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**

THE CONSUMER ADVOCATE'S MOTION TO RECONSIDER THE MAJORITY'S DECISION REGARDING A ONE CALL POLICY FOR EMBARQ

The Attorney General & Reporter Robert E. Cooper, through the Consumer Advocate and Protection Division ("Consumer Advocate") respectfully submits this motion for reconsideration of the final decision of the Tennessee Regulatory Authority ("TRA", "Authority"). Specifically, the Consumer Advocate seeks reconsideration of the decision made by a majority of the Hearing Panel in determining that a one call allowance policy for United Telephone Southeast LLC d/b/a Embarq ("Embarq") in providing Directory Assistance is sufficient to serve the public interest.

The Consumer Advocate is not seeking reconsideration of the unanimous decision of the Hearing Panel to open a generic docket to examine the treatment of D.A. policy of incumbent local exchange carriers and competitive local exchange carriers ("CLECs") or the determinations made in regard to promoting exemptions from D.A. charges. [1]

1 Although the Consumer Advocate does not object to a generic docket to examine these issues on a state-wide scale, the Consumer Advocate maintains that contested cases against price cap regulated incumbents such as AT&T and Frontier Communications, in dockets 08-00076 and 08-00021 respectively, are still required in order to timely

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). On December 15, 2008, the Hearing Panel deliberated. The *Order Approving Directory Assistance Tariff* was issued on January 8, 2009. Among the issues determined, a majority of directors directed that Embarq be allowed to lower the D.A. call allowance from three calls to one call.[2] Pursuant to TRA Rule 1220-1-2-.20, the Consumer Advocate moves the Hearing Panel for reconsideration. This motion addresses the decision of the *Majority* to lower the call allowance to one call only.

II. Embarq's Reliance Upon Case No. PUC-2008-00046 Before the Virginia State Corporation Commission is Misplaced

As part of the presentation of the company's position, Embarq has represented that the efforts of the telecommunications industry in Virginia to eliminate free D.A. call allowances are relevant to this proceeding.[3] Embarq's post-hearing brief went so far as to attach public comments of the staff of the Virginia State Corporation Commission ("Virginia Commission") staff in support of its argument. At the time the Hearing Panel in this matter made a decision, the Virginia proceeding was on-going.

On December 23, 2008, the Virginia Commission issued an order concluding the matter and denied the request of the telecommunications industry to eliminate the free call allowance.[4] Rather than eliminate the free call allowance, the commission lowered the call allowance from

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resolve their respective D.A. tariffs in order that they be modified to better serve the public interest.
2 Director Kyle dissented from the majority.
3 Post Hearing Brief of Embarq (October 31, 2008), p. 10; p. 17-19.
4 A copy of the order is provided at Attachment A.

three calls to two. Thus, Embarq's call allowance in Virginia is currently two calls.

The Virginia commission's rationale for maintaining a minimum two call allowance is grounded in a concern that without a free call allowance, consumers would be required to pay to obtain telephone numbers that are neither available in printed directories nor from alternatives to D.A. service.[5] The Consumer Advocate would note this is similar to the rationale the Hearing Panel in Docket 97-01423 relied upon in creating D.A. call allowances. More than a decade later, the rationale for a call allowance of more than one call remains. Furthermore, the proceedings in Virginia did not have the benefit of the comprehensive data and information compiled and publicly reported by Connected Tennessee, Inc. regarding the digital divide, and thus a disparity in terms of access to alternative D.A. services, that remains in this State in terms of income, education, race and geographic location.

Because Embarq made arguments based upon the aforementioned proceedings in Virginia, the Consumer Advocate urges the Hearing Panel to consider the actual outcome of that proceeding.

III. Access to Free Alternatives to Traditional D.A. Service Is Not Available to All Tennesseans

In the past, when companies have been allowed to lower the call allowance, the Authority 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.[6] However, it is undisputed that the alternatives to traditional D.A. service are either solely advertised upon or based in function on the internet. Thus, a household requires computer

5 *Id.*, p.6.
6 Wireless providers also provide directory listings. However, there is no free wireless call allowance and the rate is

ownership and Internet subscriber status to have access to alternatives to traditional D.A. service.

It is undisputed that the level of income a household makes is a determining factor in whether Internet access is present in the home.[7] 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 lower income households cannot afford access to the Internet will be subject to higher and higher rates for a service that was formerly 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. Given the current economic environment, it is the households not so abundantly blessed that will shoulder the burden of a lower call allowance and higher D.A. rates.

In this proceeding the Consumer Advocate has submitted evidence demonstrating not all consumers have access to these D.A. alternatives. The Connected Tennessee data has shown that a correlation exists in terms of access to the Internet in relation to the education level obtained.[8] The less education one has obtained, the less likely they will have access to the Internet in their home. The Connected Tennessee data has shown that a disparity exists in terms of race and Internet access.[9] Further, a disparity exists in terms of rural vs. urban areas.[10] Similarly, Mr. Chrysler's pre-filed Direct Testimony notes similar negative correlations in terms of computer

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generally $1.50 per call.

7 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 Chrysler (July 1, 2008).

8 *Id.*, p. 96 of Transcript, p. 2 of Summary.

9 *Id.*, p. 3 of Summary.

ownership with each of these factors.[11]

According to the Connected Tennessee 2007 survey, the state-wide average for household Internet access is only 65%.[12] 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. 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 affluence from which to access free alternatives and avoid the increasing rates for traditional D.A. service.

Furthermore, while the Consumer Advocate considers the alternatives to traditional D.A. service that have been discussed in this docket as viable for locating phone numbers, such alternatives are not full proof. The Staff Comments of the Virginia Commission Staff, which Embarq submitted in support of the company's post-hearing brief, notes that no evidence had been presented to demonstrate that alternatives to traditional D.A. service are able to furnish phone numbers not available in telephone directories or through a LEC's D.A. service.[13] The alternatives to traditional D.A. service may have problems with providing accurate phone listing information. Mr. Chrysler's pre-filed testimony indicated that a random sampling of one alternative, 1-800-FREE411, could not provide listing information for some phone listings that were *already listed* in one of Embarq's phone directories.[14]

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10 *Id.* p. 4 of Summary.
11 Direct Testimony of Mike Chrysler (July 1, 2008).
12 *Id.*, p.97-98 of Transcript, p. 5 of Summary.
13 Post Hearing Brief of Embarq (October 31, 2008) at Attachment 2: Staff Comments of the Virginia Staff, p. 9-10.
14 *See* Direct Testimony of Mike Chrysler (July1, 2008) and Consumer Advocate's Response to the Second Discovery Request of Embarq, Discovery Request 13 (filed July 18, 2009)

Thus, the Consumer Advocate urges the Hearing Panel to reconsider this aspect on this docket and the impact of reducing to one call allowance upon consumers in light of the current economic conditions.

IV. Embarq's D.A. Policy in Other States

Embarq has conceded it provides D.A. call allowances in half of the state jurisdictions it operates in. [15] What is specifically telling is the company's own tariff language employed in North Carolina concedes that a three call allowance is reasonable:

> 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.[16] Indeed, Embarq has provided D.A. call allowances of greater than one call without being ordered to do, such as in South Carolina.[17] Thus, the company freely gives a call allowance of greater than one call in one state without prodding from regulators to do so. Yet in Tennessee, where the company is under a legal obligation to provide a call allowance, Embarq finds the practice objectionable.

While the TRA has the absolute right to fashion a D.A. call allowance policy, the Consumer Advocate urges the Hearing Panel to reconsider its decision in this matter in light of the call allowance requirements and practices of Embarq in half of the jurisdictions the company operates in and in light of the current economic environment.

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15 Post Hearing Brief of Embarq (October 31, 2008), p. 17.
16 *Id.* attached D.A. tariff pages for Carolina Telephone and Telegraph Company and Central Telephone Company., both at pages 18.1, p3.
17 Transcript of Proceeding, (October 6, 2008), p. 60.

IV. CONCLUSION

For these reasons herein, the Consumer Advocate requests the Hearing Panel to reconsider the Majority's decision to allow the company to reduce the call allowance to one call.

Respectfully Submitted,

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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 23 day of January 2009.

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

Ryan L. McGehee
Assistant Attorney General

Attachment A

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, DECEMBER 23, 2008

APPLICATION OF

2008 DEC 23 A 11: 36

VIRGINIA TELECOMMUNICATIONS INDUSTRY ASSOCIATION

For authority to eliminate the current requirement for a Three-Free Call Allowance for Local Directory Assistance Service

CASE NO. PUC-2008-00046

FINAL ORDER

On June 11, 2008, the Virginia Telecommunications Industry Association ("VTIA") filed its application with the State Corporation Commission ("Commission") requesting the elimination of the requirement that Virginia's local exchange carriers ("LECs") include a monthly three free call allowance for local directory assistance ("DA") calls as part of dial tone telephone service. The VTIA requested that the requirement be eliminated to allow LECs to be on the same footing as other voice communications providers such as wireless, cable Voice over Internet Protocol ("VoIP"), or over-the-top VoIP.

On August 7, 2008, the Commission issued an Order for Notice and Comment that docketed the VTIA's application, required the VTIA to give notice to the public of its application, permitted interested persons to submit written and electronic comments thereon, directed the Commission's Staff ("Staff") to file comments relative to the application, and permitted the VTIA to file a response to the comments that were filed.

On October 24, 2008, the Staff filed its comments in this proceeding. As part of its filing, the Staff provided a summary of each comment and noted that comments were received from the following: Cox Virginia Telcom, L.L.C. ("Cox"), Verizon South Inc. and Verizon Virginia Inc. (collectively referred to as "Verizon"), Central Telephone Company of Virginia and

United Telephone Southeast, LLC (collectively referred to as "Embarq"), AT&T Communications of Virginia, LLC and TCG Virginia, Inc. (collectively referred to as "AT&T"), the Fairfax County Board of Supervisors ("Fairfax County") and the Communications Workers of America ("CWA"). Fourteen individuals also filed comments.[1]

The VTIA filed its Response to Comments ("Response") on November 7, 2008.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds as follows.

The current three free DA call allowance was established by Commission Order dated June 7, 1990, in Case No. PUC-1989-00025 ("1990 Order").[2] In the 1990 Order, the Commission reduced from eight to three the allowance for free DA calls that Virginia's LECs are required to provide to their customers. The Commission also indicated, however, that it would be appropriate to eliminate the three free DA call allowance if Virginia's LECs could formulate a mechanism "of charging only for those numbers that are available from the customer's printed directory."[3]

In support of its application, the VTIA does not suggest such a mechanism. Instead, the VTIA asserts that the free DA call allowance should be eliminated because there are now numerous other DA providers, many of which are not LECs and, therefore, are not required to provide DA free of charge.

Cox, Embarq and AT&T all filed comments supporting the VTIA's application and, in particular, the VTIA's contention that the three free DA call allowance should be eliminated

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[1] The fourteen individual commenters oppose the elimination of the three free DA call allowance.

[2] *See Application of the Virginia Telephone Association for Authority to Reduce the Free Call Allowance for Directory Assistance Calls,* Case No. PUC-1989-00025, 1990 S.C.C. Rep. 241 (June 7, 1990).

[3] *Id.*

given the numerous alternative, and non-regulated, choices for DA which now exist.[4] As explained by Cox, LECs provided a monopoly service when the three free DA call allowance was imposed in 1990, but customers can now "shop around for other directory options."[5] Cox and AT&T note further that other states have phased out or eliminated free DA call requirements.[6]

Verizon also supports the VTIA's application and the request that Virginia's LECs be placed on equal footing with other DA providers. As support for its contention that the free DA call allowance should be eliminated, Verizon provides data reflecting that it has seen significant declines in its DA call volumes and revenues from 2002 to 2007.[7]

Both Fairfax County and the CWA oppose the VTIA's request. Fairfax County notes that Verizon's Northern Virginia directory failed a recent Staff audit and contends that "eliminating the allowance would penalize those customers who are unable to locate an accurate listing in the directory and must call the local DA service provided by their local exchange company."[8] Fairfax County also asserts that alternative sources for DA are not comparable to DA provided

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[4] Cox September 22, 2008 Comments; Embarq September 22, 2008 Comments; AT&T September 22, 2008 Comments.

[5] Cox September 22, 2008 Comments at 3.

[6] *Id.* at 3, n. 4 (citing public service commission decisions from Kansas and Pennsylvania); AT&T September 22, 2008 Comments at 4.

[7] Verizon September 22, 2008 Comments at 3 (Verizon also filed a confidential version of its Comments, containing the specific percentage declines, under seal). Pursuant to the Commission's Order dated December 14, 2007, in Case No PUC-2007-00007 ("Deregulation Order"), Verizon's DA service has been deemed competitive. *See Application of Verizon Virginia Inc. and Verizon South Inc. for a Determination that Retail Services are Competitive and Deregulating and Detariffing the Same*, Case No. PUC-2007-00007, 2007 S.C.C. Ann. Rep. 225 (Dec. 14, 2007). However, the Commission also concluded in the Deregulation Order that Verizon should continue to be required to provide three free monthly DA calls to each of its customers. 2007 S.C.C. Ann. Rep. at 245. Thus, if the three free DA call allowance were to be eliminated in this proceeding, Verizon would have no restrictions on its DA service.

[8] Fairfax County September 22, 2008 Comments at 1.

by LECs and that such services tend to focus on providing business, rather than residential, listings.[9] Similarly, the CWA contends that alternative sources for DA are inferior to LEC DA because they are typically available via the Internet (and, thus, take more time to access or are completely unavailable to those without Internet access) or because customers are not aware of such services.[10]

The Staff acknowledges in its comments that a "more competitive environment" has developed with respect to directory assistance subsequent to the Commission's entry of the 1990 Order.[11] However, the Staff notes that no evidence has been submitted demonstrating that alternative DA providers have the capacity to furnish numbers that are not provided in LEC printed directories or the ability to provide all of the numbers that are available through LEC DA.[12] Thus, the Staff stated that "a directory listing allowance may still be in the public interest to ensure that customers are not forced to pay to seek telephone numbers that are neither available in their printed directory nor available from alternative DA providers, particularly for those that are not available because an error or omission by the customer's LEC."[13] As an alternative to eliminating the three free DA call allowance in its entirety, the Staff recommends that the Commission consider either establishing different call allowances for business and residential customers or gradually eliminating the DA call allowance over time.[14]

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[9] *Id.* at 3.

[10] CWA September 22, 2008 Comments.

[11] Staff October 24, 2008 Comments at 8-9.

[12] *Id.* at 10.

[13] *Id.* at 11.

[14] *Id.* at 11-12.

In its Response, the VTIA provides data from some of its members suggesting "that the demand for DA among Virginia customers is waning."[15] The VTIA contends that this reduction in demand makes it difficult for LECs to recover their costs associated with providing DA and asserts that the Commission is required, in accordance with Va. Code § 56-235.5:1, to "reduce or eliminate" requirements that "do not permit" an LEC to recover the costs of its products and services.[16] The VTIA also contends that the reduction in demand "is due in great part" to the vast number of DA choices that are now available to consumers.[17]

The VTIA argues that the three free DA call allowance places LECs at a competitive disadvantage to other, non-regulated, providers of DA and denies each Virginia LEC the ability to make a "business decision ... that could eliminate economically inefficient aspects of their service offerings."[18] The VTIA also notes that the Commission has been instructed, pursuant to Va. Code § 56-265.4:4, to encourage competition and contends that the three free DA call allowance is "at odds with what is an increasingly vibrant and competitive marketplace."[19] In addition, the VTIA contends that "[i]t is not appropriate to address the past errors and omissions in the directories of some [LECs] by placing a regulatory burden on all LECs.[20]

Finally, the VTIA asserts that the Staff's suggestion for a "phased-in approach or plan that distinguishes between customer classes" should be rejected. The VTIA contends that such a course is not appropriate because there is no "significant demand or use of DA in any customer

[15] Response at 2-3 (providing data pertaining to Cox and Ntelos).

[16] *Id.*.

[17] *Id.* at 3.

[18] *Id.*at 4.

[19] *Id.*

[20] *Id.*

group" and because "[t]here is no evidence that the movement towards a more competitive marketplace" with respect to DA service will reverse.[21]

While we acknowledge that options for obtaining DA have increased in the years following the 1990 Order, we are unable to find just cause for the complete elimination of free LEC DA based on the information that has been provided in this proceeding. We are particularly concerned that the complete elimination of free LEC DA would require customers to pay to obtain telephone numbers that are neither available in their printed directories nor available through an alternative DA source. As correctly recognized by the Staff, the VTIA has not established that all of the numbers available through LEC DA can be, or are being, provided by alternative DA providers.

In accordance with the statutory duty of Virginia's LECs to provide "reasonably adequate service,"[22] and the Commission's statutory duty to supervise and regulate all public service companies providing service in the Commonwealth—including LECs—"in all matters relating to the performance of their public duties,"[23] we conclude that Virginia's LECs should continue to provide at least some free DA to their customers. Given the decline in LEC DA demand and the increase in alternative DA providers, we find it appropriate to reduce the current three free DA call allowance to two.[24]

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[21] *Id.*

[22] *See* Va. Code § 56-234.

[23] *See* Va. Code § 56-35.

[24] The alternative regulatory plans for certain Virginia LECs that have been approved by the Commission pursuant to Va. Code § 56-235.5 do not govern the price that may be charged for DA. *See, e.g., Application of Central Telephone Company of Virginia and United Telephone-Southeast, Inc., For Approval of its New Plan for Alternative Regulation*, Case No. PUC-2008-00008 (Final Order June 20, 2008) and *Application of Verizon Virginia Inc. and Verizon South Inc., For Approval of a Plan for Alternative Regulation*, Case No. PUC-2004-00092, 2005 S.C.C. Ann. Rept. 213 (January 5, 2005).

Therefore, IT IS ORDERED THAT:

(1) Virginia's LECs are hereby authorized to file tariffs to implement a reduction of the current three free DA call allowance to a two free DA call allowance.

(2) This case is dismissed.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Richard D. Gary, Esquire, Noelle J. Coates, Esquire, Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219-4074; C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and the Commission's Office of General Counsel and Division of Communications.