Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia	)	
	)	

PETITION FOR RECONSIDERATION OF
SPRINT CORPORATION

Sprint Corporation ("Sprint"), pursuant to Section 1.429 of the Commission's rules, submits this Petition for Reconsideration of the Commission's Memorandum Opinion and Order, FCC 03-338 (released Jan. 22, 2004) ("*Virginia Cellular Order*" or "*Order*"), granting in part and denying in part Virginia Cellular LLC's petition for designation as an eligible telecommunications carrier ("ETC"). Sprint is an "interested person" within the meaning of Section 1.429 of the rules because Sprint has filed several petitions for ETC designation before the Commission that remain pending, and the *Virginia Cellular Order* purports to adopt a framework that will apply to all future ETC applications. *See Order*, ¶ 4.

Sprint urges the Commission to reconsider two aspects of the *Order*: (1) the requirement that ETC applicants make a separate demonstration that it is in the "public interest" to designate them in areas served by <u>non-rural</u> incumbent

local exchange carriers ("ILECs") (*Order*, ¶ 27); and (2) the imposition of additional requirements on the applicant as "conditions" for the grant, even though such requirements are not included in the statute, the existing rules, or in any pre-existing Commission rulemaking decision (¶ 46 & n.141).

1. *"Public Interest" Showing for Non-Rural ILEC Areas.* The Telecommunications Act of 1996 adopted a "national policy framework" in favor of "opening all telecommunications markets to competition." 1/ Consistent with that policy objective, Sprint – like Virginia Cellular – seeks to compete in markets for federally-supported universal service. Such competitive entry is generally in the public interest: consumers in high-cost areas benefit from the increased customer choice, innovative services, and new technologies that competition promotes, the expanded availability of mobile service offerings, and expanded access to emergency services. 2/ Indeed, provided that a carrier demonstrates that it has satisfied the statutory requirements of all ETCs, the Bureau has previously decided that such a carrier's receipt of ETC status "is consistent *per se* with the public interest," and no additional public interest showing should be necessary. 3/

1/ *See Telecommunications Act of 1996, Conference Report to Accompany S.652,* Rept. 104-458, 104th Cong., 2d Sess. (Jan. 31, 1996), at 1 ("*1996 Act Conference Report*").

2/ *See Virginia Cellular Order*, ¶ 29; *Federal-State Joint Board on Universal Service, Petitions for Reconsideration of Western Wireless Corporation's Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming,* 16 FCC Rcd 19144, 19151-52, ¶ 19 (2001)

3/ *Federal-State Joint Board on Universal Service, Cellco Partnership d/b/a/ Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, 16 FCC Rcd 39, 45, ¶ 14 (Com. Car. Bur. 2000)) ("*Cellco Delaware ETC Order*").

This approach is rooted in the statute itself, as well as the legislative history. Section 214(e)(2) of the Act (with respect to ETC designation by state commissions), and Section 214(e)(6) of the Act (with respect to ETC designation by the FCC) provide that regulators "shall" designate ETC applicants in non-rural ILEC areas. The same statutory provisions state that regulators "may" issue such designations in rural ILEC areas – but only if, before doing so, they "find that the designation is in the public interest." The legislative history makes it clear that, in non-rural areas, the role of the regulatory review is to determine whether the applicant meets the statutory criteria; if it does, then the statutory requirements have been met and the regulator "shall" issue the designation. By contrast, the legislative history makes it clear that the statute requires the regulator to conduct an additional public interest inquiry in rural ILEC areas that does not apply in non-rural ILEC areas. 4/

Given that the statute specifically requires an additional "public interest" finding for ETC applications in areas served by rural, but not non-rural, ILECs, it makes no sense to interpret the general language in the statute stating that all designations are to be "consistent with the public interest, convenience, and necessity" as requiring an additional showing in non-rural areas. The Common

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4/ *See 1996 Act Conference Report* at 141 ("If more than one common carrier that meets the requirements of new section 214(e)(1) requests designation as an eligible telecommunications carrier in a particular area, the State commission shall, in the case of areas not served by a rural telephone company, designate all such carriers as eligible. If the area for which a second carrier requests designation as an eligible telecommunications carrier is served by a rural telephone company, then the State commission may only designate an additional carrier as an eligible telecommunications carrier if the State commission first determines that such additional designation is in the public interest.")

Carrier Bureau resolved this issue correctly in the *Cellco Delaware ETC Order*: the general "public interest, convenience, and necessity" language in the statute can only mean that, "[f]or those areas served by non-rural telephone companies, . . . designation of an additional ETC based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) is consistent *per se* with the public interest." 5/ In other words, Congress has already made the decision that, if a carrier has met the prescribed ETC criteria, then designation of that carrier as an ETC is in the "public interest, convenience, and necessity." 6/ No additional public interest finding is needed.

Moreover, the *Virginia Cellular Order* fails to provide any guidance regarding the content of the public interest standard that now purportedly will apply to competitive ETC applications in non-rural ILEC areas. 7/ To the contrary, while recognizing that the public interest standard in non-rural areas must be less rigorous than that in rural areas, the *Order* simply observes that, "given our finding that Virginia Cellular has satisfied the more rigorous public interest analysis for the rural study areas, it follows that its commitments satisfy the public interest

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5/ *Cellco Delaware ETC Order,* 16 FCC Rcd at 45, ¶ 14.

6/ The phrase "public interest, convenience, and necessity" is a stock boilerplate phrase used elsewhere in Section 214 and in comparable state statutes regarding certifying carriers and permitting them to enter a market.

7/ This lack of guidance regarding the public interest standard for non-rural ILEC areas is not surprising since, as the *Order* admits, "no parties oppose[d] Virginia Cellular's request for ETC designation in the study areas of these non-rural telephone companies." *Virginia Cellular Order*, ¶ 26. There was no discussion in the record of this proceeding regarding the proper "public interest" standard for non-rural ILEC areas. As discussed below, the lack of notice and comment rulemaking procedures prior to adopting this fundamental policy change violates the Administrative Procedure Act. *See infra*, pp.7-8.

requirements for non-rural areas." This approach provides no information on what standard non-rural applicants like Sprint must satisfy. Rather, the *Order* places non-rural applicants in the very difficult position of either attempting to satisfy the rural public interest standard – even though that standard clearly does not apply in non-rural areas – or going forward without standards or certainty.

In sum, the *Virginia Cellular Order* incorrectly reversed the precedent established in the *Cellco Delaware ETC Order*, and the Commission should reconsider this reversal and restore the Bureau's earlier approach. To inject a public interest analysis into ETC applications in non-rural ILEC areas – while failing to provide any specific articulation of what standard applicants must meet – renders meaningless the special, additional public interest test that the statute applies to rural ILEC areas. Furthermore, for the reasons discussed below, the FCC's unannounced reversal of its prior precedent violates the Administrative Procedure Act. *See infra* pp.7-8.

2. *Imposition of Conditions.* The *Virginia Cellular Order* imposed a number of additional requirements on the applicant as "conditions" for the grant of ETC status (¶ 46). The Commission, following the recommendation of the Joint Board, recently decided *not* to add any additional specific ETC requirements to the "definition of universal service" in the federal rules. 8/ Nonetheless, in this case involving a particular ETC application, the Commission used an *ad hoc* decision-

8/ *Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, 18 FCC Rcd 15090 (2003) ("*Definition of Universal Service Order*").

making process to invent and impose new ETC requirements. 9/ This is not only unfair; it also constitutes a violation of the Administrative Procedure Act.

As a policy matter, the Commission correctly found in the *First Report and Order* that: "the imposition of additional eligibility criteria would 'chill competitive entry into high cost areas' . . . and . . ., to the extent that they would preclude some carriers from being designated eligible pursuant to section 214(e), would violate the principle of competitive neutrality." 10/ While the Fifth Circuit held that nothing in the statute prohibited state commissions from imposing additional ETC designation criteria, 11/ the court said nothing about the Commission's ability to do so in a proceeding involving a particular ETC application. As noted above, the Commission recently reaffirmed the existing criteria for designating ETCs and declined to expand that list. 12/ Given that the Commission has consistently held, in every general rulemaking proceeding addressing the issue, that the imposition of additional eligibility conditions is unwarranted, unnecessary, and anti-competitive, the Commission must not reverse its position in the context of an individual carrier's ETC application.

9/ While these conditions purport to be based on "commitments" offered by the applicant, it is clear that the Commission directed the applicant to offer these commitments, and that doing so was anything but voluntary. *See* Virginia Cellular Letter, CC Docket No. 96-45 (Nov. 12, 2003), *passim* (making it clear that the commitments were being offered at the direction of the Commission, and "as a condition of obtaining ETC status").

10/ *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, ¶ 144 (1997) ("*First Report and Order*"), subsequent history omitted.

11/ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999), cited in *Virginia Cellular Order*, ¶ 46 n.141.

12/ *Definition of Universal Service Order*, *supra*.

As noted above, the Commission's change of course in this case violates the Administrative Procedure Act, which mandates "a distinction between rulemaking and a clarification of an existing rule. Whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements, . . . new rules that work substantive changes in prior regulations are subject to the APA's procedures." *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). Where, as here, the Commission "changes the rules of the game, . . . more than a clarification has occurred." *Id.* Given that the Commission has decided, in a series of notice-and-comment rulemaking proceedings, that no additional ETC criteria must be satisfied beyond those in the statute and rules, the Administrative Procedure Act does not permit the Commission to "largely jettison[ ]" its existing framework and impose a long list of new criteria in a proceeding like this one, in which the Commission was supposed to be simply applying existing rules to a particular application. *Id.*

In similar cases in which the FCC summarily reversed its own precedent, it has faced reversal by the D.C. Circuit.

> [N]o matter how reasonable it may be for the FCC to require [a different showing in a certain type of applications], it is not reasonable for the Commission to announce such a policy without providing a satisfactory explanation for embarking on this course when it has not followed such a policy in the past. The FCC "cannot silently depart from previous policies or ignore precedent" as it has done here.

AT&T Corp. v. FCC, 236 F.3d 729, 736 (D.C. Cir. 2001), citing *Committee for Community Access v. FCC,* 737 F.2d 74, 77 (D.C. Cir. 1984); *see also Shalala v. Guernsey Memorial Hosp.,* 514 U.S. 87, 88 (1985) (agencies may issue guidelines or

interpretive rules without engaging in a notice-and-comment rulemaking, but the Administrative Procedure Act requires such a proceeding if the agency action adopts a "new position inconsistent with . . . existing regulations"). 13/

On reconsideration, the Commission should eliminate the "conditions" imposed on Virginia Cellular in the *Order*. Chairman Powell has aptly argued that the Commission should refrain from using individual companies' Section 214 applications as vehicles for imposing "conditions" that are found nowhere in the statute, rules, or pre-existing precedent, and instead should straightforwardly apply existing rules to these applications, as the Administrative Procedure Act requires:

> [W]e increasingly use these reviews as substitutes for regulatory process. I believe we are losing focus on our institutional charge. I am of the view that the FCC's focus should be on compliance with the current regulatory regime and a forward-looking focus on the appropriate regulatory treatment of the industry *as a whole*. * * * * * I find that the Commission is willing to pursue broad-reaching industry-wide regulatory questions in the context of an adjudicatory proceeding, the record of which is limited to the facts solely involving the applicants. Our merger "conditions" more often look like rules, reflecting judgments that, if true, affect the entire industry and not just the parties. As such, they should be entertained, if at all, in a broader-based proceeding. 14/

13/ It should also be noted that the Commission's policies and rules cannot lawfully be modified by a Recommended Decision of a Joint Board, but only by a final Commission order in a notice-and-comment rulemaking proceeding.

14/ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc. Transferee*, 16 FCC Rcd 6547 (2001), Separate Statement of Commissioner Michael K. Powell, Concurring In Part and Dissenting In Part, at 2; subsequent history omitted.

In conclusion, Sprint respectfully requests that the Commission reconsider and reverse its conclusions in the *Virginia Cellular Order* as discussed herein.

Respectfully submitted,

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February 23, 2004