and state utility and consumer advocate groups, and that one SWG chair be a state utility commissioner or consumer advocate.[26] But Neustar supported the consensus proposal as written, including the proposal that the SWG elect all its chairs.[27] Neustar cannot now argue that the SWG's composition violates the FACA when it could have raised this objection in 2011, but did not.

Neustar is also wrong on the merits — both the SWG and NANC were fairly balanced. NANC is composed of representatives from large and small ILECs, CLECs, trade associations, wireless providers, and VoIP providers, state public utility commissions and state public utility consumer advocates. The SWG's membership was open to every member of the NANC, including state utility consumer advocates, with no prerequisites to participation other than NANC membership.

The fact that state consumer advocates elected not to participate does not mean that the SWG wasn't balanced, as they clearly could have participated, and the FACA is primarily concerned with the *ability* to participate. The fairly balanced requirement does not confer a right to committee membership on any particular representative;[28] it merely

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26 Telcordia March 22, 2011 Comments at 2-3.

27 Neustar March 29, 2011 Reply Comments at 2 n.6 ("Neustar agrees with the Bureau that the Consensus Proposal is 'consistent with prior delegations of authority and Commission rules regarding the LNPA selection.'").

28 *Nat'l Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey On Cost Control*, 711 F.2d 143, 146 n.2 (D.C. Cir. 1983).

seeks to ensure that groups affected by committee decisions can have their voices heard.[29] What matters for the FACA is that consumer groups had that opportunity—their decision not to take it is not a FACA violation.

Moreover, a committee does not need to include every conceivable group that a decision might affect,[30] and the absence of consumer groups on advisory committees does not violate the fairly balanced provisions when committees render specialized advice regarding highly technical issues such as LNPA selection.[31] By permitting all NANC members to participate in the SWG, the SWG was "fairly balanced in its membership in terms of the points of view represented and the functions to be performed."[32]

B. Even if the Fairly Balanced Requirement Applied, that Would Not Be a Reason for the Commission to Disregard the NANC's Recommendation.

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29 *Id.* ("[T]he legislative history makes clear, [that] the 'fairly balanced' requirement was designed to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee.").

30 *Nat'l Treasury Employees Union v. Reagan*, No. 88-186, 1988 WL 21700, at *3 (D.D.C. Feb. 26, 1988) (agreeing that Congress did not intend to require "Committee representation for every group that is 'directly affected' by the work of a particular committee.").

31 *Pub. Citizen v. Nat'l Advisory Committee on Microbiological Criteria for Foods*, 708 F. Supp. 359 (D.D.C. 1988) (finding absence of consumer groups on committee did not violate FACA where committee rendered highly technical advice).

32 41 C.F.R. § 102-3.30(c).

Even if the FACA does apply to the SWG, however, and even if the SWG and NANC did not comply with certain technical FACA requirements, Neustar is wrong that the Commission may not rely on their reports. Agencies do not have a duty to ensure that subcommittees follow the FACA,[33] which itself contains no enforcement provisions.[34] Indeed, courts routinely caution against enjoining agencies from relying on advisory committee reports that technically violate the FACA when there is no discernable injury.

If the FACA was violated, the notice-and-comment process in which Neustar has already actively taken part is its own remedy. In *California Forestry Association v. U.S. Forest Service*,[35] the D.C. Circuit dealt with FACA violations similar to what Neustar alleges.[36] The court warned that that it could frustrate the purposes of the FACA to enjoin the Forest Service's use of a study where — like here — "the rulemaking will be

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33 *See Claybrook v. Slater*, 111 F.3d 904, 908 (D.C. Cir. 1997) ("[R]egardless what the legislative history says about what an *advisory committee* should and should not do, it no more manifests that the *agency* (or its representative) has a duty to prevent unauthorized committee actions than does the statute itself.") (emphasis in original).

34 *Id.* (rejecting argument that FACA is ambiguous for not containing enforcement provisions, because "the statute is not ambiguous merely because it lacks something [appellant] believes should be there"); *Northwest Forest Resource Council v. Epsy*, 846 F. Supp. 1009, 1014 (D.D.C. 1994) ("FACA itself does not prescribe remedies for violations of its requirements."); *cf. id.* at 1015 ("There is no 'exclusionary rule' applicable to the decisionmaking process of the President.").

35 102 F.3d 609 (D.C. Cir. 1996).

36 The advisory committee failed to follow a number of FACA requirements including publishing meeting notices in the Federal Register, permitting interested persons to attend meetings, making its records available. *Id.* at 611 n.2.

subject to full notice and comment and ultimately to judicial review."[37] Although this is not a rulemaking for which formal Federal Register notice is required, the Bureau has nonetheless sought public comment and Neustar has had ample opportunity in its hundreds of pages of comments to make whatever arguments it needs, yet revealingly, it has not explained *how* a supposed FACA violation has actually harmed it.

Because Neustar claims no specific harm, its FACA allegations, even if true, raise no concern. Neustar has not shown that strict compliance with the FACA would have resulted in a different report or recommendation. Nor, at this stage in the process, can any discrete decision by the Commission be traced to these reports. Courts have declined to stop agencies from relying on committee reports that may technically violate the FACA when the violation cannot be associated with a particular harm.[38]

This lack of injury is particularly important considering that, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings . . . ."[39] If the Commission cannot rely on the SWG report or NANC recommendation, the result will be additional costly procedures, to redress an injury that

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37 *Id.* at 613.

38 *See, e.g.*, *Fertilizer Inst. v. U.S. E.P.A.*, 938 F. Supp. 52, 55 (D.D.C. 1996) ("[T]here is no reason to believe that the Committee would do anything differently with one or two more industry representatives serving on it."); *Northwest Forest Resource Council*, 846 F. Supp. at 1015 ("There is nothing in the record to suggest that the . . . Report . . . would have in any way been altered had FACA been complied with to the letter.").

39 *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453 (1989).

does not exist. Such a result would be inconsistent with the "FACA's aim to reduce wasteful expenditures,"[40] as the LNPA selection process has already dragged on at enormous cost. Indeed, in *California Forestry Association*, the D.C. Circuit cautioned against fashioning unnecessary relief for a FACA violation where "[t]he preparation of the report has already consumed millions of dollars."[41]

Although costly additional committee proceedings would suit Neustar's purposes of constant delay, they would violate the spirit of the FACA, and would be completely unnecessary. The Commission is not required to disregard the SWG and NANC's work, it is doubtful that Neustar could even obtain judicial review of its FACA objections,[42] and Neustar has been uninjured by any technical FACA violations. The Commission can and should ignore this red herring.

CONCLUSION

The Commission should rest assured that the existing solicitation's existing requirements fully encompass each of the areas Neustar erroneously characterizes as absent. The LNPA solicitation outlines an overarching security framework; the specific details must be refined during contract performance. Telcordia's proposal pledges the

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40 *California Forestry Ass'n*, 102 F.3d at 614 (internal quotation marks omitted).

41 *Id.*

42 In any event, more than one court has held that the broad "fairly balanced" requirement does not provide any judicially manageable standards for review, and that questions arising under this provision are therefore nonjusticiable. *See, e.g.*, *Fertilizer Inst.*, 938 F. Supp. at 54-55; *Pub. Citizen v. Dep't of Health and Human Servs.*, 795 F. Supp. 1212, 1221-22 (D.D.C. 1992).

company's full and complete cooperation in implementing all such requirements to ensure the security and integrity of both the NPAC SMS and its ancillary systems such as ELEP. Each of these details is properly addressed as a matter of contract administration and Neustar's attempt to force the Commission to reopen the competition is a meritless delay tactic. The Commission should approve the NANC's recommendation of Telcordia as the next LNPA and should direct NAPM to expeditiously enter into a contract with Telcordia.

Respectfully submitted,

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