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2 **BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

3 WASHINGTON EXCHANGE CARRIER  
4 ASSOCIATION, et al.,

5 Complainant,

6 v.

7 LOCALDIAL CORPORATION, an Oregon  
8 Corporation,

9 Respondent.

Docket No. UT-031472

COMMENTS OF BROADBAND  
COMMUNICATIONS ASSOCIATION  
OF WASHINGTON RE IMPACT OF  
FCC's AT&T ORDER ON CASE

10 **INTRODUCTION**

11 Intervenor Broadband Communications Association of Washington (“BCAW”) files these comments in response to the Commission’s April 23, 2004 notice inviting input regarding the impact on this case, if any, of the recent order of the FCC in 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 (April 21, 2004) (“AT&T Order”). BCAW submits that the AT&T Order serves to emphasize the continuing regulatory uncertainty facing regulation of VoIP<sup>1</sup> and VoInternet<sup>2</sup> at the federal level. Moreover, the FCC has made it clear that continued Federal preemption of state regulation of internet-based services is likely. Thus, the AT&T Order reaffirms that this Commission should keep its order in this docket as narrow as possible and avoid addressing LocalDial’s very recent and limited Internet-based service.

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24 <sup>1</sup> BCAW uses “VoIP,” which stands for “Voice over Internet Protocol,” to describe a service that uses the internet protocol (“IP”) at some point in the transmission path regardless of whether or not the service uses the public internet.

25 <sup>2</sup> BCAW uses “VoInternet,” describe a service that at some point is uses the public internet. VoInternet is necessarily also “VoIP” because the internet converts all information to IP.

26 COMMENTS OF BROADBAND COMMUNICATIONS  
ASSOCIATION OF WASHINGTON RE AT&T ORDER - 1

1 **DISCUSSION**

2 Although the FCC held that AT&T’s “**specific** service is a telecommunications  
3 service as defined by the Act”<sup>3</sup> and subject to access charges under its rules, the FCC left all the  
4 doors open to a completely different approach in near future. For example, the FCC noted that  
5 its order, “in no way precludes the Commission from adopting a **fundamentally different**  
6 **approach** when it resolves the IP services rulemaking, or when it resolves the *Intercarrier*  
7 *Compensation* proceeding.” *Id.*, ¶ 10 (emphasis added). Thus, not only was the AT&T Order  
8 narrowly limited to the “specific” AT&T service under review, the FCC stated that its ruling  
9 even on that specific service was open to revision in two other pending dockets.

10 The FCC repeatedly emphasized the interim, temporary, nature of its holding in  
11 the AT&T Order. For example:

12 [The FCC] has commenced a comprehensive rulemaking proceeding to address IP  
13 services generally. [footnote omitted] That proceeding will entail an analysis of  
14 the regulatory characterization of a variety of IP services, including VoIP, and the  
15 applicability of access charges to those services. The decision we make in this  
16 order with regard to AT&T’s specific service is meant to provide clarity to the  
17 industry with respect to the application of interstate access charges **pending the**  
18 **outcome of the rulemaking proceeding**.

19 *Id.*, ¶ 10 (emphasis added). While the FCC may have claimed it was bringing “regulatory  
20 certainty” to the field, such certainty as there is is transitory, at best.

21 The obvious overhang to this case is the threat of FCC preemption. The broader  
22 this Commission’s decision, the greater is the exposure to federal preemption. The FCC recently  
23 reaffirmed its intent to preempt state regulation of the Internet.

24 While many states have not acted to produce an outright conflict between federal  
25 and state law that justifies Commission preemption, today’s Order confirms that  
26 the Commission possess significant authority to act in this area if a conflict of law  
should occur.

26 <sup>3</sup> AT&T Order, ¶ 12 (emphasis added).

1 In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither  
2 Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45 (Feb. 19, 2004)  
3 (“Pulver Order”), Statement of Michael Powell; *see also, id.*, ¶ 18. Indeed, the Pulver Order is  
4 somewhat remarkable for its extensive discussion of the FCC’s preemption powers and its long  
5 history of broad preemption of state regulation of the Internet. *Id.* ¶¶ 15-25

6           Nothing in the AT&T Order detracts from the FCC’s preemption of state  
7 regulation of the Internet. Indeed, the FCC effectively reaffirmed its decision in the Pulver  
8 Order and its intention to continue to develop the law regarding voice communications over the  
9 Internet. *See AT&T Order*, ¶ 10. Based on not only long-standing precedent, but also the  
10 caveats in very recent Pulver Order and AT&T Order, this Commission should expect the FCC  
11 to be very expansive in its preemption of any and all state regulation of Internet-based services.  
12 Thus, simply because the FCC declared a specific service to be subject to interstate access  
13 charges (albeit temporarily), that does not mean the FCC would permit states to assess access  
14 charges on an allegedly similar service that a state might view as “intrastate.”

15           The problem a state faces in attempting to assert jurisdiction over Internet-based  
16 services that are perceived to be “intrastate” is that it begs the question of what is “intrastate” or,  
17 more importantly, what is **not** “interstate.” It is the FCC, not this Commission, that will  
18 ultimately determine the scope of the interstate jurisdiction. The FCC has unmistakably signaled  
19 its intention to preempt state regulation of the Internet, perhaps to the full extent constitutionally  
20 permitted by the Commerce Clause. *See Pulver Order*, ¶¶ 23-25. Accordingly, the best way for  
21 this Commission to avoid preemption--or at least minimize the potential for arguments that its  
22 orders are preempted--is to avoid any appearance that it is regulating the Internet. *See, e.g.,*  
23 Vonage Holdings Corp. v. Minn. PUC, 290 F. Supp. 2<sup>nd</sup> 993 (2003). In particular, the  
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1 Commission should rejected WECA's invitation for the Commission to extend its ruling in this  
2 case to the very recent, and relatively minor, aspect of LocalDial's service that uses the Internet.<sup>4</sup>

3 WECA argues that it would be more efficient to deal with LocalDial's new,  
4 Internet-based service, even though it did not exist at the time of the Federal court's referral. In  
5 reality, the opposite is likely to be true. Because of the continuing uncertainty regarding  
6 Federal/state jurisdiction, the more expansive order WECA seeks is likel to lead to litigation over  
7 the jurisdictional questions. Even at best, following WECA's recommendation to broaden the  
8 issues referred by the court could lead to an order that is irrelevant or preempted later this year or  
9 early next year.

### 10 CONCLUSION

11 The Commission certainly could, but need not, enter an order regarding voice  
12 over Internet. However, the more prudent and efficient approach is to follow the FCC's lead in  
13 the AT&T Order. As did the FCC, the Commission should limit its order to the "specific  
14 service" that was before the U.S. District Court when it referred the LocalDial case to this  
15 Commission. That service did not use the Internet.

16 DATED this 3<sup>rd</sup> day of May, 2004.

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26 <sup>4</sup> See BCAW's Answer to Motion for Summary Determination, April 9, 2004 and WECA's Reply to BCAW's Answer, April 23, 2004.