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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**:**	
On Its Own Motion	**:**	
-vs-	**:**	**06-0652**
Illinois Bell Telephone Company,	**:**	
Verizon North, Inc. and Verizon South, Inc.	**:**	

<u>POST-EXCEPTIONS PROPOSED ORDER</u>

By the Commission:

I. PROCEDURAL HISTORY

By an order entered on August 16, 2006, the Illinois Commerce Commission (the "Commission") initiated this proceeding to investigate whether intrastate coin drop pay telephone revenues collected by Illinois Bell Telephone Company ("AT&T Illinois") and Verizon North Inc. and Verizon South Inc. (collectively "Verizon") are "gross revenue" as defined in the Illinois Public Utilities Act (the "PUA") and subject to the tax on gross revenues under Section 2-202 of the PUA. *Initiating Order* at 2-3. This action was taken upon Staff's recommendation, as set out in the Telecommunications Division Staff Report ("Staff Report") dated August 1, 2006. The Staff Report was made a part of the record for the case and both AT&T Illinois and Verizon were made respondents to this proceeding. *Id*.

Pursuant to notice, status hearings were held on August 30 and November 20, 2006. On September 20, 2006, a petition to intervene was filed on behalf of Gallatin River Communications L.L.C. No party objected to that petition.

In accordance with the procedural schedule established at the August 30, 2006 status hearing, AT&T Illinois, Verizon and Staff each filed verified initial comments on October 17, 2006 and reply comments on November 14, 2006. Concurrent with its initial comments, AT&T Illinois also filed the supporting affidavits of Larry G. Parker, Timothy Dominak, and Louise A. Sunderland. Together with its reply comments, AT&T Illinois filed the supporting reply affidavit of Timothy Dominak.

At the November 20, 2006 status hearing, AT&T Illinois and Verizon were granted an opportunity to file surreply comments for the purpose of responding to portions of Staff's reply comments. Also at that hearing, the parties agreed that there was no need for hearings to cross-examine witnesses with respect to the verified comments and/or the supporting affidavits.

Pursuant to the schedule established at the November 20, 2006 hearing, AT&T Illinois and Verizon each filed surreply comments on December 6, 2006. Thereafter, on January 19, 2007, AT&T Illinois and Verizon filed a joint draft order Staff also filed a draft order.

The ALJ's Proposed Order issued to the service list on April 13, 2007. On April 27, 2007, the Staff filed a Brief on Exceptions. Thereafter, on May 4, 2007, AT&T Illinois and Verizon filed a joint Reply Brief on Exceptions. The instant order takes full account of all the arguments presented.

II. BACKGROUND TO THE CASE

The Respondents provide the Commission with background material as context for their arguments and position. Here is their joint recitation.

In 1996, Congress enacted Section 276 of the Telecommunications Act of 1996 (the "1996 Act") "to promote competition among payphone service providers" by directing the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed call using their payphone." 47 U.S.C. §§ 276(b)(1), 276(b)(1)(A). Pursuant to its authority under Section 276, the FCC concluded that, after October 7, 1997, the market "should set the compensation amount for all payphone calls, including local coin calls," unless "market failures" can be demonstrated to exist. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 96-388, ¶¶ 56, 60-61 (rel. Sept. 20, 1996) (the "*Payphone Order*"). The FCC concluded that a "deregulatory market-based approach to setting local coin rates is appropriate." *Id*. at ¶ 58. In its *Order on Reconsideration*, the FCC reaffirmed this approach, which it described as the "deregulation of local coin rates." *Order on Reconsideration*, FCC 96-439, ¶ 10 (rel. Nov. 8, 1996).

Section 276(c) of the 1996 Act provides that: "To the extent that any State requirements are inconsistent with the [FCC's] regulations, the [FCC's] regulations on such matters, shall preempt such State regulations." 47 U.S.C. ¶ 276(c). Accordingly, the FCC's *Payphone Order* preempts state regulation of rates for local coin payphone calls after October 7, 1997. The effect of the *Payphone Order* was recognized and affirmed on appeal. *Illinois Public Telecommunications Ass'n. v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997) ("*Ill. Pub. Tel. Ass'n*") (holding that "Congress gave the Commission [FCC] the authority to set local coin call rates in order to achieve that goal [i.e., "that payphone operators must be 'fairly compensated'").

In a subsequent accounting order, the FCC made it clear that "the *Payphone Order* deregulated" local coin payphone service and directed that revenues from such "nonregulated payphone service" be recorded in Account 5010 of the FCC's Uniform System of Accounts ("USOA"), which has been adopted by this Commission. *Local Exchange Carriers Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*. AAD 97-9, et al., *Memorandum Opinion and Order*, DA 97-

1244, ¶¶ 16, 17 (rel. June 13, 1997). The FCC later authorized ILECs to transfer payphone revenues in Account 5010 to Account 5280, "Nonregulated Revenues." *United States Telephone Association Petition for Waiver of Part 32 of the Commission's Rules*, AAD 97-103, Order (rel. Dec. 31, 1997). In accordance with these accounting rules, beginning in 1997, AT&T Illinois has recorded revenue from the provision of local (Bands A and B) coin payphone services in Account 5280, "Nonregulated Revenue."

Pursuant to the *Payphone Order*, AT&T Illinois filed tariff sheets (Advice No. 5819) on March 25, 1998, to implement the detariffing of its local coin payphone rates, effective March 31, 1998. As explained in both the transmittal letter and the Background Memorandum accompanying the filing, the only rates being detariffed were those for local (Bands A and B) coin sent calls. AT&T Illinois has not detariffed rates for non-local (Band C and intraLATA toll) coin calls or rates for non-sent paid calls (collect and calling card calls). (Parker Affidavit, ¶¶ 8, 9). The detariffing of local coin payphone rates was allowed to take effect and the Commission has never initiated an investigation into the March 25, 1998 filing.

AT&T Illinois and Verizon each file an Annual Gross Revenue Return with the Commission each year. The Annual Gross Revenue Return is used to calculate the amount of Gross Revenue subject to the public utility fund ("PUF") tax under Section 5/2-202 of the PUA. In calculating Gross Revenue, AT&T Illinois deducts nonregulated revenue booked to Account 5280. For each year beginning with 1997, the revenue booked to Account 5280 (and, consequently, the revenue deducted from reported taxable Gross Revenue) has included revenue derived from local coin payphone service. (Dominak Affidavit, ¶ 4). Since 1997, Verizon has also consistently excluded local coin payphone revenue from the calculation of taxable Gross Revenue.

The Commission Staff first contacted AT&T Illinois and Verizon regarding their treatment of local coin payphone revenues for PUF tax purposes on November 8, 2004, when Bill Baima of the Commission's Financial Information Section sent a letter to each company asserting that payphone revenues are "taxable and should also be tariffed." ("Baima Letter," Exhibit A to Verizon's Initial Comments). Mr. Baima requested that AT&T Illinois and Verizon review their Annual Gross Revenue Tax Returns for the years 1998 through 2003 "and verify that these revenues were properly calculated and included in the tax calculations on the tax returns filed for these years." (*Id*.).

Verizon responded to Mr. Baima's letter by advising in a December 29, 2004 letter from Philip J. Wood ("Wood Letter," Exhibit B to Verizon's Initial Comments) that Verizon "respectfully disagrees that unregulated payphone and collocation revenues ("P & C Revenues") must be included in the calculation of the ICC administration fee under 220 ILCS 5/2-202." The Wood Letter noted that unregulated payphone revenues are not subject to the Commission's regulatory oversight and therefore not properly included in the calculation of the PUF tax, since unregulated payphone rates are not subject to the tariffing requirements of 220 ILCS 5/9-102. Verizon also noted that it had not deviated from its past PUF tax calculation practices (which the Commission had never before challenged), and that in any event, the amount at issue was minimal.

In a letter dated December 22, 2004, AT&T Illinois also responded to Mr. Baima's letter, explaining that "while [AT&T Illinois] agrees that revenue derived from intrastate payphone services for which rates are subject to Commission regulation are subject to the PUF tax, that tax does not apply to revenues from non-regulated payphone operations, including the provisioning of local coin payphone service and payphone customer premises equipment ("CPE")." (Sch. TD-2). AT&T Illinois advised Mr. Baima that it had "reviewed its Annual Gross Tax Returns for each of the years 1998 through 2003 and verified that it correctly included revenues from regulated intrastate payphone operations in the calculation of Gross Revenues on which the PUF tax was calculated for each year." (*Id*., ¶ 7).

AT&T Illinois further informed Mr. Baima that, in the course of its review, AT&T Illinois discovered that it had overstated the amount of taxable Gross Revenue for the years 1998 through 2001 as a result of the inclusion of certain revenues, including wholesale revenues, mobile access revenues, fees, non-regulated semi-public payphone revenues, and imputed revenues for which no actual billing is received and no cash is ever realized. (Dominak Aff., Sch. TD-2, p. 2; Dominak Reply Aff., ¶ 2). AT&T Illinois, therefore, submitted with its letter Amended Returns for the years in question. As a result of the Amended Returns, AT&T Illinois asserts that it is owed a PUF tax credit of $905,318. Follow-up requests for issuance of the credit were made by AT&T Illinois in letters sent to Mr. Baima on April 27, 2005 and June 30, 2006. AT&T Illinois has not yet received any portion of the claimed PUF tax credit from the Commission. (Dominak Affidavit, ¶ 7).

Prior to the initiation of this proceeding on August 16, 2006, when the August 1, 2006 Staff Report was made available for review, neither AT&T Illinois nor Verizon received any response from the Staff or the Commission to the explanations of their positions on the applicability of the PUF tax to nonregulated local coin payphone revenues, as set forth in their December 2004 letters to Mr. Baima. In its Report, Staff continues to contend that PUF taxes are due on revenues from intrastate coin drop rates for pay telephone services provided in Illinois.

III. GOVERNING STATUTES

The provisions of the Public Utilities Act ("PUA"), as relevant to this proceeding, are here provided.

A. 220 ILCS 5/2-202(c)

Section 2-202(c) of the PUA sets forth the PUF tax obligations of providers in pertinent part as follows:

> A tax is imposed upon each public utility subject to the provisions of this Act equal to .08% of its gross revenue for each calendar year commencing with the calendar year beginning January 1, 1982, except that the Commission may, by

rule, establish a different rate no greater than 0.1%. For purposes of this Section, "gross revenue" shall not include revenue from the production, transmission, distribution, sale, delivery, or furnishing of electricity. "Gross revenue" shall not include amounts paid by telecommunications retailers under the Telecommunications Infrastructure Maintenance Fee Act.

B. 220 ILCS 5/3-120

Section 3-120 of the PUA defines “intrastate public utility business” as follows:

As used in Section 3-121 of this Act, the term "intrastate public utility business" includes all that portion of the business of the public utilities designated in Section 3-105 of this Act and over which this Commission has jurisdiction under the provisions of this Act.

C. 220 ILCS 5/3-121

For purposes of the PUF tax provisions in Section 2-202, Section 3-121 of the PUA defines “gross revenue” as follows:

As used in Section 2-202 of this Act, the term "gross revenue" includes all revenue which (1) is collected by a public utility subject to regulations under this Act (a) pursuant to the rates, other charges, and classifications which it is required to file under Section 9-102 of this Act and (b) pursuant to emergency rates as permitted by Section 9-104 of this Act, and (2) is derived from the intrastate public utility business of such a utility. Such term does not include revenue derived by such a public utility from the sale of public utility services, products or commodities to another public utility, to an electric cooperative, or to a natural gas cooperative for resale by such public utility, electric cooperative, or natural gas cooperative. "Gross revenue" shall not include any charges added to customers' bills pursuant to the provisions of Section 9-221, 9-221.1 and 9-222 of this Act or consideration received from business enterprises certified under Section 9-222.1 of this Act to the extent of such exemption and during the period in which the exemption is in effect.

D. 220 ILCS 5/9-102

Section 9-102 of the PUA, referenced in Section 3-121, provides as follows:

Every public utility shall file with the Commission and shall print and keep open to public inspection schedules showing all rates and other charges, and classifications, which are in force at the time for any product or commodity furnished or to be furnished by it, or for any service performed by it, or for any service in connection therewith, or performed by any public utility controlled or operated by it. Every public utility shall file with and as a part of such schedule and shall state separately all rules, regulations, storage or other charges, privileges and contracts that in any manner affect the rates charged or to be charged for any service. Such schedule shall be filed for all services performed wholly or partly within this State, and the rates and other charges and classifications shall not, without the consent of the Commission, exceed those in effect on December 31, 1985. But nothing in this section shall prevent the Commission from approving or fixing rates or other charges or classifications from time to time, in excess of or less than those shown by said schedules.

Where a schedule of joint rates or other charges, or classifications is or may be in force between two or more public utilities such schedules shall in like manner be printed and filed with the Commission, and so much thereof as the Commission shall deem necessary for the use of the public shall be filed in every office of such public utility in accordance with the terms of Section 9-103 of this Act. Unless otherwise ordered by the Commission a schedule showing such joint rates or other charges, or classifications need not be filed with the Commission by more than one of the parties to it: Provided, that there is also filed with the Commission a concurrence in such schedule by each of the other parties thereto.

Every public utility shall file with the Commission copies of all contracts, agreements or arrangements with other public utilities, in relation to any service, product or commodity affected by the provisions of this Act, to which it may be a party, and copies of all other contracts, agreements or arrangements with any other person or corporation affecting in the judgment of the Commission the cost to such public utility of any service, product or commodity.

E. 220 ILCS 5/13-503

Section 13-503 of the PUA provides as follows:

With respect to rates or other charges made, demanded or received for any telecommunications service offered, provided or to be provided, whether such service is competitive or noncompetitive, telecommunications carriers shall comply with the publication and filing provisions of Sections 9-101, 9-102, and 9-103.

IV. OVERVIEW OF THE PARTIES' POSITIONS

A. Summary of AT&T Illinois' Position

AT&T Illinois takes the position that revenue derived from local coin payphone calls is not subject to the PUF tax. According to AT&T Illinois, the PUF tax is a tax imposed on a public utility's "gross revenues." (220 ILCS 5/2-202(c)). For purposes of the PUF tax, "gross revenues" means "revenue which is collected by a utility subject to regulations under this Act (a) pursuant to the rates, other charges, and classifications which it is required to file under Section 9-102 of this Act and . . . (2) is derived from the intrastate public utility business of such a utility." (220 ILCS 2/3-121). Section 9-102 of the PUA refers to the tariff filing requirements to which the regulated rates and charges of telecommunications services are subject pursuant to 13-503 of the Act. 220 ILCS 5/13-503. The term "intrastate public utility business" means that portion of a public utility's business "over which this Commission has jurisdiction under the provisions of this Act." (220 ILCS 5/3-120).

Based on these statutory provisions, AT&T Illinois contends that "gross revenues" do not include revenues collected under rates or charges that are not subject to regulation (including tariffing requirements) under the Act and over which the Commission does not have jurisdiction. According to AT&T Illinois, the FCC, pursuant to its authority under Section 276 of the 1996 Act, preempted state regulation of the rates charged by AT&T Illinois for coin-sent local payphone calls, effective October 7, 1997. (*Payphone Order*, ¶¶ 55-61; *Illinois Public Telecommunications Ass'n. v. FCC*, 117 F.3d 555, 561-63 (D.C. Cir. 1997) (holding that FCC "has been given an express mandate to preempt State regulation of local coin calls")). AT&T Illinois notes that, in its Reply Comments, Staff expressly acknowledges that the FCC has "removed state authority" to regulate the rates charged by AT&T Illinois and other carriers for coin-sent local payphone rates. (Staff Reply Comments at 2). Accordingly, AT&T Illinois concludes, revenues derived from local coin payphone calls clearly do not constitute "gross revenues" within the meaning of Section 3-121 of the PUA and, therefore, are not subject to the PUF tax.

In response to the Staff Report's assertion that states "retain jurisdiction over payphone services although they no longer set local coin rates" (Staff Report at 2), AT&T Illinois argues that even as the Commission may retain jurisdiction over some aspects of payphone services other than local coin rates, this does not make the revenues derived from local coin rates part of "gross revenues" under Section 3-121 of the PUA. According to AT&T Illinois, under Section 3-121, the relevant factor in determining whether the PUF tax applies is whether the rates and charges for a particular service are subject to regulation, including the tariffing requirement under Section 9-102 of the PUA. If the rates for a service are *not* subject to such regulation, the revenues derived from those rates are not subject to the PUF tax, AT&T Illinois argues, even if the Commission retains jurisdiction to regulate non-rate aspects of the service. Thus, for example, the Illinois Appellate Court has held that because the Commission has "excluded the cellular industry from rate regulation," rates charged by cellular companies are not subject to PUF tax liability even though the Commission retains authority to regulate other aspects of cellular service. (*Chicago SMSA Limited Partnership v. Illinois Dept. of Revenue*, 306 Ill. App. 3d 977, 984 (1st Dist. 1999), citing *Chicago SMSA, Ltd. Partnership v. Illinois Commerce Commission*, 284 Ill. App. 3d 326 (1996)).

AT&T Illinois notes the Staff Report to assert that "states continue to have the ability to set rates for local collect calls from payphones" and that regional Bell operating companies are required by the FCC to "tariff wholesale payphone service rates." (Staff Report at 2). In AT&T Illinois' view, these assertions are irrelevant, because the only intrastate retail payphone revenues that AT&T Illinois excludes from "gross revenues" are revenues from local coin-sent calls; AT&T Illinois has always paid the PUF tax on local *collect* calls. AT&T Illinois notes that revenues from wholesale payphone service, on the other hand, are excluded from "gross revenues" pursuant to the provision of Section 3-121 which states that the term "gross revenues" "does not include revenue derived by such a public utility from the sale of public utility services, products or commodities to another public utility . . . for resale by such public utility." (220 ILCS 5/3-121). According to AT&T Illinois, the wholesale service exclusion from the definition of "gross revenues" is not at issue in this case.

AT&T Illinois observes Staff to argue, at great length, that the statutory provisions governing the PUF tax were not preempted by the Payphone Order as either "improper rate regulation" or a "barrier to entry or exit" (Staff Comments at 6-16). AT&T Illinois asserts that these arguments are all beside the point because the question is not whether the statutory provisions governing application of the PUF tax have been preempted; AT&T Illinois does not make such an assertion. Instead, the real question here is whether those provisions, by their very terms, apply to revenues collected under rates which are not subject to regulation and the Section 9-102 tariffing requirement. According to AT&T Illinois, the answer to that question is unquestionably "no." Thus, because rates for local coin-sent payphone calls are not subject to regulation, including the Section 9-102 tariffing requirement, revenues collected under those rates are not, as a matter of state law, subject to the PUF tax.

AT&T Illinois also responds to Staff's argument that the FCC did not preempt the imposition of tariff requirements for payphone services. AT&T Illinois notes Staff to rely on the FCC's statement that states "remain free to impose regulations, on a competitively neutral basis, to provide customers with information and price disclosure." (Staff Init. Comments at 11). AT&T Illinois observes, however, that the FCC did not state that such "information and price disclosure" can, or should, take the form of a tariff. Further, AT&T Illinois argues, for purposes of the definition of "gross revenues" under Section 3-121, the relevant question is whether local coin payphone rates constitute rates that telecommunications carriers are "required to file under Section 9-102" of the PUA. (220 ILCS 5/3-121). Contrary to Staff's suggestion (Comments at16), AT&T Illinois asserts, Section 9-102 is not merely a "regulation tending to provide 'price disclosure.'" Rather, and as the Illinois Appellate Court has expressly held, Section 9-102 is an integral part of the PUA's scheme for "regulat[ing] public utilities with respect to the reasonableness of rates." (*Citizens Utility Board v. Illinois Commerce Commission*, 275 Ill. App. 3d 329, 338 (1st Dist. 1995)).

Indeed, AT&T Illinois contends, there is no "informational only" tariffing requirement for nonregulated rates under any provision of the PUA. AT&T Illinois asserts that this fact was recognized by the Commission's Office of General Counsel

("OGC") in 1998 when it agreed with AT&T Illinois that the *Payphone Order* allowed AT&T Illinois to detariff its local payphone coin rates. (Sunderland Affidavit, ¶ 8). AT&T Illinois argues that, contrary to Staff's suggestion (Comments at 16-17), the Section 9-102 tariffing requirement is no less a form of rate regulation when applied to competitive telecommunications services than it is when applied to noncompetitive telecommunications services. Tariffed competitive service rates are required to be "just and reasonable" (220 ILCS 5/13-101) and are subject to Commission review for reasonableness in complaint or investigatory proceedings under Section 9-250 (220 ILCS 5/13-505(b)). [1]

Thus, AT&T Illinois concludes, the FCC's reference to states' ability to require "information and price disclosure" does not permit the Commission to impose the PUA's tariffing requirements on local coin payphone rates. Rather, the *Payphone Order* would allow the Commission to adopt information and price disclosure requirements that do not involve Section 9-102 tariffs. For example, the FCC would permit states to require a certain amount of rate disclosure on the payphone placard or require the establishment of toll-free numbers where customers can obtain payphone rate quotes. But, by preempting the Commission from regulating local coin payphone rates, AT&T Illinois asserts, the FCC necessarily also preempted the Commission from imposing the tariffing requirement under Section 9-102.

AT&T Illinois argues that, in the event that the Commission were to disagree with its position and accepts the Staff Report's position that local coin payphone revenues are subject to the PUF tax because they are subject to an "informational tariffing" requirement, the PUF tax should be imposed on AT&T Illinois on a prospective basis only. According to AT&T Illinois, it acted in good faith, with the full knowledge of the Commission and its Staff, and with the express approval of the OGC, when it made the filing to detariff its local coin payphone rates in March of 1998. The Commission has never investigated that filing. Accordingly, AT&T Illinois concludes, even if the Commission deems it appropriate to now impose a tariffing requirement (and any such action would be in violation of the *Payphone Order*'s ruling preempting state regulation of local coin payphone rates), it would be improper and unfair for the Commission to apply that tariffing requirement retroactively in an attempt to collect PUF taxes on payphone revenues that AT&T Illinois has properly excluded from "gross revenues."

AT&T Illinois observes that, in its Reply Comments, Staff appears to have abandoned its argument that non-regulated rates must be tariffed as a means of "price

[1] According to AT&T Illinois, the fact that tariffing requirements are an aspect of rate regulation is recognized by the Uniform System of Accounts for Telecommunications Carriers in Illinois. The instructions for "regulated accounts" states that "regulated accounts shall be interpreted to include the investments, revenues and expenses associated with those telecommunications products and services to which the tariff filing requirements are applied, except as may be otherwise provided in 83 Ill. Admin. Code 711.15 or 712.15." 47 U.S.C. § 32.14, as modified and adopted in 83 Ill. Admin. Code Section 710.14. The accounting instructions further provide that "[p]reemptively deregulated activities . . . will be classified as 'non-regulated.' " 47 U.S.C. § 32.23, was modified and adopted in 83 Ill. Admin. Code Section 710.23. Pursuant to the FCC's direction, AT&T Illinois accounts for local coin payphone revenue as "non-regulated."

disclosure." Instead, Staff now argues, and for the first time, that the PUF tax obligation is triggered by the inclusion of the word "classifications" in Section 3-121, which defines "gross revenue," in relevant part, to mean "all revenue which is (1) collected by a public utility subject to rates, other charges, and *classifications* which it is required to file under Section 9-102 of this Act . . ." (220 ILCS 5/13-121 (emphasis added)). (Staff Reply Comments at 2). This language tracks the first sentence of 9-102, which requires a public utility to file tariffs "showing all rates, and other charges, and classifications . . . for any service performed by it." (220 ILCS 5/9-102). Staff argues that the word "classifications" as used in Sections 3-121 and 9-102 of the Act refers to the classification of a telecommunications service as "competitive" or "noncompetitive" under Section 13-502. (220 ILCS 5/13-502). On this basis, AT&T Illinois observes Staff to conclude that, because payphone service generally is classified as competitive, "AT&T and Verizon each collect revenue pursuant to the *classification* of pay telephone service, including local coin drop revenue, that they are required to file under Section 9-102." (Staff Reply Comments, pp. 2-3) (emphasis in original).

AT&T Illinois contends that Staff's new argument does not advance its position in the slightest. According to AT&T Illinois, because local coin payphone rates have been deregulated, they are not "classified" as either competitive or noncompetitive. AT&T Illinois further states that the competitive/noncompetitive classifications in Article XIII of the Act are fundamentally rate-related: *inter alia*, they determine the amount of advance notice required for proposed changes in tariff rates and whether the Commission has authority to suspend the effectiveness of such changes pending investigation. (220 ILCS 5/13-101 (applying the notice and suspension provisions of Section 9-201 to noncompetitive, but not to competitive, rates and service); 220 ILCS 5/13-505 (providing that changes in competitive rates shall be permitted upon filing, but remain subject to review for reasonableness under Section 9-250)). Under Article XIII, AT&T Illinois points out, the requirement to classify a service as "competitive" or "noncompetitive" is driven by whether the service is required to be tariffed - not vice versa. (220 ILCS 5/13-502 (requiring that telecommunications service provided "under tariff" shall be classified as "competitive" or "noncompetitive")). As such, AT&T Illinois argues, if the services are not subject to tariffing requirements, then they do not have to be "classified" either. Because the tariff requirement is part and parcel of rate regulation, AT&T Illinois asserts, the tariff requirement does not apply to non-regulated rates. Accordingly, AT&T Illinois concludes, when the FCC preempted the regulation of local coin payphone rates, it necessarily also preempted application of both the PUA's tariff and classification requirements to such rates.

AT&T Illinois further argues that, even if local coin payphone service does have to be "classified," Staff's interpretation of Section 9-102 is incorrect. According to AT&T Illinois, the phrase "rates, and other charges, and classifications," as used in that section, and numerous other sections of Article IX ("Rates") of the PUA, is a carryover from the Public Utilities Act of 1921 and, therefore, was in existence long before the 1986 rewrite of the PUA which introduced Article XIII ("Telecommunications") and the concept of "competitive" and "noncompetitive" telecommunications services. Thus, AT&T Illinois concludes, the term "classification," as used in the phrase "rates and other charges and classifications," has absolutely nothing to do with the competitive and noncompetitive classifications of telecommunications service under Section 13-502. Rather, AT&T Illinois asserts, the word "classifications," as used in the phrase "rates, and other charges, and classifications," refers to *rate* classifications, such as the classification of rates as business and residential rates.

According to AT&T Illinois, the fact that the term "classification" as used in Section 9-102 refers exclusively to the concept of rates, and not to the competitive or noncompetitive "classifications" of telecommunications services, is apparent from the context in which the phrase "rates and other charges, and classifications" is used in Section 9-102 and other provisions of Article IX. For example, the third and fourth sentences of Section 9-102 state as follows:

> Such schedule shall be filed for all services performed wholly or partly within this State, and *the rates and other charges and classifications shall not, without the consent of the Commission, exceed those in effect on December 31, 1985*. But nothing in this section shall prevent the Commission approving or fixing *rates or other charges or classifications from time to time in excess of or less than those shown by such schedules.* (220 ILCS 5/9-102 (emphasis added)).

AT&T Illinois contends that the phrases "not to exceed" and "in excess of or less than," as used in the passage above, make sense only if the phrase "rates and other charges and classifications" refers exclusively to the rates and other forms of compensation demanded by a utility in exchange for a product or service.

As another example, AT&T Illinois asserts, Section 9-227 states that "it shall be proper for the Commission to consider as an operating expense, for the purpose of determining whether a *rate or other charge or classification* is sufficient, donations made by a public utility for the public welfare or for charitable scientific, religious, or educational purposes, provided that such donations are reasonable in amount." (220 ILCS 5/9-227 (emphasis added)). According to AT&T Illinois, it is clear from the context that the term "classifications," - when used as part of the phrase "rates or other charges or classifications" - refers to the monetary compensation demanded in exchange for a utility service.

In support of its position that the term "classifications," as used in Section 9-102, does not include the "classification" of telecommunications service as "competitive" or "noncompetitive," AT&T Illinois also cites Section 13-503, which makes the Section 9-102 tariff filing requirement applicable to "rates or other charges made, demanded or received for any telecommunications service offered, provided or to be provided, whether such service is competitive or noncompetitive." (220 ILCS 5/13-503). AT&T Illinois notes that Section 13-503 does not say that a carrier shall file its "competitive" or "noncompetitive" "classification" pursuant to the requirements of Section 9-102. Rather, Section 9-102 is made applicable to telecommunications services only "with respect to rates or other charges." AT&T Illinois reiterates that the Section 9-102 tariff requirement, as incorporated through Section 13-503, is part and parcel of the regulation of rates under Illinois law and, therefore, does not apply to unregulated rates.

Finally, AT&T Illinois responds to Staff's argument, based on the second sentence of Section 9-102, that, in addition to requiring the tariffing of regulated rates, Section 9-102 also requires that each utility "file and include as part of such [rate] schedule and shall state separately all rules, regulations, storage or other charges, privileges and contracts that in any manner affect the rates charged or to be charged for such service." (220 ILCS 5/9-102). (Staff Reply Comments at 4). According to AT&T Illinois, this language refers to "rules, regulations, storage, or other charges, privileges and contracts" that "in any manner affect" the *regulated* rates which a utility is required to file pursuant to the first sentence of Section 9-102. Thus, AT&T Illinois concludes, the second sentence of Section 9-102, like the first sentence, does not apply to services (like local coin payphone service) for which rates are not subject to regulation.

AT&T Illinois further contends that, even if, as Staff apparently intends to suggest, the second sentence of Section 9-102 requires carriers to tariff all non-rate terms and conditions of local coin payphone service (and it does not), such a requirement would not trigger application of the PUF tax. The definition of "gross revenues" under Section 3-121 refers to "revenue which is collected . . . pursuant to the rates, other charges and classifications which it is required to file under Section 9-102." (220 ILCS 5/13-121). As previously stated, this language tracks the first sentence in Section 9-102, which requires the filing of "rates and other charges and classifications." AT&T Illinois contends that the phrase "rates and other charges and classifications" refers to regulated rates and other forms of monetary consideration demanded in exchange for the provision of service. According to AT&T Illinois, Section 3-121 does *not* contain language tracking the second sentence of Section 9-102 and does not define "gross revenues" to include all revenues obtained from services for which the Commission may have jurisdiction over non-rate-related aspects of the services.

AT&T Illinois concludes that the clear intent of Section 3-121 is to apply the PUF tax only to revenues collected under rates which are subject to regulation. Local coin payphone rates are indisputably not subject to regulation. Therefore, such rates are not subject to the PUF tax.

AT&T Illinois asserts that Staff's Comments misstate the facts, as well as the relevant law. Specifically, AT&T Illinois contends, Staff erroneously asserts that it was not until 2003 that AT&T Illinois "withdrew its tariffs for, and ceased remitting the PUF tax upon payphone coin-drop revenues." (Staff Comments at 5). In fact, AT&T Illinois asserts, AT&T Illinois detariffed its local coin payphone rates in March of 1998, shortly after the deregulation of such rates became effective pursuant to the *Payphone Order*. (Dominak Aff., Sch. TD-2, at 3; AT&T Ill. Init. Comments at 4-5). AT&T Illinois states that it did so with the full knowledge of Staff and the approval of the OGC. (*Id*.). As the December 2004 Letter states, AT&T Illinois has not remitted the PUF tax on local coin payphone revenues since that time (although it has continued to remit PUF taxes on revenues from non-sent paid (collect and credit card) and non-local coin payphone calls). (*Id*.).

AT&T contends that Staff is also confused about the nature of the PUF tax credits that AT&T Illinois has requested and continues to request. According to AT&T Illinois, it has pending requests for the issuance of credits in the total amount of $905,318, which represents amounts which AT&T Illinois overpaid in PUF taxes for the years 1998 through 2001. AT&T Illinois states that, contrary to Staff's apparent misconception (Comments at 5), no portion of the requested credits is related to taxes paid on local coin sent payphone revenues, since AT&T Illinois did not pay PUF taxes on such revenues during the years in question. Rather, the requested credits represent overstatements of Gross Revenues resulting generally from the improper inclusion of wholesale revenues, mobile access revenues, fees, non-regulated semi-public payphone revenues, and imputed revenues for which no actual billing is received and no cash is ever realized. (Dominak Aff., Sch. TD-2, p. 2; Dominak Reply Aff., ¶ 2).

AT&T Illinois asserts that, despite repeated requests for issuance of the credit, AT&T Illinois has not yet received any portion of the credit from the Commission. (Dominak Aff., ¶ 7). It is AT&T Illinois' understanding that Staff has opposed issuance of the full amount of the requested credit based on its position that there should be an offset for the amount of PUF taxes that AT&T Illinois would have paid on local coin-sent payphone revenues since 1998 if they had been included in the gross revenues subject to the PUF tax since 1998. AT&T Illinois contends that it is not liable for any portion of that amount and, therefore, is entitled to receive the entire amount of the requested $905,318 credit. AT&T Illinois further contends that, even if the Commission were to accept Staff's position that AT&T Illinois is liable for PUF taxes on local coin-sent payphone revenues for prior periods, AT&T Illinois has never received an explanation for why it has not yet been issued a credit for the difference between the requested credit of $905,318 and the amount allegedly owed for PUF taxes for local coin-sent payphone revenues. (Dominak Reply Aff., ¶ 5).

B. Summary of Verizon's Position

Verizon contends that Illinois law does not require it to pay PUF tax on revenues from intrastate coin drop rates for pay telephone services provided in Illinois because those rates are unregulated and, thus, not subject to the PUF tax. Verizon also notes the Commission investigation against it to be financially unjustified, since the additional tax sought from Verizon is negligible – less than $700 each year for 2005 and 2006, and less than $20,000 in the aggregate for the past eight years. Verizon makes a number of arguments in support of its position.

According to Verizon, this issue first arose on November 8, 2004, when Bill Baima of the Commission's Financial Information Section sent his letter asserting that "[p]ayphone and collocation revenues are taxable and should also be tariffed." (*See* Exhibit A to Verizon's Initial Comments). The Baima Letter requested that Verizon identify prior years' intrastate pay telephone revenues and/or collocation revenues, review prior gross revenue tax returns, and submit revised tax returns if Verizon "did not correctly report these revenues and/or calculate the tax amount." *(Id.).*

Verizon responded to the Baima Letter with the Wood Letter, which stated that Verizon "respectfully disagrees that unregulated payphone and collocation revenues ("P & C Revenues") must be included in the calculation of the ICC administration fee under 220 ILCS 5/2-202." (*See* Exhibit B to Verizon's Initial Comments). The Wood Letter noted that unregulated P & C revenues were not subject to the Commission's oversight and therefore not properly included in the calculation of the PUF tax, since unregulated payphone and collocation rates were not subject to the tariffing requirements of 220 ILCS 5/9-102. (*Id*.). The Wood Letter also noted that Verizon had not deviated from its past PUF tax calculation practices (which the Commission had never before challenged), and that in any event, the amount at issue was minimal. (*Id*.). Verizon heard nothing more from the Commission until the initiation of this investigation nearly two years later by order dated August 16, 2006. (*See generally*, *Initiating Order*).

Verizon argues that the definition of "gross revenue" is critical to whether PUF taxes are due on revenues from intrastate coin drop rates for pay telephone services provided in Illinois. Verizon notes that the Staff Report acknowledges that "gross revenue" "includes all revenue which is (1) collected by a public utility subject to regulation under [the Illinois Public Utilities Act ("PUA")] (a) pursuant to the rates, other charges, and classifications which it is required to file under Section 9-102 of [the PUA] and (b) pursuant to emergency rates as permitted by Section 9-104 of [the PUA], and (2) is derived from the intrastate public utility business of such a utility." (*See* Staff Report at 1; *see also* 220 ILCS 5/3-121).

Verizon points out that while Section 9-102 of the PUA requires public utilities to file schedules of rates and classifications and gives the Commission ultimate authority to approve rates different than those filed by providers, Section 9-102 only applies to regulated services. Verizon cites *Cerro Copper Products v. Illinois Commerce Commission*, 83 Ill. 2d 364, 415 N.E. 2d 345 (1980) (noting that fundamental purpose of providing a rate schedule is rate regulation); *Chicago SMSA Limited Partnership v. Illinois Commerce Commission*, 672 N.E.2d 37, 39 (Ill. App. 3rd Dist. 1996) ("*Chicago SMSA*")[2] (since services in question do not generate any "gross revenue" under Section 3-121 of the PUA, no PUF tax liability exists under Section 2-202); and *Chicago SMSA L.P. v. Illinois Dept. of Revenue*, 715 N.E.2d 719, 724 (Ill. App. 1st Dist. 1999) ("*Illinois DOR*") (explaining that *Chicago SMSA* court "held cellular providers bore no tax liability under the act because the ICC had excluded the cellular industry from rate regulation") in support of this point.

Verizon further observes that "intrastate public utility business" is defined as including "all that portion of the business of the public utilities designated in Section 3-105 of [the PUA] and over which this Commission has jurisdiction under the provisions

[2] Verizon explains that although Staff attempts to distinguish this case (*see* Staff's Initial Comments at 17), it relies on a distinction without a difference, since the fact that the ICC's authorization to regulate rates in Chicago SMSA was eliminated by ICC order – versus FCC order here – is irrelevant.

of [the PUA]." (*See* 220 ILCS 5/3-120). Verizon submits that rates for intrastate coin drop payphone services fall outside the Commission's jurisdiction in light of the FCC's preemption of state regulation of such rates. Verizon also indicates that since revenue from intrastate coin drop rates for pay telephone services provided in Illinois is plainly not collected "pursuant to emergency rates as permitted by Section 9-104 of [the PUA]," it can only be subject to the PUF tax if it is *both* under the Commission's jurisdiction *and* collected "pursuant to the rates, other charges, and classifications which [the public utility] is required to file under Section 9-102 of the [PUA]."

Verizon explains that because revenues from intrastate coin drop rates for pay telephone services provided in Illinois do not meet either of these mandatory criteria, these are not subject to the PUF tax. Importantly, Verizon argues, it does *not* claim that the PUF tax is preempted, or a barrier to market entry or exit, or an impermissible form of rate regulation. As such, Verizon explains, Staff's discussion seeking to refute these purported arguments is altogether moot (*see* Staff's Initial Comments at 6; 9; 13-15), given that neither Verizon nor AT&T has ever advanced such arguments. Verizon posits that Staff is simply seeking to divert the Commission's attention from the real issues in this proceeding. Verizon submits that the real question is not whether the *PUF tax* is preempted as rate regulation and/or a barrier to market entry or exit, but rather whether the *regulation of intrastate coin drop rates for pay telephone services* is.

Verizon advises the Commission that Staff's "brief assay" into preemption law fails to highlight 47 U.S.C. § 276(c), which states unequivocally that "[t]o the extent that any State requirements are inconsistent with the [Federal Communication's] Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." As a result, Verizon asserts that the FCC has flatly barred states from regulating intrastate coin drop rates for pay telephone services. (*See Payphone Order; Order on Reconsideration; Ill. Pub. Tel. Ass'n,* 117 F.3d 555, 562*)*. Verizon points out that Staff admits that 47 C.F.R. § 64.1330(a) preempts any state regulations that impose market entry or exit requirements (*see* Staff's Initial Comments at 4) – the hallmark example being rate regulation. (*See Illinois DOR* at 724, describing "rate and market entry regulation" as "'heart of regulation'"). Verizon also argues that Staff's citation to the Commission's June 11, 2002 order in Docket 01-0614 (*see* Staff's Initial Comments at 18) is inapposite, since in that proceeding, the Commission found that the FCC had not yet spoken on the preemption question before the Commission. Here, Verizon points out, the FCC has spoken clearly in preempting state regulation of local payphone rates, and the Commission need only comply with the FCC's explicit findings.

Verizon also discusses the 1997 deregulation of payphone CPE and local service rates, citing the *Payphone Order* and *Order on Reconsideration*. Verizon additionally points out that Staff's own report to the Commission acknowledges this. (Staff Report at 2). Verizon also notes that after certain parties appealed the FCC's decision to deregulate local payphone rates, the D.C. Circuit unequivocally affirmed, finding that the FCC "has been given an express mandate to preempt State regulation of local coin calls." (*See Ill. Pub. Tel. Ass'n,* 117 F.3d 555, 562*)*. Thus, Verizon argues, there is no question that intrastate coin drop rates for pay telephone services that Verizon provides in Illinois are deregulated and not under Commission jurisdiction.

As a result of the FCC's deregulation of local payphone service rates, Verizon submits that this Commission is not permitted to regulate intrastate coin drop rates for pay telephone services provided in Illinois, nor may it require them to be tariffed, citing *Cerro Copper, Chicago SMSA* and *Illinois DOR*. Because state regulation of such rates has been preempted, Verizon alleges that there can be no PUF tax due on them, since the "gross revenue" condition of Section 2-202 cannot be met. The revenue in question does not constitute "gross revenue" as defined in Section 3-121, states Verizon, because it was not collected pursuant to rates regulated under Section 9-102 of the PUA.

Verizon also contends that Staff's disagreement with this point is ultimately irrelevant because until very recently (as detailed below), neither Staff nor the Commission had asserted or held that tariffing of intrastate coin drop rates for pay telephone services is required under Section 9-102, and had instead consistently cited Section13-501 as the basis for requiring payphone providers to tariff their services. Verizon reminds the Commission that this is the position that Staff took during the ICC workshops that followed the issuance of the FCC's *Payphone Order* and *Payphone Reconsideration Order*. Citing to Section13-501, Staff asserted that end user payphone rates should be declared competitive, and therefore moved from local exchange carriers' non-competitive tariffs into their competitive tariffs (as defined in 220 ILCS 5/13-502). Verizon disagreed, but decided to undertake such tariffing on a voluntary basis. Following the workshops, the Commission issued an order directing payphone providers to detariff their payphone CPE offerings as a result of the FCC's newly-issued payphone orders, again citing Section13-501 as the origin of the tariffing requirement. (Order, *Illinois Commerce Commission on Its Own Motion v. Illinois Bell Tel. Co. et al.*, Docket 97-0630, 1997 Ill. LEXIS 856, *2 (December 3, 1997)).

While Staff is heard to argue that a tariffing requirement does not constitute a barrier to market entry or exit (Staff Comments at 16-18), Verizon disagrees. Staff alleges that since a "tariffing requirement constitutes a regulation tending to provide 'price disclosure,'" it is "perfectly proper state regulation." (*Id*. at 16). Verizon notes, however, that the PUA is devoid of any provisions providing for "informational tariffs," a point which AT&T notes was already conceded by the ICC's Office of General Counsel. (*See* AT&T Comments at 4).

Verizon argues that Staff's reliance on the "competitive telecommunications service" tariffing requirements of Section 13-501 of the PUA to support its contention that intrastate coin drop rates for pay telephone services provided in Illinois must be tariffed (Staff Comments at 16-17), fails to recognize the distinction between permissible regulation of competitive and noncompetitive services that are subject to some regulatory oversight and impermissible regulation of intrastate coin drop payphone rates (via an ostensible tariff requirement) that are not regulated at all by the ICC. Verizon contends that Section 13-501 does not authorize regulation of rates for intrastate coin drop pay telephone rates.

Verizon also disputes Staff's contention that Section 13-501's requirements do not constitute a barrier to market entry or exit because Section 13-505(a) requires only one day's notice for such filings, and does not provide for suspensions. (*See* Staff Comments at 16-17). Verizon explains that requiring the filing of a tariff affects both market entry and exit because a provider must tariff a service before offering it, and must seek approval to withdraw a tariff in the event of market exit, and notes that Staff's citation to *Cellular Telecommunications Industry Ass'n v. Federal Communications Comm'n*, 168 F.3d 1332 (D.C. Cir. 1999) is flawed.

Verizon observes that the D.C. Circuit found only that a mandate to make USF contributions did not constitute impermissible rate regulation of wireless service simply by virtue of increasing the cost of doing business in the state (*see Cellular Telecommunications*, 168 F.3d at 1336), but the D.C. Circuit did not disagree that state tariffing requirements were a barrier to entry. (*Id*.). Verizon further argues that Staff overlooks that Section 13-505(a) only applies to *increases or decreases in rates or charges* for competitive services, not to the *introduction or withdrawal* of a service, and states that to assess whether the ostensible tariffing requirement is a barrier to market entry or exit, the Commission must look to Section 13-501, which sets forth the tariffing requirements for the *introduction* of a competitive service. Section 13-501 does not allow for one-day notice filings, but instead provides for tariff suspension, investigation and hearing. In addition, for carriers like Verizon that offer both competitive and non-competitive services, tariffs offering a new competitive service, or newly reclassifying a non-competitive service as a competitive service, cannot take effect until certain cost study filing requirements are met. (*See* 220 ILCS 5/13-502(d)). According to Verizon, these are all barriers to market entry and exit.

Verizon asserts that all of this is ultimately irrelevant since, until recently, neither Staff nor the Commission had ever asserted Section 9-102 to impose a tariffing requirement for intrastate coin drop rates for pay telephone services. As already detailed above, Verizon maintains that intrastate coin drop rates are not regulated under Article 9 of the PUA, and thus, do not meet the definition of "gross revenue" under 220 ILCS 5/3-121. Consequently, Verizon argues, even if the Commission were to ultimately determine that providers are somehow required to file "informational tariffs" under Section 13-501 for intrastate coin drop rates for pay telephone services (despite the fact that the Commission is barred from regulating those rates), this would not subject payphone providers to paying PUF tax on the revenues therefrom.

Verizon notes that it was not until the November 14, 2006 filing of Reply Comments in this proceeding that Staff advanced its new theory that Section 9-102 was the origin of the ostensible tariffing requirement for intrastate coin drop payphone services. (Staff's Reply Comments at 2-8). Verizon makes several points in response to Staff's new contention.

First, Verizon notes that it advised the Commission in the Wood Letter that Section 9-102 of the PUA did not require the payment of PUF tax on revenues from intrastate coin drop payphone service. Yet, Staff ignored the Wood Letter (as well as similar correspondence from AT&T) for almost two years before the Commission initiated the instant investigation in response to AT&T's pursuit of the $905,318 PUF tax refund due to it. In its *Initiating Order*, the Commission made the August 1, 2006 Staff Report part of the record of this docket. (*See Initiating Order* at 3). Verizon points out that neither the Initiating Order nor the Staff Report referenced Section 9-102 of the PUA as the basis for Verizon's and AT&T's alleged liability for PUF tax payments on intrastate coin drop pay telephone revenues collected by those companies, despite the fact that the legal issue had been raised by Verizon nearly two years prior. Rather, Staff had previously asserted that the ostensible tariffing requirement that triggered the alleged PUF tax liability arose under Section 13-501 of the PUA, not Section 9-102.

Verizon also notes the AT&T filings in this docket to demonstrate that the Commission's Office of General Counsel long ago disagreed with Staff on this point, and instead concurred with AT&T that there was no tariffing requirement relating to intrastate coin drop pay telephone services. Verizon observes that, even after Staff requested and obtained the opportunity to supplement the Staff Report by filing verified comments on October 17, 2006 (the same day Verizon and AT&T were required to respond to the Staff report), Staff once again made no assertion that Section 9-102 was the basis of Staff's theory of liability. Verizon claims that only after it noted that Staff had *never* made such an argument, and pointed out that this was fatal to Staff's position, did Staff do so for the first time on reply. (*See* Staff Reply Comments at 2-8).

Verizon next argues that even Staff does not dispute that the Commission may not set, review, or otherwise regulate intrastate coin drop pay telephone rates, recognizing that "federal law removed state authority to set prices for local coin calls from pay telephones" and conceding that "the Commission may not regulate the *price* for intrastate local coin pay telephone service...." (*See* Staff Reply Comments at 2; Italics in original). As a consequence, Verizon submits that these rates are not subject to regulation under Article IX of the PUA, which governs only *regulated rates*, because statutory tariffing and rate approval requirements such as those set forth in Article IX are the hallmark example of rate regulation, citing *Citizens Utility Board v. Illinois Commerce Commission*, 655 N.E.2d 961, 967 (Ill. App. 1st Dist. 1995) ("*CUB*") ("[t]hese plenary requirements embody the Commission's plenary jurisdiction to regulate public utilities with respect to the reasonableness of rates.") and *Illinois DOR* (describing "rate and market entry regulation" as "'heart of regulation'").

Verizon argues that Staff attempts, unconvincingly, to argue that "Section 9-102 is not limited to regulated prices" (Staff Reply Comments at 3), but that the provisions of Section 9-102 quoted by Staff only confirm that the statute's purpose is regulating rates and any associated rate-affecting terms and conditions of service. For example, Verizon notes that the formal title of Article IX of the PUA is "RATES," and that rate regulation is the fundamental purpose of Article IX. Section 9-101 explicitly mandates that the rates subject to Article IX be "just and reasonable." (*See* 220 ILCS 5/9-101).

Subsequent sections of Article IX confirm that the rates required to be filed and published thereunder are subject to ICC review and approval; may not be changed without 45 days notice to the ICC; and are subject to suspension pending a hearing on the "propriety" thereof. (*See, e.g.,* 220 ILCS 5/9-104 and 9-201(b)). In Verizon's view, Staff's argument that unregulated rates are somehow subject to the rate regulation requirements of Article IX turns the whole concept of regulation on its head.

Verizon next addresses Staff's argument that revenues derived from intrastate coin drop pay telephone services provided in Illinois are subject to the PUF tax because Verizon "collect[s] revenue pursuant to the *classifications* which [it is] required to file under Section 9-102 of the PUA." (*See* Staff Reply Comments at 2). Verizon states that the essence of Staff's argument is that because Verizon's local payphone services are "classified" as competitive services, the revenues therefrom are collected due to the "classification" of those services as competitive. The next step in Staff's logic, Verizon explains, is that since competitive services are classified in Article XIII of the PUA, and Section 13-503 references the filing requirements of Section 9-102, Verizon's intrastate coin drop pay telephone revenues are collected under "classifications" Verizon is required to file under Section 9-102.[3] Rounding out Staff's theory is that since these revenues are collected pursuant to Section 9-102's filing requirement, they meet Section 3-121's definition of "gross revenues," and are consequently subject to the PUF tax under Section 2-202.

Verizon argues that Staff's creative statutory "daisy chain" argument is fatally flawed because Staff ignores that intrastate coin drop pay telephone rates are deregulated, and therefore not subject to the rate regulation provisions of Article IX of the PUA regardless of Section 13-503's internal reference to the filing processes outlined in Section 9-102. Verizon points out that Staff also fails to recognize the critical distinction between Section 13-503 referring to the filing provisions of Section 9-102, and the unreasonable leap that Staff makes in asserting that Section 9-102 is therefore fully applicable to services like those at issue here, even though the rates for those services are not subject to regulation.

Verizon argues that even if the Commission is inclined to entertain Staff's sudden shift in position that the ostensible "informational tariffing requirement" for intrastate coin drop payphone services arises not out of Section 13-501 (as the Commission has posited for more than a decade), but under some combination of Sections 13-503 and 9-102, revenues from competitive services are not, by virtue of Section 13-503's internal reference to Section 9-102, "collected" pursuant to filings required by Section 9-102. If

[3] Verizon notes that Staff claims that AT&T agrees with Staff's contention in this regard (Staff Reply Comments at 5). However, Verizon explains that an actual review of AT&T's words demonstrates that AT&T merely confirmed that Section 9-102 sets forth a tariffing requirement to which "***regulated*** rates and charges of telecommunications services are subject to 13-503 of the PUA." *Id*. (Italics added). Staff ignores that AT&T has consistently argued throughout this proceeding that intrastate coin drop payphone rates are ***deregulated*** and therefore not subject to this requirement. Moreover, footnote 2 to AT&T's Reply Comments plainly states that "[e]ven if the Commission were to conclude that it has authority to impose an informational-only tariff requirement on non-regulated rates (and it does not), such authority clearly does not emanate from Section 9-102." (*See* AT&T Reply Comments at 8, FN 2).

they are "collected" pursuant to any alleged filing requirement, argues Verizon, it would be pursuant to a filing required by Section 13-503.

In other words, the mere fact that Section 13-503 incorporates filing parameters set forth in Section 9-102 does not translate into a requirement that rates for intrastate coin drop payphone service be filed *pursuant to Section 9-102*, because Section 9-102 requires only the filing of rates *regulated* under Article IX of the PUA. Moreover, Verizon observes that even if the legislature had intended to subject *all* rates for *all* services to the rate regulation requirements of Section 9-102 (including filing a schedule of regulated rates) by referencing that filing process in Section 13-503, the FCC has preempted the legislature from doing so. Verizon asserts that the only rates required to be filed under Section 9-102 are those subject to regulation by the Commission for their compliance with the "just and reasonable" standard. Intrastate coin drop payphone rates do not meet this condition – as Staff has conceded – because they are not subject to any regulation. Accordingly, Verizon concludes that revenues from local coin pay telephone service are not collected pursuant to rates required to be filed under Section 9-102.

Consequently, Verizon states, PUF taxes cannot be due on the revenues derived from the intrastate coin drop pay telephone services Verizon provides in Illinois. Verizon reiterates the relevant portions of the statutory definition of "gross revenue," claiming that to be subject to the PUF tax, revenues must be "*collected* ... pursuant to the *rates*, *other charges and classifications* which [a public utility] is required to file under Section 9-102 of this Act." Verizon observes that Staff attempts to deflect the import of these words by focusing the Commission's attention solely on the word "classifications," rather than the phrase "rates, other charges and classifications" as a cohesive unit by asserting, without any basis, that the term "classifications" refers to the competitive and non-competitive *service* classifications of Article XIII of the PUA, rather than *rate* classifications that arise under Article IX – *e.g.*, business, residential, etc. (*See* Staff Reply Comments at 3) [4] Verizon references the discussion set forth in AT&T's surreply comments explaining that the term "classifications" in Article IX dates back many decades prior to the enactment of Section 13-502 of the PUA, which states that telecommunications services will be classified as competitive or non-competitive. Verizon argues that given that Article IX deals with rates, whereas Article XIII deals with competitive/non-competitive services and was enacted years later, the only logical interpretation of the reference to "classifications" in the context of Section 9-102 is that it refers to *rate* classifications, not to competitive and non-competitive *service* classifications.

As a result, Verizon posits that its intrastate coin drop payphone revenues are not "collected" pursuant to "rates, other charges and classifications" required to be filed

[4] Verizon also notes that earlier in Staff's Reply Comments, Staff chooses to ignore the portion of the definition of "gross revenues" that relates to Section 9-102, identifying only the portion of Section 3-121 that mandates that "gross revenues" be "derived from the intrastate public utility business of [a public] utility," without mentioning that they must also be collected pursuant to "rates, other charges and classifications" required to be filed under Section 9-102. (*See* Staff Comments at 1).

under Section 9-102 of the PUA. Verizon reminds the Commission that under Section 3-120 of the PUA, "intrastate public utility business" of a utility is limited to public utility business over which the Commission has *jurisdiction*, and thus, several requirements of Section 3-121's definition of "gross revenues" cannot be satisfied here. Verizon also notes that the Illinois Appellate Court has unambiguously determined that revenues excluded from the definition of "gross revenues" cannot be subject to the PUF tax, citing *Chicago SMSA* at 39 and *Illinois DOR* at 724.

Verizon also disputes Staff's effort to conjure up a new, non-statutory basis for its ostensible "informational filing requirement" by relying on 83 Ill. Admin. Code § 745.20. Verizon points out that the reach of that administrative rule is necessarily limited to those matters over which the Commission has jurisdiction. Verizon submits that the FCC has preempted the Commission's authority to regulate intrastate coin drop payphone rates, including the Commission's authority to require them to be tariffed. Since the Commission cannot regulate intrastate coin drop payphone rates, Verizon argues that it cannot require them to be tariffed, notwithstanding Staff's bold assertion that detariffing cannot occur absent a Commission order. Verizon dismisses any contention that the Commission must first issue an order acknowledging that preemption has occurred before preemption can occur as unsupportable since 47 U.S.C. § 276(c) states unequivocally that "[t]o the extent that any State requirements are inconsistent with the [Federal Communication's] Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."

In sum, Verizon believes that Staff is attempting to generate a new source of PUF tax revenue to offset the PUF tax refund that AT&T has previously advised the Commission is due and owing for the 2001 tax year. Verizon argues that Staff's basis for asserting that intrastate coin drop rates for pay telephone services provided in Illinois are subject to the PUF tax is legally flawed. Because the FCC has deregulated those rates, and because the revenues therefrom do not constitute "gross revenue," Verizon asserts that there is no legal basis for Staff's contention that Verizon must pay PUF tax on such revenues, and urges the Commission to close this investigation with a conclusive finding that PUF taxes are not appropriately collected on such revenues.

C. Summary of Staff's Position

1. Staff's Initial Comments

Staff considers this matter to have something more of a history than is typically the case. At the outset, it notes the Initiating Order for this proceeding to state that:

> In a Staff Report from the Telecommunications Division dated August 1, 2006, the Commission Staff has presented the Commission with information concerning the failure of Illinois Bell Telephone Company (AT&T Illinois), Verizon North, Inc., and Verizon South, Inc. (collectively "Verizon") to pay the tax created by Section 2-202 of the Act on revenues derived from payphones. It is Staff's contention that payphone revenues

> are subject to the gross revenue tax. AT&T Illinois and Verizon contend that these revenues are exempt from the tax in that the Federal Communications Commission has preempted state regulation of payphone rates. The Commission Staff has recommended that the Commission initiate a proceeding to determine whether intra-state coin drop pay telephone revenues collected by AT&T Illinois and Verizon are "gross revenues" as defined in the Public Utilities Act and subject to the tax on gross revenue. (*Initiating Order*, Docket 06-0562 (Aug. 16, 2006)).

Staff believes it necessary to supply context for the Staff Report upon which the Commission based its Initiating Order. It observes that, in 2003, AT&T Illinois withdrew its tariffs for, and ceased remitting the PUF tax upon, payphone coin-drop revenues, on the assertion that it was not required to do so, and further sought credit for amounts already paid.

In Staff's view, there is no question that, as a matter of purely state law, intrastate coin-drop payphone service revenues are fully subject to the PUF tax. Staff considers it impossible to dispute that intrastate coin-drop payphone service is a telecommunications service within the meaning of Section 13-203 of the Public Utilities Act, 220 ILCS 5/13-203, and assumes that the respondents do not dispute it. Likewise, as a purely state law matter, Staff observes that Sections 2-202, 3-120, 3-121 and 13-505 apply to such services and the revenues derived therefrom. Thus, absent some specific bar against the enforcement of these provisions by the Commission, Staff contends that the PUF tax must be remitted on such services.

Staff understands the Respondents to argue that the PUF tax is not applicable for either of two reasons: (1) that Congress has entirely preempted state regulation of payphone services; or (2) that the FCC has deregulated payphone service in such a way that they are not subject to state regulation. Staff views the former argument as essentially an assertion that, in this case, imposition of the PUF tax requirement constitutes a barrier to entry or exit from the marketplace, and the latter as an assertion that imposition of the PUF tax requirement constitutes improper state rate regulation.

Staff urges the Commission to find that both of these closely related contentions are without merit. To demonstrate the deficiency of these claims, Staff opines that it is necessary to closely review the FCC's actions in this regard.

At the foundation of the FCC's actions in this matter is, Staff argues, Section 276. As noted above, Section 276 provides, in relevant part, that:

> In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, …the [FCC] shall … prescribe regulations that … establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[.] (47 U.S.C. §276(b)(1)(A)).

Staff observes that, in response to the Section 276(b) requirement that the FCC adopt rules "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public", the FCC issued its *Payphone Order*. In that *Order*, it reached several conclusions that bear upon this matter.

Staff states that the matter of primary interest here is that the FCC addressed the Section 276(b)(1)(A) "fair compensation" requirement by concluding that:

> [O]nce competitive market conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones. It is only in cases where the market does not or cannot function properly that the Commission needs to take affirmative steps to ensure fair compensation[.] (*Payphone Order*, ¶49).

In doing so, avers Staff, the FCC recognized that: "states have long had a traditional and primary role in regulating payphones, including setting local call rates paid by end users[,]" (*Id*., ¶58), and that: "[h]istorically, … the rate for the most common type of call -- the local coin call -- has not been set by the market, but has instead been determined by state commissions." (*Id*., ¶57). With respect to existing state regulation regarding payphone rates, the FCC stated that:

> Many states impose regulations on PSPs, including certain requirements that must be fulfilled before a PSP can enter or exit the payphone marketplace. We conclude that these state regulations are barriers to a fully competitive payphone market, and, therefore, "to 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." (*Payphone Order*, ¶59).

Staff further observes that, notwithstanding the above, the FCC gave responsibility for determining whether state requirements were "inconsistent" to the states themselves, stating that:

> [W]e believe that ease of entry and exit in this market will foster competition and allow the market, rather than regulation, to dictate the behavior of the various parties in the payphone industry. To this end, each state should examine and modify its regulations applicable to payphones and PSPs, removing, in particular, those rules that impose market entry or exit requirements. We conclude that, for purposes of ensuring fair compensation through a competitive marketplace, the **states should remove only those regulations that affect payphone competition; the states remain free at all times to impose regulations, on a competitively neutral basis, to provide consumers with information**

> **and price disclosure**. [fn] In addition, the states at all times must ensure that access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled is available from all payphones at no charge to the caller. (*Id*., ¶60 (emphasis added; footnote omitted)).

The Staff further notes that the FCC promulgated an administrative rule to this effect; the rule in question provides that: "[e]ach state must review and remove any of its regulations applicable to payphones and payphone service providers that impose market entry or exit requirements[.]" (47 C.F.R. §64.1330(a)). There is no question that Illinois has done this. (*See, e.g., Order*, Illinois Commerce Commission On Its Own Motion: Revision of 83 Illinois Administrative Code Part 730, ICC Docket No. 98-0453, 2000 Ill. PUC Lexis 179 (February 9, 2000) (requirement that ILECs maintain at least one payphone in each exchange it serves is repealed, as constituting a barrier to exit)).

Staff thus frames the question as whether the statutory requirement that ILECs remit PUF tax on coin-drop rates for public payphones is preempted by the FCC's regulation in this area, as either improper rate regulation, or a constituting a barrier to entry or exit. To resolve this question, it is necessary to undertake a brief assay into the complicated law surrounding federal preemption.

Staff notes the law of preemption is concisely to be 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. Spitz v. Goldome Realty Credit Corp., 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) (emphasis added)

Staff further notes that U.S. District Court has concluded as much, holding that there is indeed no complete preemption under Section 276. (Precision Pay Phones v. Qwest Comm'n. Corp., 210 F. Supp. 2d 1106, 1116-17, 2002 U.S. Dist. Lexis 11855 at 26-7 (N.D. Cal. 2002)). Moreover, avers Staff, the FCC has given states clear guidelines on how to conduct their review. Specifically, the FCC has stated that "any [state] regulations applicable to payphones and payphone service providers that impose market entry or exit requirements" are preempted. (47 C.F.R. §64.1330(a)). Even more specifically, Staff observes, the FCC made clear that "states remain free … to impose regulations, on a competitively neutral basis, to provide consumers with information and price disclosure." (*Payphone Order*, ¶60 (emphasis added)).

Clearly, Staff contends, any preemption of state payphone regulations occasioned by Section 276 is express, deriving from Section 276(c) and the FCC regulations promulgated under the authority of Section 276. Staff considers it to be further clear that neither Congress nor the FCC entirely preempted state regulations applicable to payphones, inasmuch as Section 276 provides that state requirements are preempted only "[t]o the extent that [the state] requirements are inconsistent with the [FCC's] regulations[,]" and the FCC regulations themselves provide that state regulations are preempted only to the extent that they constitute barriers to entry or exit. (47 U.S.C. §64.1330(a)). Moreover, Staff contends that discretion to determine which state regulations constitute barriers to entry is left in the hands of state regulators. Thus, in Staff's view, federal preemption under Section 276(c) is of a modest sort, not extending beyond elimination of barriers to entry resulting from state regulations.

In Staff's estimation, there is little question that the FCC determined that payphone rates should be set by the market. (*Payphone Order*, ¶49). That, however, does not constitute wholesale deregulation of such rates. By contrast, notes Staff, the FCC in the *Payphone Order* ordered "deregulated and detariffed" the physical payphone instrument itself, not payphone services themselves. In the *Payphone Order*, the FCC stated that:

> We conclude that to best effectuate the 1996 Act's mandate that access charge payphone service elements and payphone subsidies from

> basic exchange and exchange access revenues be discontinued, incumbent LEC payphones should be treated as deregulated and detariffed CPE. The Commission determined in Computer II that CPE should be deregulated and detariffed to ensure that the costs associated with regulated services are separated from the competitive provision of the equipment used in conjunction with those services. [fn] The Commission concluded that CPE should be unbundled from its underlying transmission service in order to prevent improper cross-subsidization. [fn] Consistent with this prior finding, we conclude that LEC payphones must be treated as unregulated, detariffed CPE in order to ensure that no subsidies are provided from basic exchange and exchange access revenues or access charge payphone service elements as required by the Act.
>
> **….**
>
> [T]he Commission … recognized the right of nonLEC payphone providers to interconnect smart payphones to the interstate public switched network. [fn] Following this order allowing the interconnection of smart payphones, independent payphone providers began to compete with the LECs. Currently, there are approximately 1.5 million LEC payphones and approximately 350,000 competitively provided payphones. [fn] We conclude that the market for payphone CPE is competitive and that it is no longer necessary to treat payphone CPE differently by integrating LEC payphones with the underlying service. (*Payphone Order*, ¶¶142-43).

In other words, Staff avers, the FCC recognized that the ILEC payphone – the physical device itself – should be treated as CPE (customer premises equipment) unbundled, deregulated and detariffed, so as to prevent cross-subsidies. This, in Staff's view, is entirely different than declaring that payphone service - the service purchased by a person who drops his or her 50¢ in the coin slot in order to make a call – is wholly deregulated and detariffed, as suggested by Illinois Bell and Verizon.

Staff points to courts decisions holding that state requirements that carriers collect and remit certain taxes or surcharges do not constitute rate regulation. Staff argues that, in this context, Section 332 of the federal Telecommunications Act, 47 U.S.C. §332, is instructive, in light of the well-developed case law under that Section regarding what constitutes rate regulation and barriers to entry or exit. Section 332, by its terms, specifically prohibits state entry and rate regulation of commercial and private mobile service. Section 332(c)(3)(A) provides that:

> [N]o State … government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services[.] (47 U.S.C. §332(c)(3)(A)).

Staff observes that, in interpreting this provision, courts have determined that Section 332's prohibition against rate regulation does not preempt state laws requiring telecommunications providers doing business in a state to contribute to state universal service funds. (Cellular Communications Industry Assn. v FCC, 168 F.3d 1332, 1336 (DC Cir. 1999); Likewise, and significantly, the *Cellular Communications* court found that state action that increases the cost of doing business does not amount to state regulation. Id., *accord* Mountain Solutions v. Kansas Corp. Comm'n, 966 F. Supp. 1043 (D. Kan. 1997); Sprint Spectrum v. Kansas Corp. Comm'n, 149 F.3d 1058, 1061 (10th Cir. 1998); Bell Atlantic Mobile, Inc. v. Connecticut PUC, 253 Conn. 453; 754 A.2d 128 (2000). Likewise, in NASUCA v. FCC, 457 F.3d 1238; 2006 U.S. App. Lexis 19173; 19 Fla. L. Weekly Fed. C 860 (11^{th} Cir. 2006), the Court of Appeals vacated an FCC order that purported to preempt state regulations requiring certain elements to be disclosed as separate line items on customer bills, finding that billing requirements of this nature are not preempted, as they are not rate regulation. NASUCA, 457 F.3d at 1258, 2006 U.S. App. Lexis 19173 at 53-54).

Staff further notes that other courts have rendered similar decisions. In Brown v. Washington / Baltimore Cellular, Inc., 109 F.Supp.2d 421 (D. Md. 2000), the court was called upon to decide the issue of whether late payment fees assessed by a cellular carrier were "rates" under Section 332(c)(3)(A)(1), such as would deprive a state court of jurisdiction to hear a claim that such fees were unlawfully assessed in violation of state consumer fraud laws. (Brown, 109 F.Supp.2d at 422). The court determined that such late fees were not in fact rates, but rather "other terms and conditions of service," and therefore subject to state consumer fraud jurisdiction. (*Id*., 109 F.Supp.2d at 423). In so holding, the Brown court rejected the carrier's argument that any reduction or rescission of such fees would result in an increase in rates, and that fees were therefore rates. (*Id*.) Instead, the court reasoned, "Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves." (*Id*.)

Likewise, Staff points to similar results reached with respect to billing and consumer protection issues. (*See, e.g*., Esquivel v. Southwestern Bell Mobile Systems, Inc. 920 F. Supp. 713 (S.D.Tex. 1996) (charges for early termination of cellular service are "term and conditions" of service, not rates, and therefore subject to state regulation); Commonwealth of Kentucky, *ex rel*. Gorman v. Comcast Cable, 881 F. Supp. 285 (W.D.Ky. 1995) (billing customers for certain services unless they specifically decline them is a term or condition subject to state regulation)).

Similarly, Staff points to state court decisions determining that a municipal requirement that wireless carriers pay a registration fee, and obtain a right-of-way license for which a fee is also assessed, does not constitute regulation of entry. (AT&T Communications v. City of Eugene, 177 Ore. App. 379; 35 P.3d 1029, 1050-51 (Ore. App. 2001)). Clearly, then, according to Staff, no case can be made that remittance of PUF tax on coin-drop payphone calls is rate regulation of the sort that the FCC prohibited in the *Payphone Order*.

The next question Staff frames is whether payment of the PUF tax constitutes a barrier to entry or exit within the meaning of 47 C.F.R. §64.1330(a). To do so, Staff believes it necessary to examine what a carrier must do comply with the specific requirements of the PUF tax statute. Staff argues that this is not a great deal. A carrier must complete a return, the form of which is found on the Commission's website at the follow in address: http//www.icc.illinois.gov/rl/library.aspx?key=form&=annual%20report, and file it. Staff notes that the Commission has tailored a return to type of carrier's likely needs. Staff views the process as sufficiently uncomplicated that some 250 carriers, all of them smaller than AT&T or Verizon, were readily ably to file returns for the year 2005. Staff notes that none of these carriers disputes the application of the tax. Certainly, then, the filing of a yearly return is no barrier to entry or exit.

In Staff's view, the only other question to be addressed is whether a tariffing requirement constitutes a barrier to entry or exit, Staff argues it does not. Staff sees it as well established that a tariff is a public document describing the services being offered by a common carrier, the rates and charges it assesses for such services, and the rules, regulations and practices governing its offering of those services. (Int'l Telephone & Telegraph Co. v United Telephone Co. of Florida, Inc., 433 F. Supp. 352, 357, n. 3; 1975 U.S. Dist. Lexis 16295 at 9, n. 3; 1975-2 Trade Cases (CCH) ¶60,544 (M.D. Fla. 1975); Maurice Transport Co. v. Amoco Oil Co., 144 Ill. App. 3d 156, 162; 494 N.E.2d 738, 742; 1986 Ill. App. Lexis 2326 at 11; 98 Ill. Dec. 616 (4th Dist. 1986)). Accordingly, Staff argues, there can be little question that a tariffing requirement constitutes a regulation tending to provide "price disclosure", and therefore constituting, by the FCC's own reckoning, *Payphone Order*, ¶60, perfectly proper state regulation.

Staff urges the Commission to remember that intrastate coin-drop payphone service is a competitive telecommunications service. (*Payphone Order*, ¶49). The Commission has likewise declared that both AT&T's and Verizon's payphone service are competitive. (*Interim Order* at 5, 6, 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 "ICC Payphone Order")). Accordingly, Staff concludes, as is the case with any tariff filing relating to competitive services, changes to the tariff, by statute, go into effect on one day's notice and are not subject to suspension. (220 ILCS 5/13-505(a)). Such a requirement is clearly not a barrier to entry to, or exit from, the payphone marketplace.

Likewise, Staff states that there is no state law basis for the exclusion of payphone service from the tariffing requirement. The Commission, Staff argues, is authorized to exclude certain types of service, namely private line, wireless, point-to-point high capacity, and incidental, from oversight. (220 ILCS 5/13-203). Indeed, the Commission has exercised this authority in the case of wireless service. (*See* 220 ILCS 5/13-203 (authorizing Commission to exclude wireless service from active regulatory oversight); 83 Ill. Adm. Code 760.10 (Commission excludes wireless carrier from the applicable tariff provisions contained in Sections 13-501, 13-502, 13-503, 13-504, 13-505, and 13-509 of the Public Utilities Act)). In the case of payphone services, Staff observes that no such authority under Section 13-203 exists.

Staff agrees that, in Chicago SMSA LP, et al. v. Commerce Comm'n, 284 Ill. App. 3d 326; 672 N.E.2d 37; 1996 Ill. App. Lexis 778; 219 Ill. Dec. 722 (3rd Dist 1996), the Appellate Court for the Third District found that the PUF tax was not applicable to wireless service, precisely because the Commission had determined, pursuant to authority granted by it under Section 13-203 of the Public Utilities Act, to exclude wireless service from active regulatory oversight, including tariff-filing requirements. (Chicago SMSA LP at 329-30; 672 N.E.2d at 39; 1996 Ill. App. Lexis 778 at 5-8). However, Staff takes the view that no such situation obtains here. Further, and as Staff has noted, a requirement that a carrier remit the PUF tax certainly does not constitute rate regulation.

Finally, Staff argues, even if there is merit to the assertion that Section 276 with its associated regulations does indeed preempt the PUF tax requirement, the Commission is not in a position to make the determination. It must be remembered that the PUF tax requirement is statutory, as opposed to being a Commission rule. (220 ILCS 5/3-202). The Commission has long recognized that it is bound to enforce state statutes, even in the face of arguments that such statutes are preempted by federal law. (*See, e.g., Order*, ¶42, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (June 11, 2002) (Commission states that it cannot preempt act of General Assembly)). Accordingly, contends Staff, no argument that Section 3-202 is preempted can succeed in this proceeding, regardless of its merits.

2. Staff's Response to Verizon

Staff sees Verizon to argue that intrastate coin drop rates for pay telephones services that it provides in Illinois are deregulated and not under the Commission's jurisdiction, and more specifically, to contend that revenues from local coin calls from pay telephones are not subject to the PUF tax because the prices are deregulated. Staff states that Verizon is mistaken. Staff contends that, by statute, the PUF tax applies to a telecommunications carrier's "gross revenues", and that the definition of "gross revenues" refers to revenues "derived from the intrastate public utility business of such a utility." Staff further avers that Section 3-120 defines "intrastate public business" to include "all that portion of the *business* of [a telecommunications carrier] and over which this Commission has jurisdiction under the provisions of this Act." Verizon, argues Staff, is not in the *business* of local coin call rates, but rather is in the *business* of providing pay telephone service, a component of which is local coin call pay telephone service. Staff observes that federal law did not preempt states' jurisdiction over local coin call pay telephone service; instead, it merely authorized the FCC to regulate and set local coin call prices for pay telephone service. Indeed, Staff points out, the FCC in its payphone orders determined that the price for local coin drop calls should be set by market forces. Thus, although federal law removed state authority to set prices for local coin calls from pay telephones, Staff argues that the Commission still retains jurisdiction over all other aspects of local coin call pay telephone service.

Even if the Commission may not regulate the *price* for intrastate local coin pay telephone service, Staff takes the view that revenues from local coin rate pay telephone service are nonetheless subject to the PUF Tax. Staff notes that the PUF tax is imposed on a telecommunications carrier's "gross revenues," which in turn are defined to include "all revenue which (1) is collected by a public utility subject to regulations under this Act (a) pursuant to the rates, other charges, and *classifications* which it is required to file under Section 9-102 of this Act . . . and (2) is derived from the intrastate public utility business of such a utility." The term "intrastate public utility business, as used in Section 3-121, is defined to include "all that portion of the business of the public utilities . . . and over which this Commission has jurisdiction under the provisions of this Act." (220 ILCS 5/3-121).

Staff contends that AT&T and Verizon each are public utilities within the meaning of Section 3-121,[5] are subject to regulation under the PUA, and collect revenue pursuant to the *classifications* which they are required to file under Section 9-102 of the PUA. That is, they each are telecommunications carriers as defined in the PUA. They each are subject to regulations under the PUA. And, they each collect revenue pursuant to the *classifications* which they are required to file under Section 9-102 of the PUA.

Staff avers that Section 13-503 requires telecommunications carriers to comply with the filing requirements of Section 9-102, and this Section 9-102 requires telecommunications carriers to file tariffs showing the classification "for any product or commodity furnished or to be furnished by [them], or for any service performed by [them], or for any service in connection therewith, or performed by any public utility controlled or operated by [them]." (220 ILCS 5/9-102). Staff notes that telecommunications services are classified as either competitive or noncompetitive, and that pay telephone services are classified as competitive services. Further, Staff points out, AT&T and Verizon each collect revenue pursuant to the *classification* of pay telephone service, including local coin drop revenue that they are required to file under Section 9-102.

Staff argues that AT&T Illinois and Verizon also each satisfy the second clause of Section 3-121, in that the revenue from local coin pay telephone service is derived from the intrastate business of the carriers and the Commission has jurisdiction under the PUA, at a minimum, over the classification of local coin pay telephone service. Nothing in federal law purports to preempt the PUA's competitive/noncompetitive classifications. Accordingly, Staff asserts that AT&T's and Verizon's local coin drop revenue is subject to the PUF tax.

Moreover, Staff argues that Section 9-102 is not limited to regulated prices, as Verizon contends. Section 9-102 has, in Staff's view, a much broader reach, requiring telecommunications carriers to file tariffs "showing all rates and other charges, and

[5] Section 13-101 makes Articles II and III of the PUA, among others, pertaining to public utilities, public utility rates and services, and the regulation thereof, fully and equally applicable to competitive telecommunications rates and services, and the regulation thereof.

classifications . . . for any product or commodity furnished or to be furnished by it, or for any service performed by it, or for any service performed in connection therewith, or performed by any public utility controlled or operated by it." (220 ILCS 5/9-102). Section 9-102, according to Staff, also requires carriers to file tariffs stat[ing] separately all rules, regulations, storage or other charges, privileges and contracts that *in any manner affect* the rates charged or to be charged for any service." (*Id*.) Thus, in Staff's view and contrary to Verizon's contention, Section 9-102 is not limited, to regulated *prices* for a particular service.

Staff considers Verizon's second argument that, revenues from services for intrastate coin drop rates for pay telephone service are not subject to the PUF tax because Verizon is not subject to Section 9-102, to fare no better. Staff contends that in advancing this argument, Verizon ignores Section 13-503, which requires telecommunications carriers such as Verizon, to comply with Section 9-102. Staff observes that Section 13-503 provides in full: "With respect to rates or other charges made, demanded or received for any telecommunications service offered, provided or to be provided, whether such service is competitive or noncompetitive, telecommunications carriers shall comply with the publication and filing requirements of Sections 9-101, 9-102, and 9-103." (220 ILCS 5/13-503). Thus, Staff argues that Verizon must comply with the filing requirements of Section 9-102 and, as a result, its revenues from local pay telephone services, including intrastate coin drop rates, are "gross revenues" within the meaning of Section 3-121, and are subject to the PUF tax under Section 2-202(c). Notably, and unlike Verizon, Staff observes that AT&T Illinois makes no such argument and in fact agrees that Section 9-102's requirements are incorporated through Section 13-503. (AT&T Comments at 7 ("Section 9-102 of the PUA refers to the tariff filing requirements to which the regulated rates and charges of telecommunications services are subject pursuant to 13-503 of the PUA.")).

Likewise, Staff sees as both irrelevant and wrong Verizon's contention that its intrastate coin drop pay telephone revenues are not subject to the PUF tax because the Commission supposedly "has not asserted or held that tariffing of intrastate coin drop rates for pay telephone services provided in Illinois is required under 220 ILCS 5/9-102": This is irrelevant, Staff claims, because Section 13-503 is a statutory mandate on Verizon. It is also wrong, Staff argues, because the Commission's rules expressly require that telecommunications carriers, such as Verizon, comply with the tariffing requirements of *both* Section 13-501 and Section 13-503. Staff observes Section 745.20 of the Commission's rules to provide, in full that:

> Section 745.20 General Filing Requirements
>
> a) No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which complies with this Part and which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other

geographical area or areas in which the service shall be offered or provided (Section 13-501 of the Act).

b) As required by Section 13-503 of the Act, with respect to rates or other charges made, demanded or received for any telecommunications service offered, provided or to be provided, whether such service is competitive or noncompetitive, telecommunications carriers shall comply with the publication and filing provisions of Sections 9-101, 9-102, and 9-103 of that Act. 83 Ill. Adm. Code 745.20.

Staff points out that Section 745.20 of the Commission's rules, which mirrors Sections 13-501 and 13-503, requires that *all* telecommunications services, including intrastate coin drop pay telephone service, be tariffed.

Staff views Verizon's contention, that Section 13-501 alone is the sole basis for its tariffing obligations, to be incorrect. Verizon claims that even if the Commission required it to file a tariff for intrastate coin drop rates for pay telephone service the Commission did so under Section 13-501, which, according to Verizon, would not subject it to the PUF tax because the PUF tax obligation flows from Section 9-102 and not Section 13-501. Staff notes, however, that Section 13-503 applies to Verizon and that section incorporates the filing requirements of Section 9-102. Staff argues too, that Section 13-501's general tariffing requirement does not define the universe of Verizon's tariffing obligations. Staff maintains that Section 13-503 imposes additional tariffing obligations on Verizon, including the filing requirements of Section 9-102.

Further, Staff notes that the Commission did not state, as Verizon contends, that Section 13-501 is "the origin of the tariffing requirement." Staff observes that as far back as 1986, the Commission expressly referenced Section 13-503 and noted that under that section all tariff filings must comply with Section 9-102, among other sections. (*See* Order, Illinois Bell Telephone Co., Petition for Declaratory Ruling Regarding Obligations of Telephone Companies on Customer-Owned Pay Telephones, Docket No. 84-0442, 1986 Ill. PUC Lexis 30 at *33-34 (June 11, 1986) ("Under Section 13-503 of the Act all tariff filings must comply with Sections 9-101, 9-102 and 9-103.")). Thus, Staff states that Verizon's contention that "revenues from services tariffed pursuant to [Section 13-501] are not subject to the PUF tax," is demonstrably wrong.

All in all, given the statutory mandate and Commission rules regarding tariffing, which apply to telecommunications carriers and telecommunications services, Staff sees the relevant question to be whether the Commission has *excluded* Verizon's pay telephone service (which, of course, is a telecommunications service) from the statutory requirements and Commission rules. According to Staff, Verizon has identified no such tariffing exclusion for its local pay telephone services, let alone its local coin drop service, by a Commission order, rule or regulation. Indeed, Staff observes, while Verizon points to the Commission's order detariffing payphone customer premises equipment ("CPE"), it identifies no similar Commission order detariffing local coin drop pay telephone service. Accordingly, Staff considers Verizon's argument to be without merit.

3. Staff's Response to AT&T Illinois.

Staff understands AT&T to assert, based on the affidavit of Louise Sunderland, that Staff ultimately concurred in the proposition that Band A and B payphone coin drop revenues need not be tariffed, effectively blessing AT&T's position. This, according to AT&T, means that, at the very least, application of the tariffing requirement should be prospective, inasmuch as AT&T was in its view acting in good faith in failing to file tariffs. (*Id*. at 10). This contention lacks merit, according to Staff, and should be disregarded.

Staff contends that the Commission must enforce the laws enacted by the General Assembly, regardless of Staff's, or anyone else's views on the matter. While Staff has no particular insights to offer regarding conversations between AT&T representatives and Staff counsel who has long since departed from the Commission's employ,[6] this has in any case no relevance. The Staff states that it has no specific authority to issue informal, non-written opinions regarding the application of state laws or Commission regulations, and, even where the Staff might be rash enough to do so, the Commission is not bound by such informal opinions. Moreover, Staff contends that AT&T's reliance on any such informal opinion is disingenuous for any of several reasons.

First, Staff notes that the FCC promulgated an administrative rule that delineates the scope of Section 276 preemption and which provides that: "[e]ach state must review and remove any of its regulations applicable to payphones and payphone service providers that impose market entry or exit requirements[.]" Staff notes that the Commission held precisely such a review, as a formal, docketed proceeding, and it resulted in the requirement that ILECs maintain at least one payphone in each exchange it serves being repealed, as constituting a barrier to exit. Staff notes that there is no mention of AT&T having raised the tariffing issue in that proceeding, although the issue appears to have been squarely within the scope of the matter. As such, Staff believes it as difficult for AT&T to assert here that it can rely on informal representations, rather than the proceeding itself.

Second, Staff notes that AT&T might have, but did not, seek a declaration from the Commission regarding the tariffing question. Section 200.220(a) of the Commission's Rules of Practice provides that:

> When requested by the affected person, the Commission may in its sole discretion issue a declaratory ruling with respect to:

[6] AT&T brings these conversations to light for the first time in its reply comments, some nine years after Ms. Sunderland states that they took place. It certainly did not raise them in its correspondence to Staff regarding this matter.

1) the applicability of any statutory provision enforced by the Commission or of any Commission rule to the person(s) requesting a declaratory ruling; and

2) whether the person's compliance with a federal rule will be accepted as compliance with a similar Commission rule.

Staff argues that to the extent that AT&T sought the Commission's blessing for its course of action, the orderly and proper way to do so would have been to obtain a formal declaration from the Commission, pursuant to Section 200.220. AT&T's failure to seek such a declaration, Staff argues, militates strongly against accepting its assertion that it relied upon an informal opinion.

Third, Staff asserts that preemption (especially where it is not by any means clear what the scope of preemption actually is) should be affirmatively sought, rather than informally assumed. The written record regarding Staff's position in this case, i.e., the Staff Position Paper dated February 23, 1997 and attached to AT&T's Comments as part of Schedule TD-2, reveals that the Staff "[did] not agree with the proposed detariffing of end user payphone rates." The Staff described, in detail, its multiple bases for this position. AT&T, however, chose to rely on informal, oral statements, never reduced to writing, or otherwise confirmed by letter or other correspondence, which are said to repudiate a position that Staff had formally taken. According to Staff, this raises the possibility for, at the very least, a mutual misunderstanding of what was being agreed upon and this is not something upon which reliance can be prudently placed.

Fourth, Staff argues, to the extent that its informal position has been accurately reported by AT&T (and given that passage of time and the lack of contemporaneous written confirmation, there is great likelihood for inadvertent error in this regard) there is no evidence whatever that Staff's informal view of the matter was made clear to any interested party whatsoever <u>except</u> AT&T. If Staff took the view that AT&T was exempt from tariffing local coin drop payphone revenues, it would likewise take the view that every carrier of PSP otherwise obligated to file tariffs was also exempt, (inasmuch as the statute is, as the rules are, of general application) There is, however, no evidence that any such view was generally publicized to such entities; Verizon, for example, makes no mention of it. Staff claims that whether AT&T representatives fully understood Staff's informal position is a matter open to conjecture.

V. COMMISSION ANALYSIS AND CONCLUSION

The Commission convened this proceeding to determine whether the intrastate coin drop pay telephone revenues collected by Illinois Bell Telephone Company, Verizon North, Inc., and Verizon South, Inc. are "gross revenues" as defined in the Public Utilities Act and subject to the tax on gross revenues pursuant to Section 2-202 of the Public Utilities Act. That question arises only because of the FCC's deregulation of payphone charges in its *Payphone Order*. Accordingly, the only question squarely before the Commission is whether the FCC's finding -- that "any [state] regulations applicable to payphones and payphone service providers that impose market entry or exit requirements" are preempted[,] (47 C.F.R. §64.1330(a)) -- preempts our statutory tariffing requirement imposed under Sections 9-102 and 13-501 of the PUA. The Commission finds that it does not. Further, the Commission finds that, even if the federal mandate preempts the statutory requirement that services be tariffed, that requirement is one that we are bound to enforce until such time as the Illinois General Assembly amends or repeals it, or a court of competent jurisdiction enjoins its enforcement. The Commission's reasoning is as follows.

In its *Payphone Order*, and the regulations promulgated pursuant to that Order, the FCC, while deregulating payphone charges (*Payphone Order*, ¶¶49, 57), specifically did not preempt other state regulation of these services. It directed only that:

> (a) Each state must review and remove any of its regulations applicable to payphones and payphone service providers that impose market entry or exit requirements.
> (b) Each state must ensure that access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled is available from all payphones at no charge to the caller.
> (47 C.F.R. §64.1330).

The Commission conducted precisely such a review and duly removed those state regulations considered to impose market entry or exit requirements. (*See, e.g., Order*, Illinois Commerce Commission On Its Own Motion: Revision of 83 Illinois Administrative Code Part 730, ICC Docket No. 98-0453, 2000 Ill. PUC Lexis 179, *21 (February 9, 2000) (requirement that ILECs maintain at least one payphone in each exchange it serves is repealed, as constituting a barrier to exit)). The Commission observes that, while we specifically find that the obligation to file a tariff does not impose a barrier to entry or exit, the Commission could not "remove" this requirement even if we believed otherwise, in light of its arising from statute. In any case, the Commission fully, and timely, complied with the federal mandate.

Significantly, the FCC specifically found in the *Payphone Order* that "states remain free … to impose regulations, on a competitively neutral basis, to provide consumers with information and price disclosure." (*Payphone Order*, ¶60 (emphasis added)). Furthermore, states were specifically directed to make certain that access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled remained available, without charge. Inasmuch as tariffs historically have been and to a significant degree remain, an important form of price disclosure and enforcement of terms and conditions of service – a long standing fact of which the FCC is certainly aware – the Commission finds no basis in the *Payphone Order* to conclude that the Section 9-102 tariffing requirement is preempted. Moreover, even if Section 9-102 was in our view preempted, the Commission's policy has long been that we are bound to enforce state statutes, even in the face of arguments that such statutes are preempted by federal law. (*See, e.g., Order*, ¶42, Illinois Bell Telephone Company:

Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (June 11, 2002) (stating that the Commission cannot declare an act of the Illinois General Assembly preempted)). A party seeking preemption of any section of the PUA simply cannot obtain such relief here.

Further, the Commission's authority under Section 9-102 is not nearly so circumscribed as some parties have asserted. The obligation to file tariffs not only attaches to rates (and we note that the term "rates" is also subject to broader construction than has been suggested) but also to "charges", "classifications", "rules" and "regulations". Accordingly, the Commission declines to adopt any finding or conclusion that would remove such vital conditions and terms from the ambit of the tariffing requirement.

AT&T Illinois requests that the PUF tax should be imposed on a prospective basis. We disagree, and find that both parties are to pay taxes for those years in which they did not include intrastate coin drop pay telephone revenues in their Annual Gross Revenue Return. However, we are of the opinion that it would be unjust to enforce the collection of penalties. This is the first time the Commission has addressed the issue of carriers having to pay PUF taxes on intra-state coin drop pay telephone service. Further, the facts show that the parties were engaged in good-faith discussions to reach a resolution prior to the initiation of this docket. In addition, we are of the opinion that it would be unjust to impose penalties prior to the resolution of this issue, especially when the parties were engaged in discussions as to their respective position and interpretations of the law prior to the initiation of this docket.

Finally, the Commission notes that in this proceeding, we decline to decide any issues not squarely before us, which is to say not within the scope of our Initiating Order in this proceeding. If our Staff and utilities have disputes regarding other PUF tax matters, they should resolve these matters expeditiously, and, failing that, bring them before us for decision. However, nothing is at issue here except whether the PUF tax applies to payphone coin drop revenues, a question we answer, as set forth above, in the affirmative.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, being fully advised in the premises, is of the opinion and finds that:

(1) Illinois Bell Telephone Company ("AT&T Illinois") and Verizon North Inc. and Verizon South Inc. (collectively "Verizon") are Illinois corporations engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, are telecommunications carriers within the meaning of Section 13-202 of the Illinois Public Utilities Act (the "Act");

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding pursuant to the Act;

(3) the recitals of facts and law and conclusions reached in the prefatory portion of this Order are supported by the record, and are hereby adopted as findings of fact and law;

(4) revenues collected pursuant to local coin payphone rates are "gross revenues" within the meaning of Section 3-121 of the PUA and, therefore, are subject to the public utility fund tax on gross revenues under Section 2-202 of the PUA;

(5) public utility fund taxes are due on intrastate coin drop pay telephone revenues collected by AT&T Illinois and Verizon;

(6) AT&T Illinois and Verizon are to file corrected returns, pursuant to Section 2-202, for those years in which they did not include intrastate coin drop pay telephone revenues in Annual Gross Revenue Return.

IT IS THEREFORE ORDERED that revenues collected pursuant to local coin payphone rates are "gross revenues" within the meaning of Section 3-121 of the PUA and, therefore, are subject to the public utility fund tax and Section 2-202 of the PUA.

IT IS FURTHER ORDERED that public utility fund taxes are due on intrastate coin drop pay telephone revenues collected by AT&T Illinois and Verizon, including those years in which they did not include intrastate coin drop pay telephone revenues in their Annual Gross Revenue Return.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Act and 83 Ill. Admin. Code 200-880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 12th day of September, 2007.

(SIGNED) CHARLES E. BOX

Chairman