WILTSHIRE & GRANNIS LLP

January 13, 2010

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: 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; Renewed Request for Interim Standstill Order; and Request that NANC Resolve Dispute Concerning Necessity of Adding Certain URI Codes for the Completion of Telephone Calls, WCB Docket Nos. 07-149 and 09-109

Dear Ms. Dortch:

On January 12, 2010, Richard Jacowleff and Louise Tucker of Telcordia Technologies, Inc. ("Telcordia"), and Madeleine Findley and I of Wiltshire & Grannis, on behalf of Telcordia, met with Priya Aiyar, Legal Advisor to Chairman Julius Genachowski, to discuss Telcordia's Petition 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.

The points discussed in these meetings are summarized in the attached written presentations,[1] and have been previously set forth in Telcordia's Petition filed May 20, 2009, and Reply to Comments filed September 29, 2009. We provided a copy of a September 17, 2009 letter from Melvin Clay and Timothy Decker, Co-Chairs of the North American Portability Management LLC ("NAPM LLC") to Thomas M. Koutsky, Chairman, North American Numbering Counsel ("NANC"), disclosing that the "minutes of the meetings of the Members

[1] *See* The Commission Should Grant the Telcordia Petitions (Dockets No. 07-149 & 09-109) (attached); Presentation at the FCC: FCC Must Act to Reassert Its Oversight and Control of Inherently Governmental Decisions, Reopen Competition in NPAC Services, and Preserve Competition in ENUM Services (November 4, 2009) (attached).

cannot be published, released to, or made accessible for inspection by, the public or non-Members, except on written request and upon a Majority Approval," subject to restrictions.[2] We also provided a copy of the Comptroller General of the United States' decision in *In re CPT Corp.*,[3] and a copy of Article 15.2 of the Amendment 70 to the Master Agreement. As follow-up, we are pleased to provide a copy of Articles 23-25 of the Master Agreement.

A copy of this letter is being filed in the above-referenced dockets.

Sincerely,

/s/John T. Nakahata
John T. Nakahata
Counsel to Telcordia Technologies, Inc.

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[2] *See* Letter from Melvin Clay, Co-Chair, NAPM LLC, & Timothy Decker, Co-Chair, NAPM LLC, to Thomas M. Koutsky, Chairman, NANC (Sept. 17, 2009) (attached).

[3] *See In re CPT Corp.*, 84-1 Comp. Gen. Proc. Dec. P606 (1984) (attached).

Attachment 1

THE COMMISSION SHOULD GRANT THE TELCORDIA PETITIONS (07-149 & 09-109)

Number Portability Administration Costs are Significant:

- Currently ~$300 million for 2009 (due to one-time discounts)
- Projected to rise to ~$500 million for 2015, with total $2.8 billion spend 2009-2015.
- Only one Administrator today – with no competitive bidding since 1997 to discipline price/service.
- 4 no-bid extensions/major cardinal changes by industry LLC to the Administrator contract, with no FCC approval.

Why this is important –

- Non-competitively bid contracts result in excessive costs, ultimately paid by consumers.
    - Amendment 57 – At least 20% too high
    - Amendment 70 – Again 20% too high.
- Competitive bidding provides marketplace and market-based accountability and transparency.

Fundamental premise – FCC, not a small group of providers, should be making the fundamental decisions with respect to governmental programs.

- Number Portability Administration is a governmental program. Carriers must participate, and must pay fees to support NPAC, under threat of FCC fines. Administrator is designated by the FCC.
    - NPAC contracts are not just "private contracts."
- Precedent – NANPA and Pooling contracts.

FCC must make cardinal (fundamental) policy decisions with respect to Administrator contracts:

- FCC cannot delegate fundamental policy decisions to non-federal governmental entities.
    - Fundamental policy decisions include:
        1. When, if ever, will the Administrator contracts be subject to open, competitive bidding?
        2. Will there be one Administrator or multiple Administrators?
        3. Can the Administrator use the database to provide competitive services in other markets such as ENUM?
    - Interim authority to "manage and oversee" NPAC contracts cannot be interpreted to encompass policy decisions.
    - FCC has insisted on competitive bidding for other numbering administrators.
- If NAPM is a federal entity, then the Competition in Contracting Act requires competitive bidding for cardinal changes, which has not occurred.
- Key Issue: Operating checks and balances on NAPM actions
    - Inseverability clauses frustrate checks and balances.

Appropriate Remedy for Contract Extended without Proper Authority is to Terminate Contract and Rebid. ***See e.g. CPT Corp.***

Attachment 2

Telcordia

the elements of success

FCC Must Act to Reassert Its Oversight and Control of Inherently Governmental Decisions, Reopen Competition in NPAC Services, and Preserve Competition in ENUM Services

Telcordia Contact:
Richard Jacowleff
rjacowleff@telcordia.com

Joel Zamlong
jzamlong@telcordia.com

Adam Newman
anewman@telcordia.com

Telcordia Counsel Contact:
John Nakahata
jnakahata@wiltshiregrannis.com

Linda McReynolds
lmcreynolds@wiltshiregrannis.com

Madeleine Findley
mfindley@wiltshiregrannis.com

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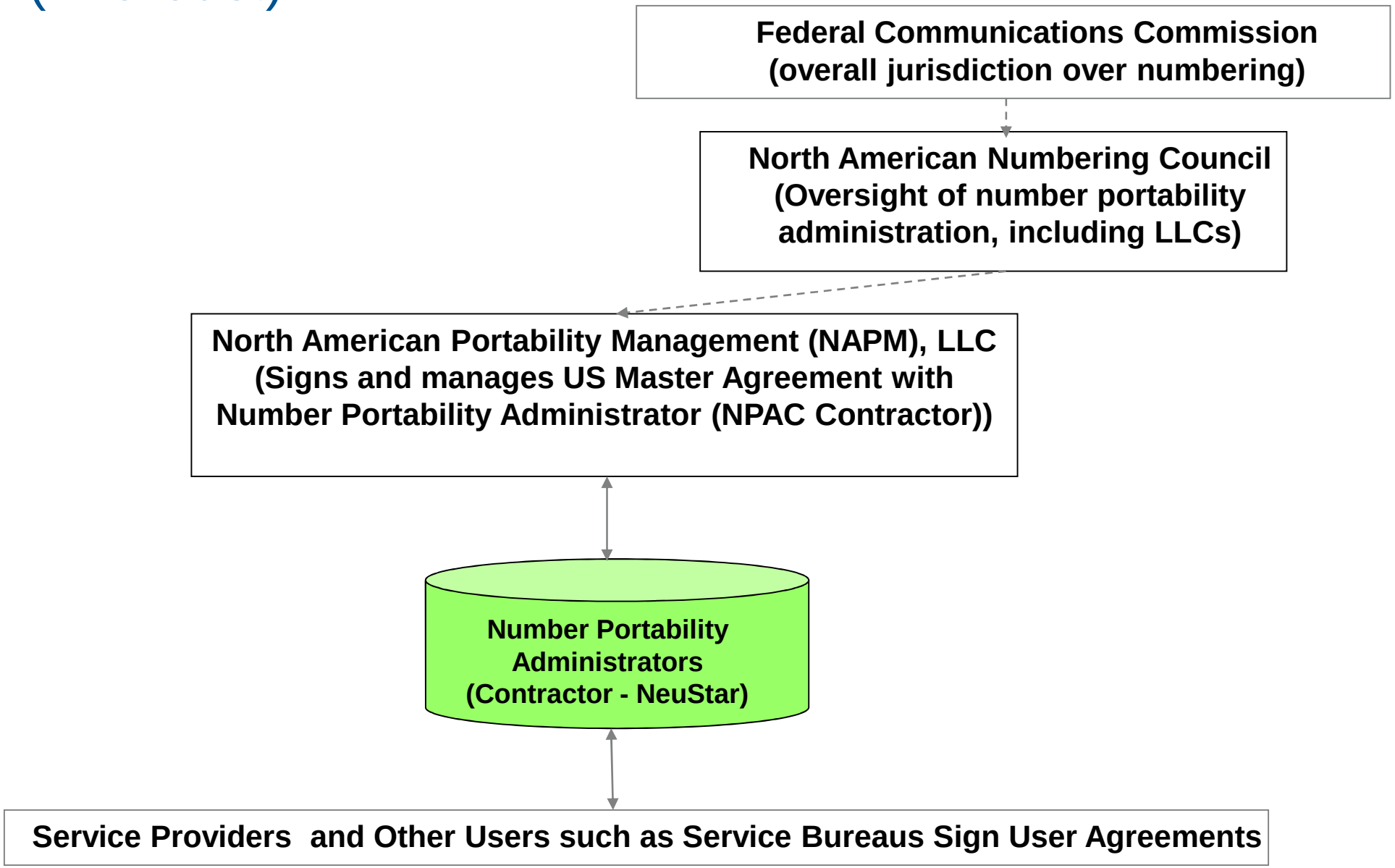
Oversight of Number Portability in the USA (The Cast)



Telcordia's 2009 Requests Before FCC and NANC

- Amendment 70 Petition
  - Begin competitive bidding for new NPAC contract.
  - Leave Amendment 70 prices in place during bidding and implementation transition.
  - Terminate existing contract when new contract is implemented.
- NANC Dispute on Whether URIs Can Be Implemented Without a NANC or FCC Finding that the are "Necessary to Route Telephone Calls."
- Request for a Standstill Order Pending NANC Dispute Resolution

Amendment 70 is Anti-Competitive And Attempts to Frustrate FCC Oversight

- NAPM and NeuStar eliminate all possibility of competitive NPAC services until 2016 (extended from 2012) – done in secret, without FCC approval.
  - Industry and consumers are overcharged by ~$550 million thru 2015
  - NAPM is exercising the FCC's inherently governmental authority over when to extend contracts or conduct bids.
  - Failure to bid violates Presidential directive and Competition in Contracting Act.
- NAPM improperly exceeds its authority by permitting NeuStar to transform the NPAC into an ENUM provisioning database – enabling NeuStar to extend its monopoly from NPAC to ENUM by 2016, without FCC approval.
- "All-or-nothing" inseverability clause, NAPM and NeuStar deliberately frustrate FCC oversight and consideration of policy issues.

NeuStar and NAPM LLC – A History of No-Bid Cardinal Changes That Harm Competition for Short Term Cost Savings, With No FCC Approval

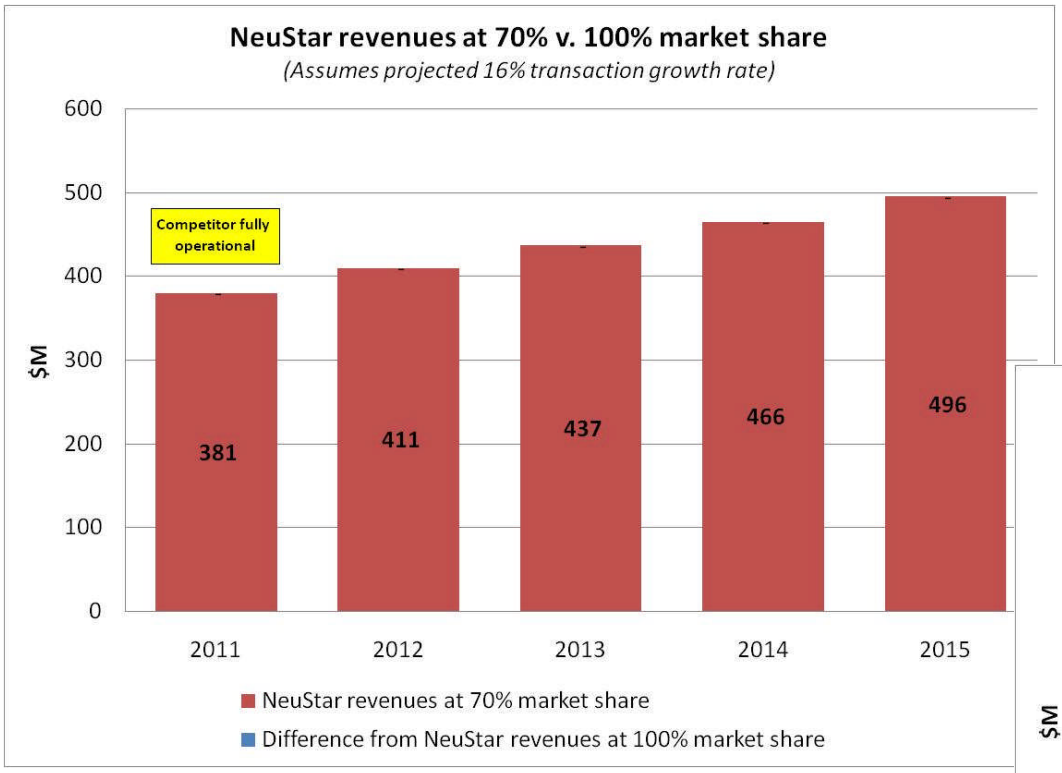
- Original bid contract – Term 1997-2002
- First No-Bid extension (12/2000) – Term extended to 2006, w/option for 2007.
- Second No-Bid extension (10/2003) – Term extended to 2011.
- Third No-Bid extension (Amendment 57, 9/2006) – Term extended to 2015; competitive bidding forbidden before 2012 with penalty clauses.
- Fourth No-Bid modification (Amendment 70, 1/2009) – Competition blocked to 2016

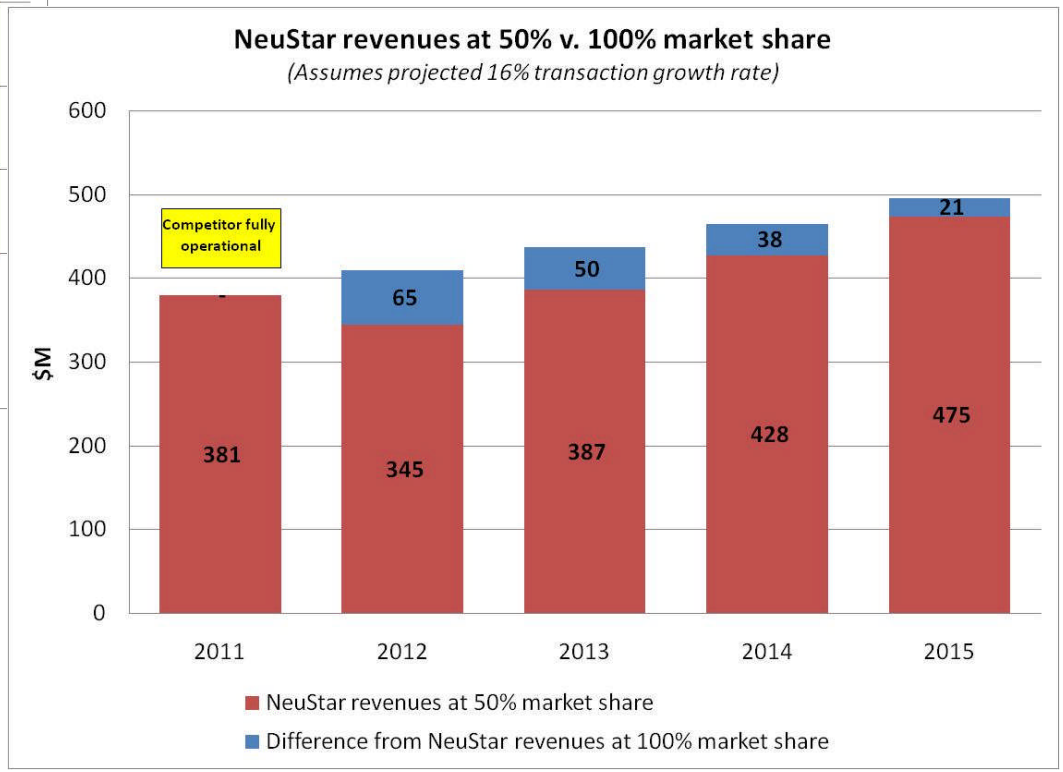
Amendment 70 Forecloses NPAC Competition to 2016 – Making Non-Exclusivity a Sham

- Amendment 57 (2006) blocked competition in NPAC services before 2012 by creating a $30+ million penalty for issuing an RFI or RFP, or selecting an additional NPAC vendor.
- Amendment 70 (2009) blocks competition by making it uneconomic to select an additional NPAC vendor(s).
  - NeuStar loses no revenue for one year after competitive entry, no matter how much market share it loses in the first year.
  - NeuStar may never lose any revenue. Even at significant (e.g. -30%) loss of market share, NeuStar loses no revenue.*
  - Even losing 50% market share, NeuStar gets ***92% of the revenue it would have received for handling 100% of the market.****
  - At 70% market share loss, NeuStar still gets 82% of the revenue it would have received for handling 100% of the market.*
  - If transactions grow faster, the picture is even worse.

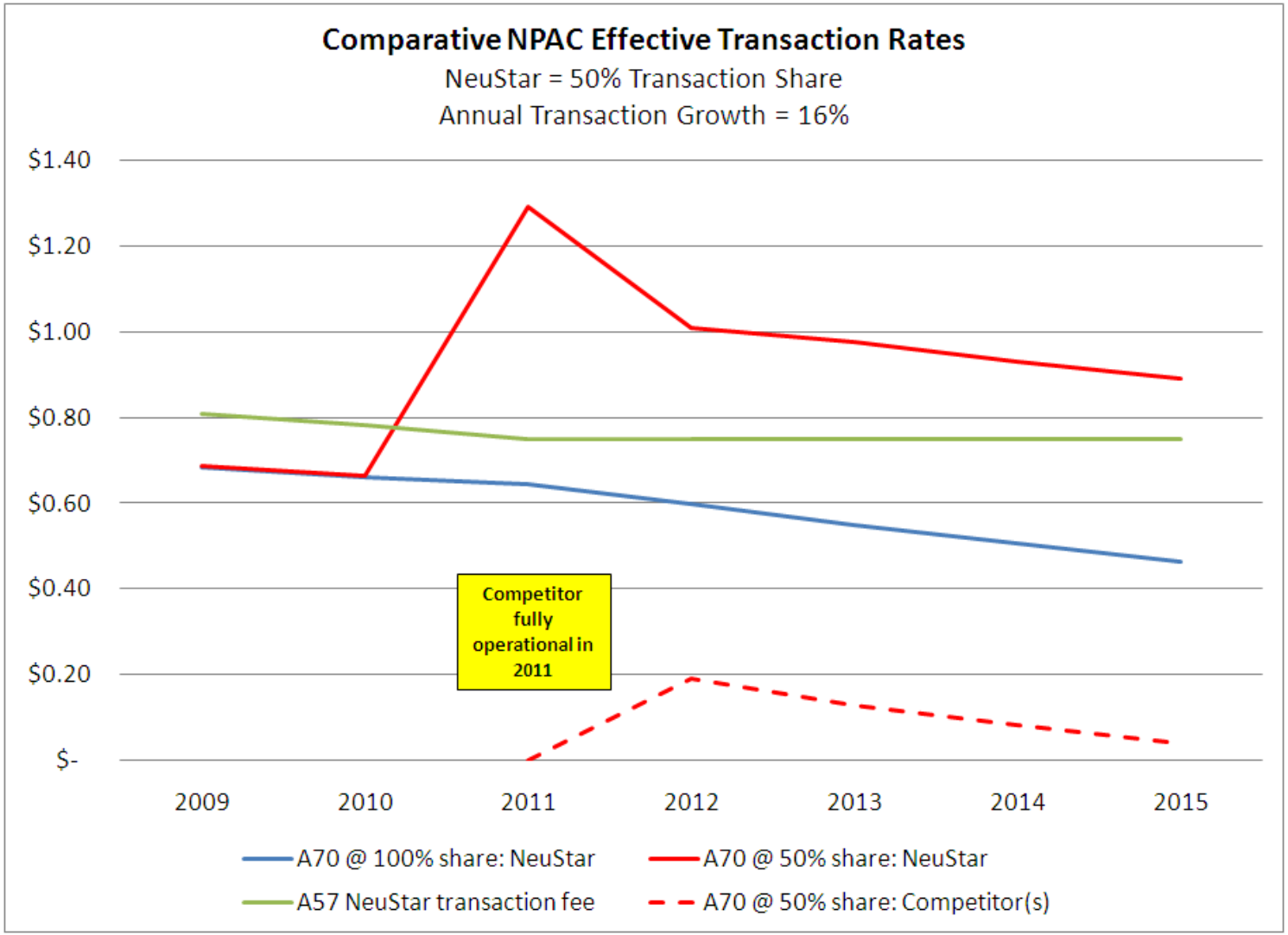
* For 2011-2015, assuming 16% annual transaction growth, and competitive entry in 2011 immediately at the stated percentage. Does not include 2016 credits.

Amendment 70: At 50% Market Share Loss, NeuStar Keeps 92% of Revenues – 2011-2015; at 30% Market Loss, it Keeps 100%





Another View – At 50% Share, Competitor's Effective Per Transaction Price Must Be Over 5x Lower than NeuStar's (And Free for the First Year)



A Bad Contract Gets Even Worse – Amendment 70 Extends the NPAC Monopoly to ENUM (Background)

- ENUM – A competitive, multi-vendor market today.
  - ENUM associates a Telephone Number with Uniform Resource Locators (URIs) associated with IP gateways for customer services/devices.
  - ENUM is not a number portability administration service, but today uses NPAC as an input; *however, in an all IP-IP universe, use of NPAC may no longer be needed*.
  - Tier 0/1 ENUM Clearinghouse Providers enable IP-IP traffic exchange between service providers.
  - For Tier 0/1 ENUM Clearinghouses, key asset is database of TNs and associated URIs.
  - ENUM providers charge their customers.

Amendment 70 Harms ENUM Competition

NeuStar CEO: “What [Amendment 70] does is takes an existing platform that all networks are currently physically interfacing with, they’re currently depending upon it for routing virtually all telephone calls and it puts into that database the first three simple IP data points that are necessary for the first simple IP applications that networks are going to provide.” (1/28/09 Investor Call)

- Amendment 70 cross-subsidizes the creation of an ENUM provisioning database by using the NPAC contract to create financial incentives (up to $22.5M) for the industry to issue the change orders and to actually use the URIs by 2011.
- URIs populated and modified under Amendment 70 are paid by industry as a whole, not by customer, creating another cross-subsidy.
- No other vendor can integrate NPAC and ENUM before 2016 due to Amendment 70’s competitive lock-out.
- High costs for others to create database means NeuStar can recoup monopoly profits after it drives other ENUM vendors from market.

FCC Rules Do Not Permit NAPM to Add URIs to the NPAC

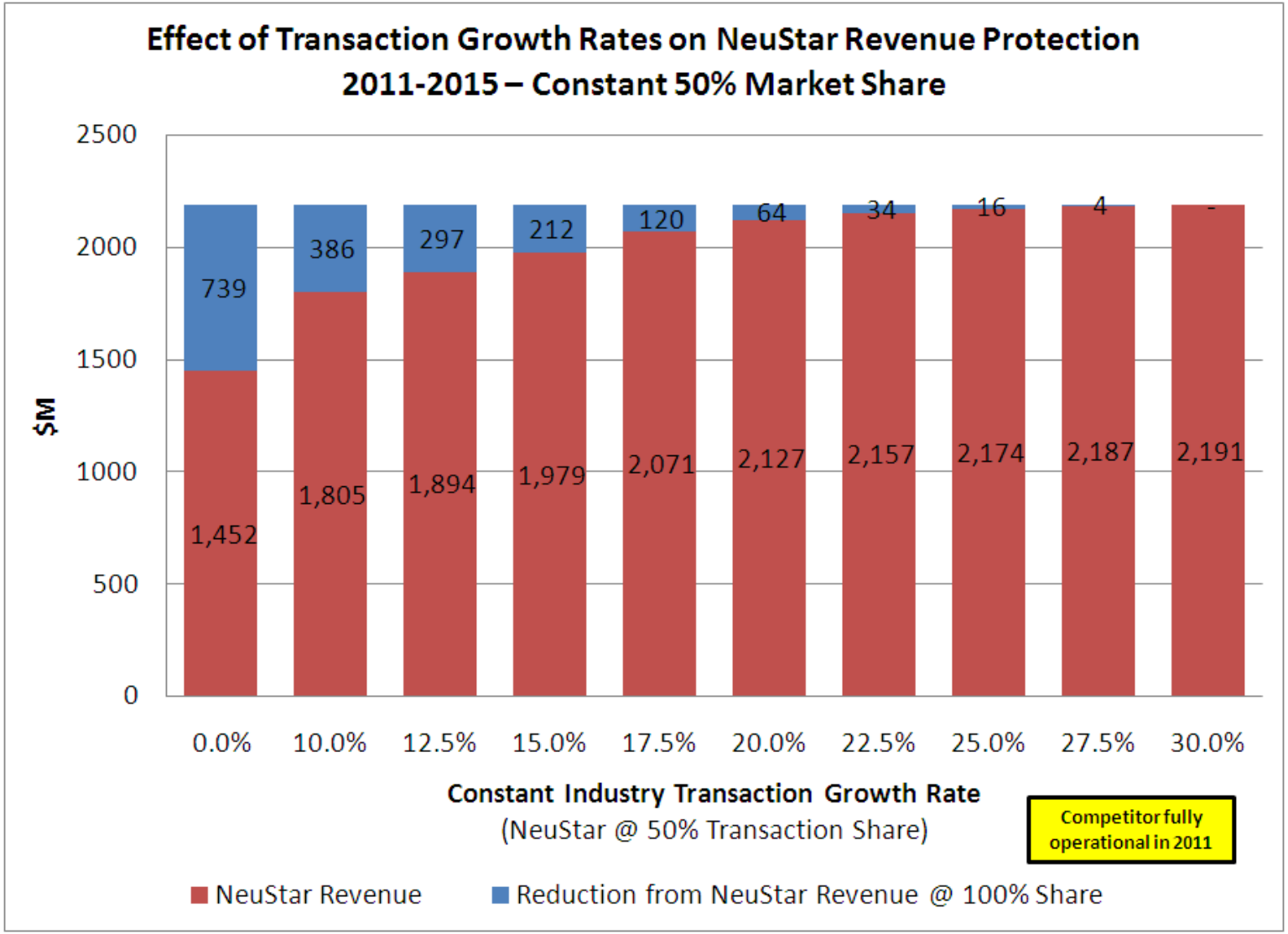
- 47 C.F.R. 52.25(f) prohibits addition to NPAC of data not "necessary to route calls to the appropriate telecommunications carriers." "The NANC shall determine what specific information is necessary."
- NANC has never found URIs to be "necessary to route calls to the appropriate telecommunications carriers. "
  - NANC considered in 2005 and failed to reach consensus.
  - As stated in the NANC 400 Report, "At the April 14, 2005 joint meeting of the Future of Numbering and LNPA Working Groups there was agreement of all parties that placement of Internet URIs (Universal Resource Identifiers) in the NPAC (Number Portability Administration Center) was not necessary to support PSTN (Public Switched Telephone Network) call completion."
- Neither NAPM nor the LNPA Working Group are NANC, and thus cannot add URIs to the NPAC without NANC finding the fields to be necessary. NANC operates pursuant to FACA – NAPM does not.
- No entity other than the FCC can authorize adding fields to the NPAC that are not "necessary to route calls to the appropriate telecommunications carriers." NANC cannot make policy.

What the FCC Needs to Do

- Prevent Further Harm
  - Immediately direct the NAPM and NeuStar to halt implementation of URI change orders, pending resolution of NANC dispute.
  - Direct NAPM not to execute further amendments without prior NANC and FCC review and approval.
- Reestablish Competition in NPAC Services at the Best Possible Price for Consumers
  - Declare current contracts unlawfully extended, unjust, unreasonable, contrary to public interest.
  - Immediately begin a competitive procurement for multivendor NPAC to replace the current contracts.
  - During bidding and transition use Amendment 70 to set NeuStar compensation. *See e.g. CPT Corp.*
- Reestablish Governmental Oversight
  - FCC makes final decision on all cardinal change contract amendments.

ADDITIONAL BACKGROUND

Slower Transaction Growth Does Not Negate Market Foreclosure; Faster Growth Enhances It



ENUM and the NPAC Chronology

- 2005
  - July – NANC sends report of no consensus on NANC 400 adding URI data in NPAC to FCC based on NANC Future of Numbering Working Group (FoN) Report
  - Nov – CableLabs issue RFI for VoIP Peering, reported that over 30 companies respond
- 2007
  - Nov – CC1 ENUM LLC issues RFP for Provider ENUM
- 2008
  - Feb – FCC permits the industry to reconsider NANC 400 in light of the FCC 08-188 Order on Number Portability (VoIP and Porting Fields Order)
  - May – LNPA Splits NANC 400 into 4 change orders one per URI (NANC 429-432) and includes in SP prioritization of next release; two of the URI COs are “above the line” in initial prioritization. Meeting of prioritization new Change Order 435 adding SMS added and included
  - July – Three of the URI Cos are included on the Recommended List for a next NPAC Release to LLC; neither NANC nor FoN consensus has been sought with regard to adding URI data to NPAC per the original report.
  - Sept – Amendment 62 expands definition of “calls” to include video, music, pictures and text.
- 2009
  - Jan – NeuStar and NAPM LLC sign Amendment 70 with discounts for inclusion of URI Data in NPAC
  - Feb – VeriSign issues press release announcing PacketCable certification of ENUM Server Provisioning Protocol for cable providers
  - Feb – Telcordia issues press release announcing award of CC1 ENUM LLC Service Provider ENUM registry to Telcordia

Chronology of Events Including Telcordia – NAPM LLC Activity

Legend
LLC Disclosure
Telcordia Disclosure

- 2005
  - Telcordia (and other competitor) submit unsolicited NPAC proposal presentations
- 2006
  - NAPM and NeuStar sign Amendment 57
- 2008
  - Mar - Telcordia presents unsolicited Regional proposal w/discounted pricing
  - July - Telcordia submits unsolicited Regional and Multi-Peering proposals
  - Aug – NAPM asks 28 questions regarding Peering proposal
  - Sep - Telcordia presents Peering responses and industry ROI information
  - Sep – NeuStar advises the NAPM that it "wanted to discuss a restructuring of pricing terms in the Master Agreements"
  - Nov 20 – NAPM informs Telcordia that is will not consider a regional model because it "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 . . . ." Says "The Multi-Peering Administrator Model deserves and warrants further consideration." Requests Telcordia to initiate "appropriate industry-wide subject matter expert consideration, review and buy-off" on a peering NPAC.
- 2009
  - Jan 8 – LNPA WG meets to consider multipeering NPAC architecture.
  - Jan 28 – NAPM adopts Amendment 70 and notifies NANC and the FCC.

Attachment 3

NAPM
NORTH AMERICAN PORTABILITY MANAGEMENT, LLC

North American Portability Management, LLC

September 17, 2009

Thomas M. Koutsky
Chairman, North American Numbering Counsel
5335 Wisconsin Avenue, NW, Suite 440
Washington, DC 20015-2034

Chairman Koutsky,

At the July 16, 2009 NANC meeting, as part of the report of the NAPM LLC, I reported that Amendments 62 and 70 both were approved by the requisite Supermajority Approval of the Members of the NAPM LLC (that is, approval of at least 75% of the Members present at a meeting at which a quorum is present), but were not unanimously approved. I was asked by a NANC representative what the "minority position" was with respect to these two Amendments. At the time, I was unable to recall the details of those "minority positions." I offered to refresh my memory by consulting the minutes of the meetings of the Members of the NAPM LLC at which those discussions occurred, and I agreed to provide a response after I consulted the minutes.

I have now consulted the minutes of the meeting of the Members that occurred on July 10, 2008, with respect to Amendment No. 62, and the minutes of the meeting of the Members that occurred on January 16, 2009, with respect to Amendment No. 70. Under the terms of the "Operating Agreement" of the NAPM LLC, Section 5.14.2, the minutes of the meetings of the Members cannot be published, released to, or made accessible for inspection by, the public or non-Members, except upon a written request for release and upon a Majority Approval, and then, subject to applicable attorney-client privileges, attorney work product privileges and restrictions regarding Confidential Information (as described in the Operating Agreement). Therefore, I cannot simply provide copies of those minutes or extracts from those minutes. In addition, the NAPM LLC has never published or released minutes of meetings during non-public or closed portions of the meetings in the past, because the Members of the NAPM LLC believe that such publication or release could "chill" or reduce the free, full and robust exchange of views and the debate that occur at the meetings.

Nonetheless, in an attempt fully to respond to the questions regarding the "minority position" with respect to Amendments No. 62 and 70, the Member Company who held and expressed that "minority position," has consented to my disclosure of that position in summary form in response to those questions. Accordingly, the following is my summary of the minority position expressed with respect to approval of Amendments No 62 and 70.

Please also be aware that it is not unusual for actions of the NAPM LLC not to be unanimous. Nonetheless, despite lack of unanimity, the processes and procedures of the NAPM LLC consistently are followed to allow full and fair debate and discussion, and were followed with respect to discussion and approval of Amendments No. 62 and 70. No Member of the NAPM LLC has expressed any objection to those processes and procedures or has raised any concern or question regarding their ability to participate in that process and in those procedures.

SOW 62: NUE - (NPAC / SMS - Contractor as a User)

The Member Company that disagreed with Amendment 62 stated that voting to adopt Amendment 62 would give NeuStar the ability to leverage the NPAC platform, as well as all future enhancement of that platform, for commercial gain. They felt this would give NeuStar an unfair competitive advantage being both the NPAC data administrator and user. In addition the Member Company voiced concern that the definition of call routing that was drafted only for Amendment 62 was overly expansive and allowed URI capabilities to the NPAC platform which they state was not intended to support that routing functionality.

SOW 70: Pricing Amendment - (Modifications to Exhibit E Pricing Schedules)

The dissenting Member Company acknowledged that the fixed price model provided the benefit of pricing improvement and the elimination of key triggers in SOW 57 that would allow issuance of an RFP prior to 2012, but did not feel the fixed price model was the right thing for the industry to do at the time for the following reasons:

- TN incentives give NSR [NeuStar, the current vendor] the upper hand in potentially undermining nascent ENUM development;
- The deal creates a framework for NSR to build a super-LERG;
- The incentives to add URI fields are inconsistent with the NPAC platform charter to support porting of voice telephone numbers.

All of these reasons would seem to add up a conflict of interest for the LLC, as well as potentially higher legal costs to defend against any actions.

Secondly, the industry will be assuming downside risk if volumes drop, thereby creating a disincentive to the industry to introduce competition for NPAC services.

The assumption of downside risk is also contrary to the initial guidance provided to VPAC by the LLC.

Lastly, the Member Company believed the urgency to complete the agreement in such an abbreviated time frame served the best interests of NSR, rather than the industry.

The content of this letter should answer the NANC representative's question on what the "minority position" was with respect to Amendments No. 62 and 70. If there are questions please forward them to the NAPM LLC Co-Chairs, Tim Decker and Mel Clay.

Sincerely,

Melvin Clay

Melvin Clay
Co-Chair
North American Portability Management LLC

TIMOTHY DECKER

Timothy Decker
Co-Chair

Attachment 4

LexisNexis

LEXSEE 1984 US COMP GEN LEXIS 1037

MATTER OF: CPT Corporation

B-211464

Comptroller General of the United States

1984 U.S. Comp. Gen. LEXIS 1037; 84-1 Comp. Gen. Proc. Dec. P606

June 7, 1984

HEADNOTES:
[*1]

1. Agency's use of standardization policy to justify continued sole-source acquisition of incumbent's word processing and related equipment raises significant issue which GAO will consider regardless of timeliness of protest.

2. Modification of existing requirements contract that (1) increased the period for ordering new word processing and related equipment from 3 to 6 years; (2) made substantial changes to the types of equipment that could be ordered, and (3) altered the contract by greatly expanding the facilities for which equipment could be ordered under it and by altering the prices that would be incurred, amounted to a new procurement that should have been competed unless the agency's needs could only be met by the incumbent.

3. Civilian agency's decision to standardize word processing and related equipment around incumbent's products, which restricted follow-on contract to that firm, is improper where the record does not establish that standardization was required by any unusual or abnormal agency-wide condition or situation, as envisioned by statutory provision authorizing standardization.

OPINION:

CPT Corporation protests the Department of State's continued acquisition of word [*2] and data processing equipment under contract 0000-920047, awarded to Wang Laboratories, Inc. on September 29, 1979. According to CPT, State has improperly modified the contract through a series of amendments which are outside the scope of the 1979 procurement. CPT contends that State should have conducted a new competition to meet the needs reflected in the modification. We agree and sustain the protest.

The Wang contract was awarded following a competitive procurement under request for proposals (RFP) No. ST-0000-920047 to provide standard commercial quality word processing equipment for use at overseas Foreign Service posts. The contract took the form of a fixed-price requirements contract to provide specific models of equipment for a base period with annual renewal options that (1) permitted equipment to be ordered for lease or purchase through September 30, 1982, and (2) allowed the government to order maintenance for purchased equipment for up to 4 years thereafter.

The contract as modified, however, is not limited to orders for specific equipment models, or for equipment to meet overseas Foreign Service needs, but rather, permits any State Department activity to obtain [*3] any products Wang markets or may market in the future at new prices which are for the most part determined as a percentage of Wang's

commercial list prices. The contract permits State to order Tempest certified equipment (equipment satisfying electronic emissions standards established by the National Security Agency (NSA)) as well as standard quality equipment. It allows equipment to be ordered through December 31, 1985.

The present contract is the product of a number of State Department actions. In the first 2 years following award, the original contract was amended to enhance the usefulness of the equipment for data processing applications and to provide for equipment installations at domestic as well as overseas locations. On August 5, 1981, the Assistant Secretary for Administration signed a Determinations and Findings (D & F) which concluded that standardization of all State Department word processing equipment was in the public interest At about the same time, State modified the contract to include Tempest equipment, initially for installation at domestic locations but eventually for overseas installation as well. Finally, an amendment issued January 6, 1983, extended [*4] the contract from October 1, 1982 through December 1985.

According to State, its action was properly within the scope of the original Wang contract. Alternatively, State says a sole-source award to Wang was justified because only Wang equipment meets its needs as defined in the Assistant Secretary's D & F concerning standardization, and because only Wang could adequately provide and support that equipment. State asserts numerous reasons in support of the decision to standardize, reflecting the fact that:

"a substantial portion of the benefits to the Department of acquiring a word processing system are realizable only if that system is used for its full useful life (i.e., six years)."

CPT, on the other hand, contends that the D & F is not valid and, as applied, unduly and improperly restricts award to Wang.

We will consider CPT's protest on the merits notwithstanding a contention raised by State and Wang that the protest is untimely. Section 21.2(c) of our Bid Protest Procedures provides for consideration of an untimely protest that raises an issue significant to procurement practice or procedure. 4 C.F.R. § 21.2(c) (1984). Although, as State and Wang point out, section [*5] 21.2(c) is invoked sparingly (see Kemp Industries, Inc., B-206653, March 19, 1982, 82-1 CPD P P262), we think the agency's attempt to meet its continuing needs under a contract awarded in 1979 on standardization grounds raises a significant issue. We therefore conclude that the exception should be invoked in this instance.

A. Modifications Amounted to a New Procurement:

We agree with CPT that the Wang contract modifications are so substantial as to amount to a new procurement. In this respect, we normally will not review a protest concerning a contract modification, since we do not consider contract administration questions. We will consider such a protest, however, where it is alleged that the modification is outside the scope of the original competition and should have been the subject of a new procurement. Webcraft Packaging, Division of Beatrice Foods Co., B-194087, Aug. 14, 1979, 79-2 CPD P P120. Whether a modification is outside the scope of the original procurement is determined on the facts of each case, taking into account the circumstances attending the procurement that was conducted and whether the changes accomplished by the modification are of [*6] a nature which would be reasonably anticipated under the changes clause in the original contract. American Air Filter Company--DLA request for reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD P P443.

On the record before us it is clear that the modifications made to the Wang contract were outside the scope of the original procurement in three specific respects, and thus amounted to a new procurement: (1) State improperly extended the period of performance; (2) it significantly expanded the scope of work by adding new equipment, including Tempest equipment, which was not procured originally; (3) State significantly altered the conditions under which the work was to be performed by including domestic as well as overseas installations, by assuming a multi-year rather than a year-to-year contractual obligation, and by modifying the basis on which price is determined.

First, concerning the period of performance, we point out that there is a significant difference between those situations where a contractor is given additional time to perform a contractual obligation, and those where time is used in a contract to define the extent of an obligation. Cf. Kent Watkins [*7] & Associates, Inc., B-191078, May 17, 1978, 78-1 CPD P P377 (distinguishing between one-time and ongoing requirements). Requirements or indefinite quantities contracts generally concern on-going needs. Extension of the performance period under those kinds of contracts involves new requirements that should be competed. Intermem Corporation, B-187607, April 15, 1977, 77-1 CPD P P263. The Wang contract was of the requirements type, and we think the extension of the term of the contract was on its face a new procurement of an additional 3-year term.

Second, the contract modification permits State to order any products Wang now markets, or may market in the future, and has been used to acquire Tempest-approved equipment. This obviously goes significantly beyond the terms of the original contract. With respect to Tempest equipment, State argues that the addition of that equipment was not outside the scope of the original procurement because the procurement was for word processing equipment, whether Tempest-approved or not. The record shows, however, that State held a quite different view in 1979 when it decided to exclude Tempest equipment from the procurement. In a 1979 letter [*8] to CPT, State observed that:

"With regards to TEMPEST, we did make a conscious decision, through the Department's Word Processing Management Group, to distinguish between TEMPEST and non-TEMPEST equipment . . . . We felt that issuing a requirement for a TEMPEST approved machine in July would have unduly restricted the competition for the RFP on the one hand, yet to delay issuing the procurement [for non-Tempest requirements] would have continued a pattern of proliferation of non-standard word processors worldwide. I agree that there is a substantial TEMPEST requirement and that we will be moving to TEMPEST word processing overseas. When and how is not yet clear."

State's current view thus is not consistent with its 1979 position. We think the 1979 letter makes it clear that the addition of Tempest equipment alone to Wang's contract amounted to a new procurement. See Webcraft Packaging, Division of Beatrice Foods Co., supra; W.H. Mullins, B-207200, Feb. 16, 1983, 83-1 CPD P P158.

Third, the changes to the terms of performance (which added domestic installations) and to the term and price structure of the contract (which included adoption of the multi-year obligation [*9] and price changes), fall within the purview of our decisions in Tymshare, Inc., 60 Comp. Gen. 268 (1981), 81-1 CPD P P118, and Memorex Corporation, 61 Comp. Gen. 42 (1981), 81-2 CPD P P334, as explained on reconsideration, B-200722.2, April 16, 1982, 82-1 CPD P P349, which indicate that such changes are not properly the subject of contract modifications.

In Tymshare, we held that the Department of Health and Human Services (HHS) improperly ordered teleprocessing services for HHS's Health Care Financing Administration under a contract, awarded after a separate competitive procurement, that only procured services for the Office of the Secretary of Health and Human Services. As explained in National Data Corporation, B-207340, Sept. 13, 1982, 82-2 CPD P P222, it was significant to our decision in Tymshare that HHS's solicitation did not communicate to potential offerors the agency's intent to add the additional disputed work.

In our view, State's intent to order equipment for domestic installation was no more clearly expressed in this instance than was HHS's intent in Tymshare. State's basis for insisting that domestic installations were included in the 1979 [*10] procurement is a telegraphic amendment to the RFP that advised offerors to consider North American and Greenland posts as falling within what was called "Option Area II," which concerned Foreign Service facilities within the jurisdiction of State's Inter-American Bureau. (The RFP divided State's overseas facilities into three service or "Option" areas and set out anticipated requirements for each area.) The facilities, however, were all outside the United States, and the RFP clearly stated that the intent of the procurement was to provide word processing to meet the requirements of overseas foreign service posts.While it would seem reasonable in view of the amendment to construe "overseas" as including neighboring foreign countries, we cannot see how offerors could have been expected to characterize State's Washington, D.C. offices as either foreign or overseas. Nor did the RFP contain any estimated requirements for domestic installations. We think, therefore, that the effect of the amendment was merely to include countries such as Canada and Mexico in the Inter-American area. That certainly is no indication to offerors that more

than 40 percent of the equipment ordered during [*11] the original 3-year contract life would be installed within the United States.

Concerning other contract terms and price structure, the original Wang contract established fixed prices for the acquisition of specific equipment on an annual option basis. The modifications have produced a multi-year contract with new pricing provisions which convey a right to acquire additional new equipment (for domestic installation as well as overseas sites). The situation presented is in this respect similar to that encountered in Memorex, where we concluded that a change in the form of a contract for disk drives from purchase to a 5-year lease-to-ownership plan, with stringent performance requirements over the lease term, created a new ongoing agreement to support the equipment and was a significant change which should have been competed.

In the circumstances, therefore, we conclude that the modifications made to Wang's contract amounted to a new procurement.

B. Authority to Standardize:

State contends that if the modifications are viewed as sole-source awards, the selection of Wang was justified because State had adopted the Wang product line as an agency standard. What we must [*12] first consider, then, is the extent to which State as a civilian agency has authority to standardize. n1

n1 Defining needs ordinarily involves determining the attributes that items being acquired must have to perform the specific function for which they are to be bought. The D & F State prepared in this instance, which seeks to standardize equipment on an agency-wide basis, is a statement of need only in a broader sense. It imposes a limitation on all State Department procurement for the type of equipment in question, without regard to whether the grounds cited as justifying standardization actually apply in every individual procurement affected by it.

According to State, the agency derives its authority to standardize from section 302(c)(13) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 252(c)(13) (1982), as implemented in the Federal Procurement Regulations (FPR), 41 C.F.R. § 1-3.213 (1983) and augmented by State's own regulations, 41 C.F.R. § 6-3.213. (41 C.F.R. § 6-3.213 merely reiterates section 1-3.213. Since section 1-3.213 is controlling, we focus only on section 1-3.213 in our decision.)

Section 252(c)(13) of title 41 of the United [*13] States Code deals with agencies' authority to negotiate contracts in lieu of using formal advertising when the contracts are:

"for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest . . . ."

The section's legislative history reveals that this authority to standardize was viewed as limited to special situations or in particular localities and was to be exercised only under extraordinary circumstances. The conference report expresses congressional understanding that the provision should be read as intended to:

"protect in every way possible the principles of competition and antimonopoly consistent with the occasional need for such standardization." H.R. Rep. No. 670, 81st Cong., 1st Sess. 12, reprinted in 1949 U.S. Code Cong. & Ad. News 1475, 1497-1498 (emphasis added).

Likewise, the implementation of section 252(c)(13) by FPR § 1-3.213 narrowly [*14] interprets the authority granted. "Special situations" are defined as precluding application of the authority merely because standardization is

viewed as desirable, in generally prevailing or generalized conditions, and as distinguished from unusual or abnormal conditions. FPR § 1-3.213(c). "Particular localities," the regulation states, refers to locations which are both physically remote and remote from available stocks or replacement parts and related services. FPR § 1-3.213(c) (3). For example, the regulation states:

". . . it is not enough to conclude that standardization is required of a motor vehicle in Alaska because of remote location if in fact replacement parts of various vehicle makes are readily available. It must be shown expressly, and not by inference, (i) that the location involved is inaccessible because of stated conditions, such as the absence of a connected road system, or (ii) that there are not available within stated reasonable distances, adequate stocks of replacement parts or personnel and facilities necessary to perform required services, and that there are circumstances which make it impractical to maintain at the location such stocks and furnish [*15] such service for more than a particular number of makes of vehicles. 41 C.F.R. § 1-3.213(e)(2).

We further point out that neither the statute nor the regulation authorizes an agency to adopt a vendor's entire product line. The statute (41 U.S.C. § 252(c)(13)) refers to standardization in the context of parts interchangeability, and FPR § 1-3.213 speaks only of standardization regarding specific makes and models of equipment.

Thus, standardization is an exception to normal procurement practice with respect to specifically identified equipment. It is an exception which may be used only in situations that can be clearly documented as being truly unusual or abnormal. Standardization is not available merely because the contracting activity views standardization to be desirable, or because it would be convenient for administrative reasons to standardize.

C. Arguments Regarding State's Decision to Standardize:

While State in its reports to our Office appears to agree that standardization is authorized only in abnormal or unusual circumstances, the agency contends that this test is met. The D & F recites and State asserts that standardization was justified in this instance: [*16] (1) to avoid problems that might be encountered in order to connect other brands of equipment to State's high-speed telecommunications network; (2) to achieve substantial savings by permitting cannibalization of unserviceable equipment by salvaging usable parts; and (3) to avoid personnel retraining costs.

State explains that it maintains more than 200 establishments abroad. It says these facilities must be able to communicate with each other as well as with Washington using State's telecommunications network. State also points out that to assure maintenance at some overseas facilities, it has trained a number of employees to maintain Wang equipment and has acquired a limited spare parts inventory. State contends that substantial savings accrue if it can avoid maintaining duplicate parts inventories and training maintenance personnel to service multiple types of equipment, and if it can use common equipment to permit cannibalization of unserviceable equipment by salvaging usable parts. The logistics of serving its posts requires that office equipment be compatible and readily replaceable, State says, and is complicated by the fact that Foreign Service officers and secretaries [*17] move on the average of once every 3 years and would have to be retrained in basic word processing skills unless the equipment at their new posts is familiar to them. State says that more than 4,000 employees have been trained.

Moreover, according to State, significant resources have been invested in developing software which is unique to the Wang equipment. With respect to Tempest equipment, State says it has developed certain security systems which take advantage of the attributes of Wang equipment and which would have to be reexamined and redesigned if other equipment were substituted.

D. GAO Analysis:

The result of State's standardization in this instance was to limit the procurement of word processing and related equipment to Wang for a total of 6 years. We will closely scrutinize any agency action that, by establishing restrictive

needs, limits competition to a single source of supply. See, e.g., Jarrell-Ash Division of the Fisher Scientific Company, B-185582, Jan. 12, 1977, 77-1 CPD P P19.

We do not believe State has justified its actions. For example, although the D & F states that difficulty might be encountered in connecting other brands of equipment [*18] to State's high speed telecommunications network, State has not shown that the difficulty anticipated is any greater than that which is normally encountered in establishing telecommunications data links, or that the risks involved cannot be handled as they normally are in such cases by establishing a communications protocol and equipment specifications. In fact, in a report to our Office, State concedes this could be done.

Nor is there any evidence that the availability of parts and service is anything more than an isolated problem at remote locations. There is no evidence that maintenance poses any problem at, for example, State's Washington, D.C. or European installations where, as CPT notes, on-call service could be provided by any multi-national company. Moreover, as stated earlier, FPR § 1-3.213 specifically requires a showing that it would be impractical to maintain duplicate parts and furnish services as necessary--there has been no such showing here.

Concerning the cannibalization of usable parts, we point out that there is no evidence that parts salvage is critical in maintaining equipment in operating condition. Actually, there is no evidence that State does cannibalize [*19] parts to keep equipment in service. The record shows that State does not rely on salvage to keep equipment operating, but has designed its installations so that sufficient equipment is available to assure that, in the event a unit fails, critical work can continue to be processed until the equipment that has failed can be repaired.

Also, concerning the economic value of using cannibalized parts, there is no evidence of record establishing the value of usable parts that could be saved by cannibalizing parts, or establishing the value of equipment that could be kept in service but which would otherwise be replaced if parts were not salvaged. There is no proof that it is less expensive for the government to salvage parts than to allow the vendor to refurbish salvageable parts.

Moreover, regarding State's contention that standardization produces substantial savings, there is no evidence that savings flowing from standardization would not be offset by lower prices obtained through competition. An agency's belief that one firm would enjoy a price advantage if a competition were conducted does not alone justify selection of that firm without competition. Olivetti Corporation of America, [*20] B-187369, Feb. 28, 1977, 77-1 CPD P P146.

The remaining grounds cited by State as reason to standardize are similarly unpersuasive. State says that through standardization the agency would avoid retraining personnel who have been trained in the use of Wang equipment.According to State's estimates, training requires from 2 days to a week, and results in an at least temporary loss of employee morale and efficiency. Also, State says it would achieve a greater return on the investment it has made in software that has been developed for use with the Wang equipment, or in the alternative, would avoid the cost of converting this software for use on other systems.

However, all government agencies have to retrain personnel and convert software whenever new equipment is procured. In initially awarding a contract that allowed it to purchase equipment for only 3 years, we think State should have anticipated that equipment ordered later might have to be obtained from another vendor.

F. Other Issues:

State contends that events since 1981 would justify continued sole-source procurement from Wang were we to hold, as we have, that standardization was improper. Wang equipment has now [*21] been installed throughout the State Department's facilities in Washington, D.C. and abroad. State insists that efficiencies in terms of supply, maintenance, and training all favor continuing to contract with Wang. State also says its present contract affords it very reasonable prices compared with what it would have to pay if it acquired software, maintenance and equipment from, for example, the Federal Supply Schedule, which State points out would not in any event cover overseas maintenance

on government-owned Wang equipment.

State says it has determined that only a distributed system having sufficient capacity to permit many work stations to be operated from a central unit would meet its requirements for protecting the integrity of the classified data base at posts abroad and in most domestic offices. State questions whether CPT could meet this requirement, although it concedes that Wang is not the only source that could.

We do not find these contentions to be persuasive.

In part, we think State has misconstrued the intent of CPT's protest. CPT does not contend, nor would we require, that State cease contracting with Wang for services on equipment only Wang could provide.What [*22] CPT does object to is State's continued sole-source acquisition of equipment from Wang to meet needs that CPT believes it could fill were it given an opportunity to compete.Since a sole-source award is justified only if there is only one firm that can meet the government's needs (see, e.g., ROLM Corporation and Fisk Telephone Systems, Inc., B-202031, Aug. 26, 1981, 81-2 CPD P P180) and since, as noted, State concedes that Wang is not the only firm that can meet its needs, it would appear that State has no legal basis for refusing to break out those of its requirements which could be procured competitively. Interscience Systems, Inc.; Cencom Systems, Inc., 59 Comp. Gen. 438 (1982), 80-1 CPD P P332, aff'd 59 Comp. Gen. 658, 80-2 CPD P P106.

State also suggests that CPT may be unable to meet the agency's needs. We point out, however, that since equipment specifications suitable for use in a competitive procurement have not been written, it is premature to decide whether CPT could or could not meet State's needs if they were competed.

C. Conclusion:

The protest is sustained.

In view of the scope of the needs filled under the Wang contract, we believe it [*23] is important in framing a recommendation for corrective action that we balance the need for effective remedial relief with State's short term need for continuity during any transition period. We believe State should immediately initiate a competitive procurement for word processing and related needs of the type presently being filled under the Wang contract. That procurement should be completed as expeditiously as possible; when it is completed, the present Wang contract should be terminated for convenience. In no event, however, do we believe State should continue to acquire new equipment or software or continue to lease any equipment under the existing Wang contract after December 31, 1984 unless, with respect to each affected installation, the selection or continued use of Wang equipment is based on competition, or unless in each such instance Wang is clearly shown to be the only source of supply that can meet the specific need to be filled.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and the House Committee on Government Operations and Appropriations [*24] in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawPrice Fixing & Restraints of TradeExclusive & Reciprocal DealingRequirements ContractsPublic Contracts LawDispute ResolutionBid ProtestsPublic Contracts LawTypes of ContractsFederal Supply Schedule Contracts

Attachment 5

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

Attachment 6

ARTICLE 23- TERMINATION

23.1 Terminationby Customer

Customer shall have the right, upon written notice to Contractor, toterminate this Agreement or any applicable Statements of Work :

(a) ifa Default by Contractor has occurred and is continuing under this Agreement;or,

(b) if(i) a receiver, trustee, administrator, or administrative receiver is appointedfor Contractor or its property, (ii) Contractor makes an assignment for thebenefit of creditors, (iii) any proceedings are commenced against Contractorunder any bankruptcy, insolvency, or debtor's relief law, and such proceedingsare not vacated or set aside within ninety (90) days from the date ofcommencement thereof, or (iv) Contractor is liquidated or dissolved; or,

(c) ifContractor is merged with or acquired by an entity which is not a Neutral ThirdParty; or

(d) ifContractor otherwise ceases to be a Neutral Third Party, and such cessationcontinues for a period of thirty (30) days following the date that an executiveofficer of Contractor first becomes aware of the event causing the cessation ofneutrality (with Contractor having an obligation to diligently conductquarterly investigations of its affiliates' activities that may impactContractor's neutrality); provided, however, that where such cessation ofneutrality cannot reasonably be cured within such thirty (30) day period, solong as Contractor is diligently pursuing such cure, and regulatory authoritieshaving jurisdiction over such matters (after having reviewed the details of theevent(s) causing Contractor's cessation of neutrality) have not specificallyrequired Customer to terminate this Agreement due to such cessation ofneutrality, the time for curing such

failure shall be extended for such period as may be necessary forContractor to complete such cure; or

(e) under thecircumstances related to a regulatory event as set forth in Article 25.

23.2 Nonwaiver

The termination rights provided to Customer under this Article 23are not intended to constitute an election of remedies, and, except as providedotherwise in this Agreement or the subject Statement of Work, Customer isentitled to any additional rights and remedies available to it at law or inequity, subject to the limitations and exclusions in this Agreement. All rights and remedies of Customer hereincreated or otherwise existing at law or in equity are cumulative, and theexercise of one (1) or more rights or remedies shall not be taken to exclude orwaive the right to exercise any of the others.

23.3 Users'Liability for Payments

Except as provided in Articles 9 and 24 herein and Section 7 ofthe NPAC/SMS User Agreement, in the event of termination under this Article,Users shall be liable only for payment to Contractor for Services performedprior to the effective date of the termination, and Users shall not be liablefor anticipated profit or fee on Services not performed. Except as otherwise provided in thisAgreement, Customer shall have no liability for any payments to Contractor.

23.4 Return ofProperty Upon Termination

Subject to Article 24 - Transition at Expiration or Termination ofthis Agreement, upon termination and regardless of any dispute between theParties, all property, equipment, data, documents or other materials ofCustomer or the Users pertaining to this Agreement in the possession ofContractor, its employees, agents or subcontractors shall be returned to theirowners within fifteen (15) days of the notice of termination or such later dateas Customer may designate.

ARTICLE 24 - TRANSITION ATEXPIRATION OR TERMINATION OF THIS AGREEMENT

24.1 Contractor'sObligation to Assist With Transition

Upon termination of this Agreement by Customer under either Article 23or Article 12 hereof (hereafter "Termination Event"), or upon expirationof the Agreement as the result of an election not to renew under Article 3hereof ("Non-Renewal"), Contractor shall assist Customer in the orderlytransition of the Services specified herein from Contractor to a successorcontractor or administrator for NPAC/SMS (in either case, the "SuccessorContractor"), consistent with the requirements of this Article 24 - Transition at Expiration or Termination of this Agreement.

24.2 OptionalExtension Upon Termination or Non-Renewal Without License

Upon the occurrence of a Termination Event (other than a TerminationEvent under Section 23.1(c), (d), or (e) or Article 12) or Non-Renewaland, in each case, upon Customer's request in lieu of being granted a licenseunder Article 9 hereof, Contractor shall agree to extend this Agreementwith Customer for a period the last day of which shall not extend beyond theearlier of (i) the date that Customer completes its transition to a SuccessorContractor for the provision of NPAC/SMS in the Service Area or (ii) the datethat is eighteen (18) months after (A) in the case of such a Termination Event,the date notice of termination is given by Customer ("Termination Event NoticeDate"), or (B) in the case of Non-Renewal, the date the notice of non-renewalis given or received by Customer, as applicable ("Non-Renewal NoticeDate"). Any such extension shall be at aprice and level of Service in effect on the date of such termination orexpiration of the Agreement, as applicable, as adjusted pursuant to Section 6.1if such extension extends beyond the Initial Term. In addition, upon any such extension,Contractor shall provide any Transition Services (as defined below) requestedby Customer; provided that (i) Contractor shall be paid for such services atreasonable rates, consistent with the charges underlying the pricing schedulesset forth in Exhibit E and (ii) Contractor shall have no obligation to performany such Transition Services under this Section 24.2 after the end of theextension period. Notwithstandinganything to the contrary above, Contractor's obligation to perform Servicesduring any extension period is subject to Customer using diligent efforts totransition to a Successor Contractor beginning no later than the TerminationEvent Notice Date or Non-Renewal Notice Date, as applicable.

24.3 OptionalExtension Upon Termination or Non-Renewal With License, Loss of Neutrality or Regulatory Termination

Upon the occurrence of (A) a Termination Event (other than aTermination Event under Section 23.1(c) or (d) or Article 12) orNon-Renewal and, in each case, under circumstances where Customer has obtaineda license under Article 9 hereof,or (B) a Termination Event under Section 23.1(c)or (d), whether or not Customer has obtained a license under Article 9hereof, or (C) a Termination Event under Section 23.1(e), Contractorshall, upon Customer's request, extend this Agreement with Customer for aperiod the last day of which shall not extend beyond the earlier of (i) thedate that Customer completes its transition to a Successor Contractor for theprovisioning of NPAC/SMS in the Service Area or (ii) the date that is onehundred and eighty (180) days after the Termination Event Notice Date orNon-Renewal Notice Date, as applicable. Any such extension shall be at a price and level of Service in effect onthe date of such termination or the expiration of the Agreement, as applicable,as adjusted pursuant to Section 6.1 if such extension extends beyond theInitial Term. In addition, upon any suchextension, Contractor shall provide any Transition Services (as defined below)requested by Customer; provided that (i) Contractor shall be paid for suchservices at reasonable rates, consistent with the charges underlying thepricing schedules set forth in Exhibit E and (ii) Contractor shall have noobligation to perform any such Transition Services under this Section 24.3after the end of the extension period. Notwithstanding anything to the contrary above, Contractor's obligationto perform Services during any extension period is subject to Customer usingdiligent efforts to

transition to a Successor Contractor beginning no later than theTermination Event Notice Date or Non-Renewal Notice Date, as applicable.

24.4 TransitionServices

Contractor shall cooperate with Customer in effecting the orderlytransition of the Services to a Successor Contractor by performing the servicesset forth below (collectively, the "Transition Services") where requested byCustomer upon or in anticipation of a Termination Event or Non-Renewal. The Transition Services shall be providedthrough the period of any extension under Section 24.2 or 24.3, or if theAgreement is not being extended pursuant to such Sections, for a period not toexceed one hundred and eighty (180) days after the expiration or termination ofthe Agreement. Contractor shall be paidfor the performance of such Transition Services at reasonable rates, consistentwith the charges underlying the pricing schedules in Exhibit E. Customer shall submit its request forTransition Services in writing to Contractor on or immediately prior to theexpiration or termination date.

At Customer's request, which request shall be made as provided above,Contractor agrees to provide the following Transition Services in accordancewith this Section 24.4:

(a) provideCustomer with a list or summary, as applicable, of all hardware, software, andcommunications inventories and documentation of operational and proceduralpractices required for the orderly transition to a Successor Contractor for theServices;

(b) consistentwith Contractor's contractual obligations to Third Parties regardingnondisclosure, provide Customer and/or its designees all Contractor informationthat is reasonably necessary to enable Customer and/or its designees to providethe Services. Contractor shall use itsbest efforts to secure in its agreements with Third Parties the right toprovide such Third Party information to Customer and/or its designees underthese circumstances;

(c) withrespect to Third Party Software used to provide the Services, Contractor shallprovide reasonable assistance to Customer in obtaining licenses from theappropriate vendors;

(d) withrespect to any other agreements for necessary Third Party services being usedby Contractor to perform the Services, Contractor shall:

(i) useits best efforts to transfer or assign such agreements to Customer or theSuccessor Contractor, and

(ii) payany transfer fee or non-recurring charge imposed by the applicable Third Partyvendors, which fee or charge Customer agrees to reimburse to Contractor; and

(e) Contractorshall return to Customer (without retaining copies) all intellectual property,including software, documentation, and procedures including all tapes, disks,and printed matter provided by Customer and Users, and the contents of theNPAC/SMS database pertaining to Customer.

Customer agrees to allow Contractor to use, at no charge, thoseCustomer facilities necessary to perform the Transition Services for as long asContractor is providing the Transition Services.

ARTICLE 25 - REGULATORY AND LEGISLATIVE CONSIDERATIONS

25.1 Users areCommunications Common Carriers

Contractor expressly recognizes that (i) Customer, Members and theUsers and the NPAC/SMS are or may be subject to certain federal and statestatutes and rules and regulations promulgated thereunder, as well as rules,regulations, orders, opinions, decisions and possible approval of the FCC,NANC and other regulatory bodies havingjurisdiction or delegated authority over Customer, Member and the Users and theNPAC/SMS and (ii) this Agreement is subject to changes and modificationsrequired as a result of any of the foregoing; provided, however, that theParties hereby agree that this Agreement and the NPAC/SMS User Agreements shallremain in full force and effect in accordance with their respective terms andeach of the Parties and each of the Users shall continue to perform all of itsrespective obligations under this Agreement and the NPAC/SMS User Agreements,as applicable, in accordance with the respective terms thereof until theParties can agree upon any amendment (which shall include any Statement ofWork) that may be required to this Agreement as a result of any such regulatorychange;

and provided, further, however, that if the Parties are unable to agreeupon any required amendment (or Statement of Work), the Parties agree toresolve such dispute pursuant to an “expedited” arbitration proceeding inaccordance with the procedures set forth in Section 4 of the form ofEscrow Agreement attached hereto as Exhibit M (“Expedited Arbitration”). Notwithstanding anything to the contraryabove, Customer may terminate this Agreement if the required amendment orStatement of Work is technically or economically unfeasible or if theregulatory change requires Customer to terminate this Agreement, except thatCustomer agrees it will give Contractor at least ten (10) days advance writtennotice of its intent to terminate this Agreement on such basis and agrees thatif, within ten (10) days of its receipt of such notice, Contractor delivers itswritten objection to Customer disputing the basis on which Customer isexercising its termination right, Customer will resolve such dispute withContractor in an Expedited Arbitration proceeding, with the focus of suchproceeding being whether the required amendment or Statement of Work istechnically or economically unfeasible or whether the regulatory changerequires Customer to terminate this Agreement, as applicable. The Parties shall cooperate fully with eachother in obtaining any necessary regulatory approvals of the NPAC/SMS or otherregulatory proceeding regarding regarding NPAC/SMS.

25.2 Changes inLaw and Regulations

Customer shall notify Contractor of any relevant changes in applicablelegislative enactment and regulations that Customer becomes aware of in theordinary course of its business in accordance

with the provisions of Section 27.6. Any necessary modifications to the NPAC/SMSas a result of such changes shall be made in accordance with the provisions of Article 13and subject to Section 25.1 Contractor shall be responsible for any fines and penalties imposed onUsers and/or Contractor arising from any noncompliance by Contractor, itssubcontractors or agents with the laws and regulations in respect of theNPAC/SMS. A User shall be responsiblefor any fines and penalties imposed on it or Contractor relating toContractor’s provision of the NPAC/SMS and arising from the failure of suchUser to comply with laws and regulations to which it is subject.