IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

Act	Communications Act of 1934
APA	Administrative Procedure Act
FCC	Federal Communications Commission
IP	Internet Protocol
IXC	Interexchange Carrier
LEC	Local Exchange Carrier
PSTN	Public Switched Telephone Network
VoIP	Voice over Internet Protocol
VON	Voice on the Net Coalition

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ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

FEDERAL RESPONDENTS' FINAL RESPONSE TO THE VOICE ON THE NET COALITION, INC. PRINCIPAL BRIEF

ISSUE PRESENTED

Whether the Federal Communications Commission ("FCC") lawfully exercised its authority when it prohibited providers of Voice over Internet Protocol ("VoIP") service from blocking telephone calls.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC has long prohibited telecommunications carriers from "blocking, choking, reducing, or otherwise restricting" the transmission of telephone calls. *Developing a Unified Intercarrier Compensation Regime*, 27 FCC Rcd 1351, 1352 ¶3 (Wireline Comp. Bur. 2012). These practices, which fall under the general rubric of "call blocking," have significant economic and public safety consequences. "Small businesses can lose customers who get frustrated when their calls don't go through," and callers with a medical or

other emergency "may be unable to reach public safety officials." *Id.* at 1352 ¶2.

For decades, interexchange carriers ("IXCs") – providers of long-distance telephone service – have paid access charges to the local exchange carriers ("LECs") that originate and terminate long-distance calls. *See* FCC Preliminary Br. 4-5. Several years ago, in response to access charges that they considered unreasonably high, some IXCs began to block long-distance calls "that terminate with certain [LECs] as a form of self help to resolve disputes concerning the access rates of these [LECs]." *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 11629, 11629 ¶1 (Wireline Comp. Bur. 2007) ("*Call Blocking Declaratory Ruling*"). At that time, the FCC's Wireline Competition Bureau issued a declaratory ruling reiterating the agency's "general prohibition on call blocking." *Id.*[1]

Today, a growing number of consumers are using VoIP service to place telephone calls. *See* FCC Preliminary Br. 13-14. In the order on review, the FCC determined that intercarrier compensation obligations would apply prospectively to VoIP calls that are exchanged with LECs over the

[1] The Bureau noted that FCC "rules and regulations provide carriers with several mechanisms to address allegations of unreasonable access charges, including tariff investigations and informal and formal complaints." *Id.* at 11629 ¶1 (citing 47 C.F.R. §1.773 and 47 U.S.C. §208).

public switched telephone network ("PSTN"). *Connect America Fund*, 26 FCC Rcd 17663, 18002 ¶933 (2011) ("*Order*") (JA at 390, 729). The FCC recognized that, going forward, "VoIP providers" – just like other providers of long-distance service – may have incentives to block long-distance calls in order to avoid paying "high access charges." *Id.* ¶974 (JA at 756). The agency further noted that, if a VoIP provider blocked "a call from a traditional telephone customer to a customer of a VoIP provider, or vice versa," it "would deny the traditional telephone customer the intended benefits of telecommunications interconnection under section 251(a)(1)" of the Communications Act. *Id.* n.2043 (JA at 756). Accordingly, the FCC decided to "prohibit blocking of voice traffic to or from the PSTN by [VoIP] providers." *Id.* ¶974 (JA at 756).

In challenging this decision, the Voice on the Net Coalition ("VON") contends that the FCC: (1) gave inadequate notice under the Administrative Procedure Act ("APA"), Br. 9-13; (2) engaged in unreasoned decisionmaking, Br. 13-15; and (3) exceeded its authority insofar as it imposed a "no blocking" obligation on information services, Br. 15-19.

I. The FCC received "no opportunity to pass" on the claims presented in VON's brief. *See* 47 U.S.C. §405(a). Neither VON nor any other party raised those issues before the FCC issued the *Order*, or on reconsideration.

VON has failed to preserve its arguments, and the Court should dismiss its petition. *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1227-28 (10th Cir. 2009) ("*Sorenson I*").

II. In any event, the FCC satisfied its notice obligations under the APA before it imposed a call blocking ban on VoIP providers. Under established standards, the agency's action was a logical outgrowth of the proposed rules on which the FCC sought comment – specifically, its proposal to permit the assessment of access charges on VoIP calls during a transitional period.

III. The FCC also reasonably explained why it banned the blocking of calls by VoIP providers. The agency reasoned that, because the *Order* requires VoIP providers to pay access charges during a transition period, they might block calls to avoid paying high access charges, as other service providers had done in the past. This reasonable predictive judgment is entitled to this Court's deference. *Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1145-46 (10th Cir. 1991).

IV. Regardless of whether VoIP services are classified as "telecommunications services" or "information services" under the Communications Act ("Act"), the FCC has authority to ban the blocking of calls by VoIP providers. To the extent that VoIP services are telecommunications services, VON does not dispute that the FCC may

prohibit call blocking by VoIP providers as an "unjust and unreasonable" practice under Title II of the Act. Alternatively, if VoIP services are information services, the FCC may exercise its ancillary authority under Title I of the Act to bar VoIP providers from blocking calls. The ban on call blocking by VoIP providers is reasonably ancillary to the FCC's effective performance of its Title II duties to ensure the reliability of the nation's telecommunications network. Without such a ban, a telecommunications carrier that is barred from blocking calls under Title II could evade that restriction by asking an affiliated VoIP provider to block calls.

ARGUMENT

I. VON HAS WAIVED ALL OF ITS CLAIMS.

"The filing of a reconsideration petition" with the FCC "is 'a condition precedent to judicial review … where the party seeking such review … relies on questions of fact or law upon which the [FCC] … has been afforded no opportunity to pass.'" *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1044 (10th Cir. 2011) ("*Sorenson II*") (quoting 47 U.S.C. §405(a)). The FCC received no "opportunity to pass" on any of the issues raised in VON's brief. And neither VON nor any other party petitioned for FCC reconsideration of the ban on call blocking by VoIP providers. Consequently, section 405 of the

Communications Act precludes judicial review of VON's claims. *See id.* at 1044, 1048 n.8; *Sorenson I*, 567 F.3d at 1227-28.

VON alleges that the agency gave no prior notice that it intended to ban call blocking by VoIP providers. Br. 9-13. Even if that were correct – and it is not (*see* Part II below) – VON was still obliged to present its claims to the FCC before bringing them to court. "[E]ven when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the [agency] before it may seek judicial review." *Qwest Corp. v. FCC*, 482 F.3d 471, 474 (D.C. Cir. 2007) (internal quotation marks omitted). This exhaustion requirement is designed "to 'afford the [FCC] the initial opportunity to correct errors in its decision or the proceeding leading to decision.'" *Fones4All Corp. v. FCC*, 550 F.3d 811, 818 (9th Cir. 2008) (quoting *Qwest*, 482 F.3d at 475).

For example, a deficiency in an FCC rulemaking notice may not become apparent until after the agency promulgates rules that were not foreshadowed by the notice. Courts thus will not consider a claim that the FCC provided inadequate notice unless the petitioner has filed a petition for reconsideration to give the agency a chance to address the issue. *See, e.g.*,

Globalstar, Inc. v. FCC, 564 F.3d 476, 483-85 (D.C. Cir. 2009); *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 442-43 (6th Cir. 1998).[2]

II. THE FCC COMPLIED WITH THE APA'S NOTICE REQUIREMENTS.

In a 2007 order, the FCC's Wireline Competition Bureau made clear that carriers may not block phone calls to avoid paying intercarrier compensation. *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631-32 ¶¶5-7. Until recently, however, the FCC had never expressly resolved whether intercarrier compensation obligations apply to interconnected VoIP services, which enable customers "to make real-time voice calls to, and receive calls from," the PSTN. *Connect America Fund*, 26 FCC Rcd 4554, 4747 ¶612 (2011) ("*2011 NPRM*") (SA at 1, 194); *see also* 47 C.F.R. §9.3 (defining "interconnected VoIP service"). This uncertainty spawned "considerable dispute about whether, and to what extent, interconnected VoIP

[2] VON may contend on reply that section 405 is inapplicable here because a reconsideration petition would have been futile. This Court should reject any such notion. Courts should "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). Although the D.C. Circuit has construed section 405 to contain a futility exception, *see Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996), the Ninth Circuit has properly concluded (in accordance with *Booth*) that section 405 does not permit a futility exception because the statute does not expressly provide for one. *See Fones4All*, 550 F.3d at 818.

traffic is subject to existing intercarrier compensation rules." *2011 NPRM* ¶613 (SA at 194).

In an effort to clarify the compensation obligations associated with interconnected VoIP calls, the FCC in 2011 sought comment on various proposals to require interconnected VoIP providers to pay intercarrier compensation during a transitional period (until the agency phases out intercarrier compensation for all service providers). *See 2011 NPRM* ¶¶616-619 (SA at 195-98); Public Notice, *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, 26 FCC Rcd 11112, 11128 (2011) (JA at 349, 365) ("*Public Notice*") (published at 76 Fed. Reg. 49401 (Aug. 10, 2011) (JA at 369)). Initially, the agency considered imposing compensation obligations solely on two-way interconnected VoIP services (which permit customers both to make calls to, and receive calls from, the PSTN). *2011 NPRM* ¶612 (SA at 194). The FCC later sought comment on a proposal that would also impose intercarrier compensation requirements on "'one-way' interconnected VoIP services" (which "allow users to terminate calls to the PSTN, but not receive calls from

the PSTN, or vice versa"). *Public Notice*, 26 FCC Rcd at 11128 n.57 (JA at 365).[3]

In the *Order*, the FCC established prospective intercarrier compensation obligations for "VoIP-PSTN" traffic. *Order* ¶¶940-975 (JA at 732-57). It defined "VoIP-PSTN traffic" as "traffic exchanged over PSTN facilities that originates and/or terminates in IP [*i.e.*, Internet Protocol] format." *Id.* ¶940 (JA at 733) (internal quotation marks omitted). Applying this definition, the agency imposed intercarrier compensation requirements on both "one-way" and "two-way" interconnected VoIP services. *Id.* ¶941 (JA at 733-34).[4]

The FCC also declared that VoIP providers subject to the new intercarrier compensation rules may not block VoIP calls. *Order* ¶¶973-974 (JA at 755-56). VON argues that the agency took this action without providing the notice required by the APA. Br. 9-13. This argument is baseless.

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[3] VON observes that "[t]he term 'one-way interconnected VoIP' is not defined in the Act or any FCC rule and was not used in the [*2011 NPRM*]." Br. 3. But VON does not dispute that, in the *Public Notice* (which was published in the Federal Register), the FCC clearly explained what it meant by "one-way interconnected VoIP."

[4] The FCC emphasized that these obligations are "transitional." Eventually, VoIP-PSTN traffic – like all other intercarrier compensation traffic – "will be subject to a bill-and-keep framework." *Order* ¶933 (JA at 729).

The APA generally requires that before an agency adopts a rule, it must provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). To satisfy this requirement, "[a]n agency's final rule need only be a 'logical outgrowth' of its notice." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The logical outgrowth test is satisfied if it was "reasonably foreseeable" that the agency would take the action it did. *Long Island Care*, 551 U.S. at 175; *see also Covad*, 450 F.3d at 548 (asking whether parties "should have anticipated the agency's final course") (internal quotation marks omitted); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

The rule at issue here passes that test. Given the close connection between the imposition of access charges and the incentive to block calls, it was reasonably foreseeable that, if the FCC decided to require access charge payments for VoIP calls, it would bar VoIP providers from blocking such calls in order to avoid access charges. Previously, the FCC's Wireline Competition Bureau had ruled that all carriers subject to intercarrier compensation obligations are prohibited from blocking calls to evade those obligations. *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631-32

¶¶5-7; *see also 2011 NPRM* ¶654 (SA at 210). Once the agency made clear that VoIP providers must pay access charges, it was reasonable to assume that the FCC would also act to prevent circumvention of that requirement (and the endangerment of public safety) through call blocking.

III. THE FCC REASONABLY EXPLAINED WHY IT BARRED VOIP PROVIDERS FROM BLOCKING CALLS.

The "ubiquity and reliability of the nation's telecommunications network" are critical to ensuring the nationwide availability of dependable telephone service – one of "the explicit goals of the Communications Act." *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629 ¶1 (citing 47 U.S.C. §§151, 254). The FCC has long been "concerned that call blocking may degrade the reliability" of the PSTN. *Id.* at 11631 ¶5; *see also Order* ¶973 (JA at 756). Accordingly, the FCC has barred call blocking "as a means of 'self-help' to address perceived unreasonable intercarrier compensation charges." *Order* ¶973 (JA at 756); *see also Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629 ¶1.

The FCC's actions here were consistent with this established policy. The agency explained that the prohibition on call blocking by VoIP providers was necessary because VoIP providers – like other providers of telephone service – "could have incentives" to block certain calls "in an effort to avoid high access charges." *Order* ¶974 (JA at 756).

That judgment was eminently reasonable. Experience showed that, in the absence of an express prohibition on call blocking, providers of wireline and wireless telephone service blocked calls "to resolve disputes concerning … access rates" they deemed unreasonable. *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629 ¶1. The FCC's prediction that VoIP providers might engage in the same conduct was based on the agency's "knowledge of the industry" and "common sense." *See Colorado Interstate Gas Co. v. FERC*, 904 F.2d 1456, 1463 n.14 (10th Cir. 1990) (internal quotation marks omitted). "[E]ven in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009); *see also Franklin Sav. Ass'n*, 934 F.2d at 1145-46.

Moreover, when the FCC makes a predictive judgment within its area of expertise, "complete factual support in the record … is not possible or required." *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978). Therefore, contrary to VON's assertion (Br. 13), the agency was not required "to articulate an explanation grounded in … record evidence."

The FCC did not ban call blocking by VoIP providers because there was evidence that VoIP calls previously had been blocked. Rather, the agency was concerned that VoIP providers would block calls in the future,

after they became subject to the *Order*'s intercarrier compensation obligations. "[A]gencies can, of course, adopt prophylactic rules to prevent potential problems before they arise. An agency need not suffer the flood before building the levee." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009).

Although VON asserts that the FCC "merely speculated" that VoIP providers would block calls (Br. 14), VON itself suggested – in comments submitted for the record – that VoIP providers might resort to call blocking if the FCC required them to pay access charges. *See* VON Comments, Apr. 1, 2011, at 4-5 (JA at 1890-91) (if VoIP providers became subject to access charges, "interconnected VoIP providers offering products integrated into websites" could choose to "develop specific technology to prevent rural Americans (and others living in areas with high access rates) from accessing these innovative technologies or communicating with their online counterparts").

Indeed, VON's legal challenge to the call blocking ban amounts to a tacit admission that VON's members wish to preserve their ability to block calls in the future. If VON's members had no intention of blocking calls, VON could not establish that its members were injured by the call blocking

ban – a prerequisite to Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

IV. THE FCC HAS AUTHORITY TO BAN CALL BLOCKING BY VOIP PROVIDERS.

VON contends that the FCC exceeded its statutory authority insofar as its ban on call blocking applies to "information services." Br. 15-19. That is incorrect.

The FCC has not yet decided whether VoIP services that are exchanged with LECs over the PSTN should be classified as "telecommunications services" or "information services" under the Communications Act.[5] *See Order* ¶974 & n.2042 (JA at 756).[6]

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[5] The Act defines "telecommunications service" as "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. §153(53). "Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* §153(50). The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* §153(24).

[6] The *Order* concerns only VoIP services that are exchanged with LECs over the PSTN. *See Order* ¶940 (JA at 732-33). While VON is correct that the FCC has found one particular type of VoIP service to be an information service (Br. 6), that service was not exchanged with LECs over the PSTN. *See Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004).

If the FCC ultimately determines that the VoIP services subject to the call blocking ban are telecommunications services, it would have authority to ban VoIP call blocking as "an unjust and unreasonable practice" under 47 U.S.C. §201(b). *Order* ¶973 (JA at 756) (quoting *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631 ¶5). Indeed, it has banned call blocking by providers of telecommunications services for decades. *See, e.g., Blocking Interstate Traffic in Iowa*, 2 FCC Rcd 2692 (1987).

If the FCC ultimately determines that the affected VoIP services are information services, it still would have authority to ban the blocking of VoIP calls "under its Title I ancillary jurisdiction." *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976, 996 (2005) ("*Brand X*"). Title I of the Communications Act empowers the FCC to take measures that are "reasonably ancillary to the effective performance of the [FCC's] various responsibilities" under the Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 659-70 (1972). Specifically, the Supreme Court has recognized that the FCC may "impose special regulatory duties on [information service providers] under its Title I ancillary jurisdiction." *Brand X*, 545 U.S. at 996. *See also Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (the FCC may exercise ancillary jurisdiction over enhanced

data services, which "are not within the reach of Title II," in order to ensure compliance with the Title II requirement that rates for wire communications services be "just and reasonable"). Section 4(i) of the Act, moreover, authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. §154(i). The FCC's ban on call blocking by VoIP providers falls well within this Title I authority.

Contrary to VON's assertion (Br. 16-18), the agency's action here satisfied the Supreme Court's test for the FCC's proper exercise of its ancillary authority, *see Southwestern Cable*, 392 U.S. at 178, as well as the two-part test that the D.C. Circuit recently applied in *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010).

First, the FCC's "general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject." *Comcast*, 600 F.3d at 646 (internal quotation marks omitted). Title I gives the FCC jurisdiction over interstate "communication by wire or radio." 47 U.S.C. §152(a). The VoIP services at issue here fit the Act's definitions of "radio communication," 47 U.S.C. §153(40), and "wire communication," *id.* §153(59), because they "involve transmission of [voice] by aid of wire, cable, or other like connection and/or transmission [of voice] by radio." *Order* ¶954

(JA at 741) (internal quotation marks omitted). Those services are therefore "covered by the [FCC's] general jurisdictional grant" under Title I. *IP-Enabled Services*, 20 FCC Rcd 10245, 10262 ¶28 (2005), *pet. for review denied, Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

Second, the ban on call blocking by VoIP providers is "reasonably ancillary to the [FCC's] effective performance of its statutorily mandated responsibilities." *Comcast*, 600 F.3d at 646 (internal quotation marks omitted); *see also Southwestern Cable*, 392 U.S. at 178. The agency explained that, if it did not ban call blocking by VoIP providers, a telecommunications carrier that is barred from blocking calls by section 201 of the Act could circumvent that constraint by partnering with a VoIP provider and asking the VoIP provider to block calls. *Order* n.2043 (JA at 756). The FCC further noted that, if a VoIP provider blocked "a call from a traditional telephone customer to a customer of a VoIP provider, or vice versa," it "would deny the traditional telephone customer the intended benefits of telecommunications interconnection under section 251(a)(1)" of the Act. *Id.* (citing 47 U.S.C. §251(a)(1)).

The use of ancillary authority is especially appropriate here because consumers regard VoIP services "as substitutes for traditional voice telephone services." *Order* ¶63 (JA at 412). Likewise, the FCC treats interconnected

VoIP service like traditional telephone service in several respects. Like providers of traditional phone service, interconnected VoIP providers must provide 911 service,[7] contribute to the federal Universal Service Fund,[8] and ensure that their networks can be accessed by authorized law enforcement officials to conduct electronic surveillance.[9] Moreover, the FCC has previously relied on Title I authority to impose other obligations on VoIP providers to ensure the achievement of such important Title II mandates as protecting consumer privacy and providing telecommunications access to disabled persons.[10] The FCC's action here to ensure that consumers' calls are completed fits comfortably within this line of decisions.

Supreme Court precedent supports the FCC's reliance on its ancillary authority to ban call blocking by VoIP providers. In *Southwestern Cable*, 392 U.S. at 167-80, the Court upheld the FCC's authority to regulate cable television in the 1960s, even though the Communications Act at that time

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[7] *See Nuvio*, 473 F.3d at 303-09.

[8] *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

[9] *See American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

[10] *See, e.g.*, *IP-Enabled Services*, 22 FCC Rcd 11275, 11286-89 ¶¶21-24 (2007) (extending to VoIP providers the disability access requirements of 47 U.S.C. §255); *Implementation of the Telecommunications Act of 1996*, 22 FCC Rcd 6927, 6954-56 ¶¶54-57 (2007) (requiring VoIP providers to comply with the consumer privacy safeguards of 47 U.S.C. §222).

made no mention of cable television. Deferring to the agency's judgment that the unregulated growth of cable television might "destroy or seriously degrade the service offered by … local broadcasting stations," *id.* at 175 (internal quotation marks omitted), the Court held that the FCC's regulation of cable television was "reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting." *Id.* at 178. Thus, by regulating a service (cable television) over which the agency had no express statutory authority, the FCC was able to carry out its responsibility to regulate a service (broadcasting) over which it unquestionably had authority.

Here, as in *Southwestern Cable*, the FCC reasonably concluded that it could not effectively discharge its duty to regulate traditional communication services under the Act unless it exercised its ancillary authority to regulate emerging communication services. Just as the unchecked growth of cable television in the 1960s threatened to degrade local television broadcasting, the prospect of call blocking by VoIP providers under the new intercarrier compensation rules created the possibility of circumvention of the Title II prohibition on call blocking and "risk[ed] degradation of the country's telecommunications network." *Order* ¶973 (JA at 756) (internal quotation marks omitted). Thus, the ban on call blocking by VoIP providers was

"reasonably ancillary to the effective performance of the [FCC's] various responsibilities" under Title II to ensure the widespread availability of reliable telephone service. *See Southwestern Cable*, 392 U.S. at 178.

CONCLUSION

The Court should dismiss VON's petition for review because VON has waived its claims. If the Court reaches the merits, it should deny VON's petition for review.

Respectfully submitted,

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July 29, 2013

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, Type Style Requirements, Privacy Redaction Requirements

1. This brief complies with the type-volume limitation of the Second Briefing Order. It does not exceed 15% of the size of the brief to which it is responding. The Voice On The Net Coalition, Inc. Principal Brief was certified to be 4,094 words in length. Therefore, the FCC may file a response brief up to 4,708 words in length. This brief contains 4,088 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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.

3. All required privacy redactions have been made.

/s/ James M. Carr
James M. Carr
Counsel

July 29, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

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

BRIEF OF INTERVENOR NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION IN SUPPORT OF THE FCC'S RESPONSE TO THE VOICE ON THE NET COALITION, INC. BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the National Telecommunications Cooperative Association ("NTCA") respectfully submits the following corporate disclosure statement:

The NTCA is a trade association whose membership is composed of nearly 900 small operating companies providing communications services in rural areas, many of whom may be substantially affected by the outcome of the proceeding. The NTCA membership includes operating subsidiaries of Telephone and Data Systems, Inc. (NYSE:TDS; NASDAQ: TDA), Otelco, Inc. (NASDAQ: OTT), New Ulm Telecom, Inc. (NASDAQ: NULM), LICT Corporation (NASDAQ: LICT), Hickory Tech Corporation (NASDAQ: HTCO), Horizon Telecom, Inc. (NASDAQ: NRZCA, HRZCB), and Shenandoah Telecommunications Company (NASDAQ: SHEN), all of which are either publicly traded or owned by publicly traded companies. The stock or equity value of these publicly held members could be affected by the outcome of the proceeding. No other members are subsidiaries of publicly-traded companies.

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GLOSSARY

Act, or 1934 Act	Communications Act of 1934, as amended
APA	Administrative Procedure Act
FCC, or Commission	Federal Communications Commission
ICC	Intercarrier Compensation
ILEC	Incumbent Local Exchange Carrier
JA	Joint Appendix
Notice	Further Inquiry Into Certain Issues In The Universal Service-Intercarrier Compensation Transformation Proceeding, *Connect America Fund*, Public Notice, DA-1348, 26 F.C.C.R. 11112 (2011) (JA at 349-67)
NPRM	*Connect America Fund*, FCC 11-13, Notice of Proposed Rulemaking, 26 F.C.C.R. 4554 (2011) (SA at 1-289)
NTCA	Intervenor National Telecommunications Cooperative Association
Order	*Connect America Fund*, FCC 11-161, Report and Order and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 17663 (2011) (JA at 390-1150)
SA	Supplemental Joint Appendix
VoIP	Voice over Internet Protocol
VON	Petitioner Voice on the Net Coalition

SUMMARY OF ARGUMENT

VON erroneously asserts that the FCC failed to provide sufficient notice under the APA to apprise interested parties that it was considering adopting a VoIP anti-blocking rule, including for one-way VoIP, and that the *Order* did not justify the FCC's assertion of ancillary authority over VoIP providers that could be classified as information service providers rather than telecommunications carriers.

These claims lack merit. The FCC's notices, when read together, provide the requisite notice and the resulting rule was a logical outgrowth of those notices. Similarly, the *Order*, as a whole, explains how the FCC's VoIP anti-blocking rule is covered by the Act's jurisdictional grant and is reasonably ancillary to the FCC's statutory responsibilities regarding intercarrier compensation.

ARGUMENT

I. The FCC Provided Notice that it Could Address Blocking of VoIP Calls

VON misreads the APA's standard when it argues that the FCC failed to afford VoIP providers an opportunity to comment on its proposed anti-blocking rule. VON asserts that the FCC "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." VON Br. at 10. Neither statement is accurate. VON admits that the *NPRM* refers to call-blocking, *Id.* at 10-11; and the *NPRM* notified the public that the FCC's reforms could apply to non-interconnected VoIP providers. *NPRM* ¶612 (SA at 194). VON appears to argue that the FCC never linked its discussion of call-blocking with its discussion of VoIP. But the APA only requires the final rule to "be a logical outgrowth" of the notice, FCC Br. at 10, and a notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule" provided it "fairly apprise[s] interested parties of the issues involved." *Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977).

In part, the FCC aimed its ICC reforms at minimizing disputes between providers. *NPRM* ¶604 (SA at 191). The FCC sought comment on reforms to improve the signaling information used for billing between providers ("phantom traffic"), *Id.* ¶620-34 (SA at 198-204); to reduce disputes regarding traffic stimulation in calling areas where ICC rates were high, *Id.* ¶635-677 (SA at 204-220); and to require payment of ICC on VoIP traffic for which the FCC previously had not definitively imposed an obligation. *Id.* ¶608-619 (SA at 191-

198). The FCC explained that its pre-existing anti-blocking policy factored into industry disputes because carriers had to deliver calls – even if an ICC obligation was disputed or rates appeared unfair. *Id*. ¶654 (SA at 210-211). The FCC rejected proposals to allow blocking of calls lacking proper signaling information. *Id*. ¶634 n.980 (SA at 204). It also proposed applying revised signaling rules to interconnected VoIP. *Id*. ¶37 (SA at 17). The FCC thus provided notice that its anti-blocking rule was integral to its ICC reforms.

The FCC also asked whether its "focus on [interconnected] VoIP is too narrow" and whether ICC obligations should apply to "other forms of VoIP traffic." *Id*. ¶612 (SA at 194). It subsequently sought comment on proposals to apply ICC obligations and new signaling rules to "one-way" VoIP traffic. *Notice* at 11128 (JA at 365). One-way VoIP providers were plainly notified that the FCC was considering including their traffic within its ICC regime, which could include an anti-blocking rule.

II. The FCC Justified its Ancillary Authority to Prohibit Call-Blocking by VoIP Providers

VON claims that the *Order* "failed completely" to explain how the VoIP anti-blocking rule satisfies the two-part test governing the FCC's exercise of ancillary authority. VON Br. at 17. But the FCC is

not required to explain its analysis in the specific paragraphs where it announced the anti-blocking rule. *See Nader v. FCC*, 520 F.2d 182, 193 (D.C. Cir. 1975) (Court "must uphold the [FCC's] decision if, upon consideration of the entire record, the agency's rationale reasonably may be perceived.") *See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). (Court should "uphold a decision of less than ideal clarity if … agency's path may reasonably be discerned.")

The FCC's anti-blocking rule falls within its jurisdiction under Title I of the Act because VoIP is plainly "communications by wire or radio." *See Order* ¶954 (JA at 740-741); FCC Br. at 16.[1] The *Order* further explains that VoIP providers "offer[] service over broadband networks[,]" ¶63 (JA at 412), which fall within the FCC's "general jurisdictional grant." *Comcast v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010).

The *Order* contains sufficient discussion of the anti-blocking rule and the FCC's statutorily mandated responsibilities to satisfy the

[1] The *FNPRM* explains that because "it is 'communications by wire or radio,' the Commission clearly has subject matter jurisdiction over …packetized voice traffic." ¶1357 (JA at 858-59).

"reasonably ancillary" prong of *Comcast*. The *Order* recaps the long-standing no-blocking rule, responding to concerns that providers might block calls to "address perceived unreasonable [ICC] charges." *Order* ¶973 (JA at 755-756). The FCC extended the anti-blocking rule to VoIP providers because they "likewise could have incentives to avoid such rates." *Id*. ¶974 (JA at 756).

VON still denies any linkage with the effective performance of the FCC's "specific statutorily-mandated responsibilities." VON Br. at 17. VON's claim is inconsistent with the standard requiring the Court to "consider[] … the entire record" *Nader*, 520 F.2d at 193, and affirm "if the agency's path may reasonably be discerned." *Bowman*, 419 U.S. at 286. That path is visible where the FCC asserts authority over ICC rates.

The FCC is obligated to "ensure that interstate switched access rates remain just and reasonable, as required under section 201(b) of the Act." *Order* ¶662 (JA at 602). "Section 201 has long conferred authority on the Commission to regulate interstate communications to ensure that 'charges, practices, classifications, and regulations' are 'just and reasonable.'" *Id.* ¶771 (JA at 646-647). The FCC also relied on Sections 251(b)(5) and 251(g) to exercise authority, including

transitional authority over ICC rates for all telecommunications, including VoIP traffic. *Id.* ¶¶954, 956-57 (JA at 740-741, 742-744).

The FCC's anti-blocking rule for VoIP, as part of its ICC reform, is plainly in furtherance of its statutorily mandated responsibilities regarding ICC rates and thus is reasonably ancillary to the effective performance of its duties.

Respectfully submitted,

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July 29, 2013

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, Type Style Requirements, and Privacy Redaction Requirements

1. This brief contains 981 words of the 21,400 words the Court allocated for the briefs of intervenors in support of the FCC in its October 1, 2012 Order Consolidating Case No. 12-9575 with Other FCC 11-161 Cases, Establishing Windstream Briefing Schedule, and Modifying Intervenor Participation. The intervenors in support of the FCC have complied with the type-volume limitation of that order because their briefs, combined, contain a total of fewer than 21,400 words, excluding the parts of those briefs exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 Century Schoolbook font.

3. All required privacy redactions have been made.

/s/ Tamar E. Finn
July 29, 2013

CERTIFICATE OF DIGITAL SUBMISSION
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The Combined Responses of Federal Respondents and Supporting Intervenor to the Voice On The Net Coalition, Inc. Principal Brief were scanned for viruses with Symantec Endpoint Protection, version 11.0.7200.1147, updated on July 29, 2013, and according to the program are free of viruses.

/s/ James M. Carr
James M. Carr
Counsel

July 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, I caused the foregoing Combined Responses of Federal Respondents and Supporting Intervenor to the Voice On The Net Coalition, Inc. Principal Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

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July 29, 2013