**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of the Petition for Arbitration of an Interconnection Agreement Between<br><br>COMCAST PHONE OF WASHINGTON, LLC,<br><br>with<br><br>UNITED TELEPHONE COMPANY OF THE NORTHWEST, INC. d/b/a EMBARQ<br><br>Pursuant to 47 U.S.C. Section 252(b).<br>. . . . . | ) | DOCKET UT-083025<br><br>REPLY BRIEF OF EMBARQ |

# UNITED TELEPHONE COMPANY OF THE NORTHWEST D/B/A EMBARQ'S REPLY BRIEF


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**REPLY BRIEF OF UNITED TELEPHONE COMPANY OF THE NORTHWEST d/b/a EMBARQ**

*1* United Telephone Company of the Northwest d/b/a Embarq ("Embarq") files this Reply Brief in response to Comcast Phone of Washington, LLC's ("Comcast") Opening Brief, filed on September 17, 2008. In it's brief, Comcast attempts to impugn Embarq's proposed monthly recurring charge ("MRC") for directory listing storage and maintenance ("DSLM") on multiple grounds. Embarq has demonstrated, however, that Comcast's arguments are unavailing.

*2* Comcast's Opening Brief misconstrues Section 222(e) of Communications Act of 1934, as amended (the "Act"). The arguments in the Comcast Opening Brief need to be considered in light of what Section 222(e) requires, and does not require, of local exchange carriers ("LECs"). Furthermore, Comcast ignores the changes in the directory publisher marketplace that have occurred since passage of the Telecommunications Act of 1996 ("TA96"). The market has changed substantially with the LECs divesting their publishing businesses.

*3* In addition, Comcast admits at the outset of its Opening Brief that Embarq only intends to charge the MRC to Comcast and other similarly situated LECs. It is not discriminatory when Embarq treats similarly situated LECs alike. In addition, Comcast's argument that the DLSM MRC represent's a "third" source of revenue totally ignores the language of the *SLI/DA Order* and the Act.

4 Comcast also fails, in its flawed assessment of the Commission's 1995 Qwest order, to account for the *SLI/DA Order* and the Act as developments in the evolving reduction in regulation of LEC directories. The *Qwest Order* is not applicable in this case because of the changes in law and the changed circumstances in the directory services market. Embarq responds to these and Comcast's other arguments in greater detail below.[1]

## ARGUMENT

### I. COMCAST MISCONSTRUES SECTION 222(e) AND IGNORES CRUCIAL FACTS

5 Comcast's Opening Brief relies on very selective citation of the FCC's *SLI/DA Order*. Specifically, Comcast relies on the statement in the *SLI/DA Order*, that Section 222(e) was enacted to correct a "perceived failure in the market for subscriber list information."[2] Embarq notes that the market failure that Section 222(e) was intended to correct involved directory assistance/directory publisher markets, and that this market failure was punctuated by ILEC control over directory publishers. Comcast mistakenly

[1] Embarq expects that Comcast will raise in its Reply Brief the very recent Texas Arbitrator's decision finding in Comcast's favor on this issue. *Petition of Comcast Phone of Texas, LLC for Arbitration of an Interconnection Agreement with United Telephone Company of Texas, Inc. d/b/a Embarq and Central Telephone Company of Texas, Inc. d/b/a Embarq Pursuant to Section 252 of the Federal Communications Act of 1934, as Amended and Applicable State Laws*, Proposal for Award, TX PUC Docket No. 35402, dated Aug. 27, 2008. Embarq notes that this is an Arbitrator's decision and not a final Texas Commission decision and emphasizes that the instant case needs to be decided on the basis of the pleadings and record before this Commission. Moreover, the facts in the Texas case differ from the facts in this case, and the decision is of course not binding on the WUTC.

[2] Opening Brief of Comcast Phone of Washington, LLC filed in Docket No. A-310190 on August 15, 2008, at p. 4 ("Comcast Opening Brief").

claims that "[t]he ILECs' control over the directory listing ("DL") 'market' has not changed in the intervening years."[3] To the contrary, it is undeniable that the directory publishing market has experienced sweeping change since passage of the TA96 and the *SLI/DA Order*. Mr. Lubeck demonstrates this change in the market in his testimony:

> When the Federal Telecommunications Act of 1996 was enacted, each of the large ILECs, including the RBOCs, GTE and Sprint, owned and controlled their own directory publishing businesses. Similarly, when the *SLI/DA Order* was released in 1999, all large ILECs, including Sprint (Embarq's predecessor), still owned and controlled their own directory publishing businesses. Thus, access to the dominant white pages directories was largely controlled by the major ILECs during the relevant time period leading up to the *SLI/DA Order*. … Beginning in 2002 with Qwest, and later Sprint (2003), and then Alltel (2007), most ILECs have now sold their publishing businesses. In 2006, Verizon 'spun off' its publishing business to Verizon shareholders as an independent company. Currently, among the major ILECs, only AT&T publishes its own directory through an affiliated company (except for the Chicago/NW Indiana directories).[4]

*6* Furthermore, Comcast does not come close to proving that Embarq has market power sufficient to create a monopoly with respect to directory services. This is because it concedes that is possible for it to access the Embarq-branded directory directly through R.H. Donnelley ("Donnelley"),[5] the independent third party that publishes Embarq's directories. Moreover, in the case of DL there is no "market failure" when the LEC does not control or restrict access to the directory publisher. Comcast has the same ability to access Donnelley as Embarq does. Comcast has simply chosen to have

[3] Comcast Opening Brief, at p. 5.

[4] Direct Testimony of Alan Lubeck at p. 11 ("Lubeck Direct").

[5] Transcript, at 43:22-25.

Embarq perform this function rather than self-provisioning it. And it has exercised little if any diligence in determining how to appropriately do this,[6] so any claim that it makes that it would be cost, or otherwise, prohibitive is without merit.

*7* It is, however, the language that Comcast fails to quote from the *SLI/DA Order* that is most compelling and which undoes it's argument. As Embarq explained in its Opening Brief, the *SLI/DA Order* makes clear that Embarq need not to provide this service for Comcast at all. As Embarq explains in its Opening Brief,[7] the FCC concluded in its *SLI/DA Order* that there is no legal obligation under Section 222(e) for an incumbent local exchange carrier ("ILEC") to function as a clearinghouse for another local exchange carrier ("LEC").[8] Moreover, Comcast has a legal obligation under Section 222(e) to provide subscriber listing information ("SLI") to requesting directory publishers.[9] Thus, not only is Embarq not required to perform this function for Comcast, but Comcast is required to perform it itself.

Comcast's interpretation of Section 251(b)(3) is squarely at odds with Section 222(e), and this conflict is unreconciled by Comcast in its Opening Brief. The proper way to reconcile Congress' intent under the Section 222(e) with the nondiscriminatory

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[6] Transcript, at 36:3 – 38:5.

[7] *See, e.g.*, Initial Brief of United Telephone Company of the Northwest d/b/a Embarq, filed September 17, 2008, at ¶¶ 5-6 ("Embarq Initial Brief").

[8] *SLI/DA Order*, ¶¶ 53-55.

[9] *SLI/DA Order*, ¶¶ 53-55; Embarq Initial Brief, at pp. 20-21.



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access requirements of Section 251(b)(3) is to interpret Section 251(b)(3) in a manner that preserves the intent of Section 222(e) as set forth in the *SLI/DA Order*.

## II. COMCAST'S ARGUMENTS REGARDING SECTION 251(B)(3) ARE UNAVAILING

### A. The Case Law Comcast Cites Is Unpersuasive and Not Controlling

*8* Comcast asserts that Embarq may not impose a charge for its DL function on Comcast that Embarq does not impose on its own customers or other LECs.[10] Comcast cites two cases that it purports address this matter, *MCI Telecom Corp. v. Michigan Bell Tel. Co.*[11] and *U.S. West Comm., Inc. v. Hix.*[12] However, both cases are distinguishable from the instant situation and neither is controlling.

*9* Significantly, neither case addresses the statutory conflict between Section 222(e) and Section 251(b)(3), vis-a-vis the *SLI/DA Order*'s holding that ILECs need not perform a clearinghouse function for CLECs. Moreover, the directory publisher at issue in *Hix* was affiliated with the ILEC.[13] Similarly, in *MCI*, there was evidence that the directory publisher was affiliated with the ILEC.[14] Neither case expressly considered the facts and legal argument presented here. Embarq's argument harmonizes Sections 222(e)

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[10] Comcast Opening Brief, at p. 7. Comcast mischaracterizes Embarq's "alternative defenses" to Comcast's Section 251(b)(3) claims. As described in Embarq's Opening Brief at p. 10, for example, Embarq's position is that Section 251(b)(3) must be read in harmony with Section 222(e). Comcast, however, wholly ignores Section 222(e).

[11] Comcast Opening Brief, at p. 11 (citing 79 F.Supp. 2d 768 (Mich. 1999).

[12] 93 F.Supp. 2d 1115 (D. Colo. 2000).

[13] *Hix*, at p. 1133 ("USWC does not dispute the CLEC's assertion that Dex is an affiliate of USWC.").

[14] *MCI*, at p. 802.

and 251(b)(3) of the Telecommunications Act of 1996 ("TA96"), and neither of the cases Comcast cites addressed Embarq's argument. The cases cited by Comcast are therefore not helpful in resolving the issues in this arbitration.

*10* In an attempt to further support its argument, Comcast alleges that Embarq exerts some degree of control over certain facets of Donnelley's publication of Embarq's directories.[15] Embarq emphasizes that while Embarq maintains some say over various publication matters, Embarq in no way controls Comcast's access to or ability to work directly with Donnelley. This distinction is also relevant with respect to the policy concerns Comcast gleans from the *Hix* case.[16]

*11* It is important to remember that in *Hix*, the directory was published by an affiliate of the ILEC. Comcast cites the *Hix* court's *speculation* that each CLEC would have to publish a separate directory for its particular customers, which in turn, would require every telecommunications user to acquire several phone books to obtain full coverage of all telecommunications users. Such a doomsday scenario is not possible here. Embarq is not, and could not, keep Comcast's subscribers out of Donnelley's Embarq directory because Embarq does not and cannot restrict access to Donnelley.

[15] Comcast Opening Brief, at p. 11-12.

[16] Comcast Opening Brief, at n.45.

Thus, those policy concerns are completely moot in light of Comcast's ability to deal directly to Donnelley.[17]

*12* Moreover, Comcast even acknowledges that although it "could probably" establish a direct interface with Donnelley, it shouldn't have to "undertake such socially wasteful expenditures" because of Section 251(b)(3).[18] Comcast relies on "standard industry practice" for the ILEC to keep doing what it's doing, regardless of the law and important changes in the marketplace.[19] The fact remains that under Section 222(e), Embarq is not required to perform this function for Comcast. Moreover, Comcast's attitude is the antithesis of true competition. Comcast would prefer to have Embarq perform this function for free rather than self-provision it. True facilities-based competition cannot be realized if the fourth largest residential telephone provider, larger than Embarq, can be allowed to continue to piggyback on Embarq. Embarq is performing functions it is not required to provide, and which Comcast is legally obligated to provide itself. Embarq, therefore, should be compensated.

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[17] Comcast acknowledges that "it could probably do as Embarq suggests" and establish a direct interface with Donnelley. Comcast Opening Brief, at p. 15.

[18] Comcast Opening Brief, at p. 14.

[19] Comcast Opening Brief, at p. 5. If "standard industry practice" were controlling, Comcast, a cable company, wouldn't even be in the residential telephone business. Clearly, blind reliance on "standard industry practice," especially in this industry that has evolved so dramatically over the past 12 years, is ill-advised.

### B. Embarq Is Not Asking This Commission for "Forbearance"

*13* Comcast goes on to assert that Embarq's interpretation of Section 251(b)(3) is somehow tantamount to Embarq's asking this Commission to forbear from applying the statute.[20] This is simply not true. Aside from the obvious fact that Embarq has not petitioned this Commission for any type of forbearance, a statute has to be applicable in the first place in order for a regulator to forbear from applying it. The crux of this case requires a reconciliation of Section 222(e) and Section 251(b)(3). As Embarq explained in its Opening Brief, Section 222(e) does not require Embarq to be a clearinghouse for CLEC SLI, and Section 251(b)(3) does not alter this conclusion.[21] As explained in Embarq's Opening Brief, Embarq's position is supported by (1) the fact that ILECs no longer control access to directory publishers;[22] (2) the language of 47 C.F.R. § 51.217;[23] and (3) the structure of Section 251.[24] Thus, Comcast's forbearance analogy fails.

### C. Despite Comcast's Unsupported Claims to the Contrary, the Record Reflects that Comcast Can Deal Directly with Donnelley

*14* Comcast also implies that Embarq must point to examples of carriers that deal directly with Donnelley in order for Embarq's argument to have merit, wrongly

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[20] Comcast Opening Brief, at pp. 12-14.

[21] Embarq Initial Brief, at ¶¶ 5-10.

[22] Embarq Initial Brief, at ¶¶ 11-17.

[23] Embarq Initial Brief, at ¶ 19.

[24] Embarq Initial Brief, at ¶¶ 21-24.

asserting that there is not a competitive alternative for Embarq's DL function.[25] First, the requirements of Section 222(e) apply regardless of what other carriers are, or are not, doing. Second, Embarq is simply not in a position to know what every competitor in every state in the nation is doing for DLSM, and need not point to a competitor to make its case. Comcast maintains that Embarq is imposing this DLSM charge because CLECs have no choice but to pay it.[26] To the contrary, Comcast holds the keys to this self-imposed prison and can readily set itself free.

*15* Embarq fully expects that carriers will increasingly look to establish direct relationships with Donnelley to avoid ILEC charges for DL services that can be self-provisioned, and the record reflects that there are no impediments to CLECs doing so. Comcast was unable to identify any real, non-speculative grounds for it not to deal directly with Donnelly. The record reflects that Donnelley is unaffiliated with Embarq.[27] The record reflects that Comcast can deal directly with Donnelley.[28] The record reflects that Comcast undertook only a superficial examination of what it would take to establish a direct relationship with Donnelley.[29] Comcast's Opening Brief itself states that it "could probably" establish a direct interface with Donnelley.[30] ILEC

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[25] Comcast Opening Brief, at p. 14.

[26] Direct Testimony of Timothy J. Gates ("Gates Direct"), at p. 32.

[27] Lubeck Direct, at 9:5-13.

[28] Lubeck Direct, at 16:1-5

[29] *See supra*, footnote 7.

[30] Comcast Opening Brief, at p. 13.

divestiture of directory publishing businesses has created a "market" for DL services, and Donnelley is the competitive alternative to Embarq's DL function that Comcast seeks because Donnelley publishes "the" phonebook that Comcast has acknowledged is of paramount importance to CLEC subscribers.[31]

Similarly, a ready pool of third party suppliers need not be available to Comcast before this Commission can find that there is no requirement under Section 251(b)(3) for Embarq to provide this DL service at cost-based prices. There are some functions that LECs should be expected to perform for themselves even if there is currently no obvious market of alternative suppliers. For example, CLECs are required to go to Neustar to obtain numbers; CLECs cannot continue to require ILECs to obtain numbers for them now that Neustar is the numbering administrator (though, theoretically ILECs could get the numbers from Neustar on behalf of CLECs). CLECs are required to deal with Telcordia, the LERG administrator, and with ALI database administrators. Moreover, Comcast has acknowledged in testimony how critical it is for CLEC subscribers to be included in "the" phonebook for their area.[32] Donnelley is the only publisher of that one phonebook, so presumably is the only market Comcast needs to access. And under Section 222(e), CLECs are required to deal directly with "any person" who requests SLI for directory publication purposes. There is no reason that

[31]Gates Direct, at 13:5.

[32] *Id*.

CLECs cannot be required to deal directly with a directory publisher, particularly one the size of Comcast. And if the CLEC chooses to have another LEC provide that service to it then the charge for that service ought to reflect its discretionary nature.

### D. Assessing DLSM Charges on Facilities-Based Carriers Only Is Not Discriminatory

*16* Comcast argues that Embarq's MRC violates Section 251(b)(3) because Embarq does not assess the charge on its own customers and because Embarq has not proven that Comcast is "not similarly situated to those LECs that would be exempt from the DLSM charge."[33] Comcast goes on to assert, erroneously, that because "the cost of serving Comcast and other LECs is the same, Embarq has conceded the point as a legal matter."[34] Comcast is in error because it ignores Section 222(e). As Embarq explained in its Opening Brief, if Section 251(b)(3)'s nondiscriminatory access standard:

> …were construed to require any LEC that already submits *its own* listings to a third party publisher (even if submitted for the purpose of printing a directory for its own customers) to also submit the listings of its competitors to the third party publisher, every LEC that satisfies its Section 222(e) obligation to provide listing information to a third party publisher would necessarily be required to be a clearinghouse."[35]

[33] Comcast Opening Brief, at p. 17.

[34] Comcast Opening Brief, at p. 18.

[35] Embarq Initial Brief, at ¶ 8.

Section 251(b)(3) should not be reconciled with Section 222(e) in such a way that mere compliance with Section 251(b)(3) creates the very clearinghouse obligation that Congress did not impose under Section 222(e).[36]

*17* As Embarq further discusses in its Opening Brief, application of the MRC to facilities-based only competitors is reasonable and not discriminatory because of the different pricing principles for those services under the Act.[37] The very passage cited by Comcast allows price differences based on the requirements of the Act.[38] It would be impossible to treat the 3 types of CLECs exactly the same way from a pricing perspective, some carrier is always going to be treated differently. Comcast's argument is further undermined by the fact that there is no clear pricing standard for this clearinghouse function, which is a discretionary service provided by the ILEC.[39] Even though Embarq does not have to provide a clearinghouse function to any CLEC, a directory listing is included in the services provided as part of UNE-L and resale. The

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[36] As Embarq notes in its Opening Brief, if the FCC believed that Section 251(b)(3) would have imposed the very clearinghouse obligation Section 222(e) does not, the *SLI/DA Order* would have said that. Embarq Initial Brief, at ¶ 9.

[37] Embarq Initial Brief, at ¶¶ 41-45.

[38] Embarq Initial Brief, at ¶¶ 44-45 & footnote 53 (explaining that the FCC's First Local Competition Order finds "price differences based …on … other factors not reflecting costs, ***the requirements of the Act***, or applicable rules, would be discriminatory…." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 861 (1996) *(emphasis added)*. The Act requires any UNE-L service or functionality to comport with TELRIC pricing principles. The Act requires resale to be provided at an avoided cost discount off of the ILEC's tariffed rates. So even though Embarq does not have to provide a clearinghouse function to any CLEC, it is not discriminatory for Embarq to impose different charges on similarly situated CLECs that are purchasing different products or services that are subject to different pricing standards under the Act.

[39] Embarq Initial Brief, at ¶¶ 27-30.

fact that the DLSM charge is not an explicit line item for reseller and UNE-L customers is of no consequence. As Mr. Lubeck explained,

> With these industry changes [i.e., the development of facilities-based competition] it has become apparent to Embarq that the interconnection agreements do not provide compensation for some services provided by Embarq, such as DLSM service, in situations where the facilities-based CLECs merely interconnect without purchasing UNEs or resale services. Consequently, Embarq has developed its stand-alone price for Directory Listings to obtain compensation for a service that Embarq is increasingly being asked to provide on a stand-alone basis.[40]

*18* Comcast wrongly asserts that the MRC is unjust and unreasonable, contrary to federal and Washington law.[41] Moreover, the *Panamsat* case cited by Comcast fails to support its proposition, which is that Embarq has failed its burden because it has not specified the amount of the DL "charge" included in UNE-L and resale rates. The *PananSat* decision involves a discrimination claim under Section 202, not Section 251(b)(3), and the decision found that the *complainant* had failed to meet it burden to

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[40] *See,* Rebuttal Testimony of Alan Lubeck, at 7:12-18 ("Lubeck Rebuttal"). The same rationale why the MRC passes muster under Section 251(b)(3) holds with respect to RCW 80.36.180, which provides:

> No telecommunications company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, unduly or unreasonably charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to communication by telecommunications or in connection therewith, except as authorized in this title… than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by telecommunications under the same or substantially the same circumstances and conditions.

[41] Comcast Opening Brief, at p. 21.

establish a *prima facie* case of discrimination.[42] Comcast, however, has not shown that the MRC at issue is an interstate service subject to Sections 201 and 202 of the Act.

Comcast argues that in order for a rate to be just and reasonable, the rate must be based on cost. While Embarq concedes that this is true in many cases, it is not true in every case, and it is certainly not true in this case.[43] Embarq has demonstrated that the DL clearinghouse service it provides is not governed by the rate scheme under Section 222(e) of the Act;[44] and (2) is not an interstate service subject to Section 201 of the Act. To the extent that the rate must be just and reasonable, the FCC precedent that Comcast has cited (claiming that "just and reasonable" requires cost-based rates) deals with monopoly services that are fully regulated under Section 201 of the Act, primarily switched access services. But even interstate services subject to Section 201 are not limited to cost-based rates, as even the *Competitive Telecom. Ass'n* decision cited by Comcast makes clear.[45] And the FCC has found it appropriate to allow for non-cost

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[42] *PanAmSat Corp. v. Comsat Corp*, 12 FCC Rcd 6952, ¶ 35 (1997).

[43] Indeed, even in the case Comcast cites for this proposition, there is not an absolute requirement that just and reasonable rates always be based on costs: "just and reasonable rates required by Sections 201 and 202 of the Communications Act must ***ordinarily*** be cost-based…." Comcast Opening Brief, at p.19 (citing *Access Charge Reform*, 12 FCC Rcd 16606, 16619-20 (1997)).

[44] Embarq Initial Brief, at ¶ 39 (describing why the $0.04 and $0.06 rates under the *SLI/DA Order* are inapplicable to the DLSM services performed by Embarq for Comcast).

[45] As stated in *Competitive Telecom Ass'n,* at p. 529, the FCC is not required to establish purely cost-based rates. *National Ass'n of Regulatory Util. Comm'rs v. FCC* 737 F.2d 1095, 1137 (D.C. Cir. 1984).

based pricing for various services, such as special access (subject to a price cap, rather than cost-based, scheme).[46]

*19* Embarq explained in its Opening Brief that the FCC does not require that Embarq's DLSM services be provided at cost, TELRIC, embedded or otherwise.[47] Even RCW 80.36.08 and 80.36.140, cited by Comcast,[48] do not establish cost-based pricing standards. Rather, they state that rates must be just and reasonable. As Mr. Lubeck explained, the existence of alternatives is the prerequisite for allowing the market, rather than regulation, to set prices.[49] Here, Comcast has an alternative because it can deal directly with Donnelley, and market, or non-cost based prices, are appropriate. Also, the DLSM charge is based on a tariffed rate for the foreign listing service, and that tariff was permitted to go into effect by the Commission. Therefore, the foreign listing charge is presumably just and reasonable.[50] As explained in Embarq's Opening Brief, the foreign listing charge applies to a wide variety of scenarios and in-market intermodal competitors, not only to out-of-market subscribers seeking listings in a particular directory as Comcast narrowly describes.[51]

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[46] *See, In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6787 (1990).

[47] Embarq Initial Brief, at ¶¶ 27-30.

[48] Comcast Opening Brief, at p. 17.

[49] Lubeck Direct, at p. 17:15-21 and 20-23.

[50] Embarq has not claimed that the DLSM charge is based on cost, and has consistently emphasized that Embarq is seeking a non-cost based rate for the service.

[51] Embarq Initial Brief, at ¶ 46: "Embarq applies the same charge to Comcast that Embarq charges: (i) to its own end users, (ii) to other LEC end users, (iii) to wireless end users, and (iv) to VoIP end users, that

*20* Although Comcast cites an Illinois decision that purports to challenge Embarq's reliance on the foreign listing rate for this service,[52] the Indiana Utilities Regulatory Commission ruled in Embarq's favor on this issue in allowing a $3.00 MRC which was based on the foreign listing rate. The Indiana Commission found it "significant that the FCC determined not to subject the directory listing obligation to a TELRIC pricing standard."[53] The Commission also found:

> Because the rate need not be cost-based, we conclude that it should be set based on market principles. Verizon is not prohibited from contracting directly with the publisher, and therefore, Embarq is not a monopoly bottleneck with respect to this service. If Verizon deems the rate Embarq seeks to charge too high, Verizon can bypass Embarq. We find it immaterial that Verizon's cost of doing so may be greater than the rate Embarq wishes to charge. Finally, we find Verizon's argument that inclusion of Verizon listings inures a significant material benefit to Embarq in its relationship with the directory publisher fundamentally flies in the face of the concept of marginal utility.
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> Accordingly, we agree with Embarq that a market-based price is appropriate and equitable to both Parties, and accept Embarq's monthly directory listing charge. Embarq's proposed language on this issue is adopted for insertion into the parties' interconnection agreement.[54]

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request a listing in a directory where the end user customer is not purchasing basic residential or business service through resale or UNE loop services."

[52] Comcast Opening Brief, at p. 24 (citing Arbitration Decision, Sprint Communications, L.P. d/b/a Sprint Communications Co. L.P., Dkt No. 05-0402, 2005 WL 3710228 (Ill. Commerce Commission, Nov. 8, 2005)). Embarq notes that the decision does not reflect whether the Illinois Commission considered the arguments Embarq raises in this case in criticizing basing the MRC on the foreign listing rate.

[53] *See, Petition of MCIMetro Verizon Access Transmission Services LLC d/b/a/ Verizon Access Transmission Services for Arbitration of an Interconnection Agreement with United Telephone Company of Indiana, Inc. d/b/a Embarq Under Section 252(b) of the Telecommunications Act of 1996*, IURC Case No. 43373 INT 01 (Mar. 12, 2008), at p. 19 ("*IURC MRC Decision*").

[54] *Id.*

The rationale of the Indiana Commission to allow a non-cost based rate is also reflected Mr. Lubeck's testimony where he describes how price should reflect the value that the buyer places on the service:

> In this case, the service being offered is access to Directory Listings. This is a service that Comcast can provide for itself—by dealing directly with R.H. Donnelley—or it can purchase the service from an intermediary such as Embarq. Therefore the value that we are discussing is *the value of Embarq's providing the service for Comcast rather than Comcast's doing it themselves.* It is exactly the same as a consumer's decision whether to go out to dinner in a restaurant or cook dinner for herself. The value of the restaurant meal is not just the worth of the steak and the potatoes; it is also the worth of not cooking them. It is also the worth of the expertise and experience of the chef, which may exceed that of the diner. It is also the worth of not having to wash the dishes. Because the consumer can supply dinner to herself, the restaurant is permitted to charge what the market will bear for its meals. And because Comcast can supply itself with access to the Directory Listing service, Embarq should similarly be permitted to charge a non-cost based rate.[55]

### E. The Database Maintenance Costs At Issue Are Not Already Recovered by Embarq

*21* Comcast ineffectively challenges the various functions Embarq performs in conjunction with the DLSM charge, viewing them in isolation. Comcast first challenges Embarq's "storage" functions, suggesting rather incredulously that Embarq's costs are only a fraction of a cent.[56] Even if costs were relevant to this case, which they are not, Mr. Gates testified at hearing that there are real functions and substantial costs

[55] Lubeck Direct, at pp. 25-26.

[56] Comcast Opening Brief, at p. 25.

associated with the DL services Embarq provides.[57] Moreover, Embarq described in great detail the variety of functions it performs as part of the MRC, of which storage is only a component.[58]

*22* Comcast is wrong to view storage in isolation and to tie its erroneous low-ball estimate of those costs to the MRC when Embarq has consistently asserted throughout this case that cost is not relevant and when there is no requirement that this function be provided at cost-based rates. The same holds true for the special directory distribution requests, which Comcast challenges on similar grounds.[59]

*23* Comcast also asserts that database maintenance services described in Section 71.3.5 of the prospective agreement with respect to the Service Order Entry ("SOE") System are the same functions for which Embarq seeks to impose the DLSM MRC.[60] This is not the case. There are two distinct database systems, the SOE System and the Subscriber Universal Directory System ("SUDS"). Database maintenance activities in Section 71.3.5 relate to the SOE System and are covered by the NRC. Maintenance of the SUDS database is one of the functions covered by the MRC.[61] Thus, the databases and functions are distinct.

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[57] Embarq Initial Brief at ¶¶ 31-32.

[58] Lubeck Direct, at pp. 5-6.

[59] Comcast Opening Brief, at p. 26-27.

[60] Comcast Opening Brief, at p. 25-26.

[61] As Mr. Lubeck explained, SUDS "serves as Embarq's interactive Directory Listing database…". Lubeck Direct, at 5:9-11.

*24* Comcast alleges that the $0.04 and $0.06 rates should compensate Embarq for the DLSM activities it is performing.[62] As Embarq explained in its Opening Brief, the *SLI/DA Order* addresses compensation only when a LEC provides its ***own*** listings to directory publishers, since that is all that LECs are required to provide under Section 222(e). The *SLI/DA Order* did not address or limit compensation when Embarq is providing a clearinghouse function to other carriers that it is not required to provide under Section 222(e). Thus, the $0.04 and $0.06 per listing rates established in the *SLI/DA Order* are inapplicable.[63] Embarq has discussed here and in its Opening Brief why it is appropriate to assess Comcast a non-cost based rate for performing this function.

*25* Comcast then argues that directory proofing should not be part of the MRC, alleging an inconsistency in the interconnection agreement language.[64] As explained in Embarq's Opening Brief, Section 71.3 of the Prospective Agreement addresses proofreading for portions of the directory not provided by Embarq, including the yellow pages advertising and yellow pages listings.[65] Comcast then points out that Section 71.3.1 states that "Section 71.3 pertains to listings requirements published in the traditional white pages." Embarq acknowledges that this is what Section 71.3.1 says,

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[62] Comcast Opening Brief, at p. 25.

[63] Embarq Initial Brief, at ¶ 39.

[64] Comcast Opening Brief, at pp. 28-29.

[65] Transcript, at 111:22 – 112:21.

but explains that this provision is inaccurate. One need only look to Section 71.3 itself to see that Section 71.3.1 is wrong, because Section 71.3 clearly discusses the performance of functions for yellow pages and information pages, which are obviously not traditional white pages.[66] Other subsections under Section 71.3 also bear this out.[67] It is unfortunate that neither Embarq nor Comcast caught the inconsistency in Section 71.3.1 before this time.

*26* In further support of Embarq's position that it, in fact, is responsible for and does conduct the proofing activities associated with the white pages to ensure their accuracy, Comcast's confidential cross exhibit makes clear that Donnelley relies on Embarq to ensure the accuracy of the white pages:

[**BEGIN CONFIDENTIAL**]

[68] [**END CONFIDENTIAL**]

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[66] Cross Exhibit ALL-9, at p. 5: "CLEC acknowledges that many directory functions including but not limited to ***yellow page listings***, enhanced white page listings, ***information pages*** …"

[67] Cross Exhibit 9, pp. 6, 7 (Section 71.3.6 discusses directory advertising, which is clearly a yellow pages function, and Section 71.3.9 addresses information pages).

[68] [**BEGIN CONFIDENTIAL**]

Embarq performs these functions approximately every twelve (12) months. As Embarq explained in its Initial Brief, it is appropriate for Embarq to impose a recurring charge for these functions.[69] Comcast improperly suggests that Embarq's acknowledgements that the databases may contain errors in some way means that Embarq is not, in fact, performing this proofreading function. This is not true. The acknowledgements are merely to help limit liability for errors and omissions by recognizing that, despite Embarq's best efforts, mistakes may occur. However, these acknowledgements in no way affect or diminish Embarq's performance of proofing functions for white pages listings.

## III. COMCAST'S OPENING BRIEFS ONLY PAINTS HALF THE PICTURE IN ITS ANALYSIS OF THIS COMMISSION'S PRECEDENT AND POLICY; ITS ANALYSIS IS WRONG AND SHOULD BE REJECTED

*27* Comcast relies heavily on the Commission's 1995 decision in *WUTC v. U S WEST Comms., Inc*.[70] Embarq refutes Comcast's contentions about the *1995 Order*, explaining that both the law and the facts involved are substantially changed since the Commission entered that order:

> First, because R.H. Donnelley is an independent third party, Embarq no longer controls access to the publisher, Comcast can choose to submit listings directly to R.H. Donnelley, and the listings will be included in

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**[END CONFIDENTIAL]**

[69] Embarq Initial Brief, at ¶ 38.

[70] *WUTC v. U S WEST Comms., Inc*., Docket Nos. UT-941464, *et al*., Fourth Supp. Order (Oct. 31, 1995)("*1995 Order*").

> the Embarq-branded directory. Second, the Commission chose not to require US West to distribute directories to either the CLECs or the CLECs' end users. Embarq has agreed to provide and pay for distribution services, through R.H. Donnelley, to all residences and businesses within the geographic area covered by the directory. Third, the Commission stated that the Qwest profited from yellow pages advertising and, therefore, maintained an incentive to ensure complete listings and broad distribution. That is no longer case with Embarq, because Embarq no longer owns or controls the directory.[71]

Comcast's reliance is on this Commission's 2002 order in the Qwest UNE proceeding[72] is even more broken down than its reliance on the *1995 Order*. First, the Commission in the *2002 UNE Order* affirms the Commission's initial with respect to directory *assistance* listings. Had Comcast bothered to review that order and discuss, it may have noticed that critical distinguishing fact.[73] It also should have noted that the Commission in ruling against Qwest's DAL proposal determined that the FCC, "makes a distinction between DAL and other call-related databases."[74] While there is no reference specifically to directory publishing as an excepted service, the language appears to clearly exclude it. Second, the Commission in these 2002 WUTC orders is dealing with a completely different set of facts. The 2002 WUTC orders pertained to directory *assistance* services, like 411, where a customer calls and requests a number by

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[71] Embarq Initial Brief, at ¶¶ 49.

[72] Comcast Opening Brief, at p. 31, *citing In re Unbundled Network Elements, Transport, and Termination*, 44th Suppl. Order, Docket No. UT-003013, ¶¶ 122, 212 (Dec. 20, 2002) ("*2002 UNE Order*").

[73] *In re Unbundled Network Elements, Transport, and Termination*, 41st Suppl. Order, Part D Initial Order, Docket No. UT-003013, ¶¶ 221-239 (Oct. 11, 2002) ("*UNE Initial Order*"), *citing Local Competition Order, at* ¶ *484*.

[74] *Id*., at ¶¶ 238.

telephone. The systems involved with providing this service are and the service itself are completely different from the DLSM services at issue in this case. The FCC has accorded the two different treatment and the 2002 WUTC orders that Comcast cites clearly address DAL, not DLSM. As a result, the 2002 WUTC orders are inapplicable to the instant case and the *SLI/DA Order* and Embarq's interpretation of the Act apply to directory publishing as set forth in this and Embarq's Initial Brief.

*28* Comcast's arguments regarding WAC 480-120-042 are also strained.[75] As noted in Embarq's Initial Brief, in anything, the rule changes appear to suggest confluence with the FCC's *SLI/DA Order*, rules, and the Act in placing the same obligations on all LECs. Furthermore, Comcast misapprehends the Commission's intent by quoting it out of context. In addition to the fact that there was no discussion of the relevant federal law governing what LECs are and are not required to do with directory listing information, the Commission stated intent was not to address the issue raised in this case, but to address companies' concerns that, "that this rule as proposed addresses cellular telephone numbers but not the larger category of services that can be offered by a commercial mobile radio service company."[76] At best for Comcast, the rule was not

[75] Comcast Opening Brief, at p. 31, n.114.

[76] *In re Amending, Adopting and Repealing Chapter 480-120 WAC Relating to Telephone Companies*, Order Amending, Adopting and Repealing Rules Permanently, Docket No. UT-990146, Gen. Order No. R-507, ¶ 114 (Dec. 16, 2002).

intended to address the issues in this case. At worst, it recognizes and adopts the federal regulatory scheme advocated by Embarq in this case.

*29* Last, the Commission's approval of a non-arbitrated agreement is not tantamount to a legal finding that the terms in the agreement are consistent with the law.[77] And in any event, under Embarq's view of the case, the provisions that Comcast cites would go above and beyond what is required by the law. Certainly the Commission would not force a party to agree to more restrictive terms if the party, for whatever reason, felt it made business sense to do so, in particular an ILEC party. In the case of Comcast's cited examples, Verizon and Qwest either were not aware of or simply did not choose to assert the lawful position that Embarq asserts in this arbitration.

## IV. CONCLUSION

*30* Embarq returns to the two simple questions it posed in its Opening Brief: (1) whether Embarq is permitted to charge Comcast for DLSM; and (2) whether Embarq may charge Comcast a non-cost based rate for DSLM. The answer to these questions remains a resounding yes. Section 222(e) makes clear that Embarq is not legally obligated to provide the DLSM service Comcast is requesting, and because Comcast has the same ability to self-provision this service directly from Donnelley as Embarq does, that Embarq's MRC does not run afoul of Section 251(b)(3)'s "nondiscriminatory access"

[77] Comcast Opening Brief, at p. 32.

obligation. As a result, Embarq may assess the MRC on Comcast and similarly situated carriers. This outcome is supported by Section 222(e), by Comcast's ability to access Donnelley directly, by the FCC's nondiscriminatory access rule, and by the structure of Section 251 itself.

*31* In addition, Embarq's proposed non-cost based MRC of $.50 is reasonable and appropriate for several reasons. First, there is no requirement that the MRC be cost-based. Second, because Comcast is free to contract with Donnelley directly, Embarq is not a monopoly bottleneck to this service. Comcast itself has a legal obligation to provide this same information to directory publishers under Section 222(e), and Comcast has much, if not all, of this information already compiled in other databases it currently maintains. Third, the MRC is a based on an appropriate analogous charge, Embarq's tariffed foreign listing rate. Finally, Embarq is consistently seeking an MRC from all similarly-situated competitors.

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Embarq therefore requests that the Commission grant it the relief it has requested and approve Embarq's proposed language that would require Comcast to pay a $.50 monthly recurring charge for the valuable DLSM service.

Respectfully submitted this 26th day of September 2008.

By: _____

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