

BRIEF FOR RESPONDENTS

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

No. 09-1310

KRISTIN BROOKS HOPE CENTER,

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 of Petitioner.

B. *Rulings Under Appeal:*

U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers, Toll Free Access Codes, Memorandum Opinion and Order and Order on Review, 24 FCC Rcd 13022 (2009) (JA)

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

Commission or FCC	Federal Communications Commission
HHS	U.S. Department of Health and Human Services
KBHC	Petitioner Kristin Brooks Hope Center
1-800-SUICIDE	the toll free number 1-800-784-2433
1-888-SUICIDE	the toll free number 1-888-784-2433
1-877-SUICIDA	the toll free number 1-877-784-2432
<i>Order on Review</i>	<i>U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers, Toll Free Service Access Codes, Memorandum Opinion and Order and Order on Review, 24 FCC Rcd 13022 (2009) (JA)</i>
<i>Red Cross Reassignment Order</i>	<i>Toll Free Service Access Codes, 20 FCC Rcd 15089 (2005), aff'd, 21 FCC Rcd 9925 (2006)</i>
SAMHSA	Substance Abuse and Mental Health Services Administration
suicide prevention hotlines	three toll free numbers known mnemonically as 1-800-SUICIDE, 1-888-SUICIDE, and 1-877-SUICIDA
VA	U.S. Department of Veterans Affairs

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BRIEF FOR RESPONDENTS

ISSUE PRESENTED

Nearly four years ago, the U.S. Department of Health and Human Services (“HHS”) notified the Federal Communications Commission (“Commission”) that 1-800-SUICIDE (1-800-784-2433) and two other toll free suicide prevention hotline numbers then assigned to petitioner Kristin Brooks Hope Center (“KBHC”) were at risk of disconnection because of KBHC’s failure to pay its service providers’ charges for the use of the numbers. The Commission’s staff temporarily reassigned those numbers to a component of HHS, specifically, the Substance Abuse and Mental Health Services Administration (“SAMHSA”). SAMHSA

subsequently requested, and KBHC opposed, the permanent reassignment of these numbers to SAMHSA. In the order on review, the Commission granted SAMHSA's request. The issue presented is:

Whether the Commission properly exercised its authority over telephone numbers when it permanently reassigned to SAMHSA three toll free numbers used nationwide to route calls to local suicide prevention counseling centers.

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 the FCC the authority to “create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.” 47 U.S.C. § 251(e)(1). The Commission exercises this authority in light of its statutory mission of, among other things, “promoting safety of life and property through the use of wire and radio communication.” 47 U.S.C. § 151.

A toll free number is a “telephone number for which the toll charges for completed calls are paid by the toll free subscriber.” 47 C.F.R. § 52.101(f). Toll free numbers are maintained in an administrative database called the Service Management System (“SMS Database”). 47 U.S.C. § 52.101(d). Responsible Organizations (“RespOrgs”) are entities chosen by the toll free subscriber to reserve numbers from the SMS Database and to manage those records. 47 C.F.R.

§ 52.101(b). Typically, to obtain a toll free number, the subscriber makes a request through its telephone carrier and then the RespOrg (which may also be the telephone carrier) ascertains the status of the requested toll free number. If the number is available, the RespOrg takes the necessary steps to assign the number to the subscriber.¹ Toll free numbers are “made available on a first-come, first-served basis unless otherwise directed by the Commission.” 47 C.F.R. § 52.111.

As the Commission has long held, toll free telephone numbers are a scarce public resource and are not the property of or owned by the individual entities to which they are assigned.² The Commission thus has in place rules that prohibit the warehousing and hoarding of toll free numbers.³ In the Commission’s rule

¹ See generally 47 C.F.R. § 52.103.

² See, e.g., *Toll Free Service Access Codes, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 11162, 11185-86 (¶¶ 30-32) (1997); *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588, 2591 (¶ 4) (1995); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Appendix B, FCC Policy Statement on Interconnection of Cellular Systems*, 59 RR 2d 1275 (¶ 4) (1986).

³ Warehousing occurs when a RespOrg reserves toll free numbers in the SMS Database without having an actual subscriber for whom the number is being reserved. See 47 C.F.R. § 52.105. The Commission’s rules mandate that telephone company tariffs relating to toll free numbers provide that warehousing “is an unreasonable practice under § 201(b) of the Communications Act and is inconsistent with the Commission’s obligation under § 251(e) of the Communications Act to ensure the numbers are made available on an equitable basis.” 47 C.F.R. § 52.105(e). In addition, the Commission’s rules place a limit on the number of toll free numbers a RespOrg may have in reserve at any one time. 47 C.F.R. § 52.109.

against hoarding, it expressly prohibits number brokering, which is “the selling of a toll free number by a private entity for a fee.” 47 C.F.R. § 52.107.

II. FACTUAL BACKGROUND

KBHC is a private, non-profit organization that operates, among other activities, toll free suicide prevention hotlines. *See December 20, 2006 Comments of the Kristin Brooks Hope Center* at [i] (“KBHC’s 2006 Comments”) (JA). In 1998, KBHC requested, and was assigned, the toll free number 1-888-SUICIDE (1-888-784-2433) to serve as a “national hotline” so that local organizations could be “connected [as a] national group by routing calls received by the national number to the appropriate local counseling center based on the originating location of the inbound call.” *Id.* (JA). In 1999, KBHC expanded its service to include 1-800-SUICIDE, and later added 12 more help lines, including 1-877-SUICIDA, a Spanish-language suicide prevention hotline. *Id.* (JA).

A. Reassignment of the Suicide Prevention Hotlines.

From 2001 to 2005, KBHC indirectly received funds to operate its hotlines through federal grants provided by SAMHSA. Because KBHC was a subgrantee, however, that funding ended when the primary grantee ceased to participate, and

Hoarding occurs when the subscriber acquires more toll free numbers from the RespOrg than the subscriber intends to use for the provision of toll free services. The Commission’s rules require that telephone company tariffs relating to toll free numbers contain language that hoarding 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.” 47 U.S.C. § 52.107(b).

KBHC ran into financial difficulty that resulted in defaults on payments to two carriers. On August 25, 2006, the Secretary of HHS, Michael O. Leavitt, wrote to the Chairman of the FCC requesting that the Commission promptly reassign 1-800-SUICIDE from KBHC to SAMHSA. As the Secretary explained, he was “gravely concerned” that 1-800-SUICIDE faced disconnection by its telephone provider and that “permitting 1-800-SUICIDE to be disconnected and unused is not in the best interests of the public.” *Letter from Michael O. Leavitt, Secretary of HHS* (JA).

In the letter, the Secretary explained that “KBHC [recently] announced significant financial difficulties and that the 1-800-SUICIDE number is scheduled to be disconnected on August 26 by Patriot Communications, the current telecommunications provider.” *Id.* (JA). He also advised that “SAMHSA has worked diligently to arrange for an orderly transfer of control of the toll-free number but has not been able to reach an agreement with KBHC.” *Id.* (JA).

The Secretary further urged that the seriousness of the situation required the “immediate” transfer of 1-800-SUICIDE from KBHC to SAMHSA in order “to prevent any risk to the public health that could arise from the sudden disconnection of this national hotline which currently receives 30,000 calls per month.” *Id.* (JA). He also stated that the reassignment would “minimize the potential for loss of life due to 1-800-SUICIDE callers being unable to connect immediately with a crisis center” or being “confronted with a non-working line, or be[ing] advised that they must dial yet another number before receiving assistance.” *Id.* (JA). Otherwise, he contended, “[i]f the 1-800-SUICIDE number is placed on disconnect status,

then each day, or even every hour, during which calls go unanswered, may pose a risk to callers in crisis.” *Id.* (JA).

On December 12, 2006, SAMHSA submitted a letter to update and expand the initial reassignment request for 1-800-SUICIDE to include four additional toll free numbers assigned to KBHC: 1-888-SUICIDE, 1-877-SUICIDA, 1-800-442-HOPE, and 1-800-827-7571. *Letter from Eric B. Broderick, Acting Deputy Administrator of SAMHSA* (JA). SAMHSA explained that although the disconnection threat which prompted HHS’ initial request had been averted by SAMHSA’s assumption of financial and operational responsibility for the suicide prevention hotlines, “Patriot [Communications] recently informed SAMHSA that absent a binding, written agreement permitting unencumbered use of the lines, Patriot will cease routing telephone calls to the toll free telephone numbers on January 8, 2007.” *Id.* (JA).⁴

On January 22, 2007, the Commission’s Wireline Competition Bureau (“Bureau”) granted in part SAMHSA’s request for reassignment of the toll free numbers. *In the Matter of Toll Free Service Access Codes*, 22 FCC Rcd 651 (2007) (“800-SUICIDE Order”) (JA). The Bureau explained that “[g]iven the

⁴ See November 28, 2006 Letter from Lee E. Hejmanowski, Counsel for Patriot Communications at 2-3 (“While Patriot would be pleased to continue to support the suicide-prevention toll-free telephone numbers, it is not willing to do so unless SAMHSA and KBHC confirm in a binding, written agreement that Patriot may do so and that KBHC will assert no claims against Patriot for having done so or continuing to do so. Absent an agreement in writing from KBHC and SAMHSA by January 8, 2007, . . . Patriot will cease routing telephone calls to the toll-free telephone numbers at 12:01 am on January 9, 2007 and will post an outgoing message directing callers to call 1-800-273-TALK for assistance.”) (JA).

record of discord among the parties involved, as well as KBHC’s history of being unable to pay its service providers,” it was necessary to order the temporary reassignment for one year of 1-800-SUICIDE, 1-888-SUICIDE and 1-877-SUICIDA, in order to “ensure an orderly transition of service without possible interruption that could jeopardize the ability of callers in crisis to reach the assistance they need.” *Id.* at ¶ 8 (JA). The Bureau denied SAMHSA’s request for reassignment of the two other toll free numbers, however, because the request relating to those two numbers did not “rise[] to the same level of emergency as [that relating to] the suicide prevention hotlines.” *Id.* at ¶ 10 (JA).⁵

On February 21, 2007, KBHC filed an application for review by the Commission of the Bureau’s temporary reassignment, which SAMHSA opposed.⁶ While KBHC’s application for review was pending, on November 20, 2007, SAMHSA petitioned the Commission to make permanent the reassignment to SAMHSA of the three suicide prevention hotlines.⁷

⁵ Although 1-800-827-7571 was formerly identified (prior to the establishment of 1-800-SUICIDE in 1999) as a national suicide prevention hotline, it is no longer promoted as such; and 1-800-442-HOPE is not explicitly promoted as a suicide prevention hotline. *See Supplemental Petition of the U.S. Dept. of Health and Human Services in Support of its Request for Reassignment of Toll Free Suicide Prevention Numbers* (“*Supplemental Reassignment Request*”) at 9 n.7 (JA).

⁶ *Application for Review* (JA); *Opposition to Application for Review* (JA).

⁷ *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers* (JA).

B. The Order on Review.

On October 14, 2009, the Commission granted SAMHSA's petition for permanent reassignment of the three suicide prevention toll free numbers, and denied KBHC's application for review of the staff's temporary reassignment of these numbers. *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers, Toll Free Service Access Codes*, 24 FCC Rcd 13022 (2009) ("*Order on Review*") (JA).

The Commission noted that while its "role as regulator does not, in the normal course, encompass choosing among parties seeking to use the same number," the "unique" circumstances of this case (that the suicide prevention hotlines "were in danger of disconnection") "thrust [the Commission] into this role." *Id.* ¶ 14 (JA). The "overriding priority" for the Commission, therefore, was "the long-term stability of the Hotlines and, in turn, avoidance of another potential public safety crisis in the future." *Id.* (JA).

In choosing between KBHC and SAMHSA as the permanent assignee for the suicide prevention hotlines, the Commission explained that it "must err on the side of caution and choose the entity that we believe is more capable of operating the Hotlines long-term." *Id.* (JA). The Commission found that "[g]iven the evidence, it does not appear that KBHC has the financial resources to maintain the Suicide Prevention Hotlines long-term." *Id.* ¶ 21 (JA). Moreover, the Commission found that there was "strong evidence that SAMHSA has used and will continue to use these numbers to provide financially stable, top-quality service

for the long-term.” *Id.* (JA).⁸ It therefore concluded that “the permanent reassignment of the Suicide Prevention Hotlines to SAMHSA will best serve the overwhelming public interest in promoting the safety of life through the prevention of suicide.” *Id.* (JA).

In reaching this conclusion, the Commission explained that it “continue[d] to be concerned about [KBHC's] ability, long-term, to finance the Hotlines.” *Id.* ¶ 15 (JA). The agency emphasized that “it is critical to ensure that individuals at risk for suicide receive the assistance they need,” and noted the Bureau’s finding that “KBHC’s financial vulnerability in 2006 and 2007 posed a significant threat to the continued availability of the critical public service provided by the Hotlines.” *Id.* (JA). The Commission explained that it was not “convinced that the \$240,000 [KBHC] has accumulated is sufficient to prevent future disruptions of the Hotlines.” *Id.* (JA). The Commission also noted that SAMHSA had reported that “calls made to Suicide Prevention Hotlines are on the rise, and if funding is

⁸ In addition, the *Order on Review* ¶ 10 (JA), noted that two cabinet members sent a joint letter to the Commission requesting that “1-800-SUICIDE be permanently reassigned to [SAMHSA].” *May 13, 2009 Letter from Eric K. Shinseki, Secretary of U.S. Department of Veterans Affairs and Kathleen Sebelius, Secretary of HHS* (JA). They explained that in 2007, VA and HHS had jointly launched the Veterans Suicide Prevention Hotline as a part of the Lifeline hotline (or 1-800-273-TALK), which is a national telephone counseling network operated by a SAMHSA grantee. Subsequent to the temporary assignment of the suicide prevention hotlines to it, SAMHSA integrated calls to 1-800-SUICIDE into the Lifeline network, and more than 2000 calls per month from veterans “currently enter the Lifeline network through 1-800-SUICIDE.” (JA). The secretaries further explained that “[i]f 1-800-SUICIDE does not remain with SAMHSA as a part of the Lifeline network, the safety of those callers seeking veterans services and using 1-800-SUICIDE could be jeopardized.” (JA).

not secured for the future years, a public health crisis could occur repeatedly, destabilizing the Hotlines and requiring continuing Commission intervention.” *Id.* ¶ 16 (JA).

The Commission further found “compelling the support SAMHSA’s operation of the Hotlines has received from crisis center managers.” *Id.* ¶ 19 (JA). By contrast, the Commission did not share the “chief concern of those commenters advocating support for KBHC’s operation of the Hotlines [] that the governmental control of the Suicide Prevention Hotline numbers would impair privacy rights.” *Id.* at ¶ 20 (JA). The record showed that “while individual local crisis centers may gather basic demographic and general information, SAMHSA does not collect or request personal information identifying callers.” *Id.* (JA). The Commission pointed out that “no party cites any instance in which a breach of privacy has occurred since SAMHSA was granted temporary assignment of the Hotlines.” *Id.* (JA).

Finally, in ruling on KBHC’s challenge to the Bureau’s temporary reassignment order, the Commission rejected KBHC’s claim that it was entitled to just compensation under the Fifth Amendment for a taking of its property. *Id.* ¶ 31 (JA). The Commission reiterated that telephone numbers are a “scarce public resource” and that “neither carriers nor subscribers ‘own’ their telephone numbers.” *Id.* ¶ 31 (JA). This petition for review followed.

SUMMARY OF ARGUMENT

The Commission's decision to reassign permanently three toll free suicide prevention hotline numbers from KBHC to SAMHSA was a reasonable exercise of the Commission's authority over telephone numbers, one which furthered the agency's statutory mandate to promote the public safety through the use of wire and radio communication.

The hotline numbers had been assigned temporarily to SAMHSA after the Secretary of Health and Human Services notified the Commission that KBHC's failure to pay its telecommunications providers' charges had resulted in an imminent threat that the numbers would be shut down, thereby threatening a public health crisis. The record shows that SAMHSA's subsequent stewardship of the numbers has been exemplary, winning praise from numerous suicide prevention professionals.

In seeking to have the numbers made available for its use again, KBHC relies on its claims that it has sufficient funds to operate the suicide prevention hotlines for approximately two years. But as the Commission recognized, SAMHSA has the resources to operate the toll free numbers indefinitely. The Commission reasonably concluded that ensuring the stable operation of the suicide prevention hotlines for the long term would best promote the public interest and avoid the risk that the Commission might have to intervene in the future to avert a disruption of this public service.

The decision to reassign permanently the toll free numbers also did not cause a taking of KBHC's property. It is well settled that private parties obtain no

ownership rights in telephone numbers, which remain at all times subject to the Commission's authority to administer, as here, in accordance with the public interest.

ARGUMENT

I. STANDARD OF REVIEW

The Court must deny the petition for review unless KBHC demonstrates that the challenged agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action.” *LaRouche’s Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 737 (D.C. Cir. 2006), *quoting Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). To withstand a challenge to the agency’s 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).

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 *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992)).

The cases KBHC cites for less deference (Pet. Br. at 18-19) provide no support for its position. For example, *Al-Fayed v. CIA*, 254 F.3d 300, 306-07 (D.C. Cir. 2001), stands for the ordinary proposition that agencies receive *Chevron* deference only in construing statutes for which they are the primary administrators, but not when construing a statute (such as the Freedom of Information Act) that applies to all agencies. The statute being applied here is the Communications Act, for which the FCC obviously receives deference. Similarly, *Sternberg v. Secretary, Department of Health and Human Services*, 299 F.3d 1201, 1205-06 (10th Cir. 2002), holds that even in dealing with subjects outside their normal area of expertise, agencies’ factual findings are reviewed under a substantial evidence test. Neither case remotely supports *de novo* review here.

II. THE COMMISSION REASONABLY DIRECTED THE PERMANENT REASSIGNMENT OF THE TOLL FREE NUMBERS TO SAMHSA.

The Commission has a “statutory mandate to promote the safety of life and property.” *Order on Review*, ¶ 12 (JA). See 47 U.S.C. § 151. Given the “highly unusual situation” in this case, the Commission decided that permanent reassignment of the three suicide prevention hotlines from KBHC to SAMHSA

was “necessary . . . to promote the public safety goal of suicide prevention.” *Order on Review* ¶ 1 (JA). For the Commission, the “overriding priority” was “the long-term stability of the Hotlines.” *Id.* ¶ 14 (JA). The Commission therefore chose to “err on the side of caution and choose the entity that we believe is more capable of operating the Hotlines long-term.” *Id.* (JA).

As the Commission explained, it generally does not choose among parties seeking the same number. *Id.* (JA). But in unusual circumstances, when required by the public interest, the Commission may be compelled to intervene. Thus, in the *Red Cross Reassignment Order*,⁹ the Commission directed the permanent reassignment of the toll free numbers 1-800-733-2767 and 1-888-733-2767 (mnemonically known as 1-800-RED-CROSS and 1-888-RED-CROSS) to the American Red Cross, in order to “serve the overwhelming public interest in assisting the disaster recovery efforts of the Red Cross related to hurricanes and other natural disasters.” *See* 20 FCC Rcd at 15091 (¶ 5). The Commission similarly found that permanent reassignment of the three suicide hotline numbers from KBHC to SAMHSA would serve the important “public safety goals of suicide prevention.” *Order on Review* ¶ 1 (JA).

⁹ *Toll Free Service Access Codes*, 20 FCC Rcd 15089 (2005), *aff’d*. 21 FCC Rcd 9925 (2006) (“*Red Cross Reassignment Order*”).

A. Substantial Evidence in the Record Supported Permanent Reassignment of the Telephone Numbers to SAMHSA.

Here, the numbers at issue had already been the subject of a Commission action ordering their temporary reassignment from KBHC to SAMHSA when federal officials with public health responsibilities asked the Commission to intervene because the entity responsible for paying for toll free calls over these important hotlines, *i.e.*, KBHC, had failed to do so and the service provider was threatening an imminent shutdown. Although KBHC challenged the temporary reassignment before the Commission, it does not argue before the Court that the temporary reassignment was improper. In the action KBHC is challenging, the Commission was thus required to choose between the current holder of the numbers who was asking for their permanent assignment and the former holder who wanted the numbers available for its use once again.

As the Commission found, the record contains “strong evidence” that SAMHSA, as the temporary holder, “ha[d] used and w[ould] continue to use these numbers to provide financially stable, top-quality service for the long-term.” *Id.* ¶ 21 (JA). The agency noted that “SAMHSA has taken its temporary responsibility for the Hotlines very seriously and has demonstrated a strong commitment to operate the Hotlines in the most reliable and comprehensive manner possible.” *Id.* ¶ 17 (JA). The Commission observed that, among other things, “SAMHSA has partnered with the [Veterans Administration] to offer a new service to assist veterans in crisis . . . and has launched a national public awareness campaign for youth suicide prevention.” *Id.* ¶ 18.

The Commission also found “compelling the support SAMHSA’s operation of the Hotlines has received from crisis center managers,” many of whom had first-hand experience with the operation of suicide prevention hotlines both under KBHC’s stewardship and during the temporary reassignment to SAMHSA. *Id.* ¶ 19 (JA). As the Commission explained, “[t]hese crisis centers are at the front lines of suicide prevention,” and in their view, SAMHSA “has increased the quality of suicide prevention services they can offer.” *Id.* (JA).¹⁰

The Commission also addressed the “chief concern of those commenters advocating support for KBHC’s operation of the Hotlines” – “that the governmental control of the Suicide Prevention Hotlines numbers would impair

¹⁰ See, e.g., *Letter from Carol Loftur-Thun, et al.* (“During the years Kristin Brooks Hope Center administered 1-800-SUICIDE, we experienced . . . [d]aily dropped calls on 1-800-SUICIDE, sometimes in the middle of a suicide call . . . [and] we were later told [by KBHC] that no action had been taken to correct the problem due to lack of funds”) (JA); *John Bateson* (While KBHC is “to be commended for conceiving and launching 800-SUICIDE, the nation’s first suicide prevention hotline . . . [o]perating a service of this magnitude and importance is different from founding it . . . [A] critical service like 800-SUICIDE, that’s answered by dozens of independent agencies and handles thousands of life-threatening calls every year, must continue uninterrupted . . . Having the federal government and, in particular SAMHSA, assume responsibility for the number is the best way to ensure this.”) (JA); *Letter from Joseph Cordero* (As someone with “intimate knowledge” of the operation of the suicide prevention hotlines by both KBHC and SAMHSA, “[i]t is alarming that the FCC would even consider control of 1-800-SUICIDE reverting to KBHC”) (JA); *Letter from Dale and R. Darlene Emme* (“We do not feel our clients/consumers would continue to be safe with the number back in the hands of KBHC . . . [so] we will initiate the process to remove the 800-SUICIDE number from our materials if the FCC gives the number back to KBHC. We will not put anyone at more of a risk than they already are by giving them a resource that would be unreliable and unsafe.”) (JA). See generally *Order on Review*, ¶ 19 nn.77-79 (JA).

privacy rights.” *Id.* ¶ 20 (JA). The Commission did not share that concern – it noted that SAMHSA “does not collect or request personal information identifying callers,” and “personal information is never requested by or shared with the federal government.” *Id.* (JA). Moreover, the Commission emphasized, no party had pointed to “any instance in which a breach of privacy has occurred since SAMHSA was granted temporary assignment of the Hotlines.” *Id.* (JA).¹¹

KBHC argues that it was improper for the Commission to consider the quality of services SAMHSA provided during the time the numbers were assigned to it. Pet. Br. at 34. This argument was not made below 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). In any event, KBHC is wrong: SAMHSA’s current use of the toll free numbers under the temporary authorization was plainly relevant to the issue whether the Commission should permit SAMHSA to continue to hold the numbers under a permanent reassignment.

B. The Record Did Not Demonstrate that KBHC Could Operate the Suicide Prevention Hotlines Over the Long Term.

The Commission gave KBHC the benefit of the doubt on its claim (disputed by SAMHSA) that its \$240,000 in cash reserves “are sufficient for two years of operation of the numbers.” *Id.* ¶ 16 (JA). The Commission also did not dispute KBHC’s contention that in the years after 2006, when its financial vulnerability

¹¹ *See also Order on Review* ¶ 20 n.81 (discussing SAMHSA’s privacy and confidentiality requirements for the suicide prevention hotlines) (JA).

threatened shutdown of the suicide prevention hotlines, “[KBHC’s] fundraising efforts have improved and its resources have been expanded with new existing and pledged assets.” *Id.* ¶ 17 (JA).

The Commission reasonably concluded, however, that “the public interest objective of suicide prevention” required measures designed to “ensure that the Hotlines will operate effectively, long-term.” *Id.* ¶ 16 (JA). The Commission emphasized that, as SAMHSA had reported, there had been a rise in the number of calls made to suicide prevention hotlines. *Id.* (JA).¹² As the Commission explained, “if funding is not secured for the future years, a public health crisis could occur repeatedly, destabilizing the Hotlines and requiring continuing Commission intervention.” *Id.* (JA). KBHC’s improved fundraising efforts “do not guarantee that KBHC would be able to commit sufficient funding to operate the Hotlines for more than two years.” *Id.* ¶ 17 (JA). By contrast, the Commission found, “SAMHSA can guarantee this, and can guarantee it indefinitely.” *Id.* (JA). The Commission accordingly found that “the long-term financial viability of the Hotlines” is better assured if they are placed under SAMHSA’s control. *Id.* ¶ 21 (JA).

To be sure, the Commission recognized that, under the permanent reassignment, the toll free numbers would be operated by SAMHSA’s grantees. *Id.* (JA). But, the agency emphasized, the operation of those numbers “will not be dependent on the financial condition of those grantees.” *Id.* (JA). “Once

¹² See *Order on Review* at n.64 (JA), n.69 (JA) and n.75 (JA).

permanently assigned to SAMHSA,” the Commission explained, the “numbers can be used by any grantees SAMHSA chooses to fund,” thereby “stabilizing central telephonic points of contact for the American public” for suicide prevention services. *Id.* (JA)

The question is not, as KBHC would have it, whether it has the financing to operate the hotlines for some period of time, or even for a couple of years. Pet. Br. at 24. Especially in light of KBHC’s prior “financial vulnerability in 2006 and 2007,” which “posed a significant threat to the continued availability of the critical public service provided by the Hotlines,” (*Order on Review* ¶ 15 (JA), the relevant question was whether “KBHC has the financial resources to maintain the Suicide Prevention Hotlines *long-term*.” *Id.* at ¶ 21 (emphasis added) (JA).

In the end, the Commission refused – reasonably – to assume the risk that, because of a future lack of funding, it “could be faced with a similar situation as occurred previously in which KBHC was unable to pay its service provider for telecommunications services and the service provider threatened disconnection.”

Id. at ¶ 16 (JA). The Commission reasonably was unwilling to “allow the Hotlines to face possible disconnection again.” *Id.* (JA).¹³

The resolution of this case-specific issue was informed by the Commission’s obligation to promote the “safety of life and property through the use of wire and radio communication,” 47 U.S.C. § 151, a matter that (contrary to KBHC) is quite plainly related “to the FCC’s mandate under its organic statute.” *See* Pet. Br. at 20. KBHC contends (Pet. Br. at 21-23) that the Commission was required to articulate a “standard” beyond the specific explanation it gave of its decision in the order under review. But the Administrative Procedure Act requires only that the Commission articulate, as it did here, a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43.

III. KBHC’S FIFTH AMENDMENT TAKINGS ARGUMENT ALSO LACKS MERIT.

KBHC argues that the “FCC also erred when it determined that permanent reassignment of the three numbers did not constitute an unconstitutional taking.” Pet. Br. at 36. KBHC is in the wrong forum to pursue a claim that property has

¹³ KBHC’s repeated complaints about SAMHSA’s termination of its grant funding in 2005, *see, e.g.*, Pet. Br. at 15, 22; *see also June 25, 2008 Letter from Rina Hakimian* (JA) (attaching HHS Appeals Board upholding denial of KBHC claims for reimbursement), are entirely beside the point so far as the Commission’s going-forward determination in the *Order on Review* that the numbers should be permanently reassigned. As KBHC itself emphasizes, it “has now taken actions to be financially independent of any financing from SAMHSA.” Pet. Br. at 25. In any event, as the Commission observed, KBHC is free to “participate in the competitive bidding process for SAMHSA’s grant program once the current grant expires, and could regain use of the Hotline numbers as a SAMHSA grantee.” *Order on Review* ¶ 22 (JA).

been taken from it for which it is entitled to compensation. KBHC must bring this claim, if at all, in the Court of Federal Claims under the Tucker Act. *See Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1444-45 n.1 (D.C. Cir. 1994), *citing Preseault v. ICC*, 494 U.S. 1, 11 (1990)¹⁴; *see also Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 690 (D.C. Cir. 2000) (“The remedy of just compensation is not within our jurisdiction but that of the United States Court of Federal Claims, under the Tucker Act, . . . If there is a taking, and a claim for just compensation, then that is a Tucker Act matter to be pursued in the Court of Federal Claims, and not before us.”).

In any event, there has been no taking of KBHC’s property. As the Commission explained in denying review of the temporary reassignment action, telephone numbers are not “private property.” *See Order on Review* ¶ 31 (JA). The Commission noted that KBHC did not cite any case in which a court had found that a telephone number was property which, when subjected to regulatory

¹⁴ The court in *Bell Atlantic* considered whether a taking had occurred because it found that this determination was relevant in resolving an issue of the agency’s statutory authority to take the disputed action. 23 F.3d at 1444-47 & n.1, *citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). That situation is not presented here because KBHC has not challenged the Commission’s exclusive authority over numbering administration.

action, required a payment of just compensation under the Fifth Amendment. *See id.* ¶ 32 (JA). Nor has KBHC cited such a case in its brief to this Court.¹⁵

The First Circuit case KBHC cites 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 Play Time, Inc. v. WorldCom Inc.*, 123 F.3d 23, 31 (1st Cir. 1997). As the Commission said, that finding does not warrant a finding that a toll free telephone number is “property” for the purposes of the Fifth Amendment. *Cf. Jahn v. 1-800-Flowers.Com, Inc.*, 284 F.3d 807, 811 (7th Cir. 2002) (noting that the airwaves are a public resource and broadcast licenses are thus not private property but these licenses nevertheless are sold for valuable consideration). Courts that have considered whether telephone numbers are the property of their subscribers have agreed that they are not. *See Business Edge Group, Inc. v. Champion Mortgage Co.*, 519 F.3d 150, 154 (3rd Cir. 2008) (“subscribers do not ‘own’ toll free telephone numbers”); *In re StarNet, Inc.*, 355 F.3d 634 (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*, 284 F.3d at 811 (telephone numbers “are not the subscribers’ property”).

¹⁵ KBHC’s reliance on the *Red Cross Reassignment Order* is misplaced. *See* Pet. Br. at 37 n.9. In that case, the American Red Cross agreed to reimburse the prior assignee for its reasonable costs in relinquishing the toll free number at issue. *See Order on Review* ¶ 32 (JA); *see also Red Cross Reassignment Order*, 20 FCC Rcd at 15091(¶ 6). There was no payment of compensation for the value of the number. Similarly, in this case, “SAMHSA offered to pay KBHC for reasonable transfer costs associated with the reassignment of the toll free numbers to SAMHSA” but the “offer [was] rejected by KBHC.” *Supplemental Reassignment Request, Declaration of Eric Broderick* at ¶ 11 (JA).

Finally, KBHC has adduced no authority for the proposition that the possession of trademark rights in the mnemonic rendering of a toll free telephone number, *e.g.*, 800-SUICIDE, somehow creates an ownership interest in the underlying telephone number that otherwise does not exist, and thus its reliance on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is misplaced. *See* Pet. Br. at 37. Although KBHC alleges that the reassignment of the number has caused a decline in the value of the trademark, KBHC fails to show such a decline is compensable.

CONCLUSION

For the reasons stated above, the Commission acted reasonably and within its authority in permanently reassigning the suicide prevention hotlines to SAMHSA, and thus the petition for review should be denied.

Respectfully submitted,

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May 26, 2010

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

KRISTIN BROOKS HOPE CENTER,)	
)	
PETITIONER,)	
)	
V.)	
)	
FEDERAL COMMUNICATIONS COMMISSION)	No. 09-1310
AND THE UNITED STATES OF AMERICA,)	
)	
RESPONDENTS.)	

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 6977 words.

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May 26, 2010

STATUTORY APPENDIX

47 U.S.C. § 151
47 U.S.C. § 251(e)
47 C.F.R. § 52.101
47 C.F.R. § 52.103
47 C.F.R. § 52.105
47 C.F.R. § 52.107
47 C.F.R. § 52.109
47 C.F.R. § 52.111

47 U.S.C.

§ 151. Purposes of chapter; Federal Communications Commission created

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.

§ 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.

47 C.F.R.

§ 52.101 General definitions.

As used in this part:

(a) Number Administration and Service Center (“NASC”). The entity that provides user support for the Service Management System database and administers the Service Management System database on a day-to-day basis.

(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.

(c) Service Control Points. The regional databases in the toll free network.

(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.

(e) Toll Free Subscriber. The entity that requests a Responsible Organization to reserve a toll free number from the SMS database.

(f) Toll Free Number. A telephone number for which the toll charges for completed calls are paid by the toll free subscriber. The toll free subscriber's specific geographic location has no bearing on what toll free number it can obtain from 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.

§ 52.105 Warehousing.

(a) As used in this section, warehousing is the practice whereby Responsible Organizations, either directly or indirectly through an affiliate, reserve toll free numbers from the Service Management System database without having an actual toll free subscriber for whom those numbers are being reserved.

(b) Responsible Organizations shall not warehouse toll free numbers. There shall be a rebuttable presumption that a Responsible Organization is warehousing toll free numbers if:

(1) The Responsible Organization does not have an identified toll free subscriber agreeing to be billed for service associated with each toll free number reserved from the Service Management System database; or

(2) The Responsible Organization does not have an identified toll free subscriber agreeing to be billed for service associated with a toll free number before switching that toll free number from reserved or assigned to working status.

(c) Responsible Organizations shall not maintain a toll free number in reserved status if there is not a prospective toll free subscriber requesting that toll free number.

(d) A Responsible Organization's act of reserving a number from the Service Management System database shall serve as that Responsible Organization's certification that there is an identified toll free subscriber agreeing to be billed for service associated with the toll free number.

(e) 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 warehousing, which the FCC defines as Responsible Organizations, either directly or indirectly through an affiliate, reserving toll free numbers from the SMS database without having an identified toll free subscriber from whom those numbers are being reserved, is an unreasonable practice under § 201(b) of the Communications Act and is inconsistent with the Commission's obligation under § 251(e) of the Communications Act to ensure that numbers are made available on

an equitable basis; and if a Responsible Organization does not have an identified toll free subscriber agreeing to be billed for service associated with each toll free number reserved from the database, or if a Responsible Organization does not have an identified, billed toll free subscriber before switching a number from reserved or assigned to working status, then there is a rebuttable presumption that the Responsible Organization is warehousing numbers. Responsible Organizations that warehouse numbers will be subject to penalties.

§ 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.

§ 52.109 Permanent cap on number reservations.

(a) A Responsible Organization may have in reserve status, at any one time, either 2000 toll free numbers or 7.5 percent of that Responsible Organization's numbers in working status, whichever is greater.

(b) A Responsible Organization shall never reserve more than 3 percent of the quantity of toll free numbers in spare status as of the previous Sunday at 12:01 a.m. Eastern Time.

(c) The Wireline Competition Bureau shall modify the quantity of numbers a Responsible Organization may have in reserve status or the percentage of numbers in the spare pool that a Responsible Organization may reserve when exigent circumstances make such action necessary. The Wireline Competition Bureau shall establish, modify, and monitor toll free number conservation plans when exigent circumstances necessitate such action.

§ 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.

09-1310

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

Kristin Brooks Hope Center, Petitioner,

v.

**Federal Communications Commission and United States of America,
Respondents.**

CERTIFICATE OF SERVICE

I, Pamela L. Smith, hereby certify that on May 26, 2010, 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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