



# PUBLIC NOTICE

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## SECURE DATA ENCLAVE FOR ACCESSING HIGHLY CONFIDENTIAL BUSINESS DATA SERVICES (SPECIAL ACCESS) DATA WILL CLOSE ON DECEMBER 31, 2017

WC Docket Nos. 16-143, 15-247, 05-25; RM-10593

In this Public Notice, the Wireline Competition Bureau (Bureau) announces that the secure data enclave used by authorized parties for accessing and analyzing highly confidential data filed in the business data services (special access) proceeding will close on **December 31, 2017**.

On December 18, 2012, the Commission released the *Data Collection Order* initiating a comprehensive data collection for analyzing the business data services market and delegated authority to the Bureau to implement the collection.<sup>1</sup> Data collected include information from providers and purchasers of traditional circuit-based dedicated services, including DS1s and DS3s, packet-based dedicated services such as Ethernet, and from certain entities providing best effort business broadband Internet access service.<sup>2</sup> By February 27, 2015, the last group of filers were required to respond to the data collection.<sup>3</sup> The collected data and analysis based on the data are integral parts of the record in the broader rulemaking proceeding on what regulatory framework to apply to price cap incumbent local exchange carriers (LECs) interstate business data services.<sup>4</sup> The data was also incorporated into the record of the Commission's investigation into terms and conditions of certain incumbent LEC tariff pricing plans for business data services.<sup>5</sup>

The collected data includes highly competitively sensitive information only available subject to protective orders that govern the processes for designating, submitting and accessing confidential and

<sup>1</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16340, para. 52 n.111 (2012) (*Data Collection Order*).

<sup>2</sup> See FCC, *Special Access Data Collection Overview*, <https://www.fcc.gov/general/special-access-data-collection-overview-0> (last visited Sept. 29, 2017). For a more detailed discussion of the Bureau's implementation of the data collection and an overview of the data collected, see *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4737-43, paras. 29-37, 39-43 (2016), *remanded in part*, Order, *AT&T, Inc., et al. v. FCC*, Nos. 16-1145, 16-1166, 11-1177 (D.C. Cir. Aug. 29, 2017) (*Further Notice or Tariff Investigation Order*).

<sup>3</sup> See *Further Notice*, 31 FCC Rcd at 4740, para. 37.

<sup>4</sup> See *Data Collection Order*, 27 FCC Rcd at 16322-23, 16341, 16345, paras. 8, 56, 66.

<sup>5</sup> See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans et al.*, WC Docket No. 15-247 et al., Order and Protective Orders, 31 FCC Rcd 13680, 13680, para. 1 (WCB 2015) (*Tariff Investigation Protective Order*); see also Order, *AT&T, Inc., et al. v. FCC*, Nos. 16-1145, 16-1166, 16-1177 (D.C. Cir. Aug. 29, 2017) (granting Commission's motion for voluntary remand of the *Tariff Investigation Order*); see also FCC Mot. for Voluntary Remand, *AT&T, Inc., et al. v. FCC*, No. 16-1166 (D.C. Cir. June 13, 2017).

highly confidential information.<sup>6</sup> Access to the highly confidential data is limited to outside counsel and consultants, and their employees, not involved in competitive decision-making.<sup>7</sup> Individuals seeking access to the data are required to execute and file with the Commission acknowledgments of confidentiality (Acknowledgments) subject to an objection process.<sup>8</sup>

Given the scale and scope of the collection and to allow parties to participate meaningfully in the proceeding, the Bureau established a secure data enclave as the exclusive method for authorized parties to access and analyze the highly confidential data submitted in response to the data collection.<sup>9</sup> The Commission contracted with the National Opinion Research Center dba NORC at the University of Chicago (NORC) to host the secure data enclave through its NORC Data Enclave.<sup>10</sup> Authorized parties have been able to access the data and analytical software either remotely via a virtual private network (VPN) or in-person at NORC facilities in Bethesda, Maryland.<sup>11</sup> The NORC Data Enclave provides access to the data, analytical software to analyze the data, and virtual lockers for storing notes and analysis results. Parties have also been able to remove their analysis results subject to NORC's release process.<sup>12</sup> These procedures provided authorized parties with a full opportunity to analyze the highly confidential data, and to present the results of their analysis and arguments based on those results to the Commission.<sup>13</sup>

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<sup>6</sup> See *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Order, 31 FCC Rcd 7104 (WCB 2016); *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Modified Data Collection Protective Order, 30 FCC Rcd 10027 (WCB 2015) (*Modified Data Collection Protective Order*); Order and Data Collection Protective Order, 29 FCC Rcd 11657 (WCB 2014) (*Data Collection Protective Order*); Second Protective Order, 25 FCC Rcd 17725 (WCB 2010) (*Second Protective Order*); Modified Protective Order, 25 FCC Rcd 15168 (WCB 2010) (*Modified Protective Order*); see *Tariff Investigation Protective Order*, 31 FCC Rcd at 13683-84, para. 10 (incorporating highly confidential data collected in the rulemaking proceeding into the record of the tariff investigation).

<sup>7</sup> See *Data Collection Protective Order*, 29 FCC Rcd at 11673, Appx. A at para. 5; *Second Protective Order*, 25 FCC Rcd at 17727, para. 5; see also *Modified Protective Order*, 25 FCC Rcd at 15170, para. 4.

<sup>8</sup> See *Data Collection Protective Order*, 29 FCC Rcd at 11680, Appx. C; *Second Protective Order*, 25 FCC Rcd at 17733, Appx. A; *Modified Protective Order*, 25 FCC Rcd 15175, Appx. A. Wireline Competition Bureau Now Receiving Acknowledgements of Confidentiality Pursuant to Special Access Data Collection Protective Order, WC Docket No. 05-25, RM-10593, Public Notice, 30 FCC Rcd 6421 (WCB 2015) (*Public Notice*); see also FCC, *Parties Authorized to Review Special Access Data*, <https://www.fcc.gov/general/parties-authorized-review-special-access-data> (last visited Sept. 29, 2017).

<sup>9</sup> *Data Collection Protective Order*, 29 FCC Rcd at 11657, para. 1.

<sup>10</sup> See *id.* at 11661, para. 12 n.32. "National Opinion Research Center" is the legal name but "NORC" is registered as the "externally facing, to-do-business (TDB) name." See NORC, *About Our Name*, <http://www.norc.org/About/Pages/about-our-name.aspx> (last visited Sept. 29, 2017).

<sup>11</sup> See *Data Collection Protective Order*, 29 FCC Rcd at 11657, para. 1; *Modified Data Collection Protective Order*, 30 FCC Rcd at 10027, para. 1 (modifying how reviewing parties gain remote access to the secure data enclave by using a software-based VPN in lieu of hardware-based thin client laptops).

<sup>12</sup> See *Data Collection Protective Order*, 29 FCC Rcd at 11664, paras. 20-21 (directing that the vendor ensure that the parties do not remove datasets from the secure data enclave).

<sup>13</sup> On June 24, 2015, the Commission began receiving executed Acknowledgements of Confidentiality (Acknowledgements) in order for individuals to begin accessing the data and secure data enclave via the NORC Data Enclave. See *Public Notice*, 30 FCC Rcd at 6421. Comments in the business data services rulemaking proceeding were due June 28, 2016; reply comments were due August 9, 2016. See *Further Notice*, 31 FCC Rcd at 4916, para. 544; see *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Order, 31 FCC Rcd 7753 (WCB 2016) (extending reply comment deadline).

On April 28, 2017, after carefully reviewing commenters' arguments raised in the record, including those based on analysis of highly confidential data available through the NORC Data Enclave, the Commission released the *Business Data Services Order* establishing a new regulatory framework for the provision of business data services.<sup>14</sup> No party filed a petition for reconsideration of the *Business Data Services Order*, so there is no further need for authorized parties to access the NORC Data Enclave for the purpose of presenting arguments based on new data analysis not already in the record that the Commission has not had an opportunity to pass.<sup>15</sup> While several parties petitioned for judicial review of the *Business Data Services Order*,<sup>16</sup> the briefing schedule established by the court concludes on January 2, 2018.<sup>17</sup> That deadline will afford the petitioners, respondents and intervenors ample time to access the NORC Data Enclave before it closes for purposes of judicial review.

On August 29, 2017, the D.C. Circuit remanded the Commission's *Tariff Investigation Order*, which had declared unlawful certain incumbent LEC tariff terms and conditions for business data services.<sup>18</sup> Given the scope of the analyses already presented to the Commission, the Commission's findings in the *Business Data Services Order*, and the additional data collected as part of the tariff investigation, we find that it is highly unlikely that resolution of this remand will require any additional analysis of the data in the NORC Data Enclave.<sup>19</sup>

In these circumstances, we find that there is little, if any, utility in maintaining continued access to the complete business data services dataset via the secure data enclave. Maintaining that access would entail significant public expense and require continued oversight by Commission staff. Even after the secure data enclave is closed, authorized parties will still be able to access unredacted highly confidential data in comments and reply comments filed in the record of this proceeding pursuant to the protective orders.<sup>20</sup> Finally, most of the data collected dates from 2013 and is becoming increasingly less reflective

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<sup>14</sup> *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Report and Order, 32 FCC Rcd 3459 (2017), *appeal docketed*, Nos. 17-2296, 17-2342, 17-2344 and 17-2685 (8th Cir. June 12, 2017).

<sup>15</sup> A petition for reconsideration is a condition for judicial review where the petitioner is seeking judicial review on questions of fact or law on which the Commission has not had the opportunity to pass. See 47 U.S.C. § 405(a); see, e.g., *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-80 (D.C. Cir. 1997); *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825 (D.C. Cir. 1997); *Russian River Vintage Broadcasting v. FCC*, 5 F.3d 1518, 1521 (D.C. Cir. 1993) (*RRVB*); *BDPCS v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003).

<sup>16</sup> See Order, *Citizens Telecommunications Co. of Minn., et al. v. FCC*, Nos. 17-2296, 17-2342, 17-2344 and 17-2685 (8th Cir. Aug. 7, 2017) (consolidating challenges to *Business Data Services Order*).

<sup>17</sup> See Order, *Citizens Telecommunications Co. of Minn., et al. v. FCC*, Nos. 17-2296, 17-2342, 17-2344 and 17-2685 (8th Cir. Aug. 3, 2017) (setting the briefing schedule); Consent Mot. To Establish Briefing Schedule for These Consolidated Cases, *Citizens Telecommunications Co. of Minn., et al. v. FCC*, Nos. 17-2296, 17-2342, 17-2344 and 17-2685 (8th Cir. Aug. 17, 2017) (proposing revised briefing schedule, including proposing for final briefs be due January 2, 2018); Order, *Citizens Telecommunications Co. of Minn., et al. v. FCC*, Nos. 17-2296, 17-2342, 17-2344 and 17-2685 (8th Cir. Aug. 22, 2017) (granting consent motion to amend the briefing schedule).

<sup>18</sup> See Order, *AT&T, Inc. et al. v. FCC*, Nos. 16-1145, 16-1166, 11-1177 (D.C. Cir. Aug. 29, 2017); see also *Tariff Investigation Order*, 31 FCC Rcd at 4761-90, paras. 86-158.

<sup>19</sup> See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd 11417, 11430-31, paras. 26-29 (WCB 2015) (requiring more targeted data from AT&T, CenturyLink, Frontier and Verizon on their tariff pricing plan terms and conditions designated for investigation than the data collected as part of the collection adopted in the *Data Collection Order*); *Business Data Services Order*, 32 FCC Rcd at 3460-61, para. 1.

<sup>20</sup> See *Data Collection Protective Order*, 29 FCC Rcd at 11664, para. 20.

of current market conditions.<sup>21</sup> In sum, the financial and administrative burdens to the Commission and the public of continuing to maintain the secure data enclave far outweigh any benefits of continuing to provide parties with access to the data for analysis.

Accordingly, on December 31, 2017 the secure data enclave for business data services data will close. After that date, parties will no longer have access to the secure data enclave, including the business data services data, analytical software and any virtual lockers containing notes and analysis results.<sup>22</sup> Any notes, analysis results or other documents, programs or files saved to virtual lockers will be deleted and parties will no longer be able to request copies from NORC.<sup>23</sup> Up until December 31, 2017, parties may remove their notes, analysis results or other documents from the secure data enclave subject to NORC's release process consistent with the protective orders.<sup>24</sup> The Commission will retain the data collected in the business data services rulemaking proceeding consistent with applicable statutory requirements.<sup>25</sup>

After December 31, 2017, the Bureau and NORC will no longer process requests to access the secure data enclave.<sup>26</sup> Closure of the secure data enclave, however, will not affect authorized parties access to confidential and highly confidential information that is accessible outside the secure data enclave.<sup>27</sup> Authorized parties will continue to be able to discuss and share the contents of confidential and highly confidential documents with other authorized parties, as appropriate,<sup>28</sup> and to access the confidential and highly confidential portions of any documents issued by, or filed with, with the Commission or a reviewing court in the *Business Data Services* or the *Tariff Investigation* proceedings.<sup>29</sup> Accordingly, the Bureau will continue to process requests seeking authorization to access confidential and highly confidential information subject to the applicable protective orders.<sup>30</sup>

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<sup>21</sup> See *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order on Reconsideration, 29 FCC Rcd 10899, 10902, para. 8 (WCB 2014).

<sup>22</sup> See *Data Collection Protective Order*, 29 FCC Rcd at 11664, para. 20.

<sup>23</sup> See *id.* at 11664, para. 21.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* at 11668, para. 28; 44 U.S.C. §§ 3301, *et seq.*

<sup>26</sup> See *Data Collection Protective Order*, 29 FCC Rcd at 11680, Appx. C; *Public Notice*, 30 FCC Rcd at 6421.

<sup>27</sup> *Data Collection Protective Order*, 29 FCC Rcd at 11673, para. 5.

<sup>28</sup> *Id.* at 11674, Appx. A at para. 9.

<sup>29</sup> *Id.* at 11674, Appx. A at para. 8 (permitting authorized parties to use of confidential and highly confidential information solely for purposes of the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding).

<sup>30</sup> See *id.* at 11664-65, 11673, paras. 23-24 & Appx. A at para. 5 (the Bureau will periodically release public notices identifying Acknowledgment-filers seeking authorization to access confidential and highly confidential information submitted in the data collection subject to a five business day objection period). In order to access confidential and highly confidential information submitted in the rulemaking proceeding, parties are required to sign and file with the Commission three Acknowledgments pursuant to the *Data Collection Protective Order*, *Second Protective Order* and *Modified Protective Order*. See *id.* at 11680, Appx. C; *Second Protective Order*, 25 FCC Rcd at 17733, Appx. A; *Modified Protective Order*, 25 FCC Rcd 15175, Appx. A.