
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

UNCITED BRIEF OF INTERVENOR NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION IN SUPPORT OF THE FCC'S
RESPONSE TO THE VOICE ON THE NET COALITION, INC. BRIEF
(DEFERRED APPENDIX APPEAL)

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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 representing approximately 880 small rural telephone companies and cooperatives, many of whom may be affected by the outcome of this proceeding. Four of those telephone company members (Mosinee Telephone Company, LLC; Oakwood Telephone Company; Salem Telephone Company; and Tenney Telephone Company) are operating subsidiaries of Telephone and Data Systems, Inc. (NYSE: TDS; TDS.S) and may be affected by the outcome of this proceeding. Effective March 1, 2013, NTCA and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) merged under the name NTCA. The following members of OPASTCO that were not also members of NTCA before the merger are also either publicly traded or owned by publicly traded companies: Hickory Tech Corporation (HTCO); NTELOS Holdings Corp (NTLS); and New Ulm Telecom, Inc. (NULM).

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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, <i>Connect America Fund</i> , Public Notice, DA-1348, 26 F.C.C.R. 11112 (2011)
NPRM	<i>Connect America Fund</i> , FCC 11-13, Notice of Proposed Rulemaking, 26 F.C.C.R. 4554 (2011)
NTCA	Intervenor National Telecommunications Cooperative Association
Order	<i>Connect America Fund</i> , FCC 11-161, Report and Order and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 17663 (2011)
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. (JA-). 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. (JA-). The FCC sought comment on reforms to improve the signaling information used for billing between providers (“phantom traffic”), *Id.* ¶620-34 (JA-); to reduce disputes regarding traffic stimulation in calling areas

where ICC rates were high, *Id.* ¶¶635-677 (JA-); and to require payment of ICC on VoIP traffic for which the FCC previously had not definitively imposed an obligation. *Id.* ¶¶608-619. (JA-). 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. (JA-). The FCC rejected proposals to allow blocking of calls lacking proper signaling information. *Id.* ¶¶634 (JA-) n.980. (JA-) It also proposed applying revised signaling rules to interconnected VoIP. *Id.* ¶¶37. (JA-). 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. (JA-). It subsequently sought comment on proposals to apply ICC obligations and new signaling rules to “one-way” VoIP traffic. *Notice* at 11128. (JA-). 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-); FCC Br. at 16.¹ 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-).

Order further explains that VoIP providers “offer[] service over broadband networks[,]” ¶63, 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 “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-). The FCC extended the anti-blocking rule to VoIP providers because they “likewise could have incentives to avoid such rates.” *Id.* ¶974. (JA-).

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-). “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-). 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-).

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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CERTIFICATE OF COMPLIANCE

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

1. This brief contains 999 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.

4. This brief was scanned for viruses with Symantec Endpoint Protection, version 11, updated on April 24, 2013, and according to the program is free of viruses.

/s/ Tamar E. Finn

April 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2013, I caused the foregoing 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.

/s/ Tamar E. Finn

April 24, 2013