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October 18, 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 95-116; WC Docket 07-149; WC 09-109

Dear Ms. Dortch:

On October 16, 2012, Scott Deutchman, Richard Fruchterman, and Aaron Goldberger of Neustar, Inc., Kevin Dwyer of Jenner & Block, and I met with Sean Lev, Suzanne Tetreault, Diane Griffin Holland, Maureen Duignan, Neil Dellar, and Marcus Maher of the Office of General Counsel, and Lisa Gelb and Ann Stevens of the Wireline Competition Bureau ("Bureau"). The subject of our presentation was the request for proposal ("RFP") process for the selection of the Local Number Portability Administrator ("LNPA") at the conclusion of Neustar's current contract.

We discussed the scope of Commission authority with respect to neutrality and the proper procedure for evaluation of neutrality in the context of the RFP process. We noted the distinction between the Commission's neutrality rules and the value that the industry and the NANC may place on neutrality in judging relative strengths of competing bids. The Commission unquestionably has authority to ensure that any entity recommended to serve as LNPA meets the requirements in the Commission's rules. At the same time, in light of the Commission's reliance on the North American Numbering Council ("NANC") and on the industry to define the requirements for the LNPA, the NAPM, LLC's Future of NPAC subcommittee ("FoNPAC") and the NANC should have the opportunity fully to evaluate bids and to prepare a recommendation. Those entities have deep expertise in matters related to local number portability ("LNP"), and evaluation of neutrality is intertwined with the technical and

cost aspects of bids. The Commission will have a full opportunity to review the NANC's recommendations and its reasons in just a few months, if the process is allowed to move forward.

The proposed RFP process has garnered virtually unanimous support: every segment of the industry, state regulators, and consumers have urged the Commission to allow the RFP process to move forward. Only a single bidder has expressed reservations, not with the substance of the RFP requirements, but with the process for evaluation of neutrality. The fact that only a single bidder has raised objections should give the Commission confidence that the proposed RFP process is designed to ensure competition and to preserve the world's best LNP system.

We also addressed the concern that a potential bidder may be eliminated from the process on neutrality grounds before the technical and cost aspects of its bid are evaluated. The Commission can provide clarification to ensure that, under the RFP process as proposed, the FoNPAC will conduct a full evaluation of all bona fide bids. As described in the Vendor Qualification Statement ("VQS"), the RFP process anticipates that bidders will establish that they meet the RFP's neutrality requirements by submitting an opinion of counsel to that effect.<sup>1</sup> The Commission can clarify, when authorizing the RFP process to move forward, that, so long as such an opinion is submitted, a bidder will not be disqualified from participating in the RFP on neutrality grounds, and then the relative merits of all aspects of its bid (technical, management, and cost – including neutrality) will be fully evaluated.<sup>2</sup> That approach would ensure that no party is prematurely excluded from the process and will give the Commission the full benefit of the evaluation of the bids by FoNPAC and NANC, as laid out in the Bureau's May 2011 Order.

The possible alternatives to the process described above are likely to create significant delay and would risk undermining the competitiveness of the bidding process. The NPAC

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<sup>1</sup> See VQS § 3.5.

<sup>2</sup> We discussed the fact that the neutrality criteria of the VQS are modeled on the Commission's neutrality rules applicable to the NANPA, the PA, and the B&C Agent, set out in 47 C.F.R. § 52.12(a)(1), though there are also differences. We note that under § 52.12(a)(1)(iii), "[n]otwithstanding the neutrality criteria" set forth in subparagraphs (a)(1)(i) and (ii), an entity "may be determined to be or not to be subject to undue influence" based on NANC's evaluation. The proposed VQS does not expressly provide for a bidder to satisfy the neutrality requirement through a showing that it is *not* subject to undue influence notwithstanding its failure to satisfy the objective neutrality criteria in the VQS. See VQS § 3.4 ("For purposes of being a Neutral Third Party, an entity must satisfy **ALL** of the following criteria."). As we have argued elsewhere, it is entirely appropriate for the industry and the NANC to define neutrality requirements that meet the industry's needs. At the same time, the Commission has the option of clarifying that any bid that satisfies the requirements of § 52.12(a)(1) should be considered, with satisfaction of any additional industry requirements going to the strength of the neutrality showing.

contract is not a government procurement; the Commission exercises regulatory authority over private contracts between the industry and the LNPA. Accordingly, to the extent the Commission intends to rule on the neutrality of one or more bidders, it must do so through a public process in which interested parties would have the opportunity to provide meaningful comment. In particular, as we noted before, it would not be lawful for the Commission to engage in *ex parte* undisclosed negotiations regarding neutrality with any single bidder as it would impermissibly distort the process. The Commission's actions with respect to the RFP process are currently taking place in existing dockets that are "permit but disclose" – any *ex parte* contacts with Commission staff related to LNP administration must be disclosed pursuant to the Commission's rules. *See* 47 C.F.R. § 1.1206. Moreover, because this is not a government procurement, there is (and should be) no mechanism under the Commission's rules or the Administrative Procedure Act for the Commission to carry out any confidential negotiations with potential bidders concerning the selection of the next LNPA.

Given the legal requirement of public disclosure, the Commission can and should evaluate any potential concerns about bidders' neutrality *after* the NANC has made its recommendation. By giving the process the chance to proceed in keeping with the Bureau's May 2011 Order, the Commission will, as noted above, ensure that it has the full benefit of the FoNPAC and the NANC's evaluation of all bids. Moreover, by conducting its review after the bids have been fully evaluated, the Commission can preserve effective public participation in the Commission's decision-making process, as is legally required, while also preserving the confidentiality of (and hence the maximum competitiveness of) the RFP process while bid evaluation is under way. By contrast, if the Commission were to evaluate bidders' compliance with the Commission's neutrality rules either before or during the RFP process, that would necessarily lead to disclosure of the identity of potential bidders and would potentially reveal aspects of their bidding strategies (for example, use of subcontractors). Keeping bidders in the dark concerning the number and identity of competitors during the RFP process ensures that all bidders have the right incentives to maximize the value of their bids, including through the best-and-final-offer process. Premature disclosure and possible elimination of potential bidders does not serve the interest in competition that provided the impetus for the RFP process in the first place.

Finally, we noted that the NAPM, LLC and the NANC have exactly the right incentives to ensure that the RFP process results in the best value for the industry. The members of the NAPM, LLC (and the FoNPAC in particular) bear the vast majority of the costs of LNP; they are also the companies that rely on the NPAC in running their businesses. The industry has no incentive to increase unnecessarily the costs of LNP – to the contrary, they have every incentive to maximize benefits and minimize costs. The RFP process is designed to do so.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron M. Panner", with a long horizontal flourish extending to the right.

Aaron M. Panner  
*Counsel for Neustar, Inc.*

cc: Sean Lev  
Suzanne Tetreault  
Diane Griffin Holland  
Maureen Duignan  
Neil Dellar  
Marcus Maher  
Lisa Gelb  
Ann Stevens