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

COMMUNICATION OPTIONS, INC.'S
MEMORANDUM CONTRA
THE INTERLOCUTORY APPEAL AND REQUEST FOR CERTIFICATION
OF UNITED TELEPHONE COMPANY OF OHIO DBA EMBARQ

Communication Options, Inc. ("COI") urges the Public Utilities Commission of Ohio ("Commission" or "PUCO") to deny United Telephone Company of Ohio dba Embarq's ("Embarq") Interlocutory Appeal and Request for Certification ("Appeal") from the Attorney Examiner's Entry of February 28, 2008 ("Entry") that denied Embarq's Motion to Dismiss the rate issues in the Petition for Arbitration. COI files this Memorandum Contra the Interlocutory Appeal and Request of Certification ("Memo Contra") pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-15 (D) which provides that a party may file a memorandum contra an application for an interlocutory appeal within five days after the filing of the application for review. The central tenant in the Embarq Appeal is that COI did not negotiate rates in good faith as is required (Embarq alleges) by the Telecommunications Act of 1996 (the "Act"). Embarq argues that OAC Rule 4901-1-15 (B) applies because the Attorney Examiner's Entry presents a new or novel question of interpretation of law or policy. However, Embarq has chosen to obfuscate the fact that there is a dispute concerning the factual basis upon which its legal argument is based.

The legal question presented assumes that the factual question of bargaining in good faith has been determined. An interlocutory appeal cannot be taken from a question of fact. There is no evidence supporting the contention that COI did not attempt to bargain the issue of rates in good faith. Indeed, COI takes exception to the statement that it did not attempt to bargain the rate issues. Several times COI attempted to discuss rates. Each time, Embarq insisted that COI should consult Embarq's TELRIC studies (not approved by the Commission) and refused to discuss the rates further.

With this ploy, Embarq attempted to shift the burden to COI to prove that Embarq's TELRIC rates were not justified. COI purposefully refused to accept a shift in the burden of proof. If Embarq insists that its new rates are appropriate and will not consider other rates, Embarq has the obligation to bring a TELRIC case to the Commission. The Entry noted that "Embarq does not currently have approved TELRIC rates for its unbundled network elements..." and that "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." Entry at Finding 5. Embarq's "TELRIC pricing" does not become "TELRIC" pricing until Embarq complies with OAC Rules 4901:1-7-17 and 4901:1-17-19.

The Entry also found that Section 251 (c) (1) of the Act requires good faith negotiations for terms and conditions, but not for rates. Embarq takes the Entry to task on this point by claiming that its finding is illogical. Appeal at p. 3. While Embarq attempts to make an issue out of a requesting carrier's duties to negotiate in good faith under Section 251 of the Act, it totally ignores the constraints that apply to any negotiations concerning pricing—constraints that Embarq is attempting to circumvent. As applied to pricing, the parties to the negotiation are both constrained by the fact that the Act imposes an obligation on Embarq to offer network elements

to requesting carriers at TELRIC rates, set pursuant to a proceeding conducted for the purpose of ensuring that such rates are, in fact, TELRIC compliant. 47 C.F.R. § 51.507 (e); OAC Rules 4901:1-7-17 and 4901:1-17-19. Embarq has an affirmative obligation, in the context of these negotiations, to offer COI rates that comply with both federal and Ohio law. Embarq did not do this. If any party to this arbitration has failed to negotiate in good faith, it is Embarq for failing to comply with its obligations under the law.

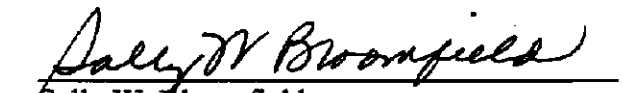
COI takes the position that this issue need not even be reached or considered in the denial of Embarq's Motion to Dismiss because the factual issue of "good faith bargaining" has not been established. COI attempted to bargain in good faith with respect to the issue of rates, but Embarq, not COI, thwarted the negotiations in good faith by requiring that COI dispute its TELRIC studies, which had not been approved by the Commission.

As noted previously, the issue of whether or not there was good faith as between the parties on these issues is a question of fact. Factual issues are not appropriate for an interlocutory appeal pursuant to OAC Rule 4901-1-15. Moreover, the Entry's result can be justified without considering an interpretation of Section 251 (c) (1). The Entry was justified in denying Embarq's Motion to Dismiss based upon the fact that Embarq had not complied with OAC Rules 4901:1-7-17 and 4901:1-17-19 with respect to TELRIC studies.

It is unconscionable that Embarq should be permitted to shift its burden of establishing TELRIC rates to COI by insisting that COI examine the cost studies and secure an expert to contest it in order to display "good faith." The good faith requirement ***has*** been satisfied by COI's attempts to question the rates and by COI's questions to Embarq concerning the basis for the rates, which were not answered. Instead, Embarq directed COI to analyze Embarq's non-Commission-approved TELRIC studies.

Not only was the Entry correct in denying the Motion to Dismiss, but this Appeal does not present a new or novel question of interpretation of law or policy (if there is a question here, it is one of fact, not an interpretation of law or policy). Nor does this ruling represent a departure from past precedent. Furthermore, a reversal of this ruling will place undue prejudice and expense, not upon Embarq, but upon COI. Thus, the Appeal should not be certified, nor should the Commission reverse the ruling in the Entry.

Respectfully submitted,
Communication Options, Inc.



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CERTIFICATE OF SERVICE

The undersigned certifies that on March 10, 2008, a copy of the foregoing Memorandum Contra Embarq's Application for Interlocutory Appeal and Request for Certification was either hand delivered or electronically mailed to:

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