

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

REBUTTAL TESTIMONY OF

ALAN L. LUBECK

ON BEHALF OF

UNITED TELEPHONE COMPANY OF THE NORTHWEST, d/b/a EMBARQ

Page 1 of 26

1 **I. INTRODUCTION**

2 **Q Please state your name, title, and business address.**

3 **A.** My name is Alan L. Lubeck. I am employed by Embarq (Embarq Management
4 Company) as Regulatory Manager in the Department of Law and External Affairs.
5 My business address is 5454 W. 110th Street, Overland Park, Kansas 66211.

6

7 **Q.** Are you the same Alan Lubeck who filed Direct Testimony in this proceeding
8 on July 2, 2008?

9 **A.** Yes.

10

11 **Q.** What is the purpose of your Rebuttal Testimony?

12 **A.** The purpose of my Rebuttal Testimony is to respond on behalf of United Telephone
13 Company of the Northwest d/b/a Embarq ("Embarq") to the Direct Testimony of
14 Comcast¹ witness Mr. Timothy J. Gates, which was also filed on July 2, 2008.

15

16 **Q.** Could you briefly restate the difference of opinion regarding the positions on
17 directory listing?

18 **A.** Yes. As described in my Direct Testimony, when a CLEC such as Comcast buys a
19 resale line or a UNE loop to serve an end user customer, Embarq includes a
20 directory listing in the service provided to the CLEC. But when a CLEC such as

¹ Comcast Phone of Washington, LLC (hereinafter "Comcast") filed a Petition for Arbitration on April 28, 2008.

1 Comcast does not buy a resale line or UNE-Loop from Embarq, but still requests
2 that Embarq provide a directory listing for the CLEC's end users on a stand-alone
3 basis, Embarq has proposed a stand-alone Directory Listing Storage and
4 Maintenance (DLSM) service for this directory listing request. The service should
5 be provided at market-based rates, and the monthly recurring charge (MRC) of \$.50
6 is appropriate for this service. Comcast has proposed that it should always be
7 entitled to this DLSM service for free, regardless of whether or not Comcast
8 purchases a UNE Loop or Resold service from Embarq.

9

10 **Q. Can you please summarize your Rebuttal Testimony?**²

11 **A.** My Rebuttal Testimony demonstrates that Embarq is not required to provide the
12 DLSM service to Comcast, but Embarq offers to provide the service at a market-
13 based price. This DLSM service, including its market-based price, is the same
14 service at the same price that Embarq already charges to other wholesale customers
15 whose end users order a Directory Listing (DL) through Embarq's retail service
16 centers. The MRC for the DLSM service is based on a reasonably analogous
17 service, the foreign listing service, that is available in Washington under tariff at a
18 rate of \$.50 per month. None of the arguments offered by Mr. Gates establishes an
19 Embarq obligation to provide the DLSM service at all, much less an obligation to
20 provide the DLSM service without a corresponding MRC. Embarq's offer of the

² Throughout this testimony any references to legal documents such as statutes, rulings, orders, etc. are a Regulatory Manager's reading of the document specifically with regard to the economic and pricing issues or findings contained in the document. They are not intended to be put forth as legal opinions.

1 foreign listing service, which is already available to retail and wholesale customers,
2 is an appropriate analogous service for the DLSSM service and should be adopted by
3 the Commission.

4
5 **Q. Why are the recommendations reached by Mr. Gates wrong?**

6 **A.** Mr. Gates confuses Comcast's desire to have Embarq provide a clearinghouse
7 service for Comcast with the FCC's rules for providing the service. Mr. Gates also
8 makes various claims about discrimination that are not supported by the facts, and
9 attempts to reinstitute cost-based pricing where FCC rules do not require it. I
10 discuss each of these claims below.

11

12 **II. SUMMARY OF NEGOTIATIONS AND POSITIONS OF THE**
13 **PARTIES**

14
15 **Q. Does Mr. Gates accurately portray the negotiations between the parties?**

16 **A.** No. Mr. Gates makes several unsupported claims and misstatements regarding the
17 negotiations between the parties.³ Mr. Gates' many assertions about the
18 negotiations and Embarq's supposed changes are rebutted by his own testimony just
19 on a page later. Neither Mr. Gates nor I were directly involved the negotiations, but
20 it is apparent that the discussions between the parties was more encompassing than
21 suggested in these characterizations because Mr. Gates accurately portrays the

³ Gates Direct, pp. 4-5.

1 single issue in this proceeding when he states that “the parties have identified the
2 disputed issue as follows:

3 Where Comcast is not purchasing UNE loops or resold services
4 from Embarq, should Embarq be permitted to charge Comcast a
5 monthly charge for “maintenance and storage” of Comcast’s
6 customers’ basic directory listing information?”⁴

7 As discussed in my Direct Testimony, Embarq uses the directory listing (DL)
8 database to provide subscriber listing information to both directory publishers (DP)
9 and directory assistance (DA) providers. FCC rules specifically do not require
10 Embarq to maintain, store or sell Comcast’s subscriber listing information to third
11 party DPs or DA providers,⁵ nor to share revenue from any sales with Comcast, but
12 Embarq is willing to do both for Comcast in return for Embarq’s proposed MRC.
13 In addition, the issue here has absolutely nothing to do with the rates charged by
14 Embarq to DPs or DA providers. Mr. Gates’ attempts to recreate the negotiation
15 discussions are not at all helpful to the issue at hand and should be disregarded.
16 Comcast’s decision to arbitrate would not have changed regardless of the
17 information provided by Embarq. This is obvious because the parties are still
18 pursuing arbitration here even after Comcast has had the benefit of Embarq
19 responses to multiple discovery requests and three different State arbitration
20 hearings on this directory listing issue to further identify the positions of *each* party.

21

⁴ Gates Direct, p. 6.

⁵ FCC’s SLI/DA Order, paragraph 54.

1 **III. EMBARQ IS NOT REQUIRED TO BE A CLEARINGHOUSE FOR**
2 **DIRECTORY LISTINGS**

3
4 **Q. What rationale does Comcast use to claim that Embarq is required to provide**
5 **DLSM service on Comcast's behalf?**

6 **A. Mr. Gates relies on section 251(b)(3) to claim that Embarq discriminates against**
7 Comcast when Embarq offers the DLSM service. Based on this supposed
8 discrimination, Mr. Gates would require that Embarq a) make sure Comcast's
9 listings are accurate,⁶ b) act as a clearinghouse to sell Comcast subscriber list
10 information whenever Embarq sells its own⁷, and c) provide Comcast with all the
11 DLSM service's advantages without any charge to Comcast.

12
13 **Q. What are the Directory Listing obligations for a Local Exchange Carrier?**

14 **A. As noted in my Direct Testimony on pages 10-12, Embarq agrees that Section**
15 251(b)(3) obligates *each* Local Exchange Carrier (including Comcast) to provide
16 nondiscriminatory access to telephone numbers, operator services, directory
17 assistance and directory listing. And Section 222(e) states that when directory
18 listings are requested by a directory publisher, each LEC is required to provide non-
19 discriminatory access to subscriber list information that is obtained when providing
20 service to retail customers.

21

⁶ Gates Direct, p. 19.

⁷ Gates Direct p. 10.

Page 6 of 26

1 **Q. So is Comcast required to provide their DLs to requesting carriers and**
2 **directory publishers?**

3 **A.** Yes. Section 222(e) of the Act requires *every* LEC to provide its subscriber list
4 information to other LECs and directory publishers that request them⁸. Therefore,
5 if the listings of its end users are requested by a directory publisher, Comcast is
6 already required to provide its subscriber list information directly to that publisher.
7 Merely because no publishers have requested this information directly from
8 Comcast does not change Comcast's obligation.

9

10 **Q. Does Section 251(b)(3) require Embarq to provide this service on behalf of**
11 **Comcast, as Mr. Gates claims?**

12 **A.** No. As discussed in IV below, Comcast attempts to use a discrimination claim
13 under Section 251(b)(3) to attempt to shift Comcast's obligations under Section
14 222(e) to Embarq. Embarq agrees to provide this DLSSM service on behalf of
15 Comcast, but shouldn't be obligated to provide a valuable, non-required service for
16 free or at cost-based rates.

17

18 **Q. Why else does Mr. Gates claim that Embarq should provide the DLSSM service**

⁸ *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*; Third Report and Order in CC Docket No. 96-115; Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273; FCC 99-227, Released September 9, 1999, ¶ 54 ("FCC's SLI/DA Order").

1 **on behalf of Comcast?**

2 **A.** Mr. Gates claims that it is standard industry practice for ILECs to perform this
3 service.⁹ But Embarq submits that “standard industry practices” in our industry are
4 fluid and evolving for a number of reasons, including regulatory changes, new
5 market entrants and shifting customer demands. Before the advent of cable
6 telephony, facilities-based CLECs who only sought to interconnect without
7 purchasing any UNEs or resale services did not comprise a very significant portion
8 of the market. More recently, the cable companies have had tremendous success in
9 attracting large numbers of subscribers. Comcast now has more than five million
10 local residential telephone customers¹⁰ and purports to be the fourth largest
11 residential phone service provider in the United States,¹¹ making Comcast a larger
12 provider of residential telephone service than Embarq. With these industry changes
13 it has become apparent to Embarq that the interconnection agreements do not
14 provide compensation for some services provided by Embarq, such as DSLM
15 service, in situations where the facilities-based CLECs merely interconnect without
16 purchasing UNEs or resale services. Consequently, Embarq has developed its
17 stand-alone price for Directory Listings to obtain compensation for a service that
18 Embarq is increasingly being asked to provide on a stand-alone basis.

19

⁹ Gates Direct, p. 12.

¹⁰ Comcast 1st quarter, 2008 earnings release, which can be found at

www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1138015&highlight=

¹¹ Comcast press release dated 1/8/08 attached to my Direct Testimony as Attachment A. The three largest residential telephone service providers are widely reported to be AT&T, Verizon and Qwest.

1 Furthermore, Mr. Gates' "rationale" just isn't logical. If followed, Comcast would
2 not have been entered the telephone market as a competitor, because providing
3 retail telephone service wasn't the standard industry practice for cable companies.
4 Mr. Gates' rationale would also prevent Embarq or any other ILEC from adjusting
5 any practice, procedure, or position going forward because it would constitute a
6 shift away from "standard industry practice." For example, no ILEC would worry
7 about reimbursement from CLECs or other ILECs for transit charges associated
8 with indirect traffic, since many ILECs have historically not charged other LECs for
9 such transit services. But assessing transit charges is now done in many regions
10 where such charges were previously not an issue. The introduction of new transit
11 charges has not been disallowed merely because those charges were not previously
12 assessed.

13

14 **Q. Do you agree with the other reasons Mr. Gates uses to claim that Embarq**
15 **should be the clearinghouse?**

16 **A.** No. Mr. Gates claims having Comcast deal directly with publishers would
17 "increase the cost of the directories,"¹² and that the industry and the public benefit
18 from "ILECs play[ing] this central repository role."¹³ Since Mr. Gates didn't
19 identify how Comcast's costs or the industry's costs would increase or who would
20 pay the increased costs, I am not sure how the public is impacted. Printed

¹² Gates Direct, p. 29.

¹³ Gates Direct, p. 12.

1 directories are free to the end user, so the public has no change in cost. If Mr. Gates
2 means that Comcast's costs would increase, the only plausible reason for the
3 increase would be Comcast is not prepared to fulfill its obligations as a LEC to
4 provide listings to requesting directory publishers.¹⁴

5
6 **Q. Does Embarq's approach to the DLSM service have analogies among standard**
7 **business practices?**

8 **A.** Absolutely. For example, sometimes travelers stay at a hotel chain where guests
9 who reserve and pay for a room are offered a beer or glass of wine at the hotel's bar
10 during happy hour at no additional charge. But if someone simply walked into the
11 hotel off the street, without reserving and paying for a room, and asked for a glass
12 of wine at happy hour, the hotel would charge that customer for the drink. It is the
13 same situation here. When CLECs are buying other services from Embarq, they are
14 not assessed a separate charge for access to directory listing; when CLECs are
15 buying nothing from Embarq, as is the case with Comcast, they are charged a stand-
16 alone fee for directory listing.

17

18 **Q. Is Embarq willing to enter into a commercial business arrangement with**
19 **Comcast for the stand-alone DLSM service?**

20 **A.** Yes, Embarq is willing to provide the stand-alone DLSM service to Comcast.

¹⁴ FCC's SLI/DA Order, ¶ 54.

1 Embarq is willing to assist Comcast in correcting Comcast's DL ordering errors,
2 storing, maintaining and preparing Comcast DLs for sale to third parties, satisfying
3 Comcast end user requests for additional directories or out-of-area directories, and
4 even providing Comcast with a clearinghouse service to sell Comcast DLs when
5 directory publishers and directory assistance providers request Embarq DLs.
6 Embarq has even agreed to share the revenues from those sales when Embarq acts
7 as a clearinghouse for Comcast (Comcast agreed in the contract that sales to R.H.
8 Donnelley would be exempt from sharing). However, Embarq cannot agree to
9 provide these valuable services to Comcast without charging for the stand-alone
10 DLSM service when Comcast is not purchasing a resale service or UNE Loop.

11

12 **IV. MR. GATES' CLAIMS OF DISCRIMINATION**

13 **Q. Do you agree with Mr. Gates' assertions regarding Embarq's obligations**
14 **related to Comcast's DLs?**

15 **A.** No. Mr. Gates confuses obligations when he asserts that Embarq must provide
16 Comcast with access to DL databases on the same rates, terms and conditions that
17 Embarq provides to itself and others.¹⁵ As noted in my Direct Testimony at pages
18 10-12, Embarq agrees under Section 251(b)(3) *every LEC* has the obligation to
19 provide access to DL. And Embarq agrees under Section 222(e) *every LEC* has the
20 obligation to provide access to its own subscriber list information. So Embarq

¹⁵ Gates Direct, p. 14.

1 agrees that it is obligated to sell Embarq's directory listings to Comcast if Comcast
2 needs them for its Directory Assistance service or for its directory publications.
3 Embarq also agrees that Embarq has to accept Comcast DLs when Embarq controls
4 access to Directory Assistance database or a directory publication. But Embarq
5 does not control access to any directory publisher. Therefore, Comcast is free to
6 build its own access to R.H. Donnelley and the other directory publishers or to use
7 Embarq's DLSM service.

8
9 In combining Sections 222(e) and 251(b)(3), Mr. Gates attempts to ascribe an
10 obligation to Embarq for which there is no foundation. As noted above and in my
11 Direct Testimony, the FCC specifically did not require a LEC to be a clearinghouse
12 for another LEC's subscriber list information. If the FCC wanted to require one
13 LEC to be a clearinghouse for another LEC's subscriber list information under
14 Section 251(b)(3), the FCC could have stated such, especially because in another
15 paragraph in the same SLI/DA Order the FCC specifically stated that a LEC does
16 not have to be a clearinghouse.¹⁶ Comcast cannot require Embarq to provide the
17 DLSM service as an obligation using an assertion that Embarq is somehow required
18 to provide the DLSM service under Section 251(b)(3), because to do so would
19 ignore and override the clear wording of the FCC's SLI/DA Order.

20

¹⁶ FCC's SLI/DA Order, ¶ 54.

1 **Q. Do you agree with Mr. Gates that treating similarly situated customers equally**
2 **is not enough?**

3 **A.** No. Mr. Gates attempts to use Section 251(b)(3) to assert that Embarq
4 discriminates if Embarq treats a single CLEC differently than any other CLEC. If
5 Mr. Gates assertion is followed to its logical conclusion, every CLEC would have a
6 discrimination claim for any purchase from an ILEC. ILECs charge retail end users
7 under the rate methods prescribed by the Commission; resale CLECs are then
8 charged based on the retail rates less an avoided cost discount. CLECs purchasing
9 UNE Loops to provide service to end users are charged based on a TELRIC
10 standard for pricing. CLECs purchasing Special Access channel terminations to
11 provide service to end users are charged based on price methods used by either the
12 Commission or the FCC. None of those pricing policies yield the same price for the
13 CLECs, so under Mr. Gates plan every CLEC would be the beneficiary of a
14 discrimination claim. Yet it seems clear that CLECs are not discriminated against
15 when Embarq follows different pricing methodologies for different customers.

16

17 I have demonstrated above and in my Direct Testimony that Section 251(b)(3) does
18 not apply when the ILEC does not control access to a directory publisher. Thus, it
19 is not discriminatory to include the DLSM service as part of the service bundles
20 offered to retail, resale and UNE Loop customers, but to charge a stand alone
21 DLSM service MRC to retail and wholesale customers that do not purchase the

1 retail, resold or UNE Loop service bundles. These groups of customers are simply
2 different.

3

4 **V. COMCAST'S DESIRE FOR DIRECTORY LISTING SERVICES**
5 **WITHOUT COMPENSATION TO EMBARQ**

6

7 **Q. Do you agree with Mr. Gates' contention that Embarq is already adequately**
8 **compensated for the DLSM service?**

9 **A.** No. Mr. Gates made several inaccurate claims that he used to assert that Embarq is
10 already compensated for the DLSM service that I address below.

11

12 **Q. Is Mr. Gates correct that contract language in the Interconnection Agreement**
13 **already compensates Embarq for the DLSM service?**

14 **A.** No. Mr. Gates identifies several paragraphs in the contract and interprets the
15 language in a manner inconsistent with the construction of the agreement and the
16 Embarq responses to Comcast Discovery requests.

17

18 Mr. Gates relies on paragraph 71.3.5 of the prospective agreement to claim that
19 Embarq already provides database maintenance services to Comcast.¹⁷ But that
20 paragraph describes the activities associated with Embarq's non-recurring charge
21 for directory listing service orders. Although the contract language *could* describe
22 the activities more clearly, in responses to Discovery Requests Embarq provided to

¹⁷ Gates Direct, p. 16.

1 Comcast the activities associated with the non-recurring charge. These activities
2 are distinct from the activities that Embarq provides to Comcast that relate to the
3 DLSM service.¹⁸

4
5 Mr. Gates also refers to paragraph 71.3 of the prospective agreement between the
6 parties. Mr. Gates misconstrues the words in the paragraph to assert that Embarq is
7 attempting to profit from activities performed by the publisher. Paragraph 71.3
8 merely identifies for CLECs that a third party publishes the “Embarq-branded”
9 telephone directories. The specific proofing activities mentioned in that paragraph
10 relate to portions of the directory not provided by Embarq, including the yellow
11 pages advertising and yellow pages listings. Embarq is not involved in the yellow
12 pages portion of the directory other than providing business listing updates to the
13 directory publisher, and has no way of proofreading the yellow pages. Likewise,
14 the publisher has no way to proofread the white pages listings because the publisher
15 is not involved with the Embarq-provided white pages listings, other than
16 combining the Embarq-provided listings with listings provided by other LECs.
17 Depending on the terms of the agreements with R.H. Donnelley, proofs would be
18 sent to each LEC that provides listings to allow that LEC to review its own listings
19 prior to publishing the directory.

20

¹⁸ Gates Direct, p. 18.

1 **Q. How else does Mr. Gates claim that Embarq is compensated for the DLSM**
2 **service?**

3 **A.** First, Mr. Gates makes an unsupported assertion that Embarq's costs for order
4 processing are much less than the non-recurring charge Comcast has agreed to pay
5 and somehow subsidizes the DLSM service. Mr. Gates offers no facts for this
6 claim, and even states that if Embarq did so this practice would violate FCC rules
7 by including recurring activities in a non-recurring charge.¹⁹ The non-recurring
8 charge compensates Embarq for receiving, recording, and processing service orders
9 received from Comcast. Those activities do not include any portion of the DLSM
10 service activities. The activities related to the DLSM service were separately noted
11 in Embarq's response to Comcast Data Request 7 and do not overlap with the
12 activities included in the non-recurring charge. As identified in these responses,
13 assertions that Embarq is somehow double recovering by charging both an ordering
14 NRC and a DLSM service MRC are completely inaccurate and should be
15 disregarded.

16
17 Second, Mr. Gates claims on page 31 that Embarq receives the benefit of a network
18 effect when including Comcast listings in Embarq's DL database, and that because
19 of this network effect the DLSM service should be provided without additional cost
20 to Comcast. Following this line of reasoning, a residential or business end user

¹⁹ Gates Direct, p.19, footnote 33

1 should be able to request and receive free telephone service from Comcast because
2 of a network effect, since the value of Comcast's telephone network is higher
3 because the end user is on Comcast's network. I don't envision Comcast agreeing
4 with that end user's request; likewise, Embarq does not agree that Embarq should
5 provide Comcast with DLSM service without a charge. The Indiana Utilities and
6 Regulatory Commission also disagreed with Mr. Gates' line of reasoning in a
7 March, 2008 arbitration decision:

8 "we find Verizon's argument that including of Verizon listings inures
9 a significant material benefit to Embarq in its relationship with the
10 directory publisher fundamentally flies in the face of the concept of
11 marginal utility."²⁰

12 Third, Mr. Gates claims that the DLSM service activities performed by Embarq
13 don't count because the services are somehow related to preparation of the listings
14 for sale to directory publishers.²¹ The service being provided by Embarq is for the
15 storage and maintenance of directory listings for Comcast. The purpose of storing
16 and maintaining the directory listings is to prepare and maintain the listings so that
17 a ready database of directory listings is available for sale to directory publishers. If
18 Comcast does not value this service offered by Embarq, Comcast can choose to
19 perform these activities for itself. Embarq has absolutely no control over Comcast's
20 listings or the directory publishers; therefore, Comcast has a classic "build or buy"

²⁰ *MCIMetro Verizon Access Transmission Services LLC d/b/a Verizon Access Transmission Services for Arbitration of an Interconnection Agreement with United Telephone Company of Indiana, Inc. d/b/a Embarq*, IURC Cause No. 43373 INT-01, Order entered March 12, 2008 at 19 ("Verizon-Embarq Order").
p.19.

²¹ Gates Direct, p. 18-19.

Exhibit No. (ALL-6TC)
Rebuttal Testimony of Alan L. Lubeck
Washington Utilities and Transportation Commission - Docket No. UT-083025

Page 17 of 26

1 decision, similar to decisions faced by businesses every day.

2

3 Fourth, Comcast's assertion that Embarq somehow profits from the sale of Comcast
4 listings is inflated to say the least. Based on the information provided by Comcast
5 in response to Embarq Data Request 6, Embarq receives approximately [BEGIN
6 CONFIDENTIAL] \$94 [END CONFIDENTIAL] in revenue from each sale of
7 Comcast listings.²²

8

9 Finally, Mr. Gates attempts to minimize revenue sharing language included in both
10 the current and proposed interconnection agreements. Paragraph 71.3.11 of the
11 parties' proposed interconnection agreement, which has been agreed to and is not
12 part of this arbitration, addresses the revenue Comcast claims will reimburse
13 Embarq for its costs of providing Comcast's DLs to directory publishers, stating:

14 Embarq will sell or license CLEC's customer listing information to
15 any third parties unless CLEC submits written requests that Embarq
16 refrain from doing so. Embarq and CLEC will work cooperatively to
17 share any payments for the sale or license of CLEC customer listing
18 information to third parties. Any payments due to CLEC for its
19 customer listing information will be net of administrative expenses
20 incurred by Embarq in providing such information to third parties.
21 The parties acknowledge that the release of CLEC's customer listing
22 to Embarq's directory publisher will not constitute the sale or license
23 of CLEC's customer listing information causing any payment
24 obligation to arise pursuant to this Section 71.3.11.

25 Based on this contract language, Comcast will be receiving compensation for the

²² Revenue from the sale equals Comcast customers noted in response to Embarq Data Request 6 multiplied by the \$0.04 FCC rate for the sale of directory listings.

1 sale of Comcast DLs (Comcast agreed in the proposed interconnection agreement
2 that it will not share revenues from sales to R.H. Donnelley), and Comcast in fact
3 recently requested that the parties work cooperatively to share these revenues. Mr.
4 Gates makes excuses about why Comcast had not previously requested that the
5 parties work cooperatively to share revenues from the sale of Comcast DLs.²³
6 Embarq recognizes that both parties have a shared obligation under both the current
7 and proposed agreement and is working with Comcast to fulfill this obligation in
8 light of Comcast's letter to Embarq dated June 24, 2008.

9
10 Embarq performs valuable activities for Comcast in connection with the DLSM
11 service, and these activities are separate and distinct from the activities performed
12 for other charges. Therefore, Comcast's assertions are not supportable by the facts
13 and should be disregarded.

14
15 **Q. Are there other purported benefits that Embarq receives?**

16 **A.** Mr. Gates claims that Embarq can potentially "strike a better deal" with the
17 directory publisher than Comcast can. Apparently Donnelley wouldn't verify that
18 Comcast would receive the same "deal" that Donnelley and Embarq have,²⁴ but
19 Comcast just had informal communications with Donnelley and didn't enter into

²³ Gates Direct, p. 21.

²⁴ Gates Direct, p. 30.

1 negotiations.²⁵ As the fourth-largest residential service provider in the country,
2 Comcast should be able to negotiate terms at least equal to those received by
3 Embarq because Comcast could provide listings not just in Embarq service areas,
4 but also in AT&T and Qwest service areas where Comcast competes and Donnelley
5 publishes directories. And even if Comcast has failed, or failed to try, to negotiate
6 at least equal terms, that is not a sufficient reason to force Embarq to provide the
7 DLSM service for free.

8

9 **Q. Are there other obstacles claimed by Mr. Gates?**

10 **A.** Comcast's communication with R.H. Donnelley²⁶ apparently highlighted some
11 supposed difficulties of R.H. Donnelley that appear to be nothing more than
12 operational issues that successful businesses regularly confront and conquer. Mr.
13 Gates also claims unlawful discrimination would exist if Comcast could not get the
14 same terms from Donnelly that Embarq or other LECs could. But he is wrong
15 because he is incorrectly attempting to impose on Donnelley the non-discrimination
16 obligations that §251(b)(3) of the Act imposes on LECs. If Donnelley did not give
17 Comcast the same deal it gave Embarq, and assuming that constituted
18 discrimination, it would be Donnelley, not Embarq, who was discriminating. And
19 §251(b)(3) does not apply to Donnelley.

20

²⁵ Exhibit ALL-7, Comcast response to Embarq Data Request 2.

²⁶ Gates Direct, pp. 29-30.

Page 20 of 26

1 **Q. Do you agree with Mr. Gates claims that Comcast has no options other than**
2 **dealing with Embarq for Directory Listings?**

3 **A.** No. On pages 31-32 Mr. Gates claims that Embarq is only attempting to charge
4 Comcast only because it knows Comcast has no options for receiving DLSM
5 service other than from Embarq. These claims are pure speculation and should be
6 disregarded. There are other equally valid reasons for Embarq's DLSM charge,
7 including the desire to treat all LECs alike by charging either an implicit or explicit
8 charge for DLSM service; the desire to be compensated for a valuable service
9 offered to Comcast and others on a non-discriminatory basis; and the desire to cap
10 the substantial internal efforts a) to review DLs on behalf of Comcast and other
11 CLECs, b) to communicate errors with CLEC service reps, c) to train CLEC service
12 reps to enter DL orders and corrections accurately, and d) to follow up with CLECs
13 regarding the accuracy of listings for their end user customers.

14

15 **Q. Even if it were beneficial to Embarq to provide directory publishers with these**
16 **listings—which it is not—is this a justification for Embarq to provide the**
17 **DLSM service to Comcast at no charge as Mr. Gates would prefer?**

18 **A.** No. From a pure business perspective this approach is nonsensical. Consider the
19 example of a hotel that finds it beneficial to also operate a restaurant in order to
20 attract more paying customers to increase the occupancy rate of the hotel. The hotel
21 may realize real and significant benefits—in terms of increased bookings and more

Exhibit No. (ALL-6TC)
Rebuttal Testimony of Alan L. Lubeck
Washington Utilities and Transportation Commission - Docket No. UT-083025

Page 21 of 26

1 satisfied customers—from having the restaurant. But that fact does not mean the
2 restaurant should be prohibited from charging for its meals, especially if the patron
3 is not staying at the hotel.

4
5 In summary, from a business standpoint Embarq receives little benefit from R.H.
6 Donnelley's incorporating CLEC listings into its directory. Comcast receives
7 significant benefits, and Donnelley may receive benefits. But Mr. Gates apparently
8 does not believe that Comcast should pay for this benefit. And if there are benefits
9 that accrue to the *publisher* from including Comcast's listings in the directory, that
10 is all the more reason that Comcast should deal directly with the publisher. If
11 Comcast thinks the benefits are substantial, Comcast can just as easily provide the
12 service directly rather than through a wholesale commercial arrangement with
13 Embarq.

14
15 **Q. Is there any merit to Mr. Gates' speculation that charging the Directory**
16 **Listing will harm consumers?**

17 **A. Absolutely not. Mr. Gates states on page 26 that approving Embarq's charge,**
18 **which would cost Comcast about [BEGIN CONFIDENTIAL] \$14,000 [END**
19 **CONFIDENTIAL] annually²⁷, would harm consumers by lowering funds available**
20 **to Comcast to invest in system upgrades, marketing plans, etc. To put this claim in**

²⁷ Cost equals subscriber number included in Comcast response to Embarq Data Request 6 multiplied by the \$.50 monthly recurring charge times twelve months.

Page 22 of 26

1 perspective, Comcast Corporation spent \$6 billion on capital additions and had
2 nearly \$12 billion in operating cash flow during 2007.²⁸

3

4 **V. APPROPRIATE COMPENSATION FOR THE DLSM SERVICE**
5 **PROVIDED TO COMCAST**

6

7 **Q. Do you agree with Comcast's arguments about the timing of the services**
8 **provided by Embarq?**

9 **A.** No. Mr. Gates contends that some of Embarq's activities are not recurring in
10 nature, so the charges should be non-recurring.²⁹ Embarq disagrees with Mr. Gates
11 line of reasoning because the DLSM service is based on market pricing principles,
12 not on regulated rate-of-return principles. In addition, even if the Commission
13 decides to review the specific activities, these activities cannot be viewed one day at
14 a time. The activities highlighted by Mr. Gates often do not occur at the time of the
15 initial order for service, and do not normally happen just one time – the end users
16 making these requests change their requests and instructions from time to time;
17 therefore, rather than charging Comcast both a recurring DLSM charge for some
18 activities, and multiple non-recurring charges for the remainder of the activities,
19 Embarq has chosen to charge a single monthly recurring charge for a market-based
20 DLSM service.

21

²⁸ Comcast Corporation 2007 results, available at http://library.corporate-ir.net/library/11/118/118591/items/279702/Q407_PR.pdf

²⁹ Gates Direct, pp. 19.

1 **Q. Does Embarq have an obligation to make any demonstration regarding costs?**

2 **A.** No. As stated in my Direct Testimony, when the FCC required all LECs to offer
3 access to directory listing service they also chose *not* to require ILECs to offer a
4 clearinghouse function, nor to require ILECs to follow a pricing standard based on
5 costs.

6
7 **Q. Does Mr. Gates offer any evidence that there is some statutory or regulatory**
8 **obligation to make a cost demonstration?**

9 **A.** Mr. Gates makes several assertions about Embarq's supposed obligations, none of
10 which survives scrutiny. First, Mr. Gates suggests that the FCC already rejected
11 market-based rates and that Embarq is already reimbursed for its costs from sales of
12 directory listings under Section 222(e).³⁰

13
14 Mr. Gates relies on paragraph 83 of the FCC's SLI/DA Order to claim that the FCC
15 has rejected market-based rates. Paragraph 83 specifically relates to the sale of
16 directory listings to third-party directory publishers, an area where Congress had
17 found a "market failure."³¹ But this paragraph does not relate to the Directory
18 Listing issue in this arbitration. In fact, the FCC has said nothing about charges
19 related to providing the DLSM service, because the FCC did not mandate that LECs
20 provide this service for each other.

³⁰ Gates Direct, pp. 36.

³¹ FCC's SLI/DA Order, ¶ 89.

1

2 Embarq is not required, under § 251(b)(3) or any other section, to provide its DL
3 service at cost, using embedded costs, TELRIC, or any other cost methodology.

4 Embarq's offer to perform this clearinghouse function for Comcast should be
5 viewed in the same light as other services that the FCC has said do not need to be
6 provided on an unbundled basis. For example, ILECs who are no longer required to
7 provide something as important to telephone exchange service as switching
8 (because CLECs are not impaired without access to the ILECs' switching), now
9 provide switching pursuant to *commercial* agreements where the prices are not
10 based on cost.

11

12 **VI. APPROPRIATE PROXY FOR THE DLSM SERVICE**

13 **Q. Do you agree with Mr. Gates claim that the foreign listing service is not an**
14 **analogous service for the DLSM service?**

15 **A.** No. Mr. Gates attempts to use retail-wholesale comparisons to assert that the
16 foreign listing service is not an analogous service to the DLSM service.³² Mr.
17 Gates is incorrect when he suggests that there is no relationship between the foreign
18 listing service and the DLSM service. Wireless end users and VoIP end users
19 residing in Embarq's service areas already pay the foreign listing charge when that
20 end user calls an Embarq retail service center to request a stand-alone DL. CLECs

³² Gates Direct, pp. 21-22.

1 purchasing Special Access Channel Terminations to provide local telephone service
2 already pay the retail foreign listing service for a stand alone DL. These customers
3 are wholesale end users to Embarq, just as Comcast end users are wholesale end
4 users to Embarq. Therefore, Mr. Gates is incorrect when he claims that all foreign
5 listings sold by Embarq are retail end users requesting out-of-territory listings.

6

7 **Q. Did Comcast propose that Embarq use a different proxy service?**

8 A. No. Comcast did not propose a different service that would be a better proxy than
9 the foreign listing service.

10

11 **Q. Why is the foreign listing service an appropriate analogous service for the**
12 **DLSM service?**

13 A. Embarq used an offering already available in Washington to serve as a proxy for the
14 DLSM service. As noted above, some wholesale customers already purchase the
15 foreign listing service as their stand-alone primary DL. Embarq is seeking to treat
16 Comcast in the same manner as Embarq treats other wholesale customers that
17 request a stand-alone DL.

18

19 Comcast did not propose a different service that would be a better proxy, nor did
20 Mr. Gates prove that cost-based rates are required to be used by Embarq.

21 Therefore, the foreign listing service should be allowed as a market-based

1 analogous service to the DLSM service.

2

3 **VII. CONCLUSION**

4 **Q. Could you please summarize your Testimony?**

5 A. Comcast is required by Section 222(e) to provide their DLs to requesting directory
6 publishers. Embarq has no obligation to provide the DLSM service to Comcast or
7 to provide Comcast DLs to any third party publisher. By offering the stand-alone
8 DLSM service to Comcast, Embarq is treating Comcast exactly the same as Embarq
9 treats other similarly-situated customers. Comcast has the option of providing the
10 service internally or purchasing the service from Embarq. To the extent Comcast
11 desires to have Embarq provide this service, Embarq is entitled to charge a market-
12 based rate. Embarq's market-based rate for the DLSM service is derived from an
13 appropriate analogous service, the foreign listing service. Therefore, Embarq's
14 market-based rate is appropriate and should be approved, and Embarq's contract
15 language adopted.

16

17 **Q. Does this conclude your Rebuttal Testimony?**

18 A. Yes.