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PUC DOCKET NO. 35402

PETITION OF COMCAST PHONE OF §
TEXAS, LLC FOR ARBITRATION OF AN §
INTERCONNECTION AGREEMENT §
WITH UNITED TELEPHONE COMPANY §
OF TEXAS, INC. D/B/A EMBARQ AND §
CENTRAL TELEPHONE COMPANY OF §
TEXAS, INC. D/B/A EMARQ PURSUANT §
TO SECTION 252 OF THE FEDERAL §
COMMUNICATIONS ACT OF 1934, AS §
AMENDED AND APPLICABLE STATE §
LAWS §

PUBLIC
UTILITY COMMISSION
OF TEXAS

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PROPOSAL FOR AWARD

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PUBLIC UTILITY COMMISSION
OF TEXAS

PROPOSAL FOR AWARD

This Proposal for Award (Award) resolves an Interconnection Agreement dispute between Comcast Phone of Texas, LLC (“Comcast”) and United Telephone Company of Texas, Inc. d/b/a Embarq and Central Telephone Company of Texas, Inc. d/b/a Embarq (collectively “Embarq”). Embarq is an incumbent local exchange carrier (ILEC) and Comcast is a certificated facilities-based local exchange carrier (LEC) that uses cable facilities to provide voice telephone services to affiliated and unaffiliated interconnected Voice over Internet Protocol (VoIP) providers. The parties have resolved all of the issues in their prospective Interconnection Agreement except for the issue of whether Embarq is entitled to charge Comcast a monthly charge for the maintenance and storage of Comcast’s customers’ directory listings information when Comcast is not purchasing unbundled network element (UNE) loops or resold services from Embarq. The Arbitrators find that the non-discriminatory access requirement in § 251(b)(3) of the Federal Telecommunications Act of 1996 (FTA)¹ precludes Embarq from charging Comcast a monthly charge for the maintenance and storage of Comcast’s customer directory listings information when Comcast is not purchasing UNE loops or resold services from Embarq. The Arbitrators also find that Embarq is sufficiently compensated for maintaining and storing Comcast customer directory listings by other revenue sources.

¹ Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 15 and 47 U.S.C.).

I. JURISDICTION

The Federal Communications Act of 1934 (FCA)² as amended by the FTA authorizes state commissions to arbitrate open issues between an ILEC and a requesting telecommunications carrier.³ The FTA also invests state commissions with authority to approve or reject interconnection agreements (ICAs) adopted by negotiation or arbitration.⁴ The FTA's authorization to approve or reject these interconnection agreements carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.⁵ The Public Utility Commission of Texas (Commission) is a state commission responsible for arbitrating interconnection agreements approved pursuant to the FTA.

II. PROCEDURAL HISTORY

On February 25, 2008, Comcast filed a petition to arbitrate an Interconnection Agreement with Embarq. Embarq filed its response on March 21, 2008. The parties waived in writing the nine month jurisdictional deadline established by § 252(b)(4)(c) of the FTA.⁶ A hearing on the merits was held on May 9, 2008. The parties filed their respective post-hearing initial briefs on May 28, 2008 and reply briefs on June 6, 2008.

III. RELEVANT STATE AND FEDERAL PROCEEDINGS

Relevant Commission Decisions

The Arbitrators are not aware of any relevant Texas Public Utility Commission decisions.

² Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

³ 47 U.S.C. § 252(b).

⁴ 47 U.S.C. § 252(e).

⁵ *Southwestern Bell Tel. Co. v. Public Util. Commission of Texas*, 208 F.3d 475, 479-480 (5th Cir. 2000); *see also, Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364-365 (4th Cir. 2004); *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 583 (6th Cir. 2002); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-338 (7th Cir. 2000); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds*; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-497 (10th Cir. 2000); *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277-1278 (11th Cir. 2003).

⁶ 47 U.S.C § 252(b)(4)(c) and *see* P.U.C. INTER. R. 21.95(s).

Relevant Federal Communications Commission Decisions**Second Order on Reconsideration⁷****Nondiscriminatory Access to Directory Listings Pursuant to FTA § 251 (b)(3)**

In this order, the FCC clarified that it had unnecessarily mixed the requirements for nondiscriminatory access to directory assistance with those for directory listings in its previously adopted rules regarding nondiscriminatory access to directory assistance and directory listings. Paragraph 160 of the Order concluded that the § 251(b)(3) requirement of non-discriminatory access to directory listing is most accurately reflected by defining “directory listing” as a verb that refers to “the act of placing a customer’s listing in a directory assistance database or in a directory compilation for external use (such as a white pages).”

The Third Report and Order⁸**Nondiscriminatory Access to Directory Listings and Obligations of Telecommunications Carriers pursuant to FTA § 222(e)**

The FCC determined that FTA § 222(e) obligates all telecommunications carriers, including competitive LECs to provide its customers’ subscriber list information to requesting directory publishers. However, this requirement does not obligate an ILEC to act as a clearinghouse for providing this information to directory publishers, except to the extent a state commission so requires. The FCC ruled that \$0.04 per listing constitutes a presumptively reasonable rate for base file subscriber list information and that \$0.06 per listing constitutes a presumptively reasonable rate for updated subscriber list information. A telecommunications carrier is not prevented from charging a different rate, but in the event of a complaint, the carrier should be prepared to provide cost data and any other relevant data to justify the rate. Also, the FCC concluded that the non-discrimination requirement in § 222(e) obligates a carrier to provide subscriber list information to requesting directory publishers at the same rates, terms, and

⁷ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd. 15550, Paragraph 160 (1999) (“SLI/DA Order”).*

⁸ *Id.*

conditions that the carrier provides to itself, its directory publishing affiliate, or another directory publisher.

Time Warner Cable Request for a Declaratory Ruling⁹

This matter involved a petition for a declaratory ruling filed by Time Warner Cable (TWC) asking the FCC to declare that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with ILECs when providing services to other service providers, including Voice over Internet Protocol (VoIP) service providers, pursuant to §§ 251(a) and (b) of the FTA. The FCC found that the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of §§ 251(a) and (b) and held that providers of wholesale telecommunications services enjoy the same rights as any “telecommunications carrier” under those provisions of the Act.

Relevant Court Decisions

MCI Telecommunications Corp. v. Michigan Bell Telephone¹⁰

This case involved a United States District Court’s review of an interconnection agreement which had been approved by a state commission. One of the issues in this proceeding involved the duty of an ILEC under FTA § 251(b)(3) to list a competitor’s customers in its yellow pages. The ILEC argued that because it did not publish a yellow pages directory itself, but contracted with a separate company which published yellow pages listings on its behalf, it did not have a duty to publish its competitor’s listings in such a directory. The Court found that argument “specious”, and relying on the FCC’s regulations defining “directory listings” as any information “that the telecommunications carrier or an affiliate has published, caused to be published or accepted to be published in any directory format,”¹¹ found in favor of the competitor carrier. The Court held that the “duty to publish competitors’ business customers in a

⁹ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 F.C.C.R. 3513, 22 FCC Rcd. 3513 (Released March 1, 2007).

¹⁰ *MCI Telecommunications Corp. v. Michigan Bell Telephone Company*, 79 F. Supp.2d 768, 802 (E.D. Mich. 1999).

¹¹ 47 C.F.R. § 51.5.

yellow pages directory on a non-discriminatory basis extends to incumbent carriers who have caused their own customers listings to be published in a yellow pages directory.”

IV. DISCUSSION OF THE DISPUTED ISSUE

Prior to Comcast’s filing of its Petition, the parties had successfully negotiated all of the terms and provisions of their ICA except those pertaining to one issue. The one contested issue was articulated by the parties in the statement of the disputed issue jointly filed on April 2, 2008. The issue is:

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

Embarq’s Obligations Under FTA §§ 251(b)(3) and 222(e)

Comcast’s Position

Comcast argues that Embarq would violate FTA § 251(b)(3) if it were to charge Comcast a recurring monthly charge for its directory listing (DL) service because Embarq does not charge other CLECs or its own customers a similar charge for that service.¹² Comcast relies on FCC rules implementing FTA § 251(b)(3) which requires all LECs to “permit competing providers to have access to [directory listing] services that: a) does not discriminate between or among requesting carriers in rates, terms, and conditions of access; and b) is equal to the access that the providing LEC gives itself.”¹³ Comcast states that the “access” which it is being denied is the uploading of information such that Comcast customers have their numbers listed in the local directory.¹⁴ Relying on the FCC’s interpretation of “directory listing,” Comcast argues that “directory listing” means “the act of placing a customer’s listing information in a directory assistance database or in a directory compilation for external use (such as a white pages).”¹⁵

¹² Comcast Exhibit No.1, Direct Testimony of Timothy J. Gates (Gates Direct) at 6.

¹³ SLI/DA Order at ¶ 125.

¹⁴ Transcript (Tr.) at 137.

¹⁵ Initial Brief of Comcast Phone of Texas, LLC at 11-12, *quoting* SLI/DA Order at ¶ 160.

Therefore, Comcast believes that Embarq has a duty to place Comcast's customer listings in Embarq's directories.¹⁶

Comcast distinguishes between a LEC's duty to provide non-discriminatory access to its DL functions under FTA § 251(b)(3) and a LEC's separate obligation to make directory listings available on reasonable and non-discriminatory terms to entities that might wish to publish a directory which is governed by FTA § 222(e).¹⁷ Comcast argues that this case does not involve the market governed by FTA § 222(e) and relates solely to the non-discriminatory access requirement of FTA § 251(b)(3).¹⁸

Comcast claims that FTA §§ 251(b)(3) and 222(e) and various FCC Orders interpreting them are designed to prevent telephone companies from exercising control over directory listing information in their databases and assure that competitive local exchange carriers (CLECs) (who provide DLs to ILECs for populating the ILEC's DL databases) and directory publisher providers (who purchase the ILEC DL information for purposes of directory publishing) have non-discriminatory access to DL information.¹⁹ Therefore, Comcast argues, Embarq must provide Comcast with equal access to DL databases on the same rates, terms, and conditions that Embarq provides to itself and other carriers.²⁰ Absent a cost difference which does not exist in this case, Comcast argues that such disparate treatment is the very essence of discrimination.²¹ Comcast further argues that FTA § 251(b)(3) prohibits discriminatory treatment on the basis of rates.²² Comcast also denies Embarq's argument that Embarq is not discriminating against Comcast because Embarq includes a directory listing within the monthly recurring charge when

¹⁶ Comcast Reply Brief at 8-9.

¹⁷ Comcast Reply Brief at 7.

¹⁸ Gates Direct at 6-7.

¹⁹ Gates Direct at 8.

²⁰ *Id.*

²¹ Gates Direct at 16.

²² *Id.*

a UNE loop or resale line is purchased; Comcast notes that Embarq has not provided evidence that a DL service charge is included in the monthly charge for UNE loop or resale line.²³

Comcast disputes Embarq's claim that Embarq has the right to charge it a separate DL storage and maintenance (DLSM) charge because Comcast is not "similarly situated" to those carriers which are not assessed a separate charge.²⁴ Comcast claims that Embarq has not presented any evidence showing that there is a difference in the cost of storing the directory listings of Comcast and those CLECs that Embarq would exempt from DLSM charges.²⁵ Moreover, Comcast argues that the "similarly situated" argument is not applicable to a claim that a LEC has breached an obligation under FTA § 251(b).²⁶ Comcast argues that the "similarly situated" element is one of the elements for a claim arising under FTA § 202(a) and is not found in FTA § 251.²⁷ Therefore, FTA § 251 is a lower and different standard to which the "similarly situated" requirement does not apply.²⁸

Comcast states that an ILEC such as Embarq is the only entity that possesses the comprehensive DL database for a particular service territory.²⁹ Comcast says that the DL function is one of the strongest aspects of LEC incumbency and that there are no close substitutes to subscriber list information possessed by the ILEC.³⁰ Comcast posits that having a single entity as the repository for subscriber list information is a benefit for the publisher because it would only have to contract with a single entity as opposed to having to establish numerous relationships to prepare a directory, thus increasing costs and decreasing efficiency.³¹ Moreover, Comcast claims that the non-discrimination requirement of FTA § 251(b)(3) would be violated if

²³ Comcast Exhibit No. 2, Rebuttal Testimony of Timothy J. Gates (Gates Rebuttal) at 23.

²⁴ Gates Direct at 17.

²⁵ Gates Direct at 17-18; Gates Rebuttal at 6-7; Comcast Initial Brief at 14-15.

²⁶ Gates Direct at 17.

²⁷ *Id.*

²⁸ Gates Rebuttal at 6.

²⁹ Gates Direct at 9, 20.

³⁰ Gates Direct at 20.

³¹ Gates Direct at 7-8, 21.

it was unable to verify from the publisher of the directory or Embarq that Comcast was receiving the same deal with the publisher of the directory as the terms available to Embarq.³² Comcast argues that Embarq's proposal to set a market- or value-based rate is "premised on a hypothetical 'competitive market' that does not exist, and which probably never will."³³ Comcast agrees that the FCC has ruled that ILECs are not required to be clearinghouses under FTA § 222(e).³⁴ However, Comcast emphasizes that the FCC's ruling does not preclude an ILEC from serving as a DL clearinghouse and indicates that state commissions can require this.³⁵

Comcast makes the additional argument that the DL recurring charge is anticompetitive.³⁶ It claims that Embarq's charge would effectively penalize those carriers that have built their own last mile facilities, which represent the most promising form of competition to the incumbent wireline LECs.³⁷ If the Commission were to approve a recurring charge for this service, Comcast argues that it would impede what it calls growing and increasingly effective facilities-based competition.³⁸ Comcast states that this would also add to its cost of doing business, and would in effect be a "residual" monopolistic tax paid by a new competitor to the established incumbent.³⁹

Comcast states that its request in this arbitration is limited to vindicating its rights under FTA § 251(b)(3) requiring Embarq to provide for the non-discriminatory placement of Comcast's DL information in Embarq-branded directories and directory assistance services

³² Gates Direct at 22.

³³ Gates Rebuttal at 2-3.

³⁴ Tr. at 147.

³⁵ *Id.*

³⁶ Gates Direct at 18.

³⁷ *Id.*

³⁸ Gates Direct at 19.

³⁹ Gates Direct at 19.

created on Embarq's behalf by Donnelley.⁴⁰ Comcast stated that it has made no requests regarding Embarq's dealings with third parties exercising their rights under FTA § 222 (e).⁴¹

Embarq's Position

Embarq argues that FTA § 251(b)(3) does not obligate it to provide DL services to Comcast when Embarq does not control access to the directory.⁴² This argument is based on Embarq's assertion that an interpretation of FTA § 251(b)(3) must be consistent with an interpretation of FTA § 222(e).⁴³ According to Embarq, FTA § 222(e) imposes on each LEC the obligation to provide the DLs of only its own subscribers to third-party publishers.⁴⁴ Embarq claims that this limitation conflicts with Comcast's interpretation of FTA § 251(b)(3) which would require Embarq to provide the listings of other LECs to third-party publishers and not just Embarq's publisher.⁴⁵ According to Embarq, the DL requirement of FTA § 251(b)(3) only applies when a LEC controls access to the directory such as when it publishes the directory or otherwise controls the publisher.⁴⁶ Embarq further buttresses its interpretation based on the marketplace conditions that existed at the time § 251(b)(3) was enacted and the purpose for which it was implemented.⁴⁷ Embarq claims that FTA § 251(b)(3) was adopted at a time when regional Bell operating companies and major ILECs owned and controlled their own publishing businesses and may have had an incentive to exclude the listings of competitors.⁴⁸ Since, as Embarq claims, it no longer self-publishes its own directory listings and because other LECs can

⁴⁰ Comcast Reply Brief at 8-9.

⁴¹ *Id.*

⁴² Embarq Initial Brief at 6-9.

⁴³ *Id.* at 8.

⁴⁴ *Id.* at 6-8, quoting SLI/DA Order at ¶¶ 54, 55.

⁴⁵ *Id.* at 8.

⁴⁶ *Id.*

⁴⁷ *Id.* at 9.

⁴⁸ *Id.*

allegedly deal directly with third-party publishers, the anti-discriminatory provisions of FTA § 251(b)(3) are no longer applicable.⁴⁹

Embarq states that it should not be required to serve as a clearinghouse for providing DL information to third-party publishers.⁵⁰ Embarq notes that Comcast has the choice to either: (1) deal with Embarq's directory publisher, R.H. Donnelley ("Donnelley"), directly to have Comcast's customers listed; (2) use Embarq as an intermediary provider to arrange for Comcast's customers to be listed; or (3) use the services of a competing provider.⁵¹ Embarq claims that Donnelley is willing to deal directly with Comcast, but suggests that this would entail a significant undertaking such that Comcast might simply prefer to deal with Embarq.⁵² Embarq argues that because Comcast can deal with the publisher directly, it cannot be said that Embarq has a monopoly-like control over directory publishing.⁵³ Embarq further argues that standard marketplace dynamics dictate that Embarq can and should offer its services at a non-cost based rate.⁵⁴ Embarq states that contrary to Comcast's claim, ILEC clearinghouses are not the industry standard because ILECs are no longer the monopoly providers of telephone service and Comcast is a larger provider of telephone service than Embarq.⁵⁵ Embarq further denies the claim that having an ILEC serve as DL clearinghouse lowers transaction costs noting that transaction costs are not lower for the ILEC.⁵⁶ Embarq also denies that requiring a DL publisher to work with multiple LECs would not allow the process to function smoothly; there are multiple ILECs in the Houston market and Donnelley already works with multiple LECs to manage DLs to sell classified advertising and publish directories.⁵⁷ Embarq acknowledges that market alternatives may not yet have sprung up, but contends that a ready pool of third-party suppliers need not be

⁴⁹ *Id.* at 9-10.

⁵⁰ Embarq Initial Brief at 7.

⁵¹ Embarq Exhibit No. 1, Direct Testimony of Alan L. Lubeck (Lubeck Direct) at 8.

⁵² Lubeck Direct at 8-9.

⁵³ Lubeck Direct at 10.

⁵⁴ *Id.*

⁵⁵ Embarq Exhibit No. 2, Rebuttal Testimony of Alan L. Lubeck (Lubeck Rebuttal) at 5-6.

⁵⁶ Lubeck Rebuttal at 6.

⁵⁷ Lubeck Rebuttal at 12.

available to Comcast before this Commission can find that there is no requirement under § 251(b)(3) for Embarq to provide this DL service at cost-based rates.⁵⁸

Embarq points out that the FCC has interpreted FTA § 222(e) to require all LECs to provide subscriber list information directly to any requesting directory publisher.⁵⁹ Thus, because all LECs, including Comcast, already have an obligation to provide DL information to requesting publishers and because CLECs are not required to use an ILEC's DL service, Embarq argues that the ILEC's DL service is a substitute for the DL service Comcast is already obligated to provide.⁶⁰ Therefore Embarq contends that it should not be required to provide a "service of convenience" for free or at a cost based rate.⁶¹

Embarq argues that the definition of non-discriminatory access does not prohibit market (non-cost) based rates.⁶² Rather, it only means that Embarq must offer the same non-cost based rates to similarly situated carriers.⁶³ In this case, similarly situated customers would be those purchasing an underlying line from Embarq, either as a retail end user or a CLEC purchasing UNE loops or resold services on behalf of its end use customers.⁶⁴ If Comcast purchases the UNE loops or resold services, Embarq states that it will provide a directory listing to Comcast's end user customer without a separate monthly charge.⁶⁵ If Comcast does not purchase the underlying line from Embarq, Embarq says it will provide the DL service to Comcast's end user customers in the same manner and at the same rate that it charges Embarq's or another LEC's end user customer that is purchasing foreign listing service.⁶⁶ Embarq claims that it will offer a

⁵⁸ Embarq Reply Brief at 9-10.

⁵⁹ Lubeck Rebuttal at 21.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Lubeck Direct at 6.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

competing carrier access that is at least equal in quality to that which it provides itself.⁶⁷ If Comcast chooses to utilize the DL service, its DL orders will flow through the same process used by Embarq for its own end use customer directory listing orders and will be published in the same directory.⁶⁸ Embarq justifies the \$2 monthly charge in part because it desires to treat all LECs alike by charging either an implicit or explicit charge for DL service.⁶⁹

Embarq provides further justification for the claim that the \$2 monthly charge is not discriminatory because the DL service is analogous to the foreign listing service charge which it charges its own retail end user customers to be included in a directory other than the directory associated with the requestor's location.⁷⁰ It also imposes this charge on a non-Embarq end user customer requesting a listing in an Embarq directory.⁷¹ The proposed charge is imposed only when the Comcast end user is not purchasing basic residential or business service, resale or UNE loop service from Embarq.⁷² Embarq argues that the foreign listing service is comparable to the DL service because the party demanding the service is not purchasing a service within the local service area from Embarq, yet they desire a directory listing.⁷³ Embarq claims that it is appropriate to charge for this service because the requesting party perceives value in being placed in the "Embarq" directory.⁷⁴

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Lubeck Rebuttal at 13.

⁷⁰ Lubeck Direct at 3-4, 14; Lubeck Rebuttal at 16-17.

⁷¹ Lubeck Direct at 3-4.

⁷² *Id.*

⁷³ Lubeck Direct at 14.

⁷⁴ *Id.*

Arbitrators' Decision

The fundamental issue in dispute in this proceeding relates to the obligation on Embarq to provide non-discriminatory access to directory listings pursuant to FTA § 251(b)(3).⁷⁵ Section 251(b)(3) imposes on all local exchange carriers:

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

The FCC has ruled that the requirement of FTA § 251(b)(3) for non-discriminatory access to directory listing would best be interpreted by defining directory listing as a verb that refers to “the act of placing a customer’s listing information in a directory assistance database or in a directory compilation for external use (such as white pages).”⁷⁶ Because the FCC has explicitly referred to the “act of placing a customer’s listing information . . . in a directory compilation for external use (such as white pages),” the Arbitrators find that FTA § 251(b)(3) imposes an obligation on Embarq to include Comcast’s subscriber list information in its directory listings.

The Arbitrators note that Comcast’s request in this arbitration is limited to requiring Embarq to provide for the non-discriminatory placement of Comcast’s DL information in the Embarq-branded directories published by Donnelley.⁷⁷ Therefore, the Arbitrators will address the appropriateness of the \$2.00 monthly charge for DLSM as that relates to directory listings published by Donnelley as opposed to directory listings that may be published by other publishers. Embarq contends that Donnelley is a third-party publisher and it is therefore not legally obligated to include Comcast’s listings under FTA § 251(b)(3).⁷⁸ There is no such distinction in the text of § 251(b)(3), and as applied to the issue at hand, it is not relevant if the directory publisher is Embarq, an affiliated publisher or a third party publisher. Simply stated,

⁷⁵ Comcast Phone of Texas, LLC Petition for Arbitration at 5 (February 25, 2008).

⁷⁶ SLI/DA Order ¶ 160. This requirement is codified in 47 C.F.R. § 51.217(c)(3).

⁷⁷ Comcast Reply Brief at 9. While Comcast also seeks non-discriminatory placement of Comcast’s DL information in Embarq’s directory assistance database, the parties do not disagree on this issue. Tr. at 87-91, 141-143.

⁷⁸ Embarq Initial Brief at 8-9.

the fact that Embarq has decided to contract with Donnelley does not relieve Embarq of its obligations under FTA § 251(b)(3).

Furthermore, the Arbitrators find it significant that the definition of directory listings in the FCC rules includes any information that a telecommunications carrier or an affiliate has published, *caused to be published*, or accepted for publication in any format.⁷⁹ This question was addressed in MCI Telecommunications Corp. v. Michigan Bell Telephone where under substantially similar facts the court found that the duty to publish a competitor's listings in a directory on a non-discriminatory basis extends to incumbent carriers who have caused their own customers' listings to be published in a directory.⁸⁰ The Arbitrators find that Embarq has caused the publication of its directory through its contract with Donnelley, and therefore, pursuant to FTA § 251(b)(3), Embarq must provide non-discriminatory placement of Comcast's directory listing information in the Donnelley directory.⁸¹

Embarq further argues that it is not obligated to provide Comcast's listings to a third-party directory publisher under § 251(b)(3) because requiring it to do so would obligate it to perform a clearinghouse function which would conflict with § 222(e), which does not require it to serve as a clearinghouse.⁸² FTA§ 222(e) provides for the following:

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

⁷⁹ 47 C.F.R. § 51.5.

⁸⁰ *MCI Telecommunications Corp. v. Michigan Bell Telephone Company*, 79 F. Supp.2d 768, 802 (E.D. Mich. 1999).

⁸¹ Comcast Reply Brief at 3-5.

⁸² Lubeck Rebuttal at 3-4; Embarq Initial Brief at 7-9.

Embarq argues that since § 222(e) has been interpreted to mean that a LEC is only required to provide subscriber list information⁸³ to a requesting directory publisher when it has gathered that information in its capacity as a provider of telephone exchange service, it should not have to provide Comcast's listings to Donnelley because it did not acquire those listings in its capacity as a provider of telephone exchange service.⁸⁴ The Arbitrators disagree with Embarq on this point. When viewed in the context of the purpose for which §222(e) was enacted, that limitation only applies when the publisher is an independent third-party publisher who does not publish directories on behalf of a LEC. FTA § 222(e) was enacted to protect independent publishers from the monopolistic control of subscriber listing information that LECs had at that time.⁸⁵ Since the issue in dispute in this case involves the requirement for Embarq to provide Comcast's listings to Donnelley, which is an entity that publishes a directory on behalf of Embarq and is not a true independent directory publisher,⁸⁶ the policy-based purpose of § 222(e), which supports the limitation on a LEC to provide only the listings it gathers as a provider of telephone exchange service is not applicable here. Thus, the Arbitrators conclude that Embarq must provide not only those listings it acquires in its capacity as a provider of telephone exchange service, but all listings from other competing LECs to Donnelley.

With respect to directory publishers other than Donnelley, the Arbitrators find that the FCC's interpretation of § 222(e) would relieve Embarq of any obligation to act as a clearinghouse for providing Comcast's subscriber list information to directory publishers.

⁸³ For the sake of clarification, the Arbitrators note that the terms "directory listings" as used in § 251(b)(3) and "subscriber list information" as used in § 222(e) are synonymous at least for the purposes of this arbitration. *See*, 47 C.F.R. 51.5 defining "directory listings" and 47 C.F.R. 64.2305 defining "subscriber list information." The only difference between the FCC's definitions is that the term "carrier" is modified by the word "telecommunications" in the definition of "directory listings" whereas the definition of "subscriber list information" does not contain that modification to the term "carrier."

⁸⁴ Embarq Initial Brief at 8.

⁸⁵ SLI/DA Order at ¶ 3. An additional indication that the purpose of § 222(e) is to protect the interests of independent publishers is the FCC requirement on a LEC subject to § 222(e) to disclose to independent directory publishers any written contracts that it has executed for the provision of subscriber list information for directory publishing purposes to itself, an affiliate, or an entity that publishes directories on the LEC's behalf. SLI/DA Order at ¶ 58.

⁸⁶ While Donnelley may be a separate legal entity from that of Embarq, it is not an "independent directory publisher" as that term is used by the FCC in discussing § 222(e) in the SLI/DA Order. *See*, SLI/DA Order ¶¶ 48, 58, and 60.

However, the Arbitrators find that access to listings in directories published by third party publishers other than Donnelley is a moot point since Comcast has indicated that its request in this arbitration is limited to obtaining non-discriminatory placement of Comcast listings in the Embarq branded directory published by Donnelley.⁸⁷ The Arbitrators point out that the FCC concluded that while incumbent LECs are not required to act as a clearinghouse for providing subscriber list information to independent directory publishers, they are not precluded from doing so.⁸⁸ The Arbitrators note that that § 71.3.11 of the parties' prospective Interconnection Agreement addresses the treatment of Comcast directory listings with respect to third-party directory publishers.

The Arbitrators now address those arguments made by the parties regarding the existence of a competitive market for directory publishing and whether Embarq should serve as a clearinghouse for directory listing information. Embarq justifies the appropriateness of the \$2 monthly rate for DSLM charge because it believes that Comcast has the option of bypassing Embarq entirely and dealing directly with directory publishers including Donnelley.⁸⁹ The Arbitrators note that while it may be possible for competing carriers such as Comcast to deal directly with directory publishers such as Donnelley, Embarq was unable to identify a single CLEC which submits directory listings directly to a directory publisher.⁹⁰ In fact, the standard industry practice appears to be for ILECs to maintain the complete directory listing information database for all telephone subscribers in a given service territory.⁹¹ In any event, as explained above, the Arbitrators find that the obligation for Embarq to provide non-discriminatory access to Comcast to place its listings in Embarq's directory arises under § 251(b)(3) and is not based on the competitive aspects of the directory publishing market.

⁸⁷ Comcast Reply Brief at 8-9.

⁸⁸ SLI/DA Order at ¶ 55.

⁸⁹ Lubeck Direct at 8-10; Lubeck Rebuttal at 14.

⁹⁰ Tr. at 61-62. While acknowledging in its reply brief that a ready pool of third-party directory publishers may not be available to Comcast, Embarq contends that the lack of viable options for Comcast is not sufficient basis for the Commission to require Embarq to provide the directory listing at cost-based rates. Embarq Reply Brief at 10.

⁹¹ Gates Direct at 7

The Arbitrators now address those arguments which bear upon the discrimination element of § 251(b)(3). Embarq argues that the definition of “non-discriminatory access” for the purposes of § 251(b)(3) does not prohibit non-cost based rates such as its proposal of a monthly recurring charge of \$2 for the DLSP.⁹² The Arbitrators find that Embarq’s interpretation of non-discriminatory access to be at odds with the FCC’s definition of “non-discriminatory access.” “Non-discriminatory access” requires that the LEC providing access to directory listings “must permit competing providers to have access to such service that: (a) does not discriminate between or among requesting carriers in rates, terms, and conditions of access; and (b) is equal to the access that the providing LEC gives itself.”⁹³ Embarq contends that it has met the requirements for non-discriminatory access under § 251(b)(3) because it charges the same non-cost based monthly recurring rate to carriers that are similarly situated to Comcast such as CLECs, wireless end users, VOIP end users, and retail end user customers that request a DL without purchasing a resold line or UNE loop.⁹⁴ Embarq similarly contends that certain carriers such as a CLEC purchasing UNE loops or resold services on behalf of their end-user customers are not charged a separate monthly charge, because they are not “similarly situated” to facilities-based carriers such as Comcast which would be subject to a separate \$2 monthly charge.⁹⁵ The Arbitrators note that the phrase “similarly situated” does not appear in the text of § 251(b)(3) nor in the definition of “non-discriminatory access” provided by 47 C.F.R. § 51.217 and therefore, as such, is not applicable to the definition of “non-discriminatory access” under § 251(b)(3). More importantly, a LEC’s obligation under § 51.217 is to a “competing provider of telephone exchange service or telephone toll service.” 47 C.F.R. § 51.217(a)(1) defines a “competing provider” as “a provider of telephone exchange or telephone toll services that seeks non-discriminatory access from a local exchange carrier (LEC) in that LEC’s service area.” There is no distinction drawn between different types of “competing providers” (resale and UNE-L carriers versus facilities based carriers) in the definition of non-discriminatory access in 47 C.F.R. § 51.217. Embarq’s argument that it is not discriminatory to charge carriers that are not similarly

⁹² Lubeck Direct at 6.

⁹³ 47 C.F.R. 51.217(a)(2); SLI/DA Order at ¶ 125.

⁹⁴ Lubeck Rebuttal at 16-17.

⁹⁵ Lubeck Direct at 5-6; Lubeck Rebuttal at 16-17.

situated different rates is therefore unconvincing. Embarq does discriminate in this context and its discrimination is not affected by the fact the carriers may or may not be similarly situated to one another.

Embarq makes the additional claim that it charges the same monthly rate to all other carriers similar to Comcast for directory listings storage and maintenance, thus satisfying the non-discrimination requirement.⁹⁶ Embarq states that the costs for the storage and maintenance for directory listings are included in the costs used for the establishment of UNE-L rates and that the costs for DLSSM are also implicit in the retail rates (based on residual rate making and rate of return principles) and resale services (which are calculated as a percentage of retail rates).⁹⁷ However, other than Embarq's assertion that costs for DLSSM are recovered in rates for UNE-L service, retail service, and resale service, Embarq has not provided any credible evidence to substantiate its assertion and the Arbitrators are thus unable to verify the amount charged for DLSSM to resale and UNE-L carriers and Embarq's retail end user customers.⁹⁸ The Arbitrators find that in order to meet the non-discriminatory access principle, Embarq needed to demonstrate that it charges the same monthly rate of \$2 for DLSSM to all competing carriers regardless of whether the carrier is resale, UNE-L, facilities based or Embarq itself. Embarq has failed to demonstrate this.

The definition of non-discriminatory access also requires Embarq to provide access to directory listings that is at least equal to the access that the providing LEC itself receives. The FCC concluded that "the term 'nondiscriminatory' as used throughout FTA § 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well on itself."⁹⁹ The FCC further determined that "in order to provide ...directory listings to end users, LECs must first

⁹⁶ Lubeck Rebuttal at 16-17.

⁹⁷ Gates Direct, Exhibit TJG-2 (Embarq Response to Comcast RFI No. 15).

⁹⁸ Embarq produced documentation in response to the Arbitrators' request following the hearing on the merits for documentation showing its charges for UNE Loop and Resale lines which Embarq claims include the rate for directory listings including costs for storage and maintenance. Embarq's Response to Order No. 6. Embarq's Response, however, does not indicate that there is a separate monthly charge for directory listings service in those rates.

⁹⁹ SLI/DA Order at ¶ 129.

provide those services to themselves.”¹⁰⁰ The Arbitrators find that in order to meet the nondiscriminatory standard, Embarq must provide access to Comcast on the same terms and conditions that it provides to its end use customers. The Arbitrators find that Embarq has not provided sufficient evidence that it charges its own end use customers a separate monthly charge to be listed in the Embarq branded directory published by Donnelley.¹⁰¹ Therefore, Embarq has not shown that it treats its own customers the same as it treats Comcast and, as such, it is in violation of § 251(b)(3).

Embarq makes the related claim that it does not discriminate against Comcast since it charges the same \$2 recurring charge for its foreign listings service.¹⁰² While the directory listing service involves the placement of listings of Comcast’s in-region end-user customers in Embarq’s local directory, Embarq has stated that its foreign listing service involves the placement of its retail end user customers in a directory other than the directory associated with the requestor’s location.¹⁰³ The foreign listings service charge is also imposed on a non-Embarq end-use customer requesting a listing in an Embarq directory.¹⁰⁴ Because of the differences between these services, the Arbitrators find that the foreign listing service is not a sufficiently analogous service to the directory listings service at issue in this arbitration and thus does not justify the \$2 monthly rate for DLSM for directory listings charged to Comcast.

Embarq makes the claim that Comcast is not even entitled to the rights afforded by § 251(b)(3) because Comcast does not qualify as local exchange carrier because it offers PSTN interconnection services to providers of interconnected VoIP services on a wholesale basis.¹⁰⁵ The Arbitrators note that in its Time Warner Order,¹⁰⁶ the FCC concluded that

¹⁰⁰ SLI/DA Order at ¶ 130.

¹⁰¹ There is no record evidence of a separately stated charge for the directory listings service that Embarq provides for its own customers. *See*, Tr. at 57-59; Embarq’s Initial Brief at 15.

¹⁰² Lubeck Direct at 3-4, 14.

¹⁰³ Lubeck Direct at 3; Lubeck Rebuttal at 16.

¹⁰⁴ Lubeck Direct at 3-4.

¹⁰⁵ Embarq Initial Brief at 19-21.

¹⁰⁶ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to*

telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to §§ 251(a) and (b) of the Act for the purposes of providing wholesale telecommunications service. Comcast is a telecommunications carrier that has interconnected with Embarq, an ILEC, under these provisions of the FTA. Therefore, the Arbitrators find that Comcast is entitled to the protections of § 251(b)(3) in this case.

Lastly, the Arbitrators find it necessary to address an issue that was not raised by either party but which is relevant to the Arbitrators' ultimate decision herein. Paragraph 124 of the SLI/DA Order states that "[n]either the statutory language nor our implementing rules allow requesting LECs to use listing information obtained pursuant to section 251(b)(3) to publish telephone directories."¹⁰⁷ Paragraph 124 also states that "[t]o the extent that a requesting LEC wishes to publish its own directories, the manner in which it may use another LEC's listing information, and the compensation that the requesting LEC must pay to the providing LEC for the right to use to use that information in publishing a directory, is governed by 222(e) and our rules implementing that section."¹⁰⁸ These two provisions can be read to negate the obligation on an LEC to use another telecommunications carrier's directory listings to publish a directory. However, the Arbitrators find that these two provisions can be distinguished from the facts of this arbitration in that the statements refer to the obligation on a "requesting LEC" to provide another carrier's directory listing information to a directory publisher. Since Embarq has not asked for Comcast's listings in this case, but rather it is Comcast that has requested Embarq to publish its listings, it cannot be said that Embarq is a "requesting LEC."¹⁰⁹ Therefore, the Arbitrators' finding that Embarq must provide Comcast's directory listings to a directory publisher is not altered by these two provisions from the SLI/DA Order.

Provide Wholesale Telecommunications Services to VoIP Providers, Memorandum Opinion and Order, 22 F.C.C.R. 3513, 22 FCC Rcd. 3513 (Released March 1, 2007).

¹⁰⁷ SLI/DA Order at ¶ 124.

¹⁰⁸ *Id.*

¹⁰⁹ Comcast Reply Brief at 9.

Reasonableness of the Monthly Recurring Charge

Comcast's Position

Comcast stated that when it enrolls a new customer, it submits an electronic "Directory Listing Service Request" to Embarq.¹¹⁰ Comcast has agreed to pay a non-recurring charge of \$9.09 for every listing that Comcast submits.¹¹¹ Comcast objects to the additional \$2 monthly charge proposed by Embarq for the storage and maintenance of Comcast's directory listings in Embarq's directory listing databases because it believes Embarq is sufficiently compensated by other revenue streams for providing this service.¹¹² Those other revenue streams include a \$9.09 per listing non-recurring charge which Comcast has agreed to pay and which it contends should "cover any conceivable cost Embarq might incur to keep that listing in its database."¹¹³

In addition to the \$9.09 non-recurring charge, Embarq is paid a set rate determined by the FCC of \$0.04 per listing for base subscriber list information and \$0.06 for updates from directory publishers and directory assistance providers ("DP/DA providers") for DL information.¹¹⁴ Comcast relies on the FCC's finding that these fees allow ILECs the opportunity "to recover the cost of installing, maintaining, and programming the computers that store subscriber list information databases, and the costs of ensuring that those databases are up-to-date and accurate."¹¹⁵ Additionally, Comcast claims that the proposed \$2 fee is arbitrary because Embarq has sought different rates for the same service in different states (\$3 in Minnesota, \$2 in Texas and \$0.50 in South Carolina) though Embarq's DL database is not state specific.¹¹⁶ Comcast believes that there is longstanding FCC and Texas Commission precedent for establishing just

¹¹⁰ Comcast Initial Brief at 3.

¹¹¹ *Id.*

¹¹² Gates Direct at 3, 5, 31.

¹¹³ Gates Direct at 11-12.

¹¹⁴ Gates Direct at 12.

¹¹⁵ Gates Direct at 13 and SLI/DA Order at ¶ 78.

¹¹⁶ Gates Direct at 14.

and reasonable rates as cost based rates.¹¹⁷ Comcast does not argue that DL services are subject to total element long run incremental cost (TELRIC) rates because “a service can be cost-based without being TELRIC-based.”¹¹⁸

Comcast contends that “since this arbitration began, Embarq has admitted that the DLISM charge has nothing to do with ‘storing and maintaining’ Comcast’s DLs.”¹¹⁹ Embarq has, according to Comcast, “effectively zero cost associated with ‘storing’ directory listings in a database”¹²⁰ and has provided no information that it actually performs the tasks for which they are requesting a fee or what the costs may be of performing these tasks.¹²¹ Comcast also argues that some of the functions for which Embarq seeks payment should not be borne by Comcast customers.¹²² According to Comcast, charges such as providing “special directory distribution instructions” should be paid for by the end users who require this specific service and charges for “process[ing] invoices and pay[ing] R.H. Donnelley for the purchase of out-of-area directories that are requested by ILEC and CLEC end users” should not be charged to Comcast’s in-region customers through a wholesale charge.¹²³

Embarq’s Position

With respect to the non-recurring charge of \$ 9.09 per listing, which Comcast has agreed to pay, Embarq argues that that charge relates exclusively to the costs incurred in receiving orders, accepting or rejecting the orders through automated edits, and completing the DL order from the CLEC.¹²⁴ Embarq contends that the evidence shows that the activities that the proposed \$2 monthly recurring charge for directory listing storage and maintenance is based on are different than those activities on which the non-recurring charge of \$9.09 per listing is based.

¹¹⁷ Gates Rebuttal at 2.

¹¹⁸ Gates Direct at 24-25.

¹¹⁹ Comcast Initial Brief at 8.

¹²⁰ *Id.*

¹²¹ *Id.* at 9.

¹²² Comcast Initial Brief at 9-10.

¹²³ *Id.* at 9-10.

¹²⁴ Embarq Reply Brief at 17.

Embarq states that the proposed \$2 monthly recurring charge for DLSSM will compensate it for activities related to reviewing white pages proofs from the publishers, work associated with correcting of CLEC errors, extraction of base files and periodic feeds throughout the year to multiple publishers, creation and provision of daily files to publishers for business customer updates, and development and maintenance of the database software.¹²⁵ Embarq avers that the proposed \$2 monthly charge for DL service will effectively treat all LECs alike by charging either an implicit or explicit rate for DL service.¹²⁶ Embarq argues that providing Comcast's directory listings to publishers requires performing functions that are recurring and ongoing in nature.¹²⁷ Embarq contends that it is not sufficiently compensated for these recurring and ongoing functions by the non-recurring \$9.09 charge for ordering DL service or by the \$0.04 and \$0.06 per listing charges related to providing the listing to directory publishers.¹²⁸ Moreover, Embarq claims that the terms of the proposed interconnection agreement do not allow it to keep the \$0.04 and \$0.06 per listing it receives from selling Comcast's DLs to directory publishers other than Donnelley.¹²⁹ Therefore, Embarq maintains it is not already compensated for DL service to Comcast from the fees it receives from directory publishers.¹³⁰

Embarq asserts that the fact that it did not set forth all of the tasks related to the non-recurring charge and proposed monthly recurring charge and the associated costs in a formal cost study does not undermine the evidence of the differences between the tasks performed for each separate charge.¹³¹ Embarq argues that the FCC chose not to subject directory listings to the TELRIC pricing standard that was applied to other LEC obligations (such as unbundled loops) as a result of either the FTA or the FCC's other implementation rules.¹³² Embarq explained that it only refers to its proposed rate as "market-based" as a way of distinguishing it from a "cost-

¹²⁵ *Id.*

¹²⁶ Embarq Initial Brief at 15-16.

¹²⁷ Lubeck Rebuttal at 7-8

¹²⁸ *Id.* at 8.

¹²⁹ Lubeck Rebuttal at 14.

¹³⁰ Lubeck Rebuttal at 20-21.

¹³¹ Embarq Reply Brief at 17-18.

¹³² Lubeck Direct at 5.

based” rate, and in that regard, it is more accurate to refer to Embarq’s proposed rate as simply “non-cost based.”¹³³

Arbitrators’ Decision

As explained above, the Arbitrators conclude that the non-discriminatory access requirement under FTA § 251(b)(3) precludes Embarq from assessing a separate \$2 monthly charge for DLSSM on Comcast when it provides Comcast listings to its directory publisher Donnelley. In addition, the Arbitrators find that Embarq is sufficiently compensated for maintaining and storing¹³⁴ the directory listings of Comcast’s customers by the revenues it receives from the non-recurring service order charge that Comcast pays to have a customer listing loaded into Embarq’s database and by the revenues that Embarq receives from Donnelley when Embarq sells Comcast listings to Donnelley.

The Arbitrators find it noteworthy that Embarq did not provide a cost study or any relevant cost information concerning its storage and maintenance costs for directory listings in this proceeding. Embarq argues that it did not provide cost information to substantiate the non-recurring charge service order entry fee of \$9.09 because it contends that it is a negotiated rate and therefore a cost study is irrelevant.¹³⁵ Embarq also argues that it was not necessary for it to provide cost information to substantiate its proposed monthly \$2 charge for storage and maintenance of directory listings because it believes that Comcast can deal directly with directory publishers and therefore a non-cost-based rate for providing the service to Comcast is appropriate.¹³⁶ While Embarq disputes Comcast’s assertion that costs associated with the storage of directory listings are miniscule,¹³⁷ it did not provide cost information to counter that assertion.

¹³³ Embarq Reply Brief at 9.

¹³⁴ The Arbitrators wish to point out that §§ 71.2.5 and 71.2.6 of the parties’ prospective ICA refers simply to a monthly rate for “storage” of directory listings whereas the statement of the disputed issue jointly filed by the parties requests refers to the “maintenance and storage” of Comcast customers’ basic directory listing information. The Arbitrators find that statement of the disputed issue is controlling and will therefore address the appropriateness of a monthly charge for “storage and maintenance.”

¹³⁵ Tr. at 45-47.

¹³⁶ Tr. at 69-70.

¹³⁷ Tr. at 184.

This gist of Comcast's argument is that Embarq is sufficiently compensated for storage and maintenance of directory listings by various means and therefore should not be allowed to charge an additional fee. Pursuant to § 71.3.5 of the prospective Interconnection Agreement, Comcast has agreed to pay a Service Order entry fee of \$9.09 for each initial directory listing to be uploaded to the Embarq database and an additional \$9.09 if Comcast requests changes to these listings.¹³⁸ Section 71.3.5 also requires Embarq to provide White Pages database maintenance to Comcast for each directory listing, the cost for which is included in the \$9.09 Service Order entry fee. Donnelley also pays Embarq an FCC-approved rate of \$0.04 per listing for base file subscriber list information and \$0.06 per listing for updated subscriber list information for access to CLEC (including Comcast) and Embarq directory listings contained in Embarq's directory listing database.¹³⁹ The FCC concluded that the rates of \$0.04 per listing and \$0.06 per listing for updates should allow most carriers to recover the incremental costs of providing base file and updated subscriber list information to directory publishers and provide a reasonable contribution to those carriers' common costs and overheads.¹⁴⁰ In addition to failing to provide a cost study or other relevant cost information for the publishing related activities,¹⁴¹ Embarq has not approached the FCC with cost support to justify a rate higher than the presumptively reasonable rates ordered by the FCC.¹⁴²

Embarq contends that the proposed \$2 monthly charge is intended to compensate it for activities it performs in providing a CLEC's subscriber listings to a directory publisher for which it is not already compensated by the FCC-mandated \$0.04 and \$0.06 charges. The evidence indicates that the functions Embarq performs in providing listings to a directory publisher are the

¹³⁸ Comcast Unnumbered Exhibit (admitted into the record post-hearing), Prospective Interconnection and Collocation Agreement for the State of Texas (Prospective Agreement or Prospective ICA), Table 1 (Embarq Rate Element Cost Summary); The Arbitrators note that both the current agreement between Embarq and Comcast (previously between Sprint and Comcast) and the prospective agreement between Embarq and Comcast contain identical language with respect to the non-recurring service order entry fee except that the service order entry fee is \$7.66 in the current agreement and has been increased to \$9.09 in the prospective agreement.

¹³⁹ Lubeck Rebuttal at 14; Tr. at 22-24.

¹⁴⁰ The FCC noted, that according to the ILECs, the subscriber list information rates should allow carriers such as Embarq to recover the cost of installing, maintaining, and programming the computers that store subscriber list information databases and the cost of ensuring that these databases are up to date and accurate. SLI/DA Order at ¶ 78.

¹⁴¹ Tr. at 42-43.

¹⁴² Gates Direct Testimony, Embarq Response to Comcast RFI No. 12.

same as those upon which the FCC based the \$0.04 and \$0.06 charges. During the course of discovery, Embarq provided information regarding those specific functions that Embarq performs that are associated with the directory listing monthly charge.¹⁴³ The Arbitrators find no significant difference between those functions identified by Embarq and those functions upon which the FCC justified the \$0.04 and \$0.06 monthly charges.¹⁴⁴ Even though the functions may be the same, Mr. Lubeck explained during the hearing that Embarq is compensated by directory publishers at the FCC-mandated rates only for Embarq's listings and not Comcast's.¹⁴⁵ According to Mr. Lubeck, Embarq does not get compensated for Comcast's listings because it is required to share the revenues it receives from directory publishers for Comcast's listings with Comcast.¹⁴⁶ Therefore, Embarq argues that it is justified in assessing the recurring charge for those listings. However, the notion that Embarq is obligated to share Comcast's listings revenues with Comcast is belied by the actual requirements of the parties' ICA. The ICA contains language stating that with respect to Donnelley, Embarq will not share with Comcast revenues it receives from selling Comcast's subscriber listings to Donnelley at the FCC's prescribed rates.¹⁴⁷ The Arbitrators note that since this proceeding is limited to a determination of the obligation on Embarq to provide Comcast listings to Donnelley, the issue of recovering costs of recurring activities associated with providing listings to other publishers is not relevant. The Arbitrators therefore conclude that Embarq is adequately compensated by the statutory FCC rates it receives from Donnelley for Comcast's directory listings.

Moreover, the record is not clear as to the frequency which Embarq checks for errors of the directory listings it provides to directory publishers. While Mr. Lubeck did testify that Embarq checks for errors once prior to the publication of a directory, it is not clear how often a

¹⁴³ Gates Direct, Embarq Response to Comcast RFI No. 9.

¹⁴⁴ SLI/DA Order ¶¶ 78, 94 and 96. Embarq witness Alan Lubeck attempted at the hearing to distinguish the error correcting of a record that has already been placed into Embarq's directory from those functions listed by the FCC in SLI/DA Order ¶ 78. Tr. at 41. However, Mr. Lubeck did not refute Comcast counsel's suggestion that such error correcting was synonymous with the "ensuring that . . . databases are up-to-date and accurate." Tr. at 41-42; SLI/DA Order ¶ 78. The Arbitrators note that the functions referred to in SLI/DA Order ¶ 78 are not significantly different from those functions referred to in SLI/DA Order ¶¶ 94 and 96.

¹⁴⁵ Tr. at 37-38.

¹⁴⁶ Tr. at 169-170.

¹⁴⁷ Comcast Exhibit No. 6, Current Agreement, § 70.3.11; Prospective Agreement, § 71.3.11; Tr. at 50-51.

directory is published.¹⁴⁸ Embarq has failed to provide evidence indicating that the error correcting occurs on a monthly basis and has therefore not met its burden to show that charging for error correcting on a monthly basis is reasonable.

Lastly, the Arbitrators find that Embarq's proposal to use the rate for its Foreign Listings service as a proxy for the DLSSM is not reasonable for the same reason as described above in the discussion regarding discrimination under § 251(b)(3), which is that the foreign listing service is not a sufficiently similar service to the directory listing service at issue in this arbitration and as such it is not an apt comparison.

V. RULING ON SPECIFIC CONTRACT LANGUAGE

Pursuant to P.U.C. INTER. R. 21.95(t)(1), the Arbitrators adopt the following contract language proposed by Comcast for use in the parties' ICA:¹⁴⁹

71.2 Directory Listings Service Requests

71.2.3 Embarq will provide to CLEC the ability to maintain directory listings when CLEC ports a number or provides a new directory listing.

71.2.5 Embarq shall not charge for storage of CLEC subscriber information in the DL systems.

71.2.6 CLEC shall not charge for storage of Embarq subscriber information in the DL systems.

¹⁴⁸ Tr. at 29-30.

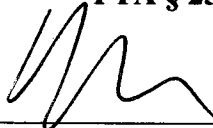
¹⁴⁹ Comcast Petition, Exhibit B.

VI. CONCLUSION

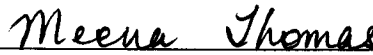
The Arbitrators conclude that the decisions outlined in this Award, as well as the conditions imposed on the Parties by these decisions, meet the requirements of FTA § 251 and any applicable regulations prescribed by the FCC pursuant to FTA § 251.

SIGNED AT AUSTIN, TEXAS on the 27th day of August, 2008.

FTA § 252 PANEL



**BRENNAN FOLEY
ARBITRATOR**



**MEENA THOMAS
ARBITRATOR**

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James Kelsaw
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