

December 9, 2010

Honorable Betty Ann Kane
Chairman, North American Numbering Council
District of Columbia Public Service Commission
1333 H Street NW, West Tower 7th Floor
Washington, DC 20005

Don Gray
Telecommunications Specialist
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RE: Telcordia Contribution Regarding NANC Authority over LNP Administrator Selection and Delegation

Dear Chairman Kane and Mr. Gray:

At the October 22, 2010, North American Numbering Council (“NANC”) meeting, the question was raised whether the NANC or the North American Portability Management LLC (“NAPM”) had the authority to select a number portability Administrator, as well as to make policy decisions regarding the number of Administrators, the areas they would serve and whether they would be “peered.” To the extent that it actually assigned decision-making authority,¹ the Federal Communications Commission (“FCC” or “Commission”) gave NANC, not NAPM, the responsibility to make these critical public policy decisions.

- The FCC’s rules and the First Number Portability Report and Order place responsibility for “selection,” determination of the number of Administrators and other core policy issues with NANC, not NAPM.
- The FCC did not alter that assignment of responsibility in the Second Report and Order, or subsequently. The FCC’s direction that the NAPM “shall manage and oversee the local number portability administrators, subject to review by the NANC” did not reverse or limit NANC’s authority over Administrator selection, numbers and regions.

¹ There is a question as to whether the FCC can assign final decision-making authority with respect to the LNP Administrator contracts to a non-federal entity, or must reserve ultimate decision-making to itself. *See Reply Comments of Telcordia Technologies, Inc., WC Docket No. 07-149, 20-40 (filed Sept. 29, 2009); Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, WC Docket No. 07-149, 43-45 (filed May 20, 2009).* However, even if the FCC retains final decision-making authority, the points in this contribution remain valid.

- NANC itself never subdelegated the selection of the LNP Administrator to NAPM – nor would it have been proper for it to do so.
- Although the FCC’s compressed timelines in 1996-1997 meant that many groups acted roughly in parallel, NANC never ceded its ultimate authority or responsibility to the NAPM’s predecessor LLCs. In fact, NANC specifically approved the Administrators, who were then approved by the FCC.

As more fully set out below, the only plausible reading of the FCC’s rules is that NAPM’s role to “oversee and manage” the number portability administrator NPAC contractor *excludes* the specific duties reserved to NANC in 47 CFR §§ 52.25(c) (selection of the administrator) and (d) (determination of the number of administrators, regions, and how they interact). The FCC authorized—and obligates—the NANC to make these decisions. In doing so, NANC—which includes public interest representatives from state commissions and state consumer advocates – protects the public interest by ensuring that “LNP administration does not unduly favor or disfavor any particular industry segment or group of consumers,” and that “LNP administration does not unduly favor one technology over another.”² NAPM then “oversees and manages” the Administrator’s contract once the NANC has made the selection and decided the public policy issues assigned to it.

I. Applicable FCC Rules

A. Rules Establishing NANC’s Duties With Respect to NPAC Administrator Selection

FCC rules expressly describe NANC’s responsibilities and authority regarding NPAC Administrator selection in detail, and do not assign the NAPM (or its predecessors) any *decision-making* role in NPAC Administrator selection:

47 CFR § 52.11 – The duties of the North American Numbering Council (NANC), may include, but are not limited to:

...
(f) Carrying out the duties described in § 52.25....

47 CFR § 52.25 Database architecture and administration.

(a) The **North American Numbering Council (NANC)** shall direct establishment of a nationwide system of regional SMS databases for the provision of long-term database methods for number portability.

...

² See NANC, *What is NANC?*, <http://www.nanc-chair.org/docs/nanc-chair> (last visited Dec. 6, 2010).

(c) The NANC shall select a local number portability administrator(s) (LNPA(s)) to administer the regional databases within seven months of the initial meeting of the NANC.

(d) The NANC shall determine whether one or multiple administrator(s) should be selected, . . . how the LNPA(s) should be selected, the specific duties of the LNPA(s), the geographic coverage of the regional databases, the technical interoperability and operational standards . . .

(e) Once the NANC has selected the LNPA(s) and determined the locations of the regional databases, it must report its decisions to the Commission.

...

B. Rules Governing NAPM's Authority to "Manage and Oversee" the NPAC Administrator

In contrast to the decision-making duties assigned to NANC, the FCC's rules provide a limited role for NAPM, subject to NANC oversight:

47 C.F.R. § 52.26(b)(2): The regional limited liability companies (LLCs) [*i.e.* NAPM] . . . shall manage and oversee the local number portability administrators, subject to review by the NANC, but only on an interim basis, until the conclusion of a rulemaking to examine the issue of local number portability administrator oversight and management and the question of whether the LLCs should continue to act in this capacity.

...

47 C.F.R. § 52.26(c): The NANC shall provide ongoing oversight of number portability administration, including oversight of the regional LLCs [*i.e.*, NAPM], subject to Commission review.

II. Analysis

The plain language of the rules assigns selection-related responsibility to NANC, not NAPM. As a comparison of the plain language of these rules demonstrates, the FCC has not given NAPM the authority to select or determine the number of LNP Administrators or to make other policy decisions such as the number of regions and whether there might be multiple, interconnected (*i.e.* peered) LNP Administrators in a given region. Those decisions are given to the NANC. Reading NAPM's authority to "manage and oversee" the LNP Administrator as a grant of authority over LNP selection and policy decisions that supplants the NANC makes no sense. The FCC adopted the rule designating the NAPM to provide oversight and management of the LNP Administrator contract *without* repealing the already-existing assignments of responsibility to NANC. The rules regarding NANC and NAPM must be read together. The

plain language makes clear that NANC bears selection-related responsibility. In addition, NAPM carries out its “oversight and management” of the LNP Administrator subject to express NANC and FCC oversight, as NAPM itself repeatedly has acknowledged.

No provision of the FCC’s *Number Portability Second Report and Order* suggests that the FCC intended any other result. Indeed, the FCC in the *Second Report and Order* assigned “immediate oversight of the local number portability administrators” because, at that time, they had been “responsible for negotiating the master contracts with their respective local number portability administrators,” which reinforces the reading that oversight and management was with respect to an *existing* contract, not a *new* contract.³

No delegation from NANC to NAPM. Furthermore, NANC never delegated its selection and other policy decision responsibilities to NAPM or its predecessors. Historically, in fact, the regional LLCs issued RFPs and made initial LNP administrator selection recommendations in 1996. However, that was a result of the FCC’s compressed implementation post-1996 Act schedule, under which the FCC mandated that database number portability commence by October 1, 1997.⁴ The FCC did not issue its First Number Portability Report and Order, in which it assigned the selection of the number portability administrator to NANC, until July 2, 1996, and NANC’s Local Number Portability Selection Working Group did not hold its initial meeting until November 8, 1996.⁵ By that time, RFPs had been issued in all but one region, and RFP responses had been submitted in four of seven regions.⁶

Even in that time-compressed environment, however, NANC maintained its authority over number portability selection. As the Local Number Portability Selection Working Group Report stated, “The LLCs are aware that NANC will ultimately review and act on the selection of LNPs and determine the guidelines for LNP deployment.”⁷ NANC ultimately reviewed and selected LNP Administrators, as well as making recommendations on the other key policy issues assigned to it.⁸ These recommendations were then considered, and in some cases modified, by the FCC before becoming final.⁹

³ *Telephone Number Portability*, Second Report & Order, 12 FCC Rcd. 12281, 12346 (1997) (“Second Report & Order”). Telcordia also believes that “oversight and management” does not include decisions to extend contracts, as that is tantamount to a new selection for the extension period.

⁴ *Telephone Number Portability*, First Report & Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352 (1996).

⁵ Local Number Portability Administration Selection Working Group Report to the North American Numbering Council, at §§1-2.3 & App. B (Apr. 25, 1997), <http://www.fcc.gov/wcb/cpd/Nanc/wknggrp.doc>.

⁶ *Id.* at App. C.

⁷ *Id.* at § 4.6.5.

⁸ *Id.* at §§ 6.2-6.6.

⁹ See *Second Report & Order*, 12 FCC Rcd. 12281. As an example of a modification, the FCC did not give the regional LLCs the permanent role of managing and overseeing the LNP Administrator, but did so on an interim basis only.

The fact that NANC generally has exercised relatively light oversight of NAPM in the intervening years does not alter NANC’s responsibilities with respect to the *new selection* of and receipt of bids for designation(s) as NPAC Administrator(s). Indeed, as the NPAC contract has not been re-bid since 1997, but has been extended by NAPM on multiple occasions without NANC or FCC pre-approval, there has been no occasion since 1997 for NANC even to consider a delegation of authority to NAPM with respect to a new contract solicitation.

Nor would any delegation of authority from NANC to NAPM have been advisable or lawful. Unlike NAPM, NANC’s members are appointed by the FCC, and its membership is subject to a statutory requirement of balance. NANC, unlike NAPM, has public interest members – state commissioners and consumer advocates – in addition to members of the industry. NANC’s industry membership is also broader than NAPM’s.

In addition, to the extent that *decision-making* (rather than recommendation) authority can rest with any entity other than the FCC, it can rest only with the entity designated expressly by the FCC. The unlawful subdelegation doctrine prohibits a federal entity from delegating decision-making to an “*outside entities* – private or sovereign – absent affirmative evidence of authority to do so.”¹⁰ The only possible source of express authority is Section 251(e)(1), which provides, “The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.”¹¹

Were NANC to have subdelegated its authority over LNP Administrator selection and related policy issues, it would have shifted without the FCC’s consent any decision-making authority from the entity entrusted by the FCC (the NANC) to an outside third party (the NAPM). To the extent that Congress permitted the FCC to delegate responsibilities to non-federal entities, however, Congress gave that authority to the FCC only and not to the NANC; thus NANC cannot subdelegate its authority without the FCC’s affirmative consent – which has never been solicited or granted.

¹⁰ *United States Telecom Ass’n. v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (emphasis added).

¹¹ 47 U.S.C. § 251(e)(1).

Telcordia Nondelegation Doctrine Contribution

December 7, 2010

Page 6 of 6

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Accordingly, NAPM's assertion that it, rather than the NANC, has the authority to select the LNP Administrator and to make other key policy decisions such as the number of administrators, the scope of the areas they will serve and whether they will be "peered," is groundless and unsupported. By the FCC's plain direction, those responsibilities rest where they always have: with the NANC.

Respectfully submitted,

/s/ John T. Nakahata

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