

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.

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**PUBLIC VERISON – REDACTED FOR PUBLIC INSPECTION**

January 29, 2014

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

*Electronically Filed*

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

Dear Ms. Dortch:

Neustar, Inc., by its attorney, and pursuant to Sections 0.457 and 0.459 of the Commission's rules, hereby submits a public version of the enclosed letter regarding the Local Number Portability Administrator ("LNPA") selection process. The letter was originally filed January 15, 2014, with a request for confidential treatment of the entire letter. Because certain information contained in the letter has been otherwise disclosed, Neustar no longer seeks confidential treatment for the entire letter, but only for the redacted portions. Neustar respectfully requests that, pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, the Commission withhold from public inspection and afford confidential treatment to the redacted portions of the letter in accordance with Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and Sections 0.457(d)(2) and 0.459(b) of the Commission's Rules, 47 C.F.R. §§ 0.457(d)(2), 0.459(b).

Section 552(b)(4) of the Freedom of Information Act permits an agency to withhold from public disclosure any information that qualifies as "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Section 0.457(d)(2) of the Commission's Rules allows persons submitting materials that they wish withheld from public inspection in accordance with Section 552(b)(4) to file a request for non-disclosure. 47 C.F.R. § 0.457(d)(2). The requirements governing such requests are set forth in Section 0.459(b).

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In accordance with Section 0.459 of the Commission's rules, Neustar hereby submits the following:

- (1) *Identification of Specific Information for Which Confidential Treatment is Sought (Section 0.459(b)(1))*. Neustar is requesting confidential treatment of the redacted portions of the enclosed letter.
- (2) *Description of Circumstances Giving Rise to Submission (Section 0.459(b)(2))*. Neustar's letter includes descriptions of confidential communications that contain commercially sensitive information and that are subject to a non-disclosure agreement; these communications have not otherwise been disclosed.
- (3) *Explanation of the Degree to Which the Information is Commercial or Financial, or Contains a Trade Secret or is Privileged (Section 0.459(b)(3))*. The letter contains commercially sensitive information that may be withheld from public disclosure under FOIA Exemption 4. The Commission has long recognized that, for purposes of Exemption 4, "records are 'commercial' as long as the submitter has a commercial interest in them." *Robert J. Butler*, 6 FCC Rcd 5414, 5415 (1991) (citing *Pub. Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Am. Airlines v. Nat'l Mediation Bd.*, 588 F.2d 863, 868 (2d Cir. 1978)). In this regard, the redacted portions of Neustar's letter contain sensitive financial and business information that constitute commercial information which may be withheld under FOIA Exemption 4.
- (4) *Explanation of the Degree to Which the Information Concerns a Service that is Subject to Competition (Section 0.459(b)(4))*. Neustar's letter contains information that is subject to the competitive bidding process for the LNPA contract.
- (5) *Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))*. The redacted portions of the letter are confidential because their release would reveal information that is competitively sensitive and subject to a non-disclosure agreement. Providing Neustar's competitors with access to the information would competitively harm Neustar. The D.C. Circuit has found parties do not have to "show actual competitive harm" to justify confidential treatment. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291 (quoting *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979)). Rather, "[a]ctual competition and the likelihood of substantial competitive injury" is sufficient to bring commercial information within the realm of confidentiality." *Id.*
- (6) *Identification of Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6))*. Neustar treats the redacted portions of the letter as highly confidential and does not publicly disclose this information.

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(7) *Identification of Whether the Information is Available to the Public and the Extent of Any Previous Disclosure of Information to Third Parties (Section 0.459(b)(7)).* Neustar has not previously disclosed the redacted portions of the letter to the public.

(8) *Justification of Period During Which the Submitting Party Asserts that the Material Should Not be Available for Public Disclosure (Section 0.459(b)(8)).* The redacted portions of the letter should not be released for public inspection until such time as there is a final and non-appealable order ending this proceeding and all information concerning vendors' proposals is made public.

For the foregoing reasons, Neustar respectfully requests that the Commission withhold the letter from public inspection.

Sincerely,

Handwritten signature of Aaron M. Panner in black ink, with a stylized flourish at the end.

Aaron M. Panner

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January 15, 2014

***CONFIDENTIAL UNDER NON-DISCLOSURE AGREEMENT  
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*Via Hand Delivery*

Ms. Julie Veach  
Chief, Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Mr. Jonathan Sallet  
General Counsel  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

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

Dear Ms. Veach and Mr. Sallet:

I write on behalf of Neustar, Inc.,  
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On October 21, 2013, Neustar requested that the FoNPAC grant all bidders (not just Neustar) the opportunity to submit additional proposals, either by extending the date for submission of a response to the first best-and-final-offer (“BAFO”) request or by issuing a second request.

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If the FoNPAC makes its recommendation without inviting a second BAFO, it will have deliberately disregarded the availability of potentially superior offers and unfairly biased the process against Neustar. Under those circumstances, the FoNPAC's recommendation (whatever it is) would disserve the industry and consumers. Given the Commission's focus on protection of the public interest, the Commission should ensure that the opportunity to obtain a stronger, more competitive proposal – the benefits of which will ultimately flow to consumers – is not missed.

As explained below, another round for all bidders is consistent with the RFP Documents and sound procurement practices, would be equitable for all bidders, and promises a better outcome to the RFP process. Accordingly, Neustar requests that the Commission take any and all action necessary to ensure that vital information that it needs to evaluate the LNPA vendor selection recommendation is obtained from all bidders.

1. Neustar submitted its response to the FoNPAC's initial BAFO request on September 18, 2013. For reasons explained below, Neustar anticipated that FoNPAC would seek additional proposals in the interests of fostering robust competition. When a month had passed, and the FoNPAC had not made any such request, Neustar sent a letter to the FoNPAC on October 21, 2013, to request that FoNPAC allow all bidders to submit further proposals;  
REDACTED FOR PUBLIC INSPECTION Neustar also provided a copy of the proposal it was prepared to make. (Neustar sent a copy of the letter but not the proposal to the SWG tri-chairs.)

The FoNPAC did not respond to Neustar's letter. Neustar therefore followed up with a further letter on November 4, 2013, to explain why seeking additional proposals would bring substantial benefits with no downside and also be consistent with previous actions of FoNPAC. (Neustar also provided a copy of this letter to the SWG tri-chairs.)

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2. Neustar reasonably anticipated that – either on its own or in response to an improved proposal from one of the bidders – FoNPAC would provide further opportunities for improvement in the proposals, because such action to promote competition is most consistent with the language of the RFP and the usual course of private and public procurements of a similar magnitude. Section 13.4 of the RFP states explicitly that “competition will be used to determine price reasonableness,” and section 13.6 of the RFP gives the FoNPAC authority to engage in such price competition through a multiple best-and-final-offer process. The draft RFP specifically reserved to the FoNPAC the right to conduct only a single best-and-final offer process. That language, however, was removed from the final RFP. Moreover, although the draft RFP document contained language that would have restricted bidders’ ability to request the opportunity to submit additional bids, that language was also removed from the final RFP. Those changes signaled that bidders would be permitted to seek the opportunity to submit additional proposals. Taken together, the language of the revised RFP created the expectation that multiple best-and-final-offer solicitations were likely, including those resulting from a bidder’s request.

Sound procurement practices also favor the submission of multiple rounds of bids. In the government contracting context, agencies frequently solicit a second round of best-and-final offers (also referred to as “final proposal revisions”).<sup>2</sup> And agencies have the authority to solicit further proposals from bidders in response to a bidder’s offer REDACTED FOR PUBLIC INSPECTION

<sup>3</sup> There is thus no constraint on the FoNPAC’s ability to seek additional bids; to the contrary, “[t]he public’s interest is clearly served when suppliers engage in fair and robust competition . . . . Healthy competition ensures that the costs to [consumers] will be minimized.” *SAI Indus. Corp. v. United States*, 60 Fed. Cl. 7331 (2004). Indeed, FAR 15.306(d)(2) governs “discussions,” the last phase of which is the solicitation of final proposal revisions, and provides: “The primary objective of discussions is to maximize the Government’s ability to obtain best

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<sup>2</sup> See, e.g., *Biospherics, Inc. v. United States*, 48 Fed. Cl. 1 (2000) (indicating that agency may reopen discussions after receiving final proposal revisions); *Antarctic Support Assocs. v. United States*, 46 Fed. Cl. 145 (2000) (noting without comment that agency reopened discussions and requested second BAFOs after receipt of first BAFOs); *United Int’l Investigative Servs. v. United States*, 42 Fed. Cl. 73 (1998) (court notes without objection or legal commentary that there were four rounds of BAFOs); *Marine Hydraulics, Int’l, Inc.*, B-403386.3, May 5, 2011, 2011 CPD ¶ 98; *Pemco Aeroplex, Inc.*, B-310372.3, June 13, 2008, 2008 CPD ¶ 126 at n.7.

<sup>3</sup> See *Burron Medical Prods., Inc.*, B-176407, Sept. 27, 1972, 1972 WL 6292 (Comp. Gen.).

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value . . .” Consistent with that mandate, agencies often seek multiple rounds of final proposal revisions in order to obtain “best value.”

It is worth reemphasizing that this is not a government procurement, and the industry is not subject to the FAR. But, as we have discussed before, even if the FAR were applicable, procurement regulations grant an agency great discretion as to whether it may choose to reopen discussions with bidders:

The current FAR provisions do not discourage agencies from resolving a given proposal’s weakness or deficiency by means of multiple rounds of discussions with the offerors, provided the discussions are not conducted in a fashion that favors one offeror over another. *See* 48 C.F.R. § 15.306. Indeed, both the objective of discussions – to maximize the government’s ability to obtain the best value, based on the requirements and evaluation factors set forth in the solicitation, 48 C.F.R. § 15.306(d)(2) – as well as the FAR’s definition of discussions – which includes bargaining, consisting of persuasion, alteration of assumptions and positions, and give and take, 48 C.F.R. § 15.306(d) – both presuppose that there may be multiple rounds of discussions regarding a single issue.

*ManTech Telecommunications & Info. Sys. Corp. v. United States*, 49 Fed. Cl. 57, 77 (2001); *see also Galen Medical Assocs., Inc. v. United States*, 74 Fed. Cl. 377 (2006) (approving agency decision to conduct discussions to bring nonconforming offers into the competition because of the agency’s “obligation to obtain the best value for the government”).

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There is no direct precedent for this RFP process, and the lack of certainty concerning matters such as the likely number of additional rounds of bidding makes it especially important that the public interest not suffer because disagreements about procedures are elevated above the substantive merits of available proposals. For what it is worth, an outside economic consultant also advised Neustar that multiple rounds of bids were to be expected in a procurement like this one. Neustar’s expectation that it would be permitted to submit an additional proposal cannot be dismissed as unreasonable or unfounded.

3. Any refusal to permit additional proposals in response to Neustar’s request would be unjustifiable. Such a decision would deprive the Commission of a complete record and full

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evaluation of the available proposals. The information resulting from further proposals would provide assurance to all parties that the RFP process will have resulted in the selection of the best qualified vendor and the most competitive proposal.

The benefits of an additional round of proposals go well beyond providing a stronger record for decision. The fundamental purpose of the RFP process is to subject all bidders to the pressure of competition to ensure that the industry – and consumers – benefit from the most technically excellent and economical LNP solution available. The process will fail to achieve that purpose if a bidder can be severely disadvantaged solely because it misapprehended how the final stages of bidding would proceed. Given Neustar’s request that it be permitted to improve on its existing proposal, a further round of submissions will sharpen all bidders’ incentives to put their best offers on the table; the FoNPAC will have a stronger slate of options to evaluate. The benefits of that improvement would not accrue solely to the members of the FoNPAC and the NAPM, LLC; they would accrue directly to all of the thousands of telecommunications companies that rely on the NPAC. Ultimately, ensuring that the NPAC continues to provide flawless service in a cost-effective manner will benefit consumers, whose interests the RFP process should be designed to promote.

In its May 2011 Order, the Commission made clear that the RFP process is subject to the Commission’s authority under section 251(e) of the Communications Act to provide for impartial number administration.<sup>4</sup> In addressing other numbering procurements, the Commission has found that “federal law assumes that competitive procedures best serve the public interest” and achieve “innovative proposals and lower costs.”<sup>5</sup> That same policy in favor of competitive procedures argues strongly in favor of permitting all bidders to submit a further round of proposals.

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<sup>4</sup> *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*, Order, WCB Docket No. 09-109 (rel. May 16, 2011).

<sup>5</sup> *Numbering Resource Optimization, Report and Order*, 15 FCC Rcd 7574, 7640-41, ¶ 150 (2000). Permitting the submission of “multiple alternative bids” is consistent with the FCC’s statutory mandate to design systems of competitive bidding that “promot[e] economic opportunity and competition” for the “benefit of the public.” *Cf.* 47 U.S.C. § 309(j)(3).

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4. If the FoNPAC refuses to consider additional proposals, that would not only harm the industry and consumers; it would also give rise to severe bias in the RFP process because the FoNPAC previously extended the deadline for submission of initial offers to benefit bidders other than Neustar.<sup>6</sup> The extension of the April deadline violated an express limitation on bidders' participation in the RFP process: any party wishing to submit a proposal was required to submit a qualifying bid no later than April 5, 2013. The FoNPAC's decision to waive that deadline after it had passed favored at least one bidder at the expense of Neustar. By contrast, nothing in the RFP procedures precludes the FoNPAC from requesting an additional round of proposals. It would be patently unfair and anticompetitive for the FoNPAC to deny Neustar's request that all bidders be invited to submit revised proposals when it permitted an extension of the filing deadline in April 2013, presumably in the name of promoting a more competitive process.<sup>7</sup>

Fair and impartial treatment of competing bidders is not only necessary to ensure that the bid process and outcome are competitive; it is also fundamental to the legal validity of the eventual contract award. Ultimately, the selection of the LNPA is for the Commission to make. Accordingly, to the extent that the selection process treats competing bidders unequally, the outcome of that process will be subject to legal challenge. In selecting a vendor, the government must treat all candidates impartially;<sup>8</sup> similarly, when the government grants a valuable benefit,

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<sup>6</sup> The FoNPAC has not revealed the circumstances that led to the extension of the deadline for initial submissions in April 2013, but Neustar's proposal was complete by the original April 5, 2013 deadline. Accordingly, the extension could only benefit Neustar's competitors.

<sup>7</sup> That extension was the subject of a letter from me to the Chief of the Wireline Competition Bureau and the Commission's then-General Counsel, along with the NAPM, LLC, co-chairs, dated April 24, 2013.

<sup>8</sup> See, e.g., *Raytheon Tech. Servs. Co., LLC*, B-404655.4, Oct. 11, 2011, 2011 CPD ¶ 236 (finding unequal treatment and sustaining protest where agency gave awardee more time to submit its proposal than it gave protester); *Standard Communications, Inc.*, B-406021, Jan. 24, 2012, 2012 CPD ¶ 51 (holding that "to treat all of the competitors equally," agency was obligated to allow the protester to revise its quote after agency allowed two other offerors to revise their quotes); *DGS Contract Service, Inc. v. United States*, 43 Fed. Cl. 227 (1999) (upholding agency's decision to disclose relative price standing to all offerors after agency revealed that information to one offeror).

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it must treat all competitors equally and impartially.<sup>9</sup> Because the FoNPAC already modified the RFP process to permit the submission of additional bids – presumably to benefit a bidder that failed to comply with a deadline – it would be inconsistent and arbitrary to deny Neustar’s request, which does not seek to modify any of the rules governing the RFP process.

\* \* \* \* \*

Neustar has requested confidential treatment of this letter pursuant to 47 C.F.R. §§ 0.457 & 0.459, because it contains information that is confidential to Neustar and subject to a Non-Disclosure Agreement between Neustar and the NAPM LLC. Please let me know if there is anything that I can do to assist in this matter.

Sincerely,



Aaron M. Panner

cc: Honorable Geoffrey Why  
Ms. Ann Berkowitz  
Ms. Tiki Gaugler  
Mr. Tim Decker  
Mr. Tim Kagele  
Todd Daubert, Esq.  
Dan Sciullo, Esq.

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<sup>9</sup> See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Oregon v. FCC*, 102 F.3d 583 (D.C. Cir. 1996) (reversing FCC’s refusal to consider competing license application where agency failed to provide clear notice of filing deadline); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995) (referring to “the ability to compete on an equal basis” as “the essence of *Ashbacker*”).