ORAL ARGUMENT SCHEDULED FOR NOVEMBER 18, 2004

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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

NOS. 03-1414; 03-1443

UNITED STATES TELECOM ASS'N, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS 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, 110 Stat. 56
APA	Administrative Procedure Act
CMRS	Commercial Mobile Radio Service
CTIA	Cellular Telecommunications & Internet Association
ILEC	Incumbent Local Exchange Carrier
JA	Joint Appendix
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
LNP	Local Number Portability
NANC	North American Numbering Council
Order	Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, FCC 03-284, 18 FCC Rcd 23697 (rel. Nov. 10, 2003)
RFA	Regulatory Flexibility Act
USTA	United States Telecom Association

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STATEMENT OF JURISDICTION

The Federal Communications Commission released the order on review on November 10, 2003. Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, 18 FCC Rcd 23697 (2003) (*Order*) (JA 1-35). The United States Telecom Association (USTA) and CenturyTel, Inc. filed a petition for review on November 20, 2003. The National Telecommunications Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) filed a petition for review on December 15, 2003. The petitions were timely under 28 U.S.C. § 2344. The petitions

for review of the Order were consolidated by order of the Court dated December 17, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

STATEMENT OF QUESTION PRESENTED

Acting at the direction of Congress, the Federal Communications Commission in 1996 adopted rules to implement local number portability. *See generally CTIA v. FCC*, 330 F.3d 502 (D.C. Cir. 2003). Subsequently, there was a dispute among telephone service providers concerning the scope of their duties under those rules to provide "intermodal" local number portability – that is, when a customer of a local exchange carrier ("LEC" or wireline carrier) seeks to retain his telephone number when he changes his service provider to a commercial mobile radio service ("CMRS" or wireless) provider, or vice versa. In the order on review, the Commission sought to resolve the industry controversy and clarify the scope of its existing rules. At the heart of the controversy was a narrow construction of the rules taken by certain LECs that would sharply limit their duty to port numbers to competing CMRS providers. But that narrow construction, the Commission found, was not the best interpretation of its rules, would deny the benefits of number portability for many consumers, and would slow the development of local telephone competition. The Commission declared that its existing rules do not permit the limits on intermodal number portability that certain carriers unilaterally had sought to impose. The resulting consolidated petitions for review present the following central issue for review:

Did the Commission follow correct procedures in clarifying the intermodal number portability obligations imposed on telephone service providers by its existing rules?

STATUTES AND REGULATIONS

Pertinent statutes and regulations that are not reproduced in petitioners' brief are attached at the Addendum to this brief.

COUNTERSTATEMENT

I. Statutory and Regulatory Background

A. The Telecommunications Act of 1996

Wireline telephone service historically was provided by monopoly wireline local exchange carriers (LECs). In the Telecommunications Act of 1996, Congress undertook to eliminate the LEC monopoly and to replace it with competition. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371-372 (1999). Among the provisions Congress adopted to advance competition in local markets was the requirement of "number portability," which allows customers to keep their telephone numbers when they change from one service provider to another. 47 U.S.C. § 251(b)(2) (requiring local exchange carriers "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission"); *see also* 47 U.S.C. § 153(30) (defining number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another").

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). *See also CTIA*, 330 F.3d at 513 ("The 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

As directed by Congress, the FCC promulgated rules and deployment schedules for the implementation of number portability within five months of the passage of the 1996 Act. *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) (*First Portability Order*), *recon.*, 12 FCC Rcd 7236 (1997), *further recon.*, 13 FCC Rcd 21204 (1998). Consistent with the statute, the Commission adopted broad porting requirements: "number portability must be provided . . . by all LECs to *all* telecommunications carriers, including commercial mobile radio services (CMRS) providers."[1] *Id*., 11 FCC Rcd at 8355 ¶ 3 (emphasis added); *see also id*. at 8431 ¶ 152.[2] The Commission also required CMRS carriers to offer number portability both to LECs and among themselves. *Id*. at 8433 ¶ 155. Transferring a number from a wireline carrier to a wireless carrier, or vice versa, is known as "intermodal" porting. Intermodal porting is the subject of the order on review in this case, which we refer to as the *Order*.[3]

In the *First Portability Order*, the Commission required a form of portability known as "service provider portability," which "refers to the ability of end users to retain the same telephone numbers as they change from one service provider to another." *First Portability*

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[1] *See* 47 C.F.R. § 52.3 (1996) (describing the number portability obligations of LECs). This provision has been recodified at 47 C.F.R. § 52.23. LECs historically have used wireline facilities to provide service and are commonly known as wireline carriers. *See also* 47 C.F.R. § 52.11 (1996) (describing the number portability obligations of CMRS carriers). This provision has 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] The transfer of a telephone number from one wireless carrier to another (which is a form of "intramodal portability") is the subject of the order on review in *Central Texas Telephone Cooperative, Inc. v. FCC*, No. 03-1405.

Order, 11 FCC Rcd at 8443 ¶ 172.[4] Service provider portability is distinguishable from "location portability," which "refers to the ability of users of telecommunications services to retain existing telecommunications numbers . . . when moving from one physical location to another." *Id*. at ¶ 174.[5] The Commission did not require location portability in its initial number portability order, *see id*. at ¶ 181, and has not required location portability in any of its subsequent orders.

The implementation of number portability raised technical issues that affected different industry participants differently. In an effort to resolve those issues, the Commission enlisted a federal advisory committee called the North American Numbering Council (NANC), which comprises representatives of a broad range of telecommunications interests. The agency had created the NANC earlier to develop a consensus within the industry on technical issues relating to the administration of the country's telephone numbers and to provide advice to the FCC on the basis of that consensus. *See First Portability Order*, 11 FCC Rcd at 8401 ¶ 93.

C. Subsequent Number Portability Proceedings

On May 1, 1997, the NANC forwarded to the FCC a series of recommendations pertaining to intramodal service provider portability between one wireline carrier to another.[6] In August 1997, after issuing a public notice soliciting comment on the *NANC Working Group*

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[4] Service provider portability can be either intramodal (such as when a customer ports its number from one wireline provider to another, or one wireless provider to another) or intermodal (such as when a customer ports its number from a wireline provider to a wireless provider, or vice versa).

[5] A third type of portability – not relevant to this case – is "service portability," which refers to a customer's ability to retain his number when he changes from one kind of service to another. *First Portability Order*, 11 FCC Rcd at 8443 (¶ 174).

[6] *See* North American Numbering Council, *Local Number Portability Administration Selection Working Group Report* (Apr. 25, 1997) ("*NANC Working Group Report*").

Report, the Commission adopted recommendations from the NANC for the implementation of intramodal wireline-to-wireline service provider portability. *See Telephone Number Portability*, 12 FCC Rcd 12281 (1997) (*Second Portability Order*); *see also* 47 C.F.R. § 52.26(a) (codifying by reference *NANC Working Group Report*). Under the guidelines developed by the NANC, porting between LECs was limited to carriers with facilities or numbering resources in the same rate center to accommodate technical limitations associated with the proper rating of wireline calls. *Order* at ¶ 7 & n.13 (JA 4). Accordingly, under the same guidelines, if a state elected to impose a separate location portability requirement between LECs, that 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.[7]

The *Second Portability Order* did not address intermodal porting or place any limits on the requirement of such porting. Instead, it asked the NANC to develop a consensus recommendation on various outstanding matters, including the fact that wireless customers are mobile and not fixed and "how to account for differences between service area boundaries of wireline versus wireless services." *Second Portability Order*, 12 FCC Rcd at 12333-12334 ¶ 91. *See Order* ¶¶ 11 (describing "rate center" disparity issue) (JA 5-6). A "rate center" is a geographic area designated by a LEC and state regulators that is used to determine whether a given call is a local call or a toll call. LECs generally serve a customer by using a number assigned to the rate center where the customer resides, whereas a CMRS carrier may serve a

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[7] *See Local Number Portability Selection Working Group Final Report and Recommendation to the FCC*, Appendix D, § 7.3, at 6 (rel. Apr. 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' obligations to provide *service provider* portability.

customer by using a number assigned to any rate center that is within the CMRS carrier's service area. The area for a LEC's rate center typically is smaller than the service area for a wireless carrier. As a result, a wireless carrier typically can port in any number that has been assigned to a wireline rate center that is located within the wireless carrier's service area. A wireline carrier, on the other hand, can port in only those wireless numbers that are assigned to the rate center where the customer lives.[8] *Id*. at ¶ 11 (JA 5-6).

The NANC reported to the Commission in May 1998 that its members were not able to reach consensus on the intermodal porting technical issues and that it would not make a recommendation on the topic. *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).[9] The failure to reach consensus on technical issues was not surprising, because the NANC comprises all industry sectors. The Commission sought public comment on the NANC report. *See Common Carrier Bureau Seeks Comment on Recommendation Concerning Local Number Portability Administration*, 13 FCC Rcd 17342 (1998).

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[8] LECs may be able to use so-called "foreign exchange" services that allow them to "serve customers with numbers ported from wireless carriers" without regard to the number's assigned rate center. *Order* at ¶ 44 (JA 19). The NPRM part of the *Order* seeks comment on that possibility.

[9] *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 "theoretially" result in *de facto* location portability. *Telephone Number Portability*, 13 FCC Rcd 21204, 21232 ¶ 61 (1998). In reponse 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." *Id.* 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.*

The Commission did not address intermodal porting again for some time. That is largely because it did not have to: Although the Commission originally had ordered CMRS carriers to implement number portability by June 30, 1999, *First Portability Order*, 11 FCC Rcd 8355 ¶ 4, the Commission extended that deadline after finding that the 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). As a practical matter, there could be no porting of numbers by CMRS carriers – either intramodal or intermodal – until they implemented the necessary technology. During this period, the NANC issued several reports but did not adopt standards for intermodal portability. In its third report on wireless-wireline integration, the NANC referred the intermodal issues back to the FCC for resolution. *See* North American Numbering Council, *LNPA Working Group 3rd Report on Wireless Wireline Integration* (Sept. 30, 2000) ("*NANC Third Report*") § 5.1.1 at 16.

In July 2002, the Commission established a firm deadline of November 24, 2003, for intermodal and wireless number portability (both intramodal and intermodal) within the 100 largest metropolitan areas. *Verizon Wireless' Petition for Partial Forbearance*, 17 FCC Rcd 14972, 14985-86 ¶ 31 (2002) ("*Forbearance Order*"), *aff'd, CTIA*, 330 F.3d 502. Wireless carriers outside of the largest 100 metropolitan areas 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*. By these deadlines, a carrier had to be capable of allowing end users to port their telephone numbers if another carrier had made a request for portability.

In its order establishing the deadlines for the implementation of intermodal and wireless number portability, the Commission denied a request that it forbear from requiring such

portability. The Commission reaffirmed its policy rationale for wireless number portability, explaining that wireless number portability would enhance competition, was necessary to protect consumers, and would promote the public interest. *Forbearance Order*, 17 FCC Rcd at 14977-981 ¶¶ 14-22. This Court affirmed 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." *CTIA*, 330 F.3d at 509.

II. The *Order* under Review

The November 24, 2003, deadline brought intermodal portability to the fore once again. On January 23, 2003, CTIA, a trade group that represents CMRS carriers, petitioned the Commission for a declaratory ruling on the matter. It asked the FCC to clarify that its existing rules require a LEC to port numbers to a CMRS provider whose service area overlaps the LEC's rate center, without regard to whether the CMRS carrier operates facilities within the rate center or has been assigned numbers associated with that rate center.[10] The Commission issued a public notice seeking comment on the CTIA petition. *See* 68 Fed. Reg. 7323 (Feb. 13, 2003) (JA 309). USTA, among other parties, filed comments. (JA 319).

On November 10, 2003, the FCC released the *Order*. The Commission clarified that the obligation imposed by the 1996 Act, as implemented in the *First Portability Order*, requires LECs to port numbers to a CMRS carrier if the wireless carrier's service area overlaps the rate center associated with the number at issue, "provided that the porting-in carrier maintains the number's original rate center designation following the port." *Order* ¶ 22 (JA 10). The

[10] Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association, CC Docket No. 95-116 (January 23, 2003) (CTIA Petition). CTIA explained that its petition was "not a request for location provider portability which the Commission has declined to require." *Id*. at 3 n.5 (JA 289).

Commission also declared that CMRS carriers are required to port numbers to LECs, as long as the number is assigned to the rate center of the customer's residence. *Id*. ¶ 25 n.70 (JA 11).

The Act and the existing porting rules, the Commission found, "impose broad porting obligations on LECs." *Order* ¶ 21 (JA 9). Furthermore, the Commission found, there are no technical difficulties or existing regulatory requirements that would prevent porting to a CMRS carrier that does not have numbers assigned to the LEC rate center or an interconnection agreement with the LEC. *Order* ¶¶ 23-24 (JA 10-11). Because the agency "has never adopted any limits regarding wireline-to-wireless number portability," the Commission held, "as of November 24, 2003, LECs must port numbers to wireless carriers where the requesting wireless carrier's coverage area overlaps the geographic location of the rate center to which the number is assigned." *Id*. ¶ 25 (JA 11).

The FCC rejected the claim by wireline carriers that the agency had to issue a notice of proposed rulemaking (NPRM) before it could require intermodal portability. The porting obligations imposed in the *First Portability Order* were not limited in any way, the agency pointed out, and the response to the CTIA petition amounted only to "clarifications" of the existing rules, which do not require a new notice. *Order* ¶ 26 (JA 12).

The Commission also rejected the claim that it could not impose LEC-to-CMRS porting because CMRS carriers could port in from LECs more numbers than LECs could port in from CMRS carriers. "The fact that there may be technical obstacles that could prevent some . . . types of porting does not justify denying wireline consumers the benefit of being able to port their wireline numbers to wireless carriers," the Commission said. "Each type of service offers its own advantages and disadvantages . . . and wireline customers will consider these attributes in determining whether or not to port their number." *Order* ¶ 27 (JA 12). The Commission

nevertheless remained sensitive to the alleged asymmetry of porting between CMRS carrier and LECs. In the *Order*, it published a further notice of proposed rulemaking in which it sought additional comment on possible regulatory responses to it. *Id*. ¶¶ 41-44 (JA 17-19).

The Commission explained that "porting from a wireline to a wireless carrier that does not have a point of interconnection or number 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." *Id.* ¶ 28 (JA 12); *see also id*. (because "a wireless carrier porting in a wireline number is required to maintain the number's original rate center designation following the port . . . calls to the ported number will continue to be rated in the same fashion as they were prior to the port").[11]

In its request for a declaratory ruling, CTIA also asked the Commission to confirm that porting need not occur through interconnection agreements. *Order* ¶ 31 (JA 14). The Commission provided this clarification, explaining that interconnection agreements are unnecessary in light of the "minimal exchange of information" necessary to complete a port. *Id*. at ¶¶ 34, 37 (JA 15, 16). The Commission found that "interconnection agreements are not necessary to prevent unjust or unreasonable charges or practices by wireless carriers with respect to porting," *id*. at ¶ 35 (JA 15), and that interconnection agreements are not necessary for the protection of consumers. In fact, the Commission concluded, "[r]equiring interconnection agreements for the purpose of intermodal porting could undermine the benefits of LNP to consumers by preventing or delaying the implementation of intermodal porting." *Id*. at ¶ 36 (JA

[11] The *Order* also explained that carriers "may file petitions for waiver of their obligation to port numbers to wireless carriers, if they can provide substantial, credible evidence that there are special circumstances that warrant departure from the existing rules." *Order* ¶ 30 (JA 13-14).

16). The Commission recognized that a prior order "could be interpreted to require" interconnection agreements for wireline-to-wireless porting pursuant to sections 251 and 252 of the 1996 Act, but it resolved any ambiguity in these provisions by forbearing from any possible interconnection requirement pursuant to its general forbearance authority in Section 10 of the 1996 Act, 47 U.S.C. § 160. *See Order* ¶¶ 34-37 (JA 15-16).

Shortly after the *Order* was issued, several parties – including petitioners USTA and CenturyTel – sought an administrative stay from the Commission. The Commission denied the stay on November 20, 2003. *See* Order, *Telephone Number Portability, United States Telecom Association and CenturyTel, Inc. Joint Petition for Stay Pending Judicial Review*, 18 FCC Rcd 24664 (2003) (*Stay Order*) (JA 429). In seeking a stay, USTA and CenturyTel asserted that the Commission's number portability rules established an "'unfair fight'" because they permitted "only a one-way migration of customers from wireline to wireless carriers." *Stay Order*, 18 FCC Rcd at 24665 ¶ 6 (JA 430). The Commission rejected this argument, explaining that "wireline carriers can port in some number of wireless customers today" and that "a wireline carrier may compete to win back a customer who ported his home telephone number to a wireless carrier, provided that customer has remained at the same location." *Id*. The Commission acknowledged that "there are circumstances under which a wireless carrier need not port a number to a requesting wireline carrier (i.e., where the wireless customer seeks to port a number to a wireline telephone falling in a different rate center)," and noted that "the Commission has sought comment on how to facilitate wireless-to-wireline porting in these instances." *Id*. *See also Order* at ¶¶ 41-44 (seeking comment on wireless-to-wireline porting issues) (JA 17-19). In evaluating the request for a stay, the Commission also noted that number portability would promote competition – "among wireless carriers, and between wireless and wireline carriers" –

and that there was no reason to delay the consumer benefits associated with the implementation of intermodal portability. *Stay Order*, 18 FCC Rcd at 24666 ¶ 7 (JA 431).

In seeking a stay, USTA and CenturyTel also asserted – "with no factual backup" – "that there is no established method for routing and billing calls ported outside of the local exchange." *Stay Order*, 18 FCC Rcd at 24666 ¶ 9 (JA 431). The Commission found that, "without more explanation, the scope of the alleged problem and its potential effect on consumers [are] unclear," and that, in any event, even "in the absence of wireline-to-wireless LNP, calls are routed outside of local exchanges and billed correctly." *Id*.

On November, 21, 2003, the petitioners in this Court (collectively, "USTA") filed an emergency motion for a judicial stay, which the Court denied on December 4, 2003. *See Order*, *USTA v. FCC*, No. 03-1414 (D.C. Cir. Dec. 4, 2003) (JA 457).

A number of rural LECs that are intervenors in this case – including Central Texas Telephone Cooperative, Inc., Leaco Rural Telephone Co., Inc., and Valley Telephone Cooperative, Inc. – belatedly filed with the Court a petition for review of the *Order*, which was dismissed.[12]

Since the Commission implemented wireless number portability on November 24, 2003, the Commission's staff reported in May 2004 that there have been more than two million ports

[12] *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).

involving wireless carriers, some involving wireline customers taking their wireline numbers to a wireless carrier.[13]

STANDARD OF REVIEW

To prevail on review, USTA 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. *See, 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. *See, 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.[14] 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.'"[15] 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

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

[14] *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).

[15] *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).

requirements for the adoption of a new legislative rule "´in itself is entitled to a significant degree of credence.'" *See 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)).

SUMMARY OF ARGUMENT

In the *Order* under review, the Commission clarified the broad porting obligation adopted by the Commission in its original order implementing the statutory porting requirement of the 1996 Act. The Commission's original portability rules imposed a porting obligation on all LECs, and expressly required that they provide number portability to any licensed CMRS provider that requests porting. The Commission never limited that obligation. When the Commission clarified in the *Order* that LECs are required to port numbers to a CMRS carrier if the wireless carrier's service area overlaps the rate center associated with the number at issue – "provided that the porting-in carrier maintains the number's original rate center designation following the port," *Order* at ¶ 22 (JA 10) – it did not establish a new substantive rule. Because the *Order* was interpretive of existing rules, the Commission was not required to conduct a rulemaking before issuing the *Order*.

Number portability promotes competition by making it more attractive for consumers to consider changing carriers. See *CTIA v. FCC*, 330 F.3d at 513. Unable to challenge the substance of the Commission's policy, USTA complains that the Commission ran afoul of the APA in issuing the *Order* without notice and comment. None of its complaints has merit. First, USTA claims the Commission, by deciding this matter on its own, violated its "established procedure" of referring such issues to the NANC. The Commission in fact followed its general practice of seeking industry consensus through the NANC, and resolved the intermodal portability dispute only after the NANC referred the dispute back to the Commission when it was

unable to reach consensus. Along the way, the Commission consistently solicited comment on its efforts to resolve the dispute. In any event, as a matter of law, a change in the Commission's procedure for getting guidance on its decision-making does not amount to a change in a legislative rule that requires notice and comment. Furthermore, under established law, the Commission could not delegate to the NANC its decision-making role, but could only call on the NANC for advice.

Second, USTA briefly argues that the Order – by allowing wireline-to-wireless portability in the absence of a CMRS carrier's "presence" in the rate center – imposes location portability, which the Commission never has required. This argument misapprehends location portability. As the Commission has held since the *First Portability Order*, porting a number from a LEC to a CMRS carrier is a form of service provider portability. The fact that a subscriber is more mobile after porting its wireline number to a wireless carrier does not establish location portability; that is simply the result of switching from a wireline carrier to a wireless carrier.

Third, USTA claims that the rate center disparity permitted by the Order violates the Commission's obligation to treat all carriers in a competitively neutral manner. USTA's claim overstates the competitive neutrality principle. In fact, the Commission never established a policy of requiring the same treatment for all industry players with respect to portability. Moreover, a fundamental purpose of the 1996 Act – including the number portability provision – was to eliminate the longstanding LEC monopoly in the local exchange market and to open that market to effective competition. The Commission's number portability rules – as clarified in the *Order* – promote competition, and reasonably reflect differences between the wireless and wireline markets as well as between the services provided by wireless and wireline carriers.

USTA appends to its APA claims an argument that the Commission was required to conduct a Regulatory Flexibility Analysis of the impact on small businesses. But this contention depends entirely upon USTA's claim that the Commission changed its rules. The Commission has no obligation to conduct a Regulatory Flexibility Analysis when – as is the case here – the Commission does not engage in rulemaking but merely clarifies existing rules.

The rural LEC intervenors attempt to enlarge the issues before the Court by making a number of APA arguments that are based upon claims of increased costs resulting from "new" interconnection and transport obligations. It is well established that intervenors may not present arguments that were not even mentioned by the petitioners in their opening brief. In any event, the intervenors' claims are unavailing, given that (1) they are in fact complaints about the Commission's existing interconnection and intercarrier compensation rules, and the time for challenging those rules has long passed; (2) the intervenors have not established any actual or imminent injury; and (3) the rural LECs' speculative injury is outweighed by the competitive benefits of number portability, especially when waivers are available to carriers that can establish circumstances "that warrant departure from existing rules," *Order* ¶ 30 (JA 13). Finally, the intervenors' argument that the Commission should have required carriers to arrange for porting through interconnection agreements is wrong on the merits for the reasons set out by the Commission in the *Order*. See *id*. at ¶¶ 31-37 (JA 14-16).

ARGUMENT

I. The Commission Correctly Clarified Its Existing Rule With Respect To Intermodal Portability Without Notice and Comment.

A. The *Order* is Interpretive.

In the *First Portability Order*, issued in 1996, the Commission established the requirement of service provider number portability between LECs and CMRS carriers when customers change service providers. The Commission imposed *no* limitations on that rule. In the *Order*, the Commission clarified that under the terms of the previously established rule, LECs must port numbers to CMRS carriers if the CMRS carrier's service area overlaps the rate center associated with the telephone number at issue, regardless of whether the CMRS carrier has facilities located in the rate center. USTA's fundamental claim is that the *Order* amounts to a new substantive rule that the Commission promulgated without notice and opportunity for comment. That claim is wrong because the order on review is a clarification of the requirement of LEC/CMRS number portability that has been on the books since 1996. The law is clear that such a clarification is an interpretive rule, which is exempt from the Administrative Procedure Act ("APA") notice requirement.

The APA requires an agency to publish in the Federal Register a "[g]eneral notice of proposed rule making" when the agency is proposing to make new legislative-type rules. 5 U.S.C. § 553(b). But the Act expressly exempts "interpretive rules" from the notice requirement. 5 U.S.C. § 553(b)(3)(A). Thus, an agency can "declare its understanding of what a [regulation] requires" without notice and comment. *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991); *see also* 5 U.S.C. § 554(e) (agency may issue declaratory rulings to remove uncertainty); 47 C.F.R. § 1.2 (FCC may issue declaratory rulings).

There is no precise demarcation between legislative and interpretive rules. The Court has stated that one of the key inquiries in making such a determination is "whether the [agency's action] effectively amends a prior legislative rule." *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). "'If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.'" *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 831, 896). By contrast, a rule is interpretive if it "confirm[s] a regulatory requirement, or maintain[s] a consistent agency policy." 979 F.2d at 237. "[T]he legislative or interpretive status of the agency rules turns . . . on the prior existence or non-existence of legal duties and rights." *American Mining Cong.*, 995 F.2d at 1110.

Section 251(b)(2) imposes on LECs a broad "duty to provide . . . number portability." Congress defined number portability to mean "the ability of users . . . to retain, at the same location, existing [telephone] numbers . . . when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). In the *First Portability Order*, the Commission pointed out that "Section 251(b) requires local exchange carriers to provide number portability to all telecommunications carriers, and thus to CMRS providers as well as wireline service providers." 11 FCC Rcd at 8431 ¶ 152. Such intermodal portability, the Commission found, will "promote competition between CMRS and wireline service providers as CMRS providers offer comparable local exchange . . . services." *Id*., 11 FCC Rcd at 8436 ¶ 160.

The Commission's original rules thus imposed a porting obligation on all LECs, including the duty to port to CMRS carriers. *See* 47 C.F.R. § 52.23(a) & (b)(2)(i) (1997)

(providing that all LECs must provide number portability and that "any licensed CMRS provider" may request porting). The Commission imposed no limitations on the LECs' duty of wireline-to-wireless porting. Furthermore, the Commission did not specify any circumstances under which a LEC would *not* have to comply with the intermodal portability requirement.

Some LECs nevertheless have contended that they have no duty to port when a CMRS carrier does not have numbers that are assigned to a LEC's particular rate center or facilities within the rate center. CTIA, in January 2003, asked the Commission to address that contention, petitioning for "a declaratory ruling that wireline carriers have an obligation to port their customers' telephone numbers to a CMRS provider whose service area overlaps the wireline carrier's rate center." CTIA Petition at 1 (JA 287); *see also Order* ¶ 20 (JA 9). The Commission addressed that petition in its *Order*. The Commission found – in light of the "broad porting obligations" imposed on LECs by the statute and by "the Commission's rules reflect[ing] those requirements," which did not "require[] wireless carriers to have points of interconnection or numbering resources in the same rate center as the assigned number for wireline-to-wireless porting" – that LECs must "port numbers to wireless carriers where the requesting wireless carrier's 'coverage area' overlaps the geographic location of the rate center in which the customer's wireline number is provisioned." *Id*. at ¶¶ 21-22, 24 (JA 9-10, 11).

Given the breadth of the statutory porting requirement, the unqualified nature of the Commission's 1996 rule implementing that requirement, and the policy of fostering competition that underlies portability, the ruling in the *Order* clarifies – and does not amend – the original rule. The breadth of the original rule shows that nothing in the *Order* "effectively amends [the] prior legislative rule." *American Mining Congress*, 995 F.2d at 1112. The *Order* does not "work substantive changes in prior regulations," does not "repudiate" the existing rule, and is not

"irreconcilable" with the existing rule. *See Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). Rather, the *Order* addresses and resolves an industry controversy by confirming the breadth of the duty that Congress and the Commission had imposed on LECs years ago. The clarification "illustrate[s] [the Commission's] original intent," which is precisely what the Court has held that a clarification order may do. *Sprint*, 315 F.3d at 374; *see also Order* ¶ 26 (JA 12). In resolving this industry dispute in the *Order*, the Commission did not exercise – and did not need to exercise – legislative power because its existing rules already required intermodal portability. *See American Mining Congress*, 995 F.2d at 1110.

B. Petitioners Have Not Established That the *Order* Amended Existing Rules.

(1) The NANC Claim

USTA contends that the Commission's earlier portability orders "established [a] procedure" for determining "the scope of carriers' number portability obligations" – referral of such issues to the NANC – and that the agency then violated that procedure in the *Order* by deciding the issues on its own. Pet. Br. at 19. As a threshold matter, USTA has failed to explain how a change in the agency's *procedure* for getting guidance in its decisionmaking amounts to a change in a *rule* that requires notice and comment. In any event, the agency did not violate any established procedure.

The NANC, as described above, is a federal advisory committee that consists of representatives from various industry groups and companies with a stake in the administration of numbering resources. *See First Portability Order*, 11 FCC Rcd at 8401 ¶ 93. The NANC has been useful in recommending regulatory approaches that are supported by a broad-based industry consensus, and the agency has referred to it many of the technical issues of numbering

administration, including questions related to number portability. In keeping with that practice, the FCC referred to the NANC various LEC/CMRS technical portability issues. *See Second Portability Order*, 12 FCC Rcd at 1234 ¶ 92; *see also Order* ¶ 10 (JA 5). The NANC members were not able to reach a consensus on the technical LEC/CMRS portability issues, and they made no recommendation. *Id*. ¶ 11 (JA 5-6).

Some time later – as the deadline for CMRS portability implementation approached and in the face of claims by LECs that they had no obligation to port numbers to CMRS carriers – CTIA filed its petition for declaratory ruling asking the Commission to resolve the controversy over LEC and CMRS porting obligations. The Commission in response to that petition resolved the controversy itself in the *Order*.

The Commission did not violate an "established procedure," but in fact *followed* its general practice of seeking industry consensus through the NANC advisory panel. When the NANC was unable to resolve the controversy, the Commission simply discharged its own primary responsibility to clarify its rules. USTA contends that the Commission was obligated either to provide additional guidance to the NANC and wait for further advice or to issue an NPRM on the petition issue. Pet. Br. at 20. No such duty exists under law or in agency practice, however. The NANC's inability to reach consensus did not somehow strip the Commission of its power nor relieve it of its obligation to clarify the meaning of its rules and resolve industry controversy.

When it created the NANC and relied on many of its recommendations, the Commission did not abdicate or delegate permanently its decision-making role or abandon its administrative prerogatives. Indeed, the Commission *could not* make such a permanent delegation, and could not avoid its responsibility simply because an advisory agency had failed to make a

recommendation. *See* 5 U.S.C. App. 2 § 9(b) ("Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or officer of the Federal Government."). And, most pertinent to the issue presented, nothing in the Commission's resolution of the matter itself, rather than relying on the NANC, rendered its ultimate decision an amendment, as opposed to a clarification, of the pre-existing portability rule.

If the Commission's use of the NANC to help resolve portability issues has any relevance here, it is to show the extent to which all of the interested parties had actual notice that specific issues were before the agency, and had and exercised opportunities to comment on them. The Commission referred to the NANC for recommendations the very issues it later resolved in the *Order*. *Order* ¶ 10 (JA 5). After the referral, all parties had multiple opportunities to participate in the decision-making process. USTA and many of its individual member companies are voting members of the NANC and were able to participate directly in the advisory process. *See Second Portability Order*, 12 FCC Rcd at 12282 n.3. After the NANC announced its inability to reach consensus, the Commission sought public comment on the NANC report. After CTIA asked for the declaratory ruling, which again squarely raised the issue at hand, the Commission again sought comment from interested parties. In short, the matters at issue here were subject to multiple rounds of comment before the Commission which informed the agency's clarification of its rules.

Finally, USTA attempts to bolster its APA claim by asserting that the *Order* effectively imposed a "new" intermodal portability requirement by resolving implementation issues raised

by intermodal portability.[16] Pet. Br. at 20. However, as USTA acknowledges, the Commission already had promulgated the rule requiring a wireline carrier to port numbers to a requesting CMRS carrier well before it adopted and released the *Order*. The *Order* did no more than clarify "wireline carriers' existing obligations to port numbers to wireless carriers." *Order* ¶ 26 (JA 12). *See Sprint*, 315 F.3d at 373 ("agencies possess the authority in some instances to clarify . . . existing rules without issuing a new NPRM and engaging in a new round of notice and comment."); *see also American Mining Congress*, 995 F.2d at 1112 ("A rule does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted.").

(2) The Location Portability Claim

USTA briefly argues that allowing wireline-to-wireless portability in the absence of a CMRS carrier "presence" in the rate center implements "location portability," even though the Commission in the *First Portability Order* decided not to require location portability. Pet. Br. at 23-24. USTA's argument fails because it rests on an incorrect understanding of location portability. The Commission from the beginning has held that LEC-to-CMRS porting of numbers when a change of service providers occurs does not constitute location porting. To the extent the prior orders were not clear on that point (and we believe they were), the *Order* only clarifies, and does not amend, the existing rule.

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[16] USTA also insists that the *Order* must have amended the earlier rule because it is different from the rules governing LEC-to-LEC porting. Pet. Br. at 21. That claim is wrong because LEC-to-CMRS porting presents different issues from LEC-to-LEC porting; it is hardly surprising that the rules would be different. The Commission had adopted some NANC recommendations limiting LEC-to-LEC porting, but it had "never adopted any limits regarding wireline-to-wireless number portability." *Order* ¶ 25 (JA 11).

In the *First Portability Order*, the Commission defined "service provider porting" to include "switching among wireline service providers and . . . CMRS providers" – *i.e.*, intermodal porting. *Id*., 11 FCC Rcd at 8443 ¶ 172. The Commission defined "location portability," in contrast, to mean "the ability of users of telecommunications services to retain existing telecommunications numbers . . . when moving from one physical location to another." *Id*. at 8443 ¶ 174. The Commission explained that under its current rules – which do not require location portability – "subscribers must change their telephone numbers *when they move outside the area served by their current central office*." *Id*. (emphasis added); *see also Telephone Number Portability Notice of Proposed Rulemaking*, 10 FCC Rcd 12350, 12360 ¶ 26 (1995) ("*Notice*") ("Location portability would enable subscribers to keep their telephone numbers when they move to a new neighborhood, a nearby community, across the state, or even, potentially, across the country."). In the *First Portability Order*, the Commission declined to require location portability. 11 FCC Rcd at 8447 ¶ 181. [17]

To ensure the implementation of service provider portability, the Commission clarified that a telephone number ported to a wireless carrier must remain assigned to the same rate center from which it originated. *Order* ¶ 28 (JA 12-13). "As a result, calls to the ported number will continue to be rated in the same fashion as they were prior to the port." *Id*. Under the established definitions, if the *number* does not leave the rate center, it has not been subject to

[17] "Location portability" appears to be a concept that need not have anything to do with a choice by a customer to change service providers, and thus need not necessarily be governed by the number portability requirement as defined in the Act. Location portability would come into play when a customer moves, say, from one house to another and wants to keep the same number. As the Commission initially concluded, "location portability will not foster the development of competition to the same extent as service provider portability." *First Portability Order*, 11 FCC Rcd at 8448 (¶ 185).

location porting. *Id*. It makes no difference that, after the port, a wireless user may change from one "location" to another as he or she moves about with a cellular telephone. That is the very nature of wireless telephone service.

Adopting USTA's view would seriously curtail the scope of LEC-CMRS portability and thus "deprive the majority of wireline consumers of the ability to port their number to a wireless carrier." *Id*. ¶ 27 (JA 12).[18] That outcome would seriously impair the role of intermodal number portability in fostering competition. And that explains why the Commission saw no inconsistency between requiring in the *First Portability Order* broad intermodal portability (which is critical to competition) and declining to require location portability (which is not).

The Commission correctly clarified that intermodal porting "does not, in and of itself, constitute location portability." *Id*. at ¶ 28 (JA 12). That declaration confirmed the agency's understanding of location portability. Even to the extent that the ruling may have expanded on the discussion in the *First Portability Order*, it was plainly a clarification of the Commission's

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[18] Intervenors and *amici* attempt to bolster the location portability argument with a discussion of the Seventh Circuit's recent decision, *In the Matter of Starnet, Inc.*, 355 F.3d 634 (7th Cir. 2004). Intervenors Br. at 12-13, *Amici* Br. at 8-9. In *Starnet*, the court held that the term "location" is ambiguous, and referred the matter to the Commission for clarification. 355 F.3d at 639. *Starnet*, does not provide any support for the argument that the Commission, in clarifying the implementation of intermodal portability, actually imposed location portability in the *Order*. Moreover, to the extent that intervenors and *amici* argue that the Commission violated the 1996 Act by allegedly requiring location portability (Int. Br. at 5, 6, 9-15; *Amici* Br. at 7-8), that claim is barred because USTA did *not* make this claim (*see* Pet. Br. at 23-24). *See Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). In support of their peculiar construction of location portability, the intervenors also assert that "the relevant location is not the physical location of the customer but the location of the serving switch or the POI." Int. Br. at 13. 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 desired new carrier provides service "at the same location" at which the customer currently receives service, then porting would be permitted under these circumstances.

original meaning. To accept USTA's contrary view would be to reject this Court's observation that "[a] rule does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." *American Mining Cong.*, 995 F.2d at 1112.[19]

(3) The Competitive Neutrality Claim

USTA's final notice and comment claim is that because CMRS carriers are able to port in LEC numbers in some cases where a LEC could not port in a CMRS number, the *Order* "abandons. . . the nondiscrimination requirements upheld in prior orders." Pet. Br. at 25. USTA also claims that the Commission's action was arbitrary. Pet. Br. at 25-26. But the FCC never had established a policy requiring the same treatment of all industry players with respect to portability.

A fundamental purpose of the 1996 Act – including the number portability provision – was to eliminate the longstanding LEC monopoly in the local exchange market and to open that market to effective competition. The Commission's actions implementing the 1996 Act have

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[19] USTA complains that "wireless carriers have no obligation to assign numbers [ported from wireline customers] based on the geographic location of their subscribers." As a result, it says, a wireless company may assign "a customer in Gaithersburg a telephone number associated with an exchange in Rockville – even though a call from D.C. to Gaithersburg is a toll call, while a call to Rockville is not." Pet. Br. at 23. This illustration of "location portability" said to be permitted by the *Order* is actually an example of service provider portability because it occurs only when the customer switches "his current wireline telephone number . . . to a wireless service provider." Pet. Br. at 24. Furthermore, this complaint has nothing to do with the distinction between location portability and service provider portability. The assignment of new numbers by a wireless carrier occurs with new customers of that wireless carrier – not with a customer porting his old wireline number to a new wireless carrier. Moreover, when a number is ported to a wireless carrier from a wireline carrier, that number is still assigned to the same rate center; under the Commission's rules, that does not qualify as location portability.

that overarching goal in mind. Most notably, the 1996 Act expressly imposed a statutory porting requirement only on LECs, and did not include CMRS carriers in the definition of a LEC. 47 U.S.C. §§ 251(b)(2); 153(26).[20] In that way, Congress itself recognized that differences between carriers can permit differential regulatory treatment. *See also* 47 U.S.C. § 332(c)(8) ("A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide *equal* access to common carriers for the provision of telephone toll services"). And the Commission itself imposed different timetables on LEC-LEC and LEC-CMRS porting. Thus, although the Commission has been conscious of the need to foster competition by fair means, fairness does not require that all carriers be treated the same without regard to their differences.

Wireless carriers and LECs are different in at least two fundamental ways that are pertinent here. First, their market positions are fundamentally dissimilar. LECs have local wireline market shares above 90 percent, whereas CMRS providers participate in the highly competitive wireless marketplace. Second, the services provided by LECs and CMRS carriers have an essential difference: the wireline phone is tied to a single physical location, whereas the wireless phone can travel at will. A regulatory approach that reflects those differences and explains any disparities is not "unfair" or "discriminatory;" it is rational. The Court will intervene only when the agency "improperly discriminate[s] between *similarly situated* phone services *without a rational basis*." *C.F. Communications v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997) (emphasis added).

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[20] The Commission's imposition of porting requirements on CMRS carriers relies upon its authority elsewhere in the Act. 47 U.S.C. §§ 151, 152, 154(i), 332. *See Forbearance Order*, 17 FCC Rcd at 14973 n.4.

The *Order* reflects those differences. It requires numbers to be ported from LECs to CMRS carriers whenever the wireless service area overlaps a rate center; yet it acknowledges the current technical and regulatory limitations of the incumbents' telephone system and thus requires porting in the other direction only where the CMRS customer lives within the rate center to which the wireless number is assigned. That outcome reflects the technological difference between the two types of providers. The Commission was unwilling to subordinate the prime statutory objective of fostering competition in the local market to a policy of complete equality of treatment. *Order* ¶ 27 (JA 12). In that way, the portability rule reflects the 1996 Act itself, which places many requirements on monopoly LECs that it does not place on other carriers. This was not, as USTA wrongly claims, an "abandon[ment], without hardly a backward glance, [of] nondiscrimination requirements," Pet. Br. at 25, but a carefully chosen, and fully explained, balancing of regulatory priorities.

LECs have ample opportunity to compete with wireless carriers. First, their product, at least for the time being, continues to have advantages over wireless service, including a higher quality of transmission and an absence of dropped calls. *See Order* ¶ 27 (JA 12). Second, in many cases, if a CMRS carrier lures away a LEC customer, portability works both ways and the LEC can try to regain that customer. The exception is when the customer subsequently moves out of the rate center. If the customer moves to an area in which the same LEC provides service, the LEC still has the opportunity to compete to provide wireline service once again at that new address. At this point, the vast majority of wireless customers still have wireline telephone service as well, with the result that wireless customers have relatively little incentive to port numbers to their wireline service. The ability of wireless carriers to compete in that regard will not develop until a significant number of customers have given up their landline phones. The

Commission properly undertook to consider whether to address the question of regulatory parity in a further proceeding, which it began by a Further Notice of Proposed Rulemaking in the *Order*. *See Order* ¶¶ 41-44 (JA 17-19). Furthermore, the thrust of the 1996 Act was to bring competition into the local exchange marketplace; the CMRS marketplace, by contrast, already was subject to substantial competition. At least in the beginning, the public policy in favor of competition mandates that the FCC focus on the monopoly market.

At bottom, USTA's challenge to the *Order* is an objection to intermodal portability itself. That basic requirement was imposed seven years ago, and the time for review of that decision has long since expired. USTA has not provided a credible argument that the *Order* altered the existing rule in a way that would have required a notice of proposed rulemaking under the APA. Nor has USTA shown that the *Order* is substantively unreasonable.

II. The Commission Was Not Required To Conduct A Regulatory Flexibility Analysis Because It Did Not Engage In Rulemaking

With respect to the issues clarified by the Commission in the *Order* – including the issues raised by USTA in this case – the Commission did not prepare a Regulatory Flexibility Analysis of the possible economic impact on small entities. USTA contends that because the *Order* allegedly established a new rule, the FCC was required to conduct a Regulatory Flexibility Analysis. Pet. Br. at 31-43. As petitioners acknowledge, however, the Regulatory Flexibility Act applies only when an agency engages in rulemaking. *See* Pet. Br. at 31; *see also* 5 U.S.C. §§ 603, 604. Because the Commission did not engage in rulemaking, as shown in our APA argument above, the Regulatory Flexibility Act does not apply.

III. The Interconnection Arguments of the Intervenors and *Amici* Are Not Properly Before This Court And, In Any Event, Are Without Merit

The intervenors[21] and *amici*[22] complain that the *Order* imposes new interconnection and transport obligations on rural telephone companies ("RTCs") without complying with the notice and comment procedures of the APA. *See* Int. Br. at 2, 3, 5-6, 15-22; *Amici* Br. at 2-4, 5-6, 9. USTA, however, did not present in its opening brief an APA challenge or an arbitrary and capricious claim based upon alleged new interconnection and transport obligations. *See also* Int. Br. at 6 ("this brief focuses on *additional* arguments in support of Petitioners' position that the *Intermodal Order* effected a substantive change in law . . . by fundamentally altering the interconnection obligations of RTCs in a manner inconsistent with prior law and the Act").

Although USTA mentions the "practical problems" – in particular alleged increased costs for small LECs – associated with the Commission's clarification of its intermodal portability rule, this discussion is presented in the context of USTA's Regulatory Flexibility Act claim. *See* Pet. Br. at 36-37. USTA did not argue that such costs violated the APA's notice and comment requirement, or that they were arbitrary and capricious. The intervenors – a number of whom tried but failed to file timely petitions for review of the *Order* – may not now advance arguments that were not presented by the petitioner. To hold otherwise would allow the intervenors improperly to enlarge the issues before the Court. *See Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues"). Accordingly, this Court should

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[21] The intervenors are Central Texas Telephone Cooperative Inc.; the Champaign Telephone Co.; Chariton Valley Telephone Corp.; Comanche County Telephone Co., Inc.; Leaco Rural Telephone Cooperative, Inc.; and Valley Telephone Cooperative, Inc.

[22] The *amici* are Hot Springs Telephone Co. and Ronan Telephone Co.

not consider any of the intervenors' interconnection arguments, *see* Int. Br. at 15-23, because "[a]n intervening party may join issue only on a matter that has been brought before the court by another party." *Illinois Bell Telephone Co.*, 911 F.2d at 786.

In any event, intervenors' interconnection arguments are unavailing. Essentially their claim is that the *Order* erroneously requires rural LECs "to transport calls outside of their service areas and networks to ported numbers and to treat such calls as local non-toll calls." Int. Br. at 5. They further claim that the Commission should have required such arrangements to be addressed through interconnection agreements. *Id.* Finally, the intervenors assert that the Commission made "[t]hese changes to substantive law" without notice and comment in violation of the APA. *Id.* at 6.[23]

First, the intervenors' complaint about their obligation to transport traffic is in fact a grievance with an obligation that is imposed by the Commission's long-standing interconnection rules – not by the *Order* clarifying intermodal portability. Under section 251(a) of the Act, every telecommunications carrier, including CMRS providers, has a duty to interconnect with other carriers either directly or indirectly. 47 U.S.C. § 251(a)(1). In the *Local Competition First Report and Order*, the Commission made clear that 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

[23] A number of the intervenors are petitioners in *Central Texas Telephone Cooperative, Inc., v. FCC*, No. 03-1405, which will be argued before the same panel that will hear argument in this case and on the same day. Many, if not all, of the intervenors' arguments in this case repeat arguments made by the rural LEC petitioners in *Central Texas Telephone Cooperative*. The Commission will address the intervenors' arguments here, but also requests that the Court incorporate by reference the arguments made by the Commission in its brief in *Central Texas Telephone Cooperative.*

history omitted). In rural areas, CMRS carriers typically interconnect indirectly with smaller LECs through the tandem switch of one of the regional Bell Operating Companies ("RBOCs").[24]

Rural LECs thus always have been required to deliver traffic to other carriers through direct or indirect interconnection – even when a wireless carrier's switch is not located in the rural LEC's rate center. The FCC's LEC/CMRS interconnection rules were upheld in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), and this Court has rejected efforts to attack those rules collaterally. *See Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001). It is too late in the day for the intervenors to challenge the Commission's long standing interconnection rules.

Second, the intervenors' complaint about the lack of a "compensation mechanism," *see* Int. Br. at 16, is unrelated to the clarifications of intermodal service provider portability in the *Order*. Instead, intervenors' grievance is with the long standing Commission's intercarrier compensation regime. Again, the time for challenging the Commission's existing intercarrier compensation rules has long passed.

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 for the origination and termination of long distance calls. By contrast, carrier compensation for the exchange of local traffic is determined according to the Commission's

[24] 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.

reciprocal compensation procedures under section 251 of the Act.[25] The Act also provides that, for "purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) . . . each carrier [shall recover the] 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." 47 U.S.C. § 252(d)(2)(A)(i).

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)[26] is subject to reciprocal compensation 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

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

[26] 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.

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 point of interconnection ("POI") selected by a competing telecommunications carrier.[27] At least two federal appellate courts have held that this rule applies in cases where an incumbent LEC delivers calls to a POI that is located outside of its customer's local calling area.[28]

Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this transport. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport. These obligations arose under the Commission's intercarrier compensation rules implementing the 1996 Act, and not under the *Order*. The intervenors' complaint is with the intercarrier compensation regime established by Congress and implemented by the FCC through rules issued in other orders. The *Order* in this case is not the cause of intervenor's claimed injury. That injury thus cannot be redressed by review of the *Order*. This shortcoming is fatal to their claim that the *Order* required rural LECs to transport calls outside their service areas without appropriate compensation. *See, e.g., Fulani v. Bradley*, 935 F.2d 1324, 1331 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992).

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[27] *See TSR Wireless v. US 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).

[28] *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).

Third, to the extent that the intervenors have asserted that the *Order* itself causes injury to rural carriers independent of injury that results from the Commission's preexisting interconnection and intercarrier compensation regimes, they have not established that any such injury is actual or imminent. Millions of telephone numbers have been ported, yet the petitioners have not identified any rural carrier that has actually had to incur increased and unrecoverable costs associated with transporting a call to a former customer that has ported its number to a wireless carrier. *Cf.* Int. Br. at 4. Accordingly, the intervenors' claimed injury is speculative, and the Court should not entertain their claims. *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Qwest v. FCC*, 240 F.3d 886, 893-95 (10th Cir. 2001) (dismissing challenge to Commission orders governing cost recovery of interim wireline number portability regime absent showing that carrier had actually ported any numbers).

In any event, the speculative injury claimed by intervenors is outweighed by the public interest benefits associated with the general requirement of intermodal number portability discussed above. The relief sought by intervenors – vacatur of the *Order*, *see* Int. Br. at 23 – is overbroad given the injury claimed and the merit of the general requirement. Waivers are available, moreover, to carriers that "can provide substantial, credible evidence that there are special circumstances that warrant departure from existing rules." *Order* ¶ 30 (JA 13-14).

Similarly, intervenors' claim that the Commission erred by not requiring interconnection agreements is unavailing given the explanation in the *Order* that: (1) interconnection agreements are unnecessary in light of the "minimal exchange of information" necessary to complete a port, *id*. at ¶ 34 (JA 15); *see also id*. at ¶ 37 (JA 16); (2) "interconnection agreements are not necessary to prevent unjust or unreasonable charges or practices by wireless carriers with respect to porting," *id*. at ¶ 35 (JA 15); and (3) interconnection agreements are not necessary for the

protection of consumers, and in fact, "[r]equiring interconnection agreements for the purpose of intermodal porting could undermine the benefits of LNP to consumers by preventing or delaying the implementation of intermodal porting." *Id*. at ¶ 36 (JA 15-16).

Contrary to intervenors' assertions, Congress did not include a requirement in the 1996 Act that number portability occur through interconnection agreements. Section 251(b)(2) separates the number portability obligation for LECs from the interconnection requirements set out in other provisions in section 251.[29] And the Commission resolved any ambiguity in these provisions by forbearing from any possible interconnection agreement requirement pursuant to its general forbearance authority in Section 10 of the 1996 Act. *See* 47 U.S.C. § 160. *Order* ¶¶ 35-37 (JA 15-16).

[29] In any event, the Commission required the CMRS-to-LEC aspect of intermodal portability on the basis of its authority in sections 1, 2, 4(i), and 332 – and none of those provisions mentions interconnection agreements.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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July 9, 2004

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

UNITED STATES TELECOM ASS'N, *ET AL.,*	)	
	)	
PETITIONERS,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	NOS. 03-1414; 03-1443
	)	
RESPONDENTS.	)	
	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 11540 words.

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