COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

ISSUED: September 17, 2008

IN REPLY PLEASE
REFER TO OUR FILE

A-310190

MICHAEL SLOAN ESQUIRE
DAVIS WRIGHT TREMAINE LLP
1919 PENNSYLVANIA AVE NW
SUITE 200
WASHINGTON DC 20006

Petition of Comcast Business Communications, LLC
d/b/a Comcast Long Distance

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Recommended Decision of Administrative Law Judge David A. Salapa (acting as an arbitrator).

An original and nine (9) copies of signed exceptions to the decision, if any, MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265; a copy in the hands of the Office of Special Assistants, Third Floor; and a copy in the hands of each party of record no later than **October 2, 2008** by 4:30 P.M. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions or reply exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, no later than **October 13, 2008** by 4:30 P.M. as well as served upon the parties. A certificate of service shall be attached to the filed exceptions.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535, particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should be clearly labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

Any reference to specific sections of the Administrative Law Judge's Recommended Decision shall include the page number(s) of the cited section of the decision.

Parties are also requested to provide the Commission's Office of Special Assistants with a copy of exceptions/reply exceptions on a computer disk, 3 1/2" in size, in Microsoft Word 6.0 format. If Word 6.0 is not available, either Wordperfect 5.1 or ASCII format is acceptable.

Very truly yours,

James J. McNulty
Secretary

MH
Encls.
Certified Mail
Receipt Requested

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Comcast Business Communications, LLC d/b/a Comcast Long Distance for Arbitration of an Interconnection Agreement with United Telephone Company of Pennsylvania, Inc. d/b/a Embarq, pursuant to 47 U.S.C. §252(b)	:	A-310190

RECOMMENDED DECISION

Before
David A. Salapa
Administrative Law Judge
(Acting as an Arbitrator)

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HISTORY OF THE PROCEEDING

On April 4, 2008, Comcast Business Communications, LLC d/b/a Comcast Long Distance (Comcast) filed a petition for arbitration, pursuant to 47 U.S.C. §252(b), requesting that the Commission arbitrate the terms and conditions for interconnection with United Telephone Company of Pennsylvania, Inc., d/b/a Embarq (Embarq). The petition alleges that, pursuant to 47 U.S.C. §252(b), Comcast made a request for negotiations that Embarq received on November 1, 2007. According to the petition, the arbitration has to be concluded on or before August 1, 2008.

The petition asserts that Comcast and Embarq have resolved all issues except for one. The sole disputed issue is whether Embarq should collect a proposed $2.00 monthly charge for maintaining and storing Comcast's directory listings in Embarq's databases. According to Comcast's petition, the $2.00 monthly charge is discriminatory since Embarq does not charge its own customers a separate charge to maintain and store their listings. The petition also alleges that Embarq has failed to provide any cost justification for the monthly charge. The petition concludes that the Commission should reject the proposed monthly charge because it is discriminatory and not cost justified. The petition requests that the Commission adopt Comcast's position that it should not be obligated to pay the proposed $2.00 monthly charge.

By notice dated April 22, 2008, the Commission scheduled a pre-arbitration conference in this case for May 1, 2008 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg and assigned me to preside. I issued a pre-arbitration conference order on April 22, 2006 setting forth the procedural matters to be addressed at the pre-arbitration conference.

On April 29, 2008, Embarq filed a response to Comcast's petition for arbitration. The response agrees with Comcast's petition that the sole disputed issue between Comcast and Embarq is Embarq's proposed $2.00 monthly charge for maintaining and storing Comcast's directory listings in Embarq's databases. According to the response, Embarq is entitled to charge Comcast to maintain and store Comcast's directory listings as well as transmit

Comcast's directory listings to a directory publisher. According to Embarq's response, the proposed monthly charge is not discriminatory. Embarq states that Comcast is not similarly situated to other carriers. Embarq argues that because Comcast is not similarly situated to other carriers, it may impose a monthly charge on Comcast even though it does not impose a monthly charge on other carriers.

Embarq's response also asserts that the proposed monthly charge need not be cost-based. Embarq's response states that since the parties are litigating the same issue in several states, it may be necessary to extend the nine month deadline established by 47 U.S.C. §252(b). The response requests that the Commission adopt Embarq's position that it may charge Comcast the proposed $2.00 charge.

On April 30, 2008, Deanne M. O'Dell, Esquire, on behalf of Comcast, filed a motion for admission *pro hac vice* on behalf of Michael Sloan, Esquire requesting that he be admitted for the purpose of representing Comcast in this proceeding. No answers opposing the motion were filed.

I conducted a pre-arbitration conference in this case as scheduled on May 1, 2008 at 10:00 a.m. in Harrisburg. Present were counsel for Comcast and Embarq. As a result of the pre-arbitration conference, I issued Pre-Arbitration Conference Order #2 on May 2, 2008. Pre-Arbitration Conference Order #2, granted Comcast's motion for admission *pro hac vice,* of Michael Sloan, Esquire, established a litigation schedule as agreed to by the parties (N.T. 8-9), and modified the Commission's normal discovery timelines as agreed to by the parties. (N.T. 9-10) The parties agreed to extend the nine-month deadline established by 47 U.S.C. §252(b) so that the arbitration would conclude by November 13, 2008 with a Commission decision. By notice dated May 1, 2008, the Commission scheduled this matter for hearing on July 22, 2008 at 10:00 a.m. in Hearing Room 3, Commonwealth Keystone Building in Harrisburg.

On May 23, 2008, Comcast filed a petition requesting that I issue a protective order in this proceeding and enclosed a proposed agreed-upon order with its petition. Comcast

alleged in its petition that the proposed order had been negotiated between Comcast and Embarq in order to permit the exchange of confidential information between Comcast and Embarq. Comcast asserted that the parties had begun to conduct discovery and identified confidential information that they wished to safeguard through a protective order. According to the petition, the parties had negotiated the terms of the attached proposed protective order and requested that the Commission adopt the proposed protective order. On May 28, 2008, I issued an order granting the petition for a protective order and incorporating the proposed agreed-upon order attached to the petition.

On July 8, 2008, Zsuzsanna E. Benedek, Esquire, on behalf of Embarq, filed motions for admission *pro hac vice* on behalf of Jeanne W. Stockman, Esquire and Joseph R. Stewart, Esquire requesting that they be admitted for the purpose of representing Embarq in this proceeding. No answers opposing the motions were filed. On July 15, 2008, I issued an order granting the motions for admission *pro hac vice.*

I conducted the hearing on this case as scheduled on July 22, 2008. Michael C. Sloan, Esquire and Deanne M. O'Dell, Esquire represented Comcast. Jeanne Stockman, Esquire and Joseph R. Stewart, Esquire represented Embarq. The hearing resulted in a transcript of 124 pages.

On August 15, 2008, Comcast filed a petition to reopen the record in this proceeding for the purposes of admitting as a late-filed exhibit a copy of the directory services license agreement between Embarq and R.H. Donnelley, a directory publisher. Attached to the motion is a copy of the agreement. According to the petition, Embarq produced the agreement on August 5, 2008 in response to an ongoing discovery request. Since Embarq did not produce the agreement until after the July 22, 2008 hearing, Comcast argued that it was not able to produce it as an exhibit earlier. Comcast also argued that Embarq was not prejudiced by the late submission of the document since it was an Embarq document and was only produced ten days before main briefs were due. Also on August 15, 2008, the parties filed their main briefs.

On August 22, 2008 Embarq filed a letter with the Commission stating that it did not oppose Comcast's petition to reopen. On August 25, 2008, I issued an order granting Comcast's petition to reopen the record.

Also on August 25, 2008, Comcast and Embarq, pursuant to 52 Pa. Code §§1.15 and 5.502, requested by e-mail that I extend the time for filing and serving reply briefs. Pre-Arbitration Order #2, issued May 2, 2008, directed the parties to file and serve reply briefs on or before August 22, 2008. I had agreed to the parties' previous request to extend this deadline to August 28, 2008. The parties requested that I extend the deadline for filing and serving reply briefs until September 2, 2008. The parties also agreed to waive the nine-month deadline for rendering an arbitration decision set forth in 47 U.S.C. §252 and their right to petition the FCC under 47 U.S.C. §252(e)(5) for failure of the Commission to act on the arbitration within the statutory deadline by extending that deadline until December 18, 2008. On August 26, 2008, I issued an order granting the parties' request.

The parties filed reply briefs on September 2, 2008. The record closed on September 2, 2008, upon the filing of reply briefs.

Comcast and Embarq have waived the nine-month deadline for rendering an arbitration decision set forth in 47 U.S.C. §252 and their right to petition the FCC under 47 U.S.C. §252(e)(5) for failure of the Commission to act on the arbitration within the statutory deadline. The parties agreed to extend the nine-month deadline so that the arbitration will conclude no later than December 18, 2008.

This recommended decision shall address the unresolved issue as agreed to by the parties. The parties have requested a fifteen (15) day time period for filing exceptions and a ten (10) day period for filing replies to exceptions. (N.T. 9)

THE UNRESOLVED ISSUE

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?

DISCUSSION AND RECOMMENDED RESOLUTION

The unresolved issue in this case involves the application of the Federal Communications Commission's (FCC's) decision captioned In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network information and Other Customer Information; Implementation of the Local Competition provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, Third Report and Order in CC Docket No. 96-115; Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-273, Released September 9, 1999 (SLI/DA Order). I admitted a copy of a portion of the SLI/DA Order into the record in this proceeding as Comcast Cross Ex. 8. (N.T. 96-110, 123) The SLI/DA Order addressed certain issues regarding directory listings. Comcast and Embarq disagree as whether the SLI/DA Order and the statutes and regulations discussed in that order, prohibit Embarq from charging Comcast a monthly charge to maintain Comcast's directory listing information. I will generally explain the ruling in the SLI/DA Order.

Under the Telecommunications Act of 1996 (1996 Act), Congress sought to provide a competitive framework in the telecommunications industry that would accelerate deployment of advanced telecommunications and information technologies throughout the United States. The SLI/DA Order addresses two components of that competitive framework.

First, the SLI/DA Order addresses 47 U.S.C. §222(e), which requires telecommunications carriers that provide telephone exchange service to provide subscriber list information to requesting directory publishers under reasonable rates, terms and conditions.

Second, the SLI/DA Order addresses 47 U.S.C. §251(b)(3), which requires local exchange carriers to permit competing providers of telephone exchange service non discriminatory access to directory listing. According to the FCC, these two sections address third party rights to obtain telephone exchange service subscribers' names, addresses and telephone numbers from local exchange carriers. (SLI/DA Order ¶1) I will explain the FCC's rulings in the SLI/DA Order regarding these two sections in more detail below.

Turning first to section 222(e), telecommunications carriers acquire subscriber list information when they initiate service to a customer. According to the FCC, Congress enacted section 222(e) because local exchange carriers owned and controlled directory publishing operations and had total control over subscriber list information. Congress determined that some carriers misused this control by refusing to sell subscriber list information to potential competitors, charging excessive and discriminatory prices for the information or imposing unreasonable conditions on the sale. (SLI/DA Order ¶3) Congress enacted section 222(e) to prevent these local exchange carriers from engaging in these practices and to encourage development of competition in directory publishing.

The FCC received information regarding the difficulty independent directory publishers had in obtaining subscriber list information on a nondiscriminatory basis from the local exchange carriers after Congress enacted section 222(e). (SLI/DA Order ¶4) In response, the FCC established rules to implement section 222(e) in the SLI/DA Order.

The FCC concluded that all carriers, including competitive local exchange carriers, had an obligation, pursuant to section 222(e), to provide subscriber list information to requesting directory publishers. However, the FCC also concluded that section 222(e) did not require a carrier to provide subscriber list information of customers of other local exchange carriers to directory publishers. According to the FCC, an incumbent local exchange carrier did not have to act as a clearing house for providing subscriber list information to directory publishers. (SLI/DA Order ¶¶8, 53-55) However, section 222(e) did not preclude incumbent local exchange carriers from acting as a clearing house. (SLI/DA Order ¶55) Section 222(e) also requires that a local exchange carrier provide subscriber list information to requesting

directory publishers at the same rates, terms and conditions that the carrier provides the information to itself, its directory publishing affiliate or another directory publisher. (SLI/DA Order ¶¶8, 56-70)

The FCC established a presumed reasonable rate of $0.04 per listing for subscriber list information and $0.06 per listing for updated subscriber list information that the carriers could charge the directory publishers. (SLI/DA Order ¶¶8, 71-104) The FCC did not preclude a carrier from charging a rate higher than the presumed reasonable rates. However, a carrier that charged higher rates had to be prepared to provide cost data justifying the higher rate in the event that a directory publisher filed a complaint regarding that rate with the FCC. (SLI/DA Order ¶¶8, 73)

Turning now to section 251(b)(3), the FCC promulgated rules requiring incumbent local exchange carriers to provide nondiscriminatory access to directory assistance and directory listings because the local exchange carriers owned and controlled directory publishing operations. The FCC rules were designed to ensure that customers of all local exchange carriers would have access to accurate directory assistance information. (SLI/DA Order ¶6) These rules required the incumbent local exchange carriers to make directory assistance and directory listing available to all competitors on an equal basis.

The FCC, in the SLI/DA Order, required that local exchange carriers offer all competitors directory assistance and directory listings equal to the access that it provided to itself. (SLI/DA Order ¶9) It also required that each local exchange carrier, upon request, provide access to directory assistance and directory listings in any format that the competitor specified if the local exchange carrier's internal systems could accommodate that format.

The FCC defined nondiscriminatory access pursuant to section 251(b)(3) to mean that a local exchange carrier that provides directory assistance or directory listing must permit competing providers to have access to those services that does not discriminate among requesting carriers in rates, terms and conditions of access and is equal to the access that the providing local exchange carrier gives itself. (SLI/DA Order ¶125) Nondiscriminatory access to

directory listing means that a local exchange carrier publishing a telephone directory has a duty to incorporate a listing supplied by its competitor with the same level of accuracy, in the same manner and in the same time frame that it would list its own customer's information. (SLI/DA Order ¶158) The FCC concluded that the section 251(b)(3) requirement of nondiscriminatory access to directory listing refers to the act of placing a customer's listing in a directory assistance database or directory compilation for external use such as a white pages directory. (SLI/DA Order ¶160) Having briefly explained the SLI/DA Order, I will now address the unresolved issue.

Comcast proposes to delete language in the proposed interconnection agreement that would allow Embarq to collect its proposed $2.00 per month recurring maintenance and storage charge for each Comcast customer's directory listing. (Comcast St. 1.0 pg. 6, Comcast Cross Ex. 1) The current interconnection agreement between the parties does not provide for a monthly recurring maintenance and storage charge. (Comcast St. 1.0 pg. 7, Comcast Cross Ex. 2) Comcast points out that the proposed $2.00 recurring charge would be in addition to the $9.63 non-recurring charge that it would pay under the proposed agreement to Embarq for Embarq to load each directory listing into Embarq's database. (Comcast St. 1.0 pg. 3)

According to Comcast, the $2.00 monthly recurring charge is discriminatory because Embarq does not apply a monthly recurring charge to itself, its own customers or other competitive local exchange carriers. (Comcast St. 1.0 pg. 4) Comcast also asserts that the $2.00 per month recurring charge is unreasonable because it bears no relation to the cost Embarq incurs to provide the service. (Comcast St. 1.0 pg. 4-5)

According to Comcast, when it acquires a new customer, it submits a service order to Embarq that includes the customer's name, address and telephone number. (Comcast St. 1.0 pg. 8) Under the proposed interconnection agreement, Comcast will pay a $9.63 non-recurring charge to submit each customer's information to Embarq which will in turn place that information in its directory listing database. (Comcast St. 1.0 pg. 8-9)

According to Comcast, the standard industry practice is for incumbent local

exchange carriers, such as Embarq, to maintain a complete file of directory listing information for all telephone numbers in their service territory because the incumbents retain the majority of listings in their service territory. (Comcast St. 1.0 pg. 9) Comcast does not maintain a separate directory listing database with its customer's names, addresses and telephone numbers.

The incumbents, such as Embarq, benefit from having the only comprehensive database in their service territory. Directory publishers use the database to assemble their directories. Comcast contends that it is necessary for it and other competitors to be able to place their directory listing information in the incumbent's databases. Otherwise, a customer will be less likely to switch to a competing carrier if the customer's listing does not appear in the telephone book for their area. (Comcast St. 1.0 pg. 10)

According to Comcast, the $2.00 recurring charge is discriminatory because it is imposed only on competitors that do not purchase UNE loops or resold services from Embarq. If a competitor purchases UNE loops or resold services from Embarq it does not have to pay the $2.00 per month recurring charge. (Comcast St. 1.0 pg. 21) According to Comcast this violates Embarq's obligation under section 251(b)(3) to provide non discriminatory access to Comcast to directory listing under the same rates, terms and conditions that it provides that service to other competitors. (Comcast St. 1.0 pg. 21)

Comcast points out that Embarq does not charge a monthly recurring charge to its own customers for the same service. Comcast asserts that this also violates Embarq's obligation under section 251(b)(3) to provide non discriminatory access to Comcast to directory listing under the same rates, terms and conditions that it provides for itself. (Comcast St. 1.0 pg. 22)

Comcast also alleges that Embarq has provided no support for the $2.00 recurring charge. Comcast points out that Embarq already collects a non-recurring charge for maintaining and storing directory listings in its database. (Comcast St. 1.0 pg. 24) Comcast contends that the $2.00 recurring charge is arbitrary, noting that Embarq is proposing different rates for the recurring charge in different states. (Comcast St. 1.0 pg. 24-25) Comcast asserts that no other incumbent local exchange carrier that it is aware of is attempting to impose a similar recurring

charge. (Comcast St. 1.0 pg. 25)

Alternatively, Comcast contends that if the Commission wishes to approve the concept of a recurring charge, the rate should reflect the cost that Embarq incurs in providing the service that is not recovered from other sources. (Comcast St. 1.0 pg. 30) Such a recurring charge should then apply to all carriers, including Embarq and other competitors. According to Comcast, Embarq has failed to provide any cost or other support for its proposed $2.00 recurring charge. (Comcast St. 1.0 pg. 35)

Embarq advocates retaining the language in the proposed interconnection agreement that will allow it to charge Comcast a $2.00 monthly recurring charge for directory listing if Comcast does not purchase a UNE loop or resale line to serve an end customer. (Embarq St. 1.0, pg. 5) Embarq states that this charge would be in addition to the proposed $9.63 non-recurring charge for order processing. (Embarq St. 1.0, pg. 7)

According to Embarq, the $2.00 recurring charge covers services it provides related to directory listing storage and maintenance that are not included in the $9.63 non-recurring charge. These services include: maintaining the operability of the directory listing database, maintaining the electronic equipment and software which updates the database, invoicing for the purchase of out of area directories, forwarding special distribution requests to directory publishers, manual review of new or changed directory listings, and proof reading the directory for errors before the directory is published. (Embarq St. 1.0, pg. 7-8) Embarq points out that Comcast has not estimated the cost of complying with section 222(e) or built the infrastructure to respond if a directory publisher requested subscriber list information from Comcast. (Embarq St. 1.0, pg. 10)

Embarq no longer owns its own directory publishing business, having sold it to R.H. Donnelley. According to Embarq, most of the major incumbent local exchange carriers have sold their publishing businesses. (Embarq St. 1.0, pg. 11-12) Since it no longer owns or controls its directory publishing business, Embarq argues that this changes its obligations pursuant to the SLI/DA Order. (Embarq St. 1.0, pg. 11-12) Embarq asserts that because it no

longer controls its directory publishing business, Comcast can access R.H. Donnelley directly and Comcast is no longer required to use Embarq to be included in the Embarq brand directory. According to Embarq, this change eliminates its obligation to provide directory listing services. (Embarq St. 1.0, pg. 12-13)

Embarq states that the price for its recurring charge is market based, not price based. (Embarq St. 1.0, pg. 23) Embarq contends that this is appropriate because Comcast can directly access R.H. Donnelley and other directory publishers itself. (Embarq St. 1.0, pg. 20-21) Since it can deal directly with R.H. Donnelley, Comcast is no longer a captive customer of Embarq. Because Comcast now has this option, marketplace forces should establish the price for Embarq to provide the service for Comcast instead of Comcast dealing directly with R.H. Donnelley. (Embarq St. 1.0, pg. 21) The price of the recurring charge should reflect the value that Comcast receives for access to directory listings. (Embarq St. 1.0, pg. 25-26) This is the value of Embarq providing the service for Comcast rather than Comcast doing it themselves. (Embarq St. 1.0, pg. 26)

Embarq also asserts that it is treating similarly situated customers in the same way. Customers purchasing a UNE loop or resold service from Embarq receive the directory listing as part of their service. (Embarq St. 1.0, pg. 29) Customers not purchasing a UNE loop or resold service must purchase a stand alone listing. (Embarq St. 1.0, pg. 29)

Embarq contends that it relies on its recurring charge for its foreign listing service as the basis for the recurring charge it seeks from Comcast. Embarq contends that this is an analogous service and has a logical basis. (Embarq St. 1.0, pg. 30) Embarq charges the foreign listing service charge when the end user does not purchase a retail access line. It charges the foreign listing charge to wireless end users and Voice Over Internet Protocol (VOIP) end users who request that Embarq list their names and numbers in a printed directory. (Embarq St. 1.0, pg. 29)

Neither party has cited any Commission decisions on this issue so it appears to be an issue of the first impression. Likewise, neither party has cited any decisions from any state or

federal court on this issue. A decision of the Indiana Utility Regulatory Commission captioned 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, Cause No. 43373 INT 01, (Order entered March 12, 2008) adopts Embarq's position. A decision of the Minnesota Public Utilities Commission captioned In the Matter of MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services for arbitration of an interconnection agreement with Embarq Minnesota, Inc. Pursuant to 47 U.S.C. §252(b), Docket No. P-430, 5321/M-07-611, (Order entered February 6, 2008) rejects Embarq's position.

After reviewing the evidence and law in this case, I find in favor of Comcast. I do this for several reasons.

First, Embarq must provide all requesting carriers access pursuant to section 251(b)(3) of the 1996 Act. The FCC, in the SLI/DA Order, required incumbent local exchange carriers to provide nondiscriminatory access to directory listings to ensure that customers of all local exchange carriers would have access to accurate directory assistance information. (SLI/DA Order ¶6) These rules required the incumbent local exchange carriers to make directory assistance and directory listing available to all competitors on an equal basis and offer directory assistance and directory listings equal to the access that it provides to itself. (SLI/DA Order ¶9)

Embarq's proposed language for the proposed interconnection agreement does not provide for nondiscriminatory access. The language provides for different treatment between carriers that purchase UNE loops or resale services and those that do not. Competitors that purchase UNE loops or resale services would not have to pay the proposed $2.00 monthly charge. Competitors, such as Comcast, that do not purchase UNE loops or resale services would have to pay the proposed $2.00 monthly charge.

Embarq claims that it is treating similarly situated competitors the same (Embarq Main Brief pg. 23-25). However, the phrase "similarly situated" does not appear in section 251(b)(3). Neither the statute nor the applicable regulations distinguish between different types

of competitors. The statute and regulations state that access to all competitors must be on an equal basis. Embarq's proposed provision does not provide access to all competitors on an equal basis. It treats competitors that do not purchase UNE loops or resale services different from those competitors that do purchase UNE loops or resale services. Embarq's proposed provision is therefore discriminatory, contrary to section 251(b)(3).

Embarq also argues that the competitors that purchase UNE loops or resale services pay a monthly charge as part of the bundle of services they receive. However, Embarq did not present any evidence detailing the monthly amounts that these competitors pay as part of their purchase of UNE loops or resale services. Embarq bears the burden of proof under section 251(b)(3) that it is permitting nondiscriminatory access. (SLI/DA Order ¶¶9, 132-134) In the absence of any evidence that Embarq has charged a similar recurring charge to all competitors, I conclude that Embarq is not making directory listing available to all competitors on an equal basis.

Similarly, under section 251(b)(3), Embarq must offer directory assistance and directory listings equal to the access that it provides to itself. Embarq did not present any evidence that its own customers pay a similar monthly charge for similar services. Again, Embarq bears the burden of proof under section 251(b)(3) that it is permitting nondiscriminatory access. In the absence of any evidence that Embarq charges a similar monthly amount to its own customers, I conclude that Embarq is not offering directory listing equal to the access that it provides to itself.

Embarq also argues that since it no longer owns or controls its directory publishing business, its obligations pursuant to the SLI/DA Order have changed. (Embarq Main Brief pg. 10-13) This argument should be addressed either to the FCC or Congress. Neither party has pointed to any legislation, court decisions or administrative action that has overruled or modified the SLI/DA Order. In the absence of any such modification, the SLI/DA Order is applicable to this proceeding and the Commission should follow it and apply its holding to the facts of this case.

Furthermore, two federal court decisions have rejected the argument that Embarq makes. In MCI Telecomm. Corp. V. Michigan Bell Tel. Co., 79 F. Supp. 2d 768 (E.D. Mich. 1999), an incumbent carrier argued that it could not be required to publish a competitor's directory listing information because it had divested itself of its directory publishing business. The court ruled that the FCC's regulations define the term "directory listing" broadly to include any information that the telecommunications carrier causes to be published in any directory format. The court held that the incumbent carrier continued to have an obligation to provide all carriers nondiscriminatory access pursuant to section 251(b)(3), even though the incumbent had sold its directory publishing business to a third party, because the incumbent caused a directory to be published through a contract with a directory publisher.

In U.S. West Comm., Inc. v. Hix, 93 F. Supp. 2d 1115 (D. Colo. 2000), an incumbent carrier also argued that section 251(b)(3) did not apply to it because it did not own or control the directory publisher. The court determined that the incumbent was obligated under section 251(b)(3) to place a customer's listing information in the directories it caused to be published on terms and conditions that are equal to those provided to its own customers, even though it did not own or control the directory publisher, because the incumbent caused a directory to be published through a contract with a directory publisher. While neither of these cases is controlling authority in this federal circuit, their reasoning is persuasive and should be adopted by the Commission.

In this case, Embarq is causing the publication of directories. It has agreements with R.H. Donnelley that Donnelly will publish and distribute Embarq's directories. (Comcast Cross Ex. 4, Comcast Late Filed Ex. 1) Since it is causing information to be published in a directory, it continues to have an obligation to provide all carriers nondiscriminatory access pursuant to section 251(b)(3) even though Embarq does not own or control R.H. Donnelley. Embarq also has the obligation to place a customer's listing in the directories its causes to be published on terms and conditions that are equal to those provided to its own customers. Its proposed language does not comply with these requirements because the language is discriminatory on its face in that it treats competitors differently depending on whether they purchase UNE loops or resale services. Embarq has failed to present sufficient evidence that

either its competitors that purchase UNE loops or resale services from it or its own customers pay a similar monthly amount for the same services.

Since I have concluded that Embarq's proposed provision is discriminatory, contrary to the requirements of section 251(b)(3), I will not address the parties' arguments regarding the reasonableness of Embarq's proposed $2.00 monthly recurring charge. For the same reason, I will also not address the parties' arguments regarding whether Embarq is already adequately compensated for maintaining and storing Comcast's customers' directory listing information by the proposed $9.63 nonrecurring charge and the $0.04 per listing for subscriber list information and $0.06 per listing for updated subscriber list information that Embarq charges directory publishers.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. The resolution of the parties' unresolved issue meets the requirements of Section 251 of the Telecommunications Act of 1996, 47 U.S.C. §251 and the regulations of the Federal Communications Commission.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That in regard to the unresolved issue between Comcast Business Communications, LLC d/b/a Comcast Long Distance and United Telephone Company of Pennsylvania, Inc., d/b/a Embarq, the proposal of Comcast Business Communications, LLC

d/b/a Comcast Long Distance for inclusion in the proposed interconnection agreement is approved, consistent with this Order.

2. That within 30 days after the entry of the Pennsylvania Public Utility Commission's Order in this proceeding, Comcast Business Communications, LLC d/b/a Comcast Long Distance and United Telephone Company of Pennsylvania, Inc., d/b/a Embarq, shall file with the Pennsylvania Public Utility Commission for approval an amended interconnection agreement consistent with this Order.

3. That upon the filing of the amended interconnection agreement, as specified in Order Paragraph 2, above, and its approval by the Pennsylvania Public Utility Commission, this proceeding be marked closed.

Date: September 10, 2008

David A. Salapa
Administrative Law Judge