May 2, 2016

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

Electronically Filed

Re: *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration*, WC Docket No. 07-149, WC Docket No. 09-109, CC Docket No. 95-116

Dear Ms. Dortch:

We write on behalf of Neustar, Inc., to urge that the Commission require Ericsson's wholly-owned subsidiary Telcordia Technologies, Inc., d/b/a iconectiv ("Ericsson"), to file in the record of the above-captioned proceedings all *ex parte* communications with Commission staff relating to Ericsson's compliance with commitments and obligations reflected in the *Selection Order*,[1] including communications related to the Commission's resolution of any violations of the *Selection Order*. These disclosures must be placed in the record—and an adequate opportunity for review and comment provided—before the Commission takes any action to approve the Master Services Agreement ("MSA") between Ericsson and the NAPM. The need for such disclosure is evident given the revelation of a serious breach of Ericsson's commitments under the *Selection Order*.

On April 28, 2016, the *Washington Post* reported that *last fall* "the FCC learned of a Chinese citizen being employed by Telcordia" for development of the NPAC database.[2] An

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[1] *See* Order, *Telcordia Technologies, Inc. Petition To Reform Amendment 57 and To Order a Competitive Bidding Process for Number Portability Administration, et al.*, 30 FCC Rcd 3082 (2015) ("*Selection Order*").

[2] Ellen Nakashima, "Security of Critical Phone Database Called into Question," *Washington Post* (Apr. 28, 2016), *available at* https://www.washingtonpost.com/world/national-security/security-

FCC spokesman reportedly stated that "the Commission and Telcordia agreed that the company would discard the pre-contract work performed and start entirely anew."[3] The *Washington Post*'s report followed the Office of General Counsel's recent action to place in the record of this proceeding a complaint filed in New Jersey state court by a former Ericsson employee. The complaint alleges that Ericsson had failed to adhere to certain commitments that the Commission relied on in the *Selection Order*.[4] Although Ericsson denied the allegations of the complaint on the record,[5] the Commission confirmed in a statement that Ericsson had violated its obligations by employing non-U.S. citizens for the development of the NPAC database,[6] suggesting that the Commission had long been aware of Ericsson's failure to comply with the *Selection Order*. The timing of these disclosures suggests that, if the lawsuit against Ericsson had not been made public, the Commission would have continued to conceal evidence of a serious violation of Ericsson's commitments under the *Selection Order*.

Communications relating to Ericsson's compliance with the *Selection Order* are not exempt from the *ex parte* rules. In August 2015, the Bureau modified the *ex parte* rules to exempt certain presentations to the Commission staff regarding "contract negotiations between NAPM and Telcordia, issues around the transition of the LNPA and related stakeholder outreach, education, and database testing."[7] However, the Bureau admonished all parties that "to the extent that they make presentations to (i) Commission decision makers, (ii) the NAPM, or (iii) the TOM *beyond the subjects specified above*, the Commission's filing requirements for 'permit-

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of-critical-phone-database-called-into-question/2016/04/28/11c23b10-0c8d-11e6-a6b6-2e6de3695b0e_story.html.

[3] *Id.*

[4] The complaint alleges that an employee of iconectiv "was not CFIUS compliant." *Cf. Selection Order* ¶¶ 122, 125. The complaint also alleges that information concerning this alleged issue was provided to the president of iconectiv on the eve of a meeting "with government officials in Washington, D.C."

[5] *See* Letter from John T. Nakahata to Marlene H. Dortch, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (Apr. 25, 2016) ("Telcordia ha[s] investigated the plaintiff's allegations of non-compliance with certain obligations, and ha[s] found them to be meritless.").

[6] *See supra* note 2.

[7] Public Notice, *Notice Concerning* Ex Parte *Status of Communications With Respect to the Local Number Portability Administrator Selection Proceeding*, DA 15-929, WC Docket Nos. 07-149, 09-109, CC Docket No. 95-116 (rel. Aug. 18, 2015) ("*Ex Parte Public Notice*"). Prior to the date on which the *ex parte* rules were modified, *all* communications between iconectiv and the Commission were subject to disclosure. The Commission should ensure that all such communications are appropriately filed in the record of this proceeding.

but-disclose' proceedings under Section 1.1206 apply."[8] Under the *Ex Parte Public Notice*, the modification of the *ex parte* rules does not apply to communications related to the Commission's LNPA selection decision, including any communications relevant to the accuracy of or compliance with any commitments reflected in the *Selection Order*. Impermissible *ex parte* communications could undermine the validity of the entire proceeding.[9]

Communications related to the Commission's resolution of any violations of the *Selection Order* must be disclosed for an additional and even more fundamental reason. It is a bedrock principle of administrative law that Commission decisions must be "supported by evidence in the record."[10] "Before the courts can properly review agency action, the agency must disclose the basis of its order."[11] The adoption of a secret Commission order based on a secret record known only to Ericsson, the NAPM, and Commission staff flouts the APA,[12] not to mention the rule of law and fundamental notions of due process.[13] The Commission can no longer hide the basis for allowing Ericsson to continue with the transition in light of its apparent violation of the *Selection Order*.

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[8] *Id.* (emphasis added).

[9] *U. S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 523 (D.C. Cir. 1978) (holding "that the Commission improperly relied on unspecified materials known only to it and on Ex parte contacts nowhere mentioned or recorded in the public record in reaching this decision").

[10] *Ass'n of Pub.-Safety Commc'ns Officials-Int'l, Inc. v. FCC*, 76 F.3d 395, 398 (D.C. Cir. 1996).

[11] *FPC v. United Gas Pipe Line Co.*, 393 U.S. 71, 73 (1968); *see also Kennecott Copper Corp. v. Envtl. Prot. Agency*, 462 F.2d 846, 849 (D.C. Cir. 1972) ("The provision for statutory judicial review contemplates some disclosure of the basis of the agency's action."); *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 565 n.32 (D.C. Cir. 1982) ("Where facts and arguments 'vital to the agency decision' are only communicated to the agency off the record, the court may at worst be kept in the dark about the agency's actual reasons for its decision.").

[12] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 15 (D.C. Cir. 1977) ("[F]undamental notions of judicial review require that reviewing courts have access to 'the full administrative record' that was presumably before an agency when it exercised its discretion"); *U. S. Lines, Inc.*, 584 F.2d at 541 ("Ex parte contacts . . . foreclose effective judicial review of the agency's final decision according to the arbitrary and capricious standard of the Administrative Procedure Act.").

[13] *Home Box Office*, 567 F.2d at 15 ("Moreover, ex parte contacts violate fundamental notions of fairness implicit in due process."); *U. S. Lines, Inc.*, 584 F.2d at 539-40 ("The inconsistency of secret Ex parte contacts with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized. . . . Ex parte communications and agency secrecy as to their substance and existence serve effectively to deprive the public of the right to participate meaningfully in the decisionmaking process.").

Accordingly, all communications related to Ericsson's compliance with the *Selection Order*—and the Commission's resolution of any violations—must be placed promptly in the record. The Commission must also provide a sufficient opportunity to review these disclosures prior to adopting any order approving the MSA between Ericsson and the NAPM. The Commission cannot deny "meaningful participation to the public" and rely "on communications never revealed to the protesting party or to the public."[14] Given the Commission's position that its Section 251(e)(1) designation is ongoing, Ericsson's alleged impropriety is potentially disqualifying, and Neustar is entitled to the facts and an opportunity to respond.[15] It would be ill considered for the Commission to approve the MSA while continuing to conceal the facts related to Ericsson's violation of the *Selection Order*.

On March 3, 2015, less than three weeks before the beginning of the sunshine period for the *Selection Order*, the Wireline Competition Bureau added to the record hundreds of pages of documents, including confidential documents, that the Bureau had in its possession for months.[16] The confidential treatment of those documents was unwarranted, raising the question whether that treatment was designed to shield from public scrutiny the unlawful actions of the Bureau, the Commission staff, and the NANC Chair. The Commission confronts a comparable issue today. Due process, fundamental fairness and the public interest demand disclosure of the information being withheld.

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[14] *U. S. Lines, Inc.*, 584 F.2d at 541.

[15] *Id.* at 542-43 ("It is the obligation of the agency . . . [to] at least disclose the substance of these [ex parte] comments publicly and afford an opportunity for public response. Fairness requires no less.")

[16] *See* Letter from Aaron M. Panner to Marlene H. Dortch, CC Docket No. 95-116, WC Docket No. 09-109 (Mar. 11, 2015).

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

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