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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application by SBC Communications, Inc.)
for Authorization to Provide In-Region,)
InterLATA Services in Kansas and Oklahoma)
_____)

CC Docket No. 00-217

**COMMENTS OF WORLDCOM, INC. ON
SOUTHWESTERN BELL'S DECEMBER 28, 2000 EX PARTE FILING**

Pursuant to the Commission's December 28, 2000 Public Notice, WorldCom submits these comments in response to the ex parte letter filed by Southwestern Bell ("SWBT") on December 28, 2000, containing new proposed prices for unbundled elements ("UNEs") in Kansas and Oklahoma. The Commission should disregard the new prices because they were not filed as part of SWBT's application, but instead were submitted on the eve of the 90-day deadline for resolving SWBT's application. Even if the Commission were to consider the newly proposed rates, SWBT's application should be rejected because the rates are not set at TELRIC levels that permit competitive entry.

**I. THE RATES IN SWBT'S EX PARTE LETTER
SHOULD NOT BE CONSIDERED**

The Commission has consistently held that a Bell Operating Company ("BOC") must include in its section 271 application "all of the factual evidence on which the applicant would have the Commission rely in making its findings." TX Order ¶ 35 (citations omitted).^{1/} The Commission has been equally clear that a BOC is never permitted to supplement its application with new factual evidence that "post-date[s] the filing of the comments (*i.e.*, day 20)." Id.

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^{1/} Full citations for the authorities included in this memorandum are included in the Table of Citation Forms in WorldCom's opening comments (filed Nov. 15, 2000).

SWBT has long been on notice of this standard, but chose to flout it in an attempt to force the Commission to decide critical, complex issues based on submissions long after the factual record closed.

SWBT is in complete control over when to file a section 271 application, and what terms it will offer in support of its application. SWBT elected to rest its Oklahoma/Kansas application on grossly excessive, above-cost rates that do not permit competition. Only when it was called to task for relying on unlawful rates did SWBT present a new story and rely on the promotional “Alt Reg” rates for the first time in its reply filing. That change alone violated the complete when filed rule. But SWBT did not stop there. When it became clear that the rates presented in SWBT’s reply brief could not pass muster under section 271, SWBT began haggling with new rate proposals and new pricing analyses in a series of post-reply letters culminating (at least for now) in the December 28 ex parte letter.

Nothing prevented SWBT from proposing these rates in its initial application, let alone earlier in the state cost proceedings. SWBT simply decided to come in with a high opening bid and periodically shave a few cents off its rates through what it perceives to be an ongoing bidding process.

It is indisputable that the revised rates “post-date the filing of the comments” and therefore must be disregarded pursuant to Commission precedent. That precedent represents sound policy. Only when a BOC presents its case in its application can the Department of Justice (“DOJ”), the public and the Commission have an adequate opportunity to evaluate the facts fully. The very point of the rule is “to prevent applicants from presenting part of their initial prima facie showing for the first time in reply comments.” TX Order ¶ 36. Of course, SWBT has gone even further, attempting to put on a prima facie case for the first time in post-reply

correspondence with the Commission. By changing its application in this fashion, SWBT is attempting to make a mockery of the Commission's processes, and has virtually assured that any decision based on the new rates would be uninformed, hurried and vulnerable to appellate reversal on that ground alone. The Commission should enforce its prior directives and disallow SWBT's new evidence. SWBT remains free to file a new application anytime it chooses, thereby allowing sufficient opportunity for all parties and the Commission to evaluate the application.

II. SWBT'S NEW RATES ARE EXCESSIVE AND ARE NOT COST-BASED

A. SWBT's Rates are Not Cost-Based

If the Commission were to abandon the complete when filed rule and consider SWBT's December 28 submission, even a limited review in the time permitted demonstrates that the rates are not TELRIC-compliant and do not permit competitive entry. SWBT's new rates are no more cost-based than the rates they have replaced. They do not fairly derive from reasonable application of TELRIC principles and, therefore, do not meet the standards established by the Telecommunications Act or this Commission's regulations. The new rates are not based on any cost studies, either directly or with considered adjustments.

As a threshold matter, SWBT argues that the Commission should not independently review prices in section 271 proceedings. This argument disregards the plain text of the statute and Congress' precise instructions to this Commission. Section 271 charges the Commission with determining whether a BOC has met the requirements for interLATA in-region entry, including the requirement of cost-based pricing of unbundled network elements set forth in section 271(c)(2)(B)(ii). The Commission is expressly prohibited from granting a section 271 application unless it has done so. See § 271(d)(3)(A). Section 271 also establishes what deference, if any, the Commission owes to other agencies' review. The Commission is required

to consult with the Attorney General and to “give substantial weight” to DOJ’s evaluation. See § 271(d)(2)(A). The Commission is also required to consult with the applicable state commission, but does not owe any particular deference to its views. See § 271(d)(2)(B). The Commission has therefore already acknowledged that it has the exclusive responsibility for determining checklist compliance (MI Order ¶ 282), a conclusion also reached by the D.C. Circuit (SBC Communications v. FCC, 138 F.3d 410, 416-17 (D.C. Cir. 1998)).

Thus, in urging this Commission to disregard DOJ’s evaluation and rely instead on the decisions of the Oklahoma (“OCC”) and Kansas (“KCC”) commissions, SWBT has it exactly backwards. It is the DOJ’s evaluation to which the Commission must give substantial weight, not those of state commissions. Under the scheme Congress enacted, the Commission is required to review independently whether an applicant has met each statutory requirement. Congress expressly provided that even the DOJ’s evaluation, which must be given substantial weight, “shall not have any preclusive effect on any Commission decision” under section 271. (§ 271(d)(2)(A)). It necessarily follows that state commission recommendations cannot have preclusive effect, and absolutely nothing in the statute supports the “clearly erroneous” standard of review that SWBT proposes.

In any event, the state pricing decisions challenged here – which SWBT acknowledges served as the basis for the December 28 ex parte rates – fail even the most cursory review because the OCC in all of its UNE pricing decisions, and the KCC in its nonrecurring UNE rates decision, wholly violated basic TELRIC principles by throwing their hands in the air without even trying to apply TELRIC principles. Their failure to take any steps to apply TELRIC rates makes it particularly difficult to point to “clear errors in factual findings” because in order for there to be specific errors, there have to be factual findings. These “split the difference” rates are

not based on factual findings, such as determinations of proper inputs or assumptions. And it is the absence of factual findings linking TELRIC costs to UNE rates that so patently violates the Act.

SWBT and the OCC nevertheless contend that the rates contained in the non-unanimous stipulation agreed to by Cox Cable and OCC Staff are cost-based (and therefore that the December discounts are necessarily cost-based), but neither SWBT nor the OCC offers any evidentiary support for its contention. There are no cost studies supporting the original rates, or any record of adjustments to any other cost studies – let alone justification for any such adjustments – that would yield the established rates. The ALJ conceded that the rate levels in the stipulation “do not strictly equal any cost proposal of any party.” ALJ Report at 158. Instead, both SWBT and the OCC base their entire support for these rates – challenged by the DOJ as well as many parties to this proceeding – on conclusory assertions by the ALJ that the stipulated rates are based upon costs and that the OCC “has the discretion to adopt a position in the ‘middle’ of that which is proposed by the parties.” ALJ Report at 159.

But the ALJ cannot turn compromise rates into cost-based rates with a wave of the hand, and neither can the OCC, SWBT or this Commission. An assertion that there is sufficient evidence in the record to demonstrate that the stipulated rates are based upon costs, see ALJ Report at 159, does not make it so. Indeed, the record is completely lacking in any evidence that the stipulated rates fall within a reasonable TELRIC-based range. As the DOJ correctly stated in its Evaluation, “[t]he fact that a price is set in some mid-point range between prices proposed by an ILEC and a CLEC does not indicate that the price is appropriately cost-based, absent a separate determination that both the higher and lower proposed prices are appropriately cost-

based.” DOJ OK/KS Eval. at 18. That the December rates are at a slightly lower mid-point between the Cox and SWBT proposals does nothing to correct this fundamental flaw.

Contrary to SWBT and the OCC’s unsupported assertions, SWBT’s proposed rates – which they contend represent the upper boundary of the range of TELRIC costs and rates for UNEs, see SWBT Reply at 18 – are not consistent with TELRIC and, therefore, are not cost-based. Indeed, as AT&T extensively discussed in its opening comments, SWBT’s cost studies assumed investment, network placement, fill factors and expense ratios to be fixed at historical levels and, therefore, were not forward-looking as required by TELRIC. See AT&T Comments at 17.

Although SWBT contends that Dr. Francis Collins, a Cox witness in the cost proceedings, found that SWBT’s proposed rates represent the upper boundary of TELRIC costs, see SWBT Reply Br. at 18, Dr. Collins in fact reached no such conclusion. Rather, he determined that numerous assumptions and inputs in SWBT’s cost study were inconsistent with TELRIC methodology. For example, Dr. Collins testified that:

- SWBT’s proposed weighted average cost of capital of 10.69% and proposed 13.0% cost of common equity are too high and should be rejected, ALJ 1998 Report at 108;
- a number of SWBT’s input values (i.e., maintenance and administration expense factors) and incremental investment figures (i.e., engineering, power, fill factors and support facilities) for unbundled loops are questionable, id. at 109;
- SWBT’s use of the CAPCOST model is inappropriate and overstates TELRIC costs, id.;
- SWBT’s proposed loop costs are substantially overstated and exceed Dr. Collins’ own estimates by 42-48%, id. at 110; and
- if the costs presented by SWBT for its UNEs were adopted by the OCC and used to develop rates, the rates for unbundled loops would essentially match the existing retail revenues for this same service. Id.

As a result, Dr. Collins recommended to the ALJ that SWBT's proposed costs for UNEs be rejected and that SWBT be required to re-run its studies using the appropriate input values and modeling procedures as determined by the OCC. Id. Thus, Dr. Collins' testimony provides no support for SWBT's claim that its studies are consistent with TELRIC, but is instead further evidence that SWBT's costs studies and proposed rates are not consistent with TELRIC, and that compromise rates using SWBT's proposals as one boundary are invalid.

SWBT also argues that the nonrecurring rates in Kansas comply with TELRIC. However, SWBT does not, and could not, refute that the KCC set nonrecurring rates only after expressly finding it could not set rates that were "supported by accurate and Commission-approved cost data." KCC NRC Order at 24. The KCC nevertheless decided to set nonrecurring rates in order to hurry SWBT's entry into in-region interLATA service. Id. at 4, 24. SWBT also does not refute that the KCC found that SWBT's cost studies did not comply with the KCC's order on reconsideration. Id. at 4. Applying insignificant discounts to the rates does nothing to make them TELRIC-compliant.

For the same reason, the Oklahoma "Alt Reg" rates – whether temporary or permanent – are not cost-based. They represent nothing more than shaving a small amount off rates plucked from thin air. No cost studies were evaluated and no adjustments were made to any cost studies to arrive at the arbitrary (and woefully insufficient) reductions. SWBT is therefore reduced to making the outlandish claim that CLECs did not oppose the Alt Reg reductions (SWBT 12/28/00 ex parte at 1). When presented with a choice of grossly excessive rates versus grossly excessive rates less a small discount, competitors of course chose the latter, at the same time expressly

reserving the right to challenge the rates as unlawful and in violation of the requirements of section 271.^{2/}

SWBT next contends that the variation among rates in Kansas, Oklahoma and Texas are “reasonable” and are to be expected under the 1996 Act’s pricing regime and the FCC’s pricing methodology. But nowhere in SWBT’s lengthy defense of its UNE rates in Oklahoma does SWBT offer any explanation why recurring rates in Oklahoma are higher than in Kansas – even when comparing the Oklahoma “Alt Reg” rates to the Kansas recurring rates. Indeed, SWBT acknowledges that Oklahoma and Kansas are both “predominantly rural” states. SWBT Br. at i. And SWBT’s own calculations estimated virtually identical costs and comparable geographic zone definitions for Oklahoma and Kansas, which would support the conclusion that prices in Oklahoma and Kansas should be about the same. The fact they are not, that recurring charges in Oklahoma greatly exceed those in Kansas, and that SWBT has no explanation for this disparity, present a powerful basis for concluding that SWBT has not demonstrated – and cannot demonstrate – that its UNE rates in Oklahoma are properly cost-based, as required for section 271 approval.

SWBT even acknowledges that “loop costs in Kansas are greater than in Oklahoma . . . especially in the rural zone.” SWBT Reply Br. at 9. That argues for loop rates that are lower in Oklahoma than in Kansas, not the higher prices that SWBT charges for loops in Oklahoma. Similarly, SWBT’s reference to this Commission’s proxy rates also shows that loop rates should

^{2/} See Alt Reg. Stipulation at 4, ¶ 9: “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.”

be lower in Oklahoma than in Kansas. SWBT Reply Br. at ii, 6. What is clear, and even SWBT admits, is that the discrepancies in loop prices in Oklahoma and Kansas reflect fundamental differences in the approaches taken by the Kansas commission and the Oklahoma commission. SWBT Reply Br. at 9. The KCC adjusted SWBT's loop cost driver values but the OCC just adopted compromise rates without even attempting to determine the actual costs of providing loops in Oklahoma and appropriate rates to reflect those costs.

Finally, even if Oklahoma rates were set at Texas levels, that would be an insufficient basis on which to find that the Oklahoma rates meet the requirements of the checklist and enable competition. There is not a shred of evidence in the record tying the Oklahoma rates to TELRIC-compliant cost studies; instead, there were numerous and significant TELRIC errors in SWBT's cost studies, as discussed above. Moreover, as SWBT itself argues when convenient to its purpose, "a state-by-state comparison is inappropriate and meaningless, especially since the costs vary significantly from state to state." SWBT 12/28/00 ex parte at 1. It is thus remarkable that in its attempt to show its new rates are TELRIC-complaint, SWBT states that it will not under any circumstances discount NRCs in Kansas or Oklahoma lower than the corresponding NRCs it charges in Texas. Id. at 2-3. If state comparisons are meaningless for purposes of TELRIC, as SWBT argues, what possible justification is there for refusing to lower Oklahoma or Kansas rates below rates in Texas?

The point of comparing rates across different states is not to suggest that one size fits all. As DOJ and CLECs noted, the gross disparity between Oklahoma and Kansas prices strongly suggests TELRIC principles were not followed since the costs are very close and, in fact, SWBT submitted nearly identical cost studies in both states. That comparison is merely a guide suggesting that the Oklahoma rates are not cost-based, triggering the need to examine the process

employed by the Oklahoma commission for deriving TELRIC rates. Such an examination reveals a complete absence of a cost analysis by the state commission. Setting the Oklahoma rates at Texas levels does not change this or magically make the rates TELRIC compliant.

B. SWBT's UNE Rates Preclude Competitive Entry

SWBT's December rate submission for Oklahoma, which merely trims wildly excessive rates, would result in a price squeeze in which WorldCom and other UNE-P residential providers would lose money every month on every customer in every zone in the state. The Commission should not turn its back on the stark reality that to comply with the Act's goal of fostering local competition, UNE prices cannot be set at a level that would cause CLECs to lose money providing UNE-P service to residential subscribers.

SWBT attempts to sidestep this vital issue by arguing that the total monthly rate for UNE platform in Texas is the same as or higher than in Kansas or Oklahoma. SWBT 12/14/00 *ex parte*; SWBT 12/28/00 *ex parte*. That is neither true nor relevant.

The statement is inaccurate because SWBT has not presented an apples-to-apples comparison. First, in its December 14 *ex parte*, SWBT improperly limits its analysis to urban exchanges in Oklahoma and Kansas, completely ignoring residential customers located in suburban exchanges (a significant percentage of all customers), as well as smaller rural zones. True residential competition in Oklahoma and Kansas can only exist when the vast majority of residential customers can benefit from CLECs' UNE-P offerings. Second, and even more egregious, is that SWBT compares UNE-P rates in urban areas of Oklahoma and Kansas with the UNE-P rate in suburban areas of Texas. Since urban rates are more attractive than suburban rates, SWBT's conclusion that Oklahoma rates are comparable to those in Texas is invalid. Moreover, UNE-P rates in rural areas in Oklahoma and Kansas are significantly greater than

UNE-P rates in rural areas in Texas, principally because loop rates in Oklahoma and Kansas in rural zones are so much higher than in Texas. SWBT 12/14/00 *ex parte*, Attachment 3. An apples-to-apples comparison reveals that UNE-P rates in Oklahoma are higher than in Texas for each comparable zone.

Third, to hide the fact that UNE-P rates in Oklahoma are typically higher than the UNE-P rate in Texas, SWBT misleadingly lists a range of UNE-P rates in Texas. See SWBT 12/14/00 *ex parte* at 2-3 & attachments. SWBT does so despite having the data on the distribution of its switches and the ability to calculate a single UNE-P rate for different areas of Texas, just as it did for Oklahoma and Kansas.

Fourth, for purposes of its revised analysis, SWBT assumes only 1400 minutes of use (“MOU”) for local traffic as opposed to the 1800 MOU local traffic which was assumed in the mega-arbitration. See SWBT 12/14/00 *ex parte* at 3 n.6. SWBT’s assumption is therefore inaccurate, and hardly “conservative” as it claims. Because local switching rates are so much higher in Oklahoma than in Texas, this unsupported assumption has the effect of lowering the perceived difference in switching costs for purposes of UNE-P rate comparisons.

Even if the Oklahoma rates were identical to the Texas rates in all respects, however, that would not show that residential competition would be viable in Oklahoma, given different economic conditions in each state and the fact that even in Texas the rates are excessive. WorldCom has been forced to eliminate its active marketing efforts in the enormous Zone 2 in Texas (nearly half the households in the state) because the rates do not permit viable competition, and WorldCom understands that other CLECs have withdrawn from all or part of the Texas residential market as well. WorldCom is now limiting its active marketing to the smaller urban

zone in Texas in order to avoid losses that result from marketing more widely, even though WorldCom has systems in place for the entire state if pricing improves.

Moreover, the very nature of TELRIC is that it is forward-looking, so that rates that may have been TELRIC compliant in Texas in the past may no longer be so today. Indeed, the Texas PUC has agreed to review the Project Pronto loop rates, which reflect forward-looking technology for loops in SWBT's service territory. Setting the Oklahoma rates at current Texas levels therefore does not equate with cost-based rates or viable entry in Oklahoma. As noted above, WorldCom would lose money on every residential customer it attempted to serve over UNE-P in Oklahoma, regardless how those rates do or do not compare with Texas.

In its December 14 ex parte, SWBT makes the remarkable assertion that its UNE rates have not created a barrier to entry in Oklahoma and Kansas. As the DOJ found, however, there are a mere 14 residential UNE-P customers in Oklahoma, and zero in Kansas. WorldCom is obviously not alone in concluding that residential entry in Oklahoma and Kansas using SWBT's unbundled elements is not economically viable.

Respectfully submitted,


Mary L. Brown
Keith L. Seat
WORLDCOM, INC.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2993

Jerome L. Epstein
Nory Miller
Jeffrey I. Ryen
JENNER & BLOCK
601 13th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 639-6000

January 8, 2001

CERTIFICATE OF SERVICE

I, Jerome L. Epstein, hereby certify that I have this 8th day of January, 2001, caused a true copy of the Comments of WorldCom, Inc. on Southwestern Bell's December 28, 2000 ex parte filing to be served on the parties listed below:

Chairman William E. Kennard
Commissioner Harold W. Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Layla Seirafi
U.S. Department of Justice
Antitrust Division, Suite 8000
Telecommunications Task Force
1401 H Street, N.W.
Washington, D.C. 20530

John Stanley
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20544

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20544

Brent Olson
Deputy Chief, Policy & Program
Planning Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20544

Janice M. Myles
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th St., S.W., Room 5-B-145
Washington, D.C. 20554

Michelle Carey
Chief, Policy and Program Planning
Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20544

ITS, Inc.
445 12th St., S.W.
Washington, D.C. 20554

Geoffrey M. Klineberg
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
1615 M Street, N.W., Suite 300
Washington, D.C. 20036
Counsel for SBC

James D. Ellis
Paul M. Mancini
Martin E. Grambow
SBC Communications, Inc.
175 E. Houston
San Antonio, TX 78205

Katherine D. Farroba
Deputy Chief
Policy and Program Planning division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20544

Jonathan Askin
General Counsel
ALTS
888 17th Street, N.W., Suite 900
Washington, D.C. 20006

Geraldine Mack
AT&T Corporation
295 North Maple Ave
Basking Ridge, NJ 07920

Mark E. Haddad
Ronald S. Flag
Peter D. Keisler
David L. Lawson
Sidley and Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
Counsel for AT&T Corporation

David J. Newburger
Newburger & Vossmeier
One Metropolitan Square, Suite 2400
St. Louis, MO 63102
Counsel for Campaign for
Telecommunications Access

Antony Petrilla
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Counsel for Adelphia, Connect!

Robert W. McCausland
Vice President, Regulatory and
Interconnection
Allegiance Telecom, Inc.
1950 Stemmons Freeway, Suite 3026
Dallas, Texas 75207-3118

Pace A. Duckenfield
Counsel
Alliance for Public Technology
919 18th Street, N.W., Suite 900
Washington, D.C. 20006

Karen Nations
Senior Attorney
Metromedia Fiber Network Services, Inc.
One Meadowlands Plaza
East Rutherford, NJ 07073

Jane Van Duzer
Senior Counsel
Focal Communications Corp.
200 North LaSalle Street
Suite 1100
Chicago, IL 60601

A. Renee Callahan
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st St., N.W.
Washington, D.C. 20036
Counsel for Sprint

Brad E. Mutschelknaus
Ross A. Buntrock
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
Counsel for e.spire

Michael J. Shortley, III
Associate General Counsel
Global Crossing Telecommunications, Inc.
180 S. Clinton Ave.
Rochester, NY 14646

Kevin Hawley
Swidler Berlin Shereff Friedman, LLP
3000 K St., N.W., Suite 300
Washington, D.C. 20007
Counsel for KMC Telecom

Commissioner Ed Apple
Oklahoma Corporation Commission
Jim Thorpe Building
2101 N. Lincoln Blvd.
Oklahoma City, OK 73152-2000

Terry J. Romine
Director of Legal and Regulatory Affairs
Adelphia Business Solutions, Inc.
One N. Main Street
Coudersport, PA 16195

Genevieve Morelli
Andrew M. Klein
Kelley Drye and Warren LLP
1200 19th Street, N.W.
Washington, D.C. 20036
Counsel for KMC Telecom

Chair John Wine
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-2425

Bret Lawson
Eva Powers
Janet Buchanan
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, KS 66604-4027

Joyce Davidson
Oklahoma Corporation Commission
Jim Thorpe Office Building
2101 N. Lincoln Blvd.
Oklahoma City, OK 73152-2000

Commissioner Bob Anthony
Oklahoma Corporation Commission
Jim Thorpe Building
2101 N. Lincoln Blvd.
Oklahoma City, OK 73152-2000

Commissioner Denise Bode
Oklahoma Corporation Commission
Jim Thorpe Building
2101 N. Lincoln Blvd.
Oklahoma City, OK 73152-2000

Howard Siegel
Vice President of Regulatory Policy
IP Communications Corporation
17300 Preston Road, Suite 300
Dallas, TX 75252

Commissioner Cynthia Claus
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-2425

Commissioner Brian Moline
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66606-2425

David R. Conn
Deputy General Counsel & AP
Richard S. Lipman
Associate General Counsel
McLeodUSA Incorporated
McLeodUSA Technology Park
6400 C Street, SW
Cedar Rapids, Iowa 52406-3177

Walker Hendrix
Citizen's Utility Ratepayers Board (CURB)
1500 SW Arrowhead Rd
Topeka, KS 66604-4027

Merle R. Blair
President & CEO
Greater Topeka Chamber of Commerce
120 SE 6th Avenue, Suite 110
Topeka, KS 66603-3515

Lisa C. Creighton
Sonneschein, Nath & Rosenthal
4520 Main Street
Suite 1100
Kansas City, MO 64111
Counsel for Ionex Communications, Inc.

Gene Spineto
Telecommunications Manager
Environmental Management Inc.
Post Office Box 700
Guthrie, OK 73044-0700

Glen Reynolds
Associates Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20544

Michael Donohoe
Vice President-Legal
Joann Russell
Director-LEC Relations
McLeod USA Incorporated
CapRock Communications Corp.
15601 Dallas Parkway - Suite 700
Dallas, TX 75001

Patricia Ana Garcia Escobedo
ConnectSouth Communications, Inc.
9600 Great Hills Trail 250E
Austin, TX 78759

Mary C. Albert
Morton J. Posner
Regulatory Counsel
Allegiance Telecom, Inc.
1150 Connecticut Ave., N.W., Suite 205
Washington, DC. 20036

Carrington F. Philip
Vice President, Regulatory Affairs
Donald L. Crosby
Senior Counsel
Cox Communications
1400 Lake Hearn Drive, NE
Atlanta, GA 30319

Patrick J. Donovan
D. Anthony Mastando
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Counsel for Focal Communications


Jerome L. Epstein