

Stewart A. Baker
202 429 6402
sbaker@steptoe.com



1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

March 12, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Electronically Filed

Re: CC Docket No. 95-116; WC Docket No. 09-109

Dear Ms. Dortch:

I write on behalf of Neustar, Inc. (“Neustar”) to raise concerns about the security standards the Commission will establish for the local number portability administrator (LNPA). Neustar strongly supports the Commission’s actions to take national security concerns related to the selection of an LNPA seriously. It is unfortunate that delay and secrecy have become part of the process in this proceeding.¹ These irregularities diminish the Commission’s choices and the opportunity for public input while at the same time unfairly restricting Neustar’s (and likely, Ericsson’s) access to information that is highly relevant to these proceedings. With the Commission’s open meeting addressing this issue scheduled for March 26, 2015, we are asking the Commission to address these irregularities expeditiously in two ways:

First, the Commission should make the national security provisions for the LNPA’s contract publicly available for comment before the LNPA selection, consistent with its past practice.

¹ See Letter from Aaron M. Panner, partner, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, to Marlene H. Dortch, Sec’y, Fed. Commc’ns Comm’n, CC Docket No. 95-116; WC Docket No. 09-109 (Mar. 11, 2015).

Second, the Commission should make the Executive Branch report and recommendations on those security standards part of the record in this proceeding (with redactions as appropriate) and allow comment on them before taking action on the LNPA selection.

On March 3, 2015, the Commission disclosed that on December 17, 2014, it had received a report from the Office of the Director of National Intelligence (“ODNI”). The report was based on an interagency review that evaluated the national security implications of the LNPA and set forth security recommendations and requirements. Neustar has been intensely engaged with the Commission throughout this period on national security issues and it has designated counsel who meet the Commission’s security clearance requirements to review all nonpublic filings, including those containing classified material, at the Commission’s secure facility. But these counsel were not provided with the content of the report, nor were they informed that the report had been requested or received by the Commission. Instead, on March 3, 2015, the DNI’s December 17 cover letter transmitting the report was filed by the Wireline Bureau “as part of the record” in this proceeding. The report itself was not made available, even to Neustar’s cleared counsel.

Two days later—on March 5, 2015—the Commission announced imminent plans for an order allowing the Wireline Bureau to begin negotiations with Ericsson to become the next LNPA. The announcement provided no details about national security measures to be adopted. It simply said that “[t]he Commission will coordinate with other federal agencies and ensure that any final contract includes provisions to protect national security.” It appears that this process will not include further notice to or comment from the public (or indeed the Commissioners).

Setting aside the oddity of selecting Ericsson before opening negotiations with that company, the Commission’s process allows no opportunity for Congress, the public, or other stakeholders to know about or comment on the LNPA security provisions. This approach is inconsistent with the prior practice of the Commission and with its international obligations. For example, when the Commission proposes to impose security conditions on foreign-owned telecom carriers operating in the United States, it routinely makes those conditions public. Indeed, there is a well-established process by which Executive Branch agencies evaluate the security risks of allowing a particular foreign carrier to offer telecommunications service in the United States. The process routinely results in the operator agreeing to comply with a “Network Security Agreement” as a condition to receiving a license.² Once the Network Security

² See, e.g., *In the Matter of Global Crossing Ltd. and GC Acquisition Limited*, IB Docket No. 02-286, Order and Authorization, DA 03-3121 (Oct. 8, 2003); see also *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket Nos. 9714 and 9522, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23918 (1997) (“Foreign Participation Order”) (acknowledging that involvement of foreign carriers in the U.S. telecommunications market

(Continued...)

Agreement is negotiated, it is added to the record with enough time for public comment.³ Compliance with the agreement is then made a condition of the license award and remains part of the public record.

This practice was adopted in the 1990s in part because of an FCC commitment to transparency and in part because of the transparency requirements of the World Trade Organization's Basic Telecommunications Services Agreement ("BTA").⁴ Signed by the United States and sixty-eight other nations in 1997, the BTA expressly requires member nations to ensure that "relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available."⁵ The Commission adopted these transparency requirements in its 1997 Foreign Participation Order.⁶

could raise potential national security concerns, and instructing the FCC to defer to the Executive Branch with regard to such concerns).

³ See 47 C.F.R. § 63.20 (requiring that Section 214 licensing applications be made through the FCC's online filing system and guaranteeing interested parties the right to comment on them). There are numerous examples of Network Security Agreements between foreign carriers and the Defense, Justice, and Homeland Security departments in the record. See, e.g., *In the Matter of Applications filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, IB Docket No. 11-78, Petition to Adopt Conditions to Authorizations and Licenses (Sept. 26, 2011); *In the Matter of Guam Cellular & Paging, Inc. and DoCoMo Guam Holdings, Inc.*, WC Docket No. 06-96, Petition to Adopt Conditions to Authorizations and Licenses (Oct. 19, 2006); *In the Matter of Global Crossing Ltd., Transferor, and GC Acquisition Limited, Transferee, Application for Consent to Transfer Control and Petition for Declaratory Ruling*, IB Docket No. 02-286, Petition to Adopt Conditions to Authorizations and Licenses (Sept. 26, 2003); *In the Matter of the Global Venture of AT&T Corp. and British Telecommunications, plc*, FCC IB Docket No. 98-212, Petition to Adopt Conditions to Authorization and Licenses (Oct. 8, 1999); *In the Matter of the Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, Comments of the Federal Bureau of Investigation (May 23, 1997).

⁴ See Foreign Participation Order, 12 FCC Rcd at 23893 (1997) ("Foreign Participation Order"). The BTA was incorporated into the General Agreement on Trade and Services on February 5, 1998. See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, Annex on Telecommunications ("BTA").

⁵ See *id.* § 4 ("Transparency"). In particular, the BTA requires transparency with respect to "tariffs and other terms and conditions of service; specifications of technical interfaces with

(Continued...)

The transparency requirements incorporated by the BTA and Foreign Participation Order into Commission practice mandate the publication of proposed national security conditions. The conditions have been made public many times, and in sufficient detail to allow informed public comment without compromising national security.

There is no justification in law or practice for treating differently the security requirements to be adopted in the context of the LNPA selection. Under the BTA, the Commission must ensure that “relevant information on conditions affecting access to and use of” the number portability system “is publicly available.”

The Commission’s failure to make its security conditions public at a reasonable level of detail is inconsistent with its own practice and with U.S. international obligations. The Commission should instead make the national security provisions for the LNPA’s contract publicly available for comment before the LNPA selection, consistent with its past practice.

By the same token, the Commission should make the ODNI report and recommendations, dated December 17, 2014, part of the record in this proceeding (with redactions as appropriate). Putting the cover letter of a submission into the record and withholding the substance hardly comports with appropriate administrative procedure. We understand that the remainder of the report may be classified, but the ODNI official responsible for protecting classified information has made clear that the Commission should make its decision without relying on the report’s classified status. In an email received by undersigned counsel yesterday, the General Counsel of the Director of National Intelligence specified the Commission’s responsibility is to determine under its rules whether the report should be part of the record, and it is then the responsibility of the Executive Branch to evaluate whether cleared counsel may have access to the report under relevant classification rules:

such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.” *Id.*

⁶ Foreign Participation Order, 12 FCC Rcd at 24037 (“... all WTO Members [must] undertake transparency obligations in accordance with Article III (Transparency) of the GATS...”). In the intervening years, the FCC has continued to identify transparency as an important interest when discussing regulation of foreign participation in the U.S. market. *See, e.g., Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, IB Docket No. 11-133, FCC 13-50, para. 1 (Apr. 18, 2013) (“We believe the actions we are taking today will . . . provide greater transparency and more predictability with respect to the Commission’s foreign ownership filing requirements and review process”).

Ms. Marlene H. Dortch
March 12, 2015
Page 5



If the FCC determines it is appropriate within the framework of its process to provide you access to this document, we can then consider issues of classification and need to know.

Because it is hard to imagine that ordinary Commission procedures permit it to rely on substantive filings while putting only the cover letter in the record, we urge that this question be promptly resolved in favor of disclosure and that the issues of classification and need to know be referred to the ODNI before the Commission takes action on the LNPA. The Commission delayed disclosure of the report's existence for two and a half months; it should allow a reasonable time to resolve the question of access and classification and to comment on the security issues before it takes action on the report.

Sincerely,

/s/

Stewart A. Baker

Counsel to Neustar, Inc.
sbaker@steptoe.com
(202) 429-6402

/s/

Michael Sussmann

Counsel to Neustar, Inc.
msussmann@perkinscoie.com
(202) 654-6333

cc: Chairman Wheeler
Commissioner Clyburn
Commissioner Rosenworcel
Commissioner Pai
Commissioner O'Rielly
David Simpson
Allan Manuel
Mindel De La Torre
Julie Veach
Jonathan Sallet