ORAL ARGUMENT SCHEDULED FOR MARCH 4, 2011

BRIEF FOR RESPONDENTS

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

NO. 10-1116

STATON HOLDINGS, INC. D/B/A STATON WHOLESALE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE 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

A. Parties:

All parties, intervenors, and amici in this case are listed in the Brief for Petitioner.

B. Rulings Under Appeal:

Staton Holdings, Inc. d/b/a Staton Wholesale, Complainant v. MCI WorldCom Communications, Inc. and Sprint Communications Company, L.P., Defendants, Order on Reconsideration, 25 FCC Rcd 5094 (2010) (JA 584)

C. Related Cases:

The order on review has not previously been before this Court or any other court, and counsel is not aware of any related case before this or any other court.

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

All Eights Number	the toll free number 1-888-888-8888
Call Interactive	FDC Interactive, also referred to in Brief for Petitioner as First Data Corporation or FDC
Commission or FCC	Federal Communications Commission
MCI	MCI WorldCom Communications, Inc.
Order on Review	*Staton Holdings, Inc. d/b/a Staton Wholesale, Complainant v. MCI WorldCom Communication, Inc. and Sprint Communications Company, L.P., Defendants,* Order on Reconsideration, 25 FCC Rcd 5094 (2010) (JA 584)
Sprint	Sprint Communications Company, L.P.
Staton	Staton Holdings, Inc. d/b/a Staton Wholesale
Staton Order	*Staton Holdings, Inc. d/b/a Staton Wholesale, Complainant v. MCI WorldCom Communication, Inc., Defendant and Sprint Communications Company, L.P., Defendant,* Order, 19 FCC Rcd 8699 (2004) (JA 396)

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BRIEF FOR RESPONDENTS

ISSUE PRESENTED

This proceeding arises out of a telephone carrier's mistaken disconnection of a toll free number that a corporate customer, petitioner Staton Holdings, Inc. ("Staton"), had used as a secondary telephone line for receiving faxes. By the time the error was discovered—eight months after the disconnection—the number had been reassigned to another customer.

The carrier, MCI WorldCom Communications, Inc. ("MCI"), acknowledged its mistake. Finding that the mistake was negligent, rather than willful, the Federal Communications Commission ("FCC" or "Commission") directed the carrier to

pay a penalty. The Commission denied Staton's request for equitable relief ordering reassignment of the number from the innocent party that was using it. Exercising its plenary authority over telephone numbering, the Commission found that the equities did not weigh in Staton's favor because, among other things, Staton had waited eighteen months after discovering the mistaken disconnection before commencing proceedings before the Commission.

Staton filed a complaint under Section 208 of the Communications Act, 47 U.S.C. § 208, alleging that MCI had willfully disconnected the toll free number from Staton and reassigned it to the new user. The issue presented is:

Whether the Commission acted within its discretion in concluding that Staton failed to meet its burden of proving that MCI engaged in willful misconduct and in declining, based on a balance of the equities, to order a return of the toll free number to Staton.

STATUTES AND REGULATIONS

Pertinent statutory provisions and regulations are set forth in the addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

The Communications Act grants to the Commission exclusive jurisdiction over telecommunications numbering administration. 47 U.S.C. § 251(e)(1). Petitioner Staton does not dispute that the Commission has plenary authority over numbering assignment. Rather, it challenges the Commission's exercise of this

authority in connection with a "vanity toll free number," 888-888-8888 (the "All Eights Number").[1]

Toll free numbers are maintained in an administrative database called the Service Management System ("SMS database"). 47 C.F.R. § 52.101(d). The Responsible Organization ("RespOrg") is the entity chosen by the toll free subscriber to reserve numbers from the SMS database and to manage the subscriber's records in the SMS database. 47 C.F.R. § 52.101(b). Typically, to obtain a toll free number, the subscriber makes a request through its telephone carrier. The RespOrg (which also may be the telephone carrier) then ascertains the status of the requested number; if the number is available, the RespOrg takes the necessary steps to assign the toll free number to the requesting party. *See generally* 47 C.F.R. § 52.103.

While toll free numbers using the 800 access code have been in use since 1967, those using the 888 access code are of more recent vintage. These numbers were introduced in 1996, *see* 13 FCC Rcd at 9060 ¶ 2, and initially were assigned on a first-come, first-served basis, subject to a limited exception: those subscribers with an 800 number had a "right of first refusal" to obtain the corresponding number in the 888 access code. *See id.* at 9068-69, 9071 ¶¶ 22-23, 30; s*ee also* 47

[1] A "vanity toll free number" is one that either spells a word (based on the letters associated with the number's digits on a telephone handset) or is of particular interest to the subscriber. *See Toll Free Service Access Codes,* Fourth Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 9058 ¶ 1 (1998).

C.F.R. § 52.111 ("Toll free numbers shall be made available on a first-come, first-served basis unless otherwise directed by the Commission.").

II. FACTUAL AND PROCEDURAL BACKGROUND

Staton is a clothing distributor based in Dallas, Texas. In 1990, it acquired the toll free number 800-888-8888. *Staton Holdings, Inc. d/b/a Staton Wholesale, Complainant, v. MCI WorldCom Communications, Inc., Defendant, and Sprint Communications Co., L.P., Defendant,* Order, 19 FCC Rcd 8699, 8700 ¶ 2 (2004) ("*Staton Order*") (JA 397), *reconsideration denied,* 25 FCC Rcd 5094 (2010) (*"Order on Review*") (JA 584). Staton exercised its right of first refusal to obtain the corresponding number in the 888 access code, and in September 1998, it acquired the right to use the All Eights Number. *Staton Order* ¶ 2 (JA 397).

From September 1999 to September 2001, MCI provided long-distance telecommunications services to Staton. *Id.* (JA 397). Beginning in September 1998, Staton used the All Eights number as a line for receiving customer orders by fax. *Id.* ¶ 4 (JA 398). By the time the number was disconnected in October 2000, Staton was using the number only as a "secondary" (*i.e.*, backup) fax line that received little incoming traffic. *Id.* ¶¶ 8, 27 (JA 399, 404). Unaware of the disconnection, Staton explained that it removed the number from its sales catalog in 2001 because it planned to start using the number for a service that would allow customers to access information by calling the number. *Id.* ¶ 4 & n.15 (JA 398); *see also* Complaint at 11 (JA 23).

On October 27, 2000, MCI mistakenly disconnected the All Eights Number from Staton as a result of an error by a former MCI employee, Venus Nicholson.

Staton Order ¶ 5 (JA 398).[2] Four days later, on October 31, a third-party company, FDC Interactive (Call Interactive),[3] contacted a different MCI employee, Denise Nilson, to express its interest in using the All Eights Number. *Id.* (JA 398). Call Interactive told Nilson that when the number was called, an automated recording played indicating that the number was not in use. *Id.* (JA 398).[4] Nilson checked the status of the All Eights Number in the SMS database and learned that MCI was the RespOrg for the number and that the number was in disconnect status (*i.e.*, it was not in current use and an automated recording was assigned it). *Id.* ¶ 6 (JA 398-99). On November 2, 2000, Nilson assigned the All Eights Number to MCI's account for Call Interactive, while leaving the number in "hold status" (*i.e.*, awaiting release to a pool of available numbers). *Id.* (JA 399).[5] The number remained disconnected until January 4, 2001, when Nilson activated the All Eights Number for Call Interactive's use. *Id.* ¶ 7 (JA 399).[6] In April 2001, MCI received a letter of authorization from Call Interactive to port the All Eights Number to

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[2] *See also* MCI Answer at 16 ("On October 27, 2000, the All Eights Number was disconnected from Staton's Corporate Identification Number"; "[t]he disconnection order was the result of an error by Venus Nicholson, a former MCI customer service representative.") (JA 376); Joint Statement at 6 (same) (JA 353).

[3] Staton refers to this company as First Data Corporation or FDC. *See, e.g.*, Brief for Petitioner at 4.

[4] *See also* MCI Answer at 16 ("On October 31, 2000, a MCI service representative employee, Denise Nilson . . . was contacted by her customer FDC Interactive ("Call Interactive") and was told that the All Eights Number was not terminating to an active location because when the number was dialed, a recording . . . indicated that the number was not in use.") (JA 376); Joint Statement at 6 (same) (JA 353).

[5] *See also* MCI Answer at 17 (JA 377); Joint Statement at 7 (JA 354).

[6] *See also* MCI Answer at 12 (JA 372); *see* Joint Statement at 7 (JA 354).

Sprint Communications Company ("Sprint"), which then became the RespOrg for the All Eights Number. *Staton Order* ¶ 7 (JA 399).[7]

It was not until June 2001—eight months after MCI had mistakenly disconnected the All Eights Number from Staton and five months after it had activated the number for use by Call Interactive—that any party, including Staton, became aware of the mistaken disconnection. *Id.* ¶¶ 11-13 (JA 400-01). Staton explained that it did not discover the disconnection earlier because, at the time, it was using the number only as a "secondary facsimile line" that "would not have received much traffic." *Id.* ¶ 8 (JA 399); *see also* Complaint at 12 (JA 24).

A. Staton's Complaint and Petition for Reconsideration.

On December 20, 2002, a year-and-a-half after Staton discovered that the All Eights Number was being used by Call Interactive, Staton filed a formal complaint with the Commission under Section 208 of the Communications Act, 47 U.S.C. § 208. Staton alleged that MCI and Sprint "'knowingly and intentionally took the All Eights Number from Staton without its consent' and that such 'willful misconduct' violated sections 1, 201(b), and 251(e)(1) of the Act, as well as several Commission orders concerning toll free number assignments." *Staton*

[7] *See also* Sprint Answer at 3-4 (JA 601-02); MCI Answer at 12 (JA 372); Joint Statement at 3 (JA 350).

Order ¶ 9 (JA 399-400) (*quoting* Complaint at 14 (JA 26)).[8] Staton sought the immediate return of the All Eights Number. *Id.* (JA 400).

In the proceedings before the agency, the parties agreed that the "key legal issue" was "'whether MCI's actions with respect to the All Eights Number were negligent or can be characterized as willful misconduct.'" *Staton Order* ¶ 15 (JA 401) (quoting Joint Statement at 9 (JA 356)).[9] The parties also agreed that if MCI's actions were negligent rather than willful, Staton's damages would be limited to $1,000. *See supra* note 9.

In 2004, the Commission's Enforcement Bureau ("Bureau") released an order partially upholding Staton's complaint. Noting that "MCI readily admits

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[8] 47 U.S.C. §§ 151, 201(b), 251(e)(1). Staton's complaint also sought relief against Call Interactive and Mills Fleet Farm, Inc., but these companies were dismissed because they are not common carriers and therefore the complaint against them did not state a cause of action under Section 208 of the Communications Act. *Staton Order* n.1 (JA 396). Staton did not challenge the dismissal in the proceedings before the agency, nor does it raise the issue on appeal.

[9] This agreement was consistent with an order of the United States Bankruptcy Court for the Southern District of New York, which presided over bankruptcy proceedings involving MCI that were pending at the time Staton filed its complaint before the FCC. Adopting a stipulation between Staton and MCI, the Bankruptcy Court permitted the agency proceeding to move forward on the following terms: "if MCI is found liable, all further proceedings regarding determination and liquidation of damages shall take place in the Bankruptcy Court," but "[i]n the event that the FCC determines that [MCI is] liable for negligent, and not willful, reassignment of the All Eights Number, then the parties hereby agree that Staton's claim for damages only shall be liquidated at the tariff cap amount of $1000, and shall be allowed in that amount and not subject to further appeal by either party." *Staton Order* ¶ 24 (JA) (quoting Bankruptcy Stipulation and Order at ¶ 5 (JA 341)) (internal quotation marks omitted). *See also* Joint Statement at 8-9 (JA 355-56).

that" its disconnection of the All Eights Number "was the result of an error by a former MCI employee," the Bureau agreed with Staton "that MCI's negligent disconnection of the All Eights Number constituted an unjust and unreasonable practice" in violation of Section 201(b) of the Communications Act. *Staton Order* ¶¶ 5, 18 (JA 398, 402); *see also id.* ¶ 16 (401-02). Accordingly, the Commission ordered MCI to pay $1,000 in damages for this violation, *id.* ¶¶ 24, 31 (JA 404, 405) – the maximum amount that could be awarded upon a finding of only negligence.

After analyzing the evidence cited by Staton in support of its argument that MCI willfully disconnected the All Eights Number, the Bureau found that Staton had failed to carry its burden in establishing willful misconduct by MCI. *Id.* ¶¶ 15-17 (JA 401-02). Rather, the Bureau found that MCI's actions were "negligent," *id.* ¶¶ 15-16 (JA 401-02), because Staton did not "provide evidence to counter MCI's assertion that its disconnection . . . was merely an error, and provide[d] no evidence that MCI acted intentionally." *Id.* ¶ 17 (JA 402).[10]

The Bureau also denied Staton's request for equitable relief ordering the immediate return of the number to Staton. *Id.* ¶ 25 (JA 404). The Bureau explained that "[t]he relief that Staton seeks obviously cannot be granted without causing harm to the current user" – an "innocent third party." *Id.* ¶¶ 25-26 (JA 404). That concern was particularly significant given the "age-old principle that in

[10] The Bureau denied Staton's complaints under Sections 1 and 251(e)(1) of the Communications Act, 47 U.S.C. §§ 151, 251(e)(1), and denied all claims against Sprint. *See Staton Order* ¶¶ 19-20, 22-23 (JA 402-03). Staton did not challenge those denials below, nor does it do so on appeal.

formulating equitable relief . . . the effects of the relief on innocent third parties" must be considered. *Staton Order* ¶ 25 (JA 404) (*quoting In re Envirodyne Indus.*, 29 F.3d 301, 303 (7th Cir. 1994), in turn, *citing Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 375 (1977)). The Bureau acknowledged that "Staton has suffered some harm as a result of the loss of the All Eights Number," but noted that, at the time of the disconnection, the number was used only as a secondary fax line. *Id.* ¶ 27 (JA 404). The Bureau further found that Staton's claims regarding its contemplated use of the All Eights Number as a call-in information service were speculative and lacking in evidentiary support. *Id.* (JA 404-05). Moreover, Staton "did not act promptly to protect its rights" upon discovering the disconnection; indeed, it "waited 18 months" before filing its complaint with the Commission. *Id.* ¶ 28 (JA 405). Based on its consideration of "all these factors," the Bureau found that "the balancing of equities here weighs in favor of leaving the All Eights Number with Call Interactive." *Id.* ¶ 29 (JA 405).

On June 15, 2004, Staton petitioned the Bureau to reconsider its decision principally contending that there were "unresolved questions of fact" concerning "the circumstances involved in the unauthorized loss of Staton's right to use the toll-free vanity 1-888-888-8888 number." Petition for Reconsideration at 1 (JA 406).

On September 8, 2005, Staton supplemented its reconsideration petition to ask the Bureau to reopen the record. Staton asserted that "newly discovered evidence" "suggest the potential that the unusually attractive" All Eights Number

"is being 'hoarded' at this time, in contravention of 47 C.F.R. § 52.107."[11] *See* Supplement to Petition for Reconsideration at 1, 3 (JA 432,434). Over eight months later, on May 18, 2006, Staton again supplemented its reconsideration petition to include the transcript of a deposition of MCI employee Denise Nilson from a separate litigation that Staton had brought against Call Interactive.[12] In that deposition, Nilson provided additional details regarding her role in reassigning the disconnected number to Call Interactive. Second Supplement to Petition for Reconsideration at 2 (JA 441). The Bureau referred Staton's petition for reconsideration, as supplemented, to the full Commission for disposition. *See* 47 C.F.R. § 1.106(a)(1).

B. The *Order on Review*.

On May 5, 2010, the Commission denied Staton's petition for reconsideration. *See Order on Review* ¶ 31 (JA 594).

At the outset, the Commission explained that its rules "do not allow reconsideration requests" that simply "reiterate arguments already presented" by the petitioner where those arguments already were "considered and rejected" by the agency. *Id.* ¶ 6 (JA 586) (internal quotation marks and citation omitted). The Commission found that Staton's petition was almost exclusively "based upon facts and arguments that the Bureau already considered and rejected." *Id.* ¶ 7 (JA 587).

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[11] 47 C.F.R. § 52.107 prohibits a toll free subscriber from "hoarding" toll free numbers—in other words, acquiring more numbers than it intends to use to provide toll free service.

[12] *Staton Holdings, Inc. d/b/a Staton Wholesale, et al. v. First Data Corp.*, Civil Action No. 3-04-CV-2321-P (N.D. Tex.).

Staton's "only new argument" was that "it did not receive an adequate hearing" because it allegedly was not allowed to question witnesses in person. *Order on Review* ¶ 7 (JA 587). The Commission considered this new argument and rejected it.

First, the Commission explained that under its rules, formal complaint proceedings "are generally resolved on a written record" and that the testimony of live witnesses therefore is not necessary. *Id.* ¶ 9 (JA 587) (*quoting* 47 C.F.R. § 1.720 and *citing American Message Centers v. FCC*, 50 F.3d 35, 40-41 (D.C. Cir. 1995) (formal complaint proceedings "are often resolved solely on the written pleadings")). Second, the Commission pointed out that Staton could have sought depositions in the proceeding before the agency—as it had in its separate litigation against Call Interactive—but chose not to do so. *Id.* ¶ 10 (JA 588). Rather, its efforts to obtain discovery regarding MCI's allegedly willful misconduct consisted of nothing more than issuing five interrogatories, which MCI answered. *Id.* ¶ 11 (JA 588). The Commission thus rejected Staton's claim "that it was not afforded an opportunity to investigate fully the matters set forth in the formal complaints" and further rejected Staton's "related argument that it was denied an adequate hearing." *Id.* ¶ 12 (JA 588).

The Commission also found that Staton's second supplement to its reconsideration petition and its reliance on the deposition of Denise Nilson – obtained from its separate litigation against Call Interactive – did not "undermine" the Bureau's finding of negligence or "justify reopening the record." *Id.* ¶ 29 (JA 593). The Commission explained that Staton's supposedly new evidence of willful

misconduct ignored the fact that "the critical act" was MCI's mistaken disconnection of the All Eights Number. *See Order on Review* ¶ 30 (JA 593). "[T]he preponderance of the evidence clearly demonstrated negligence on the part of MCI," the Commission observed, and Staton had failed to carry its burden in presenting evidence of willful misconduct. *Id.* ¶ 19 (JA 590). The Commission specifically noted that Staton had "fail[ed] to refute" testimony concerning "an employee error at MCI that resulted in the disconnection of the number." *Id.* ¶ 19 (JA 590); *see also id.* ¶ 30 (JA 593). Apart from its reliance on unsupported inferences and "conclusory allegations," Staton also had failed to "explain the particular significance of any new facts" contained in its second supplemental submission "to the question of willful misconduct or to the specific violations averred in its complaint." *Id.* ¶ 29 (JA 593).

The Commission agreed with the Bureau's conclusion that the balance of the equities weighed against returning the All Eights Number to Staton. *See id.* ¶ 24 (JA 591). The Commission noted that the only argument that Staton asserted in support of its demand for return of the number was that the Bureau failed to properly consider its claims that it had incurred a loss valued at $100 million as a result of the disconnection and reassignment of the number. *Id.* ¶ 21 (JA 591). Staton based this evaluation on the claim that it had "'applied' for trademarks for 'All Eights' and 'InfoEights'" and had been "'advised'" by a consultant that it "'probably could' expect $100 million at an initial public offering 'after'" it had taken initial steps to form a public company. *See id.* ¶ 22 (JA 591); Petition at 7-8 (JA 412-13). The Commission explained that, "aside from Staton's bald

assertions, there is a lack of credible evidence to support such damages." *Order on Review* ¶ 23 (JA 591). It also noted that Staton did not address the other factors identified by the Bureau as weighing against Staton in the equitable calculus, including its prolonged delay in commencing proceedings before the Commission. *Id.* ¶ 24 (JA 591). The Commission also found that Staton's supplement to the reconsideration petition failed to establish that the All Eights Number was, on the record before it, no longer "in use." *Id.* ¶ 25 (JA 592).

Staton filed this petition for review, arguing that the Commission acted arbitrarily and capriciously in (a) finding that MCI had acted negligently rather than willfully, (b) refusing to order the return of the All Eights Number to Staton, and (c) refusing to reopen the record. Brief for Petitioner ("Staton Br.") at 3.

SUMMARY OF ARGUMENT

The Commission acted well within its discretion in concluding that Staton's loss of the All Eights Number resulted from MCI's negligence, rather than willful misconduct. The Commission's determination was based on substantial evidence, and Staton failed to carry its burden in establishing otherwise.

The Commission correctly rejected Staton's argument that it was unable to question live witnesses in support of its case. Staton did not avail itself of the opportunity under the Commission's rules to depose the MCI employee who was directly responsible for the disconnection. The Commission, moreover, explained why it rejected Staton's attempt to establish willful misconduct by relying on a deposition of a different MCI employee (Denise Nilson) obtained in a different litigation. Staton failed to present this testimony in a timely manner in accordance

with the Commission's rules, and even if it had done so, the Commission explained that much of the information in Nilson's deposition already was in the record and did not support an inference of willful misconduct in any event. Contrary to Staton's claims, Nilson did not acknowledge any deliberate violation of federal regulations in connection with the reassignment of the All Eights Number. To the extent that Staton attempted to link the alleged misconduct of one MCI employee in reassigning the number after it was disconnected with the earlier act of disconnection by a different MCI employee, that attempt failed because Staton's argument relied on conjecture and unsupported inferences.

The Commission did not act arbitrarily in declining to order the return of the All Eights Number to Staton based on the Commission's analysis of the balance of the equities. Staton does not dispute on appeal that two factors (its delay in commencing proceedings before the agency and its use of the number only as a secondary fax line) weighed in favor of leaving the number with the innocent party that was using it. It also conceded before the agency that it did not even notice that the number had been disconnected until eight months after the disconnection. Staton instead argues that its loss of the number caused it to forgo a business opportunity worth $100 million and that the Commission should have weighed the equities differently on that basis. As the Commission explained, Staton's estimated loss consisted of little more than "bald assertions," without "credible evidence."

Staton fares no better in arguing, based on an affidavit from its attorney, that Call Interactive was "no longer" actually using the number. The Commission

correctly found that claim to be unsupported by evidence. Finally, Staton's attempt to inject a takings claim under the Fifth Amendment fails for multiple reasons: the claim was not raised below; Staton asserts the claim in the wrong forum and without attempting to show any government action; and the All Eights toll-free telephone number is not "property" under the Fifth Amendment in any event.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FCC orders "under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission's decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (*quoting* 5 U.S.C. § 706(2)(A)). "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 Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (citations omitted). To withstand a challenge to agency action, the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

The Court also affords substantial deference to the Commission's interpretation of its own rules and policies, and "will uphold the FCC's interpretation unless it is 'plainly erroneous or inconsistent with the regulation.'"

Damsky v. FCC, 199 F.3d 527, 535 (D.C. Cir. 2000) (citation omitted). The Court must uphold the Commission's factual findings that are supported by substantial evidence. *See, e.g., Millar v. FCC*, 707 F.2d 1530, 1540 (D.C. Cir. 1983). In this context, substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "An agency conclusion 'may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.'" *Robinson v. NTSB,* 28 F.3d 210, 215 (D.C. Cir. 1994) (*quoting Chritton v. NTSB*, 888 F.2d 854, 856 (D.C. Cir. 1989).

II. THE COMMISSION REASONABLY CONCLUDED THAT THE DISCONNECTION OF STATON'S NUMBER WAS THE RESULT OF MCI'S NEGLIGENCE RATHER THAN WILLFUL MISCONDUCT.

As the Commission explained, a complainant alleging willful misconduct must present evidence of such misconduct. *Order on Review* ¶ 19 (JA 590); *see also American Message Centers v. FCC*, 50 F.3d at 41 (the Commission's rules "place the burden of pleading and documenting a violation of the Act" on the complainant and do not require a defendant "to prove that it has not violated the Act"). Relying on substantial evidence, including unrefuted evidence from MCI that the disconnection of the All Eights Number was the result of an employee error, the Commission reasonably concluded that Staton failed to meet its burden of establishing willful misconduct.

The Commission has explained that willful misconduct refers to "the *intentional* performance of an act *with knowledge* that the performance of that act will probably result in injury or damage, or . . . the *intentional* omission of some act, *with knowledge* that such omission will probably result in damage or injury." *Gerri Murphy Realty, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 19134, 19142 ¶ 19 (2001) (emphasis added; citation omitted).[13] As the Commission found, Staton failed to present evidence establishing such intentional and knowing acts by MCI. *Order on Review* ¶¶ 15, 19, 29-30 (JA 589, 590, 593); *see also Staton Order* ¶¶ 15-17 (JA 401-02). In particular, it failed to come forward with any evidence refuting MCI's statement that the disconnection was an innocent mistake. *Order on Review* ¶¶ 19, 30 (JA 590, 593); *Staton Order* ¶¶ 16-17 (JA 401-02); *see also* MCI's Answer at 11-12 (JA 371-72).

On appeal, Staton only summarily challenges the conclusion, based on the record before the Bureau, that MCI's disconnection was the result of a "negligent" mistake and not willful misconduct. *See* Staton Br. at 12-13. But none of the facts on which Staton relies supports an inference of willful misconduct. *See id.*

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[13] Staton relies on *MCI Telecommunications Corp. v. Management Solutions, Inc.*, 798 F. Supp. 50 (D. Me. 1992), for the proposition that willful misconduct may be inferred from an "affirmative representation to correct a problem" coupled with a "subsequent failure to follow up." Staton Br. 13. Even if that case were binding on this Court, it does not assist Staton because there was no such evidence here. As the Commission explained, the record evidence did not establish that MCI ever "agreed to attempt to" retrieve the All Eights Number after discovering that the number was mistakenly disconnected. *Order on Review* ¶ 18 (JA 590). Nor could it have taken any corrective action by that time. As the Commission observed—and Staton does not dispute—MCI no longer controlled the number in June 2001 when it first heard from Staton about the disconnection. *Id.* (JA 590).

First, MCI's admission that it "mistakenly disconnected the All Eights Number" (Staton Br. at 12) in fact supports the *opposite* inference – that the disconnection was precisely that: an innocent "mistake[]." Second, MCI's subsequent assignment of the number to Call Interactive "without any confirmation that the number was even available" (*id.*) likewise does not establish that MCI engaged in intentional and knowing acts that would injure or damage Staton. *See Gerri Murphy Realty*, 16 FCC Rcd at 19142 ¶ 19. Third, the fact that *third parties* allegedly continued to send faxes to Call Interactive that were addressed to Staton (Staton Br. at 12) has no bearing on whether *MCI* intentionally engaged in misconduct. And the mistaken billing of Staton for approximately one month following the disconnection (*id.*) is equally consistent with an innocent – and, at most, "negligent" – mistake. In a similar vein, MCI's "admi[ssions] that it had caused the problem" (*id.* at 13) do not support any reasonable inference of intentional acts by MCI with knowledge that they would injure or damage Staton.

Given the insufficiency of this "evidence," on appeal, Staton attempts to establish willful misconduct by relying almost exclusively on its argument that the Commission should have enlarged the record to include the deposition of Denise Nilson in an unrelated litigation. *See id.* at 14-18, 29. The Commission explained why this deposition—taken *two years* after the Bureau's decision in this proceeding—did not alter the Commission's conclusion that Staton had failed to meet its burden of proving willful misconduct by MCI.

First, Staton's attempt to introduce Nilson's testimony into the record came too late. By no later than September 2003 (when MCI filed its answer to Staton's

complaint), Staton learned of Nilson's identity as a participant in the post-disconnection reassignment of the All Eights Number. Staton availed itself of the opportunity under the Commission's rules to take discovery, but it chose not to depose Nilson. Citing its rule, 47 C.F.R. § 1.106(c), the Commission explained that absent a showing of a compelling public interest—which Staton does not even attempt to establish here—it does not accept on reconsideration "new evidence that could have been discovered previously with due diligence." *Order on Review* ¶ 27 & n.61 (JA 592). Thus, the Commission's conclusion that Staton had failed to justify reopening the record (*id.* ¶ 27 (JA 592)) was not arbitrary and capricious (*see* Staton Br. at 3). To the contrary, it followed settled law and sound public policy. As this Court has explained, an assertion that new evidence "might undermine" the agency's prior findings is insufficient "to establish an abuse of the Commission's discretion to consider the matter closed." *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852, 854 (D.C. Cir. 1975) (citation omitted). Section 405 of the Communications Act "merely authorizes and does not require the Commission to grant rehearings to consider newly available evidence." *Id.* at n.4.

Second, it is undisputed that Nilson's involvement in the events surrounding the reassignment of the All Eights Number occurred after the critical act of the disconnection of the number by a different MCI employee. *See* Br. at 4. The Commission considered Staton's argument that Nilson's post-disconnection conduct somehow caused the earlier disconnection of the number, but rejected it. As the Commission explained, this argument "relies on conjecture and unsupported conclusions to assert that the All Eights Number could not have been taken from

Staton but for MCI's actions *after* the October 27, 2000 disconnection." *Order on Review* ¶ 30 n.68 (JA 593) (emphasis in original). Staton came forward with no evidence showing that any post-disconnection acts by MCI rose to the level of willful misconduct that caused Staton's loss of the number.

Third, Staton is mistaken in its characterization of Nilson's deposition testimony. For example, contrary to Staton's assertions on appeal (Staton Br. at 16), Nilson did *not* acknowledge any deliberate violation of federal regulations in reassigning the All Eights Number (or any other toll free number) to Call Interactive. In fact, she testified that she did not know that directly transferring the All Eights Number to Call Interactive violated federal regulations. *See* Deposition at 30 ("Q. Is it your testimony that you did or you did not know that this transfer was contrary to federal regulations? A. I did not know.") (JA 479).[14]

Moreover, as Staton recognizes (Staton Br. at 19), at the time the All Eights Number was transferred to Call Interactive in November 2000, the Commission

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[14] In any event, the Commission reasonably declined to consider Staton's claim that MCI violated Section 52.103(d) of the Commission's rules, 47 C.F.R.§ 52.103(d), by reassigning the All Eights Number to Call Interactive without first placing it in a pool of available numbers. *Order on Review* ¶ 26 (JA 592). As the Commission noted, Staton failed to plead a violation of Section 52.103(d) in its complaint, *id.* ¶ 28 (JA 592), thus the claim was not properly before the agency, *see* 47 C.F.R. § 1.721(a)(4). Even if the claim had been properly presented, Staton's reliance on Section 52.103(d) is misplaced. As the Commission explained, "[t]he fact that Staton cannot demonstrate that it would have been more likely to recover the All Eights Number had it been placed in the spare number pool confirms that it is the initial negligent act of disconnection that is crucial here, not the fact that MCI subsequently assigned the All Eights Number to a particular party, Call Interactive." *Order on Review* ¶ 30 n.69 (JA 593).

had not yet released an order clarifying that its toll free numbering regulations do not permit the direct transfer of toll free numbers from one subscriber to another, nor had the Commission yet modified the SMS database to "prevent numbers from being transferred directly between subscribers." *December 6, 2000 Letter from L. Charles Keller to Michael Wade*, 15 FCC Rcd 24053, 24054 (2000).

The remaining "evidence" that Staton purports to glean from the Nilson deposition (*see* Staton Br. at 14-18) as the Commission found, "largely repeats the history of this dispute that is contained in previous pleadings and the *Staton Order* itself." *Order on Review* ¶ 29 (JA 493) (citations omitted).[15] It does not establish that the Commission's evidentiary finding was arbitrary and capricious.

In sum, contrary to Staton's assertions that the Commission "completely ignored the facts and arguments contained" in its petition for reconsideration (Staton Br. at 9), as shown above, the Commission carefully considered – and rejected – Staton's arguments. The Commission correctly concluded that Staton failed to carry its burden in showing willful misconduct. And even if the agency could have reached a different conclusion, that is insufficient to displace the

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[15] Like its analysis of the evidence in the original record before the Bureau, much of Staton's discussion of the Nilson testimony rests on flawed reasoning. For example, Staton argues that "[t]he fact that MCI knew that [its] conduct [would] result in injury to another party is shown conclusively by the fact that in at least one other instance, a number which had been transferred to [Call Interactive] in this fashion had to be returned." Staton Br. at 17-18 (citation omitted). Contrary to Staton's assumption, a return of a prior number is not evidence that MCI's mistaken disconnection of Staton's toll-free number (or its subsequent reassignment) was intentional and carried out with knowledge that it would harm Staton.

deference owed to the Commission's fact-finding. *See Robinson,* 28 F.3d at 215 ("An agency conclusion 'may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.'") (citation omitted); *see also Zoltanski v. FAA*, 372 F.3d 1195, 1200 (10th Cir. 2004) (Court "may not displace the agency's choice between two fairly conflicting views.") (internal quotation marks and citation omitted).

III. THE COMMISSION REASONABLY CONCLUDED THAT IT SHOULD NOT ORDER A RETURN OF THE ALL EIGHTS NUMBER TO STATON.

The Commission agreed with the Bureau that a proper balancing of the equities did not require the return of the All Eights Number to Staton. Staton is unable to establish that the Commission abused its discretion in reaching that conclusion.

As an initial matter, Staton does not challenge the agency's conclusion that two factors in particular weighed against depriving the current user – a "completely innocent third party" (*Staton Order* ¶ 26 (JA 404)) – of the All Eights Number by returning the number to Staton. Staton had waited eighteen months after learning of the disconnection before it commenced proceedings before the agency. *Order on Review* ¶ 24 (JA 591) (adopting reasoning of *Staton Order*). Moreover, at the time of disconnection, Staton used the number only as a secondary fax line that concededly received little "traffic." *See Staton Order* ¶ 8

(JA 399); *see also Staton Order* ¶¶ 25-29 (JA 404-05).[16] Indeed, Staton did not even notice that it had lost the use of the number until some eight months after the number was disconnected. *See id.* ¶¶ 5, 8 (JA 398, 399).

Rather than challenging the crux of the Commission's reasoning for leaving the number with Call Interactive—a decision made pursuant to the Commission's plenary authority over numbering administration, *see supra*—Staton renews its argument that the agency abused its discretion in balancing the equities because it gave insufficient weight to Staton's alleged "evidence" that deprivation of the number caused it to forgo a business opportunity worth an estimated $100 million. *See* Staton Br. at 21. The Commission explained why it found that estimate to be unfounded. *See Order on Review* ¶ 22 (JA 591). First, the Commission noted that Staton had shown only that it "intended" to assign the All Eights Number to an entity that would use the number and that it had "applied" for certain trademarks associated with the number – not that it had actually obtained such trademarks. *See id.* (JA 591). The $100 million estimate was based on nothing more than the assertion that a consultant had "'advised'" Staton that it "'probably could'" expect that amount to be realized from an initial public offering of the new business venture "'after'" the "'initial steps to form a public company had been taken.'" *Id.* (JA 591) (quoting Petition for Reconsideration at 7-8) (JA 412-13); *see also* Staton

[16] The Bureau also noted that the All Eights Number was "active and being used to generate traffic" and that "Staton ha[d] provided no other evidence of the importance, or lack thereof, of the All Eights Number to Call Interactive." *Staton Order* ¶ 26 (JA 404).

Br. at 21 (evidence allegedly demonstrated "Staton's commitment to the *development* of the business opportunity represented by this number and the *potential for profit* therefrom") (emphasis added).

The Commission concluded that, by Staton's own admission, "many steps" remained to be taken before an initial public offering could even commence, let alone bring in $100 million thereafter. *Order on Review* ¶ 23 (JA 591). And Staton does not explain on appeal how the $100 million it expects to obtain from such a public offering is specifically attributable to use of the All Eights Number.

Based on this record, the Commission correctly found that Staton's proof fell short because it consisted of "bald assertions" that were not supported by "credible evidence." *Id.* (JA 591). *Cf. Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (rejecting petitioner's argument that it would have applied for cellular franchises in certain markets had it known that a lottery would be offered, reasoning that "[s]uch an alleged lost opportunity is wholly speculative").

Staton also argues that the Commission should have ordered an immediate reassignment of the All Eights Number based on evidence set forth in an affidavit by its attorney asserting that "it appears that no one is actually 'using' the [All Eights] number in the true sense of the word." Staton Br. at 25. As relevant here, Staton's attorney asserts that Staton was told by a Sprint representative on July 14, 2005 that Mirage Network had replaced Sprint as the RespOrg and/or carrier for the All Eights Number. According to the affidavit, Mirage Network advised Sprint in August 2005 that the number was "currently in use," but the Sprint

representative explained to Staton's attorney shortly thereafter that "'in use' does not mean that there is any traffic on the number or that an end use subscriber actually has the number." Staton Br. at 27 (quoting affidavit of Christopher M. McCaffrey, Esq.). Staton's attorney asserted that the Sprint representative "opined to me that Mirage Network Service *could be* 'holding' the number without actually using it." *Id.* (emphasis added).

As the Commission found, this speculation was insufficient to require it to revisit the Bureau's determination that the number was "in use" at the time of its decision. While Staton "doubt[ed]" that the number is "in use," it had "not established otherwise." *Order on Review* ¶ 25 & n.57 (JA 592).

Finally, Staton contends that the Commission erred in denying its request for equitable relief because "the deliberate removal of the [All Eights] number from Staton's control constitutes a taking" under the Fifth Amendment. Staton Br. at 23. Staton, however, never made this argument before the agency and thus it is not properly before the Court. *See* 47 U.S.C. § 405; *see also Charter Communications, Inc. v. FCC*, 460 F.3d 31, 39 (D.C. Cir. 2006). Moreover, even if Staton could establish the existence of a taking, which it cannot for the reasons discussed below, Staton must bring such a claim in the Court of Federal Claims

under the Tucker Act. *See Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1444-45 (D.C. Cir. 1994) (citing *Preseault v. ICC*, 494 U.S. 1, 11 (1990)).[17]

In any event, this claim lacks merit. First, the conduct about which Staton complains is that of a private actor, MCI, and Staton has made no attempt to establish how the Commission's denial of Staton's request to order the return of the All Eights Number satisfies the threshold inquiry in a taking analysis – that is, the conduct complained of can be attributed to the federal government. *See Lingle v. Chevron*, 544 U.S. 528, 543 (2005). Moreover, courts that have considered whether telephone numbers are the property of their subscribers have uniformly held that they are not. *See Business Edge Group, Inc. v. Champion Mortgage Co.,* 519 F.3d 150, 154 (3d Cir. 2008) ("subscribers do not 'own' toll free telephone numbers"); *In re StarNet, Inc*., 355 F.3d 634, 637 (7th Cir. 2004) ("No one has a property interest in a phone number . . . at most [the subscriber has] a right to use a given number"); *Jahn v. 1-800-Flowers.Com, Inc.*, 284 F.3d 807, 811 (7th Cir. 2002) (telephone numbers "are not the subscribers' property").

[17] The Court in *Bell Atlantic* considered whether a taking had occurred because that issue was relevant to determining whether the agency had statutory authority to take the disputed action. 24 F.3d at 1444-47 & n.1 (*citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)). That situation is not present here because Staton has not challenged the Commission's exclusive authority over numbering administration. Moreover, even if Staton could establish the existence of a taking, the equitable relief Staton is seeking for that taking is not available, except where compensation has been expressly precluded. *See Preseault,* 494 U.S. at 11. That exception is not available to Staton, which thus must bring a takings claim in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491.

Play Time, Inc. v. WorldCom Inc., 123 F.3d 23 (1st Cir. 1997), cited by Staton (Br. at 22), is not to the contrary. That case did not involve a takings claim, and the court said only that the right to control a number can be found to have inherent value in the marketplace. *See* 123 F.3d at 31. That conclusion does not mean that a toll free telephone number is "property" under the Fifth Amendment. *Cf. Jahn*, 284 F.3d at 811 (noting that the airwaves are a public resource and broadcast licenses therefore are not private property, even though licenses are sold for valuable consideration). Nor does Staton cite any authority for the proposition that, in the event its trademark applications are granted (*see* Staton Br. at 22), the possession of trademark rights linked to a particular toll free telephone number somehow creates an ownership interest in the underlying number that otherwise does not exist.

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In sum, the Commission acted well within its discretion in denying Staton's petition for reconsideration. Its determination that MCI's mistaken disconnection of the All Eights Number was merely negligent (and not willful misconduct) was supported by substantial evidence, and Staton failed to establish that the Commission acted arbitrarily in declining to order the return of the number based on its balancing of the equities.

CONCLUSION

For the reasons above, the petition for review should be denied.

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January 31, 2011

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

STATON HOLDINGS, INC. D/B/A STATON WHOLESALE, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 10-1116

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 7355 words.

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January 31, 2011

STATUTORY APPENDIX

47 U.S.C. § 151
47 U.S.C. § 201(b)
47 U.S.C. § 208
47 U.S.C. § 251(e)(1)
47 U.S.C. § 405

47 C.F.R. § 1.106(a)(1)
47 C.F.R. § 1.106(c)
47 C.F.R. § 1.720
47 C.F.R. § 1.721(a)(4)
47 C.F.R. § 52.101(b)
47 C.F.R. § 52.101(d)
47 C.F.R. § 52.103
47 C.F.R. § 52.107
47 C.F.R. § 52.111

47 U.S.C.

§ 151. Purposes of Act, Creation of Federal Communications Commission

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 201. Service and charges

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

§ 251. Interconnection
(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.

§ 405. Reconsiderations

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be

made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R.

§ 1.106 Petitions for reconsideration.

(a)(1) Petitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained. (For provisions governing reconsideration of Commission action in notice and comment rule making proceedings, see § 1.429. This § 1.106 does not govern reconsideration of such actions.)

. . .

(c) A petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts fall within one or more of the categories set forth in § 1.106(b)(2); or

(2) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

§ 1.720 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings. Those formal complaint proceedings handled on the Enforcement Bureau's Accelerated Docket are subject to pleading and procedural rules that differ in some respects from the general rules for formal complaint proceedings.

(a) Pleadings must be clear, concise, and explicit. All matters concerning a claim,

defense or requested remedy, including damages, should be pleaded fully and with specificity.

(b) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(c) Facts must be supported by relevant documentation or affidavit.

(d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(e) Opposing authorities must be distinguished.

(f) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(g) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(h) Specific reference shall be made to any tariff provision relied on in support of a claim or defense. Copies of relevant tariffs or relevant portions of tariffs that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such complaint, answer, or other pleading.

(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

(j) Pleadings shall identify the name, address, telephone number, and facsimile transmission number for either the filing party's attorney or, where a party is not represented by an attorney, the filing party.

§ 1.721 Format and content of complaints.

(a) Subject to paragraph (e) of this section governing supplemental complaints filed pursuant to § 1.722, and paragraph (f) of this section governing Accelerated Docket proceedings, a formal complaint shall contain:

(4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated.

§ 52.101 General definitions.

As used in this part:

(b) Responsible Organization ("RespOrg"). The entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber.

(d) Service Management System Database ("SMS Database"). The administrative database system for toll free numbers. The Service Management System is a computer system that enables Responsible Organizations to enter and amend the data about toll free numbers within their control. The Service Management System shares this information with the Service Control Points. The entire system is the SMS database.

§ 52.103 Lag times.

(a) Definitions. As used in this section, the following definitions apply:

(1) Assigned Status. A toll free number record that has specific subscriber routing information entered by the Responsible Organization in the Service Management System database and is pending activation in the Service Control Points.

(2) Disconnect Status. The toll free number has been discontinued and an exchange carrier intercept recording is being provided.

(3) Lag Time. The interval between a toll free number's reservation in the Service Management System database and its conversion to working status, as well as the period of time between disconnection or cancellation of a toll free number and the point at which that toll free number may be reassigned to

another toll free subscriber.

(4) Reserved Status. The toll free number has been reserved from the Service Management System database by a Responsible Organization for a toll free subscriber.

(5) Seasonal Numbers. Toll free numbers held by toll free subscribers who do not have a year-round need for a toll free number.

(6) Spare Status. The toll free number is available for assignment by a Responsible Organization.

(7) Suspend Status. The toll free service has been temporarily disconnected and is scheduled to be reactivated.

(8) Unavailable Status. The toll free number is not available for assignment due to an unusual condition.

(9) Working Status. The toll free number is loaded in the Service Control Points and is being utilized to complete toll free service calls.

(b) Reserved Status. Toll free numbers may remain in reserved status for up to 45 days. There shall be no extension of the reservation period after expiration of the initial 45-day interval.

(c) Assigned Status. Toll free numbers may remain in assigned status until changed to working status or for a maximum of 6 months, whichever occurs first. Toll free numbers that, because of special circumstances, require that they be designated for a particular subscriber far in advance of their actual usage shall not be placed in assigned status, but instead shall be placed in unavailable status.

(d) Disconnect Status. Toll free numbers may remain in disconnect status for up to 4 months. No requests for extension of the 4-month disconnect interval shall be granted. All toll free numbers in disconnect status must go directly into the spare category upon expiration of the 4-month disconnect interval. Responsible Organizations shall not retrieve a toll free number from disconnect status and return that number directly to working status at the expiration of the 4-month disconnect interval.

(e) Suspend Status. Toll free numbers may remain in suspend status until changed

to working status or for a maximum of 8 months, whichever occurs first. Only numbers involved in billing disputes shall be eligible for suspend status.

(f) Unavailable Status.

(1) Written requests to make a specific toll free number unavailable must be submitted to DSMI by the Responsible Organization managing the records of the toll free number. The request shall include the appropriate documentation of the reason for the request. DSMI is the only entity that can assign this status to or remove this status from a number. Responsible Organizations that have a toll free subscriber with special circumstances requiring that a toll free number be designated for that particular subscriber far in advance of its actual usage may request that DSMI place such a number in unavailable status.

(2) Seasonal numbers shall be placed in unavailable status. The Responsible Organization for a toll free subscriber who does not have a year round need for a toll free number shall follow the procedures outlined in § 52.103(f)(1) of these rules if it wants DSMI to place a particular toll free number in unavailable status.

§ 52.107 Hoarding.

(a) As used in this section, hoarding is the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service. The definition of hoarding also includes number brokering, which is the selling of a toll free number by a private entity for a fee.

(1) Toll free subscribers shall not hoard toll free numbers.

(2) No person or entity shall acquire a toll free number for the purpose of selling the toll free number to another entity or to a person for a fee.

(3) Routing multiple toll free numbers to a single toll free subscriber will create a rebuttable presumption that the toll free subscriber is hoarding or brokering toll free numbers.

(b) Tariff Provision. The following provision shall be included in the Service Management System tariff and in the local exchange carriers' toll free database access tariffs:

[T]he Federal Communications Commission ("FCC") has concluded that hoarding, defined as the acquisition of more toll free numbers than one intends to use for the provision of toll free service, as well as the sale of a toll free number by a private entity for a fee, is contrary to the public interest in the conservation of the scarce toll free number resource and contrary to the FCC's responsibility to promote the orderly use and allocation of toll free numbers.

§ 52.111 Toll free number assignment.

Toll free numbers shall be made available on a first-come, first-served basis unless otherwise directed by the Commission.

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

Staton Holdings, Inc., Petitioner,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Pamela L. Smith, hereby certify that on January 31, 2011, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. 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.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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