

October 1, 2012

*Ex Parte*

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

*RE: Petition of Telcordia Technologies, Inc. to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, and Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute a Competitive Bidding for Number Portability Administration, and to End the LLC's Interim Role in Number Portability Administration Contract Management, WC Docket Nos. 07-149, 09-109*

*Telephone Number Portability, WC Docket No. 95-116*

Dear Ms. Dortch:

On September 27, 2012, Adam Newman and Joel Zamlong of Telcordia Technologies, Inc. ("Telcordia") and Louise Tucker of Ericsson, Inc. ("Ericsson"),<sup>1</sup> Madeleine Findley of Wiltshire & Grannis LLP, and I met with Maureen Duignan and Neil Dellar of the Office of General Counsel and William Dever, Ann Stevens, Marilyn Jones, Christopher Sova, John Visclosky, and Sanford Williams of the Wireline Competition Bureau to discuss Telcordia's concerns regarding impediments to competitive bidding in the proposed Request for Proposal ("RFP") and associated Technical Requirements Document ("TRD") and Vendor Qualification Survey ("VQS") for the next Local Number Portability Administrator(s) ("LNPA").<sup>2</sup> Telcordia discussed the importance of neutrality, competition, and transparency in the LNPA procurement process, as described in Telcordia's comments in the above-captioned proceeding<sup>3</sup> and in the attached document, which was provided to the FCC attendees.

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<sup>1</sup> Ericsson closed its acquisition of Telcordia Technologies, Inc. on January 12, 2012. Telcordia is now a wholly-owned subsidiary of Ericsson, Inc.

<sup>2</sup> See *Wireline Competition Bureau Seeks Comment on Procurement Documents for the Local Number Portability (LNP) Administration Contract*, Public Notice, DA 12-1333 (rel. Aug. 13, 2012).

<sup>3</sup> Comments of Telcordia Technologies, Inc., WC Docket Nos. 95-166, 07-149 & 09-109 (filed Sept. 13, 2012).

Telcordia's objective has been and continues to be ensuring a fair, open, and transparent competitive bidding process. To that end, Telcordia made the following points during the meeting:

Telcordia, much like NAPM and Neustar, believes neutrality is of vital importance for an LNPA. Telcordia and Ericsson believe they are neutral and look forward to the opportunity to demonstrate as much.<sup>4</sup> Nonetheless, Telcordia remains concerned that the proposed procurement process will fail to resolve neutrality issues in a fair, open, and timely fashion and that the process lacks sufficient clarity regarding how and when the neutrality evaluation will occur, who will conduct the evaluation, and whether a sufficient cure period exists for any perceived shortcoming.

**The RFP Process for determining neutrality is unlawful and will not yield a timely result.** Telcordia again urged the Commission to bifurcate the neutrality review from the merits evaluation. Doing so would permit the Commission or Bureau staff to review a bidder's neutrality, including any necessary focus on the issue of "undue influence," while the FoNPAC and SWG evaluate the bid's technical, operational, and price merits. A parallel track review process provides additional time for both neutrality and merits evaluations. It also assigns each track of the bid review to the entity best suited to evaluate it. And a parallel review process is the most likely option to ensure that the procurement process concludes in keeping with the proposed procurement timeline.

The neutrality process in the RFP is premised on the FoNPAC being able to make rapid, up-or-down, final determinations as to a bidder's neutrality. This premise, however, is legally incorrect. The Commission never gave the FoNPAC authority to make *any* final determinations with respect to NPAC bids. The FoNPAC's authority is limited *solely* to making recommendations.<sup>5</sup> Disqualifying a bidder for any reason is a final decision, as FAR § 15.503 reflects, and is solely reserved to the Bureau and Commission for final determination.

That premise is also incorrect as a practical matter. A controverted FoNPAC neutrality determination will not be final: if a bidder is disqualified by FoNPAC, that bidder will seek review by the Commission; if a recommended winning bidder is not disqualified by FoNPAC when another bidder thinks it should have been, that losing bidder will likely seek review by the Commission. In either case, the Bureau or Commission will be called upon to render a final decision as to a bidder's neutrality. This would extend the neutrality review beyond the qualifications stage, and could substantially delay awarding the final contract.

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<sup>4</sup> Ericsson does not believe its recent small investment in CENX, a carrier Ethernet interconnect systems and services provider, changes this assessment.

<sup>5</sup> *Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End NAPM LLC's Interim Role in Number Portability Administration Contract and Telephone Number Portability*, Order, DA 11-883, 26 FCC Rcd. 6839, 6841-44 ¶¶ 8-10, 13-14, 19 & Attach. A ¶ 5 (2011) ("*LNPA Selection Process Order*") (clarifying that the FoNPAC has authority to make recommendations but that the Commission retains "ultimate oversight and control" and will "make a final decision about the contract award").

The Commission, not the FoNPAC, is best suited to evaluate neutrality, particularly any issues of potential “undue influence.” “Undue influence” is not susceptible to a “bright line” test, and the Commission has never articulated a comprehensive scheme for determining what constitutes undue influence. The Commission, not FoNPAC, possesses both the authority and the experience to decide LNPA-related neutrality concerns.<sup>6</sup> These qualities are important because the neutrality review is likely to raise issues that have not previously been considered or decided. This is no surprise: the same company has served as the LNPA since 1997. And the neutrality questions that may arise will likely be complicated, nuanced, and not suited to black-or-white evaluations.

Parallel review of neutrality and merits offers the additional benefit of preserving competition on the merits throughout the RFP process. The FoNPAC/SWG and the FCC will benefit from a fuller record, including operational and price information from competing bidders that will likely yield a more competitive contract price. This in turn reduces number portability costs to industry and benefits the rate-paying public.

The RFP does not take these legal and practical considerations into account. As currently proposed, within the 60-day period between receiving the RFP and submitting final bids, bidders would submit their qualifications (including neutrality) and the FoNPAC would determine whether to reject the response, in whole or in part. If, and only if, the rejection is based on “undue influence,” the bidder may submit additional information. And even then, all submissions must be filed before the RFP responses are due.<sup>7</sup> Bidders whose qualifications are rejected will be eliminated from the RFP, even if they could have resolved neutrality concerns during the bid evaluation period. This is a process better designed for eliminating bidders than for actually achieving a resolution of any neutrality issues.

Overall, it is in the public interest to take the opposite approach – to treat neutrality as an important criterion that must be met by the end of the process, but not to disqualify a bidder unless the neutrality issues are irremediable. This approach best preserves what the RFP is intended to accomplish – to have a competitive bid for NPAC services that awards the contract(s) to the entity or entities that meet the neutrality criteria and are best able to provide high quality services at the lowest overall price.

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<sup>6</sup> *Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, Order, FCC 99-346, 14 FCC Rcd. 19,792, 19,794-5 (1999) (“*Warburg Transfer Order*”); *Neustar, Inc., Request to Allow Certain Transactions Without Prior Commission Approval and to Transfer Ownership*, Order, FCC 04-203, 19 FCC Rcd. 16,982 (2004) (“*Safe Harbor Order*”); *Neustar Request for Clarification*, Order, FCC 11-109, 26 FCC Rcd. 10,726 (2011) (“*Neustar Clarification Order*”).

<sup>7</sup> In addition, the VQS is ambiguous regarding the timing of neutrality. This ambiguity may reflect that the Commission’s neutrality rules apply to an entity selected as an LNPA, not to entities seeking to become an LNPA. In any event, it is unreasonable to expect bidders to make corporate structure changes, assuming such changes would be needed, prior to winning the contract. A reasonable approach would be instead to require bidders to submit a binding plan ensuring that the bidder would be neutral, if selected.

Accordingly, bidders should have an opportunity to resolve any potential concerns about neutrality with the Commission during the bid evaluation process. This would ensure that whoever is selected as an LNPA meets the crucial neutrality requirement. All bidders must commit in their bids to meeting the neutrality requirements. But the means by which each individual bidder meets those requirements may differ, just as the corporate structure and circumstances of each bidder will differ. A parallel-review process would permit a “cure” period, during which the Commission and bidders could discuss safeguards or other actions needed to resolve any potential neutrality concerns. Neutrality compliance is a living process, and a similar collaborative and iterative process occurred between Neustar, the NANC, and the FCC in 1999 when Warburg Pincus acquired Neustar from the Lockheed Martin.<sup>8</sup> An Issue Management Group authorized by the NANC proposed a set of neutrality safeguards to Warburg Pincus, Lockheed Martin, and the entity that became Neustar. Lockheed, Warburg, and Neustar responded with suggested changes. Once the parties reached agreement, the NANC reviewed the proposed safeguards and forwarded them to the FCC. Those proposed safeguards formed the basis for the Neustar Code of Conduct in the 1999 *Warburg Transfer Order*.<sup>9</sup>

**The RFP should require bidders to provide an auditable Code of Conduct, rather than simply prescribing the Neustar Code of Conduct for all NPACs.** Section 4.2 of the RFP specifies the neutrality review that each LNPA must undertake. A portion of that section reflects the requirements of 47 C.F.R. § 52.12(a). A second part of that section, however, requires all LNPAs to be evaluated according to the Code of Conduct proposed by Neustar in 1999 as part of the Commission’s transaction-specific approval of the transfer of Neustar from Lockheed Martin to Warburg Pincus.<sup>10</sup> Applying this code of conduct, developed by and for a single vendor in an adjudicatory proceeding, as if it were a rule of general applicability does not make sense, and may either unreasonably exclude other bidders or not be adequately protective (*i.e.*, be overbroad and underinclusive).

The Neustar Code of Conduct represented a set of safeguards ensuring that Neustar would satisfy the FCC’s neutrality rules, particularly when it was beneficially owned by Warburg Pincus, which also had substantial and controlling interests in telecommunications service providers. It is not part of the FCC’s neutrality rules themselves. It did not exist until

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<sup>8</sup> See Letter from Alan C. Hasselwander, Chair, North American Numbering Council, to Lawrence E. Strickling, Chair, Common Carrier Bureau, FCC, CC Docket No. 92-237 (Mar. 31, 1999), Attachments (written responses and counter-proposals from the CIS unit of Lockheed Martin IMS (which became Neustar), Lockheed Martin, and Warburg Pincus to the framework of safeguards that the NANC CIS Issue Management Group proposed to ensure Neustar’s neutrality after the sale to Warburg Pincus, and written correspondence responding to inquiries from the NANC itself) (“NANC Recommendation”).

<sup>9</sup> *Warburg Transfer Order* at ¶¶ 9-16 (discussing NANC Recommendation and attached correspondence between NANC, its Issue Management Group, Lockheed Martin, CIS (which became Neustar), and Warburg Pincus).

<sup>10</sup> Compare RFP § 4.2 (portion entitled “Evaluation of Code of Conduct”) with *Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14 FCC Rcd. 19792, 19815 (Exhibit A) (1999).

Warburg Pincus acquired the entity that became Neustar – *two years after* Neustar was selected as the LNPA.

Certain provisions of the Neustar Code of Conduct are unworkable outside of the Warburg-ownership context. For example, the requirement that no person employed by, or serving in the management of, any shareholder of the LNPA will be directly involved in the day-to-day operations of the LNPA is not workable for an LNPA or sub-contractor that is a subsidiary of a larger corporation.

Indeed, certain provisions of the Neustar Code of Conduct appear unworkable for Neustar itself.<sup>11</sup> It admits that it has modified the prohibition on employees of the LNPA “hold[ing] any interest, financial or otherwise, in any company that would violate the neutrality requirements of the FCC or the Master Agreements.” Although Neustar offers a plausible defense of its modification,<sup>12</sup> the plain language of the Neustar code prohibits holding “any interest.” A potential Respondent must rely on the RFP’s plain language, however, and cannot assume that interpretations or modifications are permitted – no matter how reasonable.

Any neutrality review should involve a careful, fact-driven analysis of any potential neutrality issues, allowing bidders to respond to concerns with safeguards applicable to their particular factual circumstances. All Respondents should have the opportunity to respond to any neutrality concerns that the FoNPAC, SWG, or the Bureau and Commission may identify. Respondents also should have the opportunity, as Neustar did, to propose safeguards or a neutrality plan to address any concerns relating to their individual circumstances.

**In order to ensure that it has the option to select multiple regional Administrators rather than just a single, nationwide NPAC, the Commission should require all bidders to submit regional bids, and to answer the regional questions, in addition to any national bid submitted.** As written, the RFP requires only bidders submitting regional bids to provide information about how a regional system might operate and does not require any bidders to submit a regional bid. This sets up the possibility that the RFP could result in only two bids: one with a national bid but no regional bid, and one with both regional and national bids. As a result, the Commission would lack the information and bids needed to consider multiple regional Administrators and likely would have little alternative than to select a single nationwide NPAC. But such a scenario can be easily avoided simply by requiring all bidders to submit regional bids and to answer the regional-specific questions of the RFP.

The RFP implicitly recognizes the need for information from all bidders, but fails to require that all bidders provide it. For example, the RFP acknowledges that a regional system would require cooperation and coordination between LNPAs.<sup>13</sup> Bidders submitting regional bids

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<sup>11</sup> See Comments of Neustar, Inc., Docket Nos. 95-116, 07-149 & 09-109, 8-12 (filed Sept. 13, 2012); see also *Ex parte* Letter of Aaron Panner, Counsel to Neustar, Inc., to Marlene H. Dortch, Secretary, FCC, Docket Nos. 95-116, 07-149 & 09-109, 5-6 (filed Sept. 25, 2012) (“*Neustar Sept. 25 Ex Parte*”).

<sup>12</sup> Neustar Sept. 25 Ex Parte at 5-6.

<sup>13</sup> RFP § 14.1 (“If a Respondent submits one or more Regional Proposals ..., then such Respondent must itemize and explain with specificity how such Respondent will coordinate its NPAC solution ... with the NPAC solution or solutions in other Regions”).

must include information on how they would coordinate with other LNPAs to interconnect, overcome system complexities, and allocate or absorb the ensuing costs. A bidder can only offer information about how it would coordinate; it has no authority or ability to speak for other bidders on how they would act. Yet the FoNPAC/SWG and the FCC will need information about how *all* sides of a regional solution would coordinate in order to evaluate the true costs and benefits. The choice between regional and national approaches ought to be a choice that the Commission, with the recommendations of the FoNPAC/SWG, gets to make, and not one that is thrust upon them by the unilateral actions of a single bidder.

**Preventing single party negotiations by requiring that a best and final offer be solicited from more than one bidder.** Ensuring full and robust competition in the procurement requires that there actually be some competition during all parts of the evaluation process. To this end, the FCC should revise the RFP so that if a best-and-final offer (“BAFO”) is solicited, it must be solicited from at least two bidders. This will ensure the FoNPAC/SWG have at least two bids to evaluate at every stage. Contrary to NAPM’s suggestion, Telcordia’s request to get at least two best offers does not require that every bidder be allowed to submit a BAFO, but it precludes even the appearance of engaging in single-source procurements, as has been an historical issue with the LNPA agreement, and it assures that an open and competitive process is followed at all stages of the procurement. Allowing for a single-party BAFO can itself lead to gamesmanship: if the incumbent, for example, believes that it will be allowed to match a challenger’s price at the end of the process, it will have much less incentive to bid aggressively in the opening bids.

**The RFP process for communicating selection recommendations should be made consistent with FAR § 15.503, all bidders should have access to materials referenced in the procurement documents, and the RFP’s confidentiality provisions should match the NDA, rather than contradicting it.** Telcordia urged the Commission to ensure that the RFP process be open and transparent. The RFP offers no explanation of how bid evaluation decisions will be communicated with the bidders. Indeed, the RFP apparently would permit a bid to be rejected out-of-hand with no explanation to the bidder. This seeming lack of transparency is likely to deter bidders and contribute to an impression of secrecy. The RFP, therefore, should look to the procedures in the Federal Acquisition Regulations (“FAR”) section 15.503, 48 C.F.R. § 15.503, as examples for decision-making transparency and communications with bidders regarding bid selection and decision-making that should be followed. The Commission has experience with the benefits of such greater transparency because both the NANPA and PA procurements followed the FAR processes. The RFP likewise should follow procedures guaranteeing an open and transparent process.

Two additional simple adjustments to the procurement documents will facilitate transparency and competition and thus encourage vendors to participate. First, all materials referenced in the RFP, Technical Requirements Document, or Vendor Qualification Survey should be made available (redacted as appropriate for any proprietary information) on the NAPM or NANC website. The RFP references multiple documents without indicating where a bidder may find the current versions. Creating a central repository or index of all the current versions of all relevant documents will ensure all bidders have equal access to necessary information.

Second, the RFP should either state that all materials submitted as part of a Respondent’s bid will be subject to the confidentiality provisions in the Commission’s confidentiality rules in 47 C.F.R. §§ 0.457 and 0.459, or it should expressly incorporate the terms of the Non Disclosure

Ms. Marlene H. Dortch

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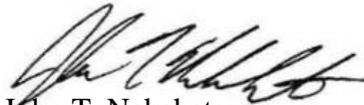
Agreement (“NDA”) required of all FoNPAC and SWG participants. Telcordia appreciates that NAPM and Neustar agree with its assessment that an NDA provides appropriate confidentiality protection. However, it is not at all clear that the NDA on the RFP site is the same or appropriately related to that signed by FoNPAC and SWG participants or that the NDA on the site would override the express terms of the RFP. Moreover, because potential bidders look to the language of the RFP, the confidentiality protection should be clear on the face of the RFP and not dependent on a separate NDA that is not included in the RFP materials. Telcordia therefore requested that the Commission revise the RFP to reflect the standard confidentiality protections in the Commission’s rules, or to expressly incorporate the terms of the NDA.

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Telcordia shares the desire that the LNPA procurement documents be finalized and issued expeditiously but believes that both expediency and fairness can be satisfied through the changes that Telcordia has suggested.

A copy of this letter is being filed in the above-captioned dockets.

Sincerely,



John T. Nakahata

Madeleine V. Findley

*Counsel to Telcordia Technologies, Inc.*

cc: Neil Dellar  
William Dever  
Maureen Duignan  
Marilyn Jones  
Christopher Sova  
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John Visclosky  
Sanford Williams

# **Attachment 1**

**THE COMMISSION SHOULD REVISE THE RFP TO ENSURE NEUTRALITY,  
COMPETITION AND TRANSPARENCY (95-116, 07-149 & 09-109)**

**RFP Process on Neutrality Will Fail to Resolve Issues Quickly and Depends Upon FoNPAC Making Decisions Beyond its Authority Under the Bureau's Procurement Orders.**

- The proposed RFP neutrality process sets up a sequential gateway process that depends upon the FoNPAC *deciding* neutrality and *disqualifying* bidders up front, without Commission review. But the FoNPAC lacks authority to make such decisions; it is only authorized to make recommendations.
  - “Undue influence” is not suited to up-or-down decisionmaking.
  - Forcing “up-or-down” decisions on undue influence could artificially limit competition.
- Telcordia supports the FCC’s neutrality **rules** (and will demonstrate its neutrality under those rules) -- but unilateral application of the Neustar-specific Code of Conduct to all bidders and subcontractors is inappropriate.
  - Neustar’s Code of Conduct is not part of the neutrality rules nor a rule of general applicability, but was a supplemental safeguard designed for Neustar. It did not exist until Warburg Pincus acquired Neustar – *two years after* Neustar was selected as the LNPA.
  - The first item of the Neustar Code of Conduct (printed in the RFP) is unworkable for an LNPA or sub-contractor that is itself a subsidiary of a larger corporation, and would inappropriately exclude qualified bidders.
  - Neustar’s practice of permitting employees to own up to 5 % of a TSP deviates from the terms of the Code. The Code provides no such ownership threshold as constituting a “violat[ion] of the neutrality requirements of the FCC or the Master Agreements.” Neustar’s apparent modification of the Code’s provisions renders the applicability of the Code unclear and this ambiguity will discourage bidder participation.
- Telcordia’s proposal for parallel review of neutrality by the Bureau and bids by the FoNPAC/SWG is the only process that can realistically work within the RFP timeline.
  - Proceeding with neutrality and merits in parallel gives sufficient time to resolve any issues in either track.
  - Concerns that the FoNPAC/SWG will needlessly spend time evaluating bids from bidders that ultimately cannot meet neutrality requirements are overstated, because of the low number of bidders likely to respond and the ability of neutrality safeguards to address many undue influence concerns.
  - Parallel consideration preserves competition on the merits throughout the process, increasing the public benefit realized through the procurement.

### **Requiring All Parties to Submit Regional Bid Information and Requiring Solicitation of At Least Two BAFOs Supports Full and Robust Competition**

- To ensure complete information when selecting regional or national approaches, the RFP should require bidders to submit regional bids and answers to related questions, and should permit bidders to submit national bids if they wish.
  - Any regional approach will require coordination between all regional LNPAs; the Commission thus will need to know how all candidate LNPAs would handle coordination.
  - Bidders are unable to provide necessary data about coordination on behalf of other bidders.
- The RFP should require that if a BAFO is solicited, it must be solicited from *more than one bidder*, thus ensuring at least two bids to evaluate at every stage.

### **The Commission Should Improve Transparency in the RFP's Process**

- The RFP should look to the FAR procedures regarding transparency of decisions and communications with bidders.
- All materials referenced in the RFP, Technical Requirements Document, or Vendor Qualification Survey should be made available (redacted as appropriate for any proprietary information) on the NAPM or NANC website.
- Confidentiality protection should be clear on the face of the RFP, and not dependent on the NDA.