

September 15, 2016

**Ex Parte**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

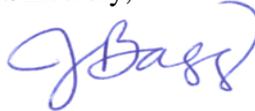
***Re: Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25, RM-10593; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No. 15-247; Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143***

Dear Ms. Dortch:

On September 13, 2016, Charles McKee of Sprint Corporation, and Paul Margie and the undersigned of Harris, Wiltshire & Grannis LLP, met with Eric Ralph, David Zesiger, Christine Sanquist, Justin Faulb, Pam Arluk, William Kehoe, Deena Shetler, Thomas Parisi, and Richard Benson of the Wireline Competition Bureau; Bill Dever of the Office of General Counsel; and Anthony DeLaurentis of the Enforcement Bureau. The attached presentation formed the basis of our discussion.

Pursuant to the Commission's rules, I have filed a copy of this for inclusion in the public record of the above-referenced proceedings. Please contact the undersigned with any questions.

Sincerely,



Jennifer Bagg  
*Counsel to Sprint Corporation*

Attachment

cc: meeting participants



# Business Data Services – Benchmark Enforcement

September 13, 2016

#moveforward

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# Ethernet Benchmark Proposal: A Brief Overview

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**Proposal: The FCC should establish a benchmark for Ethernet-based BDS in markets that are presumed non-competitive (at or below 50 Mbps) or fail the Competitive Market Test (above 50 Mbps up to 1 Gbps)**

- Use tariffed DS1 rate (after PCI adjustment) as the benchmark for lowest speed, highest quality Ethernet service above 1.5 Mbps (e.g., 2 or 3 Mbps) to create the “anchor rate”
- Establish price curve using each price cap carrier’s existing price curve for its highest quality, three-year term Ethernet service
- Apply the price curve to the anchor rate to arrive at benchmarks for higher bandwidth services
- Apply annual X-factor to reduce benchmarks going-forward
- Exempt new entrants for now
- **Adopt streamlined dispute resolution process**

# Streamlined Dispute Resolution

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## **A streamlined dispute resolution process is vital to the proposed benchmark remedy**

- Benchmarks must have “teeth” to discipline pricing in non-competitive areas
- Expedited proceeding promotes certainty and reduces burdens on buyers, sellers, and consumers

## **Expedited dispute resolution processes are increasingly commonplace**

- Major arbitral institutions
- Rocket dockets
- Corporate governance disputes

## **The FCC should assign subject matter experts to benchmark disputes**

# Day 0: Complaint Filed

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- **The Buyer/Complainant must file the complaint electronically and serve immediately on Seller/Respondent**
- **The Complaint must include specified information, such as:**
  - The quality, speed, term, and proposed rates for each challenged service
  - Identification of the relevant (or most relevant) benchmark
  - A history of written correspondence related to the dispute
  - A description of the reasons why the offered rates are unlawful
- **The FCC should allow broad complaints that cover “batches” of related services, such as a dispute related to a master services agreement negotiation**
- **The FCC should deal with confidential treatment of information in advance of the dispute process by:**
  - Applying existing protections in 47 C.F.R. 1.731
  - Adopting a standing protective order to further restrict disclosure when needed
- **The day after the complaint is filed is Day 1 for purposes of calculating subsequent dates in the dispute resolution process**

# Day 5: Facial Deficiency Challenge Due

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- **By the 5<sup>th</sup> day following the filing of the complaint, the Seller/Respondent can file an early challenge to the facial validity of complaint**
  - For example, a facial challenge can allege that the Complainant failed to provide all required information in the complaint
- **The Respondent is not required to file a facial deficiency challenge and does not waive any defenses by not filing an early challenge**
- **But the procedure will prevent obviously deficient complaints from burdening either the Commission or Seller/Respondent**
- **The FCC should review a facial deficiency challenge immediately**
  - The FCC should issue an order ruling on the challenge on the day following the day the facial deficiency challenge is filed
  - A decision by the FCC to dismiss the complaint based on a facial deficiency challenge is without prejudice to the Complainant correcting deficiencies and refiling the complaint

# Day 10: Respondent Initial Disclosures Due

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- **By the 10<sup>th</sup> day following the filing of the complaint, the Respondent must file initial disclosures**
- **The FCC should establish in advance the list of initial disclosures that Respondents must file in any benchmark challenge process**
  - Puts sellers on notice of the types of information that the FCC will use to consider whether the challenged rate is just and reasonable
  - Alleviates burden of expedited schedule; sellers are on notice of what evidence they must produce if a rate is challenged

# Initial Disclosures

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**Initial disclosures must include information necessary for the FCC to evaluate comparable rates and service offerings, including:**

- Rate and service description (quality, speed, term) for each retail and wholesale non-government customer located within a CB where buyer seeks service
- Cost information sufficient to support defense that rates are cost-justified
  - The burden should be on the Respondent to justify allocation of costs to BDS
  - BDS should bear no more than a just and reasonable share of the joint and common costs

# Day 15: Supplemental Data Filed by Complainant

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- By the 15<sup>th</sup> day after the complaint is filed, the Complainant may file any additional data it believes may aid the Bureau in deciding the matter
- For example, buyer may provide information on rates paid to or offered by other providers

# Day 20: Respondent Answer and Supplemental Data Due

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- By the 20<sup>th</sup> day after the complaint is filed, the Respondent must answer the complaint
- The Respondent may also include supplemental facts (beyond initial disclosures) with its answer
- No additional factual data may be submitted after the answer is filed

# Day 30: Complainant Reply Due

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- By the 30<sup>th</sup> day after the complaint is filed, the Complainant may file a reply to the Respondent's answer
- No new factual submission may accompany reply, to prevent either unfair surprise or delay
- Record complete after 30 days – Hard cut-off to enable FCC to consider evidence and rule on the complaint

# Day 60: Decision Rendered

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- Bureau will issue a decision within 60 days or the complaint is deemed granted
- Decision should be rendered with input from subject matter experts within Commission
- Strict deadline necessary to avoid “pricing limbo”
- In addition to reconsideration and review by the Commission, parties may seek *de novo* review by filing a petition for declaratory ruling

# Timeline: Summary

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- Day 0: Complaint is filed
- Day 5: Respondent provides notice of any facial deficiency
- Day 6: Bureau dismisses any facially deficient complaint
- Day 10: Respondent provides initial disclosures
- Day 15: Complainant files supplemental information, if any
- Day 20: Respondent files answer and any supplemental information
- Day 30: Complainant files reply
- Day 60: Bureau issues decision

# Burden of Proof

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## **Challenge is related to the rate of a service with a directly comparable benchmark (an “on-benchmark” service)**

- Example: A benchmark exists for the ILEC’s 100 Mbps, highest quality BDS sold on a 3-year term, but the buyer challenges the rates
- Seller/Respondent bears the burden of defending an above-benchmark rate, and
- Buyer/Complainant bears the burden of proving that rate at or below the benchmark is unlawful

## **Challenge is related to the rate of a service without a directly comparable benchmark (an “off-benchmark” service)**

- There is no benchmark for the requested service or the ILEC claims that the service deviates from the benchmarked service
- Example: A benchmark exists for the ILEC’s 100 Mbps, highest quality BDS sold on a 3-year term, but the buyer wants to purchase BDS with same bandwidth and term, but less stringent service quality guarantees
- Seller/Respondent bears burden of identifying closest benchmark and establishing that the rate differential is reasonable

# Minimizing Impact on Service Delivery

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- **Provisional pricing**
  - Interim rates should apply during pendency of proceeding
  - Challenge to above-benchmark rate: buyer takes at benchmark rate
  - Challenge to below-benchmark rate: buyer takes at seller's offered rate
  - Provisional service deemed provided on a month-to-month basis
- **True up**
  - If FCC challenge decision results in a rate that differs from provisional rate, then there must be a true up after final decision
- **Termination**
  - Buyer has 30 days to terminate after a final decision



**Sprint**