

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of Telcordia Technologies, Inc. to	)	WC Docket No. 09-109
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	)	CC Docket No. 95-116

**REPLY COMMENTS OF NEUSTAR, INC. ON  
PETITIONS FOR DECLARATORY RULING**

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**SUMMARY AND INTRODUCTION**

In response to the Bureau's Public Notice,<sup>1</sup> Ericsson and its allies offer no substantive response to the issues raised in Neustar's petitions for declaratory ruling. Instead, they urge the Commission to ignore both the substantive and procedural flaws in the RFP process and to rubber-stamp an unsubstantiated NANC recommendation that provides no basis for a reasoned judgment about the relative merits of the proposals submitted by Ericsson and Neustar. If the Commission proceeds down that road, its action will be legally unsound and contrary to the public interest, risking significant disruption to the nation's telecommunications infrastructure and harm to consumers.

Neustar necessarily is an interested party in any potential LNPA transition, but that does not mean that the issues that Neustar has raised are unfounded. On the contrary, Neustar is

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<sup>1</sup> See Public Notice, *Wireline Competition Bureau Seeks Comment on Petitions for Declaratory Ruling Filed by Neustar, Inc.*, WC Docket No. 09-109, CC Docket No. 95-116 (rel. Nov. 7, 2014) ("Public Notice").

perhaps best positioned to understand the many roles that the NPAC plays in the nation's telecommunications systems as well as the risks to national security, law enforcement, and public safety from a difficult transition to an untested service. The Commission must be allowed to do its job, based on a full record and free from undue pressure to install a favored vendor who by law is not qualified to serve as LNPA. Only the Commission is in a position to put self-interested motives to one side – including the lure of promised savings for a few carriers – and to determine where the public interest lies. But it cannot carry out this crucial task based on the NANC recommendation.

Ericsson's Opposition and Comments, as well as Comments submitted by the NAPM, effectively concede that FACA applies not only to the NANC but also to the SWG. Neither Ericsson nor the NAPM offers a substantive response to Neustar's showing that both committees failed to comply with FACA's requirements. Ericsson argues instead that these legal violations have no consequences because Neustar has failed to establish either resulting harm or entitlement to relief. But the Commission has previously characterized the committees' advice as "essential," and, because of the FACA violations, the Commission may not lawfully rely on their work now. As courts reviewing FACA violations have held, "[a] simple 'excuse us' cannot be sufficient. It would make FACA meaningless."<sup>2</sup> Moreover, the Administrative Procedure Act ("APA") requires courts to "hold unlawful and set aside" agency action that is "not in accordance with law."<sup>3</sup> The Commission should re-open the LNPA selection process to permit the development of the record it originally expected and which is required to comply with the fundamental APA requirement of reasoned decision-making in accordance with law.

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<sup>2</sup> *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994) (citations omitted).

<sup>3</sup> 5 U.S.C. § 706(2)(A).

## **I. The Comments of Ericsson and Its Allies Confirm that the Commission Lacks a Record Basis for Selection of Ericsson**

Neustar's recent comments filed in response to the Bureau's Public Notice identified the many issues that Neustar raised in its February petition for declaratory ruling that are not addressed in the NANC recommendation.<sup>4</sup> Rather than address these concerns, the comments filed by the NAPM, LLC, and USTelecom fail to point to anything in the NANC recommendation that addresses these important issues.

Ericsson's comments rely on its earlier filing in response to the February petition which – rather than provide any substantive response – argued that Neustar was procedurally barred from raising concerns about the RFP process.<sup>5</sup> But Ericsson's claim<sup>6</sup> that the Commission can ignore the procedural and substantive defects in the NANC's recommendation because Neustar is

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<sup>4</sup> Comments of Neustar, Inc., WC Dkt. No. 09-109; CC Dkt. No. 95-116, at 2-4 (Nov. 21, 2014) (“Neustar Comments”).

<sup>5</sup> Ericsson also cites an *ex parte* letter filed by CTIA and others, erroneously claiming that the failure to approve the NANC recommendation “will cost consumers over \$40 million per month.” *Ex Parte* Letter of Peter Karanjia, Counsel, CTIA-The Wireless Ass'n, to Marlene H. Dortch, Sec'y, FCC, WC Dkt No. 07-149, 09-109 & CC Dkt. No. 96-116 (Nov. 20, 2014). *See* Letter from Aaron M. Panner, Counsel for Neustar, Inc., to Marlene H. Dortch, Sec'y, FCC, WC Dkt. No. 09-109, CC Dkt. No. 95-116 (Dec. 3, 2014) (“That claim is wrong on its face, and CTIA's discussion of the cost issue is misleading and incomplete. It erroneously assumes that the only alternative to selecting Ericsson is extending the current contract, ignoring Neustar's risk-free, lower priced offers. It ignores the fact that whoever is selected as LNPA will charge for that service. It completely ignores the substantial transition costs – estimated at \$60 million per month in the first year alone – as well as the potential impact of a transition on small carriers and consumers. It ignores the threat to consumer welfare from a difficult transition. The claim ignores the potentially serious effects on national security, law enforcement, and public safety if NPAC and numbering functionality is not maintained at current levels. And finally CTIA's emphasis on price simply highlights the harm to the public interest from the failure to consider the best available offers during the RFP process.”).

<sup>6</sup> *See* Letter from John T. Nakahata, Counsel for Ericsson, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dkt. Nos. 09-109 & 07-149, CC Dkt. No. 95-116, at 2 (Nov. 21, 2014) (“Ericsson Comments”).

procedurally barred from raising them is incorrect.<sup>7</sup> Pursuant to the process laid out in the Bureau's May 2011 order, the Commission is responsible for selecting the LNPA, and it therefore has the legal obligation to engage in reasoned decision-making and to base its decision on substantial evidence in the record.<sup>8</sup> The NANC recommendation fails to provide the Commission with an adequate record for selection of Ericsson; the recommendation not only fails to address the issues raised in Neustar's February 2014 petition, but it also fails to address additional national security, law enforcement, and public safety issues that have arisen in response to the NANC's recommendation.<sup>9</sup> Neither Neustar nor affected stakeholders had a prior opportunity to raise these concerns and consequently could not have waived them.<sup>10</sup>

USTelecom admits that the RFP process was intended "to ensure that a record was compiled upon which the Commission could formulate a basis for its decision."<sup>11</sup> Despite this intention, the process failed to fulfill that requirement. The NANC recommendation provides virtually no analysis or substantive justification for its recommendation beyond a reference to price difference, without adequately addressing the significant risks and high costs of transition. The Commission is therefore required to reject this recommendation.

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<sup>7</sup> See also Reply of Neustar in Support of Its Petition for Declaratory Ruling, CC Dkt. 95-116, WC Dkt. No. 09-109 (Mar. 4, 2014).

<sup>8</sup> Order, *Petition of Telcordia Technologies Inc.*, 26 FCC Rcd 6839, 6842, ¶ 12 (rel. May 16, 2011) ("*May 2011 Order*").

<sup>9</sup> Neustar Comments at 2-4.

<sup>10</sup> See also Letter from Aaron M. Panner, Counsel for Neustar, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Dkt. No. 95-116; WC Dkt. No. 09-109, at 5-6 (Sept. 23, 2014) (rebutting claims of waiver).

<sup>11</sup> Comments of United States Telecom Association, CC Dkt. No. 95-116; WC Dkt. No. 09-109, at 2 (Nov. 21, 2014) ("USTelecom Comments").

Both NAPM<sup>12</sup> and USTelecom<sup>13</sup> claim that the Commission approved the terms of the RFP, suggesting that its deficiencies are therefore beyond further challenge. But that claim is false, because there was no Commission or Bureau order approving the RFP. Moreover, and as Neustar has explained, although the evaluation process might have addressed deficiencies in the RFP, it did not. There is nothing in the NANC recommendation that analyzes and addresses differences between the competing proposals, demonstrates that Ericsson’s proposal matches Neustar’s services and proposed enhancements, or supports a decision to make cost the determining factor, while ignoring the substantial risk and costs of transition.

The comments filed by NAPM and USTelecom also demonstrate the need for the Commission to issue a Notice of Proposed Rulemaking and put an end to the lack of clarity and transparency surrounding the rules governing the RFP process. NAPM acknowledges that the LNPA selection is “a rulemaking proceeding,”<sup>14</sup> yet the Commission has not issued an NPRM or any other public notice that frames the issues for informed public comment. On the other hand, USTelecom claims that the proceeding is *not* a rulemaking,<sup>15</sup> but it provides no basis for that assertion, which is incorrect.<sup>16</sup> Although the Commission sought comment generally on the NANC recommendation, it has never identified or evaluated the issues implicated by a potential transition. The comments filed in response to the Bureau’s June Public Notice, along with subsequent submissions by many parties urge the Commission to address transition costs, public safety, law enforcement, national security, the impact on small carriers, consumer protection,

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<sup>12</sup> See Opposition of the NAPM LLC, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 3 (Nov. 21, 2014) (“NAPM Comments”).

<sup>13</sup> USTelecom Comments at 2.

<sup>14</sup> NAPM Comments at 2.

<sup>15</sup> USTelecom Comments at 2.

<sup>16</sup> See Comments of Neustar, Inc. at 49-60 (July 25, 2014).

neutrality, and the comparability of Ericsson’s proposal to existing NPAC services.<sup>17</sup> The comments filed by the LNP Alliance<sup>18</sup> and the recent letter filed by Frontier Communications<sup>19</sup> further emphasize the need to address this basic procedural defect.

With seventeen years experience, Neustar has developed proprietary systems, services, tools and processes to meet the changing and growing needs and uses of the LNP system. The recommendation of Ericsson simply does not address many of these uses and the necessary services and tools that have been developed to keep the system functioning properly. Neustar provided detailed comments on service gaps and risks associated with transition and operating the system. The continued failure to address these issues emphasizes the need for the Commission to undertake a rigorous evaluation of a critical technical, operational, and policy decision.

## **II. Public Safety, Law Enforcement, and National Security Issues Must Not Be Neglected in the RFP Process**

Absent from the comments filed by USTelecom and NAPM is any mention of the serious national security, law enforcement, and public safety issues raised in this proceeding by a variety of organizations that depend on the NPAC. For example, the letter to Chairman Wheeler filed by nineteen state and local law enforcement and public safety organizations from around the country emphasizes that the prospect of a transition in LEAP functionality could have “significant implications for investigations and other public safety priorities – particularly in the

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<sup>17</sup> See Neustar Comments at 3 n.4.

<sup>18</sup> See Comments of the LNP Alliance on Neustar’s Petition for Declaratory Ruling, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 7–8 (Nov. 21, 2014) (“LNP Alliance Comments”).

<sup>19</sup> Letter from Kathleen Q. Abernathy, Frontier Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dkt. No. 09-109, CC Dkt. No. 95-116 (Nov. 26, 2014).

event that any such transition is not conducted carefully, and with sufficient attention to security and performance.”<sup>20</sup>

The number of voices expressing concern about the national security, law enforcement, and public safety implications of a potential transition continues to grow as more entities learn of risk and potential loss of services that they depend upon daily. FBI, DEA, Secret Service, U.S. Immigration and Customs Enforcement, the International Associations of Chiefs of Police and National Sheriffs’ Association, NENA, the New York City Police Department, the Office of Emergency Management in Arlington County and Fairfax City, Virginia, the Maryland Fire Chiefs Association, the Orleans Parish Communications Division of Louisiana, the Collier County, Florida Bureau of Emergency Services, the Public Utility Division of the Oklahoma Corporation Commission, and the Iowa Utilities Board, as well as private companies responsible for E911 deployments have urged the Commission to conduct the evaluation that the NANC recommendation omits.<sup>21</sup>

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<sup>20</sup> Letter from Robert Eckman, Senior Officer, Oxnard Police Department, *et al.* to Tom Wheeler, Chairman, Federal Communications Commission, WC Dkt. No. 09-109, CC Dkt. No. 95-116 (Nov. 21, 2014).

<sup>21</sup> *See* Neustar Comments at 3 n.4; *see also* Joint Reply Comments of the International Associations of Chiefs of Police and National Sheriffs’ Association, CC Dkt. No. 95-116, WC Dkt. No. 09-109 (Aug. 20, 2014); Letter from Brian Fontes, CEO, NENA: The 9-1-1 Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Dkt. No. 95-116, WC Dkt. No. 09-109 (Aug. 22, 2014); Letter from Lawrence Byrne, Deputy Commissioner, New York Police Department, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Dkt. No. 95-116, WC Dkt. No. 09-109 (Oct. 9, 2014); Letter from John J. Brown, Jr., Director, Arlington County, Virginia, Office of Emergency Management, to Tom Wheeler, Chairman, Federal Communications Commission, CC Dkt. No. 95-116, WC Dkt. No. 09-109 (Nov. 4, 2014); Letter from Ken Rudnicki, CEM, City of Fairfax, Virginia Office of Emergency Management, to Tom Wheeler, Chairman, Federal Communications Commission, CC Dkt. No. 95-116, WC Dkt. No. 09-109 (Nov. 4, 2014); Letter from Terry Thompson, President, Maryland Fire Chief Association, to Tom Wheeler, Chairman, Federal Communications Commission (Nov. 18, 2014); Letter from Stephen J. Gordon, Director, Orleans Parish Communication District, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 24, 2014); Letter from Dan E. Summers, Director, Collier

The selection process did not include law enforcement agencies, PSAPs, and other organizations, and their concerns over transition and security were neither considered nor reflected in the recommendation of Ericsson. These stakeholders, in addition to consumers, will bear the greatest burden owing to loss of or diminution in service or security. The costs to these government entities and organizations are not only monetary – they include serious security and public safety risks, including inadequate protections of the functionality of critical investigatory tools such as LEAP and the location accuracy of life-saving 911 services. The Commission has the broader responsibility of addressing and resolving the risks that an inadequate selection poses to security and public safety in the United States.

### **III. The NANC and the SWG Are Subject to FACA, and Have Failed To Comply with Its Requirements**

In both its Opposition to the Petition<sup>22</sup> and its subsequent Comments, Ericsson offers no substantive response to Neustar’s arguments at pages 18-43 of its October petition on FACA issues that: (1) FACA applies to both the SWG and the NANC; and (2) both failed to comply with FACA’s requirements to maintain and make available records and to hold open meetings. The NAPM’s Comments filed in opposition to Neustar’s Petition concede these points altogether. Furthermore, while Ericsson argues that FACA was satisfied because participation in the SWG was open to all NANC members,<sup>23</sup> it does not and cannot argue that the SWG achieved the “fairly balanced [membership] in terms of the points of view represented and the functions to

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County Bureau of Emergency Services, to Tom Wheeler, Chairman, Federal Communications Commission (Nov. 14, 2014); Reply Comments of Public Utility Division of the Oklahoma Corporation Commission, WC Dkt. No. 09-109, CC Dkt. No. 95-116 (Aug 8, 2014); Letter from Elizabeth Jacobs, *et al.*, Iowa Utilities Board, to Tom Wheeler, Chairman, Federal Communications Commission (Nov. 3, 2014).

<sup>22</sup> See Opp’n of Telcordia Technologies, Inc., D/B/A Iconectiv To Neustar’s Pet. for Declaratory Ruling, WC Dkt. Nos. 07-149 & 09-109, CC Dkt. No. 95-116 (Nov. 3, 2014) (“Ericsson Opp.”).

<sup>23</sup> See *id.* at 6.

be performed” that FACA requires.<sup>24</sup> As noted in the Petition, the SWG lacked consumer representation despite the Commission’s repeated acknowledgements that the inclusion of such stakeholders are required.<sup>25</sup> As further noted by the LNP Alliance, the SWG’s “failure to include smaller carriers was [also] a violation of FACA.”<sup>26</sup> Additionally, because the NPAC has evolved to serve “important law enforcement, public safety and national security” functions, “assist[ing] virtually all significant criminal and national security investigations,”<sup>27</sup> the SWG’s lack of members representing these public safety interests further evidences its imbalance. The Commission’s consideration of Neustar’s petition therefore should begin from the essentially undisputed premise that the recommendation of Ericsson was the result of a process that violated federal law.

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<sup>24</sup> See 5 U.S.C. app. 2 § 5(b)(2); see also LNP Alliance Comments at 12 (“The mere opportunity to participate is not adequate to meet FACA balanced membership requirements, and there is no record that any meaningful or concerted effort was made to ensure a balanced membership compliant with FACA.”).

<sup>25</sup> See Petition for Declaratory Ruling of Neustar, Inc., WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 39 (Oct. 22, 2014) (“Oct. 22 Petition”) (citing *First Report and Order In the Matter of Admin. of the N. Am. Numbering Plan*, 11 FCC Rcd. 2588, 2609 ¶ 47 (1995) (“*Numbering Plan Order*”); *May 2011 Order*, 26 FCC Rcd at 6842, ¶ 12).

<sup>26</sup> LNP Alliance Comments, at 3; see also *id.* at 4–5 (“There is no industry participant on the current SWG with annual revenues of less than \$1.5B and no voice for much smaller companies, such as those in the LNP Alliance, with a \$100M, \$20M, or less than a \$1M in annual revenues.”).

<sup>27</sup> See Reply Comments of the Federal Bureau of Investigation, the Drug Enforcement Administration, the United States Secret Service, and U.S. Immigration and Customs Enforcement, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 2–3 (Aug. 8, 2014) (“FBI, DEA, Secret Service & ICE Reply Comments”).

#### IV. Neustar and the Public Have Been Harmed by the NANC's and the SWG's FACA Violations.

Ericsson's argument that Neustar has suffered "no prejudice"<sup>28</sup> from the FACA violations ignores both the purpose of FACA and the record.<sup>29</sup> The statute is designed "to open – *contemporaneously* – to the light of public scrutiny the workings of advisory committees subject to FACA."<sup>30</sup> It was enacted to permit the public to "view the components of [advisory committee] decisionmaking so that the people would understand *the reasons for the decision as well as the results themselves*."<sup>31</sup> In the case of the LNPA recommendation process, no "contemporaneous" access to the SWG process was available, nor are there any "contemporaneous" records (such as minutes or working papers) that would permit the public or stakeholders to "understand the reasons" for the various decisions of the SWG or the NANC.<sup>32</sup> This failure of access and documentation is in itself a prejudice both to Neustar and to the public, and courts have repeatedly found such deprivations constitute irreparable harm.<sup>33</sup>

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<sup>28</sup> Ericsson Opp. at 5.

<sup>29</sup> See LNP Alliance Comments at 12 ("Telcordia argues that there was no prejudice in the failure to make the LNPA recommendation through a FACA-compliant committee. But the record demonstrates otherwise.").

<sup>30</sup> *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 813 F. Supp. 82, 94 (D.D.C. 1993) *rev'd on other grounds*, 997 F.2d 898 (D.C. Cir. 1993) (emphasis added).

<sup>31</sup> *Public Citizen v. National Econ. Comm'n*, 703 F. Supp. 113, 128 (D.D.C. 1989) (emphasis added).

<sup>32</sup> See LNP Alliance Comments at 5–6 ("Smaller carriers were only permitted to comment on the SWG's findings *after* the SWG's critical selection recommendation had already been made . . . put[ting] smaller carriers at a distinct disadvantage in terms of influencing the decision making process." (emphasis in original)).

<sup>33</sup> *Public Citizen*, 703 F. Supp. at 129; *Ass'n of Am. Physicians & Surgeons*, 813 F. Supp. at 94; *Gates v. Schlesinger*, 366 F. Supp. 797, 800 (D.D.C. 1973) ("[I]t is well-established that acts by Government agencies in derogation of statutory rights of the public or certain individual members of the public can constitute irreparable injury."); *Idaho Wool Growers Ass'n v. Schafer*, 637 F. Supp. 2d 868, 880-81 (D. Idaho 2009).

Ericsson further argues that Neustar “has not shown how circumstances would be different absent the FACA irregularities it alleges.”<sup>34</sup> While such a showing is not required, examples of the impact of the failure of the NANC and the SWG to adhere to FACA’s requirements are not hard to find. As Neustar has repeatedly noted, the selection process pivoted on two irregular decisions – in the first instance, to accept an untimely bid from Ericsson, and in the second instance to refuse to solicit additional proposals from all bidders even though further competition would benefit the public. No consumer representatives voted on these decisions and neither Neustar nor the public was provided notice of or allowed to participate in the evaluation of these issues, nor were they given access to the contemporaneous documentation that FACA requires to explain the decisions that were made. If the public had received notice that the SWG was considering whether to allow another round of competitive bids at a reduced cost to consumers, or been allowed to attend portions of the SWG meeting at which the issue was discussed, or if the SWG had complied with FACA’s requirement to generate meeting minutes and disclose individual SWG member notes or working papers that would explain such a decision, the LNPA selection process record – and the resulting bid evaluation – would look drastically different. The exclusion of Ericsson’s untimely bid or the consideration of a further round of bids would have completely changed the LNPA selection process record and, in all likelihood, the outcome.<sup>35</sup>

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<sup>34</sup> Ericsson Opp. at 5.

<sup>35</sup> To demonstrate prejudice in an analogous circumstance, in the context of the Commission’s failure to satisfy notice and comment requirements under the APA, an interested party need only show that it “ha[d] something useful to say . . . that may allow it to mount a credible challenge if given the opportunity to comment.” *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237-38 (D.C. Cir. 2008) (internal quotation marks omitted). Neustar – as well as numerous other interested parties – fully satisfy this standard.

An additional harm to both Neustar and the public arises from the failure of the NANC and the SWG to consider essential NPAC factors such as transition risk, service levels, vendor neutrality, and national security. It is difficult to imagine that a criterion as important as national security would have been overlooked if the SWG’s membership had included law enforcement or public safety representation. Moreover, contemporaneous notice of and access to what the SWG was considering at the time it evaluated the bids and the FoNPAC recommendation – even if the substance of those discussions were properly shielded from the public under a FOIA exemption – would have led to the “open, robust, unvarnished public debate” envisioned by Congress in passing FACA.<sup>36</sup> Doing so could have ensured that the SWG’s evaluation fully took into account all requirements mandated by the RFP and necessary for the safe and effective administration of the NPAC.

Similarly, the selection process ultimately relied on price rather than technical and management expertise despite Neustar’s superior system and proposal and yet the record is devoid of any discussion of the magnitude and impact of industry transition costs that would affect any cost comparison. The parties that would be most prejudiced by ignored transition costs – small carriers and consumers – were not represented on the SWG.<sup>37</sup> Nor was the public able to address the wisdom of this approach. Without any meaningful record documenting the comparative strengths and weaknesses of each proposal, and without any substantive evaluation

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<sup>36</sup> *Public Citizen*, 703 F. Supp. at 128.

<sup>37</sup> *See* LNP Alliance Comments at 3-4 (“[S]maller carriers and other entities have been outspoken concerning the failure to consider the particular needs of niche service providers and the dearth, even now, of information concerning the cost of the transition to smaller carriers.”); *id.* at 12 (“As the LNP Alliance has demonstrated, there was very little consideration given to the costs that smaller carriers will bear – a critical issue that is still [far] from clarified.”).

of transition costs and risks, the record provided by the NANC to the Commission provides no basis for a reasoned Commission decision favoring selection of Ericsson.<sup>38</sup>

Furthermore, a FACA-compliant record would have provided the parties with greater assurance that the FACs' decisions were free of undue influence by Ericsson and its commercial partners. "[I]n order for the [advisory committee's] work product to be credible and reliable, it ha[s] to be perceived by both the public and the interested industries as being free of bias – in either direction."<sup>39</sup> Otherwise, "[f]ear flourishes when the process is shrouded in a cloak of secrecy,"<sup>40</sup> and "conflicts of interest – whether actual or perceived – undermine the public's confidence in the agency's decision-making process and render its final product suspect, at best."<sup>41</sup> The LNP Alliance has stated that its confidence in this regard has already been shaken: as "[f]ive of the [SWG's] ten industry representatives, all representing the largest telecom companies, have strong ties to the wireless industry," and "Ericsson[] is a major telecommunications equipment manufacturer that is very closely aligned with the wireless telecommunications industry segment," the SWG's FACA violations "resulted in both actual and

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<sup>38</sup> *See id.*

<sup>39</sup> *Lorillard, Inc. v. U.S. Food & Drug Admin.*, No. 11-440 (RJL), 2014 WL 3585883, at \*15 (D.D.C. July 21, 2014).

<sup>40</sup> *Public Citizen*, 703 F. Supp. at 128.

<sup>41</sup> *Lorillard*, 2014 WL 3585883, at \*15. Indeed, this is a concern that is particularly heightened where, as here, the FAC members are appointed as industry representatives rather than Special Government Employees. *See Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 921-22 (Buckley, J., concurring) ("Because committees not composed exclusively of [government] officers and employees have members who are not required to forswear their private associations and insulate themselves against potential conflicts of interest, FACA requires, as an alternative check, that their deliberations be conducted in the open."); U.S. Gov't Accountability Office, GAO-04-328, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Insure Independence and Balance* at 5 (Apr. 2004) ("Because conflict-of-interest reviews are only required for federal or special government employees, agencies do not conduct conflict-of-interest reviews for members appointed as representatives. As a result, the agencies cannot be assured that the real or perceived conflicts of interest of their committee members who provide advice on behalf of the government are identified and appropriately mitigated.").

perceived bias . . . , both in terms of a lack of attention to the issues of smaller entities and a bias in favor of the wireless industry segment.”<sup>42</sup>

Ericsson argues that even if the NANC and SWG had complied with FACA, the public would not have had access to any additional information because the proposals were confidential.<sup>43</sup> But there is no reason the decision to accept a late bid or refuse to accept additional proposals from all parties would need to be discussed in secret – even if certain details were properly confidential. Furthermore, the SWG’s discussion of the framework and process for evaluating such issues as transition risks, neutrality, and technical sufficiency could and should have been discussed publicly. Contrary to Ericsson’s unsupported assertions, openness is the preferred outcome in FACA proceedings. Congress “expressly determined in the Federal Advisory Committee Act that Advisory Committee reports and functions are *not* generally confidential.”<sup>44</sup> Federal advisory committee meetings are thus presumed open and federal advisory committee documents are presumed publicly accessible unless the agency proves otherwise.<sup>45</sup> This is such a critical component of FACA that the statute requires that if a portion of a meeting is to be closed, there must be a “detailed analysis” of the reasons for doing so and

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<sup>42</sup> LNP Alliance Comments at 3, 5. In fact, Ericsson’s CEO and President is a member of CTIA’s Executive Committee, calling into question Ericsson’s neutrality as well as CTIA’s advocacy. *See CTIA Announces 2015 Executive Committee Members* (Nov. 7, 2014) available at <http://www.ctia.org/resource-library/press-releases/archive/ctia-announces-2015-executive-committee-members>.

<sup>43</sup> Ericsson Opp. at 5.

<sup>44</sup> *Gates*, 366 F. Supp. at 799 (emphasis in original).

<sup>45</sup> Section 10(d) of FACA provides that the open meeting requirement of FACA “shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination.” 5 U.S.C. app. 2 §10(d).

public access preserved to any portion of a meeting for which the agency cannot justify confidentiality.<sup>46</sup> Likewise, with documents, the agency bears the burden of establishing that a specific FOIA exemption applies, and must “disclose all reasonably segregable, nonexempt portions” thereof.<sup>47</sup> Ericsson’s casual *post hoc* assurances that all SWG discussions would necessarily have been confidential fall far short of the statutory requirements and do not excuse or cure the violations of law that occurred.

Neustar is not alone in voicing concerns that the LNPA selection process has lacked transparency and the record lacks evidence that essential issues were considered: as the LNP Alliance noted, “a number of other disparate parties, representing other corners of the industry, have also publicly noted that their concerns have not been adequately considered . . . by virtue of their limited access to, and at times exclusion from, the SWG’s LNPA selection process.”<sup>48</sup> Among other commenters, US TelePacific and Hyper-Cube Telecom have objected that “the overall lack of transparency during the NANC process has resulted in a ‘black box’ that leaves outside parties that depend on [NPAC] services unable to meaningfully understand how the process was conducted, and how the final recommendation was made.”<sup>49</sup> U.S. Representatives

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<sup>46</sup> *Nader v. Dunlop*, 370 F. Supp. 177, 179 (D.D.C. 1973) (internal quotation marks omitted) (noting that an agency may not “sweep[] entire advisory committee meetings under the general allegation of a [FOIA] exemption”); *Gates*, 366 F. Supp. at 800.

<sup>47</sup> *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003); *Gates*, 366 F. Supp. at 800.

<sup>48</sup> LNP Alliance Comments at 13.

<sup>49</sup> Comments of US TelePacific Corp. and Hyper-Cube Telecom, LLC, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 3 (Jul. 25, 2014); *see also* Letter from John R. Liskey, Executive Director, Michigan Internet & Telecommunications Alliance, to Julie Veach, Chief, Wireline Competition Bureau, CC Dkt. No. 95-116, WC Dkt. No. 09-109, at 2 (Feb. 17, 2014) (“We urge you to make this an open and transparent process” (emphasis omitted)); Comments of Eugene Robin, Senior Analyst, Cove Street Capital, WC Dkt. No. 09-109, at 3 (Jul. 15, 2014) (“The entire process has been marred by . . . opacity that runs counter to every intention that the FCC had when it established rules governing the LNPA selection process.”).

Mike J. Rogers and Dutch Ruppersberger, the Chairman and Ranking Minority Member of the House Permanent Select Committee on Intelligence, wrote the Commission to express their “concern[] that the bidding and selection processes [has] not adequately address[ed] the inherent national security issues involved in [the NPAC].”<sup>50</sup> Likewise, the Iowa Utilities Board has noted the “necess[ity] [of] address[ing] . . . concerns related to national security and public safety, and . . . the quality of all current LNP functionalities.”<sup>51</sup> Interested parties from a variety of constituencies have voiced similar concerns regarding essential NPAC issues such as transition risks and costs,<sup>52</sup> vendor neutrality,<sup>53</sup> and IP Transition<sup>54</sup> – all of which remain unaddressed in the advisory committee record to date.

These public comments underscore the harm resulting from the NANC’s and the SWG’s FACA violations.<sup>55</sup> Expressing alarm at the number of fundamental issues left unaddressed

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<sup>50</sup> Letter from Rep. Mike J. Rogers and C.A. Dutch Ruppersberger to Tom Wheeler, Chairman, Federal Communications Commission (Aug. 7, 2014). *See also, supra* note 20.

<sup>51</sup> Letter from Elizabeth S. Jacobs, *et al.*, Iowa Utilities Board, to Tom Wheeler, Chairman, Federal Communications Commission, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 1 (Nov. 3, 2014).

<sup>52</sup> *See* Comments of Intrado, Inc., WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 2-4 (July 24, 2014); Comments of Public Utility Division of the Oklahoma Corporation Commission, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 3 (Aug. 8, 2014); Comments of Telecommunications Systems Inc., WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 3 (Aug. 22, 2014); Comments of Cequel d/b/a/ Suddenlink, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 6-7 (Jul. 25, 2014).

<sup>53</sup> Comments of LNP Alliance, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 2-3, 6-8 (Jul. 25, 2014).

<sup>54</sup> *Id.* at 17–23; Reply Comments of LNP Alliance, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 7 (Aug. 21, 2014); Letter from Brian Fontes, CEO, NENA: The 9-1-1 Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Dkt. No. 95-116, WC Dkt. No. 09-109, at 2 (Aug. 22, 2014).

<sup>55</sup> *See* LNP Alliance Comments at 8 (“The comments filed by these [interested] entities are the evidence that there was an actual bias and prejudicial impact across many corners of the industry as a result of the pinched and skewed composition of the SWG.”); *id.* at 12 (“[I]t is clear from

when presented with deficient advisory reports as a *fait accompli* on the eve of the anticipated vendor selection is hardly the same as having contemporaneous notice of, participation in, or documentation of the advisory committees' evaluation of such issues.<sup>56</sup> As the LNP Alliance commented: "There is no question that being brought into the process after the SWG has already made its selection put smaller carriers at a distinct disadvantage in terms of influencing the selection process."<sup>57</sup> The fact that even a deficient notice resulted in the submission of new information to the Commission (and the fact that Ericsson has felt compelled to make so many material modifications and clarifications of its proposal in response) confirms that the recommendation provides an insufficient foundation for a Commission decision in favor of Ericsson.

**V. Neustar's Request for Relief Is Timely and Would Reduce Waste, Not Create It.**

Both Ericsson and the NAPM argue that it is "too late" for Neustar to raise, and for the Commission to remedy, the NANC's and the SWG's FACA violations. First, Ericsson argues that remedying these violations would be contrary to FACA's purpose because it would be wasteful and "FACA's aim is to reduce wasteful expenditures."<sup>58</sup> Second, Ericsson and the NAPM argue that Neustar has "waived" its argument for relief. Both arguments lack merit.

First, requiring compliance with FACA – and refusing to endorse a process that violated the statute – gives effect to the purposes of FACA; it does not undermine them. Ericsson argues

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non-member comments that many issues, including neutrality and the IP Transition, were not adequately addressed by the SWG.").

<sup>56</sup> See *Alabama-Tombigbee Rivers*, 26 F.3d at 1106 ("If public commentary is limited to retrospective scrutiny, the Act is rendered meaningless."); LNP Alliance Comments at 12 ("[T]he failure to keep the process open and the membership balanced throughout the SWG process cannot be cured by *post hoc* comment.").

<sup>57</sup> LNP Alliance Comments at 6.

<sup>58</sup> Ericsson Opp. at 3 (internal quotation marks omitted).

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.”<sup>59</sup> But the “waste” with which FACA is concerned is not the additional effort required to enforce compliance with its own provisions. Instead, FACA was enacted to curb the proliferation of “surreptitious” advisory committees dominated by special interest groups and the production of wasteful, biased reports that would be of no use to the public or the agency.<sup>60</sup> In passing FACA, Congress rejected the idea that agency efficiency or expediency should trump “openness to public scrutiny as the keystone of [FACA].”<sup>61</sup> As the Supreme Court noted in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 441 (1989), FACA was enacted to cure specific ills, such as “the wasteful expenditure of public funds *for worthless committee meetings and biased proposals* by special interest groups (emphasis added).” Ericsson’s suggestion that FACA violations should be ignored because they would further FACA’s purpose turns the statute on its head. Applying this tortured logic, FACA would always be most honored through its breach.

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<sup>59</sup> *Id.* at 2.

<sup>60</sup> See *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999) (“Congress also feared the proliferation of costly committees . . . dominated by representatives of industry and other special interests seeking to advance their own agendas.”); *Judicial Watch, Inc. v. National Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 31 (D.D.C. 2002) (noting that FACA Section 10(b) was designed to prevent the “surreptitious use of advisory committees by special interest groups”); *Gates*, 366 F. Supp. at 799 (“Congress was concerned with the proliferation of unknown and sometimes secret ‘interest groups’ or ‘tools’ employed to promote or endorse agency policies.”).

<sup>61</sup> *Gates*, 366 F. Supp. at 799–800 (citing 118 Cong. Rec. S14644 at S14649 (daily ed. September 12, 1972, (Remarks of Senator Percy); 118 Cong. Rec. H4275-86 (daily ed. May 9, 1972); 118 Cong. Rec. H8454-57 (daily ed. September 18, 1972); 118 Cong. Rec. S15285-86 (daily ed. September 19, 1972); 118 Cong. Rec. H8610-11, (daily ed. September 20, 1972); H.R. Rep. No. 1017, 92nd Cong., 2nd Sess., U.S. Code Cong. & Admin. News p. 3491 (1972)).

Second, even if the FACA imposed a deadline for objections to violations – and it does not<sup>62</sup> – Neustar has acted promptly to raise procedural concerns as it became aware of them. Ericsson’s and the NAPM’s only arguments to the contrary are unpersuasive attempts to manufacture Neustar’s endorsement for the current FACA violations out of thin air.<sup>63</sup> For example, Ericsson’s argument that Neustar’s “FACA claims . . . were all knowable at the time the Bureau sought comment on the selection process in 2011 and the RFP in 2012,”<sup>64</sup> defies logic, as the SWG’s document maintenance and open meeting obligations were never called into question by the Bureau’s 2011 Orders or the RFP.<sup>65</sup> These orders provided that the SWG’s role in the current LNPA selection process would mirror its role in 1997,<sup>66</sup> when the SWG followed

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<sup>62</sup> Ericsson’s reliance on *Natural Resources Defense Council v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998) for the proposition that Neustar has missed its chance for a remedy is misplaced. In *Pena*, the D.C. Circuit recognized that injunctive relief is available for FACA violations even after the advisory committee has completed its work where the violations have a “deleterious effect on the committee’s output and accountability and the public’s participation.” *Id.* at 1026. On remand, the district court allowed “appellees an opportunity to take discovery and refine their request for equitable relief.” *Id.* at 1014. However, the lower court noted that “one must first know whether there were [FACA] violations before one can ascertain whether they had a deleterious effect on the committee’s output,” *Natural Res. Def. Council v. Curtis*, 189 F.R.D. 4, 10 (D.D.C. 1999) (emphasis added).

<sup>63</sup> See Ericsson Opp. at 4-12; NAPM Comments at 3; Ericsson Comments at 3-5.

<sup>64</sup> Ericsson Comments at 2. See also NAPM Comments at 3.

<sup>65</sup> Ericsson’s more specific argument that Neustar did not object to its proposed amendment to the Bureau’s *March 2011 Order* regarding SWG membership fails for the same reason as it ignores that the final *May 2011 Order* gave Neustar no reason to do so because the Bureau “agree[d] with [Ericsson] on the need for balance within the SWG membership” and expressed its confidence “that the membership and leadership of the SWG will reflect th[e] balance” of the NANC, a “diverse body with consumer, state government, and industry constituencies represented.” 26 FCC Rcd at 6842 ¶ 12. This of course is consistent with the statutory requirements of FACA. Ericsson’s argument that Neustar waived its rights by failing to argue that a *different* NANC subcommittee – the LNPA Working Group – was subject to FACA back in 2009 is similarly irrelevant as Neustar is not now arguing that the LNPA Working Group or any NANC subcommittee other than the SWG is subject to FACA. See Ericsson Opp. at 9.

<sup>66</sup> See Order and Request for Comment, *Petition of Telcordia Technologies, Inc.*, 26 FCC Rcd 3685, 3686, 3996-97 (Mar. 8, 2011) (“*March 2011 Order*”).

an “exceedingly open and transparent process, including publication of documents and attendance at meetings,” and “exhibited the . . . hallmarks of transparency and balanced participation.”<sup>67</sup> The Bureau’s Orders and the RFP documents simply did not contemplate a process that flouted federal law, and Neustar has not “waived any right to a FACA challenge (or associated remedy) by its inaction.”<sup>68</sup>

To the contrary, Neustar voiced its concerns about procedural irregularities of which it was aware throughout the process.<sup>69</sup> However, until the NANC’s and the SWG’s reports were

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<sup>67</sup> LNP Alliance Comments at 9-10 (quoting Affidavit of David J. Malfara, Sr., attached to LNP Alliance Comments as Exhibit A). The NAPM’s argument that the SWG’s FACA violations should be disregarded because “[t]he amount of information made publicly available with the NANC Recommendation in 2014 vastly outweighs the amount of information made available in 1997,” NAPM Comments at 5, misses the mark for several reasons. *First*, the statute, not the 1997 SWG’s process, controls the procedures the current SWG had to follow to comply with FACA. *Second*, the NAPM’s focus on comparing the work products of the 1997 and 2014 SWGs ignores the stark contrast in contemporaneous access and balanced membership between these entities. *See* LNP Alliance Comments at 8–10. *Third*, the NAPM’s focus on the length of the SWG reports is misleading. Neustar is challenging the failure of the Commission to create, maintain, and make available FACA required documents explaining that report, such as meeting minutes, internal correspondence and working papers – all of which were made publicly available in 1997. *See* LNP Alliance Comments at Exs. DJM 1-3. *Fourth*, the NAPM’s argument is simply wrong: as a number of comments filed in this proceeding demonstrate, the SWG report *did not* “provide[] a full explanation of the steps taken as part of the LNPA selection process as well as the reasoning behind the unanimously supported recommendation,” *see* NAPM Comments at 5, and the 1997 SWG report provided a lengthy discussion of the SWG’s recommendations along with appendices detailing the “LNPA Technical & Operation Requirements Task Force Report and the Architecture and Administrative Plan for Local Number Portability,” Technical analysis the current SWG report lacks. *See* LNP Alliance Comments at Exs. DJM 1-3.

<sup>68</sup> Ericsson Opp. at 4.

<sup>69</sup> *See e.g.*, Letter from Aaron Panner, Counsel for Neustar, to Sean A. Lev, General Counsel, Federal Communications Commission, Julie A. Veach, Chief, Wireline Competition Bureau, Timothy Decker, Co-Chair, NAPM LLC, & Mel Clay, Co-Chair, NAPM LLC, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 1 (Apr. 24, 2013) (“I write on behalf of Neustar, Inc., to register our objection to the decision to extend the deadline for submission of responses to NAPM, LLC’s 2015 LNPA RFP.”); Letter from Aaron Panner, Counsel for Neustar, to Julie A. Veach, Chief, Wireline Competition Bureau & Jonathan Sallet, General Counsel, Federal Communications Commission, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 2 (Jan. 15, 2014) (“If the FoNPAC makes its recommendation without inviting a second BAFO, it will have

made available to outside counsel under a Revised Protective Order in July 2014, Neustar was not aware of the full extent of these advisory committees' FACA violations – precisely because of the lack of FACA-required transparency and access.<sup>70</sup> Confronted with a recommendation that appeared on its face an insufficient predicate for a Commission decision, Neustar requested to review the additional records that FACA mandates, only to learn that no such records exist.

Finally, Ericsson also ignores that many parties were prejudiced as a result of the NANC's and the SWG's failure to comply with FACA, and one party's alleged, unproven, delay in challenging such violations is irrelevant to the rights of public access FACA ensures and the relief available to protect those rights.<sup>71</sup>

**VI. The Commission May Not Rely on the Unlawful Record Before It, and Courts Have Used Injunctive Relief To Prevent Agencies From Relying on Records Predicated on FACA Violations.**

All parties – including the Commission, the Bureau, Neustar and Ericsson itself – recognize the importance and the necessity of advisory committee oversight of the LNPA selection process. The FCC created the NANC because it felt this FAC was “essential for the

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deliberately disregarded the availability of potentially superior offers and unfairly biased the process against Neustar.”); Petition of Neustar for Declaratory Ruling Concerning the Local Number Portability Administration Selection Process, WC Dkt. No. 09-109, CC Dkt. No. 95-116, at 3 (Feb. 12, 2014) (“Neustar brings this petition to remedy significant deficiencies in the process of selecting the LNPA.”).

<sup>70</sup> For example, Ericsson claims that Neustar should have known about the SWG's FACA violations because it attended “each and every NANC meeting.” Ericsson Opp. at 5-6. However, Neustar was excluded from the most important NANC meeting – the review of the SWG's recommendations on March 26, 2013 – without timely notice of the meeting as required by § 10(a)(2); the detailed justification for the blanket closure of the meeting required by § 10(d); or any post-meeting “summary of its activities and such related matters as would be informative to the public” as further required by § 10(d).

<sup>71</sup> See LNP Alliance Comments at 12 (“FACA is designed to protect a broad array of carriers and the fact that one party has not raised the issue, does not mean that FACA does not apply.”); see also *id.* at 10–11 (“The concerns raised by the LNP Alliance and others . . . demonstrate[] that small carriers' concerns were NOT fully considered. Many of these entities are not even aware of the process, or of its implications.” (quoting Malfara Affidavit ¶ 16)).

Commission to develop the most effective number administration policies.”<sup>72</sup> In the Bureau’s *May 2011 Order*, it also emphasized the important role of the SWG, stating that “[h]aving the SWG perform [the LNPA selection process] review should address [Ericsson’s] concerns and will help ensure that the procurement is open and transparent.”<sup>73</sup> Ericsson itself argues that “the value of the [NANC’s and SWG’s] work to the Commission is high” and provides “valuable insights” and “expertise.”<sup>74</sup> Given the importance of the SWG’s and the NANC’s work to the Commission’s decision process, the Commission cannot select Ericsson without a recommendation that is procedurally and substantively sound.<sup>75</sup> In the *May 2011 Order*, the Commission acknowledged that it “*must review and approve the procurement process*” and “make a final decision about the contract award.”<sup>76</sup> To fulfill this responsibility, the best course is for the Commission to re-open the process, permitting the development of the “essential” record it requires and ensuring the selection of an LNPA that best meets the needs of the public and that will not be overturned upon legal challenge.

Ericsson’s argument that Neustar has not made out a case for injunctive relief puts the cart before the horse – the responsibility for addressing any procedural violations rests with the Commission in the first instance. In any event, however, injunctive relief is available in circumstances such as this one with a record that is tainted by FACA violations. Ericsson’s

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<sup>72</sup> *Numbering Plan Order*, 11 FCC Rcd at 2611 ¶ 53.

<sup>73</sup> *May 2011 Order* ¶ 13 (emphasis added).

<sup>74</sup> Ericsson Opp. at 13.

<sup>75</sup> See LNP Alliance Comments at 3 (“In light of the SWG’s failure to comply with FACA, the Commission cannot rely on the SWG’s recommendation, nor can it proceed without relying on it.” (citing *Numbering Plan Order*, 11 FCC Rcd at 2611, ¶ 53)). Neustar has raised other legal and policy reasons that disqualify Ericsson from being selected. Although those reasons are not addressed in this pleading Neustar stands by them and incorporates them into this filing.

<sup>76</sup> *May 2011 Order*, 26 FCC Rcd at 6844 ¶ 19 (emphasis added).

argument that “FACA does not provide a remedy for the [supposedly] technical violations claimed by [Neustar]” is incorrect.<sup>77</sup> Ericsson’s only argument in support of this assertion is that “FACA contains no enforcement provisions.”<sup>78</sup> But as Ericsson acknowledges, injunctive relief is an equitable remedy.<sup>79</sup> “Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.”<sup>80</sup> Thus, as “injunctive relief [i]s the only vehicle that carries the sufficient remedial effect to ensure . . . compliance with FACA’s clear requirements,” courts have repeatedly exercised injunctive relief to remedy FACA violations.<sup>81</sup>

Ericsson argues that even if injunctive relief may be appropriate in some cases, here no relief is available because the violations are “minor” and “highly technical,” in comparison with the magnitude of the LNPA selection process.<sup>82</sup> This argument also fails. First, courts have ruled that the violations of FACA cited here are far from technicalities: “section 10(b) of FACA, [under which] an agency is generally obligated to make available for public inspection and copying all documents that are made available to or prepared for or by an advisory committee[,] . . . [is] one of the key sections in the legislation,”<sup>83</sup> and FACA’s open meeting requirement “goes

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<sup>77</sup> Ericsson Opp. at 4.

<sup>78</sup> *Id.* at 3 (emphasis omitted).

<sup>79</sup> *Id.* at 10.

<sup>80</sup> *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

<sup>81</sup> *Alabama-Tombigbee Rivers*, 26 F.3d at 1107 (noting that “[a]nything less would be tantamount to nothing”); see also *Idaho Wool Growers*, 637 F. Supp. 2d at 880.

<sup>82</sup> Ericsson Opp. at 1, 11, 13.

<sup>83</sup> *Food Chem. News v. Dep’t of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992) (internal quotation marks omitted).

to the bedrock of government decision making.”<sup>84</sup> Moreover, Ericsson’s argument has been rejected by appellate courts:

*It is simply insufficient . . . to contend that because the subject matter is serious, . . . courts should not interfere or be concerned with minor [FACA] transgressions. Quite the contrary. Because the matters are so serious and of such great concern to so many with differing interests, it is absolutely necessary that the procedures established by Congress be followed to the letter.*<sup>85</sup>

The importance of the LNPA selection process to the telecommunications industry and the public welfare highlights why relief is necessary. In comparable circumstances, courts have exercised their injunctive powers.

Ericsson also misreads both *Pena*, and *California Forestry Ass’n v. United States Forest Service*, 102 F.3d 609 (D.C. Cir. 1996), which *confirm* that injunctive relief is appropriate in FACA cases such as this one. In both of those cases, the FACs had substantial arguments that they had complied with FACA, and yet the courts held that use injunctions “might be appropriate” for the violations that existed and remanded to the district courts to fashion appropriate remedies.<sup>86</sup> Specifically, in both cases the courts concluded the FACs had made “[s]ubstantial efforts to include members of the interested public” in their process.<sup>87</sup> For example, in *California Forestry*, the record “indicate[d] that at least some of the [FAC] meetings were open to the public” and that the FAC “made other efforts to keep the public informed – it published newsletters and provided information to a ‘key contacts group’ comprised of eighty-

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<sup>84</sup> *Nader*, 370 F. Supp. at 179 (internal quotation marks omitted). *See also* LNP Alliance Comments at 11 (“[T]he record in this proceeding clearly demonstrates that the FACA violations were material and substantive, and that they had a direct prejudicial impact on smaller carriers.”).

<sup>85</sup> *Alabama-Tombigbee Rivers*, 26 F.3d at 1107 n.9 (emphasis added).

<sup>86</sup> *Pena*, 147 F.3d at 1025; *California Forestry*, 102 F.3d at 614. *See also* Oct. 22 Petition at 44-51.

<sup>87</sup> *Pena*, 147 F.3d at 1026.

seven individuals and representatives of various organizations, including [appellants].”<sup>88</sup> Similarly, in *Pena*, although the majority of FAC meetings were closed “because of their classified nature,” nearly thirty percent were open to the public; the public was “apprised . . . of the [FAC’s] membership, agendas, open meetings and mission statement”; and the FAC “also allotted meeting time to members of the public to present their views.”<sup>89</sup> The SWG, by contrast, made *no* efforts to include the public in its process, rendering it an appropriate target for injunctive relief under these cases.<sup>90</sup>

Courts in other circuits have likewise been in accord about the availability of – and necessity for – such relief. For example, in *Alabama-Tombigbee Rivers*, 26 F.3d at 1106-07 (emphasis added; internal citations omitted), the court granted injunctive relief against an agency and rejected arguments that the FACA violations at issue were not prejudicial or could be cured with *post hoc* remedies, noting:

If public commentary is limited to retrospective scrutiny, the Act is rendered meaningless. . . . As the district court aptly pointed out: “A simple ‘excuse us’ cannot be sufficient. It would make FACA meaningless, something Congress certainly did not intend. . . . The court sees no reason to retreat from its conclusion that FACA was designed by Congress to prevent the use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly constituted and produces its report in compliance with the procedural requirements of FACA, particularly where, as in this case, the procedural

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<sup>88</sup> *California Forestry*, 102 F.3d at 614.

<sup>89</sup> *Pena*, 147 F.3d at 1015.

<sup>90</sup> Ericsson’s only argument to the contrary is that, because “SWG membership [was] voluntary, and open to all NANC members . . . substantial efforts [were made] to include members of the interested public.” Ericsson Opp. at 6-7 (internal quotation marks omitted). The fault in this logic is readily apparent: public accountability refers to providing access to those *outside* the advisory committee. If a FAC could delegate its advisory functions to a subcommittee open only to its own members and thereby demonstrate compliance with FACA’s aim to ensure public accountability, FACA would be “toothless, merely aspirational legislation.” *Cargill, Inc. v. United States*, 173 F.3d 323, 341 (5th Cir. 1999).

shortcomings are significant and the report potentially influential to the outcome.” . . . We agree with the district court that to allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act.

Similarly, in *Cargill*, 173 F.3d at 341 (emphases added; internal citations omitted), the court held:

If the courts do not enforce FACA by enjoining the work product of improperly constituted committees, *FACA will be toothless, merely aspirational legislation . . . If FACA has no teeth, the work product of spuriously formed advisory groups may obtain political legitimacy that it does not deserve . . . Hence, some type of injunctive relief is appropriate.*<sup>91</sup>

As these cases demonstrate, injunctive relief to remedy FACA violations is well-established.<sup>92</sup>

Moreover, courts have held that enjoining agencies from relying on advisory committee reports prepared in violation of FACA is ultimately in the agencies’ best interests, as it “ensur[es] that all reasons supporting any agency decision are not only in accordance with the

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<sup>91</sup> See also *Idaho Wool Growers*, 637 F. Supp. 2d at 880 (“Because Plaintiffs were denied their right to participate in the Committees’ processes, FACA’s purposes are advanced by limiting the future use of the Committees’ reports. . . . [T]he Court’s findings apply to recognize the continued need for a transparent decision-making process on these (and other) important issues, which are advanced only through FACA’s . . . consistent, across-the-board enforcement.”).

<sup>92</sup> Ericsson also attempts to assure the Commission that it has no legal obligation to act on any violations. It cites *Claybrook v. Slater*, 111 F.3d 904 (D.C. Cir. 1997), which it says holds that an agency has no obligation to intercede where its FAC violates the statute. *Claybrook* says no such thing. To the contrary, in *Claybrook*, the court found that no FACA violation had occurred and therefore, unsurprisingly, the agency had no obligation to remedy the underlying conduct. See 111 F.3d at 908 (suggesting that the agency would have had a duty if plaintiff had established a claim under FACA § 10 for an open meeting violation or under §5 for lack of fairly balanced membership). Ericsson’s citation to *Northwest Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1014 (D.D.C. 1994) is similarly unhelpful. The court in *Espy* declined to grant injunctive relief on the facts of the case, noting that “an injunction would exceed the injury presently to be redressed” and would be “premature.” *Id.* at 1015. The court left open the possibility of injunctive relief in the future and granted declaratory judgment, leaving the “effect and consequences of that judgment . . . to other courts and/or cases.” *Id.* Since *Espy* was decided, circuit courts in *California Forestry*, *Alabama-Tombigbee Rivers*, *Pena*, and *Cargill* have definitively established the applicability of injunctive relief in FACA cases.

laws speaking to the generation of those reasons, but are also based upon the best, most complete evidence available.”<sup>93</sup> Precluding reliance on unlawful advisory committee records and “[b]eing overly-cautious on the front-end of such an analysis [thus] leads to better decision making which, in turn, buttresses any future defense of the decisions ultimately made.”<sup>94</sup>

Because the NANC/SWG process did not comply with FACA, the Commission’s reliance on it would violate the APA: courts reviewing agency action under the APA must “hold unlawful and set aside” agency action that is “not in accordance with law.”<sup>95</sup> Here, the violations of FACA demand the same treatment.

Accordingly, to avoid necessitating an injunction and the concomitant delays it would entail for the LNPA selection process or an APA challenge to the Commission’s selection, Neustar urges the Commission to act now to reject the NANC and SWG recommendations before it, and cure the manifest and uncontested FACA deficiencies Neustar has identified in those recommendations. The Commission should re-open the LNPA selection process to permit the development of the record it needs to comply with the fundamental APA requirement of reasoned decision-making in accordance with law. In doing so, it still has an opportunity to direct the NANC and the SWG to conduct a selection process compliant with FACA, and should use that opportunity now.

## **CONCLUSION**

Neustar’s petitions and its additional filings in this docket establish that the LNPA selection process was substantively flawed and procedurally unlawful. As a result – and in particular because of the violations of FACA established in Neustar’s October petition – the

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<sup>93</sup> *See Idaho Wool Growers*, 637 F. Supp. 2d at 880.

<sup>94</sup> *Id.*

<sup>95</sup> 5 U.S.C. § 706(2)(A).

Commission cannot rely on the NANC recommendation. Instead the Commission should grant Neustar's petitions and reopen the selection process.

Respectfully submitted,

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