back-up, security, network monitoring and service restoral for the NPAC servers and database, and which is not inputting data into the NPAC or conducting discretionary operations.

Thus, no matter what the Commission determines about Sungard AS's affiliations, one thing is clear: Sungard AS is not subject to any undue influence that could potentially affect the administration of the NPAC.

D. If the FCC Desires Additional Safeguards, They Can Be Implemented Without Re-Opening the Competition.

The solicitation defines a clear procedure for assessing neutrality and delineates the authority for such a review. The bid documents expressly state that although the NAPM LLC "will initially decide whether the Respondent satisfies the Neutrality criteria," the ***Commission*** shall verify neutrality compliance prior to award.[113] Consistent with that provision, the FoNPAC's award recommendation states that it is ****BEGIN CONFIDENTIAL****

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Further, as explained below, in the event the FCC were to be unable to verify compliance with neutrality, the solicitation expressly provides that additional neutrality measures may be

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[113] *See* VQS § 3.5.

[114] Future of the NPAC, Local Number Portability Administration Request for Proposal Evaluation Summary and Selection Report ("FoNPAC Selection Report") at 12, *attached as Exhibit B to* LNPA Selection Working Group ("SWG") Report to NANC on LNPA Vendor Selection Recommendation of the Future of the NPAC Subcommittee ("FoNPAC") at 3 (2014) ("SWG Selection Report"). The SWG Selection Report was attached to the Letter from Betty Ann Kane, Chairman, North American Numbering Council, to Julie A. Veach, Chief, Wireline Competition Bureau, Federal Communications Commission, WC Docket No. 09-109, CC Docket No. 95-116 (dated Apr. 24, 2014 and filed Apr. 25, 2014) ("NANC Apr. 24 *Ex Parte* Letter").

implemented between award and the contract start date, and that contemplated exchange is entirely consistent with analogous federal procurement practice. Neustar's self-serving assertions that the award recommendation is defective, and that the competition must be re-opened, thus are meritless.

1. Additional Neutrality Measures May Be Implemented at Any Time Between the Award and the Contract Start Date.

The solicitation sets forth the neutrality requirements applicable to offerors' proposals. Section 3.4 outlines the specific Neutrality requirements, and the detail that offerors must provide to substantiate their neutrality.[115] Then, Section 3.5 clarifies that offerors were to provide a legal opinion addressing compliance with the solicitation's neutrality requirements, and states that "[a]s long as a Respondent submits a Legal Opinion by the RFP Response Cut-Off Date, the submission ***shall be considered on the merits***, pursuant to the Evaluation Criteria in the RFP, and may not be disqualified on neutrality grounds."[116]

The solicitation goes on to explain that the ultimate assessment of neutrality—based upon the opinion letters and additional documentation provided by offerors—shall be made by the Commission, rather than by the FoNPAC or NANC. And it states that "[p]rior to award, the FCC will verify neutrality compliance. 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."[117]

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[115] *See* VQS § 3.4.

[116] *Id.* § 3.5 (emphasis added).

[117] *Id.*

That language clearly contemplates that, once the Commission evaluates neutrality, concerns can be addressed at any time prior to the contract start date. As discussed above, Telcordia amply satisfies the solicitation's neutrality requirements. But should the Commission have any concerns whatsoever, the solicitation allows the Commission and Telcordia to address such concerns prior to the start of contract performance. There is no need to re-open the competition—which would substantially delay the start of contract performance—as Neustar demands.

Other elements of the RFP also show that compliance with the solicitation's neutrality requirements was always intended to be an ongoing effort. For example, the resultant contract will require a neutrality audit every six months during contract performance, and the solicitation required offerors to acknowledge that they would be subjected to such a review.[118] This requirement shows that a prospective offeror's neutrality is properly viewed as a contract performance issue, and that additional neutrality measures might be required both ***before*** and ***during*** contract performance.

To the extent Neustar is now challenging the fact that the solicitation permits post-award changes to the proposed awardee's neutrality plan, Neustar waived that argument by failing to challenge the provision prior to the due date for proposals. If, as Neustar now contends, the FoNPAC should have required offerors to set in stone their neutrality solution prior to even being selected as the awardee, it was incumbent on Neustar to raise that challenge prior to

[118] *See* NAPM, LLC, 2015 LNPA RFP § 4.2 ("RFP"), *available at* https://www.napmllc.org/Docs/npac/ref_docs/2015%20LNPA%20RFP%202%204%2013.docx (last accessed Aug. 7, 2014).

submitting its bid.[119] Neustar should not be permitted to game the system. It cannot sit on its hands, allow the procurement to proceed to a close, and then raise concerns it could and should have raised long ago.

2. Allowing the Awardee to Address any Neutrality Concerns Without Re-Opening the Competition Is Entirely Consistent with Analogous Federal Procurement Practice.

Moreover, even if Neustar had timely challenged the solicitation's neutrality provisions prior to proposal submission, that challenge would fail. Neustar asserts that ***any*** exchange between the FCC and Telcordia leading to a modification of Telcordia's neutrality plan would require reopening the competition and obtaining revised proposals from all offerors.[120] Although the LNPA selection process is not a procurement subject to the Federal Acquisition Regulation ("FAR"), procurement law serves as a useful analogy on this point and demonstrates that the solicitation's approach is entirely sound and proper.

Under federal procurement law, a request for information that relates to an offeror's responsibility does not trigger the requirement to hold discussions with ***all*** offerors in the competitive range.[121] This is because the question of responsibility does not involve an evaluation of the substance of the offeror's proposal in response to a particular solicitation. Rather, it is a separate, affirmative determination by the contracting officer that the contractor

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[119] *See, e.g.*, *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308, 1315 (Fed. Cir. 2007) (holding that an offeror in a federal procurement must raise any challenges to the terms of the solicitation before proposal submission, or those challenges are waived).

[120] That argument is particularly ironic given that Neustar itself has had to modify its neutrality plan on multiple occasions after it was designated as LNPA.

[121] *See General Dynamics—Ordnance & Tactical Sys.*, B-295987, B-295987.2, 2005 CPD ¶ 114 at 10 (Comp. Gen. May 20, 2005).

meets the standards outlined in FAR 9.104-1 regarding the contractor's general eligibility and ability to perform (based upon factors such as the entity's financial status, corporate resources, past performance, and record of integrity and business ethics). An agency's responsibility determination is independent from the agency's assessment of the technical merits of the proposed awardee's proposal under the solicitation's technical evaluation criteria.

Even more illustrative is how the federal procurement system handles organizational conflicts of interest ("OCIs"). Agencies often must evaluate whether an apparent awardee has an OCI, and that assessment is similar to the Commission's evaluation of neutrality here: it requires an assessment of (1) whether the offeror has other business interests that might impair its objectivity in performing the contract; and (2) if the offeror has such interests, whether the conflict has been adequately mitigated.

An agency's assessment of OCIs and related mitigation measures is treated like a responsibility determination—meaning that the agency may exchange information regarding the awardee's mitigation plan, and may modify that plan, without any need to reopen discussions with all offerors.[122] In fact, FAR 9.504(e) provides for a strikingly similar exchange of information as what is contemplated under the LNPA solicitation. Specifically, the FAR requires that:

> The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest

[122] *See Overlook Sys. Tech.*, B-298099.4; B-298099.5, 2006 CPD ¶ 185 at 21 (Comp. Gen. Nov. 28, 2006) ("*Overlook Sys. Tech.*").

> considerations, the contracting officer shall notify the contractor, provide the reasons therefore, and allow the contractor a reasonable opportunity to respond.[123]

This system expressly contemplates that this exchange will occur ***after*** the evaluation is complete and an awardee has been selected—and that is what routinely happens.[124] And agencies have broad discretion to conclude that any concerns can be corrected prior to the start of contract performance.[125]

The Commission's assessment of Telcordia's neutrality—and its associated assessment of whether Telcordia will be subject to influences that might impair its objectivity when serving as the LNPA—is highly analogous to an agency's OCI assessment. Just as in the federal procurement context, there is no need to reopen the competition in the event that the FCC has concerns regarding Telcordia's neutrality. The solicitation—like FAR 9.504—expressly permits exchanges with the apparent awardee to explore and resolve any concerns prior to contract performance.

For all of these reasons, the FonPAC and the NANC properly deferred to the Commission on the issue of neutrality, and the Commission has full discretion to engage in an exchange with Telcordia as the apparent awardee to resolve any concerns it may have.

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[123] FAR 9.504(e).

[124] *See Overlook Sys. Tech.*, 2006 CPD ¶ 185 at 20; *see also CIGNA Gov't Servs., LLC,* B-401068.4, B-401068.5, 2010 CPD ¶ 230 at 10-11, (Comp. Gen. Sept. 9, 2010).

[125] *See Overlook Sys. Tech.*, 2006 CPD ¶ 185 at 16 (noting that agencies are "allowed to exercise 'common sense, good judgment, and sound discretion' in assessing whether a potential conflict exists and in developing appropriate ways to address it.").

II. A NOTICE OF PROPOSED RULEMAKING IS NOT REQUIRED, AND THE COMMISSION HAS OFFERED MORE THAN SUFFICIENT OPPORTUNITIES FOR PUBLIC PARTICIPATION.

The selection of an LNPA is a classic informal adjudication—a highly fact-dependent decision resolving which of two competing bidders will have the right to enter a contract to be the next LNPA. Despite these hallmarks of adjudication, Neustar argues that the Commission must make the selection through the informal-rulemaking process of 5 U.S.C. § 553.[126] This argument is incorrect. Contrary to Neustar's protestations, the selection of an LNPA bears little resemblance to a legislative rule, nor has the Commission enshrined the identity of the LNPA in a rule.

A. The Selection of the LNPA Is an Adjudicative Function.

Neustar first argues that the Commission must act by rulemaking because the appointment of an LNPA is an inherently legislative function. This is incorrect. The selection of an LNPA is a fact-intensive decision directly deciding the rights of the two competing bidders. As a result, the selection is an informal adjudication that is not subject to the informal-rulemaking procedures of 5 U.S.C. § 553.[127] Neustar's argument conflates rulemaking and adjudication.

The primary difference between an adjudication and a rulemaking is that an adjudication resolves questions "among specific individuals in specific cases, whereas rulemaking affects the

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[126] Neustar Comments at 50-62.

[127] *See also* USTA/CTIA Comments at 10 ("It is settled law that the Administrative Procedure Act does not require the Commission to engage in notice-and-comment rulemaking when undertaking informal adjudication like the administrator-selection at issue here.").

rights of broad classes of unspecified individuals."[128] Put differently, an adjudication has an "immediate effect on specific individuals (those involved in the dispute)," while a rulemaking is purely prospective "and has a definitive effect on individuals only after the rule is subsequently applied."[129] Indeed, the APA defines an adjudication to include cases where an agency grants a "permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."[130] Here, the Commission has already established the process for selecting the LNPA. What is left is a classic adjudicatory function—to select an Administrator.[131]

Neustar argues that selecting the LNPA is a legislative rule because it is of "general or particular applicability," of "future effect," and "designed to 'implement, interpret or prescribe law or policy."[132] While Neustar is correct that a rulemaking announces new policies of general import or amends prior rules,[133] this selection will do neither. First, the LNPA selection will determine which entity or entities are authorized *now* to negotiate and sign an LNPA contract with NAPM, not in the future. While that selection will also determine who will be the LNPA in

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[128] *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

[129] *Id.*

[130] *See* 5 U.S.C. § 551(8) (defining "adjudication" as "agency process for the formulation of an order"); *id.* § 551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than the rule making but including licensing"); *id.* § 551(8) defining "license" to include "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission").

[131] *See id.* § 551(8); *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1093 n.11 (D.C. Cir. 1979) ("[A] classic case of agency adjudication . . . involves decisionmaking concerning specific persons, based on a determination of particular facts and the application of general principles to those facts.").

[132] Neustar Comments at 51 (internal quotation marks omitted).

[133] *See Conference Grp., LLC. v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013).

years to come, that does not transform the decision into a rulemaking.[134] If it did, all adjudications would become rulemakings because every adjudication has some prospective effect on the rights of certain parties. Second, and contrary to Neustar's claims,[135] the Commission need not prescribe any new practices to select the next LNPA. The Commission has already promulgated the rules governing the LNPA's duties and practices[136]—all that is left is to select which of two parties should be the next LNPA. This "highly fact-specific, case-by case" type of determination, which is more similar to an agency granting a permit or license than a sweeping, generally applicable rule, is an adjudication.

Neustar also contends that this proceeding is a rulemaking because LNPA selection "has implications for quasi-legislative judgments" such as the "price of portability," the LNPA's corporate structure, the provision of portability and numbering services, and the operation of NPAC database facilities.[137] This argument is inconsistent with Neustar's own public position that LNPA contracts are merely "private contracts between private parties"[138] implicating "only private fees paid by those carriers" which "do not commit the government to any course of action."[139] It is also irrelevant. Adjudications regularly have prospective effect and affect parties

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[134] *Id.*

[135] *See generally*, Neustar Comments at 51.

[136] *See, e.g.*, 47 C.F.R. § 52.25(b), (f) (adopting rules on "equal and open access to regional databases" and limiting information stored in the databases to what is "necessary to route telephone calls to the appropriate telecommunications carriers); *see generally id.* Part 52, Subpart C (rules governing number portability and its administration).

[137] Neustar Comments at 51-52.

[138] Neustar's Ex Parte Response to the Reply Comments of Telcordia Technologies, Inc., at 11, WC Docket No. 09-109 (filed Dec. 9, 2009).

[139] *Id.* at v.

not before the Commission. As the D.C. Circuit recently explained, "[t]he fact that an order rendered in an adjudication 'may affect agency policy and have general prospective application,' does not make it a rulemaking subject to APA section 553 notice and comment."[140] This is because any adjudication carries with it collateral effects, some of which touch on law and policy. The mere fact that the LNPA selection may have implications on other policy questions does not turn this adjudication into rulemaking.

Moreover, the authorities Neustar cites in support of its position do not actually deal with whether an agency action is a rulemaking or an adjudication. For example, Neustar cites a four-factor test to determine "whether agency action is interpretive or legislative."[141] That test does not apply here, however, because the case Neustar cites *presupposed that it was dealing with a rule* and sought to determine whether a particular *rule* was legislative or interpretive.[142] The court was not presented with the question whether agency action was rulemaking or adjudication, and thus the four-factor test is irrelevant.

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[140] *Conference Grp., LLC*, 720 F.3d at 966 (quoting *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 814 (D.C. Cir. 1984)).

[141] Neustar Comments at 52 (citing *Am. Mining Cong. v. Mine Safety Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

[142] *See Am. Mining Cong.*, 995 F.2d at 1112 ("Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the *purported interpretive rule* has 'legal effect,' which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, *we have a legislative, not an interpretive, rule*." (emphases added)); *see generally id.* at 1109-12.

Neustar further argues that Section 251 of the Communications Act requires that the selection of the new LNPA be done pursuant to notice-and-comment rulemaking.[143] This is plainly wrong. Specifically, Neustar claims that the "Commission's authority to designate an LNPA derives from a specific delegation of legislative power in the governing statute."[144] However, nothing in Section 251 or any part of the Communications Act compels the Commission to exercise all of its Section 251(e) authority over numbering and numbering administration through rulemaking. Neustar attempts to sidestep this fact by claiming that Section 251(b)(2), which "directs the Commission to establish requirements governing the provision of number portability," compels the conclusion that any Commission action done to this effect is "substantive rulemaking."[145] This argument is sorely misplaced—by its plain language, Section 251(b)(2) does not compel all decisions to be made by rulemaking but merely directs the Commission to establish rules such as those specifying the duties of carriers during the porting process. Further, had Congress chosen to require all decisions on number portability and LNPA administration to be done through rulemaking, it could have specified that the designation of the administrators be accomplished "by rule," but it did not do so.[146]

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[143] Neustar Comments at 53-54.

[144] *Id.* at 53.

[145] Neustar Comments at 53.

[146] *Cf., e.g.*, 47 U.S.C. § 251(h)(2) ("The Commission may, *by rule*, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier" under specified conditions) (emphasis added); *id.* § 220(a)(2) ("The Commission shall, *by rule*, prescribe a uniform system of accounts for use by telephone companies.") (emphasis added); *id.* § 339(c)(3)(A) ("Within 270 days after the date of the enactment of the Satellite Television Extension and Localism Act of 2010, the Commission shall develop and prescribe *by rule* a point-to-point predictive model for reliably and presumptively determining the ability of individual locations, through the use of an antenna, to receive signals in accordance with the signal intensity standard in section 73.622(e)(1) of title 47,

In a last-ditch effort to support its position, Neustar wrongly claims that a footnote in a Supreme Court opinion stands for the proposition that Section 251(e) requires the Commission to exercise rulemaking authority.[147] This position is unavailing because the footnote analyzed whether agency *action* was required or discretionary, not whether that action needed to be rulemaking.[148] Therefore, it is clear that nothing in the Act limits the Commission's broad discretion to determine whether to proceed by rulemaking or adjudication.[149]

B. The Commission Has Not Fixed the Identity of the LNPA in a Rule.

Neustar next argues that the identity of the LNPA is currently enshrined in a rule that can only be changed by informal rulemaking. Specifically, Neustar claims that the initial LNPA designations must have been a rulemaking, rather than an adjudication, because they were issued after notice and comment, because the Commission issued certain "Final Rules" as part of the same order, and because the Commission published the order in the Federal Register. Neustar's

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Code of Federal Regulations . . . .") (emphasis added); *id.* § 309(b)(2)(F) (permitting the Commission "by rule" to add categories of licenses that cannot be granted in fewer than thirty days).

[147] Neustar Comments at 53-54 (citing *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 383 n.9 (1999)).

[148] *AT&T Corp.*, 525 U.S. at 383 n.9 ("Section 251(e), which provides that '[t]he Commission shall create or designate one or more impartial entities to administer telecommunications numbering,' *requires* the Commission to exercise its rulemaking authority, as opposed to § 201(b), which merely authorizes the Commission to promulgate rules if it so chooses." (emphasis in original)).

[149] *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007); *see also Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) ("[T]he choice . . . between proceeding by general rule or by individual, ad hoc litigation . . . [is] primarily in the informed discretion of the administrative agency." (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

position springs from a fundamental misapprehension of the adjudicative nature of the LNPA designation and is just wrong.

Indeed, none of these facts transform an adjudicative decision into a "rule." First, an agency is free to afford parties additional procedural rights such as notice and comment in an adjudication, and doing so does not turn an adjudication into rulemaking.[150] Nor is it dispositive that the Commission issued "Final Rules" in the order designating the LNPA or that it published the rules in the Federal Register. The D.C. Circuit made that clear in *Goodman v. FCC*, where it rejected essentially the same argument that Neustar makes here.[151] In *Goodman*, petitioners argued that an order issued by the Commission was a rulemaking because it (1) affected a large number of individuals; (2) was subject to notice and comment; and (3) was published in the Federal Register under the label "Final Rules." The D.C. Circuit rejected that argument and instead focused on the substance of the order itself, noting that these factors did "not alter the clearly adjudicatory nature of the Order itself."[152] What *Goodman* makes clear, and what Neustar continues to ignore, is that it is the *substance* of the Commission's action rather than the particular procedures that define the action. As discussed above, the initial selection of the

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[150] *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion.").

[151] 182 F.3d 987, 994 (D.C. Cir. 1999).

[152] *Id.*; *see also Adams Telcom, Inc. v. FCC*, 997 F.2d 955, 956-57 (D.C. Cir. 1993) (finding the FCC's characterization of its actions in denying pioneer preference as an adjudication was reasonable even though the proceeding was entitled *Amendment of the Commission's Rules*, the order was part of a rulemaking proceeding, and the order repeatedly refers to "this rulemaking").

LNPA was about the suitability of specific entities to be the next LNPA and, therefore, was a classic adjudication. It remains so today.

Moreover, the fact that the Commission began the proceeding with an NPRM does not mean that each portion of its final decision is a "rule." Indeed, the D.C. Circuit has held that it is permissible for an agency to issue an NPRM and then decide some of the issues raised in that NPRM by rule while deciding other issues by adjudication.[153] This is what the Commission did in the initial LNPA selection: it included an adjudicative decision in a proceeding that also promulgated rules. This, of course, does not transform the adjudicative decision into a rule.

Nevertheless, Neustar also argues that the Commission tied its hand by enacting 47 C.F.R. § 52.26(a), which states that "[l]ocal number portability administration shall comply with the recommendations" in NANC's April 25, 1997 report, one of which was to name Neustar's predecessor as the LNPA for four of seven regions. Because the 1997 SWG Report is incorporated into the Code of Federal Regulations, Neustar argues that *every part* of the report—including the selection and identification of the LNPA—is a legislative rule that can be modified only by rulemaking.[154] The law, however, rejects such formalism.

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[153] *Qwest Servs. Corp.*, 509 F.3d at 536 (finding nothing improper when an agency, after issuing notice of proposed rulemaking, bifurcated the proceeding into an adjudication and a rulemaking and thus acted by "half rulemaking and half adjudication").

[154] Neustar also argues that "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." Neustar Comments at 60. This is a non-sequitur and is merely a continuation of its incorrect assertion that Telcordia is actually Ericcson and has such a direct material financial interest. This argument is thoroughly discredited in Section I.B.1.

An agency's decision to publish an item in the C.F.R. does not automatically transform that action into a "legislative rule" that can be modified only be rulemaking. This is especially true in a case like this where the Commission incorporated by reference a long document that includes both rules (such as number portability requirements) and adjudicatory components (such as the selection of the LNPA, as discussed above). Indeed, the D.C. Circuit has made clear that an agency's decision to publish something in the C.F.R. is little more than "a snippet of agency intent" and is not dispositive on the issue of whether an agency action is a legislative rule.[155]

Furthermore, it bears emphasis that the Commission's past practice is entirely inconsistent with the idea that the LNPA's identity has been fixed in a rule. Although the Commission initially designated Perot Systems, Inc. as one of the initial LNPA vendors, Perot defaulted on the contract and the Commission designated Neustar to replace it *without* seeking notice and comment or the other requirements of informal legislative rulemaking. And Neustar recognizes as much in its comments—it notes that the "Commission adopted the NANC's recommendation and endorsed this substitution" without any other process.[156] Had the Commission (or Neustar) intended for the LNPA designation to be a rule, it could only have selected Neustar to replace Perot by notice-and-comment rulemaking—it did not.

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[155] *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) ("In none of the cases citing the distinction, however, has the court taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent.").

[156] Neustar Comments at 60.

In addition, it comports with common sense to interpret the *Second Report and Order*[157] as adopting legislative rules establishing criteria for the LNPA selection and then adjudicating the appointment of the LNPA against those criteria. Requiring a rulemaking to replace an LNPA that has defaulted on its contract would create an inordinately inflexible situation, and it does not make sense to read into the Commission's actions an intent to create extreme, unworkable rigidity where the record reflects no such expression of intent.

Finally, even if the identity of the LNPA were established by a legislative rule, the APA exempts certain matters such as contracts from notice and comment requirements, including any matters relating to "public property, loans, grants, benefits, or contracts."[158] Because requiring further notice and comment at this late stage would harm the public interest in competition and the integrity of the bidding process,[159] there is no reason, and certainly no requirement, to issue another NPRM.

C. The Public Has Had Ample Opportunity to Comment on These Proceedings and the Public Notice Is Sufficient.

Although the Commission has no legal obligation to put the NANC recommendation out for public notice and comment, the Commission has provided the public ample opportunity to comment on the process. Indeed, the nearly five-year long process[160] has involved notice and comment in the selection recommendation process, the terms of the Request for Proposals,

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[157] *Telephone Number Portability*, Second Report and Order, FCC 97-289, 12 FCC Rcd. 12,281 (1997).

[158] 5 U.S.C. § 553(a)(2).

[159] *See* Letter of John Nakahata, Counsel for Telcordia, to Marlene Dortch, Secretary, FCC at 6-7, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed May 9, 2014).

[160] *See* USTIA/CTIA Comments at 3-4.

Vendor Qualification Statement, and Technical Requirements Document.[161] "[A]t each stage, service providers, state regulators, consumer advocates, and industry organizations filed comments contributing to the [Commission's] deliberative process."[162] And finally, the Commission sought additional public input on NANC's recommendation that Telcordia serve as the next LNPA.[163] That notice clearly stated the issue before the Commission, sought comment on the NANC's recommendation, and gave interested parties yet another opportunity to provide input.

Thus, despite Neustar's arguments to the contrary,[164] the Commission has provided interested persons an opportunity to participate in this adjudicative process. And further, Neustar's arguments relating to the supposed insufficiency of the Public Notice would only apply if the LNPA selection was an exercise of rulemaking authority.[165]

III. THE COMMISSION CAN AND SHOULD RELY ON THE NANC RECOMMENDATION, WHICH WAS THE RESULT OF A SELECTION PROCESS SUPPORTED BY NEUSTAR, APPROVED BY THE COMMISSION, AND PROPERLY EXECUTED BY THE FONPAC AND THE NANC.

In its comments, Neustar raises a host of alleged problems with the process by which the FoNPAC and the NANC made their recommendations—all in an effort to convince the Commission to second-guess the consensus of the industry and the Commission's expert,

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[161] *See id.* at 5-6.

[162] *Id.* at 5.

[163] *Commission seeks Comment on the North American Numbering Council Rec. of a Vendor to serve as a Local Number Portability Administrator*, Public Notice, DA 14-794, 29 FCC Rcd. 6013 (2014) (Wireline Comp. Bur.).

[164] Neustar Comments at 54, 61-62.

[165] *See* 5 U.S.C. § 553(b) (discussing requirements for "[g]eneral notice of proposed rule making").

balanced advisory committee. Neustar complains that the selection 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."[166] It complains about how the NANC and the FoNPAC administered that process. And it complains about the substance of the reports prepared by the FoNPAC and the SWG ("Selection Reports"). All of these complaints are meritless. As explained below, the recommendations resulted from a well established process that Neustar supported and that the Commission approved. That process was administered fairly and appropriately by the NAPM and the NANC, with advice from ****BEGIN CONFIDENTIAL**** [redacted] ****END CONFIDENTIAL**** The NANC and the FoNPAC created a detailed report containing the reasons for the industry's consensus that Telcordia was the best choice. As a result, the Commission can and should give substantial weight to the NANC's recommendation. Indeed, to do otherwise would be arbitrary and capricious.

A. The Selection Process Was Supported by Neustar and Approved by the Commission.

Throughout its comments, Neustar makes numerous objections to the selection process itself, complaining that it "had no direct precedent and no clear rules."[167] Among other things, it complains that "detailed numerous services it currently provides as the LNPA were missing from or inadequately described in the RFP."[168] The Commission should reject this last-ditch effort to secure a redo. Neustar had the opportunity to object to the process and the bid documents when

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[166] Neustar Comments at 65.

[167] Neustar Comments at 65.

[168] *Id.* at 87.

the Commission put them out for public notice and comment years ago. It failed to raise any objections then and actually urged the Commission to move forward with the proposed process. Having supported the LNPA selection process, Neustar cannot now complain about it. It has waived any right to object to the process.

1. Neustar Had the Opportunity to Raise Any Objections to the LNPA Process.

Before approving the proposed selection process and the proposed solicitation documents, the FCC put both proposals out for notice and comment. In March 2011, the FCC put the consensus selection-process proposal out for public notice and comment.[169] In response, Telcordia submitted comments urging the Commission to make a number of amendments to the proposed process in order to make the process more open and transparent and to ensure that the membership of the SWG would be balanced "both between industry and state utility commissions/consumer advocates and between entities that are members of NAPM and those that are not."[170] Neustar, however, did not file any comments in response to the Commission's request and, following Telcordia's comments, filed reply comments criticizing Telcordia for commenting on the consensus proposal: "Neustar does not believe that it is appropriate for potential respondents to the NAPM LLC/NANC request for proposal ('RFP') to put forward changes to the Consensus Proposal by which a vendor will be recommended to the

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[169] *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*, Order and Request for Comment, DA 11-454, 26 FCC Rcd. 3685 (Wireline Comp. Bur. 2011) ("*March 2011 Order*").

[170] Comments of Telcordia Technologies, Inc., at 2-3, WC Docket Nos. 07-149 & 09-109, CC Docket No. 95-116 (filed Mar. 22, 2011).

Commission."[171] At that time, Neustar further argued that the LNPA contract was merely a "private contract" between the NAPM and the LNPA vendor and that all affected entities "are eligible to become members of the NAPM LLC."[172] Neustar therefore argued that because "the entities that pay the vast bulk of the NPAC's costs are represented through NAPM LLC membership," this creates "a significant incentive for the NAPM LLC to ensure that the NPAC is run as efficiently and pro-competitively as possible."[173] In light of the general support for the consensus proposal, the Commission ultimately adopted it with only a few modifications.[174] Under the process announced by the Commission, the NAPM, with oversight and approval by the NANC, was to develop solicitation documents, which would then be approved or rejected by the Commission.

The solicitation documents were also developed jointly by the NANC and NAPM according to the Bureau-approved selection process. And before approving them, the FCC also put drafts of these documents out for notice and public comment.[175] Once again, the industry—and particularly Neustar—generally supported the draft documents. In its comments, Neustar

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[171] Reply Comments of Neustar, Inc., at 2 WC Docket No. 09-109, CC Docket No. 95-116 (filed Mar. 29, 2011) ("Neustar Mar. 29, 2011 Reply Comments").

[172] *Id.* at 3.

[173] *Id.*

[174] *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*, Order, DA 11-883, 26 FCC Rcd. 6839 (Wireline Comp. Bur. 2011) ("*May 2011 Order*").

[175] *See Wireline Competition Bureau Seeks Comment on Procurement Documents for the Local Number Portability (LNP) Administration Contract*, Public Notice, DA 12-1333, 27 FCC Rcd. 11,771 (Wireline Comp. Bur. 2012).

praised the solicitation, characterizing it as "generally well designed."[176] Neustar also praised the process adopted in the *May 2011 Order*, opining "[t]his process, which provides the proper balance between technical and business experience of the NAPM LLC's FoNPAC, with broader involvement from the NANC's Selection Working Group . . . and oversight from the Commission, will ensure that the bidding process will provide the industry and consumers the benefits of robust competition."[177] And although Neustar initially suggested some minor modifications to the RFP,[178] it ultimately waived those objections when, in January 2013, it told the FCC that it should "proceed ... to approve the RFP Documents as drafted."[179] In part based on Neustar's support, the Commission ultimately approved the RFP documents with certain modifications.

2. Neustar Waived Any Objections to the RFP Process.

The doctrine of waiver, as articulated by the Commission, does not permit Neustar to belatedly object to a process that it not only willingly participated in but also endorsed. In *Community Teleplay*, the Commission found that "a party with sufficient opportunity to raise a challenge in a timely manner, but who fails to do so, is deemed to have waived the challenge and is precluded from raising it in subsequent proceedings."[180] In that case, winning bidders in an auction petitioned the Commission for relief after they were deemed ineligible to use a bidding

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[176] Comments of Neustar, Inc., at 2, WC Docket Nos. 09-109 & 07-149, CC Docket No. 96-116, (filed Sept. 13, 2012) ("Neustar Sept. 13, 2012 Comments").

[177] *Id.* at 2-3.

[178] *See* Neustar Sept. 13, 2012 Comments at 18-20.

[179] Neustar Jan. 11, 2013 Letter at 1.

[180] *Community Teleplay, Inc., et al.*, 13 FCC Rcd. 12,426, 12,428 ¶ 5 (Wireless Telecomm. Bur. 1998) ("*Community Teleplay Order*").

credit toward their conditionally granted licenses. The Commission denied their petition, noting that the petitioners had the opportunity to file comments on the bidding credit rule in the relevant proceeding; that they had the opportunity to petition for reconsideration once the rules were adopted; and that they could have raised their constitutional claim at the conclusion of the auction. Because they took none of those actions, the Commission found that they had waived the opportunity to raise the issue at the time of the petition.[181]

Neustar, like the petitioners in *Community Teleplay*, has had numerous opportunities to object to what it now opportunistically characterizes as a "deeply flawed"[182] process. Rather than raise its objections at the appropriate times when public comment was sought during the three years that the LNPA selection process has been underway, it repeatedly endorsed that process and worked to ensure the process would proceed without delay:

- In 2011, Neustar praised the NANC for its work in developing the Consensus Proposal and stated that it "intend[ed] to participate in the LNPA selection process set out in the Consensus Proposal."[183]

- In 2012, Neustar noted that the "Commission has consistently relied on NANC and NAPM to design and implement LNP," that the "Consensus Process follows that model," and that "Neustar supports the consensus process, and wants to ensure that it goes forward without delay."[184]

- Also in 2012, Neustar filed an ex parte in which it "urged the Commission to continue to allow the process outlined in May 2011 to continue. All interested parties have been moving forward pursuant to this process and it has been proceeding well. Delaying the

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[181] *Community Teleplay Order*, 13 FCC Rcd. at 12,428-9 ¶¶ 5-6.

[182] Neustar Comments at 2.

[183] Neustar Mar. 29, 2011 Reply Comments at 2.

[184] Letter from Aaron Panner, Counsel for Neustar, to Marlene H. Dortch, Secretary, FCC, Attachment at 2, WC Docket Nos. 07-149 & 09-109, CC Docket No. 95-116 (filed Mar. 9, 2012) ("Neustar Mar. 9, 2012 Letter"); *see also id.* at 1 ("Neustar supports the consensus process and would like to see it go forward without delay.").

process at this point would be counterproductive for the Commission, for the industry, for bidders and for consumers."[185]

- And later that year, Neustar commented that "[t]he RFP process established by the Federal Communications Commission … is generally well designed to achieve [the three fundamental] goals [of the selection [process]."[186] Neustar's comments, generally endorsed the selection process while seeking assurances that the FoNPAC would be free to provide any necessary clarifications in order to "help to avoid delays and to keep the RFP process on track."[187]

- And as recently as 2013, Neustar asserted that "the industry has the correct incentives to design and implement the RFP process to ensure that the LNP administrator continues to deliver service of the highest quality and value….The best and most legally defensible way for the Commission to proceed is to approve the RFP Documents as drafted and to allow the process to move forward."[188]

Furthermore, over the course of the last three years, Neustar never petitioned for reconsideration or filed any application for review of any Bureau decision with respect to (i) the Bureau's authority to select the LNPA, (ii) the structure of the procurement process, (iii) the contents of the RFP, or (iv) Bureau consent to changes in the time for the submission of initial bids. It was not until 2014, when Neustar had apparently come to believe that it would not be re-awarded the LNPA contract, that Neustar announced its multiple objections to the LNPA selection process. At that time, it attempted—and failed—to vacate the LNPA selection process via an untimely petition for declaratory ruling.[189] Just as in that failed attempt, Neustar's

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[185] Letter from Aaron M. Panner, Counsel, Neustar, to Marlene H. Dortch, Secretary, FCC, at 6, CC Docket No. 95-116, WC Docket Nos. 07-149 & 09-109 (filed Sept. 11, 2012) (internal citation omitted).

[186] Neustar Sept. 13, 2012 Comments at 1-2.

[187] *Id.* at 2.

[188] Neustar Jan. 11, 2013 Letter at 1.

[189] *See* Petition of Neustar for Declaratory Ruling Concerning The Local Number Portability Administration Selection Process, CC Docket No. 95-116 and WC Docket No. 09-109 (filed Feb. 12, 2014) ("Neustar Declaratory-Ruling Petition").

comments here seek to rewrite history—and gloss over its own willing participation in (and endorsement of) the selection process.

Nor is this analysis limited to an administrative proceeding such as this. Though there is general agreement that the LNPA selection process is not a procurement subject to FAR, under federal procurement law it is also true that where a party "has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process," that party "waives its ability to raise the same objection afterwards."[190] Neustar, in other words, even under the law governing federal procurement, was obligated to raise any protest to the competition *prior to the close of the bidding process*. Neustar made no such challenge. And it has not put forward an argument as to why, notwithstanding the practice under the FAR, it would be reasonable to allow Neustar to raise objections to the selection process or the content of the procurement documents that it could have raised at the time comments were solicited. Indeed, accommodating Neustar's objections at this point would create clear prejudice, because other offerors would not have been on notice of system dimensions that Neustar knew, but did not disclose, and thus did not get incorporated in the procurement documents.

Neustar's multiple attempts at a *post hoc* challenge to the LNPA selection process are little more than attempts to obtain a second bite at the apple—a second bite that is not permitted by either the Commission's own precedent on waiver, or by analogous procurement law. The Commission should not countenance these attempts.

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[190] *Blue and Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007).

B. The Selection Process Was Administered Fairly and Appropriately.

The comments demonstrate that the selection process advocated by Neustar and approved by the Commission was efficient, fair and exhaustive. The NANC, NAPM and their working groups "expended enormous time and resources, including technical, engineering, operational and other substantive expertise."[191] They conducted "hundreds of meetings and thousands of hours of review, analysis, evaluation and consultation."[192] The USTA/CTIA comments catalogue "the careful process followed" pursuant to a Commission mandate.[193] The USTA and CTIA Comments list twenty-four (24) separate actions taken since the FoNPAC working group developed a draft RFI in 2011.[194]

Neustar, nevertheless, asks the Commission to disregard the results of the process on the basis of supposed irregularities in how it was administered. But all the clever advocacy in the world cannot change the fact that the LNPA selection process was fundamentally fair and reasonable. Neustar tries to manufacture a discrepancy between the decision to extend the proposal submission date and the decision not to obtain a second round of BAFOs. But no such discrepancy exists. Both decisions were plainly reasonable, and driven by a desire to ensure that the selection process was fair and did not unfairly prejudice either bidder.

As Neustar readily admits in its comments, the FAR does not govern the LNPA selection process, and thus the FAR "late-is-late" rule does not apply here.[195] The Commission's later

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[191] USTA/CTIA Comments at 15.

[192] *Id.*

[193] *See id.*, at 13-15.

[194] *Id.*

[195] Neustar Comments at 72 ("FAR rules have no application to a private bid process.").

decision to consider an unrelated part of FAR for guidance on an unrelated matter does not change the fact—which Neustar recognizes—that FAR does not ***control***. Therefore, the only question before the FCC is whether the decision to extend the proposal submission date was reasonable. It plainly was: The RFP documents did not identify the 8 p.m. deadline for initial bid responses; Telcordia's proposal was uploaded onto the IASTA system prior to that deadline; and extending the proposal submission date could not result in an unfair competitive advantage to either offeror because the original proposal submissions were not circulated.

The decision not to obtain a second round of BAFOs was similarly reasonable. It was entirely reasonable for the Commission to look to the FAR for guidance. And there is no provision in either the RFP or the FAR that created any reasonable expectation of even one BAFO, let alone two. Moreover, the timing of Neustar's campaign for a second BAFO strongly suggests that it had learned nonpublic information that would give it an unfair competitive advantage. The decision not to seek a second BAFO was thus necessary to preserve the integrity and fairness of the competition, and to avoid the appearance of impropriety.

For all of these reasons, Neustar's complaints about the procurement process are meritless and should be disregarded.

1. The Decision to Extend the Deadline for Proposal Submission Was Reasonable and Caused No Prejudice to Neustar.

a. The Decision Was Reasonable.

The record demonstrates that the decision to extend the due date for proposals was both reasonable and well within the discretion of the FoNPAC and the SWG to conduct the LNPA procurement. The NAPM LNPA Vendor Selection Process Report explains that NAPM extended the due date ****BEGIN CONFIDENTIAL**** [redacted]