

**BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION**

WASHINGTON EXCHANGE CARRIER
ASSOCIATION, CENTURYTEL OF
WASHINGTON, INC., ELLENSBURG
TELEPHONE COMPANY, HOOD CANAL
TELEPHONE COMPANY, INLAND
TELEPHONE COMPANY, KALAMA
TELEPHONE COMPANY, LEWIS RIVER
TELEPHONE COMPANY dba TDS
TELECOM, MASHELL TELECOM, INC.,
McDANIEL TELEPHONE COMPANY dba
TDS TELECOM, TENINO TELEPHONE
COMPANY, THE TOLEDO TELEPHONE
CO., INC., and YCOM NETWORKS, INC.,

UT-031472

Complainants,

v.

LOCALDIAL CORPORATION,

Respondent.

**COMPLAINANTS' BRIEF
REGARDING AT&T'S PETITION FOR DECLARATORY RULING**

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1 1. COME NOW Complainants Washington Exchange Carrier Association (“WECA”),
2 CenturyTel of Washington, Inc. (“CenturyTel”), Ellensburg Telephone Company (“Ellensburg”),
3 Hood Canal Telephone Company (“Hood Canal”), Inland Telephone Company (“Inland”),
4 Kalama Telephone Company (“Kalama”), Lewis River Telephone Company d/b/a TDS Telecom
5 (“Lewis River”), Mashell Telecom, Inc. (“Mashell”), McDaniel Telephone Company d/b/a TDS
6 Telecom (“McDaniel”), Tenino Telephone Company (“Tenino”), The Toledo Telephone Co.,
7 Inc. (“Toledo”), and YCOM Networks, Inc. (“YCOM”), by and through their attorney of record,
8 Richard A. Finnigan, attorney at law, and file this Brief with the Washington Utilities and
9 Transportation Commission (the “Commission”). The Complainants, other than WECA, will be
10 referred to in this Brief as the “Rural Companies.” The Complainants collectively will be
11 referred to as the “Companies.”

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I. INTRODUCTION

14 2. On February 26, 2004, the Companies filed a Motion for Summary Disposition
15 (“Motion”) in this matter. In its Motion, the Companies contended that, pursuant to WAC 480-
16 07-380(2) and CR 56, the Companies were entitled to summary determination against LocalDial
17 Corporation (“LocalDial”). In presenting the factual and legal basis for granting the Motion, the
18 Companies specifically referenced the then-pending AT&T petition for a declaratory ruling¹ on
19 whether or not “phone-to-phone” Internet protocol (“IP”) telephony services are exempt from
20 interstate access charges.² Since the Companies filed their Motion, the Federal Communications
21 Commission (“FCC”) has ruled on the AT&T Petition. In so doing, the FCC has held that

¹ In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361 (filed Oct. 18, 2002) (“AT&T Petition”).

² Companies’ Brief in Support of Motion for Summary Disposition at 21.

1 phone-to-phone IP telephony services are telecommunications services under the
2 Telecommunications Act of 1996 (“the Act”) and are subject to interstate access charges.³ The
3 Commission has requested that the parties to this proceeding file briefs discussing the FCC’s
4 decision.⁴ In filing this brief, the Companies maintain that the AT&T Order has a direct and
5 immediate bearing upon this matter before the Commission and provides a compelling basis for
6 granting the Companies’ Motion.

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II. ARGUMENT

9 3. As outlined in the Companies’ Brief and as stated in the Commission’s Order No. 01,
10 there are two issues before the Commission in this matter:

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

18 4. Although the Companies have already provided the Commission a firm basis on which to
19 decide these two issues in favor of the Companies, the FCC’s recent ruling provides additional
20 basis for doing so.

³ In the Matter of AT&T Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket 02-361, Order FCC 04-97 (rel. Apr. 21, 2004) (“AT&T Order”).

⁴ WECA et al. v. LocalDial Corporation, Notice Amending Procedural Schedule and Providing Opportunity for Supplemental Filings, Docket No. UT-031472 (WUTC, Apr. 23, 2004).

1 **A. LocalDial’s Phone-To-Phone IP Telephony Service is a Telecommunications Service**
2 **Under the Act**

3 5. In finding that AT&T’s phone-to-phone IP service is a telecommunications service, the
4 FCC looked to the definitions of “telecommunications” and “telecommunications service” under
5 the Act.⁵ Specifically, “telecommunications” is defined in the federal statute as “the
6 transmission, between or among points specified by the user, of information of the user’s
7 choosing, without change in form or content of the information as sent and received.”⁶ While
8 “telecommunications service” is “the offering of telecommunications for a fee directly to the
9 public, regardless of the facilities used.”⁷ These definitions are very similar to the Washington
10 statutes. RCW 80.04.010 defines “telecommunications” as “the transmission of information by
11 wire, radio, optical cable, electromagnetic, or other similar means. As used in this definition
12 ‘information’ means knowledge or intelligence represented by any form of writing, signs,
13 signals, pictures, sounds or any other symbols.” The same statute defines “telecommunications
14 company” as any entity “owning, operating or managing any facilities used to provide
15 telecommunications for hire, sale, or resale to the general public within this state.” While there
16 are slight differences in the wording used, both the federal definitions and state definitions get to
17 the same point: voice communications transported for hire are telecommunications.

18 6. AT&T’s service looks nearly identical to LocalDial’s service. The FCC found that:

19 a. AT&T’s customers use ordinary customer premises equipment (“CPE”) to originate

⁵ AT&T Order at ¶ 5.

⁶ Ibid. Citing 47 U.S.C. § 153(43).

⁷ Ibid. Citing 47 U.S.C. § 153(46).

- 1 and terminate the service;
- 2 b. AT&T’s customers dial numbers associated with the North American Numbering
3 Plan to use the service;
- 4 c. The service originates over facilities associated with the public switched telephone
5 network (“PSTN”);
- 6 d. Once the call gets to AT&T’s network, AT&T routes it through a gateway where it is
7 converted to IP format and transported by AT&T over an Internet backbone; and
- 8 e. To get the call to the called party, AT&T changes the traffic back from IP format and
9 terminates the call to a local exchange carrier (LEC) switch and then over the PSTN
10 to the called party.⁸

11 The FCC made particular note of the fact that the conversion to IP format for transport over an
12 Internet backbone “is the only portion of the call that differs in any technical way from a
13 traditional circuit-switched interexchange call, which AT&T would route over its circuit-
14 switched long distance network.”⁹

- 15 7. In the case of LocalDial:
- 16 a. LocalDial’s customers use ordinary CPE to originate and terminate the service;
- 17 b. LocalDial’s customers dial numbers associated with the North American Numbering
18 Plan to use the service;
- 19 c. The service originates over facilities associated with the PSTN;

⁸ AT&T Order at ¶ 11.

⁹ Ibid.

- 1 d. Once the call gets to LocalDial's network, LocalDial routes it through a gateway
2 where it is converted to IP format and then LocalDial transports the call for routing
3 purposes within its local area network or LAN and, in the case of calls from
4 southwest Washington, transports the calls over an Internet backbone; and
- 5 e. To get the call to the called party, LocalDial changes the traffic from IP format and
6 terminates the call to a LEC switch and then to the called party.¹⁰

7 As with AT&T, LocalDial's conversion of the traffic to IP format, for routing in some cases and
8 for transport over an Internet backbone in other cases, is the only portion of the call that differs
9 in any technical way from the traditional circuit switch interexchange call. In fact, it looks like
10 AT&T makes more robust use of the Internet and IP format than does LocalDial.

11 8. In applying the law to the facts of A&T's offerings, the FCC found that AT&T's service
12 was not an information service, as there was "no net protocol conversion".¹¹ The FCC went even
13 further in explaining that "[t]o the extent that protocol conversions associated with AT&T's
14 specific service take place within its network, they appear to be 'internetworking' conversions,
15 which the Commission has found to be telecommunications services."¹² Given the remarkably
16 similar fact patterns, the AT&T Order is contrary to LocalDial's assertions in this proceeding
17 that the use of IP technology somehow transforms LocalDial's service into an information

¹⁰ Companies' Brief in Support of Motion for Summary Disposition at ¶¶ 11, 21, 40, 47, 48, 54 and 55.

¹¹ AT&T Order at ¶ 12. The FCC also noted that its decision is consistent with the definition of "information service" under 47 U.S.C. 153(20) and the FCC's finding in the Stevens Report (In re Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501 (rel. Apr. 10, 1998)).

¹² AT&T Order at ¶ 12 (footnote omitted).

1 service.¹³ Equally damaging to LocalDial’s contentions in this matter, the FCC noted that
2 AT&T’s “decision to use its Internet backbone to route certain calls is made internally by
3 AT&T.”¹⁴ In other words, the voluntary insertion of IP technology into the routing of what
4 would otherwise be a circuit-switched call on PSTN is not a sufficient basis for LocalDial to
5 claim that it is offering an information service.

6 **B. The Application of Access Charges to LocalDial**

7 9. In deciding the second issue in this proceeding – whether or not LocalDial has an
8 obligation to pay access charges to originating and terminating local exchange carriers – the
9 Commission should consider the FCC’s reasoning for requiring AT&T to pay interstate access
10 charges. In evaluating the AT&T Petition, the FCC weighed, among other things, its
11 Congressional mandate “to foster and preserve the dynamic market for Internet-related services”
12 against the “equally compelling statutory obligation to preserve and advance universal service, a
13 policy that remains intertwined with the interstate and intrastate access charge regime.”¹⁵ The
14 FCC emphasized that “AT&T obtains the same circuit-switched interstate access for its specific
15 service as obtained by other interexchange carriers, and, therefore, AT&T’s specific service
16 imposes the same burdens on the local exchange as do circuit-switched interexchange calls.”¹⁶
17 The same is true for LocalDial. In the words of Commissioner Adelstein:

18 Carriers deserve proper compensation for use of their network. We must continue
19 to promote and create incentives for the deployment of new technologies, but
20 these innovative services will not be able to reach their full audience or potential

¹³ See, e.g., LocalDial’s Response to Complainant’s Motion for Summary Disposition at ¶ 2.

¹⁴ AT&T Order at ¶ 12.

¹⁵ AT&T Order at ¶ 14 (footnote omitted).

¹⁶ AT&T Order at ¶ 15.

1 if we undermine the ability of providers to support their networks.¹⁷

2 10. The use of IP technology does not excuse LocalDial from paying intrastate access
3 charges as contained in the Companies' lawfully-filed tariffs. As the FCC reasoned, to allow
4 carriers to avoid access charges on the basis of the insertion of IP technology would encourage
5 other carriers to "convert to IP networks merely to take advantage of the cost advantage afforded
6 to voice traffic that is converted, no matter how briefly, to IP and exempted from access
7 charges." (Emphasis added.)¹⁸ As expressed by Chairman Powell:

8 To allow a carrier to avoid regulatory obligations simply by dropping a little IP in
9 the network would merely sanction regulatory arbitrage and would collapse the
10 universal service system virtually overnight.¹⁹

11 However, that is exactly what LocalDial seeks to do – avoid the payment of intrastate access
12 charges through the use of IP technology, regardless of the consequences for the universal
13 service system and the public interest. As articulated by Chairman Powell, such a scheme will
14 very quickly unravel a system of necessary and beneficial support that has taken years to
15 develop.

16 **C. The FCC's Order Should be Considered by the Commission**

17 11. Although the AT&T Order is not binding on the Commission's consideration of
18 Washington statutes and state access tariffs, its logic is persuasive. Moreover, it is significant
19 that the FCC's decision is in the form of a declaratory ruling, not a rulemaking. As explained by
20 Commissioner Abernathy:

¹⁷ AT&T Order, Statement of Commissioner Jonathan S. Adlestein.

¹⁸ AT&T Order at ¶ 18.

¹⁹ AT&T Order, Statement of Chairman Michael K. Powell.

1 The former clarifies the existing state of the law, while the latter establishes new
2 rules (which may modify or eliminate existing rules). It is not possible for the
3 Commission to elucidate carriers' existing compensation obligations in a
4 rulemaking.²⁰

5 Accordingly, the FCC's decision in the matter of the AT&T Petition should be placed in
6 the context of clarifying the treatment of phone-to-phone IP telephony where IP
7 conversion and transport is in the middle of a call that originates and terminates on the
8 PSTN.

9 **III. CONCLUSION**

10 12. The Companies have presented a strong case for granting their Motion for Summary
11 Disposition in this matter. With the release of the AT&T Order, there is a federal precedent for
12 the Commission to consider. The Companies respectfully request that the Commission find that
13 phone-to-phone IP telephony is a telecommunications service and hold that such service is
14 subject to the access charges contained in the Companies' lawfully-filed tariffs. For these
15 reasons, the Companies urge the Commission to grant the Companies' requested relief.

16 RESPECTFULLY SUBMITTED this 3rd day of May, 2004.

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Association and its affected Members

²⁰ AT&T Order, Statement of Commissioner Kathleen Q. Abernathy (emphasis in the original).

CERTIFICATE OF SERVICE

UT-031472

I hereby certify that I have served the attached Complainants' Brief Regarding AT&T's Petition for Declaratory Ruling to the following via electronic mail (unless e-mail address not shown) and U.S. mail:

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Dated this 3rd day of May, 2004.

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