ORAL ARGUMENT SCHEDULED FOR APRIL 15, 2003

BRIEF FOR RESPONDENTS

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

NO. 02-1264

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION
AND CELLCO PARTNERSHIP D/B/A VERIZONWIRELESS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

1996 Act	Telecommunications Act of 1996
CMRS	Commercial Mobile Radio Services
CTIA	Cellular Telecommunications & Internet Association
LEC	Local Exchange Carrier
LNP	Local Number Portability
PCS	Personal Communications Service
SMR	Special Mobile Radio Service
The Act	Communications Act of 1934
Verizon Wireless	Cellco Partnership d/b/a Verizon Wireless

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STATEMENT OF JURISDICTION

The Federal Communications Commission released the order in this case, *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability*, 17 FCC Rcd 14972 (2002) (hereinafter "*Order*") (JA ___), on July 26, 2002. Petitioners Cellular Telecommunications & Internet Association ("CTIA") and Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") filed a timely petition for review on August 19, 2002. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

ISSUES PRESENTED FOR REVIEW

In 1996, the Commission issued an order requiring wireless communications carriers to offer number portability by 1999. At the request of the industry, the Commission extended the deadline several times until November 2002. In the Order under review, the Commission again extended the deadline – to November 2003 – but denied a request for permanent forbearance from applying the number portability requirement to wireless carriers. The Commission explained that the number portability requirement is necessary to protect consumers and that forbearance from applying it would not be consistent with the public interest in promoting competition. *See* 47 U.S.C. § 160(a).

The questions presented by the petition for review are:

1. Was the Commission's decision to deny petitioners' request for permanent forbearance from the wireless LNP requirement reasonable?

2. Did the Commission have the authority to adopt wireless LNP in the first place?

STATUTES AND REGULATIONS

Pertinent statutes and regulations that are not already included in petitioners' brief are attached at Addendum A to this brief.

COUNTERSTATEMENT

Telephone numbers are essential to the routing of telephone calls over the public switched network in the United States. In the modern era, a subscriber is likely to use wireline service or wireless service or both. For basic wireline phone service, telephone numbers historically have identified a specific line operated in a specific geographic area by a specific local telephone company. For wireless service, telephone numbers typically have been associated with specific handsets served by specific wireless providers. With either service,

when a customer changes the company from which it takes service, the customer ordinarily must obtain a new telephone number from its new service provider. The customer's inability to retain his or her telephone number when he or she changes companies – that is, the absence of "number portability"[1] – is a disincentive for the customer to change.

As the Commission explained in 1995:

> [The] lack of number "portability" [] appears to deter customers who wish to select new and different services or who wish to choose among competing service providers. Changing telephone numbers can be more than inconvenient. Businesses that change telephone numbers, for example, incur administrative and marketing costs. Those costs, and the potential loss of customers, may inhibit businesses from selecting new services or new providers.

Telephone Number Portability, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12351 (para. 2) (1995) ("*Portability NPRM"*); *see also id*. at 12352 (para. 4) ("Number portability appears to offer substantial public interest benefits because it provides consumers personal mobility and flexibility in the way they use their telecommunications services, and because it fosters competition among service providers.").

A. Background

Number portability has been a subject of the FCC's attention since before the enactment of the Telecommunications Act of 1996.[2] The Commission issued a Notice of Proposed Rulemaking in 1995 seeking "comment on whether the Commission should promulgate rules to ensure the development of number portability, and if so, what rules the Commission should

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[1] "Number portability" is defined in the Telecommunications Act of 1996 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." 47 U.S.C. § 153(30). The number portability regulation at issue in this case is 47 C.F.R. § 52.31.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amends the Communications Act of 1934, 47 U.S.C. §§ 151, *et. seq.*

promulgate." *Portability NPRM*, 10 FCC Rcd at 12353 (para. 7). The Commission tentatively concluded in the NPRM that reliance upon market forces alone would not bring about number portability (because entrenched telephone companies would have no reason to reduce obstacles to entry), *id*. at 12361 (para. 28); that uniform number portability would promote competition among providers of local and interstate access services, *id*. at 12361-62 (para. 29); and that number portability would permit a more efficient use of existing telephone numbers, *id*. at 12362 (para. 31). As part of the NPRM, the FCC sought information on the application of number portability to commercial mobile radio service ("CMRS") carriers.[3] *Id*. at 12359-60, 12371 (paras. 24, 65).

Before the FCC could conclude this proceeding, Congress enacted the 1996 Act to establish "a pro-competitive, de-regulatory national policy framework" intended to "promote competition and reduce regulation" and "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 1 (1996). In order to facilitate the transition to a more competitive telecommunications market, the 1996 Act "fundamentally restructure[d] local telephone markets." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999).

With particular relevance to this case, section 251(b)(2) of the 1996 Act required all local exchange carriers ("LECs") "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). The

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[3] CMRS refers to various commercial wireless services, including cellular service, personal communications service ("PCS"), specialized mobile radio service ("SMR"), paging services, and other forms of telecommunications using radio frequencies.

legislative history of that section indicates that Congress viewed number portability as essential to its efforts to promote competition. *See*, *e.g.*, S. Rep. No. 23, 104th Cong., 1st Sess. at 19-20 (1995) (listing number portability among the minimum requirements "necessary for opening the local exchange market to competition").

Although section 251(b)(2) imposed the number portability requirement explicitly only on LECs, the 1996 Act authorized the Commission to impose LEC obligations, including number portability obligations, on CMRS carriers. Section 3(26) of the Act, which was amended as part of the 1996 Act and defines "local exchange carrier," provides that "[s]uch term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term." 47 U.S.C. § 153(26).[4]

The 1996 Act also included section 10, 47 U.S.C. § 160, which for the first time authorized the Commission to forbear from enforcing provisions of the Communications Act or

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[4] Section 332(c), entitled Regulatory Treatment of Mobile Services, provides in relevant part:

> (1) COMMON CARRIER TREATMENT OF COMMERCIAL MOBILE SERVICES.—(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—
>
> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (ii) enforcement of such provision is not necessary for the protection of consumers; and (iii) specifying such provision is consistent with the public interest.

agency regulations. The forbearance statute was enacted against the background of a history of litigation over the Commission's efforts to forbear from requiring certain carriers to file tariffs after the breakup of the Bell System monopoly in the early 1980s. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 220-24 (1994) (rejecting Commission's efforts to forbear from tariff regulation in the absence of specific forbearance authority). As this Court later explained, "[t]he landscape changed . . . when Congress passed the Telecommunications Act of 1996, which requires the FCC to forbear from applying any regulation or any provision of this chapter" if the Commission makes the statutory determinations listed in section 10. *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000).

B. The Number Portability Orders.

(1) The First Report And Order

On March 14, 1996, the Commission issued a public notice seeking comment on how the 1996 Act affected the issues raised in the 1995 *Portability NPRM*. *Further Comments: Telephone Number Portability*, Public Notice, CC Docket No. 95-116, DA 96-358, 61 Fed. Reg. 11,174 (1996). On July 2, 1996, the Commission released its number portability rules. *Telephone Number Portability*, First Report and Order, 11 FCC Rcd 8352 (1996) ("*First Report and Order*"). Much of the *First Report and Order* discusses number portability issues pertaining to LECs. With respect to CMRS carriers, the Commission addressed primarily three issues.

First, examining its authority to require CMRS carriers to provide number portability, the FCC pointed out that section 251(b)(2) required LECs to provide number portability but that the 1996 Act did not include CMRS providers in its definition of LECs. 47 U.S.C. § 153(26) (definition of LEC). The Commission recognized that the Act permitted it to include CMRS providers within the definition of LECs and thus to apply LEC obligations to CMRS carriers.

First Report and Order, 11 FCC Rcd at 8431 (para. 152). Rather than adopt such an inclusion, the Commission chose to exercise independent authority under other provisions of the Act – specifically, sections 1, 2, 4(i), and 332, 47 U.S.C. §§ 151, 152, 154(i) and 332 – to impose a number portability requirement on CMRS providers. *Id*. at 8431-32 (para. 153).

Second, the Commission found that CMRS number portability would serve the public interest by promoting competition among and between wireless and wireline providers. 11 FCC Rcd at 8443 (para. 155). In particular, the Commission noted that "[s]ervice provider portability between cellular, broadband PCS, and covered SMR providers is important because customers of those carriers, like customers of wireline providers, cannot now change carriers without also changing their telephone numbers." *Id*. at 8434 (para. 157). The Commission stated that, "[w]ith the recent and expected future entry of new PCS providers, and the growth of existing CMRS generally, we believe it important that service provider portability for cellular, broadband PCS, and covered SMR providers be made available so as to remove barriers to competition among such providers," *id*. at 8435 (para. 158); and that "number portability will promote competition between CMRS and wireline service providers as CMRS providers offer comparable local exchange and fixed commercial mobile radio services," *id*. at 8436 (para. 160).

Third, the Commission addressed the feasibility of implementing wireless number portability. Acknowledging the technical challenges of such a requirement, the FCC adopted two different deadlines for CMRS providers. The first gave CMRS carriers the same time period as LECs – until December 31, 1998 – to develop the capability to query appropriate database systems in order to deliver calls from their networks to ported numbers. 11 FCC Rcd at 8439 (para. 165). The second deadline gave covered CMRS carriers additional time – until June 30, 1999 – to resolve technical issues specific to wireless carriers. *Id*. at 8440 (para. 166). The

agency also authorized the chief of its Wireless Bureau to waive or stay the implementation schedule as appropriate, for a period not to exceed nine months. *Id*. at 8440-41 (para. 167).

A number of parties sought reconsideration of the *First Report and Order*. The Commission did not agree with any of the major points made with respect to CMRS carriers, and it issued an order reaffirming its principal findings. *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, 7315-17 (paras. 140-142) (1997) ("*First Reconsideration Order*").

On May 30, 1997, Bell Atlantic NYNEX Mobile Inc.[5] filed a petition for judicial review of the *First Report and Order* and the *First Reconsideration Order*. A number of intervenors, including CTIA, supported the petition. The case was briefed before the Tenth Circuit, but before the case could be argued the parties entered into a joint stipulation of dismissal that was approved by the court of appeals because, as detailed below, the Commission had extended the deadline for wireless LNP implementation.

On September 1, 1998, the FCC granted a petition filed by CTIA for a nine-month stay of the requirement that CMRS carriers provide service number portability. *Telephone Number Portability, Petition for Extension of Implementation Deadlines*, 13 FCC Rcd 16315 (1998). The Commission found that extending the deadline to March 31, 2000, "is necessary to facilitate efficient number portability implementation because the record in this proceeding demonstrates that the standards required to allow carriers to meet the current deadline have not been completed." *Id*. at 16317 (para. 7).

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[5] Bell Atlantic NYNEX Mobile Inc. is the predecessor to petitioner Verizon Wireless. In this brief, we will use the name "Verizon Wireless" to refer to petitioner and all of its predecessors.

(2) The 1999 Forbearance Order

On December 16, 1997, CTIA filed a petition with the FCC seeking forbearance from the imposition of "service provider local number portability requirements on broadband" CMRS "until the completion of the five-year buildout period" for such carriers. *CTIA Petition for Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd 3092, 3093 (para. 1) (1999) ("*Forbearance Order"*). Analyzing the request under the three-part test in section 10,[6] the Commission extended the deadline for CMRS carriers to provide service provider LNP in the top 100 Metropolitan Statistical Areas until November 24, 2002. *Forbearance Order*, 14 FCC Rcd at 3093, 3116-17 (1999) (paras. 1, 49).

With respect to the first part of the test, the FCC found that "the current wireless number portability implementation schedule is not necessary to prevent unjust or unreasonable charges or practices by CMRS carriers." *Id.* at 3101 (para. 18). It based this finding on "the current dynamics of the CMRS market," which featured increasing competition among CMRS providers and declining prices but "less extensive" coverage and buildout by new entrants as compared to more established carriers. *Id.* In this environment, the Commission found that a delay in the schedule for implementing wireless number portability would not lead to unreasonable charges and practices.

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[6] Section 10(a) provides that "the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier . . . if the Commission determines that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." 47 U.S.C. § 160(a).

Applying similar reasoning to the second part of the test, which focuses on consumer protection, the Commission found that maintaining the implementation deadline was not necessary to protect consumers. The Commission stated that the "record indicates that the demand for wireless number portability among CMRS consumers is currently low and that consumers are more concerned about competition in other areas such as price and service quality." 14 FCC Rcd at 3103 (para. 22). The Commission also found that "the high incidence of switching between wireless carriers (popularly referred to as 'churn') indicates that many wireless customers easily and routinely switch from one carrier to another without the benefit of number portability." *Id.*

With respect to the third part – whether a delay in implementation was consistent with the public interest – the Commission found that temporary forbearance was appropriate for a number of reasons. The Commission noted that the industry needed more time to develop and implement the necessary technology, especially in light of its need to make other improvements that would have "a more immediate impact on enhancing service . . . and promoting competition." 14 FCC Rcd at 3104-05 (para. 25). The Commission also found that, on the record before it, a delay in implementation was consistent with the public interest in competition. *Id.* at 3109-11 (paras. 34-38).

Even though the Commission concluded that temporary forbearance was appropriate on the record before it, it emphasized throughout the order the long-term need for wireless number portability. The agency reiterated that number portability would enhance competition, reduce prices – especially as customers came to view their wireless phones as possible substitutes for their wireline phones – and promote the public interest. *Id*. at 3102 (para. 20), 3103 (para. 23), 3112-13 (para. 40). The Commission rejected the contention that market forces alone would

bring about uniform, nationwide LNP. It explained that, "[i]n order for a wireless customer to switch wireless carriers while retaining its phone number, both carriers must have implemented LNP. If certain carriers conclude that they will sustain a net loss in customers overall under a LNP scenario, they will have little, if any, incentive to implement LNP in the absence of a requirement." *Id*. at 3113 (para. 41).

The Commission released the *Forbearance Order* while the legal challenges to the *First Report and Order* and *First Reconsideration Order* were pending in the Tenth Circuit. The issuance of the order prompted the parties to seek dismissal of the appeal. On March 24, 1999, the Tenth Circuit issued an order granting the parties' joint motion for dismissal of the petitions for review. That motion stated that "[t]he parties have entered into a Stipulation of Dimissal . . . provid[ing] that [Verizon] will dismiss the appeal voluntarily, and that the FCC will not object to [Verizon] raising any of the issues and arguments presented in this appeal in any future review proceeding concerning number portability obligations of commercial mobile radio service providers." Joint Motion for Dismissal, March 19, 1999, at 1-2 (JA ____).

(3) The Order Under Review

With the 2002 deadline approaching, Verizon Wireless again sought forbearance, filing a new petition with the Commission on July 26, 2001. This time Verizon Wireless sought permanent forbearance from the wireless local number portability rules. In its request, Verizon Wireless did not challenge the Commission's authority to require wireless number portability. Instead it emphasized three points to demonstrate that, on the merits, it was entitled to permanent forbearance: that the CMRS market was already sufficiently competitive; that the industry should not be required to implement wireless LNP while attempting to comply with other regulatory requirements; and that the costs of implementing wireless LNP would exceed the

benefits. *Verizon Wireless' Petition Pursuant to 47 U.S.C. § 160 for Partial Forbearance,* filed July 26, 2001 ("Verizon Wireless Petition") (JA); *see also Order* at para. 10 (JA).

A number of wireless carriers filed comments in response, the majority supporting the request. Others – including Nextel and intervenor Leap Wireless – defended the wireless LNP requirement but sought to modify it or delay its implementation. *Order* at para. 11 (JA). Several state utility commissions submitted comments opposing the request, as did some wireless resellers. *Id*. at para. 13 (JA).

On July 26, 2002, the Commission released its *Order* denying Verizon Wireless' request but extending the implementation deadline for another year, until November 24, 2003. The Commission based its decision upon its analysis of the second and third factors set out in section 10. Because Verizon's request failed both of these parts of the test, the Commission stated that it "need not address whether the LNP requirement is necessary under the first prong …." *Order* at para. 14 n.50 (JA ____).

With respect to consumer protection, the Commission described the changes in the CMRS market since the *Forbearance Order* in 1999. As the Commission had anticipated in its earlier order, *see* 14 FCC Rcd at 3103-04 (para. 23), the downturn in wireless service rates had led to more wireless consumers and more use of wireless phones. *Order* at paras. 16 and 17 (JA ____). In this market, more consumers "view their wireless phones as a potential substitute for their wireline phones." *Id*. at para. 16 (JA ____). In such a competitive market, the Commission reasonably concluded, "as wireless subscribers increase the frequency with which they give out their mobile telephone number, we anticipate that an increasing number of consumers will be reluctant to change wireless service providers unless they can keep the same number." *Order* at

para. 18 (JA ____). The Commission pointed to comments by "several hundred consumers" as support for this conclusion. *Id*.

With respect to the public interest part of the test, the Commission reiterated its view that permanent forbearance would be contrary to the public interest in competition. *Order* at para. 20 (JA ____). The Commission noted that, in particular, wireless service LNP would "make it easier for newer carriers to offer service to existing wireless consumers who would switch carriers but for lack of ability to port their wireless phone number." *Id*. at para. 22 (JA ____) (citing comments by three carriers and declaration by Dr. Peter Crampton, professor of economics at the University of Maryland).

The Commission adhered to its earlier determination that market forces alone would not result in the implementation of LNP:

> Although certain carriers may want all wireless carriers to implement LNP because they believe it will result in a net gain of subscribers, other carriers may feel differently and will not have any incentive to implement LNP because they may be convinced that industry-wide LNP will only serve to make it easier for their subscribers to leave them. Consequently, it is unlikely for the entire industry to agree to move to wireless LNP voluntarily.

Order at para. 21 (JA). The Commission elaborated:

> [T]here may be economic disincentives for any individual carrier to be the first to voluntarily adopt full LNP, which would provide its subscribers the flexibility to switch to a different carrier while retaining their current phone numbers. This is because, absent the implementation of full LNP by other wireless carriers, the carrier could not gain any new wireless customers from the non-participating wireless carriers.

Id. Accordingly, the Commission concluded that a regulatory requirement of wireless LNP was necessary "to ensure that consumers have the ability to switch carriers while retaining their phone numbers." *Id*.

The FCC also concluded that the costs of LNP would not outweigh its benefits. *Order* at para. 29 (JA ____). It cited evidence that "the relative cost of implementing LNP will be low" – including an estimate that it would cost Cingular a "per-subscriber monthly assessment of 10 to 20 cents," and other evidence showing that the cost to Sprint of implementing LNP "would represent a fraction of one percent of its capital expenditures for a single year" – in comparison with the substantial benefits to consumers and to competition. *Id*.

The Commission did extend the deadline for LNP implementation until November 24, 2003, citing technical reasons and other pending regulatory deadlines as the basis for the extension. *Order* at paras. 23-27 (JA ____). A number of carriers had sought a longer extension, but the Commission limited the extension to a year. *Id*. at paras. 28, 30 (JA ____).

No party sought reconsideration of the *Order*.

SUMMARY OF ARGUMENT

This is not a difficult case. After giving the wireless industry years to implement the technical changes necessary to provide number portability, the Commission decided in the *Order* under review not to forbear from its number portability regulation. The Commission could not make the determinations, on the basis of the record in this proceeding and consistent with its expert judgment, that would require it to forbear. In so doing, the Commission acted pursuant to its broad authority to regulate wireless carriers in the public interest and in order to ensure the implementation of an elementary pro-competitive step that the industry will not take on its own.

A number of arguments by petitioners and intervenors attack the *Order* on the merits. Petitioners first argue that the Commission erred in not making findings with respect to all three parts of section 10. This argument misreads the forbearance statute. The three factors are conjunctive, and the agency must make a determination that all three have been satisfied before it

may grant a petition. The Commission could have denied the petition for failing to meet any one of the three parts of the test.

The Commission explained – as the statute requires it to do – its decision not to forbear. The Commission based this decision upon its findings that wireless number probability would promote competition within the wireless industry (as well as with wireline carriers); that this further competition would spur innovation; that the wireless industry would not adopt portability on its own; and that the costs of number portability for the industry would be low compared with its benefits. Petitioners' challenges do not call into question any of these crucial findings.

Nor have petitioners established that the agency was arbitrary and capricious or engaged in an unexplained departure from prior practice in granting temporary forbearance in 1999 but denying the request for permanent forbearance in the *Order*. Not only had circumstances changed, but so had the industry's request. In 2002, the Commission was asked in effect to set aside its wireless LNP regulation. On the basis of its assessment of the wireless market – which, as the Commission had anticipated in 1999, is maturing, with consumers becoming more invested in their wireless numbers – and its conclusion that number portability would enhance competition, the Commission reasonably denied the permanent forbearance request.

Petitioners attack the Commission's interpretation of the term "necessary" in the *Order*, insisting that the only meaning for the term is "indispensable." This argument overlooks the basic rule of statutory construction that a statute is to be read in context. It also ignores the fact that the term "necessary" is ambiguous. In cases in which the statutory end is specific and narrowly prescribed, courts in some cases have interpreted "necessary" to mean indispensable. In many other cases, however, when the statute has a broader and more general application, courts have found "necessary" to mean useful or appropriate. Section 10 – which authorizes the

agency broadly to engage in the act of forbearance where certain determinations are made – falls within this latter category of statutes. The Commission's reasonable interpretation of "necessary" in the *Order* below should be upheld under *Chevron*.

Petitioners offer a similarly narrow interpretation of the term "protect" in connection with their attack on the Commission's findings under the consumer protection test, but that interpretation is no more availing. Since it first considered requiring wireless carriers to offer number portability, the Commission has consistently concluded that this measure would promote competition, and therefore is necessary to protect consumers. Nor, contrary to petitioners, is the Commission constrained from taking action until it is presented with an actual consumer injury to remedy; it is well within the agency's authority to take basic pro-competitive measures that would protect consumers.

Relying upon this Court's recent decisions construing the agency's biennial review statutes, petitioners contend that the Commission failed to satisfy its burden for retaining the wireless number portability regulation. Acceptance of petitioners' contention would require the Commission independently to justify every challenged statute or regulation any time an individual petitioner files a forbearance petition. Neither section 10 nor the recent case law goes this far. In evaluating a forbearance request, the Commission acts in its traditional role as adjudicator of applications, and not, as petitioners suggest, as a party with the burden of proof.

Petitioners and intervenors revive a claim from an earlier petition for review of the Commission's first wireless number portability forbearance order: they insist that when Congress enacted section 251(b)(2) of the 1996 Act, it intended to foreclose the agency from adopting wireless number portability through any other means than classifying wireless carriers as LECs. Section 251(b)(2) evidences no such intention, however, and the Commission had

ample authority under its "necessary and proper clause" – section 4(i) – and other statutes – sections 1, 2, and 332 – to adopt such a basic pro-competitive measure as number portability for the wireless industry.

STANDARD OF REVIEW

The burden is on the petitioners to 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 and must affirm unless the agency failed to consider relevant factors or made a clear error in judgment. *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000). *See also Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) ("[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."); *AT&T Corp. v. FCC*, 236 F.3d 729, 734 (D.C. Cir. 2001) (reviewing agency forbearance order under "arbitrary, capricious, abuse of discretion" standard). Deference to the expert agency's decision "is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program …." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted.).

An agency's interpretation of a statute it administers is reviewed under the two-step test set out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). This is so even if the question is whether the statute authorizes the agency to do a particular act. *See, e.g., Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (reviewing "FERC's interpretation of its authority to exercise jurisdiction over transportation with the familiar *Chevron* framework in mind"). The reviewing court looks first to whether the statute unambiguously addresses the precise issue in question. If so, the Court follows the statute. If the

statute is silent or ambiguous on the issue, the agency may exercise reasonable discretion in interpreting the statute, and the reviewing court defers to the agency's interpretation if it is reasonable. *See, e.g., AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. at 397; *Transmission Access Policy Study v. FERC,* 225 F.3d 667, 694 (D.C. Cir. 2000), *aff'd,* 535 U.S. 1 (2002).

ARGUMENT

I. The Commission Acted Reasonably And Properly Applied Statutory Standards In Denying The Forbearance Petition.

Under section 10, the Commission "shall" grant an application for forbearance if it makes each of three separate determinations. In this case, the Commission properly found that it could not make two of those determinations, finding on the basis of substantial record evidence (1) that enforcement of the number portability requirement was necessary for the protection of consumers and (2) that forbearance from applying the requirement was not consistent with the public interest. The Commission did not consider the third part of the test, which could not have justified forbearance even if it were satisfied, in the absence of the necessary determinations on the other two parts. The Commission's application of its forbearance statute was reasonable and should be affirmed.

The Commission may deny a request for forbearance on the basis of a determination that any one of the three parts of the test set out in section 10(a) requires continued application of the statute or regulation in question. This follows from the plain language of the statute, in which the factors set out in section 10(a) are connected by a semicolon and an "and." The statute thus provides that all three determinations must be made before the Commission "shall" grant a request for forbearance. In a number of Commission orders rejecting forbearance petitions, the agency has concluded that denial of the petition was appropriate after analyzing only a single

factor, without considering either of the other two factors. *See*, *e.g.*, *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom*, 2002 WL 31662787 (FCC Nov. 26, 2002) at para 13 ("forbearing from the CALLS election rule[] is not in the public interest, and therefore does not satisfy the statutory forbearance standard"); *In the Matter of Paging Network, Inc.*, 15 FCC Rcd 12141, 12146 n.28 (2000) ("Because we conclude that forbearance from Section 90.665 with respect to PageNet is inconsistent with the public interest, we find it unnecessary to address the first and second prongs of the Section 10(a) analysis.").[7]

A. The Commission's Critical Findings Support Its Decision.

In rejecting the request for permanent forbearance the Commission made a number of critical findings. First, it concluded – as it has since it first adopted the LNP requirement for wireless carriers – that number portability would promote competition both within the wireless industry and between wireline and wireless carriers. *Order* at para. 6 (in *1999 Forbearance Order*, FCC "found that the competitive reasons that led it to mandate wireless number portability in the *First Report and Order* remained fundamentally valid and indicated that it remained committed to the basic regulatory approach outlined in prior orders"), at para. 34 (denying request for permanent forbearance because it would be anti-competitive) (JA ____, ___).

[7] Petitioners' assertion that the Commission's failure to consider the first part of the test led to wrong conclusions on the other two parts is both irrelevant and incorrect. It is irrelevant because the three factors, though related, are separate and require individual analysis. For example, a regulation may not address rates or charges (part 1), but still affect consumer protection concerns (part 2) or implicate the public interest (part 3). It is incorrect in this case because the analysis of the consumer protection and public interest standards clearly is independent of any conclusions the Commission might have reached if it had considered the just and reasonable charges standard.

Second, the Commission effectively found a market imperfection that would prevent the implementation of wireless LNP in the absence of a regulation requiring it. Essentially, the Commission found a "first mover" problem – that is, no individual service provider would act to implement number portability because of the competitive disadvantage that would result from unilateral action. *Order* at para. 21 (JA _____). The Commission concluded that in such a situation, the best solution was to retain and enforce the regulation requiring industry-wide implementation of LNP. The record below and the briefs of petitioners and intervenors do not undermine the agency's assessment. Although they seek permanent forbearance from the regulation, neither petitioners nor their supporting intervenors have represented that in the absence of regulation, they would implement number portability. Indeed, their arguments for forbearance would be mere abstract or philosophical disagreements with regulation as a concept if they intended to port numbers voluntarily. The Commission correctly concluded that wireless LNP *regulation* is necessary to promote competition and protect consumer choice because number portability itself was necessary and would not occur in the absence of a regulatory mandate.

Third, the Commission found that the costs of implementing LNP would be "low." *Order* at para. 29 (citing submissions "indicating that the relative cost of implementing LNP will be low") (JA ____). On the basis of evidence in the record, the agency pointed out that for Cingular, which has 30 million wireless subscribers, the cost of implementing LNP – estimated to be $50 million a year – would be a "per-subscriber monthly assessment of 10 to 20 cents." *Id*.

It also noted that for Sprint, the cost of implementing LNP would be a "fraction of one percent" of the company's capital expenditures. *Id*.[8]

Fourth, the Commission concluded that implementing wireless LNP would promote innovation and competition within the wireless industry. *Order* at para. 22 (with LNP, "[c]ompetitive pressure on carriers will intensify, as carriers will be forced to compete on the basis of the price and quality of the service they offer to consumers, without regard to a customer's phone number"); at para. 28 ("wireless number portability will promote competition by making it easier for consumers to switch carriers to pursue better features, coverage and prices"). Petitioners and their intervenors do not fundamentally dispute this point; instead, they assert either that competition already is sufficient within the industry, or that they could spend the funds necessary for LNP on innovation. Neither point is responsive, because wireless LNP undeniably will enhance competition and thereby provide further incentive for innovation as customers are better able to change carriers without concern for the costs associated with changing their numbers. It is not up to the petitioners to decide when there is enough competition.

In evaluating the challenges made by petitioners and intervenors, the Court should keep in mind all four points. Petitioners repeatedly revisit these same points in their arguments. Thus, they argue that the current level of competition is sufficient; that the number portability requirement is "regulation," and regulation – even if it addresses market imperfection and promotes competition – is bad; and that coming into compliance with wireless LNP is expensive.

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[8] The record evidence cited by petitioners in their brief is consistent with the agency's analysis: Verizon Wireless said LNP would require a $62 million outlay in the first year, then $40 million a year; Sprint estimated annual recurring costs of $52 million. Pet. Br. at 35. Neither company offered evidence on the per-subscriber cost of LNP.

None of these arguments establishes that the Commission was arbitrary and capricious in rejecting the application for permanent forbearance.

B. The Commission Reasonably Concluded That Wireless Number Portability Was Necessary For The Protection of Consumers

Petitioners offer a highly restrictive view of the second part of the section 10 test in their attack upon the *Order*. According to petitioners, the Commission must forbear if it determines that enforcement of the wireless number portability regulation is not absolutely indispensable to prevent injury to consumers. Pet. Br. at 23-28. But section 10 is not written so narrowly, and the terms "necessary" and "protection," when read in context, have a broader meaning that provides the Commission with an appropriate degree of discretion to make the crucial determination on this part of the test.[9]

(1) The Commission's Interpretation Of The Term "Necessary" Was Reasonable

According to petitioners, the agency erred in not explicitly defining necessary as "'absolutely required,' 'indispensable,' or 'essential.'" Pet. Br. at 23 (citation omitted). Petitioners' argument is unavailing because, contrary to basic principles of statutory construction, it fails to take account of the context in which "necessary" appears in section 10

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[9] Even under the restrictive interpretation of those terms advanced by petitioners, the Commission could have concluded correctly and reasonably that denial of the forbearance request was necessary for consumer protection. In the relatively mature market that has developed for wireless services, petitioners were seeking repeal of the LNP requirement through permanent forbearance while essentially acknowledging that they would not implement number portability on their own. The only way for the Commission to protect the interest of consumers in obtaining the benefits of wireless number portability – which the Commission consistently has found to be necessary if consumers were to have the full benefits of competition – was to deny the request for permanent forbearance. The Commission correctly denied the petition, explaining that wireless LNP is "necessary" to preserve consumer choice and enhance competition among CMRS carriers and between the wireless and wireline industries. Order at para. 34 (JA _____).

and in other parts of the Act. *See, e.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context") (citation omitted); *see also Conroy* v. *Aniskoff*, 507 U.S. 511, 515 (1993) (citing *St. Vincent's Hospital*).

In interpreting the phrase "necessary for the protection of consumers," the FCC acknowledges that the word "necessary" has an everyday meaning that may imply indispensable. But as a common statutory term, it has been interpreted differently depending on the statutory context. The term has been read in some contexts in a restrictive sense to mean "indispensable" or "essential."[10] The Supreme Court has interpreted the terms "necessary" or "required" in other contexts to mean "useful," "convenient," or "appropriate."[11] Thus, there is no simple "plain

[10] *See, e.g., Kirchbaum v. Walling,* 316 U.S. 517, 525-26 (1942) (in determining the scope of the Fair Labor Standards Act, term "necessary" would encompass employees whose duties were "indispensable" and "essential").

[11] *See, e.g., National Railroad Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 418-19 (1992) (Interstate Commerce Commission reasonably interpreted the term "*required*" in the condemnation provisions of a statute as meaning "*useful or appropriate*" rather than "indispensable" where the former interpretation was consistent with the statute as a whole); *Armour & Co. v. Wantouk*, 323 U.S. 126, 129-30 (1944) (term "necessary" in the Fair Labor Standards Act, in context, means *reasonably necessary to production, and not "indispensable," "essential," or "vital"*); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (term "necessary" in the "necessary and proper" clause of the U.S. Constitution means "convenient, or useful" and does not limit congressional power to the "most direct and simple" means available; noting that "to employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.") *See also Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (term "necessary" in the National Bank Act means "convenient" or "useful"); Black's Law Dictionary 1029 (6th ed. 1990) (the word necessary "must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought.").

meaning" for this statutory phrase. Consistent with judicial precedent, the term is best construed in its statutory context.[12]

Because the term "necessary" is capable of different meanings, the Commission is entitled to deference with respect to its interpretation. It reasonably gave the term a less restrictive reading, and interpreted it to mean "useful" or appropriate for the purposes identified in the statute rather than "indispensable."

The Commission's ability to regulate has never been confined to measures that are "indispensable" for, say, consumer protection, or for ensuring reasonable rates. When the Commission adopts rules pursuant to section 4(i) or section 201 – both of which authorize actions that are "necessary" – it need not show that the particular action is "indispensable" to achieve its ends. The action need only be "appropriate and reasonable." *E.g., New England Telephone and Tel. Co. v. FCC*, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (*citing North American Telecom Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)).

Accepting petitioners' interpretation of "necessary" in the context of the forbearance statute would produce an anomalous result. Acting pursuant to the broad grant of authority provided by Congress in sections 4(i) and 201(b), the Commission could take actions or adopt rules it found to be "necessary" to achieve various regulatory ends. For purposes of illustration, one can assume that a reviewing court would uphold those rules even though they were not

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[12] *See, e.g., Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997) ("The meaning of a statutory provision is its use in the context of the statute as a whole."). *See also Iowa Utilities Board*, 525 U.S. at 399 (Souter, J., dissenting in part). *Accord, Southern Co. Services, Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (undefined term "entity" appearing in different places in 1996 Act "bears different meanings depending upon the context").

absolutely indispensable to further the identified regulatory ends. Then, through a forbearance petition filed by a single private party, the Commission's rules could be held not to apply if the agency (or this Court) concluded that they were not absolutely essential to achieve those ends. Petitioners' interpretation of the word "necessary" is not required and is plainly unacceptable.

A loose pattern of interpreting the word "necessary" in the Communications Act may be gleaned from the cases. Put simply, the pattern distinguishes between statutes with narrowly defined, specific purposes, and other statutes – such as the forbearance statute – that apply broadly to the agency's functions. Thus, some narrowly focused statutes within the 1996 Act have been held to use the term "necessary" in a restrictive, "indispensable" sense and thus to limit the agency's regulations addressing a specific problem. *See, e.g., GTE Service Corp. v. FCC*, 205 F.3d 416, 422-23 (D.C. Cir. 2000) (applying restrictive meaning of "necessary" in determining incumbent LECs' obligation to allow competitors to collocate their equipment on incumbents' premises); *Iowa Utilities Board,* 525 U.S. at 388 (applying restrictive meaning of "necessary" in determining which network elements incumbent LECs must allow competitors to use).

In contrast, statutes with broader and more general application have been held to use the word "necessary" in the more expansive sense of "useful" or "appropriate" to the purpose. *E.g., Iowa Utilities Board,* 525 U.S. at 377-78 (rejecting claim that provisions of 1996 Act limit FCC's authority under section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest"); *New England Tel. & Tel. v. FCC*, 826 F.2d at 1108 (interpreting "necessary" in section 4(i) to mean "appropriate and reasonable"). The forbearance statute, which fits nicely within the latter category of statutes that apply broadly and generally to

the agency's entire function, reasonably should have its use of the word "necessary" interpreted in a manner consistent with the use of that word in sections 4(i) and 201(b).

(2) The Commission's Interpretation Of "Protect" Was Reasonable

Petitioners also contend that the FCC erred in its interpretation of "protect," arguing that the agency incorrectly interpreted the term to mean "'benefit'" or "'enhance.'" Pet. Br. at 26. As explained above, however, the only way for the Commission to ensure the availability of CMRS number portability was to deny the forbearance request. The petitioners do not even now claim that there would be voluntary compliance. The Commission has consistently held that number portability was an important consumer protection measure. Petitioners' suggestion that the FCC must forbear unless regulation is necessary to prevent actual harm or loss to consumers reads meaning into the word "protect" that it will not bear. The Commission is not limited to taking action until it is presented with an actual consumer injury to remedy. Consumer protection measures that enhance or benefit the services or products that consumers purchase are commonplace. The Commission did not err in its interpretation of this word.

Petitioners and intervenors make much of the current level of "churn" – that is, customers changing wireless carriers – in arguing that forbearance would not "harm" consumers and that their permanent forbearance request should have been granted. *See*, *e.g.*, Pet. Br. at 19, Intervenors' Brief at 20 (citing ex parte letter of Dr. Hal Varian). But the current high level of churn does no more than establish that consumers are willing to pay the additional costs associated with changing numbers in order to change service providers.

As customers have become more invested in their wireless phone numbers (which the Commission found has occurred since the agency granted temporary forbearance in 1999, see

Order at para. 17 (JA ____)), their ability to retain their number when changing also becomes more important; absent number portability, they "will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone number in order to move to another carrier is too high." *Order* at para. 18 (JA ____). With respect to Dr. Varian's views, the Commission cited a responsive declaration by another economics professor explaining that the wireless telephone market is not one in which consumers are able to bargain around the unavailability of number portability, and is one in which government regulation is necessary. *Order* at para. 22 n.76 (citing Letter from James F. Barker of Latham & Watkins on behalf of Leap Wireless, enclosing Declaration of Dr. Peter Crampton, professor of economics at the University of Maryland (filed Feb. 12, 2002)) (JA ___, ___).

C. The Commission's Determination That The Permanent Forbearance Request Was Not Consistent With The Public Interest Was Reasonable

Petitioners' challenges to the Commission's conclusion that the permanent forbearance request was not consistent with the public interest overlook the Commission's crucial findings set out above, and none of them establishes that the decision was arbitrary and capricious. According to petitioners, the Commission was required to forbear in this case because the wireless market currently is competitive. Pet. Br. at 28-31. Petitioners' argument overstates the significance of the market conditions that prevail at the moment. They have sought permanent forbearance, so the relevant question is whether granting that request would be consistent with the public interest in promoting competition. Because it is undisputed that number portability would make the industry more competitive, and that Commission action is necessary to bring about number portability, the Commission correctly – and certainly reasonably – concluded that permanent forbearance was not consistent with the public interest.

Petitioners' emphasis on the current state of market conditions also ignores the directive in section 10(b), which requires the Commission to "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). This language obviously instructs the agency to consider the future effect of forbearance from the challenged regulation. Congress indicated that the decision to forbear entails consideration of more than the state of competition at the time the petition is filed.

Petitioners also assert that, contrary to section 10(b), the Commission did not consider whether forbearance would promote competitive market conditions. Pet. Br. at 28, 32-33. This argument rests upon an Orwellian reading of the *Order* and the record below. The Commission determined that as the wireless market matures further – as it has been doing since 1999 when the Commission granted the request for temporary forbearance – number portability would become more important as a means of promoting competition among wireless providers, and between wireless and wireline providers. *Order* at paras. 17-18, 22 (JA). The Commission reasonably concluded that the ability of consumers to change wireless carriers without changing their numbers would promote competition within the industry. In so concluding, the Commission determined that forbearance would be inconsistent with the public interest in promoting competitive market conditions.

Petitioners contend that the "Commission failed to consider the costs associated with retaining the regulation." Pet. Br. at 33; *see also id.* at 38-39 (arguing that FCC improperly made predictive judgment in *Order* and failed to evaluate facts before the agency). The Commission actually made specific findings on the likely costs of implementing wireless LNP, see *Order* at

para. 29 (JA), and concluded that the costs would be low relative to the benefits associated with requiring wireless LNP. It was well within the Commission's discretion to conclude that such costs did not outweigh the benefits. No authority – certainly none cited by petitioners – holds that the Commission was required to make a precise quantification of the costs and benefits that denial or grant of the forbearance request would bring about. Such a requirement would unduly constrict the Commission's authority under the Act to regulate in the public interest.[13]

D. The FCC Properly Performed Its Statutory Task Of Adjudicating The Forbearance Request

In a rambling argument that appears to confuse statutory presumptions with burden of proof and to ascribe to the Commission the role of party rather than adjudicator, the petitioners claim that the agency "failed to shoulder the required burden to justify retention of its rule." Pet. Br.at 16-19. If the premise of the argument is that section 10 reflects a decision by Congress that unnecessary and inappropriate regulation should be eliminated, the Commission agrees. If the argument is that section 10 obliges the FCC, upon receipt of a petition for forbearance, to evaluate the rule or statute pursuant to the criteria set out in section 10 and to determine on the basis of the record and its evaluation whether forbearance is required, the Commission agrees with that as well. But the argument goes far beyond that and appears to cast the proponent of

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[13] Well into their brief, petitioners assert that the Commission as a general matter may not regulate wireless carriers unless it "'demonstrate[s] a clear cut need'" for such regulation. Pet. Br. at 37-38 (citing *Petition of the Connecticut DPUC*, 10 FCC Rcd 7025, 7025-26 (1995)). The *Connecticut DPUC* order did not create any such standard for regulation of wireless carriers by the FCC. Nonetheless, the Commission effectively demonstrated in its *Order* that there was a clear-cut need for wireless LNP regulation. The Commission concluded – as it has since it first considered requiring wireless LNP – that number portability would encourage competition. Given the industry's refusal to adopt wireless LNP voluntarily, there was a clear-cut need to deny the request for permanent forbearance.

forbearance as someone who makes a suggestion that then requires the Commission to conduct an independent search for a justification for enforcing the rule or statute in question. Section 10 creates no such oddity.

The petitioners appear to derive their argument largely from decisions of this court -- including one decision that was altered on *en banc* review -- reviewing actions taken by the Commission in its biennial review process under sections 11 and 202(h) of the Act, 47 U.S.C. §§ 161, Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. *Fox Television Stations, Inc. v. FCC,* 280 F.3d 1048 (D.C. Cir.), *reh. granted in part*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The Commission is required under sections 11 and 202(h) to conduct a review every two years of many of its regulations and to repeal or modify those that are no longer necessary in the public interest. The Court held in those cases that the statutes created a presumption in favor of deregulation.

Although section 10 shares with the biennial review statutes a commitment to the removal of inappropriate regulation, section 10 retains the Commission's traditional role of adjudicator of applications (which other parties are free to oppose or support). It plainly does not impose on the Commission a party's "burden of proof" -- or, as the petitioners put it, a "burden of marshalling facts." Pet. Br. at 16 n.7. Section 10 authorizes certain private parties to "submit" petitions to the agency asking it to exercise its forbearance authority. The Commission is authorized to "grant or deny a petition in whole or in part," and it is required to explain its decision in writing. The statute provides the standards the Commission is to apply in adjudicating the petition, and it requires the agency to make "determin[ations]" with respect to

those standards. This is the stuff of ordinary agency adjudication, in which the FCC is the decisionmaker and the parties make their cases.[14]

Petitioners make much of the fact that the agency has a one-year deadline for acting on a petition for forbearance, and that if the agency fails to act the petition is "deemed granted." This is no more than a stringent statutory directive to the Commission to meet its deadline. Congress clearly did not want the agency effectively to deny a petition for forbearance by inaction, so it reversed the incentives on the assumption that the agency would act promptly in the face of this kind of default. In the absence of statutory language indicating a different role for the agency in this particular kind of adjudication, petitioners' arguments must be rejected.

To be sure, Congress has created a mechanism for forbearance in this statute that requires the agency to take a second look at regulations and statutes in the light of competitive developments. The Commission in this case took that second look, and it "explained," as the statute requires, "its decision in writing." It gave its explanation with respect to each of the two parts of the test that it addressed, providing the Court with a basis for review on the merits. The Commission takes its task under section 10 seriously, as shown in its earlier temporary forbearance with respect to this very rule and its several deferrals of the effective date of the requirement. Section 10 requires no more.

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[14] The Commission also may consider forbearance on its own motion, and the same standards apply to that process. *MCI Worldcom*, 209 F.3d at 762. This case does not involve *sua sponte* forbearance.

E. Intervenors' Arguments With Respect To Rural Carriers And Section 11 Are Not Properly Before The Court

The intervenors present two entirely new arguments in support of the petitioners' case. Intervenors' Br. at 21-22 (arguing that mandatory wireless LNP may be harmful to smaller/rural carriers), at 24-25 (arguing that the Commission erred when it excluded the wireless LNP rule from its biennial review during the period when temporary forbearance from rule had been granted). Neither argument was presented – or even mentioned – in the petitioners' opening brief. Accordingly, this Court should not consider either argument 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 Company v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). *See also 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").

In any event, neither argument is compelling on the merits. Intervenors claim that rural carriers and small carriers will incur more costs than benefits if permanent forbearance is not granted. But this contention presents exactly the sort of judgment call on which the Commission receives deference. Moreover, even if the Court accepted this claim, it would not support industry wide, permanent forbearance; instead, it would support temporary forbearance for a subset of the industry, or even for individual carriers. Intervenors also claim that the Commission violated its biennial review obligations when it did not include the wireless LNP rule in its 1998 and 2000 reviews. This argument does no more than reargue the merits, and the Commission decided to retain rather than repeal the rule when it denied the request for permanent forbearance. It would not be sensible, in any event, for the FCC to have to consider

separately in a biennial review proceeding a rule that it had before it in a petition for forbearance subject to a one-year deadline.

II. The Commission Has Authority To Require Number Portability For Wireless Carriers

Petitioners and intervenors, citing primarily this Court's decision in *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) ("*MPAA*"), contend that Congress's adoption of section 251(b)(2) as part of the 1996 Act took back from the Commission any preexisting authority it may have had to require number portability through any means other than rules implementing that section.[15] In arguing that the Commission lacks authority, petitioners and intervenors rely upon the fact that section 251(b)(2) specifically requires only LECs to offer number portability, and that the definition of LECs excludes CMRS carriers, *citing* section 3(26), 47 U.S.C. § 153(26). They argue that Congress thereby intended to limit the FCC to requiring number portability by LECs. The agency could impose this requirement on CMRS carriers, they acknowledged, but only if it determined that it should include those carriers in the definition of LEC. Section 251(b)(2) evidences no intent to take away the Commission's authority to require telecommunications carriers that are not LECs to offer number portability, however.

In its 1995 NPRM – a year before adoption of the 1996 Act – the Commission asserted authority to adopt a number portability requirement for wireline and wireless carriers pursuant to sections 1, 2, 4(i), and 332 of the Communications Act. *Portability NPRM*, 10 FCC Rcd at

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[15] Verizon Wireless challenged the Commission's authority to require wireless number portability in its petition for review of the Commission's *First Report and Order* and *First Reconsideration Order* in the Tenth Circuit. In a Joint Stipulation for Dismissal in that case, the Commission agreed not to object to Verizon's raising any of the legal challenges presented in that case in any future review proceeding concerning CMRS number portability. Accordingly, even though the authority question did not come up in the forbearance proceeding, we address the merits of that question in this brief.

12377 (para. 84); *see also Order* at para. 2 n.4 (JA). Neither Verizon Wireless nor any other party filing comments in that proceeding challenged the authority of the Commission to adopt number portability. Given Verizon Wireless' initial acquiescence in the Commission's authority, one would expect it to demonstrate now that Congress intended in the 1996 Act to take away the Commission's power to require portability by carriers other than LECs. Verizon Wireless and its intervenors have not shown evidence of such an intention.

The number portability provision in section 251(b)(2) is one of a number of obligations that Congress imposed upon LECs. Section 251 is an integral part of Congress's efforts to promote the transition from a monopoly regime to a competitive environment, particularly in local markets. Because the development of the wireless industry has a different history – one in which service already was provided by a number of carriers in 1996, and not through a monopoly – Congress did not explicitly impose all of the obligations in section 251 on wireless carriers. But that does not mean that Congress intended to take away the Commission's power under existing statutes to adopt some of those obligations for wireless carriers.

Indeed, Congress provided in the definitional section 3(26) of the Communications Act, as amended by the 1996 Act, that the Commission could impose any LEC-specific requirements on CMRS carriers to the extent that the agency found that CMRS should be included in the definition of a LEC. This suggests strongly that Congress decided to leave the question of extending LEC-specific requirements to CMRS carriers to the expert judgment of the Commission.

In presenting their authority argument in this case, petitioners do not even mention the savings clause in the 1996 Act. *See* 47 U.S.C. § 152 note. Section 601(c)(1) of the 1996 Act (47 U.S.C. § 152 note) provides that the 1996 Act "shall not be construed to modify, impair, or

supersede Federal, State, or local law, unless expressly so provided in such Act or amendments." No provision of the 1996 Act expressly provides that section 251(b)(2) supersedes preexisting federal law authorizing the FCC to require wireless number portability. This savings clause confirms that the Commission has the same authority to require wireless LNP after the 1996 Act that it had before the Act.

A. Sections, 1, 2, 4(i), And 332 Provide Authority For The Commission's *Order*

(1) Sections 1 and 4(i)

Sections 1 and 4(i) provide authority for Commission actions that further the broad public interest objectives of the Communications Act so long as those actions are "not inconsistent" with the Act. Section 1 provides that the Commission was established "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide . . . wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Section 4(i) authorizes the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).[16]

The Supreme Court has held that section 4(i) is an independent grant of regulatory authority that enables the Commission to execute its functions. *See, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978) (agency's "general rule-making authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is . . . reasonable"); *FCC v. Midwest*

[16] Section 2(a), 47 U.S.C. § 152(a), states that the Act applies to all interstate and foreign communications by wire and radio. We do not understand the petitioners to argue that the Commission lacks jurisdiction because the activities regulated here are not interstate.

Video Corp., 440 U.S. 689, 696 (1979) ("Congress meant to confer 'broad authority' on the Commission . . . so as 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission'") (citation omitted).

This Court accordingly has upheld Commission actions pursuant to sections 1 and 4(i) in a number of settings. For example, in *Rural Telephone Coalition*, this Court affirmed the Commission's establishment under sections 1 and 4(i) of a Universal Service Fund, which had the "limited purpose of ensuring that 'telephone rates are within the means of the average subscriber.'" 838 F.2d 1307, 1315 (D.C. Cir. 1988). No statute explicitly authorized the creation of such a fund. In *Mobile Comm. Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), this Court held that the Commission had authority under section 4(i) to require payment for PCS licenses that were granted without auction to holders of "pioneer's preferences," even though no provision of the Act explicitly authorized such payments. *Id.* at 1404.[17]

The Commission has broad authority under section 332 to regulate wireless carriers. The agency under section 4(i) has authority to adopt rules and orders necessary to promote

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[17] *See also Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) (it was "appropriate" for "the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing," even though the statutory tariff filing requirement explicitly excluded the class of carriers involved in that case); *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) (agency order prescribing rate of return for AT&T "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority," even though statute expressly authorizing FCC to prescribe did not specify authority to prescribe a rate of return); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d. Cir. 1973) ("even absent explicit reference in the statute," the FCC has "jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service"); *North American Telecom Ass'n v. FCC*, 772 F.2d at 1292 (describing section 4(i) as necessary and proper clause). *Cf. MPAA*, 309 F.3d at 804-05 (collecting section 1 cases authorizing Commission actions, where those actions "do not relate to program content").

competition within that industry. Thus, section 332 provides a jurisdictional basis for the Commission's ancillary authority under section 1 and 4(i) to enhance competition in CMRS markets.

(2) Section 332

This Court has held that section 332 is a "wholly independent" source of authority for the Commission to regulate wireless carriers, including regulation that draws on section 251 for its substance. *See Qwest Corp. v. FCC*, 252 F.3d 462, 464 (D.C. Cir. 2001). In *Qwest*, the petitioners challenged the Commission's jurisdiction to hear a complaint concerning enforcement of an agency regulation that prohibited LECs from charging paging carriers for the delivery of LEC-originated traffic pursuant to Section 251. The petitioners asserted that under the 1996 Act, complaints about intercarrier compensation could be resolved only through state-managed negotiation and arbitration.

This Court denied the petition for review, citing a prior decision in the Eighth Circuit holding that section 332 authorized the FCC to adopt interconnection rules affecting paging companies. 352 F.3d at 463-64. In particular, the Eighth Circuit had held that the FCC rule in question was authorized by section 332, which it described as "wholly independent of the 1996 Act." 352 F.3d at 464. S*ee also Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (noting that section 332(c)(1)(B) "gives the FCC the authority to order LECs to interconnect with CMRS carriers"), *aff'd in part, rev'd in part on other grounds, Iowa Utilities Board*, 525 U.S. 366.[18]

[18] No party sought further review of this part of the Eighth Circuit's decision. *Qwest,* 252 F.3d at 466 ("petitioners did not seek certiorari as to the Eighth Circuit's holding on § 332 – making it a final judgment with preclusive effects").

Intervenors invoke the canon of statutory construction that "the specific governs the general" in support of their argument that Congress gave the Commission authority to require number portability only with respect to LECs. Intervenors Br. at 7. They ignore the contrary – and here controlling – canon, which states that even partial repeals by implication are disfavored. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (repeal by implication is disfavored). *See also Mobile Comm. Corp. v. FCC*, 77 F.3d at 1404-05 ("[t]he [expressio unius] maxim has 'little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue'") (citations omitted). Section 251(b)(2) may not be read in such a way as to effectively repeal section 332 by negative implication.[19]

B. This Case Does Not Implicate Program Content Regulation And Thus Is Not Controlled By The *MPAA* Decision.

The petitioners and intervenors reply principally upon this Court's decision in *MPAA,* 309 F.3d 796, to restrict the Commission's authority under these statutes, but that case is readily distinguishable. In the order under review in *MPAA*, the Commission had adopted rules requiring that some television programming be accompanied by visual descriptions, invoking sections 1, 2(a), 4(i), and 303(r) of the Act. Section 303(r), 47 U.S.C. § 303(r), authorizes the FCC to make rules in the broadcast context. This Court reversed and vacated the Commission's Order. 309 F.3d at 798-99, 806-07. The court explained that, first, "by its terms, the [Communications Act of 1934] does not provide the FCC with the authority to enact video

[19] The Supreme Court has rejected similar arguments involving other provisions of the 1996 Act. *See National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333-39, 339-41 (2002) (rejecting arguments that Congress implicitly limited FCC's general pole attachment authority).

description rules." *Id.* at 798. It acknowledged that the FCC's ancillary authority under generally applicable statutes is "broad," but it held that those statutes did not provide authority to adopt the video description regulations, because those regulations "significantly implicate program content." *Id*. at 798-99. The court's analysis made clear that its holding was limited to the facts of the *MPAA* case, in which program content was implicated. *Id*. at 798-99 ("We hold that where, as in this case, the FCC promulgates regulations that significantly implicate program content, § 1 is not a source of authority.").[20]

MPAA is not controlling here because the Commission's number portability regulations do not touch upon program content – indeed, they have nothing to do with broadcasting – and therefore do not implicate the First Amendment. The cases discussed above – and acknowledged by the Court in *MPAA*, *see* 309 F.3d at 804-05 – are controlling, and the Commission had the authority to impose wireless number portability.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review and affirm the *Order*. If the Court finds that the FCC acted arbitrarily in denying the forbearance petition, it should remand without vacating. There would be at least a "non-trivial likelihood" that the Commission could justify a decision not to forbear on remand. *See Worldcom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (*citing Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993)). The rule in question, in any event, does not become effective until

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[20] *See also MPAA,* 309 F.3d at 802 ("We need not decide whether § 713 positively forecloses agency rules mandating video description"); at 804 (noting that cases cited by FCC "do not hold otherwise" because they "do not relate to program content"); at 807 (stating that "[w]hat is determinative here is the FCC acted without delegated authority from Congress," explaining that "[s]ection 1 does not furnish the authority sought[] because the regulations significantly implicate program content . . .").

November 2003 as a result of the Commission's deferral order. The petitioners thus will not be harmed if the Court remands for further proceedings without vacating.

Respectfully submitted,

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February 3, 2003

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

CELLULAR TELECOMMUNICATIONS & Internet Association and Cellco Partnership d/b/a VerizonWireless,	)	
PETITIONERS,	)	
V.	)	NO. 02-1264
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12188 words.

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