



June 11, 2015

Notice of Ex Parte

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

Re: *In the Matter of Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, CC Docket 99-200; *Connect American Fund, et al.*, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket No. 10-208; Technology Transitions Task Force, GN Docket No. 13-5; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; *Comment Sought on the Technological Transition of the Nation's Communications Infrastructure*, GN Docket No. 12-353; *Numbering Policies for Modern Communications*, WC Docket No. 13-97; *IP-Enabled Services*, WC Docket No. 04-36; *Telephone Number Requirements for IP-Enabled Service Providers*, WC Docket No. 07-243; *Rural Call Completion*, WC Docket No. 13-39

Dear Ms. Dortch:

On behalf of NTCA—The Rural Broadband Association (“NTCA”), I am writing to express urgent concern with respect to the recent announcement that the Federal Communications Commission (the “Commission”) will consider a Report and Order at the upcoming June 18, 2015 meeting to allow direct access to numbering resources for non-carrier interconnected Voice over Internet Protocol (“VoIP”) providers. NTCA urges the Commission to reconsider this decision given the adverse legal and practical implications of providing such direct access to non-carriers.

As the industry as a whole struggles with the problem of rural call completion, the implementation of the IP Transition, and a Local Number Portability Administrator Transition, introducing self-declared, non-certificated VoIP providers into the porting, routing, interconnection, and billing ecosystems will only add to the current disarray. Moreover, the Commission’s discretion to implement such a novel regulatory regime is limited by statute. In particular, if the Commission were to grant the direct assignment of number resources to non-carrier VoIP providers without also affirming that their services are telecommunications services and the providers are telecommunications carriers, it cannot imbue them with porting rights that are reserved for telecommunications services and telecommunications carriers by statute.

A. The Act Confers Certain Rights and Imposes Certain Obligations Only On Telecommunications Carriers

Previous commenters have explained why the Commission cannot legally confer porting rights on non-carrier IVoIP providers unless IVoIP providers are acknowledged as telecommunications service providers.¹ NTCA agrees with those commenters and will therefore only briefly highlight why doing so would violate, for example, the *Congressional* definition of “number portability” at 47 U.S.C. §153(37). In the Communications Act, Congress sought to address competing interests, arriving at a careful balancing of rights and obligations limited to certain classes of providers.² By way of example, local exchange carriers have the obligation to provide “number portability” pursuant to Section 251(b)(2).³ Number portability is defined to apply only and explicitly to “users of telecommunications services” and requires porting to other “telecommunications carriers” --

The term “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*.⁴

In addition, “telecommunications carrier” is defined in Section 153(51) as any provider of “telecommunications services.”⁵ Section 153(51) further provides 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”⁶ Because the Commission has so far refused to apply the statutory requirements applicable to “telecommunications service” and “telecommunications carriers” to IVoIP providers, the Commission cannot grant the rights Congress provided to telecommunications service users and telecommunications carriers to IVoIP providers.

¹ See, e.g., *Numbering Policies for Modern Communications*, WC Docket No. 13-97, Comments of 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 (Mar. 4, 2014)) (“NARUC Comments”); *Numbering Policies for Modern Communications*, WC Docket No. 13-97, Comments of Bandwidth.com, Inc. on the Report of the Wireline Competition Bureau on the Six-Month Technical Trial of Direct Assignment of Number Resources to Interconnected Voice over Internet Protocol Providers (Mar. 4, 2014) (“Bandwidth Comments”).

² Congress also carefully balanced state and federal roles to ensure that both would play an active regulatory role.

³ 47 U.S.C. § 251(b)(2).

⁴ 47 U.S.C. § 153(37) (emphasis added).

⁵ 47 U.S.C. §153(51).

⁶ *Id.*

That the Commission cannot do so is consistent with the finding of the D.C. Circuit in *Verizon v. FCC*.⁷ The Commission cannot rely upon more general authority granted by other statutory provisions to impose obligations that are inconsistent with more specific statutory structure specifically delineated, *inter alia*, in the statutory definitions of “number portability” and “telecommunications carrier.” An agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear.⁸ The Commission is limited to implementing the statutory regime clearly dictated and delineated by Congress.⁹

The D.C. Circuit in *Verizon v. FCC* relied on this principle in rejecting the Commission’s reliance on Section 706¹⁰ authority to impose on non-carriers common carrier regulation the Court said was precluded by another provision of law. The Court found that the Commission cannot rely on Section 706:

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.”)

We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.¹¹

⁷ *Verizon v. Federal Comm’ns Comm.*, 740 F.3d 623 (D.C. Cir. 2014)(“*Verizon v. FCC*” or “*Verizon*”).

⁸ *MCI Telecomm’ns Corp. v. AT&T*, 512 U.S. 218, 229, 114 S.Ct. 2223, 2231 (1994) (citing *PittstonCoal 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)).

⁹ *Id.* (rejecting “the introduction of a whole new regime of regulation (or of free-market competition), which . . . is not the one that Congress established.”)

¹⁰ 47 U.S.C. § 1402. The Commission’s subsequent reclassification of broadband Internet access service, discussed further below, addresses the Court’s concern.

¹¹ *Verizon v. FCC*, at 45.

Number portability is limited to permitting “users of telecommunications services” to retain existing numbers “when switching from one telecommunications carrier to another.”¹² Because Congress has spoken directly to the matter, telecommunications carriers cannot be required under the statute to port numbers to other providers that are not telecommunications carriers.¹³ Congress simply did not extend the duty to provide number portability to include ports to providers that are not “telecommunications carriers,”¹⁴ nor does the statute contemplate permitting entities that are not “telecommunications carriers” to participate in a regime whose express purpose is to facilitate the provision of “telecommunications services.”

Moreover, as NARUC has explained, Section 251(e)(1), Title I ancillary authority, and Section 706 all fail to provide a viable legal basis for granting access to number resources to IVoIP providers, particularly in light of the D.C. Circuit’s *Verizon* decision.¹⁵ NTCA concurs with these arguments but will not repeat them here. NTCA would, however, make the following additional points regarding the limits of the Commission’s authority in this regard.

B. IVoIP Offered to the Public is a Telecommunications Service

The Commission’s recent analysis of broadband Internet access service in the *Open Internet Order*¹⁶ should put to rest any argument that IVoIP is not a telecommunications service. While the Commission limited its determination to broadband Internet access service, there is no factual difference or flexibility in the statutory scheme that should allow the Commission to treat VoIP differently given the analysis employed.

Specifically, in determining that broadband Internet access service is a telecommunications service, the Commission examined in detail the same sorts of arguments that have been used to claim that IVoIP is not a telecommunications service. In the course of its examination, the Commission stated unequivocally that “IP conversion functionality is akin to traditional adjunct to basic services, which fall under the telecommunications systems management exception.”¹⁷ The

¹² 47 U.S.C. § 153(37).

¹³ 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) (“Any other *provider* of interstate telecommunications may be required to contribute”) (emphasis added).

¹⁴ *See* 47 U.S.C. § 153(37).

¹⁵ NARUC Comments at 10-11. *See also* Bandwidth Comments at 6-8.

¹⁶ *In the Matter of Protecting & Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, 62 Communications Reg. (P&F) 1 (rel. Mar. 12, 2015)(“*Open Internet Order*”).

¹⁷ *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.

Commission also examined carefully the use of DNS and caching and determined that it concluded both fall within the telecommunications systems management exception and are not inextricably intertwined with telecommunications.¹⁸ Further, the Commission found that it was 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.¹⁹ Finally, the Commission rejected arguments that "Internet-based services" could not be "adjunct-to-basic services" that the Commission had a long history of including under the telecommunications system management exception.²⁰ Put another way, in the context of examining broadband, it found that everything that has been used in the past to justify treating VoIP as potentially something other than a telecommunications service did not justify treating broadband as anything other than a telecommunications service.

Indeed, if anything, VoIP is even more quintessentially a telecommunications service than broadband Internet access 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 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.²¹

The Commission has been using these administratively crafted definitions to avoid confronting the strictures of statutory definitions, but the courts have long been clear that the agency is not at liberty to do so. The Court of Appeals, in a decision cited repeatedly by the Commission in the *Open Internet Order*, put it succinctly when it said

Further, we 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

¹⁸ *Id.* at ¶¶ 366 – 371 (DNS) and ¶ 372 (caching).

¹⁹ *Id.* at ¶¶ 361 – 362.

²⁰ *Id.* at ¶ 369.

²¹ *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. § 618(f).

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.²²

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 on policy-driven grounds. 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).”²³ 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.”²⁴ As the Commission noted several times in the *Open Internet Order* an offering is a telecommunications service “by virtue of its functions.”²⁵ The function of IVoIP 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 IVoIP to the public is offering telecommunications to the public—the definition of “telecommunications service” – is therefore a “telecommunications carrier.”

If the Commission intends to pursue direct assignment to IVoIP providers, it should simply acknowledge that IVoIP providers are “telecommunications carriers,” thereby giving them the same rights and obligations under the Communications Act as all other carriers. The Commission cannot, however, allocate numbers to IVoIP providers and at the same time refuse to apply the statutory definitions (or pick and choose, without following proper classification and subsequent forbearance processes, which statutory provisions apply). Conversely, if the Commission is going to operate on the basis that IVoIP providers are not telecommunications carriers under the plain language of the Communications Act, it must explain how it reaches that conclusion. As explained

²² *National Ass’n of Regulatory Utility Com’rs. v. F.C.C.*, 525 F.2d 630, 644 (D.C. Cir. 1976) (footnotes omitted).

²³ 47 U.S.C. § 153(51).

²⁴ *Id.*

²⁵ *Open Internet Order* at ¶¶ 363 and 384.

above, to the extent IVoIP providers are not telecommunications carriers, they are not eligible to obtain numbers under section 251.²⁶

C. The Commission Has Not Adequately Addressed Critical Issues That Could Affect NTCA Members and Other Carriers

NTCA is opposed to the addition of IVoIP providers to the carrier ecosystem without clear guidelines and rules of the kind that apply to all other carriers operating in that ecosystem. Based on ongoing issues with rural call completion and phantom traffic, there is, if anything, a need for better definition and discipline of traffic exchanged between certificated carriers. Adding a host of self-declared IVoIP providers to the ecosystem may only increase traffic identification and many other challenges for NTCA members and others throughout that ecosystem.

One area that could be of concern is intercarrier compensation. When the Commission established the transition to bill and keep, it explicitly recognized the need for a gradual transition: “this transition will help minimize disruption to consumers and service providers by giving parties time, certainty, and stability as they adjust to an IP world and a new compensation scheme.”²⁷ By allowing the direct assignment of numbers to non-carriers, the Commission could be unduly accelerating the transition to bill and keep. Non-carriers have no statutory obligations with respect to intercarrier compensation and there is no regulatory framework to support complaints against such carriers. This could lead to confusion at best, nonpayment by IVoIP providers, and a *de facto* acceleration of bill and keep. In addition, the Commission has not established what compensation obligations will apply, both in terms of switched access and reciprocal compensation, for a carrier exchanging traffic with a non-carrier IVoIP provider. These issues are difficult for smaller carriers to address today, but they would be much more clearly defined if the Commission continued to limit direct access to number resources to carriers.

The Commission also has not identified how it will protect against discrimination, particularly in the area of interconnection. Carriers know what their interconnection rights are vis-à-vis other carriers because they have been clearly defined in the Act. By contrast, carriers will

²⁶ Congress has affirmatively chosen not to grant “interconnected VoIP service” providers any specific rights under the Communications Act. Instead Congress imposed only obligations, including E911 and accessibility for individuals with disabilities. Thus Congress has spoken directly to the issue and the Commission and the courts must abide by that decision. Moreover, the fact that the Commission may have chosen to impose additional obligations on VoIP providers is irrelevant. The Commission cannot bootstrap the authority to grant common carrier rights to non-carriers by applying common carrier obligations.

²⁷ *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, FCC 11-16, 26 F.C.C. Rcd. 17663, 17932, ¶ 798 (2011).

presumably have no right to demand direct interconnection with non-carriers, and large carriers will be at liberty to discriminate and enter into private, preferred arrangements with IVoIP providers (or punish others by denying interconnection). The Commission could solve this by declaring that IVoIP providers are subject to the same interconnection rules and requirements as carriers. But of course that begs the question why the Commission is establishing a new non-carrier regulatory regime in the first instance. At this stage, it can no longer be to promote entry of IVoIP providers because they are now commonplace. IVoIP providers must be required to compete with carriers on a level playing field and within a nondiscriminatory regulatory framework.

And while number assignment trials may have indicated limited concerns in these regards, it is important to note that the construct of the trials may have helped to mitigate such concerns. The trials were constrained to discrete locations and a limited set of numbers, and—it being a trial—providers were incented to be on their best behavior. No such safeguards are likely to (or can) exist once the floodgates are opened.

There is also a series of additional, critical questions that the Commission has not answered to date. Many state commissions do not have jurisdiction over certain IP services unless they are telecommunications services under the Communications Act, so there is no mechanism to ensure that IVoIP providers will have the financial, managerial, and technical capacity to provide services. That leaves only the Commission to attempt to handle quality control (and also enforcement) for the entire nation, an untenable task even if the Commission were to establish somehow jurisdiction to hear such complaints. Another issue to consider is whether non-carriers will share the cost of number administration? Certainly, the Commission will have to impose such obligations on non-carriers or it would permit IVoIP providers to free ride on carrier payments.²⁸

As the Supreme Court has previously indicated, the Commission can modify or waive rules, “But what we have here goes well beyond that. It is effectively the introduction of a whole new regime of regulation (or of free market competition), which may well be a better regime but is not the one that Congress established.”²⁹ In this case, it is not even clear yet that it is a better regime.

²⁸ Section 251(e)(2) directs that “the cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all *telecommunications carriers* on a competitively neutral basis...” 47 U.S.C. § 251(e)(2) (emphasis added). The Commission would need to identify under what authority it could impose number portability and numbering administration costs on IVoIP providers if they are not telecommunications carriers.

²⁹ *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

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As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceedings. Please direct any questions regarding this matter to the undersigned.

Sincerely,

/s/ Michael R. Romano
Michael R. Romano
Senior Vice President – Policy

cc: Daniel Alvarez
Amy Bender
Nicholas Degani
Rebekah Goodheart
Travis Litman