

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of United)	
Telephone Company of Ohio d/b/a)	
Embarq for Approval of an Alternative)	
Form of Regulation of Basic Local)	Case No. 08-1041-TP-BLS
Exchange Service and Other Tier 1)	
Services Pursuant to Chapter 4901:1-4,)	
Ohio Administrative Code.)	

**REPLY TO EMBARQ MEMORANDUM CONTRA
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") files this reply to the Memorandum Contra of United Telephone Company of Ohio d/b/a Embarq ("Embarq" or "Company") regarding OCC's Opposition to Embarq's application seeking authority to raise its basic service rates in 44 of its exchanges by \$1.25 per month, and the rate for basic Caller ID by \$0.50 per month.¹ OCC's Opposition showed that Embarq did not meet the standard established by the Commission rules for granting basic service alt. reg.

¹ OCC's Opposition was filed pursuant to Ohio Adm. Code 4901:1-4-09(F). The Commission's basic service alternative regulation ("basic service alt. reg.") rules do not provide for a response to an Opposition, or for a reply to that response, but Entries in each basic service alt. reg. case to date have allowed such filings. In an Entry dated October 22, 2008, the Commission granted to Embarq the opportunity to reply to OCC's Opposition to Embarq's application, and granted OCC five days thereafter to reply. On October 29, 2008, OCC requested a five-day extension of the five days allotted by the Entry for OCC's response, given that Embarq had been given 17 days to respond to OCC's Opposition, and requested an expedited ruling. On November 4, 2008, an Entry was issued giving OCC until November 10, 2008 to file this reply. On November 6, 2008, Embarq filed -- without seeking leave -- what it styled as an "Addendum" to its Memorandum Contra, including "a couple of items it wishes to clarify" from the Memorandum Contra. As discussed here, the "clarifications" do not help Embarq make its case.

-- that would allow for annual rate increases in customers' rates -- in 29 of the exchanges in Embarq's application.²

It must be recalled that Embarq bears the burden of proving that it meets the Commission's rules.³ Despite this, Embarq continually refers to OCC's supposed failure to support its Opposition.⁴ But the most egregious aspect of Embarq's response is its consistent citation to national conditions as supposed proof that the criteria of Ohio Adm. Code 4901:1-4-10(C)(4) ("Test 4") are met within the specific Embarq exchanges under review here.⁵ The Commission has consistently rejected such arguments, and has repeatedly required that the competitive analysis for basic service alt. reg. cases be exchange-specific.⁶

OCC's Opposition was based on a showing that three of Embarq's candidate alternative providers -- Buckeye Telesystem ("Buckeye"), Level 3 Communications ("Level 3") and Sprint Communications Company L.P. ("Sprint") -- did not meet the Commission's criteria. Embarq's arguments to the contrary, these carriers do not qualify.

² OCC also argued that granting Embarq's application would not be in the public interest. Given the short time allowed for reply, OCC will not address Embarq's erroneous discussion of the public interest issues. Embarq argues against what it calls OCC's "vague and unrelated insinuations." Memorandum Contra of United Telephone Company of Ohio d/b/a Embarq to Opposition of the Office of the Ohio Consumers' Counsel (October 31, 2008) ("Embarq Memorandum Contra") at 1. OCC's arguments in this regard were neither vague nor unrelated, and rise far above the level of insinuation.

³ Ohio Adm. Code 4901:14-10(A).

⁴ See, e.g., Embarq Memorandum Contra at 4 ("OCC does not dispute or even attempt to explain the inconsistency between its arguments ... and the following facts in the record...."). If there are inconsistencies in the facts, it is up to Embarq to explain them given its burden of proof.

⁵ See, e.g., Embarq Memorandum Contra at 6 (national information on the operations of Sprint Communications and Time Warner Cable); *id.* at 8 (Level 3 press release naming Vonage as one of its top ten customers); see also Addendum at 2.

⁶ See, e.g., *In the Matter of the Application of Cincinnati Bell Telephone Company LLC for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 06-1002, Opinion and Order (November 28, 2006) at 12.

The PUCO should examine these companies separately and conclude that Embarq has failed its burden of proof, as shown in OCC's Opposition and here:

Sprint

Embarq admits that Sprint never served residential customers in the Embarq exchanges.⁷ But Embarq says that does not matter, because Sprint "is acting on behalf of Time Warner."⁸ This allegation did not appear in Embarq's Application, so OCC has not had the opportunity to respond.

Embarq now says that Sprint is acting as a wholesale provider for Time Warner Cable, as demonstrated in Time Warner Cable's annual report, in press releases, and in national agreements.⁹ Yet none of this information shows that Time Warner Cable is using Sprint's facilities in any of the Embarq exchanges that are the subject of this proceeding.

Likewise, Embarq's reference to "several filings made in Case No. 97-884-TP-COI, Telephone Numbering Procedures, in which Sprint Communications requested the Commission to ... grant its request for additional blocks of numbers on behalf of its customer Time Warner Cable ... including Embarq exchanges" does not suffice for Embarq to meet its burden here. Embarq does not cite the specific filings (in a docket that contains over 500 documents), and does not even identify the Embarq exchanges where the numbers were requested, much less tie them to this case. Embarq states that the "residential numbers for Sprint Communications Company L.P. are for Time Warner

⁷ Embarq Memorandum Contra at 5.

⁸ Id.

⁹ Id. at 6.

Cable customers.”¹⁰ But nothing in the record of this proceeding -- including Embarq’s new allegations -- demonstrates this to be true for the exchanges under review here.

Further, the fact that Time Warner Cable has Business White Pages listings “in various Embarq directories” that mention residential services neither demonstrates that Time Warner serves the exchanges covered by those (unnamed) directories, or specifically that service is provided in the exchanges at issue here. Certainly, those listings do not demonstrate that “Sprint Communications is the wholesale provider for Time Warner Cable for the provision of Digital Phone Service”¹¹ in any one of these exchanges, much less all 44 of them.

OCC argued that both Sprint Communications and Sprint Nextel wireless service should not be counted separately in a particular exchange; only one Sprint affiliate should count, but not both.¹² Embarq correctly points out that OCC cited no authority for that proposition,¹³ which is not surprising since this is the first time the issue has been raised. Embarq also cites no authority for its argument that these affiliated carriers should be counted twice. In adopting Test 4’s standard of the presence of five unaffiliated carriers, the Commission found that there should be five facilities-based alternative providers competing with the incumbent. Certainly the Commission also intended that the five alternatives would compete among themselves, which does not occur when the alternatives are themselves affiliated.

¹⁰ Id. at 7.

¹¹ Id.

¹² OCC Opposition at 10-11.

¹³ Embarq Memorandum Contra at 5.

Level 3

Embarq correctly points out that the Commission has previously ruled that Level 3 was acting on behalf of at least one VoIP provider.¹⁴ But in that case (the earlier Embarq case), as noted in OCC's Opposition, the Commission held that the **VoIP provider** was facilities-based because one of Level 3's wholesale services requires VoIP providers to have their own softswitches.¹⁵ More recently, OCC located another Level 3 wholesale service used by non-facilities-based VoIP "resellers."¹⁶ Thus OCC concluded that one could not know whether a VoIP provider was facilities-based without knowing which Level 3 wholesale service was used.

As in other areas, here also Embarq points to national press releases (from 2005) that say that Vonage and Packet 8 were taking service under the "facilities-based" version of the Level 3 tariff.¹⁷ (Embarq's Application did not mention either of these two VoIP providers.) This information does not show that either of these providers have a presence in any specific Embarq exchange. Embarq attempts to show this with screenshots that show numbers available from Vonage and Packet 8 in one exchange, and asserts that these numbers are assigned to Level 3.¹⁸ Embarq's conclusion is that "[s]ince both providers are marketing residential services and the ported residential numbers are going to Level 3, Embarq cannot determine which provider numbers are being ported...."¹⁹

¹⁴ Id. at 8, citing 07-760 Entry on Rehearing (May 14, 2008) at 26-27 and 07-760 Opinion and Order (May 14, 2008) at 27.

¹⁵ OCC Opposition at 13.

¹⁶ Id.

¹⁷ Embarq Memorandum Contra at 9.

¹⁸ Id.

¹⁹ Id. at 9-10.

This does not meet Embarq's burden of showing the presence of an unaffiliated provider's service in the exchanges at issue here.²⁰

Buckeye

Based on the material in Embarq's application, OCC had shown that the provider identified in the application as Buckeye Telesystem did not provide residential service.²¹ In its Memorandum Contra, Embarq does not really disagree, asserting that **Buckeye Cablevision** is providing the service, and that "Buckeye Telesystem serves as Buckeye Cablevision's numbering resource partner...."²² This is based on 1) a four-year-old filing concerning a Buckeye Cablevision VoIP service²³ and 2) the fact that Buckeye Telesystem has ported residential numbers in the Waterville exchange.²⁴ This is clearly insufficient to show that the ported numbers in the Waterville exchange are in fact being used by **residential** customers of Buckeye Cablevision.

In this respect and others discussed herein, the Commission must recognize that by acceding to the scattershot, last minute tactics used by Embarq, it would be inviting similar lack of definition and timeliness in other basic service alt. reg. applications. There is nothing about the information belatedly inserted into the record by Embarq that shows that it could not have been introduced in its Application; by waiting until this late

²⁰ Neither does Embarq's implication in the Addendum that Vonage and Packet 8 give their customers a choice of porting their current number or "choos[ing] a number based on their geographical preference...." Addendum at 3.

²¹ OCC Opposition at 8.

²² Embarq Memorandum Contra at 8.

²³ Id. and Exhibit D.

²⁴ Id. at 8, citing Embarq Application Exhibit 3.

date, Embarq has prevented OCC from conducting discovery on these issues and from doing all but the minimal investigation shown here. This undermining of the Commission's process for applications is not the way to ensure that Embarq (and other telephone companies) meet their burden of proof under the Commission's rules.

The Commission should protect consumers by denying Embarq's Application for the exchanges identified in OCC's Opposition, for the reasons set forth in the Opposition and herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply of the Office of the Ohio Consumers' Counsel was provided to the persons listed below electronically this 10th day of November 2008.

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Summary: Reply Reply to Embarq Memorandum Contra By the office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of Bergmann, David C. and Office of the Ohio Consumers' Counsel