



April 28, 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 23, 2014

Dear Ms. Dortch:

On behalf of Telcordia Technologies, Inc., d/b/a iconectiv (“Telcordia”), I write to respond to Neustar, Inc.’s (“Neustar’s”) ex parte letter of April 23, 2014 (“Neustar Letter”). In that letter, on the eve of the LNPA selection, Neustar again asserts that the Commission is legally required to hold a third round of notice and comment before completing the selection process for the next Local Number Portability Administrator(s) (“LNPA”). Neustar’s claims are meritless, but the effect of its attempt to derail and delay the process would be costly and real for carriers and consumers: Neustar’s first quarter earnings call revealed that it now collects nearly \$500 million per year from the LNPA contract.

As Senator Daniel Patrick Moynihan famously said, “everyone is entitled to his own opinion, but not his own facts.” Neustar is also not entitled to its own law. Neustar’s arguments are wrong and mere repetition does not create law where none exists. The Commission long ago adopted the basic rules governing local number portability and the LNPA and, as Telcordia explained in its prior letter, the Commission has already held two notice and comment periods on the LNPA selection process and procurement documents and reviewed comments from Neustar, Telcordia, and the industry before issuing the final selection process documents.<sup>1</sup> It is now up to the Commission to perform a classic adjudicative function akin to the approval of a license or authorization – to apply the rules and the procurement documents to determine which entity or entities will be authorized to enter into a contract with North American Portability Management LLC (“NAPM”) to provide LNPA services.<sup>2</sup>

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<sup>1</sup> See Letter from John Nakahata and Mark Davis, Counsel, Telcordia, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, at 6-7 (filed Apr. 15, 2014) (“Telcordia April 15, 2014 Ex Parte”).

<sup>2</sup> 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

Neustar's primary argument is that "the selection decision is an informal rulemaking," but this is plainly incorrect. An informal rulemaking announces new policies of general import or amends prior rules.<sup>3</sup> The selection decision will do neither. The Commission has already promulgated all regulations and orders governing the LNPA's duties.<sup>4</sup> The specific identity of the LNPA(s) is not a part of the Commission's rules. All that is left to do is to apply those orders and the procurement documents to the specific fact situation and determine which bidder(s) should be the next LNPA(s). Because the selection of a new numbering administrator reflects "a highly fact-specific, case-by-case" style of determination, it is an adjudication rather than a rulemaking.<sup>5</sup>

Neustar nevertheless argues that the Commission must act by rulemaking for four reasons, each of which is meritless. *First*, Neustar claims that the Commission must issue its selection through a rulemaking because Section 251 of the Communications Act directs the Commission to "create or designate" an entity to administer telecommunications numbering (which includes the LNPA function) and to "complete all actions necessary to establish regulations to implement the requirements of this section."<sup>6</sup> However, nothing in Section 251 or any other part of the Communications Act states that the Commission must exercise all of its Section 251(e) authority over numbering and numbering administration through rulemaking. To the contrary, 47 U.S.C. § 251(d)(1), upon which Neustar relies, by its plain language does not compel all decisions to be made by rulemaking, but rather sets a six-month statutory deadline for the Commission's initial rulemakings to implement Section 251. Furthermore, had Congress chosen to require all decisions implementing Section 251(e)(1) to be done through rulemaking, it could have specified that the designation of administrators be accomplished "by rule," but it did not do so.<sup>7</sup> Therefore, Section 251(d)(1) did not alter the Commission's "broad discretion" to determine "whether to proceed by way of adjudication or rulemaking."<sup>8</sup>

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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").

<sup>3</sup> *See Conference Grp., LLC v. F.C.C.*, 720 F.3d 957, 965 (D.C. Cir. 2013).

<sup>4</sup> *See generally* 47 C.F.R. Part 52, Subpart C (rules governing number portability and its administration).

<sup>5</sup> *Conference Grp., LLC*, 720 F.3d at 965.

<sup>6</sup> *See* Letter from Aaron Panner, Counsel, Neustar, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, at 2 (filed Apr. 23, 2014) (citing 47 U.S.C. § 251(d)(1) ("Neustar Letter").

<sup>7</sup> *Cf., e.g.*, 47 U.S.C. § 251(h)(2) ("The Commission may, *by rule*, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier" under specified conditions) (emphasis added); 47 U.S.C. § 220(a)(2) ("The Commission shall, *by rule*, prescribe a uniform system of accounts for use by telephone companies.") (emphasis added); 47 U.S.C. § 339(c)(3)(A) ("Within 270 days after the date of

Moreover, Neustar's argument is contradicted by the Commission's more recent actions when designating Neustar itself as a numbering administrator pursuant to Section 251(e). When the Commission rebid the North American Numbering Plan Administrator contract in 2008 and 2011, and the Pooling Administrator contract in 2005 and 2012, it adopted a similar process to the one at issue here. The Bureau sought comments on the draft Technical Requirements Documents,<sup>9</sup> but never sought comment prior to the final selection of the Administrator, nor did it appoint those administrators through rulemaking. Were the designation of numbering administrators under Section 251(e) required to be performed through rulemaking, then that would apply to all such designations, not just the Local Number Portability Administrator.

*Second*, Neustar asserts that the selection of the LNPA is a "rule" because it "consists of the approval or prescription for the future of practices bearing on both facilities (the NPAC databases) and services (including number portability)."<sup>10</sup> Yet the Commission regularly releases adjudicatory orders with prospective effect that affect parties not before the Commission without transforming an adjudication into a rulemaking proceeding. For example, in a case that ultimately reached the D.C. Circuit, in an informal adjudication, the Commission decided that petitioner Intercall and all similarly situated conference bridge providers offered a telecommunications service that was subject to Universal Service Fund contributions

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the enactment of the Satellite Television Extension and Localism Act of 2010, the Commission shall develop and prescribe *by rule* a point-to-point predictive model for reliably and presumptively determining the ability of individual locations, through the use of an antenna, to receive signals in accordance with the signal intensity standard in section 73.622(e)(1) of title 47, Code of Federal Regulations . . . ." (emphasis added); 47 U.S.C. § 309(b)(2)(F) (permitting the Commission "by rule" to add categories of licenses that cannot be granted in fewer than thirty days).

<sup>8</sup> *Qwest Servs. Corp. v. F.C.C.*, 509 F.3d 531, 536 (D.C. Cir. 2007) (citation omitted); *see also Nat'l Cable & Telecomms. 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 (1947)).

<sup>9</sup> *FCC Seeks Comment on the Thousands-Block Pooling Administrator Technical Requirements*, Public Notice, DA 05-3102, 20 FCC Rcd. 19,103 (2005); *The Wireline Competition Bureau Seeks Comments on the North American Numbering Plan Administrator Technical Requirements*, Public Notice, DA 08-490, 23 FCC Rcd. 3553 (WCB 2008); *Wireline Competition Bureau Seeks Comment on Technical Requirements for North American Numbering Plan Administration Contract*, Public Notice, DA 10-2346, 25 FCC Rcd. 17,182 (WCB 2010); *Wireline Competition Bureau Seeks Comment on Technical Requirements for Thousands-Block Number Pooling Administrator Pleading Cycle Established*, Public Notice, DA 12-705, 27 FCC Rcd. 4937 (WCB 2012).

<sup>10</sup> Neustar Letter at 3 (internal citations omitted).

requirements, and that they must prospectively start making such contributions.<sup>11</sup> On petition for review, the D.C. Circuit refused to classify the Commission's decision as a rulemaking because the Commission did not "amend[] a prior legislative rule or explicitly invok[e] the Commission's general legislative authority."<sup>12</sup> Simply because "an order rendered in an adjudication 'may affect agency policy and have general prospective application,' does not make it a rulemaking subject to APA section 553 notice and comment."<sup>13</sup>

The same is the case here. To designate a particular entity as the next LNPA, the Commission need not approve or prescribe any "practices" relating to number portability. The Commission has already done that by, for example, adopting rules that all carriers must have "equal and open access to the regional databases" and "information contained in the regional databases shall be limited to the information necessary to route telephone calls to the appropriate telecommunications carriers."<sup>14</sup> What is left to do here is not ultimately about regulating "practices"; it is about deciding which applicants should be designated as one or more LNPA administrators, which then authorizes them to enter into an LNPA contract with NAPM.<sup>15</sup>

Neustar responds that the LNPA selection process implicates not only "who the LNPA will be" but also what the LNPA will do, since RFP documents outline the "capabilities of the LNPA." If Neustar's argument were correct, then every change made by the North American Numbering Council's ("NANC's") LNPA Working Group with respect to LNPA processes, particularly those that get incorporated into the LNPA contract, would have to be the subject of a

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<sup>11</sup> *Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, Order, FCC 08-160, 23 FCC Rcd. 10,731 (2008).

<sup>12</sup> *Conference Grp., LLC*, 720 F.3d at 965.

<sup>13</sup> *Id.* at 966 (quoting *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 814 (1984)).

<sup>14</sup> 47 C.F.R. § 52.25(b), (f).

<sup>15</sup> Although Neustar claims that the LNPA selection will affect how the IP-transition evolves, Neustar Letter at 4, the IP-transition is a policy issue which, although not new, is still at the beginning of Commission consideration. The Commission will need to decide in the future whether it plans to address that issue through adjudication or rulemaking proceedings. The RFP allows that process to unfold because the administrator(s) is required to implement whatever solution is developed. The FCC can reasonably choose to address the IP transition in its ongoing rulemaking, and not as part of its LNPA selection process. See *Consumer Fed'n of Am. v. F.C.C.*, 348 F.3d 1009 (D.C. Cir. 2003) (upholding the FCC's decision to decline to address issues of Internet Service Provider access as part of its review of Comcast's acquisition of AT&T Broadband Corp., when the Commission was considering the same issues in an ongoing rulemaking); *SBC Commc'ns, Inc. v. F.C.C.*, 56 F.3d 1484, 1491 (D.C.Cir.1995) (upholding the FCC's decision not to address certain issues in the context of AT&T's acquisition of McCaw Cellular that were the subject of an ongoing rulemaking).

notice and comment rulemaking. But that has never been the case.<sup>16</sup> As an example, the contract amendment that permitted Neustar to insert Uniform Resource Indicator codes into the Number Portability Administration Center database clearly changed the specific tasks that the LNPA was performing, but was not subject to rulemaking. In fact, Neustar did not even agree that it should have been subject to NANC and FCC pre-approval.<sup>17</sup>

*Third*, Neustar argues that the Commission must proceed by rulemaking because the LNPA selection has a “prospective effect” rather than “a present, immediate effect.” But this is both factually and legally incorrect. As a factual matter, the selection will determine which entity or entities are authorized *now* to negotiate and sign an LNPA contract with NAPM. And while it is true that the selection will also have the prospective effect of determining who will be the LNPA in the years to come, “[t]he 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.”<sup>18</sup>

As a legal matter, Neustar appears to misapprehend the difference between prospective and immediate effect. In some sense, every Commission action is prospective in that it affects the rights of some party going forward. For the purposes of determining whether agency action is “prospective” enough to turn it into a rulemaking, the question is whether it has an “immediate effect on specific individuals” or whether it has “a definitive effect on individuals only after the

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<sup>16</sup> Neustar itself has stated that the NANC’s LNPA working group has inserted change orders in the LNPA contract “hundreds of times.” Letter from Thomas J. Navin, Counsel, Neustar, to the Honorable Betty Ann Kane, Chairman, NANC, WC Docket No. 09-109, at 1 (filed Aug. 14, 2009). The Commission did not put a single change out for public comment.

<sup>17</sup> See *Opposition of Neustar, Inc.*, WC Docket No. 09-109 (filed Sept. 8, 2009).

<sup>18</sup> *Conference Grp., LLC*, 720 F.3d at 966 (internal citation omitted); *accord Goodman v. F.C.C.*, 182 F.3d 987, 994 (D.C. Cir. 1999). Indeed, both the Commission and other Federal agencies regularly make decisions in adjudications that affect broad classes of people. See, e.g., *Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, Order, FCC 08-160, 23 FCC Rcd. 10,731 (2008) (determining that conference call providers offered a telecommunications service); *Toll Free Service Access Codes Petition to Change the Composition of SMS/800, Inc.*, Order, FCC 13-146, 28 FCC Rcd. 15,328 (2013) (holding that SMS/800, Inc., which files the SMS Tariff that controls the toll-free industry, could take over the filing of the SMS Tariff in response to petition filed by SMS/800, Inc.); *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) (discussing the National Labor Relations Board’s adjudicatory process to determine whether buyers were “managerial employees” under applicable law); *City of St. Paul v. F.A.A.*, 865 F.2d 1329 (D.C. Cir. 1989) (discussing the Federal Aviation Administration’s consideration of how test flight noise conditions would affect a city’s residents and concluding that “[t]he FAA did not purport to engage in informal rulemaking but, rather, informally *adjudicated* the merits of the flight test proposal. Because this is a case of informal adjudication, the petitioners may only challenge the agency procedures if the procedures violated constitutional norms of procedural due process.”).

rule subsequently is applied.”<sup>19</sup> Here, the Commission will be resolving the question of which specific entity or entities that responded to the RFP will be the next LNPA(s). This will resolve the rights of those specific parties and thus qualifies as an adjudication.

*Fourth*, Neustar argues that the selection process is a rulemaking because 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.”<sup>20</sup> This argument is meritless. As explained numerous times already, the selection process has now been the subject of notice and comment *twice*, giving any affected parties the opportunity to participate. Moreover, the selection itself has already been reviewed by the NANC—a federal advisory committee which is required by statute to have a balanced membership.<sup>21</sup> As explained in Telcordia’s prior letter, the NANC’s membership is required by the rules governing Federal Advisory Committees to be representative of all interests concerned.<sup>22</sup> And as Neustar has previously explained (until it completely reversed its position earlier this year), “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.”<sup>23</sup>

Furthermore, the fact that the LNPA selection will indirectly affect other parties is completely irrelevant. Neustar suggests that LNPA selection is not analogous to issuing a license because a license “directly affects the rights and obligations only of the party seeking the license.”<sup>24</sup> But the whole point of requiring a license in order to perform certain conduct is that the conduct may affect others—as, for example, radio transmissions may affect others’ ability to transmit or receive on the same or adjacent frequencies or driving a car may affect the safety of others. Moreover, the Commission has in many cases promulgated conditions in licensing adjudications that affect third parties.<sup>25</sup> These impacts did not convert an adjudication into a

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<sup>19</sup> *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

<sup>20</sup> Neustar Letter at 3.

<sup>21</sup> 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”).

<sup>22</sup> *See* Telcordia April 15, 2014 Ex Parte at 6-7.

<sup>23</sup> Letter from Aaron Panner, Counsel, Neustar, Inc., to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, at 1 (filed Mar. 28, 2012).

<sup>24</sup> Neustar Letter at 3-4.

<sup>25</sup> *See, e.g., Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Report and Order, FCC 11-4, 26 FCC Rcd. 4238 (2011); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-183, 20 FCC Rcd. 18,290, 18,292 ¶ 2, App. F (2005); *see also SBC Commc’ns, Inc.*, 56 F.3d at 1492, 1496-97 (D.C. Cir. 1995) (rejecting plaintiff’s claim that the FCC was required to protect competitors and hold an evidentiary hearing before approving a transfer of licenses between telecommunications providers).

notice and comment rulemaking. Thus, while it is true that the LNPA selection will indirectly affect those that interact with the LNPA, the decision itself will directly adjudicate the rights only of the entities that bid to be the LNPA.

Finally, even if the LNPA selection was somehow a rulemaking, it would not follow that the Commission must issue further notice and comment. The APA makes clear that any matter relating to “public property, loans, grants, benefits, or contracts” is exempt from Section 553’s notice and comment provisions.<sup>26</sup> Nowhere does Neustar explain why this exemption would not be applicable.

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Neustar’s request for a third round of notice and comment is a transparent and meritless attempt to delay the selection of the next LNPA and to derail what was designed as a pro-consumer competitive bidding process. The delay inherent in further notice and comment would do nothing more than shorten the period of transition to a new LNPA. In the interim, Telcordia and any other bidders will be forced to build a numbering system at great expense without knowing if it was selected. It is time to bring this selection process to a conclusion. The Commission now has a solid record upon which to make its selection. Telcordia respectfully submits that the Commission should reject Neustar’s attempts to derail and delay the process and continue with the selection process adopted in May 2011—a process that did not entail any further pre-selection notice and comment.

Sincerely,



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<sup>26</sup> 5 U.S.C. § 553(a)(2).