

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of

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

Telephone Number Portability

WC Docket No. 09-109

CC Docket No. 95-116

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COMMENTS OF NEUSTAR, INC.

Neustar, Inc. (“Neustar”) submits these comments in response to the Public Notice released by the Wireline Competition Bureau (“Bureau”) on June 9, 2014. The Public Notice sought comment on the recommendation of the North American Numbering Council (“NANC”) of a wholly owned subsidiary of Telefonaktiebolaget LM Ericsson (“Ericsson”)¹ to serve as local number portability administrator (“LNPA”) at the expiration of Neustar’s current LNPA vendor contract.²

¹ Telcordia Technologies Inc., d/b/a iconectiv, is part of Ericsson, and unless otherwise noted will be referred to here by the name of the corporate parent.

² See Public Notice, *Commission Seeks Comment on the North American Numbering Council Recommendation of a Vendor To Serve As Local Number Portability Administrator*, WC Docket No. 09-109, CC Docket No. 95-116, DA 14-794 (FCC rel. June 9, 2014) (“Public Notice”); see also Public Notice, *Commission Extends Comment Deadlines for Public Notice Seeking Comment on the North American Numbering Council Recommendation of a Vendor To Serve As Local Number Portability Administrator*, WC Docket No. 09-109, CC Docket No. 95-116, DA 14-937 (FCC rel. June 27, 2014). Neustar has submitted several prior filings in these dockets raising various objections to these proceedings. All of those filings are part of the

INTRODUCTION AND EXECUTIVE SUMMARY

The Commission cannot lawfully – and should not – accept the recommendation of the NANC to turn away from nearly two decades of outstanding Local Number Portability Administration by Neustar in favor of an untested and poorly documented paper proposal submitted by Ericsson and its subcontractor, SunGard Availability Services (“SunGard”). Acceptance of the NANC’s recommendation would violate the express provisions of the Telecommunications Act of 1996 (“1996 Act”), the Administrative Procedure Act (“APA”), and the Commission’s own rules, and it would harm the public interest by endorsing an unprecedented transition to an alternative technology involving critical communications infrastructure of the United States without proper risk assessment, a mitigation framework, or backup planning.

The Commission *cannot* lawfully accept the recommendation. First, neither Ericsson nor SunGard is or can be an “impartial” administrator – as required by Section 251(e) of the 1996 Act, 47 U.S.C. § 251(e) – and neither company satisfies the Commission’s neutrality requirements or the neutrality criteria of the Request for Proposal (“RFP”). Second, the recommendation cannot be accepted without the Commission first exercising its rulemaking authority under Section 251(e) by issuing a notice of proposed rulemaking (“NPRM”) and following the procedures required by the APA. Third, the recommendation is the product of a deeply flawed and highly irregular process that excluded from consideration the most competitive available proposals, unfairly benefiting one bidder to the prejudice of Neustar and the public interest, without any justification.

record, and the arguments contained therein provide additional and reinforcing reasons for rejecting the NANC recommendation.

Furthermore, the Commission *should* not accept the NANC recommendation. The NANC recommendation fails to provide any sound justification for the selection decision. To the contrary, the recommendation is essentially a black box, stating merely that [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [REDACTED] [END CONFIDENTIAL INFORMATION] – even though price was, by design, the least important factor in the selection decision, and even though [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] blocked the NAPM’s effort to solicit [END CONFIDENTIAL INFORMATION] lower-priced proposals from all bidders.

Following this approach, the recommendation fails to address and properly weigh the many important technical and management factors that proposals were required to address, and it is particularly deficient with regard to two critical issues that could result in a costly fiasco or worse. First, the recommendation does not contain any substantive evaluation of transition costs or risks, yet the record reflects that even minor transition difficulties would create costs that overwhelm any potential savings [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [REDACTED] [END CONFIDENTIAL INFORMATION] Second, the RFP and the recommendation completely disregard the public safety functions that the Number Portability Administration Center (“NPAC”) makes possible as well as the national security issues created by allowing Ericsson to administer the NPAC.

In sum, the Commission lawfully cannot and also should not accept the NANC recommendation that Ericsson be selected as the next LNPA, as it would not be in the public interest to do so.

Neither Ericsson nor SunGard Can Be an “Impartial” Administrator or Can Satisfy the Neutrality Requirements.

Ericsson cannot serve as an LNPA and its subcontractor SunGard cannot serve as a subcontractor to an LNPA because neither Ericsson nor SunGard satisfies the neutrality requirements of the statute, the Commission’s rules, and the RFP itself. Ericsson asserts that its subsidiary (Telcordia d/b/a iconectiv) that will serve as the LNPA is independent from its parent company, and therefore is not affected by the obvious neutrality concerns that awarding the bid to Ericsson would present. But Ericsson fails to make any such showing of independence; moreover, Ericsson’s proposal relies heavily on the fact that the substantial resources of the parent will inure to the benefit of the subsidiary. Ericsson cannot have it both ways. The Commission should reject the NANC recommendation because Ericsson cannot serve as an impartial LNPA. Ericsson maintains deep ties to many of the major service providers in the telecommunications industry, particularly among wireless providers, which raises exactly the type of concerns that gave rise to the statutory requirement of impartiality and the Commission’s neutrality rules. Ericsson is, by its own admission, “the largest telecom services provider in the world,” claiming a “unique position” to “support customers with everything from connectivity to customer relationship management.”³ Ericsson already provides managed services to major U.S. telecommunications service providers, including Sprint, and its business strategy is premised upon increased carrier appetite for outsourced network management.⁴ Ericsson, moreover, is a

³ 2013 Ericsson Annual Report at 16, 26, *available at* http://www.ericsson.com/thecompany/investors/financial_reports/2013/annual13/sites/default/files/download/pdf/EN_-_Ericsson_AR2013.pdf.

⁴ *Id.* at 10, 24 (“Operators increasingly outsource parts of their operations to reduce cost and focus on new services.”); *see also* Adam Ewing, *Ericsson Talks to U.S. Mobile Carriers over Managed Services*, BLOOMBERG BUSINESSWEEK (July 1, 2014) (“[A]s operators curb infrastructure spending, Ericsson is expanding services, aiming to be a partner in running and

leading provider of network infrastructure equipment in the United States, particularly to the wireless industry. Ericsson has not proposed, and could not propose, any mechanism to wall off its wholly owned subsidiary from these core aspects of its business. To the contrary, the proposal Ericsson has put forward repeatedly touts Ericsson’s role in supporting its subsidiary in the provision of LNPA services. For example, Ericsson boasts that its “ownership structure affords the advantage of substantial parent resources.”⁵

Under these circumstances, Ericsson is not “impartial” within the meaning of Section 251(e)(1) – it has a vested interest not only in the success of its managed services clients but also in managing the NPAC in a way that will favor its own managed services and network equipment businesses. Ericsson is not “neutral” within the meaning of the Commission’s rules, because it is a telecommunications network equipment manufacturer, is strongly aligned with the wireless segment of the telecommunications industry, and is subject to the undue influence of both its managed services clients and its equipment customers in the telecommunications industry. And Ericsson does not satisfy the neutrality criteria established in the RFP. To the contrary, its “neutrality opinion” is inadequate, failing to address several factors required under the RFP and the Commission’s rules, and ignoring both the practical reality of Ericsson’s corporate structure and precedent defining the fiduciary duty of directors of wholly owned subsidiaries. Telcordia, moreover, cannot credibly attempt to dissociate itself from Ericsson, because it touted Ericsson’s support in selling its proposal. Further undermining its neutrality claims, Ericsson has withheld critical information concerning its business relationships that is

maintaining everything from phone networks to computer systems, while offering consulting and software.”), *available at* <http://www.businessweek.com/news/2014-07-01/ericsson-in-talks-to-manage-wireless-networks-for-at-and-t-verizon>.

⁵ Ericsson, *The Telcordia LNPA RFP Proposal*, presented to FoNPAC, at 7.

necessary to permit any reasoned evaluation of its neutrality claims. Nor is SunGard, an admitted affiliate of both an Interconnected VoIP Provider (“IVP”) and a Telecommunications Service Provider (“TSP”) – and an affiliate of at least one other TSP that Ericsson did not disclose – neutral. Taken separately or together, these deficiencies preclude acceptance of Ericsson’s proposal. Under the terms of the RFP and the Commission’s regulations, and in light of SunGard’s central role in the provision of LNPA services under Ericsson’s proposal, those affiliations require Ericsson’s disqualification.

It is no wonder that Ericsson pushed hard to preclude evaluation of neutrality during the RFP process: given the nature of its business and its proposal, this arrangement permitted Ericsson to put in a [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [END CONFIDENTIAL INFORMATION] in the hope that, if it received the industry’s recommendation, the Commission would be willing to accept a non-neutral LNPA. The statute and the Commission’s own rules, however, foreclose that result.

The APA Requires the Commission To Adopt an NPRM Prior To Accepting the NANC’s Recommendation.

The Commission cannot accept the NANC’s recommendation without adopting an NPRM and following the procedures required under the APA. As the Supreme Court has recognized,⁶ the exercise of the authority under Section 251(e)(1) to “designate” a number administrator is an exercise of legislative rulemaking authority; it is not an adjudication. Accordingly, the requirements of 5 U.S.C. § 553 apply. The Commission followed those procedures in 1997 when it first designated Neustar as LNPA, and it incorporated that designation into the Code of Federal Regulations (“CFR”). The Commission also incorporated

⁶ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 383 n.9 (1999)

the NANC’s recommendations on neutrality – which bars telecommunications network equipment manufacturers like Ericsson and their affiliates from serving as an LNPA – into the CFR. The Commission cannot change those rules without following the same procedures. Here, the Bureau’s Public Notice provides no basis for the Commission action required for designation of a new LNPA. Furthermore, an NPRM is not only legally required but also essential to ensure that the Commission can engage in informed decision-making: on the record as it stands, the public does not have fair notice of the issues implicated by the proposed change in LNP administration or the Commission’s tentative conclusions, including with regard to neutrality, service levels, transition risk and cost, and security implications to name only a few.⁷

The NANC’s Recommendation Is Legally Insufficient as a Basis for Commission Action for Several Additional Reasons.

A. As discussed further below, the NANC recommendation does not provide any underlying evidence or analysis for its decision. For this reason, were the Commission to accept the recommendation without undertaking its own independent evaluation, it would run afoul of non-delegation doctrine as articulated by the D.C. Circuit in *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”). Section 251(e)(1) of the 1996 Act requires *the Commission* to designate numbering administrators, and does not authorize any sub-delegation of that authority. The Commission therefore cannot defer to an inadequately supported and documented NANC recommendation.

B. The RFP process was procedurally flawed in critical respects, depriving the public of the most competitive available proposals and repeatedly prejudicing the incumbent in favor of Ericsson. On the one hand, the deadline for submission of bids was extended – after it expired –

⁷ See *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1315 (D.C. Cir. 1980).

specifically to accommodate Ericsson, which failed to deliver its proposal on time. On the other hand, the NAPM LLC, [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [REDACTED] [END CONFIDENTIAL INFORMATION] refused to solicit additional proposals from bidders despite the availability of an improved proposal from Neustar – even though, only months earlier, the RFP had been expressly modified to remove any restriction on bidders seeking the opportunity to make such offers.⁸ Given the recommendation’s conclusion [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [REDACTED] [END CONFIDENTIAL INFORMATION] the failure to solicit revised proposals, especially in light of the previous deadline extension, is inexplicable. Moreover, these decisions were never subject to public comment or scrutiny, thereby creating an uneven playing field and depriving Neustar, the industry, and the public of a fair process. This inconsistent treatment of competing bidders is unlawful under established precedent.

The NANC Recommendation Fails To Provide the Commission with Sufficient Detail To Allow Meaningful Review.

The Commission also cannot reasonably rely on the NANC/NAPM recommendation because it fails to provide the information necessary for the Commission to conduct a meaningful independent review of the selection process and vendor recommendation. The recommendation and the documents supporting it are inadequate. The recommendation lacks any detailed explanation as to how the final decision was reached, what factors were considered, and how different criteria were evaluated and weighed. Even though the transition to a new LNPA is unprecedented in its complexity, the recommendation does not address the requirements for this transition, the plan for it to succeed, or a risk mitigation framework if issues are encountered.

⁸ See RFP § 13.6.

The recommendation is essentially a black box that provides only cursory conclusions, with little or no presentation or explanation as to the evidence and analysis on which those conclusions were based. Nor does it address the cost implications of the transition for NPAC services and users.

With the exception of **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED] **[END CONFIDENTIAL INFORMATION]** – the category that was, under the RFP, to be given least weight in the evaluation – the NANC documents contain almost no discussion of any specific aspect of the competing proposals. For example:

- The recommendation does not adequately address the costs and risks of a transition of LNPA vendors, who will bear these costs and risks, or who will guarantee the success of the project once it is started;
- It does not adequately address the extensive technical and management criteria that competing bidders were required to demonstrate they could meet and that were supposed to be given a substantial majority of weight in evaluating competing bids;
- It does not scrutinize Ericsson’s service quality commitments, and is silent on the subject of service parity between the incumbent and Ericsson’s proposal, neither providing any assurance of continuity nor describing any temporary or permanent loss of service the industry may need to absorb;
- It also does not address the IP Transition, a critical issue for the next LNPA.

In short, the recommendation reads as a decision based entirely on **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED] **[END CONFIDENTIAL INFORMATION]** with scant attention paid to mission-critical technical, management, and related issues that the RFP required

proposals to address. And, even with respect to [BEGIN CONFIDENTIAL INFORMATION]

[REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION]

This failure properly to justify the selection of the next LNPA, and to give technical and management criteria paramount consideration in the analysis, creates an unacceptable risk to the industry and the public.

The Selection of Ericsson Raises Serious Concerns Regarding Transition Risks and National Security.

A. Ericsson’s transition plan is [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION] The transition from one LNPA to another has never been attempted before, and is an enormously complex task, requiring dozens of interdependent work streams to occur in parallel on an aggressive schedule. Failure to ensure there is continuity between LNPAs will create unacceptable risks of service outages and degradation that can interfere with call routing, obstruct consumers’ ability to change providers at will, and prevent open access to number inventory.

None of Ericsson’s prior experience in providing LNP services outside the United States includes executing a transition of the sort required here. Of note, Ericsson proposes to outsource significant responsibility for LNP services through an untested partnership with SunGard, which also lacks any relevant transition experience. Moreover, Ericsson cannot claim any real-world experience in providing LNP services on the scale and complexity that would be involved in serving as the next LNPA, while its subcontractor, SunGard, has no LNP experience at all.

Despite this lack of prior transition experience, or perhaps because of it, Ericsson’s transition plan [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION]

B. The NANC recommendation also fails to address critical public safety and national security issues implicated by the potential change in LNPA. [BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[END NATIONAL

SECURITY INFORMATION] The Commission cannot address these deficiencies without involving the relevant agencies within the Executive Branch, adopting a set of minimum security requirements, and allowing the candidates to compete on the relative security of their proposed systems.

* * *

In light of these issues, the Commission cannot accept the NANC recommendation that Ericsson be selected as the next LNPA. The Commission should instead (1) declare that Ericsson’s proposal does not qualify for consideration in light of its failure to satisfy the impartiality/neutrality requirements required by law and Commission precedent; (2) authorize the NAPM LLC to negotiate an extension to the current contract; and (3) issue a notice of proposed rulemaking to examine future arrangements for administration of the NPAC.

I. ERICSSON IS NOT IMPARTIAL AND WOULD NOT BE A NEUTRAL NUMBERING ADMINISTRATOR

The Commission cannot lawfully select Ericsson's wholly owned subsidiary, Telcordia d/b/a iconectiv, to serve as the next LNPA, because Ericsson – the parent – is subject to the undue influence of both its managed services customers and the purchasers of its equipment, and because Ericsson has not proposed and could not propose any safeguards adequate to shield its wholly owned subsidiary from that influence. To the contrary, in persuading the industry that the subsidiary was capable of serving as an LNPA, Ericsson repeatedly touted the resources and support of the parent. *See infra* pp. 31-33. Furthermore, because Ericsson is a manufacturer of telecommunications network equipment, it and its affiliates are barred, under the terms of Section 52.26(a) of the Commission's rules, from serving as LNPA. And, because it is an affiliate of at least two TSPs and an IVP, and is subject to undue influence by TSPs, Ericsson's subcontractor SunGard, too, fails to satisfy applicable neutrality requirements, requiring rejection of Ericsson's bid. Post-bid cures are unavailable to Ericsson, its affiliates, and the Commission as they would be inconsistent with the RFP process and would constitute impermissible re-bidding to benefit a single bidder.

The requirement that the LNPA be free of improper influence – or even the appearance of such influence – has deep roots in the statute and the Commission's rules, reinforced by Commission precedent and the terms of the RFP. That requirement serves a vital purpose: ensuring not only that the LNPA will be free of any incentive to use its position to skew competitive outcomes but also that all NPAC users – large and small, from all segments of the communications industry – will be able to trust the LNPA to protect competitively sensitive information and to implement changes in the numbering system in an even-handed manner. To

put the NPAC in the hands of a company with extensive entanglement with the business affairs of a few of the largest wireless providers not only would violate the law and the Commission's own precedent, but also would jeopardize the smooth functioning of the NPAC and future innovation.

Nothing in the NANC's recommendation suggests that the NAPM or the NANC made any determination that Ericsson is impartial and would be neutral, despite the express terms of the RFP. The failure to evaluate neutrality is inconsistent with the RFP and means the recommendation is invalid. Furthermore, Ericsson's neutrality is a legal requirement that must be satisfied and that the Commission must resolve. Ericsson is not impartial and would not be neutral, and it cannot serve as LNPA. The NANC's recommendation must be rejected for this reason alone.

A. Ericsson's Contractual and Vendor Relationships with Major Wireless Providers Disqualifies Its Subsidiary from Serving As LNPA

1. Ericsson – Parent and Subsidiary – Is Subject To Undue Influence

a. Ericsson's extensive businesses in the telecommunications sector make it uniquely beholden to a few major wireless providers.

First, Ericsson's business is deeply intertwined with those of at least two telecommunications service providers in the United States, Sprint, its recently acquired subsidiary, Clearwire, and T-Mobile.⁹ The Managed Services Agreements ("MSAs") between

⁹ Ericsson, a Swedish company, presumably also has significant relationships with non-U.S. TSPs, some of which may have ownership interests in U.S. TSPs. Ericsson refused to include in the record any information about its relationships with non-U.S. TSPs, despite the FoNPAC's direct question on the subject. Ericsson may also have non-U.S. TSP affiliates that have not been disclosed. *See* Letter from John T. Nakahata, Counsel, Ericsson, to Sanford C. Williams,

these companies and Ericsson uniquely bind the companies, giving each a significant role in the management and policies of the other.¹⁰ In these MSAs, Ericsson “takes responsibility for network design, planning and building, including day-to-day operations, while the carrier retains responsibility for strategy, marketing, and customer care.”¹¹ Ericsson also “provides operations support services/business . . . support services for a wide range of wireless, wireline, cable, and IP customers.”¹² Ericsson’s subsidiary Telcordia plays an important role in this business: by its own admission, Ericsson acquired Telcordia to “help boost Ericsson’s expansion of its North American managed services business, a segment where Ericsson takes over the day-to-day management of an operator’s phone network for a fee.”¹³

To cite one important example of Ericsson’s involvement with wireless carriers’ businesses, in July 2009, Ericsson announced a seven-year, five-billion-dollar agreement (“Network Advantage”) with Sprint, North America’s third-largest wireless carrier, to operate all Sprint-owned networks.¹⁴ Pursuant to this MSA, Ericsson absorbed 6,000 Sprint employees

FCC and the FoNPAC (Nov. 13, 2013) (“Follow-Up Response”) to Question 8 at Telcordia06423. All such relationships must be disclosed. Likewise, NAPM, FoNPAC, and NANC members have or are discussing relationships with Ericsson that should be disclosed.

¹⁰ In the case of the MSA between Ericsson and Clearwire, Ericsson had responsibility for acquiring numbering resources for Clearwire. *See infra* pp. 17-18. As noted below, the terms of Ericsson’s current MSAs have not been disclosed. But the fact that Ericsson took on such responsibilities in the Clearwire agreement indicates the extent of Ericsson’s involvement with the numbering-related affairs of its managed services clients.

¹¹ Letter from John T. Nakahata, Counsel, Ericsson, to the FoNPAC and NAPM LLC (Apr. 4, 2013) (“Legal Opinion Letter”) at Telcordia06084.

¹² *Id.* at Telcordia06084-85.

¹³ Kevin O’Brien & Peter Lattman, *Ericsson to Acquire Telcordia for \$1.15 Billion*, N.Y. TIMES, June 14, 2011, http://dealbook.nytimes.com/2011/06/14/ericsson-to-acquire-telcordia-for-1-15-billion/?_php=true&_type=blogs&_r=0.

¹⁴ *See* Roger Cheng, *Sprint Signs Deal With Ericsson to Outsource Network Operations*, WALL ST. J., July 10, 2009, <http://online.wsj.com/article/SB124715621714118569.html>.

and contracted to manage the day-to-day services, provisioning, and maintenance of Sprint’s wireless and wireline networks.¹⁵ The MSA provides that

[Ericsson] and its Subcontractors, and their employees, agents and representatives will at all times comply with and abide by all policies and procedures of Sprint [Ericsson] agrees to conduct business with Sprint in an ethical manner that is consistent with the Sprint Nextel Code of Conduct for Consultants, Contractors and Suppliers. . . .¹⁶

[Ericsson] has the responsibility for, and control over, the methods and details of performing Services [for Sprint]. Except as otherwise provided in this Agreement, [Ericsson] will provide all tools, materials, training, hiring, supervision, work policies, and procedures, and be responsible for the compensation, discipline and termination of Supplier Personnel.¹⁷

Under the terms of the MSA, Sprint exerts significant control over Ericsson’s “management and policies” “by contract.”¹⁸ Specifically, the MSA requires “[Ericsson] and its Subcontractors, and their employees, agents and representatives [to] at all times comply with and abide by all policies and procedures of Sprint”¹⁹ and its business Code of Conduct.²⁰ The MSA also establishes mandatory “Service Levels,” or “specific performance metrics measuring the quality [and] efficiency” of network services, that Ericsson must meet to perform the contract.²¹

¹⁵ *See id.*

¹⁶ Managed Services Agreement By and Between Sprint/United Management Company and Ericsson Services Inc. §§ 17.1, 17.2, Sprint Policies (July 7, 2009) (“MSA”). Although the full MSA between Ericsson and Sprint has not been made public, a redacted version of the agreement was filed as an exhibit to a Securities and Exchange Commission submission by Clearwire. *See* <http://www.sec.gov/Archives/edgar/data/1442505/000095012311072552/v57546exv10w6.htm>.

¹⁷ *Id.* § 19.12, Relationship of Parties.

¹⁸ *Cf.* 47 C.F.R. § 52.12(a)(1)(i)(C).

¹⁹ MSA § 17.1.

²⁰ *Id.* § 17.2.

²¹ *Id.* § 2.1.2 & Ex. A.

At the same time, the MSA allows Ericsson to exert significant influence over Sprint because, under the MSA, Ericsson “has the responsibility for, and control over,” the operation, management, and provision of Sprint’s telecommunications network.²² This provision gives Ericsson control over Sprint’s network on a day-to-day basis.

Ericsson’s MSA with Clearwire Corporation,²³ whether or not it remains in effect, illustrates the nature of Ericsson’s managed services business and the entanglements it creates with its managed services customers:

[Ericsson] will ensure that adequate telephone numbering resources are available to Clearwire. [Ericsson] will consult with Clearwire on all matters involving interpretation of number administration rules and policies, and Clearwire will make all final decisions on such interpretations. [Ericsson] will provide necessary data, analysis and support for formal interaction with regulatory authorities affecting number administration issues, such interaction to be directed by Clearwire.

[Ericsson] responsibilities include:

- Ordering numbering resources – includes analysis, research, preparation, and submission of the appropriate paperwork to the industry number administrators. [Ericsson] will analyze each rate center in their respective areas to determine when and how many blocks to order.
- Entering and maintaining numbering resources – upon receipt of numbering resources from industry administrators, [Ericsson] will enter number blocks into all internal and external databases. The maintenance also includes the number moves/augments to ensure availability for customer assignment.
- Managing numbering issues – [Ericsson] will perform research and troubleshoot numbering issues submitted by Clearwire Customer Care and other Clearwire channels.

²² *Id.* § 19.12.

²³ See Phil Goldstein, *Clearwire to Outsource WiMAX Network to Ericsson*, FIERCE WIRELESS (May 18, 2011), <http://www.fiercewireless.com/story/clearwire-outsource-wimax-network-ericsson/2011-05-18>. Ericsson has not disclosed whether the terms of this agreement remain in effect following Sprint’s acquisition of Clearwire. Whether or not that particular MSA is in effect, it illustrates the neutrality problems that arise from this line of business.

- Managing numbering projects – [Ericsson] will support deployment projects with numbering impacts including mobile code re-homes, voicemail re-homes, and large scale audits.²⁴

In addition to these contracts with Sprint and Clearwire, Ericsson recently signed a long-term MSA with T-Mobile²⁵ and reportedly is in discussions to provide managed services to AT&T and Verizon.²⁶ Ericsson has also publicly expressed interest in expanding its MSAs to include acquisition of the network assets of its TSP partners, such as Sprint.²⁷

Second, Ericsson is a major manufacturer of telecommunications networking equipment and provides infrastructure service to many of the nation's TSPs. Ericsson is the world's largest producer of wireless networks,²⁸ with a 40% global market share in wireless network infrastructure.²⁹ It is the leading global provider of Long Term Evolution ("LTE") network technology.³⁰ It has been selected as an infrastructure vendor by each of the four major U.S.

²⁴ Letter Agreement Between Clear Wireless, LLC and Ericsson Inc. § 10.16 (May 16, 2011), *available at* <http://www.sec.gov/Archives/edgar/data/1442505/000095012311072552/v57546exv10w6.htm>.

²⁵ See Tammy Parker, *T-Mobile upgrades OSS/BSS, signs managed services pact with Ericsson*, FIERCE WIRELESS (June 1, 2014), <http://www.fiercewireless.com/tech/story/t-mobile-upgrades-ossbss-signs-managed-services-pact-ericsson/2014-06-01>.

²⁶ See Adam Ewing, *Ericsson Talks to U.S. Mobile Carriers Over Managed Services*, BLOOMBERG NEWS, July 1, 2014, <http://www.bloomberg.com/news/2014-07-01/ericsson-in-talks-to-manage-wireless-networks-for-at-t-verizon.html>.

²⁷ See Diana ben-Aaron, *Ericsson Sees Possibility of Network Acquisition With Partners*, BLOOMBERG NEWS, Nov. 18, 2010, <http://www.bloomberg.com/news/2010-11-18/ericsson-sees-possibility-of-acquiring-networks-with-financial-partners.html>.

²⁸ See *Ericsson Chairman Says Equipment Demand Looks Positive This Year*, BLOOMBERG NEWS, Apr. 6, 2013, <http://www.bloomberg.com/news/2013-04-06/ericsson-chairman-says-equipment-demand-looks-positive-this-year.html>.

²⁹ Ericsson Annual Report 2013 at 2, *available at* http://www.ericsson.com/thecompany/investors/financial_reports/2013/annual13/sites/default/files/download/pdf/EN_-_Ericsson_AR2013.pdf.

³⁰ See Ericsson, *Long Term Evolution: LTE*, <http://www.ericsson.com/thecompany/press/mediakits/lte>.

wireless carriers (AT&T, Verizon Wireless, Sprint, and T-Mobile) in their LTE deployments³¹ and “provides network infrastructure and services for fixed broadband providers.”³² Equipment sales to TSPs account for 54% of Ericsson’s total revenue.³³ Indeed, Ericsson’s annual report describes it as a “world-leading” provider of “services, software and infrastructure, mainly for telecom operators,” and one of the largest providers of “telecom services” in the world.³⁴

Ericsson also has significant financial relationships with multiple TSPs because it “arranges vendor financing for customers, including [TSPs].”³⁵ In its vendor financing agreements, Ericsson arranges financing for dozens of customers, including TSPs, for infrastructure projects.³⁶ “To the extent customer loans are not provided directly by banks, Ericsson may provide or guarantee vendor credits.”³⁷ “As of December 31, 2012, Ericsson had originated or guaranteed a total of 78 customer financing arrangements worldwide” – presumably at least some of these arrangements are with U.S. TSPs.³⁸

Deepening the two companies’ relationship, *see supra* pp. 15-17, Ericsson and Sprint have a multi-billion-dollar network hardware agreement to go along with their managed services relationship. In 2011, Sprint selected Ericsson as a key equipment provider for Sprint’s

³¹ See Legal Opinion Letter at Telcordia06084.

³² *Id.*

³³ See Kevin J. O’Brien, *Ericsson Reports Strong First-Quarter Earnings*, N.Y. TIMES, Apr. 25, 2012, <http://www.nytimes.com/2012/04/26/business/global/ericsson-reports-strong-first-quarter-earnings.html>.

³⁴ Ericsson Annual Report 2013 at 2, *available at* http://www.ericsson.com/thecompany/investors/financial_reports/2013/annual13/sites/default/files/download/pdf/EN_-_Ericsson_AR2013.pdf.

³⁵ Legal Opinion Letter at Telcordia06085.

³⁶ *Id.*

³⁷ Follow-Up Response to Question 10 at Telcordia06424.

³⁸ Legal Opinion Letter at Telcordia06085.

“Network Vision” program.³⁹ The five-year contract, estimated at between four and five billion dollars, contemplates Ericsson building a complete network infrastructure solution in roughly one-third of Sprint’s markets, as well as integrating and transitioning all vendors’ equipment into Sprint’s nationwide network infrastructure.⁴⁰ Ericsson is also a major supplier of Code Division Multiple Access (“CDMA”) Infrastructure to Sprint’s network.⁴¹

b. Under the statute, the Commission’s rules, and the terms of the RFP, these business relationships disqualify Ericsson/Telcordia from serving as LNPA. These defects cannot be cured without permitting Ericsson to fundamentally alter its proposal, which the RFP process does not allow.

First, Ericsson cannot satisfy the statutory requirement that each numbering administrator be “impartial.”⁴² Ericsson’s close relationship with Sprint and T-Mobile – and its responsibility for those carriers’ network operations – create a strong incentive to favor those carriers’ interests in the administration of the NPAC. Were Ericsson to be named as LNPA, carriers that lack a managed services relationship with Ericsson would justifiably suspect that favored competitors were gaining an advantage – and would be reluctant to trust the LNPA with sensitive business information or to consider innovations that might create some hidden benefit for Ericsson’s clients. Likewise, because Ericsson has huge equipment contracts with major wireless carriers, the rest of the telecommunications industry would have reason for concern that Ericsson would

³⁹ Press Release, *Ericsson Selected for Sprint’s Network Vision Program* (Dec. 6, 2010), available at <http://www.ericsson.com/news/1469429>.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See* 47 U.S.C. § 251(e)(1) (requiring the Commission to “designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis”).

tilt the competitive scales in favor of those major customers. The statutory requirement that the LNPA be impartial is a high bar, protecting *all* users of numbering resources. Only Congress, and not the Commission, the NANC, or Ericsson can re-write the statutory requirement.⁴³

Second, Ericsson cannot satisfy the requirements, set forth in the Commission’s rules, that the LNPA be a “neutral third part[y]”⁴⁴ that is “not aligned with any particular telecommunications industry segment.”⁴⁵ For the same reasons that Ericsson is not “impartial,” it is not “neutral”: rather, due to its managed service and vendor relationships, it has a strong incentive to favor the interests of its major customers. Furthermore, because Ericsson’s customer relationships are overwhelmingly concentrated with major wireless service providers, Ericsson is “aligned” with that industry segment. Ericsson itself boasts that “[e]very time you make a call or use an app on your smartphone, tablet, or mobile computer, you are probably using one of our solutions and one of the networks provided or managed by us.”⁴⁶ Providers in other sectors would have every reason for concern that an Ericsson-managed NPAC would naturally look out for and protect the interests of the wireless industry above other industry

⁴³ *Cf. MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (power to “modify” a requirement does not entail power to make “fundamental revision of the statute”).

⁴⁴ First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352, 8400, ¶ 92 (1996) (“*First Portability Report and Order*”).

⁴⁵ 47 C.F.R. § 52.21(k); *see also id.* § 52.12(a)(1) (stating that numbering administrators “shall be non-governmental entities that are impartial and not aligned with any particular telecommunication industry segment”); *id.* § 52.9(a)(2)-(3) (providing that the LNPA must “[n]ot unduly favor or disfavor any particular telecommunications industry segment or group of telecommunications consumers” or “unduly favor one telecommunications technology over another”).

⁴⁶ 2013 Annual Report at 2, available at http://www.ericsson.com/thecompany/investors/financial_reports/2013/annual13/sites/default/files/download/pdf/EN_-_Ericsson_AR2013.pdf.

segments.⁴⁷ The fact that reasonable questions exist about Ericsson’s lack of impartiality and inability to be a neutral administrator mean that allowing it to serve as an LNPA would be directly counter to the purposes of the statute and the Commission’s rules.

Third, Ericsson cannot satisfy the requirement – applicable under both the Commission’s rules and the terms of the RFP – that the LNPA be free of “undue influence by parties with a vested interest in the outcome of numbering administration and activities.”⁴⁸ Not only are wireless service providers major customers, but Ericsson has a special need – perhaps even commercial obligations – to ensure that numbering administration and activities have no adverse effect on the operations of its managed services clients. Moreover, because numbering activities can impact network operations – and because the nature of NPAC operations may affect Ericsson’s performance of its contractual obligations to its managed services clients – Ericsson *itself* has an impermissible, pervasive vested interest in numbering administration and activities.

This conclusion is reinforced by the Commission’s analysis in the *Warburg Transfer Order*.⁴⁹ The Commission employed a two-step inquiry. First, it asked whether a party “would have an interest in the outcome of numbering administration and activities.”⁵⁰ One indication of such an interest is a “contractual relationship or other arrangement” with a TSP “that would impair the entity’s ability to administer numbers fairly.”⁵¹ Second, the Commission asked

⁴⁷ An examination of Ericsson’s managed services clients indicates that Ericsson would be incentivized to favor *large* wireless providers over small, rural carriers.

⁴⁸ 47 C.F.R. § 52.12(a)(1)(iii); *see* 2015 LNPA RFP § 4.2 at Telcordia00005.

⁴⁹ *Order, Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14 FCC Rcd 19792 (1999) (“*Warburg Transfer Order*”).

⁵⁰ *Id.* at 19810, ¶ 29.

⁵¹ 1997 LNPA Selection Working Group Report § 4.2.2(B)(4) (Apr. 25, 1997).

whether a party has an “incentive to influence” the LNPA “in a manner that might compromise [its] neutrality.”⁵² Those criteria are satisfied in the case of Ericsson’s relationships with its managed services and equipment customers.

Fourth, Ericsson flunks the RFP requirement that the LNPA not be “involved in a contractual or other arrangement that would impair its ability to administer the NPAC/SMS fairly and impartially as an LNPA.”⁵³ The MSAs that Ericsson has with its customers are a paradigmatic example of the sort of contractual arrangement that precludes fair and impartial administration: as between a managed services client and its non-client competitor, Ericsson has every incentive to favor its client. That is precisely what the RFP requirement was designed to avoid.

c. For the same reasons that Ericsson the parent is disqualified from serving as LNPA, its wholly owned subsidiary is also disqualified. At the outset, as noted above, by virtue of its managed services relationship with major wireless service providers, Ericsson *itself* has a vested interest in numbering activities: its network management is affected by and depends on the management of numbering resources through the NPAC (particularly if Ericsson is directly responsible for number resource management, as the terms of the Clearwire MSA provide). Ericsson is the sole shareholder of its subsidiary; under the Commission’s rules (and as a matter of law and common sense), Ericsson thus controls its subsidiary – something that goes well beyond mere undue influence or indirect affiliation.⁵⁴ Furthermore, by virtue of the parent’s

⁵² *Warburg Transfer Order*, 14 FCC Rcd at 19810-11, ¶ 30.

⁵³ 2015 LNPA RFP § 4.2 at Telcordia00005.

⁵⁴ *See* 47 C.F.R. § 52.12(a).

control of the subsidiary, the undue influence that major wireless carriers can exert over Ericsson, the parent, extends to its subsidiary as well.

d. Ericsson’s April 4, 2013 Legal Opinion⁵⁵ and its November 13, 2013 letter⁵⁶ rebut none of these points and fail to carry Ericsson’s burden of demonstrating that Ericsson can meet the applicable neutrality requirements.

i. Ericsson does not make any serious attempt to support the argument that the parent company satisfies neutrality requirements. It states, instead, that it “transacts business with customers on an arms’ length basis” and that it will abide by its pre-existing Code of Business Ethics.⁵⁷ But these mechanisms were not designed to address Ericsson’s partiality and lack of neutrality: Ericsson states that it treats its customers fairly, but the neutrality requirements are designed to ensure that Ericsson treats its *non*-customers fairly and impartially. As the Commission’s extensive precedents imposing stringent structural safeguards and auditable conduct rules illustrate, assurances of intent to remain impartial are meaningless. Ericsson’s extensive relationships with certain TSPs preclude it from showing that it would be “impartial” and mean that it is not “neutral” within the meaning of the Commission’s rules and the terms of the RFP.

ii. Ericsson has likewise proposed no measures adequate to demonstrate that its wholly owned subsidiary is insulated from the business interests of its parent.

Commission Precedent: In evaluating Ericsson’s showing, the Commission is not writing on a blank slate. It has already interpreted the obligations imposed by its neutrality rules

⁵⁵ See Legal Opinion Letter at Telcordia06074-98.

⁵⁶ See Follow-Up Response at Telcordia06417-32.

⁵⁷ See Legal Opinion Letter at Telcordia06085-86.

in prior orders involving the current LNPA, Neustar, and its affiliates. In 1999, the Commission concluded that one of Neustar’s owners, Warburg Pincus, had an interest in the outcome of numbering administration activities as a result of its investments in the telecommunications industry.⁵⁸ Even though the level of Warburg’s investment in the telecommunications market was small, and although there was no indication that any of Warburg’s TSP affiliates used numbering resources,⁵⁹

the Commission expressed concern that Warburg’s affiliates could have an interest “in obtaining information about how their competitors obtain and use numbers because such information may reveal the marketing strategies of these companies.”⁶⁰ To address these concerns, the Commission required Warburg to adhere to strict structural and procedural constraints to insulate Neustar from undue influence. Among the safeguards were: a requirement that Warburg hold no more than 9.9% of Neustar directly, with the remaining interest in an irrevocable voting trust, administered by two trustees with no affiliation with Warburg and owing fiduciary duties to the other investors in Neustar; procedural constraints on its influence over Neustar’s operations; a strict code of conduct; internal and independent third-party neutrality reviews; and requirements for Commission approval before changing Neustar’s organizational structure.⁶¹

⁵⁸ See *Warburg Transfer Order*, 14 FCC Rcd at 19810-11, ¶ 30.

⁵⁹ See *id.*, 14 FCC Rcd at 19810, ¶ 29,

⁶⁰ *Id.*

⁶¹ See *id.* at 19800, 19801-02, 19811-14, ¶¶ 10, 12-13, 32-36.

The Code of Conduct imposed on Neustar in the *Warburg Transfer Order* demonstrates how strictly the Commission has interpreted the requirements of neutrality and how competitively sensitive numbering information can be. For example, no person employed by or serving in the management of any Neustar shareholder could be directly involved in Neustar’s day-to-day operations; no employees of any TSP could be simultaneously employed by Neustar; and Warburg could control no more than 40% of the Neustar board. *Id.* at 19801-02, ¶¶ 12-13.

When Neustar was poised to make the transition from a privately held company to a public company in 2005, the Commission developed a number of “Safe Harbor” provisions to provide more specificity about what changes and transactions would not affect the LNPA’s neutrality as the company went public, as well as what changes and transactions would be likely to raise concerns requiring Commission review.⁶² The *Safe Harbor Order* included mechanisms to ensure that:

- The LNPA’s bylaws and other corporate documents maintain provisions that require it to comply with all neutrality rules regardless of whether it is a public or private company;⁶³
- The boards of the LNPA’s subsidiaries adhere to a Code of Conduct and neutrality requirements;⁶⁴
- No single shareholder will control more than 40% of the LNPA’s board;⁶⁵
- No director of the LNPA is affiliated with a TSP;⁶⁶
- No director of the LNPA is nominated or chosen by a TSP or TSP affiliate;⁶⁷
- The majority of the LNPA’s board is independent;⁶⁸
- The LNPA’s bylaws, charter, or securities would not provide a TSP or TSP affiliate with rights not enjoyed by other holders of the securities class;⁶⁹

Neustar Board members were prohibited from simultaneously serving on the boards of any TSP; no Neustar employee could hold any interest in any company that would violate the Commission’s neutrality requirements; and Neustar was required to hire a Commission-approved independent auditor to conduct quarterly neutrality reviews. *Id.* at 19802, 19816, ¶ 13 & App’x A. The Commission also required Neustar to make its neutrality reviews available to the public. *Id.* at 19813-14, ¶¶ 35-36.

⁶² See Order, *North American Numbering Plan Administration; NeuStar, Inc. Request to Allow Certain Transactions Without Prior Commission Approval and to Transfer Ownership*, 19 FCC Rcd 16982 (2004) (“*Safe Harbor Order*”).

⁶³ See *id.* at 16989-90, ¶ 17.

⁶⁴ See *id.* at 16990, ¶ 18.

⁶⁵ See *id.* at 16989, ¶ 15.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

- The LNPA may issue no special rights or classes of stock to TSPs or TSP affiliates;⁷⁰
- If the LNPA makes changes to its corporate structure it keeps its numbering administration functions severable;⁷¹
- The LNPA will seek prior Commission approval before acquiring an interest in a TSP or TSP affiliate;⁷²
- The LNPA will comply with Commission debt limitations;⁷³
- The LNPA must secure a certification from entities holding 5% or more of the LNPA’s stock, including all affiliated funds, that they are not a TSP or TSP affiliate; the LNPA may not register the entity’s shares until the certification is received;⁷⁴
- The LNPA provides the Commission and the NANC with copies of certification forms and supporting documentation of shareholders who own more than 5% equity in the LNPA within 5 days of receipt;⁷⁵
- The LNPA provides the Commission and the NANC a description of any changes to its organizational structure (including Board changes), along with a detailed organization chart, within 5 days of the change;⁷⁶
- Upon Commission request, the LNPA provides copies of their equity ownership information, certifications, and shareholder filings within two business days.⁷⁷

Furthermore, by requiring the neutrality obligations to be included in Neustar’s Articles of Incorporation, the Commission made clear that it intended for neutrality to apply enterprise-wide, not just to the portion of the company that provides numbering administration, and that a voting trust would no longer be considered sufficient insulation. This is reinforced by the

⁶⁹ See *id.* ¶ 16.

⁷⁰ See *id.* at 16989-90, ¶ 17.

⁷¹ See *id.* at 16990, ¶ 18.

⁷² See *id.* at 16992, ¶ 26.

⁷³ See *id.*

⁷⁴ See *id.* ¶ 25.

⁷⁵ See *id.* at 16994, ¶ 34.

⁷⁶ See *id.*

⁷⁷ See *id.*

requirement that the boards of any subsidiaries must adhere to the Code of Conduct and the requirements of the *Safe Harbor Order*.⁷⁸

Ericsson’s Inadequate Safeguards: The safeguards that Ericsson has proposed do not remotely satisfy the standards that the Commission articulated in the *Warburg Transfer Order* and the *Safe Harbor Order*. Ericsson’s proposal relies on its subsidiary being governed by its own board of directors, “a majority of whom will be outside, independent directors.”⁷⁹ “Outside, independent” directors are simply non-Ericsson employees. They are not independent in the sense that they have any less of a duty to act in the best interest of Telcordia and its sole shareholder – Ericsson. Ericsson even admits that these directors will owe fiduciary duties to the subsidiary *and its shareholders*.⁸⁰ That provides no assurance: because Telcordia is a wholly owned subsidiary of Ericsson, Telcordia’s directors owe their fiduciary duties to Ericsson.⁸¹ As a result, the fiduciary duty owed by these “independent” directors will be to do what is best for Ericsson, not what is best to ensure Ericsson’s subsidiary remains neutral.

The *Warburg Transfer Order* demonstrates the inadequacy of Ericsson’s proposed safeguards. Unlike the Code of Conduct adopted in the *Warburg Transfer Order*, which bound each of Warburg, Neustar, and Lockheed,⁸² the Code that Ericsson proposes binds only Telcordia’s employees, officers, and directors; it does not in any way bind Ericsson or its

⁷⁸ See *id.* at 16990, ¶18.

⁷⁹ Legal Opinion Letter at Telcordia06081.

⁸⁰ See *id.*

⁸¹ See *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174 (Del. 1988) (“[I]n a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.”); see also *In re Teleglobe Communications Corp.*, 493 F.3d 345, 366-67 (3d Cir. 2007) (noting that all duties owed to the subsidiaries flow back up to the parent).

⁸² *Warburg Transfer Order*, 14 FCC Rcd at 19813, ¶ 34.

employees, officers, and directors.⁸³ This is unacceptable, as the *Safe Harbor Order*'s mandate that neutrality requirements be included in all corporate documents demonstrates that neutrality requirements apply to the entire corporation, not simply to the portion of the company providing numbering administration.⁸⁴ Indeed, Ericsson has not offered to undertake *any* safeguards governing its own operations. Moreover, the “auditable” code of conduct that Ericsson proposes is remarkably threadbare: it does nothing to ensure that the individuals who work for Telcordia will be insulated in any way from the ultimate influence of the corporate parent. Ericsson, moreover, has proposed no mechanism for (1) monitoring its shareholders and the affiliates of its shareholders; (2) restructuring its debt so that the debt holders can be monitored; (3) vetting each member of the boards of Ericsson and all its subsidiaries for neutrality issues; and (4) ensuring that its employees receive neutrality training when they are hired and on a continuing basis. Telcordia, today and under the structure and code of conduct that Ericsson proposes in its opinion letter, is an integral part of Ericsson, and nothing prevents Ericsson from exercising complete control over the company, its management, and its employees.

Commission Precedent Is Binding: Ericsson cannot dismiss the Commission's strict approach to Neustar's neutrality as one-off measures; to the contrary, the strictures imposed to ensure Neustar's neutrality reflect the Commission's interpretation of the degree of insulation from the risk of undue influence that the Commission's neutrality rules demand – there was no other legal justification for imposing the requirements. The Commission has no basis for changing that interpretation simply because it is contemplating substituting a different entity as LNPA. To the contrary, the Commission must apply its requirements consistently to similarly

⁸³ See Legal Opinion Letter at Telcordia06083.

⁸⁴ *Safe Harbor Order*, 19 FCC Rcd at 16989-90, ¶ 17.

situated parties – in this case, Neustar and Ericsson.⁸⁵ To be clear: when obligations were imposed in 1999, Warburg Pincus was not a TSP, and the only basis for concern about undue influence was the fact that Warburg Pincus had relatively minor investments in TSPs. Moreover, when the Commission in the *Safe Harbor Order* placed restrictions on Neustar as a newly emerging public company, there was no basis for any present concern about undue influence. The circumstances here, by any reckoning, present a much more significant risk of bias than anything the Commission contemplated in its earlier orders: billions of dollars in Ericsson’s revenue turn on the fortunes of its TSP partners, and the success of Ericsson’s own network management depends in part, directly or indirectly, on the NPAC. Ericsson’s failure to propose safeguards at least as stringent as those imposed on Neustar means that it cannot satisfy neutrality as the Commission itself has construed it.

Ericsson Cannot Cure Its Lack of Neutrality: Given the nature of the deficiencies in Ericsson’s neutrality showing, there is no basis to provide Ericsson an opportunity to address its lack of neutrality.⁸⁶ Neutrality is a prerequisite to being selected as the LNPA under Section 251(e)(1) and the Commission’s rules.⁸⁷ Neustar incorporated the cost of neutrality into its bid;

⁸⁵ *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”).

⁸⁶ *See* Vendor Qualification Survey § 3.4 at Telcordia05010 (“The Respondent must specifically address and demonstrate that as a Primary Vendor it is a Neutral Third Party. This may include a demonstration of how the Respondent will cure any deficiencies in neutrality if it is awarded the LNPA contract.”); *id.* § 3.5 at Telcordia05010 (“If the FCC determines that a Respondent is not in compliance with the neutrality criteria, and such noncompliance will not be cured by the start date of the new LNPA contract, the FCC shall disqualify the Respondent from the procurement.”).

⁸⁷ *See* Comments of Neustar, Inc. at 16-17, WC Docket Nos. 09-109 et al. (Sept. 13, 2012) (“[T]he only *gating* factor – that is, the only requirement that should lead to automatic

Ericsson did not. Because the parties applied entirely different neutrality criteria in formulating their bids, Ericsson and Neustar effectively bid on two different sets of requirements for serving as LNPA, with two vastly different cost bases. Allowing Ericsson a *post hoc* opportunity to “cure” its failure to demonstrate how it will comply with the applicable neutrality requirements would be arbitrary and capricious because, unlike past Commission actions allowing such remedies, here the failure to set clear expectations at the start undermined the integrity of the bidding. Affording Ericsson a *post hoc* opportunity to cure its conflict of interest and assure its neutrality would be to “radically change the terms of an auction after the fact.”⁸⁸ Moreover, the terms of the RFP do *not* permit bidders to address neutrality only after the Commission has received the NANC’s recommendation. On the contrary, the Vendor Qualification Survey (“VQS”) expressly provides that, to the extent a bidder is not neutral at the time of bid submission, it must “include a demonstration of how the Respondent will cure any deficiencies in neutrality if it is awarded the LNPA contract.”⁸⁹ Ericsson has failed to demonstrate that it is impartial and how it it will be neutral, and it cannot be given a further opportunity – that would simply be re-opening the bidding for the benefit of one party alone.

Furthermore, the terms of Ericsson’s proposal preclude the subsidiary from seeking to dissociate itself from the parent to satisfy neutrality. The proposal *relied on* Telcordia’s affiliation with Ericsson as an affirmative selling point for its proposal. In its response to the

disqualification of a bidder – is non-compliance with the neutrality criteria set forth in the *RFP Documents*. . . . [N]eutrality is the only item that *should* be considered as a prerequisite to participation in the *RFP* because neutrality is required not only by the terms of the *RFP Documents* but also by the Commission’s rules.”).

⁸⁸ *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (“We start from the intuitive premise that an agency cannot, in fairness, radically change the terms of an auction after the fact.”).

⁸⁹ Vendor Qualification Survey § 3.4 at Telcordia05010.

VQS, Telcordia relied on the “backing of Ericsson” to claim it had “an experienced and reliable team.”⁹⁰ Ericsson insisted that Telcordia would be able to “take advantage of [Ericsson’s] substantial resources.”⁹¹ Part of Ericsson’s sales pitch was based on [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION]

There can be no doubt that this is an *Ericsson* proposal: as Telcordia told the FoNPAC during their sales presentation: [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION] And the proposal included extensive materials describing the qualifications and capabilities of the parent in its proposal. Having relied on its affiliation with the parent as an affirmative selling point for its proposal, the subsidiary cannot now disclaim that affiliation to satisfy neutrality: Telcordia cut

⁹⁰ Vendor Qualification Survey, Optional Attachment § 3.3.1 at Telcordia06045.

⁹¹ LNPA Procurement Presentation and Q & A in Denver, Colorado, Telcordia Technologies, Inc. dba iconectiv, at 25 (Aug. 6, 2013) (“Telcordia Presentation”), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017881455>.

⁹² *Id.* at 147.

⁹³ *Id.* at 266.

off from Ericsson would be a different entity than the one that secured the NANC's recommendation.

2. Ericsson's Subsidiary Is Barred from Serving As LNPA Because It Is an Affiliate of a Telecommunications Network Equipment Manufacturer

Ericsson is also barred from serving as the LNPA because it has a direct material financial interest in manufacturing telecommunications network equipment for the U.S. market. Its subsidiary, Telcordia, is likewise barred as an affiliate of a telecommunications network equipment manufacturer.

The Commission adopted additional neutrality requirements for the LNPA when it incorporated the NANC's 1997 LNPA Working Group Report into its rules.⁹⁴ Thus, Commission rules provide that the LNPA contract must not be awarded to, among others, "any entity with a *direct material financial interest* in manufacturing telecommunications network equipment"; or "any entity affiliated in other than a de minimis way" with such an entity.⁹⁵ This neutrality requirement is "a crucial element" of the LNPA selection process⁹⁶ and is necessary to prevent a conflict of interest in numbering administration.⁹⁷

As shown above, Ericsson plainly has a "*direct material financial interest* in manufacturing telecommunications network equipment" because it manufactures equipment and

⁹⁴ 47 C.F.R. § 52.26(a) ("Local number portability administration shall comply with the recommendations of the North American Numbering Council (NANC) as set forth in the report to the Commission prepared by the NANC's Local Number Portability Administration Selection Working Group, dated April 25, 1997 ([1997 Selection] Working Group Report) and its appendices, which are incorporated by reference pursuant to 5 U.S.C. 552(a) and 1 CFR part 51.").

⁹⁵ 1997 Selection Working Group Report § 4.2.2(B).

⁹⁶ *Id.* § 4.2.2.

⁹⁷ *Id.* § 4.2.2(B)(2), (3); *see also id.* (noting that all regions adopted "identical or substantially similar neutrality requirements").

provides infrastructure services to many of the nation’s TSPs. And Ericsson’s wholly owned subsidiary is, of course, an affiliate of a network equipment manufacturer. Ericsson and Telcordia are thus barred from serving as LNPA under Section 52.26(a).

Ericsson’s Opinion Letter did not even bother to address this prohibition, and the company claims that it is not required to comply with that neutrality restriction because it is not codified in any rule.⁹⁸ But that is incorrect: the Commission adopted the 1997 LNPA Working Group Report pursuant to 5 U.S.C. § 552(a). Ericsson cannot evade its terms. Moreover, the prohibition on a telecommunications network equipment manufacturer serving as an LNPA makes perfect sense. Ericsson is, by virtue of its equipment manufacturing interests, partial – it has a strong incentive to favor the interests of its large customers. Even the perception that an equipment manufacturer/LNPA might play favorites is sufficient to undermine confidence among other carriers and the public that LNPA administration is truly neutral. As the Commission has explained, “[e]ven if a[n] . . . Administrator aligned with a particular industry segment was impartial, there would still likely be the perception and accusations that it was not.”⁹⁹ That recognition led the NANC, in 1997, to bar network equipment manufacturers *and* their affiliates from serving as the LNPA. The Commission properly adopted the same categorical prohibition by incorporating the NANC recommendation by reference in 47 C.F.R. § 52.26(a). Accordingly, neither Ericsson nor its subsidiary may lawfully serve as an LNPA.

⁹⁸ Letter from John T. Nakahata, Counsel, Telcordia, to Marlene Dortch, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, at 1-4 (May 9, 2014).

⁹⁹ Report and Order, *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588, 2613, ¶ 57 (1995) (“*NANP Administration Report and Order*”).

B. SunGard Is Not a Neutral Third Party Because of Its Affiliation with Various IVPs and TSPs

The RFP provides that not only the LNPA, but also “all of its Sub-Contractors,” must be “Neutral Third Parties.”¹⁰⁰ Accordingly, SunGard, like Ericsson, must comply with all of the neutrality requirements of the statute, the Commission’s rules, and the RFP itself. SunGard does not comply with these requirements: Ericsson admits that SunGard is an affiliate of an IVP and of SunGard NetWork Solutions Inc. (“SNS”), which serves as a TSP in multiple states. SunGard is also an affiliate of another TSP that Ericsson did not previously disclose. Accordingly, the Commission must disqualify Ericsson because its subcontractor, SunGard, is not impartial and would not be neutral. SunGard has undergone substantial changes to its corporate structure since the filing of Ericsson’s neutrality legal opinion that Ericsson appears not to have brought to the attention of the NAPM LLC, the NANC, or the Commission.¹⁰¹ In March 2014, SunGard’s parent company, SunGard Data Systems Inc. (“SDS”), spun off SunGard to its seven private equity owners. The chairman of SDS’s board of directors, Glenn Hutchins – a co-founder of SDS and SunGard investor Silver Lake – has been named to AT&T’s board of directors.¹⁰² (It is not clear whether Hutchins remains on the board of SunGard.) Another of the SunGard owners, Kohlberg Kravis Roberts & Co. (“KKR”), acquired a nearly 30% interest in a TSP; one of KKR’s partners sits on the board of this TSP while another KKR partner chairs the board of SunGard. Ericsson does not appear to have disclosed any of these changes – some of which raise serious questions about the ability of its chosen subcontractor to be neutral in its participation in

¹⁰⁰ 2015 LNPA RFP § 4.2 at Telcordia00005.

¹⁰¹ http://articles.philly.com/2014-04-03/business/48805607_1_buyout-wayne-sungard-data-systems-inc.

¹⁰² AT&T Corporate Governance, *Glenn H. Hutchins*, <http://www.att.com/gen/investor-relations?pid=25441>.

the administration of LNP. As a result, there may be additional neutrality questions about SunGard that are not evident from the record of this proceeding.

1. SunGard Is an Affiliate of an Interconnected VoIP Provider and at Least Two Telecommunications Service Providers

SunGard cannot serve in any numbering capacity because it is an admitted affiliate of an IVP and a TSP. Additionally, SunGard is an affiliate of at least one additional TSP that Ericsson has not previously disclosed. The Commission’s rules and the RFP prohibit an affiliate of an IVP or TSP from serving in any numbering capacity.¹⁰³ An “affiliate” includes “a person who controls, is controlled by, *or is under the direct or indirect common control with another person.*”¹⁰⁴ Similarly, the RFP states that the LNPA may not be an affiliate of a TSP or IVP “by common ownership or otherwise.”¹⁰⁵ Control is defined as, among other things, “equity interest by stock, partnership (general or limited) interest, joint venture participation, or member interest in the other person ten (10%) percent or more of the total outstanding equity interests in the other person.”¹⁰⁶

SunGard is “under direct or indirect common control with” an interconnected VoIP provider.¹⁰⁷ It is owned by seven equity firms: Bain Capital Partners, The Blackstone Group, Goldman Sachs & Co., KKR, Providence Equity Partners, Silver Lake, and TPG.¹⁰⁸ Two of

¹⁰³ See 47 C.F.R. § 52.12(a)(1)(i); *see also id.* § 52.12(a)(2) (neutrality rules apply to subcontractors); 2015 LNPA RFP § 4.2 at Telcordia000005.

¹⁰⁴ 47 C.F.R. § 52.12(a)(1)(i) (emphasis added).

¹⁰⁵ 2015 LNPA RFP § 4.2 at Telcordia000005.

¹⁰⁶ 47 C.F.R. § 52.12(a)(1)(i); *see also* 2015 LNPA RFP § 4.2 at Telcordia000005.

¹⁰⁷ 47 C.F.R. § 52.12(a)(1)(i).

¹⁰⁸ SunGard’s parent company at the time Ericsson submitted its Legal Opinion, SDS, was owned by those entities. *See* Legal Opinion Letter at Telcordia06088. On March 31, 2014, SDS

these firms, Silver Lake and TPG, each have greater than a 10% ownership interest in Avaya, Inc.¹⁰⁹ As Ericsson admits,¹¹⁰ Avaya lists itself with the Commission as an IVP.¹¹¹ Thus, SunGard is under “common control” with an IVP because Silver Lake and TPG each has more than a 10% ownership interest in SunGard and Avaya. Because SunGard is an “affiliate” of an IVP, it is not a Neutral Third Party as defined in the RFP, and, under the express terms of the RFP, Ericsson’s bid is disqualified.

Ericsson admits that SunGard is also affiliated with SNS, a registered TSP in North Carolina, Oregon, and Minnesota.¹¹² Because SunGard is affiliated with a TSP, SunGard does not meet the Commission’s neutrality requirements and must be disqualified.

Ericsson attempts to circumvent the plain language of the rule by arguing that SNS is not a TSP for purposes of evaluating SunGard’s neutrality, because SNS does not offer switched services that utilize number portability.¹¹³ But the Commission’s rules make no distinction between different TSPs: all TSPs, including SNS, pose neutrality concerns, regardless of whether they offer switched services that utilize number portability. For example, in the

spun off SunGard to the seven SDS investors. *See* SunGard Capital Corp., SunGard Capital Corp. II, SunGard Data Systems Inc., Current Report (Form 8-K) (Mar. 31, 2014). Because SDS and SunGard remain under common ownership, the neutrality analysis, including SunGard’s affiliation with SunGard NetWork Services, remains the same.

¹⁰⁹ *See* Legal Opinion Letter at Telcordia06088.

¹¹⁰ *See id.*

¹¹¹ *See* 2015 LNPA RFP § 4.2 at Telcordia00005.

¹¹² *See* Legal Opinion Letter at Telcordia06087 (“SunGard is an Affiliate, by common ownership or otherwise, of a Telecommunications Service Provider.”). When Ericsson submitted its neutrality opinion, SunGard and SNS were affiliated because both were subsidiaries of SDS. Under SunGard’s new ownership structure, SunGard and SDS, the parent of SNS, are each owned by the same seven private equity companies and thus are affiliated through common control.

¹¹³ *See id.*

Warburg Transfer Order, the Commission noted that, even though there was no indication that the TSPs affiliated with Warburg used numbering resources *at the time*, “each of these affiliates is authorized to provide telecommunications services on a common carrier basis and certain of them are positioned to compete directly with other telecommunications service providers that do use numbering resources.”¹¹⁴ Like the affiliates in the *Warburg Transfer Order*, SNS has “an interest in numbering administration issues, and in particular, in obtaining information about how [its] competitors obtain and use numbers because such information may reveal the marketing strategies of these competitors.”¹¹⁵

SunGard is also affiliated with at least one other TSP that Ericsson has not previously disclosed. In August 2013, SunGard owner KKR acquired nearly 30% of RigNet, which provides telecommunications to oil rigs throughout the world.¹¹⁶ RigNet has filed Form 499s with the Commission, listing itself as a provider of satellite service.¹¹⁷ RigNet, however, also is registered as a competitive local exchange carrier (“CLEC”) in at least two states¹¹⁸ and thus is a

¹¹⁴ *Warburg Transfer Order*, 14 FCC Rcd at 19810-11, ¶ 29.

¹¹⁵ *Id.*

¹¹⁶ See Press Release, *KKR Acquires Stake in RigNet, a Leader in Oil Field Digitalization*, (Aug. 20, 2013), available at <http://www.businesswire.com/news/home/20130820005670/en/KKR-Acquires-Stake-RigNet-Leader-Oil-Field#.U9EOwfldXuQ>.

¹¹⁷ See FCC Form 499 Filer Database Detailed Information for RigNet, Inc., 499 Filer ID No. 830113 (listing principal communications type as satellite).

¹¹⁸ See PUC of Texas, RigNet SatCom Inc. Competitive Local Exchange Carrier Certificate No. 60191 (granted Aug. 12, 1998); Letter from Adrienne Mouton-Henderson, Staff Attorney, Louisiana PSC, to Terri Bordelon, Records and Recordings, Louisiana PSC, Re: Docket No. S-32943 RigNet SatCom, Inc. (“RigNet”) and Stratos Offshore Services Company (“Stratos”), ex parte, In re: Section 301 M Request regarding the Transfer of the Customers and Assets, Including Certificate of Authority, of Stratos Offshore Services Company to RigNet SatCom, Inc. (Dec. 2, 2013) (acknowledging approval of request to transfer CLEC Certificate No. TSP00114-B from Stratos to RigNet).

TSP as defined in the Commission’s rules and the RFP. In October 2013, a partner in KKR took a seat on the RigNet board of directors.¹¹⁹ The acquisition of RigNet and the appointment of the KKR partner to its board occurred after Ericsson submitted its neutrality opinion to the NAPM LLC and the Commission in April 2013, but before its responses to follow-up questions from the NAPM LLC in November 2013. Based on the record, Ericsson failed to disclose this affiliation – which, at best, demonstrates the difficulty of monitoring its subcontractor’s compliance with the neutrality obligations that, under the terms of the RFP and the Commission’s rules, apply to it.

Ericsson’s claim that the *Warburg Transfer Order* would permit SunGard to serve in a numbering capacity, even though it is under common control with an IVP, is incorrect.¹²⁰ The finding in *Warburg* was predicated on Warburg reducing its ownership stake to less than 10% and placing the remainder of its interest in an irrevocable voting trust. The owners of SunGard each hold more than 10% of SunGard. In the *Safe Harbor Order*, the Commission reduced that limit to 5% ownership and precluded the further use of voting trusts to meet that limit for neutrality compliance.¹²¹ Pursuant to the *Safe Harbor Order*, the LNPA must obtain certifications from any investor that holds 5% or more of its stock that the investor does not own 10% or more of a TSP and that it will notify the LNPA if that status changes.¹²² Investors

¹¹⁹ See Press Release, RigNet, *Mattia Caprioli of KKR Joins RigNet Board* (Oct. 31, 2013), available at <http://www.marketwatch.com/story/mattia-caprioli-of-kkr-joins-rignet-board-2013-10-31>.

¹²⁰ Legal Opinion Letter at Telcordia06088. The same analysis also applies to the two TSPs with which SunGard is affiliated.

¹²¹ *Safe Harbor Order*, 19 FCC Rcd at 16992, ¶ 25.

¹²² *Id.*

exceeding these thresholds must reduce their ownership in either the LNPA or the TSP.¹²³ SunGard's failure to comply (or to promise to comply) with those requirements requires its exclusion from numbering activities. This analysis also applies to SunGard's two affiliated TSPs.

2. SunGard Is Subject to Undue Influence Because of Its Private Equity Owners' Interest in an Interconnected VoIP Provider

In addition to SunGard's affiliation with an IVP and two TSPs, Silver Lake's and TPG's ownership interests in Avaya, SunGard ownership's interest in SNS, and KKR's interest in RigNet create undue influence over SunGard. As described above, Silver Lake and TPG have greater than 10% ownership interests in Avaya,¹²⁴ giving both Silver Lake and TPG "an interest in the outcome of numbering administration and activities."¹²⁵ Assuming the shares are equally divided, each of the seven owners of SunGard has greater than 10% ownership interests in SDS and its SNS subsidiary, giving each of the owners "an interest in the outcome of numbering administration and activities." Furthermore, as noted above, KKR is affiliated with RigNet, a TSP that is certified as a CLEC in Texas and Louisiana, giving KKR "an interest in the outcome of numbering administration and activities."

Each of the seven of the SunGard owners holds more than a 10% interest in SNS, a TSP, so each is a TSP affiliate. In addition, Silver Lake and TPG each hold more than 10% of Avaya, so each is an affiliate of an IVP. KKR is a TSP affiliate because it owns more than 10% of a RigNet. Since each of the owners of SunGard is affiliated with a TSP or IVP, the ownership

¹²³ These restrictions have teeth: Neustar has had investors choose to sell down their Neustar stock and has had investors reduce their holdings in a TSP.

¹²⁴ Legal Opinion Letter at Telcordia06088.

¹²⁵ *Warburg Transfer Order*, 14 FCC Rcd at 19810, ¶ 29.

interest of each in SunGard exceeds the 5% threshold that the Commission established in the *Safe Harbor Order* to reduce undue influence over the LNPA.¹²⁶ The Commission adopted this threshold to “help minimize the risk that entities with a vested interest in the outcome of numbering administration activities will be able to exert undue influence over [the LNPA]. Furthermore, limiting the level of TSP or TSP affiliate equity interests will help minimize the risk of any industry segment exerting undue influence over [the LNPA].”¹²⁷ By virtue of their investments, all of SunGard’s owners, and, in particular, Silver Lake, TPG, and KKR, have “an interest in numbering administration issues, and in particular, in obtaining information about how their competitors obtain and use numbers because such information may reveal the marketing strategies of these competitors.”¹²⁸ Their interests also create an “incentive to influence” the LNPA to their affiliates’ competitive advantage “in a manner that might comprise [the LNPA’s] neutrality.”¹²⁹

Silver Lake’s connection with Avaya and KKR’s connection with RigNet preclude a finding that SunGard is neutral and raise additional areas for neutrality inquiry as well. Ericsson acknowledges that the Silver Lake representative to the board of directors of SunGard’s former parent, SDS, sits on the board of Avaya.¹³⁰ The chairman of SDS’s board of directors is Glenn Hutchins, a co-founder of Silver Lake. Because Ericsson has made no disclosure regarding the

¹²⁶ See *Safe Harbor Order*, 19 FCC Rcd at 16991, ¶ 22 (“Individual TSPs and TSP affiliates shall be limited to less than a 5% equity ownership interest in NeuStar.”). The investments of Silver Lake and TPG in Avaya and KKR in RigNet also exceed the 10% limitation in Commission Rule 52.12(a)(1)(i). See 47 C.F.R. § 52.12(a)(1)(i).

¹²⁷ *Safe Harbor Order*, 19 FCC Rcd at 16991, ¶ 22 (footnote omitted).

¹²⁸ *Warburg Transfer Order*, 14 FCC Rcd at 19810, ¶ 29.

¹²⁹ *Id.* at 19810-11, ¶ 30.

¹³⁰ See Legal Opinion Letter at Telcordia06088.

composition of SunGard’s board of directors (or even that SunGard had been sold to the owners of SDS), the composition of SunGard’s board of directors has not been disclosed. Mr. Hutchins’ current relationship to SunGard is not explained, although Silver Lake remains a large investor. In June 2014, Mr. Hutchins was named to the board of directors of AT&T. Ericsson has not addressed how the inter-relationship of these overlapping directorships may affect SunGard’s neutrality.

While SunGard’s board of directors has not been disclosed, the company has publicly disclosed that it will be chaired by James Greene, a partner in KKR,¹³¹ the same investment fund that owns almost 30% of the TSP, RigNet. Another KKR partner sits on RigNet’s board of directors. These interlocking relationships give rise to substantial neutrality concerns that Ericsson has not addressed.

3. No Safeguards Could Make SunGard Impartial or Able To Meet the Commission’s Neutrality Requirements

The minimal safeguards proposed by Ericsson would not render SunGard impartial, which provides an independent basis to reject the recommendation and Ericsson’s bid. SunGard is a central and critical component of Ericsson’s proposal. Ericsson has stated that, once its proposed solution is developed, it will be run entirely from SunGard’s data centers: “all of the production stuff will be at SunGard,” as will “all of our development environment and gear we use internally.”¹³² Moreover, SunGard’s role is [BEGIN HIGHLY CONFIDENTIAL] ■

¹³¹ Joseph N. DiStefano, *SunGard of Wayne Splits into Two Companies*, PHILA. INQUIRER (Apr. 3, 2014), http://articles.philly.com/2014-04-03/business/48805607_1_buyout-wayne-sungard-data-systems-inc

¹³² Telcordia Presentation at 126. *See also id.* at 80 [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL] Thus, Ericsson’s proposal relies heavily on SunGard’s expertise, experience, financial strength, facilities, services, and operations.

Ericsson claims that SunGard’s impartiality will be protected because SunGard will only perform tasks and functions at Ericsson’s direction.¹³⁶ According to the Opinion Letter, only Ericsson will have authority to access or perform operations in the NPAC/SMS application.¹³⁷ In addition, Ericsson argues that SunGard employees and directors are subject to SunGard’s own Global Business Conduct and Compliance Program, which requires the disclosure of perceived

CONFIDENTIAL] *id.* at 123 [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

¹³³ *See id.* at 152 [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY
CONFIDENTIAL]

¹³⁴ *See id.* at 162.

¹³⁵ *See id.* at 184 [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

¹³⁶ *See* Legal Opinion Letter at Telcordia06426-27.

¹³⁷ *See id.* at Telcordia06427.

conflicts of interest, but which is not a neutrality Code of Conduct.¹³⁸ With respect to SDS, Ericsson proposes that the two SunGard board members associated with TSPs will recuse themselves from participating in material discussions or decisions involving SunGard Systems, and the SunGard employees dedicated to providing services to Ericsson’s subsidiary and their direct managers will be bound by the Code of Conduct.¹³⁹ Ericsson also claims that it has SunGard’s assurance that it will notify Ericsson if it becomes aware that SNS or any other SunGard affiliate intends to provide switched services that utilize number portability.¹⁴⁰

These safeguards do not meet the standards set by the Commission’s precedent. Although Ericsson claims that SunGard will have no discretion to make independent choices with respect to numbering administration, it proposes no mechanism to ensure SunGard’s discretion is so limited. Any proposal to remedy a neutrality concern by “walling off” SunGard fails for the same reason that the Commission ultimately disallowed the use of voting trusts.¹⁴¹ In providing its assurances, Ericsson also ignores the fact that SunGard, as the subcontractor providing data center services, database administration, and systems administration, will have direct access to large quantities of numbering information. Ericsson offers no safeguards to protect that information from the various TSPs with which SunGard is associated, all of which will have incentives to access the information to gain any possible competitive advantage.

Ericsson’s proposed safeguards similarly do nothing to ensure that SunGard’s management is free from the influence of all of its owners, including Silver Lake, TPG, and

¹³⁸ *See id.*

¹³⁹ *See Follow-Up Response to Question 12 at Telcordia06426.* Given the change in SunGard’s corporate structure, all of these assurances are out of date.

¹⁴⁰ *See Legal Opinion Letter at Telcordia06087.*

¹⁴¹ *See Safe Harbor Order*, 19 FCC Rcd at 16991, ¶ 22.

KKR. For SunGard to serve in a numbering capacity, no SunGard board member could sit on the board of an IVP or TSP.¹⁴² All seven of SunGard’s private equity owners would have to sign certifications that they are not TSPs or IVPs or TSP or IVP affiliates. The certifications would have to include not just the entity making the investment but also all affiliates of the entity. For example, Goldman Sachs & Co., one of SunGard’s owners, would have to certify that not one of its affiliated funds owns 10% or more of a TSP or IVP and that Ericsson would be promptly notified if that situation changes. Ericsson has not agreed to any such safeguards.

Ericsson proposes to bind all SunGard employees to a Code of Conduct – but only if they are providing services to Ericsson.¹⁴³ That is insufficient. Moreover, Ericsson proposes only to bind SunGard employees.¹⁴⁴ Under Ericsson’s proposal, SunGard’s board and any affiliates and their employees are free from any binding commitment to protect the impartiality of the LNPA. By contrast, the *Warburg Transfer Order* required that all employees, not just of Neustar, but also of Warburg and Lockheed Martin, were required to adhere to the neutrality Code of Conduct.¹⁴⁵ Like Ericsson, SunGard cannot be made impartial through the sorts of minimal safeguards that Ericsson has proposed. At this stage, there is no safeguard that the Commission could craft to render SunGard neutral and allow it to serve in a numbering capacity. Because Ericsson’s bid relies on SunGard to play a central role as a data center services subcontractor, and SunGard is incapable of meeting the Commission’s neutrality requirements, Ericsson’s bid must be rejected. And, given the role proposed for SunGard in Ericsson’s proposal, permitting

¹⁴² See *id.* at 16989, ¶ 15.

¹⁴³ See Follow-Up Response to Question 12 at Telcordia06426.

¹⁴⁴ See *id.*

¹⁴⁵ See *Warburg Transfer Order*, 14 FCC Rcd at 19802, ¶ 13.

Ericsson to substitute another subcontractor in SunGard’s stead would be the equivalent of re-opening the bidding process for a single vendor.

C. Neutrality Requirements Play a Critical Role in Ensuring the Effective Functioning of the NPAC

The neutrality requirements imposed under by the 1996 Act, the Commission’s rules, and the terms of the RFP serve a critical function: they ensure that fair and impartial numbering administration will promote competition to the benefit of all service providers and consumers. By ensuring the LNPA’s neutrality, the LNPA maintains “the trust and confidence of the entities that must submit sensitive data to the [LNPA] in its numbering administration activities.”¹⁴⁶ Furthermore, strict neutrality requirements “ensure that the [LNPA] is able to comply with its obligations without extensive and constant Commission oversight.”¹⁴⁷

The Commission has strictly and consistently construed its rules, having “no tolerance for violations of the neutrality requirements.”¹⁴⁸ Careful scrutiny of the LNPA’s neutrality is essential to “ensure[] the equal treatment of all carriers and avoid[] any appearance of impropriety or anti-competitive conduct. Such administration facilitates consumers’ access to the public switched network by preventing any one carrier from interfering with interconnection . . . , thereby minimizing any anti-competitive impacts.”¹⁴⁹ “Neutral and impartial administration

¹⁴⁶ *Id.* at 19808, ¶ 24.

¹⁴⁷ *Id.* As discussed above, Ericsson’s failure to disclose that KKR owns nearly 30% of RigNet, a satellite communications services company that is on the Commission’s 499 list and is also a certificated CLEC in Texas and Louisiana, demonstrates not only the difficulty of monitoring its subcontractor’s compliance with the neutrality obligations that, under the terms of the RFP, apply to it, but also the wisdom of the Commission’s decision to apply bright-line tests for neutrality.

¹⁴⁸ *Safe Harbor Order*, 19 FCC Rcd at 16986, ¶ 9.

¹⁴⁹ *First Portability Report and Order*, 11 FCC Rcd at 8400-01, ¶ 92 (footnote omitted).

of the numbering resource is critical to the development of competition in the telecommunications market.”¹⁵⁰ As former Commissioner Harold Furchtgott-Roth has explained:

Neutrality is as important today as ever. . . . A failure of neutrality of the LNPA would undermine the integrity of the competitive telecommunications marketplace that the Congress and the FCC sought to establish in the 1990s. Of necessity, the LNPA is privy to competitively sensitive information that could be exploited if the LNPA was not unquestionably neutral. . . . A non-neutral LNPA could also manipulate the pace of porting to benefit its affiliate. . . . Even without such behavior, a non-neutral LNPA could create the appearance of impropriety and could cause lingering doubt among competitors and consumers about the fairness of the process.¹⁵¹

These concerns are strongly implicated by Ericsson’s effort to bring the LNPA function under its corporate umbrella. The Commission would reject a bid by Sprint or T-Mobile to serve as LNPA out of hand. Given Ericsson’s business commitments and interests, its proposal presents neutrality concerns that are no less substantial. The result should be the same.

D. The NANC Recommendation Fails To Address Neutrality; in Any Event, the Issue Is for the Commission To Resolve

There is no indication from the NANC recommendation that the FoNPAC, the NAPM LLC, the SWG, or the NANC ever examined, evaluated, or analyzed Ericsson’s neutrality before the NANC submitted its recommendation to the Commission. The RFP required bidders to

¹⁵⁰ Third Report and Order and Third Report and Order, *Administration of the North American Numbering Plan; Toll Free Service Access Codes*, 12 FCC Rcd 23040, 23095, ¶ 110 (1997); see also Order, *North American Numbering Plan Administration; Neustar Request for Clarification*, 26 FCC Rcd 10726, 10729, ¶ 7 (2011) (explaining that “it is vitally important that the [LNPA] be an impartial and neutral actor in the performance of its duties”).

¹⁵¹ Harold Furchtgott-Roth, *The importance of neutrality in number portability administration*, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109, at 20-21 (Sept. 13, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7022013438>.

submit detailed statements demonstrating their neutrality.¹⁵² The RFP states that the “qualification process will require” a “[s]ubstantiation of neutrality”¹⁵³ and that the NAPM would use the neutrality responses “in connection with evaluation” of the next LNPA.¹⁵⁴ Although the RFP states that “[t]he NAPM LLC will initially decide whether the Respondent satisfies the Neutrality criteria” and that “the FCC will verify neutrality compliance,”¹⁵⁵ changes to the RFP – made to accommodate Ericsson’s concerns that it would be disqualified as non-neutral at an early stage of the bidding – took the decision about neutrality compliance out of the industry evaluation process. As a result, so long as a bidder submitted a neutrality opinion – no matter how deficient – the industry would evaluate the merits of the bid.¹⁵⁶

The terms of the recommendation do not indicate that either the NAPM LLC or the NANC “determine[d] whether [Ericsson] satisfies the Neutrality criteria” before the NANC submitted its recommendation, as the RFP documents required.¹⁵⁷ And it appears that no member of the FoNPAC asked Ericsson a single question about its impartiality during their August 6, 2013 meeting.¹⁵⁸ The SWG concurred in the FoNPAC’s recommendation, but

¹⁵² See Vendor Qualification Survey § 3.4 at Telcordia05009-10.

¹⁵³ *Id.* § 1.1 at Telcordia05001.

¹⁵⁴ *Id.* § 3.5 at Telcordia05011.

¹⁵⁵ *Id.* at Telcordia05010.

¹⁵⁶ See *id.* at Telcordia05011 (“As long as the Respondent submits a Legal Opinion by the RFP Response Cut-Off Date, the submission . . . may not be disqualified on neutrality grounds.”).

¹⁵⁷ *Id.*

¹⁵⁸ See [Telcordia](#) Presentation.

likewise failed to undertake an independent examination or evaluation of Ericsson's neutrality.¹⁵⁹ The NANC's recommendation letter makes no mention of Ericsson being neutral.¹⁶⁰ The failure to address the neutrality issue means that the evaluation did not comply with the terms of the RFP and cannot be accepted.

Nevertheless, even if the recommendation had addressed neutrality, the Commission would be obligated to make its own judgment on that legal issue. The record evidence demonstrates that Ericsson is not impartial and cannot serve as a neutral LNPA. But if there were any doubt on that matter, the Commission would be required to examine the company's business and financial ties to the wireless industry; that is impossible on this record because Ericsson refused to permit examination of its MSAs and vendor financing arrangements. After Ericsson mentioned these agreements in its Legal Opinion Letter,¹⁶¹ Ericsson was asked by letter to describe the services that Ericsson manages and to provide a chart of all of Ericsson's U.S. TSP or U.S. TSP affiliate vendor financings.¹⁶² In response, Ericsson explained only that it provides managed services to a range of U.S. telecommunications customers, including Sprint, Clearwire, and AT&T.¹⁶³ However, Ericsson asserted that regulatory requirements prevented it from disclosing additional information regarding the managed services or the terms and

¹⁵⁹ See LNPA Selection Working Group (SWG) Report to NANC on LNPA Vendor Selection Recommendation of the Future of the NPAC Subcommittee (FoNPAC), WC Docket No. 09-109 & CC Docket No. 95-116 (Feb. 26, 2014).

¹⁶⁰ See Letter from Betty Ann Kane, Chairman, NANC, to Julie A. Veach, Chief, Wireline Competition Bureau, FCC, WC Docket No. 09-109 & CC Docket No. 95-116 (Apr. 24, 2014).

¹⁶¹ See Legal Opinion Letter at Telcordia06084-86.

¹⁶² See Follow-Up Response to Question 9 at Telcordia06423-24.

¹⁶³ See *id.* at Telcordia06423.

conditions of the associated agreements.¹⁶⁴ Ericsson refused to provide any additional information without “lawful compulsory process for such information,” i.e., a subpoena.¹⁶⁵ Ericsson similarly rebuffed the FoNPAC’s request for a chart of all U.S. TSP or U.S. TSP affiliate vendor financing arrangements. Thus, the FoNPAC, the NAPM LLC, the SWG, the NANC, and the Commission have never received information material to Ericsson’s neutrality. By refusing to make these agreements with TSPs part of the record, Ericsson has failed to make a *prima facie* showing that it is impartial and capable of being a neutral administrator of numbering resources. The Commission could not select Ericsson as the next LNPA without carefully examining these agreements to confirm Ericsson’s neutrality in the same way the Commission carefully scrutinized Warburg’s relationships with TSPs in the *Warburg Transfer Order*.¹⁶⁶

II. THE COMMISSION CANNOT DESIGNATE A NEW ENTITY TO SERVE AS LNPA WITHOUT A NOTICE OF PROPOSED RULEMAKING

The Public Notice provides no basis for eventual Commission action on selection of the vendor for the next LNPA contract because the Commission cannot act in this matter without first issuing an NPRM. The designation of an entity to serve as numbering administrator is a legislative function; moreover, the Commission in 1997 selected the original LNPAs pursuant to

¹⁶⁴ See *id.* at Telcordia06424.

¹⁶⁵ *Id.*

¹⁶⁶ Any concerns that Ericsson may have had about disclosure of the details of these agreements are unjustified, because all of the information it submitted in the RFP process was subject to a non-disclosure agreement. Those concerns are now addressed by the Protective Order in this proceeding. Because Ericsson is now able to provide the details of its managed services agreements and vendor financing arrangements without fear of public disclosure, the Commission must compel Ericsson to make those disclosures. Otherwise, the Commission will be unable to make a reasoned decision that Ericsson is impartial.

notice-and-comment rulemaking and codified that selection at 47 C.F.R. § 52.26(a). The Commission is therefore obligated to act pursuant to notice-and-comment rulemaking to alter the current rule.¹⁶⁷

A. The Designation of Impartial Numbering Administrators Pursuant to Section 251(e)(1) Requires Notice-and-Comment Rulemaking

1. The designation of an entity to serve as LNPA constitutes a legislative rule as defined in Section 551(4) of the APA: It is of “general or particular applicability” – affecting thousands of LECs, tasked by the Act with providing portability. It is of “future effect” – taking effect following the expiration of the current LNPA contract in June 2015; and it is designed to “implement, interpret or prescribe law or policy.”¹⁶⁸ Designation of the next LNPA has implications for quasi-legislative judgments including prescribing the price of portability, the rates telecommunications carriers must pay to comply with their statutory duty under Section 251(b)(2); the corporate structure that will be required of the LNPA vendor to meet the Commission’s neutrality criteria; the service of providing portability and numbering administration; and the operation of the NPAC database facilities. Although Ericsson has argued that the designation of the next LNPA is an adjudication that retroactively determines the rights

¹⁶⁷ For this and other reasons, action on the NANC recommendation must be taken at the Commission level and may not be taken on delegated authority by the Bureau. The Commission’s rules expressly bar the Bureau from conducting the notice-and-comment rulemaking that is required to alter the LNPA designation and the neutrality requirements currently codified in the Commission’s regulations. *See* 47 C.F.R. § 0.291(e) (“The Chief, Wireline Competition Bureau, shall not have authority to issue notices of proposed rulemaking.”). The Bureau also lacks authority “to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.” *Id.* § 0.291(a)(2). This is such a matter.

¹⁶⁸ *See* 5 U.S.C. § 551(4); *see also Daingerfield Island Protective Soc’y v. Babbitt*, 823 F. Supp. 950, 957 (D.D.C. 1993), *aff’d in part*, 15 F.3d 1159 (D.C. Cir. 1993), *supplemented and aff’d*, 40 F.3d 442 (D.C. Cir. 1994).

of named parties under established rules,¹⁶⁹ the designation of the LNPA has generally applicable prospective legal consequences for thousands of stakeholders who are required to provide – and pay for – number portability.¹⁷⁰

Moreover, the designation of the next LNPA “creates new duties,” and has “the force and effect of law,”¹⁷¹ as opposed to an interpretive rule or policy statement that simply states what the administrative agency thinks the statute means, “remind[ing] affected parties of existing duties.”¹⁷² The D.C. Circuit has identified four factors to be considered in determining whether agency action is interpretive or legislative; an affirmative answer to any one of the four makes the rule substantive.¹⁷³ Those factors include whether the agency has published the rule in the CFR; whether it has invoked its legislative authority; whether the rule effectively amends a prior legislative rule; and whether in the absence of the rule there would not be an adequate legislative basis for enforcement action.

In addressing whether an agency has invoked its legislative authority, courts look to the text of the rule, as well as the rule’s effects.¹⁷⁴ An agency need not cite its enabling statute to

¹⁶⁹ See Letter from John Nakahata and Mark Davis, Counsel, Telcordia, to Marlene Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed May 2, 2014).

¹⁷⁰ See *Franks v. Salazar*, 816 F. Supp. 2d 49, 59 (D.D.C. 2011) (“Stated differently, the “‘central distinction between rulemaking and adjudication’” is that “‘rules have legal consequences only for the future.’”) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring)).

¹⁷¹ *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997).

¹⁷² *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) (internal quotation marks omitted).

¹⁷³ See *American Mining Congress v. Mine Safety Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

¹⁷⁴ *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (citing *American Mining Congress v. Mine Safety & Health Administration*, *supra*).

invoke its legislative authority. Rather, the D.C. Circuit has ruled that “what the agency does in fact” determines whether the agency has invoked its legislative authority.¹⁷⁵ Here, the Commission’s authority to designate an LNPA derives from “a specific delegation of legislative power in the governing statute”¹⁷⁶ – namely, Section 251(e)(1), which directs the Commission to designate impartial entities as numbering administrators, and Section 251(b)(2), which “directs the Commission to establish requirements governing the provision of number portability.”¹⁷⁷ Because Congress delegated legislative power to regulate number portability and to designate an impartial numbering administrator to the Commission, the agency’s exercise of that power in designating an LNPA can only be characterized as substantive rulemaking.¹⁷⁸ Indeed, the United States Supreme Court has recognized that “[s]ection 251(e), which provides that ‘the Commission shall create or designate one or more impartial entities to administer

¹⁷⁵ *National Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 238 (D.C. Cir. 1992) (internal quotation marks omitted).

¹⁷⁶ *American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 707 F.2d 548, 559-60 (D.C. Cir. 1983) (“[O]ur decision that a CSC rule exempting certain political activities from coverage under the Hatch Act was a legislative rule was based not on the rule’s impact but rather on the fact that it was promulgated pursuant to a specific delegation of legislative power in the governing statute.”).

¹⁷⁷ *First Portability Report and Order*, 11 FCC Rcd at 8399, ¶ 91. Similarly, Section 251(d)(1) directs the Commission to take “all actions necessary to establish regulations to implement” interconnection, which includes number portability. 47 U.S.C. § 251(d)(1).

¹⁷⁸ *See United States Telecom Ass’n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005) (holding that the 1996 Act requires the Commission to rely upon legislative rulemaking and that rulemaking was therefore required when the Commission’s requirement that a wireline company port a customer’s number to a wireless company outside its geographic region was inconsistent with the Commission’s earlier rejection of such “location portability”); *American Postal Workers Union*, 707 F.2d at 558-59 (citing *Joseph v. United States Civil Service Comm’n*, 554 F.2d 1140, 1153 & n.24 (D.C. Cir. 1977)).

telecommunications numbering,’ *requires* the Commission to exercise its *rulemaking* authority.’¹⁷⁹

2. The Commission is thus obligated to observe the procedures set forth in Section 553 of the APA before acting to designate the LNPA. The Commission is accordingly required to publish a notice of proposed rulemaking in the Federal Register and to “give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments.”¹⁸⁰ Furthermore, the Commission must provide “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹⁸¹

The Public Notice serves none of those functions. It was not published in the Federal Register. It does not fairly inform the public about either the substance of the proposed rule or the subjects and issues involved. For example, the notice does nothing to explain how the Commission intends to evaluate the recommendation that the NANC has forwarded to it or how it intends to address the many legal and factual issues raised by a proposal to appoint as an “impartial numbering administrator,” an entity that stands in the shoes of major telecommunications services providers. *See supra* Part I. A proper notice must, at a minimum, identify these critical issues, and should provide guidance concerning the Commission’s proposed resolution of them.¹⁸²

¹⁷⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 383 n.9 (1999) (second emphasis added).

¹⁸⁰ 5 U.S.C. § 553(b), (c).

¹⁸¹ *Id.* § 553(b)(3). The potential exceptions to this requirement – for “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice” – do not apply to the designation of a particular entity to serve as LNPA. 5 U.S.C. § 553(b). Furthermore, there is no reason that Federal Register publication of a notice would be “impracticable, unnecessary, or contrary to the public interest.” *Id.*

¹⁸² *See United Steelworkers*, 647 F.2d at 1315.

B. Designation of Ericsson as LNPA Would Constitute a Change of a Rule Adopted Pursuant to a NPRM Published in the Federal Register and Requires the Same Procedure

When an agency “effectively amends” a previous legislative rule by making a “substantive change” to that rule, notice-and-comment rulemaking is required.¹⁸³ In *U.S. Telecom*, the D.C. Circuit explained that a Commission order was in fact “a legislative rule because it constitutes a substantive change in a prior rule.”¹⁸⁴ The designation of a new entity to serve as LNPA would work a substantive change to an existing Commission rule, 47 C.F.R. § 52.26, as would any modification to the prohibition on a telecommunications network equipment manufacturer, or its affiliate, serving as an LNPA. Similarly, “the Supreme Court has said that if an agency adopts ‘a new position inconsistent with’ an existing regulation, or effects ‘a substantive change in the regulation[,]’ notice and comment are required.”¹⁸⁵ It is plainly inconsistent with the Commission’s final rule designating Neustar as the LNPA, as well as existing neutrality rules, for the Bureau now to designate Ericsson as the sole LNPA.

1. The 1996 Act mandated local telephone number portability as a central component of the Act’s pro-competitive reforms. Congress recognized that number portability was essential to full and fair competition between telecommunications carriers because it would

¹⁸³ See *United States Telecom Ass’n*, 400 F.3d at 34-35; see also *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“[N]ew rules that work substantive changes in prior regulations are subject to the APA’s procedures.”); *American Mining Congress*, 995 F.2d at 1112 (if a “rule effectively amends a prior legislative rule,” it is a “legislative, not an interpretive rule,” and cannot be promulgated without notice and comment); cf. *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (noting that APA rulemaking is required if an agency adopts a new position “inconsistent with . . . existing regulations”).

¹⁸⁴ 400 F.3d at 30.

¹⁸⁵ *Id.* at 35 (quoting *Shalala*, 514 U.S. at 100) (emphases omitted).

“lower barriers to entry and promote competition in the local exchange marketplace.”¹⁸⁶

Accordingly, the 1996 Act requires local exchange carriers to provide “number portability in accordance with requirements prescribed by the Commission.”¹⁸⁷ It also directs the Commission to “create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.”¹⁸⁸ The Commission has interpreted these provisions as requiring the “number portability databases to be administered by one or more neutral third parties,” known as the LNPA(s).¹⁸⁹

The 1996 Act directed the Commission to “complete all actions necessary to establish regulations to implement” the requirements of Section 251 “[w]ithin 6 months after February 8, 1996.”¹⁹⁰ Pursuant to that statutory directive, on June 27, 1996, the Commission adopted its First Report and Order and Further Notice of Proposed Rulemaking in the *Telephone Number Portability* proceeding.¹⁹¹ The Commission explained that it had “adopted a Notice of Proposed Rulemaking seeking comment on a wide variety of policy and technical issues related to telephone number portability” before the passage of the 1996 Act, and that it had sought further comment on how the passage of the 1996 Act affected the issues raised in the initial notice.¹⁹² In the *First Portability Report and Order*, the Commission adopted certain of its previously

¹⁸⁶ *First Portability Report and Order*, 11 FCC Rcd at 8354, ¶ 2.

¹⁸⁷ 47 U.S.C. § 251(b)(2).

¹⁸⁸ *Id.* § 251(e)(1).

¹⁸⁹ *First Portability Report and Order*, 11 FCC Rcd at 8400, ¶ 92.

¹⁹⁰ 47 U.S.C. § 251(d)(1).

¹⁹¹ *See First Portability Report and Order*, 11 FCC Rcd at 8355, ¶ 3.

¹⁹² *Id.* at 8353, ¶ 1.

proposed rules regarding number portability.¹⁹³ The Commission decided that a system of regional databases managed by an independent administrator would best serve the public interest, but the Commission deferred until further proceedings the actual designation of that independent administrator.¹⁹⁴ At the time, the Commission stated its belief that “[s]election of the LNPA(s) falls within the duties we established for the NANC in the *Numbering Plan Order* and the NANC Charter,” and it directed the NANC to take certain steps to carry out that apparent duty.¹⁹⁵

In response to the Commission’s directive, the NANC formed an LNPA Selection Working Group (“SWG”); the SWG provided the Commission with a report containing its recommendations regarding the LNPA selection on May 1, 1997.¹⁹⁶ In that report, the NANC recommended selecting an LNPA for each of the seven RBOC operating regions and designating as LNPA two entities – Lockheed Martin IMS and Perot Systems – in four and three regions, respectively.¹⁹⁷ The NANC noted that designating “multiple vendors” to serve as LNPAs would ensure that, “if one vendor is unable to perform, or declines to renew its initial service contract term, there will be at least one other vendor capable of providing these services within a relatively short timeframe.”¹⁹⁸

¹⁹³ See *id.* at 8355, ¶ 3.

¹⁹⁴ *Id.* at 8355-56, 8399-401, ¶¶ 5, 91-92.

¹⁹⁵ *Id.* at 8355-56, 8401, 8402, ¶¶ 5, 93, 95.

¹⁹⁶ See Public Notice, *The North American Numbering Council (NANC) Issues Recommendations Regarding the Implementation of Telephone Number Portability*, 12 FCC Rcd 5003, 5003-04 (1997) (“NANC Recommendations Public Notice”); Report, North American Numbering Council, LNPA Selection Working Group (Apr. 25, 1997) (“1997 SWG Report”).

¹⁹⁷ See 1997 SWG Report §§ 2.5, 4.2, 6.2.4.

¹⁹⁸ *Id.* § 6.3.5.

On May 2, 1997, the Common Carrier Bureau issued a public notice seeking “comments on the NANC’s number portability recommendations.”¹⁹⁹ On May 8, 1997, the Commission published in the Federal Register, under “Proposed Rules,” the NANC’s proposed selection of Lockheed Martin and Perot Systems as LNPAs and solicited comments on the NANC’s recommendations.²⁰⁰ The Commission further specifically sought comment on the entirety of the 1997 SWG Report by incorporating it into the proposed rules by reference.²⁰¹ Both the Bureau’s Public Notice and the Commission’s Federal Register Notice also observed that “the NANC’s authority is limited to providing advice and recommendations to the Commission.”²⁰² Thus the Commission made plain that the NANC’s recommendation was not the final selection; that “all procedural requirements of the Administrative Procedure Act” would apply to the LNPA designation proceeding; and that the Commission would treat the final LNPA selection “as a non-restricted rulemaking.”²⁰³

After receiving and reviewing public comment, the Commission issued a Second Report and Order adopting the NANC’s recommendations with certain modifications.²⁰⁴ Among other things, the Commission “adopt[ed] the NANC’s recommendation that Lockheed Martin IMS

¹⁹⁹ NANC Recommendations Public Notice at 5004-05.

²⁰⁰ See The North American Numbering Council (NANC) Issues Recommendations Regarding the Implementation of Telephone Number Portability, 62 Fed. Reg. 25,157, 25,157-58 (May 8, 1997) (“NANC Recommendations Federal Register Notice”).

²⁰¹ See *id.* at 25,158 (“Interested parties should file an original and four copies of their comments on the NANC’s number portability recommendations . . .”).

²⁰² NANC Recommendations Federal Register Notice, 62 Fed. Reg. at 25,158; NANC Recommendations Public Notice, 12 FCC Rcd at 5005.

²⁰³ NANC Recommendations Federal Register Notice, 62 Fed. Reg. at 25,158; NANC Recommendations Public Notice, 12 FCC Rcd at 5005.

²⁰⁴ See Second Report and Order, *Telephone Number Portability*, 12 FCC Red 12281, 12283-84, ¶ 3 (1997).

(Lockheed Martin) and Perot Systems, Inc. (Perot Systems) serve as the administrators for the regional number portability databases.”²⁰⁵ The Commission promulgated its “Final Rules” in Appendix B to the Second Report and Order, establishing 47 C.F.R. § 52.26. Those rules provide that “[l]ocal number portability administration shall comply with the recommendations of the NANC as set forth in the report to the Commission prepared by the NANC’s Local Number Portability Administration Selection Working Group, dated April 25, 1997,” with certain specified exceptions that are not relevant here.²⁰⁶ The selection of Lockheed Martin and Perot Systems as the LNPAs was among the parts of the 1997 SWG Report that were incorporated into the regulation adopted by the Commission. So was the prohibition on a telecommunications network equipment manufacturer serving as the LNPA. *See supra* pp. 33-34.

On September 17, 1997, the Commission published a synopsis of its Second Report and Order, including the designation of the LNPAs and the new regulation incorporating that designation, as a “Final rule” in the Federal Register.²⁰⁷ The Commission stated that “[t]he requirements and rule adopted in this Second Report and Order are necessary to implement the provisions of the Telecommunications Act of 1996.”²⁰⁸ Pursuant to 5 U.S.C. § 552(a), the Director of the Federal Register specifically approved the Commission’s incorporation by reference of the 1997 SWG Report.²⁰⁹

Shortly after the Commission designated two LNPAs to mitigate the potential for disruption from the failure of one, Perot Systems failed to meet deadlines for implementing

²⁰⁵ *Id.*

²⁰⁶ 47 C.F.R. § 52.26(a).

²⁰⁷ *See* Telephone Number Portability, 62 Fed. Reg. 48,774, 48,775, 48,786 (Sept. 17, 1997).

²⁰⁸ *Id.* at 48,774.

²⁰⁹ *See id.*

LNPA services. In early 1998, the three regional limited liability companies that had contracted with Perot Systems terminated their contracts due to Perot's failure and immediately contracted with the other designated LNPA, Lockheed Martin.²¹⁰ The Commission adopted the NANC's recommendation and endorsed this substitution in a 1998 order.²¹¹ Neustar – the successor-in-interest to Lockheed Martin – has served as the sole LNPA since 1999.

2. Under well-established law, the regulation codifying the 1997 NANC Selection Working Group Report, 47 C.F.R. § 52.26(a), cannot be amended without notice-and-comment rulemaking.²¹² Because the original LNPA-designation was effected pursuant to a notice of proposed rulemaking in 1997 and published in the Federal Register in accordance with the requirements of Section 553 of the APA, the same procedure must be followed here. Likewise, the rule barring selection of any entity with a direct material financial interest in a manufacturer of telecommunications network equipment or its affiliate to serve as an LNPA cannot be changed without a notice-and-comment rulemaking.

Moreover, the effect of designating a new LNPA or to eliminate the prohibition on equipment manufacturers serving as LNPA would be to change the 1997 NANC Working Group Report that is incorporated by reference into the Commission's rules. "An agency that seeks approval for a change to a publication that is approved for incorporation by reference must – (1)

²¹⁰ See Order, *Telephone Number Portability*, 13 FCC Rcd 10811, 10823, ¶¶ 34-35 (1998) (granting extension of deadlines to account for delay caused by Perot Systems and entering new contracts with Lockheed Martin IMS).

²¹¹ See Second Memorandum Opinion and Order on Reconsideration, *Telephone Number Portability*, 13 FCC Rcd 21204, 21208-09, ¶¶ 8-9 (1998).

²¹² See, e.g., *Sprint*, 315 F.3d at 374 ("an amendment to a legislative rule must itself be legislative") (internal quotation marks omitted); see also *Shalala*, 514 U.S. at 100 (when an agency adopts "a new position inconsistent with" an existing regulation, or effects "a substantive change in the regulation[]," notice and comment are required) (internal quotation marks omitted).

Publish notice of the change in the Federal Register and amend the Code of Federal Regulations; (2) Ensure that a copy of the amendment or revision is on file at the Office of the Federal Register; and (3) Notify the Director of the Federal Register in writing that the change is being made.”²¹³ These requirements provide additional reasons why the Commission must observe these procedures if it wishes to modify its existing rules.

C. A Notice of Proposed Rulemaking Is Required To Ensure Interested Parties Can Comment Effectively on a Major Change to the Nation’s Basic Telecommunications Infrastructure

A notice of proposed rulemaking – as opposed to a mere Public Notice – is also required to alert potentially interested parties to the relevant issues and possible implications of any contemplated change in the LNPA. The Public Notice indicates only that the NANC has recommended a change in the LNPA vendor and that certain documents accompanied that recommendation. Such a notice does not inform potentially interested parties about what the Commission intends to do; how any proposed transition would take place; what the impact of the transition and new vendor might be on those who use the NPAC; how a change in LNP administration might affect the telecommunications system more broadly; or how the Commission intends to address the neutrality issues implicated by the proposed designation of Ericsson as a numbering administrator. Nor does it indicate what course of action the Commission is contemplating or the tentative basis for that decision.

The Public Notice is all the more inadequate as a basis to elicit public comment because of the nature of the NANC recommendation and the manner in which the Commission has developed the record. Even those parties who may be aware of the publication of the Public

²¹³ 1 C.F.R. § 51.11(a).

Notice (despite the lack of Federal Register publication) and take the additional step of attempting to inspect the documents will be stymied because most of those documents are not publicly available²¹⁴ It is unrealistic and impractical to expect the public to subscribe to a protective order simply to gain an understanding of the basis for a proposed action.

Furthermore, even if one took the additional step of obtaining access to the confidential record, a party seeking to understand the implications of a potential change in the LNPA would be left in the dark. As discussed further below, the NANC recommendation is effectively unexplained – it states that the FoNPAC and the SWG recommended the choice of Ericsson based on **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED] **[END CONFIDENTIAL INFORMATION]** but it lacks any substantive analysis or work papers that would allow the public to evaluate that conclusion. Until the Commission frames the issues, identifies the relevant factors, and provides notice of its tentative intentions, the public will be hampered in its ability to provide meaningful comment on the NANC’s recommendation and a potential change in LNPA. Making a decision on this critical issue in those circumstances would be not merely procedurally unlawful but also irresponsible.

²¹⁴ Information that is relevant to critical national security and public safety issues has, to date, been entirely shielded from scrutiny – even by parties with a legitimate need to know. *See* Letter from Aaron M. Panner to Marlene H. Dortch, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed July 21, 2014). The Commission cannot act in this matter without giving parties an appropriate opportunity to comment on those issues.

III. FLAWS IN THE SELECTION PROCESS PRECLUDE THE COMMISSION FROM RELYING ON THE NANC’S RECOMMENDATION

Independent of the procedures required by the APA, a more meaningful process for selection of the LNPA is legally necessary here for at least two reasons.²¹⁵ First, the NANC evaluation documents are so devoid of information that accepting the recommendation without independent evaluation would constitute improper delegation of the Commission’s responsibility under Section 251(e)(1) to designate numbering administrators, and would be an arbitrary action based on an inadequate record. Second, because the process has been unfairly skewed in favor of a single bidder as a result of an ill-defined and inconsistently applied NAPM/NANC process, it is now left to the Commission to establish a sound basis for its own independent selection decision.

A. The Commission Cannot Delegate the Choice of LNPA to the NANC

Section 251(e)(1) provides that “[t]he Commission *shall* create or designate one or more impartial entities to administer telecommunications numbering.”²¹⁶ The Act directs the Commission to designate impartial numbering administrators; as a consequence, the Commission may not sub-delegate that responsibility “absent affirmative evidence of authority to do so.”²¹⁷ Section 251(e)(1) contains no suggestion that the power to designate numbering administrators can be delegated. The provision does affirmatively permit the Commission to delegate “to State commissions or other entities” its “exclusive jurisdiction over those portions of the North

²¹⁵ For reasons discussed below, it would also be arbitrary and capricious for the Commission to rely on the black-box NANC recommendation. *See infra* Section VI.

²¹⁶ 47 U.S.C. § 251(e)(1) (emphasis added).

²¹⁷ *USTA II*, 359 F.3d at 566.

American Numbering Plan that pertain to the United States.”²¹⁸ By contrast, the statute contains no such authority with respect to designation of impartial numbering administrators. The negative implication of this is clear: the Commission, and not any other entity, must designate the LNPA.

This does not preclude the Commission from enlisting a Federal Advisory Committee or other advisory body to assist with evaluation and provide a recommendation. But it does prevent the Commission from simply applying a rubber stamp to an essentially unexplained recommendation by the NANC. When an agency attempts to delegate “power to outside parties,” lines of accountability “may blur, undermining an important democratic check on government decision-making.”²¹⁹ Here, as explained below, *see infra* pp. 75-91, the NANC recommendation and the documents supporting it lack any factual basis for the conclusion that

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED] **[END**

CONFIDENTIAL INFORMATION] Ericsson’s bid justified the decision to make a change in the LNPA. Indeed, there is virtually no discussion of technical, operational, or managerial considerations that substantiate the evaluators’ conclusion that the two proposals were of comparable technical and managerial merit. The Commission is thus presented with the option of deferring blindly to the recommendation of an outside entity – which it may not lawfully do under *USTA II* – or conducting a proceeding that allows it to reach an independent judgment, based on the evidence.

²¹⁸ 47 U.S.C. § 251(e)(1).

²¹⁹ *Id.* at 565.

B. Flaws in the NANC’s Process Precluded Submission of the Most Favorable Available Proposals

The RFP process, as framed by the Bureau and executed by the NANC and the FoNPAC, had no direct precedent and no clear rules, and was plagued by uncertainty and unfairness.

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL

INFORMATION] That decision was particularly inexplicable – and unfair to Neustar – in light of [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [END CONFIDENTIAL INFORMATION], several months earlier, to authorize – without any public notice or review – an after-the-fact extension of the deadline for submission of proposals, simply because Ericsson failed to submit its proposal on time. The result of these choices has not only been unfairly to prejudice Neustar, but also to deprive the industry and the public of each bidder’s most favorable proposal. The Commission must remedy these procedural flaws before it can meaningfully consider what weight, if any, to give the NANC recommendation.²²⁰

1. The RFP process has suffered from a basic flaw: the rules that purportedly governed the process were first ignored in favor of the interests of Ericsson; then, non-existent rules were invoked to bar the industry from seeking more favorable bids when *that* was in the interest of Ericsson.

²²⁰ Pursuant to 47 C.F.R. §§ 52.11(c) and 52.26(b)(3), Neustar sought dispute resolution by the NANC related to these determinations. The NANC has not acknowledged or otherwise acted on the request.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL

INFORMATION] when the NAPM announced the extension of the deadline for submissions, it stated that it was doing so “[p]ursuant to the directions of the Wireline Competition Bureau of the Federal Communications Commission.”²³¹

Had the RFP process been governed by government contracting rules, the extension of the proposal deadline would have been unlawful. As the Court of Federal Claims and Government Accountability Office have recognized, the rule barring the consideration of late offers “alleviates confusion, ensures equal treatment of all offerors, and prevents one offeror from obtaining a competitive advantage that may accrue where an offeror is permitted to submit

²³⁰ [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION]

²³¹ See E-mail from Timothy Decker, Co-Chair North American Portability Management, LLC, to Sanford Williams, FCC (Apr. 17, 2013 4:28 PM). The NAPM’s website later stated that the deadline had been extended “with the consent of the FCC.” North American Portability Management LLC, *NPAC RFI/RFP*, https://www.napmlc.org/pages/npacrfp/npac_rfp.aspx (last visited Mar. 6, 2014). It is hard to escape the inference that the Bureau directed the NAPM to change the wording so that the Bureau could deny that the extension of the deadline was the Bureau’s responsibility.

a proposal later than the deadline set for all competitors.’”²³² Moreover, the rule precluding the acceptance of “late” proposals cannot be evaded by purporting to “extend” the deadline well after it had passed.²³³ The public contracting principles underlying those decisions have obvious relevance in this context.

2. The extension of the April deadline to benefit Ericsson apparently reflected a determination that FAR regulations did not apply and presumably that an extension of the proposal submission deadline would serve the interests of competition. But those same considerations were inexplicably discarded just a few months later, when Neustar proposed that the FoNPAC seek an additional round of bids. Neustar submitted its response to the FoNPAC’s initial best-and-final offer (“BAFO”) request on September 18, 2013. Based on the plain language of the RFP documents and its history contracting with the NAPM LLC, Neustar reasonably anticipated that the FoNPAC would seek additional proposals, after consideration of the initial BAFO, in the interests of fostering robust competition. When a month had passed without the FoNPAC making such a request and with the November 14, 2013 scheduled recommendation to the NANC imminent, Neustar sent a letter to the FoNPAC on October 21,

²³² *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed. Cl. 167, 173 (2005) (quoting *PMTech, Inc.*, B-291082, 2002 CPD ¶ 172 (Comp. Gen. Oct. 11, 2002)). The FAR provides that “[o]fferors are responsible for submitting proposals . . . so as to reach the Government office designated in the solicitation by the time specified in the solicitation” and that “[a]ny proposal . . . received at the Government office designated in the solicitation after the exact time specified for receipt of offers *is ‘late’ and will not be considered,*” absent limited circumstances not implicated here. 48 C.F.R. § 52.215-1(c)(3) (emphasis added); *see also id.* § 15.208(a)-(b) (same). Courts have routinely enforced these requirements. *See, e.g., Argencord Mach. & Equip.*, 68 Fed. Cl. at 173; *Conscoop-Conzorzia Fra Coop. Di. Prod. E Lavoro v. United States*, 62 Fed. Cl. 219, 239 (2004).

²³³ *See Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 645-46 (2007) (agency could not “render the ‘late is late’ rule a nullity” by extending the deadline, after it had passed, to accommodate an offeror that had failed to submit its proposal on time).

2013, to request that the FoNPAC allow all offerors to submit further proposals. Neustar also provided a copy of the proposal it was prepared to make, which included a significant price reduction relative to the initial BAFO submission.

The FoNPAC did not respond to Neustar’s letter. Neustar therefore sent a further letter on November 4, 2013, to explain why seeking additional proposals would bring substantial benefits with no downside and would also be consistent with previous actions of the FoNPAC. (Neustar also provided a copy of this letter to the SWG tri-chairs.) **[BEGIN CONFIDENTIAL**

INFORMATION] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **[END CONFIDENTIAL**

INFORMATION] On January 24, 2014, NAPM informed Neustar that it would not consider Neustar’s proposal.²³⁴

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²³⁴ See Letter from Timothy Decker, Co-Chair, North American Portability Management, LLC, to Steve Edwards, Senior Vice President, Neustar Inc. (Jan. 24, 2014).

²³⁵ See NAPM Process Report at 48.

[REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION]

3. [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION] FAR rules have no application to a private bid process. Indeed, if FAR rules did apply, the Bureau would have had to take those rules into account in considering Ericsson’s secret April 2013 request to excuse its failure to comply with the bidding deadline. As noted above, under FAR rules such an extension would not have been permitted. To apply fundamentally different and inconsistent sets of rules to comparable decisions to the prejudice of one of two competing parties is unfair and unlawful.²⁴³

That action was particularly egregious because [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [END CONFIDENTIAL INFORMATION]

both the RFP documents and the FAR. The RFP documents signal that the FoNPAC would be likely to seek multiple rounds of proposals, including at the request of bidders. Section 13.4 of the RFP states explicitly that “competition will be used to determine price reasonableness,” and section 13.6 of the RFP gives the FoNPAC authority to engage in such price competition through a multiple BAFO process. The draft RFP specifically reserved to the FoNPAC the right to conduct only a single BAFO process. That language, however, was removed from the final RFP.

²⁴² NANC Process Report at 60-61.

²⁴³ *Burlington N. & Santa Fe Ry. Co.*, 403 F.3d at 777; *Freeman Engineering Associates, Inc. v. F.C.C.*, 103 F.3d 169 (D.C. Cir. 1997).

Moreover, although the draft RFP document contained language that would have restricted bidders' ability to request the opportunity to submit additional bids, that language was also removed from the final RFP. Those changes signaled that bidders would be permitted to seek the opportunity to submit additional proposals. Finally, section 13.6 states that BAFOs may be solicited solely on the basis of price. Taken together, the language of the revised RFP created the expectation that multiple BAFO solicitations were likely, including those resulting from a bidder's request.

Furthermore, sound procurement practices would favor, not discourage, solicitation of further rounds of proposals in the circumstances presented here. In the government contracting context, agencies frequently solicit a second round of BAFOs (also referred to as "final proposal revisions").²⁴⁴ They also have the authority to solicit further proposals from bidders in response to a bidder's offer to reduce the price of an existing proposal.²⁴⁵ Here, as in the government procurement context, there is thus no constraint on the FoNPAC's ability to seek additional bids. Indeed, "[t]he public's interest is clearly served when suppliers engage in fair and robust competition Healthy competition ensures that the costs to [consumers] will be minimized."²⁴⁶ Indeed, FAR 15.306(d)(2) governs "discussions," the last phase of which is the solicitation of final proposal revisions, and provides: "The primary objective of discussions is to

²⁴⁴ See, e.g., *Biospherics, Inc. v. United States*, 48 Fed. Cl. 1 (2000) (indicating that agency may reopen discussions after receiving final proposal revisions); *Antarctic Support Assocs. v. United States*, 46 Fed. Cl. 145 (2000) (noting without comment that agency reopened discussions and requested second BAFOs after receipt of first BAFOs); *United Int'l Investigative Servs. Inc. v. United States*, 42 Fed. Cl. 73 (1998) (court notes without objection or legal commentary that there were four rounds of BAFOs); *Marine Hydraulics, Int'l, Inc.*, B-403386.3, 2011 CPD ¶ 98 (Comp. Gen. May 5, 2011); *Pemco Aeroplex, Inc.*, B-310372.3, 2008 CPD ¶ 126 at n.7 (Comp. Gen. June 13, 2008).

²⁴⁵ See *Burron Med. Prods., Inc.*, B-176407, 1972 WL 6292 (Comp. Gen. Sept. 27, 1972).

²⁴⁶ *SAI Indus. Corp. v. United States*, 60 Fed. Cl. 731, 747 (2004).

maximize the Government’s ability to obtain best value.” 48 C.F.R. § 15.306(d)(2). Consistent with that mandate, agencies often seek multiple rounds of final proposal revisions in order to obtain “best value.”

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[END CONFIDENTIAL INFORMATION] procurement regulations grant an agency great discretion as to whether it may choose to reopen discussions with bidders:

The current FAR provisions do not discourage agencies from resolving a given proposal’s weakness or deficiency by means of multiple rounds of discussions with the offerors, provided the discussions are not conducted in a fashion that favors one offeror over another. *See* 48 C.F.R. § 15.306. Indeed, both the objective of discussions – to maximize the government’s ability to obtain the best value, based on the requirements and evaluation factors set forth in the solicitation, 48 C.F.R. § 15.306(d)(2) – as well as the FAR’s definition of discussions – which includes bargaining, consisting of persuasion, alteration of assumptions and positions, and give and take, 48 C.F.R. § 15.306(d) – both presuppose that there may be multiple rounds of discussions regarding a single issue.²⁴⁷

Among the “weakness[es] or deficienc[ies]” that might affect a bid is a price that is considered unreasonably high.²⁴⁸

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁴⁷ *ManTech Telecomms. & Info. Sys. Corp. v. United States*, 49 Fed. Cl. 57, 77 (2001); *see also Galen Med. Assocs., Inc. v. United States*, 74 Fed. Cl. 377, 384 (2006) (approving agency decision to conduct discussions to bring nonconforming offers into the competition because of the agency’s “obligation to obtain the best value for the government”).

²⁴⁸ *Tiger Truck, LLC*, B-400685, 2009 CPD ¶ 19 (Comp. Gen. Jan. 14, 2009).

[REDACTED]

[REDACTED] [END CONFIDENTIAL
INFORMATION]

4. Fair and impartial treatment of competing bidders is fundamental to the legal validity of the eventual contract award. Ultimately, the selection of the LNPA is for the Commission to make. Accordingly, because the selection process has treated competing bidders unequally – by applying different and inconsistent decision criteria – the outcome of that process will be subject to legal challenge. In selecting a vendor, the government must treat all candidates impartially;²⁵⁰ similarly, when the government grants a valuable benefit, it must treat all competitors equally and impartially.²⁵¹ Because the RFP process was modified to permit the submission of late bids – presumably to benefit a bidder that failed to comply with an explicit and fair deadline – denial of Neustar’s request, which did not seek to modify any of the rules governing the RFP process, cannot provide the basis for a sustainable recommendation.

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

²⁴⁹ Because all pricing information has been maintained in confidence, there is no reason that the Commission cannot seek further bids and evaluate those on its own or with the assistance of the NANC and the NAPM.

²⁵⁰ See, e.g., *Raytheon Tech. Servs. Co.*, B-404655.4, 2011 CPD ¶ 236 (Comp. Gen. Oct. 11, 2011) (finding unequal treatment and sustaining protest where agency gave awardee more time to submit its proposal than it gave protester); *Standard Communications, Inc.*, B-406021, 2012 CPD ¶ 51 (Comp. Gen. Jan. 24, 2012) (holding that, “to treat all of the competitors equally,” agency was obligated to allow the protester to revise its quote after agency allowed two other offerors to revise their quotes); *DGS Contract Serv., Inc. v. United States*, 43 Fed. Cl. 227 (1999) (upholding agency’s decision to disclose relative price standing to all offerors after agency revealed that information to one offeror).

²⁵¹ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Oregon v. FCC*, 102 F.3d 583 (D.C. Cir. 1996) (reversing FCC’s refusal to consider competing license application where agency failed to provide clear notice of filing deadline); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1320 (D.C. Cir. 1995) (referring to “the ability to compete on an equal basis” as “the essence of *Ashbacker*”).

[REDACTED] [END CONFIDENTIAL INFORMATION] The Commission therefore cannot complete the selection process without addressing these serious procedural flaws.

IV. THE COMMISSION CANNOT REASONABLY RELY ON THE NANC/NAPM RECOMMENDATION BECAUSE IT FAILS TO JUSTIFY THE SELECTION OF ERICSSON

The *March 2011 Order* delegates to the NANC “the initial responsibility for developing a process to select the next LNPA(s) and for recommending to the Commission one or more LNPA(s).”²⁵² It “direct[s] the NANC to consult with the NAPM” and instructs the NANC/NAPM to “submit a recommendation to the Bureau which includes a ranked evaluation of the bidders that relies on criteria established in the RFP.”²⁵³ “Once the NANC/NAPM submits its bidder recommendations, the Commission – or Bureau acting on delegated authority – will select the vendor(s) to serve as the LNPA(s).”²⁵⁴ Thus, absent its own comprehensive re-evaluation of the competing proposals, the Commission has only the NANC/NAPM recommendation on which to rely to fulfill its statutory duty to select an LNPA in a manner consistent with its duty to perform a “meaningful independent review” over the actions and decisions of the NANC/NAPM.²⁵⁵

²⁵² Order and Request for Comment, *Petition of Telcordia Technologies, Inc.*, 26 FCC Rcd 3685, 3686, ¶ 5 (2011) (“*March 2011 Order*”).

²⁵³ *Id.* at 3687, 3688, ¶¶ 5, 8.

²⁵⁴ *Id.* at 3688, ¶ 9.

²⁵⁵ *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986); *see R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir. 1952); *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 642 (5th Cir. 1983). Similarly, in the context of federal procurements, source selection officials (the role played by the Commission here) must use independent judgment when making an award decision and cannot simply rubber stamp recommendations made by an evaluation team. *See, e.g.*, 48 C.F.R. § 15.308 (“While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA’s independent judgment.”); *Information Sci. Corp. v. United States*, 73 Fed. Cl. 70, 121

The NANC/NAPM recommendation, however, is plainly insufficient for the Commission to conduct a meaningful independent review of the selection process and vendor recommendation. The recommendation and the documents supporting it lack any meaningful detail or justification as to how the final decision was reached, what factors were considered, and how the various technical, management, and cost criteria were evaluated and weighed, despite hundreds of pages of submissions on these topics. The recommendation is, instead, a “black box,” providing only cursory conclusions, with little evidentiary substantiation, explanation, or analysis supporting those conclusions.

The NANC/NAPM recommendation documents total only 5 and 12 pages, respectively. The bulk of that sparse material is background and procedural history, rather than the required evaluation. The FoNPAC Decision contains little more than **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED] **[END CONFIDENTIAL INFORMATION]** The SWG Decision uses only slightly more ink: **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED]

(2006) (“Although the FAR contemplates that decisional authority may be supported by other procurement officials, nevertheless, FAR 15.308 requires evidence of the exercise of independent judgment.”); *CIGNA Gov’t Servs, LLC*, B-401062.2 *et al.*, 2010 CPD ¶ 283 (Comp. Gen. May 6, 2009). Moreover, documented evidence of independent judgment is required even when the source selection official agrees with the underlying evaluation results. *See, e.g., FirstLine Transp. Sec., Inc. v. United States*, 100 Fed. Cl. 359, 384 (2011) (“the requirement that the SSA document its independent judgment is even more important when it agrees with” the evaluation team because disagreement with the evaluation team “suggests that the SSA has exercised independent judgment,” but uncritical agreement suggests “an increased risk that the SSA has not exercised its independent judgment”). And failure to perform independent analysis would be grounds for vacating the selection decision under generally applicable procurement principles. *See, e.g., Prism Maritime, LLC*, B-409267.2 *et al.*, 2014 CPD ¶ 124 (Comp. Gen. Apr. 7, 2014); *Wackenhut Servs., Inc.*, B-286037 *et al.*, 2001 CPD ¶ 114 (Comp. Gen. Nov. 14, 2000) (“Where there is inadequate supporting documentation for a source selection decision, there is no basis for us to conclude that the agency had a reasonable basis for the decision.”).

[REDACTED]

[REDACTED]

[REDACTED] **[END**

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The cursory nature of these recommendations is particularly striking given the size and complexity of the job with which the FoNPAC and SWG were tasked. The RFP (including the vendor qualification surveys and technical requirements documents) totaled more than 180 pages and contained more than 2,000 requirements. Neustar’s and Ericsson’s bids consisted of hundreds of pages each, with many hundreds of pages of additional supporting documents. Both companies also made extensive oral presentations, the transcripts for which consist of hundreds of additional pages. **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END**

CONFIDENTIAL INFORMATION] Thus, they fail to provide the very information that the Commission needs to conduct its own meaningful review of these proposals.

A. The Recommendation Does Not Adequately Address the Transition Risks

As discussed in Part V below, Ericsson’s transition plan is deeply problematic and poses a substantial risk of service disruption and other failures that would negatively affect the industry and the public. Even though this transition was among the most important issues for the NAPM/NANC to address, the recommendation **[BEGIN CONFIDENTIAL INFORMATION]**

[REDACTED] **[END CONFIDENTIAL INFORMATION]**

The FoNPAC and SWG conclude that [BEGIN CONFIDENTIAL INFORMATION] the

[REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION] The recommendation therefore fails to provide the Commission with a reasonable basis to conclude that the risks of the transition were adequately addressed in the decision to recommend Ericsson as the next LNPA.

The FoNPAC Decision states that each member company [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION] But no effort is made to analyze any of these dozen items. The document simply states that [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION] With respect to “risks,” the FoNPAC Decision merely states that [BEGIN CONFIDENTIAL INFORMATION]

[REDACTED]

[REDACTED]

[REDACTED]

²⁵⁶ FoNPAC Summary and Selection Report at 11 (Jan. 16, 2014) (“FoNPAC Dec.”).

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL INFORMATION] *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 12.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END

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The recommendation before the Commission thus fails to make even a cursory attempt to address the complexities and risks of transitioning to a new LNPA provider, which affect all telecommunications service providers, consumers, law enforcement, and entities subject to Telephone Consumer Protection Act (“TCPA”) compliance. Even though *none* of the 70+ LNP-enabled countries has ever attempted such a transition, there is no attempt to explain how this transition will be adequately managed, other than to say that [BEGIN CONFIDENTIAL

INFORMATION] [REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION]

The recommendation therefore fails to provide the Commission with sufficient information to determine that the costs and risks associated with transitioning to a new LNPA have been adequately addressed or to determine that the [BEGIN CONFIDENTIAL INFORMATION]

[REDACTED] [END CONFIDENTIAL INFORMATION] is superior in light of these considerations.

²⁵⁹ *Id.* It lists: [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]
[REDACTED] [END CONFIDENTIAL INFORMATION] *Id.*

²⁶⁰ LNPA Selection Working Group Report to NANC on LNPA Vendor Selection Recommendation of the FoNPAC at 3 (Feb. 26, 2014) (“SWG Dec.”).

The recommendation attempts to defend its failure to delve into the potential risks of the transition by claiming [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[END CONFIDENTIAL INFORMATION] But the recommendation makes no attempt

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL

INFORMATION]

Because the recommendations do not include a proper analysis of the risks and costs of transition – including in particular for entities not represented on the FoNPAC, such as smaller service providers, law enforcement agencies, and consumers – it is essential that the Commission perform its own assessment on these risks and costs. The Commission should, at a minimum, consider the following three categories:

²⁶¹ FoNPAC Dec. at 3-4.

(1) *direct service provider expenses*, such as: third-party vendors to test with a new LNPA; training and methods and procedures development with respect to a new LNPA; internal end-to-end and performance testing with a new LNPA; network connectivity to multiple NPACs during the testing and cutover period; and costs driven by increased outages & service degradation in the early stages of transition;

(2) *industry-wide expenses*, such as: costs for project management of the transition; development and testing of new NPAC functionality to effect the transition (for example, data extraction & conversion); activity for the National Pooling Administrator to support testing of a new LNPA; and costs of extensions to Neustar’s contract due to delay, including any period of overlap during region-by-region transition or for potential roll-back purposes; and

(3) *law-enforcement expenses*, such as the costs to develop new interfaces to test with and train on new LEAP and IVR platforms.

The failure of the recommendations to catalog, let alone quantify, these costs provides further cause for the Commission to reject them as an insufficient basis on which to select the next LNPA.

B. The Recommendation Flouts the RFP by Largely Ignoring Technical and Management Criteria in Favor of Price

The RFP, TRD, and VQS contained extensive technical and management criteria that competing bidders were required to demonstrate they were capable of meeting. These criteria were supposed to be given [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL

INFORMATION] As the FoNPAC Decision notes, [BEGIN CONFIDENTIAL

INFORMATION] [REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION]

²⁶² FoNPAC Dec. at 8-9; *see also* SWG Dec. at 2 (“Thus, the technical and management criteria, when combined, were significantly more important than the cost criteria alone, with the

[REDACTED]

[REDACTED]

[END CONFIDENTIAL INFORMATION] The FoNPAC found that both Neustar and Ericsson [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION] This conclusion is problematic for several reasons and does not provide an adequate basis for the selection of Ericsson as the next LNPA.²⁷⁰

First, in light of the weighting mandated by the guidelines, allowing price to become a [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [END CONFIDENTIAL INFORMATION] in the recommendation would be appropriate, if ever, only following a detailed showing quantifying the risks and costs of transitioning to a new vendor and analyzing

²⁶⁸ FoNPAC Dec. at 4.

²⁶⁹ *Id.*

²⁷⁰ In the federal procurement context, it is improper to award on the basis of low cost when cost is secondary to technical capability. Rather, “[i]t is a fundamental principle that agencies must evaluate proposals consistent with the terms of a solicitation.” *Prism Maritime, LLC*, 2014 CPD ¶ 124; *see* 48 C.F.R. § 15.305(a) (“An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation.”); *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 374 (2009) (“It is a fundamental tenet of procurement law that proposals must be evaluated in accordance with the terms of the solicitation.”); *Red River Holdings, LLC v. United States*, 87 Fed. Cl. 768, 786 (2009) (“When the evaluation of proposals materially deviates from the evaluation scheme described in the solicitation, the agency’s failure to follow the described plan may constitute evidence of arbitrary and capricious decision-making.”) (internal citations omitted); *Johnson Controls World Services, Inc.; Meridian Management Corp., B-281287.5 et al.*, 2001 CPD ¶ 3 (Comp. Gen. June 21, 1999) (agency improperly focused on price, thus creating a lowest-priced technically acceptable procurement in violation of the stated solicitation terms); *PharmChem Labs., Inc.*, B-244385, 1991 WL 216281 (Comp. Gen. Oct. 8, 1991) (where solicitation assigned the technical factors four times greater weight than price, agency’s award to lower-priced offeror and failure to explain why the protestor’s technical advantages were not significant “gave price more weight than specified in the RFP and therefore departed from the stated evaluation criteria”).

the differences between competing proposals. Even where the price difference between two competing proposals is significant, that difference may still be smaller than the costs that could be entailed in transitioning to a new vendor with an untested solution and inadequate transition plan. For example, a recent study by economist Dr. Hal Singer estimates the costs associated with a change in the LNPA as a result of the likely risk factors associated with the transition at \$719 million in the first year of the transition alone.²⁷¹ Only with such a full and complete accounting can these competing considerations be properly weighed and balanced. Although the recommendation [BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] [END CONFIDENTIAL INFORMATION] There is no information for the Commission or any other party to challenge this determination and determine whether cost considerations were properly weighed against other factors.

Second, having improperly permitted price to become the [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [END CONFIDENTIAL INFORMATION] in selecting a vendor, the recommendation committed further error by ignoring Neustar's best BAFO pricing proposal, thereby exaggerating the true difference in price between the competing

²⁷¹ Hal Singer, *Estimating the Costs Associated with a Change in Local Number Portability Administration* (Jan. 2014), available at <http://www.ei.com/downloadables/SingerCarrierTransition.pdf>. Based on past experience with projects of similar complexity, Dr. Singer developed a model to estimate what types of costs carriers would incur with a change in the form of "system transition, transaction processing, system outages, and testing." *Id.* at 1. Using this model, he estimated that a change in the LNP administrator would result in \$719 million in costs in the first year of the transition, which would take the form of service credits, hands-on customer service, operations research, and additional system testing. He further concluded that carriers are likely to experience greater service delays and errors in porting, resulting in additional lost revenues. Significantly, Dr. Singer's analysis assumes a relatively smooth transition. The long-term costs could be much higher if the transition to a new administrator also fails to address the many significant numbering issues that will arise in the transition to all-IP networks.

bids. Neustar's BAFO contained two alternative pricing structures, but, based on the pricing comparison contained in the recommendation, it appears that [BEGIN CONFIDENTIAL INFORMATION] [REDACTED] [END CONFIDENTIAL INFORMATION] The Commission therefore may not accept the recommendation's analysis of price, but must analyze and compare Neustar's lower-priced offer to ascertain the true cost difference between the competing proposals.

Third, the recommendation fails to weigh the actual differences between the competing proposals against the costs that are likely to be incurred following a transition.²⁷² The recommendation's failure to evaluate the technical and management criteria includes a failure to provide any assurance to the Commission or the industry of service parity between Neustar's current operations and Ericsson's proposal, or an assessment of what service elements could be compromised during a transition. In its Petition for Declaratory Ruling in February 2014, Neustar detailed numerous services it currently provides as the LNPA that were missing from or inadequately described in the RFP. These include, for example: (i) Industry Disaster Recovery Assistance and Emergency Preparedness; (ii) Industry Ecosystem Management; and (iii) Mass Port Administration and Processing. These services have naturally evolved during Neustar's tenure as the LNPA and have served to offset service provider expenses and provide extra support and security during network migrations, mergers and acquisitions, and widespread

²⁷² In the federal procurement context, the failure to consider the costs that could be incurred by selecting a particular vendor is improper. *See, e.g., Trandes Corp., B-256975 et al.*, 94-2 CPD ¶ 221 (Comp. Gen. Oct. 25, 1994) (finding that the agency unreasonably evaluated the awardee's proposal as the lowest priced because the awardee's proposal entailed costs not captured in its price volume).

emergencies.²⁷³ Yet, despite the importance of these features, and the intuitive differences between mature LNPA operations and a greenfield implementation by a new vendor, there is no indication in the recommendation or elsewhere [BEGIN CONFIDENTIAL INFORMATION]

[REDACTED] [END
CONFIDENTIAL INFORMATION]

D. The Recommendation Fails To Scrutinize Ericsson’s Service Quality Commitments

[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION]

²⁷³ Ericsson’s response to Neustar’s Petition asserting compliance with these functions, rather than providing any comfort to constituents, further underscores the amount of on-the-job learning that it will require if awarded the contract. *See* Opposition of Telcordia Technologies, Inc. d/b/a Iconectiv to Neustar’s Petition for a Declaratory Ruling, WC Docket Nos. 07-149 & 09-109, CC Docket No. 95-116 (Feb. 24, 2014).

²⁷⁴ Iconectiv Section 15 – Optional Attachments (Apr. 2013) § 2.2.1 at Telcordia00250.

[BEGIN CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [END CONFIDENTIAL INFORMATION] As the Commission has recognized in other contexts, however, such third-party testing is critical to ensuring reliable and accurate testing results. For example, in the context of determining whether Bell company operations support systems were ready to provide access to competitors, the Commission held that “[a]bsent sufficient and reliable data on commercial usage . . . the Commission will consider the results of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC’s OSS.”²⁷⁵

E. The Recommendation Fails To Account for IP Transition Issues

The Recommendation does not address one of the most important issues facing the next LNPA, and one of the largest potential drivers of cost differences between Neustar’s and Ericsson’s competing proposals: the Internet Protocol (“IP”) Transition. As the recent *Transition Order* acknowledges, the IP Transition raises “challenges and opportunities for the assignment of telephone numbers within the North America numbering plan and for the features,

²⁷⁵ Memorandum Opinion and Order, *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828, 25858, ¶ 68 (2002); see also Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3958, ¶¶ 8-9 (1999) (holding that, in the absence of real-world performance data, “extensive independent third party testing” of Bell Atlantic’s OSS” was “critical” to the Commission accepting the recommendation of the New York Public Service Commission that these systems were adequate).

capabilities, and security of numbering-related databases.”²⁷⁶ Ensuring that these numbering systems continue to operate reliably and efficiently during and after the transition is “essential to preserving core values of competition and consumer protection.”²⁷⁷ It is critical that the Commission’s numbering systems are able to accommodate and facilitate the changes that are imminent and, in some places, already happening.

The current NPAC, with continued investment, offers essential tools for service providers to facilitate and accelerate the IP Transition, by providing a universally accessible means for providers to exchange authoritative routing information from their next generation networks. Today, supported by Neustar as the LNPA, service providers have already begun trialing solutions that rely on the NPAC to provide this function, using proven interfaces to carrier networks and at no additional cost. Neustar has further committed to continued investment in the NPAC and surrounding services to ensure continued, neutrally administered number management in an IP environment. By contrast, Ericsson – even as it pursues the LNPA contract – is advocating in industry forums solutions that forgo use of the NPAC, in favor of Ericsson’s own, proprietary platforms.²⁷⁸ Widespread adoption of these platforms for IP interconnection both increases revenue opportunities for Ericsson beyond an LNPA contract and increases costs

²⁷⁶ Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, *Technology Transitions*; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; Connect America Fund; *Structure and Practices of the Video Relay Service Program*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*; *Numbering Policies for Modern Communications*, 29 FCC Rcd 1433, 1483, ¶ 151 (2014) (“*Transition Order*”).

²⁷⁷ *Id.*

²⁷⁸ See, e.g., iconectiv White Paper, *IP Inter-Carrier Routing, Capabilities To Support IP Services Interconnection* (2014), available with registration at <http://iconectiv.com/ifforms/whitepapers/iconectiv-ip-registry-whitepaper.php>.

to providers by creating more common registries to which connection is for all intents mandatory. Although industry groups have the ultimate say in what solution is adopted, the commitment and incentives of vendors play a large role in determining the range of options available to those groups. It is therefore critical in selecting the next LNPA to consider the wide disparity between current LNPA capabilities, which rely on proven open platforms, and Ericsson’s preferred proprietary technology solutions.

Despite the critical importance of the IP Transition to the next LNPA, the recommendation does not discuss it or any of the ongoing industry efforts to evolve to an all-IP interconnection framework. There is no mention of the IP Transition, even though it was addressed (albeit briefly) in the RFP, and even though both Neustar and Ericsson addressed it in their proposals. Importantly, while Neustar devoted serious attention to this critical issue in its response, Ericsson **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[END CONFIDENTIAL] The recommendation does not address the parties’ competing proposals to address the IP Transition or provide any indication that they were specifically considered by the FoNPAC, the SWG, or the NANC. There is, in short, no record on which the Commission can ensure that the LNPA and the NPAC/SMS are prepared for and committed to supporting the changing landscape of the accelerating IP Transition.²⁷⁹

²⁷⁹ See *Transition Order*, 29 FCC Rcd at 1442, ¶ 25.

V. ERICSSON’S TRANSITION PLAN IS INADEQUATE AND WILL IMPOSE UNACCEPTABLE RISKS

The transition from one LNPA to another is a task of enormous complexity that has never before been undertaken in the United States, or anywhere else in the world, on the scale that would need to be involved here.²⁸⁰ This transition will require dozens of interdependent work streams to occur in parallel, including those related to implementation, establishment of new service operations, infrastructure development, and integration of systems and processes associated with the provision of LNP. Coordination will be required across thousands of carrier accounts, public safety agencies, law enforcement, regulators, and other stakeholder groups, throughout every phase of design, development, testing, transition, and operations. And, before any final cutover can occur, there must be comprehensive testing, including a full trial, to ensure that the new LNPA’s system can function properly and at a high level before real-world deployment occurs.

Failing to develop and adhere to a comprehensive transition plan – one which guarantees service continuity on an equal basis across all stakeholders on the same schedule – could result in widespread service outages, interfere with network routing, and obstruct open access to number inventory. The complexity of executing an LNPA transition to a new system also will divert key service provider resources from other priorities, such as migration to next generation networks

²⁸⁰ A report by the leading IT analysis firm, The Standish Group, reveals the risks and challenges of IT transitions and predicts the potential consequences for consumers if a new administrator is selected to manage the NPAC. *See* Big Bang Boom, The Standish Group (2014), available at <http://blog.standishgroup.com/BigBangBoom.pdf>. The report found that a flash-cut switch to a new administrator effectively would mean a total reset of this complex system, which could impact reliability for carriers and consumers. The Standish Group found that an NPAC transition is comparable to the largest projects it has analyzed. Those projects have the highest rate of failure and only a 6 percent chance of being completed on time and within budget. After factoring in the additional elements of complexity, type of development, industry and application, it found that the likelihood of an on-time NPAC delivery was 4 percent.

and technologies. Finally, the transition could harm consumers as a result of downgrades in LNP reliability and performance, in part by weakening the competitive position of new entrants and smaller service providers.

The risks here are particularly acute because Ericsson and SunGard lack meaningful experience in completing a transition of the magnitude contemplated by the recommendation.

During its presentation to the FoNPAC, for example, Ericsson conceded that [BEGIN

CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] [END CONFIDENTIAL

INFORMATION] Indeed, Ericsson lacks experience in providing LNP services of anywhere near the scale and complexity that would be involved if it is selected as the next LNPA.

Ericsson's bid touts its experience in providing number portability systems in all NPAC regions of the United States since the beginning of LNP, but this experience is of limited relevance. It merely involves wireless portability activation, which is a small subset of LNP activity, and does not involve nearly the complexity of the full range of LNPA activities.²⁸² Ericsson also boasts of experience in providing LNP systems and services in several foreign countries. But none of these countries – which include Mexico, India, Thailand, Malaysia, Egypt, Turkey, Saudi Arabia, Lithuania, Greece, UAE, Argentina, Chile, and South Africa – has LNP systems that rival the

²⁸¹ Telcordia Presentation at 192-93.

²⁸² Wireless porting activation represents a small (single-digit) percentage of total LNPA activity. Moreover, in many if not most cases, Ericsson provides only the software for wireless porting activation, while another entity (such as the service provider customer or a service bureau) actually runs an operation. In addition, Ericsson's contractual relationships with its customers are all bilateral (i.e., between one customer at a time, per installation), whereas the NPAC is an industry service that has responsibility to every service provider simultaneously.

size, scale, or complexity of the LNPA system in the United States. For example, with respect to Ericsson’s two largest such systems, **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED]

[REDACTED] **[END CONFIDENTIAL INFORMATION]** By comparison, the U.S. LNPA system involves more than 500 million transactions annually.²⁸⁴

The Ericsson India system **[BEGIN CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED] **[END CONFIDENTIAL INFORMATION]** whereas in the United States, the LNPA serves thousands of service providers. In any event, any referenced transition experience to the countries listed above is moot because they were all greenfield implementations, and none of them was a transition within a live production environment.

Ericsson not only lacks experience with a transition of this magnitude and with providing LNP services on the scale that will be required as the LNPA throughout the United States, but it has proposed deploying **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]** This approach adds even greater complexity and risk to a transition that already promises to be extremely costly. Despite this, however, Ericsson’s transition plan is silent on many of the details needed to guide this transition, **[BEGIN HIGHLY CONFIDENTIAL**

INFORMATION] [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL**

²⁸³ See Vendor Qualification Survey § 3.1.1 at Telcordia06054.

²⁸⁴ See, e.g., Neustar’s Response to the NAPM LLC’s Local Number Portability Administration 2015 Surveys at ES-4 n.3 (Apr. 5, 2013).

²⁸⁵ Vendor Qualification Survey § 3.1.1 at Telcordia06052.

INFORMATION] Indeed, Ericsson’s transition plan suffers from numerous critical shortcomings that pose unacceptable risks and concomitant costs.

First, the current schedule in the transition plan for cutting over from Neustar to Ericsson is unrealistic, and maintaining it poses unnecessarily heightened risks. **[BEGIN HIGHLY**

CONFIDENTIAL INFORMATION] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[END HIGHLY CONFIDENTIAL INFORMATION] In 2009-10, the NAPM estimated that the transition would take approximately 33 months.²⁸⁶ At various times in the RFP process, industry members expressed concern that even the NAPM schedule was aggressive, and delays at the start would most certainly create delays to the end date.²⁸⁷ Even

²⁸⁶ See, e.g., FoNPAC Project Plan, *available at* http://www.nanc-chair.org/docs/mtg_docs/Dec10_FONPAC_PROJECT_PLAN_V1.doc.

²⁸⁷ See, e.g., NANC Meeting Transcript at 34 (May 21, 2010) (Mr. Sacra [NAPM LLC]: “This is what I would consider personally an aggressive timeline, it’s high level, but you’ll notice the major milestones in here now doesn’t preclude any possibility that the FONPAC and the NAPM LLC determines through discussion with the NANPA.”), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305777A1.doc; *id.* at 35 (Ms. Retka [Qwest]: “but doing the RFI does also add to the aggressive timeframe that we’ve got in front of us”); *see also* NANC Meeting Transcript at 33 (Dec. 16, 2010) (Ms. Emmer [Sprint Nextel]: “Being intimately involved in the process, and the timeline, and the project plan that was submitted to the NANC, and all of the work that we’ve already put into this and all of the work that needs to happen over the next couple of years, I can conclusively say that every day there is a delay in deciding if the LLC is going to be the entity who will be putting this RFI/RFP together will cause – every single day that goes by will cause a delay, period, end of story.”), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305779A1.doc.

assuming the new LNPA already has extensive subject matter expertise, that it has completed a significant amount of design, implementation, and testing before selection, and that it is engaged in parallel contract negotiations with the incumbent vendor while the selection process is occurring, cutting this schedule by two-thirds is not feasible without great risk to stable operations.²⁸⁸

Second, Ericsson’s transition plan does not adequately address the coordination with the industry that is necessary to conduct an orderly transition. The transition will require close cooperation and coordination not only between the incumbent and new the LNPA vendor, but also among service providers and other industry participants that rely on the LNPA. In order to participate in porting, each service provider must recreate its own connection to the NPAC, in some cases in partnership with a third-party vendor. A complete transition plan must incorporate the participation of all constituents, supported by Ericsson’s training, testing, and multi-vendor operations. Nonetheless, [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY
CONFIDENTIAL INFORMATION]

Third, Ericsson’s proposed transition schedule poses excessive risk in seeking to turn-up [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[REDACTED] [END HIGHLY

²⁸⁸ See Bill Reidway, Neustar, *Analysis: NPAC Transition To Take a Minimum of Two Years, Likely Longer* (2014), <http://www.neustar.biz/corporate/docs/npac-timeline-report.pdf>.

CONFIDENTIAL INFORMATION] The LNPA transition will require an enormous number of complex tasks to occur simultaneously in order to prevent service disruptions or degradation beginning on the day of cutover, including having all service providers and vendors pointing their systems away from the Neustar NPAC and to an alternate NPAC, ensuring the alternate NPAC readies its initial system configuration and service provider reference data, converting current and historical data from one NPAC’s database schema to another, and transitioning service functions such as the help desk and interfaces for smaller providers and other entities that do not rely on direct connection to the NPAC. In general, when introducing new systems or capabilities, it is preferable to deploy it on a rolling basis, to ensure that it is operational and functioning properly in a real-world setting on a limited basis, before expanding the system on a greater scale. Under the current Ericsson transition plan, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]** This unreasonably increases the potential for problems in an already risk-prone transition process.

Fourth, the transition plan does not adequately address the complex task of converting data from Neustar’s data model to that of Ericsson’s NPAC. The current NPAC stewards an enormous amount of service provider data, including telephone number routing information, service provider business rules and configurations, user authentication information, billing and collection data, and porting history that is used for, among other things, law enforcement

²⁸⁹ Telcordia Presentation at 205-06 **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]
[REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]**

support. If there is no suspension of competitive porting and network management during the cutover, all of these data must be downloaded from Neustar, converted to the new NPAC's data model, and uploaded to the alternate LNPA, within an NPAC maintenance window. Although Neustar intends fully to cooperate with this handoff, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]** indicating a basic failure on the part of Ericsson to account for the incumbent's transition obligations, and adequately plan for them. There also needs to be repeatable and testable methods and procedures to govern this handoff, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED] **[END HIGHLY CONFIDENTIAL INFORMATION]**

Fifth, just as the transition plan lacks the detail to perform the necessary data conversion, it also lacks an adequately detailed plan to "rollback" operations to the incumbent LNPA in the event a problem occurs during the transition that renders the new system inoperable. For example, in at least some scenarios under which a problem will occur, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]

[END HIGHLY

CONFIDENTIAL INFORMATION] The failure to address these important details presents a high risk to the integrity of the data that need to be transferred during the transition, and creates heightened risks of service outages.

Sixth, Ericsson’s transition plan does not adequately address how two NPACs will be operating simultaneously during the interim while the transition is occurring. From the time that the first region is brought online with a new LNPA until the final region is cutover and the new LNPA takes control nationally, there will be an interim period during which both the incumbent and new system will need to operate in parallel. Service providers and third-party vendor platforms, along with all law enforcement agencies and TCPA compliance constituents, will need to interact with both NPACs during this period, which adds complexity even beyond the transition to a single new system. To ensure that each party understands their respective roles and responsibilities during this interim period, there will need to be methods, procedures, and protocols describing each party’s responsibilities and how each company will operate.

Ericsson’s transition plan [**BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[END HIGHLY CONFIDENTIAL INFORMATION]

Taken together, these weaknesses give rise to more than mere speculative concern that the proposed unprecedented transition will encounter issues and problems. Technology projects of this size and complexity are difficult even under ideal conditions, where the target platform is operationally mature, all parties are following a proven and fully vetted project plan, and clear program management authority exists to enforce deadlines and resolve disputes. But where there is an incomplete transition plan, the vendor is learning on the job, and the chain of accountability is not clearly established, the challenges only grow, and the consequences of failure are ultimately borne by the end users and consumers.

The recent experience with the Healthcare.gov website is a case in point. The website was plagued with glitches when it first launched, placing many of the core initiatives of the Affordable Care Act in jeopardy, and ultimately resulting in the replacement of many of the underlying technology contractors.²⁹⁰ Yet another cautionary tale involves FairPoint's transition from Verizon's system following its acquisition of certain Verizon landline operations in New England. FairPoint initially continued to operate using Verizon's system, but then attempted to cutover to its own systems. Despite assurances from FairPoint and independent consultants (including CapGemini) that FairPoint was ready, the transition was plagued with problems, creating huge service problems and ultimately contributing to FairPoint's subsequent

²⁹⁰ See, e.g., Patience Wait, *HealthCare.gov: Latest Victim of Federal Acquisition Problems?*, INFORMATION WEEK (Oct. 23, 2013) (reporting “a number of factors [that] doomed the chances for a successful launch,” leading to “[t]he disastrous rollout of Healthcare.gov.” “The bulk of the problems are on the backend. . . . The prime contractor, CGI Federal . . . subcontracted the federal data services hub to Quality Software Services.”), <http://www.informationweek.com/government/enterprise-architecture/healthcaregov-latest-victim-of-federal-acquisition-problems/d/d-id/1112036>; see also Sarah Kliff, *HealthCare.Gov Was Originally Built in a Garage*, WASH. POST WONKBLOG (Oct. 9, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/09/healthcare-gov-was-originally-built-in-a-garage/>.

bankruptcy.²⁹¹ United Airline’s attempt to transition its reservations systems from the former Continental Airlines in March 2012 is another cautionary tale. The transition overwhelmed United’s systems, resulting in lost tickets, and ultimately caused a massive worldwide shutdown forcing flight delays and cancellations that affected thousands of travelers, did significant harm to United’s brand, increased customer service costs, and lowered industry customer satisfaction ratings.²⁹² If the Commission accepts the NANC recommendation based only on the cursory transition plan put forward by Ericsson, it is likely subjecting the communications industry and consumers to unacceptable risk of a similar set of conditions and circumstances.

²⁹¹ See, e.g., Decl. of Alfred C. Giammarino ¶¶ 40-41, *In re FairPoint Communications, Inc.*, No. 09-16335 (Bankr. S.D.N.Y. filed Oct. 26, 2009), ECF No. 2 (“FairPoint engaged Capgemini U.S. LLC . . . to build a back-office infrastructure to allow FairPoint to migrate off of Verizon’s systems. . . . Following Cutover, FairPoint experienced increased processing time by customer service representatives for new orders, increased processing time for customer invoices, and an inability to execute automated collection treatment efforts. These issues negatively impacted customer satisfaction and resulted in large increases in customer call volumes into FairPoint’s customer-service centers.”); see also Bloomberg News, *FairPoint, Buyer of Verizon Unit, Files for Bankruptcy Protection*, N.Y. TIMES, Oct. 26, 2009, <http://www.nytimes.com/2009/10/27/technology/companies/27fairpoint.html>.

²⁹² See, e.g., Jad Mouawad, *For United, Big Problems at Biggest Airline*, N.Y. TIMES, Nov. 28, 2012 (“[United’s] reservation system failed twice [in 2012], shutting its Web site, disabling airport kiosks and stranding passengers as flights were delayed or canceled.”), <http://www.nytimes.com/2012/11/29/business/united-is-struggling-two-years-after-its-merger-with-continental.html>; see also Susan Carey, *United’s Merger Turbulence Hits Elite Frequent Fliers*, WALL ST. J., May 24, 2012 (“Despite extensive training, United agents struggled with the Continental system, causing transaction times at airports and reservation centers to jump.”), <http://online.wsj.com/news/articles/SB10001424052702304451104577390140073664500>.

VI. NATIONAL SECURITY ISSUES ARE NOT ADEQUATELY ADDRESSED IN THE EXISTING RFP AND ARE A BASIS ON WHICH THE CANDIDATES MUST COMPETE

The selection of an LNPA implicates serious national security issues that were not addressed in the RFP process.²⁹³ Without proper vetting, these issues raise significant questions as to the vulnerability of critical U.S. telecommunications infrastructure under a new LNPA and represent a serious deficiency in the process and substance of the selection competition.²⁹⁴

[BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

A. The Selection of an LNPA Raises Serious National Security Issues

[BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

1. LEAP. [BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁹³ As noted above, *see supra* n.214, Despite Neustar’s request for appropriate representatives to receive access to information redacted for national security reasons, Neustar has had no access to the elements of Ericsson’s proposal that have been redacted for such reasons, and its comments are therefore necessarily incomplete.

²⁹⁴ *See generally* 47 U.S.C. § 151 (creating the Commission “for the purpose of the national defense, [and] for the purpose of promoting the safety of life and property through the use of wire and radio communications,” among other purposes).

[REDACTED]

[REDACTED]. [END NATIONAL SECURITY

INFORMATION]

2. Emergency communications. [BEGIN NATIONAL SECURITY

INFORMATION] [REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

3. Differences in the candidates' security profile. [BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

[REDACTED]

- a. Ericsson as a multipurpose outsourcer for telecommunication carriers.

[BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

b. Ericsson’s global footprint. [BEGIN NATIONAL SECURITY
INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[END NATIONAL SECURITY INFORMATION]

B. Security Has Not Yet Been Properly Considered in the Selection Process

[BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END NATIONAL
SECURITY INFORMATION]

1. The RFP's security terms. [BEGIN NATIONAL SECURITY
INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

2. The security terms required in similar contexts. [BEGIN NATIONAL
SECURITY INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[END NATIONAL SECURITY INFORMATION]

a. Committee on Foreign Investment in the United States (CFIUS) and Team
Telecom. [BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

3. Recent security developments call for a greater priority for security.

[BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END NATIONAL SECURITY INFORMATION]

C. This Is the Time To Consider Security Fully in Choosing the LNPA

[BEGIN NATIONAL SECURITY INFORMATION] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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