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 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, on June 27, 2008, the attorney examiner issued an entry postponing the hearing and directing COI to file, no later than June 30, 2008, a motion to strike the portions of Embarq's prefiled testimony that COI found objectionable. 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 portions of Embarq's testimony. On July 2, 2008, Embarq filed its memorandum contra and an alternative motion to strike COI's testimony.

(4) By entry issued on July 15, 2008, the attorney examiner denied both motions to strike and directed COI and Embarq to file supplemental direct testimony no later than July 25, 2008, to the extent that each party's previously stated position had changed following a review of the opposing party's prefiled testimony.

In addition, a status conference call was scheduled for July 31, 2008, to establish an arbitration hearing schedule and to address any remaining procedural issues.

(5) Following issuance of the July 15, 2008, attorney examiner entry, the parties contacted the attorney examiner and informed him that an amended deadline of August 20, 2008, had been agreed to for filing supplemental direct testimony. Accordingly, the attorney examiner rescheduled the status conference call to August 28, 2008.

(6) COI filed its supplemental direct testimony on August 20, 2008.

(7) At the August 28, 2008, status conference call, Embarq stated that it considered the supplemental direct testimony filed by COI to be rebuttal testimony and added that it would file a motion to strike such testimony. After discussion with the attorney examiner, it was agreed that Embarq would file its motion to strike no later than September 5, 2008, and COI would file its memorandum contra no later than September 12, 2008. In addition, the parties agreed to a hearing date of October 28-29, 2008. On September 5, 2008, the attorney examiner issued an entry confirming these dates.

(8) In its September 5, 2008, motion to strike supplemental testimony, Embarq argues that COI's supplemental testimony for August Ankum (Ankum Supplemental) should be stricken because it violates requirements set forth in the attorney examiner's July 15, 2008, entry (the Entry). Embarq states three reasons why it has reached this conclusion.

First, Embarq argues, the Ankum Supplemental should be stricken because it does not contain evidence in support of total element long run incremental cost (TELRIC) prices, as required by the Entry. Embarq observes that the Entry specifies that each party should present evidence supporting its own proposed interim Embarq TELRIC prices, consistent with Rule 4901:1-7-18, Ohio Administrative Code (O.A.C.). According to Embarq, the Ankum Supplemental fails to recommend interim rates based on TELRIC principles.

Second, Embarq contends that the Ankum Supplemental does not contain testimony showing that COI's prior position has

changed, as the Entry had required. Embarq argues that the Ankum Supplemental simply reaffirms contentions that COI made in previously filed testimony, because Dr. Ankum states that the recommendations made in his direct testimony still stand.

Third, Embarq states that the Ankum Supplemental is inappropriate rebuttal testimony, in contradiction to the Entry's requirement. Embarq asserts that the Ankum Supplemental attempts to rebut the rates proposed in Embarq witness Christy Londerholm's direct testimony, in addition to criticizing the Embarq cost model from numerous standpoints such as computer errors and input values.

In conclusion, argues Embarq, the Ankum Supplemental should be stricken because it violates the Entry's requirements in various ways. If the Ankum Supplemental is not stricken, Embarq asserts that it should be permitted to file rebuttal testimony, as it would be prejudiced if was not permitted to do so. Further, contends Embarq, if the Ankum Supplemental is not stricken, the Commission should confirm that the Ankum Supplemental replaces nearly all of Dr. Ankum's Direct Testimony.

(9) On September 12, 2008, COI filed its memorandum contra Embarq's motion to strike supplemental testimony. In its initial remarks, COI observes that the Entry granted each party the right to file supplemental direct testimony to the extent that a party's previously stated position had changed following a review of the opposing party's prefiled testimony. COI further notes that 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." COI presents three arguments regarding why the Ankum Supplemental should not be stricken.

First, contends COI, this proceeding is not a Rule 4901:1-7-17, O.A.C., TELRIC proceeding. In support of its position, COI points out that the Entry referenced that the proposed pricing should be consistent with Rule 4901:1-7-18, O.A.C. COI emphasizes that Rule 4901:1-7-18, O.A.C., pertains to the

Commission's reliance on the interim rates prior to the establishment of TELRIC rates. COI notes that Rule 4901:1-7-18, O.A.C., is entitled "Interim rates for forward-looking economic prices," and essentially states that the Commission can use interim rates before the establishment of TELRIC rates, while also stating that the Commission shall set interim rates when there is insufficient time to review cost information submitted by an incumbent local exchange carrier or when there may be significant Commission concerns about the cost studies. In COI's opinion, both instances contemplated by Rule 4901:1-7-18, O.A.C., apply to the matter at hand, as Embarq has not submitted TELRIC information to the Commission, thereby obviously not allowing the Commission time to review such information. Further, adds COI, "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." In sum, asserts COI, the testimony in this case concerns interim rates, and Dr. Ankum's direct and supplemental testimony appropriately critique Embarq's alleged TELRIC rates while advocating interim rates and addressing the New Cost Study.

Second, COI argues, the Ankum Supplemental was necessitated by the filing of Embarq's New Cost Study. COI explains that the starting point of its pricing proposal made in the Ankum Initial Testimony (Ankum Testimony) was the conclusion that Embarq's Cost Study, which supposedly supported Embarq's September 2006 pricing proposal, violates TELRIC principles while overstating cost. COI adds that the Ankum Testimony was completely based upon the Embarq Cost Study, but upon filing of Ms. Londerholm's testimony, it became apparent that Embarq had changed the basis of its case from the Cost Study to the New Cost Study, which had not been disclosed to Dr. Ankum or to COI despite the fact that COI's discovery specifically requested the cost study that Embarq intended to use in this arbitration. In COI's opinion, because the Ankum Testimony was based upon the Cost Study that was no longer being used by Embarq, there had to be a change in position in the Ankum Supplemental because it addressed the changed basis of Embarq's claims. To COI, the fact that the Ankum Supplemental reaches the same

conclusions as in the Ankum Testimony does not render it rebuttal testimony; rather, the Ankum Supplemental "leads to the logical conclusion that all of the cost studies presented by Embarq (and analyzed by Dr. Ankum) result in unreasonable UNE [unbundled network element] rates, including the new rates set forth in the New Cost Study."

Third, COI argues that Embarq must not be allowed to benefit from its own wrongdoing, i.e., "seeking to strike the Ankum supplemental as attempting to 'rebut the rates proposed in Ms. Londerholm's Direct Testimony' as presented in the New Cost Study." In this situation, contends COI, the alleged rebuttal is the result of Embarq's own wrongdoing in not disclosing the New Cost Study until after the filing of the Ankum Testimony, which was based on the previous Cost Study provided to COI in May 2008. The Ankum Supplemental is not rebuttal at all and only refers to the direct testimony of Ms. Londerholm twice, asserts COI; rather, the Ankum Supplemental focuses solely on the New Cost Study, which is the same subject matter permitted by the Entry, i.e., issues raised in the context of the motions to strike regarding the applicable cost studies and resulting proposed prices. COI emphasizes that Embarq cannot be allowed to allege that the Ankum Supplemental is rebuttal when it addresses the New Cost Study that was the foundation for the Commission allowing supplemental testimony to be filed. COI concludes that, but for Embarq's wrongdoing, the New Cost Study would have been the primary focus of the Ankum Testimony, but instead Dr. Ankum had no opportunity to review or analyze the New Cost Study until after (a) the filing of the Ankum Direct, (b) COI's filing of its motion to strike, and (c) the issuance of the Entry.

Finally, with respect to Embarq's request to file rebuttal testimony, COI emphasizes that Embarq should not be permitted to file any rebuttal testimony, because the Entry already prohibits the parties from inappropriate filing of rebuttal testimony.

(10) Having reviewed the arguments of both parties, the attorney examiner concludes that Embarq's September 5, 2008, motion to strike is denied. COI correctly asserts that this proceeding is not a Rule 4901:1-7-17, O.A.C., TELRIC proceeding; rather, the

Entry referred to TELRIC prices consistent with Rule 4901:1-7-18, O.A.C, and specified that supplemental testimony must address issues regarding motions to strike, as applied to cost studies and resulting proposed interim prices. The Commission observes that Rule 4901:1-7-18, O.A.C., specifies that:

(A) Interim rates may be used by the commission in setting prices while arbitrating disputed issues pursuant to rule 4901:1-7-9 of the Administrative Code.

(B) Interim rates shall be set by the commission when it determines that it does not have sufficient time to review cost information provided by an incumbent local exchange carrier or when it appears that there may be significant concerns with the cost studies from the commission's cursory review.

Applying Rule 4901:1-7-18(A), O.A.C., to the matter at hand, the parties are clearly disputing evidentiary issues regarding the applicable cost studies that have arisen in this proceeding. Next, applying Rule 4901:1-7-18(B), O.A.C., the Attorney Examiner recognizes and shares COI's concerns with Embarq's prefiled testimony, given (a) COI's assertions that Embarq's prefiled testimony did not address what the parties had negotiated before the filing of arbitration packages, (b) the fact that COI's initial testimony (Ankum Testimony) was premised on a different, previously represented set of assumptions, and (c) the concerns raised in the Ankum Testimony and Ankum Supplemental about assumptions and conclusions of the New Cost Study. In sum, Rule 4901:1-7-18, O.A.C., which focuses upon circumstances under which interim rates can be set, is applicable to the matter at hand, thereby rendering moot Embarq's argument that the Ankum Supplemental should be stricken because it lacks evidence supporting TELRIC prices.

In addition, the attorney examiner takes notice of and agrees with (a) COI's contention that the Ankum Supplemental was necessitated by the filing of Embarq's New Cost Study, while the Ankum Testimony was completely based upon the Embarq

Cost Study, and (b) that only upon the filing of Ms. Londerholm's testimony did it became apparent that Embarq had changed the basis of its case to the New Cost Study, which had been previously undisclosed to COI. While it is true that the Ankum Supplemental reaches the same conclusions as in the Ankum Testimony, it is not rebuttal testimony but rather supplements the prior contentions of the Ankum Testimony, i.e., that all of Embarq's cost studies, from Dr. Ankum's perspective, propose unreasonable UNE rates.

(11) Finally, regarding Embarq's request that it be permitted to file rebuttal testimony, consistent with the aforementioned determinations, the request is denied.

It is, therefore,

ORDERED, That Embarq's September 5, 2008, motion to strike and request to file rebuttal testimony are denied in accordance with Findings (10) and (11). 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

James M. Lynn by JRJ

By: James M. Lynn
Attorney Examiner

JRJ
/ct

Entered in the Journal
SEP 30 2008

Renee J. Jenkins

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Secretary