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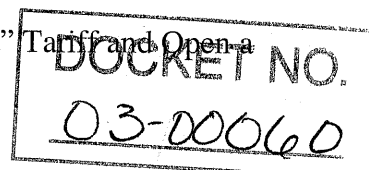
January 22, 2003

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Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

TN REGULATORY AUTHORITY
LOCKER ROOM

Re: Petition to Suspend BellSouth's "Welcoming Reward" Tariff and Open-a
Contested Case Proceeding



Dear Chairman Kyle:

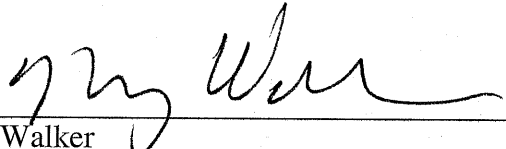
Please accept for filing the attached Petition submitted by a coalition of competitive local exchange carriers. The Petition requests that the Authority suspend BellSouth's proposed "Welcoming Reward" tariff until the Authority can consider carefully the serious legal and policy issues the tariff raises.

The tariff is scheduled to become effective on February 3, 2003. Therefore, the CLEC Coalition asks that the Authority place this matter on the docket for consideration either on January 27, 2003 or on February 3, 2003.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


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Counsel for the CLEC Coalition

HW/bb
Encl.

cc: Guy Hicks, Counsel for BellSouth

January 22, 2003

PETITION TO SUSPEND TARIFF AND OPEN A CONTESTED CASE PROCEEDING

THE TARIFF

- 1 -

bonus from BellSouth for each line in service. All existing BellSouth customers and any customer whose annual bill exceeds \$3,600 are ineligible for the program.

The tariff, scheduled to become effective on February 3, 2003, is precisely the kind of "win back" promotion that has raised concerns in a number of jurisdictions. Just last month, for example, the Minnesota Public Utilities Commission rejected a similar "win back" tariff because the Commission found that the tariff was discriminatory and would have an anti-competitive impact. (A copy of the Minnesota Order is attached). Before allowing this tariff to become effective in Tennessee, the Authority should carefully consider the legal and policy issues such a filing raises.

ARGUMENT

I. Discrimination.

The TRA has long been concerned about the anti-competitive dangers of allowing BellSouth to offer special rates only to CLEC customers. Such tariffs are discriminatory on their face: offering bonuses to a "new" customer but denying bonuses to an existing BellSouth customer who purchases the same services and has the same competitive alternatives.

In Docket No. 00-00391, BellSouth initially filed a "Win Back" tariff offering discounts only to business customers currently receiving service from CLECs. After Nextlink Tennessee Inc. and other CLECs protested, the Authority voted to suspend the tariff and convene a contested case proceeding. Within a week, BellSouth agreed to revise the tariff to make it available to all customers, both new and existing ones, in designated areas and to reduce applicable termination penalties. The intervenors then withdrew their objections to the tariff which became effective a week later. See "Initial Order Accepting Settlement Agreement and Approving Revised Tariff," June 16, 2000.

In August, 2001, prompted by concerns raised in other states over BellSouth's "win back" activities, the TRA issued a Data Request to BellSouth asking the company to

“describe in detail all BellSouth methods and procedures in place in Tennessee that are specifically aimed at gaining customers which have been lost to competitors.” The Data Request specifically cited a number of pending investigations in other states involving BellSouth’s “win back” programs.³

In response to the Data Request, BellSouth assured the Authority that “there are no programs in place in Tennessee that are specifically aimed at regaining business customers who have elected to receive service from another telecommunications carrier.” In a follow-up letter dated October 2, 2001, BellSouth added, “To this day, no BellSouth regulated offering in Tennessee is available solely to former BellSouth customers.” See letter from Guy Hicks to David Waddell, dated October 2, 2001, in Docket 01-00808.⁴ Thus, BellSouth itself is well aware of the potential problems raised by such offerings and the Authority’s concerns.

The use of win back programs by the incumbent carrier has raised problems in states both inside and outside the BellSouth region.⁵ (See the attached summary of how win-

³ See, for example, (1) *BellSouth Full Circle Promotion; Generic Proceeding In re Telephone Rules Governing Promotions*, Alabama Public Service Commission, Docket Nos. 27989 and 15957; (2) *See Generic Investigation into Whether Competitive Practices of Incumbent and Alternative Local Exchange Carriers Comply with Section 364.01(4)(g), Florida Statutes*, Florida Public Service Commission, Docket No. 01-1077-TP; (3) *See Investigation by the Georgia Public Service Commission of BellSouth Telecommunications “Win-Back” Activities Set Forth in Docket No. 14232-U*, Georgia Public Service Commission.

⁴ A BellSouth witness later acknowledged that BellSouth was, in fact, targeting CLEC customers in Tennessee with the non-tariffed “Select” program. See Docket No. 01-00868. Transcript at p. 244. BellSouth was subsequently fined \$169,200 by the Authority for failure to tariff the program. The Authority did not, however, find that the program was discriminatory because the program was technically open to all BellSouth customers, both existing ones and new ones. See “Final Order” of June 28, 2002, at p. 5.

⁵ For example, as the incumbent provider, BellSouth knows every time a CLEC submits a request to transfer a customer’s service. As the Authority is aware, there is substantial, anecdotal evidence of BellSouth sales representatives trying to “win back” such customer with special promotions, sometimes even before the customer has been switched over. For that reason, some states which have allowed BellSouth to engage in “win back” programs have subsequently imposed restrictions on BellSouth’s ability to contact those customers. (See the attached summary of BellSouth’s anti-competitive activities in the region as of July 15, 2002). Before the TRA approves such a tariff in Tennessee, the agency should first consider whether to impose similar restrictions to prevent these abuses.

back tariffs, coupled with other marketing schemes, have led to the filing of complaints in other jurisdictions). Up to now, Tennessee has largely avoided these problems by ensuring that BellSouth's tariffs and promotions are made available to all qualifying customers. This proposed tariff represents a sharp and troublesome departure from BellSouth's prior practices in Tennessee and should not be allowed to become effective until the agency can consider, in the context of a contested case, whether such programs are good for competition in this state.

II. 12-Month Contracts.

The requirement that customers must enter into a long-term agreement with BellSouth in order to receive the discount is also anti-competitive. By locking returning customers into a long-term commitment with an early termination penalty, BellSouth makes it difficult for competing carriers to gain market share. The result is customers will be loathe to change carriers at a time when this Authority is attempting to allow more flexibility in the market for local telecommunication services. If BellSouth competitors were competing on a more level playing field, such an offer might be less offensive. Here, however, where competitors are struggling to win each customer from the dominant provider, any offer that leverages BellSouth's power in the market place and that unequivocally prevents competitors from obtaining customers cannot withstand scrutiny.

III. Resale.

BellSouth states that the offer is available for resale, but it is unclear if the wholesale discount will be applied to this offer. If the wholesale discount is not applicable, then competitors do not have a meaningful opportunity to resell the win-back offer because BellSouth will have created a price squeeze by offering services at a retail price, which is less than its wholesale price.

Furthermore, by limiting the program only to "new" customers, BellSouth has eliminated most resale opportunities. A CLEC would not, for example, qualify for the bonuses by signing up an existing BellSouth customer since that subscriber would not qualify for the program. Apparently, the only way in which a CLEC could resell this tariff – and receive the \$100-a-line bonus from BellSouth – is by taking a customer away from another CLEC. Thus, BellSouth's offer to make the program available for resale is essentially meaningless.

REQUESTED RELIEF

Given the unusual nature of this tariff and serious legal and policy questions the tariff raises, the Petitioners strongly urge the Authority to exercise its statutory power under T.C.A. § 65-5-203(a) to suspend the tariff pending further investigation and to require BellSouth to prove – in an evidentiary hearing – that this tariff is "just and reasonable" and will promote, rather than stifle, competition in Tennessee.

Therefore, pursuant to T.C.A. § 65-5-203(a) and the rules of the TRA, the Petitioner submits the following:

1. Petitioner AT&T Communications of the Southern States, Inc. ("AT&T") is located at 1200 Peachtree Street, NE, Suite 8100, Atlanta, Georgia 30309.
2. Petitioner Cinergy Communications Company is located at 8829 Bond Street, Overland Park, Kansas 66214.
3. Petitioner Xspedius Corporation is located at P.O. Box 2105, Lake Charles, Louisiana 70602.
4. Petitioner Access Integrated Networks, Inc. is located at 4885 Riverside Drive, Macon, Georgia 31210.

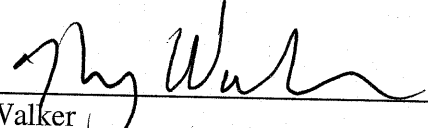
5. BellSouth is located at 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-3300.

6. BellSouth's proposed "Welcoming Reward Program" is unjust, unreasonable, discriminatory, and anti-competitive in violation of state law.

7. The TRA has jurisdiction over this matter pursuant to T.C.A. §§ 65-5-203(a), 65-5-210(a), 65-4-117(1), and 65-5-208(c).

8. Petitioners request that the TRA, pursuant to its statutory authority, suspend BellSouth's proposed tariff and open a contested case proceeding to address the issues raised in this Petition and to take whatever additional action is warranted by the evidentiary record and applicable law.

Respectfully submitted,

By: 

Henry Walker

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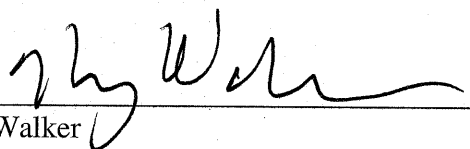
Nashville, Tennessee 37219

(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 22 day of January, 2003.

Guy M. Hicks, Esq.
BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300



Henry Walker

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Ellen Gavin
Marshall Johnson
LeRoy Koppendrayer
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation
into the Issues Raised by New Access
Communications Regarding the Application of
Qwest's Avoided Cost Discount to its Win
Back Tariff

ISSUE DATE: December 20, 2002

DOCKET NO. P-421/CI-02-582

ORDER REJECTING WIN BACK TARIFF

PROCEDURAL HISTORY

State and federal law direct Qwest to permit competing telecommunications providers to interconnect with Qwest's network, and to permit them to buy Qwest's services at wholesale rates for resale to retail customers.¹ The wholesale price of Qwest's services is determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."² Both state and federal law prohibit Qwest from imposing unreasonable or discriminatory restrictions or limitations on the resale of its wholesale services.³

On December 11, 2001, the Commission approved an avoided cost discount rate of 17.66% for Qwest wholesale services provided after February 7, 2000.⁴

On March 11, 2002, New Access Communications, LLC (New Access), a Minnesota-based reseller, filed a Request for Clarification seeking clarification of the applicability of the 17.66% avoided cost discount to Qwest's "Business, Residence and Toll Competitive Response Program" (Win Back tariff). In the tariff, Qwest offers to waive certain charges when a customer that had abandoned Qwest's services in favor of a competitor agrees to return to Qwest.

¹47 U.S.C. § 251(c); Minn. Stat. § 237.16.

²47 U.S.C. § 252(d)(3); see also 47 C.F.R. §§ 51.501-51.717.

³47 U.S.C. § 251(b)(1); 47 U.S.C. § 251(c)(4); Minn. Stat. § 237.121(a)(5).

⁴*In the Matter of a Further Commission Investigation of Avoided Cost Discount of U S WEST Communications (now Qwest)* Docket No. P-999/CI-99-776 ORDER ACCEPTING THE PROPOSED RESOLUTION. This discount rate did not pertain to competitors subject to the Qwest/MFS interconnection agreement which contains a different negotiated discount rate.

On April 26, 2002, Qwest filed to amend the business Win Back tariff to permit the service to be resold, effective May 28.⁵

On May 2, 2002, the Commission opened the current docket to investigate the issues raised by New Access' request for clarification.

By July 2, 2002, the Commission had received comments from the Association of Communications Enterprises (ASCENT), formerly Telecommunications Resellers Association;⁶ Eschelon Telecom, Inc. (Eschelon); the Minnesota Department of Commerce (the Department); New Access; Qwest; the Residential and Small Business Utilities Division of the Minnesota Office of the Attorney General (RUD-OAG); Stonebridge Communications (Stonebridge); and WorldCom, Inc. (WorldCom).

By July 17, 2002, the Commission had received reply comments from New Access and Qwest.

The matter came before the Commission on September 19, 2002.

FINDINGS AND CONCLUSIONS

I. THE WIN BACK TARIFF

On February 24, 1999, US WEST Communications, Inc. (US WEST), predecessor to Qwest, filed its Win Back tariff to take effect on March 26, 1999. The program offered to waive certain costs for customers that leave US WEST for another telecommunications service provider and then return to US WEST. The tariff offered residential customers a waiver of certain one-time charges plus two months of monthly charges. A customer that also agreed to take US WEST's intraLATA toll service could receive an additional annual discount on intraLATA charges.

The Win Back tariff made similar offers to residential and business customers, but there were some differences. Business customers, but not residential customers, could be billed for all the charges waived under the tariff if they cancelled their Qwest service within 12 months. And initially the business tariff was declared unavailable for resale. Qwest changed this aspect of the tariff after New Access had asked to open the current investigation.

⁵*In the Matter of Qwest's Business Competitive Response Program*, Docket No. P-421/AM-02-602.

⁶According to its filing, ASCENT is an industry organization founded "to assure that all service providers, particularly entrepreneurial firms, have the opportunity to compete in the communications arena...."

II. LEGAL STANDARD

Historically, Minnesota's public policy did not facilitate local telephone competition.⁷ But in the mid-1990s, state and federal law changed to promote competition in the local telecommunications market. Laws 1995, chapter 156 (Minnesota Telecommunications Act of 1995); the federal Telecommunications Act of 1996⁸ (the 1996 Act). Both pieces of legislation contemplated that new telecommunications providers would compete with the incumbent local telephone company, and with each other, to provide local telecommunications services to retail consumers. To this end, the 1996 Act directs an incumbent local telephone company –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service....⁹

Federal and state law prohibit Qwest from engaging in unreasonable discrimination.¹⁰ For example, Minnesota Statutes § 237.09, subd. 1 says:

No telephone company, or any agent or officer thereof, shall, directly or indirectly, in any manner, knowingly or willfully, charge, demand, collect, or receive from any person, firm, or corporation, a greater or less compensation for any intrastate service rendered or to be rendered by it than it charges, demands, collects, or receives from any other firm, person, or corporation for a like and contemporaneous intrastate service under similar circumstances.

⁷Minn. Stat. § 237.16, subd. 2 (1994); see also *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Common Carrier Bureau (CC) Docket No. 96-98, FIRST REPORT AND ORDER, FCC 96-325, 11 F.C.C.R. 15,499 (rel. August 8, 1996) (*Local Competition Order*) ¶ 1:

Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry.

⁸ Pub. L. No. 104-104, 110 Stat. 56 (codified throughout title 47, United States Code).

⁹47 U.S.C. § 251(c)(4). See also Minn. Stat. § 237.16.

¹⁰See, for example, 47 U.S.C. § 251; Minn. Stat. §§ 237.07, subd. 2; 237.081, subd. 4; § 237.09, subd. 1; 237.121(a)(5); 237.14; 237.60, subd. 3.

Discrimination can arise in the manner in which a telecommunications provider restricts the resale of its services. Federal and state law bar unreasonable restrictions on resale.¹¹ Resale is a critical market entry tool for new competitors and a critical network completion tool for established competitors. Unconstrained resale is essential to the development of a competitive local telecommunications market. For this reason, federal law makes all restrictions on resale presumptively invalid.¹² Any tariff affecting resale therefore triggers the highest level of scrutiny from this Commission.¹³

III. POSITIONS OF THE PARTIES

A. Support for the Win Back tariff

Qwest claims that the Win Back tariff is a very narrow offering, waiving certain charges when a local service provider attracts its own customers back. It is a neutral tariff, benefitting a reseller's customer in the same way, with the same terms and conditions, as it benefits Qwest's own retail customers.

Qwest argues that the avoided cost discount should not apply to the Win Back tariff. Qwest argues that the wholesale avoided cost rate should apply to "the relevant 'listed' Minnesota tariff rates."¹⁴ The Win Back tariff merely waives Qwest's right to collect revenues; it does not create a new tariffed rate, according to Qwest, and therefore cannot be subject to resale at the avoided cost discount. While denying that it has any obligation to offer its Win Back tariff for resale, Qwest has agreed to do so, albeit without any wholesale discount.

Qwest argues that it offers the Win Back tariff in the hope that the revenues it forgoes will be recouped through future payments from the won-back customer. In making this offer, Qwest has placed some revenue at risk; Qwest suggests that competitors should be willing to incur the same revenue risks.

¹¹Minn. Stat. § 237.121(a)(5) and 47 U.S.C. § 251(b)(1) and (c)(4).

¹²*Local Competition Order* ¶ 939.

¹³See *In the Matter of Qwest Corporation's Refiling of its Proposed Tariffs Regarding Termination Liability Assessments as Applied to Resale Arrangements*, Docket No. P-421/AM-00-1165 ORDER REJECTING TARIFF/PRICE LIST REVISIONS (October 2, 2001) (*TLA Order*) at 11-12.

¹⁴Qwest Comments (June 19, 2002) at 6; Qwest Supplemental Comments (July 2, 2002) at 6.

B. Opposition to the Win Back tariff

ASCENT, the Department, Eschelon, New Access, RUD-OAG, Stonebridge and WorldCom (collectively, the opponents) each recommend changing or eliminating the Win Back tariff.

1. Application of the wholesale discount

As noted above, the Telecommunications Act of 1996 directs an incumbent local telephone company “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers....”¹⁵ Because the Win Back tariff establishes rates for telecommunications services that Qwest provides at retail to subscribers, many opponents argue that section 251(c)(4) governs.

Specifically, they argue that the 1996 Act requires Qwest to offer its Win Back service for resale, and with the avoided cost discount. While Qwest argues that this obligation applies only to “the relevant ‘listed’ Minnesota tariff rates” and not to things like the Win Back tariff, the parties cite the Federal Communications Commission to support the opposite conclusion. According to the FCC,

Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates “any telecommunications service” that the carrier provides at retail to noncarrier subscribers. This language makes no exceptions for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.¹⁶

2. Anti-competitive effects

The opponents argue that the Win Back tariff has a disproportionately harmful effect on competitors. Qwest characterizes the tariff as a very limited offering,¹⁷ reflecting the fact that it applies to a small percentage of Qwest’s customers. But the tariff applies to nearly 100% of a competitor’s customers, the opponents observe. As a result, Qwest can use the Win Back tariff to pursue most of a competitor’s customers, but competitors cannot use the Win Back tariff to pursue most of Qwest’s customers.

Some opponents argue that there are practical limits on how many times a customer can be persuaded to change local service providers. Some opponents cite testimony declaring that once a customer is persuaded to leave a provider – with all the attendant administrative burdens of changing a local service provider – and then is persuaded to rejoin that provider – again with all

¹⁵47 U.S.C. § 251(c)(4)(A).

¹⁶*Local Competition Order* at ¶ 948.

¹⁷Qwest Comments at 6 (June 17, 2002).

the attendant burdens – that customer will be extremely reluctant to change providers for a third time. By virtue of Qwest's status as the incumbent, Qwest is virtually always in the position of inducing the customer to make the second change in local service providers.

Finally, the Win Back tariff has the effect of depressing competitors' revenues. The tariff compels competitors to design all their rates in anticipation of Qwest seeking to use the Win Back tariff on their customers. This has tended to depress competitive revenues and activities.

3. Discrimination

Win Back's critics note that the Win Back tariff does not offer a new service. It merely offers existing services to certain customers at a reduced rate. In short, it discriminates between telephone subscribers who have left Qwest and all other telephone subscribers. The competitors argue that this is not a reasonable basis for discrimination.

Also, the Department argues that Qwest exploits its role as wholesale provider to help its retail operation. As the administrator of the wholesale network, Qwest's wholesale operation must implement any resale customers' choice to change subscribers. As a result, Qwest's wholesale operation must learn of customer changes early. Resellers may not learn that they have lost a customer until 40 days later. But Qwest's wholesale operation may give its retail operation faster notice that a customer has left Qwest, permitting Qwest's retail operation to initiate Win Back efforts faster. The Department cites accounts of Qwest initiating Win Back efforts even before a customer had disconnected service from Qwest.

IV. COMMISSION ACTION

Having reviewed the record of this case and provided opportunity for all parties to be heard, the Commission finds the arguments of the tariff's opponents persuasive. While the Win Back tariff may appear neutral on its face, it has a disproportionately harmful effect on competitors. The Win Back tariff produces three types of discrimination:

- It discriminates against Qwest's wholesale customers.
- It discriminates among Qwest's wholesale customers.
- It discriminates among Qwest's retail customers.

The Commission will address each type of discrimination below.

A. Discrimination Against Wholesale Customers

The Commission concludes that the Win Back tariff discriminates against Qwest's wholesale customers, which also happen to be its retail competitors. In short, the tariff is anti-competitive.

While Qwest defends the tariff as being a very narrow offering, it is precisely this quality that generates most of the anti-competitive effects. By its terms, a provider may only use the tariff to provide service to a returning customer. Due to Qwest's role as the incumbent monopolist, nearly every phone subscriber was a customer of Qwest at some time. Competitors, lacking the advantage of incumbency, cannot make a similar claim. As a result, Qwest can use the Win Back tariff to pursue most of a competitor's customers, but competitors cannot use the Win Back tariff to pursue most of Qwest's customers. This fact produces the following consequences:

First, the Win Back tariff produces a price squeeze. A "price squeeze" results when a monopolist wholesale supplier sells a wholesale product to retailers at a price that is inappropriately close to its own retail price.¹⁸ In this way, the wholesale monopolist is able to extend its power into the retail market. Due to the Win Back tariff's limited scope, most competitors would not qualify to buy Win Back service to serve most customers. Instead, a reseller must seek to lure a typical customer by reselling Qwest's standard residential and business service. While the reseller may buy those services at a 17.66% discount, those services still cost more at wholesale than Qwest's Win Back offer – free service – costs at retail. A price squeeze results. While customers may benefit from lower retail prices in the short term, they suffer in the long run when competitive alternatives fail to materialize.

Second, competitors find that they must incur the costs of acquiring customers twice – once to attract them initially from Qwest, and a second time to attract them again if they migrate back to Qwest. In contrast, Qwest incurred no cost to attract most of its customers initially due to its position as the incumbent monopolist. As a result, Qwest only incurs the cost of attracting a customer once, when it tries to woo the customers back from the competitors. This disparity places competitors at a disadvantage.

Third, the Win Back tariff has the effect of depressing competitors' revenues more than it depresses Qwest's revenues. Qwest is able to reduce its rates for some customers, confident in the knowledge that the vast majority of its own customers continue paying the higher rate. Competitors, in contrast, lack such a regular revenue stream to support their promotional activities. To the contrary, they know that nearly all of their customers are prey to the Win Back tariff, and must adjust nearly all of their offerings accordingly. The effects of this tariff are clearly anti-competitive.

The Commission appreciates Qwest's argument that competition is supposed to result in lower prices. But the Commission observes that Qwest could have produced the same salutary effect on prices by offering a tariff that is not restricted exclusively to former customers. The Commission is disinclined to approve conduct that may harm competition where less-harmful alternatives remain unexplored.¹⁹

But not all of the anti-competitive effects of the Win Back tariff flow from its narrow scope. The tariff's vague language also invites discrimination among customers who qualify for the tariff. The tariff states the maximum offer that Qwest could make a potentially-returning customer, but otherwise gives Qwest unbridled discretion to decide how much to offer any given customer. More than three years after the Win Back tariff was filed with the Commission, the Department notes that Qwest's guidelines for implementing the tariff remain under development.

Finally, the Commission observes that the business Win Back tariff contains a termination liability clause. The clause reimposes all of the costs waived by the Win Back tariff if a customer abandons Qwest's service within a year. As the Commission has noted previously, such clauses

¹⁸*Federal Power Commission v. Conway Corp.*, 426 U.S. 271 (1976).

¹⁹See *TLA Order*, *supra* at 13 (even where a utility's tariff serves a legitimate purpose, the Commission may reject it if the utility fails to explore less harmful ways to serve that purpose).

can have anti-competitive effects in that they tend to bind a customer to the monopolist at a time when public policy is focusing on opening the local service market to competition.²⁰

B. Discrimination Among Wholesale Customers

By limiting the application of the Win Back tariff exclusively to former retail customers, Qwest interferes not only with a competitor's ability to compete with Qwest but also with a competitor's ability to compete with other competitors.

A competitor's customers will be pursued not merely by Qwest but by other competitors. In the likely event that the customer had previously received service from Qwest, Qwest could use its Win Back tariff to lure the customer. But due to the tariff's restrictions, it is likely that no other service provider would qualify to offer Win Back service to the customer. After Qwest wins the customer back, the company that lost the customer might qualify to offer resold Win Back service to the customer in an attempt to again lure the customer's business. But typically all of the other competitors would still be excluded from offering Win Back service to the customer. In short, the tariff's arbitrary limitation results in distorting the market among new entrants.

C. Discrimination Among Retail Customers

Finally the Commission faces the question of whether customers who no longer receive Qwest's service are "under similar circumstances" to customers who do, or to customers who had never received Qwest's service. As the Supreme Court noted, "Regardless of the carrier's motive – whether it seeks to benefit or harm a particular customer – the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services."²¹

Of course, some circumstances do warrant treating different customers differently. A telecommunications provider might charge customers differently that are in different customer classes. A provider might charge customers differently on the basis of the cost of providing service – including cost differences that arise when a customer agrees to receive an unusual volume of service, or service for a different term, or a service that is subject to different local taxes, fees or surcharges.²² And a provider may give employees a discount on their phone service as a form of compensation.²³

²⁰See, for example, *id.*

²¹*AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998) (citing *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218, 229 (1994)).

²²Minn. Stat. § 237.60, subd. 3.

²³Minn. Stat. § 237.14.

But in this case, the Commission cannot determine a legitimate reason for Qwest to target a tariff solely at former customers. The distinction is not cost-based; Qwest assures the Commission that the cost of providing its Win Back service is no less than the cost of providing local service generally. The distinction is not based on customer class. The distinction is not being offered as an employee discount.

The distinction appears to be designed solely to segment the market to facilitate price discrimination. Simply put, Qwest has reduced its price to attract more customers, but Qwest does not want to let existing customers receive the benefit of the price reduction, and does not want to provide competitors with an opportunity to resell a broader offering. As a result, customers that are otherwise identically situated end up making different contributions towards Qwest's operating costs. When pursued by a monopolist, the Commission finds that this practice is unreasonably discriminatory because it accords different treatment to customers that receive service under similar circumstances. Consequently, the Commission concludes that the tariff violates Minnesota Statutes §§ 237.07, subd. 2; 237.081, subd. 4; 237.09, subd. 1; 237.121(a)(5); 237.14; and 237.60, subd. 3.

D. Conclusion

The Commission has previously wrestled with the effect of the incumbent's promotional activities on the development of competition. When the Commission rejected U S WEST's proposed promotion in the *SingleNumber Service* case, the Commission reasoned as follows:

This marketing strategy and its resulting competitive advantage are available to U S WEST only because it is currently the monopoly provider.

To allow U S WEST or any other incumbent provider to exploit its monopoly status and throw up eleventh hour barriers to customers changing companies would directly contravene state and federal policies opening the local telecommunications market to competition. It would complicate, prolong, and perhaps jeopardize the already complex process of transforming a monopoly environment into an effectively competitive one.²⁴

Applying the same reasoning to the Win Back tariff, the Commission will reach the same conclusion. This Commission is charged with removing barriers to competition and protecting customers from unreasonable discrimination. By writing a backwards-looking condition into the tariff, U S WEST was able to exploit the advantages of its historical status as the monopoly provider, and to extend those advantages into the future. This situation must not endure.

For the foregoing reasons, the Commission finds the Win Back tariff to be unreasonably discriminatory and anti-competitive. Finding no compelling countervailing reason to sustain the tariff, the tariff will be disapproved.

²⁴In the Matter of U S WEST Communications, Inc's Proposal to Offer a Rate Stability Plan for SingleNumber Service, Docket No. P-421/EM-95-1245, ORDER REJECTING RATE STABILITY PLAN (May 7, 1996).

ORDER

1. Qwest's Business, Residence and Toll Competitive Response Program is rejected.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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Summary of BellSouth's Anti-Competitive Activity in the Local Retail Market
**** As of July 15, 2002 ****

State	Proceeding	Facts/Context	Holding/Result/Status
Alabama	<i>Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in the States of Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, Federal Communications Commission, WC Docket No. 02-150</i>	Comments of US LEC Corp. (July 11, 2002) Notes examples of improper BST win-back activities that were detailed in the Georgia/Louisiana Section 271 proceeding (see below).	
Alabama	Unknown	Allegations as of April 2001 that BST retail was calling Actel customers (Actel had filed for bankruptcy) in Alabama, advising these customers that they should not try another CLEC, and then offering win-back promotion. Cannot find reference to this incident in pleadings before APSC.	
Alabama	<i>BellSouth Full Circle Promotion; Generic Proceeding In re Telephone Rules Governing Promotions, Alabama Public Service Commission, Docket Nos. 27989 and 15957 (Apr. 2, 2001)</i>	SECCA sought to stay BST Full Circle Promotion, which targeted former business customers and provided discounts up to 20% for terms of up to 36 months. SECCA also sought institution of generic proceeding concerning promotions.	Report and Order (Apr. 2, 2001) Both proceedings to be conducted under a joint hearing and a joint record. Stay of promotion not granted. Proceeding remains pending.
Florida	<i>Petition of Florida Competitive Carriers Association for Expedited Review and Cancellation of BellSouth Telecommunication, Inc.'s Key Customer Promotional Tariffs, Florida</i>	(1) Challenge to successor tariff to that challenged by Florida Digital Network in Docket No. 020119-TP on essentially the same grounds (see below).	No action taken by FPSC as of July 14, 2002.

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	Public Service Commission, Docket No. 020578-JP (Petition filed June 25, 2002)	(2) Also challenges the 24- or 36-month lock-up feature of the promotion. Customers that want to leave are required to reimburse BST for all discounts received and pay any applicable termination charges.	
Florida	<i>Petition of Florida Digital Network, Inc., for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and for an Investigation of BellSouth Telecommunication, Inc.'s Promotional Pricing and Marketing Practices</i> , Florida Public Service Commission, Docket No. 020119-TP	Key Customer Program: (1) Percentage discount of 10 or 25% off of the customer's monthly total billed revenue, depending upon the length of contract signed. (2) Percentage discount of 50 or 100% off of the monthly hunting service fees, depending upon the length of contract signed. (3) A choice of Internet services consisting of certain waivers or monthly credits. (4) Available to new, existing, or former customers in selected wire centers. (5) Termination liability—must reimburse BST for all discounts received and pay any applicable termination charges. <i>Note: BST admitted that it had erroneously enrolled 8 customers in its 2002 Key Customer Promotion (all 8 were current BST customers at time of enrollment). See Notice of Proposed Agency Action Order, at 15.</i> See Petition (filed Feb. 24, 2002) (1) Challenge to Key Customer Program tariff (T-020035) (2) Alleges below cost, non-compensatory pricing.	See Notice of Proposed Agency Action Order Regarding BellSouth's 2002 Key Customer Tariff Program and Winback Promotions (June 28, 2002) (petitions for formal proceedings due July 19, 2002). (1) BST's targeting of specific geographic markets and offering volume and term discounts is permissible under applicable Florida price regulation statute (Section 364.051(5)(a)). (2) Separate tariff increasing retail rates was considered and approved by FPSC. FDN has not demonstrated that the tariffs viewed alone or in combination are unduly discriminatory in concept. (3) Termination liability provisions are commonplace in many types of contracts. BST's tariff is not unduly discriminatory. (No explanation of this conclusion.) (4) Offering is compensatory if it is offered at a rate that is equal to or greater than its incremental cost. In response to staff interrogatories, BST provided cost information concerning approximately 4500 subscribers on a "typical customer" basis (not actual customers). Percentage of contracts which are potentially non-compensatory is "very low." Based on this, agency concludes that rates are compensatory (no real explanation of why this is so). (5) Rejects argument that rates for promotion are

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		Pricing designed to eliminate the competition. (3) Alleges that, viewed in combination with separate tariff increasing retail rates in all markets, the promotion is anti-competitive. (4) Alleges results in rates that are lower than an ALEC reseller's wholesale cost. (5) Alleges unduly discriminatory in concept because targeted to specific class of customers (ALEC customers). (6) Alleges that termination liability provisions are discriminatory. "Poison pill."	less than the wholesale cost for an ALEC. (BST presented data on this issue.) (6) Declines to impose a waiting period whereby BST would be precluded from initiating "win-back" activities, but notes that BST has instituted a region-wide 10-day waiting period. (7) BST should be precluded from including any marketing information in its final bill sent to customers who have switched providers.
Florida	AG Investigation; case brought by XO Communications and Access Integrated Networks [Need documentation.]	Prompted by untariffed bonus point promotion—BST's Select Program.	
Florida	Letter from Rick Moses, Chief, Bureau of Service Quality, Florida Public Service Commission, to Nancy H. Sims, BellSouth Telecommunications, Inc. (May 2, 2001) (see also news story concerning same)		Seeking (i) script, (ii) 50 randomly selected tapes, (iii) BST's policy on when to contact customers, (iv) documentation on how long it takes to reactivate a customer's service after deciding to switch back to BST, and (v) how BST employees are informed about what customers to call.
Florida	<i>Investigation into Allegations of Anticompetitive Behaviors and Practices of BellSouth Telecommunications, Inc.</i> , Florida Public Service Commission, Docket No. 00-1077-TL [Need copies of relevant pleadings.]		
Florida	<i>Petition to Review and Cancel BellSouth Telecommunications, Inc.'s</i>	Challenge to BST's "Three Free" promotion targeted at small business customers in service	On February 19, 1999, BST withdrew the tariff.

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	<i>Promotional Tariff (T-98-1783) by Arrow Communications, Inc., Florida Public Service Commission, Docket No. 990043-TP</i> [Electronic copy of petition not available.]	areas who were currently being served by ALECs. Arrow filed petition on January, 13, 1999, alleging that tariff was discriminatory and anti-competitive, in violation of Sections 364.01(g), 364.09, and 364.10, Florida Statutes.	On February 24, 1999, Arrow withdrew its Petition. See Order Closing Docket (Order No. PSC-99-0570-FOF-TP (Mar. 29, 1999).
Georgia	<i>Joint Application of BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Federal Communications Commission, CC Docket No. 02-35</i> [Georgia/Louisiana II]		Memorandum Opinion and Order, FCC 02-147 (May 15, 2002), at ¶ 303 Finds that, in the absence of a formal complaint to FCC that BST has failed to comply with 47 U.S.C. § 222(b), the win-back issue in the proceeding (see below) has been appropriately handled at the state level and that the actions undertaken by the state commissions and BST should be sufficient to insure that it does not recur.
Georgia	(Same)	Comments of Allegiance Telecom of Georgia, Inc. (Mar. 4, 2002), at 10-11 Alleges three incidents (supported by affidavit) where BellSouth technicians either disparaged Allegiance service or misrepresented Allegiance's service to Allegiance customers.	
Georgia	(Same)	Comments of US LEC Corp. and XO Georgia, Inc. (Mar. 4, 2002) (1) Alleges various questionable tactics to win back KMC customers. In one instance, BST presented a KMC customer a list of BST customers it had allegedly won back, claiming they returned to BST due to poor service (Comments at 55, citing KMC Georgia PSC Comments at 10). Also alleges BST is using KMC's proprietary information to contact BST	

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		customers; BST's reaction to customer switches is nearly instantaneous. (<i>Id.</i>) (2) ITC\DeltaCom noted that a BST rep contacted one of its prospective customers and impugned ITC\DeltaCom's financial stability and its service quality and implied that it is promising service and value that is not always provided. (Comments at 55, citing Georgia PSC 271 Proceeding, Comments of ITC\DeltaCom, Exhibit 2 (May 31, 2001).) (3) IDS Telecom noted that BST's win-back telemarketing campaign targeting its customers occurred "during or immediately after" IDS customers experienced BST-caused service disruptions. BST also told IDS customers that IDS "was going out of business" or "ready to declare bankruptcy." (Comments at 55, citing Comments of ITC\DeltaCom, Exhibit 2 (May 31, 2001).) (4) Access Integrated Networks stated that BST sales reps advised its customer that AIN was bankrupt and that customers should switch service back to BST to avoid losing service. (Comments at 55, citing Georgia PSC Section 271 Proceeding, Comments of AIN, at 21 (May 31, 2001).) (5) US LEC customers have experienced similar conduct (no specifics alleged). (Comments at 55.)	
Georgia	<i>Joint Application of BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Federal Communications Commission,</i>	Opposition Comments of KMC (Oct. 22, 2001) Alleges that BST used proprietary information obtained from KMC for the purpose of BST's own win-back efforts in Georgia and Louisiana (see Demint Affidavit).	

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	CC Docket No. 01-277 [Georgia/Louisiana I]	Alleges that BST has made numerous misrepresentations to KMC customers such as "KMC is only a reseller" or "KMC is about to file bankruptcy" (see Chaisson affidavit).	
Georgia	(Same)	Opposition of CompTel (Oct. 22, 2001) (1) In March 2001, e.spire Communications executed a contract with a customer to provide services in Georgia. After the parties executed the contract, BST contacted the customer to market BST's own services. (2) On numerous occasions, BST's sales personnel have represented to e.spire's customers that e.spire is "going out of business." In June 2001, at least two e.spire customers in Alabama informed e.spire that a BST sales person contacted the companies and made representations that e.spire "will cease operations by the end of June 2001," an accusation known to be false. (3) In an attempt to gain a customer of ITC^DeltaCom, BST sent an e-mail to that customer (i) asserting that ITC^DeltaCom has lost money for the past five years, (ii) questioning whether ITC^DeltaCom would remain financially competitive, (iii) and insinuating that ITC^DeltaCom might not be responsive to local loop troubles. (4) BST has engaged in a pattern and practice of similar anti-competitive and illegal win-back efforts throughout Georgia. (5) BST takes advantage of its role as the wholesale provider in engaging in win-back efforts. For example, in March 2001,	

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		ITC^DeltaCom received reports that BST representatives were contacting ITC^DeltaCom customers directly and quoting substantial charges for installing telecommunications services. Also statements that BST could deliver the services more quickly. (6) Alleges that BST starts win-back activities with respect to KMC customers almost immediately following the submission by KMC of orders to switch end user customers.	
Georgia		<i>Note: On October 2, 2001, e.spire filed a complaint against BST at the FCC. It was dismissed by the Enforcement Bureau without prejudice on procedural grounds, requesting the parties to engage in mediation before re-filing. [Need copy of complaint.]</i>	
Georgia	<i>Investigation by the Georgia Public Service Commission of BellSouth Telecommunications "Win-Back" Activities Set Forth in Docket No. 14232-U, Georgia Public Service Commission (Aug. 2, 2001)</i>	Initiation of proceeding to investigate allegations of anti-competitive activity and request that staff of GPSC and interested parties develop a code of conduct for the industry. Arises from: (1) May 31, 2001, Comments of KMC, ITC^DeltaCom, WorldCom, AT&T, and Z-Tel in Section 271 proceeding (Docket No. 6863-U). [Need copies of comments,] (2) Complaint of IDS Telecom, Inc., Docket No. 14238-U (July 16, 2001). See draft Marketing Code of Conduct as of March 18, 2002.	Interim Order, Docket No. 14232-U (July 23, 2001) (1) Temporary prohibition of BST win-back activities for 7 days once customer switches to another local telephone service provider. This temporary prohibition does not appear to have expired. (2) Prohibits BST from inserting marketing material in final bill its sends to customers that have switched service.
Georgia	<i>Complaint of IDS Long Distance, Inc.</i>	IDS alleged, among other things:	Complaint voluntarily dismissed with prejudice on

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	<i>n/k/a IDS Telcom, L.L.C., Against BellSouth Telecommunications, Inc., and Request for Emergency Relief, Docket No. 14238 (July 16, 2001)</i>	(1) BST's Full Circle 2001 promotion is anti-competitive (customers who have switched in last 2 years; with BST revenue of \$70 to \$12,500; 18, 24, or 36 month terms get 10%, 15%, or 20% discount) (2) BST has applied the program in an anti-competitive fashion—by offering the promotion to IDS's customers when those customers call BST to inquire why their service has been disconnected or impaired. Anti-competitive effect compounded by the long-terms CSAs. (3) Resale discount is only 17.3%. A 20% retail discount cannot be compensatory. This allows BST to price below the "avoided cost" discount—a form of predatory pricing and cross-subsidization. (4) In its telemarketing campaigns, BST misrepresents IDS's financial stability or ability to provide quality service. (5) These activities have allowed BST to win back "thousands" of IDS customers and has "crushed" IDS's effort to provide alternative local exchange services in the State of Georgia" (at 6). From November 2000 to February 2001, BST won back more than 3100 IDS customers. (At least 2000 of these switched back because of BST's own OSS failures in the conversion process.) (6) BST improperly shares information between wholesale and retail divisions. When a CLEC places an order to switch, the customer automatically receives correspondence from BST seeking to have the customer "return" to BST.	October 2, 2001.

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		BST is improperly sharing CPNI. <i>(Note: IDS does not give specific examples in support of these allegations)</i>	
Kentucky	<i>Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996, Kentucky Public Service Commission, Case No. 2001-00105</i>		Order (May 24, 2002) Refusing to hear Motion for Rehearing and Reconsideration filed by SECCA on May 16, 2002, alleging anti-competitive activities. [Need copy of SECCA filing.]
Kentucky	<i>Complaint of Inter Mountain Cable, Inc. d/b/a MTS Communications Against BellSouth Communications, Kentucky Public Service Commission, Docket No. 2001-206 (June 6, 2001)</i>	Asks KPSC to determine if BST's win-back promotion is misleading to CLEC customers. Complaint based on the following incident: On May 1 and 7, 2001, MTS placed orders to convert a BST customer, an owner of two motorcycle dealerships in Prestonsburg and Pikeville, Kentucky. During the interim period before service was fully converted, BST sales representatives contacted the customer and encouraged the customer to institute a "LEC freeze." MTS ultimately retained the customer.	Case settled. Case dismissed without prejudice on April 1, 2002.
Louisiana	<i>Consideration and Review of BellSouth's Preapplication Compliance with Section 271 of the Telecommunications Act of 1996 and to Provide InterLATA Services Originating In-Region, Louisiana Public Service Commission, Order No. U-22252(E)</i>		Order (Sept. 21, 2001), at 3 (1) BST shall abstain from any marketing activities directed to a customer for seven days after the customer switches to another local telephone company. (2) BST's wholesale divisions are prohibited from sharing information concerning customer switches with its retail division.

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Louisiana	<i>Joint Application of BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Federal Communications Commission, CC Docket No. 01-277 [Georgia/Louisiana I]</i>	Comments of Xspedius Corp. (Mar. 4, 2002), at 11-12 Alleges that BST uses proprietary information obtained from Xspedius through the BST wholesale unit for the benefit of its retail units. See Affidavit of Marymargret Williams Groom describing example where Postal Service was contacted by BST asking why it was considering switching its service from BST to Xspedius (at 2). Alleges, in general, other instances where customers contacted by BST upon submission of a CSR request by Xspedius, when previously the customer had not heard from BST in "years."	(3) BST shall not include marketing information in the final bill sent to a customer that has switched providers.
Mississippi	<i>Formal Complaint of Southern Telecommunications Co., LLC Regarding Bellsouth Telecommunications, Inc.'s Failure to Properly and Fairly Apply Credits from Its Key Customer Promotion, Complaint, Mississippi Public Service Commission, Docket No. 01-AD-0717 (filed Oct. 16, 2001)</i>	Challenge to Key Customer E Promotion 1999 (Tariff MS 1999-213). Discount based on total revenue. 1-3 years commitment. Cumulative rewards credited to customer every 6 months. Southern attempted to enroll in this program as a reseller. BST allowed credits for the first 2 six-month periods, then denied credits thereafter. Alleges that BST intentionally misled Southern concerning its eligibility for this promotion. Also alleges that BST has provided the 2000 and 2001 Key Customer promotion to its own customers who otherwise do not qualify. <i>(Note: BST claims Southern submitted requests for credits for ineligible customers and</i>	Order (May 31, 2002) Case settled. Complaint dismissed.

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		counterclaims for these sums. BST also claims that BST customers were eligible for the Key Customer promotion.)	
Mississippi		Note: See allegation in Tennessee proceeding (summarized below) of example of unitarified offering by BST; AIN alleges similar offer made to customer by Berry Direct to customer in Southhaven, Mississippi).	
North Carolina	Application of BellSouth Telecommunications, Inc. to Provide In-Region, InterLATA Service Pursuant to Section 271 of the Telecommunications Act of 1996, North Carolina Utilities Commission, Docket No. P-55, Sub 1022		Order and Advisory Opinion Concerning Section 271 Requirements (July 9, 2002) (1) BST shall abstain from any marketing activities directed to a customer for seven days after the customer switches to another local telephone company. (2) BST's wholesale divisions are prohibited from sharing information concerning customer switches with its retail division. (3) BST shall not include marketing information in the final bill sent to a customer that has switched providers.
North Carolina	BellSouth Joint Trial Promotion with BAPCO Targeting Small Business Customers in Greensboro, North Carolina Utilities Commission, Docket No. P-55, Sub 1367	Small business customers located within the Greensboro wire centers targeted under the Key Customer promotion would be contacted by BAPCO. Benefits also offered to inbound callers. If new or existing BAPCO customer signs a 24- or 36-month term election agreement pursuant to Key Customer program and purchases new BAPCO advertising, customer receives a voucher from BST that would provide monthly credits applied to the customer's BAPCO bill over a 12-month period totaling \$600, \$1200, or \$1800, depending	Order Denying Promotion (June 25, 2002) Rejects proposed joint promotion with BAPCO because BST proposes to make promotion available only in the areas where BAPCO is conducting campaigns, rather than all customers targeted by the Key Customer promotion. (Denial is without prejudice to refile.)

State	Proceeding	Facts/Context	Holding/Result/Status
		on the number of access lines of the participating customer. Customer not required to pay back BAPCO credits if it terminates Key Customer contract. Available for resale.	
South Carolina	<i>Southeastern Competitive Carriers Association et al. v. BellSouth Telecommunications, Inc.</i> , South Carolina Public Service Commission, Docket No. 2000-378-C	SECCA and two CLECs filed complaint alleging anti-competitive impact of BST win-back promotion that (i) waived line connection charges, (ii) provided discounts up to 18% for terms up to 36 months, and (iii) included termination liability. BST witness testified that discounted prices are still above most tariffed prices of CLEC competitors and that discounted prices exceed cost of services.	Order Ruling on Complaint (Oct. 29, 2001) (1) Win-back promotion is not discriminatory, anti-competitive, or abuse of market position. (2) Win-back promotion is available for resale by CLEC. (3) BST prohibited from engaging in any win-back activities for 10 calendar days from date of service by CLEC. (4) BST prohibited from exchanging information within divisions that end users have requested switch. (5) BST prohibited from including any marketing information in final bill. Order Granting in Part and Denying in Part Petition (Jan. 9, 2002) Clarifies that prohibition on internal information sharing begins at time BST comes into possession of information from CLEC that suggests that specific customer is considering proposal from CLEC.
Tennessee	<i>Complaint of XO Tennessee, Inc.</i>	AIN Complaint filed September 18, 2001.	Initial Order (Apr. 16, 2002)

State	Proceeding	Facts/Context	Holding/Result/Status
	<i>Against BellSouth Telecommunications, Inc. and Complaint of Access Integrated Networks, Inc. Against BellSouth Telecommunications, Inc., Tennessee Regulatory Authority, Docket Nos. 01-00868, 01-00808</i>	(1) Rep of Berry Direct offered a customer three free months of service in exchange for enrolling in Key Business Discount Program. BST admitted allegation. XO Complaint filed October 9, 2001. (2) BST Senior Account Executive offered to provide a customer with service pursuant to Key Discount Program and to include three free months of service. BST admitted allegation. <i>Note: At the time of the offer, BST told the TRA that it had "no [marketing] programs that were specifically aimed at regaining former BellSouth customers." AIN/XO Complaints, Transcript of Proceedings, Monday, February 4, 2002, at 162, 243.</i>	Among other things, Initial Order concluded that BST's actions constitute unjust discrimination as defined by Tenn. Code Ann. § 65-4-122(a). Through the Select Program BST charged or received from persons receiving the same services under the same circumstances and conditions different rates for those services and made a preference between the persons thereby committing unjust discrimination. (<i>Note: This conclusion was vacated by Final Order.</i>) Final Order (June 28, 2002) (1) BST's Select Program violated three specific rules through its (i) failure to tariff the program, (ii) failure to charge customers tariff rates, and (iii) failure to provide the Select Program for resale. Affirmed fine of \$169,200 under Tenn. Code Ann. § 65-4-120. (2) Vacated hearing officer's finding that BST had committed unjust discrimination under Tenn. Code Ann. § 65-4-122(a) because no evidence that BST denied enrollment in the program to any customer meeting the enrollment criteria. (3) Affirmed hearing officer's requirement that BST cease offering conditions related to the purchase of regulated services, i.e., the ability to earn points which have not been approved by the Authority. BST is required to discontinue the non-tariffed Select Program because it contains terms and conditions for regulated service not approved by the Authority, not because it is discriminatory. (<i>Note: under Tennessee law, TRA is required to refer findings of unjust discrimination to the district attorney.</i>)

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Tennessee	<i>Complaint of Access Integrated Networks, Inc. Against BellSouth Telecommunications, Inc.</i> , Tennessee Regulatory Authority, Docket No. 01-00808	Motion to Open Show Cause Proceeding filed October 16, 2001. Docket consolidated with 01-00868 (XO's complaint proceeding). Attorney General intervenes in support of investigation of possible misrepresentations by BST. Expresses particular concern regarding misrepresentation by BST Senior Account Executive Robin Porter in Docket 01-00868.	
Tennessee	<i>BellSouth Telecommunications, Inc.'s Tariff to Offer a Special Promotion for Business Customers Subscribing to Exchange Lines with Hunting</i> , Tennessee Regulatory Authority, Docket No. 99-00936	BST submitted letter proposing "special promotion" to be effective on one day's notice. 40% to 80% discounts, depending on length of commitment, to business customers with less than a \$10,000 per month account and 4 to 20 lines. (Later clarified that discounts only apply to hunting rates, not to business line rates.)	Order Denying Tariff (Nov. 7, 2000) BST's submission was not a "special promotion" and must be tariffed. Not a temporary waiver of charges or a one-time credit. "Any alleged promotion . . . that locks up a customer for multiple years in a manner that effectively prevents the customer from switching to a competitive carrier must not be permitted to go into effect without the Authority first having an opportunity to conduct a timely review."
Tennessee	<i>Complaint of ISDN-NET Against BellSouth Telecommunications, Inc. for Offering an Illegal Rebate</i> , Tennessee Regulatory Authority, Docket No. 99-00630	BST promotion to residential customers. Would receive 2 coupons redeemable for \$15.00 cash upon ordering the Complete Choice Plan together with another service such as Internet service. ISDN alleged that the promotion was discriminatory and anti-competitive and violates provisions of Tennessee law (including provision prohibiting rebates). BST modified promotion so that all customers ordering Complete Choice would receive redeemable \$15 coupon. Separate promotion provided that any Complete Choice customer that also subscribed to another service, such as wireless or Internet, would receive redeemable \$15 coupon.	Order Denying Complaint and Motion for Suspension (Aug. 21, 2000) Complaint and request for suspension denied because ISDN has not demonstrated that customers receiving the promotional discount and customers not receiving the discount are similarly situated. Portion funded by regulated service would be considered in adjusting the annual price cap. The TRA will continue to evaluate such complaints on a case-by-case basis.

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BellSouth's Regional Suspension of Win-back Activities		(1) In May 2001, BST says it "temporarily suspended" outbound telemarketing efforts to win back customers who left for CLEC local services in all states after CLECs complained about unethical tactics, including falsely telling CLEC customers that competitor was bankrupt. <i>See</i> Comm. Daily (May 4, 2001). (2) It is again reported that BST states it "recently" suspended win-back activities throughout its region because of complaints. <i>See</i> Comm. Daily (Aug. 22, 2001). (3) BST resumes win-back activities in all states except Georgia (see above) and Florida. <i>See</i> Comm. Daily (Sept. 4, 2001).	
BellSouth's Review of Regional Win-back Activities (July 17, 2001)	<i>See, e.g.,</i> BellSouth's Late-Filed Exhibit in Docket No. P-55, Sub 1022, North Carolina Utilities Commission (filed Nov. 6, 2001)	BST's review acknowledges the following: (1) Between April 23 and April 25, 2001, several BST Authorized Sales Representatives erroneously told 10 to 15 former BST customers that their existing CLEC provider was bankrupt or was otherwise going out of business and unable to serve its customers in an attempt to sell Full Circle promotion. (2) Information concerning the financial condition of specific CLECs and the CLEC industry in general was inappropriately distributed by BST's competitive analysis organization to its ASR team. (3) "CLEC B" provided BST with a list of six small business customers that were allegedly contacted by BST sales personnel within two days following either access of a CSR by CLEC B or	

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		the execution of a LOA in favor of CLEC B. BST did not find evidence of improper contacts supporting these allegations. (4) Florida May 2001 complaint with Florida PSC alleging that BST had falsely stated that "CLEC C" was going out of business or was ready to declare bankruptcy. Complaint included nine sworn affidavits from CLEC C customers. Also alleged improper use of wholesale information. BST did not deny these allegations. (5) In April 2001 an account executive in Louisiana used an unapproved CLEC list to make win-back sales calls. (6) In April 2001, a Birmingham sales rep engaged in outbound win-back efforts using an unapproved customer list. (7) In April 2001, a North Carolina account executive engaged in inappropriate "systems surfing" in an attempt to generate an illicit CLEC list.	

Summary of Win-Back and Anti-Competitive Activities in Other ILEC States

State	Proceeding	Facts/Context	Holding/Result/Status
Illinois	<i>Z-Tel Communications, Inc. v. Illinois Bell Telephone Co., d/b/a Ameritech Illinois; Verified Complaint and Request for Emergency Relief Pursuant to Sections 13-514, 13-515 and 13-516 of the Illinois Public Utilities Act, Illinois Commerce Commission, No. 02-0160</i>	When Ameritech lost customer to Z-Tel, Ameritech knew immediately. But in reverse situation, Z-Tel said Ameritech did not notify it until some time after switch back had occurred, so customer was being double-billed and usually blamed Z-Tel for error. Z-Tel also complained that, when customers left Ameritech, they usually said why they left and Ameritech's win-back sales force could use this proprietary information to prepare win-back offer. Z-Tel said its salespeople did not have advantage of such "inside" knowledge, so they were handicapped in trying to counter Ameritech's win-back effort.	Order (May 8, 2002) [reported to be 3-2 decision] (1) SBC/Ameritech and other incumbent telcos must inform CLECs immediately when efforts to win back CLEC customers are successful and customers return to incumbent's service. (2) Incumbents must allow CLEC salespeople same access to customer information database that incumbent's sales representatives have (but rehearing has been granted on this issue; see below). (3) Order did not affect existing 17-day waiting period before incumbents can initiate win-back efforts. (4) Ameritech required to pay \$160,000 to compensate Z-Tel for costs related to defending itself at ICC against double-billing complaints <i>plus</i> reimburse Z-Tel's legal fees for bringing anti-competitive activity complaint. Ameritech also must send letter to double-billed customers explaining that foul-up was its fault, not Z-Tel's. Rejected Z-Tel's request for punitive damages. It agreed with Ameritech that Z-Tel's complaints were not caused by intentional Ameritech policy, but rather resulted from system and process problems. ICC Action (June 19, 2002) (1) ICC voted to allow rehearing on the issues of (i) whether Ameritech has to provide parity to CLECs in the form of providing the CLEC with the line disconnect file that Ameritech's retail division receives, in addition to the line loss notification that

State	Proceeding	Facts/Context	Holding/Result/Status
			the CLEC currently receives; and (ii) whether Ameritech is liable for any civil penalties. (2) ICC voted to deny rehearing on the issue of Ameritech's liability. Rehearing has yet to be scheduled; Ameritech has also filed a notice of appeal to an appellate court.
Illinois	<i>Association of Communications Enterprises f/k/a Telecommunications Resellers Association v. Ameritech Illinois, Inc.; Complaint against enforcement of unjust and anti-competitive termination penalties in tariffs and contracts for Value-Link service and for modification of Value-Link tariffs and contracts.</i> Illinois Commerce Commission, No. 00-0024	ASCENT alleged that Ameritech's early termination penalties under tariffs operated on a "take-or-pay" basis were anti-competitive and unreasonable and so exorbitant as to be unconscionable under Illinois common law and the Restatement (Second) of Contracts. If customer sought early termination, it would have to pay remaining annual commitment. Thus, disparity between discount obtained and early termination penalty was unjust and unreasonable. Unreasonableness of early termination charges also alleged to be illustrated by win-back tariffs which capped termination charges at \$200.	Order on Rehearing (Feb. 20, 2002) (1) Ameritech's retail division must provide notice of success of win-back effort to both Ameritech's wholesale division and CLEC. In no event can Ameritech collect termination charges from a CLEC after win-back. (2) Ameritech's ValueLink termination penalties are unreasonable impediments to the development of competition; they are intended to lock in customers and that is their primary effect. (3) Termination penalties contained in several Ameritech tariffs are unconscionable. (4) Requires Ameritech to institute termination penalties basically equivalent to a return of any unearned discount actually received over no more than the twelve months immediately preceding termination.
Indiana	<i>Complaint of Time Warner Telecom Against Ameritech Indiana Regarding Its Unlawful Market Practice of Issuing Equipment Vouchers in Violation of the Indiana Code and</i>	After TWTC worked for more than four months with a cardiac care practice for a state-of-the-art network and services and obtained a verbal commitment, Ameritech offered the customer an equipment voucher worth an estimated \$170,000.	

State	Proceeding	Facts/Context	Holding/Result/Status
	<i>Opportunity Indiana II and Petition for Emergency Suspension of Any and All Ameritech Indiana Equipment Voucher Marketing Practices Pending Commission Investigation, Verified Complaint and Request for Emergency Relief, Indiana Utility Regulatory Commission, Cause No. ____</i> [No official documentation.]	Allegations, <i>inter alia</i> , of illegal tie between infrastructure commitment and purchase of telecommunications service.	
Indiana	<i>Petition for Suspension of Any and All Ameritech Indiana Win-back Promotions, Including But Not Limited to Complete Link Promotions, Pending Commission Investigation of Tariff, Verified Petition and Request for Emergency Relief, Indiana Utility Regulatory Commission, Cause No. 42218 (filed Apr. 19, 2002 by Midwest Telecom of America, Time Warner Telecom of Indiana, L.P., and Cinergy Communications Co.)</i> [Need copies of filings.]		
Kansas	<i>General Investigation Into Winback/Retention Promotions and Practices, Motion to Initiate Investigation, Kansas Corporation Commission, Docket No. 02-GIMT-678-GIT (filed Mar. 5, 2002 by Staff of Kansas Corporation Commission)</i>	Staff's Motion to Initiate Investigation summarizes win-back promotions filed by SWBT and also summarizes other PUC win-back actions, particularly in BST's region. Staff concerned that win-back practices may constitute discriminatory treatment of customers.	Order (May 17, 2002) Grants Staff's Motion and initiates investigation. Proceeding in preliminary stages.
Kansas	<i>Application of Southwestern Bell Telephone Company Filing a Winback Business Access Service Promotion, Kansas Corporation Commission,</i>	SWBT's promotion at issue is targeted only at customers of a CLEC and gives 100% credit of installation charge to customer who signs one-year commitment. Promotion lasts for six months.	Order (Apr. 23, 2002) Orders Staff of KCC to conduct in-depth investigation of SWBT's filing in docket,

State	Proceeding	Facts/Context	Holding/Result/Status
	Docket No. 02-SWBT-677-MIS		notwithstanding general investigation being undertaken in Docket No. 02-GIMT678-GIT Proceeding is pending.
Minnesota	<i>Commission Investigation into the Issues Raised by New Access Communications Regarding the Application of Qwest's Avoided Cost Discount to Its Win Back Tariff</i> , Minnesota Public Utilities Commission, Docket No. P-421/CI-02-582	New Access Communications sought clarification of order arising from MPUC proceeding on US West's avoided cost discount. In particular, clarification was sought on how Qwest's 17.66% wholesale discount rate should be applied in light of Qwest's win-back tariff. Under the win-back tariff, a CLEC residential customer who returns to Qwest gets a waiver of all non-recurring charges and up to two months' free service.	Order Closing Docket (P-999/CI-99-776) and Opening a New Investigation (May 2, 2002) Orders new investigation as issue of first impression of Qwest's wholesale discount rate in connection with win-back tariff. Proceeding in preliminary stages.
Minnesota	<i>Qwest Proposal to Offer Local Service Freeze Protection</i> , Minnesota Public Utilities Commission, Docket No. P-421/CI-02-75	AT&T opposed Qwest's plan to implement a local service freeze protection plan, arguing that it appeared to be an attempt to create customer confusion and to make it difficult for customers to move to CLECs. No evidence of local service slamming in Minnesota.	Order (May 7, 2002) Rejects local service freeze option and requires Qwest to stop offering it at this time.
Minnesota	<i>Commission Investigation into Qwest's Compliance with Section 271(d)(3)(C) of the Telecommunications Act of 1996 that the Requested Authorization Is Consistent with the Public Interest, Convenience, and Necessity</i> , Minnesota Public Utilities Commission, Docket No. P-421/CI-01-1373	Direct Testimony of Curtis C. Nelson on behalf of Minnesota Office of the Attorney General (May 3, 2002) (1) Summarizes Qwest's business and residential win-back promotions. (2) States that Qwest's business win-back program is both discriminatory and anti-competitive. It is discriminatory because it is not available for resale and, in addition, because customers must stay with Qwest for one year or repay the credits.	

State	Proceeding	Facts/Context	Holding/Result/Status
		(3) States that Qwest's residential win-back program is anti-competitive because Qwest provides a waiver of charges to win-back customers that it does not provide to CLEC resellers when they first win a customer from Qwest. (4) States that to eliminate anti-competitive and discriminatory impact of win-back programs either the wholesale discount rate must be set to take account of the win-back credits or Qwest must be precluded from offering special rates, waivers, credits, or terms to win back customers from resellers.	
Missouri	<i>Southwestern Bell Telephone Company's Tariff Filing to Initiate a Residential Customer Winback Promotion</i> , Missouri Public Service Commission, Case No. TT-2002-472 (consolidated with Case No. TT-2002-473 involving business customer win-back promotions)	Residential promotion waives service and equipment charge to customers who return to SWBT. Unclear what the business promotions are.	Orders in effect from April 2002 have suspended tariffs, pending the proceeding.
Missouri	<i>Southwestern Bell Telephone Company's Proposed Revisions to PSC Mo. No. 26, Long Distance Message Telecommunications Service Tariff</i> , Missouri Public Service Commission, Case No. TT-2002-227	3-2 decision.	Report and Order (July 3, 2002) Tariffed local discounts involving term commitments exceeding one year are anti-competitive. Also struck down CLEC discounts similarly involving term commitments exceeding one year.
Missouri	<i>Southwestern Bell Telephone Company's Tariff Filing to Initiate a Business MCA Promotion</i> , Missouri Public Service Commission, Case No. TT-2002-108	SWBT proposed tariff that would implement a discount (up to 25%) for its business metropolitan calling area (MCA) service based on the customer's execution of a one-, three-, or five-year term agreement.	Report and Order (Dec. 18, 2001) Tariffs were determined to harm competition in the local exchange services market, principally because they involved terms exceeding one year. Decision was limited to two tariffs before it, but MPSC noted

State	Proceeding	Facts/Context	Holding/Result/Status
		In a separate tariff, SWBT would establish a CompleteLink service offer that would grant discounts to customers who agreed to term and volume commitments. In addition, this latter promotion offers an additional 4% discount to customers who receive and turn down a service offer from a CLEC to stay with SWBT.	that other SWBT and similar CLEC tariffs were before it (see above).
Montana	Docket No. N2002.4.44	Qwest win-back promotion is in issue. [Need copies of filings.]	
Montana	<i>US West Communications Introduction of Tariff Transmittal 00-04 "Competitive Response Tariff"</i> , Montana Public Service Commission, Docket No. D2000.2.21	Tariff filing offered waivers and/or bill credits to residential and business customers who wish to return to Qwest. Business offering required one-year contract, but could rebate up to two months service. Filing sought permanent status for promotion. Montana Consumer Counsel argued that end-users would benefit because there would be no charges to change providers and offering was otherwise competitively neutral.	Final Order (Apr. 23, 2001) Approves tariff but provides for one-year sunset. If Qwest intends to request that tariff be extended, it must monitor the program as set forth in the order.
Montana	<i>Third Application of US West Communications, Inc. for Approval of a Residential WinBack Program Tariff</i> , Montana Public Service Commission, Docket No. N99.2.20 (consolidated with Docket No. N99.2.44 involving business competitive response win-back tariff)	Residential tariff sought to make win-back promotion last 12 months. Business win-back promotion was not available for resale and contained no time limit.	Final Order (Mar. 10, 1999) Finds the tariffs to be in violation of law. Finds the duration of the promotions (12 months) too long and construes "limited period of time" in statute (MCA § 69-3-305(5)(a)) to mean no more than six months.
Ohio	<i>In the Matter of the Complaint and Motion of CoreComm, Inc. v. Ameritech Ohio</i> , Complaint Against	Win-back complaint allegations: (1) Ameritech offers up to a \$100 credit to return	Entry (Apr. 11, 2002) Temporarily prohibits Ameritech from engaging in

State	Proceeding	Facts/Context	Holding/Result/Status
	Ameritech Ohio and Motion for an Immediate Order Requiring Ameritech Ohio to Cease and Desist from Engaging in Winback Programs, Ohio Public Utilities Commission, Case No. 02-579-TP-CSS (filed Mar. 1, 2002)	to Ameritech, in addition to waiving all non-recurring charge reconnection fees and providing discounted service and/or services at no charge. Provides a select group of customers an unreasonable preference or advantage. (2) Ameritech offers grossly inadequate wholesale service, including failure to send loss of line notices to CoreComm when a customer chooses to switch providers and failure to send completion notices when new customers begin receiving service from CoreComm so CoreComm will know to begin to bill for services. (3) Ameritech uses information obtained through the operation of its network to target lost customers, including line loss notifications.	win-back efforts until 30 days after customer switch. Proceeding remains pending.
Pennsylvania	<i>Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc.</i> , Pennsylvania Public Utility Commission, Docket No. M-00021592	In investigation of certain practices of Verizon, it was found that Verizon employee had violated Code of Conduct in attempting to win back a customer. Verizon was fined \$1000 for this violation. In addition, Verizon had delayed in lifting its local service freezes on three accounts (one business) and was fined \$27,000. These terms were incorporated into settlement agreement.	Final Opinion and Order (June 20, 2002) Approves Settlement Agreement.
South Dakota	<i>Black Hills FiberCom, L.L.C. v. US West Communications, Inc.</i> , South Dakota Public Utilities Commission, Docket No. CT00-055	Complaint, filed March 14, 2000, alleging that US West was soliciting CLEC's customers by offering \$40 cash and waiver of \$50 switching fee.	Order Dismissing Complaint and Closing Docket (Dec. 20, 2000) Parties settled and complaint dismissed.

State	Proceeding	Facts/Context	Holding/Result/Status
Texas	<i>Rulemaking to Amend Subst. R. 26.226 to Address Winback/Retention Offers by Chapter 58 Electing Companies, Texas Public Utility Commission, Project No. 25784</i>	On May 3, 2002, TPUC Staff released a strawman proposal that includes the following provisions: (1) Large ILECs are prohibited from offering former customers discounts within 30 days of switching to a CLEC. (2) Discounts limited to former customers cannot be more than 25% of recurring charges and the promotion cannot exceed 60 days. (3) Customers cannot be targeted for retention purposes only, so an ILEC cannot offer a promotion only to those customers who have changed or are considering changing their ILEC. (4) Large ILECs are prohibited from using customer-specific contracts to circumvent these win-back restrictions. Rulemaking project arose out of proceeding in which Southwest Competitive Telephone Association and others filed petition to amend TPUC rules (Docket No. 24597); while the petition was denied on Nov. 8, 2001, TPUC did initiate this project.	Proceeding is pending.

State	Proceeding	Facts/Context	Holding/Result/Status
Wyoming	<i>Tariff Filing of Qwest Corp. for Authority to Increase Incentives to Make Permanent the Business Competitive Response Program That Was Previously Offered As a Promotion, Wyoming Public Service Commission, Docket No. 70000-TT-02-780</i>	Qwest sought to allow business customers who return to Qwest to receive a waiver of the current non-recurring charges, or up to three month's credit of the current monthly charges, or both on selected services. Customers who return are required to remain with Qwest for a one-year period or the customer will be billed for the charges that were waived. Qwest also sought to make the promotion permanent.	Notice and Order (Apr. 17, 2002) Finds tariff filing to be consistent with the public interest.