STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS INDEPENDENT TELEPHONE ASSOCIATION	)	
	)	Docket No. 01-0808
Petition requesting an Emergency Order with regard to Intrastate Access Charges of Incumbent Local Exchange Carriers serving 35,000 or fewer Access Lines.	)	

REPLY BRIEF ON EXCEPTIONS OF
HARRISONVILLE TELEPHONE COMPANY
AND HOME TELEPHONE COMPANY

HARRISONVILLE TELEPHONE COMPANY and HOME TELEPHONE COMPANY (referred to hereinafter collectively as the "Companies"), hereby present their arguments in response to the parties that have taken exception to the Administrative Law Judge's ("ALJ") Proposed Second Interim Order ("Proposed Order") in this their Reply Brief on Exceptions.

I.

LEGAL ISSUES TRUMP POLICY ISSUES

The Proposed Order presented herein by the ALJ reaches the only correct and legally sustainable conclusion that could come out of this proceeding, absent approval of the IITA's proposal as presented.[1] In considering the exceptions that have been taken to the ALJ's Proposed Order, the Commission must remain ever mindful of the limitations that the legislature has placed upon its authority. Many of the exceptions taken with respect to the Proposed Order by the other parties to this proceeding and the revised conclusions proposed by said parties would cause the Commission to exceed its statutory authority.

[1] Neither the IITA nor the Companies filing this Reply Brief on Exceptions have taken exception to the conclusion reached in the Proposed Order regarding the IITA's proposal.

A. The Commission's Authority to Engage in Ratemaking for Small Telephone Companies is Strictly Limited.

The Illinois Commerce Commission ("Commission") derives its power and authority from the Public Utilities Act ("the Act"). Union Electric Co. v. Illinois Commerce Comm'n, 77 Ill.2d 364, 383, 396 N.E. 2d 510, 519 (1979); Business and Professional People v. Illinois Commerce Comm'n, 136 Ill. 2d 192, 201, 555 N.E.2d 693, 697 (1990) (BPI I). The Commission's authority and jurisdiction is limited to that which has been conferred upon it by the Legislature. Illinois-Indiana Cable Television Ass'n v. Illinois Commerce Comm'n, 55 Ill.2d 205, 207, 302 N.E.2d 334, 335 (1973). The Commission has powers and jurisdiction only to determine facts and make orders concerning matters specified in the statute. Union Electric, 77 Ill.2d at 383, 396 N.E. 2d at 519. The Commission may not, by its own act, extend its jurisdiction. Peoples Energy Corp. v. Illinois Commerce Comm'n , 142 Ill. App. 3d 917, 923, 492 N.E.2d 551, 557 (1st Dist. 1986). To the extent the Commission acts outside its statutory authority, it acts without jurisdiction. BPI I, 136 Ill. 2d at 243, 555 N.E.2d at 716. Any acts which the Commission takes or orders it makes which are inconsistent with the Public Utilities Act are void. City of Chicago v. Illinois Commerce Comm'n, 79 Ill. 2d 213, 217-18, 402 N.E.2d 595, 598 (1980).

The Commission's ratemaking authority with respect to local exchange telecommunications carriers with no more than 35,000 subscriber access lines (hereinafter referred to as "small telephone companies") is strictly limited by Section 13-504 of the Public Utilities Act. Section 13-504 provides in pertinent part as follows:

> "[T]he ratemaking provisions [of Article IX of the Act] do not apply to any proposed change in rates or charges, any proposed change in any classification or tariff resulting in a change in rates or charges, or the establishment of new services and rates therefor for a noncompetitive local exchange telecommunications service offered or provided by a local

> exchange telecommunications carrier with no more than 35,000 subscriber access lines. Proposed changes in rates, charges, classifications, or tariffs meeting these criteria shall be permitted upon the filing of the proposed tariff and 30 days notice to the Commission and all potentially affected customers. The proposed changes shall not be subject to suspension. The Commission shall investigate whether any proposed change is just and reasonable **only if** a telecommunications carrier that is a customer of the local exchange telecommunications carrier or 10% of the potentially affected access line subscribers of the local exchange telecommunications carrier shall file a petition or complaint requesting an investigation of the proposed changes." (Emphasis Supplied).

The Commission regulates the rates and charges of larger local exchange telephone companies and other public utilities pursuant to the ratemaking provisions of Article IX of the Public Utilities Act. The authority to regulate the rates of these larger telephone companies and other public utilities is quite broad. Prior to 1986, the Commission had the same broad ratemaking authority with respect to small telephone companies, but that authority was specifically limited by the 1986 amendment to the Public Utilities Act which added Section 13-504 to the statute. As the above quoted language makes clear, the ratemaking provisions of Article IX of the Act no longer apply to small telephone companies.

Since the ratemaking provisions of Article IX of the Act do not apply to small telephone companies, the Commission must look to Article XIII of the Act for its ratemaking authority over small telephone companies. Section 13-504 is the only ratemaking provision of Article XIII that applies to small telephone companies. Thus, the Commission's ratemaking authority with respect to small telephone companies is strictly limited to the authority granted by Section 13-504 of the Act.

B. The Commission Has No Authority to Mandate Intrastate Access Charge Rates for the Small Telephone Companies in this Proceeding.

The present proceeding has as its essence the intrastate access charge rates of the small telephone companies in Illinois. The provisions of Section 13-504 limiting the Commission's authority with respect to small telephone companies are not restricted to rate filings regarding local exchange telecommunications services. Rather Section 13-504 applies with equal force to rate filings affecting both local exchange rates and intrastate access charge rates. There is no limiting language that excludes intrastate access charges from the gambit of items for which Section 13-504 is the Commission's only ratemaking authority over small telephone companies. In fact, the language of Section 13-504 that provides for a complaint by a telecommunications carrier that is a customer of the small telephone company makes it abundantly clear that Section 13-504 applies to rates for intrastate access because that is the service which the small telephone companies provide to other telecommunications carriers.

Therefore, the Commission has no authority in the present case to mandate intrastate access charge rates or any other rates for the small telephone companies. The Commission could pre-approve one or more intrastate access charge rate structures in its order concluding this proceeding as requested by the IITA if it so chooses, but it may not mandate any particular set of rates because the Commission does not have jurisdiction and authority to do so here. The Commission may not, by its own act, extend its jurisdiction. *People's Energy Corp. v. Illinois Commerce Commission*, 142 Ill.App.^{3d} 917, 923, 492 N.E.^{2d} 551, 557 (1st Dist. 1986).

SBC Illinois ("SBC"), in its exceptions to the Proposed Order, complains that "the [Proposed] Order seems to invite each of the small companies to proceed on its own in filing access charge rates," and that "the result of the Proposed Order would be that any

telecommunications carrier that may want to challenge any rate increases would need to file a complaint against the small carrier, with the potential for numerous complaints." SBC BOE p. 4. SBC calls this "piecemeal litigation" and criticizes the lack of guidance provided by the Proposed Order on how small telephone companies are to set their intrastate access charge rates. Id. pp. 3-5. Likewise, AT&T complains that the Proposed Order "effectively eliminate[s] any policy that applies to the pricing of access services for companies of this size," and that "[t]he Proposed Order, if adopted, would result in this Commission providing no direction whatsoever to these companies or to the access customers of these companies, regarding the criteria upon which they ought base their future intrastate access prices." AT&T Exceptions p. 2.

What these large carriers fail to recognize is that regardless of their distaste for the possibility of having to file, prosecute and bear the burden of proof in multiple complaint cases against individual small telephone companies, the legislature has tied the Commission's hands. The legislature has specifically and unambiguously imposed these burdens on SBC and AT&T and other large carriers like them that use the networks of the small telephone companies to provide interexchange service. Section 13-504 specifically contemplates, and in fact requires, the exact results about which these large carriers complain. Section 13-504 specifically provides that, "[t]he Commission shall investigate whether any proposed change is just and reasonable **only if** a telecommunications carrier that is a customer of the local exchange telecommunications carrier or 10% of the potentially affected access line subscribers of the local exchange telecommunications carrier shall file a petition or complaint requesting an investigation of the proposed changes." Whether the larger carriers like it or not, the Commission cannot interfere through this proceeding with the procedure that the legislature has placed in effect for investigating the rates of the small telephone companies only after the filing of a tariff making a

proposed change in rates or charges and a subsequent complaint by a customer that is a telecommunications carrier or 10% of the access line subscribers.

The Commission Staff makes the same argument in the introductory portion of their Brief on Exceptions. (pp. 5-7). Staff's criticism goes further suggesting that the Proposed Order adopts a position that was not advanced by any party to the docket and that it is a waste of the time and effort that the parties put forth in litigating the proceeding. Staff is wrong. The Companies filing this Reply Brief on Exceptions have been making the arguments upon which the Proposed Order appears to be based since the very first opportunity to comment in this proceeding, which was the responses they filed to the Staff's March 7, 2002 Report on or about March 26, 2002. In addition, the Companies were instrumental in having the following language included in the ALJ's Scoping Order: "Some parties have indicated that they may question whether the Commission has the legal authority to mandate, as opposed to merely authorizing, any particular intrastate access charge rate structure for Small Telephone Companies, or whether the Commission's jurisdiction and authority to set rates and charges for Small Telephone Companies are limited by Section 13-504 of the Public Utilities Act. This scoping order shall not operate to forefend any party from raising that or any related argument." The fact that the Commission Staff failed to recognize the obvious merits of the Companies' arguments sooner is their own fault. Staff has cited no statute or caselaw to show that the Companies' interpretation of Section 13-504 is anything other than 100% correct.

The Commission's ratemaking authority with respect to small telephone companies is strictly limited to the authority granted by Section 13-504 of the Act. This limitation applies equally to local exchange rates and intrastate access charge rates. Under Section 13-504, the Commission has authority to investigate whether any proposed change in rates and charges is

just and reasonable **only if** a telecommunications carrier that is a customer of the local exchange telecommunications carrier or 10% of the potentially affected access line subscribers of the local exchange telecommunications carrier shall file a petition or complaint requesting an investigation of the proposed changes. The small telephone companies have not filed tariffs resulting in a change in rates and charges, and this proceeding was not initiated by the petition or complaint of a telecommunications carrier that is a customer of the small telephone companies or by a sufficient number of the small telephone companies' subscribers. Therefore, the proceeding is not and cannot be considered a ratemaking proceeding under Section 13-504 of the Act. As a result, the Commission has no authority to set rates in this proceeding.

C. The Procedural Posture of the Case Limits the Commission's Authority.

This proceeding was initiated by the Illinois Independent Telephone Association ("IITA") with the filing of a Petition requesting certain relief with respect to the intrastate access charges of local exchange carriers serving 35,000 or fewer access lines. Specifically, the IITA showed that as a result of certain orders ("MAG Orders") entered by the Federal Communications Commission ("FCC") regarding interstate access charges, the small telephone companies in Illinois would suffer significant reductions in revenue if they were required to set their intrastate access charge rates by mirroring their interstate access charges with the adjustments set forth in the 46th Interim Order in ICC Docket No. 83-0142. The IITA's petition proposed a specific mechanism for realigning the intrastate access charges of the small telephone companies to eliminate this revenue reduction, and sought approval thereof.

As stated above, the Commission could pre-approve one or more intrastate access charge rate structures for the small telephone companies in its order concluding this proceeding as

requested by the IITA. The Commission may not however mandate any particular set of rates or formula because this is not a ratemaking proceeding under Section 13-504 of the Act.

The IITA's petition was essentially a request for pre-approval of a methodology for setting intrastate access charge rates for the small telephone companies in Illinois. Such a petition was specifically contemplated by the Commission and the parties in the 46th Interim Order in Docket 83-0142. The Stipulation approved by said order provided, "[i[t is understood and agreed that these local exchange carriers may present alternate proposals for determination of LS1/LS2 rates for the Commission's consideration at any time." 46th Interim Order, 83-0142, App. A p. 6 of 8. The Commission routinely considers similar petitions under Section 9-201 of the Act when larger telephone companies and other public utilities seek to file tariffs on less than 45 days notice. The procedure for such a proceeding is to grant the requested authority pre-approving the tariff filing or to deny the petition and thereby require the company to file a tariff proposing the rate filing with proper notice and subject to appropriate investigation by the Commission. The Proposed Order denies the IITA's petition, and having done so, it then goes on to properly require any small telephone company wishing to increase intrastate access charge rates to make an appropriate tariff filing subject to a possible investigation under Section 13-504 of the Act.

The procedural posture of the case will not permit any other result. The first question is not what policy decision the Commission would choose to implement if it had no limitations on its authority. The first question is a strict legal issue of what authority the Commission has in light of the procedural posture of the case.

AT&T, SBC Illinois and the Commission Staff, in their Exceptions to the Proposed Order, attempt to entice the Commission to ignore the legal impediments to imposing its will in

this proceeding by trumpeting the Commission's past achievements in access pricing policy and by criticizing the Proposed Order for making a "non-ruling." What these parties have ignored or simply failed to recognize is that the Commission's power and authority is limited to those specifically granted in the Public Utilities Act, and the Commission can only make policy decisions in an appropriate regulatory proceeding for which it has specific statutory authority and after complying with all proper legal requirements for such an appropriate proceeding.

The exceptions to the Proposed Order by SBC, AT&T and the Commission Staff must fail as a matter of law in this proceeding because there are procedural defects that preclude the Commission from setting the rates of the small telephone companies in this proceeding. In addition to the fact that this proceeding was not properly initiated under Section 13-504 of the Act, this proceeding was not properly initiated as a "contested case" under the Illinois Administrative Procedures Act, 5 ILCS 100/1-1 et seq. ("IAPA"). Section 10-25 of the IAPA, 5 ILCS 100/10-25, contains specific notice requirements for "contested cases."[2] Section 10-25 requires service in person or by certified or registered mail of a notice containing among other things a statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the substantive and procedural statutes and rules involved, and a plain statement of the consequences of a failure to respond. The Commission never gave the required notice.

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[2] Section 10-101 of the Public Utilities Act specifically provides that: "In the conduct of any investigation, inquiry or hearing the provisions of the Illinois Administrative Procedures Act, including but not limited to Sections 10-25 and 10-35 of the Act, shall be applicable and the Commission's rules shall be consistent therewith. Complaint cases initiated pursuant to any Section of this Act, investigative proceedings and ratemaking cases shall be considered 'contested cases' as defined in Section 1-30 of the Illinois Administrative Procedures Act, any contrary provision therein notwithstanding." (Emphasis supplied).

The Commission's ratemaking authority with respect to small telephone companies is strictly limited. The Commission must also follow the requirements of the IAPA in conducting its proceedings, including the specific notice requirements of Section 10-25 of the IAPA. Therefore, even if the Commission were predisposed to agree with the policy arguments advanced by the parties taking exception to the Proposed Order, and it should not be, the Commission may not adopt those policy arguments if and to the extent that such action would exceed the Commission's specific statutory authority. Such is the case in the present proceeding. The Commission's ability to make policy decisions is limited by its statutory authority. In other words, legal issues trump policy issues. The Proposed Order properly applies the law to the procedural posture of the present proceeding and reaches the only legally sustainable conclusion, absent approval of the IITA's proposal. The exceptions of SBC, AT&T and the Commission Staff must be rejected.

D. The Proposed Order Properly Relieves the Small Telephone Companies from Compliance with the Orders in Docket 83-0142.

The Proposed Order properly clarifies that the small telephone companies are no longer required to comply with the Commission's prior orders in Docket 83-0142 with respect to intrastate access charge rates. Based upon the arguments set forth above and other similar arguments, it was and is the position of the Companies filing this Reply Brief on Exceptions that the 46th Interim Order and the other orders in ICC Docket No. 83-0142 that purported to require small carriers to utilize certain mechanisms in setting intrastate access charge rates were advisory only and not mandatory.

Docket 83-0142 was not a proper contested case with the appropriate notice required by Section 10-25 of the IAPA having been given to the small telephone companies. Docket 83-

0142 also was not a proper rulemaking case under the provisions of the IAPA. The orders in Docket 83-0142 were not proper declaratory rulings under Section 5-150 of the IAPA because the Commission had not made provision in its rules for such declaratory rulings. See *Harrisonville Telephone Company v. Illinois Commerce Commission*, 176 Ill.App.^{3d} 399, 125 Ill. Dec. 864 (5th Dist. 1988)(Court held that portion of Commission's order authorizing use of eminent domain for then pending right-of-way acquisition which addressed required procedure to be followed by the Company for future right-of-way acquisitions was an illegal declaratory ruling). Just like in the Harrisonville case, the Commission did not have a proper declaratory ruling rule in effect at the time it established the 27th, 39th or 46th interim orders in Docket 83-0142. The Commission did not implement a declaratory ruling provision in its Rules of Practice until August 15, 1996. See 83 Ill.Admin.Code Section 200.220. Finally, certain of the orders in Docket 83-0142 were entered by the Commission after Section 13-504 of the Act became effective without a petition or complaint having first been filed by a telecommunications carrier that was a customer of the small telephone companies or by a sufficient number of the access line subscribers of the small telephone companies.

Clarification of this matter in the Proposed Order is appropriate.

II.

THE COMMISSION HAS NO AUTHORITY TO INCREASE OR DECREASE LOCAL RATES IN THIS PROCEEDING.

The Commission has no authority to take any action in this proceeding that would require or result in a mandatory increase in the rates for basic local exchange telecommunications service of the small telephone companies. The Commission's ratemaking authority with respect to small telephone companies is strictly limited to the authority granted by Section 13-504 of the

Act. Section 13-504 specifically provides that, "[t]he Commission shall investigate whether any proposed change is just and reasonable **only if** a telecommunications carrier that is a customer of the local exchange telecommunications carrier or 10% of the potentially affected access line subscribers of the local exchange telecommunications carrier shall file a petition or complaint requesting an investigation of the proposed changes."

While this proceeding was not properly initiated as a ratemaking case under Section 13-504, SBC and the Commission Staff each take exception to the fact that the Proposed Order did not adopt their proposals that would have required local rate increases for the subscribers of the small telephone companies. SBC and the Commission Staff advanced separate proposals during the proceeding that would have required the small telephone companies to mirror their interstate access charges in setting intrastate access charge rates and that would have eliminated the adjustments set forth in the 46th Interim Order in ICC Docket 83-0142. Each proposal, while recognizing the need for revenue neutrality, would have required the small telephone companies to increase their local rates. SBC's proposal called for local rate increases up to $3.00 per month, but only for the small companies that would experience a revenue deficiency from the adoption of their proposed mirroring requirement and only to the extent necessary to recover the revenue deficiency. Staff, on the other hand, proposed a mandatory increase for all small telephone companies in the amount of $1.87[3] per subscriber line per month and the pooling of the revenues generated from such increases for distribution among the small carriers.

For all the reasons previously articulated above, the Proposed Order properly rejected the local rate increase proposals of SBC and the Commission Staff as a matter of law. This proceeding was not initiated by the petition or complaint of a telecommunications carrier that is

[3] Staff's BOE at page 16 indicates that this amount has increased to $2.01 per small company subscriber.

a customer of the small carriers or a sufficient number of the small carriers' subscribers, and therefore it cannot be considered a ratemaking proceeding under Section 13-504. This proceeding was also not initiated as a proper "contested case" under the IAPA. The small telephone companies were not given the specific notice required by Section 10-25 of the IAPA, and they were not advised at the time of initiation of the proceeding that their individual rates for local exchange service could be revised as part of the final order herein. Neither were the subscribers of the small carriers notified that their rates could be increased as part of this proceeding. Therefore, the Commission has no authority in the present case to set local rates for the small carriers or to order either an increase or a decrease in such rates. The exceptions of SBC and the Commission Staff regarding their local rate increase proposals must therefore be rejected.

The Commission Staff's proposal suffers from an additional legal defect. Staff argues in its BOE that the Proposed Order errs in rejecting their proposal to establish a new high cost fund pooling arrangement to be supported by mandatory increases in local rates for all small telephone companies regardless of whether the individual company has a revenue deficiency from mirroring. The Proposed Order properly rejected Staff's proposal because there is no authorization in any statute for the Commission to order such a mandatory pooling arrangement. The only state statute authorizing a mandatory pooling arrangement like the one proposed by Staff is Section 13-301 of the Public Utilities Act. Section 13-301(d) authorizes the creation of a state universal service fund, but specifically requires that "the Commission shall require that all costs of the fund be recovered from all local exchange and interexchange telecommunications carriers certificated in Illinois on a competitively neutral basis." No provision is made in Section

13-301 or any other statute for the Commission to increase local rates and require small telephone companies alone to bear the costs of a separate fund or pooling arrangement.

Somewhat surprisingly, Staff argues in support of its mandatory pooling arrangement on pages 14-15 of their BOE that the Commission has the general authority to regulate non-competitive telecommunications rates under the authority of Article IX of the Public Utilities Act. Staff also makes the statement that Section 13-504 recognizes this authority because Section 13-504(a) in Staff's opinion makes Article IX generally applicable to small companies. It should go without saying that Staff has completely misread Section 13-504, but the relevant portions are quoted again below with emphasis:

> "Except where the context clearly renders such provisions inapplicable, the ratemaking provisions of Article IX of this Act relating to public utilities are fully and equally applicable to the rates, charges, tariffs and classifications for the offer or provision of noncompetitive telecommunications services. However, **the ratemaking provisions** [of Article IX of the Act] **do not apply to any proposed change in rates or charges,** any proposed change in any classification or tariff resulting in a change in rates or charges, or the establishment of new services and rates therefor **for a noncompetitive local exchange telecommunications service offered or provided by a local exchange telecommunications carrier with no more than 35,000 subscriber access lines**." (Emphasis Supplied).

Staff's exception regarding their mandatory pooling arrangement must be rejected as a matter of law. Their obvious misinterpretation of Section 13-504 must also be rejected.

III.

THE COMMISSION SHOULD NOT INCREASE END USER LOCAL RATES OR THE AFFORDABLE RATE.

Even if this were a ratemaking proceeding under Section 13-504 of the Act, there are additional reasons why the Commission should not adopt the proposals by SBC Illinois and the

Commission Staff that call for increased local rates for the end user subscribers of the small telephone companies in Illinois thereby increasing the affordable rate that was set by the Commission in Docket 00-0233/00-0335. Certain of those arguments are based on legal principles. Other arguments might be based on so-called policy reasons, but in fact they are just plain common sense.

If this were a Section 13-504 ratemaking proceeding, the ultimate policy issue would be one of allocation of costs among intrastate access charges, local exchange rates and universal service funding. Simply stated - the policy issue is whether recovery of the costs at issue should be allocated to the end user local exchange customers of the small telephone companies, or to the long distance carriers that utilize the networks of the small telephone companies, or to the State universal service fund.

The Commission appears to have historically favored a policy of allocating the recovery of non-traffic sensitive ("NTS") costs to the end user. Common sense dictates, however, that this policy cannot be followed blindly without any consideration of the impact on the end user customer. This Commission has recognized that common sense fact in the past. The Commission did not immediately allocate all NTS costs to end user local rates at the beginning of Docket 83-0142. Recovery of a portion of these costs was shifted to the end user local rates slowly over time throughout Docket 83-0142 with the remaining portion continuing to be recovered from intrastate access charges. Also, not all such costs were shifted directly to the end users even though they were shifted out of intrastate access charges. A portion of the NTS costs that were shifted out of access charges was allocated to the Illinois High Cost Fund. Likewise, in the MAG Orders the FCC shifted a portion of the identified NTS costs to the end users

through the increases to the federal subscriber line charge ("SLC") and they shifted the remainder of such costs to a new federal universal service fund.

Returning to the question of how to allocate the recovery of the costs between the three major revenue sources for small telephone companies, if the decision is made to transition recovery of certain costs out of intrastate access charges, then the Commission must decide whether to impose the burden of those costs on the end user customers in their local rates or to recover those costs from the state universal service fund. SBC and the Commission Staff in their BOEs, as well as in their earlier testimony and briefs, favor recovery on these costs primarily from end user local rate increases as discussed above.

SBC's rather simplistic argument is that up to $3.00 per month per access line should be allocated to the end user local rates because the MAG Orders raised the federal SLC by $3.00 to a total federal SLC of $6.50. The equally simplistic response is that the subscribers of the small telephone companies in Illinois have already had that $3.00 and more allocated to them in their local rates when the Illinois Commission removed the same NTS cost elements from intrastate access charges in Docket 83-0142. The State SLC in Illinois is up to a $12.45 adder on the local bills of the small telephone companies' subscribers. The FCC in the MAG Orders also moved the recovery of a substantial amount of the revenue deficiencies created by the interstate access charge reductions to the federal universal service fund. Common sense would say that since Illinois has already matched the allocation to the end user that the FCC imposed in the MAG Orders, the revenue deficiencies in the hypothetical Section 13-504 case should be recovered from the State USF fund.

It would appear that the subscribers of the small telephone companies in Illinois have already borne their fair share of the cost elements removed from intrastate access charges

through the State SLC that they have been paying for over a decade. State and federal policies require affordable rates for the end users. The FCC recognized this and provided for a large portion of the costs caused by reducing access charges on the federal side to be recovered from the federal universal service fund. Clearly, if the Commission determines that intrastate access charges should follow the FCC's MAG Orders, then the appropriate balance is to move recovery of the remaining costs caused thereby on the state side to the state universal service fund.

Illinois Courts have held that the Commission may not restructure telephone rates without taking into account the interests of ratepayers by considering the impact of proposed rates. Citizens Utility Board v. Illinois Commerce Commission, 276 Ill.App.3d 730, 737, 658 N.E.2d 1194, 1200 (1st Dist. 1995). The Court in Citizens Utility Board said:

> "The Commission has the responsibility of balancing the right of the utility's investors to a fair rate of return against the right of the public that it pay no more than the reasonable **value of** the utility's **services**." Id. (Emphasis Supplied).

The evidence that IITA put in the record on rebuttal suggests that subscribers are sensitive to rates and value of service and that small carriers are already losing subscribers. Mr. Schoonmaker testified as follows:

> "[Dr. Staranczak and Ms. Hegstrom] fail to recognize that there are alternative communication services that are substitutable for telephone company second lines (and primary lines) in many circumstances. Dr. Staranczak also fails to recognize that customers who discontinue service because of a price increase 'experiment' will not necessarily return if the 'experiment' is ended. ***
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> While it is true that most small Illinois companies do not face competition from a wireline CLEC, that does not mean they are not facing competition from Commercial Mobile Radio Service (CMRS) providers and that competition is becoming formidable. Growth in mobile service across the nation has been phenomenal in the past two to three years, and more and more customers are using mobile service in place of second, and in a growing number of cases, their primary line. ***

> Across the country last year, access lines declined for the wireline industry as a whole and for the rural wireline industry, as well, for the first time in many years. Those declines are coming as a result of competition and choices made based on existing rates. Similar trends can be seen in Illinois as well. I have prepared IITA Exhibit No. 2, Attachment 4.10 to demonstrate these trends. ***
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> Between 1998 and 2000, the companies, as a whole, experienced average annual line growth of 2,334 lines per year, or 2.3%, while the growth from 2000 to 2001 was only 57 lines or 0.1%. Between 1998 and 2000, 34 of the companies had average line gains while only seven averaged losses in lines. Between 2000 and 2001, only 19 companies gained lines, while 22, over half, saw losses in lines." IITA Exhibit 2.0, pp. 36-38.

The subscribers of the small telephone companies in Illinois have recently experienced increased telephone bills due to the increase in the federal SLC. Many have also seen local rate increases as a result of the Commission's orders in Docket 00-0233/00-0335. There is no evidence in the record of this proceeding regarding the potential adverse impact that another set of local rate increases would have on the subscribers of the small telephone companies. The record in this proceeding is completely devoid of any evidence on subscriber impact that would support an increase in local rates. Absent sufficient evidence to determine the impact on end user subscribers, a decision that maintains the status quo is not inappropriate. The Proposed Order does just that.

Consideration of the impact of local rate increases on the subscribers of the small telephone companies necessarily includes the issue of affordability. The Commission has recently investigated and determined the level of local exchange rates that are affordable for the subscribers of the small telephone companies. Using the common sense approach, it would seem that if recovery of certain costs is to be shifted from access charges and the local exchange rates are already set at the affordable level, the only remaining place to allocate the recovery of these costs is to the state universal service fund.

SBC argues in its BOE that the Affordable rate determined in Docket 00-0233/00-0335 should be increased by $3.00. There is not a sufficient record in this proceeding to justify a decision by the Commission deviating from its recent orders in Docket 00-0233/00-0335 addressing the appropriate level of local rates that are affordable for the subscribers of the small telephone companies. The Commission in Docket 00-0233/00-0335 took evidence on the existing rates for local service of most, if not all, local exchange carriers in the State, including Verizon North and the small carriers, and evidence of national average telephone rates. It took evidence on the decline of local telephone penetration levels in Illinois compared with national trends. It took evidence from the Bureau of Labor Statistics on the percentage that the average urban wage earning household in the United States spends on local telephone service. It also took opinion testimony on the issue of how the term "affordable" should be defined and how the "affordable rate" should be calculated and determined. After reaching its conclusion, the Commission granted a limited rehearing on the calculation of the average Verizon rate. The final conclusion in the Second Interim Order on Rehearing states:

> "The Commission has reviewed the evidence and arguments of the parties and concludes that the affordable rate should be set at the Verizon proposed rate, which, if calculated correctly in the first instance would have been $20.39." Harrisonville Exhibit 4, p. 5.

The Second Interim Order on Rehearing in Docket 00-0233/00-0335 was entered on March 13, 2002, and the matter is not yet finally resolved. The final order in that matter is still up on appeal awaiting a decision by the Illinois Supreme Court on the Petition for Leave filed by this Commission.

The Commission's determination of the "affordable rate" in Docket 00-0233/00-0335 was much more than a proxy number to plug into a calculation of the size and allocation of the state universal service fund. Section 13-301 mandated that the Commission determine the

appropriate local rates for the small carriers. In furtherance of that statutory mandate, the Commission adopted a rate of $20.39 and approved a 3 to 5 year transition plan during which small carriers whose rates were below that level would either increase rates or have such rate level imputed to them.

While the Commission, like all other administrative agencies, has continuing jurisdiction to review its prior orders, it may not lawfully rescind its previous order determining the appropriate rate level for local exchange service rates for small carriers unless it finds that the facts are different from the findings on which the original order was entered, that the facts as found in the original order were erroneous, that conditions have changed since the entry of the original order to such an extent that the facts and conditions are now different, or that a mistake as to the law was made. Central Northwest Business Men's Ass'n v. Illinois Commerce Commission, 337 Ill. 149, 158-159, 168 N.E. 890, 894 (1929). In Commonwealth Edison Company v. Illinois Commerce Commission, 180 Ill.App3d 899, 536 N.E.2d 724 (1st Dist. 1988), the Court reversed an order by the Commission which granted the utility's petition for special permission to revise its seasonal rate differential without providing 45 days' notice to the Commission and the public as arbitrary and capricious and therefore void, because the order rescinded a prior valid order where the Commission had just recently established such rates after more than two years of litigation. The Court in Commonwealth Edison said:

> We believe the Commission's June 8 order was arbitrary and capricious in that it rescinded prior valid orders of the Commission **in the absence of any change in circumstance** and it allowed a change in Edison's rate design which was revenue neutral on a calendar year rather than a 12-month basis, contrary to accepted Commission practice. Further, we find the Commission's action to be contrary to law in that it violated section 10-113 of the Public Utilities Act. 180 Ill.App.3d at 907, 536 N.E.2d at 729 (Emphasis Added).

Here - just like in the Commonwealth Edison case, there is no evidence in the record of this proceeding to show any changed circumstances. Nothing has changed that would make local exchange telecommunications services more affordable to the subscribers of the small carriers since the Commission's last order in Docket 00-0233/00-0335 was entered on March 13, 2002. SBC argues in its BOE that the entry by the FCC of the MAG Orders was a change of circumstances, but the MAG Orders certainly did not have the effect of making telephone subscribers more able or willing to pay for service than they were when the order in Docket 00-0233/00-0335 was entered. If anything the MAG Orders caused overall local rates to be less affordable, because the MAG Orders raised local rates by $3.00. In addition, contrary to SBC's argument in its BOE, the record in this proceeding shows that the MAG order (the text of which was released on November 8, 2001) was entered prior to the Commission's March 13, 2002 "affordable rate" decision. Harrisonville Cross Exhibit No.1 is the Direct Testimony on Rehearing of IITA's witness in Docket 00-0233/00-0335. Page 18 of that exhibit shows that the MAG order was one of the basis for the IITA's request to phase-in the "affordable rate" in Docket 00-0233/00-0335. Therefore, it is not new, and there has been no change of circumstance.

No party presented new evidence to show that Verizon's average local rate, which the Commission used to set the "affordable rates," has increased since the Commission entered its Second Interim Order on Rehearing in Docket 00-0233/00-0335 on March 13, 2002. In fact, since the record in this matter was closed, Verizon's rates were reduced pursuant to this

Commission's Order on Reopening in Docket 98-0866.[4] Based on the rate reductions ordered by the Commission for Verizon, if anything the affordable rate should be reduced, not increased.

Likewise, no party except IITA offered new evidence to show that the ability or willingness of the small carriers' subscribers to pay for local exchange service has changed, and the IITA evidence shows that subscribers are leaving the network. Staff witness Staranczak admitted on cross-examination in the pending proceeding that the studies upon which he was relying, in opining that local rates could be increased were conducted for companies substantially larger than the small carriers, (Transcript p. 253), that said studies were not conducted for the pending proceeding, that said studies are 10 to 15 years old, and that there had been significant changes in the industry since those studies were conducted. (Transcript pp. 250-251).

Therefore, based on Central Northwest Business Men's Ass'n and Commonwealth Edison the Commission cannot deviate from its recent order in Docket 00-0233/00-0335 determining the appropriate level of local rates for the small carriers.

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[4] In the Second Interim Order On Rehearing in Docket 00-0233/00-0335, the Commission adopted the methodology proposed by Verizon to set the "affordable rate." The formula that was ordered for calculating the affordable rate was determined based on two components. The first component is the Verizon North rate for residential service in its rural exchanges. The monthly flat rate is $16.99. The second component of the affordable rate calculation is an amount calculated for local calling usage by residential customers. Since, at the time evidence was entered into the record of Docket 00-0233/00-0335, Verizon North had a usage sensitive component in its local service rates the Commission accepted an amount to reflect the average monthly usage charge to residential customers in the affordable rate calculation. This second component was calculated by taking Verizon's stated average number of local calls (per line per month), or 100 calls, times the per call rate for local calls. The per call rate for local calls in the Verizon exchanges, at that time was $0.034 per call. Thus, the second component of the affordable rate was calculated to be an additional $3.40 per month (100 calls multiplied by the $0.034 per call charge). Thus the "affordable rate" was calculated at $20.39. Since the affordable rate was established the Commission approved rate reductions for Verizon in the Order on Reopening in Docket No. 98-0866, dated May 21, 2003. By the time these rate reductions are phased in, the per-call rate for local calls will be reduced to zero, which when applied to the formula would yield an affordable rate of $16.99, rather than the $20.39 currently in effect.

Finally, Staff argues for the first time in footnote 2 on page 13 of its BOE that certain small telephone companies, including Harrisonville, should have their previously determined USF funding from Docket 00-0233/00-0335 reduced because mirroring will generate more revenue for these companies in future time periods than their existing frozen rates would have generated, rather than less. Interestingly, Staff's previous argument about this fact was that these companies should be required to reduce their local rates. Staff's new argument is just as flawed as the last one. In fact, it is 100% at odds with Staff's own argument against allowing other small telephone companies who would see a revenue deficiency from mirroring to recover additional sums from the State USF fund. At page 16 of its BOE Staff argues, "since the Commission has recently decided upon an appropriate level of Universal Service support, further increases are not warranted at this time. The level of support provided by the USF fund was not intended to increase every time there is a change in federal or state rate setting methodologies." While Staff was careful to only use the word "increase" in the foregoing quote, the argument applies equally to "decreases."

This argument by Staff must also be rejected because it improperly considers a single change in the Company's circumstances in isolation, thereby ignoring potentially offsetting considerations and risking understatement or overstatement of overall revenue requirement. While the rule against single issue ratemaking only applies in ratecases and may not apply to USF funding, the principle is the same. Staff's argument cannot be given any credence because it was raised so late as to preclude the appropriate evidence that would show that if apples were matched to apples, Harrisonville and the other companies in this list would not see any windfall.

IV.

THE CLARIFYING LANGUAGE REQUESTED BY IITA IS APPROPRIATE AND WOULD IMPROVE THE ORDER.

The IITA filed certain limited exceptions to the Proposed Order requesting certain clarifying language. The Companies filing this Reply Brief on Exceptions generally support the clarifications to the Proposed Order requested by the IITA. The requested clarifications are appropriate and would improve the order. The Companies will not reiterate the IITA's exceptions.

V.

CONCLUSION

The Commission should completely reject the exceptions filed herein by SBC, AT&T and the Commission Staff for the reasons set forth in this Reply Brief on Exceptions. The Commission should enter a final order herein substantially similar to the Proposed Order filed by the ALJ on June 23, 2003, with appropriate clarifying language as proposed by IITA.

Respectfully submitted,

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HOME TELEPHONE COMPANY

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CERTIFICATE OF SERVICE
01-0808

The undersigned, TROY A. FODOR, hereby certifies that on the 28th day of October, 2003, he served a copy of the foregoing instrument by personally delivering a copy thereof and/or mailing a copy thereof by electronic mail and/or United States Mail, postage prepaid, at Springfield, Illinois, to the individuals named on the attached Service List in envelopes plainly addressed to each of them.

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