

MAY 3, 2004

Carol J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

VIA E-MAIL & HAND DELIVERY

Re: WECA, et al. v. LocalDial
WUTC Docket No. UT-031472
Localdial's Motion to Strike Verizon Northwest Inc.'s Response to
Complainants' Motion for Summary Disposition

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket are the original and 16 copies of LocalDial's Response to Staff's Motion for Summary Disposition, and the Supplemental Declaration of William Page Montgomery in Support of same. Copies of these documents have also been sent to the parties on the attached Certificate of Service via the method(s) indicated therein.

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

Sincerely,

ATER WYNNE LLP



Arthur A. Butler

Enclosures

cc: Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of May, 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 3rd day of May, 2004, at Seattle, Washington.



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

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I. INTRODUCTION

1. LocalDial Corporation (“LocalDial”), by and through its attorneys of record, Ater Wynne LLP, hereby submits its response to Commission Staff’s Motion for Summary Determination and Memorandum in Support (“Staff’s Motion”).
2. LocalDial incorporates by reference its response to Complainants’ Motion for Summary Disposition (“WECA’s Motion”), which addresses most of the factual and legal issues raised by Staff.

II. FACTS AND ARGUMENTS

A. LocalDial Offers Information Services, Not Telecommunications Services

3. Both Staff and Complainants focus their motions on the state law definition of telecommunications service, arguing that LocalDial’s service fits that definition, and, as a consequence, LocalDial is subject to regulation by this Commission. The inquiry, for purposes of Staff’s Motion, should more properly start with the federal law distinction between “telecommunications service” and “information service.” It is that distinction which must guide this Commission in determining whether LocalDial is subject to its jurisdiction.

4. Staff appears to downplay the significance of information services in the scheme of state and federal regulation, calling the non-regulation of information services a “curious wrinkle” in the regulatory scheme. Staff’s Motion, p. 13. Staff also quotes a text book which calls the regulatory treatment of enhanced services an “arbitrary call.” Staff’s Motion, p. 23. But information services and the federal decision not to regulate them are hardly a sideshow in the context of federal regulation. The distinction between information services and telecommunications services dates back to 1980 and is found in both the Telecommunications Act of 1996 (47 USC § 153(20) and (43)) and in the Federal Communications Commission (“FCC”)’s

regulations (47 CFR § 64.702(a)). As shown in Page Montgomery's Response Testimony, in the *Computer III Phase II Order*, the FCC considered altering its definition of enhanced services, but ultimately decided to retain the existing rule. The FCC concluded:

We affirm the status of protocol processing as an enhanced service. The extensive record compiled in this proceeding, when viewed as a whole, supports the conclusion we initially reached in *Computer II* that protocol processing services should not be treated as regulated, basic offerings.¹

Thus, the existing definition of information services is a well-established part of the federal regulatory scheme and must guide how this Commission answers the questions posed to it by the U.S. District Court.²

5. As noted in LocalDial's response to WECA's Motion, under 47 CFR § 64.702(a), LocalDial offers information services, and not telecommunications 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.

1. **The Stevens Report Does Not Compel The Conclusion That LocalDial Offers Telecommunications Service**

6. Staff argues that the 1998 *Stevens Report's* four-part definition of phone-to-phone IP Telephony must guide the analysis, and that LocalDial in particular meets the fourth element of that definition – namely, that it transmits customer information “without net change in form of content.” This contention is incorrect for two reasons. First, the four-part shorthand description of “phone-to-phone” IP Telephony in the *Stevens Report* has never been adopted by Congress or

¹ Montgomery Response Testimony, p. 16 (WUTC Docket No. UT-031472).

² *Washington Exchange Carrier Association, et al., v. LocalDial Corporation*, U.S. District Court, Western District of Washington (Case No. C03-5012).

the FCC as a definitive, general test to determine whether a VoIP service is an information service, and has never supplanted the three criteria for information services specified in 47 CFR §64.702(a). As discussed below, based upon the record then before it, the FCC recently did determine for the first time that a VoIP service, offered by AT&T, is a telecommunications, not an information, service and is subject to switched access charges at least prospectively.³ However, the characteristics of AT&T's service as described by AT&T and by the FCC⁴ differ in several critical respects from LocalDial's service. Thus, neither the *AT&T VoIP Order* nor the *Steven Report* can provide the basis for a decision in this matter. Second, even applying that four-part test for "phone-to-phone" IP Telephony – including the "net change" requirement – the record in this proceeding supports LocalDial's position. LocalDial does provide a "net protocol conversion" because its technology provides different and restructured information and use of stored information in addition to protocol processing.

7. In its discussion of federal preemption, Staff has pointed to the *Stevens Report* to support the 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

³ *Petition for a Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 Order FCC 04-97, April 21, 2004 ("*AT&T VoIP Order*").

⁴ The FCC did apply the four-part shorthand description to AT&T's VoIP service, but AT&T itself described its services as satisfying that four-part test. Moreover, AT&T failed to describe the functioning of its VoIP technology and failed to analyze it in light of the three criteria for information services in 47 CFR § 64.702(a).

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.’”⁵ The *Stevens Report* proposed a tentative four-part test for whether a service constitutes phone-to-phone IP Telephony,⁶ and therefore may lack the characteristics of “information services.” However, the FCC declined to make a definitive pronouncement as to the regulatory status of all phone-to-phone telephony absent a more complete record on individual service offerings.

8. In 1999, US West filed a petition seeking a declaratory ruling that access charges apply to phone-to-phone VoIP services provided over private IP networks.⁷ The FCC took no action on the petition and US West subsequently withdrew it.⁸

9. On April 21, 2004, the FCC released an order determining that a specific VoIP service offered by AT&T was required to pay switched access charges. The characteristics of

⁵ *Stevens Report*, ¶ 89, at 11544.

⁶ Under the FCC’s proposed test for phone-to-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.*

⁷ Petition of US West for Declaratory Ruling Affirming Carrier’s Carrier Charges in IP Telephony (filed April 5, 1999).

⁸ Letter from Melissa E. Newman, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission (August 10, 2001); *AT&T VoIP Order, infra*, Statement of Commissioner Kevin J. Martin, at 2.

AT&T's service described in the *AT&T VoIP Order* differ in several respects from LocalDial's service. The *AT&T VoIP Order* thus is not dispositive of the issues before this Commission.

10. In the *AT&T VoIP Order*, the FCC clearly states that its decision applies to AT&T's specific service as "described by AT&T in this proceeding"⁹ and is "based on the record compiled in this proceeding."¹⁰ The FCC also stated that its order "in no way precludes the Commission from adopting a fundamentally different approach when it resolves the IP services rulemaking, or when it resolves the Intercarrier Compensation proceeding."¹¹

11. The *AT&T VoIP Order* further states that with AT&T's service "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T."¹² The FCC found that "[e]nd users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customers of AT&T's specific service receive no enhanced functionality by using the service."¹³ The FCC also noted that "based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices."¹⁴

12. LocalDial's service differs from AT&T's service in each of the respects cited by the FCC. LocalDial's customers:

⁹ *AT&T VoIP Order*, at 1, ¶ 1.

¹⁰ *Id.*, at 7, ¶ 10.

¹¹ *Id.*, at 7-8, ¶ 10.

¹² *Id.*, at ¶ 12.

¹³ *Id.*, at ¶ 15.

¹⁴ *Id.*, at ¶ 17.

- (a) Order a different service from the company in order to access its VoIP network. That network is used to transmit all traffic not just “certain calls;”
- (b) Make two separate calls in order to use the service: one call to a local access number and a second dialed call in order to reach another party. The second call does not require the LocalDial customer to dial 1+; and
- (c) Pay different rates from those charged by their actual long distance carrier, whose service is not displaced by LocalDial’s secondary service. LocalDial’s customers can and do receive substantially reduced long distance prices based upon LocalDial’s \$20.00 per month flat-rate price.¹⁵

13. The conclusion of the *AT&T VoIP Order* that AT&T’s service in question is not an information service, likewise does not apply to LocalDial’s service. In its petition, AT&T did not discuss the functioning of the VoIP technology it uses and described its service as not involving a net protocol conversion.¹⁶ Not surprisingly, then, the FCC did not discuss the nature of the technology used by AT&T’s service or whether any type of computer processing is involved with the technology. The FCC noted:

This order, however, addresses only AT&T’s *specific* service, and that service does not involve a net protocol conversion and does not meet the statutory definition of an information service. If the service evolves such that it meets the definition of an information service, the Commission could revisit its decision in this order.¹⁷ (Emphasis added).

14. Mr. Montgomery’s Direct Testimony demonstrates that LocalDial’s technology offers multiple capabilities “for ... acquiring, storing, transforming, processing, retrieving, [and] utilizing ... information via telecommunications,” which in relevant part is the statutory definition

¹⁵ Supplemental Declaration of William Page Montgomery in Support of LocalDial’s Response to Staff’s Motion for Summary Disposition (“Montgomery Supplemental Declaration”), pp. 2-3, ¶5.

¹⁶ AT&T Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges (filed October 18, 2002)(“*AT&T Petition*”), at 11.

¹⁷ *AT&T VoIP Order* at ¶ 13.

of an information service.¹⁸ In support, Mr. Montgomery provides the specific technical references, in the form of internationally-adopted specifications, defining the capabilities. Further, Mr. Montgomery's Direct Testimony demonstrates that because of these capabilities, prior FCC rulings hold that there is a net protocol conversion between LocalDial's customer and the computing facility operated by LocalDial in the form of its VoIP gateway computers.¹⁹ As noted by Mr. Montgomery, in its *Computer III Phase II Order*, ¶ 69, the FCC stated unambiguously:

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.²⁰ 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 in the *Stevens Report* or determined to be a telecommunications service in the *AT&T VoIP Order*. Even under the *Stevens* and *AT&T VoIP Order* tests, LocalDial's service is an information service.

15. Therefore, at a minimum, there remain numerous factual issues specific to LocalDial for this Commission to resolve.

¹⁸ 47 U.S.C. §153(20).

¹⁹ Montgomery Supplemental Declaration, p. 3, ¶6.

²⁰ Montgomery Response Testimony, pp. 17-18 (WUTC Docket No. UT-031472).

2. **LocalDial's Technology Performs The Functions Of An Information Service**

16. Staff argues that LocalDial does not provide information services because its service differs from some of the familiar information services currently in the market – including voice mail, internet access and credit card verification service. This misapprehends the issue at hand. This Commission must ask whether LocalDial's service fits any of the three criteria for information services, not whether or to what extent it looks like certain other information services.

17. Staff appears to argue that LocalDial's VoIP service is not an information service because the changes to the content and the protocol used for the customer's message are "transparent" to the customer.²¹ However, the test is not whether the change is noticeable to the end user. There is no requirement in either the applicable rule, 47 CFR §64.702(a),²² or the statutory definition of "information service," 47 U.S.C. §153(20),²³ that the customer must perceive that he/she is getting something different.

18. Staff also asserts that LocalDial's service is not an information service because "[v]oice 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,

²¹ Staff's Motion for Summary Determination at 14, 27.

²² 47 CFR §64.702(a) provides: "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."

²³ 47 U.S.C. §153(20) defines "information service" 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."

SONET, etc.) and digital switching (5ESS, DMS, etc.).” This argument is not well taken. LocalDial’s argument is not that it is providing an information service simply because its equipment performs signal compression and suppression functions, detects and corrects errors, or performs protocol processing functions; the point is *how* it does those things. As discussed by Mr. Montgomery in his Direct Testimony, the VoIP signal compression and suppression functions in the LocalDial gateways detect and delete periods of silence in the conversation and other non-voice sounds. The gateways then create false information and insert that data into the stream of packets they are defining.²⁴ As Mr. Montgomery further explains:

The technology used by LocalDial’s VoIP gateways, the ITU G.723.1 standard technology, is not limited to compression and filter techniques or the mere management and control of a telecommunications offering. It actually involves complex, mathematical, real-time computations that act on the pitch and other characteristics of the human voice.²⁵

Further, with respect to error detection and correction, Mr. Montgomery explains that the VoIP gateway software retrieves data previously stored from the packet stream and/or creates new data that does not exist in the original signal as an error control process. In contrast, the error control used in data communications transmissions that are deemed to be telecommunications services simply involves “the repetitive re-transmission of each portion of the message that was received in a garbled state.”²⁶ Thus, this argument by Staff should be disregarded.

19. A focus on LocalDial’s technology and its functions confirms that LocalDial offers an information service. As LocalDial has shown in its response to WECA’s Motion, LocalDial

²⁴ Montgomery Direct Testimony, p. 36 (Docket No. UT-031472).

²⁵ Montgomery Response Testimony, p. 5 (Docket No. UT-031472).

²⁶ Montgomery Direct Testimony, p. 38 (Docket No. UT-031472).

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).

20. 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 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.²⁷

21. 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.²⁸ 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.

22. 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

²⁷ Montgomery Response Testimony, p. 23 (Docket No. UT-031472).

²⁸ Montgomery Response Testimony, pp. 24-25 (Docket No. UT-031472).

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.²⁹ 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.³⁰

23. 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,

²⁹ Montgomery Response Testimony, pp. 25-26 (Docket No. UT-031472).

³⁰ LocalDial discourages its customers from attempting to send faxes over the service. This is because the changes to the content of the customers’ calls performed by LocalDial’s VoIP equipment would often result in errors in the fax as received and a very unsatisfactory experience for the customers.

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.³¹

24. The foregoing discussion shows not only that LocalDial's service meets each of the three criteria for information services, but also that LocalDial does not simply manage telephone calls as do other telecommunications providers. For this reason, Staff is incorrect to argue that LocalDial's service is indistinguishable from that of many telecommunications providers.

B. This Commission Does Not And Cannot Regulate Information Service Providers

25. Because there is, at a minimum, an issue of fact as to whether LocalDial's service is an information service, this matter must proceed to a hearing. If this Commission finds that LocalDial offers an information service, then it has no jurisdiction to regulate LocalDial or order the imposition of access charges. This is the case because: (a) Washington law authorizes only regulation of telecommunications services, and (b) federal law would preempt any effort to regulate information services. LocalDial incorporates by reference the discussion of these points in its response to WECA's Motion.

C. Public Policy Considerations Dictate That This Commission Refrain From Regulating LocalDial

26. This Commission takes on the issues in this matter at a time of tumultuous technological change and regulatory uncertainty. As LocalDial noted in its response to WECA's Motion, the FCC's recently issued *IP-Enabled Services NPRM* announces the FCC's intention to step back and evaluate the appropriate nature and scope of future federal regulation of IP-enabled

³¹ Montgomery Response Testimony, p. 27 (Docket No. UT-031472).

services like LocalDial.³² 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.³³ 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.

27. In light of the legal uncertainty surrounding state authority to regulate VoIP services, and the potential adverse effects on the VoIP industry of inconsistent state rules, this Commission should refrain from ruling that it can regulate LocalDial pending further FCC action on the issue. Events within the past few weeks further underscore the wisdom of deferring action. The Pennsylvania Public Utility Commission voted on April 15, 2004, to hold back from imposing regulations on VoIP services, stating that "it would be premature for this Commission to take action until such time as the FCC has provided guidance on this issue."³⁴ Staff has provided no reason for this Commission to put itself "out front" on these issues while active consideration continues at the FCC.

28. For these reasons, this Commission should refrain from ruling on whether it has authority to regulate LocalDial.

III. CONCLUSION

29. For the reasons shown above and in LocalDial's response to WECA's Motion, this Commission should deny both Staff's and WECA's Motions for Summary Determination and either: (a) allow this matter to proceed to hearing; (b) rule that LocalDial is not subject to

³² *IP-Enabled Services NPRM*, ¶¶ 1-6.

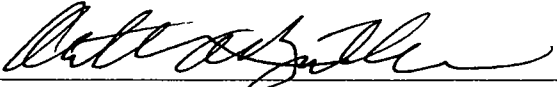
³³ *IP-Enabled Services NPRM*, ¶ 32 (discussing and citing pending petitions).

³⁴ *Investigation into Voice over Internet Protocol, Motion of Commissioner Glen R. Thomas*, Pennsylvania Public Utility Commission, Docket No. M-00031707 (April 15, 2004).

regulation by this Commission or to access charges; or (c) defer ruling pending action by the FCC or Congress.

RESPECTFULLY SUBMITTED this 3rd day of May, 2004.

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