

[Service Date: May 13, 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 BRIEF
REGARDING THE FCC'S AT&T VoIP
ORDER**

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I. INTRODUCTION

1. LocalDial Corporation (“LocalDial”), by and through its attorneys of record, Ater Wynne LLP, hereby submits its response brief¹ regarding the Federal Communications Commission’s (“FCC”) April 21, 2004 Order FCC 04-97, *In the Matter of Petition for a Declaratory Ruling that AT&T’s Phone-to-Phone Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (“*AT&T VoIP Order*”).

II. ARGUMENT

2. The FCC’s recent ruling on AT&T’s petition regarding its VoIP service does not point to an easy resolution of the issues before this Commission. Rather, the FCC’s ruling shows that the extent of state regulation of novel technologies, such as that offered by LocalDial, will remain unclear until the FCC takes further action in a rulemaking context.

A. The *AT&T VoIP Order* Is Limited To The Service Which Is The Subject Of The Proceeding.

3. The FCC determined that AT&T’s “phone-to-phone” Internet protocol (IP) telephony is “a telecommunications service upon which interstate access charges may be assessed.”² Significantly, the FCC’s *AT&T VoIP Order* is expressly limited to the service AT&T made subject to the proceeding, and it is not generally applicable to other forms of VoIP service. Because LocalDial’s service is distinctly different from AT&T’s, this Commission cannot conclude that it is required to subject LocalDial to access charges.

¹ Although the FCC’s *AT&T VoIP Order* was discussed in LocalDial’s Response to Staff’s Motion for Summary Disposition, because of the focused nature of this brief, much of that discussion is included here as well.

² *AT&T VoIP Order*, ¶ 1.

4. 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"³ and is "based on the record compiled in this proceeding."⁴ The FCC also stated that its *AT&T VoIP 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."⁵

5. Rather than consider the technology issues in detail, the FCC relied on certain characteristics of AT&T's specific service, *as described by AT&T itself*. It is important to note that AT&T did not ground its petition on the functions of the technology it uses and did not discuss it; therefore, the FCC may have lacked a factual record to even consider the specific functions of the AT&T technology. In any case, the FCC's lack of discussion of technology issues significantly limits the ruling because the agency considered only part of the definition of "information services" in the Telecommunications Act and did not consider the more detailed definition in its own rules, despite the fact that the FCC previously found that the statutory definition and rule definition were "synonymous" and should be read together.

B. LocalDial's Service Differs From The AT&T Service Subject To The FCC's *AT&T VoIP Order*.

6. The *AT&T VoIP Order* is of limited impact in this proceeding because the service described therein differs in several respects from the LocalDial service. The *AT&T VoIP Order* 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

³ *Id.*, at 1, ¶ 1.

⁴ *Id.*, at 7, ¶ 10.

⁵ *Id.*, at 7-8, ¶ 10.

calls is made internally by AT&T.”⁶ 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.”⁷ 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.”⁸

7. LocalDial’s service⁹ differs from AT&T’s service as to each of the characteristics cited by the FCC. LocalDial’s customers must:

- (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+¹⁰; 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.¹¹

⁶ *Id.*, at ¶ 12.

⁷ *Id.*, at ¶ 15.

⁸ *Id.*, at ¶17.

⁹ In its Initial Arguments Concerning Order FCC 04-97, the Commission Staff misstates how LocalDial terminates calls. The Staff asserts that LocalDial terminates all traffic over PRI trunks it purchases from a LEC in the called party’s local calling area. In fact, as explained by Mr. Montgomery in his Direct Testimony, Exhibit WPM-1T, (WUTC Docket No. UT-031472), at pp. 11-12, calls to areas where LocalDial does not have a node or hub are routed to a long-distance carrier for completion and are subject to traditional intercarrier compensation for such calls, including payments to support universal service and other social goals.

¹⁰ Note 58 of the *AT&T VoIP Order* states: “Because AT&T’s specific service does utilize 1+ dialing, **other VoIP services that do not are beyond the scope of this proceeding.**” (Emphasis added).

¹¹ Supplemental Declaration of William Page Montgomery in Support of LocalDial’s Response to Staff’s Motion for Summary Disposition (WUTC Docket No. UT-031472)(“Montgomery Supplemental Declaration”), pp. 2-3, ¶5.

LocalDial can charge this low price in part because of the “enhanced functionality” provided by the company’s VoIP gateway computers.

8. Because AT&T’s service is different from that of LocalDial, the conclusion that AT&T’s service 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.¹² 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.¹³ (Emphasis added).

9. Mr. Montgomery’s Direct Testimony in this proceeding 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 of an information service.¹⁴ 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, applying prior FCC rulings to these capabilities, 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.¹⁵

¹² 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.

¹³ *AT&T VoIP Order*, at ¶ 13.

¹⁴ 47 U.S.C. §153(20).

¹⁵ Montgomery Supplemental Declaration, p. 3, ¶6.

As noted by Mr. Montgomery, in its *Computer III Phase II Order*, ¶ 69, the FCC stated unambiguously:

We also 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).

10. Because a protocol conversion occurs between LocalDial's customers and its information service computing facilities (AudioCode gateways), there is a "net protocol conversion" under FCC precedent.¹⁶ 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 Report* and *AT&T VoIP Order* tests, LocalDial's service is an information service.

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

C. The FCC's Discussion Of The Definition Of "Information Services" Is Ambiguous.

12. The FCC's ruling contains some ambiguity in its interpretation of the statutory definition of an "information service," and for that reason this Commission should be cautious in applying it to LocalDial. In paragraph 5 of the *AT&T VoIP Order*, the FCC correctly quotes the definition as based on the "capability" itself, but in paragraph 12 of the *AT&T VoIP Order*, the text implies that the "capability" must be offered to a "customer," possibly as some form of stand-alone service. The statutory definition does not, however, require that a customer must be aware

¹⁶ Response Testimony of William Page Montgomery (WUTC Docket No. UT-031472), p. 18.

of each specific capability offered by the provider in order for a service to be classified as an information service. Some computer-controlled capabilities in an information service may in fact be invisible to the end user, as are the pitch-and-excitation processing algorithms in the G.723.1 technology used in LocalDial's VoIP gateways.

13. If an information service must have some sort of apparent (*i.e.* not invisible) stand-alone capability, then many forms of VoIP, including VoIP services connected to broadband services and those using special devices such as Session Initiation Protocol (SIP) telephone sets, might arguably not constitute "information services" either.¹⁷ It seems clear that the FCC did not intend for its ruling to have such a far-reaching impact on the industry, and, for that reason, it is appropriate to view the *AT&T VoIP Order* as limited to the specific AT&T VoIP application.

D. The FCC Declined To Address Retroactive Fees.

14. The narrow scope of the *AT&T VoIP Order* is further underlined by the FCC's failure to rule on whether AT&T's obligation to pay switched access charges was retroactive. No FCC member argued that the service should be subject retroactively to switched access charges, and one commissioner highlighted the fact that the AT&T ruling was the first one of its kind for the agency, and that considerable uncertainty has surrounded the application of access charges for years.¹⁸ The FCC's continued reluctance to rule on this issue should give this Commission pause in addressing WECA's request for retroactive access charges.

¹⁷ Cisco Systems Series 7900 telephones are examples of devices with SIP capability. They look just like regular telephone instruments, with a standard numeric keypad that can be used to place calls to telephone numbers over a broadband connection (with no "net protocol" conversion between any pair of instruments used for a call).

¹⁸ *AT&T VoIP Order*, Statement of Commissioner Kevin J. Martin, p. 1.

E. The FCC *AT&T VoIP Order* Does Not Resolve Long-Standing Uncertainty In The Industry.

15. The statement of FCC Commissioner Michael J. Copps accompanying the *AT&T VoIP Order* makes an important point about the effect of that order on the emerging market for VoIP services. Commissioner Copps noted that the FCC's comments on regulatory treatment of VoIP services has been "unfortunately opaque" for years, consisting of "vague signs" and "mixed signals" regarding whether such services are subject to access charges. "As a result," he stated, "innovative and entrepreneurial VoIP upstarts may have been encouraged to believe they had a green light to go ahead and develop business plans based on the assumption that access charges were not required."¹⁹

16. Commission Copps observed that the *AT&T VoIP Order* does not resolve all of the uncertainties on access charges, and that "the pit stop we take here to straighten out one issue leaves behind a system in need of more comprehensive improvement."²⁰ That improvement will come with FCC action on the three-year-old proceeding regarding intercarrier compensation. Pending that comprehensive treatment of the VoIP industry, uncertainty persists on its regulatory status, and this Commission should not make LocalDial subject to access charges.

III. CONCLUSION


17. For the foregoing reasons, LocalDial respectfully requests that this Commission: (1) decline to order that LocalDial is subject to access charges, or (2) proceed to a hearing on the factual issues present in this matter.

¹⁹ *AT&T VoIP Order*, Statement of Commissioner Michael J. Copps, p. 1.

²⁰ *Id.*, p. 2.

RESPECTFULLY SUBMITTED this 13th day of May, 2004.

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