

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

)	
IN RE: UNITED TELEPHONE-SOUTHEAST)	
INC. d/b/a EMBARQ CORPORATION)	
TARIFF FILING TO INCREASE RATES IN)	DOCKET NO. 07-00269
CONJUNCTION WITH THE APPROVED)	
2007 ANNUAL PRICE CAP FILING)	
)	

**CONSUMER ADVOCATE'S MOTION TO COMPEL EMBARQ TO RESPOND TO
THE 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 Rules 37.01(2) and 36.01 of the Tennessee Rules of Civil Procedure, and Tennessee Regulatory Authority Rule 1220-1-2-.11(9) hereby respectfully moves to compel United Telephone-Southeast, Inc. d/b/a Embarq Corporation ("Embarq" or "Company"). to fully and completely answer and respond to the discovery requests that are the subject of this Motion.

Tentatively, the company and the Consumer Advocate have an agreement regarding discovery requests 12, 13, 14, 15, 18 and 19. The company will file supplemental information that is responsive to those discovery requests. However, the Consumer Advocate must move the hearing officer to compel the company to respond to discovery requests 27-35. The discovery requests, company objections and the Consumer Advocate's specific grounds for compelling responses are grouped and compressed into three distinct issues for the convenience of the hearing officer.

STANDARD FOR DISCOVERY

Tennessee has a broad policy which favors the discovery of any relevant information during civil litigation:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tenn. R. Civ. P. 26.02(1). Thus, evidence does not have to be admissible to be discoverable as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Today, it is through discovery rather than pleadings that the parties attempt “to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment.” *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615 at *3 (Tenn. Ct. App. 2002) (*quoting* Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962)). Accordingly, a party seeking discovery is entitled to obtain any information that is relevant to the case and not privileged. *See Id.* Consistent with Tennessee’s open discovery policy, the relevancy requirement is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case’s issues.” *Id.* Discovery therefore is not limited to the issues raised by the pleadings. *See Id.*, *see also Shipley v. Tennessee Farmers Mutual Ins. Co.*, 1991 WL 77540 at *7-8 (Tenn. Ct. App. 1991). A party may also use discovery to: define and clarify the issues;

probe a variety of fact-oriented issues that are not related to the merits of the case; formulate and interject additional issues into the case which relate to the subject matter of the pleadings; and determine additional causes of actions or claims which need to be or can be asserted against a party or against third parties. *See Shipley*, 1991 WL 77540 at *7-8 (*quoting Vythoulkas v. Vanderbilt University Hospital*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

It is nonetheless recognized that the trial court may limit discovery under appropriate circumstances. Because of the broad policy favoring discovery, the trial court should not order limitations on discovery unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *See Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). The trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support the requested limitations. *See Id.*

Moreover, given the liberal construction of discovery rules, the trial court should approach any request for limitations with common sense rather than with narrow legalisms, basing the reasonableness of any ordered limitations on the character of the information sought, the issues involved, and the procedural posture of the case. *See Id.* Rather than denying discovery outright, it is appropriate for the trial court to fashion remedies to discovery issues by balancing the competing interests and hardships of the parties and by considering whether there are less burdensome means for acquiring the requested information. *See Id.*

I. DISCOVERY REQUESTS RELATING TO DIRECTORY ASSISTANCE EXEMPTIONS FOR SENIORS AND THOSE WITH DISABILITIES

The Consumer Advocate's discovery questions 27 through 31 pertain to relevant information surrounding the exemptions from directory assistance charges provided to consumers whom are age 65 and older or have disabilities. Embarq objected to all questions relating to these matters in a uniform manner based upon issues of relevance, admissibility and the fact that the company is not seeking to change or modify the exemptions. The Consumer Advocate disputes the objection(s) and moves the hearing officer to compel the company to answer questions 27-31. Following are the disputed questions, the company's objections for the hearing officer's convenience and the Consumer Advocate's response to the objections and basis for compelling Embarq to provide the information.

DISCOVERY REQUESTS 27-31

27. Request for Admission:

On page four of the *Response of United Telephone-Southeast, Inc. d/b/a Embarq to the CAPD's Complaint & Petition to Intervene*, the company represents that all "Directory Assistance calls made by disabled Tennesseans and all those calls made by Tennesseans 65 and older, as set forth in the Tariff, are provided to such customers completely free of charge".

Please Admit the following statement: In order to qualify for the directory assistance exemption for disabled customers and/or customers age 65 and older, consumers must document their disability and/or age pursuant to the tariff.

28. Request for Admission:

The company cannot confirm whether all billed customers with disabilities or age 65 and older residing within Embarq's service area have applied for an exemption or are exempt from directory assistance charges.

29. Explain or describe the documentation required and application and approval process by which the Company's disabled consumers and consumers age 65 and older apply for a directory assistance charges exemption.

30. Please provide copies and examples, complete with date of publication, of all bill inserts, promotions, public notices and advertisements sponsored, published or distributed by the company in the last five years that advise customers of the existence of the Directory Assistance exemption for Tennessee customers with disabilities and those age 65 and older.

31. Please provide the number of the company's Tennessee customers with disabilities and/or age 65 and older that have completed the documentation requirements of the tariff and thus qualify for the directory assistance exemption.

COMPANY'S RESPONSE TO DISCOVERY REQUESTS 27-31:

"Embarq objects on the basis that the information requested is not relevant to this proceeding and not likely to lead to relevant and admissible evidence. The issue of exemptions for Embarq's disabled and elderly customers is not in dispute. Embarq does not seek to eliminate these exemptions."

CONSUMER ADVOCATE'S BASIS TO COMPEL RESPONSES TO QUESTIONS 27-31

The relevance of exemptions for consumers 65 and older and those with disabilities is readily apparent in this proceeding. The directory assistance policy of Embarq was created in Docket 96-01423. The policy entailed not only an allotment of free calls but also exemptions for seniors and those with disabilities.¹ The call allowance and exemptions are part and parcel of the same policy. Embarq's tariff seeks to lower the call allotment to one call while raising the rate. The raising of the rate and the lowering of the call allowance makes the exemptions and public knowledge of their existence that much more important to consumers. The Consumer Advocate needs this information to evaluate the number of consumers that have applied for exemptions, the process by which consumers apply for exemptions, and the amount of public notice given to consumers that may qualify.

Furthermore, Embarq has raised the existence of exemptions for seniors and those with disabilities as a defense.² The Consumer Advocate has the right to discover facts related to the company's legal defenses.

II. DISCOVERY RELATED TO THE COST OF SERVICE FOR PROVIDING DIRECTORY ASSISTANCE

The Consumer Advocate's discovery questions 32 through 34 pertain to relevant information surrounding the cost of service and historical treatment of directory assistance. Embarq objected to all questions relating to these matters in a uniform manner based upon issues of relevance, admissibility and the fact that directory assistance is classified as a non-basic service. The Consumer

¹ Docket 96-01423, Order Approving in Part and Denying in Part Tariff no. 96-201, (September 4, 1997), p. 16.

² *Response of UTSE to CAPD's Petition to Intervene*, (December 17, 2007), p.4.

Advocate disputes the objections and moves the hearing officer to compel the company to answer questions 32-34. Following are the disputed questions, the company's objections for the hearing officer's convenience and the Consumer Advocate's response to the objections and basis for compelling Embarq to provide the information.

DISCOVERY REQUESTS 32-34

32. Request for Admission:

Prior to the date Embarq became a price cap regulated incumbent in Docket 95-02615, the cost of providing directory assistance was included in the "Basic Local Exchange Service" rates paid by tariffed customers.

33. Provide the year in which the company first provided directory assistance to Tennessee consumers and the proceeding in which the company was first allowed by the Tennessee Regulatory Authority or by the former Tennessee Public Service Commission to incorporate the cost of service for providing directory assistance into basic local exchange rates or the rates charged to consumers for basic phone service.

34. Provide a copy of the most recent cost of service study the company has conducted for providing directory assistance.

COMPANY'S RESPONSE TO DISCOVERY REQUESTS 32-34

"Embarq objects on the basis that the information requested is not relevant to this proceeding and not likely to lead to relevant and admissible evidence. The Authority, as upheld by the Middle

Section Court of Appeals, has found directory assistance is a non-basic service under the price regulation statutes that currently govern Embarq's pricing."

CONSUMER ADVOCATE'S BASIS TO COMPEL RESPONSES TO QUESTIONS 32-34

The TRA can not set rates for directory assistance, as long as the company complies with the price cap statute and Tennessee's Telecommunication's policy. Although the cost of service is not relevant for purposes of setting rates for non-basic services under price cap regulation, the cost of service for providing directory assistance is relevant to the setting of directory assistance policy, specifically the free allotment of calls set by the TRA. In setting directory assistance policy, the TRA should balance the interest of consumers and the interests of the company. For example, if the cost of service for providing directory assistance is \$0.25 but the charge for use is \$1.35, then clearly the interests of consumers in using an essential service and the financial margins of the company are not in balance. Thus, the TRA may step in and raise the call allotment to safeguard consumers. The Consumer Advocate needs this information to make certain determinations underlying any proposals the Consumer Advocate may make in regards to how many free calls may be needed to serve the public interest. Further, such information contributes to a thorough record for the hearing panel to consider.

III. DISCOVERY RELATED TO QUALITY OF SERVICE

The Consumer Advocate's discovery question 35 pertains to relevant information surrounding the quality of service issues. Embarq objected to this request relating to these matters in a uniform manner based upon issues of relevance, and admissibility. The Consumer Advocate disputes the objection and moves the hearing officer to compel the company to answer questions 35. Provided here after is the discovery request and the company's objection for the hearing officer's

convenience. The Consumer Advocate's response to the company's objections and basis for compelling Embarq to provide the information follows.

DISCOVERY REQUEST 35

35. Provide and document all billing credits issued to the company's Tennessee consumers in response to billing complaints directed toward the company, the Tennessee Regulatory Authority, Better Business Bureau or other consumer complaint gathering agency or organization involving directory assistance charges.

COMPANY'S RESPONSE TO DISCOVERY REQUEST 35

"Embarq objects on the basis that the information requested is not relevant to this proceeding and not likely to lead to relevant and admissible evidence."

CONSUMER ADVOCATE'S BASIS TO COMPEL RESPONSES TO QUESTION 35

Consumer complaints, whether filed with the TRA, another entity or documented through consumer communication directly with the company, and records of billing credits for directory assistance uses are indicative of the service quality of the company in regards to directory assistance. The TRA has jurisdiction over service quality issues. The Consumer Advocate needs this information to access the service quality of Embarq's directory assistance policy.

Furthermore, Embarq has raised the issue of consumer complaints in support of its argument that the TRA committed error and had discriminated against the company in convening this contested case. In arguing that the tariff at issue must be approved as is and the contested case dismissed, the company has represented that no Tennessee consumers have filed complaints regarding directory assistance against AT&T.³ Thus, the objection on a basis of relevance and

³ *Transcript of Authority Conference* (March 24, 2008), p. 59-60, 68.

admissibility of consumer complaints and billing credits regarding directory assistance is inconsistent with the company's statements in support of their legal defenses in this docket. During the argument on reconsideration on March 24, 2008, the Consumer Advocate objected to the reference of consumer complaints when no such documents were presently in the record. There was no ruling on the objection by the hearing panel. The company again referenced consumer complaints in reference to its legal arguments in rebuttal.⁴ The Consumer Advocate has the right to discover facts related to the company's legal defenses. This is the opportunity to examine whether consumers have filed complaints with the TRA, other entities, and with the company itself through direct contact with consumers and whether billing credits have been issued to resolve complaints regarding directory assistance issues.

In responding to this request, the company should provide such data dating back to the effective date of the tariff considered in Docket 06-00288.

RESPECTFULLY SUBMITTED,



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⁴ *Id.*, p. 68.

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 26 day of Mar, 2008.

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