

March 29, 2004

**VIA E-MAIL & HAND DELIVERY**

Carol J. Washburn  
Executive Secretary  
Washington Utilities and  
Transportation Commission  
1300 S. Evergreen Park Drive S.W.  
Olympia, WA 98504-7250

Re: WECA, et al. v. LocalDial  
WUTC Docket No. UT-031472  
LocalDial's Response to Complainants' Motion to Strike Portions of  
the Direct Testimony of William Page Montgomery

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket is an electronic copy of LocalDial's Response to Complainants' Motion to Strike Portions of the Direct Testimony of William Page Montgomery. Judge Moss has granted LocalDial an extension of time in which to deliver the original and 16 copies to your office. These documents will be delivered to you by noon tomorrow, March 30, 2004. Copies of this document have also been sent to the parties on the attached Certificate of Service via the method(s) indicated therein.

If you have any questions, please feel free to contact me.

Sincerely,

ATER WYNNE LLP



Arthur A. Butler

Enclosure

243250\_1

cc: Parties of Record

## CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of March, 2004, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn	<input type="checkbox"/>	Hand Delivered
Executive Secretary	<input type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Washington Utilities and Transportation Commission	<input checked="" type="checkbox"/>	Overnight Mail (UPS)
1300 S Evergreen Park Drive SW	<input type="checkbox"/>	Facsimile (360) 586-1150
Olympia, WA 98504-7250	<input checked="" type="checkbox"/>	Email (records@wutc.wa.gov)

I hereby certify that I have this 29<sup>th</sup> day of March, 2004, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

***On Behalf Of Qwest:***

Lisa A. Anderl	<input type="checkbox"/>	Hand Delivered
Qwest Corporation	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
1600 7th Avenue, Room 3206	<input type="checkbox"/>	Overnight Mail (UPS)
Seattle WA 98191	<input type="checkbox"/>	Facsimile (206) 343-4040
<i>Confidentiality Status: Public</i>	<input checked="" type="checkbox"/>	Email (lisa.anderl@qwest.com)

***On Behalf Of Verizon:***

Charles H. Carrathers III	<input type="checkbox"/>	Hand Delivered
Verizon Northwest Inc.	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
600 Hidden Ridge	<input type="checkbox"/>	Overnight Mail (UPS)
MC: HQE02H20	<input type="checkbox"/>	Facsimile (972) 718-0936
PO Box 152092	<input checked="" type="checkbox"/>	Email (chuck.carrathers@verizon.com)
Irving TX 75015-2092		
<i>Confidentiality Status: Public</i>		

***On Behalf Of Public Counsel:***

Robert W. Cromwell Jr.	<input type="checkbox"/>	Hand Delivered
Attorney General of Washington	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Public Counsel Section	<input type="checkbox"/>	Overnight Mail (UPS)
900 Fourth Avenue, Suite 2000, TB-14	<input type="checkbox"/>	Facsimile (206) 389-2058
Seattle WA 98164-1012	<input checked="" type="checkbox"/>	Email (RobertC1@atg.wa.gov)
<i>Confidentiality Status: Confidential</i>		

**On Behalf Of ICG Communications, Net2Phone & Vonage:**

Mr. Ronald W. Del Sesto Jr.  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street NW, Suite 300  
Washington DC 20007-5116

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (202) 424-7643  
 Email (rwdelsesto@swidlaw.com)

**On Behalf Of Net2Phone & Vonage:**

Tamar E. Finn  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street NW, Suite 300  
Washington DC 20007-5116

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (202) 424-7643  
 Email

**On Behalf Of WECA:**

Richard A. Finnigan  
Law Office of Richard A. Finnigan  
2405 Evergreen Park Drive SW, Suite B-1  
Olympia WA 98502

*Confidentiality Status: Confidential*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (360) 753-6862  
 Email (rickfinn@ywave.com)

**On Behalf Of Covad Communications:**

Karen S. Frame  
Covad Communications Company  
7901 Lowry Boulevard  
Denver CO 80230-6906

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (720) 208-3350  
 Email (kframe@covad.com)

**On Behalf Of AT&T:**

Letty S. Friesen  
AT&T Communications of the Pacific  
Northwest  
Law Department  
1875 Lawrence Street, Suite 1500  
Denver CO 80202

*Confidentiality Status: Confidential*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (303) 298-6301  
 Email (lfriesen@lga.att.com)

**On Behalf Of BCAW:**

Brooks E. Harlow  
Miller Nash LLP  
601 Union Street, Suite 4400  
Seattle WA 98101-1367

*Confidentiality Status: Confidential*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (206) 622-7485  
 Email (brooks.harlow@millernash.com)

**On Behalf Of Sprint:**

William E. Hendricks III  
Sprint Communications Co. LP  
902 Wasco Street A0412  
Hood River OR 97031-3105

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (541) 387-9753  
 Email (tre.e.hendricks.iii@mail.sprint.com)

**On Behalf Of Javelin:**

Andrew O. Isar  
Miller Isar, Inc.  
7901 Skansie Avenue, Suite 240  
Gig Harbor WA 98335

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (253) 851-6474  
 Email (aisar@millerisar.com)

**On Behalf Of Integra:**

Karen J. Johnson  
Integra Telecom of Washington, Inc.  
19545 NW Von Neumann Drive, Suite 200  
Beaverton OR 97006-6906

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (503) 748-1212  
 Email (karen.johnson@integratelecom.com)

**On Behalf Of Focal & XO:**

Gregory J. Kopta  
Davis Wright Tremaine LLP  
1501 4th Avenue, Suite 2600  
Seattle WA 98101-1688

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (206) 628-7699  
 Email (gregkopta@dwt.com)

**On Behalf Of 8x8, Inc.:**

Christy C. Kunin  
Gray Cary Ware & Freidenrich LLP  
1625 Massachusetts Avenue NW, Suite 300  
Washington DC 20036-2247

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (202) 238-7701  
 Email (ckunin@graycary.com)

**On Behalf Of Commission:**

Hon. Dennis J. Moss ALJ  
Washington Utilities and Transportation  
Commission  
PO Box 47250  
Olympia WA 98504-7250

*Confidentiality Status: Confidential*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (360) 664-2654  
 Email (dennism@wutc.wa.gov)

**On Behalf Of Verizon:**

Timothy J. O'Connell  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle WA 98101-3197

*Confidentiality Status: Public*

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail (UPS)
- Facsimile (206) 386-7500
- Email (tjocconnell@stoel.com)

**On Behalf Of Level 3:**

Mr. Rogelio E. Pena  
Peña & Associates, LLC  
1375 Walnut Street  
Suite 220  
Boulder CO 80302

*Confidentiality Status: Confidential*

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail (UPS)
- Facsimile (303) 415-0433
- Email (repena@boulderattys.com)

**On Behalf Of LocalDial:**

Lisa F. Rackner  
Ater Wynne LLP  
222 SW Columbia, Suite 1800  
Portland OR 97201-6618

*Confidentiality Status: Confidential*

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail (UPS)
- Facsimile (503) 226-0079
- Email (lfr@aterwynne.com)

**On Behalf Of Vonage:**

John Rego  
Vonage Holdings Corp.  
2147 Route 27  
Edison NJ 08817

*Confidentiality Status: Public*

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail (UPS)
- Facsimile
- Email

**On Behalf Of Voice on the Net Coalition:**

Glenn S. Richards  
Shaw Pittman  
2300 N Street NW  
Washington DC 20037-1128

*Confidentiality Status: Public*

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail (UPS)
- Facsimile (202) 663-8007
- Email (glenn.richards@shawpittman.com)

**On Behalf Of 8x8, Inc.:**

Michael A. Schneider  
Gray Cary Ware & Freidenrich LLP  
701 Fifth Avenue, Suite 7000  
Seattle WA 98104-7044

*Confidentiality Status: Public*

- Hand Delivered
- U.S. Mail (first-class, postage prepaid)
- Overnight Mail (UPS)
- Facsimile (206) 839-4801
- Email (mschneider@graycary.com)

**On Behalf Of Javelin:**

John Schnelz  
Javelin, Inc.  
2504 West Sammamish Pkwy SE  
Bellevue WA 98008

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (425) 696-0050  
 Email

**On Behalf Of Net2Phone:**

Elana Shapochnikov  
Net2Phone  
Legal Department  
520 Broad Street, 8th Floor  
Newark NJ 07102

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (973) 439-3100  
 Email (eshapo@net2phone.com)

**On Behalf Of Worldcom, Inc. (MCI):**

Michel L. Singer Nelson  
WorldCom, Inc.  
707 17th Street, Suite 4200  
Denver CO 80202-3432

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (303) 390-6333  
 Email (michel.singer\_nelson@mci.com)

**On Behalf Of Net2Phone & Vonage:**

Michael Sloan  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street NW, Suite 300  
Washington DC 20007-5116

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (202) 424-7643  
 Email (mcsloan@swidlaw.com)

**On Behalf Of Pac-West Telecomm, Inc.:**

Ethan Sprague  
Pac-West Telecomm, Inc.  
1776 W March Lane, Suite 250  
Stockton CA 95207

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (209) 601-6528  
 Email (esprague@pacwest.com)

**On Behalf Of Staff:**

Jonathan Thompson  
Attorney General of Washington  
Utilities & Transportation Division  
1400 S Evergreen Park Drive SW  
PO Box 40128  
Olympia WA 98504-0128

*Confidentiality Status: Confidential*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (360) 586-5522  
 Email (jthomps@wutc.wa.gov)

***On Behalf Of AT&T:***

Mary B. Tribby  
AT&T Communications  
1875 Lawrence Street, Suite 1575  
Denver CO 80202

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (303) 298-6301  
 Email (mbtribby@att.com)

***On Behalf Of Net2Phone & Vonage:***

William B. Wilhelm Jr.  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street NW, Suite 300  
Washington DC 20007-5116

*Confidentiality Status: Public*

Hand Delivered  
 U.S. Mail (first-class, postage prepaid)  
 Overnight Mail (UPS)  
 Facsimile (202) 424-7643  
 Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of March, 2004, at Seattle, Washington.

  
\_\_\_\_\_

BEFORE THE  
WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

WASHINGTON EXCHANGE CARRIERS  
ASSOCIATION, *et al.*,

Complainants,

v.

LOCALDIAL CORPORATION, an Oregon  
corporation,

Respondent.

Docket No. UT-031472

**LOCALDIAL'S RESPONSE TO  
COMPLAINANTS' MOTION TO  
STRIKE PORTIONS OF THE DIRECT  
TESTIMONY OF WILLIAM PAGE  
MONTGOMERY**

**I. INTRODUCTION**

1. LocalDial Corporation ("LocalDial"), by and through its attorneys of record, Ater Wynne LLP, hereby submits its response to Complainants' Washington Exchange Carriers Association ("WECA") Motion to Strike Portions of the Direct Testimony of William Page Montgomery. WECA Complainants argue that portions of the testimony filed by Mr. Montgomery regarding switched access fees and how access fees impact LocalDial are not relevant and should be stricken. LocalDial respectfully requests that the Washington Utilities and Transportation Commission (the "Commission") deny this motion, and consider the Direct Testimony of Mr. Montgomery as filed.



## II. ARGUMENT

### A. WECA Complainants' Motion to Strike.

2. WECA Complainants filed a Motion to Strike Portions of Direct Testimony of William Page Montgomery. In summary, WECA seeks to limit testimony before the Commission to matters narrowly tailored to fit within its theory of its case. According to WECA's motion, no testimony may be offered regarding the actual amount or level of access charges levied by each of the Complainants. As stated in their motion: "...it is not necessary for the Commission to consider Complainants per-minute access charge rates or the total amount of access charges that LocalDial owes to the Complainants." *See* Complainants' Motion, Page 3, ¶ 8. WECA further asserts that "...the level of access charges is not germane to whether LocalDial's service is subject to access service tariffs. The services offered by LocalDial either are or are not subject to those tariffs." *See* Complainants' Motion, Page 4, ¶ 9.

3. Even more broadly, WECA asserts that because the Commission cannot enter an order assessing damages, any discussion of the amount of access fees it is owed is not "relevant" to the issues before the Commission. According to WECA any reference by LocalDial to the level of access charges, or discussion of the stimulative effect of lower costs are not relevant to any of the issues before the Commission. For reasons discussed below, LocalDial urges the Commission to deny the Motion to Strike.

### B. Legal Standard For Relevant Testimony

4. Evidence Rule 402 requires that all relevant evidence be admissible. Relevant evidence is:

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

ER 401. Further, Washington courts have held that: “Evidence tending to establish a party’s theory, or to qualify or disprove the testimony of an adversary, is relevant evidence.” *Hayes v. Wieber Enterprises, Inc.*, 105 Wash.App. 611, 617, 20 P.3d 496 (2001), citing *Lamborn v. Phillips Pacific Chemical Company*, 89 Wn.2d 701, 575 P.2d 215 (1978). Thus, to the extent that Mr. Montgomery’s testimony supports a theory of LocalDial’s, or responds or refutes WECA’s theories, his testimony is both relevant and admissible. Mr. Montgomery’s testimony clearly does both. Mr. Montgomery’s testimony regarding access fees is offered to support LocalDial’s claims regarding the policy impacts of imposing such fees upon an enhanced (information) service provider. The testimony is also offered to demonstrate that the pricing of LocalDial’s enhanced services have caused a stimulative effect on the demand of WECA’s customers. In addition, Mr. Montgomery’s testimony regarding access fees also seeks to refute claims made by WECA regarding the harm its members allege as the result of LocalDial not paying intrastate switched access charges.

5. WECA in effect asserts that the issues before the Commission solely relate to its theory of the case, that those issues are narrow in scope, and that the Commission should only focus upon the issues as WECA views them. Unfortunately for WECA, the Commission’s authority in general, and the referral from the United States District Court in this matter are much broader in scope and purview than WECA desires. Granting WECA’s motion to strike portions of Mr. Montgomery’s testimony would deny the Commission important information relevant to its consideration of whether the Voice over Internet Protocol (“VoIP”) information services provided by LocalDial are subject to the Commission’s jurisdiction, and, if so, what intercarrier compensation, if any, LocalDial should pay. Without the testimony which WECA seeks to have

stricken, LocalDial would be unable to fully refute the claims made by WECA members. Accordingly, the Commission should deny WECA's Motion to Strike.

**C. WECA's Complaint Raises Policy Questions Regarding the Application of Switched Access Charges to LocalDial's Services.**

6. WECA seeks to strike testimony offered by Mr. Montgomery that discusses what charges should be imposed on LocalDial if the Commission were to decide that LocalDial must pay intercarrier compensation to WECA members, and the inappropriateness of imposing WECA's switched access charges. Specifically, WECA seeks to strike testimony on page 10, lines 11-15; and page 18, lines 3-11. The issue of intercarrier compensation is relevant to the issues before the Commission. If the Commission were to decide that LocalDial should pay intercarrier compensation to WECA members, it is not at all clear what charges should apply. LocalDial contends that the WECA switched access tariffs do not apply to LocalDial's service and are inappropriate for those services in a number of respects. Further, WECA's narrow view of its Complaint before the Commission seeks to strip away any consideration of the broader policy implications of its claim that switched access fees should be imposed on an information service provided by an innovative and nascent technology. This Complaint is before the Commission on a referral from the United States District Court for the Western District of Washington. As part of the referral, the District Court specifically sought the Commission's input regarding the policy decisions implicated by WECA's complaint against LocalDial.

7. In analyzing whether to refer the matter to the Commission, the District Court determined that the Commission had "concurrent jurisdiction." "Concurrent jurisdiction" has a three-factor test: (1) whether the agency has authority to resolve the issues, (2) whether the agency has specialized competence regarding the controversy, and (3) whether the agency has

authority over a specialized regulatory scheme that the Court's action would conflict with. *See Stay of Order and Order of Referral to WUTC*, C03-5012, United States District Court for the Western District of Washington. The Court stated:

With respect to the determinative second factor, the WUTC may have specialized competence to hear and understand the matter from a technical standpoint. However, any technical complexity is not the basis for the court's decision to refer the matter to the WUTC. *Instead, it is that Agency's unique ability to evaluate and implement policy considerations as they relate to the regulation of the VoIP technology that weighs, decisively, in favor of reference to it.* The Court agrees that the issue is the applicability of the tariffs, not whether they have been violated. It further notes that the threshold question of whether LocalDial is conducting business subject to the WUTC's regulatory authority is a question of fact to be determined by the WUTC. *See RCW 80.04.015.* Most importantly, the issue is whether carriers using VoIP technology *should be regulated*, even if the WUTC has the statutory and regulatory authority to do so. *These are ultimately policy questions that the WUTC is uniquely qualified to address.* (emphasis added)

8. As the District Court succinctly stated, policy issues regarding VoIP technology are an important part of the case before the Commission. This case involves at least the following issues: Is LocalDial providing an information service or a telecommunications service, as those terms are defined under federal law? If LocalDial is providing an information service, does this Commission have jurisdiction to regulate those information services given the FCC's acknowledged preeminent authority over information services? Should the term "telecommunications" under Washington law be construed to include "information services" given the fact that the Commission does not purport to regulate any other enhanced or information service provider? If the Commission determines that it has jurisdiction, is not preempted, and should regulate LocalDial's information services, what intercarrier compensation, if any, should LocalDial be required to pay to WECA members? The answers to the latter three questions will have significant policy implications that this Commission should consider and has been asked to consider by the District Court. Should WECA's Motion to Strike be granted, the specific impact

of applying switched access charges to LocalDial's VoIP technology would not be fully briefed and considered by either of the parties to the Complaint, or the Commission itself.

**D. Mr. Montgomery's Testimony Supports LocalDial's Theory**

9. One of LocalDial's theories in this matter is that its technology, VoIP, is a new, and potentially revolutionary technology. It knits together network elements in a new, innovative way that has not previously been available to end users. Further, the technology has the potential to be disruptive of existing networks, including those owned and controlled by WECA members. It is this very technology, VoIP, that is currently the subject of a Notice of Proposed Rule Making before the Federal Communications Commission. *See IP-Enabled Services NPRM*. A different "flavor" of VoIP technology was also recently the subject of the FCC's *Pulver* decision. *See WC Docket No. 03-45, Memorandum Opinion And Order (FCC 04-27)*, February 19, 2004. In short, LocalDial's technology, and how it impacts end user customers, underlying network operators, CLECs and other companies along the way is a key issue before this Commission. The various ways such services may impact WECA and other parties is relevant to the issues before the Commission.

10. Mr. Montgomery's testimony discusses how the existing law on the regulatory treatment of information services and recent FCC activity regarding VoIP and other IP-Enhanced services. One of the issues he discusses is the applicability of access charges on VoIP and other information services. *See e.g. Montgomery Direct Testimony*, p. 20. Mr. Montgomery provides information regarding access charges, the amount that WECA claims is owed by LocalDial, the impact on LocalDial's services, and how the prices for VoIP services offer a stimulative effect for LocalDial's VoIP services. His testimony supports LocalDial's theory that its technology is new, innovative, and, as an information service, is not subject to, nor should be subject to regulation as

a telecommunication service. The impact of switched access charges on LocalDial is discussed by Mr. Montgomery on page 44, lines 1-10, which WECA seeks to strike. That testimony is directly relevant to the issues before this Commission. What those access charges are is not a secret, and how they interrelate with LocalDial's new service help provide the Commission with a full picture on how its decisions, on a policy basis, will impact both Complainants and Respondent.

**E. The Testimony of Mr. Montgomery Refutes Claims Raised by WECA**

11. The admissibility and relevancy of testimony must also be considered in light of claims and theories raised by opposing parties. Testimony that can "qualify or disprove the testimony of an adversary, is relevant evidence." *Hayes v. Wieber Enterprises, Inc.*, 105 Wash.App. 611, 617, 20 P.3d 496 (2001). WECA's own arguments in this matter provide an ample basis for this Commission to admit Mr. Montgomery's testimony regarding access fees.

12. WECA itself, while simultaneously seeking to strike references to switched access fees by LocalDial (Montgomery Direct, page 7, lines 5-16; page 44, lines 1-10), relies upon and refers to the level of those switched access fees and the amount LocalDial allegedly "owes" the Complainants in its own Motion for Summary Disposition. WECA argues as follows:

Second, the fact that there is a significant financial impact to LocalDial's refusal to pay the Companies in accordance with the Companies' tariffed Access Charges presents another basis for debunking LocalDial's argument that its technology is too new to be regulated. See, Confidential Exhibit 8 estimating the amount LocalDial owes to the Rural Companies. FN 7. This financial significance clearly cuts against LocalDial's "wait and let the technology develop" argument.

*See*, Complainants' Motion for Summary Disposition, Page 13, ¶ 29.

13. WECA's arguments here specifically cite and rely upon the amount of access charges allegedly owed by LocalDial to support its argument that the financial impact of LocalDial's service is too great. LocalDial in turn argues and explains that the supposed

“significant financial impact” claimed by WECA is overstated and fails to consider the stimulative effects of LocalDial’s newly created information service. In other words, the parties rely on information about the amount LocalDial allegedly owes to make very different arguments before the Commission. Neither party, WECA nor LocalDial, is claiming that the Commission has authority to assess damages. Both parties do however claim that the amount of switched access fees that WECA claims is owed by LocalDial and the levels of charges that LocalDial would have to pay if switched access charges are assessed against it are relevant. ER 401 and ER 402 fully provide for and accommodate the claims and testimony of both parties, and as such the Commission should deny WECA’s Motion to Strike.

14. In WECA’s Motion for Summary Disposition it also cites to Confidential Exhibit 8 attached to the Declaration of Richard A. Finnigan. WECA then states in Footnote 7 that the amounts provided in the exhibit are used to provide “a level of magnitude” of the access fees and charges. Clearly this exhibit, and WECA’s related argument is similar to LocalDial’s and each party should be similarly allowed to present testimony and evidence related to access fees and how they may relate to the policies implicated by the WECA Complaint.

15. WECA also seeks to strike testimony from Mr. Montgomery that retroactive liability for switched access charges would be unfair and inappropriate (Montgomery Direct, page 6, lines 9-10). Whether any application of access charges to LocalDial should be applied retroactively is fully within the scope of the referral from the District Court. It is LocalDial’s contention that it provides an information service, and WECA members’ switched access tariffs do not apply. Further, under both federal and state law ISPs are exempt from paying switched access charges; instead, ISPs are treated as end users and given the option of purchasing flat-rated business local exchange and other end user services. If the Commission were to adopt a new rule

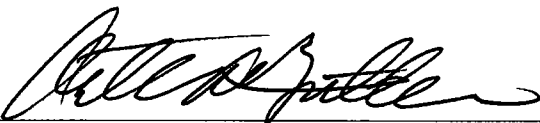
for ISPs, as it would have to do in order to subject LocalDial to paying any intercarrier compensation, it would be inappropriate and unfair to retroactively impose any such charges. This issue of retroactivity is clearly within the issues before the Commission, and Mr. Montgomery's testimony supports LocalDial's claim that retroactive application of switched access charges should not be required.

### III. CONCLUSION

16. For the reasons stated above, Complainants' Motion to Strike Portions of the Direct Testimony of William page Montgomery should be denied.

RESPECTFULLY SUBMITTED this 29th day of March, 2004.

ATER WYNNE LLP

By 

Arthur A. Butler, WSBA #04678  
601 Union Street, Suite 5450  
Seattle, WA 98101-2327  
Tel: (206) 623-4711  
Fax: (206) 467-8406  
Email: aab@aterwynne.com

Attorneys for LocalDial