REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	
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	WC Docket No. 09-109
Telephone Number Portability	CC Docket No. 95-116

REPLY COMMENTS OF NEUSTAR, INC.

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REPLY COMMENTS OF NEUSTAR, INC.

Neustar, Inc. ("Neustar") submits these reply comments in response to the Public Notice released by the Wireline Competition Bureau ("Bureau") on June 9, 2014.[1]

INTRODUCTION AND EXECUTIVE SUMMARY

The Comments filed in response to the Bureau's Public Notice establish that the Commission cannot lawfully accept the recommendation of the North American Numbering Council ("NANC") to select Ericsson's wholly owned subsidiary, Telcordia d/b/a iconectiv, as the vendor to serve as Local Number Portability Administrator ("LNPA"). The Commission,

[1] *See* Public Notice, *Commission Seeks Comment on the North American Numbering Council Recommendation of a Vendor To Serve As Local Number Portability Administrator*, WC Docket No. 09-109, CC Docket No. 95-116, DA 14-794 (FCC rel. June 9, 2014) ("Public Notice"); *see also* Public Notice, *Commission Extends Comment Deadlines for Public Notice Seeking Comment on the North American Numbering Council Recommendation of a Vendor To Serve As Local Number Portability Administrator*, WC Docket No. 09-109, CC Docket No. 95-116, DA 14-937 (FCC rel. June 27, 2014); Public Notice, *Commission Further Extends Reply Comment Deadline for Public Notice Seeking Comment on the North American Numbering Council Recommendation of a Vendor To Serve As Local Number Portability Administrator*, WC Docket No. 09-109, CC Docket No. 95-116, DA 14-937 (FCC rel. Aug. 8, 2014).

instead, must initiate a notice-and-comment rulemaking to consider the many issues that the NANC's recommendation fails to address – or that the process resolved incorrectly – with respect to selection of the next LNPA.

Aside from Ericsson itself, the only parties that support the NANC recommendation are CTIA and USTelecom – representatives of the large carriers that dominated the process that led to Ericsson's selection in the first place. Despite claims that the process leading to the NANC recommendation has been fair and representative of all parties' interests, not only have no other parties risen to the recommendation's defense, but a variety of constituents, including small carriers, law enforcement, and third party vendors, have called for additional due diligence. In addition, neither Ericsson nor CTIA/USTelecom has credibly addressed the legal objections to the NANC's recommendation. No commenter has provided any reasoned argument that Ericsson's wholly owned subsidiary satisfies the statutory impartiality requirement or the neutrality requirements of the Commission's rules and the RFP. No one has explained how the Commission can modify its existing rules without engaging in notice-and-comment rulemaking. No one can legitimately defend the legality and regularity of the process that led to a recommendation – supposedly based on price – that failed to consider the parties' lowest-priced offers.[2] No one can address whether any price difference reflects the failure of Ericsson's proposal to comply with neutrality obligations. Nor can anyone tease out of the recommendation or the supporting documents any justification for the conclusions that (1) a proposed transition to Ericsson will guarantee that the Number Portability Administration Center ("NPAC") continues

[2] Neustar continues to object to the overbreadth of the Protective Order in this proceeding, which has unfairly limited the ability of Neustar's counsel and business executives to participate in this proceeding. These comments do not waive Neustar's right to challenge the legality of this proceeding on this basis.

to provide the same level of service on which NPAC users have come to rely; and (2) the costs and risks of transition – which will fall particularly hard on smaller competitors – will not outweigh any potential cost savings. Nor can anyone address the public safety, law enforcement, and national security implications of the NANC's recommendation, or the impact of those issues on the eventual cost of the proposals. By contrast, numerous carriers and their representatives have rightly called on the Commission to scrutinize a recommendation that threatens to weaken a cornerstone of telecommunications competition, with consequent harm to service providers and consumers.

Ericsson and its wholly owned subsidiary are not impartial and do not satisfy the applicable neutrality requirements. Ericsson's comments do nothing to overcome its failure to comply with neutrality obligations or to bolster the inadequate showing from its submissions to the FoNPAC. On the contrary, although Ericsson continues to withhold the information that the Commission and interested parties need to evaluate its claims of impartiality and neutrality fully, the record already confirms that Ericsson's many ties to the wireless industry and a few large carriers – in particular, its managed services clients Sprint and T-Mobile – preclude it and its subsidiary Telcordia from being impartial or neutral. Ericsson's status as a network equipment manufacturer likewise disqualifies it and its affiliate from serving as the LNPA. Furthermore, while Ericsson has failed to provide required disclosures regarding SunGard's ownership and corporate structure, the record demonstrates that SunGard, too, is non-neutral, thus disqualifying Ericsson's bid. Particularly in light of the critical role that Ericsson's corporate backing and SunGard's services play in Ericsson's bid, the deficiency of its neutrality showing is fatal to its proposal.

A rulemaking is required. The designation of a numbering administrator is an exercise of rulemaking authority under Section 251(e)(1) for which notice-and-comment rulemaking is required. For the Commission to accept the NANC's recommendation would require a change to Commission rules that were adopted pursuant to a Federal Register-published notice and incorporated into the Code of Federal Regulations, including the designation of Neustar and the adoption of neutrality requirements that bar equipment vendors or their affiliates from serving as the LNPA. CTIA/USTelecom's claim that the designation of a numbering administrator is an adjudication is inconsistent with the Commission's own precedent and finds no support in the cases on which they purport to rely.

The flawed process leading up to the NANC's recommendation renders it invalid. Ericsson attempts to defend the NANC's recommendation primarily on the grounds that its proposal is cheaper than Neustar's. According to the RFP's evaluation criteria, however, cost was the factor of least importance, behind technical and management criteria. This reliance on price is all the more problematic because the NANC did not have the opportunity to consider Neustar's best proposal – on the contrary, as a result of unlawful action [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] the industry [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] declined to call for further proposals, despite the availability of an improved Neustar bid. The NANC's recommendation and the supporting documents demonstrate that there was no factual or legal justification for the refusal to consider improved proposals – particularly when, by Ericsson's own admission, price played such a critical role in the NANC's recommendation.

The NANC's recommendation fails to justify the proposed selection of Ericsson. The recommendation, on its face, falls well short of providing the Commission the detailed information it needs to conduct a meaningful independent review of the selection process and vendor recommendation. In particular, the recommendation does not demonstrate that Ericsson's proposal was equivalent, much less superior, to Neustar's with respect to technical and management criteria, despite the priority that these criteria were to be given over price. Moreover, the recommendation did not adequately consider the transition risks and costs, particularly its effect on smaller providers that could not participate in the recommendation process. It also failed to address the impending IP transition, despite the central importance of this transition to the next LNPA. CTIA and USTelecom's defense of the recommendation, like Ericsson's, focuses almost exclusively on the process that led to the recommendation rather than the actual decision and record evidence that is before the Commission and on which a final determination must be based.

The process has failed to consider public safety, law enforcement, and national security.[3] Because the RFP did not include any mechanism to examine and assess the critical national security, law enforcement, and public safety issues implicated by a potential transition of the LNPA's responsibilities to a foreign-owned corporation, the Commission must address those issues now, with appropriate input from Executive Branch agencies responsible for these matters. Once the Commission has adequately defined the applicable security requirements, the bidding process must be reopened to permit vendors to compete. Furthermore, the Commission

[3] These Reply Comments are supplemented by Supplemental Reply Comments of Neustar, Inc., which contain Highly Confidential and Restricted Access Critical Infrastructure Information and which were separately filed on August 22, 2014, in accordance with procedures specified by the Commission, and incorporated by reference herein.

must consider the national security implications of potential foreign ownership of the LNPA, an issue that has not been addressed through the RFP process.

DISCUSSION

When an agency acts to award a contract – whether in the context of a government procurement or, as here, when it is acting in a regulatory capacity overseeing a private contract – it is fully subject to the requirements of the Administrative Procedure Act ("APA"). Agency actions related to procurements are thus set aside when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law."[4] Under the governing standard, "a bid award may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure."[5] Applying these general standards, reviewing courts overturn agency decisions related to procurements when, for example, the agency violates an applicable statute or regulation;[6] the agency fails to adhere to the criteria in the solicitation;[7] the agency fails to document its decision adequately;[8] the agency treats offerors unequally;[9] or

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4 5 U.S.C. § 706(2)(A), (D).

5 *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (internal quotation marks omitted).

6 *See, e.g., Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 203-04 (D.C. Cir. 1984).

7 *See Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1359-60 (11th Cir. 1994) (terms of solicitation barred agency from treating cost as most important factor); *210 Earll, LLC v. United States*, 77 Fed. Cl. 710, 722 (2006) ("failure to consider the non-price factors . . . constitutes reversible error").

8 *See, e.g., IAP World Servs., Inc.*, B-407917.2 *et al.*, 2013 CPD ¶ 171, 2013 WL 3817472, at *8 (Comp. Gen. July 10, 2013) (bid award based on assumptions about relationship between offeror and corporate affiliate that were not supported in the record).

9 *See, e.g., Bayfirst Solutions, LLC v. United States*, 102 Fed. Cl. 677, 686-91 (2012).

there is a showing of subjective bad faith or favoritism.[10]

If the Commission were to approve the selection of Ericsson as the LNPA on the current record, such action would be arbitrary and capricious on most, if not all, of these grounds. As discussed in detail below, Ericsson and its wholly owned subsidiary Telcordia do not comply with the statutory requirement of impartiality or the Commission's neutrality regulations; moreover, nothing in the recommendation even addresses those requirements, even though the RFP required the NAPM LLC to evaluate offerors' neutrality showings. The process treated bidders unequally, breaking the rules of the RFP by extending the deadline for Ericsson, and improperly refusing to consider further proposals even though that was permitted by the rules of the RFP. The recommendation fails to adhere to the evaluation criteria in the RFP by treating price as the most important consideration without any documentation to support the assertion that the proposals [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] The recommendation and underlying documents fail to consider adequately important aspects of the problem, including transition costs, the TDM-to-IP transition and the role of the NPAC; and adverse effects on law enforcement, national security, and public safety. More generally, because the NANC's recommendation is effectively a "black box," providing little or no analysis or data to support its conclusions on any technical or managerial issue, the Commission has no record support for the proposed selection of Ericsson. For all of these reasons, the Commission cannot accept the NANC recommendation but must initiate further proceedings to comply with its statutory obligation under Section 251(e)(1).

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[10] *See generally Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203-04 (Cl. Ct. 1974) (discussing grounds for challenge to procurement decision).

I. ERICSSON HAS FAILED TO SHOW THAT IT IS IMPARTIAL OR THAT IT WOULD BE A NEUTRAL NUMBERING ADMINISTRATOR

As Neustar and other commenters have explained, the Commission cannot lawfully select Ericsson's wholly owned subsidiary to serve as the LNPA because neither Ericsson[11] nor its subcontractor, SunGard Availability Services ("SunGard"), can satisfy the impartiality and neutrality requirements imposed by the statute and the Commission's rules. Ericsson would have the Commission gloss over these mandatory restrictions and award the LNPA contract based on price alone, thus ignoring the sole statutory criterion for serving as the LNPA. Yet nothing that Ericsson has submitted in (or in some cases omitted from) the record in this proceeding can obscure the fact that the Commission would be acting unlawfully if it were to select Ericsson as the next LNPA.

A. Ericsson Is Not Neutral Because It Is Aligned with and Subject to the Undue Influence of the Major Wireless Carriers

To ensure the smooth functioning of the NPAC, the LNPA must be neutral and impartial – as the statute and rules require.[12] As the LNP Alliance – a "consortium of small and medium

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[11] For the same reasons that Ericsson the parent is disqualified from serving as the LNPA, its wholly owned subsidiary, Telcordia, is also disqualified. *See* Neustar Comments at 23 ("Ericsson is the sole shareholder of its subsidiary; under the Commission's rules (and as a matter of law and common sense), Ericsson thus controls its subsidiary – something that goes well beyond mere undue influence or indirect affiliation."); *id.* at 15 (explaining that Ericsson acquired Telcordia to "help boost Ericsson's expansion of its North American managed services business, a segment where Ericsson takes over the day-to-day management of an operator's phone network for a fee"); *see also* Ericsson Comments at 14-15 (arguing that "Telcordia's parent company Ericsson also meets the neutrality requirements outlined in the RFP" and offering safeguards "to minimize any perception that Ericsson could exert any undue influence"). There are also serious questions about Telcordia's industry ties as well. *See* LNP Alliance Comments at 3, 11-13.

[12] To be a Neutral Third Party, the LNPA must, at a minimum: (1) be an independent, non-governmental entity, not aligned with any particular telecommunications industry segment; and (2) not be an affiliate of a Telecommunications Service Provider; (3) not be subject to undue influence by parties with a vested interest in the outcome of numbering administration and

. . . providers that currently consists of Comspan Communications, Inc., Telnet Worldwide, Inc., the Northwest Telecommunications Association ("NWTA"), and the Michigan Internet and Telecommunications Alliance ("MITA")" – explains, "neutrality should not be a close call. The prevailing bidder must be beyond reproach in terms of neutrality."[13] Ericsson, however, is not impartial because of its extensive ties to major wireless providers.[14] Ericsson provides network infrastructure equipment, managed services, and vendor financing to major U.S. telecommunications service providers ("TSPs"), making Ericsson the self-proclaimed "largest telecom services provider in the world."[15] Ericsson must be disqualified because it is not impartial or neutral, and none of the inadequate safeguards that Ericsson has proposed to put in place can make it so.

1. Ericsson's Involvement in the Provision of Wireless Service by Sprint and T-Mobile Disqualifies It from Serving as the LNPA

Ericsson's comments gloss over its largest business relationships in North America, which include Managed Services Agreements ("MSAs") with at least two U.S. wireless providers – Sprint (including its recently acquired subsidiary, Clearwire) and T-Mobile.[16]

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activities; or (4) not be a manufacturer of telecommunications network equipment or an affiliate of such a manufacturer. 47 C.F.R. §§ 52.12(a)(1), 52.21(k); Vendor Qualification Survey § 3.4 at Telcordia05010; Neustar Comments at 46-47. Further, the FCC has interpreted and applied certain aspects of these requirements in prior Commission orders, and it would be arbitrary and capricious not to apply the same rules to Ericsson. *See* Neustar Comments 29-30.

[13] LNP Alliance Comments at 7.

[14] Neustar Comments at 14-34; LNP Alliance Comments at 2-3, 11; TelePacific and HyperCube Comments at 4.

[15] 2013 Ericsson Annual Report at 16, 26, *available at* http://www.ericsson.com/thecompany/investors/financial_reports/2013/annual13/sites/default/files/download/pdf/EN_-_Ericsson_AR2013.pdf.

[16] As of June 30, 2014, T-Mobile and Sprint had 50.5 million and 54.6 million subscribers, respectively, in the United States.

Ericsson is also considering expanding this line of business to manage the networks of other TSPs, including Verizon and AT&T.[17]

Ericsson's managed services relationships implicate the same concerns that animate the Commission's prohibition on affiliates of telecommunications services providers serving as neutral numbering administrators.[18] For example, under the terms of the Sprint-Ericsson MSA, Sprint exerts "control" over Ericsson's "management and policies" as it relates to this "contract."[19] Specifically, the MSA requires "[Ericsson] and its Subcontractors, and their employees, agents and representatives [to] at all times comply with and abide by all policies and procedures of Sprint"[20] and its business Code of Conduct.[21] The MSA also establishes mandatory "Service Levels," or "specific performance metrics measuring the quality [and] efficiency" of network services, that Ericsson must meet to perform the contract.[22] At the same

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17 *See* Neustar Comments at 18; Letter from John T. Nakahata, Counsel, Ericsson, to Sanford C. Williams, FCC, and the FoNPAC (Nov. 13, 2013) ("Follow-Up Response") to Question 10 at Telcordia06424.

18 Under the Commission's rules, the LNPA "may not be an affiliate of any telecommunications service provider(s)." 47 C.F.R. § 52.12(a)(1)(i). An affiliate is a person who "controls, is controlled by, or is under the direct or indirect common control with another person." *Id.* "Control" includes "[t]he power to direct or cause the direction of the management and policies of [another] person . . . by contract." *Id.* § 52.12(a)(1)(i)(C). Because it has withheld its MSAs from public inspection, Ericsson has not submitted sufficient information to permit the Commission to make a reasoned decision about whether Ericsson is affiliated with a TSP.

19 *Id.* § 52.12(a)(1)(i)(C).

20 Managed Services Agreement By and Between Sprint/United Management Company and Ericsson Services Inc. § 17.1 (July 7, 2009) ("MSA"). Although the full MSA between Ericsson and Sprint has not been made public, a redacted version of the agreement was filed as an exhibit to a Securities and Exchange Commission submission by Clearwire. *See* http://www.sec.gov/Archives/edgar/data/1442505/000095012311072552/v57546exv10w6.htm.

21 *Id.* § 17.2.

22 *Id.* § 2.1.2; Ex. A.

time, the MSA allows Ericsson to exert "control" over Sprint because Ericsson "has the responsibility for, and control over," the operation, management, and provision of Sprint's telecommunications network.[23] Selecting Ericsson as the LNPA – despite its entanglement with the operations of at least two of the largest TSPs in the United States – would fly in the face of Section 251(e)(1) and the Commission's neutrality rules.

2. Ericsson Is Subject to Undue Influence

Ericsson's relationships with these TSPs cause it to be "subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities"[24] and "involved in . . . contractual or other arrangement[s] that would impair its ability to administer the NPAC/SMS fairly and impartially as an LNPA."[25] Due to the numbering responsibilities undertaken by Ericsson in its MSAs, Ericsson itself may have a vested interest in the outcome of numbering administration and activities.[26]

More broadly, Ericsson's contractual ties to the wireless industry also put the industry in a position to exert undue influence over Ericsson.[27] As the LNP Alliance explains, "Ericsson, as a manufacturer and supplier of services to the wireless telecommunications industry, is indisputably aligned with a telecommunications industry segment, the wireless industry,"[28]

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23 *Id.* § 19.12.

24 47 C.F.R. § 52.12(a)(1)(iii); *see* 2015 LNPA RFP § 4.2 at Telcordia00005.

25 Vendor Qualification Survey § 3.4 at Telcordia05010; 2015 LNPA RFP § 4.2 at Telcordia00005.

26 *See* Neustar Comments at 17-18. For example, Ericsson's MSA with Clearwire makes Ericsson responsible for ensuring that adequate numbering resources are available to Clearwire and for managing numbering issues on behalf of Clearwire. *See id.* at 17.

27 *Id.* at 20-23.

28 LNP Alliance Comments at 9; *see also id.* at 11 [**BEGIN HIGHLY CONFIDENTIAL INFORMATION**] [redacted]

which violates the Commission's rules and the terms of the Vendor Qualification Survey ("VQS").[29] Ericsson claims that Telcordia "is not involved in a contractual or other arrangement that would impair its ability to administer the NPAC/SMS,"[30] but, as the LNP Alliance points out, Ericsson [**BEGIN HIGHLY CONFIDENTIAL INFORMATION**] [redacted] [**END HIGHLY CONFIDENTIAL INFORMATION**]

Instead of addressing its contractual ties to the wireless industry, Ericsson tries "to minimize any perception that Ericsson could exert any undue influence" over Telcordia by proposing various safeguards intended to establish Telcordia's independence.[33] But an entity that is disqualified from serving as a neutral administrator as a result of extensive commercial ties to an industry segment cannot be made impartial through safeguards; if safeguards were sufficient, any TSP could serve as the LNPA. As explained in detail below, there are no safeguards that could insulate Ericsson's wholly owned subsidiary from the business interests of

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29 *See* 47 C.F.R. § 52.21(k); Vendor Qualification Survey § 3.4 at Telcordia05010.

30 Letter from John T. Nakahata, Counsel, Ericsson, to the FoNPAC and NAPM, LLC (Apr. 4, 2013) ("Legal Opinion Letter") at Telcordia06079.

31 LNP Alliance Comments at 13.

32 *Id.* at 11.

33 Ericsson Comments at 15.

its parent company and its parent company's shareholders.[34] Indeed, the LNP Alliance explains that, [**BEGIN HIGHLY CONFIDENTIAL INFORMATION**] [redacted] [**END HIGHLY CONFIDENTIAL INFORMATION**]

In proposing these safeguards, Ericsson also ignores the Commission's prior decisions interpreting the neutrality rules as imposing requirements that supplement those restrictions codified in the agency's rules.[36] Ericsson claims that the only neutrality requirements with which it must comply are those incorporated into the RFP.[37] As Neustar has explained, however, Ericsson must demonstrate its compliance with the specific neutrality requirements that the Commission has adopted in its precedent and incorporated by reference into its rules; failure to require Ericsson to meet the same neutrality standard to which the Commission has held Neustar for more than a decade would be arbitrary and capricious.[38]

Ericsson's promise that Telcordia will "treat all service providers equally" reflects a misunderstanding of the statutory impartiality requirement.[39] Congress's use of the different terms "nondiscriminatory" and "impartial" in Section 251 means these words must be given

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34 *See* Neustar Comments at 28-29; LNP Alliance Comments at 13-16.

35 LNP Alliance Comments at 15.

36 *See* Neustar Comments at 24-30.

37 Ericsson Comments at 13-14.

38 *See* Neustar Comments at 29-30; *see also Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.").

39 Ericsson Comments at 15.

different meanings.[40] To be "impartial" means to be "[u]nbiased" or "disinterested."[41] By contrast, "nondiscriminatory" means avoiding "[d]ifferential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."[42]

Section 251(e)(1) does not impose mere nondiscrimination obligations on numbering administrators; rather, it requires that the Commission select (or create) an *impartial entity* to perform that function.[43] The requirement that the LNPA be impartial is thus a significantly higher standard and differs fundamentally from nondiscrimination obligations, such as the Section 251 obligation to provide nondiscriminatory access to unbundled network elements[44] and the Section 271 obligations to provide nondiscriminatory access to numbering and routing

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40 *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (" '[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.' " (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th rev. ed. 2000)).

41 *Black's Law Dictionary* 820 (9th ed. 2009).

42 *Id.* at 534.

43 The importance of the LNPA's impartiality is underscored by the FCC's approach to cost allocation and recovery. Section 251(e)(2) provides that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." The Commission has emphasized that the focus of this provision is to ensure no service provider is given an incremental cost advantage over another service provider, even if that means the recovery mechanism shifts costs among the providers so long as it is done on a "competitively neutral basis." Third Report & Order, *Telephone Number Portability*, 13 FCC Rcd 11701, 11731-33, ¶¶ 52-60 (1998). An LNPA subject to undue influence by large TSPs would have an incentive to undercut this mandate.

44 47 U.S.C. § 251(c)(3); *see also id.* § 251(b)(3) (establishing a duty "to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays").

resources.[45] At the time of the 1996 Act, Congress would have understood that "nondiscrimination" by incumbent local exchange carriers ("ILECs") was possible. It nevertheless elected a higher standard by requiring the numbering administrator to be "impartial" – that is, an independent entity not entangled with competing telecommunications interests.

The Commission has interpreted Section 251(e)(1) to preclude any significant financial entanglement between a numbering administrator and a TSP or interconnected VoIP provider ("IVP"); a less demanding interpretation would not meet the statutory requirement. This more stringent approach to competitive neutrality in Section 251(e)(1) makes sense given the competitive sensitivity of numbering administration and the pro-competition goals of the 1996 Act.[46]

Ericsson's promise to behave in a nondiscriminatory fashion has no bearing on whether it can be an "[u]nbiased" or "disinterested" numbering administrator within the meaning of Section 251(e)(1).[47] If nondiscriminatory treatment had been the standard, when Telcordia's predecessor, BellCore, relinquished its role as the administrator of the North American Numbering Plan, there would have been no reason that NECA or ATIS could not have taken over that responsibility as long as they agreed to "treat all service providers equally."[48] Yet the

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45 47 U.S.C. § 271(c)(2)(B)(ix) (requiring the Bell operating companies ("BOCs") to provide "nondiscriminatory access to telephone numbers"); *id.* § 271(c)(2)(B)(x) (requiring BOCs to provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion"); Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, 19446-47, ¶ 106 (1996) (concluding that "the term 'nondiscriminatory access to telephone numbers' requires a LEC providing telephone numbers to permit competing providers access to these numbers that is identical to the access that the LEC provides to itself").

46 *See* Neustar Comments at 46-47.

47 *Black's Law Dictionary* 820 (9th ed. 2009).

48 Ericsson Comments at 15.

Commission determined that those organizations were not impartial, stating, "[w]e share the concerns expressed in the comments of the appearance of bias associated with entities such as NECA and ATIS, both of whom historically have been closely associated with LECs."[49] Likewise, because of its strong alliance with its managed services customers in particular and the wireless industry in general, Ericsson is not impartial, and its wholly owned subsidiary Telcordia therefore is not either.

3. Ericsson Fails To Address the Ban on Telecommunications Network Equipment Manufacturers or Their Affiliates Serving as the LNPA

Ericsson is also barred from serving as the LNPA because it has "a direct material financial interest in manufacturing telecommunications network equipment."[50] The LNP Alliance agrees "that the Commission's rules do not permit a telecommunications equipment manufacturer or its affiliate to act as the LNPA"[51] because the "recommendations of the NANC *Working Group Report* were explicitly 'incorporated by reference' into 47 C.F.R. § 52.26(a)."[52] Telcordia is barred because it is "affiliated" with Ericsson in more "than a *de minimis* way."[53] As the LNP Alliance writes, Telcordia is [**BEGIN HIGHLY CONFIDENTIAL INFORMATION**] [redacted] [**END HIGHLY CONFIDENTIAL**

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49 Report and Order, *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588, 2613, ¶ 57 (1995) ("*NANP Administration Report and Order*").

50 1997 Selection Working Group Report § 4.2.2(B).

51 LNP Alliance Comments at 6.

52 *Id.* at 7; *see also* Neustar Comments at 34.

53 1997 Selection Working Group Report § 4.2.2(B).

54 LNP Alliance Comments at 9; *see also id.* at 2-3 (arguing that Ericsson "is a telecommunications equipment manufacturer that is very closely aligned with the wireless telecommunications industry segment").

INFORMATION] Ericsson does not even mention – much less describe how it complies with – this provision.[55]

B. SunGard Is Not Neutral Given Its Affiliation with IVPs and TSPs

Ericsson's proposal is fatally deficient for the additional reason that its subcontractor, SunGard, cannot satisfy the applicable neutrality requirements. Ericsson proposes to delegate to SunGard the LNPA duty of maintaining data centers and operating the LNP database through which information that is confidential, proprietary, and competitively sensitive will flow. As Neustar has explained,[56] SunGard is an affiliate of at least one IVP, Avaya Inc., and at least two TSPs, SunGard NetWork Solutions Inc. ("SNS") and RigNet, Inc. ("RigNet").[57] SunGard is also subject to undue influence from the private equity ownership that it shares with the IVP and TSPs.[58] Given the central role that SunGard would have in administering the NPAC under Ericsson's proposal,[59] Ericsson must be disqualified because it has proposed to rely upon a subcontractor that is not neutral.

1. Ericsson's argument that SunGard need not be neutral to serve as its subcontractor is incorrect.[60] The Commission's rules (which the RFP and VQS incorporate by reference) provide that "[a]ny subcontractor that performs – (i) NANP administration and central office code administration, or (ii) Billing and Collection functions, for the NANPA or for the B&C

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55 *See id.* at 14 [**BEGIN HIGHLY CONFIDENTIAL INFORMATION**] [redacted] [**END HIGHLY CONFIDENTIAL INFORMATION**]

56 Neustar Comments at 36-40.

57 *Id.* at 40-42.

58 *Id.*

59 *Id.* at 42-43.

60 Ericsson Comments at 15-16.

Agent must also meet the neutrality criteria described in paragraph (a)(1)."[61] As Neustar explained,[62] SunGard would perform the equivalent LNP administration functions on Ericsson's behalf in its role as "data center and service partner."[63] Ericsson's bid touted SunGard's experience "operating data centers around the world,"[64] claiming that SunGard has the "experience using certified methodologies to ensure a quality NPAC SMS software application is architected, designed, built, tested, and continually operated in order to satisfy the needs of the NAPM."[65] SunGard's role is [**BEGIN HIGHLY CONFIDENTIAL**] [redacted] [**END HIGHLY CONFIDENTIAL INFORMATION**]

The VQS and RFP similarly stated that not only the LNPA, but "all of its Sub-Contractors," must be "Neutral Third Parties."[68] Ericsson relies on language from the VQS that

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61 47 C.F.R. § 52.12(a)(2); *see also* 2015 LNPA RFP § 4.2 at Telcordia00005 (incorporating regulation); Vendor Qualification Survey § 3.4 at Telcordia05009.

62 Neustar Comments at 42-43.

63 iconectiv, Technical Requirements Document (TRD), Section 12 – TRD Detailed Response, at Telcordia08081.

64 *Id.*; *see also id.* at Telcordia08122.

65 *Id.* at Telcordia08087.

66 LNPA Procurement Presentation and Q & A in Denver, Colorado, Telcordia Technologies, Inc. d/b/a iconectiv, at 152 (Aug. 6, 2013) ("Telcordia Presentation"), *available at* http://apps.fcc/gov/ecfs/comment/view?id=6017881455.

67 *Id.* at 123.

68 2015 LNPA RFP § 4.2 at Telcordia00005; *see also* Vendor Qualification Survey § 3.4 at Telcordia05009.

refers to the ability of a disqualified "Primary Vendor" for the LNPA contract to serve as another bidder's "Sub-Contractor (hardware/software provider)" if the "Primary Vendor" qualifies as a Neutral Third Party.[69] Whatever that language means – and it is not clear – it does not apply to SunGard both because SunGard never attempted to be the Primary Vendor and because Ericsson does not propose merely to acquire hardware and/or software from SunGard. The provisions of the RFP require the LNPA to submit to biannual audits that demonstrate that it and all of its subcontractors are Neutral Third Parties.[70] Accordingly, the language that Ericsson cites means, at most, that a neutral LNPA might acquire hardware and software from a non-neutral vendor so long as the non-neutral vendor had no ongoing role in the provision of LNPA services.[71] SunGard's role is not so limited.[72]

2. Contrary to Ericsson's assertion, SunGard's recent corporate change did nothing to cure its lack of neutrality. Ericsson writes that "Sungard's corporate parent, SunGard Data Systems Inc. ('SDS') spun off the Sungard Availability Services business," and claims that this

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69 Vendor Qualification Survey § 3.4 at Telcordia05010 ("It is possible for a Primary Vendor that is precluded from being the NPAC/SMS Administrator may be allowable as another Primary Vendor's Sub-Contractor (hardware/software provider) if that Primary Vendor qualifies as a Neutral Third Party in responding to the RFP."). This language is absent from the RFP.

70 2015 LNPA RFP § 4.2 at Telcordia00004.

71 If Ericsson's interpretation of the neutrality exception for subcontractors were correct, there would be nothing to prevent a TSP from acting as a subcontractor to another vendor that itself is neutral. This cannot be the result intended by the NAPM LLC, the Commission, or Congress.

72 This is consistent with the application of subcontractor neutrality for the most recent NANPA and Pooling Administrator ("PA") procurements conducted by the Commission. The NANPA solicitation contained language stating that "[a]ny subcontractor that performs . . . NANP Administration and central office code administration . . . must also meet the neutrality criteria described in paragraph (a)(1)." FCC12R0007 Amendment 1, at 1-3 (Mar. 21, 2012). The PA solicitation required that "[a]ny subofferor that performs numbering plan administration or central office code administration under this contract must also meet the neutrality criteria and certify and recertify compliance in like manner." FCC13R0002, at 16 (Apr. 26, 2013).

corporate change "further ensures its neutrality."[73] Ericsson asserts that the neutrality issue caused by ownership of Avaya, an IVP, by Silver Lake and TPG, two of the private equity companies that own SDS, is mooted by this change in SunGard's ownership. But Ericsson fails to disclose that SunGard was spun off to the same seven private equity owners, including Silver Lake and TPG, that own its former parent. Thus, Ericsson's contention that none of SunGard's owners "hold[s] a great [sic] than ten percent interest in a Telecommunications Service Provider" does not appear to be accurate. Not only does the ownership of Avaya by these two SunGard investors remain a neutrality concern, the concern is heightened because their control of SunGard is now more direct. Ericsson's failure to disclose the identity of SunGard's private equity owners calls into question whether the Commission and commenting parties have all the facts that they need to evaluate Ericsson's ability to serve as a neutral LNPA.[74]

3. Ericsson also concedes that SunGard is an affiliate of SNS, which is a TSP.[75] Yet Ericsson claims that this affiliate relationship is immaterial because SNS does not offer switched services.[76] As Neustar has explained, however, the Commission's rules make no exception for

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73 Ericsson Comments at 16.

74 *Cf.* 47 C.F.R. § 1.65(a); *see also* Vendor Qualification Survey § 3.4 at Telcordia05010 ("A Respondent's submission to this Vendor Qualification survey and the RFP must fully disclose the corporate identity or affiliation of its Sub-Contractor(s). Failure to adequately do so may be a basis on which to disqualify the Primary Vendor from the RFP.").

75 Ericsson Comments at 17. Although SNS is registered as a TSP in three states, it has never filed FCC Form 499 or contributed to the Universal Service Fund. FCC, *2014 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A)*, Jan. 2014, § II.A, at 2 ("With very limited exceptions, all intrastate, interstate, and international providers of telecommunications in the United States must file this Worksheet."). Nor has another affiliate, SunGard Global Network, which offers connectivity service to the financial industry.

76 *Id.*

TSPs that do not offer such services.[77] Nor does the VQS or RFP, which define a TSP as, *inter alia*, "an entity that . . . possesses the requisite authority to engage in the provision to the public of facilities-based wireline local exchange or CMRS telecommunications services in any State or Territory of the United States."[78] By Ericsson's own acknowledgement, SNS possesses the requisite authority to engage in the provision of facilities-based wireline local exchange services to the public, which makes it a TSP under the terms of the VQS and the RFP. Because SNS is a TSP under the terms of the VQS and RFP, SunGard's affiliation with SNS is a bar to its selection as a subcontractor with responsibility for administering the NPAC.

Ericsson also failed to disclose another of SunGard's TSP affiliates, RigNet, a CLEC licensed in two states and which is almost 30% owned by one of SunGard's private equity investors, KKR.[79] Because RigNet is a TSP under the terms of the VQS and RFP, SunGard's affiliation with RigNet is a bar to its selection as a subcontractor with responsibility for administering the NPAC.

Nor does the *Warburg Transfer Order*[80] excuse SunGard's prohibited affiliate relationships.[81] As Neustar explained,[82] the Commission excused Warburg's ownership interests in TSPs only because Warburg agreed to reduce its ownership stake in Neustar to less than 10%

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77 Neustar Comments at 37-38.

78 Vendor Qualification Survey § 3.4 at Telcordia05010; 2015 LNPA RFP § 4.2 at Telcordia00005.

79 *See* Neustar Comments at 35. A representative of RigNet's 30% owner chairs SunGard's board of directors.

80 Order, *Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14 FCC Rcd 19792 (1999) ("*Warburg Transfer Order*").

81 *See* Ericsson Comments at 17.

82 Neustar Comments at 39-40.

and to place the remainder of its interest in an irrevocable voting trust.[83] In the *Safe Harbor Order*,[84] the Commission reduced that ownership limit even further to less than 5% and precluded the further use of voting trusts to meet that limit for neutrality compliance.[85] Ericsson has not attempted to show how SunGard will comply with the specific neutrality requirements adopted in the *Safe Harbor Order*.[86]

Ericsson's comments also do not explain why it failed to disclose any of the changes in SunGard's corporate structure or TSP affiliations while the proposal evaluation process was still underway. For example, KKR's investment in RigNet occurred in August 2013, and one of KKR's partners joined the RigNet board of directors in October 2013. Ericsson could have provided the NAPM LLC and the Commission with an updated neutrality legal opinion when these events happened. In October 2013, the NAPM LLC and the Commission requested that Ericsson provide additional information regarding its neutrality legal opinion, including several questions about SunGard, but Ericsson did not disclose the KKR investment in RigNet. SunGard's organizational change occurred in April 2014, yet Ericsson did not disclose it until it filed comments on July 25, 2014; even then, its disclosure was incomplete. Because the activities of private equity investment companies and their affiliated investment funds are not subject to the same disclosure requirements as publicly traded companies, it is possible that there are more neutrality concerns with SunGard that have not been revealed.

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83 *See Warburg Transfer Order*, 14 FCC Rcd at 19810, 19811, ¶¶ 28, 31.

84 Order, *North American Numbering Plan Administration; NeuStar, Inc. Request to Allow Certain Transactions Without Prior Commission Approval and to Transfer Ownership*, 19 FCC Rcd 16982 (2004) ("*Safe Harbor Order*").

85 *See id.* at 16992, ¶ 25.

86 *See* Neustar Comments at 39-40.

The VQS stated that bidders for the LNPA contract must "demonstrate an understanding and willingness to implement policies and procedures that will ensure satisfaction of these criteria and requirements."[87] Ericsson's failure to provide complete disclosure with regard to SunGard's reorganization and ownership demonstrates the opposite.

4. Ericsson claims that, regardless of SunGard's affiliate relationships, SunGard can still serve as its subcontractor because SunGard "is not subject to undue influence."[88] But that argument is inconsistent with the terms of the VQS, which imposes an additional requirement that the bidder – and subcontractors – not be "subject to undue influence" as one of the three mandatory criteria for being a Neutral Third Party.[89] All bidders agreed to comply with the neutrality provisions in the VQS. The omission from the VQS of the statement in Rule 52.12 that "[n]otwithstanding the [first two] neutrality criteria" a vendor "may be determined to be or not to be subject to undue influence by parties" means that an entity, like SunGard, that fails the objective affiliate test does not meet the RFP requirements, and the Commission cannot conclude that SunGard is qualified based on a finding that it would not be subject to undue influence.

Nevertheless, Ericsson is wrong in its assertion. SunGard is "subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities." To summarize, each of SunGard's seven private equity owners co-owns SNS, which is a TSP. Two

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87 Vendor Qualification Survey § 3.5 at Telcordia05010.

88 Ericsson Comments at 16-17.

89 Vendor Qualification Survey § 3.4 at Telcordia05010. The VQS is deliberately more stringent than the language in the Commission's Rule 52.12, which affords the Commission discretion to determine neutrality depending upon whether the party is subject to undue influence. In the past, the Commission has used the "notwithstanding" language in Rule 52.12 to determine that an entity could still be neutral even though it failed to satisfy the first two prongs of the neutrality standard (TSP affiliation, or revenue from or debt held by a TSP). *See Warburg Transfer Order*, 14 FCC Rcd at 19808, ¶ 24 (referring to the Commission's "broad discretion" under the "undue influence" prong of Rule 52.12).

of SunGard's owners also have substantial investments in Avaya, which is an IVP. Another of SunGard's investors, KKR, holds nearly 30% of RigNet, a TSP, and one of KKR's partners chairs the SunGard board of directors. SunGard is thus subject to undue influence from all of its owners, but especially Silver Lake,[90] TPG, and KKR. Development of a full record may bring additional concerns and sources of undue influence to light.

C. Ericsson's Proposed Safeguards Cannot Make Telcordia or SunGard Impartial and Neutral

Ericsson insists that Telcordia and SunGard will not be subject to "undue influence," relying on a series of alleged "safeguards" that, it claims, will "minimize any perception" of "undue influence."[91] In fact, those "safeguards" only underscore the degree to which Ericsson and SunGard are subject to undue influence. Ericsson will remain Telcordia's sole shareholder; their finances and corporate governance will remain intertwined. Ericsson's ownership of Telcordia is, by its own admission, not merely a financial investment; rather, it was a strategic purchase designed to help the parent company expand and deepen its business relationships with TSPs.[92] Moreover, none of the safeguards that Ericsson has proposed for SunGard will render it a neutral subcontractor.

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90 Silver Lake's founder, Glenn Hutchins, the chair of SDS's board of directors, sits on the board of directors of AT&T. His role with SunGard has not been disclosed, but his firm still owns a substantial stake in the company.

91 Telcordia Comments at 15.

92 Kevin O'Brien & Peter Lattman, *Ericsson to Acquire Telcordia for $1.15 Billion*, N.Y. TIMES, June 14, 2011, http://dealbook.nytimes.com/2011/06/14/ericsson-to-acquire-telcordia-for-1-15-billion/?_php=true&_type=blogs&_r=0. In contrast, the investment of Warburg Pincus in Neustar was purely financial and not undertaken to enhance any other Warburg Pincus business.

1. Telcordia Is Not Financially Independent from Ericsson and Is Subject to Ericsson's Influence for That Reason

Ericsson states that Telcordia has implemented "separate financial and accounting systems, provides its own compensation and benefits to its employees, and prohibits its employees from participating in Ericsson's Long Term Variable Stock Plan."[93] But this statement does not address the factors that give Ericsson the ability to influence the decisions of its wholly owned subsidiary. Telcordia's financial results are inextricably bound up in the consolidated financial results of its sole shareholder – Ericsson. For example, Telcordia's income and loss affect Ericsson's income and loss. Similarly, Telcordia's cash flow (positive or negative) affects Ericsson's cash flow. To the extent that Telcordia's own revenues prove insufficient to fund its cash needs – whether to fund its operations or to implement its capital budget – its likeliest source of cash (either by direct advance or by the use of Ericsson's credit) is its parent. Telcordia did not pledge to be independent of Ericsson's resources; on the contrary, Telcordia cites Ericsson's resources as one of Telcordia's unique advantages.[94]

The integration of the finances of parent and subsidiary demonstrates why awarding this contract to an entity whose parent both manages day-to-day operations for major TSPs and is a principal equipment vendor to TSPs creates the potential for – and the appearance of – partiality. By way of example, consider the following possibilities, all of which arise from the financial relationship between parent and subsidiary:

- Ericsson's desire for improved consolidated financial results (certainly a common goal of well-managed companies, especially publicly traded companies) leads it to press all of its subsidiaries (including Telcordia) to cut costs to improve the

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93 Telcordia Comments at 15.

94 *See* Neustar Comments at 30-33.

consolidated bottom line, thereby inducing Telcordia to delay or cut back on certain actions that it otherwise would take as the new LNPA.

- Ericsson's consolidated business planning, including, *e.g.*, capital allocation plans, requires input from all of its subsidiaries that then can be "rolled up" into an overall capital budget for the consolidated group. Doing so also requires Ericsson to make hard decisions as to where to allocate inevitably scarce capital resources. This exercise requires information from Telcordia that is not being presented contemporaneously to all players in the field it administers. It also could induce Telcordia to make (or have made for it) capital budget decisions that directly affect its ability to serve as the new LNPA. Such factors presumably had an impact on Ericsson's pricing strategy in its response to the RFP.

- Telcordia's need for cash or credit, combined with Ericsson's role as the likeliest source, gives Ericsson leverage over Telcordia operations. (Note in this regard that Telcordia has never represented that Ericsson would not be its principal lender/surety.)

- Decisions by Ericsson as to how to pay interest to or demand interest from its subsidiaries, including Telcordia, for cash draws from or contributions to a consolidated cash account – a typical cash management process for consolidated enterprises – could affect Telcordia's internal cash management and lead it to take actions different from what would be the case were it not part of a consolidated enterprise. Even if Telcordia's executives are compensated solely on the basis of Telcordia's and not Ericsson's results, Telcordia's results can be directly affected by intercompany transactions with its parent.

- Ericsson's desire for a competitive advantage – and the potential for increased revenue and profits at the parent level – could lead it either to press Telcordia for advance information regarding Telcordia's business plans or to provide Telcordia with Ericsson's "wish list" for how Telcordia should act. Either of these scenarios creates a potential for partiality.

- Telcordia officers and employees, even if not directly compensated based on consolidated Ericsson results, nevertheless are likely to view their future career path based on opportunities at Ericsson and not just within Telcordia.

These examples illustrate that the financial ties between parent and subsidiary create too many opportunities for mischief to award the LNPA contract to Telcordia.

2. Under Ericsson's Proposed Governance Structure, Telcordia Will Not Be Independent

Ericsson's promise to provide Telcordia with "its own board of directors, a majority of whom will be independent outside directors,"[95] likewise does not insulate Telcordia from Ericsson's effective control. As an initial matter, this implies that at least some of the board members will not be independent – *e.g.*, they may be members of both the Telcordia and Ericsson board of directors or be otherwise connected.[96] That in and of itself indicates that there will be an information flow between the two entities. Second, Ericsson, as Telcordia's sole shareholder, will have the exclusive powers to appoint and remove *all* of Telcordia's directors. Ericsson is conspicuously silent regarding any plans to relinquish these powers. Third, even the so-called "independent" directors will not be fully independent of Ericsson because, as Ericsson acknowledges, Telcordia's "independent" directors will owe fiduciary duties directly to Ericsson. Ericsson states that Telcordia's "independent" directors "will owe fiduciary duties . . . solely to Telcordia and its shareholders."[97] But Telcordia does not have "shareholders;" it has only one shareholder, and that shareholder is Ericsson. The "fiduciary duties" that Telcordia's directors will owe to Ericsson include the duty of loyalty.[98] If Telcordia must be loyal to Ericsson, it is hard to imagine that Ericsson lacks influence over Telcordia.

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95 Telcordia Comments at 15.

96 Indeed, Telcordia's interim Advisory Board includes Peter Heuman, Ericsson's Deputy Head of Business support systems. *See* http://www.prnewswire.com/news-releases/iconectiv-completes-board-appointments-220496331.html.

97 *Id.*

98 *See Malpiede v. Townson*, 780 A.2d 1075, 1095 & n.68 (Del. 2001) (stockholders may "free directors of personal liability in damages for due care violations, but not duty of loyalty violations, bad faith claims and certain other conduct," nor can shareholders " 'eliminate the duty of care,' " including "injunctive proceedings based on gross negligence") (quoting E. Norman

3. No Safeguards Could Render SunGard Impartial or Neutral

The safeguards that Ericsson has proposed to protect SunGard from undue influence are insufficient. To preserve SunGard's neutrality, Ericsson claims that SunGard employees who provide service to the NPAC will be bound by Telcordia's Code of Conduct and will only provide services at Telcordia's directive.[99] As Neustar has explained,[100] however, these so-called safeguards do not meet the standard of impartiality established by Congress. Ericsson proposes no mechanism to ensure that SunGard employees lack discretion to make independent choices with respect to numbering administration or to protect numbering information from the various TSPs with which SunGard is affiliated. Furthermore, the claim that SunGard employees will lack discretion and independence is hard to reconcile with the degree to which Ericsson touts SunGard's experience in the proposal.

D. There Is No Evidence That the NANC Evaluated Neutrality

There is no evidence that the FoNPAC, the NAPM LLC, the SWG, or the NANC ever examined, evaluated, or analyzed Ericsson's neutrality or the significant commercial entanglements that Ericsson has with the industry before the NANC submitted its recommendation to the Commission.[101] While conceding that "[n]othing in the FoNPAC or

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Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification and Insurance*, 42 Bus. Law. 399-404 (1987)).

99 Ericsson Comments at 16.

100 *See* Neustar Comments at 42-46.

101 *Id.* at 47-48. The NANC/NAPM consensus proposal – adopted by the Bureau with only a "few modifications" – explained that the "appropriate LNPA selection process is set forth in the [1997 SWG] *Working Group Report*, which, along with most of its Appendices, is incorporated by reference in Section 52.26 of the Commission's rules." 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; Telephone Number Portability*, 26 FCC Rcd 6839, 6840-

SWG report suggests that any member of those bodies questioned Telcordia's neutrality,"[102] Ericsson maintains that the NANC must have factored neutrality into its recommendation because the VQS indicated that the NAPM LLC would do so.[103] The record contradicts Ericsson's argument. Ericsson was not neutral at the time it submitted its bid because it held an interest in CENX, which was registered with the FCC as a TSP at the time of Ericsson's bid and BAFO submissions.[104] Ericsson's management services contracts with at least Sprint and Clearwire were well known throughout this process and Ericsson's legal opinion notes that its chosen subcontractor, SunGard, had affiliations with SNS and Avaya.[105] Yet the record contains no evaluation of, or even reference to, any of these relationships. Instead, the FoNPAC's recommendation was based on [**BEGIN CONFIDENTIAL INFORMATION**] [redacted]

41, ¶ 6 (Chief, Wireline Comp. Bur. 2011) ("May 2011 Bureau Order"); Order and Request for Comments, *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*, 26 FCC Rcd 3685, 3694 (Chief, Wireline Comp. Bur. 2011) ("March 2011 Bureau Order"). The process described in the 1997 SWG Working Group Report included a thorough pre-qualification screening of candidates, including for neutrality. The failure of the FoNPAC and the SWG to evaluate neutrality was thus contrary to the requirements of the process as set out in the May 2011 Bureau Order.

102 Ericsson Comments at 4.

103 *Id.*; *see also* CTIA/USTelecom Comments at 18 (arguing that the FoNPAC "carefully evaluated all pertinent issues and concerns regarding the neutral administration of the NPAC/SMS database").

104 *See* Ericsson Comments at 14 n.48 (explaining that CENX did not decommission its network until September 30, 2013).

105 Legal Opinion Letter at Telcordia06087-88.

106 FoNPAC Summary and Selection Report at 12 (Jan. 16, 2014) ("FoNPAC Dec.").

[redacted] [**END CONFIDENTIAL INFORMATION**] These entities failed to evaluate Ericsson's neutrality – the only statutory requirement to serve as the LNPA.[108]

II. THE COMMISSION CANNOT DESIGNATE A NEW ENTITY TO SERVE AS THE LNPA OR ALTER ITS NEUTRALITY REQUIREMENTS WITHOUT A NOTICE OF PROPOSED RULEMAKING

Section 251(e)(1) directs the Commission to "designate one or more impartial entities to administer telecommunications numbering."[109] Neustar has explained why the exercise of that authority constitutes quasi-legislative rulemaking.[110] The Commission reflected that understanding when designating Neustar as an impartial administrator in 1997 pursuant to a Federal Register-published NPRM.[111] The Supreme Court has also recognized the legal principle.[112] Failure to follow required rulemaking procedures would constitute prejudicial

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107 LNPA Selection Working Group Report to NANC on LNPA Vendor Selection Recommendation of the FoNPAC at 5 (Feb. 26, 2014) ("SWG Dec.").

108 *See* Neustar Comments at 49-50.

109 47 U.S.C. § 251(e)(1).

110 *See* Neustar Comments at 50-62.

111 The NANC/NAPM Consensus Proposal recognized that the "procedures outlined in the [1997 SWG] *Working Group Report* have the force of law." March 2011 Bureau Order, Attach A, at 4. The claim that the Commission has previously designated an entity to serve as the LNPA without any notice or comment is incorrect. *See* CTIA/USTelecom Comments at 9 n.20. As we have explained elsewhere, *see* Letter from Aaron M. Panner to Marlene H. Dortch, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, at 5 (FCC filed May 6, 2014), when Neustar and Perot Systems were designated as LNPAs, it was anticipated that one would be able to replace the other in the event of "vendor failure," 1997 LNPA Working Group Report § 6.3.5 – the very circumstance that arose in 1998 when Neustar was awarded the contract to serve as the LNPA in additional regions. Neustar had already been designated as qualified to serve as the LNPA pursuant to a notice-and-comment rulemaking when it was awarded additional regional contracts.

112 The United States Supreme Court has recognized that "[s]ection 251(e), which provides that '[t]he Commission shall create or designate one or more impartial entities to administer telecommunications numbering,' *requires* the Commission to exercise its *rulemaking* authority."

procedural error.

CTIA and USTelecom argue that no NPRM is required because this is a "classic adjudication."[113] Neustar has explained why this argument is incorrect: designation of an entity to serve as the LNPA does not constitute the retrospective resolution of a "dispute[] among specific individuals in specific cases;" rather, it is a determination with future effect that will "affect[] the rights of broad classes of unspecified individuals" – the thousands of NPAC users who are legally required to deal with the Commission-designated LNPA.[114] CTIA and USTelecom cite no case involving circumstances resembling those presented here in which Commission action was characterized as adjudicatory. Instead, each of the cases cited involved requests for waivers or an adjudication of liability, the very type of decisions that *do* involve the resolution of legal claims through the application of legal norms.[115] CTIA/USTelecom had no response to any of these points in their reply comments. Although Ericsson did not address this issue in its comments, its previous attempts to argue that this proceeding is adjudicatory have

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AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 383 n.9 (1999) (second alteration in original; second emphasis added).

113 CTIA/USTelecom Comments at 8-9; *see also* CTIA/USTelecom Reply Comments at 12.

114 *City of Arlington v. FCC*, 668 F.3d 229, 242 (5th Cir. 2012) (internal quotation marks omitted) (cited in CTIA/USTelecom Comments at 9 n.24), *aff'd*, 133 S. Ct. 1863 (2013).

115 *See Blanca Tel. Co. v. FCC*, 743 F.3d 860, 867 (D.C. Cir. 2014) (denial of waiver request "in the nature of an adjudicatory decision rather than the announcement of a new rule") (internal quotation marks omitted), *petition for cert. pending*, No. 14-64 (U.S. filed July 17, 2014); *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013) ("statutory interpretation" concerning liability for USF payments "was simply an interpretation given in the course of an informal adjudication"); *Goodman v. FCC*, 182 F.3d 987, 993-94 (D.C. Cir. 1999) (petitioner "never sought a change in the agency's . . . rules; he consistently identified his request as one for a 'temporary waiver' of those rules"); *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1093 n.11 (D.C. Cir. 1979) (adjudication of administrative complaint "a classic case of agency adjudication, a case that involves decisionmaking concerning specific persons, based on a determination of particular facts and the application of general principles to those facts").

similarly relied on inapposite case law.[116]

The argument that a failure to issue an NPRM would be harmless error[117] ignores that the Bureau's Public Notice failed to seek comment on the many significant policy questions that a potential change in LNPA would entail, including the impact of a potential transition; changes in the nature of the services that the NPAC will offer; the implications for public safety, law enforcement, and national security; questions related to potential foreign ownership of the LNPA; the risk of delay or disruption of the PSTN-to-IP transition; and any potential change to the rules governing neutrality, including the requirements set out in the 1997 LNPA Working Group Report and incorporated by reference into the Commission's rules.[118] Nor was the Public Notice published in the Federal Register.[119] And, of course, the Commission has offered no indication as to its tentative intentions with regard to the many policy issues implicated by the NANC's recommendation.[120] A public notice that fails to give the public fair notice of the issues

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116 *See, e.g.*, Letter from Aaron M. Panner to Marlene H. Dortch, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, at 2-3 (FCC filed May 19, 2014) ("Ericsson's argument rests almost exclusively on a misreading of *Goodman v. FCC* . . . . The FCC Order challenged in *Goodman* did not seek to amend an existing rule and had a retrospective effect that led the Court 'to conclude that the proceeding was not a rulemaking.' ").

117 *See* CTIA/USTelecom Comments at 9 & n.23.

118 *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (rejecting FCC's claim of harmless error in failing to comply with the APA where "the Commission provided inadequate notice that it was considering" a rule change); *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 906 (D.C. Cir. 2006) (finding no harmless error where agency provided "inadequate notice").

119 *See Sprint Corp.*, 315 F.3d at 374 ("The Commission concedes that it did not publish a NPRM—or even the Bureau's Notice—in the Federal Register.").

120 *See also* TelePacific and HyperCube Comments at 2. The comments in response to the Bureau's Public Notice understandably focus on the need for the Commission to undertake an appropriate investigation of the NANC's recommendation and, especially, the risks inherent in a rushed transition and loss of the NPAC services on which smaller carriers rely. *See, e.g.*, Suddenlink Comments at 5-7; TelePacific and HyperCurbe Comments at 7. Such comments

that the agency is considering does not satisfy the requirements of the APA.[121]

The large carriers that make up the membership of CTIA and USTelecom had a major role in the evaluation process through membership in the FoNPAC, the SWG, and the NANC.[122] It is perhaps understandable that those groups, having enjoyed the opportunity to participate fully in the process to date, are eager to bring the process to a close. Nevertheless, an NPRM that invites meaningful participation by the many NPAC users that have not yet had an opportunity to review relevant information and to weigh in on the merits of the proposals and the NANC's recommendation is required under the APA.[123]

III. FLAWS IN THE SELECTION PROCESS – INCLUDING THE INEXPLICABLE FAILURE TO CONSIDER THE BEST AVAILABLE PROPOSALS – PRECLUDE THE COMMISSION FROM RELYING ON THE NANC'S RECOMMENDATION

A. The Commission Must Remedy the Failure To Consider the Best Available Proposals

Ericsson's effort to defend the NANC's recommendation on the sole basis of cost founders on the hard fact that Neustar's best proposal was not considered. Because the failure to consider that proposal was the product of *unlawful agency action*, the Commission cannot consider the NANC's recommendation without addressing that fundamental procedural defect.

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underline the need for an NPRM that properly explains the Commission's intended course of action and the basis for it in the existing record.

[121] *See* Neustar Comments at 7; *Sugar Cane GrowersCoop. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) ("[A]n utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.").

[122] USTelecom was a member of the SWG, and both CTIA and USTelecom are members of the NANC. CTIA and USTelecom represent half of the NAPM membership. CTIA's four largest members are AT&T, Verizon, Sprint, and T-Mobile, and CTIA has Ericsson on its board of directors. USTelecom's largest members are Verizon, AT&T, and Sprint.

[123] USTelecom, for its part, has rightly insisted on compliance with APA standards in other proceedings. *See, e.g., USTA v. FCC*, 400 F.3d 29 (D.C. Cir. 2005); *USTA v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). This case demands similar treatment.

1. Although the NAPM LLC announced the decision not to consider additional proposals in January 2014, the still-confidential record reveals that the FoNPAC [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] Neustar's proposal and the SWG [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] The reason that the proposal was [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] never considered is because [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] Yet that action was taken without notice to affected parties, without any record of ex parte communications, and without an opportunity for Neustar to rebut [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

The [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] action was unlawful. Under the APA, the [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] was an "order"[125] because it finally disposed of the question whether [**BEGIN CONFIDENTIAL INFORMATION**] [redacted]

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124 *See* NAPM March 20, 2014 Report at 5-6 ("NAPM Process Report").

125 5 U.S.C. § 551(6).

[redacted] [**END CONFIDENTIAL INFORMATION**] Accordingly, the "agency process for the formulation of" that "order" constituted "adjudication" under the APA.[127] In any such adjudication, the agency must, as a matter of due process, provide affected parties notice and an opportunity to be heard before making a legal determination that may affect the parties' property interests.[128]

Yet here the [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] failed to provide any such notice; instead, there were private and undisclosed communications among [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] leading to [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] This decision changed the rules governing the RFP process and significantly prejudiced Neustar, yet Neustar was given no prior

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126 [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] **END CONFIDENTIAL INFORMATION**]

127 5 U.S.C. § 551(7).

128 *See, e.g.*, *Sierra Club v. Whitman*, 285 F.3d 63, 66-67 (D.C. Cir. 2002) (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975)); *American Trucking Ass'ns v. United States*, 627 F.2d 1313, 1319 (D.C. Cir. 1980).

129 Although the communications concerning the propriety of seeking an additional round of proposals were, in form, [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] those communications made explicit that the purpose of the communications was to [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] making these communications, in substance, ex parte communications that had to be disclosed under this Commission's rules. *See* 47 C.F.R. § 1.1206 (governing permit-but-disclose proceedings).

notice of [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] consideration of this issue and no opportunity to make any presentation to the undisclosed decision-maker about the propriety of seeking additional proposals. What happened in this case is the "incredible" scenario described in *Sierra Club v. Whitman*: "the adjudication took place in secret, without notice to [Neustar], and without [its] participation."[130]

[**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

2. Because [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] acted unlawfully in [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] the Commission cannot accept the NANC's recommendation and instead must adopt procedures to ensure that the Commission has an adequate basis on which to make its selection decision.[131]

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130 285 F.3d at 67.

131 Moreover, it would be arbitrary for the Commission to accept a recommendation that was made – for no valid reason – in deliberate disregard of the best available proposals.

3. The Commission cannot rely on the SWG's LNPA selection report or the NANC recommendation for an additional reason. The NANC is a Federal Advisory Committee subject to the Federal Advisory Committee Act ("FACA").[132] FACA also applies to the SWG because it is a "subcommittee . . . established or utilized by [the Commission] in the interest of obtaining advice or recommendations."[133] The Commission established the NANC, appointed its members, and directed the NANC to create the SWG from that same defined membership in the interest of obtaining advice and recommendations.[134] That is clear from the May 2011 Bureau Order, which delegated to the SWG specifically – not to the NANC – substantial responsibility for overseeing the RFP process and evaluating the FoNPAC's recommendation,[135] and from the SWG's vendor selection report and process report, which were passed on to the Commission with no alteration by the NANC. The SWG, however, failed to comply with FACA's requirements that it maintain and produce certain records, such as minutes, working papers, and drafts.[136] The SWG also operated behind closed doors with no justification, in violation of FACA's open meeting requirement,[137] and was composed of mostly large carriers and no

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132 5 U.S.C. app. 2 § 1 *et seq.*

133 *Id.* § 3(2); *see also Lorillard, Inc. v. U.S. Food & Drug Admin.*, No. CIV. 11-440 RJL, 2012 WL 3542228, at *3 (D.D.C. Aug. 1, 2012).

134 *See National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 529 (D.D.C. 1983) (stating that where a task force is providing advice directly to an agency, it may be functioning as an advisory committee under FACA).

135 *See May 2011 Bureau Order*, 26 FCC Rcd at 6846 (providing that the SWG must "work with, provide policy guidance as outlined by the FCC to, and oversee the technical work by, the FoNPAC Subcommittee"); *Id.* (noting that the "SWG will review and evaluate the FoNPAC Subcommittee's vendor selection recommendation" which it was permitted to "approve . . . or provide specific reasons for not approving").

136 5 U.S.C. app. 2 § 10(b)-(c).

137 *Id.* § 10(a)(1)-(2) & (d).

consumer groups, in violation of FACA's "fairly balanced" membership requirement.[138] This failure to comply with FACA precludes the Commission's reliance on the work product of its advisory committees.

B. The Process Was Unfairly Skewed in Favor of a Single Bidder

As Neustar explained in its opening comments, the failure to consider additional proposals – even though Neustar had made clear that it reasonably expected an additional round of bidding and was therefore prepared to improve on its proposal – is especially indefensible in light of the earlier decision by the Bureau to extend the bidding deadline to accommodate Ericsson. Ericsson can offer no justification for its failure to comply with the bidding deadline, and the confidential record makes clear [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

The credibility of Ericsson's assertion that [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] is undermined by a posting on social media by its Senior Business Developer[141] on the morning of April 5, 2013 – the day proposals were due: "I'm exhausted and still have to write the Exec Summary for this 85 page document. Coffee is failing.

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138 *Id.* § 5(b)-(c).

139 *See* Neustar Comments at 66-68.

140 *See* Ericsson Comments at 21.

141 The same Ericsson employee [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

Been here 66 straight hours now. Crap f-bomb."[142] It appears that as of the morning of the day that its bid to run the largest LNP system in the world – supporting more than 650 million numbers and 4,700 customers and processing more than 1.6 million transactions a day[143] – was due, Ericsson had not yet completed the drafting of at least one integral bid document, and that document was to be completed in a matter of hours by an employee who had not slept in three days (and who was inclined to advertise that fact to the world). This calls into question Ericsson's chronology – that it [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] It also reflects poorly on Ericsson's ability to administer the NPAC, a complex system that depends on both to-the-second timeliness and utmost discretion, and rebuts, as a matter of logic, Ericsson's assertion that "extending the bid deadline did not prejudice either

142 Neustar Petition for Declaratory Ruling at 28, CC Docket No. 95-116, WC Docket No. 09-109 (FCC filed Feb. 12, 2014).

143 *See* Jennifer Pigg & Brian Partridge, *Telephone Numbers are Portable; Is the NPAC?*, Yankee Group, at 7 (Apr. 2012).

144 NAPM Process Report, Attach. 1.

145 These assertions are also contradicted by [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

party."[146] Contrary to this assertion, the IASTA tool records demonstrate that [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] and did not revise its bid further, in compliance with the RFP.

Furthermore, the Commission must supplement the record to permit it to evaluate the impact of the extension of the April bidding deadline. Despite the generous initial deadline for submission of proposals, Ericsson was provided the opportunity to take an additional 17 days to submit its proposal, far longer than was necessary if the only reason for the extension was [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] Giving Ericsson the opportunity to improve the substance of its proposal during an after-the-fact "extension" that was not disclosed for nearly two weeks after the bidding deadline had passed distorted the contract rebid process, advantaged Ericsson, and deprived Neustar of notice and an opportunity to object – and did so without any apparent basis in law.

IV. THE RECOMMENDATION DOES NOT JUSTIFY THE SELECTION OF ERICSSON

As Neustar has explained at length, the NANC/NAPM recommendation is insufficient for the Commission to conduct a meaningful independent review of the selection process and vendor recommendation. The recommendation and the documents supporting it lack factual detail and explanation as to how the final decision was reached, what factors were considered, and how the various technical, management, and cost criteria were evaluated, weighed, and compared.

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146 Ericsson Comments at 21.

147 NAPM Process Report, Attach. 2.

Ericsson and CTIA/USTelecom attempt to defend the recommendation, but this defense focuses almost exclusively on the process that led to the recommendation, rather than the actual decision and record evidence that is before the Commission and on which a final determination must be based. Moreover, this heavy focus on process is misplaced, because many industry members – such as smaller CLECs – were not represented in this process, and some of these parties have accordingly filed comments to express their concerns. As these parties note, the costs and risks of the transition will fall more heavily on some carriers than others, and the recommendation makes no attempt to catalog, much less quantify, the costs and risks of the transition to these smaller competitors or to the industry at large.

Ericsson also makes a half-hearted attempt to defend the recommendation on its own terms. Its arguments ring particularly hollow given the position that Ericsson took during the comment period on the RFP. There, it urged the Commission to modify the "RFP to require the SWG/FoNPAC to submit a full explanation of submitted bid data, evaluation, and scoring when submitting its LNPA selection recommendations to the NANC and, ultimately, to the Commission."[148] Ericsson argued that "the Commission will need more than summary recommendations in order to fairly and fully evaluate the procurement process and determine whether or not to approve the LNPA selection recommendations."[149] Ericsson therefore sought to revise the RFP "to clarify that the vendor recommendations should be accompanied by ***comprehensive and transparent data*** and ***an explanation allowing the Commission to fully and***

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148 Comments of Telcordia Technologies, Inc. at 17, WC Docket No. 07-149 *et al.* (filed Sept. 13, 2012).

149 *Id.* at 19.

fairly review the evaluation process and vendor recommendations." [150] The FoNPAC/SWG/NANC recommendations do not come close to conforming to the level of detail that is required by law and that Ericsson has argued would be necessary for the Commission to make an informed decision.

A. The Recommendation Does Not Adequately Address the Risks and Costs of Transition

Neustar's comments demonstrated that Ericsson's transition plan is deeply problematic and poses a substantial risk of service disruption and other failures that would negatively affect the industry and the public.[151] Neustar further explained that, even though this transition was among the most important issues for the NAPM/NANC to address, the recommendation fails to make even a cursory attempt to address the complexities and risks of transitioning to a new LNPA provider.[152]

The minimalist transition plan in Ericsson's proposal is limited largely to the transfer and testing of service provider connections. Ericsson has attempted to minimize the complexity of the transition by characterizing it as "just a large [software] release."[153] The transition would be a challenging enough task even if Ericsson's characterization of the transition were accurate, in light of the NPAC's thousands of constituents and the billions of data elements under management, each of which is critical for avoiding widespread service outages. But Ericsson's characterization is not accurate, and its plan [**BEGIN HIGHLY CONFIDENTIAL INFORMATION**] [redacted]

150 *Id.* (emphasis added).

151 *See* Neustar Comments at 92-102.

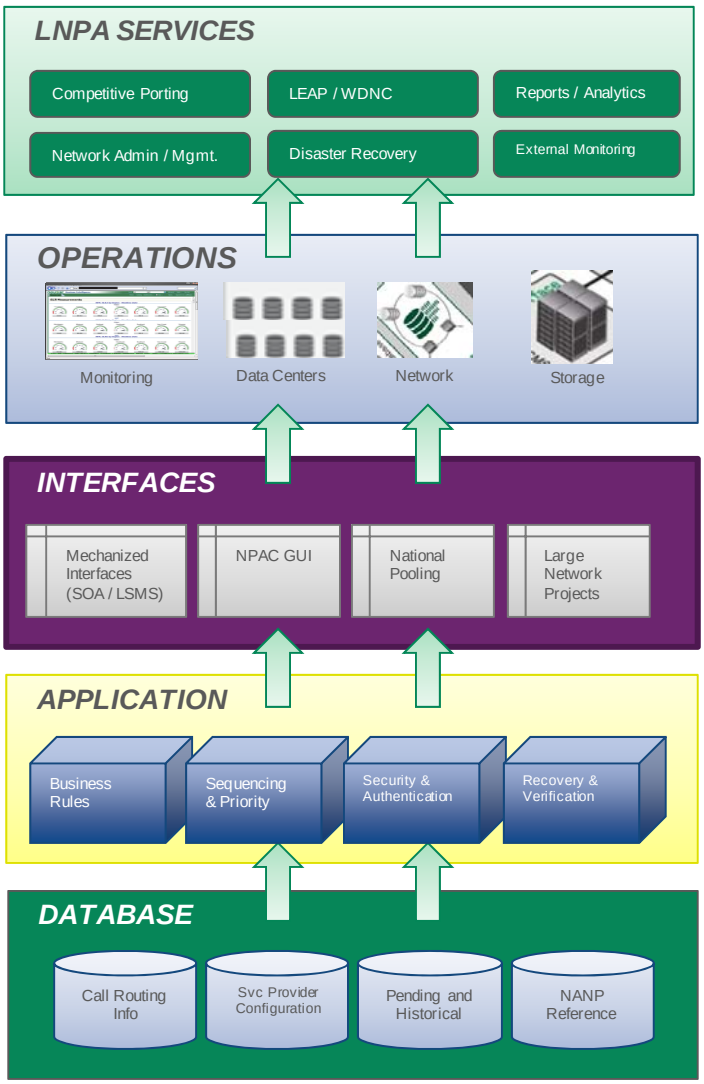
152 *See id.* at 78-82.

153 Telcordia Presentation at 240:8.

[**END HIGHLY CONFIDENTIAL INFORMATION**] which creates an unacceptable risk to both service providers and the public that critical LNPA functions and services will not be sufficiently tested prior to their live implementation.

As explained by Suddenlink and as illustrated in the Figure below, the LNPA platform involves not just a database and service provider connections, but also a host of business rules, customized services, and performance monitoring functions – all delivered via a multi-layer architecture of technology, personnel, and procedures built up over two decades. The industry relies upon the platform not just for competitive porting, but also for real-time network routing updates and new telephone number inventory acquisition. These functions ensure the successful routing and billing of billions of phone calls and text messages daily. Furthermore, connections with the NPAC are not one-size-fits-all. They vary greatly depending on each constituent's network profile and needs.

Figure: LNPA Service Architecture



A comprehensive and responsible approach to transition would systematically ensure continuity of service and performance at each point of interaction between the LNPA and all flavors of NPAC users. [**BEGIN HIGHLY CONFIDENTIAL INFORMATION**] [redacted]

[redacted]

[**END HIGHLY CONFIDENTIAL INFORMATION**] This omission suggests a broader failure to understand how the NPAC is used and to anticipate the steps necessary to complete the transition.

Neustar is hardly alone in expressing concerns that the recommendation has failed to consider these complexities and that Ericsson has failed adequately to address them in its transition plan. Nor is Neustar the only commenter to raise concerns that a poorly considered transition will have significant and deleterious effects that could overwhelm any perceived cost savings. A number of other commenters – including smaller service providers that fear the adverse effects of the transition – raise similar concerns. Cequel Communications (d/b/a Suddenlink) states that "[a] potential transition from one LNP Administrator is a complex and challenging process" that "will likely require a multifaceted campaign of coordination across thousands of carrier accounts, law enforcement and public safety agency contacts, regulators and other stakeholders," and "will need to rely upon seamless and cohesive management, sequencing of interdependent work streams, and participation by multistakeholder groups over a fixed timeline."[154] Suddenlink also raises a host of questions and issues regarding the transition that it urges "must be addressed by the Commission before any transition from the current LNP Administrator to a new administrator."[155] It also correctly observes that the costs of the transition are "yet to be seen," that "there can be little doubt" such costs will arise, and that "an

154 Suddenlink Comments at 2-3.

155 *Id.* at 5.

evaluation of the actual savings that may be realized by the industry [by selecting Ericsson] must account for the potentially significant costs that may arise from the transition from one administrator to another."[156] Similarly, TelePacific and HyperCube expressed concern about the costs of the transition, and in particular about how those costs "will be borne by CLECs and smaller service providers," which "do not have the resources available to undertake a costly and complex transition to a new LNPA provider, particularly if the transition costs are not offset by considerably lower LNPA charges."[157]

CLECs and other smaller carriers are in jeopardy of bearing a disproportionate share of the transition costs for several reasons. First, unlike larger ILECs, CLECs serve a high percentage of their users via numbers in the NPAC (because their new customers come disproportionately from porting, and their new telephone number inventory comes via the national pooling process, which also relies upon the NPAC). Accordingly, performance degradations or outages experienced by a new LNPA will disproportionately affect these providers. Second, because their telephone numbers are primarily acquired through porting and pooling, smaller carriers have no option but to perform the majority of their network management activity via the NPAC, and therefore have the highest likelihood of disruption or network errors stemming from delays or data disruption at the NPAC. Third, the IT costs of testing and conversion of back-office and network platforms from one NPAC provider to another are roughly the same regardless of carrier size. Smaller carriers have a far lower capacity to absorb those costs given their much lower total operating budgets.

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156 *Id.* at 6-7.

157 TelePacific and HyperCube Comments at 7.

In combination, these factors call into question whether smaller service providers will receive any "payback" for a switch to a new LNPA despite the lower initial price tag of Ericsson's bid. For these providers, the extra expense associated with connectivity, testing, data conversion, and service degradation that is likely to arise as a result of the transition, combined with consumer impacts resulting from the new LNPA's operational immaturity, may overwhelm any savings they would receive from the selection of Ericsson's bid. For example, approximately 75% of carriers that use the NPAC pay less than $1,000 per month in fees. For these carriers, the estimated payback time of the estimated transition costs (based on the analysis of Dr. Hal Singer[158]) ranges from 22 to 26 years, indicating that these carriers will not recoup their transition costs within the duration of the proposed contract.

Ericsson's comments make no attempt to defend its transition plan or to quantify the costs of the transition. There is not a single sentence in Ericsson's comments that describes its transition plan or its cost, or that explains why it is adequate. Nor does Ericsson come close to demonstrating that the SWG and FoNPAC adequately considered the risks and costs associated with Ericsson's transition plan. Ericsson first states that, "because Neustar submitted a report on the costs and risks of transition, it is clear that the issue of transition costs and risks was before the FoNPAC."[159] Similarly, CTIA/USTelecom argue that, because the RFP asked each respondent to provide a transition plan, and that "Telcordia presumably answered that question in the affirmative . . . Neustar cannot now contend that the bidding process gave short shrift to

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158 *See* Hal Singer, *Estimating the Costs Associated with a Change in Local Number Portability Administration* (Jan. 2014), *available at* http://www.ei.com/downloadables/SingerCarrierTransition.pdf.

159 Ericsson Comments at 10.

planning for a potential transition."[160] The fact that Ericsson presumably provided a response to the RFP on transition does not mean that it was adequate, or that it was critically evaluated by the FoNPAC or the NANC. Indeed, there is no record evidence that supports Ericsson's and CTIA/USTelecom's assertion that the FoNPAC [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

Ericsson's only other defense of the recommendation's treatment of its transition plan is to quote the FoNPAC's finding that [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] But, as Neustar explained, this conclusory finding is hardly adequate. The recommendation [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] Absent this record, the Commission must independently catalog and quantify the costs of the transition, including direct service provider expenses, industry-wide expenses, and law-enforcement expenses, and factor them into the total costs of the competing proposals.

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160 CTIA/USTelecom Reply Comments at 4.

161 Ericsson Comments at 10; *see also* CTIA/USTelecom Reply Comments at 5-6 n.13.

162 Ericsson Comments at 10.

Finally, unable to demonstrate that transition issues were properly addressed in the recommendation, CTIA/USTelecom argue, as a fallback, that this should not matter, because "the Commission in its LNPA vendor selection decision, and the NAPM in its negotiation of a final LNPA contract with the successful bidder, are fully capable of addressing these issues."[163] But the RFP clearly requires a comprehensive transition plan.[164] It would be unreasonable to conclude that any flaws in the recommendation process can somehow be cured by post-recommendation actions. Deferring the establishment of a comprehensive and workable plan until after the selection process imposes unacceptable risks to the industry and threatens the timeline on which the transition is to occur. Moreover, the Commission has only the recommendation on which to make a vendor selection decision, and CTIA/USTelecom fail to demonstrate how, based on that recommendation, the Commission can ensure itself and the public that a transition is achievable and desirable. Nor does CTIA/USTelecom explain how NAPM will adequately address these complex issues in the contract negotiation after an award is made. Even assuming that NAPM could negotiate for provisions that are intended to mitigate the transition risks and costs, it is not evident that Ericsson will be able to live up to those commitments. In any event, CTIA/USTelecom's argument that post-recommendation remedies are available and adequate merely highlights the shortcomings of the recommendation itself.

B. The Recommendation Ignores Technical and Management Criteria in Favor of Price

Neustar's comments explained that, despite the significant weight that the technical and management criteria were supposed to be given in evaluating the competing bids, the

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163 CTIA/USTelecom Reply at 9.

164 *See* 2015 LNPA RFP § 12.3.

NANC/NAPM recommendation [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] The comments do not dispute this and provide no basis for the Commission to accept the recommendation's analysis with respect to these critical areas.

Ericsson concedes that the recommendation [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] But Ericsson's sole support for this assertion is its claim that [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] Ericsson's comments thus

165 Ericsson Comments at 11.

166 *Id.*

167 *Id.* (emphases added).

fail to provide any basis for the Commission to accept the recommendation's conclusion with respect to the technical and management criteria.

C. The Recommendation's Analysis of Price Is Flawed

With respect to its evaluation of price, the NANC recommendation was flawed for at least three reasons. First, in light of the weighting mandated by the guidelines, it was improper to allow price to become the [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] in the recommendation.[168] Second, having improperly permitted price to become the [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] the recommendation committed further error by ignoring Neustar's best pricing proposal, thereby exaggerating the true difference in price between the competing bids. Third, the recommendation failed to weigh the actual price differences between the competing proposals against the costs that are likely to be incurred following a transition.[169]

Although Ericsson's comments attempt to make much of the price disparity between the two bids, it does not address any of these three points. Nor do CTIA/USTelecom's comments and reply comments. In an attempt to dissuade the Commission that it is required to find and rely upon facts that would constitute substantial evidence to support a decision, Ericsson instead

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168 As Neustar has explained, in the federal procurement context, it is improper to award on the sole basis of low cost when cost is secondary to technical capability. *See, e.g.*, *Prism Maritime, LLC*, B-409267.2, et al., 2014 CPD ¶ 124, 2014 WL 1745023 (Comp. Gen. Apr. 7, 2014); *see* 48 C.F.R. § 15.305(a); *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 374 (2009); *Red River Holdings, LLC v. United States*, 87 Fed. Cl. 768, 786 (2009); *Johnson Controls World Services, Inc.; Meridian Mgmt. Corp.*, B-281287.5, et al., 2001 CPD ¶ 3, 1999 WL 33229152 (Comp. Gen. June 21, 1999); *PharmChem Labs., Inc.*, B-244385, 1991 WL 216281 (Comp. Gen. Oct. 8, 1991).

169 *See also supra* pp. 42-49.

argues that the NANC's decision with respect to price represents "reasonable conclusions reached by the industry experts who will ultimately bear the costs and risks of any transition."[170] But that is not so. As all comments save Ericsson and CTIA/USTelecom demonstrate, the "industry" does not have a uniform view with respect to the costs and risks of the transition, and at least certain industry participants – such as smaller CLECs – have expressed a concern, unaddressed by the recommendation, that they will bear a disproportionate share of the costs and risks of the transition. As TelePacific and HyperCube noted, "NAPM is a private entity that is overseen by ten of the largest telecommunications providers in the country" and "does not represent the broader telecommunications industry, nor the public at large, and as such question whether the recommendation takes into account the interests of the broader carrier and consumer community or whether it is ultimately aimed at benefitting the larger service provider members of NAPM."[171] It further explains that "a costly or disruptive transition will be better withstood by larger service providers than CLECs and other small service providers," and that, "[g]iven CLECs' high dependence on the LNP process (especially relative to larger service providers), any transition problems that occur will likely fall harder on smaller service providers than the large ones."[172] Similarly, Suddenlink notes that "small to mid-size service providers may feel a disproportionate impact from unforeseen, or unreasonable, transition costs," and warns that "both direct and indirect costs, such as those arising from operational personnel responding to trouble

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170 Ericsson Comments at 13; *see also* CTIA/USTelecom Reply Comments at 6.

171 TelePacific and HyperCube Comments at 3-4.

172 *Id.* at 4-5.

reports, customer service inquiries, or system failures, could have a severe impact on small to mid-sized providers."[173]

The recommendation fails to address the possibility that smaller carriers will face disproportionate transition costs that overwhelm any savings received by carriers with the highest revenues from telecom services.[174] In addition, it ignores the possibility of adverse impacts across the industry and to the public based on migration to a new and untested vendor. Furthermore, there are many benefits that these and other carriers receive from the current LNPA that were not enumerated in the RFP and that therefore may not be provided as part of Ericsson's proposal. As TelePacific and HyperCube noted, "[t]he entire telecommunications industry, and especially CLECs (whose businesses surround primarily ported telephone numbers) – depends on the customized service offered by Neustar," which "currently includes a wide variety of services as part of the existing LNP fees."[175] The recommendation [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] Moreover, a

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173 Suddenlink Comments at 7.

174 It would be contrary to Commission precedent and harmful to competition to have smaller carriers bear a disproportionate share of the risks and costs of the transition. In implementing local number portability, the Commission held that requiring "new entrants . . . to bear all the costs of interim number portability is not consistent with the pro-competitive intent of sections 251(b)(2), 252(e)(2), and the 1996 Act as a whole." Fourth Memorandum Opinion and Order on Reconsideration, *Telephone Number Portability*, 14 FCC Rcd 16459, 16487, ¶ 50 (1999). The Commission therefore adopted a cost recovery mechanism based on a carrier's market share (as measured by revenues), rather than cost-causation principles, finding that "[a] LEC with a small share of the market's revenues would pay a percentage of the incremental costs of interim number portability that is small enough that it will have no appreciable [e]ffect on its ability to compete for that customer." *Id.* at 16490, ¶ 55. Consistent with this precedent, in analyzing the costs and risks of the transition, the Commission must ensure that they will not be disproportionately borne by smaller carriers.

175 TelePacific and HyperCube Comments at 5.

review of Ericsson's proposal suggests that at least some of these customized services [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] For example, Ericsson's submission does not appear to mention at least the following customized services that Neustar currently provides at no additional charge to service providers: [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] These issues take on heightened importance in light of the fact that approximately three-quarters of NPAC users pay less than $1,000 each month for Neustar service while gaining access to indispensable network management capabilities.

In their Reply Comments, CTIA/USTelecom make much of the supposed consumer benefits associated with a decrease in the LNPA contract price, but their claims ignore context. Putting aside for the moment that Neustar was denied the opportunity to submit its best proposal, CTIA/USTelecom's claim ignores the failure to quantify the likely costs of transition. It also ignores the massive consumer *benefits* that follow from the stable, highly reliable, and neutral operation of the NPAC – exactly the experience that an ill-conceived transition would jeopardize. Neustar's flawless performance as the LNPA has been a cornerstone of wireless and wireline competition. It is estimated that U.S. wireless consumers have reaped between $8 billion and $10 billion *annually* relative to pre-portability market conditions.[177] The current contract with Neustar amounts to approximately $.50 per telephone consumer per year, and has thus delivered many times its cost in consumer value.

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176 *See also* LNP Alliance Comments at 20-21.

177 Hal J. Singer, *The Consumer Benefits of Efficient Mobile-Number-Portabilty Administration, available at* www.navigant.com/~/media/WWW/Site/Insights/Economics/Consumer%20Benefits%20of%20Efficient%20MNP_Economics_030813.ashx.

D. The Recommendation Fails To Account for IP Transition Issues

Neustar's comments explained that the recommendation was silent as to one of the most important issues facing the next LNPA: the Internet Protocol ("IP") Transition. Neustar also explained that, while it devoted serious attention to this critical issue in its response, Ericsson [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] and Ericsson's comments completely ignore this issue as well. As a consequence, there is no record on which the Commission can ensure that the LNPA and the NPAC/SMS are prepared for and committed to supporting the changing landscape of the accelerating IP Transition.

The LNP Alliance echoes these concerns with respect to the IP transition. It correctly states that "the RFP only asks a single question regarding the IP transition" and "provides insufficient detail as to the methods and procedures relative to the PSTN transition and the role of the LNPA in that transition," even though "it is highly probable that the PSTN transition to IP will largely be completed well before the end of the term of this Master Agreement."[178] The LNPA Alliance further notes that it "is acutely concerned that the transition to a new LNPA could disrupt or delay the IP transition, an unforeseen and unintended consequence that deserves significant scrutiny by the Commission and the industry."[179] The LNP Alliance also faults the selection process for failing to address these issues, explaining that "there has been no mention in the RFP or the selection process of the efforts of the various groups working towards near-term consensus and standardization regarding numbering resource definition and allocation, and no

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178 LNP Alliance Comments at 18-19.

179 *Id.* at 23.

mention of IP interconnection between service providers."[180] It accordingly urges "additional time in order for the Commission to make the policy decisions that are a necessary predicate for a smooth transition," including "time to define the essential LNPA enhancement requirements to facilitate the IP transition during the term of this Master Agreement and ensure a seamless LNPA transition."[181]

CTIA/USTelecom argue that "there is no reason to place the LNPA selection process in indefinite limbo based on speculation about the *potential* effects of the IP transition," particularly "because, as part of its continuing oversight over the selection process, the Commission retains the authority to carefully define the role of the next LNPA in accordance with final rules and decisions implemented in its Technology Transitions docket."[182] As an initial matter, the effects of the IP transition are not merely speculative. As Neustar has demonstrated, there are many known issues that the IP transition raises – including the need for a universally accessible means for providers to exchange authoritative routing information from their next generation networks – and CTIA/USTelecom fail to show that even these known issues have been adequately considered. Although CTIA/USTelecom point out that the RFP requires the next LNPA to have a "flexible" architecture, this assertion does not permit selectors to ignore the recognized industry requirement for which this flexibility is needed. The recommendation provides no basis to conclude that Ericsson's proposed architecture satisfies this requirement, or is otherwise capable of adapting to the many technological requirements that the IP transition will inevitably raise.

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180 *Id.* at 5.

181 *Id.*

182 CTIA/USTelecom Reply Comments at 10 (emphasis in original).

E. Ericsson's Experience in Providing LNP Services Is Limited and Mostly Irrelevant, and Does Not Make Up for the Failure of the Recommendation Adequately To Evaluate Ericsson's Capabilities

Because it is unable to defend the recommendation on its face, Ericsson attempts to provide an alternative basis on which its selection may be justified. It begins its comments with self-serving claims regarding Ericsson's "long history of involvement in both telecommunications routing and number portability – experience which makes it well qualified to take over as the LNPA."[183] But this experience is irrelevant, because contrary to Ericsson's claims, it does not involve the same scale or substance of activities that are required of the LNPA.

Neustar explained that Ericsson lacks experience in providing LNP services of anywhere near the scale and complexity that would be involved if it is selected as the next LNPA.[184] As explained above, the NPAC is the largest, fastest, and most complex number portability system in the world; indeed, it processes more than 14 times as many transactions, orders of magnitude faster, than the next largest platform internationally.[185] Ericsson claims to be the "world's leading provider of number portability systems, with substantial number-portability experience both domestically and globally."[186] But none of this foreign or domestic experience is qualitatively or quantitatively similar to what is required of the U.S. LNPA, and therefore does not provide a basis to conclude that Ericsson is well qualified to serve as the next LNPA.

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183 Ericsson Comments at 6.

184 *See* Neustar Comments at 92-101.

185 For example, India reported 32.7 million porting transactions between February 2011 and January 2012. During that same period, the NPAC/SMS processed more than 468 million such transactions. In the United States, consumers can change service providers within minutes; in India, it can take up to seven days.

186 Ericsson Comments at 6-7.

With respect to the United States, Ericsson boasts that its systems process "about 95 percent of all U.S. wireless number porting transactions" and that, because its systems "handle wireless pre-porting, [Service Order Administration], and [Local Service Management System] transactions, and 100 percent of toll-free-number ports, Telcordia has processed more portability-related transactions than the [NPAC] itself."[187] This is yet another apples-to-oranges comparison that obscures the relevant facts. First, claiming that the transactions passing through Ericsson software are "portability-related" obscures the differences between operating an authoritative registry like the NPAC and merely interfacing with one. Second, contrary to what its statements imply, Ericsson acts as a licensed software provider for wireless porting activation. In many if not most instances, a different entity (such as a service provider customer or a service bureau partner) conducts the operations and "processes" the transactions. Not only are the transaction volumes that Ericsson claims to process spread out across multiple operations, but the vast majority of those operations are run by someone other than Ericsson. In fact, when defined by the standards of the RFP, Ericsson (the bidding entity) in fact processes close to zero portability-related transactions.

Ericsson's boasts also obscure the fact that in the case of the current RFP, the solution it has proposed to use as the LNPA relies heavily on a third-party vendor, SunGard, with which Ericsson has never before worked, and which has zero experience in providing number portability database services. Therefore, none of Ericsson's prior experience is directly relevant to whether this untested partnership, with a vendor inexperienced in LNP services, is likely to succeed.

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187 *Id.* at 8.

Ericsson's international experience is even further afield. It claims that it "offers its Number Portability Clearinghouse service – which includes base functionality similar to the U.S. NPAC plus the pre-porting business rules process – in 15 countries."[188] It is unclear whether Ericsson plans to reuse this functionality for the U.S., given indications that Ericsson plans to build its U.S. LNPA from scratch.[189] Regardless, as Neustar explained, none of these countries has LNP systems that rival the size, scale, or complexity of the LNPA system in the United States. For example, with respect to Ericsson's two largest such systems, [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] compared to more than 500 million transactions annually in the United States.[191] The Ericsson India system [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL**

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188 *Id.* at 7.

189 *See, e.g.*, Telcordia Presentation at 160-62; Ellen Nakashima, *Neustar, Telcordia Battle Over FCC Contract to Play Traffic Cop for Phone Calls, Texts*, Wash. Post, Aug. 10, 2014, at A3 (According to Chris Drake, iconectiv's Chief Technology Officer: "We are not using any of the code used and deployed in foreign installations at all, zero."), http://www.washingtonpost.com/world/national-security/neustar-telcordia-battle-over-fcc-contract-to-play-traffic-cop-for-phone-calls-texts/2014/08/09/778edeaa-1e7b-11e4-ae54-0cfe1f974f8a_story.html. Moreover, this is inconsistent with iconectiv's marketing, which claims that "[t]he iconectiv Number Portability Gateway is specifically designed to simplify and automate management of all number porting related processes — including port in/port out, disconnect/snapback, initiation/activation, hold/cancel, call routing, and validation. *This scalable, off-the-shelf system* serves as an external bridge between the national clearinghouse and a service provider's environment." http://www.iconectiv.com/collateral/brochures/number-portability-gateway.pdf.

190 *See* Vendor Qualification Survey § 3.1.1 at Telcordia06054.

191 *See, e.g.*, Neustar's Response to the NAPM LLC's Local Number Portability Administration 2015 Surveys at ES-4 n.3 (Apr. 5, 2013).

192 Vendor Qualification Survey § 3.1.1 at Telcordia06052.

INFORMATION] Moreover, most of these international systems – including Ericsson's system in India (the next largest implementation outside of the United States) are built and operated by in-country partners who provide the Operations and Managed Services (*e.g.*, data center, Tier 1 and 2 support, billing, testing, etc.), while Ericsson provides only the clearinghouse software and acts as a Tier 3 support desk. This is true in Thailand and Turkey, for example, and in most other markets. In sum, Ericsson's claims of comparable experience are not entitled to weight.

F. The Process Leading to the Recommendation Does Not Compensate for Its Substantive Failures

In a final attempt to defend the recommendation, Ericsson argues that the Commission should not second guess the decision because it was reached "through a fair and reasonable process" by a "broad cross-section of the very industry that will be affected by the LNPA selection."[193] CTIA and USTelecom also argue that the process that resulted in the recommendation was comprehensive and included broad stakeholder support. In fact, as emphasized in comments filed by Suddenlink, TelePacific and HyperCube, and the LNP Alliance, the process placed substantial control in the hands of a few of the largest service providers, while largely devaluing the views of smaller providers. This lack of key telecommunications industry stakeholders, such as smaller CLECs and consumer groups, on the SWG – which is subject to the requirements of the FACA as a "subcommittee [of an advisory committee] . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations,"[194] is inconsistent with Section 5(b)(2) of the FACA This provision

193 Ericsson Comments at 8-9.

194 5 U.S.C. app. 2 § 3(2); *see also Lorillard*, 2012 WL 3542228, at *3 ("I find that the Menthol Report Subcommittee and its writing groups are advisory committees under FACA because they were organized, managed, and funded by FDA, consisted only of [Tobacco

of law requires "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."[195]

The Commission,[196] the Bureau,[197] and the NANC Charter[198] all articulate the requirements for balanced representation on the NANC – and, by extension, the SWG. However, an examination of the current SWG's voting membership, and comparison to the 1996 incarnation of the SWG – which included over 30 organizations from across the industry[199] – demonstrates that it is far from "fairly balanced in terms of the points of view represented."

Products Scientific Advisory Committee] members, and performed a major task of the committee: drafting the Menthol Report." (internal quotation marks omitted)).

[195] 5 U.S.C. app. 2 § 5(b)(2). Although § 5(b) applies on its face to committees established by Congress, "§ 5(c) applies all relevant requirements of § 5(b) to advisory committees established by agencies." *Cargill, Inc. v. United States*, 173 F.3d 323, 334 n.17 (5th Cir. 1999).

[196] *See NANP Administration Report and Order*, 11 FCC Rcd at 2609, ¶ 47 ("An advisory Committee created under FACA must have a membership fairly balanced in terms of the points of view represented. In meeting this requirement we anticipate [NANC] membership would be drawn from all segments of the industry including LECs, Interexchange Carriers (IXCs), Wireless Service Providers, Competitive Access Providers and other interested parties . . . . We further anticipate [NANC] membership will include members representing state interests such as NARUC, state public utility commissions, telecommunications users and other consumer groups.") (footnote omitted).

[197] *See* May 2011 Bureau Order, 26 FCC Rcd at 6842, ¶ 12 ("The Bureau agrees with Telcordia on the need for balance within the SWG's membership and its leadership. . . . We note that . . . the NANC is a diverse body with consumer, state government, and industry constituencies represented. The Bureau is confident that the membership and leadership of the SWG will reflect this balance . . . .").

[198] *See* NANC Charter ¶ 12 ("Members of the Council are appointed by the Chairman of the Commission in consultation with appropriate Commission staff . . . . to balance the expertise and viewpoints that are necessary to address effectively the issues to be considered by the Council. Members represent various sectors of the telecommunications industry, . . . state regulators, and consumers.").

[199] The participants in the 1996 Working Group included: "AirTouch Communications, Ameritech, APCC, Inc., AT&T, Bell Atlantic, Bellcore, BellSouth, BellSouth Wireless, California Public Utilities Commission, Cox, Florida Public Service Commission, Frontier, GTE, Interstate Fibernet, Lucent Technologies, Maryland Public Service Commission, MCI, Nextel, Nortel, NYNEX, Ohio Public Utilities Commission, PACE Long Distance Service, Competitive

Although Ericsson notes that the SWG "was open to . . . consumer advocates,"[200] no consumer group participated on the SWG. The presence of state regulators does nothing to cure this deficiency, as "[o]ne of the dangers that Congress specifically identified in adopting FACA was the risk that government officials would be unduly influenced by industry leaders . . . . [And] it is precisely the lack of representatives of the public interest independent of *both* government *and* industry that prompted Congress to enact the 'fairly balanced' provision."[201] As Ericsson admits, consumers bear the ultimate burden of paying for NPAC services,[202] and the Commission, the Bureau, and the NANC Charter all anticipated that a balanced advisory committee in the numbering context must include consumer representation.[203]

The injury to Neustar from this omission is apparent:[204] [**BEGIN CONFIDENTIAL INFORMATION**] [redacted]

Telecommunications Association (Comptel), Pacific Bell, Perot Systems, SBC, Selectronics, Sprint, Sprint PCS, Personal Communications Industry Association (PCIA), Stentor, Telefonica de Puerto Rico, Teleport, Time Warner, National Cable Television Association (NCTA), US West, United States Telephone Association, and WorldCom." Second Report and Order, *Telephone Number Portability*, 12 FCC Red 12281, 12289 n.37 (1997).

200 Ericsson Comments at 19.

201 *Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 437 (D.C. Cir. 1989) (Edwards, J., concurring in part and dissenting in part); *see also id.* ("The fact that [members] are state rather than federal government officials does not demonstrate that they will be less amenable to influence by industry representatives.").

202 Ericsson Comments at 1 [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

203 *See* NANC Charter ¶ 12; *NANP Administration Report and Order*, 11 FCC Rcd at 2609, ¶ 47; May 2011 Bureau Order, 26 FCC Rcd at 6842, ¶ 12.

204 *See Cargill*, 173 F.3d at 337 ("[W]hen the [fairly balanced] requirement is ignored, persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue.") (internal quotation marks omitted).

[redacted] [**END CONFIDENTIAL INFORMATION**] As Congress's stated purpose for passing the Telecommunications Act of 1996 ("1996 Act") was to "promote competition . . . in order to secure lower prices and higher quality services for American telecommunications consumers,"[206] the [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] without input from any "American telecommunications consumer" is contrary to the Act and in violation of FACA's "fairly balanced" requirement.

In any event, the nature of the process – even if it had been free of significant flaws, which it was not – cannot compensate for deficiencies in the recommendation itself. As discussed above and in Neustar's initial comments, the recommendation fails to provide the details or explanation necessary for the Commission to perform its own meaningful review of the selection of vendor – as the law requires.

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205 *See also supra* pp. 34-36.

206 1996 Act, Preamble, 110 Stat. 56 (statement of 1996 Act's purpose). *See also Microbiological Criteria for Foods*, 886 F.2d at 436 (Edwards, J., concurring in part and dissenting in part) (concluding that "a fair balance of viewpoints cannot be achieved without representation of consumer interests" on a committee charged with recommending "microbiological criteria by which the safety and wholesomeness of food can be assessed" as "[f]ood contamination affects consumers . . . directly") (internal quotation marks omitted).

V. THE COMMISSION MUST ADDRESS NATIONAL SECURITY ISSUES RAISED BY THE SELECTION OF THE LNPA AND ALLOW CANDIDATES TO COMPETE ON THIS BASIS[207]

A. The RFP Process Has Not Addressed National Security Issues

Although the systems and services provided by the LNPA constitute "critical infrastructure" by anyone's definition, national security issues have not played a significant role in the LNPA selection process to date. As Neustar discussed in detail in its opening comments, there are four critical security issues raised by the selection of an LNPA. [**BEGIN RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**] [redacted]

[redacted]

[207] These Reply Comments are supplemented by Supplemental Reply Comments of Neustar, Inc., which contain Highly Confidential and Restricted Access Critical Infrastructure Information and which were separately filed on August 22, 2014, in accordance with procedures specified by the Commission, and incorporated by reference herein.

[redacted] [**END RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**]

Far from addressing these issues, the current RFP contains few of the security provisions that are routinely required in other, similar contexts by the Executive Branch when advising the Commission on foreign carrier applications or by the Committee on Foreign Investment in the United States ("CFIUS") when negotiating national security mitigation agreements. The comments of the Federal Law Enforcement Agencies ("Agencies") highlight many of these deficiencies in the current RFP and the importance of the Commission's consideration of these issues. The Agencies discuss the requirements they believe the Commission must ensure. For example, the Agencies note that the LNPA vendor must apply the National Institute of Standards and Technologies ("NIST") Framework for Improving Critical Infrastructure Cybersecurity ("Framework") to determine the security standards necessary to maintain the integrity of the system. Applying the Framework – which is a process, not a simple laundry list – is critical to ensuring a robust consideration of cybersecurity risks and mitigations. Other requirements discussed by the Agencies include:

- Requiring that queries of the system remain confidential so that a potential criminal will not learn that law enforcement is investigating them;
- Requiring the LNPA vendor to supply, at a minimum, the same information that is currently provided, including current and historical information, in real or near real time immediately upon granting the contract;
- Requiring the LNPA vendor to provide an application programming interface that permits a variety of platforms immediately to query large batches of numbers from multiple locations;

- Ensuring the LNPA vendor does not have unwarranted visibility into the queries submitted by a law enforcement agency in order to maintain the confidentiality and integrity of those investigations;

- Prohibiting remote write or administrator access outside of the United States or through a foreign corporate-parent entity;

- Prohibiting the LNPA vendor from tracking, logging, or preserving the queries submitted by law enforcement agencies;

- Requiring LNPA personnel with secure network access to be U.S. citizens capable of maintaining a security clearance;

- Requiring the LNPA vendor, in coordination with law enforcement, to assess the suitability of individuals with access to the LNP system;

- Prioritizing repairs and restoration if the LEAP system fails in whole or in part;

- Requiring the LNPA to have a written security plan that is approved by NAPM LLC in consultation with federal law enforcement and other agencies and filed with the Commission;

- Requiring compliance and incident reports, as well as a process for regularly scheduled and random compliance inspections;

- Requiring authentication of law enforcement credentials for access to the system;

- Requiring the LNPA vendor to ensure continuity of operations of the system and establish at least one secure backup data center for that purpose;

- Requiring audits of the system to detect access to law enforcement queries by employees or contractors of the LNPA vendor or any other third party; and

- Requiring the LNPA to provide to the NAPM LLC and file with the Commission a detailed accounting of supply chain standards and procedures specific to the query system.[208]

All of the provisions discussed by the Agencies are necessary, and none of them are in the RFP.

Not surprisingly, most of these requirements are also missing from Ericsson's response to the

[208] *See* Reply Comments of the Federal Bureau of Investigation, the Drug Enforcement Administration, the United States Secret Service, and the U.S. Immigration and Customs Enforcement.

RFP. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [redacted] **[END HIGHLY CONFIDENTIAL INFORMATION]** By contrast, the Agencies specified that "to maintain the confidentiality and integrity of [its] investigations . . . the LNPA vendor cannot track, log, or preserve the queries submitted by law enforcement agencies."[210] This direct inconsistency demonstrates how little security has factored into the selection process; properly addressing it will mean not only adding requirements to the RFP, but changing Ericsson's responses to the RFP as well.

Finally, the failure to make security part of the RFP from the start has unnecessarily limited the Agencies' options. It has forced the Agencies to try to improve LNPA security by setting forth a list of requirements that does not fully protect security. That list is largely based on the Agencies' past experiences, which means that it is inherently backward-looking, even though the worst cybersecurity threats are agile and always evolving. For example, while a standard such as the NIST Framework provide a helpful common structure to guide companies in developing cybersecurity programs and advancing their capabilities,[211] it does not itself ensure

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209 Technical Requirements Document (TRD) Section 12 – TRD Detailed Response § 7.7 at Telcordia08112.

210 Reply Comments of the Federal Bureau of Investigation, the Drug Enforcement Administration, the United States Secret Service, and the U.S. Immigration and Customs Enforcement at 5.

211 Interview with Adam Sedgewick, *Steptoe Cyberlaw Podcast #9* (Mar. 5, 2014), *available at* http://www.steptoe.com/staticfiles/SteptoeCyberlawPodcast-009.mp3.

that companies are taking the measures necessary now to protect against attacks, including nation-state attacks, nor that they have measures in place to adapt to ever-changing tactics in the future. The quality and effectiveness of a company's cybersecurity program depends on the company itself and the effort it is willing to put into its security program. By making LNPA security the subject of a competition, as opposed to an after-the-fact list of requirements, the Commission can challenge the candidates to maximize the value of the Framework and put forth the highest quality security system possible. Additionally, since the private sector itself is often the source of new and innovative advancements in technology and security, competition will ensure that Government requirements are met, and that state of the art security solutions are proposed.

B. National Security Issues Must Be Addressed by the Commission

Now that the selection decision has reached the Commission for consideration, it is the Commission's responsibility to address these security issues. Because of its focus and business model, Neustar raises fewer security risks as the LNPA. For example, Neustar's strong neutrality policies [**BEGIN RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**] [redacted] [**END RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**]

Only after the NANC's recommendation did these security issues come to the fore. The NANC's recommendation, which did not adequately address national security issues, is now

before the Commission for review. The Commission must ensure that national security risks have been identified and that "demonstrably effective" measures are in place to manage those risks. The Federal Government is responsible for protecting the national security of the United States, and it is up to government bodies like the Commission to ensure protections are in place for critical services such as 9-1-1 functionality and to prevent their disruption.

The Executive Branch has demonstrated an increasing recognition of the heightened cybersecurity risks in today's environment and its obligation to take steps to address them in order to protect the national security of the United States. For example, as recognized by the Department of Defense in its recent amendments to the Defense Federal Acquisition Regulations System ("DFARS"), building in cybersecurity requirements from the beginning, and ensuring them throughout the supply chain, is of critical importance.[212] The Commission has also recently recognized the importance of a strong commitment to comprehensive and effective cybersecurity. In June 2014, for example, Chairman Wheeler remarked, "The FCC cannot abdicate its responsibilities simply because the threats to national security and life and safety have begun to arrive via new technologies. If a call for help doesn't go through, if an emergency alert is hijacked, if our core network infrastructure goes down, are we really going to say, 'Well,

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[212] *See, e.g.*, Defense Federal Acquisition Regulation Supplement: Safeguarding Unclassified Controlled Technical Information, 78 Fed. Reg. 69,273 (Nov. 18, 3013) (to be codified at 48 CFR pts. 204, 212, and 252) (creating mandatory cybersecurity requirements for contractors with controlled technical information on their IT systems, and instituting flow down requirements, broadly applicable throughout the government contract supply chain, that requires contractors to flow down security requirements to all subcontractors, including entities that supply commercial items but do not otherwise have controlled technical information on their IT system); Defense Federal Acquisition Regulation Supplement: Requirements Relating to Supply Chain Risk, Interim Rule, 78 Fed. Reg. 69,268 (Nov. 18, 2013) (authorizing Department of Defense officials to exclude certain sources for information technology or direct Department of Defense contractors to exclude certain sources as subcontractors for the purpose of reducing supply chain risk).

that threat came through packet-switched IP-based networks, not circuit-switched telephony, so it's not our job?' "[213] The Commission should recognize the necessity for the same strong commitment to cybersecurity in the selection of an LNPA. In particular, due to the increasing concern that malicious actors could infiltrate or sabotage systems by compromising components during development and production, the importance of ensuring security requirements are incorporated from the beginning is fundamental to the security of the entire LNPA system.[214] The Commission must intervene to address the serious national security implications of the selection of an LNPA and to assure adequate protection of the interests of both the Government and the public. Only through reopening the bidding and requiring a full and fair competition on security issues can the Government ensure that cybersecurity is fully integrated into the LNPA's system and not simply tacked on to an already established infrastructure.

C. The Commission Must Require All Candidates To Compete on Any Additional Security Requirements

The Commission cannot simply select a prospective LNPA, tack a set of security requirements on to the existing RFP through contract negotiations, and still satisfy its responsibilities under the APA and its own rules. Doing so would be arbitrary and capricious, unfair to the competitors and to the Government, and not in the public's interest. By way of analogy, it is impermissible under federal procurement law to cure a defective bid after a contract award by asking the winning bidder to amend its bid to meet the changed requirements. First, ample precedent provides that agencies must award bids based on an RFP that reflects their

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213 Grant Gross, *FCC Will Push Network Providers on Cybersecurity, Wheeler Says*, NetworkWorld (June 12, 2014), http://www.networkworld.com/article/2363025/security/fcc-will-push-network-providers-on-cybersecurity-wheeler-says.html.

214 *See* Neustar Comments at 112.

actual requirements. In the case of the LNPA selection, these actual requirements must include national security concerns. Second, the Government cannot allow one party to negotiate changes in its proposal without giving all bidders the same opportunity. This is not just unfair; it is arbitrary and capricious. Moreover, critically important interests of the Government and the taxpayers are best served by a fair and open competition. A competition on security terms will allow the Government to obtain the most innovative and effective security at the best price. Imposing security requirements on an already-anointed "winner" is a recipe for grudging, box-checking compliance instead of creative "by design" security proposals, and is antithetical to the comprehensive risk management approach the Executive Branch is pursuing with respect to protecting critical infrastructure from cyber-attacks.

1. The Commission Must Afford All Candidates an Opportunity To Compete on an RFP That Reflects the Government's Actual Requirements, Including Security Requirements

Because the Commission, rather than the private sector, will establish the security requirements for the LNPA, federal procurement law is instructive. In that context, "[i]t is well established that the contract awarded must be the one for which the offerors have competed."[215]

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[215] *Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 276-77 (2004) (finding that post-selection revisions to contract provisions, including those related to dispute resolution, risk allocation, and choice of law, should have been the subject of amendment and re-solicitation to "prevent[] the field of competition from being unfairly changed"); *see also Cardinal Maint. Serv., Inc. v. United States*, 63 Fed. Cl. 98, 111 (2004) (finding Government's decision that materially altered contract after award required cancellation of contract and re-solicitation in order to "enforce a process whereby bidders can be confident that the contracts on which they bid will be the contracts which are awarded and performed"). This prohibition is limited to "material" changes, such as where an "agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect." *Piquette & Howard Elec. Servs.*, B-408435.3, 2014 CPD ¶ 8, 2013 WL 7085755, at *6 (Comp. Gen. Dec. 16, 2013). By contrast, "clarifications" that "give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors" are allowed. *Id.*; *see also Saco Def.*

Consequently, agencies are prohibited from "solicit[ing] proposals on one basis with the intent of materially altering the contract or task order at, or shortly after, award."[216] Instead, "where the government's requirements change after RFP issuance, it must issue an amendment to notify offerors of the changed requirements and afford them the opportunity to respond."[217]

This principle has been applied broadly. For example, in *United Telephone Company of the Northwest*, the Government Accountability Office ("GAO") upheld a bid protest when this principle was violated.[218] The *United Telephone* procurement was not directly covered by federal procurement law because it had been conducted "by or for" the Department of Energy ("Department") by a private contractor. Nonetheless, the GAO reviewed the procurement "to determine whether it conform[ed] to the 'federal norm'"[219] and ultimately concluded that it did not. Between the time the RFP was published and the award, changes in the Department's requirements led to significant changes in the estimated quantities covered by the RFP.[220] But the party administering the RFP simply argued that the RFP's flexibility, particularly its variable

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Sys. Div., Maremont Corp. v. Weinberger, 606 F. Supp. 446, 454 (D. Me. 1985) ("[T]he court does not find legally inappropriate the Army's suggestion that [] minor changes might have to be made after award.").

216 *Naval Sys., Inc.*, B-407090.3, 2012 CPD ¶ 326, 2012 WL 5871728, at *2 (Comp. Gen. Nov. 20, 2012) (finding cancellation and solicitation appropriate where agency inadvertently omitted requirement that contractor's personnel have a certain security access approval).

217 *United Tel. Co. of the Nw.*, B-246977, 92-1 CPD ¶ 374, 1992 WL 88095, at *5 (Comp. Gen. Apr. 20, 1992); *see also System Studies & Simulation, Inc*., B-409375.2, et al., 2014 CPD ¶ 153, 2014 WL 2199666, at *3 (Comp. Gen. May 12, 2014) ("Where, for example, there is a significant change in the government's quantity requirements, the appropriate course of action is for the agency to apprise the offerors of its revised requirements, and afford them an opportunity to submit proposals responsive to those revised requirements, even where, as here, a source selection decision has been made.").

218 *United Tel. Co. of the Nw.*, 1992 WL 88095.

219 *Id.* at *3 n.3 (citation omitted).

220 *Id.* at *3.

quantities clause, was sufficient to encompass these changes and awarded the contract without reopening the bidding.[221] The GAO rejected this shortcut as inconsistent with federal practice and determined that the Department should "reopen the competition on the basis of its changed requirements" despite the fact that recompetition would cause "further delay in the system's implementation."[222] The GAO further found that if, on the basis of the revised RFP, the originally successful bidder was no longer entitled to the award, the Department "should terminate the . . . contract," despite the fact that the successful bidder had already begun installation work in performing the contract for five months.[223]

The original LNPA RFP in this case does not reflect the Government's actual requirements. It fails to address important national security concerns. [**BEGIN RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**] [redacted] [**END RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**] The Commission's consideration of these national security issues will necessitate not only the addition of significant security requirements, but the removal of features from candidates' responses that are inconsistent with security.[225] These changes are essential and reflect the

221 *Id.* at *5.

222 *Id.* at *9 & n.10.

223 *Id.*

224 *See* Neustar Comments at 102-07.

225 As discussed above, any material alterations to the proposal requirements, whether to add or subtract requirements, requires resolicitation. *See System Studies & Simulation, Inc.*,

Government's actual needs in selecting an LNPA that maintains the critical national security functions performed by the NPAC. The Commission cannot pick a winner using the RFP's current terms, which omit these requirements, and then change the contract to add security requirements after award. To do so would impermissibly transform the selection process from a competition into a sole source contract for which the other candidates had no opportunity to compete.

2. The Commission Cannot Negotiate with the Successful Candidate After-the-Fact To Add Security Terms Without Allowing All Candidates an Opportunity To Address These Issues

It is a fundamental principle that the Government must treat all offerors equally.[226] Failing to do so is arbitrary and capricious under the APA.[227] In particular, in analogous procurement practice, agencies are prohibited from conducting negotiations with only one offeror after proposals have been submitted if the negotiations give that offeror an opportunity to

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B-409375.2, *et al.*, 2014 CPD ¶ 153, 2014 WL 2199666, at *5 (Comp. Gen. May 12, 2014) (finding agency could not make award based on RFP that reflected more requirements, in both quantity and type, than agency's actual needs). For this reason, it would be similarly improper for the Commission to pull services, such as LEAP, out of the RFP and resulting LNPA contract without offering an opportunity for new bids.

[226] *See Standard Commc'ns, Inc.*, B-406021, 2012 CPD ¶ 51, 2012 WL 474550, at *3 n.3 (Comp. Gen. Jan. 24, 2012) (discussing "underlying fundamental principle of equal treatment for all competitors"); *see also Dubinsky v. United States*, 43 Fed. Cl. 243, 259 (1999) ("The overarching principle codified in the Competition in Contracting Act of 1984 is that agencies provide 'impartial, fair, and equitable treatment for each contractor.'") (citations omitted).

[227] *See Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."); *see also Guzar Mirbachakot Transp. v. United States*, 104 Fed. Cl. 53, 67 (2012) (finding "unequal treatment was quintessentially arbitrary and capricious").

revise or modify its proposal.[228] This prohibition includes, for example, allowing one offeror to revise its technical approach or its price.[229] It also bars an offeror from removing a provision from its proposal after award in order to render its proposal acceptable.[230] This rule is necessary because post-selection discussions that lead to revisions of an offeror's proposal after the selection decision can "render[] competition underlying that decision illusory."[231] In the present case, allowing one LNPA candidate to amend its proposal, by either adding security requirements or removing provisions that are inconsistent with security, while precluding others from doing so would in effect turn a private-sector solicitation into a sole-source government contract. When post-solicitation revisions are necessary, "in order to treat all of the competitors

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[228] *See Dubinsky*, 43 Fed. Cl. at 261 ("[O]nce the request for final proposal revisions has been issued at the conclusion of discussions, it follows that an agency generally may not engage in further discussions with any offerors."); *see also Piquette & Howard Elec. Serv., Inc.*, B-408435.3, 2014 CPD P 8, 2013 WL 7085755, at *8 (Comp. Gen. Dec. 16, 2013) ("When an agency conducts discussions with one offeror, it must conduct discussions with all competitive range offerors, and provide all those offerors an opportunity to submit revised proposals.").

[229] *See Piquette & Howard Elec. Serv., Inc.*, 2013 WL 7085755 (sustaining protest where agency engaged in discussions with awardee that allowed awardee materially to revise its technical proposal but failed to request final proposal revisions from all offerors).

[230] *See Analysis Grp., LLC*, B-401726, *et al*., 2009 CPD ¶ 237, 2009 WL 4511151, at *2-3 (Comp. Gen. Nov. 13, 2009) (sustaining bid protest and recommending reopening of acquisition where agency's discussion with offeror led to that offeror's removal of an indemnity provision from its proposal that could not be legally included in a government contract because it rendered "its unacceptable quotation acceptable" and thus did not "provide equal treatment to the protester by providing it an opportunity to revise its quotation").

[231] *Hunt Bldg. Co.*, 61 Fed. Cl. at 277. This prohibition is limited to "material" changes, such as where an "agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect." *See, e.g.*, *Piquette & Howard Elec. Serv., Inc.*, 2013 WL 7085755, at *6. By contrast, "clarifications" that "give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors" are allowed. *See id.*; *see also Saco Def. Sys. Div., Maremont Corp. v. Weinberger*, 606 F. Supp. 446, 454 (D. Me. 1985) ("[T]he court does not find legally inappropriate the Army's suggestion that [] minor changes might have to be made after award.").

equally, the agency [is] obligated to afford the [other competitors] an opportunity to revise" their proposals by reopening procurement.[232]

Applying these fundamental principles to the LNPA selection decision, it would be arbitrary and capricious for the Commission to adopt a set of security measures and then discuss them with only one candidate. For full and fair competition, any discussions that would allow material revisions to a candidate's proposal to include necessary security terms must be had with all candidates, which should also be allowed to submit revised proposals. This requirement assures actual competition on all relevant requirements and equal treatment of all candidates.

3. It Is in the Government's Interest To Revise the RFP and Request New Proposals That Address the Relevant Security Requirements and the Cost Implications of Those Requirements

The procurement procedures discussed above are aimed at ensuring not only that all offerors compete on fair and equal grounds, but also that the agency can select a proposal that offers the best value to the Government and consumers.[233] Letting the parties compete to meet security requirements and to propose innovative security measures will produce greater security at a better price and will encourage innovative security solutions as well. By contrast, imposing an after-the-fact list of requirements creates the risk that the successful bidder will seek the easiest and cheapest approach – just enough to check all of the required boxes. This method

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232 *Standard Commc'ns, Inc*., 2012 WL 474550, at *3.

233 *See System Studies & Simulation*, 2014 WL 2199666, at *4 (finding amendment to reflect changed requirements necessary because without it "firms cannot prepare offers that reflect the agency's actual, anticipated needs, and correspondingly, the agency cannot reasonably determine whether award to one firm versus another will result in the lowest possible cost to the government"); *Hunt Bldg. Co.*, 61 Fed. Cl. at 277 ("The post-selection revisions to [the offeror's] proposal . . . prevented the Air Force from selecting the offeror whose offer was the most advantageous to the Government.").

does not engender nearly the same degree of quality or compliance that competition would yield, and it would not be accepted by the Government in other contexts.

D. Foreign Ownership Issues Must Be Evaluated Before Any LNPA Is Selected

1. Foreign Ownership Issues Have Not Been Evaluated in Connection with Numbering Arrangements and Number Portability

The potential that the next LNPA could be owned by a foreign entity raises serious national security and public policy concerns that have not been addressed to date.[234] In 1997, on the recommendation of the NANC, the Commission selected the first two LNPAs for the United

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[234] Telcordia is a wholly-owned subsidiary of Ericsson, a foreign corporation. Ericsson is a Swedish limited liability company incorporated under the Swedish Companies Act. Ericsson's Class A and Class B shares are traded on NASDAQ OMX Stockholm. Telefonaktiebolaget LM Ericsson/LM Ericsson Telephone Company, Securities and Exchange Commission, 2011 Form 20-F at 224 (filed April 4, 2012) ("Ericsson 2011 Form 20-F"). Ericsson is also affiliated with two major Swedish investment funds, Investor AB and AB Industrievarden, which may themselves hold investments in foreign communications companies. *See* Letter from Aaron M. Panner, Counsel for Neustar, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116, WC Docket Nos. 07-149, 09-109, at 2 (filed Nov. 21, 2012) ("According to public disclosures, Investor AB owns nearly 44 percent of Ericsson's Class A shares and 1.95 percent of its Class B shares, with more than 20 percent of the company's voting rights; AB Industrivarden owns over 30 percent of Ericsson's Class A shares with voting rights in excess of 14%.").

Ericsson also boasts of its international presence in more than 180 countries, with "established relationships with every major operator in the world." Ericsson 2011 Form 20-F at 9. Through its network services contracts, Ericsson maintains close relationships with TSPs in a number of foreign countries. As discussed above, Ericsson's relationships with various international TSPs raise not only foreign ownership concerns, but also highlight deficiencies in Telcordia's neutrality claims, particularly if the international TSP is affiliated with a U.S. TSP. *See supra* Section I. Ericsson is the 100 percent owner of companies incorporated in a number of countries around the world, including France (Ericsson France SAS), Germany (Ericsson Telekommunikation GmbH), The Netherlands (Ericsson Telecommunicatie B.V.), Turkey (Ericsson Telekomunikasyon A.S.), the U.K. (Ericsson Ltd.), Brazil (Ericsson Telecomunicacoes S.A.), Australia (Ericsson Australia Pty. Ltd.), China (Ericsson (China) Communications Co. Ltd.), Japan (Ericsson Japan K.K.), and Singapore (Ericsson Communication Solutions Pte Ltd). Telefonaktiebolaget LM Ericsson/LM Ericsson Telephone Company, Securities and Exchange Commission, 2013 Form 20-F at 149 (filed Apr. 8, 2014).

States – Lockheed Martin IMS, Neustar's predecessor, and Perot Systems, Inc. ("Perot").[235] In making their assessment of the LNPA candidates, neither the Commission nor the NANC were called on to address the issue of foreign ownership, as both Lockheed Martin and Perot were U.S. companies. As a result, the Commission has never had occasion to consider the national security implications of selecting a foreign company to administer local number portability in the United States.

The NPAC system, however, is essential to routing correctly telecommunications traffic throughout our nation and is "a key emergency service recovery tool"[236] "during a catastrophic network failure."[237] In unforeseen cases of natural or man-made disasters, the LNPA is called upon to work with the telecommunications industry and federal, state, and local governments to develop solutions where the NPAC system can be used to restore communications to the affected area as quickly as possible. For example, after the attacks on September 11, 2001, the NPAC system was used to port telephone numbers from non-operational switches to nearby working switches, and pooling functionality was utilized to port blocks of 1,000 numbers in the same manner. As a result, calls made to and from Manhattan were able to be completed by routing them through switches physically located in Brooklyn, Staten Island, and New Jersey. Similarly,

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235 Second Report and Order, *Telephone Number Portability*, 12 FCC Rcd 12281, ¶ 3 (rel. Aug. 18, 1997).

236 N.Y. Pub. Serv. Comm'n Release, *New York Trial Establishes Recovery Mechanism for Major Service Interruptions*, 06010/03C0922, at 2 (Feb. 8, 2006) (quoting Comm'r Thomas J. Dunleavy).

237 *Id.* at 1. *See also* Letter from Robert C. Atkinson, NANC Chair, to Thomas Navin, Chief, Wireline Competition Bureau, FCC, *et al.*, at 2-5 (Jan. 5, 2006), attachment, North American Numbering Council, *Interim Report on Out of LATA Porting & Pooling for Disaster Relief After Hurricane Katrina* (Nov. 16, 2005) ("*Interim Report*") (use of NPAC databases to port numbers out of disaster area); Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission* at 23, 33 (June 12, 2006) ("*Katrina Report*").

during Hurricane Katrina, hundreds of thousands of subscribers lost service because operators' central switching facilities were flooded or experienced severe damage. Service providers used the system to port numbers from non-operational switches to nearby functioning switches.[238] Given the continuing and evolving nature of threats to America's critical infrastructure[239] and the importance of a tested, reliable NPAC system in both the day-to-day functioning of the nation's telecommunications system as well as in times of emergency, the Commission must now confront and address the implications of foreign ownership of the critical U.S. LNPA infrastructure. To do so, the Commission must seek public comment on these foreign ownership issues in the context of rulemaking.

2. The Selection Process Has Failed To Consider Foreign Ownership Issues

Although the 2015 LNPA RFP required applicants for the LNPA contract to include information about their ownership structure, there is no evidence that the FoNPAC, the SWG, or the NANC considered foreign ownership issues. Nor did the FoNPAC, the SWG or the NANC have the benefit of the review and recommendation of the relevant national security agencies with respect to any concerns raised by Ericsson's foreign ownership. This is a significant omission.

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238 *See Interim Report* 22, 23 (use of NPAC databases to port numbers out of disaster area).

239 *See* National Security Program, Homeland Security Project, *Today's Rising Terrorist Threat and the Danger to the United States: Reflections on the Tenth Anniversary of The 9/11 Commission Report* at 7 (July 2014), *available at* http://bipartisanpolicy.org/sites/default/files/files/%20BPC%209-11%20Commission.pdf (last accessed Aug. 21, 2014) (noting that the "struggle against terrorism is far from over – rather, it has entered a new and dangerous phase").

In recent years, the Commission has automatically referred to Team Telecom – a group of representatives of the federal national security agencies[240] – any FCC application for initial issuance or acquisition of a broadcast or common carrier wireless license, section 214 authorization, or submarine cable landing license that involves even minor foreign ownership.[241] Further, the Commission has consistently deferred to Team Telecom on national security issues arising from such applications, enabling the national security agencies to investigate thoroughly the foreign interest and potential national security impact and "to recommend denial of, limitations on, or conditions to such approvals."[242] As a practice, the Commission will not act on such applications until Team Telecom has completed its review.[243]

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240 Team Telecom is comprised of representatives from Executive Branch agencies responsible for law enforcement, national security and critical infrastructure protection, including the Department of Justice, the Federal Bureau of Investigation, the Department of Homeland Security and the Department of Defense. The group was organized to review, among other things, the national security and law enforcement implications of non-U.S. investment in FCC license holders. *See* FCC Homeland Security Liaison Activities, Federal Communications Commission at 6, *available at* http://transition.fcc.gov/pshs/docs/liaison.pdf (last accessed Aug. 21, 2014).

241 *See, e.g.*, Second Report and Order, *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, 28 FCC Rcd 5741, 5776, ¶ 65 n.185 (2013) ("*Foreign Ownership Second Report*") ("We will continue to coordinate all petitions filed under the new rules with the Executive Branch agencies."); Report and Order, *Reform of Rules and Policies on Foreign Carrier Entry Into the U.S. Telecommunications Market*, 29 FCC Rcd 4256, 4261-62, ¶ 11 (2014) (The FCC will "continue to coordinate all applications for section 214 authority and cable landing licenses, and foreign affiliation notifications, that involve foreign carrier entry or investment from foreign carriers from both WTO and non-WTO Member countries with the appropriate Executive Branch agencies and accord deference to their views in matters related to national security, law enforcement, foreign policy, or trade policy that may be raised by a particular transaction.").

242 *Foreign Ownership Second Report*, 28 FCC Rcd at 5781-82, ¶ 72.

243 *See* 31 C.F.R. §§ 800.101 *et seq*.

In the context of a foreign entity acquiring a substantial interest in a U.S. telecom service provider or infrastructure, the Committee on Foreign Investment in the United States ("CFIUS") has jurisdiction to undertake a similar review.[244] CFIUS has the authority to review any covered transaction "by or with any foreign person, which could result in control of a U.S. business by a foreign person."[245] For covered transactions, CFIUS must consider "[t]he potential national security-related effects on U.S. critical technologies," as well as "[t]he potential national security-related effects of the transaction on U.S. critical infrastructure."[246] CFIUS likely

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[244] CFIUS was established by Executive Order to implement the Exon-Florio Amendment to the Defense Production Act. 50 U.S.C. app. § 2170. CFIUS is composed of nine member agencies: the Departments of Treasury, Commerce, Defense, Homeland Security, Justice, State, and Energy; the U.S. Trade Representative; and the White House Office of Science and Technology. The Office of Management and Budget, the Council of Economic Advisors, the National Security Council, and the National Economic Council also observe and, as appropriate, participate in CFIUS activities. Finally, the Director of National Intelligence and the Secretary of Labor are *ex-officio* members. U.S. Department of the Treasury, "Resource Center—Composition of CFIUS," *available at* http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx (last accessed Aug. 18, 2014).

[245] Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, Notice, 73 Fed. Reg. 74,567, 74,568 (2008) ("*CFIUS Notice*"); *see also* Foreign Investment in the United States, Executive Order 11858, 40 Fed. Reg. 20,263 (1975). From a practical perspective, "control" means having the ability to direct the day-to-day operations of a company and/or cause or make important decisions. Transactions involving foreign ownership interests of 10 percent or less are generally considered passive and are not "covered transactions" subject to CFIUS review. Transactions involving larger foreign interests may be subject to CFIUS's authority. There have been recent proposals to expand CFIUS's power to include purchasing agreements as well as covered transactions. *See, e.g.*, Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger, Permanent Select Committee on Intelligence, U.S. House of Representatives, *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE* at iv (Oct. 8, 2012), *available at* https://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf (last accessed Aug. 18, 2014) ("*Investigative Report on U.S. National Security Issues*") at vi.

[246] *CFIUS Notice* at 74,568.

reviewed Ericsson's original acquisition of Telcordia in 2012 and placed certain national security conditions on Ericsson.

Thus, even for a proposed minority, indirect ownership of a single FCC license automatically triggers an in-depth national security review. Similarly, substantial foreign investment in a U.S. telecommunications service provider subjects a transaction to CFIUS review. In sharp contrast to date, an in-depth national security review has not been part of the LNPA selection process, despite the 100% direct foreign ownership of the company recommended by the NANC to perform a critical function underlying the operation of all of the nation's telecommunications networks and important law enforcement investigative tools has not been subjected to any national security review. This omission cannot be reconciled with established FCC practice or the public interest. The Commission must remedy this failure *before* proceeding to award the LNPA contract.

3. Foreign Ownership of the LNPA Would Raise Serious National Security Concerns

Foreign ownership of the critical U.S. LNPA infrastructure heightens the risks of [**BEGIN RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**] [redacted] [**END RESTRICTED ACCESS CRITICAL INFRASTRUCTURE INFORMATION**] Similar national security and homeland security concerns are at the heart of existing restrictions on telecommunications foreign ownership in the Communications Act, and foreign ownership of the LNPA could give rise to considerable additional security risks for the nation's critical LNPA infrastructure. The Federal Bureau of Investigation, the Drug Enforcement Administration, the United States Secret Service, and U.S.

Immigration and Customs Enforcement (collectively, "Agencies") raise similar concerns about allowing foreign access to the LNPA, including through a foreign corporate-parent entity.[247] Likewise, these agencies state that foreign ownership of the LNPA raises national security risks surrounding the IP transition.[248]

Because of the critical relationship between the telecommunications industry and national security, the Communications Act and the Commission's implementing rules and policies include substantial restrictions on foreign ownership of various licenses.[249] Although there has been some recent, limited loosening of these restrictions to encourage foreign financial investment in American-owned companies, the Commission has recently declared that it has not "adopt[ed] any change in policy that affects [its] ability to condition or disallow foreign investment that may pose a risk of harm to important national policies,"[250] and continues to conduct such review on a "case-by-case" basis.[251]

Similarly, the Commission has noted that it will "continue to afford deference" to relevant Executive Branch agencies for review of applications with foreign ownership

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247 Comments of the Federal Bureau of Investigation, the Drug Enforcement Administration, the United States Secret Service, and U.S. Immigration and Customs Enforcement, at 4 (filed Aug. 11, 2014) ("Agencies Comments").

248 *Id.*

249 Section 310 of the Communications Act provides broad restrictions on foreign ownership of radio station licenses, including common carrier and broadcast licenses. For example, Section 310(b)(4) requires the Commission to decline to award a radio station license to any corporation that is "directly or indirectly controlled by another corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country." 47 U.S.C. § 310(b)(4).

250 *Foreign Ownership Second Report*, 28 FCC Rcd at 5757, ¶ 26.

251 Declaratory Ruling, *Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, MB Docket No. 13-50, FCC 13-150 ¶ 10 (rel. Nov. 14, 2013) ("*Broadcast Foreign Ownership Declaratory Ruling*").

implications "on matters related to national security [and] law enforcement," and will similarly "[m]aintain the Commission's ability to condition or disallow foreign investment that may pose a risk of harm to important national policies."[252]

The Communications Act was enacted at a time, like now, when national security issues were paramount. The foreign ownership restrictions in the Act on common carriers and broadcasters were established to "address homeland security interests," and Congress sought to protect the integrity of domestic communications and thwart foreign efforts to covertly gain control of internal U.S. telecommunications systems.[253] Although new technologies have given rise to new threats to national security since the drafting of the original Act, the Commission has recently found that "the historical statutory concern for foreign influence" over Commission licensees has not disappeared.[254] The Commission is still charged with balancing the need to maintain a marketplace open to foreign investment and innovation while continuing to protect

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252 *Foreign Ownership Second Report*, 28 FCC Rcd at 5745-46, ¶ 5. The Communications Act also imposes foreign ownership restrictions in the context of foreign carriers. For example, Section 214 requires the Commission to give notice to the Secretary of Defense, Secretary of State, and relevant State governors on receipt of an application for construction or extension of any international common carrier transport lines. 47 U.S.C. § 214(b). Under Section 310(b)(3) the Commission reviews applications for broadcast licenses from entities of which more than 20 percent of the capital stock is owned or voted by aliens, a foreign government, or a foreign corporation, and subjects applications for common carrier licenses to the same public interest standard as Section 310(b)(4). As discussed previously, the Commission has consistently found foreign investment in FCC licensees as potentially raising significant concerns such that it automatically refers to Team Telecom petitions seeking foreign ownership exceeding the thresholds in Section 310(b)(3) and 310(b)(4).

253 *Broadcast Foreign Ownership Declaratory Ruling* ¶ 2.

254 *Id.* ¶ 16.

"important interests related to national security, law enforcement, foreign policy, and trade policy."[255]

Members of Congress have warned that "the telecommunications sector plays a critical role in the safety and security of our nation, and is thus a target of foreign intelligence services."[256] A foreign company selected as the LNPA could have undisclosed ties to the government or military of its home country, and could be subject to influences that would never come to light in the course of the current LNPA RFP review process.[257] Furthermore, to the extent that a foreign-controlled LNPA is influenced by a foreign entity, "the opportunity exists for further economic and foreign espionage by a foreign nation-state."[258] The Agencies agree, and in their comments argue that "[p]reventing unwarranted, and potentially harmful, visibility" into queries submitted by law enforcement agencies "means that the FCC cannot allow an LNPA to have remote access . . . through a foreign corporate-parent entity."[259]

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255 First Report and Order, *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4) of the Communications Act of 1934, as Amended*, 27 FCC Rcd 9832, 9833, ¶ 3 (2012).

256 *Investigative Report on U.S. National Security Issues* at iv.

257 For example, it has been widely reported that in 2011 Sweden - reportedly acting to protect Ericsson's commercial ties - blocked an effort by other European Union states to impose sanctions against two Syrian telecommunications providers. Contemporary news reports noted that although it was unusual for Sweden to deviate from its policy of defense of human rights, the Syrian telecoms firms had commercial links to Ericsson, and voices inside Sweden suggested that the government had acted to protect Ericsson's interests. *See* David Brunnstrom and Anna Ringstrom, *Sweden keeps Syria telecoms firms off EU sanctions list*, Reuters, Dec. 2, 2011, http://www.reuters.com/article/2011/12/02/us-eu-syria-sweden-idUSTRE7B120J20111202.

258 *See Investigative Report on U.S. National Security Issues* at iv (noting concerns with "the potential security threat posed by Chinese telecommunications companies with potential ties to the Chinese government or military").

259 Agencies Comments.

Foreign ownership of the LNPA also adds national security considerations to the already considerable technological challenges inherent in the IP transition. As the Commission has correctly noted, "[p]ublic safety, emergency preparedness and response, and national security are fundamental government functions" that must be addressed as part of the technological transition from conventional TDM to IP networks.[260] The IP transition impacts more than just civilians, although the continued availability of consumer-facing services such as 911 are, of course, a critical security concern in the selection of a LNP administrator.[261] The Department of Defense and other Federal executive branch agencies, such as the Federal Aviation Administration, maintain communications systems "that today rely heavily on legacy TDM-based networks and services,"[262] and the LNPA will have to ensure that number portability to these government entities is not adversely impacted by the IP transition. In the context of evaluating proposals for the IP transition, the Commission observed that it must "be able to confirm that there will be no disruption to national security, emergency preparedness, and public safety operations that today depend on existing TDM-based communications services."[263] The Commission should allow the public, affected carriers, and federal agency stakeholders an opportunity to comment on the

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260 Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, *Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; Connect America Fund; Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Numbering Policies for Modern Communications*, 29 FCC Rcd 1433, ¶ 38 (2014) ("*Technology Transitions Order*").

261 *See, e.g.*, Intrado, Inc. Comments (filed July 24, 2014).

262 *Technology Transitions Order*, 29 FCC Rcd at 1447, ¶ 42.

263 *Id.*

implications of a wholly foreign-owned LNPA on the national security functions reliant on an IP transition free of potentially devastating disruptions.

* * * * *

The Commission must evaluate the public policy and other implications associated with foreign ownership of the LNPA before acting on the NANC recommendation. In particular, before adopting a final rule, the Commission should undertake a comprehensive foreign ownership review and ensure that appropriate Executive Branch agencies have the opportunity to review and comment on the potential for national security concerns that could arise from awarding the LNPA contract to a foreign-owned or foreign-controlled entity.

CONCLUSION

For the foregoing reasons, and for the reasons set out in Neustar's comments, the Commission should (1) declare that Ericsson's proposal does not qualify for consideration in light of its failure to satisfy the impartiality/neutrality requirements required by law and Commission precedent; (2) authorize the NAPM LLC to negotiate an extension to the current contract; and (3) issue a notice of proposed rulemaking to examine future arrangements for administration of the NPAC.

Respectfully submitted,

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