BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of Communications 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

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 and a motion to dismiss the petition. In the motion to dismiss, which addressed only the disputed issues concerning rates for unbundled network elements (UNEs), Embarq asserted that COI had not met its obligation to negotiate in good faith under the 1996 Act when it failed to review Embarq's costs. Embarq added that it had offered to provide COI with proprietary cost study information supporting Embarq's rates, contingent upon COI signing a nondisclosure agreement, and that COI never signed the nondisclosure agreement, thereby preventing COI from reviewing the cost studies.

(3) COI filed a memorandum contra Embarq's motion to dismiss on February 19, 2008. COI disagreed that it must review Embarq's cost studies and identify specific areas where Embarq's proposed UNEs are not total element long run incremental cost (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 carrier-to-carrier pricing standards of Rule 4901:1-7-17(B),

O.A.C. COI added 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 emphasized that under Rule 4901:1-7-17, O.A.C., an ILEC must prove to the Commission that the price of each element provided to a requesting telephone company does not exceed the TELRIC cost per unit, unless otherwise negotiated. COI noted that the Commission's Docketing Information System does not indicate that Embarq has received approval for TELRIC rates, so COI assumed that the current rates charged by Embarq are the interim rates contemplated by Rule 4901:1-7-17, O.A.C. COI argued that if Embarq wants to change the pricing of its rates via a rate increase, it must commence a TELRIC proceeding and obtain Commission approval via Rule 4901:1-7-19, O.A.C. Additionally, COI averred that Rule 4901:1-7-19(B)(2) and (C)(3)(b), O.A.C., also places the burden of proof upon the ILEC to prove the reasonableness of the TELRIC rates.

Regarding Embarq's claim that COI did not negotiate in good faith, COI asserted that it raised the issue of a rate increase by presenting arguments and supporting data in every negotiation session. COI added that its objections were ignored by Embarq.

(4) Embarq replied to COI's memorandum contra on February 26, 2008. Embarq continued to argue that COI had not negotiated in good faith regarding costing and pricing because it had not reviewed Embarq's cost studies. Embarq also asserted 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.

(5) The attorney examiner issued an entry on February 28, 2008 (the entry), concerning Embarq's motion to dismiss. As a preliminary matter, the entry noted that Embarq did not have approved TELRIC rates for its UNEs, and added that while Embarq and COI are currently operating under their existing interconnection agreement, COI now requests that Embarq

provide unbundled network services pursuant to TELRIC prices.

Next, the entry observed that under 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). If the parties elected to not negotiate on the issue of unbundled network rates or are unsuccessful in doing so, the entry stated, the ILEC must have TELRIC pricing available for the requested UNEs. As an aside, the entry noted 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." Based on the attorney examiner's analysis, Embarq's motion to dismiss was denied and the setting of TELRIC pricing was deemed appropriate for this proceeding.

(6) On March 4, 2008, Embarq applied for interlocutory appeal and requested certification. Embarq reemphasized its contention that the 1996 Act requires a requesting carrier to negotiate in good faith with respect to rates. In support of this position, Embarq notes that Section 251(c)(1) defines the duty to negotiate for both the ILEC and requesting carrier by using the same phrase, "terms and conditions." Embarq then observes that when the Federal Communications Commission (FCC) has applied the requirements of the phrase "terms and conditions" to ILECs, the FCC has ruled that the phrase includes the duty to negotiate rates. Thus, argues Embarq, the entry incorrectly concludes that the requesting carrier has no duty to engage in good faith negotiations for rates pursuant to Section 251(c)(1). To Embarq, such an interpretation is "overly narrow, illogical, and inconsistent with rules and orders of the FCC," because there "is no reason for the 1996 Act to impose a duty on a requesting carrier to negotiate terms and conditions but not rates, particularly when rates are almost always the most important issue."

In addition, observes Embarq, the FCC's First Report and Order shows that the Section 251(c)(1) use of the phrase "terms and conditions" requires the requesting carrier to negotiate regarding rates, and paragraph 155 of the First Report and Order states that an ILEC's failure to provide cost data during negotiations is a failure to negotiate in good faith.[1] In sum, states Embarq, the FCC has determined that an ILEC's duty to negotiate "terms and conditions" under Section 251(c)(1) requires an ILEC to negotiate in good faith regarding rates; therefore, adds Embarq, a requesting carrier's duty to negotiate "terms and conditions" requires the requesting carrier to negotiate rates. Finally, adds Embarq, paragraph 618 of the First Report and Order states that prices for UNEs and interconnection are critical terms and conditions of any interconnection agreement. In Embarq's opinion, this constitutes a separate and independent reason to interpret the phase "terms and conditions" as including rates in Section 251(c)(1).

Further, contends Embarq, FCC rules state that it is a failure to negotiate in good faith if an ILEC refuses to furnish cost data that would be relevant to setting rates when parties are in arbitration.[2] To Embarq, this also is evidence that the FCC interprets Section 251(c)(1) to require both parties to negotiate in good faith concerning rates, as it would be impossible for one party to negotiate in good faith without the other party doing so.

Embarq also argues that the entry's interpretation "is inconsistent with a more reasoned interpretation of Section 251(c)(1) itself." Embarq points out that Section 251(c)(1) requires a requesting carrier to negotiate in good faith the terms and conditions of "such agreements," and that those agreements must fulfill the duties of Section 251(b)(1)-(5) and subsection (c). Embarq then notes that Section 251(c)(3) imposes upon an ILEC a duty to provide to a requesting carrier access to UNEs on "rates, terms, and conditions that are just, reasonable, and non-discriminatory . . . ." Such language demonstrates, in Embarq's opinion, that a requesting carrier has a duty to negotiate in good faith with respect to rates.

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1 Embarq indicates that it refers to CC Docket No. 96-98, First Report and Order, rel. August 8, 1996.

2 Embarq indicates that it refers to 47 C.F.R. 51.301 (2006).

Embarq believes that the interlocutory appeal should be certified to the Commission because, as required by Rule 4901-1-15(B), O.A.C., the appeal presents a new or novel question of interpretation, law, or policy, and is taken from a ruling that requires an immediate determination by the Commission in order to prevent the likelihood of undue prejudice or expense to Embarq. Specifically, Embarq opines that the Commission's ruling that a requesting carrier has no duty to negotiate rates in good faith is a novel interpretation of the 1996 Act. Further, states Embarq, if the ruling is not reversed, Embarq will be required to proceed to arbitration on the issue of rates, even though the parties never conducted good faith negotiations on that topic. If this occurs, argues Embarq, it will needlessly expend time and expense for an arbitration that could have been avoided.

(7) On March 10, 2008, COI submitted its memorandum contra Embarq's interlocutory appeal. COI asserts that Embarq erred in making its central tenet for the appeal COI's alleged failure to negotiate in good faith. COI argues that the legal question presented by Embarq assumes that the factual question of good faith bargaining has been determined, yet there is no evidence supporting this conclusion. Indeed, continues COI, it attempted to bargain on rate issues by questioning Embarq's proposed rates, but Embarq insisted that COI should consult Embarq's TELRIC studies, which were not approved by the Commission. COI contends that factual issues are not appropriate for an interlocutory appeal under Rule 4901-1-15, O.A.C. In COI's opinion, if Embarq insists that its new rates are appropriate and will not negotiate rates other than those in its unapproved TELRIC studies, Embarq has the obligation to bring a TELRIC case to the Commission under Rules 4901:1-7-17 and 4901:1-7-19, O.A.C.

COI also states that while Embarq attempts to make an issue out of a requesting carrier's duties to negotiate in good faith under Section 251, Embarq ignores constraints applicable to any negotiations concerning pricing. In COI's opinion, both parties to the negotiation are constrained by an obligation placed by the 1996 Act on Embarq, i.e., to offer UNEs to a requesting carrier at TELRIC rates which are set through a TELRIC proceeding.

In sum, argues COI, factual issues regarding the occurrence or absence of good faith negotiation of TELRIC pricing are not appropriate for an interlocutory appeal under Rule 4901-1-15, O.A.C., and given Embarq's failure to comply with TELRIC requirements under Rules 4901:1-7-17 and 4901:1-7-19, O.A.C., the Entry's conclusion can be justified without considering an interpretation of Section 251(c)(1).

(8) The attorney examiner observes that under Rule 4901-1-15(B), O.A.C., an interlocutory appeal may be certified to the Commission by the attorney examiner only if:

> . . . the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.
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> (Emphasis added).

The attorney examiner notes that both parts of Rule 4901-1-15(B), O.A.C., must be met for certification to occur. Thus, while Embarq contends that, if the attorney examiner's order in the entry remains unchanged, Embarq must proceed to arbitration and, thus, incur time and expense resolving rate issues, Embarq must also prove that the attorney examiner's order presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent.

With this in mind, the attorney examiner observes, as does COI, that Embarq's appeal focuses on the issue of whether COI has engaged in good faith negotiations regarding the issue of pricing. The attorney examiner agrees with COI that, even assuming that Embarq is correct in its issue identification, such an issue is a factual one and is not certifiable for interlocutory appeal under the requirements of Rule 4901-1-15, O.A.C.

In addition, the attorney examiner is aware of Embarq's argument that the entry created a novel interpretation of the

1996 Act when the entry stated that a requesting carrier has no duty to negotiate rates. In response, the attorney examiner observes that the entry emphasized that, under Section 251(c)(3), Embarq has a duty to provide, to any requesting carrier, UNEs at rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the ICA and Sections 251 and 252. The entry also stated that if the parties elected to not 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. Thus, the entry primarily focused on Embarq's responsibilities to provide UNEs at TELRIC-approved prices to a requesting carrier, and only secondarily discussed the requesting carrier's duties with respect to good faith negotiations. Such a conclusion did not constitute a novel interpretation of law as contemplated by the Commission's rules. Consequently, Embarq's interlocutory appeal is not certifiable by law as contemplated by the Commission's rules.

It is, therefore,

ORDERED, That Embarq's interlocutory appeal will not be certified to the Commission. 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

JRJ/ct

Entered in the Journal
MAR 26 2008

Reneé J. Jenkins
Secretary