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May 29, 2008

filed electronically in docket office 5/29/2008

Chairman Eddie Roberson
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: United Telephone Southeast LLC's Response to the Consumer Advocate and Protection Division Office of the Attorney General's Motion to Compel

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 LLC's Response to the Consumer Advocate and Protection Division Office of the Attorney General's Motion to Compel. Embarq has already filed the enclosed response electronically; however, this letter is the required follow-up to that filing.

An extra copy of this letter and the response 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

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

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

UNITED TELEPHONE SOUTHEAST LLC'S RESPONSE TO THE MOTION TO COMPEL OF CONSUMER ADVOCATE AND PROTECTION DIVISION OFFICE OF THE ATTORNEY GENERAL

United Telephone Southeast LLC ("Embarq") files this response to the Motion to Compel filed on May 21, 2008 by the Consumer Advocate and Protection Division Office of the Attorney General's ("Consumer Advocate") in the above-captioned docket.[1] Embarq and the Consumer Advocate have in fact reached an agreement concerning Discovery Requests 12, 13, 14, 15, 18 and 19. In addition, Embarq also provided a response to the Consumer Advocate's Discovery Request No. 31, which contained confidential information, when the parties executed a non-disclosure agreement on May 19, 2008. As a result, the Consumer Advocate's Motion to Compel concerning Discovery Request No. 31 need not be considered by the Hearing Officer. As a

[1] While Embarq is participating in this contested case proceeding pursuant to the Tennessee Regulatory Authority's ("Authority") decision rendered at the December 17, 2007 Authority Conference and memorialized in the Authority's March 5, 2008 order, Embarq is not waiving its position that this matter should not have been convened as a contested case proceeding. Without waiving this argument, and considering the procedural posture of this matter, Embarq again restates its position that the examination of the directory assistance ("DA") call allowance policy should have either been conducted as a generic proceeding or some form of rulemaking proceeding consistent with the Court of Appeals' decision in *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W. 2d 151 (Tenn. Ct. App. 1992). Nevertheless, Embarq's arguments on this point have been rejected and this footnote only serves to preserve Embarq's position for any future review.

result, the outstanding Discovery Requests at issue in this Motion to Compel and Response concern Requests 27 - 30 and 32 - 35.

I. ARGUMENT

Several pages of the Consumer Advocate's Motion to Compel were spent discussing the standard for discovery in the State of Tennessee. A lengthy recital and response to the cases relied upon by the Consumer Advocate remains unnecessary. However, Embarq does note that even under the precedent cited by the Consumer Advocate, a trial court judge, and in this case the Hearing Officer, does have significant discretion to set reasonable limits on discovery. See *State v. Vanderford*, 980 S. W. 2d 390, 397 (Tenn. Crim. App. 1997).

A reasonable exercise of discretion by the Hearing Office in placing limits on discovery should be based "upon the broad parameters of the rules [of civil procedure and controlling Authority rules] and the fundamental notion of fairness." See *Vythoulkas v. Vanderbuilt University Hospital*, 693 S.W.2d 350 (Tenn. Ct. App. 1985) quoting *Harrison v. Greenville Readi-Mix, Inc.*, 220 Tenn. 293, 301-02, 417 S.W.2d 48, 51-52 (1967) and *Ivey v. State*, 207 Tenn. 438, 443-44, 340 S.W.2d 907, 909 (1960). Also, it must be kept in mind that the cases relied upon by the Consumer Advocate involve proceedings before trial courts where pretrial discovery plays a more crucial role in framing issues versus an administrative forum in which great pains are taken to develop the issues prior to serving discovery and the prefiling of testimony.

The Hearing Officer, just like a trial court judge, may limit discovery under appropriate circumstances. Discovery limitations are necessary when they are meant 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 Hearing Officer may decline to limit discovery if the party opposing such discovery is unable to demonstrate specific facts that support the limitations it seeks. *See Id.* Such reasonable limitations on discovery are appropriate and necessary this proceeding, as addressed below.

A. The Issue in This Proceeding Has Already Been Set And Discovery Should be Limited to the Issue

The parties agreed at a status conference held on January 3, 2008 that this matter could be resolved by disposing of three pertinent issues. Those issues are as follows: (1) what are the appropriate number of DA ("Directory Assistance") allowances that should be required of Embarq; (2) whether Embarq's rate increase should continue to be suspended; and (3) which party has the burden of proof. It was decided at the January 3, 2008, status conference that Issue Nos. 2 and No. 3 could be decided as a matter of law and that Issue No. 1 arguably is a question of policy that should be determined by the Authority.

Since the disposition of this matter now centers on one issue alone, that is, the appropriate number of DA allowances that should be provided by Embarq – no other issues need be addressed outside of this very narrow scope. As a result, any discovery requests seeking to expand Issue No. 1 should be denied because as they are outside of the scope of the proceeding, not likely to lead to admissible evidence or are propounded for the purpose of annoyance. This is true of Discovery Request Nos. 27-30.

Discovery Request Nos. 27-30 address the elderly and physical impairment exemptions. Discovery on this exemption is only meant to annoy since it is not an issue to be resolved by the Authority and is not within the Authority's jurisdiction to address at all. The Consumer Advocate failed to raise any claims regarding elderly and physical impairment exemptions in its

Complaint and Petition to Intervene filed on December 11, 2007. The Advocate only sought review of the proposed reduction in DA call allowances from three to one per billing cycle that Embarq filed as part of Tariff No. 2007-456.[2]

Embarq clearly stated in its Response to the Consumer Advocate it filed on December 14, 2007, that with the exception of the rate element, its tariff mirrored an existing BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee tariff that was approved by the Authority in Docket No. 06-00232.[3] Further, as part of the process in determining the terms and conditions of its tariff filing, Embarq made a sound business decision to preserve the exemption for elderly and physically impaired Tennesseans thereby removing the possibility that this exemption would be raised as an issue in a possible contested matter. Moreover, unlike the Consumer Advocate contends, Embarq did not rely on the mentioning of the preservation of this exemption as a defense in its response. Contrary to the Consumer Advocate's assertion, Embarq's defense was not that it preserved this exemption[4] but rather, Embarq's defense set forth in its Response was that the Authority should not treat similarly situated price regulated incumbent local exchange carriers ("ILECs") in a dissimilar way – by convening a contested case when Embarq's tariff mirrored an existing lawful tariff.[5]

Not only is mandating elderly and physically impaired exemptions outside the scope of the case and the identified disputed issues, this claim is not an integral component of the Authority's determination of what is the appropriate number of DA allowances. Any data requests attempting to glean information concerning the same are ripe for the Hearing Officer to set reasonable limitations as these requests are burdensome and create blatant annoyance to the

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[2] See the Consumer Advocate's Complaint and Petition to Intervene at pp. 2-3.
[3] See Embarq's December 14, 2007 Response at p. 2.
[4] See the Consumer Advocate's Motion to Compel at p. 6.
[5] See Embarq's December 14, 2007 Response at pp. 4-5.

producing party. A limitation on this discovery request is necessary and the Hearing Officer should find that Embarq need not be compelled to provide the requested information. This limitation on discovery will not result in prejudice to the Consumer Advocate as the Consumer Advocate. In addition, even without this information, the Authority will have all relevant facts upon which to base its decision.

B. Discovery Requests Resulting in a Need to Produce a Special Study is Both Burdensome and Expensive

The Consumer Advocate's Discovery Request No. 35 requires engaging in the development of a special study that will result in an undue burden and expense in terms of manpower and time required to generate such a comprehensive study. Embarq's position relative to this request is not based on mere anecdotal statements. Rather, this knowledge was obtained in our efforts to respond to Discovery Request No. 18. Out of the spirit of cooperation Embarq agreed to undertake the task to respond to the Consumer Advocate's request after initially filing objections to the same. Compliance with the request required that the information be obtained from Embarq's service order entry completed data base. This process took several weeks and was only in the form of "raw form" once done. By voluntarily engaging in this activity Embarq garnered experience and first-hand knowledge that producing such studies require countless man-hours and expense by dedicating a number of employees to accomplish a difficult task over a number of weeks.

The production of the study related to the Embarq's response to Discovery Request No. 18 as discussed above not only required the dedication of manpower resources to initially pull the raw data, it took considerable equipment time to aid in the completion of that task.

Moreover, the request still required additional time for manual culling of the raw data before Embarq will be able to produce the final report. Based on these experiences and a small sampling already performed in a effort to comply with Discovery Request No. 35, it has been determined that the requirements are greater still. Fortunately, applicable authority does not require a party responding to discovery to endure the burden and/or expense related to such an undertaking. See *Shipley v. Tenn. Farmers Mut. Ins. Co.*, No. 01-A-01-9011-CV-00408, 1991 Tenn. App. Lexis 346, at p. 5 (Tenn. Ct. App. May 15, 1991). See also, *Kuehne & Nagel, Inc. v. Preston*, No. M1998-00983-COA-R3-CV, 2002 Tenn. App. LEXIS 457, at p. 3 (Tenn. Ct. App. June 27, 2002); *Reid v. State*, 9 S.W.3d 788, 792-93; and Tenn. R. Civ. P. 26.02(1).

Therefore, based on controlling authority and Embarq's first hand knowledge, Embarq requests the Hearing Officer place reasonable limitations on the Consumer Advocate's discovery by denying the Consumer Advocate's Motion and not requiring Embarq to provide a special study.

C. Information Pertaining to Rate of Return or Other Cost Information Goes Beyond The Scope of The Issue in This Proceeding

The Consumer Advocate's Discovery Request Nos. 32 and 33 seek information relating to Embarq's predecessors operations as a rate of return regulated company and the cost of the service at that time and how it may have been treated in the rate base. However, the issue in this case concerns the appropriate number of DA call allowances that should be granted by the Authority – not antiquated, stale, and irrelevant return and cost information. The Consumer Advocate's requests are not related in any tangible way to the issue to be decided in this matter and as a result, such discovery is only meant to annoy the producing party. As the Authority and

the Consumer Advocate are aware, Embarq's predecessor became a price regulated ILEC through approval of its application by the Tennessee Public Service Commission in Docket No. 95-12615 pursuant to the requirements of Tenn. Code Ann. § 65-5-209.[6]

The fact is that the historical treatment of DA under a rate of return regime is not even remotely relevant in this proceeding. This request epitomizes the need for limitations on burdensome, irrelevant discovery that is clearly designed to harass and annoy in its efforts to engage in a "what if" fishing expedition. Fact: Embarq and its predecessor company have been operating as a price regulated entity for nearly thirteen years in Tennessee. Moreover, given the vintage nature of this information, if it can even be located – discovery is not justified. Given these facts, it is easy to see that the Consumer Advocate's requests may in fact lead to annoyance despite any intentions to the contrary. Further, the authenticity of such information may be greatly compromised if it was being produced by individuals who do not have first-hand knowledge and may only be relying on incomplete information at best. Thus, it is reasonable to deny the Consumer Advocate's request seeking this information.

Finally, the Consumer Advocate's Data Request No. 34, which seeks the discovery of a recent cost study, is yet another attempt to inject another issue into the proceeding and create annoyance to the producing party. Embarq is a price regulated ILEC operating in the State and cost of providing a non-basic service has no bearing on the policy issue involved in this matter. Further, while the Authority does have discretion under Tenn. Code Ann. § 65-4-117(3) to establish the terms under which a service can be provided – it does <u>not</u> have the ability to consider cost issues related to the provisioning of a non-basic service. Thus, the Consumer Advocate's Discovery Request No. 34 is not relevant, will not lead to admissible evidence, and

[6] Tenn. Code Ann. § 65-5-209 was later renumbered to Tenn. Code Ann. § 65-5-109 and this reference is only included for historical purposes.

only serves to annoy and mislead the Authority if the Advocate is ultimately allowed to admit testimony or other evidence regarding costs in this proceeding. As a result, the Consumer Advocate's motion should be denied.

WHERFORE, based on the foregoing, Embarq respectfully requests that the Hearing Officer deny the Consumer Advocate's Motion to Compel in all respects and protect Embarq from annoyance and the undue burden and expense of developing any special study otherwise.

Respectfully submitted this 29th day of May, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response of United Telephone Southeast LLC's to the Consumer Advocate and Protection Division Office of the Attorney General's Motion to Compel by depositing a copy addressed to the representative of the Consumer Advocate and Protection Division in the United States Mail, first-class postage prepaid.

This 29th day of May, 2008.

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

Edward Phillips
United Telephone Southeast LLC