

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of
Communication Options, Inc. for Arbitration
of Interconnection Rates, Terms and
Conditions and Related Arrangements with
United Telephone Company of Ohio dba
Embarq Pursuant to Section 252(b) of The
Telecommunications Act of 1996.

Case No. 08-45-TP-ARB

MEMORANDUM CONTRA
EMBARQ'S MOTION TO DISMISS
BY
COMMUNICATIONS OPTIONS, INC.

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Communication Options, Inc. ("COI") files this Memorandum Contra to the Motion to Dismiss filed by United Telephone Company of Ohio d/b/a Embarq ("Embarq") on February 11, 2008 ("Memo Contra").

In its Motion to Dismiss, Embarq claims that the pricing and costing aspects of the services to be provided under Embarq's proposed interconnection agreement ("ICA") should be dismissed because COI has failed to negotiate in good faith under the Telecommunications Act of 1996 ("Act") and has failed to comply with the rules of the Public Utilities Commission of Ohio ("Commission"). Embarq's premise, that COI has an obligation (1) to review its costs studies and (2) to employ an expert to identify specific areas where COI believes the cost studies are wrong, is simply fallacious.

Ohio Administrative Code ("OAC") Rule 4901:1-7-17 (A) and (A) (2) provides that ILEC rates for the pricing of interconnection shall comply with the standards of paragraph (B) of the rule. The rule further states that the Commission may set the ILEC's rates for each pricing element the ILEC offers by either using the interim rates based upon the best information the

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Commission has available or using the forward looking economic cost-based methodology set forth in OAC Rule 4901:1-7-19. Embarq, not COI, has the obligation to prove that it is proposing Commission-approved TELRIC rates. Paragraph (A) (6) states:

The ILEC shall prove to the commission's satisfaction that the price for each element provided to a requesting telephone company does not exceed the forward-looking economic cost per unit of providing that element unless otherwise negotiated.

Emphasis added. Thus it is irrelevant whether COI concludes that Embarq's proposed rates are Ohio-TELRIC compliant, rather it is the Commission that must be convinced.

Paragraph (A) (4) of Rule 4901:1-7-17 notes that once the Commission has set the TELRIC¹ rates pursuant to Rule 4901:1-7-17, the interim rates shall cease to be in effect. A review of the Commission's Docketing Information System does not reveal that Embarq has approval for TELRIC rates. In the absence of Commission-approved TELRIC rates, COI will assume that the current rates are the "interim" rates contemplated by the rule. Parties can agree to rates so long as they are not below an accurate TELRIC rate. The fact that Embarq has negotiated the proposed disputed rates with other carriers and that the Commission has approved them is not material to this proceeding, because COI has disputed these rates and Embarq now has the burden of proving that they are Commission-approved TELRIC rates.

If Embarq desires to change the pricing of its rates --- because its proposed rates are increases from the current rates --- it must commence a TELRIC proceeding and obtain Commission approval. Rule 4901:1-7-19 sets forth the standards for establishing TELRIC rates. This rule is predicated upon the ILEC's proving the reasonableness of the TELRIC rates. For example, Paragraph (A) (2) states:

¹ OAC Rule 4901:1-7-19 (A) defines TELRIC as the "forward-looking, economic cost-based price of an element . . . at a level that allows the providing carrier to recover the sum of the total element long-run incremental cost."

The commission will consider a cost study period of five years to be reasonable. An incumbent local exchange carrier (ILEC) shall have the burden of proof, to the commission's satisfaction, that such study period would not be reasonable for a specific element.

Emphasis added. Likewise Paragraph (C) (3) (b) states in part:

The ILEC shall have the burden of proving that the fixed allocator permits only reasonable recovery of any forward-looking common costs.

Emphasis added.

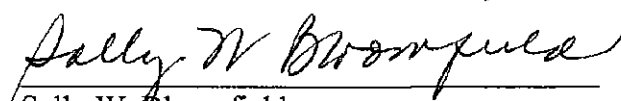
Throughout the negotiations with Embarq, COI raised the issue of the increase in rates. Though Embarq did offer to provide the basis for the rate increase under the protection of a confidential agreement, Embarq, not COI, has the burden of showing that the rates are Commission-approved using the Commission's TELRIC principles as set forth in Rules 4901:1-7-17 through 19. Though the rates do not have Commission approval, Embarq has claimed that its proposed rates are "in accordance with TELRIC pricing rules." Petition, Exhibit D at 11. Its mere claim that it followed the Ohio TELRIC rules does not comply with its obligation to initiate a TELRIC proceeding to obtain Commission approval. It is noteworthy that, for example, the DS1 rate increases to which COI objects are on the magnitude of 181% to 359%! None of the underlying "costs" for these increases has been justified in accordance with the Commission's rules.

Moreover, it is simply untrue that COI did not attempt to negotiate these rates. In nearly every negotiation session, Embarq was put on notice that COI objected to the rates. The extremely sharp proposed rate increases are the greatest issues of concern to COI. In negotiating in accordance with Section 251 (c) (1) of the Act and OAC Rule 4901:1-1-08(A), COI representatives presented arguments and data to show that the increased rates were unreasonable. These were ignored and/or rejected out of hand by Embarq. Embarq cannot now claim that COI

did not negotiate in good faith because COI did not undertake to review the Embarq cost studies and did not hire a consultant to refute them when its studies have not been approved by the Commission! By this assertion, Embarq has revealed its underlying objective: to shift an immense cost burden to COI in order to bludgeon COI to accept its new rates. Embarq's absurd statement that COI has caused Embarq "needlessly to expend time and resources²" on this issue is all the more galling. As argued above, Embarq's attempt to shift Embarq's obligation to COI to disprove Embarq's non-approved "TELRIC" rates obfuscates Embarq's underlying obligation to prove the reasonableness of its rates to the Commission and receive approval from the Commission that its rates are appropriately TELRIC based pursuant to the Ohio rules.

For these reasons, COI urges the Commission to deny Embarq's Motion to Dismiss with respect to the proposed pricing items.

Respectfully submitted,
Communication Options, Inc.



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² Motion to Dismiss at 2.

CERTIFICATE OF SERVICE

The undersigned certifies that on February 19, 2008, a copy of the foregoing Memorandum Contra Embarq's Motion to Dismiss was either hand delivered or electronically mailed to:

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