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 UNITED TELEPHONE COMPANY OF OHIO'S MOTION TO STRIKE SUPPLEMENTAL TESTIMONY

I. INTRODUCTION

The Motion to Strike filed by United Telephone Company of Ohio dba Embarq ("Embarq") arose from the filing of the Supplemental Testimony of August H. Ankum, Ph.D. ("Ankum Supplemental Testimony") on August 21, 2008 by Communication Options, Inc. ("COI"). The Attorney Examiner Entry of July 15, 2008 ("Entry") resolved the prior two motions to strike filed by each of the parties. As set forth in the Entry, the focal point of COI's motion to strike involved a cost study presented by Embarq in support of their proposed rates:

> COI contends that on February 11, 2008, when Embarq filed its Response to the Petition. . . 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. . . . 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.[1]

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[1] Entry, p. 2, Finding No. 3.

The Entry granted each party the right to file supplemental direct testimony "to the extent that its previously stated position has changed following a review of the opposing party's prefiled testimony."[2] More specifically, the Entry stated that such supplemental testimony is "limited to the issues raised in the context of the motions to strike **regarding the applicable cost studies and resulting proposed interim prices**."[3] When COI filed the Ankum Supplemental Testimony, Embarq responded with its Motion to Strike on September 5, 2008 (the "Motion").

As explained in greater detail below, the Ankum Supplemental Testimony is appropriate because:

- The Ankum Supplemental Testimony was not required to be directed at TELRIC pricing per se but only as interim pricing was required to be set in accordance with Ohio Administrative Code ("O.A.C.") Rule 4901:1-7-18, as evidence in support of pricing proposals;
- The Ankum Supplemental Testimony addressed only the New Cost Study that allegedly supported the testimony of Christy V. Londerholm ("Ms. Londerholm's Testimony") [when Embarq and Ms. Londerholm no longer based their position upon the cost study provided in May 2008[4] ("Cost Study") or the September 2006 price list], which New Cost Study allegedly supported Embarq's price list dated September 2006;
- The Ankum Supplemental Testimony would have been filed as direct testimony "but for" Embarq's own wrongdoing in basing its case upon the New Cost Study that had not been provided to COI as required.

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2 Entry, p. 6, Finding No. 12.

3 Entry, p. 6, Finding No. 12, emphasis added.

4 COI does not intend to imply that Embarq was not willing to provide the Cost Study prior to May 2008; COI did not enter into a protective agreement to secure the Cost Study until May 2008.

II. LAW AND ARGUMENT

A. This proceeding is not an O.A.C. Rule 4901:1-7-17 TELRIC proceeding; Dr. Ankum appropriately limited his Supplemental Testimony consistent with O.A.C. Rule 4901:1-7-18.

Embarq claims that the Entry "required that the supplemental testimony be directed to TELRIC pricing."[5] This statement is both incorrect and misleading. An important qualifier to the sentence was omitted. Embarq failed to set forth was that the Entry referenced TELRIC prices "**consistent with Rule 4901:1-7-18, O.A.C.**"[6]

Contrary to Embarq's mischaracterizations, Finding No. 12 of the Entry explains that the "opportunity to supplement limited is to the issues raised in the context of the motions to strike **regarding the applicable cost studies and resulting proposed interim prices**." Rule 4901:1-7-18, entitled "Interim rates for forward-looking economic prices," essentially states that the Commission can use interim rates prior to the establishment of TELRIC rates. Paragraph (B) of the rule states that the Commission shall set interim rates when it does not have sufficient time to review the cost information submitted by an incumbent local exchange carrier or when it appears that there may be significant Commission concerns about the cost studies. Both instances contemplated by the rule apply in this case. Embarq has not even submitted TELRIC information to the Commission for its consideration in a TELRIC proceeding, so, of course, the Commission has not had time to review it. In addition, the Commission has to have significant concerns about the New Cost Study because, even if it had been submitted in a TELRIC proceeding, Dr. Ankum has raised significant concerns about its assumptions and conclusions. Thus the testimony in this case is about interim rates, not TELRIC rates per se. Both Dr. Ankum's direct testimony ("Ankum Testimony") and the Ankum Supplemental Testimony

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5 Motion to Strike Supplemental Testimony, p. 2.

6 Entry, p. 6 at Finding No. 12 (last sentence), emphasis added.

critique Embarq's alleged TELRIC rates as well as advocate interim rates that are consistent with Rule 4901:1-7-18 and thus are proper and should not be stricken.

As argued above, the scope of the permitted supplemental testimony is much broader than Embarq's bogus limitation. Because the Ankum Supplemental Testimony addresses only the New Cost Study and accompanying proposed interim prices, it is entirely proper.

Furthermore, as noted by the prior entries in this proceeding, this arbitration is not a TELRIC proceeding. In fact, this proceeding "is an arbitration involving a relatively small company with limited resources."[7] As explained in the Ankum Testimony:

> [I]t would not be appropriate to escalate this arbitration into a full blown TELRIC proceeding. In fact, a requirement that small companies, such as COI, engage in full blown TELRIC proceedings when they want to establish interconnection agreements with ILECs would create regulatory barriers that are possibly as severe as the economic barriers that the Telecommunications Act of 1996 sought to overcome.[8]

More importantly, the Commission already has reached the conclusion that Embarq does not have Commission-approved TELRIC rates.[9] Because this is not a TELRIC proceeding, and Embarq does not have Commission-approved TELRIC rates, it would be illogical as well as unreasonable to interpret the Entry as requiring that COI's supplemental testimony be directed solely to TELRIC pricing.

B. The Ankum Supplemental Testimony was necessitated by the filing of the New Cost Study by Embarq.

The starting point of COI's pricing proposal made in the Ankum Testimony was the conclusion that Embarq's Cost Study (that supposedly supported Embarq's September 2006 pricing proposal) violates TELRIC principles and over-states cost. The Ankum Testimony was

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7 Ankum Testimony, p. 6.

8 *Id.*

9 *Communication Options, Inc.*, Case No. 08-45-TP-ARB (Entries dated February 28, 2008 and March 26, 2008).

entirely based upon the Embarq Cost Study. Upon the filing of Ms. Londerholm's Testimony, however, it became readily apparent that Embarq had pulled a "bait-and-switch" by changing the basis of its case from the Cost Study to the New Cost Study, which was not previously disclosed to Dr. Ankum or COI despite the fact that COI's discovery specifically asked for the cost study "that Embarq intends to use in this arbitration."[10] Because the Ankum Testimony was based upon the Cost Study that was no longer relied upon by Embarq, there was necessarily a "change in position" in the Ankum Supplemental Testimony because it addressed the changed basis of Embarq's claims. Simply because the Ankum Supplemental Testimony reaches the same conclusions as in the Ankum Testimony does not render it "rebuttal." Instead, the Ankum Supplemental Testimony leads to the logical conclusion that all of the cost studies presented by Embarq (and analyzed by Dr. Ankum) result in unreasonable UNE rates, including the new rates set forth in the New Cost Study.

C. Embarq must not be allowed to benefit from its own wrongdoing.

Ohio courts have recognized the "fundamental and equitable principle that wrongdoers ought not benefit from their own wrongdoing." *Brockmeier v. Brockmeier* (1993), 91 Ohio App.3d 689, 693, *citing to Williams v. Williams*, 10th Dist. App. No. 92 AP-438, 1992 Ohio App. LEXIS 4885. See, also, *K & T Enterprises v. Zurich Ins. Co.* (6th Cir. 1996), 97 F.3d 171, 178 (identifying the "ancient equity maxim that no one should benefit from his own wrongdoing"). Here, both fairness and equity prohibit Embarq from benefiting from its own wrongdoing—namely seeking to strike the Ankum Supplemental Testimony as attempting to "rebut the rates proposed in Ms. Londerholm's Direct testimony" as presented in the New Cost Study.

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[10] COI's June 3, 2008 Discovery to Embarq, Interrogatory # 1.

The alleged "rebuttal" situation in this case is the direct result of Embarq's own wrongdoing in failing to disclose the New Cost Study until after the filing of the Ankum Testimony, which was known to be based on the prior Cost Study supplied to COI in May 2008. The Ankum Supplemental Testimony is not rebuttal at all.[11] Instead, it focuses solely on the New Cost Study, precisely the subject matter permitted by the July 15, 2008 Entry—namely the "issues raised in the context of the motions to strike **regarding the applicable cost studies and resulting proposed interim prices**."[12] Moreover, Embarq cannot (and should not) be allowed to engage in procedural semantics by incorrectly alleging that the Ankum Supplemental Testimony addressing the New Cost Study is "rebuttal" when it addresses the New Cost Study that was the basis for the Entry's allowance of the supplemental testimony.

It is noteworthy that, but for the wrongdoing of Embarq, the New Cost Study would have been the focal point of the Ankum Testimony. Instead, Dr. Ankum did not have the opportunity to review or analyze the New Cost Study until after the filing of his direct testimony, after COI filed its motion to strike, and after the July 15, 2008 Entry in this case. Prohibiting COI from responding to the New Cost Study through the Ankum Supplemental Testimony would allow Embarq to benefit from its own wrongdoing in violation of fundamental principles of equity and fairness.

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[11] In fact, there are only two references in the Ankum Supplemental Testimony to the direct testimony of Christy Londerholm. The first reference, on page 17 of the Ankum Supplemental Testimony, simply restates the percentages used to calculate the cost of capital as identified on page 35 of Ms. Londerholm's Testimony. This reference does not attempt to "rebut" anything in Ms. Londerholm's Testimony, and instead, proves that the new evidence (the New Cost Study) incorrectly overestimates the cost of capital. In fact, the Ankum Supplemental Testimony assumes that the percentages stated in Ms. Londerholm's Testimony are correct, thereby making it impossible for Dr. Ankum to "rebut" anything. The second reference, on page 21 of the Ankum Supplemental Testimony, points to pages 33-34 of Ms. Londerholm's Testimony regarding the calculation of maintenance factors in the New Cost Study. Rather than "rebutting" anything in Ms. Londerholm's Testimony, this reference challenges the method by which the New Cost Study calculates maintenance factors.

[12] Entry, p. 6, Finding No. 12, emphasis added.

D. Embarq cannot be allowed to file "rebuttal" testimony.

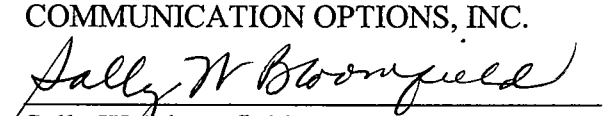
In the Motion, Embarq argues out of both sides of its mouth. Initially, Embarq emphasizes that the Ankum Supplemental Testimony violates the Entry because it constitutes "inappropriately" filed "rebuttal testimony." Several pages later, however, Embarq claims that if the Ankum Supplemental Testimony "is not stricken, fairness requires that Embarq be permitted to respond with rebuttal testimony."

Embarq's argument runs directly contrary to the same Entry relied upon by Embarq. Finding No. 12 of the Entry informed the parties that they should not "inappropriately file rebuttal testimony." COI has not filed any rebuttal testimony, and thus Embarq must not be allowed rebuttal.

III. CONCLUSION

For the above-stated reason, Embarq's motion must be denied.

Respectfully submitted on behalf of
COMMUNICATION OPTIONS, INC.



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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra United Telephone Company of Ohio's Motion to Strike Supplemental Testimony electronically filed by Teresa Orahood on behalf of Communication Options, Inc.