



Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

December 13, 2006

Jeffrey S. Lanning
Director – Federal Regulatory
401 9th Street, N.W.
Suite 400
Washington, D.C. 20004

Re: Motion to Accept Filing as Timely
Filed in WC Docket 96-45

Dear Mr. Lanning:

The Office of the Secretary has received your request for acceptance of the document filed by the Embarq Corporation in the above-referenced proceeding as timely filed, due to technical difficulties with the Commission's Electronic Comment Filing System.

In accordance with 47 C.F.R. Section 0.231(i), I have reviewed your request and verified your assertions. After considering the relevant arguments, I have determined that these filings will be accepted as timely filed on December 4, 2006. If we can be of further assistance, please contact the Office of the Secretary.

Sincerely,

A handwritten signature in cursive script that reads "Marlene H. Dortch".

Marlene H. Dortch
Secretary

MHD/gt

cc: Wireline Competition Bureau

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December 5, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

FILED/ACCEPTED

DEC - 5 2006

Federal Communications Commission
Office of the Secretary

Re: *Federal-State Joint Board on Universal Service, Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45.

Dear Ms. Dortch:

I am enclosing an original and four copies of the Opposition of Embarq Corporation in the above-referenced matter. Please accept these copies as timely filed under Commission rules, including 47 C.F.R. §§ 1.4, 1.46, 1.415, and any other sections that may apply. The filing deadline was 11:59 p.m. yesterday, December 4, 2006. I made several attempts to file the enclosed document electronically before the deadline, yet they were unsuccessful. In each case, I received the notification that appears at the end of this document, stating that "Proceeding 96-45 is not open for submission to ECFS." The Public Notice issued with the Cingular Petition on November 27, 2006 (DA 06-2367), however, invited interested parties to file comments in the Electronic Comment Filing System (ECFS). Perhaps, ECFS was not operating as it should for some time before the deadline. In an effort to comply with the Commission's rules, I also filed a copy by e-mail with ECFS and the parties listed on the Public Notice, Vickie Robinson and Antoinette Stevens.

Please call me at 202-585-1942, or send me an e-mail message at jeffrey.s.lanning@embarq.com if you have any questions or need anything else.

Best regards,

Director - Federal Regulatory
401 9th Street, NW
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FILED

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

In the Matter of)
Federal State Joint Board on)
Universal Service) CC Docket No. 96-45
Petition of Cingular Wireless, LLC for)
Designation as an Eligible)
Telecommunications Carrier in the)
Commonwealth of Virginia)

OPPOSITION OF EMBARQ CORPORATION

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December 4, 2006

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SUMMARY OF COMMENTS

Universal service funds should be used to support the provision of telecommunications service where it would not be economically feasible to do so under market conditions; it should not be wasted on uneconomic arbitrage (cream skimming). Cingular Wireless, LLC is attempting to turn this important public policy on its head in its petition to be as an Eligible Telecommunications Carrier (ETC) in the Commonwealth of Virginia (the Petition). Moreover, Cingular fails to carry its burden of proof of several specific criteria the Commission has established for ETC designation. Therefore, the Petition should be denied with respect to the Embarq study areas in the Commonwealth. Moreover, the Commission should suspend its consideration of the Petition pending its review of federal high-cost support.

Cingular provides service to less than one-third of Embarq's service territory in the Commonwealth, and Cingular's service area is concentrated in the low-cost, easier-to-serve parts of the Embarq study areas. Cingular most likely is not seeking to provide new or facilities-based service where it would not be available otherwise through market competition. Instead, it appears that Cingular intends to engage heavily in the kind of cream skimming Chairman Martin and the Commission consistently have opposed. Moreover, it is likely that Cingular is planning to rely heavily on resale to meet the criteria for ETC designation. Cingular seeks, therefore, to divert high-cost support away from its intended purpose—supporting the cost of providing carrier-of-last-resort service to customers that would not otherwise have access to telecommunications.

Rather than support true carrier-of-last-resort services, Cingular appears interested in using federal universal service support to benefit a comparatively small number of wireless subscribers that already have other options for telecommunications service. Such a diversion

would undermine Embarq's ability to provide critical network infrastructure comparatively larger numbers of customers in high-cost areas that have no alternative source of telecommunications services. This is uneconomic arbitrage, which harms consumers and violates the purpose and provisions of the Communications Act and Commission rules. Accordingly, the Petition is inconsistent with the public interest and fails to satisfy several specific criteria in the *ETC Designation Order*. It should be denied.

The Cingular Petition Is Not Consistent with the Public Interest. Cingular must prove that the public interest would be served by designating it as an ETC. Cingular has not met this burden and, indeed, it cannot do so under the terms set out by the Commission in the *ETC Designation*. The Petition creates abundant cream-skimming concerns of just the sort that have given the Commission pause. Cingular has not shown how granting it ETC status would offer an overall beneficial change in customer choice; nor has Cingular proven that it will offer any unique advantages to most of the customers in the areas for which it has sought ETC status. Finally, granting Cingular ETC status in Virginia would be harmful to the overall purposes and long-term sustainability of federal universal service support.

The Cingular Petition Also Fails to Satisfy The Specific Requirements Of The ETC Designation Order. Cingular has not met its burden of proof on several of the elements set forth by the Commission in its decision establishing ETC criteria; in fact, the Petition raises more questions than it answers. Notably, it is not clear how Cingular can even make a credible commitment to provide the supported services to all requesting customers in its proposed service territory. In addition, Cingular's coverage is so lacking in Embarq's service area that one cannot imagine how it can, on balance, show that the universal service funds will improve coverage,

signal strength, or capacity overall compared with what would happen should Cingular not receive universal service support.

The Petition is Inconsistent with the Objectives of the Communications Act. Cingular's Petition should be rejected for a third reason—it is inconsistent with the objectives of the Communications Act. Universal service support is intended under the Act to replace implicit subsidies, and it should be used to support the cost of providing service where it would not be economically feasible to do so. Therefore, universal service support should be tied to true carrier of last resort obligations, by which incumbent local exchange carriers (ILECs) such as Embarq are required to build network facilities where they would not otherwise do so because it is not economically feasible, and provide service at rates that do not cover the cost of providing service.

Competitive neutrality will be violated and, ultimately, the entire system of universal service will unravel if competitive ETCs are able to receive support without incurring comparable service obligations across comparable geographical areas. The system is designed to work when all ETCs are providing service where it is not economically feasible to do so otherwise, and at rates that do not cover the costs of providing service. Cingular claims in the Petition that it will build additional cell sites, presumably extending its network beyond where it was economically feasible to deploy facilities in the absence of support. A problem with the Petition, however, is that Cingular's coverage is so sparse in many of the wire centers where it seeks designation, however, that Cingular cannot credibly commit to providing service using its own facilities in such a way as to incur carrier-of-last-resort obligations that are remotely comparable to those incurred by Embarq and other ILECs. Therefore, granting Cingular ETC status will violate competitive neutrality and ultimately threaten universal service.

The Commission Should Suspend Its Consideration of the Petition Pending Review of the High-Cost Fund. Embarq also submits that the Commission to suspend its review of the Petition. As Chairman Martin noted while serving as Commissioner, petitions such as this one “may prejudice the on-going work of the Federal-State Joint Board regarding the framework for high-cost universal service support.” The Commission should not allow for the possibility of distractions from this important industry-wide review, particularly given that pending applications could be rendered moot by Commission action on a Joint Board recommendation.

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

In the Matter of)
)
Federal State Joint Board on)
Universal Service)
) CC Docket No. 96-45
Petition of Cingular Wireless, LLC for)
Designation as an Eligible)
Telecommunications Carrier in the)
Commonwealth of Virginia)

OPPOSITION OF EMBARQ CORPORATION

Universal service funds should be used to support the provision of telecommunications service where it would not be economically feasible to do so under market conditions; it should not be wasted on uneconomic arbitrage (cream skimming). Cingular Wireless is attempting to turn this important public policy on its head in the Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia (the Petition).¹ Cingular fails, therefore, to meet its burden of proof so the Petition should be denied.

Cingular is seeking in the Petition to be designated as an Eligible Telecommunications Carrier² (ETC) throughout all of the Commonwealth of Virginia currently served by Embarq Corporation.³ As the operator of carrier-of-last-resort networks in rural areas of Virginia,

¹ Cingular Wireless, LLC, Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Nov. 7, 2006).

² 47 U.S.C. § 214(e).

³ Embarq provides local, long-distance, mobile, and data services to over seven million lines in eighteen states. In the Commonwealth of Virginia, Embarq operates as the Central Telephone Company of Virginia and United Telephone-Southeast, Inc.

Embarq has unique information and experience to contribute to the Commission's consideration of the Petition.

Cingular provides service to less than one-third of Embarq's service territory in the Commonwealth, and Cingular's service area is concentrated in the low-cost, easier-to-serve parts of the Embarq study areas. Cingular most likely is not seeking to provide new or facilities-based service where it would not be available otherwise through market competition.⁴ Instead, it appears that Cingular intends to engage heavily in the kind of cream skimming Chairman Martin and the Commission consistently have opposed. Moreover, it is likely that Cingular is planning to rely heavily on resale to meet the criteria for ETC designation. Cingular seeks, therefore, to divert high-cost support away from its intended purpose—supporting the cost of providing carrier-of-last-resort service to customers that would not otherwise have access to telecommunications.

Rather than support true carrier-of-last-resort services, Cingular appears interested in using federal universal service support to benefit a comparatively small number of wireless subscribers that already have other options for telecommunications service. Such a diversion would undermine Embarq's ability to provide critical network infrastructure comparatively larger numbers of customers in high-cost areas that have no alternative source of telecommunications services. This is uneconomic arbitrage, which harms consumers and violates the purpose and provisions of the Communications Act⁵ and Commission rules. The

⁴ Cingular's plans for using universal service support should it be designated an ETC are contained in Exhibit E to the Petition, for which Cingular requested confidential treatment pursuant to section 0.459 of the Commission's rules. Embarq has not yet reviewed Cingular's plans, therefore, but a common-sense review of the extent of Cingular's coverage in Embarq's service area produces the inescapable conclusion that Cingular does not intend to serve the more remote parts of the Embarq study areas.

⁵ 47 U.S.C. § 254.

Commission should dismiss the Petition, therefore, at a minimum with respect to the Embarq study areas.

The Commission Should Suspend Its Review of the Petition Pending Review of the High-Cost Fund. Embarq also submits that the Commission to suspend its review of the Petition. As Chairman Martin noted while serving as Commissioner, petitions such as this one “may prejudice the on-going work of the Federal-State Joint Board regarding the framework for high-cost universal service support.”⁶ The Commission should not allow for the possibility of distractions from this important industry-wide review, particularly given that pending applications could be rendered moot by Commission action on a Joint Board recommendation.

I. CINGULAR SHOULD NOT BE DESIGNATED AS AN ETC IN VIRGINIA.

Cingular has not met its burden of proof and should not be designated as an Eligible Telecommunications Carrier in Virginia. In particular: (1) the Petition is against the public interest; (2) the Petition does not satisfy the terms of the Commission’s decision (*ETC Designation Order*)⁷ setting the minimum requirements for designation as an ETC; and (3) it is inconsistent with the objectives of the Communications Act.

A. Granting The Cingular Petition Would Harm The Public Interest.

Cingular must prove that the public interest would be served by designating it as an ETC.⁸ Cingular has not met this burden and, indeed, it cannot do so under the terms set out by

⁶ Dissenting Statement of Commissioner Kevin J. Martin, *Federal-State Joint Board on Universal Service Virginia Cellular, LLC Petition for Designation as an ETC in the Commonwealth of Virginia*, CC Docket 96-45, Memorandum Opinion & Order, 19 FCC Rcd 1563, ____ (2004) (*Virginia Cellular Dissent*).

⁷ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report & Order, 20 FCC Rcd 6371 (2005) (*ETC Designation Order*).

⁸ *Id.*, at ____ ¶¶ 40-44.

the Commission. The Petition creates abundant cream-skimming concerns of just the sort that have given the Commission pause. Cingular has not shown how granting it ETC status would offer an overall beneficial change in customer choice; nor has Cingular proven that it will offer any unique advantages to most of the customers in the areas for which it has sought ETC status. Finally, granting Cingular ETC status in Virginia would be harmful to the overall purposes and long-term sustainability of federal universal service support.

1. Cingular's Petition Creates Cream-Skimming Concerns in Abundance.

When he was a Commissioner, Chairman Martin wrote that he would prefer that:

the Commission require ETCs to provide service throughout the same geographic service area in order to receive universal service support. This obligation would help guard against the potential for creamskimming. I would have supported a recommendation to deny future requests to redefine the service areas of incumbent rural telephone companies--and to deny ETC designations in instances where an ETC's proposed service area does not cover the entire service area of the incumbent service provider.⁹

Interestingly, Cingular has requested ETC designation throughout virtually the entire Commonwealth of Virginia, including all of Embarq's wire centers in the Commonwealth. In reality, however, this has not guarded against the potential for cream-skimming; instead, it has increased the likelihood that such uneconomic arbitrage would occur. In fact, the Petition creates even greater cream-skimming concerns that it would have if Cingular had not petitioned for ETC status in every wire center.

Embarq operates as a rural carrier in Virginia. Both of Embarq's operating entities—
Central Telephone Company of Virginia and United Telephone-Southeast, Inc.—are designated

⁹ Separate Statement of Commissioner Kevin J. Martin, Dissenting in Part, Concurring in Part, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 19 FCC Rcd 4257 ____ (2004) (*ETC Designation Recommended Decision Separate Statement*).

“rural” for purposes of federal universal service. In its decision on the Virginia Cellular ETC Petition¹⁰ and its decision on the Highland Cellular ETC Petition,¹¹ the Commission offered extensive discussions of the potential for cream-skimming in rural areas. The Commission also suggested that concerns regarding potential cream-skimming should factor into the public interest analysis of a petition for ETC designation in rural carriers’ areas.

In those orders the Commission stated that cream-skimming “occurs when competitors seek to serve only the low-cost, high-revenue customers in a rural telephone company’s study area.” That statement, while not incorrect, is incomplete and over-simplistic. Cream-skimming can occur two different ways:

1. When a competitor only serves customers in low-cost areas, and does not serve high-cost areas (the Commission’s definition); and
2. When a competitor limits its network deployment to low-cost areas, and serves high-cost areas by purchasing the retail services of other providers at below-cost rates and reselling them.

In both cases, the competitor is avoiding the actual costs of serving high-cost areas. In the first case, the competitor avoids the costs by not entering the market at all. In the second case, the competitor avoids the costs by selectively relying on resale. In both cases the competitor is, in fact, cream-skimming because the competitor is selectively incurring only those costs that will not reduce its profitability below a certain level; the only difference is the method by which the competitor manages to avoid the high costs.¹²

¹⁰ *Federal-State Joint Board on Universal Service Virginia Cellular, LLC Petition for Designation as an ETC in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion & Order, 19 FCC Rcd 1563, ____ ¶¶ 31-35 (2004) (*Virginia Cellular*).

¹¹ *Federal-State Joint Board on Universal Service/Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Order, 19 FCC Rcd 6422, ____ ¶¶ 26-33 (2004) (*Highland Cellular*).

¹² Textbook definitions of cream-skimming do not generally incorporate the existence of

The Commission's discussions of cream-skimming in *Virginia Cellular* and *Highland Cellular* are limited to examinations of cream-skimming across wire centers.¹³ The Commission did not address the very real problem of cream-skimming within a single wire center. Moreover, the Commission did not assess the role that resale plays in facilitating cream-skimming. Cingular's petition is a case-study of cream-skimming within individual wire centers that is facilitated by its ability to rely on "a combination of its own facilities and resale."

Embarq's Meadowview wire center offers a clear illustration of this cream-skimming. The Meadowview wire center is located in south eastern Virginia, and has fewer than 2,000 households in it. According to the Commission's Synthesis Model (also referred to as HCPM) the forward-looking economic cost of serving this wire center is \$44.34 per line, *on average*. The higher-density portions of Meadowview, located in the southern part of the wire center along Interstate 81, would have a cost per line well below \$44.34, and the more sparsely populated portions in the north would exhibit a much higher cost. According to coverage maps available on its website, Cingular's coverage is entirely limited to the southern half of the wire center along Interstate 81—the lower-cost areas. In fact, it appears that Cingular has *no* coverage in the higher-cost, lower-density, northern half of the wire center.

Because Cingular has no network in the higher cost portion of the wire center, and because it has committed to serve the entirety of the wire center, it will purportedly rely on resale to fulfill its obligations. *In doing so, it avoids the costs of actually serving the high cost areas just as surely as if it had not entered the high-cost portion of the market at all.* Embarq's retail

regulation-based market distortions such as the mandate that incumbents must resell their telephone services to competitors at what are, in fact, below-cost rates. Therefore it is not surprising that such definitions limit the mechanism by which high-costs may be avoided to "not entering" a market.

¹³ *Supra*, nn.10-11.

rates for residential service in Meadowview are less than \$16.00 per month. If Cingular were allowed to resell that service and, moreover, to take a discount off that rate, it would reap an uneconomic windfall. The costs of an efficient provider *actually serving* that portion of the market are well above \$44.34 per line, but the costs Cingular would incur would be less than \$15. This is unacceptable as a matter of rule and public policy.

Assuming, as we should, that Cingular would report its customer counts correctly to the Universal Service Administration Company it is true that Cingular would not (and should not) receive federal universal support for its resale customers. However, the support that Cingular *would* receive for its higher-density customers in the southern portion of the wire center is based on a wire center average cost of \$44.34. And that figure, \$44.34, is only as high as it is because of the higher-cost, northern portions of the wire center that Cingular has managed to avoid *actually serving*. Therefore, Cingular would reap the benefits of uneconomic arbitrage—cream skimming—even while purporting to serve the entire wire center, and customers would ultimately suffer.

To summarize this example of Meadowview, the facts are as follows:

Fact #1: Cingular has limited its network to the lowest-cost portions of the wire center.

Fact #2: By using resale in the high-cost portions Cingular meets its obligation to “serve” all customers in the wire center but actually avoids the costs of doing so.

Fact #3: By selectively incurring only low costs, and selectively avoiding high costs, Cingular’s cream-skimming *within* the Meadowview wire center is no different than the cream-skimming across wire centers the Commission has denounced.

Fact #4: The USF support dollars Cingular would receive in Meadowview are based on the cost of serving the high-cost areas, areas that Cingular has avoided. And most importantly...

Fact #5: The example of Meadowview is repeated over and over in the vast majority of Embarq wire centers in Virginia.

Appendix A provides a discussion and a series of maps depicting the coverage of Cingular in Embarq's Virginia serving territory. Of the ninety wire centers in Embarq's region, Cingular appears to offer only partial coverage in over fifty (50) of them, and it offers *no* coverage in an additional twenty-one (21). In many cases the "partial" coverage amounts to no more than a fraction of the wire center's overall area, most often in a population center or along a highway or interstate. Individual maps of a few representative wire centers are included, demonstrating that in some cases Cingular's "coverage" represents as little as 3% of the area. In sum, Cingular serves 3034 square miles of Embarq's 9698 square miles of service territory in Virginia, which is just 31.28% of the area for which universal service support is provided on an average-cost basis. Moreover, the average population density and cost of service are markedly lower in the areas Cingular does serve. Even if Cingular intends to use resale of some form to provide service in the remaining 6664 square miles of the service territory, it is apparent that there are significant risks of cream skimming. Moreover, it is also apparent that the Petition puts at risk support for the majority of these rural areas in the hope of benefiting a much smaller part of the area. Given the dramatic absence of anything resembling ubiquity of coverage, the Commission is duty-bound to consider the impacts of cream-skimming and to investigate.

In previous discussions regarding cream-skimming the Commission has used a comparative density analysis to determine whether the petitioning carrier was selectively serving lower-cost areas. Historically, these density comparisons have been made at the wire center level. In particular, in *Virginia Cellular* the Commission denied granting ETC status in one specific rural incumbent LEC's study area "... because Virginia Cellular would only have served

the lowest cost, highest density wire center within [that] study area.”¹⁴ Embarq submits that there is no fundamental reason that wire centers should be the only basis for a comparative density analysis. An analysis should be conducted to determine if Cingular is selectively covering and serving only the “lowest cost, highest density” *portions* of Embarq’s wire centers, or of its overall study area. If so, the cream-skimming is no less real and no less problematic than that which caused the Commission to deny ETC status for the one rural area in *Virginia Cellular*. And, as described above, a casual commitment to use “resale” to fulfill service obligations does not mitigate the negative effects of the cream skimming.

Finally, Cingular may not lay the cream-skimming problem at Embarq’s feet by claiming that Embarq should have disaggregated its support. As the Commission wrote in *Highland Cellular*:

32. As we discussed in the *Virginia Cellular Order*, 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. Universal service support is calculated on a study-area-wide basis. Although Verizon South did not take advantage of the Commission’s disaggregation options to protect against possible uneconomic entry in its lower cost area, we find on the facts here that designating Highland Cellular as an ETC in these requested wire centers potentially could undermine Verizon South’s ability to serve its entire study area. Specifically, because Verizon South’s study area includes wire centers with highly variable population densities, and therefore highly variable cost characteristics, disaggregation may be a less viable alternative for reducing creamskimming opportunities. This problem may be compounded where the cost characteristics of the incumbent and competitor differ substantially. We therefore reject arguments that incumbents can, in every instance, protect against creamskimming by disaggregating high-cost support to the higher-cost portions of the incumbent’s study area.¹⁵

¹⁴ *Virginia Cellular* ¶ 35.

¹⁵ *Highland Cellular* ¶ 33.

2. *Cingular Has Not Shown that Granting It ETC Status Would Offer an Overall Beneficial Increase in Customer Choice or Unique Advantages in Its Service Offerings for Most Customers.*

A fundamental problem with the Petition is that the claimed benefits are small, while the likely costs are large. Cingular states that it will use the high-cost funds to increase its network coverage, but its current network coverage is so sparse, at least in Embarq's service area that Cingular cannot credibly claim that it will offer anything approaching ubiquitous coverage. Instead, Cingular must intend to rely heavily on resale of other networks to fulfill ETC service obligations. As mentioned above, neither Embarq nor any other interested party has had an opportunity to review Cingular's build-out plans. Therefore, Embarq's analysis relies, as it must, on common sense and logical inference from known facts. Once a protective order is entered and Embarq has had an opportunity to fully review the Petition, Embarq will update its analysis.

The Commission has established criteria by which it determines whether an ETC designation is consistent with the public interest. As the ETC applicant, Cingular must prove that designating it as an additional ETC in Virginia will serve the public interest. The Commission "takes into account the benefit of increased consumer choice when conducting its public interest analysis," and "also considers the particular advantages and disadvantages of an ETC's service offering."¹⁶ Cingular attempts to meet its burden of proof on these public interest factors by claiming that it will build some additional cell sites "to improve quality of service and extend telephone service to individuals and businesses that currently have no choice of telephone provider."¹⁷ Cingular also claims that the "mobility of Cingular's wireless service will provide

¹⁶ *ETC Designation Order* ¶ 44.

¹⁷ Petition, at 14.

further benefits to consumers,” and “the availability of mobile data services on Cingular’s network is a public interest benefit to subscribers of Cingular’s universal service offering.”¹⁸

Cingular’s coverage is sparse throughout Embarq’s service area. As described above, Cingular has coverage in only about one-third of the service area. More importantly, there are twenty-one wire centers where Cingular has no coverage at all, and fifty wire centers in Embarq’s territory where Cingular has only partial coverage. Logically, therefore, Cingular cannot credibly plan to use high-cost support to do more than modestly increase its coverage area, which will only benefit a comparatively small number of customers, most of whom would have service in any event. Conversely, the funds that Cingular would receive are currently being used by other ETCs to bring the benefits of universal service to large numbers of customers, many of whom may not have any other service alternative. Finally, even if Cingular were to offer improvements in a few parts of the requested service areas, this would not begin to justify the resale arbitrage it apparently intends to pursue throughout the rest of the service areas.

In a nutshell, the problem with the Petition, like so many other wireless ETC petitions, is that it seeks to divert funds intended to bring the benefit of telecommunications service where it would not otherwise be available and use them to modestly increase wireless coverage where customers already have telecommunications service. This is directly contrary to the principle of universal service, and the mandates of the Communications Act. Accordingly, Cingular cannot meet its burden of proving that the public interest would be served through ETC designation.

¹⁸ Petition, at 14-15.

3. *Granting Cingular ETC Status Would Be
Harmful to Universal Service Support.*

Cingular does not address anywhere in the Petition how adding another ETC will benefit consumers in the rural areas of the Commonwealth of Virginia, such as those served by Embarq. Embarq submits that multiple ETC will harm rather than help customers in these areas and, accordingly, that the public interest will not be served by adding yet another ETC. Therefore, Cingular's petition should be denied.

The Communications Act established different public interest standards for additional ETCs in rural and non-rural areas because there is a clear difference in the cost-benefit analysis between the two areas. Rural areas are more sparsely populated and, hence, less able to support multiple telecommunications service providers. Telecommunications networks exhibit considerable economies of scale and density, so reducing the number of customers served can significantly increase the average cost of service for all customers. Therefore, having too many providers in a rural market can make it uneconomic for any of them to provide service. Consequently, adding additional ETCs in rural areas can, in fact, harm consumers by driving up the average cost of providing service for all providers. This will either thwart the national policy goal of universal service or put substantial additional demand on the high-cost fund (and any associated state universal service fund).

The public interest would also be disserved should Cingular be permitted to use purchase services at below-cost rates and resell them to satisfy the requirement of section 214 that it provide service throughout the area where it would be designated as an ETC. This would produce dramatically uneconomic arbitrage and could threaten the viability of universal service support. Instead, Cingular should only be permitted to use the resale option under section 214 when it pays rates that cover the actual cost of providing the services being resold. Nor can

Cingular avoid its obligation by claiming that the cost of obtaining services for resale is “unreasonable.”

The Petition is also deficient to the extent that Cingular may seek to rely on reselling Embarq’s retail service to serve some of the over 6000 square miles of territory (nearly 70% of the total are) in the Embarq service territory. Embarq’s retail services are often sold at regulated rates, however, that do not cover the cost of providing service because they are averaged across lower-cost and higher-cost areas. Neither the Act not the Commission’s rules can rationally be read in such a way that an ETC may take support in low-cost areas while using resale to avoid incurring the cost of providing service in high-cost areas. Accordingly, Cingular would need to negotiate with Embarq to establish suitable rates for obtaining service for resale. Only then would Cingular be able to demonstrate that it could, in fact, to provide the supported services throughout the area for which it seeks ETC designation.

B. The Cingular Petition Does Not Satisfy The Specific Requirements Of The *ETC Designation Order*.

The Petition should also be denied because it does not satisfy the specific requirements of the *ETC Designation Order*. It is important at the outset of this analysis to remember that Cingular bears the burden of proof on this point. The requirements were set out in the *ETC Designation Order*:

Based on the record before us, we find that an ETC applicant must demonstrate: (1) a commitment and ability to provide services, including providing service to all customers within its proposed service area; (2) how it will remain functional in emergency situations; (3) that it will satisfy consumer protection and service quality standards; (4) that it offers local usage comparable to that offered by the incumbent LEC; and (5) an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act.¹⁹

Cingular has not met its burden of proof on several of these elements; in fact, the Petition raises more questions than it answers. Notably, it is not clear how Cingular can even make a credible commitment to provide the supported services to all requesting customers in its proposed service territory. In addition, Cingular's coverage is so lacking in Embarq's service area that one cannot imagine how it can, on balance, show that the universal service funds will improve coverage, signal strength, or capacity overall compared with what would happen should Cingular not receive universal service support.

Cingular Cannot Make a Credible Commitment to Provide the Supported Services to All Requesting Customers in Embarq's Service Areas. Cingular has stated in the Petition that it will provide the Supported Services to all requesting customers in the entire Commonwealth of Virginia, including Embarq's services areas, which are designated as rural areas. As described above, Cingular currently has coverage in very little of Embarq's service areas—only about one-third of the overall service area. While the Act states that an ETC may use a combination of its own facilities and resale to provide service,²⁰ surely it cannot satisfy this obligation by using exclusively or predominately resale in the high-cost portions of the areas where it seeks ETC designation. In any event, Cingular must prove that it will, in fact, be capable of providing

¹⁹ *ETC Designation Order*, ¶ 20.

²⁰ 47 U.S.C. § 214(e).

service *everywhere* in Embarq's service areas. This is fundamental to the very definition of universal service, and it would undermine the entire system of universal service support to allow some ETCs to receive support while failing to provide *universal* service in return.

Additionally, even if Cingular were planning on using roaming agreements to meet its obligation to offer service throughout the area in which it is an ETC, a substantial part of Embarq's service area appears to be without any coverage from a commercial mobile radio service (CMRS) provider. In those places, Cingular would have to resell landline service. Cingular does not even have a resale agreement with Embarq, however, and while Embarq may be required to allow Cingular to resell its services, at least once Cingular were to be certified as a competitive local exchange carrier (which it is not), this would have to be negotiated.

Finally, Cingular is required to advertise the supported services throughout its ETC areas. Cingular apparently is intending to satisfy its obligation, at least in part, in Embarq's service areas by reselling *landline* telecommunications services because of the extent to which wireless service is unavailable. Cingular also fails to prove that it can meet this requirement because it is certified as a CLEC in Virginia. Therefore, Cingular cannot meet the very obligation it is claiming that it will meet. Moreover, even if Cingular were to be certified as a CLEC it would also have to develop some measure of expertise and develop some customer awareness of its *landline* local exchange services before it could credibly rely on reselling Embarq's local services to satisfy ETC obligations. It could not simply advertise its CMRS services as this would fail to meet its obligation to advertise its services throughout the area in which it were designated as an ETC.

Cingular Cannot Demonstrate that, On Balance, It will Improve Service for Customers.

The Commission adopted the further requirement in the *ETC Designation Order* that an ETC applicant:

demonstrate its commitment and ability to provide supported services throughout the designated service area ... by submitting a formal network improvement plan that demonstrates how universal service funds will be used to improve coverage, signal strength, or capacity that would not otherwise occur absent the receipt of high-cost support.²¹

Cingular simply states that its five-year plan is attached as confidential information. The Petition contains no analysis of how any improvements funded by universal service support will, on balance, benefit customers in the area. This is critical—the obligation cannot be satisfied simply by improving service for some cellular customers at the cost of depriving support that was used to provide essential supported services to other customers. Instead, the benefits and harms to customers must be weighed against each other and the ETC must, on balance, improve universal service. The public interest demands no less, and Cingular has failed to meet this burden.

Cingular Cannot Show That It Could Provide Equal Access if Called Upon to Do So.

While a Commissioner, Chairman Martin would have imposed an equal access obligation on all ETCs.²² This seems sensible, yet the Commission declined to do so. Yet, the Commission did adopt an obligation for ETC applicants that they be prepared to offer equal access:

Although we do not impose a general equal access requirement on ETC applicants at this time, ETC applicants should acknowledge that we may require them to provide equal access to long distance carriers in their designated service area in the event that no other ETC is providing equal access within the service area.²³

²¹ *ETC Designation Order* ¶ 23.

²² *ETC Designation Recommended Decision Statement, supra.*

²³ *ETC Designation Order, ¶ 35.*

The Petition is largely silent on this point, simply acknowledging the text of the rule. This cannot satisfy Cingular's burden of proof on this point. Instead, Cingular must offer some credible evidence that it could, in fact, comply with such a requirement. Otherwise, the Commission's requirement would be devoid of purpose and ETCs could, in practice, flout the Commission's rules by merely "mouthing" the acknowledgment while having no intent or capability to comply with an equal access requirement.

Cingular does not offer equal access today, and it seems certain that it would cost for Cingular to develop the capability if, indeed, it could even do so using its current switching technology. The Commission should, therefore, require Cingular to come forward with credible and sufficient evidence demonstrating how it will offer equal access should it be so required.

C. The Petition Is Inconsistent With The Objectives Of The Communications Act.

Cingular's Petition should be rejection for a third reason—it is inconsistent with the objectives of the Communications Act. Universal service support is intended under the Act to replace implicit subsidies, and it should be used to support the cost of providing service where it would not be economically feasible to do so. Therefore, universal service support should be tied to true carrier of last resort obligations, by which incumbent local exchange carriers (ILECs) such as Embarq are required to build network facilities where they would not otherwise do so because it is not economically feasible. Carrier-of-last-resort regulations also require Embarq and other ILECs to provide service at rates that do not cover the cost of providing service. In this way, ILECs such as Embarq, fulfill the national policy goal of providing affordable, and high-quality, telecommunications services universally. Embarq and other ILECs welcome their role in serving all Americans, but the Commission and state regulators must not, and indeed

cannot, require Embarq and other ILECs to provide universal service without adequate compensation.

The Telecommunications Act of 1996 mandates “specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.”²⁴ The current federal high-cost support mechanisms continue to rely on carrier-of-last-resort obligations to ensure that the supported services are, in fact, available to all customers. Those obligations still apply only to ILECs, and support is provided based on average costs incurred across ILEC study areas. Therefore, as Commissioner Martin noted in 2004, it is important that competitive ETCs only receive support where they fulfill comparable obligations across comparable geographical areas:

I would have preferred that the Joint Board recommend that the Commission require ETCs to provide the same type and quality of services throughout the same geographic service area as a condition of receiving universal service support. In my view, competitive ETCs seeking universal service support should have the same “carrier of last resort” obligations as incumbent service providers in order to receive universal service support. Adopting the same “carrier of last resort” obligation for all ETCs is fully consistent with the Commission’s existing policy of competitive and technological neutrality amongst service providers.²⁵

Competitive neutrality will be violated and, ultimately, the entire system of universal service will unravel if competitive ETCs are able to receive support without incurring comparable service obligations across comparable geographical areas. The system is designed to work when all ETCs are providing service where it is not economically feasible to do so otherwise, and at rates that do not cover the costs of providing service. A corollary of this point is that, where a competitive ETC is not using its own network to provide service throughout the

²⁴ 47 U.S.C. § 254(b)(6). This mandate has not been fulfilled at the federal level. Nor, has it been fulfilled in most states. Embarq is not addressing these deficiencies in this pleading, however.

²⁵ *ETC Designation Recommended Decision Statement, supra.*

same geographic area as the ILEC, it is *not* incurring the same carrier of last resort obligations as is the ILEC. In these circumstances, a competitive ETC may not be using universal service funds appropriately. Instead, it may be reaping a windfall by collecting support solely for providing service where it could do so without support.

Embarq and other ILECs do use universal service support appropriately because they fulfill carrier of last resort obligations that require them to build network where they would not do so otherwise, and to provide service to customers at rates that do not cover the cost of providing service. The difference between costs and rates has been made up through rate averaging and higher rates to customers in low-cost areas. Cingular has not faced similar requirements however and, presumably, its current network was built where it was economically feasible to build and operate such a network *in the absence of support*. Accordingly, there is no public policy justification for providing universal service support to Cingular for its current network; doing so would only provide Cingular with an unwarranted windfall.

Cingular claims in the Petition that it will build additional cell sites,²⁶ presumably extending its network beyond where it was economically feasible to deploy facilities in the absence of support. A problem with the Petition, however, is that Cingular's coverage is so sparse in many of the wire centers where it seeks designation, however, that Cingular cannot credibly commit to providing service using its own facilities in such a way as to incur carrier-of-last-resort obligations that are remotely comparable to those incurred by Embarq and other ILECs. Therefore, granting Cingular ETC status will violate competitive neutrality and ultimately threaten universal service.

²⁶ Petition, at 14.

**II. THE COMMISSION SHOULD SUSPEND CONSIDERATION
OF THE PETITION PENDING COMPLETION OF ITS
REVIEW OF THE HIGH-COST SUPPORT MECHANISMS**

The Commission should suspend consideration of the Petition pending review of the high-cost support mechanisms. As Chairman Martin noted while serving as Commissioner, individual ETC petitions “may prejudice the on-going work of the Federal-State Joint Board regarding the framework for high-cost universal service support.”²⁷ The Commission should not allow for the possibility of distractions from this important industry-wide review, particularly given that pending applications could be rendered moot by Commission action on a Joint Board recommendation.

The Petition is directly implicated in the Commission’s broader review of high-cost support in at least two ways. First, ETC petitions are putting pressure on the Commission to consider broad policy issues in a piece-meal fashion when they should be considered together in a larger rulemaking.²⁸ There are substantial interactions between the individual rules and policies that collectively make up universal service support. When they are considered in isolation, it is difficult to make decisions effectively. Instead, decisions that may seem rational can turn out to have unintended and undesirable effects. Therefore, isolated decisions can interfere with and disrupt the Commission’s broader (and more important) review of high-cost support mechanisms.

Second, any decision that is taken on the Petition will itself be subject to the outcome of the Commission’s broader review of high-cost support. Therefore, Commission or Bureau action could subject the parties involved to unnecessary effort and expense both in the process of

²⁷ *Virginia Cellular Dissent, supra.*

²⁸ *See, e.g., Virginia Cellular; Highland Cellular.*

reviewing the Petition and acting on any decision in the market. Moreover, customers could easily be inconvenienced when the Commission does complete its broader review of high-cost support and companies respond to any new policies or procedures. Accordingly, Embarq urges the Commission to not act on the Petition until the universal service reform proceeding, including analysis of reverse auctions, is completed.

III. CONCLUSION

Cingular's Petition should be denied because it (1) fails to comply with the requirements established by the Commission in the *ETC Designation Order*; (2) is against the public interest; and (3) is inconsistent with the objectives of the Communications Act. In addition, the Commission should suspend review of the Petition pending review of the high-cost support mechanisms.

Respectfully submitted,

EMBARQ CORPORATION

By:



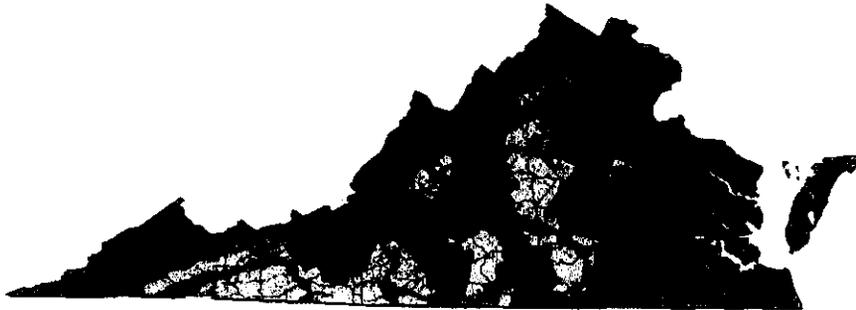
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December 4, 2006

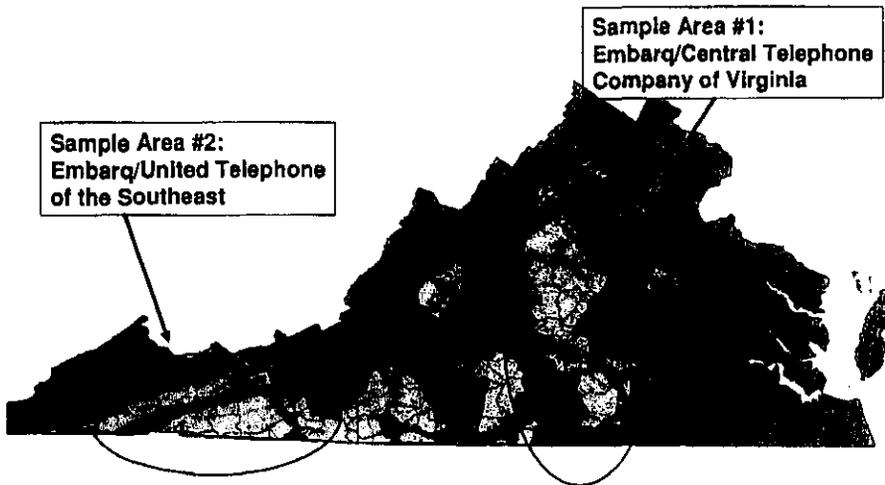
APPENDIX A

Embarq Serving Territory in Virginia



MAP #1

Embarq Serving Territory in Virginia



MAP #2



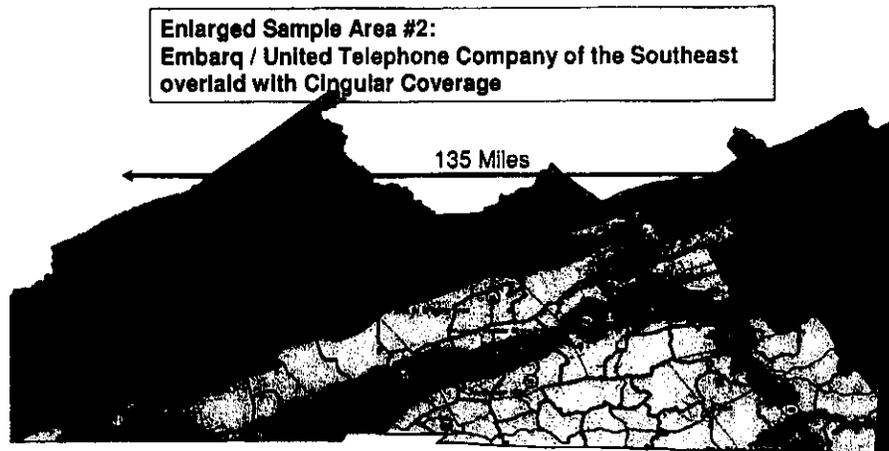
Enlarged Sample Area #1:
Embarq / Central Telephone
Company of Virginia
overlaid with
Cingular Coverage

Cingular Coverage

- Coverage Legend
- Best
 - Good
 - Moderate
 - Partner
 - No Coverage

EMBARQ EXCHANGES

MAP #3



Enlarged Sample Area #2:
Embarq / United Telephone Company of the Southeast
overlaid with Cingular Coverage

Cingular Coverage

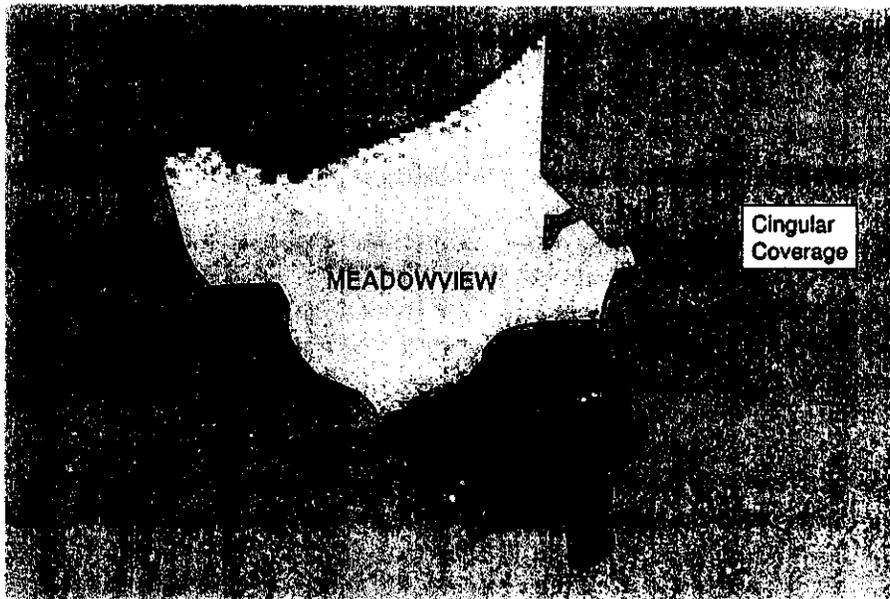
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 - No Coverage

EMBARQ EXCHANGES

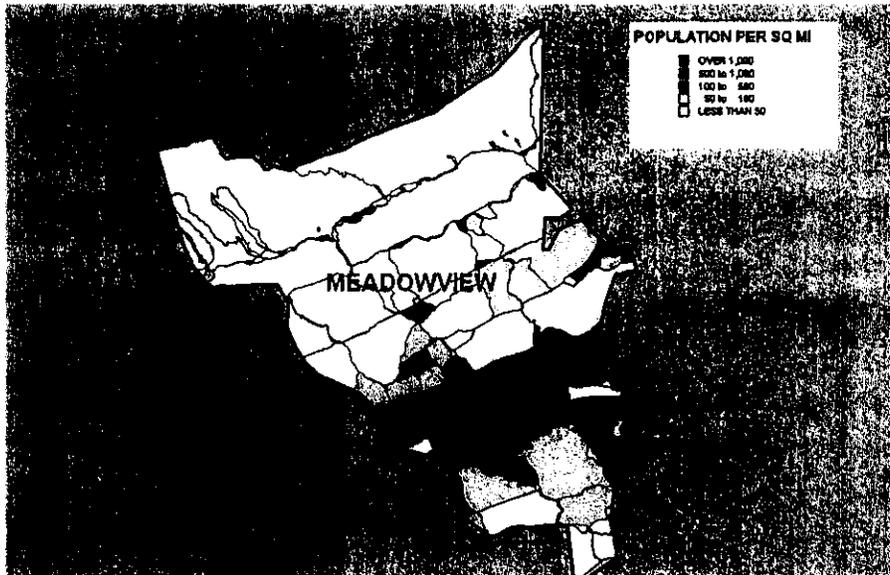
MAP #4

APPENDIX B

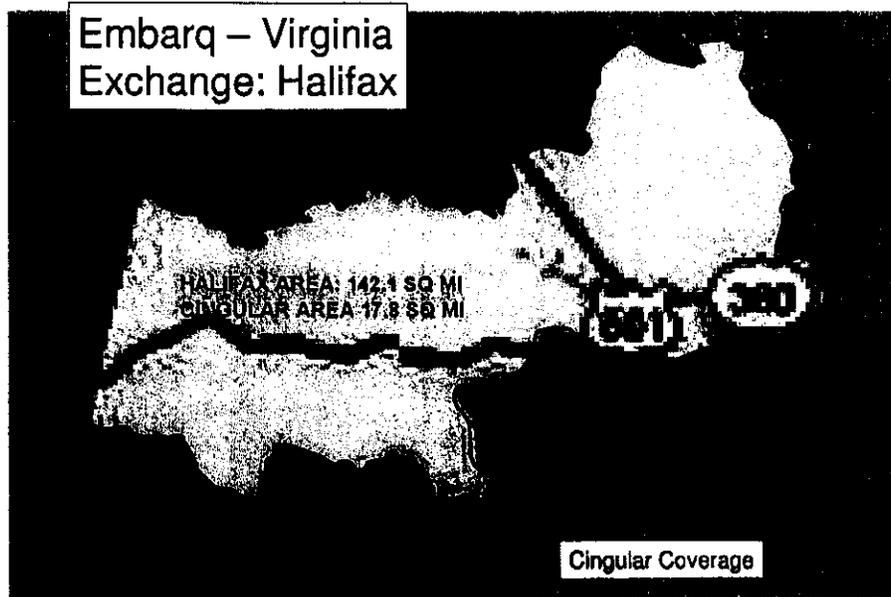
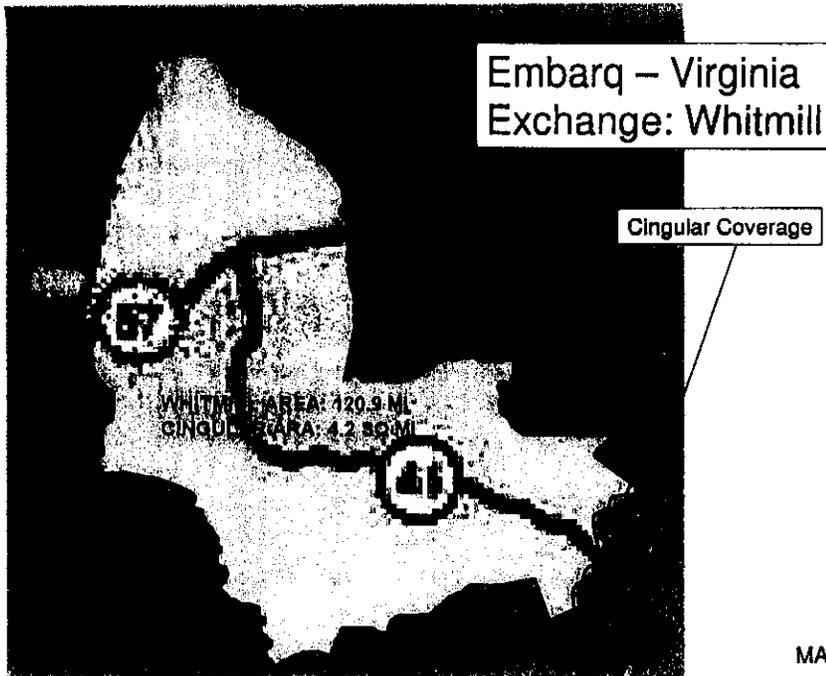
Meadowview Wire Center – Cingular Coverage

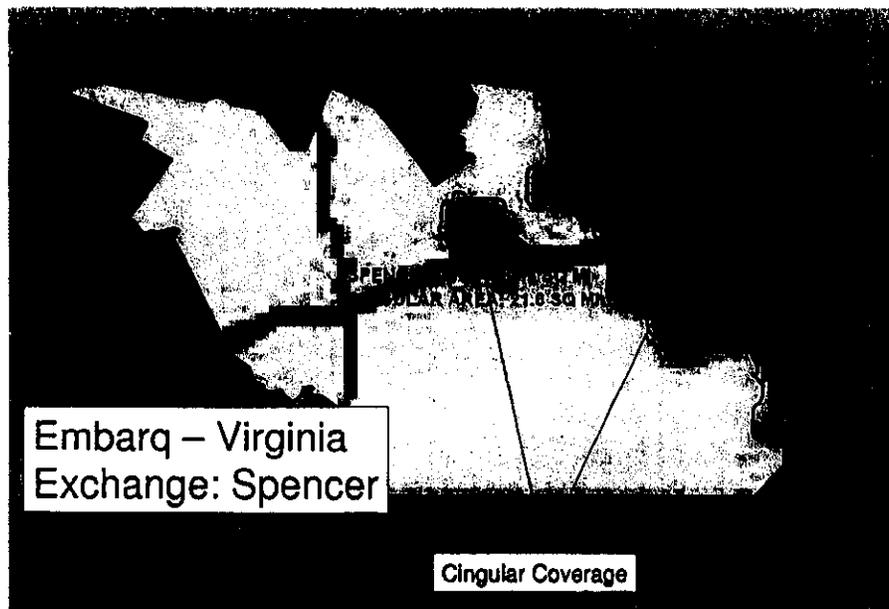
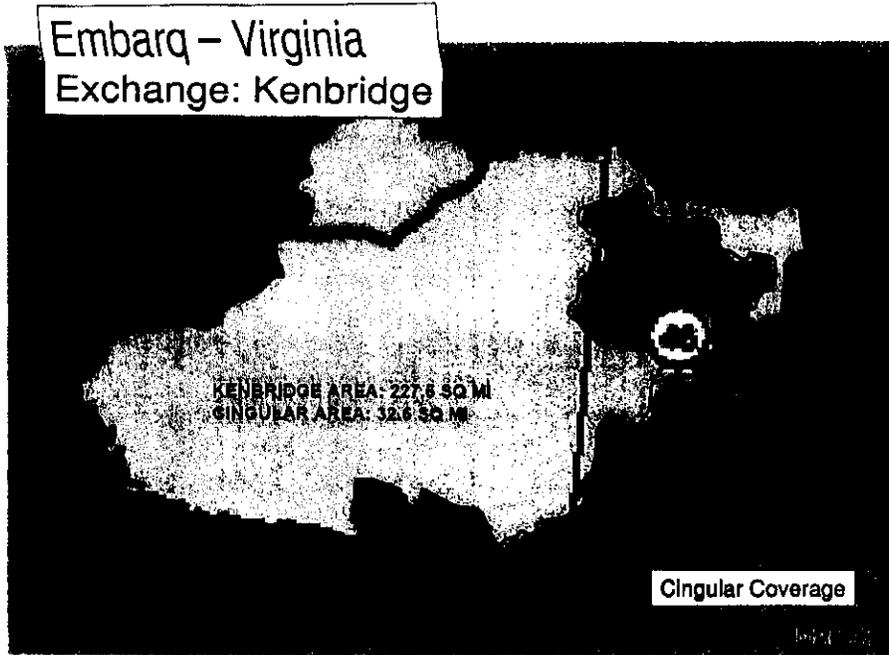


Meadowview Wire Center – Density by Census Block

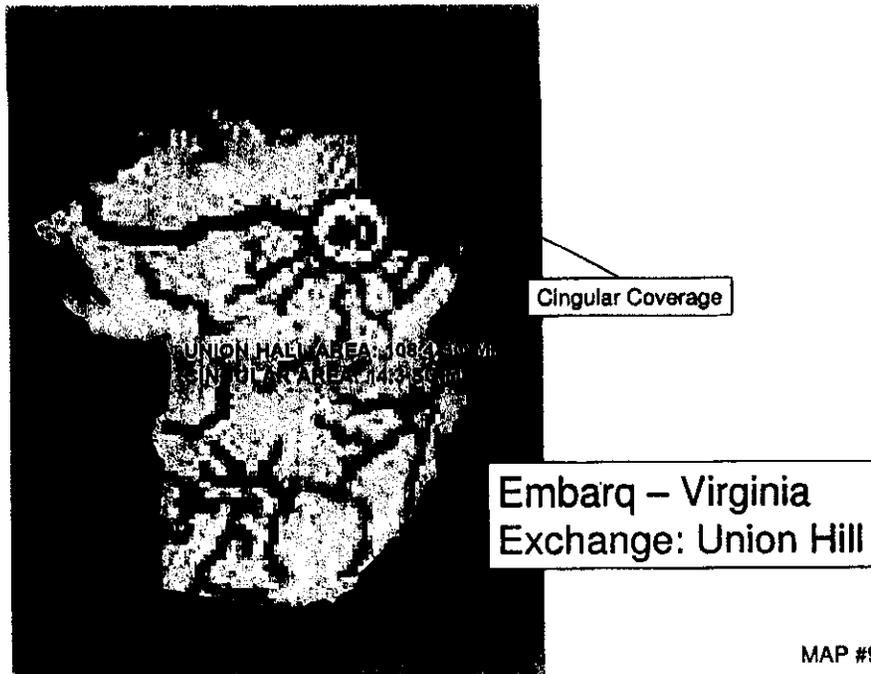


APPENDIX C





MAP #8



FCC Federal Communications Commission

Application Error(s)

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