Voice | Data | Internet | Wireless | Entertainment

EMBARQ™

Embarq
Mailstop: NCWKFR0313
14111 Capital Boulevard
Wake Forest, NC 27587-5900
embarq.com

January 31, 2008

Mr. Eddie Roberson, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

filed electronically in docket office on 01/31/08

Re: Brief of United Telephone-Southeast, Inc. d/b/a Embarq

Docket No. 07-00269

Dear Chairman Roberson:

Please find enclosed for filing in the above-referenced docket the original and four (4) copies of United Telephone-Southeast, Inc.'s ("Embarq's") Brief. Embarq has already filed the enclosed brief electronically, however, this letter is the required follow-up to that filing.

An extra copy of this letter and the brief are enclosed. Please stamp those documents as "Filed" and return them to me in the enclosed self-addressed stamped envelope. Finally, please do not hesitate to contact me if you have any questions.

Sincerely yours,

Edward Phillips

HEP:sm

Enclosures

cc: Consumer Advocate and Protection Division

Edward Phillips
ATTORNEY
Voice: (919) 554-7870
Fax: (919) 554-7913
edward.phillips@embarq.com

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

| | | |
|---|---|---|
| In Re: | ) | |
| United Telephone-Southeast, Inc. d/b/a Embarq Tariff Filing to Increase Rates in Conjunction with the Approved 2007 Annual Price Cap Filing | ) | Docket No. 07-00269 |

**BRIEF OF UNITED TELEPONE-SOUTHEAST, INC.**

On December 21, 2007, the Hearing Officer issued a notice scheduling a status conference in the above-referenced docket for January 3, 2008. As a result, United Telephone-Southeast, Inc.[1] ("UTSE" and "Embarq")[2] and the Office of the Tennessee Attorney General Consumer Advocate and Protection Division ("Consumer Advocate") attended the status conference presided over by Hearing Officer Hotvedt. At the status conference, it was decided based on comments for the party and a determination made by the Hearing Officer pursuant to Authority Rule 1220-1-2-.12 that the matter in this docket centers on two legal issues and a question of policy. As a result of authority granted to the Hearing Officer under Rule 1220-1-2-.12, the parties were ordered to submit briefs on all three issues even though the Hearing Officer will address only the questions of law.

---

[1] By letter dated November 7, 2007, United Telephone-Southeast, Inc., a Virginia corporation, notified the Tennessee Regulatory Authority ("Authority") that it was converting to a limited liability company. The conversion occurred on November 9, 2007 and all appropriate filings were made with the Secretary of State of Tennessee thereafter. It is still being determined whether a petition to approve the resulting name change must be filed.

[2] While United Telephone-Southeast, Inc. (now United Telephone Southeast LLC) is doing business in Tennessee as Embarq, it will also be referred to as UTSE for historical discussions in this brief. As the Hearing Officer may recall, prior to its separation from Sprint Nextel, UTSE was a subsidiary of Sprint Corporation. The Authority approved the merger between Sprint and Nextel as well as the separation of UTSE and the resulting creation of Embarq in Docket No. 05-00240.

The issues to be decided by the Hearing Officer are whether the rate increase for directory assistance ("DA") proposed in Tariff No. 2007-456 can go into effect without further delay and what party has the burden of proof. The third issue that the Hearing Officer cannot decide, as it is believed to be a matter of public policy and not a question of law, is how many free DA allowances a price-regulated incumbent local exchange carrier ("ILEC") such as Embarq should be required to provide per month. While Embarq does not believe this matter should proceed to a contested case hearing since the Authority is bound by the DA policy precedent it set in Docket No. 06-00232, and the requirement that similarly situated parties such as AT&T and Embarq be treated in a consistent manner, it is briefing these issues as the Hearing Officer requested.

## History of Directory Assistance Treatment in Tennessee

Prior to the Tennessee Regulatory Authority's (the "Authority's") decision in Docket No. 96-01423, [3] DA was treated as a basic service under Tenn. Code Ann. § 65-5-109. As a result of such treatment, DA was provided free of charge to all ILEC customers in Tennessee. However, after conducting a contested case proceeding, the majority of the Authority, at a regularly scheduled Authority conference held on May 20, 1997, held DA was appropriately classified as a non-basic service under Tenn. Code Ann. § 65-5-108(a)(2) and therefore subject to the requirements of Tenn. Code Ann. § 65-5-109(h). Tenn. Code Ann. 65-5-109(h) provides greater pricing flexibility, and permits a price regulated ILEC to set the price for such service that the ILEC "deems appropriate." The Authority, in its final order in Docket No. 96-01423, entered on September 4, 1997, approved the UTSE tariff that established a .29¢ DA charge. Further, the

[3] *See* United Telephone-Southeast, Inc. Tariff No. 96-201 to reflect Annual Price Cap Adjustment, Docket No. 96-01423, *Order Approving in Part and Denying in Part Tariff 96-201* (September 4, 1997).

Authority required UTSE to amend its tariff to provide six free DA inquires per month rather than the three originally proposed by UTSE in Tariff No. 96-201.

The Authority's September 4, 1997 Order, was appealed to the Tennessee Court of Appeals by the Consumer Advocate. The Consumer Advocate took issue with the vast majority of the Authority's determinations, including the Authority's holding on the DA issue. In addition to the appeal by the Consumer Advocate, UTSE raised its primary issue on appeal contending that the Authority erred when it required UTSE to provide six free DA call allowances per month rather than the three it had proposed. In its order, the Court of Appeals affirmed the Authority's determination that DA was correctly found to be a non-basic service under Tenn. Code Ann. § 65-5-108(a)(2). The Court also held that the Authority has discretion to set standards under Tenn. Code Ann. § 65-4-117(3) for utility services provided in the State.

As a result of the Authority's decision in Docket No. 96-01423, BellSouth Telecommunications, Inc. ("BellSouth" and "AT&T")[4] sought the same relief by filing a tariff that mirrored the Authority approved UTSE tariff with a .29¢ rate for DA and six free call allowances. Despite mirroring the already existing UTSE tariff, the Consumer Advocate filed a petition to intervene and complaint in Docket No. 99-00391. The Authority considered the Consumer Advocate's petition and complaint and declined to convene a contested case proceeding. The Authority subsequently approved BellSouth's tariff in its July 29, 1999 order.[5]

Since the approval of BellSouth's initial DA tariff in Docket No. 99-00391, BellSouth has increased its DA rates on four separate occasions and reduced the number of DA allowances.

---

[4] BellSouth Telecommunications, Inc. is referred to herein as both BellSouth and AT&T. The reference to BellSouth is purely historical and denotes BellSouth prior to its 2006 merger with AT&T. Also, as Embarq understands, since the merger, BellSouth Telecommunications, Inc is using the dba "AT&T Tennessee."

[5] *See* BellSouth Telecommunications, Inc. Tariff to Implement a .29¢ Directory Assistance Charge, Docket No. 99-00391, *Order Approving Tariff and Denying Consumer Advocate's Petition* (July 29, 1999).

As to the DA rates, BellSouth on September 15, 2003, BellSouth increased its DA rate from .29¢ to .40¢ per call (Tariff 2003-00902), and on September 10, 2004, it increased its DA rate to .50¢ per call (Tariff 2003-01029). On October 1, 2005, BellSouth again increased its DA charge to the rate of .98¢ (Tariff 2005-00818). These BellSouth tariffs went into effect without a request for intervention or the convening of a contested proceeding.

On December 1, 2004, BellSouth field Tariff 2004-01434 which sought reductions in the DA allowances from six to three. The Consumer Advocate filed a Complaint and Petition to Intervene on December 28, 2004 requesting that the Authority convene a contested case. The Consumer Advocate argued that BellSouth's proposal to decrease the number of DA allowances was inconsistent with the Authority's previous decision in Docket No. 96-01423 that initially established six call allowances and that such a request was contrary to the interests of Tennessee consumers.

At a regularly scheduled Authority conference on January 10, 2005, a majority of the Authority voted to permit BellSouth's tariff to go into effect concluding that the Consumer Advocate had not requested a suspension of the tariff nor did a sufficient reason exist for suspending the tariff on its own motion under Tenn. Code Ann. § 65-5-101(c). On March 14, 2005, a majority declined to convene a contested case as requested by the Consumer Advocate and concluded that the tariff as a whole did not harm the public interest.

The Authority again considered another BellSouth DA tariff at the September 25, 2006 Authority Conference. At that Conference, a majority of the voting panel assigned to Docket 06-00232 approved an increase in BellSouth's DA rates from .98¢ to the rate of $1.14 per call and a decrease of the number of DA call allowances from three to one per month. In making this

determination, the majority held that the tariff was "reasonable and not adverse to the public interest." *See* the April 17, 2007 order in Docket No. 06-00232 at p.5.

On November 13, 2006, Embarq filed its own tariff (Tariff No. 2006-0530) mirroring the BellSouth tariff that reduced the number of DA allowances from six to three. In addition, Embarq also sought to raise the DA rate from .29¢ to .50¢.[6] The Authority found that Embarq had sufficient headroom to support the rate increases for its non-basic services including DA.

In Docket 07-00188, AT&T again sought to increase its DA charge from $1.14 to $1.35 and eliminate its one remaining DA call allowance. AT&T's filed its tariff on July 25, 2007. The Consumer Advocate filed its Complaint and Petition to Intervene on August 14, 2007. AT&T responded on August 15th. The Authority considered the matter at a regularly scheduled Authority Conference on August 20, 2007. The Authority granted the rate increase but voted to convene "[a] contested case proceeding on the issue of whether the elimination of free monthly directory assistance calls to non-exempt customers is in the public interest . . ."[7] As a result of the Authority's action on August 20, 2007, AT&T filed a revised DA tariff that kept the rate increase but reinstated the one DA call allowance per month.

On November 16, 2007, AT&T filed a request to dismiss the proceeding without prejudice stating that it did not intend to pursue its DA tariff, but reserving the refile the same tariff or a new DA tariff at a later date. The matter was dismissed by the November 16, 2007 order of the hearing officer assigned to the matter. At the conclusion of this matter, it still stood that the DA policy in the state was to permit one DA call allowance.

---

[6] Tariff No. 2006-0530 also sought other rate changes; however, for purposes of clarity, such increases will not be discussed.

[7] *See* Tariff Filing by AT&T Tennessee to Increase Rates for Directory Assistance (DA) and Eliminate the Monthly DA Call Allowance, Docket No. 07-00188, *Order Approving Tariff in Part and Suspending Tariff in Part for Ninety (90) days, Convening a Contested Case and Appointing a Hearing Officer* (December 18, 2007) at p.4.

On November 17, 2007, Embarq filed Tariff No. 2007-456 mirroring the BellSouth DA tariff approved in Docket No. 06-00232. Embarq's tariff mirrored BellSouth's reduction in DA allowances from three to one per month. Embarq also proposed to increase the DA rate from .50¢ to .95¢. Previously the Authority found that Embarq had sufficient headroom to support such a rate increase.[8]

As a result of the Embarq tariff filing, the Consumer Advocate filed a Complaint and Petition to Intervene on December 11, 2007. Embarq filed its reply on December 14, 2007. The Authority considered Embarq's Tariff No. 2007-456 at a regularly scheduled Authority Conference on December 17, 2007. The majority voted to suspend the rate increase, while the entire panel voted unanimously, among other things, to suspend the DA allowance portion of the tariff, appoint a hearing officer and convene a contested case presumably based on the Consumer Advocate Complaint. The Consumer Advocate was also granted intervention. This matter is now proceeding to a contested case in this docket.

**Issue I. Whether Embarq May Place Into Effect its Rate Increase for Directory Assistance Under Tenn. Code Ann. § 65-5-109(h).**

The Authority is required under state law to permit Embarq's DA rate increase to go into effect. So long as Embarq has sufficient headroom under its annual price regulation filing, it has the authority to place rate increases into effect for basic and non-basic services.[9] However, at a

---

[8] *See* United Telephone-Southeast, Inc. d/b/a Embarq 2007 Annual Price Regulation Filing, Docket No. 07-00220, *Order Approving Price Regulation Index* Filing (December 7, 2007) at p. 2.

[9] This principle is consistent with the treatment of AT&T's DA rate increase in Docket No. 07-00188, in which Chairman Roberson at the regularly scheduled Authority Conference held on August 20, 2007 stated as follows:

> " . . . I do think though that we need to deal with the increase in rate that AT&T has proposed. And because of directory assistance is a nonbasic service, by statute, AT&T may set the prices it deems appropriate." *See* conference transcript at p. 73.

regularly scheduled Authority Conference held on December 17, 2007, a majority of the Directors voted to suspend Embarq's proposed DA rate increases in Tariff No. 2007-456.[10] The Tariff No. 2007-456 seeks an increase the DA rate from .50¢ to .95¢. The proposed .95¢ charge for DA is applicable to those DA inquiries made by customers after exceeding the total allowances permitted during the monthly billing cycle. Since DA is a non-basic service as determined by the Authority in Docket No. 96-01423, and as affirmed by the Court of Appeals in Appeal No. 01A01-9711-BC-00627, any pricing constraints for such services are controlled by Tenn. Code Ann. § 65-5-109(h). Tenn. Code Ann. § 65-5-109(h) sets forth in pertinent part as follows:

> "***Incumbent local exchange telephone companies subject to price regulation may set rates for non-basic services as the company deems appropriate***, subject to the limitations set forth in subsections (e) and (g), the nondiscrimination provisions of this title, any rules or orders issued by the Authority pursuant to Section 65-5-108(c) and upon prior notice to affected customers." (Emphasis added to original) (LexisNexis 2004).

The parties, agreed with the Hearing Officer at the January 3, 2008 status conference that the matter of the rate increase for Embarq is a question of law rather than a question of fact. As such, the question of whether or not Embarq can increase its rates for DA, which is a non-basic service, is controlled by the above-quoted statute.

---

[10] At the December 17, 2007 Authority Conference, Director Jones addressed Embarq's proposed rate increase as follows:

> "With respect to the rate, one of the things that I have to ask myself is that given that this is a nonbasic [sic] service and that's already settled matter, then this tariff came before us without the reduction in call allowance but merely had an adjustment in the rate in the nonbasic [sic] category for this service, would I approve it? And that answer for me is yes."
>
> . . . "So, in all other regards, I am okay with the motion but not with respect to inhibiting the company to make an adjustment under our accepted methodology for the nonbasic [sic] category of services."

*See* the Conference transcript at pp. 17 - 18.

Therefore, since DA is a non-basic service under Tenn. Code Ann. § 65-5-108(a)(2), accordingly, Embarq can set the rates for DA service as Embarq "deems appropriate" so long as Embarq also met the headroom restraints set forth under Tenn. Code Ann. § 65-5-109 (e). *See* Tenn. Code Ann. § 65-5-109(e) and (h) (LexisNexis 2004).

Embarq's DA rate increase was made after its 2007 annual price regulation filing. The Authority approved Embarq's price regulation filing in Authority Docket No. 07-00220 on October 22, 2007, finding, among other things, that:

> "Embarq has properly separated its services into basic and non-basic categories in accordance with the provisions of Tenn. Code Ann. § 65-5-108 (2204)."

Further, the Authority also found that:

> "Embarq's Filing demonstrates that its overall current prices and revenues are less than the maximum prices allowed under Tenn. Code Ann. § 65-5-109 (2004), and that Embarq has headroom from which future increases may be made."[11]

As demonstrated by the findings referenced above, the annual pricing constraints of Tenn. Code Ann. § 65-5-109(h) were met by Embarq with its 2007 price regulation filing. The Authority found in its order in Docket No. 07-00220, that Embarq could raise the prices (rates) for both basic and non-basic services. This is precisely what Embarq chose to do with its DA rates in Tariff No. 2007-456. Therefore, as a result of the Authority's findings made in Docket No. 07-00220, the DA rate increase as proposed by Embarq in Tariff No. 2007-456 should be approved without delay.

In addition to the findings made by the Authority concerning Embarq's 2007 price regulation filing, there is also controlling Authority precedent concerning pricing for non-basic services such as DA. For example, in Docket No. 06-00232 the Authority

[11] See the Authority's final order entered in Docket No. 07-00202 on December 7, 2007 at p. 2.

approved, among other things, the price increase proposed by BellSouth increasing the rates from .98¢ to $1.14. In its decision, the Authority clearly articulated the controlling statutory principle for rate increase on non-basic services. If the price regulated ILEC meets the headroom constraints under Tenn. Code Ann. § 65-5-109(e) then the ILEC can increase its rates as it "deems appropriate." As a result, the Authority permitted BellSouth's DA rate increase to go into effect.[12] Therefore, the bottom line in this proceeding is that once the Authority found that sufficient headroom existed in Embarq's 2007 price regulation filing there were no restraints affecting Embarq's statutory right to increate the rates for DA.

Moreover, AT&T already has a $1.35 DA rate approved in its territory. In Docket No. 07-00188[13] the Authority approved AT&T's request to increase the rate from $1.14 to $1.35. Even though the Authority took issue with AT&T attempting to bring the number of free DA allowances from the already approved one call allowance established in Docket No. 06-00232, the Authority did not take issue with the price increase because DA is a non-basic service. In its December 18, 2007 Order in Docket No. 07-00188, the majority found that "AT&T ha[d] available revenue headroom that would allow for the DA rate adjustment." *See* the December 18, 2007 Order at p. 4. When revenue headroom exists under Tenn. Code Ann. § 65-5-109(e) then the Authority cannot suspend the rate increase even though it may not agree with it. The company is granted flexibility to set the rates for non-basic services at levels "the company deems appropriate." *See* Tenn. Code Ann. § 65-5-109(h) (LexisNexis 2004). Finally, it must also be borne in

---

[12] *See* Tariff Filing by BellSouth Telecommunications, Inc. to Increase Directory Assistance and Operator Services Rates – Tariff Number. 2006-00431, Docket No. 06-00232, *Order Granting BellSouth Tariff Number. 2006-00431* (April 17, 2007) at p. 6.

[13] *See* Tariff Filing by AT&T Tennessee to Increase Directory Assistance (DA) and Eliminate the Monthly DA Call Allowance, Docket No. 07-00188, *Order Approving Tariff in part and Suspending Tariff in Part and Appointing a Hearing Officer* (December 18, 2007).

mind that the Consumer Advocate did not object to the rate increase proposed by Embarq in this docket. *See* The Consumer Advocate's *Complaint and Petition to Intervene* (filed December 11, 2007) at Para. 9, p. 3. Unfortunately, the need to brief this issue could have been obviated had the Consumer Advocate conceded at the January 3, 2008 status conference that *the Authority is required as a matter of state law to permit the DA rate increase to go into effect*.

**Issue II. Which Party to the Proceeding has the Burden of Proof Under Tenn. Code Ann. §§ 65-5-101(c) and 65-4-117?**

Under state law, the burden of proof is on the complaining party, particularly where the complaining party is asking the Authority to reverse course and change a prior, valid order. During rate of return regulation the utility attempting to place a rate increase into effect had the burden of proof to show that the rate increase, change or alteration it was affirmatively requesting was just and reasonable. *See* Tenn. Code Ann. 65-5-103 (a) (LexisNexis 2004). However, once an ILEC entered price regulation, rates were deemed just and reasonable when such rates were determined to be affordable at the outset of the approval of plan in accordance with Tenn. Code Ann. 65-5-108(c). UTSE entered price regulation on October 13, 1995 upon approval of its plan by the Tennessee Public Service Commission ("Tennessee PSC") in Docket 95-02615, and a result, its rates were just and reasonable.

Going forward, adjustments to non-basic rates maintain affordability upon a demonstration that the formula (or headroom restraints) of Tenn. Code Ann. § 65-5-109(e) are met. In this case, Embarq made this demonstration when its 2007 price regulation filing was approved by the Authority in Docket No. 07-00220. Since the initial approval of UTSE's (Embarq's) price regulation plan by the Tennessee PSC in 1995, much has changed. One change in particular was a 2005 amendment to Tenn. Code Ann. § 65-5-101. Chief among these

changes was the standard set for the suspension of tariffs. In particular, a tariff is to be suspended upon the complaint of an interested party only if that party demonstrates that it meets rigorous criteria. In this proceeding, the Consumer Advocate filed its Complaint and Petition to Intervene on December 11, 2007. By doing so, the burden fell on the Consumer Advocate to demonstrate that the tariff violates a specific law; that an injury would occur as a result of the tariff and how the complaining party would be injured. In addition, the complaining party also has to demonstrate that it has a substantial likelihood of prevailing on the merits of its complaint. *See* Tenn. Code Ann. 65-5-101(c)(3) (LexisNexis 2006 Supp. Vol. 11A).

None of these showings as required under Tenn. Code Ann. § 65-5-101(c) were made by the Consumer Advocate in this matter. The complaining party must demonstrate that Tennessee law has been violated, an injury will occur and that the complaining party is likely to prevail; *the burden of proof must therefore be on the complaining party*. The Authority did not find during its deliberations on December 17, 2007, that the Consumer Advocate had met the standard imposed by the statute. While cases arising in tort are not clearly on point, such authority provides helpful guidance. For example, the Tennessee Court of Appeals in *Hansard v. Ferguson*, 23 Tenn. App. 306, 132 S.W. 2d 221 (Tenn. Ct. App. 1939) stated that:

> "the Plaintiff was onerated with the burden of establishing the averments of her declaration by a preponderance of the evidence. This was a continuous burden and did not shift to the defendant." *Id*. at 309, 223.

The court further stated that:

> ". . . a party who has the affirmative of any issue in a suit has the burden of establishing that issue . . ." *Id*. at 309, 223.

Even though the court specifically dealt with the shifting burden when a counterclaim is asserted in a suit for damages, the court's opinion as to which party has the burden of proof when taking the affirmative of an issue is particularly helpful. That is, the Consumer Advocate has taken the

affirmative of the principle issue in this matter that a reduction in DA allowances is somehow against the public interest. *See* the Consumer Advocate's *Complaint and Petition to Intervene* at Para. 4, p. 2. Given the Consumer Advocate's position as to the effect of this tariff and the Consumer Advocate's apparent argument that the Authority should reverse course and reach a different result, the burden of proof must fall on the Consumer Advocate.

In addition, *Hansard v. Ferguson* is again illustrative when considering how an issue concerning the provisioning of services is to be brought before the Authority. Under Tenn. Code Ann. § 65-4-117(a)(1), such issue must be brought to the Authority if not on its own motion, by an interested party, in this case the Consumer Advocate "upon [a] complaint in writing." The party asserting the affirmative of an issue, again; the Consumer Advocate has the burden of proof.[14] In this matter, the Consumer Advocate asserts that the Authority must exercise its discretion under Tenn. Code Ann. § 65-4-117(3) to deal with Embarq's proposed reduction in DA allowances because such reduction according to the Consumer Advocate "is not in the interest of the consumers of Tennessee." It is evident from the tariff suspension statute and from cases such as *Hansard v. Ferguson* that the complaining party has the burden of proof. The Consumer Advocate should be no different than any complaining party. Simply put, if the Consumer Advocate believes that the consumers in Tennessee are injured and is complaining about a specific action, it has the burden to prove to the Authority that the action is contrary to state law and not in the public interest.[15] Finally, maintaining the burden of proof on the

---

[14] *See Freeman v. Felts*, 208 Tenn. 201; 344 S.W. 2d 550, 554 (Tenn. 1961), "The burden of proof is on the party having the affirmative of an issue and this burden never shifts." *See also Stewart v. City of Nashville, 96 Tenn. 50, 33 S.W. 613*; *Wilkins v. McCorkle, 112 Tenn. 688, 80 S.W. 834; City National Bank v. Barnes, 164 Tenn. 450, 51 S.W.2d 503*; *Whipple v. McKew, 166 Tenn. 31, 60 S.W.2d 1006.*

[15] *See Leonard v. Gilreath*, 625 S.W. 2d 722, 724 (Tenn. Ct. App. 1981), "The Plaintiff had the burden of proving the elements of her theory of recovery on the facts which she alleged in her complaint." *See also Freeman v. Felts, 208 Tenn. 201, 344 S.W.2d 550 (1961)*; *Galbreath v. Nolan, 58 Tenn. App. 260, 429 S.W.2d 447 (1967)*; *Hansard v. Ferguson, 23 Tenn. App. 306, 132 S.W.2d 221 (1939).*

complaining party is also consistent with the comments of Chairman Roberson considering AT&T's last DA revisions in Docket No. 07-00188 at the regularly scheduled Authority Conference held on August 20, 2007. Chairman Roberson at p. 74 of the transcript stated that:

> " . . . since we are accepting the complaint, the Consumer Advocate will carry the burden to show that there is a public interest need for that exemption to continue."

Therefore, based on the tariff suspension statute (Tenn. Code Ann. § 65-5-101(c)), the Authority's prior orders regarding DA, guidance from Tennessee case law, and the legally correct comments of Chairman Roberson in Docket No. 07-00188, the burden of proof is clearly on the Consumer Advocate.

**Issue III. Whether Embarq Should be Permitted to Reduce its Directory Assistance Allowances from Three Allowances to One Allowance Consistent with Authority Action in Docket No. 06-00232?**

Embarq should be permitted to reduce its DA allowances from three allowances per month to one per month. Such action is consistent with the Authority's decision in Docket No. 06-00232, in which the Authority considered and approved the same exact reduction in the number of DA call allowances for BellSouth. The Authority's Order of April 17, 2007 entered in Docket No. 06-00232 not only set the DA policy for the State of Tennessee, but is binding precedent. As a result, Embarq's tariff should be approved as a matter of law, to do otherwise is to subject Embarq to unequal treatment. Similarly situated businesses such as Embarq and AT&T, which are both price-regulated ILECs offering DA service cannot be treated differently.[16]

---

[16] Although the Tennessee Court of Appeals ultimately upheld a Goodlettsville ordinance prohibiting the sale of chilled wines in *Rivergate Wine Liquors, Inc. v. City of Goodlettsville*, 674 S.W. 2d 631, 636 (Tenn. Ct. App. 1983), the Court did state that the "nature of discrimination is unequal treatment among like kinds." The ordinance was upheld because it did "not purport to treat similar businesses differently." *Id.* At 636. Unfortunately, the Authority has subjected Embarq to unequal treatment because it did not treat Embarq and AT&T in the same manner and in so doing has acted arbitrarily.

The requirement that Embarq and AT&T be treated in the same manner is a fundamental tenet of administrative law. Specifically, an agency cannot treat similarly situated entities differently without a reasoned explanation – an explanation that goes beyond a simple recital of perceived factual differences without analysis. This requirement comes not only from the Constitutional guaranty of equal protection of the law,[17] but also from the fundamental requirement of rationality in administrative actions. The rule was stated explicitly by the D.C. Circuit in *Garrett v. FCC:*

> "Hitherto, we have had occasion to deal with claims of disparate decisional treatment accorded parties by administrative bodies. Speaking of one agency, we have twice said that it "cannot act arbitrarily nor can it treat similar situations in dissimilar ways," and we remanded litigation to the agency when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike. We have pursued the same course with respect to the agency now before us where "the differences [were] not so 'obvious' as to remove the need for explanation." These rulings vividly reflect the underlying principle, that agency action cannot stand when it is "*so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion*."[18] (Emphasis added original).

Because of the Authority's handling of the DA allowance issue in Docket No. 06-00232 Embarq reasonably relied on what had already been approved for AT&T. However, on December 11, 2007, the Consumer Advocate filed its Complaint and Petition to Intervene in this matter. Embarq promptly filed its Reply on December 14, 2007 prior to consideration of Embarq proposed Tariff No. 2007-456 by the Authority at the regularly scheduled Authority

---

[17] *See City of Clebume v. Clebume Living Center,* 473 US. 432, 446-47 (1985); *Yick Wo v. Hopkins,* 11 8 US. 356, 367-68 (1886).

[18] *Garrett v. FCC, 5* 13 F.2d 1056, 1060 (D.C. Cir. 1975). *See also, Melody Music, Inc. v. FCC,* 345 F.2d 730, 732 (D.C. Cir. 1965) ("[T]he Commission's refusal to at least explain its different treatment of appellant and NJ3C was error."); *Public Media Center v. FCC,* 587 F.2d 1322, 133 1 (D.C. Cir. 1978), "We cannot affirm a Commission order that does not clearly and explicitly articulate the standards which govern the behavior both of licensees that have violated the fairness doctrine and those that have not."

Conference held on December 17, 2007. Despite the outcome of the Authority's action on that day, Embarq believes that the Authority should have followed its earlier precedent in Docket No. 06-00232 and approved Tariff No. 2007-456. This action would have been in accord with the doctrine of parity and equal treatment recognized by the Court in *Garrett v. FCC* and the Tennessee Court of Appeals in *Rivergate Wine Liquors, Inc. v. City of Goodlettsville*.

The law requires that there be uniformity and consistency in the regulation of businesses entrusted to the Authority's jurisdiction and oversight. Based on the Authority's treatment of BellSouth in Docket No. 06-00232, Embarq's Tariff No. 2007-456, which mirrors AT&T's current DA allowances should have been approved. The Consumer Advocate has proffered no new arguments or basis for the Authority to reverse course and treat the Embarq tariff differently than past virtually identical tariffs. As a result, Embarq believes that this matter should not proceed to a contested case hearing and that the intervention as requested by Consumer Advocate should have been denied.

At the January 3, 2008 status conference, the Consumer Advocate made its position clear that it wanted the DA allowance portion of Embarq's tariff suspended in order to preserve ". . . the status quo for all companies required to provide free directory assistance allotments until the Authority can complete a thorough review of directory assistance policy within the confirms of the contested case." *See* the Consumer Advocate's December 11, 2007 Complaint and Petition to Intervene at Para. 8, p. 3. However, it is important to note that in the Consumer Advocate's Complaint and Petition to Intervene filed in Docket No. 07-00188, the Consumer Advocate understood that the current one DA allowance approved for AT&T was the standard for regulatory treatment of DA in Tennessee. This is true when one considers the statements made by the Consumer Advocate in its August 14, 2007 filing in Docket No. 07-00188. Specifically, when requesting the remedy it sought from the Authority, the Consumer Advocate clearly stated

that such remedy was the "preservation of at least one free directory assistance call per month for Tennessee consumers." *See* the Consumer Advocate's August 14, 2007 Complaint and Petition to Intervene at Para. 8, pp. 2 - 3. In granting the relief requested by the Consumer Advocate in this matter; the preservation of "the status quo," a discriminatory standard has been set for Embarq. Indeed, it is the Consumer Advocate that is attempting to change the status quo by asking the Authority to treat Embarq's tariff differently than previously approved tariffs. That is, Embarq is harmed by being treated differently than a similarly situated ILEC, namely AT&T.[19]

Consistency in regulation of businesses entrusted to the jurisdiction and oversight of the Authority is essential to provide clear guidance to the regulated business community. Again, Embarq filed Tariff No. 2007-456 in reasonable reliance of the Authority's rulings regarding BellSouth's DA tariff in Docket No. 06-00232. The one DA allowance sought by Embarq is the policy standard in Tennessee for DA allowances. However, it is striking, that eight months to the day from the release of the Authority's Order in Docket No. 06-00232, the Authority voted to suspend Embarq's tariff. By doing so, the Authority chose the wrong path to pursue a possible change in the current DA policy. Finally, since binding precedent compels consistent treatment between Embarq and AT&T this issue can be disposed of as a matter of law.

## Conclusion

Based on the foregoing, Embarq respectfully requests the Hearing Officer rule as a matter of law that Embarq's proposed DA rate increase go into effect without delay. That the Hearing Officer rule that the burden of proof on the number of DA allowances resides with the Consumer

[19] The Authority is compelled to treat similar situations in similar ways. While the Authority can change its policy, it cannot do so arbitrarily. *See Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 in which the D.C. Cir. Court of Appeals stated " . . . to be sure, the Board has broad discretion to determine when a jurisdictional exercise will serve the objectives of the Act, its power is not unlimited, and is never to be used dogmatically. As we recently noted in another instance where the board's action departed substantially from that taken in seemingly like cases, "the Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways." (footnote citations omitted).

Advocate. Finally, that the Constitutional guaranty of equal protection of the law and the fundamental requirement of rationality in administrative actions requires similarly situated regulated businesses to be treated in the same manner and compels a ruling, as a matter of law, that Embarq's reduction in DA allowances be approved consistent with the Authority's action in Docket No. 06-00232 without a contested case hearing.

Respectfully submitted this 31st day of January, 2008.

Edward Phillips
Attorney
United Telephone-Southeast, Inc.
Mailstop: NCWKFR0313
14111 Capital Boulevard
Wake Forest, North Carolina 27587-5900
Telephone: 919-554-7870
FAX: 919-554-7913
Email: edward.phillips@embarq.com
Tennessee B.P.R. No. 016850

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief to counsel listed below by depositing a copy of the same in the United States Mail, first-class postage prepaid, and by electronic transmission to counsel.

This 31st day of January, 2008.

Ryan L. McGehee
Assistant Attorney General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207

Edward Phillips
Attorney
United Telephone-Southeast, Inc.