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September 25, 2012

Ex Parte Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 95-116; WC Docket No. 07-149; WC Docket No. 09-109

Dear Ms. Dortch:

I write on behalf of Neustar, Inc. (“Neustar”) in response to comments filed by LM Ericsson, Inc. (“Ericsson”) relating to prospective neutrality requirements set out in the *RFP Documents*¹ and the current neutrality requirements that govern Neustar as the Local Number Portability Administrator (“LNPA”). Neustar has already explained in its comments that the *RFP Documents* properly require any prospective bidder for the LNPA contract to demonstrate, as a condition of participation in the RFP, compliance with stringent neutrality requirements modeled on the Commission’s own neutrality rules. The comments filed in response to the Bureau’s public notice expressed nearly unanimous support for the strict enforcement of stringent neutrality obligations for the LNPA.

We elaborate on the following additional points in response to Ericsson’s submission. First, the Commission should not adopt a “bifurcated” bid evaluation process; each bidder should be required to demonstrate compliance with neutrality requirements as part of the pre-qualification process. Second, the Commission’s approach to neutrality in the *Warburg Transfer Order*² represents strict adherence to neutrality requirements. Third, the proposed Code of Conduct is appropriately applied to any potential bidder; a process in which bidders propose

¹ The RFP documents include a Vendor Qualification Survey, a Technical Requirements Document, and a Request for Proposal (“RFP”). Hereinafter, these documents will collectively be referred to as the “*RFP Documents*.”

² Order, *Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14 FCC Rcd 19792 (1999) (“*Warburg Transfer Order*”).

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alternative “Codes” would unfairly advantage some bidders over others. Fourth, there is no lack of clarity in the long-standing requirement that an LNPA not be aligned with any particular telecommunications segment. Fifth, Ericsson’s legal claim that the selection of the LNPA is a government procurement is incorrect – the LNPA provides services to the industry that are paid for by the industry, subject to the Commission’s oversight. The LNPA is not a government agent.

1. Contrary to Ericsson’s argument, the Commission should not modify the bidding process to allow for consideration of bids irrespective of the neutrality of the bidder, while the Bureau carries out a separate process of evaluating neutrality.³ This approach would introduce significant unfairness to the extent it would leave the final neutrality requirements uncertain and potentially subject to modification *after* bids have been submitted. Achieving and maintaining strict neutrality imposes substantial costs – not only in terms of administrative compliance, but also in terms of business and investment opportunities that a strictly neutral LNPA must forgo.⁴ Similarly, neutrality imposes burdens and responsibilities on directors and employees of a company. Their board membership or part-time employment is limited, and their investments are constrained.⁵ A bidder that submits its bid based on the written neutrality requirements of the *RFP Documents* must reflect those costs in the price that it includes. If other competitors submit bids in the hope that neutrality requirements may be loosened or compromised, or with the intention to cure objections only if necessary, that bidder could gain an unfair advantage. Just as important, in evaluating such a bid, the Future of NPAC Subcommittee (“FoNPAC”) may be unable to judge whether the bid is a realistic alternative. It is presumably for these reasons that, in the LNPA’s procurement in 1997 as well as the Commission’s North American Numbering Plan Administrator (“NANPA”) and Thousands-Block Pooling Administrator (“PA”) procurements,⁶ all bidders were required to demonstrate neutrality before bids were submitted. The Commission should not, and cannot reasonably, prohibit FoNPAC from taking the same approach here.

³ See Comments of Telcordia Technologies, Inc. at 8, CC Docket No. 95-116 *et al.* (FCC filed Sept. 13, 2012) (“*Ericsson Comments*”).

⁴ For example, CENX recently announced a strategic investment by Ericsson; CENX is listed in the Commission’s Form 499 database as an interexchange carrier. An investment of 5 percent or more in an entity like CENX (assuming that it is a telecommunications service provider (“TSP”)) would violate the Commission’s neutrality rules; Neustar, as the current LNPA, could not consider such an investment.

⁵ See Comments of Neustar, Inc. at 15-16, CC Docket No. 95-116 *et al.* (FCC filed Sept. 13, 2012).

⁶ See NANPA RFP, Solicitation FCC12R0007, Attach. A, § 1.4 (Mar. 20, 2012), and PA RFP, Solicitation FCC SOL07000001 (Nov. 17, 2006) Replacement Page 99 (Feb. 16, 2007).

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Potential bidders should have a reasonable opportunity to address any discrepancies that the FoNPAC identifies in their initial vendor qualification submissions; Neustar submits that the process envisioned in the *RFP Documents* provides that opportunity. There is nothing unfair about requiring compliance with neutrality on the timetable proposed in the *RFP Documents* – the requirements are not new, but instead track existing law that has been in place for 15 years. (Moreover, entities that have followed the LNPA contracts for many years have long known the neutrality requirements that apply to any LNPA.) The only reasonable alternative would be to delay all bidders' RFP submissions until the vendor qualification process is completed. However, any delay to give bidders more time to qualify as bidders risks upsetting the schedule set by the Bureau, which would jeopardize the orderly process that the Bureau and the industry have established. To make such a modification to accommodate any single bidder would not serve the interests of fair and effective competition.

2. Ericsson argues that its proposed approach has a precedent in the Commission's supposed flexibility regarding neutrality at the time Warburg, Pincus & Co. ("Warburg") purchased Lockheed Martin's numbering administration assets.⁷ But the Commission's actions at the time of the Warburg transaction demonstrate the strictness of its neutrality enforcement, not any laxity. The Warburg transaction came about because Lockheed Martin – which was serving as both LNPA and NANPA – proposed acquiring Comsat Government Services, Inc., a subsidiary of Comsat Corporation, to facilitate its pursuit of opportunities in telecommunications network services.⁸ The Commission held that this acquisition made it impossible for Lockheed Martin to continue to serve as a neutral numbering administrator – no matter how it might restructure itself – which led to the divestiture of Lockheed Martin's numbering assets to Neustar.⁹ Had the Commission taken a flexible approach to neutrality, it could have permitted Lockheed Martin to continue to serve as numbering administrator, perhaps by setting up a separate subsidiary with independent directors or by serving as a subcontractor to a neutral prime vendor. But no such solution was permitted: Lockheed Martin was forced to divest.

After the Lockheed Martin divestiture, Neustar was partially owned by Warburg, which was not a TSP itself but which was "affiliated" with TSPs. The Commission found that the proposed structure for Neustar – which involved substantial management ownership, a voting trust, a Code of Conduct, and a 9.9 percent limitation on Warburg's ownership – satisfied the Commission's neutrality requirements as they stood.¹⁰ In particular, because Warburg was not

⁷ See *Ericsson Comments* at 9.

⁸ See *Warburg Transfer Order* ¶ 6.

⁹ See *id.* ¶ 10.

¹⁰ Warburg was not a TSP; it was a TSP affiliate because of (1) a majority interest in a media company that held authorizations for international services and satellite earth station common carrier authorizations (which it had announced plans to divest); (2) a 20 percent minority interest

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a TSP and owned less than 10 percent of Neustar, Neustar was not an affiliate of a TSP.¹¹ Neustar did not issue a majority of its debt to, or derive a majority of its revenues from, any TSP.¹² Even though none of the TSPs affiliated with Warburg used numbering resources, the Commission expressed “concern[]” about Warburg’s investments and the “incentive” that Warburg might have “to influence NeuStar in a manner that might compromise NeuStar’s neutrality.”¹³ After extensive analysis, however, the Commission concluded that the voting trust and the Code of Conduct that the parties had proposed were adequate to guard against undue influence under the circumstances.¹⁴ The Commission enforced its neutrality rules to the letter.

Nevertheless, the Lockheed/Warburg example does not provide a model that the Commission should consider in the present circumstance. The Lockheed transaction with Warburg came about because, in the middle of Lockheed’s terms as LNPA and NANPA, Lockheed became a TSP and thus was no longer neutral. Lockheed made a forced sale to Warburg, which, as noted above, was involved with several TSPs. Rather than cause tremendous upheaval for both local number portability (“LNP”)¹⁵ and NANP, the Commission allowed Lockheed and Warburg to craft the solution described above. Significantly, however, Lockheed’s non-neutrality occurred mid-term. Had Lockheed been a TSP in 1996 and 1997, when the LNPA contracts were first bid, there is no reason to think that any special accommodations would have been made to allow a non-neutral bidder to participate in the LNPA procurement. Instead, Lockheed would have been disqualified in the pre-qualification phase; the result should be the same today.

In addition, with regard to the voting trust that held a 59 percent ownership interest in Neustar, in the *Safe Harbor Order*¹⁶ issued shortly before Neustar transitioned from a privately

in Covad Communications Company, a provider of digital subscriber line service; and (3) a 14 percent minority interest in Primus Telecommunications Group, which held authorizations for international service and for resale of interexchange service. Warburg also held interests of less than 5 percent in other telecommunications companies.

¹¹ See 47 C.F.R. § 52.12(a)(1)(i); *Warburg Transfer Order* ¶¶ 25-26.

¹² See 47 C.F.R. § 52.12(a)(1)(ii); *Warburg Transfer Order* ¶ 27.

¹³ *Warburg Transfer Order* ¶ 30; see 47 C.F.R. § 52.12(a)(1)(iii) (requirement that NANPA not be subject to “undue influence”).

¹⁴ See *Warburg Transfer Order* ¶¶ 28-39.

¹⁵ Lockheed’s non-neutrality occurred only two years after the beginning of LNP and not long after Perot Systems, another LNPA, completely failed to deliver a workable portability system.

¹⁶ Order, *North American Numbering Plan Administration*, 19 FCC Rcd 16982 (2004) (“*Safe Harbor Order*”).

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held company to a public company, the Commission stressed that Neustar could not use the voting trust in the future:

Individual TSPs and TSP affiliates shall be limited to less than a 5% equity ownership interest in NeuStar. . . . *TSPs and TSP affiliates may not cure any excess interests by placing them in the Voting Trust.* This requirement will help minimize the risk that entities with a vested interest in the outcome of numbering administration activities will be able to exert undue influence over NeuStar.¹⁷

The Bureau and the FoNPAC should not establish special neutrality cures for bidders as part of the vendor selection process and particularly should not allow the use of a voting trust that the Commission has already told Neustar could no longer be used to cure neutrality issues.

3. Contrary to Ericsson’s argument, the version of the Code of Conduct contained in the *RFP Documents* is not specially tailored to any single bidder; Ericsson’s arguments to the contrary are generally based on a misreading of the relevant provisions of the Code of Conduct. By the same token, bidders should not be able to propose alternative versions in the bidding process.

First, contrary to Ericsson’s reading,¹⁸ the Code does not prevent “shareholders” from participating in the management of the LNPA, and therefore does not limit employee stock ownership. The provision to which Ericsson refers explicitly states that “employee[s] . . . of[] any shareholder” are prohibited from management of the LNPA; the prohibition does not apply to employees of the LNPA. In fact, Provision 6 of the Code contemplates that there will be employee shareholders of the LNPA.¹⁹ Employees of the LNPA can own shares in the LNPA and be involved in its management, but employees of LNPA *shareholders* cannot be involved in the management of the LNPA.

Second, the Code does not prohibit employees of an LNPA, or employees of subcontractors, from owning *any* publicly traded stocks or bonds of telecommunications carriers or interconnected VoIP providers, nor does it limit the employees of the LNPA or its

¹⁷ *Id.* ¶ 22 (emphasis added).

¹⁸ *See Ericsson Comments* at 12.

¹⁹ *See RFP* § 4.2. Provision 6 of the *RFP*’s Code of Conduct provides: “No shareholder of the LNPA shall have access to user data or proprietary information of the Telecommunications Carriers served by the LNPA (other than access of employee-shareholders of the LNPA that is incident to the performance of LNPA duties).” Neustar was 28.1 percent management owned under the structure approved by the *Warburg Transfer Order*, which included the Neustar Code of Conduct.

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subcontractors from participating in mutual funds.²⁰ Instead, Provision 4 of the Code of Conduct states that “[n]o employee of the LNPA will hold any interest, financial or otherwise, in any company *that would violate the neutrality requirements of the FCC or the Master Agreements.*”²¹ In the same section of the *RFP* as the Code language, the *RFP*’s neutrality provisions make clear that an interest of less than 5 percent is not considered ownership for purposes of the prohibition on TSP or interconnected VoIP provider (“IVP”) investments.²²

Third, the requirement that no single entity that cannot itself meet neutrality requirements shall control more than 40 percent of an LNPA’s Board of Directors is important to ensure that non-neutral directors cannot control an LNPA (or one of its subcontractors) in a manner that would harm competitors. This ensures that the LNPA is not subject to undue influence from any entities with an interest in number porting, and it is appropriately included in the Code of Conduct.

Fourth, in support of its argument that bidders should be able to craft their own neutrality Code of Conduct, Ericsson claims that the Commission employed a comparable procedure for the PA and NANPA procurements.²³ To the contrary: in the recent NANPA procurement, in response to a question regarding neutrality certification, the Commission revised Section H.3.3, dealing with neutrality, to require that the contractor must be “in compliance with the FCC’s specified neutrality requirements set forth in A § 1.4 and FCC orders and rules,” specifically citing the *Warburg Transfer Order* that included the Neustar Code of Conduct.²⁴ Under this provision of the NANPA procurement, any entity that became the NANPA would be expected to adhere to that Code, not a code of its own creation as suggested by Ericsson.

In sum, the Code of Conduct contained in the *RFP* provides each bidder with the same set of neutrality requirements on which to base its proposal and can be fairly applied to any prospective bidder. By contrast, allowing each bidder to craft its own Code of Conduct would unfairly advantage bidders that rely on a weaker Code of Conduct and would not provide an adequate guarantee of LNPA neutrality.

²⁰ See *Ericsson Comments* at 11.

²¹ *RFP* § 4.2 (emphasis added).

²² Neustar’s employees are very familiar with these rules and limits. All of Neustar’s employees, no matter where they are located globally and no matter the amount of involvement they have with numbering administration, undergo annual neutrality training followed by quarterly neutrality certifications.

²³ See *Ericsson Comments* at 12 n.27.

²⁴ FCC NANPA Procurement, FCC12R0007, Amendment 2, April 11, 2012 at 5.

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4. Ericsson questions whether the “not aligned with any particular telecommunications segment” language in the *RFP Documents* is a separate requirement or part of the undue influence requirement.²⁵ There is no lack of clarity. That language, in addition to being a requirement of the *RFP Documents*, is contained in the definition of LNPA²⁶ and is broader than the requirement that the LNPA not be subject to undue influence. In discussing that standard, the Commission

conclude[d] that the NANP Administrator should be a non-governmental entity that is not aligned with any particular telecommunications industry segment. The NANP Administrator must be fair and impartial. We believe it would be very difficult, if not impossible, for a NANP Administrator closely associated with a particular segment of the telecommunications industry to be impartial. Even if a NANP Administrator aligned with a particular industry segment was impartial, there would still likely be the perception and accusations that it was not.²⁷

The requirement is neither novel nor ambiguous.²⁸

5. To the extent Ericsson continues to argue that the LNPA procurement is a government procurement comparable to the selection of the TRS Fund Administrator or the Universal Service Fund Administrator,²⁹ its argument is incorrect.³⁰ The LNPA provides

²⁵ See *Ericsson Comments* at 5.

²⁶ Section 52.21(k) provides in part that the “term *local number portability administrator (LNPA)* means an independent, non-governmental entity, not aligned with any particular telecommunications industry segment.” 47 C.F.R. § 52.21(k).

²⁷ Report and Order, *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588, ¶ 57 (1995) (emphasis added).

²⁸ No party is suggesting that *any* sales to telecommunications providers renders an entity non-neutral; Neustar recognizes that most entities that are capable of providing the LNPA function likely have sales to telecommunications providers. The question is whether the sales are of such a magnitude as to render an entity subject to undue influence or are so concentrated in a particular telecommunications industry segment as to cause an entity to be aligned with that segment.

²⁹ See *Ericsson Comments* at 23-24.

³⁰ See Ex Parte Letter from Richard L. Fruchterman, III, Neustar Regulatory and Public Policy and Regulatory Counsel, to Marlene Dortch, FCC, WC Docket No. 09-109 (FCC filed Dec. 9, 2009) (with attachment explaining that the LNPA Master Agreements are not government contracts and therefore are not subject to the Competition in Contracting Act of 1984).

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services to the industry, which are paid for by the industry. To be sure, the Commission exercises ultimate authority to approve the industry's selection of the LNPA. But that does not change the fact that the government is not procuring any services for itself.³¹

If you have any questions concerning this matter, please contact me at (202) 326-7921.

Sincerely,

/s/ Aaron M. Panner

Counsel for Neustar, Inc.

cc: Julie Veach
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³¹ The government's argument in the *Lyttle* case, cited in Ericsson's comments (at 24), provides no support for Ericsson's argument. There, the government argued that the False Claims Act applied to a claim that the defendant, a provider of communications services, had overbilled the TRS Fund because the TRS Fund Administrator was acting as an agent of the government in "collecting and distributing TRS funds." Mem. in Opp. to Def. AT&T Corp.'s Mot. To Dismiss Compl. in Intervention of the United States at 5, *United States ex rel. Lyttle v. AT&T Corp.*, Civil Action No. 10-1376 (W.D. Pa. filed May 31, 2012).³¹ The LNPA does not collect or disburse funds as an agent for the government, and Ericsson does not argue to the contrary. Ericsson also points to the Universal Service Fund Administrator as another example of a government agent. Like the TRS Fund Administrator, the Universal Service Fund Administrator is selected by government procurement and collects monies from communications providers to be distributed to other entities pursuant to the Commission's Universal Service programs. The LNPA serves no similar governmental function.