

EXHIBIT B

ORIGINAL
STATE OF INDIANA

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INDIANA UTILITY REGULATORY COMMISSION

**IN THE MATTER OF THE INDIANA)
UTILITY REGULATORY COMMISSION'S)
INVESTIGATION OF MATTERS)
RELATED TO COMPETITION IN THE)
TELECOMMUNICATIONS INDUSTRY IN)
THE STATE OF INDIANA PURSUANT TO)
IND. CODE 8-1-2 *et seq.***

CAUSE NO. 42530

APPROVED: DEC 09 2005

BY THE COMMISSION:

**Larry S. Landis, Commissioner
Abby R. Gray, Administrative Law Judge**

On October 29, 2003, the Indiana Utility Regulatory Commission, on its own motion, issued an Order in the above-captioned cause commencing a formal investigation to consider developing appropriate regulatory guidelines for the telecommunications industry including, but not limited to, customer specific offerings ("CSOs"), promotions, bundling, winbacks, and waiting periods in conjunction with line loss notification. The Order was sent to all Indiana incumbent and competitive local exchange telecommunications carriers, the Indiana Office of Utility Consumer Counselor ("OUCC"), and other entities that the Commission noted may be interested in this proceeding.

The following parties participated in the proceeding, either by filing appearances, testimony, or upon grant of intervention: Hancock Rural Telephone Corporation and Hancock Communications, Inc. ("Hancock"); McLeodUSA Telecommunications Services, Inc. ("McLeod"); Indiana Exchange Carrier Association, Inc. ("INECA"); SIGECOM, LLC ("SIGECOM"); Indiana Bell Telephone Company, Inc. ("SBC Indiana" or "SBC"); Cinergy Communications Company ("CCC"); Sprint Communications Company L.P. and United Telephone Company of Indiana, Inc., d/b/a Sprint (collectively "Sprint"); Time Warner Telecom ("TWTC"); Verizon North, Inc., Contel of the South, Inc., d/b/a Verizon North Systems ("Verizon"); the Indiana Payphone Association ("IPA"); the Indiana Telecommunications Association ("ITA"); Unitycomm, LLC; AT&T Communications of Indiana, GP ("AT&T"); WorldCom, Inc., d/b/a MCI ("MCI"), Sage Telecom, Inc. ("Sage") and Z-Tel Communications, Inc. ("Z-Tel"); and the OUCC.

On January 22, 2004, the Presiding Officers issued a docket entry containing the preliminary list of issues for the proceeding, and instructed the parties to submit clarification, additions, or deletions to the issues list on or before February 23, 2004. Pursuant to the January 22, 2004 docket entry, comments on the preliminary issues list

were filed on behalf by CCC, Sprint, Verizon, SIGECOM, TWTC, IPA, Unitycomm, AT&T, MCI, Sage, Z-Tel, SBC Indiana, Hancock, and the OUCC.

On October 19, 2004, the Presiding Officers issued a docket entry establishing the Commission's final issues list for the proceeding, which included three general categories: a) CSOs; b) promotions including winbacks; and c) bundles and packages.

Pursuant to notice and as provided for in 170 IAC 1-1.1-15, a prehearing conference was held on November 17, 2004. On December 8, 2004, the Commission issued its prehearing conference order setting a procedural schedule. The procedural schedule was later modified and extended upon motion of the parties.

On January 28, 2005, opening round testimony and exhibits were filed by Verizon, Hancock, Sprint, SBC Indiana, TWTC, SIGECOM, and the OUCC.

Contemporaneously with the filing of its opening round testimony, and in accordance with 170 IAC 7-1.1-21(j), TWTC filed a Request for Administrative Notice of certain information in the record of IURC Cause No. 42236, which dealt with TWTC's challenge to a particular SBC CSO offering, as well as specified record information from IURC Cause No. 42218, which involved a challenge by certain competitive carriers to specific SBC Indiana winback promotional practices. Specifically, TWTC sought administrative notice of all testimony admitted into evidence at the evidentiary hearing of IURC Cause No. 42236, along with the transcript of the evidentiary hearing, all proposed orders filed, and the final order issued by the Commission in that proceeding on September 29, 2004. TWTC also requested administrative notice of all testimony admitted into evidence at the evidentiary hearing of IURC Cause No. 42218, along with the transcript of the evidentiary hearing and all proposed orders filed in that proceeding. On February 21, 2005, SBC Indiana filed its objection to TWTC's Request for Administrative Notice, and after a Reply by TWTC filed on March 15, 2005, the Presiding Officers issued a docket entry granting TWTC's request in its entirety.

With the filing of its opening round testimony, the OUCC filed a Motion to Remove 911/E-911 Issues to Either a Sub-Docket or Separate Cause. On February 18, 2005, SBC Indiana filed a Response asking that the Commission either deny, or in the alternative, defer the relief sought by OUCC until such time as the factual matters underpinning the Motion are investigated. On February 25, 2005, the OUCC responded by filing the Affidavit of Julie A. Keen. By docket entry dated April 15, 2005, the Presiding Officers granted the OUCC's Motion and created a subdocket designated as Cause No 42530-S1 to address the 911/E-911 issues.

Responsive testimony was filed by Sprint on March 28, 2005, and by the following parties on April 27, 2005: Verizon, TWTC, SBC Indiana, and Hancock. Reply testimony was filed on June 1, 2005 by SBC Indiana, TWTC, SIGECOM, and Verizon.

By a docket entry dated June 17, 2005, the parties were instructed to answer written questions of the Presiding Officers. Responses to the docket entry questions were

filed on June 27, 2005 by Hancock, TWTC, SBC Indiana, SIGECOM, Sprint, Verizon, and Sage. On June 29, 2005, McLeodUSA filed its responses to the written questions.

Pursuant to notice of hearing published as required by law, proof of which was incorporated into the record by reference, an evidentiary hearing on was held on June 28, 2005 in Room CCR-32 of the Indiana Government Center South. At the hearing, the following parties appeared by counsel: TWTC, SIGECOM, McLeod, Verizon, ITA, Hancock, SBC Indiana, Sprint, and the OUCC. Pamela Sherwood and Don Wood testified on behalf of TWTC; Bruce Jones testified on behalf of SIGECOM; Terry Dye testified on behalf of Verizon; Michael Burrow testified on behalf of Hancock; Alan Matsumoto testified on behalf of Sprint; and Ronald Flitsch, Linda Muscat, Elizabeth Stoia, Debra Aron, Kent Currie, David Hanson, and Jolynn Butler testified on behalf of SBC Indiana. No other party offered evidence, and the evidentiary hearing concluded on June 28, 2005.

The Commission, having examined all of the evidence presented in this Cause and being duly advised in the premises, now finds as follows:

1. Commission Jurisdiction and Notice. Indiana Code §§ 8-1-2-58 and 8-1-2-59 provide the Commission with broad authority to investigate public utilities and to hold formal hearings on matters under investigation. In addition, the Indiana General Assembly recognized in 1985 that the “regulatory policies and practices and existing statutes are not designed to deal with the competitive environment,” and therefore granted the Commission “flexibility in the regulation of providers of telephone services . . . [and] authorized [us] to formulate and adopt rules and policies as will permit [us], in the exercise of [our] expertise, to regulate and control the provision of telephone services to the public in an increasingly competitive environment, giving due regard to the interest of consumers and the public and to the continued availability of universal telephone service.” I.C. 8-1-2.6-1.

Pursuant to I.C. 8-1-1.1-4.1, the OUCC is a statutory party to this Commission proceeding. The Order initiating this investigation invited parties “interested” in the proceeding to participate. The ITA and INECA, which are trade associations of telecommunications carriers, and the IPA, which is a trade association of payphone industry members, participated in the proceeding pursuant to that invitation. The remaining parties are “public utilities” within the meaning of that term set forth in Ind. Code 8-1-2-1 *et seq.* and are telecommunications providers, each holding Certificates of Territorial Authority (“CTAs”) to provide telecommunications service to the public within and throughout Indiana.

The three largest ILECs in Indiana (SBC, Verizon, and Sprint) have Alternative Regulatory Plans (ARPs) pursuant to IC 8-1-2.6. Each ARP has a clause specifying the rules coming out of this Cause will supercede the rules in the ARP.

For all the foregoing reasons, we find that we have jurisdiction over the parties and subject matter of this Cause.

2. **Background to the Commission's Investigation.** In our Order commencing this investigation, we noted that, through our analysis of our local competition survey and various dockets addressing competitive issues, our continuing assessment of emerging issues has made us aware of changes to the competitive telecommunications landscape in Indiana. As noted, the telecommunications market in Indiana has changed dramatically since the passage of the Telecommunications Act of 1996 ("TA-96"), and it is imperative that the Commission continue to address competitive issues in our internal procedures to ensure fairness to all interested parties and to fulfill our statutory responsibilities. After considering a broad range of issues presented for consideration in this investigation, the Presiding Officers concluded that this proceeding should focus on establishing appropriate regulatory guidelines for CSOs, promotions including winbacks, and bundles and packages.

Generally speaking, our investigation set out to establish definitions for CSOs, winbacks, promotions, bundles, and packages, and to create guidelines for when and to whom these various arrangements may be offered; their duration and price; whether and how they should be filed, approved, and/or tariffed with the Commission; whether waiting periods should be observed before certain arrangements are offered; and whether carriers may impose penalties for early termination of certain arrangements.

3. **Status of Competition.** Behind the specific regulatory structure for CSOs, bundles and packages, and promotions is the extent of telecommunications competition in Indiana. Each year, the Commission prepares a telecommunications report for the Legislature. One of the areas covered in that report is the status of competition. In this Cause, various parties cite to the Commission's *Telephone Report to the Regulatory Flexibility Committee of the Indiana General Assembly* (hereafter "Reg Flex Report"). We hereby take administrative notice of the 2004 and 2005 Reports. The Parties have a fundamental disagreement on the definition of the market; effect of the mega-mergers between AT&T/SBC and MCI/Verizon; the extent of competition in the market; the role of different types of competition such as resale; how to measure competition; and whether the different types of competitors such as wireless and VOIP have any impact on wireline competition.

a. **ILEC Position.** The ILECs take a broad view of competition for wireline markets by including VOIP providers and wireless providers. For example, Sprint indicates it competes with CLECs, cable telephone providers, VOIP providers, wireless providers and municipal local exchange telephone companies. (Mastumoto Direct, p. 2) SBC claims wireless telephony, cable telephony, and VOIP telephony are expanding and redefining the market for voice services. (Aron Direct, p. 60) Verizon believes competitors are providing alternative services in virtually all of Verizon's wire centers, citing CLECs, Competitive Access Providers, Inter-Exchange Carriers, wireless providers and cable operators (Dye Direct, p. 5) Verizon indicated enterprise customers are using IP Telephony. (*Id.*) Verizon also cites a recent newspaper article indicating Comcast Corporation has plans to launch local phone service in Fort Wayne in the future. (*Id.* at 6)

The ITA indicates intermodal competition is taking place in Indiana on a widespread basis between traditional wireline providers and service providers on other platforms such as cable and wireless. Moreover, increased competition on an intramodal basis among wireline providers is also occurring in Indiana.¹ Furthermore, the increased deployment and usage of broadband is creating a fundamental shift in telecommunications infrastructure, providing more competitive choices available to the public.² (ITA Proposed Order, p. 3)

For competition between wireless and wireline, SBC indicated that the FCC noted that for the first time, as of June 2004, the number of mobile wireless subscribers (2.8 million) in Indiana exceeded the number of residential and small business fixed lines in Indiana (2.7 million). (Aron at 60-61 citing FCC reports) Typical of the nation as a whole, the penetration of mobile wireless services in Indiana has increased at a dramatic rate. (*Id.* at 61) (showing 40% increase in recent two-year period). SBC also discusses national surveys on wireless-to-wireline substitutability indicating today as high as 6% of households are wireless only. (Aron Reply, pp.31-32)

The ILECs also point to information about wireline competition. Based on FCC data CLECs doubled their number of switched access lines from 253,000 to 502,000 and increased the geographic scope from 55 percent of zip codes to 92 percent of zip codes. (Aron Direct, p. 60) Sprint indicates since 1999 in some exchanges, it has lost from 20-33 percent of its residential access lines and 30-63 percent of its business lines. (Matsumoto Responsive, p. 4)

The ILECs provide data for the Evansville, Indiana area. SBC Witness Hanson noted that "the IURC's Regulatory Flexibility Report for 2003" at page 6 states: "Vanderburgh County had the second highest number of customers served by CLECs and customers had a choice of between 20 and 25 CLECs." (Hanson Responsive, pp. 2-3) Mr. Hanson also cited the FCC's Local Competition Report, which shows that the Evansville area has significant competition.³ SBC cites specific competition in the Evansville market listing facilities-based carriers such as SIGECOM, Cinergy, and Insight and states it has lost 50% of its local lines in many of the Central Offices in Evansville. Mr. Hanson also indicates SIGECOM's 2003 annual report to the IURC

¹ As reported in the Commission's 2004 Reg Flex Report, in 2003 CLECs had evidenced a wireline growth rate in Indiana of 57.7% in comparison to an ILEC wireline growth rate of 1.8%, more than doubling the number of their residential lines from 2002, while increasing their number of business lines by almost 20%. *Reg Flex Report*, Table 1, at 5 (September, 2004).

² On July 7, 2005, the FCC released its report *High-Speed Services for Internet Access: Status as of December 31, 2004* (hereafter *FCC, July 2005*). That report shows that broadband connections to the Internet increased by 34% from 2003 for a total of approximately 38 million lines in service nationwide. In Indiana, the number of Indiana broadband lines in service has increased by 53% from 2003, for a total of 641,607 lines as follows: asymmetric digital subscriber lines ("ADSL"), 364,887; cable, 239,454; and other services (including fiber to the premises, satellite and wireless), 37,266. *FCC, July 2005*, Table 7.

³ Federal Communications Commission, Status as of June 30, 2004. Table 16 and Map Showing Reporting CLECs by zip code.

indicates that SIGECOM has 33,022 total access lines and the City of Evansville has a population of 126,272 and Vanderburgh County has 165,058. (Hanson Responsive, p. 4)

With regard to the pending merger, Verizon contends MCI's consumer business is in a continuing and irreversible decline, but the enterprise segment will remain competitive even after the merger. (Dye Reply, p. 4)

b. CLEC Position. The CLECs take a much different view of competition from the ILECs. For example, Mr. Wood contends there is not one telecommunications market and the ILECs' view of the telecommunication market fails to consider "how competitive alternatives are being provided." (Wood Responsive, p. 10-11) For example, he contends for even large customers CLECs cannot provide the entirety of the network and need to rely on a portion of the ILECs' network. He also argues since UNE-P is being eliminated, it cannot be counted on to constrain prices and pure resale cannot constrain rates. (*Id.* at 11)

The CLECs do not believe that the traditional market used in an "Areeda and Hovenkamp predatory pricing" market analysis exist. (Wood Responsive, p. 24) For example, he argues it will not hold because one company began with 100% of the market, relationship with all its customers, a fully developed line of service, and ubiquitous infrastructure. (*Id.* at 26) Other providers in the market began with a zero percent of the market, little or no infrastructure, and high costs of entry. (*Id.* at 25) ILECs such as SBC have many different types of customers, some of which have competitive alternatives and some do not. (*Id.* at 27) In contrast, CLECs face a market in which all their customers have competitive alternatives. (*Id.* at 28)

The CLECs do not have the same belief about VOIP and wireless technology as the ILECs. They note that, the degree to which wireless and VOIP providers are perceived by Indiana end-users as a viable substitute for SBC voice is unclear. (Wood Responsive, p. 14, Sherwood Responsive, p. 10) TWTC finds that many of its customers, such as hospitals and governmental agencies, are not willing to convert to wireless or other alternatives as they pose significant security concerns. (Sherwood Responsive, p. 10)

The CLECs focus on what type of competition is necessary for a competitive market. For example, competition by resale does not create the competitive forces needed to discipline prices; only facilities-based competition can. (Wood, Responsive, p. 30)

The CLECs also question how competition can be defined. SIGECOM argues one cannot measure competition by simply counting the number of companies in the area or are listed in the phone directory. (Jones Rebuttal, p. 9) One must look at the relative size of the competitors. (*Id.* at 9)

With respect to Evansville, SIGECOM argues that competition exists in Evansville because SBC is prevented by regulation and regulatory oversight from using

its vastly larger size to price that competition out of the market. (Jones Rebuttal, p. 10)
The number of lines lost is irrelevant. (*Id.* at 10)

The CLECs also are concerned about the effects of the recent mega-mergers (SBC-AT&T and Verizon-MCI) and the effects of the Triennial Review Remand Order ("TRRO"). (Sherwood Responsive, p. 10)

c. Discussion and Findings. The extent of regulation for any service is dependent on the IURC's jurisdiction and the level of competition. For example, toll competition has flourished in Indiana and we have dramatically relaxed the regulation over this service. In fact, toll resellers do not file tariffs with the IURC. The three largest ILECs in Indiana (SBC, Verizon, and Sprint) have Alternative Regulatory Plans (ARPs) as a result of IC 8-1-2.6, which recognizes that reduced regulation is warranted when competition exists. Within an ARP the level of regulation of different services is also due to the recognition of the level of competition. For example, all three ARPs have services categorized as Tier 1, 2, or 3 with services in Tier 3 having very little rate oversight. Even though Tier 3 services are only lightly economically regulated, CSOs, bundles/packages, and promotions/winbacks contain filing requirements and price floors.

In this Cause the ILECs take an expansive view of competition including wireless and VoIP as viable competitors for traditional wireline telephony, while the CLECs contend that in some cases there is no intermodal competition (e.g., some entities such as hospitals and government agencies are not willing to go completely wireless or turn to VOIP) and that events such as the elimination of UNE-P and the mergers of AT&T/SBC and MCI/Verizon will lead to a reduction of competition. They argue one reason competition has flourished is due to many of the regulations the ILECs seek to remove.

Establishment of the presence of (potential) competitors is a necessary but not sufficient precondition of establishing that a competitive market exists. But the presence of competitors does not automatically translate into the existence of competition. And the existence of competition, while also necessary, does not necessarily translate into an open, vibrant and competitive market. Finally, the presence of a competitive market in one geographic market or market segment does not automatically translate into the existence of full, robust and fair facilities-based competition across the length and breadth of Indiana.

Based on the evidence in the record and our own competition data contained in the Reg Flex Report, there is insufficient data to support a conclusion that there is a broad-based intermodal competition between wireline and wireless carriers in Indiana. For example, SBC's own evidence shows that today only 6 percent of customers are wireless only. This percentage is too low for us to consider it a viable alternative for all customers. We have noted several times in our Reports to the Regulatory Flexibility Committee of the General Assembly that wireless telecommunications is not a substitute for wireline telecommunications for the overwhelming majority of both business and residential customers at this time.

When discussing the role of VoIP as a competitor, the ILECs included general statements on VoIP, but no statistics. We also are concerned that ILECs did not distinguish between VoIP on a private network versus VoIP using the “public internet” which companies like Skype and Vonage use. Clearly, reliability, security, latency, and other measures of service quality of VOIP services delivered over the “public internet” are inferior, and in some cases, decidedly inferior, to the service quality available on a private or managed IP network, or on the public switched telephone network (“PSTN”). For competition to be measured accurately, some level of reliability and security must be included in the analysis.

Our own 2004 competition data shows that overall ILEC-to-CLEC competition appears to be leveling off and in contrast to previous years, CLEC penetration for residential lines decreased.⁴ The Parties’ testimony on the Evansville market underscores our finding that a true picture of competition can only emerge if analyzed on a market-by-market basis, which includes geographic markets, product/service markets, and markets based on customer class (i.e., residential vs. business).

Based on the evidence, we cannot declare the market for telecommunications throughout the State of Indiana competitive. Similarly, we cannot make any statement on the future of competition. However, we are concerned about the effects on competition of the elimination of UNE-P and the two mega-mergers. These are important events and understanding their full effects is paramount in determining the extent and scope of competition or the need for regulation.

Based on our findings that we have insufficient data, we find it appropriate to open a new investigation, as discussed more fully herein.

4. Need for Protection. The CLECs contend that the local telecommunications market in Indiana is not flourishing, and that companies in the market need protection from anticompetitive behavior. The ILECs and CLECs have different views, therefore, on whether and the extent to which companies in the marketplace should be protected.

a. ILEC Position. The ILECs recommend that no specific Commission-dictated regulatory protection is needed for market participants. SBC Indiana recommends the Commission rely on the standard mechanisms for protection of competition in the United States, by which complaints or allegations of anticompetitive pricing are dealt with on a case-by-case, fact-specific basis. (Muscat Direct, p. 7) As such, any remedies, and the application of those remedies, would be consistent for all competitors. Non-compliance issues may be detected by consumers or carriers and such matters may be pursued via informal and formal processes. (*Id.*) Verizon contends that as provided by statute, “The Commission shall not establish local exchange rates and charges for non-residential customers priced below cost that would require subsidization by residential customers”. (IC 8-1-2.6.6) This requirement, coupled with the requirement that, in the event an error is made and prices are set below long-run incremental cost (LRIC), any shortfall is the responsibility of the shareholders, in Mr. Dye’s opinion, provides for a reasonable price

⁴ 2005 Report to the Regulatory Flexibility Committee

floor requirement. (Dye Direct, p. 15) He points out that discriminatory behavior will be detected by customers and /or competitors complaints. (Dye Direct, p. 27)

SBC Indiana proposes the current price floor should be modified to eliminate the “price umbrella” effect. (Flitsch Direct, p. 5; Aron Direct, pp. 41-42; Aron Reply at 3) In other words, the price floor should be set no higher than that consistent with normal economic or antitrust standards for predation. (Aron Reply, p. 3)

Regarding winback offers, SBC states that they enhance competition and encourage lower prices. Imposing a waiting period simply shelters competitors from the full rigors of competition, at the expense of consumers. In fact, winback offers not only encourage more vigorous price competition, but they also increase the incentive for customers to leave incumbents to try a competitor’s service. (Aron Direct, p. 32) SBC witness Aron contends that proponents of waiting periods fail to recognize that customers do not assess their options and opportunities continuously over time, because consumers have many other decisions and requirements vying for their attention. (Aron Direct, p. 32). To deprive competitors of the opportunity to present attractive, targeted offers to customers when they are best able, willing and interested in receiving and assessing the information undercuts the competitive process and deprives customers of relevant information when they have invested the most in being able to assess them. Simply put, it devalues customers’ time and effort. (Tr. at A-125-126)

b. CLEC Position. The CLECs support the continued use of IURC regulatory measures to protect competitors of ILECs. TWTC’s Mr. Wood testified that an antitrust remedy such as that recommended by SBC is completely reactive in nature, and almost always encompasses an extended period of time before resolution. Such a process would do little to deter an ILEC and would provide no effective protection for end user customers and their long term interests.

Ms. Sherwood testified that Commission review of alleged anticompetitive behavior is essential; a complaint process is an insufficient deterrent to curb the temptation to engage in anticompetitive behavior. Ms. Sherwood also observed that if the ILECs’ proposal for reactive regulation were implemented, anticompetitive conduct would most often only be addressed *after* the carrier obtained the customer, and *after* it is too late for the victimized carrier to win the business. She went on to state that, in order to deter a carrier from engaging in anticompetitive conduct, there needs to be a meaningful negative consequence for the behavior. A complaint proceeding – even one that results in a Commission finding that a carrier engaged in anticompetitive conduct – in and of itself does not deter anticompetitive conduct.

Mr. Wood went on to state that in the broadest terms, the objective of this investigation should be to create an environment where all potential providers of telecommunications services, including both ILECs and CLECs, can compete purely on their own merits. ILECs should not be able to leverage their position as the former monopoly provider, and both ILECs and CLECs should be able to succeed only if they are efficient and offer a quality product. Mr. Wood suggested the outcome of this

proceeding should be a set of safeguards that are effective, market-driven, easily implemented, and reflect market conditions over time.

The CLECs advance two significant protections. TWTC witnesses Sherwood and Wood agree that price floors are necessary to guard against anticompetitive pricing behavior. They also agree that the existing price floors are not adequate. Waiting periods are another measure of protection that the CLECs support, to enable them to gain favor with a newly won customer before the ILEC can win that customer back with some type of special promotion.

c. Discussion and Findings. The Commission acknowledges that the task of determining a method to ensure that competition among telecommunications providers is vibrant, while at the same time allowing all parties sufficient flexibility to obtain customers, is a challenge. However, the goal is to ensure the continued health and growth of competition in the Indiana Telecommunications market. In order to reach that goal, we find it appropriate to consider implementing safeguards that will permit the continued development of competitive markets, while restricting the ability of the ILECs and CLECs to engage in strategies which could reduce competition. We find that a traditional antitrust remedy is not an effective remedy for anticompetitive behavior in the local telecommunications markets currently.

5. Parity. We have established that there is insufficient competition in Indiana to declare the local telecommunications market fully competitive in all areas of the state. Furthermore, we have found that the antitrust remedy proposed by the ILECs will not protect competitors in the local telecommunications market. We now consider the question of whether certain regulatory requirements should apply to ILECs only or both ILECs and CLECs. In the Order initiating this Cause dated October 29, 2003, the IURC specified that one of the goals of this proceeding was to “address competitive issues in the most efficient manner possible and make any appropriate modifications in our internal procedures and policies to ensure regulatory parity and fairness in Indiana’s telecommunications market both now and in the future”. The parties have differing views of fairness and whether parity is the appropriate path to take at this point in time.

a. ILEC Position. The ILECs suggest that we either eliminate regulation or extend the approach taken in the ILECs’ Alternative Regulatory Plans to all certificated LECs. They argue that equal treatment in all respects among competitors is appropriate, if regulation is not eliminated.

For instance with regard to CSOs, in the event the Commission determines that CSOs need continued regulatory oversight, the ILECs agree that the same rules should apply to all LECs with a Commission-approved Certificate of Territorial Authority (“CTA”). If the Commission decides to maintain CSO regulatory oversight, SBC Indiana recommends the CSO price floor and filing requirements set forth in its ARP should be streamlined or applied as is to all LECs.⁵ (Flitsch Direct, p. 4).

⁵ The price floor in the SBC ARP is the same as that adopted in Cause No. 38561. The SBC ARP requires SBC Indiana to maintain an inventory of CSOs and provide an update to the Director of

Regarding guidelines for porting customers between carriers, which is part of the discussion on winbacks, Verizon states that there needs to be parity among providers. Time limits for porting a customer from one provider to another must be the same for all providers. (Dye Direct, p. 29)

With regard to bundles and packages, SBC Indiana states that in a competitive market, it is not necessary to regulate packages and bundles. However, to the extent that the Commission deems it necessary to maintain price floor regulation, all companies that have a CTA approved by this Commission to provide local exchange service within Indiana should be subject to the same rules and regulations. (Stoia Direct, p. 6)

b. CLEC Position. TWTC asserts that it is wasteful to require regulatory parity for parity's sake, and offers several reasons why asymmetrical regulation continues to be necessary to protect competition in the telecommunications marketplace. In fact, the record includes a number of examples that underscore the need for ILEC guidelines.

TWTC witness Wood stated that, at this point in time, the ability of an ILEC to successfully engage in an anti-competitive, non-compensatory pricing scheme remains fundamentally different – and significantly greater – than the ability of any other carrier to do so. Mr. Wood testified that the ILECs remain in a unique position in terms of market power for several reasons, including the ubiquity and sophistication of their network; their longstanding customer relationships; their broad revenue base; and their start with 100% market share. Mr. Wood suggested that any safeguards adopted must reflect the difference in market power between ILECs and CLECs and in the ILECs' ability to act now to restrict or eliminate competitors from the market in the future. Mr. Wood noted that Congress, the FCC, and state regulators have consistently recognized the fundamentally different position of the ILECs as former monopoly providers, and pointed out that section 251 of TA-96 includes explicit distinctions between the duties of telecommunications carriers generally, local exchange carriers (including both ILECs and CLECs), and incumbent local exchange carriers specifically. (Wood Direct, pp. 10, 11)

Mr. Wood noted that in a different but relevant context, the FCC recently rejected an ILEC request that state regulators apply ILEC requirements to competitors where no public interest objective would be served, but rather to “require regulatory parity for parity's sake.” In that case, as in this one, Mr. Wood stated that ILECs argued for the extension of safeguards to competing carriers, without establishing a compelling public interest reason for doing so except to create the appearance of parity. Instead, the FCC concluded that requirements should be imposed on competing carriers “only to the extent necessary” to meet the objective at hand.⁶

Telecommunications at the Commission within 30 days of the end of each quarter rather than filing each individual CSO with the Commission. SBC ARP Settlement Agreement, pp. 11-12. The Sprint and Verizon ARPs include comparable requirements. Verizon ARP Settlement Agreement, p. 19; Sprint ARP Settlement Agreement, pp. 18-19.

⁶ *Report and Order*, FCC 05-46, ¶30.

The ILECs' well worn regulatory parity argument ignores the fundamental need for safeguards that permit the continued development of competitive markets while restricting the ability of the ILECs to leverage their former monopoly power. (Time-Warner Exceptions to Proposed Order, p. 9)

c. Discussion and Findings. As stated in the Competition section above, the evidence in this record is insufficient to show that robust competition exists in the Indiana telecommunications market in all areas and in all segments, at the level required for the market to work on its own. Furthermore, we found that the antitrust remedy proposed by the ILECs will not protect competitors in the local telecommunications market.

At the outset of this proceeding, the Commission acknowledged that the "telecommunications market in Indiana has changed dramatically since the passage of the Telecommunications Act of 1996 ("TA-96") and it set as one of the specific goals of this proceeding to "address competitive issues in the most efficient manner possible and make any appropriate modifications in our internal procedures and policies to ensure regulatory parity and fairness in Indiana's telecommunications market both now and in the future." (October 2003 Order, p. 1) The ILECs' position that we extend the approach taken in the ILECs' Alternative Regulatory Plans to all certificated LECs, is consistent with the parity goals which underpin this proceeding, at the current level of competition.

Additionally, Section 253(b) of TA-96 permits the states to continue to impose requirements necessary to accomplish certain public interest goals, *e.g.*, to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, only if the requirement is competitively neutral and consistent with the Act's universal service provisions. We find the CLECs' proposal is not competitively neutral in that it calls for the Commission to require ILECs to comply with regulatory guidelines that competitors are not required to follow.

Since the enactment of TA-96, the regulatory requirements imposed upon incumbent carriers have often been more stringent than those imposed upon competitors. This unequal regulatory treatment came about, as the CLECs point out, because Congress, the FCC, and state regulators recognized the differences in the positions of the ILECs as former monopoly providers and imposed additional duties upon the ILECs to mitigate the competitive advantages that they would otherwise enjoy. Section 251 of TA-96 includes explicit distinctions between requirements placed on ILECs versus those placed on CLECs. However, these distinctions were set out nearly 10 years ago and the Telecommunications market in Indiana has changed dramatically since that time. While we cannot find that the market is uniformly competitive, movement has been made in that direction. In order for competition to continue to grow we must begin the process of treating carriers equally.

Imposing new and existing regulations upon ILECs alone runs counter to the Commission's avowed purpose in this investigation of ensuring regulatory parity and fairness in the telecommunications market in Indiana today.

6. Specific Issues.

A. CSOs. The parties responded to a number of questions regarding CSOs including the appropriate definition, filing requirements, pricing requirements, inputs into cost studies, review process, and penalties for noncompliance. Below we summarize the positions of each party.

ILEC Position.

Definition. The ILECs proposed similar definitions for CSOs. For example, SBC defined a CSO as “service proposals tailored to the individualized needs of a specific customer and made available to that customer via a contract.” (Flitsch Direct, p. 3); Sprint defined a CSO as “specialized offerings that deviate from the standard tariff due to competitive or customer specific situations.” (Matsumoto Direct, p. 3); and Verizon defined a CSO as “a contractual arrangement, memorialized in writing, by which a LEC offers any tariffed product or service to any customer at rates, terms or conditions that differ from those set forth in the LEC’s tariff”. (Dye Direct, p. 9)

General Filing Requirements. The ILECs recommend the Commission eliminate all filing and price floor requirements for CSOs. (Flitsch Direct, p. 3; Matsumoto Direct, p. 3; Dye Direct, p. 4, *also* 14) In the event the Commission determines that CSOs need continued regulatory oversight, the ILECs agree that the same rules should apply to all LECs with a Commission-approved Certificate of Territorial Authority (“CTA”) and only to regulated intrastate service. (Flitsch Direct, p. 3) If all companies are subject to the same rules, the ILEC’s made a number of further recommendations, which are discussed below.

The ILECs support the continuation of the filing requirements from the ARPs. The ARPs recently approved for SBC Indiana, Verizon and Sprint updated the IURC’s CSO filing requirements to require each of these ILECs to maintain an inventory of CSOs and provide a quarterly update to the Director of Telecommunications at the Commission. (Flitsch Direct, p. 9-10) The three ARPs require the quarterly update to include customer name, services, contract term, annual cost, annual revenue and percentage contribution. (*Id.*) The ARPs also provide that upon ten (10) business days notice, the ILEC must provide the underlying contract and cost studies supporting each CSO to the Telecommunications Division of the Commission. While this review should occur for first-time CSOs, SBC Indiana, Sprint and Verizon agree that the Commission should not review renewals of CSO contracts. (Flitsch Direct, pp. 7-8; Matsumoto Direct, p. 4; Dye Direct, p. 15) As explained by SBC Indiana witness Flitsch, CSO contract renewals should not be reviewed by the Commission because the contract terms and conditions have been established and the initial CSO requirements were previously satisfied. (Flitsch Direct, pp. 7-8) Along with the filing requirements in the ARP the ILECs agree that CSOs should not be included as a part of a company’s tariff. (Flitsch Direct, pp. 15-16; Matsumoto Direct, p. 6; Dye Direct, p. 21) Rather, the tariff should merely include a statement explaining the availability of CSOs. (*Id.*)

Pricing/Cost Studies. The ILECs offered slightly different pricing requirements. Verizon proposes that the Commission require rates to be set in such a manner that they are not below cost, with the result that the service offering would require subsidization by residential basic local exchange service (“BLS”) customers. (Dye Direct, p. 15) To this end, Verizon proposes that services covered under CSOs are retail services and should be priced based upon retail costs such as the long run incremental cost (“LRIC”) methodology rather than wholesale costs determined within the total element long run incremental cost (“TELRIC”) methodology. Verizon further noted that since not all competitors offer unbundled network elements (“UNEs”) at TELRIC-based rates, it would be impossible to maintain a level playing field for cost support. (Dye Direct, pp. 17-18)

SBC Indiana proposes the current price floor be modified to eliminate the “price umbrella” effect. (Flitsch Direct, p. 5; Aron Direct, pp. 41-42; Aron Reply at 3) In other words, the price floor should be set no higher than that consistent with normal economic or antitrust standards for predation. (Aron Reply, p. 3) More specifically, SBC Indiana argues that the regulatory “adders” (i.e. 1% for single CSOs and 10% for the aggregate of CSOs) intended in prior Commission orders to insure a specific level of contribution to joint and common costs are not sustainable or desirable in a competitive marketplace, because they do not give customers the opportunity to obtain the best available price. Thus, if a price floor is imposed, SBC Indiana proposes a price floor based on the lesser of the services’ UNE-based costs where available or short-run incremental cost without any percentage markup. (Flitsch Direct, p. 5; Aron Direct, pp. 14-15; Aron Reply, p. 3) SBC Indiana witness Aron explained that were the LEC to set its retail price at or above this level, the price would not exclude an efficient UNE-based competitor from competition, and therefore would not be anticompetitive. (Aron Reply, p. 4)

In past cost cases (e.g., Cause No. 42393), parties have argued about specific inputs such as the cost-of-capital, fill factors and depreciation, and whether the same inputs should be used for a CSO cost study (based on TSLRIC) and an Unbundled Network Elements cost study (based on TELRIC). SBC Indiana, Sprint and Verizon take the position that the Commission should not dictate to ILECs that TELRIC and TSLRIC studies must use the same general inputs. (Flitsch Direct, p. 12; Matter Direct, p. 3; Dye Direct, pp. 17-18) TSLRIC and TELRIC studies are used for different regulatory purposes. TELRIC assumptions and costs are for “actual prices” and are based on wholesale costs. (Currie Reply, pp. 4-5, Flitsch Direct, p. 12; Dye Direct, p. 18) TSLRIC studies are based on retail costs and primarily provide a regulatory price floor for retail services to conservatively measure against predatory pricing and cross-subsidization. (Flitsch Direct, p. 12) Furthermore, as explained by Sprint witness Matter, even where the inputs between UNE TELRIC studies and TSLRIC studies (for services) do not vary, outputs of UNEs and service specific studies will be different. (Matter Direct, pp. 3-4) Dr. Currie explained that while both TSLRIC and TELRIC are forward-looking incremental cost methodologies, they are not identical, and it is unreasonable to presume that the inputs to TSLRIC and TELRIC studies should always be identical. (Currie Reply, p. 5)

Dr. Currie explained that SBC Indiana presented several examples in its recent UNE docket (Cause No. 42393) where TELRIC inputs should be different than TSLRIC inputs, the most significant of which is fill factors. (*Id.*) Furthermore, Dr. Currie explained that some TELRIC inputs may never again need to be reviewed by the Commission, such as those associated with various switching UNEs. (Currie Reply, p. 6) He explained that important inputs for developing switching costs are the price levels and structure charged by switch vendors from whom SBC Indiana purchases switching equipment. (*Id.*) Costs that rely on such inputs are frequently included in contribution analyses for retail promotions and CSOs. (*Id.*)

It would be unreasonable to cast in stone such inputs at levels determined in a TELRIC proceeding that at some point will no longer reflect forward-looking costs. (*Id.*) SBC also states that while inputs from older TSLRIC or TELRIC studies may provide guidance to determine inputs for a new TSLRIC study, experience gained with the passage of time, as well as technological change and changes in prices paid for resources, such as equipment and labor, should always be considered for use in newer studies. (SBC Reply to June 17 Docket Entry)

Review Process/Confidentiality. Regarding the appropriate review of CSOs to determine if the price floor was not met, the ILECs recommend retaining the process from the ARPs. To the extent specific questions are raised, the Commission may request information about a CSO at that time. (Flitsch Direct, p. 13; Dye Direct, p. 18) SBC Indiana and Verizon contend that the review process specified in their ARPs provides ample opportunity for the Commission to address questions regarding a specific CSO and should be extended to all LECs. (Flitsch Direct, p. 13; Flitsch Responsive, p. 21; Dye Direct, p. 17) Today the CSOs are confidential and SBC Indiana, Sprint and Verizon agree that to protect the competitive bidding and negotiation process, the Commission should continue to hold CSOs and the underlying cost information as confidential information not subject to public disclosure.

If a competitor suspects that an ILEC has acted in an anticompetitive manner or has violated any Commission rules, the competitor, after signing a confidentiality agreement, could then review the pertinent CSO information within the context of the complaint proceeding. (Dye Direct, p. 20) If a complaint arises, the Commission may then determine whether, and the extent to which, the CSO should be disclosed to the complainant pursuant to a nondisclosure agreement that restricts access to personnel not involved with marketing or pricing.

Remedies for Non-compliance. If the IURC or any other entity determines that a company has violated the CSO filing process or price floor, SBC Indiana and Verizon contend that these complaints or allegations of anticompetitive pricing be addressed on a case-by-case, fact-specific basis. Any remedies, and the application of those remedies, should be consistent for all competitors. They argue that the business risks and remedies should be as equitable as possible, and recommend the Commission only impose remedies that can be applied to all competitors in the market. (Flitsch Direct, p. 15; Dye Direct, p. 20) As explained by Mr. Dye, the provider's shareholders ultimately bear the

risks associated with unreasonably low pricing practices, and it is the responsibility of management to maintain the financial health of the company. Furthermore, commercial laws adequately govern any questionable pricing issues. (Dye Direct, p. 20) Under this approach, SBC Indiana also notes that the SBC ARP includes negotiated enforcement provisions (as do the Sprint and Verizon ARPs). (SBC ARP Settlement Agreement, pp. 27-28; Sprint ARP Settlement Agreement, pp. 12-13; Verizon ARP Settlement Agreement, pp. 28-30)

CLEC Position.

Definition. TWTC proposed the following definition of CSOs in its Proposed Order: “any ILEC service proposal tailored to the individualized needs of a specific customer and made available to a customer via contract where the price of any regulated service offered in the contract is above or below the ILEC’s tariffed price for the regulated service.” (TWTC Proposed Order, p. 34)

General Filing Requirements. Unlike the ILECs, who recommend no filing requirements, the CLECs recommend extensive filing requirements to be applied only to ILECs. Similar to the ILECs, TWTC agrees that CSOs should not be included as a part of a company’s tariff. (Sherwood Direct, p. 4) Rather, the tariff should merely include a statement explaining the availability of CSOs. (*Id.*) They cite the following reasons for the guidelines only applying to ILECs:

- (1) The ILECs began to compete with a ubiquitous network already in place. In contrast, CLECs had to enter the market with few or no network facilities in place. The ILECs, as a direct consequence of operating as the former monopoly providers, began the process with a significant head start.
- (2) The ILECs began to compete with an existing relationship with every customer within their service area. In contrast, the CLECs had to develop customer relationships, in many cases establishing the initial relationship with a customer.
- (3) The ILECs began to compete with a broad array of fully developed service offerings. In contrast, the CLECs had to develop and broaden their existing service offerings to include services that they were previously prohibited from providing.
- (4) The ILECs began to compete with a very broad revenue base and essentially 100% market share. When developing a promotion or customer-specific offering, the ILECs can do so with the knowledge that they have a significant and reliable stream of revenue from existing operations. As a practical matter, a strategy of long-term market dominance obtained through short-term anti-competitive pricing can only be accomplished if sufficient revenues are available from existing operations to fund the short-run shortfall.

The CLECs do not believe the existing SBC Indiana CSO filing requirements are adequate and provide sufficient information to verify compliance by SBC Indiana. Ms. Sherwood identified the following problems with the existing framework:

- (1) the framework puts the burden on the Commission staff to spot troubling CSOs and review the summary cost detail provided by SBC Indiana. The Commission staff admitted that it does not regularly review these cost studies.
- (2) SBC Indiana's CSO supporting cost study documents are too cursory to allow for a meaningful review. This was the conclusion of a cost study expert that TWTC hired in connection with the SBC Indiana CSO litigated in IURC Cause No. 42236.
- (3) The ILECs' CSO information is submitted too late to serve as a check on anticompetitive pricing behavior. The requirement to file a summary of contracts within 30 days after the end of the quarter would mean that an ILEC would not file its summary until 120 days after certain contracts were executed, and if the Commission staff wanted to see the contract and cost study, the ILEC would have another two weeks (10 business days) to file that. All the while, the ILEC could continue its aggressive pricing practices with an anticompetitive impact by targeting cornerstone customers. Ms. Sherwood stated there is a real danger to the competitive environment that cannot wait for up to 134 days before the Commission even considers the issue.
- (4) Both the confidential nature of SBC Indiana's CSO filings and the delay in filing any information on those contracts make the resale requirement meaningless. Ms. Sherwood indicated that to the extent that the ARPs of Verizon and Sprint are identical in this regard, her concerns apply equally to those ILECs.

Based on these major concerns the CLECs propose an extensive filing process for all CSOs, including renewals. For example, many CSOs contain multi-year terms, so there is no assurance that a CSO that is compliant now will remain compliant three years from now. The ILECs must place on their websites a listing of all CSOs that will become effective within ten (10) days of the posting, and the listing must remain on the ILEC's website for the duration of the CSO. The listing for each CSO must include at least the following: a) the name of the customer; b) the duration of the CSO; c) the services (both regulated and unregulated) included in the offering; and d) the pricing for said services.

Pricing/Cost Studies. Subject to an appropriate non-disclosure agreement (which is described below), an ILEC must provide a requesting party with costing data for a particular CSO, including but not limited to paper and electronic copies of the populated spreadsheet that the IURC requires the ILEC to submit to the Telecommunications Division. Mr. Wood provided detailed testimony and a sample spreadsheet in his testimony. The electronic version of the spreadsheet produced to a requesting party must be capable of manipulation for differing scenarios. Ten days is sufficient time for the Commission to address the prices and terms of a CSO after the details are developed, but

before the promotion (including CSOs) takes effect. To implement these new guidelines, TWTC recommends a CSO Spreadsheet Taskforce.

Because the CLECs are not using a strict TSLRIC methodology the current pricing guidelines are not necessary. Mr. Wood agreed that the existing price floor rules are not effective. He stated that for CSOs, the effective price to the customer must be no lower than the relevant costs (including the TSLRIC or TELRIC of the network and operational assets necessary to provide the service, any retail-related costs, and the costs of developing and administering the promotion itself).

Ms. Sherwood testified that SBC Indiana's recommendation that UNE-based costs be used as a price floor is problematic. Ms. Sherwood stated that the problem with this approach was made clear in Cause No. 42236. While TWTC advocated in that case that UNE inputs should be considered, there are times when there are not UNE equivalents for a service. For example, in that case, both SBC and TWTC were proposing to provide SONET rings. Because there was no UNE equivalent for a SONET ring, the UNE-based price floor methodology simply could not be used. Now, with future UNE availability in question, reliance on UNEs as an input may be even more problematic.

In terms of the relationship between TELRIC studies and TSLRIC studies, Mr. Wood noted that since the Commission has approved a set of inputs to SBC Indiana's TELRIC studies, SBC Indiana should be required to now abide by those inputs. Mr. Wood testified that there is no justification for SBC Indiana to use a different set of inputs now, simply because its interests will best be served by changing the results of those studies. Mr. Wood suggested that SBC Indiana can have higher UNE rates and a correspondingly high price floor for its promotions, or it can re-file its TELRIC studies and have lower UNE rates and a lower price floor for its promotions. ILECs should not be permitted to pick and choose among cost study inputs in order to suit their purposes in a particular proceeding.

Review Process/Confidentiality. Ms. Sherwood testified that it is troublesome that no entity, other than the understaffed Commission, has access to any information regarding the cost support SBC Indiana files to support its CSO filings. Ms. Sherwood testified that ILECs and CLECs have traditionally exchanged highly sensitive information subject to Non-Disclosure Agreements ("NDAs") carefully designed to ensure that sensitive information is not shared with individuals who have marketing or pricing authority. Ms. Sherwood observed that if TWTC did not trust that SBC would live up to the contractual NDA, TWTC would not have disclosed the data. Ms. Sherwood testified that she is not aware that any of the speculative concerns raised by Mr. Fritch have ever materialized. The NDA balances the competitors' need for the information with the ILECs' concern that the information not be used by competitors in their marketing and pricing decisions.

Ms. Sherwood also noted that the Kentucky Public Service Commission recently rejected the same confidentiality arguments made here by SBC Indiana.⁷ In that case, BellSouth argued that public disclosure of contracts would provide competitors with an unfair competitive advantage. The Kentucky PSC rejected the argument on two separate grounds: (1) the ILECs' resale obligation requires public disclosure such that any competitive harm was an outcome intended by Congress under the Telecommunications Act of 1996 and (2) federal limits on the use of customer proprietary network information limits the ability to use information for marketing purposes. The Kentucky Commission found that the entire contract service arrangements must be publicly disclosed. Ms. Sherwood testified that TWTC's proposal that CSOs be shared under appropriate nondisclosure agreements is a reasonable middle ground between full disclosure, like that required by the Kentucky PSC, and no disclosure.

Remedies for Non-Compliance. The CLECs have set out general rules for noncompliance. They recommend the expedited resolution process presently existing in the administrative rules, 170 IAC 7-7-1. In the event an ILEC is found, after notice and hearing, to have violated the CSO guidelines or to have engaged in anticompetitive conduct, the ILEC must suffer a meaningful negative consequence for the behavior. With the specific remedy being decided on a case-by-case basis, Ms. Sherwood indicated that one meaningful remedy for violation of our CSO/promotional guidelines is to restrict an offending ILEC from offering CSOs or promotions for a specific timeframe.

Discussion and Findings. Our CSO policy was first established in Cause No. 38561 and the three large ILECs (SBC, Verizon, and Sprint) have a CSO policy established in their respective ARPs. For example, SBC and Verizon are allowed to have CSOs for all Tier 3 services, while Sprint's conditions closely follow Cause No. 38561. All three ARPs have a cost floor of TSLRIC + 1% for individual CSOs with a floor of TSLRIC + 10% for an aggregate of all CSOs over a year. Each ARP has a clause specifying the rules coming out of this Cause will supercede the rules in the ARP.

The CLECs and ILECs have completely different views of CSOs. The ILECs argue the telecommunications market is highly competitive and no CSO regulations are required, while the CLECs want detailed filing requirements including review by CLECs, a new method of calculating costs, and pre-approval. They argue the current regulations are not effective and only give the appearance there is any regulation over CSOs.

In earlier sections we discussed the lack of statistical evidence on wireless competition, the uncertainty of VOIP, and the fact that the recent statistics from the Reg Flex Report on traditional wireline competition do not provide a sufficiently detailed and robust picture of intermodal competition. This is due to the absence of data from cable, captive and unaffiliated wireless and other intermodal competitors or their relative impact on the residence, small business and enterprise segments. We do not have sufficient data to sustain a finding that the telecommunications market in Indiana is sufficiently

⁷ In the Matter of: Inquiry into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky, Case No. 200-00456, Order(4/29/2005), a copy of which is attached as Exhibit PHS-Rebuttal 1.

competitive to warrant total deregulation for CSOs. However, based on evidence of record, we find that the CSO regulations should apply equally to both ILECs and CLECs. Below we establish a definition for CSOs and set the general regulations.

Definition. The ILECs proposed different definitions and the CLECs proposed definition is closely tied to the price of a service in the CSO. We find the following definition is sufficiently broad to capture the many varied CSO offerings to customers: A contractual arrangement, memorialized in writing, offered by the LEC tailored to the individualized needs of a specific customer at rates, terms and condition that differ from those in standard offerings and/or tariffs. In this context CSOs include other names for contracts with customers, such as Individual Case Basis and Individual Customer Arrangements.

General Filing Requirements. The CLECs recommend a pre-approval process for all ILEC CSOs, while the ILECs recommend using the same process as is contained in their respective ARPs. In Cause No. 38561 we rejected a pre-approval process as burdensome to ILECs and the evidence in this record supports the same conclusion. Therefore, we find the current filing requirements found in the ARPs, with time frame modifications for the submission of cost studies, are appropriate for all LECs. Specifically, ILECs and CLECs are required to maintain an inventory of CSOs and provide a quarterly update to the Director of Telecommunications at the Commission. The quarterly update shall include customer name, products and services, contract term, annual cost, annual revenue and percentage contribution.

These requirements are for initial CSOs and any renewals. Since Tier 3 services for Verizon and SBC encompass the usual products and services these companies will offer for CSOs we will not alter that requirement. To bring Sprint in line with Verizon and SBC we modify its ARP to allow Sprint the ability to offer a CSO for any of its Tier 3 services. Since CLECs do not have specific categories of services, we do not impose any constraints on the type of products/services CLECs can offer as CSOs. Furthermore, we will not put any specific constraints on the CSOs such as length of contract or other specific terms and conditions. By definition, a CSO is a contract with a specific customer and placing any terms or conditions on the CSO diminishes its benefit.

Cost Studies. The CLECs have recommended an extensive spreadsheet that calculates all the relevant costs. SBC raised sufficient questions regarding the CLECs' proposed spreadsheet to warrant retaining the general method the ILECs use today. Furthermore, since the ILECs have been doing TSLRIC cost studies for years, we do not find it appropriate to require the ILECs to develop a new spreadsheet. However, we make one important change on the TSLRIC cost standard. We find that including non-regulated services in a cost study does not equate to regulation of these services. From a customer's perspective, whether a service is regulated is of no consequence. Testimony of record in prior proceedings demonstrates that the customer compares the rate for the entire service "package" an ILEC offers (including non-regulated services, equipment, vouchers, etc.) to the CLEC offering. Therefore, we find that the TSLRIC study and revenue projections

must include the revenues and costs associated with all the services, regulated and unregulated and any equipment, vouchers or bonuses included in the offer.

We are aware that most CLECs do not prepare traditional TSLRIC cost studies. In lieu of a traditional TSLRIC cost study, the CLECs may determine the costs of a CSO utilizing long-run incremental cost principles for each service included in the CSO. If the cost studies are deficient, the staff will work with the CLEC to develop better cost estimates.

After reviewing a number of cost studies and witnessing the difficulty TWTC had in reviewing the cost studies in Cause No. 42236, we find that to facilitate our ability to monitor CSOs, cost studies shall be designed so that the workpapers/electronic spreadsheets present all the data used in developing the estimate, together with a narrative explanation of all formulas applied to the data. The workpapers/electronic spreadsheets must enable others to replicate the methodology and calculate equivalent or alternative results using equivalent or alternative assumptions. The workpapers/electronic spreadsheets must clearly set forth all assumptions and identify all source documents used in preparing cost estimates. The workpapers/electronic spreadsheets must be organized so that a person unfamiliar with the study will be able to work from the initial investment, expense, and demand data to the final cost estimate.

Regarding the issue of whether the cost study filed to support a CSO (TSLRIC) should use the same inputs (e.g., Cost of capital, fill factors, depreciation) that were used in the TELRIC cost study setting UNE rates, we are reluctant to require the ILECs to use the same inputs in each study. We are convinced by the ILECs' arguments that over time inputs are likely to change. We are aware that at this point in time, our most recent case setting TELRIC based UNE rates, Cause No. 42393, is almost two years old. It would be unreasonable for this Commission to require the use of inputs used in a previous case with no concern as to whether those inputs are currently valid. We are, however, interested in understanding the impact of using different inputs. Thus, for all ILECs who have IURC approved TELRIC inputs, we require the submission of the quarterly spreadsheet showing both the results using TELRIC inputs and TSLRIC inputs.

Pricing Standard. The current pricing requirements from the three ARP plans set the price floor at TSLRIC + 1% for an individual CSO and TSLRIC + 10% for all CSOs in the aggregate, over the course of a calendar year. Any price floor greater than TSLRIC produces an "umbrella effect" for an individual CSO, and so we reduce the price floor for individual CSOs to TSLRIC. However, we are concerned that if all the CSOs are priced at TSLRIC, too much pressure could be put on other services to be profitable, which could result in higher rates for services that are less competitive. Thus, in this proceeding, we will maintain a markup but reduce it such that, in the aggregate, the calculated revenues for all CSOs in service during a specified twelve month period must exceed TSLRIC + 5%.

Review Process/Confidentiality. The CLECs request they be able to review CSOs prior to them being offered, for compliance with the pricing standard and, if desired, the

ability to resell the CSO. The ILECs recommend the process developed in the ARPs not be altered. We find that disclosing such information puts companies at a competitive disadvantage. Furthermore, we find the CLECs do not need a list of all ILEC CSOs. When CLECs contact prospective customers, whether or not that customer has a CSO with an ILEC will be revealed. Therefore, we will not alter the review process from that established in the three ARPs, other than the timeframe under which the contracts and cost studies must be submitted. Specifically, in addition to the quarterly spreadsheet, the ILECs will provide, upon five (5) business days notice, the underlying contract and cost studies supporting each CSO to the Telecommunications Division of the Commission, if requested.

As always, parties are not barred from filing a complaint if they believe a CSO has been submitted which does not adhere to our costing standards. We find that by altering what is required in the cost study, if a complaint is filed, the ability to review the cost study will be enhanced. Because the review process has not been changed the issue of confidentiality is moot.

Remedies for noncompliance. Developing definitive remedies for noncompliance in a generic proceeding such as this Cause is difficult. The CLECs, while acknowledging the need for some meaningful penalty suggest restricting the future offering of CSOs, but are not willing to make it a general rule. The ILECs believe remedies for non-compliance must be fact-specific. We agree with both parties and will not at this juncture develop broad rules for noncompliance as it must be decided on a case-by-case basis.

B. Bundles and Packages. The ILECs' testimony in this Cause asserts that telecommunications providers today operate in a creative, competitive marketplace in which regulated and unregulated providers and technologies seek to compete with one another. Regulated and unregulated products and services are bundled and packaged together based on likely market appeal and anticipated or demonstrated consumer demand. Bundles and packages can benefit consumers by simplifying the pricing structure, offering greater convenience and simplicity, and by discounting or waiving recurring and/or nonrecurring charges.

On March 30, 2001, the FCC eliminated the restriction that prohibited common carriers, including ILECs, from offering bundled packages of telecommunications services and Customer Premises Equipment ("CPE") at a discounted price. Bundling Order, ¶¶1, 30, 33-34.⁸ In the Order, the FCC concluded:

[I]t is in the public interest to remove the bundling restriction to allow all nondominant LECs, or competitive LECs, and incumbent LECs to bundle CPE and local exchange service. We recognize

⁸ *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 96-61; CC Docket No. 98-183, 16 FCC Rcd 7418; 2001 FCC LEXIS 1802 (Released March 30, 2001) ("Bundling Order").

that the competitiveness of the local market has increased only a limited amount during the time since the Commission imposed the CPE bundling restriction in the *Computer II Order* and that incumbent LECs have market power in the provision of local exchange services. We find, however, that the consumer benefits of bundling outweigh the risk that incumbent LECs can use this power to harm competition. Our risk-benefit analysis is informed by other factors, such as the removal of barriers to entry in the local market contained in the 1996 Act and the subsequent increase in local competition, as well as the Commission's decision to lift similar bundling restrictions in the cellular markets, that tip the balance in favor of lifting the bundling restriction on the incumbent LECs' provision of local exchange service and CPE. *Id.* at ¶30.

In this proceeding the parties responded to several questions regarding bundles and packages including the appropriate definition; types of products and services that can be included; the appropriate pricing guidelines including whether promotions should be allowed; the level of Commission approval; tariff requirements; and the inclusion of unregulated services in a bundle or package. Below we summarize the positions of the parties.

ILEC Position.

Appropriateness of Regulation and Definition. Verizon and SBC Indiana do not believe that the Commission needs to or should regulate the offering of bundles and packages. However, to the extent the Commission considers regulation necessary or appropriate, these two parties propose the Commission define these terms consistent with the definitions in their ARPs. As defined in the SBC and Verizon ARPs, both a bundle and a package are defined as a "group of services." A bundle is an offering that provides a customer a discount when the customer buys a certain group of services. Each individual service within the bundle maintains a separate rate. (Stoia Direct, p. 2; Dye Direct, p. 32). In contrast, in the case of a package, the "group of services" carries one rate and this packaged rate is less than the sum of the a la carte rates of the services contained in the package. (Aron Direct, p.45) Sprint defines bundles and packages as groupings of products and services. (Matsumoto Direct, p. 9). According to Sprint, bundles are various products and services included with an access line. Packages are multiple services offered together as an addition to an access line (i.e., a package of custom calling features).

Types of Services. SBC Indiana, Sprint, and Verizon agree that the Commission should not attempt to regulate the types of services that may be included in bundles and packages. (Stoia Direct, pp. 3-4; Matsumoto Direct, p. 9; p. 8; Dye Direct, pp. 32-33). All services should be eligible for inclusion in bundles and packages. Ms. Stoia explained that this includes all regulated intrastate services as well as any unregulated service(s) or product(s) outside the jurisdiction of this Commission. (Stoia Direct, p. 4) Examples of services that could be included are Business and Consumer Access lines, Vertical

Features, Usage, Long Distance, Voice Mail, Inside Wiring Maintenance Plans, as well as other services offered by other providers, such as wireless, DSL internet access service, and satellite dish services. (*Id.*) The technology platforms could include landline, cellular, WiFi, satellite, fixed wireless, internet cable, and others. Only the regulated intrastate services and platforms contained in a bundle or package, however, would be subject to regulation by the Commission. (*Id.*)

Pricing. SBC Indiana and Sprint believe that pricing regulation for bundles and packages in today's competitive environment is unnecessary. (Stoia Direct, pp. 4-5; Matsumoto Direct, p. 9) According to Mr. Matsumoto, the market should determine the price. (Matsumoto Direct, p. 9) Ms. Stoia explained that since bundles and packages are merely another way of combining and pricing groups of services that are available from the tariff or catalog on a stand-alone basis, no customer is forced to purchase a package or bundle to obtain a desired service. (Stoia Direct, pp. 4-5; also Matsumoto Direct, p. 9) The customer always has a choice of buying the stand-alone service offerings. (*Id.*) In addition, customers have choices from other providers and other platforms. (*Id.*) Thus, pricing regulation for bundles and packages at any level is truly unnecessary. (*Id.*)

To regulate such offers of regulated providers when there are unregulated providers in the marketplace beyond the jurisdiction of the Commission disadvantages the regulated providers by needlessly burdening them with constraints the need for which has been supplanted by the existence of competition. (*Id.*) Because of the availability of competitive choice, pricing of bundles and packages should be regulated by the marketplace and customer acceptance, rather than by regulation. (*Id.*) SBC Indiana believes that providers will be encouraged to exercise pricing flexibility in order to satisfy their customers' needs for value and attractive pricing. To the extent that the Commission deems it necessary to maintain price floor regulation, SBC Indiana recommends that all certificated LECs should be subject to the same rules and regulations and that the price floor requirements in the ARPs either be extended to all LECs or further streamlined to eliminate the regulatory "adder", focus on short-run costs, and permit pricing based on the lower of the incremental floor or relevant UNES.⁹ (Aron Direct, p. 46) Verizon recommends that long run incremental cost should be the price floor, but contends that internal management controls should be sufficient to ensure that prices cover the relevant costs. (Dye Direct, p. 33)

Promotions. SBC Indiana, Sprint and Verizon contend that promotions should be allowed on packages and bundles. (Stoia Direct, pp. 8-9; Matsumoto Direct, p. 10; Dye Direct, p. 33) Ms. Stoia provided testimony that promotions provide benefits to customers and there is no logical reason to distinguish between a promotion on a

⁹ The SBC ARP provides the following pricing guidelines for bundles and packages of regulated intrastate services: bundles and packages are classified as a Tier 3 service in the SBC Plan, the tier with the greatest amount of regulatory flexibility. The price cap for the regulated services contained in bundles and packages is the sum of the a la carte prices of the regulated services contained in the package or bundle. Price increases are effective no earlier than the day after the date upon which the Company provides written notice to the Commission, via updated Catalog pages. Price decreases may be made at any time, provided the lower price exceeds the Company's price floor requirement of TSLRIC for the regulated services in the bundle or package, plus ten percent.

particular service versus a promotion on a package or bundle of services. (Stoia Direct, p. 8) If promotions are prohibited on packages and bundles, the cost to the customer will be higher, or the provider will have to make a business decision to offer the lower (promotional) price for an indeterminate period of time, which may not provide a sufficient return to bring the bundle/package to market, thereby reducing customer choice. (*Id.* at 8-9)

Commission Approval. SBC Indiana contends advance filing requirements are unnecessary for bundles and packages. (Stoia Direct, pp. 8-9) All providers need the ability to be responsive to market conditions to be successful. (*Id.*) Customers benefit from the providers' flexibility by having more choices more quickly. To the extent the Commission wishes to maintain a level of regulatory control, SBC Indiana believes an informational filing for regulated intrastate services should be all that is required. (*Id.* at 9) The optimum regulatory requirement, if there is to be a filing requirement, is to allow the bundle or package to become effective immediately upon filing. (*Id.*) Verizon agrees that Commission approval is unnecessary and that bundles and packages should be effective immediately upon filing of the informational tariff. (Dye Direct, p. 34) Sprint contends that the one day notice requirement currently in place is sufficient. (Matsumoto Direct, p. 10)

Tariff Requirements. SBC Indiana and Sprint contend that unregulated or de-tariffed items that are part of a bundle or package should not be included in an informational tariff. (Stoia Direct, pp. 10 -11; Matsumoto Direct, p. 10) Verizon contends that the Commission should not place limits or constrain the terms or conditions of any unregulated or de-tariffed products or services, but did not object to identifying the unregulated elements in informational filings. (Dye Direct, p. 34) Ms. Stoia explained that unregulated services by definition are exempt from regulation and therefore inclusion in regulated service tariffs is inappropriate. (Stoia Direct, pp. 10-11) Further, this type of requirement also runs counter to a pro-competitive and deregulatory policy in a highly competitive arena and may adversely affect consumers by causing regulated providers to incur costs not imposed on unregulated companies (which in turn could cause the regulated providers to charge prices that are artificially high and preclude the customer from receiving the full benefits of competitive pricing). (*Id.*)

Resale. SBC Indiana, Sprint and Verizon maintain there is no need for the Commission to establish any rules regarding the resale of bundles and packages over and above the ILEC resale obligations contained in TA96. (Stoia Direct, p. 11; Matsumoto Direct, p. 10; Dye Direct, p. 34)

CLEC Position.

Appropriateness of Regulation/Definition. The CLECs believe that regulations on bundles or packages should only apply to the ILECs. TWTC defines a bundle or package as an ILEC offering that contains either: (a) two or more regulated services where the price of one or both services is below the tariffed price; or (b) at least one regulated service and at least one unregulated service. (Sherwood Direct, p. 8)

Types of Services. TWTC's witness agreed in general that any service should be eligible for placement in a bundled service offering, subject to one important qualification: that the demonstration of cost recovery for a bundle of regulated and non-regulated services *must* reflect the value of any discounts associated with the non-regulated services or equipment in the effective price calculated for the regulated service. (Sherwood Direct, p. 8) SIGECOM's witness, Bruce Jones, recognized that "bundling" of regulated and non-regulated services is commonplace within the industry, and noted that SIGECOM bundles such services. While SIGECOM generally agrees with the bundling of services, SIGECOM does not agree with the position advanced by SBC Indiana that the value of any discounts associated with non-regulated services or equipment may be excluded from the cost recovery analysis performed by incumbents if they are not directly tied to the purchase of regulated services. In order to be a viable, profitable operating carrier, SIGECOM must account for all costs associated with its bundled services offerings. As Mr. Jones testified with respect to SIGECOM's bundle or package pricing, "[T]he costs for all services bundled or packaged together are accounted for separately and cover their own bottom line. Each service within a package or bundle is profitable and there are no so-called 'loss leaders'". (Jones direct, p.14) For SIGECOM, it is critical from a competitive stand point that SBC Indiana must account for the value of any discounts associated with both its regulated and non-regulated services, regardless of whether they are "directly tied" to the purchase of regulated services. To do otherwise, SIGECOM contends, would permit SBC Indiana to manipulate the bundling of regulated and non-regulated services in such a way as to provide customers with below-cost pricing (or at least pricing which is below the price floor established by the Commission) which would destroy what little competition has emerged in its service territory.

Pricing. The CLECs make the argument that the potential for anti-competitive strategies, particularly by a provider in the position currently held by the ILECs, is significant and must be carefully considered. They recommend that the Commission set a price floor equal to the total of the direct cost of network facilities and operations; retail costs of service; and any promotion-specific costs. (Testimony of Don Wood, pp.25-30)

TWTC recommends the Commission impose this price floor only on ILECs. TWTC urges the Commission to evaluate the ILEC's cost for each service in the bundle or package, so that the offering does not fall below the applicable price floor and so that unregulated services are not offered free or at a discount sufficient to compensate for the fact that the ILEC may not price regulated services below the cost floor. TWTC recommends that its position regarding TSLRIC with an adder also be adopted for bundles and packages. (Sherwood Direct, p. 8)

Promotions. TWTC agrees that promotions should be allowed on packages and bundles so long as the price floor is met. (Sherwood Direct, p. 9) Ms. Sherwood expressed TWTC's concern over SBC Indiana offerings that include regulated and unregulated services. Ms. Sherwood noted that SBC witness Debra Aron stated in Cause No. 42236 that SBC uses separate affiliates and separate contracts to ensure that the CSO

that it must file with the Commission contains only regulated services, but the package offered to the customer, as a package and not as separate contracts from which the customer may pick and choose, contains unregulated services such as equipment or monitoring vouchers, cash signing bonuses, or free customer premise equipment.

Ms. Sherwood also expressed concern with SBC Indiana witness Muscat's recommendation that SBC Indiana need not report its actual cost to offer a voucher or bonus, unless the cost for the voucher or bonus is directly tied to the purchase of a regulated, intrastate service. Ms. Sherwood noted that it is not clear what 'directly tied' would mean in this context. She noted that in discovery, Ms. Muscat indicated that:

"Directly tied" would imply that the customer would only receive a voucher or bonus if they contract or otherwise purchased SBC regulated services related to a customer specific offer or a general promotion. A bonus is not "directly tied" when it is not contingent on the purchase of regulated service.¹⁰

She noted that SBC Indiana's response to the next subpart of the discovery request indicated that an equipment and monitoring voucher in Cause No. 42236 was part of a 'package' that contained regulated services.¹¹ However, she noted that SBC Indiana did not file information regarding this voucher in its CSO filing made with the Commission.

Ms. Sherwood noted that a recent decision by the North Carolina Utilities Commission ("NCUC") echoes her concern. In its investigation into certain promotions, Ms. Sherwood testified that the NCUC found that that gift cards, checks, check coupons, and similar benefits offered as an inducement to purchase telecommunications services are not themselves services, either regulated or nonregulated. However, she said the NCUC found that when the savings or benefit is received only as part of a transaction involving the purchase of bundled services, the bundle is in effect discounted to the customer by the amount of the monetary benefit or thing of value provided in return. Therefore, such inducements are promotional discounts.¹²

When asked how his proposed safeguards can be applied to a promotion that bundles regulated and non-regulated services, Mr. Wood stated that in order to apply the cost-recovery test, the Commission should focus on the regulated telecommunications service as the subject of the test. He testified that any value received by the customer related to non-regulated services, rebates, discounted equipment prices, or other forms of value should be treated as an adjustment to the effective price charged to the customer for the regulated telecommunications service.

¹⁰ SBC Response to SIGECOM First Set of Data Requests, Response 1-16(a).

¹¹ *Id.* at Response 1-16(b).

¹² North Carolina Public Utility Commission, Docket No. P-100, Sub 72b; Order Ruling On Motion Regarding Promotions, dated December 22, 2004.

Commission Approval. TWTC requests the Commission to deregulate CLEC bundles and packages while increasing our regulation of ILEC bundles and packages by making such offerings subject to a pre-approval process. (Sherwood Direct, p. 9) Mr. Wood testified that while bundled service offerings are not inherently anti-competitive, the potential for anti-competitive strategies (particularly by a provider in the position currently enjoyed by the ILECs) is significant and must be carefully considered. Mr. Wood recommended that any promotion or customer-specific offering which bundles telecommunications services with non-telecommunications services, or one which bundles regulated and non-regulated services, should be subjected to the highest level of scrutiny before being permitted to take effect.

Tariff Requirements. Time Warner suggests that, "if any portion of the package or bundle is a regulated service, and if the package or bundle is to be offered to the public generally (such that it is not a CSO), then it should be tarified. If the bundle or package is not going to be generally offered to the public or a segment thereof, then treat it as a CSO." (Sherwood Direct, p.9)

Unregulated items in tariff. TWTC recommends that if any portion of the package or bundle is a regulated service, and if the package or bundle is to be offered to the public generally, it should be tarified. If the bundle or package is not going to be generally offered to the public or a segment thereof, then it should be treated as a CSO. (Sherwood Direct, p. 9)

Resale. TWTC contends that bundles and packages should be available for resale. (Sherwood Direct, pp. 13-14) In order to apply the resale safeguard, Mr. Wood stated that the effective price must be determined by taking the price charged to the customer for the regulated telecommunications services and adjusting it downward for any value received by the customer which is related to non-regulated services, rebates, discounted equipment prices, or other forms of value (as described above) by considering other forms of value provided to the customer. The bundled offering must then be available for resale at the effective price (minus any applicable wholesale discount), and *not* simply the stated price of the regulated telecommunications service with no adjustment for the elements of the promotion that directly impact the effective price.

Discussion and Findings.

Appropriateness of Regulation and Definition. Following our findings on parity we find that regulations on bundles and packages should apply to ILECs and CLECs alike. It appears most companies have developed their own definitions for bundles and packages and have put those definitions to use in their operations. In order to clarify and simplify the issue, we find that the terms "bundles" and "packages" should be interchangeable and should include any offering which includes two or more products or services provided by a LEC (ILEC or CLEC), where one or more product or service is discounted from the tarified rate, or where the price for the group of products and services as a whole is discounted from the total of the stand-alone prices of the products

and services included. We find this definition will alleviate the confusion which abounds in the industry regarding these terms and their specific meaning for different carriers.

Types of Services. All the parties agree that the Commission should not attempt to regulate the types of services that may be included in bundles and packages. We agree that “bundling” of regulated and non-regulated services is commonplace within the industry and, note that CLECs as well as ILECs bundle such services. Therefore, we find that all services should be eligible for inclusion in bundles and packages.

Pricing. While all parties agree that the bundling of products and services is a benefit to customers in regard to convenience and price, the parties diverge on this issue with regard to pricing and its effect on competition. The ILECs believe that pricing of bundles and packages should be governed by the marketplace and customer acceptance, rather than by regulation. As stated previously in this order, the evidence in this Cause does not rise to a sufficient level to warrant blanket statewide or territory-wide elimination of our price floor requirements. Currently, SBC Indiana and Verizon are subject to price floor requirements for bundles and packages, as specified in their respective ARPs, as follows:

If a regulated service offered by the ILEC is discounted as a part of a bundle, the Company shall demonstrate to the Commission in writing that the discounted price exceeds its TSLRIC plus ten percent. When more than one such service is part of the bundle, the cost floor requirement can be met on either an individual service or aggregate service basis. The cost study provided by the Company shall identify each individual regulated service and its TSLRIC. The ILEC shall make this demonstration when the service is (1) regulated, (2) offered by the ILEC, and (3) discounted. If any of these three criteria are not met, no cost demonstration would be required. If the bundle contains primary line residential basic exchange service, the Company may use the basic local service exchange rate contained in the Company’s Tariff in lieu of the TSLRIC for basic local service (BLS).

If a package is comprised only of regulated services provided by the ILEC, the Company shall demonstrate through a cost study provided to the Commission and the OUCC that the price of the package exceeds the TSLRIC of the group of all regulated services contained in the package by at least ten percent. The cost study provided by the Company shall identify each individual regulated service and its TSLRIC so that the Commission and the OUCC may independently verify that the price of the package exceeds the aggregate cost of the regulated services by TSLRIC plus ten percent. If the package contains primary line residential basic exchange service, the Company may use the basic local service exchange rate contained in the Company’s tariff in lieu of the TSLRIC for BLS.

The ILECs differed slightly in their recommendations in the event that the Commission believes, as it does, that price floor regulation should continue. The CLECs support a price floor of TSLRIC + 10%.

The current pricing requirements from the three ARP plans set the price floor for bundles and packages at TSLRIC + 10%. We agree with the ILECs that in a competitive market, providers will be encouraged to exercise pricing flexibility in order to satisfy their customers' needs for value and attractive pricing. We also agree with the CLECs' argument that some level of protection is necessary to prevent the ILECs from leveraging their market power to the long term detriment of competition. We therefore set the price floor for bundles and packages at TSLRIC, eliminating the "regulatory adder" included in the ARP Plans of the large ILECs. All other guidelines in the ARPs regarding bundles and packages will remain in place. However, rather than providing the Commission with the cost study supporting the bundles and packages the LEC shall file with the tariff submission a signed certification that such cost study has been completed and verify that the promotion is in compliance with the guidelines set forth herein. The cost study itself shall reside with the company until such time as this Commission, at its discretion, requests it be submitted for review. Upon request of the Commission, the cost study shall be submitted within five (5) business days. Additionally, we agree with the ILECs that all certified LECs should be subject to the same rules and regulations. Therefore this price floor and the rest of the guidelines in the ARPs regarding bundles and packages shall apply to all certified LECs.

With regard to the pricing of bundles which include both regulated and unregulated products and services, currently, SBC Indiana and Verizon are subject to price floor requirements for packages which include both regulated and unregulated services as specified in their respective ARPs, as follows:

If a package is comprised of both regulated and unregulated services provided either by the ILEC or the ILEC and an affiliate, the Company shall provide to the Commission and the OUCC the costing information for each individual regulated service, so that the Commission and OUCC may independently verify that the aggregate cost of the regulated services exceeds TSLRIC plus ten percent. The cost study provided by the Company shall identify each individual service and the TSLRIC so that the Commission and OUCC may independently verify that the price of the package exceeds the aggregate cost of the regulated services by TSLRIC plus ten percent. If the package contains primary line residential basic exchange service, the Company may use the basic local service exchange rate contained in its tariff in lieu of the TSLRIC for BLS.¹³

For the same reasons stated above in changing the price floor, we agree with TWTC's Ms. Sherwood and SIGECOM's Mr. Jones, that in the demonstration of cost recovery for a package of regulated and non-regulated services provided to the

¹³ SBC ARP Settlement Agreement, pp. 10-11; Verizon ARP Settlement Agreement, pp. 16-17. SBC Indiana's Tariff is IURC No. 20. Verizon's Tariff is IURC No. T-2.

Commission and the OUCC (as required in the ARPs), the price of the offering must be adjusted for the value of any discounts associated with the non-regulated services or equipment in the effective price calculated for the regulated service. In other words, if any discount is given on any non-regulated product or service as a part of a package, the value of that discount must be deducted from the price of the package in determining compliance with the price floor. This requirement shall also apply to all certificated LECs.

This regulatory framework stays within the Commission's jurisdictional boundaries while assuring that regulated services will not be priced below cost, and in so doing, safeguards competition.

Promotions. We agree with the parties and find that promotions should be allowed on packages and bundles. We find that promotions are a useful tool for providers and offer benefits to customers. Additionally, we find that retail promotions must meet the price floor set out above.

Commission Approval and Tariffs. SBC and Verizon assert that advance filing requirements are unnecessary and that all providers need the ability to be responsive to market conditions. They believe that an informational filing effective immediately upon filing would be sufficient. Sprint, on the other hand, indicates that the one-day notice requirement that is currently in place is sufficient. The CLECs believe that only the ILECs should be subject to a pre-approval process for bundles and packages. They stress that while bundled service offerings are not inherently anti-competitive, the potential to use such offering in an anticompetitive manner is significant for providers in the position of the ILECs and must therefore be carefully considered.

The ARPs of SBC, Verizon and Sprint require that:

New services (which include new packages and bundles of existing regulated services) shall become effective no earlier than the day after the date upon which the Company provides written notice to the Commission. Written notice shall take the form of updated ...Catalog pages with a copy provided to the OUCC. The Company may introduce new services at any time provided the price exceeds the TSLRIC plus ten percent...

We find that the above requirement from the ARPs of the ILECs shall be applicable to all LECs for the offering of bundles and packages. LECs that do not have an ARP or a catalog shall file updated tariff pages in order to comply. Tariff or catalog filings for bundles and packages must include a description of the bundle or package including a list of all products and services included in the package (both regulated and non-regulated) and the price of the bundle or package. Any filing for a bundle or package must be accompanied by documentation (described in the pricing section above) which demonstrates that the price of the package or bundle exceeds the price floor set out above.

C. Promotions & Winbacks. In this proceeding the parties responded to several questions regarding promotions and Winbacks. Below we summarize the positions of the parties on issues such as the appropriate definitions, guidelines and remedies for non-compliance, discriminatory offerings, pricing, waiting periods and lock-in mechanisms, porting guidelines, tariffing, and term length.

ILEC Position.

Definition. SBC Indiana proposes that a promotion be defined as a specified time offering that provides an incentive to eligible customers for the purchase or retention of a particular product or group of products. (Muscat Direct, p. 2) SBC points out that this is the definition used for promotions in the SBC ARP. Sprint and Verizon propose comparable definitions. With regard to a “winback” promotion specifically, the ILECs define it as a promotion targeting consumers who had service with the Company but now receive service from a competitor. (Muscat Direct, p. 3; Matsumoto Direct, p. 7; Dye Direct, p. 23) In other words, a “winback” is a special offer made by one company in an effort to attract customers back from a competitor by making the customer aware of a service or pricing package responsive to the competitor’s service offering.

Guidelines. The ILECs contend that continued Commission regulation of promotional offerings is unnecessary. However, in the event the Commission does continue its oversight, they recommend that all LECs which have a CTA be required to follow the same guidelines for providing service, including any guidelines regarding the offering of promotions. (Muscat Direct, pp. 3-4; Matsumoto Direct, p. 7; Dye Direct, p. 24)

The ILECs believe that the marketplace should drive what is included in a promotional offer. Thus, they propose that no limits be set on what can be included in a promotion, including a win, winover or winback promotion. (Muscat Direct, pp. 4-5; Matsumoto Direct, p. 7; Dye Direct, pp. 25-26) To the extent a promotion contains rates, terms or conditions that are not attractive to consumers, the consumer has the choice of declining the offer. If the offer is declined, several choices remain - purchasing stand-alone services, packages or bundles that are generally available; purchasing services (either stand-alone or packages and bundles) from a wireline competitor; or purchasing services from a non-wireline carrier (e.g., a wireless carrier).

SBC Indiana, Sprint and Verizon consider it unnecessary for the Commission to review promotions in a competitive marketplace. (Muscat Direct, pp. 5-6; Matsumoto Direct, p. 7, Dye Direct, p. 26) As explained by Mr. Dye, regular Commission review of individual promotions is unnecessary. The Commission should only have to review a company’s offerings in a complaint or other Commission proceeding. Companies should have sufficient internal controls to constrain the making of offers that are not financially viable. (Dye Direct, p. 26) To the extent the Commission believes some review is necessary, the ILECs recommend that any guidelines should provide a level playing field for all carriers, and that those guidelines should require all players to operate under the same rules. (Dye Direct, p. 24)

Marketing Material and Billing Disclosure. SBC Indiana, Sprint and Verizon believe there is no need or benefit for the Commission to review marketing materials before they are used in a competitive market. (Muscat Direct, pp. 6-7; Matsumoto Direct, p. 7; Dye Direct, p. 26) The Commission does not do so today, and as explained by Ms. Muscat, the manner in which a provider markets products and services to customers is chosen by the company, based on marketplace needs and customer preferences. (Muscat Direct, p. 7) Flexibility and quickness are essential to respond to market drivers for all companies, in all types of competitive businesses, including telecommunications. (*Id.*) As explained by Mr. Dye, the market provides direct and immediate feedback through complaints from customers and/or competitors, thus eliminating the need for Commission review of the vast majority of promotional materials generated. The Commission should let the competitive market work. (Dye Direct, p. 26)

Remedies for Non-compliance. With respect to the question of whether there should be remedies for non-compliance with these guidelines for promotions, SBC Indiana recommends the Commission rely on the standard mechanisms for protection of competition in the United States, by which complaints or allegations of anticompetitive pricing are dealt with on a case-by-case, fact specific basis. As such, any remedies, and the application of those remedies, should be consistent for all competitors. If, however, the Commission wishes to regulate in this area, then SBC Indiana recommends that all certificated LECs be subject to the same guidelines. Non-compliance issues detected by consumers or carriers should be pursued via informal and formal processes. (Muscat Direct, p. 7). Verizon contends that the shareholders bear the risk of pricing at unreasonably low rates. (Dye Direct, p. 27) Discriminatory behavior will be detected by customers and/or competitor complaints. (*Id.*)

Targeted Marketing. The ILECs contend that companies should be allowed to target offers to any subset of customers and to set the terms of their offers themselves. (Muscat Direct, p. 8; Matsumoto Direct, p. 7; Dye Direct, p. 27) Dr. Aron explained that the right of the CLEC to avoid serving all customers compels allowance of selective offers by any provider, in order to promote an efficient marketplace. (Aron Direct, p. 3) CLECs offer services where they believe there are profitable markets to be had. Prohibiting selective response is likely to create a protective price umbrella for CLECs in those attractive areas. The ILECs also point out that in its order in Cause No. 42405, the IURC found that targeted marketing, subject to reasonable safeguards (such as a price floor) is consistent with FCC precedent and is in parity with our regulation of other providers. (Cause No. 42405 at 26)

Pricing Contingent Upon Subscription to Another Service. The ILECs agree that companies should be allowed to make promotional pricing for a service contingent upon subscription to another service. (Muscat Direct, p. 9; Matsumoto Direct, p. 7; Dye Direct, p. 28) In Verizon's view, this provides the customers with the best opportunity to get the very best offers. (Dye Direct, p. 28) As explained by Ms. Muscat, this practice is widely used across all forms of business from groceries to telecommunications, and is good for

customers because it allows them to obtain new products and services at reduced risk because of the benefits they receive from other purchases. (Muscat Direct, p. 9)

Pricing Flexibility. SBC Indiana, Sprint and Verizon contend that pricing and discount flexibility for winbacks and other promotional offers should be driven by the needs of the marketplace, not regulatory mandates. (Muscat Direct, p. 10; also Aron Direct, pp. 24-42; Matsumoto Direct, p. 8; Dye Direct, p. 28) They assert that vouchers or bonuses should be allowed to be offered to select customers, even if they are not offered to the entire customer class. (Muscat Direct, p. 10; Matsumoto Direct, p. 8; also Matter Direct, p. 3; Dye Direct, p. 28) As explained by Ms. Muscat, these offers are created to attract or introduce market segments to a specific product or service, or group of products or services, based on customer needs and marketplace drivers. (Muscat Direct, p. 10) If a voucher or bonus is directly tied to the purchase of a regulated, intrastate service, the actual cost to the company to offer the voucher or bonus should be factored into the cost to support the offer. (Muscat Direct, p. 11; Dye Direct, p. 29) On the other hand, if a voucher or bonus is not tied directly to the purchase of a regulated, intrastate service, the inclusion of the cost in any cost floor calculation would not apply. (Muscat Direct, p. 11)

Sprint contends that promotions should not be subject to the price floor. (Matsumoto Direct, p. 9) Promotions are generally short-term in nature and customer cost analysis is best viewed in longer terms. (*Id.*) SBC Indiana proposes that promotional offers should be subject to no greater restrictions or regulation than other price reductions. (Muscat Direct, p. 14) To the extent the Commission imposes any price floor requirements, SBC Indiana proposes that the 10% adder in its ARP is unnecessary, inconsistent with market conditions and should be eliminated for all LECs. (Muscat Direct, p. 14) Verizon takes the position that promotions should be subject to a price floor. (Dye Direct, p. 30)

Waiting Periods. The ILECs believe that there is no logical basis for imposing a minimum waiting period. They state that winback offers enhance competition and encourage lower prices. Further, they state that imposing a waiting period simply shelters competitors from the full rigors of competition, at the expense of consumers. SBC states winback offers not only encourage more vigorous price competition, but they also increase the incentive for customers to leave incumbents to try a competitor's service. (Aron Direct, p. 32) By leaving, customers make themselves eligible for more attractive offers from the ILEC as well as its competitors. Furthermore, by signaling a willingness to switch providers, customers enhance their own bargaining power and attractiveness to carriers. Proponents of a waiting period fail to recognize that customers do not assess their options and opportunities continuously over time, because consumers have many other decisions and priorities vying for their attention. (Aron Direct, p. 32) Dr. Aron testified that consumers review options on a periodic basis, investing time and effort in comparing offers, considering options and communicating with providers. She stated that to deprive competitors the opportunity to present attractive, targeted offers to customers when they are most receptive to and interested in receiving and assessing them, undercuts the competitive process and deprives customers of relevant and timely information. Simply put, Dr. Aron stated, it devalues customers' time and effort. (*Id.*)

Duration. SBC Indiana and Verizon recommend that no time frames be mandated for promotions. (Muscat Direct, p. 16; Dye Direct, p. 31) As explained by Mr. Dye, some promotions may be on-going with no time limitations; others may be no more than six months in any 12 month rolling period. For instance, the provider may choose to run a promotion where anytime a customer purchases caller ID, the customer receives a waiver of the first month's recurring rate. The duration of the promotion is limited to the first month of service but the offer is ongoing. (Dye Direct, p. 31) The marketplace dictates the success of promotions, and the timing of promotions should remain flexible. (Muscat Direct, p. 16) There is no need to restrict promotions, as customers will define their usefulness and effectiveness based on their buying behavior. (*Id.*) Sprint recommends a 12 month maximum term for promotions. (Matsumoto Direct, p. 9)

Term Commitments, Termination Penalties & Lock-In Mechanisms. The ILECs recommend that offers involving a term length, with a penalty for early termination, should be allowed. (Muscat Direct, pp. 13-14; also Aron Direct, pp. 33-40; Matsumoto Direct, pp. 8-9; Dye Direct, p. 30) Mr. Dye advocates that companies and their customers should have the flexibility to define the terms of the agreement, without regulatory limits on the length of the contract. (Dye Direct, p. 30) As explained by Ms. Muscat, term offers provide appropriate alternatives for customers and allow the company to offer products and services at a lower price in exchange for the loyalty commitment made by the customer. (Muscat Direct, p. 13)

All parties agree that termination penalties should be allowed. (Muscat Direct, p. 15; Matsumoto Direct, p. 9; Dye Direct, p. 30; Wood Direct, pp. 22-24) Ms. Muscat explained that the steeper the upfront discount, the longer it takes for the company to recoup its costs. (Muscat Direct, p. 15) It is reasonable to offer customers alternatives by which they can take advantage of special prices, but it is also reasonable to expect them to accept the responsibility that goes along with the purchase at the special rate over a specified term.

Tariffing. SBC Indiana, Sprint and Verizon recommend that winback offers and promotions not be tariffed. (Muscat Direct, p. 14; Matsumoto Direct, p. 9; Dye Direct, p. 30) Verizon contends that filing promotions in the LECs' tariffs unnecessarily creates additional paperwork and could result in outdated material being included in company tariffs (catalogs) once a promotion is stopped. (Dye Direct, pp. 25-26) Customers, not regulation, should decide which offers meet their needs and should remain active. (Muscat Responsive, p. 19) To the extent that the Commission determines that tariffing should be a requirement, SBC Indiana proposes that offers and promotions for regulated services should continue to be included in the provider's informational tariff (which for SBC Indiana is the SBC Catalog), and all LECs should be subject to the same rule. (Muscat Direct, pp. 14-15) SBC Indiana also recommends that if an informational tariff is required, then the current process which identifies the service, eligible customers, timeframes and the benefit customers receive is appropriate. (*Id.* at 15)

Porting Guidelines. All parties believe that guidelines for porting customers from one carrier to another are necessary. (Muscat Direct, p. 16; Matsumoto Direct, p. 8; Dye Direct, p. 29; Sherwood Direct, p. 7)

CLEC Position.

Definition. The CLECs, in general, agree with TWTC's definition of promotions and winbacks. They define promotions as "the same as a CSO, but are offered to more than one customer and generally offered to similarly situated customers," and define winback as "ILEC offers for service below standard tariff pricing that are extended to selected customers who are being served by a CLEC or who have received an offer from a CLEC." (Sherwood Direct, p. 5)

When asked for an example of the winback and promotional pricing tactics of SBC Indiana, Ms. Sherwood responded that TWTC has repeatedly provided examples of these types of practices in various Commission proceedings. In Cause No. 40849, TWTC presented evidence describing situations in which SBC Indiana (f/k/a Ameritech) was engaging in textbook price squeeze strategies, including offering services at deep discounts to certain customers, waiving nonrecurring and fixed mileage charges associated with services, and offering prices to customers on a month-to-month arrangement that were previously offered only to customers executing long-term contracts. In Consolidated Cause Nos. 40785-S1, 40849, and 41058, TWTC witness Steve Jacob testified that the egregious pricing practices of SBC had continued unabated, explaining that SBC was offering its ISDN Prime retail service to TWTC customers, quoting retail prices that were sometimes \$900 less than its tariffed retail price and more than \$650 less than its wholesale rate. In these circumstances, where SBC offers retail prices that do not cover costs, Ms. Sherwood stated that TWTC is faced with the prospect of: (1) winning the customer but losing money; or (2) not competing for the customer at all. She concluded that, for the most part, competitive carriers cannot sustain losses in order to establish market share, and therefore, choose to withdraw from the market.

Asked whether promotions offered by the ILECs, as the former monopoly provider, are in the long-term best interest of the end users of a service, Mr. Wood responded that the answer is a resounding "it depends." He observed that the ILECs naturally tout the short-term benefits of such promotions (while failing to mention that the benefits may indeed be only short term) and typically argue that (1) all promotions are in the best interest of end users, and (2) any carrier arguing that constraints should be placed on such promotions is seeking to deny the benefits of competition to end-users or to artificially protect itself against competitive market forces.

Mr. Wood testified that while promotions are common in many markets and can be beneficial to consumers under certain circumstances (though clearly not in others) he believes the ILECs overstate their case when defending their promotional offerings. According to Mr. Wood, an ILEC promotion may be in the short- and long-term public interest if, but only if, the effective price to the consumer enables the ILEC to fully recover the relevant cost. He stated that an effective price lower than this level enables

the ILEC to leverage its former monopoly power – and existing market power – in a way that will enable it to enjoy continued or increased market dominance in the future.

In addition to the above discussion on market power, Ms. Sherwood also suggested that the Commission review SBC Indiana's contorted view of its resale obligations. She stated that in Cause No. 42218, Mr. Smutniak of Midwest Telecom pointed out four problems which effectively foreclosed resellers from taking advantage of resale of promotions as an effective tool to counteract SBC Indiana's pricing:

1. SBC Indiana's promotional rates offer a greater discount than the resale discount. Mr. Smutniak explained that when Midwest Telecom acquires a new customer, it does so at a 21.46% discount to retail. The CompleteLink promotion of SBC's offered discounts of anywhere from 28% to 36% to Midwest Telecom's customers. (Smutniak Rebuttal Testimony in Cause No. 42218, p. 9) The Commission has put a price floor on resellers that prohibits CLECs from proactively reselling SBC Indiana's services at prices less than its resale discount, and as a result, Midwest Telecom cannot proactively lower its prices below its 21.46% resale discount to compete with Complete-Link discounts of 28-36%.

2. SBC Indiana's procedural requirements create hurdles for CLECs that make resale unworkable and functionally unavailable for CLEC subscription. CLECs cannot subscribe to the promotions until after the CLEC learns that its customer has already been approached by SBC. By then, it is almost always too late for the CLEC to respond because the customer may already be bound to a term agreement. Once SBC Indiana has "won back" a CLEC customer using the Complete-Link promotion, that customer is locked into a term agreement, and at that point, CLECs have no opportunity to subscribe to the CompleteLink promotion and offer their own winback promotions. (Smutniak Rebuttal, Cause No. 42218, pp. 15-16)

3. The contract termination penalties imposed upon the customer by SBC Indiana are so high that the customer is effectively prevented from considering any potential CLEC winback promotion. By the time the customer's term has expired, the promotion may have expired as well, so the CLEC cannot resell a winback promotion. (Smutniak Rebuttal, Cause No. 42218, pp. 15-16)

4. In offering winback promotions, SBC Indiana targets any and all CLEC customers. CLECs are restricted from offering promotions to target all ILEC customers, and can only resell the winback promotions to customers who have left that particular CLEC. (Smutniak Rebuttal, Cause No. 42218, pp. 15-16)

Targeted Marketing. Ms. Sherwood testified that the extensive fact record in Cause No. 42218 establishes the concerns of TWTC and other CLECs regarding SBC's promotional offers which target only customers who have exercised a competitive choice, especially since SBC Indiana remains the only provider of essential wholesale inputs. Ms. Sherwood suggested that the Commission give ample consideration to whether promotions targeted to CLEC customers only should be permitted. She noted that TWTC

continues to recommend the guidelines it set forth in the TWTC Proposed Order filed in Cause No. 42218. In that proposed order they recommended that SBC f/k/a Ameritech shall not make an offer to a customer, whether that offer is pursuant to a promotion or a customer specific offering, individual basis offering, individual customer arrangement or customer specific offering, for which eligibility is limited to a class of customers who have either received or accepted an offer from a competing carrier. Ameritech must amend tariffs for all existing WinBack or Retention promotions to make them available to all customers, or withdraw those promotions. (42218, TWTC Proposed Order, pp. 52-53)

Hancock witness Burrow maintained that "winback rules should be equally and consistently applied to all carriers" and recommended that the Commission require winback offers be made available to all customers in a given wire center, because the costs of providing services within a wire center to a given customer should be comparable. (Hancock Responsive, p. 2) SIGECOM did not directly reply to this issue but suggested that continued regulation was necessary because SBC Indiana's winback and other promotional offerings are set below SBC Indiana's "costs" as well as the price floors established in the expired "Opportunity Indiana 2000" ARP. (Jones Direct, p. 10) While SIGECOM proposes that continued regulation is necessary to check unlawful predatory pricing, SIGECOM indicated that it had not analyzed SBC Indiana's cost information. (Jones Direct, p. 15)

SIGECOM stated that SBC Indiana restricts the eligibility of its discounted offers to customers who qualify as "winback" customers, and thus limits its offers to a specific subset of customers. Some winback offers are limited to those customers who received a direct mailing piece, or an outbound telemarketing call. (Jones Direct, p. 8) SIGECOM contends that selective, targeted winback promotions result in an unreasonable preference or advantage to targeted recipients over that available to non-eligible customers in Indiana. (Jones Direct, p. 9)

Pricing Contingent upon Subscription to Another Service. TWTC agrees that promotional pricing based on subscription to another service should be allowed, but proposed that offers involving an ILEC's unregulated affiliates should be subject to additional guidelines. (Sherwood Direct, p. 6) SIGECOM did not challenge the practice of "bundling" or "packaging" services at a discounted price, and stated that it is commonplace within the industry. (Jones Direct, p. 13) For example, SIGECOM offers a 20% discount on a phone service package with the purchase of high speed internet and cable television with a premium service, and Comcast offers discounted local telephone service when bundled with its internet and cable television products. (*Id.*) However, SIGECOM expressed concern with SBC Indiana's bundling regulated and unregulated services in various winback offers. (*Id.* at 18)

Waiting Period. In the record developed in Cause No. 42218, TWTC advocated that ILECs be required to observe a waiting period before contacting a customer who has switched to a CLEC, in an effort to winback the customer. Ms. Sherwood reiterated that concern in her testimony. She testified that Ms. Muscat mistakenly suggests that no

states other than Indiana impose winback waiting periods. Ms. Sherwood noted that in fact, various states have imposed waiting periods at different times. She noted that some states have lifted those waiting periods, but other states, like Georgia, have codified those waiting periods into administrative rules. (Sherwood Rebuttal, p.17)

Marketing Materials. SIGECOM recommends that the Commission require SBC Indiana to file with the Commission its winback promotional materials and identification of all appropriate tariff references so that the Commission may verify the accuracy of the materials. (Jones Direct, p. 20) They referenced several instances where what was provided was not what was promoted. The other carriers, CLECs and ILECs, do not believe that there is a need for the Commission to review promotional material.

Pricing Flexibility. One of the concerns of the CLECs is what services offered in a promotion should be covered by price floors. TWTC takes the position that price floors should apply to promotions and that there should be guidelines for porting customers. (Sherwood Direct, p.7)

Tariffing. As far as promotions being tariffed, TWTC recommends that the Commission a) require ILEC promotions to be tariffed and b) after a tariff is filed, a brief grace period should follow to allow the IURC, OUCC, and interested CLECs to review the tariff. (Sherwood Direct, p.8)

Term Commitments, Termination Penalties & Lock-In Mechanisms. TWTC agrees that termination penalties should be allowed under controlled conditions and they did not have a position on the length of promotions except for the concerns articulated by the parties in Cause No. 39983. (Wood Direct, pp. 22-24, Sherwood Direct, p.8) SIGECOM argues that term commitments limit the customers' ability to respond to favorable market conditions. (Jones, pp. 7, 18-19)

Discussion and Findings. Today, many telecommunications providers and other providers develop new and creative promotional offers designed to win and retain customers in markets where competitors are providing both regulated and unregulated products and services. Such marketing is not new, nor is it unique to the telecommunications industry. The FCC has recognized states' review of Winback promotions, by stating the following:

Finally, we are aware that a number of states are examining the issue of improper WinBack and retention activities and a number of states have adopted rules governing incumbent LECs' WinBack activities. We continue to believe that the states are uniquely qualified to assess the local competitive landscape and determine whether additional safeguards are necessary.¹⁴

¹⁴ *Third Report and Order and Third Further Notice of Proposed Rulemaking*, FCC 02-214, at page 59, paragraph 134 (July 25, 2002).

Definition. We find that a “promotion” shall be defined as a specified time offering that provides an incentive to eligible customers to purchase or retain a particular product or group of products.

As noted by the FCC as well as some of the parties in this proceeding, the concept of “winback” can be divided into distinct types of marketing: (1) marketing intended to regain a customer who has already switched to and is receiving service from another provider; (2) marketing intended to retain a customer who may have elected to switch carriers, but has not yet done so, commonly referred to as “retention” marketing; and (3) a promotion targeting consumers who establish service with a carrier for the first time, commonly referred to as “win” marketing.

Consistent with its past use of the term “winback”, the Commission finds that the term “winback” refers only to the first situation, where the customer has already switched to and is receiving service from another provider. The distinction we make today among the various types of marketing associated with the concept of “winback” is consistent not only with the Commission’s previous definitions in SBC Indiana’s alternative regulatory proceedings, but is consistent also with the distinction drawn by the FCC.

While the parties certainly recognized in this proceeding the various distinctions in promotional offerings, with SBC Indiana’s witness, Linda Muscat, specifically distinguishing between “win” and “winback” promotions, the consensus among the parties was that so-called “winback” promotions are limited to situations where customers have already switched to and are receiving service from another provider. We agree. Accordingly, the Commission’s references found in this Order pertaining to “winback” promotions apply solely to promotions that target former customers in a competitive environment. In other words, a “winback” is a special offer made by one company in an effort to attract former customers back from a competitor by making the customer aware of a service or pricing package that is responsive to the competitor’s service offering.

Guidelines. The CLECs make the argument that guidelines for promotions like those for CSOs should only apply to the incumbent carriers and not the CLECs, because unlike the ILECs, CLECs do not have the financial and human resources to sustain offerings below cost for an extended period of time. On the other hand, the ILECs continue to contend that continued regulation in this area is unnecessary; or in the alternative, the very least they assert is that all LECs which have a CTA should follow the same guidelines for providing service, including abiding equally by any guidelines for the offering of promotions.

In order for the end user customer to obtain the greatest benefit from competition and to meet our previously stated goal of regulatory parity, any guidelines that we set should be minimal, fair, and applicable to all providers. The guidelines discussed herein attempt to be competitively neutral and shall apply to all LECs.

We agree with the ILECs that the marketplace should drive what is included in a promotional offering. Providers should have the ability to offer promotions for the types of services their customers want and need, pursuant to certain guidelines set forth below.

Currently, the ARPs require SBC, Sprint and Verizon to offer promotions on one day's notice to the Commission through an informational tariff submission. These companies must also submit a confidential cost study to the Commission. The CLECs are subject to the one day filing rule but do not submit cost studies. Given the status of competition and technological change, including competition from non-jurisdictional providers such as wireless and cable companies, we find that some further streamlining of our regulatory oversight of promotions is appropriate and in the public interest.

TWTC urges the Commission to deregulate CLECs but apply a pre-approval process to ILEC promotional offerings. This asymmetrical proposal is inconsistent with our parity objective; it is also unfair and inconsistent with a competitive environment. Given this, we have several options: 1) eliminate or modify the filing process; 2) apply the ARP process to all LECs; or 3) apply the CLEC rules to all LECs. We find that in order to reach our goal of parity among providers, while continuing to provide a measure of protection for existing and emerging competitors, we will modify the processes in the ILECs' ARPs. Notice of promotional offers, along with the currently required informational tariff submission, shall be filed on or before the date the offer is effective. Regarding cost studies supporting the promotional offers, we find that all LECs shall prepare such cost studies and shall file with its informational tariff submission a signed certification that such cost study has been completed and verifies that the promotion is in compliance with the guidelines set forth herein. The cost study itself shall reside with the company until such time as this Commission, at its discretion, requests it be filed for review. Upon the request of the Commission, the cost study shall be filed within five (5) business days.

Marketing Material and Billing Disclosure. Historically, the Commission has not regulated marketing materials or billing disclosures and the record does not convince us to begin such regulation. However, we find that the parties should make the materials available if the Commission so requests.

Remedies for Non-compliance. A fundamental difference among the parties is found in the regulatory approach proposed for detecting and preventing discriminatory behavior. CLECs essentially advocate an approach that includes affirmative regulation by the Commission designed to deter a carrier from engaging in discriminatory, anti-competitive behavior and attaching meaningful negative consequences for any misbehavior. In sharp contrast, the ILECs advocate an approach whereby anticompetitive conduct would be addressed only after a carrier obtains a customer, and after it is too late for the aggrieved carrier to retain the customer's business. The Commission notes the delicate balance between detecting discriminatory, anti-competitive behavior and attaching meaningful negative consequences; and possibly restricting the ability of the ILECs to compete by placing undue restrictions on them. For this reason the Commission

finds the parties should follow the procedures that are part of the ILECs' ARP plans to settle issues of non-compliance.

Targeted Marketing. The ability of companies to make promotions and especially winback promotions available to selectively targeted groups of customers is a point of contention among the parties. ILECs contend that having the ability to offer certain customer groups special offers gives them the opportunity to respond to customers that they believe have been "cherry-picked" by CLECs. The ILECs state that restricting their ability to use targeted promotions will limit their ability to compete for customers. SBC contends that CLECs are not required to serve all customers in a given area and therefore, are able to offer services where they believe profits can be maximized.

The CLECs, on the other hand, argue that targeted promotions are discriminatory in that the ILECs give selected customers a discounted rate but do not offer the discount to other similarly situated customers. They also state that the targeted nature of promotions has a negative effect on local competition. As SIGECOM's witness Mr. Jones explained "...SBC Indiana can preclude a competitor like SIGECOM from competing effectively in the marketplace, because SBC can cross-subsidize its losses with revenues from other services it provides to customers in less competitive marketplaces in Indiana". (Jones Direct, p. 9)

All the parties agree that promotions are an effective way to acquire new customers. Therefore, this Commission must weigh the positions of the parties to determine whether the ability to target promotions to select groups of customers is beneficial or detrimental to competition. To this end, we find it appropriate to continue to allow target marketing of retail promotions for all LECs, subject to the safeguards set out previously in this Order.

Pricing Contingent on Subscription to Another Service. The parties generally agree that any service should be eligible for inclusion in a promotional offering. The divergence of the parties' positions on this issue appears to be whether the cost recovery for the promotional offering must reflect the value of any discounts for non-regulated services. The ILECs advocate that the value of discounts for non-regulated services should not be included in the promotional cost recovery analysis unless they are "directly tied" to the purchase of a regulated service.

In contrast, CLECs advocate that all costs for all services and equipment should be included in the incumbent's promotional cost recovery analysis. TWTC's witness agreed in general that any service should be eligible for inclusion in a promotional offering, subject to one important qualification: that the demonstration of cost recovery for a promotion, including regulated and non-regulated services, must reflect the value of any discounts associated with the non-regulated services or equipment in the effective price calculated for the regulated service.

Historically, we have not imposed restrictions in this area, other than to require that the price of the regulated service comply with a price floor, and that the information

pertaining to the regulated offering be submitted to the Commission through an informational tariff submission. However, we find that the value of any discounts associated with non-regulated products or services must be reflected in the effective price of the regulated products and services when testing compliance with the price floor. This information should be clearly shown in the cost studies.

The Use of Vouchers and Bonuses. The parties generally agree that vouchers and bonuses should be available as an option for use in promotional offerings; however, some of the CLECs believe that the ILECs use them as a “winback” tool. If vouchers and bonuses are used, the CLECs believe that vouchers and bonuses should be taken into account for purposes of price floor compliance regardless of whether the voucher or bonus is directly tied to a service subject to our jurisdiction. The Commission finds that vouchers and bonuses should be part of any price floor compliance. This information should be clearly shown in the cost studies.

Waiting Periods. The Presiding Officers in Cause No. 42218 previously established a “winback” waiting period of 17 days in an Interim Order on Emergency Relief dated June 5, 2002. As part of this investigation, the Commission sought input as to whether this “winback” waiting period should continue and, if so, whether it should be extended for some additional period.

TWTC argued both in Cause No. 42218 and in this proceeding that the winback waiting period should be extended to a period of thirty (30) to forty-five (45) days to permit the new customer relationship to settle for at least one billing cycle. In contrast, the ILECs believe that the record reflects that there is no logical basis to impose a minimum waiting period.

Two issues that were discussed in testimony regarding the 17 day waiting period established in Cause No. 42218 were line loss notifications and the opportunity for the carrier to develop a relationship with the customer. The interim waiting period was initially established in the prehearing conference order in Cause No. 42218 after SBC Indiana agreed voluntarily to extend to all five formerly Ameritech states, the requirement from an Illinois Commerce Commission (“ICC”) Order that Ameritech temporarily not engage in Winback promotions for a period of seventeen (17) days from when it loses a customer to a CLEC. However, when the ICC’s ruling expired, SBC requested that the provision be lifted in Indiana as well. SBC reasoned that the expiration of the 17 day waiting period in Illinois was based on the ICC’s determination that the issue of line loss notification, which was the underlying issue in that Winback complaint proceeding, had been resolved.

This Commission, however, found in a docket entry in Cause No. 42218 dated November 19, 2002 that there was sufficient information presented to raise an urgent concern as to the impact of Winback promotions on competition. The stated rationale in the Commission’s Interim Order was that the existence of a delay between the time Respondent loses a customer and the time Respondent initiates efforts to reacquire that customer would serve the continued promotion of a competitive telecommunications

marketplace in this state. The November 19, 2002 docket entry stated that the resolution of a Winback proceeding in another state will not determine when this Commission will restate, amend, or eliminate the 17 day waiting period.

Cinergy's witness Bye presented evidence in Cause No. 42218 to the issue of the need to develop a relationship with customers before those customers are subject to winback offers. He testified that the 17 day waiting period approved in the Interim Order is insufficient. He stated that a CLEC needs more than 17 days to stabilize a customer relationship and it needs one complete billing cycle (30 days) before any conversion issues are resolved. (Cause No. 42218, Bye Direct, p. 16)

Our Order initiating this docket raised the issue of a "winback" waiting period in conjunction with line loss notification. (October 2003 Order, p. 2) In this current proceeding, at TWTC's request, we took administrative notice of the entire record in Cause No. 42218. (May 23, 2005 Docket Entry) It should be noted that the record in that Cause demonstrates that since mid-2002, SBC Indiana's line loss notification procedure has been the same for both CLECs and the SBC retail business unit.¹⁵ In other words, historical concerns about inequities to CLECs due to the line loss notification process should have been resolved.

The record in Cause No. 42218 also shows that a Bearing Point report to the Commission in Cause No. 41657 confirms that the line loss notification issue has been resolved. (Clarification and Response of SBC Indiana to Submission of Supplemental Authority, Cause No. 42218, filed April 23, 2004, p. 2) Moreover, the record shows that from March 2003 to February 2004, over 99% of the line loss notifications in Indiana were returned to the CLEC within 24 hours of completion of work associated with the Local Service Request which is necessary to migrate the customer to the new carrier. (*Id.* at 2-3 and Exhibit B) Therefore, absent any new information regarding problems with line loss notifications, it appears that this issue as a driver for a waiting period, has been largely resolved.

The issue of the carrier developing a relationship with the customer may be resolved by other means. The carrier has several ways to develop this relationship. To cite an example, in our discussion of promotional offerings, we note that ILECs' promotional offerings frequently make use of an extended agreement (for example, a one-year contract may include an early cancellation penalty). As long as the terms and conditions of such contractual relationships are appropriately disclosed, assuring that the customer is making an informed decision, the CLECs could routinely employ this type of agreement in their initial provisioning of service to their customer. If these types of relationships were to develop in the future, they may obviate the need for a waiting

¹⁵ In the Reply Testimony of John M. Mitchell filed in Cause No. 42218 on August 20, 2002, he testified that under the current LLN process, a CLEC receives notification of a line loss within 24 hours of completion of all service orders associated with the Local Service Request via an EDI 836 transaction, and that SBC Indiana's retail winback group uses the same EDI 836 LLN process as the CLECs. In the past, a Local Loss Report (LLR) was used; however, as of May 29, 2002, SBC Indiana stopped using the LLR and has exclusively relied upon the EDI 836 LLN.

period since the customer, once won over by the CLEC, is unlikely to be able to accept a "winback" offer within any of the time frames (17, 30 or 45 days) discussed in this proceeding.

The previous discussion demonstrates that the line loss notification issue has been addressed. However, given the status of the record and the emergent competitive market, we find it appropriate to retain a waiting period pending further review in the new investigation discussed below. We have reviewed and agree with Georgia's rules and regulations¹⁶ on this issue. For all the foregoing reasons, we find that the 17 day waiting period established in Cause No. 42218 should be revised to a seven day waiting period.

Porting Guidelines. The Commission included the issue of guidelines for porting customers from one carrier to another as part of its list of issues to be addressed in this proceeding. (Commission Order dated January 22, 2004) However, the record developed in this proceeding produced only limited evidence on this issue. While the Commission notes the testimony presented by SBC Indiana on this issue, including its suggested Indiana End User Migration Rules, we find the record of this proceeding is not sufficiently developed for the Commission to take any action on this issue at this time.

Price Floors. A major point of contention among the parties concerned the continuation of the TSLRIC plus 10% price floor previously established for SBC Indiana promotional offerings by the Commission. Instead of this price floor, the CLECs advocate a review mechanism such as Mr. Wood's proposed spreadsheet, which ensures that a promotion is not offered below an ILEC's relevant cost. SBC Indiana argues that the TSLRIC plus 10% price floor should be eliminated as pricing should be driven by the market and not by regulation. The parties also argued whether the cost studies performed in support of a promotional offering should be based upon a TSLRIC or a TELRIC study.

The Commission is not persuaded by the incumbents' assertions that there should be no cost review for promotional offerings. As we have previously stated, the record in this proceeding is not sufficiently robust to support the elimination of regulation advocated by the incumbents. The relevant question is not whether the TSLRIC plus 10% price floor is appropriate, but whether an ILEC's promotional offerings are offered above its relevant costs.

The Commission finds that competitors in the voice communication market use offers and promotions to attract customers, and that an established price floor will not impair the ILECs from competing with other carriers in the marketplace, but it may keep ILECs from engaging in anti-competitive behavior in order to gain customers. Currently, the three ILECs' promotional offerings are subject to a TSLRIC plus 10% price floor. In our discussion of CSOs and Bundles and Packages, we found that the competitive marketplace no longer warrants the "adder." We find that the "adder" should also be

¹⁶ Georgia requires LECs to observe a 7-day waiting period before attempting to win back customers from other LECs. *Ga. Comp. R. & Regs. R 515-12-1-.34(8)(a)*.

eliminated from the price floor for promotional offerings, leaving the price floor at TSLRIC.

We are aware that most CLECs do not prepare traditional TSLRIC cost studies. In lieu of a traditional TSLRIC cost study, the CLECs may determine the costs of a promotion utilizing long-run incremental cost principles for each service included in the promotion. If the cost studies are deficient, Commission staff will work with the CLEC to develop better cost estimates.

With respect to the question of whether incumbents should be required to use the same inputs that were used in the TELRIC cost study setting UNE rates in the TSLRIC cost studies supporting their promotional filings, the Commission finds that the arguments used earlier for CSOs apply here. We therefore adopt the same requirements for reporting and disclosing promotional cost support as were established earlier in this Order for ILEC reporting and disclosure of CSO cost support.

Further, there was testimony presented by Mr. Smutniak on behalf of Midwest Telecom in Cause No. 42218 stating that since the Commission in Cause No. 39983 put a price floor on resellers that prohibits CLECs from reselling SBC Indiana services at prices less than its resale discount, CLECs cannot compete at the retail level because they cannot lower their prices below the 21.46% resale discount. In an Order dated July 1, 1996 in Cause No. 39983, page 31, the Commission expressed concern that a local reseller could set its retail rates lower than the underlying wholesale rate and cross subsidize its retail (resale) rates with revenues from other services which the reseller may offer (e.g. long distance services). Therefore, the Commission found that there was a need for a price floor for CLEC resellers and found that the price floor for any CLEC resellers' retail rate shall be the underlying ILEC's wholesale rate for that particular service. This finding did not contemplate the resale of promotions and therefore, we find that when a CLEC resells a promotional offering, the price floor, should be the price charged by the ILEC for the retail promotional offering, less the wholesale discount approved for the ILEC.

Tariffing. The parties disagree as to whether and to what extent promotional offerings should be included in the tariffs. The ILECs argue that if promotions are to be tariffed at all, they should be included in the informational tariff and the filing requirements that are in place today should remain.

TWTC believes that promotional offerings should be included in companies' tariffs and there should be a grace period during which the CLECs and the Commission can review the offering or promotion to ensure that it meets all requirements. The Commission finds that including offerings and promotions in LECs tariffs allows other LECs and the public to know what offers and promotions a company is offering. Accordingly, we find that all LECs' offers and promotions should continue to be tariffed; however, we reject the CLEC proposal that a new pre-approval process be implemented. We find as stated above, that the informational tariff shall be filed on or before the date the promotional offering is effective.

Term Commitments, Termination Penalties & Lock-In Mechanisms. Another point of contention among the parties concerns promotional offerings that subject customers to long-term commitments, the early termination of which result in customers having to pay significant financial penalties. CLECs contend that such “lock in” mechanisms can be anticompetitive and, consequently, should be the subject of Commission regulation to deter misuse. The ILECs contend that the record shows that termination penalties are imposed in consideration of the lower price the customers are granted, and penalties should be allowed if the terms of the contract are not upheld by the customers. (See Matsumoto Direct, p. 9) If termination penalties are not allowed, the term provision of the agreement is “worthless” and the available price reductions or other benefits will be “less generous” for customers. (See Dye Direct, p. 30)

We share the concerns expressed by the CLECs that term commitments can be anticompetitive if they “lock up” a customer for an extended period of time. We find that the best way to ensure that term commitments and early termination penalties are not used in an anticompetitive manner is to require companies to submit, as part of their promotional cost support to the Commission, a net present value calculation which identifies the minimum amount of time that the customer must subscribe to the service in order for the companies to fully recover their costs, as well as all data, assumptions and formulas to allow IURC staff to replicate the Net Present Value calculation if necessary. We also find that the amount of early termination penalties must be limited to recouping the LECs’ actual lost revenue associated with such termination, and cannot set a punitive level which bears no demonstrable relationship to the risks and costs identified in the cost study provided by the LEC. These safeguards do not impose any unreasonable requirements upon term commitments and early termination penalties and, in fact, are consistent with the actions a reasonable provider would want to follow in a competitive market.

Duration. Our current investigation concerns retail service offerings and seeks to establish parity in our regulation of the retail operations of certificated LECs as opposed to those promotional offerings that are required to be offered as wholesale services. The Commission accepted the definition of the word “promotion” contained within SBC Indiana’s most recent Alternative Regulatory Plan, where it defined a “promotion” as “a limited time offering that provides an incentive to eligible customers to purchase a particular product.” (June 30, 2005 Order issued in Cause No. 42405, Stipulation and Settlement Agreement Page 2) While SBC Indiana’s predecessor alternative regulatory plans explicitly acknowledged that a “promotion” is an offer with a term of 90 days or less, consistent with the FCC’s rules on promotions, SBC Indiana’s current alternative regulatory plan refers only to a “limited time offering” without any further specificity.

Since short-term promotions are not subject to resale at wholesale rates pursuant to 47 CFR 51.613 (a)(2)(i), it is important to decide the period of time after which an offering ceases to be a “short-term” promotion and therefore must be treated as a standard promotion subject to the obligation to resell at the wholesale rate. The parties to this proceeding appear to accept the 90-day term defined for short-term promotions by federal

law and we see no reason not to accept this same 90-day time period for defining a "short-term promotion" for state regulatory purposes. Presently the ILECs have limited the availability of promotions to 365 days. This is a reasonable time for a promotional offer to be available and sets this as the maximum duration for a promotion.

Finally, we have taken notice of the entire record in Cause No. 42218, and have made our findings herein on the winback issues based upon the evidence presented in that Cause and upon the updated evidence submitted in this Cause.

7. **Conclusion.** Our findings herein are steps taken to move toward a level playing field as competition emerges in the telecommunications market in the State of Indiana. The recent mergers are important events and understanding their full effect on the status of competition in Indiana is necessary in order to determine the extent and scope of competition or the appropriate level of regulation. Our stated goal is to ensure the continued health and growth of competition in the Indiana telecommunications market. In order for competition to continue to grow we must begin the process of treating carriers equally. We have found that imposing new and existing regulations upon ILECs alone runs counter to the goal of ensuring regulatory parity and fairness in the telecommunications market in Indiana today. In order to reach the goal, we have implemented safeguards in this Order that will permit the continued development of competitive markets, while restricting the ability of the ILECs and CLECs alike to engage in strategies which could reduce competition.

The establishment of the presence of (potential) competitors is a necessary but not sufficient precondition of establishing that a competitive market exists. But the presence of competitors does not automatically translate into the existence of competition. And the existence of competition, while also necessary, does not necessarily translate into an open, vibrant and competitive market. Finally, the presence of a competitive market in one geographic market or market segment does not automatically translate into the existence of full, robust and fair facilities-based competition across the length and breadth of Indiana. At the same time, consistent with authority granted to the Commission in Ind. Code 8-1-2.6 *et seq.*, we find there is a need for the Commission to nurture the continued transition from a regulated, monopoly model to a market-based competitive model.

In this proceeding, for the first time, there was testimony offered which suggests growing competition in specific markets; however, this evidence was largely anecdotal, and not comprehensive in nature. This proceeding has demonstrated that there is much information regarding the status of competition in our state to which we do not have access in part due to our inability to gather data regarding intermodal competitors because of jurisdictional issues. The possibility that full, robust and fair competition could exist in some geographical areas while not in others, or for some types of services while not for others, has been explored by other state commissions. This is an area we must explore in greater detail. Therefore, we will initiate a new proceeding to examine the level of telecommunications competition in all areas of Indiana and how to deal with that information in moving forward.

Among the conditions necessary to sustain a competitive market is the ready availability of information. The ability to compare product and service offerings by both ILECs and non-ILECs in specific geographic markets currently served by individual ILECs is an essential, fundamental underlying premise of a market economy. Access to such information, and more importantly, to competitive and comparative information, is essential and such information is not currently readily available. It is therefore likely that this new investigation will review the need for mechanisms to provide such information as can facilitate the making of intelligent choices by an informed public.

It is important to understand that competition exists only as it exists in the minds of customers. If customers do not believe that choices are available, they will not make the effort to seek out those choices. Incumbents, with a large market share, enjoy a significant communications advantage over competitors as it is easier for them to put products into the marketplace. Therefore, just because an incumbent acts as though competition exists, that does not translate into customer awareness of choices. It is therefore likely that in this new investigation the Commission will explore consumers' perceptions, knowledge of, and ability to benefit from competition as it evolves.

We have found that in order to sustain and enhance competition, it is appropriate to maintain such protections as are necessary to assure that the market continues its migration toward full, robust and fair facilities-based competition, and that emergent competitors are not impaired in their ability to compete.

Finally, there are additional areas of Commission oversight that are still essential to sustain an orderly transition for the emergent market. The Commission must continue its historic role of balancing the interests of a vibrant telecommunications industry with the continuing interests of the consumers it serves. This new investigation will review information including but not limited to the specific areas and market segments of the state where the competition exists, the classes of service to which competitors are offering service, the types of services offered by competitors, and the strategies appropriate to ensure consumer awareness of existing choices.

For the reasons stated herein and based upon our jurisdiction as found in Paragraph No. 1 herein, we hereby open a new investigation to be designated as Cause No. 42961.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION, that:

1. The findings contained herein are hereby approved.
2. A new investigation is hereby opened as Cause No. 42961, consistent with the Findings herein.
3. This Order shall be effective on and after the date of its approval.

HARDY, HADLEY, LANDIS, SERVER, AND ZIEGNER CONCUR:

APPROVED: DEC 09 2005

**I hereby certify that the above is a true and
correct copy of the Order as approved.**



Pamela K. White
Acting Secretary to the Commission