

**BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION**

WASHINGTON EXCHANGE CARRIER
ASSOCIATION, CENTURYTEL OF
WASHINGTON, INC., ELLENSBURG
TELEPHONE COMPANY, HOOD CANAL
TELEPHONE COMPANY, INLAND
TELEPHONE COMPANY, KALAMA
TELEPHONE COMPANY, LEWIS RIVER
TELEPHONE COMPANY dba TDS
TELECOM, MASHELL TELECOM, INC.,
McDANIEL TELEPHONE COMPANY dba
TDS TELECOM, TENINO TELEPHONE
COMPANY, THE TOLEDO TELEPHONE
CO., INC., and YCOM NETWORKS, INC.,

UT-031472

Complainants,

v.

LOCALDIAL CORPORATION,

Respondent.

**COMPLAINANTS' BRIEF
IN SUPPORT OF
MOTION FOR SUMMARY DISPOSITION**

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1 1. COME NOW Complainants Washington Exchange Carrier Association (“WECA”),
2 CenturyTel of Washington, Inc. (“CenturyTel”), Ellensburg Telephone Company (“Ellensburg”),
3 Hood Canal Telephone Company (“Hood Canal”), Inland Telephone Company (“Inland”),
4 Kalama Telephone Company (“Kalama”), Lewis River Telephone Company d/b/a TDS Telecom
5 (“Lewis River”), Mashell Telecom, Inc. (“Mashell”), McDaniel Telephone Company d/b/a TDS
6 Telecom (“McDaniel”), Tenino Telephone Company (“Tenino”), The Toledo Telephone Co.,
7 Inc. (“Toledo”), and YCOM Networks, Inc. (“YCOM”), by and through their attorney of record,
8 Richard A. Finnigan, attorney at law, and file this Brief in Support of Motion for Summary
9 Disposition with the Washington Utilities and Transportation Commission (the “Commission”).
10 The Complainants, other than WECA, will be referred to in this Brief in Support of Motion for
11 Summary Disposition as the “Rural Companies.” The Complainants collectively will be referred
12 to as the “Companies.”

13

14

INTRODUCTION

15 2. This matter involves a dispute between the Companies and LocalDial Corporation
16 (“LocalDial”) concerning whether LocalDial is required to pay certain charges listed in the
17 Companies’ applicable tariffs, referred to in this Motion as “Access Charges.” This matter was
18 referred to the Commission by the Federal District Court.¹

19 3. There are two issues before the Commission. As stated in the Commission’s Order No.
20 01 entered in this matter, the issues for the Commission’s determination are as follows:

21

¹ WECA, et al. v. LocalDial, Federal District Court for the Western District of Washington, Tacoma Division, Cause No. C03-5012RBL.

1 1. Is LocalDial's service that is challenged by WECA telecommunications
2 service offered to the public in Washington for compensation within the
3 meaning of Chapter 80 RCW?
4

5 2. Is LocalDial's service that is challenged by WECA a form of intrastate
6 long distance telecommunications service that subjects LocalDial to the
7 obligation to pay access charges payable to originating and terminating
8 local exchange carriers under those carriers' tariffs?
9

10 4. These two issues will be addressed in this Brief. In addition, although the Companies do
11 not believe that federal preemption is before the Commission based upon the referral from the
12 Federal District Court, the Companies will address federal preemption as a precautionary matter.

13 5. If the Commission finds that LocalDial's service is a telecommunications service offered
14 to the public in Washington for compensation within the meaning of Chapter 80 RCW and that
15 LocalDial's service is a form of intrastate long distance telecommunications service that subjects
16 LocalDial to the obligation to pay Access Charges payable to originating and terminating local
17 exchange carriers under those carrier's tariffs, then the Commission should enter an Order stating
18 these findings. That Order should then be sent to the Federal District Court so that the
19 proceeding that was stayed in that Court can be restarted for a determination of the damages the
20 Companies should be awarded. Additionally, the Commission should enter an Order requiring
21 LocalDial to register as a telecommunications company under RCW 80.36.350.

22

23

FACTS

24 6. The facts that are used for purposes of this Motion for Summary Disposition come
25 directly from the depositions of LocalDial's officers and from material provided by LocalDial in

1 response to discovery in the Federal District Court proceeding. In particular, the depositions of
2 Mr. Crawford taken on July 16, 2003 (“Crawford Dep.”), Mr. Carden taken on August 12, 2003
3 (“Carden Dep. I”), Mr. Carden’s second deposition taken on February 9, 2004 (“Carden Dep.
4 II”) and material taken directly from LocalDial’s web site provide the basis for this Motion.
5 Each of the depositions is attached to the Declaration of Richard A. Finnigan which accompanies
6 this Motion. The Crawford Dep. is Exhibit 1.² The Carden Dep. I is Exhibit 2 and the Carden
7 Dep. II is Exhibit 3. The LocalDial web site material is Exhibit 4.

8

9 **1. The Facts Support a Conclusion that LocalDial is Holding Itself Out to the Public as**
10 **a Provider of Telecommunications Services.**
11

12 7. LocalDial’s web site labels its service as “An easy to use, supplemental phone service for
13 long distance calling.” Exhibit 4 at p. 1, 13. LocalDial describes its service as follows:
14 “LocalDial provides unlimited calling. You can make as many calls and talk as long as you
15 want, any time day or night. The only restrictions are: LocalDial may not be used for business or
16 commercial purposes, or to transmit faxes or data.” Exhibit 4 at p. 13. Further, “LocalDial is for
17 residential voice calling only...You may place calls to businesses from your registered
18 residential phone with LocalDial. However LocalDial is not available for businesses.” Ibid.
19 LocalDial’s web site clearly establishes that the service is offered for hire. The customer may
20 choose from either a monthly rate of \$20.00 or a quarterly rate of \$55.00. Ibid at p. 16.

21 8. LocalDial’s customers view themselves as receiving telephone service from LocalDial.
22 In the customer testimonials portion of Exhibit 4, Ms. Sharron Lawler of Port Orchard,
23 Washington states: “I make calls everywhere in Washington and I have referred LocalDial to

² As used in this Motion, the term “Exhibits” refers to Exhibits to Mr. Finnigan’s declaration.

1 several of the members [of her historical club] to save them money on their long distance
2 calls...” Jim and Lori Leavitt of Yelm are quoted as follows: “We have been on LocalDial for
3 the past three years and have found it to be the best savings on domestic long distance ever.”
4 Jonney Miller of Issaquah, Washington is quoted as saying, “My phone bill went down from
5 \$125.00 a month with LocalDial.” Mr. and Mrs. Benson of Tahuya, Washington state:
6 “Fantastic savings, unbelievable savings on our local long distance bill.” Exhibit 4 at p. 9-11.

7

8 **2. The Facts Demonstrate That Functionally LocalDial’s Service is a**
9 **Telecommunications Service.**

10

11 9. LocalDial’s web site describes the LocalDial service as a “two step process.” The
12 customer first dials their access number issued by LocalDial and then after the voice prompt, the
13 customer dials the destination phone number. Exhibit 4 at p. 18.

14 10. On its web site, LocalDial lists the locations in Washington that it serves. Those
15 locations include the areas served by the Companies. See, Exhibit 4 at p. 5. For example,
16 LocalDial lists Dewato, Eatonville, Gig Harbor, Kalama, LaCenter, Mossyrock, Tenino, Toledo
17 and Yelm as service locations.

18 11. As described in Mr. Crawford and Mr. Carden’s depositions, the service begins when a
19 LocalDial customer picks up the phone in their home and dials an access number for LocalDial.
20 Once LocalDial authenticates that the caller is a LocalDial customer, the customer is given a
21 voice prompt to dial the number the customer wants to call, the “destination number,” and upon
22 the customer dialing that number, LocalDial completes the call and the customer talks to the
23 person that he or she desires to reach. The call is carried as a traditional TDM voice call over
24 two-way PRIs from a location in which LocalDial has a local calling number. Two-way PRIs

1 are part of the public switched telephone network (“PSTN”). The call reaches the LocalDial
2 gateway located in the Westin Building in Seattle, where it is converted to packets on
3 LocalDial’s local area network or LAN. When the destination number is dialed by the customer,
4 the call is routed internally on the LAN to the appropriate exit gateway (one of the three
5 gateways LocalDial maintains in Seattle in the Westin Building), and, if LocalDial has leased
6 PRI facilities to the area that the call is destined, it goes out over that appropriate leased PRI for
7 call termination. If LocalDial does not have a leased facility to the area, the call is routed within
8 the Westin Building to one of the interexchange carriers (“IXCs”) that LocalDial has contracted
9 with for wholesale volumes of traffic. The call always exits LocalDial’s LAN as a voice call.
10 Exhibit 2 at p. 34, l. 12 – p. 38, l. 5; p. 39, l. 1-7; p. 39, l. 23 – p. 40, l. 8; p. 40, l. 14 - 21; and p.
11 43, l. 10 - 17. Exhibit 1 at p. 42, l. 8 – p. 44, l. 14. In its response to Interrogatories, see, Exhibit
12 5, LocalDial lists the following NPA/NXX combinations as its “access numbers”:

13	Seattle	206-505-2590
14	Tacoma	253-620-1493
15	Everett	425-551-1121
16	Olympia	360-252-1944
17	Bremerton	360-824-4635
18	Centralia	360-219-2000
19	Issaquah	425-651-9925
20	Mt. Vernon	360-542-5000
21	Spokane	509-252-1035
22	Yakima	509-452-5502
23		
24	Bellingham	360-603-5000
25	Coupeville	360-544-9453
26	Enumclaw	360-615-4860
27	Hoodsport	360-614-9453
28	Pt. Angeles	360-504-9453
29	Pt. Townsend	360-554-9453
30	Aberdeen	360-612-9453
31		
32	Vancouver, WA	360-258-3200

1 Longview, WA 360-353-0137
2

3 12. LocalDial's operation shows a profit level of [confidential]. Exhibit 1, p. 51, l. 20-25 and
4 attached deposition exhibit to Confidential Exhibit 6 (Deposition of Ms. Kovaks, LocalDial's
5 CFO).

6
7 **STANDARD OF REVIEW**

8 13. Pursuant to WAC 480-07-380(2), the Companies submit to the Commission that there is
9 no genuine issue as to any material fact and that the Companies are entitled to summary
10 disposition in their favor. Under the requirements of WAC 480-07-380(2), the Commission is to
11 look to CR 56 for guidance on how to deal with motions for summary disposition. The law
12 surrounding CR 56 motions for summary judgment is well settled: summary judgment must be
13 entered if there is no genuine issue as to any material fact and the moving party is entitled to
14 judgment as a matter of law. Tanner Electric Coop. V. Puget Sound Power & Light Co., 128
15 Wn.2d 656, 668, 911 P.2d 1301 (1996).

16 14. Although the parties disagree about the conclusions to be drawn from the facts, such as
17 whether LocalDial is actually offering a Voice over Internet Protocol ("VoIP")³ service, there is
18 no genuine issue of material fact. As a result, under WAC 480-07-380(2), the Commission is
19 able to decide each of the issues outlined in the Introduction above. As demonstrated below,
20 under this standard of review, the Companies are entitled to summary disposition in their favor.

21

³ VoIP service is sometimes referred to as "IP telephony." As more fully explained below, there are different types of VoIP service, and courts and state commissions sometimes refer to one or another of these types of IP telephony as being (or not being) a VoIP service.

1 (Emphasis added). There is no question that LocalDial’s service is a “telecommunications”
2 service. As described in the Facts section above, LocalDial is transmitting information between
3 locations in Washington. It is transmitting voice calls. It is using leased PRIs – “wires” or
4 “cables” or “optical” in nature. This conclusion holds true even though LocalDial briefly
5 transforms its customers’ calls from voice to packetized data and back to voice within
6 LocalDial’s internal computer network. It does not appear that this packetization is used for
7 transport.⁴ LocalDial appears to be using the packet conversion for routing of the traffic, just
8 like a switch routes voice traffic to the appropriate trunk.⁵ Even if it can be said that the message
9 is transported in packet form for a short distance on the route, such packetization falls under the
10 “other similar means” portion of the definition. The “information” (voice call) is transmitted
11 between points in the State of Washington.

12 18. This conclusion is also supported by the Commission’s previous decisions. For example,
13 in U&I CAN v. Pacific Northwest Bell Telephone Co., Docket No. UT-960659, Third
14 Supplemental Order, (Feb. 4, 1998), the Commission rejected U&I CAN’s argument that it was
15 not a “telecommunications company” and not required to pay access charges. Instead, it held
16 that U&I CAN’s new technology that enabled it to bypass the payment of access charges using a
17 computer to transmit calls was still subject to US West’s (now Qwest) applicable tariff. U&I
18 CAN, at 16. Although the technology used is slightly different in this case than the technology
19 in U&I CAN, the holding is equally applicable.

20 19. A similar conclusion was reached in the case of In the Matter of Determining the Proper
21 Classification of U.S. MetroLink Corp., Docket No. U-88-2370-J, Second Supplemental Order

⁴ The transport between Portland and Seattle is addressed in Section 5, below.

⁵ As traditional switches are replaced by “soft” switches, does the Commission lose jurisdiction over local service? This is the logical conclusion of LocalDial’s argument.

1 (May 1, 1989). MetroLink was an entity that tried to structure itself in a way that it would be
2 exempt from Commission regulation. As the Commission stated at page 3 of its Order, however:

3
4
5 Simply stated, MetroLink holds itself out to the public to interconnect access lines
6 provided by local exchange companies and thereby provide interexchange service
7 commonly known as toll. The various organizational structures and arrangements
8 utilized by MetroLink to maintain the appearance of something other than what it
9 is demonstrate only the ingenuity of those who seek to avoid regulation.

10
11
12 Much the same can be said about LocalDial's insertion of equipment into the traffic
13 stream that packetizes data for a brief period of time in an attempt to bring it into an
14 "exempt" status.

15 **2. LocalDial is Subject to the Companies' Access Charges:**

16 20. Having established that LocalDial is offering telecommunications to the public for
17 compensation under RCW 80.04.010, the next question is whether LocalDial's service is a form
18 of intrastate long distance telecommunications service for which LocalDial is required to pay
19 Access Charges in accordance with the Companies' tariffs. The analysis below leads to the
20 conclusion that LocalDial's service is subject to the Access Charges of the Companies under
21 their respective tariffs.

22
23 **a. LocalDial is an IXC:**

24 21. LocalDial's web site defines LocalDial's service as a "supplemental phone service" that
25 allows LocalDial's customers to make "unlimited long distance call[s]." See, Exhibit 4 at p. 1,
26 13. LocalDial claims that its service allows its customers to "slash the costs of local-toll calling."
27 Exhibit 4 at p. 13. LocalDial advertises that its customers do not need "to make any changes to

1 [the customer's] current phone service,” and any calls made using LocalDial “turns your call into
2 a local call that will not show up on [the customer's] regular phone bill.” Exhibit 4 at p. 13.

3 22. In short, LocalDial functions exactly like any other IXC that bills their customer directly.
4 The only difference is that LocalDial is bypassing access charges. The fact that LocalDial
5 briefly transforms its customers' calls from voice to packetized data and back to voice within
6 LocalDial's “own private network” does not change the fact that it is an IXC. To the contrary,
7 other IXCs are also using packetized data to transport their toll calls. For example, on June 3,
8 2003, MCI announced that by 2005 it planned to move all of its long distance traffic “to an all IP
9 core.” See, MCI Press Release, attached as Exhibit 7. MCI stated that it is “[a]lready well into
10 the first stage of converging its networks onto a common IP platform.” Ibid. Few would argue
11 that MCI's choice to change its technological transport path for its voice calls would transform
12 the company from the world's second largest IXC into a VoIP provider (exempt from any state
13 or federal regulations).

14 23. Despite the obviousness of the fact that merely using packetized data does not transform
15 an IXC into an exempt VoIP provider, LocalDial has attempted to draw a distinction between
16 offering a “phone” service and a “telephone” service in an effort to argue that it is actually not an
17 IXC. For example, in the deposition of Mr. Crawford, LocalDial's Chief Operating Officer, Mr.
18 Crawford repeatedly asserted that LocalDial is “not a telephone company” even though it
19 advertises on its web site that it offers a “phone service” that provides its customers with the
20 ability to make “unlimited long distance calls.” Compare, Exhibit 1, at 36, with LocalDial's web
21 site, Exhibit 4 at p. 1, 13. This kind of hair-splitting is not only inappropriate in this case, it
22 would lead to the irrational result that all companies would be exempt from the Commission's

1 regulatory control. This is the type of “ingenuity” the Commission dismissed as inconsequential
2 in the MetroLink case.

3

4 **b. The Companies’ Tariffed Access Charges Apply to LocalDial:**

5 24. The Companies’ originating and terminating Access Charges are delineated in their
6 tariffs on file with the Commission. The Commission has approved each of the Companies’
7 tariffs (either directly or by operation of law), including the Access Charges set forth in the
8 tariffs and constitute the lawful charges for intercarrier compensation. See, General Tel Co. of
9 Northwest, Inc. v. Bothell, 105 Wn.2d 579, 585, 716 P.2d 879 (1986) (“Once a utility’s tariff is
10 filed and approved, it has the force and effect of law.”).

11 25. Interexchange carriers are required to pay Access Charges to the Companies for use of
12 the Rural Companies’ facilities to originate and terminate calls. See, Washington Utilities and
13 Transportation Commission v. Pacific Northwest Bell Telephone Company, et al., Cause No. U-
14 85-23 et al., Eighteenth Supplemental Order (December 30, 1986). The genesis of the access
15 charge system is explained in the MetroLink case as follows:

16

17 The access charge system which the Commission has adopted is mandated by
18 RCW 80.36.160 as explained in the Eighteenth Supplemental Order in our Cause
19 No. U-85-23. Even were the Commission inclined to find the operations of
20 MetroLink to be exempt from direct regulation, it would be necessary to extend
21 our jurisdiction to MetroLink at least insofar as necessary to satisfy our
22 obligations under RCW 80.36.160. The authority of the Commission to so extend
23 its jurisdiction is specifically set forth in the second paragraph of this statute.
24 Therefore, MetroLink has no hope of escaping its obligation of making an
25 appropriate contribution toward the fixed and variable costs associated with
26 accessing the public switched telecommunications network.

27

28 Metrolink at p. 4.

1 It can not be stated more directly: a company that uses the public switched telecommunications
2 network to originate or terminate interexchange calls must pay access charges.

3

4 **3. There is No Legal or Equitable Justification for Not Applying the Companies’**
5 **Tariffs to LocalDial:**

6 26. Having established that the Companies’ tariffs apply to LocalDial, the Commission may
7 consider whether there is a justification for allowing LocalDial to forbear from paying Access
8 Charges. As demonstrated below, there is no legal or equitable justification exempting
9 LocalDial from the Companies’ tariffed Access Charges. As a result, the Commission should
10 issue an Order finding that LocalDial is subject to the Companies’ tariffed Access Charges and
11 return this proceeding to the Federal District Court.

12

13 **a. The Nascent Services Doctrine Does Not Apply to LocalDial:**

14 27. LocalDial has previously asserted in the Federal District Court proceeding that its
15 technology is so new that technological innovation would be stifled if LocalDial is required to
16 abide by the clear provisions of Washington law. This argument is erroneous for a number of
17 reasons.

18 28. First, the “nascent services” or “nascent technology” argument is not supported by the
19 Commission’s previous decisions. For example, in U&I CAN, the Commission rejected U&I
20 CAN’s argument that it was not required to pay access charges. Instead, it held that U&I CAN’s

1 new technology that enabled it to bypass the payment of access charges using a computer to
2 transmit calls was still subject to the applicable access tariff. U&ICAN, at 16.⁶

3 29. Second, the fact that there is a significant financial impact to LocalDial’s refusal to pay
4 the Companies in accordance with the Companies’ tariffed Access Charges presents another
5 basis for debunking LocalDial’s argument that its technology is too new to be regulated. See,
6 Confidential Exhibit 8 estimating the amount LocalDial owes to the Rural Companies.⁷ This
7 financial significance clearly cuts against LocalDial’s “wait and let the technology develop”
8 argument. This is because while the technology develops, the Rural Companies’ customers will
9 have to bear the burden of the relatively few customers enjoying LocalDial’s service. This
10 financial balancing act weighs heavily in favor of the Rural Companies and their customers
11 more, especially given the fact that LocalDial is both profitable and debt-free. See, Exhibit 1 at
12 p. 51, Exhibit 5 at p. 23-28.

13 30. Third, the Universal Service Report also demonstrates that the nascent technology
14 doctrine is inapplicable to LocalDial. Indeed, the FCC specifically rejected the “nascent
15 technology” argument as it relates to VoIP services at Paragraph 84 of the Universal Service
16 Report⁸, when it stated:

17
18 Some commenters argue that IP telephony is a nascent technology that is
19 unlikely to generate significant revenues in the foreseeable future. Regardless
20 of the size of the market, we must still decide as a legal matter whether IP
21 telephony providers meet the statutory definitions of offering

⁶ Although the actual technology used is different than the technology LocalDial uses for its service, the results are exactly the same. In fact, the technology in both cases is similar. A computer is used in each case to attempt to avoid access charges.

⁷ This amount is provided not to precisely calculate the damages, which is not before the Commission, but to provide a level of magnitude.

⁸ See, In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, FCC 98-67 (April 10, 1998) (“Universal Service Report”).

1 “telecommunications” or “telecommunications service” in section 3 of the
2 1996 Act.
3

4 Thus, even if LocalDial was not generating significant revenue (which it is), the nascent
5 technology argument would still be inapplicable.

6 31. Fourth, with WorldCom, AT&T and other major carriers announcing their intent to move
7 to VoIP platforms, this can hardly be a nascent technology. When the largest carriers in the
8 market adopt a technology, it is the sign of a mature technology, not one in need of special
9 protection.

10
11 **b. The Commission Does Not have the Legal Authority to “Forbear” from**
12 **Applying the Applicable Statutes and Tariffs:**
13

14 32. The forbearance concept is a congressionally created doctrine that specifically allows the
15 FCC to take a “wait and see” approach to certain issues. There is no corresponding “wait and
16 see” doctrine applicable to the Commission. Indeed, under Washington law, once the
17 Commission has approved the Companies’ tariffs, they have the force and effect of law. General
18 Tel Co. of Northwest, Inc., 105 Wn.2d at 585.

19 33. Further, the Commission has previously addressed the issue of whether a developing
20 technology or service should be exempt from paying access charges. The Commission found
21 that it had no such authority because the access charge system is mandated by RCW 80.36.160.
22 MetroLink at p. 4. The access charge system was created by Commission Order (Docket No. U-
23 85-23) and continues to be the intercarrier compensation model in place today.
24

1 **c. Equity Requires that LocalDial Pay the Companies for Use of the Rural**
2 **Companies' Facilities:**
3

4 34. LocalDial will likely assert that “equity” requires the Commission to carve out an
5 exception for LocalDial to allow it to forbear from paying Access Charges until VoIP technology
6 is more fully developed.⁹ The inaccuracy of the argument that VoIP technology is still in its
7 “infancy” is addressed above in the Section demonstrating that the FCC’s “nascent technology
8 doctrine” does not apply to LocalDial or to the facts of this case. More importantly, the
9 Commission has previously addressed the issue of whether an emerging technology or service
10 should be considered in need of protection. In the MetroLink case the Commission stated as
11 follows¹⁰:

12
13 It is, of course, true that should MetroLink come into compliance with
14 Commission laws and rules, it will be obliged to pay its fair share of network
15 costs through an appropriate access charge. These costs will, in turn, necessarily
16 be passed on to MetroLink’s customers. Whether MetroLink will continue to be
17 an attractive service alternative when its customers are required to pay all of the
18 appropriate costs of service is not a matter of concern to the Commission. While
19 the policy of the state is to promote diversity in the supply of telecommunications
20 services (See RCW 80.36.300), that policy falls short of a duty to underwrite or
21 subsidize developing competition. Such a subsidy would be the result of a ruling
22 in favor of MetroLink.
23

24 Thus, the Commission has previously ruled that “equity” considerations should not be a result of
25 subsidy through free use of the PSTN.

26 35. Beyond the foregoing arguments, it is important to note that to date, LocalDial’s debt for
27 unpaid access to the Companies is [confidential].¹¹ In the past, LocalDial has been quick to

⁹ This is, of course, assuming that LocalDial can even convince the Commission that it is offering a VoIP service at all.

¹⁰ MetroLink at p.4.

¹¹ Confidential Exhibit 8.

1 argue about the potential negative impact its customers may experience if LocalDial is forced to
2 raise its flat rate to account for the Access Charges that it should pay under the Companies’
3 tariffs. If LocalDial is not required to pay in accordance with the plainly applicable legal
4 principles delineated above, the LECs may need to raise their local rates to cover LocalDial’s
5 debts. Thus, equity favors the Companies.

6
7
8

4. The Commission’s Authority is Not Preempted by the FCC:¹²

9 36. LocalDial asserts that the Commission is prohibited from addressing the substantive
10 issues because the Commission is preempted from deciding the issues in this matter by the FCC
11 under the Supremacy Clause of Article VI of the United States Constitution. While it is true that
12 “a federal agency acting within the scope of its congressionally delegated authority may
13 pre-empt state regulation[,]”¹³ in this case, the Commission is not preempted by the FCC for two
14 reasons. First, LocalDial’s service is not a VoIP service, but, instead is a traditional
15 “telecommunications service” as that term is defined by the Telecommunications Act of 1996
16 (the “Act”). See, 47 U.S.C. § 153(46) (defining telecommunications service). Second, even if
17 LocalDial’s service is accurately termed a VoIP service, it would be a “phone-to-phone” IP
18 telephony service. The FCC has not preempted state commissions from addressing the
19 regulatory issues associated with “phone-to-phone” IP telephony.

20

¹² As set forth earlier, the Companies’ position is that this issue is not before the Commission since it was not a question referred by the Federal District Court.

¹³ Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 369, 106 S.Ct. 1890, 1989 (1986).

1 **a. LocalDial’s Service is a “Telecommunications Service,” not an “Information**
2 **Service” under the Act:**
3

4 37. In 47 U.S.C. § 153(46), Congress defined a “telecommunications service” as “the
5 offering of telecommunications for a fee directly to the public, or to such classes of users as to be
6 effectively available directly to the public, regardless of the facilities used.” There is no dispute
7 that LocalDial is charging a fee for its service. Likewise, there is no dispute that LocalDial is
8 offering its service directly to the public. The only question is whether LocalDial is engaging in
9 “telecommunications,” or whether it is, instead, offering an “information service.”

10 38. The term “telecommunications” is defined within the context of a telecommunications
11 service as “the transmission between or among points specified by the user, of information of the
12 user’s choosing, without change in the form or content of the information as sent and received.”

13 47 U.S.C. § 153(43). On the other hand, “information service” is defined as:

14
15 the offering of a capability for generating, acquiring, storing, transforming,
16 processing, retrieving, utilizing, or making available information via
17 telecommunications, and includes electronic publishing, but does not include
18 any use of any such capability for the management, control, or operation of a
19 telecommunications system or the management of a telecommunications
20 service.

21
22 47 U.S.C. § 153(20).
23

24 39. In relation to these definitions, the FCC has stated that “[t]he language and legislative
25 history of both the House and Senate bills [which became the Telecommunications Act of 1996]
26 indicate that the drafters of each bill regarded telecommunications services and information
27 services as mutually exclusive categories.”¹⁴ As a result, the first question the Commission must

¹⁴ Universal Service Report at ¶ 43.

1 analyze in order to decide whether its authority is preempted by the FCC in this matter is
2 whether the definition of “telecommunications service” or “information service” more accurately
3 defines LocalDial’s operations.

4 40. The following example of a LocalDial call from Tenino to Eatonville may be beneficial
5 to the Commission:

- 6 • A LocalDial customer in Tenino (the city) originates a call using Tenino’s (the telephone
7 company) facilities by placing a call using the customer’s telephone set – not a modem.
- 8 • By virtue of a LocalDial “access number (a VNXX number),” Tenino is tricked into
9 believing that it is transporting a local/EAS call because the access number carries the
10 NPA/NXX code of a CLEC in Olympia.
- 11 • Tenino hands the call to Qwest at the Tenino/Olympia exchange boundary.
- 12 • Like Tenino, Qwest believes the call to be a local call due to the NPA/NXX code that
13 belongs to the CLEC.
- 14 • However, LocalDial has entered into a contract to lease a PRI line from the CLEC and, after
15 the call is handed from Qwest to the CLEC with which LocalDial has contracted, the call is
16 transported on the leased PRI line to LocalDial’s facilities in Seattle.
- 17 • LocalDial receives the call in its facilities in Seattle and prompts its customer to initiate a
18 second call – this time to the customer’s desired communication destination in Eatonville.
- 19 • LocalDial (internally within its computers) “packetizes” the call, apparently for routing
20 purposes.
- 21 • Once the appropriate route is determined, the call is “depacketized” and leaves LocalDial’s
22 LAN as a voice call.

- 1 • LocalDial then transports this second call along a second PRI line leased by LocalDial from a
2 CLEC until it reaches Qwest’s facilities in Tacoma.¹⁵
- 3 • Qwest, which again sees the call as apparently originating from a CLEC NPA/NXX
4 associated with the Tacoma area and destined as an EAS call to Eatonville, transports the call
5 over the EAS trunk between Tacoma and Mashell Telecom.
- 6 • Mashell sees the call as an EAS call and terminates the call to the destination telephone
7 number in Eatonville.

8 41. There is no question that the call described above would be an intrastate toll call under
9 “traditional” circumstances. However, LocalDial contends that by transforming the call,
10 however briefly within its internal computer network, from a “traditional” telephone call into
11 packetized data and then back into a “traditional” telephone call, the “form” of the call has
12 changed in such a manner that the call no longer meets the definition of “telecommunications” as
13 defined by 47 U.S.C. § 153(43). As a result, LocalDial argues that since the call is not a
14 “telecommunications” call, LocalDial’s service cannot be considered a “telecommunications
15 service” as defined by 47 U.S.C. § 153(46). Instead, LocalDial asserts it is now an “information
16 service” as defined by 47 U.S.C. § 153(20).

17 42. However, simply alleging that one is providing an information service does not make it
18 so. Likewise, briefly transforming a call that no one would dispute is a “telecommunications”
19 call into packetized data and back again does not sufficiently alter the “form” of the call to make
20 it an “information service.”¹⁶ If this were the case, anyone, including the Rural Companies,

¹⁵ If the call is destined to an area where LocalDial lacks leased facilities, LocalDial routes the call to an IXC with which it has a contract. This is no more than the resale of toll that scores of interexchange carriers offer.

¹⁶ LocalDial misunderstands the “form” change that makes what would otherwise be a “telecommunications service” into an “information service” under the Act. It is a change in the form “from the user’s standpoint.” Universal Service Report, at ¶ 89. Because LocalDial never changes the form of the call from the user’s standpoint, the calls LocalDial transports cannot be considered “information service” type calls..

1 could briefly transform calls from traditional telephone calls into packetized data and back again
2 in order to offer an “information service.” No company would then be subject to the
3 Commission’s regulatory control – or, for that matter, to the FCC’s regulatory control.

4 43. Even elementary principles of statutory construction defeat LocalDial’s proposition. If
5 LocalDial’s service is an “information service,” then every communication can be termed an
6 information service simply by briefly packetizing the message. If every communication were an
7 information service, there would be no meaning behind Congress’ definitions of
8 “telecommunications,” “telecommunications service” and “information service.” Congress
9 would have engaged in a meaningless act in providing these definitions, and the FCC would have
10 engaged in numerous “meaningless” acts in attempting to create rules and regulations based on
11 these “meaningless” definitions.

12 44. However, it is axiomatic that Congress is presumed to not have engaged in a meaningless
13 or useless act. See, Andrus v. Shell Oil Co., 46 U.S. 657, 673, 100 S.Ct. 1932, 64 L. Ed. 2d 593
14 (1980); United States v. Hecla Mining Co., 302 F.2d 204, 211 (9th Cir. 1962) (“We cannot
15 assume that Congress did a useless act.”). Thus, LocalDial’s argument results in a legal
16 conclusion at odds with Supreme Court precedent. LocalDial cannot be considered a VoIP
17 provider, and its service cannot be considered an “information service.” To find otherwise
18 would violate the plain terms of the Act, itself.

19

1 **b. The FCC Has Not Preempted the Commission from Regulating “Phone-to-**
2 **Phone” IP Telephony Issues:**

3 45. The FCC has not preempted the Commission from making its own determination
4 concerning the nature of phone-to-phone IP telephony.¹⁷ Indeed, the FCC has made an initial
5 determination that phone-to-phone IP telephony is a “telecommunications service” subject to
6 both state commission and FCC regulatory control in the same way that other forms of intrastate
7 and interstate telecommunications traffic is subject to state commission and FCC regulatory
8 control.

9 46. In the Universal Service Report, although it stopped short of actually issuing a binding
10 ruling on the subject, the FCC tentatively concluded that phone-to-phone IP telephony “lacks the
11 characteristics that would render them ‘information services’ within the meaning of the statute,
12 and instead bear the characteristics of ‘telecommunications services.’” See, Universal Service
13 Report, ¶ 89. In this context, the FCC identified a set of conditions used to determine whether a
14 company’s offering constituted phone-to-phone IP telephony. It stated:

15 In using the term ‘phone-to-phone’ IP telephony, we tentatively intend to
16 refer to services in which the provider meets the following conditions: (1) it
17 holds itself out as providing voice telephony or facsimile transmission
18 service; (2) it does not require the customer to use CPE different from that
19 CPE necessary to place an ordinary touch-tone call (or facsimile transmission)
20 over the public switched telephone network; (3) it allows the customer to call
21 telephone numbers assigned in accordance with the North American
22 Numbering Plan, and associated international agreements; and (4) it transmits
23 customer information without net change in form or content.
24

25 Universal Service Report, ¶ 88.

¹⁷ There is a petition pending before the FCC requesting such preemption (at least in part), In the matter of AT&T Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket 02-361, Petition of AT& T (filed Oct. 18, 2002). To date, the FCC has not acted on the petition, meaning there is no preemption.

1 47. LocalDial meets the criteria established in steps one, two and three of the FCC’s test for
2 determining if an IP telephony provider is a “phone-to-phone” IP telephony provider. Clearly,
3 (1) LocalDial holds itself out as providing voice telephone service; (2) the customer uses his or
4 her normal, traditional CPE, not a modem; and (3) the LocalDial service not only allows the
5 customer to call telephone numbers assigned in accordance with the North American Numbering
6 Plan, it requires it. This leaves only step four of the FCC’s test.

7 48. It is important to understand that with respect to step four of the FCC’s test to determine
8 if a service is a “phone-to-phone” IP telephony service or some other type of VoIP service, the
9 FCC clarified that the “net change in form or content” refers to a net change “from the user’s
10 standpoint.” Universal Service Report, ¶ 89. There is no “net change in form or content” to a
11 LocalDial customer’s call from the customer’s standpoint. To the contrary, on LocalDial’s web
12 site it promotes the fact that its customers can use LocalDial’s service exactly as they would use
13 a traditional telephone service. See, generally, Exhibit 4, especially p. 1 and 13. As a result, if
14 LocalDial’s service is any kind of VoIP service, it must be a phone-to-phone IP telephony
15 service, which the FCC describes as a telecommunications service.

16 49. On this point, the Vonage Court’s¹⁸ analysis of the FCC’s Universal Service Report is
17 instructive. The Court quoted from various portions of the Universal Service Report when it
18 stated:

19 Third, it [the FCC] addressed the role of “an IP telephony service provider
20 (that) deploys a gateway within the network to enable phone-to-phone

¹⁸ Vonage v. Minn. PUC, Civil No. 03-5287 (D.C. Minn. Oct. 16, 2003). For numerous reasons not at issue in this case, the Companies disagree with the ultimate holding of the Minnesota Federal District Court in the Vonage case. However, in order to hold in Vonage’s favor, the Court had to first demonstrate that Vonage’s service is an “information service” under the Act. In so doing, the Court conclusively demonstrated that LocalDial’s service cannot be considered an “information service.” As a result, a copy of the Vonage case is attached for the Commission’s review as Exhibit 9 to Mr. Finnigan’s Declaration. This should not be seen as an admission on the Companies’ part that Vonage’s service is legitimately deemed an “information service.” Instead, it should only be seen for what it is – a clear demonstration that LocalDial’s service is not an “information service.”

1 service.” “(G)ateways” are “computers that transform the circuit-switched
2 voice signal into IP packets, and vice versa, and perform associated
3 (signaling), control, and address translation functions.” The FCC concluded
4 that such services possessed “the characteristics of ‘telecommunications
5 services.’” The FCC’s conclusion focused on gateway providers that provide
6 phone-to-phone IP telephony services. The FCC noted that from a “functional
7 standpoint,” the users were only receiving voice transmission, and not
8 information services. In other words, because a person using a POTS
9 telephone was on either end of the call, even if the call was routed over the
10 Internet, there was no form change sufficient to constitute information
11 services.
12

13 Vonage, at 14-15 (emphasis added; citations omitted).¹⁹

14 50. The New York Public Service Commission used a functional approach similar to that
15 spelled out in the Universal Service Report in holding that interexchange calling using IP
16 telephony is subject to access charges. The New York Commission looked at the way in which a
17 telephone call travels over the local networks and the interexchange carrier’s network from the
18 calling party to the called party. The New York Commission compared how an IP telephony call
19 is handled with how a more traditional call is handled without packet switching. Based on the
20 facts before it, the New York Commission found:

21 (1) that the carrier was holding itself out as providing voice telephony service just as
22 LocalDial does;

23 (2) that the transmission of the voice telephony by the carrier “does not provide
24 enhanced functionality to its [the carriers] customers, such as storing, processing or retrieving
25 information,” just as with LocalDial in this case;

¹⁹ Portions in double quote marks (“”) refer to quotations from the FCC’s Universal Service Report; portions in single quote marks (‘’) are references within quotations of the FCC’s Universal Service Report to the Act. Portions in parentheses were added by the Vonage Court to the FCC’s Universal Service Report.

1 (3) that the carriers' customers are not required to use CPE different from the CPE used
2 to place ordinary calls on the public switched telephone network, just as with LocalDial in this
3 case;

4 (4) that the carriers' customers placed calls to telephone numbers assigned in accordance
5 with the North American Numbering Plan, just as with LocalDial's service;

6 (5) that use of Internet protocol is only incidental to the carriers' own private network
7 and does not result in any network protocol conversions to the end user, just as with LocalDial's
8 service; and

9 (6) that the IP telephony "uses same circuit-switched access as obtained by IXCs and
10 imposes the same burdens on the local exchange as do IXCs." Again, the same is true for
11 LocalDial – the calls originate and terminate using the Rural Companies' switches, just as any
12 other IXC's traffic.

13 51. This is a straightforward, functional approach to the analysis of IP telephony. It
14 demonstrates that IP telephony is no different than any other interexchange calling method.

15 52. LocalDial's telecommunications service is not preempted from regulation by the FCC
16 any more than the Commission is preempted from regulating any IXC – even if LocalDial is
17 offering a phone-to-phone IP telephony service (which it is not). The Commission is, therefore,
18 free to determine whether, under Washington law, LocalDial is subject to the Companies'
19 Access Charges. As demonstrated above, it is.

20

1 **5. Use of the Internet to Transport Calls between Portland and Seattle Does Not**
2 **Change the Basic Character of LocalDial's Service.**
3

4 53. Sometime in October of 2003, LocalDial apparently began to replace its dedicated PRI
5 service between Portland and Seattle with an Internet transport system. The reason for
6 pinpointing this date is that LocalDial's counsel stated at the October prehearing conference that
7 LocalDial's service does not use the Internet. (TR p. 19, l. 13-19, prehearing conference
8 transcript) In his second deposition, Mr. Carden explained that in the fall of 2003 there was a
9 move to replace the dedicated facilities it had previously leased in what LocalDial calls its wide
10 area network or WAN with Internet transport. See, generally, Exhibit 3.

11 54. What this means is that calls that originate in the Longview or Vancouver areas are
12 transported by PRIs as voice calls first to LocalDial's facilities in Portland where a gateway
13 recognizes the call as bound for a destination in Washington, which then routes the call over
14 LocalDial's WAN to the gateway in Seattle, which, in turn, routes the call out as a voice call for
15 completion. See, generally, Exhibit 3. This change does not provide any solace for LocalDial.

16 55. What this change, in fact, demonstrates is the transparency of the arguments that phone-
17 to-phone IP telephony should be classified as an information service. Up to at least the end of
18 September, 2003, LocalDial transported those calls that originated in southwest Washington
19 from Portland and Seattle on dedicated leased facilities. LocalDial then chose to change the
20 dedicated leased facilities to an unidentified Internet transport mechanism. Does that make the
21 call any different for the customer? Of course not.

22 56. Further, LocalDial could have configured its original network so that it had PRIs directly
23 between Seattle and Longview and between Seattle and Vancouver. There was no need to go to
24 the Portland office at all. Does a choice of routes mean that a company can become an

1 information service provider through that choice and avoid regulation? Of course not.
2 LocalDial is just like MetroLink and U&I CAN. It sought a mechanism by which it could avoid
3 regulation and avoid the payment of the Companies' Access Charges. LocalDial is not an
4 information service provider; it is a telecommunications company providing telecommunications
5 services.

6 **CONCLUSION**

7 57. The Commission has the authority to decide this matter. LocalDial is a
8 telecommunications company, and it is subject to the applicable Access Charges in the
9 Companies' respective tariffs. There is no legal justification for not requiring LocalDial to pay
10 Access Charges to the Companies.

11 58. WHEREFORE, the Companies move the Commission for an order finding on the
12 Companies' favor on each of these issues. The Companies also move the Commission for an
13 order requiring LocalDial to register as a telecommunications company under RCW 80.36.350.
14

15 RESPECTFULLY SUBMITTED this 26th day of February, 2004.
16
17
18

19 _____
20 RICHARD A. FINNIGAN, WSBA #6443
21 Attorney for Washington Exchange Carrier
Association and its affected Members

CERTIFICATE OF SERVICE

UT-031472

I hereby certify that I have served the attached Complainants' Motion for Summary Disposition, Brief in Support of Complainants' Motion for Summary Disposition and Declaration of Richard A. Finnigan to the following via electronic mail (unless e-mail address not shown) and U.S. mail:

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Dated this 26th day of February, 2004.

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