

# Sprint and Windstream Waste No Time Appealing Business Data Services Order

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On May 8, 2017, merely ten days after the Federal Communications Commission (“FCC”) adopted its [Report & Order](#) (“BDS Order”) deregulating the market for Business Data Services (“BDS”), Sprint and Windstream [petitioned](#) the U.S. Court of Appeals for the District of Columbia (“D.C. Circuit”) to vacate the BDS Order.

In the BDS Order, as we described in an earlier [blog post](#), the Commission eliminated price caps for significant portions of the BDS marketplace, created a competitive market test to retain price cap regulation for select services in non-competitive geographic areas, mandatorily detariffed competitive BDS, refrained from adopting specific rules to regulate the wholesale BDS market, and clarified that select competitive BDS offerings constitute private carriage offerings.

Sprint and Windstream allege that the BDS Order is arbitrary and capricious, procedurally inconsistent with the notice-and-comment requirements of the Administrative Procedure Act (“APA”), and in violation of the Communications Act and FCC rules.

Ordinarily, parties cannot challenge rulemaking orders that set forth rules of general applicability until such time as those rules are published in the *Federal Register* (which has not occurred with the BDS Order as of May 15, 2017). This publication generally represents public notice of a rulemaking order. However, Sprint and Windstream contend that the BDS Order also contained narrower adjudicatory determinations deciding matters particular to specifically-named companies, such as the conclusion that a specific business data service offered by Comcast may be treated as private carriage rather than common carriage, and the changes in scope of regulatory forbearance previously granted to certain business data services provided by Verizon affiliates. According to Sprint and Windstream, the adjudicative elements of the BDS Order render the decision as a whole subject to the public notice rules subject to adjudicatory actions – upon release of the decision. Thus, the petitioners contend that their challenge of the BDS Order prior to *Federal Register* publication is permissible and qualifies their petition for the judicial lottery procedure to determine the forum for review should additional parties seek review in other appellate venues.

As of this posting, no other parties have sought judicial relief from the BDS Order. While it remains to be seen how the D.C. Circuit responds procedurally to Sprint’s and Windstream’s protective petition, it is clear that the BDS Order will face scrutiny by the courts.