



April 15, 2014

VIA ECFS

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

Re: *Telephone Number Portability, et al.*, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, Letter of Aaron Panner, Counsel for Neustar, Inc., filed April 8, 2014

Dear Ms. Dortch:

Telcordia Technologies Inc., d/b/a iconectiv (“Telcordia”) hereby responds to Neustar Inc.’s (“Neustar’s”) ex parte letter of April 8, 2014, in which Neustar seeks further public comment prior to the Commission, or the Bureau on delegated authority, selecting the next Local Number Portability Administrator(s) (“LNPA”).

As we are now near the end of the very long process for selecting the next LNPA—the first time that contract has been put out for competitive bidding since 1997—Neustar files yet another request for more delay. Notwithstanding the fact that both the selection process itself¹ and the Requests for Proposals (“RFPs”), Vendor Qualifications and Technical Requirements Document² were all previously subject to public comment, and the fact that the Commission now has received the recommendation—or at least input—of its balanced advisory committee, the North American Numbering Council (“NANC”), Neustar now asks that NANC’s recommendation (if one was made) and all other LNPA selection-related issues be put out for further public comment. Having never presented this concern before—especially during the comment period on the selection process when it could have most appropriately been built into the schedule, if warranted—Neustar’s request is just one last-ditch effort at delay. Neustar knows that notice and comment now would add at least six months to the LNPA selection process, and keep the current contract alive through an extension, netting Neustar approximately

¹ *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; Telephone Number Portability, Order and Request for Comment, DA 11-454, 26 FCC Rcd. 3685 (WCB 2011).*

² *Wireline Competition Bureau Seeks Comment on Procurement Documents for the Local Number Portability (LNP) Administration Contract, Public Notice, DA 12-1333, 27 FCC Rcd. 11,771 (WCB 2012).*

\$250 million windfall of additional revenue, a cost to the industry borne by the carriers and ultimately paid for by consumers.

Contrary to Neustar's arguments,³ notice and comment is not required now as a matter of law. This is not a rulemaking process, the only process for which the Administrative Procedure Act ("APA") mandates public comment.⁴ In an informal adjudication such as this one, the Commission can proceed to a decision on the basis of the record it has compiled, including a report from the NANC with respect to its evaluation of competing proposals, as required by the Bureau's May 2011 Order,⁵ and NANC's documentation and evaluation of all claims of potential irregularities in the procurement process—including those specifically raised by Neustar—as directed by the Bureau's letter of February 11, 2014 to NANC.⁶

Furthermore, Neustar's last-ditch request for notice and comment would not improve and would potentially harm the competitive process. The process has already benefited from multiple rounds of notice and comment as well as significant input from the affected entities through the North American Portability Management LLC ("NAPM") and NANC. Delaying the process further would be of little benefit and would actually have significant disadvantages—including reducing the time period that the selected vendor will have to prepare to take over the contract and releasing confidential bid information before the Commission has ruled on Neustar's request to allow further bids.

Nor is further notice and comment necessitated by the fact that the NAPM had a role in developing the vendor selection recommendation. Neustar's assertion that "the Commission rel[ie]d on a recommendation that was formulated by a private industry consortium that is closed to the public and other stakeholders"⁷ is simply false. Neustar knows full well that the Bureau, on behalf of the Commission, delegated authority to NANC, and not to NAPM, to recommend LNPA(s) to the FCC and that both NANC and its Selection Working Group had full authority to force the NAPM to revise any recommendations. Indeed, the Bureau's May 2011 Order specifically revised the selection process to make clear that NANC, not NAPM, made this

³ Letter from Aaron Panner, Counsel for Neustar, Inc. to Marlene Dortch, Secretary, Federal Communications Commission, at 1-2, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Apr. 8, 2014) ("Panner Letter").

⁴ Indeed, only two months ago, Neustar asked the Commission to resolve under Section 5 of the APA, 5 U.S.C. § 554(e), which is entitled "Adjudications," all the issues for which it now seeks to have comment.

⁵ *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; Telephone Number Portability*, Order, DA 11-883, 26 FCC Rcd. 6839 (WCB 2011).

⁶ Letter from Julie Veach, Chief, Wireline Competition Bureau, to Betty Ann Kane, Chair, North American Numbering Council, DA 14-179, 29 FCC Rcd. 1279 (2014).

⁷ Panner Letter at 3.

recommendation and had the power to revise whatever came from the NAPM. Neustar itself previously assured the Commission that “the FoNPAC and the NANC will ensure that the Commission has sufficient information to make a reasoned judgment concerning the NANC’s eventual recommendation”⁸—at a time when the selection process contemplated no post-NANC recommendation, pre-selection public comment process.

Competitive bidding can’t work if the incumbent can’t lose. Neustar has already tried one way to turn competitive bidding into a no-lose scenario by trying to force successive “best-and-final” offers so that it can hone its proposals to extract its maximum incumbency premium. Now Neustar seeks to grind away the competition through additional, interminable delays—sandbagging the process by raising late objections contradicting its earlier positions. It is time for the Commission to finish the process it adopted, which was supported by Neustar, and to move forward to select the next LNPA(s).⁹

I. THE COMMISSION NEED NOT SUBJECT NANC’S RECOMMENDATION TO NOTICE AND COMMENT.

Neustar’s core argument is that the Commission “is required” to “apply a notice-and-comment process” in evaluating the NANC’s recommendation for the award of the LNPA contract.¹⁰ This argument is plainly wrong as a matter of administrative law. Under the APA, the Commission is required to use notice-and-comment procedures only when it enacts a substantive rule through the informal rulemaking process outlined in 5 U.S.C. § 553. By contrast, if the Commission conducts an adjudication, the notice-and-comment requirements simply do not apply.¹¹

Neustar does not even attempt to explain how the selection of the LNPA or the resolution of the issues raised in its letter could possibly be considered a rulemaking or require the Commission to adopt a rule. Nor could it: what is left for the Commission to do is plainly an

⁸ Letter from Aaron Panner, Counsel for Neustar, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, at 5, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Nov. 6, 2012).

⁹ Telcordia will not presume to instruct the Commission as to whether the Commission must decide the LNPA selection itself or whether that can be decided by the Bureau on delegated authority. Telcordia asks only that the Commission reach its decision in a manner that is expeditious and that also creates the least uncertainty as to whether the selection decision is final.

¹⁰ Panner Letter at 1.

¹¹ *City of St. Paul v. F.A.A.*, 865 F.2d 1329 (D.C. Cir. 1989) (unpublished) (noting that petitioner’s argument “that they received inadequate notice and comment” implicitly “assumes that the order amounts to an informal rulemaking” and noting that notice and comment is not required in an “informal adjudication”); *Int’l Internship Program v. Napolitano*, 718 F.3d 986, 988 (D.C. Cir. 2013) (agency actions did not trigger APA’s notice-and-comment procedures because they “were not rules”).

adjudicative function. The primary difference between an adjudication and a rulemaking is that adjudications resolve questions “among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals.”¹² Put differently, an adjudication has “an immediate effect on specific individuals (those involved in the dispute),” while a rulemaking is purely prospective “and has a definitive effect on individuals only after the rule subsequently is applied.”¹³ Thus, the APA defines an adjudication to include cases where an agency grants a “permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”¹⁴ In this case, the Commission has already established the process for selection of the LNPA. What is left is a classic adjudicative function—to examine and approve or disapprove the NANC’s recommendation about which specific bid is most suitable.¹⁵

Neustar nevertheless asserts that the Commission must issue notice and comment because the Commission has done so in three prior cases—two of which have nothing to do with the selection of the LNPA.¹⁶ With respect to the Commission’s initial designation of LNPAs, although the Commission did solicit comment on NANC’s selections, it did so only *after* contract awards were made through competitive bidding, not prior to the completion of the competitive bidding process.¹⁷ Thus, that initial designation of LNPAs is not analogous to the current stage of the selection process. In addition, Neustar conveniently omits that the Commission has not always put LNPA selection out for public notice: indeed, Neustar was

¹² *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

¹³ *Id.*

¹⁴ See 5 U.S.C. § 551(7) (defining “adjudication” as “agency process for the formulation of an order”); *id.* § 551(6) (defining “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing”); *id.* § 551(8) (defining “license” to include “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission”).

¹⁵ See *id.* § 551(8).

¹⁶ One of the orders cited by Neustar involved the initial selection of the North American Numbering Plan Administrator, not the Local Number Portability Administrator, *Administration of the North American Numbering Plan, Toll Free Service Access Code*, Third Report and Order, FCC 97-372, 12 FCC Rcd. 23,040 (1997). The Commission has since procured the NANPA as a government contract, with competitive bidding pursuant to the Federal Acquisition Regulations. The second decision cited by Neustar involved approval of SMS 800, Inc.’s changes in its governance structure and membership. *Toll Free Service Access Codes Petition to Change the Composition of SMS/800, Inc.*, Order, FCC 13-146, 28 FCC Rcd. 15,328 (2013). While one result of that order was to allow SMS 800 to take over the role of toll free SMS administrator, it was not an administrator selection order.

¹⁷ *Telephone Number Portability*, Second Report and Order, FCC 97-289, 12 FCC Rcd. 12,281, 12,299-303 ¶¶ 26-33 (1997). Indeed, by the time the Commission issued its Report and Order, several Master Contracts had already been fully negotiated. *Id.* at 12,302 n. 98.

awarded three of the LNPA contract awards without any notice and comment.¹⁸ Further undercutting Neustar's argument that public comment is required is the fact that Neustar benefitted from at least four cardinal change contract modifications or extensions without any public comment, or even NANC or FCC approval.¹⁹ In any event, the Commission's past process for LNPA selection is not binding—the Commission here chose a different, competitive bidding process. And even if the Commission's past practice were relevant, the time to raise that issue was in March of 2011, when the Commission put the process out for public notice or in August 2012, when it put the RFP out for public notice. Neither the process nor the RFP, once issued, contemplated any period for public notice and comment, and if Neustar objected to that omission, it should have raised the issue then. At this late date, its objections are untimely and waived.²⁰

Neustar also asserts that the Commission must issue notice and comment because “the selection process has raised novel procedural and substantive issues implicating the Commission's legislative policy-making function.”²¹ That is deeply ironic, since Neustar previously characterized the LNPA contracts as a mere “private contracts between private

¹⁸ When Perot Systems, which had been chosen to be the LNPA in the Southwest, Western, and West Coast regions, was unable to perform, the NANC recommended that Neustar be awarded the contract for those regions. The Commission approved without notice and comment. See *Telephone Number Portability*, Second Memorandum Opinion and Order on Reconsideration, FCC 98-275, 13 FCC Rcd. 21,204, 21,208-09 ¶¶ 7-9.

¹⁹ In December 2000, NAPM granted Neustar its first no-bid contract extension, extending Neustar's initial term from 2002 to 2006, with an option for 2007. In October 2003, NAPM again extended Neustar's contract—this time through 2011—in return for a claimed \$77 million in savings over the original term of the contract. When some NANC members objected to giving Neustar this long extension and requested an accounting of the claimed savings, NAPM refused to give a public accounting, citing “confidentiality” restrictions in its contract with Neustar. In September 2006, after six months of secret, closed-door negotiations, NAPM and Neustar entered into yet a third no-bid contract extension—Amendment 57. Once again claiming that it needed to secure immediate cost reductions, NAPM extended the term of the Master Agreement—which already ran to 2011—by four more years, to 2015. Then in January 2009, NAPM and Neustar signed Amendment 70, their fourth no-bid deal, again negotiated behind closed doors. This contract amendment effected a substantial change to Neustar's Number Portability Administration Center (“NPAC”) contract through the end of 2015—effectively extending Neustar's period as the exclusive NPAC vendor by four more years.

²⁰ See Opposition of Telcordia Technologies, Inc. d/b/a iconectiv to Neustar's Petition for a Declaratory Ruling at 9-16, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Feb. 24, 2014) (“Telcordia Opposition”).

²¹ Panner Letter at 2.

parties”²² implicating “only private fees paid by those carriers” which “do not commit the government to any course of action.”²³ And while it is true that Neustar has now improperly attempted to raise numerous issues in an effort to slow the selection process, the Commission has no duty to resolve those issues through notice-and-comment rulemaking. Indeed, most of these issues involve quintessentially adjudicative questions—such as whether Neustar has improperly accessed confidential bid information of its competitors and whether the NAPM properly extended the bid deadline in a particular instance. But even if there were broader policy questions, it is hornbook law that “[m]ost norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, and accordingly agencies have ‘very broad discretion whether to proceed by way of adjudication or rulemaking.’”²⁴ As the D.C. Circuit recently observed, “The fact that an order rendered in an adjudication ‘may affect agency policy and have general prospective application,’ does not make it rulemaking subject to APA section 553 notice and comment.”²⁵

II. THE COMMISSION SHOULD CONTINUE TO CARRY OUT THE SELECTION PROCESS OUTLINED IN THE RFP.

While the Commission plainly has no *obligation* to proceed by notice and comment, it does have the discretion to do so. In this case, there are important reasons to believe that proceeding by notice and comment would not improve the decision-making process and could actually be counterproductive.

To begin, the draft RFP documents and the selection process were *already* the subject of notice and comment, and another notice-and-comment period would only add more delay without any benefit. The selection process outlined in that document was designed to ensure substantial input and participation from all constituencies. That process began with a review of the bids by NAPM, whose members include a broad cross-section of the affected industry—including wireless, wireline, cable, and VoIP providers. The process continued with review by the NANC, a federal advisory committee which is required by statute to have a balanced

²² Letter from Richard Fruchterman, Public Policy and Regulatory Counsel for Neustar, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, at 11, WCB Docket No. 09-109 (filed Dec. 9, 2009).

²³ *Id.* at v.

²⁴ *Qwest Servs. Corp. v. F.C.C.*, 509 F.3d 531, 536 (D.C. Cir. 2007) (citation omitted); *see also Nat'l Cable & Telecommunications Ass'n v. F.C.C.*, 567 F.3d 659, 670 (D.C. Cir. 2009) (“the choice . . . between proceeding by general rule or by individual, ad hoc litigation . . . [is] primarily in the informed discretion of the administrative agency”) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (D.C. Cir. 1947)).

²⁵ *The Conference Group, LLC v. F.C.C.*, 720 F.3d 957, 966 (D.C. Cir. 2013) (quoting *New York State Comm'n on Cable Television v. F.C.C.*, 749 F.2d 804, 814 (D.C. Cir. 1984)).

membership.²⁶ The NANC’s membership is even broader and is certainly representative of the industry—including representatives of ILECs, CLECs (including Bandwidth.com, Level 3 and XO, all of which provide telephone numbers and manage porting for smaller providers, including interconnected VoIP providers, as well as CompTel, the trade association representing CLECs, both larger and smaller), wireless providers, cable providers, and VoIP providers (including Vonage, which has trialed direct assignment of numbers rather than through a CLEC). As Neustar put it, “the NAPM, subject to supervision by the NANC, has exactly the right incentives to design an RFP process and select an LNPA in a manner that will best serve the public interest and consumers.”²⁷ Given that the selection process has already included extensive comment and participation by all relevant players, it is unlikely that an additional round of notice and comment would significantly improve the decision-making process. Indeed, as Neustar itself has previously explained, “the FoNPAC and the NANC will ensure that the Commission has sufficient information to make a reasoned judgment concerning the NANC’s eventual recommendation.”²⁸

And just as importantly, there are important downsides to opening the process to further notice and comment at this stage. *First*, notice-and-comment proceedings result in significant further delay of a process that is already behind the schedule outlined in the RFP. While Telcordia disagrees with Neustar’s assertion that a transition to a new LNPA would take years,²⁹ it is true that if a new LNPA is selected, that entity will need time to build a system and prepare for the transition. *Second*, as Neustar has recognized, a notice-and-comment proceeding would necessarily require the Commission to release confidential bid information to the public *prior to* completing the competitive selection. Neustar seeks this even though it also asks for the opportunity to submit further bids. The release of such competitively sensitive information, even under protective order, makes it all the more likely that future bidding will be contaminated by knowledge of existing bids. In short, the issues on which Neustar wants the Commission to rule are not well suited for notice-and-comment. Lastly, this sets in place a precedent in which competitors may be discouraged from participating in the FCC bid process, seeing that a powerful incumbent can “game the system” and use its substantial weight to make it difficult, if

²⁶ 5 U.S.C. App. 2 § 5(b)(2) (requiring “the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee”).

²⁷ Letter from Aaron Panner, Counsel for Neustar, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, at 1-2, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Mar. 28, 2012).

²⁸ Letter from Aaron Panner, Counsel for Neustar, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, at 5, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Nov. 6, 2012).

²⁹ See Letter from Aaron Panner, Counsel for Neustar, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Mar. 25, 2014).

not impossible for challengers to have a fair opportunity to compete for the contract. That is anti-consumer and anti-good public policy.

Finally, the parade of horrors that Neustar invokes to support further delay is simply meritless. For example:

- Changing the LNPA will not elongate porting intervals, though Neustar has led a very public campaign that suggests the change will. The FCC already mandates one-day porting for consumer ports—and wireless industry standards provide for even faster porting—and the pace of those ports is dictated by interactions between the porting-in and porting-out carriers, and not by the LNPA.
- The RFP specifically requested that bidders provide transition plans, which have now been reviewed by the NAPM and the NANC, and which the Commission can review as well.³⁰ The processes that need to be implemented have been well-defined. Neustar has chosen to ignore what the RFP asked for.
- The RFP addressed the IP transition in the only way possible—by requiring the next LNPA(s) to implement the requirements that will be developed by the industry and/or Commission.³¹ To suggest otherwise, as Neustar has, is simply misleading.
- The interests of public safety will be fully protected. Not only was this addressed by the RFP, but the Commission itself will undoubtedly ensure that performance of critical public safety functions is not impaired.³² Once again, Neustar has chosen to ignore what the RFP asked for and the role that the Commission will play.

Given the low potential for incremental benefit from notice and comment and the large downsides that such a process would entail, Telcordia respectfully submits that the Commission should continue with the selection process adopted in May 2011—a process that did not entail any further pre-selection notice and comment. The process has already included numerous opportunities for public comment, and Neustar's last-ditch request for further comment is simply an attempt to delay implementation of the results of the competitive process.

³⁰ See Telcordia Opposition at 23.

³¹ See *id.* at 30-33.

³² See *id.* at 27-28.

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It is time to bring this selection process to a conclusion. The Commission has a solid record upon which to make its selection—grounded, as the Commission announced in March 2011, in a pro-consumer competitive bidding process.

Sincerely,



John T. Nakahata

Mark D. Davis

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