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.

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[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]

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[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

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[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

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[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

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[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.

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[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,

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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.

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