

of the *ETC Order* as a matter of right. *See* 47 U.S.C. § 405(a); *Bravo Cellular*, 15 FCC Rcd 4517, 4518 ((WTB 2000).

The purposes of § 405 of the Act are to afford the Commission both the initial opportunity to correct errors in its decision, *see Rogers Radio Communications Services v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978), and a fair opportunity to pass on legal or factual arguments before they are presented to a reviewing court. *See Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997). GCPI asks the Commission to correct one fundamental error and pass on a single issue of law.

ARGUMENT

Notice and comment rulemaking procedures obligate the Commission to respond to all significant comments. *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). *See* 5 U.S.C. § 553(c); 47 C.F.R. § 1.425. Thus, the Commission must respond to those ““comments which, if true, ... would require a change in [its] proposed rule.”” *ACLU*, 823 F.2d at 1581 (emphasis omitted) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.8 (D.C. Cir. 1987)). Under that standard, GCPI’s comments were significant in at least three material respects.

First, GCPI demonstrated that the Commission and state commissions are without statutory authority to impose ETC eligibility requirements beyond those imposed by § 214(e)(1) of the Act, 47 U.S.C. § 214(e)(1). *See* RCA-ARC Comments, at 30-41.⁴ GCPI principally relied on the Commission’s interpretation of §§ 214(e) and 253 of the Act as set forth explicitly in its First Report and Order in this proceeding.⁵ *See id.* at 30-35. It argued that the plain language of

⁴ RCA-ARC’s comments are incorporated herein by this reference.

⁵ *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997).

§ 214(e)(2) and (6) denies the Commission or a state commission the authority to impose additional eligibility requirements either expressly or under the guise of imposing a condition of ETC designation. *See* RCA-ARC Comments, at 38-41. Moreover, GCPI argued that the Commission must provide a reasoned explanation if it “reinterprets” §§ 214(e) and 253.⁶ *See id.* at 36-38.

Second, GCPI showed that an ETC designation is a “license” and that the ETC designation process is an “adjudication” under the Administrative Procedure Act (“APA”). *See id.* at 43-45. It argued that the Commission’s use of notice-and-comment rulemaking procedures to designate ETCs is inconsistent with the APA and violate the Commission’s *ex parte* rules. *See id.* at 42-43, 46-48. Therefore, GCPI urged the Commission to adopt adjudicatory procedures to govern the ETC designation process. *See id.* at 42-48.

Third, GCPI commented that the Commission is without express statutory authority to revoke an ETC designation. *See id.* at 48-51. Therefore, under the APA, the Commission cannot revoke an ETC designation. *See id.* at 48-50. GCPI cautioned that, if the Commission or a state commission deprived a carrier of its ETC designation without prior notice and the opportunity to be heard, such action could be challenged under the Fifth or Fourteenth Amendments. *See id.* at 50.

The Commission did not respond to GCPI’s comments in its *ETC Order*. Nevertheless, and without providing a reasoned explanation for its reinterpretation of § 214(e) of the Act, the Commission adopted “additional mandatory requirements for ETC designation,” including additional eligibility requirements codified in new § 54.202 of the Rules, and it urged state commissions to impose similar requirements. *See ETC Order*, 20 FCC Rcd at 6372, 6380-6402.

⁶ *See Review of the § 251 Unbundling Obligations of LECs*, 19 FCC Rcd 13494, 13497-13501 (2004) (explaining Commission’s authority to “reinterpret” § 252(i) of the Act).

It adopted new “administrative requirements” for ETC designation proceedings, but did not adopt adjudicatory procedures for those proceedings. *See ETC Order*, 20 FCC Rcd at 6399-6400. Finally, the Commission asserted that it may revoke a carrier’s ETC designation. *See id.* at 6402.

GCPI’s statutory and constitutional arguments clearly constitute “significant comments.” *ACLU*, 823 F.2d at 1581. If they are valid, the Commission could not have promulgated § 54.202 of the Rules. Nor could it have failed to adopt adjudicatory procedures that would comport with the APA, its Rules, and the dictates of due process. Thus, GCPI’s comments “deserve[d] an answer.” *Louisiana Fed. Land Bank Ass’n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1081 (D.C. Cir. 2003). And considering that the issues raised were not new to this proceeding,⁷ the Commission clearly had adequate time to address GCPI’s comments within its one-year deadline. *See* 47 U.S.C. § 254(a)(2). Under these circumstances, the Commission was required by the APA to address GCPI’s comments before issuing its *ETC Order* and promulgating § 54.202. *See Louisiana Fed. Land Bank*, 336 F.3d at 1078, 1085 (remanding case to agency to respond to comment challenging proposed rule as conflicting with the enabling statute).

For all the foregoing reasons, GCPI respectfully requests the Commission to reconsider this matter, respond to GCPI’s comments, rescind § 54.202 of the Rules, adopt adjudicatory rules to govern the ETC designation process, and otherwise revise its decision to comply with §§

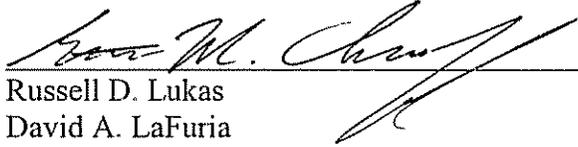
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⁷ The issues were first raised in a petition for reconsideration of *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004). *See* N.E. Colorado Cellular, Inc. *et al.*, Petition for Reconsideration, at 6-17, 23-25 (Feb. 23, 2004).

214(e) and 253 of the Act and the APA.

Respectfully submitted,

GUAM CELLULAR AND PAGING, INC.

By: 
Russell D. Lukas
David A. LaFuria
Steven M. Chernoff

LUKAS, NACE, GUTIERREZ & SACHS, CHARTERED
1650 Tysons Boulevard
Suite 1500
McLean, Virginia 22102
(703) 584-8678

Its Attorneys

June 24, 2005

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 24th day of June, 2005, placed in the United States mail, first-class postage, prepaid, a copy of the foregoing *PETITION FOR RECONSIDERATION* filed today to the following:

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

Michelle Carey, Legal Advisor
Office of the Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

Sem Feder, Acting General Counsel
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

John Branscome, Acting Legal Advisor
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

Russell Hanser, Legal Advisor
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, SW, Room 5-C124
Washington, D.C. 20554

Jordan Goldstein, Senior Legal Advisor
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302F
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

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

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

Narda Jones, Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A426
Washington, D.C. 20054

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

Mark Seifert, Legal Advisor
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C404
Washington, D.C. 20054

Pam Slipakoff, Legal Advisor
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 6-A367
Washington, D.C. 20054

Lisa Gelb, Deputy Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C451
Washington, D.C. 20054

Jeremy Marcus, Legal Counsel to the Bureau
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C413
Washington, D.C. 20054

Anita Cheng, Assistant Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A445
Washington, D.C. 20054

Qualex International
Portals II
445 12th Street, SW, CY-B402
Washington, D.C. 20054



Donna Linthicum-Brown