

**BEFORE THE TENNESSEE REGULATORY AUTHORITY AT
NASHVILLE, TENNESSEE**

January 8, 2009

IN RE:

**UNITED TELEPHONE-SOUTHEAST, INC. D/B/A
EMBARQ CORPORATION TARIFF FILING TO
INCREASE RATES IN CONJUNCTION WITH THE
APPROVED 2007 ANNUAL PRICE REGULATION
FILING**

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**DOCKET NO.
07-00269**

ORDER APPROVING DIRECTORY ASSISTANCE TARIFF

This matter came before Director Eddie Roberson, Director Sara Kyle, and Director Mary W. Freeman of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on December 15, 2008 to consider the tariff filing regarding the request to decrease the number of Directory Assistance (“DA”) call allowances filed by United Telephone-Southeast Inc. (“UTSE”) d/b/a Embarq Corporation (“Embarq” or “Company”) on November 19, 2007.

BACKGROUND

Embarq’s tariff, filed on November 19, 2007, increased residential local measured rates from \$15.45 to \$16.09 per month. The tariff sought to increase the rate for Directory Assistance (“DA”) from \$0.50 to \$0.95 per call and reduce the free call allowance from three to one. Accordingly, customers would be charged for any second DA call made in any one month. Free DA for visually or physically disabled persons and subscribers sixty-five years or older would remain intact.

The panel considered the tariff filing at its regularly scheduled Authority Conference on December 17, 2007. The panel voted unanimously to approve the rate increases in the tariff, with the exception of Directory Assistance, after finding that the Company had sufficient headroom based on

its 2007 price regulation plan.¹ As to the provisions of the tariff filing relating to DA, the panel found that the public interest required that the Authority research and review the impact on Tennessee consumers of reducing the call allowance from three calls to one call prior to making a decision on Embarq's DA proposal. As such, the panel voted unanimously to suspend the portion of the tariff pertaining to call allowances, convene a contested case, appoint a hearing officer to prepare this matter for hearing and grant the Consumer Advocate and Protection Division of the Office of the Attorney General for the State of Tennessee's ("Consumer Advocate") *Petition to Intervene*. In addition, a majority of the panel voted to suspend the proposed DA rate increase pending a hearing.² Embarq was directed to refile the tariff, as approved, without the proposed DA changes.

Subsequently, the Company filed for reconsideration of the Authority's December 17, 2008 decision that suspended the rate increase for DA pending a hearing on the merits as well as for appeal of an *Initial Order* issued on February 14, 2008 by the Hearing on the same issue. At the March 24, 2008 regularly scheduled Authority Conference, a majority of the panel granted Embarq's *Petition for Appeal of the Hearing Officer's Initial Order* and the *Petition for Reconsideration of March 5, 2008 Order* and reversed the suspension of the provision of Tariff No. 2007-00456 regarding the proposed rate increase for Directory Assistance. However, the panel maintained the suspension of the provision of the tariff regarding the proposed reduction in DA call allowances for further consideration in the contested case proceeding.³

The Hearing Officer issued the *Order Setting Procedural Schedule* on March 26, 2008. Thereafter, substantial discovery occurred between the parties. Pre-filed Testimony was filed by Mark C. Hunter on behalf of Embarq and Terry Buckner and Michael D. Chrysler on behalf of the Consumer Advocate on July 1, 2008. Both Mark Hunter of Embarq and Terry Buckner of the

¹ See *In re: United Telephone-Southeast d/b/a Embarq 2007 Annual Price Regulation Filing*, Docket No. 07-00220.

² Director Jones voted in opposition to the portion of the motion to suspend the Directory Assistance rate increase. In his opinion, the rate increase should be allowed to go into effect. Director Jones filed a separate opinion setting forth his position.

³ See *Order Granting in Part and Denying in Part Petition for Reconsideration and Petition for Appeal of the Hearing Officer's Order* (May 5, 2008) for the minority's position as well as the complete procedural history of this stage of the docket.

Consumer Advocate filed Rebuttal Testimony on August 1, 2008. The Hearing Officer filed a *Notice of Hearing* on September 8, 2008 stating that the hearing would be held on October 6, 2008.

THE HEARING

The Hearing in this docket was held before the panel on October 6, 2008. The following parties participated in the Hearing through their respective counsel:

United Telephone-Southeast, LLC, d/b/a Embarq – Edward Phillips, Esq., Embarq,
Mailstop: NCWKFR0313, 14111 Capital Boulevard, Wake Forest, NC 27587.

Consumer Advocate – Ryan McGehee, Esq. and Joe Shirley, Esq., Office of the
Attorney General, 426 5th Avenue N., 3rd Floor, John Sevier Building, Nashville, TN
37243.

As a preliminary matter, the parties informed the panel that they had entered into stipulated agreement concerning some of the exhibits that were to be made part of the record. The exhibits are an overview of the Connected Tennessee report that was filed with Michael D. Chrysler's Direct Testimony on July 1, 2008 and another county-by-county assessment for Embarq's service territories in East Tennessee completed by Connected Tennessee in relation to the report that was filed with Mr. Chrysler's testimony.

During the Hearing, Mark C. Hunter, witness for Embarq, presented testimony to the panel and was subject to examination by the panel. Mr. Hunter's Pre-filed Testimony was entered into the record without objection. Terry Buckner and Mr. Chrysler appeared as witnesses on behalf of the Consumer Advocate. Mr. Buckner's and Mr. Chrysler's testimony was entered into the record without objection. No one from the public appeared and sought to be heard at the Hearing.

POSITION OF THE PARTIES

Embarq: Embarq argues that the Hearing Officer and Authority have failed to treat similarly situated regulated entities in a consistent manner concerning the reduction in DA allowances. Embarq avers that the one DA allowance requested is consistent with the policy standard already

established by the Authority for DA allowance in Tennessee.⁴ Therefore, Embarq states that failure to approve Embarq's tariff as filed in this docket would not only aggravate the anti-competitive situation, but would sanction it by direct Authority action. Embarq states that it would consider this action to be highly discriminatory against Embarq due to the treatment already afforded to AT&T by the Authority.⁵

Embarq additionally argues that the two other major competitors in its area, Charter Communications and Bristol Tennessee Essential Services do not provide any DA call allowances to their customers and do not offer the exemptions that Embarq offers, such as to disabled customers. Embarq deems this situation as anti-competitive because the Authority requires Embarq to render these services at no charge while not requiring other regulated competitors to do the same.⁶

Embarq contends that local directory assistance alternatives are numerous, easily accessible and sometimes even free of charge. Embarq states that local directory assistance can be retrieved from various search engines on the Internet, telephone directories that are periodically published and free services such as 1-800-FREE411.⁷

Consumer Advocate: The Consumer Advocate disagrees with Embarq's position that the Authority established a "definitive DA policy for the State of Tennessee" through its decision regarding the AT&T tariff in Docket No. 06-00232. The Consumer Advocate maintains that as a matter of practice, free DA call 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.⁸ The Consumer Advocate also argues that the price cap regulated companies differ by service territory,

⁴ *Post-Hearing Brief of United Telephone Southeast LLC d/b/a Embarq*, p. 8 (October 31, 2008).

⁵ *Direct Testimony Mark C. Hunter*, p. 10 (July 1, 2008).

⁶ *Direct Testimony of Mark C. Hunter*, p. 9 (July 1, 2008).

⁷ *Direct Testimony of Mark C. Hunter*, pp. 11-12 (July 1, 2008).

⁸ *Response of the Consumer Advocate to Embarq's Petition for Appeal of the Hearing Officer's Initial Order*, p. 3 (March 10, 2008).

services provided, number of lines and customers, rates and available headroom, and are therefore, not similarly situated.⁹

The Consumer Advocate requests that the Authority maintain Embarq's three call DA allowance and to direct the company to better promote the existence of the exemptions for those with disabilities and those age 65 and older.

The Consumer Advocate avers that the proposed reduction in the DA call allowances would further erode a benefit of subscribing to affordable wireline telecommunication services in Tennessee. The Consumer Advocate argues that while wireless and Internet providers offer alternative modes of communication and information services, wireline DA remains a significant service to Embarq's customers. Additionally, although landline alternatives such as 1-800-FREE411 are available, such services are advertised almost exclusively on line.¹⁰

The Consumer Advocate states that Embarq's anti-competitive argument is without merit, arguing that Embarq's current level of DA call allowances is not anti-competitive but rather puts them at a competitive advantage. Embarq states that its two major competitors, Charter and BTSE do not provide any DA call allowances. The Consumer Advocate argues that Embarq has wide latitude on the pricing of its products and can charge the price it deems appropriate for DA services, notwithstanding, the number of DA call allowances. The Consumer Advocate states that no evidence was presented to suggest that a call allowance prevented the Company from competing or retaining existing customers.¹¹ Furthermore, true competition for telecommunications services should drive the prices down.¹²

⁹ *Post-Hearing Brief of United Telephone Southeast, LLC d/b/a Embarq*, p.16 (October 31, 2008).

¹⁰ *Post Hearing Brief of Consumer Advocate*, p. 2 (October 31, 2008).

¹¹ *Post-Hearing Brief of the Consumer Advocate*, p. 8 (October 31, 2008).

¹² *Rebuttal Testimony of Terry Buckner*, p. 3-4 (August 1, 2008).

FINDINGS AND CONCLUSIONS

The panel considered Embarq's request to reduce DA call allowances at its regularly scheduled Authority Conference held on December 15, 2008. A majority of the panel¹³ found that although Embarq and AT&T are both price cap regulated incumbent local exchange companies ("ILECs"), the companies differ by territory served, services provided, number of lines and customers, rates and available headroom. The majority further found that neither party presented an adequate comparison of AT&T and Embarq to definitively determine if the companies are sufficiently similar to necessitate identical treatment of DA call allowances. However, due to the availability of alternatives to DA, the majority of the panel voted, as a matter of policy, to decrease the number of monthly free call allowances from three to one.

Before the reduction in call allowances becomes effective, Embarq was directed by the majority that it must demonstrate that it has sufficient headroom given the rate increases for other non-basic services that went into effect December 13, 2008. Therefore, the majority voted to require Embarq to submit information demonstrating the revenue effect of reducing the DA call allowance from three to one and compliance with its price regulation plan. Concurrent with that filing, Embarq shall re-file its tariff with an effective date of thirty days after the filing date to allow time for any party to file comments in the record regarding sufficient headroom.

Additionally, in order to better promote the DA exemptions for those with disabilities and those over the age of 65, the majority voted to direct Embarq to (1) provide a monthly bill message regarding the availability of and ways to apply for the exemptions;¹⁴ (2) include language regarding

¹³ Director Kyle offered a separate motion with her findings and conclusions in which she dissented from the majority's position. Director Kyle's motion set out her consistently held position that DA is an essential service to the citizens of Tennessee while acknowledging *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700 (Tenn. Ct. App. 2002), the 2002 Court of Appeals decision which held that DA was a non-basic service. While also recognizing the state of the DA marketplace, Director Kyle maintained her longstanding policy to protect the consumers of Tennessee from absorbing cost of services that she believed were included in their monthly telephone bills. Therefore, Director Kyle voted to deny the tariff filing.

¹⁴ At the Hearing, Embarq was questioned whether it was feasible for the Company to provide such monthly notice. On December 19, 2008, Embarq filed a letter with the Authority stating that it would be able to provide such monthly notice.

DA exemptions in the published telephone directories; (3) include language regarding DA exemptions in a welcome package; and (4) provide the exemption registration forms on the company website within 30 days of re-filing the tariff.

Finally, the panel noted that DA tariffs have come before the Authority in a piecemeal fashion and the result has been a broad range of DA rates, terms and conditions. Although the record in this proceeding did not lead the panel to conclude that identical treatment of price regulated ILECs was necessary, a more comprehensive look at DA policy might demonstrate a need for, if not identical treatment of carriers, at least a more uniform policy. Therefore the panel voted unanimously to open a docket to explore the present treatment of DA call allowances for price regulated ILECs and competitive local exchange companies and to make recommendations for addressing the differences, including the promulgation of rules. The docket shall also explore alternatives to DA and methods to inform the public of such alternatives.

IT IS THEREFORE ORDERED THAT:

1. The provisions of Tariff No. 2007-00456 reducing the Directory Assistance call allowance from three free calls per month to one free call per month are approved.

2. Embarq shall submit to the Authority information demonstrating the revenue effect of reducing the Directory Assistance call allowance from three to one and compliance with its price regulation plan before the reduction in call allowance may take effect. Concurrent with that filing, Embarq shall re-file its tariff with an effective date of thirty days after the filing date to allow time for any party to file comments in the record regarding sufficient headroom.

3. Embarq shall promote the Directory Assistance exemptions for those with disabilities and those over the age of sixty-five by (1) providing a monthly bill message regarding the availability of and ways to apply for the exemptions; (2) include language regarding DA exemptions in the published telephone directories; (3) include language regarding DA exemptions in a welcome package; and (4) provide the exemption registration forms on the company website within thirty days

of re-filing the tariff.

4. A docket shall be opened to explore the present treatment of Directory Assistance call allowances for price regulated incumbent local exchange companies and competitive local exchange companies and to make recommendations for addressing the differences, including the promulgation of rules. The docket shall also explore alternatives to Directory Assistance and methods to inform the public of such alternatives.



Eddie Roberson, Director

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Sara Kyle, Director¹⁵



Mary W. Freeman, Director

¹⁵ Director Kyle concurred with the panel's decision to open a docket to explore the present treatment of DA call allowances for price regulated ILECs and CLECS and to make recommendations for addressing the differences, including the promulgation of rules.