

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter 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 Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Connect America Fund)	WC Docket No. 10-90
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Petition of Vonage Holdings Corp. for Limited Waiver of Section 52.15(g)(2)(i))	

**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**

I. INTRODUCTION

On April 18, 2013, the Commission adopted its *Numbering Trial Order*¹ establishing the ability for non-carrier interconnected Voice over Internet Protocol (“VoIP”) providers to submit proposals for limited direct assignment and utilization of number resources as an exception to the

¹ *Numbering Policies for Modern Communications*, Notice of Proposed Rulemaking, Order and Notice of Inquiry, WC Docket No. 13-97 *et al.* (rel. Apr. 18, 2013)(“*Numbering Trial Order*”).

rules that require that numbers only be assigned to telecommunications carriers (“Numbering Trials”). Then, as required by the *Numbering Trial Order*, the Wireline Competition Bureau released its final Report on January 31, 2014 (“*Bureau Report*”)² analyzing the information submitted from the approved Numbering Trials. Bandwidth.com, Inc. (“Bandwidth”) concurs with the conclusion of *Bureau Report* which recognizes that the trials effectively demonstrated how carrier/non-carrier partnerships function to enable telephone number utilization while highlighting the considerable legal and policy challenges that must be resolved before non-carriers could obtain direct access to numbering resources without significant risk of creating problems for existing services and with the upcoming *IP Transition*.³

In the same way that SBCIS has done with its underlying carrier, f/k/a SBC⁴, the trials demonstrated that other enhanced service providers (“ESPs”) can partner with underlying carriers too. Irrespective of the discriminatory nature of the relief sought, the Numbering Trials demonstrate that ultimately ESPs must still partner with carriers to have viable and compliant service offerings.⁵ Further, the Numbering Trials considered together with other recent events related to the *IP Transition*, starkly demonstrate that numbering administration is inherently embedded in the core of the Commission’s *IP Transition* initiative.⁶ One intervening event in

² *Number Policies for Modern Communications*, Report, DA 14-118, WC Docket No. 13-97 *et al.* (rel. Jan. 31, 2014).

³ *Bureau Report* at para. 28.

⁴ See generally, *Administration of the North American Numbering Plan*, CC Docket No. 99-200, Order, 20 FCC Rec 2957 (2005) (“*SBCIS Waiver Order*”).

⁵ *Bureau Report* at para. 27 [The *Bureau Report* captures the confusing and fundamentally discriminatory nature of the proposal in the *Facilities Readiness* section in particular; where for example it states: “Vonage recommends that the Commission expressly recognize that interconnected VoIP providers may demonstrate facilities readiness by showing the combination of an agreement between that underlying carrier and the relevant incumbent LEC.”]

⁶ *Technology Transitions et al.*, GN Docket No. 13-5 *et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, FCC 14-5 at para. 152 (rel. Jan. 31, 2014) (“*IP Transition*” or “*IP Transition Order*”).

particular, which speaks to the controlling legal issues at stake in these waiver proceedings, was the *Verizon v. FCC* decision from the D.C. Circuit Court of Appeals.⁷ *Verizon v. FCC* demonstrates that the legal classifications of the Act⁸ matter. So too here, the question of how to successfully reform the numbering regime is bound by the legal classifications of the Act as well. Moreover, the trials and subsequent events demonstrate that granting non-carriers access to numbers separately from the *IP Transition* would cause considerable dispute and confusion.⁹ With the trials now complete, Bandwidth looks forward to proceeding with the *IP Transition* comprehensively within the legal bounds of the Act.

II. SPECIAL TREATMENT OF VOIP PROVIDERS AS DE FACTO CARRIERS FOR NUMBERING PURPOSES IS DISCRIMINATORY

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

In the Act Congress balanced multiple competing interests to arrive at a regulatory framework under which there are certain rights and obligations that are expressly limited to particular classes of providers. For example, telecommunications carriers have the obligation to port numbers pursuant to section 153(37), but the same section only requires number porting to

⁷ *Verizon v. Federal Communications Commission*, D.C. Cir., No. 11-1355, (Jan. 14, 2014) (“*Verizon v. FCC*”).

⁸ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996) (“Act”).

⁹ See e.g. Letter from Brita D. Strandberg, Counsel to Vonage Holding Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45 (filed February 12, 2014)(explaining that Vonage has been unable to establish IP interconnections due in significant part to AT&T’s position on terminating access applicable to VoIP traffic.) (“*Vonage EO Access Ex Parte*”); and Letter from Jeffrey S. Lanning, Vice President – Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 13-97, et. al.(filed Nov. 15, 2013) (“*CenturyLink Numbering Trial Ex Parte*”).

other telecommunications carriers.¹⁰ Consistent with this statutory framework, ILEC's obligation to interconnect extends only to "telecommunications carriers" according to section 251(c)(2) and the obligation to pay for the cost of number portability is also assigned only to "telecommunications carriers" pursuant to section 251(e)(2).¹¹

The statutory definitions of "number portability" and "telecommunications carrier" are consistent with this framework and are now particularly relevant in light of *Verizon v. FCC*.

Number portability is defined as follows:

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*.¹²

Furthermore, "telecommunications carrier" is defined by statute, section 153(51), as any provider of "telecommunications services."¹³ 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"¹⁴

Number portability is limited to permitting users of "telecommunications services" to retain existing numbers "when switching from one telecommunications carrier to another."¹⁵

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

¹⁰ 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.

¹¹ 47 U.S.C. §§251(c)(2) and (e)(2).

¹² 47 U.S.C. §153(37).

¹³ 47 U.S.C. §153(51).

¹⁴ 47 U.S.C. §153(51).

¹⁵ 47 U.S.C. §153(37). *See also* May 24 CLEC Coalition Ex Parte.

carriers.¹⁶ Congress simply did not extend the duty to provide number portability to ports to providers that are not “telecommunications carriers.”¹⁷ It is worth noting that 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 . . .”).

B. The Commission’s Authority is Limited By the Express Language of the Statute

The Commission cannot rely upon more general authority granted the Commission 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.¹⁸ The Commission is limited to implementing the statutory regime clearly dictated and delineated by Congress.¹⁹

In its *Verizon v. FCC* decision the D.C. Circuit rejected the Commission’s reliance on the broad authority of section 706 authority to impose common carrier regulation specifically precluded by section 153(51) based upon this principal. The Court held that the Commission could not utilize its section 706 authority:

¹⁶ 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 . . .”).

¹⁷ 47 U.S.C. §153(37).

¹⁸ *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)).

¹⁹ *Id.* (rejecting “the introduction of a whole new regime of regulation (or of free-market competition), which . . . is not the one that Congress established.”)

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.²⁰

Just as the Commission could not read section 706(a) in a manner inconsistent with section 153(51), so too the Commission is precluded from relying on broader sources of authority in a manner that would distort 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),”²¹ and also of section 153(37), which limits number portability to transfers from one carrier to another.

C. The Commission’s Prior Justifications for Non-Carrier Porting Separate and Apart from Telecommunications Carriers and Telecommunications Carrier Partners Contravene the Statute’s Explicit Requirements

In the *Numbering Trial Order*, the Commission offered three statutory bases for direct assignment of number resources to non-carriers. In light of the longstanding Supreme Court precedent of *MCI v. AT&T*, as reflected in *Verizon v. FCC*, the Commission cannot rely on these

²⁰ *Verizon v. FCC* at 45.

²¹ *Id.*

broader grants of authority to implement a number portability scheme that expands and distorts the clear and specific dictates of sections 251(b), 251(e), 153(37), and 153(51) of the Act.²²

In the *Numbering Trial Order*, the Commission first relies upon its broad authority to administer numbers under section 251(e)(1). First, 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.” In other words, numbers are intended to be assigned only to telecommunications carriers. In addition, the broader power to administer numbers cannot be applied in such a way that it would conflict with the more specific and explicit requirements and rights detailed in, *inter alia*, sections 251(b), 251(c), 251(e), 153(37) and 153(51).²³

The Commission has also relied on its ancillary authority under Title I of the Act to impose numbering obligations on telecommunications carriers and interconnected VoIP providers.²⁴ 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.”²⁵ As noted, the requirements imposed are in fact “inconsistent with this chapter” in several respects and are therefore not within the Commission’s ancillary authority. Thus far, the Commission has relied on Section 706(a) of the Act as the to advance its numbering reform efforts. Critically, this is the very position the D.C. Circuit just rejected: the

²² *Verizon v. FCC* at 45. It is also irrelevant that broadband had been classified as an information service, while interconnected VoIP provider service is as yet unclassified. 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.

²³ *Verizon v. FCC* at 45.

²⁴ *Numbering Trial Order*, ¶85.

²⁵ 47 U.S.C. §154(i).

Commission cannot rely on the broader authority of Section 706(a) to contravene the more specific mandates of sections 251(b), 251(c), 251(e), 153(37), and 153(51).²⁶

III. NUMBERING IS INSEPARABLY INTERTWINED WITH THE *IP TRANSITION*

On January 31, 2014 the Commission released its *IP Transition Order*. The Order sets out a myriad of important findings, policy statements and ambitious objectives. Among the critical components of the *IP Transition Order* is a *FNPRM re: Numbering Research*.²⁷ Pursuant to the *FNPRM* the Commission's Chief Technologist has announced the first *Numbering Testbed Workshop* to be held on March 25, 2014.²⁸ Appropriately, the *IP Transition* and the *FNPRM re: Numbering Research* acknowledge that numbering and traffic routing are at the core of the complex technical, operational and legal challenges that confront the industry as it transitions to a new regulatory paradigm. The *IP Transition* is underway in the marketplace and the Commission has said that it intends to oversee this paradigm shift in a manner that enables innovation and competition while maintaining critical consumer protections and universal service.²⁹

In order to accomplish its stated goals, the Commission must avoid introducing unnecessary confusion whenever possible. The *Bureau Report* represents a clear opportunity for the Commission to both avoid doing harm and embrace industry cohesion by explicitly focusing the industry's efforts toward comprehensive reform. Undertaking piecemeal rulemaking efforts,

²⁶ *Verizon v. FCC* at 45.

²⁷ *IP Transition Order* at ¶ 201 (“*FNPRM re: Numbering Research*”).

²⁸ Public Notice, *FCC Chief Technologist To Host Numbering Testbed Workshop*, WC Docket No. 13-97 (rel. Feb. 28, 2014). (“*Numbering Testbed Workshop*”).

²⁹ See e.g. *IP Transition Order*, Statement of Chairman Thomas E. Wheeler.

like non-carrier access to telephone numbers, in parallel with comprehensive reform will be counterproductive.

In the *Bureau Report* the bureau made a point to note the limited scope of the trial among other issues.³⁰ Illustrating this limitation, subsequent to the *Bureau Report* Vonage “explained that it has been seeking to negotiate direct IP interconnection agreements with incumbent LECs, but that these agreements have been hampered by AT&T’s misinterpretation of the Commission’s VoIP access charge rules.”³¹ While Bandwidth agrees that AT&T is misinterpreting the plain meaning of the Commission’s “symmetry rule”, clearly the Commission’s piecemeal numbering efforts are causing additional disputes that threaten to undermine rules that should be firmly established rather than advancing the goals of the *IP Transition*.

IV. CONCLUSION

The Commission should not expend further resources on proposals that fail to confront the fact that the Act and critical rules that flow from it depend upon defined legal classifications. The Act dictates that providers must be legally classified as a telecommunications carriers to obtain and utilize telephone numbering resources directly. Until the Commission explicitly acknowledges this fact, there will be legal disagreements and corresponding operational confusion such as those highlighted in the trials. Indeed, as the Commission wisely concluded in the *SBCIS Waiver Order*, numbering should be addressed in a comprehensive, non-discriminatory fashion.³² Now that the numbering trials have concluded, proceeding further in an ad hoc manner creates a grave risk of undermining well-established Commission precedent and the obvious import of the Act. Further, doing so invites sharp disagreement and confusion as

³⁰ *Bureau Report* at ¶ 24.

³¹ *Vonage EO Access Ex Parte*, p. 1.

³² *SBCIS Waiver Order* at ¶ 11.

highlighted on a small scale by the numbering trials themselves. Rather, because numbering is intricately intertwined within the core of the *IP Transition* there is no compelling reason to continue to attempt to resolve non-carrier requests for special numbering status separately from the Commission's considerable efforts to comprehensively advance the industry toward complete adoption of all-IP networks and services.

Respectfully submitted,

_____/s/____

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