BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST INC. d/b/a EMBARQ CORPORATION TARIFF FILING TO INCREASE RATES IN CONJUNCTION WITH THE APPROVED 2007 ANNUAL PRICE CAP FILING	)	**DOCKET NO. 07-00269**

POST HEARING BRIEF OF THE CONSUMER ADVOCATE

The Attorney General & Reporter Robert E. Cooper, through the Consumer Advocate and Protection Division ("Consumer Advocate") respectfully submits this post hearing brief for consideration by the Tennessee Regulatory Authority ("TRA", "Authority").

I. INTRODUCTION

The final hearing for this matter was heard on October 6, 2008 before Director Mary Freeman, Director Eddie Roberson and Director Sara Kyle ("Hearing Panel" collectively). The parties, the Consumer Advocate and United Telephone Southeast LLC d/b/a Embarq ("Embarq"), were provided the opportunity to present live testimony in support of their positions and allowed to cross-examine the witnesses presented. The issue in chief in this proceeding is the appropriate call allowance Embarq must provide for local directory assistance ("D.A.") service to consumers in order to serve the public interest.[1] In making a decision in this docket, the Consumer Advocate would submit that the Authority is guided by a just and reasonable standard as provided in Tenn. Code Ann. § 65-4-117(3).

---

1 There is no free call allowance for listings outside the company service area. Consumers are charged for each

D.A. call allowances and the exemptions for those with disabilities and/or those age 65 and older have been required of price cap regulated carriers that have sought to charge for D.A. since 1997. In that year, in Docket 96-01423, the Authority concluded that call allowances and exemptions were appropriate as a safeguard for consumers in part due to "churn". Churn is the natural turnover and changes in phone numbers which make even new printed directories inaccurate. One must consider that churn will always remain a constant. In order for consumers to use a telephone, they must have access to telephone listings. Traditional D.A. service is the most efficient and equitable means for consumers to obtain current listings. While free alternatives do exist from which consumers may obtain listings, such alternatives are entirely based or solely advertised upon the internet. Thus, the realized internet penetration in a service area is relevant to the setting of a call allowance.

In this proceeding the Consumer Advocate has submitted evidence to show that not all consumers have access to these alternatives. Further, the Consumer Advocate has shown that in terms of access to the internet, six of the seven counties served by Embarq lag behind the state wide average. The evidence, much of which is undisputed, supports the conclusion of the Consumer Advocate that Embarq should be required to provide at least a three call allowance in order to serve the public interest. Finally, as described herein, the Consumer Advocate submits that the record does not support the positions of the company.

II. THE RECORD SUPPORTS THE POSITION OF THE CONSUMER ADVOCATE

A. The Free Alternatives to Traditional D.A. Service Are Not Available to All Tennesseans

In the past, when companies have been allowed to lower the call allowance, the Authority

---

directortory listing thatis outside the company's service area.

has concluded that such reductions were appropriate in light of alternatives available in the communications market. The Consumer Advocate does not dispute that alternatives exist.[2] These free alternatives include internet search engines for telephone listings. They also include free 1-800 telephone services that provide listing information, although it is undisputed that these services are advertised predominantly or solely on the internet. Other examples include the use of e-mail for a consumer to contact friends and family when a phone number has been changed. The single common dominator of the free alternatives presented is that internet access is required for consumers to avail themselves of them at home. As shown by the Consumer Advocate in this matter, such alternatives are not available to all consumers.[3]

In order to have access or become aware of these free alternatives, consumers must have access to the internet. A digital divide still exists in this state in terms of basic access to the internet at home. The Consumer Advocate's proof as to the availability of these alternatives remains undisputed. It is undisputed that the level of income a household makes is a determining factor in whether internet access is present in the home.[4] The lower the level of income, the less likely one is to have internet access or even a computer at home. It has been the general position of Embarq and the price cap regulated industry that simply because alternatives exist, call allowances should be reduced, or in the case of one company's proposed tariff, entirely extinct. The irony of this logic is that those households not so abundantly blessed that cannot afford access to the internet will be subject to higher and higher rates for a service that was formerly

---

2 Wireless providers also provide directory listings. However, there is no free wireless call allowance and the rate is generally $1.50 per call.

3 The data relied upon by the Consumer Advocate was collected by Connected Tennessee, a non-profit organization. This information is attached to Mr. Chrysler's Direct Testimony filed on July 1, 2008.

4 Transcript of Proceeding (October 6, 2008), p. 95; Hearing Exhibit – Summary of Testimony of Michael D. Chrysler ("Summary"), p. 1 (copy for convenience at Attachment A); Direct Testimony of Mike Chrsler (July 1,

free. The households that can easily afford climbing rates for traditional D.A. service are much more likely to have access to free alternatives and thus avoid the higher rates.

Income level is a pre-dominant factor as illustrated by the Connected Tennessee data. Should the Authority elect to create a new exemption for Life-line consumers, the Consumer Advocate would welcome the initiative.[5] However, a Life-line exemption is not a complete resolution for this policy issue. Due to the poverty level guidelines required to sign up for Life-line service, many Tennesseans that do not have access to the internet may not qualify for Life-line.[6] In fact, according to the TRA's most recent annual report, less than 50,000 Tennesseans are Life-line subscribers.

There are factors for the Authority to consider other than household income in regards to the availability of internet access. The Connected Tennessee data has shown that a correlation exists in terms of access to the internet in relation to the education level obtained.[7] The less education one has obtained, the less like they will have access to the internet. The Connected Tennessee data has shown that a disparity exists in terms of race and internet access.[8] Further, a disparity exists in terms of rural vs. urban areas.[9] Similarly, Mr. Chrysler's pre-filed Direct Testimony notes similar negative correlations in terms of computer ownership which each of these factors.[10]

These factors illustrate that on a state-wide level not all consumers have access to free alternatives to traditional D.A. service. Not all consumers have the same level of technological

---

2008).
5 *Id.*, p. 97 of Transcript.
6 *Id.*
7 *Id.*, p. 96 of Transcript, p. 2 of Summary.
8 *Id.*, p. 3 of Summary.
9 *Id.*, p. 4 of Summary.

affluence from which to access free alternatives and avoid the increasing rates for traditional D.A. service.

B. The Company's Service Area Lags Behind the State Average in Terms of Household Internet Access

According to the Connected Tennessee 2007 survey, the state-wide average for household internet access is only 65%.[11] Data collected by specific individual counties reveal that six of the seven counties served by Embarq are below the state average in terms of access to the internet. Thus, the realized internet penetration within the company's service area is below that of the state average. Consumers in these areas are less likely to have access to alternatives to D.A. and thus will be required to pay for use of a traditional service that was formerly free. Prior to 1997, the use of D.A. was free for Embarq's consumers. However, since that time the rate has climbed from $0.29 to nearly a dollar while the call allowance has been reduced. Given the large increase in the rate over the course of a decade, and the realized internet penetration within the company's service area, the Consumer Advocate would submit that at a minimum a three call allowance is required to serve the public interest.

C. The Consumer Advocate's Proposal is Consistent with the Actions of Neighboring States

It is undisputed that neighboring states in which Embarq conducts business require a three call allowance. Virginia and North Carolina require three call allowances.[12] Embarq itself has admitted that such practices are reasonable. The language contained in the D.A. tariffs with effective dates of April of this year of both of Embarq's telephone companies in North Carolina

---

10 Direct Testimony of Mike Chrysler (July 1, 2008).
11 *Id.*, p.97-98 of Transcript, p. 5 of Summary.
12 Direct Testimony of Terry Buckner (July 1, 2008), p. 6.

in essence sum up the Consumer Advocate's position quite well.

> In order to make allowance for a reasonable need for local calling area Directory Assistance, including numbers not in the directory, directory inaccessibility and other similar conditions, no charge applies for the first three local directory assistance inquiries…

See tariff pages attached to Direct Testimony of Buckner.[13] Thus, in North Carolina, Embarq's tariffs recognize that a three call allowance covers a "reasonable need." Indeed, in Virginia the largest incumbent has been allowed to deregulate D.A. service, yet Verizon must maintain a three call allowance in order to protect consumers. Thus, the proposal of the Consumer Advocate requiring Embarq to maintain a three call allowance in the service of the public interest is far from a radical policy proposal. An allowance of at least three calls in Embarq's Tennessee service area is particularly just and reasonable in that it provides the same level of service provided literally across the street in Bristol, Virginia.[14] Tennesseans deserve no less.

D. Efforts to Better Promote the Exemptions for those with Disabilities and Senior Citizens

Upon receiving discovery responses in this matter, the Consumer Advocate realized that not enough was being done to promote the existence of the D.A. exemptions due to the number of exemptions granted and the general lack of notice provided in the last five years.[15] At the hearing on behalf of Embarq, Mr. Mark Hunter testified that the company would do four things to address the issue: (a) add "information" about the exemptions to the information pages of published directories,

---

13 *Id.,* attached D.A. tariff pages for Carolina Telephone and Telegraph Company and Central Telephone Company., both at pages 18.1, p3.
14 *Id.*, p. 7.
15 See Confidential version of the Direct Testimony of Mike Chrysler on behalf of the Consumer Advocate, (July 1, 2008).

(b) provide a bill message annually, (c) include information in a welcoming package and (d) provide exemptions registration forms on the company website.[16]

The Consumer Advocate welcomes the proposals of the company in regards to better promoting the existence of the exemptions for those with disabilities and/or age 65 and older. However, the Consumer Advocate is unwilling to conclude at this time that more cannot be done. Other reasonable methods may be taken to insure the public becomes aware of the existence of the exemptions. For example, according to the company's "confidential" discovery response to the Consumer Advocate's Discovery Request 35, consumers are still complaining to the company about mistakes concerning D.A. charges. It is reasonable to require the customer services representatives to inquire of consumers complaining about D.A. charges if they qualify for an exemption and explaining how one signs up for an exemption. The Hearing Panel and the TRA staff may have other methods for promotional efforts to suggest or impose.

III. The Consumer Advocate's Rebuttal to the Company's Position

A. The Company's Anti-competitive Argument is Without Merit

Both in pre-filed testimony and at the hearing, the company's witness has opined that requiring Embarq, a price cap regulated incumbent telecommunications provider, to provide call allowances while no such requirement is placed on CLECs creates an anti-competitive situation, is discriminatory and gives CLECs an unfair advantage.[17] This is a rather novel theory for several reasons. First, neither Embarq nor any other price cap regulated incumbent has ever complained to the Authority that D.A. call allowances are anti-competitive or result in an unfair advantage. Indeed, Embarq never raised this issue when it intervened in Docket 05-00251 when

16 Transcript of Proceeding, (October 6, 2008) p. 23.

Bristol Tennessee Essential Services was certified to become a CLEC.

Furthermore, Mr. Buckner's testimony submits that the company's "anti-competitive" claims do not in any form or fashion function to prevent Embarq from competing in the market or retaining customers.[18] Indeed, the company's argument does not square with common definitions of "anti-competitive" practices.[19] When asked on cross-examination if the call allowances prevent Embarq from competing, the company's witness, Mr. Mark Hunter answered "it doesn't help" the company compete.[20] The witness could not say that the company has lost x-number of customers due to the fact Embarq has a call allowance while CLECs do not. No evidence was presented to suggest that a call allowance prevented the company from competing or from retaining existing customers. Neither a D.A. call allowance nor price cap regulation itself prevents the company from lowering rates and improving service quality to compete.

Assuming arguendo that a D.A. call allowance results in an anti-competitive situation, the tariff that Embarq is proposing would still require a call allowance of one call while CLECs would not. Thus, if the company's tariff for a one call allowance is approved, the "anti-competitive" situation would still remain, a fact admitted by the company at the hearing.[21] When questioned on his anti-competitive theory, Mr. Hunter justified the company's tariff because it put Embarq on an equal footing with AT&T, another price cap regulated incumbent.[22] One must note that Embarq and AT&T do not compete against one another for customers. As such, assuming that AT&T and Embarq had the exact same D.A. tariff, a one call allowance would still

---

17 Transcript of Proceeding (October 6, 2008), p. 32; Direct Testimony of Mark Hunter (July 1, 2008), pp. 8-10.
18 Rebuttal Testimony of Buckner (August 1.2008), p. 1-4.
19 *Id.*
20 Transcript of Proceeding (October 6, 2008), p. 39.
21 Transcript of Proceeding, (October 6, 2008), p. 37, lines 5-8.
22 *Id.,* 36.

be "anti-competitive" under the logic of the company's argument.

Finally, it should be noted that CLECs and price cap regulated incumbents are regulated quite differently. Incumbents like Embarq have carrier of last resort obligations, are subject to price cap regulations, D.A. requirements and any number of regulatory practices which CLECs do not. Surely the company realized that while it left behind the scrutiny of rate of return regulation, that as the dominant incumbent in the service area, it would still subject to regulation, including safeguards created by the Authority in service of the public interest.

B. The Company's Argument that Embarq is Harmed by D.A. Call Allowances is Without Merit

The company has argued that it is financially harmed in being required to provide free D.A. call allowances. This argument suffers from the fact that Embarq provides free call allowances in several states it operates in, including Virginia, North Carolina and South Carolina.[23] Thus, if the service is being provided at a loss in Tennessee, surely it is being provided at a loss in those states as well. Cross-examination and questioning by the Hearing Panel of Mr. Mark Hunter solicited a distinction in how Embarq implements and maintains call allowances with different states.[24] The distinction is between being "required" to provide a call allowance in some states while providing a call allowance in another state without having been directed by regulators to do so.

In states such as Tennessee and Virginia, Embarq is required by regulators to provide a call allowance. In contrast, according to Mr. Hunter, Embarq's company in South Carolina provides a two call allowance to consumers based upon "tradition", "history", "how things work"

---

23 Direct Testimony of Terry Buckner (July 1, 2008), p. 6.
24 Transcript of Proceeding (October 6, 2008), p. 28-29; 60.

and not a regulatory order or decision.[25] Yet in Tennessee, where the company is under a legal obligation to provide a call allowance, Embarq claims the practice is "anti-competitive", provided at a loss and a matter of discrimination. Thus, the company freely provides a call allowance of more than one call, presumably at a loss, in one state without any prodding by regulators to do so. The company also ignores that there are varied call allowances through the states it serves. Some states have no call allowance while others, such as New Jersey, have provided up to ten free calls per month. Presumably, Embarq may provide D.A. service at a loss in some states due to call allowances while making a profit in other states where no call allowance exists. The record does not contain a full accounting of whether Embarq suffers a financial loss on a nation-wide scale.

Furthermore, the company ignores that the cost of service for D.A. was incorporated into the basic local exchange rates during the era of the company's rate of return regulation. When Embarq opted into price cap regulation, this cost of service was already in the basic rates. In Docket 96-01423 when D.A. was declared a non-basic service, the costs consumers bore for providing that service was not stripped out of the basic rates. Affiliates provide D.A. service to Embarq.[26] The charges are based on the volumes of calls.[27] Under such an arrangement, there appears to be little incentive to keep costs down. Embarq's witness felt compelled to not answer questions about the efforts of the company to seek out cheaper sources of D.A. for other entities due to confidentiality concerns.[28]

---

25 Transcript of Proceeding, (October 6, 2008), p. 60.

26 Company Response to Consumer Advocate Discovery Request #11 (April 23, 2008).

27 *Id.*

28 Transcript of Proceedings (October 6, 2008), p. 40-41.

To an extent the company's claims made earlier in this proceeding that cost of service is irrelevant under price cap regulation are true.[29] Price cap regulation breaks away from basic rate of return principals such as the relevance of the cost of a service. For example, when the cost of service for basic service goes down, the company is not required to lower rates. Embarq may raise rates for both basic and non-basic services in accordance with price cap regulations without regard for the cost of providing service. As Mr. Buckner's Direct Testimony concludes, Embarq has benefited financially from this arrangement.[30]

However, what cannot be ignored is that the tariffed rates of price cap regulated carriers have not fallen due to competition. In an era in which the cost of service is declining for many services due to improvements in technology and efficiency, consumers are paying more for traditional services. This is illustrated by the fact that the fifteen rate of return incumbents in this state, with smaller economies of scale than companies like Embarq and AT&T, have not filed a single rate case in a decade. Through D.A. call allowances and exemptions, the Authority has the ability to inject some measure of equity on behalf of consumers served by price cap regulated incumbents as a safeguard that serves the public interest.

C. A Contested Case Was Proper in This Matter

In many ways, both the Consumer Advocate and Embarq have been talking past each other. The Consumer Advocate has been determined to be heard and allowed to present evidence and build a record supporting the position that the call allowance should not be reduced and that the exemptions should be better promoted. Embarq has been equally determined in pursuing the

---

29 Embarq's Response to Discovery Request 34 of the Consumer Advocate (April 23, 2008); "Embarq's cost of local directory assistance has no bearing on the issues in this proceeding".
30 Direct Testimony of Buckner (July 1, 2008), p. 4.

claim that it is entitled to a one call allowance as a matter of law without regard for the evidence presented. It is clear from the record that neither party disputes that the TRA has the statutory authority to set or modify the D.A. call allowance of a price cap regulated telecommunications company.[31] The holding in *Consumer Advocate v. TRA* 2002 WL 1579700*7 (Tenn.Ct.App.2002) (copies of this case have been attached to several pleadings and the Hearing Officer's *Initial Order* issued February, 14, 2008) affirmed the TRA's decision to create D.A. call allowances and exemptions. However, the company has been aggrieved at the idea that it would be subject to a contested case.

Since this case was first convened on December 17, 2007, the company has argued that a contested case in this matter is inappropriate. Extensive briefing was conducted by both parties which in consequence ultimately culminated in oral argument before the Hearing Panel. The Authority rejected the company's position that a contested case was improper.[32] For purposes of brevity, herein the Consumer Advocate adopts the positions contained in the *Consumer Advocate's Brief in Response to the Request of the Hearing Officer* filed on January 31, 2008, the *Response of the Consumer Advocate to Embarq's Petition for Appeal of the Hearing Officer's Initial Order* filed March 10, 2008 and the *Response of the Consumer Advocate to Embarq's Petition for Reconsideration of the March 5, 2008 Order* filed on March 18, 2008.[33] Briefly, the Consumer Advocate will summarize some of the basic tenets of its position, which the briefs

---

31 Although Embarq concedes the TRA has the authority to set the call allowance, the company disagrees it should be subject to a contested case based on the decision in Docket 06-00232.

32 Order Granting in Part and Denying in Part Petition for Reconsideration and Petition for Appeal of the Hearing Officer's Order (May 12, 2008) p. 5.

33 Copies of the Consumer Advocate's *Brief in Response to the Request of the Hearing Officer* (January 31, 2008) and the *Response of the Consumer Advocate to Embarq's Petition for Appeal of the Hearing Officer's Initial Order* (March 10, 2008) are attached for convenience at Attachments (B) an d (C) respectively.

referenced above explore in more detail, concluding the Authority has acted well within its province in convening a contested case.

The D.A. requirements have been set on a company by company level based on serving the public interest. Through the enabling statutes from which the Authority is empowered, the legislature has delegated to the appointed directors of TRA the prerogative to carry out Tennessee's codified Telecommunications Policy. The term "public interest" is not defined by statute. Reasonable minds will disagree on what serves the public interest. And throughout the existence of D.A. call allowances, directors have disagreed on varying aspects of what serves the public interest. It is the discretion of the directors to determine what safeguards are necessary to serve the public interest. Thus, this is a matter of public policy. Public policy is not set in stone, but rather can be revisited and reconsidered. As the Consumer Advocate has noted in the briefs it has submitted in this docket, rarely has there been consensus among the directors in considering all D.A. issues over the years. Only recently has there been consensus. This consensus has concluded that contested cases are proper to examine D.A. issues.

As a matter of practice, free D.A. allowance requirements have always been set and modified on an individual company basis as evidenced in a long chain of separate tariff filings and dockets.[34] From a practical standpoint, it must also be considered there is a widespread disparity between the eighteen incumbent telephone companies in regards to D.A. service. For many Tennessee consumers there is no charge for D.A. service. Rather, just as it was for Embarq and AT&T's customers prior to 1997 and 1999 respectively, D.A. service remains a basic and

[34] Docket 96-01423, Docket 99-00391, Docket 04-00416, Tariff 050564 (withdrawn 5/27/05), Docket 06-00232, Docket 06-00288, Docket 07-00188, Docket 07-00269 and Docket 08-00021.

free service for many consumers served by a number of rate of return regulated incumbents and Citizens Telecommunications Company of Tennessee (d/b/a Frontier Communications Solutions) ("Frontier").[35] On the other end of the spectrum, competing local exchange carriers have no regulatory D.A. requirements whatsoever. Thus, there is no uniform State policy of which Embarq is being denied from enjoying.

When companies have sought to alter the free D.A. allotment required by the TRA, they have done so on an individual and separate basis by simply filing a tariff. The companies have never sought to petition the agency for a generic proceeding in regards to D.A. service. They simply filed tariffs without any attached analysis or formal request except when responding to *Petitions* filed by the Consumer Advocate after the tariff had been filed. This trend first began in 2004 when AT&T filed a tariff reducing the D.A. allotment from six (6) to three (3) in Docket 04-00416. During that matter AT&T argued, in response to the Consumer Advocate's *Complaint & Petition to Intervene*, that the decisions in Docket 96-01423 and 99-00391 did not establish a general rule or binding precedent.[36] Instead, AT&T asserted that the orders in those specific dockets reflected a balance of consumers' interests in the context of specific tariff filings.[37]

The crux of Embarq's argument is that the company has been treated unfairly because the tariff it filed was not approved without delay. This claim fails to recognize that when D.A. call allowances have been implemented and modified, it has been on an individual basis. The

---

[35] Citizens Telecommunications Company of Tennessee has filed a tariff to introduce charges for D.A. service. This price cap regulated company currently does not charge for D.A. use. See Docket 08-00021.

[36] Docket 04-00416, *Order Declining to Convene a Contested Case*, filed 9/2/05, p. 5.

[37] *Id.*

company's argument also ignores the larger context the Authority faces considering the numerous D.A. tariff filings of other price cap regulated companies in regard to this issue. In the last year, price cap regulated incumbents have sought different D.A. tariffs. AT&T has sought to eliminate the call allowance in Docket 07-00188 but would have still provided exemptions for those with disabilities and those age 65 and older. In Docket 08-00021, Frontier is seeking approval for a tariff that would provide a two call allowance but no exemption for consumers age 65 and older. Thus, the most recent tariff filings concerning D.A. call allowances by two of the three price cap regulated carriers in this state differ considerably from the "one-call, but with exemptions for the disabled and seniors" uniform policy Embarq claims exists.

In the last year, all three price incumbents have received the same procedural treatment when they have attempted to modify the call allowance or in the case of Frontier, introduce a call allowance and D.A. charges for the first time. In Docket 07-00188, Docket 08-00021 and in this docket, the Authority has convened contested cases.[38] Furthermore, the Authority is presently in the process of reconsidering the decision not to convene a contested case in Docket 08-00064 in which the Consumer Advocate filed a complaint and petition to intervene seeking to potentially raise AT&T's call allowance and to examine issues dealing with exemptions in light of a rate increase for D.A. service. Thus, the Authority has been acting consistently given its concern over the proliferation of D.A. tariff filings to change and reduce the call allowance to the point of extinction.

The company has raised issues of unfair or arbitrary treatment throughout the course of this docket. The crux of the company's arguments is that AT&T and Embarq are similarly

38 In Docket 07-00188, before discovery could be conducted, AT&T withdrew the tariff eliminating the call

situated. Thus, as the company argues, because AT&T was allowed to reduce the call allowance to one call in 2006 Embarq should also be allowed to reduce the call allowance to one. The Consumer Advocate has argued that Embarq and AT&T are not similarly situated due to their incomparable service areas, services provided, number of lines and number of customers. In addition, both have different rates and varying headroom under price cap regulation as designed by Tennessee law. Indeed, the company has conceded that at the time AT&T was allowed to have a one call allowance it did not have sufficient headroom to do so.[39]

The rates AT&T and Embarq charge for not only D.A. but also basic services are different.[40] A comparison produced by Mr. Buckner in his Rebuttal Testimony of the residential rates and respective call allowances of AT&T and Embarq in areas in which their respective service territories border shows a distinguishing result. Embarq's residential rate, at $17.50, is higher than AT&T, ranging from $9.44 to $10.03, in these areas. Assuming an AT&T customer makes three D.A. calls, paying for two at $1.50 each, while an Embarq customer makes three D.A. calls, paying for none, the Embarq customer still pays a higher combined rate for residential service. Even with Embarq's current three call allowance, an AT&T customer with only one call allowance pays less for residential service even after making three D.A. calls.[41]

In several references, Embarq has implicated an equal protection claim in its defense. The Consumer Advocate would submit that the party making an equal protection claim should be required to do more than simply state that it is being treated differently from a similarly situated person(s) or entity. *State v. Southern Fitness and Health, Inc.* 743 S.W. 2d 160, 163 (Tenn.1987).

---

allowance. The Hearing Officer in that matter closed the docket the day AT&T withdrew the tariff.
39 Transcript of Authority Conference (March 24, 2008), p. 68.
40 Rebuttal Testimony of Bucker (August 1, 2008), p.4-5.

Equal protection claims require more rigorous analysis under the law than simply stating one party is similar to another.

An equal protection claim that involves neither a suspect or protected class or entails fundamental right is subject to a rational basis test. *Hadix v. Johnson,* 230 F.3d 840, 843 (6th Cir.2000). Embarq is not a member of a suspect or protected class. Neither does this matter entail a fundamental right such as freedom of speech or the right to travel. Thus, the equal protection claim made by the company and the decision of the Authority to convene a contested case must be examined under the rational basis test. Tennessee courts have consistently held not only that the rational basis standard is a very low level of scrutiny but that the challenging party bears the burden to proving that the distinction made is unreasonable and arbitrary. *Harrison v. Schrader*, 569 S.W. 2d 822, 826 (Tenn.1978). Under the rational basis review, the government policy at issue will be afforded a strong presumption of validity and must be upheld as long as there is a rational relationship between the disparity of treatment. *Midkiff v. Adams County Regional Water District*, 409 F.3d 758, 770 (6th Cir.2005) (citing *Hadix v. Johnson*, quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993).

Under a rational basis review, a plaintiff faces a severe burden and must negate all possible rational justifications for the distinction. *Id.* citing *Gean v Hattaway*, 330 F. 3d 758,771 (6th Cir.2003); *Heller v. Doe*, 509 U.S. 312, 320-321 (1993). Thus, the burden is upon Embarq to show that the convening of this contested case had no rational basis. The Consumer Advocate would submit that the company has failed.

The rational basis, from the Consumer Advocate's position, is the Authority's consistent

---

41 *Id.*

decisions to closely scrutinize the D.A. tariffs that propose to eliminate, lower or introduce D.A. charges with a call allowance since Docket 07-00188. The D.A. policy of each price cap regulated incumbent is influx. As a safeguard and policy that has been subject to erosion since 2004 and that has been pushed to the edge of extinction by AT&T, the Authority has determined to examine the issues surrounding D.A. call allowances closer. Furthermore, in considering Embarq's motion for reconsideration, the panel concluded that due to the proliferation of tariff filings to change and reduce the D.A. call allowance to the point where D.A. allowances face extinction, it is appropriate for the Authority to step back and review how these changes will impact the public.[42] This is clearly not an irrational or arbitrary action.

Due to the piece-meal fashion in the way AT&T, Embarq and now, Frontier, have individually filed tariffs that lowered the call allowance to the point of one company proposing to eliminate the call allowance altogether, the Authority has determined that now is the time to step back take a closer look. The Authority determined that it needed to take a "time-out" and closely examine these issues in a contested case.[43] Assuming arguendo that AT&T and Embarq are similarly situated and that an equal protection claim is plausible, the company has not shown that the Authority's actions in this matter lack a rational basis or that in convening a contested case the Hearing Panel acted arbitrarily.

IV. CONCLUSION

For these reasons herein, the Consumer Advocate requests the Hearing Panel to maintain

42 Order Granting in Part and Denying in Part Petition for Reconsideration and Petition for Appeal of the Hearing Officer's Order (May 12, 2008) p. 5.
43 Transcript of Authority Conference (March 24, 2008), p. 83-84.

Embarq's three call D.A. allowance and to direct the company to provide better promotional efforts as to the existence of exemptions for those with disabilities and those age 65 and older through whatever means the Authority suggests or imposes.

Respectfully Submitted,

RYAN L. McGEHEE, B.P.R. # 025559
Assistant Attorney General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-5512 (phone)
(615) 532-2910 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post-Hearing Brief was served on the party below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 31 day of October 2008.

Edward Phillips, Esq.
Embarq Corporation
1411 Capital Boulevard
Wake Forest, NC 27587-5900

Ryan L. McGehee
Assistant Attorney General

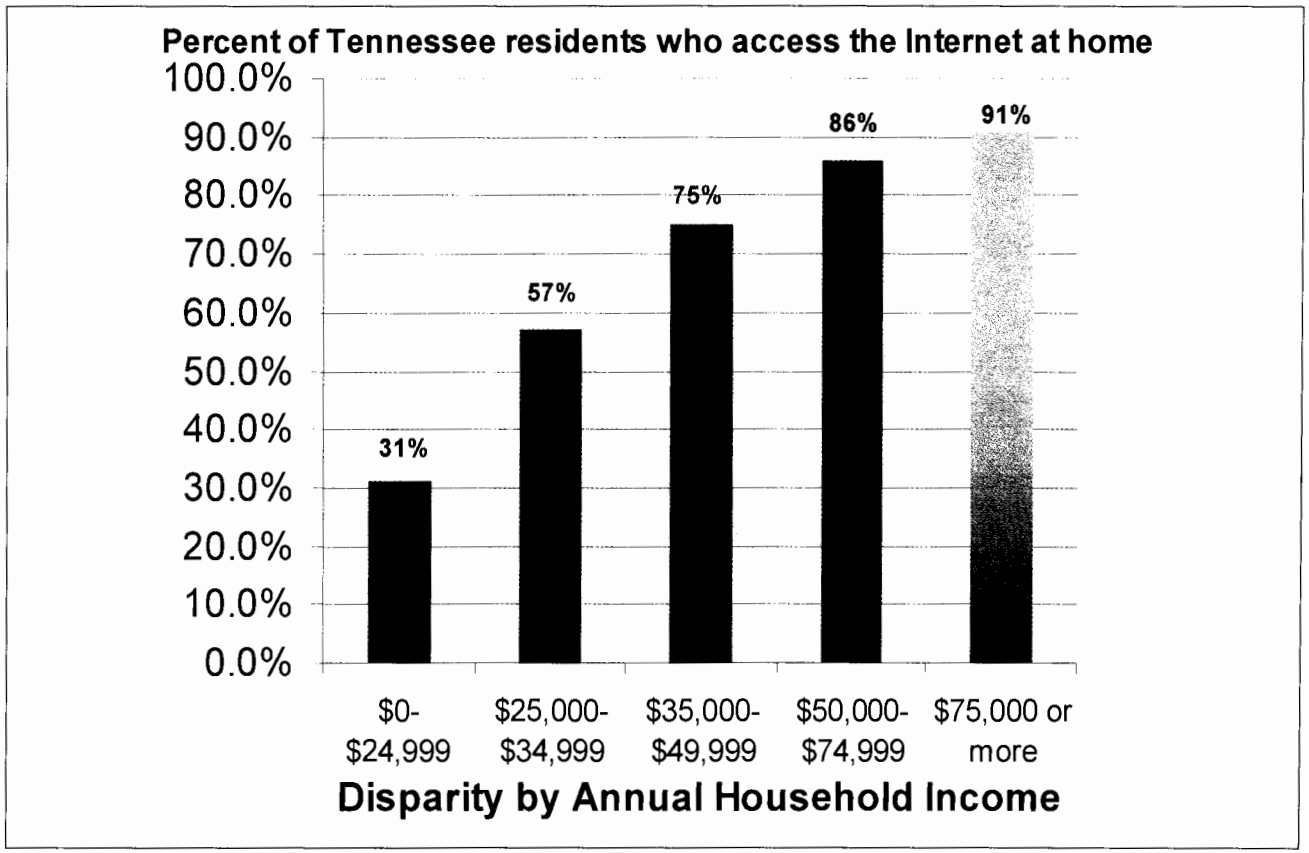
Post-Hearing Brief of the Consumer Advocate

Attachment A

United Telephone- Southeast d/b/a Embarq Corporation
Tariff Filing to Increase Rates For Conjunction With the Approval 2007 Annual Price Cap Filing
TRA Docket No. 07-00269

Summary of Testimony
Michael D. Chrysler
Consumer Advocate and Protection Division (CAPD)
October 6, 2008

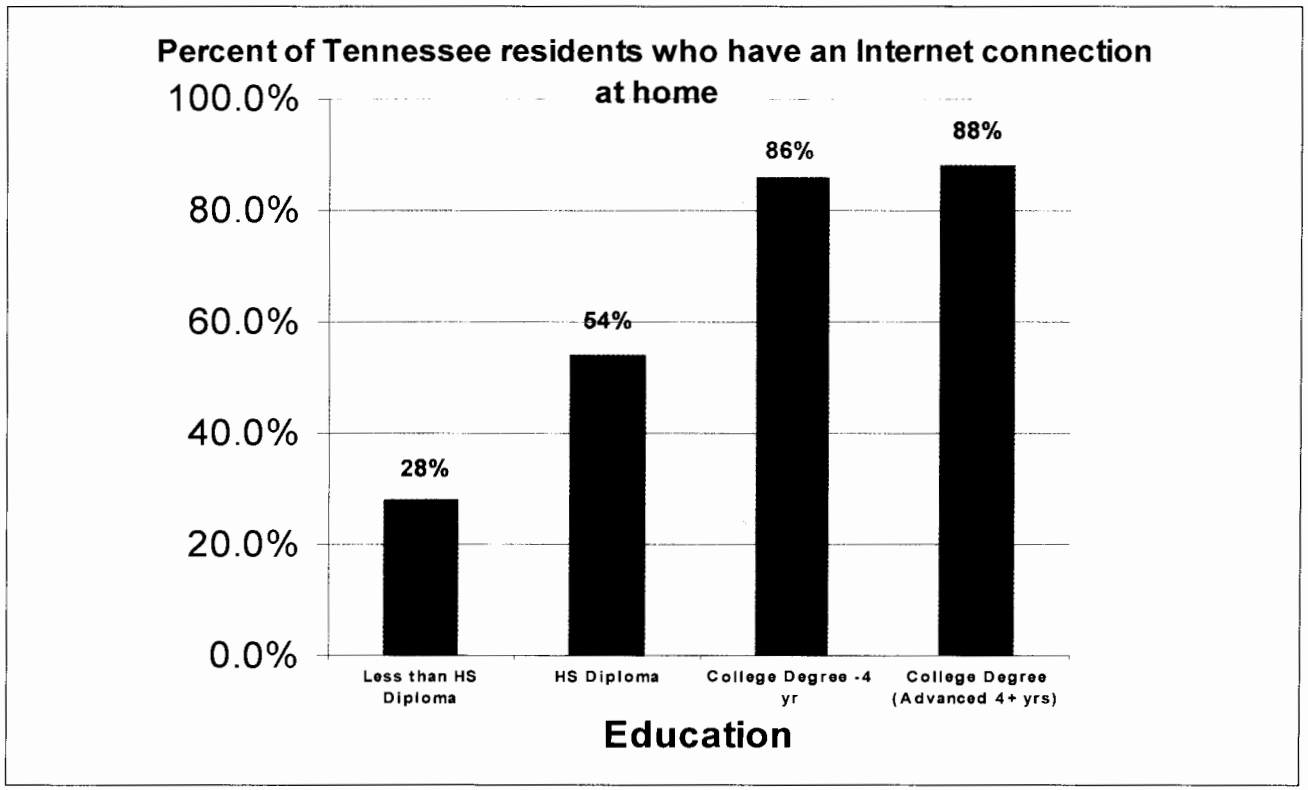
Tennessee Residents with an Internet Connection at Home



Statewide Average: 65% of Tennessee residents report having an Internet connection at home.

Source: 2007 Connected Tennessee Residential Technology Assessment with permission

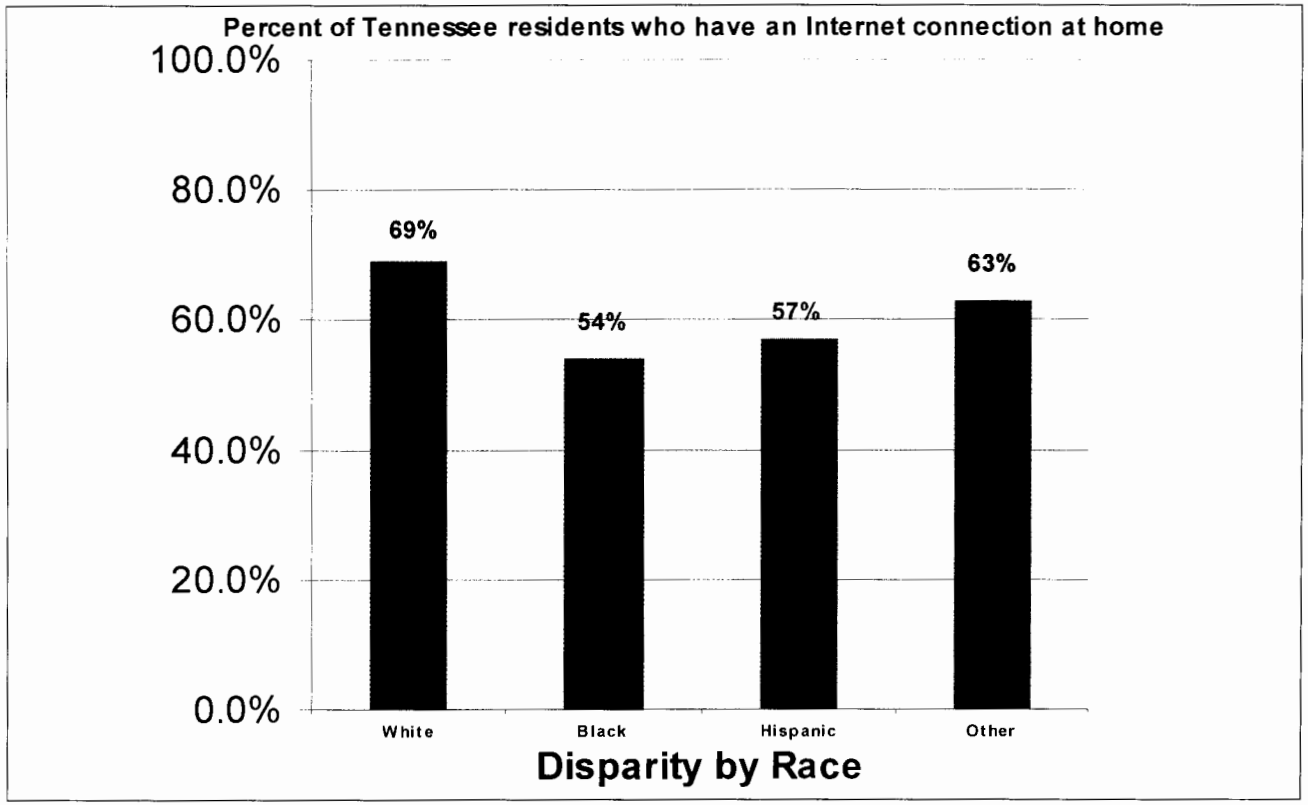
Tennessee Residents with an Internet Connection at Home



Statewide Average: 65% of Tennessee residents report having an Internet connection at home.

Source: 2007 Connected Tennessee Residential Technology Assessment with permission

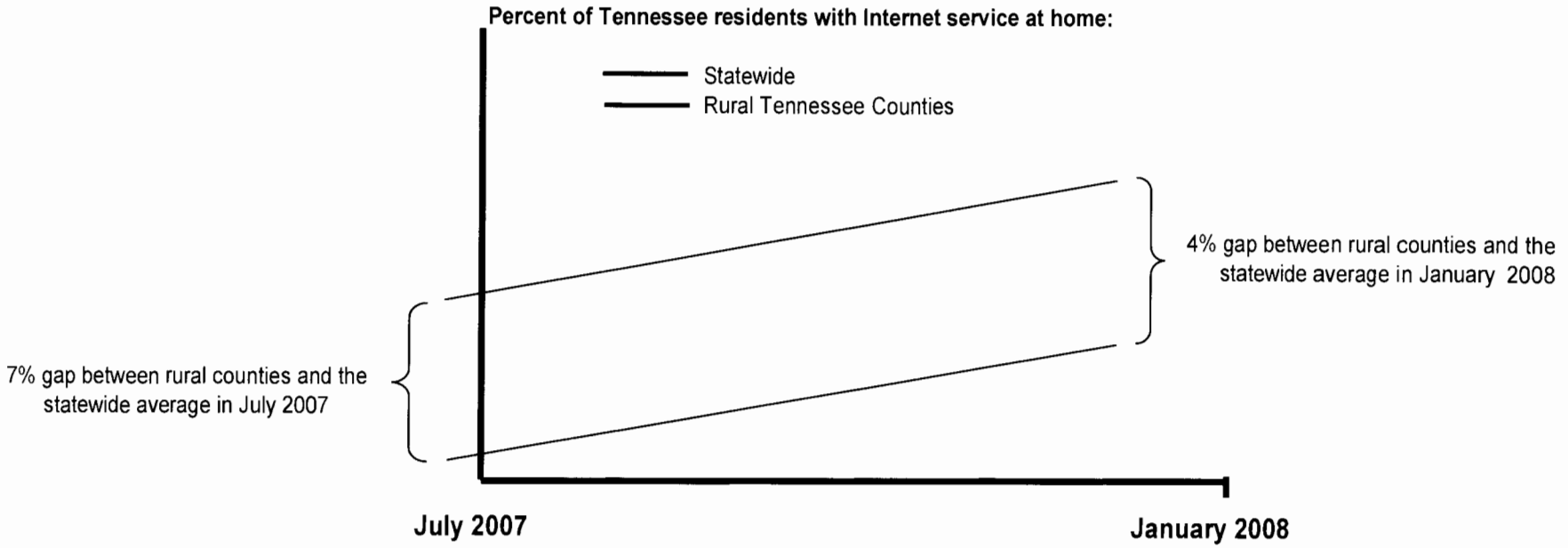
Tennessee Residents with an Internet Connection at Home



Statewide Average: 65% of Tennessee residents report having an Internet connection at home.

Source: 2007 Connected Tennessee Residential Technology Assessment with permission

Trends in Rural Internet Adoption

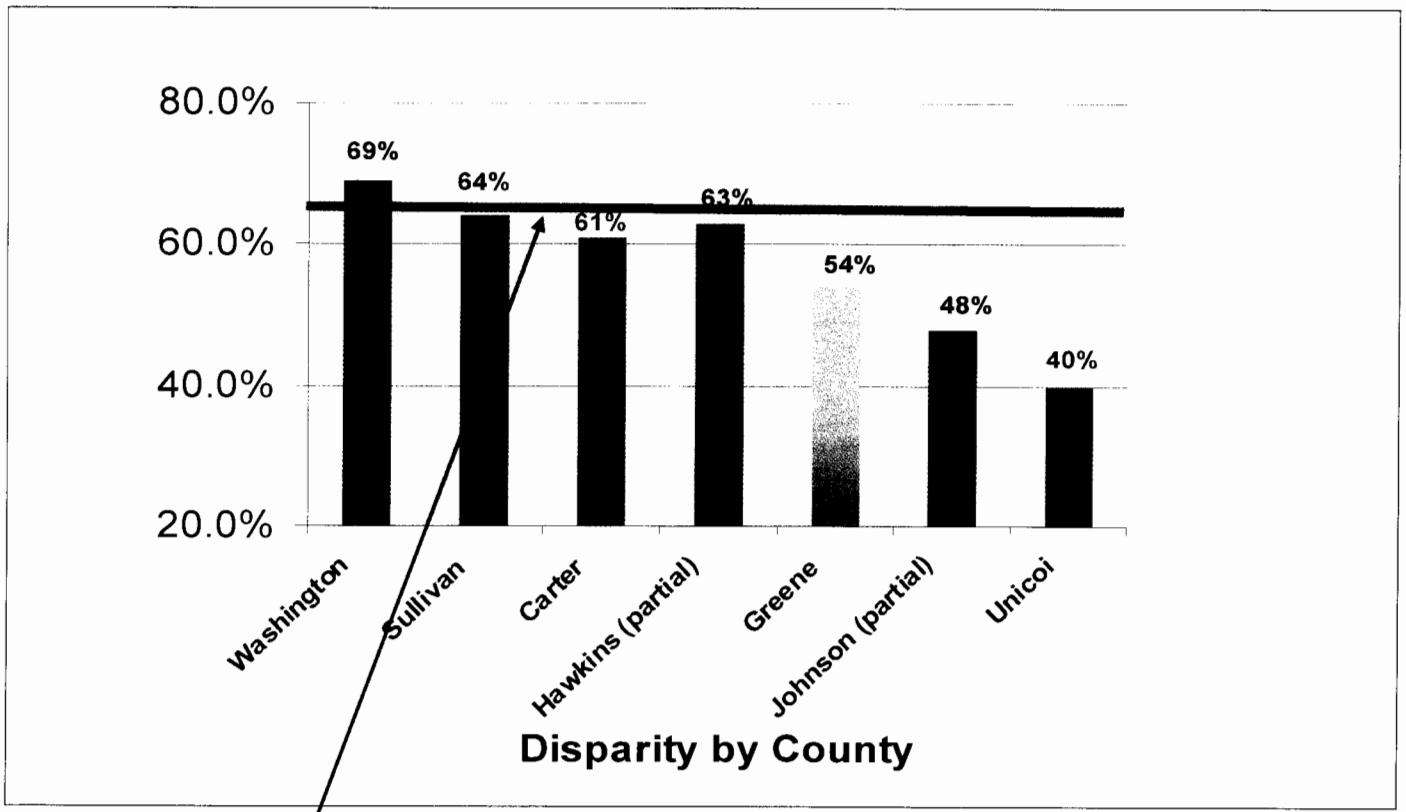


In January 2008, there were 42 Tennessee counties actively engaged in Connected Tennessee's eCommunity Strategies. Of these 42 counties, 66% are rural.

Statewide Average: 65% of Tennessee residents report having an Internet connection at home.

Source: Jan 2008 Connected Tennessee Residential Technology Assessment

Tennessee Residents Internet Adoption



Purple horizontal line represents the statewide average for internet adoption (65%)

Source: 2007 Connected Tennessee Residential Technology Assessment and Mark Hunter's Rebuttal, exhibit MCH-5

Post-Hearing Brief of the Consumer Advocate

Attachment B

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST INC. d/b/a EMBARQ CORPORATION TARIFF FILING TO INCREASE RATES IN CONJUNCTION WITH THE APPROVED 2007 ANNUAL PRICE CAP FILING	)	**DOCKET NO. 07-00269**

BRIEF OF THE CONSUMER ADVOCATE IN RESPONSE TO THE REQUEST OF THE HEARING OFFICER

On January 3 of this year, at a status conference convened before the Tennessee Regulatory Authority ("TRA") after notice, the hearing officer requested briefs from the respective parties concerning the burden of proof and the "rate increase" issue. He further invited the Consumer Advocate to discuss any potential change in the number of free monthly directory assistance uses that it would suggest. Herein, the Consumer Advocate responds as requested. Additional comments are also included addressing issues of legal merit counsel for Embarq Corporation ("Embarq") brought forth at the status conference that should have been addressed formally in a motion for reconsideration.

BURDEN OF PROOF

As Embarq is well aware, published tariffs are binding on the company and its customers and have the effect of law upon the same. *GBM Communications, Inc. v. United Inter-Mountain Telephone Company*, 723 S.W. 2d 109, 112 (Tenn.Ct.App.1986) (cert.denied). Proposed tariffs do not have such binding or legal qualities. Only the TRA can empower a tariff. The company in

this matter has sought to change the tariff that governs it, specifically a tariff that is required of it by the TRA to serve the public interest. According to Tenn Code Ann. § 65-2-109(5), "[t]he burden of proof shall be on the party asserting the affirmative of an issue[.]" In the case at bar, the party asserting the affirmative of the issue is Embarq.

Clearly, the company is affirmatively asserting that the current free monthly directory assistance call allowance of three (3) should be reduced to one (1). In essence, it seeks to change the "law" it is governed by in regards to directory assistance ("D.A.") policy requirements. The proposed tariff filing at hand is not in effect. The tariff that currently and legally binds the company requires, by TRA authority, that three (3) free monthly D.A. uses be provided to consumers. The hearing officer should not consider a proposed tariff as bearing the same legal and binding authority as a tariff that has gone into effect. Otherwise, all proposed tariffs acquire a standing of infallibility and "law" until a complaining party shows otherwise. Embarq must prove that the proposed tariff will not harm the public interest.

By the same reasoning, the Consumer Advocate would bear the burden of proof if it asserts the current tariff that is in effect, requiring three (3) D.A. uses, is insufficient to serve the public interest.[1] Any party in this proceeding advocating a change in the status quo of three (3) free monthly D.A. calls is asserting the affirmative of the issue and bears the burden of proof pursuant to Tenn. Code Ann. § 65-2-109(5). Thus, both parties may shoulder the burden of proof for their respective positions in this matter, but only for those respective affirmative positions alone.

---

[1] The Consumer Advocate's position on the number of free D.A. uses required to serve the public interest is addressed later in this brief.

THE RATE INCREASE ISSUE

Rates for Non-Basic Services Can Not Be Set By the TRA

It is the preference of the Consumer Advocate that consumers not be burdened with increased rates for D.A. service. However, there is no legal basis for the Consumer Advocate to challenge the rates charged for D.A. provided by price cap regulated companies in this specific matter. The Court of Appeals has determined that directory assistance is not a basic service as the term is applied in the price cap statute. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700, *3-4 (Tenn.Ct.App.2002). As a matter of law, the TRA can not set the rate for a non-basic service, assuming the company has complied with all price cap regulations. Thus, Embarq may set the rate for directory assistance as it deems appropriate subject to certain statutory limitations that govern price cap regulation. Tenn.Code Ann.§ 65-5-109 (h). The Consumer Advocate has not requested the agency to set the rate for a non-basic service. Nor does the agency appear poised to do so.

The Suspension of the Rate Increase by A Majority of Directors was Lawful

There is a relationship between the rate charged for DA calls and the number of free DA uses the agency mandates in the service of the public interest. The higher the charge, the more important the number of free DA calls become to consumers. The relevance of this relationship must not be lost sight of during the procedural maneuvers of this proceeding. In other words the TRA may need to determine the number of the free D.A. allotment in relation to the standard rate set by the company. Perhaps the agency recognized the relevance of this relationship when a majority of the TRA directors voted to suspend the rate increase portion of the DA tariff. The

legal validity of the suspension of the rate increase is not in doubt.

In 2004, the General Assembly provided statutory standards for the suspension of tariffs that establish rates filed by incumbent local exchange carriers. Tennessee Public Acts of 2004, Public Chapter 545. While setting a high standard for a complaining party to prove a tariff suspension is warranted, the amending law also specifically allowed the agency to retain the discretion to suspend a tariff on its own volition and independent judgment.

> The authority may suspend a tariff pending a hearing, on its own motion, upon finding that such suspension to be in the public interest. The standard established herein for suspension of tariffs shall apply at all times including the twenty one (21) or one (1) day period between filing and effectiveness; Tenn.Code Ann.§ 65-5-101 (c)(3)(C)(ii).

Comments made by directors clearly indicate a concern for the public interest in relation to directory assistance when this matter was first considered and the rate increase was suspended. *See* Transcript of Authority Conference, December 17, 2007, p. 13-20. In determining whether to suspend a tariff under Tenn.Code Ann.§ 65-5-101 (c)(3)(C)(ii), directors need not rely upon or defer to a prior agency decision if the suspension is undertaken in the public interest. It is apparent from the record that the agency exercised its discretion in the public interest as is clearly provided for within the law. While the hearing officer in this matter may be authorized to make rulings on matters of law, it must be noted that the suspension of the rate increase by a majority of the directors was made at their discretion on public interest grounds as specifically authorized under Tennessee law.[2]

\

[2] The Consumer Advocate did not request a suspension of the rate increase.

THE CONSUMER ADVOCATE'S POSITION AS TO THE NUMBER OF FREE D.A. USES REQUIRED TO SERVE THE PUBLIC INTEREST

The Consumer Advocate will not suggest the number of D.A. uses that should be required of Embarq until discovery has taken place. Various issues such as the "churn" rate in Embarq's service area, the availability of alternatives to D.A. service to Embarq consumers and other issues surrounding D.A. service for disabled consumers and those age 65 and older require discovery and consideration by expert witnesses prior to the Consumer Advocate making a proposal or taking a specific position of this nature. The direct testimony of the Consumer Advocate will address specific positions and proposals on these matters.

COMMENTS TO VARIOUS ISSUES RAISED BY EMBARQ AT THE INITIAL STATUS CONFERENCE

At the status conference, counsel for Embarq brought forth improperly several issues for consideration that should have been raised in a formal motion for reconsideration. The Consumer Advocate had no notice that substantive issues of law and argument would be presented that address the legal merits of the decision of the TRA in this docket to convene a contested case. To date, no formal motions have been made to reconsider the convening of this contested case. The hearing officer did not specifically request briefing on these issues and did not indicate he would rule on these matters. However, as the company's opinions on these issues occupied a great deal of time at the initial status conference, the Consumer Advocate would offer these comments while reserving the right to respond to any formal motion that may be made in the future.

The TRA Did Not Act Arbitrarily or Capriciously

The comments made at the status conference by Embarq and the Consumer Advocate would indicate that there is general agreement that the TRA has the authority to go back and re-

examine public policy. Thus, the authority of the agency to review D.A. policy does not appear to be at issue per se. However, the company appears aggrieved about the manner in which the agency has chosen to do so. Embarq insists that a generic proceeding is required to avoid error because the of the majority's decision in approving a D.A. tariff of AT&T in Docket 06-00232. The Consumer Advocate disagrees that Docket 06-00232 is somehow a controlling precedent which should dictate how the directors must proceed and that a generic proceeding is warranted. As matter of practice, D.A. policy has always been set and modified on an individual company basis as evidenced in a long chain of separate tariff filings and dockets.[3]

Furthermore, it must be noted that Embarq was not simply singled out by the Consumer Advocate or the agency for a contested case. The convening of a contested case in Docket 07-00188 in fall of last year concerning AT&T's attempt to terminate it's respective D.A. policy signaled a renewed interest in examining the specifics of such proposals and growing consensus that this policy must be reviewed. Naturally, when a policy that has served the public interest so well is threatened with extinction, the agency is well within its province to scrutinize and reconsider all proposals that pertain to that policy. Embarq can not maintain that it was unaware of Docket 07-00188 or that the agency did not have the authority within the AT&T docket to maintain or even raise the number of free D.A. allotment calls.

Public policy is not set in stone, but rather is subject to healthy debate. At times it must be reviewed in order to adapt to changing realities and to meet objectives. The decision to convene a contested case in this matter can not be considered the product of an arbitrary or capricious

---

[3] Docket 96-01423, Docket 99-00391, Docket 04-00416,Tariff 050564, Docket 06-00232, Docket 06-00288, Docket 07-00188, Docket 07-00269 and Tariff 080024.

decision but rather of evolving opinions and circumstances that currently surround concerns for the public interest. D.A. policy is far from a settled matter. Historically, it is obvious from the public record that the TRA directors have not shared total agreement on all details and specifics of D.A. policy. Indeed, TRA directors have indicated some differences of opinion in one form or fashion regarding D.A. policy issues and procedure for a decade. Director Kyle has dissented on directory assistance issues and decisions made by a majority of directors.[4] Director Jones has dissented from majority decisions in allowing reductions in the respective D.A. allotments of individual companies without a contested case.[5] These differences of opinion are merely a sign of the natural progression of how regulatory public policy is debated, implemented and reconsidered by directors. This is how the legislature intended the TRA to function in determining public policy rather than as evidence of arbitrary or capricious decisions.[6]

TRA directors have the discretion to change, modify or further develop their opinions on matters of public policy and form a consensus as evidenced by the decisions in Docket 07-00188 and the current proceeding at hand to convene a contested case, a procedure all three directors

---

[4] Director Kyle dissented from the majority decision in Docket 96-01423 which concluded that D.A. was not a basic service. The director has repeatedly expressed interest and commented on D.A. policy and most recently dissented and concurred in Docket 07-00188. Her dissent in the AT&T docket was with regard to the majority's decision not suspend the rate increase. See Footnote 12 of the Order convening a contested case in Docket 07-00188.

[5] Director Jones dissented from approval of tariffs reducing the number of free D.A. service allotments in his Concurrence and Dissent in Docket 04-00416. Director Jones further referenced and incorporated this *Dissent* in the Final Orders of Docket 06-00232 and Docket 06-00288 respectively.

[6] In appointing TRA directors, the law instructs the governor and the respective speakers of both chambers of the legislature to ensure that people of diverse background, education, professional experience, ethnicity, residence, heritage and perspective serve in these important positions. Tenn.CodeAnn. § 65-1-101 (2004). This mandate promotes broader consideration, debate and thought to matters of public policy determined by TRA directors.

concluded was appropriate for reviewing directory assistance polices. In exercising this discretion, directors may reach their own independent and reasonably supportable conclusions in matters of public policy.

D.A. Policy Has Been Established & Modified On An Individual Company Basis for a Decade

The Consumer Advocate is unaware of a precedent requiring the TRA to convene a generic proceeding rather than a contested case when the agency seeks to review a tariff of a company or the public policy guiding that company's tariffs.[7] The D.A. tariffs of each company have been established and changed on multiple occasions in separate dockets and tariff filings.[8] Thus, the D.A. requirements of each price cap regulated company have seldom been in complete alignment since 2004. Rather, the policy guiding each company has been in flux.

When companies have sought to alter the free D.A. allotment required by the TRA, they have done so on an individual and separate basis by simply filing a tariff. The companies have never sought to petition the agency for a generic proceeding in regards to directory assistance. They simply filed tariffs without any attached analysis or formal request except when responding to *Petitions* filed by our office after the tariff had been filed. This trend first began in 2004 when AT&T filed a tariff reducing the D.A. allotment from six (6) to three (3) in Docket 04-00416. AT&T argued, in response to the Consumer Advocate's Petition to Intervene, that the decisions

---

[7] Embarq has implied that the "Kingsport decision" from the Court of Appeals, cited at 01-A-01-9601-BC-00049, may require the agency to convene a generic case. *See* Transcript of Initial Status Conference, 1/3/08, p. 8, lines 20-25, next page. A reading of the opinion in that case does not support that conclusion.

[8] *See* Footnote 3 of this brief.

in Docket 96-01423 and 99-00391 did not establish a general rule or binding precedent.[9] Instead, AT&T asserted that the orders in those specific dockets reflected a balance of consumers' interests in the context of specific tariff filings.[10]

This trend of company tailored D.A. policy continues to this day. On January 16 of this year, Citizens Telecommunications Company of Tennessee (d/b/a Frontier Communications Solutions) ("Citizens Telecom-Tennessee") filed a tariff to modify the D.A. policy guiding its tariff, reducing the free D.A. allotment from three (3) to two (2).[11] This goes to illustrate that two of the three price cap companies have proposed tariffs that are unique and designed to meet the business demands of the respective companies.[12] There are also several significant differences between all three companies that must considered. As Embarq ably pointed out, AT&T is the largest carrier in Tennessee by far with "90% of the consumers" in the state.[13] Embarq, AT&T and Citizens Telecom-Tennessee are very different companies in terms of service area and numbers of consumers. In this regard, they are far from similarly situated. In setting D.A. public policy, the agency may take into consideration the vast differences between the companies in coming to a decision that serves the public interest.

---

[9] Docket 04-00416, *Order Declining to Convene a Contested Case*, filed 9/2/05, p. 5.

[10] *Id.*

[11] Tariff 20080024

[12] Embarq appears to suggest it is merely trying to mirror the tariffs of AT&T rather than design a tariff strictly related to the company's and consumers' needs. *See* Transcript of Initial Status Conference, 1/3/08, p. 11.

[13] *See* Docket 07-00269,Transcript of the Initial Status Conference, 1/3/08, p. 18, line 19.

Respectfully Submitted,

RYAN L. McGEHEE, B.P.R. # 025559
Assistant Attorney General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-5512 (phone)
(615) 532-2910 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complaint and Petition to Intervene was served on the party below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 31st day of January 2008.

Edward Phillips, Esq.
Embarq Corporation
1411 Capital Boulevard
Wake Forest, NC 27587-5900

Ryan L. McGehee
Assistant Attorney General

Post-Hearing Brief of the Consumer Advocate

Attachment C

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST INC. d/b/a EMBARQ CORPORATION TARIFF FILING TO INCREASE RATES IN CONJUNCTION WITH THE APPROVED 2007 ANNUAL PRICE CAP FILING	)	**DOCKET NO. 07-00269**

RESPONSE OF THE CONSUMER ADVOCATE TO EMBARQ'S PETITION FOR APPEAL OF THE HEARING OFFICER'S INITIAL ORDER

On February 29, 2008 United Telephone-Southeast, Inc. ("Embarq" or "company") filed a *Petition for Appeal of the Hearing Officer's Initial Order* ("*Petition for Appeal*"). Herein, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") responds as follows.

INTRODUCTION

This matter is before the hearing panel consisting of Chairman Eddic Roberson, Director Sara Kyle and Director Ron Jones of Tennessee Regulatory Authority ("TRA", "Authority" or "agency"). Briefly, the procedural history of this matter is as follows. On November 19, 2007 Embarq filed Tariff 2007456 which, among other things, reduced the directory assistance ("D.A.") call allowance of the company from three (3) to one (1) and raised the rate for D.A. calls made in excess of the allowance.[1] The Consumer Advocate filed a *Complaint & Petition to Intervene* on December 11, 2007.

On December 17, 2007 at a regularly scheduled conference, the hearing panel voted to

[1] For clarification, D.A. scrvice refers to local directory assistance service only.

convene a contested case and a majority of the directors suspended the D.A. rate increase portion of the tariff.[2] At the initial status conference on January 3, 2008 the hearing officer requested briefs on the issues of burden of proof and the rate suspension. Both parties filed briefs on January 31. The hearing officer issued an *Initial Order* on February 14, 2008. On February 29, 2008 Embarq timely filed the *Petition for Appeal.*

The hearing officer's decision in the *Initial Order* settled two issues; the validity of the rate suspension and the burden of proof. The Consumer Advocate would note that Embarq's *Petition for Appeal* extends well beyond the pale of appealing the *Initial Order*. In essence, the company's appeal serves as a motion to reconsider the decision of the directors to convene a contested case. In doing so, Embarq pleads that the tariff in its entirety must be allowed to go into effect without delay.

The company's arguments in the *Petition for Appeal* are briefed in two issues, but chiefly predicated upon several assumptions and conclusions:

(1) That Docket 06-00232, which approved a tariff filed by AT&T Communications, Inc. ("AT&T") allowing a reduction in free D.A. calls from three (3) to one (1), is a binding precedent setting the definitive State Policy for D.A. and that this decision controls this proceeding;

(2) That in light of this "controlling" precedent, the agency can not suspend the D.A. rate increase nor suspend the portion of the reduction in the D.A. allotment;

(3) That Embarq and AT&T are similarly situated, thus in this proceeding the company has allegedly been treated in an arbitrary, capricious and/or unwarranted manner;

(4) That the price cap statute determines when and what rate may be increased and thus,

---

[2] *Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008); *Dissent of Director Ron Jones to the Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008). The other portions of the tariff not related to D.A. service were allowed to go into effect.

the rate cannot be suspended under Tenn.Code Ann.§65-5-101(c); and

(5) That in approving the company's annual price regulation plan in Docket 07-00220, the agency has already made a determination on the public interest and the validity of the rate increase.

The Consumer Advocate disagrees with each of these assertions and responds as follows.

I. THE CONVENING OF A CONTESTED CASE IN THIS MATTER IS NOT PRECLUDED BY THE DECISION IN DOCKET 06-00232

The company has submitted that Docket 06-00232 is a binding precedent controlling the outcome of this matter.[3] Embarq further argues that Docket 06-00232 created the definitive D.A. policy for the State of Tennessee and as such the company may reduce the free call allowance to one.[4] The Consumer Advocate disagrees such a uniform policy exists or that the outcome of Docket 06-00232 forecloses the possibility of a contested case in this matter. As a matter of practice, free D.A. allowance requirements have always been set and modified on an individual company basis as evidenced in a long chain of separate tariff filings and dockets.[5]

From a practical standpoint, it must also be considered there is a widespread disparity between the eighteen incumbent telephone companies in regards to D.A. service. For many Tennessee consumers there is no charge for D.A. service. Rather, just as it was for Embarq and AT&T's customers prior to 1997 and 1999 respectively, D.A. service remains a basic and free

---

[3] *Id.*, 13-16 "Issue II."

[4] If Docket 06-00232 is a binding precedent that set the "State Policy" as requiring one free D.A. call allowance, the company failed to take advantage of the "State Policy" when it filed for D.A. call allowance reduction from six to three in Docket 06-00288 rather than the one call allowance approved earlier in Docket 06-00232.

[5] Docket 96-01423, Docket 99-00391, Docket 04-00416, Tariff 050564 (withdrawn 5/27/05), Docket 06-00232, Docket 06-00288, Docket 07-00188, Docket 07-00269 and Docket 08-00021.

service for many consumers served by a number of rate of return regulated incumbents and Citizens Telecommunications Company of Tennessee (d/b/a Frontier Communications Solutions) ("Citizens Telecom-Tennessee").[6] On the other end of the spectrum, competing local exchange carriers have no regulatory D.A. requirements whatsoever. Thus, there is no uniform State policy for D.A. service.

Embarq has asserted the Consumer Advocate "understood" that the current D.A. policy in this State is "one call" in Docket 07-00188.[7] This is an incorrect characterization. The remedy sought by the Consumer Advocate in Docket 07-00188 was the preservation of "at least one call" in its *Complaint & Petition to Intervene*. The use of the words "at least" was intentional as there was and remains the certain possibility the Consumer Advocate, after discovery was concluded, would have presented evidence and testimony that supported that more than one call was needed to serve the public interest.[8] The TRA would have been well within its authority to increase AT&T's call allotment in that matter as well as the matter presently before it.

The TRA's authority to impose such requirements upon price cap regulated companies was clearly affirmed by the Court of Appeals. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700, *7 (Tenn.Ct.App.2002) (Attachment "A"). D.A. requirements were first imposed on Embarq in Docket 97-01423 and later upon AT&T in Docket 99-0391.

---

[6] Citizens Telecommunications Company of Tennessee has filed a tariff to introduce charges for D.A. service. This price cap regulated company currently does not charge for D.A. use. See Docket 08-00021 and footnote 25 of this brief. In addition, some rate of return incumbents have been allowed to charge for D.A. service.

[7] Docket 07-00188 considered AT&T's proposal to eliminate the D.A. call allotment in Tariff 20070283.

[8] It is the intention of the Consumer Advocate to press upon the Authority the need for increased D.A. calls where evidence and expert testimony supports such measures. D.A. service is essential for Tennessee consumers.

Since 2004, the policy requirements of both Embarq and AT&T have been in a state of flux as the rates for D.A. have climbed while the number of free D.A. calls have been reduced. The public benefit of a D.A. service has been subject to a general decline from a consumer's perspective as rates have risen and the number of free calls has dwindled. Since 2004, these changes have been approved without the benefit of an evidentiary record. There has been no opportunity for an evidentiary hearing on these matters since 1999. The issue of D.A. service allotment is particularly ripe for review in light of recent tariff proposals.

On July 25 2007, AT&T filed a tariff which sought to eliminate the company's free D.A. call allowance altogether.[9] This proposed tariff was considered by the Authority in Docket 07-00188. After years of permitting the free D.A. call allowance to be reduced, the Authority faced the extinction of a company specific policy that has served to balance the interests of the price cap regulated carriers and those of consumers. In Docket 07-00188, the agency unanimously concluded to convene a contested case to examine the issue.[10] Naturally, when a policy that has served the public interest so well is threatened with extinction the agency is well within its province to scrutinize and reconsider all proposals pertaining to that policy. As a result, the decision in Docket 07-0188 served as a watershed moment signaling a renewed interest and consensus of the directors in examining free D.A. allowances in the service of the public interest.

Although AT&T withdrew the proposed D.A. allotment tariff proposal and the docket

---

[9] As with Embarq's proposed tariff, the requirements of free D.A. calls for the disabled and those over age 65 would have remained in place.

[10] *Order Approving Tariff In Part And Suspending Tariff In Part For Ninety (90) Days, Convening A Contested Case Proceeding And Appointing A Hearing Officer*, Docket 07-00188.

was closed by the hearing officer in that matter, the issue remains a concern.[11] Beginning with Docket 07-00188, the agency has been consistent in convening contested cases to review the proposed D.A. call allowance tariffs of all three price cap regulated companies.[12] Embarq has not been singled out for a contested case in an arbitrary or capricious manner by the TRA. Rather, the agency has committed to making such a decision in the service of the public interest based upon an evidentiary record, as Director Kyle expressed during deliberations when this contested case was convened.

> "I think I owe it to Tennessee consumers to pause right now and take the time to research, to review evidence, and to build a record about how they will be impacted by reducing the call allowance from three to one. Also I would like to hear from the Consumer Advocate on this issue. So I would be in favor of suspending the portion of the tariff concerning directory assistance so we could have a hearing." See *Transcript of Authority Conference*, (December 17, 2007) p.14.

Director Jones has expressed similar and consistent comments about the need for a contested case and an evaluation of various perspectives and relevant data in Docket 04-00416, Docket 06-00232, Docket 06-00288 and Docket 07-00188.[13] The Consumer Advocate readily agrees with these determinations. D.A. is an essential part of the telecommunications policy in this State. However, since D.A. service was determined to be a non-basic service under price cap regulation, the rates charged have risen sharply despite the General Assembly's intention to foster

---

[11] AT&T withdrew the D.A. tariff on November 16, 2007. The hearing officer closed the docket the same day.

[12] Docket 07-00188 for D.A. tariff filed by AT&T, Docket 07-00269 for a D.A. tariff filed by Embarq and Docket 08-00021 for a D.A. tariff filed by Citizens Telecom-Tennessee.

[13] See *Transcript of Authority Conference*, (August 20, 2007) p.69.

competition, which would presumably control prices.[14]

The legislature has charged the Authority with safeguarding the public interest of consumers. Tenn. Code Ann. § 65-4-123. The term "public interest" is not defined by statute.[15] The General Assembly and Governor have appointed and delegated to TRA directors the role to determine what serves the "public interest" in matters of regulated public utilities. In that regard, public policy is not set in stone, but rather is subject to healthy debate. At times, it must be reviewed in order to adapt to changing realities and to meet objectives. The decision to convene a contested case in this matter can not be considered the product of an arbitrary or capricious decision but rather of evolving opinions and circumstances currently surrounding concerns for the public interest. D.A. policy is far from a settled matter. Historically, it is obvious from the public record the TRA directors have not shared total agreement on all details and specifics of D.A. policy.[16]

Indeed, TRA directors have indicated some differences of opinion in one form or fashion regarding D.A. policy issues and procedure for a decade. Director Kyle has dissented on D.A. issues and decisions made by a majority of directors.[17] Director Jones has dissented from majority

---

[14] One would observe that the cost of service for providing most traditional telecommunication services has been generally lowered by advancing technology, although the Consumer Advocate realizes this is irrelevant in application to the rate increases of price cap regulated incumbents.

[15] Although Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B) employs the phrase "public interest" as grounds for the Authority to suspend a tariff, neither it nor other relevant statutes define its meaning. It is left to the TRA to determine such matters in carrying out Tennessee's Telecommunications Policy.

[16] Eight current and former TRA directors, with varied opinions on different D.A. tariffs, have served as TRA directors since 1997, the year the issue of D.A. call allowance was first determined for a company.

[17] Director Kyle dissented from the majority decision in Docket 96-01423 which concluded that D.A. was not a basic service. The director has repeatedly expressed interest and commented on D.A. policy and most recently dissented and concurred in Docket 07-00188. Her dissent in the AT&T docket was with regard to the majority's

decisions in allowing reductions in the respective D.A. allotments of individual companies without a contested case.[18] Disagreements or a lack of complete consensus among directors continues on matters of public interest to this day as evidenced by the differing opinions on the matter of the suspension of the rate increase in this docket.[19]

Reasonable minds will disagree on the policies serving the public interest. These differences of opinion are a sign of the natural progression of how regulatory public policy is debated, implemented and reconsidered by directors. This is how the legislature intended the TRA to function in determining public policy rather than as evidence of arbitrary or capricious decisions.[20] One must consider the structure of the TRA as tailored by legislation. There are four serving directors. Tenn.Code Ann.§ 65-1-101(a). Each matter before the agency is assigned in a random fashion to the extent practicable to hearing panels of three directors. Tenn.Code Ann.§ 65-1-104(d).

Under this structure, devised by the legislature, hypothetically similar dockets with different hearing panels could reach differing and opposing conclusions on determinations that

---

decision not to suspend the rate increase. See Footnote 12 of the *Order* convening a contested case in Docket 07-00188.

[18] Director Jones dissented from approval of tariffs reducing the number of free D.A. service allotments in his Concurrence and Dissent in Docket 04-00416. Director Jones further referenced and incorporated this *Dissent* in the Final Orders of Docket 06-00232 and Docket 06-00288 respectively.

[19] *Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008); *Dissent of Director Ron Jones to the Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008).

[20] In appointing TRA directors, the law instructs the governor and the respective speakers of both chambers of the legislature to ensure that people of diverse background, education, professional experience, ethnicity, residence, heritage and perspective serve in these important positions. Tenn.CodeAnn. § 65-1-101 (2004). This mandate promotes broader consideration, debate and thought to matters of public policy determined by TRA directors.

serve the public interest on 2 to 1 (two to one) votes by directors.[21] This is not to suggest that the General Assembly sought to encourage differing outcomes on issues of the public interest. Neither would the Consumer Advocate suggest that the determinations of directors are not governed by statutory and constitutional boundaries. *Consumer Advocate v. TRA,* 2005 WL 3193684*9 (Tenn.Ct.App.2005) (Attachment "B"). Discretionary decisions must take the law and the facts into account. *Ballard v. Herzke*, 924 S.W. 2d 652, 661 (Tenn.1996). Yet, the public interest determination is a matter of discretion for the directors. In regards to the novel policy initiative of D.A. service call allotments and public interest requirements guiding such tariff offerings of price cap regulated companies, the discretion of the agency is clear and certain. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700, *7 (Tenn.Ct.App.2002) (Attachment "A").

TRA directors have the discretion to change, modify or further develop their opinions on matters of public policy and form a consensus. As evidenced by the decisions in Docket 07-00188, the current proceeding, and in Docket 08-00021, the convening of a contested case has unanimously been deemed an appropriate procedure for reviewing directory assistance polices. In exercising this discretion, directors may reach their own independent and reasonably supportable conclusions in matters of public policy.

---

[21] This hypothetical is not present here. While not a voting member of the panel in the matter at hand, Director Hargett is a voting member of the hearing panel which has been assigned to handle the D.A. tariff filing of Citizens Telecom of Tennessee in Docket 08-00021. Director Hargett voted in favor of a contested case and for suspending the introductory rate for D.A. service in that matter. This indicates considerable consensus among all four serving directors.

II. D.A. SERVICE REQUIREMENTS AND PUBLIC POLICY HAVE BEEN IMPOSED AND ALTERED ON A COMPANY-BY-COMPANY BASIS FOR A DECADE

The D.A. tariffs of each company have been established and changed on multiple occasions in separate dockets and tariff filings.[22] Thus, the D.A. requirements of each price cap regulated company have seldom been in complete alignment since 2004. Rather, the policy guiding each company has been in flux.

When companies have sought to alter the free D.A. allotment required by the TRA, they have done so on an individual and separate basis by simply filing a tariff. The companies have never sought to petition the agency for a generic proceeding in regards to D.A. service. They simply filed tariffs without any attached analysis or formal request except when responding to *Petitions* filed by the Consumer Advocate after the tariff had been filed. This trend first began in 2004 when AT&T filed a tariff reducing the D.A. allotment from six (6) to three (3) in Docket 04-00416. During that matter AT&T argued, in response to the Consumer Advocate's *Complaint & Petition to Intervene*, that the decisions in Docket 96-01423 and 99-00391 did not establish a general rule or binding precedent.[23] Instead, AT&T asserted that the orders in those specific dockets reflected a balance of consumers' interests in the context of specific tariff filings.[24]

This trend of company tailored D.A. policy continues to this day. On January 16 of this year, Citizens Telecommunications Company of Tennessee (d/b/a Frontier Communications

---

[22] Docket 96-01423, Docket 99-00391, Docket 04-00416, Tariff 050564 (withdrawn 5/27/05), Docket 06-00232, Docket 06-00288, Docket 07-00188, Docket 07-00269 and Docket 08-00021.

[23] Docket 04-00416, *Order Declining to Convene a Contested Case*, filed 9/2/05, p. 5.

[24] *Id.*

Solutions) ("Citizens Telecom-Tennessee") filed a tariff that would introduce charges for D.A. service but would allow for two (2) free calls.[25] This illustrates that two of the three price cap companies have proposed tariffs that are unique and designed to meet the business demands of the respective companies.[26] There are also several significant differences between all three companies that must considered. As Embarq ably pointed out, AT&T is the largest carrier in Tennessee by far with "90% of the consumers" in the state.[27] Embarq, AT&T and Citizens Telecom-Tennessee are very different companies in terms of service area and numbers of consumers. In this regard, they are clearly far from similarly situated.

In setting D.A. public policy, the agency may take into consideration the vast differences between the companies in coming to a decision that serves the public interest. The Consumer Advocate submits there are additional factors that may be examined in determining the free D.A. allowances of each company. The directors may wish to examine the "churn" rate of a company, the availability of alternatives available to a community or service area to accurately locate numbers and the over all impact of the D.A. rates in relation to the free call allowance upon communities and low-income households within that particular community.

III. THE TRA HAS THE STATUTORY AUTHORITY TO SUSPEND A RATE INCREASE IN THE SERVICE OF THE PUBLIC INTEREST

The record in this proceeding is quite clear that the parties and the hearing officer are in

---

[25] Tariff 20080024; The Consumer Advocate erred in the *Brief in Response to the Request of the Hearing Officer* (January 31, 2008) when it cited Citizens's current D.A. policy as offering three (3) free calls. Tariff 2005654, which introduced D.A. service rate and three (3) call allotment, was withdrawn on 5/27/05 and was never effective. The Consumer Advocate regrets this error.

[26] Embarq appears to suggest it is merely trying to mirror the tariffs of AT&T rather than design a tariff strictly related to the company's and consumers' needs. *See* Transcript of Initial Status Conference, 1/3/08, p. 11.

[27] *See* Docket 07-00269,Transcript of the Initial Status Conference, 1/3/08, p. 18, line 19.

complete agreement that the agency can not set rates for a non-basic service, assuming all price cap regulations have been complied with.[28] D.A. is not a basic service as the term is applied in the price cap statute. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700, *3-4 (Tenn.Ct.App.2002). Thus, Embarq may set the rate for directory assistance as it deems appropriate subject to certain statutory limitations governing price cap regulation. Tenn.Code Ann.§ 65-5-109 (h). This issue is well settled.

The matter at bar is whether the agency may on its own motion suspend a rate increase proposed by a price cap regulated incumbent telephone company.[29] Notably, there is a distinction between the setting of rates, an act which carries with it a sense of permanence, and the temporary suspension of a rate increase in the public interest pending a hearing. At the conclusion of this proceeding or perhaps before, the agency will at some point in time allow the rate increase to go into effect. The agency is not setting rates, it has merely suspended a rate increase on its own motion by a majority of directors pending a hearing. The TRA is authorized by statute to do so. Tenn.Code Ann.§ 65-5-101 (c)(3)(iii)(B). The rate charged for D.A. service impacts the value and public benefit of the number of free D.A. calls determined for consumers. The existence of the TRA's authority to suspend a rate increase in the public interest can not plausibly be in doubt.

The company has opined that the price cap regulation statute strictly controls when

---

[28] *Petition for Appeal* (February 29, 2008) p.9; *Initial Order*, (February 14, 2008) p. 4-5; *Brief of the Consumer Advocate at the Request of the Hearing Officer*, (January 31, 2008) p. 3; *Brief of UTSE* (Embarq) (January 31, 2008) p. 6.

[29] Embarq concedes on p. 12 of the *Petition for Appeal* (February 29, 2008) that the Hearing Officer correctly concluded that the TRA can suspend a tariff in the public interest. However, the company's assertions on pages 7-10 appear to imply that if headroom is present under the price cap, the agency would be precluded from suspending the rate increase on public interest grounds. Thus, the Consumer Advocate briefs the issue.

Embarq may increase its rates.[30] Further, the company submits that there "is no public interest standard that can be applied to Embarq's DA rate increase" because D.A. is classified as a non-basic service and the company can set rates as it deems appropriate when there is sufficient headroom.[31] By this reasoning, all rate increases for telephone communication services filed by an incumbent telephone company under price cap regulation cannot be suspended in the public interest by the agency. A stand alone reading of Tenn.Code Ann. § 65-5-109(h) supports the company's conclusion. However, statutory provisions are not construed on a stand alone basis. They must be construed in harmony with other relevant sections of the statute. The acceptance of Embarq's line of argument would result in a distorted and unnatural construction rendering meaningless the clear and unambiguous language provided in Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B).

Legislative intent is ascertained from the natural and ordinary meaning of the statutory language read "within the context of the entire statute, without any forced or subtle construction which would extend or limit its meanings." *State v. Butler*, 980 S.W. 2d 359, 363 (Tenn.1997). Strained interpretations must be avoided that would render portions of a statute inoperative or void. *Consumer Advocate v. Greer*, 967 S.W. 2d 759, 761 (Tenn.1998). Thus, if the language is clear and unambiguous, the particular language in dispute is read within the context of the entire statute in a manner that would not produce an unreasonable or unnatural interpretation while expressing the full intent of the General Assembly.

In 2004, the General Assembly provided statutory standards for the suspension of tariffs

---

[30] *Id.* p. 8-9.

[31] *Id.* 8.

establishing rates filed by incumbent local exchange carriers. Tennessee Public Acts of 2004, Public Chapter 545. While setting a high standard for a complaining party to prove a tariff suspension is warranted, the amending law ("2004 Act") also specifically allowed the agency to retain the discretion to suspend a tariff on its own volition and independent judgment.

> The authority may suspend a tariff pending a hearing, on its own motion, upon finding such suspension to be in the public interest. The standard established herein for suspension of tariffs shall apply at all times including the twenty one (21) or one (1) day period between filing and effectiveness; Tenn.Code Ann.§ 65-5-101 (c)(3)(iii)(B).

The 2004 Act, enacted nearly a decade after price cap regulation came into effect, was geared specifically toward the tariffs of incumbent local exchange telephone companies that establish rates for telecommunication services. Tennessee Public Acts of 2004, Public Chapter 545; Tenn.Code Ann.§ 65-5-101(c). Without question, the aim of the 2004 Act was directed specifically in application toward price cap regulated companies such as Embarq.[32] It is a basic tenant of statutory construction that it is presumed that the General Assembly knows the existing state of the law when it enacts new legislation. *Blankenship v. Estate of Bain*, 5 S.W. 3d 647, 651 (Tenn.1999); *Still v. First Tennessee Bank*, 900 S.W. 2d 282, 285 (Tenn.1995). Further, it must be presumed the legislature chose its words carefully. *State v. Medicine Bird*, 63 S.W. 3d 734, 754 (Tenn.Ct.App.2001) (cert.denied).

If the General Assembly had intended for a distinction between basic and non-basic services to be made in the application of the suspension standards in Tenn.Code Ann.§ 65-5-101(c), it would have done so. However, no such distinction or exception was made by the

---

[32] Incumbent telephone companies that are not price cap regulated can not simply file a tariff to raise the rate for most if not all services, but rather must file a rate case and be subject to a contested case as they are rate of return regulated.

General Assembly within the 2004 Act between that of a tariff that establishes rates for basic or non-basic services that would preclude a suspension on public interest grounds. In clear and unambiguous language Tenn.Code Ann § 65-5-101(c) applies to any tariff filed by an incumbent telephone company that files tariffs proposing rates and terms for service. Thus, the provisions of Tenn.Code Ann. § 65-5-109 should not be considered a controlling authority forbidding the suspension of the D.A. rate increase under the mandate inherent in Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B). To do so would render the directives of the 2004 Act meaningless and place unlawful constrainst on the agency's regulatory powers.

Embarq also submits that the TRA's approval of the company's 2007 annual price cap filing in Docket 07-00220 requires the agency to approve the rate increase without delay.[33] The company further submits in a footnote that the public interest determination for Embarq's D.A. rates was made during the same proceeding in which the annual price cap filing was approved.[34] The Consumer Advocate must disagree. When the TRA concludes that headroom exists and rates for basic and non-basic services *may* be increased, such a finding is not a blanket determination upon all future tariffs filed. Published tariffs are binding on the company and its customers and have the effect of law upon the same. *GBM Communications, Inc. v. United Inter-Mountain Telephone Company*, 723 S.W. 2d 109, 112 (Tenn.Ct.App.1986) (cert.denied). Thus, the wording and application of proposed and effective tariffs are still subject to approval and scrutiny before the Authority. The conclusion that headroom exists does not preclude the Authority from acting in the public interest in suspending a tariff that increases rates under

---

[33] *Petition for Appeal* (February 29, 200). p.10.

[34] *Id.* p. 12, second paragraph of footnote 18.

Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B).

IV. THE SUSPENSION OF THE D.A. RELATED PORTIONS OF THE TARIFF WERE MADE IN THE PUBLIC INTEREST

The Consumer Advocate did not request a suspension for the D.A. rate increase portion of the proposed tariff. A majority of directors did so on its own motion.[35] During deliberations, Director Kyle noted that the rate increase and the corresponding reduction in the free D.A. allowance "may roll in together".[36] The Consumer Advocate would submit that there is a relationship between the rate charged for D.A. calls and the number of free D.A. uses the agency mandates in the service of the public interest. The higher the charge, the more important the number of free D.A. calls become to consumers. In other words, the TRA may need to determine the number of the free D.A. allotment in relation to the standard rate set by the company.

For example, assume a price cap regulated company filed a tariff that charges $0.10 per D.A. service use and no free calls are allowed. The TRA may determine the price is fairly low and no free calls are required to serve the public interest. In another example, the agency may determine that another price cap regulated company must provide a dozen free D.A. calls per month to serve the public interest if it proposes a $5.00 charge for each individual D.A. service call. The agency has no authority to set the rate. The rates are determined by the company, subject to price cap requirements. However, the TRA can set the D.A. call allowance in relation to the rate set by the company. As such, if the agency is setting the call allowance in relation to the rate deemed appropiate by the company, then the suspension of the rate increase for D.A.

---

[35] *Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008).

[36] Transcript of Authority Conference, (December 17, 2007) p.15.

service has a rational basis.

As pointed out by Embarq, in Docket 07-00188 concerning AT&T's D.A. elimination tariff, the hearing panel did allow the rate increase for D.A. service to go into effect while suspending the portion of the tariff that eliminated free D.A. calls. However, this was not a unanimous decision. Director Kyle dissented from the portion of the decision in that matter that allowed AT&T's rate increase to go into effect.[37] During the deliberations of the hearing panel in convening a contested case in this matter, Director Kyle repeated her objections of allowing a D.A. rate increase to go into effect pending a hearing on D.A. policy.[38] Chairman Roberson, whom in Docket 07-00188 had voted to allow the D.A. rate increase to go into effect immediately in that matter, took a brief recess to consult with General Counsel as reflected in the record.[39] Chairman Roberson then voted with Director Kyle to suspend the rate increase.[40] Again, as briefed earlier, TRA Directors may change or modify their opinions on what serves the public interest so long as their conclusions are reasonably and logically supportable.[41]

The company has raised issues of equal protection and unfair or arbitrary treatment. The Consumer Advocate would tend to agree with the proposition that the nature of discrimination is unequal treatment among like kinds. *Rivergate Wines v. City of Goodlettsville*, 647 S.W. 2d 631,

---

[37] See Footnote 12 of the *Order Approving Tariff In Part And Suspending Tariff In Part For Ninety (90) Days, Convening A Contested Case Proceeding And Appointing A Hearing Officer* in Docket 07-00188.

[38] Transcript of Authority Conference, (December 17, 2007) p.14.

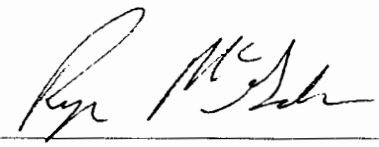
[39] Id., 15-16.

[40] Id., 17.

[41] See pages 6-9 of this brief.

636 (Tenn.1983). However, as briefed earlier, the price cap regulated incumbent telephone companies are far from similarly situated entities.[42] These companies serve different markets, possess incomparable and unique service territories, and have vastly different volumes of services and service lines. Presumably, they have varied earnings and price cap headroom.[43] The Consumer Advocate would point out that *Rivergate Wine* includes the proposition that in the exercise of police powers, the government may burden one or a few for the public good. *Id.* 635. Furthermore, the Court applied a rational basis test. *Id.* The Consumer Advocate would submit that if there is a rational basis for the rate suspension and that any suspension is temporary pending a hearing, such action is valid under the law.

Respectfully Submitted,



RYAN L. McGEHEE, B.P.R. # 025559
Assistant Attorney General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-5512 (phone)
(615) 532-2910 (facsimile)

[42] See pages 10-11 of this brief.

[43] The Consumer Advocate does not have ready access to the Annual Price Cap Filing of the companies. They are filed under seal and treated as confidential.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complaint and Petition to Intervene was served on the party below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 10 day of March 2008.

Edward Phillips, Esq.
Embarq Corporation
1411 Capital Boulevard
Wake Forest, NC 27587-5900

Ryan L. McGehee
Assistant Attorney General