The Honorable Dennis J. Moss

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 **PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF ORDER NO. 01 (PREHEARING CONFERENCE ORDER)**

I. INTRODUCTION

1. Pursuant to WAC 480-09-810, Respondent LocalDial Corporation ("LocalDial") petitions the Washington Utilities and Transportation Commission ("WUTC" or "Commission") for reconsideration of its Order No. 01 - the Prehearing Conference Order issued in this docket on October 24, 2003 ("Prehearing Conference Order"). Specifically, LocalDial contends that the Commission's statement of the issues to be addressed in this docket, listed in paragraph 15 of the Prehearing Conference Order, is unduly narrow and insufficient to allow the parties to address the question referred to the Commission by the United States District Court.

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2. In support of its Petition, LocalDial relies upon the *Stay Order and Order of Referral to WUTC* issued by the District Court in *WECA v. LocalDial*, Case No. C03-5012 (U.S. District Court, W.D. Wash., September 4, 2003)("District Court Order").

II. BACKGROUND

3. On December 11, 2002, the Complainants Washington Exchange Carrier Association and a number of its members (collectively referred to herein as "WECA") filed a civil suit for damages against LocalDial in the Lewis County Superior Court. The basis of WECA's complaint was simple: WECA claimed that it's intrastate access tariffs apply to LocalDial's voice over Internet protocol ("VoIP") service and that therefore LocalDial owes WECA damages for failure to pay intrastate access charges. LocalDial subsequently removed the case to the federal court.

4. Before the United States District Court for the Western District of Washington, LocalDial filed a motion to dismiss WECA's complaint, arguing that the WUTC had primary jurisdiction over issues central to plaintiffs' claims. Specifically, LocalDial argued that the court should defer to the WUTC to decide not only whether the WUTC has jurisdiction over LocalDial, but also whether, even if the WUTC does have jurisdiction, and even if LocalDial is providing telecommunications services as defined by Washington statute, the WUTC should refrain from imposing access charges on LocalDial's services for public policy reasons.

5. The District Court granted LocalDial's motion and referred the case to the WUTC. *See* District Court Order. The court made it clear that it was doing so in order to allow the WUTC to "evaluate and implement policy considerations as they relate to the regulation of the VoIP technology ..." District Court Order at 4, lines 1-3. The court stated:

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> The court agrees that the issue is the applicability of the tariffs, not whether they have been violated. It further notes that the threshold question of whether LocalDial is conducting business subject to the WUTC's regulatory authority is a question of fact to be determined by the WUTC. Most importantly, the issue is whether carriers using VoIP technology ***should be regulated*** even if the WUTC has the statutory and regulatory authority to do so. These are ultimately policy questions that the WUTC is uniquely qualified to address.

District Court Order at 4, lines 5-10 (citations omitted)(emphasis in original).

6. The District Court then stated the two questions it viewed as essential for the Commission to decide:

> 1. Do the plaintiffs' tariffs apply to the VoIP intrastate telephone calls made by LocalDial's customers using plaintiffs' facilities?
>
> 2. And if they do apply, to what extent, if any, should the WUTC regulate the relatively new VoIP technology?

Id., lines 11-17.

III. DISCUSSION

7. In its Prehearing Conference Order, the Commission stated the two questions it would determine in this proceeding as follows:

> 1. Is LocalDial's service that is challenged by WECA telecommunications service offered to the public in Washington for compensation within the meaning of chapter 80 RCW?
>
> 2. Is LocalDial's service that is challenged by WECA a form of intrastate long distance telecommunications service that subjects LocalDial to the obligation to pay access charges payable to originating and terminating local exchange carriers under those carriers' tariffs?

Prehearing Conference Order at 6, ¶ 15. After so framing the issues, the Commission went on to comment on the type of arguments it would hear from the parties. The Commission stated:

> The parties may argue whether the service LocalDial offers meets the definition of telecommunications in RCW 80.04.010. The parties may argue whether, even if the service meets that definition, it is removed from our jurisdiction and

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> regulatory authority by another provision of state law, or whether federal law preempts our exercise of jurisdiction and regulatory authority.

Id.

8. Thus, the Order contemplates that the parties will address the threshold question posed by the District Court - whether LocalDial's service meets the definition of telecommunications under Washington law. In addition, the Commission correctly recognizes that federal law may preempt their jurisdiction over LocalDial's service. However, the Commission has framed the issues in such a way as to ***prevent*** the parties, and the Commission, from ever getting to what the District Court posed as the ***central*** question for the Commission: given the public policy considerations, whether and how the Commission ***should*** regulate LocalDial's service. Thus, the Commission's description of the issues to be addressed in this case is contrary to the District Court's Order.

9. At the time of the prehearing conference, the parties did agree that it did not make sense for the Commission to consider all policy issues raised by all types of VoIP service. LocalDial and several other parties suggested that the Commission's inquiry focus only on phone-to-phone VoIP. *Transcript of Proceedings, Prehearing Conference* ("Tr."), Docket No. UT-031472 (LocalDial, Tr. 17-19; Public Counsel, Tr. 22; Broadband Communications Association [applicability of intrastate access charges on specific facts of this case but acknowledges necessary precedential effect of decision], Tr. 23-24; Focal and XO [should be two phases, first is specific complaint, second is broader VoIP inquiry], Tr. 26-27; Sprint [two levels, first is whether intrastate access charges apply to phone-to-phone VoIP service, second is what other regulatory requirements apply], Tr. 27-28; AT&T [proceeding ought to be limited to phone-to-phone VoIP issue], Tr. 30-31). Other parties suggested that the Commission should

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confine its inquiry to the facts presented in the LocalDial case. (Staff, Tr. 20-21; Level 3; Tr. 32; ICG, Tr. 33; Vonage, Tr. 33-34; VON Coalition, Tr. 34; Net2Phone, Tr. 35). However, no party suggested that the Commission should fail to consider the public policy aspects of this case. On the contrary, several parties opined that, whether or not the Commission's ruling explicitly applied to other carriers, they recognized that the policies adopted by the Commission would serve as precedent for future proceedings on VoIP services. (LocalDial, Tr. 19; Broadband Communications, Tr. 24-25; MCI, Tr. 30).

10. This is consistent with the scope of the Commission's investigation intended by the District Court. In granting LocalDial's Motion to Dismiss during oral argument, the court stated the issues as follows:

> My concern is that the public has an interest in seeing that emerging technologies are allowed to develop and to flourish, and the mixture of stimulus and regulation involves a formula uniquely delegated to regulatory bodies that have as their charge or mission the oversight of an entire industry ... [T]his case involves more than the parties that are before the court today and it is for that reason that I am going to adopt the primary jurisdiction doctrine and refer the matter to the WUTC.

Transcript of Proceedings for the Hearing on Motion to Dismiss Pursuant to the Doctrine of Primary Jurisdiction at 35, lines 2-11, Case No. C03-5012 (W.D. Wash., September 4, 2003).

11. The fact is that the decisions made by the Commission in this case will have a significant impact on all VoIP services in the State of Washington - and possibly elsewhere as well. The Commission cannot and should not avoid addressing the public policy issues raised by the Complainants' request that switched access charges be imposed upon LocalDial's services.

12. Accordingly, LocalDial requests that the Commission revise its statement of the issues to more closely reflect the federal court's referral as follows:

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1. Is LocalDial's service that is challenged by WECA telecommunications service offered to the public in Washington for compensation within the meaning of chapter 80 RCW?

2. Is the Commission preempted by federal law from regulating LocalDial's VoIP services, or is LocalDial's service otherwise removed from the Commission's regulatory authority by another provision of state law?

3. If LocalDial's VoIP services are subject to the Commission's regulatory authority, what intercarrier charges should apply to the intrastate calls made by LocalDial's customers using WECA's facilities?

IV. CONCLUSION

13. In its order on LocalDial's Motion to Dismiss, the District Court agreed with LocalDial that WECA's claims present important issues of public policy. Accordingly, the District Court stayed this case, primarily to allow the WUTC to hear and decide public policy arguments as to ***whether*** and ***how*** LocalDial's VoIP ***should*** be regulated. For this reason, LocalDial asks the Commission to reframe the issues in order to reflect the core public policy issues raised by this case.

DATED this 3rd day of November, 2003.

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I hereby certify that I have this 3rd day of November, 2003, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of November, 2003, at Seattle, Washington.

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