Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Telephone Number Portability	CC Docket No. 95-116
Petition of Telcordia Technologies, Inc. to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration	WC Docket No. 07-149
Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC's Interim Role in Number Portability Administration Contract	WC Docket No. 09-109

NEUSTAR'S REPLY IN SUPPORT OF APPLICATION FOR REVIEW

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It is no secret that "consumers are better off when the government forbears from intervening and allows private parties to negotiate and enter into voluntary agreements."[1] This commonsense view that "freely-negotiated contracts" should "be allowed and enforced"[2] is reflected in the Federal Arbitration Act ("FAA"). As Justice Scalia wrote in *AT&T Mobility LLC v. Concepcion*, "arbitration is a matter of contract,"[3] and the FAA provides that private agreements to settle disputes through arbitration "shall be valid, irrevocable, and enforceable."[4]

The former Commission, defended by the North American Portability Management LLC ("NAPM") and Telcordia in their oppositions to Neustar's application for review, took a different view of the government's power to abrogate arbitration agreements.[5] By resolving the NAPM's dispute with Neustar regarding the terms of a nondisclosure agreement, the Bureaus "eviscerate[d] [the NAPM's] arbitration agreement with [Neustar] and liberate[d] [the NAPM] from the consequences of [its] agreement."[6]

The question presented in Neustar's application for review is whether this Commission "should give effect to the arbitration agreement" or whether the Commission should instead "reduce that arbitration agreement to all but a nullity."[7] The "FAA compels the former course," as Justice Thomas explained in a pre-*Concepcion* opinion joined by Chief Justice Rehnquist and

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[1] Statement of Commissioner Ajit Pai on Approval of the T-Mobile and MetroPCS License Transfer, WT Docket No. 12-301 (Mar. 12, 2013) ("Pai Statement").

[2] *Id.*

[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

[4] 9 U.S.C. § 2; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting the "liberal federal policy favoring arbitration agreements" embodied in the FAA).

[5] NAPM Opp. 2-3; Telcordia Opp. 8; *Protecting the Privacy of Customers of Broadband & Other Telecomm. Servs.*, Report and Order, 65 Communications Reg. (P&F) 1349, ¶ 305 (2016) ("*Broadband Privacy Order*") (initiating a "rulemaking on the use of mandatory arbitration requirements in consumer contracts for broadband and other communications services").

[6] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 309 (2002) (Thomas, J., dissenting).

[7] *Id*. at 308-309.

Justice Scalia.[8] Because the Bureaus chose the latter course, the application for review should be granted.[9]

1. Telcordia claims the Commission has "broad authority" to abrogate arbitration clauses in private contracts.[10] This unbounded view of the Commission's authority conflicts with the plain language of the FAA, which compels the Commission to enforce arbitration agreements as written.[11] The arbitration clause in Neustar's Master Services Agreement ("MSA") must "be allowed and enforced" because it was "freely-negotiated."[12]

Telcordia's contention that the Commission's authority to oversee the LNPA transition trumps the FAA is wrong.[13] "[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."[14] Only express statutory language can override the FAA,[15] but there is no such language in the Communications Act.[16]

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[8] *Id.* at 309.

[9] Despite the fact that Neustar, the NAPM, Telcordia and the Transition Oversight Manager entered into a nondisclosure agreement following the Bureaus' letter, the overarching issue raised by the letter is not moot. If the NAPM invokes Commission oversight every time the parties are unable to reach agreement that is to the NAPM's liking, the contract between the NAPM and Neustar will become a dead letter. The Commission should take the opportunity to confirm the private nature of that contract and to clarify that the parties should adhere to their contract, including its dispute resolution provisions. That is the mechanism that the parties put in place. The Commission's confirmation will ensure that the parties have the right incentives to honor all of their legal obligations.

[10] Telcordia Opp. 8.

[11] 9 U.S.C. § 2.

[12] Pai Statement.

[13] Telcordia Opp. 10-11 (citing *Waffle House*, 534 U.S. at 294 (opinion by Stevens, J.)).

[14] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

[15] *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("The FAA's mandate to enforce arbitration agreements applies to all categories of claims unless Congress overrides the FAA in another federal statute."); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) (When a statute "is silent" on arbitration, "the FAA requires the arbitration agreement to be enforced according to its terms.").

[16] *Broadband Privacy Order* (statement of Commissioner O'Rielly) (explaining that "[a]ny foray into mandatory arbitration clauses is unlikely to withstand legal challenge.").

In any event, contrary to Telcordia's supposition that Neustar seeks to divest the Commission of regulatory authority,[17] there is no tension between the FAA and the Commission's authority in Section 251(e)(1).[18] It is undisputed that the Commission established the LNPA contracts as "private contracts negotiated and entered into between private entities."[19] The Commission delegated to the NAPM its authority to negotiate the LNPA contracts,[20] and the NAPM exercised that authority by entering into a private contract containing an arbitration provision.[21] The Commission is bound to respect the arbitration provision because the NAPM acted within the scope of its delegated authority when it agreed to the MSA's arbitration provision.[22]

Nor will the arbitration provision interfere with the Commission's ability to oversee the LNPA transition. The MSA requires the parties to arbitrate *before* seeking Commission intervention.[23] As the NAPM correctly observes, "any party could have appealed the decision of

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[17] Telcordia Opp. 2.

[18] *Compare Waffle House*, 534 U.S. at 297-98.

[19] *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration*, Order, 31 FCC Rcd. 8406, 8427-28 ¶ 55 (2016) ("*Approval Order*"); *see also id.* at 8442 (statement of Commissioner O'Rielly) ("Is this a private contract or not? Either the Commission is actively involved, and the process is treated like a government procurement with much greater transparency, or the Commission is not involved except to review for consistency with the Act.").

[20] 47 C.F.R. § 52.26(b)(2); *see also Telephone Number Portability*, Second Report and Order, 12 FCC Rcd. 12281, 12346 ¶ 117 (1997); *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration*, Order, 30 FCC Rcd. 3082, 3085 ¶ 6 (2015) ("*Selection Order*").

[21] Agreement for Number Portability Administration Center/System Management System between Lockheed Martin IMS and Mid-Atlantic Carrier Acquisition Company, LLC, Article 26.2 ("MSA").

[22] *See, e.g.*, *Cooke v. United States*, 91 U.S. 389, 398 (1875) ("Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect."); *Walsonavich v. United States*, 335 F.2d 96, 101 (3d Cir. 1964) ("The acts or omissions of the officers of the government, if they be authorized to bind the United States in particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority."); *Baistar Mech., Inc. v. United States*, 128 Fed. Cl. 504, 517 (2016) ("A government agent can bind the government if the agent possesses express or implied actual authority.").

[23] MSA, Article 26.2.

the arbitrator to the FCC" after exhausting the arbitration remedy.[24] Because the Commission could have adjudicated the dispute (if necessary) after the arbitrator had ruled, there was no justification for the Bureaus' premature intervention.

2. Neither Telcordia nor the NAPM point to any language in the Commission's orders demonstrating that the Bureaus acted within the scope of their specific delegated authority.[25] In the *Approval Order*, the Commission "delegate[d] authority to oversee the LNPA contract, or other issues related thereto, to the Wireline Competition Bureau."[26] The Commission plainly did not intend to delegate unbounded authority to abrogate the arbitration clause, interfere with the negotiation of a private contract, or compel Neustar to enter into a nondisclosure agreement.

Nor do they make any credible argument that Neustar violated the terms of the Commission's orders by refusing to agree to a nondisclosure agreement.[27] The Commission directed Neustar to cooperate with the transition in good faith,[28] but the scope of Neustar's transition obligations is defined by Article 24 of the MSA.[29] Neither Telcordia nor the NAPM allege that Neustar breached this provision by refusing to enter into a nondisclosure agreement. Instead, Neustar simply sought to remain within the scope of its existing contractual obligations.

3. Telcordia and the NAPM mischaracterize the Bureaus' action by claiming that the Bureaus did not resolve the dispute or compel Neustar to do anything.[30] Instead of allowing Neustar and the NAPM to arbitrate, the Bureaus inserted themselves into the negotiations and

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[24] NAPM Opp. 3.

[25] Telcordia Opp. 6-7; NAPM Opp. 2.

[26] *Approval Order* at 8431 ¶ 63.

[27] Telcordia Opp. 6; NAPM Opp. 2-3.

[28] MSA, Article 24.4; *Selection Order* at 3151 ¶ 159.

[29] *Approval Order* at 8423 ¶ 43 n.121 (explaining that Neustar "is obligated under its existing contract with the NAPM to cooperate with any transition process to a new LNPA").

[30] NAPM Opp. 2-3; Telcordia Opp. 1.

sided with the NAPM.[31] The Bureaus stated their preference for particular terms proposed by the NAPM, concluding that they "present[] a workable solution," "set forth a reasonable definition . . . and a reasonable agreement."[32] When the government sides with one party over another, the dispute is over.

Finally, Telcordia incorrectly claims that the Bureaus' action was evenhanded because it was not "directed solely at Neustar."[33] The Bureaus addressed their letter *solely* to Neustar and made a veiled threat regarding Neustar's unrelated transaction with Golden Gate Capital.[34] Nowhere in the letter did the Bureaus "call into question"[35] the other parties' commitment to the transition.[36]

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The Commission should grant Neustar's application for review.

Respectfully submitted,

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[31] Letter from Matthew S. DelNero, Chief, FCC Wireline Competition Bureau, and David G. Simpson, Chief, FCC Public Safety & Homeland Security Bureau, to Lisa A. Hook, President & Chief Executive Officer, Neustar, Inc. (Jan. 6, 2017) at 2 ("Letter").

[32] *Id*. at 3.

[33] Telcordia Opp. 12.

[34] Letter at 2-3.

[35] *Id.* at 2.

[36] Telcordia incorrectly claims (at 14-15) that the application for review is procedurally barred. As explained above, the Bureaus resolved the dispute in a way that compelled Neustar to act. The Bureaus had an opportunity to pass on Neustar's arguments because, as the NAPM concedes, "Neustar itself frequently discussed the NDA issue with the Bureaus." NAPM Opp. 4.