

**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
MOTION OF NEUSTAR, INC., TO ORDER TELCORDIA TECHNOLOGIES, INC., TO
SHOW CAUSE WHY IT SHOULD NOT BE DISQUALIFIED FROM SELECTION AS
LOCAL NUMBER PORTABILITY ADMINISTRATOR**

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INTRODUCTION

In its motion for a show-cause order, Neustar seeks yet again to delay this proceeding so that it can continue to overcharge the industry by hundreds of millions of dollars per year. The Commission should not countenance these delay tactics. The issues raised in Neustar’s motion have already been addressed in contract negotiations and in discussions with the North American Portability Management (“NAPM”) LLC and in contract and transition-related discussions with the Bureaus’ staffs. They are now moot. Neustar has no right to divert this proceeding from the sole remaining issue that awaits Commission review—whether the Master Services Agreement (“MSA”) between Telcordia and the NAPM complies with the security and neutrality requirements articulated in the *Selection Order*.

Regarding the issues raised in Neustar’s motion, the relevant facts are simple. In the selection process, Neustar raised concerns about the fact that Telcordia is owned by Ericsson, a non-U.S. company. In responding to those concerns, Telcordia made an ambiguous statement about the citizenship or residency of personnel who would write the NPAC code. This statement, which was made in a SCIF filing, was a response to the specific concerns raised by Neustar regarding foreign influence that would flow through and from Telcordia’s Ericsson affiliation, not a response to generalized concerns about cybersecurity, which would have been applicable to all bidders. In the *Selection Order*, the Commission interpreted Telcordia’s statement as a commitment that the code for the NPAC would be written only by U.S. citizens.

During contract negotiations—the forum within which Telcordia understood security issues were to be resolved subject to subsequent review by the Commission—Telcordia affirmatively disclosed that, prior to its selection, it had voluntarily begun to develop code for use in the NPAC if it were awarded the contract. It had begun this work without a contract—and it did so not even knowing whether it would be awarded the contract, much less the exact

contractual requirements that would ultimately be negotiated. The parties discussed whether using this code would be consistent with the requirements of the *Selection Order*. And, after discussions with both the NAPM and the Commission staff, the parties ultimately agreed that Telcordia would discard that code and start entirely anew. As a result, if the Commission approves the contract between Telcordia and NAPM, the code used in the NPAC will have been written entirely by U.S. citizens—something that was not required for the current system. At the end of the day, the Commission and the NAPM will get exactly what they sought—a system that is far more secure from cybersecurity threats than the decades-old system built by Neustar and one that saves the industry and consumers hundreds of millions of dollars per year as compared with the status quo.

In its Motion for an Order to Show Cause, Neustar nevertheless demands the opportunity to go on a fishing expedition. Neustar essentially argues that the Commission must conduct an on-the-record proceeding to determine whether to take enforcement action against Telcordia. But the Supreme Court held in *Heckler v. Chaney* that a decision not to bring enforcement action is wholly within the Commission’s discretion and is not subject to judicial review.¹ Moreover, the Commission already addressed in the contract negotiations the questions that Neustar seeks to pursue in an enforcement action, making an enforcement action unnecessary. Therefore, the Commission has no duty to further delay this proceeding in order to conduct an on-the-record proceeding into issues that have been addressed. In any event, Neustar has failed to meet its burden for the sole remedy it seeks—an order to show cause. Accordingly, the Commission should deny Neustar’s motion and approve the MSA expeditiously.

¹ 470 U.S. 821 (1985).

ARGUMENT

I. NEUSTAR HAS NO RIGHT TO HIJACK A CONTRACT-REVIEW PROCEEDING TO PURSUE A MATTER COMMITTED TO THE COMMISSION'S UNREVIEWABLE DISCRETION.

Neustar's motion is a transparent attempt to divert attention away from the narrow set of issues remaining in this proceeding. The only remaining open issue in this proceeding is whether the proposed MSA between Telcordia and the NAPM meets the neutrality and security requirements of the Commission's *Selection Order*. Neustar does not contend that any of the issues raised in its motion are relevant to either of those questions. Nor could it. Questions surrounding code that was never used and will never be used in the NPAC have absolutely nothing to do with whether the MSA complies with the *Selection Order*.

Rather than address the remaining open issues in this proceeding, Neustar is essentially demanding that the Commission open a new proceeding to investigate, on the record, whether there has been a violation of the Commission's rules and if so, whether to initiate enforcement action. The motivation for Neustar's demands is easy to discern: for every day of delay in the cutover to the new Telcordia system, Neustar can continue to charge the industry approximately \$1.4 million per day (not including the cost of transition services) that it would not collect if the Telcordia system went into production sooner. And every day of delay also means continued use of an older system that has not been designed subject to the strict contractual security requirements and enforcement mechanisms that are part of the NAPM-Telcordia MSA. But Neustar has no right to an on-the-record proceeding about whether to initiate enforcement action. As the Supreme Court has explained in *Heckler v. Chaney*, "an agency's decision not to

prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and is not subject to judicial review.²

In addition, in the conditional *Selection Order*, the Commission reserved the right, during contract negotiations, to ensure that "any and all national security issues are addressed and mitigated to our satisfaction,"³ and it then reasonably chose to address the pre-contract code development issue in the course of those negotiations. Having unreviewable discretion not to institute enforcement proceedings, the Commission surely had the right to address the issue in that manner rather than in an enforcement proceeding.

II. NEUSTAR HAS NOT MET THE REQUIREMENTS FOR AN ORDER TO SHOW CAUSE.

Putting aside that Neustar has no right to a proceeding about whether to initiate enforcement action, Neustar has not met the requirements for the relief it seeks. Importantly, Neustar does not even argue that Telcordia has violated the Commission's rules. Rather, it speculates that Telcordia "may have misled the Commission" and demands that the Commission turn the usual evidentiary burdens on their head by ordering Telcordia to *prove* that it did not do so. Although that might suit Neustar's primary goal of delay, that is not how an order to show cause works.

The issuance of an order to show cause is entirely subject to the Commission's discretion.⁴ "The general rule," however, "is that the Commission will refuse to issue an order to

² *Id.* at 831.

³ *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Admin., et al.*, Order, FCC 15-35, 30 FCC Rcd. 3082, 3164 ¶194 (2015) ("*Selection Order*").

⁴ *Application of Century Cellunet of Jackson MSA Ltd. P'ship*, Mem. Op. and Order, FCC 91-330, 6 FCC Rcd. 6150, 6151 ¶8 (1991) ("*Century Cellunet Order*") (issuance of order to show cause is "wholly subject to our discretion").

show cause based upon the petition of a third party unless that party's threshold allegations establish a *prima facie* case of a violation of a Commission rule or order.”⁵ Neustar does not—and cannot—make such a *prima facie* case. The allegations in Neustar's motion consist of nothing more than rank speculation that Telcordia “may have misled the Commission” coupled with a demand that Telcordia “explain the commitments that it made” and “how it complied or failed to comply with them.” Mot. at 6. As Neustar implicitly concedes, it does not know the facts and circumstances behind Telcordia's representations to the Commission. These sorts of “unsupported and speculative” allegations of a lack of candor cannot possibly make a *prima facie* case.⁶

Moreover, while Neustar's fundamental premise is that Telcordia might have misled the Commission, it has not even identified a misrepresentation, much less established an intent to deceive as would be required for a *prima facie* case.⁷ The only “misrepresentation” alleged by Neustar is that Telcordia “led the Commission to conclude that [it] had committed to use only U.S. citizens to develop the NPAC software.” Mot. at 6. But, as even Neustar concedes, the code for the NPAC *is* being written solely by U.S. citizens. At this juncture, the Commission is

⁵ *Cease & Desist Order to Be Directed Against Humboldt Bay Video Co., D.B.A. H B Cable TV, Mckinleyville, Calif. & Petition for Special Relief*, Mem. Op. and Order, FCC 75-1106, 56 FCC.2d 68, 71 ¶6 (1975).

⁶ *In re Kurian et al.*, Order, DA 03-3307, 18 FCC Rcd. 21,949, 21,953 ¶12 (PSPWD 2003) (dismissing petition to revoke license for lack of candor where allegations were “unsupported and speculative”).

⁷ *Id.* at 21,952 ¶11 (“Lack of candor is a concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive. The standard for misrepresentation is a false statement with intent to deceive.”); *Century Cellunet Order*, 6 FCC Rcd. at 6151 ¶7 (“JCI has attempted to establish by mere allegation that Century's error was part of an intentional plan to avoid the petition-to-defer process. Such ‘speculation is unsupported by any evidence tending to show an intent to deceive.’”).

getting exactly what it believed it was getting. No one has been misled, nor is there any evidence of intent to mislead.

Whether Telcordia used non-citizens to develop code prior to entering a contract is, quite simply, irrelevant because all parties have agreed that this code will not be used in the NPAC. Neustar has presented no evidence that Telcordia intentionally hid from the Commission the facts regarding its pre-contract code development. Nor could it. In the contract negotiation process, Telcordia discussed the pre-contract development with both the NAPM and the Commission staff, and the parties reached an agreement that the code would be discarded. Moreover, this early work on the NPAC code—begun even *before* Telcordia was selected and the requirements of the contract were specified—does not amount to a violation of the *Selection Order*. At most, the requirements of the *Selection Order* apply to the code ultimately used in the NPAC. The pre-contract code at issue—*i.e.* the code developed prior to March 2016—has been discarded and was never used.⁸

Moreover, even if Neustar could have made a *prima facie* case of a rules violation—which it cannot—the Commission still would have no obligation to issue an order to show cause: “within its broad discretion in this area, the Commission can refuse to issue an order to show cause based upon the petition of a third party *even if it is determined that a violation of a Commission rule exists.*”⁹ Doing so is particularly appropriate when “the order would serve little

⁸ Neustar also suggests that the need to rewrite the code will severely delay the cutover to Telcordia. But the critical impediment to completing the transition at this juncture is the need for final approval of the MSA—not the development of new NPAC code.

⁹ *Humboldt Bay Video Co.*, 56 FCC.2d at 71 n.9; *accord Applications of Tulsa Cable Television, Tulsa, Oklahoma, for Certificate of Compliance and Request for Order to Show Cause*, Mem. Op. and Order, FCC 78-457, 68 FCC.2d 869, 877 ¶13 (1978) (emphasis added); *C&W Commc'ns, Inc. et al.*, Order on Review, FCC 05-61 20 FCC Rcd. 5586, 5589-90 ¶7 (2005).

purpose since the system has already corrected its prior deficiencies, and there is no reason to believe that” the violation will recur.¹⁰ Here, Telcordia, NAPM, and the Bureau have addressed the issues about who will work on the NPAC code through the contract-negotiation process, and these issues have been codified in the MSA that is now before the Commission. There is therefore no reason to believe that the alleged violation—if there was one—would recur.

Neustar attempts to avoid this conclusion by suggesting that the Commission must address Neustar’s speculative allegations in a proceeding on the record. For this conclusion it relies on two cases involving broadcast licenses. *See* Mot. at 5 (citing *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991) and *California Pub. Broad. Forum v. FCC*, 752 F.2d 670, 680 (D.C. Cir. 1985)). But these cases are inapposite. In those cases, the FCC was required by statute to entertain motions to deny as part of the license-renewal process,¹¹ which under the Commission’s rules required it to consider the character of the applicant as part of the proceedings.¹² Because the participants raised serious factual disputes about the applicant’s character, the Commission was required to address them.¹³ By contrast, Neustar is raising issues outside the scope of the pending proceeding and is essentially asking the Commission to initiate an enforcement action. The Commission had complete discretion to decline to initiate an enforcement proceeding, instead resolving concerns about the pre-contract code through contract

¹⁰ *Teleprompter of Worcester, Inc., Worcester, Massachusetts, Auburn, Massachusetts, Leicester, Massachusetts, Spencer, Massachusetts Petition for Special Relief*, Mem. Op. and Order, FCC 78-8, 67 FCC.2d 643, 647 ¶5 (1978).

¹¹ 47 U.S.C. §309.

¹² *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, FCC 85-648, 102 FCC.2d 1179, 1189 ¶21 (1986), *amended*, 5 FCC Rcd. 3252 (1990).

¹³ 47 U.S.C. §309(d), (e).

negotiations. It therefore has no obligation to resolve the question of whether to initiate an enforcement proceeding through an on-the-record proceeding.

Neustar's resort to government-procurement cases decided under the Federal Acquisition Regulation ("FAR") fare no better. As Neustar concedes, this case is not governed by the FAR. Moreover, even if cases decided under the FAR were applied by analogy, they hold at most that an applicant can be disqualified for intentionally misrepresenting its qualifications or for intentionally engaging in a bait-and-switch. But that is plainly not what happened here. Neustar has not alleged that Telcordia misled the Commission in any way about its qualifications. Moreover, there has not been a bait-and-switch. The Commission has interpreted Telcordia's filings as having made a commitment that only U.S. citizens would write code for the NPAC, and Telcordia is complying with that commitment.

CONCLUSION

For these reasons, Neustar's application for an order to show cause should be denied.

Respectfully submitted,



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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 Motion for an Order to Show Cause were sent by electronic and first-class mail to the following parties to the proceeding:

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/s/ Caroline Schuitema
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