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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF INDIANA BELL TELEPHONE)	CAUSE NO. 43599
COMPANY, INCORPORATED FOR)	
TERMINATION OF CODE OF CONDUCT)	<u>FINAL ORDER</u>
REQUIREMENT IMPOSED IN CAUSE NO.)	
41998)	APPROVED:

JUL 08 2009

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BY THE COMMISSION:

Larry S. Landis, Commissioner

Lorraine Hitz-Bradley, Administrative Law Judge

On October 27, 2008, Indiana Bell Telephone Company, Incorporated d/b/a AT&T Indiana ("AT&T Indiana" or "Petitioner") filed its Petition initiating this Cause. AT&T Indiana requests the Indiana Utility Regulatory Commission ("Commission") to relieve AT&T Indiana from any further obligation to comply with the Commission's Order in Cause No. 41998 ("41998 Final Order")¹ wherein the Commission required that AT&T Indiana submit a Code of Conduct, applicable only to AT&T Indiana.

On November 10, 2008, Midwest Association of Competitive Carriers ("MACC") filed a *Petition to Intervene*, which was granted by docket entry dated November 21, 2008. On December 3, 2008, the Commission issued its Prehearing Conference Order, which among other things, established a procedural schedule for this Cause. On January 21, 2009, AT&T Indiana prefiled its direct testimony and exhibits constituting its case-in-chief. On February 2, 2009, Indiana Cable Telecommunications Association ("ICTA") filed a *Petition to Intervene*, which was granted by docket entry dated February 11, 2009. In accordance with modification of the procedural schedule approved by the Presiding Officers, on February 13, 2009, MACC prefiled its direct testimony and exhibits. On February 27, 2009, the Indiana Office of Utility Consumer Counsel ("OUCC") filed its *Notice of Intent Not to Prefile Testimony*. On March 20, 2009, AT&T Indiana prefiled its rebuttal testimony and exhibits.

Pursuant to public notice duly given and published as required by law, proof of which was incorporated into the record by reference and placed in the Commission's official file, a public hearing was held in this Cause on March 26, 2009 at 9:30 a.m. EST in Room 224, 101 W. Washington Street, Indianapolis, Indiana. At the hearing, AT&T Indiana, MACC, ICTA and the OUCC appeared by counsel. AT&T Indiana's and MACC's respective evidence was admitted into the record and the witnesses were made available for cross-examination. No members of the general public attended. By docket entry dated March 27, 2009, the Presiding Officers requested AT&T Indiana to provide documentation regarding its calculation of the

¹ *In the Matter of the Complaint of Comptel, Ascent, AT&T Communications of Indiana GP, TCG Indianapolis, and McLeodUSA Telecommunications Services, Incorporated Requesting that the Indiana Utility Regulatory Commission Order the Structural Separation of Indiana Bell Telephone Company, d/b/a Ameritech Indiana, Cause No. 41998 (Ind. Util. Regulatory Comm'n Dec. 22, 2004).*

financial impact of the Indiana Code of Conduct on AT&T Indiana. The March 27, 2009 docket entry also requested AT&T Indiana and MACC to provide a side-by-side analysis of the code-of-conduct provisions at issue in this proceeding. Finally, the March 27, 2009 docket entry requested MACC to provide documentary evidence in support of certain live testimony offered by its witness at the evidentiary hearing. On April 3, 2009, AT&T Indiana provided the information requested in the docket entry. On April 3, 2009, MACC provided the side-by-side analysis requested in the docket entry and informed the Commission that the live testimony referenced in the docket entry should be stricken from the record. At this time, tw telecom (“TWTC”) informed the Commission that TWTC would no longer actively participate in this docket on behalf of MACC, and TWTC, as an individual company, withdrew from this Cause. On April 13, 2009, AT&T Indiana filed its proposed order in this Cause and filed its response to MACC’s April 3, 2009 filing. On April 23, 2009, ICTA filed a response brief, to which AT&T Indiana replied on May 4, 2009.

The Commission, based upon the applicable law, the evidence of record, and being duly advised, now finds as follows:

1. **Notice and Jurisdiction.** Due, legal and timely notice of the hearing held in this Cause was given and published by the Commission as required by law. AT&T Indiana is a “communications service provider” as defined in Ind. Code § 8-1-32.5-4, and a “provider” as defined in I.C. § 8-1-2.6-0.4. The Commission has jurisdiction over Petitioner and the subject matter of this Cause in the manner and to the extent provided by the laws of the State of Indiana.

2. **Petitioner’s Organization and Business.** AT&T Indiana is a corporation organized and formed under the laws of the State of Indiana, having an office at 240 North Meridian Street, Indianapolis, Indiana 46204. AT&T Indiana is a certificated local exchange and intraLATA interexchange carrier and currently provides local service, intraLATA service and other services within its certificated areas in Indiana.

3. **Background.** On May 10, 2001, a complaint was filed by certain communications carriers associations and companies, seeking to have Indiana Bell Telephone Company, Incorporated structurally separated into separate retail and wholesale divisions.² An evidentiary hearing was held on April 15-16, 2002 and concluded on June 4, 2002. The Commission resolved the complaint by directing AT&T Indiana to submit, and subsequently approving, a Code of Conduct (“Indiana Code of Conduct”). The Indiana Code of Conduct requirement imposed in Cause No. 41998 applies only to AT&T Indiana. There is no comparable requirement imposed on any other telecommunications or communications service provider in Indiana, including the individual members of the intervening associations, and any other incumbent or competitive carriers.

² At the time of Cause No. 41998, Indiana Bell Telephone Company, Incorporated was doing business as Ameritech Indiana and subsequently as SBC Indiana. As noted above, the Company currently does business as AT&T Indiana. For ease of reference AT&T Indiana is used throughout this document, including quotations without the use of brackets to indicate the name substitution.

In the 41998 Final Order, the Commission stated that it was “aware that the telecommunications landscape has continued to change and evolve since this matter was presented to us for consideration.” *41998 Final Order* at 2. The Commission indicated that it would “continue to monitor and fully consider issues regarding competition in the State.” *Id.* Following the conclusion of Cause No. 41998, there has been no Commission investigation of any complaint by a competitor alleging non-compliance with the Indiana Code of Conduct by AT&T Indiana, nor has any other Commission inquiry into the Indiana Code of Conduct occurred.

Since the evidentiary record was completed in Cause No. 41998, there have been significant changes in the state, national and global telecommunications environment and corporate governance. In 2003, the Federal Communications Commission (“FCC”) granted AT&T Indiana’s application to provide in-region interLATA services, finding that the Indiana local exchange markets are open to competition and that AT&T Indiana has fully satisfied the TA96 “competitive checklist.” Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243 (rel. Oct. 15, 2003). Technological and regulatory changes have resulted in a shift away from traditional wireline usage to alternative technologies, some of which are not regulated by the Commission. These alternative technologies include cable, wireless and voice over Internet protocol (“VOIP”) services.

In 2006, the Indiana General Assembly, through House Enrolled Act (“HEA”) 1279, declared that:

(2) competition has become commonplace in the provision of telecommunications services in Indiana and the United States;

(3) advancements in and the convergence of technologies that provide voice, video, and data transmission, including:

(A) landline, wireless, cable, satellite, and Internet transmissions; and

(B) transmissions involving voice over Internet Protocol (VOIP), Internet Protocol enabled services, and voice over power lines;

are substantially increasing consumer choice, reinventing the marketplace with unprecedented speed, and making available highly competitive products and services and new methods of delivering local exchange service[.]

I.C. § 8-1-2.6-1.

With limited exceptions, HEA 1279 expressly provides that the Commission shall not exercise jurisdiction over any non-basic telecommunications services after March 27, 2006 and shall not exercise jurisdiction over basic telecommunications service after June 30, 2009. I.C. § 8-1-2.6-1.2 and 1.4.³ Following the enactment of HEA 1279, the Commission has taken

³ “After June 30, 2009, the Commission has jurisdiction over a communications service provider only to the extent that jurisdiction is: (1) expressly granted by state or federal law, including: (A) a state or federal statute;

steps to create parity across different types of communications providers. For example, consistent with its obligations to streamline and reduce regulatory burdens on communications carriers, the Commission determined that entities seeking authorization to provide resold wide area telephone services would no longer need to provide a copy of their application or notice to all facilities-based LECs in Indiana.⁴ Similarly, the Commission dismissed Cause No. 42218 because its jurisdiction over winback requirements was eliminated as of March 27, 2006 with the enactment of HEA 1279.⁵

4. Summary of Evidence of the Parties.

a. Petitioner's Case-in-Chief. Petitioner submitted the testimony of Kathy Rehmer, Executive Director – Corporate Compliance for AT&T. Ms. Rehmer described the compliance programs and policies that AT&T has in place. Ms. Rehmer explained her view that the Indiana Code of Conduct is neither necessary nor appropriate and testified that the significant change in the business landscape generally and the telecommunications landscape specifically warrants termination of the Indiana Code of Conduct.

Ms. Rehmer explained that AT&T has had in place its own internally-developed corporate code of conduct as well as a set of competition guidelines for many years. She added that AT&T, like other companies, is subject to various laws and regulations that govern the ethical conduct of business, including the Sarbanes-Oxley Act and the Foreign Corrupt Practices Act, antitrust and securities law, laws governing competition (including laws that prohibit deceptive and unfair business practices), and state and federal regulatory laws. Ms. Rehmer indicated that over the last several years, the Department of Justice, the Securities and Exchange Commission, and other organizations have also provided guidance about what is required to be included in an effective compliance program. During the hearing, Ms. Rehmer explained that the Federal Sentencing Guidelines were recently updated. She explained that the code of conduct has and will continue to receive more scrutiny under the Federal Sentencing Commission because it is now deemed to be required as part of an effective compliance program.

Ms. Rehmer testified that the current AT&T Corporate Compliance Program was developed and adopted in August 2007, building upon the compliance processes that have been in place for many years. Ms. Rehmer stated that the cornerstone of the program is AT&T's Code of Business Conduct ("COBC"), which applies to operations in all states where

(B) a lawful order or regulation of the Federal Communications Commission; or (C) an order or a ruling of a state or federal court having jurisdiction; or (2) necessary to administer a federal law for which regulatory responsibility has been delegated to the commission by federal law." I.C. § 8-1-2.6-13(f).

⁴ *In re Investigation to Determine the Extent of Regulation of Wide Area Telephone Service (WATS) Resellers*, Cause No. 38149, Eighth Supplemental Order (Ind. Util. Regulatory Comm'n Aug. 7, 2008).

⁵ *Petition for Suspension of Any and All Ameritech Indiana Winback Promotions*, Cause No. 42218, Dismissal Order (Ind. Util. Regulatory Comm'n Mar. 29, 2006). The Commission similarly rescinded the findings and ordering paragraphs from its December 9, 2005 Final Order in Cause No. 42530. See, *In Re Investigation of Matters Related to Competition in the Telecommunications Industry*, Cause No. 42530, Dismissal Order (Ind. Util. Regulatory Comm'n Mar. 29, 2006).

AT&T offers service, including Indiana. Ms. Rehmer stated that the COBC reaffirms AT&T's commitment to high standards of business ethics, including compliance with applicable laws, and that it directs employees to conduct business lawfully and with integrity.

Ms. Rehmer described provisions of the COBC that direct employees to treat all customers, including customers of competitors and competitors themselves, with the same high level of fair, courteous, professional, efficient and respectful treatment and service. Ms. Rehmer stated that all AT&T employees are required to review the COBC annually to ensure their awareness and understanding of the COBC. Ms. Rehmer also discussed other aspects of AT&T's Corporate Compliance Program that have changed since the hearings were held in Cause No. 41998. Ms. Rehmer testified that AT&T has adopted a new compliance program that focuses on high risk compliance areas and creates compliance programs for each area, which include standards and procedures, monitoring and auditing, training, communications and risk assessments. Ms. Rehmer stated that currently the core compliance areas include: Antitrust/Fair Competition; Consumer Protection, Privacy and Data Protection; Environment Health and Safety; Ethics; Finance, Securities and Tax; Government Contracts; Government and Regulatory Relations; Labor and Employment; Records and Information Management; Trade; and Regulatory. Ms. Rehmer stated that falling within these broad categories are numerous company policies providing direction to employees. Ms. Rehmer testified that the Corporate Compliance Program requires each Business Unit to "own" compliance and provide verification that standards and procedures are in place to ensure compliance with laws and regulations in these core areas. Ms. Rehmer stated that a risk assessment is conducted annually which results in a gap analysis and action plans for any areas that need improvement. Ms. Rehmer noted that the Corporate Compliance Program is overseen by a Compliance Oversight Committee made up of senior leaders of the company, including the General Counsel and Chief Compliance Officer, who has ultimate responsibility for oversight of the program and risk analysis. Ms. Rehmer stated that annual reports are made to the Audit Committee of the Board of Directors about the status of the Program.

Ms. Rehmer testified that antitrust and fair competition are areas that AT&T takes very seriously. Ms. Rehmer noted that AT&T has developed Competition Guidelines to facilitate compliance by all personnel with antitrust and competition laws, as well as the special regulatory requirements applicable to AT&T. Ms. Rehmer stated that in addition, employees are informed of, and required to comply with, the various non-discrimination obligations applicable to AT&T's regulated telephone operations under TA96, the general obligations under sections 201 and 202 to provide just and reasonable service that is not unjustly or unreasonably discriminatory, and the specific local market opening requirements under sections 251, 271 and 272.

Ms. Rehmer explained that it is neither necessary nor helpful to have two codes of conduct. She testified that the issues covered by the Indiana Code of Conduct are already covered in the COBC and other aspects of the AT&T Corporate Compliance Program. She testified that it is administratively burdensome and time consuming for employees and that having multiple codes creates redundancy and is costly and time-consuming from a training perspective.

During cross-examination, Ms. Rehmer estimated that it costs AT&T approximately a quarter of a million dollars a year for employees to take annual training associated with the Indiana Code of Conduct.⁶ She explained that this estimate did not include other administrative costs, including those associated with AT&T personnel trying to answer questions about the two codes of conduct.

Finally, Ms. Rehmer generally summarized the developments in the telecommunications market since the Indiana Code of Conduct was adopted. Ms. Rehmer recommended that the Commission issue an order terminating AT&T Indiana's obligation to maintain a state-specific code of conduct. In her view, the environment in which the original complaint in Cause No. 41998 arose no longer exists. Thus, the Commission's resolution of that complaint – an Indiana-specific code of conduct applicable only to AT&T Indiana – is no longer relevant and it is unreasonable to require AT&T Indiana to continue to maintain this state-specific code.

b. MACC's Evidence. MACC offered the testimony of Pamela H. Sherwood, Vice President of Regulatory Affairs for the Central Region for TWTC. Ms. Sherwood stated that she was testifying on behalf of MACC, which is an association of seventeen (17) competitive communications carriers operating in the Midwest.⁷ Ms. Sherwood stated that MACC was formed in June of 2008. The purpose of the Association is to promote and foster competition in the telecommunications industry in the Midwest (Illinois, Indiana, Michigan, Ohio, and Wisconsin) and Southwest (Missouri, Oklahoma, Kansas, and Arkansas); intervene in state regulatory and/or legislative proceedings on behalf of the membership; file briefs and testimony in order to promote the policies that promote competition in telecommunications; educate and inform public officials and the public about the benefits of competition; provide a forum for the discussion of issues of common interest to all MACC members; and represent the interests of the members before administrative agencies, state legislatures and other governmental officials. Ms. Sherwood stated that several individual MACC members hold certificates of territorial authority issued by the Commission and provide communications services to Indiana customers. Ms. Sherwood testified that as competitive carriers, several MACC members are also wholesale customers of AT&T Indiana. Ms. Sherwood stated that while she was testifying on behalf of MACC, she is supporting her testimony with her experience at TWTC.

Ms. Sherwood testified that the framework under which the Indiana Code of Conduct was imposed is relevant to the determination whether the Indiana Code of Conduct should be terminated. She testified that in 2001, Comptel (Competitive Telecommunications Association), ASCENT (Association of Communications Enterprises), McLeodUSA, and

⁶ This testimony was supplemented by AT&T Indiana's response to the March 27, 2009 docket entry in this Cause.

⁷ At the time of intervention, MACC had 15 carrier members: 360 Networks; Birch Communications; Cavalier Telephone; Cbeyond Communications, LLC; Cimco; Covad Communications Company; Data Net Systems, LLC; Globalcom, Inc. (n/k/a FirstComm); Level 3 Communications, LLC; One Communications; PAETEC; TDS Metrocom LLC; tw telecom; Socket Telecom, LLC; and XO Communications, Inc. Since then, two additional carriers have joined MACC: Access Point, Inc. and Nuvox. MACC also has 8 associate members, including consultants and law firms, none of whom are a party to this proceeding.

AT&T/TCG filed a petition seeking to have Ameritech/SBC Indiana (n/k/a AT&T Indiana) structurally separated into separate retail and wholesale divisions in recognition that Ameritech/SBC Indiana has two separate, often conflicting roles as the sole wholesale provider of competitive inputs and the largest competitor (hereafter referred to as the "Structural Separation Case"). Ms. Sherwood noted that TWTC was an intervenor in the Structural Separation Case and noted that the Commission found it had jurisdiction under I.C. § 8-1-2-54 and § 8-1-2-69 to consider the relief requested, namely to structurally separate Ameritech/SBC Indiana into two components – a wholesale and a retail division. She also stated that the Commission found that TA96 did not preempt the relief sought in that it explicitly preserved the role of state commissions to continue to act in furtherance of the goal of opening local telephone markets to competition. Ms. Sherwood testified that in 2002, the Commission reopened the record in the Structural Separation Docket to allow Ameritech/SBC Indiana to provide the Commission with a formal Code of Conduct, and noted that on August 1, 2003, AT&T Indiana filed a second version of the Code of Conduct, which was approved by the Commission in Cause No. 41998.

Ms. Sherwood testified that despite the passage of time, the key fact underpinning the Structural Separation Case has not changed. She stated that AT&T Indiana is still the sole wholesale provider and the largest provider of wireline services in Indiana. She also provided a chart demonstrating that the industry has actually undergone additional consolidation. Ms. Sherwood observed that AT&T/TCG and MCI, at one time strident competitors to Ameritech/SBC, have each been acquired by ILECs, resulting in fewer competitors to address regulatory and competitive issues, and larger, fully-integrated ILECs with considerable economic power, size and scale. Ms. Sherwood urged that under these conditions, the Commission should be vigilant over conditions impacting local competition.

In response to Ms. Rehmer's claims that the environment that existed at the time the original complaint was filed no longer exists, Ms. Sherwood noted an inaccuracy on at least two fronts: (1) AT&T Indiana continues to be the monopoly provider of wholesale services to competitors and the wholesale and marketing protections remain at least as important today as they were when the Indiana Code was approved in 2004; and (2) the level of wireline competition has actually fallen since the Commission approved the Indiana Code.

Ms. Sherwood testified that the record in the Structural Separation Case was replete with evidence of conflicts faced by AT&T Indiana as both the wholesale provider and retail competitor. She stated that this has not changed. Ms. Sherwood testified that AT&T Indiana certainly does not face competition at the wholesale level such that wholesale protections in the Indiana Code of Conduct could be substituted for the type of protections that a fully-competitive, robust, wholesale market would provide. She noted that Ms. Rehmer does not argue, nor could she, that AT&T Indiana has effective competition in the wholesale market, such that AT&T Indiana is no longer in a conflicting role of both wholesale provider and key competitor to CLECs. Ms. Sherwood stated that the Commission should do nothing to weaken the wholesale protections currently in place in the Indiana Code of Conduct without a full and complete evaluation of the wholesale market in Indiana.

Ms. Sherwood pointed to two recent studies suggesting that if the Commission were to analyze whether AT&T remains the monopoly provider of wholesale services, the answer would be unequivocally affirmative. Ms. Sherwood testified that there simply is no competitive choice for wholesale inputs, like the loops necessary to reach the end user customer. She noted that while some landline competitors have become a competitive force for transport between major telecommunications nodes, the National Regulatory Research Institute (“NRRI”) recently released a report, conducted at the request of NARUC, that concludes that landline competitors are unlikely to ever be a strong competitive force in channel termination markets outside downtown areas. She stated that the NRRI report concludes that the ILEC has 99% of the market for DS1 loops in Indianapolis, and provided Appendix C of NRRI’s paper on “Competitive Issues in Special Access Markets” released January 21, 2009.⁸ Similarly, she noted that the U.S. Governmental Accounting Office (“GAO”) conducted a study, released in 2006, finding that in the 16 metropolitan areas studied (Indiana was not included), competitors provide less than 6% of the buildings with dedicated access on average.⁹ Ms. Sherwood indicated that this means that when CLECs can financially justify the construction of their own facilities, they reach less than 6% of the buildings and the ILECs continue to have a ubiquitous reach to the ‘last mile’ to 94% of the business buildings. She testified that although CLECs may have constructed to a building, it does not necessarily mean that competitors have wholesale alternatives to the ILEC for the last mile facility.

Ms. Sherwood testified that both of these studies support the conclusion that nothing in the wholesale market has materially changed since the Commission approved the Indiana Code of Conduct in 2004. She noted that the factual basis for the wholesale protections in the Indiana Code of Conduct – that AT&T Indiana was both the wholesale provider and major competitor – has not changed and testified that those protections continue to be critical to the continued existence of competition in Indiana.

Ms. Sherwood disagreed with AT&T Indiana’s assertion that the Indiana Code is no longer necessary because of the existence of other allegedly duplicative AT&T Indiana corporate compliance programs. Ms. Sherwood indicated that the Indiana Code of Conduct, drafted and submitted to the Commission by AT&T Indiana on August 1, 2003, approved on December 22, 2004, contains the following explanation of the interaction between the Corporate Code of Business Conduct and the Indiana Code of Conduct:

This Code supplements but does not replace the more comprehensive SBC Code of Business Conduct or other company policies, standards, practices, methods, procedures, guidelines, directives and programs already in place, or that may be subsequently deployed to secure compliance with the law by SBC Indiana personnel.

SBC Indiana Code of Conduct, p.1, 41998 Final Order.

⁸ http://nrri.org/pubs/telecommunications/NRRI_spl_access_mkts_jan09-02.pdf.

⁹ <http://www.gao.gov/new.items/d0780.pdf>. <http://www.gao.gov/new.items/d0780.pdf>.

Ms. Sherwood observed that when AT&T Indiana drafted that provision in 2003 and included it in its Indiana Code of Conduct, there was an internal SBC Code of Business Conduct in place. Now, six years later, Ms. Sherwood notes that AT&T Indiana claims the existence of the same or similar internal Code of Business Conduct should justify termination of the Indiana Code.

When asked if she had reviewed the AT&T COBC and Competition Guidelines referenced in Ms. Rehmer's direct pre-filed testimony, Ms. Sherwood testified that those documents are not publicly available documents. Ms. Sherwood testified that in order to review those documents for purposes of this proceeding, AT&T required her to execute a nondisclosure agreement. Ms. Sherwood testified that there are several major areas covered by the Indiana Code of Conduct that are not included in AT&T's internal corporate policies. Even if AT&T's internal corporate policies did address all the same subject matters in the Indiana Code of Conduct today, Ms. Sherwood noted that AT&T is free to change or eliminate any provisions in its internal corporate policies at any time. She observed that AT&T Indiana would have no legal obligation to be accountable to the Commission or the CLECs prior to making changes to its internal corporate policies, and by keeping those policies confidential, a CLEC would not know that discriminatory behavior was a violation of the Code addressable by the Commission. Ms. Sherwood testified that ultimately, AT&T Indiana is asking that it be allowed to police itself. She noted that AT&T Indiana has no incentive to adhere to its own rules, especially when it is in a conflicting role of wholesale provider and competitor.

Ms. Sherwood noted two key areas of the Indiana Code of Conduct that are not covered by AT&T Indiana's internal corporate policies that will be eliminated if the Commission terminates the Indiana Code of Conduct: (1) wholesale protections, which includes the treatment of CLECs as customers, the protection of competitors' relationships with their end users, winback and marketing restrictions, the protection of contracts, and nondiscriminatory treatment of CLECs who order wholesale services; and (2) public availability of the Code with enforcement procedures for wholesale and competitive provisions.

Ms. Sherwood testified that the following provisions of the Indiana Code of Conduct are absent from AT&T Indiana's internal corporate policies:

In dealing with CLECs or other competitor-customers, SBC Indiana employees shall always be mindful that they are customers first and should be treated with courtesy and respect. (Indiana Code of Conduct, p. 3)

SBC Indiana personnel who have direct contact with CLECs, other competitor-customers, and their end-user customers should remember that when performing work for or on behalf of competitor-customers, they should refrain from any conduct that is (or gives the appearance

of being) inconsistent with the task of accomplishing the work requested by the competitor-customer. This rule applies not only to installers, technicians, and customer service personnel but also to all SBC Indiana personnel who perform work requested by competitor-customers. More specifically, all SBC Indiana personnel should:

- Provide competitor-customers and their customers the same high level of fair, courteous, professional, efficient and respectful treatment and service provided to the retail customers of SBC Indiana and its affiliates
- Refrain from engaging in inappropriate conduct in scheduling and performing work operations
- Never use contacts with end-users initiated in performing services for a competitor as an occasion to disparage the competitor, try to 'win' or 'win back' customers for SBC Indiana or an affiliate, or otherwise sell against the competitor. (Indiana Code of Conduct, pp. 2-3).

SBC Indiana Employees shall not cause or encourage prospective customers to violate contractual commitments or nondisclosure obligations to CLECs or other third parties. (Indiana Code of Conduct, p. 2).

SBC Indiana employees shall not induce customers or prospective customers to violate contractual commitments or nondisclosure obligations to anyone. (Indiana Code of Conduct, p. 4).

SBC Indiana employees shall not use carrier proprietary information or other information received from competitors in an effort to win or win back customers. (Indiana Code of Conduct, p. 3).

SBC Indiana employees shall not use carrier proprietary information or other information received from CLECs as competitor-customers in an effort to win or winback their wholesale customers. (Indiana Code of Conduct, p. 5)

Carrier information should not be accessed, disclosed, or used by SBC Indiana for its retail marketing efforts. (Indiana Code of Conduct, p. 9)

Ms. Sherwood testified that it is important for the Indiana Code of Conduct's wholesale protections, including the prohibition on AT&T Indiana's use of CLEC or competitor-obtained information for marketing or retail purposes, to remain in place. She noted that the Indiana Code of Conduct specifically prohibits AT&T Indiana's disclosure of proprietary information received from CLECs by its wholesale operations to its retail operations for use in retention marketing. She noted that AT&T Indiana's pre-filed direct testimony regarding its internal policies did not even address this important issue. Ms. Sherwood testified that there is no dispute that CLECs have no choice but to rely on AT&T as the incumbent in order to install customers moving from AT&T. For example, she noted that CLECs must disclose to AT&T proprietary customer information in order for AT&T to port a telephone number so the CLEC can complete the installation, or if a CLEC is relying on AT&T for wholesale services such as the loop to serve the customer, the CLEC must provide specific information about the customer's location and types of services ordered. Ms. Sherwood stated that it is critical for the protection of retail competition in Indiana that this Commission prohibit AT&T Indiana, by virtue of its status as the incumbent, from using for customer-retention purposes, proprietary information obtained from CLECs in its role as a wholesale provider.

Ms. Sherwood disagreed with the argument that state commissions should forego oversight over the wholesale market because there are other protections in place at the federal level or corporate compliance activities. Ms. Sherwood testified that these protections are critical enough to the continuation of local telecommunications competition that the Commission should not quickly remove itself from the umpire role. Ms. Sherwood noted that, while she agrees with the general principle that the Commission should mitigate unnecessary and duplicative regulatory requirements, the record here does not demonstrate that the Indiana Code of Conduct, especially as it pertains to wholesale issues, is unnecessary or duplicative. She noted that as the Petitioner in this proceeding, it is AT&T's burden to demonstrate to the Commission that 15 points enumerated by the Commission as being required in the Indiana Code of Conduct are contained in existing AT&T internal corporate compliance policies. However, Ms. Sherwood observed that even if the existing internal AT&T corporate policies addressed the same issues as the Indiana Code of Conduct, AT&T would remain free to eliminate or change those provisions, thereby leaving competitors with no recourse if the Indiana Code of Conduct were eliminated.

Ms. Sherwood testified that provisions governing transparency, openness, and remediation are not included in AT&T's internal Corporate Policies. She noted that the Indiana Code of Conduct contains specific requirements regarding the availability of the Code and complaint processes:

Written complaints by competitor-customers or by their end-user customers concerning alleged violations of this Code should be reported to the appropriate regulatory compliance officer. Preliminary responses to the competitor-customers should be made within 30 days

and final responses should be made within 90 days in the absence of extenuating circumstances. (Indiana Code of Conduct, p. 6)

This Code shall be published on SBC external-facing websites accessible by retail customers, wholesale customers, and the public at large. This Code shall be made available in hardcopy format to any SBC Indiana wholesale or retail customer upon request. (Indiana Code of Conduct, p. 7)

SBC Indiana employees shall take appropriate measures to prevent and report unlawful discrimination against competitor-customers by subordinates, co-workers, vendors, agents, contractors, and others acting on behalf of SBC Indiana in providing services to them. (Indiana Code of Conduct, p. 8)

Ms. Sherwood questioned why AT&T Indiana takes the position that its internal corporate policies are confidential, noting that Indiana Code of Conduct was not confidential, but rather was to be made a publicly available document. Ms. Sherwood further testified that AT&T's internal corporate policies also lack any procedure for dealing with complaints by competitor-customers and fail to impose any obligation on AT&T employees and agents for reporting discrimination. Moreover, Ms. Sherwood observed that if the Commission were to terminate the Indiana Code of Conduct based on the rationale that it is duplicative of an internal Corporate Code, the Commission should consider whether the internal Corporate Code provides the Commission with the oversight over wholesale issues necessary to the development and expansion of local competition and whether the Commission retains the ability to approve any changes made to the internal Corporate Code. Finally, Ms. Sherwood questioned how a wholesale purchaser or a competitor would ever know whether there was a violation of AT&T's internal corporate policies to obtain redress if the policies remain confidential.

In response to Ms. Rehmer's claim that "no complaint about a violation of the code has been filed with the Commission," Ms. Sherwood testified that while the assertion may be technically correct, TWTC did bring a Code violation to Ameritech/SBC Indiana's attention on August 31, 2006, and copied the Commission on the letter and details of the violation. Ms. Sherwood testified that the complaint stemmed from a false and misleading statement made by an agent of AT&T Indiana about TWTC's service. She testified that as a result of AT&T Indiana's investigation, the agent conducted additional training on the requirements of the Indiana Code of Conduct, and issued an apology and retraction of her false statements to TWTC's end user. Ms. Sherwood stated that this is evidence of a successful resolution of the complaint without a formal complaint being filed at the Commission. She also noted that because the Indiana Code of Conduct was in place, and was a publicly available document, TWTC was able to address the issue on a company to company basis. Ms. Sherwood stated

that she offered this as an example of the importance of the Indiana Code of Conduct to the economic health of the telecommunications marketplace and to competitors.

Ms. Sherwood disagreed with Ms. Rehmer's contention that to the extent retail competition exists, it does not obviate the Indiana Code of Conduct sections that apply to AT&T Indiana's wholesale obligations. She testified that robust retail competition should supplant regulation in policing retail quality of service issues, retail marketing and provision, and customer service issues. However, she stated that retail competition does not provide any protection against wholesale abuses by a single wholesale provider. Ms. Sherwood concluded that continued regulation over the wholesale duties and obligations is warranted.

Ms. Sherwood went on to disagree with Ms. Rehmer's assertion that there is a robustly competitive retail market. She stated that a review of the statistics on the relevant market share of CLECs demonstrates that there has not been a significant change in the competitive landscape for wireline competition since 2004. In the Commission's final order the Structural Separation Case, the Commission noted that the market share for CLECs statewide was currently 12.4%, which was a gradual increase in competition from the 2002 assessment of 8.4% and the 2001 assessment of 5.9% when the petition was filed, but that the 12.4% still warranted imposition of the Code of Conduct. *41998 Final Order* at p. 2. Ms. Sherwood attached an FCC report showing that, despite AT&T Indiana's suggestion that competition is rampant, the FCC's latest competition report released September of 2008 (based on data as of December 31, 2007), shows CLECs' market share to be decreasing, down to 9%. Ms. Sherwood testified that local wireline competition is actually backsliding, making the provisions set forth in the Indiana Code of Conduct even more critical to continued competition in Indiana.

When asked about the effect of HEA 1279 on this proceeding, Ms. Sherwood noted that while HEA 1279 proclaimed that Indiana's telecommunications market was competitive, this declaration does not mean that there is sufficient competition to protect the interests of retail and *wholesale* consumers throughout the state. Ms. Sherwood testified that even if retail competition was fully functioning and irrevocable, this would not warrant elimination of the wholesale protections. Ms. Sherwood disagreed with any contention by AT&T Indiana that as a result of HEA 1279, the Commission will no longer have the jurisdiction to impose the types of conditions set forth in the Indiana Code of Conduct, such as wholesale conditions regarding marketing, use of CPNI, its technician's treatment of wholesale customers, etc., once additional deregulatory measures become effective in July of 2009. Ms. Sherwood testified that while it is true that HEA 1279 declared that there is full and fair competition in the telecommunications market in Indiana as a general principle, the legislation specifically recognized the need for continuing Commission regulation over wholesale components and fair competition. She noted the section of HEA 1279 that preserves the Commission's jurisdiction over wholesale terms and conditions is I.C. 8-1-2.6-1.5, which provides, in relevant part:

Sec. 1.5. (a) In acting to impose any requirements or set any prices concerning:

(1) interconnection with the facilities and equipment of providers for purposes of 47 U.S.C. 251(c)(2);

(2) the resale of telecommunications service for purposes of 47 U.S.C. 251(c)(4); or

(3) the unbundled access of one (1) provider to the network elements of another provider for purposes of 47 U.S.C. 251(c)(3);

the commission shall not exceed the authority delegated to the commission under federal laws and regulations with respect to those actions. This subsection does not affect the commission's authority under IC 8-1-2-5.

(b) Subject to any regulations adopted by the Federal Communications Commission, this section does not affect:

(1) the commission's authority to mediate a dispute between providers under 47 U.S.C. 252(a);

(2) the commission's authority to arbitrate a dispute between providers under 47 U.S.C. 252(b);

(3) the commission's authority to approve an interconnection agreement under 47 U.S.C. 252(e), including the authority to establish service quality metrics and liquidated damages;

(4) the commission's authority to review and approve a provider's statement of terms and conditions under 47 U.S.C. 252(f);

(5) a provider's ability to file a complaint with the commission to have a dispute decided by the commission:

(A) after notice and hearing; and

(B) in accordance with this article; or

(6) the commission's authority to resolve an interconnection dispute between providers under the expedited procedures set forth in 170 IAC 7-7.

Ms. Sherwood testified that the Commission's jurisdiction over wholesale issues, including the terms and conditions under which UNEs and resale are offered and provided – issues that the Indiana Code of Conduct addresses – remains intact. Moreover, she noted that in finding it had jurisdiction to consider the structural separation requested in Cause No. 41998, the Commission relied on I.C. 8-1-2-54 (utility may not engage in unreasonable or unjustly discriminatory practices) and Section 261 of TA 96 (states may impose requirements for intrastate service that are necessary to further competition). She noted those provisions of Indiana law are all still in effect today and were not modified by HEA 1279. Most importantly, she noted that the facts that led to the need for AT&T-specific Indiana Code of Conduct have not changed: AT&T Indiana is still uniquely empowered to use its legacy monopoly position to discriminate against wholesale providers and gain an unfair competitive advantage. Ms. Sherwood noted that these are the very behaviors that the Commission still retains the authority to address and correct *vis a vis* I.C. § 8-1-2-54 and I.C. § 8-1-2-69.

c. ICTA's Position. The ICTA filed its response to the proposed orders by both AT&T and MACC. ICTA stated that it takes no position as to the possible termination of the Indiana Code of Conduct adopted by this Commission on December 22, 2004 in response to the

complainants' request in Commission Cause No. 41998 to structurally separate AT&T Indiana's wholesale and retail affiliates.

ICTA stated that an important exception concerns the continuing need for the Commission to maintain the prohibitions contained in the Indiana Code of Conduct relating to AT&T Indiana's conduct regarding efforts to retain current customers or to "win back" former customers who have elected to migrate from AT&T Indiana to one of its competitors. If these pro-competitive protections are taken away, the ICTA said that it is concerned that AT&T Indiana's near-total dominance of the wholesale marketplace as the owner of last-mile facilities in its incumbent service territories, as well as its retail service market power, will serve as a basis for AT&T Indiana to thwart competition in the market for retail communications services. ICTA stated that these protections are too important to the viability of voice competition to leave it to AT&T Indiana's discretion to voluntarily act against its self-interest. ICTA noted that the Commission recognized as much when it adopted the Indiana Code of Conduct just over four years ago in lieu of ordering a structural separation, and said that AT&T Indiana has failed to demonstrate that the public interest necessity for such regulatory oversight of this aspect of the communications market has gone away in the intervening years. ICTA said that the decrease in the number of competitors for wireline services since Cause No. 41998 indicates that the need for such measures is even greater today than it was when the Commission adopted the Indiana Code of Conduct.

The ICTA requested that the Commission specifically retain the following paragraphs from the Indiana Code of Conduct:

- AT&T Indiana personnel should "never use contacts with end-users initiated in performing services for a competitor as an occasion to disparage the competitor, try to "win" or "win back" customer for [AT&T] Indiana or an affiliate, or otherwise sell against the competitor." (Indiana Code of Conduct, p. 3.)
- "[AT&T] Indiana employees shall not use carrier proprietary information or other information received from competitors in an effort to win or win back customers." *Id.*
- "[AT&T] Indiana employees shall comply with all legal and regulatory requirements prohibiting [AT&T] Indiana from giving itself, its affiliates, or any CLECs any unreasonable preference or advantage over any other CLECs in the preordering, ordering, provisioning, or repair and maintenance of any telecommunications service provided at a wholesale discount, network elements subject to unbundling requirements as provided by law, or other facilities provided to CLECs for us in providing local telecommunications service." (Indiana Code of Conduct, p. 8.)
- "[AT&T] Indiana employees shall take appropriate measures to prevent and report unlawful discrimination against competitor-customers by subordinates,

co-workers, vendors, agents, contractors, and others acting on behalf of [AT&T] Indiana in providing service to them.” *Id.*

- “Carrier information is proprietary information received from another carrier for the purpose of providing telecommunications services and should not be used for any other purpose. Carrier information should not be accessed, disclosed, or used by [AT&T] Indiana for its retail marketing efforts.” (Indiana Code of Conduct, p. 9.)
- Information received from CLECs and other competitor-customers “should be used only for the limited purposes for which that information has been provided. Competitively sensitive information received from competitor-customers should not be shared with persons outside [AT&T] Indiana or with persons within [AT&T] Indiana who do not need that information to conduct business with the competitor-customer. Personnel in [AT&T] Indiana’s wholesale operations may not disclose or provide personnel in the retail sales and marketing operations of [AT&T] Indiana access to any information received from CLECs or other competitor-customers and shall not use or permit the use of such information for retail purposes.” (Indiana Code of Conduct, p. 10.)

ICTA said that AT&T Indiana has taken the position in this case that the Indiana Code of Conduct is not necessary because it duplicates certain protections already contained in the code of conduct adopted by AT&T Indiana’s corporate parent. The ICTA disagreed with this position for two reasons: first, the Indiana Code of Conduct is more detailed than AT&T’s corporate code in describing what activity is prohibited. The excerpts cited on pages 7 and 8 of the rebuttal testimony of AT&T Indiana’s witness Kathy Rehmer leave too much room for AT&T Indiana to engage in the kinds of practices of which the ICTA is aware in other jurisdictions but that are specifically prohibited by the Indiana Code of Conduct. Second, ICTA believes that even if the Commission were convinced that AT&T’s corporate code currently provides enough of the same protection as is afforded competitors and the public by the Indiana Code of Conduct, Ms. Rehmer confirmed during her cross-examination that AT&T is free to amend its corporate code whenever it pleases. ICTA asserted that voluntary protections are inadequate to the task.

Finally, ICTA said that given AT&T Indiana’s overwhelming share of the retail market, it is uniquely situated to take action against its competitors when it is contacted by a wholesale customer-competitor about porting a retail customer’s number to that competitor. ICTA fears that absent such regulations in Indiana, termination of the Indiana Code of Conduct as AT&T Indiana has requested would force CLECs to try to compete on an unfair playing field, depriving the communications-consuming public of the full benefits of a competitive marketplace. The ICTA therefore concluded that the competition-enhancing limitations on AT&T Indiana from the Indiana Code of Conduct as set forth above continue to serve the public interest. Whether or not the Commission terminates other aspects of the Indiana Code of Conduct, in ICTA’s view these sections should be retained.

d. Petitioner's Rebuttal Evidence. Petitioner submitted the rebuttal testimony of Ms. Rehmer. Ms. Rehmer's rebuttal testimony sponsored two exhibits, Petitioner's Rebuttal Exhibit A, a copy of AT&T's COBC, and Petitioner's Rebuttal Exhibit B, a copy of MACC's Responses to AT&T Indiana's First Set of Data Requests. Ms. Rehmer stated that Ms. Sherwood's positions must be viewed in context, including the fact that Ms. Sherwood's company, and the other members of MACC, are competitors of AT&T and thus have a self-interest in the outcome of this proceeding. Ms. Rehmer pointed out that if the state-specific regulatory requirement is maintained, AT&T Indiana will continue to incur a cost that is not imposed on its competitors.

Ms. Rehmer stated that MACC resisted AT&T Indiana's attempts to use the discovery process to explore the basis for MACC's and Ms. Sherwood's position in this Cause. She testified that MACC objected on the grounds that AT&T Indiana's discovery requests called for MACC to perform an analysis or compilation that MACC had not performed and objected to performing. Ms. Rehmer stated that although AT&T Indiana was provided a copy of TWTC's code of conduct, the document appeared to be a corporate code of conduct applicable company-wide and not one imposed solely on Indiana employees and agents. Ms. Rehmer's exhibit also stated that Ms. Sherwood did not possess the information necessary to respond to certain questions regarding the other MACC members. Ms. Rehmer noted that AT&T Indiana did learn through the discovery process that TWTC uses various ways to address business issues, including carrier-to-carrier negotiation and resolution, arbitration, mediation or litigation. In Ms. Rehmer's opinion, this indicates that if the Indiana Code of Conduct did not exist, companies would continue to have numerous ways to address and resolve problems.

Ms. Rehmer pointed out that Ms. Sherwood's testimony focused on wireline local exchange carrier competition and end-user switched lines. Ms. Rehmer stated that this approach ignored wireless competition and competing digital telephony offerings available via broadband competitors. Ms. Rehmer also disagreed with Ms. Sherwood's characterization of AT&T as a monopoly provider of wholesale service, noting that AT&T does not have the sole right to provide service within its service area and that other companies do in fact deploy their own facilities and engage in wholesale transactions with CLECs.

With respect to Ms. Sherwood's criticism regarding AT&T Indiana's provision of its COBC via a nondisclosure agreement, Ms. Rehmer noted that neither MACC nor TWTC raised an objection to AT&T Indiana's discovery response prior to filing testimony. Ms. Rehmer stated that while TWTC provided its corporate code of conduct to AT&T in discovery, this document is not "publicly available" on its website or other published sources. Ms. Rehmer further stated that the purpose of a code of conduct is to provide guidance to employees on how to behave, and that the focus should not be on whether the document is publicly available but whether the Indiana Code of Conduct, applicable only to AT&T Indiana, is necessary. That said, Ms. Rehmer stated that to eliminate this concern from this proceeding, she attached a copy of the COBC and stated that AT&T waived any claim of confidentiality as to the COBC in this proceeding.

Ms. Rehmer disagreed with Ms. Sherwood's claim that the COBC is incomplete. Ms. Rehmer identified sections of the COBC that addressed the concerns raised in Ms. Sherwood's testimony and asserted that the COBC provides the same guidance to its employees and agents even if the identical language is not used. Ms. Rehmer further stated that the Commission did not dictate the terms of the Indiana Code of Conduct, but rather approved language that was drafted by AT&T Indiana. Thus the specific words set forth in the Indiana Code of Conduct were not mandated by the Commission.

Ms. Rehmer responded to Ms. Sherwood's contention that the COBC does not address proprietary customer information. Ms. Rehmer quoted passages from the COBC that address proprietary information, and direct employees as to the treatment of information received from carriers like the members of MACC. Ms. Rehmer noted that these safeguards include protection of proprietary customer information that AT&T receives from CLECs when AT&T ports a telephone number. Ms. Rehmer noted that MACC admitted in discovery that CLECs do not rely on AT&T Indiana to port a telephone number when a customer moves from any carrier other than AT&T Indiana. Ms. Rehmer stated that other companies do not have Indiana-specific codes of conduct to address this issue, and that Ms. Sherwood failed to demonstrate why the Indiana Code of Conduct, applicable only to AT&T Indiana, is necessary to safeguard against the possibility of a porting problem.

Ms. Rehmer testified regarding the D.C. Circuit case involving Verizon that was relied upon by Ms. Sherwood as a reason to maintain the Indiana Code of Conduct applicable to AT&T Indiana. Ms. Rehmer testified that Verizon is a separate company and does not dictate policy or procedure to AT&T or AT&T Indiana. Ms. Rehmer disagreed that Verizon's operations were relevant to this Cause, and pointed out that MACC itself objected to providing AT&T with information concerning the activities of other carriers on the ground that such matters were irrelevant. Rather than supporting MACC's position, Ms. Rehmer testified that the FCC's decision and the federal court's denial of Verizon's appeal show that existing protections work without any state-specific code requirement. Ms. Rehmer stated that it is federal law, and the FCC's interpretation of those laws, which provides the protection MACC claims it needs. Ms. Rehmer also pointed out that MACC failed to acknowledge that any carrier receiving a number porting request has the potential to misuse the porting information for retention marketing purposes. Ms. Rehmer stated that if this situation were truly a concern, MACC should advocate that the Commission impose a similar restriction on all telecommunications carriers in Indiana, but that in any event this issue does not justify continuing the AT&T-only Indiana Code of Conduct.

Ms. Rehmer disagreed with Ms. Sherwood's claim that the COBC fails to impose any obligation on AT&T employees or agents to report discrimination. Ms. Rehmer noted that the COBC is replete with directions to employees to report compliance issues, and that even AT&T's suppliers are required to share AT&T's commitment to integrity, ethics and compliance. Ms. Rehmer stated that the COBC also includes a list of resources for guidance and reporting purposes such as the Corporate Compliance Program. In addition, Ms. Rehmer stated that the Audit Committee of the Board of Directors of AT&T oversees the administration and enforcement of the COBC, and discusses with the Company's General Counsel any significant legal, compliance or regulatory matters.

Ms. Rehmer also disagreed with Ms. Sherwood's claim that wholesale purchasers or competitors would have no recourse if the Indiana Code of Conduct were terminated. Ms. Rehmer stated that the Indiana Code of Conduct is a document which guides the behavior of AT&T's employees, and which did not establish new rights for CLECs. Ms. Rehmer stated that if a carrier has an issue with AT&T or any other company, it will not hesitate to do what it can to resolve that issue. Ms. Rehmer testified that with or without an Indiana-specific code of conduct, a competitor can address issues with AT&T on a company-to-company basis. Ms. Rehmer noted that a competitor can also file a formal complaint with the Commission for violations of any state or federal rules or laws for which the Commission has enforcement authority. Ms. Rehmer stated that these processes have worked in Indiana and other states, and that there is no reason to maintain an Indiana-specific code of conduct, particularly one applicable solely to AT&T Indiana.

Ms. Rehmer testified that all of AT&T's employees are required to comply with the COBC and are subject to disciplinary repercussions if they fail to do so. Ms. Rehmer stated that if there are such severe problems of non-compliance and mistreatment of CLECs that require an AT&T-specific code of conduct as Ms. Sherwood suggested, Commission complaint proceedings would be ubiquitous, which they are not. Ms. Rehmer stated that if AT&T had no incentive to adhere to its own internal rules, MACC should have been able to produce many instances of AT&T abuses from other states. Ms. Rehmer stated that Ms. Sherwood did not do so because she could not. Ms. Rehmer stated that AT&T Indiana has the same incentives as all other AT&T operating companies to comply with its internal rules, including ensuring good customer care and compliance with laws, rules and regulations, including non-discrimination requirements.

Ms. Rehmer stated that granting AT&T's request to terminate the Indiana Code of Conduct would not change the scope of the Commission's authority, but would remove the confusion and other business problems described in Ms. Rehmer's direct testimony. Ms. Rehmer further stated that the Commission should consider how the continuation of the Indiana Code of Conduct only as to AT&T Indiana fits with Indiana's goal that there is parity in the regulatory treatment of all communication services providers.

Ms. Rehmer rejected Ms. Sherwood's argument that the consolidation that has occurred in the telecommunications industry since Cause No. 41998 warrants the continuation of the Indiana Code of Conduct, and that the key facts underpinning Cause No. 41998 have not changed. Ms. Rehmer noted that the evidentiary hearing in Cause No. 41998 concluded on June 4, 2002, and that the record in that case is old and does not reflect current conditions, including the convergence of technology and increase in wireless competition. Ms. Rehmer also explained that Ms. Sherwood provided no data to support her contention that industry consolidation somehow warrants an Indiana-specific code of conduct applicable solely to AT&T Indiana.

Finally, Ms. Rehmer commented on the one example cited by Ms. Sherwood. Ms. Rehmer explained that even with the best policies, procedures and training in place, no performance record is "perfect," and the single occurrence of employee error identified by Ms. Sherwood does not demonstrate a need to maintain the Indiana Code of Conduct. Ms.

Rehmer concluded that regardless of the historical concerns that led the Commission to adopt an Indiana-specific code of conduct as a safeguard, circumstances have changed, and thus it is appropriate to retire the Indiana Code of Conduct.

5. Discussion and Commission Findings.

a. Jurisdiction. As an initial matter, we must analyze the extent to which we have jurisdiction to act in this case. The Commission derives its power and authority solely from statute, and unless the power and authority can be found in the statute, it must be concluded that there is none. *General Tel. Co. v. Pub. Serv. Comm'n*, 150 N.E.2d 891 (Ind. 1958). However, the Commission has the power to, among other things, find facts based upon the evidence before it. *S. Eastern Ind. Nat. Gas Co., Inc. v. Ingram*, 617 N.E.2d 943, 948 (Ind. App. 1993). "Inherent in this grant of power is the implicit power and authority to do that which is necessary to effectuate the regulatory scheme." *Id.* AT&T Indiana contends that we have no jurisdiction to act in this proceeding except to issue an order terminating the Indiana Code of Conduct. In its Proposed Order, AT&T Indiana relies on I.C. § 8-1-2.6-13(f), which states that "after June 30, 2009, the Commission may not regulate telecommunications services and has jurisdiction over a communications service provider only to the extent that jurisdiction is expressly granted by state or federal law." AT&T contends that the Commission has no express state or federal statutory authority to impose the Indiana Code of Conduct on AT&T Indiana.

MACC contends that this Commission possesses the authority under Indiana and federal law to find that the Indiana Code of Conduct must remain in place. MACC states that I.C. § 8-1-2.6-13(f) is not triggered until June 30, 2009. After that date, MACC contends that the statute contemplates our continued jurisdiction where necessary to fulfill the Commission's obligations under the federal Telecommunications Act of 1996. MACC points to I.C. § 8-1-2.6-13(f), which confers jurisdiction upon the Commission when the jurisdiction is expressly conferred by federal law, or where the exercise of the Commission's jurisdiction is necessary to administer a federal law for which regulatory responsibility has been delegated to the Commission by federal law. MACC contends that this Commission is charged by the Telecommunications Act of 1996, and specifically 47 U.S.C. § 261(c)¹⁰, with the responsibility to impose requirements that are necessary to further competition in the provision of telephone exchange service, consistent with the FCC's regulations. Ms. Sherwood notes that our original jurisdictional basis for imposing the Indiana Code of Conduct was I.C. § 8-1-2-54 (a utility may not engage in unreasonable or unjustly discriminatory practices) and Section 261 of TA'96 (states may impose requirements for intrastate service that are necessary to further competition).

Assuming AT&T's interpretation of HEA 1279 is correct, AT&T Indiana could have waited for the Indiana Code of Conduct to "expire" on June 30, 2009, thereby eliminating the

¹⁰ 47 U.S.C. 261(c) provides: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part."

need for this regulatory proceeding. However, AT&T did not do that. We do not accept AT&T's position regarding our jurisdiction in this matter. We find that HEA 1279 did not eliminate our ability under 47 U.S.C. § 261 to impose requirements for intrastate service that are necessary to further competition or to assure conditions or climate conducive to competition. The implementation of the federal Telecommunications Act of 1996 has been referred to as a scheme in "cooperative federalism" where state agencies have a considered role when they have accepted Congress' invitation to become crucial partners in administering federal regulatory schemes, including state authority as described in 47 U.S.C. § 261(c). *BellSouth Telecomm., Inc. v. Sanford*, 494 F.3d 439, 448 (4th Cir. 2007).

While HEA 1279 has largely deregulated wide swaths of the telecommunications industry in Indiana, our exercise of jurisdiction over this matter is an appropriate balancing of our regulatory authority in light of the state of competition in the wholesale telecommunications market. "The legislature enacted telecommunications reform with an eye to the balancing forces of the marketplace supported by a light regulatory touch, replacing traditional regulation." *In the Matter of the Petition of Midwest Telecom of America for Confidential and Proprietary Treatment of Portions of the 2006 Annual Report*, Cause No. 43260, Order at 9 (Ind. Util. Regulatory Comm'n Dec. 5, 2007). Given the authority conferred by 47 U.S.C. § 261 to impose requirements for intrastate service that are necessary to further competition, we continue to approach AT&T Indiana's request through the lens of I.C. § 8-1-2-54 and I.C. § 8-1-2-69 to determine whether the elimination of the Indiana Code of Conduct constitutes a just and reasonable practice based on the state of the Indiana telecommunications market. We must also view AT&T's request in light of our finding that AT&T Indiana is still uniquely positioned to use its legacy monopoly position to discriminate against wholesale providers and gain an unfair competitive advantage if they should elect to do so. Accordingly, we find that we have jurisdiction to consider AT&T Indiana's petition in this proceeding and to issue the findings and orders set forth below.

b. Necessity of an AT&T Indiana Code of Conduct. There have been advances toward robust retail competition in the Indiana telecommunications market since the 1998 Final Order requiring the Indiana Code of Conduct was issued. We note, however, that even robust competition does not necessarily remove the opportunity for anti-competitive behavior. The evidence of record demonstrates that with regard to the wholesale wireline telecommunications market, the key reason for imposing the Indiana Code of Conduct still exists: AT&T Indiana is still the predominant wholesale provider and the largest provider of wireline services in Indiana. The evidence shows that for most competitive providers, there is no alternative or competitive provider choice other than AT&T Indiana for acquiring key wholesale services like last-mile facilities (loops). The evidence also demonstrated that the industry has actually undergone additional consolidation so that there are fewer wireline competitors and the large ILECs are now larger and have considerable economic power, size and scale. While AT&T Indiana's witness testified that aggrieved competitors have rights under anti-trust laws to remedy matters such as unfair or misleading comparisons between products and services offered by AT&T and its competitors, we are not aware of any ruling suggesting that this behavior is covered by antitrust laws or that such a case would respond to problems in the wholesale market in a timely, meaningful, or efficient manner. We find that

given the conditions in the Indiana wholesale telecommunications market, it is appropriate that we continue oversight of conditions impacting local competition as set forth below.

We find that AT&T's COBC should be publicly available to all of AT&T's customers. Without notice of the actual provisions of AT&T's COBC, its customers have no basis on which to form expectations for AT&T's conduct and no way of knowing if and when an alleged violation occurred. We further find that if AT&T modifies its Code of Conduct, it should file its modified Code with both the Commission and the OUCC. The filing of any revised COBC will address our concerns regarding AT&T's dominance on the wholesale side, producing benefits to customers of AT&T. See, I.C. 8-1-2.6-2(d)(3). Requiring the filing of future COBC versions also promotes cost minimization; rather than incurring annual training cost as was incurred under the Indiana Code of Conduct, AT&T will merely incur the occasional amount required to notify the Commission and the OUCC of its revisions to the AT&T Code of Conduct. I.C. 8-1-2.6-2(c)(1), (2).

c. Is the Indiana Code of Conduct Duplicative of the AT&T COBC? In evaluating whether to terminate the Indiana Code of Conduct, we evaluate AT&T Indiana's claim that its COBC covers the issues addressed in the Indiana Code of Conduct, thereby making the Indiana Code of Conduct obsolete, duplicative, and unnecessary. After the evidentiary hearing, the Presiding Officers ordered AT&T Indiana and MACC on March 27, 2009 to submit their respective side-by-side comparisons of the Indiana Code of Conduct and the AT&T COBC. We have reviewed those submissions and find that the AT&T Indiana COBC does not include the level of specificity and protection to wholesale customers found in the Indiana Code of Conduct. Nonetheless, we have determined that AT&T's current COBC suffices in Indiana's current regulatory landscape.

Even though the evidence establishes that there are few, if any, competitive choices for wholesale services and facilities, we conclude that maintaining the Code is inconsistent with the general tenor of deregulation and competitive forces in Indiana. The enactment of HEA 1279 in 2006 substantially deregulated the provision of communications and established regulatory parity as a goal to be achieved by June 30, 2009. While the Commission retains authority in this matter, it is not necessary for us to exercise it.

d. Technological change, competitive forces and regulation by other state and federal regulatory bodies render the exercise of jurisdiction by the Commission regarding the Indiana Code of Conduct unnecessary and wasteful. The Indiana Code of Conduct was intended to provide guidance to employees on appropriate conduct to follow in performing their jobs to facilitate AT&T Indiana's compliance with applicable state and federal laws, rules and regulations governing the telecommunications industry. This included TA96 and its implementing regulations, which themselves are designed to open local markets to competition. In the Interim Order in Cause No. 41998 dated December 26, 2002, the Commission recognized that the resolution of then-pending TA96 dockets could yield solutions or serve to refine those areas that require further attention. Interim Order at 17-18. Other Commission proceedings pending at that time have been resolved. Furthermore, in October 2003, the FCC granted AT&T Indiana's application to provide in-region interLATA services, finding that the Indiana local exchange markets are irreversibly open to competition

and that AT&T Indiana had fully satisfied the TA96 "competitive checklist." Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243 (rel. Oct. 15, 2003).

Other state and federal laws and regulations govern areas addressed in the Indiana Code of Conduct. AT&T cited the federal Communications Act of 1934, as amended by TA96, laws that govern the ethical conduct of business such as securities laws, the Sarbanes-Oxley Act of 2002, the Foreign Corrupt Practices Act, antitrust laws, and laws governing competition, including laws that prohibit deceptive and unfair business practices. As noted by Ms. Rehmer, over the last several years, the Department of Justice, the Securities and Exchange Commission, and other organizations have provided additional guidance about what is required to be included in an effective corporate compliance program. The evidence indicates that AT&T maintains its COBC as part of its Corporate Compliance Program to meet the elements of an effective compliance and ethics programs as defined by the Federal Sentencing Guidelines.

Like the Indiana Code of Conduct, AT&T's COBC sets forth detailed policies and procedures governing employee behavior. The COBC requires all AT&T employees to adhere to applicable laws, rules, regulations and court or commission orders. AT&T also has adopted detailed policies regarding customer privacy and use of customer proprietary network information. The record reflects that the Indiana Code of Conduct requirement overlaps AT&T's existing codes and policies with which AT&T Indiana complies. While AT&T asserted that having a separate code creates the potential for confusion and is costly and time-consuming from a training perspective, we are not convinced that such impediments, such as they are, are sufficient to dispense with the Indiana Code of Conduct. Nonetheless, the Indiana Code of Conduct imposes burdens on AT&T Indiana that are not imposed on any other communications service provider in the state.

As to wholesale service, the record demonstrates that TWTC and other providers can and do use alternatives to AT&T Indiana's infrastructure, including deploying their own modern facilities, and using existing facilities owned by cable companies, or using the facilities of other facilities-based providers. This is a departure from the traditional monopoly utility situation where regulation is imposed because only one provider has a legal right to provide a particular service. Federal telecommunications law regulates the interconnection of carriers, requires AT&T Indiana to provide services on a nondiscriminatory basis and makes the disclosure of carrier information and customer proprietary network information unlawful. AT&T Indiana has the same incentives as other AT&T operating companies and other communications service providers to comply with internal rules, including ensuring appropriate customer care and compliance with laws, rules and regulations, including non-discrimination requirements.

Moreover, and perhaps most important, as retail competition (including facilities-based competition, which was far less prevalent at the time the Interim Order in Cause No. 41998 was issued) has become more prevalent, and as the public has become more aware of the choices available to them, the sorts of anti-competitive practices which the Order sought to forestall would increasingly inure to the detriment of AT&T if consciously engaged in. We note our recent General Administrative Order ("GAO") 2009-5, in which we announced our

intention to repeal or modify certain of our administrative rules in light of the full implementation of HEA 1279. The changes to our rules are sweeping in scope and lift many carrier obligations, applying across the market to all carriers, regardless of size or technology. While recognizing that AT&T has a larger percentage of the wholesale business overall, we do not think that retaining the Indiana Code of Conduct, while simultaneously repealing or modifying our rules to be consistent with HEA 1279, is congruent regulation.

Among the rules to be retained and modified is that requiring carriers to fully and promptly answer all inquiries from Commission staff. In the event a dispute arises, carrier-to-carrier complaints may be resolved in a variety of informal and formal means. For example, disputes may be resolved on a business-to-business basis, or through the dispute escalation and resolution procedures provided in interconnection and lease agreements. Complaint phone calls may be made and letters may be sent to government, including state and federal regulators and legislators. Finally, if a formal complaint becomes necessary, proceedings may be initiated with the FCC, this Commission and/or in the courts. The retirement of the Indiana Code of Conduct requirement will do nothing to terminate these existing wholesale protections. There is no record evidence that the absence of a Code of Conduct has left carriers without the means of resolving issues with AT&T Indiana's sister companies. In those few cases where individual states have imposed rules governing carrier behavior, the rules apply across the board, without singling out specific companies. Accordingly, we find that technological change, competitive forces and regulation by other state and federal regulatory bodies render the retention of the Indiana Code of Conduct unnecessary.

e. The exercise of Commission jurisdiction regarding the Indiana Code of Conduct does not produce tangible benefits to the customers of providers. In AT&T Indiana's view, the absence of complaint proceedings demonstrates that technological change, market forces and the existence of other law and regulation discussed above, as well as AT&T's compliance program (including its COBC), have supplanted the need for the Indiana Code of Conduct. Ms. Sherwood asserted that the absence of complaint proceedings may demonstrate that the Indiana Code of Conduct is regulating AT&T Indiana's conduct. Ms. Sherwood also suggested that the Indiana Code of Conduct provides a benefit to consumers because it is publicly available. However, all of the other laws and regulations discussed above are also publicly available. If the Indiana Code of Conduct did not exist, wholesale customers could still have their complaints addressed on a company-to-company basis. As we find more fully below, maintaining the AT&T COBC on a public basis will be sufficient to allay any concerns that the Commission has.

Even in the absence of the Indiana Code of Conduct, a competitor could file a complaint with the Commission and/or other regulatory bodies or courts. These processes work in Indiana for other communications service providers, including incumbent telecommunications carriers. As noted above, these processes also work in other states where AT&T provides services. No quantitative data was presented that supports that the Indiana Code of Conduct is providing a tangible benefit to Indiana customers or providers. Moreover, the one incident that was provided concerned a single employee, and the behavior occurred more than three years ago. Accordingly, we find that the lack of substantial evidence of misbehavior on the record supports the proposition that the continued enforcement of the

Indiana Code of Conduct will not provide a tangible benefit to Indiana customers or providers.

f. Exercise of the Commission's jurisdiction inhibits AT&T Indiana from competing with unregulated providers and the elimination of the Indiana Code of Conduct will minimize costs, and improve efficiency. AT&T argues that there is evidence that the enforcement of the Indiana Code of Conduct inhibits AT&T Indiana from competing against other communications service providers. First, the Indiana Code of Conduct requirement is imposed only on AT&T Indiana, and AT&T Indiana incurs a cost and administrative burden that other providers are not required to assume. The estimated additional annual cost AT&T Indiana incurs for its Indiana Code of Conduct annual employee training is approximately \$250,000. AT&T argues that this additional training cost is non-productive time and is a cost other Indiana communications service providers are not required to incur. While we agree that the Indiana Code of Conduct is unique to AT&T and therefore a burden not shared by other providers, we do not find that the \$250,000 per year is a factor for our decision to suspend enforcement of the Code. In the context of AT&T's bottom line, the amount alone is not sufficient to establish an unsustainable burden.

However, maintaining the Indiana Code of Conduct will not minimize costs of regulation or provide the Commission with a more accurate evaluation of AT&T Indiana's physical or financial condition. Because the costs a provider incurs to provide service are reflected in the prices charged for service, maintaining the Indiana Code of Conduct will not have the effect of reducing prices. The duplication between the Indiana Code of Conduct and the COBC creates the potential for confusion, arguably causing AT&T to incur management and other costs to sort through the resulting uncertainty. On the other hand, termination of the Indiana Code of Conduct will increase management efficiency and increase the level of competitive parity, as envisioned by the Indiana General Assembly when it passed HEA 1279. Although the Commission no longer has jurisdiction to address AT&T's rates overall, we would also expect that any resulting efficiencies from the elimination of the Indiana Code of Conduct would be reflected in AT&T's rates on a going-forward basis.

6. Conclusion. Substantial record evidence demonstrates that due to the sea change in the communications industry and the passage of time, the continued imposition of a single-state, single-provider code of conduct required by the 41998 Final Order is unnecessary, inconsistent with the General Assembly's regulatory parity mandate, and not warranted in the competitive environment. Therefore, we find it is reasonable and appropriate to terminate this requirement. Accordingly, we further find and conclude that the requirements imposed in Cause No. 41998 regarding the Indiana Code of Conduct should be terminated.

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

1. AT&T Indiana shall be and hereby is relieved of all obligations to maintain and comply with the Commission Orders in Cause No. 41998 wherein the

Commission approved an Indiana Code of Conduct applicable solely to AT&T Indiana.

2. AT&T Indiana shall make reasonably available to all wholesale customers its Code of Business Conduct.
3. This Order shall be effective on and after the date of its approval.

HARDY, GOLC, AND ZIEGNER CONCUR; ATTERHOLT AND LANDIS ABSENT:

APPROVED: JUL 08 2009

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



**Brenda A. Howe
Secretary to the Commission**