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July 30, 2004

Carole Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

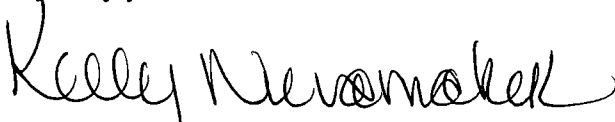
Re: WECA, et al. v. Marathon Communications
Docket No. UT-041244
Our Matter No. 1224.02

Dear Ms. Washburn:

Enclosed please find the original and thirteen copies (one for conforming and returning to us) of an Answer and Counterclaim of Respondent Marathon Communications Incorporated.

Please return a conformed copy to me in the enclosed self addressed stamped envelope.

Very truly yours,



Kelly A. Nunamaker
Paralegal to Jeffrey M. Grieff

Enclosures

cc: Richard Finnigan
Simon Fitch
Sally Johnston

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UTIL. AND TRANSP.
DIV.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

Washington Exchange Carrier
Association, a Washington non-profit
corporation, CenturyTel of Washington,
Inc., a Washington corporation, Hood
Canal Telephone Company, a Washington
corporation, Kalama Telephone Company,
a Washington corporation, Tenino
telephone Company, a Washington
Corporation, Mashell Telecom, Inc., a
Washington corporation, McDaniel
Telephone Company d/b/a TDS
Telecom, a Washington corporation, Lewis
River Telephone Company, d/b/a TDS
Telecom, a Washington corporation, The
Toledo Telephone Co., Inc., a Washington
Corporation, Inland Telephone Company,
a Washington corporation, YCOM
Networks Inc., a Washington corporation,
and Ellensburg Telephone Company, a
Washington corporation,

Complainants,

v.

Marathon Communications Incorporated
d/b/a Marathon Communications of
Washington, a Delaware corporation,

Respondent.

DOCKET NO. UT-041244

ANSWER AND COUNTERCLAIM OF
RESPONDENT MARATHON
COMMUNICATIONS INCORPORATED

ORIGINAL

GRIEFF & HAMILTON, PLLC

520 PIKE TOWER
520 PIKE STREET, SUITE 1440
SEATTLE, WA 98101
(206) 467-6969

1 Respondent, Marathon Communications Incorporated d/b/a Marathon
2 Communications of Washington ("Marathon"), answers the Complaint filed in this
3 proceeding on July 14, 2004 as follows:

4 1. Respondent admits the allegation contained in paragraph nos. 1, 2 and 3
5 of the Complaint.

6 2. In response to paragraph no. 4 of the Complaint, Marathon states that it is
7 an independent contractor to LocalDial Corporation ("LocalDial") and admits that it is
8 providing intrastate interexchange service to certain customers who previously have
9 received service from LocalDial. Marathon denies all other allegations in this
10 paragraph.
11

12 3. In response to paragraph no. 5 of the Complaint, Marathon admits that it
13 executed an agreement with LocalDial entitled "Billing and Services Plus Independent
14 Contractor Agreement," that this agreement is subject to a protective order, and that the
15 name of this agreement was disclosed. Marathon also admits that an e-mail was sent
16 by a low-level employee to a small percentage of LocalDial customers that erroneously
17 stated that LocalDial "merged" with Marathon; this message was incorrect and was
18 promptly retracted. Marathon denies the remaining allegations in this paragraph.
19

20 4. In response to paragraph no. 6 of the Complaint, Marathon does not have
21 sufficient knowledge or belief as to the truth of the allegations set forth in paragraph 6,
22 and therefore denies them.
23

24 5. In response to paragraph no. 7 of the Complaint, Marathon admits that it
25 initiated service to certain LocalDial customers on or about June 22, 2004. Marathon
26 admits that for a period of time after such initiation it used LocalDial facilities in some
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1 instances, but denies that it did so to avoid payment of applicable access charges.
2 Marathon admits that it moved some but not all originating traffic to 800 numbers.
3 Marathon denies the last sentence and all other allegations in this paragraph.

4 6. In response to paragraph no. 8 of the Complaint, Marathon admits the
5 existence of the order cited in the Complaint, but the Complaint has quoted the order
6 incorrectly. The quote that the Complaint appears to have intended to include is:
7 "LocalDial's service is a form of intrastate interexchange (*i.e.*, long distance)
8 telecommunications service that subjects LocalDial to the obligation to pay access
9 charges payable to originating and terminating local exchange carriers, including
10 Complainants, to extent required of interexchange carriers by those carriers' tariffs."
11 Marathon denies the remaining allegations, and specifically denies that it currently
12 operates or seeks to operate in a way that violates any applicable law or tariff, including
13 those relating to access charges. To the extent Complainants have actually provided
14 services to Marathon and have not blocked traffic, Marathon is prepared to pay their
15 lawful access charges upon receipt of an accurate bill therefor. Marathon further denies
16 that the origination of intrastate interexchange traffic over local exchange facilities is a
17 violation of any Commission rule or any provision of Complainants' tariff.

18 7. Paragraph 9 of the Complaint does not include any allegations of fact, and
19 no responsive pleading to this paragraph is required. To the extent any such response
20 is required, the allegations of this paragraph are denied.

21 8. Respondent denies all other allegations not specifically admitted.

22 **AFFIRMATIVE DEFENSE**

23 By way of further answer and affirmative defense, respondent states as follows:
24

1 1. The Complaint fails to state a claim against Respondent on which relief
2 can be granted.

3 2. Complainants are not entitled to payment to the extent that they breached
4 any agreements or violated any statutes or regulations.

5 3. Marathon is an independent contractor to LocalDial and all of
6 Complainants' alleged damages are properly the responsibility of LocalDial.

7
8 4. Marathon has paid all amounts due and owing.

9 **COUNTERCLAIM**

10 Marathon Communications, Inc. ("Marathon"), and as its Formal Complaint
11 against Washington Exchange Carrier Association, a Washington non-profit corporation,
12 CenturyTel of Washington, Inc., a Washington corporation, Hood Canal Telephone
13 Company, a Washington corporation, Kalama Telephone Company, a Washington
14 corporation, Tenino Telephone Company, a Washington Corporation, Mashell Telecom,
15 Inc., a Washington corporation, McDaniel Telephone Company d/b/a TDS Telecom, a
16 Washington corporation, Lewis River Telephone Company, d/b/a TDS Telecom, a
17 Washington corporation, The Toledo Telephone Co., Inc., a Washington Corporation,
18 Inland Telephone Company, a Washington corporation, YCOM Networks Inc., a
19 Washington corporation, and Ellensburg Telephone Company, a Washington
20 corporation, (together, the "Counterrespondents"), pursuant to RCW 80.04.110 and
21 80.36.160, states as follows:
22
23

24 1. Counterclaimant, Marathon Communications, Inc., is a registered
25 telecommunications carrier offering interexchange services to customers in the State of
26 Washington. Since September 14, 1995, Marathon's has been registered in
27
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1 Washington as an interexchange telecommunications company, which registration is set
2 forth in Docket UT-941001. In Docket UT-971720, Marathon was granted amendment
3 to its registration to provide local exchange services and authorizing provision of
4 interexchange services.

5 2. Counterrespondent, Washington Exchange Carriers Association, Inc.
6 (“WECA”), is a Washington corporation established pursuant to an order of this
7 Commission that acts as tariff bureau and billing and collection agent for its member
8 companies.

9 3. Each of the other named Counterrespondents, namely CenturyTel of
10 Washington, Inc. (“CenturyTel”), Ellensburg Telephone Company (“Ellensburg”), Hood
11 Canal Telephone Company (“Hood Canal”), Inland Telephone Company (“Inland”),
12 Kalama Telephone Company (“Kalama”), Lewis River Telephone Company d/b/a TDS
13 Telecom (“Lewis River”), Mashell Telecom, Inc. (“Mashell”), McDaniel Telephone
14 Company d/b/a TDS Telecom (“McDaniel”), Tenino Telephone Company (“Tenino”),
15 The Toledo Telephone Co., Inc. (“Toledo”), and YCOM Networks, Inc. (“YCOM”), is a
16 corporation certificated and operating as a local exchange carrier (“LEC”) in at least
17 portions of the State of Washington.

18 4. Each of the Counterrespondents named in paragraph 3 above is a
19 member company of WECA.

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23 **Factual Background**

24 5. During and prior to June 2004, LocalDial provided services to consumers
25 by which customers could dial a local telephone number that would connect them to
26 LocalDial’s service platform. Various competitive local exchange carriers provided the
27 local telephone services used by LocalDial. Each of these local exchange carriers had
28

1 established interconnection arrangements either with counterrespondents or with
2 another incumbent local exchange carrier within a counterrespondent's extended area
3 service ("EAS") calling scope.

4 6. As of June 21, 2004, LocalDial served approximately 2,800 subscribers in
5 the exchange areas served by Counterrespondents in Washington, most of whom are
6 individuals subscribing to residential services. Many of these individuals have no
7 presubscribed interexchange carrier ("PIC") on their residential telephone lines,
8 because they relied upon the ability to access LocalDial's services using a local access
9 number. Therefore, these customers are unable to complete any interexchange calls by
10 "1+" dialing.

11 7. On June 11, 2004, the Commission entered its Order No. 8 in Docket UT-
12 031472, *Washington Exchange Carrier Association Inc. et al. v. LocalDial Corporation*,
13 in which it found among other things that LocalDial was operating as a
14 telecommunications carrier in the State of Washington without the required
15 authorization. Each of the counterrespondents in this Complaint was a party to Docket
16 UT-031472.

17 8. In response to this Commission's decision, LocalDial decided to cease
18 providing interexchange services rather than undertake to modify its operations to
19 conform to regulatory requirements.

20 9. On or about June 21, 2004, LocalDial and Marathon entered into an
21 agreement by which Marathon, as an independent contractor, would provide interstate
22 and intrastate interexchange services to the customers formerly served by LocalDial.

1 10. Marathon is not affiliated with LocalDial, or with any of the
2 Counterrespondents.

3 11. On or about June 22, 2004, Marathon began providing intrastate and
4 interstate interexchange communications services to the customers that had been
5 served by LocalDial, both in Washington and elsewhere.

6 12. Out of necessity, for a period of time Marathon served some former
7 LocalDial customers using the same local access arrangements previously established
8 by LocalDial.

9 13. Beginning on or about June 22, 2004, certain Counterrespondents began
10 blocking calls to certain of the local telephone numbers formerly used by LocalDial for
11 network access. Customers attempting to dial these numbers have received either a
12 "fast-busy" signal or a recording indicating that the number was out of service.

13 14. On information and belief, some Counterrespondents have configured
14 their local exchange switches so that calls to the local telephone numbers formerly used
15 by LocalDial for network access would be completed only if the caller dialed "1+" to
16 place the call as a toll call, even though calls to other numbers in the same exchanges
17 as these local telephone numbers were completed as local calls.

18 15. On information and belief, some Counterrespondents have configured
19 their local exchange switchers so that the caller dialed 800 numbers that Marathon
20 provided to LocalDial customers were blocked for a certain period of time because
21 Counterrespondents had blocked local access as described in paragraphs 13 and 14
22 above.

1 16. On information and belief, the conduct described in paragraphs 13 and 14
2 above continues at the time of the filing of this Complaint.

3 17. On information and belief, Respondent WECA has encouraged and
4 coordinated the actions described in paragraphs 13, 14 and 15 above.

5 **Claim for Relief**

6 18. RCW 80.36.200 provides that "Every telecommunications company
7 operating in this state shall receive, transmit and deliver, without discrimination or delay,
8 the messages of any other telecommunications company."

9 19. RCW 80.36.220 provides in pertinent part that "Telecommunications
10 companies shall receive, exchange and transmit each other's messages without delay
11 or discrimination, and all telecommunications companies shall receive and transmit
12 messages for any person."
13

14 20. By blocking calls to Marathon's network access lines, Counterrespondents
15 are violating RCW 80.36.200 and RCW 80.36.220.

16 21. By imposing higher rates on calls to Marathon's network access lines than
17 on calls to other telephone numbers in the same exchange, Counterrespondents are
18 violating RCW 80.36.200 and RCW 80.36.220.

19 22. Counterrespondents have alleged that their refusal to deliver calls to
20 Marathon is justified because, under the Commission's Order in Docket UT-031472,
21 they claim that Marathon is acting illegally by originating interexchange traffic over local
22 access lines. The Order in question, however, only ordered LocalDial to register as a
23 telecommunications carrier and to "otherwise conform with the requirements for
24 telecommunications companies operating in Washington[.]" Marathon is registered as a
25 telecommunications carrier, and is in material compliance with the requirements
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1 applicable to such carriers. To the extent that Marathon is obligated to pay access
2 charges for use of Respondent's facilities to originate traffic, the Counterrespondents
3 can assess such charges pursuant to the terms of their applicable tariffs. Nothing in the
4 Commission's Order relating to LocalDial, or in any applicable law or access tariff,
5 permits Counterrespondents to hold Marathon's customers hostage with access
6 charges as the ransom demand. To the contrary – Counterrespondents obviously have
7 no right to collect access charges *until* they begin providing access services to
8 Marathon, which thus far they have refused to do.

10 **Request for Emergency Adjudication**

11 23. Counterrespondents' actions have interfered and are continuing to
12 interfere with the ability of hundreds of residents of Washington to make long-distance
13 calls. Many of these customers do not have in place any alternative access to long-
14 distance services.

16 24. These actions create an immediate danger to the public safety and
17 welfare, because citizens of Washington may be unable to contact friends, family
18 members, medical providers, and other persons in an emergency situation.

19 25. Marathon therefore requests emergency adjudication, pursuant to RCW
20 34.05.479 and WAC 480-07-620.

21 WHEREFORE, having fully answered the Complaint, Marathon Communications,
22 Inc. requests that the Commission enter the following relief:

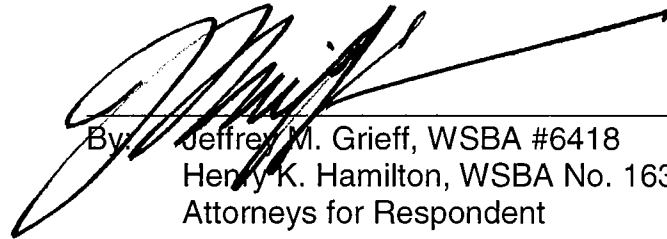
24 1. An emergency order directing each and every of the Counterrespondents
25 immediately to receive, transmit, and deliver, without delay or discrimination, all
26 telephone messages directed to Marathon Communications, Inc. access lines;

27 2. For dismissal of all of Complainants' Complaint; and
28

1 3. For such other and further relief as justice requires.

2 Dated this 30th day of July 2004

3 GRIEFF & HAMILTON, PLLC

4 
5 _____
6 By Jeffrey M. Grieff, WSBA #6418
7 Henry K. Hamilton, WSBA No. 16301
8 Attorneys for Respondent

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GRIEFF & HAMILTON, PLLC
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520 PIKE STREET, SUITE 1440
SEATTLE, WA 98101
(206) 467-6969

1 CERTIFICATE OF SERVICE

2 The undersigned certifies under the penalty of perjury according to the laws of
3 the United States and the State of Washington that on this date I caused to be served in
4 the manner noted below a copy of this document entitled **RESPONDENT'S ANSWER
AND COUNTERCLAIM** on the following individuals:

5 **Richard A. Finnigan**
6 **2405 Evergreen Park Drive, S.W., Suite B-1**
7 **Olympia, WA 98502**
8 **Attorney for Complainants**

9 VIA FACSIMILE
10 VIA MAIL
11 VIA MESSENGER

12 **Simon Ffitch**
13 **Office of the Attorney General**
14 **Public Counsel**
15 **900 Fourth Avenue, Suite 2000**
16 **Seattle, WA 98164**

17 VIA FACSIMILE
18 VIA MAIL
19 VIA MESSENGER

20 **Sally Johnston**
21 **Assistant Attorney General**
22 **P.O. Box 40128**
23 **Olympia, WA 98504**

24 VIA FACSIMILE
25 VIA MAIL
26 VIA MESSENGER

27 Dated this 30th day of July 2004, at Seattle, Washington.

28 Kelly Sunmaker