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1 P R O C E E D I N G S

2 JUDGE TOREM: Good morning. It's now almost  
3 ten o'clock in the morning, and we are on the record in  
4 Docket UT-083025. This is Administrative Law Judge  
5 Adam Torem, and we are before the Washington Utilities  
6 and Transportation Commission on Tuesday, August 19th,  
7 2008. This is the matter of Comcast Phone of  
8 Washington, LLC, in an arbitration with United  
9 Telephone Company of the Northwest, doing business as  
10 Embarq, and I want to take appearances this morning.  
11 For those that have already given an appearance, you  
12 can give the short version, and if this is a first  
13 appearance, if you would give us the courtesy of a full  
14 appearance, essentially reading your business card, we  
15 will go ahead and start with Comcast today.

16 MR. SLOAN: I'm Michael Sloan. I'm with the  
17 law firm Davis, Wright, Tremaine in the Washington DC  
18 office. The address there is 1919 Pennsylvania Avenue  
19 Northwest, Washington DC, 20006. My phone number is  
20 (202) 973-4227, and my e-mail address is  
21 michael Sloan@dwt.com.

22 MR. HENDRICKS: Trey Hendricks on behalf of  
23 the United Telephone Company of the Northwest doing  
24 business as Embarq. My address is 902 Wasco Street,  
25 Hood River, Oregon, 97031. My e-mail address is

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1 tre.hendricks@embarq.com. My office line is (541)  
2 387-9439, and my fax number is (541) 387-9753.

3 JUDGE TOREM: We conducted a prehearing  
4 conference back in May and set a schedule for the  
5 filing of witness testimony, and those two witnesses  
6 are here today for cross-examination. They are Mr. Tim  
7 Gates on behalf of Comcast and Mr. Alan Lubeck on  
8 behalf of Embarq, and I want to go over the exhibit  
9 list.

10 The direct testimony of Mr. Gates and all of  
11 his exhibits will be labeled with the initial TJG. His  
12 direct testimony is TJG-1. His curriculum vitae or  
13 qualifications are set out in Exhibit 2 with the same  
14 initials. Exhibit 3 is the data request response to  
15 No. 14. Exhibit 4 is Mr. Gates' reply testimony.

16 Exhibit 5, which also has confidential  
17 information in it, is the subscriber listing agreement  
18 between Embarq and the Donnelley Publishing Company,  
19 and then on cross-exam this morning, I was presented  
20 with TJG-6. It's a response to DR-2. Exhibit 7 is a  
21 response to DR-9, and Exhibit 8 is the Gallatin River  
22 and Comcast interconnection agreement, so there is a  
23 joint petition and then the actual agreement itself.

24 For Mr. Lubeck, his exhibits will begin with  
25 ALL. ALL-1 is his direct testimony, ALL-2 contains

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1 responses to two data requests, No. 10 and No. 12.  
2 ALL-3 was a response to DR-3. ALL-4 and 5 are both  
3 press releases. 4 is from Comcast in January of 2008,  
4 and 5 is from Cox and Yellow Book, and I couldn't find  
5 a date on there. ALL-6 is Mr. Lubeck's reply  
6 testimony. ALL-7 is a response to DR-2, and that very  
7 well may be the same as TJG-6. ALL-8 is the existing  
8 interconnection agreement between Sprint and Embarq and  
9 Comcast.

10 MR. SLOAN: That's a cross-examination  
11 exhibit.

12 JUDGE TOREM: Correct, and anything after, I  
13 believe it was ALL-7, these are all cross-exam  
14 exhibits. Thank you Mr. Sloan.

15 ALL-9 has been labeled a perspective or  
16 proffered interconnection agreement from Embarq to  
17 Comcast, and it again has excerpts. ALL-10 is a  
18 directory services license agreement between Donnelley  
19 and Sprint. ALL-11 is a directory licensing agreement,  
20 and this is actually a form agreement that Embarq  
21 provides to its vendors. ALL-12 is again a form  
22 directory assistance listing agreement, and ALL-13 are  
23 a complete compendium of all the discovery responses of  
24 Embarq.

25 I've also been handed a couple of things we

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1 won't mark as exhibits but for a variety of legal  
2 provisions that may be handed to a witness from the  
3 Telecom Act or other Code of Federal Regulations, and  
4 is some excerpts of the subscriber listing information  
5 and directory assistance order issued by the FCC called  
6 the SLI/DA.

7 MR. SLOAN: I believe that Mr. Lubeck's  
8 Exhibit 3 is confidential.

9 JUDGE TOREM: I'm looking at where I can see  
10 the yellow pages. TJG-3 contains confidential  
11 information as does TJG-5, and I don't believe the  
12 cross-exam exhibits or confidential 6, 7 and 8. As far  
13 as Mr. Lubeck's testimony, his first five did not  
14 contain any confidential information; is that correct,  
15 Mr. Hendricks?

16 MR. HENDRICKS: Correct.

17 JUDGE TOREM: But his reply testimony does  
18 have confidential information.

19 MR. HENDRICKS: Yes.

20 JUDGE TOREM: That's in Exhibit 6 but not in  
21 Exhibit 7, and then were any of the cross-exam exhibits  
22 to contain confidential information?

23 MR. HENDRICKS: No. Oh, yes, for Comcast,  
24 the digital subscriber listing directory.

25 JUDGE TOREM: So the DSLA, or the directory

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1 service license agreement, does contain confidential  
2 information.

3 MR. HENDRICKS: Yes.

4 JUDGE TOREM: As required, we didn't set a  
5 deadline for the filing of these cross-exam exhibits  
6 ahead of today's hearing on the merits, but I would  
7 like to make sure that appropriate copies are filed  
8 with the normal custom of the yellow pages showing  
9 what's confidential. Are you going to be able to do  
10 that today?

11 I'm not worried about my copies so much.  
12 I'll treat them as confidential and make sure as we get  
13 to them point out any confidential information that I  
14 flag it, and when the case is done, dispose of it  
15 correctly, but it would be helpful for the records  
16 center before they distribute to the rest of the  
17 Commission the witnesses that are on the distribution  
18 list internally that those customs be followed. So if  
19 you need a couple of days to get those filed, as long  
20 as they are in by hard copy by the end of the week.  
21 Will that suffice?

22 MR. SLOAN: Yes, Your Honor.

23 JUDGE TOREM: Is there anything before I  
24 swear in the witnesses and we proceed with  
25 cross-examination? Do we want to move in advance for

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1 the admission of all the exhibits so it's clear they  
2 are in the record now? Will there be any objections to  
3 the admissibility of any of what we've listed?

4 MR. SLOAN: Not from Comcast.

5 MR. HENDRICKS: Not from Embarq.

6 JUDGE TOREM: TJG-1 through 8 will you  
7 admitted, and ALL-1 through 13 are admitted into the  
8 record, and the testimony I've received that's included  
9 in that as well as those exhibits will be the basis in  
10 the evidentiary record for any decision I issue in this  
11 arbitration.

12 At this time, I think it might be helpful to  
13 swear in both witnesses at once. So I'm going to ask  
14 both Tim Gates and Al Lubeck to stand and raise their  
15 right hands.

16

17 Whereupon,

18 TIMOTHY GATES and ALAN LUBECK,  
19 having been first duly sworn, were called as witnesses  
20 herein and examined and testified as follows:

21

22 JUDGE TOREM: Who is going first today?

23 MR. SLOAN: As petitioner, we figured that  
24 Comcast would present its witness first.

25 JUDGE TOREM: Are you ready for that,

0022

1 Mr. Hendricks.

2 MR. HENDRICKS: Yes.

3

4 DIRECT EXAMINATION

5 BY MR. SLOAN:

6 Q. Please state your full name and business  
7 address.

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

11 Q. Are you the same Tim Gates who filed direct  
12 testimony on behalf of Comcast in this proceeding?

13 A. Yes, I am.

14 Q. And that has been premarked as Direct Exhibit  
15 No. 1 with various exhibits attached to it; is that  
16 correct?

17 A. Yes, that's correct.

18 Q. Do you have any corrections that you would  
19 like to make to that testimony?

20 A. I have one correction on Page 25 in Footnote  
21 45. Please strike 218; replace that with 861. So that  
22 footnote should read, "Local competition order  
23 Paragraph 861." Those are my only corrections.

24 Q. Did you also file reply testimony in this  
25 proceeding?

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1 A. Yes.

2 Q. With attachments as well?

3 A. That's correct.

4 Q. Any corrections to the reply testimony,

5 Mr. Gates?

6 A. No.

7 Q. Were the direct and reply testimonies

8 prepared at your direction?

9 A. Yes, they were.

10 Q. If I asked you the same questions that I

11 asked you in there, would your answers be the same?

12 A. Yes.

13 MR. SLOAN: These all have been admitted into

14 evidence. Therefore, I tender Mr. Gates for

15 cross-examination.

16 JUDGE TOREM: I'll make a note on my copy of

17 TJG-1 to correct that footnote. If you want to file a

18 replacement page, feel free, but I think it's on the

19 record now and the parties are made aware of it.

20 Mr. Hendricks?

21

22 CROSS-EXAMINATION

23 BY MR. HENDRICKS:

24 Q. Good morning, Mr. Gates.

25 A. Good morning.

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1 Q. Is it true that you testify in your testimony  
2 that for Comcast to provide directory listings directly  
3 to the publisher that that can be complicated by the  
4 number of competitors that would be providing that to  
5 the publisher?

6 A. No, not specifically. First of all, no one  
7 has asked Comcast to do that, so it makes no sense to  
8 do it, but your question suggested the complication  
9 would arise because of the number of CLEC's?

10 Q. Yes.

11 A. Clearly, it would increase costs and  
12 complexity for the entire industry if all CLEC's were  
13 required to do that, but I'm not aware of any directory  
14 publishers who have ever gone to a CLEC and asked for  
15 that process to be done.

16 Q. Has Comcast then looked at the number of  
17 competitors that exist in Embarq's service territory in  
18 Washington?

19 A. What do you mean by "competitors"?

20 Q. Other companies that also provide voice  
21 service to end-users in addition to Comcast and Embarq?

22 A. No. This is a bilateral arbitration, and the  
23 dispute is between the two parties, so there was no  
24 need to look at other competitors or potential  
25 competitors in the Embarq area.

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1           JUDGE TOREM: Are you otherwise aware, even  
2 if you didn't look into it specifically for this case,  
3 are there any other CLEC's competing for business or  
4 other entities competing for the same business that  
5 Embarq and Comcast seek to provide?

6           A.     Based on my experience in the industry, I  
7 would expect there to be some. I just don't know how  
8 many there would be or what type, whether we are  
9 talking about wireless or VOIP or fixed UNE-based  
10 providers. I would expect there to be some.

11          Q.     Are you familiar with the nature of Embarq's  
12 service territory where Comcast also serves in  
13 Washington?

14          A.     Only very vaguely.

15          Q.     What is your vague understanding of the  
16 nature of that territory?

17          A.     Without a map -- even if I had a map, I  
18 probably couldn't point to it. We discussed it last  
19 night in the hotel lobby. I just don't know.

20          Q.     So vaguely, or you don't know?

21          A.     I could not tell you exactly where the  
22 serving territory is for Embarq in Washington State.

23          Q.     So you don't know where it is, but do you  
24 know anything about the nature of it?

25          A.     I guess I don't understand what you mean by

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1 the nature of the service.

2 Q. Do you know whether it's rural or urban or  
3 somewhere in between?

4 A. Probably somewhere in between. Probably more  
5 on the rural side than the urban side.

6 Q. Could you please turn to Page 28 of your  
7 direct testimony. Are you there?

8 A. Yes.

9 Q. At the bottom of that page, you begin to  
10 describe contacts or discussions that Comcast had with  
11 Donnelley to explore establishing a direct relationship  
12 for listing information; is that correct?

13 A. Yes. This was in response to the claims made  
14 by Embarq in this proceeding.

15 Q. Did Donnelley indicate during those  
16 discussions that they would work with Comcast?

17 A. My recollection of the discussions, and this  
18 is based on my discussions with Comcast employees who  
19 had the direct discussions with Donnelley, was that  
20 Donnelley was willing to discuss anything with Comcast,  
21 but based on that discussion, the information was that  
22 there were no CLEC's that were coming directly to them  
23 to provide directory listings for publishing, and that  
24 they also pointed out the difficulties and problems  
25 associated with getting listings from CLEC's as opposed

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1 to the incumbent ILEC in each serving territory, and I  
2 discussed that on Page 29 where some of those listings  
3 might be overlooked. They might be duplicated. There  
4 might be more errors in the data base because of the  
5 multiple transactions required, and that the process  
6 generally would not run smoothly because of the  
7 increased scope of the number of entities involved, but  
8 again, the bottom line is that no CLEC's have done that  
9 and gone to Donnelley to provide them directly.

10 Q. So there were conversations, and there was no  
11 reticence by Comcast to engage in discussions about it.

12 A. You mean Donnelley?

13 Q. Yes, sorry.

14 A. We were very willing to have discussions,  
15 which you would expect.

16 Q. Were these constraints, whatever you want to  
17 call them, that you say Donnelley raised, were these  
18 initial problems that Donnelley thought would occur or  
19 were they continuing? Was it something that Donnelley  
20 thought would end the discussions, would be initial  
21 problems, or would they continue on forever?

22 A. Well, I think it's clear that if you were to  
23 have multiple CLEC's going to the directory publisher  
24 as opposed to one, the initial feeds would be a  
25 one-time occurrence. All the updates for business and

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1 res would be additional occurrences, so this would  
2 happen at least annually, perhaps daily for business,  
3 times the number of CLEC's.

4 So I think it would be a continuing problem,  
5 continuing issue in terms of developing the system's  
6 know-how, employees, etcetera, for a system that's  
7 already in place, so I think it would be continuing.

8 Q. So in your opinion, there is no way that the  
9 parties could resolve those issues after trying a  
10 process like that over a period of time?

11 A. I'm not suggesting that the issues aren't  
12 insurmountable. I'm sure if Comcast wanted to, they  
13 could do something such as this. They could put a  
14 person on the moon, for that matter, but is it a good  
15 public policy?

16 Should the industry have to expend all of  
17 these resources for a function that's already there,  
18 and most importantly, no data publisher is going to  
19 CLEC's saying, Give me your listings. The data  
20 publishers go to the ILEC's to get those, because  
21 that's the one industry source where all of the CLEC  
22 information is consolidated. It's the most efficient  
23 way to do it, and the ILEC's and the data publishers  
24 have long-standing relationships and systems in place  
25 to make this an efficient process, whereas CLEC's do

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1 not.

2 Q. I'm going to refer now to TJG-8, which is a  
3 cross-exhibit entered into the record. Do you have a  
4 copy of it?

5 A. No, I do not.

6 Q. This is a portion of an interconnection  
7 agreement between Comcast and Gallatin River  
8 Communications, LLC, and Comcast Phone of Illinois,  
9 LLC, d/b/a Comcast Digital Phone. Have you seen this  
10 document before, Mr. Gates?

11 A. I've seen parts of it, yes.

12 Q. I'm going to refer mainly to the second  
13 document but just ask you a quick question about the  
14 first one in this package, which is the joint petition  
15 for approval by the parties to this agreement.

16 I'm just curious about your staff. Earlier  
17 you mentioned that you spoke about communications that  
18 Comcast has had with Donnelley. Do the several Comcast  
19 staff -- let me refer you to the last two pages of the  
20 joint petition for approval. These are signature pages  
21 by the parties. Do you know who David Rudd is?

22 A. No, I do not

23 Q. And Beth Choroser, who is Beth Choroser?

24 A. I believe she's a senior director of  
25 regulatory for Comcast.

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1 Q. And have you spoken with her about these  
2 issues in general?

3 A. Yes.

4 Q. Is she one of the main people at Comcast that  
5 you discuss these interconnection issues with?

6 A. She's definitely one of the people involved  
7 in trying to resolve this dispute with Embarq.

8 Q. Turning to the second portion of this  
9 package, TJG 8, and I'll identify this as the agreement  
10 between Comcast and Gallatin River, and I would ask you  
11 to turn to the last page, which is Attachment A. Do  
12 you have that in your package?

13 A. I do.

14 Q. Could you please read into the record the  
15 paragraph numbered 3, Directory Listings?

16 A. Would you like me to read 3 through 3.6?

17 Q. No. Why don't you just read 3 and 3.1.

18 A. No. 3, Directory Listings: This section  
19 pertains to listings published in any media, including  
20 but not limited to traditional white/yellow pages,  
21 specialty directories, CD ROM, or other printed or  
22 electronic formats.

23 3.1, Listings: CLEC will direct Customers to  
24 GRC's publisher for Directory Listings (bold print and  
25 yellow page ads) except as set forth below: CLEC

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1 agrees to supply GRC's publisher on a regularly  
2 scheduled basis, and in a mutually agreed upon format  
3 (e.g. Ordering and Billing Forum developed), all  
4 listing information for CLEC's subscribers who wish to  
5 be listed in any GRC published directory for the  
6 relevant operating area. Listing information will  
7 consist of names, addresses (including city, state and  
8 zip code) and telephone numbers.

9 Q. You can stop there. The rest is admitted  
10 into the record. Doesn't this require Comcast to  
11 provide directory listing information, the same  
12 information that is the subject of this dispute,  
13 directly to the publisher for Gallatin River?

14 A. No. If you read those first two sentences in  
15 3.1, it's less than clear. The first sentence says  
16 that the CLEC will direct customers to GRC's publisher  
17 for directory listings, and then the second sentence  
18 says that CLEC agrees to supply publisher on a  
19 regularly scheduled basis all listing information.

20 So those two sentences in and of themselves  
21 are confusing, but the most important thing is that the  
22 first document that you gave me was signed by Todd  
23 Stein of CenturyTel. Gallatin River has been purchased  
24 by CenturyTel, and CenturyTel and Comcast have an  
25 overriding agreement for interconnection which would

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1 supersede any Gallatin River agreement.

2           And finally, they've never really -- we've  
3 seen this language, but nothing has ever been done  
4 pursuant to this language. It hasn't been put into  
5 place, so the parties haven't sat down and fleshed it  
6 out as to what it means, but I believe it's superseded  
7 by the CenturyTel agreement, which would not include  
8 that information.

9           Q.     Can you explain why Comcast, and it looks  
10 like Ms. Choroser was the one who maybe negotiated or  
11 at least testified to this filing, would agree to the  
12 language, and in particular, the second sentence that  
13 you read there?

14           A.     Well, I can tell you that most of these  
15 interconnection agreements contain hundreds and  
16 hundreds of pages and thousands of different  
17 requirements and operating procedures. This was done  
18 in March at about the time this dispute was becoming  
19 formal, so I don't know, but I do know that nothing has  
20 occurred pursuant to this agreement, that it would be  
21 superseded by the CenturyTel agreement, and that the  
22 parties have not sat down and discussed how this would  
23 affect Comcast and its responsibilities, if at all.

24           JUDGE TOREM: While you are looking,  
25 Mr. Hendricks, let me follow-up. Mr. Gates, what you

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1 are saying is the language was included but never  
2 implemented; is that correct?

3 THE WITNESS: Yes.

4 JUDGE TOREM: You are not sure whether it was  
5 ever intended to be implemented even though it was  
6 included.

7 THE WITNESS: That's correct, because of the  
8 overriding CenturyTel agreement with Comcast.

9 JUDGE TOREM: Was that CenturyTel agreement  
10 in place at the time this was signed, to the best of  
11 your knowledge?

12 THE WITNESS: I believe it was, but I'm not  
13 certain. I don't know.

14 JUDGE TOREM: But the GRC, the Gallatin River  
15 Company, wasn't taken over until after this was signed;  
16 isn't that correct?

17 THE WITNESS: Because CenturyTel signed the  
18 document, Mr. Stein, so I don't know the timing of the  
19 relationship between Centurytel and Gallatin River.

20 JUDGE TOREM: It may not be relevant. I just  
21 question why the lawyers would negotiate a completely  
22 useless interconnection agreement, but you don't know.

23 THE WITNESS: I don't know, and I've just  
24 started looking at this, actually, in the last few  
25 days, so I haven't had much time to investigate it.

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1           JUDGE TOREM: I think Mr. Hendricks' point  
2 was if Comcast agreed to such a language, the clear  
3 implication he wants me to take from this is that they  
4 could actually directly provide Comcast's subscriber  
5 listing information directly to a directory publisher.  
6 Do you think they could do that?

7           THE WITNESS: As I said earlier, given enough  
8 time and money, they could probably accomplish most  
9 anything. Is it a good idea? I don't think so,  
10 especially in a very small market in Illinois to  
11 require Comcast to develop all those systems in place.

12           JUDGE TOREM: Was there another ILEC in this  
13 market, to your knowledge?

14           THE WITNESS: I don't know. I don't think  
15 so.

16           JUDGE TOREM: Was there any other alternate  
17 directory publisher that was getting information  
18 elsewhere, to your knowledge?

19           THE WITNESS: I don't know.

20           JUDGE TOREM: I'm starting to wonder if the  
21 question is if there is going to be a phone book and  
22 there is no ILEC, where is that directory publisher  
23 going to get the information?

24           THE WITNESS: I think the ILEC will now be,  
25 instead of Gallatin River, it will be a CenturyTel

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1 property, so CenturyTel will continue to deal with its  
2 directory publishers as it always has, and it's  
3 probably the same, one of the same publishers they've  
4 dealt with, even though it's Gallatin River, so I don't  
5 think that's a problem in terms of getting anything  
6 published, the change in ownership.

7 JUDGE TOREM: So from your perspective was  
8 that Gallatin River was collecting it as the ILEC and  
9 providing it to their publisher for their clients, and  
10 this language in 3.1 would have obligated Comcast to  
11 skip Gallatin and go directly to the publisher of GRC's  
12 choice?

13 THE WITNESS: Yes, or direct customers to go  
14 to the publisher, in the first sentence, and then there  
15 is the second sentence, so it's just very confusing. I  
16 think it would require some discussion between the  
17 parties to actually implement something like this, but  
18 it hasn't been implemented.

19 But I agree. There is language there that  
20 would seem to suggest that Comcast would have to go  
21 directly to the publisher depending on how one would  
22 interpret that, but again, I think CenturyTel takes  
23 precedent and supersedes Gallatin River.

24 Q. (By Mr. Hendricks) On the cover page for  
25 this agreement, isn't it between Comcast and Gallatin

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1 River Communications, LLC, a CenturyTel company?

2 A. Yes. That's what it says.

3 Q. A couple more questions here. These  
4 communications between Comcast and Donnelley, and I  
5 think you've actually testified to this in other  
6 states. We'll do it for Washington as well. How many  
7 communications would you say were added to the company?  
8 How many discussions between the company?

9 A. I don't know precisely, maybe three or four,  
10 two or three. I'm not certain.

11 Q. Other than these sort of vague concerns, were  
12 there any other discussions of the specific terms under  
13 which Comcast could enter into an arrangement with  
14 Donnelley?

15 A. Yes. Let me first disagree with the premise  
16 of your question. I don't think they were vague at  
17 all. They were very specific and founded in the  
18 reality of the difficulty of getting these things  
19 published and managing those, but as far as  
20 discussions, yes.

21 Comcast wanted to know from Donnelley if we  
22 did develop this system, hire these people, put in the  
23 software to provide listings directly to you, would you  
24 give us the same relationship, the same deal, the same  
25 compensation cost structure as you provide to Embarq,

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1 and Donnelley would not agree to that.

2 Q. But did you negotiate any terms? Did you  
3 discuss what those terms would be, what Donnelley would  
4 charge you, what it would actually cost Comcast?

5 A. No. Remember Donnelley didn't go to Comcast  
6 and say, We want you to send all of your directory  
7 listings directly to us. That didn't happen. So this  
8 was an investigation trying to follow up on the claims  
9 that Embarq has made.

10 Q. So the only reason you talked to Donnelley  
11 about this is to follow up on claims that Embarq made?  
12 You never made any business inquiry into the process?

13 A. Why would you? No directory publisher has  
14 ever come to Comcast and said, Give me your directory  
15 listings directly. I don't want to go through the ILEC  
16 anymore. I want every CLEC in the country to come to  
17 me. I want to develop hundreds of new relationships.

18 It's never happened in the industry, so why  
19 would you expect Comcast to engage in some business  
20 discussion with an organization that hasn't even asked  
21 Comcast to do this function?

22 Q. Is it possible Comcast could lose on this  
23 issue in any of the multiple states where it's sought  
24 arbitration?

25 A. Is it possible Comcast could lose?

0038

1 Q. Yes.

2 A. Of course. Anything is possible, but that  
3 would not require Comcast to go out and establish those  
4 systems and start sending all of their listings to all  
5 of the 200 directory publishers in the country.

6 Q. Would it be sensible for Comcast to engage in  
7 those discussions in the event that Comcast lost in one  
8 or more of the states as a business practice?

9 A. I think that would be very bad public policy.  
10 I don't think they should do that in anticipation of  
11 losing. I don't think they will. If they do lose,  
12 then they have to look at all their options, and then  
13 they might engage in those sort of investigations.

14 Q. This question may elicit a confidential  
15 answer.

16 How many total end-users does Comcast have in  
17 Washington that are included in directories through  
18 which Embarq provides the listing information?

19 A. Are you referring to Data Request No. 6?

20 Q. Yes.

21 A. I think there is a confidential number in  
22 there. Would you like me to respond, or should we put  
23 that onto the record?

24 Q. It should be left out of the record.

25 JUDGE TOREM: We have no idea if there are

0039

1 folks that would benefit from the confidential  
2 information on the bridge line as well, I want to  
3 remind the parties, so it may be easier to use a piece  
4 of paper for this number, and you can hand it up to me,  
5 and I have to admit this is the first time I've handled  
6 confidential information coming in in an on-the-record  
7 proceeding as opposed to our paper filing. So if  
8 you've got a copy of that DR 6. Mr. Hendricks, is it  
9 one of the exhibits yet?

10 MR. HENDRICKS: It's not. I didn't list it  
11 as a cross-exhibit wondering how it would be handled,  
12 so possibly it should be a cross-exhibit.

13 MR. SLOAN: We don't object as long as the  
14 confidentiality is maintained.

15 JUDGE TOREM: The easiest way to make this  
16 part of the record for those that have access to the  
17 confidential information is to now mark this as TJG-9  
18 and identify it as Embarq's Data Request 6 and  
19 Comcast's response, so referring to that then...

20 MR. HENDRICKS: Now that it is in the record,  
21 it may be unnecessary to have the witness answer the  
22 question.

23 JUDGE TOREM: We'll make sure this is  
24 TJG-9-C.

25 MR. HENDRICKS: Sorry about the confusion.

0040

1           JUDGE TOREM:  These things come up, and we  
2   are all thinking alike as to sensitivities to  
3   proprietary information.  So I have the information  
4   here.  Are there any follow-up questions on the number  
5   we are not going to mention?

6           MR. HENDRICKS:  No.  I've actually already  
7   asked him questions that I think will suffice.  Thank  
8   you.

9           MR. SLOAN:  Your Honor, I would like to refer  
10  to this number as the number that will not be  
11  mentioned.

12          JUDGE TOREM:  Since there is no objection, we  
13  will admit this for the record, and can I hold onto  
14  this copy of it?

15          MR. HENDRICKS:  Yes.

16          Q.    (By Mr. Hendricks)  Does Comcast submit  
17  Automatic Location Identification, or ALI, to database  
18  providers in Washington?

19          MR. SLOAN:  Objection.  Can you repeat the  
20  question?

21          Q.    First of all, let me go back a little bit.  
22  Does Comcast submit Automatic Location Identification,  
23  or ALI, to database providers for purposes of E-991?

24          A.    Yes.  ALI information is provided to a third  
25  party for purposes of 911 functionality.

0041

1 Q. Do you know how many different database  
2 providers that Comcast submits that information to in  
3 Washington?

4 A. No.

5 Q. Is it more than one? Any guess?

6 A. I don't know, and I wouldn't want to guess.

7 Q. Probably wise. How about across the country?  
8 Any idea across the country how many providers in the  
9 many states that Comcast serves, how many database  
10 providers Comcast submits this information to?

11 A. Comcast submits its information via a third  
12 party. The third party is the organization that deals  
13 with the database managers from which the P-SAP's and  
14 other emergency response organizations get their  
15 information. So Comcast really does not submit it.  
16 It's all managed via a third party, and the third party  
17 gets that information from the ILEC databases.

18 Q. Do you know who this third party is?

19 A. I don't.

20 Q. Is it a Comcast affiliate?

21 A. I don't believe it is, no.

22 Q. The information that this provided, isn't it  
23 the same information that Comcast also provides for  
24 directory listing?

25 A. Well, it's very similar. Of course, we are

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1 talking about the third party getting this information,  
2 not Comcast, but it's very similar. The NENA  
3 requirements have a little different information  
4 requirement for purposes of location as opposed to  
5 billing, which is what we typically think of for  
6 subscriber listing information.

7 Q. Do you know what format Comcast provides this  
8 information in to the database provider?

9 A. Again, I believe it's the third party that  
10 goes to the ILEC's to get this information to submit  
11 for 911 databases. So it's not Comcast submitting a  
12 flat file or an Excel file or some other information  
13 directly to the third party. The third party provider  
14 goes to the ILEC's, which is where, of course, the data  
15 publishers go to get this information, and then submits  
16 it to the appropriate 911 authorities.

17 Q. Is this something that happens in Washington  
18 alone, or is this across all states?

19 A. I think it's a national process for the  
20 third-party provider.

21 JUDGE TOREM: So if I understand, Mr. Gates,  
22 you have a third party hired to provide this  
23 information. You called it ALI information, or  
24 Automatic Location Information, to the emergency  
25 response databases as needed nationwide.

0043

1 THE WITNESS: Yes.

2 JUDGE TOREM: Comcast hires this third party  
3 to perform this function, but Comcast doesn't give the  
4 third party its subscriber listing information but  
5 directs the third party to get it from the appropriate  
6 ILEC.

7 THE WITNESS: That's correct, and then that  
8 is frequently or sometimes ILECs will come to Comcast  
9 and say, Is it okay if we provide this information to  
10 this organization on your behalf. The answer is yes,  
11 and that's the way it's done.

12 JUDGE TOREM: So essentially, Comcast hires a  
13 company to obtain it, and then the ILEC checks to make  
14 sure it's permissible to release the information  
15 contractually and/or for provision of privacy and those  
16 sorts of concerns?

17 THE WITNESS: Yes.

18 Q. (By Mr. Hendricks) So Comcast provides the  
19 information directly to the ILEC?

20 A. Yes, through the local service request;  
21 that's correct.

22 Q. Couldn't this information that Comcast  
23 provides to the ILEC be modified to provide directly to  
24 the publisher as well, this type of information?

25 A. It might be possible. Again, no publisher

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1 has asked Comcast to do that, so I wouldn't recommend  
2 they do it, but that doesn't solve the fundamental  
3 problem in the case, which is discrimination --

4 MR. HENDRICKS: I'm going to object. I  
5 didn't come close to asking anything about this  
6 information.

7 JUDGE TOREM: Sustained.

8 MR. HENDRICKS: Just one moment, Your Honor.  
9 I may be finished here. I think I'll finish on that  
10 happy note. Thank you.

11 JUDGE TOREM: Mr. Sloan?

12 MR. SLOAN: I have one, maybe two redirect  
13 questions.

14

15

16 REDIRECT EXAMINATION

17 BY MR. SLOAN:

18 Q. Do you remember a company called Insight  
19 Communications?

20 A. Yes.

21 Q. What are they?

22 A. Telecom industry service group.

23 Q. Are they a cable company?

24 A. I'm not sure of their entire business plan,  
25 but yes, they provide MSO-type services.

0045

1 Q. Do you know when Comcast bought the Insight  
2 operations in Illinois?

3 A. I do not.

4 MR. SLOAN: No further questions.

5 MR. HENDRICKS: No further questions from  
6 Embarq. Thank you.

7 JUDGE TOREM: Let me see if I have any  
8 questions that I want to ask before we let Mr. Gates  
9 step down. Bear with me, Mr. Gates, if I am completely  
10 revealing of the emperor having few clothes, if any, in  
11 this particular field. This is new to me but I'm  
12 taking it seriously and want to see if I can understand  
13 where things were.

14 So if we roll back the time machine to  
15 apparently 1996 when the Telecom Act came out and was  
16 unleashed on America, I'm trying to think back to some  
17 of the arguments that I read in both yours and  
18 Mr. Lubeck's testimony regarding what you said;  
19 although, the objection was sustained about the key  
20 points that Comcast wants to make in this case about  
21 discrimination, and there has been a lot of arguments  
22 made as to whether Embarq, if you were to purchase UNE  
23 loop-based services, they provide this directory  
24 listing recurring service included in that service.

25 So I want to ask the question then with that

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1 background as if Comcast is distinguishable from the  
2 UNE loop-based competitors that existed at the time the  
3 Act came out in 1996. My understanding is Comcast  
4 doesn't use the loop-based technology from Embarq, or  
5 Sprint as it was, but provides its own equipment.

6 THE WITNESS: Could I provide just a little  
7 background to kind of fill in my understanding of the  
8 '96 Act?

9 JUDGE TOREM: Yes.

10 THE WITNESS: The Act was to fix, basically,  
11 three things: access charges, universal service  
12 reform, and local competitive entry, and the Act said,  
13 there is really three ways that carriers can enter the  
14 market. A new carrier will probably enter via resale,  
15 perhaps total service resale where we go in and you  
16 resell the services of the incumbent. That's quick and  
17 easy because you don't have to develop any systems.  
18 You don't have to develop any network. It's simply  
19 resale, but it doesn't provide a lot of benefits  
20 because you are limited by whatever services the  
21 incumbent does.

22 The next step in the continuum of competitive  
23 effect would be unbundled network elements. A key  
24 component of the Act where the Act said and the FCC  
25 said, Okay, the incumbents because of their history of

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1 monopoly must unbundle these key aspects of the  
2 network -- transport, switching, loops, etcetera. So  
3 some carriers once they are comfortable in the market  
4 will start purchasing UNE's, whether it's switching or  
5 a loop or some transport, to provide service.

6           And then finally at the other end of the  
7 continuum is where you have a carrier that goes in and  
8 builds its own complete network. So on this end,  
9 you've got total service resale, complete dependence on  
10 the incumbent. On this end, you've got a complete  
11 network build replacing the incumbent, and you are  
12 absolutely correct in your first statement that Comcast  
13 has built its own network, and so it does not need to  
14 rely on resale or UNE's.

15           Now, CLEC's are CLEC's. There is no  
16 distinguishing parameters in the Act that says a CLEC  
17 who uses resale versus a CLEC who uses UNE's versus a  
18 CLEC which builds its own network, they all need to be  
19 treated the same, and 251(b)(3) says that incumbents  
20 must provide this directory listing function to CLEC's  
21 on nondiscriminatory rates, terms, and conditions, and  
22 the FCC has specifically said in those paragraphs in my  
23 testimony in the local comp order, Paragraph 218 and  
24 Paragraph 861, that the discrimination standard for  
25 251(b)(3) is even more stringent than the other

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1 discrimination standards.

2           In other words, when we talk about  
3 discrimination, it's not how Embarq or other ILEC's  
4 would treat CLEC's as a class, but how it treats  
5 itself, and in this case, we have Embarq, which admits  
6 to not charging this rate to UNE-loop CLEC's, does not  
7 charge this rate to total service resale CLEC's, and  
8 certainly does not charge this rate to its own  
9 customers, and yet it wants to charge facilities-based  
10 CLEC's like Comcast, so it's discriminatory on its face  
11 from that perspective.

12           Now, let's suppose as you said, can you  
13 distinguish Comcast from these others? Well, the Act  
14 doesn't provide for that, but if you could, Embarq has  
15 said that Comcast is not similarly situated but it  
16 hasn't provided any proof, no cost bases whatsoever to  
17 support this discriminatory treatment of Comcast.

18           JUDGE TOREM: I understand that thrust of  
19 your testimony. What I was looking at is the basis to  
20 distinguish Comcast from what, again, in my rudimentary  
21 understanding of the Act and the historical basis, was  
22 that the main entries for competition then were the  
23 total resale that you described, those that would take  
24 the subscribers network, jump onto it and resell it.

25           THE WITNESS: Just rebrand it perhaps, yes.

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1           JUDGE TOREM:  Then we got to the unbundled  
2 network elements again, the UNE's, and it took some  
3 time, but Comcast then built their own network.  So  
4 you've listed three different types of local  
5 competition, Comcast and the third category of having  
6 their own network, not having to buy UNE's, and not  
7 doing total resale, but selling Comcast telephony over  
8 cable.

9           THE WITNESS:  That's correct, over hybrid  
10 fiber cable.

11          JUDGE TOREM:  The subscriber listing  
12 information or directory assistance, the SLI/DA  
13 obligations that an ILEC might have or does have to a  
14 UNE loop-based competitor, are they any different than  
15 the SLI/DA obligations they have to a competitor that  
16 has its own network?

17          THE WITNESS:  No.  And that's our point in  
18 the testimony, and the SLI/DA order also refers  
19 specifically to the Section 222(e) requirements of the  
20 Act.  This is a two-pronged attack that Congress took  
21 to make sure that the incumbents' monopoly control over  
22 this market was eliminated or minimized.

23          The 222(e) requirement says that you've got  
24 to provide all these directory listings to data  
25 publishers and directory assistance companies on a

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1 nondiscriminatory basis, so it's that end, and I would  
2 agree with Mr. Lubeck that that is a very competitive  
3 market, that there are many publishers out there, but  
4 that did not translate to competition. What we are  
5 talking about with respect to 251(b)(3) that more  
6 stringent nondiscrimination requirement that says you  
7 ILEC's have to accept these directory listings if they  
8 are causing directories to be published for their ILEC  
9 territories.

10 JUDGE TOREM: But the 222(e) obligation  
11 applies to all LEC's, whether ILEC's or CLEC's; isn't  
12 that correct?

13 THE WITNESS: Correct. And Embarq might say,  
14 Well, if it applies to us, then it applies to Comcast.  
15 I think we would agree. It probably requires a legal  
16 conclusion, which I won't make, but the point is, no  
17 data publishers are coming to Comcast and saying, Send  
18 me all of your directory listings to me. Don't go  
19 through the ILEC, and there is a reason for that. It  
20 would just be this geometric increase in complexity and  
21 cost that would be put upon the market if that were  
22 required, and certainly, the directory publishers don't  
23 want that.

24 JUDGE TOREM: Under 222(e) though, has the  
25 obligation is there, and arguably, perhaps, was in the

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1 Gallatin River interconnection agreement, if they came  
2 to Comcast, they would have to provide the information  
3 as requested; is that correct?

4 THE WITNESS: I think they would; that's  
5 correct. The fact that that hasn't happened is  
6 significant.

7 JUDGE TOREM: So if one directory publisher  
8 popped up and asked, they could throw a monkey wrench  
9 into your whole vision of the current industry  
10 standard; isn't that correct?

11 THE WITNESS: It would, and we might want to  
12 ask ourselves why that hasn't happened; why haven't the  
13 publishers come directly to the CLEC's, and it's  
14 because of this incumbent long-term relationship they  
15 have with the ILEC's in the serving territory.

16 Remember that these serving territories, the  
17 directories are for a geographic area. There might be  
18 two or three or four, maybe ten CLEC's in some areas,  
19 maybe more. It's much easier to just go to the ILEC  
20 and get all of those listings to make sure there is no  
21 duplication, to make sure that there is no errors, and  
22 to rely on the ILEC to do that.

23 I think you are right though from a legal  
24 perspective. If Donnelley went to Comcast and said, I  
25 want them from you directly, I think there would be an

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1 obligation to do that, but it's not in the publisher's  
2 best interest to do that.

3 JUDGE TOREM: So I think we agree that the  
4 law puts the obligation on Comcast, but the real world  
5 has yet to propose that.

6 THE WITNESS: Yes. It puts it on LEC's in  
7 general, but congress's intent, if you look at the  
8 history, was to control the monopoly vestiges and  
9 control that ILEC's had, not the new LEC's, the CLEC's  
10 in the market.

11 JUDGE TOREM: Now, in Mr. Lubeck's testimony,  
12 there was some citation to this SLI/DA order, Paragraph  
13 54, and you don't necessarily have that in front of  
14 you --

15 THE WITNESS: But I could get it if you would  
16 like me to.

17 JUDGE TOREM: I was going to look at a  
18 question, and you may have an answer now, but I'll  
19 advise both parties, and I think this is something that  
20 we will want your view on in the briefs. Let me read  
21 54 slowly into the record and then 55, which wasn't  
22 cited, necessarily, in the original testimony.

23 This is under the context of subscriber list  
24 information obtained from CLEC's, and they have an  
25 introductory paragraph about the FCC's view on 222(e),

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1 but at Paragraph 54 they say, "We conclude that the  
2 obligation under Section 222(e) to provide a particular  
3 telephone subscriber list information extends only to  
4 the carrier that provides that subscriber with  
5 telephone exchange service.

6           The language of Section 222(e) makes clear  
7 that a carrier need not provide subscriber list  
8 information to requesting directly publishers pursuant  
9 to that section unless the carrier, quote, 'gathered,'  
10 end quote, that information, quote, 'in its capacity as  
11 a provider of telephone exchange service,' end quote.

12           Under the statutory definition of 'telephone  
13 exchange service,' a carrier acts in this capacity only  
14 to the extent it, quote, 'furnishes to subscribers  
15 intercommunicating service of the character ordinarily  
16 furnished by a single exchange and which is covered by  
17 the exchange service charge or comparable service  
18 provided through a system of switches, transmission  
19 equipment, or other facilities, or a combination  
20 thereof by which a subscriber can originate and  
21 terminate a telecommunications service,' end quote.

22           This reference to, quote, 'furnishing to  
23 subscribers intercommunicating a service,' end quote,  
24 establishes that a carrier acts in its capacity as a  
25 provider of telephone exchange service only to the

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1 extent it provides telephone exchange service to  
2 subscribers of that service. When a LEC provides,  
3 quote, 'nondiscriminatory access to directory listing  
4 under Section 251(a)(3), it is not providing telephone  
5 exchange service to subscribers of that service  
6 instead, as the language of 251(a)(3) makes clear, the  
7 LEC is providing a service -- maybe we could say  
8 another service directory listing to, quote, 'competing  
9 providers' of telephone exchange service and telephone  
10 toll service." So that's Paragraph 54, and I think  
11 that's the position that Embarq takes. It's a  
12 different service.

13           55 goes on to say, "We note that our  
14 conclusion that the obligation under Section 222(e) to  
15 provide a particular telephone subscriber's subscriber  
16 list information extends only to the carrier that  
17 provides that subscriber with telephone exchange  
18 service does not preclude an incumbent LEC or other  
19 entities from acting as a clearinghouse for providing  
20 subscriber list information to directory publishers.

21           We reject, however, for the reasons stated  
22 above the argument that we, the FCC, have authority  
23 under Section 222(e) to require incumbent LEC's to  
24 provide competitive LEC's subscriber list information  
25 to directory publishers." Here's the question to get

0055

1 ready for briefing on. "To the extent state law  
2 permits, state commissions are free to require ILEC's  
3 and CLEC's to enter into cooperative arrangements for  
4 the provision of subscriber list information to  
5 directory publishers."

6 So the question based on that, Mr. Gates, is  
7 under Washington State law, are you aware of what this  
8 commission's position has been or might be based on  
9 prior decisions or the legislator's enactments that  
10 would require Comcast and Embarq to enter into a  
11 cooperative agreement to make this subscriber list  
12 information available to directory publishers?

13 THE WITNESS: Yes. I believe I cite a  
14 Commission in order my testimony. I'm just looking for  
15 it now, but this whole clearinghouse argument is  
16 interesting, but that's, again, the 222(e) argument,  
17 and it relates to the relationship between Embarq and  
18 the directory publishers.

19 What we are talking about in this case is  
20 Embarq's requirement under 251(b)(3) to accept those  
21 listings, and I'm still looking for this quote. I  
22 would note as I'm looking for this that if Embarq  
23 really wanted to be released from its obligation to be  
24 this clearinghouse that it could certainly go to the  
25 FCC and seek that sort of forbearance, but that's

0056

1 really not what we are here talking about today. We  
2 are talking about 251(b)(3) discrimination.

3 JUDGE TOREM: Certainly it's what Comcast is  
4 talking about, but I know Embarq has taken a different  
5 angle on this.

6 THE WITNESS: Yes. Certain ILEC's after the  
7 '99 SLI/DA order immediately came to the FCC and said,  
8 We don't want to have this responsibility of taking  
9 these directory listings, and the FCC rejected that;  
10 very specifically in the MCI and Hicks cases that I  
11 cite, and to the best of me knowledge, no carrier since  
12 then has come in and said that they wanted to be  
13 released of their obligation to take --

14 JUDGE TOREM: I recall that part of your  
15 testimony. Now, as far as the response of the state of  
16 this commission's approach, we are looking for a  
17 footnote in your direct testimony or reply?

18 MR. SLOAN: There is a reference to the  
19 Washington orders, and I will -- perhaps if we could  
20 take an adjournment.

21 THE WITNESS: Could we take a five-minute  
22 break and find it?

23 JUDGE TOREM: Let's take five minutes, and we  
24 will come back on the record when you have that  
25 citation.

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1 THE WITNESS: I found it. I'm sorry.

2 Page 13 of my direct, starting on Line 11 of Page 13.

3 JUDGE TOREM: So we'll stay on the record  
4 then. We are at Line 11, Page 13.

5 THE WITNESS: Of TJG-1, and should I just  
6 read it, Your Honor?

7 JUDGE TOREM: No. I've got it marked, and  
8 what I'm looking at here is this is a 1995 UTC order.  
9 The paragraph that I refer to is from the 1999 SLI/DA  
10 order, and so the follow-up question is do you see any  
11 change in state law that would have come out after the  
12 1996 Telco Act and the 1999 SLI/DA order? Has that  
13 impacted at all what you are relying on here? Is this  
14 still current in your mind?

15 THE WITNESS: I don't know. I would have to  
16 defer to counsel on the status of Washington law since  
17 the SLI/DA order.

18 MR. SLOAN: Your Honor, we will brief those  
19 issues.

20 JUDGE TOREM: It just seems to me that the  
21 ability of state law to allow for this might at least  
22 in Washington be different than in the other states in  
23 which you are arguing, but it may be that the  
24 Commission looks at the arguments that you've received  
25 and chooses to act, just as the FCC Paragraph 55 of the

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1 SLI/DA order allows, and resolve the arbitration by --  
2 you tell me in your briefs why yes or no this is a good  
3 idea or a bad idea on public policy or other state law  
4 grounds to just order a cooperative agreement in this  
5 regard, and that may require other evidence on pricing  
6 to go forward.

7 I'm not leaning that way. It up to state  
8 law, and yet this is a federal telecom arbitration. I  
9 understand if we look at 251(b)(3), that language may  
10 not be there on the 222(e) language. It is depending  
11 how they interact, so I invite you to better inform me  
12 from your particular positions.

13 Let me see if I had additional questions for  
14 this witness. I think, Mr. Gates, I have one other.  
15 In your testimony, you point out rather poignantly the  
16 degree of increase in the nonrecurring charge?

17 THE WITNESS: Yes.

18 JUDGE TOREM: And I'm trying to remember the  
19 exact terminology, but it went from \$6.40-some cents to  
20 maybe \$9.41 cents.

21 THE WITNESS: Yes, about 45 percent increase.

22 JUDGE TOREM: So that increase, your argument  
23 on behalf of Comcast was that that nonrecurring charge  
24 covered most of what Embarq is trying to now impose on  
25 the DLSSM recurring charge; is that correct?

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1           THE WITNESS: Yes, and that the other  
2 activities that they've identified are covered by the  
3 .04- and .06-cent charges that they impose on the  
4 directory publishers, and that the agreements in and of  
5 themselves already incorporate compensation through  
6 that nonrecurring rate for maintenance activities.

7           JUDGE TOREM: This nonrecurring charge  
8 doesn't exist in the current interconnection agreement;  
9 is that correct?

10          THE WITNESS: Well, there is a charge. It's  
11 just much lower. It's six dollars and something versus  
12 \$9.41 as proposed.

13          JUDGE TOREM: I asked my question  
14 incorrectly. There is no recurring DLSSM charge in the  
15 existing agreement.

16          THE WITNESS: That's correct. To the best of  
17 my knowledge, nobody charges a recurring rate.

18          JUDGE TOREM: Is there something newly  
19 covered in the nonrecurring charge with this 45 percent  
20 increase that wasn't covered before?

21          THE WITNESS: We don't know. We've asked  
22 Embarq to provide support for that rate, but as you  
23 know, it's difficult to ask for that when, in fact,  
24 Comcast is not disputing that nonrecurring charge.

25          JUDGE TOREM: That charge is not before me.

0060

1 I'm clear on the scope of the arbitration, but it  
2 offers, at least as a base of reference, the agreement  
3 that exists without a DLSSM charge. The proposed  
4 agreement that has this increase, as you've called a  
5 substantial increase, there may be reasons for that,  
6 but again, maybe that's irrelevant too, the amount of  
7 the increase because it's agreed, but to your  
8 awareness, is there anything you've agreed within the  
9 scope of that charge that's being added into the  
10 parties' agreement, something else you are getting for  
11 that nonrecurring charge that you weren't getting  
12 before?

13 THE WITNESS: No. To the best of my  
14 knowledge, based on what I read from Mr. Lubeck, was  
15 they updated their cost study and came up with this new  
16 rate. Now, as Your Honor is aware, this commission has  
17 very seriously investigated nonrecurring charges about  
18 four years ago of Qwest requiring time and motion  
19 studies and a very serious investigation of what  
20 underlies nonrecurring costs.

21 We haven't engaged in that investigation in  
22 this case. Comcast has agreed that there are  
23 activities that were being performed, and they chose  
24 not to dispute the rate. Now, finding this new monthly  
25 recurring charge, they may rethink that, but that's not

0061

1 before you, as you said. But the point is, and I think  
2 the answer to your question is, yes, all of the  
3 activities associated with directory listings are  
4 covered by the existing nonrecurring charge and by the  
5 four- and six-cent rate charged to the directory  
6 publishers, and that's what all other ILEC's do around  
7 the country today.

8 JUDGE TOREM: Those four- and six-cent  
9 charges are still in effect under the existing  
10 agreement now; is that correct?

11 THE WITNESS: Yes, and if Embarq so chose,  
12 they could go to the FCC and say, These are  
13 confiscatory rates. I think they should be higher, and  
14 they never have. In fact, just intuitively, these  
15 rates were put into effect in 1999, and they were  
16 incremental costs, forward-looking costs. We are in a  
17 decreasing cost industry, so that may be why nobody has  
18 gone in to increase the rates, because they become more  
19 and profitable every year as our costs go down with the  
20 technology and systems, but the bottom line is that  
21 Embarq has never sought to increase those rates or  
22 contest those rates.

23 JUDGE TOREM: Embarq at one point in its  
24 submissions suggests that Comcast expects to get this  
25 directory listing and the update service for free. Am

0062

1 I correct in thinking then that under the old  
2 nonrecurring charge, would you agree that Embarq would  
3 say that yes, that was included for free before but we  
4 are not continuing to give it for free?

5 THE WITNESS: I guess. I was very confused  
6 by that statement from Mr. Lubeck. Clearly, Comcast  
7 has agreed to pay that NRC, even the double NRC rate.  
8 We are not contesting the fact that they are getting  
9 revenues from the directory publishers. Comcast isn't  
10 involved in that side of the relationship. So it was  
11 surprising for Comcast to hear that Embarq thought that  
12 Comcast wanted it for free when Comcast has been paying  
13 for it all along. So we think this is a multiple  
14 recovery of the same costs for the same activities that  
15 Comcast has always paid for.

16 JUDGE TOREM: That just clarifies what I  
17 think I read and gets me on the same page with  
18 Comcast's position this morning.

19 Let me see if Mr. Hendricks has any follow-up  
20 for you on cross, and then I'll tender, Mr. Sloan, the  
21 witness back to you, and we hope we can wrap up his  
22 testimony at that point.

23

24

25

0063

1                                   FURTHER CROSS-EXAMINATION

2   BY MR. HENDRICKS:

3           Q.    If the Commission were to agree with Embarq  
4   on its position with respect to the Act and the SLI/DA  
5   order, what would Comcast's options be for continuing  
6   to have its customers listed in directories in Embarq's  
7   territories in Washington?

8           A.    I can't object to those questions, but I  
9   thought that was very vague.  If Embarq wins, is that  
10   what you are suggesting, on its interpretation of the  
11   Act and its interpretation of the SLI/DA order, what  
12   would be --

13          Q.    What would Comcast do to continue to have its  
14   customers listed in the directory?

15                  MR. SLOAN:  I'll object here, Your Honor.  
16   It's obviously a hypothetical question.

17                  MR. HENDRICKS:  It is a hypothetical  
18   question.

19                  THE WITNESS:  I think it would have a couple  
20   of options.  The most obvious option is it could pay  
21   the rate if the Commission were to order that and  
22   suggest it was just and reasonable.

23                  The other option would be to try and provide  
24   those directory listings directly to the directory  
25   publishers themselves.  Neither of those are good

0064

1 options, but those are two options that could occur  
2 with the decision as you suggest.

3 Q. (By Mr. Hendricks) If that occurred, that  
4 hypothetical, and Comcast -- it would be going directly  
5 to the publisher because why?

6 MR. SLOAN: Objection, vague.

7 Q. Why would Comcast go directly to the  
8 publisher if Embarq won in Washington on this issue?

9 MR. SLOAN: Object to the foundation, because  
10 I think that Mr. Gates' answer identified two  
11 alternatives.

12 MR. HENDRICKS: That's fine. I will withdraw  
13 the question, and I'm done.

14 JUDGE TOREM: Any redirect?

15 MR. SLOAN: None, Your Honor.

16 JUDGE TOREM: It's now 11:15. Mr. Sloan, any  
17 estimation on time for Mr. Lubeck?

18 MR. SLOAN: I think an hour and a half. I  
19 bet we could push through.

20 (Recess.)

21 JUDGE TOREM: Mr. Lubeck, you've already been  
22 sworn, so I'll have your attorney introduce you for the  
23 record.

24

25

0065

1 DIRECT EXAMINATION

2 BY MR. HENDRICKS:

3 Q. Mr. Lubeck, could you please introduce  
4 yourself on the record, state your name and address?

5 A. My name is Alan Lubeck. I work for Embarq,  
6 and my address is 5454 West 110th Street, Overland  
7 Park, Kansas, 66211.

8 Q. And who do you represent in this case?

9 A. I represent Embarq.

10 Q. Are you the same Alan Lubeck that caused to  
11 be filed direct and responsive testimony in this case?

12 A. Yes.

13 Q. Which has been admitted into the record?

14 A. Yes.

15 Q. Do you have any changes to those testimonies?

16 A. I do. On my direct testimony, Page 16, Line  
17 15, I would like to replace "Indiana" and replace it  
18 with "Washington," and that's the only change to my  
19 direct testimony.

20 In my rebuttal testimony, Page 2, Line 20, at  
21 the end of Line 20 is the word "the." Right before  
22 that, I would like to add, "a service analogous to."

23 Q. Could you read the sentence as it would read  
24 then?

25 A. Yes. "Embarq's offer of a service analogous

0066

1 to the foreign listing service which is already  
2 available to retail and wholesale customers..." And it  
3 goes on.

4 Q. Thank you.

5 A. And on Page 8, Line 2, the third word is  
6 "been." It should be deleted, b-e-e-n. That's all.

7 Q. Thank you, Mr. Lubeck. Did you prepare this  
8 testimony or have it prepared at your direction?

9 A. Yes, I did.

10 MR. HENDRICKS: Thank you. I offer  
11 Mr. Lubeck for cross-examination.

12 JUDGE TOREM: Mr. Hendricks, as I said  
13 earlier about offering any correction or errata pages,  
14 if you would like to do that you may, but certainly  
15 we've made those changes on the record, and hopefully  
16 those changes for anybody that's interested to look in  
17 the record as well, or at least be on the line today.  
18 All those exhibits, including, I think, the ALL-1  
19 through 7 were submitted by Embarq, and then ALL-8  
20 through 13 are cross. They are already admitted.

21 Mr. Sloan?

22 MR. SLOAN: Thank you, Your Honor.

23

24

25

0067

1 CROSS-EXAMINATION

2 BY MR. SLOAN:

3 Q. Mr. Lubeck, I'm Michael Sloan. I represent  
4 Comcast in this matter, and it is a pleasure to see you  
5 again.

6 A. Thank you, and you.

7 Q. We have done this -- this will be our fourth  
8 hearing; isn't that correct?

9 A. Yes, it is.

10 Q. I cross-examined you in a hearing in Texas,  
11 another in Indiana, and another in Pennsylvania.

12 A. Yes.

13 Q. So I'm going to try to pretend that I haven't  
14 grown fond of you during this time and be as tough on  
15 you as I've always been in the other cases.

16 I don't have with me today an Embarq  
17 directory as I've had in the other states, but just so  
18 the judge can appreciate what it is we are talking  
19 about, the Embarq directory is a standard -- the record  
20 would reflect that I'm holding what I call a telephone  
21 directory. Do you see this, Mr. Lubeck?

22 A. Yes. It's the Qwest Dex Olympia directory.

23 Q. And it's got a series of white pages in front  
24 of it and then Yellow Pages in the back; right?

25 A. Yes.

0068

1           MR. HENDRICKS: Your Honor, I don't know if  
2 he's going to offer this as an exhibit, but I guess I  
3 object to it if he's going to suggest that it's somehow  
4 similar to Embarq's directory. I don't think it's  
5 really going to provide much use to the commission.

6           MR. SLOAN: I'm not planning to offer it as  
7 an exhibit. I'm holding it as an illustrative to  
8 concretize what it is we are talking about.

9           JUDGE TOREM: Clearly I have a doorstep like  
10 the rest of us here. I've seen a phone book.

11          MR. SLOAN: And there are white pages.

12          Q.     (By Mr. Sloan) So we've laid a foundation for  
13 what we are talking about. When Embarq issues  
14 directories, it doesn't publish them. It sells; isn't  
15 that correct?

16          A.     That's correct.

17          Q.     The actual directory is published by a third  
18 party called Donnelley.

19          A.     Yes.

20          Q.     And does the Embarq directory in the  
21 Washington service territories have Embarq's name on  
22 the cover of it?

23          A.     Yes, it does. There is Dex' name also. RH  
24 Donnelley goes by the name "Dex."

25          Q.     In the directories that Donnelley issues for

0069

1 Embarq, there are customers of both Embarq and other  
2 providers listed in those directories; is that correct?

3 A. Yes. Depending on the scope of the  
4 directory, Embarq would be listed as well as all the  
5 CLEC's and their end-users would be listed. Also other  
6 ILEC's if the scope of the directory includes another  
7 ILEC service area.

8 Q. For directories that encompass just an Embarq  
9 service territory, those listings that are contained in  
10 the directory, who provides them to Donnelley for  
11 inclusion in the directory?

12 A. In nearly all cases, Embarq provides those  
13 listings directly to Donnelley.

14 Q. And the exception would be in the example you  
15 mentioned earlier in which directory encompassed  
16 multiple ILEC service territories; is that correct?

17 A. Yes. That would be one example. Another  
18 example would be where a CLEC goes direct to Donnelley.

19 Q. Are you aware of a case in which a CLEC in  
20 Embarq service territory gives its subscriber listing  
21 information directly to Donnelley?

22 A. Yes. In my responses to Comcast questions,  
23 Donnelley has told us that there are some CLEC's that  
24 go direct to them.

25 Q. In the Embarq service territory?

0070

1           A.     That's the context of the discussion.  I  
2     didn't specifically ask.

3           Q.     Have you identified which CLEC's those are?

4           A.     I did not on the record.  I didn't ask the  
5     Donnelley person which CLEC's those were.

6           Q.     We premarked a number of exhibits.  Do you  
7     have them in front of you?

8           A.     No, I do not.

9                   MR. SLOAN:  Could we go off the record for  
10    just a moment?

11                   JUDGE TOREM:  Certainly.

12          Q.     (By Mr. Sloan) If you would look at the  
13    exhibit that's been premarked as ALL-10, Mr. Lubeck, do  
14    you recognize what this is?

15          A.     I can see that it's the directory services  
16    license agreement.

17                   MR. HENDRICKS:  This is a confidential  
18    document.

19                   MR. SLOAN:  We will substitute a yellow-paged  
20    version of this for the record.

21                   MR. HENDRICKS:  We may have folks on the  
22    bridge line.  I don't know how you want to address  
23    that.

24                   JUDGE TOREM:  Where is the confidential  
25    information?  Is it going to the subject of your

0071

1 question as well?

2 MR. SLOAN: I would ask him a couple of  
3 questions about provisions in the contract.

4 JUDGE TOREM: Is the entire contract  
5 confidential?

6 MR. SLOAN: It is. That's how it's been  
7 produced.

8 JUDGE TOREM: I have a couple of choices. I  
9 can either disconnect the bridge line, but it's still  
10 going to become part of the record so we still have to  
11 worry about that. I would rather not have folks hang  
12 up and call back because then we will have to take a  
13 break and get our phone services folks back in the  
14 building.

15 Let's take it this way. If you can put your  
16 questions out in such a way that they don't include  
17 confidential information but only the answers do --  
18 last time was easy because we had the numbers. I don't  
19 know what to expect on this.

20 MR. HENDRICKS: It seems like it would be  
21 problematic to do that. This document is part of the  
22 confidentiality -- but it's a third-party agreement,  
23 and there is some confidentiality agreements in place,  
24 so I would prefer to take more precautions and want to  
25 be on the safe side.

0072

1           MR. SLOAN:  Actually, I believe I can  
2 probably avoid asking questions about the content of  
3 the agreement because it's been admitted into evidence.  
4 There hasn't been objection to that.

5           Q.     (By Mr. Sloan) Mr. Lubeck, if you could just  
6 confirm that this agreement covers the terms and  
7 conditions by which Donnelley publishes Embarq  
8 directories across the country, I think that would be  
9 sufficient for now.

10          A.     I believe it covers most of the operational  
11 aspects.  There is one other agreement that I think is  
12 the next -- there is one other agreement, a subscriber  
13 listing or directory listing agreement that identifies  
14 some payments between Embarq and Donnelley.

15          Q.     And that agreement has been premarked.  It  
16 was a prefiled examination.  It was TJG-5.  It's a  
17 confidential agreement.  You have a version of it in  
18 front of you.  If you would turn to Page 16 of the  
19 first document, the directory services license  
20 agreement, please.

21          A.     (Witness complies.)

22          Q.     Do you see Section 6.3?

23          A.     Yes.

24          Q.     And do you see that it makes reference to the  
25 subscriber listings agreement?

0073

1 A. Yes.

2 Q. And is that the same subscriber listings  
3 agreement that had been marked as TJG-5?

4 A. Yes, it is.

5 Q. If you would refer to TJG-5 for a second,  
6 please, I'm going to make reference to a provision to  
7 the Recital A here, which the confidentiality has been  
8 previously waived, and I assume that waiver will apply  
9 for this proceeding.

10 MR. HENDRICKS: Yes.

11 JUDGE TOREM: So this is TJG-5-C. It's a  
12 confidential exhibit. Which page --

13 MR. SLOAN: On the first page, on the recital  
14 that is letter number "A," the confidentiality of that  
15 recital has been waived, and I'm going to read an  
16 excerpt from it into the record.

17 Recital A says, "On the date of this  
18 agreement, publisher, and that's Donnelley, and Embarq,  
19 are entering into a directory services license  
20 agreement in order to provide for the continued  
21 production, publication, and distribution of the Embarq  
22 directories by publisher following the completion of  
23 this spin-off, with some minor excerpts that I've just  
24 made. Is that what this recital says?

25 A. Yes, it is.

0074

1 Q. We've spoken a lot this morning about what  
2 directory listings are. Directory listing is a name,  
3 address, and a phone number of an end-user; isn't that  
4 correct?

5 A. For the end-user, yes.

6 Q. I believe that you have in front of you a  
7 page of regulatory excerpts.

8 JUDGE TOREM: These are not marked as an  
9 exhibit?

10 MR. SLOAN: Right.

11 Q. (By Mr. Sloan) In fact, the FCC has  
12 established a definition of directory listings at 47  
13 CFR, Section 51.5; isn't that correct?

14 A. Yes, for directory listings, yes.

15 Q. And there is also another phrase that governs  
16 the definition of a directory listing, and that term is  
17 referred to in Section 251(b)(3) of the Act.

18 MR. HENDRICKS: Objection. He's testifying  
19 as to what the Act says.

20 MR. SLOAN: I'm asking him, do you know that  
21 to be the case?

22 MR. HENDRICKS: Could you repeat the  
23 question?

24 MR. SLOAN: Sure.

25 Q. (By Mr. Sloan) Are you familiar, sir, with

0075

1 the FCC's regulatory definition of what the phrase  
2 "directory listing" means when Congress referred to it  
3 in Section 251(b)(3)?

4 A. Yes.

5 Q. The FCC has defined it as, quote, "The Act of  
6 placing directory listing information into a directory  
7 compilation, such as a white pages." Isn't that  
8 correct?

9 A. Yes. That's the wording that the FCC used.

10 Q. Could you take a look for a minute at the  
11 documents that have been marked ALL-8 and ALL-9?

12 A. Okay.

13 Q. ALL-8 is an excerpt. There is a title page  
14 of the current interconnection agreement between Embarq  
15 that was executed between when the company was known as  
16 Sprint, but between Embarq and Comcast. Do you see  
17 that?

18 A. Yes.

19 Q. There is a cover page. The next page begins  
20 on 114. Do you see that?

21 A. Yes.

22 Q. And it's an excerpt from the directory  
23 listing service requests provisions from the  
24 interconnection agreement. Do you see that?

25 A. Yes.

0076

1 Q. ALL-9 is a copy of what we refer to as the  
2 prospective agreement, which is the one that the  
3 parties are negotiating.

4 A. Okay.

5 Q. And I'll refer to ALL-9 as the prospective  
6 agreement from time to time, and there is the cover  
7 page which indicates that this is not yet an effective  
8 agreement; correct?

9 A. Okay.

10 Q. And then we turn the page, and the next page  
11 is 107, and the exhibit goes from 107 to Page 114. Can  
12 you confirm that?

13 A. Yes, that's true.

14 Q. Can you take a look at the prospective  
15 agreement on Page 109?

16 A. (Witness complies.)

17 Q. Section 71.2.1 is what I would direct your  
18 attention to. Are you with me?

19 A. Yes.

20 Q. 71.2.1 states that the requirements that will  
21 follow pertain to Embarq's listings, service request  
22 process that enables CLEC to, "A," submit CLEC  
23 subscriber information for inclusion in directory  
24 listings databases. Do you see that?

25 A. Yes.

0077

1 Q. That describes literally the process by which  
2 CLEC, in this case Comcast, submits its directory  
3 listing information to Embarq; is that correct?

4 A. Yes.

5 Q. Now, is that the directory listing service  
6 request process that we referred to previously?

7 A. Yes, it is.

8 Q. Then continuing with the excerpt from the  
9 agreement, sub "B" carries on by saying that the next  
10 set of activities that the agreement involves the  
11 submission of the CLEC subscriber information for  
12 inclusion in published directories; is that correct?

13 A. Yes.

14 Q. So "A" covers the relationship between  
15 Comcast and Embarq; is that correct?

16 A. Well, I think they all cover the relationship  
17 between Embarq and Comcast.

18 Q. Fair enough. "A" describes the process by  
19 which Comcast submits its customers' information to  
20 Embarq; is that correct?

21 A. Yes.

22 Q. And then "B" addresses the subsequent  
23 requirement by which Embarq submits that information  
24 for inclusion in directories.

25 A. Yes.

0078

1 Q. Then there is another provision which  
2 addresses the distribution of the directories.

3 A. Yes.

4 Q. And those three requirements are dealt with  
5 in 71.2.1 of the agreement.

6 A. Yeah. I think that the 71.2.1 is kind of  
7 the, for lack of a better term, the preamble for the  
8 rest of the section.

9 Q. Thank you. I think that's an excellent  
10 description of it. Now "A," Mr. Gates testified  
11 earlier about the nonrecurring service order entry  
12 charge that Comcast pays. Do you recall hearing that?

13 A. Yes, I do.

14 Q. And the judge's questions about that process,  
15 and Mr. Gates also testified that Comcast currently  
16 pays \$6.49 cents -- I'm sorry. And Mr. Gates testified  
17 that Comcast currently pays \$6.49 for every listing  
18 that it submits to Embarq; is that correct?

19 A. I believe he said six dollars and  
20 forty-something.

21 Q. Is the correct nonrecurring charge \$6.49?

22 MR. HENDRICKS: Objection. "A," this is not  
23 an issue that's teed up in this proceeding, and "B," I  
24 don't know that the witness has that information.

25 JUDGE TOREM: Is it important we have the

0079

1 exact number of cents, Mr. Sloan?

2 MR. SLOAN: No, it's not.

3 Q. (By Mr. Sloan) Was Mr. Gates correct when he  
4 testified it was approximately six dollars?

5 A. Yes.

6 Q. As part of the prospective agreement, the  
7 relationship that will be in place following Commission  
8 approval of whatever is adopted here, Comcast has  
9 agreed to pay \$9.41; is that correct?

10 A. Yes.

11 Q. And Mr. Gates characterized that as a 45  
12 percent increase.

13 A. Yes, he did.

14 Q. Is it true that all CLEC's pay this  
15 nonrecurring charge or any nonrecurring charge to  
16 submit information to Embarq, submit their customers'  
17 directory listing information to Embarq?

18 A. Yes, it is.

19 Q. So I'm going to ask you to take a look at  
20 Page 5 of your direct testimony. So Comcast has not  
21 disputed the new nonrecurring charge. Of course what's  
22 at issue in this case is the new recurring charge.

23 A. That's correct.

24 Q. And in your Page 5 of your testimony, you  
25 identify a number of functions that you say are

0080

1 associated with this new charge; is that correct?

2 A. Yes. These are the activities that we base  
3 the charge on.

4 Q. When I look at these activities, I see some  
5 groupings, and I'm going to try to summarize them, and  
6 if you object to that, my characterization of them,  
7 please feel free to correct me.

8 When I look at the two first bullets, it  
9 appears to me you are saying that one aspect of the  
10 nonrecurring charge is associated with database  
11 activities, the cost of storing directory listing  
12 information in your databases and maintaining those  
13 directories on a continuous basis; is that correct?

14 A. Maintain not the directories, but yes, the  
15 listings and the systems that they are housed in.

16 Q. And then when I look at the next two bullets,  
17 I see a variety of processes, which I summarize as  
18 being associated with special directory distribution  
19 requests. Do you object to that characterization of  
20 those two bullets?

21 MR. HENDRICKS: I think I object to it. You  
22 are putting words in the witness' mouth. I would  
23 rather see a question about the provisions.

24 MR. SLOAN: Your Honor, I'm trying to develop  
25 a short answer so we can refer back to it later.

0081

1           JUDGE TOREM:  Overrule the objection, but I  
2    want to make sure the witness is comfortable with how  
3    you are describing them for your grouping.

4           THE WITNESS:  Could you repeat it?

5           Q.    (By Mr. Sloan)  The next two bullets deal  
6    with the special directory distribution requests.

7           A.    That's what the fourth one deals well.  The  
8    third one would be just a special request for a  
9    directory.  The end-user is asking for a directory, so  
10   it's a special request for a directory.

11          Q.    So this is not the directory in which the  
12   CLEC's information is being listed; is that correct?

13          A.    It's possible it could be.  If the end-user  
14   is requesting, say for Poulsbo, is requesting a  
15   Bremerton or Seattle listing, they can request that  
16   Bremerton or Seattle directory by calling 1-800, I  
17   think it's "To Get Dex", or it's 1-877 "To Get Dex",  
18   and then Dex will obtain that directory and send it to  
19   the end-user, and they will bill Embarq for that.

20          Q.    Thank you.

21          A.    It could also be they lost their directory or  
22   the dog ate it and they could ask for another one in  
23   territory, and that would be another way they could get  
24   a directory.

25          Q.    The next two bullets, the last two bullets,

0082

1 appear to me activities for which you seek compensation  
2 that are associated with proofreading directories.

3 A. The first one of those two is for  
4 proofreading the listings themselves. The second one  
5 is for proofreading the directory, but proofreading  
6 activities.

7 Q. So we are dealing with database storage,  
8 maintenance charges, directory distribution activities,  
9 and proofreading.

10 A. Okay.

11 Q. And currently, these activities are performed  
12 by Embarq without receiving a specific payment from any  
13 CLEC; is that correct?

14 A. Well, they are being performed without  
15 receiving compensation from Comcast, yes.

16 Q. And the charge in Washington that you have  
17 proposed is fifty cents per listing per month; is that  
18 correct?

19 A. That's correct.

20 Q. And that rate we were talking earlier at the  
21 outset that we've done this arbitration proceeding  
22 around the country, and that rate varies around the  
23 country; is that correct?

24 A. Yes, it does.

25 Q. And the charge, I think, is three dollars in

0083

1 Texas; is that correct?

2 A. No. It's two dollars in Texas, three in  
3 Indiana.

4 Q. So it's three in Indiana, and is it 2.50  
5 anywhere?

6 A. I think we decided that it should be two  
7 dollars in Pennsylvania. It's possible. I don't  
8 remember.

9 JUDGE TOREM: Is that an annual charge?

10 THE WITNESS: It's a monthly charge.

11 Q. (By Mr. Sloan) So for example, you said it  
12 was three dollars in Indiana, so that would  
13 effectively, three times twelve, if I'm not mistaken,  
14 is \$36; is that right?

15 A. Yes.

16 Q. That would be \$36 annual charge, and the  
17 effect of the annual charge in Washington will be 12  
18 times fifty cents.

19 A. It would be six dollars.

20 Q. Just again to clarify the nature of the  
21 charge, only listings then are ordered that are not  
22 ordered with a company by request for Embarq's  
23 facilities, that's the only case in which the charge  
24 will be imposed; is that correct? So for example, a  
25 CLEC that wants to resell Embarq service and use all of

0084

1 Embarq's facilities to serve end-users -- the DLSSM  
2 charge. Isn't that correct?

3 A. I agree with your example. I'm not sure  
4 that's how you said the initial question.

5 Q. Similarly, we were talking about UNE  
6 providers, unbundled network element providers. When  
7 those providers surveyed users using Embarq UNE's and  
8 then place a directory listing service request to serve  
9 an end-user, that CLEC will not be charged the DLSSM.  
10 Is that correct?

11 A. Specifically the UNE loop, yes. For both the  
12 resale and the UNE loop, Embarq has chosen to include  
13 directory service or directory storage and maintenance  
14 activities in the bundle of services that make up the  
15 request, for either a resold line or a UNE loop.

16 Q. Have you -- when I say "you," I refer to  
17 Embarq. Has Embarq submitted the cost evidence from  
18 any UNE rate proceeding that documents that UNE loop  
19 rates include these activities?

20 A. We've never been through a UNE study or case  
21 in Washington, to my knowledge.

22 Q. Have you included UNE loop rate information  
23 anywhere in the country that includes a directory  
24 listing storage and maintenance charge?

25 MR. HENDRICKS: Objection. I don't see the

0085

1 relevance of this.

2 MR. SLOAN: The relevance is that -- I'll  
3 establish a foundation and then I'll come back.

4 Q. (By Mr. Sloan) Embarq systems for taking  
5 directory listing service requests, are they state  
6 specific?

7 A. I'm sorry. Could you repeat the question? I  
8 got lost.

9 Q. When a CLEC enters a directory listing  
10 service request as provided for in the interconnection  
11 agreement, does Embarq have different systems in place  
12 in different states?

13 A. No. We have one system.

14 Q. So is it fair to say then that the cost  
15 associated with that activity is the same in all of  
16 your service territories?

17 MR. HENDRICKS: Objection. Costs aren't at  
18 issue in this case at this point. This isn't a cost  
19 proceeding.

20 MR. SLOAN: That's their position, Your  
21 Honor, but obviously --

22 MR. HENDRICKS: There is no evidence.

23 MR. SLOAN: There is no evidence in the  
24 record that supports that any rate includes these  
25 activities. Is that not correct, Mr. Lubeck?

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1           MR. HENDRICKS: I still maintain the  
2 objection.

3           JUDGE TOREM: I'll overrule the objection  
4 because I think I'm interested in where Mr. Sloan is  
5 going. I'm not sure he has my question exactly, but  
6 it's in one of the directions I had for Mr. Lubeck.

7           THE WITNESS: Your question was if we filed  
8 any file a specific line for directory listing  
9 anywhere?

10          Q.     (By Mr. Sloan) Yes.

11          A.     I'm not a costing expert, but I do not  
12 believe so. I have not seen any cost filings.

13          Q.     And the record of this case does not contain  
14 any evidence regarding Embarq's costs with respect to  
15 performing these activities. Isn't that correct?

16          A.     There are no costs associated with the  
17 activities in the record; you are right.

18          Q.     So there is then no evidentiary support for  
19 your earlier contention that Embarq has identified that  
20 these activities -- when I say "these activities," I'm  
21 referring to Page 5 through 6 of your testimony -- are  
22 ones for which you are not being compensated.

23          A.     If you mean by no evidence that there is no  
24 cost study, then there is no cost study on file. We  
25 filed the responses under oath, but these are

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1 activities related to the service that was providing.

2 Q. I'm going to ask a mischievous question. I'm  
3 not sure it's going to be an effective one, but when a  
4 local exchange carrier submits cost evidence in a state  
5 UNE case, would an affidavit like that be considered --

6 MR. HENDRICKS: I object --

7 Q. -- substantial competent evidence for the  
8 carrier's actual costs?

9 THE WITNESS: I'm not a cost expert. I could  
10 not tell you that.

11 JUDGE TOREM: I'll allow the question, but I  
12 think I understand the spirit in which it was offered.

13 Q. (By Mr. Sloan) Let's turn back to the  
14 prospective agreement.

15 JUDGE TOREM: Before we do that, I'll just  
16 take the liberty to intrude.

17 MR. SLOAN: Please do, Your Honor. Maybe you  
18 have a better sense of where we want to go.

19 JUDGE TOREM: Mr. Lubeck, what I wanted to  
20 understand is the arguments made by Comcast about the  
21 cost-based issues, and I recognize it's not a cost  
22 proceeding, but it peaked my attention as to maybe  
23 showing, again, how little clothes this emperor might  
24 have, but when I look at the arguments under Section  
25 251(b)(3), and there is an issue that if you are a

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1 UNE-loop purchaser, you don't have to pay this DLSSM  
2 charge. It's included.

3 THE WITNESS: Right.

4 JUDGE TOREM: Maybe the first question on  
5 this line is just how did Embarq come to link the  
6 purchase of the UNE loop to giving this DLSSM service as  
7 part of the package? Do you have any information from  
8 where you are sitting on that?

9 THE WITNESS: I'm not a cost expert, like I  
10 said. My understanding from talking to the costing  
11 people is that when the original costs were developed  
12 for UNE loop, it includes overheads, and primarily,  
13 that's what we are talking about here. Are the  
14 overheads that are related to directory, they are  
15 included in the common and overhead charges that are  
16 allowed in UNE filings.

17 JUDGE TOREM: So let me parrot this back. If  
18 a competitor comes in and wants to sell or purchase UNE  
19 loops in order to sell their own services to clients  
20 within Embarq service territory, then Embarq is  
21 charging them a sufficient fee for the UNE loop,  
22 including some overhead, that will pay for any inner  
23 associated directory listing service and maintenance  
24 charges.

25 THE WITNESS: Yes. It would be included in

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1 the cost studies, those activities would.

2 JUDGE TOREM: Now, if you have a UNE loop  
3 competitor, UNE looped-based competitor that comes in,  
4 do they also have that nonrecurring charge for the  
5 initial setup of the directory listing?

6 THE WITNESS: Yes. We charge the  
7 nonrecurring charge whenever there is a directory  
8 segment on the order.

9 JUDGE TOREM: So the DLSSM charges are not  
10 included in that charge, from Embarq's perspective.

11 THE WITNESS: The activities, no they are  
12 not.

13 JUDGE TOREM: Those activities are covered  
14 under the overhead.

15 THE WITNESS: Yes.

16 JUDGE TOREM: I'm totally out of my depth  
17 when I ask this, but UNE loop prices are set by  
18 something called a TELRIC approach; is that correct?

19 THE WITNESS: Yes.

20 JUDGE TOREM: Are the listings and the basis  
21 for the prices of listings, aren't they historically  
22 established by a different standard, because everything  
23 I've read says they are not TELRIC.

24 THE WITNESS: Directory listings are not  
25 UNE's, so they were never included in TELRIC cost

0090

1 studies, the directory listings themselves, and Embarq  
2 has historically offered a directory listing with  
3 either a resold line or a UNE loop. The historical  
4 context is Embarq was part of Sprint at the time, and  
5 Sprint had a significant CLEC, so for whatever reason,  
6 we offered a directory listing with those two types.

7           There weren't any significant  
8 facilities-based providers yet, and over the past  
9 several years, since this last, the existing Comcast  
10 agreement, we started seeing a significant amount of  
11 facilities-based providers, mostly cable companies, but  
12 there are a few others, that have taken a large market  
13 share from us in different areas of the country,  
14 including in Poulsbo, where Comcast offers service, and  
15 as ones we spun off, we went through and identified  
16 some of the services that we were providing without  
17 compensation, and this is one of them.

18           JUDGE TOREM: But again, if that's when you  
19 are providing it without compensation to Comcast or any  
20 other facilities-based CLEC.

21           THE WITNESS: That's correct. I'm told that  
22 those activities are included in the UNE loop prices,  
23 and a directory has always been a part of the retail  
24 price, and for resale, the CLEC gets a retail price  
25 less at discount, so all the services that are included

0091

1 in a retail end-user service, they are included in the  
2 retail end-user service, just with a discount.

3 JUDGE TOREM: And then on the flip side of  
4 the coin, a facilities-based CLEC, they are getting it  
5 for free; right?

6 THE WITNESS: They are not buying anything  
7 else from us other than maybe interconnection. Comcast  
8 does purchase -- we interconnect our networks, but  
9 that's primarily the service that they purchase from us  
10 other than directory listings.

11 JUDGE TOREM: If they did get onto Embarq's  
12 facilities like a UNE loop provider, then when they  
13 purchase that, they would be buying these activities  
14 and the overhead.

15 THE WITNESS: Sure. For example, Comcast  
16 typically provides service within a town within the  
17 city limits. They could provide service through us to  
18 somebody that's not in their service area, the service  
19 area that they have.

20 JUDGE TOREM: Where they don't have their own  
21 network.

22 THE WITNESS: Yes.

23 JUDGE TOREM: They could be both a UNE loop  
24 provider outside their service area and a  
25 facilities-based provider within their service area.

0092

1 That's what you are saying.

2 THE WITNESS: There are many CLEC's that do  
3 that.

4 JUDGE TOREM: Well, is any other ILEC trying  
5 to do this with CLEC's nationwide? I posed the  
6 question more to follow -- is this a new policy that  
7 Embarq is seeking to bring in through all these varied  
8 states that you are having this arbitration, or is this  
9 a trend that's already going on? Are you on the  
10 cutting edge of this to push it forward, or is this  
11 part of something else that nationally we are now just  
12 seeing in Washington?

13 THE WITNESS: We didn't do a full study of  
14 this, but I'm not aware of other cases pending  
15 nationally. I think we are probably on the cutting  
16 edge for this issue.

17 JUDGE TOREM: Okay. I just want to see  
18 contextually where this is going so as I get around to  
19 reading the briefs and writing the decision, I know  
20 where I should park the turnip truck.

21 But where I'm going to go with this and see  
22 it in its full context, I think we talked at the  
23 prehearing conference with your counsel as to whether  
24 any of the other arbitrations would have been ripe  
25 enough for a decision, and they were predicting no at

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1 that time, and I think they were correct. Since we are  
2 fourth in line, other decisions are still pending or  
3 maybe briefs are still pending in other places, so you  
4 don't have the benefit of any other trends.

5 THE WITNESS: We did arbitrate not with  
6 Comcast, but we did arbitrate this with Verizon, and we  
7 had two decisions, one for us and one against us. For  
8 us in Indiana and against us in Minnesota.

9 JUDGE TOREM: And I think that was discussed  
10 in Mr. Gates' testimony as to his views on both and  
11 issues that were or weren't raised by Verizon that  
12 Comcast chooses to bring to this Commission's  
13 attention.

14 THE WITNESS: Yes, and of course we would say  
15 that the Indiana result was correct, clearly.

16 JUDGE TOREM: That part, no argument as to  
17 your viewpoint on that. I just wanted to go,  
18 Mr. Sloan, and take some time on that UNE loop issue  
19 and understand. This isn't a cost proceeding. I don't  
20 know if you have any other cost-based questions.

21 MR. SLOAN: I do have a couple of questions  
22 based on Mr. Lubeck's testimony in response to your  
23 questions, and I'm confused on a couple of points.

24 JUDGE TOREM: Just when I was getting clear.

25 Q. (By Mr. Sloan) You seem to say two

0094

1 contradictory things to the judge. You said that the  
2 cost of the directory listing service is included in  
3 the UNE loop rates as an overhead. Is that what you  
4 said?

5 A. The activities related to the DLSSM service  
6 are included primarily in overheads.

7 Q. Then you said that the directory listings are  
8 not UNE's and that they were never included in the  
9 TELRIC cost studies.

10 A. As a specific UNE itself. Directory listings  
11 were never a specific UNE, like a loop or switching was  
12 originally.

13 Q. So if I were to go into the details of one of  
14 Embarq's cost studies and looked in the work papers  
15 dealing with overheads, I would find directory listing  
16 activities, and that's a question. Would I find  
17 directory listing-related activities?

18 A. I don't know. I've not reviewed the cost  
19 studies. What I've been told from our costing experts  
20 is that the activities related to -- for example, the  
21 last two bullets where we do proofreading activities on  
22 Pages 5 and 6 of my direct testimony, the group that  
23 does that are included in the overheads. I don't know  
24 what the moniker of the name would be related to that.

25 Q. You also said that the costs are included in

0095

1 the total service resale discount rate; is that  
2 correct?

3 A. Based on that the retail end-user gets a  
4 listing with their monthly service, so a resold  
5 end-user would get a listing with their monthly  
6 service.

7 Q. But when we are talking about costs, these  
8 aren't really -- the DLSP doesn't reflect the cost of  
9 these activities; isn't that correct?

10 A. I don't think I've ever submitted that the  
11 DLSP is a cost-based service.

12 Q. It goes without saying that if the charge is  
13 fifty cents in Washington and three dollars in Indiana  
14 that we are not talking about cost-based charge.

15 A. Right. What the decision was made to use the  
16 analogous service, and so we used the analogous service  
17 in each state so that Comcast isn't disadvantaged, say,  
18 if we averaged all those rates it may come out to be a  
19 dollar fifty, and Comcast then would be disadvantaged  
20 in Washington compared to a Vonage subscriber that  
21 calls in and gets a fifty-cent listing. So we didn't  
22 average the price and come up with one price. We used  
23 the foreign listing service charge.

24 Q. Let's go back to the prospective agreement.  
25 We were talking earlier about how the interconnection

0096

1 agreement deals with the nonrecurring charge. Take a  
2 look at Section 71.3.4 of the agreement on Page 111 of  
3 the exhibit. Are you with me?

4 A. Yes.

5 Q. It says that CLEC agrees to provide customer  
6 listing information, including without limitation  
7 directory distribution information, to Embarq at no  
8 charge. Do you see that?

9 A. Yes.

10 Q. It goes on to say that Embarq will provide  
11 CLEC with appropriate format for provision of CLEC  
12 customer listing information, and the parties will  
13 agree to adopt a mutually acceptable electronic format  
14 for the provision of such information as soon as  
15 practicable. Do you see where it says that?

16 A. Yes.

17 Q. Then the next section, Section 71.3.5, it  
18 says that Embarq agrees to provide -- by the way, when  
19 we look at provisions in this exhibit, which is the  
20 prospective agreement, and we see language that does  
21 not have a cross-out through it, such as these  
22 provisions we've just been reading from, that's  
23 language that the parties have agreed to include in the  
24 forthcoming agreement regardless of the outcome of this  
25 arbitration proceeding. Isn't that correct?

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1 A. That is correct.

2 Q. So the next provision, 71.3.5, it says that  
3 Embarq agrees to provide white pages database  
4 maintenance services to CLEC.

5 A. Yes.

6 Q. CLEC will be charged a service order entry  
7 fee upon submission of service orders into Embarq's  
8 service order entry system, which will include  
9 compensation for such database maintenance services.

10 A. Yes. That's what it says.

11 Q. So it says, Mr. Lubeck, that as part of the  
12 nonrecurring fee, that includes white pages, database  
13 maintenance services. Is that not correct?

14 A. Yes, and what those white pages database  
15 maintenance services are were included in one of my  
16 responses.

17 Q. But they are not referred to in this contract  
18 as anything other than the databases associated with  
19 the service order entry activity; isn't that correct?

20 A. The databases associated with the service  
21 order entry. So the service order entry database, yes,  
22 that's what it would include. Embarq keeps or  
23 maintains a database of all the service orders that  
24 come into our company so we know how to properly charge  
25 CLEC's as well as if questions come up, we can

0098

1 investigate.

2 Q. The first bullet on Page 5 refers to storing  
3 the directory listing information; is that correct?

4 MR. HENDRICKS: You are back to Page 5?

5 Q. Yes. First bullet, Page 5 of your direct  
6 testimony.

7 A. Yes.

8 Q. I take it from the distinction there that you  
9 have made here that storing information and maintaining  
10 databases associated with storing information are  
11 different activities that have different costs  
12 associated with them. Is that a fair assumption on my  
13 part?

14 MR. HENDRICKS: Objection. I don't know that  
15 he said costs.

16 Q. They are separate activities; is that true?

17 JUDGE TOREM: Mr. Sloan, you are asking  
18 Mr. Lubeck if there is a difference between what's  
19 covered in Paragraph 71.3.5 and what's been being  
20 listed back in his direct testimony as a directory or  
21 database management service?

22 MR. SLOAN: That's not quite what I was  
23 asking, so I'll ask more directly.

24 Q. (By Mr. Sloan) Is the activity of storing a  
25 listing different from the activity of maintaining the

0099

1 databases associated with storing the listing?

2 A. Well, storing the listing is different than  
3 maintaining the database, but I don't think that 71.3.5  
4 talks about either of those. It doesn't talk about  
5 storing the listing. It refers to storing the service  
6 order that comes in. It's not worded very well, but  
7 that's the intent.

8 Q. That's Embarq's intent.

9 A. Yes.

10 Q. We were talking about the proofreading  
11 activities that Embarq claims to perform as part of the  
12 DLSP. Are there records about how often Embarq  
13 performs these activities?

14 A. When you say "records"...

15 Q. Does Embarq know how often it perform this  
16 activity?

17 A. The directory operations group reviews, as it  
18 says in here on Pages 5 and 6, the directory operations  
19 group reviews each listing when they come into the  
20 database within a week, or however long, as soon as  
21 they can get to it, to review for accuracy. If the  
22 listing isn't accurate, they will work with the CLEC to  
23 correct it.

24 Then again, just prior to publication, the  
25 last bullet, they review the proofs, and the proof

0100

1 would include the listing as it's supposed to be  
2 printed in the directory. So it provides a visual  
3 that's maybe different than what the original review  
4 was so they can check and hopefully find additional  
5 errors that they would be able to correct so we will  
6 have accurate telephone directories.

7 Q. How often last year did Embarq contact  
8 Comcast to relate a concern about a listing that arose  
9 after a proofreading activity?

10 A. I don't have the last year, but I know that  
11 between February and, I believe, June, Embarq contacted  
12 Comcast nearly 700 times.

13 MR. SLOAN: Your Honor, I move to strike  
14 that, because we asked for information just like that  
15 as part of this proceeding, and if it had been provided  
16 earlier, I would have had a means of cross-examining  
17 about it, but I don't, so I don't know how that could  
18 be competent evidence submitted in this arbitration.

19 JUDGE TOREM: Mr. Hendricks?

20 MR. HENDRICKS: If there was an objection  
21 made that you can produce that we didn't respond to a  
22 discovery response or a motion to compel, then that  
23 would be acceptable, but there has been no such motion.

24 MR. SLOAN: Well, you didn't produce it  
25 because you said it wasn't relevant. I asked him a

0101

1 question about how often they perform this, and they  
2 said that they have tabulated some 700 times which they  
3 contacted us from February until whenever, and I've  
4 never seen that before. That just came out of his  
5 mouth right now.

6 JUDGE TOREM: I think I understand, but it's  
7 coming out in the form of a question that you asked and  
8 an answer you got.

9 MR. SLOAN: And we asked specific questions  
10 in discovery about these very same activities. We  
11 asked them how often they perform the activities  
12 associated with directory listing storage and  
13 maintenance charge. They said that information was not  
14 relevant and they weren't going to provide it.

15 I was asking questions in which I anticipated  
16 the answer would be, "I don't know," or "I don't have  
17 that information because it's not relevant," and now  
18 he's giving me a new answer that reflects the fruit of  
19 some internal activities that were undertaken, I  
20 presume, in response to this proceeding. I have no way  
21 of cross-examining him about it, so it just can't  
22 become part of the record here.

23 JUDGE TOREM: Mr. Sloan, you are saying you  
24 haven't heard this answer as it's come out today in  
25 Washington in Indiana, Texas, or Pennsylvania?

0102

1 MR. SLOAN: No.

2 JUDGE TOREM: I'm torn as to how to handle  
3 this as an evidentiary objection versus a discovery  
4 dispute, which you've now intertwined the two for me.

5 MR. SLOAN: The two are integrally related as  
6 a legal matter. Discovery, they have all this  
7 information within their possession. They refuse to  
8 provide it as part of discovery in the case. They've  
9 created a record in which there is no such evidence in  
10 the record of the case.

11 Now I have been -- this is the veritable  
12 surprise at the hearing that is the product of one  
13 party's noncompliance with its discovery obligations,  
14 and the normal remedy for that is to just not consider  
15 that evidence in a proceeding. That is cost evidence,  
16 because it goes to how often they perform these  
17 activities. It is part of the basis for their  
18 intention of imposing this charge.

19 JUDGE TOREM: I think that's a matter that  
20 could be argued if it's cost evidence or if it's just  
21 evidence of the basis to have a charge at all.

22 MR. SLOAN: We asked discovery questions --  
23 we would have to go back and take a look at the  
24 specific wording word.

25 JUDGE TOREM: Let me ask Mr. Hendricks to

0103

1 respond before I formulate some sort of ruling on this  
2 and hear what Embarq has to say.

3 MR. HENDRICKS: If Embarq responded that it  
4 wasn't relevant, which is what Comcast says right now,  
5 Comcast would have the opportunity to make a motion to  
6 compel, which it did not do, and those issues, whether  
7 or not it's relevant, are a matter of a discovery  
8 dispute, and Comcast didn't avail itself of those  
9 rights that time, let's waive them, and if you ask the  
10 question now in hearing and he gets an answer, he's  
11 made his bed and Comcast has to deal with that.

12 MR. SLOAN: That's absolutely incorrect, Your  
13 Honor, and the reason it's incorrect is a matter of law  
14 is because Embarq bears the burden of proof in this  
15 proceeding, and as part of bearing the burden of proof  
16 means that they've got to come forward with the  
17 evidence to support the case. They have not done that.

18 They can't pull it out of the hat at the  
19 hearing and say, "Oh, by the way, none of that evidence  
20 which we said was irrelevant, we've gone back and  
21 developed that evidence, and in response to your  
22 question, which is going to expose the lack of  
23 evidentiary support or ability to meet the burden of  
24 proof which is on them in this proceeding, we've  
25 decided we are going to present it to you now. That

0104

1 doesn't wash.

2 JUDGE TOREM: Mr. Lubeck, apparently you  
3 haven't answered this question in the other three  
4 states with a number that you've given me now on a  
5 measured time line of how often Embarq has gone back to  
6 Comcast.

7 MR. SLOAN: More to the point, they haven't  
8 produced in discovery in this case.

9 JUDGE TOREM: I understand that the discovery  
10 requests are ongoing, so if numbers became available,  
11 you would be obliged to reveal that. Can you tell me a  
12 little bit where that number comes from or how you came  
13 to know that number to recite it today?

14 THE WITNESS: Yes. In relation to Comcast's  
15 request to share revenues, the four and six cents we  
16 get from directory publishers included in the contract  
17 is a requirement that the parties share the revenues,  
18 that we cooperatively share those revenues.

19 Comcast about two months ago, it was June  
20 24th, I believe, sent us a request to share those  
21 revenues, and during that as we were going back and  
22 developing what we would share, how much we would  
23 share, and how much it would cost to share those,  
24 that's how it came up.

25 JUDGE TOREM: So that number was tabulated in

0105

1 response to this other revenue sharing request as  
2 opposed to the discovery request that came in.

3 THE WITNESS: Yes. I believe that's how I  
4 found out about it, it's possible that we were  
5 tabulating before. I don't have any idea, but that's  
6 how I found out about it.

7 JUDGE TOREM: Do you remember being consulted  
8 about this number in the context of a data request or  
9 discovery request?

10 THE WITNESS: No.

11 JUDGE TOREM: And Mr. Hendricks, you don't  
12 have any independent recollection of why this was  
13 deemed as just not relevant?

14 MR. HENDRICKS: I don't. I wasn't aware of  
15 the information at the time the request was made. I  
16 think the request was made prior to the time frame that  
17 Mr. Lubeck is talking about.

18 JUDGE TOREM: I wouldn't be surprised if the  
19 request came in before that simply because of the  
20 nature of this dispute nationwide, and the way you  
21 described it to me back in May, you probably had your  
22 stock discovery requests in each case that you filed.  
23 If there is a date on the discovery request --

24 MR. SLOAN: Your Honor, I'll read for  
25 example, Data Request No. 5.

0106

1                   JUDGE TOREM: This is an exhibit in the case;  
2 right?

3                   MR. SLOAN: It's an exhibit that's been  
4 marked as 13, and I'm looking at Data Request No. 5.  
5 The request is, "Please identify all activities  
6 associated with the..." This is nonrecurring charge;  
7 I'm sorry.

8                   As I look at Data Request No. 7, "Please  
9 identify all activities associated with the proposed  
10 recurrent DLISM charge and all costs support and  
11 analysis data or other evidence that supports the  
12 charge. Please identify and provide all costs or  
13 analysis and other documents that support your answer."

14                   That answer that he just gave is squarely in  
15 response to that request. It hasn't been produced.  
16 The point of having discovery is so that parties  
17 contest each other's case before they get into these  
18 proceedings, and it wasn't produced, and it can't just  
19 be pulled out of the hat here. The ordinary remedy for  
20 attempts to introduce evidence at trial which is  
21 responsive to a document to a discovery request that  
22 wasn't produced is you don't consider it.

23                   JUDGE TOREM: Hang on, because I want to read  
24 the entirety of this DR-7.

25                   Mr. Sloan, the way the data request is

0107

1 phrased appears to be seeking two pieces of  
2 information, both the general activities, which I think  
3 we are talking about on Pages 5 and 6 of Mr. Lubeck's  
4 direct testimony in Exhibit 1; correct?

5 MR. SLOAN: Yes.

6 JUDGE TOREM: From there, it goes on to ask  
7 to identify and provide the cost support analysis, and  
8 the objection is --

9 MR. SLOAN: And other documents that support  
10 the identified activities.

11 JUDGE TOREM: So what you are suggesting  
12 should have happened here is that although on June  
13 16th, this cost sharing revenue data was not yet  
14 presented and didn't exist, apparently, if we take the  
15 witness's word and recollection of the sequence of  
16 events.

17 Then on June 24th when the company began to  
18 begin responding, either Mr. Hendricks or whoever at  
19 Embarq was responsible for remembering this is an  
20 ongoing request should have thought, "Ah, this is now  
21 responsive to DR-7, and it should be disclosed at that  
22 point as soon as it's tabulated." That's what you are  
23 suggesting should have happened?

24 MR. SLOAN: Yes.

25 JUDGE TOREM: And Embarq's objection is

0108

1 essentially saying, We are not trying to figure out the  
2 cost of these services, and maybe today the argument is  
3 different, but this wasn't produced as a cost-basing  
4 analysis but was produced only in a revenue sharing  
5 model, which is probably well over my head as to  
6 whether they can be one in the same -- you can draw me  
7 somewhere it should have been disclosed for both  
8 purposes.

9 I think the arguments are being made that I'm  
10 going to grant your request here on full consideration.  
11 Yes, I'll grant your motion to strike that number and I  
12 won't consider it here. This probably changes the  
13 perspective of going forward in the other states you  
14 have left.

15 MR. SLOAN: If they are produced in  
16 discovery.

17 JUDGE TOREM: It allows you to take some  
18 other discovery issues in those cases but not in  
19 Washington given the nature of how it was disclosed  
20 here. So I will grant that, and I haven't even written  
21 down the number, so I won't worry about that part of  
22 the transcript that might refer to the number of  
23 contacts between Embarq and Comcast in this case.

24 The reason I'm granting it is because I think  
25 the case is being made as to whether this should be

0109

1 allowed at all. We've agreed it's not a cost  
2 proceeding, so therefore, I think what I'm doing by  
3 granting your motion to strike is essentially endorsing  
4 Embarq's position that it's not relevant. If it was  
5 disclosed, it appears from what I've laid out here  
6 there is a rational explanation as to how it occurred.

7 MR. SLOAN: I'm not suggesting bad faith,  
8 Your Honor.

9 JUDGE TOREM: I didn't think you were, but I  
10 wanted to make it clear that by doing that, it leads,  
11 perhaps, against where Comcast wants to go --

12 MR. SLOAN: We'll see when the briefing is  
13 done.

14 JUDGE TOREM: Correct, so I wanted to make  
15 sure that this argument is relevant, but now that  
16 you've got it, it can't be admitted because it's a  
17 surprise. If that's the way the objection is and I'm  
18 ruling in your favor, you can't --

19 MR. SLOAN: My objection is both -- I'm going  
20 to stop there since I've won; how about that.

21 JUDGE TOREM: I'm giving you a chance --

22 MR. SLOAN: I'll say that my objection is  
23 based on their objection in our discovery responses,  
24 which were that our costs don't matter. It doesn't  
25 matter how often we perform these activities because we

0110

1 can charge you whatever you want, and that's fine. I  
2 understand that position. It's been their position  
3 throughout, and I can deal with that as a legal matter.

4 JUDGE TOREM: I wanted to make sure you knew  
5 what you won before you go home with a cross.

6 MR. SLOAN: They can't say, "Oh, by the way,  
7 it's irrelevant. Oh, and here..."

8 JUDGE TOREM: Correct, but now the number is  
9 stricken, so you can't come back anyway.

10 MR. SLOAN: Let's move on with  
11 cross-examination. Thank you, Your Honor.

12 Q. (By Mr. Sloan) On Page 110 of that  
13 prospective agreement, Section 71.3 is titled  
14 "Directory Listings General Requirements." The first  
15 sentence says, "CLEC acknowledges the main directory  
16 functions included but not limited to Yellow Page  
17 listings, traditional white pages listings, information  
18 pages, directory proofing, and directory distribution  
19 are not performed by Embarq but rather are performed by  
20 and are under the control of the directory publisher."  
21 Is that what it says?

22 A. Yes.

23 Q. 71.3.1, the next page, says that 71.3, which  
24 are all of the provisions on that page, Page 111 up  
25 through Page 112, deal with listing requirements

0111

1 published in traditional white pages. Do you see that?

2 A. Yes, I do, and for 71.3, that's an  
3 acknowledgment that Embarq doesn't provide all services  
4 related to the telephone directory --

5 Q. One of the activities it does not provide is  
6 directory proofing. That's a provision that the  
7 parties have agreed to; isn't that correct?

8 MR. HENDRICKS: Could Mr. Lubeck finish his  
9 answer?

10 MR. SLOAN: He's not testifying in response  
11 to a question so I thought I would just clarify what  
12 he's saying.

13 JUDGE TOREM: Let's let the witness finish  
14 the answer, and remind me now, are we on Page 110 or  
15 111?

16 MR. SLOAN: The provision I read from was on  
17 Page 110, and then I pointed out that the next  
18 provision explained that all of Section 71.3, which  
19 includes both the provision on Page 110 up until the  
20 next to the last provision on Page 112 deals with white  
21 pages listings.

22 THE WITNESS: What I would submit is that  
23 these are acknowledgments from Embarq that Embarq  
24 doesn't perform all of the activities required to get a  
25 telephone directory to an end-user. The Yellow Pages

0112

1 portion of directory proofing would be one such service  
2 that Donnelley provides, because to get a telephone  
3 directory ready for publication, Embarq provides and  
4 others provide daily updates to create the classified  
5 section, the Yellow Pages section, and in the Yellow  
6 Pages section, there is classified headings, and then  
7 inside that there is alphabetical listings of each  
8 business.

9 Donnelley creates that from the updates that  
10 Embarq and others provide, and then they use it to go  
11 sell classified advertising. The white pages piece  
12 Embarq provides and others, ILEC's primarily, provide a  
13 once per publication set, complete set of listings, and  
14 it also includes how the listings should be printed,  
15 whether there should be an indent, multiple listings  
16 for the same customer, whether it should say "Bob and  
17 Jane Doe," or how it should be printed, and then the  
18 printer or the publisher, Donnelley, sent back to us  
19 the white pages so that Embarq can proof it and make  
20 sure that it's as accurate as possible. That's that  
21 last bullet on Page 6 of my direct testimony.

22 Q. (By Mr. Sloan) Just one clarification. You  
23 said that 71.3 is an Embarq acknowledgment. In fact,  
24 71.3 is a CLEC acknowledgment. That's what it says,  
25 correct?

0113

1           A.     I'm sorry.  Yes, acknowledging that Embarq  
2     doesn't provide all of the services to get a directory  
3     to the end-user.

4           Q.     And this language here is not stricken out  
5     like the language above it; do you see that?

6           A.     That's correct.

7           Q.     So this is language that the parties have  
8     agreed to and is a product of give and take in the  
9     negotiations.

10          A.     Okay.

11          Q.     Directory distributions, how many requests  
12     from Comcast -- well, how many requests for directory  
13     distribution for out-of-area directories does Embarq  
14     receive?

15          A.     I do not know.

16          Q.     You just know you perform them sometimes in  
17     some places?

18          A.     Yes.  Upon request by an end-user or a CLEC.

19          Q.     When Embarq does that, to send a directory  
20     out for a particular customer who seeks an  
21     out-of-service territory request, does Embarq send a  
22     bill?

23          A.     No.  Donnelley performs that function for  
24     Embarq on behalf of the end-users inside the service  
25     area for that directory and then bills Embarq for that.

0114

1 Q. Look at 71.3.8 on Page 111, again, we are  
2 looking at a provision that the parties have agreed to.  
3 It says here, Mr. Lubeck, that Embarq or its directory  
4 publisher agree to provide white pages distribution  
5 services to CLEC customers within the Embarq service  
6 territory at no additional charge to CLEC. And that,  
7 Mr. Lubeck, refers to the directories that are being  
8 published with CLEC listing information pursuant to  
9 this agreement. Isn't that correct?

10 A. Yes. It would be for the directories that  
11 are distributed by Donnelley.

12 Q. So it says that the distribution of these  
13 directories, "these" being the directories encompassed  
14 by the agreement, will be distributed without  
15 additional charge. The implication is that  
16 distribution of other directories will be charged.  
17 Isn't that a reasonable interpretation of this  
18 provision? And to follow up on that before you answer,  
19 does not Embarq currently bill for those directories?

20 MR. HENDRICKS: Maybe one question at a time.  
21 There is several questions there.

22 JUDGE TOREM: Mr. Lubeck, the first question  
23 was is this essentially how you get your home phone  
24 book and nothing else.

25 MR. SLOAN: You said you get it free.

0115

1 JUDGE TOREM: That's a reasonable inference?

2 THE WITNESS: Yes.

3 JUDGE TOREM: And the next question was,  
4 doesn't that mean that the end-user or the CLEC who has  
5 the end-user will pay for any additional out of area or  
6 additional copies? Is that a reasonable inference from  
7 71.3.8?

8 THE WITNESS: It could be. Embarq may choose  
9 to charge an end-user or to charge a CLEC.

10 JUDGE TOREM: So that was the last part of  
11 the question. What does Embarq actually do? Who do  
12 they bill, or do they bill?

13 THE WITNESS: In some states, there are  
14 specific rules related to interterritory directories, you  
15 get so many for free, and then above that, you have to  
16 pay for them. Out-of-territory directories are  
17 sometimes charged for -- I don't know the specific  
18 circumstances. If a customer asked for an Indianapolis  
19 directory and they are not an Indianapolis or a Seattle  
20 directory here, I do not know the specific charge, if  
21 there is one.

22 MR. SLOAN: Your Honor, I'm going to ask  
23 Mr. Lubeck about a provision of Washington law. It  
24 doesn't need to be admitted into evidence, but for  
25 convenience, I have a hard copy of it.

0116

1 JUDGE TOREM: Okay.

2 Q. (By Mr. Sloan) This is Washington  
3 Administrative Code Section 480-120-251. Do you see  
4 that, Mr. Lubeck?

5 A. Yes.

6 Q. I'll represent that the entire provision is  
7 not on this page, but I'm not going to ask you about  
8 the entire provision. If you look at Subsection 1, it  
9 says that the local exchange company, a LEC, must  
10 assure that a telephone directory is regularly  
11 published for each local exchange it serves, listing  
12 the name, address, unless omission is requested, and  
13 primary telephone number for each customer who can be  
14 called in that local exchange and for whom subscriber  
15 list information has been provided. Do you see that?

16 A. Yes.

17 Q. So doesn't this provision require that when a  
18 directory is published it include all listings in it,  
19 including CLEC listings?

20 MR. HENDRICKS: Objection. He's calling for  
21 a legal conclusion about a rule he's never seen before,  
22 and it's inappropriate.

23 MR. SLOAN: But there is so much legal. He's  
24 practically a lawyer, all the legal citations in his  
25 direct testimony.

0117

1           MR. HENDRICKS:  Maybe if it was a better  
2 rule, I may go along with that, but it's a Washington  
3 rule he's never seen before.

4           MR. SLOAN:  I didn't ask him a foundation  
5 question.

6           JUDGE TOREM:  I'll sustain the objection.  If  
7 you want to rephrase it to see if you can ask his  
8 interpretation without it being a legally-binding  
9 conclusion, fire away.

10          Q.     (By Mr. Sloan)  Have you seen this provision  
11 before?

12          A.     I believe I have seen it before.

13          Q.     What requirement do you understand that it  
14 imposes on Embarq?  That's a question you can answer  
15 without a yes or no.  Hopefully, it will be the only  
16 one I'll ask you today.

17          A.     It says that a directory must be regularly  
18 published in each exchange, and that this is for each  
19 LEC, not for an ILEC, and that a primary telephone  
20 number for each customer that can be called must be  
21 included unless omission is requested.

22          Q.     I'll move on.

23          MR. SLOAN:  Your Honor, can we go off the  
24 record for just a second?

25          JUDGE TOREM:  We'll take a recess and come

0118

1 back.

2 (Recess.)

3 JUDGE TOREM: I appreciate the parties'  
4 willing to press on a little bit. You have about a  
5 half hour left?

6 MR. SLOAN: I believe that's a good-faith  
7 estimate about how much time is left.

8 Q. (By Mr. Sloan) You testified earlier,  
9 Mr. Lubeck, about the sharing issue which led you to  
10 look at some evidence. That is in section 71.311 of  
11 the agreement. Take a look at that, if you would, for a  
12 minute on Page 112.

13 A. Yes.

14 Q. It says that Embarq will sell or licensee  
15 CLEC customer listing information to third parties, and  
16 then that Embarq and CLEC will work cooperatively to  
17 share any payments for the sale or license of CLEC  
18 customer listing information to third parties. Have I  
19 accurately represented what 71.311 says?

20 A. Yes.

21 Q. The first provision there regarding the sale  
22 of CLEC listing information, when Donnelley and other  
23 publishers purchase listing information from Embarq,  
24 they pay four cents for each listing; is that correct?

25 A. There is two different rates. There is a

0119

1 four-cent and a six-cent rate. The six-cent rate would  
2 cover updates, and the updates would be like for the  
3 business listings that Donnelley purchases so they can  
4 build the classified section of the phone book. The  
5 four-cent would be for bulk sale of all listings in a  
6 specific area, but it would be four cents per listing.

7 Q. And that is in accord with the rate that the  
8 FCC established in the SLI/DA order; isn't that  
9 correct?

10 A. Yes.

11 Q. And Embarq, to the best of your knowledge,  
12 has never petitioned a regulatory authority seeking  
13 more compensation per listing than that rate; is that  
14 correct?

15 A. No, they haven't.

16 Q. So I was correct that they have not sought?

17 A. They have not sought to increase that rate.

18 Q. And 71.311 says that Embarq and CLEC will  
19 work cooperatively to share any payments for the sale  
20 or license of CLEC customer listing information. Has  
21 Embarq, in fact, shared any revenue from those sales  
22 yet?

23 A. Not to my knowledge.

24 Q. Just back up a little bit, and I apologize.  
25 Again, we talked about the identification of the

0120

1 activities that are part of the DLSSM. I just want to  
2 clarify, the charge is being posed just for the storage  
3 and maintenance of listings that are provided to  
4 Donnelley; is that correct?

5 A. No. It's the storage of maintenance of  
6 listings. We sell the listings to various parties.  
7 Donnelley happens to be one of those, but it's the  
8 storage and maintenance of Comcast's listings in our  
9 databases.

10 Q. But you don't proofread all third-parties'  
11 directories, do you?

12 A. We proofread the Donnelley directory, and we  
13 proofread others that request it.

14 Q. Would you take a look at the stack of  
15 exhibits sitting next to you? I just want to clarify  
16 what these are for the record. I won't ask you any  
17 questions about them.

18 MR. HENDRICKS: I think they speak for  
19 themselves.

20 MR. SLOAN: I want to make sure they speak  
21 for themselves.

22 Q. (By Mr. Sloan) Exhibit 11 is the directory  
23 listing license agreement, and this was produced by  
24 Embarq in discovery. What is this document?

25 A. This is a contract between Embarq and a

0121

1 printed directory publisher that the printed directory  
2 publisher would sign before we sell them any listings.

3 Q. You said it's a generic agreement; is that  
4 right?

5 A. It is.

6 Q. And what about the next exhibit, ALL-12?

7 A. That's a directory assistance listing, so a  
8 directory assistance provider that requests our  
9 listings would ask for this type of an agreement, and  
10 we then would sign it before we sell them any listings.

11 Q. Directory assistance is 411?

12 A. Yes. It would be for the purpose of  
13 providing 411 service.

14 Q. Does Donnelley also provide 411 service; do  
15 you know?

16 A. I don't know.

17 Q. Take a look at Page 13 of your direct  
18 testimony, Mr. Lubeck. On Line 5, there is a question  
19 posed to you. Has the FCC established any regulatory  
20 prohibition against Embarq's charging non cost-based  
21 MRC?

22 A. Yes.

23 Q. And then you answered that, there is no  
24 restriction because Section 251(b)(3) should not apply  
25 when a LEC doesn't control access to the directory

0122

1 publisher. So my question to you is, are there any FCC  
2 orders that say that?

3 A. That say it should not apply when a LEC does  
4 not control access?

5 Q. Yes.

6 A. I think that's just one of the reasons why I  
7 said no. Section 222 also doesn't require Embarq to  
8 sell listings of third-party providers.

9 Q. But Embarq does sell listings of third-party  
10 providers; does it not?

11 A. But this doesn't require us to.

12 Q. But Embarq does do it; isn't that correct?

13 A. Yes, Embarq does do it through the  
14 interconnection agreement.

15 Q. You say in your testimony that the market  
16 should set the rates for the directory listing storage  
17 and maintenance charge; is that right?

18 A. Yes.

19 Q. What's the market that you are referring to?

20 A. A market would be a willing buyer and a  
21 seller providing the service, or the seller providing  
22 the service and a willing buyer.

23 Q. Who are the sellers in this market?

24 A. Well, Embarq is selling a service, the  
25 directory listing storage and maintenance service.

0123

1 Q. And who are the other sellers of that  
2 service?

3 A. Well, to have a market you don't need more  
4 than one, but there would be others. I think in the  
5 SLI/DA order, and I believe --

6 Q. Who else in the market today --

7 MR. HENDRICKS: Can he finish the answer?

8 JUDGE TOREM: Let's let him finish.

9 THE WITNESS: I'm looking for the exact  
10 paragraph, but in one of the paragraphs -- it's around  
11 Paragraph 90 -- the FCC listed five other providers of  
12 subscriber list information.

13 Q. (By Mr. Sloan) Other providers of subscriber  
14 list information. Who are the other purchasers of  
15 subscriber list information in Embarq service  
16 territory? Besides Embarq, who are the other  
17 purchasers of that information? You said there is a  
18 market. The market is composed of buyers and sellers.

19 A. Right.

20 Q. You said that the buyers are the directory --  
21 the service is a directory listing storage charge and  
22 you are selling it.

23 A. Yes.

24 Q. Who are the buyers of the service?

25 A. Comcast could.

0124

1 Q. Who are the other sellers --

2 MR. HENDRICKS: It's asked and answered. He  
3 just answered the question.

4 Q. Who are the other sellers?

5 MR. HENDRICKS: He answered the question. He  
6 cited the SLI/DA order.

7 Q. In Embarq's market today around the country,  
8 who are the other sellers?

9 A. I think I said just a little bit ago that to  
10 have a market, you only need one provider and one  
11 seller.

12 JUDGE TOREM: So Mr. Sloan is asking you are  
13 you aware of anyone else selling this information to  
14 the directory assistance or directory publisher  
15 companies?

16 THE WITNESS: I'm not aware of any in  
17 particular. I know that the FCC set out rules in a  
18 second order -- it wasn't second SLI/DA order, but I  
19 refer to it as SLI/DA two -- that identified that once  
20 a company has bought the listings from a LEC, they can  
21 turn around and resell them if they like. They don't  
22 have to use them just for the purpose of a printed  
23 telephone directory or a directory assistance service.  
24 They can turn around and sell those listings.

25 Q. (By Mr. Sloan) They can sell them to other

0125

1 directory publishers.

2 A. Yes.

3 Q. Or other directory assistance providers.

4 A. Or for whatever reason.

5 Q. On Page 18 of your direct testimony, you cite  
6 here some examples of prices for the identical good --  
7 I believe this is your testimony -- I'm go to ask you  
8 what I understand your testimony to be. Are you  
9 testifying about examples for the identical good that  
10 have different prices in different markets?

11 A. No. What I talk about is two different  
12 markets, the two different products that have identical  
13 costs.

14 Q. Two different products.

15 A. Or services.

16 Q. What is the relevance of that?

17 A. That a price is not a determinant, or cost is  
18 not the only determinant of price. So in a market, you  
19 can have a different price base -- in different  
20 markets, different prices for the same cost of a  
21 service.

22 Q. Your testimony also cited an example of a  
23 vendor that could produce a product at sixty cents and  
24 a rival can only produce it for one dollar; is that  
25 correct?

0126

1           A.     Yes.

2           Q.     On Page 19, and so in that situation, if the  
3 one-dollar producer can't lower her prices, she can't  
4 compete with the sixty-cent provider; isn't that right?

5           A.     Depending on how the parties price it and  
6 assuming that no other parties get into that market.

7           Q.     Well, let's say someone comes in and they can  
8 price the product at seventy cents but that the market  
9 demand is being met at sixty cents. Will the second  
10 producer be able to sell her product at seventy cents  
11 in a fully functioning economic market?

12          A.     Under that strict hypothetical where there is  
13 no other value determinants or pricing differentiation  
14 then if it was just who can produce it at the lowest  
15 cost, then the lowest cost provider would win.

16          Q.     Then what happens if someone could come into  
17 the market, and then in your example where you have two  
18 vendors and one can produce for 40 cents less than the  
19 other -- and supply and demand, that provider will win  
20 the entire market, will he not?

21          A.     Without any other provider coming in the  
22 market, yes, they should, but there could also be price  
23 differentiation. I'm sorry, product differentiation.

24          Q.     In a market that only has one provider of  
25 service, what do you call that provider?

0127

1 A. The economic term being monopolist.

2 Q. Just a couple of questions about the foreign  
3 listing charge. That's a charge imposed on end-users;  
4 correct?

5 A. Yes, it is.

6 Q. And by way of example, if a customer from  
7 Seattle wanted to have his or her listing included in  
8 the local directory, local Embarq directory, in that  
9 case, Embarq would not be receiving that person's  
10 request through the CLEC, LEC service order entry  
11 charge; correct?

12 A. If the subscriber calls Embarq directly, they  
13 would call our retail service center, and the retail  
14 service center would take the order. If it's a CLEC's  
15 end-user in Seattle, then the CLEC would order it  
16 through us the same way that Comcast would order it.

17 Q. So then the Seattle end-user's number will be  
18 listed in the local directory, and you will bill that  
19 Seattle end-user here in Washington fifty cents a  
20 month.

21 A. Yes.

22 Q. And is that a tariffed charge?

23 A. Yes, it is.

24 Q. And that charge is three dollars per customer  
25 per month in Indiana; is that right?

0128

1           A.     Foreign listing charge in Indiana for a  
2 retail end-user is three dollars.

3           Q.     And in Texas...

4           A.     It's two dollars.

5           Q.     So that's the basis for the DLSSM charge.

6           A.     Yes.

7           Q.     How is the foreign listing charges set in the  
8 different markets?

9           A.     Like I said, I'm not a costing expert and I  
10 don't know. I've been around a long time. It  
11 predates me.

12                   MR. SLOAN: I don't have any further  
13 questions.

14                   JUDGE TOREM: If I understand, Mr. Lubeck,  
15 this foreign listing charge, then let's take my local  
16 phone book is the Tacoma and University Place area of  
17 Pierce County, and I want my telephone number listed in  
18 the Olympia directory. Then I would be paying a  
19 foreign listing service charge because I'm not within  
20 that exchange?

21                   THE WITNESS: That would be one way. Another  
22 way would be let's say that you cut the cord and you  
23 only have a wireless phone, but you still want to be in  
24 the directory, in your own home directory, you would  
25 pay that foreign listing service charge then.

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1           JUDGE TOREM: How would you bill -- let's go  
2 with your wireless example -- if in our home we chose  
3 not to go with Qwest as the hard-line provider and we  
4 said to them instead we want you to list a Verizon cell  
5 phone number in your Qwest directory, I would have to  
6 pay a foreign listing service charge, whatever Qwest's  
7 tariff says?

8           THE WITNESS: Yes.

9           JUDGE TOREM: That would apply whether or not  
10 I maintained that home line through Qwest?

11          THE WITNESS: That's correct. You could  
12 still maintain your home line, but let's say you were a  
13 business and you wanted to have your cell phone listed  
14 also, then that would apply.

15          JUDGE TOREM: So the Qwest Dex that arrived  
16 would include, from what we discussed today, my  
17 hard-wired line, the land line, but it wouldn't include  
18 my cellular telephone or my wife's cellular telephone  
19 unless we paid an additional fee.

20          THE WITNESS: Correct.

21          JUDGE TOREM: If we wanted to do that, who  
22 would charge us?

23          THE WITNESS: If you called Qwest, Qwest  
24 would charge you for that service.

25          JUDGE TOREM: So the publisher, either Dex or

0130

1 Qwest as the LEC providing that would bill me directly.

2 THE WITNESS: In Embarq's territory, it would  
3 be Embarq billing you, not Dex. I'm not sure how Dex  
4 and Qwest have their contract arrangement.

5 JUDGE TOREM: So you would be sending a  
6 monthly bill to the folks.

7 THE WITNESS: Yes. There is several ways.  
8 When it's that small, typically you would bill one time  
9 for the whole year.

10 JUDGE TOREM: Otherwise postage would catch  
11 up with you quickly.

12 THE WITNESS: Yes.

13 JUDGE TOREM: But that's between the ILEC and  
14 the end-user. For instance, the mobile provider isn't  
15 a part of that. If you asked them, Hey, I want this  
16 listed. I call my local provider. They would tell me  
17 to call the local directory publisher or the ILEC?

18 THE WITNESS: Typically, yes. That charge is  
19 not typically included in the wireless interconnection  
20 agreement.

21 JUDGE TOREM: When I pay that -- in this  
22 case, let's go with if I'm in Embarq's territory and I  
23 want my mobile phone listed, is that the only charge  
24 I'm going to pay, just the foreign listing service  
25 charge?

0131

1           THE WITNESS:   There is also a tariff  
2 nonrecurring charge.  I don't know the rate for it.

3           JUDGE TOREM:   So there is a nonrecurring  
4 charge --

5           THE WITNESS:   I believe so.

6           JUDGE TOREM:   And then on top of that, I'm  
7 paying the annualized for the billing purposes, but a  
8 monthly recurring charge for every month that it stays  
9 in the directory?

10          THE WITNESS:   Yes.  I was looking to see if I  
11 have the tariff page.  The nonrecurring change for  
12 retail is five dollars, and a business foreign listing  
13 is seventy-five cents.  A residential is fifty cents.

14          JUDGE TOREM:   So in comparison, the same  
15 nonrecurring charge would be imposed on the CLEC's  
16 customer, but this time on the CLEC instead of the  
17 customer directly.

18          THE WITNESS:   It's not the exact same rate,  
19 but yes, there is a nonrecurring charge.

20          JUDGE TOREM:   But what you've done here with  
21 this market-based approach is take the foreign listing  
22 service charge as the same level for the recurring  
23 charge?  The nonrecurring charge is what you are saying  
24 is a different rate?

25          THE WITNESS:   Yes.  The nonrecurring charge

0132

1 is the same nonrecurring charge for any type of order  
2 that a CLEC would enter regardless of order type, other  
3 than an LNP order, local number portability order.  
4 Other than that, any CLEC would have a nonrecurring  
5 charge of the nine-plus dollars for any type of order  
6 that they submit to us.

7 JUDGE TOREM: So any type of service order.

8 THE WITNESS: I believe so, yes. I'm sorry.  
9 We do not charge for delete orders, so if Comcast  
10 submitted a request to delete the listing out of our  
11 database, we do not charge a nonrecurring charge for  
12 that.

13 JUDGE TOREM: The reason that you have the  
14 charge and nonrecurring charge at whatever it's set to  
15 the CLEC as opposed to the CLEC's end-user, is that  
16 because you have an interconnection agreement with the  
17 CLEC?

18 THE WITNESS: Because the CLEC submitted the  
19 order to us, we don't have a direct relationship with  
20 that end-user because they did not call us directly.

21 If the CLEC's end-user calls us directly, we  
22 would still provide that same service to them, but  
23 typically, they are not going to call us. They changed  
24 local providers, and they are going to go to Comcast to  
25 request that listing.

0133

1           JUDGE TOREM: But if they are a mobile user,  
2 they go to you directly.

3           THE WITNESS: It's possible that a wireless  
4 provider could submit that order, but I don't believe  
5 we get many of those type. It usually comes direct  
6 from the end-user.

7           JUDGE TOREM: I'm trying to think what  
8 distinguishes it, because it would appear to me that  
9 the wireless user that picks up their phone and  
10 contacts the directory publisher and the ILEC that  
11 provides the information to the directory publisher,  
12 they know that they are paying on top of whatever their  
13 cell phone bill is. They've set up a new contractual  
14 agreement with Embarq.

15           Comcast's end-user doesn't see you  
16 necessarily. They see Comcast, and now when they are  
17 looking at the pricing, they are paying this extra fee.  
18 Perhaps one could call it an extra fee. I guess if  
19 they asked for an out-of-the-ordinary directory  
20 listing, I'm not clear and it's not really before me  
21 here, but they have to pay for their extra fee through  
22 Comcast that pays you, or if Comcast would refer them  
23 out? I would doubt it. They would probably want to  
24 keep their customer talking to them.

25           But how it looks to the end-user, the

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1 wireless person pays their wireless provider and then  
2 says, Oh, by the way, for the phone book, I have to go  
3 to this other land-line provider, and I may have gone  
4 around, and the CLEC provider says, Well, I chose to  
5 switch services and I don't know whether I'm getting  
6 retail, resale. Those guys don't know what they are  
7 getting. They just have a different provider, and now  
8 there is this additional charge that helps them decide  
9 price-wise is that CLEC competitive.

10 THE WITNESS: I don't think that what we are  
11 talking about is the retail relationship between  
12 Comcast and their end-user. They may chose not to  
13 charge that to their end-user. This is the charge  
14 between Comcast and Embarq. It's not my business to  
15 decide if Comcast would pass that on to their own  
16 end-users.

17 JUDGE TOREM: I'm trying to think in my own  
18 mind, I recognize where the scope of the arbitration is  
19 but to get the bigger picture as to what Comcast does.  
20 Why they aren't simply willing to pay the fee here  
21 appears they don't want to eat the fee. They don't  
22 think it's lawful -- they don't want to pass it on to  
23 make their rates less competitive.

24 So for all those reasons, the one that's  
25 before me is what's lawful, what can be done, but I

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1 don't want to miss that, but your relationship is not  
2 with their end-user. I think that's where all these  
3 questions were going was Comcast's the CLEC's end-user  
4 in your service territory, this fee is not directed at  
5 them. It's directed to the CLEC as an additional fee  
6 for what you've described on Pages 5 and 6 of your  
7 direct testimony as activities that otherwise might be  
8 provided in the overhead for that UNE loop or the  
9 resale provider but are not recouped by Embarq when  
10 Comcast comes along on its own facilities.

11 THE WITNESS: You are exactly right. Once  
12 Comcast submits an order to port that customer to  
13 Comcast, we lose the retail relationship with the  
14 customer, and typically, our only relationship then is  
15 with Comcast, not with the end-user. So that's why we  
16 would bill Comcast rather than the end-user.

17 JUDGE TOREM: I'm at the point where I'm  
18 clear on that. This nonrecurring charge, and I asked  
19 Mr. Gates this question earlier about the raising the  
20 price isn't what's before me, and you said it was a new  
21 trend, part of the cutting edge on this nonrecurring  
22 charge, am I to understand from your testimony --

23 THE WITNESS: The recurring charge, not the  
24 nonrecurring.

25 JUDGE TOREM: Yes, the recurring charge is

0136

1 new. Am I to understand from your submitted testimony  
2 today and your prefiled testimony that Embarq has  
3 looked and decided it should be being compensated for  
4 these six activities you've listed, and there is  
5 nowhere in the current agreement, I think that's ALL-8,  
6 that has Comcast reimbursing you?

7 THE WITNESS: That's correct. In the current  
8 agreement, we don't think that we are being compensated  
9 for those activities and we would like to be  
10 compensated for them.

11 JUDGE TOREM: So the 45 percent increase in  
12 the nonrecurring charge doesn't cover these items  
13 still.

14 THE WITNESS: No. The activities related to  
15 the nonrecurring charge are separate and distinct.  
16 They are related to receiving the order, doing some  
17 automatic edits to make sure that all fields are  
18 populated, and then passing the order through our  
19 systems once we've either worked the order with Comcast  
20 to get all those fields populated or the order comes in  
21 with all of the fields populated that are necessary.  
22 Then it sends those orders on to our billing and our  
23 directory databases.

24 JUDGE TOREM: So the new nonrecurring charge  
25 raised approximately 45 percent, does it cover anything

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1 now that it didn't cover before?

2 THE WITNESS: I don't have the specific  
3 answer to that other than I don't believe so. I did  
4 not ask if there were any changes in what was  
5 considered in the old cost study versus the new cost  
6 study.

7 JUDGE TOREM: So by Comcast agreeing to pay  
8 that, you are essentially conceding that yes, your  
9 costs for providing those same services have gone up  
10 about 45 percent since you last studied them.

11 THE WITNESS: I can't tell you the reasons  
12 why Comcast agreed to it, but that would be the  
13 implication, I guess.

14 JUDGE TOREM: I want to ask you the same  
15 question, but I'm not going to read the paragraphs from  
16 the SLI/DA order we talked about, 54 and 55, but that  
17 last line of the SLI/DA order says that to the extent  
18 state law permits that this Commission would be free to  
19 require, in this case, Embarq and Comcast, enter into a  
20 cooperative agreement or arrangement for the provision  
21 of the subscriber list information to those directory  
22 publishers.

23 Again, first off, do you know anything as far  
24 as state law that's cited in your testimony that would  
25 tell me the current state of it other than the 1995 UTC

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1 case that was cited by Mr. Gates?

2 THE WITNESS: No, I don't know of any, and  
3 that case was decided before the Telecom Act, before  
4 the SLI/DA order, and the facts were somewhat different  
5 than what we have here. What I would suggest in  
6 Paragraph 55, and that state law does allow, the  
7 Commission could require that we come to a commercial  
8 agreement, and we are not against coming to a  
9 commercial agreement. I think both parties are  
10 agreeable to that. I think it's what rate should it  
11 be, and we think a market-based rate should be applied.

12 JUDGE TOREM: It's possible that the  
13 Commission, depending on how it reads its jurisdiction,  
14 could order that a cost study be done and a cost-based  
15 rate be required.

16 THE WITNESS: I haven't read the Washington  
17 rules. If the state law permits, I guess that could  
18 happen.

19 JUDGE TOREM: I just wonder then if the state  
20 wanted to engage, if it's not already covered in the  
21 rule that was quoted earlier, the WAC 481-120 series,  
22 in this case 251, and I'm not going to refer to any  
23 specific revision, but it's entirely possible the  
24 Commission could look at its rules, find the basis for  
25 something and an additional rule to require that this

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1 simply be provided; that all ILEC's will provide the  
2 directories, and based on what the FCC said, they don't  
3 have the power to require one or the other.

4           We could seize that and say, That's what we  
5 want in Washington. For policy reasons, we want one  
6 regional phone book. It's going to have everybody, and  
7 we are going to recognize the market that's been argued  
8 today and the testimony that, You know what? CLEC's  
9 don't provide this in reality, so ILEC's, now the  
10 reality is the law will provide it. State law could do  
11 that?

12           THE WITNESS: I'm not aware of any provision,  
13 but I think that would be okay when the publisher is  
14 the telephone company. When the publisher is not the  
15 telephone company, and Embarq has a fifty-year  
16 agreement with Donnelley, and we really don't profit.  
17 That was one of the differences we have from the Qwest  
18 case is that one of the reasons the Commission decided  
19 to have Qwest provide it is because Qwest profited from  
20 the sale of advertising. Embarq doesn't profit from  
21 the sale of advertising, Donnelley does.

22           JUDGE TOREM: And the mirror image question  
23 is the implication that Embarq is not losing or taking  
24 a tremendous hit on the four- or six-cent rate they are  
25 paying Donnelley. That is federally imposed as to what

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1 Donnelley pays to get the information.

2 THE WITNESS: Donnelley pays Embarq to get  
3 that information, yes, but I didn't understand the rest  
4 of your question. I'm sorry.

5 JUDGE TOREM: I just was looking to say that  
6 they are not, in your relationship, they are not -- I  
7 don't know what else the terms of this fifty-year  
8 contractual provision are other than to provide it, am  
9 I missing something about the rates being other than  
10 what the FCC provides?

11 MR. HENDRICKS: By the way, that fifty year  
12 might be confidential.

13 MR. SLOAN: No, it's not.

14 THE WITNESS: The four and six cents, I  
15 believe there is a typical clause in there that says if  
16 the rates change that the parties will update and amend  
17 the agreement. So if the FCC came back and said, Now  
18 it's fifteen, then Embarq would come back and ask for  
19 fifteen cents.

20 JUDGE TOREM: But for that particular  
21 service, that's the rate that's required by regulation;  
22 is that correct?

23 THE WITNESS: Yes.

24 JUDGE TOREM: We've already established that  
25 Embarq is not seeking for the FCC to change the rate in

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1 the agreement.

2 THE WITNESS: No. Embarq has not done that.

3 JUDGE TOREM: Mr. Hendricks, any redirect?

4 MR. HENDRICKS: Just a couple.

5

6

7

REDIRECT EXAMINATION

8 BY MR. HENDRICKS:

9 Q. So just to clarify here, the position in your  
10 testimony is that -- could you explain your testimony  
11 in terms of whether we seek a market-based rate or a  
12 cost-based rate?

13 A. We are seeking a market-based rate, and the  
14 reason that we are seeking a market-based rate is that  
15 we are not required to provide the service under  
16 Section 222, and we think that if we try -- and I'm  
17 going to let the attorneys deal with whether or not 251  
18 applies versus 222, but under 222, we are not required  
19 to provide the service, and to the extent we offer to  
20 provide it, we should be able to do it under a  
21 market-based rate.

22 Q. And Embarq has not proffered nor has Comcast  
23 sought any cost data; is that true?

24 A. I think Comcast asked for cost data, and we  
25 refused to provide it.

0142

1 Q. But beyond that, there was no sharing of cost  
2 data and there was no motion to compel for that data.  
3 It's not a part of the record in this case.

4 A. It's not a part of the record.

5 Q. You and Mr. Sloan spent a considerable amount  
6 of time discussing the various services and functions  
7 that Embarq performs. Is there any overlap between the  
8 NRC and the MRC that Embarq is seeking to charge?

9 A. There is no overlap in the activities for  
10 providing it. As I was trying to explain, that the  
11 activities for the NRC, the nonrecurring charge, allow  
12 Comcast to get a listing into our database. There is a  
13 requirement that Comcast be allowed access to the data  
14 base, and that's the way we provide that access is  
15 through the nonrecurring charge. They can submit  
16 orders to get it into our listing database.

17 The monthly recurring charge is related to  
18 the maintenance and storing of that directory listing  
19 once it's in our database and then providing it to  
20 third parties that request it.

21 Q. We had a fairly sensitive discussion about  
22 some information that you provided in testimony that  
23 was stricken about sharing, and without reverencing any  
24 specific information, has Comcast requested discussions  
25 on this sharing issue?

0143

1           A.     Yes.  It wasn't quite two months ago, I asked  
2     for the parties to work cooperatively to share the  
3     revenue that we get from selling directory listings, or  
4     subscriber list information; excuse me.

5           Q.     Aside from the number, are you aware that  
6     Embarq continues to work on that with Comcast?

7           A.     Yes.  As a matter of fact, in my e-mail last  
8     night, I saw an e-mail where they are getting ready to  
9     send back to Comcast a proposal.

10           MR. HENDRICKS:  I don't have any more  
11     questions.  Thank you.

12           JUDGE TOREM:  Any additional cross?

13

14

15                           FURTHER CROSS-EXAMINATION

16     BY MR. SLOAN:

17           Q.     Prior to 1996 with the passage of the  
18     Telecommunications Act, was there local exchange  
19     competition in Washington State?  Isn't it the case  
20     that there was local exchange competition in  
21     Washington?

22           A.     I don't know for sure, but since there was a  
23     Qwest, or US West had a case with a CLEC or another  
24     company, I don't know that they were referred to as  
25     CLEC's at the time, I would assume that there was.

0144

1 Q. You've testified that there is no overlap in  
2 activities between the nonrecurring charge and the  
3 recurring directory list storage and maintenance  
4 charge; is that correct?

5 A. From the activities provided for those  
6 services, yes.

7 Q. Other than your testimony, sworn, albeit, is  
8 there any evidence that supports that contention?

9 A. We did not put a cost study on the books or  
10 on the record if that's what you are asking.

11 Q. We do have a negotiated agreement between the  
12 parties that identifies certain activities; isn't that  
13 correct?

14 A. We have an agreement between the parties,  
15 yes.

16 MR. SLOAN: That's all I have, Your Honor.

17 JUDGE TOREM: Let's take just three or four  
18 minutes. I want to gather my thoughts as to what might  
19 need to go into briefs.

20 JUDGE TOREM: Let's go off the record.

21 (Recess.)

22 JUDGE TOREM: We are going to wrap it up by  
23 confirming that the briefing dates, now that we've  
24 conducted the arbitration hearing itself, will require  
25 simultaneous briefings from both Embarq and Comcast

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1 starting on Wednesday, September the 17th. The reply  
2 briefs will be due Friday, September 26th, and again,  
3 as we said, the electronic filing followed by the  
4 actual delivery of the briefs and service the next  
5 business day, that will apply. I think that's covered  
6 in the prehearing conference order that we issued back  
7 in May.

8 As far as topics, clearly I'm interested in  
9 seeing both sides address the SLI/DA order  
10 recommendation as to state commissions have the power  
11 in Paragraph 55 that has to do with what the FCC  
12 doesn't. So if there are any state provisions of law  
13 that you think you can give us an angle as to what we  
14 can do on your behalf, great, but if there are also  
15 some briefing objective as it can be to the  
16 Commission's authority or jurisdiction in this area  
17 under any existing state law, that would be helpful.  
18 I'll talk to our policy analyst.

19 MR. HENDRICKS: Who is your policy analyst?

20 JUDGE TOREM: Brian Thomas will be on this.  
21 It's sounds as though, Mr. Sloan, Comcast is going to  
22 cover the costing provisions that it argues will be  
23 there, and I imagine then on the reply brief, Embarq,  
24 you will have to address any arguments that are brought  
25 up, not that you haven't done this in other states yet,

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1 so I imagine that will be a surprise.

2 I will be interested to see what the costing  
3 arguments are going to be based on all of the evidence  
4 that's it, but I definitely want to make sure that the  
5 251(b)(3) discrimination argument. There was a  
6 question I asked earlier today about the differences,  
7 and I think I walked through with Mr. Gates the three  
8 types of CLEC's. There is more types, but these three  
9 types of CLEC's, the retail, resellers, and then the  
10 folks that have their UNE loop-based competitors, and  
11 then what Comcast is here having their own network for  
12 that portion we are dealing with.

13 MR. SLOAN: It will a prominent part of our  
14 brief, I assure you.

15 JUDGE TOREM: As long as we see how the  
16 discrimination claim applies, and the arguments that  
17 they are distinguishable or are not distinguishable, or  
18 again, if there is a reason to distinguish them and  
19 charge them cost-based rates I think is where your case  
20 goes, Mr. Sloan, in some ways. It's a couple of  
21 different alleys it goes down. If that's covered, then  
22 I think that's all the information I believe we need.

23 Now, if when I get your opening briefs, Brian  
24 and I feel there is something else we need before the  
25 reply briefs are due, we will see how quickly -- but

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1 even after the reply briefs, we may issue a Bench  
2 request if that's what we need to issue an appropriate  
3 order and go from there. The date that we are looking  
4 at, I don't see a reason to tell you we can't make it.  
5 We said in May we are going to try to have this by  
6 October 28th or something like that.

7 MR. SLOAN: We are happy to extend that date  
8 as long as the Commission feels the need; however long  
9 the Commission needs to come up with a decision, but  
10 it's easier for us to say that because we are not  
11 paying the charge.

12 JUDGE TOREM: I'm not going to ask Embarq for  
13 that indulgence today because I don't think we'll need  
14 it. If that becomes an issue, then I'll let you know  
15 somewhere in mid October so we can get on a prehearing  
16 conference and set a new date, but I do think it's  
17 going to work.

18 My plan will be to have something by a couple  
19 of days ahead of that as my military reserve duties are  
20 going to take me out of the country the last week of  
21 October. So the date that's due for me to have the  
22 order to you, I should be in Korea, so hopefully, you  
23 will have the order on or before that date.

24 MR. SLOAN: How long will you be gone?

25 JUDGE TOREM: Just three weeks. When I get

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1 back, I'm into another rate case. Anything else we  
2 need to cover today? Thank you. It's a little after  
3 two and we are adjourned.

4 (Hearing adjourned at 2:03 p.m.)

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