



N A R U C  
National Association of Regulatory Utility Commissioners

**NOTICE VIA ELECTRONIC FILING**

*June 11, 2015*

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

**RE: *Notice of Oral Ex Parte filed in the proceedings captioned:***

***In the Matter(s) of Numbering Policies for Modern Communications, WC Docket 13-97, IP-Enabled Services, WC Docket 04-36, Telephone Number Requirements for IP-Enabled Services Providers, WC Docket 07-243, Telephone Number, Portability, CC Docket 95-116, Developing a Unified Inter-carrier Compensation Regime, CC Docket 01-92, Connect America Fund, WC Docket 10-90, Numbering Resource Optimization, CC Docket 99-200***

Secretary Dortch:

Today, I am forwarding this letter to **Gigi B. Sohn**, Counselor to the Chairman, **Daniel Alvarez**, Legal Advisor to the Chairman, **Rebekah Goodheart**, Wireline Legal Advisor to Commissioner Clyburn, **Priscilla Delgado Argeris**, Senior Legal Advisor to Commissioner Rosenworcel, **Travis Litman**, Legal Advisor to Commissioner Rosenworcel, **Nicholas Degani**, Wireline Legal Advisor to Commissioner Pai, **Amy Bender**, Wireline Legal Advisor to Commissioner O'Rielly, and **Matthew DelNero**, Wireline Competition Bureau Chief.

There are five basic points to this written ex parte:

- [1] ***Voice over Internet Protocol (VoIP) providers are “telecommunications carriers” under the Act’s explicit definitions and are already eligible to obtain numbers as per 47 U.S.C. § 251 of the Communications Act.***
- [2] ***The D.C. Circuit’s decision in Verizon v. FCC (Verizon)<sup>1</sup> makes very clear, the classification, whether as a “telecommunications service” or an “information service”, sets limits on the FCC authority.***
- [3] ***The Commission cannot allocate numbers to VoIP providers and at the same time refuse to apply the statutory definitions.***
- [4] ***If the Commission is going to assert that VoIP providers are not telecommunications carriers under the plain language of the Communications Act, it must explain how it reaches that conclusion.***
- [5] ***The FCC must assure that VoIP providers have the incentive and obligation to cooperate fully with impacted NARUC member commissions.***

<sup>1</sup> *Verizon v. Federal Communications Commission*, D.C. Circuit Case 11-1355 (Jan. 14, 2014), at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf).

As discussed, *infra*, any explanation of why it is granting numbers to VoIP providers that eschews classification will necessarily require the FCC to explain its actions against the backdrop of not only the *Verizon* decision cited, *supra*, but also the FCC's own analysis in the *Open Internet Order*,<sup>2</sup> at ¶¶ 361–375, as well as the 10<sup>th</sup> Circuit's decision in *IN RE: FCC11-161*, 753 F.3d 1015, at 1048-1049 (10<sup>th</sup> Cir. 2014).

For well over ten years, NARUC has been filing comments in this and related proceedings pointing out that VoIP providers continue to seek favored treatment via direct access to numbers without complying with ALL the obligations that their competitors face.

From a policy perspective, it makes absolutely no sense for the FCC to continue to favor “one competitor over another – based on the technology used to provide a service.”<sup>3</sup>

NARUC is not the only organization to come to this conclusion.

Earlier in this docket, **AARP, Common Cause, Consumer Federation of America, Consumers Union, Free Press, Public Knowledge, the National Consumer Law Center** and the **National Association of State Consumer Advocates** joined NARUC in comments stating:

Assigning telephone numbers to providers who are not State-certificated telecommunications carriers undermines the Congressionally-established structure of the Telecom Act. State and Federal roles on consumer protection, interconnection, and number management are clearly defined in the Act specifically for “telecommunications carriers”, which would be circumvented by lack of a defined legal authority over providers that have chosen not to be “telecommunications carriers.” The signatories to this letter are concerned that signaling its intent to allow direct assignment of numbers to non-carriers would trigger a “Race To the Bottom” in the American communications market - where providers of all kinds race to self-define their regulatory status to obtain desired privileges or avoid unwanted burdens of regulations (e.g. – number spoofing, harassing or fraudulent calling and the consumer complaints and enforcement that follow).<sup>4</sup>

<sup>2</sup> *In the Matter of Protecting and Promoting the Open Internet*; GN Docket No. 14-28; Report and Order on Remand, Declaratory Ruling, and Order (rel. Mar. 12, 2015) (*Open Internet Order*).

<sup>3</sup> See the June 1, 2012 NARUC Notice of Oral Ex Parte filed in the proceedings captioned: *In the Matter of Administration of the North American Numbering Plan*, CC Docket 99-200; *Corecomm-Voyager, Inc., Dialpad Communications, Inc., Enhanced Services d/b/a Pointone, Frontier Communications of America, Inc., Nuvio Corporation, Qwest Communications Corporation, RNK, Inc. d/b/a RNK Telecom, Inc., Unipoint, Voex, Inc., Vonage Holdings Corp., & Wiltel Communications, LLC Petitions for Limited Waiver of Section 52.15(G)(2)(I) of the Commission's Rules Regarding Access to Numbering Resources*. [DA 11-2074], available online at: <http://apps.fcc.gov/ecfs/document/view?id=7021921482>.

<sup>4</sup> See April 11, 2013 Ex Parte Letter to Chairman Genachowski, Commissioner McDowell, Commissioner Clyburn, Commissioner Pai, and Commissioner Rosenworcel, from AARP, Common Cause, CFA, Free Press, Consumers Union, Public Knowledge, National Consumer Law Center, NASUCA and NARUC, addressing the Orders on Circulation in Docket CC No. 99-200 – “Vonage Waiver Petition” – in the proceedings captioned: *In the Matter of Administration of the North American Numbering Plan*, CC Docket 99-200; *Corecomm-Voyager, Inc., Dialpad Communications, Inc., Enhanced Services d/b/a Pointone, Frontier Communications of America, Inc., Nuvio Corporation, Qwest Communications Corporation, RNK, Inc. d/b/a RNK Telecom, Inc., Unipoint, Voex, Inc., Vonage Holdings Corp., & Wiltel Communications, LLC Petitions for Limited Waiver of Section 52.15(G)(2)(I) of the Commission's Rules Regarding Access to Numbering Resources*, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7022269120>

NARUC comments have also pointed out at length that the express terms of the statute require VoIP services to be classified as telecommunications services.<sup>5</sup>

More recently, as the association outlined in this docket last year,<sup>6</sup> the D.C. Circuit's *Verizon* decision made clear, the classification, whether as a "telecommunications service" or an "information service", sets very real limits on the FCC authority. NARUC's March 4, 2014 comments point out that the FCC cannot provide numbering resources to entities that do not qualify as "telecommunications service" providers under the statute. The FCC's recent *Open Internet Order* unequivocally explicates VoIP's classification as a *telecommunications service*.

***The FCC lacks authority to provide carriers that do not provide "telecommunications services" with direct access to numbering resources.***

The FCC's April 18, 2013 Order<sup>7</sup> ("*Numbering Order*") established a trial to allow unclassified non-carrier interconnected Voice over Internet Protocol ("VoIP") providers to obtain direct assignment of number resources. After the trial period, the Wireline Competition Bureau released a Report ("*Report*").<sup>8</sup> According to the *Report*: "[T]here may be some confusion regarding parties' rights and obligations with respect to porting and interconnection, but the Bureau believes that these matters could be addressed in pending rulemakings addressing these topics."<sup>9</sup> But the request to grant direct access to numbers to unclassified services is facially inconsistent with the scheme established by Congress in the Telecommunications Act. The *Report* assumes the FCC has authority to impose obligations on telecommunications carriers to port numbers to non-carriers, *i.e.*, specifically VoIP services the Commission has explicitly stated in more than one order that it has deferred classification as telecommunications service providers.<sup>10</sup> However, the *Verizon* Court indicates that the FCC lacks authority to

<sup>5</sup> See, July 14, 2014 filed *Reply Comments on the VXCX High Definition Voice request for a Notice of Inquiry*, in GN Docket No. 13-5, at: <http://www.naruc.org/Filings/14%200707%20NARUC%20VCFX%20HC%20Reply%20comments.pdf>. See July 17, 2013 *NARUC Notice of Oral Ex Parte filed In the Matter(s) of Wireless E911 Location Accuracy Requirements*, PS Docket 07-114; *PSHSB Inquiry Into Circumstances of Major 911 Outage Centered in Washington State April 9-10, 2014*, PS Docket 14-72, *Protecting and Promoting the Open Internet*, GN Docket 14-28; *VXCX Petition for Notice of Inquiry on the Migration to HD Voice*, GN Docket 13-5, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=6018211438>. NARUC respectfully requests that both comments, and the arguments they contain, be incorporated by reference in the docket of this proceeding.

<sup>6</sup> See, March 4, 2014 *Comments of the National Association of Regulatory Utility Commissioners on the Report on the Six-Month Trial of Direct Assignment of Number Resources to Interconnected Voice Over Internet Protocol Providers*, online at: <http://apps.fcc.gov/ecfs/document/view?id=7521088290> and filed: *In the Matter(s) of Numbering Policies for Modern Communications*, WC Docket No. 13-97, *IP-Enabled Services*, WC Docket No. 04-36); *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243; *Telephone Number Portability*, CC Docket No. 95-116; *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92; *Connect America Fund*, WC Docket No. 10-90; *Numbering Resource Optimization*, CC Docket No. 99-200.

<sup>7</sup> *In the Matter of Numbering Policies for Modern Communications*, Notice of Proposed Rulemaking, Order and Notice of Inquiry, WC Dkt. 13-97 *et al.* (rel. Apr. 18, 2013), at: <http://apps.fcc.gov/ecfs/document/view?id=7022304844>.

<sup>8</sup> *Number Policies for Modern Communications*, Report, DA 14-118, WC Docket No. 13-97 *et al.* (rel. Jan. 31, 2014), available online at: <http://apps.fcc.gov/ecfs/document/view?id=7521070329>.

<sup>9</sup> *Report*, ¶1. See also *Report* at ¶28 ("To the extent that porting and interconnection disputes arose, the Bureau believes that additional clarity and guidance can be given in pending rulemakings addressing those topics.")

<sup>10</sup> The *Report*, at ¶14, justifies the porting obligations imposed on telecommunications carriers by saying that "carriers have been required to port numbers to VoIP providers" before. The 2007 *VoIP Number Portability Order* is distinguishable on several grounds, including that it only requires carriers to port to other carrier partners, and it includes an explicit statement that only carriers can be directly assigned telephone numbers. See, *e.g.*, *Ex Parte Letter from James C. Falvey*,

extend the benefits and obligations of number portability to providers that are not telecommunications carriers and do not offer telecommunications services.<sup>11</sup> In 47 U.S.C §153(37), Congress only requires “telecommunications carriers” to port numbers – and then - only to other “telecommunications carriers.”<sup>12</sup> “Information service” providers, the classification most often erroneously claimed by VoIP providers, were given no such obligations.<sup>13</sup> Consistent with this statutory framework, the obligation to pay for the cost of number portability is also assigned only to “telecommunications carriers” pursuant to section 251(e)(2).<sup>14</sup>

The definitions of “number portability” and “telecommunications carrier” confirm Congress’ scheme. “Number portability” means “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience *when switching from one telecommunications carrier to another.*”<sup>15</sup>

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*Counsel for CLEC Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 99-200, at 2-8 (May 24, 2012) (“May 24 CLEC Coalition Ex Parte”), available online at: <http://apps.fcc.gov/ecfs/document/view?id=7021920082>. The FCC cannot bootstrap authority from prior orders to create an industry-wide framework that is explicitly precluded by express statutory language. Cf. Verizon, at 45.*

<sup>11</sup> Moreover, perceptions, whether accurate or not, about any deficits in State jurisdiction caused by the Commission’s decision to avoid classifying such services could well undermine number conservation authority the FCC has always delegated to States.

<sup>12</sup> 47 U.S.C. §153(37). In the same vein, Section 251 establishes three levels of very specific and distinct obligations for telecommunications carriers (§251(a)), local exchange carriers (§251(b)), and incumbent local exchange carriers (§251(c)). 47 U.S.C. §251.

<sup>13</sup> The definition of “*telecommunications services*” is a functional definition that is focused narrowly on the characteristics of the service provided-NOT the technology used to provide the service. Indeed, there is no reference to technology in these key definitions. In so doing, the definitions in the statute take a technology-neutral approach to defining services. The FCC, in implementing those definitions, has not. It is hard to argue that any business that provides real time point-to-point voice services, for a fee, to the public is NOT a “telecommunications service” carrier. The 1996 Act defines the term “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,” and defines “telecommunications” as “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.” Currently, real-time voice service, provided for a fee “directly to the public,” is a “telecommunications service” because it is “the transmission, between or among points specified by the user, of information” . . . in this case – the user’s voice . . . “of the user's choosing, without change in the form or content of the information as sent and received.” The 1996 Act makes no distinction based on whether the provider was previously in another related business regulated under another “silo” (e.g., cable) or uses a different packet-based technology/communications protocol, i.e., IP. vs. time division multiplexing (or TDM), to deliver the voice service. And yet for years, the agency has been unable, under different administrations, to provide needed certainty by classifying voice services, provided using VoIP, as either a “telecommunications service” or an “information service.” The result has been regulatory arbitrage that undermined the intercarrier compensation system and is the *raison d'être* for the call completion problems that continue to plague rural constituents. It is important to understand that the Act does not treat “information services” as a distinct category. Rather, Congress explicitly made it a residual catchall for things that are not “telecommunications services.” Specifically, the Act says that term means: “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, *but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.*” 47 U.S.C. §153(20) (emphasis added), January 31, 2013 *Comments of the National Association of Regulatory Utility Commissioners on House Energy and Commerce Committee White Paper “Modernizing the Communications Network*, at page 4, online at: <http://www.naruc.org/Testimony/140131NARUCFINALcommentstoHouseEC96whitepaper10457pm.pdf>.

<sup>14</sup> 47 U.S.C. §251(e)(2).

<sup>15</sup> 47 U.S.C. §153(37).

And, “telecommunications carrier” can only be, as per the dictates of section 153(51), a provider of “telecommunications services.”<sup>16</sup> Section 153(51) also specifies that “[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . . .”<sup>17</sup> Number portability is limited to permitting users of “telecommunications services” to retain existing numbers “when switching from one telecommunications carrier to another.”<sup>18</sup> Congress simply did not extend the duty to provide number portability to or to port to providers that are not “telecommunications carriers.”<sup>19</sup>

The definition of telecommunications carrier reinforces this point: “A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . . .” 47 U.S.C. §153(51) (emphasis added). Clearly, number portability is limited to porting numbers to *telecommunications carriers* that offer *telecommunications services*.<sup>20</sup>

Moreover, the FCC is not free to rely upon more general authority granted elsewhere to impose obligations flatly inconsistent with very specific statutory provisions on numbering obligations. An agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear.<sup>21</sup> The Commission is limited to implementing the statutory regime clearly dictated and delineated by Congress. *Id.* (rejecting “the introduction of a whole new regime of regulation (or of free-market competition), which . . . is not the one that Congress established.”)

The D.C. Circuit’s *Verizon* case rejected the FCC’s reliance on general Section 706 authority to impose common carrier regulation specifically precluded by section 153(51), finding the FCC cannot utilize its section 706 authority:

in a manner that contravenes any specific prohibition contained in the Communications Act. *See Open Internet Order*, 25 F.C.C.R. at 17969 ¶119 (reiterating the Commission’s disavowal of ‘a reading of Section 706(a) that would allow the agency to trump specific mandates of the Communications Act.’); *see also D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (“General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.”) . . . .the

<sup>16</sup> 47 U.S.C. §153(51).

<sup>17</sup> 47 U.S.C. §153(51).

<sup>18</sup> 47 U.S.C. §153(37). See also *May 24 CLEC Coalition Ex Parte*.

<sup>19</sup> 47 U.S.C. §153(37). When Congress intended the Commission to have the authority to expand a right or obligation to providers that were *not* telecommunications carriers, the statute provided that flexibility. See, e.g., 47 U.S.C. §254(d) (emphasis added) (“Any other *provider* of interstate telecommunications may be required to contribute . . .”).

<sup>20</sup> There really is no other way to read these provisions. However, read this way allows some to argue that States lack jurisdiction over the underlying service as a matter of federal law. To the extent any court accepts that reading, Section 601(c)(1) of the act specifies that where a provision can be read in more than one way, it must be construed to avoid preemption.

<sup>21</sup> *MCI Telecomm’ns Corp. v. AT&T*, 512 U.S. 218, 229, 114 S.Ct. 2223, 2231 (1994) (citing *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113, 102 L. Ed. 2d 408, 109 S. Ct. 414 (1988); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Commission would violate the Communications Act were it to regulate broadband providers as common carriers.<sup>22</sup>

Similarly, the FCC is precluded from relying on broader sources of authority to ignore or override the definition of number portability in section 153(37). By requiring the porting of numbers to providers that the Commission has not classified as telecommunications carriers (and that provide services that the Commission has not classified as telecommunications services), “such treatment would run afoul of section 153(51),”<sup>23</sup> and also of section 153(37), which limits number portability to transfers from one carrier to another.

The *Numbering Order* offers three statutory bases for direct assignment of number resources to non-carriers. *In the context of a “trial,” these rationales were not ripe for review.* That is not the case for any final order. The FCC cannot rely on those broader grants of authority to implement a scheme that distorts the specific dictates of sections 251(b), 251(e), 153(37), and 153(51) of the Act.<sup>24</sup>

The *Numbering Order* first relies upon the FCC’s broad authority to administer numbers under section 251(e)(1). However, this authority must be read in conjunction with section 251(e)(2), which requires that the costs of both number administration and number portability be borne by “all telecommunications carriers,” as well as the definitions listed *supra*. It is clear from the face of the statute, that numbers were intended to be assigned only to telecommunications carriers – not information service providers. The broader power to administer numbers cannot be applied in a way that conflicts directly with the more specific requirements and duties specified in, *inter alia*, sections 251(b), 251(e), 153(37) and 153(51).<sup>25</sup>

The *Numbering Order* also relies on the FCC’s ancillary authority under Title I to impose numbering obligations on both telecommunications carriers and interconnected VoIP providers.<sup>26</sup> Section 4(i) provides that the FCC may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>27</sup> As noted, the requirements imposed are in fact “inconsistent with this chapter” and are therefore not within the Commission’s ancillary authority. To argue, as the Commission has, that its new numbering scheme is “reasonably ancillary to the Commission’s performance of . . . statutory duties . . . under sections 251 . . . of the Act,” is a *non sequitur*.<sup>28</sup> That proposed new scheme is flatly inconsistent with section 251 which only applies obligations on and confers rights to telecommunications carriers.

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<sup>22</sup> *Verizon v. FCC*, *mimeo* at 45.

<sup>23</sup> *Id.*

<sup>24</sup> *Verizon v. FCC* at 45. The obligations of number portability apply only to those classified as “telecommunications carriers,” and the right to receive a number port is only conferred on “telecommunications carriers,” and only in connection with “telecommunications services.” 47 U.S.C. §153(37). In addition, a carrier can *only* be treated as a common carrier to the extent it is engaged in providing “telecommunications services.” 47 U.S.C. §153(51). These provisions make no mention of imposing requirements or conferring rights on providers and services in regulatory limbo.

<sup>25</sup> *Verizon v. FCC* at 45.

<sup>26</sup> *Numbering Order*, ¶85.

<sup>27</sup> 47 U.S.C. §154(i).

<sup>28</sup> *Numbering Order*, ¶85.

Finally, the Commission has relied on Section 706(a) of the Act to advance its new numbering scheme. This is precisely the argument that the D.C. Circuit in *Verizon* rejected: the Commission cannot rely on the broader authority of Section 706(a) to contravene the more specific mandates of sections 251(b), 251(e), 153(37), and 153(51).<sup>29</sup>

***The FCC's Net Neutrality Order eliminates any argument that VoIP offered to the public for a fee is not a Telecommunications Service***<sup>30</sup>

The FCC analysis of broadband Internet access service in the *Open Internet Order*<sup>31</sup> eliminates any argument that VoIP is not a *telecommunications service*. While the order attempts to limit its determination to broadband Internet access service, there are no factual differences or flexibility in the statutory scheme that allows the Commission to do so.

In finding broadband Internet access service (*BIAS*) is a *telecommunications service*, the FCC examined in detail the exact arguments that have heretofore been used to *claim* that VoIP is not a telecommunications service.

Specifically, the FCC

- states unequivocally “IP conversion functionality is akin to traditional adjunct to basic services, which fall under the telecommunications systems management exception;”<sup>32</sup>
- examines carefully the use of DNS and caching and determines that both fall within the telecommunications systems management exception and are not inextricably intertwined with telecommunications;<sup>33</sup>

<sup>29</sup> *Verizon v. FCC* at 45.

<sup>30</sup> Indeed, as NARUC has pointed out elsewhere, the 10<sup>th</sup> Circuit effectively confirmed *prior to the reclassification of broadband earlier this year*, that the FCC, by permitting carriers providing only broadband and IP-based voice services access to federal universal service funds, funds only available under 47 U.S.C. § 214 to carriers providing telecommunications services, categorized VoIP services as telecommunications services. See attached AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF THE MICHIGAN PUBLIC SERVICE COMMISSION, filed August 19, 2014, in *Michigan Bell Telephone Company, et al. v. John D Quackenbush, Greg R. White, and Sally A. Talbert*, Case No. 1:14-cv-00416 United States District Court, Western District of Michigan, at pages 8-13. Note also the arguments at 8-13 that the Act’s function approach requires fee-based real time voice services to be classified as telecommunications services. A copy of this brief was filed as a separate attachment to this written ex parte. However, as a convenience to online readers, it is also available online at this link: <http://www.naruc.org/Filings/18%200819%20Michigan%20IP%20Interconnection%20NARUC%20Amicus%20Brief%20final%20final.pdf>.

<sup>31</sup> *In the Matter of Protecting and Promoting the Open Internet*; GN Docket No. 14-28; Report and Order on Remand, Declaratory Ruling, and Order (rel. Mar. 12, 2015) (*Open Internet Order*).

<sup>32</sup> *Open Internet Order* at ¶ 375. The phrase “telecommunications systems management exception” refers to the Congressional exclusion of information processing and storage used for certain purposes from the definition of “information service”. *Id.* at n. 974.

<sup>33</sup> *Id.* at ¶¶ 366 – 371 (DNS) and ¶ 372 (caching).

- specifically finds it is not necessary for users to know the geographic location of the end points of the communication and that the addition of packet headers to enable transmission does nothing to alter the form or content of the user’s information;<sup>34</sup>
- rejects arguments that “Internet-based services” cannot be “adjunct-to-basic services” that the FCC has a long history of including under the telecommunications system management exception.<sup>35</sup>

Far more than the FCC’s reclassified BIAS service, fee-based VoIP services are the archetype telecommunications service. The primary service provided by VoIP is real-time voice communications between two parties. It is the functional equivalent of telephone service that has been regulated as a common carrier service since the Communications Act was first adopted in 1934 and as a “telecommunications service” since that definition (which is itself “functional” and does not reference any technology) was added by Congress in the Telecommunications Act of 1996. Both broadband Internet access service and VoIP are terms that have been defined by the Commission without reference to the statutory terms adopted by Congress in the Communications Act.<sup>36</sup>

The Commission has been using these administratively crafted definitions to avoid applying the statutory definitions, but the courts have long been clear that they are not at liberty to do so. A 1976 D.C. Circuit decision, cited repeatedly in the *Open Internet Order*, specifies:

[W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve... A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. Thus we affirm the Commission’s classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers. If practice and experience show the SMRS to be common carriers, then the Commission must determine its responsibilities from the language of the Title II common carrier provisions.<sup>37</sup>

There is nothing in the statutory definitions of “telecommunications,” “telecommunications service” or “telecommunications carrier” in the Communications Act that grants or implies that the Commission has discretion to apply or not apply those definitions. In fact, the definition of “telecommunications carrier” directly addresses the issue by stating that the term means “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226).”

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<sup>34</sup> *Id.* at ¶¶ 361 – 362.

<sup>35</sup> *Id.* at ¶ 369.

<sup>36</sup> See 47 C.F.R. § 8.11(a) (definition of broadband Internet access service, which is redesignated as 47 C.F.R. § 8.2 by the *Open Internet Order*) and 47 C.F.R. § 9.3 (definition of interconnected Voice over Internet Protocol). The 2010 amendments to the Communications Act which added “interconnected VoIP service” and “non-interconnected VoIP service” to the definitions in section 3 of the Communications Act both refer back to the Commission’s regulatory definition at 47 C.F.R. § 9.3. Unlike the definition of “telecommunications carrier” however, Congress in 2010 did not include any language excluding “interconnected VoIP service” or “non-interconnected VoIP service” from the other statutory definitions or from being treated as a common carrier. See 47 U.S.C. §§ 153(25) and (36). Further, section 716(f) of the Communications Act makes clear that “interconnected VoIP service” can be a “telecommunications service” subject to section 255 of the Act. 47 U.S.C. § 617(f).

<sup>37</sup> *National Ass’n of Regulatory Utility Com’rs. v. F.C.C.*, 525 F.2d 630, 643-4 (D.C. Circuit 1976) (footnotes omitted).

The definition continues “[a] telecommunications carrier shall be treated as a common carrier under this Act... except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.”<sup>38</sup> As the Commission noted repeatedly in the *Open Internet Order* an offering is a telecommunications service “by virtue of its functions.”<sup>39</sup> The function of VoIP is voice communications in real time – i.e. the transmission of the user’s information without change in the form or content – the very definition of “telecommunications.” Anyone offering VoIP to the public is offering telecommunications to the public – the definition of “telecommunications service” is therefore a “telecommunications carrier.”

Because VoIP providers are telecommunications carriers under the statutory definitions they are already eligible to obtain numbers under section 251 of the Communications Act. The Commission cannot allocate numbers to VoIP providers and at the same time refuse to apply the statutory definitions. If the Commission is going to assert that VoIP providers are not telecommunications carriers under the plain language of the Communications Act, it must explain how it reaches that conclusion.

***The FCC must assure that VoIP providers have the incentive and obligation to cooperate fully with impacted NARUC member commissions.***

State Commissions receive voluminous and direct feedback on specific area code/NPA exhausts from the public. Moreover, State commissions play a crucial role in number conservation efforts – a role that has unquestionably slowed the rate of area code exhaust across the country. NARUC and the States presented a fairly unified front for several years pointing out that including this “trial” in any proposed rulemaking – on its face prejudices several crucial issues. However, NARUC’s opposition did not prevent the FCC from permitting the “trials.”

One thing is clear. For any adjustment to the existing regime to have a chance of success, the FCC must specifically require VoIP providers to be responsive to State requests and instructions as a condition to access to numbers. The limited actions by trial participants today, demonstrate a not-unexpected lack of cooperation.

Respectfully Submitted,

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<sup>38</sup> 47 U.S.C. § 153(51).

<sup>39</sup> *Open Internet Order* at ¶¶ 363 and 384.