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September 25, 2009

**VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY**

Ms. Darlene Standley  
Chief - Utilities Division  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505  
Attention: Ms. Sharla Dillon - Docket Room Manager

**Re: Docket to Study the Merits of a Rural Affordability Fund; Docket  
No. 09-00096**

Dear Ms. Standley:

Enclosed are an original and five (5) copies of Charter Fiberlink - Tennessee, LLC's Comments in the above captioned matter (the "Comments"). Please file the Comments in your usual fashion and return one (1) file-stamped copy of the filing to us in the enclosed envelope.

Sincerely,



Kennard B. Woods  
Counsel to Charter Fiberlink – Tennessee, LLC

KBW/nah

Enc.

cc: Charter Fiberlink – Tennessee, LLC (Via Regular Mail and With Enc.)

**BEFORE THE  
TENNESSEE REGULATORY AUTHORITY**

IN RE: DOCKET TO STUDY THE	§	
MERITS OF A RURAL	§	DOCKET NO. 09-00096
AFFORDABILITY FUND	§	

**COMMENTS OF  
CHARTER FIBERLINK – TENNESSEE, LLC**

**COMES NOW** Charter Fiberlink – Tennessee, LLC (“Charter Fiberlink”) and respectively submits the following to the Tennessee Regulatory Authority (the “Authority”) regarding House Bill 2117/Senate Bill 2147, the “Tennessee Rural Affordability Fund” (“TRAF”), and in support of Comcast Phone of Tennessee, LLC’s (“Comcast”) responses to the Authority’s September 4, 2009 letter, which set forth substantially the same concerns that Charter Fiberlink has with the proposed legislation. Charter Fiberlink submits these comments, not only to express its fundamental opposition to the TRAF, but to provide the Authority with an overview of the regulatory background and context of, and significant policy issues implicated by, House Bill 2117/Senate Bill 2147.

Charter Fiberlink, a wholly-owned subsidiary of Charter Communications, Inc., Debtor-in-Possession,<sup>1</sup> provides facilities-based and resold communications services to residential and business customers in Tennessee. As of December 31, 2008, Charter Fiberlink and its affiliates served approximately 5.5 million customers throughout the United States, including approximately 5.0 million video customers, 2.9 million high-speed Internet customers, and 1.3

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<sup>1</sup> Please see the Application filed May 15, 2009 in Docket No. 17772-U for information regarding the Chapter 11 bankruptcy reorganization of Charter Communications, Inc. and its subsidiaries, including Charter Fiberlink.

million telephone customers.<sup>2</sup> Charter Fiberlink and its affiliates have invested, created jobs and are fulfilling the promise of the Telecommunications Act of 1996 by developing facilities-based choice for local phone service in Tennessee. Charter Fiberlink offers a true alternative to the local phone monopolies, bringing competition and lower prices to phone service, saving customers millions of dollars. More to the point – Charter Fiberlink is providing services to locations, including in rural areas, that are not otherwise served by competitive carriers.

For over ten (10) years in Tennessee, and as a result of state deregulatory legislation, incumbent local exchange carriers have been able to enjoy the opportunity for “price regulation”, which limits the Authority’s jurisdiction to review an electing carrier’s initial rates and provides few constraints on rate increases – and then only as to basic retail local rates.<sup>3</sup> Pursuant to the Market Regulation Act of 2009, which presupposes the existence of competitive conditions for local communications in Tennessee, several incumbents now enjoy the opportunity to elect virtually full “market” retail rate deregulation.<sup>4</sup> In such an environment, the rural local telephone lobby – more than thirteen (13) years after enactment of the Telecommunications Act of 1996 – now proposes to create the TRAF. The timing of the lobby’s proposal is not coincidental, since cable telephony providers like Charter Fiberlink are vigorously engaged in negotiating interconnection agreements in order to provide competitive choices in communications and information services to rural consumers. The TRAF would exist for the sole benefit of rural ILECs and cooperatives, while it would be contributed to by the customers of *all* providers of voice services, including and especially those companies certificated by the Authority which,

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<sup>2</sup> Most customers subscribe to more than one service offered by a Charter Communications, Inc., Debtor-in-Possession operating subsidiary.

<sup>3</sup> T. C. A. § 65-5-109(a) - (k). *See BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663 (Tenn. App. 1997) (audit performed by Authority, when BellSouth Telecommunications, Inc. (“BellSouth”) filed an application for price regulation plan pursuant to the statute, was limited to verifying the accuracy of BellSouth’s most recent reported operating results).

<sup>4</sup> *See* proposed T. C. A. § 65-5-109(l) - (r).

like Charter Fiberlink, are actually attempting to compete in rural service areas but are being met with significant barriers to entry. The proposed fund would be used to subsidize rural ILECs and cooperatives on a dollar-for-dollar basis, without cost justification or other review by the Authority,<sup>5</sup> for bringing intrastate access charges to parity with interstate access charges.

Moreover, it is clear that the intent of the TRAF is to subsidize the *unregulated* information services of rural ILECs and cooperatives, while, notwithstanding the bill's expressed intent to raise rural telephone retail rates to "comparable" levels of urban retail rates,<sup>6</sup> keeping retail telephone rates (whether or not regulated by the Authority) artificially low, so as to ward off competing services. Compounding the anti-competitive effects of this legislation, the proposed fund would inevitably exist in perpetuity,<sup>7</sup> as witnessed by the Georgia Universal Access Fund, which has been in existence since 1995 despite endless proceedings before the Georgia Public Service Commission to limit the growth and scope of the fund.<sup>8</sup> At the same time, the bill seeks to expand the Authority's jurisdiction over VoIP and wireless providers,<sup>9</sup> subjecting their revenues (and, thus indirectly, the rates of their customers) to regulation in order to subsidize the competing information services of rural telephone companies.

House Bill 2117/Senate Bill 2147 is unclear as to how extensive that jurisdiction would be construed, but in any event the legislation raises substantial legal concerns, for at least two (2) reasons. First, the Tennessee General Assembly in the "Broadband Business Certainty Act of

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<sup>5</sup> See proposed T. C. A. § 65-5-109(n).

<sup>6</sup> See proposed T. C. A. § 65-5-107(b).

<sup>7</sup> See proposed T. C. A. § 65-5-109(o).

<sup>8</sup> The Georgia Universal Access Fund ("UAF") was created to compensate rural ILECs for reductions in switched access charges. See O.C.G.A. 46-5-166(f)(2). Fourteen (14) years later, rural ILECs continue to receive substantial subsidies from the UAF, without any cost justification and despite numerous attempts to reduce those subsidies. See Georgia Public Service Commission Docket No. 5825-U.

<sup>9</sup> See proposed T. C. A. § 65-5-107(f) and (i). VoIP providers and wireless carriers contribute to the federal Universal Service Fund.

2006” categorically removed the Authority’s jurisdiction regarding “broadband services”.<sup>10</sup> The proposed legislation would bring VoIP providers, which provide service via a broadband connection, within the Authority’s jurisdiction, an action that cannot be reconciled with the existing state law. Moreover, and as the Authority is aware, the Circuit Court of Appeals for the Eighth Circuit recently affirmed a lower court’s injunction, based on federal preemption, of the Nebraska Public Service Commission’s efforts to collect state universal service fund subsidies from nomadic VoIP providers.<sup>11</sup>

The bill also would potentially subject the access charges of *any* “telecommunications service provider” to rate regulation; *e.g.*, some may contend that CLEC access charges could be lowered.<sup>12</sup> Assuming, for the sake of argument, that the bill confers such jurisdiction on the Authority and that a carrier (including a CLEC) has “lawful rates for carrier access”, those rates

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<sup>10</sup> T.C.A. § 65-5-203 (“federal preemption”) states:

In order to ensure that Tennessee provides an attractive environment for investment in broadband technology by establishing certainty regarding the regulatory treatment of that technology, consistent with the decisions of the federal communications commission to preempt certain state actions that are not in accordance with the policies developed by the federal communications commission, *the Tennessee regulatory authority shall not exercise jurisdiction of any type over or relating to broadband services*, regardless of the entity providing the service, except as provided in § 65-5-202(a).

(Emphasis added.)

“Broadband services” are defined by T.C.A. § 65-5-202 as:

(1) *any service that consists of or includes* a high-speed access capability to transmit at a rate that is not less than two hundred kilobits per second (200 Kbps), either in the upstream or downstream direction and either:

(A) *Is used to provide access to the Internet*; or

(B) Provides computer processing, information storage, information content or protocol conversion, *including any service applications or information service provided over the high-speed access service.*

(2) “Broadband services” does not include intrastate service that was tariffed with the Tennessee regulatory authority and in effect as of May 15, 2006; furthermore, the intrastate service shall not be reclassified, bundled, detariffed, declared obsolete or otherwise recharacterized to avoid the imposition of inspection fees by the Tennessee regulatory authority.

(Emphasis added.)

<sup>11</sup> *Vonage Holdings Corp. v Nebraska Public Service Commission*, 564 F.3d 900 (Fed. 8th Cir. 2009) (affirming the lower court ruling on the basis of the FCC’s *Vonage Preemption Order* (*Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004))).

<sup>12</sup> See proposed T. C. A. § 65-5-107(i).

could not be lowered by the Authority's order unless it is done on a "revenue neutral basis". Accordingly, the proposed legislative language suggests the potential that (a) some competitors' current access rates could be determined to be unlawful, although it is not clear on what legal basis and what relevance to rural telephone rates and subsidies the "power" to "fix charges" would be exercised, and (b) the lowering of "lawful" CLECs' access charges could be accomplished by mandatorily raising CLEC retail charges, which as a matter of state law would be an entirely unprecedented action for the Authority to take. Thus, House Bill 2117/Senate Bill 2147, intentionally or otherwise, creates considerable opportunities for protracted confusion and resultant litigation.

Of course, it goes without saying that consumers throughout Tennessee – not only in metropolitan areas of the State – deserve choices for their telephone and Internet services. Even in this era of "bundled" services that combine local and long distance services with added features and information services, there is still a need to ensure that everyone of whatever means – including the elderly, the disabled, and the poor – can continue to have access to at least basic telephone services. Indeed, given the present economic recession, there is every reason to continue to ensure that basic telephone services remain available. The proposed legislation, however, not only fails to ensure that "affordable" basic telephone services will be available to rural customers; it does much to harm the ability of rural customers to have meaningful choices in communications services. Such harm is the true, and probably immeasurable, "financial impact" of the TRAF.

Cable communications providers, including Charter Fiberlink, would like to build networks and provide facilities-based services to consumers in the areas in Tennessee served by rural ILECs and cooperatives; however, there are many places in Tennessee that competitive

carriers and cable providers have yet to serve, because some rural ILECs and cooperatives, citing exemptions that they maintain they are entitled to pursuant to 47 U.S.C. § 251(f), will not agree to interconnect their networks.<sup>13</sup> For example, even when Charter Fiberlink is not seeking to lease unbundled network elements, Charter Fiberlink's straightforward requests for interconnection are often met with foot-dragging and specious arguments from rural carriers based on the federal Telecommunications Act of 1996. The legislation would encourage this situation to continue, if not worsen. A rural ILEC or cooperative that is price regulated, whose earnings and, indeed, overearnings, as a practical matter, are not subject to meaningful review, and that has not had to interconnect its network with competitors in order to receive the subsidies paid by its competitors, including by Charter Fiberlink and other cable communications providers, is simply not incented to engage in meaningful negotiations under 47 U.S.C. § 252.

Until a few years ago consumers had one choice, and one choice only, for local phone service – the incumbent local exchange carrier. Since the mid to late 1990s, with the enactment of the federal Telecommunications Act of 1996 and the amendments to Tennessee's utility statutes, the mission of the Authority, like state public utility commissions everywhere, has been to open those previously closed markets to competition. This means to ensure that competitors can play on a level field. The industry, with the Authority's assistance, has made substantial progress in ensuring a level playing field. However, competitive choice cannot and does not spring up overnight, and it has been a long process – requiring the Authority's assistance at times – to lay the groundwork for competitive phone services. Interconnecting networks is essential for a consumer to be able to place a phone call on a competing carrier's network, and to have that

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<sup>13</sup> The Marketing Act of 2009 attempts to address this situation, but only as to incumbents that elect "market" regulation. *See* T. C. A. § 65-5-107(m).

call transmitted to another consumer, who may be using the incumbent local carrier's service. The Authority at times must intervene to ensure that this kind of interconnection takes place.

Therefore, both of these components of modern regulation – protecting the availability of affordable basic telephone services for consumers and promoting market-based competitive forces to foster the growth of new technologies and new choices in telecommunications – are absolutely essential. House Bill 2117/Senate Bill 2147 is fundamentally and irretrievably flawed on both counts. There are no provisions in the bill to ensure the provision of affordable or adequate basic telephone services; nor is there any provision that would allow the Authority to exercise its state law jurisdiction to stimulate interconnection. This is so even if competitive alternatives in a given service area are unavailable and likely to remain so given the lack of interconnection between the incumbent carrier and competitors who otherwise are seeking to provide service or if the incumbent carrier is engaging in anticompetitive conduct and, thereby, driving off potential competitors. If the bill is enacted it will become, without a doubt, more difficult for cable operators to move into areas where they do not currently provide service. Cable is the hope for facility-based competition and choice in telephone-related services for consumers throughout the state. Accordingly, it is essential that the General Assembly examine the issues discussed above and in Comcast's responses, recognize that there is very little competition in rural areas other than where cable provides service, and understand that the ability of Charter Fiberlink and other cable communications providers to offer communications services is the key to having meaningful competition in the rural areas of the State.



Respectfully submitted this 25<sup>th</sup> day of September 2009.

FRIEND, HUDAK & HARRIS, LLP

A handwritten signature in cursive script, reading "Kennard B Woods". The signature is written in dark ink and is positioned above a horizontal line.

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CHARLES A. HUDAK  
KENNARD B. WOODS

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COUNSEL FOR CHARTER FIBERLINK – TENNESSEE, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing Comments, by depositing same in the United States mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following parties:

Mr. Robert E. Heath  
EVP  
American Fiber Network, Inc.  
9401 Indian Creek Parkway  
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Mr. Larry Wright  
Vice President  
American Dial Tone  
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Ms. Cynthia Kinser  
Deputy  
Consumer Advocate and Protection Division  
Office of the Attorney General  
P.O. Box 20207  
Nashville, Tennessee 37202

This the 25<sup>th</sup> day of September, 2009.



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KENNARD B. WOODS

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