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3 **BEFORE THE WASHINGTON UTILITIES**
4 **AND TRANSPORTATION COMMISSION**

5 WASHINGTON EXCHANGE
6 CARRIER ASSOCIATION, et al.

7 Complainants,

8 v.

9 LOCALDIAL CORPORATION, an
10 Oregon corporation,

11 Respondent.
12

DOCKET NO. UT-031472

COMPLAINANTS' MOTION TO STRIKE
PORTIONS OF THE DIRECT TESTIMONY
OF WILLIAM PAGE MONTGOMERY

13
14 **I. RELIEF REQUESTED**

15 1. COME NOW Complainants Washington Exchange Carrier Association ("WECA"),
16 CenturyTel of Washington, Inc. ("CenturyTel"), Ellensburg Telephone Company ("Ellensburg"),
17 Hood Canal Telephone Company ("Hood Canal"), Inland Telephone Company ("Inland"), Kalama
18 Telephone Company ("Kalama"), Lewis River Telephone Company d/b/a TDS Telecom ("Lewis
19 River"), Mashell Telecom, Inc. ("Mashell"), McDaniel Telephone Company d/b/a TDS Telecom
20 ("McDaniel"), Tenino Telephone Company ("Tenino"), The Toledo Telephone Co., Inc.
21 ("Toledo"), and YCOM Networks, Inc. ("YCOM"), by and through their attorney of record,
22 Richard A. Finnigan, attorney at law, and file this Motion to Strike Portions of the Direct Testimony
23 of William Page Montgomery ("Motion") with the Washington Utilities and Transportation
24 Commission (the "Commission").

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26 COMPLAINANTS'
MOTION TO STRIKE- 1

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1 2. Pursuant to WAC 480-07-375(1)(d) and RCW 34.05.452, the Complainants seek to have the
2 Commission strike portions of the Direct Testimony of William Page Montgomery (“Montgomery
3 Testimony”) from the record in this proceeding. This Motion is made on the basis that the
4 Montgomery Testimony contains information that is not relevant or material to this proceeding.
5

6 **II. BASIS FOR MOTION AND ARGUMENT**

7 3. In his direct testimony, Mr. Montgomery discusses the “intrastate switched-access revenues”
8 owed to Complainants, as well as per-minute originating and terminating access rates. Mr.
9 Montgomery attempts to analyze the harm that Complainants have suffered as a result of
10 Respondent LocalDial Corporation’s (“LocalDial”) failure to pay access charges to Complainants.¹

11 4. Pursuant to WAC 480-07-375(1)(d), a party may bring a motion to strike evidence presented
12 before the Commission. The Commission’s rules reference that evidence is to be received in
13 accordance with RCW 34.05.452.² The pertinent language in RCW 34.04.452(1) is as follows:
14 “The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.”

15 5. Additionally, RCW 34.05.452(2) directs the presiding officer to refer to the Washington
16 Rules of Evidence as guidelines, so long as the rules are not inconsistent with the statutory
17 requirements of RCW 34.05.452. Rule 402 of the Washington Rules of Evidence provides:

18 All relevant evidence is admissible, except as limited by constitutional
19 requirements or as otherwise provided by statute, by these rules, or by other rules
20 or regulations applicable in the courts of this state. Evidence which is not
relevant is not admissible.

21 In turn, Rule 401 defines “relevant evidence” as:
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23

24 ¹ Montgomery Testimony at p. 6, l. 9-10; p. 7, l. 5 - p. 9, l. 13; p. 10, l. 11-15; p. 18, l. 3 – p. 21, l. 4; p. 44, l. 1 – p. 48,
l. 17.

25 ² See, WAC 480-07-470(5).

1 evidence having any tendency to make the existence of any fact that is of consequence to the
2 determination of the action more probable or less probable than it would be without
evidence.

3 See, e.g., State v. Sargent, 40 Wn. App. 340, 348, 698 P.2d 598 (1985) (Evidence is not relevant
4 unless (1) it has a tendency to prove or disprove a fact, and (2) that fact is of consequence),
5 modified on other grounds, 49 Wn. App. 64, 741 P.2d 1017 (1987).

6
7 6. Under the legal standards outlined in WAC 480-07-470(5), RCW 34.05.452 and the
8 Washington Rules of Evidence, the direct testimony of Mr. Montgomery – as it relates to access
9 charges and the harm suffered by the Complainants – is not relevant to this proceeding.

10 7. As stated in the Commission’s Order No. 01 in this docket, there are only two issues before
11 the Commission:

- 12 1. Is LocalDial’s service that is challenged by WECA telecommunications service offered to
13 the public in Washington for compensation within the meaning of chapter 80 RCW?
- 14 2. Is LocalDial’s service that is challenged by WECA a form of intrastate long distance
15 telecommunications service that subjects LocalDial to the obligation to pay access charges
payable to originating and terminating local exchange carriers under those carriers’ tariffs?

16 These are the issues referred to the Commission by the United States District Court.³

17 8. In addressing these issues, it is not necessary for the Commission to consider Complainants’
18 per-minute access charge rates or the total amount of access charges that LocalDial owes to the
19 Complainants. The Commission can render a decision on the two questions referred by the District
20 Court without delving into the testimony concerning access charges contained in the Montgomery
21 Testimony. On this basis alone, the Montgomery Testimony’s passages concerning the level of
22 _____
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24 ³ WECA, et al. v. LocalDial, No. C03-5012RBL (W.D. Wash. Sept 4, 2003) (stay order and order of referral to WUTC).

1 access charges and analysis is irrelevant under the applicable evidentiary standards: it is not a fact
2 that is of consequence to the determination of the matter at issue.

3 9. Further, the level of access charges is not germane to whether LocalDial's service is subject
4 to access service tariffs. The services offered by LocalDial either are or are not subject to those
5 tariffs. The rates contained within those tariffs are not before the Commission in this proceeding.

6 LocalDial itself recognizes that much of this testimony is not relevant. LocalDial states at p. 20, l.
7 1-2 of the Montgomery Testimony as follows: "WECA members' switched-access tariffs are not at
8 issue in this proceeding."

9
10 10. In addition, the discussion in the Montgomery Testimony of stimulation factors and how
11 that may or may not mean the actual damages suffered by the Complainants are higher or lower is
12 not a relevant consideration for any public policy argument such as forbearance. Even assuming
13 that a forbearance argument is relevant for purposes of this Motion, Mr. Montgomery's testimony
14 concerning the stimulation of traffic caused by LocalDial's flat rate pricing has nothing to do with
15 any sort of policy issue. Nor does the particular level of rates have anything to do with any policy
16 issues. Either this is a "nascent technology" which deserves protection (assuming the Commission
17 has authority to take such a step, which it does not) or not.

18
19 11. Finally, in referring this matter to the Commission, the United States District Court
20 specifically retained jurisdiction over the issue of monetary damages on the issue of damages.
21 Some of the testimony concerning access charges referenced in the Montgomery Testimony may be
22 relevant on this issue.⁴ Aside from the sole purpose of determining damages at such time this
23

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25 ⁴ WECA, et al. v. LocalDial, No. C03-5012RBL (W.D. Wash. Sept 4, 2003) (stay order and order of referral to WUTC).

1 matter is referred back to the District Court, the access charge arguments and analysis in the
2 Montgomery Testimony have no relevance in or material consequence to this proceeding and
3 should not be considered as evidence.
4

5 **III. CONCLUSION**

6 12. WHEREFORE, pursuant to WAC 480-07-375(1)(d) and RCW 34.05.452, Complainants
7 move this Commission for an Order to Strike Portions of the Direct Testimony of William Page
8 Montgomery, including page 6, lines 9-10, page 7, line 5 through page 9, line 13; page 10, lines 11-
9 15; page 18, line 3 through page 21, lines 1 through 4; page 44, line 1 through page 48, line 17.
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11 RESPECTFULLY SUBMITTED this 22nd day of March, 2004.
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