

that are hereafter set by the Oklahoma commission and that, too, are likely to be excessive and not cost based. These limitations will thus further inhibit UNE-based entry in Oklahoma.

* * * * *

While each of the individual limitations on the present and future availability of the promotional rates should itself foreclose exclusive reliance on these rates in this proceeding, it is critical to understand that the overall effect of all of the limitations that SBC will be to eliminate any realistic prospects for broad-based UNE competition now as well as in the future. The collective effect of all the limitations is, quite simply, to ensure that no CLEC will be willing to invest its capital based on a blithe assumption that the promotional rates are the only rates that it will have to pay. Rather, a CLEC evaluating these promotional rates will discount them for multiple interrelated reasons. They apply fully only to a subset of its target market, for they exclude, for example, most business UNE-L customers. They will expire at some point in time, and the expiration will be accelerated to whatever extent CLECs are successful in aggregate. At the same time, an individual CLEC is in no position to know when the rates will expire or to control the timing of their expiration. That is particularly so because the definition of the criteria for determining when the rates expire are initially for SBC alone, and all the monitoring of the relevant data is to be performed by SBC. Accordingly, no rational business plan could be premised on these promotional rates. As the Justice Department has stated, the limitations thus create “a problematic basis on which to predicate long-term competitive entry.” DOJ Eval. 24.

In short, because the permanent rates in Oklahoma cannot be found to be cost-based, the limitations on the present and future availability of the promotional rates mean that SBC could not be found to satisfy the checklist and that the grant of the application cannot be

found to be in the public interest, whether or not the promotional rates could be found themselves to be cost based.

II. THE KANSAS UNE RATES ARE NOT COST-BASED

AT&T's opening comments also demonstrated that SBC has failed to show that its non-recurring UNE rates in Kansas are cost-based. The point is straightforward. Despite having been ordered by the Kansas Commission to re-run its non-recurring charge cost studies with forward-looking assumptions, SBC filed studies that failed to make most of the needed corrections and that contained *higher* rates than those the Kansas Commission had disapproved. AT&T Comments 19. Because the Kansas Commission had already committed itself to support SBC's application, however, it chose to approve some of the inflated NRCs as is, and arbitrarily and inadequately reduced others. *Id.* at 20. The Kansas NRCs, as a result, are not cost-based, and the result is NRCs that have devastating consequences for the provision of UNE-P based service to new customers. Flappan Decl. ¶¶ 7-8.

The Kansas Commission does not confront the issue and does not defend the nonrecurring charges on the merits. Instead, the comments merely report that the Kansas commission "issued an order setting nonrecurring rates on November 3, 2000." Kansas Comments at 21. Its comments therefore provide the Commission no reasoned basis for deferring to any state commission judgement that the non-recurring rates it set on November 3, 2000, comply with TELRIC.

The Department of Justice, on the other hand, confirms that the Kansas non-recurring rates are infirm. It observes that "both the [high] level of the final NRCs in Kansas and the acknowledged flaws in the information on which they were based suggest that the rates may not

be properly cost-based.” DOJ Eval. 27. The importance of NRCs (*see* AT&T Comments at 19-21), and the clear evidence, including the Kansas’ Commission’s own initial finding, that they are not cost-based, preclude a finding that SBC has fully implemented the competitive checklist with respect to Kansas.

Indeed, DOJ’s comments provide a cogent analysis of why the process used by the KCC could not establish non-recurring rates that satisfy TELRIC. The KCC took a weighted average of the NRC rates proposed by AT&T and by SWBT. Unless *both* of these proposed rates are TELRIC, there can be no automatic conclusion that the weighted average rate is TELRIC. Because the KCC found SWBT’s initial rates were excessive under TELRIC, and because the SWBT rates that were used to calculate this weighted average *exceeded* those rates, it is clear that there is no basis for a finding that the weighted average itself satisfied TELRIC. DOJ Eval. at 26-27.

Further, as DOJ points out, the recurring rates in Kansas are higher than those established in Texas, and many of the recurring charges are also interim. DOJ Eval. 27-28. While AT&T’s Comments pointed out that the Kansas commission generally did an exemplary job in applying TELRIC to set recurring rates, there were exceptions. As a result there are also recurring rates in Kansas that exceed their Texas counterparts without justification.

Finally, it is important to reiterate that getting rates closer to TELRIC, while a “step in the right direction,” is of no importance in the business world. Unless the rates are no higher than TELRIC, a CLEC’s economic business plan will be negative; it will not enter, and competition will not develop.

III. SBC HAS NOT DEMONSTRATED THAT COMPETITORS HAVE NONDISCRIMINATORY ACCESS TO ITS OSS

Both WorldCom and the DOJ commented at length on the deficiencies in SBC's attempted showing that it is providing nondiscriminatory to access to OSS as required by the checklist. As both demonstrate, there is no evidence that the OSS in Oklahoma and Kansas is substantially the same as that in Texas or that it could be permissible for the Commission to rely on its Texas findings. Further, as DOJ observed SBC's has not provided either the evidence of significant "commercial volumes of orders" for Kansas or Oklahoma, or an "independent third party test," each of which were heavily relied upon by this Commission in approving the New York and Texas 271 applications. DOJ Eval. 28.

While these claims are persuasive and correct, AT&T respectfully submits that consideration of OSS claims in connection with this Application would be putting the cart before the horse. The reason that there has been no significant CLEC usage of SBC's Kansas and Oklahoma OSS systems is that SBC has maintained unlawfully high UNE prices in both Kansas and Oklahoma and that it simply has not been economic for CLECs to use of UNEs or of UNE-platform in either of these states. Thus, unless and until these states have established cost-based UNE rates, any consideration of the adequacy of SBC's OSS in these states is premature.

* * *

The negligible level of UNE-based competition in both Kansas and Oklahoma underscores the urgent need for the Commission to reject the joint application. To assure that UNE-based competition can develop, it is essential that the Commission seize this opportunity to clarify that a BOC will not receive section 271 approval unless – well before presenting its 271 application – the BOC fully implements UNE rates that truly are cost-based.

CONCLUSION

For the reasons stated above and in AT&T's opening comments, AT&T respectfully submits that SBC's joint application for Kansas and Oklahoma should be denied.

Respectfully submitted,



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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

**In the matter of
Joint Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, And)
Southwestern Bell Communications Services, Inc.) CC Docket No. 00-217
d/b/a/ Southwestern Bell Long Distance For Provision)
of In-Region, InterLATA Services)
In Kansas and Oklahoma**

DECLARATION OF

WAUNETA B. BROWNE

ON BEHALF OF

AT&T CORP.

managing of tariff filings, access related activities and the development and interpretation of regulatory policy as it applies to AT&T.

4. My declaration focuses on the promotional unbundled network element (“UNE”) rate discounts (“Promotional Discounts”) set out in a November 29, 1999 Stipulation endorsed by the Oklahoma Corporation Commission (“OCC”) in connection with SBC’s Application for Approval of Its Transition Plan for Alternative Regulation, OCC Cause No. PUD 990000613 (“Alt. Reg. Proceeding”). SBC did not rely upon (or even mention) these Promotional Discounts in its Section 271 Application. I understand, however, that recent *ex partes* filed by SBC in this proceeding indicate that SBC is belatedly asking the Federal Communications Commission (“FCC”) to rely upon the Promotional Discounts in determining that all of SBC’s Oklahoma UNE rates are cost-based, a pre-condition to SBC’s provision of interLATA services in Oklahoma.

5. It is not surprising that SBC chose in its initial Application not to rely upon the Promotional Discounts to support a finding that UNE rates satisfy the competitive checklist. The rates produced by the stipulated Promotional Discounts: (i) were supported by no cost studies, analyses or other evidence, have never been shown to be cost based, and, without explanation, are, in many cases, much higher than SBC’s UNE rates in contiguous states, (ii) contain numerous anticompetitive and discriminatory limits on their availability, and (ii) have only recently become available and will remain available only during a limited “Promotional Window” that will be determined by factors that are largely beyond the ability of any CLEC to control or predict.

6. *There is no cost basis for the Promotional Discounts.* SBC has not claimed, and could not claim, that the Promotional Discounts reflect any consideration of the relevant costs of

providing UNEs. Rather, the Promotional Discounts are nothing more than a negotiated aspect of a much larger “global” settlement of a host of regulatory issues – including price cap regulation, pricing flexibility, plant upgrades, and education funding – that took place against a backdrop of extraordinary legislative proposals (including proposals effectively to *deregulate* SBC, notwithstanding its enduring bottleneck monopoly). In this regard, it is useful to review briefly the legislative and regulatory environment in which the Promotional Discounts were adopted.

7. In May, 1999, at the end of the 1999 Oklahoma legislative session, proposals that would have allowed SBC to avoid a contemplated 2001 rate case and to obtain other significant benefits – including possibly the complete termination of OCC oversight – were under consideration. It was contemplated that SBC would agree to contribute millions of dollars to education funding. The 1999 legislative session ultimately ended before any action was taken on these proposals, but another opportunity for deregulation of SBC presented itself during a special session of the legislature held in June 1999. The special session also ended without any telecommunications legislation being passed, but a special Task Force on Telecommunications was established by the governor to study these issues further and to make a recommendation back to the Legislature by August 1999.

8. In an effort to forestall legislative action, the OCC operationalized its Telecommunications Advisory Group “TAG” to consider proposals for alternatives to the existing rate-of-return regulation of SBC. Efforts to resolve this Alternative Regulation Proceeding through negotiation, rather than litigation, led to proposals on a wide range of outstanding regulatory and other issues, including access charge reform, universal service cost recovery, education funding, plant upgrades, and UNE pricing.

9. On December 10, 1999, the OCC approved a final Stipulation supported by SBC, the OCC staff, the Oklahoma Attorney General, Logix Communications, Birch Telecom, and the Oklahoma Education Coalition. AT&T, MCI/WorldCom and others did not support the Stipulation, but agreed “to not oppose the approval of the Stipulation.” See Stipulation at 7. The Stipulation addresses a range of issues in addition to alternative regulation of SBC and UNE pricing, and the only inference that can be drawn from any party’s support of, or agreement not to oppose, approval of the Stipulation, is that the party viewed the settlement, *as a whole*, superior to the alternatives of a lengthy and costly litigated proceeding or action by the legislature. Thus, the first page of the Stipulation makes clear “that positions taken in this Stipulation do not constitute admissions by any party.” Stipulation at 1, § A, ¶ 5.

10. The Promotional Discounts established in Section B of the Stipulation were based largely on UNE rate proposals by Birch Telecom. Neither Birch nor any other party provided any cost analyses, cost studies or cost evidence of any kind to support those proposals. Rather, the Birch proposals were simply the settlement rate levels that Birch determined it was willing to accept, and even Birch recognized that its proposals were only “a step in the right direction.” OCC Alt. Reg. Order at 7.¹ For that reason, the Stipulation expressly provides that:

Signing this Stipulation does not constitute an admission by any party that UNE rates are or are not cost-based or that SWBT has or has not complied with Section 271 of the Federal Telecommunications Act of 1996. Parties are not prohibited from taking any position regarding UNE rates in a proceeding pursuant to Section 271 of the Federal Telecommunications Act of 1996.

Stipulation at 4, § B, ¶ 9.

¹ As the Department of Justice notes, Birch itself apparently obtained additional rate reductions in an undocumented separate settlement with SBC.

11. Nor is it possible to make any after-the-fact showing that the rates produced by the Promotional Discounts are cost-based. The Promotional Discounts are wholly unsupported percentage discounts to the existing UNE rates that were themselves the product of a stipulation rather than any cost analysis and that AT&T has previously demonstrated are not cost-based. *See* Declaration of Baranowski/Flappan ¶¶ 11-17, 35-71.

12. Moreover, in many cases, the rates produced by applying the Promotional Discounts to the existing Oklahoma UNE rates greatly exceed the SBC rates that have been approved as cost-based by the Texas and Kansas commissions. For example, the Oklahoma switching rates, even with the Promotional Discounts, exceed the comparable Texas rates by 30-60%. And Oklahoma promotional common transport rates exceed Texas transport rates by approximately 95% in the most dense zone, 57% in the suburban zone, and 160% in the rural zone. SBC has not identified any significant cost differences among these states that could explain such large price variations.

13. *The Promotional Discounts do not even apply to all UNEs, zones or circumstances.* Even apart from the fact that the Promotional Discounts have not been shown to be cost-based, they are very limited in scope. No discounts are available for switch ports. *See* Stipulation, Attachment A at 1. No discounts are available in zone 3 – the zone that covers the *majority* of residential access lines – for stand-alone loops or for cross-connects to collocation. *See id.* at 2. Thus, any CLEC that wishes to pursue a partially facilities-based strategy must pay the bloated rates established in the original cost docket. Moreover, although some discounts are available in zone 3 to UNE-P purchasers, these discounts are so low as to provide virtually no relief at all from the excessive existing rates. The Promotional Discount for 2-wire analog loops, for example, is only 6.6% as compared to 24-25% in zones 1 and 2. *See id.* at 1.

14. *The Promotional Discounts are available only during a limited and unpredictable “Promotional Window” and “Promotional Period.”* The Promotional Discounts only became available at all on June 15, 2000 when SBC opted into the Alternative Regulation Plan (thereby initiating the “Promotional Period.” And they were not available as a practical matter until October, 2000, the same month that SBC filed its Section 271 Application. From June to October, SBC continued to insist that a CLEC that wished to place a UNE platform migration order must pay non-recurring charges for each individual element, totaling almost \$100/customer/month.²

15. Moreover, as the label “Promotional” suggests, these discounts are temporary. As an initial matter, the “Promotional Window” to order UNEs at the Promotional Discounts closes statewide 4-5 years after the commencement of the Promotional Period. *See* Stipulation at 2, § B, ¶ 4(a). More importantly, the Stipulation establishes a “Line Threshold Limitation” that operates *by exchange*. Thus, for any given exchange, the Promotional Discounts are no longer available for new customers whenever “the number of residential access lines provisioned by competitive local exchange carriers (CLECs) *in the aggregate* . . . equals or exceeds twenty-five percent (25%) of the total residential access lines in that exchange.” *Id.* at 2-3, § B, ¶ 4(b).³ And once the Line Threshold Limitation is reached in a “majority” of exchanges in any rate zone, SBC can not only immediately terminate the Promotional Discounts for *all* exchanges in that zone, but can even seek to increase the UNE rates to which the Promotional Discounts were applied. *Id.*, § B, ¶ 8.

² Specifically, the NRCs totaled \$99.62 and were comprised of the following elements: loop - \$24.38, port - \$1.20, cross connect - \$70.71, and service order charge - \$3.33.

16. These restrictions severely limit SBC's duties with respect to the promotional rates. They also preclude SBC from fairly relying on the promotional rates as evidence that SBC is "providing" CLECs with access to UNEs at cost-based rates. *Michigan 271 Order* ¶110. My understanding is that a BOC cannot satisfy the requirements of section 271 unless the BOC has an enforceable commitment to provide UNEs on the nondiscriminatory, just, and reasonable terms required by the Act upon the CLECs request. *Id.* The market-share limitations on SBC's obligations with respect to the promotional rates are thus inconsistent with SBC's obligations under sections 252 and 271.

17. As a result, neither AT&T nor any other CLEC can know, with any certainty, how long the Promotional Discounts will remain available in any given exchange – actions by others beyond any single CLEC's ability to control or predict could result in immediate termination of the Promotional Discounts to all CLECs in an exchange (or even an entire zone). Obviously, AT&T cannot justify a long-term entry decision – or the enormous investments required to support such entry – on such discounts that may or may not continue to exist.

³ To make matters worse, the Line Threshold Limitation determination is not based upon 25% of the access lines that exist at the time of the calculation, but 25% of the access lines that existed when the Promotional Period began. *Id.* at 3, § B, ¶ 4(b)(3)(iv).

VERIFICATION

I, Wauneta B. Browne, declare under penalty of perjury that the foregoing is true and correct.



Wauneta B. Browne

Executed on December 10, 2001.



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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

**In the matter of
Joint Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, And)
Southwestern Bell Communications Services, Inc.) CC Docket No. 00-217
d/b/a/ Southwestern Bell Long Distance For Provision)
of In-Region, InterLATA Services)
In Kansas and Oklahoma**

DECLARATION OF

ROBERT P. FLAPPAN

ON BEHALF OF

AT&T CORP.

4. I was employed by AT&T in 1982 at the Bell System Sales Center as a Telemarketing Supervisor where I sold AT&T products and network services. In 1984, I accepted a position with AT&T's Network Organization, where I held positions in Access Management, as a Switched Access Engineer and as a Methods and Procedures Supervisor, and on the Network Services Division Staff. In 1987, I transferred into what is now AT&T's Government Affairs Organization, where I have had interstate and intrastate regulatory responsibilities, and where I have represented and testified for AT&T on technical, economic and policy issues. In April of 1996, I was named District Manager of Pricing and Cost.

5. Over the last ten years, I have testified before the Public Utility Commissions in Kansas, Oklahoma, Missouri, Arkansas and Texas. Much of my testimony has dealt with economic, costing and pricing issues related to local exchange competition.

6. The purpose of my reply declaration is to detail the excessive non-recurring charges that apply to new customer orders. In this regard, it is important to note that it is far from clear exactly how SBC defines a "new customer." A new customer certainly includes new residences that have never had service installed, but SBC may also apply these charges to customers that move into residences where all of the wiring was already installed for the previous resident.

7. In Oklahoma, a \$3.33 service order charge applies to all orders. In addition, whenever a CLEC serves a new customer with the unbundled network element ("UNE") platform the CLEC must pay over \$125.00 in other non-recurring charges under the existing O2A rates approved by the Oklahoma Corporation Commission.¹ Even applying the

¹ These non-recurring charges include a loop charge of \$37.50, a port charge of \$1.20, a cross-connect charge of \$70.71, and a COAC charge of \$16.35.

temporary, limited availability promotional discounts in connection with SBC's alternative regulation proceeding, the CLEC must pay almost \$105 in non-recurring charges.² This is over twice the rate that SWBT charges to end users for installation of new service in Oklahoma.³ Pursuant to the Oklahoma Commission's recent 271 Order, the non-recurring charge for an existing customer is currently \$3.33. This rate is interim, and is subject to true up pending the outcome of further proceedings in which the Oklahoma Commission will consider SWBT's position that the non-recurring charges associated with each individual UNE should be applied to every UNE-P migration order.

8. In Kansas, a CLEC serving a new customer with the UNE platform must pay nearly \$80.⁴ This is more than twice the rate that SWBT charges to end users for installation of new service.⁵ A CLEC pays only the \$5.00 service order charge for an existing customer.

² These non-recurring charges include a loop charge of \$24.38, a port charge of \$1.20 a cross-connect charge of \$70.71, a COAC charge of \$5.00, and a service order charge of \$3.33.

³ SWBT charges its residential end users \$44.45 to install new service. In order to be priced competitively, the CLEC would have to meet or beat SWBT's price, and would thus incur a loss on the transaction.

⁴ These non-recurring charges include a \$30.75 loop charge, a \$26.70 cross-connect charge, a \$5.00 service order charge, and a \$16.35 COAC charge.

⁵ SWBT charges its residential end users \$39.00 to install new service. In order to be priced competitively, the CLEC would have to meet or beat SWBT's price, and would thus incur a loss on the transaction.

VERIFICATION

I, Robert P. Flappan, declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in cursive script, reading "R P Flappan", written over a horizontal line.

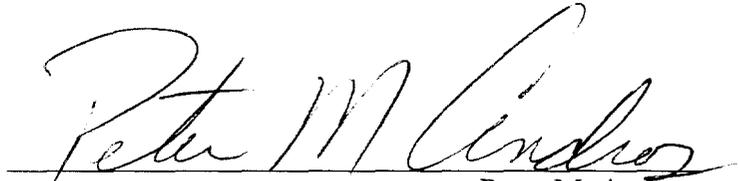
Robert P. Flappan

Executed on December 11, 2001.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2000, I caused true and correct copies of the forgoing Reply Comments in Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: December 11, 2000
Washington, D.C.


Peter M. Andros

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