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

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

To: The Commission

PETITION FOR RECONSIDERATION

RUSSELL D. LUKAS
DAVID A. LAFURIA
STEVEN M. CHERNOFF

LUKAS, NACE, GUTIERREZ & SACHS, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 857-3500

*Attorneys for
N.E. Colorado Cellular, Inc.
Midwest Wireless Holdings, L.L.C.
Rural Cellular Corporation
U.S. Cellular Corporation*

May 12, 2004

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
BACKGROUND	1
STANDING	3
ARGUMENT	5
I. The New ETC Designation Rules Were Adopted In Violation Of The Act And The APA	5
A. The ETC Designation Rules Are Legislative	5
B. The Commission Made Substantive Changes In The ETC Rules	9
C. The Commission Violated The Act And The APA	11
II The Commission Gave No Reasoned Explanation For Repudiating Its Prior Construction Of § 214(e)(2)	12
III. The Commission Has Not Provided A Reasoned Explanation For Its Departure From Previous Policies And Precedent	15
A. The Unexplained Repeal Of The <i>Per Se</i> Policy Under § 214(e)(1)	16
B. The Unexplained Departure From <i>Western Wireless</i>	16
C. The Unreasonable Adoption Of A Minimum Service Area Rule	18
IV. The Commission’s Public Interest Finding Is Neither Supported By Facts Nor Based On An Articulated Balancing Of Universal Service Principles	20
CONCLUSION	25

SUMMARY

The Commission is asked to reconsider its decision that the designation of Highland Cellular, Inc. (“Highland Cellular”) as a eligible telecommunications carrier (“ETC”) in the study area of Verizon South, Inc. (“Verizon South”) would not serve the public interest. By its adjudicatory order, the Commission imposed new standards and requirements for designation as an ETC. However, the Commission changed legislative (substantive) rules without the prior notice-and-comment rulemaking proceeding required by 47 U.S.C. § 254(a) and 5 U.S.C. § 553. Consequently, the new rules are invalid and unenforceable.

The Commission formally construed 47 U.S.C. § 214(e) in 1997 to prohibit it and state commissions from supplementing the statutory eligibility requirements for designation as an ETC. That construction of the statute was overturned by the Fifth Circuit in favor of its own view that states are permitted to impose additional ETC eligibility requirements. The court’s statutory interpretation could not bind the Commission nationwide. Nevertheless, the Commission simply acquiesced to the Fifth Circuit, adopted its statutory interpretation, and enforced new eligibility requirements in this case. The adoption of the Fifth Circuit’s interpretation without a statement of the Commission’s reasons was improper.

The Commission’s new requirements marked a radical departure from precedent and its pro-competitive policies. Nevertheless, it did so without articulating how the new requirements were based on the universal service principles that it is obligated to apply. That violated the Commission’s duty to engage in reasoned decision-making.

Likewise, the Commission failed to explain its inconclusive, but dispositive, “finding” that the ETC designation could “potentially could undermine Verizon South’s ability to serve its entire

study area.” The finding clearly was not based on any facts in the record, the statutory universal services principles, or the administrative principle of competitive neutrality. Rather, it was based on assumptions that were unwarranted by the facts, unfairly favorable to the incumbent LEC, and wholly inconsistent with the congressional presumption that competition serves the public interest. The Commission’s decision can be explained only by its impermissible desire to stop the rapid growth of competitive ETCs and reserve universal service funds incumbent LECs.

The Commission claims to make the public interest finding required by 47 U.S.C. 214(e)(6) by performing the “fact-specific exercise” of weighing the benefits of an additional ETC against any potential harms. In this case, the exercise was nothing more than balancing speculative harms against proven benefits and announcing that the former outweigh the latter.

The Commission placed the burden on Highland Cellular to prove both the benefits of its CETC designation and the absence of any countervailing harms. After Highland Cellular carried its burden of proving that its designation as an ETC will benefit rural consumers, the burden should have shifted to Verizon South to prove that the designation would materially impair its ability to serve its entire study area or otherwise be inconsistent with the public interest. Verizon South not only made no effort to carry that burden, it never even alleged that the designation would cause it any harm.

Despite the fact that Highland Cellular’s case stood un rebutted, the Commission declared that it had failed to “satisfy” its burden of proof. It made no attempt at explaining how the mere possibility of harm to Verizon South outweighed the proven benefits of Highland Cellular’s universal service offering.

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

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

To: The Commission

PETITION FOR RECONSIDERATION

N.E. Colorado Cellular, Inc., Midwest Wireless Holdings L.L.C., Rural Cellular Corporation, and U.S. Cellular Corporation (collectively, "Petitioners"), by their attorneys, and pursuant to § 405(a) of the Communications Act of 1934 ("Act"), 47 U.S.C. § 405(a), and § 1.106(b)(1) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(b)(1), hereby petitions the Commission to reconsider parts of its Memorandum Opinion and Order, FCC 04-37, released April 12, 2004, in the above-captioned proceeding ("*Order*"). In support thereof, the following is respectfully submitted:

BACKGROUND

In September 2002, Highland Cellular, Inc. ("Highland Cellular") petitioned the Commission to be designated as an eligible telecommunications carrier ("ETC") throughout its licensed service area in the Commonwealth of Virginia. *See Order at 5 (¶ 10)*. Less than a month later, the Commission asked the Federal-State Joint Board on Universal Service ("Joint Board") to examine the process for designating ETCs. *See Federal-State Joint Board on Universal Service*, 17 FCC Rcd 22642, 22647 (2002) ("*Referral Order*"). Responding to that request in February 2003, the Joint Board solicited public comment on a variety of issues pertaining to that process. *See Joint Board Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service*

Support and ETC Designation Process, 18 FCC Rcd 1941, 1954-56 (Joint Bd. 2003) (“*Rulemaking PN*”). In particular, the Joint Board asked for comment on what factors the Commission should consider when it performs ETC designations pursuant to § 214(e)(6) of the Act. *See id.* at 1955.

Not waiting for the Joint Board’s recommendation, the Commission issued an order on January 22, 2004, by which it adopted “more stringent public interest analysis for ETC designations in rural telephone company service areas.” *Virginia Cellular, LLC*, 19 FCC Rcd 1563, 1565 (2004). The Commission not only applied its new public interest “framework” retroactively, it announced that its new framework would “apply to all ETC designations for rural areas” pending action on the Joint Board’s recommendations. *Id.* True to its word, the Commission enforced its new requirements against Highland Cellular.

The Commission adopted its *Order* just days before the Joint Board issued its recommended decision.¹ Not only did the Commission apply the *Virginia Cellular* standards, it adopted a new rule that makes a rural telephone company’s wire center the “minimum geographic area for ETC designation.” *Order*, at 17 (¶ 33). The *Order* is now cited as holding that “a telephone company in a rural study area may not be designated as a competitive ETC below the wire center level.”²

First in *Virginia Cellular*, and now in this case, the Commission issued “statement[s] of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy” pertaining to the ETC designation process. 5 U.S.C. § 551(4). In short, the Commission co-

¹*See Federal-State Joint Board on Universal Service*, FCC 04J-1, 2004 WL 369091 (Feb. 27, 2004).

²*Parties are Invited to Comment on Supplemented Petitions for ETC Designations*, DA 04-998, 2004 WL 769940, at *1 (Wireline Comp. Bur. Apr. 12, 2004) (“*Comment PN*”); *Parties are Invited to Update the Record Pertaining to Pending Petitions for ETC Designations*, DA 04-999, 2004 WL 770012, at *1 (Wireline Comp. Bur. Apr. 12, 2004) (“*Update PN*”).

opted the ongoing rulemaking by issuing rules. *See id.* For proof of the general applicability and future effect of the Commission's statements, we need look no farther than the reopening of ETC cases so that parties may "refresh" the records.³ Parties were given a deadline by which they are to demonstrate how they satisfy the Commission's "new standards and requirements set forth in the *Virginia Cellular Order* and the *Highland Cellular Order*."⁴

STANDING

Petitioners, their subsidiaries, or affiliates are prosecuting petitions for ETC status before this Commission and/or state commissions, or plan to file petitions for ETC status with this Commission, or have petitions pending with this Commission to redefine rural ILEC service areas pursuant to § 54.207 of the Rules.⁵ By its recent decisions, the Commission changed the process for designating ETCs to make it significantly more difficult for parties seeking designation under § 214(e)(6) of the Act. If the *Order* stands, and is followed by state commissions, Petitioners' interests in obtaining valuable ETC designations will be adversely affected. That should be enough to give them standing under § 405(a) of the Act and 1.106(b)(1) of the Rules.⁶

³*Update PN*, at 1.

⁴*Id.* *See also Comment PN*, at 2.

⁵*See, e.g.*, RCC Minnesota, Inc., Application for Designation as an ETC in Oregon, Docket No. UM 1083 (Or. PUC); U.S. Cellular Corp., Application for Designation as an ETC in Oregon, Docket No. UM 1084 (Or. PUC); *WCB Initiates Proceeding to Consider the Minnesota PUC Petition to Redefine Rural Telephone Company Service Area in the State of Minnesota*, DA 03-3594 (released Nov. 7, 2003); *WCB Initiates Proceeding to consider the Colorado PUC Petition to Redefine the Service Area of Wiggins Tel. Assoc. in Colorado*, 18 FCC Rcd 18595 (WCB 2003).

⁶Petitioners had good reason for not participating earlier in this proceeding. When it solicited comment on Highland Cellular's petition, the Wireline Competition Bureau ("Bureau") notified the public that among the issues to be decided was whether Highland Cellular "satisfie[d] all the statutory and regulatory prerequisites for ETC designation." *Wireline Competition Bureau Seeks Comment on Highland Cellular, Inc. Petition for Designation as an ETC in the State of Virginia*, 17 FCC Rcd 19175, 19175 (Wire. Comp. Bur. 2002) ("*Highland PN*"). The Bureau gave no notice that new "regulatory prerequisites to ETC designation" would be adopted in this proceeding. Petitioners had no reason to comment on the merits of Highland Cellular's petition. It may have been otherwise had they been

Petitioners recognize that the precedential effect of an adjudicatory order generally is not enough to meet the “adversely affected” test for non-party standing. *See AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 21750, 21752-53 (2001). However, under the peculiar circumstances of this case, the Commission should find that Petitioners have standing to be heard.

The Commission has refused to grant non-parties standing to seek reconsideration of adjudicatory orders based on the adverse precedential effects for fear that it “would open the ‘floodgates’ to non-party participation in adjudicatory proceedings, and thus effectively convert every adjudicatory proceeding into a rulemaking proceeding.” *Id.* at 21753. Here, the adjudication of Highland Cellular’s petition for ETC designation has already been converted into a quasi-rulemaking proceeding.⁷

Purportedly acting pursuant to §§ 1.415 and 1.419 of the Rules, the Bureau invited “interested parties” to comment on Highland Cellular’s petition. *See Comment PN*, 17 FCC Rcd at 19176. Obviously, however, §§ 1.415 and 1.419 apply only in rulemaking proceedings after the issuance of the notice of proposed rulemaking. *See* 47 C.F.R. §§ 1.399, 1.415(a). Thus, from the onset, the Bureau treated Highland Cellular’s petition for ETC designation as a petition for rulemaking.

notified that the Commission was re-examining the “framework” of its ETC designation process. *See Order* at 3 (¶ 4). Indeed, Petitioners have actively participated in the Joint Board’s ongoing consideration of these matters in CC Docket No. 96-45 both on their own behalf and as members of the Alliance of Rural CMRS Carriers.

⁷An “adjudication is an “agency process for the formulation of an order.” 5 U.S.C. § 551(7). An “order” is defined as “the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing.” *Id.* §551(6). “Licensing” includes an “agency process respecting the grant . . . or conditioning of a license.” *Id.* §551(9). A “license” in turn is defined to include “the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” *Id.* § 551(8). Thus, the Commission’s process for the formulation of its *Order* permitting Highland Cellular to be designated as an ETC, subject to certain conditions, was an adjudication.

Had the Commission changed the ETC designation process by rulemaking, any “interested person” would have had the right to seek reconsideration under § 1.429(a) of the Rules. Petitioners would have been entitled to petition for reconsideration without meeting the “adversely affected” test or showing “good reason” for not participating earlier in the case. *Compare* 47 C.F.R. § 1.429(a) *with id.* §1.106(b)(1). Apropos of the Bureau’s decision to invite “interested parties” to participate in this case under § 1.415(a), and insofar as it has conducted this proceeding as a rulemaking, the Commission should afford Petitioners standing as if they were interested parties under § 1.429(a).

ARGUMENT

I. The New ETC Designation Rules Were Adopted In Violation Of The Act And The APA

The issue is whether the adoption of the Commission’s new standards and requirements for ETC designations violated the notice-and-comment rulemaking requirements of § 254(a) of the Act, 47 U.S.C. § 254(a), and § 553 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553. Our analysis of the issue begins with a look at the nature of the Commission’s formally-adopted and still-effective ETC rules.

A. The ETC Designation Rules Are Legislative

In the Telecommunications Act of 1996 (“1996 Act”), Congress directed the Commission to convene the Joint Board to conduct a notice-and-comment proceeding to recommend changes to the Rules to implement the universal service provisions of §§ 214(e) and 254 of the Act. *See* 47 U.S.C. § 254(a)(1). The 1996 Act mandated that the Commission also conduct a rulemaking to implement the recommendations of Joint Board. *See id.* § 254(a)(2). Congress authorized the Joint Board and the Commission to implement the statute following the universal support principles

enumerated in § 254(b) and such other principles that they determine are “necessary and proper” for the protection of the public interest and are consistent with the 1996 Act. *See* 47 U.S.C. § 254(a)(2); *Referral Order*, 12 FCC Rcd at 90.

The 1996 Act not only authorized the Commission to engage in a notice-and-comment rulemaking to implement the universal service provisions of §§ 214(e) and 254 of the Act, it explicitly empowered the agency to fill gaps in the statute following principles of its own determination. Hence, the Commission was delegated the authority to promulgate “legislative” or “substantive” rules under the APA. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979). As the Supreme Court held in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (footnotes omitted):

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

In effect, Congress gave the Commission the interpretative authority “to speak with the force of law when it address[ed] ambiguity in the statute or fill[ed] a space in the enacted law.” *United States v. Mead Corp.*, 533 U.S. 218, 229 (2002). The Commission exercised that authority when it promulgated its Part 54 universal service rules. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) (“*Universal Service Order*”). As the fruits of a notice-and-comment rulemaking pursuant to a statutory delegation of authority, the Part 54 rules are clearly legislative (or substantive) and therefore have the binding effect of law. *See* 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.3 (3rd ed. 1994). *See also American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109-12 (D.C. Cir. 1993) (setting forth the

criteria for legislative rules).

The Commission spoke with the force of law when it adopted the statutory criteria contained in § 214(e)(1) as the rules for determining eligibility to be designated as an ETC. *See Universal Service Order*, 12 FCC Rcd at 8850-51. The Commission construed the ambiguous provisions of § 214(e)(2) to prohibit both it and the states from adopting criteria for designating ETCs in addition to those set out in § 214(e)(1). *See id.* at 8851. The Commission explained:

Read together, we find that these provisions dictate that a state commission must designate a common carrier as an [ETC] if it determines that the carrier has met the requirements of section 214(e)(1). Consistent with the Joint Board's finding, the discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one [ETC] in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional [ETC] is in the public interest. The statute does not permit this Commission or a state commission to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal service support.⁸

The Commission construed § 214(e)(2) to achieve Congress's goal of "opening up all telecommunications markets to competition."⁹ For example, the Commission held that the imposition of additional obligations on competitive carriers as a condition of ETC eligibility would "chill competitive entry into high cost areas."¹⁰ In a similar vein, it held that a state's refusal to designate an additional ETC on grounds other than the § 214(e) criteria could "prohibit or have the

⁸*Universal Service Order*, 12 FCC Rcd at 8852 (footnotes omitted).

⁹*Id.* at 8781. The Commission "intended to encourage the development of competition in all telecommunications markets." *Id.* at 8782.

¹⁰*Id.* at 8858 (quoting *Federal-State Joint Bd. on Universal Service*, 12 FCC Rcd 87, 170 (Joint Bd. 1996)).

effect of prohibiting the ability of any entity” to provide a telecommunications service in violation of § 253 of the 1996 Act.¹¹

Because the Commission’s interpretation of the ambiguous provisions of § 214(e) was authorized by Congress, and consistent with the “pro-competitive” mandate of the 1996 Act,¹² that construction of the statute had the effect of law and is entitled to *Chevron* step-two deference.¹³ *See Mead*, 533 U.S. at 229-30. The Commission’s construction and implementation of § 214(e) was published in the Federal Register¹⁴ and codified in § 54.201 of the Rules. *See* 47 C.F.R. § 54.201(a)-(d). Because it is a binding rule that affects a carrier’s right to obtain universal service support, the § 54.201 ETC eligibility rule is legislative (or substantive) under the APA. *See, e.g., Chrysler*, 441 U.S. at 301-03.

Congress employed the language of § 214(e)(2) when it enacted § 214(e)(6) in 1997 to authorize the Commission to designate as ETCs carriers that are not subject to the jurisdiction of a state commission. *Compare* 47 U.S.C. § 214(e)(2) *with id.* § 214(e)(6). Having already construed the language of § 214(e)(2) to prohibit it from supplementing the § 214(e)(1) eligibility criteria, the Commission adopted the requirements of § 214(e)(1) as its eligibility criteria for designating ETCs under § 214(e)(6). *See Procedures for FCC Designation of ETCs Pursuant to Section 214(e)(6) of the Act*, 12 FCC Rcd 22947, 22948-49 (1997) (“*Section 214(e)(6) PN*”).

Although the requirements for ETC designation under § 214(e)(6) were not promulgated in

¹¹*Universal Service Order*, 12 FCC Rcd at 8852 (quoting 47 U.S.C. § 253(b)).

¹²*Id.* at 8781.

¹³*See Chevron*, 467 U.S. at 843-44; *TOPUC*, 183 F.3d at 409-10.

¹⁴*See* 62 Fed. Reg. 32,862 (Jan. 17, 1997).

an APA rulemaking, they were clearly a contemporaneous outgrowth of the universal service rulemaking. The Commission adopted its § 214(e)(6) ETC requirements on an expedited basis in order to go into effect with the Part 54 rules (thereby correcting the congressional “oversight” in failing to include § 214(e)(6) in the 1996 Act). *See id.* at 22950 n.14. Because those requirements mirrored the ETC eligibility rule adopted in the just-completed notice-and-comment proceeding, their promulgation satisfied the requirements of the APA. *See generally American Mining Congress v. United States EPA*, 907 F.2d 1179, 1182 (D.C. Cir. 1990).

The Commission unquestionably intended that its § 214(e)(6) eligibility requirements be binding legislative rules. For example it made the requirements “effective upon publication in the Federal Register.” *Section 214(e)(6) PN*, 12 FCC Rcd at 22950. Formal Commission policy statements that have “general applicability and legal effect” are published in the Federal Register. *See* 47 C.F.R. § 0.445(d). Therefore, by making its § 214(e)(6) requirements “effective” upon such publication, the Commission showed that its requirements were intended to be binding legislative rules. *See American Mining Congress*, 995 F.2d at 1109, 1112.

B. The Commission Made Substantive Changes In The ETC Rules

The APA provides that when an agency proposes to promulgate a legislative (or substantive) rule, it must give notice to interested parties and allow them an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553(b)-(c). The APA further requires an agency to incorporate in the rules it adopts “a concise general statement of their basis and purpose.” *Id.* § 553(c). Finally, a substantive rule must be published thirty days before its effective date. *See id.* § 553(d). Failure to follow the notice-and-comment procedures of the APA is grounds for invalidating the rule. *See National Organization of Veterans' Advocates v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375

(Fed. Cir. 2001).¹⁵

An APA rulemaking is required when an agency adopts “a new position inconsistent with any . . . existing regulation.” *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995). Certainly, “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). Thus, it has become a “maxim of administrative law” that “if a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.” *Id.* (quoting *National Family Planning & Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)) (brackets omitted). Under that maxim, the *Virginia Cellular* requirements and the “minimum geographic area” rule of this case were subject to an APA rulemaking because they amount to an amendment of existing legislative regulations.

When it adopted its current requirements for requesting ETC designation under § 214(e)(6), the Commission did not require an ETC petitioner to demonstrate that a requested designation would be consistent with the public interest. *See Section 214(e)(6) PN*, 12 FCC Rcd at 22948-49. *See also Order*, at 4 (¶ 7) (listing five requirements for § 214(e)(6) ETC designation). Having required no public interest showing, the Commission obviously did not place a burden of proof on an applicant to establish that its designation as an ETC would serve the public interest. *See Section 214(e)(6) PN*, 12 FCC Rcd at 22948-49. Nor did the Commission mandate that an ETC applicant satisfy a burden of proof to establish that its universal service offering will benefit rural consumers. *See id.* Nor,

¹⁵Agencies need not comply with the APA notice-and-comment requirements in certain instances, but not “when notice . . . is required by statute.” 5 U.S.C. § 553(b). Notice and opportunity to comment appears to be required before any ETC rules are recommended by the Joint Board and adopted by the Commission. *See* 47 U.S.C. § 254(a).

finally, did it adopt standards under which an ETC applicant for a rural study area must show:

[1] the benefits of increased competitive choice, [2] the impact of the designation on the universal service fund, [3] the unique advantages and disadvantages of the competitor's service offering, [4] any commitments made regarding quality of telephone service, and [5] the competitive ETC's ability to satisfy its obligation to serve the designated service area within a reasonable time frame.¹⁶

The Commission's ETC rules do not require a carrier seeking an ETC designation "to commit to provide the supported services throughout a minimum geographic area." *Order*, at 17 (¶ 33). And the rules certainly do not suggest that "a rural telephone company's wire center is an appropriate minimum area for ETC designation." *Order*, at 17 (¶ 33). As the Commission recognized, an ETC has been designated for a portion of a rural carrier's wire center. *See Order*, at 17 (¶ 33) (citing *RCC Holdings, Inc.*, 17 FCC Rcd 23532, 23545-46 (Wireline Comp. Bur. 2002)).

By substantially changing the substance of the Commission's prior requirements for § 214(e)(6) designation, the Commission amended legislative rules. Moreover, by imposing new requirements that will "affect subsequent [Commission] acts" and have a "future effect" on petitioners for ETC designations,¹⁷ the Commission has promulgated a "fundamentally new regulation." *Syncor International Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). Yet, no component of the Commission's "new standards and requirements" for making ETC designations was adopted by rulemaking at the recommendation of the Joint Board following a notice-and-comment proceeding.

C. The Commission Violated The Act And The APA

¹⁶*Virginia Cellular*, 19 FCC Rcd at 1575-76; *Order*, at 11 (¶ 22).

¹⁷*See Sprint*, 315 F.3d at 373.

As evidenced by its request that the Joint Board examine the process for designating ETCs, *see Referral Order*, 17 FCC Rcd at 22642, the Commission was aware that substantive changes in the designation process would trigger the notice-and-comment requirements of the Act and the APA. Moreover, it knew that those requirements had been triggered with respect to the factors it should consider when it performs ETC designations under § 214(e)(6). *See Rulemaking PN*, 18 FCC Rcd at 1955. *See also Virginia Cellular*, 19 FCC Rcd at 1576; *Order*, at 11 (¶ 22). Whatever authority it has to adopt rules in adjudications, the Commission is prohibited from adopting new legislative regulations in ETC designation cases knowing that the very same regulations are under consideration in a notice-and-comment rulemaking required by § 254(a) of the Act and APA § 553.

Because they were adopted in violation of statutory rulemaking requirements, the Commission's new ETC standards and requirements are invalid and cannot be applied in this case, or any other case, until promulgated in accordance with law. *See Sprint*, 315 F.3d at 377 (case remanded for Commission's "utter failure" to follow notice-and-comment procedures). The Commission's new ETC rules should be set aside. *See Syncor*, 127 F.3d at 96 (case remanded with instructions to vacate rule adopted without notice and comment); *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1236 (D.C. Cir. 1994) (rule set aside for violating notice-and-comment requirements).

II. The Commission Gave No Reasoned Explanation For Repudiating Its Prior Construction Of § 214(e)(2)

As we have noted, the Commission read the language of § 214(e) in 1997 to forbid it or state commissions from supplementing the §214(e)(1) criteria governing a carrier's eligibility to be designated an ETC. *See supra* p. 5. Proposals to impose pricing, marketing, service provisioning, and service quality obligations as a condition of being designated an ETC were rejected in 1997,

“because [§] 214(e) does not grant the Commission authority to impose additional eligibility criteria.” *Universal Service Order*, 12 FCC Rcd at 8856.

The Commission defended its interpretation of the statute before the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (“*TOPUC*”). With respect to a carrier seeking federal universal service support in non-rural service areas that satisfies the § 214(e)(1) criteria, the Commission argued that a state commission “*must* designate it as eligible” and “may not impose additional eligibility requirements.” *TOPUC*, 183 F.3d at 417 (emphasis in original). Although claiming to review the Commission’s interpretation of § 214(e) under the *Chevron* standards,¹⁸ the Fifth Circuit afforded the Commission no deference under *Chevron* step-two. Finding that “nothing in [§ 214(e)] prohibits the states from imposing their own eligibility requirements,” which confirmed the statute’s ambiguity, the court nevertheless rejected the Commission’s interpretation in favor of a “reading” of § 214(e) that “makes sense in light of the states’ historical role in ensuring service quality standards for local service.” *TOPUC*, 183 F.3d at 418.¹⁹

In this case, as before in *Virginia Cellular*, the Commission acquiesced to the *TOPUC* court’s wrongheaded interpretation of the statute. Enlightened by the Fifth Circuit’s holding that § 214(e)(2)

¹⁸See *TOPUC*, 183 F.3d at 409-10.

¹⁹ After finding that § 214(e) did not unambiguously speak to whether the FCC may prohibit state commissions from imposing additional criteria on ETCs, the Fifth Circuit should have upheld the FCC’s rule if it was based on a “permissible construction of the statute,” and reverse the agency only if its construction of § 214(e) was “arbitrary, capricious or manifestly contrary to the statute.” *TOPUC*, 183 F.3d at 409. Instead, the court reversed the Commission simply because the plain language of § 214(e) does not prohibit the states from imposing ETC eligibility standards. See *id.* at 418. It did not hold that the FCC’s rule was “manifestly contrary” to the 1996 Act. Instead, the court simply construed the statute in a way that made “sense” to it. See *id.* The Fifth Circuit has been correctly criticized for not affording the FCC *Chevron* step-two deference in *TOPUC*. See *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001); *Comsat Corp. v. FCC*, 250 F.3d 931, 940 (5th Cir. 2001) (Pogue, J., concurring).

did not bar a state from imposing additional eligibility conditions on ETCs, the Commission discovered that nothing in § 214(e)(6) prohibited it from doing the same. *See Order*, at 20 n.122. *See also Virginia Cellular*, 19 FCC Rcd 1584 n.141.

On the “strength” of *TOPUC*, the Commission jettisoned the interpretation of § 214(e) that it formally adopted in its *Universal Service Order*. It read the language of § 214(e)(6), which was unchanged and virtually identical to that of § 214(e)(2), to permit it to supplement the § 214(e)(1) eligibility criteria. That new reading of the statute freed the Commission to decide that the designation of an competitive ETC (“CETC”) in an area served by a non-rural telephone company will not necessarily be based merely “upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of [§] 214(e)(1) of the Act.” *Order*, at 11 (¶ 21). Indeed, the Commission concluded that the “public interest requirements for non-rural areas” were satisfied in this case “based on the detailed commitments Highland Cellular made to ensure that it provides high quality service throughout the proposed rural and non-rural service areas.” *Id.*

When once it construed § 214(e) to prohibit it from imposing service quality obligations as a condition of being designated as an ETC, the Commission now purports to find nothing in § 214(e) that prohibits it from imposing that “eligibility condition” on Highland Cellular. The Commission has not only “repudiated” its construction of the statute in the *Universal Service Order*, it has taken a position that is “irreconcilable” with its previously held view of § 214(e).

Considering that the impact of *TOPUC* on the Commission’s interpretation of § 214(e) adopted in the *Universal Service Order* is being considered in a rulemaking, *see Rulemaking PN*, 18 FCC Rcd at 1955, it was incumbent on the Commission to provide a reasoned explanation for its radically new view of the statute. Merely professing deference to the Fifth Circuit’s reading of §

214(e) does not suffice as the Commission's reasoned judgment as to the meaning of the statute. *See Holland v. National Mining Ass'n*, 309 F.3d 808, 816-19 (D.C. Cir. 2002).

Because there is no "nonmutual collateral estoppel" against the Government, a single circuit court cannot determine the meaning of an ambiguous statute for the entire nation by imposing an interpretation that the agency must follow outside of the court's jurisdiction. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984). For that reason, the Commission is not required to follow the Fifth Circuit's approach to § 214(e)(2) nationwide. *See Holland*, 309 F.3d at 810. Moreover, the Fifth Circuit construed § 214(e)(2) in light of the "states' historical role" in maintaining service quality standards for local service, a consideration that does not bear on the Commission's authority under § 214(e)(6). Therefore, the Commission cannot simply acquiesce to *TOPUC*. If it is to adhere to its new view of § 214(e), the Commission must give substantive reasons for its acquiescent interpretation in a reasoned decision. *See id.* at 817-18.

III. The Commission Has Not Provided A Reasoned Explanation For Its Departure From Previous Policies And Precedent

The law imposes a duty on the Commission to explain departures from precedent. *See 2 Davis & Pierce, supra*, § 11.5, at 204-07. The need for such an explanation is especially great in this case because Congress placed a mandatory duty on the Commission to base its universal service policies on the six principles listed in § 254(b)(1)-(6) of the Act, as well as such other principles that it adopts in conjunction with the Joint Board. *See 47 U.S.C. § 254(b); Qwest Corp. v. FCC*, 258 F.3d 1191, 2000 & n.7 (10th Cir. 2001).

We have scoured the *Order* and found that the Commission articulated no rational relationship between its new requirements and the six statutory principles and/or its principle that

all universal service rules must be competitively (and technologically) neutral.²⁰ All we found were a host of conclusory statements unrelated to any adopted universal service principle and untied to the facts of this case. And “conclusory statements cannot substitute for the reasoned explanation” that the Commission must provide. *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001) (quoting *ARCO Oil & Gas v. FERC*, 932 F.2d 1501, 1504 (D.C. Cir. 1991)).

A. The Unexplained Repeal Of The *Per Se* Policy Under § 214(e)(1)

The Commission overturned *Cellco Partnership d/b/a Bell Atlantic Mobile*, 16 FCC Rcd 39 (Com. Car. Bur. 2000) and its progeny where the Bureau had “found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of Act.” *Virginia Cellular*, 19 FCC Rcd at 1575 & n.84. By way of explanation, the Commission simply repeated that it “do[es] not believe” that designation of an additional ETC in those circumstances “will necessarily be consistent with the public interest in every instance.” *Id.* at 1575; *Order*, at 10-11 (¶ 21). That amounts to an “ipse dixit conclusion,” not a reasoned explanation. *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997).

B. The Unexplained Departure From *Western Wireless*

In *Petitions for Reconsideration Western Wireless Corporation’s Designation as an ETC in the State of Wyoming*, 16 FCC Rcd 19144, 19149 (2001) (“*Western Wireless*”), the Commission held that any concern regarding “creamskimming” was “substantially eliminated” by a rural telephone company’s option of disaggregating and targeting high-cost support below the study area level.

²⁰*See Universal Service Order*, 12 FCC Rcd at 8801-02 (“competitive neutrality means universal service support mechanisms and rules neither unfairly advantage or disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another”).

Pirouetting, the Commission now rejects “arguments” that disaggregation can protect incumbents against creamskimming “in every instance.” *Order*, at 16-17 (¶ 32).

In this instance, the Commission claimed that “disaggregation *may* be a less viable alternative for reducing creamskimming opportunities,” specifically “because Verizon South’s study area includes wire centers with highly variable population densities, and therefore highly variable cost characteristics.” *Id.* at 16 (emphasis added). It also volunteered that “[t]his problem *may* be compounded where the cost characteristics of the incumbent and competitor differ substantially.” *Id.* (emphasis added). The Commission’s rationale is unsettling seeing that disaggregation was designed for use where cost characteristics “vary widely” throughout a rural study area. *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 11244, 11302 (2001) (“*RTF Order*”).

When it first approved of disaggregation in 1999, the Bureau recognized that “the methodology is designed to address opportunities for ‘creamskimming’ by competitors.”²¹ In subsequent ETC cases, the Bureau found that there were no creamskimming concerns in study areas with disaggregated and targeted support.²² It recognized that when an incumbent creates “high-cost” and “low-cost” zones, a CETC has no incentive to target only the wire centers that are designated “low-cost” zones since it will be limited to receiving only the per-line support established for those zones.²³ The Commission agreed in *Western Wireless*.

²¹*Petition for Agreement with Designation of Rural Company ETC Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Support*, 15 FCC Rcd 9921, 9928 (Com. Car. Bur. 1999).

²²*See Cellular South License, Inc.*, 17 FCC Rcd 24393, 24404 (Wire. Comp. Bur. 2002); *RCC Holdings*, 17 FCC Rcd at 23544.

²³*Cellular South*, 17 FCC Rcd at 24404; *RCC Holdings*, 17 FCC Rcd at 23544.

If it is to retreat from disaggregation, the Commission must explain exactly why it believes that the option is not a “viable alternative” in a study area that includes wire centers with highly variable cost characteristics. In this case, we would be interested in knowing why Verizon South could not have designated its four highest-density, and “presumably lowest-cost,” wire centers as “low-cost” zones,²⁴ and why creamskimming would be a concern if Verizon South and Highland Cellular received the same low level of per line support in those lowest-cost wire centers. Absent a reasoned explanation as to such matters, it would appear that the Commission is simply abandoning disaggregation as a means to achieve its “goal of encouraging competitive entry.” *RTF Order*, 16 FCC Rcd at 11302.

C. The Unexplained Adoption Of A Minimum Service Area Rule

The Commission overruled *RCC Holdings* to the extent the Bureau found that the public interest was served by the designation of a CETC for portions of three wire centers of rural telephone companies. *See Order*, at 17 & n.100 (¶ 33). The Commission concluded that making designations for a portion of a rural wire center “would be inconsistent with the public interest,” and that “the competitor must commit to provide the supported services to customers throughout a minimum geographic area.” *Order*, at 17 (¶ 33). It offered the following explanation:

A rural telephone company’s wire center is an appropriate minimum geographic area for ETC designation because rural carrier wire centers typically correspond with county and/or town lines. We believe that requiring a competitive ETC to serve entire communities will make it less likely that the competitor will relinquish its ETC designation at a later date. Because consumers in rural areas tend to have fewer competitive alternatives than consumers in urban areas, such consumers are more vulnerable to carriers relinquishing ETC

²⁴*See Order*, at 15-16 & n.93 (¶ 15).

designation.²⁵

As the court observed in *West Michigan Telecasters, Inc. v. FCC*, 396 F.3d 688, 691 (D.C. Cir. 1968), the Commission's explanation is "merely a collection of conclusory comments." The first comment rests on no solid data and is contradicted by the record. Petitioners submit that rural wire centers typically do not "correspond with county and/or town lines."²⁶ Indeed, Highland Cellular proposes to serve all or portions of eleven rural wire centers, none of which remotely corresponds with a county or town line.²⁷

Moreover, it is far from apparent why a wire center can be the "appropriate minimum geographic area for ETC designation" when the Rules permit a rural carrier to disaggregate support to multiple levels below a wire center (with state approval) or into two cost zones per wire center (by self-certification). See 47 C.F.R. § 54.315(c)(2), (d)(1)(ii); *RTF Order*, 16 FCC Rcd at 11304-07. Surely then, it could be appropriate for a CETC to be designated to serve only a disaggregated high-cost portion of a rural carrier's wire center.²⁸

The Commission provides no factual basis for its belief that a CETC serving "entire communities" will be less likely to relinquish its ETC designation. Particularly because wire centers

²⁵*Order*, at 17 (¶ 33) (footnote omitted).

²⁶A "wire center" is defined as "a telephone company central office designated by the telephone company to serve the geographic area in which the interexchange carrier or other person's point of demarcation is located." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 12460, 12465 n.20 (1997) (citing 47 C.F.R. §69.2(rr)).

²⁷Seven of the wire centers are within the Bland and Tazewell county lines and the remaining four overlap county lines. Each wire center encompasses several small towns or communities. See Petition, at Ex. C.

²⁸The Commission has decided that the level of disaggregation should be considered in determining whether to designate a competitive ETC. See *RTF Order*, 16 FCC Rcd at 11308-09.

do not correspond to entire communities in rural areas, there is no reason a CETC serving all the communities within a wire center would be less likely to relinquish its ETC status than a CETC serving only some of the communities.

Prior to this case, the concern shared by Congress and the Commission was that consumers continue to be adequately served if the incumbent LEC, not the CETC, exercised its option to relinquish its ETC designation under § 214(e)(4) of the Act.²⁹ No concern was ever expressed that an operating wireless CETC would relinquish its ETC designation.³⁰

Finally, the Commission engages in tautology by claiming that rural consumers have “fewer competitive alternatives” and consequently are “more vulnerable to carriers relinquishing ETC designation.” An ETC can relinquish its designation only in an area served by more than one ETC. *See* 47 U.S.C. § 214(e)(4); 47 C.F.R. § 554.205(a). Therefore, the geographic area served by any one CETC will not affect the number of competitive alternatives available to rural consumers upon a relinquishment of an ETC designation. There will be one less competitive alternative available in a wire center irrespective of whether the remaining CETC serves all or a portion of the wire center. Put another way: the larger the area served by a CETC, the greater the number of rural consumers vulnerable to ETC relinquishment by an incumbent.

IV. The Commission’s Public Interest Finding Is Neither Supported By Facts Nor Based On An Articulated Balancing Of Universal Service Principles

For the purposes of federal universal service support, “rural creamskimming occurs when

²⁹*See Western Wireless Corp.*, 16 FCC Rcd 18123, 18139 (2002); *RCC Holdings*, 17 FCC Rcd at 23541; *IT&E Overseas, Inc.*, 17 FCC Rcd 10620, 10626 (Wire. Comp. Bur. 2002); *Guam Cellular and Paging, Inc. d/b/a Guamcell Communications*, 17 FCC Rcd 1502, 1508-09 (Com. Car. Bur. 2002); *Cellco*, 16 FCC Rcd at 44.

³⁰*See Western Wireless*, 16 FCC Rcd at 18139; *RCC Holdings*, 17 FCC Rcd at 23541; *IT&E*, 17 FCC Rcd at 10626; *Guam Cellular*, 17 FCC Rcd at 1508-09.

competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area." *E.g., Virginia Cellular*, 19 FCC Rcd at 1578. Thus, creamskimming involved the intentional targeting of the rural customers that are least expensive to serve by deliberately seeking to serve only certain portions of a study area. *See id* at 1578 & n.102. A charge of creamskimming could not be leveled at cellular service providers, such as Highland Cellular, that serve one of the nation's 428 Rural Service Areas ("RSAs"). Limited to providing service within the RSA boundaries,³¹ cellular carriers often cannot provide facilities-based service throughout the entire study areas of rural telephone companies. *See Virginia Cellular*, 19 FCC Rcd at 1578; *Order*, at 14 (¶ 26). For that reason, they cannot be charged with deliberately proposing to serve portions of a rural study area for the purpose of only serving high-density, low-cost areas.

Cellular carriers and other CMRS providers are subject to Commission scrutiny for "de facto creamskimming."³² That involves a determination whether the designation of a wireless CETC will have the "same effect" on the incumbent rural telephone company as "rural creamskimming." *Virginia Cellular*, 19 FCC Rcd at 1578; *Order*, at 14 (¶ 27). As this case shows, the competitive neutrality of the Commission's new, stringent de facto creamskimming standards are suspect.

The Commission found that the CETC designation of Highland Cellular in six of Verizon South's thirteen wire centers "raises [de facto] creamskimming concerns." *Order*, at 15 (¶ 31). Despite acknowledging that Highland Cellular would serve Verizon South's two lowest-density wire

³¹Unlike the wire centers boundaries of rural telephone companies, the cellular market boundaries of the RSAs were mandated by the Commission and conform exactly to county lines. *See* 47 C.F.R. § 22.909. Cellular carriers are generally restricted to providing service within the boundaries of their RSAs, and are permitted only de minimis service area boundary extensions into adjacent cellular markets. *See* 47 C.F.R. § 22.912(a).

³²*Cellular South*, 17 FCC Rcd at 24404; *RCC Holdings*, 17 FCC Rcd at 23543.

centers, *see id.* at 15-16 (¶ 31), the Commission concluded that Highland Cellular “would be primarily serving customers in the low-cost and high-density portion of Verizon South’s study area.” *Id.* at 15 (¶ 31). That conclusion was based on the Commission’s calculation that “approximately 94 percent” of Highland Cellular’s potential customers in Verizon South’s study area would be located in its four highest-density, and presumably its lowest cost, wire centers. *See id.*

The Commission relied solely on *Virginia Cellular* for the inapplicable proposition that “when a competitor serves only the lowest-cost, highest-density wire centers in a study area with widely disparate population densities, the incumbent may be placed at a sizeable unfair disadvantage.” *Id.* at 16 (¶ 32). After examining the disparity of the population densities of the six Verizon South wire centers served by Highland Cellular, *see id.* at 16 n.97, the Commission found that designating Highland Cellular as an ETC in those six wire centers “*potentially could* undermine Verizon South’s ability to serve its entire study area.” *Id.* at 16 (¶ 32) (emphasis added). Based solely on that one inconclusive finding, the Commission made its § 214(e)(6) determination that it would not serve the public interest to designate Highland Cellular as a CETC in Verizon South’s study area. *See id.* at 14 (¶ 28).

The Commission’s decision-making fell far short of what was required by the Act. Before designating a CETC for an area served by a rural telephone company, § 214(e)(6) commands that the Commission “*shall* find the designation is in the public interest.” 47 U.S.C. § 214(e)(6) (emphasis added). The Commission maintains that it makes the mandatory public interest finding by weighing the benefits of an additional ETC against any potential harms, and it contends that “this balancing of benefits and costs is a fact-specific exercise.” *Virginia Cellular*, 19 FCC Red at 1575; *Order*, at 11 (¶ 22). In practice, however, the exercise has been one of balancing speculative harms

against proven benefits and announcing that the former outweigh the latter.

In this case, the Commission placed the burden on Highland Cellular to prove both the benefits of its CETC designation and the absence of any countervailing harms. Assuming that the concept of a burden of proof applies in an informal adjudication, the burden of producing evidence of harm should have been borne by Verizon South. It alone has access to its costs of serving its “entire study area,” and it would have been the logical proponent of a finding that its ability to serve the study area would be materially “undermined” by the designation of Highland Cellular as a CETC. *See General Plumbing Corp. v. New York Telephone Co.*, 11 FCC Rcd 11799, 11809 n.63 (Com. Car. Bur. 1996). *Cf.* 5 U.S.C. § 556(d). But in its comments, Verizon South produced no evidence of its cost of service, and it never came close to claiming that designation of Highland Cellular would have any material, adverse effect on its ability to serve all its study area.³³ Such a claim coming from a Verizon company would have been laughable.³⁴

The Commission found that Highland Cellular carried its burden of proving that its designation as an CETC will benefit rural consumers and serve the public interest even under the new “more rigorous” public interest analysis. *See Order*, at 10-11 (¶¶ 20-22). The burden then should have shifted to the incumbent LECs to prove that designating Highland Cellular in their rural study areas would harm rural consumers or otherwise be inconsistent with the public interest. *See General Plumbing*, 11 FCC Rcd at 11809 n.63 (once a *prima facie* case is established, the burden of producing evidence shifts to the opposing party). The incumbent LECs that came forward made no effort to carry that evidentiary burden.

³³See Comments of Verizon, CC Docket No. 96-45, at 1-7 (Oct. 15, 2002).

³⁴See Reply Comments of Highland Cellular, CC Docket No. 96-45, at 4-5 (Oct. 22, 2002).

No party made specific allegations of fact sufficient to show that the designation of Highland Cellular as a CETC would produce any harms whatsoever. As was often the case before *Virginia Cellular*, the incumbents produced no evidence, persuasive or otherwise, that designation of an additional ETC will reduce investment in infrastructure, raise rates, reduce service quality to rural consumers, or result in a loss of network efficiency. See *Western Wireless*, 16 FCC Rcd at 18138. See also *RCC Holdings*, 17 FCC Rcd at 23542. In particular, Verizon South proffered no evidence to support the inference that designation of Highland Cellular would either undercut its ability to serve its study area or “undermine the Commission’s policy of promoting competition in all areas, including high-cost areas.” *RCC Holdings*, 17 FCC Rcd at 23542. That should have been the end of the matter.

Despite the fact that Highland Cellular’s case stood unrebutted, the Commission solicited additional information from Highland Cellular and then announced without explanation that it had not “satisfied” its burden of proof. But, as was noted in *Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 172 (D.C. Cir. 1994), “assigning the burden of proof is not a magic wand that frees an agency from the responsibility of reasoned decision-making.” An exercise of that responsibility requires the “conjunction of articulated standards and reflective findings.” *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Therefore, it was not enough for the Commission merely to declare that Highland failed to carry its burden of proof.

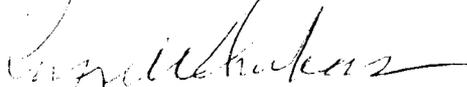
Reasoned decision-making requires the Commission to explain how the percentage of Highland Cellular’s customers in four of thirteen wire centers supported the finding that Verizon South’s ability to serve its study area could “potentially” be undermined. It must also explain how the mere possibility of harm to Verizon South outweighed the proven benefits of Highland Cellular’s

universal service offering. As it now stands without supporting facts or an articulated rationale, the Commission's holding appears to be aimed at shielding incumbent LECs from competition and preserving the sufficiency of the universal service fund for one class of carrier. Neither aim is among the universal service principles the Commission may balance. See *Qwest*, 258 F.3d at 1200; *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000).

CONCLUSION

For all the foregoing reasons, the Commission should reconsider and rescind its *Order*, overrule *Virginia Cellular*, and designate Highland Cellular as a CETC throughout its RSA.

Respectfully submitted



RUSSELL D. LUKAS
DAVID A. LAFURIA
STEVEN M. CHERNOFF

LUKAS, NACE, GUTIERREZ & SACHS, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 857-3500

Attorneys for Petitioners

May 12, 2004

CERTIFICATE OF SERVICE

I, Steven M. Chernoff, an associate in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 12th day of May, 2004, placed in the United States mail, first-class postage, prepaid, a copy of the foregoing *PETITION FOR RECONSIDERATION* filed today to the following:

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-A204B
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

Bryan Tramont, Senior Legal Advisor
Office of the Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

Christopher Libertelli, Legal Advisor
Office of the Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

Matthew Brill, Senior Legal Advisor
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-A204B
Washington, D.C. 20554

Jessica Rosenworcel, Legal Advisor
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302F
Washington, D.C. 20554

Daniel Gonzalez, Senior Legal Advisor
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

Scott Bergman, Senior Legal Advisor
Office of Commissioner Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

William Maher, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C450
Washington, D.C. 20554

Paul Garnett
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room
Washington, D.C. 20054

Thomas Buckley
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room
Washington, D.C. 20054

Romanda Williams
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A321
Washington, D.C. 20554

Eric Einhorn, Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C360
Washington, D.C. 20554

Narda Jones, Deputy Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-B552
Washington, D.C. 20554

Anita Cheng, Assistant Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A445
Washington, D.C. 20554

Robert W. Woltz
President
Verizon Virginia, Inc.
P.O. Box 27241
600 East Main St.
Richmond, VA 23261

Lydia R. Pulley
Vice President and General Counsel
Verizon South, Inc.
600 East Main St.
11th Floor
Richmond, VA 23219

Benjamin M. Sanborn, Esq.
External Affairs Manager
Telephone Association of Maine
Post Office Box 128
Buckfield, ME 04220-0128

Michael Altschul
Christopher R. Day
CTIA
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036


Steven M. Chernoff