EXHIBIT C
THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
John Wine
Robert E. Krehbiel

In the Matter of a General Investigation into Winback/Retention Promotions and Practices
Docket No. 02-GIMT-678-GIT

ORDER 18: ESTABLISHING POLICY FOR WIN, WINBACK, AND RETENTION OFFERINGS BY INCUMBENT LOCAL EXCHANGE CARRIERS

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the files and being fully advised of all matters of record, the Commission summarizes the arguments of the parties and concludes as follows:

1. On March 5, 2002, the Staff of the State Corporation Commission of the State of Kansas (Staff) filed a motion to initiate a generic investigation of whether a local exchange carrier (LEC) should be allowed to offer winback or retention promotions and practices. The Commission issued its Order Initiating Investigation on May 17, 2002, to investigate customer winback and retention promotions and practices by local exchange carriers (LECs). In Order 11, issued on May 22, 2003, the Commission expanded the issues to include investigation of win offers by LECs. Order 11, ¶ 17.

2. An evidentiary hearing was conducted from November 3 to 5, 2003. Appearances of counsel at the hearing were as follows: Bret Lawson and Eva Powers on behalf of Staff and the public generally; Brent Getty and David Springe on behalf of the Citizens' Utility Ratepayer...
Board (CURB); Bruce A. Ney and W. Bradford Smith on behalf of Southwestern Bell Telephone Co. (SWBT); Robert A. Fox on behalf of WorldNet, LLC, Sage Telecom, and AT&T Communications of the Southwest, Inc. (AT&T); Rose Mulvany Henry on behalf of Birch Telecom of Kansas, Inc.; and Patricia Ana Escobedo and Luke Sobba on behalf of MCI Metro Transmission Access Services, Inc. On December 12, 2003, post-hearing briefs were filed by Staff, SWBT, MCI, and CURB, and by AT&T and WorldNet jointly. On January 9, 2004, reply briefs were filed by Staff, SWBT, and MCI, and by AT&T and WorldNet jointly.


FINDINGS AND CONCLUSIONS

4. This docket involves complex issues that will have a wide-ranging impact on the telecommunications industry in Kansas and the public it serves. In this Order, the Commission sets out its decisions regarding the ability of an incumbent local exchange carrier (ILEC) to make offerings to customers that are served by a competing local exchange service provider (CLEC). The Commission also will discuss its concerns about disparate offerings to retain similarly situated customers. In reaching its decision, the Commission is aware that technologies for communications will continue to develop, which will change how services are marketed. Also, the Commission recognizes that the market is not static and continues to evolve. The Commission is conscious of its duty to fulfill the public policy goals of the Kansas Telecommunications Act (the Act) set forth in K.S.A. 66-2001. The Commission anticipates that, as competition evolves in the marketplace and more services become price deregulated, the
need for regulatory review of the offerings considered in this docket will diminish and eventually disappear.

5. Before stating its findings and conclusions, the Commission notes that this is a generic docket to evaluate whether win, winback, and retention offerings should be permitted in Kansas and, if so, whether any restrictions should be applied to such offerings. In making its decision, the Commission is acting in a quasi-legislative role to establish policy, not in its quasi-judicial role of making findings and conclusions based upon the facts related to a specific offering. *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 491-96, 720 P.2d 1063 (1986); *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 378-79, 673 P.2d 1126 (1983). This decision is based on the Commission's collective understanding of its policy imperatives inherent in the legislative mandate.

6. By way of introduction to the issues at hand, the Commission notes that Staff defined a “winback offer” as a promotional offer or discount available to former LEC customers that had voluntarily terminated their service in favor of a competing CLEC. A “retention offer” was defined as a promotional offer or discount available to existing LEC customers who were considering service offers from CLECs. Order Initiating Investigation, issued May 17, 2002, ¶ 1. In Order 11, the Commission granted a motion to expand this docket to include issues involving “win” solicitations, which were described as offers or promotions by SWBT to current customers of competitive LECs that have never used SWBT services. Order 11, issued May 22, 2003, ¶ 6, 17. In Order 13, the Commission declined SWBT’s request to add an issue in this docket covering the transfer of customers from CLECs to SWBT and from one CLEC to another CLEC. Order 13, issued June 24, 2002, ¶ 13. The Commission concluded that the investigation of such issues should occur in a different docket. Order 13, ¶ 14. In Order 15, the Commission stated,
At issue in this proceeding are the SWBT win, winback and retention promotions and practices.” Order 15, ¶ 14.1

7. The first issue this Commission must decide is whether win, winback, or retention offers as proposed by SWBT violate Kansas law because these offerings are not available to all customers within a class of customers as traditionally defined. If the Commission concludes such offerings are lawful, the Commission must make a public policy decision about the propriety of allowing such offerings in the present competitive environment in Kansas and decide whether criteria and guidelines should be established for such offerings. Finally, the Commission must examine SWBT’s access to information about customers of the CLECs and the processes SWBT uses in marketing its offerings to determine whether SWBT enjoys an unfair advantage over its competitors. This order will examine each issue separately.

I. Do win, winback, or retention offers violate Kansas law?

A. Statutory Provisions

8. The Commission must begin by determining whether the statutory language indicates the Legislature intended to allow win, winback or retention offerings by incumbent local exchange carriers. The Legislature stated one of the public policy objectives of this state is to ensure that consumers realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates. K.S.A. 66-2001(b).

The Federal Telecommunications Act of 1996 also sought to create competitive markets. The

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1The Commission notes that although this generic proceeding was served on all certificated local exchange carriers, Order Initiating Investigation, ¶ (B); Order 5, ¶ (E), the only incumbent local exchange carrier to actively participate in this docket was SWBT. The United Telephone Companies of Kansas d/b/a Sprint entered an appearance in the docket on May 30, 2002, but filed a motion to withdraw from active participation in the docket on March 7, 2003. None of the 38 independent rural telephone companies operating in Kansas entered an appearance in this docket. On August 2, 2002, attorneys with James M. Caplinger, Jr., Chartered, filed an entry of appearance on behalf of the State Independent Alliance, which is composed of several rural independent telephone companies. At the prehearing conference conducted on October 30, 2003, the presiding officer noted that she had been contacted by
state and federal acts combine to require this Commission to put in place a regulatory framework that permits customers to reap the benefits of competition. This Commission has taken several steps under the Kansas Act to create such a competitive telecommunications market. For example, SWBT and the four United local service companies, commonly known as Sprint, operate under price-cap regulation, rather than traditional rate-of-return regulation. Docket No. 98-SWBT-380-MIS (SWBT); Docket No. 98-UTDT-401-MIS (United/Sprint). Price deregulation of services has been granted when the Commission concluded customers had alternative services available. Docket No. 01-SWBT-444-TAR (Plexar® Family of Service, Auto Redial and Speed Calling); Docket No. 01-SWBT 932-MIS (Directory and Operator Assistance services). Subsidies that were once implicit in companies’ rates have been reduced and replaced with explicit subsidies. Docket No. 94-GIMT-478-GIT. In this docket, the Commission will address whether the public interest requires constraints on incumbent local exchange carriers’ ability to compete with CLECs in both the short and long term by allowing promotions or long term discounts to win, win back, or retain customers. The Commission must decide if such offerings will foster a competitive environment and further the goals of the state and federal acts.

1. Offerings by telecommunications public utilities, K.S.A. 66-1,189 and K.S.A. 66-1,191

9. The Legislature has provided that “[e]very telecommunications public utility . . . shall be required . . . to establish just and reasonable rates, joint rates, tolls, charges and exactions and to make just and reasonable rules, classifications and regulations.” K.S.A. 66-1,189. Rates, tolls, charges, exactions, or classifications of telecommunications public utilities are “prohibited,

James Caplinger, Jr., and was advised that the firm would be monitoring the case on behalf of the State Independent Alliance but would not be actively participating.
unlawful and void" if they are found to be "unjust or unreasonably discriminatory or unduly preferential." K.S.A. 66-1,189. Also, the Commission has authority to investigate on its own initiative and to fix rates, tolls, charges or exactions, classifications or schedules of telecommunications public utilities that are found to be "unjust, unreasonable, unjustly discriminatory or unduly preferential." K.S.A. 66-1,191.²

10. The Kansas Act defined local exchange carriers to be telecommunications public utilities that provided switched telecommunications service within any local exchange service area on or before the Kansas Act became effective on January 1, 1996. K.S.A. 66-1,187(h). Local exchange carriers in Kansas include SWBT, Sprint/United and 38 rural local exchange carriers. These local exchange carriers are often referred to as incumbent local exchange carriers or ILECs. The Commission notes that the investigation in this docket has focused on offerings of SWBT, which is the ILEC that has actively requested Commission approval of win, winback, or retention offerings.

11. The Commission concludes that the language in K.S.A. 66-1,189 does not expressly forbid ILECs from making win, winback, or retention offerings as long as their rates, tolls, charges, exactions, or classifications are just and reasonable. However, this does not resolve the issue. ILECs are required to file any win, winback, or retention offerings with the Commission pursuant to K.S.A. 66-1,190. Then the Commission must review these filings to determine if their provisions are unjust or unreasonably discriminatory or unduly preferential. K.S.A. 66-1,189. Furthermore, the Commission can investigate whether the win, winback, or retention offerings are unjust, unreasonable, unjustly discriminatory or unduly preferential.

² Although CLECs are considered telecommunications public utilities, the Commission concluded in Order 13 that an investigation of win, winback and retention offerings by CLECs, and the methods used by CLECs to transfer customers between CLECs or to SWBT and other LECs should occur in a different docket. Order 13, ¶ 14.
K.S.A. 66-1,191. Also, the Commission must determine whether such offerings are in the interest of the public. These issues will be discussed later in this Order.


12. As enacted by the Legislature, K.S.A. 66-2006(l) states, “A local exchange carrier may offer promotions within an exchange or group of exchanges. All promotions shall be approved by the commission and shall apply to all customers in a nondiscriminatory manner within the exchange or group of exchanges.” K.S.A. 66-2005(l). This statute specifically provides that promotions shall be nondiscriminatory within an exchange or group of exchanges. Although the Legislature did not define “nondiscriminatory,” the parties do not argue about its meaning. The Commission concludes that this term requires all customers within an exchange or group of exchanges to be treated in the same manner and thus to be equally eligible for the promotional offering. By using the phrase “nondiscriminatory,” the Commission finds the Legislature made clear its intent that a stricter standard of nondiscrimination be applied to promotions, rather than reviewing such offerings to determine whether they were unjust, unreasonably discriminatory, or unduly preferential.

13. The Legislature does not define “promotions.” The legislative history of the Kansas Act does not indicate the source of the word. The Federal Act contains a lengthy definitional section, 47 U.S.C. § 153, but “promotions” is not defined. The Federal Act required the Federal Communications Commission (FCC) to implement regulations within six months of its passage to establish interconnection among the facilities and equipment of telecommunications carriers. 47 U.S.C. § 251(d)(1). To fulfill this obligation, the FCC enacted rules that implement sections 251 and 252 of the Federal Act. 47 C.F.R. § 51.1, et seq. The term “promotions” appears in provisions relating to the terms and conditions under which ILECs must
offer telecommunications services to requesting CLECs for resale. 47 C.F.R. § 51.601. These rules provide for restrictions on resale relating to short term promotions. If an ILEC promotional offering involves rates that will be in effect for no more than 90 days, the ILEC may continue to apply the wholesale discount to the ordinary rate for a retail service, rather than using the special promotional rate. 47 C.F.R. § 51.613(a)(2)(i). On the other hand, if an ILEC promotion involves rates that will be in effect for longer than 90 days, then the ILEC must apply the wholesale discount to the rate contained in the promotion.

14. In this docket, Staff pointed out that if SWBT offers a promotion of greater than 90 days, a competitive LEC is allowed to receive the wholesale discount on the promotional rate. Direct Testimony of Janet Buchanan (Staff), filed September 19, 2003, (Buchanan Dir.) 19. This discount is provided for in SWBT's generic interconnection agreement, referred to as the K2A, which was approved by the Commission in Docket No. 97-SWBT-411-GIT, Order issued October 4, 2000. This pricing provision appears in § 4.2 of the K2A as follows:

Resale services offered by SWBT through promotions will be available to CLEC on terms and conditions no less favorable than those SWBT makes available to its customers, provided that for promotions of 90 days or less, SWBT will offer the services to CLEC for resale at the promotional rate without a wholesale discount. For promotions of more than 90 days, SWBT will make the services available at the avoided cost discount from the promotional rate.

15. In Docket No. 02-SWBT-677-MIS, SWBT sought approval of a promotion for a winback offer. In that docket, Staff observed that generally SWBT's promotions are offered for 90-day periods. Staff noted that if a promotion lasts longer than 90 days, it may be appropriate to modify the tariff rate rather than allow the offering using a promotion. Staff cautioned against allowing companies to file promotions to avoid filing changes to tariffs and noted that repeated promotions may circumvent the Commission's decision to deny price deregulation for certain
services. Docket No. 02-SWBT-677-MIS, Order Addressing Staff’s Report and Recommendation, filed July 18, 2002 (02-677 Order), ¶ 6. The Commission denied the promotional offering in that docket because it did not apply in a nondiscriminatory manner. However, the Commission noted that the issues in 02-677 should be reevaluated based upon information provided in this generic docket. 02-677 Order, ¶¶ 14-15.

16. In this proceeding, AT&T explained why it is less costly for ILECs, as opposed to CLECs, to engage in limited price competition through short term promotions aimed exclusively at CLEC customers. By limiting the eligibility of a promotion to CLEC customers or customers considering a CLEC’s service, the ILEC can maintain high rates, or even increase rates, for the vast majority of its customers while offering limited price reductions only to those customers that have sought a competitive choice during the initial stages of competition. Meanwhile, CLECs have to reduce rates for all customers to compete with the ILEC because the CLEC customer becomes immediately eligible for the ILEC’s promotional rates. Direct Testimony of John F. Finnegan (AT&T), filed October 10, 2003, (Finnegan Dir.) 20. The Commission agrees with AT&T that the ability to offer short term promotions without being required to offer CLECs discounted wholesale rates is a distinct advantage for ILECs.

17. Although the Legislature did not define “promotions” when enacting K.S.A. 66-2005(l), the Commission concludes the Legislature intended this term to refer to offerings of short duration and intended for the Commission’s treatment of such short term offerings to be distinguishable from its review of offerings of longer duration that are available in tariffs or contained in contractual agreements. The Commission finds it reasonable to interpret the provisions in K.S.A. 66-2005(l) to allow any LECs to offer promotions as long as the promotions are offered in a nondiscriminatory manner to all customers within the exchange or group of
exchanges as required by K.S.A. 66-2005(l). If promotions offer benefits such as reduced rates for 90 days or less, CLECs are not entitled to receive a wholesale discount of the promotional rate; if promotions offer benefits such as reduced rates for more than 90 days in length, CLECs will be eligible to receive the resale discount on these rates.

18. The Commission notes that K.S.A. 66-2005(l) requires ILECs to "offer" promotions to all customers within an exchange. In interpreting another provision of this statute, K.S.A. 66-2005(q), this Commission has held that the Legislature intended the verbs "offer" and "provide" to have different meanings. The first two meanings of the word "offer" are listed in Webster's Dictionary as "[t]o present for acceptance or rejection" and "[t]o put forward or submit for consideration." The Commission concludes that by using the term "offer" in K.S.A. 66-2005(l), the Legislature did not intend to require that the ILEC provide the promotion to all customers in the exchange but instead intended that the ILEC make the particular promotion available for acceptance or rejection by all customers in the exchange.

19. Furthermore, because the language of K.S.A. 66-2005(l) clearly states that promotions shall be approved if they "apply to all customers in a nondiscriminatory manner within the exchange or group of exchanges," the Legislature apparently intended that if the contrary is present, i.e. if a promotion discriminates among customers within an exchange or group of exchanges, the promotion should not be approved under K.S.A. 66-2005(l). The Commission concludes that in enacting K.S.A. 66-2005(l) the Legislature intended to allow LECs to offer customers the benefits of short term promotions as long as these benefits comply

3 In Docket No. 02-SWBT-245-MIS, Order issued November 19, 2001, ¶ 16, the Commission held that by using the term "providing" in K.S.A. 66-2005(q) the Legislature intended something other than offering. See Docket No. 02-GIMT-555-GIT, Order 13, issued Sept. 30, 2003, ¶ 9.
with the requirement that offerings be made available in a nondiscriminatory manner to all customers throughout an exchange or group of exchanges.

20. In another issue regarding promotions, Staff has asked the Commission to prohibit ILECs from making “pancake promotional offerings of less than 90 days.” Buchanan Dir. 19. Staff explained that “pancake” refers to the practice of offering the same promotion immediately after the initial promotion has expired. Buchanan Dir. 19, n. 21. The Commission notes that the FCC’s rule restricting resale of short term promotions does not allow this practice. The FCC rule allows an ILEC to apply the wholesale discount to the ordinary rate for a retail service, rather than the special promotions rate, only if the ILEC “does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.” 47 C.F.R. § 51.613(a)(2)(ii). If such a practice is not prohibited, a CLEC reseller will be precluded from making the same service offering to customers.

21. The Commission agrees with Staff’s recommendation not to allow ILECs to pancake promotional offerings. An ILEC will not be permitted to file successive promotions in a manner that does not allow CLECs to receive the wholesale discount that applies to promotional rates of greater than 90 days.

B. Public Interest

22. Although the Commission concludes Kansas statutes do not expressly prohibit win, winback and retention offerings, this does not resolve the question of whether such offerings are to be permitted in Kansas. The Commission must determine whether such offerings are in the public interest. The Commission has concluded that the Legislature intended to allow short term promotions if the offerings comply with K.S.A. 66-2005(l), as discussed above. The issue remains whether ILECs can make win, winback, and retention offerings that
are not promotions under K.S.A. 66-2005(1). The Commission now turns its attention to whether win, winback, and retention offerings meet the requirements of K.S.A. 66-1,189 and K.S.A. 66-1,191 and are in the public interest.

23. The Legislature has not defined what it means by terms in these statutes such as “unjust or unreasonably discriminatory or unduly preferential” in K.S.A. 66-1,189 and “unjust, unreasonable, unjustly discriminatory or unduly preferential” in K.S.A. 66-1,191. When evaluating long term win, winback and retention offerings and the meaning of terms such as unreasonably discriminatory, the Commission must keep in mind the Legislative goals enunciated in K.S.A. 66-2001. Furthermore, when regulating public utilities, the Commission has consistently considered the appropriate determination of the public interest in each discrete fact pattern. In light of the goal of both the Kansas and Federal Acts to promote competition in the telecommunications industry, the Commission must decide whether it is in the public interest to allow ILECs, and SWBT in particular, to make long term win, winback, or retention offerings in Kansas.

24. SWBT recognized that the Commission’s evaluation of win, winback, or retention offerings has a public interest component. Transcript of Proceedings, November 3 to 5, 2003, (Tr.) 65 (Rodriguez). SWBT argued that winback and retention offerings are in the public interest because they provide definite benefits to consumers by lowering prices. Direct Testimony of Eduardo Rodriguez (SWBT), filed August 15, 2003, (Rodriguez Dir.) 5-6; Tr. 66 (Rodriguez). The fact that a company needs to engage in winback and retention activities is, in SWBT’s view, a sign that competition exists and is forcing a company to make a competitive response in the market. Rodriguez Dir. 6. In a free competitive market, customers should be entrusted to choose the right benefit for them and should control the market by voting with
dollars. Rodriguez Dir. 7; Tr. 67-68 (Rodriguez). SWBT noted that during the time it was allowed to make winback offerings, the number of CLEC access lines increased and it lost customers to CLECs. Rodriguez Dir. 2-3, 6. SWBT cautioned against the Commission invoking artificial assistance or barriers that will support inefficient competitors and hurt the overall health of the market. Rodriguez Dir. 7.

25. SWBT presented testimony discussing several economic theories that support its argument that the Commission should be careful not to take any action that would harm or impair competition. For example, the Commission should promote offerings that benefit consumers and not be concerned about whether it harms competitors. Direct Testimony of Debra J. Aron (SWBT), filed August 15, 2003, (Aron Dir.) 13-14. As long as win, winback, or retention offerings do not cut prices to a degree that efficient competitors are excluded, SWBT argued the Commission should allow such offerings. According to SWBT, predatory pricing does not occur unless two components are present: (1) a firm sets the price below some measure of its incremental cost, and (2) a reasonable likelihood exists that the firm can use the predatory pricing to exclude its competitors and then raise its price to recoup the losses. Aron Dir. 17. Because predatory pricing is not present unless a company has the ability to recoup its losses by offering services below incremental costs, SWBT argued that this is not likely in local telecommunications markets in Kansas as long as the ILEC's retail service price is at or above the equivalent, cost-based UNE price. Aron Dir. 18-26.

26. In addition, SWBT cautioned the Commission against engaging in protectionist regulation by limiting price competition to protect nascent competitors. SWBT argued that such "infant industry" regulation handicaps incumbents and offers preferences to less-experienced rivals. In addition, SWBT pointed out CLECs competing in Kansas are not necessarily "infants"
and do not need shielding from price competition to facilitate development of local exchange competition. Aron Dir., 27-31.

27. On the other hand, Staff urged the Commission to find that win, winback and retention offerings are unlawful in Kansas because they would be available to a limited number of customers that are a subset of existing customer classes recognized by the Commission. In Staff's view, such limited offerings may violate K.S.A. 66-1,189, K.S.A. 66-1,191, and K.S.A. 2005(l). Buchanan Dir. 3. Staff argued that defining a new customer class within existing customer classes, which is based upon customers who take advantage of competition, would be contrary to the way the Commission has traditionally defined customer classes. Buchanan Dir. 5. Staff found that the cost to provide a winback or retention service is no less than the cost to provide the same service generally; instead, the distinction in pricing for winback or retention classes is based on the value of service or elasticity of demand considerations. Buchanan Dir. 6.

28. Staff recognized that the Commission has the authority to establish special rates under K.S.A. 66-1,191, but Staff argued this statue requires these special rates to be available to any customer with similar circumstances. Buchanan Dir. 6-7. Staff stressed that the Kansas Act and the Federal Act require that all customers have service options available to them; therefore, Staff argued that any discount approved by the Commission must be available to all customers. Buchanan Dir. 7-8.

29. Also, in addition to the nondiscrimination requirement in K.S.A. 66-2005(l) for promotions, Staff pointed to the provisions of K.S.A. 66-2005(o), which allows ILECs to request rate range pricing that must apply to all customers "in a nondiscriminatory manner in an exchange or group of exchanges." Buchanan Dir. 9 quoting K.S.A. 66-2005(o). K.S.A. 66-2005(l) and (o) give the ILECs pricing flexibility as long as these benefits are made available to
all consumers in an existing class. Buchanan Dir. 9. Both statutes were enacted in the Kansas Act and arguably reflect the Legislature’s intent not to allow discrimination within an exchange or group of exchanges. Because of the limited availability of competitive choices at this time in Kansas, the winback and retention classifications proposed by SWBT would not make these offerings available to customers in all of SWBT’s Kansas markets. Buchanan Dir. 9-10. Staff recommended that the Commission require that any winback offering be available to all customers in a customer class as traditionally defined by the Commission. Buchanan Dir. 13-14.

30. AT&T urged the Commission to reject SWBT’s arguments based on antitrust analysis because the Kansas market looks more like a monopoly market structure than a competitive market structure. AT&T questioned the competitive nature of the market in Kansas in light of the high market share of SWBT and the extent to which CLEC customers are served relying on SWBT’s facilities. Instead, AT&T characterized the Kansas market as one in the early stages of moving away from a monopoly environment. Finnegan Dir. 5-6. AT&T noted that Kansas law, K.S.A. 66-2005(w), generally does not permit regulation of prices CLECs charge their customers, which is justified in light of the limited inroads CLECs have made in Kansas. Finnegan Dir. 8-9. AT&T argued that no legitimate reason exists for an ILEC to categorize potential customers who are considering signing up for the ILEC’s service as a different class of customers based upon whether that customer is a former ILEC customer or a current ILEC customer. Finnegan Dir. 9.

31. MCI noted that although steps have been taken to open the local Kansas telecommunications market to competition, SWBT and other ILECs still have vertical integration of their services, which gives them the incentive and means to discriminate against competitors. Direct Testimony of Don Price (MCI), filed September 19, 2003, (Price Dir.) 5. Although some
competitors are present in the market, MCI argued that significant economic and operational entry barriers remain in Kansas, particularly for service to residential and small business customers. Price Dir. 6-8. MCI pointed out that SWBT is "well aware of the value of the market intelligence it possesses" and has implemented comprehensive processes and systems to take advantage of this information in the marketplace. Price Dir. 10-11. MCI asserted that SWBT has the ability now to lower its rates to all its customers, but instead seeks to make lower rates available in limited win, winback, and retention offerings to enable it to preserve its overwhelming market share in Kansas’ telecommunications markets. Price Dir. 12-16. MCI agreed with Staff that public policy reasons, including social welfare objectives and a “value of service” basis for price discrimination, supported the historic creation of customer classes, but MCI argued these reasons do not explain the classes proposed by SWBT. Rebuttal Testimony of Don Price (MCI), filed October 10, 2003, (Price Reb.) 3. Instead, the only rationale for allowing the three proposed classes is to allow SWBT to maximize its profits instead of requiring it to make offerings available to all its customers. Price Reb. 4.

32. WorldNet expressed its concern that winback offers and promotions stifle competition from facilities-based service providers because of the large investment needed in switching and network facilities to provide consumers a competitive choice. WorldNet noted its business plans were developed assuming the regulatory environment would foster competition. In particular, WorldNet emphasized its concern that winback campaigns can attract a customer back before the competitor has any chance to recoup its initial costs for the customer or to establish any relationship with the customer. Direct Testimony of Debra Schmidt (WorldNet), filed September 19, 2003, (Schmidt Dir.) 3-4. Also, WorldNet stated its concern that these offerings promote discrimination among similarly situated customers. Schmidt Dir. 5.
33. CURB noted that competition is in its infancy in Kansas. While CURB recognized that win, winback, and retention offerings would benefit some consumers, it noted that overly aggressive win, winback or retention filings could be counterproductive and very detrimental to the growth of competition. CURB expressed its hope that adequate guidelines could be developed to allow for some selected win, winback or retention filings to be approved. Direct Testimony of Michael D. Lura (CURB), filed September 19, 2003, (Lura Dir.)

2. CURB pointed out that in deciding whether to approve an offering, the Commission would need to balance the competing interests of short run benefits for selected consumers with a possible long term decline in the competitive market. Lura Dir. 3.

34. In stating the public policy of the state with regard to telecommunications, the Legislature made clear in the Kansas Act that it intended to move toward a competitive telecommunications market. Consumers throughout the state are to “realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates.” K.S.A. 66-2001(b). The Commission concludes that win, winback, and retention offerings by ILECs will provide benefits to consumers and, therefore, are in the interest of the public. Yet the Legislature has not given ILECs carte blanche approval to make these offerings. Instead, win, winback, and retention offerings must be filed with the Commission pursuant to K.S.A. 66-1,190 and reviewed by the Commission to assure that they comply with the appropriate statutory limitations.

35. All win, winback, and retention offerings must be reviewed individually. As noted above, ILEC promotions must comply with K.S.A. 66-2005(l) and will be approved if available in a nondiscriminatory manner to all customers within an exchange or group of exchanges. If the benefit offered in the promotion lasts for 90 days or less, the ILEC is not
required to give CLECs the wholesale discount on the promotional rate; if the benefit offered is for more than 90 days, the ILEC must make the services available to the CLECs at the resale discount.

36. Meanwhile, long term win, winback, and retention offerings that are made by ILECs through tariffs or contracts must comply with K.S.A. 1,189 and K.S.A. 1,191. This means the offerings must be just and reasonable and must not be unjust, unreasonable, unreasonably discriminatory, or unduly preferential. None of these terms were defined by the Legislature. In applying these terms when considering proposed offerings, the Commission will be required to use its judgment in evaluating win, winback, and retention offerings and to use its discretion in balancing competing interests in determining whether the benefits provided to certain customers outweigh the possible harm in the long run to the competitive market. This Order discusses those considerations the Commission must take into account when evaluating these offerings.

37. In conducting an evaluation, the Commission agrees with SWBT that it should not focus its concerns on protecting competitors. Instead, the Commission should seek to assure customers the continuing availability of competitive choices. The Commission anticipates that, at some time in the future, a strong competitive telecommunications market will exist in Kansas and restrictions will no longer be necessary. Also, as price deregulation of services occurs, the need for restrictions decreases. At this time, however, the market is nascent and still developing. Therefore, the Commission finds that imposing restrictions and conditions on win, winback, and retention offerings at this stage will assure customers that choices will continue to be available in the Kansas market. This finding is entirely consistent with the legislative mandate.
38. Yet merely including restrictions and conditions set forth by the Commission will not guarantee Commission approval of an ILEC's win, winback, or retention offerings. The Commission notes that K.S.A. 66-1,189 and 66-1,191 do not prohibit all offerings that discriminate or include a preference but prohibit rates, tolls, charges and exactions that are unreasonably discriminatory or unduly preferential. In this Order, the Commission will evaluate the three classifications proposed by SWBT to determine whether these categories, while perhaps discriminatory or preferential, are unreasonably discriminatory or unduly preferential. The Commission will also evaluate SWBT's proposed offerings to determine whether such an offering is unjust or unreasonable. The Commission’s evaluation will be conducted in light of the emerging competition in the telecommunications market in Kansas and will balance the competing interests to determine whether benefits to certain customers outweigh possible harm to the competitive market.

II. What offerings will be permitted in Kansas?

39. In evaluating K.S.A. 66-2005(l) above, the Commission held that the statute required promotions to be offered in a nondiscriminatory manner to all customers within the exchange or group of exchanges. The Commission concludes the statute is clear on this point and does not need further interpretation. Thus, the language of this statute does not allow the Commission to further classify customers for promotions offered under K.S.A. 66-2005(l). However, the language of K.S.A. 66-1,189 and 66-1,191 does not resolve this issue for these statutes. The Commission still must address whether to recognize classifications of customers different than those traditionally recognized in the regulation of utilities, such as business and residential customers as well as rural and urban classifications. As the Kansas Supreme Court noted, "The touchstone of public utility law is the rule that one class of consumers shall not be

40. SWBT has urged the Commission to recognize three distinct classes of customers based upon whether those customers are eligible for win, winback, or retention offerings. To support its position that these three classifications should be recognized, SWBT argued no barrier exists to a current customer becoming eligible for one of these classifications. For example, a current customer can become a former customer in the winback class by switching from SWBT to CLEC service or become a current customer in the retention class by considering leaving SWBT for a CLEC offer. Rodriguez Dir. 9; Tr. 70 (Rodriguez).

41. Furthermore, SWBT urged “selective marketing” as a valid response to competition and asserted the Commission should not prevent customers from qualifying for a classification that will allow them to benefit from competitive offers. Rodriguez Dir. 10. According to SWBT, it should be allowed to focus its marketing on a group that is readily identifiable and easily distinguishable from other SWBT customers. SWBT disputed that this is discriminatory or preferential. Even if it is, SWBT argued it is not unreasonably discriminatory or unduly preferential, and, therefore, is not prohibited by K.S.A. 66-1,189 or K.S.A. 66-1,191. Rodriguez Dir. 10-11.

42. Staff argued the Commission should continue to use traditional classifications for customers of utilities. Staff noted, “A provider has been allowed to charge customers differently based on cost differences and social welfare goals that arise from providing service to either residential or business customers, volume or longer terms of service, rural or urban provisioning of service, etc.” Buchanan Dir. 5. Because the cost to provide a winback or retention service is no less than the cost to provide the same service generally, Staff argued the distinction in pricing
for winback or retention classes is based on the value of service or elasticity of demand considerations. Staff noted that as competition continues to develop and consumers are educated concerning choices, price elasticity of demand may become more elastic for all customers of local telecommunications services. However, at this time the nascent competitive reality and a cost based rationale do not justify the rate differential contained within a win, winback or retention offer. Buchanan Dir. 6.

43. MCI argued the only reason for SWBT to create separate classes of customers is to discriminate by making special offers to end users of local telephone service. Price Dir. 13. MCI asserted that, in adopting SWBT’s proposed classes, regulators are not evaluating the expense required for SWBT to run its operations and the capital needed to make investments in equipment. Therefore, the Commission is not determining rates needed to provide SWBT with the opportunity to generate revenues sufficient to pay reasonable expenses and to earn a reasonable rate of return on invested capital. While a useful public policy objective was served by creating separate classes for residential versus business customers, MCI argued no such useful or appropriate public policy object is demonstrated here. Price Dir. 14.

44. The Commission agrees with assertions by Staff and CLECs that the classifications proposed by SWBT are not based upon traditional considerations used to establish classes of customers for setting utility rates. Instead, the proposed classifications are a response to initial competition in the telecommunications market. These classifications are not based upon the cost of providing service or upon social welfare goals traditionally used in establishing classifications of customers for utility rates. In light of the public policy goal of the state to create competitive telecommunications markets, the Commission concludes it is appropriate to consider whether new classifications proposed by SWBT should be recognized that would exist
solely for the purpose of allowing SWBT to respond quickly to the nascent competition present in the market. To this end, the Commission will evaluate each of SWBT’s three proposed classifications separately to determine whether a new classification of customers should be recognized.

A. Winback classification

45. In opening this docket, the Commission defined “winback offer” to be a promotional offer or discount available to former ILEC customers that have voluntarily terminated their service in favor of a CLEC. Order Initiating Investigation, ¶ 1. SWBT stated that it “would like to make special offers to end users of local telephone service that formerly used SWBT’s local service but are not end users of telecommunications carriers or alternative service providers in an effort to encourage those end users to once again select SWBT as their provider of local service.” Rodriguez Dir. 1-2.

46. SWBT has asked the Commission to recognize this class of winback customers to allow it to respond to offers of its competitors that have been successful in convincing its customers to change service to a competing provider. SWBT argued that a classification of winback customers is appropriate because these customers can be readily identified and easily distinguished without burdening other classes. Rodriguez Dir. 11. In support of its argument, SWBT asserted that the FCC has approved use of winback offerings, although it admitted that the FCC left the decision of whether to approve such offerings up to state commissions. Rodriguez Dir. 12; Tr. 62 (Rodriguez). According to SWBT, this classification is available to any of its customers because all a customer has to do is leave SWBT’s network and immediately that customer becomes a former SWBT customer and, thus, a member of the class eligible to receive winback offers. Tr. 81-82, 88 (Rodriguez).
47. WorldNet argued winback campaigns create obstacles for competitors who do not have a chance to serve customers for any length of time to recover network investment or the cost of obtaining the customers. Also, winback campaigns prevent the competitor from establishing a relationship with the customer or addressing any problems that occurred for the customer during the switch to a new service provider. Schmidt Dir. 4-5. Citing long distance business as an example, WorldNet cautioned that marketing techniques can develop using winback campaigns that make it difficult for customers to obtain only the service needed or to understand numerous termination requirements or monthly fees. Schmidt Dir. 6. WorldNet warned that ILECs can sustain revenue losses and average lower revenues over a large customer base for a long period of time, while new facilities-based competitors will be forced out of business if a decrease in revenue is sustained. Schmidt Dir. 7. WorldNet urged the Commission not to allow winback offerings by SWBT as long as SWBT has more than 50% of the market share against all other competitors in the market combined. Schmidt Dir. 9.

48. AT&T urged the Commission to reject SWBT's request to recognize a winback classification of customers. AT&T argued that being able to readily identify or easily distinguish a group of customers is not sufficient reason to create a new class of customers; for example, AT&T pointed out customers with last names starting with the letter “F” are readily identified and easily distinguished from other customers, but no reason exists for giving them more preferable offerings than other customers. Finnegan Dir. 13-14. In response to an argument by SWBT regarding an AT&T tariff, AT&T noted that its tariff waives installation charges for all AT&T customers obtaining the identified services and does not discriminate between new and existing customers. Finnegan Dir. 15. AT&T cautioned that a CLEC spends considerable costs to obtain a customer and expects to recover those costs over time, but now more than half of new
CLEC customers are lost in a very short period. Finnegan Dir. 16. According to AT&T, SWBT should make broad campaigns to all its customers and not target the campaigns to those customers that have left SWBT and are obtaining service from a CLEC. Finnegan Dir. 18.

49. The Commission's main concern in this docket is to ensure a climate for competition in the telecommunications market in Kansas. Since the Kansas Act was passed, the Commission has sought to create a competitive environment in the telecommunications market as mandated by state and federal public policy. At this time, the Commission concludes a transitional process is needed to encourage further development of the nascent competition existing in Kansas. The Commission finds that SWBT's proposed winback classification can be easily identified and readily defined as former SWBT customers in Kansas that currently receive telecommunications service from a competitor. Although the classification discriminates against customers that have never left SWBT, it is addressed to customers that have left SWBT due to competition in the marketplace and is not unreasonably discriminatory or unduly preferential. Furthermore, the definition of the winback classification is based upon objective criteria and is not left to the discretion of SWBT's employees. Therefore, the classification is not unjust or unreasonable. The Commission concludes that SWBT should be allowed to market long term offerings to such a winback class in response to offerings of competitors. Due to the significant presence SWBT currently maintains in the Kansas telecommunications market, however, the Commission will consider in a subsequent section of this Order whether restrictions or conditions should be imposed on SWBT's winback offerings at this time.

B. Retention Classification

50. The Commission defined a “retention offer” to be a promotional offer or discount available to existing ILEC customers who are considering service offers from CLECs. Order
Initiating Investigation, ¶ 1. A classification subject to retention offers would consist of customers that the ILEC wants to retain or keep from leaving. SWBT stated it "would also like to make special offers to its current customers who are considering leaving SWBT for another telecommunications carrier or alternative service provider in an effort to retain these customers." Rodriguez Dir. 2.

51. SWBT has asked the Commission to approve a classification of customers for retention offerings to allow it to respond to competitive offerings by CLECs that have resulted in desired SWBT customers considering an offer from a competitor. SWBT explained two tracks exist for retention customers: (1) current customers that need to feel appreciated, and (2) current customers who call SWBT and self-identify that they are considering a competitor's offer. Tr. 71-73, 88 (Rodriguez). SWBT admitted that some customers are more valued than others and that no criteria have been developed by SWBT to identify those customers qualifying for the retention class aside from self-identification. Tr. 56-57, 59-61 (Rodriguez). Thus, to obtain the benefits of a retention offering, a customer must call SWBT. On the other hand, if a SWBT customer claims to be considering an offer from a competitor, SWBT will assume the statement to be true and not question the customer further about details of the competing offer. Tr. 80-81 (Rodriguez).

52. CLECs argued that rather than allowing a select offering to those customers that call and threaten to leave SWBT for a competing offer, SWBT should lower its cost of service to all its customers so that current SWBT customers will not have an incentive to leave and, as a result, will not need to receive a winback offering. Tr. 83 (AT&T). In response, SWBT argued it should not be required to lower its costs for all customers to make a retention offer to those customers that identify they are considering leaving. Tr. 84-86 (Rodriguez). In addition, AT&T
noted that, as a price cap regulation company, SWBT has the ability to reduce rates at any time to meet competition as long as it does not price the service below long-run incremental costs. Finnegan Dir. 23. Therefore, according to AT&T, no reason exists to justify a classification of retention customers.

53. Staff argued any customer meeting the ILEC’s criteria for a service discount offering should be able to take advantage of it without calling SWBT and threatening to change providers. According to Staff, the retention class proposed by SWBT is difficult to justify. All a current customer must do to become eligible for the offering is to place a call to SWBT and ask for the retention offerings. No other criteria are apparent. Post-hearing Brief of the Commission Staff (Staff Br.) 8-9.

54. WorldNet argued the Commission should not allow SWBT to conduct retention promotions or offerings as long as SWBT has more than 50% of the market share. WorldNet pointed out that SWBT enjoys inherent competitive advantages, such as name recognition and customer loyalty, due to its long monopoly presence. For this reason, WorldNet argued SWBT should not be allowed to make retention offerings in a market until parity exists among competitors and SWBT. Schmidt Dir. 9.

55. The Commission finds SWBT’s proposed retention classification of customers is much less clearly defined and identified than its winback classification. SWBT has failed to give an objective reason for establishing a retention class among SWBT’s current customers. Two neighbors receiving the same service from SWBT will have different rates merely because one neighbor knew to call SWBT and claim to be considering a CLEC offering. Due to SWBT’s legacy as a monopoly provider, the Commission is concerned that not all consumers are informed about alternative choices in the emerging competitive market. An uninformed
customer will not know how to benefit from SWBT's retention offerings. In this way, a loyal SWBT customer will be penalized for not understanding the transition of the telecommunications industry from a monopoly environment to a competitive market. SWBT makes no proposal to educate its customers about choices in the emerging competitive market.

56. The Commission must balance the need for consumers to become educated and learn about competitive choices available in the telecommunications market with the obligation of an ILEC, which established a legacy network as a monopoly provider, to inform its loyal customers about options available in the market. Because of the arbitrary nature of SWBT's definition and identification of customers, the retention classification is unduly discriminatory. This might not be the case if all SWBT customers were fully informed of the potential retention offer, but SWBT does not propose to do this. The Commission recognizes that if the Legislature's goal of competition is realized, eventually the local telecommunications market will be fully competitive. At that time, consumers will need to be more fully aware that choices are available and that it may be desirable to compare prices and services offered by competing providers.

57. Regarding the retention classification proposed by SWBT, the Commission finds it highly likely similarly situated customers will be treated differently if SWBT is allowed to focus retention offerings on a classification that is smaller than all residential customers in an exchange. The Commission is concerned about SWBT's inability to state objective criteria to define who would be eligible for such retention offerings and, perhaps just as important, who is not eligible. The Commission concludes SWBT's proposed retention classification of customers is unjust, unreasonable, unreasonably discriminatory and unduly preferential and, therefore, it will not be approved.
C. Win classification

58. “Win” offerings were not initially listed as an issue in this docket. However, in Order 11, the Commission ruled that consideration of such offerings would be added as an issue because the issues involving access to information on win offerings were the same or very closely related to questions being reviewed for winback and retention offerings. Order 11, ¶ 17. In Order 11, win offerings were described as offers or promotions by SWBT to current customers of competitive LECs that have never used SWBT services. Order 11, ¶ 6. In asking the Commission to recognize this classification, SWBT explained that “win” offerings are those made to customers that “never were on SWBT’s network.” Rodriguez Dir. 14.

59. In asking the Commission to recognize this classification, SWBT explained that allowing “win” offers will add as a unique class of customers those who have never had SWBT service. SWBT noted that this classification includes those customers remaining after the winback classification is created for former SWBT customers and the retention classification is created for current SWBT customers. Rodriguez Dir. 14.

60. AT&T noted that it has many of the same concerns regarding SWBT’s proposed win classification as it has regarding SWBT’s winback classification. The upfront investment of a CLEC to acquire collocation space and equipment, switching equipment, and transport facilities can be quite expensive. Additional expenses and non-recurring costs are required to enable a CLEC to compete for customers. A CLEC anticipates that it will recover these costs by providing service over several months. Finnegan Dir. 15-16. Before a new provider will enter a market, it must believe that it can acquire sufficient business in a reasonable amount of time to achieve significant economies of scale. Finnegan Dir. 19-20.
61. In analyzing SWBT's proposed classifications, the Commission concludes SWBT's description of a "win" classification is not clearly defined. SWBT does not specify whether win offerings are limited to customers that have never been on SWBT's network in the Kansas telecommunications market or in any market in SWBT's footprint. It is not clear whether a customer that has had service from SWBT in a state besides Kansas, and is currently receiving service from another provider in Kansas, will fall within the win classification. On the other hand, if a customer is new to the Kansas telecommunications market and is not yet receiving telecommunications service from any provider, this customer does not fall within the win classification. In that case, the Commission assumes this customer is available for any competitive offering from all providers in the telecommunications market.

62. Because SWBT's proposed win classification is not clearly defined and its qualifying customers are not objectively identified, the Commission finds this proposed classification is unreasonable and unjust. Allowing SWBT to make win offerings based upon this classification would be unreasonably discriminatory and unduly preferential. Therefore, the Commission declines to approve SWBT's win classification as proposed in this docket.

D. Spinning

63. A spinner was defined at the hearing as a customer that leaves SWBT more than once to go to a CLEC and then always returns to SWBT. Tr. 55 (Rodriguez). Spinners cause problems for all carriers. A competitor will expend resources to acquire a customer that does not intend to stay, and in fact may have left (or threatened to leave) its prior carrier only to qualify for a winback (or retention) offering. Although SWBT's witness testifying at the hearing was not aware that SBC had a policy on spinners, Tr. 55 (Rodriguez), AT&T asserted that SBC has
the ability to identify spinners and exclude them from those customers eligible for its winback offerings. Finnegan Dir. 12.

64. The Commission recognizes that spinners will be present in a competitive market. No doubt a customer that continuously switches providers in search of the cheapest rates will be a burden on the competitive market. However, the Commission concludes this problem is best left to providers and the competitive market to resolve. The Commission will not establish a policy regarding spinners.

III. Criteria Used to Determine Price Floor

65. Because the Commission has approved SWBT's proposed classification of customers for long term winback offerings, it is appropriate to address what criteria should be used to assure that an offering is above the price floor. Parties recognize that offerings for local residential phone service must be above the price floor, but parties disagree on how the Commission should determine the price floor. Tr. 507 (Lammers). The Legislature stated that, unless the Commission approved something different, the price floor is "long-run incremental cost and imputed access charges." K.S.A. 66-2005(k). A long-run incremental cost (LRIC) study develops three costs: "volume sensitive recurring costs, volume sensitive nonrecurring costs, and nonvolume sensitive costs." Direct Testimony of Gerald A. Lammers (Staff), filed September 19, 2003, (Lammers Dir.) 11.

66. Staff pointed out the role of the price floor is to protect other competitors from predatory pricing designed to drive them from the marketplace. Lammers Dir. 3. Staff noted that usually tariffs go into effect within 21 days and promotional offerings are filed 20 days before their effective date, which leaves little time for Staff to review a series of cost studies and determine if the cost studies are accurate. To enable a fast review of filings, Staff proposed the
Commission adopt a method to use in reviewing win, winback, or retention offerings that will assure such offerings are above the price floor while at the same time eliminate the need for parties to file cost studies. Lammers Dir. 3. Staff recommended that, if the Commission allowed winback or retention offerings, the Commission use unbundled network element (UNE) rates along with an allocation of general sales costs as the LRIC price floor. Staff noted this formula would allow room for price reductions and provide some protection for continuing competition in the marketplace. Lammers Dir. 26-27. Applying this examination will allow the Commission to determine whether the ILEC's offering will permit it to engage in anticompetitive, price squeeze behavior. Buchanan Dir. 18.

67. In its proposal, Staff urged the Commission to use UNE rates as a portion of the LRIC price floor to the extent the required service can be provided by UNEs. Lammers Dir. 6. UNE rates in Kansas were established in Docket No. 97-SCCC-149-GIT using the TELRIC methodology. Tr. 508 (Lammers). In addition, Staff urged the Commission to include sales costs in the price floor by using the predominant resale discount factor for SWBT in calculating common costs to ensure a reasonable margin. Lammers Dir. 15-16. In Kansas, most customers served by CLECs in SWBT's territory are served using UNE-P. Buchanan Dir. 17; Price Dir. 7-8. Staff explained that a service like local service may involve several UNE rate elements as in the UNE-P combinations: loop, port, transport, and switching. Lammers Dir. 4. Staff recommended that the calculation focus on known UNE rate elements to see if the price in a particular filing is high enough to cover the resale discount rate and the UNE rate elements. Lammers Dir. 17-18. Also, the resale discount factor should be included in the price floor because UNE rates do not include retail marketing, customer service, or billing costs. Lammers Dir. 16-17. Staff recognized that using this formula had advantages and disadvantages, Lammers
Dir. 22-26, but urged its adoption to enable Staff to review offerings without delay. At the hearing, Staff noted that its proposal allowed a company to request something other than the UNE prices in a particular market where the competition is not UNE-based. Tr. 505 (Lammers).

68. SWBT argued that the statute only requires the price offered by a price cap company not to be below the LRIC-based price floor. Therefore, the Commission cannot prevent SWBT from making winback and retention offerings based on a belief that competitors must make a designated profit level. Rodriguez Dir. 17-18. Regarding Staff’s proposal, SWBT asserted it is not confident that all UNE prices in Kansas are recovering their actual cost. Furthermore, SWBT expressed concern about using two methods depending upon whether a service in an offering can be pieced together using UNEs to duplicate a retail service. Instead, SWBT urged the Commission to adopt a single LRIC test designed for retail services that would be the subject of a win, winback, or retention offer. Rebuttal Testimony of Edwardo Rodriguez (SWBT), filed October 10, 2003, (Rodriguez Reb.) 19.

69. The Commission adopts Staff’s proposal to use UNE rates and the resale discount factor as a basis for evaluating the price floor when reviewing winback offerings. The purpose of the price floor is to preclude predatory pricing. To enable long term tariffs and agreements and short term promotions to be approved quickly, the Commission finds it reasonable to adopt Staff’s recommendation because UNE rates and SWBT’s resale discount factor are already established, they are publicly available, and most competitors in Kansas rely upon UNEs to provide service. Adopting Staff’s recommendation does not preclude a company from asking that the Commission evaluate LRIC cost studies for a service, particularly if competition in a specific market is not UNE-based.

IV. Restrictions and Conditions
70. The Commission is concerned about SWBT's significant presence in the marketplace due to its legacy as a monopoly. Staff noted that an incumbent LEC is different from all other competitors because it was able to build and maintain a telecommunications infrastructure through the investment of shareholders who knew that the incumbent did not face competition for service and that Commission-determined rates would allow for a reasonable rate of return on investment. Buchanan Dir. 16. SWBT's economic expert premised her analysis on the recognition that SWBT has market power and that the market in Kansas is not competitive to the extent that no one provider has significant market power. Tr. 178 (Aron).

71. In light of the Legislature's goal to transition the telecommunications industry from a monopoly environment to a competitive market, the Commission in this Order has found the competitive environment in the Kansas telecommunications market has developed enough to allow SWBT's proposed winback classification of customers to be recognized for receiving winback offerings. Yet Staff pointed out that, as of December 2002, SWBT served 79% of residential customers and 68% of business customers in its service territory in Kansas. Buchanan Dir 17; Tr. 513 (Buchanan). MCI argued that as a result of SWBT's historical local monopoly, significant economic and operational entry barriers exist regarding the ability of CLECs to serve residential and small business customers. Price Dir. 5-6.

72. The Commission concludes that at this time winback offerings by ILECs should not be unlimited. Some concerns expressed by CLECs are very real and threaten continued development of the competitive market. The Commission will examine what consideration should be made when reviewing an ILEC's offerings to assure the benefits of competition are realized throughout the state. In other words, the Commission will determine whether any
restrictions or conditions are necessary to ensure that the offerings are just and reasonable in
light of the public policy favoring competition.

A. Nonrecurring charges

73. Nonrecurring charges refer to one-time charges for a service, such as an
installation charge for connecting service. SWBT argued that it should be allowed to waive
nonrecurring charges for win and winback customers. According to SWBT, customers do not
understand why nonrecurring charges are imposed, particularly if the customer did not have to
pay them when it changed to CLEC service. Direct Testimony of Donna Harrison (SWBT), filed
August 15, 2003, (Harrison Dir.) 2-3; Rebuttal Testimony of Donna Harrison (SWBT), filed
October 10, 2003, (Harrison Reb.) 5. SWBT pointed out that many competitors waive
nonrecurring charges, such as AT&T’s waiver of installation charges, when service is converted
from SWBT to service from the competitor. SWBT is merely asking that it be allowed to do the
same. Rodriguez Dir. 15. Furthermore, SWBT pointed out that it is less costly to re-establish
service than to establish service initially and argued that prices for nonrecurring charges should
be determined by market conditions. Harrison Dir. 6-7.

74. Staff pointed out that the Missouri Public Service Commission allowed win or
winback offerings that waive nonrecurring charges associated with providing a service as long as
the waiver of nonrecurring charges is not contingent upon the customer agreeing to a term of
service. Buchanan Dir. 13. Staff did not object to the Commission allowing SWBT to waive
nonrecurring charges, but it urged the Commission to require that such a waiver not be
contingent upon agreeing to a term of service exceeding one year. Staff noted that waiving these
costs would lower the transaction costs faced by a customer who is switching providers.
However, Staff argued waiver of nonrecurring charges may still violate the nondiscrimination
provisions of the Kansas statutes. Therefore, Staff urged the Commission to permit the waiver of nonrecurring charges for all new customers of an incumbent unless the ILEC can provide a cost-based rationale for charging a new customer differently than a winback customer. Buchanan Dir. 13-14.

75. In response to SWBT's argument that AT&T's tariff is discriminatory because it waives installation charges for all new or added lines and/or trunks, AT&T noted that its provision applies to all AT&T customers of the identified services and, therefore, does not discriminate between former AT&T customers, former ILEC customers, or customers that have not previously had local exchange service. Finnegan Dir. 15. MCI argued that SWBT was not prohibited from reducing or eliminating its tariffed nonrecurring charges. Price Dir. 16.

76. The Commission concludes that it is appropriate to allow SWBT to make winback offerings that waive nonrecurring charges for customers that decide to return to SWBT for service. Staff proposes that the Commission permit SWBT to waive nonrecurring charges for all new customers unless SWBT provides a cost-based rationale for charging a new customer differently than a winback customer. Buchanan Dir. 13-14. Although Staff's proposal appears reasonable, the Commission will not decide this issue at this time.

B. Prohibiting solicitation of CLEC customers after changing providers.

77. Several parties have asked the Commission to implement a waiting period that prevents an ILEC from soliciting customers with winback promotions for a designated period of time after a customer is lost to a competitor. CURB recommended that an ILEC not be allowed to initiate a winback offer for at least 60 days after a customer has gone to a CLEC to allow time for the CLEC to complete at least one billing cycle with their new customer. CURB noted that if the customer, rather than the ILEC, initiates the request for a winback offer from an ILEC and
the ILEC has an approved offer available, then no waiting period should apply to prevent the
customer from making the change of providers. Lura Dir. 5.

78. If the Commission determines that ILEC winback offers are allowed, AT&T
recommended the Commission impose a requirement that prohibits ILECs from contacting
former customers for at least 30 days after the customer has completed conversion to the CLEC.
This permits customers to experience at least one billing cycle with the new provider. Finnegan
Dir. 36. Also, AT&T pointed out that virtually all market entry vehicles used by CLECs rely to
some extent on ILEC supplied inputs. If the ILEC’s provisioning of inputs causes a problem
while converting to the CLEC, the customer will naturally blame the CLEC, which creates a
perverse incentive for the ILEC to provide poor quality service during the conversion process. A
30-day waiting period gives the CLEC an opportunity to address any negative experiences
during the first few days of the CLEC providing service or allows the customer to experience the
CLEC’s high quality services if no problems occur. Also, AT&T argued that a 30-day waiting
period would protect against SWBT misusing its access to CLEC carrier proprietary information.
Finnegan Dir. 36-37. If the Commission finds SWBT’s proposed winback class does not violate
Kansas Law, MCI urged the Commission to impose a waiting period of no less than 30 days after
the conversion of the end user to a CLEC before SWBT could begin its winback campaign.
MCI’s Initial Brief, ¶ 55.

79. WorldNet argued that, at a minimum, the Commission should require an ILEC to
wait at least 120 to 160 days before contacting a customer that has been lost to a CLEC with a
winback offer. WorldNet cautioned that SWBT can engage in anticompetitive conduct if such a
waiting period is not required. As examples, WorldNet noted SWBT can continue to send a
customer monthly bills or leave automated recordings that inform the customer it may have been slammed. Schmidt Dir. 4.

80. Staff summarized the regulatory treatment that other state commissions have imposed on winback and retention offerings. Some state commissions have adopted waiting periods while others have not. The public service commissions of Georgia and Louisiana approved a waiting period of seven days before a LEC can attempt to win back a customer. The state commissions in Illinois and Indiana banned Ameritech from soliciting former customers that migrate to a CLEC for a period of 17 days. Buchanan Dir. Attachment B, 2-4. The Ohio Public Utilities Commission issued a temporary order that prevents Ameritech from soliciting CLEC customers with winback offerings for 30 days after a customer is switched to a CLEC. Buchanan Dir., Attachment B, 6. These rulings show that the issues in this docket are not unique.

81. The Commission concludes that adopting a short waiting period before an incumbent can directly solicit a customer that has switched to a competitor will address many of the concerns raised in this docket. The Commission adopts a 30-day waiting period before ILECs can make winback offerings that involve basic local service. The 30 days will begin when an end user’s service is converted to a CLEC provider. An ILEC cannot directly solicit a CLEC customer with an approved winback offering until 30 days after the conversion is completed. This time period will allow the CLEC to develop a relationship with the customer, to work out any complications that arose during the conversion of service, and to serve the customer during at least one billing cycle. Also, the waiting period will ensure no misuse of customer information, as discussed later in this Order. The limitation applies to direct solicitation of a specific CLEC customer who has left ILEC service within 30 days. The
limitation does not prohibit contact with customers that occurs as a result of general media advertising or mass mailings that explain ILEC offerings to telecommunications customers.

82. The Commission finds this 30-day waiting period is a reasonable restriction to impose on winback offerings for a limited amount of time. The Commission concludes imposing a 30-day waiting period until July 1, 2005, is reasonable in light of the evidence presented in this docket, but the Commission reserves the right to extend the 30-day waiting period at that time if circumstances justify. Imposing this restriction for slightly more than one year ensures time to prepare consumers for transition to a competitive market for basic local telephone service. The Legislature’s goal of developing a competitive market is furthered because carriers and competitors will know the time frame under which they are operating. During this transitional period, CLECs and other competitions will have assurance that new customers can be served for 30 days without solicitation from the incumbent. Yet incumbents will know that these restrictions will not be in place indefinitely. Competitors and incumbents should use this time to educate the public about the movement towards a competitive market for basic local telephone service. For these reasons, the Commission finds the 30-day waiting period restriction will end on July 1, 2005, unless the Commission takes further action to extend it.

C. Restriction on the term commitment of contracts.

83. Although service providers and customers look for ways to minimize risk, including the use of long-term contracts, Staff expressed concern that offerings with a term commitment can be used to thwart competition. Staff noted an ILEC has a particularly strong incentive to use contracts to block entry of competitors into the market. Contracts can impose entry costs by delaying entry of an efficient competitor or through a competitor’s absorption of termination liabilities that arise if a customer breaches its contract to go to a competitor.

38
Buchanan Dir. 15. Staff suggested that ILECs not be permitted to use term provisions in offerings involving basic local service or any bundle of services that includes basic local service and vertical services. At most, Staff recommended the Commission not allow a term of more than one year for such services. Staff recognized that a longer term may be justified for more sophisticated services offered to larger business customers, but recommended that such discounts be evaluated on a case-by-case basis. Buchanan Dir. 15.

84. SWBT argued that offerings should have no limit on the length of time of the benefit because this would discourage competitive creativity and potential customer benefits. Rodriguez Dir. 20. SWBT opposed a fresh look provision because it too would discourage competitive creativity by not allowing certainty that the cost of a given promotion would be recovered. SWBT argued not allowing costs to be recovered would be contrary to the requirement that prices not fall below the LRIC price floor. SWBT noted that if a fresh look is adopted, companies should be able to bill a terminating charge that recovers the full remainder of the term agreement, similar to previously allowed termination charges. Rodriguez Dir. 21.

85. SWBT pointed out that when it previously entered into term contracts with customers, CLEC lines continued to increase. Thus, the argument that term contracts are harmful to the growing competitive market is not substantiated. SWBT argued that term contracts can benefit all consumers, whether larger businesses or single line residential customers. Rodriguez Reb. 16. If a term restriction is imposed, SWBT asserted it should be imposed on all telephone public utilities. Rodriguez Reb. 17.

86. In response to SWBT’s discussion, Staff noted a fresh look provision gives consumers who have entered into long term contracts an opportunity to change service to another provider that might not have been providing service at the time the original agreement was
reached. When the Commission provided a fresh look provision in Docket No. 99-GIMT-706-GIT, customers were given a limited opportunity to take advantage of fresh look for a window of 180 days beginning 30 days after the order was issued. During that window of time, a customer taking advantage of the fresh look opportunity could only be charged limited termination liabilities. However, Staff did not recommend a fresh look period be initiated here. Buchanan Dir. 25-26.

87. AT&T agreed with Staff that ILECs can use contracts with term provisions as entry barriers. AT&T noted that CLECs use term provisions to ensure that they will retain a customer long enough to recover nonrecurring costs. Also, customers generally benefit through reduced rates or additional free services for the life of the contract term. On the other hand, AT&T argued that ILEC contracts with term provisions result in formidable barriers to entry by reducing the addressable market for new entrants. Rebuttal Testimony of John F. Finnegan (AT&T), filed October 10, 2003, (Finnegan Reb.) 7-8.

88. The Commission agrees with Staff and AT&T that term provisions in contracts involving basic local service, or a bundle of services that includes basic local service, results in barriers to entry that discourage new entrants in the telecommunications market. Although fresh look provisions are useful in some situations, the Commission does not find them to be appropriate here. Instead, the Commission concludes term provisions should be limited to no more than one year for contracts that involve the provision of basic local service. However, as with the 30-day waiting period, the Commission again concludes that the limitation of a one-year term should end on July 1, 2005, unless this Commission takes further action to extend it. During this transitional period, competitors and incumbents should education the residential and business customers about the choices they will need to make in the developing competitive
market. Also, competitors will have an opportunity to come forward with evidence justifying an extension of these restrictions.

D. Bundling of services with an affiliate to avoid Commission rulings.

89. Staff recommended that the Commission prohibit an ILEC from participating in bundled service offerings with an affiliate when such an offering would avoid the intent of the Commission’s ruling on winback. As an example, Staff pointed to a promotion offered in 2002 by Southwestern Bell Communications Service, Inc., d/b/a Southwestern Bell Long Distance, that required a residential customer to have been a former customer of an affiliated carrier (i.e. SWBT) and to agree to subscribe again to that local service to receive the benefits of the long distance offering. The promotion in that offering gave the customer a discount for a bundle of services that was not equally available to other customers. Buchanan Dir. 19.

90. SWBT argued that restrictions developed in this docket would not apply to any offerings by affiliates that were not regulated. If an affiliate is not regulated, the Commission has no authority over them. Therefore, SWBT argued that if offerings bundled regulated products and services with products and services from an unregulated affiliate, the Commission would have no jurisdiction over the unregulated portion of the offering, but would retain jurisdiction over the products and services offered by the regulated affiliate. Rodriguez Dir. 22.

91. CURB noted that local exchange service offered by an affiliate of the incumbent provider can covertly circumvent the requirements established in this docket. CURB suggested the best way to avoid this is close monitoring of all incumbent affiliates, starting with an examination of the application to provide service considering the relevant criteria discussed in this docket. Also, revenue and line count reports should be monitored for unusual growth of an affiliate compared to CLECs in the same exchanges. Lura Dir. 6-7.
92. AT&T argued SBC should not be able to use its unregulated affiliates to avoid complying with Kansas or federal law or a ruling of this Commission. Therefore, SWBT's affiliated long distance provider should not be able to make winback offers to former customers under the guise of a long distance bundle that includes local exchange service. Finnegan Dir. 7.

93. The Commission agrees with Staff that an ILEC cannot avoid the requirements of this docket by offerings made through an affiliate. By such a restriction, the Commission is not regulating the unregulated affiliate, but requiring the regulated company to comply with Commission orders. Staff is directed to evaluate offerings, including those made by an ILEC's affiliates, to assure compliance with this Order.

E. Should the rules of this docket be imposed upon CLECs?

94. Although CLECs are price deregulated, SWBT argued that the provisions of K.S.A. 66-1,189 and K.S.A. 66-1,191 apply to all public utilities, which includes CLECs. Therefore, SWBT argued CLEC tariffs should be subject to any restrictions placed on offerings by ILECs in this proceeding. Rodriguez Dir. 15-16; Rodriguez Reb. 17-18. At a minimum, SWBT argued that CLECs should be required to meet ordering standards that are imposed on ILECs when providing UNE service to CLECs. Rodriguez Dir. 20.

95. Staff noted that, before passage of the Kansas and Federal Acts, the telecommunications infrastructure of ILECs was built and maintained through investment of shareholders who knew the service was a monopoly and a reasonable rate of return on investment was guaranteed. Unlike a CLEC, an ILEC enters the competitive market from a position of relative strength due to the capital investment needed to support a facilities-based network and the advantage of being the first company in the market for advertising and brand name recognition. Buchanan Dir. 16-17.
96. When Staff filed a motion to initiate the investigation in this docket, Staff suggested that the decisions made should apply equally to all companies. Staff Motion to Initiate Investigation, ¶ 9. The Commission found that it had jurisdiction to investigate “SWBT’s winback/retention promotions, as well as any similar promotions of other LECs.” Order Initiating Investigation, ¶ 16. However, in Order 13, the Commission declined a request by SWBT to add an issue relating to the transfer of CLEC customers to SWBT or to another CLEC, noting that issue would be investigated in a different docket. Order 13, issued June 24, 2002, ¶ 13-14. The Commission declines to address the question of whether the decisions made in this docket should apply to offerings by CLECs. If these questions need to be investigated regarding offerings by CLECs, it should be done in a different docket.

IV. Access to Information

97. At the Commission’s direction, Staff conducted a workshop over two days about access to information issues. The evidence about access to information was limited to SWBT’s network. As a result of these workshops, SWBT filed its statements of fact on April 8, 2003, and its flowchart on June 9, 2003.

A. SWBT’s Access to CLEC Customer Information

98. Staff summarized information about SWBT’s organizational structure that was learned from the workshop and subsequent discovery. Direct Testimony of Thomas C. Behner (Staff), filed September 19, 2003, (Behner Dir.) 2-7. Staff noted that SWBT’s organizational structure separates CLEC activity from SWBT’s retail operations and that SWBT has a Code of Business Conduct in place that prohibits employees from sharing customer account information with unauthorized employees. Behner Dir. 4; Direct Testimony of Lance McNeil (SWBT), filed August 15, 2003, (McNeil Dir.) 2-4; Direct Testimony of David Browne, Jr. (SWBT), filed
August 15, 2003, (Browne Dir.) 2-6. Staff further noted that CLECs have access to the same customer information that SWBT can access through the Local Disconnect Report (LDR) and the Line Loss Notification (LLN) report. Behner Dir. 7; McNeil Dir. 5-10. Although CLECs expressed concern that SWBT could take advantage of its access to CLEC customer account information for SWBT's winback and retention marketing purposes, Staff noted that no formal complaint has been filed with this Commission against SWBT alleging such conduct. Behner Dir. 8.

99. The CLECs asked the Commission to prohibit SWBT from using any Customer Proprietary Network Information (CPNI) in determining what customers to target for winback and retention offerings. AT&T argued SBC has the tools and opportunity to generate winback or retention lists before a CLEC order is completed. Although AT&T did not allege that SBC is using these tools to generate winback lists prior to completion of CLEC orders, AT&T noted the tools were in place to create such a list and SBC could easily change the source of the disconnect orders after this case is over to capture orders that are pending and not yet completed. Finnegan Dir. 33-34. To be sure the misuse of this information does not occur in the future, AT&T argued the Commission should prohibit ILEC win, winback and retention programs. Finnegan Dir. 35.

100. AT&T and MCI noted that the FCC concluded use of CPNI for the purpose of winback offerings is not intrinsically unlawful, but recognized that states could impose additional safeguards on ILEC winback and retention activities after examining the specifics of a given offer. Finnegan Dir. 28-29; Price Dir. 18-19. MCI argued that the FCC found an ILEC is prohibited by 47 U.S.C. § 222 from using CPNI to retain a customer that is considering changing service to a CLEC. Price Dir. 22-23.
101. SWBT argued that the FCC has characterized winback activity as being pro-consumer and pro-competitive behavior even in the face of unsubstantiated theoretical concerns of anti-competitive behavior. Rodriguez Reb. 13. SWBT asserted it recognized the restrictions of both the FCC rules and 47 U.S.C. § 222 and included them in its code of business conduct that all employees must follow. Although SWBT may have the technical capability of mishandling customer information due to its federally mandated role as a wholesale provider, SWBT argued no evidence has been presented to show potentially damaging behavior to competition by SWBT personnel in its handling of CPNI. Rodriguez Reb. 4-5.

102. The Commission understands the CLECs' concern that SWBT's personnel has the ability to misuse CPNI in competitive behavior. However, the Commission will not assume that such inappropriate behavior is inevitable. If a competitor has evidence suggesting the misuse of CPNI by SWBT or any ILEC, it should bring this to the Commission's attention. In the absence of such evidence relating to SWBT, the Commission finds that CLECs can gain access to the same information SWBT's retail employees have available through the LDR and the LLN report. These reports are made available to CLECs at the same time, or earlier, than SWBT's report is made available to its retail operation. Behner Dir 7-8; Tr. 385 (McNeil). The Commission concludes that CLECs have equal access to information SWBT provides its retail operation and that SWBT's code of business conduct for employees adequately protects this information. The Commission notes that CLEC concern about SWBT's ability to use CPNI for winback activities after this docket is completed is addressed by the 30-day restriction on soliciting customers that have switched to CLEC service, which the Commission has adopted in this Order.
B. Slamming Message Directs Customers to Winback Representative

103. Using an automated call notification system, SWBT notifies all customers who have a carrier change on their account that they may have been slammed. Direct Testimony of Sam G. Maropis (SWBT), filed August 15, 2003, (Maropis Dir.) 13. Staff noted SWBT gives this warning through a voice message or by letter to all customers who switch local, local toll, or long distance service to another carrier. Staff expressed concern about this practice of warning customers they may have been slammed and then giving them a toll free number to call if they did not authorize the switch. Buchanan Dir. 21-22. If a customer calls the number provided in the message, a SWBT retail marketing representative is reached. Maropis Dir. 17. Although SWBT argued the slamming message was a public service, Rebuttal Testimony of Sam G. Maropis (SWBT), filed October 10, 2003, (Maropis Reb.) 5, Staff asserted the message was more about marketing than about proving a public service to customers that might have been slammed. Staff recommended that the Commission require SWBT to direct the caller to a customer service representative that can assist in determining if slamming has actually occurred, rather than directing the caller to a SWBT retail marketing representative. Buchanan Dir. 21-22; Staff Br. 16.

104. AT&T alleged one of the more egregious examples of the anti-competitive aspects of SWBT's winback program is the telephone call to each customer that changes its service from SWBT to a CLEC. In this voice message, the customer is told “you may have been slammed” and is advised to call a toll-free number regarding the change in service. Finnegan Dir. 23. AT&T noted that one of the first experiences with a CLEC's new service is a SWBT message implying that the change was illegal or improper. AT&T urged the Commission to
prohibit ILECs from contacting CLEC customers for the purpose of implying the switch to the CLEC may have been the result of a slam. Finnegan Dir. 24.

105. WorldNet noted SWBT used automated recordings to inform customers that they may have been slammed and gives customers a number to call. WorldNet noted a CLEC has no control over what a customer is told if the customer calls the number given on SWBT’s recording. WorldNet described use of the slamming message as a scare tactic. Schmidt Dir. 4.

106. The Commission concludes that use of a recorded message or direct mailing about slamming that directs a CLEC customer to call a number that is answered by a SWBT retail marketing representative is improper and must stop immediately. This message is misleading if a customer is directed to a retail marketing representative rather than to a customer service representative who can confirm or deny that slamming has occurred. The public policy, as set forth by the Legislature in the Kansas Act, includes the goal to protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience, and necessity. K.S.A. 66-2001(e). The Commission concludes that the slamming message in use by SWBT is not consistent with the public interest. If SWBT or any carrier wants to provide a public service call about the possibility of slamming, the message should direct the caller to a customer service representative that can assist in determining whether slamming has occurred, not to a marketing representative.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) The Commission hereby orders that, pursuant to K.S.A. 66-2005(l), ILECs may offer short term promotional offerings as long as these offerings are made available in a nondiscriminatory manner to all customers throughout an exchange or group of exchanges, as set forth above. However, ILECs cannot pancake promotional offerings. ILECs cannot directly
solicit winback customers until 30 days after the end user’s service has been converted to the CLEC. This 30-day restriction expires on July 1, 2005, unless the Commission takes further action to extend it.

(B) The Commission finds that long term win, winback, and retention offerings are not prohibited by the Kansas Act, but must be reviewed individually and must comply with K.S.A. 1,189 and K.S.A. 1,191, as discussed in this Order.

(C) The Commission finds that SWBT’s proposed winback classification of customers is not unreasonably discriminatory or unduly preferential and is not unjust or unreasonable. The Commission will allow SWBT to waive nonrecurring charges in winback offerings. The Commission imposes the following restrictions on winback offerings: (1) An ILEC cannot directly solicit a former customer with a winback offering until 30 days after the conversion of basic local service to a CLEC is completed. (2) Any winback offering by an ILEC relating to the provision of basic local service to a customer cannot contain a term provision that exceeds one year. These restrictions expire on July 1, 2005, unless the Commission takes further action to extend them.

(D) As discussed in this Order, the Commission finds that public policy considerations do not support approval of the retention classification proposed by SWBT and that a retention classification of customers is unreasonably discriminatory, unduly preferential, unjust, and unreasonable. As further discussed in this Order, the Commission finds that SWBT did not identify or define a win classification of customers that was not unreasonably discriminatory, unduly preferential, unjust, and unreasonable. In addition, the Commission declines to establish a policy regarding spinners.

(E) To evaluate winback offerings in an expeditious manner, the Commission finds it reasonable to use UNE rates and the resale discount factor of the ILEC as a basis for evaluating
ILEC winback offerings. In an appropriate docket, the company is not prohibited from asking the Commission to evaluate LRIC cost studies for a service, particularly in a specific market that is not UNE-based.

(F) The Commission directs Staff to evaluate offerings by ILECs and their affiliates to assure the ILEC is complying with this Order.

(G) The Commission concludes that CLECs have equal access to information SWBT provides to SWBT’s retail operations and that SWBT’s code of business conduct for employees adequately protects this information, as discussed in the above order.

(H) The Commission concludes the slamming message used by SWBT is not consistent with the public interest and must stop immediately, as discussed in the above order.

(I) A party has fifteen days, plus three days if service is by mail, from the date of service of this Order in which to petition the Commission for reconsideration of any final agency action. K.S.A. 66-118b; K.S.A. 2003 Supp. 77-529(a)(1).

(J) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders, as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr., dissenting in part; Wine, Com.; Krehbiel, Com, concurring in part, dissenting in part.

Dated: APR 02 2004

ORDER MAILED

APR 02 2004

Susan K. Duffy
Executive Director

mjc
Chair Moline, dissenting in part:

I concur with the Order but would not impose the automatic expiration of the 30-day waiting period and the one-year term restriction after fifteen months. While I agree that the goal should be elimination of any delay in competitive efforts to obtain and retrieve customers, I do not share the presumption that the competitive landscape will significantly alter in fifteen months. The language of the provision regarding automatic expiration of these restrictions also blurs the burden of proof in any future proceeding to determine whether competition has developed to the point that the restraints are no longer necessary.
Commissioner Krehbiel, concurring in part, dissenting in part:

Generally I concur with the Order. However, I dissent regarding the imposition of a thirty-day waiting period on winback offerings and the decision to disallow retention and win offerings. The three categories proposed by SWBT (win, winback, and retention) cover the entire universe of telecommunications customers without exception, and every consumer of telecommunications services can, upon their own initiative, avail themselves of such offerings indiscriminately. All such offerings, if made, must be made upon approval of this Commission, without discrimination in the case of promotions, or without undue discrimination in the case of all other tolls, charges, or exactions.

Eight years have passed since the Legislature extolled and codified the virtues of competition in the telecommunications industry. How long will it be before sustainable competition exists? And, while we concern ourselves with the transition from a regulated to a competitive environment, technological advancements have rendered much of the effort irrelevant or archaic. Unanticipated opportunities for various unregulated telecommunications providers now pose, perhaps, the greatest competition and the greatest challenges for both incumbent and competitive local exchange carriers.

It is correct for this Commission to concern itself with a smooth transition to a sustainable competitive environment — the public interest requires it. I believe we have done that in this Order. But we also recognize that competition has presented itself in many different forms, largely beyond the regulatory authority of this Commission, which provides consumers with many different choices. As reality changes, so too must we.

Commissioner Robert Krehbiel