

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

In the Matter of the Petition for)	DOCKET UT-083025
Arbitration of an Interconnection)	
Agreement Between)	ORDER 04
)	
COMCAST PHONE OF)	
WASHINGTON, LLC,)	ARBITRATOR'S REPORT
)	AND DECISION
with)	
)	
UNITED TELEPHONE COMPANY OF)	
THE NORTHWEST, INC. d/b/a)	
EMBARQ)	
)	
Pursuant to 47 U.S.C. Section 252(b).)	
.....)	

1 **SYNOPSIS.** *In this Order, the Arbitrator concludes that Embarq may not impose its proposed recurring monthly charge on Comcast for provision of Directory Listing Storage and Maintenance (DLSM) services and adopts the contract language proposed by Comcast for inclusion in the parties' interconnection agreement. Under Section 251(b)(3) of the Telecommunications Act of 1996 (Act), any such charge for access to directory listing must be nondiscriminatory. A DLSM charge that exceeds what the Federal Communications Commission has determined to be presumptively reasonable for provision of subscriber list information must be justified with appropriate cost data. Embarq's proposal to charge Comcast fifty cents per month for DLSM services violates Section 251(b)(3) of the Act because Embarq is discriminating against Comcast as a facilities-based competitive local exchange carrier (CLEC) and because Embarq has not cost-justified the proposed recurring charge.*

I. INTRODUCTION

2 **NATURE OF PROCEEDING.** On April 29, 2008, Comcast Phone of Washington, LLC (Comcast) filed with the Washington Utilities and Transportation Commission (Commission) a request for arbitration pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Act). The petition was served on United Telephone Company of the Northwest, Inc. d/b/a Embarq (Embarq).

3 **APPEARANCES.** Gregory J. Kopta, Seattle, Washington, and Michael C. Sloan, Washington, D.C., Davis Wright Tremaine LLP, represent Comcast. William E. Hendricks, III, United Telephone Company of the Northwest, Hood River, Oregon, represents Embarq.

4 **ISSUE PRESENTED.** Comcast and Embarq are negotiating a successor interconnection agreement (ICA) to their currently effective ICA of May 5, 2005. The parties have been able to resolve all disputed issues except one that is presented for resolution in this arbitration. The sole issue 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 parties dispute Embarq’s proposed monthly Directory Listing Storage and Maintenance (DLSM) charge of 50 cents per month per customer listing, a charge that does not exist in the parties’ currently effective ICA. According to the parties, this same issue has been submitted for arbitration to seven (7) other state commissions.¹

5 **PROCEDURAL HISTORY.** The Commission held a prehearing conference in this docket at Olympia, Washington, on May 27, 2008, before Administrative Law Judge (ALJ) Adam E. Torem. The parties agreed upon the issue presented and a procedural

¹ See Exhibit A to Comcast’s Petition for Arbitration (letter of November 20, 2007, setting out agreement on arbitration-related deadlines for eight state jurisdictions). The seven other states are Texas, Indiana, Pennsylvania, Minnesota, Virginia, New Jersey, and South Carolina. The proposed DLSM charges in those states range from 50¢ per month to \$3.00 per month.

schedule that included filing deadlines for witness testimony, an evidentiary hearing, and a deadline for the Arbitrator's Report and Decision. *See* Order 02 (*Prehearing Conference Order*).

6 The Commission held a hearing in this docket at on August 19, 2008, before ALJ Torem. Each party presented a single witness for cross-examination: Timothy Gates testified for Comcast and Alan Lubeck testified for Embarq.

7 The parties filed responsive post-hearing briefs on September 17, 2008, and September 26, 2008. Subsequently, Comcast filed "supplemental authority" supporting its position from arbitrators' rulings in Texas² and Pennsylvania;³ while Embarq filed "supplemental authority" supporting its position from the Indiana Utility Regulatory Commission.⁴

8 The parties agreed to several extensions of the original deadline for the Arbitrator's Report and Decision. As a result, the current deadline is January 15, 2009.

II. MEMORANDUM

9 Embarq currently provides directory listing information to regional telephone book publisher R.H. Donnelley on behalf of Embarq's own customers as well as customers of competing local exchange carriers (CLECs), including Comcast. Embarq provides this service without additional expense to CLECs who purchase unbundled network element (UNE) loops or resale services from Embarq. However, Embarq wishes to

² On August 27, 2008, two arbitrators of the Texas Public Utility Commission issued their *Proposal for Award* in Docket No. 35402, finding in favor of Comcast. Neither Comcast nor Embarq filed exceptions. Therefore, on September 22, 2008, the Texas PUC issued its *Arbitration Award* and adopted the contract language proposed by Comcast, eliminating the recurring DLSSM charge of \$2.00 per month.

³ On September 17, 2008, the Pennsylvania Public Utility Commission issued an arbitrator's *Recommended Decision* in Docket No. A-310190, recommending adoption of the contract language proposed by Comcast. On December 18, 2008, after considering and rejecting Embarq's exceptions to the *Recommended Decision*, the Pennsylvania PUC issued its *Opinion and Order* adopting the contract language proposed by Comcast, eliminating the recurring DLSSM charge of \$2.00 per month.

⁴ On November 6, 2008, the Indiana Utility Regulatory Commission issued its *Final Order* in Cause No. 43462 INT 01 and adopted the contract language proposed by Embarq, retaining the recurring DLSSM charge of \$3.00 per month. Comcast has filed a *Petition for Reconsideration* of the Indiana decision.

impose a recurring monthly Directory Listing Storage and Maintenance (DLSM) charge for this service on facilities-based CLECs who do not purchase UNE loops or resold services from Embarq, including Comcast.

- 10 The Federal Communications Commission (FCC) has ruled that incumbent LECs (ILEC), such as Embarq, are not obligated to act as a clearinghouse for CLECs in providing subscriber list information (SLI) to directory publishers.⁵ However, federal law also prohibits Embarq from discriminating in providing competing providers access to directory listing.⁶ This decision addresses Embarq's duties under these laws and resolves the issue presented by the parties.

A. Directory Listing Charges: Current v. Proposed Interconnection Agreements

- 11 According to FCC regulations, "directory listings" include not only the name and telephone number(s) of a telecommunications carriers' subscriber(s), but also any information that the telecommunications carrier or an affiliate "has published, caused to be published, or accepted for publication in any directory format."⁷
- 12 Embarq maintains a database containing not only its own customers' SLI, but also the SLI of CLECs within its service territory.⁸ In 2003, Embarq sold its telephone directory publishing business to R.H. Donnelley and, concurrently, contracted with this company to provide publishing services for the next 50 years.⁹ In accordance with a 1999 FCC ruling known as the SLI/DA order,¹⁰ when providing its own and

⁵ *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, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd. 15550, ¶ 55 (1999) [hereafter "SLI/DA Order"].

⁶ Federal Telecommunications Act of 1996, 47 U.S.C. § 251(b)(3).

⁷ 47 C.F.R. § 51.5 (definitions). *See also* 47 U.S.C. § 222(h)(3)(B) which relies on this same language to define the term "subscriber list information".

⁸ Lubeck, Exh. ALL-1T, at 5:7-8. *See also* note 39, *infra*.

⁹ *Id.*, at 9:5-13.

¹⁰ SLI/DA Order, at ¶¶ 72 and 93-104.

other CLECs' SLI to a directory publisher, including R.H. Donnelley, Embarq is limited to charging the publisher 4 cents per listing and 6 cents per update listing.¹¹

- 13 In the existing ICA, Comcast is required to pay a non-recurring charge of \$6.49¹² for every "Directory Service Request" (DSR)¹³ that it submits.¹⁴ In exchange for this fee, Comcast receives "one basic White [P]ages listing for each CLEC customer located within the geographic scope of its White Page directories, at no additional charge to CLEC"¹⁵ as well as "White Pages database maintenance services".¹⁶ The existing ICA explicitly provides that Embarq "shall not charge for storage of CLEC subscriber information in the DL systems."¹⁷
- 14 In their prospective ICA, Comcast and Embarq have agreed that Comcast will pay a higher non-recurring charge of \$9.41¹⁸ for every DSR that it submits.¹⁹ As before, in exchange for this fee, Comcast would continue to receive basic White Pages listing for its customers and White Pages database maintenance services.²⁰ However, in addition to increasing the non-recurring charge for each DSR, in the prospective ICA Embarq seeks to add a new recurring DLSPM fee for storage of CLEC subscriber information in the company's DL systems.²¹

¹¹ Exh. ALL-11 (Generic Directory Listing License Agreement), at Appendix A; *see also* Lubeck, Exh. ALL-6T-C, at 17:4-7 and footnote 22; *also* Comcast Opening Brief, at 4-5 and footnote 7.

¹² Exh. ALL-13 (*Embarq Responses to Comcast Data Requests*), at Data Request (DR) 3.

¹³ A Directory Service Request (DSR) is the formal process by which a CLEC asks Embarq to include its subscriber's name in a telephone directory. *See* Exh. ALL-8 (*Master Interconnection and Collocation Agreement for the State of Washington between Comcast Phone of Washington, LLC, and United Telephone Company of the Northwest*, May 5, 2005), at § 70.3.

¹⁴ Exh. ALL-8, at § 70.3.5. The non-recurring charge is known as the service order entry (SOE) fee.

¹⁵ *Id.*, at § 70.3.3.

¹⁶ *Id.*, at § 70.3.5.

¹⁷ *Id.*, at § 70.2.5.

¹⁸ Exh. ALL-13, at DR 3.

¹⁹ Exh. ALL-9 (*"Prospective" Interconnection and Collocation Agreement for the State of Washington between Comcast Phone of Washington, LLC, and United Telephone Company of the Northwest*), at § 71.3.5, referring to a service order entry fee. *See also* Exh. ALL-9, at § 71.3 (referencing DSR). These sections in the "prospective" ICA are exactly the same as their counterparts in the existing ICA.

²⁰ *Id.*, at §§ 71.3.3 and 71.3.5.

²¹ *Id.*, at §§ 71.2.3, 71.2.5, and 71.2.6.

B. Synopsis of Party Positions

- 15 Comcast argues that the DLSM charge is discriminatory in violation of Section 251(b)(3) of the Act.²² In addition, Comcast asserts that the DLSM charge is unreasonable and unjust.²³ Finally, Comcast argues that the DLSM charge contravenes the Commission’s established policy on a “unified White Pages” directory listing.²⁴
- 16 Embarq responds that Section 251(b)(3) does not modify the provisions of Section 222(e) in a manner that requires Embarq to serve as a clearinghouse for CLEC SLI.²⁵ Further, Embarq contends that its DLSM fee need not be cost-based.²⁶ Finally, Embarq questions the applicability of Commission orders that pre-date the Act and the FCC’s SLI/DA Order.²⁷

C. Arbitrator’s Decision

1. Section 222 of the Act Does *Not* Obligate Incumbent Local Exchange Carriers (ILECs) to Serve as Directory Listing Clearinghouses for Competitive Local Exchange Carriers (CLECs).

- 17 Section 222 of the Act generally addresses the privacy of information provided to telecommunications carriers by their customers. Subsection (e) distinguishes “subscriber list information” as customer-provided data that must be shared with other persons for the purposes of publishing telephone directories. In its entirety, Section 222(e) states:

Notwithstanding subsections (b), (c), and (d) of this section [which address confidentiality requirements and exceptions], 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

²² Comcast Opening Brief, at 8-20; *see also* Comcast Reply Brief, at 4-11.

²³ *Id.*, at 21-29; *see also* Comcast Reply Brief, at 11-13.

²⁴ *Id.*, at 29-33; *see also* Comcast Reply Brief, at 13-14.

²⁵ Embarq Initial Brief, at 5-18; *see also* Embarq Reply Brief, at 5-22.

²⁶ *Id.*, at 18-32; *see also* Embarq Reply Brief, at 13-18.

²⁷ *Id.*, at 32-34; *see also* Embarq Reply Brief, at 22-25.

conditions, to any person upon request for the purpose of publishing directories in any format.

- 18 In its SLI/DA Order, the FCC concluded “that the obligation under Section 222(e) to provide a particular subscriber’s subscriber list information extends only to the carrier that provides that subscriber with telephone exchange service.”²⁸ Thus, to comply with the FCC’s interpretation of Section 222(e), Embarq need only provide requesting directory publishers with subscriber list information for its own customers, not that of customers who reside within Embarq’s service territory but obtain their telephone service from a competing LEC.
- 19 Even so, the FCC noted in the SLI/DA Order that its reading of Section 222(e) “does not preclude an incumbent LEC or other entities from acting as a clearinghouse for providing subscriber list information to directory publishers.”²⁹ Further, the FCC noted that “[t]o the extent State law permits, State commissions are free to require incumbent LECs and competitive LECs to enter into cooperative arrangements for the provision of subscriber list information to directory publishers.”³⁰
- 20 In sum, then, Section 222(e) of the Act obligates each individual LEC to respond to requests from directory publishers for its own subscriber list information. This law does not create obligations between ILECs and CLECs, but only between LECs and directory publishers. Under this provision of federal law, Embarq is not legally obligated by federal law to provide R.H. Donnelley or any other directory publisher with subscriber list information for Comcast’s customers.³¹

²⁸ SLI/DA Order, ¶ 54.

²⁹ *Id.*, ¶ 55.

³⁰ *Id.* Comcast argues that the Commission has in fact required as much by expressing in 1995 its belief that “a unified directory database is essential” for white pages listings. *See* Comcast Opening Brief, at 29-33, citing various Commission orders and regulations; *see also* Comcast Reply Brief, at 13-14.

³¹ Conversely, Comcast has no obligation to provide its own SLI to a directory publisher until a directory publisher asks Comcast to do so. According to Comcast, this is very unlikely. *See* Gates, TR. 37:13-21.

2. Embarq Has Voluntarily Entered into Contracts Obligating it to Serve as a Directory Listing Clearinghouse for CLECs in Embarq's Service Areas.

- 21 When the FCC released its SLI/DA Order in 1999, many large ILECs around the country owned and controlled their own directory publishing businesses.³² At that time, ILECs controlled access to the principal white pages directories published in their telephone exchange service areas.³³ Subsequently, like many other ILECs, Embarq decided to sell its directory publishing business. In 2003, the company entered into a contract with a purchaser, R.H. Donnelley, to have R.H. Donnelley publish Embarq's local phone books for the next 50 years.³⁴
- 22 Despite these changes in ownership and control of the directory publishing industry, Comcast maintains that the current industry practice is for ILECs to sell not only their own SLI but also all of the SLI they collect from CLECs to requesting directory publishing providers.³⁵ Indeed, the record in this case demonstrates that even in today's marketplace, it remains commercially desirable and highly efficient for directory publishers to obtain all of the data required for publishing their phone books from a single source, usually an ILEC that has traditionally collected and maintained a comprehensive database for that exact purpose.³⁶
- 23 During the hearing, Mr. Lubeck confirmed that "Embarq does do it [sell listings of third-party providers] through the interconnection agreement."³⁷ Further, Embarq's Directory Listing License Agreements contain language showing that the company has continuously chosen to provide requesting publishers with the entirety of the "base file listings and/or listing updates contained in Embarq's database,"³⁸ not just SLI relating to Embarq's own customers.³⁹

³² Lubeck, Exh. ALL-1T, at 8:8-12.

³³ *Id.*, at 8:12-16.

³⁴ *Id.*, at 10:5-13; *see also* Exh. ALL-10C (*Directory Services License Agreement between Embarq and R.H. Donnelley*).

³⁵ Gates, Exh. TJG-1T, at 4:2-7.

³⁶ *Id.*, at 28:14 to 30:2; *see also* Lubeck, Exh. ALL-1T, at 15:1-19, Lubeck, Exh. ALL-6T-C, at 7:2-18, and Lubeck, TR. 122:15 to 125:4; *see also* Gates, Exh. TJG-4T, at 14:3-13 and Gates, TR. 24:1 to 29:1.

³⁷ Lubeck, TR. 122:9-14; *see also* Exh. ALL-13, at DR 13.

³⁸ Exh. ALL-11 (*Generic/Form Directory Listing License Agreement between Embarq and Publisher*), at ¶ 1; *see also* Exh. ALL-13, at DR-13, DR-24 (paragraph iii), and DR-25. *See also*

24 Embarq's arrangements with R.H. Donnelley or any other directory publisher are private contractual obligations to publish a directory voluntarily entered into by Embarq, not mandated by federal law. Through these contracts, Embarq creates its own obligation to serve as a clearinghouse for CLEC SLI. As discussed further below, once Embarq causes information to be published in a directory format, it must afford CLECs the same access to directory listing it provides to its own customers.⁴⁰

25 Embarq could eliminate this provision in its agreements with R.H. Donnelley or other directory publishers, forcing any entity publishing a directory to directly contact each of the CLECs in a particular service territory in order to obtain all of the SLI needed for publishing a comprehensive directory.⁴¹ To date, Embarq has not chosen this path, presumably because market forces motivate the company to maintain its historical role as a collector and distributor of SLI for CLECs in its service territories. Further, despite the company's claims, Embarq's current lack of ownership or control of its directory publisher is simply not relevant to this analysis.⁴²

Gates, Exh. TJG-4T, at 6:3-12 and Lubeck, TR. 68:12 to 69:13. Given its confidential status, we refrain from quoting any language contained in Exh. ALL-10C which directly addresses Embarq's contractual obligations to provide subscriber listing information to R.H. Donnelley, including the SLI of CLECs operating in Embarq service areas that have interconnection agreements with Embarq.

³⁹ In fact, the record suggests that Embarq does not maintain the data of its own retail subscribers separate and apart from that of CLEC subscribers, raising the question of whether Embarq could even provide a directory publisher with data relating only to Embarq customers. *See* Lubeck, Exh. ALL-1T, at 5:7-8 ("Embarq stores all ILEC and CLEC listings in a DL database and maintains the operability of the database"); *see also* Lubeck, Exh. ALL-6T-C, at 16:14-17 ("The purpose of storing and maintaining the directory listings is to prepare and maintain the listings so that a ready database of directory listings is available for sale to directory publishers."). *See also* Exh. ALL-8, at § 70.3.3 and Exh. ALL-9, at § 71.3.3 ("Basic White Pages listings of CLEC customers will be interfiled with listings of [Sprint] Embarq and other LEC customers."); *see also* note 61, *infra*, and accompanying text.

⁴⁰ *See supra*, note 7 with accompanying text in ¶ 11 and note 6 with accompanying text in ¶ 10.

⁴¹ We note here that Comcast did raise arguments regarding the Commission's "unified White Pages" policy (*see supra*, note 24 with accompanying text in ¶ 15) that arguably requires ILECs such as Embarq to serve as clearinghouses for CLEC SLI. However, given our conclusions with regard to Comcast's Section 251(b)(3) contentions, we choose not to analyze further Comcast's suggestions that either WAC 480-120-251 or our decision in *WUTC v. US West Comm., Inc.*, 4th Suppl. Order, Docket Nos. UT-941464, UT-941465, UT-950146 (Oct. 31, 1995) might create such a requirement under state law, as permitted under the FCC's SLI/DA Order.

⁴² Embarq argues otherwise. *See* Lubeck, Exh. ALL-1T, at 13:7-8 and Embarq Initial Brief at 9-13. We recognize that market conditions regarding directory publishers have changed dramatically since the FCC issued its SLI/DA Order in 1999. We are in no position, however, to

3. Embarq Provides a Valuable Service to Comcast by Transmitting Comcast's Subscriber List Information to R.H. Donnelley.

- 26 Federal law explicitly recognizes that an ILEC's provision of directory listing to CLECs is a service.⁴³ The parties do not dispute that when one LEC provides a service to another, it should be compensated for providing the service.
- 27 Comcast acknowledges that Embarq's storage and maintenance of directory listings is a valuable service and Comcast expressly states its willingness to pay for this service; indeed, Comcast contends it already does so pursuant to the terms of the existing ICA between the parties.⁴⁴ Comcast objects to Embarq's newly proposed DLISM charge as discriminatory because it is not uniformly imposed on all CLECs.⁴⁵ Additionally, Comcast views Embarq's new DLISM charge as duplicative of other fees already agreed upon and contained in the proposed ICA.⁴⁶
- 28 We concur with the parties that Embarq's storage and maintenance of CLEC directory listings and its role as a clearinghouse in providing CLEC SLI to directory publishers are valuable services. Therefore, we conclude that Embarq may impose a charge for providing directory listing storage and maintenance to CLECs, such as Comcast. However, as explained below, we also conclude that any such charge may only be imposed in compliance with the provisions of the Telecommunications Act of 1996, particularly Section 251(b)(3).

re-write or otherwise ignore the language in the FCC's SLI/DA Order. Any revisions to the SLI/DA Order must come from the FCC itself. Further, Embarq's position that Comcast could independently approach R.H. Donnelley to secure directory listings for its customers (*see* Embarq Initial Brief, at 10-11, and Embarq Reply Brief, at 9-12) is not helpful because the same is apparently true for each of the CLECs who choose to purchase resale retail or UNE loop services from Embarq.

⁴³ *See* SLI/DA Order, at ¶ 54 (final sentence).

⁴⁴ Gates, Exh. TJG-1T, at 15:5-15.

⁴⁵ *Id.*, at 15:5 to 21:12.

⁴⁶ *Id.*

4. Section 251(b)(3) of the Act Prohibits all Local Exchange Carriers (LECs) from Discriminating Against Other LECs in Allowing Access to Directory Listings.

29 Section 251 of the Act generally addresses the development of competitive markets through interconnection of telecommunications carriers' facilities and equipment. Subsection (b) addresses the "obligations of all local exchange carriers." Of these obligations, Section 251(b)(3) specifically imposes on all LECs:

[t]he 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.

Section 251 (b)(3) makes no distinction between different types of competing providers. The law requires nondiscriminatory access for "all" competing providers.

30 According to the FCC's regulations, "nondiscriminatory access" refers to access that is "at least equal to the access" that the providing LEC itself receives.⁴⁷ It includes, but is not limited to:

- a) Nondiscrimination between and among carriers in the rates, terms, and conditions of the access provided; and
- b) The ability of the competing provider to obtain access that is at least equal in quality to that of the providing LEC.⁴⁸

31 The record is clear that Embarq does not impose a recurring DLSSM charge on its own retail customers or on other CLECs that purchase resale services or UNE loops from Embarq. Embarq wishes to impose the recurring DLSSM charge only on facilities-based CLECs such as Comcast that do not rely on Embarq's "last-mile" facilities or services to compete within Embarq's service area. Given the expansive language of Section 251 (b)(3) and the FCC's definition of "nondiscriminatory access", we find it

⁴⁷ 47 C.F.R. § 51.217.

unreasonable and contrary to federal law for Embarq to single out a particular type of competitor, in this case a facilities-based CLEC, to impose a charge related to directory listing only when a carrier does not purchase another service such as resold service or UNE loops.

32 Embarq explains its new proposal to charge Comcast the recurring DLSM charge as follows:

If Comcast purchases an access line at resale rates, Embarq agrees that it will provide a directory listing to Comcast's end user customer as part of the resale service bundle without a separate monthly charge. If Comcast purchases the UNE Loop, Embarq will provide a directory listing to Comcast's end user customer as part of the service bundle without a separate monthly charge. If Comcast does not purchase the underlying line from Embarq, it is appropriate for Embarq to provide the stand-alone DLSM service to Comcast's end user customers in the same manner and at the same rate that Embarq charges its own or another LEC's end user customer that is purchasing similar services – in this case the stand-alone foreign listing service.⁴⁹

According to Mr. Lubeck, Embarq does not impose the DLSM charge on CLECs purchasing UNE loop services because the cost of purchasing the UNE loop includes sufficient overhead charges to cover the costs of providing DLSM services.⁵⁰

33 Embarq argues that is not discriminating in imposing the recurring DLSM charge on facilities-based CLECs such as Comcast because a facilities-based CLEC is not similarly situated to other CLECs that purchase retail services for resale or CLECs that purchase UNE loop services.⁵¹ Embarq contends that:

There are differences between carriers and the pricing of the different services that they buy from Embarq that not only justify, but require, different treatment, notwithstanding, the “nondiscriminatory access” requirement that permeates Section 251.⁵²

⁴⁸ *Id.*

⁴⁹ Lubeck, Exh. ALL-1T, at 13:21 to 14:7.

⁵⁰ Lubeck, TR. 87:24 to 89:15 and 93:25 to 94:6.

⁵¹ Embarq Initial Brief, at 28-31.

⁵² *Id.*, at 31.

According to Embarq, “[i]t 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.”⁵³

34 We find Embarq’s position untenable. Mr. Lubeck’s listing of options for Comcast to avoid the imposition of a stand-alone recurring DLSM charge appears to be nothing more than a pricing strategy designed to encourage CLECs to purchase higher levels of service from Embarq. Mr. Lubeck concedes that he does not know how much it costs Embarq to provide DLSM service, relying instead on the assumption that any such costs are included in overhead charged to CLECs who purchase resale services or UNE loop services.⁵⁴ Embarq did not introduce any costing evidence in the proceeding supporting its overhead contribution theory for either resold services or UNE loop customers. Embarq’s attempt to justify the DLSM charge as a method to ensure Comcast does not receive what it contends would be free access to directory listing services cannot be reconciled with the Act’s nondiscrimination requirements.

35 Further, despite the company’s effort to create a distinction among CLECs that interconnect with Embarq, the words “similarly situated” do not appear within the language of Section 251(b)(3). Rather, as noted above, Section 251(b)(3) places a duty on all LECs to permit *all* competing providers to have nondiscriminatory access to directory listing. The FCC’s repeated use of the term “all” within Section 251(b)(3) does not allow for Embarq’s interpretation that discrimination of any sort between CLECs, similarly situated or not, is permissible.

36 We conclude that under the nondiscrimination provisions of the Act, Embarq can only impose the recurring DLSM charge on facilities-based CLECs such as Comcast if it does so in a manner that demonstrates the same or equivalent fee is imposed on all other CLECs receiving access to directory listing from Embarq.

⁵³ Embarq Reply Brief, at 13.

⁵⁴ Lubeck, TR., at 86:7 to 87:1, 88:4 to 89:15, and 90:21 to 91:2.

5. The FCC’s SLI/DA Order Requires Embarq to be Prepared to Provide Credible and Verifiable Cost Data to Justify its DLSM Charge.

- 37 When the FCC was determining the presumptively reasonable rates that LECs could charge directory publishers for providing subscriber list information, the discussion included an analysis of what sorts of costs might be associated with maintaining the databases required for this service.⁵⁵ In the SLI/DA Order, the FCC recognized that LECs need to buy and maintain computer systems that are used for a variety of functions beyond providing SLI to directory publishers.⁵⁶ Further, the FCC characterized the incremental cost of adding a listing to an existing database as “*de minimis*”.⁵⁷
- 38 In determining that 4 cents per listing was a presumptively reasonable rate for providing directory publishers base file SLI and that 6 cents per listing was a presumptively reasonable rate for providing updated SLI, the FCC concluded that these rates would allow most carriers to recover the incremental costs of providing the SLI as well as provide a reasonable contribution to the LEC’s common costs and overheads.⁵⁸ The FCC was very clear that these presumptively reasonable rates were cost-based.⁵⁹ Even so, the SLI/DA Order explicitly did not preclude LECs from charging higher rates; the FCC cautioned that “any carrier whose rates exceed either of these rates should be prepared to provide cost data and all other relevant information justifying the higher rate. . . .”⁶⁰
- 39 As noted above, Embarq did not provide any cost data to explain the reasonableness of its proposed recurring DLSM charge. Even so, we note that Embarq did acknowledge that “there is no difference in the way Embarq stores and maintains its own and CLECs’ directory listings.”⁶¹ Further, the existing and prospective ICAs

⁵⁵ SLI/DA Order, at ¶¶ 71 through 79.

⁵⁶ *Id.*, at ¶ 78.

⁵⁷ *Id.*, at ¶ 79.

⁵⁸ *Id.*, at ¶¶ 94, 95, 99, and 103.

⁵⁹ *Id.*, at ¶¶ 92 (“Basing rates on costs. . .”) and 103 (“Because these rates are cost-based. . .”).

⁶⁰ *Id.*, at ¶ 73; see also SLI/DA Order, ¶¶ 74, 92, and 102. We recognize that these warnings were in the context of a directory publisher filing a complaint under Section 208 of the Act, but we find the FCC’s cost justification requirements equally applicable in this context.

⁶¹ Exh. ALL-13, at DR-8; see also Exh. ALL-13, at DR-24 (paragraph viii indicates that the primary differences between the processes associated with creating and maintaining directory

both acknowledge that “listings of CLEC customers will be interfiled with listings of Sprint and other LEC customers.”⁶² Thus, it is difficult to understand what additional overhead or incremental costs Embarq might incur above and beyond those approved as presumptively reasonable by the FCC in its SLI/DA Order.

40 Despite its arguments to the contrary, Embarq cannot rely on a market-based approach to set its DLSM charge. In providing Comcast access to directory listing, the database management services that Embarq provides are directly analogous to those described in the SLI/DA Order. Therefore, we conclude that Embarq must provide cost data and all other relevant information if it wishes to establish and impose a DLSM charge on Comcast or any other CLEC.

III. CONCLUSION

41 Embarq seeks to impose a monthly DLSM recurring charge on Comcast to ensure that the costs Embarq allegedly incurs to provide R.H. Donnelley Comcast’s subscriber list information for inclusion in R.H. Donnelley’s telephone book are not foregone. In other words, Embarq does not want to continue to act on its competitor’s behalf without compensation.

42 Embarq does not impose the recurring DLSM charge on CLECs that purchase UNE loop service from Embarq. In accordance with Section 251(b) of the Act, Embarq cannot treat Comcast differently from all other CLECs in its service territory. Embarq’s arguments that Comcast’s failure to purchase UNE loop services create a permissible basis on which to discriminate against Comcast by imposing the DLSM charge are not persuasive. Therefore, Embarq cannot impose the DLSM charge through its interconnection agreement with Comcast.

43 We recognize that our interpretation of Section 251(b)’s non-discrimination requirement arguably imposes the very “clearinghouse” obligation on Embarq that the

listings for Embarq’s own customers and those of CLECs like Comcast are: (a) the initial database for data entry (Service Order Entry (SOE) System vs. Integrated Request Entry System (IRES)) and (b) the point of contact for correcting potential errors discovered in the database (direct contact with Embarq retail subscriber vs. contact with CLEC to obtain information from CLEC’s subscriber).

⁶² See Exh. ALL-8, at § 70.3.3 and Exh. ALL-9, at § 71.3.3.

FCC explained in its SLI/DA Order is not created by Section 222(e).⁶³ Nevertheless, our interpretation of the Act does not require Embarq to do so without compensation. We simply require Embarq to impose an appropriately justified fee on all CLECs in a non-discriminatory manner.⁶⁴

44 In sum, in order for Embarq's proposed recurring DLSM charge to be proper under Section 251 (b)(3), Embarq must

- a) cost-justify the proposed DLSM charge;
- b) show that the proposed DSLM charge is imposed equally on all competing providers; and
- c) demonstrate that the costs involved are not already recovered under the FCC's presumptively reasonable fees for provision of SLI to directory publishers.

Embarq has not carried its burden in any of these requirements. Therefore, we must find for Comcast and adopt its proposed language for the interconnection agreement.

FINDINGS OF FACT

45 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

- 46 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies. Federal law vests the Commission with the authority to arbitrate interconnection disputes between local exchange carriers.

⁶³ See Embarq Initial Brief, at ¶ 8, which sets out this argument.

⁶⁴ If Embarq believes that the SLI/DA Order's presumptively reasonable 4 cent/6 cent fees associated with data processing in maintaining directory listing databases for directory publishers are not the appropriate measure for imposing a DLSM fee on CLECs, they must take up that argument with the FCC.

- 47 (2) Comcast Phone of Washington, LLC (Comcast) and United Telephone Company of the Northwest, Inc. d/b/a Embarq (Embarq) are “public service companies” and “telecommunications companies,” as those terms are defined in RCW 80.04.010 and as those terms otherwise are used in Title 80 RCW. Comcast and Embarq are engaged in the state of Washington in the business of supplying telecommunications services for hire, sale, or resale to the general public for compensation.
- 48 (3) Comcast and Embarq have negotiated a new interconnection agreement but have been unable to reach agreement on a single issue: a recurring Directory Listing Storage and Maintenance (DLSM) charge of 50 cents per month.
- 49 (4) On April 29, 2008, Comcast filed a Petition for Arbitration of an Interconnection Agreement with the Commission and timely served the Petition on Embarq.
- 50 (5) Embarq seeks to impose the recurring DLSM charge on Comcast because Comcast does not purchase Unbundled Network Element (UNE) loop services from Embarq.
- 51 (6) Embarq does not impose the recurring DLSM charge on its own customers or on other CLECs that purchase UNE loop services from Embarq.

CONCLUSIONS OF LAW

- 52 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 53 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings. *47 U.S.C. § 252(b); Title 80 RCW; and WAC 480-07-630.*

- 54 (2) Embarq's proposed DLISM charge violates Section 251(b)(3) of the Telecommunications Act of 1996 because in seeking to impose the recurring DLISM charge only on CLECs not purchasing UNE loop services, Embarq does not provide non-discriminatory access to directory listing.
- 55 (3) Embarq's proposed DLISM charge should not be incorporated into the interconnection agreement (ICA) between these parties.
- 56 (4) The resolution of the parties' unresolved issue meets the requirements of Section 251 of the Telecommunications Act of 1996 and the regulations adopted by the Federal Communications Commission. *47 U.S.C. § 251 and Chapter 47 C.F.R., Part 51.*
- 57 (5) The Commission should retain jurisdiction over the subject matter and the parties to this proceeding to effectuate the terms of this Order. *Title 80 RCW.*

ORDER

THE COMMISSION ORDERS:

- 58 (1) The relief sought in Comcast Phone of Washington, LLC's Petition for Arbitration of an Interconnection Agreement is granted: United Telephone Company of the Northwest, Inc. d/b/a Embarq's proposed recurring DLISM charge of 50 cents per month is rejected.
- 59 (2) Within thirty days after the entry of this Order, the parties shall file with the Commission for approval a signed Interconnection Agreement containing Comcast Phone of Washington, LLC's proposed language, and otherwise consistent with the terms of this Order.

60 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective January 13, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Arbitrator / Administrative Law Judge