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) Following a prehearing conference on February 21, 2008, and continued negotiations between the parties, a status conference call was scheduled for June 27, 2008, prior to a previously scheduled July 1-3, 2008, hearing. At the status conference call, the parties disagreed on evidentiary issues regarding cost studies that were included within Embarq's prefiled testimony. Consequently, the attorney examiner concluded that the hearing must be postponed to a later date in order to first address the pending evidentiary issues. In accordance with the June 27, 2008, status conference, on June 27, 2008, the attorney examiner issued an entry postponing the scheduled hearing and directing COI to file a motion to strike the portions of Embarq's prefiled testimony that it found objectionable. COI was directed to file its motion on or before June 30, 2008. Embarq was directed to file its memorandum contra on or before July 2, 2008.

(3) On June 30, 2008, COI filed a motion to strike (COI Motion) the testimony of Embarq witness Christy Londerholm (Londerholm Testimony), as well as the accompanying cost study disc (New Cost Study). COI states that in May 2007, representatives of Embarq and COI began negotiations toward

a new ICA for the purpose of replacing the current ICA. COI adds that the first ICA tendered to COI had a price list attached that was dated September 27, 2006 (September 2006 Price List) and that, during later negotiations in September 2007, Embarq offered COI a price list dated July 31, 2007 (July 2007 Price List).

COI asserts that it could not agree to the rates in the July 2007 Price List and, thus, filed the Petition which, among other issues, disputed four sets of rates. COI contends that on February 11, 2008, when Embarq filed its Response to the Petition (the Response), Embarq referred to the July 2007 Price List. Further, COI asserts that at the close of the mediation on March 20, 2008, Embarq stated that "it would not be 'offering' the July 2007 Price List but would be supporting the September 2006 Price List as the rates charged to COI." However, COI contends that, when Embarq filed its Response to the Petition, Embarq "never filed any price list, nor put the July 2007 Price List in dispute . . . ." (Emphasis added by COI) (COI Motion at 2). According to COI, the first time it had an opportunity to view anything other than the aforementioned price lists was when a new set of rates was presented in Embarq's Londerholm Testimony and the attached New Cost Study that supposedly supported the new rates.

(4) COI presents four arguments in support of its Motion. First, COI contends that Sections 251 and 252 of the Telecommunications Act of 1996 (the Act) require good faith negotiations and do not permit changes in basic price terms once the response to the petition has been filed. More specifically, COI observes that Section 251(c)(1) of the Act requires incumbent local exchange carriers (ILECs) to negotiate ICAs in good faith in accordance with Section 252. Further, COI asserts that 47 C.F.R. §51.301 delineates specific actions that violate the duty to negotiate in good faith. These actions include refusal by an ILEC to furnish cost data that would be relevant to setting rates if the parties are in arbitration. Consequently, argues COI, when Embarq proffered the Londerhold Testimony and the New Cost Study for the first time on June 24, 2008, it violated the good faith standards set forth in federal law and provided no opportunity to negotiate on rates that it now seeks to impose on COI.

COI also observes that, under Section 252(b)(4)(a) of the Act, a state commission must, during an arbitration proceeding, limit its consideration of any petition for arbitration to the issues set forth in the petition and in the response to the petition. COI contends that Embarq's Response did not take issue with the rates that were attached to the COI Petition, which included the July 2007 Price List, and that Embarq cannot now change the terms of its agreement at this date in the arbitration.

(5) Second, COI asserts that Rule 4901:1-7-09(F) and (G), Ohio Administrative Code (O.A.C.), limit Embarq to the positions it set forth in its Response to COI's Petition. Specifically, states COI, Rule 4901:1-7-09(F), O.A.C., states that the response of the non-petitioning party must identify that party's position on the petitioning party's unresolved issues, while Rule 4901:1-7-09(G), O.A.C., states that it is the function of the arbitration panel to recommend a resolution of the issues in dispute. With this in mind, COI asserts that Embarq's Response to the Petition does not identify a disagreement with the July 2007 Price List attached to the ICA. Instead, adds COI, Embarq's Response makes several references to the July 2007 Price List that imply agreement with the prices, though not with COI's statements in the Petition about the prices.

(6) Third, COI contends that fair notice pleading and Commission precedent support striking Embarq's new terms and cost study. COI cites numerous court decisions, including a ruling by the United States Supreme Court, which emphasize that pleadings must give a party fair notice of what a claim is and the grounds upon which the claim rests, so that a party has an opportunity to prepare a response. In contrast, states COI, "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" (COI Motion at 8). COI adds that Embarq had never filed any price list or put the July 2007 Price List in dispute until it presented the Londerholm Testimony and the accompanying New Cost Study. Rather than allowing COI to have a reasonable opportunity to evaluate or prepare a response to the New Cost Study, COI asserts that Embarq prejudiced COI by filing the new rates just before the hearing commencement date.

(7) Finally, COI states that, despite Embarq's arguments to the contrary, this arbitration proceeding does not require that COI examine or rebut Embarq's proffered cost studies. Additionally, COI disagrees with Embarq's contention that the New Cost Study is simply an update to Embarq's 2006 Cost Study. In particular, COI states that "even a cursory look" at the new rates indicates rate bands that differ from the rate bands set forth in the 2006 Cost Study and the July 2007 Price List (COI Motion at 9).

(8) Embarq filed its memorandum contra and an alternative motion to strike testimony (Embarq Memorandum) on July 2, 2008. Embarq presents four arguments in response to the allegations raised by COI.

First, Embarq asserts that it has negotiated in good faith, and that COI was well aware that Embarq would be filing testimony that supported updated prices different than those contained in the September 2006 Price List or the July 2007 Price List. While Embarq states that the history of the proceedings in COI's Motion is generally accurate, Embarq contends that COI failed to mention that Embarq offered to provide COI with a 2006 Cost Study that supported the September 2006 Price List during negotiations prior to the filing of COI's Petition. According to Embarq, COI refused to sign the non-disclosure agreement and thus refused to review the 2006 Cost Study. Therefore, Embarq questions COI's claim of prejudice regarding its inability to respond to the Londerholm Direct and the 2008 Cost Study.

In response to COI's criticism of Embarq for not filing a new price list or putting the July 2007 Price List in dispute, Embarq believes that such a criticism "exalts form over substance," because COI was aware that the issue of the rates was in dispute and that Embarq would be supporting rates based on the 2006 Cost[1] Study with updated inputs (Embarq Memorandum at 3). Further, Embarq submits that COI never submitted proposed rates to Embarq and did not engage a cost expert on COI's behalf during negotiations or during mediation.

(9) Second, Embarq emphasizes that COI is not prejudiced by the Londerholm testimony. In Embarq's opinion, COI's apparent argument that Embarq should be limited to supporting the rates shown in the July 2007 Price List is offset by COI's admission that by March 20, 2008, it was informed by Embarq that Embarq would be supporting the 2006 Cost Study, which in turn supports the September 2006 Price List. In addition, Embarq asserts, it advised COI that Embarq would be updating the inputs to the 2006 Cost Study that produced the September 2006 Price List. In sum, Embarq states that, even though it did not file an amended Response to COI's Petition, COI was not prejudiced, because COI was made aware that Embarq would not be supporting the July 2007 Price List that contained rates rejected by COI.

Embarq also contends that COI was not prejudiced by the 2008 Cost Study filed by Embarq witness Londerholm. Embarq attached an exhibit in an attempt to demonstrate that the 2008 Cost Study that Embarq witness Londerholm filed with her testimony was virtually identical, except for more current inputs, to the 2006 Cost Study that supported the September 2006 Price List. Embarq contends that a comparison of testimony of its witness Londerholm and Embarq's witness August Ankum reflects that statewide average rates for DS1 service pursuant to the 2008 Cost Study are lower than the rates produced by the 2006 Cost Study.

(10) Third, Embarq asserts that to the extent that the Commission strikes the testimony of witness Londerholm, the testimony of COI witness Ankum should also be stricken. Specifically, Embarq explains that, while COI claims that it had inadequate opportunity to examine and respond to Embarq's proposed rates and supporting cost study, COI filed testimony that contains arguments and rates that have not previously been shared with Embarq. Embarq reasserts that COI's refusal to review the 2006 Cost Study and discuss the substance of its proposed rates prevented Embarq from having opportunity to address COI's issues.

(11) Further, Embarq contends that the Commission should set interim rates based on the Londerholm Testimony and the 2008 Cost Study. Embarq states that, as the Londerholm affidavit

shows, the 2008 Cost Study does not differ from the 2006 Cost Study in material respects, aside from updated inputs. Also, Embarq observes that the updated inputs benefit COI due to the lower cost of capital utilized by Embarq. Finally, to the extent that any remedial action is deemed necessary, Embarq recommends that the Commission permit each party to file rebuttal testimony.

(12) Upon a review of the arguments raised, the attorney examiner determines that the motions to strike should be denied. As part of this determination, the attorney examiner calls attention to the fact that, absent an in depth comparison of the June 24, 2008, prefiled testimony and the 2006 Cost Study/September 2006 Price List referenced above, it is difficult to ascertain the validity of the arguments raised by COI as to whether a substantive change in cost study methodology has occurred. Additionally, the attorney examiner concludes that the request to strike of testimony will adversely impact the Commission's ability to render a decision due to the depletion of a record in this matter. In issuing this ruling, the attorney examiner highlights the fact that a record is required in order for the Commission to establish the requisite interim pricing.

Notwithstanding the aforementioned ruling, the attorney examiner recognizes that both COI and Embarq will have the opportunity to engage in the cross-examination of other party's witnesses. Additionally, each party shall be afforded the opportunity to supplement its prefiled, direct testimony to the extent that its previously stated position has changed following a review of the opposing party's prefiled testimony. The parties should not exceed this scope and inappropriately file rebuttal testimony. This opportunity to supplement is limited to the issues raised in the context of the motions to strike regarding the applicable cost studies and resulting proposed interim prices. The supplemental direct testimony should be filed on or before July 25, 2008, and would replace any previously filed testimony on the same subject. The parties are reminded that each party should be presenting evidence in support of its own proposed interim Embarq total element long run incremental cost (TELRIC) prices, consistent with Rule 4901:1-7-18, O.A.C.

(13) A status conference is scheduled for July 31, 2008, at 1:30 p.m., for the purpose of establishing an arbitration hearing schedule and for addressing any remaining procedural issues. The parties are to participate by calling (614)644-1080.

It is, therefore,

ORDERED, That the motions to strike are denied in accordance with Finding (12). It is, further,

ORDERED, That the parties may file supplemental direct testimony in accordance with Finding (12). It is, further,

ORDERED, That a status conference is scheduled in accordance with Finding (13). It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: James M. Lynn
Attorney Examiner

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Entered in the Journal
JUL 15 2008

Reneé J. Jenkins
Secretary