



PUBLIC NOTICE

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WIRELINE COMPETITION BUREAU TO INCORPORATE BUSINESS DATA SERVICES DATA AND SECOND FURTHER NOTICE AND FURTHER NOTICE RECORD INTO USTELECOM FORBEARANCE PROCEEDING

WC Docket Nos. 18-141, 17-144, 16-143, 05-25; RM-10593

Objections Due: April 15, 2019

By this Public Notice, the Wireline Competition Bureau (Bureau) announces its intent to incorporate confidential and highly confidential information and data filed in response to the Commission's business data services (BDS) data collection (Highly Confidential and Confidential BDS Collection),¹ and public comments filed in the *Second Further Notice and Further Notice* in the BDS proceedings,² into the record of the USTelecom—The Broadband Association (USTelecom) Forbearance Petition proceeding, WC Docket No. 18-141,³ subject to protective orders. Interested parties wishing to file an objection to the incorporation of their Highly Confidential and Confidential BDS Collection responses into the record of the USTelecom Forbearance Petition proceeding have until **April 15, 2019** to do so.

In 2015, the Bureau implemented a one-time mandatory collection of facilities and competition data from providers and purchasers of BDS and larger entities that provide “best efforts” business broadband Internet access service on a nationwide basis in price cap areas that is part of the record in the BDS proceedings (BDS collection).⁴ Respondents submitted data and information on revenues, prices, expenses, customers, and facilities that is highly competitively sensitive and not publicly available. The

¹ *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, Order on Reconsideration, 29 FCC Rcd 10899 (WCB 2014); *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16340, para. 52 (2012) (delegating authority to the Bureau to implement the BDS collection); see FCC, Instructions for Data Collection for Special Access Proceeding, WC Docket No. 05-25, RM-10593, OMB Control No. 3060-1197 (Dec. 5, 2014), <https://docs.fcc.gov/public/attachments/DOC-330865A2.pdf>.

² *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, Report and Order, Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 33 FCC Rcd 10403, 10453-58, paras. 147-62 (2018) (*Second Further Notice and Further Notice*). To date, parties have filed approximately 15 comments, reply comments, and ex parte notices in response to the *Second Further Notice and Further Notice*.

³ Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141 (filed May 4, 2018) (USTelecom Forbearance Petition).

⁴ See *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4737-43, paras. 29-37, 39-43 (2016) (*First Further Notice*) (in-depth discussion of the Highly Confidential and Confidential BDS Collection).

Bureau adopted Protective Orders in the BDS proceedings governing the process for designating, submitting, and accessing confidential and highly confidential information and data submitted in those proceedings.⁵ Pursuant to the Protective Orders, the Bureau established a secure data enclave as the exclusive method for parties to access and analyze the Highly Confidential and Confidential BDS Collection.⁶

On May 4, 2018, USTelecom filed a petition pursuant to section 10 of the Communications Act of 1934, as amended (Act), requesting that the Commission grant forbearance from, among other requirements, section 251(c) unbundling and resale requirements and related obligations.⁷ The facilities and competition data from the BDS collection are “the most comprehensive source of data for business data services”⁸ and, as such, will significantly enhance the Commission’s ability to analyze competitive facilities deployment. In addition, the issues raised by USTelecom’s request for nationwide relief from the incumbent local exchange carrier (LEC) obligation to provide dedicated transport as an unbundled network element pursuant to section 251(c)(3) of the Act and section 51.319(d) of the Commission’s rules are similar to some of the issues raised in the BDS proceeding.⁹ Indeed, USTelecom relies on the Commission’s analysis of the data submitted in the BDS proceedings for the factual basis of its forbearance request.¹⁰ Accordingly, subject to the protective order described below, the Bureau intends to incorporate the Highly Confidential and Confidential BDS Collection into the record of the USTelecom Forbearance Petition proceeding for participants to access and analyze for purposes of commenting on the USTelecom Forbearance Petition.¹¹

The Bureau will adopt a protective order to ensure the confidentiality of the Highly Confidential and Confidential BDS Collection when incorporated into the record of the USTelecom Forbearance Petition proceeding. This protective order will provide the same protections adopted in the Protective Orders in the BDS proceedings. Specifically, the secure data enclave will remain the exclusive method for accessing the Highly Confidential and Confidential BDS Collection.¹² Access to the Highly Confidential and Confidential BDS Collection and the secure data enclave will be limited to outside

⁵ See *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Order and Data Collection Protective Order, 29 FCC Rcd 11657 (WCB 2014) (*Data Collection Protective Order*); Order and Modified Data Collection Protective Order, 30 FCC Rcd 10027 (WCB 2015); *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Order, 31 FCC Rcd 7104 (WCB 2016) (collectively “the Protective Orders”).

⁶ *Data Collection Protective Order*, 29 FCC Rcd at 11657, para. 1; see *id.* at 11677-79, Appx. B (defining “Highly Confidential Data” pursuant to the Protective Orders).

⁷ See USTelecom Forbearance Petition; *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, Order, DA 19-75 (WCB Feb. 14, 2019) (extending to August 2, 2019 the date by which the USTelecom Petition shall be deemed granted in the absence of a Commission denial).

⁸ *Second Further Notice and Further Notice*, 33 FCC Rcd at 10457, para. 156; see *First Further Notice*, 31 FCC Rcd at 4741-42, paras. 39-41 (scope and mandatory nature of Highly Confidential and Confidential BDS Collection).

⁹ 47 U.S.C. § 251(c)(3); 47 CFR § 51.319(d); see USTelecom Forbearance Petition, Appx. A at 1.

¹⁰ See, e.g., USTelecom Forbearance Petition at 13-14. We note that this is not the first time that the record of the BDS proceeding, or a subset thereof, has been incorporated into another proceeding regarding similar subject matter. See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, 30 FCC Rcd 13680, 13683 para. 9 (WCB 2015).

¹¹ The Bureau will issue a public notice announcing the re-opening of the secure data enclave for this purpose for a limited period of time and establishing a comment period for parties in the USTelecom Forbearance Petition proceeding to submit comments on the Highly Confidential and Confidential BDS Collection.

¹² *Data Collection Protective Order*, 29 FCC Rcd at 11657, para. 1; *id.* at 11673, Appx. A at para. 6.

counsel and outside consultants not involved in competitive decision-making.¹³ The protective order will provide parties that submitted data and other information that is part of the Highly Confidential and Confidential BDS Collection an opportunity to object to disclosure of their data and information to any party requesting access within five business days of release of a public notice identifying a party or parties seeking access.¹⁴ The protective order will be in addition to the protective order adopted by the Bureau on June 1, 2018, which governs access to confidential information submitted in the USTelecom Forbearance Petition proceeding that is not included in the Highly Confidential and Confidential BDS Collection.¹⁵

Parties wishing to object to the incorporation of their data and information into the USTelecom Forbearance Petition proceeding have until **April 15, 2019** to file their objections.

We also incorporate into the record of the USTelecom Forbearance Petition the public filings submitted in response to the *Second Further Notice and Further Notice* in the BDS proceedings, WC Docket Nos. 16-143 and 17-144, since October 24, 2018.¹⁶ In the *Second Further Notice and Further Notice*, the Commission proposed to eliminate ex ante pricing regulation of price cap lower speed time division multiplexing (TDM) transport services and sought comment on the appropriate regulatory framework for certain rate-of-return incumbent LECs' provision of lower speed TDM transport and other transport based on the existence of competitive alternatives, specifically seeking comment on the potential use of the Commission's competitive analysis in the *BDS Order*, including its use of the Highly Confidential and Confidential BDS Collection, and other more recent data and information for such purposes.¹⁷ Those comments are on the public record and many of the issues discussed therein relate to competitive network deployments similar to issues in question in the USTelecom Forbearance Petition proceeding. We therefore believe that the analyses in the submissions may assist our inquiry here.

For further information, please contact Christopher Koves, Pricing Policy Division, Wireline Competition Bureau, at (202) 418-8209 or via email at Christopher.Koves@fcc.gov, or Michele Levy Berlove, Competition Policy Division, Wireline Competition Bureau, at (202) 418-1477 or via email at Michele.Berlove@fcc.gov.

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¹³ See *id.* at 11673, Appx. A at para. 5.

¹⁴ See *id.* at 11665, para. 23; *id.* at 11673, Appx. A at para. 5; see *Parties Seeking Access to Data and Information Filed in Response to the Special Access Data Collection*, WC Docket No. 05-25, RM-10593, Public Notice, 30 FCC 7260, 7262-64, Attach. (WCB 2015).

¹⁵ See *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, Protective Order, 33 FCC Rcd 5290 (WCB 2018).

¹⁶ The comment period established by the forthcoming public notice, see *supra* n.11, will also establish the comment deadline for parties in the USTelecom Forbearance Petition proceeding to submit comments on the public record in response to the *Second Further Notice and Further Notice* that is incorporated into the USTelecom Forbearance Petition docket herein.

¹⁷ See, e.g., *Second Further Notice and Further Notice*, 33 FCC Rcd at 10453, 10456, paras. 147, 154; see *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5, RM-10593, Report and Order, 32 FCC Rcd 3459 (2017) (*BDS Order*), remanded in part *sub nom.*, *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. Aug. 28, 2018).