

and the laws pertaining to use of a test year; and (7) the Commission erred in not requiring a cap on cost recovery in the rider.

A brief consideration of policy and procedural history is necessary to an understanding of the issues presented in this review. Section 8-402 of the Act (Ill.Rev.Stat.1989, ch. 111 2/3, par. 8-402 (section 8-402)) requires the Commission to adopt long range energy plans for both the State as a whole and for each energy service utility in order to effectuate "least cost" policies of the State. Every three years, the Department of Energy and Natural Resources (DENR) is required to prepare and submit proposed utility energy plans for Illinois. The utilities also prepare and submit individual company plans for Commission approval. (FN1) Evidentiary hearings are to be held, and the Commission must either adopt or modify the plans submitted. The Commission must select the plan, and *1144 [189 Ill.Dec. 827] components thereof, which will result in the greatest likelihood of providing adequate, efficient, reliable and environmentally safe energy services at the least cost to consumers and which will utilize, to the fullest extent practicable, all economical sources of conservation, renewable resources, cogeneration and improvements in energy efficiency as the primary sources of new energy supply. To the fullest extent possible, the plans adopted for each utility are to be consistent with the statewide plan. (FN2) Section 8-402.

Where the Commission determines, as a result of the hearings, that a utility's existing or planned programs or policies inhibit or do not fully ensure the economical utilization of conservation, renewable [250 Ill.App.3d 321] resources, cogeneration or improvements in energy efficiency, it "shall" revise the plan as necessary and order the utility to implement the program or policies in cooperation with the DENR. Implementation by a utility of such additional programs or policies as ordered by the Commission entitles the utility to recover reasonable costs through the ratemaking procedures outlined in the Act. Section 8-402.

On October 6, 1989, the Commission adopted the first statewide plan, setting forth in detail how utilities are to develop the capability to use the demand-side resources that are favored, consistent with section 8-402. The Commission directed the utilities to "begin to build the capability to turn potential demand resources into available resources consistent with section 8-402 * * *". This process

should include technical and market research and development, pilot programs, and marketing tests designed to gather information, test incentive designs, and assess and build delivery mechanisms."

The Commission also recognized that utilities should recover costs they incur with demand-side program analyses, and were directed to develop proposals for the recovery of "prudently-incurred" costs associated with analysis, design and implementation of demand-side programs. The Commission found it premature to articulate a uniform policy with respect to DSM cost recovery and lost revenues.

The statewide plan also addressed the recovery of a particular cost associated with demand-side programs due to lost revenue, which are revenues that the utility would earn but for DSM capability building activities, referred to as a potential barrier to implementing demand-side programs. The utilities were directed to include in their least cost plan a proposal to reduce this barrier.

Witnesses during hearings on Rider 22 explained, in part, that: "The lost earnings due to implementing such a demand[-]side resource prematurely are a real cost of the decision to do so." Further, "[t]he recovery of Lost Revenues allows utilities to recover revenues lost through the implementation of capability building pilot programs that the Commission has found to be in the public interest." Also, "demand-side resources provide much lower earnings than supply-side resources, unless profits lost as a result of decreased sales due to demand-side management ['DSM'] are offset in some manner."

Edison submitted its first individual company electric energy plan on January 8, 1990, in which it charted its capability to design, implement and evaluate demand-side resources. Edison addressed the issue of how to best recover the costs associated with its DSM and proposed that its cost of building capability in the design, evaluation and [250 Ill.App.3d 322] implementation of demand-side resources be recovered by the use of a cost recovery mechanism called a rider, which is a form of tariff that modifies an otherwise applicable standard rate under specific circumstances.

*1145 [189 Ill.Dec. 828] The Commission confirmed the use of a rider as an appropriate cost recovery mechanism in an order dated December 12,

1990 (Illinois Commerce Commission, Illinois Commerce Commission docket number 90-0038 (Dec. 12, 1990) (Docket No. 90-0038)), asserting that the absence of a cost recovery mechanism for DSM presents substantial barriers to least cost energy planning, which should be reduced or minimized if possible.

Pursuant to the Commission's order, on January 3 and 8, 1991, Edison met with interested parties to discuss the proposed cost-recovery rider. Prior to these "workshops" Edison circulated a proposed rider for review to all those entities participating in the prior proceeding. Edison received written comments on the proposed rider from the Commission staff, DENR, the City of Chicago, IIEC, the Attorney General and the Office of the Public Counsel (OPC).

Following the workshop, Edison, DENR, the Cook County State's Attorney Office, the City of Chicago and Low-Income Residential Consumers entered into a stipulation agreeing that Rider 22 be placed into effect without suspension or hearing. IIEC sought modification and objected to the recovery of costs on a per kilowatt basis and raised other objections. CUB did not actively participate in this stage of the proceedings.

On January 11, 1991, Edison filed with the Commission proposed Rider 22, its supplemental statement and a copy of the stipulation. The Commission nevertheless suspended the rider and held evidentiary hearings. On October 2, 1991, the Commission approved Rider 22 with minor modifications, finding that:

"A rider is the most appropriate method for the recovery of [demand-side] costs because the actual expenses are difficult to predict in advance, especially given the fact that neither the Commission nor Edison has extensive experience in the implementation of [demand-side] analysis and programs, and may fluctuate from year to year and from month to month."

The Commission asserted that use of a rider would be more accurate than recovering such costs through an adjustment of base rates, noting also that Edison's schedule of rates currently includes several riders which allocate the costs, or savings, of a wide variety of items.

IIEC and CUB filed petitions for rehearing, which

the Commission denied. This petition for review followed.

[250 Ill.App.3d 323] [1] Our jurisdiction to review Commission orders is set forth in section 10-201 of the Act. Section 10-201(d) of the Act requires the Commission's findings and conclusions on questions of fact to be held *prima facie* true; its orders and decisions *prima facie* reasonable; and the party appealing to have the burden of proof on all issues. Section 10-201(e)(iv) of the Act provides that a reviewing court shall reverse a Commission order, in whole or in part, where the Commission's findings are not supported by substantial evidence or the order violates state or federal law. Although deference is to be accorded to the Commission's interpretation of its own rules and regulations, and its long standing interpretation of the provisions of the Act, the Commission's interpretation of questions of law is not binding on a reviewing court. *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n* (1989), 136 Ill.2d 192, 204, 144 Ill.Dec. 334, 555 N.E.2d 693 (*BPI I*).

I.

[2] Edison initially asserts that by failing to appeal the Commission's earlier order in Docket No. 90-0038, which (1) established the rider as the best method to use to recover demand-side capability building costs; (2) required a provision for a prudence review; and (3) directed Edison to file such a rider, IIEC and CUB have waived any right to challenge the use of a rider to recover demand-side capability building costs or the provision for a prudence review. Accordingly, Edison urges that the challenges to the use of the rider and to the provision for prudence review be denied.

*1146 [189 Ill.Dec. 829] [3] The Commission's order in Docket No. 90-0038, directing Edison to prepare such a rider, did not identify the same issues raised in this proceeding. Further, decisions of the Commission are not *res judicata*, as noted in *City of Chicago v. Illinois Commerce Comm'n* (1985), 133 Ill.App.3d 435, 88 Ill.Dec. 643, 478 N.E.2d 1369, quoting from *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n* (1953), 1 Ill.2d 509, 513, 116 N.E.2d 394:

" The concept of public regulation includes of necessity the philosophy that the [C]ommission shall have power to deal freely with each situation

as it comes before it, regardless of how it may have dealt with a similar or the same situation in a previous proceeding.' "

[4] Nor does section 10-201(f) of the Act support Edison, which provides that:

"When no appeal is taken from an * * * order or decision of the Commission, as herein provided, *parties affected by such [250 Ill.App.3d 324] * * * order or decision*, shall be deemed to have waived the right to have the merits of the controversy reviewed by a court and there shall be no trial of the merits of any controversy in which such * * * order or decision was made, by any court to which application may be made for the enforcement of the same, or in any other judicial proceedings." (Emphasis added.)

Therefore, only when a party who is affected by a decision fails to take an appeal from that decision is such party precluded from having the merits of that controversy reviewed in context of another judicial proceeding. Here, IIEC's and CUB's members were not affected by the order entered in Docket No. 90-0038 because that order did not set rates. The final order in Docket No. 90-0038 approved the theoretical concept of a rider, but not a specific rider with a rate impact.

[5] Edison's reliance upon *City of Galesburg v. Illinois Commerce Comm'n* (1977), 47 Ill.App.3d 499, 5 Ill.Dec. 765, 362 N.E.2d 78, is misplaced. The absence of *res judicata* in administrative proceedings makes it inappropriate and contrary to the promotion of judicial and administrative economy to maintain an appeal based only on a theoretical issue which may never "affect" an appellant. To the extent the *City of Galesburg* decision holds to the contrary, we decline to follow it.

We find no waiver of IIEC's or CUB's right to challenge the propriety of Rider 22.

II.

IIEC and CUB aver that because the Commission is mandated to set rates for public utility service which are just and reasonable, the Commission erred by approving Rider 22, which rider permits recovery for a single issue in violation of the prohibition against single-issue ratemaking.

In its instructive opinion in *Citizens Utilities Co. v. Illinois Commerce Comm'n* (1988), 124 Ill.2d 195, 200-01, 124 Ill.Dec. 529, 529 N.E.2d 510 (*Citizens Utilities Co.*), our supreme court explained:

"In establishing the rates that a public utility is to charge its customers, the Commission bases the determination on the company's operating costs, rate base, and allowed rate of return. A public utility is entitled to recover in its rates certain operating costs. A public utility is also entitled to earn a return on its rate base, or the amount of its invested capital; the return is the product of the allowed rate of return and rate base. The sum of those amounts--operating costs and return on rate base--is known as the company's revenue requirement. The [250 Ill.App.3d 325] components of the ratemaking determination may be expressed in 'the classic ratemaking formula R (revenue requirement) = C (operating costs) + Ir (invested capital or rate base times rate of return on capital).' (*City of Charlottesville, Virginia v. Federal Energy Regulatory Comm'n* (D.C.Cir.1985), 774 F.2d 1205, 1217, citing T. Morgan, *Economic Regulation of Business* 219 (1976).) The same formula is used by the Commission in ratemaking determinations for Illinois. The revenue requirement represents the amount the company is permitted to recover from its customers in the rates it *1147 [189 Ill.Dec. 830] charges. Ratemaking is done in the context of a test year, which in this case was 1983."

In determining the amount of money a utility is authorized to collect from the consumers, the Commission is required to consider *all* aspects of the utility's operations during a year selected by the utility as a test year. The test year so selected is intended to be representative of both the utility's anticipated rate-base expenses and its expected revenues, including overall costs and rate of return in the same year. Here, instead of considering costs and earnings in the aggregate, where potential changes in one or more items of expense or revenue may be offset by increases or decreases in other such items, single-issue ratemaking considers those changes in isolation, ignoring the totality of circumstances. Addressing this issue, the supreme court in *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n* (1991), 146 Ill.2d 175, 244-45, 166 Ill.Dec. 10, 585 N.E.2d 1032 (*BPI II*), stated:

"The rule against single-issue ratemaking

recognizes that the revenue formula is designed to determine the revenue requirement based on the *aggregate* costs and demand of the utility. Therefore, it would be improper to consider changes to components of the revenue requirement in isolation. Often times a change in one item of the revenue formula is offset by a corresponding change in another component of the formula. For example, an increase in depreciation expense attributable to a new plant *may* be offset by a decrease in the cost of labor due to increased productivity, or by increased demand for electricity. (Demand for electricity affects the revenue requirement indirectly. The yearly revenue requirement is divided by the expected demand for electricity to arrive at a per kilowatt hour rate. If actual demand is more than the estimated demand used in the formula, the utility's revenues increase.) In such a case, the revenue requirement would be overstated if rates were increased[250 Ill.App.3d 326] based solely on the higher depreciation expense without first considering changes to other elements of the revenue formula. Conversely the revenue requirement would be understated if rates were reduced based on the higher demand data without considering the effects of higher expenses." (Emphasis in original.)

[6] In the present case, the Commission authorized Edison to charge customers for DSM program costs without considering whether other factors offset the need for additional charges. The order violates the prohibition against single-issue ratemaking. The order thereby isolates one operating expense for full recovery without considering whether changes in other expenses or increased sales and income obviate the need for increased charges to consumers, which may result impermissibly in ratepayers facing additional charges for direct and indirect additional revenues to cover Edison's expenses and pay a return to its investors.

The Commission contends that single-issue ratemaking usually occurs in a general rate case setting where one item of revenue or expense is altered without taking into account related changes in other revenue and expense items. The Commission found that Rider 22 does not fit this scenario. "The acceptance of a single-issue ratemaking argument would totally hamstring Edison and the Commission. Under such a scenario, the Commission could not approve individual rate tariffs outside a general rate proceeding." We disagree.

[7] An examination of Rider 22 reveals support for the contrary contention, that expenses incurred in connection with least cost planning essentially are ordinary expenses imposed by statute. Among the anticipated costs listed in Rider 22 are the following:

"Capability building costs are all direct out of pocket costs and all documented incremental costs incurred by Commonwealth Edison Company in the implementation and evaluation of capability building pilot programs and in its other DSM capability building activities, including but not limited to:

*1148 [189 Ill.Dec. 831] (a) Payroll for specifically identified DSM planning, designing, analysis, implementation and evaluation positions;

(b) Costs incurred for training and education for personnel involved in DSM capability building activities, including materials, travel, seminar participation and DSM organization membership;

(c) Costs incurred for contractors and consultants;

(d) Out of pocket program costs, including costs incurred for advertising and promotion; rebate, subsidy and incentive payments;[250 Ill.App.3d 327] metering in excess of standard; software, computer hardware, and data acquisition; and demand side measures installed at customer premises;

(e) Costs incurred in conducting workshops and participating in the cooperative process ordered in Docket 90-0038;

(f) Indirect costs related to the above."

Riders are useful in alleviating the burden imposed upon a utility in meeting *unexpected, volatile* or *fluctuating* expenses. (See *City of Chicago v. Illinois Commerce Comm'n* (1958), 13 Ill.2d 607, 150 N.E.2d 776.) Examination of the Rider 22 costs set forth above involve payroll for specifically identified planning and similar positions; personnel training, education and travel; contractors and consultants costs; out-of-pocket promotion and computer costs; and conducting workshops. Such costs reveal no greater potential for unexpected, volatile or fluctuating expenses which Edison cannot control, than costs incurred in estimating base ratemaking. In contrast, costs over which Edison

does not have control, exemplified by fuel costs, may be reflected automatically in a different rider, the Electric Fuel Adjustment Clause, Rider 20. Here, any lack of certainty in predicting costs would be ameliorated by the aggregate costs and revenues method of balancing now followed in setting base rates. In the case of Rider 22, as the Commission itself acknowledges, "the amount of dollars to be recovered by Edison through a rider mechanism is not significant." Further, the costs are recoverable through the usual base rate mechanism; only a delay in the recovery process would ensue, according to the Commission.

[8] A utility must file its least cost plan every two years. (Section 8-402.) Edison decided not to include those ordinary costs in its request for a rate increase and, therefore, did not include them in base rates. Such an omission does not justify single-issue treatment of costs in a rider. The authorization of Rider 22 is contrary to the supreme court decision in *Citizens Utilities Co.* and *BPI II* and the October 2, 1991 Commission order must be reversed.

III.

IIEC and CUB assert that the Commission violated section 9-244 of the Act (Ill.Rev.Stat.1989, ch. 111 2/3, par. 9-244 (now 220 ILCS 5/9-244 (West 1992)) (section 9-244)) by approving Rider 22 as an incentive to perform a legally required act.

[9] [10] Section 9-244 requires the Commission to study incentive-based regulation. The Commission is without authority to implement directly [250 Ill.App.3d 328] incentive-based regulation, but only may report its findings to the legislature. (*Illinois Bell Telephone Co. v. Illinois Commerce Comm'n* (1990), 203 Ill.App.3d 424, 437-38, 149 Ill.Dec. 148, 561 N.E.2d 426 (*Illinois Bell Telephone*).) The Commission has set forth as justification for authorizing Rider 22 that it will remove a barrier to least cost planning. By approving Rider 22, the Commission has, in effect, provided Edison with an incentive to comply with both section 8-402 and the Commission's order in Docket 90-0038, which ordered Edison to propose a rider. Least-cost programs such as this are mandated by statute. Section 9-244 requires for any study of incentive regulation to "consider the consistency of such mechanism with the existing obligation of utilities to provide least-cost service and traditional ratemaking principles." Edison has an ongoing legal obligation to comply with the Commission's least cost plan.

(Section 8-402.) There was no reason to give Edison this illegal incentive and the October 2, 1991 Commission order must be reversed for this reason as well.

*1149 [189 Ill.Dec. 832] IV.

IIEC and CUB contend that the Commission has improperly authorized Edison to charge ratepayers for lost revenues because the lost revenue provision is illegal.

Lost revenues are revenues that the utility would have earned but for DSM capability building activities. The formula for recovery of lost revenues in Rider 22 fails to take into consideration Edison's aggregate costs and revenues, which is also the vice inherent in this revenue recapture as set forth succinctly in Commissioner Ruth Kretschmer's critical characterization of Edison's recovery of lost revenues, in part:

"This Order [approving Rider 22] allows Commonwealth Edison Company, to recover *all* documented incremental costs associated with the research and development of demand-side management resource options. These costs include screening, implementation and evaluation of pilot programs as well as carrying costs and--incredibly, in my opinion--lost revenues. Thus, even if the pilot programs work and usage is decreased, ratepayers will be required to reimburse Commonwealth Edison (with interest) for the sales Commonwealth Edison claims it did not make due to the implementation of those programs and for any expenses incurred by Commonwealth Edison in not making those sales.

Incredible but true!"

[250 Ill.App.3d 329] Charging ratepayers for lost revenues due to decreased demand vitiates the goal of reducing energy costs by reducing demand. Section 8-402(a) (Ill.Rev.Stat.1989, ch. 111 2/3, par. 8-402(a)) provides:

"The objective of this Section shall be to ensure the provision of adequate, efficient, reliable and environmentally safe energy services at the lowest possible cost to all Illinois energy consumers and users, and, in doing so, to utilize, to the fullest extent practicable, all economical means of conservation, nonconventional technologies relying on renewable energy resources, cogeneration and

improvements in energy efficiency as the initial sources of new energy supply."

[11] Requiring ratepayers to bear the expense of services they avoid due to conservation or DSM programs is not only incredible, but runs afoul of basic ratemaking principles. The Act requires that rates be set which "accurately reflect the long-term cost of such services and which are equitable to all citizens." (Ill.Rev.Stat.1989, ch. 111 2/3, par. 1-102 (now 220 ILCS 5/1-102 (West 1992)) (section 1-102).) Both in *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n* (1973), 55 Ill.2d 461, 483, 303 N.E.2d 364, and in *Candlewick Lake Utilities Co. v. Illinois Commerce Comm'n* (1983), 122 Ill.App.3d 219, 227, 77 Ill.Dec. 626, 460 N.E.2d 1190, the courts have asserted that ratepayers are not to pay certain costs unless they directly benefit from them. The lost revenue charge here does not reflect the cost of providing electric service, does not reflect a cost that benefits ratepayers and, further, adds to Edison's revenues without regard to whether Edison's demand or revenues increased because of factors unrelated to DSM programs. This is yet another basis for reversal.

V.

[12] CUB contends that the Commission cannot authorize Edison to collect funds from ratepayers subject to later reconciliation, a violation of the prohibition against retroactive ratemaking.

[13] The Commission approved a formula in Rider 22 for determining charges to Edison's customers. Part of that formula is a review procedure to determine whether Edison prudently incurred the expenses passed on to its customers. If the review results in a finding that the rates collected were too high, a refund possibly would be ordered. Ordering of refunds when rates are too high, and surcharges when rates are too low, violates the rule against retroactive ratemaking. (See *BPI I*, 136 Ill.2d at 209, 144 Ill.Dec. 334, 555 N.E.2d 693; *Illinois Bell Telephone*.) Rider 22 was improvidently approved for this reason as well.

***1150** [250 Ill.App.3d 330] [189 Ill.Dec. 833] VI.

IIEC asserts that Rider 22 violates the test year rule because the Commission cannot authorize an automatic increase in rates without applying that rule; there is no evidence in the record as to

whether Rider 22 will result in an increase of 1% or more of Edison's total jurisdictional revenues; and the "needs" test is a corollary to the test year rule.

The Commission concluded that a test year is appropriate only in the context of a base rate increase and here only where an increase in total jurisdictional annual revenues of 1% or more is requested. IIEC maintains that the Commission's application of the rule is contrary to case law which requires that the Commission view the totality of the utility's financial circumstances. Further, the Commission allegedly has failed to make a finding as to what level total jurisdictional revenues will be effected and, in fact, the record is devoid of any substantial evidence with which to make this finding.

[14] The supreme court has held that ratemaking is done in the context of a test year. (*Citizens Utilities Co.*, 124 Ill.2d at 201, 124 Ill.Dec. 529, 529 N.E.2d 510.) The test year concept is one promulgated by the Commission in its own rules, particularly General Order 210 (83 Ill.Adm.Code 285.150 (1985)). General Order 210 requires a utility to file its rate data in accordance with a proposed one year test year, which may be an historical, current or future year. This rule has the salutary purpose of preventing the utility from mismatching revenues and expenses. For example, the utility cannot use a low revenue figure from one year and a high expense figure from another year to justify a rate increase.

[15] In *BPI II*, the supreme court addressed, among other issues, Commonwealth Edison's right to record and recover deferred charges related to three nuclear generating units, which were broken down into three different categories. The court then examined the categories of deferred charges in context of arguments raised in that case, including whether their recovery violated the Commission's test year rule and the prohibition against single-issue ratemaking, and held (*BPI II*, 146 Ill.2d at 237-38, 166 Ill.Dec. 10, 585 N.E.2d 1032):

" * * * a utility's rates are a function of its annual revenues and operating expenses, as well as its rate base. In order to accurately determine the utility's revenue requirement, the Commission established filing requirements under which a utility must present its rate data in accordance with a proposed one-year test year. The purpose of the test-year rule is to prevent a utility[250 Ill.App.3d 331] from overstating its revenue requirement by

mismatching low revenue data from one year with high expense data from a different year. *Business and Professional People I*, 136 Ill.2d at 219, 144 Ill.Dec. 334, 555 N.E.2d 693."

Deferred depreciation and decommissioning expenses were then held subject to the test year rule because they were operating expenses. (*BPI II*, 146 Ill.2d at 240-41, 166 Ill.Dec. 10, 585 N.E.2d 1032.) These deferred operating expenses cannot be recovered, even in context of a rate case, because the test year rule would be violated. Here, "operating expenses" are categorically no different than DSM costs. DSM costs determined outside the context of a test year cannot be recovered from ratepayers. Rider 22, which does not utilize a test year, is illegal for this reason as well.

Edison would be authorized to recover DSM costs from a period other than the test year period upon which Edison's current revenue requirement is based. A mismatch between DSM expense and the revenue data from the test year, intended to be prevented under General Order 210, would be authorized under Rider 22. In direct contravention of the supreme court's reasoning, Edison's Rider 22 contemplates recovering demand-side capability building costs (operating costs) which have not been presented in the context of a test year, contrary to the Commission's practice of setting rates on a year to year basis, and in violation of its own rule.

*1151 [189 Ill.Dec. 834] The Commission recently determined Edison's revenue requirement in Docket 90-0169, based on test year data. The Commission concluded in its order that it was neither necessary nor desirable to require preparation of a test year data forecast in order to permit Edison to recover DSM expenses. The Commission, without any supporting evidence, assumes that each dollar of DSM expense incurred will automatically result in one dollar's worth of reduced revenue for Edison; however, since test year principles were not followed, the Commission cannot determine whether the increase in DSM expenditures will be offset by a decrease of other expenditures currently reflected in Edison's revenue requirement, or an increase in revenue not reflected in the test year underlying the utility's current base rates.

The Commission also asserted that a test year application is not required unless Edison's revenue request results in an increase of more than 1% of its

total jurisdictional revenues. The level of DSM costs Edison expects to recover through Rider 22 is not shown by substantial record evidence; there is no foundation for the Commission to determine whether DSM costs will result in a 1% or more jurisdictional revenue increase. Absent any limit on the amount of costs [250 Ill.App.3d 332] that can be recovered under Rider 22, the possibility exists of an overall revenue increase of more than 1%.

Clearly, the test year requirement applies to these facts and the Commission's conclusion to the contrary was error and must be reversed.

VII.

[16] IIEC urges error in the Commission's rejection of its proposed cap on DSM cost recovery.

IIEC proposed a "cap" of \$5 million on the amount of DSM costs Edison may recover under Rider 22, which the Commission rejected for the reason that other provisions in the rider would alleviate the need for a cap. The Commission held that the costs to be flowed through the rider would be (1) reviewed by its staff every month; (2) subject to periodic prudence reviews which may result in application of a reconciliation factor; and (3) subject to additional review during the biennial least cost planning dockets and the ongoing cooperative process. The cap was devised by IIEC because Edison continually maintained it did not know how much it intended to recover through the rider. IIEC argued that some protection was needed for the ratepayers and arrived at the \$5 million dollar figure because Edison was able to identify only \$800,000 in out-of-pocket costs for three pilot programs. IIEC further reasoned that if Edison's costs approached the cap, it could then petition the Commission for relief, demonstrating the bases for its request.

Commissioner Paul G. Foran's dissenting opinion, supporting IIEC's proposed \$5 million cap, suggested that elimination of the cap would undermine the Commission's ability to monitor and review the costs passed through Rider 22, despite the three checks described above because,

"Such costs could be incurred completely independently of the manner in which the programs are managed and, therefore they would be outside the scope of the annual management prudence review. Such costs may also be of a nature that renders them undetectable until they

become ponderous, in which case the monthly status reports, as well as the biennial review, will not be effective checks; this problem will be compounded by the time and resource constraints already faced by the Staff. Thus, the monthly filing and the biennial review may become too little review, too late."

[250 Ill.App.3d 333] Commissioner Foran was concerned that the majority had provided Edison with "essentially a blank check for these vague DSM capability expenses."

Edison claimed that the cap would result in the arbitrary disallowance of prudently incurred costs and would necessarily restrict the flexibility that is needed to promote successful DSM capability building; however, no foundation was established for Edison's claim that the cap would restrict its capability building efforts. Indeed, Edison *1152. [189 Ill.Dec. 835] did not demonstrate that its DSM capability building efforts to date have been hindered by the lack of an approved cost recovery mechanism, or by a mechanism that would impose a cap, although Edison had been engaged in DSM and conservation activities well before the rider was filed. It must be noted that regardless of whatever cost recovery mechanism is approved or whatever constraints the Commission may impose, the utility is obligated by law to pursue DSM programs. Section 8-402.

The Commission's order is not supported by substantial evidence in the record in this regard, and must be reversed.

The reasons set forth above compel this court to reverse the Commerce Commission's order authorizing Commonwealth Edison to recover costs associated with demand side management through Rider 22.

Reversed.

McCORMICK, P.J., and DiVITO, J., concur.

FN1. At all relevant times, the period within which to submit the proposed plans was two years. It was not until 1992 that it became three years.

FN2. As Edison notes, a plan proposing demand-side resources over supply-side resources is preferred. Supply-side resources are those that increase the amount of electricity available for consumption in Illinois or in the service territory of each utility. Demand-side resources are those that are derived from implementation of demand-side programs, which reduce the use of electricity and influence the distribution of a utility's total electricity demand over time. §3 Ill.AdM.Code § 440.100 (1991).

*170 565 N.E.2d 170

207 Ill.App.3d 52, 151 Ill.Dec. 899

Dominic F. SHORTINO and Valerie Johnson,
Individually and on
Behalf of All Those Similarly Situated, Plaintiffs-
Appellees,

v.

ILLINOIS BELL TELEPHONE COMPANY,
Defendant-Appellant
(Business and Professional People for the Public
Interest, et al., Intervenors-Plaintiffs).

No. 1-88-1748.

Appellate Court of Illinois,
First District, Third Division.

Dec. 5, 1990.

Rehearing Denied Jan. 15, 1991.

Telephone customers sought preliminary injunction against telephone utility to stop utility's practice of spreading municipal message tax on gross receipts from pay phone by charging monthly billed customers. The Circuit Court, Cook County, Sophia H. Hall, J., granted motion for permanent injunction, and appeal was taken. The Appellate Court, Rizzi, J., held that: (1) under Public Utility Act (PUA), tracing and not spreading was preferred method for recovering utility's municipal utility tax liability; (2) shifting of telephone utility's tax liability for pay phones to monthly billed customers was not just and reasonable; and (3) telephone utility was not authorized to shift burden of tax liability from one group of customers to another.

Affirmed.

1. TELECOMMUNICATIONS ⚡ 313

372 ----

372II Telegraphs and Telephones

372II(F) Charges and Rates

372k313 Expenses.

Ill.App. 1 Dist. 1990.

Under Public Utility Act (PUA), tracing, and not spreading, was preferred method for recovering utility's municipal utility tax, and, thus, telephone utility's use of spreading was not just and reasonable method of recovering municipal utility tax; language used by legislature in PUA did not expressly authorize use of spreading and it was not just and reasonable to include within tax burden of monthly billed customers a charge for tax applied to pay phone use. S.H.A. ch. 111 2/3, ¶¶ 9-222.2,

10-201(e)(iv)A.

2. PUBLIC UTILITIES ⚡ 129

317A ----

317AII Regulation

317Ak119 Regulation of Charges

317Ak129 Rate of return.

Ill.App. 1 Dist. 1990.

Term "just and reasonable," as used within meaning of requirements for rates and charges made by public utility, means reasonable return on basis of fair value of utility property; concept of fair value holds that it is value of utility's property devoted to public service upon which reasonable rate must be returned. S.H.A. ch. 111 2/3, ¶¶ 9-222.2, 10-201(e)(iv)A.

See publication Words and Phrases for other judicial constructions and definitions.

3. PUBLIC UTILITIES ⚡ 194

317A ----

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of
Commission317Ak194 Review and determination in
general.

Ill.App. 1 Dist. 1990.

Appellate Court is not bound by orders of State Commerce Commission if it finds that Commission's order is not supported by evidence. S.H.A. ch. 111 2/3, ¶¶ 9-222.2, 10-201(e)(iv)A.

4. TELECOMMUNICATIONS ⚡ 313

372 ----

372II Telegraphs and Telephones

372II(F) Charges and Rates

372k313 Expenses.

Ill.App. 1 Dist. 1990.

Shifting pay phone users' tax burden onto monthly billed customers discriminated against billed customers in violation of Public Utility Act, and, thus, spreading was not just and reasonable alternative to tracing; fact that telephone utility found it inconvenient to collect municipal utility tax from pay phone customers did not make it just and reasonable to overload monthly billed customers. S.H.A. ch. 111 2/3, ¶ 9-241.

5. TELECOMMUNICATIONS ⚡ 313

372 ----

372II Telegraphs and Telephones

372II(F) Charges and Rates

372k313 Expenses.

Ill.App. 1 Dist. 1990.

Telephone utility's use of "r" factor percentage to spread Chicago message tax liability to monthly billed customers was unjust and unreasonable, even though "r" factor was uniformly applied to all monthly billed customers; "r" factor formula determined applicable percentage for monthly billed customers by dividing total amount of revenue subject to tax into amount of billed revenue to which additional charge was to be applied and then dividing tax rate by resulting decimal. S.H.A. ch. 111 2/3, ¶ 9-241.

6. TELECOMMUNICATIONS ⚡313

372 ----

372II Telegraphs and Telephones

372II(F) Charges and Rates

372k313 Expenses.

Ill.App. 1 Dist. 1990.

Prohibition against spreading did not impair telephone utility's right to pass its municipal tax liability onto its customers since utility could collect all or part of its tax liability by adding to customer bills additional charge representing uniform percentage of tax liability on customers' intrastate telephone usage; utility could not shift burden of tax liability from one group of customers to another. S.H.A. ch. 111 2/3, ¶ 9-241.

*171 [207 Ill.App.3d 54] [151 Ill.Dec. 900] Henry L. Mason III, Lisa A. Hausten, L. Bow Pritchett, John C. Gockley, Chicago, for defendant-appellant.

Sidney Z. Karasik, Leonard E. Handmacher, Seymour Schriar, Chicago, for plaintiffs-appellees.

Justice RIZZI delivered the opinion of the court:

Defendant Illinois Bell Telephone Company (Illinois Bell), appeals from an order of the circuit court of Cook County which granted the motion of plaintiffs Dominic F. Shortino and Valerie Johnson, individually and on behalf of all those similarly situated (plaintiffs) for a permanent injunction on count I of their three-count class action complaint. Illinois Bell also appeals from an order granting plaintiffs' motion for summary judgment on the issue of damages as to count I. The summary judgment order created a Chicago class fund, and ordered judgment in favor of the Chicago class and against Illinois Bell in the *172 [151 Ill.Dec. 901] sum of \$9,310,452.81. The order creating the class fund was later supplemented by an order which added \$5,422,717 to the fund. Illinois Bell also appeals

from the supplemental order. Counts II and III of the complaint are still before the trial court and are not a part of this appeal. We affirm.

Illinois Bell contends that (1) the trial court erred in ruling that Illinois Bell's procedure of recovering the municipal message tax on gross receipts from pay phones by charging monthly billed customers [207 Ill.App.3d 55] was unjust and unreasonable; (2) the trial court erred in ruling that the "r" factor method of recovering the message tax expense from pay phone use was not a just and reasonable method; and that (3) Illinois Bell's constitutional rights would be violated if it were not allowed to recover message tax expenses pursuant to the procedure it advocates.

Plaintiffs, residents of the City of Chicago, filed a three count class action complaint against Illinois Bell on March 12, 1985. The plaintiffs were certified as a class representing Illinois Bell customers located or residing in Chicago who during the five-year period before the filing of the complaint were surcharged for the City of Chicago Message Tax, based on gross receipts from coin operated pay phones, which were spread to or loaded onto their own telephone bills in addition to their proportionate share of the tax on their own telephone use. Count I of the complaint alleged that Illinois Bell's revenues from pay phone customers are part of the gross receipts base upon which the Chicago Message Tax is imposed and that Illinois Bell has wrongfully contrived to free itself of the burden of that tax expense by the device of spreading the tax to monthly billed customers who routinely pay "additional charges" for the tax. The plaintiffs further alleged that "in effect all of Bell's Chicago customers, except its pay phone users, are required to pay an extra and illegal additional charge of the Municipal Utility Tax (MUT) to compensate Bell for what it fails to recover from its pay phone users."

In 1955, the Illinois legislature enacted a law which authorized municipalities to impose on utilities, at a rate not to exceed 5% of their gross receipts from local operation, a Municipal Occupation Tax. For the telephone companies, the base of the tax is the gross receipts of such business originating within the corporate limits of the taxing municipality. Ill.Rev.Stat.1987, ch. 24, par. 8-11-2(1). The City of Chicago subsequently adopted the Chicago Message Tax Ordinance, which parallels the State statute and currently charges a tax rate of 5%. Chicago Municipal Code, sec. 132-31 (1986). At the same time, the Illinois legislature adopted an amendment to the Public Utilities Act

(PUA), which permitted public utilities to recover through an additional charge to be shown separately on the utility bill to each customer, any occupation tax imposed by a municipality. Ill.Rev.Stat.1987, ch. 111 2/3, par. 9-221.

The PUA provides in pertinent part:

The additional charge authorized by Section 9-221 or Section 9-222 shall be made (i) in the case of a tax measured by gross receipts or gross revenue, by adding to the customer's [207 Ill.App.3d 56] bill a uniform percentage to those amounts payable by the customer for intrastate utility service which are includible in the measure of such tax, *except, however, such method is not required where practical considerations justify a utility's use of another just and reasonable method of recovering its entire liability for such tax * * ** (Emphasis added.) Ill.Rev.Stat.1987, ch. 111 2/3, par. 9-222.2.

Prior to recodification of PUA Section 36(c) as Sec. 9-222.2, effective January 1, 1986, this section of the Act provided:

(c) The additional charge authorized by paragraph (a) or paragraph (b) shall be made in the case of a tax measured by gross receipts or gross revenue by adding to the customer's bill a uniform percentage to those amounts payable by the customer for intrastate utility service which are includable in the measure of such tax, *except, however, such method is not required where practical considerations justify a utility's use of another *173 [151 Ill.Dec. 902] just and reasonable method of recovering its entire liability for such tax.* This paragraph is not intended to make any change in the meaning of this Section, but is intended to remove possible ambiguities, thereby confirming the intent of paragraphs (a) and (b) as they existed prior to the effective date of this amendatory Act of 1985. (Emphasis added.) Public Act 84-126, Ill.Rev.Stat.1985, ch. 111 2/3, par. 36(c).

The above emphasized portions of section 36(c) and section 9-222.2 were added to the PUA shortly after the filing of and presumably in response to the present case. The parties disagree as to the legislative intent behind both the emphasized amendment and the later deletion of the last sentence of former PUA section 36(c) when it was recodified as section 9-222.2.

In 1984, the Illinois Commerce Commission instituted an investigative procedure to reconsider the propriety of Illinois Bell's practice of spreading the Municipal Message Tax expense through the use of the "r" factor. The trial court noted that the ICC held no hearings into the past or present use of the "r" factor before rendering its decision. In its order of May 13, 1987, the ICC found that telephone companies face "practical difficulties" in recovering their tax liability from "sent-paid" coin and "sent-collect" calls. The ICC then ruled that the use of spreading to recover utility taxes "was and is clearly permissible." The ICC order provided:

Since 1955, in accordance with procedures approved by the Commission, most major utilities, "targeted" the amount of additional charges ... by imposing those ... charges on customers[207 Ill.App.3d 57] whose receipts give rise to the utility tax liability being collected. Specifically, the utility recovers from each customer the exact amount of the utility's actual tax liabilities resulting from the taxable gross receipt received from that customer. Since 1955, in accordance with procedures approved by the Commission, telephone utilities have "spread" the amount of additional charges ... Unlike gas and electric utilities, telephone utilities have a difference between their additional charge base and their tax base. Telephone utilities face practical difficulties in recovering their tax liability from sent-paid and sent-collect messages * * *.

*If there was any question that the Commission was erroneously construing the legislative intent by approving both a "traced" ... and a "spread" methodology, all uncertainty was resolved by subsequent legislative enactments. Public Act 84-126 added Section 36(c) to the old Act * * *. Corresponding Section 9-222.2 of the [new Act] contains the same provision regarding "a utility's use of another just and reasonable method of recovering its entire liability for such tax." The use of both the "traced" or "targeted" and the "spread" methodology was and is clearly permissible. Moreover, since the propriety of their use is ascertainable on its face from the language of the old Act and new Public Utilities Act, any additional proceedings are unnecessary as the outcome is predetermined as a matter of law.* (Emphasis added.) ICC Investigative Proceeding No. 84-0082, May 13, 1987.

The trial court chose to disregard the ICC's validation of Illinois Bell's spreading methodology

and found instead that Section 9-222.2 of the PUA does not authorize Illinois Bell's continuous practice of spreading. The trial court found that Section 9-222.2 does not by its terms sanction spreading, and that the method of spreading adopted by Illinois Bell is not "just and reasonable" because it discriminates against monthly billed customers without demonstrating any tangible difference or *quid pro quo* justifying charging monthly billed customers the municipal taxes generated by coin telephone users.

On September 9, 1986, the trial court granted plaintiffs' motion for summary judgment on the issue of liability as to count I of their complaint. On November 12, 1986, the trial court granted plaintiffs' motion for summary judgment on count I of their complaint on the issue of damages, and created a Chicago class fund in the amount of \$9,310,452.81. On May 11, 1988, *174 [151 Ill.Dec. 903] the trial court granted plaintiffs' motion for permanent injunction enjoining Illinois Bell from its billing [207 Ill.App.3d 58] practice of "spreading," *i.e.*, passing through to its monthly billed customers, Bell's liability and expense for the Chicago Message Tax which Bell does not recover from its coin pay customers. On May 20, 1988, the trial court entered an order supplementing the class fund by an additional \$5,422,717.

On appeal, Illinois Bell first contends that the trial court erred in ruling that its procedure of charging monthly billed customers to recover the municipal message tax on gross receipts from pay phone use was unjust and unreasonable. We disagree.

The plaintiffs' complaint alleged that the revenues from pay phone customers are part of the "gross receipts" base upon which the Chicago message tax is imposed, and that Illinois Bell improperly charges the expense from such taxes to monthly billed customers in addition to their own proportionate share of the tax. Plaintiffs contend that monthly billed customers should pay only their fair and just proportional share of the tax. Plaintiffs further allege that Illinois Bell's practice of spreading the message tax expense, which it does not collect from pay phone users, to billed customers, violates the PUA's prohibition against discrimination. Ill.Rev.Stat.1987, ch. 111 2/3, par. 9-241. The plaintiffs further contend that the amendment to section 9-222.2 of the PUA does not expressly describe, or even recognize by implication, "spreading" as one of the "practical" exceptions to a utility's generic duty to trace or target its municipal

utility tax liability by a uniform percentage to all of its customers in a service area subject to a MUT. Plaintiffs therefore conclude that spreading is *prima facie* discriminatory because it benefits one class of Illinois Bell customers (coin pay phone users) at the expense of another class (monthly billed customers).

Illinois Bell responds that the first clause of section 9-222.2 expressly authorizes the "tracing" method used by gas and electric companies. They further contend that the second clause, which allows a just and reasonable alternative to tracing, authorizes the use of spreading to recover message tax expenses which cannot be recovered from the customer whose utilization of telephone services gave rise to the revenue subject to the tax. Bell also posits that its interpretation of section 9-222.2 does not conflict with the PUA's prohibition against discrimination because both sections require rates and charges that are just and reasonable. Bell further believes that because the "r" factor method used to calculate the additional charges has the precise effect of limiting recovery of message tax expense to residents of the taxing municipality, the "r" factor method is a far more equitable method of recovery than statewide spreading because the benefit of the utility [207 Ill.App.3d 59] tax and the municipal services it helps to provide are enjoyed by the residents of the taxing municipalities.

[1] The pertinent language of former section 36(c) and current section 9-222.2 of the PUA is "such method is not required where practical considerations justify a utility's use of another just and reasonable method of recovering its entire liability for such tax." It is clear that the language used by the legislature does not expressly authorize the use of spreading. Unfortunately, the legislative histories of the two enactments do not reveal the intent of the legislature in adopting the language that it used. Our interpretation of the statute, therefore, must be limited to the plain meaning of the language that was adopted.

[2] The phrase "just and reasonable" is a standard phrase of art in public utility regulation. It has been used frequently and therefore judicially construed often in the context of utility rate regulation. The statutory language that rates and charges made by a public utility shall be "just and reasonable" has remained unchanged since the enactment of the Public Utilities Act in 1913. *Union Electric Co. v. Illinois Commerce Comm'n.* (1979), 77 Ill.2d 364, 372, 33 Ill.Dec. 121, 125, 396 N.E.2d 510, 514. In the area of rate regulation, the Illinois Supreme

Court has construed the term "just and reasonable" to mean a reasonable return on the basis of the fair value of the *175 [151 Ill.Dec. 904] utility property. *Union Electrical Co.*, 77 Ill.2d at 369, 33 Ill.Dec. 121, 396 N.E.2d 510; *City of Chicago v. Illinois Commerce Comm'n.* (1966), 34 Ill.2d 49, 50-51, 213 N.E.2d 550, 551-52; *DuPage Utility Co. v. Illinois Commerce Comm'n.* (1971), 47 Ill.2d 550, 553, 267 N.E.2d 662, 664. The concept of fair value holds that it is the value of the utility's property devoted to public service upon which the reasonable rate must be returned. *Union Electrical Co.*, 77 Ill.2d at 369, 33 Ill.Dec. 121, 396 N.E.2d 510.

[3] Here, we are not concerned with a just and reasonable method for determining rates, but rather, a just and reasonable method of recovering a utility's tax liability. There is no Illinois case which has specifically addressed this issue. The only support for Illinois Bell's contention that the use of spreading is a just and reasonable method of recovering the MUT is the ICC's order. A reviewing court, however, is not bound by the Commission's order if it concludes that the findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to the Commission to support the Commission's findings. See *General Mills, Inc. v. Illinois Commerce Comm'n* (1990), 201 Ill.App.3d 715, 720, 147 Ill.Dec. 225, 559 N.E.2d 225; Ill.Rev.Stat.1987, ch. 111 2/3, par. 10-201(e)(iv) A. Because we conclude that the findings of the ICC order are not supported [207 Ill.App.3d 60] by substantial evidence based on the entire record of evidence presented to the ICC to support its findings, we are not controlled by and do not follow the order of the ICC.

Further, we find that an examination of the plain language of Section 9-222.2 of the PUA reveals that tracing and not spreading is the preferred method for recovering the utility's MUT liability. The statute clearly provides:

The additional charge ... shall be made ... by adding to the customer's bill a uniform percentage to those amounts payable by the customer for intrastate utility service which are includible in the measure of such tax * * *. Ill.Rev.Stat.1987, ch. 111 2/3, par. 9-222.2.

It is clear from the language of the statute that the legislature intended that, in the first instance, the utility would recover its MUT liability by adding to

the customer's bill a uniform percentage reflecting the tax liability on the services charged to that customer. The second clause provides that tracing is not required where practical considerations justify another just and reasonable method of recovering the utility's entire liability for the tax. This language cannot be construed to authorize the shifting of this tax burden from the consumer of the services to another party who did not utilize the services which gave rise to the tax. It would however, be just and reasonable to include the tax burden within the pay phone charge or adopt any other just and reasonable method of collecting from the consumers of the telephone services a uniform percentage of the tax charged on their telephone use.

[4] Additionally, section 9-241 of the PUA prohibits unreasonable differences in charges between customers or classes of customers. Ill.Rev.Stat.1987, ch. 111 2/3, par. 9-241; *City of St. Charles v. Illinois Commerce Comm'n* (1961), 21 Ill.2d 259, 264, 172 N.E.2d 353, 355-56. Plainly, the shifting of pay phone users' tax burden onto monthly billed customers discriminates against billed customers in violation of section 9-241 of the PUA. It follows that spreading is not a just and reasonable alternative to tracing. The fact that Illinois Bell has found it inconvenient to collect the MUT from pay phone customers does not make it just and reasonable to overload monthly billed customers. We therefore conclude that the trial court did not err in finding that Illinois Bell's policy of spreading the MUT liability from pay phone users onto monthly billed customers was unjust, unreasonable and discriminatory.

Illinois Bell next contends that the trial court erred in ruling that the "r" factor method was not the most just and reasonable method [207 Ill.App.3d 61] for recovering the message tax expense from pay phone use. We disagree with defendant's contention.

*176. [151 Ill.Dec. 905] In the trial court's findings of fact it found that for more than 30 years, Illinois Bell has recovered its Chicago message tax expense by charging each of its monthly billed customers in the city a surcharge reflecting both the message tax expense resulting from the customer's billed intrastate service and the statutorily authorized administrative charge. The surcharge has also included an additional sum to recover the Chicago message tax expense imposed on Illinois Bell's coin pay telephone revenues which Illinois Bell does not collect from its coin pay telephone users. The trial court further found that the method of overcharging

monthly billed customers to recover the coin pay telephone message tax expense from monthly billed customers is known as "spreading." The amount "spread" to each monthly billed customer is determined by using a mathematical formula known as the "r" factor.

[5] The "r" factor formula is a ratio or percentage which is applied uniformly to monthly customer bills. The applicable percentage is determined by dividing the total amount of revenue subject to the tax (the tax base) into the amount of billed revenue to which the additional charge is to be applied (the additional charge base) and then dividing the tax rate (5%) by the resulting decimal. The "r" factor percentage is then applied uniformly to monthly bills for intrastate telephone service.

The trial court found that the "r" factor method "spreads" to the monthly billed customer residing in Chicago, the Chicago message tax liability not recovered from coin pay telephone users. The trial court found that this results in overcharging the monthly billed customer. In making its finding, the trial court noted that Illinois Bell's expert acknowledged that the "r" factor formula and Illinois Bell's practice of spreading has never been specifically authorized by the PUA.

Under the circumstances, we agree with the trial court that although the "r" factor is uniformly applied to all monthly billed customers, the inclusion in the additional charge base of the revenue from pay phone use results in a formula which improperly overcharges monthly billed customers. The method

is therefore unjust and unreasonable. We therefore conclude that the trial court did not err in ruling that the "r" factor method was not a just and reasonable method for recovering the message tax expense from pay phone use.

[6] Finally, Illinois Bell contends that its constitutional rights would be violated if it were not allowed to recover message tax expenses in [207 Ill.App.3d 62] the manner that it advocates. Illinois Bell posits that if section 9-241 is held to prohibit spreading, they will be left with a purely illusory right to pass on their tax liability which cannot be exercised. We disagree.

Our decision in no way impairs Illinois Bell's right to pass its municipal tax liability on to its customers. Illinois Bell may collect all or part of its tax liability by adding to customer bills an additional charge representing a *uniform percentage* of the tax liability on the customers' intrastate telephone usage. Illinois Bell, however, is not authorized to shift the burden of the tax liability from one group of customers to another. To do so would impermissibly violate the PUA by establishing an unreasonable difference in charges made to monthly billed and pay phone customers.

Accordingly, the orders entered in the circuit court are affirmed.

AFFIRMED.

CERDA, P.J., and WHITE, J., concur.