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April 23, 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:

I write on behalf of Neustar, Inc., in response to the April 15, 2014, ex parte letter submitted by Ericsson,¹ and to follow up on my earlier letters of April 8 and April 14, 2014. In its letter, Ericsson argues that the Commission should refuse to issue a notice and should deny interested parties an opportunity to comment on the selection recommendation of the North American Numbering Council (“NANC”) for the Local Number Portability Administrator(s) (“LNPA”) before the Commission makes its selection decision. Such a procedure would be unlawful, not only because the Commission’s selection decision fulfills its statutory responsibility to “designate” a neutral numbering administrator but also because that determination will affect the prospective rights and obligations of every service provider that is required to provide local number portability and/or to pay for Number Portability Administration Center (“NPAC”) services. Accordingly, and as explained below, the selection decision is an informal rulemaking that requires notice and comment under the Administrative Procedure Act (“APA”).

Ericsson’s sole basis for asserting that the Commission may dispense with notice-and-comment procedures is the argument (at 3-4) that the LNPA selection process is an adjudication, not a rulemaking.² That is incorrect. The selection of a neutral numbering administrator is a

¹ Telcordia Technologies Inc., d/b/a iconectiv (“Telcordia”), is a part of Ericsson; unless context dictates otherwise, we refer to the entity as “Ericsson.”

² Ericsson’s blanket statement that notice-and-comment procedures are never required in quasi-adjudicatory proceedings is incorrect: even when an agency conducts an informal adjudication, a

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quasi-legislative – that is, rulemaking – function, and the Commission has in the past treated its selection processes accordingly. Section 251(e) of the Communications Act directs the Commission to “create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.”³ One of these “impartial entities” is the LNPA.⁴ Section 251 further mandates that local exchange carriers must provide number portability according to the requirements adopted by the Commission and must bear the costs of establishing number portability.⁵ Section 251 also directs the Commission to “complete all actions necessary to establish regulations to implement the requirements of this section.”⁶ One of those requirements is the designation of one or more impartial entities to serve as the LNPA.

That designation decision is a rulemaking function. Under the APA, a “rule making” is an “agency process for formulating, amending, or repealing a rule.”⁷ A “rule,” in turn, is “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”⁸ It includes “the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.”⁹ The designation of the LNPA falls within the APA’s definition of a rule: it is an agency statement of future effect that implements law – including § 251(b)(2) and (e) – and

reviewing court is “justified in demanding some sort of procedures for notice, comment, and a statement of reasons as a necessary means of carrying out [its] responsibility for a thorough and searching review.” *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 923 (D.C. Cir. 1982); *see also Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (“In fact, we have gone so far as to suggest that notice and comment is sometimes required in an adjudication.”).

³ 47 U.S.C. § 251(e)(1).

⁴ *See Order, 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*, 26 FCC Rcd 6839, ¶ 2 (WCB May 16, 2011) (“May 2011 Order”).

⁵ *See* 47 U.S.C. § 251(b)(2), (e)(2).

⁶ *Id.* § 251(d)(1) (emphasis added).

⁷ 5 U.S.C. § 551(5).

⁸ *Id.* § 551(4).

⁹ *Id.*

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consists of “the approval or prescription for the future” of “practices bearing on” both “facilities” (the NPAC databases) and “services” (including number portability).¹⁰

Ericsson attempts to liken the designation process to an adjudication by claiming (at 4) that the process affects only “specific individuals” – that is, the specific parties that have submitted proposals to serve as the LNPA. But Ericsson ignores the effects of LNPA selection on the telecommunications industry, including the service providers who use (and pay for) the services provided by the LNPA. Far from being limited to the specific entities who have submitted bids, the designation of the LNPA affects the broader telecommunications industry and the public.

The LNPA designation also differs from an adjudication because it has only prospective effect. Ericsson cites (at 4) *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442 (9th Cir. 1994), for the proposition that the principal distinction between adjudication and rulemaking is whether the agency action affects specific parties or broader, unspecified classes. But *Yesler* in fact states that “[t]wo principal characteristics distinguish rulemaking from adjudication”; the second distinction is that adjudication has a present, immediate effect, whereas rulemaking “is prospective.”¹¹ Indeed, “the entire dichotomy upon which the most significant portions of the APA are based” is that “rules have legal consequences only for the future,”¹² whereas adjudications principally determine past and present rights.¹³ The designation of the new LNPA will not have any past or present effect; Neustar remains the LNPA at least through the end of its current designation. The designation process that is underway will determine the identity of the future LNPA.

These quasi-legislative aspects of the LNPA designation process underscore the reasons why notice and comment is important here. The designation of the LNPA will affect the obligations of parties that have had no opportunity to participate in the selection process leading to the recommendation by the NANC. These effects on third parties distinguish the LNPA selection process from a licensing proceeding – a comparison Ericsson tries to draw because licensing is treated as an adjudication under the APA.¹⁴ The outcome of a licensing proceeding

¹⁰ See also *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

¹¹ 37 F.3d at 448 (emphasis added).

¹² *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring).

¹³ See *id.* at 218-19 (citing Attorney General’s manual on the APA, prepared at the time of its enactment).

¹⁴ See 5 U.S.C. § 551(6)-(8) (defining an adjudication as the “agency process for the formulation of an order,” with “order” defined as a final agency disposition “in a matter *other than* rule making but including licensing”) (emphasis added). The fact that the statute specifies that

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directly affects the rights and obligations only of the party seeking the license. By contrast, the selection of the LNPA affects not only the parties that submitted proposals but also the carriers that are required to use and pay for LNP and the members of the public using the numbering system. Those parties – as well as other interested members of the public – should have an opportunity to provide input on the ultimate designation of the LNPA through a notice-and-comment proceeding.¹⁵

Moreover, the LNPA selection process and the decision whether to adopt the NANC recommendation not only implicate *who* the LNPA will be, but *what* the LNPA will be. Throughout these proceedings, Neustar has highlighted the fact that the RFP and requirements documents implicate dozens of related policies in a variety of subject-matter areas. For example, the limited requirements for the prospective LNPA's role in the IP transition will no doubt shape how quickly (or how slowly) that transition proceeds. Determining capabilities of the LNPA in order to meet the Commission's goals is a quasi-legislative decision to which notice-and-comment procedures apply.

As Neustar demonstrated in its April 8 letter, the Commission has consistently taken this approach in carrying out its designation duties pursuant to § 251(e)(1). For the original LNPA selection, the Commission ordered the NANC to conduct a selection process and to provide its recommendation; the Commission then held a notice-and-comment proceeding before designating the LNPA.¹⁶ In this proceeding, the Commission (through the Bureau) has again directed the NANC to provide a recommendation on the designation of the LNPA.¹⁷ The Commission should adhere to its established procedure of using a notice-and-comment proceeding to decide whether to adopt the NANC's recommendation or to take a different course. Because the original LNPA designation was accomplished through a notice-and-

licensing is an adjudication does not support the conclusion that other procedures that bear some resemblance to licensing are also adjudications; to the contrary, the fact that the LNPA selection is *not* a licensing further undermines Ericsson's argument.

¹⁵ See, e.g., *Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011) (holding notice and comment required due to effect of TSA policy change on the public). If Neustar ultimately is selected to remain the LNPA, notice and comment is necessary because of the apparent potential for a significant change. See, e.g., *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 169 (2d Cir. 2013) (substantive rule requires notice and comment even if it does not impose any new substantive burdens).

¹⁶ See Second Report and Order, *Telephone Number Portability*, 12 FCC Rcd 12281, ¶ 2 (1997).

¹⁷ See May 2011 Order ¶ 6.

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comment rulemaking proceeding, the Commission could not change that designation without notice and comment.¹⁸

Ericsson (at 4 & n.16) attempts to distinguish the recent designation of SMS/800, Inc., as the neutral administrator of the toll-free numbering database by arguing that the designation in question “was not an administrator selection order.” That is incorrect: one effect of the order was to designate SMS/800, Inc., as the new neutral administrator for toll-free numbering, replacing the previous administrator, DSMI.¹⁹ That order was issued after a public notice and comment period. In fact, the Commission in that proceeding issued a *second* public notice and sought a second round of comments, specifically addressing the designation of SMS/800, Inc., as the neutral administrator.²⁰

For the reasons stated above and in Neustar’s previous letter of April 8, 2014, Neustar urges the Commission to provide public notice and to solicit comments on the NANC’s recommendation before designating the LNPA for the contract period beginning July 2015.

Pursuant to section 1.1206 of the Commission’s rules, 47 C.F.R. § 1.1206, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact me.

Sincerely,



Aaron M. Panner

cc: Julie Veach
Jonathan Sallet
Phillip Verveer
Michele Ellison
Daniel Alvarez
Rebekah Goodheart
Priscilla Delgado Argeris
Nicholas Degani
Amy Bender

¹⁸ See, e.g., *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 39 (D.C. Cir. 2005) (agency cannot change existing rule without complying with APA notice-and-comment procedures); *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (same).

¹⁹ See Order, *Toll Free Service Access Codes*, 28 FCC Rcd 15328, ¶¶ 23-24 (2013).

²⁰ See *id.* ¶ 26.