Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In The Matter of	)	
Petition for Declaratory Ruling or to	)	
Initiate Rulemaking on Universal Service	)	WC Docket No. 06-122
Fund Contributions for Conference	)	
Bridge Providers	)	
	)	
By Anonymous	)	

COMMENTS OF GRASSHOPPER GROUP, LLC

July 22, 2010

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I. Introduction

Grasshopper Group, LLC ("Grasshopper" or "the Company") hereby submits the following comments in response to the anonymously filed petition in the above-captioned docket. On May 27, 2010, an anonymous provider ("Petitioner"), by and through its attorneys, filed a petition asking the Federal Communications Commission ("FCC" or "Commission") to establish a Universal Service Fund ("USF") safe harbor for audio and conference bridging providers or, in the alternative, to initiate a rulemaking proceeding to examine these issues ("Petition").[1] Grasshopper respectfully requests that the Commission deny Petitioner's request to establish a safe harbor on account of an insufficient factual record. Any Commission decision based on the current record may lead to unintended consequences, including discrimination against providers who have previously taken steps to quantify and jurisdictionalize traffic for USF reporting purposes. In the alternative, the Company asks the FCC to either (a) permit affected providers to submit alternatives to any proposed default safe harbor or (b) allow providers to rely on internal traffic studies and/or actual revenue data. Finally, Grasshopper requests that the Commission adopt any safe harbor only after collecting information and data from other audio and conference bridging providers in a rulemaking proceeding to ensure that a safe harbor creates the proper incentives by exceeding the average percentage of interstate traffic based on data submitted by such providers.

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[1] *In the Matter of Petition for Declaratory Ruling or to Initiate Rulemaking by Anonymous*, Petition of Anonymous for a Declaratory Ruling to Establish a Universal Service Fund Safe Harbor for Audio and Conference Bridging Providers or, in the Alternative, to Initiate a Rulemaking Proceeding to Examine these Issues, WC Docket No. 06-122, filed May 27, 2010 ("Petition").

II. Background

Grasshopper started operating on or about December 4, 2002 as GotVMail Communications, LLC, providing voicemail processing applications, such as voicemail access via the Internet and email delivery of voicemails, as well as other non-regulated enhanced or information services to business end-users. Because it took six months to design the Company's initial service platform, Grasshopper did not have active subscribers until June 2003. Over time, Grasshopper's suite of services evolved and, today, the Company's service enables callers to call into a Grasshopper toll-free or local direct inward dialing ("DID") number and perform specific functions based upon how Grasshopper's customers have configured their accounts. For example, callers may leave a voicemail for a Grasshopper subscriber, send a fax (which is converted to PDF and emailed to the Grasshopper subscriber) or search and dial from a list of a customer's employees by first or last name.

In 2004, the Company added the ability to bridge inbound and outbound call legs into a service it termed "call forwarding." This service enables a Grasshopper customer to have calls to its Grasshopper-assigned telephone number forwarded to one or more other numbers, such as a cell phone or home telephone. At the same time, Grasshopper added conference calling and the ability for a customer to call into its Grasshopper-assigned telephone number and place an outgoing call billed to its account. Due to the way this service was developed with Grasshopper's voicemail processing infrastructure, Grasshopper had no technical ability to rate calls based on origination and termination points of the end-to-end call. Grasshopper relied on its underlying carriers (wholesale suppliers) to identify the jurisdictional nature of its call traffic for USF reporting purposes.

In 2007, Grasshopper initiated internal projects to completely redesign and re-implement its entire back office infrastructure. The Company selected a billing system (HighDeal) and a regulatory and taxation calculation engine (BillSoft's EZTax) to replace its homegrown billing system. In January 2008, Grasshopper hired an entire team of developers to build the new system. This team worked full-time over the next eighteen months to design the system and complete the build-out.

Finally, nearly two years and millions of dollars after starting the process, on May 5, 2009, Grasshopper launched the new infrastructure, along with new billing and taxation systems, and rebranded the company as Grasshopper Group, LLC. In the several months since then, the Company has been migrating customer accounts from the old infrastructure onto the new systems. The new billing and taxation systems enable Grasshopper to rate each individual transaction and sum up these transactions on monthly invoices to customers. This new approach allows the Company to capture origination and termination data for each transaction that can be used to classify each end-to-end call as interstate, intrastate or international. Previously, such "jurisdictionalization" of traffic was technologically infeasible. With this new ability to jurisdictionalize call traffic data, Grasshopper can determine how to allocate revenue derived from these calls and run reports on revenue, tax and regulatory fee liabilities for submission to the FCC, appropriate public utility commissions and taxing authorities.

About the same time Grasshopper began developing its new infrastructure, the FCC issued the *InterCall Order*, declaring InterCall's audio-bridging services to be

"telecommunications" and thus subject to USF reporting and contribution.[2] Until that time, the jurisdictional status of certain audio-bridging services was unclear and, as such, much of the industry treated these services as unregulated enhanced or information services. In its Order, the FCC affirmed a decision by the Universal Service Administrative Company ("USAC") in a 2007 audit that InterCall's audio-bridging services were not exempt from contribution obligations, but instead should have been classified as "toll teleconferencing" services.[3] The Commission justified the decision, stating "a uniform application of USF contribution obligations to all audio-bridging service providers will promote the public interest by establishing a level playing field and encouraging open competition among providers of audio-bridging services."[4]

Grasshopper sought the advice of counsel to evaluate the implications of the *InterCall Order* and conservatively concluded that its conferencing and call forwarding could be considered sufficiently similar to the audio-bridging services found by the FCC to be telecommunications. Accordingly, out of an abundance of caution, Grasshopper filed a Form 499 Registration and obtained Section 214 authority to provide international services. And, by virtue of its recently attained ability to jurisdictionalize call conferencing and call forwarding traffic and its determination that it may be providing intrastate telecommunications, it likewise sought approval to provide resold toll services in various states.

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[2] *In the Matter of Request for Review by InterCall, Inc. of Decision of Universal Service Administrator,* CC Docket No. 96-45, 23 FCC Rcd. 10731 at ¶¶ 1, 8, 24 (2008) ("*InterCall Order*").

[3] *InterCall Order*, 23 FCC Rcd. 10731 at ¶¶5, 7.

[4] *InterCall Order*, 23 FCC Rcd. 10731 at ¶25.

III. No Safe Harbor is Required

In its Petition, the anonymous filer suggests that the competitive imbalance caused by the *InterCall Order*, coupled with administrative burdens of compliance necessitate the establishment of a safe harbor for audio and conference bridge service providers for USF purposes.[5] The Commission has adopted safe harbors with respect to several categories of service including wireless and Voice over Internet Protocol ("VoIP") for purposes of identifying the portion of interstate and international traffic subject to federal USF fees.[6] According to the Commission, safe harbors serve the purpose of administrative ease, while assuring the sustainability, sufficiency and stability of the Fund and promoting equitable contributions.[7]

While Grasshopper agrees that safe harbors are warranted in certain circumstances, based upon the current sparse factual record, it disagrees with the Petition's nomination of conference services as deserving of such treatment. Petitioner suggests that the *InterCall Order* has caused regulatory uncertainty, leading some providers to avoid compliance all together.[8] While Grasshopper recognizes that some of its competitors may gain competitive advantages by circumventing their legal obligations, the Company does not agree that this, alone, is sufficient grounds for the establishment of a safe harbor. A safe harbor, in and of itself, will not prevent providers from skirting their regulatory obligations. Nor will it discourage certain

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[5] Petition at 2-4.

[6] *See, e.g., In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service, et. al.*, Report and Order and Notice of Proposed Rulemaking, WC Docket No. 06-122, CC Docket No. 96-45, et. al., FCC 06-94 (Rel. June 27, 2006) ("*Safe Harbor Order*") at ¶2 (raising interim wireless safe harbor to 37.1%); *Id*. at ¶53 (establishing a safe harbor percentage for interstate traffic of VoIP providers at 64.9%).

[7] *See Safe Harbor Order* at ¶¶3, 5, 9.

[8] Petition at 3.

providers from gaining a competitive advantage through non-compliance. Furthermore, a safe harbor -- especially the *wrong* safe harbor -- will not provide regulatory certainty while fundamental questions remain about the applicability of the *InterCall Order* to certain services.[9] Although the *InterCall Order* has undoubtedly sparked confusion in the industry, this confusion will not be resolved by the mere creation of a safe harbor.

Petitioner further suggests that administrative difficulty in determining the jurisdictional nature of conference traffic supports adoption of a safe harbor.[10] Petitioner's proposal, however, would promote administrative ease over careful regulatory compliance. More importantly, adoption of a safe harbor without consideration of data and other factors, would likely result in unintended consequences, including penalizing companies, like Grasshopper, which have invested heavily to ensure regulatory compliance.

The *InterCall Order* purportedly places all conference providers on a level playing field by requiring all providers to comply with a host of regulatory requirements. To become compliant, all providers were obligated to segregate interstate and international traffic for USF reporting purposes. Through its investment of millions of dollars in technology which now

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[9] As Petitioner noted, various providers have sought reconsideration of the *InterCall Order*. Petition at 3, n.10 (citing A+, Ltd., Free Conferencing Corporation, and The Conference Group, Petition for Reconsideration, CC Docket No. 96045 (July 30, 2008); Global Conference Partners, Petition for Partial Reconsideration and Clarification of the InterCall Order, CC Docket No. 96-45 (July 30, 2008)).

[10] Petition at 4 (noting that "[B]ecause many conferencing providers purchase voice and data transmission from wholesalers [who] send their audio bridging customers call detail records after the fact…it is not practical for audio and conference bridge providers to determine the jurisdictional nature of the service provided at the time they invoice end-users."). Petitioner suggests that to avoid the delay, some providers "simply assess the USF fee on each and every transaction." *Id*. But, the Commission's rules do not require that providers allocate all revenue as USF contribution-eligible. Instead, like Grasshopper, Petitioner is free to adopt a method to accurately jurisdicionalize and report its traffic pursuant to Commission rules.

enables the Company to identify each customer transaction as interstate, intrastate or international, Grasshopper is capable of complying with the mandates of the *Intercall Order*.

Grasshopper is certainly not the only company which has taken its USF compliance obligations seriously. Other companies engaged in various forms of call-bridging activities have redesigned their billing platforms to capture and effectively jurisdictionalize call traffic data, invariably at great expense and effort. Entities that have invested significant resources to ensure compliance, like Grasshopper, should be entitled to the benefit of their investments. Creating a safe harbor degrades the investments made by Grasshopper and others. It affords a free ride to providers that have chosen to ignore their regulatory responsibilities by avoiding taking those steps needed to become compliant. To the extent these providers have dodged their regulatory responsibilities under the guise of administrative ease, the Commission should refrain from rewarding such behavior. Any result which does not take this concern into consideration may unintentionally discriminate against providers that have expended significant resources to implement compliance measures, directly contradicting the Commission's goal of "establishing a level playing field" via the *InterCall Order*.[11] Furthermore, it violates the Telecommunications Act of 1996 which requires that, "All providers of telecommunications services should make an <u>equitable and nondiscriminatory</u> contribution to the preservation and advancement of universal service."[12] In sum, an arbitrarily-selected safe harbor assists free-riding carriers that have failed to undertake measures that are necessary to jurisdictionalize traffic and revenue.

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[11] *InterCall Order*, 23 FCC Rcd. 10731 at ¶25.

[12] 47 U.S.C. § 254(d) (emphasis added).

IV. If a Safe Harbor Must be Established, Carriers Should be able to Choose their Preferred Reporting Methodology

While the Commission has recognized the administrative efficiency accomplished through safe harbors, it also acknowledges the inequity of imposing default percentages that do not accurately reflect the allocation of a carrier's traffic. For example, for both wireless and VoIP services, the Commission allows providers to reject the safe harbor and report based upon a company-specific traffic study or actual revenue data.[13] The Commission reasons that companies may be able to more accurately calculate USF-assessable revenues.[14] The same analysis applies to audio-bridging and conferencing services. If the Commission determines that a safe harbor is appropriate for the industry, it nonetheless should allow carriers to submit traffic studies or other evidence to support their preferred revenue reporting methodology. Without such an option, carriers like Grasshopper would be unfairly penalized for having taken steps necessary to report revenue in the absence of a safe harbor option.

Furthermore, without the option to contribute based upon actual revenues or a reasonable estimate thereof, carriers would be denied the protection of the Commission's Rules which mandate that carriers contribute to the USF based only on interstate and international

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[13] *Safe Harbor Order* at ¶26 ("[W]e recognize that individual wireless providers have access to a considerably larger amount of company-specific caller data, which may result in an individual provider calculating a more accurate result for the particular company. It is for this reason that we rely on the TNS Telecoms traffic study only to establish the revised interim wireless safe harbor level and that each wireless provider retains the option of reporting its revenues based on a company-specific traffic study or on its actual interstate end-user telecommunications revenues."); *See also id*. at ¶56 ("Therefore, an interconnected VoIP provider may rely on traffic studies or the safe harbor described above in calculating its federal universal service contributions. Alternatively, to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls.").

[14] *Id*.

end-user revenues.[15] Where, for example, a safe harbor percentage exceeds the actual percentage of interstate and international end-user traffic revenues, carriers would experience an unlawful increase in their USF obligations.[16] Thus, the Commission must allow carriers to propose alternative methods for identifying USF contribution-eligible revenues based upon traffic studies or other reliable methods.

V. To Adopt a Safe Harbor, a Rulemaking Proceeding is Required

Petitioner requests that the Commission set a safe harbor by declaratory ruling.[17] In the alternative, its Petition seeks initiation of a rulemaking proceeding to determine whether a safe harbor is appropriate, and if so, at what percentage.[18] To the extent the Commission deems Petitioner's request meritorious, Grasshopper urges the Commission to take the rulemaking route rather than adopt a safe harbor via declaratory ruling. Declaratory rulings are appropriate to clarify issues and rights.[19] Contrarily, rulemaking procedures are required to evaluate requests for substantive amendments to the Commission's rules.[20] Establishing a safe harbor substantively amends the Commission's rules, directly impacting the rights and

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[15] 47 C.F.R. §54.706(b).

[16] For example, a carrier would experience significant unlawful increases in its USF liability if the Commission set the safe harbor at 60%, but the carrier's actual interstate and international end-user revenues comprised only 15% of its combined intrastate, international and interstate end-user revenues.

[17] Petition at 1, 5.

[18] *Id*.

[19] 47 C.F.R. §1.2; 5 U.S.C. §554(e); *See also In the Matter of Lifeline and Link-Up Petitions for Declaratory Ruling and Requests for Waiver by US Cellular Corporation, et al.*, WC Docket No. 03-109, Order and Declaratory Ruling at ¶10 (Rel. Feb. 2, 2010).

[20] 5 U.S.C. §§551, 553.

obligations of providers subject to the FCC's jurisdiction.[21] Thus, to adopt a safe harbor, the Commission must engage in the rulemaking process before adopting a final rule.

Even Petitioner recognizes that it cannot accurately estimate a proposed safe harbor based upon its traffic data.[22] Despite being the expert agency, it is highly unlikely the FCC would fare any better absent facts and data from impacted industry participants. Therefore, to ensure that its safe harbor is not arbitrary while simultaneously creating proper market incentives, the Commission must solicit actual data from providers, like Grasshopper, in a rulemaking proceeding.

The Commission must also ensure that the safe harbor percentage it ultimately adopts reasonably exceeds the average interstate traffic samples submitted by participating providers. For example, if, on average, providers' data identifies 49% of audio-bridging and conferencing traffic as interstate in nature, the Commission must set the safe harbor percentage for interstate traffic in excess of 50%. If the FCC fails to do so, it would unfairly reward providers who, unlike Grasshopper, have neglected to invest in system upgrades which would allow them to accurately jurisdictionalize traffic.

As discussed, providers like Grasshopper should be entitled to the full benefit of their investments which were, at least partially, motivated by management's desire to comply with FCC rules, taxes and other governmental regulations. In the example outlined above, if the

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[21] That is, the safe harbor would have a substantive impact because it implements, interprets and prescribes FCC policy. *See* 5 U.S.C. §§551(4), 552(a)(1)(D); *GMC v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) ("An interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds affected parties of existing duties." On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.") (internal citations omitted).

[22] Petition at 5.

Commission set the safe harbor at 49%, all providers would elect the safe harbor, and Grasshopper and others would lose the benefit of their investments. On the other hand, if set at 65%, companies like Grasshopper would have the benefit of declining the safe harbor, opting instead to submit revenue at a materially lower percentage (as supported by a valid traffic study or actual revenue data).

Grasshopper does concede that investing in systems which facilitate the jurisdictionalization of audio-bridging and conference call traffic can be cost-prohibitive. In this regard, Grasshopper supports Petitioner's efforts to draw attention to this concern. But Grasshopper's support is conditioned on the Commission adhering to the rulemaking process and taking due consideration of the potential inequities which could arise if a safe harbor is adopted in a vacuum, devoid of facts and data.

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VI. Conclusion

For the foregoing reasons, Grasshopper respectfully requests that the Commission decline to adopt a safe harbor in a declaratory ruling. If the FCC decides that a safe harbor should be pursued, Grasshopper urges the Commission to engage in the necessary rulemaking processes to avoid arbitrariness and inequitable outcomes.

Respectfully submitted,

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