

March 18, 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 March 12 *ex parte* letter.¹ In its latest *ex parte*, Neustar again invokes the bogeyman of national security—a topic that has already been exhaustively addressed in the papers²—and makes the extraordinary demand that the Commission put in the public record the (not-yet-existing) national security provisions of the LNPA contract, and that the Commission should seek further comment on an assessment by the Office of the Director of National Intelligence (“ODNI”).³ The Commission should reject both of these proposals.

Neustar’s request to put the national security provisions of the LNPA contract in the public record is both premature and unwise. As Neustar well knows, the selection process has always contemplated that contract negotiation would follow, not precede, the selection decision.⁴

¹ Letter from Stewart A. Baker & Michael Sussmann, Counsel to Neustar, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 09-109 (filed Mar. 12, 2015) (“*Ex parte*”).

² Neustar admits that it has been “intensely engaged” with the Commission on national security issues, and concedes that its designated counsel have already had extensive access to sensitive materials. *Ex parte* at 2.

³ *Id.* at 4.

⁴ See *Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End NAPM LLC’s Interim Role in Number Portability Administration Contract; Telephone Number Portability, Order*, DA 11-883, 26 FCC Rcd. 6839, 6844 ¶¶ 19-20, Attachment A (2011) (noting that after recommendation, Commission will select LNPA and retain oversight control over LNPA); *Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End NAPM LLC’s Interim Role in Number Portability Administration Contract; Telephone Number Portability, Order and Request for Comment*, DA 11-454, 26 FCC Rcd. 3685, 3693

Neustar already had the opportunity to comment on the security provisions of the procurement documents (Request for Proposals, Vendor Qualification Statement and Technical Requirements Document), and to submit voluminous comments after the fact claiming that other issues should have been included. With respect to national and operational security, there are very good reasons for proceeding in this manner: national security and public safety agencies should not be required to negotiate these sensitive provisions with any entity other than the selected provider. Neustar's position that the Commission should make the national security provisions of the contract and the report public recklessly places corporate opportunity above national security interests. Such an exposition increases the threat to national security. Counsel for Neustar have had ample opportunity to comment on the security of the LNPA and have taken that opportunity to full advantage. Counsel for Neustar know well that the revelation of such security provisions depend upon a "need-to-know," a need that arises only after the selection of the LNPA is confirmed.

While this is not a federal procurement, it is common in federal procurements under the Federal Acquisition Regulations for these types of security matters to be addressed following selection, and such exchanges do not trigger any obligation to re-open the competition. The question of whether an offeror is capable of satisfying security requirements—such as obtaining a security clearance—is considered a matter of contractor responsibility.⁵ It is well-established that agencies may request new information relating to an offerors' responsibility, and may also require offerors to take additional measures to address responsibility matters, without triggering any obligation to re-open the competition.⁶ That is because an agency's responsibility determination (i.e., whether an offeror satisfies the standards outlines in FAR 9.104-1 regarding the contractor's ability to perform) is independent from the agency's assessment of the technical merits of the proposed awardee's proposal under the solicitation's evaluation criteria. Therefore, even if federal procurement law applied, the Commission would have the latitude to address security with Telcordia, without re-opening the competition.

Neustar is also wrong that the Commission is violating its international transparency obligations by not seeking comment on the ODNI report or publishing the not-yet-existing LNPA contract provisions addressing security. As an initial matter, Neustar's references to the

Attachment A at 3 (2011) (under NANC/NAPM proposed timeline, contract negotiations begin after LNPA selection).

⁵ See *Ktech Corp.*, B-241808, B-241808.2, 91-1 CPD ¶ 237 at 2 (Comp. Gen. Mar. 1, 1991) ("whether a prospective contractor has the ability to obtain any necessary security clearances concerns the firm's ability to perform and is therefore a matter of responsibility."); see also *Rohmann Servs., Inc.*, B-405171, B-405171.2, 2011 CPD ¶ 177 at 6 (Comp. Gen. Sept. 8, 2011) ("the ability to obtain a security clearance generally is a matter of responsibility, absent an express requirement in the solicitation to demonstrate the ability prior to award.").

⁶ *Overlook Sys. Tech.*, B-298099.4, B-298099.5, 2006 CPD ¶ 185 at 21 (Comp. Gen. Nov. 28, 2006) (agency's exchange regarding awardee's organizational conflict of interest mitigation plan permissible and is not require opening discussions with all offerors).

“World Trade Organization’s Basic Telecommunications Services Agreement”⁷ apparently conflate at least three separate sets of transparency requirements,⁸ none of which apply here,⁹ because the LNPA is not a public supplier of telecommunications transport networks¹⁰ or a provider of transmission services.¹¹ Even if the requirements applied, however, only *governments of other WTO members* may invoke them with respect to U.S. governmental processes and requirements—not U.S. companies such as Neustar. And even if Neustar were right that the requirements apply and that it may invoke them,¹² the Commission has more than satisfied them in any event.

The Commission has properly balanced transparency and security, and all interested parties have had sufficient access to sensitive materials to enable them to thoroughly and productively engage the Commission on national security issues. There is no reason to acquiesce to Neustar’s demands for more. Neustar has been privy to all the information it needs in order to

⁷ *Ex parte* at 3 & n.4.

⁸ Neustar conflates: the WTO’s 1994 Annex on Telecommunications, to which the United States committed when it signed the General Agreement on Trade in Services (“GATS”); the 1997 WTO Reference Paper to which the United States committed as part of its schedule of commitments in basic telecommunications; and Title III of GATS itself, which is what the Commission adopted as part of its 1997 Foreign Participation Order.

⁹ The 1997 Foreign Participation Order does not provide otherwise; as the Commission noted, GATS Article III, which Neustar cites, does not impose any specific obligations, but merely requires the publication of national laws and regulations—a standard the Commission already meets and exceeds. *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23,891, 24,043 ¶ 349 (1997).

¹⁰ See 1994 Annex on Telecommunications §§ 1, 4 (applying transparency requirements to public telecommunications transport networks and services), *available at* https://www.wto.org/English/tratop_e/serv_e/12-tel_e.htm (last visited Mar. 18, 2015); Neustar *Ex Parte* at 4 n.5 (citing 1994 Annex transparency language).

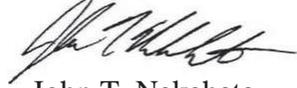
¹¹ See 1997 Reference Paper § 4 (imposing transparency requirements “[w]here a license is required”) *available at* https://www.wto.org/english/Tratop_e/serv_e/telecom_e/tel23_e.htm (last visited Mar. 18, 2015). Indeed, the LNPA does not fall under any of the categories listed in the U.S. schedule of commitments in basic telecommunications. See United States International Trade Commission, U.S. Schedule of Commitments under the General Agreement on Trade in Services, Aug. 1998, *available at* <https://www.citizen.org/documents/GATS98.pdf>.

¹² And if GATS did govern the LNPA selection process, the Commission still would not be required to disclose more than it has, because Article XIV bis (1)(2) protects members from disclosing information when doing so is contrary to their security interests.

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adequately represent itself in the selection process, and it lost on the merits. The Commission should ignore Neustar's latest *ex parte*.

Sincerely,



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