

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

In re AT&T Wireless Services, Inc.,)	
Cingular Wireless LLC,)	No. 03-1259
and Alltel Communications, Inc.,)	
)	
Petitioners)	

**OPPOSITION OF
FEDERAL COMMUNICATIONS COMMISSION
TO PETITION FOR WRIT OF MANDAMUS**

INTRODUCTION

Three wireless carriers have filed a petition for a writ of mandamus seeking a stay of the Federal Communications Commission’s November 24, 2003, deadline for implementing number portability until after the FCC acts on a pending challenge to the agency’s authority and any appropriate judicial review of that FCC decision is completed. On June 16, 2003, AT&T Wireless Services, Cingular Wireless LLC, and ALLTEL Communications, Inc. (collectively “petitioners”), along with the Cellular Telecommunications and Internet Association (“CTIA”), filed with the FCC an expedited petition for rulemaking to rescind the rule (“petition to rescind”), challenging the agency’s authority to adopt it in the first place. They contend that a stay of the implementation deadline is warranted because the FCC lacks authority to require wireless number portability, and because the balance of the equities favors a stay until final resolution of the authority issue.

The FCC opposes the petitioners’ request for several independent reasons.

First, the mandamus petition seeks an unusual - - perhaps unprecedented - - form of relief. The petitioners have not requested an order compelling the agency to take

action that has been delayed unreasonably, *see* Pet. Br. at 8 n. 16 (citing *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)), presumably because their petition to rescind was filed with the agency just three months ago. Instead they seek a stay of an existing rule that already has become final, and that was subject to direct challenge in a Tenth Circuit proceeding that the wireline carriers voluntarily dismissed. *See* Joint Motion for Dismissal, *Bell Atlantic NYNEX Mobile, Inc. v. FCC*, No. 97-9551 (10th Cir. filed March 19, 1999). The wireless carriers indirectly challenged the number portability rule again in this Court pursuant to a petition for review of the FCC's denial of their petition for permanent forbearance from applying the rule. *Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502 (D.C. Cir. 2003) ("*CTIA*"). In *CTIA*, this Court rejected the wireless petitioners' challenge to the FCC's authority as time-barred. *Id.* at 504, 508-509. The Court noted that the petitioners in *CTIA* had filed a timely petition for review of the Commission's orders adopting wireless number portability in the Tenth Circuit, but voluntarily dismissed their petition and "did not refile their petition within the statutory time limit." *Id.* at 508. Petitioners now seek yet again to challenge the FCC's authority to require number portability but, there is no precedent supporting petitioners' mandamus request for a stay pending resolution of their efforts to pursue a collateral attack on the Commission's authority through the decision-making process of the FCC and this Court.

Second, mandamus is not available in any event because the FCC is under no duty to act on the petition to rescind within any particular timetable or in order to enable the petitioners to file a petition for judicial review before the rule is implemented. By seeking relief in the form of a stay rather than an order compelling the agency to act,

petitioners have obscured the fact that their grievance against the FCC is that the agency has not acted as soon as they would like on the petition to rescind. Nevertheless, the petitioners acknowledge that they are not entitled to mandamus relief unless they are able to establish that the FCC has a “clear duty to act” on the petition to rescind. See Pet. Br. at 8-9.¹ The petitioners cannot establish, however, that the FCC has a duty to act immediately on their recent petition to rescind simply to provide them with yet another opportunity to challenge the rule, where the agency has many other matters competing for its time and attention. There is no statutory or regulatory deadline by which the FCC must rule on the petition to rescind. Indeed, as the petitioners acknowledge, the Commission more than once has ruled on its authority to require carriers to provide number portability. Pet. Br. at 3-4. That the petitioners failed to pursue judicial review of those rulings in accordance with applicable provisions governing judicial review does not oblige the Commission to give special priority to yet another attempt by these petitioners to avoid number portability. And, contrary to the petitioners’ apparent position, there is no suggestion in this Court’s opinion in *CTIA*, see 330 F.3d at 508-09, that any challenge to the FCC’s authority would have to be resolved *before* the number portability regulation becomes effective.

Third, even if mandamus relief might be available to provide a stay in some circumstances, the petitioners have not satisfied the standard four-part test for obtaining a stay in these circumstances because all of the factors weigh in the Commission’s favor. The petitioners are not likely to prevail ultimately in their effort to avoid the portability rule. It is undisputed that wireless number portability will promote competition by

¹ Petitioners assert that the FCC has “an obligation to issue a reviewable order denying the Rescission Petition promptly so that the legality of its action could be reviewed.” Pet. Br. at 9.

making it easier for customers to change carriers. The FCC has authority to adopt such a basic pro-competitive measure even if it did not do so pursuant to 47 U.S.C. 251(b)(2). Petitioners' claimed injury – the costs associated with implementing portability – is not irreparable because those costs are recoverable through charges passed on to consumers. As to the other factors, the Commission has consistently concluded that number portability is in the public interest because it will make it easier for consumers to switch carriers and therefore will promote competition within the industry, and in *CTIA* this Court agreed with that assessment. *See* 330 F.3d at 513 (noting that “having to change phone numbers presents a barrier to switching carriers”).

BACKGROUND

A. Adoption of The Wireless Number Portability Requirement in 1996 and Deferral of That Requirement Until 2003.

This Court has defined wireless number portability as “the ability of consumers to keep their phone numbers when they switch wireless carriers.” *CTIA*, 330 F.3d at 503.² Number portability has existed at least since 1981 in some services, as term or condition of interconnection between carriers engaged in providing 800-type services. *See Telephone Number Portability*, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12351 (1995) (para. 3) (“In the United States, 1-800 numbers are the best example of portable telephone numbers. Since 1981, when AT&T implemented database technology in its network, 800 service subscribers have been able to retain their telephone numbers

² *See also* 47 U.S.C. 153(30), which defines portability as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”

while changing the termination location for calls placed to their 800 numbers."'). The 1996 Telecommunications Act amended the Communications Act of 1934 and for the first time explicitly addressed number portability. Section 251(b)(2) of the 1996 Act requires all local exchange carriers ("LECs") "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). Although section 251(b)(2) imposes the number portability requirement only on LECs, the Commission retains the authority under the 1934 Act on which number portability decisions had been based. *See* Section 601(c) of the 1996 Act (Act "shall not be construed to modify, impair or supersede Federal . . . law unless expressly so provided. . . ."). In addition, the 1996 Act authorizes the Commission to treat wireless carriers the same way as local exchange carriers "to the extent that" the Commission finds that to be appropriate.³

On July 2, 1996, the FCC promulgated rules requiring both LECs and wireless carriers to provide number portability. *Telephone Number Portability*, First Report and Order, 11 FCC Rcd 8352 ("*First Report and Order*"). The Commission asserted and exercised authority under 47 U.S.C. §§ 151, 152, 154(i) and 332 in applying number portability to wireless carriers, and it set an initial compliance date of June 30, 1999, for wireless carriers. *Id.* at 8355 (para. 4); *see also CTIA*, 330 F.3d at 505. On May 30,

³ 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 [wireless] 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).

1997, Bell Atlantic NYNEX Mobile Inc.⁴ filed a petition for judicial review of the *First Report and Order* and the *First Reconsideration Order*,⁵ and the case was briefed before the Tenth Circuit. On December 16, 1997, while that case was pending in the Tenth Circuit, CTIA filed a petition with the FCC seeking temporary forbearance from the local number portability requirements on broadband CMRS carriers until the “five-year buildout period” for such carriers was completed. *CTIA Petition for Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd 3092, 3093 (para. 1) (1999) (“*1999 Order*”). The Commission in response extended the deadline until November 24, 2002. 14 FCC Rcd at 3093, 3116-17 (paras. 1, 49). In extending the deadline, the Commission found, among other things, that an extension would give the wireless industry additional time “to develop and deploy the technology that will allow viable implementation of service provider portability” and would give “CMRS carriers greater flexibility in that time-frame to complete network buildout, technical upgrade, and other improvements” *Id.* at 3104-05 (para. 25).

On March 19, 1999, given “the Commission’s extension of the enforcement deadline to November 24, 2002, Bell Atlantic and the Commission agreed to dismiss without prejudice the case that was pending before the Tenth Circuit.” *CTIA*, 330 F.3d at 506. On March 24, 1999, the Tenth Circuit granted the parties’ joint motion for

⁴ Bell Atlantic NYNEX Mobile Inc. is the predecessor to Verizon Wireless. Although Verizon Wireless was a petitioner in *CTIA*, it now supports wireless number portability. See Carmen Nobel, “Verizon Charts Own Course on Cell Number Portability,” *PC Week*, Aug. 25, 2003, 2003 WL 5736676. See also Bruce Meyerson, “Verizon to Allow Land Numbers for Cells,” *The Washington Post*, September 23, 2003. This article is attached and also is available at <http://www.washingtonpost.com/wp-dyn/articles/A48831-2003Sep22.html>. The news articles cited in this opposition are attached at Exhibit A.

⁵ See *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236 (1997).

dismissal. As the 2002 deadline approached, Verizon Wireless filed a petition with the Commission seeking permanent forbearance from wireless local number portability. *CTIA*, 330 F.3d at 506.

On July 26, 2002, the Commission denied permanent forbearance but again extended the deadline, this time until November 24, 2003. *Verizon Wireless' Petition for Partial Forbearance*, 17 FCC Rcd 14972 (2002) (“2002 Order”). On the basis of record evidence, the FCC concluded, among other things, that the costs of wireless number portability would not outweigh its substantial benefits to consumers and to competition. *Id.* at 14984-85 (para. 29). The Commission’s extension of the deadline was based on technical considerations and the pendency of other regulatory deadlines. *Id.* at 14981 (para. 23) (one-year extension is “warranted to provide adequate time to resolve all outstanding LNP implementation issues”). The FCC was not asked in that forbearance proceeding to address its authority to require wireless number portability, and it did not consider that issue.

B. The *CTIA* Decision

CTIA and Verizon Wireless filed a petition for judicial review of the denial of permanent forbearance. In June 2003, this Court rejected their claims in the *CTIA* opinion. The Court held that the petitioners’ challenge to the FCC’s authority was time-barred. 330 F.3d at 504, 508-09. The court explained that “[a] petition for judicial review to challenge a final order of the Commission must be filed ‘within 60 days after its entry,’” and that the “FCC [had] promulgated the number portability rules in July 1996 and the petition for review in this case was not filed until August 2002.” *Id.* at 504 (citations omitted). The Court recognized that the statutory time limits for seeking

judicial review “are not always inviolate.” It pointed out that the petitioners might be able to challenge the regulation “as applied to them” if, when the November 24, 2003, implementation date arrived, the FCC enforced the rule against them over their objections that the rule is outside the agency’s authority. *Id.* at 508-09. The Court also recognized that an opportunity for judicial review may arise “following an agency’s rejection of a petition to amend or rescind” the rule. *Id.* The Court concluded that, because the statutory limit for seeking review of the rule had expired, the petitioners “cannot challenge the regulation before it is applied to them.” *Id.*

The Court upheld the denial of forbearance, rejecting petitioners’ challenges on the merits. The Court found that the FCC had reasonably concluded that continued application of the rule was “necessary for the protection of consumers,” within the meaning of the forbearance statute. *CTIA*, 330 F.3d at 509; *see also* 47 U.S.C. § 160(a)(2). The Court stated that “[t]he simple truth is that having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently.” 330 F.3d at 513 (citation omitted).

Ten days after the Court issued its decision in *CTIA*, the petitioners in this action on June 16, 2003, filed – along with *CTIA* – a petition for rulemaking asking the FCC to rescind the wireless number portability regulation, asserting that the Commission’s rule was beyond its statutory authority. On June 20, 2003, the Commission listed the petition for rulemaking to rescind on its weekly list of FCC filings.⁶ The Commission promptly made the petition available on its electronic docketing system, but it entered the wrong

⁶ See <http://www.fcc.gov/Bureaus/Miscellaneous/Filings/fl030620.html> (attached as Exhibit B).

date (“2002” instead of 2003) in the electronic system and did not assign a rulemaking (“RM”) number. FCC staff subsequently corrected these technical errors. On September 16, 2003 - - after the Commission received the current petition for mandamus - - the FCC’s Consumer & Governmental Affairs Bureau invited comment on the petition for rulemaking.⁷ The petition now has an RM number, it has a current comment schedule, and it is available on the Commission’s electronic docketing system with the correct date.⁸

On August 15, 2003, petitioners, along with CTIA, requested an administrative stay of the wireless number portability deadline pending final action on the statutory authority issue. Two weeks later, on August 29, petitioners filed this mandamus petition.

C. The Other Wireless Number Portability Petitions Pending At The FCC

Also pending before the FCC are several petitions from wireless carriers seeking guidance on number portability implementation issues. On January 23, 2003, CTIA filed a petition for declaratory ruling seeking guidance on whether wireless carriers must port their customers’ numbers to other wireless providers. On May 13, 2003, CTIA filed a petition for declaratory ruling seeking guidance on a number of technical and implementation issues, including the time interval within which a port must occur.⁹

⁷ See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238952A1.doc (attached as Exhibit C) (requesting comments within 30 days).

⁸ See http://fccweb01w/prod/ecfs/s_a/ (attached as Exhibit D).

⁹ Another pending petition for a writ of mandamus asks this Court to require the FCC to resolve the implementation questions related to number portability that were raised in the January and May petitions. See *In re: Cellular Telecommunications & Internet Association* (D.C. Cir. No. 03-1270, filed Sept. 5, 2003). The Court has not directed the FCC to respond to that petition.

On July 3, 2003, the chief of the FCC's Wireless Telecommunications Bureau, acting on delegated authority, issued a letter providing guidance on some of the questions raised by the petitions. *See* Letter from John B. Muleta, Chief of the Wireless Telecommunications Bureau, CC Dkt. 95-116, DA 03-2190 (July 3, 2003). Several wireless carriers have applied for Commission review of this staff letter. Their request is currently pending before the Commission. The FCC's staff is preparing a draft order (or draft orders), for the Commission's consideration, addressing the applications for review of the Bureau Chief's letter as well as other implementation issues raised by the pending petitions. The FCC's wireless number portability rule becomes effective on November 24, 2003.

ARGUMENT

Under "well-established rules" of the Supreme Court and this Court, the remedy of mandamus "is a drastic one, to be invoked only in extraordinary situations."¹⁰ A party seeking the writ of mandamus must demonstrate: (1) that he has "no other adequate means to attain the relief he desires[;]" and (2) that his right to issuance of the writ is "clear and indisputable."¹¹ To that end, the party seeking the writ must demonstrate not only that he has a clear right to the relief sought but also that the responding party has a

¹⁰ *In re: Richard B. Cheney*, 334 F.3d 1096, 1101 (D.C. Cir. 2003) (quoting *Kerr v. United States Dist. Court*, 426 U.S. 401(1976)); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985) ("[m]andamus is an extraordinary remedy [and] we require similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process"), *cert. denied*, 475 U.S. 1123 (1986).

¹¹ *Kerr*, 426 U.S. at 403 (internal citations and quotations omitted). *See also* *Air Line Pilots Ass'n v. DOT*, 880 F.2d 491, 503 (D.C. Cir. 1989); *In re Richard Thornburgh*, 869 F.2d 1503, 1506-07 (D.C. Cir. 1989).

clear duty to perform the act amounting to the relief sought. *See, e.g., Weber v. United States*, 209 F.3d 756, 760 (D.C. Cir. 2000) (“mandamus is proper only when an agency has a clearly established duty to act”). As this Court has explained, “[m]andamus is an extraordinary remedy, warranted only when agency delay is egregious.” *In re Monroe Communications Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988).

The petitioners have not approached the showing necessary to warrant mandamus. The situation is “extraordinary” only in the sense that petitioners seek unprecedented relief under the All Writs Act in a third attempt by wireless carriers to attack the rule and avoid providing number portability to consumers. The petition should be denied.

A. The All Writs Act Does Not Authorize a Stay Of Agency Action That Has Been Reviewed And Has Become Final.

Although petitioners purport to invoke the Court's authority under the All Writs Act to issue an order in aid of its jurisdiction to review final decisions of the FCC, they do not ask the Court to require the Commission to act on their petition challenging the portability rule. Petitioners apparently realize that they cannot claim unreasonable delay because their petition to rescind was filed only three months ago. Instead, they ask the Court to stay the deadline for implementation of a rule that has become final and no longer is subject to direct judicial review. That deadline was established in a decision of the FCC that was reviewed and affirmed in this Court. *CTIA*, 330 F.3d at 506. This kind of collateral attack on a final rule and the deadline for implementing the rule appears to have no precedent in All Writs Act cases, and petitioners cite nothing to support it.

In effect, petitioners are asking the Court after the fact to stay a decision that already has been reviewed and affirmed on the merits. As this Court has made clear, a stay motion "necessarily contemplate[s] that the motion will be made in a proceeding in

this court in which a petition to review an agency order is pending" *In re GTE Service Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985). Because there is no pending petition for review in this Court to which the petitioners' stay request is ancillary -- as there could not be, because the order sought to be stayed has been reviewed and has become final -- an ordinary motion for stay would have to be dismissed. *Id.*

The petitioners creatively attempt to avoid the consequences of their untimely challenge to the FCC's authority by labeling their (also untimely) stay motion as a petition for mandamus, arguing that they are entitled to have yet another chance to challenge the FCC's rule before it becomes effective. It is true that the Court can issue a writ of mandamus in appropriate circumstances to compel an agency to take action that has been unreasonably withheld or delayed. But the FCC already has ruled on the issue petitioners raise here: the agency's authority to require wireless number portability. Petitioners could have had review of that issue, but they chose to dismiss their first petition for review in the Tenth Circuit, and they were untimely in seeking to raise it in the *CTIA* case. The FCC has no obligation to set its priorities in such a way as to provide them with yet another vehicle to challenge the rule before it becomes effective.

The petitioners suggest that the *CTIA* opinion itself envisioned pre-enforcement review of the FCC's rule by identifying FCC action on a petition to rescind the rule as a possible vehicle for a collateral challenge. But the Court envisioned no such thing. Rather, after explaining that petitioners' challenge to the rule in that case was time-barred, the Court described two circumstances in which a reviewing court "would - - entertain a challenge beyond a statutory time limit to the authority of an agency to promulgate a regulation." *CTIA*, 330 F.3d at 508. One such exception involves review of an agency

order denying a petition to amend or rescind a disputed rule. *Id.* at 508-09. But the Court did not suggest that such review would occur (or even should occur, given the default of the petitioners) in the number portability context before the rule at issue in *CTIA* was implemented. Indeed, the concluding sentence in this part of the Court's opinion states: "But because the 60-day statutory limitations period [for challenging the rule] has expired, petitioners cannot challenge the regulation before it is enforced against them." *Id.* at 509.

The All Writs Act authorizes actions by the Court in aid of its own jurisdiction. It does not authorize actions to give litigants a second (or third) chance to invoke the Court's jurisdiction where their earlier efforts failed for reasons that were the litigants' own doing.

B. The Commission Is Under No Duty To Act Immediately On The Petition To Rescind For The Sole Purpose Of Giving Petitioners Another Opportunity For Pre-Enforcement Review.

Petitioners acknowledge that in 1996, the Commission issued an order addressing the agency's authority to adopt wireless number portability, and that the industry failed to pursue a timely petition for review of this order. Pet. Br. At 3, 4. They nevertheless insist that the FCC now must revisit this issue and has a duty to act immediately on their petition to rescind. *Id.* at 8-9. Petitioners have not come close to demonstrating that the FCC has any duty to act immediately or, more to the point, sufficiently quickly to allow the completion of judicial review before the rule is implemented.

First, petitioners have cited no authority establishing that the FCC has any duty to act immediately. The best they can do is suggest that, since the FCC's appellate counsel briefed the authority issue in the *CTIA* case, the agency need not consider the petition to

rescind but should simply perform the “ministerial act” of “summarily denying” the petition. This suggestion gives short shrift to the FCC’s duty to evaluate the petition and to explain the decision it takes on the petition. It also ignores the FCC’s interest in analyzing the issues thoroughly, in light of the petitioners’ arguments, and to make the best case for the decision it makes.

Second, petitioners ignore the other petitions from wireless carriers pending at the agency related to the implementation of wireless number portability (which are now the subject of another mandamus petition in this Court). The FCC is devoting substantial resources to acting on those petitions. This Court has recognized that an “agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing.” *Cutler v. Hayes*, 818 F.2d 879, 896 n. 150 (D.C. Cir. 1987). It is reasonable for the Commission to give priority to technical implementation issues as the deadline nears.

Third, petitioners have no right at this stage of proceedings to “pre-effectiveness review” of the Commission’s authority to issue the number portability regulation. *Cf.* Pet. Br. at 10. Such a claim finds no support in the recent *CTIA* decision, which found that the petitioners there had forfeited their opportunity for pre-effectiveness review by not making a timely challenge. In *CTIA*, this Court suggested two ways in which a wireless carrier could challenge the FCC’s authority to issue its wireless number portability regulations even though the statutory deadline had passed. First, a carrier may challenge the FCC’s authority following enforcement of the number portability regulation. *CTIA*, 330 F.3d at 508. This approach contemplates implementation of the regulation before any resolution of the authority issue.

The second approach is for a wireless carrier to file a petition for a rulemaking to rescind the number portability regulation, then to appeal the agency's rejection of that petition. *Id.* at 508. With respect to this option, the Court did not suggest a deadline by which the agency would have to act if presented with a petition to rescind, or otherwise indicate that there was any obligation on the agency to respond to a petition to rescind with any unusual urgency. Moreover, the Court did not even suggest that petitioners were entitled to "pre-effectiveness review" of the regulation. *Id.* at 508-09 ("because the 60-day statutory limitations period has expired, petitioners cannot challenge the regulation before it is enforced against them.").

Fourth, because the petition to rescind has been pending for little more than three months and now has been properly docketed and placed on public notice, the FCC is not compelled at this time to take immediate action on the petition. Furthermore, as petitioners apparently acknowledge, the FCC has not unduly delayed acting on it by any reasonable standard. *See, e.g., Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 81 (D.C. Cir. 1984) (delays of two and five years did not warrant mandamus). The agency in the short term is required to do no more than it already has done, and petitioners have not demonstrated any legal duty for the agency to take further action on pain of a stay of its rule. *See Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C.Cir.1985) ("[m]andamus is an extraordinary remedy; we require similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process.").

C. Petitioners Are Not Entitled To a Stay Under The Standard Test.

Even if mandamus relief were available to provide a stay pending appeal, petitioners have not satisfied the standard four-part test for obtaining a stay. In evaluating a request for a stay, this Court examines: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Wisconsin Gas v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (citation omitted). As none of the factors supports the petitioners’ request for a stay, petitioners have not established a “clear and indisputable” right to the relief sought in their mandamus petition.

1. The Commission Reasonably Has Determined That It Has Authority To Require Wireless Number Portability.

The element of “likelihood of success on the merits” is difficult to address in the present posture of this case. It is not clear what “the merits” are in this unusual case: the FCC’s duty to act promptly on the petition to rescind, the FCC’s authority to adopt the rule in the first place, or even the petitioner’s entitlement to mandamus relief. Since the petitioners have briefed the case as if “the merits” refers to the FCC’s authority to adopt the rule, and since we have considered the other to potential “merits” issues elsewhere, we address the issue of the FCC’s authority in this context. Although the FCC has not yet ruled on the petitioners’ pending petition to rescind, the agency has addressed its

authority, and we draw from that discussion in showing that petitioners have not shown a likelihood of success on the merits of the authority issue..

Petitioners contend that Congress’s adoption of section 251(b)(2) as part of the 1996 Act withdrew from the Commission any preexisting authority it may have had to require number portability through any means other than rules implementing that section. The petitioners 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. *See* 47 U.S.C. § 153(26). They argue that Congress intended to limit the FCC to requiring number portability by LECs. Pet. Br. at 11-12. Section 251(b)(2) evidences no intent to take away the Commission’s pre-existing authority to require telecommunications carriers that are not LECs to offer number portability.

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); *see also CTIA*, 330 F.3d at 507. 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., Transmission Access Policy Study v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000), *aff’d*, 535 U.S. 1 (2002).

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), 201-205, 218 and 332 of the Communications Act. *Portability NPRM*, 10 FCC Rcd at 12377 (para. 84); *see also 2002 Forbearance Order*, 17 FCC Rcd at 14973 (para. 2 n.4). *See also Portability NPRM*, 10 FCC Rcd at 12351-12354. No party filing comments in that proceeding challenged the authority of the Commission to adopt number portability. Given the industry’s initial acquiescence in the Commission’s authority, one would expect petitioners to demonstrate now that Congress specifically intended in the 1996 Act to take away the Commission’s power to require portability by carriers other than LECs. Petitioners 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 telephone markets. Because the development of the wireless industry has a different history, Congress did not explicitly impose Section 251 obligations 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. The only thing Congress took away was the FCC’s discretion not to impose those obligations on LECs, unless the FCC made the findings necessary to justify forbearance from applying them. *See* 47 U.S.C. § 160.

Indeed, Congress provided in the definitional section 3(26) of the Communications Act, as amended by the 1996 Act, that wireless carriers could be

included within the definition of LECs “to the extent that” the Commission found that wireless services should be included in the definition of that term. This suggests strongly that Congress decided to leave the question of extending LEC-specific requirements to wireless carriers to the expert judgment of the Commission.¹²

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).¹³

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

¹² In presenting their authority argument, 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 number portability after the 1996 Act that it had before the Act.

¹³ 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.

view is . . . reasonable”); *FCC v. Midwest 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.), *cert. denied*, 519 U.S. 823 (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 1404.¹⁴

Furthermore, 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

¹⁴ *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 a necessary and proper clause).

(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. 252 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.” 252 F.3d at 464. *See 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. 366.¹⁵

Petitioners 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. Petitioners Br. at 12 n.28. 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 repeal section 332 by negative implication.

2. The Economic Injury Claimed By Petitioners Is Recoverable And Therefore Is Not Irreparable

Although the “irreparable harm” claimed by the petitioners – the costs associated with implementing wireless number portability – is economic, they have not shown that their claimed losses are not recoverable or that the existence of their business is threatened. It is “well settled that economic loss does not, in and of itself, constitute irreparable harm.” *Wisconsin Gas*, 758 F.2d at 674. Furthermore, “[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movants’ business.” *Id.*

Petitioners do not identify any legal or regulatory bar that would prevent wireless carriers from recovering the legitimate costs incurred in providing number portability to consumers. Indeed, the Commission has stated that CMRS providers may recover their carrier-specific costs directly related to providing number portability in any lawful manner consistent with their obligations under the Communications Act. *Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11774 (1998) (para. 136). *See also* 47 C.F.R. § 52.33(b) (2002) (“All telecommunications carriers other than incumbent local exchange carriers may recover their number portability costs in any manner consistent with applicable state and federal laws and regulations.”). Instead, petitioners assert – without any support – that it is “unknowable” whether consumers will

¹⁵ 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”).

tolerate carrier efforts to recover number portability costs through rates or surcharges. *See* Pet. Br. at 16. Such unsubstantiated claims fall far short of demonstrating nonrecoverable economic injury as required by this Court's precedents.

Moreover, a number of wireless carriers – including at least two of the petitioners in this action – apparently are attempting to ascertain whether the market will tolerate such cost recovery. To this end, they reportedly are attempting to recover the costs associated with implementing wireless number portability by passing the costs on to consumers before the service is actually available to the public.¹⁶ Such efforts further undermine petitioners' unsubstantiated assertion that their alleged economic injury is nonrecoverable.

The petitioners also overstate the extent of their claimed injury. From 1996 through 2003, the wireless industry successfully and successively delayed the effective date of the wireless number portability regulation. The wireless industry persuaded the Commission to postpone the effective date primarily on the grounds that it would cost less and be easier for the industry to implement number portability if it had additional time. *See, e.g., 2002 Forbearance Order*, 17 FCC Rcd at 14973-74 (paras. 4-6), 14986-87 (para. 34). If the wireless industry had devoted more resources to preparing for

¹⁶ Petitioners AT&T Wireless Services, Inc., and Cingular Wireless LLC, for example, have included in their bills a monthly charge to cover number portability costs. *See, e.g.,* Suzanne King, "Number portability will alter the landscape of wireless industry," *Kan. City Star*, Sept. 15, 2003, 2003 WL 62250725 (noting that "AT&T Wireless charge[s] a monthly fee . . . to cover the cost of implementing number portability"); Bruce Meyerson, "Number Switch Fees Bring Carrier Profits," *The Capital Times & Wisconsin State Journal*, Sept. 12, 2003, 2003 WL 59180716 ("Since the spring, AT&T Wireless has been charging some customers what it calls a temporary fee of \$1.75. Since April, Cingular has been charging from 32 cents to \$1.25 per month depending on the state."). *See also Construction Energies, Inc. v. Nextel Communications, Inc.*, Case No. 03-21155-Civ-Huck/Turnoff (attached as Exhibit E) (referring to FCC claim that Nextel's monthly charge for number portability is "unjust and unreasonable" charge in violation of 47 U.S.C. 201(b)). The articles are attached at Exhibit A.

number portability and less to avoiding or delaying the obligation, the costs would have been incurred by now and probably fully recovered through service charges. The petitioners have not shown irreparable injury within the meaning of stay motion practice.

3. A Stay Would Injure Consumers by Delaying the Implementation of Number Portability, and Is Not in the Public Interest

The public interest weighs heavily against a stay in this case. As this Court has recognized, the Commission's regulation requiring wireless number portability will remove a current obstacle to consumers who wish to change carriers. In its most recent forbearance order, the Commission balanced the costs of implementing number portability against the benefits to consumers and to competition that would result from adopting portability. On the basis of record evidence, the Commission concluded that the relative cost of implementing number portability was low, that the benefits outweighed the costs, and that number portability was in the public interest. *2002 Forbearance Order*, 17 FCC Rcd at 14984-85 (para. 29).

In fact, the Commission consistently has concluded that number portability is in the public interest. *See Telephone Number Portability*, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12352 (para. 4) (1995) ("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."); *First Report and Order*, 11 FCC Rcd at 8443-46 (paras. 155-160) (explaining why number portability would serve the public interest); *Forbearance Order*, 14 FCC Rcd 3102, 3103, 3112-13 (paras. 20, 23, 40) (same); *2002 Forbearance Order*, 17 FCC Rcd at 14980-81 (paras. 20-22) (same).

From 1996 through 2003, the wireless industry obtained extensions of the number portability deadline from 1999 to 2003, citing the costs and difficulties associated with implementing portability. In *CTIA*, however, this Court rejected the industry's request for permanent forbearance, and left in place the current deadline of November 24, 2003, for implementing portability. In doing so, this Court in effect found that wireless number portability was in the public interest:

The simple truth is that having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently. As the Commission reasoned, consumers "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*, 17 F.C.C.R. at 14,980.

CTIA, 330 F.3d at 513.

If a stay were granted, it would frustrate the expectations of many individuals who wish to take their numbers with them when they change carriers. And it would discourage rational market decisions to take service from a different carriers. There is no public interest in staying the effective date of the number portability requirement.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

John A. Rogovin
General Counsel

Richard K. Welch
Associate General Counsel

John E. Ingle
Deputy Associate General Counsel

Rodger D. Citron
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

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