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February 29, 2008

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

FILED ELECTRONICALLY IN DOCKET OFFICE 2/29/2008

Re: Petition for Appeal of the Hearing Officer's Initial Order 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") Petition for Appeal of the Hearing Officer's Initial Order. Embarq has already filed the enclosed petition electronically. This letter is the required follow-up to the electronic filing.

An extra copy of this letter and petition are enclosed. Please stamp the petition and letter as "Filed" and return to me in the enclosed self-addressed stamped envelope. Finally, please do not hesitate to contact me with any questions.

Sincerely yours,

Edward Phillips

Edward Phillips

HEP:sm

Enclosures

cc: Consumer Advocate and Protection Division

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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

PETITION FOR APPEAL OF THE HEARING OFFICER'S INITIAL ORDER

United Telephone-Southeast, Inc. ("UTSE" or "Embarq")[1] pursuant to Tenn. Code Ann. § 4-5-315(b) petitions the Tennessee Regulatory Authority ("Authority") for review of the February 14, 2008 Initial Order ("*Initial Order*") entered by the Hearing Officer in this matter. Both the Hearing Officer and the Authority are required under Tenn. Code Ann. § 65-5-109(h) and controlling precedent established by the Court of Appeals in Appeal No. 01A01-9711-BC-00627[2] to permit Embarq's non-basic Directory Assistance ("DA") rate increase filed as part of Tariff No. 2007-456 to go into effect *without further delay or further suspension.*[3] In addition, Embarq also asserts as a basis for this review that the Hearing Officer and Authority are required to treat similarly situated regulated entities in a consistent manner concerning the proposed DA rate

[1] 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 petition.

[2] The Court of Appeals affirmed the Authority's decision that DA is a non-basic service. As a result, if the safeguards established under the price regulation statutes are met, a price regulated company can "set rates for non-basic services as the company deems appropriate . . ." *See* Consumer Advocate v. Tennessee Regulatory Authority, 2002 WL 1579700 (Tenn. Ct. App. 2002) and Tenn. Code Ann. § 65-5-109(h). (LexisNexis 2004).

[3] Under Tenn. Code Ann. § 4-5-315(c), a Petition for Appeal must set forth the basis for such appeal.

increases and the reduction in DA allowances. Specifically, the Authority is required pursuant to the precedent it established in Docket No. 06-00232, when it considered a BellSouth tariff,[4] to grant Embarq's reduction of DA allowances from three call allowances per month to one allowance per month. Embarq will discuss the historical treatment of DA in Tennessee before setting forth its arguments concerning its Petition for Appeal.

Finally, Embarq maintains – as raised at the status conference – that this matter should not proceed to a contested case hearing. In this regard, Embarq does not seek an appeal of the Hearing Officer's decision concerning the assignment of the burden of proof and the burden of persuasion. However, the lack of appealing the assignment of the burdens of proof and persuasion should not be construed as waiver of Embarq's position that the Authority erred rendering this matter a contested proceeding.

History of Directory Assistance Treatment in Tennessee

Prior to the Authority's decision in Docket No. 96-01423, [5] 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 incumbent local exchange carrier ("ILEC") customers in Tennessee. However, after conducting a contested 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-

[4] For discussion purposes, 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. As Embarq understands, since that merger, BellSouth Telecommunications, Inc. uses the dba "AT&T Tennessee."

[5] *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).

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 non-basic services 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 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 not only affirmed the Authority's determination that DA was correctly designated as a non-basic service under Tenn. Code Ann. § 65-5-108(a)(2), but 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 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 a 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.[6]

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. As to the DA rates, September 15, 2003, BellSouth increased its DA rate from .29¢ to .40¢ per call (Tariff 2003-00902). On September 10, 2004, BellSouth 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 filed Tariff 2004-01434 seeking 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

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[6] *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).

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 Authority's September 25, 2006 Conference. At that Conference, a majority approved an increase in BellSouth's DA rates from .98¢ to the rate of $1.14 per call and approved a decrease of the number of DA call allowances from three to one per month (Docket 06-00232). 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 in that Embarq's tariff reduced the number of DA allowances from six to three. In addition, Embarq also sought to raise the DA rate from .29¢ to .50¢.[7] Notably, just like Docket No. 06-00232, the Consumer Advocate did not intervene. The Authority approved Embarq's proposed tariff, including the DA rate increase and the reduction in DA call allowances.

On July 25, 2007, at Docket 07-00188, AT&T again filed a tariff seeking to increase its DA charge from $1.14 to $1.35 and proposing elimination of its one remaining DA call allowance. Thus, AT&T's filing was an attempt to change the DA policy in the State by eliminating the last DA call allowance. The Consumer Advocate filed a Complaint and Petition to Intervene on August 14, 2007, to which AT&T thereafter responded. The Authority considered the matter at a regularly scheduled Authority Conference on August 20, 2007. The Authority granted the rate increase but

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

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 . . ."[8] The DA rate increase was permitted as AT&T was found to have sufficient headroom. As a result of the Authority's action, 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 reserved the right to re-file 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 the matter in Docket No. 07-00188, the DA policy of the State was to permit one DA call allowance per month.

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.[9]

As a result of Embarq's 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

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[8] *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.

[9] *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.

proposed rate increase. In addition, the majority unanimously voted, among other matters, to suspend the DA allowance portion of the tariff, appoint a hearing officer, and to convene a contested case presumably based on the Consumer Advocate's Complaint. In addition, the Authority also granted the Consumer Advocate's intervention. This matter is now proceeding to a contested case in this docket.

Issue I. Whether the Hearing Officer and the Authority are Required to Permit Embarq to Place its Rate Increase for Directory Assistance Into Effect Under Tenn. Code Ann. § 65-5-109(h).

The Hearing Officer and the Authority are required under state law to permit Embarq's DA rate increase to go into effect.[10] So long as Embarq has sufficient headroom under its annual price regulation filing, Embarq has the statutory authority to place rate increases into effect for basic and non-basic services.[11] Embarq made a prima facie showing with its 2007 price regulation filing that it had sufficient head room to support the rate increases it sought as part of Tariff No. 2007-456 including, most importantly, the proposed DA rate increase. Also, it is important to note that the Consumer Advocate throughout the course of these proceedings has never taken issue with Embarq's proposed DA rate increase.

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[10] The Hearing Officer addressed this issue as Issue 2 in the Initial Order. The discussion begins at p. 4 of the order and concludes on p. 5.

[11] This principle is consistent with the treatment of AT&T's DA rate increase in Docket No. 07-00188. In that matter, 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 [sic] service, by statute, AT&T may set the prices it deems appropriate." *See* conference transcript at p. 73.

As set forth above, a majority of the Directors on December 17, 2007, voted to suspend Embarq's proposed DA rate increase.[12] The Authority's suspension was wrongly continued by the Hearing Officer's *Initial Order*. The Hearing Officer specifically held that the Authority had discretion under Tenn. Code Ann. § 65-5-101(c)(3)(iii)(B) "to suspend a tariff in the public interest."[13] There is no public interest standard that can be applied to Embarq's DA rate increase because DA is a non-basic service under Tenn. Code Ann. § 65-5-108(a)(2) and the company has the right to set rates it deems appropriate under Tenn. Code Ann. § 65-5-109(h) once sufficient headroom is found to exist.

Even though AT&T was halted from taking its existing DA allowance from one to zero in Docket No. 07-00188, AT&T was still permitted to place its DA rate increase into effect taking the AT&T rate from $1.14 to $1.35. The Authority granted AT&T's rate increase in August 2007 at the outset of a contested case in that matter, and in February 2008 it appears that the Authority is now compelled by an undefined public interest requirement to freeze Embarq's DA rates at .50¢ pending the outcome of this contested case proceeding. The action taken by the Hearing Officer and the Authority

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[12] At the December 17, 2007 Authority Conference, Director Jones voted to approve Embarq's DA rate increase and stated 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.

[13] *See* the *Initial Order* at p. 5.

toward Embarq versus the action taken in favor of AT&T's DA allowances is arbitrary and capricious.

As the Authority may recall, Embarq 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, 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 is a question of law. As such, the question of whether Embarq can increase its non-basic DA rates is controlled by the above-quoted statute. 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 meets 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).

As stated earlier, 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 (2004)."

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."[14]

As demonstrated by the Authority's findings in Docket No. 07-00220 the annual pricing constraints of Tenn. Code Ann. § 65-5-109 were met by Embarq's 2007 price regulation filing. The Authority held in Docket No. 07-00220 that Embarq could raise the 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 in Docket No. 07-00220 the DA rate increase proposed by Embarq must 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 rates for non-basic services such as DA. If the Authority fails to follow applicable precedent, as discussed below, the Authority and the Hearing Officer will accord disparate and arbitrary treatment to Embarq's non-basic DA rates relative to the Authority's treatment of similar tariff filings made by other price-regulated ILECs.

For example, in Docket No. 06-00232 the Authority 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

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

constraints under Tenn. Code Ann. § 65-5-109(e), then the ILEC can increase its rates as it "deems appropriate." Because the requirements of Tenn. Code Ann. § 65-5-109(e) were met, the Authority permitted BellSouth's DA rate increase to go into effect.[15] Thus, once the determination was made that Embarq has sufficient headroom no constraints exist that prohibit Embarq from exercising its statutory right to increase its DA rates.

Moreover, as already discussed briefly, AT&T has a $1.35 DA rate approved in its territory as a result of Authority action in Docket No. 07-00188.[16] Even though the Authority took issue with AT&T's attempt to bring the number of free DA allowances from the already approved one call allowance established in Docket No. 06-00232 to zero, 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).

Further, the Consumer Advocate; while not supportive of the Embarq's DA rate increase, it did not object at any time to such increase and even conceded in its brief that the Authority "can not [sic] set the rate for a non-basic service, assuming the company

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[15] *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.

[16] *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).

has complied with all price regulations [which it did in Docket No. 07-0020]." " . . . Embarq may set the rate for directory assistance as it deems appropriate. . ." *See* The Consumer Advocate's Complaint and Petition to Intervene filed December 11, 2007 at Para. 9, p. 3 and the Consumer Advocate's Brief filed on January 31, 2008 at p. 3.

The Authority approved AT&T's DA rate increases on several occasions. The Authority, however, suspended Embarq's rate increase only four months after the Authority approved AT&T's most recent DA rate increase. Clearly, the Authority has treated similar situations in a dissimilar, arbitrary manner.[17] The public interest does not support arbitrary and capricious decision-making and treatment.

While the Hearing Officer correctly stated the Authority can suspend a tariff by exercising its discretion under Tenn. Code Ann. § 65-5-101(c)(3)(iii)(B) such exercise remains unwarranted. *See* Tenn. Code Ann. § 4-5-322(h)(4). The continued suspension of the DA rate increase is unwarranted and rises to the level of an abuse of discretion given the agency's treatment of AT&T's DA rates.[18] Therefore, the Authority is required as a matter of state law to permit Embarq's DA rate increase to take effect without further delay. Each and every day Embarq's DA rate increase continues to be suspended subject to the delay associated with an ill-advised contested proceeding, the requirements of

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[17] *See Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 in which the D.C. Cir. Court of Appeals stated "the Board [NLRB] cannot act arbitrarily nor can it treat similar situations in dissimilar ways." (Footnote citations omitted).

[18] The Tennessee Court of Appeals noted in *Highland Mem. Funeral Home V. Board Of Funeral Dirs. & Embalmers,* 1986 Tenn. App. LEXIS 3329 (Tenn. Ct. App. 1986) that a court can modify an administrative agency's decision not only when there is an abuse of discretion but also when an agency has exercised its discretion in an unwarranted manner.

The public interest determination as to the DA rates in Embarq's tariff was made when the Authority approved Embarq's 2007 price regulation plan. In addition, the decision in Docket No 06-00232 also demonstrates that the Authority made a public interest determination as to DA rates and allowances within the State. In light of these determinations, to now hold Embarq's DA tariff hostage is unwarranted and not a proper exercise of discretion.

Tenn. Code Ann. § 65-5-109(h) continue to be frustrated and Embarq suffers economic harm.

Issue II. The Authority and the Hearing Officer are bound by the Authority's Precedent in Docket No. 06-00232 and Must Grant Embarq's Tariff Reducing Directory Assistance Allowances From Three Allowances to One Call Allowance Per Month.

The Hearing Officer found the allowance issue to be a matter of policy to be decided by the Authority, Embarq believes that Authority precedent controls the outcome of the agency's decision. As a result, Embarq should be permitted to reduce its DA allowances from three allowances per month to one per month. This 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 in Docket No. 06-00232 not only set the DA policy for the State of Tennessee, but is also binding precedent on the Authority. As a result, Embarq's tariff must be approved as a matter of law, to do otherwise is to subject Embarq to unequal, capricious treatment. Similarly situated businesses such as Embarq and AT&T that are both price-regulated ILECs operating in the State and offering DA service cannot be treated differently.[19]

The requirement that Embarq and AT&T be treated in the same manner is a fundamental tenet of administrative law. An agency cannot treat similarly situated

[19] 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 established policy in Docket No. 06-00232 and then failed to apply that policy determination to Embarq in a consistent manner.

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,[20] 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."[21] (Emphasis added to original).

Because of the Authority's approval of the DA allowance issue in Docket No. 06-00232, Embarq assumed consistency of administrative decision-making and relied on what had already been approved for AT&T. Despite the outcome of the Authority's action on December 17, 2007, Embarq maintains 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

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[20] *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).

[21] *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."

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 in every aspect 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 BellSouth was the standard for regulatory treatment of DA in Tennessee. This is also true when one considers the statements made by the Consumer Advocate in its August 14, 2007 filing in Docket No. 07-00188. 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 – and the policy of the Authority – by seeking unequal treatment of Embarq's tariff relative to other previously approved tariffs. Embarq is decidedly harmed by being treated differently than a similarly situated ILEC, namely AT&T.[22]

Consistency in regulation of businesses entrusted to the jurisdiction and oversight of the Authority is essential to provide clear guidance to regulated entities. 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 consistent with the policy standard already established by the Authority for DA allowances in Tennessee. As a result, binding precedent established in Docket No. 06-00232 compels consistent treatment between Embarq and AT&T.

Conclusion

Embarq is entitled as a matter of law to implement its DA rate increase without further delay or suspension by the Authority. Embarq is also entitled to implement its proposed reduction in DA call allowances from three allowances per month

[22] 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).

to one allowance per month immediately and without having to participate in a contested case proceeding. In suspending both the DA rate increase and the reduction in DA call allowances, the Authority and the Hearing Officer have acted in an arbitrary and capricious manner. Embarq respectfully requests that the Authority reverse the findings of the Hearing Officer on Issue Nos. 1 and 2 and permit the portion of Embarq tariff number 2007-456 concerning DA services to go into effect without further delay.

Respectfully submitted this 29th day of February, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Appeal of the Hearing Officer's Initial Order 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 29th day of February, 2008.

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