

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of )  
 Communications Options, Inc. for )  
 Arbitration of Interconnection Rates, Terms, ) Case No. 08-45-TP-ARB  
 and Conditions and Related Arrangements )  
 with United Telephone Company of Ohio )  
 dba Embarq Pursuant to Section 252(b) of )  
 The Telecommunications Act of 1996. )

ENTRY

The attorney examiner finds:

- (1) On January 16, 2008, Communication Options, Inc. (COI) filed a petition for arbitration (the petition) of numerous issues to establish an interconnection agreement (ICA) with United Telephone Company of Ohio dba Embarq (Embarq). COI filed the petition pursuant to Section 252(b) of the Telecommunications Act of 1996 (1996 Act).
- (2) On February 11, 2008, Embarq filed a response to the petition for arbitration.

Also on February 11, 2008, Embarq filed a motion to dismiss the petition, to the extent that COI seeks arbitration regarding pricing and costing of services under the ICA. Embarq asserts that COI has not met its obligation to negotiate in good faith under the 1996 Act and has failed to comply with Commission rules. While noting COI's argument that Embarq's rates, based upon Embarq's total element long-run incremental cost (TELRIC), are not justified, Embarq asserts that COI makes this contention without having reviewed Embarq's costs.

Embarq adds that, during negotiations, it was ready to provide COI with proprietary cost study information supporting Embarq's rates contingent upon COI signing a nondisclosure agreement. Embarq submits that COI never signed the nondisclosure agreement and, thus, never reviewed the cost studies. Further, Embarq contends that COI has not retained an expert to review Embarq's cost studies, identify specific areas where Embarq's cost studies are incorrect, or suggest any changes to Embarq's proposed rates.

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- (3) COI filed a memorandum contra Embarq's motion to dismiss on February 19, 2008. COI disagrees that it is obligated to review Embarq's cost studies and retain an expert to identify specific areas where COI believes that Embarq's proposed unbundled network element rates are not TELRIC compliant. In COI's opinion, Rule 4901:1-7-17(A)(1) and (A)(2), Ohio Administrative Code (O.A.C), require that incumbent local exchange carrier (ILEC) rates for the pricing of interconnection must comply with the standards of Rule 4901:1-7-17(B), O.A.C. COI adds that Rule 4901:1-7-17, O.A.C., further states that the Commission may set the ILEC's rates for each pricing element that the ILEC offers by either using the interim rates, based upon the best information that the Commission has available, or using the forward-looking economic cost-based methodology found in Rule 4901:1-7-19, O.A.C.

COI emphasizes that Embarq is obligated to prove that it is proposing Commission-approved TELRIC rates, because under Rule 4901:1-7-17, O.A.C.,

(A)(6) 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 by COI.)

COI notes that the Commission's Docketing Information System does not indicate that Embarq has received approval for TELRIC rates. Therefore, COI assumes that the current rates charged by Embarq are the interim rates as contemplated by Rule 4901:1-7-17, O.A.C. If Embarq wants to change the pricing of its rates via a rate increase, COI asserts that Embarq must commence a TELRIC proceeding and obtain Commission approval, under proceedings pursuant to Rule 4901:1-7-19, O.A.C. Additionally, COI avers that Rule 4901:1-7-19(B)(2) and (C)(3)(b), O.A.C., also place the burden of proof upon the ILEC to prove the reasonableness of the TELRIC rates.

Finally, as to Embarq's claim that COI did not attempt to negotiate in good faith, COI asserts that it did raise the issue of

a rate increase by presenting arguments and supporting data in every negotiation session; however, its position was ignored by Embarq. While recognizing that Embarq offered to provide the basis for a rate increase through the protection of a confidential agreement, COI asserts that Embarq has the burden of proving that the rates are Commission-approved using the TELRIC principles set forth in Rules 4901:1-7-17 through 4901:1-7-19, O.A.C.

- (4) Embarq replied to COI's memorandum contra on February 26, 2008, by contending that COI has not negotiated in good faith regarding costing and pricing. Embarq also asserts that whether it is Embarq's burden to prove that its cost study is TELRIC compliant is a decision for the Commission to make after COI has met its duty for good faith negotiations.

Specific to COI's claims that it negotiated in good faith, Embarq focuses on COI's acknowledgment that it did not take the time to review Embarq's cost studies. With this in mind, Embarq argues that because rates must be cost-based, a party which negotiates in good faith is responsible for reviewing the cost studies underlying the proposed rates. COI has not done so, adds Embarq.

Embarq also asserts that COI "has the process backwards" by stating that it did not hire a consultant to rebut cost studies that have not been approved by the Commission. In Embarq's opinion, the appropriate time for COI to review and analyze Embarq's cost studies is before the parties submit such information during arbitration to the Commission.

Finally, Embarq states that while it has the burden to prove to the Commission that its rates are TELRIC compliant, the issue of which party has this burden is irrelevant to COI's duty to negotiate in good faith. Only after the parties have negotiated in good faith does Embarq believe that the Commission should become involved. COI, contends Embarq, wishes to claim that Embarq's rates are not TELRIC compliant but has done nothing to determine whether that claim is true prior to filing for arbitration. Such actions, concludes Embarq, are not good faith negotiations.

- (5) As a preliminary matter, the Commission recognizes that Embarq does not currently have approved TELRIC rates for its unbundled network elements. While Embarq and COI are currently operating under their existing interconnection agreement, COI has now requested that Embarq provide unbundled network services pursuant to TELRIC pricing.

Consistent with Section 251(c)(3), Embarq has "the duty to provide, to any requesting carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and Section 252" (emphasis added). Therefore, to the extent that the parties elect not to negotiate on the issue of unbundled network rates or are unsuccessful in doing so, the ILEC must have TELRIC pricing available for the requested UNEs. This determination is supported by the fact that the Section 251(c)(1) requirement of good faith negotiations for the requesting carrier extends to the issues of "terms and conditions", but not "rates."

Pursuant to this determination, Embarq's motion to dismiss is denied and the identified issue of TELRIC pricing is appropriate in the context of this proceeding.

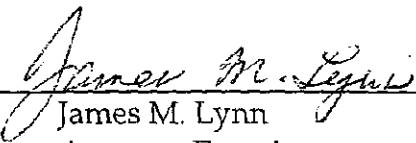
- (6) Inasmuch as the parties have expressed the desire for mediation in this proceeding, the Commission staff will be contacting the parties in the near future for the purpose of scheduling.

It is, therefore,

ORDERED, That Embarq's motion to dismiss is denied. It is, further,

ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO

By:   
James M. Lynn  
Attorney Examiner

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Act

Entered in the Journal

**FEB 28 2008**



Renee J. Jenkins  
Secretary