sole possession and control of substantial financial data, operating information and affiliate company documentation relative to its Oklahoma operations. Since there are no alternative sources for the detailed information required during a rate proceeding,

SWBT is uniquely positioned to delay implementation of the rate reductions which are clearly justified.

Brosch, pp.32-33.

The history of Attorney General Request No. 97, which was submitted on April 3, 1990, but not answered until October 10, 1990, more than six months later, illustrates that Bell is not acting to expedite discovery in this case. It is clear from the answer, consisting of four pages of monthly financial reports dated December 1989, that the document existed before the Attorney General's question was even submitted. Bell has not--and cannot--possibly justify delays of months in providing responses that are already in existence. The information sought by the Attorney General is that normally sought in Bell rate cases and many of the requests which have had delayed responses ask only for production of existing documents.

There are currently more than 340 data requests to which no response has been provided by Bell. See Ex. 3 (Attorney General Data Request log). Our past experience demonstrates that the ratepaying public will continue to be disadvantaged by Bell's delays in the absence of an order compelling prompt discovery. Accordingly, the Attorney General requests that this Commission, pursuant to Rule 15, issue an order requiring Bell to respond to all unanswered data requests within 20 days of the date of the order, and to respond to all future data requests within 20 days of the date of the data request.

B. Bell Has Failed To Provide Copies of Documents Required To Be Provided According To The Proprietary and Non-Disclosure Agreement Executed Between Bell And The Attorney General's Witnesses. Accordingly, The Attorney General Requests That This Commission Enter An Order Requiring That Copies Of Such Documents Be Provided To The Attorney General.

The above discussion addressed only the delays in Bell's responses to the Attorney General's data requests. Bell is causing additional delays by (1) failing to provide copies of

certain of these responses as required by the proprietary and non-disclosure agreements executed between the Attorney General, his expert witnesses, and Bell; (2) improperly classifying certain documents as "highly confidential" which should be either unclassified or classified "proprietary"; and (3) refusing to respond to data requests through unfounded objections. These items are discussed in detail below. However, we are also attaching to this brief a summary description of those responses of which Bell has improperly denied copies or improperly refused to answer.

1. Bell has Failed to Provide Copies of Proprietary Information That Must Be Produced Under The Terms Of The Proprietary Agreement.

The Attorney General has retained three expert witnesses, residing in Washington D.C., Lee's Summit, Missouri and Richmond, Virginia. Bell originally insisted on on-site inspection at their Oklahoma City headquarters of all documents deemed "proprietary" or "voluminous" by Bell. This requirement crippled our discovery effort, as our witnesses had to fly to Oklahoma City every time they needed to review a proprietary or voluminous document. Accordingly, the Attorney General initiated discussions with Bell that resulted in the execution of a Proprietary and Non-Disclosure Agreement. Under this agreement, copies of responses properly designated as "proprietary" must be made available to the Attorney General and to the expert witnesses who have executed the agreement. Copies of voluminous documents must also be provided if the Attorney General is willing to pay the reasonable copying expenses. See A.G. Ex. 5 (Proprietary Agreement executed by Bell, Attorney General and Mike Brosch).

In Attorney General Data Requests 226-243, submitted on June 21, 1990, the Attorney General requested copies of SWBT's Oklahoma trial balance by FCC account for the months of January 1989 through June 1990. Bell's response to each of these, included as Ex. 6, designates the information as voluminous and proprietary and attempts to limit access to on-site review at Bell's Oklahoma

City premises[1]. Since the proprietary agreement requires that copies of such information be provided, the only possible basis for restricting access to Bell's premises is the designation of these documents as "voluminous." On October 25, 1990, the Attorney General notified Bell by letter of his agreement to pay the reasonable copying fee for these documents. See A.G. Ex. 7. Now, more than two months later, no response has been received to our letter, nor has Bell provided copies of these documents as required by the Proprietary Agreement.

Similarly, Bell's responses to the Attorney General's Data Request No. 261 denied a request for a copy of the Oklahoma Monthly Report No. 14, for the months of December 1988 and January through November, 1989, on the grounds that said information was "proprietary". A.G. Ex. 6. However, the report for the month of December 1989 was stamped "proprietary" and provided to Mike Brosch as required by the proprietary agreement. Bell has failed to provide copies of a number of additional "proprietary" responses, including Attorney General Request No. 11 (Oklahoma business plans), Nos. 32 and 60 (management audit reports), No. 84 (SWBT/SWB goals and objectives), No. 91 (volume of business statistics).[2]

The Attorney General moves for an immediate order requiring that copies be provided to him of responses to Data Requests 226-243, 261, 11, 32, 60, 84 and 91 and all other "proprietary" responses as required by the proprietary and non-disclosure agreements. In addition, the Attorney General requests an order requiring that copies of any responses to pending or future data requests, properly classified as "proprietary", be also provided to the Attorney General, pursuant to the Proprietary Agreement.

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[1] Copies of Bell's responses to all other data requests that are the subject of this Motion to Compel are also included in Ex. 6.

[2] In the event that any of these responses are properly classified as "voluminous", the Attorney General hereby notifies Bell of his willingness to pay the reasonable copying costs, pursuant to the terms of the proprietary agreement.

2. Bell has Improperly Classified Certain Information as Highly Confidential

Under the terms of the proprietary agreement, Bell may restrict access to its premises of information properly classified as "highly confidential." Highly confidential information, however, is limited to information which is "customer specific, employee-specific, or employee sensitive," and to a narrow class of proprietary data which, if exposed, could expose Bell to an "unreasonable risk of harm". ¶ 3, Ex. 5. Because of the public policy that discovery be expedited and that information not be withheld from public scrutiny, the agreement places the burden on Bell of justifying its "highly confidential" designation upon challenge by the Attorney General. ¶ 9, Ex. 5.

The Attorney General contends that a number of data requests do not properly fall within the definition of "highly confidential." These include Attorney General Data Request Nos. 160-162, which sought Oklahoma intrastate operating results for 1989 and 1990. See A.G. Ex. 6. These reports form the starting point for the 1989 unadjusted test year levels reflected in Bell's Minimum Standard Filing Requirements filing and "represent the only readily available source for intrastate income tax calculations." Further, copies of the same intrastate operating results are routinely provided in other cases. Brosch, pp 41-42.

The Attorney General submits that these responses do not contain customer or employee-specific or sensitive information, and even if proprietary, do not pose an unreasonable risk of harm if disclosed. Accordingly, the Attorney General requests that the hearing officer issue an order unclassifying these documents or, alternatively, that they be reclassified as "proprietary", such that copies can be provided to the Attorney General and his expert witnesses.

C. Bell Has Improperly Objected To The Production Of Certain Documents That Must Be Produced Under Commission Rules.

In addition to improperly restricting access to "proprietary" documents, Bell has outright failed to answer certain Attorney

General requests on the proffered grounds that they were irrelevant or constituted attorney work product. None of these objections has merit, and the Attorney General requests that the Commission enter an order requiring production of these documents.

The Commission Rules provide for discovery of documents not privileged which "constitute evidence relevant to the subject matter of the case, or may reasonably lead to such evidence." OCCRP Rule 15(b). Thus, the Commission provides for the same broad discovery as that provided by the Legislature in the Civil Procedure Code. See 12 O.S. Supp. 1990, § 3226 (not grounds for objection if evidence is inadmissible at trial providing it appears reasonably calculated to lead to the discovery of admissible evidence).

1. Bell Improperly Objected to Data Request No. 22

Attorney General Data Request No. 22 was issued to Bell April 3, 1990, nine months ago. This requested copies of the most recent legal representation letters or reports provided for the Company's financial auditors by the Company. This information enables the Attorney General's expert witnesses to examine potential legal liabilities and make appropriate adjustments to test year operating results based on those potential liabilities. Brosch, p. 35. Bell does not question the relevance of this information. However, the response provided only a listing of the letters for the period 1989 to date, and did not include a text of those responses. See Ex. 6. Bell objects to the disclosure of its legal representation letters on the grounds that such letters constitute attorney work product.

The Commission Rules do not contain a discovery exception for attorney work product. But under the case law interpreting this limited privilege under the civil discovery code, it is clear that the requested letters do not constitute attorney work product. To qualify as work product, a document must be prepared in anticipation of litigation or for trial. 12 O.S. Supp. 1990, § 3226. In Hall v. Goodwin, 725 P.2d 291 (Okl. 1989), the

Oklahoma Supreme Court held that documents prepared by an in-house attorney in the regular course of his business--and not in anticipation of a specific law suit--did not qualify as work product. A review of Bell's responses indicates that the requested information consists of periodic, quarterly reports of significant pending litigation and proceedings provided by Bell to its outside financial auditors. Moreover, the documents are not prepared to assist Bell to prepare for litigation, but rather to assist its outside auditors in determining whether to footnote or otherwise qualify Bell's financial reports.

Finally, even if Bell's legal representation letters were deemed work product, the Attorney General is still entitled to their production. When applicable, the work product privilege is a limited privilege only. Discovery must be provided upon a showing of inability "without undue hardship to obtain the requested information by any other means." 12 O.S. Supp. 1990, § 3226. In the instant case, there are no alternative means by which the Attorney General can obtain the information requested in Data Request No. 22.

2. Bell Has Improperly Objected to Data Request No. 50

Data Request No. 50 was also issued April 3, 1990. There, the Attorney General sought all budget variance reports or other reports which calculate or explain variances between actual operations and budget levels. Such information assists in determining the reasons for fluctuations in monthly operating results, and may provide a basis for necessary adjustments to reported operating reports to account for one-time or unusual occurrences. After initially objecting to the production of this information as "vague and irrelevant", Bell provided a copy of a report on September 14, 1990, which presented a purely numerical comparison of actual and budget results for January 1989 through July 1990, without any textual explanation. Brosch, pp. 36-37.

This purely numerical data does not provide an adequate response to Data Request No. 50. In order to analyze this information, the Attorney General must be provided an explanation for these variances. We have been informed that such information exists. While it was requested from Bell on April 4, 1990--nine months ago--it has not yet been provided.

3. Bell has Improperly Objected to Data Request No. 51

Attorney General Data Request No. 51, issued to Bell on April 3, 1990, sought identification of company personnel whose responsibilities include lobbying efforts. Bell has objected on the grounds that its pre-filed adjustment No. 7 is thought by Bell to completely eliminate lobbying costs from its 1989 revenue requirements. Ex. 6 .

The information sought in Request No. 51 is clearly relevant to the determination of the appropriate exclusion of lobbying expenses. Mr. Brosch testifies: "Without data responses we are unable to test the Company's adjustment. . . The definition of lobbying is at issue in this proceeding and may be quite different within the SWBT adjustment that in the adjustment based upon a broader investigation of the Company's external/public affairs activities." Brosch, p. 37.

4. Bell Should Be Required Immediately to Respond to Data Requests Nos. 22, 50 and 51

More than six (6) months have passed since the Attorney General submitted Data Requests 22, 50 and 51 to Bell. Bell's objections are without merit, and the Attorney General requests that the Commission issue an order requiring Bell promptly to respond to these data requests.

CONCLUSION

In view of the foregoing, the Attorney General requests that the Commission issue an order:

(1) Placing Bell's rates subject to refund, effective with the date of the order;

(2) Requiring Bell to respond to all pending and future data requests within twenty days;

(3) Requiring Bell immediately to provide copies to the Attorney General of its responses to data request nos. 11, 32, 60, 84, 91, 226-243 and 261, as required by the non-disclosure agreement executed by Bell and the Attorney General; and to provide copies of all other responses which Bell properly classifies as "proprietary" as required by that same agreement;

(4) Unclassifying Bell's responses to data request nos. 160-162; or, alternatively, reclassifying these responses as "proprietary", and requiring Bell to provide copies of these responses to the Attorney General;

(5) Requiring Bell to respond to data request nos. 22, 50 and 51, as Bell has filed unfounded objections to those requests.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL

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