

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

| | | |
|-----------------------------|---|----------------------------|
| WASHINGTON EXCHANGE |) | DOCKET NO. UT-031472 |
| CARRIER ASSOCIATION, ET AL. |) | |
| |) | |
| Complainants, |) | ORDER NO. 07 |
| |) | |
| v. |) | GRANTING MOTION TO SET |
| |) | APRIL 9, 2004, AS THE DATE |
| LOCALDIAL CORPORATION, |) | FOR RESPONDING TO |
| |) | COMPLAINANTS' MOTION |
| Respondent. |) | FOR SUMMARY |
| |) | DETERMINATION |

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 issues concern the regulatory status of certain services offered by LocalDial in Washington.

2 **PARTIES:** Richard A. Finnigan, attorney, represents the Washington Exchange Carrier Association (WECA). Arthur Butler and Lisa Rackner, Ater Wynne Hewitt Dodson & Skeritt, Seattle and Portland, represent LocalDial Corporation (LocalDial). Brooks E. Harlow, Miller Nash LLP, Seattle, Washington, represents the Broadband Communications Association of Washington. 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, represents the Commission's regulatory staff ("Commission Staff" or "Staff").

3 **MOTION TO SET APRIL 9, 2004, AS THE DATE FOR RESPONDING TO**
 COMPLAINANTS' MOTION FOR SUMMARY DISPOSITION: On March 10,
2004, Respondent LocalDial filed its Motion To Set April 9, 2004, As The Date For
Responding to Complainants' Motion for Summary Disposition. Complainants
filed their Motion for Summary Determination on February 27, 2004. Responses
would be due on March 18, 2004, under the 20-day default provision in WAC
480-07-380(2)(b). However, WAC 480-07-380(2)(b) also provides that the
Commission may establish by order a different date for a response to be filed.

4 LocalDial argues that establishing April 9, 2004, as the date for responses would
allow the company to file its response to Complainants' Motion for Summary
Determination after responsive testimony is filed on March 29, 2004, thereby
avoiding unnecessary duplication of work. LocalDial states that under the
default schedule established under WAC 480-07-380 and the procedural schedule
in this proceeding, the company would have to prepare simultaneously both
responsive testimony, and a full response to the issues and arguments raised by
Complainants' Motion. LocalDial argues, "Since much of the work would be
duplicative, the effect is essentially to shorten the time LocalDial has to file
response testimony under the existing case schedule."

5 LocalDial also argues that the company and its witness will be occupied in the
relevant time period preparing opening testimony to be filed in a similar
complaint proceeding pending before the Oregon Public Utility Commission
("OPUC"). LocalDial states that opening testimony in that case is due on April 5,
2004.

6 LocalDial argues that responses filed by April 9, 2004, will allow the Commission
sufficient time to resolve Complainants' Motion before hearings are scheduled to
begin on May 5, 2004. LocalDial states in summary, "extending the time of
LocalDial's response to Complainants' motion until April 9, 2004, would be more

efficient for the parties and more efficient for the Commission in determining whether there are disputed issues of material fact.”

7 **RESPONSE:** On March 12, 2004, Complainants’ filed their Response in Opposition to LocalDial’s Motion. Complainants’ argue that they “will suffer needless delay and inefficiency if LocalDial’s request is granted.” Complainants argue that if the Commission sets April 9, 2004, as the date for responses, it may be difficult for the Commission to enter an order disposing of Complainants’ Motion for Summary Determination sufficiently in advance of the evidentiary hearings, scheduled to begin on May 5, 2004, to permit parties to avoid expending “considerable resources preparing for the hearing.”

8 Complainants argue that it would not burden LocalDial to argue the existence of material issues of fact based on LocalDial’s prefiled direct testimony and affidavits that should accompany the company’s response to Complainants’ Motion for Summary Determination. Complainants base this argument, in part, on the suggestion that “[a]ny reply testimony is likely to only elaborate on the points addressed in LocalDial’s initial testimony.”

9 Finally, Complainants argue that LocalDial’s obligations in the similar proceeding in Oregon impose no undue hardship on LocalDial because there is sufficient time for the company to prepare its testimony in that proceeding after March 18, 2004, and because it is likely that the testimony filed in Oregon will be similar to, and perhaps simpler than, the testimony already filed in Washington.

10 **COMMISSION DETERMINATION:** WAC 480-07-380(2)(a) provides:

A party may move for summary determination of one of more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Although prefiled testimony is not among the examples parenthetically listed, such testimony may be part of the basis of support for a motion for summary determination, either in its own right, or as offered via an essentially mirror-image affidavit. Complainants' Motion for Summary Determination in this proceeding exemplifies this point. We expect that LocalDial's reply testimony and any affidavit(s) it may offer in support of its response to Complainants' Motion will be quite similar.¹ Thus, LocalDial's argument concerning duplicative effort seems well taken.

11 We are also concerned, of course, that parties not needlessly expend resources preparing for an evidentiary hearing if, ultimately, it is determined that no such hearing is required to inform the Commission's decision. Given the relatively light volume of prefiled evidence submitted thus far (*e.g.*, LocalDial has sponsored testimony by only one witness), however, it does not appear that parties will need to expend significant resources to prepare for an evidentiary hearing. Moreover, considering the Commission's own schedule and the considerable volume of other business now before the Commission, it appears that the timing of a Commission decision on the pending Motion for Summary Determination will be little affected, if affected at all, by setting the date for responses as April 9, 2004, instead of March 18, 2004.

¹ We do not accept Complainants' speculation that "any reply testimony is likely to only elaborate on the points addressed in LocalDial's initial testimony." The purpose of the second round of testimony that is scheduled in this proceeding is to allow parties an opportunity to respond to facts asserted by opposing witnesses in the first round. The second round of testimony is not for the purpose of reiterating points made in the first round, or to present additional direct testimony that is not responsive to a matter asserted by another witness in the first round.

12 On balance, we find that LocalDial has established good cause for us to grant its request to establish that April 9, 2004, be set as the date for filing responses to Complainants' Motion for Summary Determination. We find further that this will not cause undue hardship for, or prejudice any other party. Accordingly, LocalDial's Motion should be granted.

ORDER

13 THE COMMISSION ORDERS That LocalDial's Motion To Set April 9, 2004, As The Date For Responding to Complainants' Motion for Summary Disposition is GRANTED.

14 THE COMMISSION ORDERS FURTHER That the procedural schedule in this proceeding is modified as reflected in Appendix A to this Order.

DATED at Olympia, Washington, and effective this 12th day of March, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the date of mailing of this statement, pursuant to WAC 480-07-430 and WAC 480-07-810. Absent such objection, this order will control further proceedings in this matter, subject to Commission review.

APPENDIX 1

**REVISED PROCESS AND
PROCEDURAL SCHEDULE
DOCKET NO. U-031472**

| EVENT | DATE |
|--|--------------------|
| Referral from Federal District Court filed with the Commission | September 15, 2003 |
| First Prehearing Conference | October 20, 2003 |
| Deadline for IP requests; deadline for timely petitions to intervene | November 3, 2003 |
| Objections to petitions to intervene | November 10, 2003 |
| Responses to objections | November 17, 2003 |
| Simultaneous Direct Testimony | February 27, 2004 |
| Simultaneous Response Testimony | March 29, 2004 |
| Responses to Complainants' Motion for Summary Determination | April 9, 2004 |
| Evidentiary Hearings | May 5-7, 2004 |
| Simultaneous Initial Briefs | June 14, 2004 |
| Simultaneous Reply Briefs | July 7, 2004 |