

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

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

**OPPOSITION OF SPRINT CORPORATION TO
CENTURYLINK'S APPLICATION FOR REVIEW**

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

Chris Frentrup
Director, Senior Economist

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

Paul Margie
Jennifer P. Bagg
Rachel W. Petty
Walter E. Anderson
Counsel to Sprint Corporation
WILTSHIRE & GRANNIS LLP
1200 Eighteenth St, NW
Washington, D.C. 20036
(202) 730-1300

November 6, 2013

EXECUTIVE SUMMARY

Sprint supports the Federal Communication Commission's continuing efforts to address the broken special access market and reform the special access regulatory regime. Sprint urges the Commission to continue the efforts it undertook in its 2012 *Data Collection Order* by commencing a "one-time multi-faceted market analysis of the special access market," that will allow for "a comprehensive evaluation of competition in the special access market." The Commission should reject CenturyLink's effort to delay this data collection through its Application for Review of the Wireline Competition Bureau's ("Bureau") September 18, 2013, *Report and Order*.

The Commission delegated to the Bureau the task of finalizing the data collection. It instructed the Bureau to modify the data collection as necessary to address public feedback, resolve Paperwork Reduction Act issues, and ensure that the collection meets the Commission's needs and policy goals. The Commission also permitted the Bureau to take any other actions necessary to implement the Commission's *Data Collection Order*. Contrary to CenturyLink's assertions, the Bureau carefully adhered to the Commission's instructions and provided sufficient justification for excluding cable connections that are not capable of providing a dedicated service from the scope of the data collection. The Bureau limited the scope of the data collection to respond to concerns raised by public comments, to ensure the collected data would not frustrate the Commission's effort to identify actual and potential competitors in special access markets, and to avoid skewing the data and subsequent analysis. As such, the Bureau properly followed the Commission's instructions and acted within its delegated authority.

Sprint respectfully requests that the Commission expeditiously deny the CenturyLink Application for Review and proceed with the data collection.

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CENTURYLINK’S APPLICATION FOR REVIEW**

Sprint Corporation (“Sprint”) opposes CenturyLink’s Application for Review of the Wireline Competition Bureau’s (“Bureau”) September 18, 2013, *Report and Order*.¹ CenturyLink asks the Federal Communications Commission (“Commission” or “FCC”) to reverse the Bureau’s decision to exclude from the upcoming special access data collection certain cable system facilities that “are *not* linked to a *Node* capable of providing Metro Ethernet (or its equivalent).”² The Commission should deny the CenturyLink Application for Review because the Bureau (1) properly followed Commission direction and justified its determination

¹ See *Special Access Rates 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, DA 13-1909 (Wireline Comp. Bur. rel. Sept. 18, 2013) (“*Bureau Order*”).

² Application for Review of CenturyLink at 3, WC Docket No. 05-25, RM-10593 (filed Oct. 22, 2013) (“CenturyLink Application for Review”). The CenturyLink Application for Review appears to be premature, as the *Bureau Order* at issue has not yet been published in the Federal Register. See 47 C.F.R. §§ 1.115(d) (“[T]he application for review . . . shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b).” Section 1.4(b)(1) defines “public notice” in notice-and-comment rulemaking proceedings as “the date of publication in the Federal Register”). Nevertheless, Sprint submits this opposition to the CenturyLink Application for Review in order to avoid any further delay in this proceeding.

that collecting data on these facilities would frustrate the Commission’s effort to identify actual and potential competitors in special access markets, and (2) acted within its delegated authority.

I. The Bureau Followed the Commission’s Direction and Offered Valid Justifications for Excluding Connections That Are Not “Capable” of Providing a Competing Service From the Data Request.

The Commission’s special access proceeding is almost a decade old.³ During that time, incumbent price-cap LECs have enjoyed unchecked market power. These companies have imposed supra-competitive rates and anti-competitive terms and conditions on the businesses, schools, local governments, and competitive wireline and wireless companies that depend on special access. Over the past several years the Commission has taken a number of substantial steps toward much-needed reform. It sought comments on the proper framework for its analysis,⁴ issued two voluntary data requests,⁵ and suspended the prospective application of its pricing flexibility rules.⁶

³ See *Special Access Rates 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*, Order and Notice of Proposed Rulemaking, FCC 05-18, 20 FCC Rcd. 1994, 1995 ¶ 1 (2005) (“In this Notice of Proposed Rulemaking (NPRM), we commence a broad examination of the regulatory framework to apply to price cap local exchange carriers’ (LECs) interstate special access services . . .”). See also *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002) (asking the Commission to revoke the pricing flexibility rules and revisit the CALLS plan as it applies to special access services).

⁴ See *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, DA 09-2388, 24 FCC Rcd. 13,638 (Wireline Comp. Bur. 2009).

⁵ See *Data Requested in Special Access NPRM*, Public Notice, DA 10-2073, 25 FCC Rcd. 15,146 (2010); *Competition Data Requested in Special Access NPRM*, Public Notice, DA 11-1576, 26 FCC Rcd. 14,000 (Wireline Comp. Bur. 2011).

⁶ See *Special Access Rates 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, FCC 12-92, 27 FCC Rcd. 10,557 (2012).

But the Commission determined that it required additional data before it could comprehensively reform the broken special access market. Consequently, the Commission issued the *Data Collection Order* in 2012 directing the Bureau to conduct a “one-time, multi-faceted market analysis of the special access market,”⁷ that will allow for “a comprehensive evaluation of competition in the special access market.”⁸ The final data request to which parties must respond was not included in the *Data Collection Order*. Instead, the Commission delegated the task of finalizing the request to the Bureau. The Commission instructed the Bureau to modify the data request as necessary to address public feedback, resolve Paperwork Reduction Act (“PRA”) issues, and ensure that the data request meets the Commission’s needs.⁹ The Commission also permitted the Bureau to take any other actions necessary to implement the Commission’s *Data Collection Order*.¹⁰ The Bureau adhered to these instructions and offered valid justifications when it excluded certain facilities from the data collection.

A. Non-Capable Cable Facilities Do Not Support Actual or Potential Competition and are Outside the Scope of the Data the Commission Intended to Collect.

At its core, the *Data Collection Order* reflects the Commission’s desire to ensure that special access rules “reflect the state of competition today.”¹¹ To that end, the data request will support the Commission’s efforts to “identify measures of actual and potential competition that

⁷ *Special Access Rates 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, FCC 12-153, 27 FCC Rcd. 16,318, 16,346 ¶ 67 (2012) (“*Data Collection Order*”).

⁸ See *Data Collection Order* at 16,324 ¶ 13.

⁹ See *id.* at 16,340 ¶ 52.

¹⁰ See *id.*

¹¹ *Id.* at 16,319 ¶ 1.

are good predictors of competitive behavior.”¹² Despite the data request’s broad scope, the Commission seeks information related only to the state of competition for special access services, which it defines as a service that “transports data between two or more designated points . . . at a rate of at least 1.5 megabytes per second (Mbps) with prescribed performance requirements that include bandwidth, latency, or error-rate guarantees or other parameters”¹³ The Commission explained that mass market services, specifically services targeted at residential and small business customers, are outside of this market.¹⁴ Likewise, the Commission found that it required only data that will enable it “to identify measures of actual and potential competition that are good predictors of competitive behavior”¹⁵

To that end, only two types of services are relevant to the inquiry: (1) special access services and (2) services that could potentially compete with special access services.¹⁶ Accordingly, the *Data Collection Order* appropriately limited the scope of the inquiry to data on those facilities “that either provide special access services or provide connections that are *capable* of providing special access services.”¹⁷

Consistent with the Commission’s objectives and statements in the *Data Collection Order*, the *Bureau Order* specified that the data collection would be limited to “only *Locations* where the *End Users* are demanding services relevant to [its] inquiry” across all types of providers.¹⁸ The Bureau explained that granular data detailing connections that are not *capable*

¹² *Id.* at 16,346 ¶ 67.

¹³ *Id.* at 16,361 app. A.

¹⁴ *Id.* at 16,325 ¶ 15 n.36.

¹⁵ *Id.* at 16,346 ¶ 67.

¹⁶ *Id.* at 16,338 ¶ 48.

¹⁷ *Id.* at 16,325 ¶ 15 & n.36.

¹⁸ *Bureau Order* at ¶ 31; *see also id.* at ¶ 26.

of providing *Dedicated Services* without being upgraded would provide no additional useful information on potential competition to contribute to the Commission’s analysis of the market structure, and would in fact confound its assessment of demand.¹⁹

The Commission, however, did not define the term “capable,” and, as the Bureau notes, multiple parties have sought clarification on the meaning of this term.²⁰ Indeed, this definition is critical for special access providers to have notice of the scope of their obligation to report granular data about their facilities. As a result, the *Bureau Order* clarified the meaning of the term “capable” by explaining the scope of granular facilities data that ILECs, CLECs, and cable system operators must provide. For example, the Bureau explained that ILECs are not required to report “copper loops that were unable to provide a bandwidth connection of at least 1.5 Mbps in both directions . . . ‘as provisioned’ during the relevant reporting periods”²¹

In clarifying the meaning of “capable” in the context of cable operators, the Bureau explained that such companies must report only (1) “those *Locations* with *Connections* owned or leased as an *IRU* that are connected to a *Node* (*i.e.*, headend) that has been upgraded or was built to provide Metro Ethernet (or its equivalent) service”²²; and, (2) for other facilities, only those that “were used during the relevant reporting period to provide a *Dedicated Service* or a service that incorporates a *Dedicated Service* within the offering”²³

The Bureau properly determined that the data request excluded connections that were not *capable* of providing special access services because changing these facilities to enable them to

¹⁹ *Id.* at ¶ 27.

²⁰ *See id.* at ¶ 22 (citing *ex parte* letters from AT&T, Verizon, and Sprint).

²¹ *Id.* at ¶ 28.

²² *Id.* at ¶ 26.

²³ *Id.* at ¶ 27.

deliver a competing service would require significant investments of time and resources. Facilities that could not be used to provide a competing service were thus outside the scope of the data collection. The Bureau also provided a safeguard to ensure that it would not inadvertently fail to capture some relevant facilities, requiring cable system operators to include any facilities that had been upgraded to provide Metro Ethernet *or* any facilities that had, in fact, been used to provide a *Dedicated Service* (or a service that incorporates a *Dedicated Service*) during the relevant reporting period.

Consistent with its most recent analysis of complex markets,²⁴ the Commission correctly determined that to “understand the impact of competition in special access, it is important to grasp the effects of potential, as well as actual, competition.”²⁵ But not every company that owns transmission facilities is a potential competitor in every geographic market. To be considered a potential competitor, a company must be able to “rapidly and easily enter the market” or bring new services on line in response to a small but significant and non-transitory increase in price (“SSNIP”).²⁶

²⁴ See *Data Collection Order* at 16,331 ¶ 29. See also, e.g., *Petition of Qwest Corporation for Forebearance Pursuant to 47 U.S.C. § 160(C) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 10-113, 25 FCC Rcd. 8622, 8642-44 ¶¶ 37-38, 8660-61 ¶ 72 (2010) (“*Qwest Phoenix Forbearance Order*”) (explaining the Commission’s decision to apply its traditional, comprehensive market power analysis to in regulatory forbearance proceedings).

²⁵ *Data Collection Order* at 16,338 ¶ 48. See also *Qwest Phoenix Forbearance Order* at 8660-61 ¶ 72.

²⁶ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* at § 9 (rev. ed. 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (“*2010 DOJ/FTC Horizontal Merger Guidelines*”). See also *Qwest Phoenix Forbearance Order* at 8660-61 ¶ 72 (The FCC should consider the “likelihood of potential competition for wholesale loops considers entry via supply-side substitution (*i.e.*, whether an existing provider of services is likely to construct new loop facilities to expand its service offerings) and *de novo* entry (*i.e.*, whether an entrant is likely to construct its own last-mile network).”).

In the case of special access, potential competition includes only providers that offer services that “constrain” the prices of *Dedicated Services*.²⁷ Therefore, the Commission’s analysis need consider only “potential entry [that] would be timely, likely, and sufficient to counteract the exercise of market power.”²⁸ As the *2010 DOJ/FTC Horizontal Merger Guidelines* explain, “[i]n order to deter” anticompetitive effects, “entry must be rapid enough” to prevent the anticompetitive harm that would otherwise occur.²⁹ A company that is not “ready to provide the relevant product to customers” will not likely constrain prices and is therefore *not* potential competition.³⁰ As such, entities that are not prepared to enter the market or to bring new facilities into service quickly are not potential competitors. If a company’s need to expend capital and time requirements to upgrade its facilities means that it cannot rapidly and easily enter the market to respond to a SSNIP, it is not a potential competitor.

The Bureau’s exclusion of non-capable cable connections is consistent with this framework. Connections that are not connected to a Node capable of providing Metro Ethernet or its equivalent cannot be potential competitive services in the special access market. As the Bureau recognized, cable companies would have to upgrade these facilities before they could use them to offer a service that is a substitute for special access services. If a dominant special access provider imposed a price increase, cable companies could not respond quickly enough using these facilities because they would require substantial investments of time and capital to

²⁷ See *Data Collection Order* at 16,347 ¶ 69; see also *2010 DOJ/FTC Horizontal Merger Guidelines* at §§ 9.1-9.2.

²⁸ *Qwest Phoenix Forbearance Order* at 8,635 ¶ 28 (citing U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (Apr. 2, 1992, rev. Apr. 8, 1997)).

²⁹ *2010 DOJ/FTC Horizontal Merger Guidelines* at § 9.1.

³⁰ *Id.*

upgrade the facilities to make them a viable substitute for the dominant carrier's special access services.

The Bureau's analysis is supported by cable companies' marketplace behavior. Rather than relying on the excluded facilities to offer actual special access competition, cable companies rely on new fiber facilities that they deploy to meet specific demand for dedicated services.³¹ As Paul Schieber explained in his declaration in this docket, "cable companies almost invariably elect to build new dedicated fiber plant to serve cell sites rather than serve those sites using the companies' best efforts data infrastructure" to provide both wireless backhaul and enterprise wireline services; like wireless backhaul, "enterprise customers require carrier-grade performance and cannot rely on best efforts."³²

Perhaps recognizing these facts, CenturyLink also asserts that the non-capable connections are relevant because cable operators have already made substantial investments and

³¹ See, e.g., Letter from Andrew D. Fisher, Senior Counsel, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, Attachment: Response of Comcast Business Communications, LLC, to Question III.D. of the Public Notice Seeking Additional Data Related to Special Access (Redacted) (filed Feb. 9, 2011) (describing its process in "determining whether to construct high-speed last-mile facilities to reach a special access customer in a specific geographic area within its footprint"). See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17009-10 ¶ 40 (2003), *subsequent history omitted* ("Cable companies have also deployed networks to serve business customers. These are generally not the historic hybrid-fiber-coaxial cable networks providing service to residential customers but newly deployed facilities specifically designed to serve enterprise customers.").

³² Comments of Sprint Nextel Corporation at Attachment A: Declaration of Paul Schieber at 7 n.10&11, WC Docket 05-25 (filed Feb. 11, 2013). See also Letter from Joshua Bobeck, Counsel, PAETEC, and Thomas Cohen, Counsel, XO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 at 24-30 (filed May 28, 2010) (explaining that special access purchasers do not view "HFC-based services as substitutes for special access services because HFC networks are not capable of providing the features demanded by special access customers such as guaranteed bandwidth and service level agreements.").

sought to grow their market share.³³ But the fact that cable system operators have upgraded some of their facilities in some markets does not mean that they are potential competitors in markets where they have not upgraded facilities. The data collection will properly capture the upgraded facilities.³⁴ But where a cable system operator has not yet made the facilities investments necessary to provide *Dedicated Services*, these non-capable connections are irrelevant to the Commission’s analysis. Accordingly, the Bureau clarified this information is outside the scope of the data collection.

B. The Bureau Provided Adequate Justification for its Determination that Collecting Data on Non-Capable Cable Facilities Would Corrupt the Assessment of Demand and Confound the Commission’s Analysis.

The *Bureau Order* also properly found that including non-capable cable facilities in the data collection could “skew [its] assessment of demand for special access service,”³⁵ because cable companies did not invest in these facilities based on their analysis of special access demand. As the Bureau explained, historically, cable operators “deployed facilities widely in their [franchise areas] to serve primarily residential customers and other community needs,”³⁶ rather than to serve businesses with special access service. As a consequence, non-upgraded connections “were most likely built to provide residential-type services instead of high-capacity services to non-residential customers based on the historical deployment of cable systems.”³⁷ Additionally, the Bureau found that cable companies’ decisions to deploy these facilities were “subject to outside factors in decisions to deploy,” such as build-out requirements in their

³³ CenturyLink Application for Review at 6 n.23 (citing The Insight Research Corp., *Cable TV Enterprise Services: 2012-2017*, at 4, 105 (Sept. 2012)).

³⁴ *Bureau Order* at ¶ 26; see also *id.* at App. B, Question II.C.1.

³⁵ *Id.* at ¶ 27.

³⁶ *Id.* at ¶ 26.

³⁷ *Id.* at ¶ 27.

franchise agreements, and were not a response to perceived special access demand.³⁸ Finally, the Bureau determined that it could “still account for the potential competition from these [excluded] facilities by referencing data provided elsewhere in the collection, *e.g.*, we can refer to the fiber maps filed by cable system operators, the location of *Nodes* upgraded to provide Metro Ethernet (or its equivalent), and the information provided showing those census blocks within the [franchise areas] where the cable system operator reports making broadband service available with a bandwidth rate of at least 1.5 Mbps in both directions”³⁹

Cable system operators are required to build out service to “substantially all residential households” in their service areas.⁴⁰ As the Bureau noted, cable companies generally must obtain a franchise or license to provide service.⁴¹ These franchises or licenses to provide service have build-out requirements that require cable companies to build out their networks essentially to an entire franchise area without regard to demand for this service.⁴² As a result, the *Connections* of a cable system operator include a large number of facilities that are not provisioned to provide *Dedicated Services*, were never intended to provide *Dedicated Services*, and will likely never be upgraded to do so.

³⁸ *Id.* at ¶ 26, n.70.

³⁹ *Id.* at ¶ 27.

⁴⁰ *Id.* at ¶ 26 n.70.

⁴¹ *Id.* See also 47 U.S.C. § 541(b)(1) (“Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.”).

⁴² *Bureau Order* at ¶ 26 n.70 (citing 47 U.S.C. § 541(a)(4)(A) (“In awarding a franchise, the franchising authority shall allow the applicant’s cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area. . . .”); *Comcast Cable Communications, LLC, on Behalf of its Subsidiaries and Affiliates*, 23 FCC Rcd 10,073, 10,075 ¶ 6 (Media Bur. 2008) (noting that franchisee is obligated to build-out its service to “‘substantially all residential households’ served by the town’s ‘aerial plant . . . within twelve (12) months’ and ‘to all residential areas of the Service Area, within four (4) years’”)).

If included in the data collection, facilities constructed because of these franchise-wide build-out requirements would skew the Commission’s assessment of demand, and therefore the analysis of potential competition.⁴³ As the *Bureau Order* correctly recognizes, “cable system operators are subject to outside factors [including build-out requirements] in decisions to deploy, in contrast to their non-cable *Competitive Providers*”⁴⁴ that can choose to deploy costly facilities—or not—based on perceived demand. As the Bureau acknowledged, a rational business that responds to market forces by investing in facilities to provide service would only build facilities where there was, or was likely to be, sufficient demand.⁴⁵ Including non-capable cable facilities would skew the assessment of demand, thereby skewing overall analysis of potential competition and thwarting the overall goal of the *Data Collection Order*.⁴⁶

Unlike cable companies, non-cable competitive providers are only building out *Connections* where they believe they will find businesses seeking dedicated service. The granular *Connections* data obtained from non-cable competitive providers is therefore a reasonable proxy for demand. If the Bureau collects data on all cable facilities, even those not

⁴³ CenturyLink claims that it is “unclear how the inclusion of such data could ‘skew [the] assessment of demand’ . . . as the facilities data in question falls in the ‘market structure’ category, rather than the ‘demand (*i.e.*, observed sales and purchases)’ data being collected.” CenturyLink Application for Review at 5 n.20. But both the Commission and the Bureau note that each data point will be useful for more than one inquiry—in this case both market structure and demand—and that data is essential for understanding the role and likelihood of potential competition.

⁴⁴ *Bureau Order* at ¶ 26.

⁴⁵ *Id.*

⁴⁶ *Data Collection Order* at 16,331 ¶ 29 (“One way to assess potential competition is by obtaining structural, pricing, and demand data over a two- year period to observe and better understand how and why competition has evolved over time and, therefore, where potential competition exists.”). The analytical framework set forth by the *2010 DOJ/FTC Horizontal Merger Guidelines* similarly makes clear that “[e]ntry is likely if it would be profitable;” *i.e.*, if there is sufficient demand to support investment. *2010 DOJ/FTC Horizontal Merger Guidelines* at § 9.2.

capable of providing *Dedicated Services* as provisioned, *i.e.*, those which have not been upgraded, they will have included unknown numbers of *Connections* that do not reflect demand, and which cannot easily be distinguished from useful data and readily culled from the data set. The Commission anticipated this issue in its *Data Collection Order*, noting that “firms set prices and make competitive investment decisions taking into account a variety of factors, including existing and expected prices, investments (including as informed by advertised offerings), and regulatory rules,”⁴⁷ and stated that it intended to control for those factors in the data collection.⁴⁸

Although CenturyLink does not complain about the guidance issued on ILECs’ capable connections, the Bureau similarly excluded ILECs’ non-capable copper loops—those that could not provide *Dedicated Services* without further upgrade—to avoid contaminating the data set.⁴⁹ Just like the non-capable cable facilities, the ILECs’ “copper loops can be modified to provide higher capacity services.”⁵⁰ Like its exclusion of non-capable cable facilities (and the prohibition on reporting residential-level services), this “exclusion is again aimed at limiting the data reported to only *Locations* where the *End Users* are demanding services relevant to [the Commission’s] inquiry.”⁵¹ In other words, the Bureau is properly limiting the data set to include only those facilities that are actually or potentially capable of meeting demand for special access. This limitation is crucial to a useful analysis and accurate understanding of the special access market.

⁴⁷ *Data Collection Order* at 16,346 ¶ 68.

⁴⁸ *Id.*

⁴⁹ *Bureau Order* at ¶ 30. Note that the Bureau also prohibited ILECs from reporting facilities “used to provide services substantially similar to the services provided to residential customers.” *Id.* at ¶ 31.

⁵⁰ *Id.* at ¶ 30.

⁵¹ *Id.* at ¶ 31.

II. The Bureau Acted Within the Scope of Its Delegated Authority.

The Communications Act explicitly authorizes the Commission to delegate authority “[w]hen necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business.”⁵² Pursuant to such authority, the Commission properly delegated certain authority to the Bureau in the *Data Collection Order* and the Bureau’s actions are fully consistent with such delegation.⁵³

The *Bureau Order* is consistent with the explicit grants of authority from the Commission in the *Data Collection Order*. First, the Commission instructed the Bureau to “modify the data collection based on public feedback.”⁵⁴ Multiple parties sought clarification regarding the definition of the term “capable.”⁵⁵ This definition is critical so special access providers have notice of the data collection’s scope, given the Commission’s express intent to limit its collection of location-specific data to connections “*capable of providing special access.*”⁵⁶ Thus, the Bureau’s clarification of the term “capable” in response to public feedback through its explanation of which cable facilities met that definition was within the scope of its delegated authority.

⁵² 47 U.S.C. §§ 155(c)(1), (4)-(5).

⁵³ The Commission’s implementing regulations allow parties to challenge an action taken under delegated authority where, among other things, the action “is in conflict with statute, regulation, case precedent, or established Commission policy.” 47 C.F.R. § 1.115(b)(2)(i). The Commission’s regulations provide additional grounds for challenging action taken pursuant to delegated authority, *id.* §§ 1.115(b)(2)(ii)-(v), but CenturyLink has not raised any additional grounds here, and they are thus waived. *See id.* § 1.115(b)(2) (“[T]he application for review shall specific with particularity . . . the factor(s) which warrant Commission consideration of the questions presented”).

⁵⁴ *Data Collection Order* at 16,340 ¶ 52.

⁵⁵ *Bureau Order* at ¶ 22 (citing ex parte letters from AT&T, Verizon, and Sprint).

⁵⁶ *Data Collection Order* at 16,331 ¶ 31 (emphasis added).

Second, the Commission instructed the Bureau to “make corrections to the data collection to ensure it reflects the Commission’s needs as expressed in [the *Data Collection Order*].”⁵⁷ As the Bureau recognized, the data collection must support an accurate assessment of the demand for special access services.⁵⁸ As discussed above, the inclusion of location-specific data for connections that have not been upgraded to Metro Ethernet (or its equivalent) would distort any effort to analyze special access demand by suggesting that cable operator build-outs of unconnected facilities to residential and small business locations reflect demand for special access services.⁵⁹ Thus, its inclusion would impede one of the stated desires of the Commission to access the demand for special access.

Furthermore, as also discussed above, collection of the excluded data would confound the Commission’s effort to identify potential competition in special access markets.⁶⁰ To provide special access services over the excluded facilities, cable operators would have to make substantial and expensive upgrades. Thus, these facilities cannot be used to “rapidly and easily” respond to a small but significant and non-transitory increase in special access prices. The collection of granular data for these facilities could, therefore, cause the Commission or others to overstate the extent of potential competition in special access markets.

Again and again, where, as here, a disappointed party has sought to second guess an order by accusing a Bureau of exceeding delegated authority, the Commission has supported its staff’s decisions.⁶¹ As these Orders make clear, the Commission has routinely affirmed bureau actions,

⁵⁷ *Id.* at 16,340 ¶ 52.

⁵⁸ *See, e.g. Bureau Order* at ¶ 27.

⁵⁹ *See supra* at Section I.A.

⁶⁰ *See supra* at Section I.B.

⁶¹ *See, e.g., Petition of Reconsideration of Dismissal of Application for Assignment of Licenses from United States Wireless Cable, Inc. to Rioplex Wireless Ltd.*, Order, FCC 11-46, 26 FCC

so long as they are consistent with the Commission’s statutes, regulations, precedents, and policies.

Furthermore, the Commission should not be distracted by CenuryLink’s attempt to characterize the Bureau’s decision as being part of its PRA analysis.⁶² The Bureau excluded location-specific data for cable facilities that have not been upgraded to Metro Ethernet (or its equivalent) because it determined that the data would be irrelevant to its inquiry and skew its analysis. The Bureau concluded that the appropriate focus of the collection should be “on

Rcd. 4178, 4183 ¶ 13 (2011) (“[T]he Bureau’s decision is fully consistent with the Communications Act as well as the Commission’s rules, policies, and all relevant precedent”); *AT&T Corporation Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of Worldcom, Inc. for Prevention of “Whipsawing” on the U.S.-Philippines Route*, Order on Review, FCC 04-112, 19 FCC Rcd. 9993, 10,011 ¶ 34 (2004) (finding no need to address “arguments regarding delegated authority” where the Commission affirmed “all substantive points” of the Bureau’s order under review); *Coxcom, Inc. d/b/a Cox Communications New England*, Memorandum Opinion and Order, FCC 03-72, 18 FCC Rcd. 6941, 6943 ¶ 7 (2003) (“The Bureau’s decision was consistent with Commission and Bureau precedent. We therefore deny DTE’s Application for Review.”); *Application of Lakeshore Broadcasting, Inc.*, Memorandum Opinion and Order, FCC 98-227, 13 FCC Rcd. 19,062, 19,062 ¶ 3 (1998) (“The Managing Director’s decision was fully consistent with . . . the Communications Act . . . [and] the Commission’s implementing regulations Moreover, the Managing Director’s decision was consistent with Commission precedents”); *Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6; New England Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 40; Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Revisions to Tariff F.C.C. No. 1; Contel Service Corporation Revisions to Tariff F.C.C. No. 1; Pacific Bell Telephone Company; New York Telephone Company*, Memorandum Opinion and Order, FCC 91-173, 6 FCC Rcd. 3760, 3767 ¶ 59 (1991) (“The Bureau’s actions are fully consistent with the Commission’s Title I quality of service mandate, and with its responsibilities under Title II, and are not in conflict with the findings in the Consolidated Application Order.”); *Annual 1985 Access Tariff Filings*, Order on Review, FCC 86-379, 61 Rad. Reg. 2d (P&F) 53, ¶ 10 (1986) (“[T]he Bureau’s action was consistent with Commission policy and precedent and was not an excursion beyond its delegated authority.”); *Application of Commonwealth Telephone Company*, Memorandum Opinion and Order, FCC 81-595, 88 F.C.C.2d 782, 786 ¶ 9 (1981) (“This approach is not only consistent with Commission case precedent and policy but is also consistent with . . . the Act”).

⁶² CenturyLink Application for Review at 7 (suggesting that the Bureau’s decision to exclude location-specific data for legacy cable connections was a result of the “PRA process”).

Locations with Connections relevant to our inquiry. . . .”⁶³ While it noted that this decision would also “reduc[e] the reporting burden for cable system operators,” it recognized that this was merely an added “benefit” of the exclusion.⁶⁴ CenturyLink’s citations to the Bureau’s authority to resolve PRA concerns therefore are nothing more than red herrings.

Accordingly, the Bureau acted squarely within the scope of express instructions from the Commission, and CenturyLink has failed to identify any statute, regulation, order, or policy with which the Bureau’s actions conflict. As such, the Commission should uphold the Bureau’s actions as consistent with its delegated authority.

⁶³ *Bureau Order* at ¶ 27.

⁶⁴ *Id.* Moreover, it is hard to believe that a burdensome collection of wholly irrelevant data would survive PRA review.

III. Conclusion

The Bureau acted in accordance with the instructions provided by the Commission and offered valid justifications for its actions that will ensure the final data collection ultimately adheres to the Commission's stated policy objectives in the *Data Collection Order*. Moreover, the Bureau acted well within its delegated authority when it concluded that certain data should be excluded from the data collection. For the reasons stated herein, the Commission should deny the CenturyLink Application for Review.

Respectfully submitted,
SPRINT CORPORATION

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

Paul Margie
Jennifer P. Bagg
Walter E. Anderson
Rachel W. Petty
Wiltshire & Grannis LLP
1200 Eighteenth Street NW, 12th Floor
Washington, DC 20036
202-730-1300
Counsel for Sprint Corporation

Chris Frentrup
Director, Senior Economist

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

November 6, 2013