

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON EXCHANGE)	
CARRIER ASSOCIATION,)	DOCKET NO. UT-031472
)	
Complainant,)	ORDER NO. 04
)	
v.)	ORDER DENYING PETITION
)	FOR INTERLOCUTORY
LOCALDIAL CORPORATION,)	REVIEW OF ORDER NO. 01
)	(PREHEARING CONFERENCE
Respondents.)	ORDER)
.....)	

1 **PROCEEDINGS:** On September 4, 2003, the United States District Court, Western District of Washington at Tacoma, Judge Ronald B. Leighton presiding, entered its Stay Order and Order of Referral to WUTC [Washington Utilities and Transportation Commission], in Case No. C03-5012, a civil complaint proceeding styled *Washington Exchange Carrier Association, et al., Plaintiffs, v. LocalDial Corporation, an Oregon Corporation, Defendant*. The Commission conducted a prehearing conference on October 20, 2003, before Chairwoman Marilyn Showalter, Commissioner Patrick J. Oshie, and Administrative Law Judge Dennis J. Moss. The Commission entered and served Order No. 01 (Prehearing Conference Order) on October 24, 2003.

2 **PARTIES:** Richard A. Finnigan, attorney, Olympia, Washington, represents the Washington Exchange Carrier Association (WECA). Arthur Butler and Lisa Rackner, Ater Wynne LLP, Seattle, Washington and Portland, Oregon, represent LocalDial Corporation (LocalDial). Brooks E. Harlow, Miller Nash LLP, Seattle, Washington, represents the Broadband Communications Association of Washington (BCAW). Mary B. Tribby and Letty S.D. Friesen, AT&T Law Department, Denver, Colorado, represent AT&T Communication of the Pacific Northwest (AT&T). Robert Cromwell, Assistant Attorney General, Seattle,

Washington, represents the Public Counsel Section of the Office of Washington Attorney General. Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").¹

3 **PETITION FOR INTERLOCUTORY REVIEW:** On November 4, 2003, LocalDial filed a "Petition for Reconsideration and/or Clarification of Order No. 1 (Prehearing Conference Order)." LocalDial's Petition is grounded in WAC 480-09-810, which provides an opportunity for parties to seek Commission reconsideration of final orders. Order No. 01 is not a final order; it is an interlocutory order.

4 WAC 480-09-425, however, provides that the Commission will construe pleadings liberally, disregarding errors or defects that do not affect the substantial rights of the parties. WAC 480-09-460(2) expressly provides for objections to "written statements" by the Commission concerning prehearing conferences. This includes prehearing conference orders, which typically include, as in this instance, a notice pursuant to WAC 480-09-460(2) of the opportunity to object. In addition, WAC 480-09-760 provides for discretionary review of interlocutory orders. It is appropriate in this instance to construe LocalDial's Petition as being either an objection or a petition for review of an interlocutory order.

5 We stated in Order No. 1 that the Commission will answer the following questions in this proceeding:

¹ In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

1. Is LocalDial's service that is challenged by WECA telecommunications service offered to the public in Washington for compensation within the meaning of chapter 80 RCW?

2. Is LocalDial's service that is challenged by WECA a form of intrastate long distance telecommunications service that subjects LocalDial to the obligation to pay access charges payable to originating and terminating local exchange carriers under those carriers' tariffs?

6 LocalDial contends that "the Commission's statement of the issues to be addressed in this docket . . . is unduly narrow and insufficient to allow the parties to address the question referred . . . by the United States District Court." *Petition at 1.* LocalDial emphasizes this argument as follows:

The Commission has framed the issues in such a way as to **prevent** the parties, and the Commission, from ever getting to what the District Court posed as the **central** question for the Commission: given the public policy considerations, whether and how the Commission **should** regulate LocalDial's service. Thus, the Commission's description of the issues to be addressed in this case is contrary to the District Court's Order.

Id. at 4.

Reduced to its essence, LocalDial's argument is that the Commission "cannot and should not avoid addressing the public policy issues raised by the Complainants request that switched access charges be imposed upon LocalDial's services." *Id. at 5.*

7 **ANSWERS:**² Broadband Communications Association of Washington filed its “Answer” to LocalDial’s Petition on November 14, 2003, then filed a “Corrected Answer” on November 18, 2003. BCAW’s pleading is not an Answer, but rather a statement of support for LocalDial’s Petition. BCAW states that it supports LocalDial’s request that the Commission clarify Order No. 1 “to specify that the Commission will consider certain matters of policy.” *BCWA Corrected Answer at 1*. BCAW states that if the Commission intended to preclude consideration of policy matters, BCAW supports LocalDial’s request for reconsideration. BCAW argues that the Commission need not necessarily determine “whether or not LocalDial should be classified as a ‘telecommunications company.’” *Id. at 2*. And, while arguing that the Commission should consider policy issues, nearly half of BCAW’s “Corrected Answer” is devoted to arguing that the Commission should not consider a list of policy questions BCAW argues are “outside the scope of the court’s order.” *Id.*

8 Level 3 Communications filed a “Response” to LocalDial’s Petition on November 18, 2003, that, like BCAW’s pleading, presents argument nominally in support of the Petition. Level 3 states that the Commission must “allow for a three-prong approach” as follows:

First, the WUTC must determine if the LocalDial service a “telecommunications service” under Washington law. Second, if the service offered by LocalDial is found to in fact be a “telecommunications service” under Washington law, the WUTC must then address whether it has been preempted by federal law from regulating LocalDial’s service. Finally, only if the WUTC has not been preempted by federal law or is otherwise removed from regulatory authority, it is necessary to address “what intercarrier

² Verizon filed a Response to LocalDial’s Petition on November 20, 2003, two days after the deadline. We decline to exercise our discretion to consider this late-filed pleading, finding the matters fully addressed by those who filed by the deadline, November 18, 2003.

charges should apply to the intrastate calls made by LocalDial's customers using WECA's facilities." Petition at 6, ¶ 12. Level 3 believes that the issues as set out in LocalDial's Petition allows for such an analysis.

Level 3 Response at 2.

9 WECA filed its Answer to LocalDial's Petition on November 18, 2003. WECA disagrees with LocalDial's position, and argues that "Issue No. 2 as published in the Prehearing Conference Order is sufficiently broad to allow LocalDial to raise its 'forbearance' issues." *WECA Answer at 2.* The issue WECA refers to is stated in our Order No. 1 as follows:

Is LocalDial's service that is challenged by WECA a form of intrastate long distance telecommunications service that subjects LocalDial to the obligation to pay access charges payable to originating and terminating local exchange carriers under those carriers' tariffs?

Order No. 1, ¶ 15. WECA argues that the phrase "subjects LocalDial to" allows for argument that LocalDial "should not" be subject to WECA member's tariffs, even though WECA disagrees with LocalDial on the substance of the issue.

10 WECA argues further that the Commission should not accept LocalDial's proposed formulation of the issues in this proceeding, because that formulation would imply prejudgment that LocalDial's services constitute VoIP services, an issue WECA or others may dispute.

11 WECA also argues that the Commission should not consider questions of federal preemption and whether LocalDial's service is removed from the Commission's regulatory authority by another provision of state law. WECA argues these legal

issues should be deferred for consideration by the Federal District Court, which has retained jurisdiction over WECA's civil complaint.

12 Commission Staff filed its Response to LocalDial's Petition on November 18, 2003. Staff states that it:

believes the Commission has appropriately defined the issues as: (1) Whether LocalDial's service is telecommunications service subject to the Commission's regulation and, (2) Whether LocalDial is obligated to pay access charges to the WECA companies. While the court referred the question of whether LocalDial's services *should* be regulated, the proper question regarding WECA's access tariffs is whether they *do* apply to the service offered by LocalDial in the circumstances presented.

Staff Response at 2-3. Staff argues that the present proceeding is not an appropriate one in which to consider what regulations should apply to a particular company. That question, Staff argues, would have to be presented in a competitive classification proceeding under RCW 80.36.320(2). Staff argues that the present proceeding is not an appropriate one to consider "the design of the WECA companies' access charges and their application to companies like LocalDial." Staff says LocalDial can challenge the tariffs and their applicability only in a complaint proceeding.

13 **COMMISSION DISCUSSION AND DETERMINATION:** We deny LocalDial's petition and overrule any objection it states with respect to our Prehearing Conference Order. There may be policy aspects to the Commission's determination of the issues it identified in Order No. 1, as LocalDial argues. On the other hand, it may be that the Commission has no discretion, as a matter of law, with respect to these issues under the facts presented, as Staff argues. There is room for both perspectives to be presented in the context of our statement of

the issues. There is nothing in Order No. 01 that precludes a party from making a policy argument and urging the Commission to make a policy determination within the constraints of what governing law allows.

Order No. 01 also states that:

The parties may argue whether the service LocalDial offers meets the definition of telecommunications in RCW 80.04.010. The parties may argue whether, even if the service meets that definition, it is removed from our jurisdiction and regulatory authority by another provision of state law, or whether federal law preempts our exercise of jurisdiction and regulatory authority.

These appear at the outset of this proceeding to be important considerations, but this statement concerning arguments that parties may make is not meant to be prescriptive, exhaustive, or exclusive. The parties also may argue, as a matter of law, that the Commission has some discretion in this matter, and may argue how the Commission should exercise that discretion in light of policy considerations.

14 We remain of the view that by considering the issues as we have framed them, we will fulfill the Federal District Court's need as expressed in its referral order while not straying beyond the narrow questions presented to the Court, and to us, in connection with this private complaint matter.

DATED at Olympia, Washington, and effective this 1st day of December 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner