Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
The Petition of Telcordia Technologies, Inc. To Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End the NAPM LLC's Interim Role in Number Portability Administration Contract Management	)	**WC Docket No. 09-109**

COMMENTS OF THE
NORTH AMERICAN PORTABILITY MANAGEMENT LLC

Pursuant to Public Notice DA 09-1762 (rel. August 6, 2009)

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COMMENTS OF THE
NORTH AMERICAN PORTABILITY MANAGEMENT LLC

I. INTRODUCTION AND SUMMARY

A. Introduction

Pursuant to the Commission's Public Notice, DA 09-1762 (rel. August 6, 2009), the North American Portability Management LLC (the "NAPM LLC") respectfully submits these Comments both (1) to oppose the Petition[1] of Telcordia Technologies, Inc. ("Telcordia") and (2) to oppose Telcordia's associated requests that the Commission immediately issue an "interim standstill order" to block the addition of three Uniform Resource Identifier ("URI") parameters[2] into each United States service area or region's Number Portability Administration Center/Service Management System (the "NPAC/SMS") until both the Commission and NANC

1. All references in these Comments to the Petition of Telcordia are to the Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End the NAPM LLC's Interim Role in Number Portability Administration Contract Management, filed May 20, 2009.

2. The three URI parameters at issue are designated in NANC Change Orders 429, 430 and 435, and will be referred to in these Comments as the "Additional URI Parameters." They are, specifically, the URI for Voice, the URI for Multimedia Messaging, and the URI for Short Messaging Service.

expressly approve and authorize the inclusion.[3] The NAPM LLC urges the Commission ***not*** to grant the extraordinary and unwarranted relief sought by Telcordia.[4] Both Telcordia's Petition and its repeated requests for an order prohibiting inclusion of the Additional URI Parameters into the NPAC/SMS are merely a continuation of what has now become Telcordia's longstanding and extended challenge to, and second-guessing of, the judgment of the NAPM LLC[5] in its capacity as the Commission-mandated entity charged with the immediate administration of the NPAC/SMS and the supervision of the Master Agreements and the third party administrator of the NPAC/SMS under each of those Master Agreements.[6]

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3. All references in these Comments to Telcordia's requests for an "interim standstill order" are to Telcordia's initial letter, dated May 18, 2009, from John T. Nakahata, counsel for Telcordia, to Julie Veach, Acting Chief, Wireline Competition Bureau (the "May 18, 2009 Telcordia Standstill Order Request Letter"), and to Telcordia's subsequent letter, dated May 22, 2009, from Mr. Nakahata to Ms. Veach, renewing the request (the "May 22, 2009 Telcordia Standstill Order Renewal Letter"). In both the May 18, 2009 Telcordia Standstill Order Request Letter and the May 22, 2009 Telcordia Standstill Order Renewal Letter, Telcordia requests that the Commission issue interim injunctive relief prohibiting the addition of the Additional URI Parameters into the NPAC/SMS pending review by the NANC and the Commission of Telcordia's substantive underlying assertion that the Additional URI Parameters cannot be added to the NPAC/SMS without express findings and approval by the Commission. It should be noted that the May 22, 2009 Telcordia Standstill Order Renewal Letter advises the Commission that Telcordia both has invoked the dispute resolution process of the North American Numbering Council ("NANC") to seek a determination by the NANC in its favor and has asked the Commission in the Petition to make a determination in its favor. Telcordia seems to be attempting to take at least two simultaneous bites of the same apple.

4. Telcordia's requests for an interim standstill order are now moot. The Additional URI Parameters have already been added to the NPAC/SMS and are available for use by NPAC/SMS Users. Therefore, the sole issue raised by Telcordia in the Petition with respect to the Additional URI Parameters that still remains for determination is the underlying substantive issue of whether Amendment No. 70 should be abrogated because the NAPM LLC somehow "abused its authority" by allowing the future inclusion of the Additional URI Parameters into the NPAC/SMS. *See* Petition at 40-43.

5. *See e.g.* the Petition of Telcordia Technologies, Inc. to Reform Amendment No. 57 and to Order a Competitive Bidding Process for Number Portability Administration, filed June 13, 2007 (the "Telcordia 2007 Petition to Reform Amendment No. 57") and associated Comments, Reply Comments, *Ex Partes*, and requests filed in WBC Docket No. 07-149.

6. The seven separate Master Agreements govern the administration of the NPAC/SMS in each of the seven former Regional Bell Operating Company ("RBOC") service areas or regions, and each was executed and has been in effect since mid-1997. These Master Agreements have been in effect without interruption since that time and have been supervised and administered by the NAPM LLC during all that time, in accordance with the initial directive and endorsement of the FCC contained in the *Second Report and Order*, CC Docket Number 95-116, RM 8535, FCC 97-289, adopted August 14, 1997 (the *"Second Report and Order"*), and subsequently further acknowledged without change by the FCC in the *Third Report and Order*, CC Docket Number 95-116, RM 8535, FCC 98-82, adopted May 5, 1998 (the *"Third Report and Order"*).

Under the proper standard for the Commission's consideration of Telcordia's requests, Telcordia (1) has failed to demonstrate either an immediate detriment to the public interest or a genuine future threat to the public interest from adoption of Amendment No. 70 and (2) has also failed to show any sufficient real benefit to the public interest and to telecommunications consumers that would warrant the Commission's extraordinary and unprecedented intervention now, as sought by Telcordia. Accordingly, the Commission should not unilaterally abrogate, modify or rewrite Amendment No. 70 or any other amendment to the Master Agreements negotiated by the NAPM LLC, sweep away the long-standing and successful Commission-mandated regulatory-industry number portability regime, or, even on some interim or temporary basis, require specific findings and pre-approval by the Commission before the NPAC/SMS can be enhanced by including certain URI information. The relief requested by Telcordia, at its core, merely reflects Telcordia's *disagreement with the good faith judgment of the NAPM LLC and an attempt to substitute Telcordia's judgment,* and, if granted, risks adversely affecting the consistent quality of telecommunications services currently enjoyed by consumers, by adversely impacting the operations and immediate enhancement of the NPAC/SMS in the seven separate United States regions, and, thereby, adversely impacting telephone number portability and pooling[7] in those regions.

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7. Pursuant to Statement of Work No. 15, dated May 7, 1999, NANC Change Order Number 109 was implemented in all United States regions through each of the seven regional NPAC/SMSs. NANC 109 encompassed the entire set of changes required to support national standards for number pooling to be accomplished through use of the NPAC/SMS. Consequently, any change or alteration in NPAC/SMS services could not only adversely affect telephone number porting but could also adversely affect telephone number pooling, although the administration of national telephone number pooling is the responsibility of the Pooling Administrator under separate agreements (which do not involve the NAPM LLC) and not the NPAC/SMS administrator.

B. SUMMARY

1. Telcordia has failed to show under the applicable standard that Amendment No. 70 or any of the terms of Amendment No. 70, either on their face or by their operation, adversely affect the public interest.

Telcordia has failed to prove under the *Sierra-Mobile* doctrine that the problems alleged by Telcordia with respect to Amendment 70 (or any other amendment to the Master Agreements) are "sufficiently serious" to support an explicit finding by the Commission that Amendment No. 70 taken as a whole "adversely affects the public interest." Amendment No. 70 should not be abrogated in whole or in part, and should stand and remain effective. Consequently, the extraordinary relief that Telcordia asserts would follow if Amendment No. 70 is abrogated should not now be granted. Telcordia's Petition should, therefore, be denied by the Commission.

Telcordia argues that Amendment No. 70 is unlawful and should be abrogated and rewritten by the Commission because in agreeing to Amendment No. 70, the NAPM LLC lacked authority, abused its authority and eviscerated the Commission's authority. These arguments are all without merit, but more importantly, they do not reflect the proper test for the Commission's evaluation of whether Amendment No. 70 should be abrogated. That test is whether Telcordia has demonstrated that Amendment No. 70 adversely affects the public interest, and Telcordia has failed to make that showing.

In fact, Amendment No. 70 benefits the public interest. It was the result of the exercise of the NAPM LLC's good faith, best judgment in arms-length negotiations, where the NAPM LLC carefully balanced and weighed a variety of considerations, including garnering substantial monetary savings by adoption of a fixed price methodology rather than a transaction-based pricing methodology, while ensuring both the continued operational stability and effectiveness of

the NPAC/SMS in a dynamic technologically evolving environment and the contractual and real-world flexibility to move to the next-generation of NPAC/SMS in the future.

a. <u>The provisions of Amendment No. 70 are not facially or in effect anti-competitive, unreasonable or exclusionary and do not create barriers to continued competition.</u>

Telcordia has failed to show that Amendment No. 70 is anti-competitive, unreasonable or exclusionary, either on its face or in effect, and, therefore, adversely affects the public interest. Amendment No. 70 did not extend the term of the Master Agreements, nor did Amendment No 70 eliminate or modify either the "non-exclusivity" provisions of Article 28 of the Master Agreements or the contractual separateness of the seven United States regions.

Telcordia's sole argument is that the pricing formulas of Amendment No. 70 somehow operate to create some kind of putative or constructive exclusivity by creating barriers to competition. But the computations and charts of Telcordia, which allegedly demonstrate the future projected anti-competitive and unfair nature of Amendment No. 70, are not grounded in reality; and they are static, theoretical, speculative and biased. Under realistic scenarios, the portions of the pricing formulas theoretically isolated by Telcordia likely will have no effect and will impose no limitation on the flexibility of the NAPM LLC to migrate to another vendor or alternate NPAC/SMS platform, should the decision be made to do so.

On its face, Amendment No. 70 increased the flexibility of the NAPM LLC, if it chose, to commence RFP, RFI, or RFQ discussions, to make public announcements regarding its intentions to issue RFPs, RFI, or RFQs, and even to consider and endorse alternative TN-based routing systems. This is because Amendment No. 70 included as part of its package of negotiated provisions, the elimination of provisions of Section 8.3 of prior Amendment No. 57 that could operate *prospectively only to* cause a reversion of pricing under the Master

Agreements to pre-Amendment No. 57 pricing if the NAPM LLC engaged in those types of activities. The elimination via Amendment No. 70 of these Amendment No. 57 prospective pricing reversion trigger provisions did not, as Telcordia attempts to portray it,[8] demonstrate that the NAPM LLC was filling in a "hole it had dug." To the contrary, it demonstrates that the NAPM LLC successfully preserved sufficient flexibility and leverage in Amendment No. 57 to allow it to use the negotiations with respect to Amendment No. 70 to enhance the position and flexibility of the NAPM LLC going forward as conditions changed, just as that same flexibility is preserved under Amendment No. 70.

b. Section 15.2 of Amendment No. 70 does not in any way limit or eviscerate regulatory oversight.

Telcordia incorrectly argues that Section 15.2 of Amendment No. 70 is a provision that embodies the unlawfulness of Amendment No. 70, because it operates to shield Amendment No. 70 from regulatory review. Section 15.2 of the Amendment No. 70 is a standard "boilerplate" provision. It has been included in all amendments to the Master Agreements since Statement of Work 25 in December 2000.

It is ***not***, as Telcordia argues, a "poison pill" that should be deemed void because it "eviscerates" the Commission's authority.[9] The provision, pejoratively and inaccurately referred to by Telcordia as the "inseverabilty clause," merely provides that an "Ineffectiveness Determination" by the Commission will result in the rescission of the challenged contract amendment.

The provision operates to return the contracting parties to their respective positions that existed prior to entering into the new contract amendment, as if the contract amendment had

8. *See* Petition at 28.

9. *See e.g.* Petition at 43-45.

never existed, if that contract amendment is determined by the applicable regulator to be invalid or impermissible. This "Ineffectiveness Determination" provision merely contractually acknowledges (not eviscerates) the supervisory regulatory authority of the Commission and the NANC. For Telcordia to turn this provision, which is intended to preserve regulatory authority, inside out and to portray it as a predatory provision designed to avoid and to eviscerate regulatory oversight, is almost unfathomable. Telcordia is simply wrong.

2. The NAPM LLC adhered to and followed all proper procedures and past precedent in negotiating and adopting Amendment No. 70 and at all times exercised good faith and its best collective judgment.

In negotiating Amendment No. 70, the NAPM LLC has acted at all times in good faith, it has exercised its collective best judgment, and it has adhered consistently and uniformly to and has followed its own processes and procedures and the processes, procedures, past practice and operational precedent of the NANC and the Commission applicable to the NPAC/SMS or to the NAPM LLC. There is no evidence with respect to Amendment No. 70 (or any other conduct) that the NAPM LLC has engaged in a pattern of clandestine and ultra vires practices to the detriment of consumers and the public interest. Its decisions to amend and to modify the Master Agreements by entering into Amendment No. 70 should, therefore, stand.

The concept of a multi-vendor peering model (which Telcordia is now demanding that the Commission move to endorse) was, in actuality, conceived by the NAPM LLC – not Telcordia. Further, the NAPM LLC has on its own convened meetings of one of its standing advisory committees called the Future of the NPAC (the "FoNPAC Committee") to consider and to vet issues related to the next generation NPAC/SMS (not merely a substitution of vendors for a same-generation NPAC/SMS as reflected in Telcordia's regional model). The FoNPAC has already introduced and is discussing a timetable with respect to that next generation NPAC/SMS

that would culminate in a competitive RFI-RFP preparation, issuance and consideration cycle. Although tentative, it appears that the schedule under development does not envision the full operability of this next generation NPAC/SMS until around or after the termination date of the current Master Agreements.

Contrary to the unsubstantiated allegations of Telcordia that the NAPM LLC has exhibited a longstanding disregard for the NANC and the Commission and has usurped regulatory authority through a series of contract amendments and changes without NANC or Commission involvement, the NAPM LLC has, in reality, adhered to the very same regulatory protocol and followed the same processes and procedures with respect to Amendment No. 70 as it followed in a consistent and unbroken string of conduct since the initial RFPs were developed by the founding LLCs and the resulting initial contracts were awarded by those founding LLCs to the initial NPAC administrators, through all subsequent changes to and modifications of those initial contracts to date.

The historical record and applicable regulatory framework are clear. The Commission directed the regional LLCs (now the NAPM LLC) to "manage and oversee the local number portability administrators,"[10] which includes, among other things, negotiating and managing the contractual relationship with the third party administrator as well as managing and overseeing work authorizations regarding the third party's administration of the NPAC/SMS. The NAPM LLC is well aware of and greatly respects that its decisions are "subject to review by the NANC"[11] and that the NANC itself and its "ongoing oversight of number portability

10. 47 C.F.R.§ 52.26(b)(2).

11. 47 C.F.R.§ 52.26(b)(2).

administration, including oversight of the regional LLCs [(now the NAPM LLC)]," are also ultimately "subject to Commission review."[12]

However, there has never been an express requirement of seeking advance Commission consent, nor has the Commission ever insisted upon it. Accordingly, Amendment No. 70 was appropriately negotiated and adopted by the NAPM LLC and should not be abrogated.

II. BACKGROUND: THE SCOPE OF TELCORDIA'S REQUESTED RELIEF

A. Telcordia is seeking both the abrogation of Amendment No. 70 and further extraordinary and unprecedented relief, without sufficient justification or basis.

Given the accelerated pleadings cycle and the numerous filings by Telcordia, both before this Commission and before the NANC, it is beneficial to identify in one place all the issues raised by Telcordia and the true scope of the relief sought by Telcordia. This will allow the NAPM LLC fully and completely to refute Telcordia's contentions and to put this continuing and longstanding series of complaints by Telcordia to rest.

1. Telcordia is requesting the immediate dismantling of the current portability regime and the Commission's immediate direct assumption of all duties.

Telcordia is requesting ***the Commission to do all of the following***:

- Nullify or abrogate all or material portions of certain existing amendments and modifications to the Master Agreements, ***going back as far as 2002,***[13] and not just Amendment No. 70[14];

12. 47 C.F.R.§ 52.26(b)(3).

13. Telcordia states "...Amendment 70 – and all contract amendments since 2002 – must now be terminated because NAPM lacked the authority to execute those extensions without FCC approval." *See* Petition at 32. *See also* Petition at 7, 26, 37, 38, 40, 43, 45, 49, 50 and 53.

14. Each of the Master Agreements under Article 13 expressly authorizes the Customer, here the NAPM LLC, to negotiate to amend and to amend the Master Agreement to add additional services and to make enhancements to the NPAC/SMS. Article 13 sets forth a specific set of procedures for such amendments, including the embodiment of suggested changes in Statements of Work. Over time, a convention has developed to refer to Statements of Work that do not reflect a charge to Users and End-Users as Amendments. As of the date of the Petition, 72 Statements of Work and Amendments have been negotiated and either withdrawn or agreed upon, some of which also include separate subsequent releases and versions. Statements of Work are sometimes referred to as SOWs.

- Unilaterally establish a new and indefinite termination date for and impose an indefinite interim transition period under the then-remaining Commission-abrogated or -modified Master Agreements with the current NPAC/SMS administrator, but require the continuation of Amendment No. 70's pricing terms during this transition period;[15]

- Commence immediately an accelerated and undefined public bidding and contract award process (for a yet undefined next-generation "multi-vendor peering NPAC/SMS)[16];

- "Fire" the NAPM LLC and have the Commission itself immediately assume directly all day-to-day administrative, supervisory and contractual duties with respect to local number portability and oversight of the NPAC/SMS administrator now performed by the NAPM LLC[17];

- Find that it is unlawful both to allow the inclusion of the Additional URI Parameters in the NPAC/SMS and to provide a price reduction to NPAC/SMS users in exchange for their inclusion under the pricing structure of Amendment No. 70[18];

- "Pending further review by the Commission", issue an interim and emergency standstill order prohibiting the inclusion of the Additional URI Parameters in the NPAC/SMS[19]; and

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15. Telcordia states that the "only way" the Commission can grant the relief requested by Telcordia is for the Commission to terminate all Master Agreements with the current NPAC/SMS contractor and make the new multi-vendor peering contracts "effective as soon as services can be transitioned." *See* Petition at 50. Telcordia further states the following: "In the interim, the Commission should use the current pricing terms of Amendment 70 (other than those applicable to URI fields) to establish an interim rate for NeuStar, to apply until the new contracts are implemented and the current contracts are awarded." *Id. See also* Petition at 7 and 52.

16. *See e.g.* Petition at iv, 7. Telcordia even goes so far as to state the following: "The Commission should task NANC [and the LNPA Working Group] with completing those standards [for a multi-vendor peering database structure] within three months, so that bidding can commence immediately once the Commission has fully considered this petition." Petition at 51-52.

17. *See* Petition at iv, 8, 51.

18. Petition at 40-41.

19. Petition at 6-7. Telcordia states that "This is the subject of a separate letter filed in this docket." Petition at iv, 6. Based upon the Petition's May 20, 2009 filing date, the preceding reference must be to the May 18, 2009 Telcordia Standstill Order Request Letter, before Telcordia triggered the NANC dispute-resolution process. Accordingly, it is unclear whether the Commission now must wait under this Petition for the conclusion of the NANC dispute resolution process before considering the merits under the Petition in this proceeding of Telcordia's contention that it was unlawful to allow the inclusion of the Additional URI Parameters in the NPAC/SMS and to provide a price reduction in exchange for their inclusion under the pricing structure of Amendment No. 70 or if the Commission can or should consider here the merits of Telcordia's contentions even while those same contentions

- Pending completion of the Commission's proceeding related to Telcordia's Petition, "direct the NAPM [LLC] not to execute any additional contract amendments without prior Commission approval."[20]

The sheer scope of the foregoing requests for relief is over expansive; Telcordia is not requesting small or incremental relief. Telcordia is requesting the wholesale and immediate dismantling of the Commission's entire local number portability regulatory-industry regime that has enabled and resulted in the successful design, launch, implementation, administration, advancement and nurturing of number portability and pooling since inception in 1997. In its place, Telcordia offers no real long-term solution, other than to recommend that the Commission take over the "procurement" of the new NPAC/SMS and to suggest that the Commission commence "rulemaking".[21]

2. Telcordia argues that the alleged invalidity and requested abrogation of Amendment No. 70 should trigger a unilateral rewriting of the remaining provisions of the Master Agreements by the Commission, the acceleration of the process to competitively bid a multi-vendor peered NPAC/SMS, and the direct assumption by the Commission of all duties and responsibilities with respect to supervision and management of the NPAC/SMS agreements and its contractors.

To justify the extensive scope of the relief it seeks, Telcordia cites the following actions by the NAPM LLC: (1) that the NAPM LLC negotiated and agreed to a modification of the existing NPAC/SMS Master Agreements with the existing NPAC/SMS contractor (that is, Amendment No. 70) ***rather than*** accept Telcordia's unsolicited offer to replace that contractor as the NPAC/SMS administrator in all or some of the United States regions (referred to herein as

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are pending before NANC. Notwithstanding the foregoing, the request for the issuance of a standstill order to prohibit the inclusion of the Additional URA Parameters is now moot. Accordingly, the merits of granting a standstill order shall not be addressed in these Comments.

20. Petition at 7.

21. Petition at 51.

Telcordia's "regional model" offer), and (2) that, after not accepting Telcordia's unsolicited offer, the NAPM LLC proceeded with a comprehensive process to analyze and to develop the requirements for a next-generation, multi-vendor peering model-based NPAC/SMS, but that process is moving too slowly for Telcordia.[22] Telcordia is arguing that Amendment No. 70 was wrongfully agreed to by the NAPM LLC and should be abrogated by the Commission and that that abrogation should trigger the rest of the relief sought by Telcordia, including the acceleration of the process that has already commenced to explore the requirements and feasibility of the next generation, multi-vendor peering NPAC/SMS. Thus at the root of Telcordia's requests is that Telcordia simply ***disagrees*** with the judgment of the NAPM LLC on these matters and wishes to ***substitute its own judgment*** for that of the NAPM LLC.

Telcordia dresses up its mere disagreement over the NAPM LLC's judgment by claiming that Amendment No. 70 is unlawful and should be abrogated by the Commission based upon the following assertions: (1) the NAPM LLC *lacked the authority* to enter into Amendment No. 70 at all without the approval of the Commission, because Amendment No. 70 constitutes an extension of the Master Agreements, was itself entered into without a competitive bid and unreasonably forecloses competition with potential NPAC/SMS vendors during the remaining term;[23] and (2) the NAPM LLC *abused its authority* by allowing in Amendment No. 70 the future inclusion of the Additional URI Parameters into the NPAC/SMS; and (3) the NAPM LLC *attempted to eviscerate the Commission's authority* by including in Amendment No. 70 Section

22. In fact, Telcordia apparently does not even disagree with the NAPM LLC's view that this next-generation NPAC/SMS should not simply be a continuation of the "regional" model but should be a "multi-vendor peering model" as first conceived and suggested by the NAPM LLC itself.

23. Petition at 26-31.

15.2, which Telcordia dubs the "inseverability clause."[24] Nonetheless, even Telcordia admits that Amendment No. 70 delivered immediate material monetary savings to the telecommunications industry and, by implication, to consumers.[25]

Telcordia is not simply asking for Amendment No. 70 to be abrogated; Telcordia actually requests that the Commission abrogate ***all amendments to the Master Agreements since 2002.***[26] This attempt by Telcordia to leverage the requested abrogation of Amendment No. 70 to trigger a cascading abrogation of all amendments since 2002 and an immediate unilateral rewriting of the Master Agreements by the Commission betrays the transparency of Telcordia's contentions as mere pretenses to accelerate the timing of the competitive bidding process on the next generation, multi-vendor peering NPAC/SMS from the timing that Telcordia believes the NAPM LLC is following. What Telcordia really wants - and boldly has requested - is the termination of the Master Agreements with the current NPAC/SMS contractor, an immediate bid and award of contracts for a new NPAC/SMS contractor (hopefully in Telcordia's view for it to be Telcordia), and the imposition of a Commission-mandated transition period from now until the award of new contracts (to force the current NPAC/SMS contractor to continue to provide NPAC/SMS services until then).

B. By requesting in its Petition and in its requests for a standstill order that the Additional URI Parameters can not be added to the NPAC/SMS, Telcordia is, in effect, requesting that the Commission shield Telcordia's Provider ENUM business from competition.

Telcordia has also requested the Commission to mandate that the NPAC/SMS cannot now be enhanced to allow carriers to provide URI information to the NPAC/SMS, as many

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24. Petition at 43-44.

25. *See e.g.* Petition at 29.

26. Petition at 32.

telecommunications carriers have requested. Some carriers have expressed concerns that local number portability, if not kept current with evolving technologies, could cause the degradation of the quality of their existing and evolving services provided to their customers, as more and more customers utilize "smart phones," VoIP, and attendant services.

Telcordia, on the other hand, contends that this Commission-mandated prohibition on the provisioning of URI information into the NPAC/SMS is necessary immediately to *prevent* competition with, and the premature death of, the nascent ENUM databases, which are being developed independently. However, in February 2009, Telcordia was awarded the commercial contract by the CC1 ENUM LLC for a Provider ENUM Tier 0/1 Registry service (so-called Service Provider ENUM),[27] and Telcordia has made no secret of its desire to be the vendor for the ENUM Tier 1A Registry (so-called End User ENUM). Therefore, if the Commission grants Telcordia's request to prohibit the inclusion of the Additional URI Parameters into the NPAC/SMS, Telcordia's own Service Provider ENUM business will be shielded from otherwise-permissible competition.

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27. *Infra Footnote 40*

III. DISCUSSION

A. Telcordia has failed to show that the extraordinary relief requested in its Petition should be granted by the Commission at this time, because Telecordia has failed to prove that Amendment No. 70 adversely affects the public interest, either by its express terms (on their face or in operation) or by the circumstances and manner of its negotiation and adoption by the NAPM LLC.

1. Telcordia argues that Amendment No. 70 should be abrogated or modified because of its express terms or because of the circumstances and manner of its negotiation and adoption by the NAPM LLC, or both.

Telcordia's argument that Amendment No. 70 should be abrogated or modified seems to the NAPM LLC to boil down to the following two conclusions and contentions by Telcordia: (1) that Amendment No. 70's terms are impermissible (on their face or in operation, or both); and (2) that the circumstances and manner of Amendment No. 70s negotiation and adoption by the NAPM LLC were impermissible. The NAPM LLC asserts that both of those conclusions and contentions are wrong.

2. Amendment No. 70's terms are not impermissible, either on their face or in operation.

Most of Telcordia's objections in its Petition involve the following two provisions of Amendment No. 70: (1) the "pricing formulas"[28]; and (2) Section 15.2, referred to by Telcordia as the "inserverablity clause," and by the NAPM LLC as the "Ineffectiveness Determination" clause or merely as Section 15.2.[29] Telcordia argues that the pricing formulas render Amendment No. 70 impermissibly anti-competitive, unfair and exclusionary to other potential vendors. Telcordia also argues that Section 15.2 is a "poison pill" and a kind of latent "booby trap" that impermissibly renders Amendment No. 70 essentially bullet-proof from regulatory

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28. *See, e.g.* Petition at 19-22 and at 33-36.

29. *See e.g.* Petition at 25-26 and at 43-44.

review of those allegedly impermissible pricing formulas. Although the floridness of Telcordia's contentions are appealing, the underlying contentions are not true.[30]

a. Amendment No. 70 did not extend the term of the Master Agreements or eliminate or modify either the "non-exclusivity" of the Master Agreements or the contractual separateness of the seven United States regions.

Amendment No. 70 did not extend the term of the Master Agreements, nor did Amendment No 70 eliminate what the NAPM LLC views as the two principal provisions in the Master Agreements that foster competition and ensure contractual flexibility to accommodate current and future market, technological and financial changes. First, Amendment No. 70 preserves the legal and operational separateness of the seven separate Master Agreements for the seven United States regions, so that potential competition is preserved across geographic regions, if ever deemed desirable.[31] Second, Amendment No. 70 preserves the non-exclusivity of the contractual relationship with the current administrator embodied expressly in Article 28 of the Master Agreements, so that experimentation and the ability potentially to migrate to other vendors or technologies, if desired, are preserved.

Accordingly, it is incontestable that Amendment No. 70, on its face at least, represents no change from what preceded it. As a result, Telcordia is forced to craft an argument that Amendment No. 70 "had the effect" of making these impermissible changes. Telcordia argues

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30. Telcordia did not in either its current Petition or in its preceding Petition assert that the current NPAC/SMS services are inadequate, unreliable or obsolete, nor does Telcordia assert that it or any other vendor can, in fact, now deliver superior services (or even comparable services) or ensure that no interruption in telecommunications services to consumers would result if all or any of the United States regions transitioned to new, untested administrators as part of an open bidding process now. Therefore, Telcordia makes no allegations that the current NPAC/SMS is inadequate, obsolete or insufficient or that Telcordia or any other vendor proposes improvements, new ideas or advanced technology.

31 Even Telcordia recognizes the flexibility that this regional contract preservation provision provides to migrate to competing vendors, because in presenting its unsolicited regional models to the NAPM LLC, Telcordia structured its presentation in recognition that it did not have to be the NPAC/SMS administrator in all United States regions to satisfy its business case.

that the provisions that wrought this "effect" are Amendment No. 70's pricing formulas (nothing else). Telcordia then goes one step further and asserts that the "boiler plate" Ineffectiveness Determination provision of Section 15.2 of Amendment No. 70 (even though it is not unique to Amendment No. 70) has the impermissible "effect" of sheltering these pricing formulas from regulatory review and *partial invalidation,* because Section 15.2 requires Amendment No. 70 to be invalidated in whole and not in part. It is interesting to note that this argument by Telcordia implicitly, if not explicitly, acknowledges that even the pricing formulas have good "effects" and are a good "deal," since Telcordia even urges the Commission to order that "NeuStar's interim compensation [should] be calculated in accordance with Amendment 70," but only "without the provisions related to discounts for implementing URI fields."[32]

According to Telcordia, it is the *combination* of the *effects* of these two facially benign provisions that render Amendment No. 70 exclusionary, anti-competitive and impermissible. The NAPM LLC asserts that this strained argument simply does not stand up to scrutiny, and at the very least, is insufficient under the Commission's standard of review to warrant the relief requested by Telcordia.

b. <u>The pricing formulas in Amendment No. 70 are not anti-competitive, unreasonable or exclusionary, and the ability to foster competition is still preserved after Amendment No. 70.</u>

i. <u>Telcordia's arguments rely on trying to show that Amendment No. 70's pricing formulas create some kind of putative or constructive exclusivity.</u>

Despite the fact that Amendment No. 70 made no change to the contractual term of the Master Agreements and did not alter or amend Article 29 of the Master Agreements, Telcordia contends that the "complex pricing formulas" adopted under Amendment No. 70 somehow

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32. *E.g.* Petition at 8-9.

operate both (1) to extend the term of the Master Agreements "four more years"[33] and, (2) to lock out competition, even though Telcordia concedes that the Master Agreements remain "nominally non-exclusive" (in the words of Telcordia[34]). Telcordia's ***entire argument*** that Amendment is anti-competitive, unreasonable, unfair, and, therefore, impermissible, rests on Telcordia's assertion that Amendment No. 70's pricing methodology constitutes some kind of putative or constructive exclusivity.

ii. Telcordia's argument is based upon disconnected and unrealistic theoretical assumptions and not on actual circumstances.

Telcordia's foundational assertions – that because of Amendment No. 70's pricing formulas, no potential competitor would dare attempt to compete with NeuStar and that NeuStar is sheltered from competition – are based upon Telcordia's speculation, conjecture and judgment regarding the behavior of unknown potential NPAC/SMS vendors sometime in the future and under unknown circumstances. These assertions are also tainted by Telcordia's own bias as a potential, highly motivated future vendor. Surely the kind of extraordinary relief sought by Telcordia demands a greater and more reliable showing.

Telcordia attempts to demonstrate in Charts 1 and 2 that the pricing formulas of Amendment No. 70, by their operation, are disguised barriers to competition, by projecting revenues payable to the current NPAC/SMS contractor under Amendment No. 70 in calendar years 2011 though 2015 under two different scenarios of presumed competition with another contractor.[35] The charts are based upon various assumptions by Telcordia but are intended to

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33. Petition at 19.

34. Petition at 33.

35. Charts 1 and 2, Petition at 20-21.

compare the difference under Amendment No. 70 between the projected revenues the current NPAC/SMS contractor would receive assuming it was the only NPAC/SMS contractor in all United States regions, versus the projected revenues the current NPAC/SMS contractor would receive if its "market share" of the projected portability transactions was reduced, allegedly to 70% and 50%.

Telcordia's charts, their underlying analysis and the conclusions that can be drawn from them are all flawed for a number of reasons. First, they are indisputably merely "models," constructed from a variety of assumptions and theoretical presumed events that are used to predict the future behavior of unknown agents, who are assumed to all act alike and to have the same clinical motivations. Second, it is not clear if they are based upon Telcordia's "regional model," or its "primary administrator – backup administrator regional model," or some form of "multi-vendor peering model." Depending on which model is implemented, both the assumptions and the consequences could be different. Third, they also represent calculated one-time, accumulated annual revenues in each year and assume that any year is equivalent to any other year and that the benefit or motivation of market share does not change from year to year, that is, that market share in any year is fungible to a prospective competitor to market share in any other year. Put differently, the charts focus and isolate single points in time, based upon steady-state immediate (that is zero to something) assumptions, and no more. Reality does not work that way; reality does not spontaneously spring from nothing, so that models that assume that it does are worth little. Fourth, the charts and the underlying analysis focus solely on Telcordia's view of how a *potential competing vendor* would act, and ignore completely how the *current incumbent NPAC/SMS contractor would react* to any loss of market share. For example, an incumbent NPAC/SMS contractor likely would react differently to a loss of market share in

earlier years compared to later years and to whether the loss of market share resulted from the imposition of the regional model or a peering model. Finally, Telcordia's charts and underlying analysis and its resulting conclusions are static and limited to a single point in time; they ignore both the past and the future and they are not dependent on the either the past or the future. There are few independent variables in reality; most are variable. Telcordia's charts and analysis ignore this.

iii. **The pricing formulas of Amendment No. 70 not only do not create barriers to competition under realistic scenarios, but they may even be shown to have the effect of fostering competition.**

Telcordia's charts and the underlying analysis that they are intended to depict are both flawed and of little value. In addition, they only represent one of many different ways of analyzing and comparing the pricing under Amendment No. 70. There is no reason that Telcordia's analysis constitutes the definitive analysis. Put quite simply, the NAPM LLC disagrees with the conclusions that Telcordia has reached based upon speculation, conjecture and its own judgment that Amendment No. 70 must be abrogated because it "has the effect" of locking in an exclusive relationship with the current contractor and thereby lessens the likelihood of future competition by reducing the likelihood that the NAPM LLC can migrate or transition to one or more other vendors.

Far from restricting or limiting competition, Amendment No. 70 taken as a whole could actually be viewed as having the effect of *increasing the competitive pressures on the incumbent NPAC/SMS contractor* for several reasons. It certainly was not negotiated by the NAPM LLC with the purpose of lessening competition; not even Telcordia asserts that. Therefore, the inquiry under Telcordia's argument is merely upon the *effect* of the pricing.

First, Amendment No. 70 allows the NAPM LLC to proceed unimpeded immediately in investigating and implementing porting and pooling solutions for the future, including the immediate consideration of multi-administrator and other next-generation solutions. To further preserve and enhance the future benefits of the new fixed porting fee approach negotiated in Amendment No. 70, the NAPM LLC used the negotiations to obtain the elimination of the provisions of Section 8.3 of prior Amendment No. 57 that could in certain circumstances operate *prospectively only to* cause a reversion of pricing under the Master Agreements to pre-Amendment No. 57 pricing in the event of a so-called Customer Modification Event (referred to as "Customer Modification Event Triggers"). This was accomplished under Section 13.3 of Amendment No. 70 which read as follows: "Effective on the Amendment Effective Date, Section 8.3, 8.4, 8.6, and 8.7 under Amendment No. 57 are hereby rescinded and shall have no further force or effect." Although the NAPM LLC never viewed the Customer Modification Event Triggers under Amendment No. 57 as material restrictions on the actual authority and ability of the NAPM LLC, the NAPM LLC negotiated to eliminate them in light of the move to a fixed fee pricing arrangement, and did. This is because in part, the risk of losing the anticipated benefits from a fixed fee arrangement, even if lost only prospectively, was viewed as worth eliminating to ensure the fixed fee arrangement prospectively. As a result, after Amendment No. 70, no attempt by the NAPM LLC to develop or issue an RFP, RFQ, RFP or similar requests or to solicit information in preparation for developing any RFP, RFQ, RFP or similar requests or to endorse, adopt or consider an alternative TN-based routing system or to make any public statements about the foregoing, could be used by the NPAC/SMS contractor to rescind the fixed fee pricing under Amendment No. 70, even prospectively.

Second, the new pricing formulas themselves do restrict the flexibility and freedom of NAPM LLC to do any of the foregoing. The fact that the NAPM LLC has convened the FoNPAC and that the FoNPAC has already developed a tentative timetable with respect to the next-generation NPAC provides direct evidence of this preserved flexibility and the absence of any putative exclusive contractual arrangement with the current NPAC/SMS contractor.

Any single model or analytic predictive approach is subject to criticism and challenge, and it is not worth belaboring that point with further examples of the flaws and limitations of Telcordia's models. What is most relevant in the view of the NAPM LLC is that Telcordia's models are theoretical and speculative and are not based in the real world or on the circumstances that are actually present (and were actually present when Amendment No. 70 was negotiated). It is the position of the NAPM LLC that the two most relevant and meaningful inquiries are (1) what is the real and most likely alternative ***at this point in time*** to replace the current NPAC/SMS arrangement, and (2) what is the real most ***likely timeline*** to accomplish that?

The foregoing two inquiries show that the pricing formulas of Amendment No. 70 taken as a whole do not operate as barriers to realistic competition and are consistent with sound judgment.[36] Therefore, they should not be disturbed.

The NAPM LLC recognized that in a fixed fee pricing arrangement there existed the theoretical possibility that depending upon future circumstances, if transactions volumes dropped, the agreed-to fixed fee could exceed the amount that would have been paid at those reduced volumes under the prior transaction pricing agreement (that is, "the Amendment No. 57 Pricing"). Accordingly, it was the desire of the NAPM LLC when it agreed to accept NeuStar's

36. The pricing formulas under Amendment No. 70 are detailed but they are straightforward and logical. *See* Section 7.2 of Amendment No. 70, adding Article 35 to the Master Contracts.

invitation to attempt to negotiate a fixed fee pricing structure amendment to the Master Agreements that the NAPM LLC would propose that if in any year the cumulative volumes of transactions fell below that number of transactions at which the fixed price under Amendment No. 70 equaled the price computed for that number of transactions under Amendment No. 57 (the so-called "Imputed Transaction Volume"[37]), then the transactions would be billed under the lower Amendment No. 57 Pricing. NeuStar did not agree to this proposal.

After a series of further negotiation sessions, the parties compromised and agreed to a "true up" (called a Floor Threshold Adjustment) in each year subsequent to the year in which actual volumes fell below a computed "floor amount" and the true up reflected a partial "refund" of the amount that the fixed fee exceeded the Amendment No. 57 Pricing in the prior year, by way of reducing the amount of the on-going fixed fee for the current year.

It was at the time the NAPM LLC negotiated and agreed to Amendment No. 70, and still is, the judgment of the NAPM LLC that this arrangement over the most likely range of realistic and probable scenarios has resulted in, and will continue in the future to result in, material immediate and future costs savings, at absolutely no risk to service or porting interruptions or degradation and without constraining the discretion and ability of the NAPM LLC and the industry, in general, to proceed to development of the next generation NPAC/SMS. The NAPM LLC evaluated each of these probable scenarios based upon the following "realities" that Telcordia's charts and underlying analysis completely ignore.

First, Amendment No. 70, by the immediate elimination as of January 1, 2009, of transaction-based pricing and the conversion of the Master Agreements to a fixed porting fee

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37. This was also referred to during negotiations as the "Breakeven Volume."

model, will result in immediate and quantifiable savings to the industry from what preceded it.[38] Those savings can and will be immediately delivered to the industry; Telcordia's models and analysis fail to account for these immediate savings and for all prior savings that are paid and, in effect "banked" by the industry. Second, there is no appetite in the industry at this time merely to seek the substitution of new vendors in one or more regions for the current incumbent contractor, in part because there is a recognition that the NPAC/SMS is not merely a black box that can be substituted without risk (a) of unanticipated problems and delays associated with migrations of such large amounts of data in such a dynamic environment and that raise the potential for degradation of the current high level of porting and pooling services and (b) of the incursion of unanticipated transaction and transition costs. Third, business, financial, consumer and technological developments seem to be converging in such a way as to warrant not merely the replacement of the current NPAC/SMS with a same generation NPAC/SMS, but the consideration and analysis of the next generation NPAC/SMS. Fourth, the timeline for such a next generation NPAC/SMS must include time under a cycle that spans conception, design and development, competitive bidding, award, contract negotiation and execution, testing and full functionality.

The Provider ENUM Database illustrates the likely durations and the inherit uncertainty and risks that could cause delays in the timeframe from conception to full functionality and rollout of a next-generation NPAC.SMS. The Provider ENUM Database still has not been launched, fully 5 years after formation of the CC1 ENUM LLC and 22 months after the issuance of the RFP. In fact, award under the RFP for the Provider ENUM Database took approximately

38. This includes the noncontingent and irrevocable locked-in National Annual Fixed Porting Adjustments that are guaranteed (and separate from the anticipated effects of the Fixed Porting Fee arrangement) to reduce NPAC/SMS costs to the industry in the cumulative amount of $70,000,000 in the years 2009, 2010 and 2011.

15 months, and as of August 2009, the contract still has not been successfully negotiated and executed with the selected vendor.[39] With respect to the Provider ENUM Database, the original press release announcing the award of the RFP, dated February 17, 2009, recited an estimated launch date as "the second half of 2009,"[40] but that date has apparently been delayed, because the CC1 ENUM LLC currently recites that the database will be available in "early 2010." Although there are justifications for this slippage in the rollout timeline for the Provider ENUM Database, it nonetheless illustrates the susceptibility of estimates regarding complex database implementation to slippage and extension.

These realities merely point to the fact that, wholly separate from the effects of the pricing formulas under Amendment No. 70, it is highly unlikely that a multi-administrator peered NPAC/SMS could become operation before June 2015 – the recited date of the expiration of the term of the Master Agreements. Even if that date were pushed forward to sometime in 2014, the pricing formula will have a relatively small effect on such later term decisions.

Amendment No. 70's pricing formulas also *do not force* the NAPM LLC to migrate to substitute or peered administrators during the existing contract terms. If volumes remain above the computed "floors," then the industry will continue to reap the benefits of the lower fixed charges. Therefore, the pricing formulas of Amendment No. 70 leave the NAPM LLC's discretion unchanged – the NAPM LLC is not either precluded from investigating substitute or alternate vendors or remaining with the current vendor.

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39. *See* Screenshot of Country Code 1 ENUM LLC webpage, www.enumllc.com, August 25, 2009, attached hereto as Exhibit A.

40. *See* News Release, dated February 17, 2009, "Country Code 1 ENUM LLC Enables Next Generation Services with Launch of Extensible ENUM Registry Services."attached hereto as Exhibit B.

c. **Telcordia contends that Amendment No. 70's mere continuation as a single-source contractor agreement renders Amendment No. 70 per se invalid under the Competition in Contracting Act and that the NAPM LLC is a public instrumentality, but Telcordia is wrong.**

Even though Amendment No 70 does not constitute an extension of the term of the Master Agreements[41], either expressly or by its operation, and does not contain any provision that on its face or by its application creates a bar or otherwise rescinds the express non-exclusivity provisions of Article 28 of the Master Agreements, Telcordia nonetheless asserts that Amendment No. 70 is still anti-competitive because it preserves the current administrator, NeuStar, as the sole and single administrator in all seven Unites States regions, allegedly contrary to the Commission's determination that a single administrator was unacceptable.[42] But Telcordia grasps at straws in its Petition by asserting that Amendment No. 70 is void because the NAPM LLC did not issue an RFP and adhere to a public bidding process under the Competition in Contracting Act before entering into Amendment No. 70.

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41. Accordingly, the authority cited by Telcordia regarding impermissible extensions of contracts simply does not apply and is inapposite.

42. Telcordia attempts to imply that the administration of the NPAC/SMS in the seven United States regions by one administrator is per se suspect. Telcordia made the same arguments with respect to Amendment No. 57, so the NAPM LLC will only summarize its response to those same arguments here with respect to Amendment No. 70. In addition, even Telcordia's Petition acknowledges that the Commission only ever ruled that "one or more" [emphasis added] database administrators should be selected, and that the NANC, the LNPA WG (a subject matter group under the NANC) and the Commission never made specific recommendations that "more than one" database administrator must be selected or that "one" database administrator was insufficient or per se improper. In fact, in the *Third Report and Order,* when it became apparent that Perot Systems, which had been selected as the administrator in three of the seven United States regions, could not deliver the required NPAC/SMS services, the Commission acknowledged that the Master Agreements with Perot Systems had been terminated by the LLC's in those three United States regions and that those LLC entered into Master Contracts with the same administrator that was then acting in the other four regions. Therefore, even before the NPAC/SMS became operational, the Commission was aware that one administrator was acting in all seven United States regions, but pursuant to seven separate Master Agreements, the terms of which the Commission had previously "approved." *See Third Report and Order*, at Paragraph 13. Accordingly, for Telcordia to imply now that the continuation of a single administrator in the seven regions when Amendment No. 70 *did not extend the term of the existing Master Agreements* is somehow *per se* improper or suspect is simply disingenuous, misleading and absolutely without judicial or administrative support. There is no disagreement that in general it is theoretically better to have more than one vendor for almost any contract. However, Telcordia does not cite any authority that holds that the mere continuation of a single contractor

In support of this novel contention, Telcordia concludes that the NAPM LLC is "by any measure" a "public instrumentality" and that Amendment No. 70 does not constitute an exempt "modification" of an existing contract.[43] Both conclusions are contrary to the applicable authority.

The NAPM LLC has never been found to be a public instrumentality, and it would not be considered a public instrumentality under the decision cited by Telcordia.[44] In that case, *Motor Coach Indus, Inc. v. Dole*, 725 F.2d958 (4th Cir. 1984), a Trust was established by the Federal Aviation Administration (the "FAA") and funded by air carriers at Dulles International Airport (in part by waiver of their fees otherwise payable to the FAA) for the purpose of purchasing shuttle buses to the airport in an effort by the FAA to increase the airport's usage. The Trust was found to be a public instrumentality, and its funds were found to be public funds subject to the Competition in Contracting Act. The court in that case reached its decisions because, as the court stated, "the FAA's hand was visible in all critical aspects of the Trust." In particular, the court found the following:

- The Trust was established at the urging of the FAA to accomplish an objective that it had long sought;
- The documents governing the Trust were created by the FAA;
- The FAA was the sole beneficiary of the Trust;
- The FAA established the contribution formula;
- The FAA monitored collections with its own staff; and
- The FAA participated in every phase of the decision at issue to award a contract for the purchase of buses at the FAA owned airport.

The NAPM LLC is distinguishable from the Trust in that case. In that case, the Trust was essentially a captive vessel of the FAA. The NAPM LLC is an independent organization

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arrangement renders the contract null and void without a showing of more. And Telcordia has not shown anything more.

43. Petition at 39.

that is subject to supervision and not control by the Commission pursuant to a regime established in the *Second Report and Order*. Unlike the FAA's creation of the trust agreement for the Trust, the Commission did not create the operating agreement of the NAPM LLC or its predecessors. The Commission is not a Member of the NAPM LLC, nor do representatives of the Commission regularly attend its meetings or have a vote in the NAPM LLC. The Commission does not monitor the use of the NAPM LLC's funds; those funds are contributed by the Members of the NAPM LLC and they are not the result of any waiver of fees otherwise payable by the Members to the Commission. The Commission did not in 1997 actually participate in the drafting of the RFPs, their award and the drafting of the seven separate Master Agreements. The Commission established guidelines and rules, but its "hand was not visible in all critical aspects" of the predecessor LLCs or of the NAPM LLCs. Accordingly, the NAPM LLC is not a public instrumentality, and, therefore, the Competition in Contracting Act is simply not applicable here.[45]

d. Section 15.2 of the Amendment No. 70 does not in any way limit or eviscerate regulatory oversight and, accordingly, should not be held void.

Telcordia asserts that Section 15.2 of Amendment No. 70 constitutes "an attempt to shield [the NAPM LLC's] unlawful and anticompetitive contract from meaningful FCC oversight" because it "would vaporize all of Amendment 70 and immediately give NeuStar a windfall by upwardly repricing all porting transactions since January 1, 2009 if the Commission declares any part of Amendment 70 to be unlawful or void." Petition at iv. Telcordia continues:

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44. Petition at 38, footnote 86.

45. Even if the NAPM LLC is held to be a public instrumentality, it is difficult to understand how Amendment No. 70 is not exempt from the bidding procedures of the Competition in Contracting because it is a modification that need not be publicly bid.

"The Commission cannot permit its oversight and control to be blunted in this way." *Id.* Telcordia is wrong on its characterization of Section 15.2.

On its face, it is incontestable that Section 15.2 *does not* profess to blunt or in any way limit the Commission's oversight, review or authority.[46] To the contrary, it expressly acknowledges the full power and authority of the Commission to hold all or any part of Amendment No. 70 invalid or ineffective. There is simply no other reading of Section 15.2 on its face. Section 15.2 merely then specifies the parties' agreement and acknowledgement as between them of the consequences from such a Commission determination.

Therefore, Telcordia must be contending that Section 15.2 constitutes some kind of regulatory "reverse psychology," whereby acknowledging regulatory authority and making sure the parties to the contract acknowledge and agree to be bound by that regulatory authority is really an affront and challenge to that regulatory authority. Such a contention is nonsensical.

The provision operates, quite simply, in the event that the contract amendment is determined by the applicable regulator to be invalid or impermissible, to return the contracting

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46. Section 15.2 of Amendment No. 70 states the following:

"15.2 If any provision of this Amendment is held invalid or unenforceable the remaining provision of this Amendment shall become null and void and be of no further force or effect. 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 initio (an "Ineffectiveness Determination"), immediately upon such Ineffectiveness Determination and without any requirement on any party to appeal, protest or otherwise seek clarification of such Ineffectiveness Determination, this Amendment shall be rescinded and of no further force or effect retroactively to the Amendment Effective Date. Consequently, the Master Agreement in effect immediately prior to the Amendment Effective Date shall continue in full force and effect in accordance with its terms, unchanged or modified in any way by this Amendment. In the event of an Ineffectiveness Determination, any amounts that would have otherwise been due and payable under the terms and conditions of the Master Agreement, in effect immediately prior to the Amendment Effective Date (including, but not limited to any adjustments necessary to retroactively re-price TN Porting Events under Exhibit E from the Amendment Effective Date through the date of the Ineffectiveness Determination, or other amounts or credits, to any party hereunder), shall be invoiced by Contractor at the earliest practical Billing Cycle in accordance with the Master Agreement and shall be due and payable in accordance with the applicable invoice therewith or shall be credited or applied for the benefit of the Customer or any Allocated Payor in accordance with the Master Agreement."

parties to their respective positions that existed prior to entering into the new contract amendment, as if the contract amendment had never existed. The parties are simply agreeing in advance that in such event, they are both agreeing to give up their respective "benefits of the bargain," because they cannot predict at the time the amendment is entered into "whose ox may be gored" by an Ineffectiveness Determination.

The "Ineffectiveness Determination" provision is consistent with Article 4 Consideration Recital of Amendment No. 70, which in part states the following:

> "The modifications and amendments made herein were negotiated together, and each is made in consideration of all of the other terms and conditions herein. All such modifications and amendments are interrelated and are dependent on one another. No separate, additional or different consideration is contemplated with respect to the modifications and amendments herein."

Such an integrated consideration recital provision is common in arms-length negotiated contracts. In addition, the provision reflected in Article 15.2 of Amendment No. 70 has served as, and has been included essentially as, "boilerplate," course of dealing language between the NAPM LLC and NeuStar since SOW 25 first included it in December 2000. Accordingly, it is simply wrong for Telcordia to contend that inclusion of Section 15.2 in Amendment No. 70 was intended to operate as a booby trap against Commission review of Amendment No. 70. Nothing could be further from the truth.

For Telcordia to turn this provision, which is intended to preserve regulatory authority, inside out and to portray it as a predatory provision designed to avoid and to eviscerate regulatory oversight, is almost unfathomable. And it is simply untrue. Therefore, Telcordia has failed to show that this provision is improper, and it can not form any basis for finding Amendment No. 70 invalid or subject to abrogation by the Commission.

3. The timing and manner of the negotiation and adoption of Amendment No. 70 by the NAPM LLC and without Commission pre-approval do not evidence an exclusionary or anti-competitive purpose nor demonstrate conduct in violation of the authority of the NAPM LLC.

a. The timing of Amendment No. 70 with respect to Telcordia's unsolicited offer and the confidentiality of the negotiations was not anti-competitive or exclusionary.

Telcordia contends that the timing of the negotiation and execution of Amendment No. 70 after the NAPM LLC's rejection of Telcordia's unsolicited "regional" model and while the LNPA-WG was (and is) evaluating the feasibility and functional specifications of the "multi-vendor peering model," somehow demonstrates anti-competitive behavior and taints Amendment No. 70.[47] Telcordia also contends that the confidentiality under which the negotiations with NeuStar were conducted also betrayed clandestine and impermissible motives and conduct. All of these contentions are without merit; and Amendment No. 70 cannot be held invalid due to the timing and conduct of its negotiation and execution.

The current NPAC/SMS contractor approached the NAPM LLC and proposed amending the Master Agreements to change to a fixed fee model, and not the other way around. The contractor was acutely aware of the concerns the industry was having over escalating portability costs. At that same time, some members of the telecommunications industry were requesting certain enhancements to the NPAC/SMS so that portability would not cause the degradation of the quality of the services provided to their customers, as more and more customers acquired "smart phones," used those phones to do more than to make voice calls, and used VoIP and attendant services. But those enhancements could cost the industry money under a statement of work. Also, around the fall of 2008, as a result of a number of developments, including the

47. Petition at 22.

presentation by Telcordia of unsolicited proposals for both a "regional model" and a "primary – standby administrator regional model" and the consideration by the Members of the NAPM LLC of those proposals through the Spring and Summer of 2008, the Members of the NAPM LLC were beginning to form a consensus that a multi-vendor peered NPAC/SMS was preferable to either a "regional model" and a "primary – standby administrator regional model" for the NPAC/SMS.

In part as a result of the detailed discussions and consideration of the "regional model" and the "primary – standby administrator regional model" for the NPAC/SMS, the NAPM LLC confirmed its general conclusion that the NPAC/SMS was not merely a "black box" for which one vendor's black box could seamlessly be substituted in any one or more regions for another vendor's black box. In addition, by virtue of the Commission's issuance of its Order extending the obligations of Local Number Portability to interconnected VoIP carriers[48], changes in the NPAC/SMS would be required and certain porting intervals would be required to be shortened. Accordingly, the NAPM LLC concluded that any change of vendors and the substitution of NPAC/SMSs carried with it the very real likelihood of the degradation, even if only temporarily, of number porting and pooling and that this risk of service degradation had to be included in any consideration of cost savings from changing vendors and reflected in any timetable for implementing and transitioning to a new vendor.

On September 8, 2008, NeuStar, the current administrator under the Master Agreements contacted the NAPM LLC and requested an opportunity to discuss a restructuring of pricing terms in the Master Agreements. On October 7, 2008, NeuStar presented the NAPM LLC with its initial proposal. Soon thereafter, NeuStar and a negotiating team of the NAPM LLC

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48. *See* FCC 07-188, adopted October 31, 2007 (the "Interconnected VoIP Order").

commenced negotiations. Those negotiations culminated in the January 28, 2009, announcement of the execution of Amendment No. 70.[49]

The negotiations were hard fought and contentious and were conducted in good faith by the NAPM LLC in the exercise of its best judgment. Meetings of the Members of the NAPM LLC were convened to discuss and to evaluate the progress of the negotiations, and the final agreement was approved by a Supermajority vote of the Members.

Telcordia insinuates that the confidentiality under which the negotiations were conducted with NeuStar was improper and clandestine and is further evidence of the exclusionary motives. But this is untrue.

Confidentiality during sensitive contract negotiations is routine, especially when one of the negotiating parties is a public company. The sensibleness and routine nature of such confidentiality is definitively demonstrated by the fact that *Telcordia itself* insisted upon imposing confidentiality upon the NAPM LLC in connection with Telcordia's presentations and discussion of its unsolicited offers by requiring that NAPM LLC enter into a Nondisclosure Agreement (the "Telcordia NDA"). The Telcordia NDA governed the following: "an unsolicited presentation by Telcordia to the Members of the Company on March 20, 2008 and any subsequent related meetings, discussions or information exchanges related to a proposed Telcordia NPAC/SMS System and associated Services ('Telcordia NPAC/SMS')."

The Telcordia NDA only governed the NAPM LLCs ability to disclose information about the Telcordia NPAC/SMS and did not in any way restrict or limit disclosures by Telcordia. This was a conscious decision by the NAPM LLC. It reflected the view and philosophy of the NAPM LLC that it is unconcerned generally with protecting its discussions and negotiations from

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49 *E.g.*, attached hereto as Exhibit C is the announcement of Amendment No. 70 delivered to the NANC Chair.

disclosure or scrutiny, but recognizes the legitimate concerns of others to maintain confidentiality.

In addition, as it always does, the NAPM LLC ensured that it negotiated and obtained in the Telcordia NDA an exception to any and all restrictions on its freedom to make disclosures for disclosure to the Commission.[50] Confidentiality as part of discussions regarding prospective contracts or modifications to contracts is routine and customary (especially when one or more of the negotiating parties public companies. It does not evidence clandestine conduct or bad faith. Telcordia's intimations to the contrary are simply without merit.

b. The NAPM LLC has adhered to all proper procedures and precedent in negotiating and adopting Amendment No. 70 without obtaining the pre-approval or consent of the Commission or NANC.

Although the NAPM LLC recognizes the authority and vital role of the NANC with respect to local number portability and the administration of the NPAC/SMS and its contractors[51], and the ultimate authority of the Commission, the *Second Report and Order*[52] also expressly designates limited liability companies ("LLCs") in each of the seven United States regions to oversee and to manage the NPAC/SMS contractors (referred to as administrators) and to serve as the contracting entity in each of these Service Areas with the respective administrators. By the *Second Report and Order*, the FCC mandated the use of these LLCs instead of direct governmental contracting and administration.

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50. The Telcordia NDA states in pertinent part as follows: "Notwithstanding the foregoing, (i) nothing in this Agreement or otherwise shall preclude or restrict the Company, any of the Company's Members, or any of the Members' authorized representatives from disclosing, without the prior consent of or notice to Telcordia, any Telcordia Confidential Information to the Federal Communications Commission (FCC), the North American Numbering Council or any other governmental authority asserting jurisdiction or regulatory authority over or with respect to telephone number portability or pooling or the Company..."

51. *See*, for example, *Second Report and Order*, FCC 97-289, Paragraphs 128-131.

52. See, for example, Second Report and Order, FCC 97-289, Paragraphs 115-117.

In the *Second Report and Order*, the FCC explained the rationale for utilizing these LLCs as follows, especially in light of the likelihood that the NPAC/SMS will need to evolve and to be modified over time:

> "116. We agree with the NANC that there will likely be a need to modify some requirements to permit database system enhancements and other modifications as local number portability is deployed throughout each region. Without a single entity to oversee such modifications in each region, local number portability administrators would likely be faced with varied, if not conflicting, proposals from the carriers utilizing the database regarding how the modifications should be implemented. The need for the local number portability administrator to reconcile such varied proposals, in turn, could potentially delay the administrator from making necessary modifications.
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> 117. We conclude that the LLCs are the entities that are best able to provide immediate oversight of the local number portability administrators at this time. Because the LLCs are responsible for negotiating the master contracts with their respective local number portability administrators, each LLC is the entity with the greatest expertise regarding the structure and operation of the database for its region. Therefore, with respect to each region, using an entity other than the LLC to provide immediate oversight of the local number portability administrator would waste the LLC's valuable expertise and run the risk that necessary modifications to the database system may be delayed."

The NAPM LLC believes that those statements are as true today as they were when promulgated by the Commission.

Telcordia asserts that the adoption of Amendment No. 70 without pre-approval and consent of the Commission rendered Amendment No. 70 ultra vires and subject to abrogation by the Commission. Although the applicable regulations do not expressly impose a Commission or NANC pre-approval or consent requirement with respect to agreements, amendments and modifications between the NPAC/SMS administrator and the NAPM LLC, Telcordia asserts that it is both implicit and necessary. However, the actual course of conduct and dealings and the operational precedent that has evolved make clear that no strict Commission pre-approval and consent requirement exists.

Since the seven separate Master Agreements were executed beginning in 1997, the seven LLCs (and now their successor, the NAPM LLC[53]) have managed and supervised the NPAC/SMS contractor, have considered and approved modifications and enhancements to the NPAC/SMS to respond to industry, technological and financial changes and evolution, and have updated, modified and extended the Master Agreements to reflect those modifications and enhancements. Those modifications have included, but have not been limited to the following:

- Implementing Modifications. Modifications to the NPAC/SMS to implement the Commission's order for wireless number portability, commencing with Statement of Work 10 and revisions thereto;

- Assignment to NeuStar after Lockheed Martin IMS Spinoff. Approval of an assignment of the Master Agreements in November 1999 to NeuStar, Inc., after formation of NeuStar to succeed to the interest of Lockheed Martin IMS after Lockheed Martin IMS no longer qualified as a Neutral Third Party by reason of the acquisition of a telecommunications service provider by Lockheed Martin,[54]

- Imposition of a Gateway Evaluation Process to Improve Quality. A substantial modification and improvement of service level requirements ("SLRs") monitoring, price reductions and extension of the initial term by reason of Statement of Work 25,

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53. On November 1, 1999, the NAPM LLC was formed upon the merger or consolidation of the seven separate regional LLCs, and after such combination, the NAPM LLC has operated as the sole limited liability company, by operation of law, in the seven separate Service Areas as the successor-in-interest to each of the seven original regional LLCs. Nonetheless, despite the consolidation of the seven LLCs into the NAPM LLC, the seven separate Master Agreements have been maintained and preserved as distinct and separate contractual relationships.

54. *See Order In the Matter of Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of Transfer of the Lockheed Martin Communications Industry Services Business*, FCC 99-346, at Paragraph 1 (Released November 17, 1999)(whereby the Commission stated the following: "We conclude that Lockheed must obtain our prior approval before transferring the NANPA functions..." and the Commission approved the transfer.) The Commission did not similarly conclude that its approval was necessary to transfer the LNPA functions under the Master Agreements, and the Commission did not, therefore, include such approval in the Order. Instead, after the Commission's Order did not conclude that the Commission's approval was required, each of the regional LLCs (as the contract parties and predecessors to the NAPM LLC) consummated a separate assignment with respect to each United States region and consented to the transfer of LNPA functions, subject to both an extension of the conditions set forth in the Order with respect to the NANPA and additional conditions negotiated by those LLCs. *See e.g.* Assignment Agreement (Contractor Services Agreement), dated November 30, 1999, by and among Lockheed Martin IMS, CIS Acquisition Corporation [the name given to NeuStar for purposes of the transfer before its adoption of its current name] and the Western Region Telephone Number Portability LLC, attached hereto as Exhibit D.

- Implementation of Pooling. Clarification of the utilization of the database to implement FCC-mandated pooling requirements and the settlement of disputes regarding the pricing for such utilization by reason of Statement of Statement of Work in 2000.

- Price Reductions and Contract Improvements. Several contractual improvements and associated pricing reductions, including SOW43 and other Statements of Work to fine-tune the contractual, service level monitoring and pricing structure of the Master Agreements to accommodate developments in the telecommunications industry since 1997.

These modifications were evaluated and accomplished without pre-approval by either the NANC or the Commission (but by consulting with them and advising them of such modifications). They were also evaluated and accomplished in accordance with the *Second Report and Order*, utilizing the input and recommendations of subject matter expert groups, such as the Local Number Portability Administration Working Group (the "LNPA WG") (in which all vendors including Telcordia, are invited to be active participants and many do become participants), on technological issues, and following the procedures and requirements of the NAPM LLC itself. That same process was adhered to with respect to Amendment No. 70. Nothing in this industry is static (nor should it be), and the *Second Report and Order* recognized this and the need to empower the LLCs to modify and to enhance the NPAC/SMS, and, accordingly, to modify and to amend the respective contractual relationships and agreements with the NPAC/SMS contractor. Accordingly, there is no basis to rescind or to reconsider Amendment No. 70 because the prior consent of the Commission or NANC was not obtained.

B. The terms in Amendment No. 70 that provide for a reduction in the fixed price computations resulting from the future inclusion of the Additional URI Parameters in the NPAC/SMS are not void or ultra vires nor do they render Amendment No. 70 void or ultra vires.

Telcordia contends that Amendment No. 70 should be abrogated by the Commission as void and ultra vires, because Amendment 70, (1) expressly allowed the future addition of the

Additional URI Parameters into the NPAC/SMS without any finding or consent from the Commission or the NANC, and (2) provided for a reduction in the fixed porting fee in months in years 2009, 2010 and 2011 if and when the Additional URI Parameters were actually included in the NPAC/SMS, by amounts referred to as the "National Monthly New URI One-Time Adjustments. *See* Amendment No. 70, Section 7.2, Article 35.5(a). Both of these contentions are currently being considered by the NANC as part of the dispute resolution process triggered by Telcordia. Parties participating in that dispute resolution process already have submitted Comments refuting Telcordia's contentions.[55] The NAPM LLC asserts that Amendment No. 70 is not void or ultra vires by reason of the inclusion of the Additional URI Parameters in the NPAC/SMS and the operation of the National Monthly New URI One-Time Adjustments; however, the questions of the permissibility of including the Additional URI Parameters in the NPAC/SMS and the operation of the National Monthly New URI One-Time Adjustments are being considered in the NANC dispute resolution process. Therefore, the NAPM LLC will not address those questions in these Comments, and will reserve its right to do so in Reply Comments.

IV. CONCLUSION AND REQUEST FOR RELIEF

For all the reasons discussed in these Comments, there is no need to up-end and wash away the existing NPAC/SMS and telephone number portability regime, merely because the NAPM LLC did not accept Telcordia's unsolicited proposals to be a substitute regional NPAC/SMS administrator or because Telcordia disagrees with the good faith judgment of the NAPM LLC in negotiating and agreeing to Amendment No. 70 (and, before it, to Amendment No. 57). Not only has Telcordia failed to show the necessary detriment to the public interest

55. *See e.g.* Comments of COPMPTEL on Telcordia Dispute Concerning Necessity of Adding Certain URI Codes for the Completion of Telephone Calls, dated August 14, 2009.

sufficient to warrant the extra-ordinary intervention by the Commission requested by Telcordia, but the NAPM LLC contends that such intervention now would itself immediately harm and risk further future harm to the public interest. Considering the process that the NAPM LLC has already put in place with respect to the next-generation NPAC/SMS, the NAPM LLC sees no need to risk that harm.

Telcordia's Petition is without merit and the relief requested by Telcordia should be denied. The NAPM LLC respectfully requests that the Commission deny the Petition in its entirety.

Respectfully Submitted

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