

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

In the Matter of)	
)	
Advanced Methods to Target and)	CG Docket No. 17-59
Eliminate Unlawful Robocalls)	
)	

**REPLY COMMENTS OF ICONECTIV
IN SUPPORT OF PETITION FOR RECONSIDERATION**

Pursuant to the Commission’s Public Notice released April 29, 2019, iconectiv is pleased to submit these reply comments in support of the Petition for Reconsideration filed on behalf of the Competitive Carriers Association, CTIA, and USTelecom (“Petitioners”).¹

I. Introduction and Summary

Like Petitioners, iconectiv applauds the Commission’s ongoing efforts to protect consumers from the scourge of unwanted telephone calls. Having recently been selected as the Policy Administrator for the SHAKEN/STIR call authentication process, iconectiv is committed to working with government and industry stakeholders in developing technical solutions to this growing problem. The Commission’s decision in this proceeding to establish a single database of reassigned telephone numbers will provide another critical tool in what is necessarily a multifaceted effort to eliminate illegal robocalls.

The concern raised by the Petitioners is very narrow and, indeed, Petitioners’ intent is to help the Commission more fully achieve its fundamental goal in this proceeding: development of an effective reassigned numbers database (RNDB or RND) as quickly and cost efficiently as

¹ *Competitive Carriers Association, CTIA, and USTelecom-The Broadband Association Joint Petition for Reconsideration*, CG Docket no. 17-59 (filed Apr. 25, 2019) (“Petition”).

possible. Specifically, Petitioners urge the Commission to reconsider language in the *Order* concerning its future intentions on the contracting approach for selecting a vendor for the reassigned numbers database. Petitioners and other commenters in this proceeding have explained why the Commission’s presuppositions of expected synergies from tying acquisition of the reassigned numbers database to the NANPA/PA are unlikely to be realized.² But this has now been reinforced by the very authority the Commission has tasked with identifying the most efficacious way of getting the reassigned numbers database up and running quickly and efficiently—the NANC. As the Chair of the NANC recently wrote to the Commission, following several months examining the matter, its working group “anticipates the [RNDB] will have few administrative and functional similarities with the NANPA/PA system.”³

iconectiv questions whether reconsideration is required because it does not believe the prospective language at issue in any way legally binds the Commission to acquiring the services in the suggested manner – nor that the Commission intended preemptively to tie its own hands in doing so. Nonetheless, to the extent reconsideration is necessary, iconectiv fully supports the Petition.

II. The Commission’s General Statement of Policy Can Not Bind its Future Contracting Decisions.

The Commission’s consideration of the process for selecting an Administrator consisted of two paragraphs in the Order. The Commission first appropriately “**conclude[d]** that it is in the public interest for the reassigned numbers database to be administered by an independent

² See, Comments of NetNumber, Inc., WC Dkt. 17-59 (filed May 22, 2019) (“NetNumber Comments”).

³ Letter from Travis Kavulla, Chair, North American Numbering Council, to Kris Montieth, Chief, Wireline Competition Bureau, and Patrick Webre, Chief, Consumer and Governmental Affairs Bureau (WC Dkt. 17-59) (Apr. 30, 2019) (“NANC Letter”).

third party administrator chosen under a competitive bidding process.”⁴ The Commission expressly determined that a private entity with appropriate technical expertise would be better situated than a government agency at building and administering the database.⁵

The Order then proceeded to opine on the options that were available to it for such an acquisition explaining that:

“the Commission may be able to achieve operational and cost efficiencies by merging the administration of the reassigned number database with the already consolidated NANPA and Pooling Administrator functions under a single contract and a single administrator... **We expect that** leveraging the existing reporting and administration mechanisms between providers and numbering administrators will result in only a small, incremental burden resulting from reporting to the Administrator the date of the most recent permanent disconnection for each number. **The Commission will therefore seek to procure a contract** that consolidates the Administrator’s function with the present NANPA and Pooling Administrator functions as soon as reasonably practical.”⁶

In the only other reference to the procurement process, the Order states that “**we expect to issue the solicitation** for the new reassigned numbers database administrator in the next twelve months.”⁷ Neither the Order’s Ordering Clauses nor its Final Rules make any reference to the acquisition processes.

While iconectiv is in full agreement with the arguments in favor of reconsideration made by Petitioners (as detailed further below), these aspirational comments concerning the Commission’s current expectations as to how it might conduct the competitive bidding process clearly constitute a “general statement of policy” (analogous to an interpretive rule), and are

⁴ Order at para. 33 (emphasis added).

⁵ Id.

⁶ Id. at 34 (emphasis added).

⁷ Id. at 11 (emphasis added).

therefore not subject to notice-and-comment rulemaking. Accordingly, these statements did not bind the Commission's future actions and a change in approach does not require formal reconsideration.⁸

A general statement of policy is a statement “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power,” but which “does not establish a binding norm” and which “is not finally determinative of the issues or rights to which it is addressed.” *Guardian Fed. Savings and Loan Ass’n v. Fed. Savings and Loan Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978). General statements of policy “inform[] the public concerning the agency’s future plans and priorities for exercising its discretionary power,” and they “provide direction to the agency’s personnel in the field[.]” *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). The “critical factor” in determining whether an agency directive is a rule subject to notice and comment rulemaking or a general statement of policy is “the extent to which [it] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case.” *Id.* (modifications omitted). “To the extent that the directive merely provides guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make individualized determinations, it constitutes a general statement of policy.” *Id.* (internal quotation marks and modifications omitted).

The Commission’s statement that it would “seek to procure a contract . . . as soon as reasonably practicable” fits squarely within the definition of a general statement of policy. Significantly more Commission action—and the exercise of substantial Commission

⁸ 5 U.S.C. § 533(b)(3)(A) (exempting general statements of policy from notice and comment); *Am. Tort Reform Ass’n v. OSHA*, 738 F.3d 387, 407 (D.C. Cir. 2013) (noting same).

discretion— needs to take place before the Commission even begins a formal procurement process, much less completes one. No one’s rights have been determined by the Commission merely noting its future, indefinite plan to pursue a procurement. The D.C. Circuit has held that even a formal RFP—which is arguably a more concrete and binding step than simply noting a desire to one day undertake a procurement—is a nonbinding general statement of policy because “like the initial communication between parties negotiating to hammer out a contract, it . . . allows the agency to announce its tentative intentions for the future, while leaving the agency open to modifications.”⁹ Moreover, nothing in the Commission’s statement suggests the Commission will absolutely go forward with consummating a contract in the proposed manner, which is significant because “even the possibility of the nonapplication of a given statement can entitle the agency to claim shelter under the ‘general statement of policy’ exemption.”¹⁰

Nor do the Commission’s rules require a formal petition for reconsideration—and hence a formal reconsideration order—in order for the Commission to change its mind. The Commission’s rules contemplate petitions for reconsideration in the context of final Commission actions,¹¹ whereas the language in the Order is far too indeterminate to constitute a final agency action. For an action to be “final,” it must (1) “mark the consummation of the agency’s decisionmaking process,” and “not be of a merely tentative or interlocutory nature,” and (2) be an action “by which rights or obligations have been determined, or from which legal consequences will flow.”¹² But the language in the Order does none of these things; it marks the

⁹ *Am. Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1053 (D.C. Cir. 1987).

¹⁰ *Id.*

¹¹ 47 C.F.R. §§ 1.106(a)(1), 1.1429(a).

¹² *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1808, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

beginning of the Commission’s decision-making process about soliciting a contract, which would require substantial further proceedings before any party’s rights or obligations were determined.

Nor did the Commission initiate a process from which legal consequences will ultimately flow. It noted only that it will seek to procure a contract in the future, when “practicable.” And consistent with this indeterminacy, none of the ordering clauses in the Order take even a preliminary step toward the Commission’s someday-in-the-future procurement. Courts have recognized that an agency’s generalized statement of future intent does not constitute final agency action. In *Alascom, Inc. v. FCC*, 727 F.2d 1212 (D.C. Cir. 1984), the D.C. Circuit held that the FCC’s statement in an NPRM that “it is our intention, therefore, to preempt inconsistent state regulation,” was not a final agency action because it only indicated “the intent of the agency to conduct further administrative proceedings”¹³

Indeed, the Order specifically contemplates further action that may or may not ultimately be consistent with the approach described. The *Order* refers to the North American Numbering Council (NANC) the responsibility for developing recommendations on the technical and cost recovery details of for the database.¹⁴ But nowhere in the referral is the NANC directed to limit its technical recommendations to approaches that tie the reassigned numbers to the NANPA/PA database -- in fact, the referral language makes no mention of the NANPA/PA database whatsoever. Rather, the Commission referral provides the NANC with very broad discretion to “consider the most cost-effective way of administering the database, with the goal of minimizing costs and burdens for all users and service providers, while ensuring that it will fully serve the

¹³ 727 F.2d at 1218-19 (emphasis removed).

¹⁴ *Order* at para. 60

intended purpose.”¹⁵ And once the NANC submits its recommendation, the Commission has indicated that it intends to put those out for public comment and “*expect[s] the Council’s guidance, as well as any relevant comments submitted by interested parties, will be incorporated into any contracting decision.*”¹⁶

Restricting the scope of the NANC inquiry to a predefined combination of unrelated services would limit the usefulness of this advice and leave additional market research to be done, adding time and inefficiency to the process. On the other hand, allowing the NANC to consider the full range of contracting options would also be consistent with the statutory requirements for agencies to conduct “full and open” procurements, in which all responsible sources are considered, and in which the government does not restrict participation without good reason. *See* 41 USC § 3301. Moreover, procuring agencies are required to conduct market research in order to determine the best way to meet the government’s needs while obtaining full and open competition. 41 USC § 3306.

In short, on the face of the *Order* the Commission fully intended a subsequent robust evaluation of the best contracting approach for meeting its goals and did not impair its own future discretion through the general policy statement concerning benefits that it “may be able to achieve” by tying procurement to the NANPA/PA contract. Accordingly, iconectiv asserts that it is not necessary for the Commission to issue a formal order on reconsideration to effectuate the change sought by Petitioners. The Commission merely needs to provide clear guidance to the

¹⁵ *Order* at para. 60

¹⁶ *Order* at para. 62 (italics added). *See also*, Statement of Commissioner O’Reilly (“I urge the North American Numbering Council (NANC)—to whom we have delegated substantial discretion to develop a database administration plan— to focus on minimizing costs and burdens for users and service providers and ensuring that it is reasonably affordable for all to use. *I also thank the Chairman for agreeing to conduct a comment process in response the NANC’s recommendation*, and to solicit feedback in response to paperwork burdens imposed by the Technical Requirements Document” (italics added)).

NANC that it should follow the specific directive in the *Order* and ***consider all options*** for achieving the “the most cost-effective way of administering the database, with the goal of minimizing costs and burdens for all users and service providers, while ensuring that it will fully serve the intended purpose.”¹⁷

III. Separate Acquisitions for the Reassigned Numbers and NANPA/PA Databases Are More Likely to Draw Competitive Bids, Leading to More Timely and Cost-Effective Solutions

However, to the extent the Commission determines that formal reconsideration is necessary, iconectiv fully supports the Petition. The NANC itself has echoed the arguments made in the Petition, and effectively rejected the self-serving assertions that have been made in opposition.

A. Few Synergies Exist Between the Proposed Reassigned Numbers Database and the NANPA/PA Database.

As the Petitioners explain, there are likely to be few actual synergies realized from tying acquisition of the reassigned numbers database to the NANPA/PA.¹⁸ From both a technical and operational standpoint, the databases are fundamentally different. These differences include the following, just to name a few:

- The NANPA/PA does not maintain a database of telephone numbers nor allow for real-time access. Service providers file NRUF reports twice per year (2/1 and 8/1) reflecting a snapshot of their inventories as of 12/31 and 6/30 at the Thousand-number Block level.
- An RNDB will need to upload and process 3+ million individual telephone numbers per month across all 1500+ TN owning SPs, while the NANPA/PA ingests and assimilates approximately 14,000 NRUF reports per year at the thousand block level.
- NANPA Administrator issues a finite number of reports to FCC/NANC/States generated from analysis of data. RNDB is likely to service 2B+ inquiries from nearly 1000 telemarketer companies and 1000s more companies that telemarket directly to consumers.

¹⁷ *Order* at para. 60

¹⁸ *See also Ex Parte Letter* from Glenn Reynolds, Head of Government and Industry Affairs, iconectiv, to Marlene Dorch, WC Dkt 17-59 (Mar. 29, 2019).

- None of the GUI, API and batch files query mechanisms required in the *Order* are part of NANPA services, let alone at such volumes.
- Certifying and entering into agreements with thousands of institutional callers will require establishment of formal processes and documentation. NANPA deals with relatively limited and steady universe of Service Providers requiring only review of Letters of Authorization.
- Back office billing and collections: The RNDB will require extensive billing and collection processes and support. All of the billing and collection activities for the NANPA/PA are performed by the B&C Agent.

In addition to the Petitioners, who represent the breadth of the wireless and wireline carrier industry, the substance of the Petition is affirmed by NetNumber a company concerned they will be excluded from an opportunity to compete for the reassigned numbers database if it is combined with the NANPA/PA.¹⁹ As NetNumber succinctly concludes, the “operational needs for the RND are distinct from the NANPA/PA administration.”²⁰ Indeed, the only commenter that even tries to suggest that there might be synergies between the two databases is Somos – who as the incumbent NANPA/PA Administrator would also be the primary beneficiary of such an approach. But Somos’ generic comments do nothing to demonstrate actual synergies and – more importantly—have already been rejected by the NANC and its Numbering Administration Oversight Working Group (NAOWG) following several months of intensive investigation. As the NANC has explained:

The NAOWG is familiar with the NANPA/PA systems, but it has recognized that the RND will be a much more transaction-intensive database. *The NAOWG anticipates it will have few*

¹⁹ See, Comments of NetNumber, Inc., at 3 (WC Dkt. 17-59) (May 22, 2019) (combining the acquisitions “effectively closes the door to entities, like NetNumber, that are good candidates to serve as the RND Administrator, but either cannot perform the functions of the NANPA or PA or do not wish to build the capabilities to do so”).

²⁰ *Id.*

*administrative and functional similarities with the NANPA/PA systems.*²¹

The NANC comment concerning its familiarity with the NANPA/PA is, in fact, understated. The NAOWG is the entity that only recently developed for the Commission the Technical Requirements Documents (“TRD”) for the combined NANPA/PA database and is accordingly the most familiar with the requirements. And, of course, the Commission has tasked the NAOWG with the specific role of identifying the best approach for the reassigned numbers database specifically because it “is especially well-situated to handle matters related to this aspect of numbering administration because of its prior experience and collective expertise advising the Commission, among other things, on administration of number portability data and numbering administration procedures and systems.”²²

B. Tying the Acquisitions Will Likely Lead to Delay and Additional Cost.

Somos’ opposition to having a stand-alone acquisition for the reassigned numbers is understandable given its incumbent status as the NANPA/PA administrator -- Somos benefits both from eliminating potential competition and from the extension of its existing NANPA/PA contract that is all but guaranteed if the contracts continue to be tied to the reassigned numbers database. This makes good business sense from Somos’ standpoint – but in the absence of clear and strong synergies between the two procurements is unlikely to achieve the Commission’s end-game of achieving “the most cost-effective way of administering the database, with the goal of minimizing costs and burdens for all users and service providers, while ensuring that it will fully serve the intended purpose.”²³

²¹ NANC April 30 Letter at 2 (emphasis added).

²² *Order* at para. 59.

²³ *Order* at para. 60.

First, it is simple business economics that tying two dissimilar acquisitions together will reduce the number of potential competitors for each, resulting in higher costs, delayed delivery, and/or impaired performance. NetNumber's comments demonstrate this point:

By presupposing that cost and operational efficiencies can be achieved from a single administrator, the Commission unnecessarily hampers its ability to evaluate all options and, potentially, reduces the number of bidders for the RND....In particular, the Commission effectively closes the door to entities, like NetNumber, that are good candidates to serve as the RND Administrator, but either cannot perform the functions of the NANPA or PA or do not wish to build the capabilities to do so. Thus, NetNumber and entities similarly positioned to it may decline to bid on the RND Administrator contract, which may result in increased costs of the database and limit the technical capabilities of the RND.²⁴

Second, as verified by the recent NANC Letter, continuing to combine the solicitations for the NANPA/PA and reassigned numbers database will assuredly delay procurement of vendors for both contracts. NANC has asked for a 10 month delay for delivering to the Commission its recommendations in response to the *RNDB Order* – in part, due to its determination that the NANPA/PA is not a useful starting point.²⁵ Even if the NANC could deliver the recommendation by June 13 as requested by the Commission, combining the acquisitions will almost certainly require a delay in the acquisition of the combined NANPA/PA contract. The current NANPA and PA bridge contracts expire on October 31, which under ideal circumstances would be an extremely compressed schedule given the Commission's plans to put those recommendations out for public comment before issuing an RFP. The delay that the

²⁴ Comments of NetNumber at 4-5.

²⁵ NANC Letter at 2 ("The NAOWG anticipates [the RND] will have few administrative and functional similarities with the NANPA/PA systems. *As such, the NAOWG has asked FCC staff for assistance with obtaining information associated with other governmental transactional databases, such as the Do Not Call database, since such information is likely more relevant to the design of the RND*" (emphasis added)).

NANC has requested in order to appropriately perform its responsibility and deliver quality and well-considered recommendations to the Commission will make it impossible for a combined RFP to be issued in time to meet the current deadline. Of course, such a result benefits Somos who would presumably be in a position to negotiate a sole-source extension of the existing NANPA and PA contracts until the Commission can complete work necessary for the RNDB acquisition.

CONCLUSION

For the foregoing reasons, iconectiv urges the Commission to take appropriate steps to ensure that the NANC has sufficient flexibility to bring all of its expertise to fulfilling the primary directive given to it in this proceeding of providing recommendations to the Commission for achieving the “most cost-effective way of administering the database, with the goal of minimizing costs and burdens for all users and service providers, while ensuring that it will fully serve the intended purpose.”

Respectfully submitted,

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