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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 APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code ("R.C.") Section 4903.10, Communication Options, Inc. ("COI") respectfully files this application for rehearing from the Arbitration Award issued by the Public Utilities Commission of Ohio ("Commission") on February 11, 2009 in the above-captioned proceeding. By issuing the Arbitration Award, the Commission erred in the following respects:

- Failing to find that Embarq had included the recovery of line conditioning costs in the rate proposed for DS1 loops;
- Removing the word "excessive" from Section 54.3.1 of the proposed ICA; and
- Adopting unreasonable interim rates.

The reasons supporting this Application for Rehearing are set forth in the Memorandum in Support below.

MEMORANDUM IN SUPPORT

For the past 17 years, COI and United Telephone Company of Ohio d/b/a Embarq ("Embarq") have provided reciprocal telecommunications services to one another under a series of four interconnection agreements. The most recent interconnection agreement ("ICA") expired on December 31, 2006, thereby necessitating the negotiation of a new agreement. For the first

time in its decade-long relationship with Embarq, COI was forced to file a petition for arbitration with the Commission regarding the unresolved issues arising out of the interconnection negotiations.[1] An arbitration hearing was held on October 28-29, 2008, and initial and reply briefs were filed by December 19, 2008. On February 11, 2009, the Commission issued an Arbitration Award resolving each of the issues disputed by COI and/or Embarq. As explained in detail below, three conclusions reached by the Commission are unreasonable and proper grounds for rehearing.

First, the Commission adopted Embarq's proposed language for Issues 1, 8, and 9, thereby concluding that line conditioning charges were not already included in the costs of DS1 loops.[2] In reaching this conclusion, the Commission supports language through which Embarq seeks a double recovery of line conditioning costs – once as part of the astronomical cost of the DS1 loop itself, and the second time as an unwarranted and unnecessary separate line conditioning charges. As Dr. Ankum explained, "Embarq failed to provide evidence that loop-conditioning costs were removed from the New Model's recurring cost estimates of loops."[3] In essence, "because Embarq did not provide NRC [cost] studies in support of its proposed loop installation rates, there is no guarantee that loop conditioning costs had not been included in those rates."[4] Thus, in the absence of a cost study affirmatively demonstrating that Embarq's loop conditioning costs are not included in the rates of its DS1 loops, Embarq should not be allowed to require COI to pay additional line conditioning charges.

Second, COI believes the Commission erred in allowing the term "excessive" to remain in Section 54.3.1 of the proposed ICA, which essentially allows Embarq to complete (and charge

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1 Direct Testimony of Steve Vogelmeier ("Vogelmeier Testimony"), dated June 24, 2008, p. 1, lines 16-17.

2 Arbitration Award, p. 7.

3 Supplemental Direct Prefiled Testimony of August H. Ankum, Ph.D. ("Supplemental Ankum Testimony"), August 20, 2008, p. 24, lines 8-10.

4 Direct Prefiled Testimony of August H. Ankum, Ph.D. ("Ankum Direct Testimony"), June 24, 2008, p. 46, lines 13-17.

for) more line conditioning than necessary. It is essential that the Commission understand that COI does not support the inclusion of the word "excessive" in Section 54.3.1.[5] The language for Section 54.3.1 proposed by COI mistakenly omitted a strikethrough of the word "excessive" in its Initial Brief. This was a typographical mistake. It was not designed to express support for the use of the word "excessive."

Instead, COI's pleadings emphasize that, as a matter of policy, Embarq engages in line conditioning all the time regardless of the cost—and then simply passes along that expense to COI (and presumably other customers) in the form of a line conditioning charge. In fact, an e-mail dated June 4, 2008 from Pam Zeigler (Embarq's account representative to COI) to Mr. Vogelmeier stated:

> Steve, I've had a chance to discuss this issue with Judy Crowe and here's what I found out. Partial conditioning is allowable on anything, but a T1. **We require 100% conditioning for our own T1 service too.**[6]
> (Emphasis added.)

In reality, Embarq should not remove all bridge taps, only those "based upon the line length and the length of the bridge tap and how far it is from the CO."[7] It is this practice of labeling (and removing) all bridge taps under the belief that they are excessive that COI seeks to prevent. For that reason, COI urged the arbitration panel to remove the word "excessive" from Section 54.3.1.

Should the Commission choose to leave the word "excessive" in Section 54.3.1 of the proposed ICA, COI urges that it be defined in order to prohibit Embarq from subjectively interpreting it so as to complete more line conditioning than necessary. More specifically, COI proposes that the word "excessive" be governed by the manufacturer's standard for the HDSL technology used by COI as identified in Section 3.1 of the Telcordia TA-NWT-001210 Generic

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[5] See e.g. Tr. Vol. I, p. 70, lines 12-24.

[6] COI Exhibit 4 to Tr. Vol. II. See, also, Tr. Vol. I, p. 109, lines 6-10 ("I have an e-mail from my account manager. They discussed it with Judy Crowe, and Judy Crowe says they take them all off, and they even take them all off for Embarq when Embarq does a T1.").

[7] Tr. Vol. I, p. 110, lines 14-16.

Requirements for High-Bit-Rate Digital Subscriber Lines. Notably, Section 45.8.8 of the proposed ICA already references this same document in establishing the duties regarding HDSL installations. These guidelines offer a neutral and objective standard for determining when line conditioning is necessary when compared to the unpalatable, subjective approach currently used by Embarq.

Therefore, the Commission should direct that the term excessive be removed and instead direct that the Section 54.3.1 of the proposed ICA reference the requirements set forth in subparagraphs (2), (3), (4), and (5) of Section 3.1 of the Telcordia manual as follows:[8]

> Conditioned loops are loops from which ~~excessive~~ bridge taps, load coils, low-pass filters, range extenders, and similar devices have been removed based upon the technical references in Section 3.1 of the Telcordia TA-NWT-001210 Generic Requirements for High-Bit-Rate Digital Subscriber Lines to enable the delivery of high-speed switched wireline telecommunications capability, including DSL. Embarq will condition loops at CLEC's request and will assess charges for loop conditioning in accordance with the prices listed in Table One. Embarq recommends that CLEC utilize the Loop Make-Up process in Section **Error! Reference source not found.** prior to submitting orders for loops intended for advanced services.

This language will correct the Commission's error of directing the term "excessive" in Section 54.3.1 and address the arguments and evidence presented by COI (an unrebutted by Embarq) in this case and will result in reasonable resolution of the line conditioning issues.

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[8] The specific requirements are as follows:

2. For loops with 26-gauge cable (used alone or in combination with other gauge cables), the maximum allowable loop length included bridged tap is 9 kft.
3. If all cable is coarser than 26-gauge, the maximum allowable loop length included bridged tap is 12 kft.
4. Any single bridged tap is limited to 2 kft maximum length, and the total length of all bridged taps is limited to 2.5 kft maximum length.
5. The total length of multi-gauge cable containing 26-gauge cable must not exceed:

$$12 - [3 \times L26) / (9\text{-}LBTAP)] \text{ kft}$$

Where $L26$ = total length of 26 gauge cable excluding bridged tap and
$LBTAP$ = total length of all bridged tap.

It also should be noted that the cover of the manual referenced above includes the name Bellcore, which is the predecessor company to Telcordia.

Third, the Commission erred in selecting interim rates equal to those set forth in the recently-approved ICA between Embarq and CBET (the "CBET Rates").[9] The unreasonableness of these rates is highlighted by the fact that these rates were not actually negotiated. In reality, the only two rates disputed (and therefore negotiated) by CBET were 2-wire loops and subloops (that through negotiation were increased by less than 50¢);[10] CBET did not care about the rest of the prices and simply accepted them once CBET had achieved the desired rates for the services it would be ordering from Embarq. Therefore, citing to the CBET Rates as reasonable represents a serious error because those rates were merely the ones that Embarq proposed and were left unchallenged by CBET. Absolutely no support exists for CBET rates other than for 2-wire loops and subloops – which represent the only two rate prices contested by CBET. And, in the CBET proceedings (Case No. 07-1275-TP-NAG), the Commission was not asked to opine on the reasonableness of the CBET Rates as applicable to future ICA negotiations between different contracting parties (i.e. COI).

Perhaps more importantly, the level of Commission review for negotiated rates is quite different from the level of review required in this arbitration proceeding. More specifically, the voluntary negotiations engaged in by CBET and Embarq in Case No. 07-1275-TP-NAG are governed by a federal mandate stating "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."[11] This Commission

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[9] See Case No. 07-1275-TP-NAG.

[10] The ICA negotiation process generally focuses on a limited number of rates that are important to the competitive local exchange carrier ("CLEC") – in this case COI. The negotiation process begins with the ILEC – in this case Embarq – providing COI a price list of all possible interconnection services that the ILEC could provide. Of the dozens of prices provided by Embarq, only a handful proves important to each CLEC, depending upon that CLEC's unique market position and business plan. Rather than waste time negotiating all of the prices provided by Embarq, COI (or any other CLEC) only negotiates the prices of the handful of services the CLEC expects to order from Embarq. It would be a waste of resources – time and money – to negotiate rates for services the CLEC does not need (or expect) to order.

[11] See 47 U.S.C. 252(a)(1). *See also Qwest Corp. v. Pub. Utils. Comm'n of Colorado*, 479 F.3d 1184, 1188 (10th Cir. 2007) (explaining that "the 'without regard' clause [in Section 252(a)(1)] indicates that the parties may make agreements that go beyond or contradict the specific statutory requirements that an incumbent must follow")

recognizes that this federal mandate allows negotiating parties to "waive any of its statutory rights" under 47 U.S.C. 251(b) and (c).[12] Among other things, subsection (c) of Section 251 imposes on incumbent local exchange carriers the "duty to negotiate in good faith,"[13] and the obligation to interconnect on "rates, terms, and conditions that are ***just, reasonable, and nondiscriminatory***."[14] This means that the voluntary negotiations involving CBET and Embarq did not have to be in good faith, and ***did not have to result in just/reasonable/nondiscriminatory rates, terms or conditions***.[15]

In stark contrast, federal law mandates that the very standards inapplicable to voluntary negotiations must be applied by state public utilities commissions in arbitration proceedings.[16] In the context of mediations, the United States Supreme Court noted that this "option comes with strings," as it "subjects the parties to the duties specified in § 251 and the pricing standards set forth in § 252(d)." *Verizon Communications, Inc. v. FCC* (2002), 535 U.S. 467, 492-93. These same "strings" are attached to compulsory arbitration proceedings (such as this one) – which federal law mandates are conducted in a manner that ensures the standards in 47 U.S.C. 251(b) and (c) are met. It is this type of complete review that the Commission failed to do in adopting the voluntarily negotiated rates from the CBET proceedings (Case No. 07-1275-TP-NAG) that were not subject to the standards set forth in 47 U.S.C. 251(b) and (c) – and assuredly not the "best information available" in this proceeding.[17] In fact, there is no shred of evidence before the Commission that would support the Commission's findings that the "CBET rates reflect: 1) recent investments and expenses that are close to what would be used in a TELRIC proceeding; 2) DS-1 rates that have a reasonable allocation of circuit equipment; 3) five rate bands that depict cost-based deaveraging; and 4) 4-wire loops and DS-1 loops served from a given wire center

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12 *In re Ameritech Ohio Inc.*, Case No. 96-565-TP-UNC (Ohio P.U.C. Aug. 29, 1996), p. 7.
13 See 47 U.S.C. 251(c)(1).
14 See 47 U.S.C. 251(c)(2)(D).
15 See 47 U.S.C. 251(c)(2)(D).
16 See 47 U.S.C. 252(c) (explaining that arbitration proceedings must "ensure that such resolution and conditions meet the requirements of Section 251").
17 Arbitration Award, p. 29.

would belong to the same rate band"[18] because no such information was submitted in the CBET record nor in this record.

The arbitrariness of the rates imposed by the Commission is further illustrated by examining Rate Band 5. The CBET rates adopted by the Commission would require that a customer in Rate Band 5 to pay Embarq $509.60 for DS1 service. For a DS-1 line that uses the same equipment, the same copper wires, and the same people that install the circuit, Embarq quoted that same customer month-to-month price of $336.00; a 36 month price of $296.00; and a 60 month price of $249.00. The Commission erred in directing the CBET Rates to be used resulting in both unfair and unreasonable rates.

WHEREFORE, COI respectfully requests that the Commission grant its request for rehearing.

Respectfully submitted on behalf of
COMMUNICATION OPTIONS, INC.

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[18] Arbitration Award, p. 29.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Rehearing was served upon the following parties of record by regular U.S. Mail this 10th day of March 2009.

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