

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Petition of Telcordia Technologies, Inc. To Reform or Strike Amendment 70, To Institute a Competitive Bidding for Number Portability Administration, and To End the LLC's Interim Role in Number Portability Administration Contract Management

Telephone Number Portability

WC Docket No. 09-109

WC Docket No. 07-149

CC Docket No. 95-116

**OPPOSITION OF TELCORDIA TECHNOLOGIES, INC., D/B/A ICONECTIV TO
NEUSTAR'S PETITION FOR DECLARATORY RULING**

John T. Nakahata
Christopher J. Wright
Timothy J. Simeone
Mark D. Davis
John R. Grimm

HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Eighth Floor
Washington, D.C. 20036
(202) 730-1320
jnakahata@hwglaw.com

November 3, 2014

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
ARGUMENT	2
I. Neustar Ignores the Core Goals and Basic Structure of FACA.	2
II. Neustar Cannot Demonstrate any Harm from Alleged FACA Violations.	4
A. Neustar has not demonstrated prejudicial error, as the APA requires.	5
B. Neustar has waived any claim to relief by its inaction.	8
III. The Commission can consider the SWG and NANC Recommendations.	12
CONCLUSION.....	14

INTRODUCTION AND SUMMARY

Telcordia Technologies, Inc., d/b/a iconectiv (“Telcordia”), hereby files this opposition to Neustar’s Petition for Declaratory Ruling. Neustar asks the Commission to declare the North American Numbering Council (“NANC”) and its Selection Working Group subcommittee (“SWG”) in violation of the Federal Advisory Committee Act (“FACA”);¹ to refrain from relying on the recommendation or record developed by the NANC and SWG; and to reopen the Local Number Portability Administrator (“LNPA”) selection process. Neustar’s Petition is yet another meritless attempt by Neustar to game the selection process and to manufacture delay so as to continue collecting over \$500 million per year for as long as possible. There is no reason to re-open the bidding process—to the contrary, it is time for the Commission to finish the selection process.

Neustar’s Petition should be rejected in the first instance because NANC and its SWG subcommittee complied with FACA and applicable General Service Administration (“GSA”) regulations. In addition, the Petition should be rejected because it would directly undermine FACA’s core goal of promoting government efficiency. Neustar has not and cannot show any prejudice from the highly technical violations of FACA that it alleges, and it has, moreover, waived its objections to these violations and is now just trying to sandbag the selection process. The SWG meetings of which Neustar belatedly complains were publicly disclosed at quarterly meetings of the North American Numbering Council (convened in accordance with FACA procedures) that Neustar attended. Neustar never once during the more than four years of LNP Selection process meetings protested that the SWG’s meeting violated FACA until after it learned that it would not be recommended as the next LNPA—and it has never in its seventeen

¹ 5 U.S.C. app. 2 § 1 *et seq.*

year history as the LNPA, North American Numbering Plan Administrator or Number Pooling Administrator suggested that NANC subcommittees—including the SWG and groups such as the LNPA Working Group that defines local number portability processes and requirements—ever needed to comply with the requirements of the FACA. Furthermore, it is undisputed that FACA contains no enforcement provisions and Neustar therefore is not entitled to the relief it seeks. Finally, while the Commission certainly need not rely on the NANC’s recommendations to reach its own conclusions in this proceeding, Neustar is simply wrong that a “use injunction” is appropriate here. To the contrary, under controlling precedent, the Commission is fully entitled to take cognizance of the NANC’s and the SWG’s recommendations.

ARGUMENT

I. NEUSTAR IGNORES THE CORE GOALS AND BASIC STRUCTURE OF FACA.

Even Neustar admits² that a core goal of FACA is to avoid exactly the kind of wastefulness that could occur if the work of the SWG and NANC is excluded in these proceedings.³ Indeed, the FACA is intended “to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings”⁴ Undeterred, Neustar demands that exact result, by asking the Commission to dismiss all the work done by the NANC

² Neustar Petition for Declaratory Ruling at 44, WC Docket No. 09-109, CC Docket No. 95-116 (“Petition”).

³ Neustar points out that another goal of FACA is to promote government accountability. Neustar Petition at 44 & n.180. But as discussed below, the sensitive nature of the SWG’s work meant that it would always be confidential. Thus, rather than defeat FACA’s goals of public accountability, the SWG’s secrecy promoted an important interest of protecting trade secrets and sensitive infrastructure information. Notably, all key outputs from the SWG and NANC—including the draft procurement documents and the selection recommendation—have been subject to public comment, which further promotes both transparency and accountability.

⁴ *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 453 (1989).

and SWG over the past three years. Redoing all the SWG's work just to arrive, inevitably, at the same result would be an utterly worthless exercise.

The law does not require such a drastic, and wildly disproportionate, outcome. The D.C. Circuit has emphasized "FACA's aim to reduce wasteful expenditures,"⁵ and cautioned against FACA remedies that would result in additional costly committee work.⁶ The LNPA selection process has already dragged on for four years, at substantial expenditure of time and resources. Further delay would benefit Neustar as the current incumbent, but would cost consumers and the industry more than an estimated \$1 million per day.⁷ The Commission need not and should not allow Neustar to undermine the FACA's goals by racking up more consumer cost.

In its September 24 *ex parte*, Telcordia demonstrated why no FACA violation occurred here, or if one did, why Neustar is entitled to no relief. Telcordia stands by those earlier arguments. The GSA regulations explicitly exclude subcommittees of advisory committees, like the SWG, from the ambit of FACA when they report to a parent advisory committee which then undertakes further deliberations.⁸ That is precisely what occurred here.

In addition, however, Neustar's quibbles over the validity of GSA regulations to obscure the essential—*undisputed*—fact that FACA contains *no* enforcement provisions. Indeed, while

⁵ *Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 614 (D.C. Cir. 1996).

⁶ *Id.* ("The preparation of the report has already consumed millions of dollars."); *see also* *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1026 (D.C. Cir. 1998) ("The district court should also consider whether FACA's principal purposes—(1) avoidance of wasteful expenditures and (2) public accountability—will be served by granting a use injunction.").

⁷ Reply Comments of CTIA—The Rural Wireless Association and the United States Telecom Association at 2, WC Docket No. 09-109, CC Docket No. 95-116 (filed Aug. 8, 2014).

⁸ 41 C.F.R. § 102-3.35(a) ("In general, the requirements of the Act . . . do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency."); *cf. id.* § 102-3.145 (excusing subcommittees from openness requirements unless recommendations will be adopted by parent committee or agency "*without further deliberations*" (emphasis added)).

Neustar takes for granted that if a FACA violation occurred it is the Commission's responsibility to remedy it, the courts have held to the contrary.⁹ As the D.C. Circuit has explained, "regardless 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."¹⁰

In short, FACA does not provide a remedy for the technical violations claimed by Neustar. Significantly, however, in this case there also is *nothing to remedy*—as set forth below, Neustar does not demonstrate any prejudice at all from the FACA violations it alleges.

II. NEUSTAR CANNOT DEMONSTRATE ANY HARM FROM ALLEGED FACA VIOLATIONS.

No amount of delay or consumer expense is too much for Neustar, but even if FACA requirements apply to the SWG (which they do not) the Commission need not acquiesce to Neustar's demands for three reasons: (A) FACA does not require the result Neustar seeks, because Neustar cannot demonstrate any prejudicial error; (B) Neustar has waived any right to a FACA challenge (or associated remedy) by its inaction; and (C) the notice-and-comment process cured any FACA defect that may have existed.

⁹ See *Claybrook v. Slater*, 111 F.3d 904, 908 (D.C. Cir. 1997) (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"); *Nw. Forest Res. 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.").

¹⁰ *Claybrook*, 111 F.3d at 908 (emphasis in original). *Claybrook* was also more recently decided than *Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983), which Neustar relies on to argue that the Commission is responsible for NANC and SWG's alleged omissions. Petition at 41.

A. Neustar has not demonstrated prejudicial error, as the APA requires.

Even if a technical violation of FACA occurred, because there has been no prejudice to Neustar, it is not entitled to relief. Under the Administrative Procedure Act (“APA”), FACA violations are reviewed for prejudicial error,¹¹ and Neustar has not shown how circumstances would be different absent the FACA irregularities it alleges. Neustar has not even shown that FACA violations, as opposed to other considerations, are the reason it did not have access to SWG minutes or meetings. After all, SWG proceedings would have been confidential—and thus closed—under any circumstances due to their subject matter—the consideration of confidential, proprietary bids. The errors alleged by Neustar therefore do not entitle it to the relief it requests.

Neustar maintains that it is injured by the NANC and SWG’s lack of transparency,¹² but because their deliberations involved industry secrets, proprietary bid and proposal information, and questions of sensitive infrastructure, the public would not have been privy to them regardless of the strictures of FACA. “[W]here, as here, a large part of the Committee’s deliberations involved classified materials to which the public would not have had access even under FACA, the loss of public participation is less significant.”¹³ Moreover, it was no secret that the SWG was meeting. At each NANC meeting after the SWG was formed, the SWG provided a report—or at least had a place on the agenda to do so. Neustar—which attends each and every NANC

¹¹ See 5 U.S.C. § 706 (requiring courts to take “due account” of the rule of prejudicial error); see also *Pena*, 147 F.3d at 1026 n.7) (“[I]f the FACA violation appears to have had little deleterious effect on the committee’s output and accountability and the public’s participation, the district court should withhold a use injunction.”).

¹² Petition at 46.

¹³ *Pena*, 147 F.3d at 1026.

meeting—never asked NANC to ensure that the SWG’s meeting be publicly announced in the *Federal Register* or opened for public participation.¹⁴

Neustar also continues to argue that the SWG membership was not fairly balanced, but it is hard to imagine how the absence of a state utility consumer advocate—who are NANC members and thus were eligible and invited to participate in the SWG—prejudiced Neustar, as courts have expressed skepticism that a one or two-member difference on a committee would sway the outcome of its work.¹⁵ Moreover, Neustar cannot show prejudice because it does not even seriously maintain that any group was *improperly* absent from the SWG, since SWG membership was voluntary, and open to all NANC members,¹⁶ including state public utility consumer advocates (who also did not participate in the 1997 LNPA SWG).¹⁷ Neustar instead

¹⁴ It is also worth noting that the 1997 LNPA Selection Working Group Report actually contains less-detailed information about the basis for the LNPA recommendations than does the current SWG report, which included and attached the FoNPAC report. The current report evaluates each vendor bid based on specific RFP criteria like technical and managerial merit, transition risk, and long-term cost, whereas the 1997 report focuses mostly on selection methodology, and does not support its recommendation with particularized analysis.

¹⁵ *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.”); *Nw. Forest Res. 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.”).

¹⁶ Neustar’s suggestion, Petition at 50, that the SWG has an “appearance of partiality” is particularly meritless considering its membership pool—all NANC members—included telecommunications providers of all sizes, as well as trade groups representing a diverse array of parties.

¹⁷ Neustar Petition at 12 (listing 1997 LNPA SWG members). Neustar makes much of the fact that the 1997 LNPA SWG—which had a much broader set of tasks than the current SWG—had 38 participants, as compared with 13 participants in the current SWG. However, a closer examination shows that 19 of the 38 entities that participated in the 1997 LNPA SWG themselves or through successor entities participated in the current SWG. Two 1997 participants, Comptel and NCTA, were NANC members and thus eligible for participation in the current SWG, but elected not to do so (although had significant members participating in the SWG directly). In 1997, four state PUCs participated, while three participated in the current SWG. Although Frontier participated in 1997 and did not do so in the current SWG,

argues that the *ability* to participate was not enough to satisfy FACA¹⁸—but as *Pena* indicates, “substantial *efforts* to include members of the interested public in at least some committee meetings . . . counsel against a use injunction.”¹⁹

Here, NANC made substantial efforts to include all interested parties in the SWG membership, so under the logic of *Pena*, there is no defect in the committee’s membership²⁰—nor is there any reason to suspect a more balanced or differently balanced committee would result from the declaratory ruling Neustar seeks now. Even Neustar does not go so far as to suggest that NANC or the FCC should somehow *force* entities to join the SWG, but that is apparently the only remaining option if existing efforts were not enough.

The other errors Neustar alleges were also manifestly *non*-prejudicial. For example, Neustar complains that the NANC and SWG recommendations lacked an evaluation of LNPA

it is similar to CenturyLink, which participated in the current SWG. Similarly, Time Warner participated in 1997, and did not participate in the current SWG, but Comcast participated in the current SWG and did not participate in 1997. Of the remainder of the 1997 participants, one was Bellcore, Telcordia’s predecessor, one was Perot Systems, which was one of the initial LNPA designees, and two were equipment manufacturers Nortel and Lucent. Neustar’s comparison of the 1997 and current membership rosters is simply another red-herring.

In any event, it remains an open question whether a court could even hear Neustar’s challenge to the group’s composition. On at least several occasions, courts have held that FACA’s fair-balance requirement presents a non-justiciable political question.¹⁷ *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).

¹⁸ Neustar Petition at 40.

¹⁹ *Pena*, 147 F.3d at 1026 (emphasis added). *Pena* addressed whether a petitioner has standing to seek a FACA use injunction, and not whether a FACA violation actually occurred. But the analysis necessarily involved a discussion of factors that strengthen or weaken a FACA argument, as well as the likelihood an injunction would provide relief (and therefore whether it would be available).

²⁰ The fair-balance requirement does not confer a right to committee membership on any particular representative. *Nat’l Anti-Hunger Coal.*, 711 F.2d at 1074 n.2.

neutrality, or the costs and risks associated with an LNPA transition.²¹ But it does not show how supposed *FACA violations* led to those omissions, and it overlooks the obvious fact that these topics have been discussed extensively in the comments, replies, and *ex partes*.²² Neustar does not actually claim that there are neutrality or transition issues that have not been adequately raised in the comments (due to a FACA violation, no less), and the sheer volume of ink spilled on those topics alone would make that claim absurd. The notion that any of Neustar's alleged violations has led to a real harm to Neustar is simply not supported by the record, and under the APA's prejudicial error rule, no relief is appropriate.

B. Neustar has waived any claim to relief by its inaction.

Neustar has also waived any objection to the committees' composition or procedures, or right to relief, by failing to object to the SWG's composition or operating procedures for years. As Telcordia pointed out in its September 24 *ex parte*,²³ in March 2011, Telcordia proposed that SWG membership be balanced between industry and state utility and consumer advocate groups, and that one SWG chair be a state utility commissioner or consumer advocate.²⁴ But Neustar supported the consensus proposal as written, which had no explicit balance requirement and

²¹ Petition at 46-47.

²² See e.g., Comments of Neustar, Inc. at 13-47, 90-100, WC Docket No. 09-109, CC Docket No. 95-116 (filed July 25, 2014); Comments of Telcordia Technologies, Inc. d/b/a iconectiv at 13-18, CC Docket No. 95-116, WC Docket No. 09-109 (filed July 25, 2014); Reply Comments of Telcordia Technologies, Inc. d/b/a iconectiv at 11-36, 106-117, WC Docket No. 09-109, CC Docket No. 95-116 (filed Aug. 22, 2014) ("Telcordia Reply Comments") (citations in this document use pagination from Errata filed on Sept. 3, 2014); Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Sept. 29, 2014).

²³ Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Marlene H. Dortch, Secretary, FCC at 22, CC Docket No. 95-116, WC Docket No. 09-109 (filed Sept. 24, 2014).

²⁴ Comments of Telcordia Technologies, Inc. at 2-3, WC Docket Nos. 07-149 & 09-109, CC Docket No. 95-116 (filed Mar. 22, 2011).

which included the proposal that the SWG elect all its chairs.²⁵ Neustar also defended the LNPA Working Group's (another NANC subcommittee) procedure for deciding issues in response to Telcordia's dispute over URI codes in 2009, even though those proceedings did not provide for publication of meeting notices in the Federal Register, or the presence of a Designated Federal Official.²⁶

Now, for the first time, Neustar takes issue with NANC committee practices it has long endorsed. But this recent change of heart is not enough to earn Neustar the relief it seeks. For instance, *Pena* makes clear that a party should not receive a FACA use injunction when it has delayed seeking relief: "If the plaintiff has failed to prosecute its claim for injunctive relief promptly, and if it has no reasonable explanation for its delay, the district court should be reluctant to award relief."²⁷ Neustar's silence about NANC procedures it has long known about would preclude it from a use injunction even if such relief were otherwise called for. That is especially true here, because Neustar was well aware that the Selection Working Group was meeting, apprised along with the rest of the public through reports at the NANC's regular

²⁵ Reply Comments of Neustar, Inc. at 2 n.6, WC. Docket No. 09-109, CC Docket No. 95-116, (filed Mar. 29, 2011) ("Neustar agrees with the Bureau that the Consensus Proposal is 'consistent with prior delegations of authority and Commission rules regarding the LNPA selection.'). In fact, Neustar criticized Telcordia for suggesting changes to the selection process, claiming that it was illegitimate for a potential bidder to do so. *Id.* at 2 ("In contrast to the comments of [Telcordia] in response to the Order, however, Neustar does not believe that it is appropriate for potential respondents to the NAPM LLC/NANC request for proposal...to put forward changes to the Consensus Proposal by which a vendor will be recommended to the Commission.").

²⁶ Letter from Thomas J. Navin, Counsel to Neustar, Inc., to the Honorable Betty Ann Kane, Chairman, D.C. Public Service Commission, *et al.* at 4-8, Aug. 14, 2009, *available at* http://www.nanc-chair.org/docs/mtg_docs/NeuStar_Response.pdf; Letter from Thomas J. Navin, Counsel to Neustar, Inc., to the Honorable Betty Ann Kane, Chairman, D.C. Public Service Commission, *et al.* at 21-25, July 30, 2010, *available at* http://www.nanc-chair.org/docs/mtg_docs/Neustar_Response_July_30_2010.pdf.

²⁷ *Pena*, 147 F.3d at 1026.

meetings that were themselves convened pursuant to the FACA. If Neustar had a genuine concern about transparency and openness—rather than after-the-fact looking for a way to upset a selection process that it once endorsed now that it recommended a different vendor—it could have and should have raised that concern at one or more of NANC’s meetings. It never did so.

Indeed, Neustar forgets that a use injunction—to which it claims entitlement—is an equitable remedy, and equitable relief is unavailable where there has been “(1) unreasonable delay in bringing the claim for relief and (2) prejudice caused by the delay.”²⁸ If Neustar had a bona fide objection to SWG members or procedures, it has long waived the opportunity to challenge them, and any prejudice Neustar suffered is in significant part a result of its own delay. Neustar is engaged in *post hoc* sandbagging.

C. The Commission’s Notice-and-Comment Proceedings Have Cured Any Potential FACA Irregularities in the NANC and SWG Recommendations.

Not only has Neustar waived any relief it could claim a right to, it continues to overlook the importance of the Commission’s independent decision-making as a remedy to a potential FACA violation. NANC and the SWG play a limited role in a much broader process—a process in which all interested parties, including Neustar and the public have had the opportunity to file hundreds of pages of comments raising any issue they want, (and they have done so) and in which the Commission will make its own decision.²⁹ Neustar is therefore wrong to claim³⁰ that

²⁸ *Id.* (applying “[t]he venerable maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those who slumber on their rights)” in FACA use injunction context) (citing *Indep. Bankers’ Ass’n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980)) (internal quotation marks omitted).

²⁹ The D.C. Circuit has even recognized the potential that suppressing a committee’s report because of a FACA violation could violate the committee members’ First Amendment rights. *See id.* at 1025 (cautioning that use injunction should be “the remedy of last resort” due to “First Amendment implications”).

³⁰ Neustar Petition at 47-48.

the notice-and-comment procedure does not matter; to the contrary, it has cured any lingering FACA violations that may have occurred.

Pena recognized the curative effect of notice-and-comment proceedings on FACA violations in the use-injunction context: “if members of the public will have another opportunity to comment on an agency decision, the district court should determine whether the subsequent opportunity will render harmless (or at least less harmful) the loss of any past opportunity to participate,” in determining whether to issue an injunction.³¹ Neustar cannot seriously claim that even after thousands of pages have been filed in this docket *since the SWG met*, minor technical FACA violations have somehow deprived the Commission of a fulsome record sufficient to allow a proper, reasoned LNPA determination. And since the record is now replete with papers related to Neustar’s meritless FACA challenge, there is truly no relevant issue which has escaped the notice-and-comment procedure.

It is simply implausible in light of all the substantive comments filed in this proceeding—with public comment at each stage (defining the selection process, establishing the terms of the procurement documents, evaluating the bids)—that the Commission’s decision would be different if Neustar had had access to SWG minutes or public meeting notices, or if the SWG’s membership varied just a little. For example, as discussed above, the notice-and-comment proceeding has demonstrably given Neustar the opportunity to raise concerns over LNPA neutrality and transition costs, even though it claims they are lacking from the NANC recommendation due to FACA errors. No procedural irregularity has denied Neustar or the general public ample opportunity to raise any issue they want to regarding the *substance* of the various groups’ recommendations.

³¹ *Pena*, 147 F.3d at 1026.

Furthermore, Neustar treats it as a foregone conclusion that the groups' recommendations will dictate the ultimate decision in this proceeding, when in fact the Commission has not taken any action yet, and any decision the Commission makes will be the result of the Commission's own independent judgment, in consideration of the entire record, including the public comments. As Telcordia pointed out in its Reply Comments,³² the Commission will not simply rubber-stamp the committees' recommendations but will instead make its recommendation on the full record. The Commission made this clear in its 2011 Order.³³ The Commission's independent decision will be based on the entire record, including all of Neustar's comments which, presumably, raise all the issues Neustar felt were lacking from the NAPM recommendation. There is no credible suggestion that any procedural irregularities have not been cured.

III. THE COMMISSION CAN CONSIDER THE SWG AND NANC RECOMMENDATIONS.

Finally, the Commission can consider the NANC and SWG recommendations as part of its independent decision-making in this proceeding, because a use injunction would not be appropriate here. Neustar's cases only suggest that a use injunction "*might* be appropriate in some cases,"³⁴ where the lack of an injunction would "render FACA a *nullity*."³⁵ This is not such a case. As already discussed, any FACA errors here were non-prejudicial because the SWG's work was confidential regardless of FACA, and the public has had the opportunity to file extensive comments prior to the Commission rendering any decision. FACA can hardly be said

³² Telcordia Reply Comments at 100-102.

³³ *Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, To Institute Competitive Bidding for Number Portability Administration and to End The NAPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability, Order and Request for Comment*, DA 11-454, 26 FCC Rcd. 3685, 3685 ¶ 1.

³⁴ *Cal. Forestry Ass'n.*, 102 F.3d at 614 (emphasis added).

³⁵ *Id.* (emphasis added).

to be a “nullity” where non-FACA considerations like national security and industry confidentiality would produce the same result, and when the open comment proceedings allowed the general public the opportunity to present its views to the true decision-maker in this matter, the FCC.

Neustar is right, however, that *Pena* should inform the Commission’s action regarding Neustar’s Petition. That case cautions restraint in issuing injunctions, and it spells out clearly why that result would not be appropriate here:

The district court should also consider whether FACA’s principal purposes—(1) avoidance of wasteful expenditures and (2) public accountability—will be served by granting a use injunction. While a complaint filed after a committee has completed its meetings and is in the process of wrapping up its affairs will likely produce waste if a use injunction is granted, the district court should also consider the magnitude of the waste, the value of the committee’s work to the sponsoring federal agency and the effect of the FACA violation on the committee’s findings [I]f the FACA violation appears to have had little deleterious effect on the committee’s output and accountability and the public’s participation, the district court should withhold a use injunction.³⁶

Here, the analysis is straightforward. The magnitude of waste if the NANC and SWG recommendations were thrown out would be tremendous: years of work might need to be re-done at enormous cost—to say nothing of the cost to consumers overpaying Neustar as LNPA in the interim. Meanwhile, the value of the committees’ work to the Commission is high. While the Commission will render an independent decision based on the entire record, NANC’s and the SWG’s expertise—combined with the expertise of the FoNPAC—provides the Commission with valuable insights. And as demonstrated above, the purported FACA violations had no prejudicial effect on the committees’ ultimate work product, or cost to public accountability

³⁶ *Pena*, 147 F.3d at 1026.

because of the subsequent extensive notice and comment process. All of the *Pena* considerations therefore would counsel against the use injunction Neustar claims it deserves.

It is clear under *Pena* that “a use injunction should be the remedy of last resort.”³⁷ Indeed, “[w]hile denying a use injunction may leave a plaintiff without an effective remedy, that circumstance cannot determine the plaintiff’s ultimate entitlement to the relief.”³⁸ Consequently—though Neustar overlooks this fact—the D.C. Circuit in *Pena* reversed the district court’s use injunction stemming from a FACA violation, in order for the district court to determine whether an injunction could redress the injuries the plaintiff claimed.³⁹ Here, it is clear that a use injunction would not redress Neustar’s supposed injuries because they were non-prejudicial in the first instance, and have been cured by the much less destructive remedy of the notice-and-comment process. A use injunction is inappropriate and unwarranted. The Commission may consider the NANC and SWG’s work.

CONCLUSION

Neustar urges the Commission to upset FACA’s core goal of promoting efficiency by invalidating the NANC and SWG recommendations solely in the interest of exalting form over substance. Neustar has not shown that a FACA violation actually occurred—and none did—and it certainly has not shown any prejudice from any such violation. This alone would be enough to defeat Neustar’s claim under the APA’s harmless error rule. But Neustar has also waived this objection and any relief it might be entitled to by failing for more than four years to object to the issues it raises now, when doing so then may have been useful. Indeed, the notice-

³⁷ *Id.* at 1025.

³⁸ *Id.*

³⁹ *Id.* at 1023.

and-comment process alone has cured any potential FACA defect, and the dire remedy of a use injunction would be wholly unwarranted and inappropriate here. Neustar's FACA arguments are without merit, the Petition should be rejected, and the LNPA Selection Process should not be re-opened

Respectfully submitted,



John T. Nakahata
Christopher J. Wright
Timothy J. Simeone
Mark D. Davis
John R. Grimm

HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, Eighth Floor
Washington, D.C. 20036
(202) 730-1320
jnakahata@hwglaw.com