BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON EXCHANGE CARRIER ASSOCIATION, et. al., Petitioners, v. LOCALDIAL CORPORATION, an Oregon Corporation, Respondents.	DOCKET NO. UT-031472 RESPONSE ARGUMENTS OF COMMISSION STAFF CONCERNING ORDER FCC 04-97

1 Pursuant to Judge Moss's April 23, 2004 Notice Amending Procedural Schedule and Providing Opportunity for Supplemental Filings, Commission Staff submits the following responsive arguments concerning the FCC's decision and order concerning AT&T's *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 Order"*).

2 In its Response to Commission Staff's Motion for Summary Determination, LocalDial argues that neither the Stevens Report nor the *AT&T Order* provide a basis for the Commission to decide this case because the phone-to-phone service described

in the Stevens Report and the AT&T VoIP "service" at issue in the *AT&T Order* are different "in several critical respects from LocalDial's service." LocalDial's Response at pp. 3, 5. In fact, LocalDial's service meets all the criteria that the FCC has articulated for the type of IP-enabled interexchange services that should be subject to access charges and that lack any legitimate claim to classification as enhanced or information services.

3 Three of the differences the company identifies between its service and the AT&T service simply are not material to the FCC's declaratory order. As discussed below, these allegedly "critical" differences are really just based on observations that the FCC made in *dicta* about AT&T's service. These differences do not remove LocalDial from the class of providers to which the FCC expressly intended its declaratory order to apply.

4 The fourth difference that LocalDial alleges between its service and both the phone-to-phone type of service described in the Stevens Report and the AT&T service at issue in the *AT&T Order*, is that LocalDial's service provides a "net protocol conversion" or a change in the content of the information that is being transmitted. But LocalDial's assertion is at odds with the FCC and Congress's definition of "telecommunications" and "information services" and the *AT&T Order* disposes of all serious argument to the contrary.

1. The three differences that LocalDial enumerates at ¶ 12 of its Response to Staff's Motion between its service and AT&T's IP-enabled long distance service are irrelevant the FCC's reasoning.

5 The FCC clearly intended for its declaratory ruling to apply not only to AT&T's specific service, but also to other services meeting the three criteria that it announced.

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

AT&T Order, ¶ 1. LocalDial does not contest that its service meets the first two criteria. We address below its argument that it does not meet the third criteria. The important point here is that these are the only three criteria that are "critical" or relevant to whether the *AT&T Order* applies to LocalDial's service.

6 It is true that the FCC made a number of observations about AT&T's so-called VoIP "service" in addition to announcing these criteria. For example, as Mr. Montgomery points out in his supplemental declaration, the FCC stated 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." *Id.* at ¶ 12. The FCC also stated 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," Id. at ¶ 15, and that "based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices." *Id.* at ¶ 17. These were facts that demonstrated how particularly strange it was for AT&T to argue that it should not have to pay access charges for those calls it chose to route over its internet backbone, because AT&T's "VoIP service" is not even really a separate and distinct service from AT&T's traditional service and AT&T didn't even pass on to consumers any of the cost savings that are sometimes touted as a reason for the FCC to forbear from regulating IP-enabled services.

7 LocalDial attempts to fashion from these statements a number of additional criteria for determining the type of services to which the FCC's declaratory order should apply. Based on its statement in the *AT&T Order's* first paragraph (quoted above), this is obviously not what the FCC intended.

8 **Different service--** It's true that all of LocalDial's calls have IP inserted in the transmission path, whereas only some of AT&T's did. However, this cannot be determinative of whether a service is an information service and not a

telecommunications service. It merely serves to highlight that, despite the insertion of IP in the transmission path of some calls, customers of phone-to-phone VoIP services like AT&T's are receiving exactly the same functionality as a phone call that is transmitted using circuit-switched TDM protocol. As the FCC said in the Stevens Report at ¶ 98, "Congress did not limit 'telecommunications' to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users." LocalDial provides transmission only, and as such, telecommunications.

9 **LocalDial's service uses a different originating access method than AT&T's service--** It is true that LocalDial's customers access LocalDial's network in a different way than AT&T's customers. As we stated in our initial argument regarding the *AT&T Order*, AT&T used Feature Group D (1+) originating access while LocalDial uses a method that is functionally the same as Feature Group A originating access (i.e., dialing a seven digit number and then, at the prompt, dialing the number of the party the customer wishes to call). Initial Arguments of Staff at ¶ 7. LocalDial persists in its argument that its customers make two calls every time they use its service—one to LocalDial and a second to the party the customer wishes to call. But LocalDial's customers don't "call" LocalDial any more than a customer of any other long distance company "calls" his long distance company by dialing a 1, or 1010XXX,

or an 800 number plus a PIN, or an assigned number in the customer's local calling area before dialing the number of the party to whom they actually wish to be connected. *See Id.* at n. 5. Similar attempts to divide calls into parts to avoid access charges or regulations that would otherwise apply have been rejected by this Commission in its EAS bridging cases,[1] and by the FCC in the interstate/intrastate jurisdiction cases[2] and in explaining the ISP exemption from access charges.[3]

10 **Reduced price to customers--** In his supplemental declaration, Mr. Montgomery says: "LocalDial can offer [its] low price in part because of the 'enhanced functionality' provided by the company's VoIP gateway computers." First, this statement begs the question of what kind of criteria LocalDial is suggesting here for distinguishing its service from AT&T's. The FCC clearly did not have in mind that so long as an interexchange carrier passes some of its savings on to its customers, it may be excused from paying access charges to the local carriers whose originating and terminating facilities it uses. Second, even though it is immaterial to the *AT&T Order,* there is no support in the record for the contention that LocalDial is able to offer its customers a lower price for long distance service because of some

1 *Re U.S. Metrolink Corp.* 103 P.U.R.4th 194 (1989); *Re United and Informed Citizens Advocates Network*, WUTC Docket No. UT-971515, 4th Supp. Order (Feb. 1999).
2 *See* Staff Motion for Summary Determination at ¶¶ 38-41.
3 In the Matter of GTE, CC Docket No. 98-79, FCC Order 98-292 (Oct. 30, 1998) at ¶¶ 17-19 (Even a call to an ISP that is treated as a local call for purposes of the ESP exemption is viewed not as ending at the ISP's equipment, but continuing on to distant servers and websites. Therefore, ISP's are said to use the LEC's interstate access services, though they are exempted from paying access charges.)

supposed operational efficiency resulting from it use of VoIP gateway computers. In fact, to the contrary, Mr. Montgomery makes much of the fact that if LocalDial were required to pay access charges plus its existing costs, it could no longer price its service below the "retail benchmark rate" for long distance service of $0.05 per minute. Montgomery Direct at 44:6 to 45:10.

2. LocalDial's allegation that its phone-to-phone service provides "enhanced functionality" or "net protocol conversion" is inconsistent with settled law that was confirmed by the *AT&T Order*.

11 LocalDial argues that, unlike AT&T, its service provides a net protocol change or a change in content. This is the only argument LocalDial advances that actually goes to the definition of enhanced service or to the criteria the FCC announced in the *AT&T Order*.

12 LocalDial's argument seems to boil down to the following. All VoIP technology (and therefore the technology used by AT&T for it's phone-to-phone service) uses a compression technique that deletes background noise from those parts of a conversation when no one is speaking in order to save transmission bandwidth. Supp. Decl. of Williamson at ¶¶ 6, 7. When the compression process is reversed, the compression hardware can either leave silent periods in those parts of the conversation when no one is speaking, or it can put in white noise called "comfort noise" to simulate the low background noise that is transmitted by circuit-switched

protocol on the PSTN. *Id.* (However, as Mr. Williamson points out, even with comfort noise, no detective in and English mystery novel will be able to hear Big Ben tolling behind the caller and know where and when the mystery call was made.) *Id.* at n. 7. LocalDial has opted to use comfort noise. Any VoIP provider has this option. *Id.* at ¶ 7. The *AT&T Order* does not indicate whether AT&T used it. Without any testimony from an engineer, LocalDial's argument seems to be that by inserting comfort noise, LocalDial provides an "enhanced functionality" that brings its service across the divide from a telecommunications service to an information service. But the uncontested fact is, both IP and the existing technologies for transmission of information on the PSTN perform computer processing functions that are designed to make sure the parties to the call receive the best possible facsimile of the sound of the other caller's voice. *Id.* at ¶¶ 5, 8, 9. This insertion of white noise in the dead spaces that are created by VoIP compression techniques represents neither a change in the format or content of the information transmitted, nor the provision of any information to the end user that the user does not already receive through telecommunication using circuit switched protocols. It is merely a technique that is used to restore, as closely as possible (though imperfectly—no Big Ben), the sound that is lost through the compression process that is necessary for transmission by VoIP.

13 The *AT&T Order* did not discuss, at all, the specific compression techniques, filtering, or other "computer processes" utilized by AT&T, except to dismiss them as "internetworking functions" that do not result in a net protocol conversion. *AT&T Order* at ¶ 12. Most significantly, the *AT&T Order* discredited the premise underlying LocalDial's arbitrage-based business model: that by purchasing business lines as an end-user and transmitting PSTN originated and terminated calls with Internet Protocol, one can lawfully avoid paying access charges that would otherwise apply.

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CHRISTINE O. GREGOIRE
Attorney General

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JONATHAN C. THOMPSON
Assistant Attorney General
Washington Utilities and
Transportation Commission
(360) 664-1225