IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 11-9900

IN RE: FCC 11-161

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

UNCITED VOICE ON THE NET COALITION, INC. PRINCIPAL BRIEF (DEFERRED APPENDIX APPEAL)

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CORPORATE DISCLOSURE STATEMENT

The Voice on the Net Coalition, Inc. ("VON Coalition") does not own or maintain a controlling interest in any public company, nor is it owned or controlled by any public company, and no publicly held company has a 10 percent or greater ownership interest in the VON Coalition.

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GLOSSARY

Act:	Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq*.).
APA:	Administrative Procedure Act (5 U.S.C. § 551 *et seq.*).
Commission or FCC:	Federal Communications Commission
ICC:	Intercarrier Compensation.
IP:	Internet Protocol.
IVoIP:	Interconnected Voice over Internet Protocol, defined in 47 C.F.R. § 9.3.
No-Blocking Obligation:	The obligation of IVoIP and one-way VoIP providers to refrain from blocking telephone traffic, adopted in paragraph 974 of the Order.
NPRM:	The FCC's February 2011 Notice of Proposed Rulemaking initiating the proceeding that resulted in the Order. *Connect America Fund*, 26 FCC Rcd. 4554 (2011).
Order:	The FCC's November 2011 Order (FCC 11-161) broadly reforming the USF and ICC systems. *Connect America Fund*, 26 FCC Rcd. 17663 (2011).
Public Notice:	The FCC's August 2011 Public Notice seeking additional comment on specific proposals for reform of the USF and ICC systems. *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, 26 FCC Rcd. 11112 (2011).
PSTN:	Public Switched Telephone Network.
USF:	Federal Universal Service Fund, used to subsidize telecommunications services (and, after the Order, broadband Internet access) in underserved and high-cost markets.
VoIP:	Voice over Internet Protocol.

STATEMENT OF RELATED CASES

There are no prior appeals of the Order at issue in this case. All related cases have been consolidated with this case.

STATEMENT OF ISSUES PRESENTED

(1) The Federal Communications Commission ("FCC" or Commission") failed to provide prior notice to affected entities that the obligation imposed upon providers of Interconnected Voice over Internet Protocol, 47 C.F.R. § 9.3 ("IVoIP") and "one-way VoIP" (herein the "No-Blocking Obligation") adopted in paragraph 974 of the FCC's November 2011 Order (FCC 11-161), *Connect America Fund*, 26 FCC Rcd. 17663 (2011) ("Order"), was under consideration, in violation of section 553(b) of the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) ("APA"), 5 U.S.C. § 553(b).

(2) The FCC failed to articulate a rational explanation grounded in record evidence in adopting the No-Blocking Obligation, rendering its action arbitrary, capricious, and an abuse of discretion within the meaning of the APA, 5 U.S.C. § 706(2)(A).

(3) The FCC exceeded its jurisdiction and authority under the Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq.*) ("Act") by imposing the No-Blocking Obligation.

STATEMENT OF THE FACTS

The NPRM. In February 2011, the FCC launched a proceeding to modernize the federal universal service fund ("USF") and the nation's intercarrier compensation ("ICC") regime, as described in the Uncited Joint Preliminary Brief of the Petitioners filed September 24, 2012, at 24-25 ("Petitioners' Joint Brief"). *Connect America Fund*, 26 FCC Rcd. 4554 (2011) ("NPRM") (JA __). In the NPRM, the FCC proposed to address for the first time the appropriate ICC system for certain "Voice over Internet Protocol" ("VoIP") services.[1] NPRM ¶¶ 38, 608-619 (JA __, __-__).

The NPRM proposed ICC rules to govern only a specific subset of VoIP services, referred to as IVoIP, defined in the FCC's rules as a service that "permits users generally to receive calls that originate on the [PSTN] and to terminate calls

[1] VoIP services generally include "any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony." *IP-Enabled Services*, 19 FCC Rcd. 4863, ¶3 & n. 7 (2004). The record shows that such services may include solely computer-to-computer communications or services, such as voice chat features on gaming consoles, mobile device software applications, and interactive web-based voice and video conference systems, *see, e.g.*, Letter from Donna N. Lampert, Lampert, O'Connor & Johnston, P.C., on behalf of Google Inc., Skype Communications S.A.R.L., Sprint Nextel Corporation, and Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. 10-90, *et al*. (Sept. 30, 2011), *Hold the Phone (Charges)*, Attach. at 5-6 ("VoIP White Paper") (JA __-__), as well as services that enable customers to make and receive voice communications over the Public Switched Telephone Network ("PSTN"). *See, e.g.*, 47 C.F.R. § 9.3 (definition of IVoIP).

to the [PSTN]," requires both a broadband connection from the user's location and Internet Protocol ("IP")-compatible customer premises equipment (such as an IP-compatible telephone handset), and enables real-time, two-way voice communications. NPRM ¶ 612 (JA __); 47 C.F.R. § 9.3. The NPRM also sought comment on whether the FCC's call signaling rules, which require certain information regarding a telephone call to be included in the call transmission path, should extend to IVoIP. NPRM ¶¶ 620, 627 (JA __, __). The NPRM made no reference to any type of VoIP other than IVoIP.

The Public Notice. On August 3, 2011, the FCC issued a Public Notice seeking further comment on its proposed USF and ICC reforms, including on issues related to IVoIP ICC and call signaling. *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, 26 FCC Rcd. 11112, 11128-11129 (2011) ("Public Notice") (JA __-__). The Public Notice also raised the issue of whether and how ICC and call signaling rules should apply to "'one-way' interconnected VoIP services – in particular, to those that allow users to terminate calls to the PSTN, but not receive calls from the PSTN, or vice versa." *Id*. n.57 (JA __). The term "one-way interconnected VoIP" is not defined in the Act or any FCC rule and was not used in the NPRM.

The VON Coalition and some of its individual members participated at all stages of the FCC's proceeding, providing the FCC with comments on the issues raised in the NPRM and the Public Notice.

The Order and the No-Blocking Obligation. In November 2011, the FCC released the Order (JA __), which is described at pages 25-39 of the Petitioners' Joint Brief. Among the many rules and obligations adopted in the Order was a prohibition on blocking of VoIP calls by telecommunications carriers, which the FCC held is an unjust and unreasonable practice in violation of section 201(b) of the Act. *See* Order ¶ 973 (JA __); 47 U.S.C. 201(b); 47 U.S.C. § 153(51) (definition of "telecommunications carrier"). The Order also imposed the No-Blocking Obligation, prohibiting the blocking of calls by "interconnected VoIP providers or by providers of 'one-way' VoIP service that allows customers to receive calls from, or place calls to the PSTN, but not both." Order ¶ 974 (JA __). Similar to the term "one-way interconnected VoIP," the term "one-way VoIP" is not defined in the Act or in any FCC rule, and was not used in the NPRM, the Public Notice, or elsewhere in the Order.

The Order hypothesized that blocking "could be performed" by IVoIP or "one-way VoIP" providers, and speculated that such providers "could have incentives" to engage in blocking. *Id*. (JA __). Concerning the FCC's authority to impose the No-Blocking prohibition, the Order stated that "[i]f IVoIP or one-way

VoIP services are telecommunications services, they already are subject to restrictions on blocking under the Act." *Id*. (JA __). The Order further stated that "[i]f such services are information services, we exercise our ancillary authority and prohibit blocking of voice traffic to or from the PSTN by those providers just as we do for [telecommunications] carriers." *Id*. (JA __).

Statutory Framework. The Act distinguishes between "telecommunications services," which are subject to mandatory common carriage obligations set forth in Title II of the Act, and "information services," which are not subject to such obligations. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975-77 (2005); 47 U.S.C. § 153(53) (definition of "telecommunications service"); 47 U.S.C. § 153(24) (definition of "information service"). *See also* Petitioners' Joint Brief at 7-8. With respect to information services, the FCC has authority to impose regulatory obligations only pursuant to its limited "ancillary authority" under Title I of the Act. *Brand X*, 545 U.S. at 976.

The FCC consistently has declined (including in the Order) to classify VoIP services uniformly as either "telecommunications services" or "information services." *See* Order ¶¶ 954, 974 & n.2042 (JA__, ___ & __). In recognition of variations among specific services that include a VoIP component, however, the FCC has reached different conclusions regarding the appropriate regulatory classification of such services. Thus, the FCC has found one service with a VoIP

component to be a "telecommunications service," *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 24 (2004), but found another to be an "information service." *Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶¶ 11-12 (2004) (JA __-__). Other VoIP services also are clearly information services, *see* VoIP White Paper at 5 (JA __).

SUMMARY OF THE ARGUMENTS

The No-Blocking Obligation as adopted in the Order is unlawful and should be vacated on three separate grounds.

First, the FCC failed to provide prior notice that the No-Blocking Obligation was under consideration, in violation of the APA, 5 U.S.C. § 553(b). The APA's notice requirement serves essential functions in the administrative rulemaking process. Notice affords interested persons a fair opportunity to participate in the rulemaking process through submission of written data, views, or arguments and allows a genuine interchange of views. Just as importantly, notice helps ensure that agency regulations are tested via exposure to diverse public comment and that the agency retains a flexible and open-minded attitude towards its own rules. Neither the NPRM nor the subsequent Public Notice provided any notice whatsoever that the FCC was considering adopting the No-Blocking Obligation. The lack of notice that is expressly required by the APA provides sufficient reason alone to vacate the No-Blocking Obligation.

Second, the failure to articulate a rational explanation grounded in record evidence for adoption of the No-Blocking Obligation renders the FCC's action arbitrary, capricious, and an abuse of discretion within the meaning of the APA, 5 U.S.C. § 706(2)(A). To comply with the APA, an agency must examine the relevant data and articulate a satisfactory explanation for its actions, including a

rational connection between the facts found and the choice made. The Order lacked any reference to record evidence discussing adoption of the No-Blocking Obligation for any type of VoIP service or provider (which is unsurprising given the lack of notice). Further, the Order contained no discussion whatsoever regarding the extent to which call blocking by VoIP providers has occurred, any problems or concerns such practices may have created, or the costs or consequences of prohibiting such conduct by VoIP providers. These gaping factual holes and lack of any explanation in the Order make it impossible to conclude the action was the product of reasoned decision-making.

Finally, the FCC exceeded its jurisdiction by relying on its "ancillary authority" under Title I of the Act to impose the No-Blocking Obligation, and its adoption of the No-Blocking Obligation is not entitled to deference by the Court. To the extent an IVoIP or "one-way VoIP" service is an "information service" as defined in the Act, the FCC may exercise "ancillary authority" only where: (1) its general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are reasonably ancillary to the FCC's effective performance of its statutorily mandated responsibilities. The Order wholly failed to address whether the No-Blocking Obligation is within the FCC's authority under Title I of the Act, and failed to show that the No-Blocking Obligation is reasonably ancillary

to any responsibility mandated under the Act. Consequently, the Court should vacate the No-Blocking Obligation.

ARGUMENT

I. THE FCC VIOLATED THE APA BY FAILING TO PROVIDE ADEQUATE NOTICE OF THE NO-BLOCKING OBLIGATION.

Under the APA, a federal agency generally must conduct a notice-and-comment rulemaking before it adopts a new rule. 47 U.S.C. § 553(b). The APA mandates that the agency must publish in the Federal Register notice of the proposed rule, providing "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § 553(b)(3). These requirements "ensure that agency regulations are tested via exposure to diverse public comment," "ensure fairness to affected parties," and "give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011), *cert. denied*, *Tribune Co. v. FCC*, 2012 U.S. LEXIS 4894 (June 29, 2012) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)). *See also* 5 U.S.C. § 551(4) (definition of "rule").

The notice required under the APA must be "'sufficient to fairly apprise interested parties' of all significant subjects and issues involved." *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977) (citation omitted). While a

final rule need not be precisely described in the notice, changes to proposed rules after the comment period must be in "character with the original scheme and (be) foreshadowed in proposals and comments advanced during the rulemaking." *Beirne v. Sec'y of Dep't of Agric.*, 645 F.2d 862, 865 (10th Cir. 1981) (citation omitted).

A reviewing court must hold unlawful and set aside an agency action if the agency has failed to comply with the procedural requirements of the APA. 5 U.S.C. § 706(2)(D). "It is fundamental law that a rule promulgated by a federal agency is not valid unless adopted in substantial compliance with the requirements of the APA," *N. Am. Coal Corp. v. Dir., Office of Workers' Comp. Programs*, 854 F.2d 386, 388 (10th Cir. 1988), and failure to provide sufficient notice is grounds for invalidating the improperly enacted requirement. *See, e.g.*, *Prometheus Radio Project*, 652 F.3d at 450-51; *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-241 (D.C. Cir. 2008).

The NPRM did not propose to adopt the No-Blocking Obligation for VoIP providers, did not discuss or seek comment on the issue of call blocking by VoIP providers, and never discussed "one-way VoIP providers" in any context. The only references to call blocking in the NPRM appeared in the context of a practice called carrier access stimulation; there, the NPRM cited FCC precedent prohibiting certain telecommunications carriers (specifically, interexchange carriers) from

blocking calls to customers of local exchange carriers. NPRM ¶ 654 (JA __). Although adoption of the No-Blocking Obligation was discussed in the "Interconnection and Traffic Exchange Issues" section of the Order (Order ¶¶ 972-974 (JA __-__)), the corresponding portion of the NPRM sought comment on a host of "interconnection and related issues" (NPRM ¶¶ 972-974 (JA __-__)) without ever mentioning call blocking. The summary of the NPRM published in the Federal Register, 76 Fed. Reg. 11632-11663 (Mar. 2, 2011) (JA __-__), also did not include notice of a proposed No-Blocking Obligation.

The FCC likewise failed to "give affected parties an opportunity to develop evidence in the record to support their objections," *Prometheus Radio Project*, 652 F.3d at 449, in its subsequent Public Notice seeking further comment on issues affecting the ICC and USF obligations and rights of IVoIP providers. *See* Public Notice, 26 FCC Rcd. at 11128-11129 (JA __); 76 Fed. Reg. 49401-49408 (Aug. 10, 2011) (JA __-__).

Neither the NPRM nor the Public Notice even so much as hinted that the FCC was considering the No-Blocking Obligation, thereby extending to IVoIP providers and "one-way VoIP" providers the proscription against blocking of telephone calls by telecommunications carriers which the FCC has held is a violation of section 201(b) of the Act, 47 U.S.C. § 201(b), and is not applicable to information service providers. For example, the FCC never posited any

hypothetical or actual problems caused by any alleged or actual blocking by any VoIP service provider, and the voluminous record that was the basis for the Order did not reflect any such concerns. These absences in the record and the paucity of the FCC's reasoning are a direct result of the FCC's failure to provide adequate notice.

Because the FCC gave no indication that it was considering adopting the No-Blocking Obligation, the FCC failed to provide notice "sufficient to fairly apprise interested parties of all significant subjects and issues involved." *Am. Iron & Steel Inst.*, 568 F.2d at 291 (citation omitted)*; see also Prometheus Radio Project*, 652 F.3d at 453 (two sentences in a notice of proposed rulemaking did not "fulfill [the FCC's] obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.") (citation omitted). VoIP service providers, including VON Coalition members and other affected parties, were not "give[n] . . . an opportunity to develop evidence in the record to support their objections" to the No-Blocking Obligation. *Prometheus Radio Project*, 652 F.3d at 449.

The record is clear that at no time prior to issuing the Order did the FCC ever give notice that it was contemplating adopting the No-Blocking Obligation. Because the obligation was not adopted in substantial compliance with the APA, it must be vacated. *Prometheus Radio Project*, 652 F.3d at 453; *N. Am. Coal Corp.*,

854 F.2d at 388; *First Bancorporation v. Bd. of Governors of Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984).

II. THE FCC FAILED TO ENGAGE IN REASONED DECISION-MAKING IN ADOPTING THE NO-BLOCKING OBLIGATION.

The APA requires a reviewing court to set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1241 (10th Cir. 2000) (quoting 5 U.S.C. § 706(2)(A)). To comply with the APA, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1045 (10th Cir. 2011) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "The grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. The agency must make plain its course of inquiry, its analysis, and its reasoning." *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1029 (10th Cir. 1976). The reviewing court may not make up for deficiencies in the agency's explanation by supplying a reasoned basis for the agency's action that the agency itself has not given. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

The Order failed to articulate an explanation grounded in any record evidence to support the FCC's decision to adopt the No-Blocking Obligation.

First, the record is completely bereft of any discussion or data regarding call blocking and VoIP, or regarding the need to extend to any type of VoIP service or provider the prohibition against call blocking applicable to telecommunications carriers. The record does not contain evidence or facts regarding the extent to which VoIP call blocking has occurred, does not describe any problems or concerns as a result of VoIP call blocking, and does not include any information regarding the costs or consequences of prohibiting such conduct by VoIP providers.

This lack of record evidence is not surprising given the FCC's failure to provide notice "sufficient to fairly apprise interested parties" that such action was under consideration. *Am. Iron & Steel Inst.*, 568 F.2d at 291. Previous cases have overturned agency action for failure to develop an administrative record sufficient to support an agency's factual determinations. *See, e.g.*, *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976) ("[J]udicial review is meaningless where the administrative record is insufficient to determine whether the action is arbitrary and capricious.").

Second, the Order made no factual findings whatsoever regarding the No-Blocking Obligation. Rather, the FCC merely speculated that blocking "could be performed" by IVoIP and "one-way VoIP" providers, who "could have incentives" to avoid access charges. Order ¶ 974 (JA __).

Consequently, it is "impossible to conclude the action was the product of reasoned decision making." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (citation omitted) ("In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's action to be supported by the facts in the record. . . .") (setting aside agency action found to be "unsupported by substantial evidence"); s*ee also Qwest Corp. v. FCC*, 258 F.3d 1191, 1201 (10th Cir. 2001) (remanding agency action where the FCC failed to "articulate[] a satisfactory explanation that would enable us to review the rationality of the [order]" (quotation and citation omitted)).

Because the FCC impermissibly crossed the line from "the tolerably terse to the intolerably mute," *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)), this Court should vacate the No-Blocking Obligation as adopted in the Order.

III. THE FCC EXCEEDED ITS STATUTORY AUTHORITY BY IMPOSING THE NO-BLOCKING OBLIGATION ON INFORMATION SERVICES.

While a reviewing court typically defers to the FCC's interpretation of its authority under the Act, *see Qwest Corp. v. FCC*, 689 F.3d 1214, 1224 (10th Cir. 2012) (citing *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)), the Court owes no deference where the action was "not promulgated with procedural protections," including those required by the APA in connection with notice and comment rulemaking proceedings. *S. Ute Indian Tribe v. Amoco*

Prod. Co., 119 F.3d 816, 833 (10th Cir. 1997); *see Mission Grp. Kansas, Inc. v. Riley*, 146 F.3d 775, 782 (10th Cir. 1998). Because the FCC failed to comply with the APA, as shown in Section I *supra*, its assertion of authority to adopt the No-Blocking Obligation is not entitled to deference.

Moreover, a reviewing court may review whether an agency's interpretation of its statutory authority is a permissible construction of the statute. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005). Although the 10th Circuit has not previously reviewed an exercise of ancillary jurisdiction by the FCC, the Court of Appeals for the District of Columbia Circuit, distilling Supreme Court precedent regarding the FCC's ancillary authority, has stated that the FCC may exercise ancillary jurisdiction only when "(1) the Commission's general jurisdictional grant under Title I [of the Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010); *see also Am. Library Ass'n*, 406 F.3d at 700. The FCC's asserted exercise of ancillary authority in the Order imposing the No-Blocking Obligation fails both prongs of this test.[2]

[2] The FCC "must defend its exercise of ancillary authority on a case-by-case basis," *Comcast Corp.*, 600 F.3d at 651, and "the permissibility of each new exercise of ancillary authority must be evaluated on its own terms," *id*. at 650 (citing *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 670 (1972)).

First, the Order failed completely to address whether and how Title I of the Act grants the FCC general jurisdictional authority to impose the No-Blocking Obligation upon IVoIP and "one-way VoIP" services that meet the definition of "information services." In the Order, the FCC merely stated without more that "if" IVoIP and "one-way VoIP" services are information services, then they are subject to the FCC's ancillary authority under Title I. Order ¶ 974 (JA __). As such, the FCC's attempted regulation does not satisfy the first prong of *Comcast*.

Second, the Order failed to demonstrate that the No-Blocking Obligation is "reasonably ancillary to the . . . effective performance of [the FCC's] statutorily mandated responsibilities," *Comcast Corp.*, 600 F.3d at 646. The Order did not describe any specific statutorily-mandated responsibilities, and did not articulate with specificity how the No-Blocking Obligation would further any such responsibilities. Rather, the Order simply alluded in a single footnote (Order ¶ 974, n.2043) (JA __) to sections 201 and 251(a)(1) of the Act, 47 U.S.C. §§ 201, 251(a)(1), and proffered hypothetical scenarios whereby a specific type of telecommunications carrier ("an interexchange carrier that is a wholesale partner of such a [sic] VoIP provider") might evade its obligations under section 201 of the Act, and whereby telecommunications carrier interconnection required under section 251(a)(1) of the Act could be impeded, if that carrier's "VoIP provider

wholesale customer" was not subject to the No-Blocking Obligation. Order ¶ 974, n.2043 (JA __).

Such conjecture alone cannot justify the FCC's assertion of ancillary authority over all IVoIP and "one-way VoIP" providers. Merely reciting that carriers might seek to evade their statutory obligations or that traditional phone customers might be denied "the intended benefits of telecommunications interconnection under section 251(a)(1)," Order ¶ 974, n.2043 (JA __, __), failed to link a specific statutory responsibility under the Act with the imposition of a new obligation on all IVoIP and "one-way VoIP" providers, including providers of information services. Accordingly, the Order failed to articulate the requisite connection between the FCC's statutory responsibilities under the Act and its assertion of ancillary authority imposing the No-Blocking Obligation.

As such, the Order failed to satisfy the second prong of the ancillary authority test, and does not support "untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority." *Comcast Corp.*, 600 F.3d at 661 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)). *See also Comcast*, 600 F.3d at 651-661 (rejecting FCC's lengthy attempt to justify exercise of ancillary authority); *Am. Library Ass'n*, 406 F.3d at 703-705) (same).

Because the No-Blocking Obligation was promulgated without the APA's required procedural protections and is not a permissible construction of the statute, the Court should vacate, as contrary to law, the No-Blocking Obligation.

CONCLUSION

The adoption of the No-Blocking Obligation violates the notice requirements of the APA, 5 U.S.C. § 553(b), is arbitrary, capricious, and an abuse of discretion within the meaning of the APA, 5 U.S.C. § 706(2)(A), and exceeds the FCC's jurisdiction and authority under the Act. Petitioners therefore respectfully request that the Court vacate the No-Blocking Obligation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and the Amended First Briefing Order, I certify that this brief complies with the type-volume requirements because it contains 4,094 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

By: /s/ Donna N. Lampert

Donna N. Lampert (Digital)
Counsel for the Petitioner

STATUTORY AND REGULATORY ADDENDUM

5 U.S.C. § 551

§ 551. Definitions

For the purpose of this subchapter --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title --

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) 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. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 153

§ 153. Definitions

…

(24) Information service. The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

…

(51) Telecommunications carrier. The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

…

(53) Telecommunications service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

…

47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

47 U.S.C. § 251(a)

§ 251. Interconnection

(a) General duty of telecommunications carriers. Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

…

47 C.F.R. § 9.3

§ 9.3 Definitions.

…

Interconnected VoIP service. An interconnected Voice over Internet protocol (VoIP) service is a service that:

(1) Enables real-time, two-way voice communications;

(2) Requires a broadband connection from the user's location;

(3) Requires Internet protocol-compatible customer premises equipment (CPE); and

(4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

…

CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that I have scanned for viruses the Portable Document Format version of the attached document, which was mailed electronically to FCC_briefs_only@ca10.uscourts.gov, in accordance with the Court's October 17, 2012 Order Governing Procedures for the Electronic Filing of All Briefs in the Consolidated Proceeding. The document has been scanned using Symantec Endpoint Protection version 12.1.1101.401 (Release) RU1MP (definitions last updated October 23, 2012), and according to that program, the document is free of viruses. I further certify that no privacy redactions were required.

By: /s/ Donna N. Lampert

Donna N. Lampert (Digital)
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2012, I caused the foregoing **UNCITED VOICE ON THE NET COALITION PRINCIPAL BRIEF** to be mailed electronically to FCC_briefs_only@ca10.uscourts.gov, in accordance with the Court's October 17, 2012 Order Governing Procedures for the Electronic Filing of All Briefs in the Consolidated Proceeding. The document will be available for viewing and downloading on the CM/ECF system through notice of docket activity (NDA) to all attorneys who have entered their appearances in the consolidated proceedings.

By: /s/ Donna N. Lampert

Donna N. Lampert (Digital)
Counsel for the Petitioner