Exhibit ____(TJG-1T)

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

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

DIRECT TESTIMONY

OF

TIMOTHY J GATES

ON BEHALF OF COMCAST PHONE OF WASHINGTON, LLC

July 2, 2008

TABLE OF CONTENTS

Exhibits

I. INTRODUCTION

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Timothy J Gates. My business address is QSI Consulting, 819 Huntington Drive, Highlands Ranch, Colorado 80126.

Q. WHAT IS QSI CONSULTING, INC. AND WHAT IS YOUR POSITION WITH THE FIRM?

A. QSI Consulting, Inc. ("QSI") is a consulting firm specializing in traditional and non-traditional utility industries, econometric analysis and computer-aided modeling. QSI provides consulting services for regulated utilities, competitive providers, government agencies (including public utility commissions, attorneys general and consumer councils) and industry organizations. I currently serve as Senior Vice President.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND WORK EXPERIENCE.

A. I received a Bachelor of Science degree from Oregon State University and a Master of Management degree, with an emphasis in Finance and Quantitative Methods, from Willamette University's Atkinson Graduate School of Management. Since I received my Masters, I have taken additional graduate-level courses in statistics and econometrics. I have also attended numerous courses and seminars specific to the telecommunications industry, including both the National Association of Regulatory Utility Commissions ("NARUC") Annual and NARUC Advanced Regulatory Studies Programs.

Prior to joining QSI, I was a Senior Executive Staff Member at MCI WorldCom, Inc. ("MWCOM"). I was employed by MCI and/or MWCOM for 15 years in various public policy positions. While at MWCOM I managed various functions, including tariffing, economic and financial analysis, competitive analysis, witness training and MWCOM's use of external consultants. Prior to joining MWCOM, I was employed as a Telephone Rate Analyst in the Engineering Division at the Texas Public Utility Commission and earlier as an Economic Analyst at the Oregon Public Utility Commission. Exhibit____ (TJG-2) contains a complete summary of my work experience and education.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION ("WUTC" OR "COMMISSION")?

A. Yes. I testified before the Commission in docket numbers UT-030614, UT-021569, UT-023043, UT-003013, Part D, UT-970325, UT-960338 and U-88-2052-P. In addition, I have testified more than 200 times in 44 states and Puerto Rico, and filed comments with the Federal Communications Commission ("FCC") on various public policy issues ranging from costing, pricing, local entry and universal service to strategic planning, merger and network issues. *See* Exhibit ____ (TJG-2).

Q. DO YOU HAVE EXPERIENCE WITH THE ISSUES IN THIS PROCEEDING?

A. Yes. I have participated in dozens of arbitrations since the 1996 amendments to the Communications Act of 1934 (the "Act") were enacted. I am knowledgeable about the manner in which telephone listing information is compiled and provided to end-users, and am familiar with the other issues in this proceeding arising from the obligations imposed by federal and state law. I am currently serving as Comcast's expert witness in interconnection arbitrations with Embarq in Texas, Indiana, Pennsylvania, and Minnesota arising from the same proposed directory listing storage and maintenance ("DLSM") charge at issue in this case.

Q. ON WHOSE BEHALF ARE YOU FILING THIS DIRECT TESTIMONY?

A. I am filing this testimony on behalf of the petitioner, Comcast Phone of Washington, LLC ("Comcast").

II. BACKGROUND ON DISPUTE

Q. PLEASE BRIEFLY DESCRIBE THE DISPUTE BETWEEN COMCAST AND EMBARQ.

A. This case is about Embarq's attempt to add a rate element for costs that Embarq alleges that it incurs for storing and maintaining Comcast's directory listing ("DL") information in its DL databases and for disseminating that information to third-party directory publishers and directory assistance providers.[1] It is the only issue in dispute in this arbitration. Embarq has never imposed this rate in the past and no other incumbent local exchange carrier ("ILEC") imposes a similar charge.

Q. PLEASE EXPLAIN EMBARQ'S POSITION.

[1] Directory Listing information is also generally referred to as Subscriber Listing Information by the FCC and the industry.

A. Embarq's position has "evolved" during the course of negotiations and the various state proceedings, including this one. It is undisputed that the current industry standard practice is for ILECs to sell the subscriber list information that they collect from competitive local exchange carriers ("CLECs") as part of the service order entry process (and store and maintain in their DL databases in the ordinary course) to third party requesting directory publishing/directory assistance ("DP/DA") providers. Indeed, I know of no case in which a CLEC bypasses the ILEC DL function and provides listing information to DP/DA providers directly. It is also undisputed that Embarq currently sells Comcast's customers' subscriber list information to DP/DAs that request it at the FCC-approved "Section 222(e) rate" of $0.04 per listing / $0.06 per update.

At no point during the parties' negotiations did Embarq seek interconnection language to alter this arrangement. To the contrary, Embarq has proposed to delete language in the parties' current interconnection agreement, which provides that "[Embarq] *shall not charge* for storage of CLEC subscriber information in the DL systems,"[2] and replace it with the following:

> The charge for storage of CLEC subscriber information in the DL system is included in the rates where CLEC is buying UNE Loops or resold services with respect to specific addresses. CLECs that are not buying UNE Loops or resold services shall pay for such storage services at the rate reflected in Table One [*i.e.,* $0.50 per listing per month]."[3]

[2] Interconnection and Collocation Agreement for the State of Washington between Comcast Phone of Washington, LLC d/b/a Comcast Digital Phone and The United Telephone Company of the Northwest ("Current ICA") § 70.2.5 (emphasis added).

[3] Embarq Response to Petition, Exhibit A (proposed § 71.2.5).

Comcast, of course, questioned the appropriateness of the new proposed rate. How could Embarq seek $0.50 per month to "store" a single customer's DL information when the cost of such computer storage is essentially zero, especially given that Comcast had agreed to the 50% increase in the DL service order entry charge of $9.41 that Embarq proposed? The clearly discriminatory, unjust and unreasonable nature of the DLSM charge led Comcast to initiate this proceeding.

It was not until Embarq began responding to Comcast's discovery requests in the various arbitration cases that Embarq explained that this so-called "storage charge" was really for activities associated with directory publishing, not "storing" information in Embarq's databases.

Comcast was still not persuaded, however, because, (1) the FCC has ruled that carriers are to recover such costs from the DP/DA providers to whom listings are sold, (2) the FCC has established a mechanism for carriers to pursue if they believe those rates to be confiscatory, and (3) most of the activities that Embarq identified as associated with the proposed charge are clearly not appropriately charged-back to Comcast under ***any*** circumstance.

III. SUMMARY OF TESTIMONY

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. Comcast's Petition for arbitration[4] seeks resolution of a single issue – whether Embarq may impose a recurring $0.50 per month, per subscriber charge for

[4] On April 28, 2008, Comcast filed "Comcast Phone of Washington, LLC Petition for Arbitration" (hereinafter "Petition" or "Comcast Petition").

storing Comcast's customer DL information in Embarq's DL databases.[5] Embarq seeks to impose this recurring DLSM charge ***in addition*** to the $9.41 per listing, non-recurring charge ("NRC") for loading Comcast's listings into the DL database in the first place.[6] The parties have identified the disputed issue 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?

As this statement makes plain, Embarq seeks to impose the recurring DLSM charge only on facilities-based competitors that utilize their own-last mile facilities. Thus, Embarq's proposed recurring DLSM charge is effectively a tax on intermodal competitors, which runs counter to national policies expressly promoting intermodal competitive alternatives,[7] and to Washington's policies promoting facilities-based competition.[8]

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[5] *See* United Telephone Company of the Northwest d/b/a Embarq Response to Comcast Petition (hereafter "Embarq Response") ¶ 10 (May 27, 2008); Embarq Response to Comcast Interrogatory DR-2. *See* also Table One at page 153 (Table One) of the Proposed Agreement.

[6] Embarq is unilaterally increasing the NRC from $6.49 which it currently charges to $9.41 – a 45 percent increase. (See Embarq's Response to Comcast's DR-3) Although Comcast believes that the $9.41 NRC is grossly inflated, it has agreed to pay that rate and is not contesting that charge in this proceeding.

[7] *See, e.g.*, Memorandum Opinion and Order, *AT&T, Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd. 5662, ¶ 83 (2007) ("find[ing] that intermodal competition from cable telephony … provide[s] these customers with viable alternatives"); *see also* Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, *Telephone Number Requirements for IP Enabled Service Providers*, 22 FCC Rcd 19531, ¶ 55 (2007) (adopting rules to "help enable … intermodal competition" presented by "wireless providers and cable operators"). Embarq's proposed DLSM charge is particularly targeted at intermodal competition because CLECs that resell Embarq's services are not assessed the charge.

[8] *See* RCW 80.36.300(5) (legislative policy declaration to "Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state").

My testimony demonstrates that the proposed recurring charge is both discriminatory and unjust and unreasonable. Embarq does not apply a recurring DLSM charge to itself, its own customers, or any other CLEC. The charge therefore violates Embarq's obligation under Section 251(b)(3) of the Act to provide nondiscriminatory access to directory listing functions.[9] The recurring DLSM charge is also unjust and unreasonable because it bears no relation to the cost Embarq incurs to provide the service. Indeed, Embarq ***already*** recovers its DLSM-related costs from directory publishers, which use Embarq's DL information to compile their directories, and from the NRC DL service order charge that Comcast pays to enter its customers' DL information into Embarq's databases in the first instance. Embarq has not presented any evidence to justify its proposed recurring DLSM charge.

Embarq contends that it should be allowed to assess a "market-based" rate (as opposed to a "cost-based" rate) for DLSM and, therefore, should not be required to produce any cost support at all.[10] As I explain below, Embarq's call for a "market-based" DLSM rate is based on a misunderstanding of the law, the relevant market forces, and a misplaced focus on a market that does not exist.

Q. WHAT ARE YOUR RECOMMENDATIONS?

A. I recommend that the Commission reject, in its entirety, Embarq's proposed recurring DLSM charge and adopt Comcast's proposed interconnection agreement ("ICA") language as identified herein and in Exhibit B to the Comcast

[9] 47 U.S.C. § 251(b)(3); 47 C.F.R. § 51.217 (a) and (b).
[10] *See* Embarq's Response to Comcast DR-10.

Petition. If the Commission ultimately finds that Embarq may impose a recurring DLSM fee, the charge should be *nondiscriminatory*, just and reasonable, cost-based, and substantiated by reliable evidence.

IV. DISPUTED INTERCONNECTION AGREEMENT LANGUAGE

Q. PLEASE PRESENT THE INTERCONNECTION AGREEMENT ("ICA") LANGUAGE PROPOSED BY EACH PARTY.

A. The ICA language in dispute is provided below with Comcast's proposed language disputed by Embarq shown in underlined text and Embarq's proposed language disputed by Comcast shown in ~~strike-though~~ text.[11]

> **71.2 Directory Listings Service Requests**
> 71.2.3 Embarq will provide to CLEC the ~~following Directory Listing Migration Options, valid under all access methods, including but not limited~~ ability to~~, Resale, UNEs and Facilities-Based:~~
> ~~71.2.3.1 Migrate with no Changes. Retail all white page~~ maintain directory listings ~~for the subscriber in both DA and DL. Transfer ownership and billing for white page listings to~~when CLEC~~.~~
> ~~71.2.3.2 Migrate with Additions. Retain all white page listings for the subscriber in DL. Incorporate the specified additional listings order. Transfer ownership and billing for the white page listings to CLEC.~~
> ~~71.2.3.3 Migrate with Deletions. Retain all white page listings for the subscriber in DL. Delete the specified listings from the~~ ports a number or provides a new directory listing ~~order. Transfer ownership and billing for the white page listings to CLECs.~~.

***[12]

[11] *See also* Exhibit B, Comcast Petition.

[12] There is a difference in the numbering of ICA sections because Embarq proposes more subsections than Comcast. Not all of the numbering changes are shown here. Also, Comcast has proposed deleting the listing options in Section 71.2.3.1-3, a position that Embarq has not contested in any of the state arbitration proceedings to date.

> 71.2.5 ~~The~~ <u>Embarq shall not</u> charge for storage of CLEC subscriber information in the DL systems~~is included in the rates where CLEC is buying UNE Loops or resold services with respect to specific addresses. CLECs that are not buying UNE Loops or resold services shall pay for such storage services at the rate reflected on Table One.~~<u>.</u>
> <u>71.2.6. CLEC shall not charge for storage of Embarq subscriber information in the DL systems.</u>

As discussed above, the rate proposed for the DLSM described in the Embarq agreement Section 71.2.5 (disputed by Comcast) is a monthly recurring charge of $0.50 for "Directory Listings – (if CLEC not purchasing UNE Loops or Resale Services)." The parties' current agreement ("Current Agreement") provides that, "[Embarq] shall not charge for storage of CLEC subscriber information in the DL systems."[13]

<u>V. BACKGROUND ON DIRECTORY LISTING AND RELATED OBLIGATIONS</u>

Q. PLEASE PROVIDE SOME BACKGROUND INFORMATION ON THE DIRECTORY LISTING FUNCTION IN ORDER TO FRAME THE ARGUMENTS IN THIS CASE.

A. In simple terms, a directory listing is the customer's name, phone number, and address that are published in a directory, such as a telephone book, or included in a directory database, such as that used when a caller dials "411." The FCC's regulations define "Directory listings" as follows:

> Directory listings. Directory listings are any information:
>
> (1) Identifying the listed names of subscribers of a telecommunications carrier and such subscriber's telephone numbers, addresses, or primary advertising classifications (as such

[13] Current Agreement § 70.2.5.

> classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses or classifications; and
>
> (2) That the telecommunications carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.[14]

In addition, Section 251(b)(3) of the Act requires all local exchange carriers ("LECs") to provide competing providers with "*nondiscriminatory* access to ... directory listing."[15] The FCC has interpreted the statutory term "directory listing" to mean "the act of placing a customer's listing information in a directory assistance database or in a directory compilation for external use (such as a white pages)."[16] Among other things, Section 251(b)(3) and 47 C.F.R. § 51.5 require that LECs "publish competitors' business customers in … [their] director[ies] on a nondiscriminatory basis," regardless of whether LECs own those directories or not.[17]

Note that the statutory obligation of Section 251(b)(3) is different from the act of making "directory listings" available to entities that might want to publish a directory. Section 222(e) of the Act imposes a *separate* obligation on telecommunications carriers to make their "subscriber list" information available

[14] 47 CFR § 51.5.

[15] 47 U.S.C. § 251(b)(3) (emphasis added).

[16] *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 [sic], As Amended*, CC Docket Nos. 96-115, 96-98, 99-273, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd 15550, ¶ 160 (1999) ("*SLI/DA Order*").

[17] *See MCI Telecomm. Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d 768, 801 (E.D. Mich. 1999); *see also U.S. West Comm., Inc. v. Hix* , 93 F. Supp. 2d 1115, 1132 (D. Colo. 2000) (*citing MCI Telecomm.*).

to any *directory publisher* on reasonable and nondiscriminatory terms.[18] Although the market for the publication of directories is discussed below, at bottom the issue in this case does not involve that market, which is governed by Section 222(e). Instead, this case relates to the separate and distinct requirement under Section 251(b)(3).

Q. HOW DO LISTINGS FOR COMCAST CUSTOMERS GET INCLUDED IN EMBARQ'S DIRECTORY LISTING DATABASES?

A. The actual business process is straightforward. When Comcast signs up a new customer, it submits a Directory Listing "Service Order Entry Request" ("DLSR") using Embarq's web-based graphical user interface.[19] This electronic service order includes the relevant customer information – name, address, and telephone number. Under the forthcoming interconnection agreement, Comcast will pay a $9.41 NRC to submit each of its customer's DL information to Embarq, which information Embarq uses to populate various DA and DL databases. (Even though Comcast believes Embarq's charge for this simple, automated process is inflated, Comcast has agreed to pay it and not contest the electronic DLSR order charge in this proceeding.)

Q. WHY DO ILECS LIKE EMBARQ MAINTAIN DL DATABASES?

A. ILECs were the monopoly providers of local service for many years and still retain the vast majority of subscribers in their service territories, especially in the

[18] The FCC has held that the "subscriber list" information referred to in Section 222(e) and the "directory listing" obligation of Section 251(b)(3) refer to the same information.

[19] *See* Embarq Response to Comcast DR-5. A DLSR may also be submitted via facsimile, and the rate for such a "manual" submission is $17.01 (an increase from the current rate of $11.68). *See* Embarq Response to Comcast DR-3.

mass-market / residential market segments in which Comcast primarily competes. Historically the ILECs maintained and printed their own directories. Today, even though some ILECs no longer publish their own directories, the standard industry practice is for ILECs to maintain the complete file of DL information for ***all*** telephone numbers in their service territory. This is not surprising since ILECs such as Embarq still retain the vast majority of listings in their service territory. This standard industry practice of using the ILEC's DL database as the repository for all DLs in the service territory serves several important purposes. It provides directory publishers and directory assistance providers (collectively, "directory publishers" or "DP/DA providers") one-stop shopping for the information they need to assemble their electronic, paper, and on-line directories, thus assuring a single, complete source of DL information. This arrangement lowers transaction costs for all carriers and the DP/DAs, which leads to lower prices for end users, and improves the accuracy of the DL information available to the public. Consistent with these important benefits to consumer welfare, I know of no situation anywhere in the country where a CLEC provides its listing information directly to directory publishers, and Embarq has not presented any evidence to demonstrate otherwise.

Q. DOES THE FACT THAT ILECS MAINTAIN THE DL DATABASE PUT THEM IN A UNIQUE POSITION RELATIVE TO THEIR COMPETITORS?

A. Yes. ILECs are in a unique position because the ILEC is the only carrier with a comprehensive DL database for their service territory. Competing DP/DA providers, including small competing publishers such as Chambers of Commerce, use this database to assemble their directories. Thus, CLECs need to be able to place their customers' DL information in the ILECs' database because, obviously, customers will be much less likely to switch to a competing carrier if their listings will not appear in "the" phonebook for their area.

Q. ARE THERE OTHER REASONS WHY ILECS MAINTAIN DL INFORMATION OF THIRD PARTIES?

A. Yes. In addition to the legal obligation imposed by Section 251(b)(3), many states require ILECs to publish directories that includes all published phone numbers in their service territories, including the numbers of customers served by competitors. For example, this Commission recognized more than a decade ago that there is a, "strong public and consumer interest in having a complete listing of subscribers for each local calling area available to subscribers," and that "independent directories published by each ALEC will cause 'some customer confusion.'"[20] Thus, the Commission found that,

> We do not believe that a situation where multiple companies distribute different kinds of directories to all telephone customers in a calling area is practical, economically feasible, or desirable. Thus, while USWC may argue somewhat persuasively that directories and directory assistance are not essential, we believe that a unified directory database is essential."[21]

Second, ILECs get paid by third-party DP/DA providers for each listing ($0.04 per listing and $0.06 for each update). Third, the NRCs for each listing received

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[20] *WUTC v. U S WEST Comms., Inc.*, Docket Nos. UT-941464, *et al.*, Fourth Supp. Order, 1995 WL 735315, at 45 (Oct. 31, 1995).
[21] *Id.*

from CLECs provide an additional financial incentive to maintain the DL databases. In a confidential response to a Comcast data request that I have attached to this testimony, Embarq has admitted that it receives substantial revenues for the sale of its DLs to DP/DA providers and receipts from CLECs in each of the last two years.[22]

Q. WHAT ARE THE STATUTORY REQUIREMENTS?

A. Congress recognized the importance of accurate, readily accessible DL information when it enacted Sections 251(b)(3) and 222(e) of the Act. These statutory provisions, together with the FCC's rules and orders applying them, are designed to prevent telephone companies from leveraging their control over the DL information in their databases to the disadvantage of their competitors, and assures that CLECs (who provide DLs to ILECs for populating the ILECs' DL databases) and DP/DA providers (who purchase the ILEC DL information for purposes of directory publishing) have non-discriminatory access to DL information.[23] The combined effect of these laws is simple: Embarq must provide Comcast with access to DL function and publish Comcast customers' DL information in Embarq-branded directories on the same rates, terms and conditions that Embarq provides to itself and other providers.

Q. DOES IT MATTER THAT EMBARQ HAS SOLD ITS DIRECTORY PUBLICATION BUSINESS AND NO LONGER PUBLISHES DIRECTORIES ITSELF?

[22] Exhibit ____ (TJG-3C) (Embarq Confidential Response to Comcast DR-14).

[23] The legislative history of the 1996 Act makes this plain. *See, e.g.*, House Rept. 104-204, Part 1, pp. 89-90; 142 Cong. Rec. E184 (daily ed. Feb. 6, 1996) (statement of Rep. Paxon); 142 Cong. Rec. H1160 (daily ed. Feb. 1, 1996) (statement of Rep. Barton).

A. No. As the courts have recognized, as long as Embarq "causes" a directory to be published, Embarq must include competitors' listings in those directories on the same non-discriminatory rates, terms and conditions as Embarq provides to itself and third-parties.

VI. COMCAST IS NOT ATTEMPTING TO GET THIS SERVICE FOR FREE

Q. EMBARQ HAS ARGUED THAT COMCAST IS ATTEMPTING TO GET THIS SERVICE FOR FREE. DO YOU AGREE?

A. No. Comcast has already been paying Embarq for the storage and maintenance of its directory listings and is willing to continue to do so. It should not be required, however, to pay for this service many times over, as Embarq proposes. Embarq is recovering its DL-related costs from CLECs through its $9.41 non-recurring service order charge, and from the fees it collects from multiple DP/DA providers that purchase subscriber list information from Embarq. Embarq's proposed recurring DLSM charge would constitute a third duplicative source of revenue derived from the same activity.

Q. PLEASE DISCUSS FURTHER THE FEES THAT COMCAST IS ALREADY PAYING FOR DLSM.

A. As noted above, the process of getting a Comcast listing into the DL database is simple. It does not conceivably cost $9.41 to perform this function. Moreover, the ongoing cost of maintaining a directory listing in the database is infinitesimal.[24] But even if we assume that it took an Embarq employee a few

[24] It should be nothing more than the cost of the computer-readable storage capacity needed to preserve the listing. A quick look at the Office Depot web site reveals that one can buy a 4.7 gigabyte DVD storage disk for about $0.50 (when bought in a pack of 50 discs). If we

minutes to enter a directory listing manually, the $9.41 fee would more than cover any conceivable cost Embarq might incur to keep that listing in its database. And that is exactly what is reflected in both the current and prospective interconnection agreements, which contain the following identical provisions:

> Embarq agrees to provide White Pages database maintenance services to CLEC. CLEC will be charged a Service Order entry fee upon submission of Service Orders into Embarq's Service Order Entry (SOE) System, ***which will include compensation for such database maintenance services.*** Service Order entry fees apply when Service Orders containing directory records are entered into Embarq's SOE System initially, and when Service Orders are entered in order to process a requested change to directory records.[25]

Thus, under the current agreement, Embarq ***already provides*** database maintenance services to Comcast and the agreement explains that the $9.41 NRC that Comcast currently pays "include[s] compensation for such database maintenance services."

In the prospective agreement, the NRC will be dramatically increased (as noted, the per-listing NRC will be $9.41 after the new agreement is executed), and Embarq now plans to charge an additional $0.50 per listing per month – or $6 annually for each and every Comcast customer – to recover purported costs which it already recovers under the existing NRC. While we have no idea what percent of the $6.49 NRC that Comcast currently pays is for database maintenance as opposed to the other activities associated with the Directory Listing service

generously assume that a directory listing contains 1,000 bytes (each byte is essentially one letter or digit in a listing), the cost of storing a directory listing, essentially indefinitely, is about *one one-hundred-thousandth of a penny.* This is, for all intents and purposes, zero.

[25] Current ICA Section 70.3.5 and Section 71.3.5 of the negotiated draft agreement (emphasis added).

function (Embarq has refused to provide such information),[26] the considerable increase in fees cannot be justified by any applicable standard, as it would give Embarq the opportunity to recover its costs many times over.

Q. DOES EMBARQ ALSO RECEIVE LISTING FEES FROM DP/DA PROVIDERS?

A. Yes. FCC regulations set the rate that DP/DA providers pay LECs for DL information at \$0.04 per listing for base subscriber list information and \$0.06 per listing for updates.[27] As the FCC explained, the \$0.04 per record charge was set so as to allow ILECs, "to recover the cost of installing, maintaining, and programming the computers that store subscriber list information databases, and the costs of ensuring that those databases are up-to-date and accurate,"[28] as well as the "other costs, such as personnel costs, maintenance and administrative costs."[29] These are the same activities which Embarq has claimed would be recovered by its proposed recurring DLSM charge.[30] Allowing Embarq to assess a new charge on Comcast for the very same expenses recovered by the FCC-approved rate would allow it to recover its costs many times over. Such multiple recovery is fundamentally unfair and, therefore, Embarq's proposed recurring DLSM charge is not "just and reasonable."

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[26] *See* Embarq Response to Comcast DR-6.

[27] 47 C.F.R. § 64.2325(a).

[28] *SLI/DA Order* ¶ 78 (recounting ILECs' descriptions of their costs), ¶ 92 (accepting ILEC arguments).

[29] *Id.* ¶ 78.

[30] *See* Embarq Response to Comcast DR-7 and DR-23.

Q. GIVEN THAT COMCAST AND DP/DA PROVIDERS ARE ALREADY PAYING EMBARQ FOR DL-RELATED COSTS, HOW DOES EMBARQ JUSTIFY THE NEW CHARGE?

A. According to Embarq's responses to Comcast's discovery requests, the recurring DLSM charge is intended to recover the costs associated with performing the following activities:

> Embarq's directory listing operations manages and maintains the database of listings on an on-going basis. The continuing functions that Embarq performs that are associated with the directory listing monthly recurring charge are:
> - forward special directory distribution instructions to the publisher;
> - review listings on an ongoing basis according to information available to Embarq, including but not limited to comparing street name and city name to the directory being requested, and reviewing listing name, street address and city for obvious errors.
> - review proofs from the publisher containing the white page listing information for each directory and work with each CLEC to correct errors Embarq identifies during the reviews;
> - process invoices and pay R.H. Donnelley for the purchase of out-of-area directories that are requested by ILEC and CLEC end users;
> - develop and maintain the software that stores and maintains the Directory Listings.[31]

Q. WHAT STRIKES YOU ABOUT THESE ACTIVITIES THAT EMBARQ HAS IDENTIFIED AS THE BASIS FOR THE RECURRING DLSM CHARGE?

A. Several things. First, I am struck that these activities all appear to be associated with preparing the listings for publication in a directory. While I don't dispute

[31] *See* Embarq Response to Comcast DR-7.

that these may be activities that Embarq performs, the FCC made it very clear in the *SLI/DA Order* that LECs that publish directories are supposed to recover the cost of performing such activities from the $0.04/$0.06 per listing charge that directory publishers pay.[32]

Second, it is plainly inappropriate to shift the cost of performing several of the above-identified functions to Comcast (or any CLEC) under any circumstances. This is especially true when Embarq is already recovering the costs from the DP/DA providers. For example, the first identified function – "forward[ing] special directory distribution instructions to the publisher" – is, presumably, a "special" activity the cost of which, if any, should be allocated to the end-user that creates the "special" need. The same is true of the function in the fourth bullet. There is no conceivable reason why the cost of "process[ing] invoices and pay[ing] R.H. Donnelley for the purchase of out-of-area directories that are requested by ILEC and CLEC end users," should be born by ***Comcast's*** in-region customers through a wholesale charge.

Third, while I realize that Embarq characterizes these activities as "on-going," it is clear on the description's face that Embarq is not required to perform these activities on a monthly basis. Under well-established cost-recovery principles, it is inappropriate to impose a recurring charge for what is obviously a non-recurring activity.[33]

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[32] I provide quotes from the *SLI/DA Order* later in this testimony that describe the activities for which the LEC is compensated. Most, if not all, of those activities overlap with the activities identified by Embarq in support of its DLSM charge.

[33] For instance, the FCC has long recognized rule that "costs should be recovered in a manner that reflects the way they are incurred," noting specifically that "recurring costs must be recovered

Finally, Embarq's attempt to impose charges for these activities flies in the face of other contract provisions to which the parties have already agreed.

Q. PLEASE PROVIDE AN EXAMPLE OF HOW THE PROPOSED RECURRING DLSM CHARGE CONFLICTS WITH LANGUAGE TO WHICH THE PARTIES HAVE ALREADY AGREED.

A. An example is found in Section 71.3 of the Prospective Agreement. That Section provides as follows:

> Directory Listings General Requirements. CLEC acknowledges that many directory functions including but not limited to yellow page listings, enhanced white page listings, information pages, directory proofing, and directory distribution ***are not performed by Embarq but rather are performed by and are under the control of the directory publisher***.[34]

Nonetheless, Embarq wants to impose a separate charge for its own proofreading activities, despite the fact that the parties have already agreed that these are activities that Embarq will not be performing. Likewise, as noted, the agreement states that Embarq already collects fees for DL database maintenance activities.

Q. THE CURRENT CONTRACT AND THE PROPOSED CONTRACT ALLOW FOR "SHARING" OF THE DIRECTORY LISTING FEES. HAS EMBARQ EVER SHARED THOSE FEES WITH COMCAST?

A. No. Embarq has never shared any of those monies with Comcast nor, based on its responses to discovery, with any other CLEC that has uploaded DLs into

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through recurring charges, rather than through a nonrecurring charge." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499, ¶ 745 (1996) ("*Local Competition Order*").

[34] Prospective Agreement § 71.3; *see also* Current ICA § 70.3.

Embarq's database.[35] And even if Embarq did, the provision provides that the sharing obligation is "net" of administrative expenses, which Comcast has heretofore assumed would ***exclude*** most of the revenues received from the sale of listings to the DP/DA providers. (The FCC set the Section 222(e) rates, after all, at levels designed to compensate carriers for their costs, and Comcast has not argued that Embarq should not be permitted to recover its costs.) Also, the provision expressly excludes revenues received from "Embarq's directory publisher" (i.e., Donnelley) from the sharing from "any payment obligation," which will, presumably, exclude a significant portion of the revenues that Embarq receives. In any event, the few pennies that Embarq might be willing to "share" with Comcast will be dwarfed by the revenue that Embarq will receive from the sale of Comcast's listings to DP/DA providers.

VII. "FOREIGN LISTING" IS NOT AN ANALOGOUS SERVICE

Q. IS THE FOREIGN LISTING CHARGE A VALID PROXY FOR THE DLSM RATE?[36]

A. No. In fact, it is a completely apples and oranges comparison. ***End-users*** pay a Foreign Listing charge when they want their information published in a non-local directory. The interest that out-of-territory customers have in placing their listings in non-local directories bears little relation to the ***need*** that CLECs have to make sure that their customers' listings are published in the local telephone book.

[35] *See* Embarq Responses to Comcast RFA-1 and DR-19.

[36] *See* Response of Embarq at pages 4-5.

Congress recognized that nondiscriminatory access to directory listing was an imperative if telephony competition was to take root.

Moreover, Embarq's attempt to find an "analogous"[37] rate for its DLSM service demonstrates that the proposed DLSM rate is not a market-based rate, but instead just a proxy chosen by Embarq. In almost all cases, customers that order a foreign listing are already receiving a free listing in their home exchange, making the foreign listing an "extra." The DLSM charge at issue in this proceeding, on the other hand, is for the primary listing for which Comcast has already agreed to pay $9.41 to have entered into Embarq's database.

Q. WOULD THE DLSM RATES OF OTHER ILECS BE A BETTER PROXY FOR EMBARQ'S DLSM RATE?

A. First of all, as discussed elsewhere in this testimony, no other ILECs charge a "DLSM rate" for this activity. So there would be no other ILEC DLSM rate with which to make such a comparison. But even if there were other DLSM rates, it would be inappropriate to price Embarq's offering the same as some other carrier without a showing that the cost structures were substantially similar.

VIII. EMBARQ'S PROPOSED DLSM CHARGE IS DISCRIMINATORY AND ANTI-COMPETITIVE

Q. PLEASE DESCRIBE EMBARQ'S OBLIGATION TO PROVIDE DLs.

[37] It is not at all clear what Embarq means by "analogous" rate but it is clear that using the pricing for an unrelated retail service as a proxy for wholesale pricing has never been a standard in this industry.

A. Embarq is obliged under Section 251(b)(3) of the Act to provide Comcast with nondiscriminatory access to its directory listings. The FCC's rules implementing Section 251(b)(3) require all LECs to "permit competing providers to have access to [directory listing] services that: (a) does not discriminate between or among requesting carriers in rates, terms, and conditions of access; and (b) is equal to the access that the providing LEC gives itself."[38] The FCC explained that "any standard that would allow a LEC to provide access to any competitor that is inferior to that enjoyed by the LEC itself is incongruent with Congress' objective of establishing competition in all telecommunications markets."[39] Embarq does not impose its proposed recurring DLSM charge on its own customers or on other CLECs, and as such, the charge is discriminatory on its face.

Q. DOES EMBARQ SATISFY THE NON-DISCRIMINATION REQUIREMENT BY SIMPLY ALLOWING COMCAST TO PLACE DLs IN ITS DATABASE, AS IT HAS CLAIMED?

A. No. Obviously, if Embarq were trying to argue that it *was* entitled to simply exclude Comcast listings altogether that would be a completely untenable position. But Embarq does not meet its obligation to provide nondiscriminatory access to DLs if it charges Comcast for the identical service that it provides to itself or other LECs at no additional charge. Indeed, charging different entities different prices for the same service – absent a proven difference in cost of providing the service, which does not exist here – is the very definition of

[38] 47 C.F.R. § 51. 217(a)(2)(i).
[39] *SLI/DA Order* ¶ 128.

discrimination. As the FCC has explained, the obligation under Section 251(b)(3) to provide nondiscriminatory access to DLs extends to the "rates, terms and conditions" of that access.[40] Thus, the Commission should reject any claim by Embarq that the only thing Section 251(b)(3) requires is for Embarq to provide Comcast access to its DL database, regardless of price.

Q. DO YOU AGREE WITH EMBARQ'S CLAIM THAT IT IS NOT DISCRIMINATING AGAINST COMCAST BECAUSE COMCAST IS NOT "SIMILARLY SITUATED"[41] TO THOSE CARRIERS THAT ARE NOT ASSESSED A RECURRING DLSM CHARGE?

A. No. Embarq argues that the differences between, for example, a UNE-based competitor and a full facilities-based competitor justifies the conclusion that those two types of entities are not "similarly situated" for purposes of access to DLs.[42] This contention is off the mark for at least two reasons. First, the FCC has explained that, "the term 'nondiscriminatory,' ***as used throughout section 251***, applies to the terms and conditions an incumbent LEC imposes on third parties ***as well as on itself***."[43] Simply put, because Embarq does not impose the charge on itself (*i.e.,* on its own customers), it may not impose it on Comcast.[44] Second,

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[40] 47 C.F.R. § 51.217(a)(2)(i).

[41] *See* Embarq Response at 3.

[42] *Id.* at 3-4.

[43] *Local Competition Order* ¶ 218 (emphasis added).

[44] This 12-year-old rule applies with equal vigor today. *See McLeodUSA Telecommunications Services. v. Iowa Utilities Bd.*, No. 4:07-cv-214, 2008 WL 1953515, *22 (May 6, 2008 S.D. Iowa) (reversing Iowa Utilities Board decision for failing to properly apply the nondiscrimination provisions of Section 251 and to determine, "whether Qwest's differential treatment of itself and McLeod was the result of cost differences").

Embarq has not justified the differential pricing. The FCC has explained the discrimination standard established by Section 251 as follows:

> 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 ... higher rates for interconnection than it charges other carriers, unless the different rates could be justified by differences in the costs incurred by the incumbent LEC.[45]

Thus, Embarq may not treat facility-based carriers like Comcast differently from CLECs that utilize UNE-L or resale-based business models absent a showing that the ***cost*** of serving Comcast differs. The burden is on Embarq to prove that there is a cost difference that justifies the discriminatory pricing and Embarq has not even attempted to satisfy that burden.[46] Indeed, Embarq has admitted that, "[t]here is no difference in the way Embarq stores and maintains its own and CLECs' directory listings."[47]

Q. PLEASE EXPLAIN WHY EMBARQ'S PROPOSED RECURRING DLSM CHARGE IS ANTI-COMPETITIVE AND CONTRARY TO THE PUBLIC INTEREST.

A. Because Embarq's proposed DLSM charge applies only to intermodal, facilities-based competitors, it is both discriminatory ***and*** anticompetitive. Embarq's charge would effectively penalize those carriers that have built their own last-mile facilities, which represent the most promising form of competition to the

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[45] *Local Competition Order* ¶ 218.

[46] *See SLI/DA Order* ¶¶ 132-34. Not only has Embarq failed to produce the evidence required to overcome Comcast's discrimination claim, the evidence that ***is*** in the record suggests that there is no cost difference in serving Comcast as opposed to CLECs utilizing other business models.

[47] Embarq Response to Comcast DR-8.

incumbent wireline LECs, as the FCC has recognized. This is another policy factor for the Commission to consider in evaluating the reasonableness of Embarq's proposed recurring DLSM charge.

Q. WHAT WOULD BE THE IMPACT ON COMCAST IF EMBARQ'S CHARGE WAS APPROVED IN WASHINGTON?

A. Approving Embarq's charge would impede the development of facilities-based competition. ILECs still hold a predominant market share among landline phone subscribers. This means that most of Comcast's new customers in Embarq's territory are going to come from Embarq, rather than, say, another CLEC. Approving Embarq's unreasonable $0.50 per-month charge would simply and unnecessarily add to Comcast's cost of doing business. It would be a residual monopolistic "tax" paid by the new competitor to the established incumbent with no concomitant benefit to the public welfare. This would lower the funds available to Comcast to invest in system upgrades, marketing plans, etc. Consumers would be harmed, for no good reason, while Embarq's shareholders would be unjustly enriched, again for no good reason.

IX. EMBARQ'S PROPOSED RECURRING DLSM CHARGE IS UNSUPPORTED AND FUNDAMENTALLY UNFAIR

Q. WHY DO YOU CONTEND THAT EMBARQ'S PROPOSED RECURRING DLSM CHARGE IS UNSUPPORTED AND FUNDAMENTALLY UNFAIR?

A. There are two primary reasons. First, as noted above, Embarq already collects fees that are designed to recover costs for activities related to maintaining and storing DLs in its database, and therefore, another charge for the same purpose is inappropriate. Second, Embarq's proposed charge is arbitrary.

Q. WHY IS EMBARQ'S PROPOSED RECURRING DLSM CHARGE ARBITRARY?

A. First, Embarq has provided no support for its proposed recurring DLSM charge. Indeed, it has even proposed different rates in different states (e.g., $3.00 in Minnesota and Indiana, $2.50 in Pennsylvania, $2.00 in Texas, and $0.50 here and in South Carolina and New Jersey), despite the fact that Embarq's DL database is not state-specific. Second, no other ILEC that either Embarq or I am aware of imposes a similar charge.[48] Though not all ILEC rate structures are identical, it is notable that Embarq is the only ILEC attempting to impose a recurring charge on facilities-based competitors. It is simply not credible to suggest that profit-maximizing ILECs such as Verizon, Qwest and AT&T have simply overlooked an opportunity to assess a recurring charge for this function, as Embarq has suggested.[49] It is much more likely that no other ILECs charge for DLSM on a recurring basis because the costs are not only minor, but are recovered elsewhere (e.g., in the NRC Embarq charges Comcast and the fee that Embarq collects from directory publishers for Comcast's directory listings), many times over.

[48] *See* Embarq Response to Comcast DR-17 and Note 8 *supra*.

[49] "Embarq would suggest that other ILECs simply have not yet awakened to the realization that their existing interconnection agreements do not adequately address this issue." Reply Testimony of Dr. Brian K. Staihr on behalf of Embarq, *Petition of MCIMetro Access Transmission Services LLC*, Cause No.43373-INT-01, at 10 (March 12, 2008).

X. EMBARQ'S PROPOSED "MARKET BASED" RATE IS PARTICULARLY OBJECTIONABLE

Q. WHAT IS THE BASIS FOR EMBARQ'S "MARKET-BASED" RATE PROPOSAL?

A. Embarq claims that the competitive DP/DA market justifies its proposed recurring DLSM charge – which it calls a "market" or "commercial wholesale" rate.[50] This argument is completely illogical. Directory publishers compete with one another to serve end-users, but there is no analogous competitive market for directory listings. Indeed, the FCC has recognized that the directory listing function is one "of the strongest aspects of LEC incumbency,"[51] and that "there are no close substitutes to subscriber list information" possessed by the ILEC.[52] The flat bar that Section 251(b)(3) places on one carrier's impairing another carrier's access to DL reflects this business reality.

Q. WHAT ARE THE OBSTACLES THAT PREVENT COMCAST FROM "BYPASSING" EMBARQ AND PROVIDING DL INFORMATION TO DIRECTORY PUBLISHERS DIRECTLY?

A. Embarq claims that its main directory publisher (R.H. Donnelly, a/k/a Dex) would be happy to obtain DL information directly from CLECs, rather than from Embarq, and that some unspecified CLECs in some unspecified locations

[50] *See* Embarq Response at pages 4-5. *See* also Embarq's Response to Comcast DR-10.
[51] *SLI/DA Order* ¶ 6.
[52] *Id.* ¶ 97, n.233.

currently provide this information directly rather than through the ILEC.[53] Comcast has attempted to verify this claim and has received very different information. Comcast was told that a few CLECs have approached Donnelly over the years to inquire about establishing a direct relationship, but that ***none*** ever established a direct business relationship due to reasons of economics and complexity. For example, directory publishers require ***daily*** updates of business records, and a satisfactory means of using multiple daily feeds from multiple data sources (the ILEC and CLECs) for the same market has not been established. Donnelly also expressed concerns that if it had to work with multiple providers in a given service territory, some listings would be overlooked, duplicate listings might creep into the database, and the process would not function smoothly. Naturally all this additional effort would increase the cost of the directories without benefiting anyone.

With ILECs maintaining the one, complete DL database for each service territory, DP/DA providers know that they only have to contract with the ILEC in each service territory to obtain all the information they need to assemble complete and up-to-date directories. In the "market" that Embarq contends exists, however, DP/DA providers would be required to contract with multiple LECs to assemble a complete directory. This exponential increase in the number of contracting relationships that would be required to prepare a complete directory would lead to

[53] *See* Direct Testimony of Dr. Brian Staihr on behalf of Embarq, *Petition of MCIMetro Access Transmission Services LLC*, Cause No.43373-INT-01, at 5 (March 12, 2008). *See* also Embarq's Responses to Comcast DR-15 and DR-16.

a reduction in consumer welfare by increasing costs and decreasing efficiency and accuracy.

Q. IS DONNELLEY WILLING TO OFFER COMCAST THE SAME BUSINESS RELATIONSHIP THAT IT CURRENTLY HAS WITH EMBARQ?

A. No. Donnelley could not verify that it would be able to offer Comcast the same "deal" as ILECs like Embarq currently enjoy. Further Comcast would have no way to verify the potential differences between the agreements with Embarq and other LECs as these agreements are not public. So even if Comcast could conceivably "bypass" Embarq's DL listing service, there is no evidence that it could obtain the same terms as Embarq, which would clearly undermine the non-discriminatory obligations imposed on Embarq by Section 251(b)(3) of the Act.

Q. WHAT SHOULD THE COMMISSION DO WITH THE CONFLICT BETWEEN WHAT EMBARQ HAS HEARD FROM DONNELLEY AND WHAT COMCAST HAS HEARD?

A. In my view, the conflicting evidence in the record means that the Commission lacks a sufficient foundation to consider ordering the dramatic change in accepted industry procedures that Embarq is proposing. If the Commission is genuinely interested in addressing this issue in general, an arbitration proceeding is not the appropriate venue.[54]

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[54] As explained elsewhere herein, federal law constrains the Commission's authority to institute changes in ILECs' DL obligations. But that is a separate issue from the evidentiary basis for such a change.

Q. IS THERE OTHER EVIDENCE THAT EMBARQ'S "MARKET-BASED" RATE PROPOSAL IS AN UNWORKABLE ATTEMPT TO EXPLOIT ITS MARKET POWER?

A. Yes. Consider the following analysis: We believe that Embarq profits from the current arrangement, in which Comcast pays Embarq a $9.41 NRC to place each subscriber's DL information into Embarq's database, and for which DP/DA providers pay Embarq $0.04 for each initial listing and $0.06 for updated listings, including each Comcast listing. Indeed, because of network effects, Embarq's DL database is more valuable because it contains a complete listing of all numbers in its service territory, including CLEC listings. (A network effect is an economic characteristic that causes the value of a service to depend on the number of other customers who use the service.)

If Embarq's proposal to require CLECs to avail themselves of the "free market" for DLSM services succeeded, then (1) Embarq would lose the revenue associated with receiving CLEC DL information into their database -- the profitable NRC paid by the CLEC, and (2) the overall value of Embarq's database would decline because it would contain fewer listings, meaning smaller payments from directory publishers. If CLECs could easily contract and establish connectivity with DP/DA providers directly – which would allow them to avoid paying Embarq the $9.41 NRC and the proposed $0.50 per month DLSM charge, ***and*** receive direct payments from the DP/DA providers for each subscriber listing, they clearly would. But the process is untested and is not simple for the logistical reasons explained above. Indeed, even Verizon's CLEC affiliate has stated that it does not have the ability to maintain its own DL database for DP/DA providers.[55] Thus, the only economically rational explanation for Embarq's proposed recurring DLSM charge is that it is confident that it can impose the charge without losing other revenue streams because CLECs have no other viable options. The only obstacle that stands in the way of Embarq's collecting this monopoly rent is this Commission.

Q. IF THE COMMISSION DISAGREES WITH YOUR PRIMARY RECOMMENDATION TO REJECT EMBARQ'S PROPOSED "MARKET-BASED" DLSM CHARGE, BUT IS INCLINED TO ENTERTAIN A SEPARATE RECURRING DLSM CHARGE, HOW SHOULD A RATE BE ESTABLISHED?

A. I reiterate that any DLSM charge would be discriminatory and should be rejected. However, if the Commission is, nonetheless, inclined to consider permitting such a charge, whatever rate it approves should reflect the cost Embarq incurs in providing the service that is not recovered from other sources. Moreover, whatever that rate might be, it should apply to all carriers, including Embarq's customers and other CLECs.

Q. WHAT IS THE BASIS FOR YOUR ALTERNATIVE CONTENTION THAT, IF EMBARQ IS PERMITTED TO IMPOSE A RECURRING DLSM CHARGE, IT MUST REFLECT COST INCURRED BY EMBARQ THAT IS NOT RECOVERED ELSEWHERE?

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[55] *See,* Rebuttal Testimony of Mr. Don Price on Behalf of Verizon, filed on August 10, 2007, MPUC Docket No. P-430, 5321/M-07-611, at page 21.

A. First, and perhaps most obvious, Section 201(b) of the Act requires that rates for all services under the FCC's jurisdiction must be "just and reasonable."[56] The FCC has long equated this obligation with cost-based rates.[57] I should be clear that the "cost-based" requirement under Section 201(b) does not necessarily mean forward-looking economic cost (or Total Element Long Run Incremental Cost ("TELRIC")), but could also mean based on the actual incremental cost Embarq incurs providing the service. In fact, this is another error in Embarq's apparent theory of this case. Embarq has repeatedly asserted that it is not required to provide access to DL services as an unbundled network element ('UNE') with the accompanying cost standard for UNEs.[58] But Comcast is not saying that DL services are UNEs, subject to pricing at TELRIC rates. A service can be *cost*-based without being *TELRIC*-based. I am not a lawyer but I can read the words of Section 251 of the Act and the FCC's rules. UNEs are addressed in Section 251(c)(3). The obligation to provide the directory listing function is in Section 251(b)(3). Section 251(b) contains duties that all LECs, both ILECs and CLECs, owe to each other. But the fact that the specific TELRIC standard does not apply, does not mean that there is *no* standard for what constitutes a reasonable, cost-based rate. To the contrary, non-TELRIC, cost-based rate setting under Section

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[56] *See* 47 U.S.C. § 201(b); *see also First Directory Listing Order* ¶ 35 ("failure to provide directory assistance at nondiscriminatory and reasonable rates to DA providers within the protection of section 251(b)(3) may also constitute an unjust charge under section 201(b)").

[57] *See* Second Order on Reconsideration and Memorandum Opinion and Order, *In the matter of Access Charge Reform*, 12 F.C.C. Rcd. 16606, 16619-20 ¶ 44 (1997) (noting that the D.C. Circuit found that "just and reasonable rates required by Sections 201 and 202 of the Communications Act must ordinarily be cost-based, absent a clear explanation of the Commission's reasons for a departure from cost-based ratemaking") (citing *Competitive Telecom. Ass'n. v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)).

[58] *See* Embarq Response at 5 and Embarq Response to Comcast DR-10.

201 has a long history.[59] Second, as noted above, Embarq is already compensated for its DLSM expenses by third-party directory publishers who pay Embarq $0.04/$0.06 per listing. It should go without saying that allowing Embarq to impose a new charge on its competitor for activities that Embarq recovers through other charges would not be "just" or "reasonable" because it would literally amount to taking money out of Comcast's pocket and putting it in Embarq's pocket for no reason whatsoever to the detriment of the public interest and consumer welfare.

Q. WHAT IS THE BASIS FOR THE PER LISTING CHARGE THAT DIRECTORY PUBLISHERS PAY?

A. That charge, too, is based on cost, and was set in order to compensate ILECs for the cost of maintaining DL databases – *i.e.*, the very charge at issue in this case. Directory publishers' right to access DL databases for the purpose of assembling their directories derives from Section 222(e) of the Act, and is helpful in evaluating Embarq's obligations in this area.

Section 222(e) requires all LECs to "provide subscriber list information ... 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."[60] In determining a "reasonable" rate for third-party access to LEC DL databases, the FCC expressly "reject[ed] the idea that incumbent LECs be allowed to charge either whatever they want or value-based

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[59] *See* notes 61-62 *supra*.
[60] 47 U.S.C. § 222(e).

prices for subscriber list information."[61] Recognizing that, "Congress enacted section 222(e) to correct a perceived failure in the market for subscriber list information,"[62] the FCC concluded the following:

> [S]ubscriber list information rates should allow LECs to recover their incremental costs of providing subscriber list information to directory publishers plus a reasonable allocation of common costs and overheads. Basing rates on costs should promote the development of a competitive directory publishing market, while fairly compensating carriers for the subscriber list information they provide directory publishers.[63]

Pursuant to this cost-based standard, the FCC established the presumptively reasonable rates of $0.04 per listing for base file subscriber list information and $0.06 per listing for providing updated subscriber list information.[64] Embarq has never challenged the sufficiency of this charge.[65]

In setting a rate based on the estimated cost of providing the service, the FCC expressly rejected ILEC arguments that they be permitted to set rates as they pleased. The FCC explained that, "the value of a product or service [in a competitive market] equals the price at which it can be sold. As prices converge toward costs … value also converges toward cost."[66] The FCC recognized that Congress enacted Section 222(e) as an antidote to the lack of a functioning market for the raw DL information that publishers need to compile their directories.[67] Carriers cannot, therefore, claim injury from the FCC's setting rates based on

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[61] *SLI/DA Order* ¶ 86.

[62] *Id.*

[63] *Id.* ¶ 92.

[64] *Id.* ¶¶ 93-104.

[65] *See* Embarq Response to Comcast DR-19(ii).

[66] *SLI/DA Order* ¶ 89, n. 207.

[67] *Id.* ¶ 89.

cost. The same is true here.

Q. WHAT SUGGESTS THAT EMBARQ'S "MARKET-BASED" RATE PROPOSAL IS MISGUIDED?

A. Embarq claims that, in the purported absence of a specific pricing standard promulgated by the FCC for its DLSM services, it is appropriate to charge a "market-based" rate or a rate that reflects "...the value Comcast assigns to having Embarq perform those services for Comcast rather than performing them itself..."[68] This claim is not only false, as demonstrated above,[69] it is also identical to one that the FCC has already expressly rejected:

> We reject the arguments that the 1996 Act requires that subscriber list information rates be based on either an incremental cost or a value-based methodology. As an initial matter, the statutory language does not state that subscriber list information rates must be cost-based, value-based, or even set in accordance with any particular methodology. Because the statutory language on its face does not require any particular methodology for determining reasonableness, we look to the broader statutory scheme, its legislative history, and the underlying policy objectives stated by Congress to determine Congressional intent.[70]

Thus, the FCC has already rejected both a value-based methodology for setting rates for subscriber list information, selecting, instead, one that took into account Congress' goals and intent. Embarq's proposals here should be rejected for the same reasons.

Q. HAS EMBARQ PROVIDED ANY COST OR OTHER SUPPORT FOR ITS PROPOSED RECURRING DLSM CHARGE?

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[68] *See* Embarq Response to Comcast Petition ¶ 12.

[69] As explained above, Sections 251(b)(3) and 201(b) place clear bounds on the rates Embarq can charge.

[70] *SLI/DA Order* ¶ 83.

A. No. Embarq has not produced any cost support for the recurring DLSM charge or for its claim that the recurring DLSM charge is an implicit component in UNE-L rates.[71] And that is not surprising. Embarq has admitted that its proposed recurring DLSM charge bears no relationship to cost, and QSI has reviewed literally hundreds of cost studies from numerous ILECs across the country and we have never seen directory listing costs included in or recovered by the UNE loop rate.[72]

Likewise, Embarq has not provided any evidence of a functioning "market" for DL services. Given that Embarq's case is predicated on its so-called right to charge a "market-based" rate, Embarq's failure to present evidence that such a market actually exists is a failure on Embarq's part to carry its burden of proof and persuasion in this proceeding.

XI. OTHER STATE COMMISSION RULINGS ON EMBARQ'S PROPOSED RECURRING DIRECTORY LISTING CHARGE

Q. HAVE OTHER STATE COMMISSION'S RULED ON EMBARQ'S PROPOSED DLSM CHARGE?

A. Yes. Both the Minnesota Public Utilities Commission ("MPUC") and the Indiana Utility Regulatory Commission ("IURC") have issued rulings in the last couple of months. The results are a mixed bag, with the MPUC rejecting Embarq's fee and the IURC accepting (without any record evidence) Embarq's fee in Indiana.

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[71] *See,* e.g., Embarq Response to Comcast DR-10.

[72] I researched the standard negotiation proposals of both SBC (the 13 state ICA pricing appendices in the 10-state former Ameritech and SWBT regions) and Qwest (the Negotiations Template Interconnection Agreements pricing appendices in Qwest's entire 14 state region). I also perused several DL tariffs of Verizon.

Obviously, I agree with the MPUC's course of action and commend it to the Commission's attention. The MPUC basically found that Embarq was not free to set rates for DLSM as it saw fit, failed to justify any rate other than the status quo of $0, and in light of the revenues it already received for providing DL information to third-party DP/DA providers, it was not just and reasonable to impose a discriminatory charge on facilities-based CLECs. I believe that this Commission should make the same findings as the MPUC.

Q. BASED ON YOUR REVIEW OF THE INDIANA RECORD, WHY DO YOU THINK THE IURC RULED THE WAY IT DID?

A. I cannot speculate on the thought processes of the IURC. The case presented in Indiana, however, was very different from what Comcast and Embarq are presenting here. Based on my review of the record from the Indiana case, it appears that the IURC accepted Embarq's contention that there is a functioning competitive market for Embarq's DLSM services. Verizon did not attempt to rebut Embarq's contention that such a market exists, as I have done here. More to the point, Embarq has not presented any evidence to support its contention that such a market exists. And since that contention is fundamental to Embarq's position in this case, and since Embarq bears the burden of proof, its proposal to assess the proposed new charge must fail.

I also disagree with the IURC's finding that ***any*** access to Embarq's DL databases, regardless of price, satisfied the non-discrimination obligation of Section 251(b)(3). As I have explained above, that position is not consistent with 47 C.F.R. § 51.217(a)(2), the FCC's regulation implementing Section 251(b)(3).

My review of the record from the Verizon case suggests that Verizon may not have fully brought this controlling provision of federal law to the IURC's attention, so it is not surprising that the IURC did not address its relevance in its order.[73] Furthermore, the proposed rate is still subject to the long-standing "just and reasonable" standard, even if it is not subject to TELRIC. Finally, from what I can tell, it does not appear to me that Verizon even attempted to rebut Embarq's contention that Verizon is "differently" situated from those LECs that Embarq intends to exempt from the DLSM charge obligation.

Q. IS THERE A NEW PROCEEDING IN INDIANA PENDING TODAY BETWEEN COMCAST AND EMBARQ ON THIS SAME ISSUE?

A. Yes. That case has been docketed as Cause No. 43462.

XII. CONCLUSION AND RECOMMENDATION

Q. PLEASE SUMMARIZE YOUR TESTIMONY AND RECOMMENDATIONS

A. I recommend that Embarq's proposed $0.50 monthly charge per directory listing be rejected. Embarq's proposed charge is discriminatory, unjust and unreasonable, and anti-competitive. As a result, Comcast's proposed ICA language should be adopted and Embarq's language rejected.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes.

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[73] Indeed, in *Petition of MCIMetro Access Transmission Services LLC*, Cause No.43373-INT-01, at 10 (March 12, 2008), the Commission summarily dismissed Verizon's discrimination claim by citing only Section 251(b)(3) of the Act and concluding that "it is significant that the FCC determined not to subject the directory listing obligation to a TELRIC pricing standard." *Id.* at 19.