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

OPENING BRIEF
OF
COMCAST PHONE OF WASHINGTON, LLC

PUBLIC VERSION

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OPENING BRIEF
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Comcast Phone of Washington, LLC ("Comcast"), through undersigned counsel, submits this Main Brief in support of its petition to arbitrate an interconnection agreement with United Telephone Company of the Northwest, Inc. d/b/a Embarq ("Embarq").

INTRODUCTION

This arbitration stems from Embarq's proposal to charge Comcast $0.50 per month for every Comcast customer listing placed into the White Pages directories that R.H. Donnelley publishes on Embarq's behalf. Embarq proposes to impose this directory listing storage and maintenance ("DLSM") charge ***only*** on Comcast and other purely facilities-based providers. Embarq would exempt its own customers, and other competitive local exchange carriers ("CLECs") that purchase unbundled network element ("UNE") loops or that resell Embarq's finished service. Embarq does not offer any cost justification for this disparate treatment. Indeed, Embarq claims that its costs are irrelevant.

Based on these undisputed facts, the proposed DLSM charge plainly violates Embarq's statutory "duty," under Section 251(b)(3) of the Communications Act of 1934, as amended (the "Act"), to provide Comcast with "nondiscriminatory access" to its "directory listing" ("DL") function. So long as Embarq publishes its own directories – which it does through its 50-year term contract with Donnelley – Embarq must include Comcast's listings in those directories on the same non-discriminatory "rates, terms and conditions" that it provides to its own customers and other LECs.[1] Embarq does not impose the DLSM charge on its own customers or other LECs. It may not, therefore, charge Comcast.

The charge is also unjust and unreasonable under both federal and Washington law. Embarq's description of the activities associated with the DLSM charge makes it clear that it recovers its costs from at least two other revenue sources, including (1) the non-recurring DL service order entry charge, which Comcast has agreed to pay, and (2) the FCC-approved per-listing fees that directory assistance providers and directory publishers (collectively, "directory publishers") pay to purchase the subscriber list information from Embarq. Thus, the DLSM charge would represent a ***third*** source of revenue for the very same activities.

The proposed charge is also contrary to Washington policy. The Commission has ruled that a unified white pages directory is "essential" and that a market-based charge for DL service is discriminatory under Section 251(b)(3). For these and the other reasons addressed below, Embarq's proposed DLSM charge should be rejected.

Finally, Comcast brings to the Commission's attention the *Proposal for Award* recently issued by the arbitrators in the Texas version of this case.[2] While the *Proposal for Award* is not

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[1] *See* 47 C.F.R. § 51.217(a)(2)(i).

[2] Proposal for Award, *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*

a final order of the Texas Public Utility Commission, Comcast believes that it is a highly persuasive analysis of the issues in this case. The Texas arbitrators summarized their findings as follows:

> The Arbitrators find that the non-discriminatory access requirement in § 251(b)(3) of the Federal Telecommunications Act of 1996 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.[3]

For the same reasons, this Commission should also reject Embarq's DLSM charge proposal and order the adoption of Comcast's proposed interconnection agreement language.

BACKGROUND

A "directory listing" is an end-user's name, phone number, and address that are published in a directory, such as a telephone book, or included in a directory database, such as that used to retrieve information when a customer dials "411."[4] When a competitive local exchange carrier ("CLEC") like Comcast obtains a new customer, it submits an electronic "Directory Listing Service Request" to Embarq, which includes the relevant customer information – name, address, and telephone number. Embarq uses this information to populate its directory databases, which

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Central Telephone Company of Texas, Inc. d/b/a Embarq Pursuant to Section 252 of the Federal Communications Act of 1934, as amended, and Applicable State Laws, Docket No. 35402 (Public Utility of Commission of Texas Aug. 27, 2008) ("*Texas Arbitrators' Proposal for Award*") (attached).

[3] *Id.* at 2.

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

include both CLEC and Embarq customer listings, which are then sold to directory publishers pursuant to Section 222(e) of the Act.

As part of the Interconnection Agreement that the parties will execute following the conclusion of this proceeding (the "Prospective Agreement"), Comcast has agreed to pay Embarq a $9.41 non-recurring charge ("NRC") for every listing that Comcast submits.[5] The agreement provides that the electronic service order NRC, "appl[ies] when Service Orders containing directory records are entered into Embarq's [Service Order Entry] System initially, and when Service Orders are entered in order to process a requested change to directory records."[6]

Because Embarq's DL databases contain both its own and CLEC customers' listing information, third-party directory publishers, exercising rights under Section 222(e) of the Act, purchase listing information from Embarq to compile their directories. Among these publishers is R.H. Donnelley, which publishes directories on Embarq's behalf. Directory publishers pay the FCC-approved rate of $0.04 per listing (and $0.06 for updated listings) for each listing,

[5] *See* Exhibit ALL-13 (Embarq Response to Comcast Data Request) ("Eq. Resp. DR") 4. *See also* Exhibit TJG-1 (Direct Testimony of Timothy J. Gates) ("Gates Direct") at 3. The $9.41 charge represents a 45 percent increase over the rate Comcast currently pays (up from $6.49, *see* Eq. Resp. DR 3).

[6] Exhibit ALL-9 ("Prospective Agreement") § 71.3.5. The language is identical to that in the parties' current agreement. *See* Exhibit ALL-8 ("Current Agreement") § 70.3.5;

including the listings of Comcast's customers – the same listings which Comcast has already paid to have included in Embarq's databases.[7]

The FCC- set these Section 222(e) per listing rates at a level that enables LECs to recover a variety of costs associated with (1) establishing and maintaining DL databases, and (2) providing that information to directory publishers.[8] While various ILECs argued that the FCC should let market forces set the rates, the FCC rejected that approach because there was, in fact, no functioning market for these activities,[9] which the FCC specifically found was controlled by ILECs like Embarq.[10]

The ILECs' control over the DL "market" has not changed in the intervening years. As Comcast's witness Tim Gates explained, "the standard industry practice is for ILECs to maintain the complete file of DL information for ***all*** telephone numbers in their service territory."[11] Embarq has effectively conceded this to be the case by failing to identify a single instance in which any CLEC anywhere in the United States bypasses the local ILEC to provide listing

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[7] *See* Eq. Resp. DR 19; Tr. at 62:5-15; 122:9-18. The payments that publishers make to purchase subscriber list information are referred to herein as "Section 222(e) payments" or "Section 222(e) rates. While more than 200 providers access these Embarq databases, Embarq has explained that the DLSM charge applies only to listing information sold to R.H. Donnelly. Eq. Resp. DR 13; Exhibit ALL-1 (Direct Testimony of Alan L. Lubeck) ("Lubeck Direct") at 5-6, 22.

[8] *SLI/DA Order* ¶¶ 71-104.

[9] *Id.* ¶ 86 ("reject[ing] the idea that incumbent LECs be allowed to charge either whatever they want or value-based prices for subscriber list information").

[10] *Id.*; *see also Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, First Report and Order, 16 FCC Rcd. 2736, ¶ 3 (2001) (recognizing that ILECs, "continue to maintain a near total control over the vast majority of local directory listings that form a necessary input to the competitive provision of directory assistance").

[11] Gates Direct at 12.

information to publisher directly.[12] And Donnelley has told Comcast that it does not receive any listing information from CLECs directly.[13] As Mr. Lubeck admitted, in a market that has only one provider, that provider is termed a monopolist.[14]

Further evidence of Embarq's market power is its admission that its proposed DLSM rate is unbounded by cost considerations.[15] One of the defining characteristics of a competitive market is that prices trend toward cost (which includes, of course, a reasonable rate of return (also known as profit)). As Mr. Gates has explained, perhaps the best evidence of Embarq's market power and the lack of competitive alternatives to its service is that Embarq would set its DLSM rates without respect to cost considerations, and not be concerned that it would lose market share as a result.[16]

ILECs continue to be the exclusive repository for all providers' directory listing information for a variety of reasons. First, it is economically and operationally efficient because it provides publishers with "one-stop shopping" for the DL information they need to assemble their electronic, paper, and on-line directories. From a market perspective, these efficiencies explain why no CLEC has bypassed the ILEC to work directly with a directory publisher. While it might be the case that CLECs ***could***, as a theoretical matter, transmit their customers' DL information to publishers directly – if there were only one or two third parties to work with – that

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[12] *See* Eq. Resp. DR 16; Tr. at 69:19-70:4; 124:12-17.

[13] Gates Direct at 29; Exhibit TJG-7 (Comcast Response to Embarq Data Request 2) ("Comcast Resp. DR 2"); Tr. at 26:9-27:9.

[14] Tr. at 126:24-125:1.

[15] *See* Lubeck Direct at 20-21; Tr. at 95:7-15. *See also* Exhibit TJG- 4 (Rebuttal Testimony of Timothy J. Gates) ("Gates Rebuttal") at 21-26 (debunking Mr. Lubeck's economic "analysis" and explaining that Mr. Lubeck's testimony described a monopoly pricing situation).

[16] Gates Direct at 31-32.

does not reflect real world conditions.[17] Embarq has admitted that more than 200 different providers purchase its listing information.[18] As Mr. Gates explained, having ILECs provide publishers with all subscriber list information in a given local service area, including that of CLEC customers, "lowers transaction costs for all carriers and the [directory publishers], which leads to lower prices for end users, and improves the accuracy of the DL information available to the public."[19]

Another reason that this arrangement remains in place despite the many changes that have taken place in the local phone market the past 10 years, is the revenues received from the sale of the listing information.[20] The FCC specifically found that the $0.04-per-listing / $0.06-per-update rates were "presumptively reasonable" and would, "enable carriers to recover the incremental costs of providing subscriber list information to directory publishers and provide reasonable contributions to the carriers' common costs and overheads"[21] associated with performing the activities that include, among other things, taking orders for subscriber list information, processing such orders, and the installation, maintenance and programming of computers to store subscriber list information.[22] These are the very functions the costs of which Embarq claims are recovered through the non-recurring service order entry charge and the

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[17] *See* Tr. at 28:11-15 (Mr. Gates testifying that Comcast could, if it devoted sufficient resources to the project, "put a person on the moon," but questioning the wisdom of attempting to do either – i.e., put a person on the moon or develop the capability to provide listing information to publishers directly absent a business reason to do so).

[18] Eq. Resp. DR 13; Lubeck Direct at 5-6, 22.

[19] Gates Direct at 12.

[20] *See id.* at 14. Indeed, the ILECs' DL databases are more valuable because they are complete.

[21] *SLI/DA Order* ¶ 103.

[22] *Id.* ¶¶ 77-78.

disputed DLSM charge at issue in this proceeding.[23]

There is no discernable difference between the Embarq and the CLEC customer listings that Embarq maintains in its DL databases. All listings – its own, Comcast's and other LECs' – are maintained, stored, and sold to directory publishers the same way.[24] Moreover, when directory publishers purchases listings from Embarq, they do not distinguish between Embarq's and other LECs' listings, but display them all in undifferentiated alphabetical order in its directories and pay the same Section 222(e) rates for all listings.[25] Nevertheless, Embarq intends to impose a recurring DLSM charge only on Comcast and other purely facilities-based competitors. Embarq's own retail customers and other CLECs that utilize different business models to provide service will not be charged a comparable fee (or any fee, for that matter) for the maintenance and storage of their listings in Embarq's database, or for publication of their listings in Embarq's directories.

ARGUMENT

I. THE DLSM CHARGE IS DISCRIMINATORY IN VIOLATION OF SECTION 251(b)(3)

Section 251(b)(3) requires all LECs to offer one another, "nondiscriminatory access to ... directory listing[s]."[26] The FCC has interpreted the term "directory listing," as used in Section 251(b)(3), to mean "the act of placing a customer's listing information in a directory assistance

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[23] Eq. Resp. DRs 5, 7; Lubeck Direct at 5-6.

[24] Eq. Resp. DR 8.

[25] According to the Directory Services License Agreement between Donnelley and Embarq, Donnelley agrees to **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** Exhibit ALL-10 ("Directory Services License Agreement") § 3.16 (Proprietary).

[26] 47 U.S.C. § 251(b)(3).

database or in a directory compilation for external use (such as a white pages)."[27] It has also interpreted the "nondiscriminatory access" obligation of Section 251(b)(3) as follows:

> "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.[28]

Thus, under Section 251(b)(3), as long as Embarq publishes directories for its own customers – which it does through Donnelley – Embarq is obliged to include the listings of CLECs that purchase Embarq's DL service in those directories on the same rates, terms and conditions as it provides for its own customers and other LECs.[29] The DLSM charge does not satisfy the "nondiscriminatory access" obligation because, while facilities-based providers, like Comcast, would be subject to the DLSM charge, Embarq's own customers, as well as other CLECs that purchase Embarq's last-mile access facilities (*i.e.*, UNE-L and resale CLECs) will not be charged.[30] This is precisely the discrimination prohibited by Section 251(b)(3). The charge, therefore, discriminates "between and among carriers in the rates, terms and conditions

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[27] *SLI/DA Order* ¶ 160.

[28] 47 C.F.R. § 51.217(a)(2).

[29] *See SLI/DA Order* ¶ 130 (explaining that, "Section 251(b)(3)'s 'nondiscriminatory access' requirement mandates a standard that such access be equal to that provided by the LEC to itself").

[30] *See* Tr. at 83:20-84:15; Lubeck Direct at 3; *see also* Gates Direct at 8-9 (setting forth disputed language).

of the access provided," and is therefore illegally discriminatory under both federal and Washington law.[31]

II. EMBARQ'S DEFENSES TO COMCAST'S SECTION 251(b)(3) DISCRIMINATION CLAIM ARE UNPERSUASIVE

Embarq offers three alternative defenses. First, it claims that Section 251(b)(3) does not apply because it does not "control access" to Donnelley. Second, Embarq claims that Section 251(b)(3) should not be applied in this case because doing so would conflict with Section 222(e). Third, Embarq argues that even if Section 251(b)(3) does apply, it may discriminate against Comcast because Comcast is differently situated from other CLECs. None of these arguments is persuasive, as we explain in turn below.

A. Section 251(b)(3) Applies Even If Embarq Does Not Own Or Control The Directory Publisher

Embarq argues that Section 251(b)(3) does not apply because it has sold off its directory publishing operation and no longer controls Donnelley's publication of the Embarq directories.[32] There is no legal or factual basis for this claim. There is nothing in Section 251(b)(3) or any FCC rule or order that suggests that Section 251(b)(3) applies only when the LEC "controls" the

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[31] 47 C.F.R. § 51.217(a)(2)(i); *see also* RCW 80.36.180 ("No telecommunications company shall, directly or indirectly, ... unduly or unreasonably charge, demand, collect or receive from any person or corporation a greater or less compensation for any [telecommunications] service...than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous [telecommunications] service under the same or substantially the same circumstances and conditions."); RCW 80.36.186 ("[N]o telecommunications company providing noncompetitive services shall...make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage."); RCW 80.36.170; 80.36.140.

[32] Lubeck Direct at 10 ("...Comcast can access R.H. Donnelley directly, meaning that Comcast is no longer required to use Embarq service to be included in Embarq-branded directories."); *see also id.* at 13.

directory publisher.[33] Indeed, this very argument was rejected by state commissions and the courts almost 10 years ago. As neither the law nor the relevant facts have changed, the result should be the same.

The leading case is *MCI Telecomm. Corp. v. Michigan Bell Tel. Co.*[34] *MCI* involved an ILEC that, like Embarq, argued that it, "c[ould] not be required to publish" a CLECs' DL information because it had divested its directory publishing business to a third-party.[35] The court rejected the argument as "specious."[36] First, the court observed that the FCC's regulations define the term, "directory listings ... broadly as any information 'that the telecommunications carrier or an affiliate has published, ***caused to be published***, or accepted for publication in any directory format.'"[37] Thus, the court found that the obligations imposed by Section 251(b)(3), "extend[] to incumbent carriers who have caused their own customers listings to be published ...."[38] Because the ILEC "caused" its listings to be published in the third-party's directory, the court found that the ILEC owed the CLEC "the duty to provide nondiscriminatory access to" the at-issue directories, as required by Section 251(b)(3).[39]

A subsequent case, *US WEST Comm., Inc. v. Hix*,[40] is identical. In *Hix*, the court rejected as "irrelevant" the claim made by the ILEC in that case (US WEST, n/k/a Qwest) that Section

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[33] *See* Tr. at 121:23-122:7.

[34] 79 F. Supp. 2d 768 (E.D. Mich. 1999).

[35] *Id.* at 801.

[36] *Id.*

[37] *Id.* at 802 (quoting 47 C.F.R. § 51.5) (emphasis added).

[38] *Id.*

[39] *Id.*

[40] 93 F. Supp. 2d 1115 (D. Colo. 2000).

251(b)(3) did not apply because it did not "own or control" the directory publisher.[41] Instead, the court found that US WEST was obligated under Section 251(b)(3) to, "actually place a customer's listing information in" the directories it causes to be published, "on terms and conditions that are equal to those provided to [its] own customers."[42]

The reasoning of *MCI* and *Hix* is dispositive of Embarq's claim that its asserted lack of control over Donnelley means that Section 251(b)(3) does not obligate it to provide Comcast's subscriber list information to Donnelley. First, there is no question that Embarq "causes" the publication of these directories. The first recital of the "Subscriber Listings Agreement" between Embarq and Donnelley states that the purpose of the agreement is, "to provide for the continued production, publication and distribution of the Embarq Directories by [Donnelley]."[43] Section 1.1(a) of that agreement states that, **[BEGIN CONFIDENTIAL]**

[44]**[END CONFIDENTIAL].**[45] Moreover, the separate Subscriber Listing Agreement between Embarq and Donnelley calls into question Embarq's

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[41] *Id.* at 1133.

[42] *Id.* at 1132.

[43] Exhibit TJG-5 ("Subscriber Listing Agreement") (Proprietary).

[44] *Id.* § 1.1(a) (emphasis added).

[45] *See* Directory Services License Agreement **[BEGIN CONFIDENTIAL]**
[END CONFIDENTIAL]; *see also id.*
[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL].

claim that it has no control over the publication of the Embarq-branded directories.[46] Finally, both the current and prospective interconnection agreements between Embarq and Comcast clearly provide that Embarq is responsible for "submit[ting] CLEC subscriber information for inclusion in published directories."[47] The *MCI Telecom* court relied upon the very same evidence as support for its finding that the ILEC in that case "caused" the publication of the disputed directory.[48]

Underlying Embarq's position is its claim that Comcast could bypass Embarq and provide DL information to Donnelley directly if it wanted to. It may be true that if Comcast diverted sufficient resources away from its current operations and directed them, instead, to establishing a direct interface with Donnelley, that it could probably do as Embarq suggests. But by enacting Section 251(b)(3), Congress has already made the policy determination that Comcast is not required to undertake such socially wasteful expenditures.[49]

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[46] *See id.* **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

[47] Prospective Agreement § 71.2.1; Current Agreement § 70.2.1.

[48] *See MCI Telecom*, 79 F. Supp. 2d at 802 (construing 47 C.F.R. § 51.217(a)(2)). Construing the same record as in this case, the Texas Arbitrators reached the same conclusion, finding 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." *Texas Arbitrators' Proposal for Award* at 16.

[49] *See Hix*, 93 F. Supp. 2d at 1132-33 (observing that Section 251(b)(3) was enacted expressly to prevent a LEC from charging its competitors higher prices for including their customers' listings in directories); *see also* Tr. at 133:7-134:23 (recognizing that Embarq's DLSM charge would make Comcast's rates less competitive).

Because Congress expressly codified the "nondiscriminatory access to directory listing" obligation into the text of the Act, only the FCC, not this Commission, may "forbear from applying" it.[50] But even if this Commission could forbear from applying Section 251(b)(3) – which, of course, it cannot – there would still be no basis for doing so because there is no evidence of actual, as opposed to potential, competition that would justify forbearance, as several recent FCC forbearance decisions make clear.[51]

Embarq's theory in this case is similar to that which the FCC rejected in the Verizon and Qwest forbearance cases. It is premised on the ***potential*** existence of a competitive alternative for Embarq's directory listing function. But there is no evidence of any actual competition let alone effective competition,[52] and as Mr. Gates has explained, it is unlikely that such a market will develop any time soon.[53] This "market failure" – to use the FCC's words – is precisely why Congress enacted Sections 251(b)(3) and 222(e) in the first place.[54]

Thus, even if it were possible for Comcast to one day provide listing information to publishers directly as Embarq suggests, that would still not satisfy Embarq's burden of proof in ***this*** proceeding. Embarq must support its proposed rates, and its DLSM rate proposal is

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[50] 47 U.S.C. § 160 (the forbearance statute).

[51] *See Verizon 6-Market Forbearance Order,* 22 FCC Rcd. 21293, ¶ 36 (2007) (discounting the significance of Verizon's showing that cable competitors had deployed facilities to 75% of end-user customers in some market territories, and thus ***could*** compete with Verizon for those customers' business, although they had not yet succeeded in winning the business); *see also Qwest 4-Market Forbearance Order,* FCC No. 08-174, ¶ 27 (rel. July 25, 2008) (same).

[52] *See* Eq. Resp. DR 16; Tr. at 69:19-70:4; 124:12-17. As noted, Embarq has not identified a single instance in which a CLEC anywhere in the country, let alone in any of its service territories, provides subscriber list information to Donnelley (or any other publisher) directly. *See also Texas Arbitrators' Proposal for Award*, at 18.

[53] *See* Gates Direct at 28-30, 31-32.

[54] *See SLI/DA Order* ¶ 84.

predicated on the supposed existence of a "market alternative" to its own DLSM function. Absent concrete evidence of such a market, Embarq fails to satisfy its burden of proof.[55]

B. There Is No Conflict Between Section 251(b)(3) And Section 222(e)

Embarq's alternative rationale for disregarding Section 251(b)(3) – that it conflicts with Section 222(e) – is similarly misplaced.[56] There is simply no conflict between Section 251(b)(3) and Section 222(e).[57] Indeed, they complement one another as they address different aspects of the directory listing functionality. Section 222(e) requires all LECs to sell "subscriber list information" to any "request[ing]" directory publisher on "nondiscriminatory and reasonable rates terms and conditions."[58] The FCC has said, however, that this obligation requires only that LECs sell their own customers' information. LECs are not required to serve as "a clearinghouse for providing ... other entities['] ... subscriber list information to directory publishers."[59] Based on this limitation, Embarq argues that any attempt to read Section 251(b)(3) as requiring it provide a DL service to other LECs conflicts with the limited obligation imposed by Section

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[55] *See id.* ¶¶ 132-34, 47 CFR 51.217(e) (providing that in "disputes involving nondiscriminatory access to ... directory listings, a providing LEC shall bear the burden of demonstrating with specificity ... [t] hat it is permitting nondiscriminatory access.

[56] Lubeck Direct at 11-12, 14.

[57] Even if there was a conflict, simply disregarding Section 251(b)(3) in favor of Section 222(e) would be counter to accepted cannons of statutory interpretation, which require that multiple statutory provisions must be read together in order to "fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959). Embarq's approach would also conflict with the "standards for arbitration" established by Section 252(c)(1) of the Act, which requires the Commission to "ensure" that all of the disputed terms of the interconnection agreement are resolved in such a way that they "meet the requirements of Section 251." Section 222 is not expressly mentioned. Thus, to the extent there is a conflict between Section 222(e) and Section 251(b)(3), it is the latter that must prevail, not the former.

[58] 47 U.S.C. § 222(e).

[59] *SLI/DA Order* ¶ 55.

222(e).[60] This "conflict" is what leads Embarq to suggest that the Commission should simply disregard Section 251(b)(3) altogether.

Comcast respectfully disagrees. Section 222(e) applies only to directory publishers' rights. Comcast's request here, in contrast, arises under Section 251(b)(3). Thus, while Section 222(e) may limit ***directory publishers*** rights to demand that a LEC provide it with all listings in its service territory, that limitation does not speak to one LEC's obligation to another under Section 251(b)(3).

The limitation in Section 222(e) also is not relevant here because Embarq has voluntarily agreed to provide that service to CLECs that use Embarq's last-mile access facilities (*i.e.*, UNE-L and resale CLECs) without imposing the DLSM charge.[61] Only purely facilities-based providers, like Comcast, would be subject to the DLSM charge.

This is precisely the discrimination prohibited by Section 251(b)(3). In other words, while Section 222(e) might entitle Embarq to refrain from transmitting other LECs' information to directory publishers, once it ***does*** provide this service to one class of CLECs, Section 251(b)(3) requires that it do the same for all CLECs in a nondiscriminatory manner. Embarq cannot pick and choose who it will serve and, therefore, favor certain competitors over others. An example from another industry is illustrative. Restaurants frequently make their restrooms available to customers only. While such policies are usually permissible, restaurants may not choose to open their restrooms to some but not others on the basis of race, color, religion, age or

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[60] Lubeck Direct at 11-12, 14.

[61] The Texas Arbitrators agreed, finding that because the limitation of Section 222(e) was intended to protect independent third-party publishers from LECs' monopolistic control of subscriber listing information, the "policy-based purpose of [Section] 222(e)...is not applicable here." *Texas Arbitrators' Proposal for Award*, at 17.

national origin. In other words, while providing the public with access is not mandatory, once access is offered to some, it must be made available to all. That is what "nondiscriminatory access" (under any statute) means and it is easily reconciled with lack of a free-standing access obligation in the first place.

Thus, under the facts of this case, Embarq's "clearinghouse" arguments are beside the point. If Embarq offers its directory listing service to one group of CLECs without a monthly recurring DLSM charge, it may not impose a charge on Comcast without violating Section 251(b)(3), a requirement that comports with its supposedly limited obligations under Section 222(e).

Finally, as Judge Torem recognized at the hearing, the FCC has said that Section 222(e) does not prevent State commissions from imposing additional requirements, "[t]o the extent State law permits."[62] As we explain in Section III, below, Washington law does require ILECs to include CLEC listing information in their directories, an obligation that this Commission has not hesitated to enforce in the past.

C. Embarq Has Not Proved That Comcast Is Not "Similarly Situated"

Embarq also argues that even if Section 251(b)(3) ***does*** apply, its discriminatory treatment of Comcast does not violate the law because, it claims, Comcast is not "similarly situated" to those LECs that would be exempt from the DLSM charge.[63]

There are two fundamental problems with Embarq's claim. First, it omits half of the legally required analysis. Section 251(b)(3) requires evaluating not just how Embarq treats other carriers, but also how Embarq treats its own customers. Embarq has admitted that it does not,

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[62] *SLI/DA Order* ¶ 55.

[63] *See* Lubeck Direct at 23.

and will not, impose the DLSM charge on its customers,[64] which is fatal to its attempt to impose the charge on Comcast. Second, Embarq has not proven that Comcast is "differently situated" from those carriers that would be exempt from the DLSM charge. In fact, by admitting that the cost of serving Comcast and other CLECs is the same,[65] Embarq has conceded the point as a legal matter.

As the FCC recognized in its first order implementing the 1996 amendments to the Act, Section 251 imposes numerous separate nondiscrimination prohibitions on LECs generally (Section 251(b)), and ILECs in particular (Section 251(c)). These prohibitions against discriminatory conduct, found throughout Section 251, differ from the prohibition against "***unjust or unreasonable*** discrimination" found in Section 202(a). The FCC concluded that the omission of the "unjust or unreasonable" modifying clause, present in Section 202(a) but absent in Section 251, reflected Congress' intent to impose, "a more stringent standard"[66] in Section 251. "The term 'nondiscriminatory,' ***as used throughout section 251***, applies to the terms and conditions an incumbent LEC imposes on third parties ***as well as on itself***."[67] Simply put,

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[64] *See* Tr. at 83:20-84:15; Lubeck Direct at 3; *see also* Gates Direct at 8-9 (setting forth disputed language).

[65] Eq. Resp. DR 8.

[66] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 217 (1996) ("*First Local Competition Order*"); *see also SLI/DA Order* ¶ 129 (1999) (specifically construing Section 251(b)).

[67] *First Local Competition Order* ¶ 218 (emphasis added). *See also Texas Arbitrators' Proposal for Award*, at 19 (noting that "similarly situated" does not appear in the Act or the FCC's rules, and no distinction is drawn between different types of competing providers in 47 CFR § 51.217).

because Embarq does not impose the charge on itself (*i.e.*, on its own customers), it may not impose it on Comcast.[68]

But the charge is illegally discriminatory even under Embarq's mistaken discrimination standard – *i.e.*, considering only its claim that Comcast is not "similarly situated" to those UNE-L and resale CLECs that Embarq proposes to exempt from the DLSM charge.[69] The FCC has explained that, "***price difference based not on cost differences***, but on such considerations as competitive relationships, the technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other factors not reflecting costs, the requirements of the Act, or applicable rules, ***would be discriminatory and not permissible*** ...."[70] Examples of impermissible discrimination, the FCC found, would "include the imposition of different rates, terms and conditions based on the fact that the competing provider does or does not compete with the incumbent LEC, or offers service via wireless rather than wireline facilities."[71] To summarize, the FCC has explained the discrimination standard established by Section 251 as follows:

> We find that it would be unlawfully discriminatory, in violation of sections 251 and 252, if an incumbent LEC were to charge one class of interconnecting carriers ... higher rates for interconnection than it charges other carriers, unless the different rates could be ***justified by differences in the costs*** incurred by the incumbent LEC.[72]

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

[69] *See* Lubeck Direct at 23.

[70] *First Local Competition Order* ¶ 861 (emphasis added).

[71] *Id.*

[72] *Id.* (emphasis added).

Thus, Embarq may not treat facilities-based providers like Comcast differently from CLECs utilizing UNE-L or resale-based business models absent a showing that the ***cost*** of serving Comcast differs. The burden is on Embarq to prove that there is a cost difference that justifies the discriminatory pricing.[73] Embarq has not even attempted to make this showing, instead claiming – obviously erroneously – that costs do not matter. Because it has failed to justify the "discriminatory access" it is offering Comcast, Embarq's DLSM rate proposal must be rejected.[74]

[73] *See SLI/DA Order* ¶¶ 132-34; 47 CFR § 217(e)(1). Not only has Embarq failed to produce the evidence required to overcome Comcast's discrimination claim, Embarq has admitted that there is no cost difference in serving Comcast as opposed to CLECs utilizing other business models. *See, e.g.*, Gates Direct at 15 n.24; Eq. Resp. DR 8.

[74] While Embarq has argued that the DLSM cost is embedded in the rates charged to retail end-users or UNE-L or resale CLECs, the claim is irrelevant given that the amount of the charge is unspecified. Tr. at 88:4-89:1. Thus, Embarq has not successfully rebutted the presumption of impermissible discrimination. *See* 47 CFR § 51.217(e) (explaining that the burden of production and persuasion in Section 251(b)(3) discriminatory access claims falls on the "providing LEC" – which in this case is Embarq); *see also PanAmSat Corp. v. Comsat Corp.*, 12 FCC Rcd 6952, ¶ 34 (1997) (explaining burden of production and persuasion in Section 202 discrimination claims).

III. THE PROPOSED DLSM CHARGE IS UNJUST AND UNREASONABLE

Embarq's proposed DLSM charge is not only discriminatory, it is unjust and unreasonable under both federal,[75] and Washington law,[76] because it would permit Embarq to recover its costs many times over.[77] While Embarq has refused to produce cost information,[78] the absence of that evidence means only that the ***extent*** of the windfall is uncertain; that imposition of Embarq's proposed DLSM charge would result in recovery in excess of Embarq's costs is beyond doubt. Consider, for example, Embarq's admission that it receives more than **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** per year from DP/DA providers from the ***nationwide*** sale of its listings.[79]

The prohibition against excess recovery derives from the long-standing imperative that just and reasonable rates must be based on a carrier's costs.[80] The rationale for cost-based rate-

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[75] 47 USC § 201(b) (requiring that "[a]ll charges, practices, classifications ... be just and reasonable"). The FCC has recognized the applicability of this standard to "local" services provided under Section 251. *See, e.g., SLI/DA Order* ¶ 189; *Provision of Directory Listing Information under the Telecommunications Act of 1934 [sic], As Amended*, First Report and Order, 16 FCC Rcd. 2736, ¶ 37 ("[F]ailure to provide directory assistance at nondiscriminatory and reasonable rates to DA providers within the protection of section 251(b)(3) may also constitute an unjust charge under section 201(b)").

[76] *See* RCW 80.36.080 (requiring all rates to be "fair, just, reasonable and sufficient"); RCW 80.36.140 (authorizing Commission to fix any "rate, charge, toll or rental demanded, exacted, charged or collected by any telecommunications company, as well as company rules, regulations or practices," that are "unjust, unreasonable, unjustly discriminatory or unduly preferential").

[77] *See, e.g., Local Exchange Carrier's Rates, Terms, and Conditions for Expanded Interconnection*, Second Report and Order, 12 FCC Rcd. 18730, ¶ 89 (1997) (disallowing proposed rate element as "unjust and unreasonable" because it would permit the carrier to "recover its investment twice"); *2004 Access Charge Tariff Filings*, Order Designating Issues for Investigation, 19 FCC Rcd. 18593, ¶ 29 (2004) (requiring NECA to explain why proposed rate, "is lawful and does not over-recover costs for these assets or activities").

[78] *See, e.g.*, Eq. Resp. DRs 6-10 (refusing to provide cost support information).

[79] *See* Eq. Resp. DR 14 (Proprietary).

[80] *See, e.g., In the matter of Access Charge Reform*, Second Order on Reconsideration and

making is that it serves as a proxy for the efficiency-enhancing effect of competition.[81] Regulators attempt to set rates based on some measure of cost because that is where prices trend to in a competitive market. In a regulated market, cost-based pricing prevents providers from extracting monopoly rents from customers and ultimately end-user consumers.[82]

Embarq's attempt to escape this cost constraint is based primarily on its mis-reading of the (limited) significance of the ***absence*** of the "directory listing" function from the list of UNEs

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

[81] *See* Gates Rebuttal at 23-25.

[82] *See First Local Competition Order*, 11 FCC Rcd 15499, ¶ 8 (1996) ("It is widely recognized that, ***because a competitive market drives prices to cost,*** a system of charges which includes non-cost based components is inherently unstable and unsustainable") (emphasis added); *see also INFONXX, Inc. v. New York Telephone Co.*, Memorandum Opinion and Order, File No. E-96-26 (released October 10, 1997) at ¶ 15 ("[C]osts are traditionally and naturally a benchmark for evaluating the reasonableness of rates under Section 201(b) of the Act"); *In the Matter of International Settlements, Policy Reform International Settlement Rates*, IB Docket Nos. 02-324 and 96-261, First Report and Order (released March 30, 2004) at ¶ 74 ("The Commission determined that above-cost settlement rates paid by U.S. carriers to terminate international traffic are neither just nor reasonable, and it acted pursuant to its statutory authority in Section 201(b) of the Communications Act to prohibit U.S. carriers from continuing to pay such charges"); *In the Matter of Access Charge Reform, Price Cap Performance Review of Local Exchange Carriers, Transport Rate Structure*, CC Docket Nos. 96-262, 94-1 and 91-213, Second Order on Reconsideration and Memorandum Opinion and Order (released October 9, 1997) at ¶ 44 ("In reviewing the Commission's interim transport rate structure, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that the just and reasonable rates required by Sections 201 and 202 of the Communications Act must ordinarily be cost-based, absent a clear explanation of the Commission's reasons for a departure from cost based ratemaking").

that ILECs must "unbundle" and make available to CLECs at cost-based rates.[83] TELRIC is the unique cost methodology the FCC established to implement the UNE pricing standard of Section 252(d)(1) of the Act.[84] A rate can be cost-based without being TELRIC-based.[85] To cite an example close to home, the FCC established the Section 222(e) payments that Embarq receives should be more than sufficient to cover Embarq's directory publication-related costs, and those rates were not set based on forward looking cost principles.[86]

Embarq's selection of the "foreign listing charge" as the basis for the amount of the DLSM charge is also indicative of the unreasonableness of the DLSM charge. This foreign listing charge varies from $0.50 to $3.00 per month depending on the part of the country (for example, $0.50 in Washington and New Jersey, $2.50 in Indiana; and $3.00 in Texas), and thus illustrates the extent to which the DLSM rate proposal is ***not*** based on any cost considerations. But even if the amount of the charge was uniform throughout the country, there is simply no analogy between (1) a CLEC's expectation that its customers listings will appear in the same directory as the ILEC's customers and (2) the "value" – *i.e.,* willingness to pay – that an out-of-

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[83] This Commission, of course, has ample experience with the UNE unbundling obligations created by the Act and the total element long-run incremental cost ("TELRIC") standard established by the FCC. *See, e.g., In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State*, Order 06, Docket UT-053025, 2006 WL 3792690 (WUTC Dec. 15, 2006); *In re Unbundled Loops and Switching Rates*, 27th Suppl. Order, Docket UT-023003, 2005 WL 1657104 (WUTC June 10, 2005).

[84] 47 U.S.C. § 251(d)(1)(A)(i) (requiring that the setting of "just and reasonable rates" for network elements, "be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element ...").

[85] *See, e.g., Verizon Communications Inc. v.* FCC, 535 U.S. 467, 500-01 (2002) (observing that, "words like 'cost' give rate setting commissions broad methodological leeway; they say little about the 'method employed' to determine a particular rate" (internal quotations omitted)).

[86] *SLI/DA Order* ¶¶ 93-104.

region retail customer might place in having his or her listing information included in the local directory. The Illinois Commerce Commission ("ICC") agrees. In an arbitration between the Sprint CLEC and several rural ILECs in Illinois, the ICC rejected the ILECs' attempt, "to charge Sprint the tariff rate for foreign listings in connection with" maintaining and publishing Sprint's DLs.[87]

But perhaps the best proof that the proposed DLSM charge is unjust and unreasonable is the uncontroverted showing Comcast has made that the charge would permit Embarq to recover its costs many times over. At pages 5-6 of his direct testimony, Mr. Lubeck identifies six separate activities that he claims are associated with the proposed DLSM charge. The following analysis demonstrates: (1) that Embarq is already compensated for these activities through either the NRC that Comcast has agreed or the Section 222(e) payments that providers make to purchase subscriber list information from Embarq, or (2) that the identified activity is not appropriately born by Comcast.

A. Database Maintenance Costs Are Already Recovered

According to the first and second activities identified by Mr. Lubeck, the proposed DLSM charge would permit Embarq to recover costs associated with, "stor[ing] all ILEC and CLEC listings in a Directory Listing database and maintain[ing] the operability of the database," including the so-called, "Subscriber Universal Directory System (SUDS), which serves as Embarq's interactive DL database."[88] There is, however, no justification for Embarq's attempt

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[87] Arbitration Decision, *Sprint Communications L.P. d/b/a Sprint Communications Co. L.P.* Dkt. No. 05-0402, 2005 WL 3710228 (Ill. Commerce Comm'n., Nov. 8, 2005). *See also Texas Arbitrators' Proposal for Award* at 29 ("[T]he 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.").

[88] Lubeck Direct at 5.

to recover these costs through the $.50 per month per subscriber DLSM charge. As Mr. Gates has demonstrated, the cost of storing an individual listing in a computerized database is less than 1/100,000 of a penny,[89] and Embarq has not offered any rebuttal of this testimony.

As for the purported database maintenance activities, those costs are clearly covered by the NRC that Comcast has agreed to pay, as Section 71.3.5 of the Prospective Agreement makes clear. Section 71.3.5 provides as follows:

> Embarq agrees to provide White Pages database maintenance services to CLEC. CLEC will be charged a Service Order entry fee upon submission of Service Orders into Embarq's Service Order Entry (SOE) System, ***which will include compensation for such database maintenance services***. Service Order entry fees apply when Service Orders containing directory records are entered into Embarq's SOE System initially, and when Service Orders are entered in order to process a requested change to directory records.[90]

Moreover, the Section 222(e) payments that Embarq receives from directory publishers provides yet another source of revenue for these very same activities. As the FCC explained when it promulgated the $0.04 per listing / $0.06 per update rates, they were set specifically to permit LECs to recover a fair "allocation[] of common costs and overheads" associated with 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."[91] Likewise, Section 222(e) rates were set to allow an ILEC to recover the "computer

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[89] Gates Direct at 15 n.24.

[90] Prospective Agreement § 71.3.5 (emphasis added); *see also* Tr. at 97:2-10. Embarq's assertion that the "database maintenance services" identified in Section 71.3.5 – the costs of which are recovered via the non-recurring charge – are different from the databases for which Embarq seeks to impose the DLSM charge is unsupported by any record evidence except Mr. Lubeck's testimony. Absent corroborating proof, Mr. Lubeck's assertions cannot satisfy Embarq's burden of proof in this proceeding.

[91] *SLI/DA Order* ¶ 78.

operator time, processing time, and programming time" associated with responding to requests for subscriber list information from directory publishers.[92]

There is no record evidence, or any other reason to believe, that the databases referred to in paragraphs 77 and 78 of the *SLI/DA Order* are somehow different from the DL databases described in the parties' agreement. Thus, the proposed DLSM charge presumptively involves activities the cost of which Embarq is already recovering from Section 222(e) payments ***and*** from the NRC.

B. It Would Not Be Just Or Reasonable To Permit Embarq To Recover The Costs Of Special Directory Distribution Requests Through A Recurring Charge Imposed On Facilities-Based Providers Such As Comcast

Mr. Lubeck also attempts to justify the proposed DLSM charge on the ground that it would permit Embarq to recover the cost associated with fulfilling end-user requests for out-of-service territory directories, including, "invoice[ing] for the purchase of such out-of-area directories and remit[ing] payment to R.H. Donnelley for such directories," as well as the costs associated with "forward[ing] to the publisher any special distribution requests received from the CLEC (such as number of books for delivery, alternate delivery address, etc)."[93]

Comcast objects to shifting these costs to Comcast on several different grounds. First, of course, Embarq has provided no justification for the proposed charge, such as evidence demonstrating how often such activities occur or the magnitude of the costs involved.[94] But it is equally true, as Mr. Gates has explained, that "it is plainly inappropriate to shift the cost of performing several of the above-identified functions to Comcast (or any CLEC) under any

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[92] *Id.* ¶ 77.

[93] Lubeck Direct at 5.

[94] Tr. at 86:7-25; 113:11-15; 115:11-21.

circumstances."[95] For example, "forward[ing] special directory distribution instructions to the publisher" is, as its name implies, a "special" activity, the cost of which, if any, should be allocated to the end-user that creates the "special" need. The same is true of the "out-of-directory" service. There is no conceivable reason why the cost of "process[ing] invoices and pay[ing] R.H. Donnelley for the purchase of out-of-area directories that are requested by ILEC and CLEC end users,"[96] should be born by each of Comcast's in-region customers through a wholesale charge, especially when Embarq has failed to present any evidence documenting the magnitude of those costs.[97]

Moreover, these directory distribution activities are already covered by the parties' interconnection agreement. The agreement explains that the, "Directory Listings Service Request" process includes enabling the CLEC to "provide CLEC subscriber delivery address information to enable Embarq to fulfill directory distribution obligations."[98] More specifically, the agreement provides that Embarq (or Donnelley) "agrees to provide White Pages distribution services to CLEC customers within Embarq's service territory ***at no additional charge to CLEC.***"[99] Thus, not only are "White Pages distribution services" already included in Embarq's overall DL service, such activities are part of the service that Comcast has agreed to pay for.

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[95] Gates Direct at 19. The Texas Arbitrators, likewise, noted that Embarq had failed to present evidence supporting these claims. *Texas Arbitrators' Proposal for Award* at 26.

[96] Gates Direct at 18; Eq. Resp. DR 7.

[97] As Judge Torem noted at the hearing, the charge would either have to be passed onto Comcast's customers, thus making Comcast's offerings less competitively attractive, or absorbed, thus raising Comcast's costs. *See* Tr. at 133-34.

[98] Prospective Agreement § 71.2.1(c).

[99] *Id.* § 71.3.8 (emphasis added); *see also* Tr. at 114:1-115:2.

C. It Would Not Be Just Or Reasonable To Shift The Cost Of Directory Proof Reading Activities To Comcast Via The Proposed DLSM Charge

The last set of activities that Mr. Lubeck claims justifies the proposed DLSM charge – reviewing new or changed listings and proofreading the Donnelley directories for accuracy[100] – would unfairly shift costs to Comcast for services that it never requested and that Embarq is not even supposed to perform. Comcast never instructed Embarq to review Comcast's submissions for "questionable listings." It is, therefore, unjust and unreasonable to charge Comcast for a service that it has not requested.

In any event, the parties already agreed that "directory proofing" is not to be performed by Embarq, "but rather [is] performed by and [is] under the control of the directory publisher."[101] Embarq attempts to distance itself from this clear contractual provision by explaining that "directory proofing" was intended to mean proofing of yellow page classified listings only,[102] but the parties' agreement flatly refutes this "explanation." The Prospective Agreement confirms that "directory proofing" "pertains to listings requirements published in the traditional white pages."[103] In addition, Embarq's own standard licensing agreements with directory publishers

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[100] Lubeck Direct at 5-6.

[101] Prospective Agreement § 71.3; *see also* Tr. at 110:12-22.

[102] *See* Tr. at 111:22-112:21; Exhibit ALL-6 (Reply Testimony of Alan L. Lubeck) ("Lubeck Reply") at 14.

[103] Prospective Agreement § 71.3.1.

and directory assistance providers expressly disclaims Embarq's responsibility for ensuring the accuracy of subscriber listings in its own directory databases.[104]

Moreover, there is simply no reason to believe that Embarq would actually incur monthly recurring costs for these proofing activities. Presumably, once Embarq confirms that a new or changed Comcast listing is accurate, there is no reason to review that listing again, much less every month.[105]

IV. THE PROPOSED DLSM CHARGE CONTRAVENES THE COMMISSION'S LONG-STANDING POLICY ON REQUIRING A UNIFIED WHITE PAGES DIRECTORY LISTING ON NON-DISCRIMINATORY RATES

The FCC has recognized that Section 222(e) does not prevent State commissions from, "requir[ing] incumbent LECs to provide competitive LECs' subscriber list information to directory publishers."[106] This Commission has already done that, and more. Indeed, the Commission has a long-standing policy of requiring ILECs to coordinate with other LECs for the provision of a uniform white pages directory. Embarq's DLSM charge proposal not only contravenes this policy, the Commission rejected a similar charge as discriminatory under Section 251(b)(3) as recently as 2002.

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[104] *See* Exhibit ALL-11("Directory Listing License Agreement"), at 1 (requiring publisher to acknowledge that DL information taken from Embarq's database "may contain errors, omissions and/or inaccuracies which have not yet been identified and/or corrected"); *see also* Exhibit ALL-12 ("Directory Assistance Listings Agreement"), § 2.3 (indicating that Embarq "shall not have any duty to contact subscribers or take any action beyond a review of [Embarq's] existing records *in connection with a notification received* from [the publisher]..." (emphasis added)).

[105] According to Embarq, after a new listing is processed (*i.e.*, reviewed for accuracy), a confirmation is sent to Comcast and the listing is "passed on to Embarq's directory listing database." Eq. Resp. DR 5. There is no rational reason why, then, a "confirmed" and otherwise accurate listing would need to be "processed" again.

[106] *SLI/DA Order* ¶ 55.

The Commission's directory listing policy dates back to a comprehensive 1995 proceeding.[107] Like Embarq here, US West (now Qwest) argued that it was not required to publish CLEC listings in its directories because CLECs had "several options for listing their customers' information in the US West Direct directory, including negotiating with US West Direct and purchasing USWC's listing services."[108] US West, therefore, argued that it should be permitted to charge CLECs a "$0.60/month per residential listing, plus a $5.00 non-recurring charge for each listing added or changed."[109] The Commission ruled otherwise:

> [T]here is a strong public and consumer interest in having a complete listing of subscribers for each local calling area available to subscribers. Commission rules enforce this interest by requiring that subscribers be provided the directories necessary to access all numbers within a local calling area. In the absence of a complete, unified listing, the incumbent LECs would have to acquire directories from every other telephone company providing service in that calling area and provide each subscriber with a set of such directories.... We do not believe that a situation where multiple companies distribute different kinds of directories to all telephone customers in a calling area is practical, economically feasible, or desirable. Thus, while USWC may argue somewhat persuasively that directories and directory assistance are not essential, ***we do believe a unified directory database is essential.***[110]

To implement its policy, the Commission ordered ILECs to include CLEC listings in their directories, "without additional charge." As the Commission explained,

> [t]o ensure that USWC, GTE, and all other LECs can continue to be in compliance with WAC 480-120-042, USWC and GTE must include all listings of telephone subscribers submitted to them by companies serving the same area served by the directory or database. This database of directory listings shall be the same that is provided to the company's directory publishing subsidiaries and other

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[107] *WUTC v. US West Comm., Inc.*, 4th Suppl. Order, Docket Nos. UT-941464, UT-941465, UT-950146, 1995 WL 735315 at 4 (WUTC Oct. 31, 1995) ("*US West*) ("This proceeding involves several complex issues, including...unified white pages directory listings....").

[108] *US West*, at 44.

[109] *Id.*

[110] *Id.* at 45 (emphasis added).

> directory publishers.... [G]iven that there is value associated with a complete listing and that USWC and GTE are required to provide complete listings to its subscribers, the Commission believes that simple listings in the published directories should be provided, without additional charge, as 'in kind' compensation to the company providing the subscriber information.[111]

The Commission's analysis of LECs' directory listing obligations in *US West* is still applicable today. The Commission appears to agree, having rejected in 2002 Qwest's proposal to charge a so-called, "market-based rate" for directory assistance and directory listings.[112] The Commission unequivocally held that "Qwest's proposal to charge a market-based rate is discriminatory under Section 251(b)(3)."[113]

Moreover, when the Commission promulgated its revised telecommunications rules in 2003, it did not substantially alter the directory listing obligations of LECs in Washington.[114] In fact, in explaining the revised rule, the Commission reiterated the important policy of maintaining a unified white pages directory when it clarified that the revised rule requires

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[111] *Id.*

[112] *In re Unbundled Network Elements, Transport, and Termination*, 44th Suppl. Order, Docket No. UT-003013, 2002 WL 32128606, ¶¶ 122, 212 (WUTC Dec. 20, 2002) ("*2002 UNE Order*").

[113] *Id.* at 40, ¶ 132.

[114] *Compare* WAC 480-120-042 (2003) ("(1) A telephone directory shall be regularly published for each exchange, listing the name, address (unless omission is requested), and telephone number of the subscribers who can be called in that exchange, except those subscribers who have a nonlisted or nonpublished telephone number."), *with* WAC 480-120-251(1) (2008) ("A local exchange company (LEC) must ensure that a telephone directory is regularly published for each local exchange it serves, listing the name, address (unless omission is requested), and primary telephone number for each customer who can be called in that local exchange and for whom subscriber list information has been provided.").

companies to "publish all subscriber list information provided to them by any type of service provider."[115]

Finally, the Commission has approved numerous interconnection agreements in which ILECs have agreed to publish CLEC customers listings in directories "without additional charge."[116] These Commission-sanctioned interconnection agreements often contain express provisions acknowledging the ILEC's obligation to offer its DL service on a non-discriminatory basis pursuant to Section 251(b)(3) of the Act.[117] The fact that other ILECs in Washington (who, like Embarq, do not publish directories themselves or through an affiliate) recognize their obligation to comply with Section 251(b)(3) exposes the deficiencies in Embarq's position. The

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[115] *In re Amending, Adopting and Repealing Chapter 480-120 WAC Relating to Telephone Companies*, Order Amending, Adopting and Repealing Rules Permanently, Docket No. UT-990146, Gen. Order No. R-507, ¶ 114 (WUTC Dec. 16, 2002).

[116] *Interconnection Agreement between Qwest Corp. and Bandwidth.com CLEC, LLC*, Agreement No. CDS-080225-0013 ("*Qwest-Bandwidth ICA*") § 10.4.2.1.1 ("Qwest will accept one (1) primary Listing for each main telephone number belonging to CLEC's resale and facilities-based End User Customers at no monthly recurring charge."); *see also Agreement by and between Ymax Comm. Corp. and Verizon Northwest Inc.* ("*Verizon-Ymax ICA*"), §§ 4.2, 4.3 ("Ymax shall provide to Verizon on a regularly scheduled basis, at no charge...all Listing Information and the service address for each Ymax Customer," and "Verizon shall include each Ymax Customer's primary listing in the appropriate alphabetical directory...."); *Agreement by and between Trans Nat'l Comm. Int'l, Inc.. and Verizon Northwest Inc.* ("*Verizon-TNCI ICA*"), §§ 4.2, 4.3 ("TNCI shall provide to Verizon on a regularly scheduled basis, at no charge...all Listing Information and the service address for each TNCI Customer," and "Verizon shall include each TNCI Customer's primary listing in the appropriate alphabetical directory....").

[117] *See, e.g.*, *Qwest-Bandwidth ICA*, § 14.0 ("The Parties shall provide local Dialing Parity to each other as required under Section 251(b)(3) of the Act. Qwest will provide local Dialing Parity to competing providers of Telephone Exchange Service...and will permit all such providers to have non-discriminatory access to...Directory Listings...."); *Verizon-Ymax ICA*, § 2; *Verizon-TNCI ICA*, § 2. *See also Qwest-Bandwidth ICA*, § 10.4.2.5 ("CLEC End User Customer Listings will be treated the same as Qwest's End User Customer Listings"); *id.* § 10.4.2.8 (providing for "non-discriminatory appearance and integration of white pages directory Listings for all CLEC's and Qwest's End User Customers"); *id.* § 10.4.2.11 (ensuring that "CLEC's Listings provided to Qwest are included in the white pages directory published on Qwest's behalf using the same methods and procedures, and under the same terms and conditions, as Qwest uses for its own End User Customer Listings").

proposed DLSM charge is not a "cutting edge" approach to directory listings service[118] – it is an attempt to suppress real, facilities-based competition by extracting a monopolistic rate from Comcast.[119]

In sum, the Commission recognized nearly two decades ago the fundamental need to have a unified white pages directory. Congress ***subsequently*** enacted Section 251(b)(3), which imposes substantively identical obligations. The Commission has reaffirmed the obligations imposed by both Washington and federal law several times since. Embarq's justification of its proposed DLSM charge is at odds with both policies and simply rehashes arguments that have already been rejected before. Nothing it has presented would justify departing from the Commission's long-standing policy of requiring a comprehensive, nondiscriminatory directory in this State.

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[118] Tr. at 92:15-16.

[119] Embarq is, of course, free to adjust its "practice, procedure, or position going forward" in the face of competitive entry in its market. *Cf.* Lubeck Reply at 8. It may not, however, do so in contravention of federal or state law.

CONCLUSION

For the foregoing reasons, the Commission should reject Embarq's proposed DLSM charge and adopt the interconnection agreement that Comcast has recommended.

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