

April 9, 2004

VIA ABC LEGAL MESSENGER SERVICE AND E-MAIL

Carol J. Washburn

Executive Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S.W.
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All Parties of Record

(Per attached Certificate of Service)

Re: WECA, et al. v. LocalDial
WUTC Docket No. UT-031472

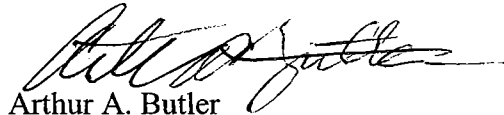
Dear Parties and Ms. Washburn:

Enclosed please find the original and 16 copies of LocalDial's Response to Complainants' Motion for Summary Disposition, and the Declaration of William Page Montgomery in Support of same.

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

Sincerely,

ATER WYNNE LLP



Arthur A. Butler

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of April, 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:

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

DATED this 9th day of April, 2004, at Seattle, Washington.



[Service Date: April 9, 2004]

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 FOR
SUMMARY DISPOSITION**

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1. LocalDial Corporation (“LocalDial”), by and through its attorneys of record, Ater Wynne LLP, hereby submits its response to Complainants’ Motion for Summary Disposition (“Complainants’ Motion”).

I. INTRODUCTION

2. Complainants are not entitled to summary disposition. The record in this matter shows that LocalDial offers information services, not telecommunications services, and thus is not subject to regulation by the Washington Utilities and Transportation Commission (this “Commission”) under either state or federal law. In particular, LocalDial is not subject to access charges in the tariffs of Complainants. At a minimum, there are issues of fact as to whether LocalDial offers information services or telecommunications services, and for that reason alone, this matter should proceed to hearing. Therefore, this Commission should: (a) deny Complainants’ Motion and allow this matter to proceed to hearing, (b) rule that LocalDial is providing an information service and is not subject to regulation by this Commission or to Complainants’ access charges under existing law, or (c) defer ruling on whether it can or should regulate LocalDial pending further action by the Federal Communications Commission (“FCC”) regarding Voice over Internet Protocol (“VoIP”) services in the interest of comity between state and federal regulation.

II. FACTS

3. LocalDial is an Enhanced Services Provider (“ESP”), also known in the telecommunications industry as an Information Services Provider (“ISP”). LocalDial provides VoIP services to its customers. In providing this information service, LocalDial obtains telecommunications services from carrier vendors and then transforms the aural content of its customers’ calls into “data” packets of information. More specifically, LocalDial:

- (a) Adds, deletes, and changes some of the original subscriber-generated content and changes the protocol of the communication from a “circuit-switched” or Time Division Multiplexing (“TDM”) protocol to an Internet Protocol (“IP”);
- (b) Transfers the information (as changed) to a new location;
- (c) Reassembles the packets (as changed);
- (d) Converts the packets (as changed) into “circuit-switched” protocol; and
- (e) Sends the content (as changed) for transmission to a competitive local exchange carrier (“CLEC”) or interexchange carrier (“IXC”).

The CLEC or IXC then sends the call (with the changed content) to the intended recipient over the public switched telephone network (“PSTN”).

4. The difference between the services provided by LocalDial and those provided by telecommunications carriers is simple: LocalDial changes the form and content of the communication; telecommunications carriers switch and transport the form and content of the sender’s information *without change*.

5. LocalDial has contracts with its customers and with CLECs, IXCs and other telecommunications vendors as necessary to provide service to its customers. By definition, an ISP uses telecommunications, but does not provide telecommunications services. Some of LocalDial’s vendors may have contractual or other trade relationships with Complainants, but LocalDial has no contractual or trade relationship with them.

6. LocalDial is not a telecommunications carrier and does not provide telecommunications service. Instead, LocalDial *uses* telecommunications to provide *information services*. As an ESP, LocalDial is a customer that obtains telecommunications services from carriers. As an end user and a customer of telecommunications services, LocalDial is exempt

from the access charges that Complainants seek to recover and from regulation by this Commission.

III. PROCEDURAL HISTORY

7. Complainant Washington Exchange Carriers Association (“WECA”) is an association of local exchange telephone companies doing business in Washington State. In 2003, Complainants filed suit in the Thurston County Superior Court claiming that LocalDial’s business activities in Washington State require it to pay access charges for originating and terminating intrastate long distance telephone calls using the equipment and/or facilities of the local exchange telephone companies. The case was later removed to the U.S. District Court, Western District of Washington.

8. Following LocalDial’s motion to dismiss in the Federal Court action, the Court referred the matter to this Commission to resolve these “core questions”: (a) do the plaintiffs’ tariffs apply to the VoIP intrastate telephone calls made by LocalDial’s customers using the plaintiff’s facilities?; and (b) if they do so apply, to what extent, if any, should the WUTC regulate the relatively new VoIP technology?”¹

9. On October 24, 2003, this Commission, in turn, issued a Prehearing Conference Order stating that it will answer two questions in this proceeding: (a) 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?; and (b) is LocalDial’s service that is challenged by WECA a form of intrastate long distance telecommunications service that subjects

¹ *Stay Order and Order of Referral to WUTC, Washington Exchange Carrier Assoc., et al. v. LocalDial Corp.*, No. C03-5012 (WD Wash), p. 4.

LocalDial to the obligation to pay access charges payable to originating and terminating local exchange carriers under those carriers' tariffs?"

10. Complainants have moved for summary disposition on both of these questions. LocalDial respectfully requests that this Commission deny the motion for because: (a) issues of fact remain to be resolved at hearing; and (b) LocalDial is exempt from access charges as a matter of law.

IV. STANDARD OF REVIEW

11. Complainants' Motion is brought pursuant to WAC 480-07-380(2). That rule provides that in evaluating a motion for summary disposition, this Commission shall be guided by the law relating to Civil Rule 56 motions for summary judgment.

12. It is well settled that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."² However, the moving party bears the burden of establishing the absence of disputed material facts, and all reasonable inferences are drawn against the moving party.³ "A material fact is one upon which the outcome of the litigation depends in whole or in part."⁴

13. In reviewing a motion for summary judgment, a court (and this Commission) must consider the evidence and all reasonable inferences therefrom in a light most favorable to the non-

² CR 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

³ *Id.*

⁴ *Samis v. City of Soap Lake*, 143 Wn.2d 798, 23 P.3d 477 (2001).

moving party.⁵ And, the motion for summary judgment should be granted only if reasonable persons could reach but one conclusion from all of the evidence.⁶

14. If the moving party does not satisfy its burden, summary judgment should not be granted, regardless of whether the non-moving party has submitted affidavits or other evidence in opposition to the motion.⁷ Moreover, a court (and this Commission) may grant summary judgment even to a *non-moving party* if that is the appropriate result.⁸

15. Here, there are clearly issues of material fact, and Complainants are not entitled to judgment as a matter of law. Accordingly, Complainants' Motion should be denied. Moreover, considering the facts and the reasonable inferences to be drawn therefrom, granting judgment in favor of LocalDial would be the appropriate result (*i.e.* this Commission should rule that LocalDial is providing an information service and is not subject to regulation by this Commission or to the Complainants' access charges under existing law).

V. ARGUMENT

A. Issues Of Fact Exist Which Prevent Summary Disposition In This Case

16. The Prehearing Conference Order states that this Commission expects to address the scope of its jurisdiction on motions for summary disposition "grounded in stipulated facts concerning the precise nature of the service LocalDial offers."⁹ Despite their efforts, the parties were unable to agree on a set of stipulated facts and therefore could not meet this Commission's precondition for summary disposition. As discussed in further detail below, the record shows

⁵ *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

⁶ *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

⁷ *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

⁸ *Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967).

disputed issues of fact which prevent summary disposition and which require this matter to proceed to hearing.

B. LocalDial Provides Information Services, Not Telecommunications Services

17. As the Federal Court noted in referring this matter to this Commission,¹⁰ the central issue in this proceeding is a factual one: Does LocalDial offer to its customers “information services” or “telecommunications services”? If, as LocalDial contends, it offers information services, then: (a) it is not subject to this Commission’s jurisdiction under Chapter 80 RCW by the plain terms of that law; and (b) even if Washington State sought to regulate those services, such regulation would be preempted by federal law.

18. By way of illustration, the following sections: (a) discuss the meaning of the terms information services and telecommunications services; (b) show this record supports the conclusion that LocalDial offers information services, or, at a minimum, shows that there is an issue of fact remaining to be resolved at hearing; (c) discuss Washington State and federal law on regulation of information services and telecommunication services; and (d) show LocalDial is not subject to this Commission’s jurisdiction as a matter of law.

1. “Telecommunications Services” And “Information Services” Defined.

19. The FCC, which has paramount authority to define “information services,” is just now embarking on a review and new consideration of how to classify various types of VoIP offerings.¹¹ However, as demonstrated by Mr. Montgomery in his Direct Testimony and

⁹ Prehearing Conference Order, Order No. 1, ¶ 14 (Docket No. UT-031472).

¹⁰ Stay Order and Order of Referral to WUTC, *Washington Exchange Carrier Assoc., et al. v. LocalDial Corp.*, No. C03-5012 (WD Wash), p. 4.

¹¹ *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36 (FCC 04-28) (March 10, 2004)(“IP-Enabled Services NPRM”).

Response Testimony¹², even without the benefit of the FCC's analysis, the record makes clear that LocalDial's service is an enhanced or information service as that term is currently defined by FCC rules.¹³

20. The FCC has long distinguished "basic (telecommunications) services" from "enhanced services" or "information services." In the 1980 *Computer II* decision¹⁴, the FCC specified that a "basic service" is a service offering "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."¹⁵ In contrast, an "enhanced service" contains a basic service component and is offered over common carrier transmission facilities, but also "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."¹⁶ This is the three-part definition of an "enhanced service" that is currently contained in 47 CFR § 64.702(a).¹⁷

¹² The prefiled Direct Testimony and Response Testimony of William Page Montgomery are incorporated in his Declaration submitted in support of this Response to Complainants' Motion for Summary Disposition; further references in this response are to the specific testimony (Docket No. UT-031472).

¹³ 47 C.F.R. 64.702(a).

¹⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980).

¹⁵ *Id.*, at 420.

¹⁶ *Id.*

¹⁷ 47 CFR §64.702(a) states: "For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act."

21. In subsequent orders, the FCC decided that ESPs should not be subjected to originating access charges for ESP-bound traffic.¹⁸ Instead, the FCC has given ESPs and ISPs the option of acting as end users and subscribing to flat-rated business lines and other local end user services.¹⁹

22. The Telecommunications Act of 1996 (“1996 Act”) codified the FCC’s distinction between “basic” and “enhanced” services. The 1996 Act defined “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”²⁰ In contrast, “information service” was 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.²¹

23. In a 1998 report to Congress regarding universal service (the “*Stevens Report*”), the FCC explained that the new terms Congress had adopted to describe different types of communications services were based on the same distinction between “basic” and “enhanced” services.²²

¹⁸ See IP-Enabled Services NPRM, FCC 04-28, ¶ 25 (released March 10, 2004); *MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, Memorandum Opinion and Order, 97 FCC 2d 682, 715, ¶ 83 (1983) (*MTS/WATS Market Structure Order*); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Mpl/ 87-215, Order, 3 FCC Rcd 2631, 2633, ¶ 17 (1988) (*ESP Exemption Order*).

¹⁹ See, e.g., *MTS/WATS Market Structure Order*, ¶ 77.

²⁰ 47 U.S.C. §153(43).

²¹ 47 U.S.C. §153(20).

²² *In re Federal-State Joint Board on Universal Service*, CC Docket No. 906-45, Report to Congress, 13 FCC Rcd. ¶ 21, at 11511 (1998) (“*Stevens Report*”).

24. WECA and Staff have pointed to the *Stevens Report* to support their contention that LocalDial offers telecommunications service. This contention is not justified, given the *Stevens Report* lacks the force of law. The *Stevens Report* addressed how services using new technology such as the Internet might affect universal telephone service. It was limited to universal service issues and did not adopt or change any rules or prior decisions, and did not discuss intercarrier compensation as such. The *Stevens Report* specifically examined two types of IP Telephony: phone-to-phone and computer-to-computer. While the FCC did not go so far as to explicitly classify either type as a telecommunications or an information service, the *Stevens Report* tentatively concluded that phone-to-phone 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.’”²³ The *Stevens Report* proposed a tentative four-part test for whether a service constitutes phone-to-phone IP Telephony,²⁴ and therefore may lack the characteristics of “information services.”

25. While WECA and Staff assert that this four-part test should be applied to determine whether LocalDial offers information services, it is critical to note that the FCC has never adopted this four-part shorthand description of “phone-to-phone” IP Telephony in any context, much less as a test to determine whether a VoIP service is an information service.²⁵ In particular, the four-part test has never supplanted the three criteria for information services in

²³ *Stevens Report*, ¶ 89, at 11544.

²⁴ Under the FCC’s proposed test for phone-phone IP Telephony, a VoIP service is categorized as “phone-to-phone” if: (1) it holds itself out as providing voice telephony or fax service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call over the PSTN; (3) it allows the customer to call telephone numbers assigned in accordance with the NANP; and (4) it transmits customer information without net change in form or content. *Id.*

²⁵ *Montgomery Direct Testimony*, p. 16 (Docket No. UT-031472); *Montgomery Response Testimony*, pp. 4, 6, 9 (Docket No. UT-031472).

47 CFR § 64.702(a). In any event, this four-part shorthand description of “phone-to-phone” IP Telephony is incorrect in material ways. It does not accurately summarize either the current rules or earlier FCC decisions concerning information services.

26. Further, in its recently released *IP-Enhanced Services Notice of Proposed Rulemaking* (“*IP-Enabled Services NPRM*”), the FCC again explicitly refused to apply the “phone-to-phone” shorthand description of IP Telephony.²⁶ As the *IP-Enabled Services NPRM* noted, “by seeking comment on whether access charges should apply to the various categories of service identified by the commenters, we are not addressing whether access charges apply or do not apply under existing law.”²⁷

27. The FCC’s *IP-Enabled Services NPRM* makes clear that the proceeding will review the basis for exclusive federal jurisdiction with respect to the various classes of IP-Enabled Services, including any classification of services.²⁸ Until this review is complete, the general rule is “that courts have recognized the preeminence of federal authority in the area of information services, particularly in the area [of] the Internet and other interactive computer services.”²⁹ Any state jurisdiction over VoIP services is, at best, unsettled.

28. The *IP-Enabled Services NPRM* also expressly reserves the FCC’s ability to move forward on specific petitions regarding VoIP services and other pending matters, such as the

²⁶ Part III of the *IP-Enabled Services NPRM* “solicits comments regarding how, if at all, we should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate.” *IP-Enabled Services NPRM*, ¶ 35. Far from contemplating “phone-to-phone” as a category of VoIP services having legal effect, the FCC’s *IP-Enabled Services NPRM* expressly poses the question: “Is there any utility to distinguishing between ‘phone-to-phone’ services, ‘computer-to-computer’ services, and ‘computer-to-phone’ services ...” *IP-Enabled Services NPRM*, ¶ 37

²⁷ *IP-Enabled Services NPRM*, ¶ 32.

²⁸ *IP-Enabled Services NPRM*, ¶ 41.

²⁹ *IP-Enabled Services NPRM*, ¶ 39.

Unified Intercarrier Compensation rulemaking.³⁰ The *IP-Enabled Services NPRM* expressed a preference that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations and the cost of the PSTN should be borne equitably among those that use it in similar ways.³¹ In the Unified Intercarrier Compensation rulemaking, the FCC has expressed a preference for bill-and-keep arrangements as the uniform type of intercarrier compensation.³²

29. The regulatory history shows that, until Congress or the FCC indicates otherwise, 47 CFR §64.702(a) provides the three criteria for information services. This means that LocalDial offers information services if it: (a) employs computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, (b) provides the subscriber additional, different, or restructured information, or (c) involves subscriber interaction with stored information. For the reasons shown below, this record supports the conclusion that LocalDial's services meet each of these criteria, or, at a minimum, an issue of fact remains to be resolved as to each of them.³³ On that basis, Complainants' are not entitled to summary disposition.

³⁰ *IP-Enabled Services NPRM*, ¶ 32.

³¹ *IP-Enabled Services NPRM*, ¶ 33.

³² *Montgomery Response Testimony*, pp. 7-8 (Docket No. UT-031472); *Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, CC Docket No. 01-92, April 27, 2001, FCC 01-132, 16 FCC Rcd 9610 (2001), ¶4.

³³ WECA also suggests that the WUTC should adopt the analytical framework applied by the New York Public Service Commission (NYPSC) in ruling that certain VoIP services are subject to access charges. *Complainants' Brief in Support of Motion for Summary Disposition* at ¶ 50 (Docket No. UT-031472). WECA's reliance on the NYPSC ruling is misplaced for two reasons. First, the NYPSC incorrectly applied the 4-prong test from the Stevens Report. As explained above, the 4-prong test from the Stevens Report does not have the force of law and does not accurately reflect existing federal law. Second, the NYPSC did not analyze whether the VoIP provider's equipment performed enhanced service functions as defined under existing federal law at 47 C.F.R. § 64.702(a). By failing to engage in a meaningful analysis of the functions of the VoIP service provider's equipment, the NYPSC bypassed a crucial analytical step. Accordingly, the WUTC should reject WECA's suggestion that it follow the NYPSC's flawed reasoning.

2. ***The Record Supports The Conclusion That LocalDial Offers An Information Service.***

30. WECA's witnesses characterize LocalDial's service as telecommunications. Two of WECA's witnesses dispute that LocalDial's service is an enhanced or information service. Mr. Smith says that use of compression and filter techniques to improve the quality of voice calls occurs in traditional basic telecommunications services.³⁴ Mr. Martin avers that the sole purpose of LocalDial's use of Internet Protocol-based technologies is to provide management and control of a telecommunications service.³⁵

31. In contrast, LocalDial's expert witness, Mr. Montgomery, demonstrates that under existing law, LocalDial's service is an enhanced or information service. As he explains, LocalDial uses gateway technology that incorporates the ITU G 723.1 standard. That technology operates to satisfy all three clauses of the existing enhanced services rule, 47 CFR §64.702(a).

32. Clause 1 of the rule states that the enhanced service may "*employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information.*" In this case, the transmitted information is the human voices of the called and calling parties once the call is in process. G.723.1 samples the digitized voice signals (the content) and mathematically creates several types of filters in real time. The technology measures the pitch of the human voices and adapts the filters to the pitch. The technology also measures the "excitation" of the digitized sound, *i.e.*, the random signals or

³⁴ *Smith Direct Testimony*, p. 9 (Docket No. UT-031472).

³⁵ *Martin Direct Testimony*, pp. 6-7 (Docket No. UT-031472). Mr. Martin also states, incorrectly, that LocalDial's customers use a "local (*sic*) phone, provided and maintained by" an ILEC (p. 5). Regulated telephone companies have not provided or maintained telephone instruments for many years.

waveforms that cannot be mathematically measured in terms of the pitch of the sound, and uses two additional mathematical processes to make computations based on the excitation.³⁶

33. The technology uses a number of different computing processes to act on each unique voice signal to construct information components that model the voice of the speaking party, create a series of filters that respond to the unique voice, recompute the variables by repeated sampling of the information, and perform other computing processes. All of these computations are designed to affect the perception of a speaker's individual voice.³⁷ Thus, LocalDial's service employs computer processing applications to act on the transmitted information and meets the first clause of the definition of information service.

34. Clause 2 provides that the enhanced service may "*provide the subscriber additional, different, or restructured information.*" The additional, restructured information provided by G.723.1 technology is part of what makes the human voice signal intelligible to the listener. Neither the speaker nor the listener may be cognizant of these computer processes, but they perceive what is in fact a synthetic manipulation of voice sounds as more intelligible and natural-sounding human voices. The process involves mathematical algorithms to detect voice activity, an algorithm to create "comfort noise," and a process to insert a reduced bit stream during periods of silence.³⁸ This means the technology constantly provides each speaker with new and restructured information and stores the information for reference purposes as part of the voice activity detection and comfort noise generation, thus meeting both Clauses 2 and 3 (discussed below) of the FCC criteria.

³⁶ *Montgomery Response Testimony*, p. 23 (Docket No. UT-031472).

³⁷ *Montgomery Response Testimony*, pp. 24-25 (Docket No. UT-031472).

³⁸ *Montgomery Response Testimony*, pp. 25-26 (Docket No. UT-031472).

35. Clause 3 covers enhanced services that “*involve subscriber interaction with stored information.*” G.723.1 stores and retrieves the most recent adaptation of several variables created under Clauses 1 or 2, including the encoded pitch information, data stored in the excitation buffer, signal quantization from both the high-rate and low-rate excitation processing, the computations from the impulse response calculations, and (possibly) the combined LPC synthesis, perceptual weighting and harmonic noise shaping filters. This storage allows the technology to update the information it is using to configure the real-time voice signal with the best currently available data (*i.e.*, if the real-time data being used is better than the data stored in memory at that point in time the memory swaps its stored information for the better real-time data, in order to maintain or improve the quality of the synthetic voice signal.) If the technology operates as specified, the parties to the voice conversation would not be aware of any change in the data being transmitted, because, to their ears, the quality of the signal would be as good or better than it was (nanoseconds or milliseconds) earlier. LocalDial’s service involves interaction with stored information and thus meets Clause 3 of the FCC rule.³⁹

36. Further, even applying the four-part test for “phone-to-phone” IP Telephony proposed in the *Stevens Report*, this record supports LocalDial’s position. In particular, LocalDial’s technology does not satisfy the fourth element of the *Stevens* test: It provides a “net protocol conversion” because it provides different and restructured information and use of stored information in addition to protocol processing.⁴⁰ As noted by Mr. Montgomery, in its *Computer III Phase II Order*, ¶ 69, the FCC stated unambiguously:

³⁹ *Montgomery Response Testimony*, p. 27 (Docket No. UT-031472).

⁴⁰ *Montgomery Response Testimony*, pp. 16-18 (Docket No. UT-031472).

We wish to clarify that for those subscriber-to-network communications in which the carrier itself is providing *second and third clause enhanced services*, the carrier's information system computing facilities being used to provide those services *are treated as the equivalent of an end user for the purpose of [interpreting] this exemption. Thus, if a net protocol conversion between the user and the carrier's information facilities were to take place, that particular conversion would be treated as an enhanced service.* (Emphasis added).

Because a protocol conversion occurs between LocalDial's customers and its own facilities, there is a net protocol conversion under the *Stevens* test.⁴¹ Accordingly, LocalDial's service does not qualify as the type of "phone-to-phone" IP-telephony that the FCC tentatively classified as a telecommunications service. Even under the *Stevens* test, LocalDial's service is an information service.

37. This record thus shows that the technology which LocalDial uses is consistent with the definition of information services. At a minimum, there is an issue of fact as to whether, as Complainants contend, LocalDial's technology is typical of telecommunications services. This issue must be resolved at hearing. Complainants are not entitled to summary disposition that LocalDial offers a telecommunications service.

C. The WUTC Does Not Have Authority To Regulate LocalDial Under Washington State Law.

38. Because LocalDial does not provide telecommunications services, this Commission does not have authority to regulate LocalDial or to impose intercarrier compensation – including but not limited to Complainants' switched access charges – under Washington State law. Under Chapter 80 RCW, this Commission regulates "telecommunications companies" offering "telecommunications."⁴² RCW 80.04.010 defines "telecommunications" as:

⁴¹ *Montgomery Response Testimony*, pp. 17-18 (Docket No. UT-031472).

⁴² RCW 80.04.010.

the *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, pictures, sounds, or any other symbol. (Emphasis added.)

39. The term “telecommunications” under Washington State law should be interpreted consistently with federal law to apply only to pure transmission services – and not enhanced services;⁴³ this would be consistent with WUTC precedent. The WUTC has never regulated an enhanced service provider – that is, a provider who offers enhanced services as defined by federal law, not just basic “transmission” – as a provider of telecommunications services. In fact, the WUTC has indicated that, under Washington State law, providers who *use* telecommunications to provide *information services* are exempt from access charges because they are end users, not telecommunications providers. For example, in *In re Electric Lightwave, Inc.*,⁴⁴ this Commission analyzed the nature of the services provided by ISPs in the context of determining when telecommunications carrier should be compensated for “terminating” the call. After explaining that the cost of terminating a call to an ISP occurs at the point where the traffic is routed on to a packet-switched network, this Commission unequivocally stated that ISPs “*are end-users, not telecommunications carriers.*”⁴⁵ Accordingly, the WUTC has never regulated any ISP as a telecommunications provider under Washington State law.

⁴³ As the *IP-Enabled Services NPRM* notes at paragraphs 25-26, the FCC has long distinguished between “basic” and “enhanced” services. Since the *Computer Inquiry* line of decisions, the FCC has specified that a “basic” service is one offering transmission capacity for the delivery of information without net change in form or content. The 1996 Act similarly defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. §153(43).

⁴⁴ Docket No. UT 980370, *Order Approving Negotiated and Arbitrated Interconnection Agreement*, ¶¶ 31-32 (May 12, 1999).

⁴⁵ *Id.* (emphasis added). The WUTC further explained that: “In the case of [Internet Service Provider]-bound traffic, the terminating carrier incurring costs is the carrier that delivers traffic to the [Internet Service Provider]. In the context of [Internet Service Provider]-traffic, the “call” actually consists of gaining “access” to a packet-

40. Like an ISP, LocalDial is an enhanced service provider under federal law. As such, the WUTC precedent requires that it treat LocalDial as an end-user of telecommunications services, not a telecommunications carrier. Indeed, LocalDial's method of routing its customers' calls by using the public switched network on either end is no different from the way ISPs use the PSTN to connect to their customers. In both cases, the customer of the enhanced service provider places a call over the PSTN to the ESP. Based on the definition of "telecommunications" under Washington State law and WUTC precedent, recognizing that ESPs are end-users of telecommunications, not carriers, this Commission should conclude that it lacks authority to regulate LocalDial.

41. WECA cites two WUTC orders (*U&I Can v. Pacific Northwest Bell Telephone Co.*⁴⁶ and *In the Matter of Determining the Appropriate Classification of U.S. Metrolink Corp.*⁴⁷) as authority for the proposition that LocalDial's service is a "telecommunications" service subject to WUTC jurisdiction.⁴⁸ Neither decision is relevant. Both *U&I Can* and *Metrolink* involved WUTC analysis of services provided by toll bridging companies, which the WUTC rightly determined constituted "telecommunications services" subject to WUTC jurisdiction. Because those decisions involved pure telecommunications or "transmission" services, and not enhanced services like those provided by LocalDial, the decisions are inapposite here.

42. For these reasons, as a matter of Washington State law, this Commission should not rule that LocalDial is providing "telecommunications" services such that it must register and

switched network. While a packet-switched network may enable users to replicate a circuit-switched call, Internet access is an amorphous medium and should not be considered a 'call' in the switched-circuit sense."

⁴⁶ Docket No. UT-960659, *Third Supplemental Order* (February 4, 1998).

⁴⁷ Docket No. U-88-2370-J, *Second Supplemental Order* (May 1, 1989).

⁴⁸ See *WECA Brief* at ¶¶ 18, 19.

be subject to regulation by this Commission. Similarly, this Commission should not rule that the Complainants can impose switched access charges on LocalDial.

D. Commission Regulation Of LocalDial's Enhanced Services Would Conflict With The FCC's Policy Of Non-Regulation Of Enhanced Services, And Is Therefore Preempted

43. Even if Washington State law purported to allow the regulation of information services, federal law would preempt such regulation.⁴⁹

1. The FCC Has A Clear Policy That Enhanced Services Should Remain Free From Regulation.

44. In the *Computer II* decision, the FCC concluded that enhanced services were subject to its jurisdiction⁵⁰ but declined to treat providers of enhanced services as common carriers subject to regulation under Title II of the Communications Act.⁵¹ In distinguishing between basic service and enhanced service, the FCC held that the “market for these [enhanced] services will continue to burgeon and flourish best in the existing competitive environment...free from public-utility type regulation...”⁵² Later, following the adoption of the term “information services” in the 1996 Act, the FCC noted the “intentions of the drafters of both the House and Senate bills that the two categories be separate and distinct, and *that information service providers not be subject to telecommunications regulation.*”⁵³ (Emphasis added.) In addition to

⁴⁹ Notably, WECA does not appear to dispute that the WUTC is preempted from regulating LocalDial if it determines that LocalDial's services are information services under federal law.

⁵⁰ *Computer II Final Decision*, 77 FCC2d at 432, ¶ 125.

⁵¹ *Id.*, at 432-35, ¶¶ 126-132.

⁵² *See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, ¶ 5 (1980)

⁵³ *Stevens Report* at ¶ 43, at 11523.

those positions taken by the FCC, Congress has expressly stated that enhanced services are not to be regulated under Title II of the Telecommunications Act.⁵⁴

45. Similarly, Congress has explicitly stated its policy of non-regulation of the Internet: “It is the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁵⁵ In implementing federal telecommunications policy, the FCC has incorporated Congress’ intent to leave the Internet unregulated, including with regard to technology, such as VoIP, which is at the intersection of telecommunications and the Internet.

46. The FCC has recently clarified and confirmed its position that enhanced services should remain free from regulation. On February 19, 2004, the FCC released an Order declaring that pulver.com’s Free World Dialup VoIP service is “an unregulated information service subject to the Commission’s jurisdiction.”⁵⁶ In so holding, the FCC first concluded that Free World Dialup constituted an “information service” under federal law, and then determined that “consistent with our precedent regarding information services, ...any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of non-regulation.”⁵⁷

⁵⁴ 47 C.F.R. 64.702(a).

⁵⁵ 47 U.S.C. § 230(b); *see also Southwestern Bell Tel. Co. v. FCC*, 153 F3d 523, 544 (8th Cir. 1998) (concluding that Internet Services Providers should be excluded from the imposition of state access charges in light of Congress’s intent to leave the Internet unregulated).

⁵⁶ Petition for Declaratory Ruling that pulver.com’s Free World Dialup is *Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 0345, Memorandum and Order, FCC 04-27 (rel. Feb. 19, 2004) (*Pulver Declaratory Ruling*)

⁵⁷ Pulver Declaratory Ruling at ¶ 15.

47. Similarly, in *Vonage Holdings Corp. v. Minnesota Public Utility Commission*⁵⁸ the U.S. District Court for the District of Minnesota held that the Minnesota PUC was preempted from regulating Vonage's VoIP service as a telecommunications service. That Federal Court first concluded that Vonage's VoIP service constituted information, not telecommunication, services.⁵⁹ Consequently, that Federal Court then concluded that "state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated."⁶⁰ In that Federal Court's view, "Congress's expression of its intent to not have Title II apply to enhanced services demonstrates its intent to occupy the field of regulation of information services."⁶¹

48. This regulatory history makes clear that Congress and the FCC have a strong policy of non-regulation of information services.

2. *WUTC Regulation Of LocalDial's Service Would Conflict With The FCC Policy Of Non-Regulation Of Information Services And Is Therefore Preempted.*

49. Where a state regulation would conflict with federal law, or have the effect of discouraging conduct that federal policy encourages, the state law must be preempted.⁶² For example, in *Vonage*, that Federal Court concluded that: "[b]ecause Congress has expressed an intent that services like Vonage's must remain unregulated by the Communications Act, and

⁵⁸ 290 F. Supp. 2d 993 (D. Minn. 2003)

⁵⁹ *Vonage*, 290 F.Supp 2d at 996.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See Louisiana PSC*, 476 US at 368.

because the MPUC has exercised state authority to regulate Vonage's service, and the Court concludes that the state and federal laws conflict, preemption is necessary."⁶³

50. Here, as in *Vonage*, federal law preempts regulation under state law. Congress has distinguished telecommunications services from information services. The purpose of Title II is to regulate telecommunications services, and Congress has clearly stated that it does not intend to regulate the Internet and information services. As shown above, LocalDial's services do not constitute a telecommunications service. The Commission may not regulate LocalDial as if it were a telecommunications provider, because to do so would be in direct conflict with the FCC's policy of non-regulation of enhanced services. Moreover, preemption is required because this Commission's regulation of LocalDial as a telecommunications provider would create "an obstacle to the accomplishment and execution of the full objectives of Congress."⁶⁴

3. *LocalDial's Service Is Not Purely Intrastate*

51. Exclusive FCC jurisdiction over information services has been confirmed by federal courts, except where: (a) the information service can be characterized as "purely intrastate"; and (b) it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally-mixed information service without negating federal objectives for the interstate component.⁶⁵ Neither of these circumstances applies to LocalDial's service; exclusive federal jurisdiction is therefore proper.

⁶³ See also *Vonage Holdings*, 290 F. Supp.2d at 1002

⁶⁴ *Louisiana PSC*, 476 US at 1898. See also *Pulver Declaratory Ruling*, ¶ 19 (confirming that "the Commission does have the authority to act in this area if states promulgate regulations applicable to FWD's service that are inconsistent with its current nonregulated status").

⁶⁵ *Pulver Declaratory Ruling*, ¶ 20. For example, in *People of the State of California v. FCC*, 39 F3d 919 (1994), the Ninth Circuit considered whether the FCC had properly preempted certain state requirements that common carriers maintain corporate separation between their provision of basic services and provision of unregulated enhanced services. The Ninth Circuit found that FCC preemption of the state regulations was proper because, if

52. By its very nature, LocalDial service combines both interstate and intrastate service. There is no “intrastate” component of LocalDial’s service that could be split off from the interstate calls of LocalDial’s customers.⁶⁶ According to Mr. Montgomery, any attempt to apply state regulations (*i.e.*, WECA’s switched access tariffs) only to an “intrastate” component of LocalDial’s service “would likely end LocalDial’s ability to do business” because “it would be economically inefficient and unduly burdensome to try to separate those components.”⁶⁷ Here, because it is impossible to separate the interstate from intrastate services, and this Commission’s regulation would negate the FCC’s lawful authority over enhanced services, FCC jurisdiction preempts this Commission’s regulation of all aspects of LocalDial’s service.

E. Other Fact Issues Remain To Be Resolved

53. In addition to the fact issues surrounding the definition of information services, other fact issues relating to whether Complainants’ intrastate switched access charges apply to LocalDial remain and should prevent entry of summary disposition.

54. As Mr. Montgomery points out, LocalDial is not, in fact, a “customer” of WECA’s members and should not be forced to pay tariff charges as if it were a customer.⁶⁸ Moreover, WECA’s members’ intrastate switched access tariffs, by their terms, demonstrate that the incumbent LECs could not and did not satisfy their own tariff requirements in the periods since LocalDial has been in business. Those tariffs would require WECA’s members to provide LocalDial with services and functions that LocalDial does not need and would not be able to

subjected to the state regulations, enhanced service providers would separate their facilities for services that were both interstate and intrastate, “thereby negating the FCC’s goal of allowing integrated provision of enhanced and basic services.” *Id.*, at 932 (providing additional examples of the so-called “impossibility exception”).

⁶⁶ *Montgomery Response Testimony*, p. 8 (Docket No. UT-031472).

⁶⁷ *Id.*

utilize. As Mr. Montgomery points out, the WECA and CenturyTel tariffs include affirmative obligations of the LEC to provide network management protective measures; network design and traffic routing, including sizing network capacity and offering uni-directional or two-way trunk groups. The LEC must provide an interexchange carrier with service performance data, such as call completion and non-completion statistics, and trunk group usage measurements. The LEC, not the interexchange carrier, is obligated to determine the number of transmission paths, based on access tandem or end office routing; the number of end office transport terminations; and the design blocking probability. WECA's members are also obligated to provide a number of optional features, without charge, to interexchange carriers that purchase switched access services. LocalDial, of course, never utilized these services nor would ever need to.⁶⁹

55. In other words, even if this Commission were to determine that it had authority to regulate LocalDial, arbitrarily subjecting LocalDial to WECA's members' tariffs would be misguided. WECA's members' tariffs were drafted to apply to the circuit-switched network and, as such, are ill-suited for application to enhanced service providers. Thus, in the event that this Commission should determine that it has authority to regulate LocalDial, it should consider, as a matter of first impression, whether enhanced services like LocalDial's should be subject to carrier access charges or some other form of compensation.

F. In The Alternative, For Public Policy Reasons The Commission Should Refrain From Ruling On Whether It Can Or Should Regulate LocalDial's Voip Service

56. Even if this Commission ultimately were to conclude that it has authority to regulate LocalDial as a telecommunications carrier under Washington State law, a host of public

⁶⁸ *Montgomery Direct Testimony*, p. 27 (Docket No. UT-031472).

⁶⁹ *Montgomery Direct Testimony*, pp. 28-29 (Docket No. UT-031472).

policy reasons require this Commission to refrain from regulating LocalDial until the FCC has taken action to either (a) clarify the application of existing federal rules to various types of VoIP services; or (b) promulgate a new regulatory scheme for VoIP and other IP-enabled services.

57. As discussed in greater detail in Section B(1) above, the FCC's recently issued *IP-Enabled Services NPRM* announces the FCC's intent to step back and evaluate the appropriate nature and scope of future federal regulation of IP-enabled services like LocalDial.⁷⁰ The FCC also has pending before it various petitions asking it to rule on the proper legal classification and regulatory treatment of a variety VoIP services under existing federal law, including services bearing some similarity to LocalDial's.⁷¹ Thus, it is only a matter of time until the FCC issues one or more rulings either clarifying the application of existing federal rules to or adopting new rules for VoIP services. For the following reasons, this Commission should refrain from ruling on whether it can or should regulate LocalDial pending further FCC action.

58. The FCC's *IP-Enabled Services NPRM*, as well as the statements of individual FCC Commissioners regarding the *IP-Enabled Services NPRM*, emphasize the FCC's paramount authority to regulate information services in general and VoIP services in particular. Beyond that, the FCC Commissioners have made the following public policy statements: (a) IP-enabled services are ill-suited to, and should remain free from, traditional monopoly regulation;⁷² (b) IP-enabled services should be subject to regulation to preserve certain public interests, such as law enforcement access, universal service, disabled access, and emergency 911 service;⁷³ and (c) the public has an interest in national uniformity of regulation of VoIP services. In particular,

⁷⁰ *IP-Enabled Services NPRM*, ¶¶ 1-6.

⁷¹ *IP-Enabled Services NPRM*, ¶ 32 (discussing and citing pending petitions).

⁷² *Statement of Chairman Michael Powell re: IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28.

Commissioner Kathleen Abernathy has stated that “a federal scheme will facilitate nationwide deployment strategies and avoid the burdens associated with inconsistent state rules.”⁷⁴

59. Given the legal uncertainty surrounding state authority to regulate VoIP services, combined with the adverse effects on the VoIP industry of inconsistent state rules, this Commission should refrain from ruling on whether it can or should regulate LocalDial pending further FCC action. The Colorado Public Utilities Commission recently closed its docket investigating VoIP services pending FCC action.⁷⁵ In a Special Concurrence, Commissioner Sopkin stated that he welcomed FCC direction as to whether and how VoIP should be regulated, because “the nascent VoIP industry should not be subject to death-by-regulation, which could well occur by having 51 state commissions imposing idiosyncratic, inconsistent, and costly obligations.”⁷⁶

60. For these reasons, and in the interest of comity between Washington State and federal law, this Commission can and should refrain from ruling on whether it can or should regulate LocalDial pending further FCC action.

VI. CONCLUSION

61. For the reasons discussed above, this Commission should deny the Complainants’ motion for summary disposition and either (a) allow this matter to proceed to hearing, (b) rule that LocalDial is providing an information service and is not subject to regulation by this Commission

⁷³ *Id.*

⁷⁴ *Id.*

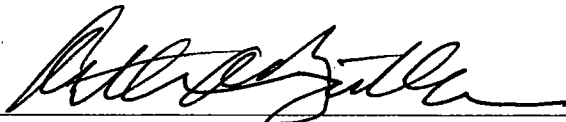
⁷⁵ *In the Matter of the Investigation into Voice Over Internet Protocol (VOIP) Services*, CPUC Decision No. C04-0004, Order Closing Docket, (January 2, 2004).

⁷⁶ *Id.*, at 3.

or to the Complainants; access charges under existing law, or (c) defer ruling on whether it can or should regulate LocalDial pending further FCC action.

RESPECTFULLY SUBMITTED this 9th day of April, 2004.

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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

**DECLARATION OF WILLIAM PAGE
MONTGOMERY IN SUPPORT OF
LOCALDIAL'S RESPONSE TO
COMPLAINANTS' MOTION FOR
SUMMARY DISPOSITION**

I, WILLIAM PAGE MONTGOMERY, under penalty of perjury under the laws of the State of Washington, hereby declare and state as follows:

1. I am over the 21 years of age and I make this declaration on the basis of my personal knowledge, and if called upon to testify in this matter I could and would competently do so as set forth herein.
2. I am the principal of Montgomery Consulting in Laguna Beach, California, which I founded in 1993 after 16 years with the consulting firm of Economics and Technology, Inc.
3. I submitted Direct Testimony in this proceeding on February 27, 2004, on behalf of LocalDial Corporation. The factual assertions in that Direct Testimony are true and correct, and

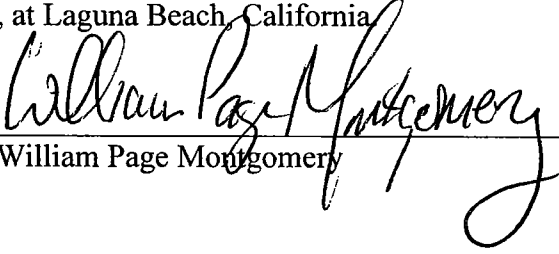
the Direct Testimony accurately reflects the opinions and conclusions I drew after researching the matters at issue in this proceeding, provided the following correction to p. 27, l. 1, is noted:

1 in effect until further FCC action; the current reduced rate is \$0.0007 per minute.¹⁹ As

4. I submitted Response Testimony in this proceeding on March 29, 2004, on behalf of LocalDial Corporation. The factual assertions in that Response Testimony are true and correct, and the Response Testimony accurately reflects the opinions and conclusions I drew after researching the matters at issue in this proceeding.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 31st day of March, 2004, at Laguna Beach, California



William Page Montgomery