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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Filing, Docket No. 99-200; Docket No. 92-237.

Dear Ms. Salas:

On behalf of NeuStar, Inc., as the North American Numbering Plan Administrator ("NANPA"), the undersigned files in the above-captioned proceedings the attached legal memorandum in response to the Ex Parte statement filed on February 16, 2000 by Telecordia Technologies, Inc. The attached memorandum concludes that the Commission's designation of a Pooling Administrator is not a procurement under federal law.

One original and one copy of this letter and the attached memorandum are being filed pursuant to Section 1.1206(b)(1) of the Commission's rules for inclusion in the record in each of the above-captioned proceedings. If you have any questions regarding this matter, please contact the undersigned.

Respectfully submitted,

Cheryl Tritt
Counsel for NeuStar, Inc.
North American Numbering Plan Administrator

Enclosure

cc: Christopher Wright, General Counsel
Larry Strickling, Chief, Common Carrier Bureau
Yog Varma, Deputy Chief, Common Carrier Bureau
Charles Keller, Chief, Network Services Division
Tejal Mehta, Senior Staff Attorney, Network Services Division
John Hoffman, Chair, NANC

ISSUE

Whether selection of a Pooling Administrator[1] by the Federal Communication Commission (the "FCC" or the "Commission") is governed by federal procurement laws, such as the Federal Acquisition Regulations ("FAR") and the Competition in Contracting Act ("CICA").[2]

SUMMARY

Federal procurement laws do not apply to the Commission's selection of a Pooling Administrator because the Commission is acting as a regulator and not as a commercial party contracting for a procurement. The Commission's designation of a Pooling Administrator is not a procurement contract governed by federal procurement laws, such as CICA or the FAR, but by the Commission's organic authority, primarily the Telecommunications Act of 1934, as amended (the "Act").

It has long been recognized that Congress may authorize federal agencies to use means other than procurement to establish relations with private entities to fulfill certain regulatory missions of that agency.[3] Where such designation is made pursuant to express statutory authorization, federal procurement laws are inapplicable.[4] Instead, the relationship between the

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[1] A Pooling Administrator will coordinate and administer thousand-block number pooling. "Thousand-block number pooling is an alternative method for the assignment of numbering resources. Instead of assigning all 10,000 numbers within an NXX code to a single service provider, thousands-block pooling involves the allocation of telephone numbers within an NXX code in blocks of a thousand sequential numbers to different service providers in a particular rate area. A Pool Administrator will coordinate and administer the allocation of the thousands blocks." FCC Public Notice, *Common Carrier Bureau Receives North American Numbering Council (NANC) Requirements Document for Thousand Block Pool Administration*, DA 00-0074 (Jan. 14, 2000).

[2] Federal Acquisition Regulations (FAR), 48 CFR § 1 *et seq.*; Competition in Contracting Act (CICA), 41 U.S.C. § 253 *et seq.*

[3] *See, e.g., United States v. Citizens & Southern Nat'l Bank*, 889 F.2d 1067 (Fed. Cir. 1989).

[4] *Id.*

federal agency and the private entity is analogous to an agency relation, the terms and conditions for which need not comport with the strictures of federal procurement laws.[5]

Here, the Commission contemplates designating a private entity to serve as the thousand-block number Pooling Administrator pursuant to section 251(e) of the Telecommunications Act of 1996 ("the 1996 Act"). Section 251(e) expressly directs the Commission to "create or designate" one or more impartial entities to administer telecommunications numbering:

> The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.[6]

BACKGROUND

The Commission previously has exercised its authority under section 251(e) to designate a private entity to serve as the North American Numbering Plan Administrator ("NANPA"). For both the NANPA and the Pooling Administrator, the Commission's designation is governed by the Commission's organic authority under the Act, not federal procurement law.

For NANPA, the Commission determined that the public interest would be best served by designating a private entity, chosen by a consensus of the industry, rather than by "creating" an office within itself to function as the NANPA.[7] In so concluding, the Commission adopted the

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[5] *See, e.g., Grisby Bradford & Co. v. A.H. Williams*, 869 F. Supp. 984, 997 (D.D.C. 1994).

[6] 47 U.S.C. § 251 (e)(1) (1969) (emphasis added).

[7] *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588 (1995) ("NANP Order"); *Administration of the North American Numbering Plan*, 11 FCC Rcd 19392 (1996) ("Second Order"); *Administration of the North American Numbering Plan*, 12 FCC Rcd 23040 (1997) ("Third Report and Order").

recommendation of the North American Numbering Council (NANC), a Federal Advisory Committee composed of industry representatives and charged by the Commission to provide the consensus views of the industry with interests in the North American Numbering Plan.[8] NANC's recommendation was in response to the Commission's request that NANC recommend a private entity to serve as NANPA, as well as make recommendations concerning: "What measures should be taken to conserve numbering resources?" and "What number resources, beyond those currently administered by Bellcore [now known as Telecordia Technologies, Inc.] should the NANP Administrator administer?"[9]

In response to the Commission's directive, NANC formed the NANPA Working Group with instructions to determine the terms and functions of the NANPA, and to make an initial determination as to which private entity provided the best means for fulfilling those terms and conditions. After determining the functions that it expected the NANPA to fulfill, the NANPA Working Group implemented a competitive selection process to identify the private entity that offered the best terms and conditions for performing those functions. At the conclusion of that process, NANC recommended Lockheed Martin IMS ("Lockheed," now known as NeuStar, Inc.) as the NANPA over Mitretek Systems, Bellcore (now Telecordia) and other candidates.[10]

In 1997, pursuant to its *Third Report and Order,* the Commission accepted NANC's recommendation and designated Lockheed as the NANPA.[11] In so doing, the Commission comprehensively reviewed the basis for NANC's recommendations, including findings that

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[8] NANC was formed pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 §1-15 (1988). The membership of NANC, which includes thirty-two voting members and four special non-voting members, "was selected to represent all segments of the telecommunications industry with interests in numbering administration." *Third Report and Order* at 23040.

[9] *NANP Order* at 22609.

[10] *See Third Report and Order* at 23050-23057.

[11] *Id.*

Lockheed offered the "potential to achieve synergy from the future consolidation of numbering administration systems and processes (*e.g.*, number pooling)."[12] The Commission designated Lockheed as the new NANPA, based in significant part on the finding that the "record demonstrates that Lockheed . . . can bring efficiency and synergy advantages to number administration activities."[13] These statements clearly demonstrate that the NANC and the Commission were contemplating number pooling administration as an expansion of NANPA functions as early as 1997.

After Lockheed was designated as the NANPA, the Commission charged NANC with recommending a centralized approach to thousand-block number pooling to conserve scarce and dwindling numbering resources. NANC, in turn, charged the NANPA Working Group ("Working Group") with the initial work on this issue in a fashion similar to the procedures used to determine the NANPA requirements and designation.[14] In spring 1998, the Working Group notified NANC that after due deliberation, it had concluded that the function of thousand-block number pooling is a CO-code administration function and an extension of the NANPA duties. The Working Group recommended that Lockheed, as the existing NANPA, serve as the Pooling

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[12] *Third Report and Order* at 23052-23053. The Commission also recognized number pooling as a means of conserving numbering resources. *See Id.* at 23053 n.68 (defining number pooling as "a tool for slowing depletion of CO codes and of using numbers more efficiently").

[13] *Third Report and Order* at 23071.

[14] *Third Report and Order* at 23094. The Third Report and Order neither required the NANC to recommend a different Pooling Administrator (PA) from the NANPA, nor suggested the NANC employ a second "competitive bidding process." By contrast, the Commission directed "the NANC to examine the issue of *toll free* number administration and make a recommendation to the Commission regarding what entity would be an appropriate administrator for the toll free database. The NANC is free to use a competitive bidding process, similar to those the NANC used in developing its recommendations for the NANPA and the LNPAs, if it determines that such a process is necessary in this context." *Id.* (emphasis added).

Administrator pursuant to a modification of the NANPA requirements and without a second round of competitive bidding.[15]

On June 23-24, 1998, NANC reviewed the NANPA Working Group recommendations regarding implementation of thousand-block number pooling. As part of that deliberation, NANC considered presentations by Lockheed and BellCore (now Telecordia). NANC subsequently "reached consensus that the industry should not bid the 1000's block administration function, and that it is to be treated as an extension of the existing contract with [Lockheed]/NANPA."[16] Thereupon, NANC directed the Industry Numbering Committee (INC) to research and prepare a detailed set of guidelines for performance of the Pooling Administrator function.

From June 1998 until December 1999, the NANC, various Working Groups and the INC worked first, to define the function of the Pooling Administrator and then on the terms by which NeuStar, as the incumbent NANPA, would perform these modified or additional functions. That work was completed on December 22, 1999, when final agreement on the functions and performance criteria for the Pooling Administrator was adopted and approved by the NANC.

On January 14, 2000, NeuStar submitted its formal response to NANC setting forth the terms under which NeuStar would agree to serve as Pooling Administrator. In addition, in January, the INC requested that NANC recommend to the Commission that NeuStar, as the incumbent NANPA, become the Pooling Administrator.

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[15] In February, 1998, the Working Group reported to the NANC that it had identified three options for pooling administrator requirements: "(1) an RFP Process; (2) the addition of pooling requirements to current NANPA requirements; and (3) direct selection without a competitive bid (single source)." *NANC Meeting Minutes*, February 18, 1998, at 12. The following month, the Working Group announced to the NANC the "position of the NANPA Working Group that the work required for thousand-block number pooling is an extension of the NANPA requirements and is a CO-administration function." The Working Group also recommended that "Lockheed Martin, as NANPA, perform the number pooling administrator function." *NANC Meeting Minutes*, March 24, 1998, at 11.

[16] *NANC Meeting Minutes,* June 23-24, 1998, at 13.

Telcordia (formerly BellCore), a competitor to NeuStar which has been actively engaged in NANC's deliberations regarding the selection of the Pooling Administrator from the beginning, now raises the last-minute assertion that the Commission's action in designating a private entity, such as NeuStar, to serve as Pooling Administrator is subject to federal procurement laws, such as CICA or the FAR.[17] Telecordia is incorrect.

ANALYSIS

FEDERAL PROCUREMENT LAWS DO NOT APPLY TO THE COMMISSION'S DESIGNATION OF A POOLING ADMINISTRATOR

Federal procurement laws and regulations apply only when an agency acts as a commercial purchaser of goods and services. A federal agency's "designation" of a private entity pursuant to statute to perform certain functions is not a commercial acquisition or procurement. Here, the Commission would be designating NeuStar as a Pooling Administrator pursuant to the Act. The Commission would not be contracting for goods or services as is customarily done in a procurement. In designating a Pooling Administrator, the Commission is acting as a regulator within the scope of its organic authority (primarily the Act). Thus, federal procurement laws do not apply.

A. WELL ESTABLISHED LEGAL PRECEDENT DEMONSTRATES THAT AGENCY DESIGNATION PURSUANT TO STATUTE IS NOT A PROCUREMENT

When squarely faced with the question of whether federal procurement laws apply to a federal agency designation of a private entity to perform certain regulatory functions, U.S. Courts of Appeals, federal district courts and the General Services Board of Contract Appeals, all

[17] On February 16, 2000, Telcordia Technologies, Inc., (formerly BellCore) filed an *ex parte* statement contending, in part, that the Commission was conducting a procurement to obtain a Thousand-Block Pool Administrator in violation of CICA. *Ex Parte Notice of Telcordia Technologies, Inc*, CC Docket 92-237, CC Docket No. 99-200, DA No. 00-0074 (Feb. 16, 2000) ("Telecordia's Letter").

uniformly have ruled that although federal procurement law may govern agency actions as a commercial party, those laws do not apply when the agency as a regulator designates an entity pursuant to statute. "[I]t is well settled that federal procurement laws and regulations, such as CICA and the FAR, apply only when an agency . . . acts as a commercial purchaser of goods and services."[18] A federal agency's "designation" of a private entity pursuant to statute to perform certain functions is not a commercial acquisition or procurement.[19]

In *Citizens & Southern National Bank*, the Federal Circuit Court of Appeals considered whether the designation by the Treasury Department of Riggs National Bank to serve as a financial agent for a new system of cash concentration and reporting under the National Bank Act constituted procurement such that the court could entertain subject matter jurisdiction. The Federal Circuit unambiguously ruled that the Treasury Department's designation of a private entity to perform certain functions pursuant to statute "does not constitute a procurement of property and services" within the meaning of federal procurement law.[20] The Federal Circuit described the designation pursuant to statute as a "congressionally sanctioned relationship" in which the sovereign delegates government functions to a private entity "some of the functions that the government itself would otherwise perform."[21] The Federal Circuit concluded "this was not a procurement contract" and thus the "body of procurement law" did not apply.[22]

The Federal Circuit's analysis in *Citizens & Southern National Bank* has been applied consistently by subsequent tribunals against a range of federal procurement laws, including the

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[18] *Grisby Bradford & Co. v. A.H. Williams*, 869 F. Supp. at 997; *see Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 452 (D.C. Cir. 1994) (The "FAR applies only to 'acquisitions' . . . the CICA applies only to government 'procurements'").

[19] *See, e.g., United States v. Citizens & Southern Nat'l Bank*, 889 F.2d 1067 (Fed. Cir. 1989).

[20] *Id.* at 1069 (citing Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-544).

[21] *Id.*

[22] *Id.* at 1069 and 1070.

FAR and CICA.[23] It is now well accepted law that when a federal agency designates a party to serve a regulatory function in a "congressionally sanctioned relationship," federal procurement laws do not apply to that relationship.

B. THE COMMISSION IS DESIGNATING A POOLING ADMINISTRATOR PURSUANT TO STATUTE, NOT CONTRACTING FOR A PROCUREMENT

Here, the Commission's designation of a Pooling Administrator has been fully sanctioned by Congress. Section 251(e) expressly authorizes the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[24] The language of section 251(e) does not authorize procurement, but instead authorizes the creation or designation of an impartial entity to administer scarce and dwindling telephone number resources.

The Commission, in exercise of its discretion, earlier determined that the public interest was best served by not creating an entity within the FCC to perform the NANPA function.[25] Rather, the Commission concluded that the most efficient means for managing these limited resources was to designate a private entity as the NANPA.[26] The same concerns and findings that underlay the Commission's decision to designate NANPA again demonstrate that the

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[23] *See, e.g., Grigsby Brandford & Co. v. A.H. Williams*, 869 F. Supp. at 999 (D.C. District Court holding neither CICA nor FAR applied to the Department of Education's selection of a Designated Bond Authority pursuant to statute); *National Loan Servicenter v. Department of Housing and Urban Dev.*, GSBCA No. 12193-P, 1993 GSBCA LEXIS 120; 93-2 B.C.A. (CCH) ¶ 25,853 (March 2, 1993) (General Services Administration Board of Contract Appeals holding HUD's selection of a Master Servicer to manage and service government loans constituted a designation of an agent under statute rather than the procurement of services and thus federal procurement law did not apply); *cf. Saratoga Dev. Corp. v. United States*, 21 F.3d 445 at 452-53 (D.C. Circuit holding that neither CICA nor the FAR controlled the government corporation's selection of a land developer pursuant to statute).

[24] 47 U.S.C. § 251(e).

[25] *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588 (1995) ("NANP Order"); *Administration of the North American Numbering Plan*, 11 FCC Rcd 19392 (1996) ("Second Order"); *Administration of the North American Numbering Plan*, 12 FCC Rcd 23040 (1997) ("Third Report and Order").

[26] *Id.*

Commission has clear authority under section 251 (e)(1), to approve modification of the NANPA functions to include thousand-block pooling administration.

Like the Treasury department in *Citizens & Southern National Bank* and other agencies that each had a designation subject to judicial review, the Commission would be merely delegating "some of the sovereign functions that the government itself would otherwise perform" in a manner that Congress specifically contemplated and authorized.[27] The terms of performance that NANC, INC and the Working Group developed for service of the Pooling Administrator, as well as the terms under which NeuStar has agreed to serve as the Pooling Administrator, all demonstrate that the Commission's selection of a NANPA and a Pooling Administrator must be viewed solely a designation pursuant to statute, not as a procurement of goods and services. The Federal Circuit's analysis in *Citizen & Southern*[28] is compelling:

> What Treasury did here was designate or authorize, in the exercise of its discretion, a financial institution to act in its stead for the stated purposes. Regardless of appearances, this was akin to appointment of public employees, which is not a matter of contract even when terms and conditions guide the employment relationship. . . .This was not a procurement contract . . . .

Consequently, any arguments that the Commission must conduct a procurement process to select the Pooling Administrator are baseless and contrary to the regime authorized by Congress.

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[27] *See Citizens & Southern Nat'l. Bank*, 889 F.2d at 1069; *Grigsby Brandford & Co. v. A.H. Williams,* 869 F. Supp. at 998; *National Loan Servicenter v. Department of Housing and Urban Dev.*, GSBCA No. 12193-P, 1993 GSBCA LEXIS 120 at *7; *cf. Saratoga Dev. Corp. v. United States*, 21 F.3d 445 at 449.

[28] *Citizens & Southern National Bank*, 889 F.2d at 1070 (citations omitted).

C. BECAUSE THE COMMISSION IS ACTING IN ITS REGULATORY CAPACITY, THE COMMISSION'S RELATIONSHIP WITH THE POOLING ADMINISTRATOR IS GOVERNED BY ITS ORGANIC AUTHORITY

The Commission's designation of NANPA and approval of a modification to its functions to allow its performance as the Pooling Administrator would not violate CICA because such federal procurement laws do not apply to the Commission's selection of a Pooling Administrator. Assertions to the contrary notwithstanding,[29] even if NANC were to issue a new and distinct "contract" for a thousand-block Pooling Administrator, a competitive bidding process would not be required—indeed, such process would conflict with the need for the urgent and cost-effective action contemplated by the regime Congress authorized under section 251(e).

Congress specifically directed the Commission to "designate one or more impartial entities to administer telecommunications numbering."[30] That authorization was intended to provide immediate attention to and solution for the rapidly dwindling number resources. Designation of the Pooling Administrator is therefore a federal designation akin to that at issue in *Citizen & Southern* — not a procurement.

The statutory framework of section 251(e) grants the Commission broad discretion to act in the public interest in its regulatory capacity.[31] Accordingly, the Commission's relations with the private entities designated under section 251(e) are governed by its organic authority under the Act.[32]

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[29] *See Telecordia's Letter* at 10.

[30] 47 U.S.C. § 251(e).

[31] *See* 47 U.S.C. § 201(b) (the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act"); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999) (holding the Commission has "rulemaking authority to carry out the 'provisions of this Act,' which include sections 251 and 252, added by the Telecommunications Act of 1996").

[32] *See Citizens & Southern Nat'l. Bank*, 889 F.2d at 1069 ("The relationship [between the Treasury and its designated entity, Riggs National Bank] is governed by the National Bank Act and attendant Treasury

CONCLUSION

Federal procurement laws do not apply to the Commission's selection of a Pooling Administrator because the Commission is acting as a regulator and not as a commercial party contracting for a procurement. The Commission's designation of a Pooling Administrator is not a procurement contract governed by federal procurement laws, such as CICA or the FAR, but by the Commission's organic authority, primarily the Telecommunications Act of 1934, as amended.

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regulations. The body of procurement law, applies to Treasury only when it is acting as a commercial purchaser of goods and services."); *Saratoga Dev. v. United States*, 21 F.3d at 453 (the Pennsylvania Avenue Development Corporation "was not 'acquiring' or 'procuring' anything; far from expending public funds to purchase public property, the PADC was simply offering developers the right to spend their own funds on private projects [on public land]. The laws and regulations guiding government construction contracts had no bearing on those procedures.")