

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

In the Matter of:

Petition of Telcordia Technologies, Inc.
To Reform Amendment 57 and To Order a
Competitive Bidding Process for Number
Portability Administration

WC Docket No. 07-149

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

WC Docket No. 09-109

REPLY COMMENTS OF TELCORDIA TECHNOLOGIES, INC.

John T. Nakahata
Amy Richardson
Linda Coffin
Madeleine Findley
WILTSHIRE & GRANNIS LLP
1200 18th Street NW
Washington, DC 20036
(202) 730-1320

Counsel for Telcordia Technologies, Inc.

September 29, 2009

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	7
I. Competition and Competitive Bidding are Critical to Protecting the Public Interest Against Being Overcharged for a Public Contract.....	7
A. The NPAC Contract Is a Fundamentally Public Contract, with a Public Purpose and Supported by Public Funding.....	7
B. Competition and Competitive Bidding Are Necessary To Protect the Public Interest.....	11
II. NAPM Lacks the Authority To Make Inherently Governmental, Fundamental Policy Choices with Respect to the NAPM Contract, including Basic Structure, Number of Vendors, Term, Renewal/Competitive Bidding and Scope.....	17
III. NAPM’s Repeated Non-Competitive Contract Extensions and Modifications of <i>De Facto</i> Exclusivity and Scope Violated the Competition in Contracting Act and the President’s Contracting Directive.....	26
A. NAPM’s and NeuStar’s Interpretations Evade CICA’s Requirements for Full and Open Competition for Government Procurement Contracts.....	27
1. CICA Applies Because the NAPM LLC Is a “Public Instrumentality” Under <i>Motor Coach v.</i> <i>Dole</i>	28
2. NeuStar Cannot Evade Being Subject to CICA’s Open and Competitive Bidding Requirement by Labeling Itself an “Agent,” Not Involved in Delivering Services for the Benefit of the Government.....	32
3. Amendments 57, 70 and 72 Were Modifications Beyond the Scope of the Initial Procurement.....	34
IV. Like Amendment 57, Amendments 70 and 72 Are Anti- Competitive.....	37

A. The Plain Fact Is that Amendment 70 Forecloses NPAC Competition.....	37
B. Extending the NPAC into Adjacent Markets Such as ENUM and IP Routing Allows NeuStar To Cross-Subsidize Its Entry into Those Markets.....	43
V. The FCC Has the Authority and the Basis for Setting Aside or Directing Revisions to the NPAC Contract as Contrary to the Public Interest.	46
VI. The Inseverability Clause Cannot Be Permitted To Erect a Shield Against FCC Oversight.....	52
VII. The FCC Cannot Simply Ratify NAPM’s Actions Without Competitive Bidding.....	54
VIII. A Standstill Order Remains Appropriate and Necessary To Allow the NANC and Commission To Resolve Telcordia’s Challenge to the Lawfulness of Adding the Disputed URI Fields.....	55
CONCLUSION.....	57

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

In the Matter of:

Petition of Telcordia Technologies, Inc.
To Reform Amendment 57 and To Order a
Competitive Bidding Process for Number
Portability Administration

WC Docket No. 07-149

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

WC Docket No. 09-109

REPLY COMMENTS OF TELCORDIA TECHNOLOGIES, INC.

INTRODUCTION

Both the law and the facts mandate that the NPAC contracts be terminated and put out for competitive bid. North American Portability Management LLC's ("NAPM") and NeuStar's behind-closed-door dealings do not ensure that this enormous procurement – an estimated \$2.8 billion through the end of 2015 – provides number portability administration efficiently and securely at the lowest overall cost. The Commission has a special responsibility to maintain accountability in number portability administration and safeguard the public's pocketbook because the entire process of number administration has been established under the authority of the Commission and is funded by a Commission-mandated tax-like fee. This proceeding is about more than NeuStar or NAPM and its members: it is about the hundreds of other carriers and millions of

consumers who were not invited to NeuStar's closed-door negotiations, but who pay carrier surcharges and bear the burden of higher rates.

The FCC never delegated to NAPM the authority to make fundamental changes in the NPAC contracts or to decide when to seek competitive bids – and it could never have done so because these changes involve the exercise of inherently governmental authority. In addition, the Competition in Contracting Act and prudent contract practices exercised by the FCC to protect the public interest require competitive bidding for these fundamental changes. The Commission long ago recognized for numbering administration that “competitive procedures best serve the public interest.”¹ Competition and competitive bidding are the only ways for the Commission to adequately protect the public interest, and to assure itself that these contracts are not overpriced and that industry and consumers are not overcharged.

Open and transparent competitive bidding would yield substantial and material savings over Amendment 70. While it is impossible to predict with certainty the results of competitive bidding, Telcordia made a proposal that would have saved an estimated \$550 million – or about 20% of the projected cost of Amendment 70.² And this is after the industry and consumers overpaid at least 20% since 2006 under the previous amendment, Amendment 57, which was also negotiated in secret without FCC approval and without proper authority to do so.

¹ *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 7574, 7641 ¶ 150 (2000) (“Numbering Resource Optimization”).

² Incredibly, the proposal was rejected by the NANC as not creating sufficient near-term vendor choice in a situation in which there presently is *no* vendor choice.

The FCC needs to re-assert its authority over the number portability process. As Comcast urges, the Commission must “undertake a review of the LNP administrative process to ensure that the benefits of competition are fully realized and that the roles of administrative bodies such as the NAPM are appropriately defined.”³ NAPM is spending tax-like funds and making fundamental policy decisions without any actual accountability or required governmental control. Amendment 70 is just the latest in a series of policy decisions implemented as contract amendments that make cardinal changes to the NPAC contract. These changes include extending the contract from an initial termination date of 2002 until the end of 2015, changing from a non-exclusive contract to a functionally exclusive one, and expanding it from porting for PSTN service into IP routing.

NAPM and NeuStar vastly overread the interim authority that NAPM was given to “manage and oversee” the NPAC contracts, subject to review by the North American Numbering Council and the FCC. Under NAPM’s and NeuStar’s view there is no real remedy for actions that compromise the public interest: NAPM makes all decisions regarding the NPAC contracts without limitation, and enters into binding contracts and amendments without FCC approval. In their inaccurate view, NAPM and NeuStar get to decide all the fundamental parameters such as when the contract ends, when to seek competitive bidding, what it covers, and whether it is exclusive or non-exclusive in form or function. The FCC’s role in the process, if it is involved at all, comes only after it has been presented with a *fait accompli*. Even then, NAPM and NeuStar attempt to

³ Comments of Comcast Corporation, WC Docket No. 09-109, at 2 (filed Sept. 8, 2009) (“Comcast Comments”); *see also* Comment of Evolving Systems, Inc., WC Docket No. 07-149 (filed June 19, 2009) (“We believe that the industry as a whole, individual operators, and by extension, telecommunications consumers would reap substantial benefits from the re-introduction of competition into the NPAC clearinghouse environment.”).

hamstring the FCC's review by inserting an inseverability clause in each contractual amendment that limits the FCC's review to an all-or-nothing basis, regardless of the unlawfulness, unjustness or unreasonableness of any particular provision.

This simply is not lawful. The FCC cannot delegate its fundamental policymaking authority to non-federal entities without expressly approving, and making the final judgment respecting, these decisions. At the core of governmental accountability, enshrined in both the prohibition against unlawful subdelegation and OMB Circular A-76, is the fundamental principle that the federal government must make inherently governmental decisions. NAPM cannot exercise that authority in the FCC's stead. The fact that NAPM has operated in this manner for years does not change its unlawfulness.

Moreover, NAPM has continually and unlawfully eschewed competitive bidding – a cornerstone of accountability in contracting. Congress mandated in the Competition in Contracting Act that “an executive agency in conducting a procurement for property or services shall obtain full and open competition through the use of competitive procedures.” Likewise, earlier this year the President issued a directive to all federal agencies – including the FCC – reminding them that “[i]t 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.” Despite both the Congressional mandate and the Presidential directive, no competitive bidding has occurred with respect to the NPAC contracts since 1997, even though the initial contracts were bid for a term that expired in 2002.

NAPM's and NeuStar's argument that NAPM lies outside the Competition in Contracting Act is wrong-headed and conveniently ignores the public nature of the NPAC contract. NAPM exists only to administer that contract, that contract exists only to fulfill the FCC's statutory mandate with respect to number portability, and the contract itself is funded through mandatory tax-like fees that carriers must pay or face FCC fines and penalties. Contrary to its assertions, NeuStar simply is *not* an agent of the FCC, but is clearly selling database services that must be used by all carriers in meeting the FCC's number portability requirements.

Amendments 57, 70 and 72 are all anticompetitive, and not permissible under the Competition in Contracting Act. Turning first to Amendment 70, NAPM's and NeuStar's arguments that Amendment 70 does not create *de facto* exclusivity do not fly. The effect of Amendment 70's pricing structure on competition is revealed by testing it in actual models. These models show that it would be economically irrational for NAPM to enter into a contract with an additional NPAC vendor beginning anytime prior to 2016. Neither NAPM nor NeuStar actually articulates how introducing competition could be economically rational when Amendment 70 secures NeuStar's contractual revenues even if NeuStar loses substantial market share.

Moreover, this amendment follows Amendment 57, which had used a different mechanism (penalty clauses) to establish *de facto* exclusivity through 2012. Either way, the impact is the same. The contract amendments dismantle the engine of competition by eliminating the potential for any significant cost savings through competition. NAPM and NeuStar have foreclosed competition in NPAC administration services until 2016

without any affirmative decision by the FCC to do so and without requiring competitive bids to ensure that they have gotten the best deal the market can deliver.

Furthermore, the amendments also unlawfully expand the scope of the initial number portability administration procurement by establishing a pricing structure that includes new URI fields for ENUM and IP routing services. Not only has NAPM expanded the scope of the NPAC contract into new areas, but it has also created a cross-subsidy for NeuStar's entry into these adjacent competitive markets – again without any FCC approval. NAPM and NeuStar completely ignore the fact that the NPAC is not funded by charging each carrier for the specific services that it uses, but rather through a general, industry-wide, FCC-mandated tax-like mechanism. This means that the costs of using these new fields are borne not by the customers for those fields, but by the industry as a whole. NeuStar will be able to wield this cross-subsidy against its ENUM competitors solely because it serves as the NPAC contractor and because the NPAC contracts are functionally exclusive through 2015. To add insult to injury, NeuStar is offering a \$21 million rebate to induce use of these IP-based fields, and has touted to Wall Street analysts that it is locking up this market also.

The FCC has full authority under the law to reassert its proper policymaking functions with respect to these contracts, to terminate or reform the NPAC contracts and to seek new competitive bids going forward. Contracts that NAPM entered into beyond its authority cannot be enforced. The *Mobile-Sierra* cases expressly permit the Commission to overturn contractual provisions that are unlawful, unjust and unreasonable or contrary to the public interest – and the Commission's own *MDU Exclusive Access Order* and the subsequent D.C. Circuit decision upholding that order

further support the Commission's authority to act here. Even Article 25 of the NPAC contract itself specifically acknowledges the Commission's authority, which neither NAPM nor NeuStar contests.⁴

The remedy is clear. To comply with the 1996 Act and to protect consumers from monopoly pricing, the FCC has no lawful alternative here other than to terminate the existing contracts and put them out for competitive bid. If the FCC now were to ratify the existing contracts, the FCC would itself violate the Competition in Contracting Act by selecting a vendor for additional periods and additional contractual scope without conducting a competitive bid. Telcordia's petition lays out a path under which the Commission can reestablish its supervisory and policymaking authority over number portability administration, and migrate in an orderly manner to a truly competitive NPAC. That is what the Commission should now do.

ARGUMENT

I. Competition and Competitive Bidding are Critical to Protecting the Public Interest Against Being Overcharged for a Public Contract.

A. The NPAC Contract Is a Fundamentally Public Contract, with a Public Purpose and Supported by Public Funding.

Fundamentally, NAPM and NeuStar portray the NPAC contract as just a private contract between private actors. But that belies reality. As Tom Koutksy, NANC Chair, observed:

I do want to stress that I don't view these as private contracts between private parties. I believe this is a contract that does the public's business, basically done at the authorization of the FCC to put in place a procedure

⁴ NAPM also states that Section 15.2 of Amendment 70 recognizes "the supervisory regulatory authority of the Commission and the NANC." Comments of the North American Portability Management LLC, WC Docket No. 09-109, at 7, 29 (filed Sept. 8, 2009) ("NAPM Comments").

of which will not just benefit the industry but it will also benefit consumers and businesses in the United States.⁵

The NPAC contract is a contract made at the behest of the FCC for the public purpose of implementing Congress's mandate that all carriers participate in number portability and funded by a mandatory, FCC-enforced tax-like fee. These are hardly the hallmarks of a purely private agreement.

It cannot be disputed that the NPAC exists because the FCC directed that it be created. In the *Number Portability First Report and Order*, the FCC concluded that “a system of regional databases that are managed by an independent administrator will serve the public interest.”⁶ The neutral database administrator is a core part of the FCC's local competition regime: “Neutral third party administration of the databases containing carrier routing information will facilitate entry into the communications marketplace by making numbering resources available to new service providers on an efficient basis.”⁷ It accordingly directed the NANC to select as database administrators “one or more independent, non-governmental entities that are not aligned with any particular telecommunications industry segment.”⁸ The FCC then approved NANC's selections before the NPAC contracts were finally executed.⁹ In so doing, the FCC specifically

⁵ North American Numbering Council Meeting Minutes, Apr. 17, 2007, at 31-32 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272592A1.pdf (emphasis added).

⁶ *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8355 ¶ 2 (1996) (“First Report and Order”).

⁷ First Report and Order, 11 FCC Rcd at 8400 ¶ 92.

⁸ *Id.* at 8401 ¶ 93.

⁹ *Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12281, 12282 (1997) (“Second Report and Order”).

exercised the authority Congress gave it in Section 251(e) to create or designate “one or more impartial entities to administer telecommunications numbering.”¹⁰

Furthermore, to promote and protect telecommunications competition, the FCC requires all carriers and interconnected VoIP providers to use the NPAC database, and thus to contract with the NPAC administrator. The 1996 Act and the Commission’s rules require carriers and interconnected VoIP providers to provide number portability, and to do so using the long-term number portability database that NeuStar administers.¹¹ Carriers and interconnected VoIP providers have no ability to opt out of number porting.

Cementing the NPAC’s public nature, FCC rules require all carriers to fund the NPAC’s operations through a mandatory tax-like user fee.¹² Every carrier must annually file with the FCC a report breaking down its telecommunications revenues by NPAC region.¹³ On that basis, it is assessed fees to pay for the costs of operating the NPAC in that region.¹⁴ Failing to file revenue reports, filing inaccurate revenue reports or failing to pay these NPAC assessments can result in substantial fines.¹⁵ It is thus not just NAPM’s seven members that foot NeuStar’s bill, but all telecommunications carriers and

¹⁰ 47 U.S.C. § 251(e)(1).

¹¹ 47 U.S.C. § 251(b)(2); First Report and Order, 11 FCC Rcd at 8431 ¶¶ 152-53 (extending number portability requirements to wireless carriers); *Telephone Number Requirements for IP-Enabled Service Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007).

¹² 47 U.S.C. § 251(e)(2); 47 C.F.R. § 52.32(a).

¹³ 47 C.F.R. § 52.32(b).

¹⁴ 47 C.F.R. § 52.32(a).

¹⁵ See *Telrite Corporation, Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7231, 7237 ¶ 12 & n.42 (2008) (imposing forfeiture for, *inter alia*, failure to make LNP contributions).

interconnected VoIP providers – including carriers that will never port numbers, such as pure long-distance carriers.

Finally, many carriers pass these fees directly on to consumers in bottom-of-the-bill surcharges.¹⁶ Even those carriers that do not have surcharges must recover these fees as part of their overall service charges.

The NPAC contract – which will cost nearly \$3 billion between 2009 and the end of 2015 under Amendment 70 – thus cannot be equated to a private contract between private parties who bear the benefits and costs solely amongst themselves. Many third parties, including millions of individual consumers, are affected by the price of the NPAC contracts. A core public interest issue therefore is whether NPAM is in fact getting the best deal possible for the industry and the public. The total cost of the NPAC contract and its fundamental terms, such as its basic structure, number of vendors,

¹⁶ See, e.g., Sprint, Know which fees you will incur when transferring a number to Sprint (Aug. 5, 2009), http://support.sprint.com/support/article/Know_which_fees_you_will_incur_when_transfering_a_number_to_Sprint/case-ib376964-20090630-161658#_highlight&id16=number+portability (“Sprint customers are assessed a monthly Federal Wireless Number Pooling and Portability fee [that] recovers costs incurred by Sprint to comply with these federal regulations concerning both number pooling and number portability.”); AT&T Wireless, Additional Charges, <http://www.wireless.att.com/cell-phone-service/additionalcharges/index.jsp?requestid=206482> (“Wireless Number Portability and Number Pooling ... [fees are] designed to recover the costs associated with the federal mandates of number portability and number pooling.”); Verizon, Glossary, <http://www22.verizon.com/content/billingcenter/popup/glossary.htm> (“Local Number Portability. This charge funds the technology that allows customers to keep their phone numbers when they change local telephone companies within their same calling area. The Federal Communications Commission (FCC) authorizes this charge.”); see also *Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11773 ¶ 135 (1998) (“Third Report and Order”) (“We will allow but not require incumbent LECs subject to rate-of-return or price-cap regulation to recover their carrier-specific costs directly related to providing number portability through a federal charge assessed on end-users” for five years after number portability is implemented by that carrier.).

duration, renewal or competitive bidding and scope, all affect whether the FCC is requiring industry and consumers to pay too much.

B. Competition and Competitive Bidding Are Necessary To Protect the Public Interest.

The FCC never chose to have only one NPAC administrator nationwide, nor to eschew competitive bidding for the NPAC contracts since 1997. As Comcast points out, NeuStar in fact became the sole number portability database administrator by happenstance: when it became apparent in 1998 that Perot Systems would not begin operations on time, NeuStar became the country's sole number portability administrator by default.¹⁷ Replacing Perot with NeuStar's predecessor reflected the limited options then available.

In fact, although NeuStar and NAPM fail to acknowledge as much, the Commission has recognized the strong public interest in competition and competitive bidding since the inception of numbering administration and long-term database number portability administration.¹⁸ As the Commission concluded, there are "clear advantages to having at least two experienced number portability database administrators that can compete with . . . each other."¹⁹ First, multiple database administrators would create competition in both the competitive bidding and selection processes: "[h]aving multiple

¹⁷ Comcast Comments at 3-4; *Telephone Number Portability*, Second Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 21204, 21209 ¶ 9 (1998).

¹⁸ It would have been strange for the FCC to conclude otherwise. The general purpose of the [Telecommunications] Act [of 1996] is to "promote competition . . . in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new technologies." First Report and Order, 11 FCC Rcd at 8409 ¶ 110 (quoting Telecommunications Act of 1996 ("the 1996 Act"), 110 Stat. 56 (statement of the 1996 Act's purpose)).

¹⁹ Second Report and Order, 12 FCC Rcd at 12306 ¶ 38; *see also* Comcast Comments at 2-4.

database administrators . . . should enable carriers to obtain *more favorable terms and conditions than if only one database administrator had been selected.*”²⁰ Second, multiple administrators would provide a “back-up” system if one administrator could not or would not perform its obligations under its Master Agreement or declined to renew its Agreement. As a result, NANC said that “*the selection of two database administrators is consistent with the Commission’s directive that the NANC recommend the most cost-effective number portability methods.*”²¹

Some of NAPM’s members recognize the core value of competition. Sprint Nextel and Verizon acknowledge that competition in number portability administration “benefit[s] the telecommunications industry and ultimately the American consumer.”²² Comcast Corporation – also a NAPM member – goes further – “agree[ing] . . . that the LNP administrative regime should be based on a competitive paradigm” and urging that “the Commission therefore should undertake a comprehensive review of the existing monopoly-based system of providing LNP database services to carriers.”²³

Unfortunately, Comcast’s view has not carried the day within NAPM: “NeuStar remains the only administrator over a decade later,”²⁴ and NAPM has facilitated that situation by

²⁰ *Id.* at 12305 ¶ 36 (emphasis added).

²¹ *Id.* (emphasis added).

²² Comments of Sprint Nextel Corporation, WC Docket No. 09-109, at 1 (filed Sept. 8, 2009) (“Sprint Nextel Comments”) (“Sprint commends Telcordia’s [*sic*] for its interest in number portability administration; indeed, Telcordia has played an important role in enhancing competition in this space”); Comments of Verizon, WC Docket No. 09-109, at 2 (filed Sept. 8, 2009) (“Verizon Comments”) (“To be sure, Verizon agrees that competition among potential vendors is beneficial.”).

²³ Comcast Comments at 2, 4.

²⁴ *Id.* at 4.

entering into repeated noncompetitive contract extensions and fundamental modifications.

The FCC has not only recognized the value of competition in protecting the public interest but also the critical role of competitive bidding in harnessing competition:

As a general matter, federal law assumes that competitive procedures best serve the public interest . . . [T]he benefits that can be achieved through a competitive process, such as innovative proposals and lower costs, may well counterbalance any benefits of a sole source arrangement. . . . *[B]ecause of the potential for innovative concepts and cost savings obtained through free and open competition . . . we believe that the public interest is best served through a competitive process that is consistent with our pro-competitive, deregulatory national policy and the policy considerations underlying federal laws requiring competition.*²⁵

The Commission uses a fair and open competitive bidding process to select the North American Numbering Plan Administrator and the national thousands-block Pooling Administrator, the two other major aspects of number administration under the Commission's jurisdiction.²⁶ When NANC wished to use sole source appointment to appoint the policy administrator, for example, the Commission rejected use of sole source and directed competitive bidding:

*We also conclude that seeking competitive bids in response to a request for a proposal or requirements for thousands-block number pooling administration, as we did with respect to NANP administration, furthers the competitive framework that Congress established in implementing the 1996 Act and is consistent with federal procurement law. We believe that a competitive bid process that is open and fair, and will include the opportunity for participation from all interested parties, will ensure the selection of the most qualified, cost-efficient Pooling Administrator.*²⁷

²⁵ Numbering Resource Optimization, 15 FCC Rcd at 7641 ¶ 150 (emphasis added).

²⁶ *See Administration of the North American Numbering Plan*, Report and Order, 11 FCC Rcd 2588, 2616-18 ¶¶ 143-56 (1995) (“*North American Numbering Plan*”); Numbering Resource Optimization, 15 FCC Rcd at 7637-44 ¶¶ 143-56.

²⁷ Numbering Resource Optimization, 15 FCC Rcd at 7639-40 ¶ 148 (emphasis added).

Competitive bidding not only ensures that the government gets the best deal, but its openness and transparency provide critical safeguards against abuse. As the United States Court of Appeals for the Tenth Circuit long ago observed:

The purpose of these statutes and regulations [requiring competition] is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition.²⁸

When competitive bidding is not employed, potential vendors are deprived of the equal right to compete for the contract, and the door is opened for human bias, undue influence and just plain error that would otherwise be prevented or revealed.

NeuStar argues that NAPM was not required to use competitive bidding which, as explained in Part III, is incorrect.²⁹ Moreover, neither NeuStar nor NAPM can explain why an open and competitive process could not have been used to select a number portability database administrator for periods beyond the initial contract term, or why it would not have provided the same benefits that accrue to the two other major aspects of number administration under the Commission's jurisdiction. On the contrary, the public interest and pro-competition policy determinations that led the Commission to use competitive bidding for the NANPA or Pooling Administration apply equally to number portability administration.

There is one possible reason why NAPM did not use competitive bidding for Amendment 70, and that is because doing so would have triggered a prospective price

²⁸ *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

²⁹ Opposition of NeuStar, Inc., WC Docket No. 09-109, at 18 (filed Sept. 8, 2009) (“NeuStar Opposition”).

adjustment of \$30-40 million annually. NAPM, of course, denies that Amendment 57 affected its thinking or processes,³⁰ but those denials lack credibility.

NAPM and NeuStar contend that Amendment 70 (and its predecessors) cannot be over-priced because NAPM, made up of “some of the world’s largest and most sophisticated carriers,” agreed to it.³¹ The Commission need not spend much time on this “sophisticated buyer” argument. Telcordia does not dispute that NAPM’s members are large carriers and sophisticated buyers – although, as discussed above, many more carriers and interconnected VoIP providers than just NAPM’s members pay the NPAC’s costs and so do consumers.³² No matter who pays, no matter how sophisticated the buyer, they do not have all the information that an open and competitive market bid would reveal. As courts have recognized, “when the contracts are competitively bid, the government might receive a better offer than it now has due to full and open competition.”³³ By failing to pursue competitive bidding, NAPM foreclosed that possibility.

Here, there is particular reason to be skeptical of the “sophisticated buyer” argument as a reason to avoid competitive bidding: NAPM has already demonstrated that it will contract for higher prices than necessary – or than the market would likely have delivered using competitive bidding. When Amendment 57 was adopted, Telcordia projected that with competitive bidding, the industry – and its consumers – could have

³⁰ NAPM Comments at 6.

³¹ NeuStar Opposition at 3.

³² *See supra* Part I.A.

³³ *See Cardinal Maint. Serv., Inc. v. United States*, 63 Fed. Cl. 98, 111 (2004) (citing *SAI Indus. v. United States*, 60 Fed. Cl. 731, 747 (2004)).

saved at least another 20% – or at least \$60 million per year.³⁴ Amendment 70, which drops NeuStar’s anticipated 2009 NPAC revenues from approximately \$350 million to approximately \$300 million – or approximately 20% – conclusively shows Telcordia was right. Amendment 57 was far too rich, and industry and consumers could have saved substantially through competitive bidding in 2006. Yet NAPM and NeuStar now want the Commission to believe that this time NAPM got it right, and struck a good deal without actually testing the potential for better offers through an open and transparent competitive bidding process.

Notably, neither NAPM nor NeuStar presents any cogent explanation of why competitive bidding could not have occurred at some time between 2002 and the present, or why it is necessary now to foreclose competition until 2016 without using competitive bidding to ensure that consumers and industry are adequately protected against overcharges. Even the unsolicited proposals that were presented – which in and of themselves are not responses to a transparent, competitive bid process in which all bidders are responding to a defined statement of needs with a common understanding of the period for which the contract will be let – indicate that Amendment 70 is likely to be far too rich. As an alternative to Amendment 70, Telcordia’s regional proposal would have saved a projected \$550 million through 2015 – money that will one way or another come out of the pockets of consumers.

The public interest in protecting consumers and industry against overcharges demands that the NPAC contracts be rebid with any substantial changes, and that the

³⁴ Petition of Telcordia Technologies, Inc., The Petition of Telcordia Technologies to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, WC Docket No. 07-149, at 14 (filed Jun. 13, 2007).

NPAC administration system be as open to competition as is possible. Certainly, it can hardly be in the public interest to preclude competitive bidding for eighteen years – which is what will occur if Amendment 70 is left in place – without a compelling justification. NAPM and NeuStar have never provided any such justification with respect to Amendment 70, Amendment 57 or any of their major contract extensions and modifications. This is paradigmatic anticompetitive conduct. The public interest now demands that the NPAC contracts be rebid so that the FCC – on behalf of the whole industry and consumers – can ensure that it has the best possible deal for NPAC administration services.

II. NAPM Lacks the Authority To Make Inherently Governmental, Fundamental Policy Choices with Respect to the NAPM Contract, including Basic Structure, Number of Vendors, Term, Renewal/Competitive Bidding and Scope.

NAPM and NeuStar and their supporting commenters argue that all contract decisions with respect to the NPAC contract, without limitation, have been delegated by the FCC to NAPM. But this argument cannot be squared with the FCC’s responsibility to ensure that the tax-like number portability fees that it imposes are prudently expended. What NAPM and NeuStar fail to acknowledge is that the FCC never had the authority to delegate its inherently governmental functions to NAPM. Therefore NAPM’s limited authority to “manage and oversee” the NPAC contracts cannot extend to inherently governmental issues, such as policy determinations regarding the contracts’ term, scope, basic structure, number of vendors and when to renew or initiate competitive bidding, all of which NAPM nonetheless addressed in Amendments 57, 70 or 72. When construed against the backdrop of law regarding unlawful subdelegation to non-federal entities, and the corresponding limitations on contracting out inherently governmental functions, the

FCC’s grant to NAPM of interim authority to “manage and oversee” the NPAC administrator cannot extend to these most fundamental parameters of the NPAC contracts.

NAPM and NeuStar significantly overread the authority the FCC has vested in NAPM. In the *Second Report & Order*, the Commission – on an interim basis – designated the LLCs to “manage and oversee” the NPAC contracts.³⁵ On the basis of this authority to “manage and oversee,” NeuStar argues “there is simply no basis on which to conclude that Commission approval was required” for NAPM to negotiate new contract terms. This is incorrect. The issue here is not whether NAPM could make minor change order adjustments within the scope of the initial contract; the relevant inquiry is whether the FCC could have and did delegate to NAPM the authority to make fundamental policy decisions and fundamental changes to these contracts. It did not.

The unlawful subdelegation doctrine prohibits such delegation. Neither NAPM nor NeuStar explains the United States Court of Appeals for the D.C. Circuit’s teaching in *United States Telecom Association v. FCC* that “[w]hile federal agency officials may subdelegate their decision-making authority to *subordinates* absent evidence of contrary congressional intent, they may not subdelegate to *outside entities* – private or sovereign – absent affirmative evidence of authority to do so.”³⁶ Here, of course, neither NAPM nor

³⁵ Second Report and Order, 12 FCC Rcd at 12345-46 ¶ 115 (“We conclude that, at least in the short term, the LLCs should provide immediate oversight for the regional local number portability administrators.”).

³⁶ *United States Telecom Ass’n. v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (emphasis added) (“*USTA*”). Indeed, *USTA* presented what should have been a more compelling case for delegation than this one, because the FCC was relying on state public utilities commissions to make determinations affecting competition in their states. In that case, in which the Commission argued that it could subdelegate to state agencies as long as the authorizing statute did not expressly foreclose such delegation, the court

NeuStar claims that NAPM is a federal entity because if it were it would be subject to the Competition in Contracting Act.³⁷ NAPM and NeuStar cannot have it both ways.

NeuStar argues that *USTA* is inapplicable because Section 251(e)(1) provided express authorization for an expansive delegation to NAPM, but this fundamentally misreads the statute. Section 251(e)(1) gives the FCC the authority to designate “one or more neutral entities to administer telecommunications numbering.” That section, however, simply authorizes the FCC to appoint NeuStar to be the NPAC administrator, which the FCC did. Nothing in Section 251(e)(1) authorizes the FCC to delegate its fundamental policy-making decisions with respect to the scope, duration and terms of that NPAC Administration contract to yet another third party – the NAPM – especially when the NAPM in no way can qualify as a “neutral entity,” and thus cannot plausibly fall within Section 251(e)(1). Section 251(e)(1) has never authorized the FCC to delegate its authority regarding the NPAC contracts to a non-federal third party.

Certain limited exceptions to the unlawful subdelegation doctrine permit a federal agency engaged in decision-making to look to an outside entity, but none applies here. This is not a case where, in exercising its “broad discretion to permit or forbid certain activities,” the FCC is conditioning “its grant of permission on the decision of another [government] entity, so long as there is a reasonable connection between the outside

rejected the FCC’s argument as “a fundamental misreading of the relevant case law.” The Court held that “the fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis.” *Id.* at 566.

³⁷ Moreover, no *Chevron* deference could save the agency’s position because “[a] general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates.” *Id.* at 566.

entity's decision and the federal agency's determination."³⁸ Nor is this a case in which the FCC is using the NAPM merely "to provide the agency with factual information."³⁹ NAPM's decisions to extend the NPAC contracts from an initial termination date in 2002 until 2016, to expand the scope to include URI fields for IP routing, picture mail and text messaging, and to add *de facto* exclusive pricing terms can hardly be considered mere factual information.

Finally, although "a federal agency may turn to an outside entity for advice and policy recommendations, *provided the agency makes the final decisions itself*,"⁴⁰ no one here claims the FCC has made the final decisions itself. The comments manifestly demonstrate that the FCC has made none of Amendment 57's, 70's or 72's critical major and fundamental decisions. By their terms Amendments 57, 70 and 72 were all effective when executed, without any FCC approval. Thus, none of these exceptions to the prohibition against unlawful subdelegation obtain here.

Office of Management and Budget ("OMB") Circular A-76 further confirms that the FCC, and not NAPM, must make the fundamental decisions with respect to the NPAC contracts. Neither NeuStar nor NAPM actually address Circular A-76 – which applies expressly to the FCC as an "independent establishment[]" within the federal government. Circular A-76 makes clear that "agencies shall . . . [p]erform inherently

³⁸ *USTA*, 359 F.3d at 567. A classic example of such discretion arises in the licensing context, where input from another agency might be an important condition in the approval process. *See, e.g., United States v. Matherson*, 367 F. Supp. 779, 782-83 (E.D.N.Y. 1973) (upholding National Park Service's decision to condition issuance of federal seashore motor vehicle permits on applicant's acquisition of analogous permit from neighboring town).

³⁹ *USTA*, 359 F.3d at 567.

⁴⁰ *Id.* at 568 (emphasis added).

governmental activities with government personnel.”⁴¹ “Inherently governmental activities” are ones that are “so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.”⁴² They include “the establishment of procedures and processes related to the oversight of monetary transactions or entitlements” and, 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.⁴³

In short, inherently governmental activities include fundamental policy decisions, and Circular A-76, consistent with the prohibition on subdelegation to non-federal entities, reserves those decisions to the agency.

NAPM’s decisions in Amendments 57, 70 and 72 clearly committed the government to a course of action. The NPAC contracts initially were to expire in 2002.

⁴¹ Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-76, Performance of Commercial Activities (2003) at 1 (inherently governmental functions with governmental employees), 6 (applies to “independent establishments” under 5 U.S.C. § 104, which includes the FCC).

⁴² *Id.* at Attachment A(B)(1)(a).

⁴³ *Id.* at Attachment A(B)(1)(a), (b). Specific provisions apply to agency-contractor relationships such as the Commission’s relationship with NAPM:

An agency shall consider the following to avoid transferring inherently governmental authority to a contractor....The degree to which official discretion is or would be limited, *i.e.*, whether involvement of the private sector or public reimbursable provider is or would be so extensive that the ability of senior agency management to develop and consider options is or would be inappropriately restricted.

Id. at A-3.

Before Amendment 57, under earlier extensions that also lacked FCC approval, the NPAC contracts would have expired in 2012. Amendment 57 extended them to 2015. It also imposed contractual penalties against competitive bidding that applied until 2012. In Amendment 70, NAPM then restructured the contract to foreclose competition for the remainder of the contract term, until the beginning of 2016. Amendments 70 and 72 expanded the scope of the NPAC contract to include URI codes to enable the use of the NPAC for ENUM services, although those were not within the scope of the prior competitively bid contract.

Here, there are no existing FCC policies, directions or guidance identifying specified ranges of acceptable NAPM decisions or conduct regarding contract extensions and industry structure; the FCC never delegated authority in those areas to NAPM, and it did not give NAPM the authority to determine the scope of the NPAC. And as discussed in Part I.B, above, decisions regarding basic contract structure, number of vendors, term, renewal/competitive bidding and scope all have direct public policy implications. These decisions must be inherently governmental because they determine the level of a mandatory, FCC-enforced user fee and commit the payment of these tax-like revenues to a third party, the NPAC contractor. Unless these decisions are inherently governmental, there would never be a federal decisionmaker making an affirmative decision to expend these tax-like funds.

Against this backdrop, the Commission's orders granting NAPM interim authority to "manage and oversee" the NPAC contracts must be construed narrowly. The only reasonable interpretation of the FCC's rules and orders is that while NAPM may make *non-inherently* governmental decisions in managing and administering the NPAC

contracts, the FCC must make inherently governmental decisions, as it did in initially selecting the NPAC contractors. NeuStar’s selective quotations from the FCC’s orders do not point in any other direction. For example, although NeuStar contends that the Commission “determined that the LLCs are ‘best able to provide immediate oversight of the [Administrators],’” the Commission actually made a narrower and time-restricted determination “that the LLCs are best able to provide immediate oversight of the [NPAC contractors] *at this time*.”⁴⁴ The fact that the Commission granted the LLCs the authority to “manage and oversee” the NPAC administrator only “on an *interim basis*” for the “short term”⁴⁵ further supports limiting NAPM’s authority to the scope of the *initial* contract, and not to fundamental decisions to expand that contract in duration, exclusivity or scope. Furthermore, when the FCC made these statements, NAPM was going to “manage and oversee” contracts that were just being finalized, and had been awarded pursuant to competitive bidding for a five-year term through 2002. The Commission had no reason at that time to authorize the NAPM to extend the contracts beyond 2002.

The FCC’s rules further underscore that NAPM was not given unlimited authority to decide the scope of the NPAC database. Rule 52.25(f) limits the NPAC to data that is “necessary to route telephone calls to the appropriate telecommunications carriers,” with the NANC, not NAPM, designated to determine in the first instance what specific information is “necessary.” There is no interpretation of NAPM’s authority to “manage and oversee” the NPAC contracts that can give it the authority to expand the NPAC

⁴⁴ Second Report and Order, 12 FCC Rcd at 12346 ¶ 117 (emphasis added).

⁴⁵ *Id.* at 12345 ¶ 114 (emphasis added); *see also id.* at 12345-46 ¶ 115 (“We conclude that, at least in the short term, the LLCs should provide immediate oversight for the regional local number portability administrators.”).

beyond the limits of Rule 52.25(f), or allow NAPM to act without NANC authorization with respect to disputed fields.⁴⁶

NAPM's contention that it or its predecessors "have updated, modified and extended the Master Agreements" numerous times without seeking or obtaining NANC or Commission approval does not demonstrate that it was given authority to do so, only that it has gotten away with unauthorized activity to date.⁴⁷ No commenter offers any evidence that the Commission actually ratified any of these extensions or expansions of the NPAC contract – and in any event even ratification of prior decisions would not authorize NAPM to enter into and bind the industry to *these* newer agreements absent new FCC ratification.

NeuStar's and NAPM's assertion of the expansive breadth of NAPM's authority is as unprecedented as it is breathtaking. For every other program funded by a mandatory tax-like user fee – whether for USF, NANPA or TRS – the FCC, or a subunit, reviews the amounts that are proposed to be collected and expressly sets the contribution factor and approves the collection of funds at that factor.⁴⁸ Only with respect to local number portability database administration is it asserted that a non-FCC third party can determine the level of expenditures that will be collected without any further FCC action. Yet that is NAPM's and NeuStar's view – that they can enter into and modify contracts that

⁴⁶ See Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to the Honorable Betty Ann Kane, Chairman, District of Columbia Public Service Commission, Don Gray, Telecommunications Specialist, Nebraska Public Service Commission, and Thomas M. Koutsky, Chairman, North American Numbering Council at 15-16 (Aug. 31, 2009) ("Telcordia NANC Reply") (filed in WC Docket No. 09-109 on Sept. 1, 2009).

⁴⁷ NAPM Comments at 36-37.

⁴⁸ See, e.g., 47 C.F.R. § 54.709 (USF); 47 C.F.R. § 52.17 (NANPA); 47 C.F.R. § 64.604(c)(5) (TRS).

dictate the level of expenditures for NPAC administration database services for years to come, and then collect those amounts from carriers and interconnected VoIP providers without any express approval by the FCC.

The limits placed on NAPM's authority by the prohibition on unlawful subdelegation, Circular A-76, and an appropriate reading of the FCC's orders are critical to maintaining governmental accountability for its programs. As the *USTA* court explained, "when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making."⁴⁹ 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."⁵⁰ As has time and again become apparent – most recently with the banking crisis – the quarter-by-quarter demands of Wall Street do not always match the public interest. The Commission, not the handful of companies comprising NAPM, is the guardian of the ultimate public interest in the short- and long-term.

Accordingly, the NAPM lacked the authority to make fundamental policy decisions about the term, scope, basic structure, number of vendors, and when to renew or initiate competitive bidding with respect to the NPAC contracts. These decisions, which were made by NAPM in Amendments 57, 70 and 72, were fundamentally the FCC's to make. As such, the amendments are invalid and, on this basis alone, the contracts must now be terminated and subject to new competitive bidding.

⁴⁹ *USTA*, 359 F.3d at 565.

⁵⁰ *Id.* at 565-66 (quoting *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)).

III. NAPM's Repeated Non-Competitive Contract Extensions and Modifications of *De Facto* Exclusivity and Scope Violated the Competition in Contracting Act and the President's Contracting Directive.

Even assuming the FCC delegated to NAPM its authority to make fundamental changes to the NPAC contracts – which, as discussed above, the FCC had no authority to do – NAPM must comply with the Competition in Contracting Act (“CICA”)⁵¹ and the President’s contracting directive competitive bidding requirement. CICA requires agencies to “obtain full and open competition through the use of competitive procedures” in all procurements unless another statute expressly authorizes the use of other procedures.⁵² Consistent with CICA, in a memorandum to the Heads of Executive Departments and Agencies, including the FCC,⁵³ President Obama stated that “[i]t 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 that taxpayer.”⁵⁴ Both the CICA and prudent contracting practices mandate competitive bidding for fundamental contract changes, including expanding the scope of an existing contract. Again, this is a matter of fundamental governmental accountability and responsibility for the proper expenditures of the taxes and fees that the government imposes.

⁵¹ 41 U.S.C. § 253.

⁵² 41 U.S.C. § 253(a)(1)(A).

⁵³ NeuStar incorrectly asserts that the FCC is not an “executive agency.” NeuStar Comments at 21 n.59. As an “independent establishment,” the FCC is an “executive agency.” 5 U.S.C. § 104.

⁵⁴ Memorandum for the Heads of Executive Departments and Agencies; Subject: Government Contracting (Mar. 4, 2009), *available at* <http://www.govexec.com/pdfs/030409e1.pdf>.

A. NAPM's and NeuStar's Interpretations Evade CICA's Requirements for Full and Open Competition for Government Procurement Contracts.

NAPM and NeuStar incorrectly argue that – notwithstanding the public character of the NAPM contract – NAPM itself and, by extension, the contract for number portability administration are immune from the requirements of the CICA. Under CICA, however, anything short of “full and open competition” requires agency justification – which is specifically constrained by statute.⁵⁵ Agencies may not delegate their authority to determine whether a process other than full and open competition is in the public interest.⁵⁶ Furthermore, agencies may not “enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning.”⁵⁷ No such competitive bidding or justification occurred here with respect to NAPM's repeated extensions of the scope and term of the NPAC contracts far beyond the extent of the initial competitive procurement.

NAPM and NeuStar assert three bases for escaping CICA's competitive bidding mandate. First, they assert that NAPM is not a “public instrumentality” even though the

⁵⁵ 41 U.S.C. § 253(a)(1)(A). Telcordia's insistence that the FCC must now review actions of the LLC in advance are supported by the policies embodied in the CICA. Under CICA, sole-source procurement contracts are not permitted without written authorization from the head of an agency and statutory or regulatory authority exists to support the procurement of a sole-source or limited competition procurement. Deviations from “full and open competition” must be documented in writing. See 41 U.S.C. § 253(c)(B). These justifications must *precede* the award of a procurement contract. See 41 U.S.C. § 253(f)(2). Even where an agency is justified in limiting competition, it must request offers from as many potential sources as possible. 41 U.S.C. § 253(e). “[W]here a responsible source is known to the agency and has expressed interest in the procurement, the agency must undertake reasonable efforts to permit the source to compete.” *In re Neil R. Gross & Co., Inc.*, 1990 U.S. Comp. Gen. LEXIS 230 (Comp. Gen. Feb. 23, 1990).

⁵⁶ 41 U.S.C. § 253(d)(2), (f)(1).

⁵⁷ 41 U.S.C. § 253(f)(4)(A).

NPAC contract is funded by tax-like revenue and NPAM exists solely to administer the number portability contracts that are created by FCC order. Second, NAPM and NeuStar claim that the procurement of NPAC database services is not, in fact, a procurement of service, but merely the appointment of an agent. Third, they contend that NAPM's repeated non-competitive contract extensions were modifications within the scope of the original contract. These assertions all lack merit.

1. CICA Applies Because the NAPM LLC Is a “Public Instrumentality” Under *Motor Coach v. Dole*.

NAPM and NeuStar argue that CICA does not apply to NAPM because NAPM is not an “executive agency.”⁵⁸ But the facts, as discussed below, establish that NAPM is a public instrumentality. And *Motor Coach Industries, Inc. v. Dole* provides that if NAPM is a “public instrumentality,” then it can be treated as an extension of the FCC, an “executive agency,” and thus is subject to CICA’s competitive bidding requirements.⁵⁹ Although NAPM and NeuStar argue that NAPM differs factually from the Trust considered in *Motor Coach*,⁶⁰ they fail to consider the “total factual circumstances”⁶¹ – which here show that NAPM is in fact a “public instrumentality.” If NAPM and NeuStar’s view were to be adopted, CICA could be evaded simply because the NAPM, instead of the FCC, is conducting the contracting activity, irrespective of the NPAC’s public purpose and non-appropriated public funding source. NAPM clearly qualifies as an executive agency for three reasons.

⁵⁸ NAPM Comments at 27; NeuStar Opposition at 29.

⁵⁹ See *Motor Coach Indus., Inc. v. Dole*, 725 F.2d 958, 964-65 (4th Cir. 1984). 5 U.S.C. § 105 defines an “executive agency” to include “independent establishment[s],” which in turn includes the FCC. See 5 U.S.C. § 105.

⁶⁰ NAPM Comments at 27-28; NeuStar Opposition at 29-31.

⁶¹ *Motor Coach*, 725 F.2d at 964-65.

First, as in *Motor Coach*, the NPAC contract concerns the expenditure – without congressional appropriations – of public funds collected through use of the police power.⁶² In *Motor Coach*, the use of the police power to raise funds was indirect: the FAA waived landing and mobile lounge fees that carriers would have paid to the U.S. Treasury for any carrier contributing instead to a trust that would be used to purchase additional inter-terminal buses for Dulles International Airport.⁶³ Here, the use of the police power to raise funds is direct: the FCC has established rules mandating that every telecommunications carrier and interconnected VoIP provider pay the costs of the NPAC contracts, under threat of FCC fines and other sanctions.⁶⁴ And – as in *Motor Coach* where the FAA determined the airlines’ contribution formula⁶⁵ – the FCC established the formula for contribution to the costs of the NPAC contracts, although the precise percentage assessment on each carrier and interconnected VoIP provider necessarily varies.⁶⁶

NAPM and NeuStar wholly ignore the FCC’s use of the police power to fund the NPAC contracts, emphasizing instead that NAPM members’ fees fund its administrative expenses.⁶⁷ But these administrative expenses are infinitesimal compared to the nearly \$3 billion that will be expended for NPAC services between 2009 and the end of 2015. Moreover, the *Motor Coach* court focused not on who paid the trust’s administrative

⁶² *Id.* at 961, 965.

⁶³ *Id.* at 961-62.

⁶⁴ *See supra* n.15 and accompanying text.

⁶⁵ *Motor Coach*, 725 F.2d at 961-62.

⁶⁶ 47 C.F.R. § 52.32.

⁶⁷ NAPM Comments at 27-28; NeuStar Comments at 30.

expenses, but rather on how the object of the contracts – the buses – was funded.⁶⁸ In both cases, the respective objects of the contracts – the buses or the NPAC – were funded through the police power.

Second, like the buses in *Motor Coach*, these NPAC database administration contracts serve a public purpose – the FCC’s implementation of the 1996 Act’s number portability mandates and local telephone competition. Just as the market had not created adequate bus service at Dulles, the larger incumbent carriers (both wireline and wireless) had no market incentive to develop a tool to facilitate their customers’ migration to other carriers.⁶⁹ The FCC directed the creation of the NPAC after determining that number portability was “essential to meaningful competition in the provision of local exchange services”⁷⁰ and required all carriers to use the NPAC.⁷¹ This compelled participation makes NAPM an even clearer “public instrumentality” than the trust in *Motor Coach*, which was funded only by the airlines that agreed to participate. Unlike *Motor Coach*, NAPM’s decisions affect not only its members, but *all* carriers, interconnected VoIP providers, and consumers.

⁶⁸ *Motor Coach*, 725 F.2d at 965.

⁶⁹ Indeed, wireless carriers continued to fight the imposition of wireless number portability requirements for years after the long term database number portability was implemented for wireline carriers. See, e.g., *Telephone Number Portability, Emergency Motion for Stay of the CMRS LNP Deadline*, Order, 19 FCC Rcd 18756 (2004).

⁷⁰ First Report and Order, 11 FCC Rcd at 8367 ¶ 28.

⁷¹ *Id.* at 8431 ¶¶ 152-53 (extending number portability requirements to wireless carriers); Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues, Memorandum Opinion and Order, 18 FCC Rcd 20971 (2003); *Telephone Number Requirements for IP-Enabled Service Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007).

Third, NAPM's and NeuStar's attempt to distinguish *Motor Coach* on the grounds that NAPM's members, not the FCC, created its predecessor LLCs is unavailing.⁷² In *Motor Coach*, as here, the trust's settlors, the airlines, formally created the trust. Although NAPM's members are a handful of carriers and interconnected VoIP providers, they are not just "an independent association of private companies that happen to be regulated by the FCC."⁷³ NAPM in fact has no purpose apart from being the interim manager and overseer of the NPAC contracts.

Fourth, if NAPM were delegated unilateral authority to make fundamental changes to the NPAC contracts into the future, which, as discussed in Part II, *supra*, it was not, NAPM would be acting as the FCC's agent in procuring these databases created solely to implement the FCC's number portability orders and mandates. If NAPM is making all decisions for the FCC – including the most fundamental, policy-based choices such as the term of the contract, when to conduct competitive bidding, the scope of the contract, and whether to create *de facto* exclusive structures – it cannot also deny that it is a public instrumentality.

Finally, NAPM exists solely at the FCC's pleasure. The FCC could take away its contract management role at any time, leaving NAPM with no purpose. The FCC has retained the authority to revoke the LLCs interim authority if, after gaining "practical experience with number portability implementation . . . [the FCC] determine[s] whether problems arise as a result of oversight and management envisioned by LLCs."⁷⁴

⁷² *Motor Coach*, 725 F.2d at 962.

⁷³ NeuStar Opposition at 29.

⁷⁴ See Second Report and Order, 12 FCC Rcd at 12347 ¶ 119.

Thus, under the “total factual circumstances,” NAPM, like the *Motor Coach* trust, is not an ordinary private actor negotiating a contract in the market. Rather, NAPM is a public instrumentality contracting for a service on behalf of the FCC in order to implement the FCC’s public purpose of establishing and maintaining a long-term number portability database that all carriers and interconnected VoIP providers must use and for which they must pay by FCC rule. The Competition in Contracting Act’s protections must apply to safeguard the public interest and maintain accountability.

2. NeuStar Cannot Evade Being Subject to CICA’s Open and Competitive Bidding Requirement by Labeling Itself an “Agent,” Not Involved in Delivering Services for the Benefit of the Government.

NeuStar next tries to avoid accountability and transparency through competitive bidding by incorrectly likening itself to a “bonding authority,” as if it were an agent or employee providing services under the FCC’s supervision that do not directly benefit the government.⁷⁵ NeuStar cites *Grigsby Brandford & Co. v. United States*, in which CICA was found inapplicable because a statute’s provision for selecting a designated bonding authority for a Congressionally established college capital financial assistance program implicated “no deliverable goods or services.”⁷⁶ In that case – in which the government issued solicitation notices and requests for proposals – the court held that the selection of the bonding authority “more closely resembled the appointment of a public employee or agent than it resembled the procurement of any goods or services,”⁷⁷ as the selection conferred status without any deliverable services to the government. Here, in contrast,

⁷⁵ See NeuStar Opposition at 31-32.

⁷⁶ 869 F. Supp. 984, 998 (D.D.C. 1994).

⁷⁷ *Id.*

the creation and administration of a number portability database is a very tangible deliverable aiding the Commission in effectuating Congress' number portability mandate. And this deliverable generates approximately \$300 million per year (and growing) for NeuStar in return for the services provided, paid by an FCC-mandated user fee. By any token, this is the procurement of database services.

Saratoga Development Corp. v. United States – another case in which competitive bidding was actually used – is likewise inapposite. There, a wholly government-owned corporation, itself covered by the CICA, acted in two roles, one “as a developer in its own right.” In the developer role, its actions were “far from expending public funds to purchase public property.” Instead the corporation “was simply offering developers the right to spend their *own* funds on *private* projects.”⁷⁸ Further, in *Saratoga*, the court applied the savings clause exception of CICA, under which CICA’s competition requirements do not apply if a statute expressly authorizes other procurement procedures.⁷⁹ Here, NeuStar is not being appointed to spend its own funds; it is being paid out of funds raised by a government-mandated and enforced fee to provide the NPAC database services. Moreover, no commenter has identified any alternate procurement procedure contained in any statute that would override CICA’s competitive bidding requirements. NeuStar cannot evade CICA’s requirements by labeling itself an “agent.”

⁷⁸ *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 453-54 (D.C. Cir. 1994).

⁷⁹ *See id.* at 454; 41 U.S.C. § 253(a).

3. Amendments 57, 70 and 72 Were Modifications Beyond the Scope of the Initial Procurement.

NAPM and NeuStar argue that even if CICA applies, it would not require NAPM to engage in the discipline and accountability of competitive bidding to enter into Amendments 57, 70 and 72 (as well as earlier amendments), because they constitute permissible modifications.⁸⁰ Although NeuStar concedes that failing to seek competitive bids for contracts exceeding the scope of the initial procurement violates CICA's competitive bidding requirements,⁸¹ it asserts that the original competitive procurement broadly concerned the "administration of the NPAC database," so that the changes wrought by Amendments 70 and 72 – and their predecessor amendments – cannot be outside its scope. But NeuStar ignores critical case law demonstrating that these amendments go far beyond the scope of permissible modifications by adding to the length of the contract and changing its scope and pricing structure.

To determine whether modifications materially change the scope of an original contract enough to require a new bid procedure, courts have applied the "cardinal change" doctrine. As the Court of Federal Claims made clear in *Northrup-Grumman Corp. v. United States*, "Factors important to the cardinal change analysis include modifications to the type of product or service being delivered or performed, the quantity of the product or service, the performance period, and the cost between the solicitation as competed and the contract as modified."⁸² "Significant addition or subtraction of the

⁸⁰ NeuStar Opposition at 32; NAPM Comments at 28 n.45.

⁸¹ NeuStar Opposition at 32.

⁸² 50 Fed. Cl. 443, 466 (2001); *see also Neil R. Gross & Co.*, 1990 U.S. Comp. Gen. LEXIS 230, at *4 ("In determining the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period and costs between the contract as awarded and as modified.").

quantity of work can ... be outside the scope.”⁸³ And “[a]dditional time spent on performance of a contract is within the scope when it is due to problems with the completion of performance, but not when such time is extended in order to add significantly more quantity or new requirements to the contract.”⁸⁴

In re CPT Corp., cited with approval in *Northrup-Grumman*, is on point. In *CPT*, the State Department had entered into a competitively bid contract for specific Wang word processing equipment for its overseas posts for the period from 1979 to 1982.⁸⁵ The State Department then modified the contract without competitive bidding or following sole source justification procedures to extend the term for three years, expand its scope to cover domestic and overseas posts, expand the range of products available from a specific list to all products in the Wang catalog, change the pricing model and change from a year-to-year renewal basis to a multiyear contract.⁸⁶ The Comptroller General overturned the State Department actions, finding that these modifications were “so substantial as to amount to a new procurement.”⁸⁷ Specifically, the Comptroller General found that modifications “amounted to a new procurement” where

- (1) State improperly extended the period of performance; (2) it significantly expanded the scope of work by adding new equipment . . . ;
- (3) State significantly altered the conditions under which the work was to be performed by including domestic as well as overseas installations, by

⁸³ *Northrup-Grumman Corp.*, 50 Fed. Cl. at 466 (citing *In re PAI Corp.*, 1991 U.S. Comp. Gen. LEXIS 1384 (Comp. Gen. Nov. 29, 1991)).

⁸⁴ *Id.*

⁸⁵ *In re CPT Corp.*, 1984 U.S. Comp. Gen. LEXIS 1037, at *2 (Comp. Gen. June 7, 1984).

⁸⁶ *Id.* at *2-*4, *6.

⁸⁷ *Id.* at *5.

assuming a multi-year rather than a year-to-year contractual obligation, and by modifying the basis on which price is determined.⁸⁸

The same analysis applies here. First, through a combination of amendments, NAPM and NeuStar have extended the duration of NeuStar's contract from 2002 until the end of 2015 – *thirteen years*. *CPT* teaches that a requirements contract, such as the NPAC contract, concerns “ongoing needs,” and thus, “extension of the performance period under those kinds of contracts involves new requirements that should be competed.”⁸⁹ The NPAC contract extensions thus “on [their] face” constitute a new procurement that should be subject to competition.⁹⁰

Second, NAPM has changed the scope of the NPAC contract by adding URI fields for IP routing, picture messaging and SMS. These fields permit NeuStar to use the NPAC database to supply ENUM services. This was not part of the initial competitive bid. This is analogous to adding word processing equipment for domestic installations to Wang's contract for foreign installations – new competitive bidding is required.⁹¹

Third, through Amendment 70, NAPM and NeuStar adopted substantial changes in the pricing structure, effectively extending NeuStar's *de facto* exclusivity from the end of 2011 to the end of 2015. Changes to the pricing structure and term of a contract are “not properly the subject of contract modifications,” as the Comptroller General found in *CPT*.⁹²

⁸⁸ *Id.* at *6.

⁸⁹ *Id.* at *7.

⁹⁰ *Id.*

⁹¹ *Id.* at *7-*9. In any event, FCC Rule 52.25(f) does not permit NAPM to add these fields. *See* Telcordia NANC Reply.

⁹² *Id.* at *9.

It boggles the imagination to argue, as NeuStar apparently does, that these changes fall within the scope of an initial 1997 competitive procurement that was only for five years, was priced on a per-transaction basis, did not extend to IP capabilities or provide ENUM services, and that had no *de facto* exclusivity clauses. CICA's competitive bidding mandate is not so easily negated. As *CPT* demonstrates, the types of fundamental changes wrought by NAPM's successive amendments, including Amendments 57, 70 and 72, required competitive bidding and could not be executed through non-competitive contract modifications.⁹³ As in *CPT*, the appropriate remedy is to terminate and bid the contract, which is what the Commission should do.⁹⁴

IV. Like Amendment 57, Amendments 70 and 72 Are Anti-Competitive.

A. The Plain Fact Is that Amendment 70 Forecloses NPAC Competition.

Amendment 70 precludes NPAC competition until at least 2016. Although NAPM and NeuStar both deny this and protest that the Amendment does not contain an exclusivity provision or say that it is exclusive "on its face at least,"⁹⁵ they fail to rebut Telcordia's showing that Amendment 70's actual effect is to extend and protect NeuStar's monopoly through the end of 2015.

Telcordia has never maintained that Amendment 70 – or its predecessor Amendment 57 – were exclusive other than in effect. Although the NPAC contract

⁹³ These limits are also consistent with the limitations on agency outsourcing of inherently governmental activities. *See supra* Part II.

⁹⁴ *CPT Corp.*, 1984 U.S. Comp. Gen. LEXIS 1037 at *23 (prohibiting the State Department from obtaining further Wang word processors after the reasonable transition period notwithstanding the new contract term agreed upon between the State Department and Wang).

⁹⁵ NAPM Comments at 16 ("Accordingly, it is incontestable that Amendment No. 70, on its face at least, represents no change from what preceded it.").

remains nominally non-exclusive, the pricing structures of both Amendment 57 and Amendment 70 render the contracts exclusive. Amendment 57 created exclusivity through a \$30 million annual penalty that would be triggered if NAPM issued an RFP, RFQ or RFI, or entered into an alternative NPAC administration contract before the end of 2011. In Amendment 70, NAPM and NeuStar dropped the penalty clauses for competitive activity, instead adopting a pricing structure that makes it economically irrational for NAPM to enter into any contracts with competing NPAC vendors taking effect before the end of 2015.

Telcordia's analysis of Amendment 70 presumed that NAPM would act economically rationally – seeking to minimize the industry's overall costs for NPAC database administration function and that NAPM would not want to pay a competitor if doing so meant that the combination of the competitor's charges and NeuStar's charges would exceed what NeuStar would be paid if it were to handle 100% of porting transactions. If that presumption is unreasonable, the analysis would change, but one would have to question whether NAPM was acting in the public interest in doing so. Subject to this cost-minimization assumption, the pricing structure in Amendment 70 locks out any competition until after 2015.

NeuStar and other commenters argue that Telcordia has “completely mischaracterize[d] Amendment 70.”⁹⁶ But NeuStar offers no rebuttal whatsoever to Telcordia's analysis of the anticompetitive effects of the contract's pricing clauses. It instead simply falls back on an unsupportable syllogism, arguing that the contract was negotiated at “arms' length” by a group comprised of carriers “possess[ing] the most

⁹⁶ NeuStar Opposition at 18; *see also, e.g.*, Comments of AT&T Inc., WC Docket No. 09-109, at 4 (filed Sept. 8, 2009); Verizon Comments at 1.

expertise with respect to number portability,”⁹⁷ therefore, the contract cannot be anticompetitive. NeuStar does not explain how this “expertise” precludes Amendment 70 locking out competition through 2015.

NAPM attacks Telcordia’s analysis of Amendment 70’s impacts as “merely models,”⁹⁸ and purports to not understand what Telcordia’s charts were illustrating.⁹⁹ Telcordia agrees that it based its analysis on models; but the pricing structures in Amendment 70 cannot be evaluated and understood except by modeling the results.¹⁰⁰ But NAPM then never addresses the specific barriers to entry that Telcordia identified.

As set forth in the Petition, Amendment 70 erects two substantial and interrelated barriers to entry for competing NPAC database administration providers. First, Amendment 70 creates a one-year lag between NeuStar’s loss of transactions to a competitor and NeuStar’s loss of revenue (if any). The lag is simple, and has nothing to do with whether a competitor enters on a per-transaction model, a regional model, a primary-standby model or a fixed price model. Under Amendment 70, NeuStar is initially paid its fixed fee for the year, irrespective of whether it handles all or a fraction of the total industry porting transactions for that year. Any volume-based adjustments to NeuStar’s fee are then not made until after year-end. Accordingly, if a competitor presents a proposal to NAPM to compete with or supplant NeuStar, NAPM will have to consider that the industry will not see savings, if any, in the NeuStar contract until the

⁹⁷ NeuStar Opposition at 19, 21.

⁹⁸ NAPM Comments at 19.

⁹⁹ NAPM’s protestations are curious because Telcordia previously had a conference call with NAPM’s co-chairs to explain their analysis.

¹⁰⁰ Indeed, NAPM itself appears to have done some modeling, because it provided to the NANC spreadsheets that appeared to model Amendment 70 as compared to continuing under Amendment 57.

following year, meaning that the industry will have to pay both NeuStar's full fee initially, and also the competitor's fee, increasing the industry's costs, before receiving any offset for volume-based adjustments in NeuStar's contracts. NAPM does not deny that this one-year lag effect exists. It simply ignores it.

Second, Amendment 70 creates a barrier to entry by not reducing NeuStar's revenue *at all* unless it loses approximately 30% of the market, and even then only imposing very modest reductions if a competitor should reach 50% share of the market.¹⁰¹ This means that, assuming NAPM is seeking to minimize overall costs, NAPM would not introduce a competing vendor who would have less than 30% market share because the industry – and, ultimately, consumers – cannot possibly save a penny, and will necessarily pay more in total for number porting, until a new vendor gains at least 30% of the market.¹⁰² NAPM fails to point to any flaws in this analysis, which flows straight from the pricing formulas in Amendment 70.

In fact, it is doubtful that it would ever be rational under Amendment 70 for the industry to bring in a competitor before 2016. Even at 50% market share, the competing NPAC vendor would have to be so much more efficient than NeuStar that a substantial question would be raised as to why it would be in the public interest for NeuStar to be the porting administrator for any transactions. Losing half the business, NeuStar would still receive 92% of the revenue for 2009-2015, as compared with serving 100% of the

¹⁰¹ 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 Nos. 07-149, 09-109 at 19-22 (filed May 20, 2009) ("Telcordia Petition").

¹⁰² This assumes that the competitor does not provide NPAC services for free.

market.¹⁰³ Again this does not vary whether the competitor entered under a regional, primary/standby, or multivendor model.

Rather than acknowledging that it has agreed to give NeuStar nearly the same revenue even if it handles only half the work, NAPM posits that the incumbent would react to loss of market share presumably by lowering its fixed fee, which would then make it economically rational for NAPM to introduce competition. But NAPM fails to explain what possible incentive the incumbent would have to do so when the incumbent loses no revenue until it has lost at least 30% of the market, suffers only modest revenue losses thereafter even at a 50% loss of market share, and by failing to drop its fee creates a disincentive to hiring a competing vendor. Thus, while the incumbent may have substantial incentive to bid lower for work performed after 2015, there is no economic engine to drive substantial reductions in the incumbent's prices prior to 2016. The NAPM-claimed dynamic effects are simply wishful thinking.

NeuStar asserts that Amendment 70 provides some benefits to NAPM – namely, “immediate and significant savings.”¹⁰⁴ But this is a red herring. NAPM presents no analysis to show that the total expenditure through 2015 would be lower under any alternative other than continuing under Amendment 57. It does not appear that NAPM actually financially evaluated the possibility of soliciting competitive bids, or any other alternative to Amendment 70. NAPM and NeuStar simply fall back on NAPM's good faith. But such good faith does not establish that NAPM got as good a deal as the market

¹⁰³ Telcordia Petition at 21. While the precise percentage of NeuStar's revenue would vary depending upon assumptions regarding year-over-year transaction growth, the magnitude of the drop in NeuStar's revenue at a 50% loss in share of porting transactions is always small when compared to the drop in transactions.

¹⁰⁴ NeuStar Opposition at 16.

would have delivered. What is equally plausible is that NeuStar simply used short-term discounts to purchase protection from competition and competition-driven price and revenue reductions from 2012 to 2016.

These contracts cannot be rationalized on the ground that there has been a competition “for the market” to substitute for the foreclosure of the market for a defined period, as NAPM and NeuStar contend.¹⁰⁵ Competition “for the market” occurs when all vendors are on notice that they are bidding for an exclusive contract for a specific period and all – including the incumbent – can be excluded, so that they will all have an incentive to bid low. No such open competitive bidding occurred here with respect to Amendments 57 and 70. Nor did NAPM actually oust NeuStar from any region. To the contrary, when Telcordia presented proposals for a return to sole providers by region through its regional or primary/standby proposals, NAPM rejected those proposals, precisely because they “will not provide Users with a sufficient level of vendor choice that the Members of the NAPM LLC believe will best serve and benefit consumers.”¹⁰⁶ NAPM cannot now claim that it conducted a procurement “for the market” prior to executing Amendment 70.

Finally, Amendment 70’s foreclosure of any NPAC competition through 2015 cannot be justified on the basis of its elimination of Amendment 57’s penalty clauses. NAPM trumpets the elimination of those penalty clauses as a pro-competitive virtue.¹⁰⁷ But it would not have been necessary to eliminate these clauses if they had not been

¹⁰⁵ NeuStar Comments at 22-25; NAPM Comments at 16-17.

¹⁰⁶ See Letter from Melvin Clay and Timothy Decker, NAPM LLC Co-Chairs, to Joel Zamlong, Telcordia Technologies, at 2 (Nov. 20, 2008) (attached as Exhibit 3 to Telcordia NANC Reply).

¹⁰⁷ NAPM Comments at 5.

(unlawfully) included in Amendment 57 in the first place. And in any event, a prohibition on issuing RFPs, RFIs or RFQs, or on contracting with an alternative NPAC vendor prior to the end of 2011, subject to a \$30 million annual penalty, is hardly necessary if, as under Amendment 70, NPAC competition is now economically foreclosed through the end of 2015. NAPM's attempt to spin its vices into virtues should be rejected.

The plain economic reality remains that Amendment 70 does not permit NPAC competition until 2016, no matter how overpriced Amendment 70 may be or how efficient a competitor may be, and was adopted without an upfront competitive bid "for the market" for this period. This is anticompetitive.

B. Extending the NPAC into Adjacent Markets Such as ENUM and IP Routing Allows NeuStar To Cross-Subsidize Its Entry into Those Markets.

Amendment 70 also creates a structure, implemented through Amendment 72, that allows NeuStar to use the NPAC to provide ENUM and IP routing services funded through the FCC's mandatory cost recovery scheme. This enables NeuStar to cross-subsidize entry into those markets. NeuStar and NAPM fail to address the cross-subsidy.

In contrast to the NPAC market, ENUM/IP routing and interconnection today is a competitive market. Telcordia is but one competitor of many. Of the three major U.S. competitions for carrier ENUM services, Telcordia has won one, VeriSign has won one, and NeuStar has won one.¹⁰⁸ Several IP-peering federations presently provide IP-routing

¹⁰⁸ Telcordia was awarded the CC1 ENUM LLC, VeriSign was awarded the Cable Labs, and NeuStar, with its Pathfinder product (not an NPAC related product, at least at the time), was awarded the GSM Association contract.

services.¹⁰⁹ Telcordia competes with all of these companies to provide these services to others.

Without NPAC, each competitor providing ENUM/IP routing must bear the costs of creating its underlying database, which it then recovers from its ENUM/IP routing customers. But Amendment 70 permits NeuStar to expand NPAC to support NeuStar's separate ENUM/IP routing services and, significantly, to bury these database costs into the overall NPAC costs that are recovered through the FCC's mandatory assessment on all telecommunications carriers and interconnected VoIP providers. This means that carriers using Telcordia, VeriSign, or another NeuStar competitor for ENUM/IP routing services capabilities must pay not only for their own ENUM/IP routing services, but also to support NeuStar's database.

Amendment 70 thus serves to transfer significant marginal costs – the costs of establishing and populating an ENUM database – from NeuStar's ENUM customers to the NPAC cost recovery mechanism. It further exacerbates the cross-subsidy from the NPAC to NeuStar's ENUM products by giving additional discounts for use of the URI fields.¹¹⁰ No other ENUM competitor can do this, because all other ENUM competitors have been locked out of the NPAC market through 2015. These effects of Amendments 70 and 72 are hardly “neutral,”¹¹¹ nor do they benefit “the public interest”¹¹² or “consumers and carriers.”¹¹³ Further underscoring the anticompetitive nature of the URI

¹⁰⁹ Examples include Arbinet and Stealth.

¹¹⁰ See Amendment 70 § 35.5(b) (attached as Exhibit 1 to Telcordia Petition).

¹¹¹ See NeuStar Opposition at 11-12.

¹¹² NAPM Comments at 4.

¹¹³ Reply Comments of tw telecom, inc., WC Docket No. 09-109, at 5 (filed Sept. 29, 2009).

provisions of Amendment 70, these optional fields do not meet the FCC’s standard for inclusion of data in the NPAC – that the data must be “necessary to route telephone calls to the appropriate telecommunications carriers.”¹¹⁴ This issue is currently pending before NANC, and Telcordia incorporates herein its reply submission to the NANC. However, neither NAPM nor NeuStar have actually demonstrated that the URI fields incorporated in the NPAC pricing through Amendment 70 and authorized in Amendment 72 are in fact necessary to route any services to the appropriate telecommunications carrier, even without converting IP traffic to PSTN.¹¹⁵ Moreover, the addition of these fields to the NPAC does not actually address the problem that leads to transcoding of IP traffic to TDM and then back into IP, which stems in part from lack of direct and trusted IP connection between service providers. Solving this problem will require more information than just a URI field in the NPAC.¹¹⁶

The record demonstrates that Amendment 70 suppresses competition and its accompanying innovation, both by preventing NPAC competition prior to 2016 and by allowing the current NPAC contractor to use the NPAC to cross-subsidize entry into adjacent markets. This harms the public interest without any affirmative evaluation, decision or approval by the FCC. Indeed, NAPM member Comcast’s comments reflect this concern, urging that “the Commission should reiterate that it is the NAPM’s duty to act in the best interests of the telecommunications industry at all times, including by

¹¹⁴ 47 C.F.R. § 52.25(f).

¹¹⁵ Telcordia NANC Reply at 15-16.

¹¹⁶ Telcordia NANC Reply at 17.

taking actions necessary to minimize porting costs.”¹¹⁷ To do this, the NPAC contracts must be terminated and put out for competitive bid.

V. The FCC Has the Authority and the Basis for Setting Aside or Directing Revisions to the NPAC Contract as Contrary to the Public Interest.

NeuStar’s and NAPM’s next ploy to insulate their contracting practices from meaningful review and accountability is to invoke the *Mobile-Sierra* doctrine.¹¹⁸ But this is also unavailing. First, the contract itself recognizes the Commission’s authority to modify the contract. Second, *Mobile-Sierra* doctrine is inapplicable here, where NAPM has acted outside its authority, and also because *Mobile-Sierra* does not apply to third party challenges. Third, *Mobile-Sierra* permits the Commission to modify the terms of “a private contract between two carriers” if it determines that “the terms of the contract would ‘adversely affect the public interest.’”¹¹⁹ Further, the Commission “has long had a policy” that it will abrogate parts of agreements “that violate Commission policy,” particularly “agreements that provide for exclusivity on the grounds that they violate Commission policy in favor of competition.”¹²⁰

NeuStar does not dispute – because it cannot – that the FCC has the authority to oversee the NPAC contracts. The FCC permitted NAPM’s predecessors to “manage and oversee” the NPAC contracts on an interim basis, subject to NANC and FCC oversight, and with the express requirement that NAPM’s predecessors would “follow any and all

¹¹⁷ Comcast Comments at 6.

¹¹⁸ NeuStar Opposition at 35-38; NAPM Comments at 4.

¹¹⁹ *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum and Opinion Order, 10 FCC Rcd 654, 656 ¶ 15 (1995) (“ACC”); see also *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 n.2 (D.C. Cir. 1987).

¹²⁰ *AT&T Corp. Country Direct Service Agreement with Telecomunicaciones Internacionales de Argentina Telintar, S.A.*, Memorandum Opinion and Order, 11 FCC Rcd 13893, 13896 ¶ 10 (2001).

directives from state and federal regulators.”¹²¹ This oversight authority would be meaningless if the FCC lacked the authority to alter the NPAC contracts when it was in the public interest to do so. Indeed, Article 25 of the Master Agreement expressly reflected as much:

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 there under 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.¹²²

NeuStar cannot now claim that the FCC lacks authority to direct changes to the NPAC/SMS contracts, including reformation.

In any event, *Mobile-Sierra* applies to valid contracts only,¹²³ not to contracts – or aspects thereof – that are invalid in their formation.¹²⁴ Although Telcordia is not challenging the validity of the initial, competitively bid NPAC contract, as discussed in Part II, *supra*, the subsequent amendments such as Amendments 57, 70 and 72 exceeded the scope of the NAPM’s authority by deciding inherently governmental issues. NAPM cannot enter into a valid contract outside the scope of its authority. For the same reason, *Mobile-Sierra* does not apply to violations of CICA’s competitive bidding requirements. Contract amendments, such as Amendments 57, 70 and 72 entered into in violation of

¹²¹ Second Report and Order, 12 FCC Rcd at 12348 ¶ 121.

¹²² Agreement for Number Portability Administration Center/Service Management System between Lockheed Martin IMS and Mid-Atlantic Carrier Acquisition Company, LLC, entered into Sept. 22, 1997, at Article 25 (emphasis added).

¹²³ See *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.*, 128 S. Ct. 2733, 2747 (2008).

¹²⁴ See *id.*

CICA's competitive bidding requirements are invalid and must be re-bid in compliance with CICA.¹²⁵

NeuStar also ignores the D.C. Circuit's ruling in *Maine Public Utilities Commission v. Federal Energy Regulatory Commission*, which held that when a challenge "is brought by a non-contracting third party, the *Mobile-Sierra* doctrine does not apply."¹²⁶ That is the case here: Telcordia – a non-contracting third party – is challenging Amendments 57, 70 and 72 as failing to safeguard the public interest in obtaining the lowest possible prices by failing to conduct a competitive bid, impermissibly excluding Telcordia from the market for NPAC administration services, and cross-subsidizing NeuStar's entry into other markets.

Moreover, courts have made the commonsense judgment that, even under *Mobile-Sierra*, the public interest standard allows agencies to protect third parties from harm. "The most attractive case for affording additional protection [under the public interest standard], despite the presence of a contract, is where the protection is intended to safeguard the interests of third parties The *Mobile-Sierra* doctrine itself allows for intervention by [the regulatory agency] where it is shown that the interests of third parties are threatened."¹²⁷

¹²⁵ See, e.g., *CPT Corp.*, 1984 U.S. Comp. Gen. LEXIS 1037.

¹²⁶ 520 F.3d 464, 478 (2008), cert. granted, 129 S. Ct. 2050 (2009). *Mobile-Sierra* originated from cases in which one party to a contract sought relief from that contract through the regulatory process. See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

¹²⁷ *Northeast Util. Serv. Co. v. Fed. Energy Regulatory Comm'n*, 993 F.2d 937, 961 (1st Cir. 1993); see also *Northeast Util. Serv. Co. v. Fed. Energy Regulatory Comm'n*, 55 F.3d 686, 692-693 (1st Cir. 1995).

NeuStar’s argument that a heightened public interest standard applies fundamentally misreads the Commission’s cases. To be sure, the *Mobile-Sierra* cases establish that a party to a private contract seeking relief from rates it agreed to pay must show not that it might be entitled to a higher or lower rate in the absence of a contract, but rather that the contract harms the public interest. The standard merely requires more than just “private injury” from agreeing to too high a rate or to one that was unreasonably discriminatory.

Here, however, Telcordia is challenging the contract’s harm to competition, in which the Commission has long recognized a public interest. As discussed in Part I, *supra*, competition and competitive bidding themselves protect the public interest by “giv[ing] all persons equal right to compete for Government contracts; [] prevent[ing] unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus [] secur[ing] for the Government the benefits which arise from competition.”¹²⁸ As Comcast notes, the Commission already recognized that “there are clear advantages to having at least two experienced number portability database administrators that can compete with and substitute for each other, thereby promoting cost-effectiveness and reliability in the provision of Number Portability Administration Center services.”¹²⁹ These public interest concerns are compromised when NAPM gives NeuStar *de facto* exclusivity through 2015 without any open and transparent competitive bidding.

¹²⁸ *United States v. Brookridge Farm, Inc.*, 111 F.2d at 463.

¹²⁹ Comcast Comments at 3 (quoting Second Report and Order, 12 FCC Rcd at 12306 ¶ 38).

Similarly, NeuStar's use of the NPAC contract to cross-subsidize its entry into adjacent markets and thus negatively affect competition in those markets poses a public interest concern. Furthermore, there is no issue here of "contract stability." Telcordia is challenging Amendments 70 and 72 promptly, as it did with Amendment 57. Because NAPM and NeuStar did not present these amendments to the FCC for pre-effectiveness review, the FCC had no opportunity to oversee this contract amendment prior to its execution.

Here, therefore, the applicable public interest standard is not a heightened standard of review, but the Commission's ordinary public interest test. As the D.C. Circuit underscored in upholding the FCC's *MDU Exclusive Access Order*, the Commission had the authority to "significantly alter[] the bargained-for benefits of now-unenforceable exclusivity agreements" after weighing the public interest benefits and harms.¹³⁰ Thus, the FCC can revoke or reform these contracts when necessary to protect third-party carriers, interconnected VoIP providers and consumers and the public interest in competition.

None of the cases cited by NeuStar demonstrate otherwise. *ACC Long Distance* is inapposite to the situation here. There, the complainant made no public interest showing at all.¹³¹ In *IDB Mobile*, the main case relied on by NeuStar, the Commission

¹³⁰ *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 671 (D.C. Cir. 2009); Telcordia Petition at 47-49. Although that case did not apply Section 201, the Commission used its analogous authority in Section 628 with respect to "unfair or deceptive acts or practices" to ban such exclusive contracts. *NCTA*, 567 F.3d at 661.

¹³¹ See *ACC*, 10 FCC Rcd at 657 ¶ 18 (The party challenging the rates in a contract had "made no showing that the terms of [the] contract . . . had any impact at all on the public interest."); *Western Union*, 815 F.2d at 1501 ("The Commission made no finding that the requirements [that it had abrogated] were detrimental to the public interest.").

found that IDB offered no evidence that the disputed contract provision “adversely affect[ed] the public” because striking the contract provision would have had no effect on end users.¹³² Moreover, IDB was seeking to lower its own rate in what the Commission characterized as a “heads I win, tails you lose” approach to long-term contracts.¹³³

Furthermore, NAPM invents out of whole cloth the requirement that the Commission examine the contract as a whole and not just the offending provisions.¹³⁴ None of the *Mobile-Sierra* cases cited by NeuStar or NAPM hold that the Commission must uphold a provision that violates the public interest or is unlawful if it is contained within a contract that has other public interest benefits.

Where, as here, NAPM has compromised the public interest in competition and in minimizing the overall cost of number portability administration by foreclosing competition through 2015, and has also compromised the public interest in competition in the ENUM services market, the Commission therefore has full authority to reform the offending contracts, as well as to terminate them and subject all NPAC contracts to new, open and transparent competitive bids.

¹³² *IDB Mobile Comm. Inc. v. COMSAT Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 11474, 11480 ¶ 14 (2001).

¹³³ *Id.* at 11482 ¶ 18.

¹³⁴ NAPM Comments at 4; *see also* NeuStar Comments at 36 (misstating the standard for modifying contract terms as requiring a finding of unlawfulness; that legal standard applies to challenging rates, and differs from the public interest standard that applies to give the Commission authority to change other contract terms). *Cf. Western Union Tel. Co.*, 815 F.2d at 1501 (“Under the *Sierra-Mobile* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest.”).

VI. The Inseverability Clause Cannot Be Permitted To Erect a Shield Against FCC Oversight.

NeuStar and NAPM feign insult at Telcordia's use of the term "inseverability clause" to describe Section 15.2 of Amendment 70.¹³⁵ But we call it as it is, and no semantic pettifogging can obscure the fact that Section 15.2 operates as an inseverability clause. If left in place the clause would obstruct the FCC's abilities to ensure proper accountability and decisionmaking processes on inherently governmental public policy issues.

Section 15.2 provides:

If any provision of this Amendment is held invalid or unenforceable the remaining provisions of this Amendment shall become null and void and be of no further force or effect.

NAPM and NeuStar do not deny that in the event the FCC actually exercises its oversight authority and concludes that one or more provisions of Amendment 70 (or Amendment 57 before it) were unlawful, the effect of this clause would be to reprice, retroactively to January 1, 2009, for Amendment 70, and September 21, 2006, for Amendment 57, all porting transactions. For 2009 alone, accepting *arguendo* NeuStar's numbers, that creates an oversight penalty of \$50 million.

NeuStar correctly observes that inseverability clauses are common in business contracts.¹³⁶ But this contract is not just an ordinary business contract, as described in Part I.A, *supra*. All telecommunications carriers and interconnected VoIP providers end up bound by the terms of the NAPM-NeuStar agreement, not just NAPM's members, and all telecommunications carriers and interconnected VoIP providers bear the costs of the

¹³⁵ NeuStar Comments at 34-35; NAPM Comments at 6, 28-30.

¹³⁶ NeuStar Comments at 35.

NAPM-NeuStar agreement, not just NAPM's members. Just as importantly, the contracts impose costs on all consumers. In addition, the contract's exclusionary terms and cross-subsidization of NeuStar's entry into adjacent markets also impair the public's interest in fair and open competition in those markets. This is not a situation in which an inseverability clause reflects the fact that the contracting parties themselves internalize all the risks and the benefits of inseverability.

Furthermore, NAPM and NeuStar both ignore the fact that the NAPM-NeuStar agreements, including Amendment 70, are expressly subject to FCC oversight, as a condition of NAPM's ability to "manage and oversee" these contracts precisely because the agreements affect the public interest and parties beyond NAPM's members. FCC oversight must necessarily include the ability to review NAPM's actions for their lawfulness, justness, reasonableness and consistency with the public interest. This is especially the case with respect to a publicly funded contract that took effect without Commission approval.

NAPM engages in Alice-in-Wonderland logic when it argues that Section 15.2 is really just an acknowledgement of the FCC's regulatory authority, rather than an attempted constraint on the FCC's authority. In the first instance, the provision of the contract that acknowledges the FCC's regulatory authority is Article 25 of the Master Agreement, which expressly acknowledges the Commission's authority to direct changes or modifications to the Agreement. Section 15.2 is different: it provides that if the Commission exercises the authority acknowledged in Article 25 to direct changes or modifications to Amendment 70 (or any of the other amendments containing this clause)

the entire amendment ceases to exist – retroactive to its execution and implementation.

This can be nothing other than an attempt to blunt oversight.

The Commission simply cannot allow its oversight powers to be held hostage – or for parties to reap a windfall from including unlawful or anticompetitive terms in a contract with as public a character as the NPAC contract. Invalidating the Section 15.2 inseverability clause is not “cherry-picking,” but accountability, demanding that NeuStar and NAPM be accountable to the Commission’s rules and the public interest.

VII. The FCC Cannot Simply Ratify NAPM’s Actions Without Competitive Bidding.

CICA does not permit the FCC simply to ratify NAPM’s contract decisions without justifying it. The FCC itself is unambiguously subject to CICA’s requirements. As discussed above, where a contract has been improperly modified beyond the scope of the initial procurement, a new competition must be conducted to meet the needs of the modified contract.¹³⁷

Requiring a rebid is an appropriate form of injunctive relief to remedy failures to conduct competitive bidding. Potential competitors’ inability to bid on the contract and their loss of potential business is an irreparable harm that warrants injunctive relief. In the context of awarding an injunction to enforce federal procurement processes, the Court of Federal Claims has noted that “[i]t is well-settled that a party suffers irreparable injury when it loses the opportunity to compete on a level playing field with other bidders.”¹³⁸ To satisfy this prong, it is sufficient to show that the potential bidder was excluded

¹³⁷ *CPT Corp.*, 1984 U.S. Comp. Gen. LEXIS 1037, at *2.

¹³⁸ *Cardinal Maint.*, 63 Fed. Cl. at 110 (“Specifically, when a plaintiff shows that it was excluded from the bidding process, perhaps solely because of the government’s improper conduct, the plaintiff has satisfied requirement for irreparable injury.”).

because of a CICA violation.¹³⁹ On the other hand, NeuStar cannot be found to be harmed where it reaped the benefits of maintaining its foothold as a sole-source vendor as a result of a negotiation process that violates federal procurement laws.¹⁴⁰ The grant of injunctive relief also serves the public interest by “preserv[ing] the integrity of the federal procurement process.”¹⁴¹

Ordering a new competitive procurement preserves accountability and oversight, and, along with the possibility that a competitive bidding process will attract a less costly bid, serves the public interest.¹⁴² It would be neither “extraordinary” nor “unprecedented”¹⁴³ for the FCC to take back the reins and rebid the number portability administration contract. Once a new contract or contracts are in place, the existing contract would be terminated. In the meantime, if the Commission determines that the public interest would be served by maintaining some provisions of the number portability contract, it has full authority to tailor relief to meet the interim needs for number portability database administration with the current vendor on an interim basis.

VIII. A Standstill Order Remains Appropriate and Necessary To Allow the NANC and Commission To Resolve Telcordia’s Challenge to the Lawfulness of Adding the Disputed URI Fields.

Both NAPM and NeuStar, as well as some of their supporters, attack Telcordia’s request for a standstill order with respect to the implementation of Amendment 72’s provisions regarding URI fields for IP voice, SMS and picture-messaging. The merits of

¹³⁹ *Id.*

¹⁴⁰ *See Al Ghanim Combined Group Co. v. United States*, 56 Fed. Cl. 502, 520 (2003).

¹⁴¹ *See SAI*, 60 Fed. Cl. at 747.

¹⁴² *See Cardinal Maint.*, 63 Fed. Cl. at 111.

¹⁴³ NAPM Comments at 9.

the standstill order have already been addressed. Telcordia will not repeat those arguments here, and instead incorporates by reference its relevant previous filings.¹⁴⁴ NeuStar continues to misstate the applicable test that the FCC has applied for granting a standstill request. As discussed more fully in Telcordia's requests for a standstill order, under the Commission's precedent, the Commission applies a balancing test of all four factors for injunctive relief, and has found "no due process requirement that any single factor, such as irreparable injury to the moving party, be demonstrated as a prerequisite to issuance of a standstill order."¹⁴⁵ As Telcordia has demonstrated in previous filings seeking this relief, it nonetheless satisfies each of the four prongs, including the likelihood of success on the merits.¹⁴⁶

Nor is Telcordia's request for a standstill order now "moot" because the parties have proceeded with implementation of alterations to the NPAC via Amendment 72 in

¹⁴⁴ See Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Ms. Julie Veach, Acting Chief, Wireline Competition Bureau, Federal Communications Commission (May 18, 2009); Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Ms. Julie Veach, Acting Chief, Wireline Competition Bureau, Federal Communications Commission (May 22, 2009); *Ex Parte* Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (June 12, 2009); *Ex Parte* Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (June 19, 2009); *Ex Parte* Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (June 24, 2009) (all filed in WC Docket No. 07-149).

¹⁴⁵ *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 14508, 14516 n.43 (1998) ("*AT&T*"); Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (Jul. 29, 2009) ("*Telcordia Letter*").

¹⁴⁶ See Telcordia Letter.

the midst of the ongoing regulatory proceedings.¹⁴⁷ The request to halt the implementation and use of these fields in the NPAC database is not mooted simply because the parties have implemented unauthorized fields. Here, as in the *Ameritech-Qwest Teaming Standstill Order*, “it will be virtually impossible to ‘unscramble’ the effects of the agreement and return to the current status quo.”¹⁴⁸

CONCLUSION

NAPM’s administration of the NPAC contracts has, for too long, operated outside of the well-recognized parameters that require government officials to make the fundamental public policy decisions regarding government programs. There can be little doubt that NPAC administration is a government program – just as NANPA administration and number pooling administration are. Yet unlike those other programs, there have been no competitive bids since 1997, and NAPM has continually extended and expanded the NPAC contracts without FCC authorization or approval. This has to stop. As Comcast points out, the Commission must review “the LNP administrative process to ensure that the benefits of competition are fully realized and that the roles of administrative bodies such as the NAPM are appropriately defined.”¹⁴⁹

The FCC is responsible for ensuring that the fees carriers, interconnected VoIP providers and, ultimately, consumers, pay in FCC-mandated local number portability surcharges are well spent. It cannot do so when NAPM fails to conduct any open and transparent competitive bids. Industry and consumers will now pay an estimated \$2.8

¹⁴⁷ NAPM Comments at 2 n.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.”).

¹⁴⁸ AT&T, 13 FCC Rcd at 14520 ¶ 24.

¹⁴⁹ Comcast Comments at 2.

billion between 2009 and the end of 2015 to NeuStar for NPAC administration services. If, like Amendment 57, that proves to be 20% too much, industry and consumers will have been overcharged by \$500-\$600 million. The only way that the FCC can protect the public interest and reestablish competition is to require the NPAC contracts to be rebid in an open and transparent matter, to be effective as soon as possible.

Respectfully submitted,



John T. Nakahata
Amy Richardson
Linda Coffin
Madeleine Findley
WILTSHIRE & GRANNIS LLP
1200 18th Street NW
Washington, DC 20036
(202) 730-1320

Counsel for Telcordia Technologies, Inc.

Date: September 29, 2009