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July 9, 2004

VIA HAND DELIVERY

Honorable Pat Miller, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

RE: Tennessee Coalition of Rural Incumbent Telephone Companies and Cooperatives Request for Suspension of Wireline to Wireless Number Portability Obligations Pursuant to Section 251(f)(2) of the Communications Act of 1934, as Amended
TRA Docket No. 03-00633

Dear Chairman Miller

Enclosed please find an original and thirteen (13) copies of the following for filing in the above-captioned matter· Brief of Verizon Wireless.

Also enclosed is an additional copy to be "File Stamped" for our records If you have any questions or require additional information, please let me know.

Respectfully,

Melvin J. Malone

MJM/cgb
Enclosures
cc: Stephen G. Kraskin
R Dale Grimes
Timothy C Phillips
Edward Phillips

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STATE OF TENNESSEE

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE TENNESSEE COALITION OF RURAL INCUMBENT TELEPHONE COMPANIES AND COOPERATIVES REQUEST FOR SUSPENSION OF WIRELINE TO WIRELESS NUMBER PORTABILITY OBLIGATIONS PURSUANT TO SECTION 251(F)(2) OF THE COMMUNICATIONS ACT OF 1994, AS AMENDED	)))))))))))	Docket No. 03-00633

BRIEF OF

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Dated July 9, 2004

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BRIEF OF VERIZON WIRELESS

NOW COMES Verizon Wireless, by and through its attorneys, and respectfully submits its brief to the Tennessee Regulatory Authority ("TRA" or "Authority") in opposition to the Petition of the Tennessee Coalition of Rural Incumbent Telephone Companies and Cooperatives ("Petitioners") requesting suspension of the federal obligation that Petitioners[1] provide intermodal local number portability ("LNP"), pursuant to the Federal Communications Commission's ("FCC") requirements.

[1] Verizon Wireless specifically opposes Petitioners' request as it applies to seventeen (17) members of the Coalition, as identified in Verizon Wireless' discovery responses and direct testimony Ardmore Telephone Company, Ben Lomand Rural Telephone Cooperative, Inc , Bledsoe Telephone Cooperative, CenturyTel of Adamsville, Inc , CenturyTel of Claiborne, Inc , CenturyTel of Ooltewah–Collegedale, Inc , Crockett Telephone Company, Inc , DeKalb Telephone Cooperative, Inc , Highland Telephone Cooperative, Inc , Loretto Telephone Company, Millington Telephone Company, North Central Telephone Cooperative, Inc , Peoples Telephone Company, Twin Lakes Telephone Cooperative Corporation, United Telephone Company, West Tennessee Telephone Company, and Yorkville Telephone Company

I. INTRODUCTION AND SUMMARY

On March 24, 2004, Petitioners filed an Amended Petition seeking suspension (practically indefinite in its scope) from LNP pursuant to Section 251(f)(2) of the Federal Telecommunications Act.[2] Verizon Wireless opposes Petitioners' request because: (1) Petitioners fail to meet the high legal standard for obtaining relief under the statute, and (2) Petitioners' request is a collateral attack upon the FCC's November 10, 2003 *Intermodal Porting Order*.[3]

To prevail, Petitioners must demonstrate under Section 251(f)(2)(A) on a case-by-case basis that the requested relief is necessary to avoid a significant adverse impact on users of telecommunications services generally, to avoid adverse economic impact, or to avoid imposing a requirement that is technically infeasible The Petitioners also must show under Section 251(f)(2)(B) that the requested suspension would be consistent with the public interest. The TRA is given limited authority under Section 251(f)(2) to grant suspensions if both statutory criteria are met, which is not the case here. Petitioners allege substantially identical claims, using substantially identical testimony.[4]

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[2] Petitioners did not serve any wireless carriers from whom Petitioners had received correspondence, requests, inquiries or BFRs regarding wireline-to-wireless LNP with either the original Petition or the Amended Petition for Suspension. *See* Coalition's Responses to Verizon Wireless' Discovery Requests at 19-20 (In responding to Request No 1 27)

[3] *See* Telephone Number Portability, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* 18 FCC Rcd 23697, (2003) ("*Intermodal Porting Order*")

[4] *See Order Requiring the Tennessee Coalition to Amend Its Petition and Appointing Hearing Officer*, TRA Docket No 03-00633, p 3 (March 18, 2004) ("After noting that the FCC requires the requests for suspensions be addressed on a company by company basis and that the Tennessee Coalition's *Petition* does not specify the relief being sought by the individual companies represented by the Tennessee Coalition, the panel voted unanimously to require the Tennessee Coalition to amend its *Petition* to show the basis for and the nature of the relief sought by each company ") *See also* Amended Petition for Suspension (setting forth substantially identical claims). What Petitioners would characterize as the "core" of each of their cases is presented by a single witness, Steven Watkins This is particularly so with respect to those petitioners that are already or soon will be LNP capable Moreover, the direct testimony submitted by the petitioners themselves is substantially similar In said direct testimony, petitioners respond to the exact same or substantially similar questions, many of which are irrelevant to the issues herein presented, and provide little information beyond that previously presented in either the Amended Petition or

In support of their claims, Petitioners provide only limited, estimated cost information.[5] Even if the TRA accepts the cost information as provided, Petitioners have not demonstrated that a suspension from LNP is necessary to avoid significant adverse impact on users generally, an undue economic burden, or that the requirement is technically infeasible. Instead of directly meeting the criteria of Section 251(f)(2)(A), Petitioners divert attention to irrelevant issues, such as interconnection issues (which are not material to the TRA's analysis under Section 251(f)(2)), and essentially seek to reverse the FCC's decision in the *Intermodal Porting Order*.[6] Section IV(B) of this brief addresses the interconnection issues raised in this proceeding and explains why they are not relevant to the TRA's analysis in this proceeding.

Petitioners also claim that few customers have made inquiries to them about porting numbers to wireless carriers.[7] This claim ignores the fact that customer demand is <u>not</u> one of the criteria for evaluating Petitioners' request for suspension and that, under the porting process, customers generally approach a new service provider when seeking to port, not the old provider.[8] Therefore, even if true, it is not surprising that Petitioners have not experienced demand for porting from their existing customers.[9] Moreover, Petitioners' anecdotal observations regarding

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discovery responses *Compare, e g* , Direct Testimony of Terry Wales on Behalf of Ardmore Telephone Company, Inc with Direct Testimony of Gregory L Anderson on Behalf of Bledsoe Telephone Cooperative

[5] *See* Amended Petition for Suspension *See also, e g* Direct Testimony of Roger Galloway on Behalf of Highland Telephone Coop , Inc at 5, *In the Matter of the Petition of Citizens Telephone, et al* , Cause No 42529 et al , Ind URC, p 21 (May 18, 2004) (hereafter "*Indiana WLNP Order*") ("Ultimately, the Petitioners' evidence offered in support of economic burden fail for the requisite level of detail A lump sum, without context, is meaningless ")

[6] *See, e g* , Direct Testimony of Steven Watkins at 9-19

[7] *See, e g* , Direct Testimony of Kerry Watson on Behalf of Yorkville Telephone Cooperative at 5

[8] Upon being approached by a customer seeking to port to Verizon Wireless, if the porting tool indicates that a carrier's numbers are not marked portable in the Local Exchange Routing Guide due to a waiver, the salesperson will not initiate a port request to the other carrier *See, cf*, Rebuttal Testimony of Gregory C Cole at 8

[9] Requests by LECs, such as Petitioners, to further delay the availability of LNP further depresses any nascent demand for the service Spotty availability and varying deadlines hardly provide an environment where customers are fully aware of the options available to them

wireless carriers' coverage is not supported with factual evidence,[10] and worse, is not relevant to whether consumers may have the *choice* of porting their telephone numbers. LNP is a forward-looking requirement that seeks to spur competition in the local exchange marketplace.[11] As such, LNP must be widely available, first and foremost, so that consumers can weigh the pros and cons of switching carriers without fear of losing their telephone numbers. In this weighing process, *consumers* will determine whether wireless carrier service is adequate for their needs.

Petitioners' off-point objections do not disguise the fact that they simply do not meet the legal tests required to secure an exception to the federal law that requires compliance with LNP. The FCC and other state Commissions have correctly denied waiver requests when presented with similar claims.[12]

Petitioners failed also to justify suspension of the LNP mandate under the public interest standard of Section 251(f)(2)(B). This section of the statute requires Petitioners to prove, and the TRA to find, that suspension is consistent with the public interest, convenience and necessity Both Congress' express imposition of LNP in the Federal Telecommunications Act, and years of federal precedent finding that direct and strong public benefits to enhanced competition and customer choice flow directly from LNP, must be overcome to justify the requested suspensions. Petitioners failed to do so.

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[10] In fact, a substantial portion of the scant anecdotal comments presented by the Petitioners concern carriers that are not parties in this docket *See* Direct Testimony of Terry Wales at 8 (commenting on Cingular), Direct Testimony of Gregory L Anderson at 8 (commenting on AT&T Wireless), Direct Testimony of David Dickey at 6 (commenting on Cingular), and Direct Testimony of W S Howard at 8 (commenting on Cingular)

[11] *See Telephone Number Portability, Petition of Yorkville Telephone Cooperative et al*, Order, CC Docket 95-116, DA 04-1455, p 4, para 10 (FCC, May 24, 2004) ("*Yorkville et al Order*") ("The Commission's number portability requirements are an important tool for promoting competition and bringing more choice to consumers These benefits are particularly important in smaller markets across the country where competition may be less robust than in more urban areas ")

[12] *See supra notes 5 and 11 and infra* notes 35, 43, 95, 100, and 101

Petitioners have no proof that LNP will not bring all the benefits expected of it by Congress and the FCC. Absent such evidence, the TRA cannot possibly place the claims of competitors whose interests lie in minimizing the uncertainties of competition above Congress' judgment that LNP will promote competition and serve the public. In fact, doing so would be a reversal of the TRA's policy, as demonstrated by the TRA staff's participation in comments filed before the FCC, that strongly support LNP generally, and specifically support intermodal porting on competitive grounds.[13]

Having failed to meet their legal burden under either section of 251(f)(2), especially when satisfying both sections is required by the conjunctive "and,"[14] Petitioners should be required to implement intermodal LNP immediately upon the conclusion of these proceedings, and in any event no later than November 24, 2004 The TRA should immediately deny the requested relief and require the Petitioners to fulfill their obligations under the Telecommunications Act and the FCC's rules.

[13] *See* Comments of the State Coordination Group, *Verizon Wireless' Petition Pursuant to 47 U S C § 160 for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation,* WT Docket No 01-184, CC Docket No 99-200, p 9 (Feb 2001) ("Comments of State Coordination Group") ("Granting the requested forbearance will guarantee that wireless service will not become truly competitive with wireline local exchange services because customers cannot switch between wireline and wireless service without giving up their telephone numbers In addition, granting the requested forbearance will establish a precedent for discriminatory policies between technologies ") (Tennessee Regulatory Authority Staff is identified in the document as a member of the State Coordination Group)

[14] While Petitioners may satisfy section 251(f)(2)(A) by meeting any of the three (3) prongs, they must also satisfy the public interest criteria of section 251(f)(2)(B)

II. PETITIONERS HAVE FAILED TO MEET APPLICABLE LEGAL STANDARDS

Congress established a very high standard for a local exchange carrier to obtain a suspension of its LNP obligations [15] Section 251(f)(2) of the Act permits state commissions to suspend a carrier's LNP obligations **only**.

"to the extent that, and for such duration as, it determines that the suspension or modification"[16] is both:

(1) ***necessary*** to avoid

a. a significant adverse economic impact on users of telecommunications services generally;

b. imposing a requirement that is unduly economically burdensome; or

c. imposing a requirement that is technically infeasible;

AND

(2) consistent with the public interest, convenience, and necessity.[17]

"Congress intended exemption, suspension, or modification of the section 251 requirements to be the <u>exception</u> rather than the rule.. [the FCC] believe[s] that Congress did not intend to insulate smaller or rural LECs from competition. . . . "[18]

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[15] 47 U S C § 251(f)(2) Only local exchange carriers with fewer than 2 percent of the nation's aggregate installed subscriber lines ("two percent carriers") are even permitted to request a suspension of LNP requirements

[16] 47 U S C § 251 (f)(2)

[17] 47 U S C §§ 251(f)(2)(A)(i)-(iii) and (B)

[18] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report & Order, 11 FCC Rcd 15499, ¶1262 (1996) ("*Local Competition First Report and Order*") (emphasis added)

A. Petitioners Fail To Meet The Burdens Placed Upon It By Section 251(f)(2) Of The Telecommunications Act

The FCC's rules place the burden squarely on Petitioners to demonstrate that they meet the statutory and regulatory standards for a suspension of their intermodal LNP obligations under Section 251(f)(2).[19] Specifically, the FCC stated:

> A LEC with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.[20]

As is discussed below, Petitioners do not satisfy their legal burden under any of the three prongs of Section 251(f)(2)(A). Under each of the three possible standards for a waiver from the FCC's requirement to provide wireline-to-wireless LNP contained in Section 251(f)(2)(A), Petitioners must prove that such a suspension is "necessary to avoid" certain outcomes.

1. *Petitioners Fail To Prove That A Suspension Is "Necessary To Avoid" Adverse Impacts On "Users Of Telecommunications Services Generally"*

In order to determine if a suspension is "necessary to avoid" potential adverse impacts, the Authority must examine potential impacts of LNP on all "users of telecommunications services generally." The TRA cannot interpret the statutory phrase "users of telecommunications services generally" as applying only to Petitioners' customers, but must consider the impact broadly on all consumers[21]

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[19] 47 C F R § 51 405(b).

[20] 47 C F R § 51 405(b), *see also Local Competition First Report and Order*, ¶1262

[21] *See, e g Tennessee Mfr'd Housing Ass'n v Metropolitan Gov't*, 798 S W 2d 254, 257 (Tenn Ct App 1990) (Courts must take statutes as they find them) Given the clarity of the statute, it is unnecessary to resort to rules of statutory construction *See Kentucky-Tennessee Clay Co v Huddleston*, 922 S W 2d 539, 542 (Tenn 1996) ("Where the language of the statute is plain, clear, and unambiguous, the statute will be given full effect without need to resort to rules of construction ")

Acceptable grammatical construction requires the reader to examine each word in the phrase, and its position, to discern the meaning of the phrase as a whole.[22] Among the definitions for the word "generally," is "without reference to particular instances or details; not specifically."[23] Thus, Congress, by applying the word "generally" to the phrase "users of telecommunications services" could not have meant for the TRA to examine the impact of any potential suspension *only* on users of Petitioners' service, but on all users of telecommunications services who would be affected by any suspension[24] To interpret the phrase "users of telecommunications services generally" to refer only to users of Petitioners' telecommunications services would also be inconsistent with the well established rule of statutory construction that prohibits statutes from being interpreted in a manner that renders words or phrases meaningless or superfluous[25] Not only must the Authority examine the statute in such a manner, the Authority is bound to "construe legislative intent 'primarily from the natural and ordinary meaning of the language used read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning.'"[26]

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[22] "The Elements of Style" authors William Strunk, Jr and E B White write

> The position of the words in a sentence is the principal means of showing their relationship Confusion and ambiguity result when words are badly placed

William Strunk, Jr & E B White, The Elements of Style 28 (4th ed , Longman Publishers, 2000)

[23] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed 2000)

[24] *See, e g , State of Tennessee v Medicine Bird Black Bear White Eagle*, 63 S W 3d 734, 754 (Tenn Ct App 2001) ("Judicial construction of a statute will more likely hew to the General Assembly's expressed intent if the court approaches the statutory text believing that the General Assembly chose its words deliberately, and that the General Assembly meant what is said ")

[25] *State of Tennessee v Morrow*, 75 S W 3d 919, 921 (Tenn 2002) ("A statute should be interpreted to preclude any part from being 'inoperative, superfluous, void or insignificant in order to carry out the legislative intent '") (citations omitted)

[26] *Knox County Education Ass'n v Knox County Board of Education, et al* , 60 S W 3d 65, 74 (Tenn Ct App 2001) (citations omitted) *See also Medicine Bird Black Bear White Eagle*, 63 S W 3d at 754 ("The courts' role is to ascertain and give the fullest possible effect to the intention and purpose of the General Assembly as reflected in the statute's language ")

Also, the statute should be evaluated as a whole; each provision should be construed in connection with every other section.[27] Section 251 of the Act deals generally with obligations owed by an incumbent LEC with other carriers to facilitate local competition. Any request for suspension of a requirement under Section 251(f)(2) specifically involves other carriers and impacts all consumers in the relevant marketplace The TRA must not limit its analysis to the Petitioners' customers,[28] but must broadly consider the adverse impact of delaying the benefits of LNP to all consumers.

Petitioners fail to offer any evidence regarding the impact of a suspension on all consumers in Tennessee.[29] Petitioners also ignore the positive effect LNP would have on consumers who would benefit from lower prices, greater competition,[30] and improved number conservation.[31] The FCC ordered all carriers to implement intermodal LNP in part based on its

[27] *Id* at 754- 755 ("[B]ecause words are known by the company they keep, we must construe statute's language in the context of the entire statute and in light of the statute's general purpose ") (citations omitted)

[28] Further, the final paragraph of Section 251(f) states, "Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers " This provision demonstrates that when referring only to the petitioning carrier or carriers, the statute clearly denotes that it is applicable only to that carrier or carriers, and not to that carrier "generally " Section 251(f)(2)(A)(i) does not contain such limiting language

[29] *See supra note 11 and infra* notes 86 and 90

[30] Tenn Code Ann Section 65-4-123, captioned *Declaration of telecommunications services policy*, provides as follows

> The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services *by permitting competition in all telecommunications services markets*, and by permitting alternative forms of regulation for telecommunications services and telecommunications service providers To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider, universal service shall be maintained, and rates charged to residential customers for essential telecommunications services shall remain affordable (emphasis added)

[31] *See, e g*, Comments of the Tennessee Regulatory Authority, *Numbering Resource Optimization, National Thousand-Block Number Pooling Rollout Schedule*, CC Docket No 99-200 (Nov 6, 2001) ("The Tennessee Regulatory Authority has been very active in pursuing numbering resource conservation "), *See* Reply Comments of the Tennessee Regulatory Authority, *Numbering Resource Optimization, CC Docket NO 99-200, Petitions for*

finding that users of telecommunications services would benefit directly from the competition that intermodal LNP would promote[32] The FCC found that the benefits from competition that LNP promotes will far outweigh the costs of implementing LNP, including areas served by rural LECs[33] Petitioners' assertions do not demonstrate that extraordinary or unique circumstances compel a different conclusion with respect to their service areas.

Even if the Commission examines only the Petitioners' customers, the requirements of Section 251(f)(2)(A)(i) are not met since the reasonable costs provided by Petitioners would not have an adverse impact on Petitioners' customers Petitioners were unable (or unwilling) to provide exact total LNP implementation costs or cost per customer, but instead provided estimated and incomplete cost data.

However, as William C. Jones stated in rebuttal testimony:

> The costs and/or cost estimates that are provided in the testimony, even if assumed to be accurate, are not burdensome, especially as spread across the customer base over the five-year period allowed by the FCC. Specifically, taking the data provided in Petitioners' direct testimony on June 4, 2004, I was able to determine that the per-customer surcharge would range from approximately five (5) cents per month to fifty-six (56) cents per month For example, Crockett, Peoples and West Tennessee telephone companies assert that the end-user surcharge for their customers would be .50, 40, and .48 respectively. Similarly, based on the costs and number of access lines provided, I was able to do "back of the envelope" calculations yielding monthly surcharges of .56 for Ardmore, .05 for Ben Lomand, .31 for Loretto, and .25 for Yorkville telephone companies Of course, if LNP yields market-induced efficiencies by the LECs, these

Delegated Authority, Tennessee, NSD File No L-01-277, (Feb 28, 2001) ("Since 1996 Tennessee has had to implement three (3) new area codes The constant addition of new area codes is not only confusing but also costly to consumers[ ] In recognition of the telephone numbering problems in Tennessee, the TRA has taken specific action designed to implement long-term solutions for area code relief"), *See also* Petition of the Tennessee Regulatory Authority for Additional Delegated Authority to Implement Numbering Conservation Measures, FCC NSD File No L-99-94 (Nov 16, 1999) (Indicating that Tennessee NPAs 901 and 615 were near exhaust)

[32] *See, e g*, Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, *Memorandum Opinion and Order*, 17 FCC Rcd 14972 (2002) ("*VZW Forbearance Order*")

[33] *Intermodal Porting Order*

customers could benefit from off-setting rate reductions in LEC provided services.[34]

Even if these costs were high, which they are not,[35] the FCC recently permitted "all incumbent local exchange carriers that did not include the initial costs of implementing intermodal LNP in already-filed LNP cost recovery tariffs" to extend their cost recovery period by an additional five years.[36] In doing so, the Commission emphasized that such a waiver would be appropriate "when the relief requested would not undermine the policy objective of the rule in question, special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest."[37] If Petitioners believe that when amortized over a five year period, carrier-specific costs directly related to providing long-term number portability still remain too high for its customers, they may petition the FCC to minimize the adverse impact of these costs by amortizing them over a greater period of time

2. *Petitioners Fail To Prove The Grounds For Suspension Under Section 251(f)(2)(A)(ii)*

Petitioners have requested a suspension under Section 251(f)(2)(A)(ii) ("to avoid imposing a requirement that is unduly economically burdensome").[38] The FCC has determined that where such petitions are filed, "State commissions will need to decide on a case-by-case

[34] Rebuttal Testimony of William C Jones at 2-3

[35] *Petition of Multiple Communications Companies for a Suspension of Wireline-to-Wireless Number Portability Obligations*, Case 03-C-1508, Order Denying Petition, p 14 (NY PSC April 19, 2004) ("*NY WLNP Order*") ("[N]o company provided a detailed analysis of the impact on their respective customers in the petitions Using the company submissions, the Commission does not find a basis to conclude that there would be 'significant adverse economic impact ' We conclude that these costs estimates produced increments that would amount to less than one dollar per subscriber line per month over five years ")

[36] Telephone Number Portability, BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, *Order* (rel Apr 13, 2004) ¶ 1 ("*BellSouth Order*")

[37] *Id* , ¶ 11

[38] *See, e g* , Amended Petition for Suspension at 9

basis whether such a showing has been made"[39] Another FCC ruling determined that blanket waivers of the LNP requirements for smaller and/or rural LECs are "unnecessary and may hamper the development of competition in areas served by smaller and rural LECs that competing carriers want to enter."[40] The TRA, in requiring the Petitioners to re-file, acknowledged that their original petition did not pass muster because requests for suspension must individually meet the requirements of the statute.[41]

a. Economic Burden

Petitioners offered unconvincing evidence that application of the intermodal LNP obligations would cause undue economic burdens.[42] In rejecting suspension requests by wireline carriers in its state, the Michigan Commission determined that the carriers requesting relief had not demonstrated costs different from, or more burdensome than, the costs of wireless carriers and concluded that rural telephone companies must implement and bear the costs of portability if they receive a request to do so.[43] All carriers, wireline and wireless, have to bear economic burdens to upgrade their networks and adapt their business practices to offer the service Only a

[39] *Local Competition First Report and Order*, ¶1262, 47 C F R § 51 401

[40] Telephone Number Portability, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 7236 (1997), ¶ 112-23

[41] *See supra* note 4

[42] In their discovery responses, Petitioners conceded that they were not aware of any documents in their possession or relied upon by them in this proceeding that discuss the economic burden of providing wireline-to-wireless LNP *See* Coalition's Responses to Verizon Wireless' Discovery Requests at 2-3 (Response to Request No 1 03)

[43] *In the matter of the Petition of CenturyTel of Michigan, Inc , and CenturyTel Midwest-Michigan for temporary suspension of wireline to wireless number portability obligations*, Michigan Public Service Commission, Case No U-13729, p 6 (Dec 9, 2003) (*"Michigan Order")*

truly exceptional demonstration of undue cost by the Petitioners could justify a special exception or suspension from the LNP requirement [44] Petitioners have not met that burden.[45]

Since May 24, 2004, some Tennessee ILECs have offered, or are currently required to offer, intermodal LNP available in their service territories. Among these carriers is 2% rural carrier Citizens Communications Company d/b/a Frontier Communications of Tennessee.[46] Clearly the availability of intermodal LNP in some areas of the state demonstrates that intermodal LNP is economically feasible The fact that these other carriers, especially Frontier Communications of Tennessee, which is similarly situated to Petitioners, are able to offer intermodal LNP undercuts the significant adverse economic impact claimed by Petitioners.[47]

The record, including discovery responses and the testimony, reveals that ten (10) of the seventeen (17) Petitioners in question are, or soon will be (prior to August 24, 2004), LNP capable. [48] According to the record, United Telephone Company is LNP capable[49] and has withdrawn from the case. The remaining six (6) Petitioners in question are in differing stages of completion, none of which justify a further prolonged extension.[50] Ardmore Telephone

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[44] *Indiana WLNP Order* at 23 ("The Petitioners here must make a choice either invest in their own networks for the inevitability of some form of LNP in the future, or contract with another entity upon receipt of a bona fide request ")

[45] *See id* at 21 ("To support a suspension request, carriers must have taken appropriate action to prepare for LNP prior to the LNP deadline, and must show what efforts they have made to that end ") Actions on the eve of the deadline have been determined to be insufficient *See e, e g , Yorkville, et al Order*

[46] *See* Rebuttal Testimony of Gregory C Cole at 2

[47] United Telephone Company withdrew from this matter on June 16, 2004

[48] *See* Direct Testimony of William C Jones at 11-12

[49] *See* Exhibit A to Amended Petition for Suspension

[50] *See* Rebuttal Testimony of Gregory C Cole at 6 ("DeKalb Telephone Cooperative, Inc had an LNP capable switch ordered, delivered and installed – but, without explanation, is waiting to 'turn up' the switch on October 1, 2004") *See also* Rebuttal Testimony of William C Jones at 7-8 ("This request is unreasonable especially since most of the Petitioners acknowledge dates ranging from late summer to early fall 2004 when their software, hardware and back office tasks will be completed Several have completed agreements with vendors and Neustar since they filed the Amended Petitions in this case "), Rebuttal Testimony of Hoke R Knox at 5-6

Company, Inc.[51] and Bledsoe Telephone Cooperative[52] need only to complete software upgrades before they can port numbers. Likewise, Crockett, Peoples and West Tennessee Telephone Companies apparently only need to complete software upgrades [53] These Petitioners do not need to replace switches nor do they face other economic or technical obstacles to providing LNP. Soon, they will be able to test their systems with wireless carriers and provide the service.[54] These facts in the record belie Petitioners' claim of undue economic burden

b. Cost Recovery of LNP Related Expenses Excludes Routing

The FCC, in its LNP *Third Report and Order*,[55] provided guidelines for carrier recovery of costs related to providing long-term LNP. The FCC established that carrier-specific costs directly related to providing number portability could be recovered in two federally-authorized charges: (1) a monthly number portability charge recoverable from end-users; and (2) a number portability query-service charge that applies to carriers on whose behalf a LEC performs queries and codified these requirements in its Rules.[56] Under the FCC's rules, the end-user surcharge must be determined as follows:

> the incumbent local exchange carrier shall levelize the monthly number-portability charge over five years by setting a rate for the charge at which the present value of the revenue recovered by the charge does not exceed the present value of the cost being recovered, using a discount rate equal to the rate of return

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[51] Direct Testimony of Terry Wales at 3-4

[52] Direct Testimony of Gregory L Anderson at 4

[53] Direct Testimony of Lera Roark at 4 ("The current schedule is to install the software in each company's host office switch By August 31, 2004, each host office switch should be ready, i e , installed and tested ")

[54] *See* Rebuttal Testimony of William C Jones at 8 ("Most Petitioners have completed or will soon complete internal testing They state in their testimony that then can then coordinate testing with wireless carriers Verizon Wireless not only stands ready to test but has already reached out to rural LECs across the nation, including several Petitioners in Tennessee (Ardmore, DeKalb, Loretto, Millington), requesting testing dates ")

[55] Telephone Number Portability, *Third Report and Order*, 13 FCC Rcd 11701, (1998) (*"LNP Third Report and Order"*)

[56] 47 C F R § 52 33

on investment which the Commission has prescribed for interstate access services pursuant to Part 65 of the Commission's Rules.[57]

In addition to providing the general framework for the recovery of long-term number portability costs, the Commission delegated authority to the [Common Carrier] Bureau to determine appropriate methods for apportioning joint costs among portability and non-portability services.[58] Under the FCC's cost recovery formulation, carriers may only recover those costs specifically related to the provision of LNP. The FCC outlined standards for identifying eligible LNP costs.[59] Costs that support non-portability related functions, general system upgrades, or are not otherwise specific to LNP are not allowed to be included in an LNP surcharge, but rather are recovered through regular rates and charges or intercarrier compensation agreements. Further, interconnection expenses are not recoverable as part of the LNP surcharge and as such, are immaterial to the TRA's consideration under Section 251(f)(2)(A)(ii)

In applying the FCC's cost recovery decisions, the Indiana Commission closely scrutinized the cost data submitted by petitioners in that state and found the data to be insufficient Petitioners' costs directly related to implementing LNP, such as costs for hardware and software upgrades, are not unduly burdensome.[60] Given the dated provided, the per-

[57] 47 C F R §52 33(a)(1)(iv)

[58] In the Matter of Long-Term Number Portability Tariff Filings, CC Docket No 99-35, FCC 99-158, 14 FCC Rcd 11883, July 16, 1999, ¶6

[59] Telephone Number Portability Cost Classification Proceeding, *Memorandum Opinion and Order*, 13 FCC Rcd 24495 (1998)

[60] Petitioners face costs no more burdensome than costs faced by wireless carriers *See* Rebuttal Testimony of William C Jones at 4

Q DID WIRELESS CARRIERS FACE THE SAME TYPES OF COSTS FOR SOFTWARE AND HARDWARE UPGRADES, BACK OFFICE COSTS AND EMPLOYEE TRAINING AS PETITIONERS?

A Yes In his direct testimony at pages 4-5, Gregory Cole outlined the various tasks Verizon Wireless completed to become LNP capable In fact, wireless carriers have experienced additional costs associated with a technological challenge unique to wireless Wireless carriers customer surcharge to recover Petitioners' claimed costs directly related to implementing LNP ranges from approximately five (5) cents per month to fifty-six (56) cents per month. By any standard, and certainly by the applicable standard of Section 251(f)(2), Petitioners' estimated recoverable costs are not economically burdensome, let along unduly so.[61]

c. Routing Costs

Given the weakness of their cost justification, Petitioners argue, chiefly in the testimony of Steven Watkins, that so-called unresolved routing issues will cause undue cost burdens for Petitioners.[62] Petitioners would have the TRA consider costs for routing calls to ported numbers as part of their economic burden associated with LNP. It is clear, however, the FCC's LNP cost recovery decisions that it would not permit cost recovery for routing from consumers, and from its *Intermodal Porting Order,* that expressly provided that routing concerns were a separate matter for a separate proceeding, that Petitioners' claim is meritless. Further, Petitioners have not demonstrated that routing costs will be unduly burdensome: (1) if demand is low, as Petitioners imply in their testimony, there will be no discernible difference in their routing costs; (2) if demand improves upon wider availability and customer awareness, costs associated with LNP are no different that those borne today under existing interconnection laws.

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were required to separate the Mobile Directory Number ("MDN") from the Mobile Identification Number ("MIN"), which impacted almost every aspect of wireless operations Separation of the MIN from the MDN was a huge challenge and provided the basis for the FCC's earlier extensions of wireless LNP

[61] *See, e g , NY WLNP Order* at 14 ("We conclude that these costs estimates produced increments that would amount to **less than one dollar** per subscriber line per month over five years ") (emphasis added) Moreover, the costs estimates submitted herein are, in large part, unsubstantiated and often vague *See Indiana WLNP Order* at 22 ("[P]ricing in vague lump sums, expressed in terms of per line or per interface cost, does not provide the requisite level of the net cost of LNP after appropriate parsing out of unrelated particulars ")

[62] *See, e g* , Direct Testimony of Steven Watkins at 6 and 23

At bottom, Petitioners' argument that the FCC's *Intermodal Porting Order*, which effectively sanctions the routing of calls to ported customers, is objectionable is really an argument about interconnection laws.[63] Petitioners assert that the FCC's decisions to require intermodal porting unduly burden them with routing costs, which will be exacerbated by LNP.[64] Such an argument is not an indictment of LNP *per se,* but is a criticism of interconnection laws that are best reserved, as the FCC already determined, to federal and state interconnection proceedings where these issues can be more fully examined by regulators.[65]

Even if Petitioners correctly stated concerns cognizable under interconnection laws, the record in this proceeding simply does not support Petitioners' assertions of undue economic burden due to routing costs. General policy arguments presented in the testimony of Steven Watkins are no substitute for the lack of data.[66] A careful review of Petitioners' testimony will likewise demonstrate the lack of any such data.

3. *Petitioners Fail To Prove That Intermodal LNP Is Technically Infeasible*

Section 251(f)(2)(A)(iii) of the Act requires Petitioners to demonstrate that intermodal LNP is "technically infeasible" before the Commission can grant a suspension of the requirement under Section 251(f)(2)(A)(iii) of the Act. A requirement is technically infeasible only if the technology necessary to permit the party requesting suspension of the requirement to implement is not available. The technology necessary for LNP is widely available, as carriers, large and

[63] *See, e g , Id* at 9-14

[64] *See, e g* , Direct Testimony of Steven Watkins at 24, 30 and Rebuttal Testimony of Steven Watkins at 13-14.

[65] The record developed in those proceedings will allow regulators to test the veracity of Petitioners' interconnection routing arguments The FCC recently filed its Respondents Brief with the Court of Appeals for the D C Circuit on these issues in response to a LEC challenge to the FCC's LNP orders It is clear from the brief that the FCC does not accept Petitioners' routing arguments as valid under existing interconnection law The brief is attached hereto as **Exhibit A**

[66] See, e g , Direct Testimony of Steven Watkins at 8-14, 23-24

small are now supporting intermodal LNP. A requirement is not technically infeasible merely because the party requesting suspension failed to implement the requirement on a timely basis or because implementation of the necessary technology is costly. In the specific context of intermodal porting, the FCC stated in the *Intermodal Porting Order*:

> There is no persuasive evidence in the record indicating that there are significant technical difficulties that would prevent a wireline carrier from porting a number to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number. Accordingly, the plain text of the Act and the Commission's rules, requiring LECs to provide number portability applies. In fact, several LECs acknowledge that there is no technical obstacle to porting wireline numbers to wireless carriers whose point of interconnection is outside of the rate center of the ported numbers.[67]

Both the Michigan and New York Commissions denied requests for relief from LNP, in part, due to the fact that wireline carriers had sufficient notice and time to plan for the implementation of portability, given multiple orders dating back to 1996 -- and that carriers' lack of planning and foresight did not excuse compliance with the May 24, 2004 deadline.[68] These state commission decisions should guide the Authority here in denying Petitioners' request Carriers across the country, including many rural carriers, modified their networks to facilitate LNP in order to meet the May 24, 2004 mandate.[69] The technical obstacles that the Petitioners claim to face are no different than the technical obstacles faced by all other carriers, including other rural carriers. The rating and routing issues, the various distinctions between wireless and wireline service, interconnection, and witness Watkins' "rate center" concept concerns, may, to the Petitioners, present operational challenges, but obstacles to LNP they are not. These

[67] *Intermodal Porting Order at* ¶ 23

[68] *NY WLNPOrder* at 15-16, *Michigan Order* at 6

[69] *See, cf, Comments of the State Coordination Group* at 10 (opposing a wireless proposal that "would discriminate to the detriment of wireline carriers who already have spent millions of dollars to deploy LNP technology[ ]") *See also* Direct Testimony of William C Jones at 10-11 ("A delay only serves to deny (1) those competitive carriers that have made local number portability investments the opportunity to leverage that investment in the Petitioners' serving areas, and (2) customers the opportunity to port their numbers ")

concerns, including the testimony by Steven Watkins regarding the scope of the intermodal porting, do not rise to the level of technical infeasibility.[70] As discussed above section II, A (2) (a), some carriers in the State of Tennessee are providing intermodal LNP, demonstrating the feasibility of doing so [71]

The *Intermodal Porting Order,* which settled the issues raised by wireline carriers regarding the scope of intermodal porting, did not affect the key steps that Petitioners needed to take to implement LNP (*i.e.*, ensuring that its switches are LNP capable). There is no evidence in the record in this proceeding to suggest that unique or special circumstances made it technically infeasible for Petitioners to comply with LNP.

III. THE PUBLIC INTEREST STANDARD HAS NOT BEEN MET

In addition to finding that Petitioners have not met their burden of proof under 251(f)(2)(A), before granting a suspension under Section 251(f)(2), the Commission must find that such additional suspension would be "consistent with the public interest, convenience, and necessity," the additional requirement imposed by Section 251(f)(2)(B). Petitioners have the burden to prove to the Authority that a suspension or modification of the requirement is consistent with the public interest.[72] The FCC has found that the public has a very strong and

[70] *See supra* note 67 *See also Indiana WLNP Order* at 26 ("Thus, the resolution of LNP, in Mr Watkins estimation, centered on issues related to rating and routing – *not* of technical feasibility ") (emphasis in original), *NY WLNP Order* at 9 ("The Petitioners have not provided compelling evidence that it is technically feasible for them to meet their portability obligations Rather, they have made numerous unsupported statements regarding unspecified 'existing technical limitations[ ]'")

[71] *See supra* p 14

[72] *Local Competition First Report and Order,* ¶1262, 47 C F R § 51 405(b)

compelling public interest in intermodal LNP.[73] Petitioners fail to supply record evidence to the contrary.

A. LNP is in the Public Interest

In the landmark Federal Telecommunications Act of 1996, Congress determined that LNP should be required of all LECs and the FCC has repeatedly confirmed that implementation of intermodal LNP by rural LECs is in the public interest. The Authority should not override that determination without convincing evidence that authorizing an exception to this well-documented federal policy would serve the public interest. Upon release of the *First Report and Order* in 1996, the FCC stated, "[t]he ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase."[74] The FCC determined that customers' enhanced ability to respond to price and service changes by switching providers, without changing their telephone numbers, promotes competition.[75] This has been further emphasized by the FCC's actions in rejecting every request for suspension or waiver of the May 24, 2004 LNP deadline to come before it

The FCC's intermodal LNP rules have a long history, complete with multiple challenges to the rules at the FCC and in the Court of Appeals for the D.C. Circuit.[76] Petitioners' request for

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[73] Telephone Number Portability, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23697 (2003) ("*Intermodal Porting Order*")

[74] Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, 8368, ¶ 30 (1996) ("*First Report and Order*").

[75] *Id*

[76] *See* Telephone Number Portability, CTIA Petition for Extension of Implementation Deadlines, *Memorandum Opinion and* Order, 13 FCC Rcd 16315 (1998), Telephone Number Portability, CTIA Petition for Forbearance from CMRS Number Portability Obligations, *Memorandum Opinion and Order*, 14 FCC Rcd 3092 (1999), Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, *Memorandum Opinion and Order*, 17 FCC Rcd 14972 (2002) ("*VZW Forbearance Order*")

suspension under Section 251(f)(2) is fundamentally inconsistent with the FCC's LNP rules and orders At every turn, the FCC has defended federal pro-competitive and pro-consumer policies underpinning the LNP rules, including expansion of the mandate to include wireless carriers.[77] The FCC concluded that intermodal LNP would enhance competition between wireless and wireline carriers[78] and that the pro-competitive and pro-consumer aims of federal policy would be realized by intermodal porting that encourages wireless/wireline competition, creating market incentives for carriers to reduce prices, invest in innovative technologies, and enhance flexibility for consumers [79] In rejecting a recent petition, the FCC stated,

> The Commission's number portability requirements are an important tool for promoting competition and bringing more choice to consumers. Accordingly, it is in the public interest that carriers implement porting as quickly as possible.[80]

In rejecting another petition, filed by North-Eastern Pennsylvania Telephone Company, the FCC noted,

> Section 251(b) of the Communications Act of 1934, as amended, mandates local exchange carriers ("LECs") to provide LNP in accordance with the requirements outlined by the Commission. The Commission, in the Number Portability First Report and Order, established the parameters for LNP and required commercial mobile radio service (CMRS or wireless) providers to become LNP-capable pursuant to sections 1, 2, 4(i), and 332 of the Act ***In doing so, the Commission concluded that the public interest is served by making LNP available across different technologies and thereby promoting competition between CMRS service providers and wireline carriers.***[81]

[77] *Id*

[78] *First Report and Order* at 8434-36, ¶¶ 157-160

[79] *Id* at 8437, ¶ 160

[80] Telephone Number Portability, *Petition of Leaco Rural Telephone Cooperative, Inc*, CC Docket No 95-116, DA 04-1684, June 10, 2004, ¶ 4

[81] *Northeastern Pennsylvania Order*, CC Docket No 95-116, DA 04-1312, May 13, 2004, ¶ 2 ("*NEP Order*") (emphasis added, footnotes omitted)

Not only has the FCC already made the determination that intermodal LNP is in the public interest, but independent factors before this Authority also demonstrate that Petitioners' request would not be in the public interest

1. LNP optimizes number resources

As stated in the testimony of William C. Jones:

> There is a significant indirect benefit to the public: number efficiency and conservation Once a carrier is LNP capable it can participate in thousand-block number pooling (TBNP). The TRA can extend the lives of various area codes in Tennessee by implementing TBNP throughout the state where it does not exist today or by increasing the number of carriers participating in pooling. Additional conservation measures that the FCC may require in the future (such as individual telephone number pooling "ITN" and unassigned number porting "UNP") build on the same technological platform as LNP and TBNP. With that in mind, moving carriers to the related capabilities of LNP and TBNP should be a high priority for the Authority.[82]

2 LNP advances local competition

No effective competition for landline service has developed in Petitioners' service territory.[83] Verizon Wireless, as demonstrated by sending BFRs, stands ready to compete with 17 members of the coalition petitioning the TRA for relief. Many of these carriers stated that they had not received BFRs from CLECs,[84] making wireless service the best hope for competition in local rural markets in Tennessee

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[82] Rebuttal Testimony of William C Jones at 6 *See also* note 31 *supra*

[83] *See* note 30 *supra*

[84] *See, e g* , Direct Testimony of Terry Wales at 2, Direct Testimony of Rodney Schlimmer at 2, Direct Testimony of David Dickey at 2

Clearly, the proven public interest in competition and choice weighs heavily against a suspension of LNP. Like the Indiana Commission, the TRA should reject assertions that the grant of suspension is in the public interest based solely upon generalized statements.[85]

B. Demonstrated Demand (Or "Take Rate") Is Not Required

Demand is not the legal standard to be met nor is it required for LNP to be in the public interest.[86] Petitioners assert that their customers have made few inquiries about intermodal porting.[87] Petitioners, however, did not take any surveys of customers[88] and did not provide any customer education or information about the potential availability of LNP to customers[89] Moreover, increased demand will follow the wide availability of the service as carriers attempt to woo customers and compete in the marketplace with advertisements and targeted mailings.[90] As noted by witness William C. Jones, "[t]here is little data at this time to judge the demand for LNP in Petitioners' territory given that intermodal LNP only took effect on November 24, 2003 in the top 100 MSAs (and only the largest five (5) LECs were require to participate) and outside the top 100 MSAs on May 24, 2004."[91] Still, in the short period of time that intermodal LNP has

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[85] *Indiana WLNP Order* at 28 ("While Petitioners have made assertions that the grant of suspension is in the public interest, nothing more than generalized statements have been presented ")

[86] Citing the FCC, the Indiana Commission has noted that "LNP implementation provides benefits for even those who choose not to port " *Indiana WLNP Order* at 28

[87] *See, e g* , Pre-filed Direct Testimony of Steven Watkins at 31

[88] *See, cf*, Comments of State Coordination Group at 7 (The State Coordination Group commented that "Without any assessment of the extent to which [consumers] value their telephone numbers and how much of an impediment this is to changing carriers, [petitioner] <u>cannot</u> assert that the benefit of deploying LNP does not justify the cost ") (emphasis in original)

[89] *See* Coalition's Responses to Verizon Wireless' Discovery Requests at 6 (In responding to Request No 1 10, Petitioners acknowledged that they had not performed or contracted for a study on the demand for wireline-to-wireless local number portability in Tennessee)

[90] *See Comments of State Coordination Group* at 7-8 ("The ability to change carriers without barrier or consequences is the essence of competition ")

[91] Rebuttal Testimony of William C Jones at 7

been available in Tennessee, customers have in fact sought to port their landline numbers for wireless use. In fact, Verizon Wireless provided factual evidence in this case demonstrating that customers served by similarly situated carriers in Tennessee have sought to port their wireline numbers to wireless handsets.[92] As customers learn about the opportunities to port their landline numbers, demand for LNP will grow even more, spurring additional competition and the related public interest benefits.[93] In any event, it is well-settled that speculation about possible low demand for LNP service is not determinative and does not qualify Petitioners for a suspension of their obligations to provide LNP.[94]

IV. THE FCC AND OTHER STATE COMMISSIONS HAVE REJECTED SUSPENSION PETITIONS.

The FCC has rejected every request for suspension or waiver of the May 24, 2004 LNP deadline. In denying North Eastern Pennsylvania's waiver request for an extension of the May 24, 2004 implementation deadline, the FCC concluded that extending the porting deadline in order to accommodate Petitioner's switch delivery and deployment schedule and to provide additional time to resolve service feature issues was not warranted, as Petitioner had failed to present extraordinary circumstances beyond its control.[95]

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[92] *See* Rebuttal Testimony of Gregory C Cole at 2

[93] *See, cf.,Comments of State Coordination Group* at 5 ("Given the opportunity to keep their current wireless numbers, customers are certainly more likely to shop for the best rates and service they can find ")

[94] *See, e g Yorkville et al Order* at 4 ("The Commission's number portability requirements are an important tool for promoting competition and bringing more choice to consumers Granting petitioners' waiver request would slow the LNP implementation process and limit the choices available to consumers in the markets petitioners service ")

[95] *See, NEP Order* at ¶ 10 ("NEP has known since 1996 that it would need to support LNP within six months of a request from a competing carrier ") As further evidence of how seriously the FCC is taking the timeliness of suspension petitions, see the FCC's Upper Peninsula Telephone decision, summarily rejecting a petition filed less than 60-days before the implementation deadline *In the Matter of Telephone Number Portability, Petition of Upper Peninsula Telephone Company for Extension of Time to Implement Local Number Portability*, CC Docket No 95-116, DA 04-1456, May 24, 2004

The FCC also denied requests from wireless carriers Yorkville Telephone Cooperative and Yorkville Communications, TMP Corp. and TMP Jacksonville, LLC, and Choice Wireless, LC which sought an extension due to delays in switch upgrades from their vendors,[96] on the grounds that Petitioners failed to demonstrate special circumstances that would warrant an extension of the deadline, given the public interest in porting. The FCC held the carriers accountable for only recently beginning efforts to prepare for porting [97]

State commissions also have determined, pursuant to Section 251(f)(2), to hold petitioning LECs to their porting obligations. On May 18, 2004, the Indiana Utility Regulatory Commission rejected consolidated petitions for suspension of wireline-to-wireless portability [98] In that Order, the Indiana Commission rejected various economic and technical arguments presented by the LECs. As the Indiana Commission noted,

> The FCC foresaw that the implementation of LNP would produce problems, and to that end specifically directed carriers to examine the leasing of LNP capability from neighboring LNP-capable LECs, should they choose not to upgrade their own network.[99]

The Indiana Commission also rejected the same "geographic portability" arguments asserted in this docket before the Authority by the Petitioners' witness Steven Watkins, as well as arguments about the need for interconnection agreements, also presented in this docket by witness Watkins.

The Michigan Public Service Commission denied similar requests from Michigan "two percent" carriers, finding,

> [i]ndeed, Petitioners have been on notice since 1996 to prepare for implementation of LNP and replacement of new switches should have been completed prior to the implementation date.

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[96] *See Yorkville et al Order*

[97] *Yorkville et al Order at ¶ 8*

[98] *See Indiana WLNP Order*

[99] *Indiana WLNP Order* at 22

> Therefore, the Commission cannot find that it is consistent with the public interest, convenience, and necessity to temporarily suspend [the LECs] LNP obligations beyond November 24, 2003 or May 24, 2004, if they qualify for the FCC's limited waiver Any deferment of the FCC's number portability requirements beyond that time would be anti-competitive and anti-consumer.[100]

The New York Public Service Commission also denied similar petitions, finding that

> number portability has consistently and repeatedly been found to be in the public interest at both the state and federal levels. In our view, Petitioners' lacked foresight in not planning for its eventual implementation long before this time.[101]

The FCC, New York, Michigan, and Indiana orders, to name a few, consistently note the strong public interest in favor of portability and the extraordinary circumstances required to overcome that public interest Arguments like those raised by the Tennessee Petitioners — i.e , that the cost of software upgrades is unwarranted — have been rejected. Accordingly, as its counterparts at the FCC and in other states have already done, the Authority should end Petitioners' continued denial of a right federal law grants to Tennessee consumers. Similarly situated LECs in other states are now complying with the FCC's LNP mandate – which is evidence in and of itself that intermodal LNP is both technically and economically feasible.

V. PETITIONERS' REQUEST FOR WAIVERS CONSTITUTES AN IMPROPER COLLATERAL ATTACK ON THE FCC'S NUMBER PORTABILITY ORDERS.

The FCC has long determined and affirmed, time and again, the competitive and consumer protection policies that underpin Congress' LNP mandate. The FCC has heard extensive evidence and carefully considered the economic impacts on carriers and the benefits to consumers of its LNP requirements. It would be highly imprudent for the TRA, or any state

[100] *In the Matter of the Application of Waldron and Ogden Telephone Companies*, MPSC Case Nos U-13956 & U-13958, *Opinion and Order*, p 4 (Feb 12, 2004) (denying stay where LECs filed on November 21 and November 24, 2003) (*"Michigan WLNP Order)*

[101] *NY WLNP Order* at 16

commission, to abrogate the intermodal LNP requirements outlined in the Intermodal Porting Order

A. Petitioners Incorrectly Assert that the FCC's LNP Rules Require Location Portability

As noted in the Rebuttal Testimony of witness Gregory C. Cole, witness Steven Watkins expends a considerable amount of time in his testimony discussing location portability. In responding, witness Cole concluded that "Mr Watkins does not understand the way wireless calls are processed.[102] Joining witness Hoke R. Knox, witness Cole disagreed with Watkins' statement that the FCC sanctioned "location" portability.[103] Consistent with the intent of the FCC, the Indiana Commission rejected similar testimony on location portability by Steven Watkins.[104]

Petitioners' claim is a red herring. The FCC has not required location portability. Petitioners confuse location portability with the mobility inherent to wireless services.[105] The fact that a LEC may need to deliver a call to a tandem provider or an IXC because of indirect interconnection with wireless carriers does not convert service provider portability to location portability. Regarding location portability, the FCC rejected Petitioners' argument. It has unequivocally stated that:

> [P]orting from a wireline to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number does not, in and of itself, constitute location portability, because the rating of calls to the ported number stays the same. . . . [A] wireless carrier porting-in a wireline number is required to maintain the number's original rate center

[102] Rebuttal Testimony of Gregory C Cole at 7 *See also* Rebuttal Testimony of Hoke R Knox at 11 ("I cannot understand why Mr Watkins continues to address [the location portability] issue ")

[103] *Id* at 8-9

[104] *Indiana WLNP Order* at 23-24

[105] *See also*, Exhibit A at 28

> designation following the port As a result, calls to the ported number will continue to be rated in the same fashion as they were prior to the port. As to the routing of calls to ported numbers, it should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center.[106]

Service provider portability is defined as the ability of end users to retain their existing telephone numbers "at the same location...when switching from one telecommunications carrier to another."[107] After porting, the customer's rate center designation is still his original rate center, regardless of whether the customer ports to a wireless carrier – and therefore the customer is at the same location. The customer remains at the same location where he received service from his former carrier. Any other construction equates mobility with location portability, converting all wireless ports to location portability.

B. Transport And Transiting Cost Issue Should Not Delay LNP

The FCC firmly separated considerations regarding routing calls from the obligation to provide LNP in the *Intermodal Porting Order.*[108] The Authority should not include estimated routing costs in the analysis of potential customer or carrier cost burdens because the routing issues raised by Petitioners are not unique to intermodal porting and would not be allowed to be passed on to customers through the FCC's authorized LNP surcharge. Instead, the routing issues are yet another red herring detracting from the focus of this proceeding, which is whether Petitioners have met their burden under federal law to delay implementing the federal LNP mandate.

[106] *Intermodal Porting Order* at 12-13

[107] 47 U S C § 153(30), 47 C F R §§ 52 21(1), (q)

[108] *See* Telephone Number Portability, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* 18 FCC Rcd 23697, ¶¶ 39-40 (2003) ("*Intermodal Porting Order*")

The FCC recognized that routing issues – which really involve intercarrier compensation for routing calls – exist regardless of whether intermodal porting is required.[109] In so doing, the FCC determined that the routing issues raised by the LECs and their trade groups were irrelevant to the determination of whether LECs should be required to implement intermodal porting.[110] The FCC declined to address those separate issues and refused to prejudge considerations more appropriate to another docket. The FCC stated in the *Intermodal Porting Order*

> Indeed, several wireline carriers have expressed concern about the transport costs associated with routing calls to ported numbers. The National Exchange Carrier Association (NECA) and National Telecommunications Cooperative Association (NTCA), for example, argue in their joint comments, that when wireless carriers establish a point of interconnection outside of a rural LEC's serving area, a disproportionate burden is placed on rural LECs to transport originating calls to the interconnection points. They argue that requiring wireline carriers to port telephone numbers to out-of-service area points of interconnection could create an even bigger burden. Other carriers point out, however, that issues associated with the rating and routing of calls to ported numbers are the same as issues associated with rating and routing of calls to all wireless numbers. We recognize the concerns of these carriers, but find that they are outside the scope of this order.[111]

In expressly reserving the routing issues to consideration in another proceeding, the FCC further stated:

> We make no determination, however, with respect to the routing of ported numbers, because the requirements of our LNP rules do not vary depending on how calls to the number will be routed after the port occurs. Moreover, as CTIA notes, the rating and routing issues raised by the rural wireline carriers have been raised in the context of non-ported numbers and are before the Commission in other proceedings Therefore, without prejudging the outcome of any other proceeding, we decline to address these issues at this time as they relate to intermodal LNP [112]

[109] *See* Rebuttal Testimony of Gregory C Cole at 3

[110] *See Intermodal Porting Order* at 10-14

[111] *Id*, ¶ 40

[112] *Id*

In principle, Petitioners object to the existence of indirect interconnection arrangements that exist today, whether or not intermodal porting is involved. The issues concerning "indirect" or transit traffic deal with reciprocal compensation for traffic exchanged through indirect interconnection. Since indirect traffic is already routed over existing facilities, the only disputed issues have to do with the allocation of costs between the parties.[113] Petitioners attempt to collaterally attack this aspect of the FCC's *Intermodal Porting Order* through these proceedings as justification for the very relief the FCC already denied the wireline industry.

Instead of focusing on intercarrier compensation issues that masquerade as an impediment to LNP, Petitioners must demonstrate the economic burden to them and consumers associated with implementing LNP as required by the statute.[114] It was precisely because of the costs of implementing LNP that the FCC provided a cost recovery mechanism for LECs via a monthly surcharge

C. Petitioners Should Not be Permitted to Tie Relief to the Outcome of Court Appeals and the Arbitration Proceeding Before the TRA.

Petitioners assert that they should be granted a suspension until six months after a decision on the pending appeals related to porting between LECs and wireless carriers but advance no credible reasons for this relief.[115] There are two appeals of two FCC orders governing wireless LNP. The pendency of these appeals does not support any suspension of

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[113] *See* Rebuttal Testimony of Gregory C Cole at 3

[114] *See Indiana WLNP Order* at 27 (In rejecting the argument of the unsettled rating and routing issues, the Indiana Commission, quoting the FCC, noted that "'today, in the absence of wireline-to-wireless LNP, calls are routed outside of local exchanges and routed and billed correctly '") (citation omitted) The Indiana Commission also commented in this regard that petitioners' own evidence showed that "calls to wireless carriers were being completed by Petitioners now " *Id* The same is true in Tennessee *See* Rebuttal Testimony of Gregory C Cole at 3 ("The indirect arrangements are already in place for transiting traffic and such traffic is being exchanged today between Verizon Wireless and most, if not all, of the Petitioners ")

[115] *See Central Texas Tel Coop , Inc v FCC,* No. 03-1405 (D C Cir pending), *USTA v FCC,* No 03-1414 (D C Cir pending)

Petitioners' LNP requirements, however, and certainly not for the long period of time Petitioners request. The D.C. Circuit denied motions to stay the intermodal LNP requirements pending judicial review.[116] The Court saw no need to postpone the effectiveness of the requirement pending resolution of the appeals The Court of Appeals also denied a motion for expedited review and set oral argument for both cases on November 18, 2004 – almost one year after the requirement initially went into effect.[117] This further suggests that the Court saw no need for delay of the requirement pending appeal. Granting the requested suspension would grant Petitioners the exemption from federal law that the D.C. Circuit found was not justified.

Similarly, Petitioners request that they be granted relief until the TRA decision on the merits of an Arbitration proceeding concerning interconnection issues and intercarrier compensation. As discussed above, resolution of these issues is irrelevant to LNP.

VI. CONCLUSION

Petitioners have failed to meet their burden to demonstrate that a further suspension of their LNP obligation is necessary to avoid undue economic harm or technical infeasibility and that such additional delay is consistent with the public interest.[118] Petitioners should be required to implement intermodal LNP immediately upon conclusion of this proceeding, and in any event, no later than November 24, 2004 This proposal is consistent with decisions by the FCC and the Indiana Commission in circumstances similar to those presented in Tennessee.

[116] *See*, Orders denying Motions for Stay, *Central Texas Tel Coop , Inc v FCC*, No 03-1405 (D C Cir pending), *USTA v FCC*, No 03-1414 (D C Cir pending) (Attached hereto as Attachment B)

[117] *Id*

[118] Unfortunately, even the TRA's interim stay is a significant victory for Petitioners — and a significant loss for Tennessee' consumers Here, the TRA has granted Petitioners an additional days by virtue of the procedural schedule — after the FCC had already provided 180 days since last November for 2% LECs to prepare for intermodal LNP

For example, the FCC denied waiver requests by Yorkville and Choice Wireless because these petitioners had only recently initiated efforts to prepare for porting[119] – which rendered them non-complaint by the deadline despite their recent efforts Similarly, the FCC denied a waiver request by TMP Companies because they had failed to provide sufficient evidence of timely preparations [120] Instead of granting waivers, the FCC declined to enforce petitioners' porting obligations for sixty days, providing them limited time to complete system upgrades (notably, some of those carriers even required switch changes, but the FCC still held them to a 60 day forbearance period).[121] This approach balanced the public interest in speedy LNP implementation with the realities that Petitioners had not yet completed all implementation milestones.

The Indiana Commission's order provides a good road map for the Authority It granted petitioners very limited relief of an additional ninety days, but gave no such relief to petitioners that already had LNP-capable software, switches and infrastructure in place. Further, the Indiana Commission required carriers availing themselves of additional time to report on a monthly basis regarding the steps taken towards LNP implementation.[122] Similarly, the TRA should decline to grant additional time beyond November 24, 2004 for LNP implementation To ensure rapid compliance, the TRA should require Petitioners to file monthly progress reports. Such reporting requirements will ensure that Petitioners make good faith efforts to provide LNP in compliance with the Authority's order and the FCC's requirements.

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[119] *Yorkville et al* at ¶ 8

[120] *Id* at ¶9

[121] *Id* at ¶12 The FCC took the same approach in a case involving a Pennsylvania LEC, North-Eastern Pennsylvania Telephone Company ("NEP") after NEP decided to upgrade its switches on a certain schedule rendering it noncompliant *NEP Order*, ¶¶ 1, 10

[122] *See Indiana WLNP Order* at p 29, 31

WHEREFORE, Verizon Wireless respectfully requests that the Tennessee Regulatory Authority deny Petitioners' request for suspension of their LNP obligations for the reasons set forth in this brief, and require, the Petitioners to provide LNP immediately, and in any event no later than November 24, 2004.

Respectfully submitted,

MILLER MARTIN

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July 9, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on July 9 ____, 2004, a true and correct copy of the foregoing has been served on the parties of record, via the method indicated:

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ORAL ARGUMENT SCHEDULED FOR NOVEMBER 18, 2004

BRIEF FOR RESPONDENTS

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

No. 03-1405

CENTRAL TEXAS TELEPHONE COOPERATIVE, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996)
The Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et al.*
CMRS	Commercial Mobile Radio Service
FCC	Federal Communications Commission ("FCC" or "Commission")
ILEC	Incumbent Local Exchange Carrier
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
MTA	Major Trading Area
NANC	North American Numbering Council
Order	The order under review: *Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues,* CC Docket No. 95-116, 18 FCC Rcd 20971 (2003)
POI	Point of Interconnection
RTC	Rural Telephone Company. *See* 47 U.S.C § 152(37)

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

In the order on review, the Federal Communications Commission clarified and affirmed a rule adopted by the Commission in 1996 concerning the duty of commercial mobile radio services ("CMRS") carriers to provide local number portability to other CMRS carriers. *Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issue,* CC Docket No. 95-116, 18 FCC Rcd 20971 (2003) (JA). The following questions are raised by the petition for review filed by the rural wireline carriers:

(1) Do the petitioners have standing to maintain their challenge given that the redressability of the petitioners' alleged injury depends on factors other than the rule clarified in the order on review?

(2) Was the petition for review timely filed?

(3) Did the Commission act reasonably and in accordance with law in clarifying the obligations of CMRS carriers' duty to provide local number portability to other CMRS carriers, as established in its earlier rule?

JURISDICTION

This Court has jurisdiction to review final orders of the FCC pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

COUNTERSTATEMENT

I. Statutory And Regulatory Framework For Number Portability

A. The Telecommunications Act of 1996

Number Portability is "the ability of users of telecommunications services to retain, at the same location, existing [telephone] numbers without impairment of quality, reliability or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30); *see also* 47 C.F.R. § 52.21(k) (same). Section 251(b)(2) of the Communications Act, as amended by the Telecommunications Act of 1996 (the "1996 Act"), requires all local exchange carriers ("LECs") "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2).

Congress viewed number portability as one of the minimum requirements "necessary for opening the local exchange market to competition." *See, e.g.*, S. Rep. No. 23, 104th Cong., 1st Sess. at 19-20 (1995). "[T]he ability to change service providers," the House Commerce Committee found, "is only meaningful if a customer can retain his or her local telephone number." H.R. Rep. No. 204, 104th Cong. 1st Sess. at 72 (1995); *accord Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 513 (D.C. Cir. 2003) ("*CTIA*") (observing in the context of wireless-to-wireless number portability that "[t]he simple truth is that having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently.").

B. The Commission's First Number Portability Order

In accordance with its congressional directive, on July 2, 1996, the Commission promulgated rules and deployment schedules for the implementation of number portability. *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) (*First Portability Order*), *recon.*, 12 FCC Rcd 7236 (1997), *further recon.*, 13 FCC Rcd 21204 (1998). In that order, the Commission required both LECs and wireless carriers to provide number portability.[1] As applied to LECs, the Commission adopted, consistent with the statute, broadly applicable porting requirements: "number portability must be provided...by all LECs to all telecommunications carriers, including commercial mobile radio services (CMRS) providers." *Id.*, 11 FCC Rcd at 8355 ¶ 3; *see also id.* at 8431 ¶ 152.[2] Recognizing that section 251(b)(2) explicitly imposes the number portability requirement only on LECs, the Commission relied on other provisions of the Act to require CMRS providers to provide number portability to other wireline and wireless carriers. *Id.*, 11 FCC Rcd at 8431-32 ¶ 153 (relying on 47 U.S.C. §§ 1, 2, 4(i), and 332 to impose number portability requirements on CMRS providers).[3]

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[1] *See* 47 C.F.R. § 52.3 (1996) (describing the number portability obligations of LECs). This provision has since been recodified at 47 C.F.R. § 52.23. *See also* 47 C.F.R. § 52.11 (1996) (describing the number portability obligations of CMRS carriers). This provision has since been recodified at 47 C.F.R. § 52.31.

[2] CMRS providers are commonly known as wireless providers, and we use the terms interchangeably.

[3] *See generally*, *CTIA*, 330 F.3d at 502.

In the *First Portability Order*, the Commission specifically required CMRS providers to institute number portability among themselves.[4] The Commission reasoned that number portability should be made available among CMRS providers "to remove barriers to competition among such providers[,].... [to] stimulate the development of new services and technologies, and [to] create incentives for carriers to lower prices and costs." *Id.*, 11 FCC Rcd at 8435 ¶158. The transfer of a telephone number from one wireless carrier to another (referred to herein as "wireless-to-wireless porting" or simply "wireless porting") is the subject of the order on review in this case.[5]

In the *First Portability Order*, the Commission distinguished between "service provider portability," *i.e.*, "the ability of end users to retain the same telephone numbers as they change from one service provider to another," and "location portability," which it described as "the ability of users of telecommunications services to retain existing telecommunications numbers ...when moving from one physical location to another."[6] The Commission in the *First Portability Order* mandated service provider portability -- the definition of which is synonymous with the statutory definition of number portability. It did not, however, require location

[4] *First Portability Order*, 11 FCC Rcd at 8433 ¶ 155 & 8482 (former rule 47 C.F.R. § 52.11, now codified at 47 C.F.R. § 52.31).

[5] Transferring a number from a wireline carrier to a wireless carrier, or vice versa (referred to herein as "intermodal porting"), is the subject of the order on review in Case Nos. 03-1414 and 03-1443 that are currently pending before the Court.

[6] *First Portability Order*, 11 FCC Rcd at 8443 ¶¶ 172, 174. We note that, in this context, we use the term "port" to mean the transfer of a telephone number from one carrier's switch to another carrier's switch, which enables a customer to retain his or her number when transferring from one local service provider to another. *Telephone Number Portability*, 12 FCC Rcd 12281, 12287 n.28 (1997) ("*Second Portability Order*").

portability. *Id.*, 11 FCC Rcd at 8447 ¶ 181.[7] The Commission largely affirmed the *First Portability Order* on reconsideration.[8]

C. Subsequent Number Portability Proceedings

In an effort to address technical issues raised by the implementation of number portability, the Commission turned to a federal advisory committee called the North American Numbering Council (NANC), which was composed of representatives of a broad range of telecommunications interests. The agency had earlier created NANC to develop consensus in the industry on technical issues relating to the administration of the country's telephone numbers and to make recommendations to the FCC based on that consensus. *See First Portability Order*, 11 FCC Rcd at 8401 ¶ 93.

On May 1, 1997, the NANC submitted to the FCC a series of recommendations pertaining to the transfer of a telephone number from one wireline carrier to another ("wireline-to-wireline porting").[9] In August 1997, after soliciting public comment on the *NANC Working Group Report*, the Commission largely adopted recommendations from the NANC for the implementation of wireline-to-wireline portability.[10] Under the guidelines developed by the NANC, if a state elected to impose a separate location portability requirement between LECs,

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[7] The Commission required that any long-term number portability method be able to accommodate location portability in the future. *See First Portability Order*, 11 FCC Rcd at 8383 ¶ 58.

[8] *See First Portability Reconsideration Order*, 12 FCC Rcd 7236 (1997).

[9] *See Local Number Portability Administration Selection Working Group Report* (Apr. 25, 1997) ("*NANC Working Group Report*").

[10] *See Second Portability Order*, 12 FCC Rcd 12281; *see also* 47 C.F.R. § 52.26(a) (codifying by reference *NANC Working Group Report*).

such a requirement would have to be limited to carriers with a local presence in the same rate center to accommodate wireline carriers' concerns about the proper rating and routing of calls.[11]

The *Second Portability Order* did not address issues associated with wireless or intermodal porting.[12] Nor did it place any limits on the requirement of such porting; instead, it asked the NANC to develop a consensus recommendation on various outstanding matters, including "how to account for differences between service area boundaries of wireline versus wireless services."[13] The NANC reported to the Commission in May 1998 that its members were not able to reach consensus on technical issues surrounding intermodal porting and that it would not make a recommendation on the topic.[14]

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[11] *See Local Number Portability Selection Working Group Final Report and Recommendation to the* FCC, Appendix D, § 7.3, at 6 (rel. April 25, 1997). The report addressed the question of geographic limitations on wireline carriers' obligation to provide *location* portability if required by a state commission. It did not address geographic limitations with respect to wireline carriers' obligation to provider *service provider* portability.

[12] The Commission concluded that it was "reasonable for the NANC to defer making recommendations at this time with respect to the implementation of local number portability by CMRS providers" in light of the Commission's decision to delay the implementation date of wireless portability. *Second Portability Order*, 12 FCC Rcd at 12333 ¶ 90.

[13] *See Second Portability Order*, 12 FCC Rcd at 12333-34 ¶ 91.

[14] *See Local Number Portability Administration Working Group Report on Wireless Wireline Integration*, May 8, 1998, CC Docket No. 95-116, at §3.1 (filed May 18, 1998) ("*Report on Wireless Wireline Integration*"). On further reconsideration of the *First Portability Order*, the Commission acknowledged concerns raised by a commenter that requiring service provider portability in a wireless environment without imposing explicit geographic restrictions on such porting could "theoretically" result in *de facto* location portability. In response to this comment, the Commission expressed its concern that "limiting number portability in a wireless environment to those carriers already serving the NPA of the ported wireless number may thwart the pro-competitive goals of the Act." *Telephone Number Portability*, 13 FCC Rcd 21204, 21232 ¶ 61 (1998). Noting that further analysis of this issue was needed, the Commission deferred consideration of the issue and took no action to limit the geographic scope of wireless porting. *Id.*

Although the Commission had originally ordered CMRS carriers to implement number portability by June 30, 1999, *First Portability Order*, 11 FCC Rcd 8355 ¶ 4, the Commission subsequently found that carriers needed additional time "to develop and deploy the technology that will allow viable implementation of service provider portability." *Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd 3092, 3104-3105 ¶ 25 (1999) ("*Temporary Forbearance Order*"). Thus, as a practical matter, there could be no porting of numbers by CMRS carriers until they implemented the necessary technology. *Id.*; *see also* 47 C.F.R. § 52.31. During this period of temporary regulatory forbearance, NANC issued several reports but did not adopt or recommend technical standards governing wireless-to-wireless or intermodal portability.

In July 2002, the Commission established a firm deadline of November 24, 2003, for wireless portability and intermodal portability within the 100 largest localities. *Verizon Wireless' Petition for Partial Forbearance*, 17 FCC Rcd 14972 14985-86 ¶ 31 (2002) ("*Forbearance Denial Order*"), *aff'd*, *CTIA*, 330 F.3d 502. CMRS carriers outside of the largest 100 localities were required to allow end users to port their numbers by the later of May 24, 2004, or six months after receiving a porting request. *Id.* Thus, by these deadlines, carriers had to be capable of allowing end users to port their telephone numbers if another carrier had made a request for portability. The 2002 *Forbearance Denial Order*, like the 1999 *Temporary Forbearance Order*, addressed the *timing* of wireless number portability. But neither of those orders addressed the scope of the portability obligation established in 1996.

In the *Forbearance Denial Order*, the Commission also reaffirmed its policy rationale for wireless number portability. *Id.*, 17 FCC Rcd 14972. In denying a request by wireless carriers for permanent forbearance of the wireless portability requirement, the Commission explained that wireless number portability would enhance competition, reduce prices – especially as customers came to view their wireless phones as possible substitutes for their wireline phones – and promote the public interest. *See generally id.*, 17 FCC Rcd at 14977-14981, ¶¶ 14-22.[15] This Court upheld that determination over the objections of wireless carriers, holding that the Commission reasonably had concluded that application of the wireless number portability requirement was "necessary for the protection of consumers."[16] The Court explained that "[t]he simple truth is that having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently." *CTIA*, 330 F.3d at 513 (internal citation omitted).

II. LEC-CMRS Interconnection

A. Physical Point of Interconnection

Under section 251(a) of the Act, a telecommunications carrier, including a CMRS provider, may interconnect with an incumbent LEC either directly or indirectly. 47 U.S.C. § 251(a)(1). In the *Local Competition First Report and Order*, the Commission made clear that such carriers "should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices." 11 FCC Rcd 15499, 15991 ¶ 997 (1996) (subsequent history omitted). The Commission has interpreted

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[15] Section 10(a) of the 1996 Act directs the Commission to forbear from applying any provision of the Act or agency rule if the Commission determines (1) that enforcement of the requirement is not necessary to ensure that rates are just, reasonable, and non-discriminatory, (2) that the regulation is not needed to protect consumers, and (3) that forbearance is consistent with the public interest. 47 U.S.C. § 160(a). In making that public interest determination, Congress directed the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. 47 U.S.C. § 160(b).

[16] *CTIA*, 330 F.3d at 509; *see also* 47 U.S.C. § 160(a)(2).

these provisions to give telecommunications carriers, including CMRS providers, the option to interconnect at a single point of interconnection ("POI") in each LATA.[17] In rural areas, CMRS carriers typically interconnect indirectly with smaller LECs through the tandem switch of one of the regional Bell Operating Companies ("RBOCs").[18]

B. Intercarrier Compensation Procedures

The Act and the Commission's rules provide for two separate compensation regimes when two or more carriers collaborate to complete a local or long distance call. The access charge regime governs payments that interexchange carriers ("IXCs") and CMRS carriers make to LECs to originate and terminate long-distance calls. By contrast, carrier compensation for the exchange of local traffic is determined according to the Commission's reciprocal compensation procedures under section 251 of the Act.[19] In the *Local Competition First Report and Order*, the Commission determined that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area ("MTA")[20] is subject to reciprocal compensation

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[17] A local access and transport area ("LATA") is a geographical area within which a Bell Operating Company ("BOC") may offer local or long distance telecommunications services. 47 U.S.C. §§ 271, 153(3).

[18] A tandem switch is an intermediate switch between an originating telephone call location and the final destination of the call. Its function is to sort traffic coming in over common trunk groups and then to send it on to other local switches. Rural LECs have noted that they may realize "efficiencies" in using indirect interconnection (*via* RBOC tandem switches) "instead of building a direct connection" to competing providers. National Telecommunications Cooperative Association *Ex Parte*, CC Docket No. 01-92 (March 10, 2004), *attaching* NTCA report, "Bill and Keep: Is It Right for Rural America," at 41 (March 2004).

[19] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 ¶ 6 (2001) ("*Intercarrier Compensation NPRM*").

[20] MTAs are geographic areas within which CMRS providers are licensed to provide service. The Commission has established the MTA as the local calling area for CMRS providers for purposes of intercarrier compensation. *Local Competition First Report and Order*, 11 FCC Rcd at 16014 ¶ 1036.

obligations under section 251(b)(5), rather than interstate or intrastate access charges. *Local Competition First Report and Order*, 11 FCC Rcd at 16014 ¶ 1036. Thus, section 51.701(b)(2) of the Commission's rules defines telecommunications traffic exchanged between a LEC and a CMRS provider that is subject to reciprocal compensation as traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area." *See* 47 C.F.R. § 51.701(b)(2). For traffic that is subject to reciprocal compensation, the Commission's rules provide that a terminating carrier may recover from the originating carrier the cost of certain facilities and transport costs from an "interconnection point" to the called party. *See* 47 C.F.R. §§ 51.701(a), (c).

Section 51.703(b) of the Commission's rules states that a LEC may not assess charges on any other telecommunications carrier, including a CMRS provider, for telecommunications traffic that originates on the LEC's network. *See* 47 C.F.R. § 51.703(b). The Commission has construed this provision to mean that an incumbent LEC must bear the cost of delivering traffic (including the facilities over which the traffic is carried) that it originates to the POI selected by a competing telecommunications carrier.[21] At least two federal appellate courts have held that this rule applies even in cases where an incumbent LEC delivers calls to a POI located outside of its customer's local calling area.[22]

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21 *See TSR Wireless v. U S West Communications*, 15 FCC Rcd 11166, 11181 ¶ 34 (2000), *aff'd sub nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

22 *See Southwestern Bell Tel. Co. v. Public Utilities Comm'n of Texas*, 348 F.3d 482, 486-87 (5th Cir. 2003); *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 878-79 (4th Cir. 2003); *see also Atlas Tel. v. Corp. Comm'n of Oklahoma*, 309 F. Supp. 2d 1313 (W.D. Okla. 2004).

C. Rating Calls as Local or Toll

Under standard industry practice, calls are determined to be local or toll (long distance) by comparing the NPA-NXX codes[23] of the calling and called parties.[24] Thus, carriers generally compare the NPA/NXX prefixes of the calling and called parties' telephone numbers to determine both the retail rating of a call (that is, the charge imposed on the calling party) as well as the appropriate intercarrier compensation that is due. Every 10-digit telephone number is assigned to a particular rate center. A rate center is a geographic point (defined as a specific longitude and latitude) designated by a LEC and state regulators that is used to determine whether a call that originates on the LEC's network is a local call or a toll call.

All telephone numbers assigned to a particular rate center are presumed for rate-making purposes to be located at that geographic point. In addition, each rate center has a local calling area that consists of the set of other rate centers that are local to it, and two or more rate centers may have identical local calling areas. As a general matter, a call is rated local if the called number is assigned to a rate center within the local calling area of the originating rate center.

CMRS local service areas tend to be larger than wireline carriers' rate centers. Because wireline service is fixed to a specific location, a subscriber's telephone number is generally limited to use within the rate center within which it is assigned.[25] By contrast, wireless service is mobile and not fixed to a specific location. Accordingly, although a wireless subscriber's

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[23] The ten digit code assigned to telephone numbers is NPA-NXX-XXXX, with "NPA" representing the area code, "NXX" representing the middle three digits that identify the central office switch of the local service provider, and "XXXX" representing the individual subscriber.

[24] *See Starpower Communications v. Verizon South*, 18 FCC Rcd 23625, 23633 ¶ 17 (2003).

[25] *Working Group Report on Wireless Wireline Integration*, at 7.

number is associated with a specific geographic rate center, the number is not limited to use within that rate center. *Id.*

III. The Instant Proceeding

A. CTIA Petitions for Declaratory Ruling

As the implementation deadline for wireless and intermodal portability approached, disputes arose among carriers as a result of conflicting interpretations of the Commission's number portability rules. In particular, certain wireline carriers and rural wireless carriers announced their intention to construe narrowly their obligation to port numbers to CMRS carriers, taking the position that they need not port to CMRS carriers that do not have a presence in the rate center from which the ported number originated or direct interconnection with the customer's original carrier.[26] These pronouncements concerning the proper construction of the Commission's rules led the Cellular Telecommunications & Internet Association ("CTIA"), a trade group that represents CMRS carriers, to seek guidance from the Commission to resolve these disputes. In January and May of 2003, CTIA filed with the Commission petitions for declaratory ruling seeking guidance on a number of issues relating to the implementation of wireless and intermodal number portability.[27]

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[26] *See, e.g., Ex Parte* Presentation of the Rural Wireless Working Group Regarding Rural Wireless Number Portability Guidelines, Section 1.3 (filed Aug. 25, 2003) (JA).

[27] Petitions for Declaratory Ruling of the Cellular Telecommunications & Internet Association, CC Docket No. 95-116 (filed Jan. 23, 2003 and May 13, 2003) ("CTIA Petitions") (JA). Although two separate CTIA petitions, along with other petitions, were filed with the Commission seeking clarification of the Commission's number portability rules, it is primarily the May 2003 CTIA petition that is relevant here. The January 2003 CTIA petition primarily raised issues relating to intermodal portability.

The Commission issued public notices inviting comment on the issues raised in the CTIA Petitions.[28] The public notices were published in the Federal Register on February 13, 2003 (68 Fed. Reg. 7323) and June 10, 2003 (68 Fed. Reg. 34547) respectively.

As relevant here, CTIA's May 13th petition sought guidance as to whether CMRS carriers are required to enter into interconnection agreements as a precondition to porting numbers. May 13th Petition at 16-23 (JA). In response, certain rural CMRS carriers took the position that a rural CMRS carrier has no obligation to port numbers to a second CMRS carrier unless the second carrier has a local point of presence, local numbering resources, and direct interconnection with the porting out carrier in the rate center with which the telephone number is associated.[29] In a subsequent *ex parte* submission, CTIA urged the Commission to address this issue in the context of wireless-to-wireless portability.[30] Finally, CTIA urged the Commission to resolve a petition for declaratory ruling ("the Sprint Petition") that was pending before the Commission to the extent that the petition raised, with respect to non-ported numbers, the same rating and routing issues that commenters had raised in the Commission's number portability proceeding.[31]

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[28] Petition for Declaratory Ruling that Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas, CC Docket No. 95-116, Public Notice (rel. Jan. 27, 2003); Petition for Declaratory Ruling on Local Number Portability Implementation Issues, CC Docket No. 95-116, Public Notice (rel. May 22, 2003). Approximately 100 comments and *ex parte* letters were filed in response to the CTIA Petitions.

[29] *Ex Parte* Presentation of the Rural Wireless Working Group Regarding Rural Wireless Number Portability Guidelines, Section 1.3 (filed Aug. 25, 2003) (JA).

[30] Letter from Diane Cornell, CTIA, to Marlene H. Dortch, Secretary, FCC (filed Aug. 26, 2003) (JA).

[31] May 2003 CTIA Petition, at 25 (JA), *citing Sprint Petition for Declaratory Ruling Regarding ILECs' Obligation to Load Numbering Resources and to Honor Routing and Rating Points Designated by Interconnecting Carriers*, CC Docket No. 01-92 (filed May 9, 2002).

B. The *Order* on Review

On October 7, 2003, in response to CTIA's petition for declaratory ruling and other requests for clarification, the Commission issued the *Order* on review providing guidance on matters relating to the wireless-to-wireless number portability requirement established in the *First Number Portability Order*. The Commission in the *Order* rejected the argument that number portability is not required unless the requesting carrier has local numbering resources, and local interconnection with the porting out carrier in the rate center with which the ported number is associated. *Order* ¶ 21 (JA). The Commission pointed out that its rules require all wireless carriers, by the implementation deadline, to provide a long term database method for number portability in switches to permit number portability upon another carrier's request. *Id.*, *citing* 47 C.F.R. § 52.31 (JA). The Commission found that nothing in its rules exempts wireless carriers from porting numbers in cases where the requesting carrier does not have numbering resources and/or a direct interconnection in the rate center associated with the number to be ported. *Order* ¶ 21 (JA). While permitting carriers "the flexibility to negotiate porting agreements that meet their particular needs," the Commission clarified that "no carrier may unilaterally refuse to port with another carrier because that carrier will not enter into an interconnection agreement." *Id.*, 18 FCC Rcd at 20977-78, 20979 ¶¶ 21, 24 (JA - ,). In the absence of an agreement, the Commission stated that "carriers must port numbers upon request, with no conditions." *Id.*, ¶ 24 (JA).

The Commission found that limiting wireless-to-wireless porting on the basis of wireline rate centers would undermine the competitive benefits that flow from the availability of number portability. The Commission explained that it had "established number portability requirements for wireless carriers to spur increased competition, thereby creating incentives for wireless carriers to offer lower prices and higher quality service." *Order* ¶ 22 (JA). The Commission pointed out that the practical effect of limiting wireless-to-wireless porting on the basis of wireline rate centers would be to limit the ability of some users to port their telephone numbers from one wireless service provider to another. The Commission found no justification for thus constraining the competitive alternatives available to wireless customers. Because wireless service is spectrum-based, the Commission pointed out that wireless carriers do not use or depend upon wireline rate center boundaries to provide service. *Id.*

The Commission also declined to limit wireless number portability on the basis of concerns that the transport of calls to ported numbers may involve additional transport costs for certain carriers in certain circumstances. *Order* ¶ 23 (JA). The Commission pointed out that the requirements of the wireless number portability rules do not vary depending upon how calls to the number will be rated and routed after the port occurs. The Commission also noted that it was addressing the rating and routing concerns raised by the commenters in other proceedings that are pending before the Commission. *Id.*

On November 14, 2003, the petitioners filed with the Court an emergency motion for partial stay of the *Order*, which was denied November 21, 2003. *See Central Texas Tel. Coop. v. FCC*, Order, No. 03-1405 (Nov. 21, 2003) ("Petitioners have not demonstrated the irreparable injury requisite for the issuance of a stay pending review.").

IV. Related Proceedings

On November 10, 2003, the Commission issued an order in response to CTIA's January 2003 petition, providing guidance on number portability issues relating to intermodal porting. *Telephone Number* Portability, Mem. Op. and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697 (2003) (*"Intermodal Order").* As noted above, the *Intermodal*

Order is the subject of the petition for review that was filed with the Court in *USTA v. FCC*, No. 03-1414 (D.C. Cir.). The RTCs belatedly filed with the Court their own petition for review of the *Intermodal Order*, which was dismissed.[32] On December 4, 2004, the Court denied a motion to stay that order, as well.[33]

V. Subsequent Developments

In the wake of the Court's decision in *CTIA*, as well as its denial of the stay motion in this case, wireless-to-wireless portability took effect on a phased-in basis in November 2003 and May 2004. As of May 2004, the Commission's staff reported that approximately two million consumers have availed themselves of the opportunity to port their number when switching wireless carriers.[34]

SUMMARY OF ARGUMENT

The petitioners in this case are rural telephone companies ("RTC"). The RTCs contend that the *Order* indirectly affects them adversely because they may be required to route calls to ported wireless telephone numbers beyond their wireline rate centers and, in doing so, may be unable to obtain reimbursement from the wireless carrier receiving the ported number for the cost of delivering those calls. Because the *Order* applies solely to the porting of numbers between wireless carriers when customers change wireless service providers, the petitioners, as

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[32] *See Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (Feb. 3, 2004) (ordering petitioners to show cause why petition for review should not be dismissed for lack of jurisdiction); *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (April 22, 2004) (denying motion to dismiss without prejudice "[b]ecause this court may not extend the time to file a petition for review"); *Central Texas Tel. Coop. v. FCC*, No. 04-1038 (June 3, 2004) (granting voluntary motion to dismiss).

[33] *See United States Telecom Ass'n v. FCC*, Order, No. 03-1414 (Dec. 4, 2003).

[34] *FCC Reports on Status of Local Number Portability*, Public Notice (rel. May 13, 2004) (JA).

rural LECs, do not have standing to maintain their challenge. In addition, because the obligation they describe is a product of the Commission's long-standing interconnection rules, and not of the *Order*, the RTCs' alleged injury would not be redressed by a decision of the Court in their favor. And because the RTCs have not substantiated their claim that they will incur costs beyond those that they normally incur in delivering other locally-rated traffic, they have not demonstrated that their alleged injury is concrete as opposed to hypothetical and, in any event, that it is a consequence of the order on review.

The original wireless portability requirement was broadly applicable and, by its terms, not subject to exception or qualification. Despite their claims to the contrary, it is this underlying obligation to which the RTCs object and not to the Commission's order clarifying the requirement. However, the time for direct review of the underlying rule expired years ago. Moreover, inasmuch as the RTCs contest their obligation under the Commission's interconnection rules to deliver calls to points outside of their rate centers (whether to ported or non-ported numbers), the time for direct review of those rules likewise has passed. Thus, the Court should dismiss the petition for review because the petitioners have failed to establish their standing to challenge the order and because the petition for review is time-barred.

If the Court reaches the merits, it should deny the petition. The RTCs claim that the Commission unlawfully established or created a new a rule without notice and comment, but the record shows that the Commission simply *clarified* a longstanding rule, an action as to which the APA does not require notice and comment. Although the RTCs claim that the *Order* expanded substantive wireless portability obligations for CMRS carriers and imposed newly created burdens on the RTCs, Pet. Br. at 16, this claim is wrong. The *Order* is consistent with, and merely clarified the pre-existing duty to provide wireless number portability. As such, no additional procedure was required.

Nor have the petitioners established that the 1996 rule as clarified is not reasonable. The Commission determined that limiting wireless-to-wireless porting on the bases proposed by the rural carriers would significantly impact wireless customers' ability to port their telephone numbers to other CMRS providers and would undermine the competitive benefits that flow from the availability of number portability. *Order* ¶ 22 (JA).

The RTCs' claim that the *Order* "prohibits" LECs from requiring the porting-in carrier to "negotiate the terms of interconnection" is without merit. Pet. Br. at 43. The Commission held only that the absence of an interconnection agreement between two CMRS carriers does not provide a legitimate basis for a CMRS carrier to refuse to port to another CMRS carrier. This holding was consistent with the Act and reasonable. *Order* ¶ 21 (JA).

Finally, the Commission properly declined to limit wireless number portability on the basis of concerns that the delivery of calls to ported numbers may involve additional transport costs for certain carriers in certain circumstances. *Order* ¶ 23 (JA). The Commission deferred consideration of the rating and routing concerns raised by commenters so as to permit them to be addressed upon an appropriate administrative record in the broader context of the Commission's pending intercarrier compensation rulemaking proceeding. *Id.* The RTCs' construction of the scope of the wireless porting requirement is incompatible with the wireless porting rule, as established in 1996, and, if credited, potentially would deny some consumers the ability to change wireless service providers in rural areas. The Commission properly rejected such a narrow interpretation of its rule.

STANDARD OF REVIEW

To prevail on review, the RTCs must show that the *Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action. *E.g., Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000). The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

The Court's review of an agency's interpretation of its own regulations is "particularly deferential." *Davis v. Latschar*, 202 F.3d at 365.[35] The Court must "give 'controlling weight' to the Commission's interpretation of its own regulations 'unless it is plainly erroneous or inconsistent with the regulation.'"[36] Deference to the expert agency's interpretation "is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted.). Finally, an agency's determination that "its order is interpretive" and thus not subject to APA requirements for the adoption of a new legislative rule "'in itself is entitled to a significant degree of credence.'" *See, e.g., Viacom Int'l v. FCC*, 672 F.2d 1034, 1042 (2nd Cir. 1982) (quoting *British Caledonian Airways v. CAB*, 584 F.2d 982, 992 (D.C. Cir. 1978)).

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[35] *See also Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996), *quoting National Medical Enterprises v. Shalala*, 43 F.3d 691, 697 (D.C. Cir. 1995).

[36] *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 160 (D.C. Cir.), *cert. denied*, 124 S.Ct. 463 (2003), *quoting High Plains Wireless L.P. v. FCC*, 276 F.3d 599, 607 (2002); *see also Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1069 (D.C. Cir. 2004).

ARGUMENT

I. THE COURT SHOULD DISMISS THE PETITION FOR REVIEW BECAUSE THE PETITIONERS LACK STANDING AND BECAUSE THEIR CLAIMS ARE NOT PROPERLY BEFORE THE COURT.

A. The Petitioners Lack Standing Because They Have Failed to Establish Injury.

The Court must consider as a threshold matter whether the petitioners have standing. In order to establish standing, a petitioner must demonstrate that it has suffered a concrete injury that was caused by the action complained of and would be redressed by a decision in its favor. The injury must be actual or imminent and may not be speculative.[37] The petitioners have failed to make that showing, and the Court should therefore dismiss the petition.

As an initial matter, because the *Order* on review applies solely to the porting of numbers between wireless carriers when customers change wireless service providers, *see Order* ¶ 2 (JA), it is unclear how the petitioners, as rural LECs, have standing to maintain their challenge. Although petitioners Kaplan Telephone Cooperative, Inc. and Leaco Rural Telephone Cooperative, Inc. note in passing that they provide both wireline and wireless services (Pet. Br. at 2), they make no substantive argument independently of the remaining two LEC petitioners.[38] Thus, all of the petitioners contend that the *Order* indirectly affects them adversely because they may be required (in their capacity as LECs) to transport calls to ported wireless telephone numbers beyond their wireline rate centers and, in doing so, may be unable to obtain

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37 *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc). The standing requirement also is reflected in statutory provisions limiting review of agency action to "aggrieved" persons. *See, e.g.*, 28 U.S.C. § 2344; 5 U.S.C. § 702; 47 U.S.C. § 402(a).

38 Although the wireless industry at one time vigorously resisted implementation of wireless number portability, *see CTIA*, *supra*, that no longer is the case. The only petitioners in this litigation challenge the *Order* in their capacity as wireline LECs.

reimbursement from the wireless carrier receiving the ported number for the cost of transporting those calls. This can happen when the receiving wireless carrier has no local presence in the wireline carrier's rate center. Pet. Br. at 1-2. But the obligation they describe is a product of the Commission's long-standing interconnection rules (*i.e.*, the obligation to deliver traffic for termination), and not of the order on review. Moreover, these obligations are identical to those imposed on wireless and wireline carriers with respect to the exchange of calls to both ported and non-ported numbers.[39] Thus, it is unclear how the RTCs' alleged injury was caused by the *Order* or would be redressed by a decision of the Court in their favor.

This Court examined the redressability of a petitioner's alleged injury in *Fulani v. Brady*, 935 F.2d 1324, 1331 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992). In that case, the Court determined that the petitioner's claimed injury resulted not from the agency actions challenged by the petitioner, but instead was "due to other intervening causal factors." Because the redressability of petitioner's injury "depends on those factors as well," the Court held that the alleged injury did not bear "sufficient traceability to the agency's actions" and that the requested relief would not redress the alleged injury sufficiently to warrant standing. *Id.* In this case, because the redressability of the alleged injury depends on Commission regulations that are unrelated to the subject matter of the order on review, the RTCs have not established that the requested relief would redress the alleged injury. Therefore, they lack standing to challenge the *Order*.

[39] Thus, under the Commission's pre-existing rules, a rural LEC would be required to deliver calls that originate on its network to a non-ported number of a CMRS carrier's customer where the CMRS carrier has telephone numbers assigned to the rural LEC's rate center but no local presence in the rate center or direct interconnection with the rural LEC.

Finally, the RTCs describe hypothetical situations, including wireless-to-wireless ports from Washington, D.C. to San Francisco (Pet. Br. at 21 n.53), and from Boston to Oregon (Pet. Br. at 36-37), to support their claim that the *Order* could subject a LEC (although presumably not a rural LEC given the urban locations identified in the hypotheticals) to virtually unlimited transport costs. Given that the RTCs would be required, at most, to transport calls to consumers within the MTA boundary of the requesting CMRS provider, it is not surprising that they do not claim to have been asked to transport such a call.[40] In addition, the RTCs claim that they are "adversely affected" due to the "significant cost" of transporting calls to ported numbers outside of their rate centers. Pet. Br. at 2. They do not allege, however, that wireless-to-wireless porting of the type of which they complain has in fact occurred within their service areas or that, even if it has, that they will incur costs beyond those that they normally incur in transporting other locally-rated traffic. Because the claimed injury is entirely hypothetical rather than concrete and, in any event, is not a consequence of the order on review, the petitioners have failed to establish their standing to challenge the *Order* and the Court should dismiss the petition for review.

On this basis, the Court similarly could find that the petition is not ripe for review. *See, e.g., Qwest v. FCC*, 240 F.3d 886 (10th Cir. 2001) (dismissing on ripeness grounds petition for review). In the *Qwest* case, Qwest had challenged Commission orders governing cost recovery of interim wireline number portability but had not demonstrated to the court that it had actually

[40] Regarding traffic that is exchanged between a LEC and a CMRS provider, the Commission's reciprocal compensation requirements apply only with respect to such traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area." *See* 47 C.F.R. § 51.701(b)(2). Thus, the boundaries of the CMRS provider's MTA should represent the furthest point to which a carrier's transport obligations would extend. And, as a matter of common sense, it is nonsensical to suggest that a CMRS carrier would serve a Washington, D.C. rate center using a switch in San Francisco given that the CMRS carrier must be able to serve the original rate center from which the ported number originated.

ported any numbers. The court found no hardship to Qwest in delaying judicial review and noted that the court would benefit from further factual development in a concrete setting. The court held that, if a state in the future imposed a cost recovery scheme under the Commission's rules that Qwest thought was unlawful, it could seek a Commission declaratory ruling, and then seek judicial review of any adverse Commission decision. *Id.*, 240 F.3d at 893-95.[41]

B. The Petition For Review Is Untimely.

A petition for judicial review to challenge a final order of the Commission must be filed within 60 days after its entry. *See* 28 U.S.C. § 2344.[42] As discussed more fully below, the order on review clarified CMRS carriers' duty, as established in the *First Portability Order* in 1996, to implement wireless-to-wireless number portability. The original wireless portability requirement was broadly applicable and, by its terms, not subject to exception or qualification. Despite their claims to the contrary, it is this underlying requirement to which the RTCs object and not to the Commission's *Order* clarifying the requirement. Pet. Br. at 3 ("This controversy is a challenge not to number portability itself, but rather the manner in which the FCC has sought to implement it."). The time for direct review of the underlying rule expired years ago, however. Moreover, to the extent that the RTCs contest their obligations under the Commission's interconnection and intercarrier compensation rules to deliver locally-rated calls outside of their rate centers (whether

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41 In section V., *infra*, we demonstrate that the RTCs' claims regarding particular rating and routing issues likewise are not ripe for review given that the Commission determined to defer consideration of those issues and to address them in a broader context in its pending intercarrier compensation rulemaking proceeding.

42 *See also CTIA*, 330 F.3d at 508-09 (dismissing petition challenging Commission's authority to require wireless number portability because rules in question were promulgated in July 1996 and petition for review was not filed until August 2002); *PanAmSat v. FCC*, ___ F.3d __, 2004 WL 1243132 (June 8, 2004) (dismissing untimely petition for review).

to ported or non-ported numbers), the time for direct review of those rules likewise has expired. Because the petition for review is untimely, the Court should dismiss it. 28 U.S.C. § 2344 (petition for review must be filed within 60 days). *See generally ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 285-86 (1987).

There are limited exceptions that permit parties to file late challenges to rules: "1) following enforcement of the disputed regulation; and (2) following an agency's rejection of a petition to amend or rescind the disputed regulation." *CTIA*, 330 F.3d at 508. However, neither of these exceptions is applicable here. Nor can Petitioners argue that they did not have reasonable notice of the rule's content. *See Edison Electric Institute v. ICC*, 969 F.2d 1221, 1229 (D.C. Cir. 1992) (noting that courts have allowed a late appeal of an agency rule when the agency's promulgating action did not reasonably put aggrieved parties on notice of the rule's content). As noted above, the petitioners challenge the lack of an exception to a porting obligation that facially contains none.

C. The Petitioners' Claims With Respect To The *Intermodal Order* Are Not Properly Before The Court.

The RTCs repeatedly claim that the Commission erred in holding that a ported number must keep its original rate center designation following the port of that number. But the source of that holding is not the order on review in this case but is, instead, the subsequent *Intermodal Order*. *See, e.g.*, Pet. Br. at 30, 39. As such, this claim of error is not properly before the Court in this case. To the extent that the RTCs seek to challenge this or other aspects of the Commission's *Intermodal Order*,[43] they may attempt to do so only in their limited role as

[43] For example, the RTCs claim that the *Order*, "in conjunction with the companion *Intermodal Order*," unlawfully expanded the porting obligations of CMRS carriers. Pet. Br. at 4. They further claim that the two orders impose "identical call routing obligations" and, as such, neither order "can be considered in isolation." *Id.*

intervenors in the separate litigation challenging that order.[44] They may not, however, obtain review here of their arguments against that order.[45]

II. BECAUSE THE *ORDER* IS FULLY CONSISTENT WITH THE *FIRST PORTABILITY ORDER*, NO ADDITIONAL PROCEDURE WAS REQUIRED.

A. Overview

The RTCs construe the original number portability rule to impose rather narrow, qualified obligations in the context of wireless-to-wireless portability. From this starting point, they argue that the *Order* expanded substantive portability obligations for wireless carriers and imposed newly created burdens on them. This premise permeates their brief and infuses most of their arguments. But that premise is wrong, and consequently their various arguments are wrong. The *Order* is consistent with, and merely clarified, the pre-existing duty to provide wireless number portability.

B. The *Order* Is Consistent With Commission Precedent.

In the *First Portability Order*, issued in 1996, the Commission established the requirement that numbers be portable among CMRS carriers. 11 FCC Rcd at 8433 ¶ 155; *see*

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[44] The petitioners failed to file a timely petition for review of the *Intermodial Order*. See *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (Feb. 3, 2004) (ordering petitioners to show cause why petition for review should not be dismissed for lack of jurisdiction); *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (April 22, 2004) (denying motion to dismiss without prejudice "[b]ecause this court may not extend the time to file a petition for review"); *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (June 3, 2004) (granting voluntary motion to dismiss).

[45] Notwithstanding their failure to properly invoke this Court's jurisdiction to review the *Intermodal Order*, petitioners refer to that order no fewer than two dozen times in their brief. *See, e.g.*, Pet. Br. at 4, 12, 13, 14, 15, 19, 21 n.53, 22, 24, 26, 30, 36, 37, 39 n.100, 40. This fact provides evidence that petitioners' real grievance lies not with the *Order* on review but instead with statements in the *Intermodal Order* clarifying the intermodal portability obligation established in 1996.

also 47 C.F.R. § 52.11 (1996) (providing that "all cellular, broadband PCS, and covered SMR providers must provide a long-term database method for number portability") (currently codified at 47 C.F.R. § 52.31). The Commission expressed no limitations on that rule. In the order on review, the Commission declared that, under the terms of the previously established rule, CMRS carriers must port numbers to other CMRS carriers whether or not the requesting carrier has telephone numbers assigned to it that are associated with the rate center of the ported number, and whether or not the two carriers have a direct interconnection. The RTCs' fundamental claim is that the *Order* amounts to a new substantive rule that represents an unexplained departure from Commission precedent. This contention is wrong because the *Order* amounts only to a clarification of the underlying requirement of wireless-to-wireless portability, which has been codified in the Commission's rules since 1996.

In particular, the RTCs contend that the *Order* "effected a substantive change in law by (1) requiring location portability and by (2) shifting and expanding the transport and interconnection obligations of rural carriers" without issuing a new notice of proposed rulemaking. Pet. Br. at 16. We address each of those arguments below.

(1) The Commission Did Not Require Location Portability.

The RTCs argue that the *Order* newly requires location portability without providing an explanation for this alleged departure from precedent insofar as the Commission explicitly declined to require location portability in the *First Portability Order*. Pet. Br. at 19-22. The Commission did not require location portability in its *Order*, and the RTCs appear to confuse location portability with the mobility that is the very nature of wireless communications services.

"Service provider portability" is defined as the ability of end users to retain their existing telephone numbers "at the same location ...when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30); 47 C.F.R. §§ 52.21(l), (q). That is all that the Commission required of CMRS carriers in its *Order* clarifying the 1996 rule.[46]

"Location portability," by contrast, is defined as the ability of end users to retain their existing telephone numbers "when moving from one physical location to another." 47 C.F.R. § 52.21(j). In other words, with location portability, the port occurs at the time the customer moves from one geographic location to another.[47] Location portability does not require a port from one carrier to another. At issue here is the port of a number from one carrier to another when the customer remains "at the same location" where he received service from his former carrier. This is service provider portability, not location portability.

In support of their peculiar construction of location portability, the RTCs assert that "the relevant location is not the physical location of the customer but the location of the serving switch or the POI." Pet. Br. at 20. In essence, they argue that location portability occurs when the customer's new carrier has a switch that is in a different location from the porting carrier's switch. Pet. Br. at 21-22. But this contention is incompatible with the plain language of both the statutory and rule definitions of number portability, which make clear that the "same location" requirement applies to the location of the customer, not of a switch or a POI. If a customer's

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[46] Indeed, in the *First Portability Order*, the Commission determined that wireless-to-wireless portability constituted service provider portability, *not* location portability. 11 FCC Rcd at 8447 ¶ 181.

[47] The Commission has described "location portability" as the ability of "customers to port their numbers when moving from one geographic location to another." *Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd at 3097.

desired new carrier provides service "at the same location" in which the customer currently receives service, then porting would be permitted under these circumstances.

It is clear from the *First Portability Order* that location portability refers to disassociating a telephone number from the rate center at which it originated, which would occur if a wireline subscriber moved his residence and wished to take his wireline number with him. *See, e.g.*, *First Portability Order*, 11 FCC Rcd at 8443 ¶ 174 (explaining that, under a regime that requires service provider portability, but not location portability, "subscribers must change their telephone numbers when they move outside the area served by their current central office"). A wireless telephone number, by contrast, remains assigned to the same rate center from which it originated (and the wireless carrier must provide service within that rate center) notwithstanding the mobility of the wireless service customer. *See Intermodal Order* ¶ 28. Under the established definitions, if the number does not leave the rate center, it has not been subject to location porting. It makes no difference that the end user is mobile and is capable of moving about and taking the wireless handset with him – that is the very nature of wireless phones.[48]

In the *Order*, the Commission refused to construe the number portability requirement in the manner suggested here by the RTCs. Rather, the Commission clarified that a CMRS carrier may not refuse to port to another CMRS carrier on the basis of the location of the requesting carrier's switch. *Order* ¶ 2 (JA). This clarification was both sensible and consistent with Commission precedent in this area. As a practical matter, it would make no sense to condition wireless number portability on the basis of the physical location of the serving switch. That is

[48] As noted above, the Commission consistently has found switching among wireless service providers to involve only service provider portability, notwithstanding the mobile nature of wireless service. *First Portability Order*, 11 FCC Rcd at 8443 ¶ 172.

because switch location has limited relevance to the geographic area in which wireless services are provided since CMRS carriers are capable of serving large geographic areas with a single switch. Moreover, it is common sense that a customer would not seek to switch his number to a CMRS carrier that is not providing service at the location where the customer currently receives service from another provider. By refusing to confine the wireless number portability requirement according to the particular location of the requesting carrier's switch, the Commission acted consistently with Commission precedent, which similarly imposed no geographic restriction on wireless porting. Both then and now, the Commission has recognized that imposing such conditions would deprive consumers of the ability to port their numbers and thereby jeopardize the pro-competitive purposes of the number portability requirement.

(2) The *Order* Did Not Expand Porting Obligations for Wireless Carriers or Alter Long-Standing Interconnection and Intercarrier Compensation Rules.

In response to CTIA's May 2003 Petition, the Commission confirmed CMRS carriers' obligation to port telephone numbers upon request by another CMRS carrier "with no conditions." *Order* ¶ 2 (JA). This obligation was clearly within the scope of the pre-existing wireless portability requirement, which similarly imposed no limitations on wireless porting.[49]

Nevertheless, the RTCs mischaracterize the *Order* as adopting fundamental changes to the wireless porting rules. As we demonstrate below, these arguments are contrary to the Act and the Commission's rules, and provide no legitimate basis on which to challenge the *Order*.

As an initial matter, the RTCs contend that the *Order* newly requires CMRS providers to port numbers to other CMRS providers "without geographic limitation on the location of the

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[49] *First Portability Order*, 11 FCC Rcd at 8355 ¶ 3; 47 C.F.R. § 52.31.

porting-in carrier's Mobile Switching Center ("MSC") or Point of Interconnection ("POI")." Pet. Br. at 3. In doing so, according to the RTCs, the *Order* expanded the porting obligations of CMRS providers "beyond the limitations previously adopted" in the *First Portability Order*. Pet. Br. at 28. The RTCs reason by implication that, because the Commission limited wireline-to-wireline portability previously to the boundaries of wireline rate centers, "it would only be logical to conclude" that the wireless porting requirement would be so limited. Pet. Br. at 26.

The petitioners' suggestion that the *Order* must have amended the earlier rule because it is different from the rule governing wireline porting ignores the fact that wireless porting and wireline porting present entirely different technical considerations. In 1997, the Commission had adopted some NANC recommendations limiting wireline porting in light of technical constraints that are specific to the architecture of wireline networks.[50] In the *Order*, the Commission saw "no reason to impose such limitations" on wireless porting because "wireless carriers do not utilize or depend on the wireline rate center structure to provide service." *Order* ¶ 22 (JA).

In any event, as a practical matter the RTCs' claim that there is "no geographic limitation" on wireless porting is wrong. Pet. Br. at 3, 25. Regarding traffic that is exchanged between a LEC and a CMRS provider, the Commission's reciprocal compensation requirements apply only with respect to such traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area." *See* 47 C.F.R. § 51.701(b)(2). Thus, the boundaries of the CMRS provider's MTA should represent the furthest point to which a carrier's transport obligations would extend. And, as a practical matter, it makes no sense to suggest that a CMRS carrier would serve a Washington, D.C. rate center using a switch in San Francisco

[50] *Telephone Number Portability*, 12 FCC Rcd 12281, 12313-28 (1997).

given that the CMRS carrier must be able to serve the original rate center from which the ported number originated.

The RTCs next claim that, under the *Order*, CMRS carriers are "*no longer required* to have a presence within Petitioners' telephone service areas or interconnection arrangements pursuant to which such calls may be properly routed." Pet. Br. at 1-2 (emphasis added). Contrary to this statement, CMRS carriers have never been required to have a "presence" (or POI) within every wireline local service area. Under the Act and the Commission's orders, CMRS carriers have a right to interconnect *indirectly* with other carriers, *see* 47 U.S.C. § 251(a)(1); *First Portability Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121.

Nor is there any basis to the RTCs' claim that CMRS carriers in the past have been required to enter into interconnection agreements solely for the purpose of porting numbers. Section 252 of the Act sets forth the process by which a competing provider may request and obtain interconnection from an incumbent LEC according to agreements fashioned through negotiations between the two carriers. 47 U.S.C. § 252. Such agreements are voluntary and the proposition that the Commission previously has required carriers in such circumstances to enter into interconnection agreements is simply wrong. In fact, most carriers that interconnect indirectly today do so without an interconnection agreement (often because the traffic flows between two carriers are not large enough to justify the cost of negotiating and implementing a contract).

The RTCs also argue that, due to the "significant cost" of transporting its customers' calls to ported numbers and the "inability to require compensation from the wireless carriers who benefit from such transport" the RTCs are "adversely affected" by the *Order*. Pet. Br. at 2; *see also* Pet. Br. at 28 (the Order "dramatically increased the cost and burden on RTCs to deliver traffic"). Contrary to these assertions, nothing in the *Order* altered rural LECs' pre-existing obligations to deliver calls to wireless customers, or changed pre-existing intercarrier compensation requirements.[51]

Finally, the RTCs claim that the *Order* has "eliminated the Petitioners' (and state commissions') ability to determine Petitioners' own local calling areas and to establish the rates that they charge end users." Pet. Br. at 24; see also *id.*, at 39. Neither statement is accurate. State utility commissions remain responsible for determining LECs' local calling areas and the rates charged for local wireline service. In this regard, the *Order* states only that the wireless portability requirements "do not vary depending on how calls to the number will be rated and routed after the port occurs." *Order* ¶ 23 (JA). This ruling, which is critical if consumers are to realize the benefits of number portability, does not impinge upon local rate-making authority in any way.[52]

C. Because The *Order* Only Clarified A Pre-Existing Obligation, No Additional Procedure Was Required.

(1) The Administrative Procedure Act ("APA").

The APA requires an agency to publish in the Federal Register a "[g]eneral notice of proposed rulemaking" when the agency is proposing to make new legislative-type rules. 5 U.S.C. § 553(b). But the Act exempts "interpretive rules" from the scope of the notice requirement. 5 U.S.C. § 553(b)(3)(A). Thus, an agency can "declare its understanding of what a [regulation] requires" without providing notice and comment. *Fertilizer Institute v. EPA*, 935

[51] *See, e.g.*, 47 C.F.R. § 51.703(b) (a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network).

[52] Despite the RTCs' allegation that the *Order* tramples on state authority, no state commission challenges the *Order* on this (or any other) basis. Indeed, the National Association of Regulatory Utility Commissioners ("NARUC") has intervened in support of the Commission.

F.2d 1303, 1308 (D.C. Cir. 1991); *see also* 5 U.S.C. § 554(e) (agency may issue declaratory ruling to remove uncertainty); 47 C.F.R. § 1.2 (Commission may issue declaratory rulings). A rule is interpretive, and thus not subject to the notice requirement, if it "confirm[s] a regulatory requirement, or maintain[s] a consistent agency policy." *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992). The legislative versus interpretive status of an agency's rule turns on "the prior existence or non-existence of legal duties and rights." *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993).

Consistent with their premise that the *Order* adopted a substantively new rule, the RTCs claim that it was, therefore, procedurally improper insofar as it was adopted without following the notice and comment requirements governing informal rulemaking under the APA and in alleged violation of the Regulatory Flexibility Act ("RFA"). Pet. Br. at 16-28, 45-48. These arguments are without merit.

As previously noted, the Commission's number portability rules in 1996 imposed a wireless-to-wireless porting obligation on all CMRS providers without limitation. The Commission did not specify any circumstances under which a CMRS carrier would *not* have to comply with the wireless portability requirement. Although the Commission referred several matters to the NANC pertaining to wireless and intermodal portability, the NANC was unable to reach a consensus. *See Intermodal Order* ¶ 11. Nevertheless, as the implementation deadline approached, certain rural CMRS carriers contended that they had no duty to port numbers to another CMRS carrier unless the carrier requesting the port has a local point of presence and numbering resources within the rate center as well as a direct interconnection with the porting out CMRS carrier within that rate center. *Ex Parte* Presentation of the Rural Wireless Working

Group Regarding Rural Wireless Number Portability Guidelines, Section 1.3 (filed Aug. 25, 2003) (JA). In response, CTIA urged the Commission to clarify these issues in the context of the wireless-to-wireless portability requirement. *Ex Parte* Letter from Diane Cornell, CTIA, to Marlene H. Dortch, Secretary, FCC (filed Aug. 26, 2003) (JA). In essence, these rural wireless carriers read the Commission's (unqualified) rule narrowly, and unilaterally limited the scope of portability that they would provide to requesting CMRS carriers. It was this unilateral action by rural wireless carriers – and the resulting controversy it ignited among industry participants – that made clarification of the pre-existing rule necessary and appropriate.

In the *Order*, the Commission addressed the issues raised in CTIA's petition and in the *ex parte* letters from CTIA and the Rural Wireless Working Group. In rejecting the limitations on wireless porting proposed by the rural wireless carriers, the Commission pointed out that its rules require all CMRS carriers, by the implementation deadline, to provide wireless number portability. *Order* ¶ 21 (JA). The Commission found that nothing in its rules exempts CMRS carriers from porting numbers in cases where the requesting carrier does not have numbering resources and/or a direct interconnection in the rate center associated with the number to be ported. *Id.* Given the unqualified nature of the 1996 rule and the policy of increasing competition underlying the portability requirement, the *Order*'s ruling that CMRS carriers must port numbers among themselves without qualification only clarified and did not amend the original rule.

The RTCs' reliance on *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), is misplaced. Pet. Br. at 18, 27. In that case, the Court ruled that the Commission had fundamentally changed a rule without notice, pursuant to a petition for clarification that requested action different from the action the agency subsequently took. Here, CTIA's petition and letter sought exactly the clarification the Commission then rendered – a situation that the Court did not have occasion to rule upon in *Sprint*. Because the *Order* does not "work substantive changes in prior regulations," does not "repudiate" the existing rule, and is not "irreconcilable" with the existing rule, it did not amount to a new rule. *Id.*, 315 F.3d at 374. Instead, the *Order* resolved an industry controversy by confirming the breadth of the pre-existing duty that the Commission imposed on CMRS carriers years ago; it "illustrate[s] [the Commission's] original intent," which is precisely what the Court has held a clarification order may do. *Sprint*, 315 F.3d at 374; *see Intermodal Order* ¶ 26.[53]

Although additional notice and comment rulemaking procedures were not required in connection with the Commission's *Order*, the Commission nonetheless issued public notices (both of which were published in the Federal Register) seeking comment on the January and May 2003 petitions for declaratory ruling filed by CTIA. In response, the Commission compiled a record consisting of more than 100 comments, reply comments, and *ex parte* letters. Notably, the comments included those of rural LEC organizations whose arguments were nearly identical to those pressed here by the RTCs.[54] Thus, unlike in *Sprint*, the very matters at issue here were themselves subject to multiple rounds of comment and no party was deprived of any opportunity to make its views known to the agency on the precise regulatory issue at hand.

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[53] By contrast, had the Commission wished to adopt the conditions and limitations offered here by the RTCs, under the APA, it likely would have been required to commence a new rulemaking.

[54] For example, comments and/or reply comments were filed by GVNW Consulting; Independent Alliance; Missouri Independent Telephone Group; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Rural Cellular Association; Rural Iowa Independent Telephone Association; Rural Telecommunications Group; South Dakota Telecommunications Association, and USTA.

(2) The Regulatory Flexibility Act.

In the *Order*, the Commission determined that it was not required to prepare a Regulatory Flexibility Analysis of the possible economic impact of the *Order* on small entities. *Order* ¶ 42 (JA). The RTCs counter that the Commission erred because the Regulatory Flexibility Act ("RFA") requires the agency to consider, according to the RTCs, the impact of its *Order* on the small businesses operated by the petitioners. Pet. Br. at 45-48. This argument is flawed because, as discussed above, the RTCs mistakenly assume that the *Order* imposes new portability and interconnection/intercarrier compensation obligations on CMRS carriers and rural LECs that did not exist previously. The RFA applies when the Commission engages in rulemaking. See 5 U.S.C. §§ 603, 604. Because (as demonstrated above) the agency did not engage in rulemaking, the RFA did not apply.

III. THE WIRELESS-TO-WIRELESS PORTING REQUIREMENT AS CLARIFIED IS REASONABLE.

In the *Order*, the Commission rejected proposed limitations on the wireless porting requirement, including those that would require wireless portability only to the extent that a requesting CMRS carrier has local numbering resources, and local interconnection with the porting out carrier in the rate center with which the ported number is associated. *Order* ¶ 21 (JA). The Commission pointed out that the wireless porting obligation in section 52.31 of its rules requires all wireless carriers, by the implementation deadline, to provide a long term database method for number portability in switches to permit number portability upon another carrier's request. *Id.*, *citing* 47 C.F.R. § 52.31. The Commission found that nothing in its rules exempts wireless carriers from porting numbers in cases where the requesting carrier does not have numbering resources and/or a direct interconnection in the rate center associated with the number to be ported. *Order* ¶ 21 (JA).

The Commission also found that limiting wireless-to-wireless porting on the basis of wireline rate centers would undermine the competitive benefits that flow from the availability of number portability. The Commission explained that the practical effect of limiting wireless porting on the basis of wireline rate centers would be to limit the ability of end users to port their telephone numbers from one wireless service provider to another. The Commission found no justification for thus constraining the competitive alternatives available to wireless customers. *Id.*

These clarifications were reasonable, consistent with Commission precedent, and faithful to the underlying pro-competitive purposes of the number portability statute that this Court has recognized. *See CTIA,* 330 F.3d 502.[55] The Commission properly found that limiting wireless-to-wireless porting on the bases proposed by the rural LECs would confine drastically the competitive benefits to consumers of wireless number portability. *See Order*, ¶ 22 (JA). Because CMRS providers have a direct interconnection or facilities only in approximately ten percent of wireline carriers' rate centers, the practical effect of limiting wireless portability solely to those rate centers in which CMRS carriers have a local presence would prevent wireless consumers living in approximately ninety percent of the wireline industry's rate centers from being able to change their wireless service providers.[56] Thus, if the Court were to grant the requested relief, it would frustrate the expectations of many wireless service customers who want to keep their numbers when they change to another wireless carrier.

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[55] Notably, the RTCs do not cite *CTIA* in their brief.

[56] CTIA January 2003 petition, at 18 (JA).

In addition, grant of the petition would generate massive customer confusion, since consumers who have not yet ported, would have no reliable method of knowing whether their wireless number could be ported. Wireless consumers who have ported their numbers would have no way of knowing whether and, if so, on what terms others in their local community of interest could call their number. And it would keep in place large parts of what this Court described as "a barrier to switching carriers." *CTIA*, 330 F.3d at 513.

IV. THE *ORDER* IS CONSISTENT WITH SECTIONS 251 AND 252 OF THE ACT.

While permitting carriers "the flexibility to negotiate porting agreements that meet their particular needs," the Commission clarified that "no carrier may unilaterally refuse to port with another carrier because that carrier will not enter into an interconnection agreement." *Order* ¶¶ 21, 24 (JA ,). In the absence of an agreement, the Commission stated that "carriers must port numbers upon request, with no conditions." *Id.* ¶ 24 (JA).

The RTCs assert that the "structure of the Act clearly requires that number portability be imposed and accomplished within the context of carrier interconnection agreements." Pet. Br. at 41. The RTCs further assert that the *Order* "prohibits" LECs from requiring the porting-in carrier to "negotiate the terms of interconnection." Pet. Br. at 43. These arguments are flawed on several levels. First, the *Order* applies only to wireless porting; LEC porting obligations are addressed in the *Intermodal Order*. Second, the *Order* does not "prohibit" any carrier (CMRS or LEC) from seeking commencement of interconnection negotiations, as the Commission made clear. *See Order* ¶ 21 (JA). The Commission ruled only that the absence of an interconnection agreement does not provide a legitimate basis for a CMRS carrier to refuse to port to another CMRS carrier.

Third, the procedures set forth in section 252 governing the negotiation and arbitration of interconnection agreements apply by their terms exclusively to incumbent LECs. 47 U.S.C. § 252. It is, therefore, unclear how section 252 is relevant here insofar as the order on review addressed the question of appropriate interconnection arrangements when two CMRS carriers port numbers.

Further, sections 251 and 252 of the Act are not the source of authority upon which the Commission has relied in requiring wireless number portability. Rather, CMRS carriers' porting obligations are imposed by the Commission under section 332 and other independent authority under the Act.

Finally, pointing to section 251(c)(2)(b) of the Act, which requires incumbent LECs to permit interconnection "within" their network, the RTCs claim that the *Order* "effectively negates" this provision by not requiring a CMRS carrier to have a POI that is "geographically proximate to the wireline carrier's network facilities." Pet. Br. at 44. This argument, however, ignores the fact that, under the Act, wireless carriers can choose to interconnect indirectly – that is, outside of their respective networks. *First Portability Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121 (citing 47 U.S.C. § 251(a)(1)).[57]

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[57] In the *First LNP Reconsideration Order*, 12 FCC Rcd at 7305 n.399, the Commission explained how a small rural LEC might interconnect indirectly with a competing carrier for purposes of providing number portability:

> For example, a smaller rural carrier and a competing carrier might interconnect indirectly by both establishing direct connections with a third carrier and routing calls to each other through that third carrier. The smaller rural carrier could then provide portability by performing its own database queries and then routing the call to the competing carrier through that third carrier.

V. THE PETITIONERS' CLAIMS CONCERNING RATING AND ROUTING ISSUES ARE NOT RIPE FOR REVIEW.

In the Order, the Commission also declined to limit wireless number portability on the basis of commenters' concerns that the transport of calls to ported numbers may result in additional transport costs. *Order* ¶ 23 (JA). The Commission pointed out that the requirements of the wireless portability rule "do not vary depending on how calls to the number will be rated and routed after the port occurs." *Id.* The Commission noted, however, that it was addressing the same rating and routing concerns raised by the commenters "in the context of non-ported numbers" in other proceedings that are pending before the Commission. *Id.* Thus, "without prejudging the outcome of any other proceeding," the Commission declined to address particular rating and routing concerns as they relate to wireless portability. *Id.*

While conceding that the Commission need not dispose of every issue and concern relating to wireless portability prior to its implementation (Pet. Br. at 31,33), the RTCs nevertheless contend that the *Order* is arbitrary and capricious because the Commission did not address all of the rating and routing issues raised by the RTCs. Pet. Br. at 29-38. The RTCs' conclusory assertion fails to satisfy their burden to demonstrate that the Commission abused its discretion when it deferred consideration of these issues. The Commission "has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings" when doing so would be "conducive to the efficient dispatch of business and the ends of justice."[58] In particular, the Commission deferred consideration of particular rating and routing issues so as to permit them to be addressed in response to the Sprint petition,

[58] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (internal citations and quotations omitted) ("Although the Commission failed to resolve [a] question pressed by the CLECs in this Order, the Commission need not address all problems in one fell swoop.").

upon an appropriate administrative record, in the broader context of the Commission's pending intercarrier compensation rulemaking.

In addition, because the RTCs' rating and routing concerns have yet to be addressed by the Commission, under the ripeness doctrine, judicial review of these claims should await final Commission action.[59]

Although the RTCs claim that they are unable to route calls to wireless customers with ported numbers, as noted above, they appear to disregard their duty under the 1996 Act "to interconnect their facilities directly or indirectly with the facilities of other carriers." 47 U.S.C. § 251(a)(1); *see also First Portability Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121. As the Commission determined in its *Intermodal Order*, if a rural LEC is capable of routing a call that its customer places to a wireless customer with a non-ported number, then the rural LEC also is capable of routing a call to a customer of the same wireless carrier who has a ported number. *Intermodal Order*, ¶ 28 (the routing of calls to ported numbers "should be no different than if the wireless carrier had assigned the customer a number rated to that rate center"). In its recent order denying a petition for administrative stay of the *Intermodal Order*, the Commission indicated that "more explanation" from the rural LECs was needed to assess their claims that the rating and routing of ported wireless numbers raises different issues than the rating and routing of non-

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[59] *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998). The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *See, e.g., Nat'l Park Hospitality Ass'n v. Dept. of the Interior*, 123 S. Ct. 2026, 2030 (2003), (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1963)).

ported wireless numbers. *See Telephone Number Portability*, Order, FCC 03-298, 2003 WL 22739558 ¶ 9 (2003). In that order, the commission stated that:

> [P]etitioners assert that there is no established method for routing and billing calls ported outside of the local exchange. We note that today, in the [case of non-ported numbers], calls are routed outside of local exchanges and routed and billed correctly. We thus find that, without more explanation, the scope of the alleged problem and its potential effect on consumers is unclear.

Id. Accordingly, the RTCs' arguments concerning the rating and routing of calls to ported numbers should not be considered ripe until their factual components have been ascertained by some concrete action that adversely affects the petitioners.[60]

[60] To the extent that the RTCs complain of an injury that is unrelated to the wireless number portability obligation clarified in the *Order* – as appears to be the case, since petitiners assert that they are aggrieved by an obligation to pay the additional transport costs associated with the delivery of calls outside of the local exchange, regardless of whether the call is to a number that has or has not been ported – the TRCs' complaint should be dismissed because it is not redressable in this case. See authorities cited *supra* in section I.A of the Argument. In any event, given the uncertainty attendant to petitioners' claims on the record before the Court in this case and the pending proceedings at the agency that should enable the development of an adequate record for review, this Court should dismiss petitioners' rating and routing claims as not ripe. *See, e.g., Lujan v. National Wildlife Fed.*, 497 U.S. at 891.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed. If not dismissed, it should be denied.

Respectfully submitted,

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June 24, 2004

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

CENTRAL TEXAS Telephone Cooperative, Inc., et al., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	))))))))))))	No. 03-1405

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 13138 words.

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June 24, 2004

STATUTES AND REGULATIONS

Contents:

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Wire or Radio Communication
General Provisions

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

(30) Number portability

The term "number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Common Carriers
Development of Competitive Markets

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

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

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

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

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

(2) Number portability

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

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

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

(5) Reciprocal compensation

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

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Common Carriers
Development of Competitive Markets

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

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TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART A--GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL
Current through September 24, 2003; 68 FR 55280

§ 1.2 Declaratory rulings.

The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

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TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B--COMMON CARRIER SERVICES
PART 51--INTERCONNECTION
SUBPART H--RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TELECOMMUNICATIONS TRAFFIC
Current through June 16, 2004; 69 FR 33774

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) Transport. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) Termination. For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) Reciprocal compensation. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

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CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B--COMMON CARRIER SERVICES
PART 52--NUMBERING
SUBPART C--NUMBER PORTABILITY
Current through June 16, 2004; 69 FR 33774

§ 52.21 Definitions.

As used in this subpart:

(j) The term location portability means the ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience when moving from one physical location to another.

(k) The term long-term database method means a database method that complies with the performance criteria set forth in § 52.3(a).

(l) The term number portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

(q) The term service provider portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

§ 52.23 Deployment of long-term database methods for number portability by LECs.

(a) Subject to paragraphs (b) and (c) of this section, all local exchange carriers (LECs) must provide number portability in compliance with the following performance criteria:

(1) Supports network services, features, and capabilities existing at the time number portability is implemented, including but not limited to emergency services, CLASS features, operator and directory assistance services, and intercept capabilities;

(2) Efficiently uses numbering resources;

(3) Does not require end users to change their telecommunications numbers;

(4) Does not result in unreasonable degradation in service quality or network reliability when implemented;

(5) Does not result in any degradation in service quality or network reliability when customers switch carriers;

(6) Does not result in a carrier having a proprietary interest;

(7) Is able to migrate to location and service portability; and

(8) Has no significant adverse impact outside the areas where number portability is deployed.

(b)(1) All LECs must provide a long-term database method for number portability in the 100 largest Metropolitan Statistical Areas (MSAs), as defined in § 52.21(k), in switches for which another carrier has made a specific request for the provision of number portability, subject to paragraph (b)(2) of this section.

(2) Any procedure to identify and request switches for deployment of number portability must comply with the following criteria:

(i) Any wireline carrier that is certified (or has applied for certification) to provide local exchange service in a state, or any licensed CMRS provider, must be permitted to make a request for deployment of number portability in that state;

(ii) Carriers must submit requests for deployment at least nine months before the deployment deadline for the MSA;

(iii) A LEC must make available upon request to any interested parties a list of its switches for which number portability has been requested and a list of its switches for which number portability has not been requested; and

(iv) After the deadline for deployment of number portability in an MSA in the 100 largest MSAs, according to the deployment schedule set forth in the Appendix to this part, a LEC must deploy number portability in that MSA in additional switches upon request within the following time frames:

(A) For remote switches supported by a host switch equipped for portability ("Equipped Remote Switches"), within 30 days;

(B) For switches that require software but not hardware changes to provide portability ("Hardware Capable Switches"), within 60 days;

(C) For switches that require hardware changes to provide portability ("Capable Switches Requiring Hardware"), within 180 days; and

(D) For switches not capable of portability that must be replaced ("Non- Capable Switches"), within 180 days.

(c) Beginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.

(d) The Chief, Common Carrier Bureau, may waive or stay any of the dates in the implementation schedule, as the Chief determines is necessary to ensure the efficient development of number portability, for a period not to exceed 9 months (i.e., no later than September 30, 1999).

(e) In the event a LEC is unable to meet the Commission's deadlines for implementing a long-term database method for number portability, it may file with the Commission at least 60 days in advance of the deadline a petition to extend the time by which implementation in its network will be completed. A LEC seeking such relief must demonstrate through substantial, credible evidence the basis for its contention that it is unable to comply with the deployment schedule set forth in the appendix to this part 52. Such requests must set forth:

(1) The facts that demonstrate why the carrier is unable to meet the Commission's deployment schedule;

(2) A detailed explanation of the activities that the carrier has undertaken to meet the implementation schedule prior to requesting an extension of time;

(3) An identification of the particular switches for which the extension is requested;

(4) The time within which the carrier will complete deployment in the affected switches; and

(5) A proposed schedule with milestones for meeting the deployment date.

(f) The Chief, Wireline Competition Bureau, shall monitor the progress of local exchange carriers implementing number portability, and may direct such carriers to take any actions necessary to ensure compliance with the deployment schedule set forth in the appendix to this part 52.

(g) Carriers that are members of the Illinois Local Number Portability Workshop must conduct a field test of any technically feasible long-term database method for number portability in the Chicago, Illinois, area. The carriers participating in the test must jointly file with the Common Carrier Bureau a report of their findings within 30 days following completion of the test. The Chief, Common Carrier Bureau, shall monitor developments during the field test, and may adjust the field test completion deadline as necessary.

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Current through June 16, 2004; 69 FR 33774

§ 52.26 NANC Recommendations on Local Number Portability Administration.

(a) Local number portability administration shall comply with the recommendations of the North American Numbering Council (NANC) as set forth in the report to the Commission prepared by the NANC's Local Number Portability Administration Selection Working Group, dated April 25, 1997 (Working Group Report) and its appendices, which are incorporated by reference pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. Except that: Section 7.10 of Appendix D of the Working Group Report is not incorporated herein.

(b) In addition to the requirements set forth in the Working Group Report, the following requirements are established:

(1) If a telecommunications carrier transmits a telephone call to a local exchange carrier's switch that contains any ported numbers, and the telecommunications carrier has failed to perform a database query to determine if the telephone number has been ported to another local exchange carrier, the local exchange carrier may block the unqueried call only if performing the database query is likely to impair network reliability;

(2) The regional limited liability companies (LLCs), already established by telecommunications carriers in each of the original Bell Operating Company regions, shall manage and oversee the local number portability administrators, subject to review by the NANC, but only on an interim basis, until the conclusion of a rulemaking to examine the issue of local number portability administrator oversight and management and the question of whether the LLCs should continue to act in this capacity; and

(3) The NANC shall provide ongoing oversight of number portability administration, including oversight of the regional LLCs, subject to Commission review. Parties shall attempt to resolve issues regarding number portability deployment among themselves and, if necessary, under the auspices of the NANC. If any party objects to the NANC's proposed resolution, the NANC shall issue a written report summarizing the positions of the parties and the basis for the recommendation adopted by the NANC. The NANC Chair shall submit its proposed resolution of the disputed issue to the Chief of the Wireline Competition Bureau as a recommendation for Commission review. The Chief of the Wireline Competition Bureau will place the NANC's proposed resolution on public notice. Recommendations adopted by the NANC and forwarded to the Bureau may be implemented by the parties pending review

of the recommendation. Within 90 days of the conclusion of the comment cycle, the Chief of the Wireline Competition Bureau may issue an order adopting, modifying, or rejecting the recommendation. If the Chief does not act within 90 days of the conclusion of the comment cycle, the recommendation will be deemed to have been adopted by the Bureau.

(c) The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the Working Group Report and its appendices can be obtained from the Commission's contract copier, International Transcription Service, Inc., 1231 20th St., N.W., Washington, D.C. 20036, and can be inspected during normal business hours at the following locations: Reference Information Center, 445 12th Street, SW., Room CY-A257, Washington, D.C. 20554 or at the Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, D.C. The Working Group Report and its appendices are also available on the Internet at http://www.fcc.gov/ccb/Nanc/.

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Current through June 16, 2004; 69 FR 33774

§ 52.31 Deployment of long-term database methods for number portability by CMRS providers.

(a) By November 24, 2003, all covered CMRS providers must provide a long-term database method for number portability, including the ability to support roaming, in the 100 largest MSAs, as defined in § 52.21(k), in compliance with the performance criteria set forth in section 52.23(a) of this part, in switches for which another carrier has made a specific request for the provision of number portability, subject to paragraph (a)(1) of this section. A licensee may have more than one CMRS system, but only the systems that satisfy the definition of covered CMRS are required to provide number portability.

(1) Any procedure to identify and request switches for development of number portability must comply with the following criteria:

(i) Any wireline carrier that is certified (or has applied for certification) to provide local exchange service in a state, or any licensed CMRS provider, must be permitted to make a request for deployment of number portability in that state;

(ii) Carries requesting deployment in the 100 largest MSAs by November 24, 2003 must submit requests by February 24, 2003.

(iii) A covered CMRS provider must make available upon request to any interested parties a list of its switches for which number portability has been requested and a list of its switches for which number portability has not been requested;

(iv) After November 24, 2003, a covered CMRS provider must deploy number portability in additional switches serving the 100 largest MSAs upon request within the following time frames:

(A) For remote switches supported by a host switch equipped for portability ("Equipped Remote Switches"), within 30 days;

(B) For switches that require software but not hardware changes to provide portability ("Hardware Capable Switches"), within 60 days;

(C) For switches that require hardware changes to provide portability ("Capable Switches Requiring Hardware"), within 180 days; and

(D) For switches not capable of portability that must be replaced ("Non- Capable Switches"), within 180 days.

(v) Carriers must be able to request deployment in any wireless switch that serves any area within the MSA, even if the wireless switch is outside that MSA, or outside any of the MSAs identified in the Appendix to this part.

(2) By November 24, 2002, all covered CMRS providers must be able to support roaming nationwide.

(b) By December 31, 1998, all covered CMRS providers must have the capability to obtain routing information, either by querying the appropriate database themselves or by making arrangements with other carriers that are capable of performing database queries, so that they can deliver calls from their networks to any party that has retained its number after switching from one telecommunications carrier to another.

(c) The Chief, Wireless Telecommunications Bureau, may waive or stay any of the dates in the implementation schedule, as the Chief determines is necessary to ensure the efficient development of number portability, for a period not to exceed 9 months (i.e., no later than September 30, 1999, for the deadline in paragraph (b) of this section, and no later than March 31, 2000, for the deadline in paragraph (a) of this section).

(d) In the event a carrier subject to paragraphs (a) and (b) of this section is unable to meet the Commission's deadlines for implementing a long-term number portability method, it may file with the Commission at least 60 days in advance of the deadline a petition to extend the time by which implementation in its network will be completed. A carrier seeking such relief must demonstrate through substantial, credible evidence the basis for its contention that it is unable to comply with paragraphs (a) and (b) of this section. Such requests must set forth:

(1) The facts that demonstrate why the carrier is unable to meet our deployment schedule;

(2) A detailed explanation of the activities that the carrier has undertaken to meet the implementation schedule prior to requesting an extension of time;

(3) An identification of the particular switches for which the extension is requested;

(4) The time within which the carrier will complete deployment in the affected switches; and

(5) A proposed schedule with milestones for meeting the deployment date.

(e) The Chief, Wireless Telecommunications Bureau, may establish reporting requirements in order to monitor the progress of covered CMRS providers implementing number portability, and may direct such carriers to take any actions necessary to ensure compliance with this deployment schedule.

03-1405

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

CENTRAL TEXAS TELEPHONE COOPERATIVE, INC., et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

Certificate Of Service

I, Shirley E. Farmer, hereby certify that the foregoing typewritten "Brief for Respondents" was served this 24th day of June, 2004, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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