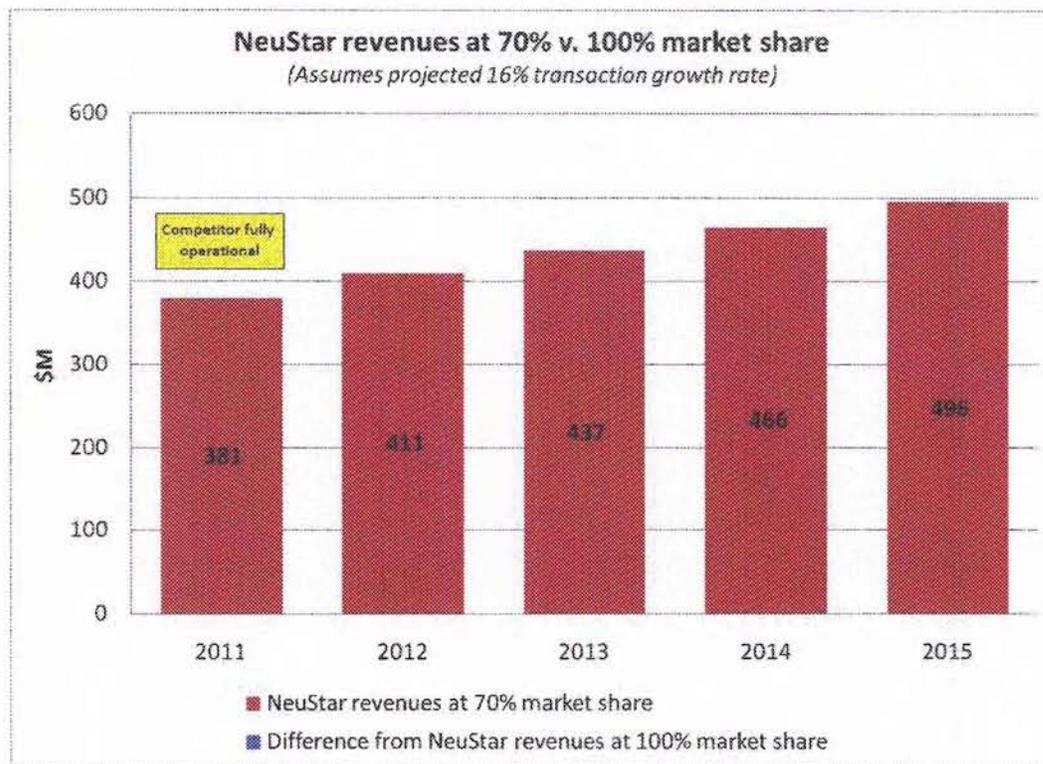


extremely unlikely choice). Chart 1 shows that NeuStar's projected revenues with 100% market share is identical to NeuStar's projected revenues with only 70% market share:

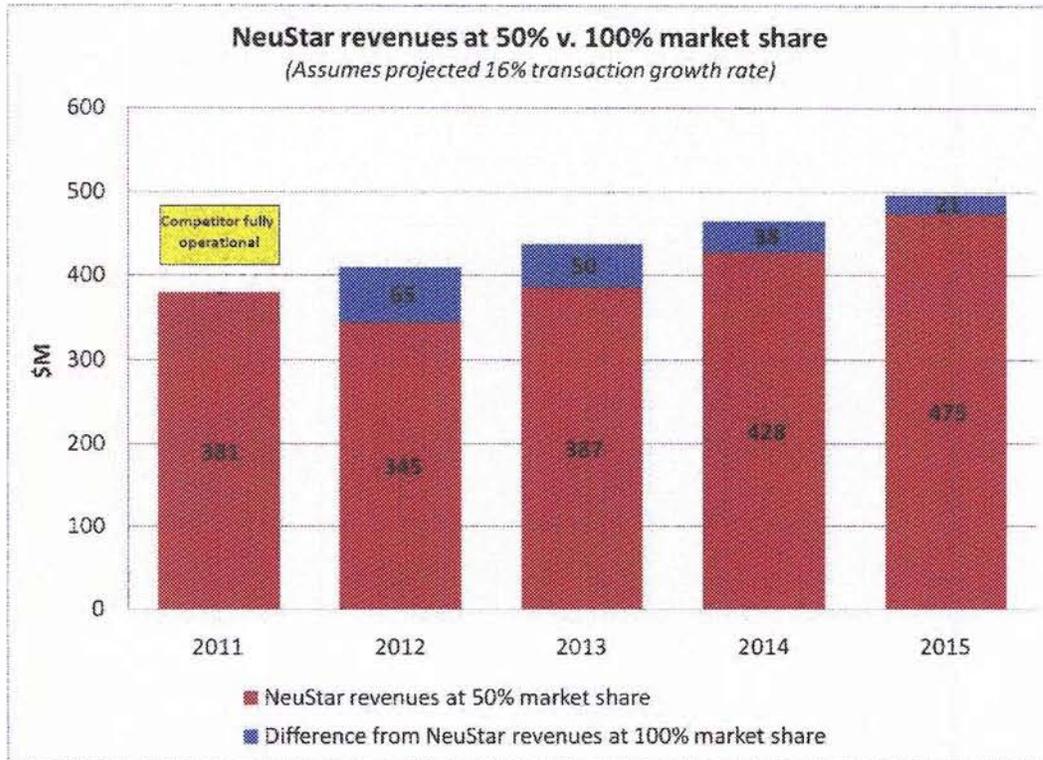
Chart 1



The picture does not improve much even when one or more competitors gain 50% market share. In that event, NeuStar still receives nearly all the revenue that it would have received had it handled 100% of the porting transactions. As Chart 2 shows, even when a competitor is assumed to gain 50% market share immediately upon entry, from 2011 through 2015, NeuStar can expect to receive 92% of the revenues that it would have received for handling all transactions.⁵⁰

⁵⁰ This is modeled using a 16% annual transaction growth rate, which was the transaction growth rate for 2008. A slower transaction growth rate would result in NeuStar receiving a slightly lower percentage of the fee it would have received for handling 100% of

Chart 2



Put slightly differently, one year after competitive entry, a competitor with 50% market share could only charge about \$0.20 per transaction in order for the industry not to pay more than if NeuStar had handled all transactions – but NeuStar would receive an effective per transaction price of approximately \$.60 per transaction for handling the exact same transactions. From both a public policy and a contract management standpoint, this makes no sense: why should the industry and consumers pay NeuStar \$0.60 per transaction for any transactions if a competitor can do the job for \$0.20? And if a competitor cannot do the job for \$0.20 per transaction, competition is entirely foreclosed, even if the competitor could handle the transactions for substantially less than transactions, and a higher transaction growth rate would increase the percentage of the fee NeuStar would have received for handling 100% of the transactions.

NeuStar's \$0.60 per transaction. The plain impact of Amendment 70's pricing formula is to foreclose any NPAC competition until 2016, because there will be no way for the industry to introduce competition and save money before that date.

2. Amendment 70's Anticompetitive Timing With Respect to Other Unsolicited Proposals.

Amendment 70's timing is particularly suspect, and further points to its anticompetitive intent to forestall competition until at earliest 2016. When Telcordia filed its prior Petition in 2007, NAPM, NAPM's members, and NeuStar variously argued that the Master Agreement with Amendment 57 was not exclusive, and that Telcordia should make an unsolicited proposal to NAPM.⁵¹ Telcordia did just that, presenting two different proposals to NAPM in March and July 2008. One proposal was for a regional model, as was originally contemplated when the Commission approved the selection of Perot Systems and Lockheed Martin; the other, for a multivendor peering NPAC database. On November 20, 2008, NAPM told Telcordia that it would cease to consider Telcordia's proposal for a regional (or primary-standby) administrator model that could have introduced competition for regions quickly, saying that such models "will not provide Users with a sufficient level of vendor choice that the Members of NAPM LLC believe will best serve and benefit consumers."⁵² However, in the same letter, NAPM told Telcordia that "the Members [of NAPM] have determined that the Multi-Peering

⁵¹ See NAPM Comments at 4-5 (arguing Telcordia's petition was premature, and that Telcordia should make a detailed, substantive proposal); NeuStar Opposition at 13-14 (arguing that Amendment 57 preserved non-exclusivity). See also AT&T Comments at 5-6; Verizon Reply Comments at 2; Sprint Nextel Reply Comments at 2-3; T-Mobile Reply Comments at 4-5.

⁵² Letter from Melvin Clay and Timothy Decker, Co-Chairs, North American Portability Management LLC, to Joel Zamlong, Telcordia (Nov. 20, 2008) at 2 ("NAPM Nov. 20, 2008 Letter") (attached as Exhibit 3).

Administrator Model deserves and warrants consideration and further evaluation.”⁵³
NAPM did not reject Telcordia’s Multi-Peering proposal, but directed that “in order to proceed with consideration of this model, it is necessary for Telcordia to initiate appropriate industry-wide subject matter expert consideration, review and buy-off of the various technical issues and challenges.”⁵⁴

Beginning on January 8, 2009, Telcordia provided the change order documentation and the LNPA Working Group began work to review the requirements, flows and interface specifications for multivendor, inter-NPAC peering contributed by Telcordia.⁵⁵ Yet, less than three weeks later, NeuStar and NAPM adopted Amendment 70, resulting in a contract that effectively precludes the implementation of a multivendor NPAC and denies users any level of vendor choice until 2016.

3. Amendment 70 and ENUM.

NeuStar was not content merely to cement its NPAC monopoly revenues through 2016. It went a step further by using Amendment 70 to gain the ability to leverage its NPAC monopoly into the competitive ENUM services market – and NAPM went along with this Faustian bargain. This was, in fact, a key part of the deal; as NeuStar CEO Jeffrey Ganek stated in the recent investor relations call announcing the amendment:

[W]hat [Amendment 70] does do is takes an existing platform that all networks are currently physically interfacing with, they’re currently depending upon it for routing virtually all telephone calls and it puts into that database the first three simple IP data points that are necessary for the first simple IP applications that the networks are going to provide. We believe that once the networks start using the NPAC for those IP data sources, that it will be very attractive to them to look to NeuStar for increasing volumes of transactions in the IP area. More importantly, as

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ The work is being done pursuant to Change Order 437, submitted by Telcordia.

the scope, scale, and complexity of their IP offerings increase, they'll need additional IP fields. When that happens, it will be easier and less expensive for them to take that data from the NeuStar NPAC, since they're already hitting us for routing of traffic.⁵⁶

To induce industry participants to populate data in these IP fields before 2012, NeuStar placed additional discounts in the NPAC contract that are contingent upon actually establishing and using these IP data fields – directly subsidizing its introduction of these new IP data fields with up to \$22.5 million in NPAC monopoly revenues.

The market for ENUM services is particularly vulnerable to cross-subsidization from the NPAC market. For an ENUM services provider, the most critical asset is a provisioning database of telephone numbers (“TNs”) and uniform resource identifiers (“URIs”). By virtue of its NPAC monopoly, NeuStar already has nearly every telephone number in its NPAC database. To convert its NPAC database into an ENUM provisioning database, NeuStar need only add the URI data fields to the NPAC and then induce service providers to add their URI data. Amendment 70 allows NeuStar to accomplish both in exchange for up to \$22.5 million in NPAC discounts while also billing NPAC users through the FCC’s mandatory Local Number Portability Administration fees for the costs of modifying the NPAC to add the URI fields. This is in sharp contrast with all other ENUM providers, who must charge their customers for the use of their ENUM services and bear their own costs of constructing their databases.

Moreover, NeuStar has a clear path for recoupment of its cross-subsidies. Once NeuStar gains a dominant position in the market for ENUM services, the costs for other carriers to develop an ENUM database of telephone numbers and URIs at that point will be prohibitive – creating a substantial barrier to entry in the ENUM market. At that

⁵⁶ NeuStar Investor Conference Call 1/28/2009 at 7.

point, NeuStar will be able to raise its ENUM rates above competitive market levels to recoup its cross subsidies and earn monopoly returns. In addition, NeuStar will eliminate the threat of ENUM eroding its market power in NPAC services.

4. Amendment 70 and FCC Oversight.

As with Amendment 57, NeuStar and NAPM have attempted to shield Amendment 70 from the Commission's legitimate oversight by adding an inseverability clause that binds Amendment 70 into a "take-it-or-leave-it package."⁵⁷ Article 15.2 provides: "If any provision of this Amendment is held invalid or unenforceable the remaining provision [sic] of this Amendment shall become null and void and be of no further force or effect." Article 15.2 then continues, "If by rule, regulation, order, opinion or decision of the Federal Communications Commission or any other regulatory body having jurisdiction or delegated authority with respect to the subject matter of this Amendment or the Master Agreement, this Amendment is required to be rescinded or is declared ineffective or void in whole or in part, whether temporarily, permanently or ab

⁵⁷ A "cooperation" clause also limits what NAPM can tell the Commission. Under Article 12 of Amendment 70, "Cooperation," the LLC is prohibited from telling the Commission that Amendment 70 is not in its best interest, should it ever conclude that was the case. This provision contradicts NAPM's duty of candor to the Commission. Article 12 provides:

Customer and Subscribing Customer shall duly authorize and direct its co-chairs and counsel, if necessary as decided by the Customer, to support, and reasonably cooperate and coordinate with Contractor in supporting all of the following in connection with any activity before any Regulatory Entity . . . including but not limited to appearances, requests, communications, filings, submissions, or other similar activities: (a) that to the best of its knowledge and belief, the Master Agreement, including all Statements of Work and amendments thereof, including this Amendment, were entered into in accordance with all legal, regulatory and organizational requirements applicable to Customer or Subscribing Customer; and (b) that in its judgment, this Amendment is in the best interests of the NPAC/SMS Users and Allocated Payors under the various Master Agreements.

initio . . . immediately upon such [d]etermination . . . this Amendment shall be rescinded and of no further force or effect retroactively to the Amendment Effective Date,” with retroactive repricing of all porting transactions. The plain intent of this provision is to make the consequence of Commission oversight so draconian that the Commission would never exercise any supervision, no matter how unjust, unreasonable, anticompetitive or otherwise unlawful a particular contract provision might be.

II. ARGUMENT

A. Amendment 70 Must Be Stricken or Reformed Because NAPM Has Unlawfully Foreclosed Competition in NPAC Services Until 2016 and Exceeded Its Authority by Doing so Without FCC Approval.

1. NAPM Lacks Authority to Extend Contracts or to Determine NPAC Industry Structure.

Although Amendment 70 nominally repeals the express contractual bars prohibiting NAPM from conducting an RFP or awarding additional contracts that would have applied through 2011, it substitutes and extends those *de jure* prohibitions on competition with *de facto* barriers to competition that will not expire until 2016. This is, of course, not the first time that NAPM has executed a contract that foreclosed competition: in September 2006, in Amendment 57, NAPM agreed to express and substantial contractual penalties for conducting an RFP or awarding additional contracts before 2012.⁵⁸ Not only are all these restrictions on the timing of competition – both those in Amendment 57 and those in Amendment 70 – anticompetitive, unjust and unreasonable, but the decision about whether to extend a sole source contract or to seek competitive alternatives is an inherently governmental function that must be decided by the FCC, not NAPM.

⁵⁸ Amendment 57, Article 7, also extended NeuStar’s contract term through 2015.

Office of Management and Budget (“OMB”) Circular A-76 – which applies expressly to the FCC as an “independent establishment[]” within the federal government – makes clear that “agencies shall . . . [p]erform inherently governmental activities with government personnel.”⁵⁹ “Inherently governmental activities” are ones that, among other things:

commit[] the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.⁶⁰

Here, there are no existing policies, directions or guidance that identify specified ranges of acceptable NAPM decisions or conduct with respect to contract extensions and industry structure; the FCC never delegated authority in those areas to NAPM. The FCC’s authorization to NAPM was narrow and temporary – merely to “manage and oversee the local number portability administrators” on an interim basis.⁶¹ That never included the authority to decide whether there should be only a single NPAC administrator through either *de jure* or *de facto* bars to competition. Indeed, it was the FCC – not NAPM acting alone – that specifically approved the initial selection of two NPAC administrators,⁶² and then subsequently approved NeuStar taking over the Perot System regions.⁶³ Decisions regarding industry structure and when new competitive bidding should occur are the sole prerogative of the FCC, not NAPM.

⁵⁹ OMB Circular No. A-76, at 1.

⁶⁰ *Id.* at Attachment A (B)(1)(b).

⁶¹ 47 C.F.R. § 52.26(b)(2).

⁶² See *Second Report and Order*, 12 FCC Rcd at 12306-07, ¶¶37-39.

⁶³ *Second Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd at 21209 ¶9.

There are good reasons to construe narrowly NAPM’s authority to “manage and oversee” the NPAC. As the United States Court of Appeals for the D.C. Circuit explained, “when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making.”⁶⁴ The Court further observed, “delegation to outside entities increases the risk that these parties will not share the agency’s ‘national vision and perspective,’ and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.”⁶⁵ That is what happened here.

NAPM’s actions with respect to Amendment 70 – and Amendment 57 – show why the fundamental question of when to extend or to rebid a contract must remain with the FCC. With Amendment 57, in return for what it thought would be near-term cost savings, NAPM agreed not to issue an RFP or award a competitive bid until 2012 or face exorbitant penalties. Then, stuck in the hole it had dug not only for itself but all carriers and consumers as a whole, NAPM could not simply issue a non-exclusive RFP to seek alternative suppliers to NeuStar once it realized that it yet again would be paying NeuStar too much for NPAC services. So it executed Amendment 70 to secure another round of short-term cost reductions. But to gain those immediate reductions, NAPM had to assure NeuStar that it would earn \$2.8 billion in NPAC revenues through 2015 without any real threat of competition. One devil’s bargain begat another. In neither case did NAPM assure itself that it was getting as good a deal as it could get for the industry because NAPM never formally or informally sought competitive, head-to-head bids.

⁶⁴ *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

⁶⁵ *Id.* at 565-566 (quoting *National Park and Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.C. Dist. Ct. 1999)).

Had NAPM been required to justify its decisions to the FCC and to obtain FCC approval prior to entering into each of these contract amendments, the FCC could have made the inherently governmental choice as to whether short term cost savings were worth the longer term elimination of competition – first through 2011 in Amendment 57 and now through 2015 in Amendment 70. The prospect of Commission pre-approval itself may have moderated NeuStar’s anticompetitive demands, and would have allowed the Commission to establish a longer term path to achieve both additional savings and competition. Instead, NAPM has lurched from short term fix to short term fix, without any broader consideration of the public interest. NAPM’s members’ short term financial objectives dominated and overwhelmed any longer term considerations of the cost or the public interest, leading to the pursuit of goals inconsistent with the Commission’s vision and the statutory focus on competition.

In fact, this situation in which NAPM sought to transition from a per-transaction contract to a quasi-fixed price contract is exactly the type of situation in which a competitive bid would have been most appropriate. Had it actually put the contract out for bid, NAPM could have allowed the industry to reap some benefits from competition. Using competitive bidding the Commission could have solicited capped fee proposals that did not contain the revenue protection that NeuStar has negotiated whereby it retains almost all of the contract revenue through the end of 2015 even if it loses 50% of the market. In addition, by opening this contract to competitive bidding NAPM would have had the opportunity to ascertain the value of the opportunity to add the URI fields to

create an ENUM provisioning database from the NPAC – if such a use comported with the FCC’s rules, which it does not.⁶⁶

Because it has not even tried competitive bidding, NAPM will never be able to tell the FCC, the industry as a whole and consumers how much less than Amendment 70’s \$2.8 billion it could have ended up paying for NPAC services between 2009 and the end of 2015, and how much more NAPM could have saved had it moved to initiate competitive bidding in 2006, rather than entering into Amendment 57.⁶⁷ Here’s what we do know:

- When Amendment 57 was adopted, Telcordia projected that with competitive bidding, the industry – and their consumers – could have saved at least another 20% — or at least \$60 million per year. Amendment 70, which drops NeuStar’s anticipated 2009 NPAC revenues from approximately \$350 million to approximately \$300 million, conclusively shows Telcordia was right. Amendment 57 was far too rich and industry and consumers could have saved substantially through competitive bidding in 2006.

⁶⁶ See Section II.A.2, *infra*.

⁶⁷ Although Telcordia had, prior to the time that Amendment 70 was adopted, submitted two unsolicited bids to NAPM, one for a Regional or Primary/Standby model for NPAC services and one, at NAPM’s suggestion, for a multivendor peering model, neither of these can be considered competitive bids to Amendment 70 because they were not submitted in response to a transparent set of bid specifications. As an example, at no time did NAPM seek to negotiate a capped expenditure contract with Telcordia – for which Telcordia would have put forward a proposal had NAPM even explored the idea. In any event, at the time that Amendment 70 was executed, NAPM had just told Telcordia that the multivendor peering proposal “deserves and warrants consideration and further evaluation.” NAPM Nov. 20, 2008 Letter at 2.

- As an alternative to Amendment 70, Telcordia’s regional proposal would have saved a projected \$600 million through 2015, as compared with Amendment 70.
- NAPM can no longer use the unsolicited proposal process to reduce costs before 2016 because the economics of Amendment 70 foreclose any savings from introducing competition, unless NeuStar suffers dramatic (and unrealistic) market share loss.

Competitive bidding was and is the only way to know for sure that the industry and consumers are not being overcharged. That is, of course, why the President has reminded all federal agencies, “It is the policy of the Federal government that executive agencies shall not engage in non-competitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards have been put in place to protect the taxpayer.”⁶⁸ It is also why Congress enacted the Competition in Contracting Act, directing that federal agencies “shall obtain full and open competition through the use of competitive procedures.”⁶⁹ As the Commission noted, “[a]s a general matter, federal law assumes that competitive procedures best serve the public interest.”⁷⁰ NAPM’s procurement of NPAC services for the FCC’s long term number portability mechanisms are not any different – competition in contracting is essential to ensuring that industry and consumers are not required to pay more than is necessary.

⁶⁸ See President’s Government Contracting Directive, *supra* n. 5, at 3.

⁶⁹ 41 U.S.C. § 253(a)(1)(A).

⁷⁰ *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7641 ¶150 (2000) (“*Numbering Resource Optimization*”).

The decision whether to seek competitive bids or to allow NeuStar to extend its NPAC monopoly for another four years affects consumers, service providers and the public interest far beyond NAPM's membership. In the first instance, when NAPM agrees to pay too much for NPAC services, consumers end up paying too much for local number portability surcharges assessed by their carriers. Beyond that, thousands of telecommunications carriers and interconnected VoIP providers are required by 47 C.F.R. § 52.32 to share the cost of long-term number portability, but only eight are members of NAPM. These thousands of providers see their FCC-mandated LNPA fees increase every time NAPM agrees to pay NeuStar too much. Furthermore, a single NPAC raises reliability and critical infrastructure concerns. With only one NPAC, and only one NPAC vendor, critical infrastructure failures resulting from systems failures, disasters or economic failures are more likely, as there is no redundancy should such a failure occur.

All of these factors show why the decision whether to conduct a competitive procurement or to extend or substantially modify NeuStar's contract are inherently government decisions to be made by the FCC. NAPM is not the right entity to weigh these various public interest concerns; only the FCC can. Accordingly, the FCC has never conferred on NAPM, the interim administrator, the authority to do so. As such, Amendment 70 – and all contract extensions since 2002 – must now be terminated because NAPM lacked the authority to execute those extensions without FCC approval.

2. Amendment 70 Unlawfully, Anticompetitively and Unreasonably Forecloses NPAC Competition Until, at Earliest, 2016.

Amendment 70 must also be stricken because it is anticompetitive, unjust, unreasonable and contrary to the public interest to agree to a no-bid, \$2.8 billion quasi-

fixed price proposal for NPAC services through 2015 that forecloses competition entirely for the next six years. Although the NPAC contract between NAPM and NeuStar is nominally non-exclusive, reality mocks that claim. The contract's structure locks out competition as much or more than it did under Amendment 57's penalty provisions. Moreover, it extends market foreclosure by four more years just as the industry is developing standards for multivendor peering that would permit two or more NPACs to compete head-to-head in all regions of the country.

As described above, Amendment 70 camouflages its anticompetitive nature with complex pricing formulas. But when numbers are actually inserted into those formulas, the anticompetitive results are plain: no one but NeuStar can provide NPAC services before 2016. Take just the impact of Amendment 70's one year lag in any revenue loss to NeuStar as a result of competition: it is wholly improbable to believe that a competitor can give away free service for a year – and it is equally improbable to believe that NAPM will agree to contract with a competitor who cannot do so, because NAPM would end up paying more during that year than if it had simply used NeuStar for all porting transactions. Furthermore, it is improbable to believe that a competitor will instantly win more than a 30% market share – the threshold necessary for NeuStar to see even the smallest loss of revenue – or that, even if a competitor could instantly get a 50% market share and survive one year without revenue, that it could then handle its half of the porting transactions for less than the small amount of revenue NeuStar would lose.⁷¹

Under Amendment 70, there is no realistic way for the industry to introduce competition

⁷¹ If transactions grow faster than 6.5% per year, NeuStar's revenue loss shrinks further, and the margin within which a competitor must operate to save the industry money shrinks even further.

and save money – even when the industry is vastly overpaying NeuStar (as it is). It is this exclusionary result that is unjust, unreasonable and violates the public interest.

In 2009, it should not be necessary to argue that competition benefits the public, and that a contract that eliminates competition – particularly without competitive bidding – harms the public interest. As the Commission previously recognized, “there are clear advantages to having at least two experienced number portability database administrators that can compete with . . . each other.”⁷² First, competition ensures that the industry, and thus consumers, gets the best service for the best price for number portability.⁷³ Second, competition ensures that the best qualified administrators are selected and that the most efficient services are obtained.⁷⁴ Third, competition provides the incentives necessary to develop and implement the most innovative methods to solve number portability challenges.⁷⁵ Fourth, the competitive process will provide the greatest opportunity to diversify number porting administration. The Commission has already affirmed the benefit of diversification: “[w]e recognize that vendor diversity for number administration services has advantages for the industry because it prevents the industry from being captive to a single, monopolistic provider for these services.”⁷⁶ Nonetheless,

⁷² *Second Report and Order*, 12 FCC Rcd at 12306 ¶138.

⁷³ *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rule Making, 22 FCC Rcd 20235, 20245 ¶19 (2007) (“*MDU Exclusive Access Order*”). *See also Request for Review of a Decision of the Universal Service Administrator by Cincinnati City School District, Cincinnati, Ohio; Schools and Libraries Universal Support Mechanism*, Order, 21 FCC Rcd 5994, 5997 (2006).

⁷⁴ *See Second Report and Order*, 12 FCC Rcd at 12306 ¶138.

⁷⁵ *See, e.g.*, 47 U.S.C. 309(j)(3)(B); *Numbering Resource Optimization*, 15 FCC Rcd at 7638-7644.

⁷⁶ *Administration of the North American Numbering Plan; Toll Free Service Access Codes*, Third Report and Order, 12 FCC Rcd 23040, 23075 ¶66 (1997).

Amendment 70, following on the heels of Amendment 57, extends the industry's captivity from 2012 to 2016.

As the Commission has found, an exclusive contract is “an unfair method of competition or unfair act or practice” when “it can be used to impede the entry of competitors into the market and foreclose competition.”⁷⁷ Exclusive agreements actively attempt to “deter new entrants from attempting to enter the market.”⁷⁸ Moreover, in determining the public interest, the Commission takes antitrust policies into account.⁷⁹ The maintenance of a monopoly through an exclusionary contract (*i.e.*, a contract prohibiting customers from dealing with a competitor) is a clear violation of Section 2 of the Sherman Act.⁸⁰ That Amendment 70's exclusivity is achieved through its pricing mechanism rather than by using the term “exclusive” is irrelevant. As the Third Circuit has explained:

*[Defendant] also disclaims as exclusive dealing any arrangement that contained no express exclusivity requirement. Once again the law is to the contrary. No less an authority than the United States Supreme Court has so stated. In Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L.Ed.2d 580, 81 S.Ct. 623 (1961) . . . the Court took cognizance of arrangements which, albeit not expressly exclusive, effectively foreclosed the business of competitors.*⁸¹

⁷⁷ *MDU Exclusive Access Order*, 22 FCC Rcd at 20255 ¶43.

⁷⁸ *Id.* at ¶19.

⁷⁹ *See United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (“competitive considerations are an important element of the ‘public interest’” standard which governs federal agency decisions, *citing Northern Natural Gas Co. v. Fed. Power Comm'n*, 399 F.2d 953, 961 (D.C. Cir. 1968)); *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

⁸⁰ *E.g., LePage's, Inc. v. 3M*, 324 F.3d 141, 157-159 (3d Cir. 2003) (upholding Section 2 monopolization liability based on exclusive dealing).

⁸¹ *Id.* (emphasis added).

Indeed, unlike the contract considered by the Supreme Court in *Tampa Electric*, Amendment 70 forecloses competition in the entire U.S. market for NPAC services – far more than a substantial portion of the relevant market.

Contract provisions requiring exclusive dealing also violate Section 1 of the Sherman Act where, as here, the seller has market power.⁸² Contractual provisions that have the “practical effect” of inducing exclusive dealing are also unlawful under Section 1 when the seller has market power.⁸³ Since it has 100% of the market, under Amendment 70, NeuStar – with NAPM’s active assent and assistance – is plainly maintaining a monopoly under Section 2 standards and has market power under Section 1 – and Amendment 70 extends that monopoly for four years beyond when it would otherwise have expired. This is not a case of parties in a competitive market negotiating a contract with permissible exclusivity. Rather, it is a case where a provider with monopoly power in a market created by Congress and the Commission now has

⁸² See *United States v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003) (finding credit card companies’ exclusivity contracts with banks illegal under Section 1); see also *LePage’s*, 324 F.3d at 157 (“Even though exclusivity arrangements are often analyzed under § 1, such exclusionary conduct may also be an element in a § 2 claim.”).

⁸³ See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326 (1961); Herbert Hovenkamp, *Antitrust Law* §1801 (Aspen Publishers 2005) (outlining basic exclusive-dealing principles) and §1807 (reviewing exclusivity achieved through, inter alia, “anticompetitive discounting”). See also *Fed. Trade Comm’n v. Brown Shoe Co.*, 384 U.S. 316, 318-20 (1966) (declaring unlawful shoe manufacturer’s agreement to pay valuable consideration, including discounts on shoes, to retailers that promise not to purchase shoes of manufacturer’s competitors); *Carter Carburetor Corp. v. Fed. Trade Comm’n*, 112 F.2d 722, 732 (8th Cir. 1940) (holding that carburetor maker’s discount for customers agreeing not to buy competitors’ carburetors was unlawful even where customers were not required “to affirmatively promise in express terms not to handle” competing goods); *United States v. Linde Air Products Co.*, 83 F. Supp. 978, 983 (N.D. Ill. 1949) (finding unlawful contracts providing discount on welding rods in exchange for customer’s agreement not to buy rods from a rival).

succeeded in cajoling NAPM into executing a contract amendment that will restrain trade for an additional four years.

NAPM's course of conduct cannot be excused by the fact that it had contractually agreed, in Amendment 57, not to solicit competitive bids or award competitive contracts until 2012. As Telcordia has previously explained, Amendment 57 itself was unjust, unreasonable and violated the antitrust laws.⁸⁴ If anything, NAPM's course of conduct with respect to Amendment 70 proves Telcordia's earlier point with respect to Amendment 57: Amendment 57's contractual penalties served their intended purpose – to cause NAPM to refuse to pursue competitive bids when that would have been the logical process.

Nor can Amendment 70's *de facto* exclusivity be excused by the goal of achieving a cap on NPAC costs. While a cap on NPAC costs is a legitimate objective, a *de facto* exclusive contract was not necessary to achieve that objective. Again, had NAPM put out the NPAC contract for bid – as Telcordia requested in its earlier petition – it could have specified that any bids cap NPAC costs. NAPM cannot now justify exclusionary actions because it turned a blind eye to pro-competitive alternatives.

Because Amendment 70 uses its pricing mechanisms to ban any competition in NPAC services until 2016 just as the industry is developing standards for multivendor peering, it must be declared unjust, unreasonable and contrary to the public interest. The time has come for the Commission to direct NANC to expeditiously complete work on the multivendor peering specifications, and then for the Commission to conduct a

⁸⁴ See Telcordia Petition at 9-13, Section I.

competitive bid, and to terminate all existing NPAC arrangements once those new contracts are in place.

3. NAPM's Failure to Obtain Competitive Bids Prior to Entering Into Amendment 70 Violates the Competition in Contracting Act.

The Competition in Contracting Act requires all Executive Agencies, which includes the FCC, to “obtain full and open competition through the use of competitive procedures,”⁸⁵ subject to only limited exceptions. Full and open competition through competitive procedures plainly did not occur here, as NAPM never issued an RFP. Moreover, none of the exceptions to the Competition in Contracting Act’s competition mandate are applicable.

Nor is failure to adhere to the Competition in Contracting Act excused by the fact that NAPM negotiated the contract, rather than the FCC. A private entity can be subject to the Competition in Contracting Act’s requirements if it nonetheless is a public instrumentality.⁸⁶ While the determination of whether the private entity is a public instrumentality is determined “by analyzing the total factual circumstances surrounding its creation,” by any measure, NAPM is a public instrumentality. NAPM exists solely to manage and oversee the long-term database number portability administration contracts, and it has been assigned that role on an interim basis by the FCC pursuant to the FCC’s rules.⁸⁷ Those contracts were created to effectuate the Commission’s duty, pursuant to Section 251(e) of the Communications Act to “create or designate one or more impartial entities to administer telecommunications numbering” and to establish a competitively

⁸⁵ 41 U.S.C. § 253(a)(1)(A).

⁸⁶ See *Motor Coach Indus, Inc. v. Dole*, 725 F.2d 958, 964-5 (4th Cir. 1984).

⁸⁷ 47 C.F.R. § 52.26(b)(2).

neutral means for all carriers to bear the costs of number portability.⁸⁸ NAPM is subject to FCC oversight.⁸⁹ And the charges incurred by NAPM under these contracts are, by FCC rule, assessed on each and every telecommunications carrier and interconnected VoIP provider; those providers are subject to FCC forfeitures if they fail to make such payments.⁹⁰ NAPM could hardly be a more public instrumentality without being an actual government agency.

In addition, Amendment 70 is not excluded from the Competition in Contracting Act's competitive bidding requirements simply because it is a modification of an existing contract. Modifications of existing contracts remain subject to the Competition in Contracting Act's competitive bidding requirements when the "contract as modified materially departs from the scope of the original procurement"; only modifications *within* the scope of the original procurement are excused from competitive bidding.⁹¹ Here, Amendment 70 lies far outside the scope of the original 1997 competitive procurement. It changed the type of service being delivered (to include URI fields for an ENUM provisioning database), the quantity of the service, the performance period (extended to 2015 rather than terminating in 2002 as under the original, competed contract), and the cost. All of these factors demonstrate that Amendment 70 is subject to the Competition in Contracting Act's competitive bidding requirements.⁹²

⁸⁸ 47 U.S.C. § 251(e)(1).

⁸⁹ 47 C.F.R. § 52.26(b)(3).

⁹⁰ 47 C.F.R. § 52.32; *see Telrite Corporation; Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture & Order, 23 FCC Rcd 7231 (2008).

⁹¹ *AT&T Communications, Inc. v. WilTel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993) (“[O]nly modifications outside the scope of the original competed contract fall under the statutory competition requirement.”).

⁹² *See Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443, 466 (2001).

It is time for the Commission to return to first principles, and to bring its number portability administration contract back within lawful parameters. That can be done only by initiating a new competitive procurement for number portability database administration.

B. Amendment 70 Must Be Stricken or Reformed Because NAPM Has Abused Its Authority by Permitting NeuStar to Add URIs to the NPAC Database and to Cross-Subsidize Its ENUM Provisioning Services.

If its provisions foreclosing competition in NPAC services until 2016 were not bad enough, NAPM compounds Amendment 70's unlawfulness and competitive harm by allowing NeuStar to add three URI fields to the NPAC database and to structure the NPAC contract to cross-subsidize the use of those URI fields. Again, this is wholly beyond NAPM's legal authority, and usurps the policy prerogatives of the Commission and the role the Commission has assigned to NANC, not NAPM. The Commission cannot ignore this *ultra vires* activity.

As discussed above, when the Commission created long-term number portability and devised the concept of a long-term number portability database, it specifically decided that the NPAC database would be "limited to the information necessary to route telephone calls to the appropriate service providers."⁹³ All other information, including proprietary customer-specific information, would go into carrier-specific databases.⁹⁴ The Commission directed that the NANC – not NAPM – would determine "what specific information is necessary" to route telephone calls to the appropriate provider.⁹⁵

⁹³ *First Report and Order*, 11 FCC Rcd at 8403 ¶¶99; 47 C.F.R. § 52.25(f).

⁹⁴ *Id.* at 8404 ¶¶100-101; 47 C.F.R. § 52.25(i).

⁹⁵ 47 C.F.R. § 52.25(f).

NAPM thus has no authority to decide whether the URI fields contemplated by Amendment 70 may be added to the NPAC database. NANC considered the matter in 2005, was unable to reach consensus and then referred the issue to the FCC.⁹⁶ Although the Commission last year referred the issue back to NANC for further consideration, NANC has yet to reconsider the issue and has not reached any decision that such URIs are “necessary to route telephone calls to the appropriate telecommunications carriers.”⁹⁷

As NANC’s Future of Numbering Working Group found when it examined the issue in 2005, the principal purpose of these URIs does not appear to be the routing of telephone calls, but the routing of IP-to-IP traffic, picture messages and text messages. Although NeuStar and NAPM have adopted a self-serving contract amendment, Amendment 63, that attempts to classify this traffic as a telephone call, neither the Commission nor the NANC have ever reached such a conclusion. Indeed, when the NANC last considered this issue, the opponents of including these URI fields in the NPAC pointed out that this traffic had not even been classified as telecommunications services.⁹⁸

Underscoring why NAPM should not be making these decisions, Amendment 70 permits NeuStar to leverage its NPAC monopoly – now cemented for the next seven years, if not longer – into the ENUM services market. As the NPAC provider, NeuStar has unique access to nearly every telephone number in the country – which is half of creating a national ENUM provisioning database. Amendment 70 combines this advantage with up to \$22.5 million in NPAC revenues, *i.e.*, cross-subsidies, to induce

⁹⁶ See Section I.C, *supra*.

⁹⁷ 47 C.F.R. § 52.25(f).

⁹⁸ Future of Numbering Report at 26-27.

carriers to place their URIs into NPAC – which would then allow NeuStar to use the NPAC to provision its own ENUM affiliate.

This is a rational business strategy for NeuStar in two significant ways. First, if ENUM remains independent of the NPAC, ENUM will diminish the significance of the NPAC as more services migrate to IP and thus more traffic is exchanged IP-to-IP rather than IP-PSTN. Second, NeuStar has a natural recoupment strategy for its cross-subsidies. As it leverages its NPAC monopoly to gain market power in ENUM services, NeuStar will be able to raise prices for ENUM services in order to recoup its initial cross-subsidies. The costs to a competing vendor of creating an independent ENUM provisioning database once NeuStar has been able to establish the NPAC as an ENUM provisioning database will be too large. And, as explained above, no other competitor can integrate NPAC services and an ENUM provisioning database because Amendment 70 locks all other competitors out of the NPAC services market until at least 2016.

NeuStar expressly recognizes that it is taking a short-term diminution in NPAC revenue in exchange for the long term gain its expanded monopoly will generate from other IP services. As NeuStar interim Chief Financial Officer Mr. Lalljie explained to investors, even though the first quarter of 2009 would show a decline in revenues, and its NPAC revenues would grow at a 10% annual growth rate, “[t]hese projections do not include potential upside revenues from additional new fields, new applications, and new user services.”⁹⁹ He went on to say that Amendment 70 “also strengthens our prospects

⁹⁹ NeuStar Investor Conference Call 1/28/2009 at 4-5.

for growth, incremental to the fixed fee by offering new innovative services that are essential to IP. Please note that revenues from these sources will emerge after 2009.”¹⁰⁰

This monopoly leveraging and cross-subsidization alone renders Amendment 70 anticompetitive, unjust, unreasonable and contrary to the public interest. Even the mere potential for such anticompetitive behavior by NeuStar under Amendment 70 demonstrates why it must be the Commission, and not NAPM, that decides whether URI data can be added to the NPAC.

C. Amendment 70 Must Be Stricken or Reformed Because Its Inseverability Clause Is Wholly Inconsistent with NANC and FCC Oversight.

Amendment 70 must also be stricken or reformed because its inseverability clause cannot be reconciled with the principle of oversight, either by the NANC or the FCC. In essence what NAPM and NeuStar have presented to the FCC is a “take-it-or-leave it” deal. If the Commission so much as alters a single word in Amendment 70, the entire amendment explodes both prospectively and retroactively. Indeed, under the terms of the inseverability clause, if the FCC were to find that the inseverability clause itself was void as a matter of public policy, Amendment 70 in its entirety would cease to exist and all porting transactions after January 1, 2009 would be automatically repriced at the higher Amendment 57 rates.

When the FCC designated NAPM to “manage and oversee” the NPAC on an interim basis, it did so subject to two levels of oversight. In the *Second Report and Order*, the Commission adopted the NANC’s recommendation that the NANC in turn

¹⁰⁰ *Id.*

provide oversight over what is now NAPM, with further review by the Commission.¹⁰¹ Backing this up, the Commission instructed the Chief of the then-Common Carrier Bureau “to *take any action* necessary to remedy possible partiality by those carriers with respect to the LLCs’ [i.e., NAPM’s] oversight and management of the local number portability administrators.”¹⁰² NAPM itself has agreed to comply with Commission directives.¹⁰³ In addition, Article 25 of the Master Agreement acknowledges the Commission’s authority over the agreement, and that the FCC may direct changes or modifications to the agreement.¹⁰⁴ The inseverability clause, however, directly challenges and frustrates all oversight by tying together lawful and unlawful provisions.

The inseverability clauses in Amendments 70 and 57 should be void as a matter of public policy because they create incentives for the contracting parties to violate the law and Commission policy. Those clauses give NeuStar the incentive and the ability to include as many unlawful provisions as possible, using the initial contractual cost reductions in the contract to shield all illegalities from review or enforcement. Without the inseverability clause, NeuStar would have to defend the legal validity of each provision separately. Any arguably unlawful provision would risk being struck down – with NeuStar thus losing its unlawful gain and whatever it traded to attempt to include the unlawful provision. Through the inseverability clause, NAPM and NeuStar have

¹⁰¹ *Second Report and Order*, 12 FCC Rcd at 12336-7.

¹⁰² *Id.* at 12349 ¶123.

¹⁰³ *Id.*

¹⁰⁴ Article 25.1 provides:

Contractor [NeuStar] expressly recognizes that (i) Users and the NPAC/SMS are or may be subject to certain federal and state statutes and rules and regulations promulgated thereunder as well as rules, regulations, orders, opinions, decisions and possible approval of the FCC and other regulatory bodies having jurisdiction over Users and the NPAC/SMS, and (ii) this Agreement is subject to changes and modifications required as a result of any of the foregoing. . .