

Before the
 Federal Communications Commission
 Washington, D.C. 20554

In the Matter of)
)
 Investigation of Certain Price Cap Local Exchange) WC Docket No. 15-247
 Carrier Business Data Services Tariff Pricing Plans)

ORDER MODIFYING PROTECTIVE ORDERS

Adopted: January 15, 2021

Released: January 15, 2021

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In 2015, the Wireline Competition Bureau (Bureau) initiated an investigation into the lawfulness of certain tariff pricing plans for business data services (BDS) offered by AT&T, CenturyLink, Frontier, and Verizon (the *Tariff Investigation Proceeding*).¹ To aid the Commission’s assessment of the issues in the *Tariff Investigation Proceeding*, the Bureau adopted an order incorporating the record in the long-running price cap BDS rulemaking proceedings (the *Price Cap BDS Rulemakings*) into the docket in the *Tariff Investigation Proceeding*.² As part of that order, the Bureau adopted two protective orders, the *Business Data Services Data Collection Protective Order* and the *Tariff Investigation Protective Order* (collectively, *Protective Orders*), that, in part, provide parties to the *Tariff Investigation Proceeding* with a process for accessing confidential information, highly confidential information, and highly confidential data from the *Price Cap BDS Rulemakings* (the *Protected Information*).³ Subject to limited exception for parties’ own pleadings and Commission releases, the *Protective Orders* require parties to destroy or return the *Protected Information* after the conclusion of the *Tariff Investigation Proceeding* and any administrative or judicial review.⁴

2. We are releasing this Order in conjunction with a public notice terminating the *Price Cap BDS Rulemakings*, closing the dockets in those proceedings, and reminding parties to those proceedings of their obligation to destroy or return to submitting parties confidential and highly confidential documents.⁵ Because the *Tariff Investigation Proceeding* has not been concluded, the duty of parties to

¹ See generally *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 (WCB 2015) (*Designation Order*).

² *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 et al., Order and Protective Orders, 30 FCC Rcd 13680 (WCB 2015) (*Order and Protective Orders*). The *Price Cap BDS Rulemakings* consisted of the following proceedings and dockets: Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25; Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; and AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593.

³ *Order and Protective Orders*, 30 FCC Rcd at 13686-94, Appx. A (*Business Data Services Data Collection Protective Order*); *id.* at 13695-13707, Appx. B (*Tariff Investigation Protective Order*).

⁴ *Id.* at 13691-92, Appx. A at para. 16; *id.* at 13702, Appx. B at para. 20.

⁵ *Wireline Competition Bureau Terminates Price Cap Business Data Services Proceedings, Closes Dockets, and Opens New Docket; Parties Required to Destroy or Return Confidential and Highly Confidential Documents*, WC

that proceeding to destroy or return the *Protected Information* is not triggered under the existing *Protective Orders*. The *Protected Information* is not, however, relevant to the issues remaining in the *Tariff Investigation Proceeding* and the confidentiality interest of parties that submitted these materials in the *Price Cap BDS Rulemakings* outweighs any minimal interest parties to the *Tariff Investigation Proceeding* have in continued access to the *Protected Information*. We therefore amend the *Protective Orders* to require all parties to the *Tariff Investigation Proceeding* that have in their possession any material containing *Protected Information* to destroy those materials or return them to the submitting party, except as provided in this Order, and certify their compliance with the amended *Protective Orders*.

II. BACKGROUND

3. In 2005, the Commission initiated the first in a series of rulemakings relating to BDS offerings provided by price cap incumbent local exchange carriers (LECs) and sought marketplace data to assist the Commission's evaluation of the issues raised in that proceeding.⁶ The Commission conducted the *Price Cap BDS Rulemakings* in WC Docket Nos. 16-143, 05-25, and RM-10593. The record in the *Price Cap BDS Rulemakings* includes data on the presence of competitive facilities and other competition and pricing data submitted in response to the Bureau's voluntary data requests conducted in 2010 and 2011.⁷ That record also includes information submitted in 2014 and 2015 as the result of a comprehensive, one-time mandatory data collection on the presence of BDS facilities and competition from providers and purchasers of BDS and larger entities that provide "best efforts" business broadband Internet access service in price cap areas which we refer to as the *2015 Data Collection*.⁸

4. Because much of the material submitted in the *Price Cap BDS Rulemakings* is highly competitively sensitive and not publicly available, the Bureau issued a series of protective orders to govern the treatment of that information. The *First Protective Order*, adopted June 8, 2005, and the *Modified Protective Order*, adopted October 28, 2010, protect proprietary or "confidential information" submitted in the *Price Cap BDS Rulemakings*.⁹ The *Second Protective Order*, adopted December 27,

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Docket No. 16-143 et al., Public Notice, DA 20-71 (WCB Jan. 15, 2021) (*January 15, 2021 Public Notice*). Pursuant to the protective orders in the *Price Cap BDS Rulemakings*, subject to limited exceptions for parties' own pleadings and Commission releases, by January 29, 2021, counsel and consultants are required to destroy or return to the submitting party confidential and highly confidential documents covered by those protective orders and, by February 5, 2021, counsel is required to deliver certification of compliance to counsel for the submitting party. However, the Bureau extended these deadlines for six months for any party that certified under penalty of perjury that timely compliance will be more burdensome because of workplace or personnel limitations arising from the Coronavirus pandemic. *Id.*

⁶ *Special Access Rates for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25 et al., Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1994, para. 1 (2005) (*Special Access NPRM*).

⁷ See *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638 (WCB 2009); *Data Requested in Special Access NPRM*, WC Docket No. 05-25 et al., Public Notice, 25 FCC Rcd 15146 (WCB 2010); *Clarification of Data Requested in Special Access NPRM*, WC Docket No. 05-25 et al., Public Notice, 25 FCC Rcd 17693 (WCB 2010); *Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25 et al., Public Notice, 26 FCC Rcd 14000 (WCB 2011).

⁸ See *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25 et al., Order on Reconsideration, 29 FCC Rcd 10899, 10908-36, Appx. A (WCB 2014) (*Data Collection Reconsideration Order*); *Wireline Competition Bureau Releases List of Special Access Data Collection Respondents*, WC Docket No. 05-25 et al., Public Notice, 30 FCC Rcd 4462 (WCB 2015).

⁹ See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order, 20 FCC Rcd 10160 (WCB 2005) (*First Protective Order*); *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25 et al, Modified Protective Order, 25 FCC Rcd 15168, 15173, para. 19 (WCB 2010) (*Modified Protective Order*). The *Modified Protective Order* superseded the *First Protective Order*. *Modified Protective Order*, 25 FCC Rcd at 15169, para. 2.

2010, created another level of protections for “highly confidential information” which, if released to the submitting parties’ competitors, would allow those competitors to gain a significant advantage in the marketplace.¹⁰ Access to highly confidential information is limited to outside counsel, their employees, and outside consultants whom they retain.¹¹ Subject to a narrow exception allowing reviewing parties to keep two copies of their own pleadings and Commission releases, reviewing parties that accessed confidential information pursuant to the *Modified Protective Order* or highly confidential information pursuant to the *Second Protective Order* are required to destroy or return these materials to the submitting parties after the conclusion of the *Price Cap BDS Rulemakings* and any administrative or judicial review.¹²

5. In 2014, the Bureau adopted the *Data Collection Protective Order* to protect confidential information, highly confidential information, and highly confidential data submitted as part of the *2015 Data Collection*.¹³ In that order, the Bureau created another level of protection for certain highly sensitive data submitted in the *2015 Data Collection*, including facilities’ locations, pricing, and customers, designated by the Bureau as “highly confidential data.”¹⁴ The Bureau established the secure data enclave administered by a third-party, the National Opinion Research Center at the University of Chicago (NORC), as the exclusive method for authorized parties to access and analyze highly confidential data submitted as part of the *2015 Data Collection*.¹⁵ Access to that highly confidential information, highly confidential data, and the secure data enclave is limited to outside counsel and outside consultants not involved in competitive decision-making.¹⁶ Subject to a narrow exception for parties’ own pleadings and Commission releases, the *Data Collection Protective Order* requires reviewing parties that have accessed confidential information, highly confidential information, and/or highly confidential data subject to the *Data Collection Protective Order* to destroy or return these materials to the submitting parties after the conclusion of the *Price Cap BDS Rulemakings* and any administrative or judicial review.¹⁷

6. In 2015, AT&T, Verizon, CenturyLink, and Frontier filed a motion to permit parties in the *Tariff Investigation Proceeding* to use highly confidential data submitted in the *Price Cap BDS Rulemakings* in the *Tariff Investigation Proceeding*.¹⁸ While “these data may not be sufficient to resolve

¹⁰ *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25 et al., Second Protective Order, 25 FCC Rcd 17725, 17726, para. 3 (WCB 2010) (*Second Protective Order*); see Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, FCC, to Paul Margie, Wiltshire & Grannis LLP, WC Docket No. 05-25, 26 FCC Rcd 6571 (WCB 2011) (granting a request for enhanced confidential treatment for certain data pursuant to the *Second Protective Order*); Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, FCC, to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, WC Docket No. 05-25, 27 FCC Rcd 1545 (WCB 2012) (granting in part, denying in part, a request for highly confidential treatment pursuant to the *Second Protective Order*).

¹¹ *Second Protective Order*, 25 FCC Rcd at 17727-28, para. 6.

¹² *Id.* at 17731, para. 20; *Modified Protective Order*, 25 FCC Rcd at 15173, para. 19.

¹³ *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25 et al., Order and Data Collection Protective Order, 29 FCC Rcd 11657, 11676, Appx. A at para. 18 (WCB 2014) (*Data Collection Protective Order*); see *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25 et al., 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) (extending the protective orders in WC Docket No. 05-25 to WC Docket No. 16-143).

¹⁴ *Data Collection Protective Order*, 29 FCC Rcd at 11677-78, Appx. B.

¹⁵ *Id.* at 11662, para. 13. The secure data enclave was administered by a third party, NORC, and provided authorized parties with access to the *2015 Data Collection* either remotely through a virtual private network (VPN) or in-person in NORC offices. See *id.* at 11657, 1161-62, paras. 1, 12 n.32.

¹⁶ *Id.* at 11657, para. 1.

¹⁷ *Id.* at 11676, Appx. A at para. 18.

the issues raised in the [*Tariff Investigation Proceeding*],” the four carriers alleged that these “data are likely to include relevant information about the state of competition in the marketplace, the impact of specific contract terms on such competition, the extent to which competitive providers use contract terms similar to [incumbent LECs], as well as potentially other matters,” and are “therefore necessary to the [incumbent LECs’] defense in the [*Tariff Investigation Proceeding*].”¹⁹ In response, the Bureau adopted an order incorporating the record in the *Price Cap BDS Rulemakings* into the docket in the *Tariff Investigation Proceeding*, and the record in the *Tariff Investigation Proceeding* into the dockets in the *Price Cap BDS Rulemakings*.²⁰ The Bureau found that “there are data submitted in the [*Price Cap BDS Rulemakings*] proceeding[s] that are relevant to the question of reasonableness of the incumbent LEC pricing plan terms and conditions in the tariff investigation” including “data related to the terms and conditions of their tariffs or sales agreements” for BDS.²¹ As part of that order, the Bureau issued two protective orders to ensure that parties to the *Tariff Investigation Proceeding* had appropriate access to confidential information, highly confidential information, and highly confidential data submitted in the *Price Cap BDS Rulemakings*.²²

7. The first protective order, the *Business Data Services Data Collection Protective Order*, protects confidential information, highly confidential information, and highly confidential data originally submitted as part of the *2015 Data Collection*. It permits outside counsel and consultants, representing participants in the *Tariff Investigation Proceeding*, who satisfy certain requirements (i.e., Reviewing Parties) to access confidential information, highly confidential information, and highly confidential data submitted in the *2015 Data Collection*.²³ It requires Reviewing Parties to execute Acknowledgments of Confidentiality seeking either “only Confidential” or “Confidential and Highly Confidential” access and to agree to be bound by the terms of the *Business Data Services Data Collection Protective Order*.²⁴ Once authorized, Reviewing Parties are allowed to request from the Bureau, as appropriate, a complete set of confidential and highly confidential information (but not highly confidential data) in electronic form.²⁵ The *Business Data Services Data Collection Protective Order* maintains the secure data enclave as the exclusive method for parties to access and analyze highly confidential data submitted in the *2015 Data Collection*. It allows Reviewing Parties to request from NORC physical or electronic copies of their analysis, excluding raw datapoints, subject to the Bureau’s output disclosure guidelines.²⁶ It also allows Reviewing Parties to submit comments or other filings in the *Tariff Investigation Proceeding* containing confidential information, highly confidential information, and highly confidential data under seal bearing the confidential or highly confidential legend.²⁷ The *Business Data Services Collection Protective Order* specifies that within two weeks after conclusion of the *Tariff Investigation Proceeding* and any administrative or judicial review, subject to limited exception for Reviewing Parties’ own pleadings and Commission releases, Reviewing Parties must destroy confidential and highly confidential documents (including highly confidential data) and all copies of the same.²⁸ All counsel are required to certify

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¹⁸ Motion of AT&T Inc., Verizon, CenturyLink, and Frontier to Modify Protective Orders, WC Docket No. 15-247, 05-25 (filed Oct. 23, 2015).

¹⁹ *Id.* at 3.

²⁰ *Order and Protective Orders*, 30 FCC Rcd at 13683-84, paras. 9-10.

²¹ *Id.* at 13683, para. 9 (citing *Data Collection Reconsideration Order*, 29 FCC Rcd at 10916, 10919-21 (Questions II.A.17-19 and II.B.10-13)).

²² *See id.* at 13680, para. 1.

²³ *Id.* at 13689-91, Appx. A at paras. 2-6.

²⁴ *Id.* at 13688-89, Appx. A at paras. 2-3; *id.* at 13693-94, Appx. A, Attach. 1.

²⁵ *Id.* at 13689, Appx. A at para. 5.

²⁶ *Id.* at 13689, Appx. A at para. 4.

²⁷ *Order and Protective Order*, 30 FCC Rcd at 13690, Appx. A at para. 8.

compliance with these terms and file such certification with the Commission not more than three weeks after the conclusion of the *Tariff Investigation Proceeding*.²⁹

8. The second protective order, the *Tariff Investigation Protective Order*, allows parties who satisfy certain requirements (i.e., Reviewing Parties) to access confidential and highly confidential information submitted in the four carriers' direct cases in response to the Order designating issues for review in the *Tariff Investigation Proceeding*,³⁰ other confidential and highly confidential information submitted in the *Tariff Investigation Proceeding*,³¹ and other highly confidential information from the *Price Cap BDS Rulemakings* incorporated by reference into the *Tariff Investigation Proceeding*.³² Reviewing Parties must execute Acknowledgments of Confidentiality seeking either "only Confidential" or "Confidential and Highly Confidential" access and agree to be bound by the terms of the *Tariff Investigation Protective Order*.³³ Once authorized, Reviewing Parties can access confidential and highly confidential documents, as appropriate, in the offices for counsel for the submitting party and request copies.³⁴ Reviewing Parties can also request from submitting parties copies of highly confidential information on an electronic storage device (such as a CD-ROM, DVD, flash drive or portable hard drive).³⁵ Reviewing Parties can submit direct cases, objections or comments, rebuttals, or other filings in the *Tariff Investigation Proceeding* containing confidential and highly confidential information under seal bearing the confidential or highly confidential legend.³⁶ Within two weeks after conclusion of the *Tariff Investigation Proceeding* and any administrative or judicial review, subject to the limited exception for Reviewing Parties' own pleadings and Commission releases, Reviewing Parties are required to destroy or return to the submitting party confidential and highly confidential documents and all copies of the same.³⁷ All Reviewing Parties are required to certify compliance with these terms and deliver such certification to counsel for the submitting party and file such certification with the Commission not more than three weeks after conclusion of the *Tariff Investigation Proceeding*.³⁸

9. In 2016, the Commission adopted the *Tariff Investigation Order*, finding that tariffed "all-or-nothing" provisions and shortfall and termination penalties contained in certain pricing plans under investigation are unjust and unreasonable under section 201(b) of the Communications Act of 1934, as amended (the Act).³⁹ AT&T sought judicial review of the *Tariff Investigation Order* in the U.S. Court

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²⁸ *Id.* at 13691-92, Appx. A at para. 16.

²⁹ *Id.*

³⁰ *Id.* at 13703, Appx. B, Attach. 1.

³¹ *Id.* at 13704, Appx. B, Attach. 1.

³² *Id.* at 13705, Appx. B., Attach. 1 (defining other highly confidential information from *Price Cap BDS Rulemakings* that will be considered highly confidential information under the *Tariff Investigation Protective Order*).

³³ *Id.* at 13698-99, Appx. B at paras. 6-7; *see id.* 13706-07, Appx. B, Attach. 2.

³⁴ *Id.* at 13699, para. 8.

³⁵ *Id.* at 13699, Appx. B at paras. 8-9.

³⁶ *Id.* at 13700, Appx. B at para. 12.

³⁷ *Id.* at 13702, Appx. B at para. 20.

³⁸ *Id.*

³⁹ *See Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 15-247 et al., *Tariff Investigation Order and Further Notice of Proposed Rulemaking*, 31 FCC Rcd 4723, 4761-90, paras. 86-158 (2016) (*Tariff Investigation Order*), *remanded sub nom. AT&T, Inc. v. FCC*, Nos. 16-1145, 16-1166, 16-1177 (D.C. Cir. Aug. 29, 2017). All-or-nothing provisions require customers to commit all their relevant in-service purchases, such as DS1 or DS3 channel terminations, to a single pricing plan. *See id.* at 4764, para. 95. Shortfall penalties or fees are charges assessed on a purchaser under special access tariff pricing plans if its purchases fall below a percentage-

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of Appeals for the District of Columbia Circuit (D.C. Circuit), alleging that the Commission’s finding invalidating tariffed “‘all-or-nothing’ provisions in optional portability plans” and “shortfall and early termination liabilities” were “unreasonable, unsupported by the record, and inconsistent with governing law, including *BellSouth v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).”⁴⁰ In *BellSouth*, the D.C. Circuit vacated and remanded for further proceedings a Commission decision finding that BellSouth’s tariffed pricing plan for special access services (now referred to as BDS) violated section 272(c)(1) and (e)(3) of the Act, which prohibit a Bell Operating Company from discriminating in favor of its affiliates or charging them less than non-affiliates.⁴¹ In 2017, the D.C. Circuit granted a motion by the Commission for voluntary remand to permit it “to consider the extent to which the reasoning in the [*Tariff Investigation Order*] is compatible with the *Bell[S]outh* decision...or to otherwise reconsider its determination.”⁴² The Bureau sought comment on the issues raised by the D.C. Circuit’s remand order, asking parties to “address issues that will permit the Commission ‘to consider the extent to which the reasoning in the [*Tariff Investigation Order*] is compatible with the *Bell[S]outh* decision...or otherwise reconsider its determination’ that the tariff provisions in question were unlawful.”⁴³ To date, the Commission has not adopted an order on remand.

10. Also in 2017, the Commission issued the *Price Cap BDS Order* in the *Price Cap BDS Rulemakings*, adopting a comprehensive regulatory framework for BDS provided by price cap incumbent LECs.⁴⁴ Several parties petitioned for judicial review of the *Price Cap BDS Order* and their appeals were consolidated before the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit).⁴⁵ On appeal, the Eighth Circuit largely upheld the *Price Cap BDS Order*, but partially vacated and remanded to the Commission the issue of pricing regulation for BDS Time Division Multiplexing (TDM) transport services for price cap incumbent LECs.⁴⁶ In 2019, the Commission adopted the *Price Cap BDS Remand*

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based or other volume commitment specific in a tariff pricing plan as a precondition for obtaining the pricing plan’s discount or circuit portability benefit. *Id.* at 4773, para. 116.

⁴⁰ AT&T Petition for Review, *AT&T, Inc. v. FCC*, No. 16-1145 (D.C. Cir. May 11, 2016); Nonbinding Statement of Issues to be Raised, *AT&T, Inc. v. FCC*, No. 16-1166 (D.C. Cir. July 7, 2016) (AT&T Stmt. of the Issues) (citing *BellSouth v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006) (*BellSouth*)). CenturyLink intervened in the proceeding in support of AT&T’s petition.

⁴¹ *BellSouth*, 469 F.3d at 1055-56. Among other things, in *BellSouth* the D.C. Circuit faulted the Commission for failing to produce evidence that marginal cost bears a linear relationship to volume with respect to volume discounts, a rationale the Commission gave for invalidating the tariff term, *id.* at 1056-58 and failing to show that customers either were or would be harmed by volume commitments, *id.* at 1059-60. In 2006, BellSouth Telecommunications, Inc. (BellSouth), a former Bell Operating Company, merged with and became a wholly-owned subsidiary of AT&T, Inc. See *id.* at 1056; *FCC Approves Merger of AT&T Inc. and BellSouth Corporation*, News Release, 2006 WL 3847995 (Dec. 29, 2006). Because the sole complainant, AT&T Corp., and sole defendant, BellSouth, were wholly-owned affiliates of AT&T, Inc., AT&T, Inc. on behalf of those affiliates moved for dismissal of the complaint and of the proceeding on remand from the D.C. Circuit in *BellSouth*. On April 16, 2007, the Enforcement Bureau’s Market Disputes Resolution Division granted AT&T Inc.’s Motion for Dismissal. *AT&T Corp. v. BellSouth Telecommunications, Inc.*, File EB-04-MD-010, Order of Dismissal, 22 FCC Rcd 7374 (Mkt. Disputes Resolution Div. 2007).

⁴² Order, *AT&T, Inc. v. FCC*, Nos. 16-1145, 16-1166, 16-1177 (D.C. Cir. Aug. 29, 2017) (*Remand Order*); FCC Mot. for Vol. Remand, *AT&T, Inc. v. FCC*, No. 16-1166, at 3 (D.C. Cir. June 13, 2017).

⁴³ *Wireline Competition Bureau Seeks Comment in Connection With Court Remand of Tariff Investigation Order*, WC Docket No. 15-247, Public Notice, 32 FCC Rcd 9291 (WCB 2017) (*November 3, 2017 Public Notice*).

⁴⁴ See *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., 32 FCC Rcd 3459, 3462-63, para. 5 (2017) (*Price Cap BDS Order*), remanded in part sub nom., *Citizens Telecomms. Co. of Minn., LLC et al. v. FCC*, 901 F.3d 991 (8th Cir. 2018) (*Citizens*).

⁴⁵ See Order, *Citizens Telecomms. Co. of Minn., LLC et al. v. FCC*, Nos. 17-2296, 17-2342, 17-2344 and 17-2685 (8th Cir. Aug. 7, 2017).

Order which, among other things, eliminated *ex ante* pricing regulation of TDM transport services provided by price cap incumbent LECs.⁴⁷ No party filed either a petition for reconsideration or a petition for judicial review.

11. While the *Price Cap BDS Order* was being appealed to the Eighth Circuit, the Bureau announced on October 2, 2017 that the secure data enclave hosted by NORC used by authorized parties to access and analyze the *2015 Data Collection* would close on December 31, 2017.⁴⁸ All data and work product stored in the secure data enclave was archived as of December 31, 2017 pending judicial review of the *Price Cap BDS Order*.⁴⁹ No parties to the *Tariff Investigation Proceeding* filed an objection or sought continued access to the secure data enclave or the *2015 Data Collection*. On June 29, 2020, the Bureau announced that as of July 3, 2020 it would no longer archive data and work product in the secure data enclave hosted by NORC, in part, because the Commission's contract with NORC was set to expire on July 3, 2020.⁵⁰ The Bureau found that renewing the contract with NORC would entail additional administrative burdens and expenses that were unnecessary and unjustified and that there was no evidence that parties will suffer harm if data and work product were no longer archived.⁵¹ Accordingly, the Commission allowed its contract with NORC to expire on July 3, 2020, after which all data and work product archived in the secure data enclave was destroyed.⁵²

12. Because the Commission has resolved all of the relevant issues in the *Price Cap Remand Order* and opportunities for administrative and judicial review have been exhausted, accompanying this Order, we are releasing a public notice terminating the *Price Cap BDS Rulemakings* and closing the dockets in those proceedings.⁵³ Pursuant to the protective orders adopted in the *Price Cap BDS Rulemakings*, subject to the narrow exception for parties' own pleadings and Commission releases, parties that accessed *Protected Information* are required to destroy or return these materials to submitting parties and certify compliance.⁵⁴

III. DISCUSSION

13. Upon consideration of the history of the *Tariff Investigation Proceeding* and the matters still at issue in that proceeding, we find that it is no longer in the public interest for parties in the *Tariff Investigation Proceeding* to have access to the *Protected Information*. Parties to the *Tariff Investigation Proceeding* will not be prejudiced by lack of continuing access to the *Protected Information* while parties that submitted the *Protected Information* have an interest in its destruction or return.

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⁴⁶ See *Citizens*, 901 F.3d 991.

⁴⁷ *Price Cap BDS Remand Order*, 34 FCC Rcd at 5775-90, paras. 15-51.

⁴⁸ *Secure Data Enclave for Accessing Highly Confidential Business Data Services (Special Access) Data Will Close on December 31, 2017*, WC Docket No. 15-247 et al., Public Notice, 32 FCC Rcd 7357 (WCB 2017) (*October 2, 2017 Public Notice*).

⁴⁹ *Wireline Competition Bureau to Archive Secure Data Enclave for Accessing Highly Confidential Business Data Services (Special Access) Data*, WC Docket No. 15-247 et al., Public Notice, 32 FCC Rcd 10362 (WCB 2017) (*December 18, 2017 Public Notice*).

⁵⁰ *Wireline Competition Bureau Announces that Parties' Work Product Will No Longer Be Archived in the Secure Data Enclave in the BDS and USTelecom Forbearance Proceedings*, WC Docket No. 16-143 et al., Public Notice, 35 FCC Rcd 6567 (WCB 2020) (*June 29, 2020 Public Notice*).

⁵¹ *Id.* at 6568.

⁵² *Id.*

⁵³ *January 15, 2021 Public Notice* at 1.

⁵⁴ *Id.*

14. Although the *Tariff Investigation Proceeding* remains open on remand from the D.C. Circuit, the issues remaining before the Commission are purely legal issues, consideration of which do not require reliance on *Protected Information*. On remand, the Commission must determine whether its previous findings invalidating “all-or-nothing” provisions and shortfall and early termination penalties in the BDS pricing plans under investigation were unreasonable, unsupported by the record, and inconsistent with *BellSouth*.⁵⁵ In the *Tariff Investigation Order*, the Commission used the *Protected Information* in considering the state of BDS competition, but did not rely on the *Protected Information* in finding that certain tariff pricing plans’ “all-or-nothing” provisions and shortfall and early termination penalties were unjust and unreasonable under section 201(b) of the Act.⁵⁶ AT&T did not refer to *Protected Information* in its pleadings before the Commission and no party responding to the public notice released by the Bureau seeking comment on the voluntary remand made use of *Protected Information*.⁵⁷ We find, therefore, that the issues before the Commission on remand do not require access to the *Protected Information* and that lack of access to the *Protected Information* will not affect parties’ ability to meaningfully participate in the *Tariff Investigation Proceeding* on remand. In sum, there is no evidence in the record suggesting that parties in the *Tariff Investigation Proceeding* will suffer harm if they are unable to access the *Protected Information*.

15. By contrast, parties that submitted the *Protected Information*, including confidential information, highly confidential information, and highly confidential data, in the *Price Cap BDS Rulemakings* have a strong interest in ensuring the confidential treatment of their competitively-sensitive, non-public information.⁵⁸ Confidential and highly confidential information is subject to protection under the Commission’s rules.⁵⁹ Highly confidential information, in particular, is claimed by Submitting Parties to constitute some of their “most sensitive business data which, if released to competitors or those with whom [they do] business, would allow those persons to gain a significant advantage in the marketplace or in negotiations.”⁶⁰ The highly confidential data submitted in the *2015 Data Collection*, in particular, contains some of Submitting Parties’ most highly competitively sensitive information, including network maps and data on locations served, revenues, and billing.⁶¹ The *Price Cap BDS Rulemakings*, in which Submitting Parties originally submitted *Protected Information*, has been terminated and is no longer active. Pursuant to the protective orders adopted in the *Price Cap BDS Rulemakings*, Submitting Parties have an expectation that *Protected Information* they submitted in the *Price Cap BDS Rulemakings* will be returned to them or destroyed now that the *Price Cap BDS Rulemakings* have concluded.⁶²

16. Also relevant to our decision is the fact that, as a practical matter, that portion of the *Protected Information* that was available only through the now-closed secure data enclave is already inaccessible to the parties to the *Tariff Investigation Proceeding*. Given the *Protected Information*’s lack

⁵⁵ See AT&T Stmt. of Issues at 2.

⁵⁶ See *Tariff Investigation Order*, 31 FCC Rcd at 4763, 4772 paras. 90-91, 110.

⁵⁷ See responses to the *October 2, 2017 Public Notice*.

⁵⁸ See *Order and Protective Orders*, 30 FCC Rcd at 13684-85, para. 14; *Data Collection Protective Order*, 29 FCC Rcd at 11658, para. 3.

⁵⁹ *Order and Protective Orders*, 30 FCC Rcd at 13686-87, para. 1.

⁶⁰ *Id.* at 13686-87, Appx. A at para. 1; see also *Data Collection Protective Order*, 29 FCC Rcd at 11659, para. 5; *id.* at 11677-79, Appx. B.

⁶¹ See *Data Collection Protective Order*, 29 FCC Rcd at 11677-79, Appx. B; *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Order on Reconsideration, 29 FCC Rcd 10899, 10908-36, Appx. A (WCB 2014) (final *2015 Data Collection* questions).

⁶² See *Data Collection Protective Order*, 29 FCC Rcd at 11676, Appx. A, para. 18; *Second Protective Order*, 25 FCC Rcd at 17731, para. 20; *Modified Protective Order*, 25 FCC Rcd at 15173, para. 19; *First Protective Order*, 20 FCC Rcd at 10165, para. 14.

of relevance to the issues remaining in dispute, it is not surprising that, when given the opportunity to do so in 2017, no parties objected to the closing of the NORC secure data enclave which was the only method for accessing highly confidential data, a subset of the *Protected Information*. Furthermore, because the now-closed NORC secure data enclave was the exclusive means for parties to access and analyze highly confidential data submitted in the *2015 Data Collection* pursuant to the *Data Collection Protective Order* and *Business Data Services Data Collection Protective Order*, that subset of the *Protected Information* could not be made available to Reviewing Parties without imposing significant and unnecessary administrative burdens and expenses on the Commission and, by extension, the public.⁶³

17. We therefore amend the *Protective Orders* to trigger Reviewing Parties' obligations to destroy or return to the submitting party, as appropriate, confidential and highly confidential documents (including highly confidential data) from the *Price Cap BDS Rulemakings* subject to the limited exception contained in those orders for retaining copies of Reviewing Parties' own confidential or highly confidential filings and Commission releases.⁶⁴ By **January 29, 2021**, Reviewing Parties subject to the *Business Data Services Data Collection Protective Order* and/or *Tariff Investigation Protective Order* shall destroy or return to the submitting party, as appropriate, confidential and highly confidential documents (including highly confidential data) and all copies of the same.⁶⁵ This includes physical or electronic copies of data analysis obtained from NORC, electronic copies obtained from the Bureau, and copies of confidential and highly confidential pleadings from the *Price Cap BDS Rulemakings*. No material containing or derived from confidential information, highly confidential information, and/or highly confidential data may be retained by any person, except that outside counsel and outside consultants may retain, under the continuing strictures of the amended *Protective Orders*, two copies of pleadings they submitted in the *Tariff Investigation Proceeding* in WC Docket No. 15-247 (one of which may be in electronic format) that contain confidential information, highly confidential information, and/or highly confidential data, and one copy of orders issued by the Commission or Bureau that contain confidential information, highly confidential information, and/or highly confidential data. By **February 5, 2021**, all counsel shall certify compliance with these terms and shall file such certification with the Commission in WC Docket No. 15-247. Such certification shall be made pursuant to 28 U.S.C. § 1746 and subject to 18 U.S.C. § 1001.⁶⁶

18. Since the tariff investigation is an open proceeding before the Commission, Reviewing Parties may retain copies of the four carriers' direct cases and data submitted in response to the *Designation Order*,⁶⁷ and other confidential and highly confidential information submitted in the *Tariff Investigation Proceeding*,⁶⁸ including oppositions or comments, rebuttals, and ex parte submissions, subject to the continuing strictures of the *Tariff Investigation Protective Order*.⁶⁹ However, no material containing or derived from confidential information, highly confidential information, and/or highly confidential data from the *Price Cap BDS Rulemakings* may be retained by any party in the *Tariff*

⁶³ See *Data Collection Protective Order*, 29 FCC Rcd at 11673, para. 6; *Order and Protective Orders*, 30 FCC Rcd at 13689, Appx. A para. 4.

⁶⁴ See *Order and Protective Orders*, 30 FCC Rcd at 13691-92, Appx. A at para. 16.

⁶⁵ See *id.*

⁶⁶ See *id.*; 28 U.S.C. § 1746 (unsworn declarations made under penalty of perjury); 18 U.S.C. § 1001(a) (providing, among other things, that whoever, in any matter within the jurisdiction of an executive agency, "knowingly and willfully... (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry... shall be fined under this title, imprisoned not more than 5 years..., or both.").

⁶⁷ *Order and Protective Orders*, 30 FCC Rcd at 13703, Appx. B, Attach. 1.

⁶⁸ *Id.* at 13704, Appx. B, Attach. 1.

⁶⁹ *Id.* at 13703-04, Appx. B, Attach. 1.

Investigation Proceeding, except outside counsel and outside consultants may retain, under the continuing limitations of the *Modified Protective Order*, *Second Protective Order*, and *Data Collection Protective Order*, two copies of pleadings they submitted in WC Docket 16-143, 05-25, RM-10593 (one of which may be in electronic format) that contain confidential information, highly confidential information, and/or highly confidential data, and one copy of orders issued by the Commission or Bureau that contain confidential information, highly confidential information, and/or highly confidential data.

19. Given the unprecedented disruptions caused by the ongoing Coronavirus pandemic, and consistent with our decision in the *Price Cap BDS Rulemakings*, the Bureau extends the deadlines discussed above for 6 months for any Reviewing Party that certifies under penalty of perjury that timely compliance will be more burdensome because of workplace or personnel limitations arising from the novel Coronavirus pandemic. Any Reviewing Party seeking to avail itself of these extensions, must by **February 5, 2021** request an extension from the Commission and certify that its ability to access and destroy or return confidential and highly confidential documents by the deadline has been made more burdensome because of disruptions caused by the novel Coronavirus pandemic and that it will comply as soon as practicable, but no later than **July 29, 2021**. Such extension requests shall be made under penalty of perjury pursuant to 28 U.S.C. § 1746 and subject to penalties under 18 U.S.C. § 1001, including fine and/or imprisonment for knowingly and willfully making materially false statements before the Commission, and shall be filed with the Commission in WC Docket No. 15-247.⁷⁰ For Reviewing Parties subject to the *Business Data Services Data Collection Protective Order* that file extension requests, the Bureau extends until **August 5, 2021** affected counsel's obligation to certify compliance and file such certification with the Commission.⁷¹ For Reviewing Parties subject to the *Tariff Investigation Protective Order* that file extension requests, the Bureau also extends until **August 5, 2021** their obligation to certify compliance and deliver such certification to counsel for submitting parties and file such certification with the Commission.⁷²

IV. QUESTIONS

20. Questions concerning this Order should be addressed to Christopher S. Koves, Pricing Policy Division, Wireline Competition Bureau, Christopher.Koves@fcc.gov, (202) 418-8209; and Joel Rabinovitz, Office of General Counsel, Joel.Rabinovitz@fcc.gov, (202) 418-0689.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to sections 4(i)-(j), 201-205, 211, 215, 218, 219, 220, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 201-205, 211, 215, 218, 219, 220, 303(r), and 332, section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and by the Commission in paragraph 52 of the *Data Collection Order*,⁷³ that this Order is hereby ADOPTED.

22. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

⁷⁰ See 28 U.S.C. § 1746; 18 U.S.C. § 1001(a).

⁷¹ See *Order and Protective Orders*, 30 FCC Rcd at 13691-92, Appx. A at para. 16.

⁷² See *id.* at 13702, Appx. B at para. 20.

⁷³ *Special Access for Price Cap Local Exchange Carriers, et al.*, WC Docket No. 05-25 et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16340, para. 52 (2012).

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Chief
Wireline Competition Bureau