STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

	:	
Illinois Bell Telephone Company	:	
	:	Docket No. 05-0575
Compliance with the Requirements	:	
of Section 13-505.1 of the Public	:	
Utilities Act (Payphone Rates)	:	
	:	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S RESPONSE TO PETITION FOR INTERLOCUTORY REVIEW

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TABLE OF CONTENTS

NOW COMES the Staff of the Illinois Commerce Commission (hereafter "the Staff") and, pursuant to 83 Ill. Admin. Code 200.520, hereby states, in response to the Illinois Public Telecommunications Association's Petition for Interlocutory Review, as follows:

I. Recent Procedural History

On April 6, 2006, the ALJ entered her *Ruling on Scope and Direction*. *See, generally*, ALJ's Ruling. This ruling first noted that:

> On February 10, 2006, and in the course of addressing a discovery dispute, the Administrative Law Judge ("ALJ") considered it wise to have Staff and the parties provide comments on the scope and direction of the instant proceeding.
>
> On February 27, 2006, Staff, AT&T Illinois and the IPTA, filed their respective Initial Comments. Thereafter, on March 13, 2006, these same parties filed their individual Reply Comments. Each of these filings was considered in the development of the instant ruling.
>
> ALJ's Ruling at 1

Based on the comments submitted, the ALJ ruled, in summary, that: (a) the Commission intended this proceeding to narrowly address imputation issues relating to payphone network rates, ALJ's Ruling at 4, 7; (b) the use of Long Run Service Incremental Cost (LRSIC) to set payphone rates, as called for by the Commission's *Payphone Order*,[1] would render it impossible to achieve this goal, at least in the case of AT&T Illinois, Id. at 3-4; (c) AT&T Illinois had shown cause

[1] *Interim Order*, Illinois Commerce Commission On its Own Motion: Investigation Into Certain Payphone Issues as Directed in Docket 97-0225, ICC Docket No. 98-0195 (November 12, 2003) (hereafter "Payphone Order")

why it could not comply with the Commission's *Imputation Order*.[2] with respect to imputation as it applies to payphone rates, Id. at 8; (d) the Commission could, as it had previously determined ion the Payphone Order, use Total Element Long Run Incremental Cost (TELRIC) as a cost basis for developing payphone network rates, and the proceeding should go forward on that basis, Id. at 4-7; and (e) the IPTA's proposed discovery, and its recommendations as set forth in testimony, would not solve the imputation problem, but rather would take the Commission in the wrong direction, and were therefore improper. Id. at 3-4. A schedule was duly set, and thereafter reset in anticipation of IPTA seeking interlocutory review of the ALJ's Ruling. *See* ALJ's Notice, April 21, 2006; ALJ's Notice, May 5, 2006.

On June 6, 2006, IPTA filed is Petition for Interlocutory Review. *See, generally*, IPTA Petition. In its *Petition*, the IPTA states that it seeks Commission review of the following alleged aspects of the ALJ's Ruling:

> 1) The ALJ's predetermination that the only permitted means of complying with the FCC's new services test, the state imputation requirement, and the ICC order in Docket No. 98-0195 is to raise the cost basis for the new services test rates to a level that equals or exceeds a predetermined level of imputed costs;
>
> 2) That TELRIC can be the cost basis for compliance with the federal new services test where the FCC has twice ruled that TELRIC is not applicable as a basis for compliance with the new services test under section 276 of the Federal Act; and

[2] *Order*, Illinois Bell Telephone Company: Petition Regarding Compliance with the Requirements of Section 13-505.1 of the Public Utilities Act, ICC Docket No. 04-0461 (June 7, 2005) (emphasis added) (hereafter "Imputation Order")

> 3) That any increases in the cost-based rates required under section 276 of the Federal Act do not need to also establish continued compliance with the requirements of section 276 prohibiting cross-subsidization and discrimination.
>
> IPTA Petition at 8

In the Staff's opinion, the IPTA's *Petition* is utterly without merit, and the Commission should dismiss it in its entirety.

II. Background

This proceeding has its genesis in the Commission's *Imputation Order.* There, the Commission found, with respect to COPTS service, as follows:

> Since the time that we entered our [Payphone O]rder …, there has been a significant change in legal and factual circumstance. Clearly, what no one foresaw at the time of our [P]ayphone [O]rder … is the effect produced by our rate change in Docket 02-0864 and the implications this would have for the instant proceeding.
>
> Where such a problem has arisen, it is incumbent upon this Commission to address the matter in the most reasonable fashion.
>
> ….
>
> Our ultimate objective … is satisfied. We know what parts of the test SBCI's rates pass and what do not pass. … Relevant to the COPTS lines that do not pass imputation, we have been shown enough to believe that: (1) there are some ways to bring about imputation success; and (2) do so without running into the preemption obstacle. The actual adjustments that need to be made and how to make them are, in our view, not well reflected.
>
> The Commission adopted the methodology prescribed in [the Payphone Order] less than eighteen months ago, and we remain satisfied that it develops just and reasonable COPTS and payphone services rates, and also stands in compliance with the federal guidelines for the formulation of such rates. We see no need to depart from it here.

All parties agree that docket 98-0195, i.e., the source of our Payphone Order, should not be reopened. The Commission also agrees that is not a direction that we need go at the present and in these premises. Taking account of all the arguments on exceptions and the replies thereto, the Commission arrives at its final determination on the payphone issues in just this way:

> We direct SBCI to file tariffs with revised rates for COPTS and payphone services that comply with the FCC's "new services test," Section 13-505.1, and the Commission's Payphone Order in docket 98-0195, or, it will show cause why such tariffs cannot be filed. It is to be understood that the Commission will suspend and investigate this tariff filing and will do likewise on a show cause filing. This action will allow the opportunity for the development of full and complete record by all interested parties. SBCI is further directed to make this filing within 90 days of the entry of the instant order.

To be sure, the Commission is strongly disinclined to upset in any way the methodology that was established in our Payphone Order. We will not, however, speculate on where this filing takes us. …[.]

Staff is correct in noting that, contrary to what the IPTA would suggest, there is no need for the Commission to consider whether to have SBCI re-run all of its LRSICs for all services and groups. We agree that such a proposal would take us far and away from the intents and purposes of this proceeding. Such a question is simply not upon us. **Our only concern and objective is to address the situation clearly before us that shows a failure of most COPT[S] rates to pass imputation. We have arrived at a reasonable means for dealing with this matter**.

Imputation Order at 103-04

III. SBC's Statement in Compliance

On September 6, 2005, AT&T Illinois filed its *Statement in Compliance with Order in Docket No. 04-0461*, thereby initiating this proceeding. In its *Statement*, AT&T Illinois asserted as follows:

> SBC Illinois is hereby filing a show cause statement, rather than tariffs. In compliance with the Commission's Order and Staff's recommendation in the imputation proceeding, SBC Illinois has updated its LRSIC studies for payphone service and has used the shared and common cost factor approved in Docket No. 02-0864. [fn] Payphone rates based on these updated cost studies still will not comply with Section 13-505.1, at least not in their entirety. Although more of the payphone rates would satisfy an imputation test based on the new cost studies (i.e., payphone rates based on the updated LRSIC studies would be higher than the currently filed rates which were based on LRSIC studies reviewed in Docket No. 98-0195), rates for the basic Coin Line in Access Areas B and C are still too low. A comparison of payphone rates based on the updated LRSIC costs and the results of an imputation test are shown in Attachment B. Based on this analysis, SBC Illinois has concluded that payphone rates cannot be developed that meet the requirements of the New Services Test, Section 13-505.1 of the [Illinois Public Utilities] Act, and the Commission's Order in Docket No. 98-0195 on an across-the-board basis.
>
> <u>Statement</u>, ¶4

AT&T Illinois stated, however, that "payphone rates can be developed that satisfy the New Services Test and Section 13-505.1[,]" by using aggregated TELRIC costs for the payphone rates at issue in this proceeding. <u>Statement</u>, ¶5. AT&T Illinois further stated that, in its view, the use of TELRIC costs is permissible under existing federal doctrines governing payphone rates. <u>Id</u>. AT&T Illinois further asserted that, in light of its inability to comply with the New Services Test, Section 13-505.1, and the Commission's Order in Docket No. 98-0195, "further proceedings will be required to determine how to achieve compliance with these various legal obligations," contending that "[s]uch a proceeding was expressly contemplated when the Commission ordered SBC Illinois to file compliant tariffs or show cause why it could not." <u>Id</u>., ¶6.

IV. Requirements of the *Imputation Order*

The Commission determined that this proceeding should address "the failure of COPTS rates to pass imputation[,]" and what steps the Commission might take in the event that AT&T Illinois[3] showed cause why the rates in question could not be made to pass imputation, i.e., "why such tariffs cannot be filed." Imputation Order at 103-04. The Commission further stated that the imputation question was: "[its] only concern and objective" in this proceeding. Id. at 104. Accordingly, this proceeding is not a wide-ranging inquiry into COPTS rates, but rather a narrowly focused inquiry into the imputation questions. It is further clear that AT&T Illinois' position from the outset of this proceeding is that it indeed cannot file compliant rates under the existing rate formula. Statement, ¶4. As such, this proceeding is an inquiry into: (a) whether AT&T Illinois has shown cause of a satisfactory nature why indeed it cannot file rates simultaneously compliant with the New Services Test, the *Payphone Order*, and imputation; and (b) if indeed AT&T Illinois has done so, what, if any steps can be taken to bring AT&T's rates into compliance with the imputation test, which is clearly the most stringent and difficult of the three to satisfy. The *ALJ's Ruling* reaches precisely this sound conclusion. *See, generally*, ALJ's Ruling.

V. Parties' Testimony

While the parties' testimony is not yet of record, it is illustrative of each party's understanding of the scope of the proceeding, and therefore merits a summary here.

[3] SBC Illinois is now AT&T Illinois.

A. AT&T Illinois

On November 9, 2005, pursuant to schedule, AT&T Illinois pre-filed its direct case in the proceeding, that being the Direct Testimony of Eric L. Panfil, AT&T Ex. 1.0, and David J. Barch, AT&T Ex. 2.0. The testimony of Messrs. Panfil and Barch purport to show that AT&T Illinois cannot, even through the use of updated LRSICs, develop basic coin line rates in Access Areas A and B that satisfy the requirements of Section 13-505.1. AT&T Ex. 1.0 at 8, *et seq*.; AT&T Ex. 2.0, *generally*. Mr. Panfil recommends that AT&T Illinois be permitted to use TELRIC costs in developing aggregated TELRICs in setting the rates it charges to payphone service providers. AT&T Ex. 1.0 at 14-17. In the event that the Commission adopts this recommendation, Mr. Panfil asserts that the rates in question will pass imputation by a fairly substantial margin in all cases. AT&T Ex. 1.0 at 14; Schedule ELP-3.

B. Staff

On January 4, 2006, the Staff pre-filed its direct case in the form of the Direct Testimony of Robert F. Koch, Staff Ex. 1.0. Mr. Koch's review of the presentation by Messrs. Panfil and Barch causes him to recommend as follows:

> At this time, I do not have reason to suggest that the [revised LRSIC] inputs proposed by SBCI are in error. If the Commission were to accept the results from the new cost models as proposed by SBC, imputation failure would need to be addressed. While Mr. Panfil's proposal to set certain payphone rates using TELRIC costs solves the problem of imputation, I hesitate to recommend its use until other options have been exhausted. Therefore, I withhold my final recommendation until after I have reviewed the testimony of other parties to this proceeding.

Staff Ex. 1.0 at 17

It should, of course, be noted that, at the time Staff pre-filed its direct testimony, it had no opportunity to review IPTA's testimony.

C. IPTA

Also on January 4, 2006, the IPTA filed its direct case, in the form of the Direct Testimony of Michael Starkey and Hallie Lawrence, hereafter referred to as "IPTA Ex. 1.0", although not in fact marked for identification. The IPTA appears to agree that a significant impediment exists to AT&T Illinois filing compliant rates. IPTA Ex. 1.0 at 5-6, 13, *et seq*. IPTA witnesses Mr. Starkey and Ms. Lawrence contend that AT&T Illinois cannot file compliant rates without the Commission reopening the *SBC Loop TELRIC Proceeding*[4] and reconsidering certain decisions made therein. Id. Mr. Starkey and Ms. Lawrence assert that the Commission made numerous "errors" in setting AT&T Illinois's loop TELRIC rates in the *SBC Loop TELRIC Proceeding*. IPTA Ex. 1.0 at 27. Specifically, Mr. Starkey and Ms. Lawrence contend that the Commission adopted fill factors that are too low, and depreciation lives that are too short. Id. at 25-27. Mr. Starkey and Ms. Lawrence recalculate UNE loop LRSICs incorporating what, in their view are the correct values for fill and depreciation. Id. at 29. Mr. Starkey and Ms. Lawrence argue that the rates thus developed "comply with all relevant pricing constraints." Id. at 28.

[4] *Order*, Illinois Bell Telephone Company: Filing to increase Unbundled Loop and Nonrecurring Rates, ICC Docket No. 02-0864, 2002 Ill. PUC Lexis 564 (June 9, 2004)

VI. The ALJ's Ruling on Scope and Direction

As noted above, on April 6, 2006, the ALJ entered her *Ruling on Scope and Direction*, which provides in relevant part as follows:

> Having established a LRSIC-based standard for COPTS line rates in Docket 98-0195, the Commission was clearly interested in seeing whether updating LRSIC studies to a current cost level would support COPTS rates high enough to pass an imputation test. But, what is of record and has been pre-filed by the parties to date, leads a reasonable mind to conclude that the updated LRSIC study approach contemplated by the Commission in the Docket 04-0461 Order is not the hoped-for solution.
>
> Even as more of its payphone lines pass an imputation test using the updated studies, AT&T informs that the rates for the Basic Coin Line in Access Areas B and C would still be too low. At the same time, it notes that these lines represent 85% of the independent payphone lines in service.
>
> To be sure, AT&T Illinois observes, the cost increases that allowed more COPTS rates to pass imputation resulted primarily from updated inputs and/or model changes that were not considered in the Commission's UNE order in Docket 02-0864 and raise additional controversy. Yet, it notes, even if AT&T Illinois were to prevail on each and every cost issue, the updated cost studies still do not solve the imputation problem. Staff suggests that under the limited scope of this proceeding, such a detailed and far-reaching examination of the cost studies is inappropriate.
>
> In short, both Staff and AT&T Illinois agree that the approach initially recommended in the Docket 04-0461 Order - to use the same LRSIC methodology approved by the Commission in Docket 98-0195, but to update the LRSIC cost inputs – does not solve the imputation problem.
>
> If anything, AT&T points out, the pre-filed IPTA testimony challenges the updated LRSIC costs as being too high, not too low. This means that even if the IPTA were to prevail on every challenge it presents to these LRSIC studies, the end result would be useless for purposes of this proceeding. In other words, and as AT&T Illinois asserts, payphone line rates based on the IPTA's view of LRSIC costs would "fail imputation by a larger, not a smaller, margin."

Staff concurs in the assertion that a continued inquiry into LRSICs is unproductive. To go any further along on this path, Staff argues, is nothing more than a futile exercise.

With respect to the LRSIC route, Staff and AT&T Illinois suggest that we be done with it. Indeed, Staff contends that it is time to enter a finding that that AT&T Illinois has shown cause why it cannot file compliant rates in the manner required by the Commission in its Docket 04-0461 Order.

On the other hand, the IPTA appears to want to focus on, and challenge, the cost study inputs. But what it would submit in analysis, we are told, would only take the parties, the record, and the Commission in the wrong direction.

To the extent that the IPTA wants to pursue the matter, it offers nothing to explain how its proposed record development on LRSIC costs might solve the imputation problem. Nor does it challenge the views and assertions of Staff and AT&T Illinois in any meaningful way. In short, there is nothing to indicate but that further investigation or evidence on the LRSIC studies is a waste of time, energy and resources for both the parties and this Commission.

It is well explained by Staff and AT&T Illinois that LRSIC is not worth pursuing any further, and certainly not in the direction that the IPTA would take us. This is not meant to stifle the IPTA by any means, but the evidence proffered in any case must be relevant and material to the issues at hand. In this instance, anything that takes us further from the objective, i.e., meeting imputation, is clearly not useful.

The ALJ confirms the view that this proceeding is a narrowly-focused inquiry into the failure of most of AT&T Illinois' payphone line rates to pass the imputation test required by Section 13-505.1. It is not a "wide-ranging inquiry into COPTS rates" that would complicate and take us away from our objective. Going forward too, the essential purpose of this proceeding is to examine what needs be done to remedy the imputation deficiencies identified in the Commission's order for Docket 04-0461, in the most efficient, economical and effective way.

We agree with Staff and find that AT&T Illinois has shown cause, of a satisfactory nature, why it cannot file rates that are simultaneously compliant with the New Services Test, the Payphone Order, and the imputation statute, i.e., Section 13-505.1 of the PUA in the way that the Commission once expected. The LRSIC route does not serve the purposes of this proceeding and thus, it is time to move on. This, of course, does not end the inquiry at hand. The question remains as to what steps, if any, might bring AT&T's rates into compliance.

[Heading omitted]

Another pronouncement in the 04-0461 Order urges the direction of this proceeding, to wit:

> ...if there is a means by which to satisfy both the FCC's mandate (the NST) and the requirements of the Illinois Act (Section 13-505.1), it must be done. Order at 103, Docket 04-0461.

In their respective comments, both Staff and AT&T Illinois maintain that an alternative, and perfectly lawful, approach to setting payphone line rates is to use TELRIC, instead of LRSIC, costs. And, Staff and AT&T Illinois both take the position that the same TELRIC costs approved in Docket 02-0864 should be used in this analysis.

Contrary to what the IPTA might claim, Staff maintains that state commissions are absolutely permitted to use TELRIC in developing these rates. In its own Payphone Order, Staff observes, this Commission recognized that either TELRIC or LRSIC can lawfully be used to set payphone service rates, finding that:

> [w]hen reviewing tariffed rates for compliance with the N[ew] S[ervices] T[est], state regulators may use either the FCC's TELRIC methodology (47 C.F.R. § 51.505) or the state's own forward-looking cost methodology. "Payphone" Order at 34, Docket 98-0195.

In other words, Staff asserts, the use of TELRIC as the cost basis for payphone service rates is an option readily available to the Commission.

Staff explains that is impossible to satisfy all three of the requirements at hand without taking some type of action. In this situation, and in the words of the IPTA's own witness, Staff reasons that, "something must give.'" According to Staff, there are not equal amounts of "give" to each of the three factors at hand. At the very outset, Staff points out that the imputation requirement in Section 13-505.1 of the PUA, has very little "give" in it. Rates for competitive services that use noncompetitive service inputs, it stresses, must exceed their LRSIC cost. Period.

On the other hand, Staff observes the Payphone Order (which implements the New Services Test), to have a great deal of "give" in it. According to Staff, payphone rates need not be LRSIC based, but instead must be "cost-based." To this end, Staff observes, the FCC made clear that a state may "use its accustomed TSLRIC methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs." *Memorandum Opinion and Order*, ¶49, In the Matter of Wisconsin Public Service Commission: Order Directing Filings; FCC No. 02-25; CPD 00-01 (January 31, 2002) (hereafter "WPSC Order")(emphasis added; footnotes omitted).

Staff further reminds that this Commission itself recognized this concept in its "Payphone" Order, and correctly found that "state regulators may use either the FCC's TELRIC methodology (47 C.F.R. § 51.505) or the state's own forward-looking cost methodology." See "Payphone" Order at 34, Docket 98-0195. So too, Staff informs that, even as it was noted that LRSIC is "generally" used for such purposes, the Commission did not, in any way, preclude the use of TELRIC. Id. On all these relevant counts, Staff believes it clear that the "Payphone" Order, and the New Services test, "give" in all the necessary places and offer up a solution to the dilemma at hand.

It is evident from these comments, that Staff has a firm grasp of what is at stake in this proceeding. Staff further identifies a reasonable path going forward, that meets with the Commission's intents for this proceeding without running afoul of any prior pronouncements. According to Staff, completely lawful payphone rates – that pass imputation, that satisfy the New Services test, and that comply with the "Payphone" Order – can be developed by the simple expedient of substituting TELRIC for LRSIC.

At this juncture, and on the representations of Staff and AT&T Illinois, the Commission is persuaded that the "Payphone" Order entered in Docket 98-0195 can be modified pursuant to Section 10-113 of the PUA, and that the NST test, on which it rests, has the necessary flexibility for use of a different methodology. The Commission is also convinced that such flexibility does not show itself in the imputation law, i.e., Section 13-505.1.

[Heading omitted]

To the extent that the Order in 98-0195 treated the NST and the cross-subsidy requirements as two separate and distinct obligations, it does not appear, at this time, that the cross-subsidy test is of relevance here. It is the intent of this proceeding to modify, as little as possible, a prior order, if such can fairly be done.

So too, the UNE rates approved in Docket 02-0864 are a settled matter - even by the courts. These are not open to being re-litigated and shall be considered a given for the imputation analysis. Not only was this matter fully litigated by numerous parties (and on the very aspects suggested here) but, we are shown that the Commission already considered the critical question and determined that:

> We do not agree with CLECs that an appropriate remedy for a failed imputation test is to lower TELRIC UNE prices. The guidelines for this proceeding are based on TA96 and the FCC's rules and regulations. <u>Whether SBC's competitive services fail an imputation test is simply not relevant to our TELRIC determination.</u> Order at 288, Docket 02-0864, (June 9, 2004) (emphasis added).

This very pronouncement, taken together with other relevant parts of the 04-0461 Order, moves us to reject any proposal in this direction. Parties to this case must not lose sight of the real objective here. The Commission is in no way inclined to open the door on matters already settled and unnecessary to the imputation solution being sought. In other words, the scope of this proceeding is narrow and not intended to serve as yet another reviewing court.

The IPTA takes yet another view of the situation at hand. It contends that purpose of this docket is to develop a full and complete record of the facts underlying the rates for network services to payphone providers according to three requirements: 1) the FCC's new services test; 2) the Illinois' imputation test; and 3) the Payphone Order in Docket 98-0195. This record, the IPTA asserts, will either determine rates that are in compliance with all three requirements or to show why they cannot be reconciled. According to the IPTA, however, a full and complete record encompasses not only a party's position as to how all requirements may be satisfied, but also a party's position as to why the requirements may not be simultaneously met.

As such, the IPTA appears to suggest that we might ignore imputation altogether. This sort of end, however, cannot be determined at the outset before other reasonable options have been tested and reviewed. In other words, if this proposal is at all viable, it must await the very record that the IPTA contends we should pursue. This means that the TELRIC proposal supported by Staff and AT&T Illinois shall first go forward

The objective at this juncture is to develop a record in an efficient and expeditious manner that would allow the Commission to determine whether payphone line rates can be established that satisfy both the FCC's NST and Section 13-505.1. Staff and AT&T Illinois believe that this can be done. Thus, it seems most prudent to proceed in that direction. At the same time, it has been found necessary to curtail burdensome litigation over irrelevant issues that do not ultimately advance a solution to the imputation problem.

[Heading omitted]

It has been pointed out that, the exploration of non-LRSIC-based service cost methodologies creates the potential of an inconsistency between the final order in this proceeding and the Order adopted in Docket 98-0195. Thus, this raises the question of how to proceed.

Staff suggests that the Commission could *either* reopen the payphone proceeding i.e., Docket 98-0195, to determine the proper TELRICs to use in developing payphone line rates <u>or</u> join in this proceeding any of the Docket 98-0195 parties that would be impacted by adding another ratemaking methodology to what the Commission approved in Docket 98-0195. (Staff Comments at 18).

For its part, AT&T Illinois supports the use of this proceeding to explore the TELRIC alternative. (AT&T Illinois Comments at 6-7). It claims that a "reopening" of Docket 98-0195 would not be efficient from a number of perspectives. Further, AT&T Illinois does not consider "joinder" to be necessary. The main concern is the participation of Verizon, AT&T Illinois observes, since it was a party to the Docket 98-0195 proceeding. But, just as long as Verizon is provided appropriate notice, AT&T explains, it can well enough decide whether or not it wishes to participate.

The ALJ believes it right to reserve a final ruling on this procedural aspect of the case until full and proper notice has been served on any interested party in the proceeding, i.e., Verizon, Thus, the Clerk is directed to send notice and a copy of this ruling to the service list for Docket 98-0195. This is intended to advise Verizon of this proceeding and of the possibility that the NST methodology approved in Docket 98-0195 might be expanded to include other approaches.

ALJ's Ruling at 3-7

VII. IPTA's Petition for Interlocutory Review

On June 6, 2006, the IPTA filed its Petition for interlocutory Ruling in this proceeding. In its *Petition*, the IPTA takes issue with the *ALJ's Ruling* in the following respects: first, that it "predetermines" that raising the cost basis for payphone network rates to a level at which they pass imputation is the only permissible way to comply with the new services test, the state imputation requirement, and the Payphone Order; second, that it finds that TELRIC can be used as a proper cost basis for payphone rates; and third, that it finds that increases payphone rates do not need to also establish continued compliance with the requirements of Section 276 prohibiting cross-subsidization and discrimination. *See* IPTA Petition at 8.

VIII. The IPTA's Petition is Meritless and Interlocutory Review Should Be Denied

The *ALJ's Ruling* is well-taken and prudent. It recognizes the proper scope of this proceeding, and seeks to prevent IPTA from undertaking discovery and adducing evidence regarding matters far outside that scope.

IPTA's stated bases for seeking interlocutory review are without merit, and interlocutory review should be denied. The *ALJ's Ruling* does not "predetermine" any issue that has not already been decided by the Commission, or is not a simple matter of law. There is no basis for preemption of the imputation requirement, even if the Commission were authorized to preempt state statutes. Further, the FCC has not, as IPTA suggests, prohibited the use of the TELRIC methodology to set payphone network rates. Finally, the *ALJ's Ruling* is correct as to matters of cross-subsidies and non-discrimination. Interlocutory review denied with respect to all issues raised by the IPTA.

A. The ALJ's Ruling Does Not "Predetermine" Issues

With respect to the IPTA's first contention - that the ALJ's Ruling somehow "predetermines" that raising the cost basis for payphone network rates to a level at which they pass imputation is the only permissible way to comply with the new services test, the state imputation requirement, and the *Payphone Order* – the only possible answer is: "so what if it does?" The ALJ's ruling certainly "predetermines" a number of matters, but all of them are matters that absolutely require predetermination.

First, the *ALJ's Ruling* "predetermines" that this proceeding is convened for the sole, exclusive purpose of "address[ing] the situation clearly before us that shows a failure of most COPT[S] rates to pass imputation[,]" largely because this was the Commission's ruling in its *Imputation Order.* Imputation Order at 104; *see also* ALJ's Ruling at 4, 6, 7. Second, the *ALJ's Ruling* further "predetermines" that, since the Commission has established a new forward-looking cost basis for AT&T Illinois in its *UNE Loop Order*, IPTA cannot challenge that cost basis here. Id. at 6. Finally, and perhaps implicitly, the ALJ's Ruling "predetermines" that IPTA may not seek discovery on, or introduce evidence regarding, matters that have no relevance to this proceeding. In other words, the only "predetermination" made by the ALJ is that IPTA cannot waste the parties', the Staff's, and the Commission's time with irrelevant matters.

IPTA argues that denying it the opportunity to develop a "full and complete record" somehow violates the *Imputation Order*. IPTA Petition at 9, *et seq*. This, however, is unavailing. Developing a "full and complete record", as IPTA insists it is being denied the opportunity to do, is not the same thing as allowing IPTA to present any evidence it wants, on any point, relevant or otherwise.

By way of example, IPTA suggests in its prefiled testimony that LRSICs be used, adjusted to utilize fill factors and depreciation lives that are "more appropriate" than the ones the Commission adopted for AT&T Illinois in its *UNE Loop Order*. IPTA Ex. 1.0 at 7. Unsurprisingly, this results in significantly *lower* payphone rates than currently exist, including one of **$0.00** for network access in Access Area A.[5] IPTA Ex. 1.0 at 7, 28. In other words, the IPTA's idea of creating a "full, complete record" – in a proceeding convened for the sole purpose of finding a manner in which AT&T Illinois' payphone rates might satisfy imputation – is to introduce that includes evidence of other ways that AT&T's payphone rates might fail imputation, by greater dollar amounts than they already do. If IPTA were a party to a proceeding convened to cure avian flu, it would probably introduce evidence of ways to spread it faster.

IPTA's strategy is, quite apart from being singularly unhelpful to the resolution of a legitimate problem, certain to adduce a large body of very irrelevant evidence. The *ALJ's Ruling*, quite properly, orders IPTA to cease

[5] In fact, the IPTA proposes a rate of negative 38 cents, but generously rounds this up to zero. IPTA Ex. 1.0 at 28. This does not include the End User Common Line (EUCL) charge required by law.

pursuing this strategy, presumably on the basis of the time-honored rule of evidence, codified in the Commission's Rules of Practice, that: "[i]n all proceedings subject to this Part, irrelevant, immaterial or unduly repetitious evidence shall be excluded." 83 Ill. Admin. Code §200.610(a).

B. Section 276 Does Not Preempt the Imputation Requirement

IPTA raises the spurious argument that the imputation requirement is somehow *prima facie* preempted by Section 276 to the extent that it results in any increase in payphone network rates. *See* IPTA Petition at 13-14. IPTA couches its argument as follows:

> Rather than allow the IPTA to develop its record to enable the ICC to make an informed decision identifying the possible problems and ways to address their reconciliation, the ALJ adopted the Illinois Bell position that predetermined the only methodology permitted to be used is one that addresses raising the cost basis of the new services test rates to the level of the predetermined imputed costs. This in effect raises the state imputation requirement to the supreme standard and makes the federal cost base requirement of the new services test subservient to the state requirements. However, this is contrary to FCC's express holding preempting state requirements inconsistent with the new services test. State requirements are subservient to, and must comply with, the federal requirements, not *vice versa*. The appropriate means of satisfying the state imputation requirement is to attempt to reconcile it with the FCC new services test, not to attempt to use imputation as a means to supersede the federal requirement.
>
> The ICC has already determined that LRSIC-based rates form the forward looking cost basis that satisfy the FCC's new services test. Now, Illinois Bell is proposing to increase the network rates to payphones 43% over the cost based rates already determined by the ICC as the appropriate rates in compliance with the federal requirements. This proposed dramatic increase in rates does not result from any change in the underlying costs upon which the rates are based, but from an effort to meet a state requirement for rates higher than those already found to be the cost based rates required under the federal new services test.
>
> Such arbitrary modifications of federal cost-based requirements solely to implement state requirements run afoul of

> the FCC orders. The sustainable approach for reconciling the competing requirements is to analyze the various inputs of the three requirements, to identify any conflicts among them, and to seek to reconcile those conflicts. This is the record for which the ICC opened this docket to develop, but which the ALJ ruling prevents by adopting the Illinois Bell proposal, not to determine the actual forward-looking cost basis for new services test rates but to simply find an excuse to raise costs to a predetermined imputation level, as the only proposal that may be developed of record. This is contrary to the FCC's orders and to the ICC's order in opening this proceeding. This ruling should be reversed with directions to permit the parties the opportunity to propose and develop a full and complete record on how to comply with these requirements, without predetermining the means to meet compliance[sic] [.]

IPTA Petition at 13-14

In this passage, the IPTA appears to argue that Section 276 and the federal rules require not "cost based rates" but rather "cost based rates set once and never revisited, even as costs increase." This is not, however, what IPTA is entitled to – it is entitled to costs based rates, which are subject to change as costs increase or decrease.

In a related vein, IPTA argues that the overall 43% increase in rates does not reflect an increase in underlying costs. IPTA Petition at 14. However, AT&T witness David J. Barch describes significant changes to the underlying costs in his direct testimony. Further, Schedule ELP-2 to AT&T witness Eric L. Panfil's direct testimony shows that rates would increase by 36% if the updated LRSIC values were used for rate development instead of TELRICs.[6] While a 43% increase is significant indeed, it has a cost basis, especially in light of the Commission's findings in the *UNE Loop Order*.

[6] The 36% figure was derived by substituting the TELRIC based rates used in the calculation of the 43% increase in Schedule 1 to Staff Ex. 1.0 with the LRSIC based rates shown in Schedule ELP-2 to AT&T Illinois Ex. 1.0.

In pursuing its futile preemption argument, IPTA argues, in essence, that a state regulatory agency should decline to enforce a state statute, and rules promulgated under its authority, that impose specific requirements on telecommunications rates, in favor of a very general federal law and regulations that merely provide for cost based rates, <u>to be determined by the appropriate state Commission, using the forward looking cost methodology that it elects to use</u>. This argument is entirely unavailing, for any of several reasons.

First, the notion that Section 276 preempts the imputation requirement is utterly without basis; indeed, as the Staff will demonstrate below, imputation is the method by which the Section 276 prohibition against cross subsidies, 47 U.S.C. §276(a)(1), is implemented. *See* <u>Payphone Order</u> at 7 ("The [imputation] test is intended to guard against cross-subsidization of competitive services by non-competitive services.") Accordingly, IPTA is arguing that a federal statute should preempt a state statute <u>that implements a portion of the federal statute</u>. This is, to put it charitably, muddled logic.

Second, to the extent that the IPTA seeks preemption of a state statute by the state regulatory agency that enforces the statute in question, it is very clearly barking up the wrong tree; indeed, it is barking in the wrong forest. The federal Act provides a means by which a party that considers itself aggrieved by a state statute that is allegedly inconsistent with the federal Act may seek preemption of the state requirement. 47 U.S.C. §253. The Commission, moreover, has recognized that it has no authority to preempt state statutes on its own initiative.

In its *Section 13-801 Order on Remand (Phase II)*, the Commission prudently determined that:

> The Commission has no general powers except those expressly conferred by the legislature. The Commission must follow and implement the statute's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1st Dist., 1995). **In other words, the Commission is not empowered to declare portions of Section 13-801 preempted or unconstitutiona**l.
>
> *Order on Remand (Phase II)* at 8-9, <u>Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act</u>, ICC Docket No. 01-0614 (November 22, 2005) (emphasis added)

Third, preemption of the imputation requirement is unwarranted, even if the Commission were authorized to take such action, simply because there is no conflict whatever between the state and federal requirements. To illustrate, Section 13-505.1 and associated regulations, 83 Ill. Admin. Code Part 792, require rates for competitive services that use noncompetitive service inputs <u>to exceed their LRSIC cost</u>, period. *See* 220 ILCS 13/505.1(a) (aggregate revenues a carrier realizes from a service subject to imputation must exceed the cost of providing it); 83 Ill. Admin. Code §792.40(b) (LRSIC is to be used as cost basis for imputation tests). In contrast, the FCC has determined that:

> [It has been argued] that the *Bureau Order* mandates the exclusive use of the TELRIC pricing methodology [in setting payphone rates] and that this mandate is improper. [fn] The *Bureau Order*, however, contains no such directive. Indeed, the *Bureau Order* states that the LECs should use a forward-looking methodology that is "consistent" with the *Local Competition Order*. [fn] TELRIC is the specific forward-looking methodology described in 47 C.F.R. § 51.505 and required by our rules for use by states in determining UNE prices. [fn] States often use "total service long run incremental

> cost" (TSLRIC) methodology in setting rates for intrastate services. **It is consistent with the *Local Competition Order* for a state to use its accustomed TSLRIC methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs**. [fn]
>
> *Memorandum Opinion and Order*, ¶49, In the Matter of Wisconsin Public Service Commission: Order Directing Filings; FCC No. 02-25; CPD 00-01 (January 31, 2002) (hereafter "WPSC Order") (emphasis added; footnotes omitted)

In other words, IPTA urges the Commission to find a preemption problem that does not need to exist, and in fact does not exist. Indeed, IPTA apparently fails to understand federal preemption. A concise recitation of the law of preemption is found in the Illinois Appellate Court's decision in Spitz v. Goldome Realty Credit Corp., which states that:

> The supremacy clause of the United States Constitution provides "[the] Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; * * * any thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI.) Under this clause, Congress has the power to preempt any legislative field over which it has jurisdiction. (*DeCanas v. Bica (1976), 424 U.S. 351, 47 L. Ed. 2d 43, 96 S. Ct. 933.)* Preemption exists only where there is a "clear and manifest purpose of Congress" to foreclose a particular field to State legislation. (*Jones v. Rath Packing Co. (1977), 430 U.S. 519, 51 L. Ed. 2d 604, 97 S. Ct. 1305.)* That purpose may be expressly stated or may be inferred where "the scheme of federal regulation is sufficiently comprehensive" to make reasonable the assumption that Congress has left no room for supplementary State regulation. (*California Federal Savings & Loan Association v. Guerra (1987), 479 U.S. 272, 280-81, 93 L. Ed. 2d 613, 623, 107 S. Ct. 683, 689.)* Also, if the Federal legislation touches a field in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws" in the same field, preemption may be inferred. *Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.*

> Even if Congress has not foreclosed a legislative field from State regulation, preemption exists if there is an actual conflict between a State statute and Federal legislation. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul (1963), 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210, 1217, rehearing denied* (1963), *374 U.S. 858, 10 L. Ed. 2d 1082, 83 S. Ct. 1861),* or where the State statute acts as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz (1941), 312 U.S. 52, 67-68, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404).* However, when Federal law preempts State law, it does so only to the extent necessary to protect the achievement of Federal goals. *Merrill, Lynch, Pierce, Fenner, & Smith, Inc. v. Ware (1973), 414 U.S. 117, 127, 38 L. Ed. 2d 348, 359, 94 S. Ct. 383, 389.*
>
> <u>Spitz v. Goldome Realty Credit Corp.</u>, 210 Ill. App. 3d 215, 218-19; 569 N.E.2d 43, 45-6; 1991 Ill. App. Lexis 218 at 5-7; 155 Ill. Dec. 43 (1st Dist. 1991)

In the field of payphone services rate regulation, of course, Congress did not by any stretch of the imagination intend to preempt all state laws or regulations. Section 276 of the federal Act provides that: "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." 47 U.S.C. §276(c). This clearly demonstrates Congressional intent not to foreclose state regulation, but rather to expressly permit it. Thus, since the federal statute by its plain terms preserves a state role,[7] for the Illinois imputation requirement to be preempted, it must be determined that: (a) compliance with both the imputation requirement and the federal cost-based rate requirement is "a physically impossibility"; or (b) the state requirement is an obstacle to the accomplishment of the full purposes and objectives established

[7] Indeed, the federal agency charged with enforcing the statute has effectively <u>required</u> significant state involvement, a fact of which this proceeding is ample evidence.

by Congress. Spitz, 210 Ill. App. 3d at 218; 569 N.E.2d at 46; 1991 Ill. App. Lexis 218 at 6-7.

The use of TELRIC, which, as seen above[8] is perfectly proper, produces rates that: (a) are based on forward looking costs, as required by the FCC; and (b) pass imputation. Accordingly, by using TELRIC as a cost basis, it is not only possible to comply with both state and federal requirements, but it results in cost-based rates, in keeping with Congressional objectives. There is, in short, no preemption issue here. The Commission should reject IPTA's arguments, and should deny interlocutory review on this point.

C. The FCC Permits the Use of TELRIC for Setting Payphone Network Rates

IPTA next argues that the "the FCC has twice held that TELRIC is not the applicable cost basis" for payphone rates. IPTA Petition at 15. This assertion is simply, and blatantly, false and misleading.

As noted above, the law in this area is clear: a state Commission setting rates for payphone services may use "its accustomed TSLRIC [LRSIC] methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs." WPSC Order, ¶49. The Commission recognized in its *Payphone Order* that TELRIC, which is by any analysis "another forward-looking methodology", is perfectly acceptable for setting payphone rates. Specifically, the Commission found that "[w]hen reviewing tariffed rates for compliance with the N[ew] S[ervices] T[est], state regulators may use either the

8 And which will be demonstrated in considerably greater detail below.

FCC's TELRIC methodology (47 C.F.R. § 51.505) or the state's own forward-looking cost methodology."[9] Payphone Order at 34. There is no evidence that IPTA attempted to dispute this finding at the time, or took any exception from it.

The IPTA's argument that the FCC has rejected the use of TELRIC does not find support in any FCC decision. In 2000, the FCC's Common Carrier Bureau determined that ILECs were required to set payphone service rates according to the following parameters:

> To satisfy the new services test, an incumbent LEC filing payphone line rates must demonstrate that the proposed rates do not recover more than the direct costs of the service plus "a just and reasonable portion of the carrier's overhead costs." [fn] **Costs must be determined by the use of an appropriate forward-looking, economic cost methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order**. [fn]
>
> With respect to the calculation of direct costs, our longstanding new services test policy is to require the use of consistent methodologies in computing direct costs for related services. n20 **Cost study inputs and assumptions used to justify payphone line rates should, therefore, be consistent with the cost inputs used in computing rates for other services offered to competitors.**
>
> *Bureau Action Order*, ¶¶9-10, In the Matter of Wisconsin Public Service Commission: Order Directing Filings, DA 00-347 CCB/CPD No. 00-1, 15 FCC Rcd 9978; 2000 FCC Lexis 1060 (rel. March 2, 2000)(emphasis added; footnotes omitted)

The *First Report and Order* referred to in paragraph 9 of the *Bureau Action Order* – with which "an[y] appropriate forward-looking, economic cost methodology" used to set payphone rates must be consistent – is, of course, the

[9] The *Payphone Order* further noted that: "[i]n Illinois, such forward-looking, direct costs are generally constructed using the Commission's LRSIC standard[.]" Payphone Order at 34. Nowhere, however, does the *Payphone Order* find that there is any state-law impediment to using TELRIC, chiefly because no such impediment exists.

First Report And Order, <u>In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers</u>, FCC No. 96-325, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499; 1996 FCC LEXIS 4312; 4 Comm. Reg. (P & F) 1 (August 8, 1996) (hereafter "First Report and Order"). It scarcely needs to be said that the forward-looking, economic cost methodology the FCC adopted in that *Order* was <u>TELRIC</u>. <u>First Report and Order</u>, ¶¶29, 35, 672-703; *see also* 47 CFR §51.505.

The full FCC subsequently endorsed the conclusions of its Common Carrier Bureau, finding that:

> Finally, the LEC Coalition asserts that the *Bureau Order* mandates the **exclusive** use of the TELRIC pricing methodology and that this mandate is improper. [fn] The *Bureau Order*, however, contains no such directive. Indeed, the *Bureau Order* states that the LECs should use a forward-looking methodology that is "consistent" with the *Local Competition Order*. [fn] TELRIC is the specific forward-looking methodology described in 47 C.F.R. § 51.505 and required by our rules for use by states in determining UNE prices. [fn] States often use "total service long run incremental cost" (TSLRIC) methodology in setting rates for intrastate services. **It is consistent with the *Local Competition Order* for a state to use its accustomed TSLRIC methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs**. [fn]
>
> *Memorandum Opinion and Order*, ¶49, <u>In the Matter of Wisconsin Public Service Commission: Order Directing Filings</u>; FCC No. 02-25; CPD 00-01 (January 31, 2002) (hereafter "WPSC Order") (emphasis added; footnotes omitted)

In other words, what the FCC stated was that it was not <u>requiring</u> the use of the TELRIC methodology, but rather <u>permitting</u> states to use TSLRIC (essentially LRSIC), or "another forward-looking methodology" - such as TELRIC.

Accordingly, the IPTA's attempt to obfuscate FCC decisions is transparently without merit. States may use LRSIC to TELRIC to set the rates in question; indeed, states may use <u>any</u> forward-looking cost methodology for this purpose.

The IPTA further argues that the FCC's *First Payphone Order* – which, significantly for purposes of this proceeding, was issued in 1996 – stated that:

> We decline to require, as proposed by AT&T, that the pricing regime under Sections 251 and 252 apply to all Section 276 payphone services offered by incumbent LECs. Section 276 does not refer to or require the application of Sections 251 and 252 to LEC payphone services. In addition, the elements and services to be offered under Sections 251 and 252 are not available to entities that are not telecommunications carriers, and many PSPs are not telecommunications carriers. [fn] In addition, Section 276 does not refer to or require the application of Sections 251 and 252 to LEC payphone services. Moreover, Section 276 specifically refers to the application of Computer III and ONA requirements, at a minimum for BOC provision of payphone services. Accordingly, we conclude that Computer III tariff procedures and pricing are more appropriate for basic payphone services provided by LECs to other payphone providers. Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter are preempted.
>
> *Report and Order*, ¶147, <u>In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation; Petition of the Public Telephone Council to Treat Bell Operating Company Payphones as Customer Premises Equipment; Petition of Oncor Communications Requesting Compensation for Competitive Payphone Premises Owners and Presubscribed Operator Services Providers; Petition of the California Payphone Association to Amend and Clarify Section 68.2(a) of the Commission's Rules; Amendment of Section 69.2(m) and (ee) of the Commission's Rules to Include Independent Public Payphones Within the "Public Telephone" Exemption from End User Common Line Access Charges</u>, FCC No. 96-98, CC Docket No. 96-128; CC Docket. No. 91-35, 11 FCC Rcd 20541; 1996 FCC Lexis 5261; 4 Comm. Reg. (P & F) 938 (rel. September 20, 1996)

This, according to IPTA, constitutes an outright rejection of TELRIC. However, in supposedly rejecting TELRIC, the FCC failed to specifically mention it by name – TELRIC, as noted above, being a methodology adopted by the FCC the previous month. This is a very slender reed upon which to base a contention that TELRIC has been rejected outright. Moreover, if the FCC had intended to prohibit the use of TELRIC for this purpose, it almost certainly would have done so specifically and explicitly, as, for example, thus: "We hereby prohibit the use of the TELRIC methodology for the purpose of setting payphone network rates." It might even have enacted rules to that effect. The FCC's failure to do any such thing is telling evidence that IPTA is simply wrong about the FCC's actions.

Indeed, the FCC stated something completely different in the cited passage. The FCC's ruling amounts to nothing more than a finding that, as is undoubtedly the case, independent payphone providers are not telecommunications carriers within the meaning of the federal Act, but rather are end users of telecommunications services. Therefore payphone providers are not entitled to the benefits of Sections 251 and 252 of the federal Act, which entitle telecommunications carriers, *inter alia*, the right to interconnect with one another, collect reciprocal compensation for traffic that they terminate on behalf of competing carriers, collocate facilities with and purchase unbundled network elements from incumbent carriers, negotiate interconnection agreements with other carriers, and a host of other rights and responsibilities, including, most significantly for this purpose, purchase wholesale services from ILECs. 47 U.S.C. §§251, 252; *see also* First Report and Order, ¶876 ("[W]e conclude that incumbent LECs need not make available service to independent public payphone providers at wholesale rates. This is consistent with our finding that wholesale offerings must be purchased for the purpose of resale by 'telecommunications carriers.'") It is thus clear that the FCC was, in the cited passages, specifically stating that ILECs were not under any obligation to provide services to payphone providers under Section 251(c)(4)(A), which requires ILEC to provide "to offer [to other telecommunications carriers] for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers[.]" 47 U.S.C. §251(c)(4)(A). Accordingly, IPTA is simply wrong about the import of these orders.

The IPTA cites extensive passages of the *WPSC Order* in support of its bootless argument that state Commissions may not use TELRIC to set payphone service rates. IPTA Petition at 16-17. However, this is unavailing. The *WPSC Order*, contrary to IPTA's assertions, does nothing but strengthen the proposition that TELRIC is a proper methodology for IPP rates. There, (at the risk of redundancy) the FCC determined that:

> 48. [T]he [LEC] Coalition states that the pricing regime set forth in sections 251 and 252 does not apply to all section 276 payphone services offered by incumbent LECs. [fn] We previously reached the same conclusion in the *First Payphone Order*. [fn]
>
> 49. Finally, the LEC Coalition asserts that the *Bureau Order* mandates the exclusive use of the TELRIC pricing methodology and that this mandate is improper. [fn] The *Bureau Order*, however, contains no such directive. Indeed, the *Bureau Order* states that the LECs should use a forward-looking methodology that is "consistent" with the *Local Competition Order*. [fn] TELRIC is the specific forward-looking methodology described in 47 C.F.R. § 51.505 and required by our rules for use by states in determining UNE prices. [fn] States often use "total service long run

> incremental cost" (TSLRIC) methodology in setting rates for intrastate services. It is consistent with the *Local Competition Order* for a state to use its accustomed TSLRIC methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs. [fn]
>
> 50. **As such, we do not impose on payphone line services the sections 251 and 252 pricing regime for local interconnection services. For example, while we have prohibited LECs from including certain "retail" costs in their prices for UNEs, [fn] no such prohibition applies to payphone line services. If they wish, the LECs may include in their direct cost calculations those "retail" costs, such as marketing and billing costs, that they can show are attributable to payphone line services.**
>
> WPSC Order, ¶¶48-50

The final paragraph of this passage, which IPTA omits from its *Petition*, *see* IPTA Petition at 17, is of course fatal to its argument. The FCC declined to "impose" Section 251 and 252 pricing, because it was permitting LECs to recover retail costs from payphone providers. The FCC clearly did prohibit the use of TELRIC; instead, it permitted recovery of retail costs – by no means the same thing.

The IPTA's assertion that the Commission may not use TELRIC as a cost basis for payphone rates is ill-taken, disingenuous, and flatly wrong. The Commission should reject it, and should deny interlocutory review on this point.

D. Cross-Subsidy and Anti-Discrimination Issues Are Not Implicated

Finally, the IPTA asserts that the ALJ's Ruling improperly finds that increases in the cost-based rates required under Section 276 do not need to be accompanied by a demonstration that such rates continue to comply with Section 276's prohibition against cross-subsidies and discrimination. IPTA Petition at 18-

19. This assertion, while perhaps true in the narrowest technical sense, is nonetheless utterly without merit.

To put the matter in context, Section 276 of the federal Act provides, in relevant part, that:

> Any Bell operating company that provides payphone service--
>
> (1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and
> (2) shall not prefer or discriminate in favor of its payphone service.
>
> 47 U.S.C. §276(a)

With respect to cross-subsidies, the Commission noted in its *Payphone Order* that:

> SBC and Verizon must demonstrate that their payphone rates do not subsidize their own payphone operations. **This is done through imputation**, the process of determining whether the aggregate revenue of certain services an ILEC provides to other telecommunications carriers, in this case IPP's, exceeds the imputed costs for such service. The imputation test requires that an ILEC show that an equally efficient competitor that must buy tariffed components from the ILEC, can fairly compete with the ILEC's pay telephone unit for end-users. **The test is intended to guard against cross-subsidization of competitive services by non-competitive services**.
>
> Payphone Order at 7 (emphasis added)

Further, the Commission found that:

> **[T]he current [state] imputation standard** … **is the most appropriate means to determine whether Verizon and SBC satisfy the federal requirement that payphone operations not be subsidized by noncompetitive service offerings**.
>
> Payphone Order at 11 (emphasis added)

Thus, IPTA's argument appears to be that the adoption of rates that pass imputation – the test designed to prevent cross-subsides – does not constitute proof that cross-subsidies have been eliminated, while rates that do not pass imputation are perfectly satisfactory. This argument cannot be credited, or taken seriously.

With respect to non-discrimination, the FCC noted in its *First Payphone Order* that: "we conclude that the Computer III and ONA nonstructural safeguards will provide an appropriate regulatory framework to ensure that BOCs do not discriminate or cross-subsidize in their provision of payphone service." First Payphone Order, ¶199. The FCC further observed that:

> The safeguards the Commission adopted in Computer III and ONA include: (1) nondiscriminatory access to network features and functionalities; (2) restrictions on the use of CPNI; (3) network information disclosure rules; (4) nondiscrimination in the provision, installation, and maintenance of services as well as nondiscrimination reporting requirements; and (5) cost accounting safeguards.
>
> Id., ¶200

There is, of course, no intimation whatever that any one of these safeguards is not being assiduously observed, or is even implicated in this proceeding. Moreover, there is no question that this proceeding will not alter or increase AT&T Illinois overhead cost markup. *See* WPSC Order, ¶¶51-52 (discussion of overhead markup, which cites with approval the Bureau Order's finding that: "LECs may not recover a greater share of overheads in rates for the service under review than they recover in rates for comparable services[.]") Accordingly, the IPTA's argument that the *ALJ's Ruling* improperly finds that increases in the cost-based rates required under Section 276 do not need to be accompanied by a demonstration that such rates continue to comply with Section 276's prohibition against cross-subsidies and discrimination is ill-taken. It should be disregarded, and interlocutory review should be denied.

IX. Conclusion

IPTA's Petition should be rejection, and interlocutory review denied. The *ALJ's Ruling* is well-taken and consistent with the Commission's Imputation Order. It recognizes the proper scope of this proceeding, and seeks to prevent IPTA from undertaking discovery and adducing evidence regarding matters far outside that scope.

IPTA's stated bases for seeking interlocutory review are without merit, and interlocutory review should be denied. The *ALJ's Ruling* does not "predetermine" any issue that has not already been decided by the Commission, or by law. There is no basis for preemption of the imputation requirement, even if the Commission were authorized to preempt state statutes. Further, the FCC has not, as IPTA suggests, prohibited the use of the TELRIC methodology to set payphone network rates. Finally, the ALJ's Ruling is correct as to matters of cross-subsidies and non-discrimination. Interlocutory review denied with respect to all issues raised by the IPTA.

WHEREFORE, for all of the reasons articulated above, the Staff of the Illinois Commerce Commission hereby requests that its recommendations be adopted in their entirety.

Respectfully submitted,

/s/________________________

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