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Darlene Standley
Chief – Utilities Division
Tennessee Regulatory Authority
460 James Robertson Parkway
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In Re: Docket to Study the Merits of Rural Affordability Fund
Docket No. 09-00096
Comments of the Competitive Carriers of the South

Dear Ms. Standley,

The Competitive Carriers of the South (CompSouth) appreciates the opportunity to comment on proposed legislation that would create a Tennessee Rural Affordability Fund (TRAF).[1] CompSouth files these comments in response to questions sent to CompSouth member companies and is intended to provide the TRA with the position of nearly all CompSouth member companies doing business in Tennessee.[2] Before turning to the specific questions posed in your letter of September 4, 2009,[3] however, CompSouth offers the following general response concerning this proposed new tax on telephone subscribers.

As a threshold point, the Tennessee Regulatory Authority (TRA) is *already* governed by an explicit statute to protect universal service and is specifically empowered to create policies or rules needed to ensure affordable rates and universal service. State law now provides:

> Universal service, consisting of residential basic local exchange telephone service at affordable rates and carrier-of-last-resort obligations must be maintained after the local

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1 *See* 2009 House Bill 2117 and Senate Bill 2147

2 Sprint Nextel is a member of CompSouth but does not share in these responses and will respond separately. Other CompSouth members are: Access Point, Birch Communications, Cavalier Telephone, Cbeyond, Covad, DeltaCom, FPL Fibernet, Level 3, NuVox, tw telecom, and XO Communications.

3 *See* Letter from Darlene Standley, Tennessee Regulatory Authority Docket No. 09-00096, September 4, 2009.

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> telecommunications markets are opened to competition. In order to ensure the availability of affordable residential basic local exchange telephone service, the authority shall formulate policies, promulgate rules and issue orders which require all telecommunications service providers to contribute to the support of universal service.[4]

Importantly, however, under the provisions of existing law, the TRA must reach reasonable evidentiary conclusions before it may impose a new universal service tax on Tennessee consumers. Specifically, under § 65-5-107, the TRA may create a universal service fund:

> ...only if it [the TRA] determines that the alternative will preserve universal service, protect consumer welfare, be fair to all telecommunications service providers, and prevent the unwarranted subsidization of any telecommunications service provider's rates by consumers or by another telecommunications service provider.[5]

Seen in this light, the TRAF as set forth in the proposed legislation is not a bill to *create* a universal service fund (for the TRA already has the statutory mandate to do so if needed); it is a proposal to *eliminate* the critical public policy constraints contained in existing law to prevent unnecessary taxation.[6] The proposed TRAF has little to do ensuring affordable rates for consumers, but everything to do with guaranteeing revenues for incumbent local exchange companies, in particular smaller incumbent local exchange carriers (i.e., those with less than one million lines), whether or not those revenues are needed for universal service.

Since the enactment of the Telecommunications Act in 1996 and the Tennessee statute that opened up the local exchange to competition, there has not been a need to have a state universal service fund.[7] Ironically, the Tennessee legislature recently enacted Market Regulation legislation which, if elected by the LECs, would eliminate government regulation of their retail rates. Now suddenly the rural LECs want a

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4 T.C.A. § 65-5-107(a).

5 T.C.A. § 65-5-107(b). Emphasis added.

6 In addition to the basic requirements outline above, § 65-5-107(b) sets forth eight (8) specific requirements that any universal service system must satisfy, all intended to protect the public interest and competition. Importantly, House Bill 2117 and Senate Bill 2147 would delete subsections (b) through (e) of § 65-5-107, which today provide important public protections against the creation of unreasonable universal service taxes.

7 Most states in the region have reached the same conclusion. Three, Louisiana, South Carolina, and Georgia have universal service funds. The others do not.

government subsidy – funded by a new state tax on Tennessee consumers. The timing of this proposed legislation is poor and the need is suspect at best. CompSouth believes that "No government regulation" goes along with "No government subsidies".

CompSouth supports universal service for targeted programs (Lifeline) and respects the TRA's important role in making sure that low income consumers in Tennessee have basic telephone service. Given that all Tennessee consumers would ultimately fund a state universal service fund through a new state tax, any subsidy program should be carefully designed to be as small – and as competitively neutral – as possible. Towards that end, if the TRA were to find through an evidentiary hearing that a universal service fund is necessary in Tennessee, CompSouth offers the following general principles that any universal service program should satisfy (and which the TRAF as currently proposed does not):[8]

* Ensuring that a simple, affordable basic rate option is available everywhere does not justify subsidizing *every* line offered by a rural telephone company. Rural phone companies, like all providers, offer basic local service as well as packages and bundles that include other features and capabilities. Limiting universal service support to only those lines that provide basic local service *without* other revenue-producing options would reduce subsidies that must, in the final analysis, be collected from other Tennessee consumers.[9]

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8 The list of principles outlined here is not necessarily exhaustive. Rather, it is a minimum set of principles that are clearly violated by the TRAF in its proposed form. Given the accelerated time-line of the TRA's request for comment, CompSouth has not fully developed a comprehensive list of principles and reserves the right to augment the list above in the future.

9 As explained by Verizon addressing the related question as to whether Lifeline discounts should apply to bundles:

> As a matter of public policy, moreover, the [Florida] Commission should not require a Lifeline discount on bundles. The underlying public policy goal of the Lifeline and Linkup programs is the "preservation and advancement of universal service." Mandating Lifeline discounts for bundles would not increase subscribership because its principal effects would be to encourage Lifeline customers who already have basic service to upgrade to nonbasic Service packages and to make the Lifeline discount available to Lifeline-eligible customers who are already subscribing to nonbasic-service packages. In other words, the mandate would not increase network subscribership, but would merely provide a Lifeline discount to additional customers who already have telephone service. Such a requirement would not advance universal service.
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> Verizon Florida LLC's Post-Hearing Brief, Florida Public Service Commission Docket No. 080234-TP, April 3, 2009 at 2 (footnotes omitted/emphasis added).

* Universal service subsidies should not be provided to lines that are no longer rate regulated. Where there is no price regulation, there is no demonstrable linkage between support (if any) and the price paid by the subscriber. A profit-maximizing firm will increase its rates until the incremental revenue from the price increase is offset by the loss of subscribers to alternatives. Because this price point is not affected by the support provided the incumbent, there is no universal service justification for a subsidy. Moreover, because the prices for packages and bundles have been deregulated in Tennessee,[10] this principle provides an additional compelling justification to deny subsidies to such offerings.

* Consistent with the existing statute, any new universal service program must be competitively neutral. Specifically, support should be portable to any carrier offering a qualifying service in the same area.

* Any new universal service support fund should rely, to the maximum extent practical, upon existing administrative systems used to implement the federal fund.

To be clear, CompSouth has seen no evidence that a new universal service mechanism is needed in Tennessee and recommends that the process described in existing law – a process that requires an *evidentiary* basis to support the creation of any fund – be retained. The TRAF is fundamentally an effort to evade the findings required by § 65-5-107 in order to guarantee revenues for certain incumbent telephone companies at the expense of Tennessee consumers. As such, CompSouth opposes its creation.

1. **Please discuss in detail the financial impact of reducing your company's access rates to the interstate level as proposed in the legislation.**

Similarly, providing TRAF support to bundles and packages would do nothing to increase universal service in Tennessee; it would simply increase the number of subscribers that upgrade their service. The goal of universal service is not to encourage ever better packages and bundles -- for that is the role of competition – but rather to ensure that every Tennessean can afford to connect and use the network so that subscribership levels remain high.

10 T.C.A. § 65-37-103, which states in part (a)(1):

> Except as provided in this section, the TRA shall not assert regulatory jurisdiction over the retail offering of combinations or bundles of products or services, whether or not such combinations or bundles of products or services are subject to a tariff or other regulatory filing with the TRA as of May 28, 2005, and whether or not comprised of products or services provided by a local exchange carrier alone or with another company.

The TRAF does not have a direct financial impact on CompSouth members because, as drafted, access reductions would only be required to the rates charged by rural telephone companies with less than one million access lines. As the TRA is aware, reform to intercarrier compensation is an exceedingly complicated topic that raises issues far beyond the narrow question of affordable rates in select rural areas. CompSouth would oppose any effort to address intercarrier compensation without a comprehensive examination of the effects on all providers, but does not recommend expanding this proceeding beyond the narrow question of universal service.

2. **Please discuss the merits of the TRAF as proposed and any changes/modifications that you believe would be necessary in establishing this fund.**

As explained above, CompSouth sees no merit in the TRAF as proposed because it would *eliminate* the existing provisions of § 65-5-107 designed to protect the public interest by requiring an evidentiary basis to support the creation of any fund. In addition to this overriding objection, CompSouth specifically opposes:

* Provisions of the TRAF that guarantee revenue neutrality without any demonstration that a subsidy is required to ensure affordable rates;[11]

* Provisions that would guarantee revenues based on 2008 access minutes, thereby shielding these incumbent rural companies from the actual choices by their subscribers to use alternatives to long distance service;[12] and

* Provisions that limit support only to incumbent local exchange carriers,[13] thereby providing such carriers a subsidy even where consumers have chosen a competitive alternative.

Importantly, even if these provisions were corrected, CompSouth supports the evidentiary-based provisions of existing law as the preferred process to evaluate whether a universal service system is needed in Tennessee.

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11 See subsection (n) preventing the TRA from conducting any rate case, earnings review or cost analysis in connection with determining the TRAF revenue guarantee.

12 *See* TRAF subsection (k) and (l). Although current data is not publicly available, United Telephone of the Southeast reported to the FCC a 28% decline in average intrastate access minutes from 2005 to 2007 in Tennessee (ARMIS 43-08). Under the provisions of the TRAF, rural incumbent local exchange carriers would be protected from fundamental changes in the marketplace that affect all carriers, while Tennessee consumers would be forced to pay a universal service tax to maintain the status quo.

13 *See* TRAF subsection (d).

3. **What should be the determining factors and criteria in determining whether to establish a TRAF?**

The factors and criteria set forth in the current statute, § 65-5-107, should be used to determine whether to establish any universal service system in Tennessee. As explained above, existing law already provides the necessary authority and guidance to determine whether a fund is needed. There is no reason for Tennessee to abandon the consumer protections of § 65-5-107 by replacing those provisions with a revenue-guarantee program funded by a new state universal service tax.

4. **Please discuss whether prices and service offerings should be comparable between all rural and urban areas, and how this determination should be made?**

Universal service does not require that prices and service offerings should be comparable between rural and urban areas. The reality is that urban and rural markets *are* different in a number of critical dimensions. For instance, housing costs and commuting times are typically much higher in urban markets, while rural markets frequently enjoy better environmental conditions. Universal service only requires that customers in every market have the option of choosing local service, without features or bundles, at an "affordable" rate. Affordability does not simply concern what a product or service costs. Affordability is determined by the relationship between the rate for a service and the customer's ability to pay.[14] As such, affordable rate levels will increase over time as personal income increases. For instance, in the time since the federal Telecommunications Act was enacted at the beginning of 1996, per-capita personal income in Tennessee has risen from $21,854 to $33,340 per year, an increase of 57%.[15] Consequently, it would be inappropriate to define "affordability" just by reference to existing rate levels that may have been in effect for many years. Moreover, there is no more justification for an inner city consumer to subsidize the phone service for the consumer who chooses to live in a development by a lake as it is for a worker on a farm to subsidize the phone service for a condo dweller in the city. As long as consumers have access to an "affordable" stand-alone basic local exchange service option, the goals of universal service will be realized.

5. **Should the earnings of incumbent local exchange carriers (ILECs) operating under rate-of-return regulation be examined prior to receiving TRAF funds?**

Yes. Every dollar of TRAF subsidy must be collected from the pockets and paychecks of Tennessee consumers. As such, before implementing any universal service tax, the TRA should first determine that a legitimate need exists. To the extent that an

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14 It is useful to remember that Lifeline programs efficiently target the lowest income members of society, further promoting universal service.

15 Comparing per-capita personal income on 1/1/96 to 1/1/08 as reported by the ALFRED (Archival Federal Reserve Economic Data) system managed by the Federal Reserve Bank of St. Louis.

incumbent local exchange carrier is today earning unreasonable profits, the revenue-guarantee structure of the proposed TRAF would lock-in those profits and impose a perpetual obligation on Tennessee consumers to maintain them forever. Such a result would simply be bad public policy.

6. **Should the TRAF target funds for expanding a recipient company's broadband deployment?**

No. As the TRA is aware, there are number of new federal subsidy programs being implemented to promote rural broadband. In addition, there is a massive effort underway to develop a national broadband map to determine the extent and location of any residual broadband gaps. The TRA should allow these efforts to fully develop before attempting to determine whether additional state-level subsidy systems will be needed in Tennessee.

7. **Should the TRAF be expanded to replace other sources of implicit funding used to support universal service?**

No. There is no evidentiary basis to determine the extent to which *any* universal service support is needed in Tennessee. The existing fact-driven requirements of § 65-5-107 should be retained in order to protect Tennessee consumers from unnecessary taxation.

8. **Should TRAF disbursements be portable to Eligible Telecommunications Carriers ("ETCs") for customers they serve in these rural areas?**

Yes, because portability ensures that the most efficient provider obtains the support. Doing otherwise would risk establishing a taxation and subsidy program that rewards inefficiency.

9. **Should the TRA establish a state-wide local residential benchmark rate for universal service and determine necessary universal funding based upon the benchmark, i.e., a company could draw money out of a universal fund if its rates are below the benchmark?**

CompSouth believes there is substantial merit in the TRA developing a specific benchmark rate to which rates for local service must rise before any universal service support would be provided. A provider seeking state universal service support would still have to demonstrate a need for any subsidy, but would first have to apply the benchmark rates to its basic local exchange services before making an application for additional state subsidies. There are several rural areas in the state of Tennessee that have enjoyed a very low basic local exchange rate (less than $10/month) for many years as rural LECs have chosen to decrease local exchange rates instead of decreasing access rates when they have been in an overearnings situation. Since wireless and cable competitors' rates are often closer to $25/month for local service, a more realistic benchmark rate may make a state universal subsidy program a moot point. As an example of how a successful benchmark was implemented, the New York Public Service Commission ordered a benchmark rate ten years ago. Carriers have to have their basic local exchange service rates set at the benchmark rate before they can request additional state universal service support and then need to make an evidentiary showing to prove they need it. In ten years since the benchmark was implemented, a carrier has yet to come forward to request state universal service support. Developing the appropriate benchmark rate level in Tennessee would require an evidentiary process as currently contemplated by the existing § 65-5-107.

10. **Please provide your thoughts/suggestions on whether there should be a phase out or reduction in the amount of TRAF funding once carriers elect Market Regulation.**

As explained above, only lines subject to a regulatory pricing constraint should qualify for subsidy. Consequently, any carrier electing Market Regulation should be immediately disqualified from receiving state universal service support.

11. **What factors and procedures should be considered in determining the per line support amount for rural carriers?**

As a general matter, universal service funds should do no more than assure the recovery of actual embedded costs reasonably incurred to provide basic local service for Lifeline customers. At this point, and without the benefit of the evidentiary process required by the existing § 65-5-107, CompSouth is unable to more fully respond to this question.

12. **Which companies should contribute to the TRAF, and state why or why not?**

13. **What method should be used to determine the TRAF contribution per company?**

CompSouth provides the following joint response to questions 12 and 13: If, after an evidentiary hearing, the TRA determines that a TRAF is necessary, the TRA should develop contribution mechanisms that track the administrative practices of the federal universal service system. Although such systems may not be ideal, it is more efficient to piggy-back on existing reports/requirements, rather than attempting to develop and apply Tennessee-specific procedures.

14. **If intrastate access rates are reduced in Tennessee, should language be incorporated into the proposed legislation to ensure that companies subscribing to intrastate access do not receive windfall profits, but rather return the access savings to their customers.**

As a general matter, targeted universal service programs are a separate issue from intrastate access charge reform. Moreover, intercarrier compensation reform requires comprehensive analysis, including knowledge concerning federal reform. The proposed TRAF inappropriately links these separate issues. CompSouth fundamentally opposes adoption of a revenue-guarantee program tied to the rural incumbent's intrastate access charges. Given the growing dominance of pricing plans that no longer track usage, the TRA would find it virtually impossible to determine whether any reduction in intrastate access rates benefited consumers through lower long distance prices..

The proposed TRAF legislation is demonstrably inferior to the existing provisions of § 65-5-107 that are designed to protect consumers. Under the proposed TRAF, consumers would face higher taxes without offsetting benefits, all to protect the profits of rural incumbent telephone companies. The TRA should oppose its adoption.

Respectfully submitted,

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