



May 9, 2014

EX PARTE

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

Dear Ms. Dortch:

On behalf of Telcordia Technologies, Inc., d/b/a iconectiv (“Telcordia”), I write to respond to the arguments raised in Neustar, Inc.’s, (“Neustar’s”) letter of May 6, 2014.¹ In that letter, Neustar claims that the Commission must select the next LNPA by notice-and-comment rulemaking because Telcordia is currently “[b]arred [b]y [r]ule” from being selected as the Local Number Portability Administrator (“LNPA”) and because the Commission (supposedly) made its initial LNPA selections by rule. These arguments are yet another transparent attempt to delay and derail the selection of the LNPA in order to force an extension of Neustar’s existing \$500 million per year contract and to disregard the recommendations of the NANC and the NAPM, which Neustar has previously said would have “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.”² As explained below, the first argument is a plain misreading of 47 C.F.R. § 52.26(a), and the second argument attempts to elevate form over substance and fundamentally misunderstands the difference between a rule and an adjudication.

A. No Neutrality Rule Bars Telcordia from Serving as LNPA.

Neustar argues that the Commission’s current rules bar Telcordia from serving as the LNPA because, it claims, the rules prohibit an LNPA from being “any entity with a *direct material financial interest* in manufacturing telecommunications network equipment” or any affiliate of such an entity.³ But the language Neustar quotes does not appear in, and has not

¹ Ex Parte Letter from Aaron M. Panner, Counsel for Neustar, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed May 6, 2014) (“Neustar May 6, 2014 Letter”).

² Ex Parte Letter from Aaron M. Panner, Counsel for Neustar, to Marlene Dortch, Secretary, FCC at 1, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Mar. 28, 2012).

³ Neustar May 6, 2014 Letter, Attach. 1 at 10.

otherwise been incorporated by, any Commission legislative rule. The LNPA's neutrality requirement appears in the Code of Federal Regulations in only one place—in 47 C.F.R. § 52.21(k), which requires that the LNPA be “an independent, non-governmental entity, not aligned with any particular telecommunications industry segment, whose duties are determined by the NANC.” The Code does not include any language expanding upon this broad statement.

The language quoted by Neustar actually appears in Section 4.2.2 of the Selection Working Group's (“SWG's”) April 25, 1997 report to the NANC (“April 1997 Report”). Neustar claims that this language was incorporated into the Commission's rules by 47 C.F.R. § 52.26(a), which requires local number portability administration to “comply with the *recommendations*” of the April 1997 Report.⁴ But the language quoted by Neustar does not appear in any of the recommendations of the report. Indeed, the April 1997 Report recommended that the NANC adopt the LNPA selection criteria set forth in Section 4.1.1.⁵ And the Commission, in the *Second Report and Order*, specifically quoted Section 4.1.1 as the criteria “NANC concluded should govern the selection of a local number portability database administrator.”⁶

Section 4.2.2, by contrast, was not recognized or discussed by the Commission as a NANC recommendation or as NANC-recommended criteria in 1997 and has not been added to any legislative rule since then. Rather, Section 4.2.2 by its terms is part of a historical recitation of the terms that had been included in the RFP issued by the Mid-Atlantic Region limited liability company, the mid-Atlantic areas predecessor to NAPM.⁷ While NANC concluded that the criteria used by the regional LLCs “met basic criteria for neutrality,” it never stated or recommended that those particular specifications constituted the minimum requirements for neutrality.⁸ Thus, Section 4.2.2 does not establish mandatory neutrality criteria that would then be incorporated by reference into 47 C.F.R. § 52.26(a).

The NANC/NAPM LLC Consensus Proposal further confirms that the particular language quoted by Neustar was never codified in a rule. In that proposal—which was supported by Neustar⁹ and adopted by the Commission—the NANC and NAPM summarized the neutrality

⁴ 47 C.F.R. § 52.26(a) (emphasis added).

⁵ North American Numbering Council, LNPA Selection Working Group, Report § 4.1.1 (Apr. 25, 1997), *available at* [https://www.npac.com/content/download/10717/104218/NANC%20LNPA%20Selection%20Working%20Group%204-25-97%20-DOC-272978A1%20\(2\).doc](https://www.npac.com/content/download/10717/104218/NANC%20LNPA%20Selection%20Working%20Group%204-25-97%20-DOC-272978A1%20(2).doc) (“1997 SWG Report”).

⁶ *Telephone Number Portability*, Second Report and Order, FCC 97-289, 12 FCC Rcd. 12,281, 12,301 ¶ 29 (1997).

⁷ *See* 1997 SWG Report § 4.2.2.

⁸ *Id.* § 6.2.3.

⁹ Ex Parte Letter from Aaron M. Panner, Counsel for Neustar, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Mar. 9, 2012) (“In addition, we briefly discussed the LNPA RFP process. We stated that Neustar supports the consensus process and would like to see it go forward without delay.”); *see also* Reply

requirement that the Commission has imposed: “‘competitive neutrality,’ meaning that local number portability database administrators must be unaligned with any industry segment and that local number portability database administrators must treat competing users of their services impartially with respect to costs, terms, and conditions.”¹⁰ The Consensus Proposal referred to the criteria recited in Paragraph 29 of the *Second Report and Order* and Section 4.1.1 of the April 1997 Report and did not suggest that the historical recitation from Section 4.2.2 had ever been incorporated into the Commission’s rules, and if Neustar believed otherwise it should have objected to the proposal when it had the opportunity.

Finally, it bears emphasis that the Bureau approved the procurement documents prepared by NANC and NAPM without including the neutrality language quoted by Neustar in the solicitation documents, even after Neustar pointed out the historical use of such a preclusion in the 1997 RFPs. In August 2012, the Commission released the proposed Request for Proposal (“RFP”), Vendor Qualification Survey (“VQS”), and Technical Requirements Documents (“TRD”) for notice and comment.¹¹ In part, the VQS specifically delineated the neutrality criteria for the next LNPA and required each bidder to submit a neutrality opinion letter.¹² During a discussion on the proposed neutrality requirements, Neustar informed the Commission that “‘manufacturer[s] of telecommunications network equipment...were specifically disqualified from the original 1997 LNPA bidding process.”¹³ Even armed with this information, the Commission specifically chose not to include the prohibition against telecommunications equipment manufacturers in the neutrality requirements. And Neustar, by failing to request the inclusion of this language in the final VQS and urging the Commission to accept the documents as written, has no right to object now.¹⁴

Comments of Neustar, Inc. at 2 & n.6, WC Docket No. 09-109 & CC Docket No. 95-116 (filed Mar. 29, 2011) (stating that Neustar “intends to participate in the LNPA selection process set out in the Consensus Proposal” and that “Neustar agrees with the Bureau that the Consensus Proposal is ‘consistent with prior delegations of authority and Commission rules regarding LNPA selection.’” (citation omitted)).

¹⁰ *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, Attach. A, DA 11-454, 26 FCC Rcd. 3685, 3695 (2011).*

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

¹² *Id.* at 11,941, VQS § 3.4.

¹³ Ex Parte Letter from Aaron M. Panner, Counsel for Neustar, to Marlene Dortch, Secretary, FCC at 3, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Sept. 11, 2012).

¹⁴ *Id.* at 2 (“The neutrality requirements in the *RFP Documents* are rooted in the statute and the Commission’s regulations, including the rules that apply to the North American Numbering Plan Administrator (‘NANPA’) and the Pooling Administrator (‘PA’).”).

The current LNPA selection documents included extensive neutrality provisions and required each bidder to submit a neutrality opinion letter. Bidding closed long ago; the NANC submitted its recommendation; and the Commission now has before it all information it requires to complete a selection with the required neutrality assessment. Further notice and comment rulemaking is not required.

B. The Commission Need Not Select the LNPA by Rulemaking.

As Telcordia explained in its prior filings on the issue, the selection of an LNPA is plainly an adjudicative function because it requires the Commission to assess specific facts about specific individuals—the bidders—and determine which of those particular individuals should be permitted to enter a contract to provide LNPA services.¹⁵ In its May 6, 2014 letter, Neustar nevertheless argues that the Commission must make the next LNPA designation by legislative rule because (it claims) the Commission made its initial LNPA designations by rule, and a legislative rule can be modified only by rulemaking. The fundamental problem with this argument, however, is that, as explained already, designation of an LNPA is a classic adjudicative function, and the Commission did not do anything to transform that decision into a “rule.”

Neustar now argues that the initial LNPA designations were a rule because they were issued after notice and comment, because the Commission issued certain “Final Rules” as part of the same order, and because the Commission published the order in the Federal Register. But the D.C. Circuit rejected just such an argument in *Goodman v. FCC*.¹⁶ In *Goodman*, the petitioners argued, as Neustar has argued here, that an order issued by the Commission was a rulemaking because it (1) affected a large number of individuals; (2) was subject to notice and comment, and (3) was published in the Federal Register under the label “Final Rules.” In rejecting that argument, the D.C. Circuit noted that these factors did “not alter the clearly adjudicatory nature of the Order itself.”¹⁷ The lesson of *Goodman* is that it is the *substance* of the Commission’s action—not whether it was put out for notice and comment, whether it was published in the federal register, or whether it was adopted in a proceeding that also promulgated rules—that distinguishes a rulemaking from an adjudication. As Telcordia has explained before, the

¹⁵ See Ex Parte Letter from John T. Nakahata, Counsel for Telcordia, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Apr. 15, 2014) (“Telcordia Apr. 15, 2014 Letter”); see also Ex Parte Letter from John T. Nakahata, Counsel for Telcordia, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Apr. 28, 2014) (“Telcordia Apr. 28, 2014 Letter”).

¹⁶ *Goodman v. FCC* 182 F.3d 987 (D.C. Cir. 1999).

¹⁷ *Id.* at 994; see also *Adams Telcom, Inc. v. F.C.C.*, 997 F.2d 955, 956-57 (D.C. Cir. 1993) (finding that FCC’s characterization of its actions in denying pioneer preference as an adjudication was reasonable even though the proceeding was entitled *Amendment of the Commission’s Rules*, the order was part of a rulemaking proceeding, and the order repeatedly refers to “this rulemaking”).

selection of the LNPA was a decision about the suitability of specific entities to be the next LNPA and, therefore, was a classic adjudication.

It is true, as Neustar points out, that the Commission made its initial (but not its subsequent) LNPA selection after issuing a “notice of proposed rulemaking” which characterized the entire proceeding “as a non-restricted rulemaking.” Once again, however, the fact that the Commission sought public comment on the LNPA selection in a “notice of proposed” rulemaking does not change the adjudicative nature of the selection itself. Indeed, the D.C. Circuit has held that it is permissible for an agency to issue an NPRM and then decide some of the issues raised in that NPRM by rule while deciding other issues raised by the NPRM by adjudication.¹⁸ That is effectively what the Commission did here: it included an adjudicative decision in a proceeding that also promulgated rules. But that does not render the adjudicative decision a “rule.”

Neustar finally argues that the Commission has tied its own hands by enacting 47 C.F.R. § 52.26(a), which states that “[l]ocal number portability administration shall comply with the recommendations” in NANC’s April 25, 1997 report, one of which was to name Neustar’s predecessor as the LNPA for four of seven regions. Because the April 1997 report is incorporated into the Code of Federal Regulations, Neustar argues that every part of this report—including the selection of the LNPA—is a legislative rule that can be modified only through a rulemaking. Once again, however, the law rejects such formalism. An agency’s decision to publish an item in the Code of Federal Regulations does not automatically transform that action into a “legislative rule” that can be modified only by rulemaking—especially here, where the Commission has incorporated by reference a long document that includes both rules and adjudicatory components. Indeed, the D.C. Circuit has made clear that an agency’s decision to publish a “rule” in the C.F.R. is little more than “a snippet of evidence of agency intent” and is not dispositive on the issue of whether agency action is a legislative rule.¹⁹ Here, there is no reason to believe that the Commission intended to enshrine the identity of the LNPA as a legislative rule simply by approving NANC’s recommendation to award Lockheed Martin a term contract.

Indeed, the Commission’s subsequent conduct suggests just the opposite. Although the *Second Report and Order* designated Perot Systems, Inc., as the LNPA vendor for three of the seven regions, Perot subsequently defaulted on its contract, and the Commission designated Neustar to replace it *without* seeking notice and comment or the other requirements for informal legislative rulemaking. Had the Commission intended for the LNPA designations to be a rule, it could only have selected Neustar to replace Perot by notice-and-comment rulemaking; it did not. Although Neustar’s letter suggests that such a substitution was authorized by Section 6.3.5 of the

¹⁸ *Qwest Services Corp. v. F.C.C.*, 509 F.3d 531, 536 (D.C. Cir. 2007) (finding nothing improper when an agency, after issuing notice of proposed rulemaking, bifurcated the proceeding into an adjudication and a rulemaking and thus acted by “half rulemaking and half adjudication”).

¹⁹ *Health Ins. Ass’n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (“In none of the cases citing the distinction, however, has the court taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent.”).

April 1997 report (which Neustar argues was incorporated by reference in the C.F.R.), that is not correct. That section simply states that in the event of a default, “at least one other vendor” would be “capable of providing these services within a relatively short timeframe”—not that the NAPM was *authorized* to substitute one vendor for another in the case of default.²⁰

Interpreting the Commission’s actions in the *Second Report and Order* as adopting legislative rules establishing criteria for the LNPA selection (as set forth in Paragraph 29 of the *Second Report and Order*) and then adjudicating the appointment of the LNPA against those criteria also fits with common sense. Appointing an Administrator by legislative rule creates an inordinately inflexible situation. For example, had the Commission actually enshrined Neustar as the LNPA by legislative rule, as Neustar now suggests, and had Neustar defaulted on its obligations or breached the contract, the Commission would have had to conduct a legislative rulemaking to fire Neustar. There is no such statement. It does not make sense to read into the Commission’s actions an intent to create such extreme rigidity in the absence of an express statement that it was doing so—and there is no such statement.

Finally, even if the identity of the LNPA had been enacted as a legislative rule, it bears emphasis that notice and comment would not necessarily be required in order to designate a new LNPA. As Telcordia has explained previously, the APA expressly exempts certain matters from its notice-and-comment requirements, including any matter relating to “public property, loans, grants, benefits, or contracts.”²¹ Moreover, the APA also allows the Commission to forego notice and comment when doing so is “impracticable, unnecessary, or contrary to the public interest.”²² Here, further notice and comment on the NANC’s recommendation is contrary to the public interest because one of Neustar’s primary arguments is that NANC should have solicited an additional round of best and final offers (“BAFOs”). But of course, it would undermine competition to release each party’s bids and then allow another round of BAFOs. Releasing each party’s bids in a situation where one party is claiming the right to submit additional bids is contrary to the public interest.

C. It Is Not in the Public Interest to Delay Proceedings Further and to Depart from the Selection Process that Neustar Supported and the Commission Approved.

Neustar’s final two arguments are nothing more than a rehash of arguments that have been previously refuted.²³ Further notice and comment is not necessary to ensure

²⁰ 1997 SWG Report § 6.3.5.

²¹ See 5 U.S.C. § 553(a)(2); see also Telcordia Apr. 15, 2014 Letter, Telcordia Apr. 28, 2014 Letter, Ex Parte Letter from John T. Nakahata, Counsel for Telcordia, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed May 2, 2014).

²² 5 U.S.C. § 553(b)(3)(B).

²³ See Telcordia Apr. 28, 2014 Letter; see also Ex Parte Letter from John T. Nakahata, Counsel for Telcordia, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Feb. 6, 2014).

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“transparency”: the solicitation documents and the selection process were both the subject of notice and comment, and Neustar assured the Commission that the input of the “the FoNPAC and the NANC will ensure that the Commission has sufficient information to make a reasoned judgment concerning the NANC’s eventual recommendation.”²⁴ Nor is additional bidding in the public interest. As explained previously, allowing additional bids at this stage of the proceeding would create a serious risk to the integrity of the bidding process by potentially allowing a bidder that has obtained confidential information about its standing with regard to competitors to revise its bid in light of that information. Neustar had no reason to believe that it would have an opportunity to submit a best and “final” offer, and the Commission should not order additional bidding now.

²⁴ Ex Parte Letter from Aaron Panner, Counsel for Neustar, to Marlene Dortch, Secretary, FCC at 5, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Nov. 6, 2012).

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It is time to stop Neustar's attempts to derail and delay the process and bring this selection process to a conclusion. The Commission now has a solid record upon which to make its selection.

Sincerely,



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