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. REPLY BRIEF (DEFERRED APPENDIX APPEAL)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Authorities upon which we chiefly rely are marked with asterisks.

CASES

STATUTES AND RULES

ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

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.
Int. Br.:	Uncited Brief of Intervenor National Telecommunications Cooperative Association in Support of the FCC's Response to the Voice on the Net Coalition, Inc. Brief.
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).
Oct. 2011 *Ex Parte*:	Letter from R. Whitt, Google Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. 10-90, *et al.* (filed Oct. 18, 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).
PSTN:	Public Switched Telephone Network.
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 (WCB 2011).

Resp.:	Federal Respondents' Uncited Response to the Voice on the Net Coalition, Inc. Principal Brief.
VOIP White Paper:	Letter from D. Lampert, Lampert, O'Connor & Johnston, P.C., to Marlene H. Dortch, Secretary, FCC, WC Dkt. 10-90, *et al*. (filed Sept. 30, 2011), *Hold the Phone (Charges)* (Attach.).
VoIP:	Voice over Internet Protocol.
VON:	Voice on the Net Coalition.

REPLY

I. THE FCC HAD AN OPPORTUNITY TO PASS ON ALL ISSUES RAISED

When the FCC "has been afforded . . . [an] opportunity to pass" on the question before the Court, filing a petition for reconsideration is not a statutory prerequisite to judicial review. 47 U.S.C. § 405(a). The FCC had ample opportunity to pass on each issue presented here; consequently, VON has waived none of its arguments.

VON demonstrates that the FCC exceeded its statutory authority by regulating all types of VoIP; this was squarely raised and addressed in the record. The FCC requested comment on a proposal addressing FCC authority over VoIP traffic, noting that it would apply to customers of both IVoIP services and "'one-way' interconnected VoIP services." Public Notice, n.57 (JA __). Parties responded that "most, if not all, 'one-way' VoIP services are likely to be information services and may even be software applications or online offerings wholly outside of the Commission's jurisdiction," VoIP White Paper, 6 (JA __); argued against "traditional telecommunications regulation[]," *id*. (JA __) – which necessarily included a blocking prohibition; and stated that the FCC "cannot avoid obvious limitations in its ability to regulate services outside of its primary jurisdiction. . . ." Oct. 2011 *Ex Parte*, 6 (JA __).

The FCC's ancillary authority to impose the No-Blocking Obligation was "necessarily implicated" by these arguments. *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 80 (D.C. Cir. 1998) (§405(a) does not require "that the *precise* issue be presented to the Commission in order to afford it a 'fair opportunity.' So long as the issue is necessarily implicated by the argument made to the Commission, *section 405* does not bar . . . review.") (emphasis in original). *Accord Echostar Satellite L.L.C. v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2013).

VON's APA claims likewise were "necessarily implicated by" arguments below. Responding to the FCC's inquiry on whether to subject "one-way" VoIP to Title II carrier charges, parties stated:

> The FCC . . . has not undertaken the pre-requisites under the [APA] necessary to impose rate regulation on "one-way" VoIP. The term "one-way interconnected VoIP" is not defined by the Act or in the Commission's rules. Neither has the Commission provided a proposed definition of the term, or provided notice, explanation or justification of the proposed regulation.

VoIP White Paper, 6 (JA __). These parties also reiterated that "[n]otice must be 'sufficient to fairly apprise interested parties of all significant subjects and issues involved.'" *Id*. n.32 (citation omitted) (JA __). Given that even Respondents assert a "close connection" between the FCC's decision to subject VoIP traffic to carrier charges and adoption of the No-Blocking Obligation, Resp. 10, it is clear the FCC had fair opportunity to pass on the arguments.

Even if the Court were to find §405(a) is not satisfied, it should conclude that the futility exception applies.[1] Section 405(a) "leave[s] room for the operation of sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied." *WATCH v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983). *Accord Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998). Courts may consider issues that "would have been futile to raise before the agency," *WATCH* at 682, especially where the agency's "general views" are already known. *ACT v. FCC*, 564 F.2d 458, 469 (D.C. Cir. 1977). *See also Conn. Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 849 (2d Cir. 1996) (applying the futility exception). Given the FCC's repeated invocation of ancillary authority to regulate unclassified VoIP services (*see, e.g.*, FCC decisions cited at Resp. 18), its position is so "firmly entrenched" that it would have been futile to question that authority before the agency. *See Tribune Co.* at 67. In fact, since *Nat'l Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967 (2005), the FCC has asserted ancillary authority (primarily over IVoIP) at least 20 times. This trend continues. *See, e.g., Reporting Requirements for U.S. Providers of International Telecommunications Services*, 28 FCC Rcd. 575, ¶81 (2013)

[1] Contrary to Respondents' assertion (Resp. 7, n.2), the Court may apply an exception to §405(a). *Booth v. Churner*, 532 U.S. 731 (2001), cited at Resp. n.2, did not involve §405(a) and is not controlling.

("Regardless of the classification of VoIP services connected to the PSTN, we have ancillary authority to require providers of those services to file traffic and revenue data."), and decisions cited *id*. at n.137 (JA __).

II. THE FCC'S ACTION DID NOT COMPLY WITH APA REQUIREMENTS

A. The Decision Was Not Adequately Explained

To comply with the APA's prohibition on arbitrary and capricious decisionmaking, an agency must both "'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) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

Respondents make no attempt to show the FCC examined relevant data; indeed, they concede the FCC had no "evidence that VoIP calls previously had been blocked." Resp. 12. Lacking any "facts found" – and affirmatively ignoring relevant data on existing practices of VoIP providers who already were paying access charges, *see* Order ¶938 (JA __) – Respondents instead now seek deference to the FCC's "predictive judgment" that "VoIP providers would block calls in the future." Resp. 12.

Deference to predictive judgment "does not mean all agency decisions are unimpeachable. . . . [I]t is the responsibility of the reviewing court to determine if

there is substantial evidence" to support the agency's finding. *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1147-48 (10th Cir. 1991). *See also Colorado Interstate Gas Co. v. FERC*, 904 F.2d 1456, 1463 n.14 (10th Cir. 1990) (contrary to Respondents' claim, Resp. 12, FERC "based [its] prediction" in part on "evidence in the record").[2] Here, it is undisputed that there is no record of call blocking by any VoIP provider; consequently, there can be no "rational connection" between non-existent facts and adoption of the No-Blocking Obligation. That decision therefore must be set aside. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994).

Deference is decidedly not warranted when an agency ignores evidence that does not support its prediction. *See BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) ("deference owed agencies' predictive judgments gives them no license to ignore the past when the past relates directly to the question at issue"). The FCC's conjecture that VoIP providers would block calls to avoid access charges was predicated on the notion that VoIP providers had not previously paid access charges and, once required to do so, would have an

[2] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), does not free the FCC of its obligation to review "relevant data." In fact, the majority affirmed *Motor Vehicle Mfrs. Ass'n.*, *id.*, 513, while emphasizing that "there are some propositions [here, the harmful effect of broadcast profanity on children] for which scant empirical evidence can be marshaled," and that courts cannot insist that an agency "obtain[] the unobtainable." *Id.*, 519.

incentive to block calls. But IVoIP providers in fact paid access charges prior to the Order. *See* Order ¶¶937-938 (JA __). The FCC could have attempted to determine whether call blocking by VoIP providers actually had occurred and whether new regulation prohibiting such blocking was warranted.[3] Instead, Respondents cobble together a tenuous *post hoc* predictive judgment argument.

B. The Blocking Prohibition Was Not a "Logical Outgrowth" of the Proposed Rules

Respondents argue the blocking prohibition was a "logical outgrowth" of the FCC's draft rules, "[g]iven the close connection between the imposition of access charges and the incentive to block calls." Resp. 10. But that connection is irrelevant here; Respondents instead must show a connection between the Public Notice's proposal (n.57, JA__) to subject undefined "one-way interconnected VoIP services" to ICC and call signaling rules, and the Order's adoption (¶974, JA __) of a No-Blocking Obligation that applies to "providers of 'one-way' VoIP service." That connection was never demonstrated, nor could it be, given that "one-way services do not meet the definition of [I]VoIP." Order ¶941 (JA __).

"[A] final rule fails the logical outgrowth test and thus violates the APA's

[3] Respondents' assertion that VON's "legal challenge . . . amounts to a tacit admission," Resp. 13, is a red herring. The FCC "must defend its action on the same grounds advanced in the Order," *Comcast Corp. v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010) (citation omitted). This case was not part of the record, and VON need not sit idly by for fear of speculative accusations.

notice requirement where 'interested parties would have had to "divine [the agency's] unspoken thoughts," because the final rule was surprisingly distant from the proposed rule.'" *CSX Transp. Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citations omitted). Here, parties brought the inadequacy of the notice – the FCC's "unspoken thoughts" – to the FCC's attention, stating "[i]t is . . . unclear what services would be encompassed by 'one-way' interconnected VoIP. . . . The FCC's definition of 'interconnected VoIP' clearly encompasses only a two-way service so that 'one-way interconnected VoIP' makes little sense." VoIP White Paper, 6 (JA __). Because the FCC never defined, and had no record regarding, one-way VoIP services, it was not "reasonably foreseeable," *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007), that the FCC would regulate such services, nor could parties have "anticipated the agency's final course," *Covad Commc'ns v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006), based on the Public Notice.[4] "[T]he APA simply requires more." *Ass'n of Private Sector*

[4] Intervenor's attempt (Int. Br. 3) to tie a reference to call blocking in the NPRM to the No-Blocking Obligation fails. Notably, the FCC did not make that connection, nor do Respondents assert the FCC proposed a No-Blocking Obligation for VoIP providers, sought comment on the issue of call blocking by "one-way" and other VoIP providers, or discussed "one-way VoIP providers" in any context. *Cf.* Resp. 9-11 *with* VON Brief 10.

Colleges and Univs. v. Duncan, 681 F.3d 427, 462 (D.C. Cir. 2012).[5]

III. RESPONDENTS FAIL TO SHOW TITLE I AUTHORITY TO ADOPT THE NO-BLOCKING PROHIBITION

Respondents confirm that the FCC has not classified "the affected VoIP services" as either telecommunications services or information services. Resp. 14-15. Although courts have upheld an exercise of ancillary authority without this classification, there are important differences between services addressed in those decisions and what is at issue here. Respondents fail to acknowledge those differences and overreach by asserting authority beyond the limits of applicable precedent.

A. Title I Jurisdiction Does Not Extend to "One-Way VoIP"

The FCC may exercise "general jurisdiction . . . under Title I" only when that jurisdiction "covers the regulated subject," *Comcast* at 646 – what Respondents vaguely refer to as "the VoIP services at issue." Resp. 16. While Respondents cite (Resp. 17) *IP-Enabled Services*, 20 FCC Rcd. 10245 (2005), which involved only IVoIP, the Order cited no authority for the proposition that Title I affords jurisdiction over any "one-way VoIP," including software

[5] *Cf., e.g., Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (rule providing that "'the *maximum* air velocity in the belt entry must be no greater than 500 feet per minute, unless otherwise approved . . .'" was not the logical outgrowth of a proposal to require that "'[a] *minimum* air velocity of 300 feet per minute must be maintained . . .'") (emphasis in original).

applications, online offerings, and other information services entirely outside FCC authority. Regardless, the FCC must provide *some* analysis when it asserts ancillary authority over a broad array of previously unregulated offerings. *See supra* Part II.A.

B. The Exercise of Authority Is Not Reasonably Ancillary to Any Statutorily Mandated Responsibility

An exercise of ancillary authority also must be "reasonably ancillary to the . . . effective performance of the Commission's statutorily mandated responsibilities." *Comcast* at 646. Like the Order, the Response fails to make such a connection. "[W]ide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority." *Id*. at 661.

Respondents first repeat the Order's hypothetical concern that a telecommunications carrier *could* circumvent its obligations under §201 of the Act (which covers *only* common carrier services) by partnering with a VoIP provider and asking the VoIP provider to block calls. Resp. 17. But this merely confirms the FCC's statutorily-mandated responsibility with respect to the Title II carrier in its hypothesis, not the VoIP provider. Moreover, nothing in the record supports the notion that any VoIP provider has done or would do so, and the Order provided no connection between this speculation and FCC exercise of ancillary authority.

Respondents also repeat the Order's speculation that blocking "a call from a traditional telephone customer to a customer of a VoIP provider, or vice versa, would deny the traditional telephone customer the intended benefits of telecommunications interconnection under [§]251(a)(1)" of the Act. Resp. 17. But §251(a)(1) mandates interconnection among telecommunications carriers; it imposes no obligations on IVoIP or information service providers. Respondents point to no responsibility under §251(a)(1) to which the FCC's exercise of Title I authority over VoIP providers is reasonably ancillary, nor does §251(a) contain an express delegation of authority. *See Comcast* at 652, 655, 657.[6]

Respondents next assert that ancillary authority over *all* VoIP services is appropriate "because consumers regard VoIP services 'as substitutes for traditional voice telephone services.'" Resp. 17 (citing Order ¶63 (JA __)). The Order made no such claim, and it is barred here. *See Comcast* at 660. Instead, the Order's discussion of substitutability applied solely to IVoIP as defined in FCC rules – a two-way service.[7] There is no record whatsoever regarding consumers' views on

[6] The FCC's recent *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications*, FCC 13-64, ¶¶100-140 (JA __-__) (May 17, 2013), seeking to justify in detail how a new rule is reasonably ancillary to specific statutory responsibilities, provides a stark contrast with the Order.

[7] All the cases cited by Respondents (*see* Resp. 15, 18) discuss its authority to regulate IVoIP. None addresses "one-way VoIP."

"one-way IVoIP" or "one-way VoIP," nor is there any support for the claim that consumers' views on "substitutability" fall within any statutory responsibility.[8] Even assuming an exercise of ancillary authority over IVoIP could be valid because IVoIP is "like traditional telephone service," the Order failed to demonstrate (or even attempt to demonstrate) that either "one-way IVoIP" or "one-way VoIP" are "like" telephone service.

Respondents' final claim, that the FCC has "'various responsibilities' under Title II to ensure the widespread availability of reliable telephone service," Resp. 20, also was not advanced in the Order and may not be considered here, *see Comcast* at 600, nor is it supported by the record.

[8] Intervenor emphasizes the need for the Court to "consider . . . the entire record." Int. Br. 5. Yet, the record includes gaps, which, post-Order, Respondents try to fill. In a subsequent proceeding, the FCC for the first time is developing a record on the extent of its authority over one-way VoIP and proposing to codify a definition of one-way VoIP. *Universal Service Contribution Methodology*, 27 FCC Rcd. 5357, ¶58 (2012) (JA __). This subsequent proceeding makes clear why the FCC's path could not "reasonably be discerned." *Cf.* Int. Br. 5.

CONCLUSION

The FCC's adoption of the No-Blocking Obligation is arbitrary and capricious within the meaning of the APA, violates the APA's notice requirements, exceeds the FCC's authority under the Act, and must be vacated.

Respectfully submitted,

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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 2,608 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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STATUTORY AND REGULATORY ADDENDUM

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 U.S.C. § 405(a)

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1) [47 USCS § 155(c)(1)], any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1) [47 USCS § 155(c)(1)], in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take action within ninety days of the filing of such petition. Rehearings [Reconsiderations] shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) [47 USCS § 402(a)] applies, or within which an appeal must be taken under section 402(b) [47 USCS § 402(b)] in any

case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

…

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.

…

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