

May 5, 2014

Via Overnight Courier

Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive, SW
P.O. Box 47250
Olympia, WA 98504-7250

RE: *WUTC v. Grasshopper Group, LLC*
Docket No. UT-132153

Dear Mr. King,

On behalf of Grasshopper Group, LLC, enclosed please find the original and 12 copies of the Motion to Dismiss the Complaint in the above-captioned proceeding, and a Certificate of Service.

If you require any additional information, please contact the undersigned.

Sincerely,



Ronald E. Quirk, Jr.
Its Attorney

Enclosures

cc: Brett P. Shearer, Esq. (w/enc)

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**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET UT-132153
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	MOTION TO DISMISS OF
)	GRASSHOPPER GROUP,
v.)	LLC
)	
GRASSHOPPER GROUP, LLC)	
)	
Respondent.)	

Pursuant to the Washington Administrative Code (“WAC”) § 480-07-380, Grasshopper Group, LLC (“Grasshopper”) respectfully moves the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) to deny and dismiss, with prejudice, the Complaint of the Commission and its Staff in Docket UT-132153, because the Complaint fails to state a claim on which the Commission may grant relief. Grasshopper’s arguments in support of this motion are set forth in the accompanying memorandum of law.

WHEREFORE, Grasshopper respectfully requests that the Commission dismiss this proceeding with prejudice.

Dated this 5th day of May, 2014.

Grasshopper Group, LLC



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UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	
)	DOCKET UT-132153
Complainant,)	
)	
v.)	
)	
GRASSHOPPER GROUP, LLC)	
)	
Respondent.)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO DISMISS OF GRASSHOPPER GROUP, LLC**

Grasshopper Group, LLC

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Dated: May 6, 2014

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I. Introduction and Facts

a. About Grasshopper, the Company

1. Grasshopper Group, LLC (“Grasshopper”) is a virtual office service provider that uses long distance services to provide access to an information service platform located outside of the state of Washington where Grasshopper’s small, medium and enterprise business customers may then utilize the platform to engage in a variety of communications and call management functions, including providing inbound, outbound and call bridging services and enhanced voice mail and call management. Grasshopper was originally formed in 2003 as “GotVMail Communications” and began doing business as Grasshopper Group, LLC in May 2009. Grasshopper was granted registration by the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) as a competitive telecommunications company on December 12, 2009. Grasshopper is located at 197 First Avenue, Suite 200, Needham, Massachusetts 02494. Siamtak Taghaddos is the company’s Chief Executive Officer. Dominic Schiavone is the company’s Chief Operating Officer and is identified as the Regulatory Contact, Consumer Complaint Contact and Emergency Contact for the company in its registration with the WUTC.

b. Grasshopper’s Services

2. As a virtual office service provider, Grasshopper provides businesses with access to the company’s IP-based platform and proprietary software. This platform, located in Massachusetts, can be accessed through virtual numbers assigned by Grasshopper¹ and is capable of performing a wide range of actions depending upon how the customer has configured the account. Callers, including Grasshopper’s customers, must use their own telecommunications services (*e.g.*,

¹ A “virtual number” is an ordinary telephone number located in the exchange area designated by the customer to provide a local presence for its own customers. Alternatively, the virtual number can be a toll free number to give the customer a regional or national presence for its own customers.

wireline, cell phone or VoIP service) to reach Grasshopper's platform. As an example, callers may leave a voice mail for one of Grasshopper's customers, send a fax (which is converted to PDF format and emailed to Grasshopper's customer) or search and dial a list of a customer's employees by first or last name. Customers may also configure their accounts to forward a call to the virtual number to the customer's cell phone, home office or another number. In this case, the inbound call would terminate at Grasshopper's platform and Grasshopper would initiate a second call to the number provided by the customer and bridge the two calls together.

Customers may, after reaching the platform, which terminates the inbound call, enter the appropriate selection at the interactive voice response system ("IVR") and place an outbound call to another number, such as a caller that left a voicemail.²

3. Grasshopper provides its customers the option of using local or toll-free numbers to access its platform. For example, one Grasshopper customer, such as a real estate office, may want to use a local number to retain its image as a local business, while another customer may want to reach a national customer base through a toll-free number on its website. However, Grasshopper's service does not provide dial tone (*i.e.*, virtual numbers can only receive incoming calls). In order to use the Grasshopper service, the customer must have an existing local or wireless service. Not a single one of the virtual numbers that Grasshopper provides its customers is associated with telephone lines in the State of Washington nor do any reside in rate centers located in Washington.

² Statutes & regulations at issue in the pleading are: RCW 80.01.060, RCW 80.04.080 RCW 80.04.110, RCW 80.04.380, 47 U.S.C. § 153(24), WAC 480-07-307, WAC 480-07-380(1)(a). WAC 480-120-382, 47 C.F.R. § 1.17, 47 C.F.R. § 1.65(a), 47 C.F.R., Part 32, 47 C.F.R. § 43.61(a)(2).

4. Grasshopper's services can best be described as enhanced or information services that use underlying telecommunications services to provide virtual, IP-based business communication management services. Grasshopper's services may have components of an interstate long-distance, toll service and an audio-bridging component, as well as advanced or enhanced features, by which the content or format of the call can be changed. Recognizing the Federal Communications Commission's ("FCC") extension of its rules to audio-bridging service providers in the 2008 *Intercall Order*,³ Grasshopper registered with the FCC as interstate toll reseller in order to be a good corporate citizen. A step that many of Grasshopper's competitors in the virtual office space have yet to take.⁴ In addition, although not explicitly recognized in the *Intercall Order*, Grasshopper tentatively recognized that its service offering may include a limited intrastate component. Based on that assumption, Grasshopper voluntarily registered with various state public utility commissions across the country. This included the WUTC, as noted above.

5. As part of its reporting strategy, Grasshopper retained Billsoft, Inc. ("BillSoft"), which holds itself out as a leading provider of tax tracking and computational software for telecommunications service providers, for the purpose of identifying intrastate revenues. Through Billsoft, Grasshopper installed a propriety algorithm that allocated revenue based on jurisdictional estimations and traffic studies.

6. These algorithms, which were developed by Grasshopper at additional expense beyond the fees paid to BillSoft, were necessary because, due to the virtual nature of Grasshopper's calling platform, Grasshopper could not readily identify the true jurisdictional nature of

³ See para. 24, *infra*.

⁴ For example, 8x8, J2(Onebox & eVoice), Jive, Phone.com, Virtual PBX and Voice Nation offer competing services to those of Grasshopper, but have not registered with the WUTC, based on a May 5, 2014 search of the Commission's database.

communications transported over its system. Specifically, since Grasshopper provides a hosted remote calling platform, virtual numbers, and enhanced services, and does not provide dial-tone (*i.e.*, the ability to make an originating call through Grasshopper’s platform), it is impossible for Grasshopper to determine the specific jurisdictional make-up of calls made through its calling platform. For example, Grasshopper sells access to its platform and related services at a fixed monthly subscription price; while customers are permitted to place calls within a state, there is no mandate that customers must avail themselves of intrastate calling services. Therefore Grasshopper customers can purchase a subscription and make no intrastate calls or any calls for that matter. Despite this lack of a clear intrastate component to its services and out of a desire to comply with state regulations, Grasshopper conducted a jurisdictional analysis of its traffic and allocated revenues for intrastate services based upon that analysis.

c. WUTC Registration and the 2012 Annual Report

7. Grasshopper was issued its registration as a competitive telecommunications company by the WUTC in December 2009. The company contracted with Marshlian & Donahue, LLC (“The *CommLaw* Group”), a specialized communications law firm, to prepare and file its Washington annual reports. The *CommLaw* Group also has an affiliated consultancy division called The *Compliance* Group.⁵ The *Compliance* Group prepares Washington state annual reports from data provided by Grasshopper, as well as from BillSoft. Once the annual report is prepared, it is sent to Grasshopper for review and approval. Grasshopper staff certifies by

⁵ The *Compliance* Group (www.ComplianceGroup.com) specializes in the delivery of technology-enhanced, expertly managed regulatory compliance solutions to communications providers ranging in size from small start-ups to Fortune 100 enterprises. Presently serving over 300 providers throughout the U.S., The *Compliance* Group consistently delivers on its promise to provide its clients with affordable, timely, accurate and professionally managed compliance services and was recently named 2014’s Niche Consultancy of the Year (Telecoms) by ACQ5 Global Awards, *see* <http://www.prweb.com/pdfdownload/11739342.pdf>.

signature that the annual report is correct and true and returns the approved report to The *Compliance* Group, who in turn files the completed report with the Commission.

8. Despite Grasshopper's reasonable reliance on BillSoft to deliver tax and regulatory fee calculation data consistent with its reputation as a market leading solution for communications service providers, the BillSoft data provided to Grasshopper did not contain information specific to the Washington State annual regulatory fee. Each month BillSoft generates and sends a monthly data matrix to Grasshopper, which contains a breakdown of the regulatory fees applicable to the Company's service offerings. This matrix contains line items that specifically summarize the total revenue subject to the specific tax type and the amount to be remitted for many regulatory agencies. However, the monthly data from BillSoft did not contain a line item for the WUTC revenues subject to the regulatory fee. Moreover, all revenue line items covering the entire State of Washington totaled zero in the fee-specific revenue matrix sent by BillSoft. Because of this, Grasshopper had to manually estimate intrastate revenue for the entire year from general data files for state regulatory services based on the estimation process described above.

9. On April 29, 2013, Grasshopper submitted its 2012 Annual Report and paid its 2013 Regulatory fees based on reported revenue of \$184,781.11. This amount was identical to amount reported on the 2011 Annual Report. However, as explained herein, Grasshopper was unaware the two amounts were identical when it filed its 2012 annual report and paid its 2013 regulatory fees.

10. On or about August 02, 2013, Susie Paul, Compliance Investigator for the WUTC, contacted Ron Quirk of The *Compliance* Group to request additional information about Grasshopper's state reporting history. Ms. Paul specifically requested documents related to the company's Washington State Business and Occupational Tax Records and Annual Reports filed

with the Secretary of State. Ms. Paul also requested clarification as to why Grasshopper reported the identical intrastate revenue information on the 2012 and 2011 Annual Reports.

11. In the course of responding to Ms. Paul's requests, Grasshopper reviewed information used to prepare past-filed Annual Reports and discovered that revenue information had been incorrectly reported to the WUTC. Specifically, Grasshopper concluded the duplicate revenue figures used on the 2011 and 2012 Annual Reports were the result of a clerical error - specifically that Grasshopper had incorrectly queried the wrong year's revenue information from Billsoft data for the 2012 Annual Report. A mistake was made.

12. On August 08, 2013, Grasshopper having corrected its mistake, submitted a revised 2012 Annual Report and paid the difference on the regulatory fees owed.

II. Motion to Dismiss

13. A defendant or respondent may file a motion to dismiss a complaint for plaintiff failing to state a claim upon which relief can be granted. Court Rule ("CR") 12(b)(6). The Commission's rules adopt the standards applicable to the Washington rules of civil procedure (*i.e.*, Court Rules), including those related to a motion to dismiss. *See* Washington Administrative Code ("WAC") 480-07-380(1)(a).

14. In deciding a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the Commission must accept "as true allegations in plaintiff's complaint and any reasonable inferences therefrom." *Bercier v. Kiga*, 103 P.3d 232, 235 (Wash. App. 2004). Dismissal is appropriate in the event the "complaint alleges no facts that would justify recovery." *Id.* "A CR 12(b)(6) motion is properly granted when it appears from the face of the complaint that the plaintiff would not be entitled to relief even if he proves all the alleged facts supporting the claim." *Citizens for Rational Shoreline Planning v. Whatcom County*, 258 P.3d 36, 39 (Wash. 2011).

III. The Commission's Complaint Fails to State a Claim upon Which Relief Can be Granted.

a. The Commission's Complaint

15. The Complaint (¶8) states the WUTC has authority pursuant to Revised Code of Washington ("RCW") 80.04.080 to require all public service companies to file "periodical and special reports, concerning any matter about which the commission is authorized or required by this or any other law, to inquire into or keep itself informed about, or which it is required to enforce." Pursuant to this statute, the Commission adopted WAC 480-120-382 that requires competitively classified telecommunications companies, including Grasshopper, to file annual reports.

16. Such company's annual report must answer all the questions set forth in WAC 480-120-382, including provision of the company's "Washington intrastate operations subject to commission jurisdiction," for the preceding year. The annual report must be filed by May 1 of the next calendar year. The Commission calculates regulatory fees based a company's intrastate revenues. *Id.*, at 480-120-382(4) & (5). When a company makes a late payment, it is subject to late fees and interest. *Id.*, at 480-120-382(5)(e).

17. Grasshopper filed its 2012 Annual Report and paid its regulatory fees on April 29, 2013. Complaint at ¶10. The Commission alleges Grasshopper's 2012 Annual Report was inaccurate and not corrected until August 9, 2013. *Id.* at ¶10. Similarly, because of the inaccurate 2012 Annual Report, the WUTC alleges Grasshopper paid an incorrect regulatory fee. *Id.*

18. Next, the Commission alleges the failure to correct the 2012 Annual Report filed on April 30, 2013 until August 9, 2013, constitutes a "continuing violation" and "a separate and distinct violation for each day from April 30, 2013, through August 9, 2013." *Id.* at ¶11. The Complaint alleges there were a total of 101 violations committed by Grasshopper. *Id.*

19. The Commission then alleges (*id.* at ¶12) it has authority, pursuant to RCW 80.04.380, to impose a penalty of as much as \$1000 for every violation of a WUTC rule or order (or any provision of RCW, Title 80) and that, in the case of a continuing violation, “every day’s continuance represents a separate and distinct violation.” *Id.* at ¶12.

20. In paragraph 14, the Complaint alleges the Commission has authority to issue a “complaint on its own motion setting forth any act or omission by any public service company that violates any law or any order or rule of the Commission,” citing RCW 80.04.110.

21. In its request for relief, the Staff requests that the Commission:

- find that Grasshopper committed 101 violations of Commission rules and state law;
- impose monetary penalties on Grasshopper, pursuant to its authority under RCW 80.04.380; and
- pursuant to its authority under RCW 80.04.080, require Grasshopper to file revenue reports on a monthly basis for a period of two years. Complaint at ¶¶15-17.

22. Finally, “[b]ased on a review of the Staff Investigation Report of this matter, and consistent with RCW 80.01.060 and WAC 480-07-307, the Commission finds probable cause exists to issue this Complaint.” *Id.* at ¶18.

23. For multiple reasons, the Complaint is flawed; fails to state a claim upon which relief can be granted; and, therefore, must be dismissed.⁶

b. The WUTC Lacks Jurisdiction over Grasshopper’s Traffic

i. Grasshopper’s Services Are Information Services

24. The Commission’s jurisdiction over Grasshopper’s services is tenuous, at best, because Grasshopper does not engage in the provision of intrastate telecommunications.⁷ Rather,

⁶ In the event the Commission considers any facts outside the Complaint in making its decision, the motion to dismiss is converted by operation of law to a motion for summary judgment, pursuant to CR 56. *Haberman*, 744 P.2d 1032.

Grasshopper provides a predominantly interstate information services, as defined in Section 3(24) of the Communications Act of 1934, as amended (“34 Act”), 47 U.S.C. § 153(24). Congress defined “information services” as a “means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” Grasshopper uses interstate telecommunications to offer information services from its network equipment, including servers, located in Needham, Massachusetts, and chiefly uses only Internet-based transport services. Grasshopper’s end user customers do not simply use its service to make simple phone calls without change in format or content, but to have access to, and use, advanced features and information. End user customers’ communications are often changed in format and content. Even Grasshopper’s call bridging functionality is distinct from services deemed by the FCC to be telecommunications services. Grasshopper’s services are distinguishable from those offered by InterCall, Inc. in several ways. *Request for Review by InterCall , Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd 10731 (2008) (“*InterCall Order*”), *recon. denied*, 27 FCC Rcd 898 (2012), *petition for review dismissed in part and denied in part sub nom. Conference Group, LLC v. FCC*, 720 F.3d 957 (D.C. Cir. 2013).

25. In the *InterCall Order*, the FCC found audio-bridging service to be simple telecommunications where multiple callers are connected through equipment. The callers’ communications were not changed in format or content. Any information services offered by

⁷ The Complaint claims jurisdiction over Grasshopper’s actions in this instance pursuant to RCW 80.01.040, 80.04.110, 80.04.380, and 80.36. RCW 80.01.040 is inapplicable because Grasshopper’s services are either interstate information services or interstate telecommunications services and not intrastate utility services. RCW 80.04.110 applies only to intrastate telecommunications services; Grasshoppers services are both information services and interstate in nature. RCW 80.04.380 applies only to violations of WUTC rules and orders relating to intrastate services and not those interstate services provided by Grasshopper. RCW 80-36 applies only to intrastate telecommunications services not those interstate and information services provided by Grasshopper. Similarly, Grasshopper is not an intrastate public service company and, as such, is not subject to WUTC jurisdiction pursuant to RCW 80-04. As there is no jurisdiction under the RCW, there can be no jurisdiction under the WUTC’s rules adopted pursuant to the RCW, including WAC 480-120.

InterCall were not integrated into the telecommunications services. In contrast, Grasshopper offers its customers the ability to make specialized communications and to change the format or content of their communications.

ii. Grasshopper's Services Are Interstate in Nature

26. Also, no Grasshopper-provided communications are processed or controlled within the State of Washington. Instead, all communications are transported in IP protocol over interstate data transport facilities and information processing occurs at Grasshopper's network control hub in Massachusetts. Every use of Grasshopper's service, whether by a Grasshopper subscriber checking voicemail or a customer of a Grasshopper subscriber calling the subscriber's virtual number, requires communication with Grasshopper's platform in Massachusetts. In most cases, the call terminates at Grasshopper's platform for delivery of a voicemail or a fax or interaction with an IVR system. These calls are interstate in nature. If the Grasshopper customer has configured its account to forward calls to another number or to return a call through the IVR, those calls from the platform in Massachusetts to the terminating number are interstate in nature. As such, the FCC has exclusive jurisdiction over Grasshopper's services. *See generally, Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (The FCC has exclusive jurisdiction over interstate services. *See also, North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977). That would include telecommunications, information and mixed services.

27. *See also, Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion & Order, 19 FCC Rcd 22404 (2004). There, the FCC concluded there was no "plausible approach to separating [Vonage's] DigitalVoice into interstate and intrastate components for purposes of enabling dual federal and state regulations to coexist without negating federal policy and rules." *Id.* at ¶24. The same is

true for Grasshopper's services. Because of the ability of end user customers to use Grasshopper's services from any location with an existing dial tone service (wireline, wireless, or VoIP), such services resemble non-interconnected VoIP services, rather than interconnected VoIP services, where call end points are readily known. As such, Grasshopper's services are under the jurisdiction of the FCC and beyond the jurisdiction of the WUTC.⁸

28. Grasshopper, in an abundance of caution and anticipating the eventual extension of some degree of state regulatory oversight of certain enhanced communications services, voluntarily subjected itself to registration and compliance reporting in the State of Washington and other states. Several of the commissions wrestled with the question of whether they had jurisdiction over Grasshopper's services and at least one commission concluded it did not and requested that Grasshopper withdraw its application.⁹

29. When state regulatory jurisdiction over Grasshopper and its services is questionable, at best, in jurisdictions throughout the U.S. and, on its face, not inapplicable in the state of Washington, as shown herein, it is bad policy for the WUTC to impose grossly excessive fines on Grasshopper, a good and conservative-minded regulatory steward who made a simple reporting mistake based in good faith reliance on data supplied by a third-party vendor.

c. The Rule at Issue Does not Specific a Timely Filed Report that Contains an Error, Later Corrected, Is a Late-Filed Report

30. WAC 480-120-382, which requires competitively classified telecommunications companies to file annual reports, does not address the status of a report that contains an error. Rather, it simply requires annual reports be filed by no later than May 1 of the next year. It does

⁸ As noted elsewhere herein, while Grasshopper maintains its services are interstate information services and/or interstate telecommunications and outside the WUTC's jurisdiction, based on a desire to be a good corporate citizen, Grasshopper has voluntarily complied with WUTC rules and makes appropriate payments of fees and taxes.

⁹ See Exhibit One.

not state that a report filed on a timely basis, but which contains one or more errors, becomes late-filed unless and until the error is discovered and corrected. It does not state this in the plain language of the rule and such a proposition cannot be read into the rule, as doing so would result in an excessively rigid and absurd outcome. If the Commission intended the rule to link “timeliness” with “100% accuracy,” it would have done so.¹⁰

31. Moreover, Washington courts have held “[d]ue process requires that a statute or rule give fair notice of what is prohibited or required.” *Gibson v. City of Auburn*, 748 P.2d 673, 676 (Wash. App. 1988), *citing State v. Reader’s Digest Ass’n*, 501 P.2d 290 (Wash. 1972). “In determining whether a statute is impermissibly vague or indefinite, Washington courts have applied the so-called ‘common intelligence’ test.” *Gibson*, 748 P.2d at 676. “A statute violates due process if it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning.” *Reader’s Digest Ass’n*, 501 P.2d at 300.¹¹ “If, within the context of its use, the language of a statute gives fair warning of what is required, then it will satisfy the demands of due process.” *Chicago*, 557 P.2d 307.

32. A person of common intelligence cannot be expected to conclude from reading the text of WAC 480-120-382 that an annual report, otherwise timely filed, becomes late-filed and subject to penalties and interest (as well the possibility of sanctions) because such report contains an error.¹² The Commission’s interpretation of its rule does not pass the “common intelligence”

¹⁰ Another Maxim of statutory construction is *expressio unius est exclusio alterius*. Roughly translated, this phrase means that whatever is omitted is understood to be excluded. Thus, if a statute provides for a specific sanction for noncompliance with the statute, other sanctions are excluded and cannot be applied (*Sprague v. State*, 590 P.2d 410 [Alaska 1979]). The maxim is based on the rationale that if the legislature had intended to accommodate a particular remedy or allowance, it would have done so expressly; if the legislature did not provide for such an allowance or event, it should be assumed that it meant not to have made that choice.

¹¹ On the other hand, the vagueness test does not require a statute to meet impossible standards of specificity. *Chicago, M., St. P. & Pac. R.R. v. State Human Rights Comm’n*, 557 P.2d 307, 310 (Wash. 1976).

¹² This result is as absurd as if the IRS were to apply late-filing penalties to a taxpayer’s return filed on April 15, simply because the taxpayer transposed digits or forgot to include \$30 of interest from a now- closed bank account.

test, but rather, fails to give fair notice to the public of what is required under the rule. Hence, the Commission's interpretation of WAC 480-120-382 is contrary to law and violates due process. The interpretation must, therefore, be rejected, and the Complaint dismissed.

d. The Commission Has Unfairly Singled Out Grasshopper for Punitive Treatment

i. Grasshopper's Actions Were Reasonable and in Good Faith

33. As noted in the Facts above and despite the WUTC's lack of jurisdiction over Grasshopper and its information and interstate services, Grasshopper has made a good faith effort to follow WUTC's rules, in an effort to be a good corporate citizen. However, as the Commission is well aware, many services utilizing IP transport, especially when they have an information services component and can be used from any underlying telecommunications service, are very difficult to separate into intrastate and interstate components. *See, e.g., Vonage Holdings*, 19 FCC Rcd 22404. Moreover, Grasshopper simply offers, and bills for, a bundle of minutes that can be used for communications and information services to and from any point. It does not operate similar to a traditional telephone company that bills for local and long distance services, the latter of which can be easily separated into interstate and intrastate calls.

34. Due to the technology, market conditions, and end user behavior, Grasshopper's billing agent's service lacks the capacity to provide "jurisdictional billing reports." However, Grasshopper has gone to additional expense to conduct traffic studies that make a good faith, reasonable effort at determining the percentage of usage that begins and ends in the State of Washington or in any of the other 25 states where Grasshopper operates. Without conceding jurisdictional challenge issues, Grasshopper has voluntarily used this information to make annual reports to the WUTC and to pay regulatory fees. Grasshopper has done this despite the fact many of its competitors do not. To Grasshopper, a better use of the Commission's enforcement

resources would be to identify and challenge those companies that serve Washington end user customers, but that file no annual reports and make no payments to the Commission at all, than to expend such limited resources to pursue egregious fines against Grasshopper due to an innocent error.

35. It is indisputable Grasshopper used the results of its traffic studies to prepare a good faith estimate of what might be described as intrastate revenues as a part of its 2012 Annual Report filed with the WUTC on April 30, 2013. Such report was timely filed. While such report contained an error (the wrong year's intrastate revenue estimate was used by mistake), it was timely filed under any fair and reasonable reading of the plain language of the Commission's rules.

36. Importantly, once the Commission questioned Grasshopper's revenue figure and months later contacted Grasshopper's Regulatory Contact identified in Grasshopper's registration on file with the WUTC, Dominic Schiavone, Grasshopper immediately investigated the claimed error and made a timely correction. Further, since the corrected figure was higher than the originally reported figure, Grasshopper also voluntarily paid the additional regulatory fee. This shows Grasshopper's good faith compliance.

ii. It is not Unreasonable for Public Service Companies to Make Mistakes on WUTC Filings

37. "Mistakes happen – often." *State v. Kronich*, 161 P.3d 982, 990 (Wash. 2007) (Sanders, J. dissenting). Of course, it is important for public service companies or information services providers to make good faith and reasonable efforts to avoid making mistakes in regulatory reports. The Commission does not have the resources to audit all data filed with the Commission and, as such must rely on the correctness of submissions by public service companies. But, as the State Supreme Court recognizes, people make mistakes, and not every public service

company report will be correct. Grasshopper clearly made a mistake by including the wrong year's revenue estimates in its 2012 Annual Report. But the mistake was innocent. And once Grasshopper received notice of its error through its Regulatory Contact, Dominic Schiavone, months after the WUTC questioned the report, Grasshopper promptly made its correction. Yet, despite this good faith compliance, Grasshopper has been singled out for a fine as if it were a scofflaw that simply ignored WUTC rules. This is wrong, unfair, and contrary to Washington law.

38. State law encourages corrections of errors in reports used by government entities, rather than the imposition of punishment. For example, a local government became aware the affected carrier's annual reports contained some factual errors, but decided to use the incorrect information against the carrier in setting rates. The "vindictive" decision was quickly reversed by a trial court, whose decision was affirmed by the state supreme court. *State ex rel. Clear Lake Lumber Co. v. Kuykendall*, 228 P. 853 (Wash. 1924). The court directed the local government to ask the carrier to correct its errors so that accurate information could be used, rather than "punish" it with a prescription of low rates for service. The court also held a rate prescription based on information the local government clearly knew was incorrect was arbitrary and capricious. Washington regulatory law allows for, and expects, mistakes and their correction. That is what Grasshopper did. It corrected its innocent mistake—hardly grounds for the unreasonably punitive sanctions the Complaint proposes levying on Grasshopper." Also, as explained in the *Big River* case below, the purpose of sanctions is not to punish, but, rather, to deter future violations. .

iii. Sanctioning Grasshopper is Contrary to WUTC Precedent

39. In the case of *In the Matter of a Penalty Assessment against Big River Telephone Company, LLC, in the amount of \$325.00*, 2012 WL 5378138 (WUTC 2012), a Telephone

Company filed its 2011 annual report on April 30, 2012. However, such report was missing information (audited financial reports) and was not supplemented until May 18, 2012. The Commission assessed a \$325 penalty for this “late filing.” The fine was followed by a request for mitigation by the Telephone Company and, then, an opposition by the WUTC Staff. The Company noted that the omission of required financial data was caused by a simple oversight. The Commission granted the mitigation and revoked the fine, largely because the Telephone Company had made an “apparent good faith effort to file its Annual Report on time and the fact that the company responded promptly to the Commission’s May 14, 2012, letter alerting the company to the fact that its Annual Report, filed on April 30, 2012, was incomplete.” The Commission noted that “punishment” was not necessary for companies making good faith efforts to comply. Clearly the intent of the WUTC’s sanctions authority is to punish scofflaws to ensure future compliance and to set an example to discourage other companies also from engaging in scofflaw behavior. Grasshopper’s actions were virtually identical to those of the Big River Telephone Company, such that similar mitigation is appropriate. Grasshopper should not be fined in this matter.

40. Both the Big River Telephone Company case and Grasshopper’s case are clearly distinguishable from that of Qwest, where sanctions seem appropriate. *Washington Utilities and Transportation Commission v. Qwest Corp.*, 2004 WL 3159259 (WUTC 2004) (“*Qwest Sanctions Order*”). In the Qwest case, the Commission proposed to fine the major incumbent carrier in the state \$48,000 for multiple late and inaccurate reports and for failing to comply with applicable accounting standards. The parties were able to reach an agreement for settlement, which was, in turn, approved by the Commission.

41. The Commission alleged seven reports were filed late; twelve reports contained material errors; and the Telephone Company failed to keep its books of account consistent with applicable accounting rules. Qwest agreed to comply with the rules and pay the \$48,000 penalty, even though some, but not all, of the violations were deemed unintentional and extraordinary.

42. Unlike Qwest, Grasshopper's annual report was filed on time. Qwest's reports were not.

43. Grasshopper's annual report contained a prior year's estimated revenues instead of the current year's estimates—a simple, unintentional error. In contrast, Qwest's errors were “due in part to certain material weaknesses and significant deficiencies in the Company's accounting procedures.” *Qwest slip op.*, at ¶2.8. Indeed, Qwest's internal accounting deficiencies were so significant that they were disclosed to the Securities and Exchange Commission (“SEC”) in Qwest's 10-K annual report. *Id.* at ¶2.10. Qwest further admitted it failed to keep its regulated books in conformance with the Uniform System of Accounts (“USOA”), 47 C.F.R., Part 32 and the corresponding WUTC requirement. *Id.* at ¶3.2. It is simply unreasonable to sanction Grasshopper similarly to Qwest, when the underlying conduct was radically different.

44. Even though Grasshopper's innocent mistake is distinguishable from the systemic deficiencies at issue in *Qwest*, it is notable and particularly relevant to this matter that the Commission acknowledged that RCW 80.04.080 and WAC 480-120-382 contained no accuracy requirements and that while reports filed with WUTC should be accurate, “[E]very restatement of an account or correction of a report is not a *per se* violation, as it is generally understood that even when companies act in good faith, they will make errors. Accounting standards allow for, and in some cases even require, such restatements. When material inaccuracies are discovered, they should be promptly corrected.” *Id.* at ¶ 3.7. Despite the WUTC's recognition that minor errors simply occur and are not *per se* violations of the rules, it proposes to sanction Grasshopper

for making a simple mistake. The Commission's complaint in the instant case flies in the face of its decision in the Qwest case that minor errors, while not encouraged, do occur in the normal course of business and are not rule violations *per se*. The presence of this inconsistency alone should cause the Commission to dismiss the Complaint against Grasshopper.

45. Moreover, the Commission's authority to levy sanctions or fines is not unlimited. At a bare minimum, the WUTC must meet its own standards for determining when sanctions are appropriate. *Verizon Northwest, Inc. v. WorldCom, Inc.* 61 Fed.Appx. 388, 394 (9th Cir. 2003). There, the WUTC had sanctioned Verizon for treating traffic differently for customer billing than it did for litigating intercarrier compensation disputes. The court found such action by Verizon to be reasonable and not subject to sanctions.

iv. Consideration of the WUTC's Eight-Factor Test for Imposing Sanctions Leads to the Conclusion Sanctions Are not Warranted against Grasshopper

46. In 1999, the WUTC listed eight factors that would be considered in making a determination whether to impose sanctions. The factors are: whether (1) the offending conduct was associated with new requirements of first impression, (2) the offending party should have known its conduct constituted a violation, (3) the offending conduct was knowing or intentional, (4) the offending conduct was gross or malicious, (5) repeated violations occurred, (6) the Commission previously had found violations, (7) the offending conduct improved, and (8) remedial steps were undertaken. *MCIMetro Access Transmission Servs. Inc. v. U.S. West Communications, Inc.*, 1999 WL 132851 (WUTC 1999) ("MCIMetro Order"); *Washington Utilities and Transportation Commission v. Electric Lightwave, Inc.*, 2001 WL 514418, at *4 (2001). ("ELI Sanctions Order").¹³

¹³ In the *ELI Order*, the Commission found the Telephone Company violated applicable rules related to filing certain contracts with the Commission. It also found:

47. The answers to these questions are readily available from a fair reading of the Complaint.

- 1) Neither Grasshopper nor the public had any idea that the Commission would interpret WAC 480-120-382 to classify an otherwise timely filed annual report as late and subject to sanctions because the report contained some unknown erroneous data;
- 2) Neither Grasshopper nor the public had any reason to believe filing an otherwise timely filed annual report that contained unknown erroneous data would constitute a late-filed report in violation of WAC 480-120-382;
- 3) There is no allegation Grasshopper's employees or agents were aware of the mistaken reporting of the wrong year's estimated data;
- 4) There is no allegation the mistake made by Grasshopper's employees or agents was in any way gross or malicious, especially when contrasted to the actions of Qwest in the *Qwest Sanctions Order*;
- 5) There is no allegation in the Complaint that this was a repeated violation, assuming *arguendo*, that any violation of WAC 480-120-382 occurred;
- 6) There is no allegation in the Complaint the Commission ever adjudicated a similar rule violation by Grasshopper, assuming *arguendo*, that any violation of WAC 480-120-382 occurred;
- 7) Upon receipt of actual notice of the mistake in the 2012 annual report, Grasshopper's employees and agents immediately investigated the WUTC's concern; located the mistake; filed a correction; and paid the difference between the initial intrastate revenue estimate and the corrected one (i.e., the desired conduct occurred promptly); and
- 8) As noted in the preceding answer 7), Grasshopper's employees and agents made appropriate internal investigation and corrected their mistake.

48. Therefore, under any fair reading and use of the Commission's eight-factor test for the appropriateness of sanctions, there is no cause to sanction Grasshopper. Any decision by the Commission to the contrary would violate those standards, the MCIMetro Order and ELI Sanctions Order, and constitute arbitrary and capricious action.

* * *

(5) ELI admitted that it committed the violations that are the subject Penalty Assessments UT-001532 and UT-001533.

(6) ELI's misconduct was not associated with new filing requirements.

(7) ELI knew its conduct constituted a violation.

(8) ELI's conduct was intentional and willful.

(9) The violations in this matter are part of series of violations by ELI.

(10) ELI's continues to file contracts in violation of the Commission's rules and statutes.

(11) ELI did not take remedial steps to correct its pattern of misconduct. *ELI Sanctions Order* at *5.

Moreover, it appears the Staff used different factors in evaluating Grasshopper's conduct herein. Such a drastic change, without notice and opportunity for comment seems to violate both the law and Due Process.

e. Looking to FCC Precedent for Guidance Suggests a Timely Filed Report Containing a Mistake Does not Make Such Report Late

i. Late Filed Reports Are Reports Filed After Their Due Date

49. The FCC requires carriers, service providers and licensees to file many reports. It generally sets due dates for reports and has imposed sanctions on late-filed reports when appropriate. Similarly, it requires filers to correct errors in such reports when appropriate and can impose sanctions on violators. However, there is no precedent for concluding a report containing an error is a late-filed report until the error is corrected.

50. The FCC rules (Title 47 Code of Federal Regulations, Parts 0 through 199 inclusive) require many carriers, service providers and licensees to file reports. Such reports generally have a due date. The FCC has, under appropriate circumstances, proposed sanctions when reports are not filed on time. *See, e.g., Apple, Inc.*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 14242 (2009) (Hearing Aid Compatible Phones); *Alpheus Communications, LP*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 8993 (2010) (Network Outage Reports). But in those cases, sanctions are imposed because the reports were filed late and not because they may have contained errors.

ii. FCC Rules Require Correction of Erroneous Reports, but Do not Consider Corrections as “Late-Filed”

51. Since 1983, the FCC has had a rule that requires parties to make truthful and accurate statements to the FCC for matters related to complaints, investigations and tariff filings. Rule 1.17, 47 C.F.R. §1.17. The FCC recognizes that parties can make mistakes or omit information. Accordingly, the FCC interprets Rule 1.17 to hold parties to “a continuing legal obligation to correct any inaccurate or incomplete data subsequently discovered in the [filed documents.]” *Material to be Filed in Support of 2014 Annual Access Tariff Filings*, Order, WC Docket No. 14-48, DA 140494, at ¶30 (rel. April 14, 2014).

52. Part 43 of the FCC's rules, 47 C.F.R., Part 43, addresses reports filed by carriers, including annual reports of international traffic. Rule 43.61(a)(2) requires subject carriers to correct those reports when there is an inaccuracy of more than five percent of the reported figure. Also, subject carriers are required to make automated reports to the FCC ("ARMIS") for information required by Parts 32, 36, 43, 51, 64, 65, and 69 of the FCC's rules. The online instructions for the ARMIS reports require subject carriers to file subsequent corrections of "previously filed data" be filed "as soon as the correction is identified."¹⁴

53. FCC Rule 1.65(a), 47 C.F.R. § 1.65(a), require radio license applicants to correct errors or to bring an application up to date within 30 days of the date by which the applicant understands the previously filed information "is no longer substantially accurate and complete in all significant respects."

54. The FCC has proposed civil forfeitures when parties have knowingly failed to provide accurate data and update it in the face of material changes. *Vermont Telephone Company, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14130 (2011). While seeking a small business credit for a radio spectrum auction, the applicant reported one of its controlling owners had no income without having a basis for making such statement and failed to correct this statement when the applicant filed modified applications. The FCC proposed a \$34,000 forfeiture. However, it did not charge the applicant with filing a late report because the information contained therein was not correct.

55. A \$2.5 million forfeiture was proposed when SBC, a regional Bell holding company, failed to update its application to provide interLATA telecommunications services in Kansas and Oklahoma when such application was no longer substantially accurate or complete in all

¹⁴ <http://transition.fcc.gov/wcb/armis/filereqt.html>.

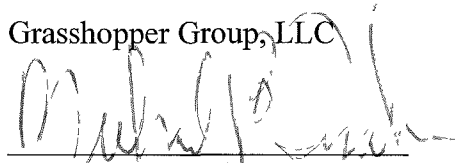
significant respects. *SBC Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 19091 (2001). However, the FCC did not take the position that the erroneous application was late-filed until corrected.

IV. Conclusion

56. The Commission cannot prove any sets of facts under which the its can grant the requested relief, because the Complaint in this case fails to state a claim upon which relief may be granted, as explained above. Grasshopper respectfully requests the Complaint be denied in total and dismissed with prejudice.

Respectfully submitted,

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**Re: Grasshopper Group of MA, LLC
Case No. 09-1061-TP-ACE**

RECEIVED-DOCKETING DIV
2009 DEC -2 PM 12: 01
PUCO


Ladies and Gentlemen:

Grasshopper Group of MA, LLC ("Grasshopper"), by its attorneys respectfully requests withdrawal, without prejudice, of its Application for certification in Case No. 09-1061-TP-ACE. Grasshopper requests this withdrawal pursuant to Staff request due to the Commission's determination that Grasshopper does not fit under the jurisdiction of the Commission and may conduct business without certification.

An original plus seven (7) copies of this request are enclosed herewith. An additional copy of this transmittal is also enclosed, to be date-stamped and returned in the postage prepaid envelope provided.

Should there be any questions regarding this matter, kindly contact the undersigned.

Respectfully submitted,

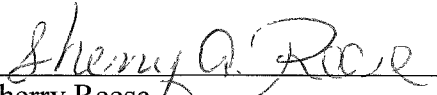

Michael P. Donahue
Regulatory Counsel

cc: Jeffrey Brown (via email: Jeffrey.Brown@puc.state.oh.us)
This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
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DOCKET NO. UT-132153
CERTIFICATE OF SERVICE

I, Sherry Reese, certify that I have served the attached Motion to Dismiss of Grasshopper Group, LLC upon the person listed on the Service List below by delivering said document via prepaid overnight courier, addressed as shown on said Service List.

DATED at McLean, VA this 5th day of April, 2014.


Sherry Reese

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