

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON EXCHANGE CARRIER
ASSOCIATION, et al.,

Complainants,

v.

LOCALDIAL CORPORATION, an
Oregon Corporation,

Respondent.

DOCKET NO. UT-031472

COMMISSION STAFF'S
MOTION FOR SUMMARY DETERMINATION
AND MEMORANDUM IN SUPPORT

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1 Pursuant to WAC 480-07-380(2), the Staff of the Washington Utilities and Transportation Commission moves for summary determination in this case. This motion is based on the files and records in this case, including this motion and memorandum, the Complainants' motion for summary disposition and brief in support, Staff's pre-filed direct and response testimony and accompanying exhibits, already filed with the Commission, and the Declarations of Robert Williamson and Timothy W. Zawislak, certifying the truth and accuracy of Staff's pre-filed testimony and exhibits. Based on this record, there is no dispute of material fact, and the matter is ripe for summary determination.

I. INTRODUCTION

2 The Commission's Order No. 01 states two issues for the Commission's determination:

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

Staff hereby moves for the entry of an order making affirmative findings on both issues and requiring LocalDial Corporation to register as a telecommunications company. While Staff generally supports the Complainants' motion for

summary determination, Staff provides in this motion and memorandum its own analysis of the case and rationale for summary determination.

3 The Court’s referral cannot confer any authority on the Commission that it does not already have. Therefore, it is important for the Commission to consider the basis of its authority to enter findings on the issues it has identified for resolution.

4 The first issue is familiar and straightforward. Telecommunications companies are required by RCW 80.36.350 to “register with the commission before beginning operations in this state.” The Commission has authority under RCW 80.04.015 to determine whether “any person or corporation is conducting business subject to regulation under this title, or has performed or is performing any act requiring registration or approval of the commission without securing such registration or approval.” The first issue identified by the Commission fits squarely within this authority.

5 That statute further provides,

In the event the activities are found to be subject to the provisions of this title, the commission shall issue such orders as may be necessary to require all parties involved in the activities to comply with this title, and with respect to services found to be reasonably available from alternative sources, to issue orders to cease and desist from providing jurisdictional services pending full compliance.

This is the basis for Staff's request that the Commission not only find that LocalDial is a telecommunications company, but that it also issue an order requiring LocalDial to register in accordance with RCW 80.36.350. Because interexchange telecommunications services are reasonably available from other sources, it also would be appropriate for the Commission to order LocalDial to cease and desist from providing its intrastate telecommunications service until it registers with the Commission.

6 The second issue—whether LocalDial's service is subject to access charges—cannot be answered by the Commission as directly as the question of LocalDial's status as a telecommunications company. The Commission ordinarily is not in the position of interpreting the rights of a company it regulates as against its customers because it lacks authority to hear complaints by companies against their customers.¹ Where access charges are concerned, interexchange carriers are customers of local exchange carriers (although they also happen to be public service companies). Certainly, in a customer complaint against a public service company alleging overcharges or seeking reparations, the Commission is authorized to interpret whether the company has properly

¹The Title 80 complaint statute, RCW 80.04.110, provides for complaints "setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission."

applied its tariff. The Commission also has primary jurisdiction to determine whether a “rate, regulation, or practice” of a telecommunications company is unreasonably preferential or discriminatory.² The Commission has no authority, however, to fix a customer’s liability to a company or to order the customer to pay its debt to the company.³ The obligation of interexchange carriers to pay access charges is not a statutory obligation or an obligation that is imposed by any commission rule—it is an obligation imposed by local exchange companies’ access tariffs.⁴

7 What the Commission can do, however, in response to the Court’s referral is issue a declaratory ruling as to whether LocalDial is an “interexchange carrier” within the meaning of the Commission’s orders and rule regarding intrastate access charges. Through a series of orders, and more recently, a rulemaking, the Commission has authorized a system of access charges that contemplates local

²RCW 80.36.170, 180.

³See *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1417-18 (D.C. Cir. 1995) (FCC lacked authority under its statutory scheme—derived from Interstate Commerce Commission model—to adjudicate local carrier rights against IXCs who were customers under access charge tariff in an overcharge dispute).

⁴Staff departs from the Complainants where they assert, based on language from *Re U.S. MetroLink Corp.*, 103 P.U.R.4th 194, 1989 WL 418657, Wash.U.T.C., May 01, 1989, (NO. U-88-2370-J) at 2, that RCW 80.36.160 requires the payment of access charges or the system of access charges that is in place. Staff does not believe that is the case. While the statute authorizes the commission to “prescribe the routing of toll messages and conversations over such connections and the practices and regulations to be followed with respect to such routing” it does not, itself, require interexchange carriers to pay access charges to local exchange carriers. See *Hardy v. Claircom Communications Group, Inc.*, 937 P.2d 1128, 1131 (Wash. App. 1997).

exchange carriers collecting access charges from “interexchange carriers” for the origination and termination of intrastate toll traffic on the local exchange carrier’s networks. The local exchange companies implemented this system by filing access tariffs.⁵

8 In Cause U-85-23, when it authorized the filing of intrastate access tariffs, the Commission found that “To be applied on a nondiscriminatory basis, access charges must be applied to all interexchange carriers uniformly.”⁶ The importance of this finding is that, if local exchange carriers’ tariffs were written in such a way that they did not apply uniformly to all carriers that meet the Commission’s definition of interexchange carrier, those tariffs would not be in compliance with the Commission’s order in U-85-23 (as modified) and would perhaps be in violation of RCW 80.36.170 and 180 (prohibiting unreasonable preference and rate discrimination). In any case, the Commission’s determination of what its access charge orders mean by “interexchange carrier” should assist the Court in determining what the term means in the

⁵If challenged to the Commission, these tariffs might or might not be found in compliance with the Commission’s statutes, orders and rules. Under the filed rate doctrine, however, they would likely be deemed per se reasonable before a court.

⁶*MODIFICATION of certain provisions of plan to replace existing settlements contracts with a system based on the use of tariffed access charges applied in a nondiscriminatory manner to all intrastate toll carriers*, 18th Supp. Order, WUTC Cause No. U-85-23, page 21, Finding of Fact 11 (1986)(available at 80 P.U.R.4th 80; 1986 WL 215085 (Wash.U.T.C.)(hereinafter “Cause No. U-85-23”).

Complainants' tariffs.

9 Every agency has authority under RCW 34.05.240 to enter declaratory orders "with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency." In this matter, it should meet the District Court's request for the Commission to issue a determination that LocalDial is an interexchange carrier as contemplated in the Commission's orders authorizing the system of intrastate access charges.

10 Certain issues should not be considered issues in this proceeding. Whether or to what degree LocalDial is liable for past or future access charges under the specific language of each of the Complainants' tariffs is an issue for the Court. Although it is potentially an issue for the Commission, whether the Complainant's access charges are too high is not before the Commission in this case. Similarly, which commission regulations should apply to LocalDial is a matter for a later proceeding under RCW 80.36.330, in the event LocalDial registers and seeks competitive classification.

11 The remainder of this memorandum sets forth Staff's argument that LocalDial's service meets the Washington statutory definition of

“telecommunications”⁷ and that LocalDial Corporation meets the definition of a “telecommunications company.”⁸ Staff argues that federal law does not preempt the Commission’s regulation of LocalDial because LocalDial does not meet the federal definition of an information service provider.⁹ Because it provides a service that is functionally identical to the inter-local-calling area service that is provided by companies that pay access charges, it would be unduly preferential and inconsistent with the Commission’s order in U-85-23 for local exchange carriers not to charge LocalDial the same access fees it charges other interexchange carriers. Finally, Staff argues that, because LocalDial is not an information service provider, it should not be allowed to purchase its access to the public switched telephone network as an end-user of local telecommunications services, but should instead be subject to intrastate access charges for the intrastate interexchange traffic it originates and terminates on local exchange companies’ networks.

⁷ RCW 80.04.010.

⁸ *Id.*

⁹ Preemption is an issue in this case because the Commission should decline to assert jurisdiction over telecommunications that are under the exclusive jurisdiction of the Federal Communications Commission.

II. FACTS

A. The intercarrier compensation system

12 The telecommunications industry is extremely interdependent and the need for interconnection is essential to the ability to provide a useful service to customers. For customers on one carrier's network to reach customers on another carrier's network, interconnection is required. Carriers expect compensation for the other carriers' use of their facilities.¹⁰

13 Since the divestiture of the Bell System in 1984 and the advent of long distance (or "toll") service competition, long distance companies ("interexchange carriers" or "LECs") have paid local exchange companies (or "LECs"), including the Complainants, per minute access charges (or "exchange access") for originating and terminating toll calls that are carried over the long distance companies' networks.¹¹ The Commission authorized LECs operating in Washington to file tariffs establishing the intrastate access charge compensation mechanism for interexchange traffic.¹² In so doing, the Commission found that: "To be applied on a nondiscriminatory basis, access charges must be applied to

¹⁰ Zawislak Response, Ex T- ____ (TWZ-RT1) at 2, 3 (Zawislak Response).

¹¹ *Id.* at 3.

¹² *Id.* at 6.

all interexchange carriers uniformly.”¹³

14 In addition to providing LECs with compensation for long distance carrier’s use of their networks, access charges have been used as a way to make sure that local rates in Washington remain affordable and that rates in rural Washington remain comparable to those in urban Washington despite higher per-customer costs in rural areas.¹⁴ In U-85-23, the Commission authorized access charges and the traditional universal service fund through adjudicative orders that recognized the importance of maintaining and protecting universal service in the State of Washington. The Commission updated and memorialized this policy by adopting WAC 480-120-540(3), which authorizes local exchange companies to recover costs for support of universal access to basic telecommunications service through additional, explicit universal service rate elements applied to terminating access service.¹⁵ The objective of this rule was to accommodate the new competition unleashed by the Telecommunications Act of 1996 while continuing to protect universal service to the extent authorized.¹⁶

15 The access charge mechanism, although not perfect, has enabled universal

¹³18th Supp. Order, Cause No. U-85-23, Finding of Fact 11.

¹⁴Zawislak Response at 6, 7.

¹⁵ WAC 480-120-540(3).

¹⁶Zawislak Response at 5, n. 8.

service to be realized (and flourish) in the State of Washington for the last 20 years.¹⁷ Docket Ut-971140 also updated portions of Cause U-85-23.¹⁸

16 The other primary form of inter-carrier compensation, besides the access charges that apply between IXCs and LECs, is the “reciprocal compensation” that applies between LECs. Local interconnection agreements govern reciprocal compensation for the transport and termination of local traffic exchanged between LECs. These agreements may include explicit interconnection agreements on file with the Commission as well as implicit non-filed arrangements (such as bill and keep) that the rural incumbent complainants are accustomed to with the non-rural local exchange companies such as Qwest.¹⁹

17 What constitutes a “local” call as opposed to a “long distance” call is defined in each local exchange telecommunications company’s tariff through the provision of local calling areas or “rate centers” within which customers are permitted to place calls without incurring toll charges. Toll calls are also the calls to which access charges apply. Interexchange carriers such as AT&T, MCI, and Sprint pay the access charges to the local exchange carriers, such as the

¹⁷The Commission’s November 1998 Report to the Legislature, which was derived from information gathered in Docket UT-980311, outlines much of the basis for this statement.

¹⁸Zawislak Response at 5, n. 8.

¹⁹*Id.* at 3, 4.

Complainants, that originate and terminate the calls on their local transport, switching, and loop facilities.²⁰

18 One exception to this is that the FCC has defined the term “local” for purposes of commercial mobile radio services (CMRS or cellular) providers in 47 CFR 51.701(b)(2) as the major trading area (MTA). MTAs are generally the size of a state—much larger than the ILEC’s local calling areas. The consequence is that wireless carriers pay access charges to LECs for PSTN-to-wireless or wireless-to-PSTN calls only when the call crosses an MTA boundary.²¹

19 Intrastate access charge tariffs, price lists, and/or contracts typically govern origination, transport, and termination of *intrastate*, inter-local-calling-area (or basic “long distance” or “toll” telecommunications) traffic. In the case of the complainants, it is their intrastate access charge tariffs and industry practice that govern the applicability of intrastate access charges on their own networks.²²

For example, CenturyTel’s Tariff WN U-4, Sheet Second Revised Sheet No. 7, governs the application of its intrastate access charges.²³ It states at part 1.2(a) that:

²⁰*Id.* at 3, n. 1.

²¹*Id.*

²²*Id.* at 4, 5.

²³ See Zawislak Exhibit _____(TWZ-2).

Interexchange Carriers, including Telecommunications Companies as defined in RCW 80.04.010, who provide service between Local Calling Areas, must purchase services from this tariff for their use in furnishing their authorized intrastate telecommunications services to end user customers, and for operational purposes directly to the furnishing of such services

While the language of the access tariffs governs to whom they apply, the tariffs in many cases do not provide much of an explanation of what constitutes “interexchange” service, and instead demur to the statutory definition of “telecommunications company,” and the regulatory definition of “interexchange carrier.” At least in the case of CenturyTel, the access tariff provides the additional explanation that its application is to “service between Local Calling Areas.”

20 Not all traffic that passes between LECs is local traffic. It may include interexchange traffic that is subject to access charges and not subject to reciprocal compensation arrangements such as bill-and-keep. It appears that the industry practice, as evidenced by CenturyTel’s interconnection agreement with Level 3 Communications in Docket UT-023043,²⁴ is to require separate trunk groups for long distance traffic, on the one hand, and local traffic on the other. This enables

²⁴ See Zawislak Exhibit _____(TWZ-3), Article IV, Section 4.3.3.

interexchange minutes of use to be measured and access charges to be assessed.²⁵

21 Interstate access charge tariffs, rules, and/or contracts typically govern origination, transport, and termination of *interstate*, long distance traffic. These interstate access charges are subject to the regulation of the FCC and are generally not subject to state regulation.²⁶

22 The Federal Communications Commission (FCC) created a curious wrinkle in the system of intercarrier compensation with respect to a kind of preferential treatment it has afforded since 1983 to a group of telecommunications users that it defines as “enhanced” or “information” service providers.²⁷ Examples of enhanced services providers include providers of voice mail services, Internet access services, and transaction services associated with credit card verification at point-of-sale.²⁸ The FCC has affirmatively required that telecommunications users in this category be allowed by local exchange carriers to purchase local exchange business circuits in order to originate and terminate traffic on the local exchange company’s facilities. This enables the information service providers lawfully to avoid (or bypass) the per minute interstate access

²⁵Zawislak Response at 4, n. 3; 10.

²⁶*Id.* at 5.

²⁷*See* Sec. III(B)(3), *infra*.

²⁸Williamson Response Testimony, Exhibit _____ (RW-3T) at 10 (Williamson Response).

charges that would otherwise be applied to this traffic.²⁹

B. LocalDial's long distance service

23 On its website, LocalDial advertises its service as providing “[u]nlimited long distance calling for a flat rate.” “[L]ocalDial is ... a supplemental phone service for domestic long distance calling.”³⁰

24 To access Local Dial's long distance service, the customer dials a local access number issued by LocalDial. The customer received a prompt, and then dials the long distance destination telephone number. The destination telephone number can be any telephone number in the 48 continental United States. Users of LocalDial's phone-to-phone VoIP service find that the service is indistinguishable from traditional telephone long distance service.³¹

25 On its website LocalDial states: “LocalDial uses a Voice-over-IP system that ends your call by means of digitally compressed and encrypted packets over our own private network to *bypass long distance tolls*” (emphasis added). In truth, the service originates and terminates switched inter-exchange calls between traditional touch-tone telephones on the Public Switched Telephone Network (PSTN) with no net change to form or content. The only difference between this

²⁹See Sec. III(B)(3), *infra*.

³⁰ Williamson Direct, Exhibit ___ (RW-1T) at 9 (Williamson Direct).

³¹ *Id.* at 9.

LocalDial service and traditional long distance service is that LocalDial inserts internet protocol (IP) in a small portion of the transmission path and converts it back to time division multiplexing (TDM) protocol before handing the call to the LEC for final delivery as a local call.³²

26 LocalDial leases facilities from a competitive local exchange company (CLEC). The CLEC has a switch in Seattle from which it provides local exchange services in a number of Qwest [and Verizon] wire centers throughout the state. Through this arrangement, LocalDial is able to provide its customers in many parts of Washington with a telephone number in their local calling area that connects them to LocalDial's leased facility via the CLEC's switch. The CLEC's trunks connect to LocalDial's Integrated Access Devices (IAD), Gateways, and routers, which are located at the Westin Building in Seattle.³³

27 Calls to and from Spokane and Western Washington as far south as Centralia/Chehalis use the LocalDial Seattle facility at the Westin Building, and calls to and from Western Washington south of Centralia/Chehalis to the Oregon border use a LocalDial facility in Portland.³⁴

28 LocalDial's gateway verifies the caller's number against a database of

³² *Id.* at 9, 10.

³³ *Id.* at 10.

³⁴ *Id.* at 13.

known subscribers to LocalDial's service and then prompts the customer to dial the long distance telephone number that they want to reach. If the called number is in an area served by the LocalDial network in Washington, the gateway converts the call to IP format and routes the call packets to the router and a particular IP address. The call packets are then routed to the IP address dedicated to the appropriate port associated with the terminating trunk via an internal LAN. The gateway converts the IP packet format back to TDM and sends the call to the CLEC facility associated with the correct terminating area. For a call from Seattle to Spokane or from Olympia to Bellingham, for example, this whole process of converting the call from TDM to IP and back to TDM again occurs in the room at the Westin Building. After receipt of the called telephone number, the CLEC routes the call over local interconnection trunks to the terminating ILEC central office, or intermediate local tandem, as a local call.³⁵

29

Calls that terminate at the Portland facility are sent from the router in Seattle over the Internet to an IP address in Portland. Some interstate calls and calls that cannot be terminated on the intrastate LocalDial/Competitive Local Exchange Carrier (CLEC) network are sent to Long Distance resellers (approximately four) for termination. Interstate calls that can be completed over

³⁵*Id.* at 10, 11.

the extended LocalDial network are routed over the Internet to the appropriate LocalDial gateways.³⁶

30 LocalDial has so far been able to purchase network access from its CLEC partners as an end user—in the same manner as the FCC has allowed for enhanced or information service providers.³⁷ Consequently, its traffic originates and terminates on local interconnection trunks and is not measured by the ILECs as interexchange traffic to which access charges apply.

III. ANALYSIS

A. LocalDial provides an intrastate telecommunications service subject to the Commission’s jurisdiction.

- 1) LocalDial’s service meets the Washington statutory definition of telecommunications, is subject to none of the statutory exemptions from WUTC regulation, and is offered to the public, for hire.

31 RCW 80.04.010 defines “telecommunications” as “[t]he transmission of information by wire, radio, optical cable, electromagnetic, or other similar means.

As used in this definition, ‘information’ means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.” Under the same statute, “telecommunications company” is defined to

³⁶*Id.* at 11.

³⁷*See* Sec. III(B)(3), *infra*.

include “[e]very corporation, company ... owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state.”

32 The definition of telecommunications under federal statutes, like the state statute, centers on the words “transmission ... of information.”³⁸ Under federal law, like state law, it is generally irrelevant what technology a provider utilizes to provide “telecommunications services.” For example, carriers using 39 GHz, microwave or data packet switched technologies to provide telecommunications services to the public have all been subject to the FCC’s Title II regulations as common carriers.³⁹ Voice suppression and compression, error detection and correction, as well as protocol related addressing and the addition of protocol related information are functions of all modern telecommunications networks and are commonly used by the public switched telephone network today in transport (T1, SONET, etc.) and digital switching (5ESS, DMS, etc.).⁴⁰ The FCC has explicitly clarified that certain internetworking protocol conversion capabilities—those conversions taking place “that result in no net conversion

³⁸47 U.S.C. § 153(43); *see also* § 153(46) (defining “telecommunications service” as the “offering of telecommunications for a fee, directly to the public . . . *regardless of the facilities used* [emphasis added].”).

³⁹ Kiser and Collins, “Regulation On The Horizon: Are Regulators Poised to Address the Status of IP Telephony?,” 11 *CommLaw Conspectus* 19, 24 fn. 41(2003).

⁴⁰Williamson Response at 7.

between users” — are frequently required in the provisioning of telecommunications service.⁴¹ As WECA points out in its own motion for summary determination, the major national IXCs are using internet protocol to transport their toll calls and MCI has announced that by 2005 it plans to move all of its long distance traffic “to an all IP core.”⁴²

33 While certain services that would otherwise arguably fall within the definition of telecommunications have been exempted from Commission regulation by RCW 80.36.370, such as cellular service or cable television, there is no indication that LocalDial meets any of those exemptions.

34 The Washington statutory definition of telecommunications is broad and, like the federal definition, does not distinguish between transmission technologies. Simply put, if the modern public switched telephone network, with all of its varied forms of transmission technology fits this definition of telecommunications (as the “transmission of information by wire, radio, or optical cable”) then LocalDial’s service should too.⁴³

35 LocalDial owns and operates the gateways, servers, and other equipment

⁴¹ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958; 2 FCC Rcd at 3082 (1986) (*Computer III*).

⁴² Complainant’s Motion for Summary Disposition, Exhibit 7.

⁴³ Williamson Direct at 16.

that it uses to provide its service and it offers its service to the public, for hire.⁴⁴

As such, the company meets the definition of a “telecommunications company” under the statute.

- 2) **LocalDial provides its customers the ability to make calls between points in Washington state and, to the extent that it does, it provides an intrastate service subject to the regulatory jurisdiction of the WUTC.**

36 The LocalDial service enables users to connect calls between locations within Washington state as well as between locations in Washington and other states.⁴⁵ When it provides users with the ability to make calls between end points within Washington, it is providing a Washington intrastate telecommunications service subject to the regulatory jurisdiction of this Commission.

37 The Communications Act of 1934 defines the FCC’s authority as extending to “all interstate and foreign communication by wire or radio,” while denying it any “jurisdiction with respect to . . . intrastate communication service.”⁴⁶ The Commission’s regulatory jurisdiction thus extends to Washington intrastate telecommunications.⁴⁷

⁴⁴ See Complainant’s Brief in Support of Motion for Summary Determination at 3, 7.

⁴⁵ See *id.* at 4.

⁴⁶ 47 U.S.C. Sec. 152(a) and (b).

⁴⁷ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 (1986)(recognizing that “once the correct allocation [of plant] between interstate and intrastate use has been made,” the FCC and state commissions may “apply different rates and methods of depreciation”).

38 When dealing with questions of whether particular traffic on a telecommunications network falls within the interstate or an intrastate jurisdiction, Federal courts and the FCC have declined to characterize calls as a series of multiple calls. The FCC “has focused on the ‘end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.’”⁴⁸

39 The dividing line between the regulatory jurisdictions of the FCC and states depends on “the nature of the communications which pass through the facilities [and not on] the physical location of the lines.” Every court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used.⁴⁹

40 FCC opinions have also discussed the fact that “court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications.”⁵⁰ The FCC has found that “a debit card call that originates and ends in the same state is an

⁴⁸*Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) (quoting *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, IntracARRIER Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3695, ¶ 10 (1999)).

⁴⁹*National Association of Regulatory Utility Commissioners*, 746 F.2d 1492 (D.C. Cir. 1984) (quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), cert. denied, 434 U.S. 1010 (1978); citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001 (1968)).

⁵⁰*Teleconnect Company v. The Bell Telephone Company of Pennsylvania*, File Nos. E-88-83 et seq, Memorandum Opinion and Order, 10 F.C.C.R. 1626, 1629, ¶ 12 (1995).

intrastate call, even if it is processed through an 800 switch located in another state.”⁵¹

41 Similarly, other states have examined the characterization of long distance calls that originate and terminate in the same state after being routed through other states and reached the conclusion that such traffic is in their intrastate jurisdiction.⁵²

42 Thus, whether calls made by LocalDial customers between end points in Washington state are routed through Local Dial’s equipment in Oregon does not change the fact that they are still subject to the Washington intrastate jurisdiction.

3) Because LocalDial’s service does not meet the FCC’s definition of an “enhanced” or “information” service provider, it is not exempt from regulation.

43 LocalDial likely will assert that it is an enhanced or information service provider and is therefore exempt from regulation. Although the FCC has exempted enhanced service providers from regulation as common carriers at

⁵¹*In the Matter of The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, Memorandum Opinion and Order, 11 F.C.C.R. 1186, 1190, ¶ 30 (1995).

⁵²*State ex rel. Utils. Comm’n v. Thrifty Call, Inc.*, 154 NC App. 58 (2002); *Northwest Telco, Inc. v. Mountain States Telephone and Telegraph Co.*, 88 Pub. Util. Rep. 4th 462, 464 (Idaho Pub. Util. Comm’n 1987); *In re: Show Cause Action Against Southland Systems, Inc.*, Order No. 11342, 82 FPSC 179 (1982); *see also In re Cease and Desist Order to Hart Industries of Intrastate Wide Area Toll Service*, Order No. 10256, 81 FPSC 73 (1981).

both the federal and state levels, LocalDial is not an enhanced service provider.

The origin of this regulatory exemption is as follows:

When digital computers first began to multiply, the FCC resolved to leave “enhanced services” outside the ambit of telephone regulation. The FCC ruled that all providers of “computer enhanced services” (as well as computers themselves and other forms of “customer premises equipment”) would be left completely unregulated. No franchise. No tariffs. No oversight of any kind. To make sure that no state regulator did otherwise, the FCC ruled all state regulation of “enhanced services” preempted, even as it declared that it would “forbear” from regulating them itself.

[T]he FCC would thereafter generally view providers of “enhanced services” in the same light as the computers they used – as operators of “equipment” rather than as providers of carrier services. The Commission recognized that this was an arbitrary call. It has repeatedly revisited the issue, most recently in the access-charge proceeding in 1997. . . . But it has never changed course.⁵³

The 1996 Telecommunications Act codified, with minor modifications, the FCC’s distinction between unregulated “enhanced” services and regulated “basic” common carrier services by defining analogous categories that it renamed “information services” and “telecommunications.”⁵⁴ The FCC has held that information services and telecommunications services are mutually exclusive.⁵⁵

It is therefore instructive to look at the 1996 Telecommunications Act’s definition

⁵³P. Huber, M. Kellog, J. Thorne, *Federal Telecommunications Law*, 2d Ed., at p. 127, 128 (1999).

⁵⁴ See IP-Enabled Services NPRM at ¶ 26.

⁵⁵In *Matter of Federal-State Joint Board on Universal Service* cc Docket No. 9645, 13 FCC RD 11501, release Number 98-67 released April 10, 1998, at footnote # 79.

of “telecommunications” to determine what information services are *not*:

the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the format or content of the information as sent or received.

This is a perfect description of what LocalDial provides its customers—namely, the ability to transmit the sound of their voice to any user of the public switched telephone network they choose without any change between the information they send (the sound of their speech) and the information that the recipient receives. In other words, this is a description of what we commonly know as making a phone call.

44 Information services, by contrast, are defined as:

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

What information services have in common, in contrast with telecommunications, is that their users connect, via telecommunications, with the provider’s computer equipment for the purpose of obtaining information, such as stored data, or for the purpose of obtaining information processing from the information services provider.

45 It is not difficult to understand how those who provide voice mail services, those who provide internet access, and those who provide credit card verification services fit this description. The user of an information service does not get the ability to transmit his own information between end points of his choosing, as with telecommunications. Rather, what a customer of an information service provider gets is information, or the processing of information that the user supplies. In other words, as the user of an information service, one does not simply pick up a phone and call whomever one wants on the public switched telephone network. One calls the information service provider (using the services of a regulated telecommunications carrier) and obtains the information service that is being provided.

46 It might be argued that telecommunications providers “process” their users’ information; however, Congress anticipated this argument and ruled it out by stating that information services do “not include any use of any such capability for the management, control, or operation of a telecommunications network or the management of a telecommunications service.” It might also be argued that a telecommunications provider “transforms” users’ information into electrical current or microwaves or packets of data, but Congress also precluded

that argument when it defined telecommunications as the transmission of information “without change in the format or content of the information *as sent or received.*”

47 The FCC’s 1998 Stevens Report to Congress differentiates telecommunications, information services, and the different types IP Telephony Services.⁵⁶ In the Report, the FCC, described distinct types of VoIP services. It termed one type “phone-to-phone,” in which the user simply dials a local traditional North American Numbering Plan (NANP) telephone number using his existing telephone and is then prompted to dial the desired NANP long distance telephone number to which he wishes to be connected. The call is transported to an internet protocol (IP) gateway, which converts the digital time division multiplexing (TDM) voice representation to digital IP packets and routes the IP packets to another IP gateway where the process is reversed. The call is completed via the public switched telephone network (PSTN) to the called NANP telephone number. The call may be routed over the public Internet or a private IP intranet but all calls are originated and terminated on the PSTN. Because calls using this type of service originate and terminate on the PSTN with

⁵⁶In the Matter of Federal-State Joint Board on Universal Service cc Docket No. 9645, 13 FCC Rcd 11501, release Number 98-67 released April 10, 1998.

some of the transport occurring via IP, this service may be referred to as “IP-in-the-middle.”⁵⁷

48 Unlike both computer-to-computer and computer-to-phone VoIP, with phone-to-phone VoIP the conversion from TDM to IP and back to TDM is transparent to the originating and terminating customers. The call is originated using the ordinary touch-tone phone that virtually every residential customer already owns, over the analog loop that is already connected to most residences, and is terminated to a NANP telephone number just like any long distance call to another analog touch-tone phone.⁵⁸

49 The service that the Federal District Court in *Vonage Holdings Corp. v. Minnesota Public Service Comm’n*⁵⁹ found to be preempted from the Minnesota Public Utilities Commission’s jurisdiction is an example of computer-to-phone VoIP and is *not* a phone-to-phone service, as that Court took great care to explain.⁶⁰ The service that the New York Public Service Commission classified as an interexchange carrier subject to the obligation to pay access charges, on the other hand, was an example of a phone-to-phone VoIP service as that

⁵⁷Williamson Direct at 10.

⁵⁸*Id.* at 10, 11.

⁵⁹290 F.Supp.2d 993 (D.Minn., 2003)

⁶⁰*Id.* at 999-1001.

Commission clarified in considerable detail.⁶¹ It is not surprising that both of these decisions turned on the Stevens Report's definition of phone-to-phone service. The FCC concluded that "[f]rom a functional standpoint, users of these [phone-to-phone IP] services obtain only voice transmission, rather than information services such as access to stored files."⁶²

50 The FCC defined phone-to-phone IP Telephony as a service that: 1) holds itself out as providing voice telephony service; 2) does not require the customer to use CPE different from that necessary to place an ordinary touch-tone call over the public switched telephone network; 3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan; 4) transmits customer information without net change in form or content.⁶³ As Mr. Williamson explains in his prefiled direct testimony, LocalDial's "supplemental Long Distance" service passes all of the above tests set forth by the FCC and is a phone-to-phone service.⁶⁴

In the Stevens Report, the FCC stated: "We first note that

⁶¹ Case 01-C-1119 Complaint of Frontier Telephone of Rochester Against US DatNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges, May 31, 2002.

⁶² *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 9645, 13 FCC RD 11501, release Number 98-67 released April 10, 1998, ¶ 89.

⁶³ *In the Matter of Federal-State Joint Board on Universal Service* cc Docket No. 9645, 13 FCC RD 11501, release Number 98-67 released April 10, 1998, ¶ 88.

⁶⁴ Williamson Direct at 8-15.

‘telecommunications’ is defined as a form of ‘transmission.’”⁶⁵

[W]hen an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network. These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate Internet-based calls. From a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests this type of IP telephony lacks the characteristics that would render them “information services” within the meaning of the statute, and instead bear the characteristics of “telecommunications services.”⁶⁶

The FCC explained that one of the characteristics distinguishing an information service from a telecommunications service is the occurrence of *net* conversion between the two ends of the common carrier transmission, of the “format, content, code, protocol” or similar aspects of the message.⁶⁷

51 Voice suppression and compression, error detection and correction, as well as protocol related addressing and the addition of protocol related information are functions of all modern telecommunications networks and are commonly used by the PSTN today in transport (T1, SONET, etc.) and digital

⁶⁵*In the Matter of Federal-State Joint Board On Universal Service*, CC Docket No. 9645, 13 FCC RD 11501, release Number 98-67 released April 10, 1998, ¶ 86.

⁶⁶*Id.* at ¶89.

⁶⁷Notice of Proposed Rule Making, *In the Matter of IP Enabled Services*, FCC 04-28, FCC WC Docket No. 04-36, footnote 94 (*citing* 47 CFR 64.702).

switching (5ESS, DMS, etc.).⁶⁸ The FCC has explicitly clarified that certain internetworking protocol conversion capabilities—those conversions taking place “that result in no net conversion between users”—are frequently required in the provisioning of telecommunications service.⁶⁹ The FCC declared that phone-to-phone IP telephony services seem to “lack the characteristics that would render them ‘information services’ within the meaning of the statute.”⁷⁰

52 Although Internet service providers are classified as information service providers, it is not because they provide their customers with transmission over the Internet, it is because they provide their customers with the ability to access and interact with stored information such as a website or e-mail stored on an Internet server. An Internet service provider’s “service ... provides more than a simple transmission path; it offers users the ‘capability for ... acquiring, storing, transforming, processing, retrieving, utilizing, or making available information through telecommunications’.”⁷¹ “The service that Internet access providers offer to members of the public is Internet Access. That service gives users a variety of advanced capabilities. Users can exploit those capabilities through applications

⁶⁸Williamson Response at 7.

⁶⁹*Computer III Decision*, 2 FCC Rcd. at 3082.

⁷⁰*In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 9645, 13 FCC RD 11501, release Number 98-67 released April 10, 1998, ¶ 83, 101.

⁷¹*Id.* at ¶ 78.

they install on their own computers.”⁷²

53 LocalDial’s network, by contrast, merely creates a “virtual transmission path” between points on the PSTN over a packet-switched IP network.⁷³ Again, as the FCC explained, “[a] Telecommunications service is a Telecommunications service regardless of the whether it is provided using wireless, cable, satellite, or some other infrastructure. Its classification depends on the nature of the service being offered to customers.”⁷⁴ “As discussed above, users of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content. Indeed, from an end-user perspective, these types of phone-to-phone IP Telephony service providers seem virtually identical to traditional circuit-switched carriers.”⁷⁵

54 LocalDial’s IP-in-the-middle VoIP does not meet the definition of an information service and is not removed from the Commission’s jurisdiction on that basis.

⁷² *Id.* at ¶ 79.

⁷³ Williamson Response at 15.

⁷⁴ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 9645, 13 FCC RD 11501, release Number 98-67 released April 10, 1998, ¶ 59.

⁷⁵ *Id.* at ¶ 101.

B. Intrastate access charges should apply to the intrastate, inter-local-calling area calls that that LocalDial provides its customers.

- 1) LocalDial's service uses the facilities of local exchange carriers to originate and terminate calls; those calls cross exchange and extended area boundaries that are set out in those carrier's tariffs and that determine which calls are "interexchange" or "toll" as opposed to "local."**

55 LocalDial's service functions the same as traditional long distance service in that it uses the Complainants' (and other LEC's) local end-office switching function, and loop facilities, at either end of each call in order to enable users to place "interexchange," inter-local-calling-area calls.⁷⁶

56 In Cause No. U-85-23, the Commission authorized LECs operating in Washington to file tariffs establishing the intrastate access charge compensation mechanism for interexchange traffic. What constitutes a "local," as opposed to a "long distance" call is defined in each local exchange telecommunications company's tariff through the provision of local calling areas or "rate centers" within which customers are permitted to place calls without incurring toll charges. Toll calls are also the calls to which access charges apply.⁷⁷

Interexchange carriers such as AT&T, MCI, and Sprint pay the access charges to

⁷⁶Zawislak Response at 6; Williamson Direct at 14.

⁷⁷See *Washington Independent Telephone Association v. TRACER*, 75 Wash. App. 356, 880 P.2d 50 (1994).

the local exchange carriers, such as the Complainants, that originate and terminate the calls on their local transport, switching, and loop facilities.⁷⁸

57 Intrastate access charge tariffs, price lists, and/or contracts typically govern origination, transport, and termination of *intrastate*, inter-local-calling-area (or basic “long distance” or “toll” telecommunications) traffic. In the case of the complainants, it is their intrastate access charge tariffs and industry practice that govern the applicability of intrastate access charges on their own networks.⁷⁹ For example, CenturyTel Tariff WN U-4, Sheet Second Revised Sheet No. 7, governs the application of its intrastate access charges.⁸⁰ It states at part 1.2(a) that:

Interexchange Carriers, including Telecommunications Companies as defined in RCW 80.04.010, who provide service between Local Calling Areas, must purchase services from this tariff for their use in furnishing their authorized intrastate telecommunications services to end user customers, and for operational purposes directly to the furnishing of such services

An “interexchange carrier” is simply a carrier that provides the service of connecting calls between the local exchange carriers’ networks, between local

⁷⁸Zawislak Response at 4, n. 1.

⁷⁹Zawislak Response at 4, 5.

⁸⁰See Zawislak Response, Exhibit _____(TWZ-2).

calling areas.⁸¹

- 2) **Because it provides a service that is functionally identical to the inter-local-calling area service that is provided by companies that pay access charges, it would be unduly preferential and inconsistent with the Commission's order in U-85-23 for LECs not to charge them the same access fees.**

58 In authorizing the system of intrastate access charges that is embodied in local exchange companies access tariffs, the Commission specifically found that “[t]o be applied on a nondiscriminatory basis, access charges must be applied to all interexchange carriers uniformly.”⁸²

59 This finding generally tracks federal statutory requirements applicable to interstate access charges. 47 CFR 69.5(b) states that “Carrier’s carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.” More generally, Congress provided in 47 U.S.C. Sec. 254(d) that “Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-

⁸¹ See *Washington Independent Telephone Association v. TRACER*, 75 Wash. App. 356, 359, 880 P.2d 50 (1994) (“Interexchange companies provide service between exchanges.”); See also, *Re U.S. MetroLink Corp.*, 103 P.U.R.4th 194, 1989 WL 418657, Wash.U.T.C., May 01, 1989, (NO. U-88-2370-J) at 3 (“Simply stated, MetroLink holds itself out to the public to interconnect access lines provided by local exchange companies and thereby provide interexchange service commonly known as toll.”).

⁸²Cause No. U-85-23, 18th Supp. Order, Finding of Fact 11.

discriminatory basis to the . . . mechanisms established by the Commission to preserve and advance universal service.” When local exchange carriers challenged the FCC’s exemption of information service providers from interstate access charges as violative of this statutory provision, the federal courts upheld the exemption based on the following reasoning:

Here, we agree with the FCC that “it is not clear that ISP’s use the . . . network in a manner analogous to IXCs,” and conclude, therefore that the Commission’s refusal to impose access charges on ISPs does not violate Sec. 254’s requirement that contributions to universal service be nondiscriminatory [citation omitted].⁸³

This reasoning would not apply to a service that utilizes the LEC’s networks in a manner that *is* analogous (if not identical) to an IXC. Indeed, in its recent IP-Enabled Services Notice of Proposed Rulemaking, the FCC stated:

As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.⁸⁴

LocalDial’s misclassification of itself as an information service provider needs to be corrected so that intercarrier compensation flows and the complainants’ networks are supported, in the way the Commission intended.

⁸³*Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

⁸⁴Notice of Proposed Rulemaking, *In the Matter of IP Enabled Services*, FCC 04-28, FCC WC Docket No. 04-36, ¶ 33.

60 LocalDial has so far avoided becoming a purchaser of exchange access services only because it found a way to originate and terminate its interexchange traffic over LEC facilities that are dedicated to use by local traffic. It appears that it should have come to the various LECs and arranged for the purchase of switched access services.⁸⁵ It is Staff's opinion that at least the complainants' intrastate local end office switching, carrier common line, interim terminating universal service, line extension surcharge, and traditional universal service access charges (as they currently exist) should be applied to LocalDial's traffic which originates and/or terminates on the complainants' networks, based on the absolute (number of minutes) and relative (jurisdictional) nature of the usage.⁸⁶

61 As an IXC, LocalDial should be responsible for the access services it uses in providing its retail long distance service.⁸⁷ It appears that, if properly classified as an interexchange carrier, LocalDial also would be responsible for reconfiguring its network in order to comply with the Complainants' tariffs and currently effective industry practices (e.g. routing traffic only over the proper jurisdictional trunk groups—local traffic over local interconnection trunks and

⁸⁵Zawislak Response at 9.

⁸⁶*Id.* That is, inter-local-calling-area calls made within the state should be assessed intrastate access charges and calls made between states should be assessed interstate access charges.

⁸⁷*Id.* at 10.

interexchange traffic over switched access service trunks).⁸⁸ Routing long distance traffic over switched access trunks enables the complainant (as well as other ILECs like Qwest and Verizon) to be able to measure and bill for the appropriate access charges.⁸⁹ LocalDial's use of local trunks (or, in this case, its CLEC-Partners' local trunks) effectively precluded the complainants from being able to perform these functions.

3) Because LocalDial's service does not meet the FCC's definition of an interstate "enhanced" or "information" service, it is not eligible to purchase network access as an end user.

62 By definition, one accesses information services "via telecommunications."⁹⁰ In most cases, the telecommunications that would be required for the users of an information service to connect with the information service provider's databases (such as a voice mail system, or an Internet server for Internet access, or a transaction services database), would almost always constitute a long distance, and in most cases an interstate long distance call. This is not how it works in practice, however, because of something called the ESP (or ISP) exemption from interstate access charges. The FCC explains it as follows:

⁸⁸ See Exhibit ____ (TWZ-3)(interconnection agreement between competitive local exchange carrier Level 3 and incumbent local exchange carrier CenturyTel describing trunking requirements for local and ISP-bound traffic versus interexchange traffic).

⁸⁹Zawislak Response at 10.

⁹⁰47 U.S.C. §153(20).

Although the [Federal Communications] Commission has recognized that enhanced service providers (ESPs), including [internet service providers], use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. Thus, ESPs generally pay local business exchange rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.⁹¹

In other words, instead of a situation in which the customer of the ESP/ISP (or the ESP/ISP itself) has to pay for a toll call, the ESP/ISP is allowed to subscribe to LEC services that enable end users to make only what amounts to a local call to reach the ESP/ISP:

[Information Service Providers] subscribe to LEC facilities in order to receive local calls from customers who want to access the ISPs data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.⁹²

This is essentially what LocalDial has managed to do by representing itself as an enhanced or information service provider.

63

For all the same reasons stated in Section III(A)(3), LocalDial is not an

⁹¹Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, paragraph 5 (February 26, 1999).

⁹²*Southwestern Bell Telephone Co. v. F.C.C.*, 153 F.3d 523, 542 fn. 9 (1998).

information service provider and should not be allowed to bypass access charges through the ESP access charge exemption.

64 As noted above, local exchange carrier CenturyTel's interconnection agreement with competitive local exchange carrier Level 3 requires the CLEC to use local interconnection trunks for local and ISP-bound traffic only and interexchange trunks for interexchange traffic.⁹³ If this is a common industry practice, the problem of LocalDial bypassing access charges should correct itself following a finding by this Commission that LocalDial is an interexchange telecommunications carrier and not an information services provider.

IV. CONCLUSION

65 For the foregoing reasons, Commission Staff moves for an order that (1) finds that LocalDial Corporation meets the definition of a telecommunications company subject to the Commission's jurisdiction, (2) orders the company to register as a telecommunications company, and (3) declares that LocalDial is an

⁹³See Zawislak Response Exhibit ____ (TWZ-3).

interexchange carrier within the meaning of the Commission's orders authorizing local exchange carrier's to file access tariffs and requiring that they apply to all interexchange carriers uniformly.

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