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

In the Matter of )  
 )  
CELLULAR SOUTH LICENSE, INC. )  
 ) CC Docket No. 96-45  
Petition for Designation as an )  
Eligible Telecommunications Carrier )  
in the State of Alabama )  
  
To: The Commission

**OPPOSITION TO SUPPLEMENT  
TO APPLICATION FOR REVIEW**

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## SUMMARY

The Alabama Rural Local Exchange Carriers (“ARLECs”) filed an application for Commission review of the designation of Cellular South License, Inc. (“Cellular South”) as an eligible telecommunication carrier (“ETC”) in Alabama by the Wireline Competition Bureau (“Bureau”). The ARLECs supplemented their pending application for review after the Bureau departed from § 1.115(d) of the Commission’s Rules (“Rules”) to invite parties prosecuting applications for review to address the Commission’s decisions in *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004) and *Highland Cellular, Inc.* 32 Communications Reg. (P&F) 233 (2004).

The Bureau’s “invitation” reflects its practice of treating the process of designating competitive ETCs (“CETCs”) under § 214(e)(6) of the Communications Act (“Act”), as if it were a notice and comment rulemaking under § 553 of the Administrative Procedure Act (“APA”). However, designation as an CETC 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 service support. Thus, under the APA, the designation process constitutes “licensing,” which is a form of “adjudication.” Consequently, the rulemaking procedures of Subpart C of Part 1 of the Rules cannot be applied to the CETC designation process. Because it is bound to abide by the Rules, the Bureau erred when it invited supplements to applications for review to be filed after the expiration of the 30-day filing period of § 1.115(d).

Under certain circumstances, the Commission can give retroactive effect to adjudications that modify or repeal rules established in earlier adjudications. However, in *Virginia Cellular*, the Commission unlawfully modified or repealed rules that were promulgated in a notice-and-comment rulemaking conducted in accordance with § 254(a) of the Act and APA § 553. Moreover, *Virginia*

*Cellular* changed substantive rules without the prior notice-and-comment rulemaking required by the Act and the APA. Therefore, the *Virginia Cellular* “rules” are invalid and unenforceable.

The ARLECs never asked for a stay of the Bureau’s designation order. Now, they have failed to carry their burden of demonstrating that the *termination* of Cellular South’s high-cost support is warranted under § 1.115(b)(2). Instead, they effectively ask the Commission to reverse the policy adopted in *Virginia Cellular* of continuing the process of designating CETCs subject to the caveat that rules relating to high-cost support may be adopted in the pending rulemaking proceeding which could impact the support CETCs may receive in the future.

The ARLECs do not explain why it was unreasonable for the Commission to have confidence that, if necessary, rules can be promulgated that will operate prospectively to protect the universal service fund (“USF”). Moreover, they failed to cite a single instance when the Commission set aside an authorization based on the mere possibility that a yet-to-be-proposed rule may be adopted. Furthermore, the Commission cannot penalize Cellular South by cutting off its support, but at the same time deferring the issue of whether it should get support to a future rulemaking. That would violate both the Commission’s duties as an adjudicator under § 155(c)(4) and 214(e)(6) of the Act, and the administrative law principle under which it is bound to follow its existing rules until they have been amended in accordance with the APA.

The ARLECs trot out the same evidence rejected by the Bureau to allege that the designation of multiple wireless CETCs could cause unspecified “harms” to a rural LEC. However, they fail to allege that the Bureau erred when it found their evidence insufficient to make a *prima facie* case of competitive harm. And they make no specific allegations of fact sufficient to show that the designation of Cellular South as a CETC has produced, or will produce, any harms whatsoever.

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To: The Commission

**OPPOSITION TO SUPPLEMENT  
TO APPLICATION FOR REVIEW**

Cellular South License, Inc. (“Cellular South”), by its attorneys and pursuant to § 1.115(d) of the Commission’s Rules (“Rules”), hereby opposes the Supplement to the Application for Review of the Alabama Rural Local Exchange Carriers (“Supplement”) filed with respect to the designation of Cellular South as an eligible telecommunication carrier (“ETC”) by the Wireline Competition Bureau (“Bureau”). *See Cellular South License, Inc.*, 17 FCC Rcd 24393 (Wireline Comp. Bur. 2002). In support thereof, the following is respectfully submitted:

**BACKGROUND**

**A. The Ad Hoc Consolidated Proceeding**

Over the objections of the Alabama Rural Local Exchange Carriers (“ARLECs”), the Bureau unconditionally granted Cellular South’s petition for designation as a competitive ETC (“CETC”) on December 4, 2002. *See id.* at 24408. Significantly, no party asked the Bureau to stay the effectiveness of its action.

The ARLECs filed an application for Commission review of Cellular South’s designation,

and they did so expressly pursuant to § 1.115 of the Rules.<sup>1</sup> Before the pleading cycle was completed in accordance with § 1.115(d), the Bureau interceded and initiated its own consolidated proceeding involving the appeal in this case with the ARLECs' application for review of its decision in *RCC Holdings, Inc.*, 17 FCC Rcd 23532 (Wireline Comp. Bur. 2002).<sup>2</sup> Departing still further from § 1.115, the Bureau established its own pleading cycle for "comments" on the two applications for review.<sup>3</sup>

By our count, eleven new parties filed comments, ten of whom filed comments adverse to Cellular South. The ARLECs and Cellular South filed "reply comments" on February 25, 2003, more than a month after the record should have closed pursuant to § 1.115(d).

In the process of imposing its own procedures on matters before the Commission for review, the Bureau effectively: reopened two proceedings to permit non-parties to participate, *but see* 47 C.F.R. § 1.115(a); allowed parties to raise questions of law or fact upon which it had been afforded no opportunity to pass, *but see id.* § 1.115(c); invited the filing of unauthorized and untimely pleadings, *but see id.* § 1.115(d); and opened a restricted proceeding to ex parte presentations, *but see id.* § 1.1208.

**B. *Virginia Cellular and Highland Cellular***

One of the ARLECs' complaints<sup>4</sup> was that the Bureau designated Cellular South shortly after the Commission asked the Federal-State Joint Board on Universal Service ("Joint Board") to

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<sup>1</sup>See Application for Review of the ARLECs, CC Docket No. 96-45, at 1 (Dec. 30, 2002) ("Application").

<sup>2</sup>See *Pleading Cycle Established for Comments Regarding Applications for Review of Orders Designating ETCs in the State of Alabama*, 18 FCC Rcd 97, 97 (Wireline Comp. Bur. 2003) ("First Comment PN").

<sup>3</sup>See *id.*

<sup>4</sup>See Application, at 2.

examine the process for designating ETCs. See *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 22642, 22647 (2002) (“*Referral Order*”). The Joint Board subsequently asked for public comment on what factors the Commission should consider when it performs ETC designations pursuant to § 214(e)(6) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 214(e)(6). 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) (“*Rulemaking PN*”).

The Commission did not wait for the Joint Board’s recommendation. Instead, in January 2004, the Commission decided a contested § 214(e)(6) designation case by adopting and applying a “more stringent public interest analysis for ETC designations in rural telephone company service areas.” *Virginia Cellular, LLC*, 19 FCC Rcd 1563, 1565 (2004). It not only applied its new public interest “framework” retroactively, it announced that the framework would “apply to all ETC designations for rural areas” pending action on the Joint Board’s recommendations. *Id.*

Concluding that “the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas,” the Commission announced in *Virginia Cellular* that it would consider at least five factors to determine whether a CETC should be designated for a rural area:

[1] the benefits of increased competitive choice, [2] the impact of multiple designations 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 provided by competing providers, and [5] the competitive ETC’s ability to provide the supported services throughout the designated service area within a reasonable time frame.<sup>5</sup>

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<sup>5</sup>*Virginia Cellular*, 19 FCC Rcd at 1565.

The Commission also revealed in *Virginia Cellular* that it did not “believe” that designation of a CETC in a non-rural area based merely upon a showing that the requesting carrier complied with § 214(e)(1) of the Act “will necessarily be consistent with the public interest in every instance.” *Id.* at 1575. Moreover, it speculated that designating a CETC *only* for the lowest-cost, highest-density wire center “could potentially significantly undermine” a rural LEC’s “ability to serve its entire study area” and could place the LEC at a “sizeable unfair competitive disadvantage.” *Id.* at 1580. Finally, based on the holding of *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999) (“*TOPUC*”), the Commission discovered that nothing in § 214(e)(6) of the Act prohibited it from “imposing additional conditions on ETCs.” *Id.* at 1584 n.141.

When deciding its very next contested CETC designation case, the Commission pronounced “a rural telephone company’s wire center” to be the new “minimum area for ETC designation.” *Highland Cellular, Inc.* 32 Communications Reg. (P&F) 233, 244-45 (2004). Extending the reach of its *Virginia Cellular* requirements, the Commission found that designating a CETC for the four lowest-cost, highest-density wire centers *and* the two highest-cost, lowest-density wire centers “could potentially undermine” a rural LEC’s “ability to serve its entire study area.” *Id.* at 244.

In *Virginia Cellular* and *Highland Cellular*, 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-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.<sup>6</sup> Parties were given a deadline by which they were to demonstrate how they satisfy the Commission’s “new standards and requirements set forth in the *Virginia Cellular Order* and the *Highland Cellular Order*.”<sup>7</sup>

### C. The “Refreshed” Record

The Bureau asked parties seeking ETC designation to supplement their pending petitions with any “new information or arguments” relevant under *Virginia Cellular* and *Highland Cellular*.<sup>8</sup> The Bureau suggested that “parties seeking ETC designation may wish to supplement previously filed pending . . . applications for review related to ETC designations.”<sup>9</sup> And the Bureau announced that the “refreshed record will facilitate appropriate consideration of pending ETC petitions and related proceedings in light of . . . *Virginia Cellular* and *Highland Cellular*.”<sup>10</sup>

The Bureau set three deadlines: a “supplemental petition due date,” a “comment date,” and a “reply comment date.” That placed Cellular South in a quandary. Having been granted, Cellular South’s petition for ETC designation was no longer pending. Nevertheless, the Bureau clearly indicated that it wanted the record refreshed and that *Virginia Cellular* and *Highland Cellular* would

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<sup>6</sup>*Parties are Invited to Comment on Supplemented Petitions for ETC Designations*, DA 04-998, at 1 (Wireline Comp. Bur. Apr. 12, 2004) (“*Second Comment PN*”); *Parties are Invited to Update the Record Pertaining to Pending Petitions for ETC Designations*, DA 04-999, at 1 (Wireline Comp. Bur. Apr. 12, 2004) (“*Update PN*”). *Update PN*, at 1.

<sup>7</sup>*Update PN*, at 1. See also *Second Comment PN*, at 2.

<sup>8</sup>*Update PN*, at 1.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

be retroactively applied. Therefore, on May 14, 2004, the “supplemental petition due date,”<sup>11</sup> Cellular South supplemented the record.

Cellular South reported that it had invested approximately \$9 million in its Alabama ETC service area since its designation as an CETC.<sup>12</sup> During this time, Cellular South constructed 44 cell sites in Alabama and installed a next generation CDMA IX system.<sup>13</sup> The CDMA IX system provides improved voice quality and system capacity, permits customers to access advance service features, and will allow Cellular South to meet the government’s E911 phase 2 requirements.<sup>14</sup>

Cellular South also demonstrated that can easily meet the *Virginia Cellular* and *Highland Cellular* standards, if they are enforced in this case.<sup>15</sup> In addition, it represented that it can now commit to serving serve all of Butler Telephone Company’s Butler wire center.<sup>16</sup>

The ARLECs also interpreted the Bureau’s invitation to supplement pending ETC petitions to permit it to supplement the post-grant record in this case. On May 14, 2004, the ARLECs filed their Supplement in which they made the now-moot arguments that Cellular South does not meet the *Virginia Cellular* standards and that *Highland Cellular* prohibits it from being designated as a CETC for a part of the Butler wire center. *See* Supplement, at 8-14.

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<sup>11</sup>*See Parties Are Invited to Update the Record Pertaining to Pending Petition for ETC Designations*, 69 Fed. Reg. 22029 (Apr. 23, 2004).

<sup>12</sup>*See* Supplement to Petition for Designation as an ETC in the State of Alabama, CC Docket No. 96-45, at 3A (May 14, 2004) (“Cellular South Supplement”).

<sup>13</sup>*See id.*

<sup>14</sup>*See id.*

<sup>15</sup>*See id.* at 3-4.

<sup>16</sup>*See id.* at 4.

## ARGUMENT

### **I. The *Virginia Cellular* and *Highland Cellular* “Rules” Cannot Be Retroactively Applied To Disturb Cellular South’s Designation**

#### **A. The ETC Designation Process Is An Adjudication**

By the ARLECs’ estimate, access to total of approximately \$2 million a year in funding is at stake in the disposition of the six pending proceedings involving petitions for designation as CETCs in rural Alabama. *See* Supplement, at 6 n.23. Like all other contested ETC designation cases, the six Alabama proceedings involve 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, they are adjudications under § 551(7) of the Administrative Procedure Act (“APA”). *See* 5 U.S.C. § 551(7).

The Bureau treats the process of designating CTECs under § 214(e)(6) of the Act as if it were a notice and comment rulemaking under APA § 553. *See* 5 U.S.C. § 553. For example, the Bureau repeatedly called for “comments” to be filed in this case, each time setting filing deadlines “pursuant” to §§ 1.415 and 1.419 of the Rules.<sup>17</sup> 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

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<sup>17</sup>*See Update PN*, at 2; *First Comment PN*, 18 FCC Rcd at 97; *Wireline Competition Bureau Seeks Comment on Cellular South License, Inc. Petition for Designation as an ETC Throughout Its Licensed Service Area in the State of Alabama*, 17 FCC Rcd 1187, 1188 (Wireline Comp. Bur. 2002).

definition, a rule making under the APA is an “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). A Commission proceeding under § 214(e)(6) of the Act 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 Joint Board’s recommendations 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, not to the designation process itself.

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 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.

#### **B. ETC Designations Are Licenses Issued In Adjudications**

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 service support. 5 U.S.C. § 551(8). Hence, in *Virginia Cellular*, the Commission ordered that the cellular carrier be designated as an ETC subject to certain conditions, *see* 19 FCC Rcd at 1585-86, which permitted the carrier to

receive “nearly \$3.6 million per year” in the estimation of one ILEC.<sup>18</sup>

Under the APA, the process by which the Commission granted and conditioned a “license” to receive universal service support in *Virginia Cellular* 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* and *Highland Cellular* was an “adjudication” under the APA. *See id.* § 551(7).

The ETC designation process is an adjudication under accepted principles of administrative law. The process has been marked by disputes between potential CETCs and rural LECs,<sup>19</sup> and the “existence of a dispute concerning particular individuals is a distinguishing characteristic of adjudication.” *McDonald v. Watt*, 653 F.2d 1035, 1042 (5<sup>th</sup> Cir. 1981). Given the level of opposition posed by the ARLECs in this case, the adjudicatory nature of the process is obvious.

The Bureau implicitly recognized the distinction between rule making and adjudication when it declined to address the ARLECs’ concerns about the nature of high-cost support in this case. It found that those “concerns are beyond the scope of this Order, which considers whether to designate a particular carrier as an ETC.” *Cellular South*, 17 FCC Rcd at 24406.

For its part, the Commission effectively admitted that the ETC designation process involves adjudication when it described its balancing of the “benefits of an additional ETC” against “any potential harms” as a “fact-specific exercise.” *Virginia Cellular*, 19 FCC Rcd at 1575; *Highland*

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<sup>18</sup>See Opposition of Verizon, CC Docket No. 96-45, at 2 n.2 (May 7, 2004).

<sup>19</sup>See, e.g., *Western Wireless Corp.*, 16 FCC Rcd 18133 (2002); *Western Wireless Corp.*, 16 FCC Rcd 48 (Com. Car. Bur. 2000), *reconsideration denied*, 16 FCC Rcd 19144 (2001); *Cellco Partnership d/b/a Bell Atlantic Mobile*, 16 FCC Rcd 39 (Com. Car. Bur. 2000).

*Cellular*, 32 Communications Reg. (P&F) at 240-41.<sup>20</sup> Moreover, it claimed that a failure to satisfy a “burden of proof” can be decisive with respect to a designation as an CETC. *See Virginia Cellular*, 19 FCC Rcd at 1575; *Highland Cellular*, 32 Communications Reg. (P&F) at 240. 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”).

### C. The Commission Should Abide By § 1.115 Of Its Rules

Under the *Accardi* doctrine,<sup>21</sup> the Commission must abide by its own rules, *Reuters Limited v. FCC*, 781 F.2d 946, 947 (D. C. Cir. 1986), as well as its “established and announced procedures.” *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). In this case, consideration of the ARLECs’ application for review is governed primarily by § 1.115 of the Rules. The procedures set forth in that rule, not those of the Bureau’s design, must apply. Although it has been delegated authority to designate ETCs under § 214(e)(6),<sup>22</sup> the Bureau has no authority to act on applications for review of its own actions. *See* 47 C.F.R. § 0.291(d). That lack of authority extends to inviting parties to supplement pending applications after the 30-deadline set by § 1.115(d).

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<sup>20</sup>When 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).

<sup>21</sup>The *Accardi* doctrine holds that government agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267-28 (1954); *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32, 34 n.3 (D.D.C. 1998).

<sup>22</sup>*See Procedures for FCC Designation of ETCs Pursuant to Section 214(e)(6) of the Act*, 12 FCC Rcd 22947, 22948 (1997) (“*Section 214(e)(6) PN*”).

From a procedural standpoint, this case is floundering. The best way to get it back on course is to recognize that it is a restricted adjudicatory proceeding, dismiss the supplemental filings of both parties, and decide the case on the law that existed when the Bureau designated Cellular South.

**D. *Virginia Cellular Cannot Be Retroactively Applied In This Case***

Assuming the rules announced in *Virginia Cellular* and *Highland Cellular* are enforceable at all, they cannot be applied retroactively in this case. In the first place, § 155(c)(5) of the Act prohibits the grant of any application for review “if it relies on questions of fact or law upon which” the delegated authority “has been afforded no opportunity to pass.” 47 U.S.C. § 155(c)(5). *See* 47 C.F.R. § 1.115(c). The ARLECs have supplemented their application for review to raise questions of law and fact based on *Virginia Cellular* and *Highland Cellular*. *See* Supplement, at 8-13. Since the Bureau enjoyed no opportunity to pass on such issues, this becomes “an open-and-shut case:” § 155(c)(5) of the Act and § 1.115(c) of the Rules do not permit the Commission to grant the ARLECs’ supplemented application for review. *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003). *See, e.g., Henrico County School District*, 17 FCC Rcd 24237, 24239 (2002).

Under certain circumstances, the Commission can give retroactive effect to “adjudications that modify or repeal rules established in earlier adjudications.” *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). However, in *Virginia Cellular*, the Commission modified or repealed rules that were promulgated in a notice-and-comment rulemaking conducted in accordance with § 254(a) of the Act and APA § 553.

In its rulemaking to implement §§ 214(e) and 254 of the Act, the Commission construed the provisions of § 214(e) to prohibit both it and state commissions from adopting criteria for designating ETCs in addition to those set out in § 214(e)(1). *Federal-State Joint Board on Universal*

*Service*, 12 FCC Rcd 8776, 8851-52 (1997) (“*Universal Service Order*”). 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.<sup>23</sup>

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. See 19 FCC Rcd at 1584 n.141. Based solely on *TOPUC*, the Commission jettisoned the interpretation of § 214(e) that it formally adopted in its *Universal Service Order*.<sup>24</sup> In short, the Commission used an adjudication to repeal a rule adopted by rulemaking. That was unlawful. The APA clearly provides that a rule can only be repealed by rulemaking. See 5 U.S.C. §§ 551(5), 553; *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 445-46 (D.C. Cir. 1982).

## **II. The *Virginia Cellular* And *Highland Cellular* Requirements Are Invalid And Unenforceable**

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<sup>23</sup>*Universal Service Order*, 12 FCC Rcd at 8852.

<sup>24</sup>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 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*.

**A. 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). 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).<sup>25</sup>

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.* (brackets omitted). Under that maxim, the *Virginia Cellular* requirements and the “minimum geographic area” rule of *Highland Cellular* were subject to an APA rulemaking.

Prior *Virginia Cellular*, the Commission had no “stringent” public interest standards and requirements. It did not require a requesting carrier to demonstrate that its designation as a CETC under § 214(e)(6) would be consistent with the public interest. *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*”). *See also Virginia Cellular*, 19 FCC Rcd at 1556 (listing five requirements for §

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<sup>25</sup>Agencies 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).

214(e)(6) ETC designation). Obviously, therefore, it did not place a burden of proof on an the requesting carrier to establish either that its designation as an ETC would serve the public interest, or specifically that its universal service offering will benefit rural consumers. *See Section 214(e)(6) PN*, 12 FCC Rcd at 22948-49.

The APA also “requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.” *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001). *See Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). The interpretation of § 214(e) that the Commission articulated in the *Universal Service Order*, and abandoned in *Virginia Cellular*, was “well established” by a formal rulemaking.

**C. The *Virginia Cellular* and *Highland Cellular* “Rules” 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 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.<sup>26</sup> 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

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<sup>26</sup>The 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).

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* and *Highland 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 Referral Order*, 17 FCC Rcd at 22642. 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). *See Rulemaking PN*, 18 FCC Rcd at 1955. *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, Cellular South. *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). Unless and until different standards are adopted by the Commission following the Joint Board's

recommendations in the high cost portability proceeding,<sup>27</sup> Cellular South is entitled to be judged under the standards and requirements properly promulgated prior to *Virginia Cellular*.

**III. The ARLECs Have Not Carried Their Burden To Show That The Bureau's Action Should Be Reviewed**

The Bureau's designation of Cellular South as a CETC was effective on December 4, 2002, the day on which the Bureau's order was released. *See* 47 C.F.R. § 1.102(b)(1). The ARLECs could have sought reconsideration and asked the Bureau to stay the effectiveness of its order. *See id.* § 1.102(b)(2). Likewise, when they filed their Application, they could have sought a stay from the Commission. *See id.* § 1.102(b)(3). The ARLECs chose not to seek a stay, and the Commission has not exercised its discretion to stay the Bureau's designation order. *See id.* Consequently, the Bureau's action has remained in effect for nearly 1½ years, during which time Cellular South has received high-cost support.

The ARLECs have asked the Commission to set aside Cellular South's designation as a CETC, presumably terminating the universal support payments Cellular South currently receives. *See* Application, at 25; Supplement, at 13. Thus, they carry the burden of demonstrating that such draconian action is warranted under § 1.115 of the Rules.<sup>28</sup> The ARLECs failed to carry their burden the first time around, and they fare no better with their Supplement.

**A. There Are No Policy Reasons To Rescind Cellular South's Designation**

The ARLECs do not attempt to show that the Bureau ran afoul of an *established* policy.

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<sup>27</sup>*See Federal-State Joint Board on Universal Service*, FCC 04J-1 (Jt. Bd. Feb. 27, 2004) ("Recommended Decision").

<sup>28</sup>The ARLECs must show that the Bureau's action: (1) conflicts with the Act, the Rules, case precedent, or established Commission policy; (2) involves an unresolved question of law or policy; (3) implicates a precedent or policy that should be overturned; (4) rests on an erroneous finding of material fact; and/or (5) is tainted by a prejudicial procedural error. *See* 47 C.F.R. § 1.115(b)(2).

They challenge the Bureau's decision to continue to designate CETCs pending the Commission's consideration of the "broader issues" raised by the recent recommended decision of the Joint Board. Supplement, at 2. But that decision is consistent with current Commission policy as evidenced by *Virginia Cellular* and *Highland Cellular*. Thus, the ARLECs are asking the Commission to overturn both the Bureau's action and its own policy.

The Commission has adopted the policy of continuing the process of designating CETCs subject to the caveat that rules relating to high-cost support may be adopted in the pending proceeding which could "potentially impact" the support the CETCs "may receive in the future." *Virginia Cellular*, 19 FCC Rcd at 1577-78; *Highland Cellular*, 32 Communications Reg. (P&F) at 242. The Alabama CETCs currently receive high-cost support, but the ARLECs do not allege that there has been any cognizable impact on the USF. Nor do they advance a reason why it was unreasonable for the Commission to express confidence that, if necessary, rules can be promulgated that will operate prospectively to protect the USF. Consequently, the ARLECs have failed to show that the Commission's policy choice, and the Bureau's before it, should be "overturned or reversed." 47 C.F.R. § 1.115(b)(2)(iii).

**B. The Application Must Be Decided Under Currently Applicable Law**

The ARLECs specifically request the Commission to set aside the Bureau's orders in this case and *RCC Holdings*, and "defer" a decision on all other pending Alabama ETC petitions, "until it issues a final rule establishing a framework for determining the 'overall impact' on the [USF] that overlapping ETC petitions will have on its sustainability and purpose." Supplement, at 7. They readily admit that the Commission is currently considering the Joint Board's recommendation that such a rule be proposed for adoption in a rulemaking. *See id.* at 2. Thus, the ARLECs contend that

authorizations to receive an explicit federal “subsidy” should be rescinded simply because of the possibility that the Commission may adopt a rule that would limit the size of the subsidy if funding yet-to-be-designated CETCs someday strains the USF. To rescind Cellular South’s designation on such grounds would be unprecedented and contrary to fundamental principles of administrative law.

The ARLECs failed to cite a single instance when the Commission set aside an authorization based on the mere possibility that a yet-to-be-proposed rule may be adopted. In any event, the Commission cannot penalize Cellular South by cutting off its support, but at the same time deferring the issue of whether it should get support to a future rulemaking. That would be “similar to a judge dismissing a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute. Like the judge, the agency has an obligation to decide the complaint under the law currently applicable.” *AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). In other words, the Commission cannot avoid its obligations as a adjudicator under §§ 155(c)(4) and 214(e) of the Act “by looking to a rulemaking, which operates only prospectively.” *Id.*; *MCI Telecommunications Corp. v. FCC*, 10 F.3d 842, 847 (D.C. Cir. 1993).

To grant the Application, but defer consideration of its merits to a rulemaking, would run afoul of the *Accardi* doctrine, under which the Commission “is bound to follow its existing rules until they have been amended pursuant to the procedures specified by [the APA].” *Amendment of Part 74, Subpart K, of the Commission’s Rules*, 22 FCC 2d 586, 591 (1969). Until it adopts the rules it has proposed in a rulemaking, the Commission’s “existing rules must govern the rights and obligations of those subject to its jurisdiction.” *CSRA Cablevision, Inc.*, 47 FCC 2d 567, 575 (1974). Therefore, it cannot depart from its existing rules to rescind an authorization, “even to achieve laudable aims.” *Reuters*, 781 F.2d at 950. It may rescind Cellular South’s designation only if

recession is warranted “under the law currently applicable.”

The ARLECs have failed to show that the Bureau’s decision to grant Cellular South’s petition for CETC designation is “in conflict with statute, regulation, case precedent, or established Commission policy.” 47 C.F.R. § 1.115(b)(2)(i). That being the case, the Commission cannot deprive Cellular South of the high-cost support it currently receives by *retroactively* enforcing a rule that may or may not be adopted, but if adopted will operate only *prospectively*.

**C. The Designation Of Cellular South Has Not Impacted The USF**

Congress specified six universal service principles on which the Commission must base its policies, *see* 47 U.S.C. § 254(b)(1)-(6), and it authorized the adoption of such additional principles that the Joint Board and the Commission determine are necessary and appropriate. *See id.* § 254(b)(7). The principle that the USF must be “sustainable” is not among the universal service principles specified by Congress, and the Joint Board and the Commission have not adopted fund sustainability as an additional principle.<sup>29</sup> Until a “sustainability” principle is adopted in conjunction with the Joint Board, the Commission cannot base its universal service policies upon a concern about the long-term impact that CETC designations will have on the USF, and it certainly cannot base its decision-making exclusively on any such concern. *See Qwest*, 258 F.3d at 1200 (Commission “may exercise its discretion to balance the principles against one another . . . but may not depart from them altogether to achieve some other goal”). Nevertheless, the ARLECs treat USF sustainability as the dispositive consideration in this case.

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<sup>29</sup>*See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 n.7 (10th Cir. 2001) (noting the Commission and the Joint Board have not adopted an explicit principle to limit funding); *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559, 22582 (2003) (declining to adopt an explicit principle under § 254(b)(7) that burdens on contributors should be minimized).

Beyond blustering about the specter of “an endless number of wireless ETC applications,”<sup>30</sup> the ARLECs produce no statistical evidence showing that Cellular South’s designation has had any significant impact on the USF. Nor have they shown that the designation will have a long-term impact on the fund. To the contrary, Cellular South’s projected support will make up only 0.003 percent of the total high-cost support to all ETCs,<sup>31</sup> and 0.102 percent of the total high-cost support to all Alabama ETCs.<sup>32</sup> That level of support is sustainable going forward. If that proves not to be the case in the future, the Commission has the rulemaking authority to take action to protect and sustain the USF, including the authority to examine the basis of support for rural LECs that currently draw well over 90 percent of all high-cost support.

**D. The ARLECs Have Not Shown Harm To Consumers**

The Bureau found that the ARLECs had not proffered “persuasive evidence” that Cellular South’s designation as a CETC would “reduce investment in infrastructure, raise rates, reduce service quality to consumers in rural areas or result in loss of network efficiency.” *Cellular South*, 17 FCC Rcd at 24403. Noting that the ARLECs had “merely presented data regarding the number of loops per study area, the households per square mile in their wire centers, and the high-cost nature of low-density rural areas,” the Bureau concluded that the “evidence submitted is typical of most rural areas and does not, in and of itself, demonstrate that designation of Cellular South . . . will harm the affected rural telephone companies.” *Id.* Nevertheless, the ARLECs have trotted out the very same evidence, now couched in the language of *Virginia Cellular*, to allege that the designation of

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<sup>30</sup>Supplement, at 6.

<sup>31</sup>See Cellular South Supplement, at 5 & n.10.

<sup>32</sup>This estimate is based on Cellular South’s projected support of \$9,161 per month measured against \$8,944,377 per month in projected high-cost support to all carriers in Alabama, as shown on USAC’s web site.

multiple wireless CETCs could cause unspecified “harms” to a rural LEC. *See* Supplement, at 11-12 & nn.41, 43, 45. However, they fail to allege, much less show, that the Bureau erred when it found their evidence insufficient to make a *prima facie* case of competitive harm. *See id.* at 11-13.

The ARLECs resort to speculating that the overall impact of having six wireless CETCs in Alabama “may be the creation of a ‘great disparity in density’ between the wire centers sought to be served and the ones left unserved by Alabama CETCs.” *Id.* at 12 (quoting *Virginia Cellular*, 19 FCC Rcd at 1579). “If this is the case,” the ARLECs suggest that an “affected” rural LEC “could be placed at a ‘sizeable unfair competitive disadvantage.’” *Id.* (quoting *Virginia Cellular*, 19 FCC Rcd at 1580). Speculating further, they contend that the service offerings of multiple wireless CETCs “could have an overall effect of taking funding away” from a rural LEC, which “could also delay the deployment of advanced services throughout the study area.” *Id.* at 12-13. Such unsupported, generalized claims amount to pure conjecture.

The ARLECs have made no specific allegations of fact sufficient to show that the designation of Cellular South as a CETC has produced, or will produce, any harms whatsoever. Instead, the ARLECs simply assert that Cellular South has not demonstrated that the benefits of its universal service offering outweigh “these harms.” *Id.* at 13. In effect, the ARLECs attempt to shift the burden to Cellular South to prove both the benefits of its CETC designation and the absence of any countervailing “harms.” Since Cellular South carried its burden of persuading the Bureau that its designation will provide benefits to rural consumers, *see Cellular South*, 17 FCC Rcd at 24402-03, the burden shifted to the ARLECs to persuade the Bureau, and now the Commission, that the designation causes, or will cause, harm to rural LECs that outweighs the established benefits to rural

consumers.<sup>33</sup> Yet, the ARLECs came forward with no facts on which the Commission can find that the economic effect of Cellular South's universal service offering will be to "significantly undermine" any rural LEC's "ability to serve its entire study area." *Virginia Cellular*, 19 FCC Rcd at 1580.

The Commission cannot afford any weight to the ARLEC's bare assertion that the designation of Cellular South as a CETC will bring significant harm to any rural LEC. The Commission's concern should be that no harm is caused rural consumers. As the Fifth Circuit held:

The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*.<sup>34</sup>

The Commission should hark back to the period when incumbent wireless carriers attempted to forestall competition with claims similar to those made by the ARLECs. The Commission held "[t]hat an existing carrier might be affected adversely by the entry of a competing carrier is not our chief concern. Injury to the overall public interest and the public's ability to receive adequate communications services are the circumstances to be avoided." *Commonwealth Telephone Co.*, 61 FCC 2d 246, 253 (1976).

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<sup>33</sup>The ARLECs cannot avoid their burden of making a *prima facie* case as to competitive harm. In the first place, they are the appellants seeking Commission review. They also are the logical proponents of a finding that the designation will place a rural LEC in an "unfair competitive disadvantage" by forcing it to "serve higher cost areas with less USF funding" which would "delay the deployment of advanced services throughout the study area." 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). Furthermore, operative facts concerning an Alabama rural LEC's infrastructure investment, rates, service quality, and the efficiency of its network are peculiarly within the ARLECs power to produce. See, e.g., *United Telephone Co. of Ohio*, 26 FCC 2d 417, 421 (1970).

<sup>34</sup>*Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (emphasis in original).

To support an allegation that competition would have an “adverse economic impact,” the Commission required a petitioner to plead “specific factual data” sufficient to make out a *prima facie* case that “grant of the application would (1) result in substantial financial losses to the petitioner, (2) that these losses would compel the petitioner to curtail some of its . . . services, and (3) that this loss of service would not be offset by the new services to be provided by the applicant.” *Commonwealth Telephone*, 61 FCC 2d at 252, 253. The purpose of the pleading requirement was to assure that the public did not “suffer a net loss of vital communications services.” *Id.* at 253. A similar requirement should be enforced today for the same purpose.

The Act creates a presumption that competition in the local telecommunications markets serves the public interest. In light of that presumption, the Bureau got it right when it placed the burden on the ARLECs to plead facts sufficient to “undermine the Commission’s policy of promoting competition in all areas, including high-cost areas.” *Cellular South*, 17 FCC Rcd at 24403. Because the ARLECs failed again to make a *prima facie* case that Cellular South’s designation as a CETC “will lead to an overall derogation of service to the public,” *Commonwealth Telephone*, 61 FCC 2d at 252-53, the Commission should deny the Application.

Respectfully submitted,



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June 1, 2004

**CERTIFICATE OF SERVICE**

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 1st day of June, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Opposition to Supplement to Application for Review* filed today to the following:

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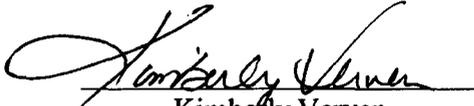
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