

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matters of

*Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration*

WC Docket No. 07-149

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

WC Docket No. 09-109

*Telephone Number Portability*

CC Docket No. 95-116

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

Thomas J. Navin  
WILEY REIN LLP  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 719-7000  
tnavin@wileyrein.com

Aaron M. Panner  
KELLOGG, HUBER, HANSEN, TODD,  
EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900  
apanner@khhte.com

*Counsel for Neustar, Inc.*

June 15, 2016

## INTRODUCTION

The response filed by Ericsson's wholly owned subsidiary, Telcordia Technologies, Inc. d/b/a iconectiv ("Ericsson") accentuates the need for on-the-record resolution of the serious questions that have been raised concerning its eligibility to serve as LNPA. If Ericsson had made no misrepresentations, it could have said so in so many words. But Ericsson makes no such statement: on the contrary, it does not deny that it misled the Commission concerning its intentions with regard to the use of non-U.S. citizen personnel in the development of the NPAC. It does not (and cannot) deny that it violated the *Selection Order*. And it does not deny that it failed to disclose the violation until *after* the NAPM and/or the Commission discovered it.

Ericsson nevertheless argues that if the Commission declines to resolve these concerns on the record, its decision will constitute an unreviewable exercise of prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). Even if *Heckler* applied, it would have nothing to say about whether the Commission *should* require an appropriate investigation. Given the serious concerns that have been raised, the crucial role that the LNPA plays in the nation's telecommunications infrastructure, and Ericsson's failure to provide a straightforward explanation, the Commission cannot responsibly turn a blind eye. In any event, however, *Heckler* is not applicable, because the question is not whether Ericsson should be subject to enforcement action; rather, the question is whether Ericsson is eligible to serve as LNPA. Ericsson hardly contests that if it misled the Commission on an issue material to the selection, it must be disqualified. It would be arbitrary and capricious for the Commission to allow Ericsson to serve as LNPA while there are serious questions about the truthfulness of its representations.

Ericsson also argues that because Neustar has not provided sufficient evidence that Ericsson misled the Commission, the Commission need not require any on-the-record showing to address this issue. This argument would make Joseph Heller proud, and it is nonsense: the

circumstances that have been revealed demand on-the-record resolution. What Neustar said before remains true: if there are explanations for how the Commission was so badly misled, and why Ericsson violated the express requirements of the *Selection Order*, Ericsson has not provided them. On the contrary, its double-speak and evasions underscore the likelihood that Ericsson has engaged in conduct that disqualifies it from serving as LNPA.

**I. ERICSSON HAS FAILED TO ADDRESS CONCERNS THAT IT MISLED THE COMMISSION REGARDING ITS USE OF NON-U.S. CITIZENS BOTH BEFORE AND AFTER THE *SELECTION ORDER***

What is most extraordinary about Ericsson's response to Neustar's motion is what Ericsson does not say: it does not deny that it misled the Commission about its use of non-U.S. citizens in the development of the NPAC code both before and after the *Selection Order* was released in March 2015. Ericsson acknowledges (at 1) that the Commission understood it to have represented that it would not use non-U.S. citizens in developing the NPAC code. But it suggests that the Commission reached that understanding based on the agency's misinterpretation of an "ambiguous statement" in a "SCIF filing." The Commission has not treated the relevant portion of that SCIF filing as confidential – it is quoted and cited in the public version of the *Selection Order*, at ¶ 125 – and it must be made part of the record. The Commission's understanding that the employees "working on the NPAC/SMS systems will be U.S. citizens who will be closely screened, vetted, trained, and supervised," *id.*, does not read as though it were based on any ambiguous statement.

Even if Ericsson were able to show that the "SCIF filing" contains no literal untruth – which it cannot do without the relevant portions of the filing being placed in the record – its actions after the *Selection Order* are at least as damning. Ericsson cannot claim the *Selection Order* is ambiguous – it was awarded the LNPA contract based on security commitments including development of the NPAC employing only U.S. citizens. *See Selection Order*

¶¶ 125-126. From the moment the *Selection Order* was released, Ericsson knew that it was in violation of its terms. Yet the Commission did not learn of the violation until the fall of 2015 – Ericsson (apparently) tried to suppress the information for six months.

Nor does Ericsson claim that it ever came forward with the information that it had employed non-U.S. citizens in the development of the NPAC code. Ericsson (at 1) tries to suggest otherwise by stating that it “affirmatively disclosed that, prior to its selection, it had voluntarily begun to develop code for use in the NPAC.” But Ericsson does *not* say that it affirmatively disclosed that it had employed non-U.S. citizens in the development of the NPAC, which is the fact that matters here. The suggestion that the violation was discovered by the NAPM and/or the Commission is hard to avoid. And that urgently begs the question why Ericsson failed to come clean on its own.

Ericsson also argues (at 2) that because it has discarded the code it had written and will use only U.S. citizens in the development of the replacement code, that there is no harm and no foul. But there is, of course, harm – the transition has been set back for an untold number of months at significant cost to the industry, a circumstance that Ericsson has wrongly attempted to lay at Neustar’s door. Much more important, the foul is that Ericsson misled the Commission during the selection process, *and* failed to act with candor *after* the *Selection Order* was released. The Commission and the industry as a whole must be able to rely on the trustworthiness and truthfulness of the LNPA. Even interpreted in a charitable light, Ericsson’s conduct betrays a willingness to deceive the Commission and the industry, and to disguise its non-compliance with obligations articulated in the *Selection Order*. In the absence of a full and open resolution of these concerns, Ericsson cannot be trusted with a critical linchpin of the nation’s telecommunications system.

## **II. THE COMMISSION HAS NO DISCRETION TO ALLOW ERICSSON TO SERVE AS LNPA WITHOUT RESOLVING THE PENDING ALLEGATIONS**

Ericsson's argument (at 3-4) that Neustar has asked for an "enforcement action" and that the Commission has unreviewable discretion to decline to initiate it is legally incorrect and provides no justification for denying Neustar's motion. Even if *Heckler* applied in this circumstance, that case simply stands for the proposition that courts will generally decline to review an agency's exercise of prosecutorial discretion. *See New York State Dep't of Law v. FCC*, 984 F.2d 1209, 1213 (D.C. Cir. 1993). That principle does not address whether the Commission *should* investigate allegations of misconduct. The extraordinary circumstances here – including public FCC statements confirming that Ericsson violated its security commitments – more than warrant public resolution.

More fundamentally, *Heckler* does not apply here because the issue is not whether the Commission should initiate an enforcement action to sanction Ericsson for its violations of the *Selection Order*. Rather, the question is whether Ericsson must be disqualified from serving as LNPA. As Neustar explained in its motion (at 7-13), when a bidder or applicant makes a material misrepresentation that influences the agency's consideration of its proposal, maintaining an award is arbitrary and capricious. *See Center for Auto Safety v. Dole*, 828 F.2d 799 (D.C. Cir. 1987) (*Heckler* is not controlling when there is law to apply). Given the facts and circumstances that have already been revealed, the Commission cannot ignore its obligation to resolve the question whether Ericsson has made such a material misrepresentation.

## **III. THE FACTS REVEALED TO DATE WARRANT AN ORDER TO SHOW CAUSE**

Ericsson's argument (at 4-8) that Neustar has not alleged sufficient facts to justify the issuance of an order to show cause is both legally and factually unpersuasive. Ericsson's main point is that, because Neustar and the public have been kept in the dark concerning the

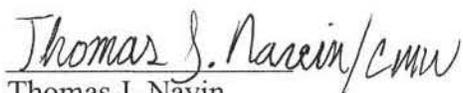
circumstances surrounding Ericsson's misrepresentation, there is not sufficient evidence to warrant further investigation. But this is pure Catch-22: the very purpose of the motion to show cause is to discover what led the Commission to rely, erroneously, on Ericsson's commitment to employ solely U.S. citizens in the development of the NPAC and, subsequently, Ericsson's failure to comply with that commitment, or promptly to disclose its non-compliance.

In any event, the facts and circumstances already revealed satisfy any supposed requirement to establish a *prima facie* case for disqualification. Given what is known, in the absence of a legitimate explanation, Ericsson indeed appears to have "misrepresent[ed] its qualifications" and "engag[ed] in a bait-and-switch," Opp. At 8, by promising that it would develop the NPAC employing exclusively U.S. citizens and then ignoring that promise. Ericsson may have an explanation for its conduct. But it has not provided one yet.

#### CONCLUSION

The Commission should grant the motion.

Respectfully submitted,



Thomas J. Navin  
WILEY REIN LLP  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 719-7000  
tnavin@wileyrein.com



Aaron M. Panner  
KELLOGG, HUBER, HANSEN, TODD,  
EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900  
apanner@khhte.com

*Counsel for Neustar, Inc.*

June 15, 2016