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**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

Washington Exchange Carrier Association,
a Washington non-profit corporation,
CenturyTel of Washington, Inc., a
Washington corporation, Hood Canal
Telephone Company, a Washington
corporation, Kalama Telephone Company, a
Washington corporation, Tenino Telephone
Company, a Washington corporation,
Mashell Telecom, Inc., a Washington
corporation, McDaniel Telephone Company
d/b/a TDS Telecom, a Washington
corporation, Lewis River Telephone
Company, d/b/a TDS Telecom, a Washington
corporation, The Toledo Telephone Co., Inc.,
a Washington corporation, Inland Telephone
Company, a Washington corporation, YCOM
Networks, Inc., a Washington corporation,
and Ellensburg Telephone Company,
a Washington corporation,

Complainants,

v.

Marathon Communications Incorporated,
d/b/a Marathon Communications of
Washington, a Delaware corporation,

Respondent.

DOCKET NO. UT- 041244

MOTION TO DISMISS ALL CLAIMS
AND CLOSE DOCKET AND FOR
INTERIM RELIEF FROM DISCOVERY

MOTION TO DISMISS ALL CLAIMS
AND CLOSE DOCKET AND FOR
INTERIM RELIEF FROM DISCOVERY - 1

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1 1. Comes now the Washington Exchange Carrier Association and its named member companies
2 (collectively “WECA”), by and through its attorney of record, Richard A. Finnigan, attorney at
3 law, and present the Washington Utilities and Transportation Commission (“Commission”) with
4 this Motion to dismiss all claims and close this docket. In addition, WECA requests that it be
5 relieved from responding to discovery propounded by Marathon while this Motion is pending.
6

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8 PROCEDURAL BACKGROUND

9 2. On July 13, 2004, WECA filed its Complaint for Order Requiring Marathon Communications
10 Incorporated d/b/a Marathon Communications of Washington (“Marathon”) to Conform its
11 Operations to the Requirements of Washington Law (“Complaint”). The essence of the
12 Complaint is that Marathon was using the same bypass mechanism utilized by LocalDial
13 Corporation (“LocalDial”) to avoid access charges that should be paid under the tariffs of
14 WECA. This bypass mechanism is the use of a two call service using a two-way primary rate
15 interface (“PRI”) service between hubs in extended area service (EAS) areas.
16

17 3. On approximately July 30, 2004, LocalDial filed its answer and counterclaim. The essence of
18 the counterclaim is that WECA violated RCW 80.36.200 and 80.36.220 by blocking calls to
19 LocalDial access service numbers that were being used by Marathon and Marathon “800”
20 access numbers when traffic was routed through former LocalDial PRI service for termination
21 that avoided WECA’s access tariffs and charges. WECA responded to the counterclaim on
22 August 23, 2004, denying the claims.
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26 MOTION TO DISMISS ALL CLAIMS
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- 1 4. On August 24, 2004, WECA filed a Motion for Restraining Order. Marathon responded to the
2 Motion on September 7, 2004 and the Commission issued a decision under Order No. 03 in this
3 Docket on September 23, 2004.
- 4 5. On October 8, 2004, WECA filed its opening testimony in this matter. Marathon's opening
5 testimony is due November 5, 2004.
- 6
- 7

8 **FACTUAL BACKGROUND**

- 9 6. This case arises as a result of LocalDial determining that it would cease doing business after the
10 issuance of the Commission's decision in Docket No. UT-031472, Order No. 08. LocalDial
11 chose to cease providing service on June 21, 2004 and Marathon began serving the former
12 LocalDial customers on June 22, 2004.
- 13 7. It soon became apparent that Marathon was continuing to use the bypass mechanisms utilized
14 by LocalDial in the provision of service to long distance customers. Marathon has admitted as
15 much.
- 16
- 17 8. Marathon has admitted on at least two occasions that it continued to use the bypass mechanisms.
18 The first was in its Answer, in paragraph 5, where it was stated "Marathon admits that for a
19 period of time after such initiation it used LocalDial facilities in some instances"
- 20 9. The second time that Marathon admitted it was using impermissible bypass facilities was in its
21 Response to WECA's Motion for Restraining Order. In paragraph 5 of that Response,
22 Marathon states as follows:
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- 24

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26 **MOTION TO DISMISS ALL CLAIMS
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1 Marathon's use of LocalDial's equipment was limited to a very brief period of time
2 following the commission's[sic] ruling against LocalDial. Marathon's use of LocalDial
3 equipment was necessary because of the extremely short time period Marathon had available
4 before beginning service to LocalDial's customers. Marathon has ceased using LocalDial's
5 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.

6 10. In Order No. 03, the Commission found that "In short, Marathon admits that it continues to
7 provide some service, to some LocalDial customers, in the same fashion that LocalDial
8 provided service to those customers." Order No. 03 at paragraph 7. The Commission went on
9 to note that Marathon's argument is that WECA's request for a restraining order should be
10 denied because "Marathon is only breaking the law to a limited extent, and fully intends to quit
11 breaking the law 'within a month.'" Ibid.

12
13 11. The Commission further found that "It appears from Marathon's statements in its pleadings that
14 the company is continuing to provide service to some former customers of LocalDial in a
15 manner previously held to be unlawful." The Commission did note that without a further
16 development of the record, WECA's request for a restraining order could not be granted.
17 However, the Commission went on to direct Marathon to cease and desist from any unlawful
18 behavior. Order No. 03 at paragraphs 8 and 9.

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21 ARGUMENT

22 12. The relief sought by WECA in this case was the cessation of bypass by Marathon and an order
23 directing Marathon to conform its operations to Washington law. In essence, the Commission
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1 has done that through its direction to Marathon in Order No. 03 issued on September 23, 2004.

2 It also appears that sometime in October of 2004, Marathon finally conformed all of its
3 operations to the requirements of Washington law. See, the correspondence to LocalDial's
4 attorney attached to Mr. Finnigan's Declaration, which is Exhibit 1 hereto.

5 13. Given the detailed description of LocalDial's use of PRI service contained in the LocalDial
6 docket and introduced in this Docket through WECA's testimony and given Marathon's
7 admission of its use of that PRI service, it is apparent that Marathon was providing a
8 telecommunications service subject to the access tariffs, just as the Commission found that
9 LocalDial was. The only remaining question is to what extent WECA is damaged by that
10 activity. That appears to be an issue for civil court, rather than Commission determination. In
11 the alternative, WECA could move for summary determination against Marathon based on the
12 clear admissions.
13

14 14. As to Marathon's counterclaims, the essence of the counterclaims is that there was blocking
15 activity. Assuming, *arguendo*, that some blocking of access to the former LocalDial access
16 numbers and some blocking of access to Marathon 800 numbers occurred when it was
17 determined that those services were being used to route traffic over PRIs for termination to
18 WECA members, that blocking is no longer occurring.¹ See, Declaration of Mr. Finnigan.
19 While WECA denies that such activity, to the extent it occurred, was improper given the
20 Commission's order to LocalDial and given the admitted bypass through use of those LocalDial
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23 ¹ Without getting specifically into the facts, it should be noted that WECA consulted with Commission Staff prior to
24 blocking access to any of LocalDial's access numbers. See, Declaration of Mr. Finnigan, Exhibit 1 hereto.

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1 facilities by Marathon, for purposes of this Motion and only for purposes of this Motion, WECA
2 will assume that somehow that activity caused some damage to Marathon.

3 15. Marathon's counsel has stated to WECA that its purpose in pursuing its counterclaim is to
4 obtain a Commission ruling that will allow it to proceed in court on an action for damages. See,
5 the Declaration of Mr. Finnigan. In essence, Marathon is seeking a declaratory ruling that past
6 conduct, which is no longer ongoing, is a violation of statute so as to allow Marathon to seek
7 civil recovery.² Such a stated purpose appears to be an abuse of the Commission's processes.
8 In any event, to the same extent concerning WECA's claim for relief against Marathon, this
9 appears to now be a matter for the civil courts rather than this Commission. Further, Marathon
10 has not met the pleading requirements for a declaratory ruling set forth in RCW 34.05.240 and
11 is deficient from that perspective as well.

12
13 16. Another way to look at this is that both the Complaint and the counterclaim are moot insofar as
14 obtaining a decision from this Commission. The matter now is one for civil action, should
15 either of the parties desire to pursue such civil action.
16

17 18 REQUEST FOR RELIEF FROM DISCOVERY DEADLINES

19 17. Marathon has issued extensive data requests to WECA. Those data requests were received on
20 October 23, 2004. See, Declaration of Mr. Finnigan.
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24 ² Given the admitted illegal behavior by Marathon, one wonders under what theory Marathon could ever prevail.
However, that is an issue for another day.

1 18. Marathon's testimony in this matter is due November 5, 2004. Responses to the data requests
2 are due November 8, 2004. Therefore, there is no possible use that Marathon can make of the
3 responses to the data requests in formulating its testimony.

4 19. Extensive work is needed to respond to the data requests propounded by Marathon. Much of the
5 information sought by Marathon requires company personnel to take time away from their
6 normal duties to gather the information sought by Marathon. This time and effort could be
7 better used in serving the public. If this Motion is granted, responses to such discovery are not
8 needed.
9

10 20. Marathon is not harmed by a delay in responding to the discovery since it cannot use those
11 responses in preparing its testimony. WECA respectfully requests that the Commission hold the
12 discovery process in abeyance, including the filing of objections and answers to Marathon's
13 data requests, until this Motion is resolved and for a period of ten business days after resolution
14 of this Motion (if the Motion is denied).
15

16 17 CONCLUSION

18 21. Based on the foregoing, Commission Staff and WECA respectfully request that the Commission
19 issue an order dismissing all claims as moot and close this docket. In addition, in the interim,
20 WECA requests that the Commission hold in abeyance the discovery process pending the
21 Commission's decision on this Motion and for a period of ten days after resolution of this
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1 Motion, should the Motion be denied.

2
3 RESPECTFULLY SUBMITTED, this 29th day of October, 2004.

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5
6 RICHARD A. FINNIGAN, WSBA #6443
7 Attorney for the Washington Exchange Carrier
8 Association and its named members
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25 MOTION TO DISMISS ALL CLAIMS
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