BRIEF FOR RESPONDENTS

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

NOS. 07–1475, 07–1477, AND 07–1480

CTIA–THE WIRELESS ASSOCIATION ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

JAMES J. O'CONNELL, JR.
DEPUTY ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
JAMES J. FREDRICKS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

MATTHEW B. BERRY
GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

RICHARD K. WELCH
ACTING DEPUTY ASSOCIATE GENERAL COUNSEL

NANDAN M. JOSHI
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners CTIA–The Wireless Association and Sprint Nextel Corporation.

2. Rulings under review

Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks:

Order, 22 FCC Rcd 10541 (2007) (J.A. 447) (*Katrina Order*), and

Order on Reconsideration, 22 FCC Rcd 18013 (2007) (J.A. 810) (*Reconsideration Order*).

3. Related cases

This case has not previously been before this Court. On September 28, 2007, CTIA filed a petition for review of the *Katrina Order* in this Court. *CTIA–The Wireless Association v. FCC*, No. 07–1386. On October 10, 2007, this Court granted CTIA's motion for voluntary dismissal of its petition for review.

TABLE OF CONTENTS

Page

JURISDICTION 1

QUESTION PRESENTED 2

STATUTORY AND REGULATORY PROVISIONS 3

COUNTERSTATEMENT 3

A. The findings of the Katrina Panel 4

B. The rulemaking proceeding 7

C. The Katrina Order 12

D. The reconsideration stage of the rulemaking proceeding 13

E. Proceedings in this Court 18

SUMMARY OF ARGUMENT 18

STANDARD OF REVIEW 21

ARGUMENT 22

I. The Commission has statutory authority to adopt the backup power rule 22

II. The Commission complied with the APA's notice requirements 32

III. The backup power rule is supported by the administrative record and is otherwise reasonable 38

A. The backup power rule is supported by the administrative record 38

B. The Commission reasonably concluded that the backup power rule would promote public safety 43

C. The exemptions to the backup power rule are reasonable 47

Page

IV. USA Mobility's paging-specific challenges to the backup power rule should be rejected 52

A. USA Mobility's petition for review is untimely and should be dismissed for want of jurisdiction........ 52

B. If the Court concludes that it has jurisdiction, it should reject USA Mobility's arguments on the merits 56

1. Application of the backup power rule to paging carriers did not violate the APA's notice requirements 56

2. Application of the backup power rule to paging carriers was reasonable........ 57

CONCLUSION 61

TABLE OF AUTHORITIES

Page

Cases

American Library Ass'n v. FCC,
406 F.3d 689 (D.C. Cir. 2005) 22, 23, 25, 26

American Radio Relay League, Inc. v. FCC,
617 F.2d 875 (D.C. Cir. 1980) 41

Animal Legal Defense Fund, Inc. v. Glickman,
204 F.3d 229 (D.C. Cir. 2000) 51

* *ANR Pipeline Co. v. FERC*, 988 F.2d 1229 (D.C. Cir. 1993) 55, 56

AT&T Corp. v. FCC, 220 F.3d 607 (D.C. Cir. 2000) 43

* *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 23, 30, 31

AT&T Wireless Services, Inc. v. FCC,
270 F.3d 959 (D.C. Cir. 2001) 51

California v. FCC, 905 F.2d 1217 (9th Cir. 1990) 28, 30

Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 21

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971). 22

City of Waukesha v. EPA,
320 F.3d 228 (D.C. Cir. 2003) 33

Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982),
cert. denied, 461 U.S. 938 (1983) 29

Covad Communications Co. v. FCC,
450 F.3d 528 (D.C. Cir. 2006) 33

Dominion Resources, Inc. v. FERC,
286 F.3d 586 (D.C. Cir. 2002) 55

East Texas Elec. Co-op., Inc. v. FERC,
218 F.3d 750 (D.C. Cir. 2000) 55

FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 22, 26, 31

Page

FCC v. National Citizens Comm. for Broad.,
436 U.S. 775 (1978) 41

* *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) 29

Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.),
cert. denied, 434 U.S. 829 (1977) 31

ICC v. Brotherhood of Locomotive Engineers,
482 U.S. 270 (1987) 53, 55

ICG Concerned Workers Ass'n v. United States,
888 F.2d 1455 (D.C. Cir. 1989) 53

Illinois Bell Telephone Co. v. FCC,
911 F.2d 776 (D.C. Cir. 1990) 49, 52

Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997),
aff'd in part and rev'd in part, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 29, 30

Keller Communications, Inc. v. FCC,
130 F.3d 1073 (D.C. Cir. 1997) 28

Long Island Care at Home, Ltd. v. Coke,
127 S. Ct. 2339 (2007) 38

Loyola University v. FCC,
670 F.2d 1222 (D.C. Cir. 1982) 41

Motion Picture Ass'n of Am. v. FCC,
309 F.3d 796 (D.C. Cir. 2002) 25, 29, 31

National Ass'n of Broadcasters v. FCC,
740 F.2d 1190 (D.C. Cir. 1984) 28, 47

National Ass'n of Regulatory Util. Commr's v. FCC,
533 F.2d 601 (D.C. Cir. 1976) 30

National Ass'n of Regulatory Util. Commr's,
737 F.2d 1095 (D.C. Cir. 1984),
cert. denied, 469 U.S. 1227 (1985) 29

National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 22

Page

National Cable & Telecomms. Ass'n v. Gulf Power Co.,
534 U.S. 327 (2002) 22

National Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696 (D.C. Cir. 2008) 35

Natural Res. Def. Council v. EPA,
822 F.2d 104 (D.C. Cir. 1987) 39

Northeast Md. Waste Disposal Auth. v. EPA,
358 F.3d 936 (D.C. Cir. 2004) 33, 37

* *Nuvio Corp. v. FCC*,
473 F.3d 302 (D.C. Cir. 2006) 24, 28, 33, 42, 43, 45, 50

Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Admin.,
494 F.3d 188 (D.C. Cir. 2007) 38, 57

Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007) 51

* *Rural Telephone Coalition v. FCC*,
838 F.2d 1307 (D.C. Cir. 1988) 29

Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991) 33

Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) 39, 42

Southern Co. Services, Inc. v. FERC,
416 F.3d 39 (D.C. Cir. 2005) 55

Southwestern Bell Telephone Co. v. FCC,
19 F.3d 1475 (D.C. Cir. 1994) 30

Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission,
650 F.2d 1235 (D.C. Cir. 1980) 32

* *United States Cellular Corp. v. FCC*,
254 F.3d 78 (D.C. Cir. 2001) 39, 41, 47

* *United States v. Midwest Video Corp.*,
406 U.S. 649 (1972) 26

* *United States v. Southwestern Cable Co.*,
392 U.S. 157 (1968) 23, 25, 28, 32

United States v. Storer Broadcasting Co.,
351 U.S. 192 (1956) 23

United Steelworkers of Am., AFL–CIO v. Marshall,
647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*,
453 U.S. 913 (1981) 35, 37, 38

* *United Video, Inc. v. FCC*,
890 F.2d 1173 (D.C. Cir. 1989) 31

* *Vonage Holdings Corp. v. FCC*,
489 F.3d 1232 (D.C. Cir. 2007) 41

Western Union Telegraph Co. v. FCC,
773 F.2d 375 (D.C. Cir. 1985) 2, 53, 55

Whitman v. American Trucking Ass'ns, Inc.,
531 U.S. 457 (2001) 31

WJG Telephone Co. v. FCC,
675 F.2d 386 (D.C. Cir. 1982) 33, 35, 41

Wold Communications, Inc. v. FCC,
735 F.2d 1465 (D.C. Cir. 1984) 50

WorldCom, Inc. v. FCC, 238 F.3d 449 (D.C. Cir. 2001) 41, 43

Statutes and Regulations

5 U.S.C. § 553(b)(3) 32

5 U.S.C. § 601 54

5 U.S.C. § 612 54

5 U.S.C. § 706(2)(A) 22

28 U.S.C. § 2342(1) 2

28 U.S.C. § 2344 .... 2, 53

44 U.S.C. § 3507(b) 18

44 U.S.C. § 3507(c)(2) 18

47 U.S.C. § 151 .... 13, 16, 19, 23, 24, 25, 31

47 U.S.C. § 152(a) 23, 25

Page

47 U.S.C. § 152(b) ... 30

47 U.S.C. § 153 ... 25

47 U.S.C. § 154(i) ... 25

47 U.S.C. § 161 ... 23

47 U.S.C. § 303(r) ... 16, 25

47 U.S.C. § 402(a) ... 2

47 U.S.C. § 405(a) ... 21, 51, 58, 59, 60

47 U.S.C. §§ 201–276 ... 27

47 U.S.C. §§ 301–399B ... 27

47 C.F.R. § 1.3 ... 50

47 C.F.R. § 1.4(b)(1) ... 53

47 C.F.R. § 20.9 ... 13, 55

47 C.F.R. § 20.9(a)(1), (6) ... 54

47 C.F.R. § 74.1111(a) (1970) ... 26

Others

72 Fed. Reg. 37655 ... 1, 13

72 Fed. Reg. 46485 ... 1, 14

72 Fed. Reg. 57879 ... 2, 18

Hurricane Katrina, A Nation Still Unprepared, Special Report of the Comm. on Homeland Security and Governmental Affairs, S. Rep. No. 109–322 (2006) ... 3

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

AAPC	American Association of Paging Carriers
APA	Administrative Procedure Act
CMRS	Commercial Mobile Radio Service
COLTS	Cell Sites on Light Trucks
COWs	Cells on Wheels
DAS	Distributed Antenna Systems
DTV	Digital television
NENA	National Emergency Number Association
NRIC	Network Reliability and Interoperability Council
OMB	Office of Management and Budget
SatCOLTS	Satellite Cells on Light Trucks
USTA	United States Telecom Association

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

NOS. 07–1475, 07–1477, AND 07–1480

CTIA–THE WIRELESS ASSOCIATION ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTION

The Federal Communications Commission released its initial order in this proceeding (*Katrina Order*) on June 8, 2007,[1] and published a summary of the order in the *Federal Register* on July 11, 2007, 72 Fed. Reg. 37655. On August 10, the Commission received seven petitions for agency reconsideration of the *Katrina Order*. *See* 72 Fed. Reg. 46485 (Aug. 20, 2007). On October 4, the Commission released an order on reconsideration (*Reconsideration Order*)

---

[1] Order, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541 (2007) (J.A. 447) (*Katrina Order*).

granting those reconsideration petitions in part and denying them in part.[2] The Commission published a summary of the *Reconsideration Order* in the *Federal Register* on October 11, 2007. 72 Fed. Reg. 57879.

Petitions for review of the *Katrina Order* and the *Reconsideration Order* were filed in this Court on November 23, 26, and 27, 2007. The petitions for review purport to invoke the Court's jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). For the reasons set forth in Section IV of the argument section of this brief, the Court should dismiss the petition for review filed by USA Mobility, Inc. in No. 07–1477 as untimely. USA Mobility's claim that the Commission should not have applied its "backup power" rule to paging carriers is a challenge to the rule as adopted by the Commission in the *Katrina Order*, not the *Reconsideration Order*. USA Mobility, however, did not petition for review of the *Katrina Order* within the 60-day window set forth in 28 U.S.C. § 2344, nor did it toll the time for seeking such review by filing a petition for reconsideration of the *Katrina Order* with the Commission. *See Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985). Accordingly, the Court lacks jurisdiction in No. 07–1477.[3]

QUESTION PRESENTED

After an independent panel concluded that the loss of electrical power during Hurricane Katrina was a main cause of widespread network outages that

[2] Order on Reconsideration, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 18013 (2007) (*Reconsideration Order*) (J.A. 810).

[3] The petition for review filed by Sprint Nextel Corporation in No. 07–1480 is untimely with respect to the *Katrina Order* for the same reason. Nonetheless, since Sprint has joined the brief of CTIA, which filed a timely petition for review, the untimeliness of Sprint Nextel's petition does not affect the issues before the Court.

severely hampered communications services during and after the storm, the Commission adopted a rule requiring wireless providers and other communications carriers to ensure that they have adequate backup power capacity to maintain emergency communications during a crisis. The question presented is whether the Commission acted lawfully and reasonably when it adopted the backup power rule.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief.

COUNTERSTATEMENT

On Monday, August 29, 2005, Hurricane Katrina struck the Gulf Coast and the millions of residents who live in the coastal areas of Alabama, Mississippi, and Louisiana. The "most destructive natural disaster in American history," Hurricane Katrina "la[id] waste to 90,000 square miles of land, an area the size of the United Kingdom."[4] "All told, more than 1,500 people died," and thousands of others "suffered without basic essentials for almost a week." Senate Report 2.

In the wake of the storm, the Federal Communications Commission established an independent panel (known as the Katrina Panel) to review the effect of the hurricane on communications networks and to make recommendations to improve network resiliency. Identifying the loss of commercially supplied electric power as one of the chief causes of network failures related to the storm, the Katrina Panel recommended that the

[4] Hurricane Katrina, A Nation Still Unprepared, Special Report of the Comm. on Homeland Security and Governmental Affairs, S. Rep. No. 109–322, at 2 (2006) (Senate Report).

Commission encourage service providers to "ensure availability" of backup power "to maintain critical communications services during times of commercial power failures."[5]

This case involves a challenge by the wireless industry to the Commission's response to the Katrina Panel's findings and recommendations concerning the need for adequate backup power. After a notice-and-comment rulemaking proceeding, the Commission concluded that service providers should back up their assets with power reserves so that emergency communications can continue when a major calamity disrupts commercial power supplies. It accordingly required communications providers to maintain an adequate backup power supply, including at least eight hours of power reserves at cell sites and other remote network locations. On reconsideration, the Commission relaxed that requirement substantially by exempting some locations, but declined to rescind the rule altogether. It explained that the "need for backup power in the event of emergencies has been made abundantly clear by recent events, and the cost of failing to have such power may be measured in lives lost." *Reconsideration Order*, 22 FCC Rcd at 18027 ¶ 31 (J.A. 824). Each step in the administrative process leading to the backup power rule is described more fully below.

A. The findings of the Katrina Panel

The Katrina Panel was established in January 2006 as a federal advisory committee charged with "study[ing] the impact of Hurricane Katrina on all sectors of the telecommunications and media industries," "review[ing] the

[5] Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Report and Recommendations to the Federal Communications Commission (June 12, 2006) (Katrina Report), at 39 (J.A. 47).

sufficiency and effectiveness of the recovery effort with respect to this infrastructure," and "mak[ing] recommendations" to the Commission "regarding ways to improve disaster preparedness, network reliability, and communications among first responders." 71 Fed. Reg. 933 (Jan. 6, 2006) (J.A. 1). It completed its proceedings on June 12, 2006, when it issued its final report to the Commission.

In its report, the Katrina Panel found that the hurricane had a "devastating impact" on communications networks, with "every sector of the communications industry [being] impacted by the storm." Katrina Report i (J.A. 4). The Katrina Panel observed that "most of the region's communications infrastructure fared fairly well through the storm's extreme wind and rain." *Ibid*. The base stations (*i.e.*, cell sites) used by wireless phone operators, for example, generally "were not destroyed by Katrina." *Id.* at 9 (J.A. 17). Rather, the "three main problems that caused the majority of communications network interruptions" were flooding, the "failure of redundant pathways for communications traffic," and, as relevant here, "lack of power and/or fuel." *Id.* at i (J.A. 4). The Katrina Report cited the "lack of commercial power" (along with lack of transport connectivity) as responsible for "the majority of the adverse effects and outages encountered by wireless providers." *Id.* at 9 (J.A. 17); *see also id.* at 6 (J.A. 14) ("a large portion of the communications infrastructure withstood the storm's wind and rain with only minor damage (as distinguished from post-storm flooding from levee breaches and power outages, which had a more devastating impact)"); *id.* at 7 (J.A. 15) ("the main cause of transmission failures was loss of power").

The Katrina Panel observed that, although communications providers had deployed some "backup batteries and generators," which generally supplied "one to two days of fuel or charge," "not all locations had them installed." Katrina Report 14 (J.A. 22); *see also id.* at 17 (J.A. 25) (post-disaster restoration efforts

were impeded by the lack of backup power sources "at all facilities"). In addition, even where backup power had been deployed, "fuel was generally exhausted prior to restoration of power," *id.* at 14 (J.A. 22), causing "the failure of otherwise functional infrastructure," *id.* at 6 (J.A. 14). As the Katrina Panel explained, "most [backup power equipment] provided only enough power to operate particular communications facilities for 24–48 hours—generally a sufficient period of time to permit the restoration of commercial power in most situations, but not enough for a catastrophe like Hurricane Katrina." *Id.* at 17 (J.A. 25). The Katrina Panel found that, in contrast to FCC-regulated networks, the internal communications networks of electric utility companies had "a high rate of survivability following Katrina" because, among other things, "they were built with significant onsite back-up power supplies (batteries and generators)." Katrina Report 12 (J.A. 20); *see also id.* at 6 (J.A. 14) (describing the communications networks operated by utilities as one of the "resiliency successes" of Hurricane Katrina).

Based upon its observations, the Katrina Panel "developed a number of recommendations to the FCC for improving disaster preparedness, network reliability and communications among first responders." Katrina Report 31 (J.A. 39). The Panel's recommendations addressed the problem of inadequate backup power reserves from different angles. *See ibid.* (recommending a "readiness checklist" to address "power reserves") (formatting altered); *id.* at 37 (J.A. 45) (recommending that states and localities maintain a cache of equipment, including "power system components," needed to restore public safety communications quickly after a disaster). With respect to measures to improve "first responder communications" (*see id.* at 37 (J.A. 45) (formatting altered)), the Katrina Panel stated that: "In order to ensure a more robust E-911 service, the FCC should encourage the implementation of [certain] best practice

recommendations issued by Focus Group 1C of the FCC-chartered [Network Reliability and Interoperability Council (NRIC) VII]." *Id.* at 39 (J.A. 47). One of those recommendations is that "[s]ervice providers, network operators and property managers should ensure availability of emergency/backup power (*e.g.,* batteries, generators, fuel cells) to maintain critical communications services during times of commercial power failures, including natural and manmade occurrences (*e.g.*, earthquakes, floods, fires, power brown/blackouts, terrorism)." *Ibid.*. The recommendation further stated that "emergency/backup power generators should be located onsite, when appropriate." *Ibid.*

B. The rulemaking proceeding

1. On June 19, 2006, the Commission initiated a "comprehensive rulemaking to address and implement" the Katrina Panel's recommendations.[6] It explained that its "goal in this proceeding is to take the lessons learned from this disaster and build upon them to promote more effective, efficient response and recovery efforts, as well as heightened readiness and preparedness, in the future." *NPRM*, 21 FCC Rcd at 7320 ¶ 1 (J.A. 53).

In the *NPRM*, the Commission requested comment "on the recommendations presented by the [Katrina] Panel" and on "the measures the Commission should take to address the problems identified" by the Panel in its final report. 21 FCC Rcd at 7321–22 ¶ 6 (J.A. 54–55). Much of the *NPRM* proceeds seriatim through the Katrina Panel's recommendations, requesting at each step what actions the Commission may take consistent with its statutory authority and what measures beyond those recommended by the Katrina Panel

[6] Notice of Proposed Rulemaking, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 21 FCC Rcd 7320, 7320 ¶ 1 (2006) (J.A. 53) (*NPRM*).

the Commission should take to promote its public safety goals. *See id.* at 7322–27 ¶¶ 8–18 (J.A. 55–60). In the section of the *NPRM* dealing with first responder communications, the Commission thus noted that the Katrina Panel "recommend[ed] that service providers and network operators . . . should ensure availability of emergency back-up power capabilities (located on-site, when appropriate)." *Id.* at 7326 ¶ 16 (J.A. 59). The Commission asked how it could "best encourage implementation of [that and other] recommendations consistent with [its] statutory authority and jurisdiction," and it "welcome[d] further suggestions on measures that could be taken to strengthen 911 and E911 infrastructure and architecture." *Ibid.*

The Commission also made clear that the scope of the rulemaking proceeding would extend beyond the Katrina Panel's specific recommendations. As the Commission explained, "[i]n addition to presenting recommendations, the [Katrina] Panel's final report describes [its] observations regarding the hurricane's impact and the sufficiency of the recovery efforts." *NPRM*, 21 FCC Rcd at 7322 ¶ 7 (J.A. 55). The Commission sought comment on whether the Panel's "observations warrant additional measures or steps *beyond* the report's specific recommendations." *Ibid.* (emphasis added). Moreover, although none of the Katrina Panel's recommendations proposed mandatory duties on telecommunications carriers, the *NPRM*, again, was more expansive: It asked expressly whether the Commission should "rely on voluntary consensus recommendations, as advocated by the [Katrina] Panel, or whether [it] should rely on other measures for enhancing readiness and promoting more effective response efforts." *Ibid.*

In his separate statement to the *NPRM*, Commissioner Copps highlighted the importance of backup power reserves and emphasized the need "to take immediate and serious corrective action." 21 FCC Rcd at 7351 (J.A. 84). He

recounted the story of the Lafon Nursing Home of the Holy Father in New Orleans, "where 100 elderly patients found themselves left behind to weather the storm." *Ibid.* It was only after three days that they were able to reach the outside world and arrange a rescue—but not before 22 patients had passed away. *Ibid.* He observed that, while communications networks failed for lack of power, "electric utility companies *have* developed networks that both survived the storm and managed to operate during the aftermath, even with the power outages," and he asked whether "public safety and commercial networks [should] be built with the same concerns in mind." *Id.* at 7351–52 (J.A. 84–85). He stated that he was "especially pleased that [the *NPRM*] seek[s] comment on whether voluntary implementation is enough or whether we need to consider other measures." *Id.* at 7352 (J.A. 85).[7]

2. The import of the *NPRM* was not lost on the industry. Communications companies understood that the Commission was considering mandatory rules to promote more resilient communications networks, and they sought to persuade the Commission not to take that course.[8] These companies

[7] In a July 26, 2006, public notice, the agency again reminded parties that the Commission's rulemaking proceeding would inquire about "whether [the agency] should rely on voluntary consensus recommendations [or] on other measures for enhancing readiness and promoting more effective response efforts." Public Notice, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 21 FCC Rcd 8583, 8584 (2006) (J.A. 101).

[8] *See* Comments of AT&T, Inc., EB Docket No. 06–119 (Aug. 7, 2006), at 5 (J.A. 122) ("the adoption of these best practices by carriers should be left to the carriers' discretion"); Comments of the Alliance for Telecommunications Industry Solutions, EB Docket No. 06–119 (Aug. 7, 2006), at 4 (J.A. 110) ("The FCC should not attempt to mandate one-size-fits[-]all checklists to disaster preparedness"); Comments, BellSouth Corporation, EB Docket No. 06–119 (Aug. 7, 2006), at 9 (J.A. 156) ("BellSouth would caution the Commission . . . against mandating specific criteria or guidelines for business continuity plans"); Comments of Qwest Services Corporation, EB Docket No. 06–119 (Aug. 7, 2006), at 5 (J.A. 247) (the Commission should "be measured in its response to the

thus attempted to show that providers had already taken action to improve their ability to maintain operations during a major calamity.

For instance, petitioner CTIA–The Wireless Association confirmed that, without "electric power, a potentially operable cellular site cannot effectively operate in many situations." CTIA–The Wireless Association Comments, EB Docket No. 06–119 (Aug. 7, 2006) (CTIA Comments), at 17 (J.A. 204). Nonetheless, it asserted that the Commission should not adopt "overly prescriptive" rules because "it is clearly in the communications industry's own best interest to ensure that its networks are resilient and reliable." *Id.* at 9 (J.A. 196). CTIA explained that "carriers must take efforts to ensure network reliability and resilience" and that, "[t]o accomplish this goal, [they] provision their cell sites and switches with batteries to power them when electrical grids fail" and "may maintain permanent generators at all of the switches and critical cell sites, as well as an inventory of backup generators to recharge the batteries during extended commercial power failures." *Id.* at 8 (J.A. 195). Petitioner Sprint Nextel likewise asserted that it was "prepared" to deal with power

---

[Katrina] Report, particularly with regards to the promulgation of rules"); BellSouth Reply, EB Docket No. 06–119 (Aug. 21, 2006), at 1–2 (J.A. 354–355) ("The Commission must neither codify any such [disaster readiness] checklists or best practices as federal rules, nor seek to promulgate any one-size-fits-all approach"); Reply Comments of Cox Enterprises, Inc., EB Docket No. 06–119 (Aug. 21, 2006), at 4–5 (J.A. 390–391) ("Effective emergency preparedness requires more flexibility and company-specific planning than would be possible if companies were forced into one-size-fits-all disaster regulations"); Reply Comments of TDS Telecommunications Corp., EB Docket No. 06–119 (Aug. 21, 2006), at 2 (J.A. 411) ("regulatory mandates are unnecessary"); Reply Comments of T-Mobile USA, Inc., EB Docket No. 06–119 (Aug. 21, 2006), at 5 (J.A. 422) ("providers should be given the flexibility to create sets of best practices tailored to their unique circumstances"); Reply Comments of Union Telephone Company, EB Docket No. 06–119 (Aug. 21, 2006), at 3 (J.A. 435) (cautioning "against adopting a 'one-size-fits-all' approach that could lead to unnecessary and costly mandatory obligations").

outages "throughout the Nation" "through the use of back-up batteries, generators, Cells on Wheels ('COWs') and . . . Satellite Cells on Light Trucks ('SatCOLTs')," and that it would spend $100 million "installing permanent generators at 800 critical wireless towers in 2006 alone." Comments of Sprint Nextel Corporation, EB Docket No. 06–119 (Aug. 7, 2006) (Sprint Nextel Comments), at 4, 6 (J.A. 263, 265). Stating that "Commission rules cannot change the fact that the wireless industry uses commercial power in the first instance," Sprint Nextel urged the Commission not to "burden[] . . . communications service providers with costly mandates." *Id.* at iii (J.A. 259).

Other industry commenters echoed these sentiments. For example, Verizon stated that "[e]very critical component in Verizon's networks is protected by automatic power back-up systems" and that "Verizon protects its cell site operations in many ways, including . . . automatic power back-up systems." Verizon's Comments, EB Docket No. 06–119 (Aug. 7, 2006) (Verizon Comments), at 7–8 (J.A. 330–331). Cingular Wireless stated that it was investing "more than $60 million for hurricane preparedness," including the "addition of 1,200 permanent and portable generators." Comments of Cingular Wireless, LLC, EB Docket No. 06–119 (Aug. 7, 2006) (Cingular Comments), at 5 (J.A. 179). The United States Telecom Association (USTA) gave an example of Shenandoah Telephone Company, explaining that "[i]ts network, including its cell network and switches, and any essential business operations requiring electricity . . . are tied to back-up generators that can keep the company operational for *several days*." Comments of the United States Telecom Association, EB Docket No. 06–119 (Aug. 7, 2006) (USTA Comments), at 5 (J.A. 287) (emphasis added). USTA also highlighted Puerto Rico Telephone Company, which has deployed back-up power capabilities that cover 90% of its cell sites and enable it to operate without commercial power for *seven days*. *Id.* at 6 (J.A.

288); *see also* Comments of Puerto Rico Telephone Co., Inc., EB Docket No. 06–119 (Aug. 7, 2006) (Puerto Rico Telephone Comments), at 3–4 (J.A. 232–233). Like CTIA and Sprint Nextel, these parties suggested that their efforts were sufficient to obviate the need for Commission mandates to protect public safety.[9]

Public safety representatives took a different view. One 911 call center representing a community that was "directly in the path of Hurricane Katrina" told the Commission that "[v]oluntary consensus measures . . . have fallen short many times" and that "it is imperative that [wireline] and wireless telephone providers be required to demonstrate they have adequate backup procedures in place" so that callers could access the 911 system during emergencies. Comments of St. Tammany Parish Communications District 1, EB Docket No. 06–119 (Aug. 7, 2006) (St. Tammany Parish Comments), at 1–2 (J.A. 102–103). The National Emergency Number Association, an association of 911 call centers, likewise urged the Commission (and state commissions) not to rely simply on voluntary measures, but instead to "require all telephone central offices to have an emergency back-up power source." Comments of the National Emergency Number Association, EB Docket No. 06–119 (Aug. 7, 2006) (NENA Comments), at 6 (J.A. 217).

C. The Katrina Order

On June 8, 2007, the Commission issued the *Katrina Order* adopting "several of the recommendations" of the Katrina Panel. 22 FCC Rcd at 10541

[9] *See* Cingular Comments 1 (J.A. 175) ("there is no need to subject the industry to new regulatory requirements to improve readiness"); Puerto Rico Telephone Comments 10 (J.A. 239) ("it is unnecessary for the Commission to adopt any of these best practices as affirmative rules"); USTA Comments 3 (J.A. 285) ("the Commission should keep in mind that its job is not to mandate best practices"); Verizon's Comments 11 (J.A. 334) ("any best practices . . . must remain voluntary").

¶ 1 (J.A 447). With respect to backup power, the Commission agreed with public safety representatives that "adoption of [a backup power] requirement serves the public interest." *Id.* at 10565 ¶ 77 (J.A. 471). Exercising its authority under Section 1 of the Communications Act, to "promot[e] safety of life and property through the use of wire and radio communications" (47 U.S.C. § 151), the Commission adopted a rule requiring local exchange carriers and CMRS providers—*i.e.*, wireless common carriers such as cellular providers and paging carriers, *see* 47 C.F.R. § 20.9—"to have an emergency back-up power source for all assets" normally powered by commercial power sources. *Katrina Order*, 22 FCC Rcd at 10565 ¶ 77 (J.A. 471). Under the rule, carriers must maintain "a minimum of 24 hours" of backup power for assets inside central offices (where telephone switches are typically located) and "eight hours for cell sites, remote switches and digital loop carrier system remote terminals." *Ibid.* Noting that several commenters "indicated that they have backup power available at their facilities," *id.* at 10565 ¶ 76 (J.A. 471), the Commission expected that the backup power requirement would "not create an undue burden" for communications companies, *id.* at 10565 ¶ 78 (J.A. 471).[10]

D. The reconsideration stage of the rulemaking proceeding

A summary of the *Katrina Order* was published in the *Federal Register* on July 11, 2007, and the rule was set to take effect on August 10, 2007. *See* 72 Fed. Reg. 37655. On July 31, CTIA asked the Commission for an administrative stay of the backup power rule, Motion for Administrative Stay of CTIA–The

---

[10] The Commission recognized that the rule may present a financial burden for small carriers. Accordingly, it exempted certain small LECs, and CMRS providers with 500,000 or fewer subscribers, from the backup power requirement. *Katrina Order*, 22 FCC Rcd at 10566 ¶ 78 (J.A. 472).

Wireless Association, EB Docket No. 06–119 (CTIA's FCC Stay Motion) (J.A. 515), prompting the Commission to act on its own motion to delay the effective date of the backup power rule until October 9, 2007.[11] Then on August 10, CTIA and six other parties—but not Sprint Nextel or USA Mobility—filed timely petitions for agency reconsideration of the *Katrina Order*, *see* 72 Fed. Reg. 46485 (Aug. 20, 2007). As relevant here, these parties argued that the Commission lacked authority to require carriers to deploy backup power reserves. They also argued that the Commission had not provided adequate notice of the rule under the Administrative Procedure Act (APA) and that the rule was arbitrary and capricious.[12] In addition, the American Association of Paging Carriers (AAPC), the paging industry's trade association, asked the Commission "to clarify or reconsider, in part" the *Katrina Order*'s application of the backup power rule to paging carriers.[13]

On October 4, 2007, the Commission released the *Reconsideration Order*, which granted the reconsideration petitions in part and denied them in part.[14]

---

[11] Order, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 14246 (2007) (J.A. 593).

[12] *See*, *e.g.*, Petition for Reconsideration, CTIA–The Wireless Association, EB Docket Nos. 06–119 *et al.* (Aug. 10, 2007) (CTIA Reconsideration Petition), at 7–25 (J.A. 608–626); Petition for Reconsideration, PCIA–The Wireless Infrastructure Association, EB Docket Nos. 06–119 *et al.* (Aug. 10, 2006) (PCIA Reconsideration Petition), at 5–20 (J.A. 744–759).

[13] Petition for Clarification or, Alternatively, Reconsideration, American Association of Paging Carriers, EB Docket Nos. 06–119 *et al.* (Aug. 10, 2007) (AAPC Reconsideration Petition), at 1 (J.A. 595).

[14] The *Reconsideration Order* does not formally dispose of CTIA's reconsideration petition because CTIA withdrew its petition before the *Reconsideration Order* was adopted. *See Reconsideration Order*, 22 FCC Rcd at 18013 n.1, 18032 ¶ 45 (J.A. 810, 829).

The Commission credited arguments that "legal impediments, including contractual obligations and inconsistency with federal, state and local environmental, safety, building and zoning laws will make compliance with the rule difficult, if not impossible" at certain locations and that "the installation of a generator and its combustible fuel on the roof of a school or public building, where many transmitters are located, may pose a risk to public health and safety even when in compliance with law." *Id.* at 18023 ¶ 24 (J.A. 820). To address these concerns, the Commission excused carriers from complying with the rule where it would be precluded by "(1) federal, state, tribal or local law; (2) risk to safety of life or health; or (3) private legal obligation or agreement." *Id.* at 18024 ¶ 25 (J.A. 821). To implement these revisions, the Commission required carriers to file a report within six months of the rule's effective date that lists their compliant and noncompliant assets and justifies any claim for exemption based on legal, safety, or contractual concerns. *Reconsideration Order*, 22 FCC Rcd at 18024–25 ¶ 26 (J.A. 821–822).

The Commission also relaxed the backup power rule for assets that are not entitled to an exemption by providing carriers with both additional time within which to achieve compliance and greater flexibility in determining the manner in which to do so. Specifically, for noncompliant assets not entitled to an exemption, the Commission gave carriers twelve months from the rule's effective date within which to submit a "certified emergency backup power compliance plan." *Reconsideration Order*, 22 FCC Rcd at 18025 ¶ 27 (J.A. 822). The Commission made clear that carriers need not in their compliance plans rely on "on-site" upgrades, but, rather, may utilize "portable backup power sources or other sources as appropriate." *Ibid.* Thus, carriers are not required to upgrade every cell site with backup power; they have flexibility to find other ways to ensure that "100 percent of the area covered by any non-compliant asset" is

protected by an emergency power supply. *Ibid*. The Commission explained that these modifications to the backup power rule would "facilitate carrier compliance and reduce [their] burden[s]," "while continuing to further important homeland security and public safety goals." *Reconsideration Order*, 22 FCC Rcd at 18013 ¶ 1 (J.A. 810).[15]

In all other relevant respects, the Commission denied reconsideration. The Commission concluded that the backup power rule was a lawful exercise of its "ancillary jurisdiction" to regulate communications services to ensure the "effective performance of its statutorily mandated responsibilities," *id.* at 18019 ¶ 16 (J.A. 816); *see also id.* at 18020 ¶ 17 (J.A. 817) (citing 47 U.S.C. § 303(r)). Because "[c]ommunications networks cannot operate without a power source," the Commission explained that it must be "mindful of an adequate power supply, particularly in emergencies, if it is to discharge its core responsibilities under Section 1" of the Act to promote "national defense" and the "'safety of life and property through the use of wire and radio communications.'" 22 FCC Rcd at 18020 ¶¶ 17–18 (J.A. 817) (quoting 47 U.S.C. § 151).

The Commission also concluded that it had complied with the APA's notice requirement. *See Reconsideration Order*, 22 FCC Rcd at 18015–19 ¶¶ 8–14 (J.A. 812–816). After reviewing the *NPRM* and the Katrina Panel's report, the Commission explained that, "[t]aken together, the questions raised in the [*NPRM*] as well as the Katrina Panel Report's findings regarding the lack of emergency power were sufficient to put interested parties on notice that the Commission was considering how to address the lack of emergency backup

[15] In addition to these changes, the Commission modified the backup power rule to clarify that it applied "only to assets necessary to the provision of communications services." *Reconsideration Order*, 22 FCC Rcd at 18024 ¶ 25 (J.A. 821).

power, including through the possible adoption of an emergency backup power rule." *Id.* at 18018 ¶ 12 (J.A. 815). The Commission further concluded that "parties should have realized that an emergency backup power mandate would inevitably include a specific durational requirement," such as the eight-hour standard for cell sites. *Id.* at 18019 ¶ 14 (J.A. 816).

The Commission found that the backup power requirement was reasonable and supported by the administrative record. *Reconsideration Order*, 22 FCC Rcd at 18021–28 ¶¶ 20–33 (J.A. 818–825). The Commission justified the need for a mandatory rule, explaining that "although many carriers do have backup power or backup power plans," the Katrina Panel found that "not all locations have backup power." *Id.* at 18022 ¶ 23 (J.A. 819). The Commission also concluded that its eight-hour backup power requirement for cell sites reasonably balanced the need for sufficient time for commercial power restoration (or the arrival of alternative power supplies) and the "burdens of ensuring longer durations of backup power." *Id.* at 18021–22 ¶ 21 & n.68 (J.A. 818–819). And the Commission rejected arguments that it rescind the rule because of its economic cost. The Commission explained that "several carriers have already deployed [backup] power capabilities, some of which allow them to remain in operation for several days," and, "[i]n any event, . . . the benefits of ensuring sufficient emergency backup power, especially in times of crisis involving possible loss of life or injury, outweighs the fact that carriers may have to spend resources, perhaps even significant resources, to comply with the rule." *Id.* at 18027 ¶ 31 (J.A. 824).

For similar reasons, the Commission rejected AAPC's argument that it did not intend for the backup power rule to apply to paging companies. *Reconsideration Order*, 22 FCC Rcd at 18028–30 ¶¶ 34–36 (J.A. 825–827). The Commission explained that "[p]aging services are a critical part of emergency

response," on which "[m]any first responders, hospitals and critical infrastructure providers rely." *Id.* at 18028 ¶ 34 (J.A. 825).

A summary of the *Reconsideration Order* was published in the *Federal Register* on October 11, 2007. *See* 72 Fed. Reg. 57879. Because the Office of Management and Budget (OMB) must approve the rule's information collection requirements, the Commission provided that the backup power rule would not become effective until it provides notice in the *Federal Register* announcing OMB's approval. *Ibid.* As of the filing of the initial version of this brief (March 3, 2008), the Commission had not yet submitted its request for approval to OMB, but it is expected to do so shortly. Once the request is submitted, OMB must provide "at least 30 days for public comment" and must make a decision on the agency's request for approval within 60 days, 44 U.S.C. § 3507(b), (c)(2).

E. Proceedings in this Court

CTIA, Sprint Nextel, and USA Mobility filed petitions for review of the *Katrina Order* and the *Reconsideration Order* in this Court, and the cases were consolidated. On January 15, 2008, this Court granted Petitioners' unopposed motion for expedited review. On December 19, 2007, Sprint Nextel moved to stay the effective date of the backup power rule pending judicial review, which this Court granted in a summary order on February 28, 2008.

SUMMARY OF ARGUMENT

Hurricane Katrina exposed a significant vulnerability in the nation's communications networks. Communications companies depend on commercially supplied electricity to power their networks. Yet during a natural disaster or terrorist attack, when the public's need to access emergency communications is at its highest, commercial power sources—and by consequence the communications infrastructure that relies on them—can easily fail. In those

circumstances, access to alternative sources of electrical power is essential to ensuring that communications networks can continue to operate during an emergency, and to fulfill their purpose of promoting the "national defense" and the "safety of life and property." 47 U.S.C. § 151. The backup power rule speaks directly to this concern.

I. The Commission had statutory authority to adopt the backup power rule. The Commission's ancillary jurisdiction authorizes the agency to regulate services that fall within its general jurisdiction where such regulation is reasonably ancillary to the effective performance of its statutorily mandated responsibilities.

There can be little doubt that the backup power rule falls within the Commission's jurisdiction over interstate communications because backup power is necessary for communications to be transmitted at all when a calamity disrupts commercial power sources. The backup power rule is also reasonably ancillary to the Commission's responsibilities under § 1 of the Act to ensure that communications facilities are capable of promoting the "national defense" and the "safety of life and property." 47 U.S.C. § 151. Courts have repeatedly upheld the Commission's authority to exercise its ancillary jurisdiction in furtherance of its § 1 responsibilities, and there is no reason that the agency's public safety responsibilities should be accorded less respect than its other statutory duties simply because Congress codified them in the first section of the Act.

II. The Commission complied with the notice requirements of the APA. The *NPRM* sought comment on the Katrina Panel's specific recommendation that service providers should ensure availability of backup power and on additional steps that the Commission should take in light of the Katrina Panel's general findings concerning the impact of Hurricane Katrina on communications networks. The *NPRM* also requested comment on whether the Commission

should go “beyond” the Katrina Panel’s recommendations and on whether the agency should rely on “voluntary consensus” measures or “other measures” to promote public safety. *NPRM*, 21 FCC Rcd at 7322 ¶ 7 (J.A. 55). The administrative record further shows that parties understood fully that the Commission was contemplating the adoption of mandatory rules. Although Petitioners complain that the Commission did not publish in advance the specific elements of the backup power rule that it ultimately adopted, the APA’s notice requirement does not require that level of detail.

III. The backup power rule is reasonable. Public safety representatives supported the adoption of a mandatory rule, and the record shows that a backup power requirement furthers the important federal interest of ensuring that emergency power supplies are deployed more broadly throughout the nation’s communications infrastructure. The record also confirms that the eight-hour minimum standard that the Commission established for cell sites and other remote locations falls well within the Commission’s broad discretion to draw administrative lines.

Petitioners’ other challenges to the reasonableness of the backup power rule also lack merit. Many of those arguments rest on a flawed interpretation of the exemptions that the Commission established for locations where compliance with the rule would be precluded by legal, safety, or contractual limitations. And Petitioners’ assertion that voluntary measures would better advance the Commission’s public safety objectives is insufficient to overcome the broad deference to which the Commission is entitled when regulating matters that concern public safety.

IV. The Court should dismiss USA Mobility’s untimely challenge to the application of the backup power rule to paging carriers. The Commission first applied the backup power rule to CMRS providers, a category that includes

paging carriers, in the *Katrina Order*. USA Mobility did not file a timely petition for review of the *Katrina Order*, nor did it toll the time for challenging that order by filing a petition for agency reconsideration. USA Mobility's petition for review, therefore, is time barred, and the Court lacks jurisdiction to address the merits of its argument.

Even if the Court concludes that USA Mobility's petition for review is timely, many of its arguments are barred by 47 U.S.C. § 405(a) because the Commission was not afforded a fair opportunity to pass on them. All of its arguments lack merit in any event. USA Mobility cannot plausibly argue that it lacked notice that paging companies would be subject to a backup power requirement given that it testified before the Katrina Panel that its own network was adversely impacted by the loss of electrical power during Hurricane Katrina. There is likewise no basis for USA's Mobility's claim that it was unreasonable to apply the backup power rule to paging companies. Although USA Mobility asserts that paging companies are not similarly situated to other CMRS providers, it does not dispute that paging carriers, like other wireless providers, depend in the first instance on commercial power supplies and that first responders and other emergency personnel rely heavily on pagers in emergency situations. Given these similarities, the Commission acted reasonably in applying the backup power rule to paging companies.

STANDARD OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Id.* at 842–843. If, however, "the statute is silent or ambiguous with

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). The *Chevron* framework governs judicial review of the Commission's exercise of ancillary authority. *American Library Ass'n v. FCC*, 406 F.3d 689, 698–699 (D.C. Cir. 2005).

Under the Administrative Procedure Act (APA), the Commission's analysis must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Judicial deference to the Commission's "expert policy judgment" is especially appropriate where the "subject matter . . . is technical, complex, and dynamic." *Brand X Internet Servs.*, 545 U.S. at 1002–03 (quoting *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

ARGUMENT

I. THE COMMISSION HAS STATUTORY AUTHORITY TO ADOPT THE BACKUP POWER RULE

"The Commission derives its regulatory authority from the Communications Act of 1934." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979) (*Midwest Video II*). That Act establishes the Commission as the "single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication." *United States v. Southwestern Cable Co.*,

392 U.S. 157, 168 (1968) (internal quotation marks omitted); *see also id.* at 172. It confers on the Commission "broad authority" to regulate interstate communications. *Id.* at 168 (internal quotation marks omitted).

The Communications Act delegates regulatory authority to the Commission in two ways. First, the Act authorizes the Commission to adopt regulations implementing the Act's various provisions. *See*, *e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377–378 (1999); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956). Second, the Act grants the Commission "so-called 'ancillary' jurisdiction" to regulate interstate communications "even where the [substantive provisions of] the Act do[] *not* 'apply.'" *AT&T*, 525 U.S. at 380; *see also American Library Ass'n*, 406 F.3d at 692 ("The FCC may act either pursuant to express statutory authority to promulgate regulations . . . or pursuant to ancillary jurisdiction").

In adopting the backup power rule, the Commission properly exercised its ancillary jurisdiction. The Commission observed that, under governing case law, it may exercise its ancillary jurisdiction when: (1) its "general jurisdictional grant under Title I [of the Act, 47 U.S.C. §§ 151–161] covers the subject of the regulations and (2) the regulations are reasonably ancillary to [the] effective performance of its statutorily mandated responsibilities." *Reconsideration Order*, 22 FCC Rcd at 18019 ¶ 16 (J.A. 816); *see also American Library Ass'n*, 406 F.3d at 691–692. With respect to the backup power rule, the Commission correctly found that both of those elements had been met.

First, the Commission observed that its "general grant of jurisdiction" under Title I encompasses "'all interstate and foreign [c]ommunication by wire or radio.'" *Reconsideration Order*, 22 FCC Rcd at 18020 ¶ 17 (J.A. 817) (quoting *Southwestern Cable*, 392 U.S. at 167, quoting in turn 47 U.S.C. § 152(a)). The Commission concluded that the backup power rule "pertains to the provisioning

of 'interstate and foreign commerce in communication,'" *ibid.* (quoting 47 U.S.C. § 151), because "backup power is necessary for the communication to be transmitted" when commercial power sources fail. *Id.* at 18020–21 ¶¶ 17, 19 (J.A. 817, 818).

Second, the Commission found that the backup power rule was "'reasonably ancillary to the effective performance' of [its] responsibilities to promote public safety." *Reconsideration Order*, 22 FCC Rcd at 18020 ¶ 17 (J.A. 817). Section 1 of the Communications Act charges the Commission with the responsibility of "mak[ing] available . . . [a] wire and radio communication service with adequate facilities . . . for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151. "Section 1 thus requires the Commission to 'consider public safety' and to 'take into account its duty to protect the public.'" *Reconsideration Order*, 22 FCC Rcd at 18020 ¶ 17 (J.A. 817) (emphasis removed) (quoting *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006)). Because the "presence of a backup power source . . . will facilitate communication for the purposes of national defense and the promotion of 'safety of life and property' during emergencies," the Commission concluded that the backup power rule was reasonably ancillary to the effective discharge of its core

national security and public safety responsibilities under § 1. *Id.* at 18020 ¶ 18 (J.A. 817).[16]

Petitioners dispute the Commission's conclusion that both prongs of the ancillary jurisdiction test have been met in this case. Their arguments lack merit.

A. Petitioners argue that "the Commission lacks jurisdiction to regulate communications facilities while they are 'not engaged in the process of radio or wire transmission.'" CTIA Br. 24 (quoting *American Library Ass'n*, 406 F.3d at 703). In their view, because backup power must be deployed *before* a calamity strikes, the Commission may not require carriers to provide it. *Ibid.*

Petitioners' argument disregards the purpose and effect of the backup power rule, which is to ensure that "radio or wire transmission" can occur in times of emergency. Although it is true that carriers must deploy backup power before an emergency occurs, its function is integral to the act of transmission itself. Adequate backup power makes it possible for carriers to be "engaged in the process of radio or wire transmission" when commercial power supplies are disrupted; without it, such transmission may not be possible.

Petitioners' argument to the contrary conflicts with the Supreme Court's decision in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest*

---

[16] Petitioners incorrectly assert that the Commission "relied exclusively" on § 1 of the Act to the exclusion of the other statutory provisions that confer ancillary jurisdiction on the agency. CTIA Br. 23. The Commission emphasized § 1 because that section sets forth the agency's national security and pubic safety responsibilities, but the Commission stated that it was asserting "ancillary jurisdiction [as] developed by the Supreme Court in *Southwestern Cable*," *Reconsideration Order*, 22 FCC Rcd at 18019–21 ¶ 16 (J.A. 816–817), a case that in turn cited 47 U.S.C. §§ 151, 152(a), 153, 154(i), and 303(r). 392 U.S. at 167–168, 178, 181. *See also Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) (referring to the FCC's ancillary jurisdiction as its "authority under § 1").

Video I). In that case, the Supreme Court upheld a Commission rule that prohibited cable operators from carrying broadcast television signals unless they also "'operate[] . . . as a local outlet by cablecasting and ha[ve] available facilities for local production and presentation of programs,'" such as "a camera and a video tape recorder." *Id.* at 653 & n.5 (footnote reference omitted) (quoting 47 C.F.R. § 74.1111(a) (1970)). Even though local production facilities would have to be deployed *before* any programming produced with them could be transmitted, the Court upheld the rule as a lawful exercise of the Commission's ancillary jurisdiction. *Id.* at 670 (plurality opinion); *id.* at 675–676 (Burger, C.J., concurring in the result).[17]

Petitioners' reliance on this Court's decision in *American Library Association* is misplaced. In that case, the Court invalidated a Commission regulation that required equipment manufacturers to make digital televisions (DTV) and other receiving devices using technology that would "allow[] them to recognize the broadcast flag," *i.e.*, "a digital code embedded in a DTV broadcasting stream" that prevents unauthorized redistribution of broadcast programs. 406 F.3d at 691. The Court did not dispute that the Commission's "general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content." *Id.* at 692. Nonetheless, the Court concluded that "the Broadcast Flag rules do not regulate

[17] In *Midwest Video II*, the Court invalidated a Commission rule requiring cable operators "to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes." 440 U.S. at 691. In concluding that the rule exceeded the Commission's ancillary authority, the Court did not disturb its ruling in *Midwest Video I* that the Commission may require cable operators to maintain local production facilities. *Id.* at 698. Rather, the Court concluded that the Commission could not require cable operators to furnish such facilities to third parties on an effectively common carrier basis. *Id.* at 700–701, 708 & n.18.

interstate 'radio communications' as defined by Title I, because the Flag *is not needed* to make a DTV transmission, does not change whether DTV signals *can be received*, and has no effect until after the DTV transmission is complete." *Id.* at 692 (emphasis added, internal quotation marks omitted). However, unlike the broadcast flag rule, the backup power requirement here is directed at communications service providers and is needed to ensure that communications can be sent and received when an emergency disrupts commercial power supplies. It falls easily within "the compass of wire or radio communication" and, consequently, within the Commission's "general jurisdictional grant under Title I." *Id.* at 702.[18]

B. Petitioners also argue that the backup power rule is not reasonably ancillary to the effective performance of the Commission's responsibilities to promote public safety. According to Petitioners, the Commission may exercise its ancillary jurisdiction under Title I only by reference to a "substantive congressional mandate *elsewhere* in the Communications Act," CTIA Br. 26 (emphasis added), such as in Title II (which deals with common carrier regulation, 47 U.S.C. §§ 201–276) or Title III (which deals with licensing and regulation of radio and other wireless communications, 47 U.S.C. §§ 301–399B). Because the Commission's national security and public safety duties under § 1 appear in Title I of the Act, in Petitioners' view it is not a "statutorily mandated responsibility" to which the backup power rule can be "reasonably ancillary." *See id.* at 25, 29.

---

[18] Because the first prong of the ancillary jurisdiction test has been met, this case does not present the question of whether the Commission may regulate the "non-communications activities of regulated entities" or whether such regulation "would lead to unbounded constructions of Section 1." CTIA Br. 25.

Petitioners' cramped reading of the Commission's ancillary authority finds no support in the case law. The Supreme Court in *Southwestern Cable* recognized that § 1 imposed "responsibilities" on the Commission, which the agency is "required" to pursue. 392 U.S. at 167. And it is beyond dispute that wire and wireless communications—by connecting people to first responders and first responders to each other—save lives and property in emergency situations. *See*, *e.g.*, *Nuvio*, 473 F.3d at 311 (Kavanaugh, J., concurring) (emphasizing the importance of 911 service to quickly respond to terrorist attacks and natural disasters). Indeed, this Court has recognized that it is because Congress deemed the telecommunications industry "important to protecting public safety" that it "*required*" in § 1 that the Commission "consider public safety" and "take into account its *duty* to protect the public" when fashioning its regulations. *Id.* at 307 (emphases added); *see also Keller Communications, Inc. v. FCC*, 130 F.3d 1073, 1076–77 (D.C. Cir. 1997) ("Congress directed the Commission to consider public safety needs when exercising its discretion"); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1213 (D.C. Cir. 1984) (the Commission's "special statutory obligation" under § 1 to promote public safety "requires the FCC to give" the needs of public safety broadcasters "priority over those of commercial broadcasters"). As these cases attest, the Commission's public safety responsibilities under § 1 are central to the agency's mission as defined by Congress; they are no less "statutorily mandated" than the responsibilities that Congress imposed on the agency "elsewhere" in the Communications Act.

Petitioners contend that allowing the Commission to exercise its ancillary jurisdiction to achieve its § 1 responsibilities would conflict with decisions in other circuits that state that "Title I is not an 'independent source of regulatory authority.'" CTIA Br. 26 (quoting *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990), and citing *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 795 (8th Cir.

1997), *aff'd in part and rev'd in part*, *AT&T*, 525 U.S. 366)). But this Court has recognized that "[u]nder § 1, Congress *delegated authority* to the FCC" to achieve the policy objectives set forth in that section. *MPAA*, 309 F.3d at 804 (observing that § 1 "authorizes the agency" to promote the objective of making radio and wire communications available to all U.S. citizens and that "the FCC's authority under § 1 is broad") (emphasis added). Thus, this Court in *Computer & Communications Indus. Ass'n v. FCC* (*CCIA*) held the Commission may regulate AT&T's offering of products and services that were not subject to Title II's common carrier regulation in order to promote the Title I goal of "assur[ing] a nationwide system of wire communications services at reasonable prices." 693 F.2d 198, 213 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). The Second Circuit reached essentially the same conclusion in *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973): Relying solely on Title I, the court upheld the "expansive power" of the Commission "to promulgate rules regulating the entrance of communications common carriers into the nonregulated field of data processing services." *Id.* at 730–731. And in *Rural Telephone Coalition v. FCC*, this Court, again relying solely on Title I, held that the Commission had "statutory authority" to create a "Universal Service Fund . . . in order to further the [§ 1] objective of making communication service available to all Americans at reasonable charges." 838 F.2d 1307, 1315 (D.C. Cir. 1988) (citing *GTE Service Corp.*, *supra*, and *National Ass'n of Regulatory Util. Commr's*, 737 F.2d 1095, 1108 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985)).[19]

---

[19] Petitioners attempt to distinguish *CCIA* and *Rural Telephone Coalition* by asserting that the FCC rules at issue in those cases were ancillary to one or more provisions in Title II of the Communications Act. *See* CTIA Br. 27 & n.7. The Court's analyses of the Commission's ancillary jurisdiction in those cases, however, focus exclusively on the Commission's statutory responsibilities under Title I. *CCIA*, 693 F.2d at 206–214; *Rural Telephone Coalition*, 838 F.2d at 1315.

Moreover, contrary to Petitioners' contention (CTIA Br. 26), neither the Ninth Circuit's decision in *California* nor the Eighth Circuit's decision in *Iowa Utilities Board*—neither of which binds this Court—requires the Commission to find a "substantive congressional mandate" outside of Title I in order to exercise its ancillary jurisdiction. Those cases merely state that the Commission's exercise of ancillary authority cannot conflict with a specific congressional directive set forth in the Act. Thus, in *California* and *Iowa Utilities Board*, the courts of appeals stated that the Commission could not regulate intrastate communications (even to achieve its Title I responsibilities) because that would be inconsistent with 47 U.S.C. § 152(b), which excludes intrastate communications from the Commission's jurisdictional reach. *See California*, 905 F.2d at 1240–41 n.35; *Iowa Utils. Bd.*, 120 F.3d at 753; *see also AT&T*, 525 U.S. at 381 (holding that the FCC's ancillary jurisdiction *would* extend to "intrastate depreciation methods that affected interstate commerce" but for the specific limitation in § 152(b)). Because the backup power rule does not conflict with any analogous limitation on the Commission's authority, *California* and *Iowa Utilities Board* are wholly inapposite.[20]

Petitioners argue that reference to a "substantive statute" is necessary to prevent the Commission from exercising "'unconstrained authority' to regulate" wireless providers in order to promote "safety of life and property." CTIA Br.

---

[20] Petitioners contend that two D.C. Circuit cases—*National Ass'n of Regulatory Util. Commr's v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC*), and *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994)—also support their restrictive reading of the Commission's ancillary authority, but neither case addressed that issue. In *NARUC*, the Court relied on § 152(b) and lack of "substantial support in the record for the Commission's view that its long term communications goals will be impaired" to invalidate the rules at issue in that case. 533 F.2d at 613–614 & n.77. In *Southwestern Bell*, the Court expressly declined to decide whether the Commission could "draw on . . . its ancillary jurisdiction[] to regulate petitioners' services." 19 F.3d at 1484.

28–29 (quoting *Midwest Video II*, 440 U.S. at 706, and 47 U.S.C. § 151). But the Commission's exercise of ancillary jurisdiction over wireless carriers and other regulated entities is constrained by the requirement that the Commission justify its regulation by reference to a "valid communications policy goal," *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989), and that it implement its regulation in a manner that does not conflict with specific congressional directives set forth in the Act, *see Midwest Video II*, 440 U.S. at 702, 707.[21] This is a far more circumscribed standard than the charge often given to agencies to regulate in the "public interest." *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001).[22]

Finally, Petitioners' restrictive view of the Commission's ancillary jurisdiction produces absurd outcomes. Under Petitioners' reading, for example, the Commission's ancillary jurisdiction would extend to rules designed to "[i]ncreas[e] program diversity" because that policy emanates from Title III of the Act, *see United Video*, 890 F.2d at 1181, 1183, but not to rules that promote

---

[21] Because the Act's provisions limit the scope of the Commission's ancillary jurisdiction and extend the Commission's jurisdiction to matters other than interstate communications (*see*, *e.g.*, *AT&T*, 525 U.S. at 379–381), the Commission's exercise of ancillary authority to advance its Title I responsibilities does not render the Act's other provisions "mere surplusage." CTIA Br. 29.

[22] Contrary to Petitioners' assertion (CTIA Br. 28), neither the Supreme Court nor this Court has invalidated the Commission's exercise of ancillary authority for failure "to point to a substantive statutory command" outside of Title I. In *Midwest Video II*, the Supreme Court held that the Commission's treatment of cable operators as common carriers with respect to video programming was inconsistent with Congress's policy of preserving "editorial discretion." 440 U.S. at 708. In *MPAA*, this Court found that regulation of "program content" was not one of the objectives set forth in Title I. 309 F.3d at 804. In *Home Box Office v. FCC*, this Court simply held that the Commission had not adequately explained its exercise of ancillary authority in light of conflicting agency precedent and the administrative record. 567 F.2d 9, 26–34 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

"national security" or "safety of life and property" because Congress placed those responsibilities in the first section of the statute. It would mean that, although the Commission lawfully exercised jurisdiction over cable operators (before they were directly regulated under the Act) in order to promote the economic viability of the broadcast industry, *Southwestern Cable*, 392 U.S. at 173–178, it is powerless to require FCC-licensed carriers to take steps to protect the public's ability to access emergency communications in times of crisis. None of the cases on which petitioners rely justifies, much less requires, these senseless results.

II. THE COMMISSION COMPLIED WITH THE APA'S NOTICE REQUIREMENTS

Petitioners' challenge to the sufficiency of the notice in this case rests on the erroneous assumption that the APA requires an agency to publish in advance the specific elements of the rule that it ultimately adopts. Thus, Petitioners repeatedly cast the notice issue in terms of whether the *NPRM* proposed an "eight-hour back-up power mandate for all cell sites." CTIA Br. 30; *id.* at 31, 32, 33, 36, 39, 41. Under the APA, however, a rulemaking notice may contain "*either* the terms or substance of the proposed rule *or a description of the subjects and issues involved*." 5 U.S.C. § 553(b)(3) (emphasis added). An agency's notice is "sufficient" under the APA "if the description of the 'subjects and issues involved' affords interested parties a reasonable opportunity to participate in the rulemaking." *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 650 F.2d 1235, 1248 (D.C. Cir. 1980). The notice "need not specify every precise proposal which the agency may ultimately adopt as a rule," *Nuvio*, 473 F.3d at 310 (bracket removed, internal quotation marks omitted); it is sufficient if it "fairly apprise[s] the parties and the public of the issues covered" in the rulemaking and gives them "'a reasonable opportunity . . . to present relevant information' on the central

issues." *Id.* at 310 (quoting *WJG Telephone Co. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982)).

Moreover, the APA's notice requirement is satisfied if the agency's final rule is a "'logical outgrowth' of its notice." *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 750–751 (D.C. Cir. 1991)). "A rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change was possible." *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *City of Waukesha v. EPA,* 320 F.3d 228, 245 (D.C. Cir. 2003)).

Applying these standards, the Commission correctly concluded that the *NPRM* fairly apprised parties that the agency might "address the lack of emergency backup power" identified by the Katrina Panel "through the possible adoption of an emergency backup power rule." *Reconsideration Order*, 22 FCC Rcd at 18018 ¶ 12 (J.A. 815).

A. Petitioners freely acknowledge that "parties were on notice about general issues of emergency preparedness that included, among many other things, considerations of back-up-power." CTIA Br. 40; *see also id.* at 32 ("interested parties already knew that back-up power was an issue during Hurricane Katrina"). Indeed, it would have been difficult for Petitioners not to notice that issue. The Katrina Panel identified "lack of power and/or fuel" as one of the "three main problems that caused the majority of communications network interruptions" during Hurricane Katrina, Katrina Report 13 (J.A. 21), including (along with lack of transport connectivity) the "majority of the adverse effects and outages" experienced by wireless phone providers, *id.* at 9 (J.A. 17).

Petitioners nonetheless assert that the *NPRM* was limited to "effectuat[ing] a voluntary model for providing backup power" because that is what the Katrina Panel recommended. CTIA Br. 32. But the *NPRM* made clear

that the scope of the Commission's inquiry would not be so limited. Consistent with its goal of building upon "the lessons learned from this disaster," the Commission invited "broad comment" on how it should "address the problems identified" by the Katrina Panel and expressly asked whether the Katrina Panel's general "observations regarding the hurricane's impact and the sufficiency of the recovery efforts" warrant "additional measures or steps *beyond* the report's specific recommendations." *NPRM*, 21 FCC Rcd at 7320, 7321–22 ¶¶ 1, 6, 7 (J.A. 53, 54–55) (emphasis added). Likewise, in discussing the Katrina Panel's recommendation on backup power, the Commission asked for "further suggestions on measures that could be taken to strengthen 911 and E911 infrastructure and architecture." *Id.* at 7326 ¶ 16 (J.A. 59). And on the issue of mandatory rules, the *NPRM* asked whether the Commission should "rely on *voluntary consensus recommendations*, as advocated by the [Katrina Panel], or whether [it] should rely on *other measures* for enhancing readiness and promoting more effective response efforts." *Id.* at 7322 ¶ 7 (J.A. 55) (emphasis added).

Indeed, Petitioners cannot credibly assert that they were unaware that "the FCC was considering a potential *mandate*," CTIA Br. 34, when CTIA, Sprint Nextel, and other industry parties sought to convince the Commission that mandates were unnecessary. *See supra* pp.10–12. CTIA's admonition that the Commission not adopt "overly prescriptive" rules, CTIA Comments 9 (J.A. 196), and Sprint Nextel's argument that "costly mandates" would not "change the fact that the wireless industry uses commercial power in the first instance," Sprint Nextel Comments iii (J.A. 259), make sense because the *NPRM* informed them that the Commission would consider going beyond the adoption of a "set of best practices." CTIA Br. 34.

B. Petitioners also claim they lacked notice of two specific elements of the backup power rule: (1) the eight-hour standard and (2) its alleged application to "all cell sites." CTIA Br. 35–36. But "interested persons must have been alerted to the possibility" that a backup power requirement would address these issues. *See National Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699 (D.C. Cir. 2008). As the Commission explained, "parties should have realized that an emergency backup power mandate would inevitably include a specific durational requirement" to avoid "an illogical and meaningless requirement that would have allowed providers to have only one minute of backup power." *Reconsideration Order*, 22 FCC Rcd at 18019 ¶ 14 (J.A. 816).[23] And although Petitioners complain that they lacked notice of "'the range of alternatives being considered,'" CTIA Br. 35 (quoting *Small Refiner*, 705 F.2d at 549), the Katrina Panel found that up to 48 hours of backup power may be needed "to permit the restoration of commercial power in most situations." Katrina Report 17 (J.A. 25); *see also Reconsideration Order*, 22 FCC Rcd at 18019 ¶ 13 (J.A. 816) (citing examples of telephone companies that had backed up their cell networks to "remain in operation for several days"). The eight-hour standard for cell sites falls well within that range.[24]

---

[23] Petitioners' response to this argument, *see* CTIA Br. 41 n.10, misses the point entirely. The crux of the Commission's explanation was that any regulatory mandate to provide backup power, as a logical matter, would necessarily specify the amount of power capacity carriers should deploy. Petitioners do not dispute that point.

[24] *See WJG Telephone Co.*, 675 F.2d at 389 (where the FCC's notice "implicit[ly]" informed parties of the possibility of a "100% coverage requirement," the adoption of a lower threshold did not violate the APA's notice provision); *United Steelworkers of Am., AFL–CIO v. Marshall*, 647 F.2d 1189, 1222 (D.C. Cir. 1980) ("proposal contains enough suggestions of the possibility of a lower [standard] to meet the test of 'adequate' notice"), *cert. denied*, 453 U.S. 913 (1981).

Petitioners also complain that they lacked notice of the rule's application to *all* cell sites. CTIA Br. 35–36. As an initial matter, Petitioners are wrong to suggest that the rule requires backup power at all cell sites: Many cell sites will be exempt, and for nonexempt sites, carriers have flexibility in determining how to "provide emergency backup power to 100 percent of the area covered by any non-compliant asset." *Reconsideration Order*, 22 FCC Rcd at 18025 ¶ 27 (J.A. 822). But more fundamentally, the Katrina Panel's recommendation on backup power (on which Petitioners heavily rely) does not exclude *any* cell site from its scope. The Katrina Panel spoke of the importance of emergency power to maintaining "critical communications services" during crisis situations, Katrina Report 39 (J.A. 47)), and Petitioners do not dispute that *every* cell site is capable of performing that function. Indeed, for a caller trying to place a call to 911 over a wireless phone at a time of crisis, whichever cell site happens to be nearby may be one that is "critical." Petitioners accordingly have no justification for their claim that they lacked a "fair opportunity" to comment on this aspect of the backup power rule, CTIA Br. 36 (quoting *Chocolate Manuf. Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985)).

C. Petitioners' remaining arguments relating to the adequacy of the notice in this case are without merit.

First, Petitioners disparage the *NPRM* as "too general" and not "concrete and focused" and declare that the final rule is "surprisingly distant" and "deviates too sharply" from the *NPRM*. CTIA Br. 30, 34, 36, 42 (citations omitted). That is simply not so. The Katrina Report, having identified the lack of adequate backup power as a "[m]ajor [p]roblem[]" and an "area of concern[]," recommended that service providers "ensure availability of emergency/backup power." Katrina Report 13, 39 (J.A. 21, 47) (formatting altered). The Commission sought comment on the Katrina Panel's report and asked whether it

should go beyond "voluntary consensus" measures, as recommended by the Katrina Panel, to promote public safety. *NPRM*, 21 FCC Rcd at 7322 ¶ 7 (J.A. 55). Parties debated whether the Commission should adopt mandatory rules, *see supra* pp.10–12, and the Commission ultimately concluded that a mandate requiring service providers to ensure availability of backup power was in the public interest. The line from the Katrina Panel's report to the *NPRM* to the final rule is fairly straightforward.

Second, Petitioners assert that the *NPRM* was inadequate because, in their view, the "policies" of the APA's notice requirement—*i.e.*, ensuring regulations are tested by exposure to diverse public comment, fairness to affected parties, and providing parties an opportunity to develop evidence in the record—were not met. CTIA Br. 30–31, 42–43. But the *NPRM* exposed the issue of backup power to public comment, and parties took advantage of that opportunity: Public safety representatives argued for mandatory rules on backup power, while the industry argued that mandatory rules were unnecessary because carriers were voluntarily deploying adequate backup power capacity. *See Reconsideration Order*, 22 FCC Rcd at 18018–19 ¶ 13 (J.A. 815–816); *see supra* pp.10–12. Because interested parties neither "misread" the *NPRM* nor "the stakes involved," *Northeast Md. Waste Disposal Auth.*, 358 F.3d at 952, there is no basis for Petitioners' suggestion that they were unfairly denied the opportunity "to participate in the rulemaking process," CTIA Br. 31.

Finally, Petitioners argue that notice must have been lacking because otherwise parties "would have offered 'new' and 'different' criticisms" in their comments, and CTIA, in particular, would have "vigorously opposed" the rule. CTIA Br. 36, 41 (quoting *United Steelworkers*, 647 F.2d at 1225). That self-serving assertion might be sufficient to show prejudice under the APA *if* notice were inadequate, *see* 5 U.S.C. § 706 (discussing rule of prejudicial error), but it

has no bearing on the threshold question of whether the agency's notice complies with the APA. *See United Steelworkers*, 647 F.2d at 1225 ("the question is still whether the agency did a legally adequate job, not whether it did the best possible job" or whether "fuller notice might have added something to the record"). In any event, it is sometimes the case that parties react more "strenuously" after the final rule has issued than they do during the rulemaking process, but such "post-promulgation outpouring . . . tells us little about what was '*reasonably* foreseeable'" from the agency's initial notice. *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 210 n.7 (D.C. Cir. 2007) (quoting *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2351 (2007)).

III. THE BACKUP POWER RULE IS SUPPORTED BY THE ADMINISTRATIVE RECORD AND IS OTHERWISE REASONABLE

Petitioners and their supporting intervenors argue that the backup power rule is arbitrary because (1) it is not supported by the administrative record, (2) it does not promote public safety, and (3) the exemptions to the rule are too narrow. None of these arguments has merit.

A. The backup power rule is supported by the administrative record

In challenging the adequacy of the record supporting the backup power rule, Petitioners make essentially the same mistake that they make in challenging the adequacy of the notice. They assert that the rule must be unsupported because they can find no commenter that endorsed *exactly* the aspects of the rule they now challenge, *i.e.*, "a rule mandating eight hours of back-up power at all cell sites." CTIA Br. 43. That is not the correct standard. "[T]he Commission has no obligation to take the approach advocated by the

largest number of commenters" and may, in fact, "adopt a course endorsed by no commenter." *United States Cellular Corp. v. FCC*, 254 F.3d 78, 87 (D.C. Cir. 2001). As long as the Commission "respond[s] to comments" and "choose[s] a reasonable approach backed up by record evidence," it has fulfilled its responsibilities under the APA. *Ibid.*; *see also Natural Res. Def. Council v. EPA*, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987) (the "number and length of comments, without more, is not germane"). The Commission satisfied that standard in this case.

As an initial matter, Petitioners are incorrect to suggest that no party supported the application of the backup power rule to CMRS carriers' cell sites. In its comments on reconsideration, the National Emergency Number Association (NENA) stated that, while its initial comments (*see* NENA Comments 6 (J.A. 217)) had mentioned "central offices as emblematic" of the need for backup power, it "endorse[d]" the "broader scope" of the NRIC's recommendation (on which the Katrina Panel's recommendation on backup power was based) and its application to "wireless networks."[25] Petitioners dismiss NENA's reconsideration comments as "post hoc," CTIA Br. 45 n.12, but they are part of the administrative record in this case. *See Sierra Club v. Costle*, 657 F.2d 298, 380 (D.C. Cir. 1981) ("Evidence added to the record since promulgation and evaluated with the petitions for reconsideration confirms the reasonableness of EPA's conclusion").

But even putting NENA's comments to one side, the record would still support the Commission's decision to extend the backup power requirement to

[25] Comments of NENA, EB Docket Nos. 06–119 *et al.* (Sept. 11, 2007), at 2 (J.A. 807); *see also id.* at 3 (J.A. 808) (explaining that its representative on the Katrina Panel "urged that wireless sites should include generators with a minimum of five days' fuel supply and backup battery systems rated for a minimum of eight hours").

wireless carriers' cell sites. The record shows that the wireless industry offers "a primary means of communications in any emergency situation, as it provides a mobile mechanism for people to connect to one another."[26] The Commission thus reasonably concluded that "it is important that both LEC and CMRS providers have backup power, because the public, public safety personnel, and hospitals, among others, rely heavily on both types of providers." *Reconsideration Order*, 22 FCC Rcd at 18022 ¶ 23 (J.A. 819); *see also ibid.* ("many Americans now rely on only a wireless phone and public safety entities, hospitals and others are increasingly relying on wireless technologies").

Moreover, although the record showed that "the public has a high expectation that networks will operate capably during times of distress," T-Mobile Reply Comments 3 (J.A. 420), the Katrina Panel found that wireless and other communications networks did *not* work, in part, because "backup generators and batteries were not present at all facilities." *Reconsideration Order*, 22 FCC Rcd at 18021 ¶ 21 (J.A. 818) (citing Katrina Report 17 (J.A. 25)). The Commission concluded that "[i]mposing a backup power rule would ensure that more communications assets have backup power." *Id.* at 18022 ¶ 23 (J.A. 819)); *see also* St. Tammany Parish Comments 2 (J.A. 103) (urging the Commission not to rely on "[v]oluntary consensus measures" generally); Sprint Nextel Comments 8 (J.A. 267) ("[r]ules and the threat of enforcement action can be effective to drive industry change"). Petitioners' intervenors suggest that voluntary measures alone will ensure the deployment of adequate backup power because, without that investment, a carrier "risks harm to its reputation for

[26] Reply Comments of T-Mobile USA, Inc., EB Docket No. 06–119 (Aug. 21, 2006) (T-Mobile Reply Comments), at 3 (J.A. 420); *see also* CTIA Comments 17 (J.A. 204) (wireless services "should be given appropriate priority for restoration of electricity and access to landline infrastructure" because they "are the primary method of communication during disasters").

reliability with consumers, which would cause substantial competitive injury." T-Mobile Br. 28. But Intervenors acknowledge that carriers' emergency preparedness plans generally "include the addition of backup power at *many* sites," *id.* at 27 (emphasis added), suggesting that carriers have determined that their "reputations" would not suffer if they keep other parts of their service areas unprotected. More fundamentally, virtually the entire panoply of federal safety regulation—from airlines to automobiles—is premised on the recognition that the risk of harm to a company's "reputation" is often insufficient to ensure an adequate level of protection for the public. "Without specific evidence" in the record that voluntary measures would achieve the same level of network resiliency as the Commission's rule, "the Commission was entitled to conclude" that voluntary measures alone would not adequately protect the public's ability to access emergency communications during a crisis.[27]

Petitioners' challenge to the eight-hour minimum standard for cell sites likewise fails. "When a line has to be drawn," an agency "is authorized to make a 'rational legislative-type judgment.'" *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007) (quoting *WJG Telephone*, 675 F.2d at 388–389, quoting in turn *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978)). This Court accordingly "is generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that the lines drawn are patently unreasonable, having no relationship to the underlying regulatory problem." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001)

---

[27] *United States Cellular Corp.*, 254 F.3d at 88; *see also American Radio Relay League, Inc.* v. FCC, 617 F.2d 875, 881 (D.C. Cir. 1980) (holding that the Commission need not adopt "an alternative that is the 'least restrictive' concerning the interests" of the parties); *Loyola University v. FCC*, 670 F.2d 1222, 1227 (D.C. Cir. 1982) ("The fact that there are other solutions to a problem is irrelevant provided that the option selected is not irrational.").

(internal punctuation omitted). The courts ask only whether the "agency's numbers are within a zone of reasonableness," not whether those numbers are "precisely right." *Ibid.* (internal quotation marks omitted); *see also Nuvio*, 473 F.3d at 309 (giving the agency wide discretion to determine where to draw administrative lines).

The eight-hour standard is well within the zone of reasonableness. The Katrina Panel found that 24 to 48 hours is "generally sufficient period of time to permit the restoration of commercial power in most situations." Katrina Report 17 (J.A. 25). Moreover, in response to the *NPRM*, many parties indicated that carriers had deployed backup power to keep their cell networks in operation for several *days*. *See* USTA Comments 5–6 (J.A. 287–288); Puerto Rico Telephone Comments 3–5 (J.A. 232–234). These figures would have supported an "even higher" minimum requirement, *Vonage*, 489 F.3d at 1243, but the Commission also recognized the "burdens" associated with "ensuring longer durations of backup power" at cell sites. *See Reconsideration Order*, 22 FCC Rcd at 18021 ¶ 21 (J.A. 818). Thus, the Commission explained that it "reasonably required only 8 hours of backup power at such locations" to ensure at least that much time "for commercial power restoration or carrier actions to obtain additional backup power sources." *Id.* at 18022 ¶ 21 (J.A. 818–819).

The record on reconsideration "confirms the reasonableness" of the eight-hour standard. *Sierra Club*, 657 F.2d at 380. For example, Verizon Wireless stated that its "internal design standard is for 8 hours or more of back-up power available at every cell site, where possible" and that "[o]nly a small percentage of sites have only batteries that will not last for 8 hours." Letter from Andre J. Lachance, Verizon Wireless, to Marlene Dortch, Secretary, FCC, EB Docket Nos. 06–119 *et al.* (Sept. 4, 2007), Attachment (J.A. 804). Likewise, T-Mobile stated that, in the Gulf Coast region, it "has installed more than eight and sometimes

even up to twenty-four hours of back-up power."[28] In light of this record evidence, there is no basis for Petitioners' argument that the Commission "'abused its discretion in drawing the lines' where it did." *WorldCom*, 238 F.3d at 462 (bracket removed) (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)); *see also Nuvio*, 473 F.3d at 309 (upholding deadline for Internet-based phone providers to implement E-911 service "[b]ased on the record evidence, the demonstrated safety concerns, and [the Court's] deference to the Commission's predictive judgments").

B. The Commission reasonably concluded that the backup power rule would promote public safety

There is no controversy in this case as to the critical importance of maintaining adequate power reserves to ensure the continued operation of communications networks during a major calamity. Rather, the dispute here centers on how backup power should be deployed. Petitioners and their supporting intervenors would prefer that cell sites that they deem of "lesser operational significance," or that are located in areas of the country that they believe "face different types of risks," not be protected with minimum power-reserve levels (what they call a "one-size-fits-all" approach). CTIA Br. 50–51; T-Mobile Br. 26–30. The Commission took a different view: In light of the Katrina Panel's findings concerning the vulnerability of communications infrastructure to commercial power disruptions, the Commission concluded that it was

[28] T-Mobile Comments in Support of Petitions for Reconsideration, EB Docket Nos. 06–119 *et al.* (Sept. 4, 2007), at 3 (J.A. 786); *see also* CTIA Reconsideration Petition, Exh. 4, at 2 (J.A. 652) (indicating that approximately 80% of Rural Cellular Corporation's cell sites comply with the eight-hour standard); Petition of the United States Telecom Association for Clarification and/or Reconsideration, EB Docket Nos. 06–119 *et al.* (Aug. 10, 2007), at 8 (J.A. 775) (most remote terminals have battery backup "typically designed to an eight-hour engineering standard").

important to provide a level of assurance "to all the people of the United States" (47 U.S.C. § 151) that, in an emergency, they will be able to rely on the nation's communications infrastructure for a minimum period of time after commercial power fails. As the Commission found, and as the parties correctly do not contest, "[t]he need for backup power in the event of emergencies has been made abundantly clear by recent events, and the cost of failing to have such power may be measured in lives lost." *Reconsideration Order*, 22 FCC Rcd at 18027 ¶ 31 (J.A. 824).

Petitioners and their supporting intervenors nonetheless argue that the backup power rule undermines, rather than advances, public safety. CTIA Br. 47, 50–51; T-Mobile Br. 22–24, 28–29. The crux of their argument is that, left to their own devices, CMRS carriers would allocate their resources to achieve the optimal level of network resiliency, with each carrier determining for itself the level of emergency preparedness that a particular cell site or geographic area of the country deserves. *See* CTIA Br. 50–51, T-Mobile Br. 29. But carriers were left to their own devices before Hurricane Katrina struck, and the Katrina Panel found that the deployment of backup power reserves on the Gulf Coast was not optimal; indeed, that is why it recommended that the Commission encourage service providers to "ensure availability" of backup power. Katrina Report 39 (J.A. 47).

Petitioners and their supporting intervenors respond that the backup power rule weakens public safety because it deprives carriers of "flexibility" (CTIA Br. 51) and requires them to "divert their necessarily finite resources" from their other public safety projects, T-Mobile Br. 22; *see also id.* at 30. But the Commission explained that carriers have flexibility to go beyond the rule's minimum requirements to enhance network resiliency. *See Reconsideration Order*, 22 FCC Rcd at 18027–28 ¶ 33 (J.A. 824–825). And it is difficult to

envision any federal safety regulation that could pass APA muster if it could be defeated by a claim that the regulation would force regulated companies to adjust their budgetary priorities. In any event, the Commission did not "overlook the economic cost" of implementing the backup power requirement (*Nuvio*, 473 F.3d at 307): Consistent with its "duty to protect the public" (*ibid.*), it considered those costs and carriers' need for flexibility and concluded that, on balance, they were outweighed by the "critical goal of ensuring that communications networks [have] sufficient backup power, particularly during times of disaster." *Reconsideration Order*, 22 FCC Rcd at 18027 ¶ 33 (J.A. 824).[29]

Petitioners and their supporting intervenors argue that the rule is overly protective because it applies to "fill-in" sites that have "much less operational significance" than "essential 'hub' locations" and to "different areas of the country [which] face different types of risk." CTIA Br. 50 (internal quotation marks omitted); *see also* T-Mobile Br. 27–29. The rule applies to "all assets necessary to maintain communications," *Reconsideration Order*, 22 FCC Rcd at 18035 (J.A. 832), and reasonably so: Individuals seeking to reach emergency personnel during an emergency do not care whether the nearest cell site is a "fill-in" or a "hub." The rule also reasonably applies to all geographic areas of the Nation. As the Katrina Panel recognized, "commercial power failures" are caused by a diverse array of "natural and manmade occurrences" such as "earthquakes, floods, fires, power brown/blackouts, [and] terrorism." Katrina Report 39 (J.A. 47). And the record shows that "[p]ower outages certainly are predictable not only in New Orleans but throughout the Nation," Sprint Nextel

[29] The Commission's consideration of the cost of deploying backup power is also reflected in its decision to exempt small carriers from the requirements of the rule. *See Katrina Order*, 22 FCC Rcd at 10565–66 ¶ 78 (J.A. 471–472).

Comments 4 (J.A. 263), which is why backup power is "common to all" emergency preparedness plans notwithstanding the "different issues" companies may face "in a flood plain, a hurricane belt, a tornado alley, an earthquake zone, or a major city that could be subject to a terrorist attack," CTIA Comments 7–8 (J.A. 194–195). Given the universal need for power to maintain communications during an emergency, and the ubiquitous risk of commercial power failures, it was reasonable for the Commission not to deny any portion of the country the protections afforded by the backup power rule.[30]

Finally, Petitioners and their supporting intervenors assert (correctly) that communications networks faced "many problems" in Katrina other than loss of commercial power (such as flooding). CTIA Br. 50; *see also* T-Mobile Br. 24–25. But they do not dispute that there will be situations in which the lack of commercial power will be the sole reason that communications networks fail. Indeed, as the Katrina Panel found, cell sites generally "were not destroyed by Katrina"; instead, a majority of sites failed because of a "lack of commercial power or a lack of transport connectivity to the wireless switch." Katrina Report 9 (J.A. 17); *see also* Cingular Comments 3 (J.A. 177) (same); CTIA Comments 16 (J.A. 203) (same). To be sure, the backup power rule does not address *every* problem identified by the Katrina Panel, but that does not mean that the rule fails to advance the Commission's public safety objectives. As this Court has often held, an agency rule is not unreasonable simply because the agency does

[30] Petitioners' supporting intervenors contend that the backup power rule "create[s] a whole new source of public safety risks" because it would require deployment of batteries and generators in "flood-prone" or "fire-prone" areas. T-Mobile Br. 23–24. Intervenors, however, do not identify any region of the country where CMRS providers have avoided deploying backup power because of these concerns. *See* T-Mobile Br. 27 (stating that 95% of T-Mobile's cell sites in the Southeast and coastal areas have backup power).

not "address all problems 'in one fell swoop.'" *United States Cellular Corp.*, 254 F.3d at 86 (quoting *National Ass'n of Broadcasters*, 740 F.2d at 1207)).

C. The exemptions to the backup power rule are reasonable

In the *Reconsideration Order*, the Commission substantially relaxed the requirements of the backup power rule by creating exemptions for areas where compliance would be precluded by "(1) federal, state, tribal or local law; (2) risk to safety of life or health; or (3) private legal obligation or agreement." 22 FCC Rcd at 18024 ¶ 25 (J.A. 821). In addition, the Commission provided that a carrier does not have to provide onsite backup power even for its facilities that do not qualify for any of the exemptions. The carrier may instead file an emergency backup power compliance plan for those facilities demonstrating, for example, that it will use portable generators to provide backup power at those locations. *Id.* at 18025 ¶ 27 (J.A. 822). Despite the significant relaxation of the backup power rule the Commission fashioned at their request, petitioners and their supporting intervenors claim that the exemptions are too narrow. Those arguments are misplaced.

1. Petitioners and their supporting intervenors argue that the Commission should have created an express exemption for "space and weight limitations." CTIA Br. 47; *see also* T-Mobile Br. 21–22. But the Commission reasonably declined to do so. *Reconsideration Order*, 22 FCC Rcd at 18026 ¶ 30 (J.A. 823). An exemption for space or weight limitations would enable carriers to avoid deploying backup power even where a site could be "modif[ied] . . . to accommodate additional equipment." *Ibid.* The Commission concluded that such an exemption would not be consistent with its "ultimate goal" of ensuring that "carriers have sufficient emergency backup power." *Ibid.*

Petitioners and their supporting intervenors protest that "[c]ell transmitters are often placed in locations with limited room," CTIA Br. 48, such as in "church steeple[s], [or on a] rooftop, tower, [or] utility pole," T-Mobile Br. 12. But even if those locations cannot be modified to accommodate additional equipment, there is no technical reason for the backup power source to be located in exactly the same place as the transmitter. Carriers may be able to locate the backup power source elsewhere and supply power to the transmitter remotely (*i.e.*, through an electrical connection). *See* Petition for Clarification or Reconsideration of NextG Networks, Inc., EB Docket Nos. 06–119 *et al.* (Aug. 10, 2007), at 7 (J.A. 703) (noting that primary power for NextG nodes may come "from a remote supply power distribution point, which is effective for distances up to approximately one mile"); *id.* at Exh. 1, at 5 (J.A. 722) (backup power could be housed in an "equipment enclosure box").

Moreover, as Petitioners acknowledge, "mobile cell sites on wheels ('COWs'), cell sites on light trucks ('COLTS'), and satellite cell sites on light trucks ('SatCOLTS')" provide "highly effective solutions to power outages that do not require the installation of a permanent power source." CTIA Br. 4; *see also* Sprint Nextel Comments 4 (J.A. 263); Katrina Report 9 (J.A. 17). And the Commission made clear that carriers may rely on such "portable backup power sources or other sources as appropriate" in their "emergency backup power compliance plan[s]." *Reconsideration Order*, 22 FCC Rcd at 18025 ¶ 27 (J.A. 822); *see also id.* at 18025 ¶ 33 (J.A. 825). Yet the option of developing an emergency backup power compliance plan for sites where space and weight constraints are an issue—thus completely dispensing with the need for onsite

power at those locations—is completely ignored by Petitioners and casually dismissed by their intervenors. *See* T-Mobile Br. 16–17.[31]

Nor is there any basis for the claim that the absence of an express exemption for space and weight constraints will result in the widespread "decommissioning" of cell sites. CTIA Br. 47. As an initial matter, because cell sites define wireless carriers' service areas, carriers will have a strong economic incentive to keep their cell sites in operation. This natural incentive against decommissioning sites would lead carriers to find solutions to space and weight limitations at existing cell sites or plan for alternative means of coverage in their emergency backup power compliance plans. In any event, many locations with space or weight constraints will be entitled to an exemption from the backup power requirement because of legal, safety, or contractual limits (whether related or unrelated to the space or weight constraints at those sites). *See*, *e.g.*, PCIA Reconsideration Petition 9 (J.A. 748) (stating that fire codes may contribute to space constraints). As the Commission explained, "a carrier could be excused from the rule to the extent that the carrier can demonstrate that an asset with purported physical constraints fall[s] into one of the three exceptions" to the rule. *Reconsideration Order*, 22 FCC Rcd at 18026 ¶ 30 (J.A. 823). Or carriers may find "other, more suitable, locations for their assets." *Ibid.* Intervenors suggest that finding new locations for "thousands of sites" might

[31] Intervenors' claim (T-Mobile Br. 13–14) that the Commission failed to consider the unique circumstances of distributed antenna systems (DAS) is not properly before the Court because that issue is not raised by Petitioners. *See Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) ("An intervening party may join issue only on a matter that has been brought before the court by another party."). The claim lacks merit in any event. The Commission considered DAS and concluded that "they should be treated similarly to other types" of wireless assets. *Reconsideration Order*, 22 FCC Rcd at 18031 ¶ 38 (J.A. 828).

pose "difficulties" for carriers, but with well over a year to implement the various avenues available to carriers, there is little basis for their suggestion that every site with space or weight constraints will have to be relocated.[32] And the Commission reasonably concluded that those "burdens are far outweighed by the ultimate goal" of ensuring that "carriers have sufficient emergency backup power, particularly during times of emergencies." *Reconsideration Order*, 22 FCC Rcd at 18026 ¶ 30 (J.A. 823); *see also Nuvio*, 473 F.3d at 308 ("the Commission has weighed the cost of an 'aggressive' implementation scheme . . . against the cost in human lives, and found in favor of human safety").

Finally, to the extent that there are cell sites (1) that do not already comply with the backup power rule, (2) that are not exempt for legal, safety, or contractual reasons, (3) that are located in areas that cannot be physically modified to accommodate onsite backup power equipment, (4) that cannot be relocated notwithstanding a provider's good faith efforts, and (5) where the carrier cannot within 12 months of the rule's effective date ensure emergency backup power to the areas covered by those cell sites through onsite, portable, or other sources, carriers retain the ability of asking the Commission for a waiver of the rule. *See* 47 C.F.R. § 1.3 (providing for waiver "for good cause shown"). Given these various options, there is no valid basis for the suggestion that an express exemption for space or weight limitations is needed to keep carriers' cell sites in operation.

2. Petitioners are wrong when they suggest that carriers may have to decommission cell sites where "existing private contractual limits" prevent

[32] T-Mobile Br. 12; *cf. Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1479 (D.C. Cir. 1984) (reviewing courts are the "wrong forum" for arguing that an agency's decision is "not likely to succeed in accomplishing what the Commission intended") (internal quotation marks omitted).

compliance with the backup power rule. CTIA Br. 49. The Commission specifically excused compliance with the rule where it would be precluded by "private legal obligation or agreement." *Reconsideration Order*, 22 FCC Rcd at 18025 ¶ 25 (J.A. 821). Nor did the Commission "direct[] CMRS providers to 'revise' their contracts," as Petitioners assert. CTIA Br. 49. The Commission urged carriers to "make efforts to revise agreements to enable rule compliance where possible" and warned them not to use the private agreement exception "to circumvent the rule," *Reconsideration Order*, 22 FCC Rcd at 18025 ¶ 25 (J.A. 821), for example, by renegotiating an existing lease to collusively create a new contractual limitation on compliance.[33] Nothing in the rule requires carriers to decommission cell sites if carriers' efforts to renegotiate their site leases are unsuccessful.

3. In creating an exemption to the backup power requirement where compliance with the rule would be precluded by "federal, state, tribal or local law," *Reconsideration Order*, 22 FCC Rcd at 18024 ¶ 25 (J.A. 821), the Commission stated that the "mere need to obtain a permit or other approval will not be deemed to preclude compliance with the backup power requirement," *id.* at 18025 ¶ 26 (J.A. 822). Petitioners and their supporting intervenors interpret that statement to mean that carriers must comply with the backup power rule where they have applied for but not yet received (or have been denied) a permit needed to deploy backup power equipment. CTIA Br. 52–54; T-Mobile Br. 18–21.

[33] Petitioners' argument (CTIA Br. 55) that the Commission's admonishment was not adequately explained is barred by 47 U.S.C. § 405(a) because it was not first presented to the Commission. *See AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 966 (D.C. Cir. 2001); *Qwest Corp. v. FCC*, 482 F.3d 471, 474 (D.C. Cir. 2007). In any event, Petitioners' argument fails in light of the "broad deference" that agencies receive "in choosing the level of generality at which to articulate rules." *Animal Legal Defense Fund, Inc. v. Glickman*, 204 F.3d 229, 235 (D.C. Cir. 2000).

There is no basis for that reading. The "mere need" to obtain a permit speaks only to the existence of a permitting requirement, which the Commission reasonably concluded was not itself a valid basis for exempting carriers from the backup power requirement. *Reconsideration Order*, 22 FCC Rcd at 18025 ¶ 26 (J.A. 822). If a carrier has diligently pursued a request for a needed permit, and that request is denied (or has not yet been acted upon) by the permitting authority, its compliance with the backup power rule would be precluded by "federal, state, tribal or local law,"[34] *id.* at 18024 ¶ 25 (J.A. 821), and the relevant asset would be exempt from the backup power requirement.[35] Nothing in the rule requires carriers to deploy backup power equipment in violation of otherwise applicable federal, state, tribal, or local permitting laws.

IV. USA MOBILITY'S PAGING-SPECIFIC CHALLENGES TO THE BACKUP POWER RULE SHOULD BE REJECTED

A. USA Mobility's petition for review is untimely and should be dismissed for want of jurisdiction

USA Mobility challenges the Commission's decision to include paging carriers within the scope of the backup power rule. That challenge is untimely.

---

[34] By contrast, were a provider to wait until the last day before the effective date of the backup power rule to apply for a permit, its lack of compliance with the rule on the effective date would be properly attributable to its own inaction (rather than federal, state, tribal, or local law).

[35] To the extent that Intervenors seek to argue more generally that the time frames set forth in the backup power rule are unreasonable, *see* T-Mobile Br. 18–20 & n.35, that argument is barred because it was not raised by Petitioners, *Illinois Bell Telephone Co.*, 911 F.2d at 786. In any event, the Commission responded to complaints that compliance with the original rule was impracticable by relaxing the rule in several significant respects. The Commission concluded it would be "feasible for providers to comply" with the modified rule, *Reconsideration Order*, 22 FCC Rcd at 18026 ¶ 28 (J.A. 823), and Intervenors have given no good reason for disregarding the "substantial deference [courts] owe the FCC's predictive judgments." *Nuvio*, 473 F.3d at 306.

In the *Katrina Order*, the Commission extended the backup power rule to CMRS providers, a category that includes paging carriers. To preserve its challenge to that action, USA Mobility was required to seek judicial review of the *Katrina Order* within the time set forth in the Hobbs Act or, alternatively, to file a timely petition for reconsideration with the Commission. USA Mobility's failure to take either of these steps deprives the Court of jurisdiction over its petition for review.

1. The Hobbs Act provides that "[a]ny party aggrieved" by a final Commission order must file a petition for review in the courts of appeal "within 60 days" of "entry" of the "final order." 28 U.S.C. § 2344. The "sixty-day period is jurisdictional in nature, and may not be enlarged or altered by the courts." *Western Union Telegraph Co. v. FCC*, 773 F.2d at 377 (internal quotation marks omitted). The 60-day period may be tolled, however, when a party files a timely petition for reconsideration of the order with the Commission because the reconsideration petition makes the agency's order "nonfinal" as to that party. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 285 (1987); *ICG Concerned Workers Ass'n v. United States*, 888 F.2d 1455, 1458 (D.C. Cir. 1989) ("in the multi-party situation, an agency decision may be final with respect to some parties but nonfinal with respect to other parties.").

USA Mobility correctly does not contend that it has sought timely review of the *Katrina Order*. For purposes of Hobbs Act review, "entry" of the *Katrina Order* occurred on July 11, 2007, the date on which a summary of the order was published in the *Federal Register*. 28 U.S.C. § 2344; *see also* 47 C.F.R. § 1.4(b)(1); *Western Union Telegraph Co.*, 773 F.2d at 376. USA Mobility did not petition for review of the *Katrina Order* within the 60-day Hobbs Act window, nor did it petition the Commission to reconsider the *Katrina Order*. Accordingly, any claims it has arising out of the *Katrina Order* are time barred.

2. USA Mobility seeks to avoid the 60-day jurisdictional bar by asserting that "the FCC first ruled that the emergency backup power mandate applies to paging carriers" in the *Reconsideration Order*, which USA Mobility did timely challenge. Br. 1. That assertion is incorrect. The rule adopted in the *Katrina Order* stated in relevant part that LECs and "*commercial mobile radio service (CMRS) providers* must have an emergency backup power source for *all assets* that are normally powered from local AC commercial power, *including* those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals." *Katrina Order*, 22 FCC Rcd at 10587–88 (emphases added) (J.A. 493–494); *see also id.* at 10565 ¶ 77 (J.A. 471). Paging carriers are CMRS providers under the Commission's rules. *See* 47 C.F.R. § 20.9(a)(1), (6). USA Mobility's statement that the *Katrina Order* "contains nothing to suggest that paging carriers were covered by the new mandate" is therefore not accurate. Br. 8. To be sure, USA Mobility asserts (Br. 9) that paging carriers do not have "central offices, cell sites," or the other facilities mentioned in the original rule. But the rule by its terms covered "all assets" of CMRS providers, a category which includes paging carriers, and the specific types of facilities listed only serve as examples.

USA Mobility suggests that the original rule did not apply to paging carriers because it did not clearly state whether paging assets should have 8 or 24 hours of backup power capacity, and because the *Katrina Order*'s Final Regulatory Flexibility Analysis did not discuss paging carriers. Br. 9 & n.4. If these omissions had not been corrected in the *Reconsideration Order*, they might have given rise to a colorable claim that the original rule was arbitrary as applied to paging carriers or was adopted in violation of the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601–612. But a claim that the original rule might have been unlawful as applied to paging carriers does not change the fact

that the original rule applied to paging carriers. The time for challenging that decision therefore began to run when a summary of the *Katrina Order* was published in the *Federal Register*. *See Western Union Telegraph Co.*, 773 F.2d at 376.[36]

Even if the original rule were unclear as to its application to paging companies, USA Mobility's petition for review would still be untimely. A party must bring a timely challenge where "an ordinary reader familiar with the industry background would have recognized a very substantial likelihood that the order meant what the Commission ultimately said it meant."[37] Here, an ordinary reader in the industry would have understood the term "CMRS providers" in the backup power rule to include paging carriers. Indeed, the American Association of Paging Carriers, the paging industry's trade association, read the rule as potentially applying to paging carriers and, accordingly, asked the Commission to "clarify or reconsider" the rule. *See* AAPC Reconsideration Petition 1 (J.A. 595); *see also ANR Pipeline*, 988 F.2d at 1234 (rehearing petition filed by another party provided "modest confirmation" that industry had notice of "a very substantial risk that [the agency order] meant

[36] USA Mobility correctly does not argue that the Commission "reopened" the rule in the *Reconsideration Order* when it added a cross-reference to the agency's definition of CMRS provider in 47 C.F.R. § 20.9. *See Reconsideration Order*, 22 FCC Rcd at 18029 ¶ 34 (J.A. 826). A "mere 'clarification' " of a prior order does not create a new, appealable order. *Southern Co. Services, Inc. v. FERC*, 416 F.3d 39, 44–45 (D.C. Cir. 2005) (quoting *Brotherhood of Locomotive Engineers*, 482 U.S. at 286).

[37] *ANR Pipeline Co. v. FERC*, 988 F.2d 1229, 1230 (D.C. Cir. 1993); *see also Dominion Resources, Inc. v. FERC*, 286 F.3d 586, 590 (D.C. Cir. 2002) ("we ask if the Commission's interpretation was so obscure that [the order] 'did not provide sufficient notice' to [the petitioner] that it inflicted the now-challenged burden.") (quoting *East Texas Elec. Co-op., Inc. v. FERC*, 218 F.3d 750, 754 (D.C. Cir. 2000)).

what it later proved to mean"). USA Mobility's "mere uncertainty" as to the application of the *Katrina Order* to paging carriers, "even if justifiable, does not excuse its failure" to bring a timely challenge to the *Katrina Order*. *ANR Pipeline*, 988 F.2d at 1234. USA Mobility's petition for review must be dismissed for lack of jurisdiction.

B. If the Court concludes that it has jurisdiction, it should reject USA Mobility's arguments on the merits

1. Application of the backup power rule to paging carriers did not violate the APA's notice requirements

USA Mobility contends that it lacked notice because the Katrina Panel's findings with respect to the loss of commercial power "afflicted *voice* providers only" and that "the Katrina Panel expressly found that paging carriers did not experience similar outages." Br. 8. That is an exaggeration. The Katrina Panel noted that "[p]aging systems seemed more reliable in some instances than voice/cellular systems." Katrina Report 10 (J.A. 18). But the Katrina Panel also observed that "*every* sector of the communications industry was impacted by the storm." Katrina Report i (J.A. 4) (emphasis added). As USA Mobility itself told the Commission, Hurricane Katrina "interrupted operations at 291 of the company's tower locations along the Gulf Coast." Letter from Matthew A. Brill, Latham & Watkins, LLP, to Marlene H. Dortch, Secretary, FCC, EB Docket Nos. 04–296 *et al.* (July 12, 2006), Attachment (unnumbered) (J.A. 98). According to Vincent D. Kelley, USA Mobility's president and chief executive officer, "[m]ost of these interruptions were due to loss of power."[38]

[38] Written Testimony of Vincent D. Kelly, President and Chief Executive Officer, USA Mobility, Before the FCC's Independent Panel Reviewing the Impact of Hurricane Katrina (Mar. 6, 2006), at 6, available at http://www.fcc.gov/pshs/docs/advisory/hkip/GSpeakers060306/ACT1010.pdf.

USA Mobility also asserts that, because the Katrina Panel's recommendation on backup power was "intended to ensure a more robust 911 and E911 service," that recommendation did not apply to paging carriers because they do not offer 911 services. Br. 7 (quoting *NPRM*, 21 FCC Rcd at 7326 ¶ 16 (J.A. 59)). As explained above, the Commission made clear that it was not limiting the scope of the rulemaking proceeding to the Katrina Panel's specific recommendations. *See supra* p.8. With respect to paging service, the Commission recognized that paging carriers provide important alternative communications capabilities to first responders and other emergency personnel. *See Katrina Order*, 22 FCC Rcd at 10544 n.9 (J.A. 450); *see also* Comments on Report and Recommendations, American Association of Paging Carriers, EB Docket No. 06–119 (Aug. 7, 2006), at i (urging that "paging technology be deployed more widely as an alternate communications channel for communications industries to use in contacting their key personnel during emergencies, as well as an effective back-up solution for existing public safety communications systems"). Given the importance of paging technology to public safety communications and the susceptibility of all communications technologies to commercial power failures, it was "reasonably foreseeable" that a requirement that carriers ensure adequate backup power capability would extend to carriers that provide paging services. *Owner-Operator*, 494 F.3d at 210 (internal quotation marks omitted).

2. Application of the backup power rule to paging carriers was reasonable

In confirming that the backup power rule applied to paging carriers, the Commission explained that "[p]aging services are a critical part of emergency response" that "[m]any first responders, hospitals and critical infrastructure providers rely on." *Reconsideration Order*, 22 FCC Rcd at 18028 ¶ 34 (J.A. 825).

"Backup power at paging carrier facilities," the Commission explained, "will help ensure the availability of these services" when a major disaster disrupts commercial power supply. *Ibid.*

USA Mobility does not contest the Commission's findings regarding the importance of having an operational paging network during severe emergencies. It nonetheless presents a variety of arguments as to why it was unreasonable for the Commission to apply the backup power rule to paging carriers. Several of these arguments are barred by 47 U.S.C. § 405(a). All of them lack merit.

a. USA Mobility first contends that "the distinctive attributes of paging networks enable reliable operation during emergencies without the need for ubiquitous backup power." Br. 10. According to USA Mobility, those "distinctive attributes" are that paging antennas are located "high off the ground," "emit extremely powerful signals," and are "more resistant to damage" than antennas used by mobile phone providers. *Id.* at 2–3. But the height, power, and physical sturdiness of paging transmitters do not amount to much if those transmitters lack the power needed to operate. The Commission, therefore, properly did not consider those attributes in applying the backup power rule to paging carriers.

USA Mobility also argues that it is unnecessary "to require paging carriers to provide backup power for every paging transmitter" because paging systems are built with "inherent redundancy." Br. 10, 11; *see also id.* at 2. But the backup power rule accounts for network redundancy by allowing carriers to submit an emergency backup power plan that describes how the carrier will provide "backup power to 100 percent *of the area* covered by a non-compliant asset." *Reconsideration Order*, 22 FCC Rcd at 18025 ¶ 27 (J.A. 822). Thus, a paging company need *not* provide backup power for a transmitter if its service area is fully covered by other transmitters for which adequate backup power reserves have been deployed.

USA Mobility next contends that the backup power rule should not apply to paging carriers because paging services "consistently have been available during emergencies of all kinds." Br. 13 (emphasis removed). However, as noted above, this statement is contradicted by USA Mobility itself. For example, "nearly half of USA Mobility's transmitters in the region were knocked out of service by Katrina's landfall," leaving only "partial network coverage for the duration of the storm" and two additional days thereafter. Comments of USA Mobility, Inc., EB Docket No. 06–119 (Aug. 7, 2006) (USA Mobility Comments), at 6 (J.A. 309). Nothing in the APA requires the Commission to await a more catastrophic failure before taking action to promote public safety.

b. Although USA Mobility does not dispute that paging services rely on commercially supplied power, it argues that paging carriers are not "similarly situated" to other CMRS providers for various reasons. First, USA Mobility states that paging carriers "do not participate in 911/E911 calling." Br. 12. But "[p]aging services are a critical part of emergency response" because "[m]any first responders, hospitals and critical infrastructure providers rely on paging services during emergencies." *Reconsideration Order*, 22 FCC Rcd at 18028 ¶ 34 (J.A. 825). Thus, even without the ability to connect callers to 911 services, "paging services continue to play a critical role" in protecting public safety during major disasters. USA Mobility Comments 3 (J.A. 306).[39]

[39] USA Mobility also argues that it was arbitrary for the Commission to require paging carriers to deploy backup power because paging carriers are "ineligible for public safety grants . . . because they do not provide 911 service." Br. 13. This argument is barred by 47 U.S.C. § 405(a) because the question of paging carriers' ineligibility for public safety grants was not raised before the Commission. The argument is meritless in any event because, unlike grants to promote 911 services, the purpose of the backup power rule extends beyond the maintenance of 911 capabilities.

Second, USA Mobility asserts that, in contrast to wireless voice carriers, paging carriers "are not subject to local number portability or 'number pooling,'" and are subject to different "universal service contribution rules." Br. 13. The Court lacks jurisdiction to address this argument because those alleged reasons for distinguishing paging carriers from other CMRS providers were not first presented to the agency. 47 U.S.C. § 405(a). In any event, whatever distinctions may exist between paging carriers and wireless phone providers in other contexts, paging carriers are similarly situated to other CMRS providers because all "are a critical part of emergency response." *Reconsideration Order*, 22 FCC Rcd at 18028 ¶ 34 (J.A. 825).

Third, USA Mobility asserts that paging carriers are disproportionately burdened by the backup power rule because paging systems "require larger, heavier, and more costly backup power solutions" than other wireless providers. Br. 14. But the Commission explained that paging companies "use a variety of facilities to provide coverage which are, in most cases, not that different from the facilities of other CMRS providers." *Reconsideration Order*, 22 FCC Rcd at 18030 ¶ 36 (J.A. 827). And while "paging providers use high-powered transmitters," paging carriers also generally have *fewer* transmitter sites overall than mobile phone providers. *Ibid.* The Commission accordingly acted reasonably in concluding that any burdens imposed on paging carriers to ensure adequate backup power would be "no more onerous than those faced by other CMRS providers." *Ibid.*[40]

3. USA Mobility's remaining arguments against the application of the backup power rule to paging carriers are barred under § 405(a). No party raised

[40] USA Mobility argues that the "precarious financial condition of paging carriers" also justifies exempting them from the backup power requirement. Br. 15. That argument was not raised below and thus is barred by § 405(a).

before the agency USA Mobility's arguments that (1) the Commission should have established "paging-specific exemption criteria" instead of using the 500,000-subscriber standard that applies to other CMRS providers, Br. 14; (2) the eight-hour standard for backup power should not apply to paging carriers, Br. 11; (3) the rule will harm public safety because it will cause USA Mobility to decommission transmitters, Br. 16; and (4) the exemptions that the Commission established to accommodate potential legal, contractual, or safety concerns are uniquely "vague and uncertain" as applied to paging carriers, Br. 16.[41] Because these arguments were not presented to the Commission in the first instance, the Court lacks jurisdiction to consider them.

CONCLUSION

For the foregoing reasons, the Court should dismiss for lack of jurisdiction USA Mobility's petition for review in No. 07–1477, as well as Sprint Nextel's petition for review in No. 07–1480 to the extent it seeks review of the *Katrina Order*. In all other respects, the Court should deny the petitions for review.

[41] To the extent USA Mobility's arguments on the last three points are not specific to paging carriers but, instead, duplicative of arguments raised by CTIA and Sprint Nextel, the Court should reject them for the reasons provided in our response to those parties' brief.

Respectfully submitted,

Matthew B. Berry
General Counsel

Joseph R. Palmore
Deputy General Counsel

Daniel M. Armstrong
Associate General Counsel

Richard K. Welch
Acting Deputy Associate General Counsel

Nandan M. Joshi
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (telephone)
(202) 418-2819 (fax)

Thomas O. Barnett
Assistant Attorney General

James J. O'Connell, Jr.
Deputy Assistant Attorney General

Robert B. Nicholson
James J. Fredricks
Attorneys

United States Department of Justice
Washington, D.C. 20530

March 24, 2008

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

CTIA–THE WIRELESS ASSOCIATION ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NOS. 07–1475, 07–1477, AND 07–1480

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's order dated January 15, 2008, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 18925 words.

NANDAN M. JOSHI
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740 (TELEPHONE)
(202) 418–2819 (FAX)

March 24, 2008

STATUTORY APPENDIX

Contents

Page

Communications Act of 1934:
- § 1, 47 U.S.C. § 151 .... A–1
- § 402(a), 47 U.S.C. § 402(a) A–1
- § 405(a), 47 U.S.C. § 405(a) A–1

Administrative Procedure Act:
- 5 U.S.C. § 553(b) A–2

Administrative Orders Review (Hobbs) Act:
- 28 U.S.C. § 2344 .... A–2

The “Backup Power” Rule:
- 47 C.F.R. § 12.1 .... A–3
- 47 C.F.R. § 12.2 .... A–3

1. Section 1 of the Communications Act of 1934 (47 U.S.C. § 151) provides as follows:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

2. Section 402(a) of the Communications Act of 1934 (47 U.S.C. § 402(a)) provides as follows:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

3. Section 405(a) of the Communications Act of 1934 (47 U.S.C. § 405(a)) provides in relevant part as follows:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a

petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

4. 5 U.S.C. § 553(b) provides in relevant part as follows:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

* * * * *

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5. 28 U.S.C. § 2344 provides as follows:

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

6. 47 C.F.R. §§ 12.1 and 12.2 provide as follows:

§ 12.1 Purpose.

The rules in this part include requirements that will help ensure the resiliency, redundancy and reliability of communications systems, particularly 911 and E911 networks and/or systems.

§ 12.2 Backup power.

(a) Except to the extent set forth in 12.2(b) and 12.2(c)(4) of the Commission's rules, local exchange carriers, including incumbent local exchange carriers and competitive local exchange carriers (collectively, LECs), and commercial mobile radio service (CMRS) providers, as defined in § 20.9 of this chapter, must have an emergency backup power source (e.g., batteries, generators, fuel cells) for all assets necessary to maintain communications that are normally powered from local commercial power, including those assets located inside central offices, cell sites, remote switches and digital loop carrier system remote terminals. LECs and CMRS providers must maintain emergency backup power for a minimum of twenty-four hours for assets that are normally powered from local commercial power and located inside central offices, and eight hours for assets that are normally powered from local commercial power and at other locations, including cell sites, remote switches and digital loop carrier system remote terminals. Power sources satisfy this requirement if they were originally designed to provide the minimum backup power capacity level required herein and the provider has implemented reasonable methods and procedures to ensure that the power sources are regularly checked and replaced when they deteriorate. LECs that meet the definition of a Class B company as set forth in § 32.11(b)(2) of this chapter and non-nationwide CMRS providers with no more than 500,000 subscribers are exempt from this rule.

(b) LECs and CMRS providers are not required to comply with paragraph (a) of this section for assets as described in paragraph (a) of this section where the LEC or CMRS provider demonstrates, through the reporting requirement as described in paragraph (c) of this section, that such compliance is precluded by:

(1) Federal, state, tribal or local law;

(2) Risk to safety of life or health; or

(3) Private legal obligation or agreement.

(c) Within six months of the effective date of this requirement, LECs and CMRS providers subject to this section must file reports with the Chief of the Public Safety & Homeland Security Bureau.

(1) Each report must list the following:

(i) Each asset that was designed to comply with the applicable backup power requirement as defined in paragraph (a) of this section;

(ii) Each asset where compliance with paragraph (a) of this section is precluded due to risk to safety of life or health;

(iii) Each asset where compliance with paragraph (a) of this section is precluded by a private legal obligation or agreement;

(iv) Each asset where compliance with paragraph (a) of this section is precluded by Federal, state, tribal or local law; and

(v) Each asset that was designed with less than the emergency backup power capacity specified in paragraph (a) of this section and that is not precluded from compliance under paragraph (b) of this section.

(2) Reports listing assets falling within the categories identified in paragraphs (c)(1)(ii) through (iv) of this section must include a description of facts supporting the basis of the LEC's or CMRS provider's claim of preclusion from compliance. For example, claims that a LEC or CMRS provider cannot comply with this section due to a legal constraint must include the citation(s) to the relevant law(s) and, in order to demonstrate that it is precluded from compliance, the provider must show that the legal constraint prohibits the provider from compliance. Claims that a LEC or CMRS provider cannot comply with this section with respect to a particular asset due to a private legal obligation or agreement must include a description of the relevant terms of the obligation or agreement and the dates on which the relevant terms of the agreement became effective and are set to expire. Claims that a LEC or CMRS provider cannot comply with this section with respect to a particular asset due to risk to safety of life or health must include a description of the safety of life or health risk and facts that demonstrate a substantial risk of harm.

(3) For purposes of complying with the reporting requirements set forth in paragraphs (c)(1)(i) through (v) of this section, in cases where more than one asset necessary to maintain communications that are normally powered from local commercial power are located at a single site (i.e., within one central office), the reporting entity may identify all of such assets by the name of the site.

(4) In cases where a LEC or CMRS provider identifies assets pursuant to paragraph (c)(1)(v) of this section, such LEC or CMRS provider must comply with the backup power requirement in paragraph (a) of this section or, within 12 months from the effective date of this rule, file with the Commission a certified emergency backup power compliance plan. That plan must certify that and describe how the LEC or CMRS provider will provide emergency backup power to 100 percent of the area covered by any non-compliant asset in the event of a commercial power failure. For purposes of the plan, a provider may rely on on-site and/or portable backup power sources or other sources, as appropriate, sufficient for service coverage as follows: a minimum of 24 hours of service for assets inside central offices and eight hours for other assets, including cell sites, remote switches, and digital loop carrier system remote terminals. The emergency backup power compliance plans submitted are subject to Commission review.

(5) Reports submitted pursuant to this paragraph must be supported by an affidavit or declaration under penalty of perjury and signed and dated by a duly authorized representative of the LEC or CMRS provider with personal knowledge of the facts contained therein.

(6) Information filed with the Commission pursuant to paragraph (c) of this section shall be automatically afforded confidentiality in accordance with the Commission's rules.

(7) LECs that meet the definition of a Class B company as set forth in § 32.11(b)(2) of this chapter and nonnationwide CMRS providers with no more than 500,000 subscribers are exempt from this reporting requirement.