

June 24, 2009

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and To End the NAPM LLC's Interim Role in Number Portability Administration Contract Management; Renewed Request for Interim Standstill Order; and Request that NANC Resolve Dispute Concerning Necessity of Adding Certain URI Codes for the Completion of Telephone Calls, WCB Docket No. 07-149

Dear Ms. Dortch:

Telcordia Technologies, Inc. ("Telcordia") hereby responds to the ex parte filed by the North American Portability Management LLC ("NAPM LLC") on June 18, 2009. For all its bluster, NAPM's ex parte confirms that Telcordia has met the criteria for a standstill order with respect to the continued implementation of three Uniform Resource Identifier ("URI") fields during the pendency of a formal dispute Telcordia filed with the North American Numbering Council on May 26, 2009. Furthermore, NAPM's extraordinary request that the Commission not even take comment on Telcordia's petition with respect to the legality of Amendment 70 should be wholly disregarded. If NAPM cannot withstand oversight, it should no longer be a key FCC contractor.

Request for a Standstill Order on Change Orders 429, 430 and 435

Telcordia's request for a standstill order is simple. As set forth in that request, Telcordia has filed a formal dispute with the NANC alleging that NAPM's Amendment 72, to the extent it implements Change Orders 429, 430 and 435, violates the FCC's rules by including impermissible data in the NPAC database. The FCC's rule, 47 C.F.R. 52.25(f), states: "The information contained in the regional databases shall be limited to the information necessary to route telephone calls to the appropriate telecommunications carriers. The NANC shall determine what specific information is necessary." No such finding has been made by the NANC. Telcordia therefore asks that the Commission issue a standstill order so that this information is

not included in the database and third parties are not required to expend funds to modify systems to use this data until after its legality has been determined. Telcordia has satisfied each of the *Virginia Petroleum Jobbers Assoc. v. Federal Power Comm.* factors (likelihood of success on the merits, the threat of irreparable harm absent the grant of preliminary relief, the degree of injury to other parties if relief is granted, and the issuance of the order will further the public interest), although it is not necessary to satisfy each prong in order for a standstill order to be granted.

NeuStar and NAPM both ignore the Commission's precedent as to how it applies the *Virginia Petroleum Jobbers* factors. As the Commission has said, "no single factor is necessarily dispositive. For example, a compelling demonstration that the public interest would be irreparably harmed lessens the level of certainty required of a moving party to show that it will prevail on the merits."¹ "A balancing of these interests then will be conducted in order to fashion an administrative response on a case-by-case basis; moreover, there is no requirement that there be a showing as to each single factor."² "If there is a particularly overwhelming showing in at least one of the factors," the Commission may find that relief "is warranted notwithstanding the absence of another one of the factors."³

The Commission's decision granting a standstill order in the Ameritech/Qwest Teaming Standstill Order is particularly instructive. In that case, the Commission issued a standstill order against a Bell Company's teaming arrangement with an unaffiliated long distance carrier because the petitions "could cause significant changes to the competitive landscape in the local exchange and long markets and because we find the petitions raise serious questions regarding whether the agreement violates the Act" such that "these issues must be addressed before any lasting effects resulting from this agreement take place in these markets."⁴ As the Commission noted in that case, "a standstill order is warranted where the circumstances are such that it would be impracticable to 'withdraw service, once established, because of its disruptive effect.'"⁵

Likelihood of success on the merits. As set out above, the FCC rule is very clear: information cannot be included in the NPAC unless it is "necessary to route telephone calls to the appropriate telecommunications carriers." All other information can go into downstream

¹ *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 14508, 14515-14515 ¶ 14 (1998) ("*Ameritech/Qwest Teaming Standstill Order*").

² *Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services Amendment of the Amateur Service Rules to Authorize Visiting Foreign Amateur Operators to Operate Stations in the United States*, Memorandum Opinion and Order, 14 FCC Rcd 9305, 9307 ¶ 4 (1999).

³ *Id.*; see also *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Non-Initialized Phones*, 17 FCC Rcd 19012, 19015 ¶ 9 (Wireless Telecomm. Bureau 2002)(applying these standards on delegated authority and granting a stay).

⁴ *Ameritech/Qwest Teaming Standstill Order*, 13 FCC Rcd at 14517 ¶ 15.

⁵ *Id.* at 14520 ¶ 25, quoting *Midwest Television, Inc. (KFMB-TV), San Diego, Ca., Petitioner for Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV Systems*, Memorandum Opinion and Order, 4 F.C.C. 2d 612, 621 ¶ 17 (1966).

databases, but may not be placed in the NPAC. 47 C.F.R. § 52.25(f),(i). The rule also specifies how information shall be determined to be necessary: NANC – and not NAPM or the Local Number Portability Administration Working Group (LNPA WG) – must find the information to be “necessary.” Neither NANC nor the FCC has ever made such a determination – a fact that neither NeuStar nor the NAPM disputes.

Knowing that the NANC has never found the three URI fields – for IP-IP VoIP, picture messaging and text messaging -- to be “necessary to route telephone calls to the appropriate telecommunications carrier,” NAPM attempts to turn the rule on its head. NAPM argues that it is permitted to add these fields to the NPAC so long as there is “no consensus and agreement among subject matter experts that Change Order 400 was beyond the scope of permissible LNP enhancements.”⁶ But that is not the test or process specified by Rule 52.25(f) – which requires that the information be found by the NANC to be “necessary.”

Moreover, neither NAPM nor NeuStar in their recent ex partes actually claim that the URI fields in Change Orders 429, 430 and 435 are “necessary to route telephone calls to the appropriate telecommunications carriers” – notwithstanding that this is the basis of both Telcordia’s standstill request and its dispute filed with the NANC. NAPM asserts that the 2005 Future of Numbering Working Group (FON WG) report “detailed under the headings ‘Pro NANC 400 Conclusions’ and ‘Pro Recommendations’ the several bases and authority for concluding that Change Order 400 was within the scope of LNP,” but it actually provides no citations or references to actual discussion within that report. In fact, nowhere in Sections 4.2.1.2, 4.2.1.3, 4.2.1.9 and 4.2.1.10 of that report (presumably the sections to which NAPM is referring) is the Rule 52.25(f) necessity standard even discussed or cited. The proponents of Change Order 400 never expressly asserted that these URI fields were “necessary to route telephone calls to the appropriate telecommunications carrier” – even though the opponents of Change Order 400 clearly stated this objection.⁷ In fact, these proponent sections of the FON WG Report appear to be carefully worded to avoid expressly making such a claim. In its most recent ex parte, NAPM provides no examples of services for which number porting cannot occur

⁶ Ex Parte Letter from Dan A. Sciullo, Berenbaum Weinshienk, PC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WCB Docket No. 07-149 at 4 (June 18, 2009)(“NAPM Ex Parte”)(emphasis omitted).

⁷ FON WG Report at 25 (“*No additional information beyond that currently in the NPAC is needed to complete telephone calls to ported numbers through the PSTN. At the April 14, 2005 joint meeting of the Future of Numbering and LNPA Working Groups there was agreement of all parties that placement of Internet URIs (Universal Resource Identifiers) in the NPAC (Number Portability Administration Center) was not necessary to support PSTN (Public Switched Telephone Network) call completion and that changes to PSTN elements (switches, Service Control Points, and Signal Transfer Points) were not contemplated. Instead, the proposal to add URIs to the NPAC is to support diverse IP-enabled services beyond call completion, including MultiMedia Messaging (MMS, e.g., exchange of camera phone pictures via email), Push-to-Talk (PTT, using VoIP), Presence (as in Instant Messaging “buddy lists”), and VoIP interconnection (i.e. completing calls using IP-based networks without traversing the PSTN.)*”)(emphasis added).

without these URI fields or services that are “broken” by number porting without these fields.⁸ NAPM merely speculates that some services “may become ‘broken’ by porting.”⁹

Thus, Telcordia has not just demonstrated a likelihood of success or that there are “serious questions” regarding the lawfulness of Change Orders 429, 430 and 435,¹⁰ but it has demonstrated an overwhelming likelihood of success. Rule 52.25(f) requires a NANC “necessity” finding and no such finding has been made. Moreover, neither NAPM nor NeuStar has even asserted that these data fields are “necessary to route telephone calls to the appropriate telecommunications carriers.”

The threat of irreparable harm absent the grant of preliminary relief is real. Like NeuStar, NAPM asserts that Telcordia will not be harmed by implementation of the URI fields because, it asserts, these parameters can simply be purged if the FCC declares them to be unlawful.¹¹ However, as explained in Telcordia’s standstill request, this argument ignores the costs that third parties, including Telcordia, will have to incur. This harm is certain to occur in the event of demand. If a customer wants to use the URI fields, local system vendors like Telcordia will have to modify its portion of the local systems infrastructure used by carriers in order to accommodate the use of these unlawful fields. That will harm those vendors, including Telcordia to the extent they cannot recover these costs from its customers, and it will certainly harm their customers. Once incurred, these costs are sunk and cannot be reversed. Moreover, these costs are not recoverable under Article 9 of Amendment 72.

Furthermore, to the extent that NeuStar uses these unlawful data fields to gain business that would otherwise have gone to Telcordia, or other competitive ENUM services providers, that lost business is also irreparable harm, as the Commission recognized in the *Ameritech/Qwest Teaming Standstill Order*. Telcordia has no way to recover its lost revenue: NeuStar is not a common carrier from whom Telcordia can recover damages under Section 207 of the Communications Act. In the *Ameritech/Qwest Teaming Standstill Order*, the Commission observed, “If we later find the agreement to be unlawful, it will be very difficult to remedy these losses without serious disruptions in service to the public and, indeed, it is possible that customers who have migrated to Ameritech/Qwest pursuant to the agreement will never return to their previous carriers.”¹² The same here is true for Telcordia and other competitive ENUM services vendors with respect to ENUM services: if customers migrate to NeuStar services based on these unlawful fields, they may never return to Telcordia. If the fields are found to be unlawful, the customers will be further harmed by needing to migrate to another provider. This is threatened irreparable harm.

There is no showing of injury to other parties if relief is granted. Neither NeuStar nor NAPM present any concrete claim of harm to third parties if relief is granted. NAPM’s

⁸ *NAPM Ex Parte* at 5.

⁹ *Id.*

¹⁰ *Ameritech/Qwest Teaming Standstill Order*, 13 FCC Rcd at 14517 ¶ 15.

¹¹ *NAPM Ex Parte* at 5.

¹² *Ameritech/Qwest Teaming Standstill Order*, 13 FCC Rcd at 14521 ¶ 27.

claims of services “broken” by porting are wholly speculative and backed by no evidence of any kind. Indeed, neither NAPM nor NeuStar provides any example of a telecommunications service that is “broken” currently without the availability of the three URI fields. This is telling, and demonstrates that there is no significant harm to third parties, other than the delay to NeuStar in rolling out its competing services based on these fields.

In a footnote, NAPM now alleges that granting the standstill order “could needlessly thwart” the implementation of interconnected VoIP number portability.¹³ But two of the URI fields are for picture messaging and text messaging, which have nothing to do with interconnected VoIP. NAPM also fails to acknowledge that interconnected VoIP number porting is occurring today without the added URI field. In any event, these technical arguments can be fully considered by the NANC as part of the dispute Telcordia filed. This does not eliminate the need for the NANC to make a finding of necessity *before* these disputed elements can be placed in the NPAC.

The issuance of the order will further the public interest. As in the *Ameritech-Qwest Teaming Order* the public interest is furthered by the issuance of the standstill order. When the FCC authorized creating of the NPAC, it set strict limits on the data that could go into the regional monopoly NPAC databases, and required all other information to be placed in downstream databases. This limited the reach of the NPAC monopoly, and left all other service open to competition without potential cross-subsidization. Here, as in the *Ameritech-Qwest Teaming Standstill Order*, “it will be virtually impossible to ‘unscramble’ the effects of the agreement and return to the current status quo.”¹⁴ As in that case, the balance of the harms favors Telcordia.

NAPM’s lack of hard facts as to the need for the three URI fields demonstrates that it has the process backwards. Had it not elected to try to circumvent NANC’s role, there would have been another opportunity for all interested parties to discuss and to try to reach consensus *through NANC* as to whether the three URI fields are in fact necessary to the routing of telephone calls to the appropriate telecommunications carrier. The public interest is served by addressing these questions in the proper order – first the NANC must determine that a particular field is necessary to the routing of telephone calls to the appropriate telecommunications carriers, then – and only then – should parties be required to incur the costs of doing so. The public interest is best served by insisting that decisions on the necessity of the data – and thus the permissibility of including the data in the NPAC – precede the investment necessary to implement use of the data by parties other than NeuStar.

The point of the standstill order is to do just that – to allow the NANC and, if necessary, the Commission the ability to consider the threshold questions of whether the URI fields should be a part of the NPAC before third parties are required to spend the money necessary to implement those fields. NAPM and NeuStar apparently want these database changes to become

¹³ *NAPM Ex Parte* at n.5.

¹⁴ *Ameritech/Qwest Teaming Standstill Order*, 13 FCC Rcd at 14520 ¶ 24.

a fait accompli before any oversight can have occurred. This is exactly the type of situation that a standstill order was meant to address especially where, as here, Commission-specified processes have been ignored. Accordingly, Telcordia's request for a standstill order pending the completion of the NANC dispute resolution process should be granted.

Consideration of Telcordia's Amendment 70 Petition

Although Telcordia has asked the Commission to seek comment on Telcordia's petition, NAPM wrongly assumes that the failure to issue a public notice means that the petition is not being considered. Under section 1.45 of the Commission's rules, all petitions are subject to a default comment cycle. The only impact of the Commission not issuing a public notice is that NAPM has already missed its opportunity to file a timely response. Nonetheless, Telcordia supports issuing a public notice seeking additional comment on its petition.

In any event NAPM's lawlessness is not something that the Commission should sweep under the rug. As Telcordia has documented in its petition, NAPM has exercised the Commission's inherently governmental authority in extending the NPAC contracts far beyond their termination dates without any competitive bids. This conduct violates the Competition in Contracting Act as well as the President's procurement directives to all agencies, including the FCC. The fact that a competitive procurement was conducted in 1997 does not excuse no-bid contract extensions twelve years later – far beyond the scope of the original bid.

It is the FCC's role, not NAPM's or its FoNPAC (Future of the NPAC) Advisory Committee's role, to decide the future of the NPAC. It may well be that the NPAC should be limited to its existing functions, with other functions performed by other databases. That is for the FCC to decide after receiving comment from all interested parties.

NAPM asserts that "at all appropriate times it has consulted with the FCC and NANC seeking guidance and direction." This is a remarkable statement – especially when the NAPM has repeatedly entered into no-bid contract extensions with NeuStar without prior review and approval by the FCC or NANC. Certainly NANC was not informed of Amendments 57 and 70 prior to their execution – even though those contracts represented significant changes to the terms and conditions of NPAC services, including changes to when competitive bidding would be permitted or feasible. And no one at the FCC has ever indicated that they reviewed, approved or were otherwise consulted with respect to these major contract amendments.

One other point is worth noting. In its *ex parte*, NAPM cites the inseverability clause in Statement of Work 25 as evidence that it "recognizes the regulatory authority of the FCC with respect to all contracting by the NAPM LLC."¹⁵ But as Telcordia details in its Petition, this inseverability clause actually serves to *discourage* compliance with FCC rules because it provides that the only penalty for an unlawful term demanded by the contractor is the extermination of an entire amendment – including the contractor's concessions. For example, if the Commission finds any provision of Amendment 70 unlawful, the entire amendment would be

¹⁵ *NAPM Ex Parte* at 3.

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eliminated and all transactions re-priced at higher rates back to January 1, 2009. This flouts meaningful oversight and accountability.

NAPM's conduct – and its consistent agreements to foreclose competition in NPAC services without any prior review or approval by the FCC – will cost consumers hundreds of millions of dollars if not stopped. The time has come for the Commission to shine the spotlight on NAPM's contracts and to see if they can withstand close examination to determine whether they are consistent with the public interest. If they are not, there is no reason to allow these contracts to continue.

Sincerely,



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