

March 17, 2015

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: *Telephone Number Portability, et al.*, CC Docket No. 95-116, WC Docket Nos.
07-149 & 09-109

Dear Ms. Dortch:

Telcordia Technologies, Inc., d/b/a iconectiv (“Telcordia”) hereby responds to Neustar’s February 27, 2015 *ex parte* urging the Commission not to consider a voting trust. Each of Neustar’s arguments rests on a premise that is fundamentally incorrect—that the Commission is considering a voting trust in order to cure a supposed “lack of neutrality and impartiality.”¹ The Commission has never concluded that Telcordia has a neutrality problem, and there is nothing in the record to support such a conclusion. As Telcordia explained previously, Telcordia and its parent, LM Ericsson (“Ericsson”), both meet the neutrality requirements today, and a voting trust would be a prophylactic step designed to limit the potential for presently unknowable future issues and to provide additional insulation that could avoid having to address such issues at a later time.

Neustar first argues that the use of a voting trust “to address neutrality concerns” is inconsistent with Commission precedent. This is nonsense: as Neustar concedes, in the *Warburg Transfer Order*, the Commission approved the use of a voting trust to address a neutrality problem. There, Neustar’s parent Warburg owned interests in three Telecommunications Service Providers (“TSPs”) and therefore had an interest in numbering administration. But the Commission held that it could eliminate the concerns of undue influence by placing a majority of Warburg’s interest in Neustar into a voting trust.² Moreover, while Neustar claims that a voting trust would be ineffective because the Trustee would be selected by Ericsson and approved by

¹ Letter from Aaron Panner, Counsel for Neustar, Inc., to Marlene H. Dortch, Secretary, FCC, at 1, CC Docket No. 95-116, WC Docket No. 09-109 (filed Feb. 27, 2015) (“Neustar Feb. 27, 2015 *Ex Parte*”).

² *Request of Lockheed Martin Corp. & Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, Order, FCC 99-346, 14 FCC Rcd. 19,792, 19,811 ¶ 31 (1999) (“*Warburg Transfer Order*”).

the FCC,³ this provision is even more stringent than the trustee selection process that the Commission adopted in *Warburg*, where the Trustee was appointed by Neustar's board *without FCC approval*.⁴

The case for permitting a voting trust is even stronger here: unlike in *Warburg*, Ericsson is not an affiliate of any TSP and (even without a voting trust) has no incentive or ability to unduly influence the administration of the NPAC. The voting trust is merely an added safeguard to ensure that no perception of undue influence could possibly develop in the future.

Neustar attempts to distinguish *Warburg* by asserting, without any citation, that *Warburg* was merely an affiliate of three TSPs, whereas Ericsson is “the largest telecommunications service provider in the world.”⁵ This is plainly false. As Telcordia has explained throughout this proceeding, Ericsson is not a TSP, is not owned by a TSP, does not own any TSP, and is not an affiliate of a TSP.⁶ Not one shred of evidence in the record suggests otherwise. Neustar apparently hopes that the Commission will conclude otherwise based upon a few words which it yanked out of context from Ericsson's annual report, where Ericsson describes itself as “the largest telecom services provider in the world.”⁷ That context makes clear, however, that Ericsson is a provider of services to telecommunications companies—not that it provides “telecommunications services” as defined by statute.⁸

Neustar also suggests that the Commission's subsequent *Safe Harbor Order*, where it permitted Neustar to become a public company, means that a voting trust is impermissible, but this is incorrect. In that order, the Commission permitted Neustar to become a publically traded company so long as no single TSP would acquire more than 5 percent of Neustar's stock. In so doing, the Commission stated that “TSPs and TSP affiliates may not cure any excess interests by

³ Letter from John T. Nakahata, Counsel for Telcordia Technologies, Inc., d/b/a iconectiv, to Marlene H. Dortch, Secretary, FCC, at 1, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Feb. 9, 2015).

⁴ *Warburg Transfer Order*, 14 FCC Rcd. at 19,801 ¶ 11.

⁵ Neustar Feb. 27, 2015 *Ex Parte* at 4.

⁶ Telcordia Bid, Vendor Qualification Section (“VQS”), Attachment to Question 3.5 at 10-11 ¶¶ 6-8 (Telcordia06083-Telcordia06084).

⁷ See Reply Comments of Neustar, Inc. at 9, WC Docket 09-109, CC Docket 95-116 (filed Aug. 22, 2014).

⁸ See Ericsson, 2013 Annual Report at 16, *available at*, http://www.ericsson.com/thecompany/investors/financial_reports/2013/annual13/en/sites/default/files/download/pdf/EN_-_Ericsson_AR2013.pdf (noting that Ericsson's role is “supporting operators in creating competitive, attractive and appeal offerings to consumers”).

placing them in the Voting Trust.”⁹ Once again, however, this language has no application here: the record plainly shows that Ericsson is not a TSP or an affiliate of a TSP. (And to be clear, Telcordia’s contractor Sungard is not a TSP or an affiliate of a TSP, either.) Moreover, even if the language in the *Safe Harbor Order* could somehow be stretched to apply to voting trusts more generally—which it cannot—that order also made clear that it was not imposing an inflexible rule against voting trusts in all future situations. On the contrary, the Commission emphasized that its prior rulings on neutrality “were designed to cure the specific neutrality conflicts that Lockheed and NeuStar faced” and emphasized that “[b]idders cannot assume . . . that the FCC would find the same terms and conditions would cure a potential or actual violation of the neutrality provisions with respect to a different situation or entity.”¹⁰ Indeed, in the *Safe Harbor Order* itself, the Commission repeatedly emphasized that the reason for its changes was that “the regulation of NeuStar as a privately held company would differ in some respects from the regulation of NeuStar as a publicly owned company.”¹¹ In short, the Commission made clear that it would tailor safeguards for each future situation and that it was not making any unchangeable rule regarding voting trusts or anything else. Similarly, Neustar argues that voting trusts cannot be used “to circumvent statutory requirements,” but again, even without a voting trust, Telcordia meets the statutory neutrality requirements.

Neustar also continues to make arguments based on federal procurement law. But as Neustar itself concedes, procurement law does not apply here. And even if it did, it would not support the outcome Neustar seeks. Neustar asserts that, in the context of a federal procurement, organizational separation cannot be used to mitigate an “impaired objectivity” organizational conflict of interest (“OCI”). Neustar is incorrect. The Federal Circuit has emphasized that the “[i]dentification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.”¹² As a result, where an agency has given meaningful consideration to whether an OCI exists, the court will not substitute its judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable.¹³

Neustar relies on a GAO decision that pre-dates these decisions by the Federal Circuit, and thus does not reflect the current state of the law.¹⁴ In the wake of the Federal Circuit’s

⁹ *North American Numbering Plan Administration, NeuStar, Inc., Request to Allow Certain Transactions Without Prior Commission Approval and to Transfer Ownership*, Order, FCC 04-203, 19 FCC Rcd. 16,982, 16,991 ¶ 22 (2004) (“2004 *Safe Harbor Order*”).

¹⁰ *2004 Safe Harbor Order*, 19 FCC Rcd. at 16,995-96 ¶ 36.

¹¹ *Id.* at 16,982 ¶ 2.

¹² *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009).

¹³ *Turner Constr. Co. v. United States*, 645 F.3d 1388 (Fed. Cir. 2011). Although the Federal Circuit’s decision is not binding on GAO, GAO has adopted the *Turner* standard and now applies that standard in bid protests filed before GAO. *E.g.*, *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7.

¹⁴ Neustar cites *Nortel Government Solutions, Inc.*, B-299522.5, Dec. 30, 2008, 2009 CPD ¶ 10, which pre-dates both *Axiom* and *Turner*. Neustar also mistakenly relies on *Cognosante, LLC*,

emphasis on the discretion of the agency in these matters, GAO does not apply a *per se* rule that organizational separation is irrelevant in the context of impaired objectivity OCIs. Rather, GAO's recent decisions show that an agency may reasonably consider organizational separation as a factor in determining whether an OCI is significant and requires further mitigation.¹⁵ Because of the degree of deference now afforded agencies in this area, there has been just one case in which GAO has sustained an OCI protest ground in the last three years. The Commission's approach here is plainly reasonable under the circumstances, and would easily pass muster if federal procurement law applied.

Finally, it bears emphasis that if the Commission requires Ericsson to institute a voting trust as a condition of selection, that would not be an alteration to Telcordia's bid as Neustar incorrectly claims. As Telcordia explained in its prior letter regarding the voting trust, the institution of a voting trust is not necessary in order for Telcordia to meet the neutrality requirements, and Telcordia's bid expressed its willingness to take "whatever actions are necessary to address any issues raised by the Federal Communications Commission or other governing bodies for neutral governance and operation."¹⁶

Sincerely,



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B-405868, Jan. 5, 2012, 2012 CPD ¶ 87. *Cognosante* involved a mere informational firewall within one organization. *Id.* at 5. That is a far lesser measure than organizational separation.

¹⁵ *E.g.*, *Q2 Administrators, LLC*, B-410028, Oct. 14, 2014, 2014 CPD ¶ 305 at 10, 2014 WL 5358431, at *7.

¹⁶ Telcordia Bid, VQS, Attachment to Question 3.5, Certificate of Ericsson, Annex B (Letter of Per Borgklint, Senior Vice President, Ericsson AB (dated March 1, 2013)) (Telcordia06131).