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 ON REHEARING

The Commission finds:

(1) On February 11, 2009, the Commission issued its arbitration award (Award) in this proceeding resolving those disputed issues brought before the Commission for resolution. Additionally, the Commission directed the parties to incorporate the Award into their entire interconnection agreement and file it for the Commission's consideration.

(2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

(3) On March 10, 2009, Communication Options, Inc. (COI or applicant) filed an application for rehearing (COI Application) asserting that the Commission incorrectly decided the following arbitrated issues:

(a) Failing to find that United Telephone Company of Ohio dba Embarq (Embarq) had included the recovery of line conditioning costs in the rate proposed for DS-1 loops (Issues 1, 8, 9, 12).

(b) Failing to remove the word "excessive" from Section 54.3.1 of the proposed ICA (Issue 11).

(c) Adopting unreasonable interim rates (Issue 15).

(4) On March 19, 2009, Embarq filed its memorandum contra (Embarq Memo) COI's Application. Embarq argues that COI has not presented any arguments that the Commission has not already considered and rejected, with ample supporting evidence in the record. In sum, asserts Embarq, the COI Application should be denied.

(5) In its first assignment of error, COI observes that the Award adopted Embarq's proposed language for Issues 1, 8, and 9, and thereby concluded that line conditioning charges were not already included in the costs of DS-1 loops. COI contends that, in arriving at this conclusion, the Commission supported language through which Embarq seeks double recovery of line conditioning costs, first as part of the "astronomical cost" of the DS-1 loop, and then as "unwarranted and unnecessary separate line conditioning charges." COI asserts that its witness Dr. August Ankum (Dr. Ankum) explained that Embarq did not provide evidence that loop conditioning costs were removed from the New Cost Model's recurring cost estimates of loops (COI Application at 2 citing COI Exhibit 3A at 24). Further, argues COI, Dr. Ankum stated that because Embarq did not provide 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 (*Id.* citing COI Ex. 2A at 46). In sum, concludes COI, in the absence of a cost study that affirmatively demonstrates that Embarq's loop conditioning costs are not included in the rates of its DS-1 loops, Embarq should not be allowed to require COI to pay additional line conditioning charges.

(6) In response to the first assignment of error, Embarq contends that, in essence, COI is arguing that Embarq failed to prove that loop conditioning costs are not included in Embarq's DS-1 loop rates. In Embarq's opinion, this is the same argument that COI made in its Initial Brief. More specifically, explains Embarq, COI had claimed that Embarq was charging twice for line conditioning, since Embarq was already recovering for loop conditioning as part of the cost for DS-1 loops and from Embarq's installation charges. Embarq also notes that COI had argued that it should not pay for loop conditioning because Embarq failed to present a cost study that supported the proposed loop conditioning rates. As these arguments simply repeat contentions made in COI's Initial Brief, adds Embarq, there is insufficient basis for the Commission to grant rehearing.

Furthermore, asserts Embarq, COI's claims are factually incorrect. Embarq argues that its witness Christy Londerholm testified that line conditioning charges are excluded in the cost of a DS-1 loop (Embarq Memo at 3 citing Embarq Ex. 3A at 33-34). Embarq notes that the Commission relied on Ms. Londerholm's testimony in making its Award (*Id.* citing Award at 7).

Finally, states Embarq, COI's claim that Embarq failed to provide a nonrecurring cost study that supported its loop conditioning is also nonpersuasive. Embarq notes that COI had presented this argument in its Initial and Reply Briefs. Embarq then asserts that because COI had never contested the rate for loop conditioning in its petition for arbitration, it was not an issue requiring Embarq to introduce a nonrecurring cost study for loop conditioning. Therefore, concludes Embarq, it is understandable and appropriate that it did not introduce a cost study, and the Commission should reject this COI argument made on rehearing.

(7) Upon a review of the arguments regarding the first assignment of error, the Commission finds that the applicant raises no new arguments that the Commission has not previously considered. The Commission agrees with Embarq that because COI did not specifically challenge Embarq's proposed loop conditioning rates in its petition for arbitration, Embarq was not required to submit a cost study for loop conditioning. In fact, 47 U.S.C. 252(b)(4) instructs the Commission to limit our consideration of any petition to the issues set forth in the petition for arbitration and any responses thereto. Furthermore, as noted in the Commission's Award for this issue, the record reflects that loop conditioning, as a non-recurring charge, is not recovered in Embarq's DS-1 loop monthly recurring rates (Award at 7). As such, the Commission agrees with Embarq that it is not proposing double recovery of loop conditioning charges from COI. Rehearing on this assignment of error is, therefore, denied.

(8) In its second assignment of error, COI contends that the Commission erred in allowing the word "excessive" to remain in Section 54.3.1 of the proposed interconnection agreement (ICA), essentially allowing Embarq to complete and charge for more line conditioning than necessary. COI emphasizes that it does not support inclusion of the word "excessive" in Section 54.3.1, and explains that its proposed language for Section 54.3.1 in its Initial Brief mistakenly failed to strike through the word "excessive."

Such an omission, adds COI, was not intended to express support for using the word "excessive."

COI argues that, as a policy matter, Embarq engages in line conditioning continuously regardless of the cost, and then passes that expense along to COI and presumably other customers as a line conditioning charge. To substantiate this claim, COI refers to a June 4, 2008, e-mail from Embarq's account representative to COI, Pam Ziegler, to COI President Steve Vogelmeier, which states that "partial conditioning is allowable on anything, but a T1. **We require 100% conditioning for our own T1 service too**" (COI Application at 3 citing COI Exhibit 4 to Tr. Vol. II. Emphasis added by COI). COI asserts that Embarq should not, in reality, remove all bridge taps, but only those "'based upon line length and the length of the bridge tap and how far it is from the CO'" (*Id.* citing Tr. Vol. I at 110). COI states that it seeks to prevent Embarq's practice of labeling and removing all bridge taps under the belief that they are excessive, and for that reason, COI had urged the arbitration panel to remove the word "excessive" from Section 54.3.1.

While COI prefers that the Commission direct the parties to remove the word "excessive," COI adds that if the Commission allows "excessive" to remain in Section 54.3.1, it should be defined to prohibit Embarq from subjectively interpreting "excessive" in a manner to undertake more line conditioning than necessary. Therefore, argues COI, "excessive" should be governed by the manufacturer's standard for the High-bit-rate Digital Subscriber Line (HDSL) technology used by COI, as identified in Section 3.1 of the Telcordia TA-NWT-001210 Generic Requirements for HDSL (Telcordia Manual). COI notes that Section 45.8.8 of the proposed ICA already references this same document in establishing duties for HDSL installations. In COI's opinion, such guidelines offer a neutral, objective standard for determining when line conditioning is necessary, as compared to the subjective approach currently used by Embarq. In COI's opinion, this proposal will remedy the Commission's error of inserting "excessive" into Section 54.3.1 and will also address COI's arguments, resulting in a reasonable resolution of line conditioning issues.

(9) In response to COI's second assignment of error, Embarq asserts that COI's contentions are "illogical and incorrect," in addition to having been made on brief. Embarq notes COI's apparent belief that allowing the word "excessive" to remain in the ICA allows

Embarq to charge for more line conditioning than necessary. The contrary is true, argues Embarq, because including "excessive" actually benefits COI by assuring that Embarq does not charge for unnecessary removal of bridge taps.

Embarq explains that its Initial Brief completely rebuts an identical COI claim, because Embarq's testimony, with references to a Telecordia publication and to standards of the American National Standards Institute, proved that it is unnecessary to remove all bridge taps from a loop in order to make the loop capable of providing high speed services. Embarq states that is also proved that its proposed definition is consistent with the Federal Communications Commission (FCC) definition of line conditioning and FCC orders.

Thus, concludes Embarq, COI's second assignment of error should be rejected because its arguments are incorrect and have already been made.

Further, emphasizes Embarq, COI promotes the addition of language based upon the Telcordia Manual to Section 54.3.1 of the ICA, yet COI never proposed such language during negotiations or in its arbitration package. Also, contends Embarq, the Telcordia Manual was not introduced as evidence, nor was there testimony supporting the applicability of the language from the manual to Section 54.3.1. Therefore, asserts Embarq, it would be improper for the Commission to adopt new language for Section 54.3.1 based on evidence that does not exist, especially when COI initially proposed the language in its Application.

(10) Upon a review of the arguments set forth specific to this assignment of error, the Commission finds that the application for rehearing should be granted in part and denied in part. The Commission denies COI's request to strike the word "excessive" from Section 54.3.1 of the proposed ICA for the reasons set forth in the Commission's Award. The plain meaning of the word "excessive" means "unnecessary" or "too many." The Commission, in its Award, was simply agreeing with COI, in principle, that unnecessary or excessive bridge taps should not be removed by Embarq. If the word "excessive" is deleted, it also removes the limitation that the Commission had intended by allowing the word to remain. In essence, without a qualifying word such as "excessive," Embarq would be entitled under the

proposed language to remove all bridge taps, which is the opposite result of what COI recommends.

The Commission will, however, grant rehearing for the purpose of agreeing with COI that reference to the Telcordia Manual TA-NWT-001210 should be included in the language as proposed by COI. While the Commission recognizes that this document was not introduced into evidence, it is a publicly available industry document, and as pointed out by COI, this same document is already referenced in another section of the proposed ICA (see proposed ICA Section 45.8.8, filed June 24, 2008). Furthermore, Embarq's witness Mr. James Maples noted Telcordia's *Notes on the Network* in support of Embarq's position that it is not necessary to remove all bridge taps from a loop (Embarq Ex. 2 at 19). Thus, the Commission finds that reference to the aforementioned Telcordia Manual is appropriate and should be included in Section 54.3.1 of the ICA.

(11) In its third assignment of error, COI asserts that the Commission incorrectly selected interim rates equal to those set forth in the ICA between Embarq and Cincinnati Bell Extended Territories, LLC (CBET), as filed in Case No. 07-1275-TP-NAG, *In the Matter of the Application of United Telephone Company of Ohio dba Embarq for Approval of a Negotiated Agreement with Cincinnati Bell Extended Territories, LLC* (07-1275). COI argues that the 07-1275 rates are unreasonable because they were not actually negotiated. According to COI, the only two rates that were disputed and therefore negotiated by CBET were 2-wire loops and subloops that, through negotiation, were increased by less than $0.50. COI contends that CBET did not care about the rest of the prices and accepted them once CBET had achieved the desired rates for services that it would order from Embarq. Thus, argues COI, citing to the 07-1275 rates as reasonable is a serious error, because those rates were simply rates that Embarq proposed and which CBET did not challenge. COI contends that no support exists for 07-1275 rates other than for 2-wire loops and subloops, which are the only two rate prices that CBET contested. COI adds that in 07-1275, the Commission was not asked to determine the reasonableness of the 07-1275 rates as applicable to future ICA negotiations between different contracting parties.

In addition, argues COI, the level of Commission review for negotiated rates differs considerably from the level of review in an

arbitration. COI contends that the voluntary negotiations between CBET and Embarq in 07-1275 are governed by a federal mandate that states that an incumbent local exchange carrier (ILEC) "'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) or section 251'" (COI Application at 5 citing 47 U.S.C. 252 (a)(1)). The Commission, states COI, has recognized that this federal mandate allows negotiating parties to "'waive any of its statutory rights'" under 47 U.S.C. 251(b) and (c) (*Id.* at 6 citing *In the Matter of the Application of Ameritech Ohio for Approval of an Agreement Between Ameritech Ohio and MFS Internet of Ohio pursuant to Section 252 of the Telecommunications Act of 1996,* Case No. 95-565-TP-UNC, Aug. 29, 1996, at 7). Among other things, COI argues, 47 U.S.C. 251(c) imposes on an ILEC "'the duty to negotiate in good faith'" and the obligation to interconnect on "'rates, terms, and conditions that are just, reasonable, and nondiscriminatory'" (*Id.* at 6 citing 47 U.S.C. 251(c)(1) and 47 U.S.C. 251(c)(2)(d). Emphasis added by COI.) Therefore, asserts COI, 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, and nondiscriminatory rates, terms, or conditions (*Id.* at 6).

COI asserts that, in contrast, federal law mandates that the very standards that do not apply to voluntary negotiations must be applied by state public utility commissions in arbitration proceedings (*Id.* citing 47 U.S.C. 252(c)). Further, states COI, in the context of mediations, the United States Supreme Court determined that this "option comes with strings," because it "subjects the parties to the duties specified in §251 and the pricing standards set forth in §252(d)" (*Id.* citing *Verizon Communications, Inc. v. FCC* (2002), 535 U.S. 467, 492-93). The same "strings," argues COI, are attached to compulsory arbitration proceedings that, under federal law, must be conducted in compliance with 47 U.S.C. 251(b) and (c) standards. COI contends that the Commission did not conduct this type of complete review when it adopted the voluntarily negotiated rates from the CBET proceedings in 07-1275 that were not subject to 47 U.S.C. 251(b) and (c). In COI's opinion, there is no evidence to support the Commission's findings in the Award that CBET's rates reflect (1) recent investments and expenses 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 would belong to the same rate band, because no such information was submitted in the 07-1275 record nor in this record.

COI argues that an examination of Rate Band 5 illustrates the arbitrariness of the rates imposed by the Commission. The CBET rates adopted by the Commission, observes COI, would require that a customer in Rate Band 5 pay to Embarq $509.60 for DS-1 service. For a DS-1 line using the same equipment, copper wires, and persons to install the circuit, contends COI, Embarq quoted that same customer a monthly price of $336.00, a 36-month price of $296.00, and a 60-month price of $249.00. In sum, states COI, the Commission erroneously directed that the 07-1275 rates be used, resulting in an unfair and unreasonable outcome.

(12) In response to the third assignment of error, Embarq argues that its witness Ms. Londerholm sponsored a TELRIC cost study that Embarq believes justifies its proposed rates. Embarq observes that the Commission, in its Award, raised questions regarding Embarq's cost study. Embarq further notes that COI witness Dr. Ankum proposed rates much lower than Embarq's proposal, and that in the Award the Commission also rejected COI's proposed rates. Finally, states Embarq, the Commission relied on a recent ICA between Embarq and CBET and adopted interim rates lower than those proposed by Embarq but higher than COI's proposal.

In Embarq's opinion, the best evidence of appropriate rates is Ms. Londerholm's testimony and the cost study that she sponsored. Because her testimony justifies higher rates than those adopted in the Award, argues Embarq, it cannot be debated whether there was adequate evidence in the record to justify rates at least as high at those in the Award.

Embarq notes that COI's primary criticism of the Commission's use of rates from the CBET ICA is that CBET was indifferent regarding 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. Embarq contends that this argument of COI is not supported by any citation from the record. Besides, adds Embarq, it is implausible that COI can know what rates CBET cares about or the services that CBET purchases. Embarq asserts that CBET would not enter into an ICA that contains excessive rates, and even if CBET were not purchasing any DS-1 loops when it entered into the ICA with Embarq, CBET has incentive to not agree upon a rate that

is excessive for DS-1 rates, because it may purchase DS-1 loops in the future.

Finally, notes Embarq, COI states that federal law allows parties to negotiate rates that need not comply with standards set forth in Sec. 251 of the Telecommunications Act of 1996. While agreeing with that legal principle, Embarq disagrees with COI's extrapolation from that principle that the Commission erred in adopting the rates in the Award. Embarq contends that Ms. Londerholm's testimony indicates that CBET had negotiated all the rates, including DS-1 rates, which were identical to what Embarq initially offered to COI and the Commission adopted in the Award (Embarq Memo at 5 citing Embarq Ex. 3A at 49-50).

Embarq also contends that COI, in its discussion of rates that CBET agreed upon with Embarq, makes assertions that are unsupported by any citation in the record. For example, notes Embarq, COI claims that CBET only cared about rates for 2-wire loops and sub-loops, yet COI provides no cite to the record to support that claim. Similarly, observes Embarq, COI attempts to show that the rates in the Award are arbitrary, based on a comparison of CBET Rate Band 5 rates and a quote that Embarq supposedly made to an unnamed customer. Yet, argues Embarq, once again COI's argument does not cite evidence in the record regarding the alleged quote by Embarq for a DS-1 line. For failing to provide such evidence, and because of COI's failure to discuss how or if the alleged quote relates to the rates in the Award, Embarq urges the Commission to disregard COI's argument.

(13) Upon a review of the arguments set forth specific to this assignment of error regarding the Commission-adopted interim rates, the Commission finds that rehearing should be denied.

First, we reject COI's claim that the Commission erred in setting interim rates at a level that mirrors rates in the current Commission-approved ICA between Embarq and CBET (CBET rates). COI argues that these interim rates are unreasonable, inasmuch as the rates were not actually negotiated between CBET and Embarq. We remind COI that "the focus of the Award was to establish interim rates for unbundled 4-wire loops and DS-1 loops based on the best information available about Embarq's forward-looking economic costs, and subject to a true-up pursuant to Rule 4901:1-7-17(A)(3), Ohio Administrative Code (O.A.C.)." (Award at 26. Emphasis added.) As stated in the Award, the Commission

rejected Embarq's proposed interim rates because we were not convinced that Embarq's TELRIC study was representative of its forward-looking economic costs for various reasons (*Id.* at 27-28). Likewise, we rejected COI's counter-proposed interim rates because we found that the rates it proposed did not represent reasonable rates based on a number of different grounds (*Id.* at 28). Based upon the record before us and our significant concerns with both parties' proposed interim rates, we found that "CBET rates are more reasonable as interim rates for the purpose of this proceeding and address several of the issues and objections raised by both COI and Embarq regarding the other party's proposal" (*Id.* at 29. Emphasis added). The issue of whether the CBET rates were negotiated or not is irrelevant to the Commission's finding that "CBET rates are more reasonable as interim rates...." (*Id.* at 29. Emphasis added.) The relevant issue was to determine the interim rates based on the "best information available" (*Id.* at 26. Emphasis added). Additionally, we find that the COI Application did not provide any reference to the record in support of its claim that CBET rates were not negotiated by the parties, and COI further fails to demonstrate that CBET rates were not based on the best information available in this proceeding. Finally, we note that COI did not attempt, in its rehearing application, to defend its proposed interim rates that were rejected by the Commission.

With respect to COI's statement that "voluntary negotiations involving CBET and Embarq did not have to be in good faith and did not have to result in just/reasonable/non-discriminatory rates, terms or conditions" (COI Application at 6), we find that COI failed to demonstrate how the CBET rates (i.e., the Commission-adopted interim rates, herein) are unjust, unreasonable, or discriminatory as COI alleges. Furthermore, we reject COI's allegation that the Commission, in adopting the CBET rates as interim rates subject to a true-up, failed to ensure that the standards in 47 U.S.C. 251(b) and (c) were met. We find that COI fails to demonstrate: 1) which of the 47 U.S.C. 251(b) and (c) standards was violated by the Commission-adopted interim rates and 2) how the Commission-adopted interim rates did not comport with any such standards. Contrary to COI's arguments, the Commission ensured that the standards in 47 U.S.C. 251(b) and (c) were met by adopting interim rates with a true-up provision pursuant to Rule 4901:1-7-17 and 4901:1-7-18 O.A.C, which are consistent with 47 U.S.C. 251 (b) and (c) (Award at 26).

Next, we find that COI fails to provide any support for its assertion that the Commission erred, due to lack of evidence, when it found 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 belonging to the same rate band. The Commission disagrees with COI and finds that the record clearly supports our previous finding that CBET's rates reflect recent investments and expenses. CBET's rates were produced by a cost study that was submitted by Embarq to CBET in 2007, and this proposal was the basis for the negotiated rates that were jointly filed by the parties in an ICA and approved by the Commission on December 31, 2007 in 07-1275 (Embarq Ex. 3 at 49; Tr. Vol. II at 401). COI's own witness, Dr. Ankum, explained that he examined various ICA applications in the process of developing COI's proposed interim rates. He stated that he assumed that the CBET rates appeared to "correspond to the end of the year in which a specific rate set first appeared in the ICA" for the purpose of applying general inflation indices (COI Ex. 2 at 33, Footnote 50). In other words, COI's own witness found that CBET rates reflected recent, i.e., 2007, investments and expenses and utilized this information for the purpose of developing COI's proposed interim rates.

Furthermore, the record supports the Commission's finding in the Award that the CBET Rates reflect DS-1 rates that have a reasonable allocation of circuit equipment investment, as presented through Ms. Londerholm's testimony upon cross-examination. When Ms. Londerholm was questioned by COI regarding the difference between a DS-1 loop and a four-wire loop as to the provisioning requirements for each, Ms. Londerholm explained that Embarq's DS-1 rates include a reasonable allocation of circuit equipment investment (Tr. Vol. II at 408). This was further explained by Ms. Londerholm when she highlighted the inconsistencies between Dr. Ankum's proposed interim rates, which did not include a reasonable allocation of circuit equipment in the model used to develop unbundled DS-1 rates in the current COI/Embarq agreement, compared to the results of the cost model used to develop the CBET Rates, and subsequently, Embarq's proposed rates in this proceeding which did include a reasonable allocation of circuit equipment to unbundled DS-1 loops (*Id.* at 409-410; COI Ex. 2 at 40-43).

> We are also puzzled by COI's allegation that the record did not support the Commission's finding in the Award that the CBET Rates reflect five rate bands that depict cost-based deaveraging. This specific issue was discussed at great length during the cross-examination of Ms. Londerholm, where she clearly explained how Embarq's model was used to develop its proposed rate bands (Tr. Vol. II at 395, 401-402) and evident by the table provided in the Commission Award (Award at 29).
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> Finally, we reject COI's assertion that the record did not support the Commission's finding that the CBET rates reflect the 4-wire loops and DS-1 loops served from a given wire center belonging to the same rate band. The record, in fact, demonstrates that COI understood that the rates did indeed reflect this exact circumstance, and when COI asked Ms. Londerholm to confirm its understanding on the record, she did so (Tr. Vol. II at 393).

It is, therefore,

ORDERED, That COI's application for rehearing is granted in part and denied in part, in accordance with the findings above. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

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