

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

CC Docket No. 96-45

Request for Review by InterCall, Inc. of Decision
of Universal Service Administrator

PETITION FOR RECONSIDERATION

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Dated: July 30, 2008

SUMMARY

The *InterCall Order* should be reconsidered because it is the product of the Federal Communications Commission's ("FCC" or "Commission") failure to adhere to settled principles of administrative process that in turn resulted in a decision that rests on material errors of both fact and law. By this order, the Commission attempts to impose USF regulations on every provider of toll teleconferencing services in the country, despite the fact that this proceeding arose from a narrow inquiry by one carrier, InterCall, Inc. ("InterCall"), and the Universal Service Administrative Company's ("USAC") reaction to and adjudication of that one carrier's service offering. The Public Notice by which the Commission purported to seek comment of InterCall's Request for Review, which provided only 11 days for submissions, gave no indication that the result of InterCall's Request would bind non-party providers of teleconferencing services nationwide in what the Commission admits is a new application of its authority under Section 254(d). This failure to explicate the scope of USAC's decision omits a crucial element from the Public Notice, rendering it insufficient under the Administrative Procedure Act ("APA") and warranting reversal of the resulting *InterCall Order*.

In part due to insufficient public notice that deprived the record of crucial facts, the *InterCall Order* is marred by significant errors of fact and law that likewise warrant reversal. Contrary to the Commission's erroneous conclusion, teleconferencing bridges are characterized by the full integration of information services and telecommunications transmission. The features at issue are different from those considered in the prepaid calling card proceeding, and, had the InterCall item been properly noticed, the Commission would have obtained evidence demonstrating this distinction. In fact, teleconference bridges are more analogous to cable modem service that the Commission found, and was affirmed by the Supreme Court in *Brand X*,

represents the seamless and complete integration of telecommunications services. The Commission's failure both to obtain relevant evidence, and to analyze appropriately what evidence it had, resulted in significant errors in the *InterCall Order* that merit reconsideration.

The logical and ultimate conclusion of the Commission's decision in the *InterCall Order* is that every end user entity that uses a feature group or internal PBX to route calls will be subject to USF obligations. Plainly that result would be absurd, burdensome, and contrary to the public interest. To avoid this unfortunate—and likely unintended—foray into hyper-regulation, the Commission should reconsider and reverse the *InterCall Order*.

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A+ Conferencing, Ltd., Free Conferencing Corporation, and The Conference Group (the “Petitioners”), by their attorneys and pursuant to 47 C.F.R. §§ 1.106 and 1.429, seek reconsideration of Order FCC 08-160 released on June 30, 2008, in this docket (the “*InterCall Order*”). The *InterCall Order*, which holds that providers of audio bridging services must contribute directly to the Universal Service Fund (“USF”), makes findings unsupported by any record evidence—largely due to the insufficiency of the Public Notice that purported to seek industry comment—and relies on the manifestly incorrect factual finding that audio bridging services do not fully integrate enhanced information features into their service offerings to reach several incorrect legal conclusions.

PROCEDURAL BACKGROUND

In 2007, USAC commenced a review of whether InterCall, an audio bridging service with a nationwide presence, had been or should be required to contribute directly to the USF in accordance with 47 U.S.C. § 254 and Commission Rules.¹ By letter dated January 15, 2008, USAC issued an Administrator’s Decision holding that InterCall’s audio bridging services are interstate teleconferencing services and are subject to USF contribution and reporting requirements (the “USAC Letter”).² The Administrator reasoned that FCC Rule 54.711, which identifies types of service providers subject to USF regulations, is not intended to be inclusive or exhaustive, and thus the omission of “audio bridging” and “teleconferencing” from Rule 54.711 does not excuse these services from contribution obligations.³

¹ See CC Docket No. 96-45, InterCall, Inc. Request for Review of Decision of Universal Service Administrator at 5-6 (Feb. 1, 2008) (“Request for Review”).

² Request for Review, Exh. 1.

³ *Id.*

InterCall filed its Request for Review of the Administrator’s Decision with the full Commission on February 1, 2008. The Commission put the Request for Review on public notice on February 14, 2008, with comments due February 25, and reply comments due March 3, 2008.⁴ On June 30, 2008, the Commission released the *InterCall Order* granting the Request for Review in part. The *InterCall Order* states that audio bridging services are subject to USF contribution and reporting requirements only prospectively,⁵ and rejected the Administrator’s attempt to impose these requirements retroactively.⁶ The *InterCall Order* was designated effective when released.⁷

STANDARD FOR RECONSIDERATION

Reconsideration is appropriate “where the petitioner shows either a material error or omission in the original order.”⁸ In addition, a petition will be granted “if the reconsideration is in the public interest.”⁹ For example, the Commission granted a petition for reconsideration of the *Centrex Waiver Order*¹⁰ in this docket that demonstrated why the order “unfairly burdens”

⁴ Public Notice, DA 08-371, *Comment Sought on InterCall, Inc.’s Request for Review of a Decision by the Universal Service Administrative Company and Petition for Stay* (rel. Feb. 14, 2008) (“Public Notice”).

⁵ *InterCall Order* ¶ 22.

⁶ The Commission conceded that its USF rules were unclear, *id.* ¶ 23, rendering the *InterCall Order* essentially a new application of the Commission’s Section 254(d) authority.

⁷ *Id.* ¶ 29.

⁸ *In re Applications of D.W.S., Inc.*, File Nos. BR-890720UD *et al.*, Memorandum Opinion and Order, 11 FCC Rcd. 2933 (1996); *see also Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, Memorandum Opinion and Order, 10 FCC Rcd. 7727 (1995) (“error of fact or law”).

⁹ *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, WT Docket No. 97-82, Second Order on Reconsideration of the Third Report and Order, 18 FCC Rcd. 10180, 10212, ¶ 48 (2003).

¹⁰ *Federal-State Board on Universal Service*, CC Docket No. 96-45, Order and Second Order on Reconsideration, 18 FCC Rcd. 4818 (2003).

one sector of the telecommunications market and “contravenes [the Commission’s] goal to advance the pro-competitive statutory aims of section 276.”¹¹

Petitioners provide herewith sworn Declarations demonstrating that the enhanced features of their conference bridges are in fact “functionally integrated” into their service such that they cannot be deemed “telecommunications” subject to Section 254. The Commission may consider the factual presentations in these Declarations on reconsideration, because their review is “required in the public interest” and thus permitted by Rules 1.106 and 1.429. 47 C.F.R. §§ 1.106(c)(2), 1.429(b)(3). The averments in the attached Declarations provide evidence that is material to the Commission’s findings and yet have no analog in the record underlying the *InterCall Order*. Defective notice, *see* Section I below, prevented their being submitted during the abbreviated comment period that the Commission allotted. The import of the rule announced in the *InterCall Order* and its broad, industry-wide scope make consideration of these facts appropriate at this time.

ARGUMENT

I. THE INTERCALL ORDER IMPROPERLY CONVERTED A USAC ADJUDICATION TO AN INDUSTRY-WIDE RULEMAKING

The Commission adopted an industry-wide legislative rule in the *InterCall Order* without affording appropriate notice and comment in violation of Section 553 of the APA.¹² Neither the Public Notice nor the item for which InterCall sought review—a letter from USAC to InterCall’s counsel—are sufficiently clear as to whether or how that adjudication could be applied to the teleconferencing industry, and as such this industry, including the Petitioners here, were not afforded a meaningful opportunity to participate in the process by which the

¹¹ *Federal-State Board on Universal Service*, CC Docket No. 96-45, Order on Reconsideration, 23 FCC Rcd. 2567, 2569, ¶¶ 5, 7 (2008).

¹² 5 U.S.C. § 553(b), (c).

Commission now has deemed an entire class of enhanced service providers to be subject to USF requirements.

Federal agencies are granted considerable power in the form of legislative rulemaking, and accordingly must adhere to “the degree of openness, explanation, and participatory democracy required by the APA[.]”¹³ To that end, Section 553 of the APA requires that “[g]eneral notice of proposed rule making shall be published in the Federal Register,” and such notice shall include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹⁴ Section 553 further provides that

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.¹⁵

The federal court of appeals for the D.C. Circuit has held that these statutory provisions require federal agencies to provide “sufficient notice” of a forthcoming rule that “affords interested parties a reasonable opportunity to participate in the rulemaking process.”¹⁶ Failure to provide

¹³ *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (9th Cir. 1978). The *Weyerhaeuser* court explained

In short, we are willing to entrust the Agency with wide-ranging regulatory discretion, and even, to a lesser extent, with an interpretive discretion vis-a-vis its statutory mandate, so long as we are assured that its promulgation process as a whole and in each of its major aspects provides **a degree of public awareness, understanding, and participation** commensurate with the complexity and intrusiveness of the resulting regulations.

Id. at 1028 (emphasis added).

¹⁴ 5 U.S.C. § 553(b).

¹⁵ *Id.* § 553(c).

¹⁶ *Forester v Cons. Prod. Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977).

sufficient notice is grounds for reversal or remand.¹⁷ Sufficient notice must, at a minimum, make clear “notice of the scope of the regulations being proposed.”¹⁸

This proceeding arose from InterCall’s discrete inquiry into whether its audio bridging services are subject to USF contribution obligations.¹⁹ The basis of the decision arose principally from two items: (1) the USAC Letter and (2) the Request for Review from InterCall. The USAC Letter, addressed directly and only to counsel for InterCall, refers specifically to the lengthy informal dialogue that occurred between itself and InterCall and the data that InterCall privately submitted.²⁰ It concludes with the statement

USAC has concluded that Intercall must file the FCC Form 499 and potentially contribute to the USF pursuant to the requirements set forth in the FCC regulations discussed above.²¹

Plainly the USAC Letter and the decision it reaches apply only to InterCall.²²

InterCall’s Request for Review was likewise focused on its particular set of facts and its particular service offering. And indeed at that time only InterCall’s interests were at stake, as the USAC Letter was directed only to InterCall. As such, the proceeding could only be described as an informal adjudication regarding one carrier’s service offering.

Nothing in the Public Notice issued February 14, 2008, gives any different

¹⁷ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (remanding rule regarding Access Broadband Over Power Line service).

¹⁸ *Forester*, 559 F.2d at 788.

¹⁹ *See generally* Request for Review at 5 & Exh. 3.

²⁰ Request for Review, Exh. 3.

²¹ *Id.*

²² Petitioners do not assert that the Commission’s promulgation of a legislative rule from within an adjudication was unlawful or improper. Federal agencies of course retain the authority and discretion to adopt rules via the procedural vehicle best suited to the purpose. *E.g.*, *Securities and Exch. Comm’n v. Chenery*, 332 U.S. 194, 201 (1947). The Commission’s error here was in failing to issue sufficient public notice that the result of the Request for Review would result in an industry-wide USF rule.

impression. The Public Notice states only that

On February 1, 2008, Intercall, Inc. (Intercall) filed a request seeking review and reversal of a decision of the Universal Service Administrative Company (USAC), in which USAC ruled that Intercall's audio bridging services are toll teleconferencing services, requiring Intercall to submit FCC Form 499 filings to USAC. On February 5, 2008, Intercall filed a petition requesting that the Commission stay USAC's decision pending the Commission's review.

Interested parties may file comments on or before February 25, 2008, and reply comments on or before March 3, 2008.

From this quite narrow description it is difficult to discern that the Commission was poised to impose USF reporting and contribution requirements on an entire industry—every conference bridge provider and every type of conference bridging service. The Public Notice was thus not sufficient to satisfy Section 553 and renders the resulting *InterCall Order* procedurally and fatally infirm.²³

Compare the posture of the rulemaking challenged in *Forester*: there, the Consumer Product Safety Commission (“CPSC”) promulgated a final rule implementing the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-74, that applied to all bicycles sold in the United States.²⁴ Several parties appealed the rule on the ground that the CPSC had not provided notice of the rule with sufficient clarity that it would apply to all bicycles and not merely children's bicycles.²⁵ The D.C. Circuit disagreed, noting that several—at least three—public notices had issued regarding the proposed rule, and “indicated that the proposed regulations applied to ‘Bicycles’” and expressly stated that all previous notices of rulemaking would entail

²³ *American Radio Relay League*, 524 F.3d at 236-37.

²⁴ 559 F.2d at 780-81.

²⁵ *Id.* at 787-88.

the scope of ‘bicycles’ without limitation.²⁶ On these facts, the Court of Appeals held that the CPSC had provided sufficient notice under 5 U.S.C. § 553 as to the scope of the rule and rejected Petitioners’ procedural challenge.²⁷

Here, by contrast, the Commission issued only the one Public Notice, and in that notice identified only “a decision of the Universal Service Administrative Company (USAC), in which USAC ruled that Intercall’s audio bridging services are toll teleconferencing services.”²⁸ The Public Notice did not indicate that the Commission would apply USAC’s decision to non-party teleconference services. As such, this entire segment of the industry, including Petitioners, cannot reasonably have been expected to know that their direct interests were at stake.

The Commission’s defective notice in this proceeding deprived Petitioners and the teleconferencing industry at large of “a reasonable opportunity to participate in the rulemaking process” by failing to give “notice of the scope of the regulations being proposed.”²⁹ As such, the Commission has failed to comport with the mandate of Section 553 that all federal regulations be adopted on the record after appropriate notice and comment.³⁰ On this ground alone, the *InterCall Order* should be reversed by the Commission.

II. THE COMMISSION MUST RECONSIDER THE *INTERCALL ORDER*, BECAUSE IT COMMITTED MATERIAL ERRORS OF FACT AND LAW

The Commission must reverse its finding that audio bridging providers are telecommunications providers, because its finding is not supported by the record and is simply erroneous. In the *InterCall Order*, the Commission premised its finding that audio bridging

²⁶ *Id.* at 788.

²⁷ *Id.*

²⁸ Public Notice at 1.

²⁹ *Forester*, 559 F.2d at 787.

³⁰ *See* 5 U.S.C. § 553(b), (c).

providers are telecommunications providers on two incorrect findings: (1) the conference bridge routes traffic, essentially operating like a switch; and (2) the features and functions offered by audio bridging providers are not integrated into an audio bridging provider's underlying service.³¹ Neither of these findings is supported by any evidence in the record; indeed, the Commission does not cite to a single commenter when reaching either of these conclusions. Moreover, each of these findings is factually incorrect, such that the Commission must reverse its conclusion that audio bridging providers are telecommunications providers.

A. The Commission's Finding Regarding Conference Bridge Functionality is a Material Error

The Commission committed a material error in its findings regarding the nature and purpose of a conference bridge, and, therefore, the Commission must reconsider—and reverse—its finding that audio bridging providers are telecommunications providers. As stated above, reconsideration is appropriate “where the petitioner shows either a material error or omission in the original order.”³² In the *InterCall Order*, the Commission concluded that InterCall's service constitutes telecommunications and that the “existence of a bridge that users dial into does not alter this classification.”³³ In reaching this conclusion, the Commission found that “the purpose and function of the bridge is simply to facilitate the routing of ordinary telephone calls.”³⁴ As an initial matter, the Commission did not cite any record evidence in support of its overly simplistic conclusion that a conference bridge routes ordinary telephone calls or even any related Commission precedent.

³¹ *InterCall Order* ¶¶ 13 n.38 & 19.

³² *In re Applications of D.W.S., Inc.*, Files Nos. BR-890720UD *et al.*, Memorandum Opinion and Order, 11 FCC Rcd. at 2933.

³³ *InterCall Order* ¶ 11.

³⁴ *Id.*

Moreover, the Commission ignored record evidence demonstrating that a conference bridge in fact does not route any traffic. In Intercall's Reply Comments, Intercall explicitly stated that audio bridging companies "do not route calls..."³⁵ Intercall explained that its bridge neither switches nor routes communications from one caller to another, but rather bridges those callers together.³⁶ The Commission, however, ignored this key point, and instead reached the opposite conclusion, never even addressing Intercall's statement about the capability—or lack thereof—of audio bridges to actually route telephone calls.

Contrary to the Commission's finding, and consistent with Intercall's statement which the Commission ignored, a conference bridge does not route ordinary telephone calls.³⁷ Indeed, there is no routing functionality whatsoever in the conference bridge.³⁸ The conference bridge provides a computer processing function. Specifically, when a customer dials a telephone number to reach the conference bridge (regardless of whether the telephone number is toll-free or a ten-digit long distance number), the call reaches a conference bridge, at which point the customer inserts its pin number so that it can enter the correct conference call.³⁹ The bridge terminates the circuit at issue and connects each conference calling participant to the appropriate conference room.⁴⁰ The Petitioners receive telecommunications services from their carriers, and those carriers provide the switching functionality. Each Petitioner relies on switching provided

³⁵ Reply Comments of Intercall, Inc. at ii.

³⁶ *Id.* at 16.

³⁷ See Declaration of Gary Greenhawk ¶ 4 (attached here to as tab A); Declaration of Eugene Tcipnjatov ¶ 4 (attached hereto as tab B).

³⁸ See Declaration of Gary Greenhawk ¶¶ 4-5; Declaration of Eugene Tcipnjatov ¶ 4.

³⁹ See Declaration of Gary Greenhawk ¶ 4; Declaration of Eugene Tcipnjatov ¶ 5.

⁴⁰ See Declaration of Gary Greenhawk ¶¶ 4-5; Declaration of Eugene Tcipnjatov ¶ 5.

by their telecommunications carrier for call routing,⁴¹ thus demonstrating that the Commission's finding that audio bridgers provide telecommunications is in error.

Moreover, it is in the public interest for the Commission to grant reconsideration. In the *InterCall Order*, the Commission made erroneous facts and conclusions and relied on sweeping generalizations about InterCall's service to the detriment of the entire audio bridging industry. In finding that audio bridging companies are telecommunications providers, the Commission has fundamentally altered the manner in which these companies do business – yet it is doing so based on erroneous information. Furthermore, the Commission's broad statements and conclusions arguably could be applied to a greater population of entities – indeed, under the Commission's rationale, arguably any entity that uses a PBX could be deemed to be routing traffic, and therefore telecommunications carriers subject to USF. The Commission must reconsider its decision, and upon reconsideration, find and conclude that audio bridging providers are not telecommunications providers.

B. The Commission Committed a Material Error of Fact and Law by Concluding that Audio Bridging Products Are Not Sufficiently Integrated So as to Constitute an Information Service

The Commission also must reconsider the *InterCall Order*, because it made a material error of both fact and law when reaching the conclusion that the features offered in conjunction with InterCall's conference service are not “integrated” and “thus do not change a service from telecommunications to an information service.”⁴²

1. The Commission's Reliance on the *Prepaid Calling Card Order* Is Misplaced.

The Commission committed a material error in law by misinterpreting and

⁴¹ See Declaration of Gary Greenhawk ¶ 4; Declaration of Eugene Tcipnjatov ¶ 7.

⁴² *InterCall Order* ¶ 12.

ignoring precedent demonstrating that audio bridging providers offer a fully integrated *information services* product. In the *InterCall Order*, the Commission erroneously relied on the *Prepaid Calling Card Order* to support its conclusion that the features offered in conjunction with InterCall’s service are not “‘integrated’ and thus do not change a service from telecommunications to an information service.”⁴³ In the *Prepaid Calling Card Order*, however, the Commission analyzed different functionalities and features than those present with audio bridge providers. Specifically, in the *Prepaid Calling Card Order*, the Commission evaluated whether an additional menu offering, which would give the caller the option to hear, for example, weather or sports information *prior to* the actual calling card telephone call was not sufficiently integrated so as to remove the prepaid telephone call from being classified as a telecommunications service instead of an information service.⁴⁴ In concluding that the additional features were not fully integrated so as to make the entire service a telecommunications service, the Commission found that the “information service features and telecommunications service are not engaged or used simultaneously.”⁴⁵ Indeed, calling card participants were permitted to bypass the enhanced offerings and proceed straight to making their call.⁴⁶

In the present case, the functions and features inherent in an audio conferencing bridge are clearly distinguishable from the functions at issue in a prepaid calling card. As an initial matter, the functions of the audio bridge itself—using computerized processing to link multiple callers together—are fully integrated into the audio bridging product consistent with *applicable* Commission precedent, which the Commission ignored. As InterCall explained, “the

⁴³ *Id.* (citing *Regulation of Prepaid Calling Card Services*, Declaratory Ruling Report and Order, 21 FCC Rcd. 7290, 7295-96, ¶¶ 14-15 (2006) (“*Prepaid Calling Card Order*”).

⁴⁴ *Prepaid Calling Card Order*, 21 FCC Rcd. at 7294, ¶ 11.

⁴⁵ *Id.* at 7294, ¶ 13.

⁴⁶ *Id.*

bridge allows users to connect to every other participant in the conference, integrating the audio channels from all other users, minus the participant's own audio, into a composite whole for each user."⁴⁷ InterCall further explains, "[p]articipants are connected only after the bridge verifies the passcode and collects user input, such as name and affiliation."⁴⁸ Thus, for each and every conference call, the caller may not bypass the enhanced/information features in order to access the call – the caller must access and use the functions of the audio bridge itself to be able to enter into the conference room.⁴⁹ The Commission, however, ignored this record evidence, such that it is necessary to engage in reconsideration as a matter of law.

In contrast to the menu-driven prepaid calling cards at issue in the *Prepaid Calling Card Order*, the functions and features used by audio bridging providers engaged and used simultaneously as part of the conference call. As one example, as stated above, the audio bridging capability itself, which connects customers from various locations and places them into one bridge, is a fully integrated service.⁵⁰ This function is performed part and parcel with the underlying transmission service,⁵¹ and is not a separate component as is the with the menu-

⁴⁷ Letter to David Capozzi, Acting General Counsel, USAC, from Steven A. Augustino, Counsel to InterCall, Inc., at 14 (June 5, 2007) (attached as Exhibit 3 to Request for Review by InterCall, Inc. of Decision of Universal Service Administrator) (hereinafter "InterCall June 5 Letter").

⁴⁸ InterCall June 5 Letter at 14.

⁴⁹ *Id.*

⁵⁰ See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Declaratory Ruling*") (classifying cable modem service as a fully-integrated information service), *aff'd*, *Nat'l Cable Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) ("*DSL Order*") (classifying wireline broadband service as a fully integrated information service), *aff'd*, *Time Warner Telecom, Inc. v FCC*, 507 F.3d 205 (3d Cir. 2007).

⁵¹ InterCall June 5 Letter at 14.

driven prepaid calling cards. The record evidence also demonstrates that other features and functionalities, such as mute and unmute, operator assistance, recording, and erasing, among other features, all occur during the conference call itself.⁵² For example, InterCall explained that its audio bridging services allow consumers the option to “record some or all of the conference, thereby creating new information that can be accessed at a later time.”⁵³ This recording also occurs while the conference call is being performed.⁵⁴ On this basis alone, the Commission’s reliance on the *Prepaid Calling Card Order* is misplaced.

Furthermore, the features and functionalities present in an audio bridging scenario are separate and distinct from the limited features that the Commission examined in the *Prepaid Calling Card Order*. The Commission cannot substitute a factual finding of a particular feature in one case for wholly separate and unique features in another case. Doing so was an incorrect application of both fact and law and necessitates reconsideration.

2. The Commission Ignored Record Evidence and Applicable Precedent in Reaching Its Erroneous Integration Finding.

The Commission applied the incorrect integration standard when evaluating InterCall’s audio bridging service.⁵⁵ Specifically, the Commission ignored the integration

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.*

⁵⁵ It is unclear precisely what the Commission considers to be the “transmission” component for purposes of the integration analysis. The Commission seems to suggest that the audio bridge itself is the telecommunications component. This is patently incorrect for the reasons stated herein. To the extent the Commission classifies the long distance transport that InterCall uses as the transmission component, the integrations analysis—evaluating whether the audio bridge is sufficiently integrated with this long distance transport, also must fail.

standard and applicable precedent set forth in *Free World Dialup*.⁵⁶ In *Free World Dialup*, the Commission noted that Free World Dialup “offers voice mail capabilities to those members who opt-into this function; offers conference bridging capabilities to members; and performs limited Internet address repair for its members.” The Commission found that these additional features, which are optional to the participant, offer members several “computing capabilities”⁵⁷ and were information services.⁵⁸ These features are substantially similar to the recording and storage capabilities that InterCall described in its petition,⁵⁹ yet the Commission did not make any effort to reference or even address *Free World Dialup*. The Commission’s failure to do so is a material legal error that warrants reconsideration.

Furthermore, the Commission ignored the one applicable integration standard: the standard set forth with regard to cable modem services. In the *Cable Modem Declaratory Ruling*, the Commission concluded that the broadband Internet service that cable companies provide is an information service.⁶⁰ In reaching this conclusion, the Commission found that there was no basis in the statutory definitions for treating cable companies differently from non-facilities-based ISPs, because both offer “a single, integrated service that enables the subscriber to utilize Internet access service...and to realize the benefits of a comprehensive service offering.”⁶¹ In reaching this conclusion, the Commission found—and the Supreme Court affirmed—that the cable modem product must be evaluated based on the “offering” of the

⁵⁶ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, 3310, ¶ 6 (2004) (“*Free World Dialup*”).

⁵⁷ *Id.* at 3310, ¶ 6.

⁵⁸ *Id.* at 3313, ¶ 11.

⁵⁹ Request for Review at 4-5.

⁶⁰ *Cable Modem Declaratory Ruling* at 4822, ¶ 38.

⁶¹ *Id.*

product as a whole.⁶² The definition of a telecommunications service includes “the *offering* of telecommunications for a fee directly to the public.”⁶³ In *Brand X*, the Court explained that it “is common usage to describe what a company ‘offers’ to a consumer as what the customer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product...”⁶⁴ The court concluded that the transmission component of the “cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering.”⁶⁵ The Commission, however, erred in failing to apply this integration standard to the *InterCall Order*.

Specifically, the Commission erred as a matter of law in its evaluation of the features and functions cursorily addressed in the *InterCall Order*. The Commission concluded that “muting, recording, erasing, and accessing operator services” were not integrated into the transmission component of the conference call.⁶⁶ The Commission also explained that the caller was not required to access any of those features and functions in order to enter the conference call.⁶⁷ In making this finding, however, the Commission misapplies the integration standard, which specifically requires the Commission to look at the consumer’s perception of the *offering* of the service as a whole – not whether the customer uses a particular feature or functionality. Despite InterCall’s reliance on *Brand X*,⁶⁸ the Commission failed to even address that standard—the appropriate integration standard—when evaluating InterCall’s petition. In failing to do so,

⁶² *Id.* at 4823-24; *Brand X*, 545 U.S. at 988.

⁶³ 47 U.S.C. § 153(46) (emphasis added).

⁶⁴ *Brand X*, 545 U.S. at 990.

⁶⁵ *Id.*

⁶⁶ *InterCall Order* ¶ 12.

⁶⁷ *Id.* ¶ 13.

⁶⁸ InterCall June 5 Letter at 13.

the Commission ignored applicable precedent, and erred as a matter of law, such that it must reconsider its decision.

CONCLUSION

For all these reasons, the Commission should grant this Petition and hold that audio bridging services are not required to contribute directly to the Universal Service Fund.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Reconsideration was electronically filed on this 30th day of July, 2008, and was served on the following persons via First Class Mail, postage prepaid:



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TAB A

**Before the Federal Communications Commission
Washington, D.C. 20054**

In the Matter of

CC Docket No. 96-45

Request for Review by InterCall, Inc. of Decision
of Universal Service Administrator

**DECLARATION OF GARY GREENHAWK IN SUPPORT OF
PETITION FOR RECONSIDERATION**

I, Gary Greenhawk, am over the age of 18, do hereby declare:

1. I am a Principal Partner of The Conference Group. In this capacity, I oversee the Information Technology and Operations Departments.

2. Prior to my current position, I was employed by the DuPont Company and held various information technology positions and then by Computer Sciences Corporation as Manager of the DuPont Account Voice Operations and Teleconferencing. I managed and provided technical and/or administrative direction to the Voice Consulting Group, PBX Network Management Center and Teleconferencing Group. I made decisions that were recognized as authoritative and had an important impact on DuPont and CSC business activities. I managed budget and coordinated activities under designated scope of authority to achieve financial objectives.

3. The purpose of this declaration is to correct a factual misstatement set forth in the Federal Communications Commission's ("Commission") June 30, 2008, Order, granting in part and denying in part, InterCall, Inc's ("InterCall") request for review of a decision by the Universal Service Administrative Company ("USAC"). In paragraph 11 of the Commission's

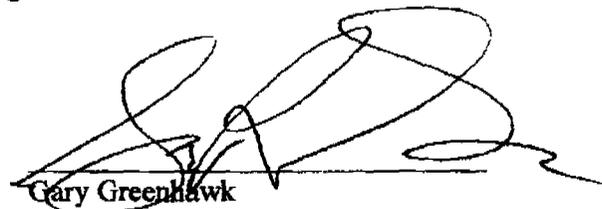
Order, the Commission states, “the purpose and function of the bridge is simply to facilitate the routing of ordinary telephone calls...” This statement is factually incorrect.

4. The audio bridging equipment that The Conference Group uses does not route, switch, or forward any telephone calls to any other call participant. The purpose of The Conference Group’s audio bridges, and based on my general understanding of other conference bridges, the bridges of other similarly situated audio bridge providers, is to unite multiple, different parties together. The bridge places the call into a conference room based on the pin code that is provided *after* the call is set up – not based on the phone number dialed.

5. The Conference Group’s audio bridge does not function as—and is not equivalent to—a switch. Indeed, The Conference Group, and all similarly situated providers of conference calling services must rely on an external carriers switch to perform call routing. The Conference Group possesses no call routing capability for its audio conferencing clients.

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

Executed on July 30, 2008



Gary Greenhawk

TAB B

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of

CC Docket No. 96-45

Request for Review by InterCall, Inc. of Decision
of Universal Service Administrator

**DECLARATION OF EUGENE TCIPNJATOV IN SUPPORT OF
PETITION FOR RECONSIDERATION**

I, Eugene Tcipnjatov, am over the age of 18, do hereby declare:

1. I am the Chief Technical Officer (“CTO”) of WydeVoice, an affiliate of Free Conferencing Corporation (“FCC”). As the CTO, I am responsible for design, development and construction of conference servers and other technology innovations for both WydeVoice and FCC.

2. Prior to my current position, I worked as a CTO in DataNaut Inc, MD USA and at Intel Corp. as an engineering manager. I have a Masters Degree in Applied Mathematics and Cybernetics from University of Nizhniy Novgorod, Russia in 1998 year and a Bachelor of Science Degree in 1996 from the same university. These degrees together are equivalent to a Bachelor’s and Master’s degrees in Mathematics offered by an accredited university in the United States. Accordingly, I am well qualified to make the technical statements regarding how conference bridges function.

3. The purpose of this declaration is to correct a factual misstatement set forth in the Federal Communications Commission’s (“Commission”) June 30, 2008, Order, granting in part and denying in part, InterCall, Inc’s (“InterCall”) request for review of a decision by the

Universal Service Administrative Company (“USAC”) finding that the audio bridging services offered by InterCall are “toll teleconferencing” services and that InterCall must contribute directly to the universal service fund (“USF”) based on revenues from these services.

4. The Commission’s conclusion in paragraph 11 of its Order that “the purpose and function of the bridge is simply to facilitate the routing of ordinary telephone calls” is factually incorrect. Contrary to the Commission’s conclusion, an audio bridge is not technically capable—and does not—route telephone calls. In particular the audio bridging equipment utilized by WydeVoice does not route, switch, or forward any telephone calls outbound to any other call participant.

5. The FCC audio bridges, and based on my general understanding of other conference bridges, the bridges of similarly situated audio bridge providers, is to simply unite multiple, different parties together. The bridge places the call into a conference room based on the pin code that is provided *after* the call is set up – not based on the phone number dialed.

6. In my capacity as the CTO of WydeVoice I design Free Conferencing Corporation’s audio bridges. These audio bridges are composed of four distinct elements: (1) the front end call flow engine; (2) database storage of pins and run time information; (3) a media processor; and (4) web service. When a call enters the bridge, it undergoes computer processing so that the call flow engine can validate the pin code entered by the caller and determine other calls whose audio needs to be mixed in with this call in media processor.

7. None of the four components listed above in any way routes a telephone call. Instead, FreeConferenceCall.com, and all similarly situated providers of conference calling services, terminate incoming call on conference bridges and must rely on a switch to perform call routing; there is no such thing as a switchless audio bridge provider. In contrast to an audio

bridge, which connects multiple callers, a switch essentially **connects two** legs together to make **one** call. One leg is **always incoming** and the other leg **always outgoing**.

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

Executed on July 30, 2008



Eugene Tcipnjatov