

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**BEFORE THE WASHINGTON UTILITIES  
AND TRANSPORTATION COMMISSION**

WASHINGTON EXCHANGE CARRIER  
ASSOCIATION, et al.,

UT-031472

Complainants,

COMPLAINANTS' REPLY TO LOCALDIAL'S  
RESPONSE TO COMMISSION STAFF'S  
MOTION FOR SUMMARY DETERMINATION  
AND MEMORANDUM IN SUPPORT AND TO  
COMMENTS OF BROADBAND  
COMMUNICATIONS ASSOCIATION OF  
WASHINGTON AND COMMISSION STAFF

v.

LOCALDIAL CORPORATION,

Respondent.

**I. INTRODUCTION**

1. Pursuant to the April 23, 2004 Notice in this proceeding, the Washington Exchange Carrier Association and its member companies (collectively "WECA"), by and through their attorney of record, Richard A. Finnigan, attorney at law, file this Reply to LocalDial Corporation's ("LocalDial") Response to Commission Staff's Motion for Summary Determination and Memorandum in Support ("LocalDial Response"). In filing this Reply, WECA also considers and responds to the Comments of Broadband Communications Association of Washington Re Impact of

COMPLAINANTS' REPLY TO LOCALDIAL'S  
RESPONSE TO STAFF'S MOTION FOR  
SUMMARY DETERMINATION AND  
MEMORANDUM IN SUPPORT - 1

Law Office of  
Richard A. Finnigan  
2405 Evergreen Park Dr. SW  
Suite B-1  
Olympia, WA 98502  
(360) 956-7001

1 FCC's AT&T Order on Case ("BCAW Comments") and the Initial Arguments of Commission Staff  
2 Concerning Order FCC 04-97 ("Staff Comments").

3 2. Both the BCAW Comments and Staff Comments focused on the Federal  
4 Communications Commission's ("FCC") recent declaratory ruling finding that AT&T's "phone-to-  
5 phone" Internet protocol ("IP") telephony services are telecommunications services under the  
6 Communications Act of 1934 as amended by the Telecommunications Act of 1996 ("the Act") and  
7 are subject to interstate access charges.<sup>1</sup> In formulating its response to Staff's Motion for Summary  
8 Determination, LocalDial also devoted significant space to addressing the AT&T Order.

## 9 II. ARGUMENT

10 3. In the LocalDial Response, LocalDial attempts to confuse and misdirect attention.  
11 LocalDial provides a declaration from Mr. Montgomery which attempts to show how the plumage  
12 of the enhanced or information service provider (collectively "ESP") definitions fit LocalDial's  
13 operations. However, no amount of legal dressing and no amount of technological draping can hide  
14 the simple fact that the emperor has no clothes. There is no net protocol change or enhanced  
15 functionality to the end user in LocalDial's operations. The call starts as a voice call and the call  
16 ends as a voice call. No matter how it is disguised, that is the bottom line.

### 17 A. The AT&T Order applies to Similarly Situated Service Carriers

18 4. The comments of both LocalDial and BCAW attempt to characterize the AT&T  
19 Order as one of very limited application and seem to imply that it may only relate to the specific  
20 service offerings of AT&T.<sup>2</sup> However, this is simply not the case and the language relied upon by  
21 LocalDial and BCAW must be placed in the proper context. The FCC clearly contemplated a  
22

---

23  
24 <sup>1</sup> 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").

25 <sup>2</sup> See, e.g., LocalDial Response at ¶ 10 and BCAW Comments at p. 2.

1 broader application affecting an area of the law in need of clarification:

2 In this order, we provide clarification about the application of our rules to  
3 AT&T's specific service because of the importance of this issue for the  
4 telecommunications industry. There is significant evidence that similarly situated  
5 carriers may be interpreting our current rules differently. These divergent  
6 interpretations may have significant implications for competition between these  
7 providers, for the ability of LECs to receive appropriate compensation for the use  
8 of their networks, and for the application of important Commission rules, such as  
9 the obligation to contribute to the universal service support mechanisms.  
10 (Emphasis added)<sup>3</sup>

11 In other words, the FCC clearly intended that the AT&T Order to apply to carriers offering similar  
12 services. Accordingly, there is not reason to conclude that the FCC intended the AT&T Order to be  
13 limited to the specific service offerings of AT&T.

14 **B. LocalDial is offering a Telecommunications Service and Not an  
15 Enhanced or Information Service**

16 5. In its response, LocalDial labors mightily to somehow distinguish its services from  
17 those of other providers of telecommunications services. In so doing, LocalDial questions the  
18 application of the Stevens Report<sup>4</sup> and argues that it is providing enhanced or information services.<sup>5</sup>  
19 Along the way, LocalDial also attempts to distinguish its services from the "phone-to-phone" IP  
20 telephony services of AT&T.<sup>6</sup> However the arguments are presented, there is simply no getting  
21 around the conclusion that LocalDial is offering a telecommunications service. In previous filings  
22 in this proceeding, WECA and Staff have already demonstrated that LocalDial is offering a  
23 telecommunications service within the meaning of RCW 80.04.010 and Chapter 80.36. This  
24 proposition is made stronger by the recently issued AT&T Order.

25 \_\_\_\_\_  
26 <sup>3</sup> AT&T Order at ¶ 2.

<sup>4</sup> LocalDial Response at ¶ 7. See, In re Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC  
Rcd. 11501 (rel. Apr. 10, 1998) ("Stevens Report").

<sup>5</sup> LocalDial Response at ¶¶ 16-24.

<sup>6</sup> See, e.g., LocalDial Response at ¶¶ 6, 9 - 14.

1           **1. LocalDial's Services are Not Distinguishable from Those of AT&T**

2           6. WECA has already demonstrated that LocalDial's service is remarkably similar to  
3 the AT&T service described in the FCC's order.<sup>7</sup> Nevertheless, LocalDial attempts to distinguish  
4 itself in three ways. Specifically, LocalDial contends that its customers:

- 5           (a) Order a different service from the company in order to access its VoIP network.  
6           That network is used to transmit all traffic not just "certain calls;"
- 7           (b) Make two separate calls in order to use the service: one call to a local access number  
8           and a second dialed call in order to reach another party. The second call does not  
9           require the LocalDial customer to dial 1+; and
- 10          (c) Pay different rates from those charged by their actual long distance carrier, whose  
11          service is not displaced by LocalDial's secondary service. LocalDial's customers  
12          can and do receive substantially reduced long distance prices based upon LocalDial's  
13          \$20.00 per month flat-rate price.<sup>8</sup>

14          However, as described by LocalDial, this is no more than the two call system the Commission has  
15          already rejected as an improper access bypass scheme in U & I CAN.<sup>9</sup>

16          7. LocalDial sets out its three points in an effort to fit within the language contained in  
17          Paragraph 12 of the AT&T Order: "End-user customers do not order a different service, pay  
18          different rates, or place and receive calls any differently than they do through AT&T's traditional  
19          circuit-switched long distance service; the decision to use its Internet backbone to route certain calls  
20          is made internally by AT&T."<sup>10</sup> On the first alleged difference, apparently  
21          LocalDial's argument is that it transits all calls over the  
22          Internet, not just some. Factually, that is not true. However,

23 <sup>7</sup> WECA Brief in Support of Motion for Summary Determination at ¶¶ 6 and 7.

24 <sup>8</sup> LocalDial Response at ¶ 12.

25 <sup>9</sup> U & I CAN v. Pacific Northwest Bell Telephone Co., Docket No. UT-960659, Third Supplemental Order (Feb. 4,  
26 1998).

1 assuming, arguendo, it is true, it does not follow that simply  
2 because LocalDial makes more use of the Internet, that its  
3 services are distinguishable from those of AT&T in any meaningful  
4 way. Following LocalDial's logic, AT&T might have avoided FCC  
5 regulation altogether simply by transporting all of its traffic  
6 over the Internet while still using the public switched telephone  
7 network (" PSTN" ) for origination and termination. Since this is  
8 an untenable conclusion, LocalDial cannot distinguish itself on  
9 this basis and the same principles and conclusions set forth in  
10 the AT&T Order should apply to LocalDial.<sup>11</sup>

11 8. In attempting to distinguish itself on the basis of its  
12 two-step dialing process, LocalDial is truly grasping at thin air.  
13 Although the FCC noted that a customer using the AT&T services  
14 would dial 1+ the intended number,<sup>12</sup> the FCC's analysis does not  
15 rise and fall on the presence or absence of 1+ dialing. Rather,  
16 the FCC adopted a straightforward three-step approach:

17 We emphasize that our decision is limited to the type of  
18 service described by AT&T in this proceeding, i.e., an  
19 interexchange service that: (1) uses ordinary customer  
20 premises equipment (CPE) with no enhanced functionality;  
21 (2) originates and terminates on the public switched  
telephone network (PSTN); and (3) undergoes no net  
protocol conversion and provides no enhanced  
functionality to end users due to the provider's use of  
IP technology. Our analysis in this order applies to  
services that meet these three criteria regardless of

---

22  
23 <sup>10</sup> AT&T Petition at ¶ 12. (Emphasis added)

24 <sup>11</sup> To the extent LocalDial argues its customers "order a different service," it is trying to color the argument with  
invisible ink. The FCC was simply pointing out that the AT&T customer did not choose the service from among other  
AT&T services. LocalDial only offers one service.

25 <sup>12</sup> AT&T Order at ¶ 11.

1           whether only one interexchange carrier uses IP transport  
2           or instead multiple service providers are involved in  
3           providing IPtransport.<sup>13</sup> LocalDial's service meets these three criteria. As noted in  
4           Staff's Comments, LocalDial's service uses switching methods that  
5           are very similar to those of Feature Group A.<sup>14</sup> This is in  
6           contrast to Feature Group D, which requires a customer to dial 1+  
7           the called party's number in order to reach a pre-subscribed  
8           interexchange carrier.<sup>15</sup> The salient point being that regardless  
9           of whether or not the customer uses an access number as part of a  
10          two-step process or dials 1+, both calls employ "both the  
11          originating and terminating facilities of the LECs in the same  
12          manner as traditional circuit-switched long-distance calls."<sup>16</sup> As  
13          correctly noted by Commission Staff, LocalDial is distinguishable from AT&T in LocalDial's use  
14          of PRI lines to transport originating calls.<sup>17</sup> However, given the FCC's discussion in the AT&T  
15          Order — that use of the PSTN is a characteristic of a regulated  
16          " phone-to-phone" IP telephony service — this is not a distinction that provides  
17          LocalDial with any solace.<sup>18</sup> Indeed, LocalDial's method of originating calls is simply a more  
18          obvious effort to bypass the legitimate access charges of WECA's member companies.

---

21  
22 <sup>13</sup> AT&T Order at ¶ 1.

23 <sup>14</sup> Staff Comments at ¶ 7.

24 <sup>15</sup> Staff Comments at ¶ 7.

25 <sup>16</sup> Staff Comments at ¶ 7.

26 <sup>17</sup> Staff Comments at ¶ 5. Technically, the calls originate over customer lines and inter-company facilities on the PSTN, and LocalDial has the call transported over PRIs once the call reaches the PRI.

<sup>18</sup> See, e.g., AT&T Order at ¶ 1.

COMPLAINANTS' REPLY TO LOCALDIAL'S  
RESPONSE TO STAFF'S MOTION FOR  
SUMMARY DETERMINATION AND  
MEMORANDUM IN SUPPORT - 6

Law Office of  
Richard A. Finnigan  
2405 Evergreen Park Dr. SW  
Suite B-1  
Olympia, WA 98502  
(360) 956-7001

1           9.       LocalDial’s effort to distinguish itself from AT&T on the basis of flat-rate pricing  
2 and on its assertion that its services do not displace those of the pre-subscribed interexchange  
3 carrier again is a misinterpretation of the AT&T Order. LocalDial is relying once again upon the  
4 language in Paragraph 12 of the AT&T Order that reads: “End-user customers do not order a  
5 different service, pay different rates, or place and receive calls any differently than they do through  
6 AT&T’s traditional circuit-switched long distance service; the decision to use its Internet backbone  
7 to route certain calls is made internally by AT&T.”<sup>19</sup> The real point that the FCC is making is that  
8 AT&T’s use of the Internet was voluntary choice of transport medium. The FCC’s comment on  
9 “pay different rates” refers to classes of AT&T customers. AT&T did not have a two stage price  
10 plan, one for calls transported over the Internet and one for calls which were not.<sup>20</sup> As with AT&T,  
11 all of LocalDial’s customers pay the same rate. Simply because LocalDial presents a flat-rate  
12 pricing scheme or does not supplant the customer’s pre-subscribed interexchange carrier, does not  
13 remove it from the Commission’s jurisdiction. If anything, LocalDial’s pricing structure is further  
14 evidence that it is engaging in a system of arbitrage that is only possible through the avoidance of  
15 legitimate access charges — the very same charges that registered interexchange  
16 telecommunications companies are required to pay. Additionally, LocalDial cannot replace the  
17 customer’s pre-subscribed interexchange carrier simply because it has thus far failed to register as  
18 an interexchange telecommunications company with the Commission. In both cases, LocalDial’s  
19 reasoning ultimately relates back to its failure to abide by Washington law.  
20  
21  
22

---

23  
24 <sup>19</sup> AT&T Order at ¶ 12.

25 <sup>20</sup> If the determining point is that one carrier’s prices are lower than another carrier’s prices, then the tautology would  
26 mean only the highest priced service is a telecommunications service. LocalDial’s logic does not hold.

1           10.     Finally, on the issue of pricing, it should be noted that LocalDial states “LocalDial’s  
2 customers can and do receive substantially reduced long distance prices...”<sup>21</sup> This is a straight  
3 admission that LocalDial offers long distance service. LocalDial’s service is not distinguishable  
4 from AT&T’s voice-to-voice IP telephony on any meaningful basis.  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

---

24 <sup>21</sup> LocalDial Response at ¶ 12.



1           **2. LocalDial is Not Offering an Enhanced or Information Service**

2           11. In their respective motions and briefs in this proceeding, both WECA and Staff have  
3 demonstrated why LocalDial is not offering an information or enhanced service.<sup>22</sup> In the LocalDial  
4 Response, LocalDial makes another attempt at dressing itself with the label of an ESP. However,  
5 there is no net protocol conversion on enhanced functionality to the end user in LocalDial's service  
6 – what starts as voice ends as voice. This is not the clothing of an ESP.  
7

8           12. LocalDial criticizes the Stevens Report. If there was  
9 anything to criticize about the Stevens Report, the AT&T Order  
10 rectifies that problem. The FCC confirmed in its decision in the  
11 AT&T Order – that AT&T's " phone-to-phone" IP telephony service  
12 is a telecommunications service – is consistent with the Stevens  
13 Report:

14           This determination is consistent with the Commission's tentative conclusion in the  
15 Stevens Report that phone-to-phone IP telephony bears the characteristics of  
16 telecommunications service. Stevens Report, 13 FCC Rcd at 11544, para. 89.  
17 AT&T's specific service meets the four conditions that the Commission stated "it  
tentatively intend[ed] to refer to" as phone-to-phone IP telephony. Stevens Report, 13  
FCC Rcd at 11543-44, para. 88.<sup>23</sup>

18 Thus, the tenets of the Stevens Report have been affirmed by the FCC's ruling in the AT&T Order.  
19 Accordingly, before the AT&T Order was issued, WECA and Staff were entirely correct to look to  
20 the Stevens Report for guidance in this proceeding.<sup>24</sup>

21  
22  
23 <sup>22</sup> See, e.g., WECA Brief in Support of Motion for Summary Disposition at ¶ 37 and Staff's Motion for Summary  
Determination and Memorandum in Support at ¶ 43.

24 <sup>23</sup> AT&T Order at n. 54.

25 <sup>24</sup> See, e.g., WECA Brief in Support of Motion for Summary Disposition at ¶ 46 and Staff's Motion for Summary  
Determination and Memorandum in Support at ¶ 47.

1           13.     In its response, LocalDial tries a myriad of approaches to establish itself as an ESP.  
2 Most of these stem from LocalDial's interpretation of 47 C.F.R. § 64.702(a).<sup>25</sup> That provision  
3 reads:

4           For the purpose of this subpart, the term enhanced service shall refer to services,  
5 offered over common carrier transmission facilities used in interstate  
6 communications, which employ computer processing applications that act on the  
7 format, content, code, protocol or similar aspects of the subscriber's transmitted  
8 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.

9 LocalDial also relies on the definition of "information services":

10           [T]he offering of a capability for generating, acquiring, storing, transforming,  
11 processing, retrieving, utilizing, or making available information via  
12 telecommunications, and includes electronic publishing, but does not include any use  
13 of any such capability for the management, control, or operation of a  
telecommunications network or the management of a  
telecommunications service.<sup>26</sup>

14 However, the FCC found that users of AT&T's service:

15           ...obtain only voice transmission with no net protocol conversion, rather than  
16 information services such as access to stored files. More specifically, AT&T does not  
17 offer these customers a "capability for generating, acquiring, storing, transforming,  
processing, retrieving, utilizing, or making available information;" therefore, its  
service is not an information service under section 153(20) of the Act.<sup>27</sup>

18 The same is true for LocalDial. Thus, LocalDial is seeking protection in an exemption that does not  
19 apply to its service offerings.

20           14.     In its effort to demonstrate it is an ESP, LocalDial tries to camouflage itself in  
21 technological garb. However, despite LocalDial's efforts to establish that its use of ITU G.723.1  
22

---

23 <sup>25</sup> See, e.g., LocalDial Response at ¶ 19.

24 <sup>26</sup> 47 U.S.C. § 153(20).

25 <sup>27</sup> AT&T Order at ¶ 12.

1 technology at its gateways changes the protocol or restructures the call data,<sup>28</sup> there simply is no  
2 meaningful change in form, content, code, protocol or structure for end users associated with  
3 LocalDial's services, as required under the AT&T Order and 47 C.F.R. § 64.702(a). No matter how  
4 strenuously LocalDial tries to argue otherwise, and no matter how much it tries to put on the  
5 trappings of technology, the types of activities described in LocalDial's Response are part of  
6 modern telecommunications. These are not activities associated with enhanced or information  
7 services.  
8

9 Commission Staff expressed a similar view:

10 Voice suppression and compression, error detection and correction, as well  
11 as protocol related addressing and the addition of  
12 protocol related information are functions of all modern  
13 telecommunications networks and are commonly used by the  
14 public switched telephone network today in transport (T1,  
15 SONET, etc.) and digital switching (5ESS, DMS, etc.).  
16 The FCC has explicitly clarified that certain  
17 internetworking protocol conversion capabilities – those  
18 conversions taking place 'that result in no net  
19 conversion between users' – are frequently required in  
20 the provisioning of telecommunications service.<sup>29</sup>

21 Concerning "Protocol conversions" similar to what LocalDial  
22 describes, the FCC held that "[t]o the extent that protocol conversions associated with  
23 AT&T's specific service take place within its network, they appear to be 'internetworking'  
24 conversions, which the Commission has found to be telecommunications services."<sup>30</sup> In arguing  
25 that its services "involve subscriber interaction with stored information" via G.723.1 technology,  
26

---

27 <sup>28</sup> LocalDial Response at ¶¶ 20 – 22.

28 <sup>29</sup> Staff's Motion for Summary Determination and Memorandum in Support at ¶ 51.

29 <sup>30</sup> Ibid.

30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

COMPLAINANTS' REPLY TO LOCALDIAL'S  
RESPONSE TO STAFF'S MOTION FOR  
SUMMARY DETERMINATION AND  
MEMORANDUM IN SUPPORT - 11

Law Office of  
Richard A. Finnigan  
2405 Evergreen Park Dr. SW  
Suite B-1  
Olympia, WA 98502  
(360) 956-7001

1 LocalDial, as elsewhere, reads the rules too narrowly and fails to place the language of 47 C.F.R. §  
2 64.702(a) in the correct context — that information  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

25 COMPLAINANTS' REPLY TO LOCALDIAL'S  
26 RESPONSE TO STAFF'S MOTION FOR  
SUMMARY DETERMINATION AND  
MEMORANDUM IN SUPPORT - 12

Law Office of  
Richard A. Finnigan  
2405 Evergreen Park Dr. SW  
Suite B-1  
Olympia, WA 98502  
(360) 956-7001

1 services “does not include any use of any such capability for the management, control, or operation  
2 of a telecommunications network or the management of a telecommunications service.”<sup>31</sup> The  
3 result is that, in trying to argue that it is providing enhanced or information services, LocalDial  
4 succeeds in deluding only itself into believing it is dressed as an ESP.<sup>32</sup>

5 **C. The Commission is Not Preempted or Otherwise Restrained from Acting in this**  
6 **Matter**

7 15. LocalDial suggests that the Commission should refrain from ruling in this matter and  
8 BCAW asks the Commission to narrowly tailor its ruling.<sup>33</sup> Both of these requests are predicated  
9 on the presumption that the FCC may soon preempt state action.<sup>34</sup> However, to date nothing at the  
10 federal level has in any way preempted or restricted the Commission from acting if it finds that  
11 LocalDial is offering an intrastate telecommunications service to the public for hire. Any concerns  
12 that the other parties raise about federal preemption in this area are mere speculation. Moreover,  
13 just because the FCC has reserved the authority to resolve any conflict between federal and state  
14 law, does not necessarily mean it will do so. In this regard, BCAW seems to confuse the FCC’s  
15 ability to regulate with intent to regulate.<sup>35</sup> In the matter before this Commission, both WECA and  
16 Commission Staff have demonstrated that LocalDial’s services are a telecommunications service  
17  
18  
19  
20

---

21 <sup>31</sup> 47 U.S.C. § 153(20).

22 <sup>32</sup> LocalDial spends several pages discussing the FCC’s notice of proposed rulemaking, IP-Enabled Services NPRM,  
23 FCC 04-028 (rel. March 10, 2004). WECA’s response is that the anticipated result of the NPRM is speculative; the  
24 AT&T order is real. WECA anticipates that the FCC will adopt a rule that use of the PSTN by a VoIP service is subject  
25 to telecommunications based intercarrier compensation mechanisms: i.e., access charges in today’s reality. Whether  
26 WECA or LocalDial has the better crystal ball is speculation. The AT&T Order exists in the here and now.

<sup>33</sup> LocalDial Response at ¶¶ 26 and 27 and BCAW Comments at pp. 1, 3 and 4.

<sup>34</sup> LocalDial Response at ¶¶ 10 and 26 and BCAW Comments at pp. 2 - 3.

<sup>35</sup> BCAW Comments at pp. 2 – 3.

1 under Washington law.<sup>36</sup> The AT&T Order also provides a persuasive precedent for finding that  
2 LocalDial’s “phone-to-phone” IP telephony service is a telecommunications service that should be  
3 subject to access charges.<sup>37</sup>

4 16. BCAW raises concerns about regulation of the Internet and what constitutes  
5 intrastate versus interstate jurisdiction.<sup>38</sup> However, the Commission need not resolve all of the  
6 issues raised by BCAW in order to find that LocalDial is a regulated telecommunications company  
7 in the state of Washington. Specifically, with regard to the issue of intrastate versus interstate  
8 jurisdiction, as pointed out by Commission Staff:  
9

10 The dividing line between the regulatory jurisdictions of the FCC and states depends  
11 on “the nature of the communications which pass through the facilities [and not on]  
12 the physical location of the lines.” Every court that has considered the matter has  
13 emphasized that the nature of the communications is determinative rather than the  
14 physical location of the facilities used.<sup>39</sup>

15 In the case of LocalDial, it is well documented that LocalDial offers an intrastate  
16 telecommunications service that, regardless of the location of the facilities, allows customers to  
17 make long-distance calls from originating points to terminating points, both within the state.<sup>40</sup>

18 Accordingly, the Commission need not delay acting in this proceeding out of concern for federal  
19

---

20 <sup>36</sup> See, e.g., WECA’s Brief in Support of Motion for Summary Disposition at ¶ 17 and Staff’s Motion for Summary  
21 Determination and Memorandum in Support at ¶ 31.

22 <sup>37</sup> As noted in Staff’s Comments, the FCC’s AT&T Order made it clear that access charges “should be assessed against  
23 interexchange carriers.” Staff Comments at ¶ 6 (quoting the AT&T Order at n. 92). See, also, AT&T Order at ¶ 19.  
24 Therefore, as concluded by Staff, “any argument that LocalDial may make that it should not have to pay access charges  
25 to the WECA companies because it is not in privity with them, or does not actually use the WECA companies’ access  
26 services are without merit under the FCC’s reasoning.” Staff Comments at ¶ 6.

<sup>38</sup> BCAW Comments at p. 3.

<sup>39</sup> Staff’s Motion for Summary Determination and Memorandum in Support at ¶ 39, quoting National Association of  
Regulatory Utility Commissioners, 746 F.2d 1492 (D.C. Cir. 1984).

<sup>40</sup> See, e.g., WECA’s Brief in Support of Motion for Summary Disposition at ¶¶ 15, 16 and 17.

1 preemption. Indeed, as the FCC stated, “We do not believe that a service of the type described  
2 above [phone-to-phone IP telephony] – which provides no enhanced functionality to the end user  
3 due to the conversion to IP – is the kind of use of the ‘Internet or interactive services’ that Congress  
4 sought to single out for exceptional treatment.”<sup>41</sup> This is hardly the language of preemption.

### 5 III. CONCLUSION

6 17. As stated by FCC Chairman Powell: “In fact, the customer receives the same plain  
7 old telephone service. To allow a carrier to avoid regulatory obligations simply by dropping a little  
8 IP in the network would merely sanction regulatory arbitrage and would collapse the universal  
9 service system virtually overnight.”<sup>42</sup>

10 18. For the foregoing reasons, WECA urges the Commission to act in this matter and  
11 find that LocalDial’s services are a telecommunications service subject to the payment of access  
12 charges under WECA’s lawfully filed tariffs. In doing so, the Commission should look to the  
13 guidance provided by the AT&T Order and not be dissuaded from acting based on ungrounded  
14 fears of federal preemption.  
15  
16

17  
18 RESPECTFULLY SUBMITTED this 14th day of May, 2004.

19  
20  
21 \_\_\_\_\_  
22 RICHARD A. FINNIGAN, WSBA #6443  
23 Attorney for Washington Exchange Carrier  
24 Association, et al.

25 \_\_\_\_\_  
26 <sup>41</sup> AT&T Order at ¶ 17.

<sup>42</sup> AT&T Order, Separate Statement of Chairman Powell (Emphasis added).

1 **CERTIFICATE OF SERVICE**

2 **UT-031472**

3 I hereby certify that I have served the attached Complainants' Reply to LocalDial's  
4 Response to Commission Staff's Motion for Summary Determination and Memorandum in Support  
5 and to Comments of Broadband Communications Association of Washington, to the following via  
6 electronic mail and U.S. mail:

6 Arthur Butler  
7 Ater, Wynne LLP  
8 601 Union Street Ste 5450  
9 Seattle, WA 98101-2327  
10 aab@aterwynne.com

Brooks Harlow  
Miller, Nash  
4400 Two Union Square  
601 Union Street  
Seattle, WA 98101-2352  
harlow@millernash.com

10 Letty Friesen  
11 AT&T Communications of the Pacific NW  
12 1875 Lawrence Street Fl 15  
13 Denver, CO 80202  
14 lsfriesen@att.com

Jonathan Thompson  
Attorney General's Office  
PO Box 40128  
Olympia, WA 98504  
jthomps@wutc.wa.gov

13 Simon Ffitch  
14 Office of the Attorney General  
15 900 4<sup>th</sup> Ave Ste 2000  
16 Seattle, WA 98164  
17 simonf@atg.wa.gov

17 Dated this 14th day of May, 2004.

18  
19  
20 \_\_\_\_\_  
21 Kathy McCrary

22  
23  
24  
25 CERTIFICATE OF SERVICE- 1

26 Law Office of  
Richard A. Finnigan  
2405 Evergreen Park Dr. SW  
Suite B-1  
Olympia, WA 98502  
(360) 956-7001