

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICANTS: HONORABLE SODY CLEMENTS,)
an Individual and Oklahoma Resident on behalf of)
herself and others similarly situated; LT. GENERAL)
(Ret.) RICHARD A. BURPEE, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated; JAMES PROCTOR, an Individual and)
Kansas Resident on behalf of himself and others)
similarly situated; RODD A. MOESEL, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated; RAY H. POTTS, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated; BOB A. RICKS, an Individual and)
Oklahoma Resident on behalf of himself and others)
similarly situated.)

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

CAUSE NO. PUD 201500344

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OF OKLAHOMA

Bob

Dissenting Opinion of Corporation Commissioner Bob Anthony – Part 2

Majority Finding the Bribed Order “Fully Satisfied” other Legal Provisions is Absurd

It is one thing to leave alone the result of an old, bribed, remanded PUD 260 rate order. However, it is beyond belief (and an affront to justice) that today’s Corporation Commissioners now go further and try to attribute an expanded applicability and validity to that tainted PUD 260 Order that was actually derived from criminal activity. The Majority now declares the Bribed 260 Order “fully satisfied” the legal provisions of the June 23, 1987 Stipulation that was signed by Southwestern Bell and adopted by Commission Order No. 313853 (SWB Stipulation Order). No testimony, no witnesses, no argument, no rate hearing and no specific notice was given for this contrivance that a bribed order “fully satisfied” a stipulated legal agreement.

Remember, the first paragraph of the Order Dismissing Cause says “consideration and action” regarding Motions to Dismiss by Southwestern Bell and the Attorney General. Those two Motions do not mention the Stipulation even once. They do repeatedly mention alleged “lack of jurisdiction.” The Motions do not ask the Commission to postulate some new feature of legitimacy for the Bribed PUD 260 Order. I must dissent when, in this fashion, the Majority embraces the Bribed PUD 260 Order and its criminal nature. This is truly abhorrent.

Interim Rates and Refund Stipulations are not Retroactive Ratemaking

The Order Dismissing Cause was issued on September 7, 2016 with my Dissent and given Number 655899. In my opinion the Majority incorrectly finds “the Cause 260 Stipulation was fully satisfied” and the relief sought by Applicants “would result in prohibited retroactive ratemaking.” On page 16 their Order states,

Because the Cause 260 Stipulation was fully satisfied, Applicants' efforts to bring a new proceeding to circumvent the legislative nature of these proceedings and turn this action into a judicial proceeding—by addressing past facts under the laws in existence during the Cause 260 Cause, simply cannot stand. *See Southwestern Bell Telephone Co.* 1994 OK 38 at ¶j 10-11, 873 P.2d at 1005. To allow such treatment would result in prohibited retroactive ratemaking and inappropriately subject this *legislative* case to continuous review and impermissible collateral attack.

Included herewith [Attachment (1), Exhibit 2] is the June 14, 1991 Amended Response of Corporation Commission in Case No. 77,521 (*SWB v. OCC*) filed at the Oklahoma Supreme Court, and prepared and argued by Scott Hempling, a nationally recognized utility attorney expert and author. It clearly establishes that Interim Rates and Refund Stipulations are not Retroactive Ratemaking. A reading of the Scott Hempling legal analysis shows Cause No. PUD 201500344 (PUD 344) is not seeking retroactive ratemaking.

Positions taken in this cause by the Majority through Order No. 655899 – that the Application in PUD 344 amounts to retroactive ratemaking or is a collateral attack on the Commission’s June 26, 1997 Order on Remand, Order No. 413667 (Remand Order), issued in Cause No. PUD 860000260 (SWB PUD 260 or PUD 260) – are unfounded. Further, those positions are inconsistent with Commission orders and other pleadings entered in SWB PUD 260, PUD 260 cases related to other jurisdictional utilities, and Cause No. PUD 890000662 (PUD 662), and rulings of the Oklahoma Supreme Court (Supreme Court).

Affidavits of James Proctor, former Director of Commission’s Public Utility Division

The relevant orders and pleadings referenced above are discussed in detail in the three attached sworn Affidavits filed by James Proctor in the record of PUD 344. Mr. Proctor was the Director of the Oklahoma Corporation Commission’s Public Utility Division from 1990 to 1993. As such he has extensive knowledge of and had involvement in SWB PUD 260, PUD 662 and PUD 260, generally.

The errors in the Bribed PUD 260 Order are significant, but since the Commission’s June 23, 1987 Order No. 313853 (SWB Stipulation Order) placed SWB’s rates subject to refund (with the consent of SWB) until SWB PUD 260 is ultimately determined with a final SWB PUD 260 order, the SWB Stipulation Order provides the Commission with the necessary mechanism and opportunity to correct the errors in the Bribed PUD 260 Order. Remember, the Commission has an Article 9, Section 18 constitutional duty to “correct abuses” by transmission companies, and we should take to the opportunity to do so whenever possible.

Based on a reading of it, the SWB Stipulation Order requires excess revenues to be refunded to SWB's customers rather than invested in its telecommunication infrastructure. The Bribe Order did not enforce Order No. 313853's requirement to refund excess revenues to SWB's ratepayers. In that regard the Bribe Order amounted to a collateral attack on "or disregard of" the Commission's prior Order No. 313853, the SWB Stipulation Order.

The Commission's 1997 Remand Order contains fundamental flaws, and rather than closing the case forever as it purports to do, the Remand Order constitutes a further violation of due process for SWB's ratepayers and the State of Oklahoma. The Commission's Order Directing Administrative Law Judge to Conduct Hearing, Order No. 412680, unjustly limited the issues to be resolved in the PUD 260 case to the four issues remanded in the Supreme Court's *Henry* decision, Order No. 74,194. Those four issues remanded to the Commission by the Supreme Court's *Henry* decision included: (1) the Commission's decision to upgrade certain central offices was not supported by substantial evidence; (2) the Commission's finding of a depreciation reserve deficiency lacked substantial evidence support; (3) the Commission should have considered SWB's severance pay expenses; and (4) the Commission miscalculated SWB's cash working capital.

The Remand Order did not consider: (1) whether the PUD 260 Order was tainted and should be vacated due to SWB's use of fraudulent actions to influence the Commission's decision in the PUD 260 case; (2) whether SWB's excess revenues were calculated correctly and accurately in the Commission's Bribe Order; or (3) whether the SWB Stipulation Order required the Commission's PUD 260 Order to compel SWB's excess revenues be refunded to Oklahoma ratepayers.

The Disposition of the Supreme Court's *Henry* decision was stated in its Order No. 74,194 issued December 24, 1991 as: "Affirmed in part and reversed in part; Cause remanded for further proceedings not inconsistent with this pronouncement". The three issues above were not addressed or ruled upon by the Supreme Court in the *Henry* decision because none of these issues were raised on appeal by parties to the SWB PUD 260 case. The Supreme Court ruled on the limited set of issues brought before it on appeal and then remanded the case to the Commission for further action. These three issues must be resolved by the Commission in PUD 344.

Please see the following attachments:

- (1) Affidavit of James M. Proctor (sworn November 23, 2015), including:
 - a. "Exhibit 2" – Commission's Response Brief, Amended Response of Oklahoma Corporation Commission filed June 14, 1991 in Oklahoma Supreme Court Case No. 77,521 (*Southwestern Bell v. Oklahoma Corporation Commission*);

- (2) Second Supplemental Affidavit of James M. Proctor (sworn January 20, 2016), including:
 - a. "Exhibit 5" – Robert H. Henry, Attorney General of Oklahoma's Brief In Support Of Motion To Place Southwestern Bell Telephone Company's Rates Subject To

Refund And To Compel Discovery filed January 9, 1991 in SBTC PUD 662;

- (3) Third Supplemental Affidavit of James M. Proctor (sworn February 23, 2016), including:
 - a. “Exhibit 3” – Attorney General Loving’s Attorney General’s Opposition to Southwestern Bell Telephone Company’s Motion to “Strike” Commission Order No. 356271, and Testimony and Exhibits Relating to Refunds and Motion in Limine filed September 17, 1991 in SBTC PUD 662.

September 9, 2016

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

AFFIDAVIT OF JAMES M. PROCTOR

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

INRODUCTION AND SUMMARY

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

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

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

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

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

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXCESS REVENUES MUST BE REDETERMINED

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

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

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

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

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

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

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

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

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

order.

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

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

and 40.

EXCESS REVENUES SHOULD BE REFUNDED

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

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

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

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

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

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

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

REFUNDING EXCESS REVENUES IS NOT IMPERMISSABLE RETROACTIVE RATEMAKING

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

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

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

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

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

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

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

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

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

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

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

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

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

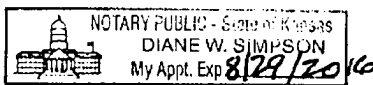
46. Attorney General Henry argued in his PUD 662 Oklahoma Supreme Court Brief that the Commission may upon its own initiative take steps to place SBTC's rates subject to refund. Clearly, SBTC voluntarily agreed to allow their rates to be subject to refund pursuant to the Stipulation it signed. Such Stipulation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

FURTHER AFFIANT SAYETH NAUGHT!

James M. Proctor
James M. Proctor

State of Kansas)
) ss
Douglas County)

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



Diane W. Simpson
Notary Public

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

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

FILED
OCT 02 2015

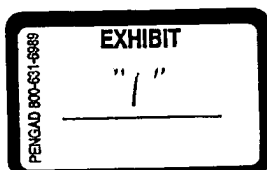
COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

NOTICE OF HEARING

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

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

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



PUD 201500344
Notice

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

J. Todd Hiatt

J. TODD HIATT, 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; I.T. GENERAL) CAUSE NO. PUD 201500344
(Ret.) RICHARD A. BURPEE, an individual and)
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similarly situated; JAMES PROCTOR, an Individual and)
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similarly situated; RODD A. MOESEL, an Individual and)
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RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA)
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CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
FOLLOWING INTRINSIC FRAUD)

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

NOTICE OF HEARING

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

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

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

PUB 001500344
Notice

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony
BOB ANTHONY, Chairman

Dana L. Murphy
DANA L. MURPHY, Vice Chairman

J. Todd Hiatt
J. TODD HIATT, Commissioner

DONE AND PERFORMED THIS 2 DAY OF October, 2015.

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)
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 Oklahoma Resident on behalf of himself and others)
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 RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA)
 CORPARTION COMMISSION ORDER NO. 341630)
 CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
 FOLLOWING INTRINSIC FRAUD)

FILED
 OCT 02 2015

COURT CLERK'S OFFICE - OKC
 CORPORATION COMMISSION
 OF OKLAHOMA

CAUSE NO. PUD 201500344


NOTICE OF HEARING

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

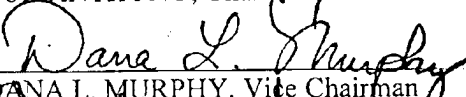
NOTICE IS FURTHER GIVEN that this Motion shall be set for hearing before the Administrative Law Judge on the **3rd day of November, 2015, at 10:00a.m.**, Courtroom 301, Third Floor, Jim Thorpe Building, 2101 N. Lincoln Boulevard, Oklahoma City, OK 73105.

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

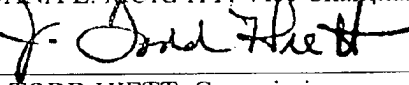
CORPORATION COMMISSION OF OKLAHOMA



 BOB ANTHONY, Chairman



 DANA L. MURPHY, Vice Chairman

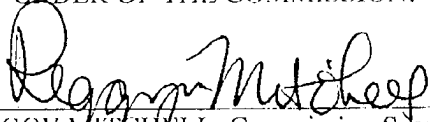


 J. TODD HIETT, Commissioner

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

FILED
OCT 02 2015

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

CAUSE NO. PUD 201500344

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Attorney General of the State of Oklahoma, E. Scott Pruitt, has filed a Motion 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 201500344
Notice

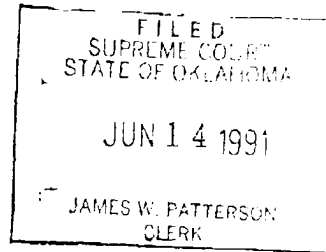
DONE AND PERFORMED THIS 2 day of October, 2015.

BY ORDER OF THE COMMISSION:



PEGGY MITCHELL, Commission Secretary

CASE NO. 77,521



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

AMENDED RESPONSE OF OKLAHOMA CORPORATION COMMISSION

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

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

ATTORNEYS FOR RESPONDENT

June 14, 1991

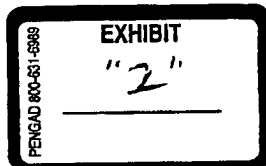


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ADMINISTRATIVE PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The Order Was Not Retroactive Rate-making

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

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

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

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

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

¹¹ Turpen supra, 769 P.2d at 1332.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

CONCLUSION

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

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



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

CERTIFICATE OF MAILING

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

Andrew M. Coats
Crowe & Dunlevy
A Professional Corporation
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Robert Butkin
Assistant Attorney General
112 State Capitol Building
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Glen A. Glass
George Makohin
Southwestern Bell Telephone Company
One Bell Central
800 North Harvey
Oklahoma City, Oklahoma 73102



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.

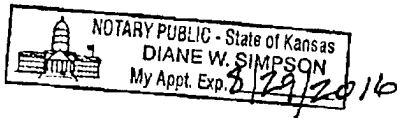
30. Clearly, in the SBTC PUD 260 case, SBTC voluntarily agreed to allow their rates to be subject to refund pursuant to the SBTC Stipulation it signed. The SBTC Stipulation was adopted by the Commission in the SBTC Stipulation Order. Surely, if the Commission can, upon its own initiative, take steps 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.



Diane W. Simpson
Notary Public

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

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

FILED
OCT 02 2015

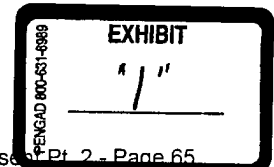
COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

NOTICE OF HEARING

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

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

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



PUD 201500344
Notice

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

J. Todd Hiatt

J. TODD HIATT, 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) CAUSE NO. PUD 201500344
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similarly situated; JAMES PROCTOR, an Individual and)
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RELIEF SOUGHT: VACATE OR MODIFY OKLAHOMA)
CORPORATION COMMISSION ORDER NO. 341630)
CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
FOLLOWING INTRINSIC FRAUD)

FILED
OCT 02 2015

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

NOTICE OF HEARING

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

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

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

PUB 201500344
Notice

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

J. Todd 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; I.T. GENERAL)
 (Ret). RICHARD A. BURPEE, an Individual and)
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 CORPORATION COMMISSION ORDER NO. 341630)
 CAUSE NO. PUD 260; AND REDETERMINE ISSUES)
 FOLLOWING INTRINSIC FRAUD)

FILED
OCT 19 2015

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

CAUSE NO. PUD 201500344

NOTICE OF HEARING

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

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

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

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

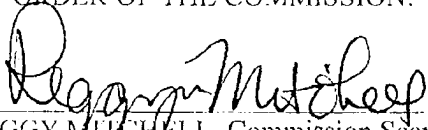
J. Todd Hiatt

J. TODD HIETT, Commissioner

PUD 201500344
Notice of Hearing

DONE AND PERFORMED THIS 2 day of October, 2015.

BY ORDER OF THE COMMISSION:



PEGGY MITCHELL, Commission Secretary

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

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

FILED
OCT 02 2015

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

CAUSE NO. PUD 201500344

NOTICE OF HEARING

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

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

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

CORPORATION COMMISSION OF OKLAHOMA

Bob Anthony

BOB ANTHONY, Chairman

Dana L. Murphy

DANA L. MURPHY, Vice Chairman

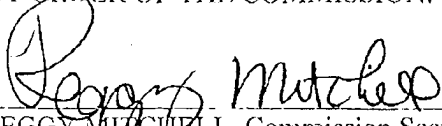
J. Todd Hiatt

J. TODD HIETT, Commissioner

PUD 201500344
Notice

DONE AND PERFORMED THIS 2 day of October, 2015.

BY ORDER OF THE COMMISSION:



PEGGY MITCHELL, Commission Secretary

FILED

JUN 23 1987

SECRETARY
CORPORATION COMMISSION
OF OKLAHOMA

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.

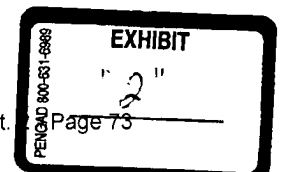
2. Applicant filed an application herein requesting that the Commission quantify the effect of the 1986 Tax Reform Act on certain public utilities, including Respondent.

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

Anthony Dissent Pt.



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

SOUTHWESTERN BELL TELEPHONE COMPANY

By: Jane P. Olson

Jane P. Olson
400 Jim Thorpe Building
Oklahoma City, OK 73105
405/521-2255

By: G. Michael Bauer

G. Michael Bauer
800 North Harvey, Room 310
Oklahoma City, OK 73102
405/236-6754

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

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) CAUSE PUD NO. 000260
INQUIRY INTO THE EFFECT OF THE 1986)
TAX REFORM ACT ON OKLAHOMA UTILITIES.) ORDER NO. 313853

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

rel.
gso

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.

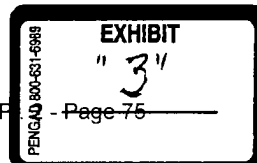
Respondent Southwestern Bell Telephone Company (Bell) and the other Respondent utilities participated in a Technical Conference conducted by the Commission Staff on November 10, 1986.

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. Limenbrink 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. Limenbrink 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

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUN 14 1991
JAMES W. PATTERSON
CLERK

CASE NO. 77,521

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

AMENDED RESPONSE OF OKLAHOMA CORPORATION COMMISSION

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

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

ATTORNEYS FOR RESPONDENT

June 14, 1991

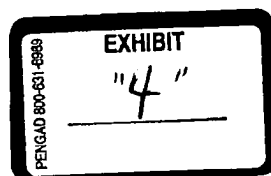


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ADMINISTRATIVE PROCEEDINGS

Corporation Commission Order No. 292337 in Cause No. 29321 (Jan. 29, 1986) 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The Order Was Not Retroactive Ratemaking

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

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

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

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

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

¹¹ Turpen supra, 769 P.2d at 1332.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

CONCLUSION

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

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



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

CERTIFICATE OF MAILING

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

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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,)
NETWORK MODERNIZATION, AND PRICE)
REGULATION.)

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PUD-000837

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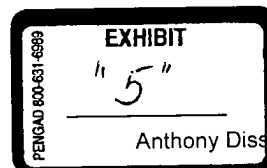
BRIEF IN SUPPORT OF MOTION TO PLACE SOUTHWESTERN BELL
TELEPHONE COMPANY'S RATES SUBJECT TO REFUND
AND TO COMPEL DISCOVERY

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 (Okla.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 premises¹. 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.

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



ROBERT A. BUTKIN, OBA #10042
ASSISTANT ATTORNEY GENERAL

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CERTIFICATE OF MAILING

On this ^{10th} ~~8~~ day of January, 1991, a true and correct copy of the foregoing was mailed to:

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ROBERT A. BUTKIN

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.)

THIRD 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.

INTRODUCTION

1. This third (supplemental) affidavit is submitted by the Applicants in Cause No. PUD 201500344 (“PUD 344”) in order to provide the Oklahoma Corporation Commission (“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.

2. From 1990 to 1993, I served as the Director of the Commission's Public Utility Division. 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.

3. In this affidavit, I demonstrate how, in contrast to the earlier positions taken by Robert H. Henry, Attorney General of Oklahoma ("Attorney General Henry") and Susan Brimer Loving, Attorney General of Oklahoma ("Attorney General Loving") in the PUD 662 case, E. Scott Pruitt, Attorney General of Oklahoma ("Attorney General Pruitt") takes the side of SBTC in PUD 344, contradicting prior arguments of Attorney General Henry and Attorney General Loving. Paradoxically, the positions taken by Attorney General Pruitt in PUD 344 are instead consistent with arguments made by SBTC in PUD 662 – arguments Attorney General Loving described as "frivolous, and must be dismissed" and that the Commission itself has already rejected.

4. Also in this affidavit, I detail the troubled procedural history of the Commission's June 26, 1997 Order on Remand, Order No. 413667 ("Remand Order"), issued in the SBTC PUD 260 case in response to the Oklahoma Supreme Court's December 24, 1991 Order No. 74,194 ("Henry Decision") regarding the appeals in Commission Order No. 341630 ("SBTC PUD 260 Order"). I also detail the fundamental flaws in the Remand Order and demonstrate how, rather than closing the case forever as it purports to do, the Remand Order constitutes a further violation of due process for SBTC's ratepayers

and the State of Oklahoma.

5. Further, in this affidavit, I demonstrate that the Commission already has jurisdiction to vacate or modify the bribed SBTC PUD 260 Order. The Disposition of the Oklahoma Supreme Court's Henry Decision, "Affirmed in part and reversed in part; **Cause remanded for further proceedings not inconsistent with this pronouncement,**" (Emphasis Added) clearly gives the Commission the authority to correct errors in the SBTC PUD 260 Order beyond the four issues specifically remanded, as long as those corrections are not inconsistent with the Henry Decision. The errors in the SBTC PUD 260 Order are significant, but since the Commission's June 23, 1987 Order No. 313853 ("SBTC Stipulation Order") placed SBTC's rates subject to refund until SBTC PUD 260 is ultimately determined with a final SBTC PUD 260 order, the SBTC Stipulation Order provides the Commission with the necessary mechanism to correct the errors in the SBTC PUD 260 Order.

6. The original (bribed) 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. Thus (as sought by this Application, PUD 344) the Commission should vacate the bribed SBTC PUD 260 Order, re-determine the SBTC PUD 260 matter, and issue a valid and untainted order in the SBTC PUD 260 case, finally granting SBTC's Oklahoma ratepayers the due process and potentially significant refunds denied them for more than 25 years.

BACKGROUND

7. On September 20, 1989 in a 2 – 1 vote, the Commission issued Order No. 341630 ostensibly resolving the issue of SBTC's excess revenues resulting from the Tax Reform Act of 1986 ("Tax Act")

as investigated in SBTC PUD 260, though at the same time ignoring the Commission's own Order No. 313853, the SBTC Stipulation Order, requiring the refund of said excess revenues to ratepayers. Aspects of the decision were immediately appealed to the Supreme Court of Oklahoma ("Supreme Court").

8. On December 24, 1991, the Supreme Court issued its decision regarding the appealed SBTC PUD 260 Order, Order No. 74,194 – the Henry Decision. SBTC, Attorney General Henry and the American Association of Retired Persons ("AARP") had all appealed certain findings of the SBTC PUD 260 Order to the Supreme Court. The Supreme Court's Henry Decision resolved the issues raised in the appeals of SBTC, Attorney General Henry and AARP.

9. The Disposition of the Supreme Court's Henry Decision was stated in its Order No. 74,194 issued December 24, 1991 as: "Affirmed in part and reversed in part; **Cause remanded for further proceedings not inconsistent with this pronouncement.**" (Emphasis Added)

10. The first paragraph of the Supreme Court's Henry Decision enumerated a concise list of issues to be resolved by the Supreme Court for the appealed SBTC PUD 260 Order. The Supreme Court's list of issues to be resolved did not include: (1) whether the SBTC PUD 260 Order was tainted and should be vacated due to SBTC's use of fraudulent actions to influence the Commission's decision in the SBTC PUD 260 case; (2) whether SBTC's excess revenues were calculated correctly and accurately in the Commission's SBTC PUD 260 Order; or (3) whether the SBTC Stipulation Order required the Commission's SBTC PUD 260 Order to compel SBTC's excess revenues be refunded to Oklahoma ratepayers. These three issues were not resolved by the Supreme Court because none of these issues were raised on appeal by parties to the SBTC PUD 260 case.

Tainted SBTC PUD 260 Order

11. The SBTC PUD 260 Order was voted for and signed by Commission Vice Chairman Bob Hopkins and Commissioner James B. Townsend. Commission Chairman Bob Anthony dissented and voted against the SBTC PUD 260 Order. Therefore, when the SBTC PUD 260 Order was issued on September 20, 1989, it was believed to have been decided by a valid 2 – 1 vote, and, thus, met the Oklahoma Constitution's requirement for a Commission majority.

12. However, on February 14, 1996 the United States Court of Appeals for the Tenth Circuit in Denver, Colorado, upheld a ruling convicting Bob Hopkins of receiving a bribe from SBTC attorney William Anderson related to his vote on the SBTC PUD 260 Order. (William Anderson never appealed to the Tenth Circuit his conviction by the United States District Court for the Western District of Oklahoma, CR-93-137-A.) The Tenth Circuit ruling upheld a decision by the United States District Court for the Western District of Oklahoma, CR-93-137-A (filed February 24, 1995).

13. As of February 14, 1996 Bob Hopkins's vote was proven tainted and should be considered void due to the Tenth Circuit ruling. On that date, the SBTC PUD 260 Order was known by the Commission and the parties to the SBTC PUD 260 case not to have been decided by the Oklahoma Constitution's required Commission majority and, therefore, the SBTC PUD 260 Order was invalid.

14. It is easy to understand why the Supreme Court's enumerated list of issues to be resolved in the Henry Decision did not include whether the SBTC PUD 260 Order was tainted and should be vacated. When Attorney General Henry and AARP considered and filed their appeals to the SBTC PUD 260 Order, they simply did not have knowledge that the SBTC PUD 260 decision was tainted by the fraudulent actions of SBTC and Commissioner Hopkins. That is, the aggrieved parties did not have sufficient information to contest the Commission's SBTC PUD 260 decision on the ground that it did

not meet the Oklahoma Constitution's requirement for a Commission majority. Hence, the appeals filed by the Attorney General Henry and AARP did not include this issue. Other parties to the SBTC PUD 260 matter may have likewise filed appeals had they known of the fraudulent actions of SBTC.

Recalculation of SBTC's Excess Revenues

15. Similarly, the Supreme Court's enumerated list of issues to be resolved for the appealed SBTC PUD 260 Order did not include whether SBTC's excess revenues, in the aggregate, were accurately and correctly calculated by the Commission in its tainted SBTC PUD 260 Order. In my November 25, 2015 affidavit in PUD 344, I explain how SBTC's excess revenues were misestimated as adopted in the Commission's SBTC PUD 260 Order.

16. Additionally, the Supreme Court made no ruling as to whether or not the SBTC Stipulation Order provided legal authority for the Commission to require SBTC to refund its accumulated excess revenues. The Supreme Court never considered whether refunds of SBTC's excess revenues were required pursuant to the SBTC Stipulation Order because that argument was never made and, therefore, was not an issue to be resolved.

17. In the affidavits that I filed on November 25, 2015 and January 22, 2016, I debunked the written and oral arguments previously made in PUD 344 by SBTC and Attorney General Pruitt that the Commission has no legal authority to require excess revenues be refunded to SBTC's ratepayers, and 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 after July 1, 1987 flows from the SBTC Stipulation Order.

CHRISTMAS EVE 1991

18. On the afternoon of December 24, 1991 I was sitting in my office at the Commission preparing to leave for the Christmas holiday when one of my secretaries brought to me a document delivered from the Supreme Court. The document was the Henry Decision. I had become the Director of the Commission's Public Utility Division in November 1990 approximately one year after the SBTC PUD 260 Order was appealed to the Supreme Court. Until that Christmas Eve, my involvement in the SBTC PUD 260 matter and the appealed Commission decision rendered in the SBTC PUD 260 Order was limited.

19. That said, I had substantial experience in reviewing the impact of the Tax Act on Kansas and Oklahoma utilities' revenue requirements. My experience in Kansas reviewing the impact of the Tax Act on utilities' regulated earnings occurred prior to my becoming the Director of the Commission's Public Utility Division. In Kansas my work regarding the Tax Act was completed while serving as the Chief of Accounting and Financial Analysis for the Kansas Corporation Commission. My familiarity with the SBTC PUD 260 matter was not extensive even though I had been working on other PUD 260 audits and related matters for various Oklahoma utilities since November 1990. So, I began reading the Henry Decision to bolster my knowledge of the SBTC PUD 260 case.

20. While reading the Henry Decision, I became frustrated with some of the information discussed in the order: First, that the Henry Decision indicated the Commission's SBTC PUD 260 Order found the changes in the tax law under the Tax Act enabled SBTC to accumulate only \$30,677,167 in excess revenues between January 1, 1987 and September 30, 1989. More specifically, the SBTC PUD 260 Order found from January 1, 1987 until September 30, 1989 (a thirty-three month period), a revenue excess of \$27,479,480 with accrued interest in the amount of \$3,197,687.

21. Second, I was surprised the SBTC PUD 260 Order did not comply with the SBTC Stipulation Order's requirement to refund the \$30,677,167 in excess revenues to SBTC's ratepayers. Third and most surprising was that Attorney General Henry's arguments (summarized in the Henry Decision) concerning the legal basis supporting his appeal that the Commission should have ordered SBTC's excess revenues refunded to its ratepayers did not even mention the SBTC Stipulation Order as a basis for requiring refunds. Attorney General Henry **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. This was surprising due to: (1) discussions I had had with Assistant Attorney General Robert A. Butkin ("Assistant Attorney General Butkin") predating the Supreme Court's December 24, 1991 Henry Decision; and, (2) the legal arguments filed earlier by Attorney General Henry and Attorney General Loving in the PUD 662 case, all of which I discuss below.

Excess Revenues Determined in SBTC PUD 260 Were Grossly Deficient

22. On August 12, 1991, as the Director of the Commission's Public Utility Division, I filed testimony in PUD 662 discussing the findings of the Commission's Public Utility Division Staff ("Staff") concerning SBTC's excess revenues for the 1989 calendar year based on Staff's audit of SBTC's revenue requirements. Also, under my direction, Staff filed revised exhibits in PUD 662 on November 18, 1991 supporting its calculation that for 1989 SBTC's revenues exceeded its revenue requirement by \$128,637,002.

23. It seemed beyond reason that the SBTC PUD 260 Order could find from January 1, 1987 until September 30, 1989 (nearly three years), SBTC accumulated excess revenues of only \$27,479,480 given that Staff, under my direction, had just filed testimony and exhibits in PUD 662 demonstrating

SBTC's excess revenues for 1989 alone were \$128,637,002. Furthermore, **Staff's determination in PUD 662 that SBTC's 1989 excess revenues were \$128,637,002 had accounted for and reflected the 1989 revenue excess found in the SBTC PUD 260 Order. That is, SBTC's excess revenues calculated in PUD 662 for 1989 of \$128,637,002 were in addition to the amounts found in the SBTC PUD 260 Order.**

Attorney General Henry and Attorney General Loving on Commission's Authority (Other Than 17 O.S. 1981 § 121) to Make SBTC's Excess Revenues Refundable

24. Discussions I had with Assistant Attorney General Butkin prior to my reading the Henry Decision fully demonstrated that Attorney General Henry believed the Commission had jurisdiction to place SBTC's rates, or for that matter any regulated utility's rates, subject to refund pursuant to the Commission's ratemaking authority. (The Commission should read the Commission's Response filed at the Supreme Court of Oklahoma on June 14, 1991 in Case No. 77,521, attached as "Exhibit No. 2" to my November 25, 2015 affidavit, for a thorough discussion of lawful refundable rates and retroactive ratemaking.) That is, the Commission did not need to demonstrate SBTC's excess revenues were an "overcharge" within the meaning of 17 O.S. 1981 § 121 to justify requiring refunds to Oklahoma ratepayers. The SBTC Stipulation Order all by itself sufficiently provided the Commission's authority to require refunds in SBTC PUD 260.

25. I first learned of Attorney General Henry's understanding of refundable rates shortly after my appointment as Director of the Commission's Public Utility Division in November 1990. In late December 1990 or early January 1991 Assistant Attorney General Butkin visited my office at the Commission to discuss the SBTC rate case that is identified herein as PUD 662. Assistant Attorney

General Butkin shared with me that he was having significant problems with SBTC, specifically regarding his office's failure to receive timely and complete responses to discovery from SBTC in PUD 662 matters. Assistant Attorney General Butkin further explained that his expert accounting witnesses had initial findings indicating SBTC's rates were significantly excessive. Mr. Butkin explained he was preparing a motion that would ask for the Commission to place SBTC's rates subject to refund, and he wanted to discuss the motion with me to have the benefit of my experience in utility ratemaking and gain my support for it. We discussed the matter on more than one occasion, and I told him I fully supported his motion.

26. Attorney General Henry's understanding of refundable rates was further demonstrated shortly after my discussions with Assistant Attorney General Butkin. Subsequent to my discussions with Assistant Attorney General Butkin, on January 9, 1991, in PUD 662 Attorney General Henry filed Brief In Support Of Motion To Place Southwestern Bell Telephone Company's Rates Subject To Refund And To Compel Discovery ("Henry's PUD 662 Brief") (see Henry's PUD 662 Brief attached as "Exhibit No. 5" to my January 22, 2016 affidavit). Henry's PUD 662 Brief stated that absent placing SBTC's rates subject to refund, SBTC will be permitted to enrich itself at the expense of its Oklahoma customers. **In Henry's PUD 662 Brief, Assistant Attorney General Butkin argued that a Commission order placing SBTC's rates subject to refund pending a decision in PUD 662 would clearly not constitute impermissible retroactive ratemaking.** More specifically, **Mr. Butkin argued in Section I, Part C of Henry's PUD 662 Brief that placing SBTC's rates subject to refund is necessary to protect SBTC's ratepayers and is an appropriate exercise of the Commission's jurisdiction.**

27. Antithetical to the Commission's and Attorney General Henry's efforts to seek refunds from

SBTC in PUD 662, SBTC filed Southwestern Bell Telephone Company's Motion to Strike Order No. 356271, Testimony and Exhibits Relating to Refunds, and Motion in Limine ("SBTC Strike Motion") on September 11, 1991. SBTC filed the SBTC Strike Motion in response to my Staff's testimony and exhibits about excess revenues (discussed above) filed in PUD 662 on August 12, 1991.

28. Staff's August 12, 1991 testimony and exhibits that were the subject of the SBTC Strike Motion explained and supported Staff's determination of SBTC's revenue requirements and SBTC's related collection of excess revenues. Staff's testimony further explained that from April 19, 1991 until a final order is implemented in PUD 662 any of SBTC's excess revenues, as determined by the Commission, should be refunded to SBTC's Oklahoma ratepayers.

29. The Staff's authority for recommending the refund of SBTC's excess revenues in PUD 662 was Commission Order No. 356271, the order SBTC sought to strike in the SBTC Strike Motion. The Commission had issued Order No. 356271 on April 19, 1991 ordering, among other requirements, that: (1) the authorized return on equity of SBTC be 11.41 percent (as I recommended in testimony filed on March 1, 1991 in PUD 662) until December 31, 1991 unless extended by order of the Commission or until further order of the Commission; and, (2) the earnings of SBTC be subject to refund, with interest, to the extent they exceed 11.41 percent return on equity, from the date of its order until December 31, 1991 or until further order of the Commission, whichever shall occur first, unless extended by order of the Commission.

30. On page one of the SBTC Strike Motion, among other arguments, SBTC argued: (1) the Commission does not have the statutory power or authority to order refunds in PUD 662, and any refund order would be and is contrary to law; and, (2) any refund order would constitute retroactive ratemaking, which is unconstitutional. On page two of the SBTC Strike Motion, SBTC argued the only

statutory authorization for the Commission to issue refunds was and is contained in 17 O.S. 1981 § 121. SBTC further argued the Commission's only Constitutional authority regarding refunds is found at Article IX, Section 21 of the Oklahoma Constitution, and SBTC argued that section did not apply in the PUD 662 case.

31. Attorney General Loving demonstrated in the PUD 662 matter she believed the Commission had jurisdiction to place SBTC's rates subject to refund pursuant to the Commission's ratemaking authority despite the arguments presented by SBTC in the SBTC Strike Motion. Consequently, Attorney General Loving filed in PUD 662 on September 17, 1991, Attorney General's Opposition to Southwestern Bell Telephone Company's Motion to "Strike" Commission Order No. 356271, and Testimony and Exhibits Relating to Refunds and Motion in Limine ("Loving's Opposition to SBTC Strike Motion") (see Loving's Opposition to SBTC Strike Motion attached hereto as Exhibit No. 1).

32. On the first page of Loving's Opposition to SBTC Strike Motion, **Attorney General Loving declares SBTC's Strike Motion "is frivolous, and must be dismissed."** Attorney General Loving points out the Commission has previously rejected SBTC's efforts to bar the Commission from exercising its constitutional duty to protect SBTC's customers by issuing an order placing SBTC's rates subject to refund. Specifically Attorney General Loving explains that by issuing Commission Order No. 356271, the Commission has already rejected SBTC's claims (heard and dismissed earlier by the Administrative Law Judge) that such an order constitutes "unlawful retroactive ratemaking".

33. Attorney General Loving explains in Loving's Opposition to SBTC Strike Motion, SBTC also made two separate filings at the Supreme Court in SBTC's failed efforts to overturn Commission Order No. 356271. Attorney General Loving explains SBTC was attempting to convince the Supreme Court that the Commission was without legal power to protect ratepayers by placing a utility's rates

subject to refund, and she further explains that SBTC even apprised the Supreme Court of the statute that SBTC attempts to rely on, 17 O.S. 1981 § 121.

34. In the affidavit that I filed in PUD 344 on November 25, 2015, I discussed these same efforts SBTC undertook at the Supreme Court to overturn Commission Order No. 356271. Specifically, on May 16, 1991, SBTC filed a Petition in Error with the Supreme Court (Case No. 77,563). SBTC was appealing the Commission placing its currently approved rates subject to refund. Further, SBTC filed another Petition with the Supreme Court (Case No. 77,521) requesting that the Court assume original jurisdiction. On June 20, 1991, the Supreme Court denied SBTC's request to assume original jurisdiction in Case No. 77,521. On September 9, 1991, the Court dismissed Case No. 77,563, indicating that the appeal was premature because it was an appeal to an Interim Order. The Commission should read my affidavit filed in PUD 344 on November 25, 2015 for additional discussion of Cases No. 77,563 and 77,521.

35. Clearly, Attorney General Henry's and Attorney General Loving's arguments about: (1) the Commission's ratemaking authority to place SBTC's rates subject to refund; and, (2) how placing SBTC's rates subject to refund is not retroactive ratemaking, in Henry's PUD 662 Brief and Loving's Opposition to SBTC Strike Motion, respectively, are consistent with the arguments proposed by the Applicants in PUD 344 on those very subjects.

36. Yet, in 2015, in contrast to the earlier positions taken by Attorney General Henry and Attorney General Loving in the PUD 662 case, **Attorney General Pruitt takes the side of SBTC in PUD 344, contradicting the prior arguments of Attorney General Henry and Attorney General Loving.** Paradoxically, the positions taken by Attorney General Pruitt in PUD 344 are instead consistent with those arguments made by SBTC in PUD 662 in the SBTC Strike Motion discussed above. In fact,

Attorney General Pruitt's arguments offered in PUD 344 are the very arguments Attorney General Loving describes as "frivolous, and must be dismissed" when she refers to the SBTC Strike Motion in the PUD 662 matter. (The Commission should refer to the affidavit that I filed in PUD 344 on November 25, 2015 for additional discussion of the positions taken by SBTC and Attorney General Pruitt in PUD 344 on the Commission's ratemaking authority and retroactive ratemaking. In that affidavit, I discuss in more detail the arguments made in PUD 344 by Attorney General Pruitt and SBTC in 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.)

37. On September 25, 1991, the Commission issued Order No. 360255 in the PUD 662 case, denying the SBTC Strike Motion.

38. Attorney General Henry and Attorney General Loving through the filing of Henry's PUD 662 Brief and Loving's Opposition to SBTC Strike Motion, respectively, demonstrated the Commission may, upon its own initiative, take steps to place SBTC's rates subject to refund. That is, Attorney General Henry and Attorney General Loving clearly believe the Commission has the constitutional authority (and duty) to protect SBTC's customers by issuing an order placing SBTC's rates subject to refund. Further, they demonstrated in their filings this authority was separate and in addition to the Commission's authority to require refunds under 17 O.S. 1981 § 121.

39. By law, the Attorney General has the statutory duty to represent and protect the collective interests of all utility consumers of the State of Oklahoma in rate-related proceedings before the Commission or in any other state or federal judicial or administrative proceeding (see 74 O.S. §18b(A)(20)). Clearly, from my knowledge of and participation in SBTC PUD 260 and SBTC PUD

662 matters, Attorney General Henry and Attorney General Loving were strong advocates for the interests of SBTC's ratepayers. Those SBTC ratepayers include individuals; local, state and federal governmental agencies; and, small and large businesses in the State of Oklahoma financially damaged by SBTC's fraudulent actions in PUD 260 and the Commission's subsequent failure to remedy that fraud. However, the arguments and positions taken in the Pruitt Motion and by Attorney General Pruitt, in general, in PUD 344 are largely indistinguishable from those of SBTC in either PUD 662 or PUD 344, and SBTC's arguments in those matters are made on behalf of its management's and shareholder's interests, not its ratepayers' interests.

COMMISSION'S ACTIONS TO ADDRESS THE HENRY DECISION

40. On June 1, 1992, some six months after the Supreme Court's Henry Decision, the Commission issued Notice and Order of Prehearing Conference Regarding Southwestern Bell Telephone Company as Order No. 365912 in the SBTC PUD 260 case.

41. In its Order No. 365912, the Commission ordered that a Prehearing Conference concerning the issues remanded to the Commission as a result of the Henry Decision be heard by the Commission en banc on August 12, 1992. The order further required that at said Prehearing Conference, the parties be prepared to schedule a hearing concerning the merits of the issues remanded to the Commission by the Supreme Court and be prepared to identify the remand issues and discuss the parameters of the Commission's jurisdiction and discretion concerning the remand issues for SBTC PUD 260. The Commission's Order No. 365912 further required any party desiring to present argument and testimony at the hearing on the merits to file a brief outline of the issues needing to be addressed at the hearing on the merits, by August 5, 1992.

42. In compliance with Order No. 365912 issued in SBTC PUD 260, I, as Director of the Commission's Public Utility Division, filed on August 5, 1992, Commission Staff's Outline of Issues to be Addressed During the Remand Hearing Concerning Southwestern Bell Telephone Company ("Staff's Outline of PUD 260 Remand Issues"). One of the issues I listed for the remand hearing on the merits for the SBTC PUD 260 case was whether the SBTC Stipulation between SBTC and Staff adopted by the Commission in the SBTC Stipulation Order affects the options available to the Commission for correcting any errors in the SBTC PUD 260 Order. That is, more specifically, due to the Disposition of the Supreme Court's Henry Decision stating in its Order No. 74,194 issued December 24, 1991, "Affirmed in part and reversed in part; **Cause remanded for further proceedings not inconsistent with this pronouncement,**" (Emphasis Added) should the Commission correct other errors in the SBTC PUD 260 Order (as long as those corrections were not inconsistent with the Supreme Court's Henry Decision) since the SBTC Stipulation Order had placed SBTC's rates subject to refund until SBTC PUD 260 is ultimately determined with a final SBTC PUD 260 order.

43. The Prehearing Conference initially scheduled to be heard by the Commission en banc on August 12, 1992, in which the parties to the SBTC PUD 260 case were to discuss the issues remanded to the Commission as a result of the Henry Decision, was continued by Commission order, Order No. 367591. The Commission continued the Prehearing Conference at least ten times between June 1, 1992 and May 19, 1994 through issuing Order Nos. 367591; 368387; 369153; 371543; 372721; 373961; 375226; 379263; 382639; and, 383537. On May 19, 1994 the Commission issued Order No. 383537 continuing the Prehearing Conference from May 19, 1994 to June 8, 1994.

44. To the best of my knowledge, the Prehearing Conference initially scheduled to be heard by the Commission en banc on August 12, 1992, in which the parties to the SBTC PUD 260 case were to

discuss the issues remanded to the Commission as a result of the Henry Decision, never took place. That said, searching the SBTC PUD 260 case log of documents, neither can I find a Commission order continuing the Prehearing Conference last rescheduled for June 8, 1994. By this point in time, the Henry Decision had languished at the Commission for almost two-and-one-half years without resolution.

Commissioner Bob Anthony's Request for Legal Briefs in SBTC PUD 260

45. On May 1, 1996, Commissioner Bob Anthony issued Request for Legal Briefs in the SBTC PUD 260 case. He requested the parties to SBTC PUD 260 submit by June 10, 1996 briefs addressing the irregularities in the decision-making process which resulted in the SBTC PUD 260 Order then before the Commission on remand as a result of the Supreme Court's Henry Decision. At that time, the Henry Decision (issued December 24, 1991) had been before the Commission, waiting for Commission action and resolution, more than four years and four months.

46. On May 22, 1996, Commissioner Bob Anthony supplemented his Request for Legal Briefs with May 22, 1996 Supplement to May 1, 1996 Request for Legal Briefs ("Anthony's Supplemental Request for Legal Briefs") (see Anthony's Supplemental Request for Legal Briefs attached hereto as Exhibit No. 2). In Anthony's Supplemental Request for Legal Briefs, he specifically asked the parties of SBTC PUD 260 to address questions about the SBTC Stipulation Order. That is, Commissioner Anthony wanted input from the parties to SBTC PUD 260 as to the need for the Commission to consider the SBTC Stipulation Order when addressing the Henry Decision in resolution of the SBTC PUD 260 case.

47. As discussed above, I filed Staff's Outline of PUD 260 Remand Issues on August 5, 1992. One

of the issues in Staff's outline concerned whether the SBTC Stipulation Order affected the options available to the Commission for addressing the Henry Decision and correcting the errors in the SBTC PUD 260 Order. Commissioner Anthony's Supplemental Request for Legal Briefs asked the parties to address the very question that I had raised in Staff's August 5, 1992 filing.

Attorney General Edmondson's Brief in Response to Commissioner Anthony

48. On June 10, 1996, W. A. Drew Edmondson, Attorney General of Oklahoma ("Attorney General Edmondson") filed Brief in Response to Commissioner Anthony's May 1, 1996 Request for Legal Briefs. Attorney General Edmondson explained that the convictions of Commissioner Bob Hopkins and SBTC attorney William Anderson for bribery in the SBTC PUD 260 case constitute an **irrefutable denial of due process**. He further explained the denial of due process was not limited to the bribery but also includes the *ex parte* communications of SBTC's representatives with Bob Hopkins and Commissioner Bob Anthony.

49. The Commission can determine the actual financial effect of the lack of due process for SBTC's ratepayers by examining the evidentiary record of the SBTC PUD 662 case. In the affidavit that I filed in PUD 344 on November 25, 2015, I comprehensively explain why the Commission's finding in the SBTC PUD 260 Order of only \$7.8 million in excess revenues for SBTC in 1989 is not a reliable measure of the actual excess revenues.

50. A substantially more accurate and reliable measure of SBTC's actual excess revenues for 1989 can be found in the evidentiary record of the SBTC PUD 662 case. Instead of using the \$7.8 million estimated figure for 1989 presented in the tainted SBTC PUD 260 Order, the Commission should base a calculation for SBTC's excess revenues for 1989 on the evidence presented in the SBTC PUD 662

case. That evidence demonstrates that SBTC's excess revenues for test year 1989 exceed \$100 million, as opposed to the grossly understated \$7.8 million found in the tainted SBTC PUD 260 order. The Commission should refer to my November 25, 2015 affidavit for a more thorough discussion of the relationship between the SBTC PUD 260 and SBTC PUD 662 cases.

51. Beginning on page 8 of **Attorney General Edmondson's** brief, he **explains the Commission has sufficient legal authority to reopen and rehear the merits of SBTC PUD 260**. He cites the Oklahoma Constitution requiring the concurrence of a majority of Commissioners to decide any question. (Oklahoma Constitution Article 9, § 18a.) When the tainted vote of Bob Hopkins is invalidated, the Commission's decision in the SBTC PUD 260 Order does not have the support of a majority of Commissioners. Attorney General Edmondson summarizes by explaining **the SBTC PUD 260 Order was not constitutionally adopted and, thus, a new trial is authorized by law**.

52. Attorney General Edmondson stated that if the Commission determines that a rehearing of the SBTC PUD 260 case is warranted, the evidentiary record in SBTC's PUD 662 case may be incorporated into the record of SBTC PUD 260 by judicial notice. I contend, **taking into account the flaws in the PUD 260 Order and the fraud by which they were adopted, it is certainly warranted and in the public interest of the State of Oklahoma, and of past and present SBTC telephone customers, for a rehearing of the SBTC PUD 260 case by the Commission**.

53. Taking this step is amply supported by the comprehensive amount of extrinsic evidence the Applicants have entered into the record of the PUD 344 case. **The extrinsic evidence provided by the Applicants describes and illustrates the inappropriate actions of SBTC's representatives and the significant benefits that can be made available to individuals; local, state and federal governmental agencies; and, small and large businesses in the State of Oklahoma financially**

damaged by those SBTC actions.

54. On page 6 of Attorney General Edmondson's brief, Attorney General Edmondson explains the step he believes the Commission needs to take in order to rule the SBTC PUD 260 Order void. Attorney General Edmondson explains the Commission needs to resort to extrinsic evidence to show the invalidity of the SBTC PUD 260 Order.

55. The Commission's determination as set forth in the SBTC PUD 260 Order is tainted and should be ruled 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. Once the SBTC PUD 260 Order is ruled void by the Commission, **the Commission should incorporate the tested evidentiary record of SBTC's PUD 662 case into the record of SBTC PUD 260 (as the Applicants of the PUD 344 case advocate). The SBTC PUD 260 case should then be reheard by the Commission in order to provide SBTC's customers the due process owed them and potential refunds amounting to between \$8,000 and \$16,000, on average, for each Oklahoma SBTC telephone number.**

Commission Staff's Brief in Response to Commissioner Anthony

56. On June 10, 1996, the Commission Staff filed Brief of the Commission Staff in Response to Commissioner Anthony's Request for Legal Briefs. In Staff's brief, Staff refers to a case decided by the Supreme Court, Harper v. Aetna Building & Loan Ass'n, 211 P. 1031 (Okl. 1923), 4 C.J. P. 1220 ("Harper Case") (see Harper Case attached hereto as Exhibit No. 3). Staff quotes from the Supreme Court's Harper Case stating:

Generally, on the remand of a case, the trial court may make any order

or direction in its further progress that is not inconsistent with the decisions and direction of the appellate court. And this rule is especially applicable where the mandate recognizes a certain discretion in the trial court. A very similar rule is that the trial court may consider and decide any matters left open by the mandate of the appellate court. The trial court may take such action, not inconsistent with the appellate court, as in its judgement, law and justice require, when the case has been remanded generally without directions, or for further proceedings, or for further proceedings not inconsistent with the opinion (Emphasis Added).

57. The Disposition of the Supreme Court's Henry Decision, Order No. 74,194 issued December 24, 1991, was stated as: "Affirmed in part and reversed in part; **Cause remanded for further proceedings not inconsistent with this pronouncement**" (Emphasis Added). The language in the Supreme Court's Disposition in the Henry Decision is strikingly consistent with the language above from the Harper Case. I believe it follows then **the Disposition of the Supreme Court's Henry Decision provides the Commission the authority to resolve the SBTC PUD 260 case, including all errors in the SBTC PUD 260 Order, as the Commission deems equitable, fair and reasonable as long as the Commission's resolution is not inconsistent with the appellate court's opinion.**

58. As discussed above in this affidavit, the Opinion of the Supreme Court's Henry Decision enumerated a concise list of issues to be resolved by the Supreme Court for the appealed SBTC PUD 260 Order. The Supreme Court's list of issues to be resolved **did not** include: (1) whether the SBTC PUD 260 Order was tainted and should be vacated due to SBTC's use of fraudulent actions to

influence the Commission's decision in the SBTC PUD 260 case; (2) whether SBTC's excess revenues were calculated correctly and accurately in the Commission's SBTC PUD 260 Order; or (3) whether the SBTC Stipulation Order required the Commission's SBTC PUD 260 Order to order SBTC's excess revenues be refunded to its Oklahoma ratepayers.

59. These three issues were not resolved by the Supreme Court because none of these issues were raised on appeal by parties to the SBTC PUD 260 case. Therefore, I believe it is reasonable and just for the Commission to now resolve: (1) whether the SBTC PUD 260 Order was tainted and should be ruled void and vacated; (2) whether SBTC's excess revenues calculated in the Commission's SBTC PUD 260 Order should be corrected as advocated by the Applicants in PUD 344; and (3) whether the SBTC Stipulation Order requires the Commission to order SBTC's excess revenues be refunded to its Oklahoma ratepayers.

60. I believe the Commission should rehear the SBTC PUD 260 case in order to provide SBTC's customers the due process denied them and the potential refunds owed them. Further, based on Harper v. Aetna Building & Loan Ass'n and the Court's Disposition in the Henry Decision, it is not necessary for the Commission to first petition the Supreme Court to remand the entire cause to the Commission for reconsideration in order for the Commission to resolve these issues. After all, the Court's Disposition itself already says "**Cause remanded for further proceedings.**"

AT&T Communications of the Southwest, Inc.'s Brief in Response to Commissioner Anthony

61. On June 10, 1996, Robert D. Allen, on behalf of AT&T Communications of the Southwest, Inc. (AT&T), submitted Response to Commissioner Bob Anthony's Request for Legal Briefs. On page 6 of its brief, citing the conviction of Bob Hopkins for having accepted a bribe for his vote on the

order, AT&T explains the Commission should vacate the SBTC PUD 260 Order and prescribe the procedures to be used in bringing the cause to a final conclusion.

62. On page 9 of its brief, **AT&T explains the vacation of the SBTC PUD 260 Order will mean none of the issues purportedly determined by the SBTC PUD 260 Order are concluded by it.** AT&T further explains there has not been a final order entered in the cause, and **the future proceedings of the Commission in the SBTC PUD 260 case will not be limited to the four matters remanded by the Supreme Court.**

63. On Page 11 of its brief, AT&T explains that when the issues involved in SBTC PUD 260 are finally concluded, if there are excess earnings during the period from July 1, 1987 to the date those rates have been changed, the excess earnings are subject to refund to SBTC's customers. **It is clear AT&T believed in June 1996 the Commission should rehear the entire SBTC PUD 260 case in order to provide SBTC's customers the due process and refunds owed them.**

COMMISSION'S ORDER ON REMAND

Commission Orders Remand Hearing for SBTC PUD 260 Case

64. On May 28, 1997, the Commission issued Order Directing Administrative Law Judge to Conduct Hearing, Order No. 412680, in SBTC PUD 260. In Order No. 412680, the Commission directed that Administrative Law Judge Bob Goldfield shall "immediately" conduct such hearings as may be necessary to examine the record and resolve the issues remanded to the Commission by the Supreme Court's Henry Decision and make a recommendation to the Commission concerning resolution of said issues. The SBTC PUD 260 case and Henry Decision had suddenly become an immediate concern for the Commission after languishing at the Commission for nearly five-and-one-

half years.

65. The Commission's Order No. 412680 unjustly limited the issues to be resolved in the SBTC PUD 260 case to the four issues remanded in the Henry Decision. Those four issues remanded to the Commission by the Supreme Court included: (1) the Commission's decision to upgrade certain central offices was not supported by substantial evidence; (2) the Commission's finding of a depreciation reserve deficiency lacked substantial evidence support; (3) the Commission should have considered SBTC's severance pay expenses; and (4) the Commission miscalculated SBTC's cash working capital.

66. In limiting the Commission's review of the SBTC PUD 260 Order and the Henry Decision to these four remanded issues, the Commission unjustly disregarded, (1) that the entire SBTC PUD 260 Order was tainted and flawed, and should be vacated due to SBTC's use of fraudulent actions to influence the Commission's decision and, (2) that, according to Attorney General Edmondson's brief filed June 10, 1996, the convictions of Commissioner Bob Hopkins and SBTC attorney William Anderson for bribery in the SBTC PUD 260 case constitute an irrefutable denial of due process.

67. Recall, on June 1, 1992, the Commission issued its Order No. 365912, therein ordering a Prehearing Conference concerning the Henry Decision for August 12, 1992. The order further required, at said Prehearing Conference, the parties be prepared to schedule a hearing and be prepared to identify the remand issues and discuss the parameters of the Commission's jurisdiction and discretion concerning the remand issues in its final order concerning SBTC PUD 260.

68. I filed Staff's Outline of PUD 260 Remand Issues in compliance with Order No. 365912. One of the issues I listed for the remand hearing on the merits for the SBTC PUD 260 case was whether the SBTC Stipulation Order affects the options available to the Commission for correcting any errors in the SBTC PUD 260 Order. That is, more specifically, should the Commission correct errors in the

SBTC PUD 260 Order beyond the four remanded issues (as long as those corrections were not inconsistent with the Supreme Court's Henry Decision).

69. When I filed Staff's Outline of PUD 260 Remand Issues on August 5, 1992, it was evident from my previous review of the SBTC PUD 260 case that the SBTC Stipulation Order required any excess revenues collected from SBTC's Oklahoma customers since July 1, 1987 must be refunded to them. So the refund of SBTC's excess revenues was an important issue needing discussion at the Commission's Prehearing Conference.

70. However, events occurring after August 5, 1992 made Staff's Outline of PUD 260 Remand Issues for the Prehearing Conference incomplete. That is, on August 5, 1992 when I filed Staff's outline of issues, the United States Court of Appeals for the Tenth Circuit in Denver, Colorado, had not yet upheld a ruling (Tenth Circuit ruling filed February 14, 1996) convicting Bob Hopkins for receiving a bribe from SBTC attorney William Anderson related to his vote on the SBTC PUD 260 Order. Furthermore, the lower court decision at the United States District Court for the Western District of Oklahoma, CR-93-137-A (District Court ruling filed February 24, 1995) had not even been rendered. Once these criminal court proceedings had been concluded, it became apparent to me the whole SBTC PUD 260 Order was flawed and invalid and, thus, the Commission should correct all errors in the SBTC PUD 260 Order.

Commission Issues Order on Remand

71. On June 26, 1997, the Commission issued Order on Remand, Order No. 413667, ("Remand Order") in the SBTC PUD 260 case. The stated intent of the two Commissioners who signed the Remand Order was to resolve only the four issues specifically remanded to the Commission in the

Henry Decision. Nevertheless, antithetical to itself, on page 10 of the Remand Order, the Commission ordered that the entire SBTC PUD 260 case not be reopened and that no further hearings, proceedings or orders are necessary with respect to the SBTC PUD 260 case. **Somehow, without reopening the case or hearing any arguments about other issues that might need to be examined or flaws corrected, the Commission majority decided there were no other issues worth examining, let alone correcting, and the entire case should be closed. How the entire case could be closed without first being reopened is a paradox worth pondering.**

72. The Remand Order was signed by Commission Chairman Cody L. Graves and Commissioner Ed Apple. Commission Vice-Chairman Bob Anthony did not sign the Remand Order and on July 2, 1997, Commissioner Anthony filed in SBTC PUD 260 Dissenting Opinion of Commissioner Bob Anthony to Order No. 413667 (“Anthony’s Remand Order Dissent”) (see Anthony’s Remand Order Dissent attached hereto as Exhibit No. 4). Anthony’s Remand Order Dissent discusses a comprehensive list of perspectives and findings Commissioner Anthony believed were flaws in the Remand Order.

73. As discussed above in this affidavit, the Opinion of the Supreme Court’s Henry Decision enumerated a concise list of issues to be reviewed and resolved by the Supreme Court for the appealed SBTC PUD 260 Order. Those enumerated issues included the four remanded issues I identified and discussed above and, ultimately, the remanded issues were the only issues resolved by the Commission’s Remand Order. The Commission majority ignored other obvious significant flaws in the tainted SBTC PUD 260 Order, not the least of which was its invalid deciding vote. It follows that the Remand Order failed to make ratepayers whole for the financial losses that resulted from SBTC’s use of fraudulent actions to influence the Commission’s decision in the SBTC PUD 260 case. As such, **the**

Commission's Remand Order constitutes an irrefutable denial of due process for SBTC's ratepayers and the State of Oklahoma, generally.

Flaws in the SBTC PUD 260 Order Unresolved by the Remand Order

74. [Note: In its sudden haste to issue the Remand Order less than a month after it finally ordered a hearing to resolve the issues remanded by the Henry Decision five-and-a-half years earlier, and just two weeks after said hearing, the Commission majority approved a document fraught with compositional errors in addition to its fundamental flaws. Among them, the "Findings and Recommendation" paragraphs were misnumbered, resulting in two paragraphs numbered "6." Hence, in the Remand Order references below, special care should be paid to the page numbers in addition to the paragraph numbers.]

75. The Supreme Court's list of issues to be resolved in the Henry Decision **did not** include: (1) whether the SBTC PUD 260 Order was tainted and should be vacated; (2) whether SBTC's excess revenues were determined and calculated correctly in the Commission's SBTC PUD 260 Order; or (3) whether the SBTC Stipulation Order required the Commission to order SBTC's excess revenues be refunded to its Oklahoma ratepayers. These issues had not been raised on appeal of the SBTC PUD 260 Order by any party, so the Supreme Court did not review or resolve these problems.

76. In paragraph 5, on page 8 of the Remand Order, the Commission majority found that the original decision rendered in the SBTC PUD 260 Order is voidable due to the bribery conviction of Commissioner Bob Hopkins. The Commission further explains voidable is not void and extrinsic evidence would be required to show that the SBTC PUD 260 Order is invalid. **It is confusing and troubling that the Commission majority signing the Remand Order chose not to review available**

extrinsic evidence to void the SBTC PUD 260 Order when so much was at stake financially for SBTC's Oklahoma ratepayers.

77. The Applicants have discussed and provided numerous documents with their Application, and otherwise, in the record of PUD 344. I have discussed and provided numerous documents in this affidavit and with my previous affidavits filed on November 25, 2015 and January 22, 2016. Therefore, the record of PUD 344 contains a substantial amount of evidence documenting SBTC's fraudulent actions tainting the Commission's determination in the SBTC PUD 260 Order. The SBTC PUD 260 Order should be declared invalid and void, and vacated in accordance with the extrinsic evidence of SBTC's use of fraudulent actions to influence the Commission's decision in the SBTC PUD 260 case.

78. In paragraph 6, on page 8 of the Remand Order, the Commission majority found it had no jurisdiction to modify or amend the issues affirmed by the Supreme Court, because more than 30 days had elapsed since the Commission issued its final orders in 1989, and, the majority believed, the Commission lacked permission from the Supreme Court to rehear the entire case.

79. First, the Commission should understand that the Henry Decision did not review, decide or affirm the issues raised above in my affidavit. That is, the Supreme Court did not address: 1) whether the SBTC PUD 260 Order was tainted and should be vacated; (2) whether SBTC's excess revenues in the aggregate were determined correctly in the SBTC PUD 260 Order; or (3) whether the SBTC Stipulation Order required SBTC's excess revenues be refunded to its Oklahoma ratepayers.

80. Second, the Commission did not need permission from the Supreme Court to rehear the SBTC PUD 260 case. Remember the Disposition of the Supreme Court's Henry Decision was stated as: "Affirmed in part and reversed in part; **Cause remanded for further proceedings not inconsistent with this pronouncement**" (Emphasis Added). This language appears to have allowed the

Commission to conduct proceedings reviewing and re-determining issues beyond the four specific issues remanded by the Supreme Court. **The Commission should have taken the initiative to rehear the SBTC PUD 260 case if for no other reason than to provide SBTC's customers the due process and potentially significant refunds owed them.**

81. Third, even if the Commission majority's finding in the Remand Order that it lacks permission from the Supreme Court to rehear the entire case were correct, accepting that assumption still begs the question why the Commission majority chose not to seek the Supreme Court's permission. Besides the bribery, the Commission was well aware of the potentially significant refunds owed SBTC's rate payers if the excess revenues found in the SBTC PUD 260 Order were re-determined based on revenue requirement evidence from the SBTC PUD 662 case. In connection with my comments here, the Commission should refer to my affidavits filed on November 25, 2015 and January 22, 2016 in PUD 344 for a thorough discussion as to the superiority of the calculations of SBTC's excess revenues in the PUD 662 case compared to the SBTC PUD 260 case.

82. The Commission was made aware of information indicating potentially significant refunds owed SBTC's rate payers, if the excess revenues were re-determined based on revenue requirement evidence from the SBTC PUD 662 case, more than a year before the Commission majority issued its Remand Order on June 26, 1997. That is, on May 22, 1996 in the SBTC PUD 260 case, Commissioner Bob Anthony had filed Anthony's Supplemental Request for Legal Briefs.

83. In Commissioner Anthony's Supplemental Request for Legal Briefs he specifically asked the parties of SBTC PUD 260 to address questions about the SBTC Stipulation Order. More specifically, Commissioner Anthony wanted input from the parties to the SBTC PUD 260 case as to whether revenue requirement evidence from the SBTC PUD 662 case could be incorporated into the record of

the SBTC PUD 260 case for determining SBTC's refundable excess revenues. As discussed in Anthony's Supplemental Request for Legal Briefs, such revenue requirement evidence from the SBTC PUD 662 case demonstrated SBTC's excess revenues exceeded \$100 million for the year 1989. The Commission will find a more thorough discussion supporting the incorporation of the evidence from the SBTC PUD 662 case to the SBTC PUD 260 record in my previous affidavits filed on November 25, 2015 and January 22, 2016 in PUD 344.

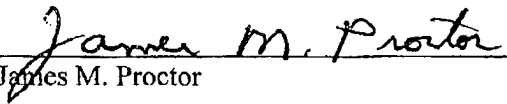
84. In paragraph 7, on page 8 of the Remand Order, the Commission's majority defended its decision to not reopen and re-determine issues in the SBTC PUD 260 case, concluding that rehearing the entire SBTC PUD 260 case was neither warranted nor in the public interest. **This conclusion is irreconcilable with the convictions of Commissioner Bob Hopkins and SBTC attorney William Anderson for bribery in the SBTC PUD 260 case and their related denial of due process for SBTC's ratepayers.**

85. In paragraph 7, on page 9 of the Remand Order, the Commission's majority claimed the Supreme Court specifically found SBTC's ratepayers were not entitled to a refund of excess revenues pursuant to 17 O.S. 1981 § 121. Again, the Commission majority was fully aware of the SBTC Stipulation Order when it issued the Remand Order and, again, chose to disregard it. Further, the Commission majority was aware the Henry Decision did not address whether the SBTC Stipulation Order required SBTC's excess revenues be refunded to its Oklahoma ratepayers. **It seems unreasonable for the Commission's Remand Order not to discuss the relevance of the SBTC Stipulation Order to the Commission's authority to refund excess revenues, especially since the Commission Staff had advocated the Commission's authority in this regard years before.**

86. On August 23, 1989 the Staff filed Brief of the Commission Staff Concerning Interest on the

Southwestern Bell Refund. In its brief, the Staff explained its position concerning refunding excess revenues. The Commission Staff's arguments then agreed with the Applicants' arguments now in the PUD 344 case, namely that the legal basis for the Commission ordering a cash refund of the excess revenues in the SBTC PUD 260 case is not 17 O.S. 1981 § 121, but rather the SBTC Stipulation Order.

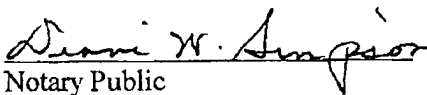
FURTHER AFFIANT SAYETH NAUGHT!


James M. Proctor

State of Kansas)
) ss
Douglas County)

Sworn before me as true and correct this 23rd of February, 2016.




Notary Public

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

44

IN THE MATTER OF THE APPLICATION OF)
HOWARD W. MOTLEY, JR., FOR AN)
INQUIRY INTO THE RATES AND CHARGES)
OF SOUTHWESTERN BELL TELEPHONE)
COMPANY,)

Case No. PUD-000662 ✓

IN THE MATTER OF THE APPLICATION)
OF SOUTHWESTERN BELL TELEPHONE)
COMPANY FOR APPROVAL OF TELESTATE)
21 A PROPOSAL FOR RATE STABILITY)
NETWORK MODERNIZATION, AND PRICE)
REGULATION.)

Case No. PUD 000837

FILED
SEP 17 1991
CORPORATION COMMISSION
OF OKLAHOMA

ATTORNEY GENERAL'S OPPOSITION TO SOUTHWESTERN BELL
TELEPHONE COMPANY'S MOTION TO "STRIKE" COMMISSION ORDER NO. 356271,
AND TESTIMONY AND EXHIBITS RELATING TO REFUNDS
AND
MOTION IN LIMINE

Bell's motion is frivolous, and must be dismissed.

The Commission has previously rejected Bell's efforts to bar the Commission from exercising its constitutional duty to protect Bell's customers by an order placing Bell's rates subject to refund.

On March 14, 1991, the Administrative Law Judge (ALJ), after two days of hearing and extensive briefing by the parties, including SWBT, issued his report recommending that Bell's rates be subject to refund. In Interim Order No. 356271, issued by the Commission on April 19, 1991, the Commission adopted the hearing officer's report, rejecting Bell's claims that the interim order constituted "unlawful retroactive ratemaking."

Having lost at the Commission level, Bell filed two actions before the Oklahoma Supreme Court. In the first action, an original proceeding styled "Application to Assume Original Jurisdiction and Petition for Writ of Prohibition", Bell attempted to convince the Court that the Commission was utterly without legal power to protect ratepayers by placing a utility's rates subject to refund, and even apprised the Court of the same statute that Bell attempts to rely on here, 17 O.S. § 121. The Court turned down Bell's efforts to have the Commission's actions declared unlawful in a unanimous order dated July 2, 1991 (Hodges V.C.J., disqualified). Bell also attempted to appeal the order to the Supreme Court. Petition in Error and Preliminary Statement, May 16, 1991, No. 77563. Just last September 9, 1991, the Court also



dismissed Bell's appeal. The Attorney General has attached hereto a copy of her brief filed on January 28, 1991, before this Commission, as well as a copy of her brief filed before the Oklahoma Supreme Court on June 10, 1991, and requests that these documents be incorporated into this response.

Both the ALJ and the Commission have found that this Commission has the legal authority to protect Bell's ratepayers when they are harmed by delays in the regulatory process, just as it has authority to protect utilities when they are harmed by delay. The ALJ and the Commission have rejected Bell's arguments to the contrary, and on two occasions the Oklahoma Supreme Court has declined to hear Bell's arguments. Bell's motion is an eleventh-hour attempt to upset a protective interim remedy already adopted by the Commission at a time when the efforts of the parties should focus on quantifying the amount of that rate refund and prospective reduction. Bell's motion should be denied.

Respectfully submitted,

SUSAN BRIMER LOVING
ATTORNEY GENERAL


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662-916.lim

FILED

JAN 28 1991

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA
COURT CLERK OF OKLAHOMA
CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF)
HOWARD W. MOTLEY, JR., FOR AN)
INQUIRY INTO THE RATES AND CHARGES) Case No. PUD-000562
OF SOUTHWESTERN BELL TELEPHONE)
COMPANY,)
)

ATTORNEY GENERAL ROBERT HENRY'S BRIEF ON COMMISSION'S
AUTHORITY TO ASSUME EN BANC JURISDICTION AND
PLACE BELL'S RATES SUBJECT TO REFUND

I. INTRODUCTION

Attorney General Robert H. Henry requests that the Commission assume en banc jurisdiction and issue an order placing the Oklahoma rates of Southwestern Bell Telephone Company (Bell) subject to refund pending the completion of Bell's current rate case.

If Bell's rates are not subject to refund, hundreds of thousands of Bell's Oklahoma customers will be harmed, because they will not have returned to them excess rates paid while the case is pending.

Time is of the essence. Each day that the Commission delays action could cost Bell's customers more than \$100,000 per day. After July 1, 1991, when a temporary \$30 million a year depreciation charge expires, each day of delay could cost Oklahomans as much as \$200,000 per day.

Bell, on the other hand, is not unfairly disadvantaged if the requested relief is granted. Bell's only refund liability will be that which the Commission ultimately determines Bell is overearning during the refund period.

Immediate Commission Action is Needed to Protect Ratepayers.

The Administrative Law Judge, Robert Goldfield, has denied our application to advance to the Commission en banc our motion to place Bell's rates subject to refund. Currently, our motion is not even scheduled to be heard before Judge Goldfield until March 7, 1991. Thus, in the absence of prompt relief, Bell's Oklahoma customers may have to wait for months before the Commission issues an order placing Bell's rates subject to refund--a period of delay

for which Bell's customers could not be refunded excessive rates paid to Bell. Each day of delay before the Commission makes Bell's rates subject to refund permanently deprives Oklahomans of tens of thousands of dollars. Accordingly, we urge the Commission to immediately agree to hear the case en banc, and to issue the order necessary to protect Bell's customers from further delay in the hearing process.

- I. THE COMMISSION SHOULD ISSUE AN ORDER PLACING BELL'S RATES SUBJECT TO REFUND TO PROTECT BELL'S RATEPAYERS PENDING THE COMPLETION OF THE CURRENT BELL RATE INVESTIGATION.

Telephone Rates Have Declined Dramatically Nationwide.

State public utility commissions in 1989 ordered major telephone companies to cut rates by nearly \$840 million, marking the continuation of a three-year downward trend in rates. Public utility commissions reduced rates for telephone subscribers a total of \$2.72 billion between 1987 and 1989.¹

Bell Customers in Other States Have Received Rate Cuts.

In our neighboring states, recent Commission proceedings involving Bell have led to significant rate reductions reflecting this national trend.

- * Bell's customers in Texas received reductions in excess of \$200 million.
- * Bell's customers in Missouri received rate reductions in excess of \$70 million.
- * Bell's customers in Kansas received rates reductions in excess of \$25 million.

Similarly, Bell Customers in Oklahoma Will Be Due Significant Rate Cuts As a Result of The Pending Bell Rate Case.

In Oklahoma, expert witnesses retained by the Attorney General's office have filed testimony in the pending Bell rate investigation, Cause PUD 000662, indicating that Bell's Oklahoma customers are due rate reductions of as much as \$40 million and that these rate reductions will grow to approximately \$70 million upon the expiration of a \$30 million reserve deficiency charge in

¹ Telephony, February 19, 1990, p. 8.

July, 1991.² While there will no doubt be adjustments to these calculations, it is critical that the Commission place Bell's rates subject to refund so that Bell's customers can be made whole at the conclusion of the case for excess rates paid to Bell while the case is pending.

Oklahoma Ratepayers Benefit From New Standards Adopted by the Oklahoma Supreme Court in the Landmark Turpen Decision, Which May Ultimately Increase the Amount of Rate Savings for Oklahomans.

The current rate proceeding, Cause PUD 000662, is the first case in which Bell's rates will be examined under the new standards established by the Oklahoma Supreme Court in Turpen v. Oklahoma Corporation Commission, 769 P. 2d 1309 (Okla. 1988) ("Turpen"). In that decision, the Court recognized the need to prevent Bell from using its captive Oklahoma customers to unfairly subsidize its entry into new, more speculative business ventures.

The Supreme Court now requires the Commission to protect Bell's customers in the following ways:

- * The Commission must closely scrutinize Bell's financial relationship with its affiliate companies, and must make adjustments where necessary to insure that Bell is not unfairly overcharging its basic phone subscribers to gain competitive advantages in unregulated, speculative markets.
- * The Commission must impute a capital structure when it finds that the structure chosen by Bell results in higher rates than necessary for basic telephone services.
- * The Commission must develop standards to account for yellow pages revenues in order to insure that Bell's customers are properly benefitting from these revenues.

When all the adjustments authorized or required by the Turpen decision are made, the Attorney General's evidence may point to even greater rate reductions than \$40 million per year (until July 1, 1991) and \$70 million per year (after July 1, 1991)

² See A.G. Exhibits 1 and 2, Prefiled Testimony of Michael L. Brosch and Michael Ileo, Exhibits in Support of Motion to Place Southwestern Bell Telephone Company's Rates Subject to Refund and to Compel Discovery.

Delays in the Pending Case Harm Bell's Ratepayers

The current Bell rate proceeding, Cause PUD 000662, has been pending for two years since it was filed on January 25, 1989. Throughout this proceeding, the Attorney General has been handicapped by Bell's failure to respond promptly to our discovery requests. Accordingly, on January 14, 1991, the Attorney General advised the Commission of the following:

- * Bell had failed to respond to 340 data requests that were unanswered as of that date.
- * Bell was averaging 150 days--five months-- of delay for all data requests that were unanswered as of that date.
- * Bell had failed to answer 18 data requests after a delay of 285 days-- more than nine months.
- * Three months had passed since Bell had last responded to a data request.³

On January 16, 1991, Administrative Law Judge Robert Goldfield issued an order requiring Bell to more promptly respond to our data requests. That order also set a procedural schedule, under which the full hearing on the merits of the rate case will be held before the hearing officer in late August.

Even if Bell complies with the discovery schedules and the August hearing dates are not extended, it will probably be early 1992 before the briefing and appeal cycles are completed and a final order is issued by the Commission. Three years (or more) will pass between the filing of the case and the issuance of a final order by the Commission. A final order will probably not issue until the passage of another year (or more) from today's date.

Unless Bell's customers are protected by an order placing the utility's rates subject to refund, excess rates paid during the pendency of the case will be permanently lost to those customers.

³ See Updated Information Concerning Southwestern Bell Telephone Company's Delays in Responding to Data Requests from the Attorney General, filed January 14, 1991.

A. By Granting the Attorney General's Motion, the Commission Can Protect Bell's Ratepayers From Further Harm Caused by Delay, Without Unfairly Harming Bell.

The Attorney General's Motion requests that the Commission issue an order placing Bell's rates subject to refund, so that the rate reduction ultimately found appropriate by the Commission can be made effective as of the date of that order. The order would not require any immediate rate reduction or dollar amount of refund, not would it preclude Bell or any other of the parties from fully litigating any relevant issue in the context of a full rate hearing.

Counsel for Bell has represented that Bell opposes our motion because Bell "disagrees" with our evidence pointing to forthcoming rate reductions of \$40 million to \$70 million per year. We have advised the Commission and the parties that Bell's statements reflect a serious misunderstanding of the remedy sought in our motion.⁴ The order we seek would protect this commission's constitutional power to protect Bell's ratepayers through refunds once it ultimately determines appropriate rates for Bell. That Bell currently "disagrees" with our numbers is irrelevant, as the only amount Bell would ever be required to refund would be the amount that the Commission determines Bell to be overearning. The remedy would protect Bell's customers from harm caused by additional delays, not fix the final amount of overearning or refund liability.

B. The Delays that Harm Bell's Customers in the Instant Case Are More Severe than the Delays That Have Led This Commission to Grant Interim Relief to Bell.

The Attorney General's motion presents even more compelling reasons for placing Bell's rates subject to refund than are present when utilities have received interim rate relief. Most recently, this Commission awarded an interim rate increase to Bell upon a showing that there would be an eleven month total delay between the filing of the original rate application and the

⁴ See letter from Assistant Attorney General R. Butkin to Administrative Law Judge Robert Goldfield, dated January 23, 1991, Attachment "A" hereto.

anticipated date of final hearing. Order No. 273137, issued February 13, 1985, p. 4 (testimony of D. Linnenbrink). In fact, in a twenty-month time frame of May 1983 to February, 1985, Bell received interim rate increases totaling more than \$210 million. Turpen, supra, 769 P. 2d at 1316.

In the instant case, Bell's customers will suffer a total passage of three years or more between initial application and issuance of a final order, three times the delay that led the Commission to protect Bell with an interim rate increase in 1985.

II. THE COMMISSION HAS THE AUTHORITY TO PLACE BELL'S RATES SUBJECT TO REFUND PENDING THE COMPLETION OF THE CURRENT RATE CASE.

This Commission's broad constitutional power to regulate utilities includes the power to place Bell's rates subject to refund during the pendency of the current rate investigation. Upon a showing that Bell's customers may be harmed by delays in the hearing process, this Commission should promptly use these powers to protect those ratepayers. Only by promptly assuming en banc jurisdiction and granting our motion can the Commission insure that excess rates paid to Bell can be refunded to its customers.⁵

A. The Commission is Constitutionally Required to Protect Bell's Ratepayers From Excessive Rates.

Under Article IX, Section 18, of the Oklahoma Constitution, this Commission is charged with the broad "duty of supervising, regulating, and controlling all transportation and transmission companies doing business in State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies."

In the landmark Turpen decision, the Oklahoma Supreme Court has recognized that the Commission's constitutional duty is not just intended to permit a utility to earn a fair return on its investment, but includes the duty "to prevent a public utility

⁵ This pleading responds to the request of Administrative Law Judge Robert Goldfield that the parties prepare a brief of the relevant legal issues.

from making excess monopoly profits and to assure fair prices and adequate service to ...consumers." Turpen, supra, 769 P.2d at 1316.

B. The Commission Has Broad Powers By Which to Protect Utility Customers From Excessive Rates, Which Must Include the Power to Place a Utility's Subject to Refund to Protect Customers From Harm Caused by Delay During a Rate Investigation.

This Commission's powers are not limited to prescribing permanent rate schedules. Rather, the Commission's powers may be exercised as the "exigencies of the times and changing conditions demand." Lone Star Gas Co. v. Corporation Commission, 39 P.2d 547,550. The Courts have recognized that the Commission should be guided by "broad equitable principles" in the discharge of its duties, and that the Constitution has invested the Commission with broad legislative, administrative, and judicial powers so that it can structure appropriate remedies to meet the needs of particular situations. Id; Community Natural Gas Co. v. Corporation Com'n, 76 P.2d 393 (Okla. 1938)

The Supreme Court has recognized that this Commission has an affirmative duty to protect utility shareholders when they suffer as a result of delay. Southwestern Bell Telephone Co. v. State, 214 P. 2d 715 (1949) (interim rate increases). In the instant case, the "exigencies of the times" require that the Commission invoke its broad equitable powers and structure a remedy to protect ratepayers from the harmful effect of delay. Where each day of delay could cost Bell's customers as much as \$100,000 per day, the only appropriate remedy is an order placing Bell's rates subject to refund so that excessive rates paid while the case is pending can be returned. Construing constitutional language similar to Oklahoma's, courts have held that the Commission's power to prescribe just and reasonable rates includes by necessity the power to declare rates "interim and subject to decrease" where necessary to protect a utility's customers. Pueblo Del Sol Water v. Arizona Corporation Com'n, 772 P. 2d 1138 (Ariz. App. 1988).

The Requested Order Would Not Constitute Retroactive Ratemaking.

The remedy sought by the Attorney General would not constitute prohibited retroactive ratemaking under Southwestern Public Service Com'n v. State, 637 P.2d 92,102 (Okla. 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 do not seek to correct alleged mistakes made in past Bell rate orders. Rather, we seek an order which would place Bell's rates prospectively subject to refund during the pendency of the current Bell rate investigation.

C. The Commission Has the Power to Immediately Issue the Requested Order and Thus Protect Bell's Ratepayers From Even One Day of Additional Delay.

Unlike an Interim Rate Increase, the Appropriate Remedy Here Does Not Require Any Immediate Rate Change and Therefore Can Be Implemented Immediately.

When this Commission awards an interim rate increase, the Commission recognizes that it has not yet had time to fully evaluate the relevant issues for the proper determination of permanent rates. See Southwestern Bell Telephone Co., Cause No. 28002, Order No. 250987, 57 PUR 4th 627, 643 (December 29, 1983) (imperative that rates be interim, because full data not yet available). Interim rate increases are always made subject to refund, because the issues are not fully tried and determined until the full hearing on permanent rates.

When the Commission awards an interim rate increase, however, there is still a need for some type of proceeding to quantify the amount of that interim increase. Thus, the Commission holds a hearing, usually of very limited duration. See, e.g., Kansas Power and Light Co., Order No. 346303 (April 9, 1990) (one day hearing); Southwestern Bell Telephone Co., Order No. 273137 (February 13, 1985) (one day hearing). The need for such an abbreviated hearing and preliminary quantification derives from the nature of the remedy sought by the utility: an actual immediate increase in rates charged to their customers.

The remedy sought here derives from a similar constitutional duty to protect Bell's customers from harm caused by delay, but it is a remedy of a different nature than an interim change in rates. There is no need, at the instant time, to quantify any precise level of rate savings, even on a preliminary basis, because the remedy we seek does not require an immediate reduction in rates. Accordingly, the Commission can place the remedy into effect immediately, knowing that the amount of refund and rate savings will be fully tried and determined in the full rate proceeding. In fact, each passing day of delay before the remedy is placed into effect destroys the effectiveness of the remedy, since it deprives the Commission of the power to refund excess rates paid during this period.

The Commission is Not Required to Limit Bell's Refunds to Return on Equity Established in Past Cases.

In interim rate increase proceedings, this Commission has not restricted itself to applying historical return on equity established in previous rate proceedings to determine the appropriate level of rate relief. Thus, in Order No. 238961, authorizing interim relief to Bell, the Commission, for the purposes of setting interim relief, reduced Bell's authorized return on equity from 15.0% to 13.5%. The Commission acknowledged that no evidence had been considered on this issue, but based its decision on downward trends in national interest rates since the last full case. Order No. 238961, Cause No. PUD 28002 (May 24, 1983).

Since Every Day of Delay Before Rates Are Placed Subject to Refund Harms Bell's Customers, The Order Should Issue Immediately, and Return on Equity for the Refund Period Can be Determined in the Full Rate Hearing.

In the instant case, the Commission will ultimately have to determine the appropriate return on equity during the refund period. However, every day that this Commission delays placing Bell's rates subject to refund may harm ratepayers by as much as \$100,000. Because the protective remedy we seek does not require an immediate quantification of interim rate savings, the order

should promptly issue and determination of appropriate return on equity for the refund period should be deferred to the full hearing.

In United Telephone Co. of Florida v. Mann, 403 So.2d 962 (Fla. 1981), the Court authorized just such a determination. The Court held that the state Public Utility Commission had the power to place rates subject to refund during the pendency of a full rate case.

The Mann Court also recognized that the consideration of extensive testimony regarding return on equity would be too time-consuming for an interim rate hearing. Yet, the Court squarely rejected the view that the "amount to be refunded must necessarily be calculated by the previously authorized rate of return." Id. at 967.

To so hold would defeat the purpose of allowing the utility to collect excess revenues subject to refund. The Commission is unable to determine at the time of the interim hearing the amount of the utility's revenues, if any, which are excessive. Such a determination can only be made after a comprehensive rate proceeding has been held. A part of that determination is the rate of return which the utility should be authorized to earn during the pendency of the full ratemaking proceeding.

Therefore, the Commission may base its refund order upon the newly established rate of return so long as the new rate is based upon data that existed before the commission issued its interim order.

Id. at 967.

The Mann Court concluded: "The Commission properly ordered a refund of all revenues that were collected in excess of the newly authorized rate of return." Id. at 968.

Similarly, in our case, the determination of appropriate return on equity for the refund period can be determined in the full rate hearing, based on data that existed before the Commission issued its order placing Bell's rates subject to refund.

III. CONCLUSION

This Commission is constitutionally required to protect Bell's Oklahoma customers from excessive rates. In the instant case, every day of delay that the Commission fails to place Bell's rates subject to refund could permanently deprive Bell's Oklahoma customers of tens of thousands of dollars. Yet, Bell is not unfairly harmed by such an order, as the only refund liability Bell would have is that which this Commission ultimately determines Bell to be overearning.

We request that the Commission exercise its broad constitutional power, assume en banc jurisdiction, and immediately issue an order placing Bell's rates subject to refund.⁶

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL


ROBERT A. BUTKIN, OBA #10042
ASSISTANT ATTORNEY GENERAL

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CERTIFICATE OF MAILING

On this 27 day of January, 1991, a true and correct copy of the foregoing was mailed to:

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Jim Thorpe Building
(INTERAGENCY)

Honorable Bob Hopkins
Oklahoma Corporation Commission
Jim Thorpe Building
(INTERAGENCY)

Honorable J.C. Watts
Oklahoma Corporation Commission
Jim Thorpe Building
(INTERAGENCY)

Honorable Robert Goldfield
Administrative Law Judge
Oklahoma Corporation Commission
Jim Thorpe Building
(INTERAGENCY)

⁶ The Attorney General is attaching a Proposed Order placing Bell's Oklahoma rates subject to refund. See Attachment "B", hereto.

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ROBERT A. BUTKIN



ATTACHMENT A

ROBERT H. HENRY
ATTORNEY GENERAL
STATE OF OKLAHOMA

January 23, 1991

FILED

JAN 24 1991

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

The Honorable Robert Goldfield
Administrative Law Judge
Oklahoma Corporation Commission
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

Re: IN THE MATTER OF THE APPLICATION OF HOWARD W. MOTLEY, JR., FOR
AN INQUIRY INTO THE RATES AND CHARGES OF SOUTHWESTERN BELL
TELEPHONE COMPANY, CAUSE NO. PUD 000662

Dear Judge Goldfield,

In your order dated January 16, 1991, you requested the parties to meet to discuss a possible stipulation of the issues raised in our pending motion to place Southwestern Bell's rates subject to refund during the pendency of the Southwestern Bell rate inquiry referenced above. In response to that order, we are advising you that we have communicated with both counsel for Southwestern Bell and Counsel for the Commission staff, and have not yet reached a stipulation as to any issues involved in the case.

In an effort to clarify the purpose of our motion, we have advised the parties during these discussions that the purpose of our motion is to protect Bell's Oklahoma customers from the harmful effect of delays in the regulatory process. Cause PUD 000662 was filed on January 25, 1989--two years ago. Even if there are no additional delays in the procedural schedule set by your order of January 16, 1991, a final order would probably not issue by the Commission until very late in 1991 or early 1992. This would result in a total passage of three years (or more) between the time the application was originally filed and the date of the final order. When our investigation of Bell's current revenue requirements points to significant forthcoming rate reductions, every month of continuing delay harms Bell's ratepayers. Accordingly, we have asked the Commission to issue an order placing Bell's Oklahoma intrastate rates subject to refund, so that the rate reduction ultimately found appropriate by the Commission can be made effective as of the date of that order.

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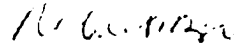
January 23, 1991
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In several conversations, counsel for Bell has indicated that Bell opposed our motion because Bell "disagreed" with our numbers. We have advised Bell that this reflects a misunderstanding of the purpose of our motion. The order we seek would not require any immediate rate reduction or refund to Bell's ratepayers, nor would it preclude Bell from fully litigating any relevant issue in the final hearing on the merits. Rather, the order would insure that the Commission preserve its constitutional ability to protect Bell's ratepayers through refunds once it ultimately determines appropriate rates for Bell.

We have advised the parties that if our motion is granted, the only refund liability that Bell would have would be the amount which the Commission determines Bell is overearning. In our view, this does not disadvantage Bell. But if Bell's rates are not subject to refund, hundreds of thousands of Bell's Oklahoma customers would be disadvantaged because they could not have returned to them excess rates paid while the case is still pending.

To protect Bell's ratepayers from additional harm to them caused by delays in the hearing process, we have requested that Bell join us in a stipulated order placing their rates subject to refund. To date, parties have not entered into such a stipulation.

Sincerely,



Robert A. Butkin
ASSISTANT ATTORNEY GENERAL

January 23, 1991
Page 3

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the above letter was mailed first class mail on this 23rd day of January, 1991, to the following:

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ROBERT A. BUTKIN

Attachment B

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 RATES AND CHARGES) Case No. PUD-000662
OF SOUTHWESTERN BELL TELEPHONE)
COMPANY,)
)

PROPOSED ORDER PLACING BELL'S RATES SUBJECT TO REFUND

Findings of Fact

1. On January 25, 1989, Cause PUD 000662, which is an inquiry into the rates and charges of Southwestern Bell Telephone Company (Bell), was filed with this Commission.

2. Cause PUD 000662 is the first rate case for Bell which will implement the new standards set forth by the Oklahoma Supreme Court in Turpen v. Oklahoma Corporation Commission, 769 P. 2d 1309 (Okla. 1988). In Turpen, the Court recognized the need, in the post-divestiture era, to insure that Bell did not charge excessive rates for customers of basic telephone services to subsidize its entry into new, competitive business ventures.

3. The Attorney General, Robert H. Henry intervened in the cause on March 13, 1989. The American Association of Retired Persons (AARP), AT&T, U.S. Sprint, MCI, and the Cable Television Operators have also intervened.

4. On January 9 and January 14, 1991, the Attorney General advised the Commission of serious discovery problems that his office had encountered with Bell. The Attorney General provided data request logs demonstrating that 340 data requests had gone unanswered for an average of five months, 18 data requests had been unanswered for more than nine months, and that no data request had been responded to for almost three months.

5. On January 9, the Attorney General submitted prefiled testimony under affidavit from two expert witnesses, Mike Ileo and Mike Brosch, indicating that Bell was currently overearning approximately \$40 million per year, and that upon the expiration

of a temporary \$30 million a year reserve deficiency charge in July, 1991, Bell's overearnings would grow to approximately \$ 70 million.

6. We note that over the last three years, state public utility commissions have reduced telephone rates by approximately \$ 2.72 billion. The reductions in 1989 alone were \$840 million. Recent proceedings in other Southwestern Bell states have resulted in significant reductions that reflect this national trend, with rate reductions of in excess of \$ 200 million, \$70 million, and \$25 million in Texas, Missouri, and Kansas, respectively.

7. On January 16, 1991, the Administrative Law Judge Robert Goldfield issued an order compelling discovery and also set a procedural schedule. Final hearing on the merits is not scheduled before the administrative law judge until late August, 1991. Even if the procedural schedule is not changed, it will probably be early 1992 before the briefing and appeal stages are completed and a final order setting rates for Bell has been issued by the Commission. Thus, a total of three years (or more) will pass between the time the case was initially filed and the time a final order issues. We face delays of a year or more from the present date to the date a final order issues by the Commission.

8. To protect Bell's ratepayers from the harm caused by delays in the hearing process, the Attorney General has filed a motion requesting that the Commission place Bell's rates subject to refund. If the requested order is granted, excessive rates paid by Bell's customers during the pendency of the rate investigation could be refunded to those customers. It is clear that the Attorney General is not seeking to require any dollar amount of refund or an immediate rate reduction. Nor would the requested order preclude Bell or any of the other parties from fully litigating any relevant issue in the final hearing on the merits. Rather the requested order would insure that this Commission could preserve its constitutional ability to protect Bell's ratepayers through refunds once it ultimately determines appropriate rates for Bell.

Conclusions of Law

1. Under Article IX, Section 18, of the Oklahoma Constitution, this Commission is charged with the broad "duty of supervising, regulating and controlling all transportation and transmission companies doing business in State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies."

2. In the Turpen decision, the Oklahoma Supreme Court has recognized that this Commission's constitutional duty is not just intended to permit a utility to earn a fair return on its investment, but includes the duty "to prevent a public utility from making excess monopoly profits and to assure fair prices and adequate service to... consumers."

3. This Commission's powers are not limited to prescribing permanent rate schedules, but may be exercised as the "exigencies of the times and changing conditions demand." Lone Star Gas Co. v. Corporation Commission, 39 P.2d 547,550. The Commission has broad equitable powers to structure appropriate remedies to protect ratepayers from excessive rates during the pendency of a rate case.

4. In the instant case, the Attorney General has made a showing that significant rate reductions are likely to be forthcoming as a result of the pending rate investigation. We also note the dramatic downward trend in telephone rates nationwide over the last three years, and that Bell's customers in Kansas, Texas and Missouri have participated in these rate savings.

5. This Commission has broad powers to structure an appropriate remedy to protect Bell's ratepayers from additional delays in the regulatory process. In the instant case, Bell's ratepayers will experience a total of three years regulatory lag (or more) between the time the case was filed and the date of the final hearing on the merits. The hearing is currently scheduled before the hearing officer in late August 1991, and even if there are no further procedural delays, it is unlikely that a final order will issue by the Commission until early 1992. These procedural

delays are in excess of those that led the Commission to award an interim rate increase to Bell in 1985. Order No. 273137, February 13, 1985 (eleven month total regulatory lag justified interim increase)

6. The nature of the inquiry and hearing required by this Commission depends on the remedy appropriate for addressing the particular problem we face. When utilities receive interim rate increases, there is a need to have some sort of proceeding to quantify the amount of rate increase to be provided on an interim basis. Even in the case of an interim rate increase, the Commission always recognizes that it has not had time to fully try the relevant issues, and it therefore places the utility's rates subject to refund.

7. In the instant case, the Attorney General is not seeking any immediate downward adjustment or refund. Rather, his concern is predicated on a concern that delays in the regulatory process harm Bell's ratepayers, because unless rates are placed subject to refund, there will be no mechanism for returning to Bell's customers excess rates paid to Bell while the case is pending. Accordingly, given the clear indications of forthcoming rate reductions and the harm to Bell's customers caused by regulatory lag, we find it unnecessary to delay the implementation of the remedy. In fact, every day of additional delay, before Bell's rates are placed subject to refund, weakens the effectiveness of the remedy, because it deprives the Commission of the power to refund excess rates paid during this period. Bell is not disadvantaged by an order placing its rates subject to refund, because its only refund liability will be that which the Commission ultimately determines Bell to have overearned during the refund period.

Conclusion

In view of the foregoing, the Commission hereby issues an order placing the Oklahoma intrastate rates of Southwestern Bell Telephone Company subject to refund. Return on equity appropriate for the refund period will be determined based on financial data that existed up to the date of this order.

No, 77,521

FILED
SUPREME COURT
STATE OF OKLAHOMA

JUN 10 1991

JAMES W. PATTERSON
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY,

Appellant,

vs.

OKLAHOMA CORPORATION COMMISSION, and
STATE OF OKLAHOMA,

Appellees.

BRIEF IN OPPOSITION TO BELL'S APPLICATION
TO THIS COURT TO ASSUME ORIGINAL JURISDICTION
AND ISSUE A WRIT OF PROHIBITION

ROBERT HENRY
ATTORNEY GENERAL OF OKLAHOMA

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ATTORNEYS FOR APPELLEES

June, 1991

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