

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON EXCHANGE	)	
CARRIER ASSOCIATION,	)	DOCKET NO. UT-041244
	)	
Complainant,	)	
	)	ORDER NO. 03
v.	)	
	)	DENYING MOTION FOR
MARATHON COMMUNICATIONS,	)	RESTRAINING ORDER;
INC.,	)	DIRECTING CESSATION OF ANY
	)	UNLAWFUL PROVISION OF
Respondent.	)	SERVICE

.....

**SUMMARY**

- 1 **PROCEEDINGS:** On July 12, 2004, the Washington Exchange Carrier Association (WECA) filed a Complaint against Marathon Communications, Inc. (Marathon), seeking an order from the Commission that requires Marathon to both originate and terminate intrastate interexchange area traffic in a way that comports with the requirements of WECA members' access tariffs and to cease and desist from the use of EAS trunks and other circuits that avoid originating and terminating access charges. Marathon filed its Answer and Counterclaim on August 2, 2004. Marathon, by counterclaim, asks the Commission to enter an order directing the WECA member Complainants to receive, transmit, and deliver, without delay or discrimination, all telephone messages directed to Marathon's access lines. WECA filed its Answer to Marathon's counterclaim on August 23, 2004.
  
- 2 **PARTIES:** Richard A. Finnigan, attorney, Olympia, Washington, represents WECA. Henry K. Hamilton and Jeffrey M. Grieff, Grieff & Hamilton, PLLC, Seattle, Washington, represent Marathon. Jonathan Thompson, Assistant

Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).<sup>1</sup>

3 **MOTION FOR RESTRAINING ORDER:** WECA filed its Motion for Restraining Order on August 24, 2004, and Supplemental Legal Authority in Support of Motion for Restraining Order on August 26, 2004. Marathon answered the Motion, as supplemented, on September 7, 2004. WECA filed a letter constituting its "brief reply" on September 13, 2004.

4 **COMMISSION DECISION:** The Commission determines that it should not enter a restraining order on the present record. However, to the extent Marathon is providing service in an unlawful manner, the Commission directs Marathon to cease and desist from such activity. On a fully developed record in this or another appropriate proceeding, the Commission can consider the nature and extent of Marathon's apparent violations of law and determine whether the Commission should impose penalties and/or direct the Attorney General to institute proceedings in superior court seeking an injunction and such other relief as may be appropriate.

### MEMORANDUM

5 WECA's Motion relies on our Final Order in the LocalDial proceeding<sup>2</sup> and on Marathon's statements in its Answer to WECA's original Complaint by which Marathon acknowledges that it initiated service to certain LocalDial customers on or about June 22, 2004, and that it did so using LocalDial facilities "in some instances." *Answer at 2-3*. Although Marathon denies "that it did so to avoid

---

<sup>1</sup> In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "ex parte wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. RCW 34.05.455.

<sup>2</sup> *Wash. Exchange Carrier Ass'n v. WebTel Corp.*, Order No. 08—Final Order Granting Motions for Summary Determination, Docket No. UT-031472 (June 11, 2004).

payment of applicable access charges,” WECA argues that the findings in the LocalDial proceeding (*i.e.*, Docket No. UT-031472) show that avoidance of such charges would occur under Marathon’s operation just as in the case when LocalDial operated its own facilities to provide service.

6 Marathon argues in opposition that WECA has presented no evidence. Yet, Marathon states:

Marathon’s use of LocalDial’s equipment was limited to a very brief period of time following the commission’s ruling against LocalDial. Marathon’s use of LocalDial’s equipment was necessary because of the extremely short time period Marathon had available before beginning service to LocalDial’s customers. Marathon has ceased using LocalDial’s equipment. The only service Marathon offers in WECA territory is 800 numbers. In Qwest and Verizon territories, Marathon is temporarily using PRI lines to avoid terminating a limited number of LocalDial customers, which use Marathon anticipates ending within a month as these customers are switched over to an 800 number platform.

7 In short, Marathon admits that it continues to provide some service, to some LocalDial customers, in the same fashion that LocalDial provided service to those customers. The Commission found in the LocalDial proceedings that this activity involved the unlawful avoidance of access charges owed to local exchange carriers pursuant to their tariffs.<sup>3</sup> Marathon’s argument essentially is that WECA’s Motion is “moot and should be denied” because Marathon is only breaking the law to a limited extent, and fully intends to quit breaking the law “within a month.”

---

<sup>3</sup> *Id.*

- 8 It appears from Marathon's statements in its pleadings that the company is continuing to provide service to some former customers of LocalDial in a manner previously held to be unlawful. Without further development of the record, however, we are not in a position to find and conclude that Marathon is providing telecommunications service in Washington in a manner that unlawfully avoids the payment by Marathon of access charges that are due and owing under Complainant local exchange carriers' tariffs.
- 9 Marathon unquestionably should cease and desist from any unlawful behavior, whether in WECA local exchanges or other local exchanges, and we direct it to do so. RCW 80.04.260 provides that the Commission, through the Attorney General, may turn to the superior court to seek an injunction to enjoin violations or threatened violations of pertinent statutes, or any Commission "order, direction, or requirement." Alternatively, or in addition, the Commission can impose penalties under RCW 80.04.380 – 405, as appropriate.
- 10 The Commission will deny WECA's Motion for Restraining Order in the absence of a more fully developed record. We caution Marathon, however, that to the extent it has provided, or continues to provide services in a fashion the Commission held unlawful in the LocalDial proceeding (*i.e.*, in a manner that is calculated to avoid payment of lawful access charges), the company risks the imposition of penalties or other action by the Commission to protect the integrity of the regulatory process and to ensure Marathon's compliance with all of its legal obligations that are subject to our jurisdiction.

**ORDER**

- 11 THE COMMISSION ORDERS That the Washington Exchange Carrier Association's Motion for Restraining Order is DENIED.

12 THE COMMISSION ORDERS FURTHER That Marathon cease and desist from providing service to former LocalDial customers, or any other customers, in the same fashion that service previously was provided by LocalDial (*i.e.*, in a manner calculated to avoid payment of lawful access charges) as discussed in our Order No. 08 in Docket No. UT-031472.<sup>4</sup>

DATED at Olympia, Washington, and effective this 23rd day of September 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS  
Administrative Law Judge

**NOTICE TO PARTIES: Any party may file a petition for interlocutory review of this Order within ten (10) days after its entry and service, pursuant to WAC 480-07-810. Interlocutory review is discretionary with the Commission.**

---

<sup>4</sup> *Id.*