

June 6, 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,

Enclosed please find the original and 12 copies of the Petition for Interlocutory Review of Grasshopper Group, LLC in the above-referenced proceeding and a Certificate of Service.

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

Sincerely,



Ronald E. Quirk, Jr.
On behalf of Grasshopper Group, LLC

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

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**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	DOCKET UT-132153
)	
Complainant,)	PETITION FOR INTERLOCUTORY
)	REVIEW OF GRASSHOPPER GROUP, LLC
)	
v.)	
)	
GRASSHOPPER GROUP, LLC)	
)	
Respondent.)	

1. Pursuant to the Washington Administrative Code (“WAC”) 480-07-810, Grasshopper Group, LLC, (“Grasshopper”), a Massachusetts limited liability company located at 197 1st Avenue, Suite 200, Needham, Massachusetts 02494, respectfully petitions the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) for interlocutory review of Order 02¹ in this proceeding, wherein the Administrative Law Judge (“Judge” or “ALJ”) denied Grasshopper’s Motion to Dismiss (“Motion”)² the Complaint which commenced this proceeding.³ In support thereof, Grasshopper respectfully states as follows:

Factual Background

2. On April 16, 2014, Commission, on its own motion and through its Staff, filed a Complaint against Grasshopper, alleging that Grasshopper’s timely filing of its 2012 Annual Report that contained an inadvertent error in the amount of intrastate revenue reported and timely payment of its associated

¹ Washington Utilities and Transportation Commission v. Grasshopper Group, LLC, Order 02, Docket No. UT-132153 (“Order 02”).

² See Washington Utilities and Transportation Commission v. Grasshopper Group, LLC, Motion to Dismiss of Grasshopper Group, LLC, Docket UT-132153 (May 5, 2014) at p. 1; and accompanying Memorandum of Law in Support of Motion to Dismiss of Grasshopper Group, LLC (“Memo of Law”) at ¶ 56.

³ Washington Utilities and Transportation Commission v. Grasshopper Group, LLC, Complaint, Docket No. UT-132153 (Apr. 16, 2014) (“Complaint”).

regulatory fees, resulted in violations of RCW 80.04.080 and WAC 480-120-382.⁴ The Complaint further alleges that Grasshopper had “101 violations” of RCW 80.04.080 and WAC 480-120-382 because it filed a revised Annual Report on August 9, 2013, 101 days after the May 1, 2013 deadline for filing annual reports.⁵ The Complaint seeks a monetary penalty of up to \$30,300.⁶

3. On May 5, 2014, Grasshopper filed its Motion stating that the Complaint should be dismissed because it failed to state a claim upon which relief could be granted. Commission Staff filed its Response to the Motion on May 23, 2014.

4. The Honorable Adam E. Torem, Administrative Law Judge (“Judge” or “ALJ”) issued Order 02 on May 28, 2014, denying Grasshopper’s Motion.⁷

Availability of Interlocutory Review

5. WAC 480-07-810(2)(c) permits any party to seek interlocutory appeal of a order when such review “could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review,” or “review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review.” Such party must state “why the ruling is in error or should be changed and why interlocutory review is necessary, and must cite reasons that support the petition.” *Id.* at (3).

Review is Warranted in This Case

6. As explained in more detail below (¶¶26-29), review is warranted in this instance because Order 02 contains erroneous conclusions that should be overturned. These conclusions are: (a) Grasshopper’s

⁴ See Complaint at ¶ 10.

⁵ *Id.* at ¶ 11.

⁶ *Id.* at ¶ 16; see also WUTC Investigation Report, Grasshopper Group, LLC, UT-132153 (March 2014) at p. 15. (“Investigation Report”).

⁷ See Order 02 at ¶ ¶6-8.

services are not intrastate and thus are subject to WUTC regulation; and (b) Grasshopper's timely filed but inaccurate Annual Report violated RCW 80.04.080 and WAC 480-120-382.⁸

7. Order 02 fails to address many substantive arguments Grasshopper raised in the Motion, including: (1) Grasshopper's services are information services as defined by the Federal Communications Commission ("FCC") and the Communications Act of 1934, as amended, and as such are beyond the Commission's jurisdiction; and (2) a timely filed report does not become untimely because it contains an error. These arguments were fully developed in Grasshopper's Memo of Law and are incorporated herein by reference.⁹

Order 02's Erroneous Statements and Conclusions

Jurisdiction

8. Order 02 confuses the issue of jurisdiction. It ignores the difference between Commission jurisdiction over a company and jurisdiction over the same company's services. It is true that Grasshopper voluntarily registered with the WUTC, and submitted to WUTC's jurisdiction over Grasshopper and its *intrastate* telecommunications services, if any.¹⁰ However, that does not mean the Commission has jurisdiction over all Grasshopper services or that the services currently being provided to Washington-based customers are intrastate in nature.

⁸ *Id.* at ¶¶ 13 & 16.

⁹ From time to time, trial courts (or ALJs) fail to address all arguments raised by a party. So long as these arguments were raised below, an appellate panel can and should decide them even when the opinion being appealed did not address all issues raised. *See, e.g., Arremony v. Dep't of Treasury*, No. 244340, *slip op.* (Mich. Ct. App., March 18, 2004) (unpublished); available online at http://publicdocs.courts.mi.gov:81/opinions/final/coa/20040318_c244340_30_244340.opn.pdf. A court must address all arguments raised. *Kopfe v. Dist. of Columbia Alcoholic Beverage*, 381 A.2d 1372, 1377 (D.C. 1977). *Accord, Commission on Human Relations v. Bentley*, 422 So.2d 964 (Fla. App. 1st Dist. 1982). Washington courts appear to have adopted this rule with the specific exception of cases of certified issue referral from a federal court. In that instance, Washington courts may properly elect to decide only the certified issue. *Danny v. Laidlaw Transit Services, Inc.*, 193 P.3d 128, 151 (Wash. 2008), *citing Christensen v. Royal Sch. Dist. No. 160*, 124 P.3d 283 (Wash. 2005).

¹⁰ *See* Memo of Law at ¶¶ 6, 24-29.

9. The FCC has jurisdiction over any facilities used to provide interstate services even when those facilities are located in a single state. *See Dep't of Defense v. C & P Tel. Co.*, Memorandum Opinion & Order, 71 FCC 2d 1336, at ¶4 (1979). The FCC has traditionally used the end points of a service to determine whether the service is interstate or intrastate in nature. *See Vonage Holdings Corp.*, Memorandum Opinion & Order, 19 FCC Rcd 22404, at ¶17 (2004). When a service, such as Grasshopper's, can be used from any location and when the provider is unable to identify those locations, the traditional end-point test has much less meaning because it is nearly impossible to determine whether such service is ever intrastate in nature. As such, the service should be treated as interstate in nature. *Id.* at ¶25. The FCC has authority to preempt inconsistent state regulations when they conflict with its jurisdiction over interstate or mixed jurisdiction services. *See Second Computer Inquiry*, Memorandum Opinion & Order, 84 FCC 2d 50, at ¶155 (1980); *Vonage Holdings, id.*

10. As explained in its Memo of Law, Grasshopper provides a virtual office service from its platform located in Massachusetts. This service allows a business to display to customers that the company has a "business presence" in Washington (or any other state for that matter) whether or not the business and its employees are located in Washington. The business presence is seen by customers in the use of local telephone numbers. But like Vonage, Grasshopper does not know where the end points of any specific communication using its platform and proprietary software are located. For example, a consumer with a Tacoma cell phone number, but located in California, may dial one of Grasshopper's customers with a Seattle telephone number, but which actually operates in Florida. While the call may look like an intrastate call, traditional end point analysis shows it is an interstate call.¹¹

¹¹ *See* Memo of Law at ¶¶ 26-29. Despite an ironclad argument that its virtual office service is interstate, Grasshopper has a business policy of being a good corporate citizen. Accordingly, it voluntarily registers with local utility commissions; estimates the proportion of "calls" that look similar to traditional intrastate calls; and pays appropriate taxes and fees on them. Many of Grasshopper's competitors, including 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. Yet, Grasshopper is being punished for its compliance while these companies flagrantly disregard even the most basic of UTC requirements with impunity.

11. Grasshopper voluntarily registered with the WUTC in order to show good faith with the Commission. As Grasshopper explained in its Memo of Law, due to the fact that its services are interstate information services, there is a lack of a clear intrastate telecom component to its services, and consequently it is questionable that WUTC has jurisdiction over those services.¹² Nonetheless, because it wished to comply with Washington State regulations (whether or not applicable as a matter of law), Grasshopper voluntarily registered with WUTC as a telecommunications company, conducted a jurisdictional analysis of its traffic, and allocated a portion of its service revenues as “intrastate” revenues.¹³

12. By voluntarily registering with the Commission, Grasshopper took it upon itself to file annual reports and pay the associated regulatory fees. Accordingly, and contrary to the Staff’s assertion that Grasshopper makes only the filings “it chooses to submit”¹⁴ Grasshopper has been compliant with the applicable statutes and rules, and has demonstrated good faith to the Commission.¹⁵

Grasshopper’s Actions Do Not Warrant Sanctions

13. Order 02 improperly denied dismissal of the Complaint based on a misapplication of the Commission’s rules.¹⁶ As the ALJ acknowledges, the facts are uncontroverted: Grasshopper timely filed

¹² See Memo of Law at ¶¶ 6, 24-29.

¹³ *Id.* at ¶¶ 6, 28. Indeed, since Grasshopper’s services are interstate, information services, it is only because Grasshopper has developed a methodology to allocate a portion of its revenue as intrastate that Grasshopper has any intrastate revenue to report to the UTC.

¹⁴ See Order 02 at ¶ 9.

¹⁵ Grasshopper has a business policy of being a good corporate citizen. Accordingly, it voluntarily registers with local utility commissions; estimates the proportion of “calls” that look similar to traditional intrastate calls; and pays appropriate taxes and fees on them. Many of Grasshopper’s competitors, including 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. Yet, Grasshopper is the subject of this Complaint. See Memo of Law at ¶ 28.

¹⁶ See Order 02 at ¶ 16.

its annual report using data that Grasshopper believed to be correct;¹⁷ Staff later questioned the accuracy of the revenue estimate; once Staff finally contacted the listed “contact person” for Grasshopper, the company immediately investigated and promptly filed a corrected report using the intrastate revenue data for 2012, rather than the intrastate revenue data for 2011.¹⁸ The Commission has acknowledged that identification and prompt correction of inaccurate filings is the appropriate procedure for handling such matters. *WUTC v. Qwest Corporation*, Docket UT-032162 (2004 WL 315259) (“Nonetheless, every restatement of an account or correction of a report is not *per se* a 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.”). There is no claim by the Staff that Grasshopper’s 2012 annual report was filed late.¹⁹ To the contrary, “[t]here is no dispute that Grasshopper filed its 2012 annual report prior to the May 1 deadline.²⁰ Accordingly, sanctions are inappropriate and the Commission should so state.

14. No one disputes the importance of accurate reports. What is at issue is whether an inadvertent error in an otherwise timely report constitutes a violation of the reporting requirements. The Commission has already said that it does not and should do so again here. It is important to note that the Commission can expect parties will not purposely lie in their reports. Similarly, there can be a valid presumption parties need to make a good faith and reasonable effort to avoid mistakes. However, recognizing that “even when companies act in good faith they will make errors,” does not limit the UTC’s ability to punish intentional misstatements of revenue or encourage less diligence by telecommunications providers in reporting accurate data.

¹⁷ See Order 02 at ¶¶ 4-5, 14. Grasshopper does not know the jurisdiction of any communications using its Massachusetts’ platform, but makes reasonable estimates through special traffic studies. See Memo of Law at ¶ 6.

¹⁸ See Memo of Law at ¶¶ 11-12.

¹⁹ Indeed, when the report was filed (on a timely basis), Grasshopper certified that it believed the report was true and correct. *Id.* at ¶¶ 8-9.

²⁰ Order No. 2 at ¶14.

15. Nonetheless, the ALJ concluded that, while Grasshopper timely filed its 2012 Annual Report, it “did not ensure that the information contained in the report was accurate, nor did the Company indicate that its reported Washington revenue was only an estimate or calculated from the best available information.”²¹ That statement mischaracterizes the filing requirements.

16. Annual Report Certifications, including the subject Annual Report signed by Dominic Schiavone, COO of Grasshopper, states that “to the best of my knowledge, information and belief, all statements of fact contained in said report are true and said report is a correct statement of the business and affairs of the above named respondent”²² As explained in the Memo of Law, Grasshopper believed, based on the information it had, that the subject Annual Report was accurate.²³ Accordingly, Grasshopper was in full compliance with the certification requirement.

17. Therefore, the issues are limited to: (1) whether the WUTC’s rules contain a requirement for all filings to be completely accurate (strict liability); (2) if so, whether a timely filed inaccurate report is late; and (3) whether the proposed sanctions for Grasshopper are consistent with relevant precedents. As a quasi-judicial body, the Commission is required to follow precedent and may not deviate from it unless the facts and law provide a compelling reason to do so. *See Vergyle v. Employment Sec. Dep’t*, 623 P.2d 736 (1981), *overruled on other grounds* in *Davis v. Employment Sec. Dep’t*, 737 P.2d 1261 (1987).

18. *Qwest* is the touchstone case on any requirement for reports filed with the Commission to be accurate.

19. Order 02 ignores the uncontroverted fact that, in *Qwest*, both Staff and the Commission agreed that Qwest’s filing of numerous inaccurate annual reports was not a violation of any statute or rule: “Neither RCW 80.04.090 nor WAC 480-120-302 explicitly imposes an accuracy requirement or defines

²¹ See Order 02 at ¶ 14. Not only is this statement not part of the annual reporting requirements, it does not take into consideration the fact that Grasshopper’s annual report included a certification signed by an officer stating that the information in the report was true and correct “to the best of my knowledge, information and belief.”

²² See Annual Report Certification of Grasshopper Group, LLC, a copy of which is attached as Appendix 19 to the Investigation Report (emphasis added).

²³ See Memo of Law at ¶¶ 8-9, 11, 37.

standards for determining whether a report or account is ‘accurate’ or ‘inaccurate’ or whether any ‘inaccuracy’ is material.” *Qwest* at *5. And while “reports filed with the Commission and accounts maintained by a public service company should be accurate in all material respects” (*id.*), “every restatement of an account or correction of a report is not *per se* a violation, as it is generally understood that even when companies act in good faith they will make errors.” *Id.*

20. What is more: the WUTC does not require or even expect errors to be corrected unless they are material. *Id.* Grasshopper’s error, which reported the wrong year’s estimated intrastate revenues, resulted in the underpayment of WUTC regulatory fees by the grand total of \$194.²⁴ And, Grasshopper immediately paid the shortage when it corrected its error.²⁵ For fiscal 2011-13, the total budget for the Commission was \$49,220,000 or approximately \$24,610,000 for a single year.²⁶ Thus, Grasshopper’s underpayment constitutes approximately 0.00079% of the WUTC’s annual budget. The underpayment is clearly immaterial under any reasonable standard. It is quite certain that Staff and Grasshopper each spent more money correcting the mistake than was at issue.

21. Moreover, even had the error been material, the prescribed duty for the filing party is: “When material inaccuracies are discovered, they should be promptly corrected.” *Qwest* at *5. Nowhere did the Commission add: “And even in the event your error is not material, you may still be subject to sanctions.” Indeed, had the Staff taken this position with *Qwest*, settlement would have been unlikely. Yet, the settlement included an agreement for the Commission to dismiss count 5 of the complaint, which related to filing inaccurate reports, such that all parties effectively agreed state law does not impose penalties for errors contained in required reports. *Id.* But, contrary to binding precedent, Order 02 imposes strict liability on Grasshopper when the UTC did not with *Qwest*.²⁷

²⁴ *Id.* at ¶¶ 11-12.

²⁵ *Id.*

²⁶ Source: Washington State Fiscal Information.

²⁷ *See* Order 02 at ¶ 16.

22. In addition, even if there is an expectation of accuracy in the annual reporting requirement, nothing in the rules states that an otherwise timely filed annual report is deemed to be late and subject to continuing violations until a correction is submitted. At most, a single inaccurate report could be considered a single incident of non-compliance with the implied inaccuracy requirements.

23. It is critical for the Commission to recall the facts in the *Qwest* case as it considers Grasshopper's interlocutory appeal. While Order No. 2 did not address this issue, Staff characterizes this and other Grasshopper arguments as in favor of mitigation.²⁸ That is not correct.²⁹ Contrary to the Staff's assertions, the arguments that Order No. 2 does not address are not contentions of "potential mitigating factors," but go directly to the issue of dismissing the Complaint. Hence, ignoring those arguments was arbitrary and capricious.

24. Qwest had so many internal accounting flaws that it had to report them to the Securities and Exchange Commission and settle an SEC enforcement lawsuit for accounting fraud.

"SEC Charges Qwest Communications International Inc. with Multi-Faceted Accounting and Financial Reporting Fraud."³⁰ The SEC's lawsuit alleged Qwest "recognized over \$3.8 billion in revenue and excluded \$231 million in expenses as part of a multi-faceted fraudulent scheme to meet optimistic and unsupportable revenue and earnings projections." Qwest agreed to a consent decree imposing "civil penalty of \$250 million and \$1 disgorgement." "Randall J. Fons, Regional Director in the SEC's Central Regional Office in Denver, added:

Qwest senior management created a corrupt corporate culture in which meeting Wall Street expectations was paramount. Senior management projected unrealistic revenue growth and would not tolerate missing the

²⁸ *Id.* at ¶ 6.

²⁹ Other arguments Order No. 2 did not address concern Grasshopper being singled out for punitive treatment because: (a) Grasshopper's actions were reasonable and in good faith, (b) it is not unreasonable for telecom companies to make mistakes on regulatory filings; (c) by sanctioning Grasshopper, the Commission acted contrary to its own precedents, and (d) Commission Staff acted in an arbitrary and capricious manner by using different liability factors in its Complaint than had been previously imposed and by failing to meet the established factors for liability *Id.* (citation omitted).

³⁰ Press Release 2004-148 (SEC Oct. 21, 2004).

numbers. As a consequence, accounting rules, policies, and controls that interfered with meeting financial targets were ignored. The Commission will continue its investigation in an effort to hold personally accountable those individuals responsible for the fraud.

25. Despite this incredibly dishonest behavior by Qwest and its executives and the concomitant false reports filed with the WTUC, the WTUC and its staff agreed to have Staff Complaint Count 5 (Qwest's filing inaccurate reports) dismissed. *Qwest* at *5. This means that, in the eyes of the very Staff that is proposing to sanction Grasshopper for using the wrong year's estimated intrastate revenues, it was acceptable for a much larger and politically connected company to be excused from sanctions for filing erroneous reports based upon conscious decisions by upper management³¹ to "cook the books" and mislead shareowners, suppliers, customers and regulatory agencies. The disparity in treatment is breathtaking.

26. In light of the differences between Qwest's fraudulent reporting and the error made by Grasshopper, Grasshopper makes a compelling argument that the entire complaint against Grasshopper must be dismissed. Given the standard set in the Qwest case, "it appears beyond doubt that the [Staff] can prove no set of facts, consistent with the complaint, which would entitle the [Staff] to relief." Hence dismissal of the complaint against Grasshopper, pursuant to CR 12(b)(6) is compelled. *Futureselect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 309 P.3d 555, 567 (Wash. App. 2013).

Review will Save WUTC and Grasshopper Substantial Effort and Expense

27. Review and reversal of Order 02 and dismissal of the Complaint will save both the Commission and Grasshopper substantial time, effort, and expense. It will, for example, save both parties the cost of a hearing, and the substantial effort and expense of preparing for same. In addition, prompt review is necessary to prevent substantial prejudice to Grasshopper that cannot be remedied by post-hearing review.

28. Further, the Commission would save the effort and expense of having to enforce any judgment against Grasshopper. It is settled law that the purpose of imposing sanctions on a carrier is to deter future

³¹ Qwest's former CEO, Joseph Naccio, was convicted in 2007 of 19 counts of securities fraud. http://www.nytimes.com/2007/04/20/technology/20qwest.html?_r=0..

violations, rather than to punish. *See Collier Technologies*, (2012 WL 675945) (Wash. U.T.C.) at p. 2. In the *Qwest* case, Staff and the Commission were already presented with an opportunity to levy substantial fines on a company for intentional, fraudulent reporting to deter similar actions by others. Instead, Staff and the Commission resolved the matter by imposing a fine that is not substantially greater than what Staff proposes to impose on Grasshopper in this proceeding. Under the circumstances, what amounted to a slap on the wrist. It is arbitrary and capricious for the Commission to seek to remedy this prior lapse by imposing a different standard and an unreasonably disproportionate penalty on Grasshopper.

29. Grasshopper timely filed the subject Annual Report and has always strived to be in compliance with the Commission's rules. Moreover, as Grasshopper explains in detail in its Answer in this proceeding, Grasshopper has implemented several internal compliance measures, designed to ensure that Annual Reports and other WUTC regulatory filings will be timely filed and contain accurate information.³² Accordingly, there is no deterrent factor here, and no reason for the Commission to impose sanctions on Grasshopper.

30. Even if it were to be assumed, *arguendo*, that Grasshopper's revised Annual Report is a "late filed" report, the correct remedy would be late fees, not punitive sanctions.³³ This is yet another reason to dismiss the Complaint, which seeks to impose monetary sanctions on Grasshopper.

³² *See* Washington Utilities and Transportation Commission v. Grasshopper Group, LLC, Docket No. UT-132153, Grasshopper's Answer to Complaint (May 5, 2014) at ¶ 54, which is incorporated herein by reference.

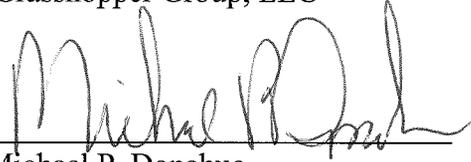
³³ *Id.* at ¶ 47.

Request for Relief

31. For all the foregoing reasons, Grasshopper requests that the Commission review and reverse Order 02, and grant Grasshopper's Motion to Dismiss.

Respectfully submitted,

Grasshopper Group, LLC



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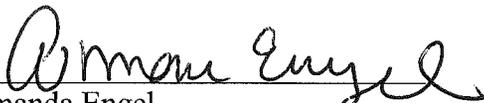
rhj@commlawgroup.com

Dated: June 6, 2014

DOCKET NO. UT-132153
CERTIFICATE OF SERVICE

I, Amanda Engel, 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 6th day of June, 2014.


Amanda Engel

Brett P. Shearer
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