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 THE UNITED STATES OF AMERICA,

Respondents.

On Petitions for Review of an Order
of the Federal Communications Commission

REPLY BRIEF OF PETITIONER

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GLOSSARY

Act	***Communications Act of 1934, as amended*** 47 U.S.C. §§151 *et seq.*
1996 Act	***Telecommunications Act of 1996*** Pub. L. No. 104-104, 110 Stat. 56 (1996)
CLEC	***Competitive Local Exchange Carrier***
FCC	***Federal Communications Commission*** 47 U.S.C. §151 (1934).
IP	***Internet Protocol*** See, comparative description under TDM, *infra*.
I-VoIP	***Interconnected Voice over Internet Protocol*** Retail phone service, i.e., offering telecommunications to the public for a fee using IP protocol instead of Time Division Multiplexing (TDM) defined in the FCC's rules in 2005: ("(1) the service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user's location; (3) the service requires IP-compatible CPE; and (4) the service offering permits users generally to receive calls that originate on the PSTN *and* to terminate calls to the PSTN.") *In the Matters of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, 20 F.C.C. Rcd. 10245, 10257 (2005)
Int.Br.	***Intervenor's Brief*** Brief filed by Intervenor Vonage Holding Corporation in support of the FCC and the United States.

LEC	***Local Exchange Carrier*** 47 U.S.C. §153(32) (1934)
NARUC	***National Association of Regulatory Utility Commissioners***
Order	***Order on Review - grants direct access to numbers to I-VoIP providers and includes portability obligations.*** Report and Order, *In the Matter(s) of Numbering Policies for Modern Communications*, WC Docket 13-97, *IP-Enabled Services*, WC Docket 04-36, *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket 07-243, *Telephone Number Portability*, CC Docket 95-116, *Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, *Connect America Fund*, WC Docket 10-90, *Numbering Resource Optimization*, CC Docket 99-200, FCC 15-70, 30 F.C.C. Rcd. 6839, (rel. June 22, 2015)
Pet.Br.	***Petitioner's Brief*** Petitioner the National Association of Regulatory Utility Commissioners' Opening Brief.
PSTN	***Public Switched Telecommunications Network*** This is not a term defined anywhere in U.S. legislation. *Newton's Telecom Dictionary*, *18th Ed*, at 596, says: "an abbreviation used by the [International Telecommunications Union]. PSTN simply refers to the local, long distance and international phones system which we use every day. In some countries, it's only one phone company. In countries with competition, e.g., the United States, PSTN refers to the entire interconnected collection of local, long distance, and international phone companies, which could be thousands."

Resp.Br.	***Respondent's Brief***
	Respondents the Federal Communications Commission and the United States' brief.
TDM	***Time Division Multiplexing***
	"Time division multiplexing is a digital multiplexing scheme that saves capacity for each device or voice on a telephone call. Once a connection is established, capacity is saved even when the device is not sending information. For example, if a call is put on hold, no other device can use this spare capacity. Small slices of silence with thousands of calls in progress in carriers' networks result in high amounts of unused capacity. This is the reason time division multiplexing is not as efficient as newer technologies such as Voice over IP, in which voice and data are interspersed whenever possible. Both T-1 and T-3 use time division multiplexing . . . T-3 is used for very large customers and Internet service provider networks . . . T-1 is lower in cost and capacity… allows 24 voice, video, and/or data conversations to share one path. It is the most common form of multiplexing at end user organizations. T-1 applications include linking organization sites together for voice calls, Internet access, and links between business customers and telephone companies . . . [S]mall organizations . . . frequently use one T-1 circuit for both Internet access and voice calling." Dodd, Annabel, *The Essential Guide to Telecommunications 4th Ed., at 18* (Prentiss Hall 2005).

ARGUMENT SUMMARY

The National Association of Regulatory Utility Commissioners' (NARUC's) standing is apparent in its brief. The challenged *Order* targets State certifications for elimination and interferes with State enforcement of crucial elements of the Congressional framework. Any relief will attenuate the injuries inflicted.

The Federal Communications Commission (FCC or Commission) finds an ambiguity in §251(e)(2) where none exists. It concedes that, if §251(e)(2) does limit cost support for *numbering administration* to *telecommunications carriers*, then the linchpin of its Order falls and the scope of its §251(e)(1) exclusive numbering authority must be limited to *telecommunications services*.

The FCC justifies its actions as good policy – untethered from any statutory authorization. Perversely, those justifications add to the mountain of evidence that Interconnected Voice over Internet Protocol Services (I-VoIP) should be classified as a *telecommunications service*.

The cases cited do not support the novel claim that the §153(37) definition of *number portability* is only a floor on agency authority.

The extension of portability to wireless, a *telecommunications service*, in no way justifies expanding portability to non-telecommunications services.

Section 251's numbering provisions apply to common carrier service and thus can only be imposed on *telecommunications services*.

The FCC cannot, in the extreme circumstances presented, reasonably decline to classify I-VoIP services as a *telecommunications service*. Assuming *arguendo*, that deferring the classification is an option, it cannot cure the *Order's* flawed reasoning. The classification question and arguments were raised and addressed in the *Order*.

The FCC and Vonage include irrelevant references to technology as an excuse for inaction. But Congress defined "*telecommunications*" in functional terms as "offering telecommunications for a fee directly to the public."

No expertise in technology is required to determine if I-VoIP meets this definition.

The FCC concedes that I-VoIP includes "*telecommunications*."

It is obvious that AT&T, Verizon, Vonage and others charge for the service.

It is equally clear from simple logic, the FCC's own statements, and the FCC's treatment of the service to-date, that it is, like the services it competes directly with–offered directly to the public.

The Court should confirm that classification.

ARGUMENT

I. *NARUC HAS STANDING TO SUE.*[1]

Both the FCC Brief (*Resp.Br.*) at 21-23 and Vonage's Brief (*Int.Br.*) at 16-20 suggest that:

NARUC's members are "not directly subject" to the challenged rules;

Their "standing is not apparent from the administrative record;"

NARUC's brief (*Pet.Br.*) did not "include arguments establishing" standing; and that NARUC has no problem with the outcome.

They are wrong on all counts. As is evident from Petitioner's Brief, NARUC members' authority is the focus of the underlying proceeding. Their standing is apparent not just from the administrative record, but also from the *Order's raison d'être* - which is to permit I-VoIP providers the option to bypass either becoming State certified or dealing with a State certified carrier:

> Today, we establish a new process by which an interconnected VoIP provider without a state certification can obtain a Commission authorization to obtain numbers directly.

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[1] See, *NARUC Petition for Review* (*Petition*) 5, n.5. (J.A. __) *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142, 1155 n.8 (9th Cir. 1975), cert. denied sub nom. *NARUC v. FCC*, 423 U.S. 836 (1975), ("NARUC is not merely a ""concerned bystander."" Congress has accorded NARUC official status as the representative of state regulatory agencies in . . . these petitions for review.")

Id. ¶21 (J.A. __) (emphasis added)

Accord, *Pet.Br.* at 3, noting, until the *Order*, number ports required a State-regulated carrier's involvement.[2]

There is no reason for the FCC to specify an I-VoIP provider "without a state certification" unless there are I-VoIP carriers with certifications. And there are.[3]

After eliminating State certification as a pre-requisite for number access, the *Order* discusses requirements designed to ensure States can continue to actively police utilization (to avoid State area code exhaustions). For providers that choose the bypass option, the *Order* substitutes a necessarily less direct and arguably more burdensome procedure for States to continue this longstanding partnership.

The *Order*, at ¶79-80 (J.A. __), specifically rejects the arguments resurrected in NARUC's brief on the reasons classification is required. It rejects proposals by

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[2] Compare, *NARUC v. FERC*, 823 F.2d 1377, 1382 (10th Cir. 1987) (Finding even though FERC's jurisdictional ruling "'required no affirmative action' by petitioners, and did not 'require' petitioners 'to refrain from anything'" petitioners were aggrieved.")

[3] Compare, *Pet.Br.* at iv & 13 (citing cases where classification impacts a State attempt to enforce 47 U.S.C. §252 and a State effort to certify a "fixed" I-VoIP carrier; and at 27, n.40 (citing State decisions exercising jurisdiction to qualify I-VoIP providers as eligible telecommunications carriers). See also "Nomadic VoIP's E911 Troubles" VoIP News (July 6, 2006) (http://it.toolbox.com/blogs/voip-news/nomadic-voips-double-e911-troubles-52047 (accessed 6/5/2016) (Fixed VoIP providers "know where their users are" and many "are formally phone companies.")

NARUC members to substitute for the proposed bypass of State certification - measures that, for some members, proper classification would resolve. See, e.g., ¶26, (J.A. __) rejecting Pennsylvania and Michigan requests for a State review process for I-VoIP number requests, and ¶¶42 & 45, (J.A. __) rejecting similar requests.

Moreover, as NARUC members are *sui generis*, *Pet.Br*. at 3-8, 13; *Petition* at 3-5, not a single "standing" case cited by Respondents is on point.

Few "standing" disputes involve federal statutes where, as here, Congress has specified State regulators are to enforce crucial elements of Congressional framework designed to protect consumers and competition for an entire sector.[4]

Fewer still where Congress specifies that State regulators act as federal administrative law judges on crucial issues of federal policy. *Petition* at 5 n.4-5.

None of the cases cited by Vonage and the FCC involve either.

[4] 47 U.S.C. §252 requires States to arbitrate interconnection disputes between *telecommunications carriers.* Those arbitrations can include §251(b)(2) number portability obligations. See also, *June 10, 2015 NARUC Ex Parte Notice in WC Docket Nos. 13-97, 04-36, 07-243, and 10-90, and CC Docket Nos. 95-116, 01-92, and 99-200*, quoting enforcement concerns from AARP, Common Cause, Consumer Federation of America, Consumers Union, Free Press, Public Knowledge, the National Consumer Law Center, the National Association of State Consumer Advocates and NARUC. (J.A. ___)

In fact, none even *involve* a State government entity - much less one with jurisdiction to conduct tasks central to a federal scheme - tasks impacted by the *Order* on review.

NARUC was clear about the *Order's* impact on porting, the Congressional scheme, including State interconnection duties, and State certificate proceedings.

But, the FCC argues States were not harmed based on NARUC's statement that:

> 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].

Resp.Br. at 23.

The FCC's reasoning is difficult to follow.

The quoted sentence states that before the *Order* only those that provide *telecommunications service* could get direct access.

If the FCC had classified I-VoIP, of course they would already have direct access as a *telecommunications service* provider under the preexisting rules.

But that's not what the FCC did. That much is obvious.

What is not obvious is the FCC's skewed logic that because of that statement, NARUC is not harmed by the *Order*. Vonage follows up with a related, but similarly flawed, contention, *Interv.Br*. at 19, that "no holding from this Court would necessarily redress NARUC's claimed injury."

Nothing could be further from the truth.

The Court has several options.

All require the *Order* to be vacated.

Each one provides relief because all will preserve the State certification requirement in the prior rules.

And as the *Order* at ¶4 (J.A. __) concedes, if the order is vacated:

> generally only *telecommunications carriers* are "able to provide the proof of authorization required under our rules, and thus able to obtain numbers directly.

All will ultimately require the FCC to address I-VoIP classification instead of continuing to apply an *ad hoc* regulatory scheme to competing functionally equivalent services.

The most efficient option for the Court is to conclude based on the face of the *Order*, its consistent treatment of the service, and a *de novo* review of its legal conclusions, that I-VoIP is a *telecommunications service.*[5]

Or this Court can follow the 10th Circuit's lead. The FCC told the 10th Circuit that I-VoIP's status as either an *information service* or a *telecommunications service* was irrelevant to whether a carrier could qualify as an eligible *telecommunications carrier*. The 10th Circuit flatly disagreed, stating that

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[5] Agency legal conclusions are reviewed *de novo*. See *Wolf Run Mining Co. v. Federal Mine Safety & Health Review Commission*, 659 F.3d 1197, 1200 (D.C. Cir. 2011).

an entity that provided only an *information service* could not qualify for subsidies Congress provided for *telecommunications services*.[6]

Similarly, this Court could hold that Congress specified only *telecommunications service carriers* can have direct access to numbers and be required to port numbers. That would require the FCC to choose to classify or deny direct access.

Or, this Court could rule that the FCC cannot define I-VoIP in its regulations as a *telecommunications service* offering:

> 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,

unless I-VoIP actually is a *telecommunications service* – that is unless the I-VoIP provider is actually offering:

> 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.

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[6] See *Pet.Br.* at 23-28. As the FCC notes, *Resp.Br.* 40 n.13, the 10th Circuit *was* dismissing a "contention that the FCC has used this new, simpler classification to provide funding to what they claim are entities that do not provide *telecommunications services*." *In Re: FCC 11-161*, 753 F.3d 1015, at 1048-1049 (10th Cir. 2014). But the dismissal was explicitly premised on the Court's specification that only carriers that provide *telecommunications services* can qualify for funding, and there was therefore no "imminent possibility" that an entity that only provides an *information service* "will receive USF support under the FCC's Order, *since they cannot be designated as "eligible telecommunications carriers*." Id. at 1049.

Compare, *Pet.Br*. at 17-23 and §153(53).

Finally, whatever, the Court's ultimate conclusions about the FCC's convoluted legal rationale, the structure of the analysis provided to justify its action is so fundamentally irrational, the Court can easily find the decision is arbitrary and capricious and/or displays a lack of reasoned decision-making. After all, in the *Order*, the FCC pointedly specifies it has *not* classified I-VoIP as a *telecommunications service*, but then:

- Specifies I-VoIP is a *telecommunications service* in its regulations (J.A. __);
- Defines I-VoIP *telecommunications services* using the words Congress used to define a *telecommunications service* (J.A. ___);
- Grants I-VoIP for the first time direct access to numbers and solo porting obligations that Congress specified be given only to *telecommunications services* providers *Order* ¶21 (J.A.___);
- Treats I-VoIP in its regular analysis of local retail phone service competition, *Order* ¶1 (J.A.__), as competing directly with services that are unquestionably *telecommunications services*;[7] and
- Reminds providers, via a clear reference to §251 that:

[7] That report shows how well the FCC is doing in implementing the *1996 Act's* core mandate to facilitate competition among *telecommunication services*.

> the duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and ***does not depend upon the network technology underlying the interconnection***" and that the Commission "expect[s] all carriers to negotiate in good faith in response to requests for [VoIP] interconnection. *Order*, ¶62 (J.A.___) (emphasis added).

The duty to negotiate under the statute may not depend on the network technology underlying the interconnection–in this case I-VoIP, but it does depend on classification. If I-VoIP is classified as a *telecommunications service* then the FCC would not need to keep reminding providers they have that duty as it would be enforceable through arbitrations by NARUC members–as Congress most certainly intended. The FCC's actions injure the State's designated role in Congresses plan–as well as the plan itself. For the last 12 years, the FCC has treated direct retail phone service competitors differently based solely on which packet-based technology they use to provide service – which the Act specifies is not a relevant consideration. This cannot be what Congress intended.

II. *FCC LACKS AUTHORITY TO IMPOSE PORTING OBLIGATIONS ON OR PROVIDE DIRECT ACCESS TO VoIP PROVIDERS.*

A. Because §251(e)(2) limits cost support for *telecommunications numbering administration* to *telecommunications carriers*, it is unreasonable for the FCC to conclude that the requirement does not also limit the scope of §251(e)(1).

Most arguments in *Resp.Br*. 24-37 were addressed in *Pet.Br*. at 45-61. However, the FCC raised a few additional points that require critique.

First, *Resp.Br.* at 25-26 cites *Building Owners & Managers Association International v. FCC*, 254 F.3d 89 (D.C. Cir. 2001), for the proposition that the grant of exclusive jurisdiction over the numbering plan

> evidences Congress's intent to "vest broad authority" in the Commission, especially where "Congress demonstrated no intent to qualify the terms" in question.

As with the standing cases referenced by Respondent, this case is distinguishable on both the facts and law.

In *Building Owner*, the FCC relied on two separate but reinforcing provisions to block building owner contract provisions that obstruct tenants' use of satellite services. One provision gave the FCC "exclusive jurisdiction to regulate the provision of direct-to-home satellite services." The other specified it had "to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through ... satellite services." Id. at 91-92.

Significantly, unlike here, no one did (or could) cite to *any* text in the Act demonstrating Congressional intent to limit or "qualify the terms in question."

By contrast, the limitations on the FCC authority in §251(e) is clear. *Pet.Br.* at 41-61.

Subsection (e)(1) gives the FCC "exclusive" jurisdiction and requires it to create an entity to administer "*telecommunications* numbering."

Subsection (e)(2) specifies that such administration "shall be borne by all telecommunications carriers on a competitively-neutral basis."

Logically, the inquiry need go no further. There is no ambiguity.

Congress said the costs "shall" be borne by all "*telecommunications carriers*" – a defined term meaning providers of *telecommunications services*.

It did not say, the costs shall be borne by all telecommunications carriers *and anyone else the FCC might want to give phone numbers to*.

Yet, predictably, *Resp.Br*. at 31concludes:

> [§]251(e)(2) does not limit cost support for "telecommunications numbering administration" to "Telecommunications carriers."

The FCC is fighting to find an ambiguity where absolutely none exists. It ignores limitations obvious in even a cursory review of the relevant text.

Moreover, Congress said - in imposing the costs of administration and portability only on *telecommunications carriers* - that *such costs should be borne on a competitively neutral basis*.

This makes sense. It is easy to parse out costs on a competitively neutral basis to those entities Congress requires to incur those costs via porting and administration duties.

Conversely, it makes no sense for Congress to require "competitive neutrality" if it were simultaneously granting the FCC an apparently unlimited

ability to give numbers directly to direct competitors not charged with those same responsibilities, i.e., anyone other than a "*telecommunications carrier*."

The FCC agrees, *Resp.Br.* at 30, conceding that:

> [i]n 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.*

The text is clear. The limiting impact of that text is also clear. Because §251(e)(2) explicitly limits cost support for telecommunications numbering administration to *telecommunications carriers,* it is unreasonable for the FCC to conclude that the requirement does not also limit the scope of §251(e)(1).

However, the FCC, *Resp.Br.* at 31 comes to precisely the opposite conclusion, arguing:

> 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).

In so doing, the FCC also has necessarily conceded that - if its interpretation of §251(e)(2) is wrong - then its "exclusive" authority under §251(e)(1) is in fact limited to telecommunications carriers.

To be clear – if the §251(e)(2) specification that the costs "shall be borne by all *telecommunications carriers* on a competitively-neutral basis." - means

Congress expected the Commission to only assess *telecommunications carriers* – then the FCC's principle rationale justifying the *Order* falls.

Resp.Br. at 26-7 notes there is "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."

This is a theme that permeates the *Order* and the FCC's arguments.

Basically, if the FCC thinks its good policy, the FCC can ignore the statutory framework.

But the FCC does not have "an unfettered discretion…to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve." *NARUC v. FCC* 525 F.2d 630, 643 (D.C. Cir. 1976); *Pet.Br.* at 31.

The FCC contention that "Congress would [not] have wanted such an anticompetitive result" puts the cart before the horse.

The result can only be anticompetitive, to the extent that it may be, *because* the FCC has refused to classify I-VoIP providers as providers of *telecommunications services*. The FCC created the competitive imbalance by not classifying I-VoIP, and then shoe-horning I-VoIP providers into a construct designed for *telecommunications carriers*.

Moreover, the FCC's continued focus on allowing I-VoIP portability to promote competition and its acknowledgement that there are no technical barriers to VoIP's participation in the local *telecommunications service* market highlight the irrationality of the FCC's approach. *Resp.Br*. at 26-7, 30-31 and elsewhere states that:

1. there are no technical barriers to VoIP porting and administering numbers, and

2. treating VoIP as a *telecommunications service* provider (on this issue) will "further the Act's purpose of "promot[ing] competition" – competition in a market the same Act defined in terms of "telecommunications services."

Again and again – every time the FCC raises additional arguments for why it is good policy to allow VoIP to compete with other *telecommunications carriers*, it is adding to the mountain of evidence that VoIP is in fact a *telecommunications service*.[8]

But the *Resp. Br*. at 27-28, seeking justification to avoid the Congressional scheme, starts its analysis of its §251(e) authority with an illogical construct.

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[8] See, *Resp.Br*. at 33, making it crystal clear that customers view the services the same: "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."

Even though in §251(e), subpart (2) specifies only *telecommunications carriers* "shall" pay the costs for administration (and porting), the use of the word "telecommunications" to describe numbering in subpart (1) must be viewed in isolation.

This seems an inappropriate way to begin any analysis.

However, the argument the FCC presents to press this construct undermines its arguments that (a) it has authority to provide numbers to and assess carriers that are not *telecommunications services*, and (b) §251(e)(1) & (2) should not be construed together in context.

The FCC notes that 47 U.S.C. §254(d) permitted it in 2006 to begin assessing a nomadic I-VoIP provider like Vonage universal service fees without first classifying the service.

Other carriers that provided fixed I-VoIP service at the time were already contributing to the fund.

But this example cuts against the FCC having the same authority with respect to fees under §251(e)(2).

Section 254(d) specifies, like §251(e)(2) that every "*telecommunications carrier* that provides interstate *telecommunications services* shall contribute" to the federal universal service program.

But, unlike Section 251(e)(2) which is strictly limited to *telecommunications carriers*, §254(d) also includes specific language to allow the FCC to reach other providers:

> any other provider of *interstate telecommunications* may be required to contribute . . . if the public interest so requires.

(emphasis added)

It is clear Congress knew how to be expansive if it intended the FCC to be able to assess anyone other than *telecommunications carriers* for the costs of *number portability* and *numbering administration*.

It is also clear they chose not to do so.

B. Portability duties cannot be imposed on entities that are not providing "telecommunications services."

Number portability is defined 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).

Citing cases that have zero applicability to the text at hand, the FCC construes, *Resp.Br.* at 34-5, that definition as merely establishing a "statutory floor."

In other words, the FCC requires this Court to construe that section as implicitly including "possible information services" anywhere the text Congress supplied actually says just "*telecommunications services*."

According to the FCC, Congress intended that *number portability* to be construed as: the ability of users of *telecommunications services* (and potentially information services) to keep their phone number when "switching from one *telecommunications carrier* (or potentially information service provider) to another.

This is irrational on its face.

Rather than engaging in any exegesis of §153(37), the FCC simply cites *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011), and claims it stands for the proposition that any grant of authority in the Act "establishes a floor rather than a ceiling." *Resp.Br.* at 34-35.

However, all this Court did there was recognize clear statutory text that specified several minimum standards (actually labeled in the statute as "Minimum Standards") for what the FCC had to include in its regulations. Petitioners there argued the FCC could not go beyond the "minimum standards" listed in the Act. For obvious reasons, this Court disagreed. On its face the "minimum standards" were a floor.

This case is simply not relevant. The *only* common factors are that (1) that case also involved the FCC and (2) the statutory text involved was, like §153(37), clear and unambiguous.

The FCC also cited to support its argument *Cheney R.R. Co. v. ICC*, 902 F.2d 66 (D.C. Cir. 1990).

This case is also completely unrelated to the case at bar. Indeed it lacks even a common appellee.

There the question involved competing applications to purchase railroad track designated for abandonment filed under 49 U.S.C. §10910(b)(1). That provision did not provide a procedure for how to treat competing applications.

However, a separate provision in the same Act, §10905, also dealt with track abandonments, albeit under different circumstances. That provision did include a procedure for how to treat competing applications.

The petitioner argued that the fact §10905 included a procedure for dealing with competing applications, and §10910 did not even speak to the issue, meant Congress must have meant not to allow competing applications in §10910.

The Court disagreed – finding the presence of a competing application procedure in §10905, did not imply that Congress meant "not to mandate any solution in the second context."

As is obvious, *Cheney* dealt with two separate application procedures applicable under slightly different circumstances.

The provisions at issue in the case at bar have a completely different relationship.

Section 153(37) is in the definitions section of the Act.

No rational analysis could apply *Cheney*, because logically, Congress would always expect agencies (and Courts) to refer to a "definition" to help discern what the provision using the defined term – in this case §251(b)(2) – actually means. That's the way definitions work. Frequently, when Congress includes a definition, it acts to constrain agency choices, as it clearly does in this circumstance. The definition makes clear number portability involves ports between two *telecommunications carriers*.

Like the Cablevision case, this case has no applicability to the case at bar.

C. Congress gave the FCC *express* authority in §332(c)(1) and in the definition of *local exchange carrier* to treat wireless carriers as local exchange carriers.

Citing *CTIA v FCC*, 330 F.3d 502 (D.C. Cir. 2003), the FCC at *Resp.Br.* 35-6, finds it significant the FCC was permitted to extend number portability requirements to wireless carriers in 1996 "even though such carriers are not "local exchange carriers"(LEC) and are so outside the express requirements of §251(b)(2).

The FCC concedes that wireless carriers provide *telecommunications service*, but ambitiously finds this extension to a "non-LEC" provides support for the suspect proposition that it can extend portability beyond *telecommunications services* specified in the portability definition.

However, the FCC's extension of portability obligations to wireless does not even provide precedent for extending portability to a non-LEC. Much less precedent to extend it to something, that whatever it is, cannot be, for purposes of this argument, a *telecommunications carrier*.

Why?

There are provisions in the Act that permit the FCC to designate wireless carriers as LECs for purposes of §251, provisions that have no application to any putative "information service." Congress in two places specified that the FCC has authority to treat wireless as a LEC for purposes of portability.

As the *CTIA* court recognized, 330 F.3d at 505, the FCC first cited, *inter alia*, its authority under 47 U.S.C. §332 to impose portability on wireless carriers.

Section 332 (c)(1) (A) says a person engaged in providing a:

> commercial mobile service *shall*, insofar as such person is so engaged, *be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable* to that service.

(emphasis added)

Section 153(32), in turn, defines *local exchange carrier* as:

> any person that is engaged in the provision of telephone exchange service or exchange access. Such term <u>does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the</u>

> Commission finds that such service should be included in the definition of such term.
>
> (emphasis added)

At the time it decided to impose number portability, the FCC did not find wireless carriers to be LECs. But no-one timely appealed the FCC's action on this ground. In *CTIA*, a carrier sought to appeal the FCC's extension of portability on the grounds the FCC had not designated them as LECs. But it was raised long after the time had lapsed to file an appeal and was denied as untimely.

The fact remains, *Congress gave the FCC express authority to treat mobile carriers as LECs under §251(b)(2).*

There is no analogous provision, or other statutory text, that supports expansion of porting obligations beyond *telecommunications carriers*.

D. Section 251 obligations are common carrier obligations.

47 U.S.C. §153(51) specifies that a carrier "shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."

Resp.Br. at 37 provides another illogical contruct in an attempt to distinguish *Verizon v. FCC,* 740 F.3rd 623 (DC Cir 2015).

It is, however, a fact, as the highlighted language of §332(c)(1) quoted, *supra*, makes clear, the provisions of subchapter II, including 251(b), amount to common carriage barred by §153(51).

Moreover, in that case, the FCC actually classified the broadband internet service at issue as an "information service."

In applying *Verizon* to the current circumstances, as NARUC discussed, *Pet.Br.* at 38-43, the Court will have to first consider the classification issue. [9]

The non-discriminatory access and interconnection provisions of §251 are at the heart of the definition of common carrier service.

III. THE FCC CANNOT REASONABLY DECLINE TO CLASSIFY I-VOIP.

The part III arguments of the FCC and Vonage briefs raise a series of excuses[10] why the Commission should be allowed to defer classification.

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[9] *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).

[10] Vonage, *Int.Br*. at 20-23 argues NARUC was required to appeal the *2007 Portability Order*. Certainly, I-VoIP providers could have argued that absent classification, the FCC lacked authority to require them to fund number administration. But they did not. NARUC is not appealing that here. We had no reason to appeal because the order recognized that as long as I-VoIP status was unresolved, the statute required a *telecommunications carrier* to handle porting obligations. *Pet.Br*. at 51-52, quoting the 2007 order specification that the statute requires portability between *telecommunications carriers* and that "[§]251(b)(2) grants us authority to impose obligations on the interconnected VoIP providers' LEC numbering partners to effectuate those requirements." Vonage, also contends the FCC's discretion to classify services when it sees fit is underscored by *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *Int.Br.* at 33 because it recognized the FCC may revisit prior classifications. However, that if that case teaches anything, it is that the FCC has no excuse to avoid classifying I-VoIP immediately as it can revisit prior classification decisions based on changing circumstances – and forebear from provisions that should not apply *ab initio.*

However, assuming *arguendo*, deferring the classification is an acceptable option in the circumstances presented, deferral cannot cure the flawed reasoning described, *supra*.

A. The FCC's "discretion to defer action" is constrained by its reasoning and actions in this proceeding.

As with any legal analysis, the court must evaluate all these claims in the context of the current circumstances.

For example, *Resp.Br.* at 41-42, cites a series of cases for the proposition that 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.'"

However, any examination of the cases cited quickly reveals that none involved the extreme factual circumstances present in this case. To recap, the FCC acknowledges it has already applied many other Title II obligations to I-VoIP, Resp.Br. at 9, and the *Order*:

- defines I-VoIP as a *telecommunications carrier* providing *telecommunications services* in its portability rules,
- bestows on I-VoIP carriers in this docket – for undeniably the first time – benefits Congress only specified were available to *telecommunications service* providers, *Order* ¶¶13, 55-56 (J.A.___)
- reminds I-VoIP providers that, even though they may not be *telecommunications carriers*, the FCC expects them to comply with the §251 obligation to "negotiate in good faith" Congress only imposed on *telecommunications carriers*, *Order* ¶62 (J.A.___)

- contends that I-VoIP can technically handle all ports and administration – just like the "*telecommunication carriers*" they compete with every day; *Order* ¶12 (J.A.___)

- urges that allowing I-VoIP to compete in this way will further the Congressional goal to further competition in what is unquestionably telecommunications service; *Resp.Br*. at 26-7, 30-31, and

- cites an FCC report on local retail phone competition demonstrating that VoIP providers have taken over a third of that market – which is, without question, the *telecommunications service* market targeted by Congress in §251. *Order* ¶1 (J.A.___)

Vonage agreed with the FCC and, *Int.Br*. at 24, also argues that Congress knows how to set a deadline for FCC action and that it didn't here. In support, they reference the 2012 Spectrum Act, which charged the FCC with designing an incentive auction to be completed by 2022. But the analogy is imperfect.

First designing an incentive auction from scratch is qualitatively different from applying straight forward functional criteria specified by Congress to a service whose characteristics are as well established because the technology already serves more than a third of all retail telephone subscribers.

Second, Congress did actually set a deadline to implement the crucial competition opening provisions of §251 – in §251(d)(1) which required the FCC to complete within six months of enactment - a rulemaking to implement number portability.

The FCC did so specifying that in

> implementing the statute, the Commission has the responsibility to adopt the rules that will implement most quickly and effectively the national telecommunications policy embodied in the 1996 Act.

In the Matter of Telephone Number Portability, 11 F.C.C. Rcd. 8352, ¶2 (1996) (emphasis added).

This short Congressional turnaround suggests the FCC's current 12 year time frame just to categorize whether a service fits within that framework - might be a little long.

B. The question of classification was raised below and considered.

Resp.Br. at 39 argues that the FCC should not have to address this issue because it did not propose to classify VoIP in this proceeding – only to confirm the impact of its definition as a *telecommunications carrier* in the regulations.

However, there is no question the FCC considered and rejected comments that it must classify interconnected VoIP providers as telecommunications carriers to give them direct access to numbers. *Order* ¶¶79-80 (J.A. __).

It is true the FCC has had an open docket on the classification issue since March of 2004. *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking,* 19 F.C.C. Rcd. 4863 at ¶32 (2004).

It is also true that the FCC has over the last 12 years repeatedly cited to that docket as the excuse for not classifying I-VoIP – all while undertaking major

structural reforms that were initiated in the first instance in that docket. Actions that unequivocally treat I-VoIP just like other "telecommunications services".[11]

For example, the FCC acted on Universal Service and Access charge issues raised in the 2004 NPRM in 2011 in the so called *Transformational Order.*[12]

There, id. at ¶68, five years ago, in 2011, the FCC stated

> As we have long recognized, "interconnected VoIP service 'is increasingly used to replace analog voice service,'"

Before again, as in this *Order*, declining to classify and even claiming, in¶69 that statutory classifications no longer matter:

> Under our approach, federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act."[13]

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[11] Compare, *In the Matter of Rates for Interstate Inmate Calling Servs.*, 31 F.C.C. Rcd. 261 (2016) ([W]e again note that "[t]he Commission has not classified one-way VoIP.") *In the Matters of IP-Enabled Servs. E911 Requirements for IP-Enabled Serv. Providers*, 20 F.C.C. Rcd. 10245, 10258 (2005) *In the Matter of Time Warner Cable Request for Declaratory Ruling*, 22 F.C.C. Rcd. 3513, 3517 (2007) ("[C]ommenters ask us to reach . . . the application of section 251(b)(5) and the classification of VoIP services. [But] the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket.")

[12] *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund*, 26 F.C.C. Rcd. 17663, 17689 (2011).

[13] See, the discussion, *infra*, at 20 n.6 of the 10th Circuit's view of this statement.

Interestingly, in the proposed rulemaking that lead to the *Transformational Order*, the FCC specifically acknowledged that "lack of classification for VoIP services has led to disputes between carriers and VoIP providers regarding intercarrier compensation obligations for VoIP traffic."

Yet in that order, the FCC, as here, chose to seek another basis to impose access charges on I-VoIP – rather than classification.

In the 1996 Act, Congress imposed a framework to assure competition in local phone service.

The FCC has ignored that framework for over 12 years firmly placing its hand on the scale to favor some local phone competitors undeniably in the local phone business – explicitly based on technology.

All the pieces of the framework that it has applied to I-VoIP - access charges, disability access, universal service obligations, customer information restrictions, the requirements to negotiate in good faith – applied *ab initio* to *telecommunications service providers* competing to provide retail phone service.

Indeed, those obligations are the defining characteristics of what Congress labeled *telecommunications service*.

C. Classification of a service as a "telecommunications service" is a straight-forward technology-neutral legal analysis.

Finally the FCC, Resp.Br. at 40, argues that the classification of I-VoIP is simply too difficult. They discuss the technology at length. Vonage references a case that is neither on point nor particularly relevant.[14] This irrelevant focus on the technology used to provide the "unclassified" service begins in the FCC's brief at 6. See *Resp.Br* at 6-7,19, 39-41; Compare, *Int.Br*. at 3-8.

These irrelevant references to the technology underlying the service has become a standard ploy to divert attention from the FCC's illogical delay in classifying the service.

It is a tactic that has served the FCC well.

But is it true?

The definition of *telecommunications service* in the statute is functional:

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[14] See, *Int.Br*. at 4, 8, &18 citing the *MPUC* case which only applies to the 10% of nomadic I-VoIP providers that provide service using the public Internet. The case focuses on State preemption–not classification issues. Although preemption of State authority over nomadic I-VoIP is not relevant to this appeal, the fact is the FCC specified in a 2006 order that fixed I-VoIP providers – which were not addressed in that decision, are subject to State jurisdiction. See *In the Matter of Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006), at ¶56, ("[A] fundamental premise of our decision to preempt Minnesota's regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage's customers stay within or cross state boundaries . . . an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation.")

> The term "telecommunications service" means the offering 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*.

This Court need decide only two things.

First, is the provider offering telecommunications?

Second, is it offered to the public at large for a fee?

On its face, neither decision requires any reference to the underlying technology.[15]

Obviously, no special expertise in any technology is required to look at definition of "telecommunications" in §153(50) and decide if the service in question:

> transmi[ts], between or among points specified by the user . . .information of the user's choosing, without change in the form or content of the information as sent and received.

If you dial a phone number, and the caller and you converse – your voice is "transmitted between points specified by the user" – from you to your caller and

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[15] In §153(46), Congress made clear that distinctions in technology deployed to transmit voice communication are not relevant in classifying a service as a "telecommunications service." Congress's definition of "advanced telecommunications capability" at 47 U.S.C. §1302(d)(1) likewise makes clear that such capability is "without regard to any transmission media or technology" and "enables users to originate and receive high-quality voice … telecommunications using any technology." That any service uses IP technology rather than some other technology to deliver voice service is immaterial to classification.

from your caller to you. Obviously, if your friend can understand you, then it is also "without change in the form or content of the information as sent and received." It is therefore "*telecommunications*."

That is why, for voice service, there is no reason to focus on protocol conversions – whether a provider uses I-VoIP (unclassified) or Time-Division Multiplexing (telecommunications service), the protocol conversions required to provide voice service *never change the form or content of the input to the service* (e.g., real time voice communications) and have never been the basis for reclassifying a *telecommunications service*. Otherwise, all voice services would be categorized as "information services." [16]

In any case, deciding voice service is "telecommunications" is not a difficult conclusion to reach.

Remember, we know "legacy" phone service has always been classified as a "*telecommunications service*" and provides a clear example of what constitutes "*telecommunications*." These "legacy" communications are real-time voice communications.

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[16] Moreover, as Congress made clear in defining *information services* if data processing of any kind is used to provide a *telecommunications service* – it cannot be an information service. 47 U.S.C. §153(20) specifically excludes from the definition "any use of any such [data processing] capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

But in this case, *this Court does not even have to make that determination*. *Resp.Br.* at 28, and *Int.Br.* at 31, n.6 both concede that I-VoIP includes "telecommunications."

So what remains of the arduous "and complex" task of classification?

Recall in the regular reports on phone competition cited in paragraph 1 of the Order, the FCC categorizes both legacy phone services (which are "telecommunications services") and I-VoIP as "retail local telephone service."

So how can one determine if a retail phone service is a *telecommunications service* that Congress wanted subject to Title II obligations so as to enhance local phone competition - or something else?

Again, no reference to any technology is required. The Court only need examine the definition of a "*telecommunications service*" and decide if, Verizon or even Vonage, both which provide I-VoIP-based voice services, are in fact:

> offering 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. §153(53)

The Statute instructs that in making this determination the facilities (technology) used to provide the service simply is not relevant. But even if it did not make that specification, it is apparent from rest of the definition that no reference to technology is needed to figure out if Vonage (or Verizon, or AT&T) using I-VoIP or "legacy technology" is offering "telecommunications.

They are.

Nor is there a need to reference technology to figure out if they are charging fees to provide the service.

They are.

The only question remaining is: Are they also offering the service to the public? Again, that appears to be a simple answer.

As the FCC points out Resp.Br. at 28: The distinction lies in whether a provider "offers" telecommunications as a service, or rather makes use of telecommunications to offer another service.

CONCLUSION

The Court should confirm classification of I-VoIP as *telecommunications services*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that this brief contains 6963 words. In making this certification, Joint Petitioners' counsel has relied on the word count function of Microsoft Word, the word processing system used to prepare this brief.

This brief 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 Office Word 2003 in 14 pt. font Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing "Brief of Petitioner" was filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on this 9th day of June, 2016 through the CM/ECF electronic filing system, and thus also served on counsel of record.

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