

**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 THE NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION'S APPLICATION FOR REVIEW**

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December 24, 2013

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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 NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION’S APPLICATION FOR REVIEW

Sprint Corporation (“Sprint”) opposes the National Cable & Telecommunications Association’s (“NCTA”) Application for Review of the Wireline Competition Bureau’s (“Bureau”) September 18, 2013, Report and Order.¹ NCTA asks the Federal Communications Commission (“Commission” or “FCC”) to review the Bureau’s alleged failure to (1) “fix” the data collection in compliance with the Paperwork Reduction Act (“PRA”), and (2) address the need for heightened data security measures.²

The Commission should not allow the Application to delay its data-collection effort, which will pave the way for long-awaited reform of the special access market. The Commission need not expend additional time or resources on the Application’s arguments, each of which the

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, WC Docket No. 05-25, RM-10593, 2013 WL 5295091 (Wireline Comp. Bur. rel. Sept. 18, 2013) (“*Bureau Order*”).

² Application for Review of the National Cable & Telecommunications Association, WC Docket No. 05-25, RM-10593 (filed Dec. 9, 2013) (“*Application*”).

Commission and the Bureau, at the Commission's direction, have already considered and rejected.

Specifically, the Commission should deny NCTA's PRA challenge because the Office of Management and Budget ("OMB") is now the proper forum for parties to raise PRA-related disputes. Moreover, the Bureau properly exercised its delegated authority and ensured the data request complies with PRA procedural and substantive requirements. In addition, NCTA's request for the Commission immediately to address its data security concerns should be rejected. The Bureau is in the process of adopting a new protective order for information being submitted in the data collection. Therefore, NCTA's arguments regarding the forthcoming protective order are unwarranted and untimely.

I. The Commission Should Deny NCTA's Request to Review the Bureau's Compliance with the Paperwork Reduction Act

NCTA asserts that the Bureau "failed to carry out its delegated authority to 'amend the data collection based on feedback received through the PRA [Paperwork Reduction Act] process' and therefore the Commission should review the *Bureau Order* and make any changes to the data collection that are necessary to bring it into compliance with the PRA."³ The Commission, however, is the improper forum for PRA arguments at this stage of the data collection process. NCTA should direct its complaints to the OMB, and presumably will do so by responding to that agency's pending proceeding on the data request. Furthermore, the Commission should also deny NCTA's Application because: (1) the Bureau properly exercised its delegated authority; (2) the data request complies with the PRA's procedural requirements; and (3) the data request complies with the PRA's substantive requirements.

³ Application at 1.

First, NCTA should submit its PRA arguments to OMB. Parties had the opportunity to, and did, raise PRA concerns with the Commission between September 18 (when the Bureau released the data request)⁴ and December 9 (when the Commission requested OMB approval).⁵ Because the PRA expressly vests authority to approve information collections with OMB,⁶ and because the Commission has formally requested OMB approval, OMB—and not the Commission—is now the proper forum to raise PRA concerns. Any interested party may file PRA comments with OMB by January 8, 2014.⁷

Second, the Bureau followed the Commission’s instruction to “amend the data collection based on feedback received through the PRA process.”⁸ In response to the First FR Notice,⁹ eleven parties filed PRA comments and even more filed *ex parte* letters raising PRA issues stemming from the data request the Commission proposed in the *Data Collection Order*. The Bureau, in part “based on the received feedback,” modified the Commission’s proposed request in at least 37 different places.¹⁰

⁴ See generally *Bureau Order*.

⁵ 78 Fed. Reg. 73861-62 (Dec. 9, 2013) (“Second FR Notice”).

⁶ See 44 U.S.C. § 3504(c)(1).

⁷ Second FR Notice.

⁸ *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 Service*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, 27 FCC Rcd. 16,318, 16,340 ¶ 52(b) (2012) (“*Data Collection Order*”).

⁹ 78 Fed. Reg. 9911-12 (Feb. 12, 2013) (“First FR Notice”).

¹⁰ See *Bureau Order* at *15 ¶ 53.

Notably, NCTA filed PRA comments and multiple *ex parte* letters raising each of the issues discussed in its Application.¹¹ The Bureau considered these submissions and granted some of NCTA's requests,¹² and denied others.¹³ The Commission routinely supports the Bureau's decisions on delegated authority, so long as they are consistent with Commission precedent, statutes, and regulations.¹⁴ The Bureau's consideration of the comments filed by a variety of parties, and alteration of the data request, were consistent with the *Data Collection Order's* instruction to modify the data requests based on PRA feedback, and as discussed below, were also consistent with PRA statutes and regulations. Thus, the Commission should find that the Bureau properly exercised its delegated authority.

Third, the data request complies with the procedural requirements of the PRA. Before it initiates a new information collection, an agency must: (1) publish notice of the collection in the Federal Register and allow 60 days for public comment;¹⁵ (2) review the information collection

¹¹ Indeed, NCTA has repeated the same substantive arguments that it made in the Application throughout the course of this proceeding prior to raising them in the PRA context. *See, e.g.*, Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 05-25 (filed Mar. 12, 2013).

¹² *See, e.g.*, *Bureau Order* *12 ¶ 41 (clarifying the instructions regarding providers' obligation to identify interconnection *Nodes* "to reduce burdens").

¹³ *See, e.g., id.* ¶ 39 (maintaining requirement that competitive providers produce fiber maps, over NCTA's objection).

¹⁴ *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 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 . . .").

¹⁵ *See* 44 U.S.C. § 3506(c)(2)(A) (requiring Federal Register publication and a 60-day PRA comment period for proposed information collections).

and consider whether it complies with the PRA;¹⁶ (3) submit the collection to OMB for approval; and (4) publish a Federal Register notice that the data collection has been submitted to OMB and allow 30 days for public comment.¹⁷

The Commission met each of these requirements. On February 12, 2013, the Commission published a Federal Register notice seeking PRA comments on its proposed data request within 60 days.¹⁸ Then, on September 18, 2013, after conducting an “internal review” of the Commission’s proposed request and all “feedback received,” the Bureau released its modified data request.¹⁹ Finally, on December 9, 2013, the Commission published a Federal Register notice that it was seeking OMB approval of the Bureau’s modified data request and requesting PRA comments within 30 days.²⁰

NCTA asserts that it is “wholly inappropriate for the Bureau to defer consideration” of NCTA’s PRA concerns. But neither the Bureau nor the Commission has deferred consideration of these concerns, which NCTA has already placed on the record. The Bureau is not required to publish its deliberation over PRA issues. Instead, internal review and analysis prior to OMB submission is sufficient for an agency to ensure PRA compliance.²¹ Indeed, the Bureau explained that the *Bureau Order* does not address “whether the collection complies with the

¹⁶ See *id.* § 3506(c)(1)(A) (requiring agencies to “review each collection of information before submission” to OMB).

¹⁷ See *id.* §§ 3507(a)(1)(D), (b) (requiring Federal Register publication of notice that agency has sought OMB approval of an information collection and requiring at minimum a 30-day comment period).

¹⁸ First FR Notice.

¹⁹ *Bureau Order* at *3 ¶ 7.

²⁰ Second FR Notice.

²¹ Information Collection under the Paperwork Reduction Act, Memorandum from Cass R. Sunstein, Administrator, Office of Management and Budget, at 4 (Apr. 7, 2010).

PRA,” and the Bureau made clear that it would address PRA compliance “as part of the PRA approval process.”²² Consequently, the Bureau considered NCTA’s concerns utilizing appropriate procedural vehicles and implemented its delegated authority to amend the data collection based on PRA feedback by NCTA and other parties.

Finally, the data request complies with the PRA’s substantive requirements. The PRA requires agencies to (1) estimate the burden of the proposed information collection, (2) justify the need for the collection, and (3) certify that the collection is necessary for the proper performance of agency functions.²³ The Bureau’s extensive modifications to the Commission’s proposed data request—which, as Sprint has explained, already met the PRA requirements²⁴—ensure that the data request fully complies with the PRA.

Burden Estimate. The Commission estimates that the average annual burden will be 146 hours²⁵ per respondent—an increase from the Commission’s initial estimate of 134 hours.²⁶ As Sprint has indicated previously, these estimates are reasonable, and for the vast majority of respondents, the burden will likely fall well below the estimated average. For example, the Commission estimates that 6400 entities will respond to the data request. In the case of special access providers, outside of the top 20 in terms of on-net buildings, it is unlikely that any vendor has even 1000 total owned-and-operated circuits to report to the FCC.²⁷ In other words, the 20 largest providers will skew the estimated average burden upward because they will require

²² *Bureau Order* at *3 ¶ 7 n.24.

²³ *See* 44 U.S.C. § 3506(c).

²⁴ Paperwork Reduction Act Comments of Sprint Nextel Corporation at 2, WC Docket No. 05-25 (filed Apr. 15, 2013) (“Sprint PRA Comments”).

²⁵ Second FR Notice.

²⁶ First FR Notice.

²⁷ *See* Sprint PRA Comments at 2-3.

substantially more time per response than the remaining, smaller providers. Thus, the Commission's burden estimate, especially considering that the vast majority of respondents will not even approach the average, is reasonable in light of the critical nature of this proceeding.

Justification for the Collection. Sprint certainly appreciates concerns regarding the collection and production of the information the Commission seeks, and will itself incur expense in complying with the data request. The Commission, however, has provided sufficient justification under the PRA to initiate this data request. The Commission will use this "comprehensive data collection" to "evaluate competition in the market for special access services,"²⁸ an evaluation that is long overdue. Special access circuits are critical to Fortune 500 companies, small employers, hospitals, schools, technology innovators, and wireless facilities. These special access purchasers have suffered from supra-competitive prices and anticompetitive terms and conditions for years because incumbent price-cap LECs have taken advantage of the Commission's out-of-date rules. To develop and implement reform effectively, the Commission has stated that it will use the data request to analyze whether any competitive entry has disciplined incumbent LEC behavior.²⁹ The heart of this inquiry is pricing and facilities data,

²⁸ *Data Collection Order* at 16,318 ¶ 1.

²⁹ See *Petition of Qwest Corporation for Forbearance 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, 8635 ¶ 28 (2010) (indicating that a market-power analysis requires an assessment of "whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power"); U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 9 (2010) ("As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.").

and the Commission has demonstrated the necessary justification to collect the information for its analysis of this critical \$10-\$20 billion market.³⁰

Certification of Necessity. The data request is necessary for the proper performance of the Commission's functions. Congress requires the FCC to "execute and enforce the provisions" of the Communications Act,³¹ which requires that the FCC ensure that all "charges" and "practices" of telecommunications carriers are "just and reasonable."³² The Commission has explained that, in order to determine whether current special access charges and practices are just and reasonable, it must study whether (1) current pricing flexibility triggers accurately predict areas where competition disciplines incumbent anticompetitive behavior; (2) current price caps are proper; and (3) incumbent LEC terms and conditions undermine competition. As described above, the Commission has provided sufficient certification of necessity to proceed with the data request.

II. NCTA's Security Concerns Do Not Warrant Delay

NCTA also argues that the "Bureau ignored critical concerns regarding the security of network maps and detailed customer proprietary network information (CPNI) that now must be addressed by the Commission before any party can reasonably be expected to submit such information."³³ Sprint shares NCTA's goal of protecting the highly confidential data that parties will submit to the Commission. NCTA's complaints about security do not, however, support review of the *Bureau Order* by the Commission.

³⁰ See Reply Comments of Sprint Nextel Corporation at 14, WC Docket No. 05-25, RM-10593 (filed Mar. 12, 2013).

³¹ 47 U.S.C. § 151.

³² *Id.* § 201(b).

³³ Application at 1.

NCTA has previously made its concerns about data security clear. The issues raised in its Application are the same as those it raised numerous times throughout this proceeding.³⁴ And it appears that the Bureau has heard NCTA's concerns and intends to act to address them. The Bureau has indicated that it is in the process of developing a protective order—in addition to the two protective orders already in place in this proceeding—to govern data collection submissions.

Recognizing the “heightened sensitivity over the handling of highly confidential data,” the Bureau issued a public notice in July seeking comment on the procedures for designating, handling, submitting and accessing the confidential information sought in the data collection.³⁵ Several parties, including NCTA, filed detailed comments in response to the Protective Order Public Notice.³⁶ Far from having “ignored NCTA's concerns completely,”³⁷ the *Bureau Order* confirms that the Bureau is undertaking a separate process for analyzing data security and will “release separately a Protective Order outlining procedures for designating and accessing information deemed confidential and highly confidential,” citing the Protective Order Public

³⁴ See, e.g., Letters from National Cable & Telecommunications Association to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Feb. 28, 2013, Aug. 30, 2012, Oct. 22, 2012, Oct. 24, 2012, Nov. 16, 2012, Nov. 29, 2012); Comments of National Cable & Telecommunications Association at 6 n.13, WC Docket No. 05-25, OMB Control No. 3060-xxxx (Apr. 15, 2013). Notably, NCTA's first expression of concern was that the data at issue could be used by incumbent LECs to disadvantage competitors and customers. See Letter from Neal M. Goldberg, Vice President and General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, at 1-2, WC Docket No. 05-25 (filed June 30, 2009).

³⁵ See *Wireline Competition Bureau Seeks Comment on Protective Order for Special Access Data Collection*, Public Notice, DA 13-1470, 28 FCC Rcd. 9170 (2013) (“Protective Order Public Notice”) (“seek[ing] comment on the procedures for designating, handling, submitting and accessing the confidential and highly confidential data and information sought in the collection”).

³⁶ See Comments of AT&T Inc.; Comments of Verizon and Verizon Wireless; Comments of Cox Communications, Inc.; and Comments of the National Cable & Telecommunications Association (all filed in WC Docket No. 05-25, RM-10593, on July 29, 2013).

³⁷ Application at 14.

Notice.³⁸ The data collection instructions further clarify the Bureau’s intent to address security timing: “In advance of the filing deadline, the Bureau will issue a Protective Order detailing the procedures for requesting confidentiality and accessing confidential and highly confidential data and information.”³⁹

Contrary to NCTA’s assertion, the Bureau was not “obligated to spell out in some detail steps it would take to protect the security of this data”⁴⁰ in its first data request order. As described above, the Bureau has a process well underway to adopt a further protective order to cover data being submitted as part of the data collection. But, in any event, the *Bureau Order* did “spell out” its plan to adopt a further protective order, as described above.⁴¹ Additional security measures are forthcoming, and, until the new protective order is released, NCTA’s concerns are premature.

Finally, NCTA attacks the “ability of the federal government to protect the security of the data that it generates and collects.”⁴² Like most companies, Sprint would suffer great harm if its confidential data were to fall into the hands of competitors. But an argument that the Commission should not collect information because the government lacks the ability to protect data even if it commits to do so in a protective order is beyond the scope of this proceeding. Inability of the FCC to protect confidential data would affect every Commission merger review, equipment certification, outage report, and any proceeding where parties must submit proprietary information to comply with regulations or to participate in rulemaking. If NCTA believes that

³⁸ *Bureau Order* *21 ¶ 57 (citing Protective Order Public Notice).

³⁹ *Id.*, Appendix A at *25 (citing Protective Order Public Notice).

⁴⁰ Application at 14.

⁴¹ *See supra* nn.38 & 39.

⁴² Application at 13.

this is the case, it should petition the Commission for a general proceeding on the subject rather than seeking to address the issue in the narrow context of the special access proceeding.

* * *

For the reasons stated herein, the Commission should deny NCTA's Application for Review.

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