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JUN 28 1999

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June 28, 1999

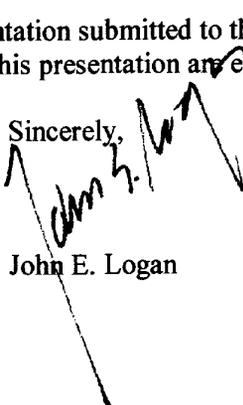
Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, D.C. 20554

Re: *Ex Parte* Presentation
CC Docket 92-237
NSD File No. 98-151

Dear Ms. Salas:

Enclosed is a copy of an Ex Parte presentation submitted to the Chief of the Common Carrier Bureau today. The necessary copies of this presentation are enclosed.

Sincerely,


John E. Logan

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28 June 1999
Q010-L-25

Mr. Lawrence P. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: North American Numbering Plan
Administrator
CC Docket No. 92-237
NSD File No. 98-151

Dear Mr. Strickling:

In its *Third Report and Order (CC Docket No. 92-237, Administration of the North American Numbering Plan)* released on 9 October 1997, the Federal Communications Commission (Commission) accepted the recommendation of the North American Numbering Council (NANC) that Lockheed Martin IMS be appointed the North American Numbering Plan Administrator (NANPA). Innovative Technology
in the Public Interest

In the *Third Report and Order*, the Commission also formally accepted the NANC's recommendation that Mitretek Systems be the alternate NANPA. Specifically, at paragraph 67, the FCC stated:

We note that the NANC recommended Mitretek as the alternate NANPA, and we accept this recommendation formally. If Lockheed [i.e., Lockheed Martin IMS] defaults on its obligations as NANPA, or if the NANC determines that Lockheed [i.e., Lockheed Martin IMS] does not perform those functions in a satisfactory fashion, Mitretek will have the opportunity to assume NANPA responsibilities for the remainder of the five-year term, if it still wishes to do so, without its undergoing another evaluation process.

Given its standing as the Alternate NANPA and the current turbulence in the administration of the North American Numbering Plan, Mitretek Systems presents the relevant history and explanation of why Lockheed Martin has defaulted on its obligation to remain neutral as the North American Numbering Plan Administrator (NANPA).

In particular, we believe that Lockheed Martin's actions – taken pursuant to a clear strategic business decision to enter the commercial telecommunications business – create an actual conflict of interest that Lockheed Martin itself has conceded. After stating that it will not continue to function as the NANPA, Lockheed Martin requests that the Commission allow it to choose an organization to provide this vital public function. Lockheed Martin also asks that the Commission risk further conflict of interest issues through the sale of this important function to an investment bank affiliated with several telecommunications companies and with no experience managing a technological venture like the NANPA. In recognition of these facts, the Commission has moved to consider whether Lockheed Martin should be allowed to “cure” its default on its neutrality obligation by selling its Communications Information Systems (CIS) business unit to Warburg, Pincus, an investment banking concern. For the reasons set out below, the Commission should determine that (1) Lockheed Martin has defaulted on its obligation to remain a neutral NANPA; (2) Lockheed Martin, fundamentally, cannot cure its default by abdication of the fundamental function and, furthermore, it cannot cure any default through a sale of the NANPA, because only the Commission has the authority to establish a new NANPA; and (3) the Commission should continue to adhere to its announced procedure and standards, and should not allow Warburg Pincus to purchase the NANPA because Warburg, Pincus lacks the requisite experience and has serious actual conflict of interest problems of its own.

Background

In July 1995, the Commission initiated a process to establish an entity not aligned with the telecommunications industry to implement the North American Numbering Plan (NANP). As you are well aware, the NANP constitutes the basic numbering scheme to ensure interoperability of telecommunications in North America and a fair and effective system for managing telephone numbers. In the wake of the AT&T divestiture, Bellcore, an entity owned by the Regional Bell Operating Companies, managed this system. Although this system worked well for the following decade, it became unacceptable as the industry moved to a competitive environment.¹ To assist in the selection of a replacement for Bellcore, the Commission asked the North American Numbering Council (NANC), a newly formed advisory committee established pursuant to the Federal Advisory Committee Act, to evaluate the applicants for this important responsibility.²

In its *Notice of Proposed Rulemaking (NPRM)* on the selection of a NANPA to replace Bellcore, the Commission tentatively concluded that the new NANPA should be a “single, non-government entity, established by the Commission and, therefore, subject to our oversight but also separate from this Commission and not closely identified with any particular industry segment.”³ The Commission also tentatively concluded that this function

¹ See *Administration of the North American Numbering Plan, Report and Order*, CC Docket No. 92-237, 11 FCC Rcd 2588, 2595 (1995) (NANP Order).

² See *id.* at 2590.

³ *Administration of the North American Numbering Plan, Notice of Proposed Rulemaking*, CC Docket 92-237, 9 FCC

could be performed by a government agency and that, if an agency were to assume this responsibility, the Commission would be the appropriate agency to do so. In its First Report and Order on the issue, the Commission agreed with nearly all the commenters that it should decline to assume this public function, as it would “be a drain on [] resources” that are “better devoted to such matters as policymaking and dispute resolution.”⁴

To avoid a situation where the new NANPA would have to be replaced (like Bellcore), the Commission emphasized that it would look for a neutral, non-biased number administrator that, like a government agency, would be above reproach and would zealously guard against even the appearance of a conflict of interest. Specifically, the Commission explained that:

We conclude that the NANP Administrator should be a non-governmental entity that is not aligned with any particular telecommunications industry segment. The NANP Administrator must be fair and impartial. We believe that it would be very difficult, if not impossible for a NANP Administrator closely associated with a particular segment of the telecommunications industry to be impartial. Even if a NANP Administrator aligned with a particular industry segment was impartial, there would still likely be the perception and accusations that it was not.⁵

In so doing, the Commission made clear that even though it chose to delegate the administrative responsibilities to an outside entity, “domestic numbering administration is within the authority of the Commission.”⁶ Recognizing the important public trust responsibilities pervading the administrator, the Commission stated that, if experience with the entity established to perform the NANPA obligations “does not permit this Commission to meet its responsibilities under the Communications Act, we may reexamine whether the Commission should be the NANP Administrator, at least for the United States portion of the NANP.”⁷

In the Telecommunications Act of 1996, Congress ratified the approach to numbering administration adopted by the Commission. In particular, the Act provides that the Commission shall “create or designate one or more impartial entities to administer telecommunications numbering” and that the Commission “shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.” 47 U.S.C. § 251(e)(1). In the wake of the Act, the Commission revisited its approach and concluded that its decisions and course of action satisfied § 251(e)(1)’s mandate.⁸

Rcd 2068 (1994).

⁴ *Id.* at para. 56 (citations omitted).

⁵ *First Report and Order* at para 57.

⁶ *Id.* at para. 26.

⁷ *Id.*

⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996. Second Report and Order and Memorandum Opinion and Order*, CC Docket No. 96-98, 11 FCC Rcd 19392, 19510 (1996).

To establish the NANPA, the Commission issued, through its advisory committee a "Requirements Document" that specified the criteria for an eligible applicant.⁹ One essential requirement set out in the document was that the applicant "may not be an affiliate of any telecommunications service provider as defined in the Telecommunications Act of 1996" – i.e., the applicant cannot "possess, directly or indirectly, [] an equity interest by stock . . . ten (10%) percent or more of the total outstanding equity" of a telecommunications service provider.^{10 11} The Document noted that this neutrality criterion judging affiliation with a telecommunications company did not necessarily disqualify an applicant, as the NANC could evaluate whether an applicant, notwithstanding this interest, would "be subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities."¹² Significantly, the *Requirements Document* emphasized that the responsibility of number administration was a public function and could be impacted by future "rules, requirements, or policy directives."¹³

As per the Commission's direction, the NANC conducted an extensive evaluation of the applications for the NANPA. The initial stage of the evaluation process, a report by an Evaluation Team, concluded that Mitretek was the applicant best suited for the position of the NANPA, but that Lockheed Martin would also be acceptable.¹⁴ After reviewing the report, 13 members of the NANC voted for Lockheed Martin and 11 voted for Mitretek to be established as the NANPA.¹⁵

In May of 1997, the NANC forwarded its recommendation to the Commission. While the Commission was considering whether to follow the NANC's recommendation, Lockheed Martin was in discussions over entering the "commercial telecommunications industry." Specifically, on August 5, 1997, Lockheed Martin entered into a confidential agreement with Comsat to explore a possible merger or joint venture focused on the commercial telecommunications service industry. The Proxy Statement regarding the proposed merger with Lockheed Martin, filed by the party to be acquired, Comsat, also states that "Lockheed Martin periodically reviewed potential market entry strategies, including the possibility of internal investments, joint ventures and strategic alliances, and acquisitions and business combinations with companies participating in the

⁹ *News Report* No. CC 97-8 (February 20, 1997).

¹⁰ The Commission also codified the basic requirements in binding regulations that provide that the NANPA must be "impartial and not aligned with any particular telecommunications industry segment," 47 C.F.R. 57.12, and that an entity is affiliated with a telecommunications company (and therefore presumptively non-neutral) if it owns more than 10% of that company, 47 C.F.R. 52.12(a)(i).

¹¹ *Requirements Document* at section 1.2.

¹² *Id.* at § 1.2.3.

¹³ *Id.* at § 1.5.1.

¹⁴ See *Third Report and Order*, Administration of the North American Numbering Plan, 12 FCC Rcd 230140, para.

19 (October 9, 1997) ("Third Report and Order").

¹⁵ *Id.* at para.20.

commercial telecommunications services industry.”¹⁶ The Comsat Proxy Statement goes on to state that on August 7 and 8, 1997, “Comsat and Lockheed Martin management met to discuss the overall market environment of the telecommunications industry and each company’s strategies regarding that industry.”¹⁷ From August 1997 through September 1998, Comsat and Lockheed Martin considered the merger of the two companies.¹⁸

On September 4, 1997, Mitretek filed an *ex parte* letter with the Commission suggesting that Lockheed Martin’s telecommunications interests raised serious neutrality concerns with respect to its potential selection as the NANPA. On September 11, 1997, Lockheed Martin responded by minimizing the extent of its interests and downplaying its “periodic review” of options for “participating in the commercial telecommunications service industry.” It also stated emphatically that organizational conflicts of interest were supervised with Lockheed Martin by an “organization conflict of interest ‘OCI’ function which is administered by senior members” of Lockheed Martin.¹⁹ Based on Lockheed Martin’s representations, but unaware of the negotiations with Comsat, the Commission concluded that Lockheed Martin’s disclosed telecommunications forays did not compromise its neutrality and thus adopted the NANC’s recommendation that Lockheed Martin be selected as the NANPA.²⁰ Mindful of the concerns about Lockheed Martin’s potential neutrality, however, the Commission stated that:

We note that the NANC recommended Mitretek as the alternate NANPA, and we accept this recommendation formally. If Lockheed defaults on its obligations as NANPA, or if the NANC determines that Lockheed does not perform those functions in a satisfactory fashion, Mitretek will have the opportunity to assume NANPA responsibilities for the remainder of the five-year term, if it still wishes to do so, without its undergoing another evaluation process.²¹

With respect to the possibility of additional Lockheed Martin ventures into telecommunications, the Order noted that Lockheed’s entry into common carrier services of more than a *de minimis* nature would require a reevaluation of its neutrality.²²

The Commission’s October 1997 Order establishing Lockheed Martin as the NANPA led to a transition scheduled to end in June 1999, during which Bellcore and the Regional Bell Operating Companies (RBOCs) handed off their numbering administration responsibilities. In August of 1998, only 11 months after the Commission’s order

¹⁶ Proxy Statement at 19. See www.sec.gov/Archives/edgar/data/936468/0000928385-99-001843.txt.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Ex Parte Presentation of Lockheed Martin*, dated September 11, 1997 at 1.

²⁰ *Third Report and Order* at para. 41-47, 69-81.

²¹ *Id.*, para. 67.

²² *Id.* at para. 81.

designating Lockheed Martin as the NANPA, Lockheed Martin finally disclosed its decision to enter the telecommunications business by forming a subsidiary, Global Telecommunications, Inc., to compete in the telecommunications marketplace. This action, Lockheed Martin acknowledged at the time, raised serious neutrality issues with respect to its NANPA responsibilities. To address the situation, Lockheed Martin committed to "work cooperatively with the NANC, the NANPA Oversight Committee and the telecommunications industry to understand and resolve all concerns about [] neutral status."²³

One month later, after making further inroads into commercial telecommunications through its agreement to acquire Comsat and to work in partnership with Nortel to develop a telecommunications product for satellite-based, underserved rural telephony, Lockheed Martin once again acknowledged that its actions would run afoul of the Commission's orders, the NANC requirements, and the industry neutrality rules. While stating that its actions "have not immediately and seriously impaired Lockheed Martin's neutrality," its October report noted that Lockheed Martin was "actively working to resolve the neutrality issues," suggesting that "[r]esolution may include a change in ownership of Lockheed Martin's CIS unit."²⁴ Lockheed Martin also stated that it was "committed to divesting" this function to ensure that it would operate as a "neutral third party."²⁵

The Common Carrier Bureau responded to Lockheed Martin's purchase of Comsat in a November 23rd letter that notified Lockheed Martin of the Commission's concerns and asked about Lockheed Martin's intended course of action. The letter reminded Lockheed Martin that the Commission had earlier determined that future telecommunications forays of more than a *de minimis* amount would trigger a review of whether it could continue as a neutral and unbiased number administrator.²⁶ Shortly thereafter, the Commission wrote Mitretek reiterating its position that Mitretek is the alternate NANPA and would "replace Lockheed Martin, if Lockheed Martin defaulted on its obligations as NANPA."²⁷ This letter indicated that Lockheed Martin planned to address the neutrality issue by divesting the CIS group to another entity and that the Commission would seek input on whether this approach was satisfactory.

²³ Report to the North American Numbering Council and the Telecommunications Industry Concerning Lockheed Martin's Global Telecommunications Subsidiary (August 28, 1998).

²⁴ Report to the North American Numbering Council and the Telecommunications Industry Concerning Lockheed Martin's Global Telecommunications Subsidiary (October 22, 1998).

²⁵ On October 23, 1998, Lockheed publicly stated intention to become a common carrier official by filing an application with the Commission to acquire Comsat Government Services, Inc., a subsidiary of Comsat that holds a Section 214 authorization to provide international common carrier services. See Lockheed Martin Corporation, Regulus, LLC, Comsat Corporation, and Comsat Government Services, Inc., application to International Bureau, Satellite Policy Branch, Report No. SPB-139 (rel. Oct. 23, 1998).

²⁶ See Letter from Yog Varma, Deputy Chief, Common Carrier Bureau, Federal Communications Commission, to Jeffrey Ganek, Senior Vice President and Managing Director, Lockheed Martin IMS, CIS at 2 (November 23, 1998).

²⁷ See Letter from Yog Varma, Deputy Chief, Common Carrier Bureau, Federal Communications Commission, to H. Gilbert Miller, Ph.D., Vice President, Center for Telecommunications and Advanced Technology, Mitretek Systems (December 2, 1998).

On December 21, 1998, Lockheed Martin filed a request with the Commission to transfer the operation of the NANPA to Warburg, Pincus & Co., an investment banking concern with large investments in the telecommunications industry, in order to address the conflict presented by its plan to become "a leading provider of telecommunications services."²⁸ In particular, this request noted that Lockheed Martin's acquisition of a subsidiary of Comsat, Comsat Government Services, Inc., would "seal its status as authorized carrier," thereby creating an actual conflict of interest with its neutrality obligations.²⁹ In its request, Lockheed Martin represented that Warburg Pincus would purchase a 95 percent stake in the CIS subsidiary of Lockheed Martin and thus "stand in the shoes of its predecessor."³⁰ In addition, the request suggested that the restructured CIS under Warburg's supervision would be well run and that, as an investment banking firm, Warburg would not have the same conflicts as an operating company.³¹

In a *Public Notice* released on January 7, 1999, the Common Carrier Bureau, now in possession of Lockheed Martin's proposed cure plan, indicated its commitment to "ensure a comprehensive review" of the request and to seek input from the public and from the NANC on whether Warburg Pincus' acquisition of CIS would satisfy the *Requirements Document*. The Notice also asked whether Mitretek should be designated as the successor to Lockheed Martin and invited commenters to suggest questions both of Lockheed Martin and of Mitretek relating to its ability to assume the NANPA responsibilities. On January 27, 1999, the Commission released a set of questions for Lockheed Martin or Warburg, Pincus concerning Lockheed Martin's proposed transfer of its NANPA responsibilities. On February 17th and March 15th, the Commission released two additional Public Notices requesting comment, inviting interested parties to address the submissions of Lockheed Martin and Mitretek.

In its comments to the Commission, Mitretek stressed that "[t]he policy behind the Commission's neutrality standard goes directly to ensure, particularly in the competitive environment envisioned by the 1996 Act," that telecommunications companies can "have confidence that the NANPA will be fair and impartial."³² Because the NANPA has access to market sensitive as well as proprietary information, such as where firms are utilizing numbers, Mitretek encouraged the Commission to zealously guard the neutrality criterion. Moreover, following Lockheed Martin's decision to enter

²⁸ See *In the Matter of the Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Corporation to an Affiliate of Warburg, Pincus & Co.*, CC Docket No. 92-237, NSD File 98-151, at 10 (December 21, 1998).

²⁹ Lockheed's Proxy Statement, filed with the SEC, illustrates the incompatibility of its merger with Comsat and its continuing service as the NANPA. Among other things, the Proxy Statement explains that "The merger combines the greater resources of Lockheed Martin with the telecommunications services expertise of Comsat . . . to meet the increased demand for broadband, Internet and virtual private network services in the global telecommunications services market." p. 1 (available at <http://www.sec.gov/Archives/edgar/data/936468/0000928385-99-001843.txt>).

³⁰ *Id.* at 6.

³¹ *Id.* at 12-14.

³² April 16, 1999 Mitretek Comments at 2.

the telecommunications business, a violation of its agreed to neutrality, and thus abandoning its NANPA responsibilities, Mitretek requested that the Commission follow the procedure set out in the *Third Report and Order* and appoint it as the NANPA.³³ Conversely, Mitretek urged the Commission not to vacate the procedure set out in its earlier Order by appointing Warburg Pincus the NANPA for, among other things, Warburg Pincus has more than a 10 percent interest in three telecommunications companies – a point highlighted by the need to impose a series of conduct remedies to even warrant consideration of Warburg Pincus to assume Lockheed Martin's NANPA responsibilities. Mitretek also submitted an in-depth explanation of how it stands ready, after a three to five month transition period, to assume the NANP responsibilities.

Lockheed Martin's comments to the Notice maintained that Warburg, Pincus would be able to be a neutral administrator of the NANP. In so doing, and in continuing violation of the neutrality standard, Lockheed Martin defended against the NANC's conclusion that Warburg Pincus "does not meet all the criteria for neutrality as cited in the *Requirements Document* and FCC rules," highlighting that there was no finding of "undue influence" and that a code of conduct and other conditions imposed on Warburg could address any neutrality concerns.³⁴ Additionally, and in contradiction with its Reports of August 28, 1998, and October 22, 1998, Lockheed Martin also defended against the charge that its commitment to buy Comsat would influence its operation of the NANPA and that its move into the telecommunications business did not constitute a default of its obligation to remain neutral.

I. LOCKHEED MARTIN HAS DEFAULTED ON ITS OBLIGATION TO REMAIN AS A NEUTRAL NANPA

Lockheed Martin's entry into the commercial telecommunications business creates actual and apparent conflicts of interest that violates its obligation to remain neutral and not to align with any industry segment while serving as the NANP Administrator. As revealed in Comsat's Proxy Statement, Lockheed Martin began to consider this initiative, including the acquisition of Comsat, even before denying that its telecommunications interests could create neutrality problems for its service as the NANPA. Having committed the company to this merger, and to a strategy to enter the telecommunication business, Lockheed Martin is now in the position of preparing to do business with and to compete against some of the same companies over which it is managing the allocation of numbers. Thus, Lockheed Martin's access to commercially sensitive and proprietary information subjects it to the type of questions that the Commission sought to avoid in replacing Bellcore with a neutral party, as "[e]ven if a NANP Administrator aligned with a particular industry segment was impartial, there would still likely be the perception and accusations that it was not."³⁵ In short, Lockheed

³³ *Id.* at 3-4.

³⁴ Lockheed Comments at 5.

³⁵ *First Report and Order* at 57.

Martin has abdicated its public trust responsibility to remain neutral while administering the NANP.

Although Lockheed defends against the charge that it is already aligned with a partial industry segment and thus in default on its neutrality obligation, it concedes that its eventual acquisition of Comsat Government Services, Inc. will place it in default. Thus, the only possible question is whether Lockheed Martin merely intends to create such a conflict of interest in the very near future or whether its commitment to enter the telecommunications business already constitutes a conflict of interest. Although Mitretek strongly believes that Lockheed Martin's impending entry into the commercial telecommunications marketplace already creates a real and apparent conflict that violates its neutrality obligation, this issue need not detain the Commission, as whether the conflict of interest is immediate or impending, it must be addressed.

By conceding that it has taken deliberate steps to compromise its obligation to remain neutral, Lockheed Martin is entitled to no procedural rights to notice from the Commission that it has defaulted on its obligation to remain neutral. The Commission's rules are intended to provide a fair opportunity for an administrator that inadvertently falls short of the NANPA's obligations, the Commission instituted a rule that if it "determine[d] at any time that the NANPA . . . substantially or materially defaults in the performance of its obligations, the Commission shall advise immediately the NANPA . . . of said failure or default, request immediate corrective action, and permit the NANPA . . . reasonable time to correct such failure or default."³⁶ If, after such notice, the NANPA "is unwilling or unable to take corrective action, the Commission may, in a manner consistent with the requirements of the Administrative Procedure Act, take any action that it deems appropriate, including termination."³⁷

In the instant case, the impending purchase of Comsat and relationship with Nortel necessarily renders Lockheed Martin unable to take corrective action to address its neutrality obligation and thus warrants the termination of its term of service without any opportunity to cure. *Cf. Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105 (D.C.Cir.1986) (where pursuit of administrative remedies would be "clearly useless," there is no requirement to exhaust them); *Smith v. Blue Cross & Blue Shield United of Wis.*, 959 F.2d 655, 658-59 (7th Cir.1992) (same). In any event, even if Lockheed Martin merited some notice of its neutrality issues, the Common Carrier Bureau provided such notice by reminding Lockheed Martin that its actions triggered the Commission's earlier commitment to review whether Lockheed Martin could continue as a neutral and unbiased number administrator in the wake of more than a *de minimis* venture into telecommunications.³⁸

³⁶ 47 C.F.R. § 52.12(e).

³⁷ *Id.*

³⁸ See Letter from Yog Varna, Deputy Chief, Common Carrier Bureau, Federal Communications Commission, to Jeffrey Ganek, Senior Vice President and Managing Director, Lockheed Martin IMS, CIS at 2 (November 23, 1998).

Although Mitretek continues to believe that notice of the neutrality standard violation is not required, and in fact has already been given, Lockheed Martin's proposed 'cure' have been provided. Through the proposed cure, Lockheed Martin would abdicate its public NANPA function and sell the NANPA to Warburg Pincus. However, by its very definition a 'cure' is a 'restoration of health,' not an abdication of responsibility or abandonment of life. The *Requirements Document* noted that the NANPA would be allowed "to correct *its* performance."³⁹

II. ONLY THE COMMISSION HAS THE AUTHORITY TO ESTABLISH A NEW NANPA

The important responsibility of administering the NANP is a public function that only the Commission, not Lockheed, is authorized to establish through a private party. The Commission's earlier Orders make quite clear that despite its decision to delegate numbering administration, "domestic numbering administration is within the authority of the Commission."⁴⁰ Thus, the Commission emphasized that (1) the intellectual property developed as part of performing the NANPA functions belonged to the NANPA – and not to the entity charged with administering it, and (2) if experience demonstrates that the entity it establishes as the NANPA "does not permit this Commission to meet its responsibilities under the Communications Act," it might reexamine whether it "should be the NANP Administrator, at least for the United States portion of the NANP."⁴¹ Additionally, the Commission has highlighted the importance of the public function that it delegated to the NANPA, explaining that:

Numbers are a public resource, and not the property of the carriers. Access to numbering resources is critical to entities desiring to participate in the telecommunications industry. Numbers are the means by which the businesses and consumers gain access to, and reap the benefits of, the public switched telephone network. These benefits cannot be fully realized, however, unless numbering resources of the NANP are administered in a fair and efficient manner that makes them available to all parties desiring to provide telecommunications services.⁴²

Despite the plethora of authority highlighting the public nature of the NANPA responsibilities,⁴³ Lockheed Martin's "cure" suggests that the NANPA responsibilities

³⁹ Requirements Document, at section 1.7, emphasis added.

⁴⁰ *First Report and Order* at para. 57.

⁴¹ *Id.*

⁴² *Third Report and Order*, 12 FCC Rcd 23044, at para 4 (quoting NANP Order at 2591).

⁴³ This was reaffirmed on May 29, 1999 in the *In re Number Resource Optimization, Connecticut Department of Public Utility Control Petition for Rulemaking to Amend the Commission's Rule Prohibiting Technology-Specific or Service Specific Overlays, Massachusetts Department of Telecommunications and Energy Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617 and 978 Area Codes, California Public Utilities*

are a commodity that can be sold to another entity. Lockheed maintains that "Commission rules do not require prior approval for any transfer of control or assignment of the NANPA."⁴⁴ Given the nature of the Commission's responsibility and the extensive evaluation process that it instituted to ensure competence and neutrality for this important public position when it was transferred from Bellcore, it is beyond dispute that the Commission retains authority over who administers the NANP – a point made plain in the *Requirements Document's* statement that the NANPA was subject future "rules, requirements, or policy directives."⁴⁵

Lockheed Martin next suggests that the Commission acquiesce in the unit's sale, since it would be invisible to the public and to CIS business unit employees, because the unit would simply be moved as a whole from one parent, Lockheed Martin, to another, Warburg Pincus, with no disruption of service or quality. But as antitrust courts are well aware, the divesting of a unit of a larger entity to a new owner does not at all guarantee future effectiveness. As the Supreme Court has acknowledged, "the economics of the market are such that [] divestiture[s] cannot be assured of success" and "divestiture remedies in Section 7 cases have not enjoyed spectacular success in the past." *Ford Motor Co. v. United States*, 405 U.S. 562, 582 (1972). The reason why divestiture of a unit cannot necessarily be trusted is that the divesting firm may not always share the regulator's commitment to find an effective purchaser, but rather will seek out the highest price and/or a buyer who will quickly take the divested property off its hands. See Kenneth Elzinga, *The Antimerger Laws: Pyrrhic Victories?*, 12 J.L. & Econ. 43, 65 (1969). ("It is in the public's interest that the buyer be independent, a business maverick, and destined to succeed. Consequently, effective antimerger relief requires that the authorities not give the companies involved free rein in this selection.")

Underscoring the difficulties in a divestiture to a party not selected by a government agency, Warburg Pincus has asked the Commission to relax its conflict of interest standard. Instead of conforming to the neutrality standard that avoids perceived and real conflicts of interest, Warburg Pincus suggests that information barriers and disclosure requirements should suffice. Rather than compromising its standards, the Commission can select an entity that has already withstood the scrutiny of the Commission's established rules and evaluation process.⁴⁶ Accordingly, the Commission should follow its earlier decision and appoint Mitretek as the NANPA in the face of

Commission and the People of the State of California Petition for Waiver to Implement a Technology Specific or Service Specific Area Code, Notice of Proposed Rulemaking, CC Dkt. No. 99-200, FCC 99-122 at paras. 16, 18 (June 2, 1999) (*NRO NPRM*).

⁴⁴ Request at 7.

⁴⁵ Req. Doc. at § 1.5.1.

⁴⁶ Interestingly, Lockheed Martin itself endorsed such a step immediately naming the alternate when it reaffirmed its readiness to be the Billing and Collection Agent in December 1997. See North American Numbering Council Meeting Minutes December 15 - 16, 1997 at 29 ("Lockheed Martin, stated that Lockheed Martin would stand behind its original bid to perform the B&C Agent functions.").

Lockheed Martin's default on its neutrality obligation and its inability to "cure" itself in a fashion that would allow it to perform the NANPA function.⁴⁷

III. THE COMMISSION SHOULD FOLLOW ITS ANNOUNCED PROCEDURE AND NOT DEVIATE FROM ITS STANDARDS TO SELECT WARBURG PINCUS TO ADMINISTER THE NANP

Given Lockheed Martin's express intent to abandon its obligations as the NANPA, the Commission should follow its announced procedure and appoint Mitretek as the NANPA. In its decision selecting Lockheed Martin, the Commission determined that:

If Lockheed defaults on its obligations as NANPA, or if the NANC determines that Lockheed does not perform those functions in a satisfactory fashion, Mitretek will have the opportunity to assume NANPA responsibilities for the remainder of the five-year term, if it still wishes to do so, without its undergoing another evaluation process.⁴⁸

In so doing, the Commission underscored the importance of the evaluation process that concluded that the only two applicants who met the competency and neutrality criteria were Mitretek and Lockheed Martin. Following this course is not only consistent with its rules, it is also the most sound course to follow, as it enables the Commission to ensure that it selects a NANPA that satisfies the necessary criteria.

If the Commission decided to establish Warburg Pincus as the new NANPA, it would take a considerable risk as to that firm's competency and neutrality. With its control of several communications companies, it has pervasive investments, in excess of \$1.1 billion in many of the most prominent telecommunications providers. Unlike Mitretek, which is a non-profit organization focused on "scientific research, engineering, and development" and whose mission is to be "a uniquely structured national resource which is recognized as the best provider of . . . technology solutions in the public interest,"⁴⁹ Warburg Pincus is an investment bank without a focus on technology. Warburg Pincus is a for-profit concern with investments in a number of telecommunications companies. Thus, unlike Mitretek, which is a non-profit technology corporation that is not aligned with any particular industry segment, Warburg Pincus is affiliated with three telecommunications providers (i.e., holds a 10 percent or greater ownership interest) – Covad Communications Co., Esprit Telecom Group, and Primus Telecommunications Group, Inc. In short, the Commission should not put itself in the position of potentially having to once again monitor a transfer of control of the NANPA

⁴⁷ *Third Report and Order* at Para 67.

⁴⁸ *Third Report and Order*, para. 67.

⁴⁹ See www.mitretek.org/company/index.html.

in the face of neutrality questions – a prospect that is a distinct possibility if it were to accept the proposed sale of the NANPA responsibilities to Warburg Pincus.

Conclusion

Lockheed Martin has elected to enter the commercial telecommunications business and to obtain status as an authorized carrier. This action creates an actual conflict of interest that Lockheed Martin itself concedes will not allow it to continue to function as the NANPA. Lockheed Martin requests that the Commission allow it to sell the NANPA to an entity of its choosing. In so doing, Lockheed Martin asks that it, and not the Commission, establish a new NANPA and that the Commission risk further conflict of interest issues through the sale of this important public function to an investment bank affiliated with several telecommunications companies and with no experience managing a technological venture like the NANPA. The Commission should reject this request and maintain its important evaluation and selection role by following its pronouncement that a default by Lockheed Martin, such as the conflict issues raised by its entry into telecommunications, would result in the assumption of the NANPA responsibilities by Mitretek.

Sincerely,



H. Gilbert Miller

HGM/dm