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March 1, 2000

Via Hand Delivery

Mr. Christopher Wright, General Counsel
Mr. Lawrence Strickling, Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ex Parte Filing
CC Docket No. 99-200

Dear Messrs. Wright and Strickling:

On February 16, 2000, Telcordia Technologies, Inc. (Telcordia) filed *ex parte* a series of objections to the recommendation of the North American Numbering Council (NANC) that this Commission expand the duties of the current North American Numbering Plan Administrator (NANPA), to include the administration of thousand block pooling.[1] Telcordia's arguments do not withstand even the slightest scrutiny. There is no question that the public interest requires cost-effective, national implementation of thousand block pooling as soon as possible. National pooling implementation will allow more efficient use of numbering resources, help to ensure that numbers are available for all service providers, and will also extend the life expectancy of the North American Numbering Plan (NANP). The NANC's recommendation includes substantial grounds for this Commission to find that expansion of NANPA's duties to include pooling administration, provides the only reasonable opportunity to implement pooling within an acceptable time frame and in a cost-effective manner. MCI WorldCom urges the Commission to accept the NANC's recommendation and disregard Telcordia's eleventh hour attempt to derail pooling implementation.

I. Expansion of NANPA's duties to include pooling administration will allow pooling implementation to occur in the most timely, cost-effective manner possible.

As part of its role as administrator of the NANP, NANPA performs central office code administration throughout the United States. In this role, NANPA distributes

[1] Letter from James J. McCullough, Counsel to Telcordia Technologies, Inc., to Christopher Wright and Lawrence Strickling (February 16, 2000).

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numbering resources to service providers in blocks of ten thousand numbers. The pooling administrator will also distribute numbering resources to service providers, except that it will do so in blocks of one thousand. In recognition of the synergies between central office code administration and pooling administration, it is expected that upon expiration of the current NANPA term, the entire NANPA function, including pooling administration, will go through a competitive bidding process for a new five-year term.[2]

The NANC has closely examined the technical and operational requirements for national pooling implementation. Indeed, the NANC has spent more than 15 months developing and finalizing the pooling administrator requirements. The NANC explicitly inquired into whether NANPA's duties should be expanded to include pooling administration, or, alternatively, whether the pooling administrator should be separately chosen in a competitive bidding process. The NANC concluded without objection that pooling administration duties should be added to NANPA's current duties, and that both should be subject to competitive bidding upon expiration of NANPA's current term.

There is substantial factual support for the NANC's recommendation. The advent of competition in all telecommunications markets has placed tremendous stress on NANP resources. Since 1996, area code exhaust has taken place at an unprecedented rate. The introduction and rapid exhaust of new area codes entails significant costs for service providers, consumers, and businesses. This Commission has responded to the rapid depletion of area code resources by launching a rulemaking on numbering resource optimization. The Commission has also granted, pending completion of its rulemaking, a number of state requests for additional, interim authority to implement optimization measures. Pooling lies at the very heart of state and federal efforts to use NANP resources more efficiently. Indeed, in the near term, pooling is one of the only potential optimization measures likely to yield any significant benefits.

Given that national implementation of pooling is critical to numbering resource optimization, the NANC determined that NANPA's duties should be expanded to include pooling administration. The selection of any other party to perform this function would introduce significant cost and delay, and would create uncertainty as to when national pooling could actually begin. Moreover, commencement of a selection process could also jeopardize the interim state pooling efforts that have begun. The states have operated under the assumption that NANPA will provide national pooling administration. NANPA is providing credits in performing interim administration, in anticipation of its selection as national administrator. A determination that NANPA will not serve as national administrator could completely derail interim state pooling efforts.

Such a determination would also significantly delay implementation of national pooling. At the February 2000 NANC meeting, some members of the Council estimated that selection of an administrator by a competitive bidding process would delay pooling

[2] Attached is a presentation that was given by the NANPA Oversight Working Group to the NANC, on October 20, 1999. This presentation, page 5, shows that pooling requirements will be integrated into the requirements document for the next NANPA term. The current NANPA term expires in November 2002.

implementation by at least a year.[3] This delay would occur not only because of the time necessary to prepare and evaluate bids, but also because provision of pooling administration by any party other than NANPA would require development of completely new interfaces between the pooling administrator, NANPA, and other databases, such as the NPAC. In its *Revised Pooling Administration Report and Recommendation to the North American Numbering Council,* the Thousand Block Pooling Administration Issue Management Group states that:

> The PA requires access to detailed rate area data, switch detail, and other relevant data points in order to develop the industry pool, manage the pool inventory and assign resources from the pool. These data requirements are virtually the same as those required for the NANPA CO Code Administrator function. The IMG felt that having separate vendors for each function would increase overall industry costs for both the PA and the NANPA. Separate vendors would require separate interfaces, which in turn would additional development time that would impact the timing and roll out of national pooling.[4]

The IMG goes on to point out that selection of a separate pooling administrator would not only cause needless delay, but would also increase the costs of pooling administration. Accordingly the IMG recommended that a single administrator be charged with assigning thousand blocks as well as entire NXX's. The NANC accepted this recommendation without objection.

II. Telcordia's letter raises no factual or legal obstacles to a decision to expand NANPA's duties to include pooling administration.

Telcordia makes three separate arguments that purport to show that the Commission should reject the NANC's recommendation and instead select a pooling administrator through a process of competitive bidding. First, Telcordia asserts that because public policy and Commission practice favor competition, selection of a pooling administrator without competitive bidding would deny all parties the benefits of competition, and would violate the Commission's duty under the Administrative Procedure Act (APA) to render a decision that is based upon a rational connection between the facts as found and the decision made. Second, according to Telcordia, federal procurement law requires that the Commission use competitive bidding to select a pooling administrator. Third, Telcordia argues that NANC's role in thousand block pool administration is illegal under the Federal Advisory Committee Act (FACA) and the NANC's charter. As we demonstrate below, Telcordia's arguments lack any merit whatsoever.

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[3] Additional delay would also be likely as the Commission would have to review and make a decision with respect to a new NANC recommendation.

[4] Revised Pooling Administration Report and Recommendation to the North American Numbering Council (February 17, 2000) at 4.

A. Public policy and FCC practice in favor of competition compel acceptance of the NANC's recommendation.

Telcordia's reliance on this Commission's preference for competition is curiously misplaced. Telcordia is of course correct that competition is fundamental to the Commission's function. MCI WorldCom understands as well any party the singular importance of competition as the cornerstone of sound telecommunications policy. In this case, the Commission should accept the NANC's recommendation precisely in order to advance and preserve competition.

Telephone numbers are the lifeblood of local and wireless competition. Without them, the most innovative business plan in the world is worthless. Yet the current area code crisis has resulted in rationing and numerous NXX lotteries throughout the country. Wherever rationing and lotteries take place, there are service providers unable to obtain the numbers that they require to offer service to customers. As this Commission knows, the prevalence of rationing and lotteries has caused service providers to scale back market entry plans.[5] The result is less competition and fewer choices for consumers.

It is intolerable that consumers are being denied the benefits of competition because of number shortages. At this time, pooling is one of the only significant policy options available to address such shortages. It is widely hoped that pooling will reduce the need for rationing and lotteries, by allowing the industry to use numbering resources more efficiently. This Commission must not allow number shortages to choke off nascent competition.[6] If the Commission does not accept the NANC's recommendation, and instead delays the implementation of pooling by a year or longer, it will deal a serious blow to competition in all telecommunications markets.[7]

B. The NANC's recommendation is supported by a substantial record and is entitled to great weight and consideration.

Telcordia argues that a competitive bidding process is needed: (1) to ensure that the most qualified administrator is selected; (2) to provide the incentive necessary to develop and implement the most innovative methods to solve the challenges associated with thousands block pooling; (3) to provide the necessary incentive to develop the most efficient and least costly method of implementing numbering optimization; and (4) to provide the greatest opportunity to diversify national and international numbering administration while ensuring selection of the most qualified pooling administrator.

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[5] *See, e.g.,* Letter from Susan M. Eid, MediaOne Group, Inc., to Magalie Roman Salas (February 10, 2000), describing MediaOne's inability to provide service solely due to an absence of numbering resources.

[6] As the Commission has consistently recognized, its duty under the Telecommunications Act of 1996 is to open all markets to competition. Moreover, Section 251(e)(1) of the Act specifically charges the Commission with ensuring that numbers are available on an equitable basis, and Section 253 requires that the Commission remove barriers to entry.

[7] This situation also has serious ramifications for the robustly competitive interexchange market. Entry into that market by Bell Operating Companies, pursuant to Section 271 of the Communications Act, in a situation where competitive carriers are unable to obtain critical numbering resources will harm long distance competition. If a competitor lacks numbering resources, it will be unable to offer a competitive, bundled product.

Telcordia fails to recognize that the NANC had every incentive to promote each of these objectives, and to balance them with the need to implement pooling in a timely manner. In any case, the NANC's recommendation provides a sufficient basis for the Commission to reject Telcordia's argument.

Telcordia ignores the fact that the NANC consists of industry members, state commissions, and other parties with substantial expertise and interest in the area of numbering administration. The members of the NANC are well aware of the benefits of competitive bidding. They also fully understand the synergies between CO Code Administration and pooling administration. Finally, the NANC's members have every incentive to make a recommendation that minimizes the costs and maximizes the benefits of pooling administration. After all, the industry and the public will incur significant costs to implement pooling. Telcordia's suggestion that the NANC would recommend an unqualified administrator to develop and implement an inefficient pooling administration system is simply nonsensical.

It is widely recognized that a Federal Advisory Committee constitutes a uniquely qualified body to review specialized and highly technical matters. Indeed, while a federal agency must ultimately make its determinations based on the entire record, the agency will give great weight and consideration to the recommendations of a Federal Advisory Committee.[8] The structure and expertise of the NANC belie Telcordia's suggestion that the NANC's recommendation takes no account of the benefits of competitive bidding. It is clear that, upon consideration, the NANC determined that in this instance it made more sense to expand NANPA's duties to include pooling administration, than to seek a separate pooling administrator. As detailed above, there is a substantial factual record in support of the NANC's recommendation. Based on that record, the Commission can easily dismiss Telcordia's objections.

C. The Administrative Procedure Act does not require that the pooling administrator be selected through competitive bidding.

According to Telcordia, failure to rely on competitive bidding would result in a decision that would be vulnerable to reversal under the APA as arbitrary, capricious, and contrary to law. While Telcordia has correctly identified the legal standard that would apply to such a determination, their application of that standard is completely lacking in analysis or support. A decision by the Commission to accept the NANC's recommendation would be supported by substantial facts on the record. As the NANC has recognized, expansion of NANPA's duties to include pooling administration would yield significant benefits in timeliness and overall efficiency. Any APA-based challenge to a decision to accept the NANC's recommendation would likely be summarily rejected.

Under § 706 of the APA, the Commission's decision in this instance would withstand legal challenge unless found to be "arbitrary, capricious, an abuse of discretion,

[8] *See, e.g.,* Request for Comments: Industrial Combustion Coordinated Rulemaking Information Collection Request, Environmental Protection Agency (July 29, 1996), 61 FR 39450, 39451.

or otherwise not in accordance with law."[9] Where, as here, there is a substantial factual basis for the determination, as well as a reasoned recommendation from a Federal Advisory Committee, agency action is entitled to substantial deference.[10]

D. Acceptance of the NANC's recommendation would not violate the Competition in Contracting Act.

Telcordia argues that the Commission would violate the Competition in Contracting Act (CICA) by using the NANC to procure a service, namely the administration of thousand block number pooling. The CICA requires that federal agencies use competitive procedures when conducting a procurement for goods or services.[11] Telcordia makes the strained argument that by ordering NANPA to expand its duties to include pooling administration, the Commission would be conducting a government procurement subject to the CICA. This argument is meritless. Alternatively, if such an order is subject to the CICA, it clearly falls within an exception to the competitive procedure requirement.

An order that the NANPA expand its duties to include pooling administration is not subject to the requirements of the CICA because public funds will not be used to pay for pooling administration. Instead, the costs of pooling administration will be borne by all telecommunications carriers on a competitively neutral basis, as determined by this Commission.[12] In addition, the industry, not the government will be the users of NANPA's pooling administration services.

In classifying the transactions that are subject to the CICA, courts have consistently found that the CICA applies only when the federal government acts as a commercial purchaser of goods and services, thus expending public funds.[13] In considering the definition of the word procurement, courts have found that the word procurement is understood to "denote the process by which the *government* pays money" to receive goods or services.[14] Additionally, in the Senate Report accompanying the statute, the Committee emphasized that the Act only applied to the "expenditure of public funds."[15] Thus, the CICA only applies when public funds are used in selecting services or goods.

Telcordia argues that the funding structure of the NANC's recommendation does not affect the conclusion that the selection of the pooling administrator constitutes government procurement. Telcordia relies on *Motor Coach Indus., Inc. v. Dole*[16] to

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[9] 5 U.S.C. § 706(2)(A) (1999).
[10] *See* United States v. Dierckman, 2000 WL 15012, at *9 (7th Cir. 2000) (holding that the standard of review for an agency's findings of fact is a highly deferential standard).
[11] *See* 41 U.S.C. § 253 *et. seq.* (1999).
[12] 47 U.S.C. § 251(a)(2).
[13] *See* Grigsby Brandford & Co. v. United States, 869 F. Supp. 984, 997 (D.D.C. 1994).
[14] *See, e.g.,* Rapides Regional Medical Center v. Secretary, Dep't of Veterans Affairs, 974 F.2d 565, 573 (5th Cir. 1992), *cert. denied*, 508 U.S. 939 (1993) (emphasis added).
[15] *See* Sen. Rep. No. 50, 98th Cong. 3 (1984).
[16] 725 F.2d 958 (4th Cir. 1984).

support this argument. That case held that the purchase of buses for a federally run airport constituted procurement of a service even though the buses were purchased through a trust funded by the airlines. Telcordia, however, fails to explain fully the facts of the case. In the *Motor Coach* case, the airlines gave monies to the bus fund *instead of* paying their normal airport fees that were paid to the FAA.[17] Because the monies funding the trust were monies that would have normally gone to the public through the FAA fees, the court found that the trust was of a public nature and subject to procurement requirements.[18] The court noted that one of the factors in determining when a fund becomes a public instrumentality is the method by which the trust is funded.[19]

Because the monies used to fund the pooling administrator are not of a public nature, an order that NANPA add pooling administration to its duties is not subject to the requirements of the CICA. The federal government, through the Commission, is neither paying for nor receiving the pooling administrator's services. The monies used by the industry to fund the administrator are not monies that would otherwise go to the Government for other purposes, thus eliminating any concern over the public nature of the funds. Thus, because the monies used to fund the pooling administrator do not come from government sources, an order expanding NANPA's duties would not be subject to the procurement requirements of the CICA.

Even if such an order were found to be subject to the requirements of the CICA, it would fall into the exceptions allowed under the statute. Under the CICA, some follow-on contracts may be awarded without re-bidding procedures. The statute states that "in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in . . . (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed available from the original source and may be procured through procedures other than competitive procedures."[20]

While Telcordia does not mention this section of the statute in its *ex parte* letter, the expansion of NANPA's duties to include pooling administration would clearly fall within this statutory exemption. It is clear pooling administration is a refinement of CO Code Administration that requires continued development of a "major system or highly specialized equipment." Selection of a party other than NANPA to take on the pooling administration duties would also cause an unacceptable delay. Effective use of numbering resources is critical in a competitive environment. As is demonstrated above, national pooling implementation is critical to numbering optimization and competition. Delay in the implementation of number pooling is unacceptable given the numbering crisis and the critical need for numbers in a competitive environment.

Contrary to Telcordia's assertions, courts have also found that contract modifications or alterations are not always subject to the procurement requirements of the

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[17] *See id.* at 961.
[18] *See id.* at 965.
[19] *See id.*
[20] 41 U.S.C. § 253 (d)(1)(B).

CICA.[21] The CICA, however, does not clearly articulate a standard for determining when the modification of an existing contract requires new competitive procedures. Because the statute sets forth no definitive standard, courts have determined that modifications outside the scope of the original contract or alterations that materially depart from the scope of the original contract are subject to the competitive requirements of the CICA.[22] One of the factors to be considered when determining if a modification materially departs from the scope of the original contract is whether the modification is of a nature that the bidders on the original contract could have reasonably contemplated the modification.[23] Additionally, the *AT&T* court found that "broad competition for the original contract may validate a broader range of later modifications without further bid procedures."[24]

While Telcordia asserts that pooling administration duties are radically different from NANPA's current duties, these arguments are seriously flawed. The NANC, in its expertise, recognized the similarity of the duties in its recommendation. Additionally, because of its expertise in administering the NANP, NANPA can quickly and easily commence the administration of pooling. The NANPA's efficiency and relative speed in implementing number pooling will help to alleviate the current numbering crisis.

An order that NANPA assume the responsibility of pooling administration also fits within another exception to the requirements of the CICA. The CICA provides that when the head of an agency determines that it is in the public interest to use other than competitive procedures, it may do so upon written notification to Congress.[25] While Telcordia argues that it is in the public interest to conduct a competitive bid for the pooling administrator's duties, it ignores the likelihood that conducting a competitive bid at this time would *not* serve the public interest. Number shortages and excessive area code exhaust harm the public directly and indirectly. Any delay in the implementation of pooling will only extend those harms.

E. NANC's role in this process is well within its charter.

Telcordia maintains that the NANC has somehow violated the Federal Advisory Committee Act, as well as the terms of its charter, by seeking to take title to, possession of, or in any way managing property. This argument fails for the simple reason that, so far, all the NANC has done is to advise the Commission with respect to pooling and its administration. The NANC has not, as yet, done any of the acts which Telcordia claims would violate the FACA. Nor is it even clear that the Commission will authorize the NANC to do any of these acts. Moreover, the advice which the NANC has given falls well within its charter, which specifically includes development and recommendation of a process for selection of a pooling administrator.

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[21] *See, e.g.,* Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1543 (Fed. Cir. 1996) (noting that not every alteration of the contract scope requires a new bidding procedure).
[22] *See* AT&T Comm. Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993).
[23] *See* CCL, Inc. v. United States, 39 Fed. Cl. 780, 791 (Cl. Ct. 1997) (quoting *AT&T*, 1 F.3d at 1204).
[24] *See AT&T*, 1 F.3d at 1204.
[25] *See* 41 U.S.C. § 253 (c)(7).

Once pooling is implemented, it is up to the Commission to determine what the NANC's future role will be. The Commission may decide to give the NANC ongoing oversight responsibilities for pooling administration, just as it did for NANP administration. Those responsibilities may include making a recommendation for the transfer of intellectual and physical property associated with pooling administration to a successor administrator. But until the Commission makes those decisions, Telcordia's argument is unripe and utterly speculative.

III. Conclusion

The Telecommunications Act of 1996 opened the door to a new world of competition and consumer choice. One unintended consequence of that Act is the acceleration of area code exhaust that the industry has witnessed in the last four years. The monopoly network assignment practices that had developed over the course of a century have proven ill-suited to the competitive world envisioned by the Act. Indeed, number shortages have forced service providers to delay ambitious market entry plans, and have made it difficult to plan for entry or expansion in several states. Moreover, premature area code exhaust imposes needless costs on consumers and businesses, and hastens the day when the NANP must be expanded. In the relatively near term, pooling is one of the only policy options available to address this crisis.

The NANC has recommended that the Commission expand NANPA's responsibilities to include pooling administration. If accepted, this recommendation will allow cost-effective, national pooling implementation to begin this year. Telcordia would have the Commission delay pooling implementation for an unknown length of time with no promise of any cost savings. Indeed, assignment of pooling administration to any party other than NANPA would result in duplicative interfaces and overhead, and thus would probably increase the combined cost of NANP and pooling administration. MCI WorldCom urges the Commission to reject Telcordia's specious arguments and accept the well-founded recommendation of the NANC.

Sincerely,

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NANPA Oversight Working Group Mission Statement

- NANC approved June 1998:

  The NANPA Oversight Working Group's mission is to ensure that the NANPA discharges its responsibilities in accordance with the terms described in the requirements document.

NANC General Policy Statement on Scope of NANPA Requirements

- NANC adopted March 1999:

  As a general principal, the core responsibilities of NANPA for central office code administration and NPA relief activities are those requirements that are either i) stated explicitly in the Requirements Document or in FCC orders; or ii) can reasonably be deduced from statements in the requirements Document or in FCC orders or iii) contained in the NANPA Transition Plan.

NANPA Oversight Working Group 1998-1999 Work Plan

- Identify FCC requirements for NANPA
  - Identify FCC documents
  - Extract applicable requirements points
  - Extract measurable components
- Outline NANPA responsibilities
  - Identify responsibilities outlined in NANP and CO Code Guidelines
- Transition Documents
  - Identify responsibilities outlined in other Industry Guidelines
  - Extract measurable components
- Develop comprehensive proposal for performance evaluation
  - Compliance Matrix
  - Identify evaluation team – Lockheed Martin, Industry, FCC participants

NANPA Oversight Working Group 1998-1999 Work Plan

- Present proposal for performance evaluation to NANC for concurrence
  - Meet with Lockheed Martin to review performance evaluation
  - Resolve any outstanding issues/questions
- Conduct performance evaluation
- Review results with LM and evaluation team
  - Resolve any outstanding issues/questions
- Present report to NANC
- Monitor LM/NANPA Performance Improvement Action Plan

NANPA Oversight Working Group Proposed 2000 Work Plan

- 1999 Performance Review, NANC report and associated follow-up activities.
- Monitor concerns, aggregate, and present to NANC industry issues related to NANPA responsibilities and requirements.
- Audit Requirements
- Update NANPA Requirements Document for expiration of current contract (February 2002).
  - Begin document development
  - Integrate Pooling Requirements
  - Manage bid process and timeline