

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

FILED/ACCEPTED

JAN - 3 2007

Federal Communications Commission  
Office of the Secretary

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	)	

**REPLY TO CINGULAR'S OPPOSITION TO EMBARQ'S FREEDOM OF  
INFORMATION ACT REQUEST AND MOTION FOR A PROTECTIVE ORDER**

Cingular Wireless, LLC (Cingular) is trying to have it both ways. Cingular wants, and in fact needs, the Commission to rely on the five-year build-out plan (Cingular's Five-Year Service Improvement Plan, or SIP) it filed as Exhibit E to the Petition.<sup>1</sup> On the other hand, Cingular wants to deny interested parties, such as Embarq Corporation, the opportunity to comment on the SIP. Cingular cannot have it both ways, however, because "information in agency files or reports identified by the agency as relevant to the proceeding [must] be disclosed to the parties for adversarial comment."<sup>2</sup> The SIP is a necessary element of the Petition pursuant to the rules adopted in the *ETC Designation Order*.<sup>3</sup> Therefore, either the SIP must be made available (through public disclosure or protective order) or the Petition must be denied.

<sup>1</sup> 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) (the Petition).

<sup>2</sup> *U.S. Lines, Inc. v. Fed. Maritime Comm'n.*, 584 F.2d 519, 534 (D.C. Cir. 1978).

<sup>3</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report & Order, 20 FCC Rcd 6371 (2005) (*ETC Designation Order*) (adopting Rule 54.202(a)(1)(B)).

**I. CINGULAR MUST DISCLOSE THE CONTENTS OF THE SIP TO INTERESTED PARTIES BECAUSE IT IS AN ESSENTIAL ELEMENT OF CINGULAR'S PETITION**

Cingular argues in its Opposition to Embarq's Freedom of Information Act Request and Motion for a Protective Order<sup>4</sup> that the SIP is protected from disclosure under the Freedom of Information Act (FOIA).<sup>5</sup> Cingular also argues that the Commission should not issue a protective order similar to those it issued to permit adversarial comments on sensitive information in proceedings involving mergers, forbearance petitions, and petitions for relief under Section 271 of the Communications Act.<sup>6</sup> While the Commission may have the freedom to choose one of the two options—public disclosure or disclosure pursuant to protective order—Cingular ultimately must disclose the contents of the SIP to interested parties so that they may offer adversarial comments. Otherwise, the Commission may not rely on the SIP in its determination, which would doom the Petition because Section 54.202(a)(1)(B) of the Commission's rules requires an applicant to “submit a five-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-

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<sup>4</sup> Cingular Wireless, LLC, Opposition to Embarq's Freedom of Information Act Request and Motion for a Protective Order, *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 (filed Nov. 7, 2006) (the Opposition).

<sup>5</sup> 5 U.S.C. § 522(b)(4).

<sup>6</sup> *E.g.*, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer Of Control - Protective Order*, WC Docket 06-74, Order, 21 FCC Rcd 5215 WCB 2006); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket 06-172, Protective Order, 21 FCC Rcd 10,177 (WCB 2006); *Application of Qwest Communications International, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 For Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket 03-194, Protective Order, 18 FCC Rcd 18,257 (WCB 2003)..

wire center basis throughout its proposed designated service area.”<sup>7</sup> Without the SIP, Cingular cannot meet its burden of proof as a matter of law, and the Petition is facially inadequate.

*The SIP is Essential to Cingular's Burden of Proof.* The Commission concluded in the *ETC Designation Order* that the Communications Act requires recipients of universal service support to use the funds they receive to invest in their networks and improve their delivery of supported services. Therefore, the Commission decided that it must receive adequate proof that the applicant will make appropriate use of the funds it receives prior to granting an ETC designation. To this end, the Commission:

require[s] an applicant seeking ETC designation from the Commission to submit a formal plan detailing how it will use universal service support to improve service within the service areas for which it seeks designation. Specifically, we require that an ETC applicant submit a five-year plan describing with specificity its proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its designated service area. The five-year plan must demonstrate in detail how high-cost support will be used for service improvements that would not occur absent receipt of such support. ... To demonstrate that supported improvements in service will be made throughout the service area, applicants should provide this information for each wire center in each service area for which they expect to receive universal service support, or an explanation of why service improvements in a particular wire center are not needed and how funding will otherwise be used to further the provision of supported services in that area.<sup>8</sup>

It is clear, therefore, that the SIP is an essential component of Cingular's Petition. Moreover, it is clear that filing the information in the SIP is far from a *pro forma* exercise. Instead, there are quite likely substantial questions, for example, whether the “supported improvements in service

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<sup>7</sup> 47 C.F.R. § 54.202(a)(1)(B)

<sup>8</sup> *ETC Designation Order*, 20 FCC Rcd at 63\_ ¶ 23.

will be made throughout the service area.” Accordingly, Cingular must make the SIP available for inspection and comment or else its Petition must be denied.

*The Commission Must Allow Parties an Opportunity to Review and Comment on the SIP.*

The Commission has been reversed in court when it did not give interested parties the opportunity to review and comment on information and then relied on that information as support for its decision. The general principle applies to all administrative agencies, and it was established in *Portland Cement Association v. Ruckelshaus*, where the court reversed a decision of the Environmental Protection Agency, writing “It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [in a] critical degree, is known only to the agency.”<sup>9</sup> This principle applies equally when only one party to a proceeding, such as the petitioner, has the opportunity to review the data. In *National Black Media Coalition v. FCC*,<sup>10</sup> the Commission was the agency that had a decision reversed for failure to allow for adversarial comment. In that case, the Commission failed to disclose maps and studies upon which it relied in making a public interest determination, and the United States Court of Appeals for the Second Circuit reversed the Commission’s decision. The court explained that:

the FCC's conclusions were, by its own admission in its report and order, based on maps which were appended to that order and internal studies. These maps and studies were not disclosed throughout the proceeding and thus parties had no opportunity to comment on their methodology or conclusions. ... This non-disclosure thus prevented petitioners and perhaps others from making relevant comments. ... The agency, therefore, cannot be said to have taken into account all relevant factors in reaching its decision. "In this circuit we have said that 'it is "arbitrary or

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<sup>9</sup> *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert denied*, 417 U.S. 921 (1974).

<sup>10</sup> 791 F.2d 1016 (2d Cir. 1986).

capricious" for an agency not to take into account all relevant factors in making its determination." [*U.S. v. Nova Scotia Food Prods.*, 568 F.2d 240, 251 (2d Cir. 1977)] (quoting *Hanly v. Mitchell*, 460 F.2d 640, 648 (2d Cir.), cert. denied, 409 U.S. 990, 93 S. Ct. 313, 34 L. Ed. 2d 256 (1972)). A reviewing court is obligated to set aside a final agency action if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or made "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).<sup>11</sup>

The Commission risks a similar result here if it does not permit Embarq and other interested parties to review the SIP and offer adversarial comments.

*The Commission Has Procedures to Permit Comment on Confidential Information That May Be Relevant to Its Decision Making.* The Commission has long recognized the need to permit interested parties to review and comment on confidential information that may be relevant to a decision. Therefore, the Commission reviewed its procedures for handling confidential information nearly a decade ago, and developed a Model Protective Order for use in situations such as Cingular's need to rely on the SIP in an effort to meet its burden of proof that the Petition is in the public interest. The Commission explained that:

In recent years, the Commission has tried to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials by making more use of special remedies such as protective orders. Protective orders can provide the benefit of protecting competitively valuable information while permitting limited disclosure for a specific public purpose. ...we conclude that the benefits of adopting an MPO for general use in Commission proceedings will be substantial. ... The MPO will be used only when it is appropriate to grant limited access to information that the Commission determines should not be

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<sup>11</sup> *National Black Media Coalition v. FCC*, 791 F.2d. at 1023.

routinely available for public inspection pursuant to Sections 0.457(d) or 0.459.<sup>12</sup>

Accordingly, the Commission should follow its procedures and issue a Protective Order if it decides that the SIP should not be disclosed pursuant to FOIA. The only alternative is to deny Cingular's Petition because it would not contain adequate information upon which the Commission could rely to make the necessary public interest determination.

**II. EMBARQ AND OTHER PARTIES ARE BEING DENIED THE OPPORTUNITY TO COMMENT ON THE SIP AND DEMONSTRATE THAT CINGULAR'S FIVE-YEAR PLAN IS INCONSISTENT WITH THE PUBLIC INTEREST.**

Cingular seeks in its Opposition to minimize the impact of a failure to comply with APA disclosure requirements by arguing that there is no reason to make the SIP available because Embarq "has raised no argument with regard to which Cingular's SIP would be relevant."<sup>13</sup> This argument is a tautology—it is based on circular logic—and it must be rejected. Embarq has, quite naturally, not made arguments based on the information in the SIP because Embarq has not had the opportunity to review the SIP. It would be wholly illogical, however, to deny Embarq the opportunity to review the SIP because it has not yet made arguments based on what it has not seen. Simply put, Embarq cannot know what it does not know. Therefore, the fact that Embarq has not yet argued that the SIP is inadequate cannot serve as a reason to deny Embarq access to the SIP for the very purpose of demonstrating that it is inadequate.

Similarly, Cingular seeks to deny Embarq and others access to the SIP based on its claim that the arguments Embarq has made would not, in Cingular opinion, be supported by the information in the SIP because they are not "fact specific." This argument is illogical, just like

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<sup>12</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Report & Order, 13 FCC Rcd 24816, 24832 ¶¶ 21-22 (1998).

<sup>13</sup> Opposition, at 3.

the first argument. There are many reasons why the Petition should be denied, and Embarq has proved some of them without resort to the SIP. This advocacy cannot possibly serve as a reason, however, to deny Embarq an opportunity to explain how the Petition is also deficient because Cingular's build-out plan in the SIP is inconsistent with the public interest.

In any case, Cingular's allegation about the so-called absence of "fact specific" arguments is simply incorrect. Embarq devoted a substantial part of the Opposition of Embarq Corporation (to the Petition) and its Reply Comments to showing how Cingular is seeking to engage in obvious and pervasive cream skimming, contrary to the public interest test established in the *ETC Designation Order*. This is exactly the kind of "fact specific" argument that would be supported by the information in the SIP. Embarq and other parties should not be denied the opportunity to analyze the SIP, therefore, to see if the build-out plans are indicative of cream skimming rather than offering real carrier-of-last-resort service (e.g., not economically feasible in the absence of support) in the truly high-cost parts of Cingular's proposed service area.

Cingular next seeks to defend its effort to deny Embarq a meaningful opportunity to offer adversarial comment on the Petition by mischaracterizing the arguments in Embarq's Opposition to the Petition, and then claiming that the arguments can be dismissed on legal grounds. First, Embarq does not argue that Cingular intends to collect support on resold lines as Cingular alleges.<sup>14</sup> Rather, Embarq explains that the public interest is not served by allowing Cingular to use resale to serve lines in the high-cost parts of its proposed service area (or any given specific wire center) while collecting universal service support on lines in the low-cost parts of the service area (or that wire center). This is cream skimming, plain and simple, that harms the public interest by engaging in naked arbitrage of our current universal service support

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<sup>14</sup> Opposition at 4.

mechanism, which is based on average costs (and, therefore, is sustainable if, and only if, all recipients serve comparable mixtures of high-cost and low-cost lines). The Commission is concerned, as it should be, that such cream-skimming be prevented. Accordingly, Embarq's argument cannot be dismissed; instead, it is Cingular's mischaracterization that must be dismissed.

Cingular also claims that Embarq's opposition is based on an assumption that "Cingular will obtain funds to which Embarq is somehow entitled."<sup>15</sup> Embarq made no such argument. Instead, Embarq explained that its customers (and all customers of telecommunications services) are harmed when universal service funds are diverted from their intended use—supporting the delivery of telecommunications services to places that would not be served otherwise—and used, instead, to support other goals, such as improved roaming or adding yet another wireless competitor in relatively low-cost areas. Embarq asserts, upon information and belief, that the build-out plan in the SIP will demonstrate just such a diversion. Should this be the case, it is highly relevant to the Commission's review of the Petition. Contrary to Cingular's assertion that such a diversion reflects "broad policy decisions that Congress and the Commission reached long ago,"<sup>16</sup> it is in fact exactly the sort of public interest harm upon which the Commission can and should rely to deny the Petition.<sup>17</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Opposition at 5 n.13.

<sup>17</sup> 47 U.S.C. § 214(e)(2) ("In the case of rural areas, such as Embarq's study areas in Virginia, the Commission may [as opposed to "shall" in other areas] designate more than one common carrier as an eligible telecommunications carrier ... so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.)

Finally, Cingular makes broad allegations about competitive risks associated with Commission adherence to the APA requirement that Embarq and other interested parties have the opportunity to review and comment on the SIP. This argument is a proverbial "red herring." The Commission routinely issues Protective Orders to protect confidentiality and follow APA requirements for administrative decision making, and Cingular does not point to problems with this process. Rather, Cingular draws analogies from unrelated disputes and implies that the Commission does not have the power to enforce its Protective Orders and ensure confidentiality. For its own part, Embarq values its corporate integrity and assures the Commission and Cingular, that Embarq will preserve the confidentiality of the information in the SIP during and after the Commission's review of the Petition. There is no reason for the Commission to fear otherwise. Accordingly, the perceived risks advanced by Cingular are, in fact, ephemeral and cannot stand in the way of the Commission's adherence to the requirements of the APA.

### **III. CONCLUSION**

Either the SIP must be made available (through public disclosure or protective order) or the Petition must be denied as facially deficient.

Respectfully submitted,

**EMBARQ CORPORATION**

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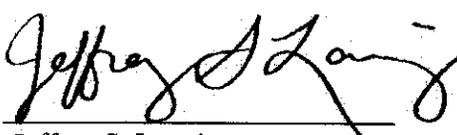
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December 22, 2006

**CERTIFICATE OF SERVICE**

I, Jeffrey S. Lanning, do hereby certify that on December 22, 2006 a copy of EMBARQ'S REPLY TO CINGULAR'S OPPOSITION TO EMBARQ'S FREEDOM OF INFORMATION ACT REQUEST AND MOTION FOR A PROTECTIVE ORDER was sent via U.S. Mail, first class, postage prepaid or via electronic mail to the persons on the attached service list.

December 22, 2006

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# Federal Communications Commission

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