

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

In the Matter of)	
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593

OPPOSITION OF SPRINT CORPORATION TO THE APPLICATION FOR REVIEW OF THE UNITED STATES TELECOM ASSOCIATION

Sprint Corporation (“Sprint”) submits this Opposition to the Application for Review (“Application”) filed by the United States Telecom Association (“USTA”).¹ As explained below, the Wireline Competition Bureau (“Bureau”) acted within its delegated authority when it modified the special access data collection to comply with the demands of the Office of Management and Budget (“OMB”).² Sprint urges the Federal Communications Commission (“FCC” or “Commission”) to reject USTA’s meritless Application, which is nothing more than a transparent attempt to further delay collection of data regarding the lack of competition in the special access marketplace.

¹ Application for Review of the United States Telecom Association, WC Docket No. 05-25 (Oct. 24, 2014) (“Application”).

² *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, Order on Reconsideration, DA 14-1327 (rel. Sept. 15, 2014) (“*Implementation Reconsideration Order*”).

I. INTRODUCTION AND BACKGROUND

In 2012, the FCC issued an *Order* announcing its plans to require providers and purchasers of special access services to submit data and documents that would allow the FCC “to conduct a comprehensive evaluation of competition in the special access market.”³ That same *Order* provided “an initial version of the data collection,” including – among many other details – an instruction that respondents were to provide data for calendar years 2010 and 2012.⁴ The Commission recognized, however, that its data collection efforts would be subject to the requirements of the Paperwork Reduction Act (“PRA”), which is administered by OMB.⁵ Accordingly, the Commission expressly authorized the Bureau to “review and modify” the proposed data collection as needed to obtain OMB’s approval.⁶ In preparation for seeking OMB approval, the FCC accepted comments regarding the burdens of complying with the data collection. In response to those comments, the Bureau issued an initial *Implementation Order* revising the data collection, which it then submitted to OMB for approval.⁷

Almost a year later, OMB completed its review of the data collection and provided the necessary PRA approval, but only on the condition that several modifications would be made to the proposed collection. These modifications included a requirement that, “[w]here data [is]

³ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, ¶ 13 (2012) (“*Order*”).

⁴ *Id.* ¶¶ 27, 30.

⁵ *See id.* ¶¶ 52, 94.

⁶ *See id.* ¶¶ 30, 52.

⁷ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 28 FCC Rcd 13189, ¶ 1 (2013) (“*Implementation Order*”).

sought for 2010 and/or 2012, [the FCC shall] only require the reporting of data for a single year, and use the most recent year (*i.e.*, calendar year 2013).”⁸ Acting on the authority expressly delegated to it by the Commission, the Bureau promptly issued a reconsideration of its earlier *Implementation Order*, modifying the data request to comply with the changes demanded by OMB.⁹

Now, almost two years after the Commission’s initial *Order*, USTA has filed its Application asking the FCC to set aside the Bureau’s *Implementation Reconsideration Order* and launch yet another round of comments regarding the data collection.¹⁰ Any changes that result from these additional comments would almost certainly require additional approval from OMB, leading to even further delay – a fact that USTA carefully avoids mentioning. As demonstrated below, USTA’s Application is procedurally defective, substantively meritless, and constitutes nothing more than a thinly-veiled attempt to postpone the final resolution of this long-running proceeding, thereby extending its members’ ability to continue charging excessive, and very lucrative, special access rates. The Commission, therefore, should reject the Application and continue with the data collection in accordance with the timetable established by the Bureau.

⁸ Notice of Office of Management and Budget Action, OMB Control Number 3060-1197, at 1 (Aug. 15, 2014), <http://www.reginfo.gov/public/do/DownloadNOA?requestID=254209> (“OMB Action”).

⁹ *Implementation Reconsideration Order*. The Bureau’s authority to make the necessary changes comes from sections 0.91, 0.291, and 1.429 of the FCC’s rules (47 C.F.R. §§ 0.91, 0.291, and 1.429), as well as the authority delegated to it in the Commission’s *Order*. *Implementation Reconsideration Order* ¶ 20.

¹⁰ Application at 4.

II. DISCUSSION

USTA's Application suffers from numerous procedural and substantive defects. First, the Application fails to comply with the procedural requirements of section 1.115(b) of the Commission's rules. Second, USTA's filing ignores the Commission's clear delegation of authority to the Bureau to make the changes reflected in the *Implementation Reconsideration Order*. Finally, the Commission can – and should – resolve any doubt as to the scope of the Bureau's delegated authority by ratifying the Bureau's *Implementation Reconsideration Order*, thereby avoiding any further delay in the data collection process.

A. USTA's Application for Review is Procedurally Defective

As an initial matter, the FCC should deny USTA's Application because it fails to comply with the procedural requirements of section 1.115(b)(2) of the Commission's rules, which governs applications for review of actions taken pursuant to delegated authority.¹¹ An application for review must "specify with particularity" which of the rule's five enumerated factors "warrant Commission consideration of the questions presented."¹² Even a thorough reading of USTA's filing fails to reveal which of the five factors USTA is relying on to justify its Application. USTA does not include this critical information because it cannot; the *Implementation Reconsideration Order* was entirely consistent with the Bureau's delegated authority. The Commission routinely rejects applications for review, like the one at issue here,

¹¹ 47 C.F.R. § 1.115(b)(2).

¹² *Id.* The relevant factors are: (i) the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) the action involves a question of law or policy that has not previously been resolved by the Commission; (iii) the action involves application of a precedent or policy that should be overturned or revised; (iv) an erroneous finding as to an important or material question of fact; or (v) prejudicial procedural error.

that do not meet the requirements of section 1.115(b)(2).¹³ Accordingly, USTA’s application should be dismissed on this ground alone.

B. The Bureau Acted Within Its Delegated Authority When It Required Respondents to Provide Data for a Single Year

In addition to the procedural defect described above, USTA’s Application lacks any substantive merit. Contrary to USTA’s assertion, the Bureau’s decision to seek data only for 2013 was well within the parameters of its delegated authority. The Commission expressly empowered the Bureau to “amend the data collection based on feedback received through the PRA process . . . and take other such actions as are necessary to implement this Report and Order.”¹⁴ Moreover, the Commission explicitly “direct[ed] the Bureau to proceed with the remainder of the data collection” to the extent that it could not obtain OMB’s “approval for some portion of the data collection.”¹⁵

The Bureau’s decision to require respondents to provide data only for 2013 was made in direct response to “feedback received through the PRA process.” Specifically, OMB agreed to approve the data collection *only if* the collection was amended to “require the reporting of data for a single year,” instead of the two years originally proposed by the Commission and the

¹³ See, e.g., *Skybridge Spectrum Foundation; On Request for Inspection of Records*, Memorandum Opinion and Order, 26 FCC Rcd 13800, ¶ 11 (2011) (“[The Applicant] did not even identify one of the factors, much less attempt to ‘specify with particularity’ why the Commission should revisit OGC’s determination. For this reason, we affirm OGC’s decision.”); *Applications for A and B Block Broadband PCS Licenses*, Memorandum Opinion and Order, 11 FCC Rcd 17062, ¶ 6 (1996) (“Petitioners’ pleading is defective because it fails to ‘specify with particularity’ any of the [enumerated factors] as grounds for granting its Application for Review. The Commission held . . . that a party that fails to identify one of the above factors in support of an application for review will have its application dismissed.”).

¹⁴ *Order* ¶ 52.

¹⁵ *Id.* ¶ 52 n.111.

Bureau.¹⁶ OMB imposed this condition after considering comments filed by several parties asserting that reporting two years' worth of data would be unduly burdensome and that the burdens would "far outweigh the benefit of collecting such data."¹⁷ OMB must have agreed that the costs imposed by reporting data for the longer time period significantly exceeded the incremental benefits that an extra year of data might have added to the Commission's analysis. In any event, the modifications the Bureau made in the *Implementation Reconsideration Order* were a rational response to OMB's requirements and to the record developed in the PRA process.

In addition, the Bureau's modifications were consistent with the Commission's instructions to secure PRA approval and to proceed without the portions of the data collection for which it could not obtain such approval.¹⁸ The Bureau could not obtain OMB approval to proceed with the two-year data collection. Rather, OMB directed the Bureau to "only require the reporting of data for a single year."¹⁹ By proceeding with a one-year data collection, the Bureau unquestionably complied with the Commission's direction and properly exercised its delegated

¹⁶ OMB Action at 1.

¹⁷ Letter from Robert Koppel, Small Purchasers Coalition to Nicholas Fraser, OMB, at 7 (Jan. 8, 2014) (noting that providing data for calendar year 2010 would be "particularly burdensome" and asking that the requirement be eliminated); *see also, e.g.*, Letter from Kath Mulholand, CANNE, to Nicholas Fraser, OMB, at 3-4 (Jan. 8, 2014) (explaining that many companies would not have data from more than one year in the past readily available and noting that complying with a requirement to provide two years of data would require "an enormous amount of time" while providing "little perceived benefit to the industry") (PRA comments available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201311-3060-001). Commenters had expressed similar concerns to the FCC as part of its PRA pleading cycle. *See, e.g.*, Joint Comments of Smith Bagley, *et al.*, WC Docket No. 05-25, at 8 (Apr. 15, 2013) (urging the Commission to eliminate the requirement that companies provide any data for years prior to 2012).

¹⁸ *Order* ¶ 52 n.111; *see also* Public Notice, WC Docket No. 05-25, "Commission Moves Forward with Special Access Data Collection," DA 14-1201, n.3 (rel. Aug. 18, 2014) (citing the *Order*'s direction to proceed with the remainder of the collection as support for the Bureau's modification).

¹⁹ OMB Action at 1.

authority. The Commission’s clear grant of authority completely undercuts any arguments that the Bureau acted improperly.

Contrary to USTA’s claims, the Bureau’s actions also were consistent with the terms and intent of the FCC’s *Order*.²⁰ In particular, the revised data collection will provide granular data that will offer a “fulsome picture of competition in the special access market” and permit the FCC to “develop rules to more precisely provide regulatory relief where it is justified.”²¹ Far from relying on a “single data point,” as USTA disingenuously claims,²² the Commission will be able to base its decision in this proceeding on extremely detailed and robust information collected from a wide variety of purchasers and providers of special access services. This voluminous data will provide the FCC with a sound basis for the analysis needed to measure competition in the special access marketplace, establish a system that will produce just and reasonable rates, and prohibit anticompetitive terms and conditions. Indeed, the Commission will have a nearly unprecedented record before it by the time it issues a final decision reforming its special access regulations.²³ For these reasons, USTA’s application should be denied.

²⁰ Instructively, the Commission provided specific examples of modifications that would and would not be consistent with the terms of the *Order*. For instance, collecting data about special access facilities deployed to places outside of the Commission’s defined “locations” would be allowed, but amending “the data collection to require census block information rather than location-by-location information” would be impermissible. *Order* ¶ 52 n.112. The Commission implied that the latter change would be impermissible because it would prevent the Commission from collecting “comprehensive data on the situs and type of facilities capable of providing special access.” *See Order* n.112, ¶ 31. The Commission, however, did not similarly forbid the Bureau from modifying the temporal focus of the data collection. Taken together, these examples clarify that the Commission’s main concern was collecting granular data about the special access market.

²¹ *Order* ¶ 78.

²² Application at 7.

²³ The FCC certainly will have a more complete record than it had when it adopted the now-suspended pricing flexibility rules. *See Special Access for Price Cap Local Exchange Carriers*;

C. The Commission Can Resolve Any Concerns and Avoid Additional Delay by Ratifying the Bureau’s *Implementation Reconsideration Order*

As explained above, the Bureau acted well within the scope of its delegated authority when it altered the timeframe covered by the data collection. If there is any doubt, however, the Commission should put an end to any concerns by ratifying the *Implementation Reconsideration Order*, thereby avoiding additional delay in this proceeding.

When considering an application for review alleging that a Bureau exceeded its delegated authority, the Commission can ratify the Bureau’s action, in which case, the Bureau’s action is treated as if it was promulgated by the Commission itself.²⁴ For example, in considering an application for review contending that the Media Bureau exceeded its delegated authority when it denied a broadcaster’s request to reallocate its channel, the Commission “affirm[ed], and thereby ratif[ied], the Bureau’s decision.”²⁵ The Commission found that, because it ratified the Media Bureau’s decision, it “need not consider [the] argument that the Bureau lacked delegated

AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Report and Order, 27 FCC Rcd 10557 (2012) (“*Pricing Flexibility Suspension Order*”); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999).

²⁴ See *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware; Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, Memorandum Opinion and Order, 26 FCC Rcd 13696, ¶ 11 (2011) (“*Reallocation Order*”) (citing *Murray Energy Corp. v. FERC*, 629 F.3d 231, 236 (D.C. Cir. 2011) and *Dana Corp. v. ICC*, 703 F.2d 1297, 1301 (D.C. Cir. 1983), both of which found that other regulatory agencies effectively ratified decisions by actors with less authority).

²⁵ *Reallocation Order* ¶ 11.

authority to act.”²⁶ The Commission could take the same approach here by ratifying the Bureau’s decision to implement OMB’s directive to focus on 2013 data.

This approach would be particularly expedient because it would allow the data collection to proceed without further delay.²⁷ In no event should the Commission acquiesce to USTA’s request to begin another pleading cycle,²⁸ especially given that there is no alternative approach that would address OMB’s specific condition that the data collection be limited to 2013 data.²⁹ Choosing to do anything that runs contrary to OMB’s clear direction will necessitate a new PRA approval process, adding to the already substantial delay in this proceeding.³⁰ Because USTA’s Application is nothing more than a transparent attempt to further postpone the resolution of this important – and long-running – proceeding, the Commission should deny the Application and take whatever other actions are necessary to ensure that the data collection proceeds as currently scheduled.

²⁶ *Id.*

²⁷ The Commission has repeatedly expressed its desire to conclude this proceeding promptly. *See, e.g., Order* ¶ 52 (delegating to the Bureau the authority to set “deadlines for responses to ensure that data collections are complied with in a timely manner”); *Pricing Flexibility Suspension Order* ¶ 7 n.16 (“It is our intent that we work as quickly as possible to conclude this proceeding as soon as possible to provide all parties the certainty they seek in the marketplace.”).

²⁸ Application at 4 (asking the FCC to “issue a notice seeking public comment on alternative approaches” to the data collection).

²⁹ *See, e.g.,* Application at 13 (suggesting that the Commission collect data “from both 2013 and 2014”).

³⁰ The data collection has already been delayed for nearly two years. The FCC’s *Order* was released in December 2012, and OMB granted conditional PRA approval to the Bureau’s data collection on August 15, 2014.

III. CONCLUSION

For the reasons stated above, the Commission should deny USTA's Application and permit the data collection to proceed in its current form.

Respectfully submitted,

SPRINT CORPORATION

/s/ Charles W. McKee

Gil M. Strobel
Pamela S. Miranda
Lawler, Metzger, Keeney & Logan, LLC
2001 K Street NW, Suite 802
Washington, DC 20006
202-777-7700

Counsel for Sprint Nextel Corporation

Charles W. McKee
*Vice President, Government Affairs
Federal and State Regulatory*

Sprint Nextel Corporation
900 Seventh Street, NW, Suite 700
Washington, DC 20001
703-433-3205

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Certificate of Service

I hereby certify that on this 10th day of November, 2014, I caused a true and correct copy of the foregoing Opposition of Sprint Corporation to the Application for Review of the United States Telecom Association to be sent by electronic mail and by U.S. mail to:

Jonathan Banks
Robert Mayer
The United States Telecom Association
607 14th Street NW, Suite 400
Washington, DC 20005
jbanks@ustelecom.org

and by electronic mail to:

Best Copy and Printing, Inc.
445 12th Street SW
Washington, DC 20554
fcc@bcpiweb.com

/s/ Ruth E. Holder
Ruth E. Holder