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

NO. 08-1071

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR REVIEW OF A FINAL REGULATORY FLEXIBILITY ANALYSIS OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties appearing before the agency are listed in petitioner's brief, as are all parties appearing before the Court.

B. Ruling Under Review

Final Regulatory Flexibility Analysis, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 F.C.C.R. 19531 (2007), 73 Fed. Reg. 9463-01 (FRFA) (JA).

C. Related cases

This matter is on remand from the Court's ruling in *United States Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005). The *Final Regulatory Flexibility Analysis* has not previously been subject to review by this Court or any other Court, and counsel is not aware of any other case, before this or any other court, that raises the same issues as those raised by NTCA's position. This case presents issues similar to those addressed by this Court in *Central Texas Telephone Co-Op, Inc. v. FCC*, 402 F.3d 205 (D.C. Cir. 2005).

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GLOSSARY

CMRS	Commercial Mobile Radio Service.
FRFA	Final Regulatory Flexibility Analysis. The analysis required by 5 U.S.C. § 604.
ILEC	Incumbent Local Exchange Carrier.
LATA	Local Access and Transport Area.
LEC	Local Exchange Carrier.
NTCA	National Telecommunications Cooperative Association.
RFA	Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*.

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

As an integral part of its effort to eliminate the monopoly held by incumbent local exchange carriers and introduce competition into the local telecommunications marketplace, Congress directed that each local exchange carrier has a "duty … to provide, to the extent technically feasible, number portability." 47 U.S.C. § 251(b)(2). Number portability benefits telephone customers by allowing them to retain their existing telephone numbers even when

they switch to new carriers. Without such a right, many customers would be unwilling to switch carriers, thus stunting the growth of competition. Congress wanted all consumers, including those living in rural areas, to enjoy the benefits of phone competition and thus did not exempt small and rural telephone companies from the duty to provide number portability.

In implementing the number portability requirement, the Federal Communications Commission has determined that all wireline telephone carriers must, upon request, be able to transfer numbers to wireless carriers. That requirement, which is known as "intermodal" number portability, is critical to promoting competition between wireline and wireless carriers. In an earlier case, the Court remanded the FCC order that required intermodal portability because the Commission did not perform the analysis required under the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. (RFA). In the order on review, the Commission performed the requisite analysis. The question presented here is whether the Commission's analysis complies with the requirements of the RFA.

JURISDICTION

The Court has jurisdiction pursuant to 5 U.S.C. § 611 to review agency compliance with section 604 of the RFA, which specifies the content of a Final Regulatory Flexibility Analysis.

STATUTES AND REGULATIONS

All pertinent materials are attached to petitioner's brief.

COUNTERSTATEMENT

For most of the last century, only one local exchange carrier (LEC) provided telephone service in any given market. In some areas, service was provided exclusively by AT&T or one of its operating companies; in many rural areas, service was provided solely by small and rural LECs, of which there are more than 1,000 scattered throughout the country. In 1996, Congress undertook a fundamental restructuring of the local market, mandating the introduction of competition for the first time. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

1. Local Number Portability.

One fundamental aspect of the transition to competitive markets is "number portability." With a focus on bringing the benefits of competition to individual consumers, Congress defined that term to mean "the ability of *users* of telecommunications services to retain, at the same location, existing telecommunications numbers … when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30) (emphasis added). "[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. 104-204 at 72 (1995); *accord CTIA v. FCC*, 330 F.3d 502, 513 (D.C. Cir. 2003). Congress accordingly imposed on "each" LEC, which includes small and rural carriers, a "duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2).[1]

Consistent with Section 251, the Commission has adopted broad porting requirements: "number portability must be provided … by all LECs to all telecommunications carriers, including commercial mobile radio services (CMRS) [*i.e.*, wireless] providers." *Telephone Number Portability*, 11 FCC Rcd 8352, 8355 (1996) (*First Portability Order*), *recon. denied in part and granted in part*, 12 FCC Rcd 7236 (1997); *see also id*. at 8431.[2] Transferring a number from a LEC to a CMRS carrier (or vice versa) is known as "intermodal" porting (wireline-to-wireline and CMRS-to-CMRS

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[1] Congress imposed many other requirements on incumbent LECs, including the duty to interconnect with other carriers, 47 U.S.C. § 251(a), and the duty to provide to competitive carriers nondiscriminatory access to unbundled network elements, 47 U.S.C. § 251(c)(3). Although Congress provided rural LECs with exceptions to some of the requirements, 47 U.S.C. § 251(f)(1), Congress did not exempt them from the requirement of number portability.

[2] FCC rules allow all carriers to pass through to their customers many of the costs of number portability. 47 C.F.R. § 52.33. In addition, most (if not all) small and rural LECs are "rate-of-return" carriers that establish rates that allow them to recover their costs and earn an 11.25% return, after taxes, on their investment. *See Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd 7507 (1990).

transfers are called "intramodal" porting). The Commission found that intermodal portability "will promote competition between CMRS and wireline service providers as CMRS providers offer comparable local exchange and fixed commercial mobile radio services." *First Portability Order*, 11 FCC Rcd at 8436. Indeed, at present nearly 12 percent of adults live in households with only wireless phones, up from 3.5 percent in 2003. *Annual Report and Analysis of Competitive Market Conditions With Respect To Commercial Mobile Services*, 23 FCC Rcd 2241, 2354 ¶292 (2008) (*CMRS Annual Report*).

2. The *Intermodal Order*.

In the *First Portability Order*, which was issued in 1996, the agency required LECs to offer "service provider" portability – the ability of a user to switch numbers between competing providers. *Id*. at 8355, 8443. It declined to mandate "location portability," which is the ability to retain a telephone number "when moving from one physical location to another," *ibid*., for example when a customer moving from Virginia to Florida seeks to keep the same wireline telephone number. The Commission made clear, however, that it "regard[ed] switching among wireline service providers and broadband CMRS providers, or among broadband CMRS providers, as

changing service providers," and not as changing location, even though wireless phones are inherently mobile. *Id*. at 8443.

In early 2003, as the deadline to implement number portability approached, CTIA, a wireless industry trade association, asked the Commission to clarify a number of issues regarding intermodal number portability. Petition For Declaratory Ruling Of The Cellular Telecommunications & Internet Association, filed Jan. 23, 2003 (available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513405655). Specifically, CTIA asked the Commission to clarify that a LEC must provide intermodal portability to a CMRS provider whose service area overlaps the LEC's service area, even if the CMRS provider has no point of interconnection in that LEC's service area. A point of interconnection is a physical place where the facilities of one carrier connect to the facilities of another and traffic can be passed between the two carriers.

After publishing CTIA's request in the Federal Register and soliciting public comment on it, the Commission granted it in the *Intermodal Order*, ruling that a LEC must port numbers to any CMRS provider whose service area overlaps the "rate center" to which the relevant number is assigned, without regard to whether the CMRS carrier operates interconnection

facilities within that rate center. *Telephone Number Portability*, 18 FCC Rcd 23697 (2003) (*Intermodal Order*) (JA). A rate center is a geographic area designated by a LEC and state regulators; calls made outside the rate center are toll calls.

When a LEC wireline customer places a call to a number that had been assigned to the LEC, but was subsequently ported to a CMRS carrier, the call must be transported from the LEC switch to the CMRS carrier's point of interconnection. If the point of interconnection facility is outside of the LEC's service area, the transport may result in additional costs. Transport costs incurred by rural LECs do not arise, however, only when calls are placed to ported numbers – a transport cost may also arise when a call is placed to a wireless number assigned initially to the rate center (*i.e.*, calls to that number from others in the rate center are local calls).[3] For example, if a rural LEC customer also gets a cell phone with a local number, calls from his neighbors to the cell phone are local calls but must be transported by the rural LEC to the wireless carrier's point of

[3] CMRS carriers' points of interconnection must be located in the LEC's local access and transport area (LATA), which is a geographic area that can be as large as a state or as small as a metropolitan area and that typically includes multiple rate centers. The *Intermodal Order* specified that the intermodal porting obligation "does not require or contemplate porting outside of LATA boundaries." *Id*. n.75 (JA). Petitioner is thus mistaken that a rural LEC may have to transport calls "thousands of miles" from its own service area. Br. 34.

interconnection. On the other side of the coin, a CMRS carrier may incur transport costs to complete a call placed by one of its customers to a rural LEC customer from either a ported number or a number initially assigned to the rate center.

In their comments, small and rural LECs, through NTCA, had asked the Commission to rule that LECs are not required to port numbers to CMRS carriers that have no interconnection facilities within a LEC's service area. They argued that the cost of transporting calls to distant points of interconnection "places a disproportionate burden on rural ILECs and their customers to transport originating calls." Joint Comments of the National Exchange Carrier Association and the National Telecommunications Cooperative Association, filed Feb. 26, 2003 at 6 (available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513582584). Since CMRS carriers often do not have interconnection facilities in the limited service areas of small and rural LECs, the result of NTCA's proposal would have been to exempt most of those LECs from the intermodal number porting requirement.

In the *Intermodal Order*, the Commission "recognized" NTCA's concerns. *Intermodal Order* ¶40 (JA). Because transport costs arise in many different contexts, however, all of which share common policy issues,

the agency declined to exempt small and rural carriers from the portability requirement. *See ibid.* The Commission deemed matters involving transport costs (also referred to as "rating and routing" issues) to fall "outside the scope of this order." *Ibid.* "[T]he requirements of [the number portability] rules do not vary depending on how calls to the number will be routed after the port occurs." *Ibid.*

Moreover, "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." *Intermodal Order* ¶40 (JA). For example, the question of which carrier must pay to transport a call to an interconnection point is no different for a ported number than it is for a number assigned to a rural LEC's rate center that is allocated to a CMRS carrier. In both cases, completion of the call requires that the LEC transport the call to the interconnection point (and the CMRS carrier must likewise transport calls placed by its customers to the rural LEC's customers). Although there are costs involved, they are attributable to underlying intercarrier compensation rules, not just to the fact that a number has been ported. The Commission accordingly deferred consideration of transport costs to other dockets, which are known collectively as the "intercarrier compensation" proceeding. *Ibid.*

The Commission also declined to require that a CMRS carrier have a point of interconnection in every rate center in which it wished to engage in porting numbers. Such a requirement, the Commission found, would "deprive the majority of wireline consumers of the ability to port their number to a wireless carrier." *Intermodal Order* ¶27 (JA).

3. Remand Of The *Intermodal Order* In *USTA v. FCC*.

Although the Commission sought comment before issuing the *Intermodal Order*, it had not published a formal notice of proposed rulemaking or conducted an analysis of the impact of the order on small businesses pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*. (RFA). The agency believed that the matters addressed in the order amounted only to clarifications of the existing rules, rendering the *Intermodal Order* merely an interpretative rule. Interpretative rules are subject to neither the notice-and-comment provisions of the APA nor the RFA, which requires a "final regulatory flexibility analysis" (FRFA) to be conducted along with the promulgation of final rules. *Intermodal Order* ¶26; *see* 5 U.S.C. §§ 553(b)(A) (NPRM requirement "does not apply to interpretative rules"), 604(a) (FRFA required only when NPRM is required).

NTCA and other parties sought review in this Court of the *Intermodal Order*. Their challenge was limited strictly to procedural grounds; they did

not "challenge the merits of the order." *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005) (*USTA*); *see also id*. at 39 ("petitioners do not challenge the substantive reasonableness of the rule"). Specifically, the petitioners claimed that the *Intermodal Order* violated the procedural requirements of the Administrative Procedure Act and the RFA because those statutes required the Commission to publish a notice of proposed rulemaking and a final regulatory flexibility analysis.

This Court held that the *Intermodal Order* was not an interpretative rule and thus was required to be the subject of notice and comment rulemaking procedures as well as RFA analyses. The Court found that although the *First Portability Order* "declare[d] that [the FCC] would not require 'location portability,'" the *Intermodal Order* "requires carriers to provide users with the ability to retain their existing numbers *regardless of* physical location." *USTA* at 35 (emphasis in original). "[T]he *Intermodal Order* effectively requires carriers to provide their subscribers with the ability to retain their numbers 'when moving from one physical location to another,' notwithstanding the *First [Portability] Order*'s declaration that such location portability would not be mandated." *USTA* at 35.

Nevertheless, the Court found that even though the Commission did not treat the *Intermodal* proceeding as a rulemaking matter subject to §553,

"it appears that the Commission satisfied" the requirements of the APA by publishing notice and seeking comment on a proposed rule. *USTA* at 40. The Court thus found that "if there was a procedural failure, it was harmless." *Id*. at 41.

The Court also held, however, that the FCC violated the RFA by failing to issue a FRFA. "Because we have concluded that the FCC was required by section 553 to publish [an NPRM], the RFA's requirements are applicable to the *Intermodal Order*." 400 F.3d at 42. The Court therefore "remand[ed] the *Intermodal Order* to the FCC for the Commission to prepare the required final regulatory flexibility analysis." *Id*. at 43. The Court stayed "future enforcement of the *Intermodal Order* only as applied to carriers that qualify as small entities," with the stay to "remain in effect until the FCC completes" a FRFA. *Ibid*.

4. The Commission's Regulatory Flexibility Analysis.

After receiving comments on an initial regulatory flexibility analysis, the Commission published a FRFA on February 21, 2008. *Final Regulatory Flexibility Analysis*, 22 FCC Rcd 19531, 19605 Appendix D (2007) (JA); 73 Fed. Reg. 9478. The FRFA analyzed each of the five specified RFA topics. 5 U.S.C. § 604(a). Pertinent here are the assessment of the

significant issues and the discussion of steps taken to minimize impacts consistent with the statutory objectives.

a. Analysis of Significant Issues.

The Commission addressed two significant issues that had been raised in the comments. First, the Commission considered whether transport costs justified an exemption or suspension of the intermodal portability requirement for small and rural LECs. The Commission explained that it declined to take that action because transport cost issues are common to "all numbers (without distinguishing between ported or non-ported numbers)," and are "outside the scope of this proceeding." FRFA ¶4 (JA). That determination followed from the Commission's earlier determination in Paragraph 40 of the *Intermodal Order* that transport costs did not justify an exception for small and rural carriers. Instead, the Commission decided to consider transport costs in the currently pending intercarrier compensation proceeding and not in the intermodal portability proceeding. "[T]he requirements of our [portability] rules do not vary depending on how calls to the number will be routed after the port occurs." *Intermodal Order* ¶40 (JA).

Second, the Commission declined to exempt small carriers from intermodal porting obligations due to implementation costs. The record

contained widely divergent estimates of such costs, ranging from as low as 11 cents per line per month to as high as $30 per line per month. FRFA nn.13, 14 (JA). The Commission declined to rely on the high-end estimates, given their "scant support" and their proponents' "failure to demonstrate that all the estimated costs are of the sort that the Commission would allow to be attributed to" portability implementation cost accounts. *Id*. ¶5 (JA). For example, some of the higher estimates included transport costs, which the Commission will consider elsewhere. *Ibid*.

Using data supplied by rural carriers themselves, wireless carriers had estimated that implementation costs appeared to be largely in the range of 11 to 67 cents per line per month. FRFA n.13 (JA). For example, a group of rural carriers in Missouri serving 88,500 lines estimated that it would cost its members $1 million collectively to implement intermodal portability. Comments of the Missouri Small Telephone Company Group, filed Aug. 19, 2005, at 2 (JA) (Missouri Comments). Given a five-year cost recovery

period,[4] the per-line, per-month cost amounted to 19 cents. Reply Comments of CTIA, filed Sept. 6, 2005, at 13 (JA). A group of Nebraska rural LECs similarly estimated implementation costs of $2.8 million for 92,000 lines, which amounts to about 51 cents per month. Comments of the Nebraska Rural Independent Companies, filed Aug. 19, 2005, at 4 (JA). The Commission found that costs in that range do not constitute "a significant economic burden on small entities" and thus did not "warrant an exemption" from the portability rule. FRFA ¶5 (JA). In addition, the costs may be even lower for LECs that have already implemented wireline-to-wireline porting capabilities. *Id*. n.13 (JA). The small and rural LECs thus had not "demonstrated such significant costs" sufficient to justify "a partial or blanket exemption" from the portability obligation. *Id*. ¶5 (JA).

b. Consideration Of Steps Taken To Minimize Impact.

The Commission considered and rejected two ways to minimize the impact of intermodal porting on small LECs. First, it considered whether to

[4] Commission rules allow incumbent LECs to recover many number portability implementation costs over a five-year period via a monthly surcharge. 47 C.F.R. § 52.33. Because almost all rural LECs are rate-of-return carriers, any local number portability costs that do not qualify for recovery through this surcharge can be added to their rate base, reflected in their tariffed rates. Costs thus will be passed through to both subscribers of basic telephone service (in the form of service rates) and interexchange carriers (in the form of access charges). The LECs themselves need not bear directly any costs of number portability.

limit small carriers' intermodal porting requirement to CMRS carriers that had a point of interconnection in a small LEC's service area. The Commission rejected that approach, pointing out that it had already rejected that very idea in the *Intermodal Order*. FRFA ¶14 (JA). There, the agency found that "limiting wireline-to-wireless porting to rate centers where a wireless carrier has a point of interconnection … would deprive the majority of wireline consumers of the ability to port their number to a wireless carrier." *Intermodal Order* ¶27 (JA).

Second, the Commission considered whether it should excuse small LECs from the portability requirement until it resolved issues regarding rating, routing and transport costs. Relying again on its previous consideration of that question in the *Intermodal Order*, the Commission determined that "such concerns [are] outside the scope of the number portability proceeding" and would be taken up in the pending intercarrier compensation proceedings. FRFA ¶14 (JA); *see id*. ¶4 (JA -). The Commission "recognize[d] that wireline carriers will still incur implementation and recurrent costs," but concluded that "reinstating, immediately, the wireline-to-wireless intermodal porting requirement … ensures that more consumers in small and rural communities will be able to

port and experience the competitive benefits" of number portability. *Id*. ¶16 (JA).

In sum, although rural LECs must incur some costs (that ultimately will be recovered from customers) to implement and provide number portability, "the benefits to the public of requiring … intermodal [portability] outweigh the economic burden imposed." FRFA ¶16 (JA); *see also* FRFA ¶13 (JA) (Commission's approach "best balances the impact of the costs … and the public interest benefits of those requirements."). A "partial or blanket exemption" from the requirement "would harm consumers in small and rural areas across the country by preventing them from being able to port," and by "discourag[ing] further growth of competition between wireless and wireline carriers in smaller markets." *Ibid*. Such competition has already "yielded important benefits for consumers, such as improved customer retention efforts by carriers." *Ibid*.

The Commission noted, however, that even though it would not relieve all small carriers of porting obligations, relief may be available in appropriate individual circumstances "where a carrier faces extraordinary costs." FRFA ¶15 (JA). One source of potential relief is the Commission's own waiver process, under which the agency can modify or

waive porting requirements where "special circumstances … warrant departure from" the rules. *Ibid.* Another source is 47 U.S.C. § 251(f)(2), which authorizes state public utility commissions to "suspen[d] or modif[y]" the number porting obligation for carriers with fewer than 2% of nationwide lines if doing so is necessary "to avoid imposing a requirement that is unduly economically burdensome." The record before the Commission indicated that § 251(f)(2) proceedings have been a "highly effective" way of securing individualized determinations. FRFA n.43 (JA). Those avenues of relief "effectively constitute steps that minimize the economic impact of LNP on small entities." *Id*. ¶15 (JA).

On February 28, 2008, NTCA sought a stay of the portability requirement on grounds nearly identical to those put forth in its brief. The Court denied the motion on March 18, 2008, and the portability requirement went into effect on March 24.

SUMMARY OF ARGUMENT

The RFA imposes on agencies an analytical obligation to consider the effects of regulatory programs on small businesses; it does not require any substantive outcome. Once an agency has considered the effects of its program, the RFA does not limit its discretion in implementing the

applicable regulatory statute. The FRFA adopted by the FCC on remand amply satisfied the statutory requirements of the Regulatory Flexibility Act.

The Commission determined the approximate costs of implementing intermodal number portability and concluded that the benefits to be gained by consumers in rural areas from the advent of competition outweighed the burdens placed on small and rural LECs. The cost determinations were reasonable, and the balancing of policies is the type of discretionary action left to agencies. The essence of NTCA's claim is that the Commission should have reached a different policy balance, but the argument fails because the FCC conducted the analysis that the RFA requires, and that statute demands no particular policy result.

The analytical steps that led to the Commission's policy balancing were reasonable. First, the Commission reasonably determined that implementation costs would not be excessive. The agency received a wide range of data, but it properly rejected the highest end of the range due to a lack of support and the inclusion of improper cost factors. The remaining data showed implementation costs in a range that did not justify a blanket exemption from an important regulatory program for small and rural carriers.

Second, the Commission reasonably exercised its discretion to defer consideration of transport costs to the intercarrier compensation proceeding. As an initial matter, NTCA may not challenge the Commission's treatment of transport costs here because that issue was determined as a substantive matter in the *Intermodal Order*, which NTCA did not challenge on its merits. Thus, such a challenge has been waived and is now time-barred. Even if NTCA may raise the claim, it fails. Transport costs arise in many circumstances, all of which share common policy issues. The Commission thus reasonably decided to consider them in a separate rulemaking. This Court affirmed a nearly identical decision in *Central Texas Telephone Co-Op, Inc. v. FCC*, 402 F.3d 205 (D.C. Cir. 2005), and its holding there should control the outcome here.

The Commission also properly considered and rejected the two alternatives suggested by commenters. The agency reasonably rejected the proposal to require CMRS carriers to establish a point of interconnection in every rural LEC service area as a pre-condition of intermodal number portability. It found that such an unrealistic requirement would, as a practical matter, deprive nearly all residents in rural markets of the benefits of intermodal competition. It likewise reasonably determined that portability must be available in small and rural markets immediately and

thus rejected a stay of the intermodal portability requirement pending resolution of the transport cost issues. In order to fulfill Congress's policy of introducing competition into all markets, including small and rural ones, the Commission found that portability must be available immediately.

ARGUMENT

I. STANDARD OF REVIEW.

This case presents a challenge only to the Commission's Final Regulatory Flexibility Analysis; NTCA does not (nor at this point could it) challenge the merits of the underlying *Intermodal Order*. To our knowledge, no court of appeals has directly addressed the standard of review of a challenge only to the sufficiency of a FRFA and not the substance of an agency order. But the RFA is a "[p]urely procedural" statute that "requires nothing more than that the agency file a FRFA demonstrating a 'reasonable, good-faith effort to carry out [RFA's] mandate.'" *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001), quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000); *see U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1011 (D.C. Cir. 2002) (upholding FRFA "[b]ecause the [agency's] analysis was reasonable"). The RFA "do[es] not alter in any manner standards otherwise applicable by law to agency action," 5 U.S.C. 606, and under the highly deferential APA standard the Court "presumes the

validity of the agency's order," and "will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

II. THE FCC MADE A REASONABLE, GOOD FAITH EFFORT TO COMPLY WITH THE RFA.

The Regulatory Flexibility Act was enacted "to improve Federal rulemaking by creating *procedures* to analyze the availability of more flexible approaches for small entities." Pub. L. 96-354 (1980) (preamble) (emphasis added). In keeping with its focus on procedure and analysis, the RFA "creates procedural obligations to assure that the special concerns of small entities are given attention in the comment and analysis process when the agency undertakes rule-makings that affect small entities." *Little Bay Lobster Co., Inc. v. Evans*, 352 F.3d 462, 470 (1st Cir. 2003). The FCC fulfilled its obligations here. In compliance with both this Court's mandate and the RFA's important analytical objectives, the FCC published an initial regulatory flexibility analysis, received and considered comments, and published a FRFA that included each of the elements specified in 5 U.S.C. § 604(a).

The RFA does not, however, "command an agency to take specific substantive measures, but, rather, only to give explicit *consideration* to less

onerous options." *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997) (emphasis added). Nor should the RFA "be construed to undermine other legislatively mandated goals." *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). By providing "[t]he analyses required by [the] RFA," the FCC met the statute's "essentially procedural hurdles." *Ibid*. At that point, the agency was "free to regulate as it sees fit," *ibid*., consistent with the public interest.

The Commission determined that the benefits to the public of the number portability requirements at issue would outweigh the burdens imposed on small entities by the *Intermodal Order* and therefore that no modifications of that order were necessary or appropriate. The Commission's FRFA explaining that conclusion easily met the RFA's requirements in this case.

A. The Commission Reasonably Assessed Implementation Costs.

The Commission reasonably found that implementation costs would not impose an undue burden on small and rural LECs. The agency conscientiously assessed the wide range of estimates of implementation costs and reasonably decided to place credence on the lower end of the range, which was about eleven to seventy cents per line per month. FRFA

¶5 & nn.13, 14 (JA ,). In light of that finding, the Commission reasonably determined that rural carriers had failed to "demonstrat[e] such significant costs" sufficient to exempt every small carrier across the country from a congressionally mandated program. FRFA ¶5 (JA).

This Court has recognized that when presented with a range of high and low estimates, an agency may "reasonably select a figure somewhere between that range and choose a number at the low end of the range." *United Parcel Service, Inc. v. U.S. Postal Service*, 184 F.3d 827, 839 (D.C. Cir. 1999); *cf. In re Core Communications*, 455 F.3d 267, 279 (D.C. Cir. 2006) (the Court "will not 'second-guess' an agency's economic analysis"). Here, the FCC had even greater leeway than usual, because it needed to determine only a general range of implementation costs and did not need to choose a particular figure, such as a reimbursement rate, with specific regulatory consequences.

The FCC properly exercised such discretion here. Several commenters provided estimates of implementation costs ranging from as low as eleven cents per line per month, *see* Missouri Comments at 3 (JA), to as high as thirteen dollars per line per month, *see* Comments of the Montana Small Rural Independents, filed Aug. 19, 2005, at Exhibit 1 (JA) (Montana Comments). *See also* Comments of the Nebraska Rural Independent

Companies, filed Aug. 19, 2005 at 4 (estimated 64 cents to $12.23 per line per month) (JA); Comments of Montana Independent Telecommunications Systems, filed Aug. 19, 2005 at 10 (43 cents to $13 per line per month) (JA). As CTIA pointed out, the Missouri LECs' data showed costs averaging 19 cents per line ($1 million divided by 88 thousand lines over five years). Missouri Comments at 2-3 (JA -); CTIA Reply Comments at 13 (JA).

The Commission explained that it rejected the higher end numbers because of their "scant support." FRFA ¶5 (JA). That determination was reasonable. Most of the data were accompanied by little or no explanation of how they were determined – the sources, methodologies, or formulas by which they were derived. Because the rural LECs bore the burden of providing reliable data in order to justify an exemption from the porting obligation (and had every incentive to maximize their estimates), the Commission was entitled to reject the highest end figures. *Cf. Federal Express Corp. v. Department of Transp.*, 434 F.3d 597, 603 (D.C. Cir. 2006) (agency is "not obliged to accept [a party's] assertions at face value").

The Commission also rejected the high-end estimates because several of them appeared to include transport costs, which the Commission had determined fell outside the scope of this proceeding. *See* Montana Comments Ex. 1 (JA) (transport costs account for 96% of recurrent costs

in estimate of $13.48 per line per month). We show at pages 29-34 below that the Commission properly excluded consideration of transport costs from its RFA analysis. Given that decision, the Commission properly rejected reliance on estimates that included such costs. That left costs in the range of about eleven to seventy cents per line per month, which the Commission reasonably held did not impose an undue burden. FRFA ¶5 (JA -).[5]

NTCA does not seriously challenge the Commission's analysis of implementation costs. While it claims that the FCC failed to "analyze this [implementation cost] data at all," Br. 26, that contention is plainly wrong. *See* FRFA ¶5 & nn.13-14 (JA). As shown above, the Commission considered the LECs' submissions and those of the wireless carriers, and it reached a reasonable assessment of the likely costs. NTCA also claims that the Commission incorrectly relied on the wireless carriers' assessment of the LEC data, Br. 27, but it identifies no specific error in the wireless carriers' approach. In fact, the wireless carriers simply either averaged the figures provided by the LECs themselves (in the case of the Missouri data), *see* CTIA Reply Comments at 13 (JA), or pointed out that costs could be as

[5] And in any event, as explained in note 4, *supra*, the implementation costs can be passed through to both customers and other carriers; the LEC itself ultimately need not bear any of the costs.

low as the lowest estimates provided, *see* Reply Comments of Verizon Wireless, filed Sept. 6, 2005, at 2 (JA).

NTCA also complains that the FRFA's analysis of implementation costs is unreasonable because it fails to "explai[n] what the FCC considers a significant economic burden." Br. 26-27. The argument amounts to a claim that the agency was required to specify the precise point at which it would deem implementation costs to outweigh the benefits of intermodal portability. Such a claim fails because the RFA contains no requirement for such an exacting analysis. To the contrary, the RFA expressly permits an RFA analysis to contain "either a quantifiable or numerical" analysis or "more general descriptive statements if quantification is not practicable." 5 U.S.C. § 607; *see Alenco Communications*, 201 F.3d at 625 ("the RFA plainly does not require economic analysis;" indeed, "[n]owhere does it require … cost-benefit analysis or economic modeling.").

The expected range of costs – about eleven to seventy cents per line per month – does not amount to a "significant economic impact," 5 U.S.C. § 604(a)(5), under any approach. As a result, nothing in the RFA required the Commission to engage in the purely hypothetical exercise of determining what costs would constitute a significant economic impact. In sum, the Commission's analysis of implementation costs and its determination that

those costs did not justify a blanket exemption from the portability requirement for rural carriers were reasonable and made in good faith.

B. NTCA May Not Challenge The Deferral Of Consideration Of Transport Costs, Which Was Reasonable In Any Event.

NTCA attempts to challenge the Commission's decision to defer consideration of transport costs to the intercarrier compensation proceeding. Br. 24, 27. NTCA may not at this point challenge that determination, which was made in the prior *Intermodal Order* and therefore is not part of this case. If the Court decides otherwise, however, the determination was reasonable.

1. NTCA May Not Challenge The Commission's Decision To Defer Consideration Of Transport Costs.

The Commission decided as a substantive matter in the *Intermodal Order* that transport costs transcend number portability and are common to all numbers, ported or not, and thus should be considered in the separate, currently pending intercarrier compensation rulemaking proceeding. *Intermodal Order* ¶40 (JA). Along with that determination, the Commission decided in the *Intermodal Order* – again, as a substantive matter –that it would not excuse small and rural LECs from the portability obligation pending the outcome of the intercarrier compensation rulemaking.

Ibid. The FRFA merely followed that prior determination; it did not revisit it. FRFA ¶4 (JA).

In the *USTA* litigation, NTCA did not challenge that decision on its merits; instead, it opted to challenge only the procedures the Commission followed in reaching that determination (and others). *See USTA*, 400 F.3d at 34, 39. To allow NTCA to challenge at this point a substantive merits determination in the guise of a challenge to the FRFA would give it a second bite at the apple long after the time to seek review of the *Intermodal Order* itself has passed. *See CTIA*, 330 F.3d at 508-509 (dismissing as untimely substantive challenge to FCC's imposition of wireless number portability). The Court therefore should not entertain NTCA's untimely claim.

2. The FCC's Decision To Defer Consideration Of Transport Costs Was Reasonable.

In any event, the Commission reasonably determined that transport costs are best considered in the intercarrier compensation proceeding, in which the agency will evaluate the matter "in the context of all numbers (without distinguishing between ported or non-ported numbers)." FRFA ¶4 (JA). The Commission has discretion "to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice." *United States*

Telephone Ass'n v. FCC, 359 F.3d 554, 558 (D.C. Cir. 2004); *accord National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207, 1210 (D.C. Cir. 1984) (agencies need not address all problems "in one fell swoop" but may engage in "incremental rulemaking" and "defer resolution of issues raised in a rulemaking even when those issues are 'related' to the main ones being considered"), citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("[R]eform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.").

The Commission appropriately exercised its discretion here. Transport costs arise in a wide variety of circumstances – essentially every time a call must travel from one carrier's facilities to another's. The policy issues involved are common to all those circumstances, and those issues are being addressed by the Commission in a pending proceeding. *Intermodal Order* ¶40 (JA). More specific to the number portability context, payment and cost issues are the same for a call placed to a ported number and one placed to a number assigned to the same rate center but allocated in the first instance to a CMRS carrier.

To illustrate the point, imagine customers A and B, both of whom are customers of a rural LEC. Calls from A to B, and vice versa, are local calls that pass only through the LEC's switch. If customer B subsequently ports

his telephone number to a CMRS carrier, a call from A to B must be transported to the wireless carrier's interconnection point, which may be outside the LEC service area, in order to be completed.[6] A call from B to A likewise must be transported from the CMRS facilities to the rural LEC's facilities for completion. On the other hand, if, instead of porting his number, customer B subscribes to wireless service in addition to his wireline service (or chooses to go wireless only without porting his number), is given a telephone number that is assigned to the rural LEC's service area, and the wireless carrier's interconnection point is outside the LEC service area, then precisely the same transport and cost situations arise.

In all cases, completion of a call requires that one carrier transport it to the facilities of the other. Although there may be costs involved, they are not attributable solely to the fact that a number has been ported, but are inherent in the nature of interconnection between carriers. Moreover, all of the above examples raise issues common not only with each other but also with many other call transport situations. The Commission therefore reasonably concluded that it should address the issue comprehensively, and

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[6] Typically, such transport is accomplished through the facilities of a Regional Bell Operating Company, which interconnects with both the rural LEC and the CMRS carrier; it is highly unlikely that a rural LEC would have to construct new facilities to transport calls to ported numbers.

not on a piecemeal basis. As it explained, "the requirements of [the number portability] rules do not vary depending on how calls to the number will be routed after the port occurs," *Intermodal Order* ¶40, and matters involving transport costs therefore fell "outside the scope of this order."[7] *Ibid*.

This Court has already determined that those same conclusions in a closely analogous situation were reasonable. *Central Texas*, 402 F.3d 205, involved a challenge to the FCC's rule requiring portability of numbers between wireless carriers. In that case – decided on the same day as *USTA* by the same panel – this Court affirmed in virtually identical circumstances the Commission's decisions to defer consideration of transport costs to the intercarrier compensation proceeding and its refusal to grant small and rural carriers a blanket exemption from a number portability rule in the meantime. In *Central Texas*, rural carriers challenged the merits of the FCC's determination and posed the same argument NTCA makes here – that the Commission was required to consider whether increases in transport costs caused by the CMRS-to-CMRS portability rule justified a blanket exemption

[7] The issue of transport costs also includes the "technical feasibility" and "cost of interconnection" components referred to by NTCA. Br. 24. As the discussion herein makes clear, NTCA is wrong when it argues that the FRFA "does not include any reference" to such costs; the FCC explicitly considered them and determined to defer the matter to a different proceeding. FRFA ¶¶4, 14 (JA - ,).

for rural carriers. The Court held that the Commission's deferral of transport costs was reasonable. 402 F.3d at 215.

That holding applies foursquare here; indeed, although *Central Texas* involved **intra**modal portability, the Court's reasoning was drawn largely from the explanation for deferring consideration of transport costs provided by the Commission in denying a request to stay the ***Inter****modal Order*. 402 F.3d at 215-216, citing *Telephone Number Portability – United States Telecom Ass'n and CenturyTel of Colorado, Inc., Joint Petition for Stay Pending Judicial Review*, 18 FCC Rcd. 24664, 24666 ¶9 (Nov. 20, 2003).

NTCA has failed entirely to confront the controlling holding of *Central Texas*, and has not even attempted to show why the outcome should be different here. Having properly taken the issue of transport costs off the table as a substantive matter in the *Intermodal Order*, the Commission reasonably declined to consider that issue as a procedural matter in the FRFA.

Moreover, the record before the Commission indicated continuing uncertainty whether transport costs are substantial. The Iowa Utilities Board, the state regulator in a geographic area that includes numerous small and rural LECs, informed the Commission that transport is not "a significant issue in Iowa … because the [rural LECs] and wireless companies entered

into interconnection agreements for the delivery and termination of telecommunications traffic that originated on the other party's network." Comments of the Iowa Utilities Board, filed Aug. 19, 2005, at 5 (JA). Those comments cast doubt on the substantiality of transport costs and disprove NTCA's claim, Br. 38, that rural LECs have no ability to negotiate interconnection agreements.

In fact, NTCA's own argument supports the Iowa Utilities Board's view that transport costs may not be significant. NTCA claims that very few rural LEC customers want to port their numbers to wireless carriers and that there is "scarce demand for intermodal LNP … in particular in rural areas." Br. 24. But to the extent NTCA is correct, small and rural LECs will face little or no transport costs: if few customers port their numbers, transport costs resulting from calls to ported numbers will be insignificant.

If petitioners are wrong about the demand for intermodal portability in rural areas, however,[8] and individual carriers face unusually high transport costs, the Commission recognized that its own waiver procedures are available, and it also expressly authorized state regulatory bodies to take such costs into account in considering case-by-case waiver requests pursuant

[8] The Commission found that predictions of a lack of demand were not correct. *See* pp 37-38, *infra*.

to 47 U.S.C. § 251(f)(2). FRFA n.10 ("Our decision here does not prejudge the ability of state commissions to consider rating and routing issues or transport costs …."). Thus, although the Commission reasonably declined to consider transport costs in determining whether to grant an industry-wide exemption, it sensibly allowed state regulators to take such costs (if proven) into account on a case-by-case basis.

NTCA has mistakenly relied on *In Re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008), in support of its claim. Br. 36. There, the Court granted a writ of mandamus on the basis of its finding that the Commission had taken an inordinate amount of time to supply a rationale for interim rules that had been remanded for the Commission to supply a sufficient legal justification. The Court had found in an earlier case that the Commission had not provided a sufficient explanation of its statutory authority to promulgate the interim rules, *see* 531 F.3d at 853, but it declined to vacate the rule on the belief that the Commission could supply an alternative rationale that did not rest on an erroneous statutory interpretation.

Core has no bearing on whether the Commission was required to take transport costs into account in the FRFA at issue here. To be sure, the intercarrier compensation proceeding has been pending before the agency for several years. If NTCA believes it is prejudiced by that delay, its remedy

would be to seek mandamus in that proceeding, not to force the Commission to decide intercarrier compensation issues as part of its FRFA on number portability. Furthermore, unlike the petitioner in *Core*, NTCA is not required to operate under rules as to which the Court has found the Commission failed to provide a sufficient rationale. To the contrary, NTCA chose not to challenge the intermodal portability rules on their merits, and on remand the FCC has provided the required regulatory flexibility analysis explaining its consideration of the interests of small entities.

C. The Commission Engaged In A Reasonable Balancing Of Applicable Policies.

The Commission properly weighed the relatively small expected costs of intermodal portability against the benefits of increased competition in rural markets. It "recognize[d] that wireline carriers will still incur implementation and recurrent costs," but "conclude[d] that the benefits to the public of requiring … intermodal [portability] outweigh the economic burden imposed on these carriers." FRFA ¶16 (JA). That analysis involved a reasonable policy balance that fulfilled the agency's responsibilities under the RFA. The RFA requires that an agency consider costs imposed on small businesses, but the statute leaves the balancing of costs and benefits entirely to the agency and "should not be construed to

undermine other legislatively mandated goals," such as Congress's policy of bringing competition to previously monopolized local telephone markets. *Associated Fisheries*, 127 F.3d at 114; *see* 5 U.S.C. § 604(a)(5) (agency may fulfill "the stated objectives of applicable statutes"). Once it had considered the costs involved, the FCC was "free to regulate as it s[aw] fit." *Environmental Defense Center*, 344 F.3d at 879. The Commission's conclusion was well within its statutory discretion to balance various policies. *Cf. United Automobile, Aerospace And Agricultural Implement Workers Of America v. Pendergrass*, 878 F.2d 389, 394 (D.C. Cir. 1989) (discussing the "policy judgment that comes in characterizing a given risk estimate as 'significant.'").

NTCA charges that the Commission's policy balance was unreasonable in light of comments in the record that small and rural LECs face no demand for intermodal portability. Br. 24-26. That evidence, NTCA argues, demonstrates that requiring small and rural LECs to provide portability will not further the goal of competition. The Commission reasonably found otherwise for several reasons.

First, the Commission "reject[ed] commenters' arguments that demand for intermodal porting among rural customers is low and does not justify" the costs involved and instead reached a reasonable predictive

judgment that telephone users in rural areas would wish to avail themselves of new competitive opportunities. FRFA n.46 (JA). The fundamental premise of the number portability requirement (along with the rest of the LEC provisions of the 1996 Telecommunications Act) is that competition is possible in, and will bring consumer benefits to, *all* markets. Although Congress exempted some small and rural LECs from *some* of the requirements of section 251, it did not grant them a blanket exemption from the requirement of number portability. *See* n.1, *supra*.[9] The Commission was accordingly justified in predicting, as Congress effectively did, that competition *could* develop in rural areas and that CMRS carriers would be an important source of that competition. "That is a predictive judgment that the FCC is entitled to make and to which [the Court will] defer." *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 44 (D.C. Cir. 2006); *accord AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987); *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006). Indeed, between December 2003 and December 2006, more than 2 million people ported their numbers from a wireline carrier to a wireless carrier. *CMRS Annual Report*, 23 FCC Rcd at

[9] NTCA claims that the Commission has recognized that different rules must apply to rural LECs than to large carriers. Br. 39. But the agency's recognition that *in some instances* different approaches may be appropriate for small and large LECs does not amount to a requirement that the approaches *must* be different in *all circumstances*.

2320 ¶191. There is no compelling reason why inhabitants of rural areas should be denied the benefits of competition.

Second, the Commission's balancing of the costs and benefits of local number portability is particularly reasonable because small and rural LECs "only are required to provide [portability] upon receipt of a specific request … by another carrier." FRFA ¶6 (JA). If the commenting LECs are correct that there will be no demand for portability in rural areas, rural LECs will incur no costs. There accordingly will be no harm to rural LECs if the Commission's prediction turns out to be mistaken. But if NTCA's prediction is wrong, a blanket exemption for rural LECs would undermine the statutory policy favoring competition, and telephone users in rural areas would remain unable to reap the benefits of that policy. LECs that are accustomed to holding a monopoly on local service understandably do not want to face even the possibility of competition, but Congress and the Commission have decided the greater public interest favors the introduction of competitors even into small markets.

NTCA nevertheless complains that the FCC improperly used a "one size fits all" regulatory approach that failed to take account of differences between rural LECs and large LECs. Br. 39, 41-42. Such a claim boils down to a policy disagreement: NTCA believes that the Commission should

have struck a different balance between the costs imposed and the benefits to be gained by portability in rural markets. That argument confuses the good faith *analysis* required by the RFA with the subsequent *outcome* that the statute leaves to the agency. NTCA has identified no genuine error in the analysis, but complains only of the outcome, which is not a proper ground for reversal.

D. The Commission Reasonably Explained Why It Rejected Alternatives.

NTCA contends that the FCC violated the RFA "because it failed to describe any steps it took to minimize small company burdens." Br. 28. The argument appears to be that 5 U.S.C. § 604(a)(5), which requires the FRFA to include "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes," requires the agency to take *some* step to reduce burdens on small businesses in all instances. That claim fails because it misreads both the Commission's order and the statute.

As an initial matter, that claim fails because the Commission found that "the cost of wireline-to-wireless intermodal LNP does *not* impose a significant economic burden on small entities." FRFA ¶5 (emphasis added). Consequently, there was no "significant economic impact" to be minimized.

Furthermore, as a matter of statutory interpretation, section 604(a)(5) is a reporting requirement that requires only a "description" of the "steps," if any, that were taken to minimize the significant economic impact on small entities. It does not affirmatively require the agency to take any such steps: the RFA "does not command an agency to take specific substantive measures, but, rather, only to give explicit consideration to less onerous options." *Associated Fisheries of Maine, Inc.*, 127 F.3d at 114. Once the Commission fulfills that "purely procedural" duty of consideration, *U.S. Cellular*, 254 F.3d at 88, it "remains free to regulate as it sees fit," *Environmental Defense Ctr.*, 344 F.3d at 879. Here, the Commission fulfilled its duty of consideration.

First, the Commission assessed requests that it limit the intermodal portability requirement to CMRS carriers that maintain a point of interconnection in the rate center of the rural LEC. The Commission had considered the very same request in the course of the *Intermodal Order* itself, holding there that "limiting wireline-to-wireless porting to rate centers where a wireless carrier has a point of interconnection … would deprive the majority of [rural] wireline consumers of the ability to port their number to a wireless carrier." *Intermodal Order* ¶27 (JA). In the RFA analysis, the

Commission saw no good reason to depart from that conclusion. FRFA ¶14 (JA).

Having declined to challenge that determination on its merits in the *USTA* litigation, NTCA may not do so now. *See* pp. 28-29, *supra*. But NTCA has failed in any event to suggest any reason why the Commission's reasoning is wrong. It was entirely reasonable for the Commission to conclude that Congress's intent to introduce competition into all markets would be undermined by the proposal. As a matter of common sense, CMRS carriers are unlikely to build interconnection facilities in more than 1000 rural rate centers in order to compete for the relatively small handful of potential customers in each rural rate center.

Second, the Commission considered requests that it stay the intermodal portability requirement until it had resolved the intercarrier compensation order in which it plans to consider transport costs. FRFA ¶¶4, 16 (JA ,). Such a stay would undermine the congressional interest in competition, the Commission found, because it would "discourage further growth of competition between wireless and wireline carriers in smaller markets across the country." FRFA ¶16 (JA). Portability "is important for promoting competition between the wireless and wireline industries and generating innovative service offerings and lower prices for consumers."

Ibid. Portability therefore must be made available "immediately" in order to "ensur[e] that more consumers in small and rural communities will be able to port and experience the competitive benefits" of number portability. *Ibid.*

That determination echoed the Commission's identical rejections of a stay due to transport costs in both the *Intermodal Order* itself, *Intermodal Order* n.75 (JA), and in the agency's order directly rejecting NTCA's request to stay that order, *United States Telecom et al.*, 18 FCC Rcd 24664. This Court also denied both a stay of the intermodal portability rule and a motion to expedite that were also based in part on transport costs. Orders of Dec. 4, 2003, and January 23, 2004, in Case No. 03-1414. The FCC has held consistently throughout this proceeding that transport costs do not justify a stay, and NTCA has not shown that the analysis or outcome should be any different in the FRFA context than it was on the merits.

The FCC was cognizant, however, that individual carriers may face atypically high costs and it recognized two avenues of relief for such carriers. First, the Commission's own waiver process is available on an appropriate showing. FRFA ¶15 (JA). Second, Congress provided that state public utility commissions may "suspen[d] or modif[y]" the number porting obligation for certain small carriers if doing so is necessary "to avoid imposing a requirement that is unduly economically burdensome." 47

U.S.C. § 251(f)(2). In June 2004, the FCC's then-Chairman wrote to the President of the National Association of Regulatory Utility Commissioners urging that in § 251(f)(2) waiver proceedings state commissions "consider the burdens" that portability places on small LECs. *See www.sba.gov/advo/laws/comments/naruc04_0618.pdf.* Indeed, the record before the Commission indicated that § 251(f)(2) proceedings have been a "highly effective" way of securing individualized determinations. FRFA n.43 (JA). Petitioner objects to those avenues of relief as insufficient, Br. 28-30, but it contests neither the availability nor the efficacy of the waiver processes. There was no error in the Commission's determination that, in light of several pre-existing avenues of potential relief and the benefits to consumers of number portability, a further exemption for small carriers would be inconsistent with the objectives of the number portability requirements of the Communications Act.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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October 2, 2008

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

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION,	)	
PETITIONER,	)	
v.	)	
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA	)	NO. 08-1071
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 9448 words.

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