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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
MOTION TO STRIKE THE TESTIMONY OF CHRISTY A. LONDERHOLM AND A DISK WITH A COST STUDY THAT ACCOMPANIED THE TESTIMONY

On June 24, 2008 United Telephone Company of Ohio dba Embarq ("Embarq"), as part of its Arbitration Package, filed the Direct Testimony of Christy A. Londerholm ("Londerholm Testimony") and a cost study provided on a disk ("New Cost Study"). Communication Options, Inc. ("COI") respectfully moves the Pubic Utilities Commission of Ohio ("Commission" or "PUCO") to strike the Londerholm Testimony to the extent that it refers to new rates disclosed for the first time and the New Cost Study provided at the same time.

MEMORANDUM IN SUPPORT

HISTORY OF THE PROCEEDINGS

As noted in the Petition filed by COI on January 16, 2008, and in the Embarq Response filed on February 11, 2008, representatives of Embarq and COI began negotiations in May 2007 of a new interconnection agreement ("ICA") to replace the current ICA.[1] The first ICA tendered

[1] In its Response, Embarq states that it initially tendered an ICA to COI in December 2006, but that COI did not provide Embarq a redline version of the ICA until May 2007.

to COI had a price list attached that was dated September 27, 2006. This price list was included as item 6 in COI's Arbitration Package and will be referred to as the "September 2006 Price List." Later in the negotiations, in September 2007 Embarq offered COI a price list dated July 31, 2007, that was represented as the one that Embarq had negotiated with Cincinnati Bell Telephone Extended Territories and will be referred to as the "CBT Proposal" or the "July 2007 Price List." The July 2007 Price List was attached to the proposed contract, Exhibit C to the Petition, and was also attached as Item 5 in COI's Arbitration Package filed June 14, 2008. For the convenience of the readers, both price lists are also appended to Mr. Ankum's Prefiled Testimony.

COI could not agree to the rates in the July 2007 Price List and thus brought the Petition which, among other issues, disputed four sets of rates contained therein as well as other issues. As will be discussed below, when, on February 11, 2008, Embarq filed its Response to COI's Petition, it referred to the July 2007 Price List. At the conclusion of the mediation session on March 20, 2008, Embarq announced that it would not be "offering" the July 2007 Price List, but would be supporting the September 2006 Price List as the rates to be charged to COI. Nonetheless, Embarq never filed any price list, nor put the July 2007 Price List in dispute, when it filed its Response. The first time COI had an opportunity to view anything other than those two price lists was when a new set of rates was presented in the Londerholm Testimony. Attached to the Londerholm testimony was the New Cost Study that Ms. Londerholm claimed would support the new rates found on page 5 of the Londerholm Testimony.

ARGUMENTS

Sections 251 and 252 of the Telecommunications Act of 1996 Require Good Faith Negotiations and Do Not Permit Changes in Basic Price Terms Once the Response to the Petition Has Been Filed

The Telecommunications Act of 1996 enacted 47 U.S.C. §§251 and 252 that govern interconnection obligations and procedures for ICAs. Section 251(c)(1) requires ILECs to negotiate ICAs "in good faith in accordance with section 252 the particular terms and conditions of agreements***."

The Federal Communications Commission ("FCC") promulgated rules to effect §§251 and 252. Its regulations, 47 CFR §51.301, which is the first section under "Subpart D – Additional Obligations of Incumbent Local Exchange Carriers," addresses "Duty to Negotiate." In pertinent part the rule states:

> (c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction the following actions or practices, among others, violate the duty to negotiate in good faith: ***
>
> (6) Intentionally obstructing or delaying negotiations or resolutions of disputes; ***
>
> (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to: ***
>
> (ii) Refusal by an incumbent LEC to furnish cost data that would be relevant to setting rates if the parties were in arbitration.

Embarq has violated the good faith standard in federal law as further defined in the FCC rules that are also to be considered by state commissions. By proffering the Londerholm Testimony and the New Cost Study for the first time in its Arbitration Package, Embarq has proposed new rates and a new cost study. Embarq never presented these rates to COI prior to June 24, 2008. COI was provided with no opportunity to view these rates until the eve of the arbitration hearing,

let along negotiate them. In short there has been no negotiation on the rates that Embarq now seeks to impose upon COI. Rates are at the heart of the dispute that COI brought to the Commission for negotiation.

By filing testimony that introduced a substantially changed New Cost Study, Embarq has also failed to meet the standards for good faith negotiation in the ICA terms. COI has not had a remotely reasonable opportunity to evaluate or prepare a responsive position with respect to the New Cost Study. The rates for network elements to be paid by COI go to the heart of this arbitration process.

Moreover, Embarq has not only violated federal law, §§251 and 252, but also the Commission's own rules that were promulgated consistent with §252 (discussed below). Section 252 (b)(3)requires that the responding party to a petition for arbitration may have 25 days to "respond to the other party's petition***." Thereafter in the state arbitration proceeding:

> The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(Emphasis added.) 47 U.S.C. §252 (b)(4)(A).

As will be demonstrated below, Embarq's Response did not take issue with the rates that were attached to Exhibit C of the COI Petition, the ICA, that included the July 2007 Price List. By federal law, Embarq is not permitted to change the terms of its proposed agreement at this date in the arbitration, when it did not dispute its own July 2007 Price List in its response.

OAC Rule 4901:1-7-09 (F) and (G) Limit Embarq to the Positions It Set Forth in Its Response

The Commission promulgated rules implementing its responsibilities granted it by the Telecommunications Act of 1996 through Ohio Administrative Code ("OAC") Chapter 4901:1-7. Ohio Administrative Code Rule 4901:1-7-09, entitled "Arbitration of 47 U.S.C. 252

Interconnection Agreements," sets forth requirements for arbitration consistent with §252. Paragraph (F), entitled "Opportunity to respond to petition," corresponds to §252 (b)(3) by stating in pertinent part:

> The response [of the non petitioning party] should identify the non petitioning party's position on the petitioning party's unresolved issues. In addition, the responding party may identify additional unresolved issues with a clear explanation of its position on the additional issues it identifies.

(Emphasis added.) Paragraph (G) entitled, "Commission responsibility," states in pertinent part:

> (1) *** It is the function of the arbitration panel to recommend a resolution of the issues in dispute if the parties cannot reach a voluntary agreement.

(Emphasis added.) Embarq filed its Response on February 11, 2008. Embarq's Response did not identify a disagreement with the July 2007 Price List attached to the ICA, Exhibit C. In fact, the Response made several references to the July 2007 Price List—each of which implied agreement with the prices, though not with COI's statements in its Petition about the prices. The following are several examples from the Embarq Response.

In arguing that COI did not accurately identify all the issues that remain in dispute on the redline contract, COI's Exhibit C, Embarq stated at paragraph 6, page 2:

> *** In addition, Exhibit C does not reflect the disputed reciprocal compensation ("recip comp charges") (related to Issues 6, 13 and 14 [subsequently settled through Commission assisted mediation] on the arbitration Matrix) either by highlighting the section or by redline changes to the applicable rates as the dispute was reflected in the price sheet from COI's e-mail to Embarq on 12/6/07 at 9:03 am, prior to COI's filing for arbitration, which identified the issues on the price sheet for arbitration purposes in yellow highlight.

(Emphasis added.) Indeed, Embarq implies agreement with the July 2007 Price List, by berating COI for not including a highlighted version, but does not take issue with the July 2007 Price List.

In arguing that it is not required by either the FCC or the PUCO to have its proposed TELRIC rates approved "in a litigated proceeding," Embarq argued in its Response that the July 2007 Price List in this proceeding has already been approved in negotiated agreements with other carriers:

> EQ further avers that the rates COI is currently disputing in this arbitration have been approved by this Commission in current/non-expired ICAs with other carriers.

(Emphasis added.) Embarq Response at paragraph 40, page 11. Finally Embarq refers to a rate comparison in the COI Petition but denied that the comparison:

> ***is sufficient to demonstrate that EQ's rates in the current [Exhibit C] price sheets are excessive and not cost justified. EQ avers the EQ's cost studies [supporting them] and the resulting rates are consistent with 47 CFR 51.501-51.513 (Subpart F-Pricing of Elements) and the OH Commission's Carrier-to-Carrier Rules pertaining to Pricing Standards (Case No. 95-0845-TP-COI).

(Emphasis added.) Embarq Response at paragraph 41, page 11. The only price list in the case at the time of the Response was the July 2007 Price List and the only cost study that Embarq could possibly have referenced was the cost study that supported the September 2006 Price List. Moreover, this agreement with the July 2007 Price List as the one that Embarq considered in dispute is further evidenced by the Motion to Dismiss filed the same day as the Embarq Response:

> Embarq recently concluded negotiations with Cincinnati Bell Extended Territories ("CBET") with respect to a new ICA. (That ICA was filed with the Commission on December 31, 2007.) During the negotiation between Embarq and CBET, CBET engaged cost study experts to review Embarq's cost studies [that pertained to the September 2006 Price List which was originally offered to CBET]. Based on that review, Embarq and CBET were able to conduct meaningful negotiations regarding Embarq's cost studies. Based on that review, CBET and Embarq reached a negotiated settlement with respect to costing and pricing. But COI,

> without any meaningful review or counter-analysis, has rejected those same rates as not cost-justified.

(Emphasis added.) Embarq Motion to Dismiss at pages 2-3. There can be no doubt that Embarq in its Response did not dispute the July 2007 Price List as the one: (a) that was offered to COI during the negotiations that preceded the filing of the Petition; (b) that was the price list that contained the four rates that COI had placed in dispute in its Petition; and (c) that was the price list that it was defending in its Response and Motion to Dismiss.

The Commission's own OAC Rule 4901:1-7-09 (F) and (G), supported by federal law, require the Commission's arbitrators to strike any portions of the Londerholm Testimony referring to a new price list: (a) that Embarq never presented to COI for negotiation; (b) that is not contained in the issues set forth in the COI Petition; (c) that is not referenced in the Embarq Response; and (d) that is presented for the first time in testimony on the eve of the arbitration hearing.

Even Absent Federal Law and the Commission's Rules, Fair Notice Pleading and Commission Precedent Support Striking Embarq's New Terms and Cost Study

Absent federal law and the Commission's rules that clearly prohibit the change of pricing terms that Embarq now proposes to COI in an interconnection agreement and the introduction of the New Cost Study, basic rules of pleading that form the cornerstone of engaging legal issues in dispute do not support Embarq's tactics in proffering new rates and the New Cost Study. For more than a half century, the United States Supreme Court has emphasized that pleadings must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombley* (2007), 1275 S.Ct. 1955 (citing to a decision from 1957). It is elementary that the purpose of providing such notice "is to insure *** that the adverse party will receive fair notice of the claim and an opportunity to prepare his response thereto." (Emphasis

added.) *Scassa v. Dye*, Carroll Cty. App. No. 02CA0779, 2003-Ohio-3480. For example, in refusing to allow a party to raise an issue for the first time during closing argument, an Ohio appellate court stated: "[t]o permit such would obviously defeat the purpose of notice pleading, as well as encourage the use of surprise tactics at trial." *Konicki v. Salvaco, Inc.* (1984), 16 Ohio App.3d 40, 44.

Here, Embarq blatantly violates the above-stated principles by failing to provide COI with fair and reasonable notice of the new rates set forth in the Londerholm Testimony and the New Cost Study upon which their proposed ICA rates would be based. As noted above, following the March 20, 2008 mediation session, Embarq announced that it would not be "offering" the July 2007 Price List, but would be supporting the September 2006 Price List as the rates to be charged to COI.[2] Until Embarq presented the new Londerholm Testimony reliant upon a substantially changed New Cost Study, and significantly higher rates, Embarq had never filed any price list nor put the July 2007 Price List in dispute.

Rather than allowing COI to have a reasonable opportunity to evaluate or prepare a responsive position with respect to this New Cost Study, Embarq filed the new rates at the end of the proceedings. These bad faith surprise tactics involve a matter at the heart of the ICA negotiations and corresponding arbitration proceedings. Were the Commission to deny this Motion to Strike, it would be extremely prejudicial and unfair to COI.

Furthermore, and consistent with the argument above, the Commission has concluded that a utility can be "prejudiced by being served with a voluminous document days before the hearing and the deadline for filing rebuttal testimony." *In the Matter of the Commission's*

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[2] All the arguments presented with respect to §§251 and 252 and the Commission's rules concerning the necessity of disputing the July 2007 Price List in the Embarq Response apply equally to Embarq's change of terms in stating that it was then offering the September 2006 Price List, but COI elected not to argue the issue at that time.

Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services, Entry dated September 23, 2003, 96-1310-TP-COI. The Commission further explained that "serving a voluminous cost study shortly in advance of the hearing and the deadline for filing rebuttal testimony could effectively deny the PAO a fair opportunity to prepare its case." (Emphasis added.) *Id.* For well established rules of pleading and fair notice alone, the Londerholm Testimony and the New Cost Study should be stricken.

This Arbitration Proceeding Does Not Require that COI Examine or Rebut Embarq Proffered Cost Studies

Embarq's counsel has orally argued repeatedly and in Embarq's Motion to Dismiss that COI had an obligation to review Embarq's 2006 cost study. More recently, in an attempt to justify the new rates proposed in the Londerholm Testimony and the New Cost Study, Embarq has argued that the New Cost Study is merely an update to Embarq's 2006 cost study. As a factual matter, this is not true. Even a cursory look[3] at the new rates reveals that the three rate bands proposed in the Londerholm Testimony are different from the four rate bands set forth in the 2006 cost study and the five rate bands set forth in the July 2007 Price List. Embarq counsel has admitted that some of the inputs in the New Cost Study are different.

As if to ameliorate the effect of the New Cost Study, Embarq's counsel has argued that since the 2006 cost study was proffered to COI prior to the filing of the Petition, COI presumably could have become familiar with it long ago. This argument has no merit, nor relevance. COI ultimately signed a protective agreement and its experts did review the 2006 cost study (but certainly not for the purpose of evaluating the entirety of Embarq's TELRIC rates). The burden of proving that Embarq's alleged TELRIC rates are reasonable rests with Embarq. COI does not

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[3] COI has not incurred the expense of requesting its consultants to review the New Cost Study at this time.

have a burden to disprove that Embarq's so called TELRIC rates—rates that have not been approved by the Commission—are reasonable. Any rates that are recommended by the arbitration panel will constitute interim rates as set forth in OAC Rule 4901:1-7-18.

When, or even if, COI reviewed the 2006 cost study is immaterial to whether the New Cost Study and the new rates in the Londerholm Testimony can properly be introduced as evidence in this arbitration proceeding. As argued above, it does not matter if the New Cost Study and the 2006 cost study are similar (a contention that COI disputes). The rates are new; the New Cost Study is new; neither has been presented to COI for negotiation; and the rates in the Londerholm Testimony were not identified as issues joined in dispute in this proceeding in accordance with federal law or the Commission's rules.

Embarq's Motion to Dismiss (which was denied) attempted to position this arbitration proceeding as one to obtain Commission-approved TELRIC rates. Not only is this position not in accordance with the Commission rules, but by itself is unfair to COI. A single party should not bear the cost of probing the reasonableness of an ILEC's TELRIC rates. As shown above in the "History of the Proceedings" section, this is not the first shift in Embarq's position with respect to the rates it offered to COI after the Petition was filed. Even prior to this latest sandbagging, COI has experienced great difficulty in attempting to ascertain Embarq's position on rates at any particular point in time. The Londerholm Testimony appears to be simply the next ploy in Embarq's tactics of continually shifting its position with respect to rates.

These tactics add to the time and expense that COI must endure. It would be highly prejudicial and unfair to COI for the Commission to admit the Londerholm Testimony and the New Cost Study into the record at this late date. It is also patently unfair simply to grant additional time to the case schedule, because that result also adds considerable expense to COI.

COI already has sought discovery of Embarq's 2006 cost study (the only one available until June 24th) and has paid its experts to evaluate that data. COI's testimony reflecting that effort has already been filed. If the Commission allows Embarq to proceed with the Londerholm Testimony, COI, at a minimum, will be compelled to evaluate the new evidence (not provided in discovery), and re-evaluate the position taken in the testimony of Dr. Ankum, and re-submit updated testimony.

This result would simply reward Embarq and penalize COI. By imposing upon ILECs the *additional* duty to negotiate in good faith found in §251(c) and in legislating a specific procedure for joining disputed interconnection issues, Congress recognized the inherent incentive of the ILECs to make obtaining reasonable interconnection as difficult as possible for competitors. The Commission must not permit Embarq to thwart this Congressional recognition by rewarding Embarq's tactics in this case.

CONCLUSION

Federal law, the Commission's own rules implementing federal law, basic litigation pleading practice and the Commission's own precedent compel the conclusion that the arbitration panel should grant the Motion to Strike the Londerholm Testimony to the extent that it refers to the New Cost Study and strike the New Cost Study itself.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that on this 30th day of June 2008, a copy of the foregoing Motion to Strike was electronically served upon Embarq as listed below.

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