

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1497

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties and intervenors appearing in this Court are listed in the opening Brief of Petitioner.

2. Rulings under review.

The order under review is *Numbering Policies for Modern Communications*, 30 FCC Rcd 6839 (2015) (JA__) (“*Order*”), released on June 22, 2015.

3. Related cases.

Respondents are not aware of any other related cases.

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GLOSSARY

1996 Act	The Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56
Act	The Communications Act of 1934, 47 U.S.C. §§ 151 <i>et seq.</i>
<i>First Number Portability Order</i>	<i>Telephone Number Portability</i> , 11 FCC Rcd 8352 (1996)
Interconnected VoIP	VoIP service interconnected with the traditional phone network that allows a user to reach and be reached by callers using a traditional telephone
LEC	Local Exchange Carrier, a traditional local telephone carrier
NANP	North American Numbering Plan, the telephone numbering system for North America
<i>NPRM</i>	<i>Numbering Policies for Modern Communications</i> , Notice of Proposed Rulemaking, 28 FCC Rcd 5842 (2013) (JA__)
VoIP	Voice Over Internet Protocol, a service that enables real-time, two-way voice communications by employing a user’s broadband connection, as opposed to the dedicated infrastructure used for traditional wireline telephone calls; in this brief, VoIP refers only to interconnected VoIP
<i>VoIP E911 Order</i>	<i>E911 Requirements for IP-Enabled Service Providers</i> , 20 FCC Rcd 10245 (2005)
<i>VoIP Number Portability Order</i>	<i>Telephone Number Requirements for IP-Enabled Services Providers</i> , 22 FCC Rcd 19531 (2007)

JURISDICTION

The order on review, *Numbering Policies for Modern Communications*, 30 FCC Rcd 6839 (2015) (JA___) (“*Order*”), was released on June 22, 2015. A summary of the *Order* appeared in the Federal Register on October 29, 2015. *See Numbering Policies for Modern Communications*, 80 Fed. Reg. 66454-01 (Oct. 29, 2015). The petition was timely filed within 60 days of that date. This Court would have jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342, except that petitioner lacks standing, as explained below.

QUESTIONS PRESENTED

Telephone numbers are essential to any telephone service provider. And the ability of consumers to retain their telephone numbers when switching providers—number portability—is essential to competition. Against this backdrop, Congress delegated “exclusive jurisdiction” to the FCC over telephone numbering. 47 U.S.C. § 251(e)(1). In the *Order*, the FCC relied on this plenary authority to allow Voice Over Internet Protocol (“VoIP”) providers to obtain phone numbers for their customers directly, rather than via a local phone service numbering partner, as was formerly the case. It also kept in place the existing duties of providers to provide number portability when customers switch to or from VoIP providers. This case presents the following issues:

1. Does NARUC have standing to challenge the *Order*, when it does not disagree with the outcome, but only the agency's legal rationale in reaching that result?

2. If NARUC has standing, does the agency's exclusive jurisdiction over telephone numbering under 47 U.S.C. § 251(e)(1) provide authority to allow VoIP providers direct access to telephone numbers, without first classifying VoIP as a telecommunications service?

3. Does the agency's exclusive jurisdiction over telephone numbering under 47 U.S.C. § 251(e)(1) provide authority to require number portability to and from VoIP providers, without first classifying VoIP as a telecommunications service?

4. Was the agency reasonable in not expanding the scope of the *Order* to address the regulatory classification of VoIP, where that issue was not necessary to the outcome of this proceeding, was not addressed in the *NPRM*, and is the subject of other pending proceedings?

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in an Addendum to this brief.

COUNTERSTATEMENT

A. FCC authority over the North American Numbering Plan

“The telephone numbering system for North America, the North American Numbering Plan (‘NANP’), was established in the 1940s by AT&T and created the familiar ten-digit dialing pattern for all telephone numbers.” *Sprint Corp. v. FCC*, 331 F.3d 952, 954 (D.C. Cir. 2003). After years of private arrangements, Congress, as part of the Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996) (“1996 Act”), amended the Communications Act, 47 U.S.C. §§ 151 *et seq.*, (“Act”) to vest in the agency “exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.” 47 U.S.C. § 251(e)(1); *see Sprint*, 331 F.3d at 954 (noting the FCC’s “exclusive authority...over all aspects of numbering administration in the United States”). Although the Act permits the FCC to delegate numbering authority to the states, it does not require it to do so, and the Commission has “retain[ed] its authority to set policy with respect to all facets of numbering administration.” *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, 19405 ¶ 19 (1996) (retaining authority to ensure a “uniform,” “efficient,” and “competitive” numbering system).

Section 251(e)(1) also requires the Commission to “create or designate one or more impartial entities to administer telecommunications numbering and to

make such numbers available on an equitable basis.” 47 U.S.C. § 251(e)(1).

Pursuant to this obligation, the Commission’s rules set out the duties of the “NANP Administrator,” a separate neutral contractor which oversees the distribution of numbers to providers that they in turn assign to customers. *See* 47 C.F.R. § 52.13.

B. Number portability

Even before the 1996 Act, the Commission emphasized the importance of allowing customers to retain their phone numbers when they switch providers. *See, e.g., Provision of Access for 800 Serv.*, 4 FCC Rcd 2824 (1989) (discussing competitive benefits of number portability for 1-800 customers). In the 1996 Act, Congress codified this duty for “local exchange carriers,” *i.e.*, local phone service providers, requiring them to provide “number portability” to their customers “in accordance with requirements prescribed by the Commission.” 47 U.S.C.

§ 251(b)(2).¹ “Congress viewed number portability as a means of encouraging competition: a customer is less likely to switch carriers if he cannot retain his telephone number.” *Cent. Texas Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 206 (D.C.

¹ The Act defines “number portability” as “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.” 47 U.S.C. § 153(37).

Cir. 2005); *see also* *CTIA v. FCC*, 330 F.3d 502, 513 (D.C. Cir. 2003) (“The simple truth is that having to change phone numbers presents a barrier to switching carriers....”).

As required by section 251(b)(2), the Commission has adopted rules requiring local exchange carriers to provide “number portability” to customers. *See* 47 C.F.R. § 52.23. However, the agency has also required other entities that are not local exchange carriers to allow customers to retain their telephone numbers, even though such entities are not required to do so under the Act. For example, in its first order implementing the Act’s number portability obligation, the FCC also required wireless phone companies—which are not classified as local exchange carriers—to port numbers, relying on sources of authority outside section 251. *See* 47 C.F.R. § 52.31; *Telephone Number Portability*, 11 FCC Rcd 8352 ¶ 5 (1996) (“*First Number Portability Order*”); *see also* *Cent. Texas Tel. Co-op.*, 402 F.3d at 206. The agency found that mandating number portability for wireless providers, by “eliminating one major disincentive to switch carriers,” would “promote competition between existing cellular carriers,...facilitate the viable entry of new providers of innovative service offerings,” and enhance competition between wireline and wireless carriers. *First Number Portability Order* ¶¶ 157-160.

The Act also provides that the “cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by

all telecommunications carriers on a competitively neutral basis as determined by the Commission.” 47 U.S.C. § 251(e)(2). The Commission interpreted the statute to require all carriers—both wireline and wireless—to share in these costs. *See Telephone Number Portability*, 13 FCC Rcd 11701, 11723-24 ¶ 36 (1998).

C. Interconnected VoIP technology and regulation

1. VoIP technology

“One of the many dramatic changes the Internet has brought to telecommunications has been the development of interconnected Voice over Internet Protocol (‘VoIP’) service, which allows a caller using a broadband Internet connection to place calls to and receive calls from other callers using either VoIP or traditional telephone service.” *Nuvio Corp. v. FCC*, 473 F.3d 302, 303 (D.C. Cir. 2006).² While a user may experience a VoIP call as very much like a traditional telephone call, *id.*, the technologies are distinct. A traditional wireline

² We use the term VoIP in this brief to refer only to interconnected VoIP, that is, VoIP service interconnected with the traditional phone network so that users can reach and be reached by users of traditional phone service.

telecommunications carrier uses a network and switches dedicated to that purpose,³ while VoIP, as the name implies, makes use of the Internet instead.⁴

Until recently, interconnected VoIP carriers normally had to partner with a local exchange carrier for two reasons. First, such partnering allowed VoIP providers to connect to the traditional phone network, and thus allow their customers to reach and be reached by traditional phone customers. Second, the Commission's rules generally made telephone numbers available only to telecommunications carriers, and partnering with a local exchange carrier allowed

³ See generally *Technology Transitions*, 29 FCC Rcd 1433, 1435 (2014) (describing “a network based on time-division multiplexed (TDM) circuit-switched voice services running on copper loops”).

⁴ See 47 C.F.R. § 9.3 (defining “interconnected VoIP service” as “a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network”).

a VoIP provider to obtain numbers for its customers.⁵ Recently, VoIP providers have been exploring technical means to interconnect without such partners, for example through Internet Protocol interconnection.⁶ *See Numbering Policies for Modern Communications*, Notice of Proposed Rulemaking, 28 FCC Rcd 5842, 5851 ¶ 14 (2013) (“*NPRM*”) (JA__).

2. Previous VoIP regulations

The Act defines two mutually-exclusive categories of communications service: “telecommunications service” and “information service.” 47 U.S.C. § 153(24), (53); *see Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005). The Act subjects “telecommunications carriers,” *i.e.*,

⁵ Section 52.15(g)(2) of the Commission’s rules limits access to telephone numbers to entities that demonstrate they are authorized to provide service in the area for which the numbers are being requested. 47 C.F.R. § 52.15(g)(2). The Commission has interpreted this rule as requiring evidence of either a state certificate of public convenience and necessity or an FCC license. *Order* ¶ 4 (JA__). Until the *Order*, such an FCC license was generally not available to VoIP providers. Thus, “[a]s a practical matter, generally only telecommunications carriers [were] able to provide the proof of authorization required under [FCC] rules, and thus able to obtain numbers directly from the Numbering Administrators.” *Id.*

⁶ Even “traditional” local and long distance calls may now be transported in part over IP Networks. *See Technology Transitions*, 30 FCC Rcd 9372, 9373 ¶1 (2015) (“Communications networks are rapidly transitioning away from the historic provision of time-division multiplexed (TDM) services running on copper to new, all-Internet Protocol (IP) multimedia networks using copper, co-axial cable, wireless, and fiber as physical infrastructure.”).

entities that offer telecommunications service, to common carrier regulation, while information services are exempt from such regulation. *Brand X*, 545 U.S. at 975.

The FCC has not classified VoIP as either a telecommunications service or an information service. *NPRM* ¶ 8 (JA___). However, it has imposed a number of duties on VoIP providers mirroring those imposed on telecommunications carriers. *See id.* (describing eight such requirements). For example, the Commission required VoIP providers to protect customers' private information, to supply 911 calling capabilities, and to contribute to the Universal Service Fund, which subsidizes telecommunications and information services for rural and high-cost areas. *See Implementation of the Telecommunications Act of 1996:*

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 22 FCC Rcd 6927, 6954–57 ¶¶ 54–59 (2007), *aff'd*, *Nat'l Cable & Telecomm. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009); *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10257–58 ¶ 24 (2005) (“*VoIP E911 Order*”), *aff'd*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538–43 ¶¶ 38–49 (2006), *aff'd*, *Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1239–41 (D.C. Cir. 2007).

D. 2007 VoIP Number Portability Order

In 2007, the Commission “extend[ed] local number portability obligations to interconnected [VoIP] providers to ensure” that their customers “may port their [NANP] numbers when changing telephone providers.” *Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531, 19537 ¶ 1 (2007) (“*VoIP Number Portability Order*”), *aff’d sub nom. Nat’l Telecomms. Coop Ass’n v. FCC*, 563 F.3d 536 (D.C. Cir. 2009). As with other number portability measures, the Commission emphasized the competitive benefits of the decision: “Allowing customers to respond to price and service changes without changing their telephone numbers will enhance competition, a fundamental goal of section 251 of the Act, while helping to fulfill the Act’s goal of facilitating ‘a rapid, efficient, Nationwide, and world-wide wire and radio communications service.’” *Id.* ¶ 17.

At the time of the 2007 *VoIP Number Portability Order*, interconnected VoIP providers were largely required to contract with a telecommunications carrier numbering partner. *See above* pp. 7-8. The Commission made clear that it was imposing number portability obligations not just on the telecommunications carrier, but also separately on the VoIP provider. *Id.* ¶ 32. Thus, a VoIP provider had “an affirmative legal obligation to take all steps necessary to initiate or allow a port-in or port-out itself or through its numbering partner.” *Id.* The Commission

also required VoIP providers to share in the costs of numbering administration, because, like wired and wireless carriers, VoIP providers benefit from and impose costs related to that administration. *Id.* ¶ 39.

As authority to impose number portability on VoIP providers and their numbering partners, the Commission cited the “plenary numbering authority” granted by section 251(e)(1). As a separate of source authority for imposing the requirement on the local exchange carrier numbering partners, the agency also relied on the “number portability” requirement of section 251(b)(2). *Id.* ¶ 22.

E. Petitions for direct access to numbering

In 2005, the FCC waived its rules to allow VoIP provider SBC Internet Services, Inc. to directly obtain telephone numbers without a local exchange carrier partner in order to “facilitate SBCIS’ ability to efficiently interconnect” to the traditional phone network, and thus promote innovation and “the delivery of advanced services.” *See Administration of the North American Numbering Plan*, 20 FCC Rcd 2957, 2957 ¶ 6 (2005). The Commission invited similarly situated entities to apply for waivers. *Id.* ¶ 4. In response, Vonage (which appears here as Intervenor) and other companies filed requests for similar relief, and Vonage renewed its request in 2011. Vonage argued that direct access to numbers, without a numbering partner, would provide a host of benefits, including reducing costs and facilitating direct IP interconnection to improve quality, features, and

troubleshooting. *NPRM* ¶ 14 (JA__). Other providers discussed similar benefits, including “eliminating [the] added costs” of contracting with numbering partners, and thereby “decreas[ing] the cost of providing VoIP services to customers” and enhancing VoIP carriers’ “ability to compete with traditional telephony providers.” *Id.* ¶15 (JA__). The Commission received some 200 comments from a variety of entities regarding the merits of such waivers. *NPRM* ¶ 97 (JA__).

In the 2013 *NPRM* that preceded the *Order* on review, the Commission issued another limited waiver in order to permit a six-month technical trial of VoIP numbering access. *NPRM* ¶ 94 (JA__). It granted Vonage and other VoIP providers direct access to telephone numbers in order to study “any potential technical complications, such as routing, intercarrier compensation, and number utilization” that might arise. *Id.* At the same time, the Commission asked for comment on whether the agency should amend its rules to allow such access permanently, including the best “number utilization and optimization requirements and industry guidelines and practices” that should apply, *id.* ¶ 22 (JA__), local number portability obligations, *id.* ¶ 57 (JA__), and the agency’s legal authority to allow direct access, *id.* ¶ 84 (JA__).

The agency stressed that it had so far promoted “important policy goals in orders addressing interconnected VoIP services, without classifying those services as telecommunications services or information services under the Communications

Act.” *Id.* ¶ 8 & n.12 (JA__); *see also id.* n.240 (JA__) (“The Commission emphasizes that it is not deciding in this Order whether VoIP is an information service or a telecommunications service.”). In the *NPRM*, the Commission did not propose to reach the issue of classification or seek comment on the issue.

F. The Order

1. Direct access to numbers

In the *Order*, the FCC amended its rules to give interconnected VoIP providers direct access to NANP telephone numbers. The six-month technical trial “demonstrated that there are no technical barriers” to allowing such access, *Order* ¶ 4, ¶¶ 9-12 (JA__, __), and the record showed that allowing direct access “will achieve a number of benefits,” *id.* ¶ 16 (JA__). Removing the need for numbering partners would “improve competition and benefit consumers” by “eliminating the middleman.” *Id.* ¶ 17 (JA__). Moreover, because VoIP providers themselves will now be “identified in...industry databases, other providers will be able to determine more easily with whom they are exchanging traffic, which should lead to...new and more efficient traffic exchange” and improved service. *Id.* ¶ 16 (JA__). The agency predicted the change would also “facilitate direct IP interconnection” and the “movement toward an all-IP network.” *Id.* ¶¶ 18-19 (JA__-__).

The FCC grounded its authority in section 251(e)(1)'s grant of “exclusive jurisdiction” over North American Numbering Plan telephone numbers. *Order* ¶ 78 (JA__). The Commission made clear that it was not classifying VoIP as either a telecommunications service subject to Title II common-carrier regulation, or as an information service, and that the issue “remains pending before the Commission.” *Id.* n.282 (JA__). But because “[n]othing in section 251(e)(1) limits access to numbers to ‘telecommunications carriers’ or ‘telecommunications services,’” the agency “conclude[d] that [it] can provide such access directly to interconnected VoIP providers, without regard to whether they are carriers.” *Id.* It further found that its obligation under the section “to ensure that numbers are available on an equitable basis is reasonably understood to include not only how numbers are made available but to whom.” *Id.*

The agency rejected NARUC's argument that section 251(e)(1) should be read as limited to the authority to provide numbers only to telecommunications carriers. *Id.* ¶¶ 79-80 (JA__). The agency pointed out that nothing in the authority granted by section 251(e)(1) was so limited. *Id.* ¶ 80 (JA__). In contrast, the agency noted that sections 251(a)-(c) explicitly apply to “telecommunications carriers,” “local exchange carriers,” and “incumbent local exchange carriers.” *Id.* ¶ 80 (JA__). The statute thus illustrated that “where—in the same statutory section—Congress wanted to limit certain rights or obligations just to

telecommunications carriers or telecommunications services, it knew how to do so.” *Id.* ¶ 80 (JA__).

2. Number portability

The *Order* also made clear that the duty to port telephone numbers to and from VoIP providers first established in the *VoIP Number Portability Order* would continue “without regard to whether the interconnected VoIP provider obtains numbers directly or through a carrier partner.” *Order* ¶ 55 (JA__). Thus, even when a VoIP partner does not use a numbering partner, the new rules would allow customers to retain their numbers when switching from a wired or wireless carrier to an interconnected VoIP carrier, or vice versa, or between VoIP carriers. *Order* ¶¶ 55, 58 (JA __, __). As authority, the agency again cited its “exclusive jurisdiction” over numbering granted by section 251(e)(1), *id.* ¶¶ 57-58 (JA __-__). The agency noted that it had already concluded in the *VoIP Number Portability Order* it had “ample authority” to impose porting requirements on local exchange carriers and interconnected VoIP providers, *id.* ¶ 54 (JA__).

Some parties had argued that the agency could not mandate number portability to and from entities that were not classified as telecommunications carriers because section 251(b)(2) requires local exchange carriers to provide “number portability,” which the Act defines in terms of a customer “switching from one telecommunications carrier to another.” *Id.* ¶ 56 (JA__). But the agency

explained that “while section 251(b)(2) expressly addresses LECs’ obligations to port numbers when their customers switch to another telecommunications carrier, it is silent about any obligations of LECs beyond that, and does not preclude reliance on other, more general authority to impose additional [number portability] obligations on LECs under section 251(e)(1), nor does it address the obligations of non-LEC wireless carriers.” *Id.* ¶ 57 (JA__). In that situation, which falls outside the scope of section 251(b)(2), the Commission read its exclusive jurisdiction over numbering as sufficient. *Id.*

This appeal followed.

SUMMARY OF ARGUMENT

I. In the *Order*, the FCC took a common-sense approach to telephone numbering, allowing VoIP providers direct access to phone numbers, thus eliminating a needless middleman and helping to drive down costs, promote competition, and improve service. And the agency kept in place existing obligations on both VoIP providers and telecommunications providers to facilitate number portability so that customers can keep their numbers when they switch to or from VoIP providers.

NARUC does not quarrel with that result. Instead, it argues that in rendering its decision, the Commission should have classified VoIP as a

“telecommunications service.” But because NARUC does not challenge the actual outcome of the proceeding, it is not injured and lacks Article III standing.

II.A. Even if NARUC had standing, it could not show that the agency’s interpretation of its authority under the Act is unreasonable. First, it was reasonable for the FCC to conclude that its “exclusive jurisdiction” over telephone numbering in the United States, 47 U.S.C. § 251(e)(1), includes the authority to decide which entities have access to numbers. Moreover, nothing in the statute forbids providing numbers to entities that may not be “telecommunications carriers,” and the agency found that allowing VoIP providers direct access to numbers would lead to increased competition, lower prices, and improved service.

NARUC’s attempts to limit the agency’s authority based on the Act’s “context” are unavailing. To be sure, section 251(e)(1) refers to “telecommunications *numbering*,” but that does not mean that the agency’s jurisdiction over the “North American Numbering Plan” is limited to numbering for telecommunications *services*. The term “telecommunications numbering” is not defined by the statute, and the agency reasonably interpreted the term to encompass services that make use of telecommunications, even if they are not defined as “telecommunications services.” In fact, an information service—the other regulatory classification that may apply to VoIP—by definition makes use of “telecommunications.” The distinction lies in whether a provider offers

telecommunications as a service in itself, or instead makes use of telecommunications to offer something more. Courts have repeatedly upheld FCC regulations that hinge on this distinction.

Nor does section 251(e)(2) limit the agency's authority by implication. That section states that the costs of numbering administration and portability must be shared by "telecommunications carriers" on an equitable basis. As the agency has made clear in past orders, this does not mean that *only* telecommunications carriers may be made to bear such costs, and VoIP providers already share in those costs. Because section 251(e)(2) is itself not limited to telecommunications carriers, it does not so limit section 251(e)(1) by implication.

II.B The FCC was likewise authorized to retain its VoIP number portability obligations. The agency reasonably read this as authorized by its plenary jurisdiction over numbering, and the policy promotes competition and customer choice, as Congress intended.

NARUC attempts to limit the agency's authority by pointing to section 251(b)(2), which imposes number portability obligations on "local exchange carriers." NARUC concludes from this that the Commission may not impose a similar requirement on an entity that is not classified as a telecommunications carrier. This mistakes a statutory floor—what the Act requires—for a regulatory ceiling on what the FCC may also require. Section 251(b)(2) does not state that

only local exchange carriers may be required to port numbers, and indeed since 1996 the FCC has required number portability for wireless carriers, which are not local exchange carriers, and so are outside the scope of section 251(b)(2). Finally, while “number portability” is defined in the Act as the ability of a customer to switch between “telecommunications carriers,” that again does not mean that the Commission cannot make a similar requirement for entities that are not “telecommunications carriers.” The Act does not unambiguously forbid such treatment in the way that it forbids, for example, applying common carriage terms to entities that are not “telecommunications carriers.” *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2007). In short, the agency’s interpretation of its authority is not foreclosed by the statute and is reasonable.

III. The Commission was reasonable in not reaching the issue of the regulatory classification of VoIP in the *Order*. The agency determined that it had authority to take action here, regardless, making it unnecessary to address that contentious and complex issue. Moreover, the issue of VoIP classification is the subject of a separate rulemaking, and is intertwined with other pending issues. And because the agency had not sought comment in the *NPRM* on how to classify VoIP, the record was poorly developed on the issue. It was therefore reasonable for the agency to choose not to expand the scope of this proceeding.

STANDARD OF REVIEW

This Court determines questions of standing de novo. *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013).

The agency's interpretation of its authority under section 251(e)(1) is subject to review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Where a "statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If so, the Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980. That standard applies equally when an agency's interpretation "concerns the scope of its regulatory authority (that is, its jurisdiction)." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1866 (2013).

NARUC's challenge to the agency's decision not to expand the scope of the proceeding to address VoIP classification is subject to "arbitrary and capricious" review. *See* 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). "Under this highly deferential standard of review," the Court "presumes the validity of agency action," and "must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004).

ARGUMENT

I. NARUC LACKS STANDING TO CHALLENGE THE ORDER.

To satisfy the “irreducible constitutional minimum of standing,” a litigant must show an actual or imminent injury that is fairly traceable to the challenged agency action and is likely to be redressed by a favorable decision. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because NARUC’s members “are not directly subjected to the regulation they challenge, standing is ‘substantially more difficult to establish.’” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (quoting *Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007)).

“When the...petitioner’s standing is not apparent from the administrative record,” its opening “brief must include arguments and evidence establishing the claim of standing.” D.C. Cir. Rule 28(a)(7) (citing *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)); *see also* Feb. 24, 2016 Scheduling Order at 2 (reiterating requirement). NARUC devotes only a single sentence to its standing, asserting without elaboration (Br. at 17) that “the Order undermines its members’ authority directly and indirectly.” This does not come close to demonstrating an injury-in-fact that is traceable to the *Order* and redressable by the Court.

NARUC addresses only two effects of the *Order*: giving interconnected VoIP providers direct access to telephone numbers and retaining VoIP number

portability obligations. *See* Br. 2, Statement of Issues No. 6. But NARUC does not challenge that result. Indeed NARUC argues at length that VoIP should be classified as a telecommunications service, subject to Title II common carriage regulation. *See, e.g.*, Br. 17-22. There is no dispute that, if the Commission did so, VoIP providers would have access to numbers and would have number portability rights and obligations, just like every other telecommunications provider. *See Order* ¶ 4 (JA___) (“[G]enerally only telecommunications carriers are able to provide the proof of authorization required under our rules, and thus able to obtain numbers directly from the Numbering Administrators.”); 47 C.F.R. § 52.23 (number portability for local exchange carriers). In other words, NARUC does not challenge the result of this *Order*, but only the rationale or legal route the FCC took to reach that result.

This Court has “made clear, however, that mere disagreement with an agency’s rationale for a substantively favorable decision does not constitute the sort of injury necessary for purposes of Article III standing.” *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 674 (D.C. Cir. 1994). As the Court has explained, “[t]hat [a petitioner] disagrees with the rationale employed by the FCC to reach a result it endorsed below does not constitute injury cognizable for standing purposes.” *See Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) (“*TRAC*”).

So too here. As NARUC states, “If the FCC had classified...I-VoIP as a *telecommunications service*, there is no question that the agency can...grant direct access to numbers.... The pre-existing rules *already allow for* [that result].” Br. 39. Thus, when NARUC alleges that the *Order* “undermines its members authority” (Br. 17), it is not alleging harm from the actual outcome of the *Order*—giving VoIP providers direct access to numbers—but only from “the rationale employed by the FCC to reach [that] result.” *TRAC*, 917 F.2d at 588. NARUC alludes to other effects that classification would have beyond numbering access. Br. 39. But a litigant’s “interest in [an agency’s] legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is ‘uncoupled’ from any injury in fact caused by the substance of the” action in question.” *Id.* Because the substantive outcome here did not injure NARUC “in concrete terms,” *Crowley Caribbean Transp.*, 37 F.3d at 674, the case should be dismissed.⁷

⁷ To the extent NARUC would frame this as a challenge to action the agency *did not* take, the Court lacks jurisdiction for the additional reason that such inaction is not a “final order[] of the Federal Communications Commission” within the meaning of the Hobbs Act. *See* 28 U.S.C. § 2342(1); Br. 1 (invoking 28 U.S.C. § 2342(1) as jurisdiction).

II. THE FCC REASONABLY FOUND IT HAS AUTHORITY TO GIVE VOIP PROVIDERS DIRECT ACCESS TO TELEPHONE NUMBERS AND TO RETAIN NUMBER PORTABILITY OBLIGATIONS.

NARUC's challenge to the agency's authority is meritless in any case.

NARUC argues that the Commission lacked authority to (1) give VoIP providers direct access to telephone numbers, and (2) require number portability to and from VoIP providers without classifying VoIP as a telecommunications service.

NARUC concedes that, because the *Chevron* framework applies to the Commission's interpretation of the scope of its authority under section 251(e)(1) (Br. 2), it must show that the "statutory text forecloses the agency's assertion of authority," (Br. 45 (quoting *City of Arlington*, 133 S. Ct. at 1871)). NARUC cannot make such a showing. The statute does not delimit the class of entities which may receive numbers, and NARUC gives no reason to think Congress would have wanted such an anticompetitive result.

A. The FCC has authority to provide VoIP providers direct access to numbers.

1. Section 251(e)(1)'s grant of "exclusive jurisdiction" vests the FCC with broad authority over numbering.

The Commission reasonably read the Act to provide the agency with authority to allow VoIP providers to obtain telephone numbers directly from numbering administrators. Section 251(e)(1) gives the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain

to the United States.” 47 U.S.C. § 251(e)(1). The section also directs the Commission to create the numbering administrator from whom providers obtain numbers, and to ensure that numbers are made available “on an equitable basis.”

The Commission concluded here that this “exclusive jurisdiction” includes the discretion to decide which entities have access to those numbers. This conclusion is reinforced by the section’s “obligation to ensure that numbers are available on an equitable basis”—a phrase that can be reasonably “understood to include not only how numbers are made available but to whom.” *Order* ¶ 78 (JA__). Because “[n]othing in section 251(e)(1) limits access to ‘telecommunications carriers’ or ‘telecommunications services,’” the agency further concluded that it could allow VoIP providers to obtain numbers, regardless of whether they have been classified as telecommunications carriers or not. *Id.*

This conclusion was reasonable and well within the agency’s broad power to interpret statutes under its administration recognized by *Chevron*. A grant of “exclusive jurisdiction” evidences Congress’s intent to “vest broad authority” in the Commission, especially where “Congress demonstrated no intent to qualify the terms” in question. *Bldg. Owners & Managers Ass’n Int’l v. FCC*, 254 F.3d 89, 94 (D.C. Cir. 2001). The Commission has already interpreted the grant of “exclusive jurisdiction” in section 251(e)(1) to give it authority to impose 911 obligations and

number portability obligations on VoIP providers. *See VoIP E911 Order* ¶ 33; *VoIP Number Portability Order* ¶ 22.

Nothing in section 251(e)(1) indicates that Congress intended to foreclose the possibility that entities not classified as telecommunications carriers would be eligible for numbers. “Had Congress intended to qualify these terms, it clearly would have done so.” *Bldg. Owners & Managers*, 254 F.3d at 95. As the agency noted, others subsections of section 251 are explicitly limited to “local exchange carriers” or “telecommunications carriers,” but there is no such limitation in section 251(e)(1). *Order* ¶ 80 (citing 47 U.S.C. § 251(a)-(c)); *see Brown v. Gardner*, 513 U.S. 115, 120 (1994) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The agency’s reading is further supported by the significant practical benefits that flow from it. By dispensing with the cumbersome and expensive requirement of a numbering partner “middleman,” who sometimes provided no technical benefit, the Commission expected VoIP providers to have lower costs and better service, which would “improve competition and benefit consumers.” *Id.* ¶ 17 (JA___). This furthers the Act’s purpose of “promot[ing] competition,”

“secur[ing] lower prices and higher quality services,” and encouraging new technologies. *See* 1996 Act, 110 Stat. at 56, preamble. Indeed, NARUC offers no reason to think Congress would have wanted VoIP providers to shoulder permanently the competitive costs of numbering partners where they were not technically necessary.

2. The language of section 251(e)(1) does not limit the agency’s authority.

Essentially conceding that the grant of exclusive jurisdiction over numbering is not itself limited to telecommunications carriers, NARUC attempts to find such a limit based on the “context” of the Act. Br. 48. That attempt fails.

NARUC points out (Br. 55) that although section 251(e)(1) grants the FCC exclusive jurisdiction over the North American Numbering Plan, it also directs the FCC to create an entity “to administer telecommunications numbering.” It is far from clear, however, that the statute’s reference to an administrator of “telecommunications numbering” in one sentence restricts the agency’s otherwise broad authority over NANP, or telephone, numbering, set out in another sentence. *See generally United States v. Great N. Ry. Co.*, 343 U.S. 562, 572 (1952) (refusing to read the limitation of one sentence into the subject matter of “an independent sentence dealing with an independent problem”).

But even if that provision limits the scope of the agency’s jurisdiction to matters related to “telecommunications numbering,” that term is undefined in the

statute. The agency reasonably interpreted that ambiguous term to be broader than numbers used by “telecommunications carriers,” *i.e.*, companies providing “telecommunications services.” *Order* ¶ 80 (JA__).

As the Commission has long made clear, not everything that involves “telecommunications” is a “telecommunications service.” *See Brand X*, 545 U.S. at 987. An information service, after all (and by definition), uses “telecommunications” to make information available. *See* 47 U.S.C. § 153(24) (“information service” is the “offering” of “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*”) (emphasis added). The distinction lies in whether a provider “offers” telecommunications as a service, or rather makes use of telecommunications to offer another service. *See Vonage Holdings*, 489 F.2d at 1241.

Thus, in *Vonage Holdings*, the Commission had determined that VoIP providers must contribute to the Universal Service Fund, relying on section 254(d), which allows the Commission to require contributions from any “provider of interstate telecommunications.” *Id.* at 1239. This Court upheld the Commission’s determination that, even if a VoIP provider is an information service provider, it is a “provider of telecommunications.” As the Court explained, the petitioner had not shown “that a provider of ‘information services’ cannot also be a ‘provider of

telecommunications’ for the purposes of section 254(d),” even if those entities do not offer a telecommunications *service* to consumers. *Id.* at 1241. “Indeed, the Act clearly contemplates that ‘telecommunications’ may be a component of an ‘information service.’” *Id.* at 1241.

So too here. Even if VoIP were to be classified as an information service, it makes use of telecommunications and of telephone numbers. The reference to “telecommunications numbering” in section 251(e)(1) is therefore no barrier to allowing VoIP providers access to telephone numbers. *See Order* ¶ 80 (JA__).

3. Section 251(e)(2) does not limit the agency’s authority.

Section 251(e)(2) states that the costs of telecommunications numbering administration arrangements and number portability “shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.” 47 U.S.C. § 251(e)(2). NARUC reads this to mean that “only” telecommunications carriers can bear those costs, and therefore only such carriers can be provided with direct access to numbers under section 251(e)(1). Br. 57.

But section 251(e)(1) does not say that “only” telecommunications carriers can be forced to bear those costs. The FCC rejected such a limited reading in the 2007 *VoIP Number Portability Order*, which required VoIP providers to share in the costs of numbering administration and number portability. The agency determined that because VoIP providers “benefit from and impose costs related to

numbering administration,” they should be required “to contribute to meet the shared numbering administration costs on a competitively neutral basis.” *VoIP Number Portability Order* ¶ 39. The agency found that the reference to telecommunications carriers in section 251(e)(2) “does not circumscribe the class of carriers that may be required to support numbering administration.” *Id.* ¶ 28. Instead, the agency read “the relevant language in section 251(e)(2) [as] designed to ensure that no telecommunications carriers were omitted from the contribution obligation,” as opposed to an affirmative limit on what other types of entities may also be “require[d]...to make such contributions.” *Id.*

The agency reaffirmed in the *Order* on review that “the language in section 251(e)(2)...reflects Congress’s intent to ensure that no telecommunications carriers were omitted from the contribution obligation, and does not preclude the Commission from exercising its authority to require other providers of comparable services to make such contributions.” *Order* ¶ 81 (JA__).

Moreover, the agency’s reading follows from the purposes of the 1996 Act, which aimed to promote competition in communications. *See above* pp. 26-27. In requiring that the costs of numbering administration and number portability be borne by carriers “on a competitively neutral basis,” Congress presumably meant to prevent the agency from setting rules that would unfairly advantage particular telecommunications carriers. It would undermine that statutory goal to preclude a

class of competitors from sharing in the costs of numbering administration and portability.

Because 251(e)(2) does not limit cost support for “telecommunications numbering administration” to telecommunications carriers, it was reasonable for the Commission to conclude that the requirement does not, by implication, limit the scope of section 251(e)(1).

B. The FCC has authority to require number portability to and from VoIP providers.

NARUC argues that, even if the FCC’s jurisdiction over numbering allows it to give VoIP providers access to numbers, that authority “does not include *number portability*.” Br. 58-59. But the text, structure, and purpose of the Act do not support that distinction.

1. Section 251(e)’s grant of “exclusive jurisdiction” over numbering provides authority to require number portability.

In the *Order*, the FCC kept in place its VoIP number portability obligations, first imposed in the 2007 *VoIP Number Portability Order*. In that earlier order, the agency, relying in part on section 251(e)(1), required both VoIP providers and

telecommunications carriers to port numbers to and from VoIP providers. *See VoIP Number Portability Order* ¶¶ 17, 22.⁸

In the *Order*, the Commission confirmed this prior interpretation of section 251(e)(1) as providing “‘ample authority’ to impose porting requirements on local exchange carriers and interconnected VoIP providers.” *Order* ¶ 54 (JA___) (quoting *VoIP Number Portability Order* ¶ 21). As the agency explained, “number portability—whether to and from an interconnected VoIP provider, [local exchange carrier], or [non-local-exchange] carrier—clearly makes use of telephone numbers.” *Id.* ¶ 57 (JA___). It was thus reasonable to “conclude that section 251(e)(1) provides authority supporting [local exchange carriers’] and [non-local-exchange] wireless carriers’ obligation to port numbers directly to and from interconnected VoIP providers.” *Id.* Put differently, it is not disputed that the FCC can exercise its exclusive jurisdiction over the North American Numbering Plan to allot numbers to telecommunications carriers in the first instance. It is a natural

⁸ NARUC mistakenly argues that the number portability obligations in the 2007 *VOIP Number Portability Order* stemmed only from the status of numbering partners as telecommunications carriers. Br. 51-53. But the FCC made clear then that “the interconnected VoIP provider” itself had “an affirmative legal obligation to take all steps necessary to initiate or allow a port-in or port-out itself or through its numbering partner.” *VoIP Number Portability Order* ¶ 32; *see also id.* ¶ 22 (“both the interconnected VoIP provider and the telecommunications carrier [numbering partner] subject themselves to the Commission’s plenary authority under section 251(e)(1)”) (emphasis added).

consequence of that authority to dictate the circumstances under which carriers must relinquish the number to a departing customer. Indeed, the opposite reading of the statute—where the Commission can allot numbers but then has no say in what happens to them, even to promote competition and consumer welfare—would be unreasonable.

The Commission's interpretation of its authority also accords with Congress's view of "number portability as a means of encouraging competition," *Cent. Texas Tel. Co-op.*, 402 F.3d at 206, and the FCC found here that the requirement would "improve competition and benefit consumers." *Order* ¶ 17 (JA__). If number portability obligations did not apply to VoIP services, customers who wished to switch to (or from) a VoIP provider would be deterred from doing so because they would not be able to keep their existing telephone number. As the agency explained in 2007, when it first applied number portability requirements to VoIP services, to fail to impose such requirements "would contravene the [number portability goals] of 'allowing customers to respond to price and service changes

without changing their telephone numbers.” *VoIP Number Portability Order* ¶ 31 (quoting *First Number Portability Order* ¶ 30).⁹

2. Sections 251(b)(2) and 153(37) do not limit the agency’s numbering authority.

NARUC once again turns to the “context” of other subsections of the Act to limit the scope of the agency’s authority. It points out that section 251(b)(2) requires local exchange carriers to provide “number portability” to their customers, where “number portability” is defined under the Act as “the ability of users of telecommunications services to retain” their numbers “when switching from one telecommunications carrier to another.” 47 U.S.C. §§ 153(37), 251(b)(2). NARUC concludes from this that “portability duties *cannot* be imposed on entities that are not providing *telecommunications services*.” Br. 46 (emphasis in original); *see also id.* 45 (“only telecommunications service carriers have the right to receive number ports and the obligation to port numbers”). But this mistakes a statutory floor—what the Act requires—with a ceiling—a limitation on what the agency, in the exercise of additional authority, may additionally require. “Congress’s mandate in

⁹ In its report on the predecessor to the 1996 Act, the House Commerce Committee determined that “the ability to change service providers is only meaningful if a customer can retain his or her local telephone number.” H.R. Rep. No. 104-204, at 72 (1995). Likewise, the Senate Commerce Committee concluded that the “minimum requirements [for interconnection set forth in new section 251(b), including number portability,] are necessary for opening the local exchange market to competition.” S. Rep. No. 104-23, at 19-20 (1995).

one context with its silence in another suggests...simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion.” *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990); *see also Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 705 (D.C. Cir. 2011) (concluding that a grant of authority to the FCC in the Act “establishes a floor rather than a ceiling”).

As the *Order* explained, “section 251(b)(2) is reasonably understood simply as reflecting a requirement that Congress anticipated as necessary to promote competition in local markets.” *Order* ¶ 82 (JA__). That does not mean the section must be read as “reflecting any inherent Congressional judgment regarding the universe of entities” on which the agency can impose a similar requirement. *Id.*¹⁰

Thus, in its *First Number Portability Order* in 1996, the FCC imposed number portability obligations on wireless carriers, even though such carriers are not “local exchange carriers” and so are outside the express requirements of section 251(b)(2). *See CTIA v FCC*, 330 F.3d 502, 505 (D.C. Cir. 2003) (upholding order applying number portability to wireless carriers and finding challenge to

¹⁰ NARUC also quotes prior Commission orders which recognized section 251(b)(2)’s affirmative obligation as limited to local exchange carriers. Br. 51 (citing *First Number Portability Order*). Those orders do not establish that the FCC has interpreted the statute as a limit on the agency’s authority to require portability from other entities, only that the agency correctly read the express requirements of the statute as limited to local exchange carriers. The agency thus has not changed its position on the matter. *See* Br. 54.

agency authority time-barred). NARUC points out that wireless carriers are “telecommunications carriers,” even if they are not “local exchange carriers.” Br. 61. But section 251(b)(2) applies only to local exchange carriers. If that section actually evidenced a statutory intent to delimit the entities of which number portability may be required, as NARUC argues, the requirements on wireless carriers would be equally illegitimate, thus upending long-standing FCC precedent—which Congress has left in place for 20 years—regarding the agency’s number portability authority.

NARUC also emphasizes that section 153 defines “number portability” in terms of a customer switching “from one telecommunications carrier to another.” In the first place, that definition is used substantively only in section 251.¹¹ Because section 251(b) applies only to local exchange carriers, which are by definition telecommunications carriers, it is no surprise that the term “number portability” would be defined in terms of telecommunications carriers. In any event, the fact that the agency *must* apply number portability obligations to (certain classes of) telecommunications carriers does not mean that Congress intended to prevent the agency, if it so chose, from applying the same obligations to other types of providers.

¹¹ The term is also used in section 271 as cross reference to section 251. *See* 47 U.S.C. § 271(c)(2)(B)(xii).

NARUC would draw a parallel to *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (Br. 50), where this Court held that the FCC could not impose what amounted to common carriage conditions on broadband Internet access service (then an information service) because the Act forbade such treatment for entities that are not telecommunications carriers. *Id.* at 650. In fact, *Verizon* shows the problem with NARUC's argument. The Court held that the Commission could not use a source of general authority to regulate in a manner that "contravenes any specific prohibition contained in the Communications Act." *Id.* In *Verizon*, the statute stated explicitly that a carrier "shall be treated as a common carrier...only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). Because the *Verizon* Court found that the treatment in question amounted to common carriage, there was a direct conflict with the statute. Here, by contrast, NARUC can point to no "specific prohibition" that prevents the agency from creating number portability obligations to and from VoIP providers. Instead, there is a requirement that local exchange carriers must provide number portability, and silence about other types of entities. In light of this silence, the agency reasonably concluded that it could rely on its general exclusive jurisdiction over numbering to require VoIP number portability to promote consumer choice and competition.

III. THE FCC REASONABLY DECLINED TO ADDRESS VOIP CLASSIFICATION HERE BECAUSE IT WAS NOT NECESSARY TO ITS DECISION.

NARUC also argues that the Commission's failure to classify VoIP as a telecommunications carrier in the *Order* was arbitrary and capricious. Br. 38.¹²

But as we have explained, there was no need to classify VoIP providers as telecommunications carriers in order to grant VoIP providers direct access to telephone numbers and to impose number portability requirements for VoIP. Because it was “unnecessary to first determine the classification of interconnected VoIP service” in order to adopt its rules, the agency reasonably “decline[d] to do so.” *Order* ¶ 82 (JA__); see *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (“[D]ecisionmakers sometimes dodge hard questions when easier ones are dispositive; and we cannot fault the FCC for taking this approach.”).

¹² NARUC also seems to argue that the agency actually *did* classify VoIP as a telecommunications service for all regulatory purposes in the *Order*. See Br. 17. This is premised on a misunderstanding of the *Order's* amendment of the definitions in part 52 of the FCC's rules, titled “NUMBERING,” which as amended state that VoIP shall be treated as a telecommunications service “[f]or purposes of this part.” See 47 C.F.R. § 52.5(e), (i), (j) (Stat. Add. 10). This change explicitly applies only to the “Numbering” part of the agency's rules, and was simply more expedient than adding the phrase “or interconnected VoIP provider” at many points in the numbering regulations. See 47 C.F.R. § 64.2003(o) (similar definition to apply consumer privacy protection obligations to VoIP providers). This definition has no applicability to the regulatory status of VoIP more generally.

A number of other considerations support the FCC's decision to adopt its rules without resolving whether or not VoIP providers are telecommunications carriers. First, the agency has a separate proceeding addressing the classification of VoIP, which "remains pending before the Commission." *Order* n.282 (JA__). Common sense suggests that the most appropriate place for the agency to resolve the VoIP classification issue is in a proceeding focused on that issue, rather than in a proceeding in which the issue is, at best, an alternative basis for action.

Second, the agency did not propose to classify VoIP in this proceeding, and the record here was poorly developed on whether VoIP is best classified as an information service or a telecommunications service under the statute. Indeed, NARUC's own comments in this proceeding barely touched on the issue. Its comments in response to the six-month technical trial following the *NPRM*, for example, argued that the "Commission [l]acks authority" to give direct access to numbers without classifying, but spent only a single footnote on a legal argument for why VoIP is a "telecommunications service." *See* NARUC Comments at 5 & n.17 (March 3, 2014) (JA __). The comments of VoIP providers Vonage and AT&T did not address the issue at all, and remained focused on the legality and practicality of granting numbering access. *See* Vonage Comments (March 3, 2014) (JA__); AT&T Comments (March 3, 2014) (JA__). Thus, even if the Commission

had wanted to address classification here, the record provided a less than optimal basis on which to make such a decision.

Third, the classification of VoIP is a debated and complex question.¹³ Parties have argued that VoIP differs from traditional phone service in ways that make it more like an “information service” than a “telecommunications service.”¹⁴ The classification of VoIP is also intertwined with other complex issues, especially those related to the transition to an all-IP network. *See generally Technology Transitions*, 30 FCC Rcd 9372, 9378 ¶ 8 (2015) (initiating rulemaking to “guide and accelerate the...transitions from [traditional telephone] networks...to all-IP multi-media networks”).

¹³ Contrary to NARUC’s argument (Br. 23-27), the Tenth Circuit has not held that VoIP is a telecommunications service. In *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), the Tenth Circuit upheld, in its entirety, the FCC’s *USF/ICC Transformation Order*, 26 FCCR 17663, 17667 ¶1 (2011). In dismissing one challenge as not ripe, the Tenth Circuit stated that *if* a VoIP provider is not a “telecommunications carrier,” it may be the case that such a provider is not eligible for universal service support under 47 U.S.C. § 254(e). *Id.* at 1049. If this is so—an issue not decided by the Tenth Circuit because the challenge was not ripe—this would go to the limits of the universal service system under section 254, and is irrelevant to the separate question of whether VoIP must be classified as a telecommunications service.

¹⁴ *See, e.g.*, Comments of Vonage Holdings Corp. at 2-6, *Connect America Fund*, FCC Docket No. 10-90 (filed April 18, 2011), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021239051>.

For example, NARUC argues that VoIP should be classified as a telecommunications service to facilitate the negotiations of interconnection arrangements between providers. Br. 20-22. But the FCC explained that, “given the complexity and importance of VoIP interconnection in facilitating the transition to all-IP network[s],” such issues were “more appropriately addressed in the Commission’s pending proceedings addressing VoIP interconnection.” *Order* ¶ 63 (JA__). The agency also found, based on the record and six-month trial, that giving access to numbers, even without classification as a telecommunications service, would itself “encourage and promote VoIP interconnection.” *Id.* (“Our actions in this Order neither rely on, nor require, the Commission to address the many issues surrounding VoIP interconnection.”).

It is well settled that “[t]he Commission has discretion ‘to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice.’” *Cent. Texas Tel. Co-op.*, 402 F.3d at 215 (quoting *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004)); *see* 47 U.S.C. § 154(j) (“The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”); *Nat’l Tel. Co-op. Ass’n v. FCC*, 563 F.3d 536, 541-42 (D.C. Cir. 2009) (“Because this Order is not the source of the transport costs problem, and because the FCC is already

performing the review of transport cost issues that NTCA asks us to mandate, NTCA’s opposition is misplaced and should be raised in the intercarrier compensation proceeding.”); *Toca Producers v. FERC*, 411 F.3d 262, 264 (D.C. Cir. 2005) (dismissing petition as unripe where petitioner may obtain its requested remedy “in a proceeding now pending before the Commission”); *U.S. Air Tour Ass’n. v. FAA*, 298 F.3d 997, 1010–11 (D.C. Cir. 2002) (agency “reasonably put off” consideration where it represented that it would address the matter in future rulemaking).

In sum, it was reasonable for the FCC not to reach the issue of whether or not VoIP providers are telecommunications carriers, when it was not necessary to do so in order to achieve the actual goal of the proceeding—giving VoIP providers direct access to numbers.

* * * * *

The issue of VoIP classification undoubtedly has been pending before the Commission for a long time, as NARUC emphasizes. Br. 4. But the appropriate procedural mechanism for raising a complaint that the agency has unduly delayed in reaching a decision is to petition for rulemaking or declaratory judgment, or to seek an order directing the Commission to resolve a proceeding in which the matter is necessarily at issue. It is not to petition for review of a rulemaking in

which the issue was not squarely presented, was not addressed, and did not need to be resolved.

CONCLUSION

The petition for review should be dismissed for lack of standing. If it is not dismissed, it should be denied.

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

No. 15-1497

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 9,310 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

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Statutory Addendum

47 U.S.C. § 153	1
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47 U.S.C.A. § 153

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 -- WIRE OR RADIO COMMUNICATION
SUBCHAPTER I -- GENERAL PROVISIONS

§ 153. Definitions

* * * * *

(24) Information service

The term “information service” 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.

(25) Interconnected VoIP service

The term “interconnected VoIP service” has the meaning given such term under section 9.3 of title 47, Code of Federal Regulations, as such section may be amended from time to time.

* * * * *

(50) Telecommunications

The term “telecommunications” means 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.

(51) Telecommunications carrier

The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). 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, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

* * * * *

(53) Telecommunications service

The term “telecommunications service” means 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.

* * * * *

47 U.S.C. § 251

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to

have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier

provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

* * * * *

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 9. INTERCONNECTED VOICE OVER INTERNET PROTOCOL
SERVICES

§ 9.3 Definitions.

* * * * *

Interconnected VoIP service. An interconnected Voice over Internet protocol (VoIP) service is a service that:

- (1) Enables real-time, two-way voice communications;
- (2) Requires a broadband connection from the user's location;
- (3) Requires Internet protocol-compatible customer premises equipment (CPE);
and
- (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

* * * * *

47 C.F.R. § 52.5

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 52. NUMBERING
SUBPART A. SCOPE AND AUTHORITY

§ 52.5 Definitions.

(a) Incumbent local exchange carrier. With respect to an area, an “incumbent local exchange carrier” is a local exchange carrier that:

(1) On February 8, 1996, provided telephone exchange service in such area;
and

(2)(i) On February 8, 1996, was deemed to be a member of the exchange carrier Association pursuant to § 69.601(b) of this chapter (47 CFR 69.601(b)); or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (a)(2)(i) of this section.

(b) Interconnected Voice over Internet Protocol (VoIP) service provider. The term “interconnected VoIP service provider” is an entity that provides interconnected VoIP service, as that term is defined in 47 U.S.C. Section 153(25).

(c) North American Numbering Council (NANC). The “North American Numbering Council” is an advisory committee created under the Federal Advisory Committee Act, 5 U.S.C., App (1988), to advise the Commission and to make recommendations, reached through consensus, that foster efficient and impartial number administration.

(d) North American Numbering Plan (NANP). The “North American Numbering Plan” is the basic numbering scheme for the telecommunications networks located in American Samoa, Anguilla, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Canada, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, Sint Maarten, St. Kitts & Nevis, St. Lucia, St. Vincent, Turks & Caicos Islands, Trinidad & Tobago, and the United States (including Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands).

(e) Service provider. The term “service provider” refers to a telecommunications carrier or other entity that receives numbering resources from the NANPA, a Pooling Administrator or a telecommunications carrier for the purpose of providing or establishing telecommunications service. For the purposes of this part, the term “service provider” includes an interconnected VoIP service provider.

(f) State. The term “state” includes the District of Columbia and the Territories and possessions.

(g) State commission. The term “state commission” means the commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of carriers.

(h) Telecommunications. “Telecommunications” means 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.

(i) Telecommunications carrier or carrier. A “telecommunications carrier” or “carrier” is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226(a)(2)). For the purposes of this part, the term “telecommunications carrier” or “carrier” includes an interconnected VoIP service provider.

(j) Telecommunications service. The term “telecommunications service” refers to 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. For purposes of this part, the term “telecommunications service” includes interconnected VoIP service as that term is defined in 47 U.S.C. 153(25).

47 C.F.R. § 52.15

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 52. NUMBERING
SUBPART B. ADMINISTRATION

§ 52.15(g) Applications for numbering—

(1) General requirements. An applicant for numbering resources must include in its application the applicant's company name, company headquarters address, OCN, parent company's OCN(s), and the primary type of business in which the numbering resources will be used.

(2) Initial numbering resources. An applicant for initial numbering resources must include in its application evidence that the applicant is authorized to provide service in the area for which the numbering resources are requested; and that the applicant is or will be capable of providing service within sixty (60) days of the numbering resources activation date. A provider of VoIP Positioning Center (VPC) services that is unable to demonstrate authorization to provide service in a state may instead demonstrate that the state does not certify VPC service providers in order to request pseudo-Automatic Numbering Identification (p-ANI) codes directly from the Numbering Administrators for purposes of providing 911 and E-911 service.

(3) Commission authorization process. A provider of interconnected VoIP service may show a Commission authorization obtained pursuant to this paragraph as evidence that it is authorized to provide service under paragraph (g)(2) of this section.

(i) Contents of the application for interconnected VoIP provider numbering authorization. An application for authorization must reference this section and must contain the following:

(A) The applicant's name, address, and telephone number, and contact information for personnel qualified to address issues relating to

regulatory requirements, compliance with Commission's rules, 911, and law enforcement;

(B) An acknowledgment that the authorization granted under this paragraph is subject to compliance with applicable Commission numbering rules; numbering authority delegated to the states; and industry guidelines and practices regarding numbering as applicable to telecommunications carriers;

(C) An acknowledgement that the applicant must file requests for numbers with the relevant state commission(s) at least 30 days before requesting numbers from the Numbering Administrators;

(D) Proof that the applicant is or will be capable of providing service within sixty (60) days of the numbering resources activation date in accordance with paragraph (g)(2) of this section;

(E) Certification that the applicant complies with its Universal Service Fund contribution obligations under 47 CFR part 54, subpart H, its Telecommunications Relay Service contribution obligations under 47 CFR 64.604(c)(5)(iii), its NANP and LNP administration contribution obligations under 47 CFR 52.17 and 52.32, its obligations to pay regulatory fees under 47 CFR 1.1154, and its 911 obligations under 47 CFR part 9; and

(F) Certification that the applicant possesses the financial, managerial, and technical expertise to provide reliable service. This certification must include the name of applicant's key management and technical personnel, such as the Chief Operating Officer and the Chief Technology Officer, or equivalent, and state that none of the identified personnel are being or have been investigated by the Federal Communications Commission or any law enforcement or regulatory agency for failure to comply with any law, rule, or order; and

(G) Certification pursuant to Sections 1.2001 and 1.2002 of this chapter that no party to the application is subject to a denial of Federal benefits pursuant to section 5301 of the Anti-Drug Abuse Act of 1988. See 21 U.S.C. 862.

(ii) An applicant for Commission authorization under this section must file its application electronically through the “Submit a Non-Docketed Filing” module of the Commission's Electronic Comment Filing System (ECFS). Once the Commission reviews the application and assigns a docket number, the applicant must make all subsequent filings relating to its application in this docket. Parties may file comments addressing an application for authorization no later than 15 days after the Commission releases a public notice stating that the application has been accepted for filing, unless the public notice specifies a different filing date.

(iii) An application under this section is deemed granted by the Commission on the 31st day after the Commission releases a public notice stating that the application has been accepted for filing, unless the Wireline Competition Bureau (Bureau) notifies the applicant that the grant will not be automatically effective. The Bureau may halt this auto-grant process if;

(A) An applicant fails to respond promptly to Commission inquiries,

(B) An application is associated with a non-routine request for waiver of the Commission's rules,

(C) Timely-filed comments on the application raise public interest concerns that require further Commission review, or

(D) The Bureau determines that the application requires further analysis to determine whether granting the application serves the public interest. The Commission reserves the right to request additional information after its initial review of an application.

(iv) Conditions applicable to all interconnected VoIP provider numbering authorizations. An interconnected VoIP provider authorized to request numbering resources directly from the Numbering Administrators under this section must adhere to the following requirements:

(A) Maintain the accuracy of all contact information and certifications in its application. If any contact information or certification is no longer accurate, the provider must file a correction with the Commission and each applicable state within thirty (30) days of the change of contact information or certification. The Commission may use the updated information or certification to determine whether a change in authorization status is warranted;

(B) Comply with the applicable Commission numbering rules; numbering authority delegated to the states; and industry guidelines and practices regarding numbering as applicable to telecommunications carriers;

(C) File requests for numbers with the relevant state commission(s) at least thirty (30) days before requesting numbers from the Numbering Administrators;

(D) Provide accurate regulatory and numbering contact information to each state commission when requesting numbers in that state.

* * * * *

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

National Association of Regulatory)	
Commissioners,)	
Petitioner,)	
)	
v.)	No. 15-1497
)	
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on May 19, 2016, I electronically filed the foregoing Initial Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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