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April 19, 2016

Ex Parte

THIS LETTER CONTAINS CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN WC DOCKET NOS. 07-149 & CC DOCKET NO. 95-116 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

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

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

Dear Ms. Dortch:

I am writing on behalf of the Open Technology Institute at New America[1] and the LNP Alliance[2] (together, the "Parties") to urge the Commission to adopt a significantly more open and transparent process that will permit all users of the National Portability Administration Center ("NPAC") to review the iconectiv Master Service Agreement ("iconectiv MSA" or "MSA") currently on file at the Commission.

We have previously indicated to Wireline Competition Bureau Staff that we were concerned that the North American Portability Management LLC ("NAPM") and iconectiv, the two parties to the iconectiv MSA, would designate too much of the MSA as Confidential. When we obtained access to the MSA, we found that NAPM and iconectiv did in fact over-designate, marking the entire MSA as at least Confidential. In addition, the *Second Protective Order*,

[1] New America's Open Technology Institute is a non-profit policy institute that develops and advocates policies that promote universal, ubiquitous and affordable access to communications technology, including more robust mobile market competition.

[2] The LNP Alliance is a consortium of small and medium-sized providers that currently consists of Comspan Communications, Inc., Telnet Worldwide, Inc., the Northwest Telecommunications Association ("NWTA"), and the Michigan Internet and Telecommunications Alliance ("MITA"). The LNP Alliance is focused on ensuring that the LNPA selection process takes into account the concerns of its S/M provider members and other similarly situated providers.

patterned too closely after the previous protective orders, does not allow for any of the member companies of the LNP Alliance to review the MSA. As discussed in detail below, this presents an unacceptable obstacle to smaller companies that are just now receiving the iconectiv contract for the first time. Moreover, the Parties are very concerned that the Commission may be rushing the process forward without adequate time for public comment.[3] It appears that the iconectiv MSA has been circulated for Commission approval, creating serious concern and uncertainty that the Commission could approve the iconectiv MSA at any time before smaller companies like the LNP Alliance members have had a fair opportunity to review and comment on it.[4] The NAPM companies first approved the draft MSA on October 26, 2015.[5] These billion-dollar-revenue carriers have had the MSA for seven (7) months or more before the LNP Alliance attorney and consultant were even given their first look at it, yet the LNP Alliance and consumer groups are being asked to review it on a much tighter and uncertain time frame, and while the MSA is being circulated for approval by the Commissioners.

This is not an even-handed process. Section 251(e)(1) provides that the Commission is "to create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[6] The process of establishing iconectiv as the Local Number Portability Administrator ("LNPA") is not creating an "impartial" entity but one that is much more closely tied to the nation's largest carriers and not sufficiently answerable to smaller carriers. The LNP Alliance has raised this issue before in light of the fact that our members are paying for the TOM pursuant to Commission order and also share equally in the cost of both number administration and number portability by statute.[7]

The LNP Alliance has hired one attorney and one contractor to review the iconectiv MSA. But once we have identified issues to discuss with our client, we soon realized that there is no mechanism under the *Second Protective Order* for our client to gain access to the iconectiv MSA so that we could have that discussion. This leaves us in an echo chamber discussing issues with each other, but siloed off from our clients who know what issues matter most to each of the

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[3] Courts in the past have universally recognized the right of interested parties to participate in on-going agency proceedings. *See Application of Neustar, Inc. for Review of Second Protective Order*, WC Docket No. 07-149; WC Docket No. 09-109; CC Docket No. 95-116 (Apr. 11, 2016)("Neustar Application" or "AFR"), p. 6 (citing *Block v. SEC*, 50 F.3d 1078, 1085 (D.C. Cir. 1995)).

[4] *See FCC Items on Circulation*, FCC.GOV, available at http://transition.fcc.gov/fcc-bin/circ_items.cgi (last visited Apr. 19, 2016).

[5] According to NAPM, the draft iconectiv agreement "was substantially completed on October 26, 2015." Letter from Letter from Todd D. Daubert to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116; WC Docket Nos. 09-109 and 07-149, at 2 (March 31, 2016).

[6] 47 U.S.C. 251(e).

[7] 47 U.S.C. 251(e)(2).

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more than twenty smaller companies we represent. We are simply not in a position to represent our clients if we cannot have an iterative discussion with them about the contents of the iconectiv MSA. Similarly, OTI's counsel has filed the Acknowledgment of Confidentiality, but finds he cannot as a result inform other consumer group members of the Public Interest Spectrum Coalition (PISC) about how the MSA may impact consumers and competition.

When you review the iconectiv MSA, it becomes all the more clear that: a) virtually all of the MSA should not be marked even as confidential; and b) the *Second Protective Order* needs to be revised so that non-NAPM NPAC users can review the MSA in the same manner as NAPM NPAC users. The following is the remarkable predicament that LNP Alliance members currently face: LNP Alliance members' employees with specialized subject matter expert knowledge ("SMEs") that will negotiate their company's User Agreement with iconectiv are considered to be involved in "Competitive Decision Making" under the *Second Protective Order* and are not permitted to review the iconectiv MSA. For LNP Alliance member companies, there are only one or perhaps a few such employee SMEs. Those employees are precluded from looking at ***any portion*** of the iconectiv MSA, in part due to the NAPM/iconectiv over-designation and in part due to the terms of the *Second Protective Order* which only permits (without explanation) ***outside*** consultant and attorney review.

Yet when you turn to Exhibit J-1 of the iconectiv MSA, which contains the User Agreement that member companies will have to sign to obtain NPAC access ("User Agreement"), [**BEGIN CONFIDENTIAL**][8] [redacted]

[redacted]

[redacted]

[8] This Confidential portion of this letter has not been reviewed or approved by any LNP Alliance member, but the LNP Alliance did give us permission to file the full ex parte.

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[redacted]

[redacted] **[END CONFIDENTIAL]**

As a practical matter, having more eyes on a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** will improve the quality of the MSA. The LNP Alliance outside consultant and attorney have in just a few days already identified certain changes that should be made to the MSA. However, we need to discuss those issues with our member companies and gain the benefit of the member company SMEs who should be entitled to review the vast majority of the MSA.

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The LNP Alliance and OTI agree with many of the points made by Neustar in its Application for Review[9] ("AFR"):

- There is very little that is proprietary about the MSA. AFR at 11.
- There is no stated rationale for iconectiv's decision to withhold every word of the iconectiv MSA from public scrutiny when the Neustar MSA (and all amendments to it) have been fully public.
- Outside attorneys and consultants lack the inside corporate knowledge to perform effective review. *Id.*
- The LNP Alliance is not aware of any restrictions on the involvement of technical personnel from larger companies, and smaller companies should not be discriminated against because their technical personnel must wear multiple hats and also review contracts. AFR at 15.
- LNP Alliance member companies must have an opportunity to comment on the terms of the proposed contract to give interested parties the chance to comment upon the relevant evidence before the Commission. AFR at 14 (citing *ITOC*, 690 F.2d at 922-23).

Given the need to revise the *Second Protective Order*, the size of the iconectiv MSA, and the fact that the MSA has already been circulated to the Commissioners, the LNP Alliance urges the Commission to issue a Public Notice and adopt a more formal and transparent timeline for the review of the iconectiv agreement. We had thought that a more expedited process might benefit the industry, but the current state of affairs raises serious concerns that must be rectified before the iconectiv agreement is reviewed and approved by the Commission.

In closing, we would note that the LNP Alliance attorney and consultant have seen some favorable terms in the iconectiv MSA and the intent is not to denigrate the efforts that have gone into the MSA. But the review to date has not been representative of the LNP Alliance member interests, the interests of other smaller, non-NAPM carriers, and of consumers more broadly, all of whom have been excluded from the process. The Commission should take this opportunity to revisit and revise the current process to more fully integrate small-carrier interests into the LNPA Transition process prospectively.

As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceedings. Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

/s/ James C. Falvey

James C. Falvey

[9] *See* Neustar Application, *supra* note 3.

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cc: Kris Monteith
Marilyn Jones
Michelle Sclater
Ann Stevens
Sanford Williams
Dianne Cornell
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Rebekah Goodheart
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