

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

<i>In the Matter of</i>)	
)	
<i>Numbering Policies for Modern Communications</i>)	WC Docket No. 13-97
)	
<i>IP-Enabled Services</i>)	WC Docket No. 04-36
)	
<i>Telephone Number Requirements for IP-Enabled Services Providers</i>)	WC Docket No. 07-243
)	
<i>Telephone Number Portability</i>)	CC Docket No. 95-116
)	
<i>Developing a Unified Intercarrier Compensation Regime</i>)	CC Docket No. 01-92
)	
<i>Connect America Fund</i>)	WC Docket No. 10-90
)	
<i>Numbering Resource Optimization</i>)	CC Docket No. 99-200

**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**

The National Association of Regulatory Utility Commissioners (“NARUC”) respectfully submits these comments in response to the January 31, 2014 released *Report*¹ of the six month technical trial in which interconnected Voice-over-Internet-Protocol providers, providing services indistinguishable from their already classified

¹ *Report*, DA 14-118, *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 Intercarrier Compensation Regime*, CC Docket No. 01-92; *Connect America Fund*, WC Docket No. 10-90; *Numbering Resource Optimization*, CC Docket No. 99-200 (rel. January 31, 2014), available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-14-118A1.doc.

and designated common carrier competitors, were permitted to reserve telephone numbers for their end-users directly from the numbering administrator.

In paragraph 8 of the *Report*, the Commission specifically sought comment on the Report's findings.

NARUC, a nonprofit organization founded in 1889, has members that include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,² energy, and water utilities.

Congress and the courts³ have consistently recognized NARUC as a proper entity to represent the collective interests of the State public utility commissions. In the Federal Telecommunications Act,⁴ Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.⁵ The States' interest in conserving numbering resources is obvious.

² NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. *See, e.g.*, 47 U.S.C. § 252 (1996).

³ *See United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985). *See also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

⁴ *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

⁵ *See* 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; *Cf.* 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). *Cf. NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system.”)

Indeed, NARUC is on record numerous times in the proceeding – and in related proceedings -- pointing out that subject VoIP providers continue to seek favored treatment via direct access to numbers without complying with ALL the obligations that their competitors face. We recently filed comments in the related “trials” dockets very applicable to this *Report* – comments that point out the obvious:

NARUC, the States, and the industry stakeholders continue to waste significant resources, all at the ultimate expense of the taxpayer and ratepayers, on proceedings that would be unnecessary if the FCC acted (to classify fee-based VoIP services). In the context of the Trials Notice, a “real-world VoIP interconnection trial” will not help the Commission clarify the statutory basis for incumbent LECs’ duty to provide VoIP interconnection. That clarification begins and ends with an interpretation of the statute. The only evidence available strongly suggests that the biggest obstacle to establishing VoIP interconnection agreements is incumbent LECs’ unwillingness to do so—not any technical issues related to VoIP interconnection. AT&T’s “real-world wire center deregulation trial” raises the same issue. An FCC ruling on the classification of VoIP services will resolve all the “issues” that this “trial” is apparently designed to “test.” . . . Congress has already established the framework for negotiating interconnection agreements.⁶ {emphasis added}

In the same comments NARUC pointed out that the FCC must also assure, to the extent a trial is approved, that trial participants cooperate with the impacted

⁶ See, January 23, 2014 *Notice of Oral and Written Ex Partes sent to Marlene H. Dortch, FCC Secretary, from James Bradford Ramsay, National Association of Regulatory Utility Commissioners, filed in the Matter of Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, GN Docket No. 13-5, Appendix A, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7521067549>

jurisdiction.⁷ Experience to-date suggests the necessary cooperation is far from assured.⁸

And NARUC was far from alone in this very proceeding in pointing out no agency should be “favoring one competitor over another – based on the technology they use to provide a service.”⁹ 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).¹⁰

⁷ Id.

⁸ Regardless of what action the FCC proposes to take moving forward, and regardless of what any Court may do with that FCC action, the agency must nail down provisions that assure that all providers remain responsive to the jurisdictions that remain most concerned about number utilization issues, i.e., the States. See, e.g., NARUC’s March 30, 2012 Request for a Rulemaking, filed in CC Docket No. 99-200, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7521070329>.

⁹ See NARUC June 1, 2012 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>.

¹⁰ 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

In this docket also, the FCC is continuing to avoid making the one decision that would save all stakeholders much time and money. It is also a decision that the FCC *must* address before proceeding. The D.C. Circuit’s recent decision in *Verizon v. Federal Communications Commission* (“*Verizon*”)¹¹ reinforces the requirements of the plain text of the federal Telecommunications Act: The FCC simply lacks authority to extend the benefits of number portability to providers that are not classified as “telecommunications carriers,” e.g., do not offer “telecommunications services.”

In support of these comments, NARUC states as follows:

DISCUSSION

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 Order¹² (“*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*”).¹³ According to the

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>

¹¹ *Verizon v. Federal Communications Commission*, D.C. Circuit Case No. 11-1355 (Jan. 14, 2014) (“*Verizon*”), online 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).

¹² *In the Matter of 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), online at: <http://apps.fcc.gov/ecfs/document/view?id=7022304844>.

¹³ *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>.

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.”¹⁴ This proposed action 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 yet to classify as “telecommunications service” providers.¹⁵ However, the FCC lacks authority to extend the benefits and obligations of number portability to providers that are not telecommunications carriers and do not offer telecommunications services.¹⁶ In 47 U.S.C §153(37), Congress only requires “telecommunications carriers” to port numbers – and then - only to other “telecommunications carriers.”¹⁷ “Information service” providers, the classification most often erroneously claimed by VoIP providers, were given no such obligations.¹⁸

¹⁴ *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.”)

¹⁵ 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, 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.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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-

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).¹⁹

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.*”²⁰

And, “telecommunications carrier” can only be, as per the dictates of section 153(51), a provider of “telecommunications services.”²¹ Section 153(51) also specifies that “[a]

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., I.P. 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>.

¹⁹ 47 U.S.C. §251(e)(2).

²⁰ 47 U.S.C. §153(37).

²¹ 47 U.S.C. §153(51).

telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services”²²

Number portability is limited to permitting users of “telecommunications services” to retain existing numbers “when switching from one telecommunications carrier to another.”²³ Congress simply did not extend the duty to provide number portability to or to port to providers that are not “telecommunications carriers.”²⁴

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*.²⁵

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.²⁶

²² 47 U.S.C. §153(51).

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

²⁴ 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”).

²⁵ 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.

²⁶ *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)).

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 recently 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 Commission would violate the Communications Act were it to regulate broadband providers as common carriers.²⁷

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),”²⁸ and also of section 153(37), which limits number portability to transfers from one carrier to another.

²⁷ *Verizon v. FCC, mimeo* at 45.

²⁸ *Id.*

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. 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.²⁹

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).³⁰

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.³¹ Section 4(i) provides that the FCC may “perform

²⁹ *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.

³⁰ *Verizon v. FCC* at 45.

³¹ *Numbering Order*, ¶85.

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.”³²

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*.³³ That proposed new scheme is flatly inconsistent with section 251 which only applies obligations on and confers rights to telecommunications carriers.

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).³⁴

CONCLUSION

For the foregoing reasons, NARUC respectfully urges the FCC to proceed to use this proceeding as the vehicle for making the long overdue classification. Before proceeding further in this docket, the FCC should classify both nomadic and fixed VoIP service providers seeking access to number resources as

³² 47 U.S.C. §154(i).

³³ *Numbering Order*, ¶85.

³⁴ *Verizon v. FCC* at 45.

“telecommunications service” or “information service” providers – in which case all can discover if the Court’s agree with the classification and, if the FCC chooses “information services”, if the agency does indeed have some new “ancillary” authority to provide such “providers” with access to numbering resources. In any case, in any “subsequent” rulemakings suggested by the Report, the Commission must assure that VoIP providers have the incentive and obligation to cooperate fully with impacted NARUC member commissions.

Respectfully Submitted,

James Bradford Ramsay
GENERAL COUNSEL
National Association of Regulatory
Utility Commissioners
1101 Vermont Ave, NW Suite 200
Washington, DC 20005
Phone: 202.898.2207
E-Mail: jramsay@naruc.org

March 4, 2014