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FILED/ACCEPTED

MAY 29 2007

Federal Communications Commission  
Office of the Secretary

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

In the Matter of )  
 )  
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

SUPPLEMENTAL OPPOSITION OF EMBARQ CORPORATION

Gerard J. Waldron  
John Blevins  
Covington & Burling LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 662-6000

May 29, 2007

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**SUPPLEMENTAL OPPOSITION OF EMBARQ CORPORATION**

This filing supplements Embarq Corporation's (Embarq) Opposition<sup>1</sup> to Cingular Wireless, LLC's Petition to be an Eligible Telecommunication Carrier (ETC) in Virginia (Petition).<sup>2</sup> Pursuant to the Commission's Protective Order entered in this proceeding, Embarq's designated representatives have now reviewed the information in Cingular's confidential five-year service improvement plan (SIP).<sup>3</sup> [REDACTED]

[REDACTED]

[REDACTED]

<sup>1</sup> Opposition of Embarq Corporation, *Federal-State Joint Board on Universal Service, Cingular Wireless, LLC, Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45 (filed Dec. 4, 2006) (*Embarq Opposition*).

<sup>2</sup> Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, *Federal-State Joint Board on Universal Service, Cingular Wireless, LLC, 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) (*Cingular ETC Petition*).

<sup>3</sup> Protective Order, *Federal-State Joint Board on Universal Service, Cingular Wireless, LLC, Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45 (rel. Feb. 8, 2007) (*Protective Order*).

As background, one basis of Embarq's original Opposition was that Cingular had not evidenced — and could not evidence — a commitment to provide service to all requesting customers throughout Embarq's study areas, but was instead seeking ETC designation to subsidize "cream-skimming" — i.e., providing service only to the low-cost, high-revenue customers in the state.<sup>4</sup> Cingular responded that "it is precisely in order to extend service into the currently unserved and underserved portions of its licensed territory in Virginia that Cingular seeks ETC designation."<sup>5</sup> It was, however, impossible for Embarq to verify Cingular's representation because the supporting evidence (and thus the evidence of Cingular's compliance with federal regulations) was maintained in its redacted SIP (Exhibit E to Cingular's ETC Petition). As a result, Embarq sought, and successfully obtained, a Protective Order that allowed its designated representatives to review the information in Cingular's SIP.

[REDACTED]

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<sup>4</sup> See, e.g., Memorandum Opinion & Order, *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, 19 FCC Rcd 1563, 1578 ¶¶ 32 (2004) (*Virginia Cellular*) ("Rural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area.").

<sup>5</sup> Reply Comments of Cingular Wireless, LLC, *Federal-State Joint Board on Universal Service, Cingular Wireless, LLC, Petition of Cingular Wireless, LLC for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, at 2 (filed Dec. 11, 2006) (*Cingular Reply Comments*).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Accordingly, Embarq again requests that the Commission deny Cingular's ETC designation with respect to Embarq's study areas.<sup>6</sup>

Finally, Embarq's experience highlights the need for the Commission to establish regular procedures to facilitate the review of confidential build-out plans. Such plans routinely accompany ETC petitions; opponents should not be required to petition for and defend the right to comment upon information that is integral to the designation process. Administrative law and fundamental fairness suggest that the review of confidential build-out plans should be routine in the ETC designation context, as it is in the contexts of Section 271 petitions and license transfer applications.

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<sup>6</sup> See *Embarq Opposition*, at 4 & n.9.

**I. CINGULAR RELIED ON INFORMATION IN THE SIP TO JUSTIFY ITS ETC DESIGNATION PETITION**

A brief summary of the procedural history provides the context for this Supplemental Opposition and Cingular's previous representations that it would construct facilities and expand service into unserved areas.

On November 7, 2006, Cingular filed its Petition seeking ETC designation in ten study areas of Virginia, including Embarq's two study areas. These study areas encompassed virtually the entire state.<sup>7</sup> To justify its Petition, Cingular stated that "universal support will enable Cingular to construct facilities to improve quality of service and extend telephone service to individuals and business that currently have no choice of telephone provider."<sup>8</sup> Cingular explained that the evidence of these assertions could be found in its SIP, which was attached in redacted form as Exhibit E.<sup>9</sup>

On December 4, 2006, Embarq filed an Opposition to Cingular's ETC Petition that comprehensively outlines the legal deficiencies of Cingular's Petition. Among other things, Embarq argued that (1) Cingular has not evidenced (and could not evidence) a specific commitment to provide services to all requesting customers in its designated study areas, and (2) Cingular's petition raised substantial concerns about its commitment to provide service throughout the entire area. In response to Embarq's arguments, Cingular replied, "[I]t is precisely in order to extend service into the currently unserved and underserved portions of its licensed service territory in Virginia that Cingular seeks ETC designation."<sup>10</sup> Indeed, Cingular

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<sup>7</sup> *Id.*

<sup>8</sup> *Cingular ETC Petition*, at 14.

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

<sup>10</sup> *Cingular Reply Comments*, at 2 (emphasis added).

strongly implied that it would expand services into unserved portions of these study areas, and even suggested [REDACTED] that these planned expansions constituted one of the strongest justifications for its ETC Petition:

- “[Cingular’s] commitment is entirely credible, notwithstanding coverage gaps that may exist *at the present time* in portions of the requested service territory.” *Cingular Reply Comments*, at 2 (emphasis added).
- “Embarq’s arguments about the lack of reasonably comparable wireless service at the present time in less-dense portions of its study area *make the case* for Cingular’s designation.” *Id.*, at 3 (emphasis added).

Because the evidence of Cingular’s commitment to extend service in Embarq’s study areas was contained in the redacted SIP, Embarq filed a Motion for Protective Order on December 7, 2006 to review this information and confirm compliance with federal regulations. On February 8, 2007, the Commission granted Embarq’s Motion and entered a Protective Order that explained, “[O]nly by providing parties with the ability to fully comment on the Cingular Petition in its entirety will we develop the complete record necessary to fully analyze the merits of the Petition.” On April 4, pursuant to the terms of the Protective Order, Embarq’s outside counsel reviewed the information contained in Cingular’s SIP and, accordingly, now file this Supplemental Opposition in light of that information.

**II. [REDACTED] CINGULAR SHOULD NOT BE DESIGNATED AS AN ETC IN EMBARQ’S STUDY AREAS**

Two central arguments in Embarq’s Opposition to Cingular’s Petition were that (1) the Petition does not comply with federal requirements because Cingular has not evidenced a commitment to expand and improve service in Embarq’s study areas, and (2) the Petition creates substantial concerns about the commitment to meet the statutory obligation to provide service throughout the area. [REDACTED]



[REDACTED] Turning  
first to the United study area, the Commission should note that this study area contains 28 wire  
centers. [REDACTED]

[REDACTED]

meeting its build out plans.”).

<sup>14</sup> See *Cingular ETC Petition*, Exhibit E (United Inter-Mtn. Tel. Co. Study Area).

<sup>15</sup> *Id.* (Central Telco Study Area).

[REDACTED]

B. [REDACTED]

In its Opposition, Embarq argued:

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.<sup>16</sup>

[REDACTED]

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<sup>16</sup> *Embarq Opposition*, at ii.

[REDACTED]

[REDACTED]

Although it is likely, as Embarq explained in its Opposition, that Cingular will serve only the lower-cost areas (or areas adjoining interstate highways) *within* the wire centers, [REDACTED] the Commission does not even have to examine Cingular's Petition at this level of detail. Instead, the Commission need only examine the maps Embarq submits with this Supplemental Opposition. With respect to both study areas, these maps illustrate [REDACTED]

[REDACTED]

The first map illustrates the United study area and includes all its wire centers. Exhibit 1 (Map No. 1). The second map identifies and superimposes [REDACTED]

[REDACTED]

[REDACTED] The third map identifies and superimposes Embarq's current coverage

[REDACTED]

area in the study area. This map illustrates two important points. First, [REDACTED]

[REDACTED]

[REDACTED] Second, and as explained in detail in Embarq's  
Opposition, Cingular's coverage area covers only a fraction of the United study area.<sup>20</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The first of these maps illustrates the Central study area and includes all wire  
centers. Exhibit 4 (Map. No. 4). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Finally, the last map  
identifies and superimposes Cingular's existing coverage area over the wire centers. Exhibit 7  
(Map No. 7). Once again, this map illustrates both [REDACTED]  
[REDACTED] and that Cingular's coverage area covers only a fraction of  
the Central study area.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See *Embarq Opposition*, at 4 ("[T]he Petition creates even greater

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<sup>20</sup> *Embarq Opposition*, at 6-9.

[REDACTED]

cream-skimming concerns that it would have if Cingular had not petitioned for ETC status in every wire center.”). [REDACTED]

**III. THE COMMISSION SHOULD CREATE A MECHANISM TO FACILITATE THE REVIEW OF CONFIDENTIAL INFORMATION IN ETC DESIGNATIONS**

Although Cingular designated its SIP as confidential, Embarq’s counsel was ultimately able to review the SIP and to provide adversarial comment on its basis. [REDACTED]

[REDACTED] Despite the SIP’s importance, Embarq was forced to petition for the right to review this information and then to overcome opposition to the proposed protective order. Embarq’s experience is not unique; confidential build-out plans routinely accompany ETC petitions. Given the integral role these plans play in the ETC designation process, Embarq requests that the Commission establish regular procedures to facilitate their review.

The Commission can and should follow the example it has set in the contexts of Section 271 petitions and license transfer applications associated with mergers.<sup>22</sup> In these contexts, the

<sup>22</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*

Commission adopts protective orders at the outset of the proceeding and requires only that actual or potential adversaries file a request for the information and sign a confidentiality agreement. Such an approach would benefit the Commission and the public interest, and is consistent with the intent of the Administrative Procedure Act that parties be able to comment meaningfully on agency proceedings.<sup>23</sup>

Finally, the Commission should consider relaxing the requirement that opposing parties employ outside counsel for such review. This burden is potentially disabling to adversarial review and comment, while providing relatively little additional protection of confidential information over in-house review subject to protective order.

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*Statistical Areas*, WC Docket 06-172, Protective Order, 21 FCC Rcd 10177 (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 18257 (WCB 2003).

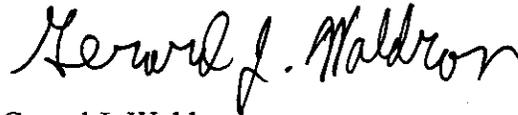
<sup>23</sup> Cf. *U.S. Lines, Inc. v. Fed. Maritime Comm'n.*, 584 F.2d 519, 534 (D.C. Cir. 1978) (“Information in agency files or reports identified by the agency as relevant to the proceeding [must] be disclosed to the parties for adversarial comment.”); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert denied*, 417 U.S. 921 (1974) (“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.”).

May 29, 2007

**CONCLUSION**

For the reasons stated both here and in Embarq's original Opposition, Cingular's Petition as applied to Embarq's study areas 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. Moreover, for the reasons stated above, the Commission should establish regular procedures for the review of confidential build-out plans that accompany petitions for ETC designation.

Respectfully Submitted,



Gerard J. Waldron  
John Blevins  
Covington & Burling LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 662-6000

May 29, 2007

**CERTIFICATE OF SERVICE**

I, Ryan Calo, do hereby certify that on May 29, 2007, a copy of the SUPPLEMENTAL OPPOSITION OF EMBARQ CORPORATION was hand-delivered to the Commission in both redacted and non-redacted form pursuant to the terms of the Protective Order, and was sent via U.S. Mail to Russell Hanser, counsel for Cingular (a Submitting Party under the Protective Order) at the address below:

Russell P. Hanser  
2300 N Street, NW  
Suite 700  
Washington, DC 20037

May 29, 2007

By:     /s/ M. Ryan Calo

Redacted Exhibits (1 - 7)