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

In the Matter of	)	
	)	
VIRGINIA CELLULAR, LLC	)	
	)	CC Docket No. 96-45
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
in the Commonwealth of Virginia	)	

To: The Commission

REPLY TO NTELOS' OPPOSITION
TO PETITIONS FOR RECONSIDERATION

N.E. Colorado Cellular, Inc., Midwest Wireless Holdings L.L.C., Rural Cellular Corporation, and U.S. Cellular Corporation (collectively, "Petitoners"), by their attorneys, and pursuant to § 1.106(h) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(h), hereby reply to NTELOS' Opposition to Petitions for Reconsideration ("Opposition") in the above-captioned proceeding.

I. The Opposition Was Late-Filed

An opposition to a petition for reconsideration must be filed within ten days after the petition is filed. *See* 47 C.F.R. § 1.106(g). Three petitions for reconsideration were filed in this case on Monday, February 23, 2004. Because Petitioners served a copy of their petition on NTELOS Telephone, Inc. ("NTELOS") by mail, the deadline for filing the Opposition was Monday, March 8, 2004.[1] NTELOS filed one day late.

NTELOS does not explain either why its Opposition is timely or why it should be accepted despite its late filing. Perhaps NTELOS relied on § 1.429(f) of the Rules, which permits the filing

[1]Counting from February 23, 2004, the tenth day fell on Thursday, March 4, 2004. Adding the three-day allowance for service by mail, *see* 47 C.F.R. § 1.4(h), and in accordance with the rule to proceed to the next business day if a deadline falls on a weekend, *see id.* § 1.4(j), the filing date became March 8, 2004.

of an opposition within fifteen days after notice of the filing of a petition for reconsideration is published in the Federal Register. *See* 47 C.F.R. § 1.429(e), (f).[2] Obviously, however, § 1.429(f) only applies to an opposition to a petition for reconsideration of a final action in a rulemaking proceeding conducted under § 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and Subpart C of Part 1 of the Rules. *See* C.F.R. §§ 1.399, 1.429(a). This proceeding was not conducted as a notice-and-comment rulemaking under the APA, and the Commission's final action in this case did not purport to adopt a rule. *See Virginia Cellular, LLC*, 31 Communications Reg. (P&F) 586 (2004) ("*Order*").

This case was an adjudication of a petition for designation as a ETC that was filed by an individual company pursuant to § 214(e)(6) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 214(e)(6).[3] The Commission's action granting the requested designation constitutes a "non-rulemaking" order. *See generally Goodman v. FCC*, 182 F.3d 987, 993–95 (D.C. Cir. 1999). The filing date for an opposition to a petition for reconsideration of a non-rulemaking order is set by the ten-day filing period of § 1.106(g) of the Rules, not the fifteen-day period of § 1.429(f).

For whatever reason, NTELOS missed its deadline. Its Opposition should be dismissed as untimely. *See, e.g., Jen-Shenn Song*, 17 FCC Rcd 3503, 3505 (CWD 2002).

II. The Commission Violated § 533 of the APA and § 254(a) of the Act

NTELOS reads the recent recommendations of the Federal-State Joint Board on Universal

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[2]As of the date of this pleading, public notice of the filing of a petition for reconsideration by Petitioners has not been published in the Federal Register. *See* 47 C.F.R. § 1.429(e).

[3]*See RCC Holdings, Inc.*, 17 FCC Rcd 23532, 23545 (2002) ("We recognize that these parties raise important issues regarding universal service high-cost support. We find, however, that these concerns are beyond the scope of this Order, which considers whether to designate a particular carrier as an ETC.")

Service ("Joint Board")[4] as reinforcing the approach the Commission took in this case. *See* Opposition, at 3. Legally speaking, however, the Joint Board demonstrated that the Commission's approach violated both § 533 of the APA and § 254(a) of the Act.

The Joint Board recognized that the Commission must adhere to the notice-and-comment procedures required by Congress before it can change its existing ETC designation process to impose a "more rigorous standard of eligibility." *Recommended Decision*, at 7 (¶ 18). The Joint Board repeatedly called on the Commission to seek public comment before adopting guidelines for ETC designations, minimum eligibility requirements, public interest standards, certification requirements, and procedures for service area redefinition.[5] It reminded the Commission of its statutory obligation "to take into account the recommendations of the Joint Board." *Id.* at 22 (¶ 52). Moreover, the Joint Board urged the Commission to take a "comprehensive approach" to changing the ETC rules in order to "avoid the perils of piecemeal decision-making." *Id.* at 3 (¶ 4). That was hardly the approach the Commission took in this case, and consequently the *Order* epitomizes the perils of piecemeal, *ad hoc* decision-making.

Two months before the Joint Board adopted its *Recommended Decision*, and without "notice and opportunity for public comment," 47 U.S.C. § 254(a)(1), the Commission adopted and retroactively applied "a more stringent public interest analysis for ETC designations" in this case. *Virginia Cellular*, 31 Communications Reg. (P&F) at 589 (¶ 4). For example, under its new "more

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[4]*See Federal-State Joint Board on Universal Service*, FCC 04J-1, 2004 WL 369091 (Jt. Bd. Feb. 27, 2004) ("*Recommended Decision*").

[5]*See id.* at 10 (¶ 22) (the Commission should "seek to further develop the record on the ways in which state commissions may determine whether an ETC applicant has adequate financial resources"), 19 (¶ 44) (it should "solicit comment on whether such national benchmarks merit additional consideration"), 19 (¶ 45) (it should "seek comment on the applicability of the proposed designation guidelines to ETCs that already have been designated"), 23 (¶ 55) ("[p]ublic comment is invited during every step in this process").

rigorous public interest analysis for the rural study areas," the Commission imposed a burden of proof on ETC applicants to show that their universal service offerings will provide "benefits to rural customers" that will "outweigh any potential harms." *Virginia Cellular*, 31 Communications Reg. (P&F) at 595 (¶¶ 26, 27), 596 (¶ 28). Despite acknowledging that the Joint Board was fashioning recommendations as to a "public interest framework" to apply to ETC applications, the Commission nevertheless announced its own framework of five specific public interest considerations. *See id.* at 596 (¶ 28).

In NTELOS' view, the Commission was "careful" in this case "not to pre-judge future Joint Board or Commission action." Petition, at 7. *Au contraire,* the Commission jumped the gun by cavalierly changing the ETC designation rules without regard to the procedural requirements of the APA and the Act. And it made a mockery of the ongoing notice-and-comment proceeding in the process.

We rely on two principles of administrative law. The first is that "[a]n agency is bound by the express terms of its regulations until it amends or revokes them." *Clean Ocean Action v. York*, 57 F.3d 328, 333 (3rd Cir. 1995). The second is that "[o]nce a legislative rule . . . is adopted, its substantive provisions may be changed only by compliance with the notice and hearing requirements of the [APA]." *Id.* Under those principles, the Commission is bound by its Part 54 universal service rules and the regulations it adopted by its 1997 *Universal Service Order*[6] until those legislative rules and regulations are amended in the ongoing notice-and-comment proceeding mandated by § 533 of the APA and § 254(a) of the Act. Therefore, the Commission acted unlawfully when it applied

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[6]*See Federal-State Board on Universal Service*, 12 FCC Rcd 8776 (1997).

standards in this case that are patently inconsistent with its existing regulations. *See Boston Edison Co. v. Federal Power Comm'n,* 557 F.2d 845, 849 (D.C. Cir. 1977).

Respectfully submitted,

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March 18, 2004

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 18th day of March, 2004, placed in the United States mail, first-class postage, prepaid, a copy of the foregoing *REPLY TO NTELOS' OPPOSITION TO PETITIONS FOR RECONSIDERATION* filed today to the following:

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