BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

UNITED TELEPHONE COMPANY OF THE NORTHWEST D/B/A EMBARQ'S INITIAL BRIEF

Barbara C. Young
State Executive
United Telephone Company of
the Northwest d/b/a Embarq
902 Wasco Street
Hood River, OR 97031
(541) 387-9850 phone
(541) 387-9753 fax
Barbara.C.Young@Embarq.com

William E. Hendricks
United Telephone Company of
the Northwest d/b/a Embarq
902 Wasco Street
Hood River, OR 97031
(541) 387-9439 phone
(541) 387-9753 fax
Tre.Hendricks@Embarq.com

ATTORNEY FOR UNITED TELEPHONE COMPANY OF THE NORTHWEST D/B/A EMBARQ

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INITIAL BRIEF OF EMBARQ

1 United Telephone Company of the Northwest *d/b/a* Embarq ("Embarq") respectfully submits this Initial Brief, pursuant to WAC 480-07-395 and Administrative Judge Torem's instructions at the August 22, 2008 hearing. This matter arises from Comcast Phone of Washington's, LLC ("Comcast") Petition for Arbitration, which it filed on April 29, 2008 ("Petition").

2 The parties agree that there is only one disputed issue before the Commission in this proceeding:

> 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?"[1]

While Comcast agrees that this is the only issue in the case, it will attempt to interject issues into this proceeding regarding Embarq's cost to provide maintenance and storage of directory listing information. Embarq notes that, even if cost was an issue in this case, which it is not, Comcast has not introduced any cost evidence into the record. It is therefore inappropriate for Comcast to discuss cost and any reference to Embarq's costs must be disregarded by the Commission.

[1] Direct Testimony of Timothy J. Gates, at p. 6.

ARGUMENT

3 Embarq asserts in this case that Sections 222 and 251 of the Communications Act of 1934, as amended (the "Act"), allow it to charge Comcast a non-cost based monthly rate for directory listing storing and maintenance ("DLSM") services. Embarq argues that Section 222(e) does not require Embarq to provide the service Comcast is requesting at all, much less at a non-cost based rate. Because Comcast has the same ability to self-provision this service directly from Donnelley (or any other directory provider) as Embarq does, Embarq's MRC does not run afoul of the "nondiscriminatory access" obligation contained in Section 251(b)(3). As a result, Embarq may assess the MRC on Comcast and similarly situated carriers.

4 The primary legal framework for this case is provided by Section 222(e) and Section 251(b)(3) of the Act, which are set forth below. Section 222(e) deals specifically with the provision of subscriber list information ("SLI") for the purpose of directory publication:

> (e) 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, and conditions, to any person upon request for the purpose of publishing directories in any format.[2]

[2] 47 U.S.C. §222(e).

Section 251(b)(3) requires all local exchange carriers to permit nondiscriminatory access to directory listing:[3]

> (b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.—Each local exchange carrier has the following duties: …
>
> DIALING PARITY.—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, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.[4]

Reconciling these two statutory provisions is the key to determining whether Embarq is authorized to assess the MRC.

I. SECTION 222(e) DOES NOT REQUIRE EMBARQ TO BE A CLEARINGHOUSE FOR CLEC SLI, AND SECTION 251(b)(3) DOES NOT ALTER THIS CONCLUSION

5 In its *SLI/DA Order*,[5] the FCC addressed the obligation of LECs to provide SLI to third party directory publishers. Significantly, the FCC concluded in the *SLI/DA Order* that no LEC has to function as a clearinghouse for another LEC:

> We conclude that the obligation under section 222(e) to provide a particular telephone subscriber's subscriber list information extends only to the carrier

[3] As an initial matter, it is important to highlight the fact that Section 251(b)(3) refers to two discrete requirements of every local exchange carrier ("LEC"), which are the requirements to permit nondiscriminatory access to directory assistance ("DA") and to DL, although only the latter is truly relevant to this case. The issue in dispute involves Embarq's proposed MRC for providing just the latter type of service, i.e., access to a "directory listing" service or function.

[4] 47 U.S.C. §251(b)(3).

[5] *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*; Third Report and Order in CC Docket No. 96-1 15; Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of proposed Rulemaking in CC Docket No. 99-273; FCC 99-227, Released September 9, 1999, ¶54 ("*FCC SLI/DA Order*").

that provides that subscriber with telephone exchange service. The language of section 222(e) makes clear that a carrier need not provide subscriber list information to requesting directory publishers pursuant to that section unless the carrier "gathered" that information "in its capacity as a provider of [telephone exchange] service." Under the statutory definition of "telephone exchange service," a carrier acts in this capacity only to the extent it "furnish[es] to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or . . . comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." This reference to "furnish[ing] to subscribers intercommunicating service" establishes that a carrier acts "in its capacity as a provider of [telephone exchange] service" only to the extent it provides telephone exchange service to subscribers of that service. When a LEC provides "nondiscriminatory access to . . . directory listing . . . ." under section 251(a)(3), it is not providing telephone exchange service to subscribers of that service. Instead, as the language of section 251(a)(3) makes clear, the LEC is providing a service -- directory listing -- to "competing providers of telephone exchange service and telephone toll service."

We note that our conclusion that the obligation under section 222(e) to provide a particular telephone subscriber's subscriber list information extends only to the carrier that provides that subscriber with telephone exchange service does not preclude an incumbent LEC or other entities from acting as a clearinghouse for providing subscriber list information to directory publishers. We reject, however, for the reasons stated above, the argument that we have authority under section 222(e) to require incumbent LECs to provide competitive LECs' subscriber list information to directory publishers. To the extent State law permits, State commissions are free to require incumbent LECs and competitive LECs to enter into cooperative arrangements for the provision of subscriber list information to directory publishers.[6]

6 While to date there might be a "standard industry practice" of ILECs' functioning as a DL clearinghouse for other LECs, as Comcast witness Mr. Gates

[6] *SLI/DA Order*, ¶¶ 54, 55 (citations omitted, emphasis added).

contends,[7] ILECs are not obliged under federal or state law ILECs to perform that clearinghouse function. Comcast's position in this case is that Section 251(b)(3) requires Embarq to function as a clearinghouse for providing other LEC's DLs to third party publishers. That interpretation of Section 251(b)(3), however, is flatly at odds with what Congress and the FCC *did not* require Embarq to do under Section 222(e).

7 At various times Comcast has attempted to distinguish the requirements of Section 222(e) from the requirements of Section 251(b)(3), while at the same time attempting to analogize to Section 222(e) for pricing purposes.[8] The fundamental flaw in Comcast's position is that it requires the Commission to ignore the statutory conflict that results. So, while under Section 222(e) Congress imposed on each LEC the obligation to provide only the DLs of *its own* subscribers to third party publishers, Comcast wants this Commission to ignore that limitation and then also interpret Section 251(b)(3) to find that LECs somehow do have the obligation to provide the listings of other LECs to third party publishers.

8 Comcast argues that to pass muster under the Section 251(b)(3) "nondiscriminatory access" standard, Embarq must provide the same service to other carriers that it provides to itself.[9] However, if this provision were construed to require any LEC that already submits *its own* listings to a third party publisher (even if

[7] Direct Testimony of Timothy J. Gates, at p. 12.
[8] *Id*., at p. 34-35.
[9] Direct Testimony of Timothy J. Gates, at p. 13.

submitted for the purpose of printing a directory for its own customers) to also submit the listings of its competitors to the third party publisher, every LEC that satisfies its Section 222(e) obligation to provide listing information to a third party publisher would necessarily be required to be a clearinghouse. Application of Section 251(b)(3) would be an absurd result because mere compliance with Section 222(e) would create the very clearinghouse obligation that Congress did not intend to impose under Section 222(e). Comcast's interpretation of the law would result in such an absurd result and must therefore be rejected.

9 Further, if the FCC declined to find that LECs are required to perform a clearinghouse function for DL information under Section 222(e), but believed that LECs (and in particular ILECs) were required to perform that function pursuant to the "nondiscriminatory access" requirement of Section 251(b)(3), the FCC presumably would have said so in the *SLI/DA Order* and referred to Section 251(b)(3). The pertinent portions of the *SLI/DA Order*, however, contain no such reference.[10]

10 The simple fact is that under Section 222(e), Congress stated its intent that when dealing with third party directory publishers, an ILEC does not have to perform a clearinghouse function and provide directory publishers the listings of other LECs. This makes sense because when third party publishers are involved, a competitive LEC can deal freely and directly with the publisher. It also makes sense that Section 222(e)

[10] *See, SLI/DA Order*, ¶¶ 53-55.

does not address the situation where a LEC publishes its own directory – the law does not need to require a LEC to provide the listings of its customers to itself or an affiliated publisher. And the mere fact that Embarq may already have systems and processes in place to provide this DL service with third party publishers does not overcome the conflict with Section 222(e). The proper way to reconcile Congress' intent under Section 222(e) with the nondiscriminatory access requirements of Section 251(b)(3) is to interpret Section 251(b)(3) in a manner that is consistent with, and preserves the effect of, Section 222(e) as set forth in the *SLI/DA Order*.[11]

A. The Fact that ILECs No Longer Control Access to Directory Publishers Supports Embarq's Position

11 The only way to reconcile Section 222(e) with the nondiscriminatory access requirement of Section 251(b)(3) is to interpret Section 251(b)(3) to apply only when a LEC controls access to the directory, as is the case when the LEC publishes the directory or otherwise controls the publisher. First, when Section 251(b)(3) was passed and implemented, and when the *SLI/DA Order* was released in 1999, the major ILECs (*e.g.*, the regional Bell operating companies, GTE, and Sprint) owned and controlled their

[11] Embarq acknowledges that there is case law from other jurisdictions finding that Section 251(b)(3) and ¶ 160 of the *SLI/DA Order* require an ILEC to place CLEC listings into the ILEC's directory. *See, MCI Telecom. Corp. v. Michigan Bell Tel. Co.*, 79 F.Supp.2d 768 (Mich. 1999) and *US West Communications, Inc. v. Hix*, 93 F.Supp.2d 1115 (D. Colo. 2000). These cases are not controlling authority before this Commission, and neither case addressed the conflict with Section 222(e) that results when the directory publisher is in fact an unaffiliated entity that the ILEC does not control.

own publishing businesses.[12] A this time, ILECs that might have had a competitive incentive to exclude the listings of competitors.

12 As Mr. Lubeck explained, today most of the major ILECs no longer self-publish their own directories, either directly or through an affiliate.[13] In the case of Embarq, the Embarq-branded directory is published by an independent third party publisher, Donnelley. And it is undisputed that Embarq does not control access to Donnelley or otherwise attempt to limit the ability of competing LECs to place listings in any directory published by Donnelley.[14] Likewise, there is no question that Embarq does not control access to the various other directory publishers that obtain listings from Embarq under Section 222(e).

13 Because a CLEC can bypass an ILEC for a particular service or function is sufficient to obviate discrimination concerns. With respect to Section 222(e), for example, the fact that directory publishers can go directly to CLECs to obtain SLI fosters the development of a competitive DL marketplace and ensures that ILECs cannot retain bottleneck control over this information. The same holds true for "nondiscriminatory access . . . to directory listing" under Section 251(b)(3). Comcast is not a captive customer of Embarq. Donnelley is an independent third party, unaffiliated with Embarq. Comcast can bypass Embarq and deal directly with Donnelley, avoiding the

[12] Direct Testimony of Alan L. Lubeck, at pp. 24-25.
[13] *Id.*
[14] *Id.*

NRC and MRC DL charges. Thus, as a result of these market changes, Comcast has "nondiscriminatory access . . . to directory listing . . . ."

14 The example of operator services ("OS") and DA services shows the weakness of Comcast's position that "nondiscriminatory access" requires a LEC to provide a §251(b)(3) service at cost even when the providing LEC does not control access to the database or directory. Section 251(c) imposes on ILECs unique and stringent obligations in addition to the obligations imposed on all LECs under Section 251(b). The FCC has found that CLECs are not impaired without access to the unbundled OS and DA services of ILECs.[15] To the extent that CLECs desire to provide their own OS and DA services, the CLEC can self-provide them or use a third party and can obtain access to the ILEC's databases and the ILEC's listings under Section 251(b)(3).

15 Yet Comcast's theory of the Section 251(b)(3) obligations inflates nondiscriminatory access to a greater form of access than exists under Section 251(c). Comcast argues that an ILEC like Embarq must provide access to third party directory publishers that Comcast can deal with directly itself. This is tantamount to requiring Embarq to provide an unbundled service to Comcast, notwithstanding the fact that Comcast is not at all impaired, because it can deal directly with Donnelley, or any other directory provider. Section 251(c) of the Telecommunications Act of 1996 ("Act"), more

[15] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996;* Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-238, 15 FCC Rcd 3696, ¶ 442 (Released Nov. 5, 1999) ("*UNE Remand Order*").

so than Section 251(b), is where Congress took steps to mitigate the scale and scope advantages of incumbency. It would be illogical to grant an ILEC relief from Section 251(c) when the ILEC has no exclusionary market power, while denying relief under Section 251(b) under the same circumstances.

16 Embarq's testimony proves that Comcast can deal directly with Donnelley.[16] Because a directory has more value with a larger number of listings, a publisher has an incentive to include the listings of as many LECs as possible in order to enhance the perceived value of the directory. Although Comcast has cited some "difficulties" in dealing with Donnelley, these are the typical challenges businesses face and overcome every day.[17] The undeniable conclusion is that Comcast would rather have Embarq provision this service than provide it itself. Embarq merely seeks to be compensated to perform these functions for Comcast, because (a) Embarq is not obligated to perform them and (b) Comcast is fully capable of performing them itself.

17 Moreover, testimony by Mr. Gates at hearing demonstrates that Comcast made little, if any, attempt to determine whether Comcast to deal directly with Donnelley or any other publisher in Embarq's service territory in Washington.[18] Comcast's testimony is not credible on the issue. On one hand, Mr. Gates claims that the main obstacle to Comcast working directly with the publisher is the difficulty of managing data from

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[16] Direct Testimony of Alan L. Lubeck, at pp. 24-25.
[17] Reply Testimony of Alan L. Lubeck, at p. 17.

[18] Transcript, at pp. 25-26.

multiple CLECs.[19] And yet in answer to Judge Torem's questions, Mr. Gates had no idea how many CLECs provided service in Embarq's service territory.[20] Furthermore, Mr. Gates testimony does not even come close to establishing that it would be too costly for Comcast to work directly with Donnelley. Comcast had very limited discussions with Donnelley regarding what would be entailed in working directly with the publisher,[21] and Mr. Gates was unable to specify what the cost would be to do so. Comcast therefore has utterly failed to establish that it would not be practicable or economical for Comcast to work with Donnelley.

B. Embarq's Position is Consistent with the FCC Rules on "Nondiscriminatory Access" with Respect to Directory Listing

18 Section 251(b)(3)'s nondiscriminatory access requirement does not apply to Embarq's offer to provide a DL service to Comcast because Embarq does not control access to Donnelley. However, Comcast argues that the "nondiscriminatory access" requirement means that Embarq cannot impose different DL rates on different LECs, and that Embarq cannot charge a rate greater than Embarq's own cost of providing the service.[22] This argument is unpersuasive.

19 The FCC's definition of "nondiscriminatory access" in 47 C.F.R. § 51.217 is set forth below:

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[19] Transcript, at p. 27, ll. 22-25. This statement also highlights the fact that Comcast believes Embarq should, inconsistent with the *SLI/DA Order*, be required to act as clearinghouse.
[20] Transcript, at p. 25, ll. 6-10.
[21] Transcript, at p. 36, ll. 6-10.
[22] Gates Direct at 18-20.

> Nondiscriminatory access. "Nondiscriminatory access" refers to access to telephone numbers, operator services, directory assistance and directory listings that is at least equal to the access that the providing local exchange carrier (LEC) itself receives. Nondiscriminatory access includes, but is not limited to:
>
> (i) Nondiscrimination between and among carriers in the rates, terms, and conditions of the access provided; and
>
> (ii) The ability of the competing provider to obtain access that is at least equal in quality to that of the providing LEC.

First, the FCC's definition of nondiscriminatory access does not require a providing LEC, such as Embarq, to provide access at the LEC's own cost to provide the service. If the FCC intended "equal access" to limit price to the actual cost incurred by the providing LEC, rather than allowing the providing LEC to charge a non-cost based rate, then it would have said so. Only the requirement in subparagraph (ii) imposes an "equal to the providing LEC" standard, and subparagraph (ii) only refers to equality in "quality" of access. The plain language of this rule does not support Comcast's contention that Embarq must charge competitors only the same rate Embarq would charge itself.

20 The *SLI/DA Order* also supports this conclusion. The *SLI/DA Order* states that nondiscriminatory access means nondiscrimination "among and between requesting carriers in rates, terms and conditions of access; and is equal to the access that the providing LEC gives itself."[23] Although the term "requesting" is not in the FCC's final

[23] *SLI/DA Order*, ¶ 125 (emphasis added).

rule, in context it makes sense to read "requesting" into subparagraph (i) and not interpret "carriers" to include the providing LEC. If the FCC had meant to apply subparagraph (i) to the providing LEC, the FCC certainly could have explicitly done so. For example, the FCC could have added "rates, terms, and conditions" to subparagraph (ii), but did not. The structure of the FCC's rule defining nondiscriminatory access leads to the conclusion that it is only the *quality* of access that must be equal to what the providing LEC provides itself, not the rate the LEC charges.

C. The Structure of Section 251 Also Supports Embarq's Reconciliation of Sections 222(e) and 251(b)(3)

21 Further buttressing Embarq's construction of Section 251(b)(3) and Section 222(e) is the structure of Section 251(b)(3) itself. The structure of Section 251(b) and the requirements of (b)(1) – (5) support an interpretation that imposes obligations only where a LEC controls access, or has the power to limit access, to a particular resource. The obligations of Section 251(b) are mutually and reciprocally imposed on all LECs, not just ILECs.

22 At the outset of competition under the Act it might have been true that ILECs had more market power and control with regard to things like dialing parity, number portability, and access to rights of way. However, Congress clearly foresaw that as competition developed, all LECs would potentially be able to stifle competition when any LEC exercised control over the assets, services, and resources that Section 251(b) says should be mutually and reciprocally provided. There is nothing in Section 251(b)

that suggests a LEC has any obligation when the LEC has no power to limit or control access to the publisher. Section 251(b)(1) requires every LEC to not prohibit the resale of *its own* services. Section 251(b)(2) requires every LEC to port numbers over which the LEC has control. Section 251(b)(4) requires every LEC to provide access to *its own* poles, ducts, conduits and rights-of-way.

23 The same holds true with Section 251(b)(3), which addresses dialing parity. The dialing parity requirement addresses a LEC's control over the dialing pattern of its own customers. And the access to directory assistance ("DA") requirement entails providing read-only access to DA databases otherwise controlled by the LEC and the sharing of the LEC's own listings with other LECs in a readily accessible format.[24] The requirement of nondiscriminatory access to operator services is also really more akin to a dialing parity requirement (and notably, "Dialing Parity" is the heading of Section 251(b)(3)); any customer, regardless of the customer's local telephone service provider, must be able to connect to a local operator by dialing "0" or "0 plus" the desired telephone number.[25] The obligations under Section 251(b)(3) generally require a LEC not to restrict access to information under its control, to permit nondiscriminatory access to its systems or databases, and to transfer DA and DL information to a *requesting*

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[24] *SLI/DA Order* ¶ 149 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, ¶ 135 (1996) *vacated in part sub. nom People of the State of California v. Federal Communications Commission*, 124 F.3d 934 (8th Cir. 1997), rev'd *AT&T Corp. v. Iowa Util. Bd.*, 119 S.Ct. 721 (1999) ("*Second Local Competition Order*").

[25] *Second Local Competition Order*, ¶¶ 112, 114.

LEC. There is no requirement under Section 251(b)(3) for a LEC to perform a service for another LEC that *involves an unaffiliated third party with whom the CLEC can deal directly*.

24 For example, with regard to nondiscriminatory access to numbers, the FCC recognized that such access would be achieved once a neutral third party numbering administrator was established pursuant to § 251(e)(1)[26] and LECs would no longer have to go through each other to obtain numbers. The numbering situation is now comparable to the instant case where all LECs can go to the same publisher(s). And there has been no showing that such publishers are not neutral purchasers of listings.

D. Embarq's Interpretation Is Consistent with, and Furthers the Purpose of, the Telecommunications Act of 1996

25 Embarq's reconciliation of Section 222(e) and Section 251(b) also furthers the purpose of the Act. The purpose of the Act is to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[27] Realizing this goal requires emergence of true facilities-based competition, not artificial competition piggy-backed on ILEC facilities. Embarq does not control access to Donnelley.

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[26] *SLI/DA* Order ¶ 107.

[27] S. Conf. Rep. No. 104-230, at 1 (1996).

26 Comcast, the fourth largest provider of residential telephone services in the country,[28] can deal with Donnelley directly to obtain the DLSM service. Comcast has simply chosen not to explore self-provisioning this service, and continues to rely on Embarq for it. Section 251(b)(3) does not require a LEC to provide a DL function to other LECs, i.e., does not require a LEC to be a DL clearinghouse when the LEC does not control access to a directory publisher. Comcast's arguments otherwise are unpersuasive and perpetuate undue reliance on ILEC facilities which frustrates development of competition envisioned by the Act.

II. EMBARQ'S MRC IS NOT REQUIRED TO BE COST-BASED; THUS A NON-COST BASED MRC, AS PROPOSED BY EMBARQ, IS APPROPRIATE

A. The FCC Does Not Mandate that the MRC Services Be Provided at Cost

27 Section 251(b)(3) does not require Embarq to provide the service at cost – either embedded cost or TELRIC. And nowhere does the FCC say in an order or in a rule that this DL service must be provided at cost.[29] Embarq's offer to perform this clearinghouse function for Comcast should be viewed in the same light as other services that the FCC

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[28] Testimony of Alan J. Lubeck, Exhibit No. 4, which is a Comcast press release dated January 8, 2008 announcing it had become the fourth largest residential phone service provider in the United States.

[29] This is what this Commission found with respect to Embarq's MRC earlier this year: "The [IN] Commission finds it significant that the FCC determined not to subject the directory listing obligation to a TELRIC pricing standard. Therefore it is not discriminatory for Embarq to charge Verizon a higher rate than it "charges" itself. To find that that constituted discrimination would result in imposing a TELRIC pricing standard indirectly, a result flatly inconsistent with the FCC's decision not to do so, not to mention the inappropriate imposition of rate-of-return or price cap treatment." *Petition of MCIMetro Verizon Access Transmission Services LLC d/b/a/ Verizon Access Transmission Services for Arbitration of an Interconnection Agreement with United Telephone Company of Indiana, Inc. d/b/a Embarq Under Section 252(b) of the Telecommunications Act of 1996*, IURC Case No. 43373 INT 01 (Mar. 12, 2008), at p. 19 ("*IURC MRC Decision*").

has said do not need to be provided on an unbundled basis under the even more stringent standards of Sections 251(c)(3) and (d)(2).

28 For example, ILECs who are no longer required to provide something as critical to telephone exchange service as switching (because CLECs are not impaired without access to the ILECs' switching), now provide switching pursuant to *commercial* agreements where the prices are not based on cost. Revisiting the OS/DA example, the FCC found that the costs of self-provisioning OS/DA services were not so substantial or material as to justify unbundling at TELRIC.[30] The FCC noted that for OS/DA, ILECs possess no particular advantage in obtaining the facilities necessary to provide OS/DA services, such as computers and employees.[31] The FCC even found unpersuasive the fact that CLECs might not be able to obtain the same quality of OS/DA via third-party providers or via self-provisioning.[32]

29 The MRC Embarq proposes for access to it's database is not for access to Embarq's database. Thus, it is unlike the access to OS and DA, under Section 251(b)(3), that the FCC cited to in the *UNE Remand Order* as one basis for its decision to not require unbundling of OS and DA services. The proposed MRC is a charge for Embarq to provide a service that a competing LEC can provide for itself by dealing directly with a third party directory publisher. It is a service that a competing LEC has to provide for

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30 *UNE Remand Order*, ¶ 450.
31 *Id.*, ¶ 451.
32 *Id.*, ¶¶ 456 – 457.

itself in order to comply with a request by a directory publisher for subscriber information under Section 222(e) – a competing LEC cannot *require* another LEC to perform the service for it. It is the same service that Embarq provides to retail customers who request a foreign or additional listing.

30 CLECs can still gain access to an ILECs' underlying databases under Section 251(b)(3), but that is so a CLEC can provide its own OS/DA service. The elimination of unbundling of OS and DA services did not move pricing for unbundled OS and DA services from a TELRIC standard to a "recovery of embedded cost" standard under Section 251(b)(3) – there is no support in the law for that proposition. If a CLEC wants to *resell* an ILEC's tariffed retail OS/DA services, presumably that can be done under Section 251(c)(4) or Section 251(b)(1). Similarly, there is no support in the law for the proposition that, when Embarq is not required to be a clearinghouse for third party directory publishers, a CLEC can still impose that requirement on Embarq at some rate that allows Embarq to do no more than recover its costs. Comcast can self-provision its own directory listing service when dealing with a third party directory publisher – there is no requirement for Comcast to go through Embarq and no legal standard that Embarq must charge cost-based rates for a service Comcast can, and has a legal obligation to, self-provision.

B. Comcast's Claims that any MRC that Embarq Charges for it to Provide DLSM Service to Comcast are Irrelevant, are not Supported by any Evidence in the Record and are Not Credible

31 Once again, Comcast is short on credibility, this time in its claims regarding rates that Embarq should be permitted to charge. Comcast's testimony at hearing refutes its own claims that Embarq incurs no costs to provide DLSM. When asked whether alleged impediments to Comcast working with Donnelley would continue forever, Mr. Gates admits that there are real and continuing processes involved, for which costly systems are required, beyond one-time initial feeds:

> Well, I think it's clear that if you were to have multiple CLEC's going to the directory publisher as opposed to one, the initial feeds would be a one-time occurrence. All the updates for business and res would be additional occurrences, so this would happen at least annually, perhaps daily for business, times the number of CLEC's.
>
> So I think it would be a continuing problem, continuing issue in terms of developing the system's know-how, employees, etcetera, for a system that's already in place, so I think it would be continuing.[33]

Mr. Gates then goes on to admit that substantial resources would be expended in the very processes for which Comcast claims Embarq incurs no costs:

> I'm not suggesting that the issues aren't insurmountable. I'm sure if Comcast wanted to, they could do something such as this. They could put a person on the moon, for that matter, but is it a good public policy?
>
> Should the industry have to expend all of these resources for a function that's already there, and most importantly, no data publisher is going to CLEC's saying, Give me your listings. The data publishers go to the ILEC's to get those, because that's the one industry source

[33] Transcript, at p. 27, l. 26 through p. 28, l. 7.

> where all of the CLEC information is consolidated. It's the most efficient way to do it, and the ILEC's and the data publishers have long-standing relationships and systems in place to make this an efficient process, whereas CLEC's do not.[34]

32 First, Embarq's argument in this case is that costs are not a proper issue for the Commission to entertain in this case. And there is no evidence to support any claims by Comcast regarding costs. Putting these arguments aside to examine the truth behind them, if the services that Embarq provides to Comcast are as difficult to provide, resource intensive, and expensive as Comcast's witness suggests, any claims by it that Embarq incurs zero additional costs to support its proposed monthly charge are totally without credibility and must be disregarded by the Commission. This proves that Comcast's real interest in this case is not to ensure an honest and fair application of the law, but to get a valuable service without paying for it.

C. Comcast Is Not a Captive Customer and Has an Alternative to Embarq's Services

33 Comcast has only provided broad generalizations and speculation about the cost and complexity for Comcast to go directly to the publisher, as noted in the preceding discussion. Comcast has not provided any evidence of the cost that it would incur if it has to self-provision this service, nor evidence that Embarq possesses some unique advantage in deploying the resources necessary to provide listings to a third party directory publisher. Embarq is not a monopoly bottleneck to this service. The record

[34] *Id.*, at p. 28, ll. 11-25.

shows what appear to be *Donnelley's* preferences for using Embarq as a clearinghouse, and purportedly some unexplained difficulty by Comcast in providing data Donnelley requires.[35] These appear to be typical challenges that businesses face and resolve everyday.[36] Because Comcast derives a benefit from having Embarq provide this service, Embarq should be compensated.

D. Comcast Already Has Much, If Not All, of the Relevant Information Compiled, and Is Legally Obligated to Provide This Information to Requesting Directory Providers

34 Not only does Comcast have the ability to deal directly with Donnelley, but the record shows that Comcast has already done much of the legwork to enable it to do so. Under Section 222(e), Comcast has a legal obligation to provide SLI to requesting directory publishers. This is not a new obligation, it has been in effect since 1996. Although Comcast claims it has not received a request for this information, the fact remains that Comcast is obligated to provide it and should have systems in place to enable its ready compliance with the law. Further, Comcast has much of the required information – name, address and telephone number – for ALI databases for E911 purposes, which it stated it could provide directly to a publisher for directory listing purposes.[37]

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[35] Transcript, at pp. 26-28 (noting Donnelley concerns about working with multiple providers, maintaining directory accuracy, and obtaining daily updates of business records).

[36] Reply Testimony of Alan L. Lubeck, at p. 16, l. 11 through p. 17, l. 1.

[37] Transcript of Hearing, at p. 43, ll. 22-25.

E. Comcast's Arguments that Embarq Enjoys Greater Economies of Scope and Scale are Unconvincing

35 Comcast asserts that Embarq enjoys greater economies of scale and scope than Comcast does, and uses that as a further reason to challenge the MRC. But, as Mr. Lubeck testified, "Comcast now has more than five million local residential telephone customers[38] and purports to be the fourth largest residential phone service provider in the United States, making Comcast a larger provider of residential telephone service than Embarq."[39] And Comcast Corporation's operating results show that it spent $6 ***billion*** on capital additions and had nearly $12 ***billion*** in operating cash flow during 2007.[40] Twelve years after the passage of the Act the policy behind the mutual and reciprocal obligations of Section 251(b)(3) is not best met by requiring an ILEC to provide a service at cost to a CLEC, in particular when the CLEC is substantially larger than the ILEC on a nationwide basis and without question is much larger than the ILEC on a statewide basis.

36 In attempting to defend itself for not contracting directly with Donnelley, Comcast says "there is no evidence [Comcast] could obtain the same terms as Embarq, which would clearly undermine the nondiscriminatory obligations imposed on Embarq

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36. Comcast 1st quarter, 2008 earnings release, which can be found at www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1138015&highlight= (visited August 14, 2008).

39 Reply Testimony of Alan L. Lubeck, at p. 7.

40 *Id*., at 21-22.

by Section 251(b)(3) of the Act."[41] This argument is unpersuasive. As Mr. Lubeck explained:

> [Gates] is incorrectly attempting to impose on Donnelley the non-discrimination obligations that § 251(b)(3) of the Act imposes on LECs. If Donnelley did not give Comcast the same deal it gave Embarq, and assuming that constituted discrimination, it would be Donnelley, not Embarq, who was discriminating. And § 251(b)(3) does not apply to Donnelley.[42]

Donnelley has every incentive to deal fairly with Comcast to maximize the value of Donnelley's directory.[43]

F. Comcast's Claim that Embarq is Already Recovering the MRC Through Other Charges Is Without Merit

37 Comcast raises a variety of claims suggesting that Embarq is already adequately compensated for the DLSM service.[44]

1. The proposed interconnection agreement does not already provide DLSM

38 Comcast will assert that Paragraph 71.3.5 of the prospective agreement between the parties indicates Embarq is already providing database maintenance service. Mr. Lubeck explained that the activities described in this paragraph relate to Embarq's NRC, not the MRC at issue in this arbitration. Embarq acknowledges that this paragraph could be worded better, but maintains that it describes activities associated

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[41] Direct Testimony of Timothy J. Gates, at p. 30.
[42] Reply Testimony of Alan L. Lubeck, at p. 19.
[43] *Id.*, at p. 20-21.
[44] Direct Testimony of Timothy J. Gates, at pp. 15-17.

with the NRC.[45] Comcast will also argue that Paragraph 71.3 of the prospective agreement shows that Embarq is trying to profit from activities performed by Donnelley, the directory publisher. Embarq reiterates that the specific proofing activities mentioned in that paragraph relate to portions of the directory not provided by Embarq, including the yellow pages advertising and yellow pages listings.[46] Further, the language of Paragraph 71.3 of the prospective agreement states that "*many* directory functions … will be performed by and are under the control of the directory publisher." That paragraph does not say that *all* directory functions are to be performed by the directory publisher. Thus, while there are functions performed by the directory publisher, there are other, distinct functions performed by Embarq for which Embarq is entitled to compensation through it's proposed MRC.

2. The presumptive rates discussed in the FCC's SLI/DA Order do not apply to this case

39 Comcast also argues that the $0.04 and $0.06 per listing that Embarq receives from directory publishers pursuant to the *SLI/DA Order* is fair compensation for providing Comcast's listings to publishers. The *SLI/DA Order*, however, addresses compensation only when a LEC provides its own listings to directory publishers,

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[45] Reply Testimony of Alan L. Lubeck at 15.

[46] As Mr. Lubeck explains: Embarq is not involved in the yellow pages portion of the directory other than providing business listing updates to the directory publisher, and has no way of proofreading the yellow pages. Likewise, the publisher has no way to proofread the white pages listings because the publisher is not involved with the Embarq-provided white pages listings, other than interfiling the Embarq-provided listings with listings provided by other LECs. Depending on the terms of the agreements with R.H. Donnelley, proofs would be sent to each LEC providing listings to allow that LEC to review its own listings prior to publishing the directory. Reply Testimony of Alan L. Lubeck, at p. 14.

because that is all that LECs are required to provide under Section 222(e). The *SLI/DA Order* did not address or limit compensation when Embarq is providing a clearinghouse function to other carriers that it is not required to provide under Section 222(e). Thus, the $0.04 and $0.06 per listing rates established in the *SLI/DA Order* are inapplicable.

3. Embarq's MRC is consistent with principles set forth the in the FCC's First Local Competition Order

40 Although Comcast claims that the MRC overlaps functions that are performed as part of the NRC, Mr. Lubeck explained why that is not true:

> The non-recurring charge compensates Embarq for receiving, recording, and processing service orders received from Comcast. Those activities do not include any portion of the directory storage and maintenance activities. The activities related to the DLSM service were separately noted in Embarq's response to Comcast Set I Interrogatory Q. 8 and do not overlap with the activities included in the non-recurring charge. As identified in these responses, assertions that Embarq is somehow double recovering by charging both for the ordering NRC and for the DLSM service are completely inaccurate and should be disregarded.[47]

A separate recurring charge is the appropriate assessment vehicle for Embarq's DLSM service. In the *First Local Competition Order*, the FCC explained that "a recurring cost is one incurred periodically over time."[48] A LEC may not recover recurring costs, such as income taxes, maintenance expenses and administrative expenses through a nonrecurring charge because these are costs that are incurred in connection with the

[47] Reply Testimony of Alan L. Lubeck, at p. 13.

[48] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 745 (1996). ("*First Local Competition Order*").

asset over time.[49] The FCC's examples of recurring charges show that a recurring charge need not happen as frequently as monthly or even as frequently as annually to be considered as a recurring charge. The FCC went on to state that it would be unjust and unreasonable for a LEC to recover a *recurring* cost through a *non*-recurring charge.[50] As Mr. Lubeck explained, the DLSM services are in exchange for Embarq performing recurring services, including maintenance functions and periodic review functions.[51] Thus, Embarq's proposed assessment of a recurring charge for these services is appropriate.

G. Embarq is Applying the MRC Reasonably and Without Discrimination

41 Comcast has also argued that Embarq's DL MRC is discriminatory because Embarq imposes this charge on facilities-based competitors only, and not on purchasers of UNE loops or on resellers of Embarq's services. Mr. Lubeck explained the impetus for the charge as follows:

> With these industry changes [i.e., the development of facilities-based competition] it has become apparent to Embarq that the interconnection agreements do not provide compensation for some services provided by Embarq, such as DLSM service, in situations where the facilities-based CLECs merely interconnect without purchasing UNEs or resale services. Consequently, Embarq has developed its stand-alone price for Directory Listings to obtain compensation for a service that Embarq is increasingly being asked to provide on a stand-alone basis.[52]

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[49] *First Local Competition Order*, ¶ 745.
[50] *First Local Competition Order*, ¶ 746.
[51] Reply Testimony of Alan L. Lubeck, at p.13-14.
[52] *Id.*, at p. 7.

42 Even if there were an obligation not to discriminate in its application of this DLSM charge, which there is not, Embarq would meet this obligation. The DLSM charge is imposed on carriers that are not similarly situated to neither Embarq's retail customers that buy voice service, nor to UNE-L or resale CLECs. Nondiscriminatory access does not require a LEC to provide services at a rate that reflects what the LEC charges its own customers for a service. Nondiscriminatory access to UNEs that is required by Section 251(c)(3), for example, includes providing loops at TELRIC-based rates that often exceed retail rates for residential service. And just because ILECs may not explicitly charge their end users for certain functions, that does not mean there is no cost involved in performing those functions that is recovered in rates.

43 Basic local phone service, including receipt of a listing and often a directory, has historically been provided at rates that were developed based on residual pricing principles that included the entire rate base. Under such rate of return regulation, all of the ILEC's legitimate costs were allowed to be recovered via the totality of its rates. Thus the costs of providing DL service to end users is recovered in the ILEC's rates, even if the basic rate charged to end users for local service cannot be definitively shown to include the specific cost of DL service. Obviously the same principles apply to the pricing of resold services, which are based on the retail rates (less an avoided cost discount under Section 252(d)(3)) of the ILEC; to the extent that the costs of DL service are or are not specifically included in retail rates, a resale CLEC may or may not be

incurring those costs even though a directory listing comes with tariffed residential service.

44 Comcast's interpretation of nondiscriminatory access with regard to pricing would require a UNE-L CLEC to pay the same price for a DL service that was included with a UNE loop that a resale CLEC would have to pay for the same DL service provided as part of resold residential service. It doesn't matter whether Embarq has included DL costs in its UNE-L rates or not, whether as a direct input or as an overhead: Comcast's argument is that the nondiscriminatory access requirement would not let an ILEC include such costs in a TELRIC rate because that would not be treating a UNE-L CLEC the same as a resale CLEC, or vice versa. In other words, Comcast's interpretation of nondiscriminatory access with regard to pricing would not permit any distinction between a resale CLEC and a UNE-L CLEC, despite the fact that the Act sets out two completely different pricing standards for resale and for UNEs.[53] This is not logical. And if DL costs are included in a UNE-L rate, then Comcast would presumably

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[53] The FCC, in it's First Local Competition Order, supports Embarq's position, stating that:

> [P]rice differences based …on … other factors not reflecting costs, ***the requirements of the Act***, or applicable rules, would be discriminatory…." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 861 (1996) *(emphasis added).*

The Act requires any UNE-L service or functionality to comport with TELRIC pricing principles. The Act requires resale to be provided at an avoided cost discount off of the ILEC's tariffed rates. So even though Embarq does not have to provide a clearinghouse function to any CLEC, it is not discriminatory for Embarq to impose different charges on similarly situated CLECs that are purchasing different products or services that are subject to different pricing standards under the Act.

argue that it should be able to obtain DL service at TELRIC, even though Comcast is not purchasing a UNE, and this DL service is not a UNE.

45 There are differences between carriers and the pricing of the different services that they buy from Embarq that not only justify, but require, different treatment, notwithstanding the "nondiscriminatory access" requirement that permeates Section 251. As the FCC noted, "nondiscriminatory access" does not permit "the imposition of disparate conditions between similarly-situated carriers in the pricing and ordering of services covered by Section 251(b)(3)."[54]

H. The Foreign Listing Service is a Reasonable Proxy for the MRC

46 The foreign listing service is a reasonably proxy for the MRC. Both involve a party that is seeking the Directory Listing service, but that is not purchasing UNE loops, resold service, or retail service within the local service area from Embarq. Embarq charges this same retail foreign listing charge to non-Embarq retail end user customers (which can be an end user customer of a different LEC in a neighboring city) requesting a listing in an "Embarq" directory. Similarly, contrary to Comcast's testimony,[55] Embarq also bills this charge to wireless end users and VoIP end users in Embarq's territory who request Embarq to list their names and numbers in a printed directory. Thus, Embarq applies the same charge to Comcast that Embarq charges: (i) to its own

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[54] *Second Local Competition Order*, ¶ 103 (emphasis added).

[55] Reply Testimony of Timothy J. Gates, at p. 9 (differentiating the need of in-territory customers to be in the local telephone book as compared to out-of-territory, but failing to acknowledge that in-territory wireless and VoIP customers pay the foreign listing charge to be listed in their in-territory directory).

end users, (ii) to other LEC end users, (iii) to wireless end users, and (iv) to VoIP end users, that request a listing in a directory where the end user customer is not purchasing basic residential or business service through resale or UNE loop services. Moreover, Embarq wholesale customers not purchasing a UNE loop or resold service (including Embarq wholesale customers purchasing special access services) must purchase a stand-alone $.50 per month foreign listing to be treated like a similarly situated wireless or VoIP customer.[56] Thus, Embarq's application of the foreign listing rate to subscribers for inclusion not only in Embarq out-of-territory directories, but also to facilities-based competitors for inclusion in Embarq home-territory directories, makes the rate a reasonable proxy for the MRC.

III. THE COMMISSION'S DECISION IN DOCKET NOS. UT-941464, UT-941465, UT-950146, & UT-950265, IS NOT APPLICABLE TO THIS CASE

47 According to Commission rules, "a local exchange company (LEC) must ensure that a telephone directory is regularly published for each local exchange it serves…"[57] The rules define "local exchange company" as "a company providing local exchange telecommunications service."[58] Thus, the rule would appear to apply to both Embarq and Comcast equally, given that both are providing local exchange service in Embarq's

[56] Lubeck Direct at 21.
[57] WAC 480-120-251. This rule was adopted in December 2002, in Docket No. UT-990146. The prior rule, which was in effect at the time of the *1995 Order*, did not specify which company was obligated to provide a directory. It simply stated that a "directory shall be published for each exchange…" WAC 480-120-062, repealed in *Cause No. U-85-56, General Order No. R-242* (November 6, 1985).
[58] WAC 480-120-021.

service territory in Washington. Even if it applies only to Embarq, the rule mentions nothing about price for directory listing being at or below cost.

48 The facts in this arbitration differ from the facts in the *1995 Order*,[59] cited by Mr. Gates in his testimony, in a number of significant ways. Since the release of the *1995 Order* thirteen years ago, the Act, the FCC's *SLI/DA Order*, and the sale of Embarq's (then Sprint's) publishing company have changed the landscape in which directory must be viewed. The FCC's SLI/DA Order is clear that the FCC does not require ILECs to sell subscriber list information to third party publishers that the ILEC obtains through wholesale relationships (such as with Comcast).

49 In addition, Embarq no longer owns its directory publishing unit, which impacts the *1995 Order* in at least three specific ways. First, because R.H. Donnelley is an independent third party, Embarq no longer controls access to the publisher, Comcast can choose to submit listings directly to R.H. Donnelley, and the listings will be included in the Embarq-branded directory. Second, the Commission chose not to require US West to distribute directories to either the CLECs or the CLECs' end users. Embarq has agreed to provide and pay for distribution services, through R.H. Donnelley, to all residences and businesses within the geographic area covered by the directory. Third, the Commission stated that the Qwest profited from yellow pages advertising and, therefore, maintained an incentive to ensure complete listings and

[59] *WUTC v. U S WEST Comms., Inc.*, Docket Nos. UT-941464, *et al.*, Fourth Supp. Order (Oct. 31, 1995).

broad distribution. That is no longer case with Embarq, because Embarq no longer owns or controls the directory. R.H. Donnelley alone profits from the yellow pages advertising, and so Embarq has no such incentive. These facts would lead to a substantially different result compared to the facts in the *1995 Order* and it therefore does not apply in this case.

IV. REQUEST FOR RELIEF

50 For the reasons set forth above, Comcast's positions on the issue as set forth in its Petition should be rejected and the language and relief requested in the Petition should be denied. Embarq requests that the Commission adopt Embarq's terms and conditions for DL, and grant any other relief it deems appropriate.

Respectfully submitted this 17th day of September 2008.

By: _____

William E. Hendricks
WSBA No. 29786
United Telephone Company of the Northwest d/b/a Embarq
902 Wasco Street
Hood River, OR 97031
Phone (541) 387-9439
Fax (541) 387-9753
Tre.Hendricks@Embarq.com

Attorney for United Telephone Company of the Northwest d/b/a Embarq

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Arbitration was served by electronic mail and overnight delivery on the 27th of May 2008.

Gregory J. Kopta
Michael C. Sloan
Davis Wright Tremaine LLP
1201 Third Avenue
Seattle, Washington 98101-3045
P: (206) 757-8079
F: (206) 757-7079
Email: gregkopta@DWT.com
michaelsloan@dwt.com

Andrew Fisher, Esq.
(215) 286-3039
Andrew_Fisher@Comcast.com

Beth Choroser
(215) 286-7893
Beth_Choroser@Comcast.com

Comcast Cable Communications, LLC
One Comcast Center, 50th Floor
Philadelphia, PA 19103
F: (215) 286-5039

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