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

MEMORANDUM CONTRA OF UNITED TELEPHONE COMPANY OF OHIO DBA EMBARQ TO APPLICATION FOR REHEARING OF COMMUNICATION OPTIONS, INC.

I. Introduction

Communication Options, Inc. ("COI") has filed an application for rehearing ("Application"). COI's Application claims that the Commission erred in three respects:

1. By failing to find that United Telephone Company of Ohio d/b/a Embarq ("Embarq") has included the recovery of line conditioning costs in its DS1 loop cost;

2. By not removing the word "excessive" from Section 54.3.1 of the proposed interconnection agreement ("ICA");

3. By adopting unreasonably high interim rates.[1]

COI's Application should be denied. COI has not presented any proper arguments to the Commission that the Commission has not already considered and rejected. And the Commission's ruling on each of the issues raised by COI is more than adequately supported by evidence in the record. Therefore, the Commission should affirm the Arbitration Award ("Award") issued February 11, 2009.

[1] COI Application at 1.

II. Argument

A. The Commission correctly found that Embarq does not include line conditioning costs in its charge for a DS1 loop.

In its Application, COI devotes merely one paragraph to arguing that the Commission erred in adopting Embarq's proposed language regarding loop conditioning.[2] The essence of COI's argument is that Embarq did not prove that loop conditioning costs are not included in Embarq's DS1 loop rates.[3] But this argument fails for two reasons.

First, this is the identical argument that COI made in its initial brief when it claimed that Embarq was "double charging" for line conditioning.[4] In its initial brief, COI claimed that Embarq was already recovering for loop conditioning as part of the cost for DS1 loops as well from Embarq's installation charges.[5] COI also argued that it should not pay for loop conditioning because Embarq did not present a cost study in support of its proposed loop conditioning rates.[6]

Because the arguments COI makes in its Application are merely repetitions of the arguments COI has already made in its briefs, they are an insufficient basis for the Commission to grant rehearing.[7]

Second, COI's claims are factually incorrect. Contrary to COI's claim that Embarq did not provide evidence that loop conditioning costs are not recovered by the

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[2] Application at 2.
[3] Id.
[4] COI Post-Arbitration Brief at 2-4.
[5] Id at 3.
[6] Id at 4.
[7] *In the Matter of Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry on Rehearing at par. 7. See, also, *Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases, Case Nos. 03-93-El-ATA et. al.*, Entry on Rehearing entered July 31, 2008 at par. 14 and *In the Matter of American Municipal Power-Ohio, Inc. for a Certificate of Environmental Compatibility and Public Need for an Electric Generation Station and Related Facilities in Meigs County, Ohio*, Case No. 06-1358-EL-BGN, Entry on Rehearing entered April 28, 2008 at par. 8.

monthly recurring charge for DS1 loops, Embarq witness Ms. Londerholm testified explicitly that line conditioning charges are not included in the cost of a DS1 loop.[8] The Commission appropriately relied on this testimony in making its Award, noting that:

> According to Embarq's testimony in this proceeding, it has not included any non-recurring costs in the cost of a DS1 loop.[9]

COI's claim that Embarq did not provide a non-recurring cost study in support of its loop installation rates is also unavailing. COI argued in both its initial and reply briefs that Embarq had not presented a cost study in support of its loop conditioning rates.[10] But because COI never contested the rate for loop conditioning in its arbitration petition, it was not an issue that required Embarq to introduce a non-recurring cost study for loop conditioning. Thus, it is both understandable and appropriate that Embarq did not introduce such a cost study. The Commission should reject COI's untimely attempt to make this an issue now.

B. The Commission correctly adopted Embarq's proposed language for Issue 11 that includes the word "excessive."

Embarq's proposed language for Sec. 54.3.1 included the sentence:

> Conditioned loops are loops in which excessive bridge taps, load coils, low-pass filters, range extenders, and similar devices have been removed …

COI claims the word "excessive" should be removed from that definition.[11] COI's argument, which again recycles the identical claims COI made in its briefs, is both illogical and incorrect.

COI claims that allowing the word "excessive" to remain in the agreement allows Embarq to charge for more line conditioning than is necessary.[12] But COI's argument

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[8] Londerholm Direct at 33, lines 15-34.
[9] Award at 7 [citation omitted].
[10] COI Post-Arbitration Brief at 4; COI Reply Brief at 9.
[11] COI Application at 2-4.

has it exactly backwards. Inclusion of the word "excessive" actually benefits COI by assuring that Embarq does not charge for the unnecessary removal of bridge taps, etc.

In its initial brief, Embarq completely rebutted COI's claim that the word "excessive" should be removed from the definition of a "conditioned loop".[13] Embarq's testimony proved, with references to both a Telecordia publication and to standards promulgated by the American National Standards Institute, that it is not necessary to remove all bridge taps from a loop in order to make the loop capable of providing high speed services. And Embarq also proved that its proposed definition is consistent with both the FCC's definition of line conditioning and with FCC orders.[14]

Because COI's Application merely recycles arguments it has already made on this point, and because COI is simply incorrect, the Commission should deny rehearing for the same reasons stated in the Award and retain the word "excessive" in the definition of a conditioned loop.

C. Because Embarq introduced evidence justifying even higher rates, the Commission should not grant rehearing with respect to the lower rates it awarded.

COI's third ground for rehearing is the claim that the Commission erred in basing interim rates on rates contained in a recent ICA between Embarq and CBET.[15] COI is incorrect.

Embarq, through the testimony of Ms. Londerholm, sponsored a TELRIC cost study that Embarq believes justifies the rates that Embarq proposed. In its Award, the Commission raised certain questions regarding Embarq's cost study.[16] COI, through Dr. Ankum's testimony, proposed rates considerably lower than those proposed by

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[12] Id. at 2, 3.
[13] Embarq Initial Brief at 8.
[14] Id.
[15] COI Application at 5.
[16] Award at 26-28.

Embarq. In the Award, the Commission also rejected the rates proposed by COI.[17]

The Commission relied upon an ICA recently agreed to between Embarq and CBET and adopted interim rates lower than those proposed by Embarq, but higher than those proposed by COI.

Embarq believes that the best evidence of the appropriate rates is the testimony of Ms. Londerholm and the cost study she sponsored. Because that testimony justifies higher rates than those the Commission adopted in the Award, it is not reasonably debatable whether there was adequate evidence in the record to justify rates at least as high as those adopted by the Commission. The record shows that there was.

COI's main criticism of the Commission's use of the rates in the CBET ICA is that "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 will be ordering from Embarq."[18] COI's argument on this point in this Application is not supported by any citation to the record. And even if it were, it is implausible, at best, that COI can know what rates CBET cares about or what services CBET purchases. It is highly unlikely that a sophisticated company such as CBET would enter into an ICA containing rates that CBET regarded as excessive. Even if CBET were not purchasing any DS1 loops when it entered into the ICA with Embarq, CBET has every incentive not to agree to a rate that is too high for DS1 rates because CBET may purchase DS1 loops in the future.

Finally, Ms. Londerholm's testimony indicates that CBET negotiated all the rates, including rates for DS1s, that were on the price list, the same rates that Embarq originally offered to COI and that the Commission adopted in the Award. She stated:

> Embarq had negotiations with CBET that resulted in an Interconnection, Collocation and Resale Agreement effective December 12, 2007 which was

[17] Award at 28, 29.
[18] COI Application at 5.

subsequently reviewed and approved by this Commission. Embarq offered the **same negotiated** and accepted rates, as found on Table One (Price List), to COI.[19]

D. The Commission should disregard those arguments of COI that rely upon evidence not contained in the record.

COI improperly attempts to support its arguments in two areas with "evidence" that is not in the record and arguments that COI never raised in negotiations. First, in arguing for a revision to the language in Sec. 54.3.1, COI claims not only that the word "excessive" should be removed but also that additional language should be added based upon a Telcordia manual.[20] The Commission should disregard this argument for two reasons. First, COI never proposed the language for Sec. 54.3.1 in negotiations, nor in its arbitration package filed in this case. Second, the Telcordia manual was not introduced as evidence, and there was no testimony whatsoever that supports the applicability of the language from the manual to the section of the ICA at issue. Accordingly, it would be completely improper for the Commission to adopt new language for Sec. 54.3.1 based on "evidence" that does not exist, particularly when the first time COI has proposed the language is in its Application.

COI also wanders far outside the record to support its claim that the Commission erred in choosing the interim rates that it did. COI engages in an extended discussion regarding the rates agreed upon by Embarq and CBET. But, in doing so, COI makes a number of factual assertions that are not supported by any citation to the record.

For example, COI claims that CBET cared about only two rates -- 2-wire loops and sub-loops.[21] COI provides no cite to the record to support that claim, nor does COI provide any citation to the record to support its theoretical discussion in footnote 10 in the Application.

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[19] Londerholm Direct at 49, 50 [emphasis added].
[20] COI Application at 4.
[21] COI Application at 5.

COI also attempts to show that the rates adopted by the Commission are arbitrary based on a comparison between CBET Rate Band 5 rates and a quote that Embarq allegedly made to some unnamed customer.[22] COI's argument fails because there is no evidence in the record regarding the alleged quote by Embarq for a DS1 line. Because there is no such evidence, and because there is no discussion of how or if the alleged quote even relates to the rates ordered in this case, the Commission should disregard that portion of COI's argument.

E. COI's discussion of the legal standards applicable to negotiated rates versus those applicable to arbitrated rates is irrelevant.

COI makes the unsurprising assertion that federal law allows parties to negotiate rates that need not comply with the standards contained in Sec. 251 of the Telecommunications Act of 1996.[23] Embarq does not disagree with COI's general statement of that legal principle. But COI extrapolates incorrectly from that principle to the conclusion that the Commission erred in adopting the rates that it did. Embarq submits that the best evidence in this arbitration regarding the appropriate rates is the testimony of Ms. Londerholm. Her testimony and the cost study she sponsored completely support the rates that Embarq proposed to COI. Because those rates are higher than the rates that the Commission ultimately adopted (based in part upon the rates Embarq agreed to with CBET), there is sufficient evidence in the record to support the rates the Commission ordered.

III. Conclusion

COI's Application should be denied. Apart from arguments based on extra-record evidence, COI has not presented any new arguments for the Commission to consider.

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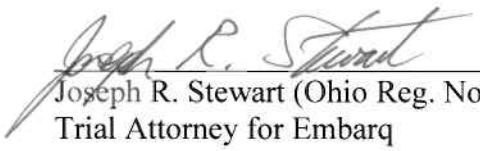
[22] COI Application at 7.
[23] Id. at 5, 6.

And the arguments based on evidence not in the record should be summarily dismissed. The Award is supported by sufficient evidence in the record. The Commission exercised appropriate discretion in evaluating the evidence and making the Award. It should be affirmed.

Respectfully submitted,



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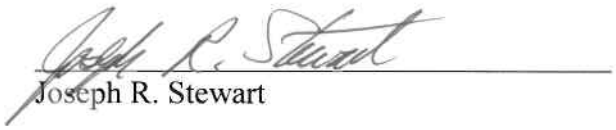
CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing Memorandum Contra was served via e-mail, mailed postage pre-paid or hand-delivered to the parties listed below on this 19th day of March, 2009.



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Summary: Memorandum Contra of United Telephone Company of Ohio d/b/a Embarq to Application for Rehearing of Communication Options, Inc. electronically filed by Sonya I Summers on behalf of United Telephone Company of Ohio d/b/a Embarq