

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Petition of Telcordia Technologies, Inc. To Reform or Strike Amendment 70, To Institute a Competitive Bidding for Number Portability Administration, and To End the LLC's Interim Role in Number Portability Administration Contract Management

Telephone Number Portability

WC Docket No. 09-109

WC Docket No. 07-149

CC Docket No. 95-116

**OPPOSITION OF TELCORDIA TECHNOLOGIES, INC., D/B/A ICONECTIV TO
NEUSTAR'S APPLICATION FOR REVIEW
OF THE SECOND PROTECTIVE ORDER**

April 25, 2016

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SUMMARY

In its March 2015 *Selection Order*,¹ the Commission ordered North American Portability Management LLC (“NAPM”) to negotiate a Master Services Agreement (“MSA”) between NAPM and Telcordia, and then to file that agreement with the Commission for review and approval. In anticipation of this filing, the Wireline Competition Bureau issued a garden-variety protective order designed to balance public access to the contract with the need to protect confidential commercial information, including sensitive security information. This was plainly a proper exercise of the Bureau’s discretion.

As the Bureau apparently recognized, releasing the entire MSA to the public would harm NAPM and Telcordia. First, releasing the MSA would effectively reveal the contents of Telcordia’s bid and thereby give Neustar an unfair competitive advantage if the contract were to be rebid, which is a result that Neustar is currently seeking in the D.C. Circuit. Neustar should not have rampant and unfettered access to Telcordia’s bid information—and the commercial, including system security, terms Telcordia negotiated with NAPM—while simultaneously seeking to force a rebid. Second, releasing the MSA would give Neustar an unfair advantage in negotiating a transition agreement with the NAPM. Third, knowing details such as contractual penalties, conditions for acceptance, termination rights, and similar details could enable Neustar to undermine the transition by strategically withholding its cooperation in ways calculated to cause delay (which would allow Neustar to continue charging the industry more than \$40 million per month as LNPA in addition to any fees for transition services), trigger penalties, or cause default.

¹ *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, et al.*, Order, FCC 15-35, 30 FCC Rcd. 3082 (2015) (“Selection Order”).

At the same time, the Bureau recognized that releasing the MSA subject to a protective order would still permit interested parties to review the MSA and to participate in the proceeding. So, consistent with the Commission’s policies on treatment of confidential information, the Bureau determined that a protective order would reach the proper balance between protecting the public’s ability to participate in this proceeding with the need to protect commercially sensitive information.

Neustar—who failed to raise any of its concerns about the protective order with the Bureau—now asks the full Commission to overturn the Bureau’s order, apparently in hopes that it can use the information to its advantage in negotiating a transition agreement and (if it is successful in its appeal) in any rebid of this proceeding.² The Commission should reject this flagrant attempt to hijack the regulatory process for commercial gain.

As explained below, Neustar’s challenges are procedurally improper because Neustar did not raise its arguments before the Bureau, as the Commission’s rules require prior to seeking review by the full Commission. In any event, Neustar’s arguments also fail on the merits. Contrary to Neustar’s protestations, the Second Protective Order gives Neustar more than ample opportunity to comment on the MSA by allowing Neustar counsel—and counsel for any other interested party—who are not engaged in competitive decisionmaking to review the document. This includes the more than twenty outside lawyers and outside consultants who have submitted Acknowledgments of Confidentiality on Neustar’s behalf and who have access to the MSA. And it also includes both inside and outside counsel for carriers who wish to participate in the

² See Application of Neustar, Inc. for Review of Second Protective Order, WC Docket Nos. 07-149, 09-109 & CC Docket No. 95-116 (filed Apr. 11, 2016) (“App.”).

proceeding, as well as inside and outside counsel for trade associations that represent these carriers.

Moreover, while Neustar also seeks to challenge the designation of the MSA as Confidential under the protective order, this is not a valid challenge to the protective order, which provides a mechanism for challenging the designation of particular information. Having failed to avail itself of this mechanism, Neustar should not be heard to complain here. And in any event, Neustar's challenge is largely moot because the NAPM has now filed a public-inspection version of the proposed MSA that has more limited redactions.

For all these reasons, the Commission should deny Neustar's application for review.

BACKGROUND

The Bureau's Order in this proceeding is a standard protective order that closely complies with the Commission's policies on handling confidential information.³ As is standard, the Order permits parties to designate information as Confidential if it is not otherwise publically available and if it is exempt from the disclosure under the Freedom of Information Act, 5 U.S.C. § 552. *See* P.O. at 2 ¶ 3. Under the Order, participants in the proceeding may view Confidential Information if they sign and serve an Acknowledgment of Confidentiality and certify that they do not participate in "Competitive Decisionmaking."

As is also standard, the Order permits a party to designate more sensitive information as Highly Confidential—if it qualifies as Confidential Information, is some of the party's "most sensitive business data," and fits one of a few enumerated categories. *Id.* The order limits access to Highly Confidential Information to outside counsel and outside consultants who are not

³ *See Applications of Charter Commc'ns, Inc., Time Warner Cable Inc., and Advance/Newhouse P'ship for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, FCC 15-110, 30 FCC Rcd. 10,360 (2015).

engaged in competitive decisionmaking. However, the definition of “outside counsel” includes any counsel for non-commercial entities.⁴

Finally, because disclosure of some of the information in the MSA could compromise the security of the NPAC, the Bureau further limited access to a small subset of Highly Confidential Information—information it referred to as the Security Documents. The Security Documents include one section of the MSA relating to security as well as five exhibits to the MSA, which contain contractual provisions related to security. Because this information is even more sensitive than other Highly Confidential Information, the Bureau limited access to four reviewers per party and required those reviewers to be U.S. citizens. Once again, putting additional limitations on data that could compromise security is entirely consistent with past practice.⁵

Also consistent with standard practice, the Bureau provided mechanisms for participants to challenge a party’s decision to designate particular information as Confidential or Highly Confidential. Under Paragraph 5 of the Order, a party seeking to challenge the designation of information as Confidential or Highly Confidential “must file such a challenge at the Commission.” The Order permits the designating party three business days to respond and then allows the Bureau to resolve the dispute based on the written record. *Id.*

⁴ *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, et al.*, Second Protective Order, DA 16-344, 2016 WL 1275357, at *2 ¶ 3 (Wireline Comp. Bur. 2016) (“P.O.”) (“The term ‘Outside Counsel of Record’ includes any attorney employed by a non-commercial Participant, provided that such attorney is not involved in Competitive Decision-Making.”).

⁵ *See Special Access for Price Cap Local Exch. Carriers, Order and Modified Data Collection Protective Order*, DA 15-1035, 30 FCC Rcd. 10,027, 10,033 ¶ 13 (Wireline Comp. Bur. 2015) (“In the Protective Order, we recognized the heightened sensitivity of information on network maps and locations served that if disclosed could compromise network security. We agreed with commenters who raised security concerns, taking steps above and beyond the restrictions contained in prior protective orders to secure fiber route and network location information, *e.g.*, placing limitations on removing certain data from the SDE.”).

In the proceedings before the Bureau, Neustar repeatedly filed letters asserting that it “reserves the right to challenge the *Second Protective Order* and to seek relief from its terms.”⁶ It did not, however, raise a single challenge to the protective order. Nor did it avail itself of the Second Protective Order’s mechanism for challenging whether particular information qualifies as Confidential or Highly Confidential. Instead, it filed an application for review, asking the full Commission to “reverse the Wireline Competition Bureau’s . . . decision and require publication of the entire MSA or, at a minimum, limit any redaction of confidential information to material that is genuinely proprietary and confidential.”⁷

ARGUMENT

I. NEUSTAR’S APPLICATION MUST BE DENIED BECAUSE IT DID NOT RAISE ITS ARGUMENTS WITH THE BUREAU.

The Commission must deny the Application for Review on procedural grounds because Neustar has not raised any of its arguments in the Bureau. Under 47 C.F.R. § 1.115(c), “No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.” The application of this rule in this case is straightforward and unambiguous. *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (holding that dismissal of application for review was “open-and-shut case” because of applicant’s “failure to present the supplemental arguments to the WTB”). Neustar has failed to raise its challenges to the Second Protective Order in the Bureau. Accordingly, the application must be denied.

⁶ *E.g.*, Letter from Aaron Panner, Counsel, Neustar, to Marlene Dortch, Secretary, FCC, at 1, Docket Nos. 95-116, 07-149, & 09-109 (filed Apr. 13, 2016).

⁷ App. at 1.

II. NEUSTAR’S APPLICATION FAILS ON THE MERITS.

But Neustar’s petition would fare no better if the Commission reached the merits. The Second Protective Order is a standard protective order designed to balance the public’s ability to participate in the proceeding with the Commission’s need to protect commercially sensitive information—a need that is particularly pressing in this case because Neustar is asking a Court to force a rebid of the contract and Neustar is also in the process of negotiating commercial agreements with respect to transition of LNPA services from Neustar to Telcordia. The Commission has long recognized the need for such balancing,⁸ and the Second Protective Order appropriately balances these factors by allowing Neustar the ability to review and comment on the MSA—subject to a Protective Order—but by preventing Neustar from using the information to gain an unfair competitive advantage.

A. The Protective Order Affords Neustar and Other Participants More than Adequate Opportunity to Comment on the MSA.

1. Neustar argues primarily that the Protective Order interferes with its ability to comment under the APA, but this argument rings hollow. Neustar has submitted Acknowledgments of Confidentiality for more than twenty outside lawyers and consultants who now have access to the MSA—including a cybersecurity expert who has been described as “one of the most techno-literate lawyers around,”⁹ numerous experts in telecommunications regulation, and an outside consultant who has claimed that she “has particular expertise and

⁸ *Rates for Interstate Inmate Calling Services*, Memorandum Opinion and Order, FCC 16-26, 2016 WL 884861, at *7 ¶ 21 (rel. Mar. 7, 2016) (“The Commission has long recognized that the handling of confidential information requires the Commission to balance the concerns of the parties submitting information; the interest of the public in accessing that information; and the Commission’s interest in reviewing all relevant evidence and hearing all relevant views in order to best determine the public interest.”).

⁹ STEPTOE AND JOHNSON LLP, http://www.steptoel.com/professionals-Stewart_Baker.html

experience in the area of telecommunications and Information Technology (IT), and is uniquely qualified” to assess Telcordia’s “technical proposals.”¹⁰ These lawyers and outside consultants should be more than capable of reviewing and evaluating the draft MSA so that Neustar can participate in this proceeding. This is particularly true because the draft MSA submitted for the Commission’s approval is primarily a legal, rather than a technical, document. It does not contain detailed technical specifications that would only be comprehensible to engineers. Indeed, the NPAC has a detailed set of publically available technical specifications, all of which Neustar, as the current LNPA, has been contractually obligated to keep up to date.¹¹ As a result, Neustar will have more than adequate opportunity to analyze and comment on the MSA.

The Bureau’s decision to issue a protective order is therefore entirely consistent with the Commission’s policies on the treatment of confidential information. As the Commission has previously explained, “We recognize that even where information is relevant and material to the issues before us, the competitive injury posed by widespread public disclosure may outweigh the public benefits of disclosure. In such cases, as the Commission has stated on numerous occasions, disclosure under a protective order serves the dual purpose of protecting competitively sensitive information while still permitting a limited disclosure for a public

¹⁰ Letter from Thomas McGovern, Counsel, Neustar, to Marlene Dortch, Secretary, FCC, at Attachment 1 (Smith & Associates Report) at 3, Docket Nos. 95-116 & 09-109 (filed Jan. 28, 2015).

¹¹ These specifications are available on the NAPM, LLC website. *See FDMO for NPAC SMS Release 3.4.6*, NEUSTAR, INC. (July 16, 2013), https://www.napmlc.org/Docs/npac/ref_docs/lnp.mo_v_3_4_6_2013_07_16%20GDMO.txt; *ASN.1 for NPAC SMS Release 3.4.0*, NEUSTAR, INC. (Aug. 31, 2010), https://www.napmlc.org/Docs/npac/ref_docs/lnp.asn_v_3_4_0_2010_08_31.txt; *NANC Functional Requirements Specification Release 3.4.8*, NEUSTAR, INC. (June 26, 2015); *NPAC SMS Interoperable Interface Specification NANC Version 3.4.6b*, NEUSTAR, INC. (Feb. 14, 2014).

purpose.”¹² Moreover, releasing the MSA only under a protective order is entirely consistent with the D.C. Circuit precedent on this issue. The D.C. Circuit has repeatedly recognized the importance of protecting a company’s confidential information from its competitors—even when that information is relevant to an ongoing proceeding in which the competitor is a participant. *See CBS Corp. v. FCC*, 785 F.3d 699, 701-02 (D.C. Cir. 2015) (reversing the Commission’s decision to release competitively sensitive data—even subject to a protective order—because Commission had not shown that release was necessary to the merger review process)¹³; *Qwest Commc’ns Int’l Inc. v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000) (reversing the Commission’s decision to release audit data, even subject to a protective order). The cases cited by Neustar do not suggest otherwise. Not one holds that releasing competitively sensitive data subject to a protective order violates a participant’s right to participate in the proceeding under the APA.

2. Neustar’s argument that the MSA prevents *public* participation in this proceeding fares no better. As Neustar concedes, the Protective Order permits the in-house lawyers of carriers who wish to participate in this proceeding to view Confidential Information, which comprises the vast majority of the MSA. Neustar asserts that many carriers do not have an eligible in-house lawyer because any in-house lawyer would be involved in competitive decisionmaking, which the order defines as participation in business decisions of the client “in

¹² *Rates for Interstate Inmate Calling Services*, 2016 WL 884861; *see also Special Access for Price Cap Local Exch. Carriers*, Order and Data Collection Protective Order, DA 14-1424, 29 FCC Rcd. 11,657 (Wireline Comp. Bur. 2014).

¹³ The Commission has subsequently clarified its standards for release of confidential information. *See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, 30 FCC Rcd. at 10,360. But this does not detract from the point that the APA does not require the Commission to grant a participant unfettered access to its competitors’ confidential information, nor the ability to utilize that information outside of the proceeding to which it relates.

competition with or in a business relationship with the Submitting Party.” P.O. ¶ 3. But a carrier is highly unlikely to be in competition with NAPM or Telcordia: Telcordia is unaware of any carrier that competes with NAPM to administer the NPAC contract, nor is it aware of any carrier that seeks to provide LNPA services in competition with Telcordia or Neustar. And while it is true that every carrier will eventually be “in a business relationship with” NAPM and Telcordia as a user of the NPAC, this relationship will not involve negotiation over the terms and conditions: all users will enter the standard user agreement that is part of the MSA. As a result, an otherwise qualified in-house counsel of a carrier is not involved in “competitive decisionmaking” merely because that carrier will be a user of the NPAC.

To the extent that a carrier has no in-house lawyer who can view the MSA and does not wish to retain outside counsel, that carrier can still be represented through counsel for trade associations. The protective order permits the in-house counsel for a non-commercial participant to view Highly Confidential Information, so the in-house counsel of most trade associations would be able to view the entirety of the MSA and comment on behalf of smaller carriers. P.O. ¶ 3 (definition of “Outside Counsel of Record”).¹⁴

¹⁴ In addition, outside counsel for two different trade associations, as well as an outside consultant, have signed the protective order acknowledgements and are thus eligible to review both Confidential and Highly Confidential information. *See* Letter from Peter Karanjia, Counsel for CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-109, 07-149, CC Docket No. 95-116 (filed Apr. 5, 2016); Letter from James C. Falvey, Counsel for the LNP Alliance, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-109, 07-149, CC Docket No. 95-116 (filed Apr. 4, 2016). Copies of the Confidential and Highly Confidential information have been provided to the outside counsel and consultants for the LNPA Alliance. In addition, pursuant to the Protective Order, copies of the Confidential and Highly Confidential information have been provided to in-house counsel for New America Foundation Open Technology Institute.

In short, the protective order appropriately balances public access to the MSA with the Commission’s obligation to protect confidential commercial information. Neustar’s claim that the protective order unreasonably impedes public access to the MSA is meritless.

B. The Protective Order Properly Gave Heightened Protections to Sensitive Security Information.

Neustar also challenges the Bureau’s decision to provide additional protection for extremely sensitive information relating to the security of the NPAC (“Security Documents”), suggesting that this information is not commercially sensitive and therefore not protected from disclosure under FOIA. This is nonsense. The Security Documents—which include just one section of the MSA relating to security as well as five security-related exhibits to the MSA—plainly qualify for protection under FOIA Exemption 4 because their disclosure would undermine Telcordia’s ability to secure the NPAC, thereby causing significant competitive harm to both Telcordia and the NAPM. Indeed, it is difficult to imagine anything that would harm Telcordia’s competitive position more than a major security breach—as companies such as Sony and Target can attest. Mindful, however, “of the right of the public to participate in this proceeding in a meaningful way,” the Bureau appropriately determined that the Security Documents would be available to review on a limited basis consistent with prior practice that seeks to balance the competing concerns.¹⁵

¹⁵ See *Special Access for Price Cap Local Exch. Carriers*, 30 FCC Rcd. at 10,033 (“In the *Protective Order*, we recognized the heightened sensitivity of information on network maps and locations served that if disclosed could compromise network security. We agreed with commenters who raised security concerns, taking steps above and beyond the restrictions contained in prior protective orders to secure fiber route and network location information, e.g., placing limitations on removing certain data from the SDE.”).

Exemption 4 authorizes an agency to withhold documents containing “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹⁶ Courts construe these terms broadly,¹⁷ and look to “whether the release of such information would ‘cause substantial harm to the competitive position of the person from whom the information was obtained.’”¹⁸ Indeed, courts have found that information related to security measures of private business entities,¹⁹ and information that “would not exist but for the commercial purposes for which it was created,”²⁰ is properly considered commercial information protected by Exemption 4.

Here, the Security Documents concern, among other things, Telcordia’s development of processes to ensure the security of the NPAC system, as well as commercially sensitive terms of Telcordia’s bid that, if released to competitors, would cause a significant competitive disadvantage to Telcordia. Moreover, as noted above, the protective order does not absolutely prevent interested participants from viewing the Security Documents. Instead, the protective order provides ample opportunity for participants in this proceeding, through individuals outside

¹⁶ 5 U.S.C. § 552(b)(4).

¹⁷ See *COMPTEL v. FCC*, 910 F. Supp. 2d, 100, 115 (D.D.C. 2012) (quoting *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002)).

¹⁸ *Scudder v. Cent. Intelligence Agency*, 25 F. Supp. 3d 19, 31 (D.D.C. 2014) (quoting *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290–91 (D.C. Cir. 1983)).

¹⁹ *Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225, 1227–28 (9th Cir. 1991); see *Porter County Chapter of Izaak Walton League of America, Inc. v. AEC*, 380 F. Supp. 630 (N.D. Ind. 1974) (approving redaction of information that could compromise the security of a nuclear power plant); see also *In the Matter of MSNBC Interactive News, LLC*, Memorandum Opinion and Order, FCC 08-233, 23 FCC Rcd. 14,518, 14,528 (2008) (withholding information related to 911 outage reports because “disclosure might impair vital homeland security programs by disclosing network vulnerabilities to potential wrongdoers”).

²⁰ *Waterkeeper All. v. United States Coast Guard*, No. CV 13-289 (RMC), 2014 WL 5351410, at *15 (D.D.C. Sept. 29, 2014).

of the competitive decision-making process, to review the MSA and effectively provide comment. The additional limitations imposed on this particular data by the protective order thus strike an appropriate balance between the public's right to participate in the proceeding, and the need to protect Telcordia's trade secrets and ensure the security of the NPAC.

C. Neustar's Attempt to Shoehorn a Challenge to Confidentiality Designations into an Application for Review Is Meritless.

The remainder of Neustar's application consists largely of a series of generalized but non-specific objections to the designation of the MSA as Confidential Information under the Protective Order. *See, e.g.*, App. at 12 ("On the other side of the balance, there has been no showing that all of the information contained in the proposed MSA should be exempt from public disclosure at all."). These objections are completely inappropriate in an application for review. As Neustar concedes, *see* App. at 12 n.15, the Protective Order established a process through which Neustar could challenge confidentiality designations by filing its objections with the Bureau. *See* P.O. ¶ 5. Neustar did not comply with those procedures, and there is therefore no Bureau ruling on this issue for the Commission to review.

They are also wrong as a matter of law. Neustar appears to suggest that the MSA is not "exempt from public disclosure at all" under FOIA, App. at 12, and that the Commission must release it in its entirety. But the MSA plainly qualifies as confidential commercial information under FOIA Exemption 4 and is therefore exempt from disclosure. 5 U.S.C. § 552(b)(4). Under the D.C. Circuit's longstanding FOIA precedents, Exemption 4 applies to information submitted under compulsion if release would "cause substantial harm to the competitive position of the person from whom the information was obtained." *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 180 F.3d 303, 305 (D.C. Cir. 1999).

The MSA plainly meets this standard for several reasons. First, because Neustar is seeking to force a rebid of the contract, disclosing the draft contract could give it an unfair competitive advantage by effectively revealing the contents of Telcordia’s bid as well as the terms which NAPM is willing to accept. Second, revealing specific information about the contract—including specific contractual requirements, penalties for their breach, and termination provisions—could enable Neustar to strategically undermine the transition in an effort to prevent Telcordia from taking over as the LNPA. Third, knowing the contractual details would give Neustar a competitive advantage in its commercial negotiations for a transition agreement with the NAPM, which are ongoing.

In any event, Neustar’s objection to the designation of the entire MSA as Confidential is now moot. Although the entire contract was a confidential document that was not ordinarily available for review by parties without signing a non-disclosure agreement, NAPM has now filed a public version of the MSA with substantial portions available for review by any person, regardless of whether they have signed the Protective Order or are engaged in competitive decisionmaking in competition with Telcordia. Making this public version of the document available publically will further ensure that information about the MSA is available to all interested parties.

D. The Protective Order Is Consistent with Section 251(e).

Finally, Neustar’s argument that the Protective Order violates 47 U.S.C. § 251(e) is meritless because Section 251(e) has nothing to do with whether the Commission may release documents subject to a protective order. Section 251(e) states that “[t]he Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.” Whether the MSA is released under the Protective Order has absolutely nothing to do with whether Telcordia is a “neutral entity”—a

question that was already decided in the March 2015 Selection Order. Moreover, nothing in Section 251(e) mandates that all telecommunications carriers or interconnected VoIP providers must have exactly the same level of access as the members of NAPM, which was expressly charged by the Commission in the *Selection Order* with negotiating the contract with Telcordia.²¹ The *Second Protective Order's* balancing of interests in public participation and protecting commercially and security sensitive information is well within the reasonable and discretion of the Commission and its Bureaus—which in this case exercised that discretion consistent with the Commission's past practices. In any event, as already explained, both Neustar and other members of the public have more than adequate ability to view and evaluate the MSA under the protective order.

CONCLUSION

For these reasons, Neustar's application for review should be denied.

Respectfully submitted,



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²¹ *Selection Order*, 30 FCC Rcd. at 3164 ¶ 193.

CERTIFICATE OF SERVICE

I hereby certify that on this day, true and correct copies of the foregoing Opposition of Telcordia Technologies, Inc., d/b/a iconectiv to Neustar's Application for Review were sent by electronic and first-class mail to the following parties to the proceeding:

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/s/ Alexandra Tate
April 25, 2016