

**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**

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DOCKET NO. 07-00269

**CONSUMER ADVOCATE’S OBJECTIONS AND RESPONSES TO EMBARQ’S FIRST
SET OF DISCOVERY REQUESTS**

Robert E. Cooper, Jr., the Attorney General & Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of Attorney General (hereinafter “Consumer Advocate”), pursuant to Tenn. Code Ann. § 65-4-118 and the Tennessee Rules of Civil Procedure, respectfully submits these objections and responses to the first discovery request of United Telephone-Southeast, Inc. d/b/a Embarq Corporation (“Embarq” or “Company”).

GENERAL OBJECTIONS

1. The Consumer Advocate objects to the definitions and instructions contained in the company’s interrogatories to the extent that the definitions and instructions attempt to impose on the Consumer Advocate a burden or obligation greater than that required by the *Tennessee Rules of Civil Procedure* and applicable statutes and regulations governing contested case hearings.

2. The Consumer Advocate objects to the interrogatories to the extent they call for information and the production of documents which are protected from disclosure by the

attorney-client privilege, the attorney work product doctrine or any other applicable privilege or protection. The Consumer Advocate objects to the data requests to the extent that the Company is attempting to impose on the Consumer Advocate obligations with regard to identification of privileged documents beyond those required by the *Tennessee Rules of Civil Procedure* and applicable statutes and regulations governing contested case hearings.

3. The Consumer Advocate objects to the Company's interrogatories to the extent they seek information relating to matters not at issue in this litigation or to the extent they are not reasonably calculated to lead to the discovery of admissible evidence. By providing information in response to these requests, the Consumer Advocate does not concede that such information is relevant, material or admissible in evidence. The Consumer Advocate reserves all rights to object to the use of such information as evidence.

4. The Consumer Advocate objects to the Company's interrogatories to the extent that the Company is attempting to impose on the Consumer Advocate obligations to supplement its responses beyond those required by the *Tennessee Rules of Civil Procedure* and applicable statutes and regulations governing contested case hearings.

5. The Consumer Advocate objects to the Company's interrogatories to the extent that the Company is attempting to require the Consumer Advocate to provide information and produce documents beyond those in its possession, custody or control as that phrase is used in the *Tennessee Rules of Civil Procedure* and applicable statutes and regulations governing contested case hearings.

6. The Consumer Advocate objects to the Company's data requests to the extent they seek information and documents that are readily available through public sources or are in the

Company's own possession, custody or control. It is unduly burdensome and oppressive to require the Consumer Advocate to respond or produce documents that are equally available to the Company.

7. The Consumer Advocate objects to the production of any document prepared by it subsequent to the filing of this litigation or contested case.

8. The Consumer Advocate's objections and responses to these requests are based on information now known to it. The Consumer Advocate reserves the right to amend, modify or supplement its objections and responses if it learns of new information.

9. The Consumer Advocate's responses to these requests are made without waiving or intending to waive the right to object to the use of any information provided in response to any subsequent proceeding or trial of this or any other action. The Consumer Advocate's responses to these requests are also not a waiver of any of the foregoing objections or any objections it has made or may make with respect to any similar, related, or future data request, and the Consumer Advocate specifically reserves the right to interpose any objection to further requests notwithstanding any response or lack of objection made in this response.

10. The Consumer Advocate will supplement its responses in accordance with the requirements of state law.

11. The Consumer Advocate expressly incorporates these general objections into its responses set forth below.

Subject to and without waiving any objections stated above the Consumer Advocate responds to the specific request as follows:

RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

1) Explain in full why the Consumer Advocate did not intervene and/or object to the tariff filing in Tennessee Regulatory Authority (“Authority”) Docket No. 06-00232 that allowed BellSouth to lower its local directory assistance (“DA”) monthly allowances from three to one?

RESPONSE:

Objection. The request is not reasonably calculated to elicit or lead to discovery that is relevant, probative or admissible. The interrogatory seeks legal opinions and theories underpinning legal arguments of the Consumer Advocate made in response to Embarq’s claims of discriminatory treatment. The company’s positions and claims of discrimination have already been heard and ruled upon by the hearing panel in this matter. Furthermore, the interrogatory calls for privileged information protected by the Work Product Doctrine in that it seeks mental impressions, legal theories and conclusions that arise in preparation for anticipated litigation. The interrogatory is further objectionable in that it represents an unjustified invasion of the deliberative process privilege and statutory discretion of the Attorney General in determining when and where the Consumer Advocate’s finite expertise and resources may be applied to represent the interest of consumers of Tennessee.

2) Did the Consumer Advocate have any discussions with BellSouth Telecommunications, Inc. concerning Docket No. 06-00232 or the local DA allowances reduction included in the docket prior to the Authority’s final decision in that docket?

RESPONSE:

Objection. The request is not reasonably calculated to elicit or lead to discovery that is

relevant, probative or admissible. Furthermore, the term “discussions” is vague and may encompass settlement communications which are indisputably privileged and protected from disclosure under the Tennessee Rules of Evidence.

Without waiving the objections set forth, the Consumer Advocate responds that it has no record, knowledge or recollection of any formal or informal discussions or communications with BellSouth Telecommunications concerning or related to Docket 06-00232.

3) The Authority’s April 17, 2007 Order in Docket No. 06-00232 at pages 5-6 includes the rationale set forth below that supports BellSouth’s reduction of its local DA monthly allowances from three to one. Explain in full (a) whether the Consumer Advocate takes exception to any part of this rationale as applied to BellSouth Telecommunications, Inc. (now AT&T Tennessee) and (b) why this rationale is not equally applicable to Embarq.

“Initially, the TRA approved a six DA call allowance in 1997 due to the fact that many telephone numbers were not published in the printed directory. Some numbers had been excluded in the printed directory at a subscriber’s request (i.e., a non-published listing), and some were inaccurate or did not appear because new numbers were obtained after the directory was printed (e.g., a new customer or customer move). Accordingly, it was necessary that customers call DA in order to obtain telephone numbers for those subscribers whose numbers did not appear in the printed directory but were still available via directory assistance.

“While some telephone numbers are not available in the printed directory today, the evolving dynamics of the communications environment enables many, if not most, consumers to obtain subscribers’ telephone numbers, not available in the printed directory, by alternative modes. For example, many telephone numbers are available through various internet search engines. Additionally, ever expanding bases of consumers have cellular telephones and electronic mail addresses (e-mail) by which they can be contacted in the event of a change to their landline telephone number. These expanding avenues of communication facilitate the acquisition of landline telephone numbers, and reduce dependency on DA for the procurement of telephone numbers that are not in the printed directory.

“Further, the majority of BellSouth’s competitors have no restrictions on

the DA services they offer, including the number of call allowances. In fact, most competing local exchange company's ("CLECs") do not have call allowances and charge for every DA request. BellSouth's consumers are permitted one free DA call per month. Given the variety of existing methods from which to acquire telephone numbers in today's environment, the Authority finds the tariff reasonable and not adverse to the public interest. BellSouth will continue to provide its DA service at no charge to physically and visually disabled customers, and to customers sixty-five years or older who request an exemption."

RESPONSE:

Objection. The request is not reasonably calculated to elicit or lead to the discovery of information that is relevant, probative or admissible. The interrogatory seeks legal opinions and theories under-pining legal arguments of the Consumer Advocate made in response to Embarq's claims of discriminatory treatment. The company's positions and claims of discrimination have already been heard and ruled upon by the hearing panel in this matter. Furthermore, the interrogatory calls for privileged information protected by the Work Product Doctrine in that it seeks opinions, legal theories and conclusions that arise in preparation for litigation. Once more, the question calls for mental impressions and a legal opinion critiquing an excerpt of an order issued by a majority of TRA directors in a case in which the Consumer Advocate was not an intervening party.

Without waiving the objection, the Consumer Advocate would respond that a contested case proceeding is necessary to evaluate evidence, the availability of alternatives, the impact on communities and other factors prior to allowing a reduction in the D.A. call allowance or in the setting of a D.A. call allowance by the TRA.

- 4) Will the Consumer Advocate stipulate that the tariff of Charter Communications

presently on file with the Authority, includes no monthly allowances for local DA (not including exemptions for disabilities)?

RESPONSE:

The Consumer Advocate objects to the form of the interrogatory. A “stipulation” is a voluntary agreement between opposing counsel and/or parties concerning disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigable issues. *Blacks Law Dictionary*, 5th Edition. The parties have not had discussions for proposed stipulations in this matter. Unilateral submission of a proposed stipulation within a discovery request does not represent a voluntary agreement between opposing counsel and/or parties. This proposed “stipulation” herein is not relevant, need not be proven and neither would it narrow the range of issues for litigation.

Assuming that the interrogatory was in the form of a question or request for admission, the interrogatory would still be objectionable on grounds that the request is not reasonably calculated to elicit or lead to discovery that is relevant, probative or admissible. Further, confirmation of such information need not come from the Consumer Advocate. The request seeks to burden the Consumer Advocate when the company need only review the tariffs of CLECs, such as Charter Fiberlink-Tennessee, which are publicly available at the TRA.

Without waiving the objections set forth, the Consumer Advocate responds that in reference to CLECs, such as Charter Fiberlink-Tennessee, there is generally no uniform policy for directory assistance. The second sentence of the last paragraph of an excerpt of the TRA order cited and quoted within the company’s third interrogatory reads as follows: “In fact, most competing local exchange company’s (“CLECs”) do not have call allowances and charge for

every DA request.”

5) In its brief filed January 31, 2008 the Consumer Advocate stated at page 5 that the “churn” rate in Embarq’s territory was relevant to the issue of local DA allowances. Please provide any studies the Consumer Advocate has performed or has in its possession that show the churn rate of telecommunication carriers in Tennessee.

RESPONSE:

The Consumer Advocate responds that it has no such studies in its possession, custody or control. To the Consumer Advocate’s knowledge, churn data is not publicly reported by Tennessee telecommunications providers. The Consumer Advocate is awaiting churn information that it requested from the company in discovery. The company may find some churn data or churn related information concerning Embarq’s Tennessee service area within Docket 96-01423, including the testimony of Mr. Archie Hickerson, a former Consumer Advocate expert witness, which is now publicly available online through the TRA website.

6) The Consumer Advocate also stated in its brief filed January 31, 2008 at page 5 that issues surrounding DA service for disabled consumers and those over age 65 and older require discovery. Will the Consumer Advocate stipulate that Embarq’s tariff filing reducing the number of allowances from three to one does not affect the local DA exemptions Embarq currently provides for disabled and elderly customers?

RESPONSE:

The Consumer Advocate objects to the form of the interrogatory. A “stipulation” is a

voluntary agreement between opposing counsel and/or parties concerning disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigable issues. *Blacks Law Dictionary*, 5th Edition. The parties have not had discussions for proposed stipulations in this matter. Unilateral submission of a proposed stipulation within a discovery request does not represent a voluntary agreement between opposing counsel and/or parties.

Without waiving the objection, the Consumer Advocate responds that exemptions for consumers with disabilities and age 65 and over are relevant and probative to the number set for D.A. call allowances. Furthermore, the Consumer Advocate's investigation into Embarq's proposed tariff is ongoing. The Consumer Advocate's position on this matter will be fully set forth in its pre-filed testimony.

7) The Consumer Advocate stated in its brief filed January 31, 2008 at page 9 that: "Embarq, AT&T and Citizens Telecom - Tennessee are very different companies in terms of service area and number of customers. 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 services the public interest."

Please explain the factors the Consumer Advocate believes makes these companies so vastly different and also articulate the nexus between those differences and a policy of establishing different standards for local DA calling allowances among these incumbent carriers.

RESPONSE:

Objection. The request is not reasonably calculated to elicit or lead to the discovery of information that is relevant, probative or admissible. The interrogatory seeks legal opinions and

theories under-pining legal arguments of the Consumer Advocate made in response to Embarq's claims of discriminatory treatment. The company's positions and claims of discrimination have already been heard and ruled upon by the hearing panel in this matter. Further, any response to the information requested in the interrogatory is duplicative as the Consumer Advocate's arguments regarding differences in price cap regulated companies are on record. To the extent the company seeks additional mental impressions and legal theories of the Consumer Advocate, the Work Product Doctrine forbids further disclosure. The interrogatory is additionally objectionable as it is vague, overly broad, and over-drawn. Further, the interrogatory quotes a small portion of one of the Consumer Advocates briefs. The cited quote answers the interrogatory.

Without waiving any objections or future arguments the Consumer Advocate may make, the Consumer Advocate will respond in two parts to the interrogatory. In regards to the factors that make the companies distinguishable and different, the Consumer Advocate has made such arguments on the record in this matter such as that cited within the interrogatory. For another example, see *Response of the Consumer Advocate to Embarq's Petition for Appeal of the Hearing Officer's Initial Order*, pages 10-11, 18.

In regards to how the differences between the price cap regulated incumbents and any different standards the TRA may impose as a result of these differences and other factors, the Consumer Advocate would submit that the agency has the authority to take these differences into account when setting D.A. policy if it chooses to do so.

8) Please explain how the public interest is advanced by enforcing different standards for local DA calling allowances between incumbents and competitive local exchange carriers that serve similarly situated customers in the same geographic areas.

RESPONSE:

Objection. The request is not reasonably calculated to elicit discovery that is relevant, probative or admissible. The interrogatory seeks legal opinions and theories under-pining legal arguments of the Consumer Advocate made in response to Embargo's claims of discriminatory treatment. The company's positions and claims of discrimination have already been heard and ruled upon by the hearing panel in this matter. Furthermore, the interrogatory calls for privileged information protected by the Work Product Doctrine in that it seeks opinions, legal theories and conclusions that arise in preparation for litigation. The interrogatory is further objectionable as to its form in that within it assumes, implies or concludes that the Consumer Advocate has argued that different standards between incumbents and CLECs advances the public interest.

The Consumer Advocate would respond that it has made no claim that the differences in local D.A. regulation between CLECs and Price cap regulated incumbents is in the public interest, advances the public interest or stunts the public interest. The interrogatory seeks to lure the Consumer Advocate into answering a hypothetical question lacking in specific details and circumstances. The opinion sought is unrelated to the merits of the case. It further calls for a response that is authored and underpinned by a mental impression and legal opinion which is privileged under the Work Product Doctrine.

Without waiving the objections set forth, the Consumer Advocate would respond that for several years Embargo has accepted that the TRA was within its authority to impose D.A. call requirements upon price cap regulated companies while CLECs have not generally been subject to these requirements. The Middle Section of the Tennessee Court of Appeals, in a decision which has been cited by both parties numerous times in this docket, affirmed the agency's ability to

impose D.A. requirements upon price cap regulated incumbents.

When Embarq made the decision to enter price cap regulation, the company gained pricing discretion for non-basic services while rates for basic services are also allowed to be raised in accordance with the statutory scheme. The setting of rates by price cap regulated incumbents no longer includes consideration of costs of service, even as the cost of service for telecommunication service has generally been lowered through factors such as advances in technology. Price cap regulation incumbents greatly benefit from price cap regulation in that under rate of return regulation, rates and the cost of service would come under scrutiny and rates may be lowered by the TRA to reflect just and reasonable rates. The great benefit of price cap regulation for companies such as Embarq is the failure to recognize a declining cost of service for most traditional telephone services. Under price cap regulation, residential rates and rates for directory assistance have risen despite “competition”.

However, while Embarq and price cap companies clearly benefit from price cap regulation, they are still subject to the TRA’s authority to make public policy to safe-guard consumers such as D.A. call allowances and exemptions. It should also be noted that CLECs are regulated differently than price cap regulated incumbents. CLECs, acting in theory as the engines of competition under the 1995 Telecommunications Act, are distinct and different from price cap regulated incumbents.

9) The Consumer Advocate stated in its Response filed March 10, 2008 at page 16 that there should be a relationship between the rate for local DA and the number of DA allowances required. If in fact a higher charge makes the number of allowances that much more important, then please explain in full why AT&T is allowed to offer only one allowance and

charge \$1.35 per inquiry while Embark's current rate for local DA is \$.95 per inquiry and the Consumer Advocate is attempting to keep Embark's DA allowances at three per billing cycle.

RESPONSE:

Objection. The request is not reasonably calculated to elicit discovery that is relevant, probative or admissible. The interrogatory seeks legal opinions and theories under-pining legal arguments of the Consumer Advocate made in response to Embark's claims of discriminatory treatment. The company's positions and claims of discrimination have already been heard and ruled upon by the hearing panel in this matter. Such claims are no longer relevant. Furthermore and rather inappropriately, the interrogatory requests the Consumer Advocate to explain a decision made by a majority of the TRA hearing panel in Docket 07-00188. The Consumer Advocate does not speak for the TRA. Nor does the Consumer Advocate speak for majority or minority decisions made by Directors. There is a public record of the proceedings of Docket 07-00188 which is available to the company.

Without waiving the objection, the Consumer Advocate would reaffirm its position in regards to the relevance of the rate for local DA and the call allotment set by the TRA. Briefly, the TRA can not set rates for non-basic services of price cap regulated companies. As long as the price cap statute requirements are followed, a company can set the price charged for a non-basic service at what it deems necessary. It is the Consumer Advocate's position that the agency may take into account the rate of a DA call set by a company in relation the number of the call allowance set by the TRA. To the Consumer Advocate's knowledge, the TRA has not yet explicitly rejected or adopted in a final decision the Consumer Advocate's position that the rates set by a company are relevant to the number of calls the TRA sets in the free allowance.

In Docket 07-00188, AT&T filed a tariff, which among other things, increased the rate for DA calls while eliminating the free call allowance, except for certain exemptions for the disabled and those 65 and older that have documented their respective disability and/or age. The Consumer Advocate filed a complaint and petition to intervene. The intervention was granted and a contested case was convened. The portion of the tariff that eliminated call allowances was suspended. The rate increase for D.A. calls was approved on a 2 to 1 vote with Director Kyle dissenting.

Prior to any action, scheduling of an initial status conference, filing of discovery or any other preliminary procedure, AT&T sought to withdraw the D.A. elimination proposal without prejudice. On the same day, the Hearing Officer granted the request and closed the docket. *See* the public record of Docket 07-00188.

10) Please provide any and all documents in the Consumer Advocate's possession or identify such documents the Consumer Advocate has knowledge of concerning DA call allowances for other incumbent local exchange carriers and competitive local exchange carriers operating in Tennessee.

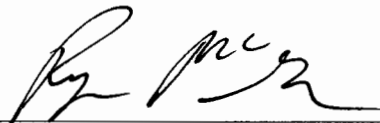
RESPONSE:

Objection, the interrogatory is far too vague and over broad. The Consumer Advocate further objects to the extent that the company seeks the Work Product of the Consumer Advocate. Finally, the Consumer Advocate objects to the unduly burdensome nature of the request. The directory assistance tariffs of incumbent and competitive local exchange carriers ("CLECS") are publicly available and on file with the TRA. The company is free to inspect the

tariffs on file at the TRA or those publicly available from some companies by website.

Without waiving the objection, the Consumer Advocate would respond that to its knowledge all rate of return incumbents provide directory assistance calls at no charge. Currently, the three price cap regulated incumbents, AT&T, Embarq and Citizens of Tennessee/Frontier, provide one free call, three free calls and unlimited free calls respectively. As quoted by the company within Interrogatory #3, the TRA has stated publicly that generally most CLECs do not have free call allowances. The tariffs of all CLECs and incumbents are on file with the TRA. Accurate and open to the public, the Company need only inspect those records.

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 23 day of April 2008.

Edward Phillips, Esq.
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