

**UNITED STATES DISTRICT COURT**  
WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF  
**RONALD B. LEIGHTON**  
UNITED STATES DISTRICT JUDGE

U.S. COURTHOUSE  
1717 PACIFIC AVENUE  
TACOMA, WA 98402

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(253) 593-6449  
(253) 593-6443/fax

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STATE OF WASH.  
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September 12, 2003

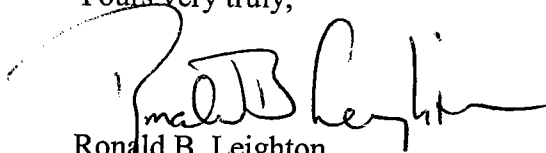
Ms. Carole J. Washburn  
Executive Secretary  
Washington Utilities and  
Transportation Commission  
P.O. Box 47250  
Olympia, WA 98504-7250

RE: *Washington Exchange Carrier Ass'n v. LocalDial Corp.*  
Case No. CV03-5012 RBL

Dear Ms. Washburn:

Enclosed you will find a copy of a Stay Order and Order of Referral to WUTC in the above-referenced matter. Pursuant to a letter dated September 8, 2003 from Stephen J. Kennedy, a copy of which is attached, it was requested that the Court send a copy of this Order to your attention.

Yours very truly,



Ronald B. Leighton  
United States District Court Judge

cc: Stephen J. Kennedy  
Richard A. Finnigan  
Robert Wallis, WUTC

September 8, 2003

The Honorable Ronald B. Leighton  
United States District Court  
1717 Pacific Avenue  
Tacoma, WA 98402

Re: *Washington Exchange Carrier Ass'n v. LocalDial Corp.* Case No.: CV03 5012RBL

Dear Judge Leighton:

In connection with the Court's oral decision to stay this case pursuant to the primary jurisdiction doctrine, you requested that the parties' counsel advise the Court whether there were any further procedural steps needed in order to accomplish the referral to the Washington Utilities and Transportation Commission ("WUTC").

Mr. Finnigan advises that he has spoken with Mr. Robert Wallis, Director, Administrative Law Division, of the WUTC. Mr. Wallis noted that the appropriate course would be for the Court to forward a copy of its written order to the WUTC's Executive Secretary, Ms. Carole J. Washburn, at the following address:

Ms. Carole J. Washburn  
Executive Secretary  
Washington Utilities and  
Transportation Commission  
P.O. Box 47250  
Olympia, Washington 98504-7250

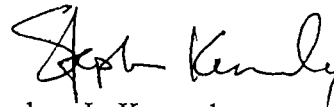
ATERWYNNE<sub>LLP</sub>

The Honorable Ronald B. Leighton  
September 8, 2003  
Page 2

We appreciate the Court's consideration of this matter.

Respectfully,

ATER WYNNE LLP

A handwritten signature in black ink, appearing to read "Stephen J. Kennedy". The signature is written in a cursive style with a large initial "S".

Stephen J. Kennedy

cc: Mr. Richard A. Finnigan, Counsel for Plaintiffs  
(via facsimile and U.S. Mail)

Mr. Robert Wallis, WUTC

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WESTERN DISTRICT OF WASHINGTON AT TACOMA  
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03-CV-05012-ORD

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WASHINGTON EXCHANGE CARRIER  
ASSOCIATION, et. al.,

Plaintiffs,

v.

LOCALDIAL CORPORATION, an Oregon  
Corporation,

Defendant.

03-5012  
Case No. CR02-5926RBL

STAY ORDER AND  
ORDER OF REFERRAL  
TO WUTC

This matter comes before the Court on Defendant LocalDial's Motion to Dismiss Without Prejudice pursuant to the Primary Jurisdiction Doctrine. The Court will Stay all aspects of this litigation and refer the core issues raised by it to the Washington Utilities and Transportation Commission (WUTC).

Plaintiffs are local exchange telephone companies doing business in Washington. They claim that Defendant LocalDial's business activities in this state require it to pay them access charges for originating and terminating intrastate long distance telephone calls using the plaintiffs' equipment and/or facilities. The exact nature of LocalDial's business activities is a central issue in the case, but at the risk of oversimplifying, LocalDial uses a technology called "Voice over Internet Protocol" ("VoIP") (or "IP telephony") to transport voice telephone calls (specifically intrastate long distance calls) over the Internet. LocalDial has thus far done so without paying access charges to the plaintiffs. The amount of the access charges allegedly due is

1 determined by tariffs the plaintiffs have on file with the WUTC.

2           The plaintiffs argue that despite this novel use of new technology, LocalDial is subject to their tariffs,  
3 just as more traditional long distance carriers are. Plaintiffs have sued to establish the applicability of the  
4 access charges to LocalDial's calls, and to recover money damages for charges that have not been paid in the  
5 past.  
6

7           LocalDial denies that the access charges apply to its technology or its calls. It asks the Court to  
8 dismiss the plaintiffs complaint without prejudice, and to defer for the WUTC's resolution the initial question  
9 of the tariffs' applicability to VoIP intrastate long distance telephone calls. It claims the WUTC is a proper  
10 adjudicative body, and perhaps more importantly that the WUTC can answer a second, fundamental policy  
11 question that this Court cannot: even if calls made using VoIP are subject to the tariffs, *should* the "full  
12 load" of "regulatory requirements" be imposed upon this "nascent technology"? It argues that the WUTC  
13 should be permitted to "develop and articulate a coherent telecommunications policy" on the regulation of  
14 VoIP technology in the first instance.  
15

16           Plaintiffs disagree, and resist referral to the WUTC. They argue that the primary jurisdiction doctrine  
17 is to be applied reluctantly and sparingly, and point out that it does not require that all claims within an  
18 agency's purview be decided by it. They argue that LocalDial has previously told Oregon's analogous OPUC  
19 that it does not have regulatory authority over LocalDial, a position inconsistent with its request to refer this  
20 litigation to the WUTC. They argue that the central issue here is not particularly complex, and may be  
21 decided by a simple determination of the applicability of various definitional statutes. They also correctly  
22 point out that even if the task is complex, the Court is asked to (and does) answer a multitude of complex  
23 questions in a variety of legal contexts on a daily basis.  
24

25           Plaintiffs further argue, again correctly, that the primary jurisdiction doctrine is not applicable where  
26 the issue is whether a tariff has been violated, as opposed to whether the tariff is reasonable. Finally, they  
27  
28

1 claim that because the WUTC cannot award money damages, it cannot resolve the issues raised by the  
2 plaintiffs' claim and that referral to it is therefore not appropriate.

3 Under the primary jurisdiction doctrine applied in Washington<sup>1</sup>, courts will defer (or refer) to an  
4 agency with "concurrent jurisdiction" when a three-factor test is satisfied:  
5

- 6 1. The administrative agency has the authority to resolve the issues that would be referred  
7 to it by the court;
- 8 2. The agency has specialized competence over all or some part of the controversy which  
9 renders the agency better able than the court to resolve the issues;
- 10 3. The claim before the court involves issues that fall within the scope of a pervasive  
11 regulatory scheme creating a danger that judicial action would conflict with the  
12 regulatory scheme.  
13

14 *See Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 345, 962 P.2d 104 (1998).

15 In the Court's view, the resolution of this motion turns on the second factor, and the parties' more  
16 persuasive arguments relate to it. With respect to the first factor, the parties agree that the WUTC has the  
17 requisite concurrent jurisdiction over the issues raised by the Defendant's technology and the plaintiffs' claims  
18 in this case, and it is apparent that the parties are correct.  
19

20 With respect to the third, the core questions are within the scope of the WUTC's regulatory scheme,  
21 and there is therefore a risk that judicial action in this case could result in conflict if the WUTC chooses to  
22 answer these questions separate from the dispute between the parties here.  
23

24 With respect to the determinative second factor, the WUTC may have specialized competence to hear  
25 and understand the matter from a technical standpoint. However, any technical complexity is not the basis  
26


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27 <sup>1</sup>The parties also enumerate the factors to be considered under the federal test, and seem to concede  
28 that the tests are substantially similar, at least as applied in this case. The calls at issue are intrastate long  
distance calls originating and terminating in Washington. Washington substantive law, including its primary  
jurisdiction doctrine, applies. The court believes the result would be the same under the federal test in any  
event. *See Syntek Semiconductor Co, Ltd. v. Microchip Technology, Inc.*, 307 F.2d 775 (9<sup>th</sup> Cir. 2002).

1 for the court's decision to refer the matter to the WUTC. Instead, it is that Agency's unique ability to evaluate  
2 and implement policy considerations as they relate to the regulation of the VoIP technology that weighs,  
3 decisively, in favor of reference to it. The Court agrees that the issue is the applicability of the tariffs, not  
4 whether they have been violated. It further notes that the threshold question of whether LocalDial is  
5 conducting business subject to the WUTC's regulatory authority is a question of fact to be determined by the  
6 WUTC. See RCW 80.04.015. Most importantly, the issue is whether carriers using VoIP technology *should*  
7 *be regulated*, even if the WUTC has the statutory and regulatory authority to do so. These are ultimately  
8 policy questions that the WUTC is uniquely qualified to address.  
9

10  
11 The Court will therefore STAY the proceedings in this case and REFER the matter to the WUTC for  
12 resolution of the core questions: do the plaintiffs' tariffs apply to the VoIP intrastate telephone calls made by  
13 LocalDial's customers using the plaintiffs' facilities? And, if they do so apply, to what extent, if any, should  
14 the WUTC regulate the relatively new VoIP technology? The court will RETAIN JURISDICTION to address,  
15 if necessary, the plaintiffs' claim for monetary damages and any other issues which remain following the  
16 WUTC's determination of these questions.  
17

18 DATED this 4<sup>th</sup> day of September, 2003.

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21   
22 RONALD B. LEIGHTON  
23 United States District Judge  
24  
25  
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