

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

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
Supplemented Petitions for Eligible)
Telecommunications Carrier Designations)

To: Wireline Competition Bureau

RESPONSE TO OPPOSITION OF VERIZON

N.E. Colorado Cellular, Inc., Midwest Wireless Holdings L.L.C., Rural Cellular Corporation, and U.S. Cellular Corporation (collectively “Joint Petitioners”), by their attorneys, hereby respond to the “opposition” filed by the Verizon telephone companies (“Verizon”), *see* Opposition of Verizon, CC Docket No. 96-45 ((May 7, 2004) (“Opp.”), allegedly in response to the public notice issued by the Wireline Competition Bureau (“Bureau”) inviting parties to comment on fourteen specific supplements to petitions for designation as eligible telecommunications carriers (“ETCs”) filed by four identified wireless carriers. *See* Public Notice, DA 04-998 (Apr. 12, 2004) (“PN”). Verizon has abused the Bureau’s invitation by submitting what amounts to an untimely opposition to a petition for reconsideration and premature comments on matters to be addressed in the high cost portability proceeding.

I. The Opposition Should Be Dismissed Or Disregarded

The Bureau’s public notice provided that “[p]arties should clearly specify in the caption of all filings the petition(s) and application(s) to which the filing relates.” PN, at 2. No petition is specified in the caption of Verizon’s filing, because it did not comment on any of the supplemented

petitions.¹ Thus, Verizon appropriately styled its pleading as an “opposition” for it is directed explicitly at the merits of a petition for reconsideration filed by Sprint Corporation (“Sprint”) with respect to the Commission’s action in *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004). *See* Opp., at 5-10 & nn.7, 12, 13.

Joint Petitioners and Virginia Cellular, LLC (“Virginia Cellular”) joined Sprint in seeking reconsideration of *Virginia Cellular*. Under § 1.106(g) of the Commission’s rules (“Rules”), an opposition to any of the three petitions for reconsideration had to be filed on or before March 4, 2004, and a copy of the opposition had to be served upon the parties. *See* 47 C.F.R. § 1.106(g). Only one party, NTELOS Telephone Inc., filed an opposition by the deadline. Now, nearly two months late, Verizon comes forward to oppose Sprint’s petition on an ex parte basis in a collateral proceeding. Verizon’s opposition should be dismissed as untimely filed, *see Jen-Shenn Song*, 17 FCC Rcd 3503, 3505 (Wireless Telecom. Bur. 2002), or simply disregarded. *See Amendment of Section 73.606(b)*, 8 FCC Rcd 460, 460 n.2 (Mass Media Bur. 1993).

As we will show, the Commission’s proceeding in *Virginia Cellular* was not a rulemaking under the Administrative procedure Act (“APA”), but an adjudication of a licensing matter. By Verizon’s calculation, there is approximately \$3.6 million per year at stake in that proceeding. *See* Opp., at 2 n.2. Thus, like all other contested ETC designation cases, *Virginia Cellular* involves the “resolution of conflicting private claims to a valuable privilege.” *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). As such, the proceeding should have been

¹Verizon did quote Nextel Partners in passing, but did not specify the petition (Nextel Partners filed seven) in which it has an interest. *See* Opposition, at 2.

restricted from the outset under the Commission's ex parte rules.² Regardless, the proceeding became restricted upon the filing of the three petitions for reconsideration. *See Rainbow Broadcasting Co.*, 9 FCC Rcd 2839, 2844-45 (1994), *remanded for further proceedings*, *Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995).

Because the opposition constitutes an ex parte presentation on a substantive issue to be addressed by the Commission in a restricted proceeding,³ and since it was late-filed with respect to that proceeding, it should not be considered on its merits in these proceedings. Nevertheless, and without prejudice to foregoing, Joint Petitioners will address Verizon's contentions and the issues they raise.

II ETC Designations Are Licenses Issued In Adjudications

By Verizon's estimate, access to total of approximately \$376 million a year in funding is at stake in the disposition of the pending petitions for designation as competitive ETCs ("CETCs"). *See Opp.*, at 2. Concern for the amount of universal service funding has not been adopted by the Joint Board and the Commission as among the universal service principles on which to base decisions in contested ETC designation cases. *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 n.7 (10th Cir. 2001). But Verizon's \$376 million estimate highlights the value of ETC designations and the need for procedural rules for the process of issuing such valuable authorizations.

To date, the Commission conducts the process of designating CTECs under § 214(e)(6) of

²Properly viewed as a licensing case, a proceeding under § 214(e)(6) of the Communications Act of 1934, as amended ("Act"), would not be listed as exempt under § 1.1204(a) of the Rules, or as permit-but-disclose in § 1.1206(a). Thus, it would be a restricted proceeding in which ex parte presentations by parties to Commission decision-makers are prohibited. *See* 47 C.F.R. § 1.1208.

³The Bureau can reasonably be expected to be involved in formulating the order on reconsideration of *Virginia Cellular*. *See* 47 C.F.R. § 1.1202(c).

the Act as if it were a notice and comment rulemaking under APA § 553. *See* 5 U.S.C. § 553. Thus, the Bureau suggested that the filing deadlines were set “pursuant” to §§ 1.415 and 1.419 of the Rules. PN, at 2. Those two rules apply only in “notice and comment rulemaking proceedings conducted under 5 U.S.C. 553.” 47 C.F.R. § 1.399. Moreover, the rules are triggered after a notice of proposed rulemaking (“NPRM”) is issued. *Id.* § 1.415(a). ETC designations cannot be made under APA § 553, and NPRMs are not issued in the designation process.

APA § 553 only governs a “rule making” by a federal agency. *See* 5 U.S.C. § 553. By definition, a rule making under the APA is an “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5).⁴ A Commission proceeding under § 214(e)(6) is a process for formulating an order designating a carrier as an ETC “in accordance with” § 254 of the Act. 47 U.S.C. § 214(e)(1). Section 254(a) in turn requires the Commission to establish the rules under which ETC designations are made in a proceeding subsequent to receiving the recommendations of the Joint Board made “after notice and public comment.” *Id.* § 254(a). Obviously, therefore, APA § 553 applies to the notice and comment proceeding required by § 254(a) to adopt rules for the ETC designation process.

Section 254(a) of the Act provides that “only an [ETC] designated under section 214(e) shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(a). Designation as an ETC is a “license” under the APA, because it serves as the Commission’s “permit, certificate, approval . . . or other form of permission” to receive federal universal support. 5 U.S.C. § 551(8). Hence, in *Virginia Cellular*, the Commission ordered that Virginia Cellular be designated as an ETC,

⁴The APA defines a “rule” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law.” 5 U.S.C. § 551(4).

subject to certain conditions, *see* 19 FCC Rcd at 1585-86, which permitted the carrier to receive “nearly \$3.6 million per year” in Verizon’s estimation. *Opp.*, at 2 n.3.

Under the APA, the process by which the Commission granted and conditioned Virginia Cellular’s “license” to receive universal service support constituted “licensing.” 5 U.S.C. § 551(9). Thus, it was a “process for the formulation of an order,” *id.* § 551(7), “in a matter other than rule making but including licensing.” *Id.* § 551(6). Therefore, the process in *Virginia Cellular* was an “adjudication” under the APA. *See id.* § 551(7).

The Commission effectively admitted the adjudicatory nature of the process in *Virginia Cellular* when it characterized the balancing of the “benefits of an additional ETC” against “any potential harms” as a “fact-specific exercise.” 19 FCC Rcd at 1575.⁵ Moreover, it claimed that Virginia Cellular’s failure to satisfy its “burden of proof” was decisive with respect to its designation as an CETC for one wire center. *Id.* The burden of proof is an adjudicative concept. *See American Trucking Ass’n, Inc. v. United States*, 688 F.2d 1337, 1343 n.8 (11th Cir. 1982) (application of “burdens of proof in a legislative, rulemaking context is awkward and problematic,” because the concept was “developed in an adjudicative, factfinding context”).

The Commission limited the scope of the rulemaking procedures set forth in Subpart C of Part 1 of the Rules to notice and comment proceedings conducted under APA § 553, and it did so in mandatory terms. *See* 47 C.F.R. § 1.399 (“subpart shall be applicable to . . . rulemaking proceedings conducted under 5 U.S.C. 553”). As we have shown, informal adjudications to

⁵When it engages in the fact-specific exercise of balancing benefits against harms in individual, contested cases, the Commission crosses a dividing line under the “recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.” *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 245 (1973).

designate CETCs cannot be conducted under APA § 553. It follows that the Subpart C rules, such as §§ 1.415 and 1.419, do not apply to the ETC designation process.

III. The *Virginia Cellular* “Standards And Requirements” Are Unenforceable

Congress specified the precise notice and comment procedures that the Commission must follow to adopt or change the rules applicable to ETC designations under § 214(e)(6), and it also employed mandatory language. *See* 47 U.S.C. § 254(a)(1) (the Commission “shall institute and refer to” the Joint Board “a proceeding to recommend changes to any of its regulations in order to implement section 214(e)”). Congress had an obvious purpose in explicitly directing the Commission to refer such matters initially to the Joint Board.⁶ It intended that universal service issues be aired publicly before an advisory body representing state and consumer interests, and that the recommendations of that body provide the basis on which the Commission promulgated universal service rules. Congress could not have intended that the Commission adopt and retroactively apply universal service rules on an ad hoc basis in contested ETC designation cases.

As evidenced by its request that the Joint Board examine the process for designating ETCs, the Commission was aware prior to *Virginia Cellular* that substantive changes to the rules and standards governing the ETC designation process would trigger the notice-and-comment requirements of the Act and the APA. *See Federal-State Joint Board on Universal Service*, 17 FCC Rcd 22642, 22642 (2002). At the same time, 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).

⁶The Joint Board was established by Congress in 1988 to include state commissioners for the purpose of acting as an advisory body with respect to federal-state telecommunications matters. *See* 47 U.S.C. § 410(c). In 1996, Congress directed that a state-appointed utility consumer advocate be added to the Joint Board and that the reconstituted body make recommendations to the Commission on universal services matters after entertaining public comment. *See id.* § 254(a)(1).

See 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, 1955 (Joint Bd. 2003). *See also Virginia Cellular*, 19 FCC Rcd at 1576. 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 knowing violation of statutory rulemaking requirements, the Commission's *Virginia Cellular* standards and requirements are invalid and cannot be applied to, or enforced against, any of the petitioners currently seeking designation as CETCs. *See Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (case remanded for Commission's "utter failure" to follow notice-and-comment procedures); *Syncor International Corp. v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997) (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). To paraphrase Verizon, unless and until different standards are adopted by the Commission following the Joint Board's recommendations in the high cost portability proceeding, petitioners seeking ETC status are entitled to be judged under the standards and requirements properly promulgated prior to *Virginia Cellular*. *Compare Opp.*, at 10.

IV. The Commission Should Adhere To Its Initial Interpretation Of § 214(e)(6)

Joint Petitioners will not grapple with Verizon's tortured interpretation of § 214(e)(6) beyond noting that it leads Verizon to the startling conclusion that "[i]n rural areas, the Commission has discretion to deny an ETC application even if a grant of the application would be 'consistent with the public interest, convenience and necessity.'" *Opp.*, at 7. Instead, we think that the Commission

must return to the interpretation in formally adopted in 1997:

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.⁷

The Commission construed § 214(e)(2) to achieve Congress's goal of "opening up all telecommunications markets to competition." *Universal Service Order*, 12 FCC Rcd at 8781. It recognized in 1997 that the imposition of additional obligations on competitive carriers as a condition of ETC eligibility would "chill competitive entry into high cost areas." *Id.* at 8858. In a similar vein, the Commission held that a state's refusal to designate an additional ETC on grounds other than the § 214(e) criteria could "prohibit or have the effect of prohibiting the ability of any entity" to provide a telecommunications service in violation of § 253 of the 1996 Act. *Id.* at 8852.

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

⁷*Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8852 (1997) ("*Universal Service Order*").

Chevron standards,⁸ the Fifth Circuit 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 418.⁹

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) 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 *Virginia Cellular*, 19 FCC Rcd 1584 n.141. On the "strength" of *TOPUC* alone, the Commission jettisoned the interpretation of § 214(e) that it formally adopted in its *Universal Service Order*.

In *Virginia Cellular*, the Commission 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 a 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." *Id.* at 1575. 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." *Id.* at 1584 n.141.

Because there is no "nonmutual collateral estoppel" against the Government, a single circuit

⁸*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁹ The Fifth Circuit has been correctly criticized for not affording the FCC *Chevron* step-two deference in *TOPUC*. See *Qwest*, 258 F.3d at 119; *Comsat Corp. v. FCC*, 250 F.3d 931, 940 (5th Cir. 2001) (Pogue, J., concurring).

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 was not required to follow the Fifth Circuit's approach to § 214(e)(2) nationwide. *See Holland*, 309 F.3d at 810. It certainly was under no obligation to follow *TOPUC* when it acted in *Virginia Cellular*, since its decision could not be subject to the jurisdiction of the Fifth Circuit. Therefore, the Commission could not simply acquiesce to *TOPUC*. If it was to adopt the Fifth Circuit's view of § 214(e), the Commission was required to give substantive reasons for its acquiescent interpretation. *See id.* at 817-18. It has yet to provide a reasoned explanation, and Verizon failed in its attempt. *See Opp.*, at 5-10.

Joint Petitioners believe Sprint got it right. Unless it can explain how it misinterpreted § 214(e) in 1997, the Commission should return to the interpretation it articulated persuasively in the *Universal Service Order*. It should grant ETC designations for non-rural areas upon a showing that the petitioners satisfied the requirements of § 214(e)(1).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 14th day of May, 2004, placed in the United States mail, first-class postage, prepaid, a copy of the foregoing *RESPONSE TO OPPOSITION OF VERIZON* filed today to the following:

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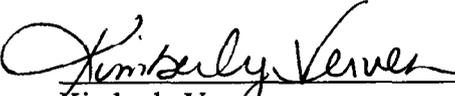
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