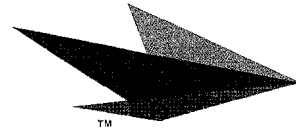


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**EMBARQ**<sup>TM</sup>

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August 4, 2006

Chairman Sara Kyle  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

Re: Rulemaking to Establish Criteria for Designating Eligible  
Telecommunications (ETCs) in Tennessee

Dear Chairman Kyle:

Please find enclosed the original and thirteen (13) copies of the Comments of  
United Telephone-Southeast, Inc. d/b/a Embarq for filing in the above-referenced docket.

Do not hesitate to contact me at 919-554-7870 with any questions concerning this  
filing.

Sincerely yours,

Edward Phillips

Enclosure

C: Laura Sykora  
Kaye Odum

**Edward Phillips**

ATTORNEY

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

In Re:	)	
	)	
	)	
	)	
Rulemaking to Establish Criteria for	)	Docket No. 05-00284
Designating Eligible Telecommunications	)	
Carriers (ETCs) in Tennessee	)	
	)	
	)	

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Comments of United Telephone-Southeast, Inc. d/b/a/ Embarq in the Rulemaking to Establish  
Criteria for Designating Eligible Telecommunications Carriers (ETCs) in Tennessee

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The Tennessee Regulatory Authority (“Authority”) has proposed rules to establish criteria designating Eligible Telecommunications Carriers (“ETCs”) and for annual ETC certification. The proposed rules also codify Lifeline/Link-Up procedures in Tennessee. The Authority’s proposed ETC rules closely parallel rules adopted by the Federal Communications Commission (“FCC”) for entities that the FCC certifies. The FCC rules represent a set of new and more rigorous minimum requirements for designating ETCs. Further, the FCC has strongly encouraged state commissions to adopt its new requirements.<sup>1</sup> As a result, on July 10, 2006, the Directors of the Authority, at a regularly scheduled Authority Conference, requested comments from interested parties. The Authority set the due date for these comments no later than August 7, 2006.

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<sup>1</sup> See *In re Federal-State Joint Board on Universal Service, Report and Order*, FCC 05-46, CC Docket No. 96-45 (Rel. March 17, 2005) (“hereinafter, March 17, 2005 Report and Order”).

Pursuant to the Authority's request, United Telephone-Southeast, Inc. d/b/a Embarq ("Embarq") submits its comments to the Authority concerning both the proposed ETC standards and proposed Lifeline/Linkup standards. For the reasons explained herein, Embarq does not believe a single set of ETC criteria applied to all types of providers [e.g., incumbent local exchange carriers ("ILECs"), wireless carriers and competitive local exchange carriers] is practical or advisable. Embarq urges the Authority to make a distinction between ILECs already designated as ETCs and new entrants seeking ETC status or newly designated ETCs. Creating this suggested distinction would not be discriminatory and would offer assurance that USF support is being used for its intended purpose, which is to preserve and advance universal service.

While the FCC's new requirements and annual certification process make sense for new entrants, as do the Authority's proposed rules, they should not be applicable to ILECs already designated ETCs. The Authority's proposed ETC eligibility rules should only be made applicable to new entrants. In addition, even though the FCC encourages states to apply its new standards in all cases, as discussed below, the FCC's encouragement simply makes no sense for ILECs.

### **ETC ELIGIBILITY STANDARDS**

For purposes of ETC designations, the FCC only has jurisdiction over wireless carriers if a state commission, such as the Authority, chooses not to exercise its jurisdiction to certify the applicant. Even the FCC in its March 17, 2005 Report and Order notes, "Specifically, portions of this order discuss the ETC framework as it relates to wireless carriers because those are the common carriers that most frequently seek to be designated as ETCs before the Commission."<sup>2</sup>

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<sup>2</sup> *Id.* at note 44, p. 9.

There are six parts to the ETC eligibility standards in the FCC's new rules, and some of these same standards have been made part of the proposed Authority rules. These standards, as the Authority is aware, have been set by the FCC for granting ETC status to new entrants and for annually certifying that all ETCs are using USF support for intended purposes. The comments below briefly explain why each of the six parts is not appropriate or is unduly burdensome for ILECs already designated as ETCs in Tennessee, and why these standards should be applied to ETC applicants and newly designated ETCs.

### **STANDARD**

Under 47 C.F.R. § 54.202(a)(1)(A), the FCC requires an ETC applicant to commit to providing service throughout the proposed designated service area to all customers making a reasonable request for service. The corresponding requirement is found under proposed Authority Rule 1220-4-14-.03(3)(e).

### **EMBARQ'S RESPONSE:**

ILECs such as Embarq already have an obligation to serve anyone in their territories requesting service. Embarq would not object to certifying annually that it has fulfilled, in accordance with its tariff, its obligations to serve all customers requesting service in its Tennessee service territory.

However, for a competitive or wireless ETC, such a commitment by an ETC applicant offers the Authority some comfort that the applicant does not intend to serve just the ILEC's lucrative customers and markets. Moreover, once a provider has been granted ETC status, the new ETC should assume the same obligations to serve requesting customers just as the ILEC is required to meet. It is true that ETCs are allowed to fulfill their obligations to serve through a

combination of their own facilities and resale. Nevertheless, a new ETC should be allowed to meet this obligation through resale only in limited situations and for a limited period of time. Otherwise, the ETC would have an incentive to avoid investing in high-cost areas where an ILEC has already done so.

**STANDARD:**

Under 47 C.F.R. § 54.202(a)(1)(B), an ETC applicant is required to submit a five year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area. The standard further requires a list of projects and their estimated costs and completion dates. The proposed standard in Tennessee only requires the submission of a two year plan to be filed with the Authority. The corresponding standard in Tennessee is set forth under proposed Authority Rule 1220-4-14-.03(3)(c)(1-7).

**EMBARQ'S REPOSE:**

Embarq supports the requirement of a two year plan to be filed only by new ETC applicants. This requirement, however, should not be applied to ILECs already designated as ETCs. The proposed Authority standard seems more practical than the FCC standard. Nevertheless, even the Authority's standard needs to be reconsidered for a number of reasons.

The FCC standard and the proposed Authority rules imply that USF support must be used solely to make network improvements. There is no basis in federal statute for such a requirement to be placed on ILECs. Moreover, as the Authority is aware, price regulated ILECs in Tennessee cannot be required to allocate funds in any manner other than what is set forth under Tenn. Code Ann. § 65-5-109(j). In addition, the FCC's newly adopted standard has the effect of narrowing

the purposes for which USF may be used, which is actually contrary to existing federal law. The FCC's own rules explicitly permit USF support to be used “. . . not only for the build-out and expansion of a network, but also for its continued maintenance.” *See* 47 C.F.R. § 54.7. Embarq urges the Authority to take the position that maintenance of existing ILEC networks is a sufficient basis for retaining ETC status. In fact, the FCC's forward looking economic cost model (“HCPM”) and the embedded cost approach used for Federal USF have specific cost components for maintenance.

It is worth reiterating that the FCC's requirements are the product of the FCC certifying *wireless* carriers as ETCs and – most importantly – wireless carriers whose serving areas did not match the serving area of the incumbent LEC. In discussing this five year plan, the FCC's Report and Order indicated that the plan should show how funds “. . . will be used to improve coverage, signal strength or capacity.” *See* the March 17, 2005 Report and Order at ¶ 21, p. 10. ILECs in Tennessee are obligated to provide 100% coverage to existing and new customers throughout their service areas. The notion of “improving coverage” when coverage is already required to be 100% is meaningless. Similarly, it may be that there are significantly more appropriate uses for USF dollars than “improving capacity” on an ILEC's wireline network when existing capacity is more than sufficient and additional capacity may never be used. Simply stated, the concerns that the proposed five year plan were intended to address are not concerns in the case of Tennessee ILECs. Embarq annually invests heavily in its Tennessee operations to meet the Authority's service standards and, more importantly, its customers' expectations for high quality service. Rather than imposing an obligation on ILECs to produce a five year plan that is unnecessary, the Authority should simply require ILECs to certify – as they do now and have done – that the

funds received are being used for the provision, maintenance and upgrading of the network used to provide the supported services.

Embarq does, however, understand why the proposed two year plan should be required for new entrants seeking ETC designation. While Embarq has typically rendered service to all requesting customers, this may not be the case for a provider applying for ETC status. Requiring a network plan and progress reports would go a long way toward ensuring an applicant or a newly designated ETC is making a genuine effort to serve all its territory, especially the high cost areas already being served by the ILEC. Again, if a provider is awarded ETC status, the provider should be subject to the Authority's rules applicable to the ILEC, including the obligation to serve all customers and meet the Authority's existing quality of service standards. When a newly designated ETC has convincingly demonstrated that it is in full compliance with the Authority's rules, the Authority could then consider eliminating the network plan requirement.

**STANDARD:**

Under 47 C.F.R. § 54.202(a)(2), the FCC requires an ETC applicant to demonstrate its ability to remain functional in emergency situations (e.g., back-up power, reroute traffic around damaged facilities, and manage traffic spikes). The corresponding Authority standard is found at proposed Authority Rule 1220-4-14-.03(f).

**EMBARQ RESPONSE:**

The Authority's existing rules for ILECs adequately address Emergency Operations (See Authority Rule 1220-4-2-.23). So long as more stringent or additional requirements are not contemplated, Embarq would not oppose certifying annually that it is meeting this requirement.

However, it is reasonable that an applicant seeking ETC designation that does not operate under the Authority's existing service quality rules – such as a wireless carrier – should be required to certify and explain how it will meet this requirement. The HCPM used to calculate USF support at the federal level for non-rural carriers assumes this level of network preparedness. Therefore, it is appropriate to require such a level from all ETCs. If the provider is designated an ETC, it then should be subject to the Authority's existing rules that require the ability to remain functional in emergency situations. Although redundant given the Authority's rules, annual certification of such ability should not be an issue.

**STANDARD:**

Under 47 C.F.R. § 54.202(a)(3), the FCC requires an ETC applicant to demonstrate it will satisfy applicable consumer protection and service quality standards. The corresponding Tennessee requirement is found at proposed Authority Rule 1220-4-14-.03(i).

**EMBARQ'S RESPONSE:**

The Authority's existing rules (e.g. Provisions for Testing – Authority Rule 12220-4-2-.25, Adequacy of Service – Authority Rule 12220-4-2-.28, Transmission Requirements – Authority Rule 12220-4-2-.31, Service Objectives and Surveillance Levels – Authority Rule 12220-4-2-.34, etc.) comprise a complete and sufficient statement of what the state expects from ILECs regarding consumer protection and service quality. Nothing more is needed. Embarq would not oppose certifying annually that it is complying with the Authority's existing rules in this regard.

An applicant seeking ETC designation should have to demonstrate how it also will comply with the Authority's rules related to consumer protection and service quality standards. If



there are other standards germane to the applicant's industry (e.g., Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service), the Authority may want to consider requiring compliance with those standards in addition to compliance with its own rules. After being designated an ETC, the provider should be subject, at a minimum, to the same rules and certification requirements as those imposed on an ILEC.

**STANDARD:**

Under 47 C.F.R. § 54.202(a)(4), the FCC requires an ETC applicant to demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which it seeks designation. The corresponding Tennessee requirement is found at proposed Authority Rule 1220-4-14-.03(j).

**EMBARO'S RESPONSE:**

The inapplicability to ILECs is obvious. However, an ETC applicant should be required to make such a demonstration. How else is the Authority to determine if an ETC is providing services comparable to those provided by an ILEC and for which the ILEC is receiving USF support?

**STANDARD:**

Under 47 C.F.R. § 54.202(a)(5), the FCC requires an ETC applicant to certify that the carrier acknowledges that the FCC (or a state commission) may require the ETC to provide equal access to long distance carriers in the event no other eligible telecommunications carrier is providing equal access within the service area. The corresponding Tennessee requirement is found at proposed Authority Rule 1220-4-14-.03(k).

### **EMBARQ'S RESPONSE:**

The inapplicability to ILECs is again obvious. The FCC declined to impose an actual equal access obligation on ETC applicants. To the extent ILECs already designated ETCs are required to provide equal access, Embarq sees no reason that any other ETC should be permitted to avoid the obligation. There are costs attendant to providing equal access, whether that cost is born by customers or investors. To the extent an ILEC competitor receives USF support, but has no actual obligation to provide equal access, the competitor has a cost and competitive advantage over the ILEC. Embarq urges the Authority to make all ETCs operating in Tennessee to provide equal access.

### **PUBLIC INTEREST ANALYSIS**

In addition to the six requirements discussed above, the FCC's standards for designating ETCs include a public interest analysis to determine if multiple ETCs in a given area would support the goals of preserving and advancing universal service. The FCC conducts and encourages an especially rigorous analysis if an applicant is seeking ETC status in rural areas. Embarq believes it is imperative that this Authority do the same.

The FCC's concern is that new entrants do not creamskim, that is, serve only the lower cost areas of a rural ILEC's territory <sup>3</sup> while receiving support based on averaged costs that reflect the cost of providing service in both high and low cost areas. By serving only the low cost lines, the new entrant could reap a financial windfall by receiving USF support in excess of the economic costs it incurs. In some proceedings, new entrants have argued that a rural ILEC could disaggregate its costs below the study area level (e.g., determine costs at the wire center level) and thus avoid the risk of creamskimming by the new entrant. The Regulatory Commission of

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<sup>3</sup> For purposes of federal USF, Embarq's Tennessee serving area is currently defined as rural in accordance with 47 USC § 153(3)(37).

Alaska, for one, recently rejected the argument that calculating costs at the wire center level would reduce the risk of creamskimming. In doing so, the Alaska commission noted that widely disparate population densities and costs have been shown to exist within a single wire center.<sup>4</sup> Embarq's wire centers in Tennessee display this same variation in cost characteristics. Embarq has 24 wire centers in the state. The per-access line investment within each of the wire centers has been calculated using a conventional forward looking cost model. Specifically, per-access-line investments were calculated for access lines within 12,000 feet of the wire center and separately for access lines beyond 12,000 feet of the wire center. Embarq's Tennessee investment to serve its areas beyond 12,000 feet of the wire center is on average 56% greater than the investment required to serve its areas within 12,000 feet of the wire center. In Embarq's largest Tennessee wire center the disparity is 73%. The largest overall disparity in an Embarq wire center is 134%.

The area within 12,000 feet of a wire center can be thought of as "in town," while the area beyond 12,000 feet can be thought of as rural. Generally speaking, the networks of new entrants (e.g., cable television and wireless providers) often are concentrated "in town." If such a new entrant were to gain ETC status even at a level as granular as a wire center, the new entrant could reap a windfall of USF support by receiving support based on the average per-access line cost for the entire wire center. And it should be noted, a token commitment to serve the outer areas through resale does nothing to offset this cream-skimming effect. The Authority should satisfy itself that an ETC applicant receiving high cost support is serving even the outlying high cost areas of a wire center. Embarq encourages the Authority to use this kind of rigorous analysis when conducting its public interest review related to an application for ETC status. Such an

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<sup>4</sup> See The Regulatory Commission of Alaska's *Order Denying Petitions for Designation as an Eligible Telecommunications Carrier, Denying Request to Redefine Study Area, and Affirming Electronic Ruling*, Docket No. U-04-62, Order No. 9 (June 27, 2006) at p. 15.

analysis becomes even more critical when the FCC permits an ETC applicant to redefine its service area and seeks state concurrence. As the FCC has observed, state commissions are the entities most familiar with the service area for which ETC designation is sought and are particularly well-equipped to determine their own ETC eligibility requirements.

### **ETC ANNUAL REPORTING REQUIREMENTS**

Regarding the FCC annual reporting requirements for providers that have been designated ETCs, the reporting requirements fall into three broad categories – (1) a progress report on the provider’s five year service quality improvement plan that is required as part of a provider’s application to become an ETC; (2) quality of service measurements; and (3) certification that the ETC is complying with other FCC qualifying criteria like being able to function in emergency situations.

For reasons already explained, Embarq urges the Authority not to adopt the requirement that ILECs already designated as ETCs develop service quality plans. If the Authority accepts Embarq’s recommendation, an annual progress report will not be necessary. Also, Embarq sees no need in requiring ETCs to report the service measures recommended by the FCC. The Authority’s rules delineate the service measures to be observed by providers under its jurisdiction and how they are to be reported to the Authority. Duplicate or similar reporting requirements for annual ETC certification would be redundant and wasteful. Embarq has already noted that compliance with Authority rules should satisfy any concerns that ILECs are using USF support for intended purposes, and Embarq would not oppose certifying on an annual basis that it is in compliance with applicable Authority rules.

In addition, the Authority's proposed rules also include a requirement to report "Detailed information on any outage lasting at least 30 minutes, for any service area in which an ETC is designated, for any facility it owns, operates, leases or otherwise utilizes." A literal interpretation of this language would lead to a requirement for ETCs to report an individual customer outage in excess of 30 minutes. Obviously, this is overly burdensome. Embarq interprets the Authority's intent with this requirement to mirror the FCC's outage reporting and would suggest inclusion of additional FCC provisions associated with outage reporting. Therefore, Embarq respectfully suggests the following clarifications be made to proposed Authority Rule 1220-4-14-.05. Please note that the suggestions reflecting the FCC detail standard appear in **bold** typeface:

1220-4-14-.05 (1)(b) – Annual ETC Certification Requirements.

Detailed information on any outage lasting at least 30 minutes **with 900,000 user minutes "potentially" affected**, for any service area in which an ETC is designated, for any facility it owns, operates, leases, or otherwise utilizes.

Embarq's suggested clarifications are consistent with 47 C.F.R. § 4.9. Also, Embarq notes that as an ILEC it reports detailed outage results to the FCC as part of its annual ARMIS reporting obligations. These reports are public information. Embarq suggests that these reports could fulfill the Authority's outage reporting requirements without the need for further reporting obligations by it or any other carrier which makes annual ARMIS filings.

### **LIFELINE / LINK-UP RULES**

Embarq supports the codification of the current Lifeline and Link-Up process as found in the proposed rules. For clarification, Embarq suggests the Authority add to its proposed rules the

definition of “toll limitation” as found in the FCC’s Recommended Decision in CC Docket No. 96-45, FCC 96J-3 at ¶ 368, note 1216, p.VIII-191.<sup>5</sup> The definition from the FCC’s Recommended Decision is codified at 47 C.F.R. § 54.400(d), which states as follows:

(d) Toll limitation. “Toll limitation” denotes either toll blocking or toll control for eligible telecommunications carriers that are incapable of providing both services. For eligible telecommunications carriers that are capable of providing both services, “toll limitation” denotes both toll blocking and toll control.

Embarq believes this additional definition will add needed clarity to the Authority’s proposed rules.

### **SUMMARY**

Embarq urges the Authority not to adopt a single set of requirements and standards to be used when making annual certification of ETC compliance to the FCC. Most of the FCC’s requirements, and the Authority’s proposed rules, are clearly met by ILECs complying with this Authority’s existing rules. Annually certifying compliance with applicable Authority rules, and thus demonstrating ETC compliance, would not be a challenge, and Embarq would not oppose doing so. However, Embarq strongly recommends that the Authority not adopt the FCC rule requiring a service improvement plan, regardless of length, for ILECs already designated as ETCs. The FCC’s new requirements and the proposed Authority rules are clearly applicable to new ETC applicants. New ETC applicants should be required to demonstrate how they will comply with the Authority’s proposed rules, including a network improvement plan and progress reports. The plans and reports will ensure that the new ETC serves even the high cost areas of their designated service territories, which is the purpose of USF support.

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<sup>5</sup> See *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 96J-3 (Rel. Nov. 8, 1996).

Regardless of how the Authority chooses to modify its proposed ETC eligibility rules, the Authority must conduct a rigorous public interest analysis in evaluating any new applications for ETC status. In addition, as part of the public interest analysis, the Authority should bear in mind that costs can vary greatly even within a wire center. Therefore, requiring the actual provision of service to the entire wire center is the only way to ensure that USF support is being used for its intended purposes.

Respectfully submitted on this 7th day of August, 2006 by:

A handwritten signature in black ink, appearing to read "Edward Phillips", written over a horizontal line.

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