

EXHIBIT 1

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held December 18, 2008

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Robert F. Powelson, Abstaining
Kim Pizzingrilli
Wayne E. Gardner

Petition of Comcast Business Communications,
LLC d/b/a Comcast Long Distance for Arbitration
of an Interconnection Agreement with The United
Telephone Company of Pennsylvania, Inc. d/b/a
Embarq Pennsylvania, Pursuant to 47 U.S.C. §252(b)

Docket No. A-310190

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration are the Exceptions of The United Telephone Company of Pennsylvania, Inc. d/b/a Embarq (Embarq), which were filed on October 2, 2008, to the Recommended Decision of Administrative Law Judge (ALJ) David A. Salapa, which was issued on September 17, 2008. Reply Exceptions were filed by Comcast Business Communications (Comcast) on October 14, 2008.

History of the Proceeding

Comcast is certified by this Commission at Docket No. A-310190 as a facilities-based local exchange carrier (LEC) providing local exchange, interexchange and other telecommunications services in Embarq's incumbent local exchange carrier (ILEC) service territory in Pennsylvania. Petition at 3. On April 4, 2008, Comcast filed a Petition for Arbitration, pursuant to Section 252(b) of the federal Communications Act of 1934, as amended (the Act), 47 U.S.C. §252(b), requesting that the Commission arbitrate the terms and conditions for interconnection with Embarq. The Petition alleged that, pursuant to 47 U.S.C. §252(b), Comcast made a request for negotiations that Embarq received on November 1, 2007. According to the Petition, the arbitration was to be concluded on or before August 1, 2008.¹ Petition at 2.

The Petition asserted that Comcast and Embarq have resolved all issues except for one. The sole disputed issue is whether Embarq should collect a proposed \$2.00 monthly charge for maintaining and storing Comcast's directory listings in Embarq's databases. According to Comcast's Petition, Comcast has already agreed to pay a significant nonrecurring charge of \$9.63 to Embarq to process Comcast's directory listing service orders. Comcast disputes Embarq's right to charge an additional \$2.00 per month charge for a directory listing data base storage and maintenance fee for each subscriber listing it provides to Embarq. Petition at 4-5.

Comcast contended that the \$2.00 monthly charge is impermissible on two grounds. First, Comcast alleged that the charge is discriminatory since Embarq does not charge either its own retail customers or its wholesale customers that purchase UNE loops

¹ As will be noted later, the Parties agreed to extend the nine-month deadline, established under Section 252(b) of the Act for the Commission to make a final ruling in this proceeding, so that the arbitration will conclude no later than December 18, 2008.

or resold services a separate charge to maintain and store their listings. Second, Comcast alleged that Embarq failed to provide any cost justification for the monthly charge. The Petition concluded that the Commission should reject the proposed monthly charge because it is discriminatory and not cost-justified. Petition at 4-5.

On April 29, 2008, Embarq filed a Response to Comcast's Petition that agreed that the sole disputed issue between Comcast and Embarq is Embarq's proposed \$2.00 monthly charge for maintaining and storing Comcast's directory listings in Embarq's databases. In its Answer, Embarq asserted that it is entitled to impose a monthly charge on Comcast to maintain and store Comcast's directory listings as well as transmit Comcast's directory listings to a directory publisher because Comcast is not similarly situated to other carriers. Embarq contended that it may impose a monthly charge on Comcast even though it does not impose a monthly charge on other carriers. R.D. at 2-3.

Embarq's Response also asserted that the proposed monthly charge need not be cost-based. Embarq's response stated that since the Parties are litigating the same issue in several states, it may be necessary to extend the nine-month deadline established by Section 252(b). R.D. at 3.

At a pre-arbitration conference on May 1, 2008, the Parties agreed to extend the nine-month deadline established by Section 252(b) so that the Arbitration would conclude by November 13, 2008 with a Commission decision. The ALJ conducted the evidentiary hearing on this case on July 22, 2008. R.D. at 3.

On August 15, 2008, Comcast filed a petition to reopen the record in this proceeding for the purposes of admitting as a late-filed exhibit a copy of the directory services license agreement between Embarq and R.H. Donnelley, a directory publisher.

On August 25, 2008, the ALJ issued an order granting Comcast's petition to reopen the record. R.D. at 4.

The Parties filed Main Briefs on August 15, 2008, and Reply Briefs on September 2, 2008. As noted, the Parties also agreed to waive the nine-month deadline for rendering an arbitration decision set forth in Section 252 and their right to petition the Federal Communications Commission (FCC) under Section 252(e)(5) of the Act, 47 U.S.C. §252(e)(5), for failure of the Commission to act on the arbitration within the statutory deadline by extending that deadline until December 18, 2008. On August 26, 2008, the ALJ issued an order granting the Parties' request. R.D. at 5.

On September 17, 2008, the Commission issued the ALJ's Recommended Decision, wherein the ALJ concluded that Embarq's proposal to charge Comcast a recurring monthly charge of \$2.00 is discriminatory and contrary to the requirements of Section 251(b)(3) of the Act, 47 U.S.C. § 251(b)(3). As a result, the ALJ did not address the reasonableness of Embarq's \$2.00 monthly recurring charge or any arguments regarding any compensation that Embarq may already be receiving for maintaining and storing Comcast's customers' directory listing information through the nonrecurring \$9.63 nonrecurring charge from Comcast or the \$.04 and \$.06 per listing charges paid by directory publishers. R.D. at 16. As noted, Embarq filed Exceptions to the Recommended Decision on October 2, 2008, and Comcast filed Reply Exceptions on October 14, 2008.

Discussion

This Petition was filed pursuant to Section 252(b) of the Act. That section states, in pertinent part:

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

- (i) the unresolved issues;
- (ii) the position of each of the parties with respect to those issues; and
- (iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

* * *

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith. (emphasis supplied)

Based on the foregoing, Section 252(c) of the Act, 47 U.S.C. § 252(c), provides that the state commission's resolution and conditions must meet the requirements of Section 251 of the Act, including the Regulations prescribed by the FCC pursuant to Section 251. Also, any interconnection agreement, whether adopted by negotiation or arbitration, must be submitted to the state commission for approval. 47 U.S.C. § 252(e). Finally, the Act authorizes the FCC to act in those instances where the state commission fails to act. 47 U.S.C. § 252(e)(5).

The unresolved issue in this arbitration proceeding is as follows:

Where Comcast is not purchasing UNE loops or resold services from Embarq, should Embarq be permitted to charge Comcast a monthly charge for “maintenance and storage” of Comcast’s customers’ basic directory listing information?

The ALJ noted in the Recommended Decision that this is an issue of first impression in Pennsylvania. Embarq’s Exceptions relate to the ALJ’s interpretation of two sections of the Act relating to directory listings: Sections 222(e) and 251(b)(3), 47 U.S.C. §§ 222(e) and 251(b)(3). Sections 222(e) and 251(b)(3) are stated as follows:

Sec. 222. Privacy of customer information

* * *

(e) Subscriber list information

Notwithstanding subsections (b), (c), and (d) of this section, a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

* * *

Sec. 251. Interconnection

* * *

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

* * *

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

Exceptions

As discussed by ALJ Salapa, the unresolved issue in this case involves the application of the FCC's decision captioned *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network information and Other Customer Information; Implementation of the Local Competition provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, Third Report and Order in CC Docket No. 96-115; Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-273, Released September 9, 1999 (*SLI/DA Order*). A copy of a portion of the *SLI/DA Order* is included in the record in this proceeding as Comcast Cross Ex. 8. Tr. at 96-110, 123. The *SLI/DA Order* addressed certain issues regarding directory listings. R.D. at 6.

Under the Act, Congress sought to provide a competitive framework in the telecommunications industry that would accelerate deployment of advanced telecommunications and information technologies throughout the United States. The *SLI/DA Order* addresses two components of that competitive framework. R.D. at 6.

First, the *SLI/DA Order* addresses 47 U.S.C. §222(e), which requires telecommunications carriers that provide telephone exchange service to provide

subscriber list information to requesting directory publishers under reasonable rates, terms and conditions. Second, the *SLI/DA Order* addresses 47 U.S.C. §251(b)(3), which requires local exchange carriers to permit competing providers of telephone exchange service non discriminatory access to directory listing. According to the FCC, these two sections address third party rights to obtain telephone exchange service subscribers' names, addresses and telephone numbers from local exchange carriers. *SLI/DA Order* ¶1; R.D. at 6-7.

In its first Exception, Embarq objects to the ALJ's finding that Embarq is not authorized to implement a monthly recurring charge under the Act. Embarq argues that the Recommended Decision failed to consider the requirements of Section 222(e) and to reconcile them with Section 251(b)(3). Embarq maintains that Section 222(e) does not require Embarq to be a clearinghouse for competitive local exchange carriers' (CLEC) subscriber listing information (SLI) and Section 251(b)(3) does not alter that conclusion. Embarq cites various FCC rules in support of its arguments.

Embarq submits that the structure of 251(b)(3) supports its interpretation of its obligations under these sections. Embarq objects to the ALJ's finding that it should have submitted cost information to prove nondiscrimination under Section 251(b)(3). Embarq contends that Recommended Decision led to an improper outcome in this matter because it did not adequately consider changes in the directory listing marketplace that have occurred. Embarq is also of the opinion that the case law cited by the ALJ is unpersuasive and not controlling.

In its Reply Exceptions, Comcast asserts that there is no conflict between Sections 222(e) and 251(b)(3). Comcast contends that these two sections are complementary. Comcast notes that Embarq has voluntarily agreed to sell other CLECs' listing information to directory publishers without imposing the \$2.00 monthly fee and

that Embarq charges only purely facilities-based carriers like Comcast the recurring \$2.00 fee. Comcast argues that, while Section 222(e) may limit *directory publishers'* rights to demand that a LEC provide it with all listings in its service territory, that limitation does not limit Embarq's obligation to provide Comcast with nondiscriminatory access under Section 251(b)(3). R.Exc. at 7-8. In Comcast's view, Section 222(e) might entitle Embarq to refrain from transmitting other LECs' information to directory publishers. However, once Embarq does provide this service to one class of CLECs, Section 251(b)(3) requires that Embarq do the same for all in a nondiscriminatory manner. R.Exc. at 8.

Comcast also argues that Embarq's proposal to ignore Section 251(b)(3) in favor of Section 222(e) would run counter to the rules of statutory interpretation and would also conflict with the standards for arbitration in Section 252(c)(1) of the Act, which requires the Commission to ensure that all disputed terms of an interconnection agreement are resolved in a way that meets the requirements of Section 251. R.Exc. at 9.

Comcast asserts that the ALJ correctly found that Embarq failed to justify its discriminatory treatment of Comcast. With regard to Embarq's failure to provide cost information, Comcast states that the FCC has placed strict limits on the legitimate grounds that can justify discriminatory treatment under Section 251. As support, Comcast quotes the FCC's explanation of the discrimination standard established by Section 251:

We find that it would be unlawfully discriminatory, in violation of Sections 251 and 252, if an incumbent LEC were to charge one class of interconnecting carriers, unless the

different rates could be justified by differences in the costs incurred by the incumbent LEC.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd. 15499, Par. 217 (1996); *See also SLI/DA Order*, Par. 129 (1999).

With regard to Embarq's objections to the case law relied upon by the ALJ, we are of the opinion that the cited cases do provide some guidance for us to reach a decision in the instant case. In addition, we also believe that the ALJ provided sufficient rationale to support a finding of discrimination based on his analysis of the facts of this case, the Act and the *SLI/DA Order*. R.D. at 13-15. We agree with the ALJ that the Act and the pertinent federal regulations state that access to all competitors must be on an equal basis and that Embarq's \$2.00 recurring charge does not provide access to all competitors on an equal basis.

Based upon our review of the Recommended Decision and the record of this proceeding, we find that there is no merit to Embarq's Exception that the ALJ erred in finding that Embarq should not be authorized to assess a \$2.00 monthly recurring charge to Comcast for directory listing storage and maintenance. Accordingly, Embarq's first Exception is denied.

In its second Exception, Embarq argues that the ALJ was incorrect to require the same directory listing storage and maintenance charge for all competitors and that this finding sets bad policy. Embarq excepts to the Recommended Decision's suggestion that the nondiscriminatory access requirement would not let an ILEC include directory listing service costs in a total element long run incremental cost (TELRIC) rate because that would not be treating a facilities-based CLEC the same as a CLEC that purchases UNE loops or other services from the ILEC. Embarq contends that there are

differences between carriers and the pricing of the different services that they buy from Embarq not only justify, but require, different treatment, notwithstanding the “nondiscriminatory access” requirement that permeates Section 251. Exc. at 12-13.

In response, Comcast asserts that Embarq has not presented any evidence to prove its claim that there are differences between carriers and the pricing of the different services that CLECs buy from Embarq. Comcast also replies that the Section 251(b) obligations guarantee, among other things, that all end users can continue to call one another, that end users will be able to retain their telephone numbers if they switch service providers, and that new entrant providers will not be required to make wasteful expenditures acquiring duplicative rights-of-way. Comcast argues that the nondiscriminatory access to the directory obligation of Section 251(b)(3) assures that, in the market for telecommunications opened by the Act, end users will continue to receive complete telephone directories containing all local listings, and that carriers will not be able to use directories as weapons against their competitors. R. Exc. at 20.

We find Comcast’s response to be persuasive. The overarching policy consideration here must consider the effect on the public interest. Differing treatment of the CLECs in the local market might well have a negative effect on the public’s interest in obtaining complete and accurate directory listings for the local area. Embarq has not provided any cost information that might justify a different directory listing rate for facilities-based CLECs as opposed to UNE-L or resale CLECs. As a result, we cannot conclude that Embarq’s \$2.00 monthly recurring charge is just and reasonable. Accordingly, Embarq’s second Exception is denied.

In its third Exception, Embarq asserts that the Recommended Decision was in error because it failed to approve Embarq’s proposed \$2.00 monthly recurring charge. This Exception summarizes Embarq’s earlier arguments that its non-cost based monthly

recurring charge need not be cost-based. Also, since Comcast is free to contract with the Donnelly, the directory publisher, directly, Embarq claims it is not a monopoly bottleneck to this service. Embarq submits that Comcast itself has an obligation under Section 222(e) to provide this same information to directory publishers. Embarq states that its \$2.00 monthly charge is based on an appropriate analogous foreign listing rate and that Embarq is not already recovering this charge from other sources. Finally, Embarq asserts that it is consistently seeking the \$2.00 monthly charge from all similarly-situated competitors. Exc. at 15-16.

We have already considered the arguments in this Exception and have found them to be without merit. With regard to directory listings, it appears to us that Comcast's provision of telecommunications services in Embarq's service territory causes it to have more in common with UNE-L and resale CLECs than those entities who must pay a foreign listing rate. Comcast's customers, like UNE-L and resale customers are located within the local calling areas of Embarq's service territories that are served by Embarq's telephone directories. Furthermore, Embarq admits that its monthly recurring charge is market-based rather than cost-based; but, more importantly, Embarq has failed in this proceeding to prove that the charge is just and reasonable. We find that Embarq's argument for similar treatment of similarly-situated CLECs does not meet the non-discrimination standard of Section 251 because the imposition of this nonrecurring charge would result in disparate treatment of Comcast as a facilities-based CLEC operating in Embarq's service territory. As such, Embarq's third and final Exception is denied.

Conclusion

Upon a review of the record, these Exceptions and the Recommended Decision, we find that the arguments contained therein are without merit. Accordingly,

we shall deny Embarq's Exceptions and adopt the ALJ's Recommended Decision;
THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania, are denied, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge David A. Salapa, acting as an Arbitrator, is adopted, consistent with this Opinion and Order.

3. That in regard to the unresolved issue between Comcast Business Communications LLC d/b/a Comcast Long Distance and The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania, the proposal of Comcast Business Communications LLC d/b/a Comcast Long Distance to reject the \$2.00 monthly recurring charge for directory listing storage and maintenance in the proposed interconnection agreement is granted consistent with this Opinion and Order.

4. That within thirty (30) days after the entry of this Opinion and Order, Comcast Business Communications LLC d/b/a Comcast Long Distance and The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania shall file with the Pennsylvania Public Utility Commission for approval an amended interconnection agreement consistent with this Opinion and Order.

5. That upon the filing of the amended interconnection agreement, as specified in Ordering Paragraph No. 3, above, and its approval by the Pennsylvania Public Utility Commission, this proceeding be marked closed.

BY THE COMMISSION

James J. McNulty,
Secretary

(SEAL)

ORDER ADOPTED: December 18, 2008

ORDER ENTERED: December 18, 2008