

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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In the Matter of:	)	
	)	
The Petition of Telcordia Technologies, Inc.	)	
To Reform Amendment 57 and to Order a	)	WCB Docket No. 07-149
Competitive Bidding Process for Number	)	
Portability Administration	)	
_____	)	

**EX PARTE COMMENTS OF TELCORDIA TECHNOLOGIES**

In this proceeding, Telcordia Technologies, Inc. (“Telcordia”) has already demonstrated that Amendment 57 to the NeuStar/NAPM contract is manifestly anticompetitive. In fact, NeuStar, Inc. (“NeuStar”) does not really argue otherwise. Rather, NeuStar primarily asserts that the NeuStar/NAPM contract is a private contract between private parties and, therefore, the Commission need not concern itself with the consequences of that contract. If the North American Portability Management, LLC (“NAPM”) is happy, so goes the argument, the Commission need not be concerned.

But, as Telcordia has also shown, the NeuStar/NAPM contract is clothed in governmental authority. NAPM exists only through the exercise of FCC authority and every carrier in the United States is subject to the contract by virtue of FCC orders. And, indeed, the contract specifically notes that it is subject to FCC authority. The NeuStar/NAPM contract is “private” in form only.

Even if the NeuStar/NAPM contract were private, however, it would not change the appropriate outcome of this proceeding. As the Commission recently demonstrated in

the *MDU Exclusive Access Order*,<sup>1</sup> it has the authority – and will use that authority – to promote competition<sup>2</sup> by reforming purely private contracts to prohibit the enforcement of anticompetitive terms.<sup>3</sup> The policies promoted, and legal authority exercised, in the *MDU Exclusive Access Order* provide additional support for the petition by Telcordia to restore competition to the market for number porting.<sup>4</sup> Telcordia’s Petition requests that the Commission reform Amendment 57 to the Master Agreement between the NAPM and NeuStar by prohibiting the enforcement of its penalty provisions. The *MDU Exclusive Access Order* makes it clearer than ever that the Petition should be granted.

## **I. THE MDU EXCLUSIVE ACCESS ORDER**

In the *MDU Exclusive Access Order*, the Commission found that it has clear *legal authority* to reform anticompetitive contracts by prohibiting the enforcement of anticompetitive terms – the specific relief requested in Telcordia’s Petition. The *MDU Exclusive Access Order* also illustrated the Commission’s clear *policy* of reforming contracts to eliminate anticompetitive contract provisions, such as the penalty provisions in NeuStar’s Amendment 57. The Commission’s authority under Section 628 with respect to contracts between multichannel video providers and MDU owners is, obviously, no broader than its statutory authority pursuant to Sections 201, 202 and 251(e) with respect to common carrier services and numbering administration and

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<sup>1</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rule Making, FCC 07-189 at ¶1 (2007) (“*MDU Exclusive Access Order*”). The *MDU Exclusive Access Order* is attached to this letter.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Petition of Telcordia Technologies, *The Petition of Telcordia Technologies To Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration*, WCB Docket No. 07-149 (filed June 13, 2007) (“Telcordia Petition”).

porting. Thus, the same analysis that led to the *MDU Exclusive Access Order* requires the Commission to grant Telcordia's Petition.

**A. The *MDU Exclusive Access Order* Demonstrates that the Commission has the Authority to Reform Anticompetitive Contracts**

In the *MDU Exclusive Access Order*, the Commission held that it has explicit legal authority to reform contracts between two private parties because of their anticompetitive effects. Specifically, the Commission found that “[s]everal sources afford the Commission ample authority to prohibit exclusivity clauses in contracts between cable operators and owners of MDUs.”<sup>5</sup> First, the Commission found that it has clear authority to adopt rules reforming anticompetitive contracts based on the statutory prohibition in the Cable Act on “unfair or deceptive acts or practices.”<sup>6</sup> The Commission concluded that this prohibition “provides a solid legal foundation for” its decision to reform the exclusive contracts at issue.<sup>7</sup> As the Commission said, an exclusive contract is “an unfair method of competition or unfair act or practice because it can be used to impede the entry of competitors into the market and foreclose competition.”<sup>8</sup> As discussed below, similar “unfair or deceptive acts or practices” prohibitions in the Telecommunications Act of 1996 provide the Commission authority to reform NeuStar's anticompetitive contract.<sup>9</sup>

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<sup>5</sup> *MDU Exclusive Access Order* ¶40.

<sup>6</sup> *Id.* ¶41.

<sup>7</sup> *Id.* (citing 47 U.S.C. § 548(b)).

<sup>8</sup> *Id.* ¶43.

<sup>9</sup> 47 U.S.C. § 548(b).

Second, the Commission found that even in the absence of this explicit statutory authority, it has ancillary authority to reform the contracts based other statutory mandates. The Commission explained that Congress has mandated that the Commission act to “promote competition and consumer choice,” to “make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges,”<sup>10</sup> and to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . .”<sup>11</sup> The *MDU Exclusive Access Order* finds that these mandates give the Commission ample ancillary authority to reform anticompetitive private contracts. Again, as will be discussed below, similar statutory mandates, derived from the Telecommunications Act of 1996, provide the Commission with authority to reform Amendment 57 of the NeuStar/NAPM contract.<sup>12</sup>

**B. The *MDU Exclusive Access Order* Also Demonstrates the Commission’s Clear Policy Favoring Competition over Anticompetitive Contracts**

In the *MDU Exclusive Access Order* the Commission also found that the anticompetitive harms of exclusive agreements outweighed any of their potential short term benefits.”<sup>13</sup> Specifically, the Commission ruled that exclusive contracts directly harm consumers, stating “[b]y far the greatest harm that exclusivity clauses cause” is that

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<sup>10</sup> 47 U.S.C. § 521(6).

<sup>11</sup> 47 U.S.C. § 157.

<sup>12</sup> See 47 U.S.C. § 157; 47 U.S.C. § 257(a), (b).

<sup>13</sup> *MDU Exclusive Access Order* at ¶¶24, 26.

they “deny [consumers] the benefits of increased competition.”<sup>14</sup> Exclusive agreements actively attempt to “deter new entrants from attempting to enter the market.”<sup>15</sup>

The “major benefits” of competition include lower prices, greater diversity, technological development and higher quality service.<sup>16</sup> Without competition these tangible benefits are not possible. For example, the Commission found that residents of multiple dwelling units constrained by an exclusive contract are denied the opportunity to save money by choosing a lower cost competitor or by choosing a bundled voice, video, and broadband Internet access package.<sup>17</sup> While the Commission recognized some limited benefits to the agreements, it found that the benefits were often speculative and short term.<sup>18</sup>

## **II. THE COMMISSION SHOULD REFORM AMENDMENT 57**

### **A. Amendment 57 is Anticompetitive**

Amendment 57, like the contracts in the *MDU Exclusive Access Order*, is clearly an anticompetitive contract that must be reformed. As discussed in detail in Telcordia’s prior filings, Amendment 57 ensures that NeuStar is the sole vendor for number portability administration service until at least 2012.<sup>19</sup> Cleverly, rather than employing an explicit exclusivity clause, the contract achieves the goal of exclusivity by mandating

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<sup>14</sup> *Id.* ¶17.

<sup>15</sup> *Id.* ¶19.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *MDU Exclusive Access Order* at ¶24. In fact, in the MDU market the use of exclusivity clauses coincided with the imminent entry of new competitors. *Id.* ¶¶13-14

<sup>19</sup> Telcordia Petition at 6-9; Reply of Telcordia Technologies, *The Petition of Telcordia Technologies To Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration*, WCB Docket No. 07-149 at 14-23 (filed Sept. 21, 2007) (“Telcordia Reply”).

a debilitating financial penalty if NAPM engages in any of a long list of actions needed even to begin the process of seeking any provider other than NeuStar. NeuStar's contract imposes this massive penalty if NAPM: (1) requests information about the capacity of any company to provide porting administration services in competition with NeuStar; (2) seeks a quotation or bid from any company other than NeuStar; (3) publically advocates any competition with NeuStar; or (4) even asks NeuStar for a lower rate.<sup>20</sup> It also imposes a penalty if NAPM accepts a wholly unsolicited offer – at the time the offer is accepted – even though the time between contracting and the provision of service is likely to be 18 months. In other words, NAPM would be forced to pay 18 months of penalties before it could reap the benefit of lower prices. Finally, in an effort to strengthen the exclusivity of the contract further, Amendment 57 also mandates that NAPM must hold any discussions on its contract with NeuStar, including negotiations about extending the contract's exclusivity, in secret, thereby avoiding any Commission or other public scrutiny.<sup>21</sup>

Because Amendment 57 imposes its debilitating penalty at the beginning of the competitive process, the risk of breaking the exclusive relationship with NeuStar is enormous for NAPM (somewhere between \$30 million and \$150 million (or more)).<sup>22</sup> This risk is designed to achieve exclusivity and eliminate competition without the need for a blatant exclusivity clause.

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<sup>20</sup> Amendment 57, Section 8.3b.

<sup>21</sup> Amendment 57, Section 8.3c(ii).

<sup>22</sup> The penalty provision imposes a 9 cent per transaction penalty in 2007 and 2008, and a 9 cent per transaction penalty in 2009-2011 up to a cap of \$0.95/transaction in 2009-2011. In 2009-2011, if transactions are less than 300 million/year, the penalty is \$.04/transaction. However, 2007 transactions are expected to be at or over 300 million, so it is unlikely that the reduced \$.04/transaction penalty would be applicable.

In the cable context, the Commission has clearly found that, in addition to contracts that include explicit exclusivity clauses, “any behavior that is tantamount to exclusivity should be prohibited.”<sup>23</sup> Obviously, the same is true in the number portability context. Yet contrary to the Commission’s stated policies,<sup>24</sup> the behaviors of NeuStar and NAPM, and the penalty provisions of Amendment 57, have resulted in NeuStar being the sole source for all number porting services in the United States for more than a decade, and have locked in exclusivity until at least 2012. Amendment 57 effectively nullifies the Master Contract’s non-exclusivity clause. Put another way, the Master Agreement as amended by Amendment 57 – while not an exclusive contract on its face – functions as an exclusive contract.

As a result of being deprived of the benefits of competition, consumers and carriers are paying at least \$240 million more for number porting administration services than is necessary.<sup>25</sup> And, as Cox Communications, Inc., a founding member of NAPM, point out, consumers and the industry have been denied the benefits of technological development.<sup>26</sup> Over the last ten years that the current database administration contracts

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<sup>23</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd. 3359, 3383 (1993).

<sup>24</sup> The Commission has previously found that competition among number portability database administrators benefits both carriers and consumers. At the inception of number porting the North American Numbering Council recognized that competition among multiple database administrators “should enable carriers to obtain *more favorable terms and conditions than if only one database administrator had been selected.*” *Telephone Number Portability*, Second Report and Order, 12 FCC Rcd. 12281, 12305 (1997) (“*Second Report and Order*”) (emphasis added).

<sup>25</sup> Telcordia Reply at 4-5. In addition, with only one company providing all portability services, the system has a dangerous single point of failure. Without the multiple vendors that the Commission prefers, if NeuStar’s system fails, the entire portability structure will fail. In addition, a sole source contract deprives consumers and carriers the benefits of competition.

<sup>26</sup> Reply Comments of Cox Communications, Inc., *The Petition of Telcordia Technologies To Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration*, WCB Docket No. 07-149 at 3-4 (filed Sept. 21, 2007).

have been in place “there have been enormous changes in information technology,” but “there have been no significant changes to the way the [number portability] database is operated and maintained.”<sup>27</sup>

The bottom line is that Amendment 57, like the contracts at issue in the *MDU Exclusive Access Order*, is an anticompetitive exclusive contract. As with those contracts, the anticompetitive harms of Amendment 57 significantly outweigh any of its benefits. Amendment 57 is, in fact, a textbook case of public harm caused by anticompetitive contract provisions.

**B. The Commission has Explicit Authority to Reform Amendment 57**

The Commission’s authority to reform NeuStar’s exclusive number portability contract is even clearer than its authority to reform exclusive MDU contracts. This is the case because: (1) the Telecommunications Act of 1996 and the Communications Act of 1934 include provisions that apply to numbering administration and mirror the provisions that the Commission found gave it authority in the *MDU Exclusive Access Order*; (2) while MDU contracts are not under the exclusive control of the Commission, the FCC has plenary authority over numbering issues; and (3) while MDU contracts are fully private, Amendment 57 is a contract between two private actors in form only – it is the result of Commission delegated authority and is enforced against a wide range of non-signatories by Commission rule.

In the *MDU Exclusive Access Order* the Commission found that the “unfair or deceptive acts or practices” prohibition of Section 628 of the Communications Act gave it direct authority to reform exclusive contracts. Section 201 of the Communications Act,

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<sup>27</sup> *Id.* at 3.

like Section 628, creates an explicit statutory provision prohibiting unfair or deceptive practices, stating that “[a]ll charges, practices, classifications, and regulations . . . shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.”<sup>28</sup> Amendment 57, like the exclusive agreements in the *MDU Exclusive Access Order*, is unjust and unreasonable, as detailed in the Telcordia Petition and Reply Comments, providing ample authority for the Commission to reform the contract.<sup>29</sup>

The Commission also has clear ancillary authority to reform Amendment 57. In the *MDU Exclusive Access Order*, the FCC found that it had ancillary authority based on Congress’s mandate that the Commission act to “promote competition and consumer choice,” to “make available . . . a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges,”<sup>30</sup> and to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . .”<sup>31</sup> The Communications Act and the 1996 Act include similar mandates for the Commission that apply to Amendment 57. The 1996 Act established “a national policy framework” that is intended to “promote competition and reduce regulation . . . to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>32</sup> This mandate is directly reflected in Section 706 of

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<sup>28</sup> 47 U.S.C. § 201(b).

<sup>29</sup> Telcordia Petition at 9-13; Telcordia Reply at 14-23.

<sup>30</sup> *MDU Exclusive Access Order* ¶ 47 (citing 47 U.S.C. § 151).

<sup>31</sup> 47 U.S.C. § 706(a); 47 U.S.C. § 157.

<sup>32</sup> S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

the 1996 Act – which was also a basis of jurisdiction in the *MDU Exclusive Access Order* – and directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . .”<sup>33</sup> Furthermore, Section 257 of the Communications Act states that it is national policy to promote “vigorous economic competition, technological advancement, and promotion of the public interest” in all aspects of the telecommunications market, including in the provision of services to “providers of telecommunications services and information services.”<sup>34</sup> These provisions provide the Commission with even stronger authority than do the provisions cited by in the *MDU Exclusive Access Order*.

The Commission’s plenary authority over numbering issues further strengthens the authority created by the above-cited provisions. Section 251(e) of the Communications Act gives the Commission independent plenary authority over numbering issues, which includes oversight of number portability administration; “[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.”<sup>35</sup> Without the Commission’s imprimatur there would be no NAPM and no Master Contracts with NeuStar – indeed, the Commission could have chosen to conduct its own competitive bidding for number portability administration. It chose to delegate authority to sign contracts to NAPM. But that the ultimate authority rests with the Commission there can be no doubt.

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<sup>33</sup> 47 U.S.C. § 706(a); 47 U.S.C. § 157.

<sup>34</sup> 47 U.S.C. § 257(a), (b).

<sup>35</sup> *New York & Public Service Comm'n of New York v. FCC*, 267 F.3d 91, 100 (2d Cir. 2001).

Indeed, when the Commission delegated oversight of number portability administration to the LLCs (and eventually NAPM), it did so only subject to Commission oversight.<sup>36</sup> In fact, in the *Second Report and Order*, the LLCs were obligated to comply with Commission directives, and the local number portability administrators (*i.e.* NeuStar) were obligated to comply with such directives pursuant to the terms of the Master Agreement.<sup>37</sup> And in the Master Agreement itself, Section 25 specifically acknowledges the Commission's authority over the terms of the Agreement in general and the effects of Amendment 57 in particular.

There can be no doubt then that the Commission has complete authority over NAPM, and Amendment 57.<sup>38</sup> This oversight over number portability administration on its own gives the Commission the ability and authority to reform provisions of the NeuStar/NAPM contract that are unjust and unreasonable or would otherwise be contrary to the public interest. It would render the Commission's oversight role meaningless if it had no authority to alter the NeuStar/NAPM agreements under any circumstances. But when combined with the authority found in the Telecommunications Act and the Communications Act, as supported by the *MDU Exclusive Access Order*, the Commission's authority is indisputable.

This already strong Commission authority over number portability and NAPM becomes even stronger in the context of Amendment 57 because Amendment 57 is not a private agreement. As discussed in detail above, this exclusive contract is inextricably

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<sup>36</sup> *Second Report and Order*, 12 FCC Rcd. at 12345.

<sup>37</sup> *Id.*

<sup>38</sup> In addition, the NANC explicitly recommended that parties utilize this authority if not satisfied with a decision by an LLC or local number portability administrator. *See Second Report and Order*, 12 FCC Rcd. at 12338 (citing *NANC Working Group* at §§ 4.4.4 - 4.4.6).

intertwined with Commission authority. Amendment 57 is a direct result of delegated Commission authority and is enforced against a wide range of non-signatories by Commission rule, bolstering Commission authority to reform anticompetitive provisions.

As Tom Koutksy, NANC Chair said:

I do want to stress that I don't view these as private contracts between private parties. I believe this is a contract that does the public's business, basically done at the authorization of the FCC to put in place a procedure of which will not just benefit the industry but it will also benefit consumers and businesses in the United States.<sup>39</sup>

Mr. Koutsky had it exactly right.

### CONCLUSION

With a manifestly anticompetitive contract to defend, NeuStar simply tries to claim that this matter is not the Commission's business. But the *MDU Exclusive Access Order* has wiped out that defense. With that defense gone, there are no legal or regulatory arguments remaining that could justify the *de facto* exclusivity created by Amendment 57. The Commission has authority to reform the anticompetitive provisions of even private contracts. When it comes to contracts entered into and enforced only pursuant to Commission order, the authority of the Commission to reform anticompetitive provisions cannot rationally be denied. Even if it were not entirely clear before, after the *MDU Exclusive Access Order* there can be no doubt that the Commission's authority, its precedent, and the relevant statutes compel the Commission to reform Amendment 57 by prohibiting the enforcement of its penalty provisions. The Commission should now do so promptly.

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<sup>39</sup> North American Numbering Council Meeting Minutes April 17, 2007 at 31-32 (emphasis added).

Respectfully submitted,

A handwritten signature in black ink that reads "SCOTT HARRIS". The signature is written in a cursive style with a horizontal line underneath the name.

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