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

In the Matter of	)	
	)	
Reporting Requirements for U.S. Providers of International Telecommunications Services	)	IB Docket No. 04-112
	)	
Amendment of Part 43 of the Commission's Rules	)	

PETITION FOR RECONSIDERATION

I. INTRODUCTION

Pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the undersigned Voice on the Net Coalition ("VON") respectfully seeks reconsideration of the Commission's *Second Report and Order* in the above-captioned proceeding.[1]

In a proceeding purporting to reduce regulatory burdens,[2] and without any significant record,[3] the Commission has imposed new burdens on entities it historically has not regulated, providers of Voice over Internet Protocol (VoIP) services.[4] The *Second R&O* for the first time extends international traffic and revenue reporting requirements beyond common carriers by requiring "international VoIP services connected to the PSTN" to submit these

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[1] *Reporting Requirements for U.S. Providers of International Telecommunications Services*, IB Docket No. 04-112, Second Report and Order, FCC 13-6 (released Jan. 15, 2013) ("*Second R&O*").

[2] *See Second R&O*, at ¶ 2.

[3] Other than AT&T, the Commission cites no commenter supporting the Commission's position with respect to VoIP providers. *See Second R&O*, at ¶¶ 77-79. And, as discussed below, AT&T's comments provided no actual evidence that would support the Commission's position. *See infra* at pp. 7-8, 11.

[4] *See id*. at ¶¶ 2, 76, 80 (announcing extension of reporting requirements "to entities providing international calling service via Voice over Internet Protocol (VoIP) connected to the public switched telephone network (PSTN)").

reports.[5] The Commission contends that it may adopt these reporting requirements under its ancillary authority[6] or based on the Cable Landing License Act.[7] The Commission asserts that these new reporting requirements could help it better "understand" U.S. international calling markets and markets for international call completion services.[8] However, curiosity is not a sufficient substitute for statutory authority.[9] Moreover, the thin record fails to establish that imposing these reporting requirements on VoIP services will produce any data relevant to the Commission's exercise of the three specific statutory responsibilities the Commission identifies as the basis for exercise of its ancillary authority. In the absence of a clear connection between the data sought to be collected and express Commission duties, the reporting requirements exceed the Commission's authority.

Similarly, the Commission should clarify that the *Second R&O* does not require circuit status reporting by capacity-holders that are not licensees for the relevant submarine cable. In in the alternative, the Commission should reconsider and remove such a requirement.

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[5] *Id*. ¶ 73.

[6] *Id*. at ¶ 81.

[7] *Id*. at ¶ 85.

[8] *Id*. at ¶ 73.

[9] As the D.C. Circuit has cautioned, the Commission may not invoke ancillary authority "as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal" at issue, even if the goal itself is defined by statute. *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 (D.C. Cir. 2013). A mere desire to better "understand" services outside the Commission's jurisdiction, based on the unsupported assumption that those services will affect regulated activities, is an even more tenuous justification than the one rejected by the *EchoStar* court, which at least was tied to the specific, statutorily mandated goal of assuring the commercial availability of independently manufactured MVPD navigation devices. *Id*. at 998-99.

II. THE COMMISSION HAS FAILED TO SHOW THAT THE REPORTING REQUIREMENTS IMPOSED ON VOIP SERVICES ARE ANCILLARY TO AN EXISTING STATUTORY AUTHORITY.

The *Second R&O* does not assert that the Commission has direct authority to require VoIP services to submit international traffic and revenue reports. As the Commission recognized, prior to the *Second R&O* "traffic and revenue reporting requirements appl[ied] only to common carriers,"[10] and the Commission explicitly has not determined that VoIP services are common-carrier services.[11] Instead, the Commission relies on its ancillary authority, asserting that "requiring providers of VoIP connected to the PSTN to report traffic and revenue data is reasonably ancillary to the effective performance of the Commission's various responsibilities under the Communications Act."[12]

For the Commission to have ancillary authority, there must be a specific statutory obligation imposed on the Commission, or specific statutory authority conferred upon the Commission, to which the proposed regulation is truly ancillary.[13] Addressing the "ancillary to what?" question is critical, because "without reference to the provisions of the Act expressly granting regulatory authority, the Commission's ancillary jurisdiction would be unbounded."[14] Thus, the Commission must be able to show that any exercise of its ancillary authority is

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[10] *Id*. at ¶ 73.

[11] *Id*. at ¶ 81 n.134.

[12] *Id*. at ¶¶ 81, 83.

[13] *See Comcast Corp. v. FCC*, 600 F.3d 642, 654-61 (D.C. Cir. 2010). To be precise, "the FCC may invoke its ancillary jurisdiction only when (1) the Commission's general jurisdictional grant under Title I of the Communications Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013) (internal quotations and alterations omitted). It is on the second prong where the *Second R&O*'s assertion of authority falls short.

[14] *Comcast*, 600 F.3d at 655 (internal quotations and alterations omitted) (quoting *FCC v. Midwest Video Corp.*, 440 US 689, 706 (1979) ("Midwest Video II")).

"reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[15] In this case, the Commission identified three specific statutory obligations to which it believes the regulations are ancillary; however, for each obligation, it failed to specifically identify *how* imposition of the regulations on VoIP providers would actually enable it to carry out the obligation.[16]

A. Asserted Statutory Authorities

The *Second R&O* states that, "as part of the public interest analysis performed under sections 214 and 310 of the Communications Act with respect to the entry of foreign carriers in the U.S. market," the Commission uses Part 43 data to analyze the state of competition in the market for international telecommunications services—a market that does not include VoIP—and that "[s]uch competition also helps protect against unreasonably high rates and undue discrimination, as required by sections 201 and 202 of the Communications Act."[17] These are the only Communications Act provisions the *Second R&O* cites in justifying its purported authority to impose the new VoIP reporting requirements.[18] Accordingly, the VoIP-reporting requirements are a valid exercise of the Commission's ancillary authority under the

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[15] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

[16] As mentioned above, the Commission also generally referenced its "various responsibilities under the Communications Act," but such a broad reference clearly fails to meet the requirement of *NARUC II* that the Commission identify "*specifically delegated* powers under the Act" in order to exercise its ancillary jurisdiction. *Nat'l Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)(emphasis added); *see also Midwest Video II* at 706 (Commission must provide "reference to the provisions of the Act *directly governing*" the subject to which the Commission asserts its proposed regulation is ancillary).

[17] *Second R&O* ¶ 83.

[18] The *Second R&O* does not discuss any specific provisions of the Cable Landing License Act at all, but instead refers only to the *FNPRM*'s discussion of this statute. *See Second R&O* ¶ 85 (citing *Reporting Requirements for U.S. Providers of International Telecommunications Services*, IB Docket No. 04-112, First Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 7274, at ¶¶ 124-25 (2011) ("*Part 43 FNPRM*")).

Communications Act only if the Commission can show that "its regulation of [this] activity over which it concededly has no express statutory authority … is necessary to further its regulation of activities over which it does have express statutory authority" pursuant to the cited statutory provisions.[19] The Commission failed to make such a showing. Nor has it justified its vague assertion that "information regarding VoIP traffic will support our efforts in carrying out the provisions of the Cable Landing License Act."[20]

B. The Record Does Not Show That Collecting Data from VOIP Services Furthers the Commission's Specific Responsibilities.

It is not sufficient for the Commission's actions to be related in some way to its statutory authorities. Rather, the assertion of ancillary jurisdiction is proper only to impose measures "*reasonably* ancillary to the Commission's *effective* performance" of statutory responsibilities.[21] It is incumbent upon the Commission to make findings "link[ing] its exercise of ancillary authority to its Title II responsibilit[ies]."[22] In other words, in this case, the Commission must be able to point to record evidence to demonstrate *how* it will use VoIP international traffic and revenue data in its evaluation of proposed entry of foreign telecommunications carriers in the U.S. market, or to fulfill its obligation to protect against unreasonably high telecommunications rates and undue discrimination in telecommunications, or to fulfill its obligations under the Cable Landing License Act. The Commission simply did not do so in this case.

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[19] *See Comcast*, 600 F.3d at 654

[20] *Id.* ¶ 85.

[21] *Am. Library Ass'n.*, 406 F.3d at 691-92 (emphasis added).

[22] *See Comcast*, 600 F.3d at 656.

Nor could the Commission have made such a showing. There is no evidence in the record that requiring VoIP providers to provide international traffic and revenue data will in fact help the Commission in its assessment of the proposed entry of foreign common carriers in the U.S. market, its obligation to protect against unreasonably high telecommunications rates and undue discrimination, or its obligations under the Cable Landing License Act. There are only unsupported and conclusory statements by the Commission with respect to each such statement.

In particular, the Commission notes that "VoIP services increasingly are viewed by consumers as a substitute for traditional telephone service,"[23] and that "carriers cited competition from VoIP providers as a major influence on the decrease in reported IMTS traffic."[24] However true or untrue these statements may be, they are beside the point in this proceeding. The Commission justifies its exercise of ancillary authority on the basis of its responsibility, derived from the Communications Act provisions it cites, "to promote effective competition, particularly the market for international telecommunications services."[25] Yet that responsibility does not justify requiring data reporting by services such as VoIP, since the Commission has not found VoIP to be a "telecommunications service" and therefore such services cannot, by definition, participate in "the market for international telecommunications services."[26]

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[23] *Second R&O* ¶ 74.

[24] *Id.* ¶ 74.

[25] *Id.* ¶ 83.

[26] To the extent the Commission believes its ancillary authority under these sections would permit it to take any action that aids "the Commission's ability to understand the U.S. international calling and call completion marketplaces," *Second R&O* at ¶ 80, including imposing requiring reports from on services in related marketplaces, that authority might next be cited in an effort to justify imposing reporting requirements on emails, instant messages, and all other forms of communication between users in the U.S. and other countries.

The *Second R&O* attempts to bridge this plain gap in the Commission's assertion of authority by describing a new set of economic markets: "modern call completion markets," a term which is not found in the Communications Act and is not further defined in the *Second R&O*. The Commission asserts that "[p]roviders of VoIP services connected to the PSTN are important participants in modern call completion markets," and that these providers "enter into arrangements with foreign service providers for call completion services that are commercially and functionally similar to settlement arrangements between U.S. and foreign IMTS providers."[27] Having defined this new market, which goes beyond the boundaries of any jurisdiction delegated by Congress, the Commission imposes regulations on the market since it concluded that "the Commission must obtain information about their traffic, payments, and receipts in order to fully understand these [modern call completion] markets" and "protect U.S. international service providers from anticompetitive activity by foreign service providers and excessive settlement rates."[28]

The Commission thus bases its authority to impose obligations on VoIP providers on the naked assertion that PSTN-connected international VoIP providers and international telecommunications service providers are competitors in the same overall market with respect to matters that are relevant to the Commission's analyses under sections 214 and 310 of the Communications Act. AT&T appears to base its support for the new reporting requirements on the same theory, asserting that interconnected VoIP "in certain instances provides 'essentially the same function to end users as IMTS,' and appears to represent a large and fast-increasing share

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[27] *Second R&O* ¶ 75.

[28] *Id.*

of U.S. international calling."[29] AT&T further asserts that one-way VoIP "can easily be used in combination by residential consumers to replicate the basic functionality of interconnected VoIP services."[30] The keystone of these arguments, however, is the assertion that PSTN-connected VoIP services — including one-way VoIP services — "directly compete with [two-way] IMTS"[31] and are sufficiently "functionally similar" to IMTS that providers' arrangements with foreign service providers are "commercially and functionally similar to settlement arrangements between U.S. and foreign IMTS providers."[32] Based on this assertion, the Commission argues that data on PSTN-connected VoIP service is relevant in helping the Commission "to support U.S. service providers' efforts to achieve cost-based termination rates and fees with other countries, to monitor U.S. international calling rates accurately, and to advise other government agencies of the characteristics of international calling."[33]

The Commission's argument collapses because the record fails to support the key assertions in this logical chain: that PSTN-connected VoIP providers actually are competitors in the same relevant market, that they enter into arrangements with foreign providers that are fundamentally similar to arrangements between U.S. and foreign carriers, and that any similarities have practical relevance to the Commission's exercise of its responsibilities with respect to international telecommunications settlements. Statistics on the growth of VoIP service in general[34] or the volume of Skype international minutes in particular[35] *show nothing* that bears

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[29] AT&T Comments at 9 (citing *Part 43 FNPRM*, at ¶ 119).

[30] *Id*. at 10.

[31] *Second R&O* ¶ 80.

[32] *Second R&O* ¶ 75.

[33] *Second R&O* ¶ 80.

[34] *See id*. ¶ 74 & n.111.

on the question of whether and how PSTN-connected VoIP services exchange traffic with foreign providers, reach termination-fee arrangements, or otherwise provide their service in ways that are akin to the traditional international settlement arrangements the Commission is charged with monitoring. Many of the VoIP statistics the Commission cites do not even appear to distinguish between fully interconnected, one-way, and PSTN-independent VoIP service.[36] At least as to many over-the-top VoIP providers, there is in fact no direct *exchange* of traffic with foreign providers, and consequently no kinship with to traditional international settlement arrangements.[37] Even if VoIP providers did enter into arrangements that were in some respects "similar" to international settlements, the Commission could not justify its reporting requirements without identifying the similarities and explaining why they are relevant to the Commission's monitoring of international telecommunications settlements. The *Second R&O* does nothing of the sort.

The true impetus for the new reporting requirements appears to be the Commission's fear that, as international communications transition to IP-based services that are beyond the Commission's express statutory authorizations, "the Commission's ability to understand the U.S. international calling and call completion marketplaces will erode."[38] To the

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[35] *See id.* ¶ 84 n.140.

[36] *See*, *e.g.*, *id.* ¶ 77 n.123, ¶ 84 n.140.

[37] For traffic terminating to foreign carriers, over-the-top interconnected VoIP providers typically use U.S. licensed international carriers to deliver this traffic to the foreign carrier. It is the U.S. licensed international carriers that actually exchange traffic with and enter into settlement agreements with foreign carriers. *See, e.g.*, *Petition for Protection from Anticompetitive Behavior and Stop Settlement Payment Order on the U.S.-Pakistan Route*, IB Docket No. 12-324, Memorandum Report and Order, DA 13-341 (released March 5, 2013), at ¶ 2. Further, this international traffic should already be reported in Section 43.61 reports by the U.S. licensed carriers. Moreover, for one-way, non-interconnected VoIP providers, there may be no *exchange* at all of traffic with foreign providers.

[38] *See id.* ¶ 80.

extent the Commission believes the powers legislatively delegated to it are no longer adequate, however, that concern is properly addressed to Congress.[39] The Commission may think it would find data regarding international IP-enabled services interesting, but curiosity cannot provide a statutory basis to assert ancillary jurisdiction. Without some explanation of how the VoIP data the Commission seeks actually would affect its performance of statutorily mandated functions, the VoIP-reporting requirements are "ancillary to nothing."[40]

The Commission's assertion that its VoIP reporting requirements can be justified by its authority under the Cable Landing License Act[41] is even weaker. In the first place, the D.C. Circuit has held that Commission's ancillary jurisdiction derives entirely from Section 4(i) of the Communications Act.[42] The Cable Landing License Act, a separate statute that grants authority to the President rather than the Commission, contains no such provision. Accordingly, the Commission has no jurisdiction "ancillary" to the Cable Landing License Act. The Commission, moreover, fails to cite any specific provision of the Cable Landing License Act to which data regarding PSTN-connected VoIP services are relevant. Instead, the *Second R&O* relies on the Commission's discussion in the *Part 43 FNPRM*[43] and on a bare assertion in AT&T's comments—itself supported only by a citation to the *Part 43 FNPRM*—that "[t]he Commission also requires reliable U.S. facilities market information to exercise its licensing responsibilities under the Cable Landing License Act and Executive Order No. 10530."[44] The

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[39] *See Comcast*, 600 F.3d at 661.

[40] *Am. Library Ass'n*, 406 F.3d at 692.

[41] 47 U.S.C. §§ 34-39.

[42] *See Comcast*, 600 F.3d at 645-46 (citing 47 U.S.C. § 154(i)).

[43] *Second R&O* ¶¶ 80, 85 (citing *Part 43 FNPRM*, 26 FCC Rcd at ¶¶ 124-25).

[44] Comments of AT&T, at 12 & n.27 (citing *Part 43 FNPRM* at ¶ 130). It appears AT&T's comment on this point was not even directed at VoIP services, but rather was offered as (continued…)

Part 43 FNPRM merely sought comment on whether VoIP-related data "is necessary for us to make informed decision[s] as to our policies and procedures developed to implement the requirements of the Cable Landing License Act," including "ensuring effective competition and availability of submarine cable facilities to service providers and users."[45] The *Part 43 FNPRM* made no attempt actually to describe how such data would inform the Commission's performance of its duties under the Act, and neither AT&T's comments nor the *Second R&O* offers any explanation. The *Second R&O* asserts that "information regarding VoIP traffic will support our efforts in carrying out the provisions of the Cable Landing License Act in licensing submarine cables that provide the bulk of international transmission capacity for Internet and VoIP traffic,"[46] but the Commission does not explain *how* this information will support its efforts or why the same logic, if extended to the Communications Act, would not justify imposing reporting requirements on Internet traffic in general.

The record therefore offers no basis for concluding that the newly mandated collections of VoIP-related data has any reasonable relationship to the effective performance of *any* of the Commission's specific statutory responsibilities.

III. THE IMPOSITION OF CIRCUIT REPORTING OBLIGATIONS ON ENTITIES THAT ARE NEITHER COMMON CARRIERS, NOR LICENSEES FOR THE RELEVANT FACILITY, WOULD BE UNLAWFUL AND UNREASONABLE.

The *Second R&O* can be read as requiring VoIP providers and other non-common carriers that hold a license for one or more submarine cables to report all capacity they use on

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justification for extending reporting requirements to non-common carrier facility operators. In any case, the Commission has not cited any specific provisions of the Cable Landing License Act or of Executive Order No. 10530 that directly authorize imposing reporting requirements on VoIP services, and neither of these sources of authority grants any form of ancillary jurisdiction.

[45] *Part 43 FNPRM* ¶ 124.

[46] *Second R&O* ¶ 80.

other cables for which they do *not* hold a license.[47] Consistent with the jurisdictional limits discussed above, the Commission should clarify that capacity reporting is not required in this situation. Alternatively, the Commission should remove the requirement.

The Commission's cited authority for requiring non-carrier licensees to report on their use of cable capacity is the Cable Landing License Act.[48] But the Commission's authority to issue licenses cannot support the imposition of a reporting burden that does not relate to any license held by the licensee.

Nor has the Commission identified a legitimate need for such reporting. The Commission's primary rationale for this requirement is that "we must collect information on all submarine cable capacity in order to ensure that common carriage services will have access to submarine cable capacity as a competitively supplied essential input," and "[g]etting this information from cable landing licensees and common carriers will provide us with sufficient data to determine market concentration in each of the oceanic regions."[49] This oversight objective, however, can be satisfied by requiring a licensee for a cable to report available and planned capacity on the cable—as the *Second R&O* mandates.[50] There is no need to impose burdensome requirements on other users of the facility. The Commission's secondary justification—that detailed information on users of available capacity might be helpful in the

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[47] *See id.* ¶108 (b) ("Cable landing licensees and common carriers will be required to report their available capacity in STMs on each international cable on which they hold capacity."); *but see id.* ¶ 100 (indicating the rule applies only to licensees and common carriers "on an international submarine cable").

[48] *Id.* ¶ 104. The Commission's passing mention of the Communications Act, without reference to any particular provision, adds nothing to its claim of authority. *Id.*

[49] *Id.* ¶¶ 98, 102, 103.

[50] *See id.* ¶ 108(b) (first paragraph).

event of a natural disaster affecting undersea facilities—is not tied to any specific statutory duty of the Commission and thus not cognizable.[51]

Accordingly, the Commission should on reconsideration clarify or amend its reporting rules to establish that non-carrier licensees need file capacity reports only with respect to those submarine cables for which they hold a license.

CONCLUSION

Congress has not given the Commission "untrammeled freedom to regulate activities over which the statute fails to confer Commission authority."[52] Whether to give the Commission new statutory authorities as part of the ongoing transition from circuit-switched to IP-based services is a question for Congress. In the meantime, the Commission may not assert ancillary authority to impose regulatory requirements on IP-based services without demonstrating that those requirements are reasonably necessary for the Commission to carry out its *existing* statutory responsibilities. The *Second R&O* fails to make the necessary showing with respect to the reporting requirements it seeks to impose on PSTN-connected VoIP providers. As in *NARUC II*, there is simply "no relationship whatever" between the specific statutory provisions identified by the Commission in the *Second R&O* and its imposition of new regulations on VoIP providers.[53] Accordingly, the Commission should rescind those requirements. The Commission likewise should not impose circuit status reporting obligations on entities that are neither common carriers, nor licensees for the relevant submarine cable.

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[51] *Id.* ¶ 103.

[52] *Comcast*, 600 F.3d at 661 (internal quotations and alterations omitted).

[53] 533 F.2d at 616.

Respectfully submitted,

VOICE ON THE NET COALITION

_____/s/________________________

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