

No. 15-1080

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEUSTAR, INC.

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

JONATHAN B. SALLET
GENERAL COUNSEL

ROBERT B. NICHOLSON
SCOTT A. WESTRICH
ATTORNEYS

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

UNITED STATES DEPARTMENT
OF JUSTICE
WASHINGTON, D. C. 20530

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

LISA S. GELB
C. GREY PASH, JR.
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554
(202) 418-1740

STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. Parties

All parties appearing in this Court are listed in petitioner's brief.

2. Rulings Under Review

In the Matters of Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, et al., 30 FCC Rcd 3082 (2015) (JA --)

3. Related Cases

The order on review has not previously been before this Court or any other court. We are not aware of any related cases pending before this Court or any other court.

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GLOSSARY

<i>Administrator</i>	Local Number Portability Administrator
<i>Advisory Committee</i>	(1) North American Numbering Council, a Federal Advisory Committee and (2) Future of Number Portability Administration Center (a subcommittee of the North American Numbering Council overseeing the LNPA selection process on behalf of the NANC)
<i>Bid Documents Comments PN</i>	<i>Wireline Competition Bureau Seeks Comments on Procurement Documents for the Local Number Portability (LNP) Administration Contract</i> , Public Notice, 27 FCC Rcd 11771 (WCB 2012) (JA --)
<i>Bid Documents Release PN</i>	<i>Wireline Competition Bureau Announces Release of Procurement Documents for the Local Number Portability (LNP) Administration Contract</i> , Public Notice, 28 FCC Rcd 1003 (WCB 2013) (JA --)
<i>First LNP Order</i>	<i>Telephone Number Portability</i> , First Report and Order and Further Notice of Proposed Rule-making, 11 FCC Rcd 8352 (1996)
<i>March 2011 Order</i>	<i>Telephone Number Portability</i> , Order and Request for Comments, 26 FCC Rcd 3685 (WCB 2011) (JA --)
<i>May 2011 Order</i>	<i>Telephone Number Portability</i> , Order, 26 FCC Rcd 6839 (WCB 2011) (JA --)
NAPM	North American Portability Management, LLC, an industry consortium
<i>Order</i>	<i>In the Matters of Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, et al.</i> , 30 FCC Rcd 3082 (2015) (JA --)
<i>Safe Harbor Order</i>	<i>In the matter of North American Numbering Plan Administration Neustar, Inc.</i> , 19 FCC Rcd 16982 (2004)
<i>Second LNP Order</i>	<i>Telephone Number Portability</i> , Second Report and Order, 12 FCC Rcd 12281 (1997)

<i>2010 Request for Information PN</i>	<i>NAPM LLC Announces Request for Information from Vendors on Upcoming Request for Proposals for LNP Database Platforms and Services, Public Notice, 25 FCC Rcd 13379 (WCB 2010)</i>
<i>2014 Recommendation PN</i>	<i>Commission Seeks Comments on the North American Numbering Council Recommendations of a Vendor to Serve as Local Numbering Portability Administrator, Public Notice, 29 FCC Rcd 6013 (WCB 2014) (JA --)</i>
<i>Warburg Transfer Order</i>	<i>Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Communications Industry Services Business, 14 FCC Rcd 19792 (1999)</i>

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BRIEF FOR RESPONDENTS

INTRODUCTION

This case involves the “number portability” system by which individuals and businesses can switch their telephone carriers but keep their old phone numbers. This occurs more than 100,000 times each day and “porting” those numbers is carried out by an entity known as the Local Number Portability Administrator. The same company – Neustar, Inc. – has held the contract to serve as Administrator for more than 15 years. In 2014 it was paid more than \$460 million to perform that function. The cost of this activity ultimately is borne by telephone consumers.

In a proceeding that began in 2011, the Commission undertook to select a new Administrator through a competitive bidding process. The Commission was assisted in this proceeding by an industry consortium and a federal advisory committee that conducted the bidding process, evaluated the bids and made a recommendation to the Commission of which bid to accept. Between the two bidders – Telcordia Technologies, Inc. and Neustar – they recommended Telcordia. [BEGIN

HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END HIGHLY**

CONFIDENTIAL].

Contrary to petitioner's arguments here, the process below was open, transparent and lawful. Neustar participated extensively in all stages of the proceeding. The Commission acted reasonably and within its statutory mandate in finding, with the conditions it imposed, that Telcordia would be impartial as Administrator, and in approving the recommendation of its Advisory Committee that the industry consortium negotiate with Telcordia to complete a contract for it to become the new Administrator. Neustar lost this competition not because of any error by the Commission but because its bid was substantially inferior to Telcordia's. The petition for review should be denied.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Court lacks jurisdiction to consider Neustar's petition for review because it seeks review of non-final agency action.
2. Whether the Commission reasonably concluded that Telcordia would be an impartial entity as required by Section 251(e) of the Communications Act.
3. Whether the Commission reasonably concluded that it was not required to conduct a notice and comment rulemaking proceeding to select an Administrator.
4. Whether the Commission's decision to approve the recommendation to select Telcordia based on its technical and management qualifications as well as the total cost of its bid was reasonable and supported in the record.

JURISDICTION

The Commission's Order was released on March 27, 2015. *In the Matters of Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, et al.*, 30 FCC Rcd 3082 (2015) (JA --) (*Order*). The petition for review was timely filed within 60 days of the applicable date established by 28 U.S.C. § 2344 and 47 C.F.R. § 1.4(b)(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Addendum to this brief.

COUNTERSTATEMENT

A. Regulatory Background

1. The FCC's Original Selection Of Local Number Portability Administrators

The system for assigning telephone numbers in North America, the North American Numbering Plan, was established in the 1940s. *See Sprint Corp. v. FCC*, 331 F.3d 952, 954 (D.C. Cir. 2003). Numbers were initially allocated through private arrangements by the local telephone companies and, following the breakup of AT&T in the 1980s, by a private corporation called Bellcore.¹ In 1996, as part of the Telecommunications Act of 1996,² Congress amended the Communications Act to vest exclusive authority in the Commission over all aspects of numbering administration in the United States, with authority to delegate that authority to state commissions or other entities. *See* 47 U.S.C. § 251(e)(1). Congress directed 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.” *Id.*

After enactment of the 1996 Act, the Commission established rules to enable a customer to keep the same telephone number even when the customer switches

¹ *See In re Admin. of the North American Numbering Plan*, 11 FCC Rcd 2588, 2593–94 (1995).

² Pub. L. No. 104–104, 110 Stat. 56 (1996).

service providers.³ The Commission concluded that this ability to “port” telephone numbers would encourage competition among telephone providers. *First LNP Order*, 11 FCC Rcd at 8401-05 ¶¶93-102. The Commission directed an advisory committee, known as the North American Numbering Council (Advisory Committee), to recommend one or more independent, non-governmental entities, not aligned with any particular telecommunications segment, to serve as the Local Number Portability Administrator (Administrator). *See id.* at 8401 ¶93.

Following the recommendations of the Advisory Committee, the Commission in 1997 adopted additional rules and procedures governing the administrative structure to manage and oversee contractors to administer the system, which consists of hardware and software platforms that host a national information database and serve as the central coordination point of number porting activity.⁴ The Commission approved the Advisory Committee’s recommendation to allow non-profit industry LLCs to manage and oversee porting contractors, *Second LNP Order*, 12 FCC Rcd at 12297-98, and to select two companies, Lockheed Martin and Perot Systems, to serve as those contractors (the Administrators) for different regions of the country, subject to successful contract negotiations. *Second LNP Order*, 12

³ *See generally Telephone Number Portability*, 11 FCC Rcd 8352 (1996) (*First LNP Order*).

⁴ *Telephone Number Portability*, 12 FCC Rcd 12281, 12297-98 (1997) (*Second LNP Order*).

FCC Rcd at 12303 ¶33. Lockheed Martin subsequently became the sole Administrator, and in 1999 the various regional industry LLCs that oversee the administrators consolidated into one and became the North American Portability Management LLC (NAPM).⁵ See Order ¶¶6-7 & n.17(JA --).

As a result of corporate changes at Lockheed Martin, the Commission concluded in 1999 that it had become a “telecommunications service provider” and thus no longer qualified as an impartial entity that could administer telecommunications numbering consistent with the regulations implementing Section 251(e)’s requirement that numbering administrators be “impartial,” 47 C.F.R.

§ 52.12(a)(1)(i).⁶ The Commission approved the transfer of the Lockheed Martin business unit that handled number portability to an affiliate of Warburg, Pincus & Co., a private equity firm. That affiliate was Neustar, Inc. The original contract with Neustar was for the term of five years, set to expire in 2002, but the contract

⁵ The NAPM is a corporation that was “formed for the purpose of engaging in business activities related to the development and implementation of policies for number portability.” <https://www.napmlc.org/pages/Home.aspx>. The NAPM membership is made up of companies from a cross section of the telecommunications industry, with members from the wireline, wireless, cable and VoIP industries. Its current membership includes, for example, AT&T, Verizon, T-Mobile, Sprint, Comcast, Time-Warner Cable and Vonage.

⁶ *Request of Lockheed Martin Corporation and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14 FCC Rcd 19792, 19805 ¶18, 19808 ¶25 (1999) (*Warburg Transfer Order*).

was extended three times. Neustar (or its predecessor-in-interest) has remained the Administrator since 1997.⁷

2. The Current Administrator Selection Process

In May 2009, Telcordia Technologies, Inc. (Telcordia) petitioned the Commission to institute a competitive bid process for the Administrator contract. JA --. The Commission's Wireline Competition Bureau sought public comment on that petition.⁸ In March 2010, the NAPM announced its intention to begin a competitive process to select a new Administrator, in anticipation of Neustar's contract ending in 2015. In September 2010, the Bureau announced that the NAPM was developing a Request For Proposal and encouraged participation by all interested parties.⁹ The Advisory Committee and the NAPM made further proposals to the Commission and, in response, the Bureau issued another public notice in March 2011 requesting comment on a variety of specific issues related to the selection process for

⁷ In April 2015 NAPM renewed the contract with Neustar for a period of 15 months – until September 20, 2016 – at 2015 price levels. An amendment to the contract provides for a series of one-year or six-month renewals, as necessary, at the same price levels.

⁸ *Wireline Competition Bureau Seeks Comment on Telcordia*, 24 FCC Rcd 10271 (WCB 2009). Neustar filed an opposition to the petition, and numerous other parties filed comments. *See Order* n.25 (JA --).

⁹ *NAPM LLC Announces Request for Information from Vendors on Upcoming Request for Proposals for LNP Database Platforms and Services*, Public Notice, 25 FCC Rcd 13379 (WCB 2010) (*2010 Request for Information PN*) (JA --).

a new Administrator.¹⁰

After receiving numerous comments in response to its *March 2011 Order*, in May 2011 the Bureau issued an order detailing the procedures that the Advisory Committee was to follow in the selection process.¹¹ The Bureau clarified that the Commission, or the Bureau acting on delegated authority, had the final authority to select the Administrator(s), and also confirmed that the Commission, or the Bureau acting on delegated authority, must make a final decision about the contract award. *May 2011 Order*, 26 FCC Rcd at 6839 ¶8, 6834 ¶19 (JA --). No party sought reconsideration or Commission review of the Bureau's Order establishing the selection process. Indeed, as the Commission has noted, "many parties, including Neustar, affirmatively stated their support for the process the [*May 2011 Order*] established." *Order* ¶9 and n.42 (citing comments) (JA --).

¹⁰ *Telephone Number Portability*, WC Docket No. 09-109, Order and Request for Comment, 26 FCC Rcd 3685, 3691-97, Attach. A (Wireline Comp. Bur. 2011) (*March 2011 Order*) (JA --). At various times in the course of this proceeding, the Advisory Committee and the NAPM utilized subsidiary committees—in particular, the "Selection Working Group" of the Advisory Committee and the "Future of Number Portability Administration Center" subcommittee of the NAPM—to facilitate the selection process. *See Order* ¶9 (JA --). Because these details are irrelevant to the legal questions presented here while adding significant complexity, throughout this brief we refer merely to the two overarching entities.

¹¹ *Petition of Telcordia Technologies Inc.*, 26 FCC Rcd 6839 (WCB 2011) (*May 2011 Order*) (JA --).

In August 2012 the Bureau issued a Public Notice seeking comment on drafts of bid documents prepared by the Advisory Committee and the NAPM, including a description of technical requirements and the draft Request For Proposal.¹² Over the next six months, interested parties commented on and proposed changes to the bid documents. In particular, Neustar and Telcordia commented on how to ensure that the eventual Administrator(s) would be neutral and impartial.¹³ In response to those comments and after further review, the Bureau directed the NAPM and the Advisory Committee to make certain modifications to the draft bid documents. *Order* ¶10 (JA --)

In February 2013, the Bureau issued a Public Notice announcing the release of the bid documents to solicit bids for a new contract for the Administrator.¹⁴ Two companies submitted bids: Neustar and Telcordia.¹⁵ Following evaluation of the

¹² See *Wireline Competition Bureau Seeks Comments on Procurement Documents for the Local Number Portability (LNP) Administration Contract*, Public Notice, 27 FCC Rcd 11771 (WCB 2012) (*Bid Documents Comments PN*) (JA --).

¹³ See, e.g., [Letter from Aaron M. Panner (Sept. 11, 2012)] (JA --); [Letter from Aaron M. Panner (Oct. 18, 2012)] (JA --); [Letter from Aaron M. Panner (Nov. 6, 2012)] (JA --); [Letter from John T. Nakahata (Nov. 13, 2012)] (JA --); [Letter from John T. Nakahata (Nov. 16, 2012)] (JA --).

¹⁴ See *Wireline Competition Bureau Announces Release of Procurement Documents for the Local Number Portability (LNP) Administration Contract*, Public Notice, 28 FCC Rcd 1003 (Wireline Comp. Bur. 2013) (*Bid Documents Release PN*) (JA --).

¹⁵ Neustar notes that Telcordia missed the initial bidding deadline, Br. at 16, but does not assert any legal error in the NAPM's decision to extend that deadline.

bids by the Advisory Committee and the NAPM, a “Best and Final Offer” was solicited from the two bidders; both responded on September 18, 2013.¹⁶ On October 21, 2013, Neustar submitted a second, unsolicited best and final offer, along with a cover letter requesting that the bid be considered.¹⁷ On January 15, 2014, the NAPM declined to consider Neustar’s second best and final offer.¹⁸

On March 26, 2014, the full Advisory Committee membership unanimously (with two abstentions) recommended the selection of Telcordia as the sole Administrator for a period of five years, with the option for two one-year extensions. That recommendation was submitted to the Commission on April 25, 2014.¹⁹ The Bureau released a Public Notice requesting comment on the recommendation of Telcordia as the next Administrator.²⁰ In response to that Public Notice, a number of parties—including both bidders—filed comments and reply comments. *See Order* n.61 (JA --).

And for good cause, as the Commission explained at length why this was reasonable. *See Order* ¶¶ 38-41 (JA --).

¹⁶ Report of the North American Portability Management LLC In Response to the Wireline Competition Bureau Letter dated Feb. 11, 2014, with Attachs. 1-4, at 43-44 (filed Apr. 25, 2014) (NAPM Process Report) (JA --).

¹⁷ NAPM Process Report at 45-47 (JA --).

¹⁸ NAPM Process Report at 63 (JA --).

¹⁹ *See* [Letter from Hon. Betty A. Kane (Apr. 25, 2014)] (JA --).

²⁰ *Commission Seeks Comment on the North American Numbering Council Recommendation of a Vendor to Serve as Local Number Portability Administrator*, Public Notice, 29 FCC Rcd 6013 (Wireline Comp. Bur. 2014) (*2014 Recommendation PN*) (JA --).

B. The Order on Review

In a March 2015 order, the Commission approved the recommendation of its Advisory Committee that the Commission authorize the NAPM to negotiate a contract with Telcordia, subject to the Commission's approval, to serve as the next Administrator. *In the Matters of Telcordia Technologies, Inc.*, 30 FCC Rcd 3082 (2015) (*Order*) (JA --). The Commission explained that the *Order* "represents an important milestone, but not the final one." *Id.* ¶2 (JA --). It added that the "process for negotiating a contract with Telcordia ... will include close coordination with other governmental entities dedicated to ensuring a secure and reliable database that is vital to the functioning of the nation's critical communications infrastructure, public safety, and the national security." *Id.* The *Order* addressed and resolved a significant number of issues about the process for selecting the new Administrator, including the evaluation of technical, managerial, and cost aspects of the bids, the impartiality or neutrality of the tentatively designated Administrator, and the process of transitioning to a new Administrator.

1. The Selection Procedures

Whether Notice And Comment Rulemaking Was Required The Commission first rejected an argument raised by Neustar that the agency was required to employ a notice and comment rulemaking in order to select a new Administrator. Initially, the Commission found Neustar's assertion was untimely because it had not

questioned the selection procedures “until April 2014, long after the selection process had been established and the bids submitted.” *Order* ¶17 (JA --).

In any event, the Commission found the argument to be “baseless” because “there is nothing inherently legislative in selecting an [Administrator] that forecloses acting through adjudication.” *Id.* ¶¶18, 19 (JA --). The Commission noted that it had already separately established a process for selecting the Administrator (that Neustar had not challenged) and that it had adopted rules governing the Administrator’s duties. “The remaining task of selecting the [Administrator] is a ‘classic case of agency adjudication,’ because it ‘involves decision making concerning specific persons, based on a determination of particular facts and the application of general principles to those facts.’” *Id.* ¶19 (JA --).

The Commission also found no basis for Neustar’s claims that certain provisions of the Communications Act and the agency’s rules required that it select a new Administrator through a notice and comment rulemaking. *Order* ¶¶21-29 (JA --). In particular, the Commission noted that Section 251(e), which directs the Commission to select an impartial entity to administer telecommunications numbering, contains no language that “requires us to do so through notice and comment rulemaking. Where Congress wishes to specify that the Commission take action ‘by rule’ it knows how to do so.” *Id.* ¶22 (JA --); *see also id.* n.85 (JA --) (citing statutory provisions).

Finally, the Commission rejected Neustar’s claim that because the initial (1997) designation of Lockheed Martin and Perot Systems as Administrators had purportedly been done by a rule, any change in Administrator would constitute a rule modification that could only be accomplished through a notice and comment rulemaking proceeding. The Commission disagreed with Neustar’s reading of the agency’s rules, concluding that the rule in question “refers to the standards and duties of the [Administrator] with respect to number portability, not the choice of [A]dministrator” *Order* ¶24 (JA --). The Commission also noted that it had previously changed Administrators—replacing Perot Systems with Lockheed Martin and allowing Lockheed Martin to sell the business unit that served as Administrator—without engaging in notice and comment rulemaking procedures. *Id.* ¶26 (JA --); see *Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Communications Industry Services Business*, 14 FCC Rcd 19792 (1999). In any event, the Commission noted that even if the selection of the current Administrator in 1997 “were read to be a legislative rule, that rule would apply only to the initial selection that expires with the term of the current [Administrator] contract in 2015; it has no bearing on the process for selecting the new [A]dministrator after that date.” *Id.* ¶29 (JA --).

Rejection of Neustar’s Second Best And Final Offer Neustar also argued to the Commission that the selection process was tainted because the groups reviewing the bids—the NAPM and the Advisory Committee—had declined to consider

its unsolicited second “Best and Final Offer.” As noted above, during the extended selection process, in response to notices from the Commission’s Advisory Committee and the NAPM, Neustar and Telcordia each submitted an initial offer and subsequently a “Best and Final Offer.” Following those submissions, Neustar sought to submit an unsolicited second “best and final” offer. Neustar contended that because the final Request For Proposal did not contain a specific statement that there would be one and only one opportunity to submit Best and Final Offers, bidders could reasonably assume that there would be multiple continuing rounds of such offers. The Commission determined that the “better” interpretation of the final Request For Proposal was “that a ‘best and final offer’ is just that: *final*, and there was no need to stipulate that there would not be multiple opportunities to submit” best and final offers. *Order* ¶43 (JA --).

The Commission concluded, in addition, that the decision not to seek further bids was “reasonable” because the “selection proceedings already had two full rounds of competing bids, ... and the [Advisory Committee] members had invested substantial time and effort reviewing those submissions, meeting among themselves, and conducting in-person interviews with Neustar and Telcordia. There was thus an ample record on which to proceed without another bidding round. In these circumstances, the decision to allow another round of bidding and evaluation of those bids had to be weighed against the desire to keep the process moving forward” *Order* ¶44 (JA --).

2. Evaluation Of Bidders

Following a detailed evaluation of the technical and management qualifications set for the Neustar’s and Telcordia’s bids, the Commission agreed with the committee’s “recommendation that both bidders are qualified to serve as” the Administrator. *Order* ¶¶65 (JA --); *see generally id.* ¶¶65-133 (JA --). As the Commission pointed out, however, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

The Commission focused on two additional areas in evaluating these bidders: (1) the cost aspects of the bids, including the cost of transition to a new Administrator, and (2) challenges to Telcordia’s compliance with the requirement of the statute and the Commission’s rules that the Administrator be impartial.

Cost Aspects of the Bids The committees that had evaluated the bids ranked

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

Id. As the Commission detailed in charts in the *Order*, Neustar’s price, as set forth in its best and final offer, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CON-

FIDENTIAL] The Commission explained that the bidders' technical and management qualifications "are essential," but that if "good quality can be achieved at a lower cost, it is reasonable to take that into account in the analysis of the bids." *Order* ¶138 (JA --).

As discussed above, Neustar had sought to submit an unsolicited "second best and final offer," which was not accepted by the NAPM or the Advisory Committee. The Commission concluded that it was reasonable for the Advisory Committee not to seek further bids after both initial bidders had submitted "best and final offers" at the Advisory Committee's request. *See Order* ¶¶42-46 (JA --); *see also* p. --- above.²¹

Finally, as part of its cost evaluation, the Commission considered the issue of the cost of transitioning to a new Administrator. The request for proposals had required bidders to submit information about implementing the transition to a new Administrator and the related costs. *Order* ¶147 (JA --). The Advisory Committee (and its sub-entities) that evaluated the bids "considered the potential risks to the

²¹Neustar states in its brief that [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL] Br. at 63.

industry from changing to a new [Administrator] and determined that these potential transition risks could be appropriately mitigated.” *Id.* ¶149 (JA --).

The Commission acknowledged that “many of the transition costs would be avoided if Neustar remained the [Administrator]. But competitive selections bring opportunities for lower costs and innovation, and we do not agree that we should maintain the same [Administrator] indefinitely merely to avoid transition.” *Order* ¶153 (JA --). Moreover, the Commission found “here that, even assuming that Neustar’s estimate of the costs to industry of transition are correct, [BEGIN

HIGHLY CONFIDENTIAL] [REDACTED] **[END**

HIGHLY CONFIDENTIAL] We are convinced that [BEGIN **HIGHLY CON-**

FIDENTIAL] [REDACTED] **[END HIGHLY CONFIDENTIAL]**

outweigh the costs and potential adjustments associated with the transition to a new [Administrator].” *Id.*; *see also id.* n.535 (comparing estimated costs of transition to the price of Telcordia’s bid and concluding that even under Neustar’s assumptions the transition costs did not change the Commission’s conclusions about the lower cost of Telcordia’s bid).

Neutrality Considerations The Commission also determined that, with safeguards, Telcordia would be an impartial administrator. *Order* ¶¶168-188 (JA --). Each party bidding on the contract was required to file an opinion of counsel describing how it would comply with the requirements of Section 251(e) of the statute, which specifies that Administrators must be “impartial,” as well as the

Commission's rules implementing that provision, 47 C.F.R. §§ 52.12(a)(1), 52.21(k). *Id.* ¶160 (JA --).

Telcordia is a wholly-owned subsidiary of Ericsson, a Swedish company that manufactures communications equipment, develops software, and provides managed network services to unaffiliated telecommunications service providers.

Telcordia explained that its board of directors would be made up of a majority of independent directors and further that all of Telcordia's other businesses, apart from the unit that would serve as Administrator, had been moved to other Ericsson divisions.²² Telcordia added that additional structural safeguards and a Code of Conduct would be put in place to ensure its neutrality. *See Order* ¶163 (JA --).

Neustar challenged Telcordia's impartiality, claiming that Telcordia relied on, or is otherwise intertwined with, its parent Ericsson for (among other things) credit, business planning, interest rates, and employees, and that each of these areas provide Ericsson with an opportunity to affect Telcordia's neutrality by, for example, controlling Telcordia's access to capital through intercompany loans or controlling Telcordia's budget. *See Order* ¶162 (JA --).

²²Telcordia explained that the business that remained provides "number portability, anti-theft and anti-counterfeit device registries, information services, mobile messaging, and spectrum management services in dozens of countries to a wide range of small, mid-size, and large wireline, wireless, cable, and IP customers." *See* [Nakahata 4-4-2013 ltr at 8](JA --) (Telcordia neutrality opinion letter describing Telcordia corporate organization and additional structural safeguards it was implementing to ensure neutrality).

The Commission stressed that “[t]he neutrality of the [Administrator] is a cornerstone of the statute and our regulations concerning the qualifications of the [Administrator].” *Order* ¶179 (JA --). But, after reviewing the submissions of both parties, the Commission concluded that Telcordia complied with its neutrality criteria. In particular, the Commission determined that (1) “Telcordia has demonstrated that it is not a [telecommunications service provider] [and] is not affiliated with a [telecommunications service provider],” *Order* ¶165 & n.570 (JA --) (citing 47 C.F.R. § 52.12(a)(1)(i)); (2) Telcordia “does not issue a majority of its debt to, nor derive a majority of its revenues from, a [telecommunications service provider],” *Order* ¶165 & n.571 (JA --) (citing 47 C.F.R. § 52.12(a)(1)(ii)); and (3) “Telcordia, subject to conditions we impose in this Order and the safeguards that Telcordia has offered, will not be subject to undue influence by parties with a vested interest in the outcome of [local number portability] administration and activities.” *Order* ¶165 & n.573 (JA --) (citing 47 C.F.R. § 52.12(a)(1)(iii)).

As to the third criterion—the only one about which there could be any doubt—the Commission found in particular that Telcordia would not be subject to “undue influence by Ericsson, nor will Ericsson adversely affect Telcordia’s ability to serve as a neutral” Administrator. *Id.* ¶168 (JA --). The Commission’s confidence in this conclusion was based in part on the fact that a majority of Telcordia’s board would be made up of independent directors and that the company’s activities as Administrator would be subject to a bi-annual neutrality audit. *Id.*

The Commission was not persuaded by any of Neustar's claims that Telcordia's connection to Ericsson precluded it from serving as Administrator under the statute and Commission rules. For example, it rejected Neustar's contention that its rules precluded telecommunications network equipment manufacturers from serving as administrators and that since Ericsson is a manufacturer of such equipment, Telcordia was barred from serving as Administrator. The Commission found, contrary to Neustar's view, that action the agency had taken in 1997 incorporating certain recommendations of an advisory committee did not incorporate into its rules a prohibition against equipment manufacturers serving as administrators. *Order* ¶170 (JA --). It added that "even if the Commission had incorporated the language to which Neustar refers as a 'prohibition' into its rules, that specific language would not extend to Telcordia," because Telcordia itself is not an equipment manufacturer, and its corporate structure and safeguards imposed by the *Order* were sufficient, in the Commission's judgment, to ensure its impartiality. *Id.*

The Commission reached a similar conclusion with respect to Neustar's claims that Ericsson's business interests in the telecommunications industry, in particular its management service agreements with wireless providers Sprint and T-Mobile, demonstrated that it is "aligned with" the wireless industry and thus its subsidiary Telcordia cannot meet the impartiality requirements of the statute and

FCC rules.²³ *Order* ¶171 (JA --). While the Commission acknowledged that wireless carriers' attempts to exert undue influence over Telcordia could "hypothetically occur," "commenters have not shown [it is] likely" and "nothing in the record demonstrates" that such undue influence could actually be exercised over Telcordia's independent board. *Id.* ¶172 (JA --). The Commission concluded that "even if Ericsson is aligned with the wireless industry, we cannot conclude that such alliance spills over to Telcordia. Telcordia is a separate company with a separate independent board of directors, each of whom owes fiduciary duties to Telcordia." *Id.*

Recognizing the importance of impartiality and the questions that had been raised about Telcordia's neutrality, the Commission imposed specific safeguards and conditions on Telcordia if it should ultimately become Administrator, in addition to the steps Telcordia itself had proposed and the requirement (contained in the Request For Proposal) that the Administrator undergo a bi-annual neutrality audit.

The Commission required that Ericsson transfer all of its voting stock in Telcordia to a voting trust administered by trustees appointed by Ericsson but with

²³See 47 C.F.R. § 52.21(k) (defining the Administrator as "an independent, non-governmental entity, not aligned with any particular telecommunications industry segment ..."); see also 47 C.F.R. § 52.12(a)(1) (describing Administrator as "non-governmental entities that are impartial and not aligned with any particular telecommunications industry segment" and specifying the three tests the Commission relies on to determine neutrality).

the prior approval of the FCC. The trustees, among other things, will vote on the election of Telcordia's independent directors. *Order* ¶182 (JA --). Any changes to the voting trust may be made only with prior agency consent. *Id.* ¶186 (JA --). The Commission considered and rejected Neustar's claims that a voting trust could not address what it considered Telcordia's lack of neutrality. *Id.* ¶¶183-85 (JA --).

The Commission also required Telcordia to adopt the code of conduct that it had proposed to further bolster its neutrality, but with a number of additional provisions. *Order* ¶186 (JA --).²⁴ As with the voting trust, the Commission required that any future changes in the code of conduct be made only with prior consent from the agency. *Id.*

In sum, the Commission concluded that "Telcordia is not *per se* precluded from serving as the [Administrator] by the Commission's rules and precedent or otherwise." *Order* ¶188 (JA --). It also found that "subject to the safeguards and conditions" it had imposed, "Telcordia has demonstrated its commitment to maintain neutrality in its [Administrator] operations, and thus meets our neutrality requirements." *Id.*

²⁴The Commission required that the revised code of conduct be submitted within 60 days of the adoption of the *Order*. *Order* ¶186 (JA --). Telcordia submitted the revised code of conduct on May 26, 2015. [5/26/15 Nakahata ltr] (JA --).

SUMMARY OF ARGUMENT

1. The Petition should be denied because the *Order* does not constitute final agency action. The Commission has not made a *final* decision as to the next Administrator. Telcordia must still successfully negotiate a contract with the NAPM and that contract must be approved by the Commission. Because the Court's jurisdiction extends only to final orders of the FCC, the Court lacks jurisdiction at this time.

2. The Commission's decision to authorize the NAPM to negotiate with Telcordia to be the next Administrator was entirely reasonable.

a. The Communications Act requires that the Commission ensure that "impartial entities" serve as Administrators. 47 U.S.C. § 251(e). The Commission acted reasonably, and consistent with the statute's impartiality requirement, in determining that – subject to the conditions Telcordia offered and that the Commission added – Telcordia satisfied the neutrality requirement.

Neustar claims that corporate-law principles precluded selection of Telcordia because no safeguards imposed by the FCC could override Telcordia's directors' fiduciary duties to Ericsson. This is incorrect. Rather, those fiduciaries have the duty to ensure that Telcordia does not violate the law, *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 163–64 (Del.Ch.2004) – including the neutrality requirements on which the Commission insisted.

In furtherance of the impartiality requirement, the Commission imposed or endorsed numerous conditions on the Administrator contract, to which Telcordia and Ericsson agreed. Among other things, Ericsson must create a voting trust, with trustees subject to FCC approval, and to place all of its Telcordia stock in that trust. Telcordia must adopt provisions that will result in a majority of Telcordia's Board being independent; it must reorganize the company to segregate numbering administration from other operations (including back-office operations); it must abide by a detailed code of conduct to ensure that the company remains neutral; and it will be subject to a bi-annual neutrality audit. The Commission reasonably concluded that these conditions satisfied the statute's impartiality requirement.

Neustar's subsidiary assertion that the selection of Telcordia was inconsistent with Commission neutrality regulations and precedent is equally flawed. Neustar's argument that Telcordia is barred from serving as Administrator because Ericsson is a manufacturer of telecommunications equipment is baseless because the agency's rules contain no such bar. The Commission reasonably applied its neutrality criteria, 47 C.F.R. § 52.12(a)(1)-(3), and found that Telcordia satisfied them. Finally, Neustar's argument that the Commission had rejected prior Administrators based on similar issues with corporate parents and cannot impose conditions to address neutrality concerns is based on a misreading of the Commission's rules and precedent.

b. Neustar's procedural argument that the Commission was required to conduct a notice and comment rulemaking to select the next Administrator is waived, and in any event is baseless. There is no such mandate in the Communications Act and, as the Commission reasonably concluded, the selection of an Administrator in a competitive bidding process "is a classic case of agency adjudication." Indeed, the Commission has selected Administrators in the past via informal adjudication.

c. The Commission acted reasonably in accepting the recommendation of its Advisory Committee and the NAPM that Telcordia be selected. The assertion that the Commission behaved arbitrarily or capriciously in refusing to consider Neustar's "*second* best and final offer," which had not been solicited and was not provided for in the Request For Proposal, is absurd. As the Commission reasonably concluded, "a 'best and final offer' is just that: *final*," especially given the efforts that had gone into reviewing prior bids.

Finally, the Commission reasonably took account of transition costs in selecting Telcordia. There was record evidence supporting the Commission's conclusion that even if the transition should take an extended period, **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[END HIGHLY CONFIDENTIAL] Moreover, Neustar's argument is based on inflated claims as to the amount of transition costs to the industry that were contradicted in the record. The effect of Neustar's argument would be to give an incumbent an advantage in the selection process to the extent that its cost exceeded that

of other bidders. The Commission acknowledged that transition costs would be avoided if Neustar remained as Administrator, but found that bidding competition brought opportunities for lower costs and innovation that would be lost if the same Administrator remained in place indefinitely merely to avoid the costs of transition. Especially given the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END

HIGHLY CONFIDENTIAL] the Commission's decision to authorize contract negotiations with Telcordia was entirely reasonable.

STANDARD OF REVIEW

This Court reviews FCC orders “under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission’s decision unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)). “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

Review of the FCC's interpretation of the statutes it administers is governed by *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If so, the court must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

ARGUMENT

I. THE COURT LACKS JURISDICTION TO CONSIDER NEUSTAR'S PETITION FOR REVIEW BECAUSE IT SEEKS REVIEW OF NON-FINAL AGENCY ACTION.

Before briefing commenced in this case, the Commission moved to dismiss Neustar's petition for review on the ground that the *Order* is not final for purposes of judicial review under the Hobbs Act, 28 U.S.C. § 2342(1), and section 402(a) of the Communications Act, 47 U.S.C. § 402(a), or in the alternative to hold the case in abeyance. The Motions Panel referred that motion to the merits panel, and instructed the parties to re-brief the issue.

This Court's jurisdiction extends "only to *final* orders" of the FCC. *North Amer. Catholic Educ. Programming Found. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006). "Finality under the Hobbs Act is to be narrowly construed." *Blue Ridge Envtl. Def. League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012) (internal citations

omitted). “A final order in an administrative adjudication is normally ‘one that disposes of all issues as to all parties.’” *CSX Transp. Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 29 (D.C. Cir. 2014) (citing *Blue Ridge Env'tl. Def. League*, 668 F.3d at 753). As this Court has recently affirmed, to constitute final agency action, an agency order must (1) mark the “‘consummation’ of the agency’s decision-making process,” and (2) determine “rights or obligations” or impose “legal consequences.” *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

The *Order* on review here is not final because it does not mark the “consummation” of the Commission’s process of selecting the next Administrator. Rather, the Commission instructed the NAPM to attempt to negotiate a contract with Telcordia, but clarified that any proposed contract eventually reached will be subject to full Commission approval before the Administrator selection is finalized. The *Order* stresses that the Commission has not made a final selection of the next Administrator. *See Order* ¶¶ 2-3, 85, 193. Neustar’s claim that “the Commission has definitively approved the selection of Telcordia to serve as the next administrator” is thus incorrect. Br. at 27. Although it is reasonable to assume that Telcordia and the NAPM will negotiate a contract that is acceptable to the Commission, that event has not yet occurred. And if it does not, that will “obviate the need for judicial review, ... a good sign that an immediate agency decision is not final.” *CSX Transp.*, 774 F.3d at 30 quoting *DRG Funding Corp. v. Sec’y of Hous. and Urban*

Dev., 76 F.3d 1212, 1215 (D.C. Cir. 1996).

Neustar contends that “[t]he mere possibility that a future event (such as an unanticipated failure in the contracting process) could require the Commission to reconsider its selection is insufficient to deprive that decision of finality.” Br. 28. That contention is a straw man: a failure in contract negotiations here would not result in the “reconsideration” of an otherwise final decision. Because the designation of Telcordia is conditioned on the successful negotiation of a contract acceptable to the Commission, the failure of negotiations would prevent Telcordia’s selection as Administrator in the first place, not result in the agency’s “reconsideration” of that action.

Finally, Neustar argues that the *Order* has an immediate impact on it because it “imposes detailed obligations with respect to the process of transitioning from Neustar to Telcordia.” Br. at 27. But Neustar’s obligation to “carry out [its] transition responsibilities in good faith and in a reasonable and cooperative manner” (*Order* ¶159 (JA --)), is grounded in its prior contractual obligations and predates the *Order*. Moreover, under its contract, Neustar will be fully reimbursed for any expenses in providing transition assistance. The fact that Neustar or other parties may be incurring some costs in preparation for a future final decision does not transform interim action into final, reviewable action. *Murray Energy*, 788 F.3d at 335 (“prudent organizations and individuals may alter their behavior (and thereby incur costs) based on what they think is likely” to become final agency action).

The Court should dismiss the petition for review, or in the alternative hold this matter in abeyance pending the Commission's final order addressing selection of the next Administrator.

**II. THE COMMISSION REASONABLY ACCEPTED THE
ADVISORY COMMITTEE'S RECOMMENDATIONS TO
AUTHORIZE NEGOTIATIONS WITH TELCORDIA AS THE
NEXT LOCAL NUMBER PORTABILITY ADMINISTRATOR.**

If this Court does not dismiss the petition for review for lack of jurisdiction, it should deny it on the merits.

After a comprehensive review, the Commission reasonably accepted the recommendation of its established expert industry Advisory Committee that it authorize the negotiation of a contract with Telcordia to be the next Local Number Portability Administrator. The Commission concluded, in addition to numerous other findings, that Telcordia would be an "impartial entity" that would operate in a neutral fashion in carrying out the Administrator duties, as required by Section 251(e) and related Commission rules, *Order* ¶188 (JA__); that the process by which Telcordia was selected was lawful, *Order* ¶18 (JA__); and that on the basis of technical and managerial considerations as well as cost factors, the Advisory Committee's recommendation was reasonable and well supported. *Order* ¶135 (JA__). Neustar has identified no legal error in any of these determinations.

A. The Commission Reasonably Concluded that Telcordia Would Be An Impartial Entity.

In its brief, Neustar principally contends, based on “fundamental principles of corporate law” (e.g., Br. at 2), that Telcordia’s corporate affiliation with Ericsson precluded it from being found “impartial” under Section 251(e) and the Commission’s rules. Contrary to Neustar’s argument, neither Section 251(e)’s requirement that the FCC select “impartial entities” nor any Commission rules mandated such a bar.

1. Section 251(e)’s Requirement That “Impartial Entities” Serve As Administrators Did Not Preclude Telcordia’s Selection.

Section 251(e)(1) of the Act requires that the Commission name “impartial entities” to the administrator position. Telcordia is a wholly-owned subsidiary of Ericsson, which manufactures telecommunications equipment, develops software and provides managed network services to telecommunications service providers. The Commission carefully evaluated the record and reasonably concluded that, with Telcordia’s representations regarding its corporate organization and with the additional safeguards imposed in the *Order*, Section 251(e)’s impartiality requirement would be met.

Specifically, the Commission found that “Telcordia is a separate company with a separate independent board of directors, each of whom owes fiduciary du-

ties to Telcordia” and that a majority of those directors are independent from Ericsson. *Order* ¶¶172, 179 (JA --); *see also id.* ¶178 (“Telcordia’s board members each owe to the company a fiduciary duty that will help preserve ongoing neutral administration of the contract.”).

Neustar contends that “settled principles of corporate law” establish that “the ‘corporate purposes’ of a parent and its wholly owned subsidiary ‘are one and the same,’” and that “‘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.’” Br. at 31, quoting *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174 (Del. 1988).

In the first place, there is nothing in the language or legislative history of the statute that would indicate that Congress gave any consideration to principles of corporate law in adopting the requirement that the Administrator be “impartial.”²⁵

²⁵Neustar seeks to draw significance from the Commission’s decision in 1996 that it was necessary to select a new administrator other than Bellcore. Neustar suggests that this decision motivated Congress to adopt the “impartial entity” language in Section 251(e). Br. at 33. Neustar offers little evidence that Congress specifically was aware of the Commission’s view regarding Bellcore. More importantly, however, the Bellcore precedent is irrelevant to the Commission’s decision here regarding Telcordia. Bellcore was *owned* by the Regional Bell Operating Companies that were formed in the wake of the AT&T breakup. These companies were telecommunications service providers. The Commission concluded, as reflected in its rules, that an administrator could not be owned by telecommunications service providers and meet the impartiality standard. Neither Telcordia nor Ericsson is a telecommunications service provider. *Order* ¶165 (JA --).

Congress's purpose was to ensure "impartiality" in the Administrator—how that goal was to be accomplished was left to the FCC. The issue in this case is thus whether the measures adopted in the *Order* reasonably ensure that Telcordia will be an impartial or neutral Administrator.

In any event, Neustar's reading of *Anadarko* to hold that directors of subsidiary corporations have duties "only" to the parent corporation is overbroad. *Anadarko* itself described its holding as "narrow" (545 A.2d at 1178), and a number of courts, unlike Neustar, have heeded that cautionary language. *See, e.g., In re Scott Acquisition Corp.*, 344 B.R. 283 (Bankr. D. Del. 2006) (disagreeing that *Anadarko* stands for the proposition that directors of a wholly-owned subsidiary owe no duties to the subsidiary, and concluding that directors and officers of an insolvent wholly-owned subsidiary owe fiduciary duties to the subsidiary and its creditors); *Superior Offshore Int'l, Inc. v. Schaefer*, No. CIV. H-11-3130, 2012 WL 5879608, at *3 (S.D. Tex. Nov. 20, 2012) ("courts that have considered the *Anadarko* decision have concluded ... that the holding should not be read so broadly as to mean that the directors of a wholly-owned subsidiary owe no duties to the *subsidiary itself* ..."); *In re Sw. Supermarkets, LLC*, 376 B.R. 281, 282-83 (Bankr. D. Ariz. 2007) ("It would be a startling and dramatic departure from settled law to conclude that officers and directors do not owe any fiduciary duty to the corporation they serve. It requires more than dictum to convince this Court that Delaware has made such a dramatic change in long-settled law.").

Further, nothing in *Anadarko* suggests that a subsidiary's fiduciary duties render it immune from safeguards that protect against partiality. Here, the Commission did not ignore the possibility that Telcordia could "behave in a manner that benefits Telcordia's parent, Ericsson." *Order* ¶181 (JA --). It concluded, however, that Telcordia and Ericsson had "provided credible assurances and offered to abide by certain conditions to demonstrate that Ericsson has no interest in, and in fact will not involve itself in the management and activities of Telcordia as the [Administrator]" and that "there is nothing in the record and no concrete reason to conclude that Telcordia or Ericsson would jeopardize Telcordia's neutrality in such a manner." *Id.*

Specifically, the Commission noted Telcordia had represented that it had implemented a number of safeguards to ensure neutrality, including a reorganization of the company to transfer operations and employees not involved in its operations involving numbering administration and related activities to other Ericsson divisions and the adoption of provisions that will result in a majority of its board of directors being independent. *Order* ¶179 (JA --) citing [Nakahata 4-4-13 ltr](JA --). The Commission also noted that Telcordia had stated that it would implement a code of conduct to ensure that the company remains neutral. *Id.* citing [Nakahata 4-4-13 ltr](JA --). The Commission added that, as indicated in the Request for Proposal, it "requires that a neutrality audit be conducted on a bi-annual basis." *Id.*; *see* [RFP § 3.5] (JA --).

In addition, the Commission imposed a condition that Ericsson “transfer all of its voting stock in Telcordia to a voting trust administered by two unaffiliated trustees, appointed by Ericsson after notice to and with prior written consent of the Bureau after consultation with the Office of General Counsel.” *Order* ¶182 (JA --). The trustees, the Commission explained, would vote on the majority of matters that are ordinarily subject to a stockholders’ vote and, in particular, on the election of all independent directors. *Id.* Neustar offers nothing that calls into question the reasonableness of the Commission’s conclusion that these assurances and safeguards would ensure Telcordia’s neutrality.

In fact, adherence to the neutrality assurances Telcordia made to the Commission and the additional safeguards imposed in the *Order* would in no way be inconsistent with Telcordia’s directors’ “fiduciary duties to Ericsson under Delaware law” (Br. at 48). Rather, it is well established that a corporate director’s fiduciary duties include the duty to ensure that the corporation does not violate the law. “Under Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity.” *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 163–64 (Del.Ch.2004); *see also In re Massey Energy Co.*, 2011 WL 2176479 at *18-21 (Del. Ch. May 31, 2011) (finding that plaintiff had stated a breach of fiduciary duty claim by alleging a failure to make a good faith effort to ensure company complied with mine safety laws; Del. Code Ann. tit. 8, §

102(b)(7) (West) (providing that a certificate of incorporation may eliminate or limit the personal liability of a corporate director but *not* “for acts or omissions ... which involve ... a knowing violation of law”).

Thus, the fiduciary duties of Telcordia’s directors include the requirement that they ensure that Telcordia comply with the Commission’s neutrality mandates, even if they would otherwise owe fiduciary duties only to Ericsson. The Commission’s conclusion that “Telcordia’s board members each owe to the company a fiduciary duty that will help preserve ongoing neutral administration of the contract” embodied this corporate law principle and was a reasonable interpretation of the “impartial entities” language of Section 251(e)(1) that is entitled to deference under *Chevron*. *Order* ¶178 (JA --).

Neustar’s reliance on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), is similarly overbroad. *See* Br. at 31. The language in that case cited by Neustar that a “parent and its wholly owned subsidiary have a complete unity of interest” (*id.* at 771) was made in the context of a holding that a corporation “and its wholly owned subsidiary ... are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.” *Id.* at 777. There is nothing in *Copperweld* that supports Neustar’s contention that the fiduciary duties of Telcordia’s directors in this context went *only* to Ericsson and precluded the FCC from relying

on Telcordia's neutrality assurances and the Commission's additional safeguards to find Telcordia would be impartial as Administrator.²⁶

2. The Order Was Also Consistent With Commission Regulations And Precedent.

Neustar raises several challenges to Telcordia's neutrality based on the Commission's rules, but none has merit.

a. Neustar contends that the *Order* was arbitrary and capricious because Ericsson is a telecommunications equipment manufacturer, and the Commission's regulations "incorporate a bright-line rule prohibiting both telecommunications equipment manufacturers and their affiliates from serving as the Administrator." Br. at 38-40. There is no dispute that Ericsson is an equipment manufacturer. However, there is no rule prohibiting telecommunications equipment manufacturers, let alone their affiliates, from serving as administrator.

²⁶Neustar's reliance on *Alarm Industry Commc'ns Comm. v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997) (Br. at 33), is also misplaced. There is no evidence that the word "entity" in the two sections must be read *in pari materia*. See *id.* at 1070 (noting that "entity" is defined in yet another section of the 1996 Act). Furthermore, the Court *rejected* the Commission's determination, relying on Black's Law Dictionary and corporate-law principles, that an unincorporated division is not separate from the parent corporation. *Id.* at 1069-70. Here, of course, the Commission *did* differentiate the parent corporation from its (incorporated) subdivision. Furthermore, the *Alarm Industry* Court afforded the Commission no deference because, the Court concluded, the Commission had failed to consider statutory objectives, congressional policy or expertise in telecommunications. *Id.* at 1069. Here, the Commission's decision, based on nearly 20 years' experience in the area, went to substantial lengths to ensure the statutory objective and congressional policy of impartiality by administrators.

Neustar's contention is based on its interpretation of the extent to which the Commission incorporated by reference in its rules, 47 C.F.R. § 52.26(a), a 1997 recommendation of the Advisory Committee to create such a bright-line rule. The Commission considered Neustar's argument directly in the *Order* and specifically "reject[ed] the claim that the Commission in fact or in effect intended categorically to prohibit telecommunications equipment manufacturers from serving as the [Administrator]." *Order* ¶170 & n.587 (JA --). As the Commission explained, the rule incorporates "certain *recommendations*" of the Advisory Committee with respect to "[l]ocal number portability administration." *Order* ¶170 (emphasis in original); 47 C.F.R. § 52.26(a). Neustar acknowledges (Br. at 39) that the proposal to establish the bright-line rule was not contained in the "recommendations" section of that report. And although the section containing that proposal was not expressly excluded from incorporation (Br. at 40), the Commission addressed this in the *Order* and explained that while express exclusion would have "eliminate[ed] any question" about whether this provision was incorporated, express exclusion was unnecessary. *Order* n.587.²⁷ The agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotes omitted).

²⁷Neustar's argument also founders on the fact that the regulation at issue addresses "local number portability administration," 47 C.F.R. § 52.26(a), *not* the selection of the Administrator. *See Order* ¶24 (JA --).

b. Neustar's additional arbitrary and capricious claims rely on its mistaken corporate law argument that Telcordia and Ericsson have a unity of interest that cannot be affected by any FCC safeguards or other action and that thus effectively precludes the Commission from designating Telcordia as Administrator. The Commission "reject[ed] Neustar's apparent position that the Commission must evaluate Ericsson's neutrality, rather than Telcordia's. Telcordia, not Ericsson, will serve as the [Administrator], and thus it is Telcordia's neutrality that must be evaluated for compliance with our neutrality requirements." *Order* ¶ 170 (JA --).

The Commission's rules provide that the Administrator may "not [be] aligned with any particular telecommunication industry segment." 47 C.F.R. §§ 52.12(a)(1), 52.21(k). The rules clarify that "[a]ccordingly," the Administrator must comply with three "neutrality criteria," 47 C.F.R. § 52.12(a)(1), two specific and one more open-ended. The Administrator "may not be an affiliate of any telecommunications service provider(s)," *id.* § 52.12(a)(1)(i), "may not issue a majority of its debt to, nor may it derive a majority of its revenues from, any telecommunications service provider," *id.* § 52.12(a)(1)(ii), and, "[n]otwithstanding the neutrality criteria set forth in paragraphs (a)(1)(i) and (ii) ... [may not] be subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities." *id.* § 52.12(a)(1)(iii). *See Order* ¶160 (JA --). The Commission addressed each of these three criteria in turn, and concluded that they did not preclude Telcordia from being selected. *Order* ¶165 (JA--).

Neustar argued below that these provisions precluded the selection of Telcordia to be Administrator because of Ericsson's "extensive business interests in the telecommunications sector" and because it is "'aligned with' the wireless industry." *Order* ¶171 (JA --). Even putting aside the separation between Ericsson and Telcordia, the Commission found that "nothing in the record demonstrates that [wireless industry members with whom Ericsson has business relationships] could exert undue influence over Telcordia, particularly [given] Telcordia's independent board, although we appreciate that it could hypothetically occur." *Id.* ¶172 (JA --).

Based on the safeguards adopted in the *Order*, it was reasonable for the Commission to conclude that Ericsson's business relationships with the wireless industry do not "spill[] over to Telcordia. Telcordia is a separate company with a separate independent board of directors, each of whom owes fiduciary duties to Telcordia." *Order* ¶172 (JA --).

c. Neustar asserts that the Commission could not "cure its failure to conduct the necessary evaluation of Ericsson's partiality simply by imposing 'safeguards.'" Br. at 41. This argument again is based on the fundamentally flawed premise that corporate law makes Ericsson and Telcordia a single unit. Neustar claims that in prior circumstances the Commission had "consistently considered the business affiliations of the administrator's corporate parent or majority owner." *Id.* at 42. However, its examples are based on misreading the Commission's rules, and none withstands examination.

Its first example involves the Commission's 1996 determination that Bellcore could not continue to serve as Administrator. *Id.* As we have observed above, Bellcore was owned by the regional operating companies that grew out of the AT&T divestiture, which were telecommunications service providers under the Commission's rules. The first neutrality criterion under Section 52.12(a)(1) is a flat ban on affiliates of telecommunications service providers serving as Administrator. *See* 47 C.F.R. §52.12(a)(1)(i); p.4-6 above. The Commission pointed out that neither Telcordia nor Ericsson is a telecommunications service provider, *Order* ¶165 (JA --)—a conclusion that Neustar does not challenge. Rather, the question with respect to Telcordia is how the Commission should apply the more-open-ended third neutrality criterion.

Neustar's second example, involving the determination that a Lockheed Martin subsidiary could no longer be Administrator, (Br. at 42), is similarly off point. Again, the Commission concluded that Lockheed Martin had become "a telecommunications service provider." *Warburg Transfer Order*, 35 FCC Rcd 19805 at ¶18. The Commission's application of that flat ban is irrelevant here.

The final precedent Neustar cites (Br. at 42-43) is the Commission's approval of the plan for Neustar to take over Lockheed Martin's role and to become Administrator in 1999. That precedent, however, is strongly supportive of the Commission's actions here. As the Commission explained at that time, the first

two neutrality criteria “serve as objective, quantifiable measures intended to prevent the [Administrator] from maintaining financial or equity relationships with telecommunications service providers that could exert control over the decisions and activities of the [Administrator]. ... Criterion three, however, affords [the Commission] *broad discretion* to determine whether the entity is subject to undue influence by parties with a vested interest in the outcome of numbering administration activities.” *Warburg Transfer Order*, 35 FCC Rcd at 19808 ¶24 (emphasis added).

The Commission undertook a detailed analysis, pursuant to that broad discretion, here. After concluding that Telcordia satisfied the two objective criteria, *Order* ¶165 (JA --), the Commission addressed at significant length the reasons why it concluded that Telcordia’s relationship with Ericsson, when cabined by the conditions the Commission insisted on in addition to those Telcordia proposed, did not disqualify it under the third criterion. *Order* ¶¶165-188 (JA --). Thus, contrary to Neustar’s claims, the precedents it cites are not inconsistent with the Commission actions here; in each case the Commission examined the parties involved, applied 47 C.F.R. §52.12(a)(1), and if appropriate imposed conditions based on those facts to ensure that the Administrator would be impartial.

Insofar as Neustar contends that the Commission failed to adequately evaluate the “nature and extent of Ericsson’s partiality” (Br. at 47), its claim is based on

its flawed corporate law argument that the FCC lacked the power to impose safeguards to ensure Telcordia's neutrality as a result of its director's fiduciary duties to Ericsson. *Id.* at 48. As discussed above, Telcordia proposed certain safeguards to ensure neutrality and the Commission imposed additional mandates. The Commission noted that it had "historically addressed [neutrality] concerns by imposing conditions on the numbering administrators" *Order* ¶181 (JA --), citing *In the matter of North American Numbering Plan Administration Neustar, Inc.*, 19 FCC Rcd 16982, 16991 ¶22 (2004) (*Safe Harbor Order*). It was reasonable for the Commission to conclude, based on its experience and expertise in this area, that the assurances and safeguards adopted in the *Order* will ensure that "Telcordia will not be subject to undue influence by Ericsson, nor will Ericsson adversely affect Telcordia's ability to serve as a neutral [Administrator]." *Id.* ¶168 (JA --).

***B. The Commission Was Not Required To Conduct
The Proceeding To Select A New Administrator
By Notice And Comment Rulemaking.***

The Commission reasonably concluded that Neustar's belated claim that the agency was required to employ notice and comment rulemaking procedures to select a new Administrator was baseless.

1. Neustar Is Procedurally Barred From Challenging The Commission's Decision Not To Use Notice And Comment Rulemaking.

As an initial matter, the Commission reasonably found that Neustar's objection is barred as untimely. *Order* ¶17 (JA --). Notably, Neustar has no response in its brief to the Commission's determination that this argument is waived.

In 2011, the Commission's Wireline Competition Bureau, after seeking and receiving comment, announced the process for selecting the next Administrator. *See Order* ¶17 (JA --); *May 2011 Order*, 26 FCC Rcd 6839. The Bureau's process "did not provide for notice and comment rulemaking procedures," *Order* ¶17 (JA --) (citing *May 2011 Order* 26 FCC Rcd at 6845-47, Attach. A), and no commenter, including Neustar, suggested that a rulemaking was required. *Id.* Indeed, Neustar admits that it waited three years, until April 2014, to assert that a notice and comment rulemaking was necessary. Br. at 18.

Under the Commission's rules, Neustar was required to object to the Bureau's order within 30 days. 47 C.F.R. §§ 1.106(f), 1.115(d). Neustar's failure to raise this procedural challenge at an appropriate time is fatal to the argument. *Order* ¶17 (JA --); *see BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003).

In addition to having waived this argument, Neustar is also estopped from challenging the selection process because it strongly supported that process at the time the agency adopted it. *See Order* ¶¶50-52 (JA __). For example, in November 2011, Neustar stated on the record that it "support[ed] the [Administrator] selection

process set forth by the Commission in its May 16, 2011 Order,” and that the bidding process “ha[d] garnered virtually unanimous support: every segment of the industry, state regulators, and consumers have urged the Commission to allow the [selection] process to move forward.” [Panner 11/22/11 ltr at 1; Panner 10-18-12 ltr at 2] (JA --). Neustar may not now challenge the process, and in particular allege that the process failed to allow for comment by interested parties, after claiming just the opposite while the Commission was developing the process. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“where a party assumes a certain position in a legal proceeding ... he may not thereafter, simply because his interests have changed, assume a contrary position”).

2. *Neustar’s Challenge To The Commission’s Decision Not To Use Notice And Comment Rulemaking Lacks Merit.*

Even if Neustar’s procedural challenge were not barred as untimely and inconsistent with its earlier position before the Commission, the claim lacks merit. The selection of an Administrator, as the Commission found, is “a classic case of agency adjudication” involving “decision making concerning specific persons, based on a determination of particular facts and the application of general principles to those facts.” *Order* ¶19 (JA --), citing *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1093 n.11 (D.C. Cir. 1979).

The mere fact that the *Order* has only prospective effect does not transform it into a legislative action. Indeed, the Commission takes many adjudicative actions, such as awarding licenses, that have only prospective effect. Similarly, a complaint that seeks only injunctive relief is adjudicative, even though it has no retroactive impact. As the Commission correctly held, a “key feature of adjudication generally is that it has ‘an *immediate* effect on specific individuals,’ in contrast to a rule, which generally has ‘a definitive effect on individuals only after [it] subsequently is applied.’” *Order* ¶20 (JA --) (quoting *Yesler Terrace Comm. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994)). Here, the *Order* “determines *immediately* which entity is authorized to negotiate” the number portability contract. *Order* ¶20 (JA --).

Neustar argues that the Communications Act *requires* the Commission to designate numbering administrators via notice-and-comment rulemaking, citing 47 U.S.C. §§ 251(d)(1) & (e)(1). Br. at 51. Neustar misreads those provisions. Section 251(e) does not require the Commission to designate numbering administrators through a notice and comment rulemaking; it does not specify any particular process for designating numbering administrators. *See Order* ¶22 (JA --).²⁸ And while Section 251(d) provides that, within six months, “the Commission shall complete

²⁸By contrast, other provisions of the Communications Act expressly require the Commission to act through rulemaking. *See, e.g.*, 47 U.S.C. §§ 251(h)(2), 309(b)(2)(F), 339(c)(3)(A).

all actions necessary to establish regulations to implement the requirements of [Section 251],” 47 U.S.C. §251(d)(1), Section 251 was adopted by the 1996 Act to address a wide range of subjects, and the agency did in fact promulgate rules under Section 251(d) to implement the section. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996). But nothing about Section 251(d) resolves the question whether the designation of an administrator under Section 251(e) must always be done via rule-making.²⁹

Neustar also misreads the decision in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). *See Order* ¶22 (JA --). In that case, the Supreme Court was evaluating “whether § 251(d) serves as a jurisdictional grant to the FCC.” *AT&T Corp.*, 525 U.S. at 382. The Court concluded, “[o]ur understanding of the Commission’s general authority under § 201(b) renders this debate academic.” *Id.* at 383. The *dicta* in footnote 9 of that decision, on which Neustar hangs its argument (Br. at 51), was merely emphasizing that Commission action pursuant to section 251(e)

²⁹Neustar relies on the Commission’s citation to 47 U.S.C. § 303(r), which Neustar describes as “grant[ing] general rulemaking authority to the Commission,” Br. at 52, to assert that “the Commission explicitly invoked its legislative authority” “[w]hen it selected Telcordia.” *Id.* (citing *Order* ¶199). But Section 303(r) affords the Commission the power to “[m]ake such rules and regulations *and prescribe such restrictions and conditions*, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act].” 47 U.S.C. § 303(r) (emphasis added). The Commission prescribed various conditions in the *Order*.

was mandatory, not discretionary. And even if one were to read that *dicta* as concluding that Section 251(e) requires the Commission to promulgate rules, nothing about the decision suggests that the Court determined that the designation of an Administrator needed to be done via rulemaking (as opposed to, for example, determining that the Commission must address by rule how to ensure that numbers be made “available on an equitable basis,” 47 U.S.C. §251(e)), let alone that the Court had considered whether the Commission would be free to change the administrator in the future without relying on notice-and-comment rulemaking procedures.

Neustar further argues that, because the initial Administrator was purportedly selected via rulemaking, any change to that selection also had to occur via rulemaking. Br. at 52. As the Commission pointed out in the *Order*, this argument is based on a flawed assumption. “Commission documents lawfully may—and frequently do—have both rulemaking and adjudicatory components. It is the substance of the agency action, rather than its label, that controls.” *Order* ¶28 (JA --), citing *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007); *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (fact that a decision was made following notice and comment and published in the “Final Rules” section of the Federal Register did not alter its adjudicatory nature). While the Commission used a rulemaking to establish rules regarding local number portability, the selection of the specific vendor was an adjudicative decision. In fact, Lockheed Martin and Perot

were selected “subject to final contract negotiation,” and thus subject to modification if contract negotiations were not successful. *Order* ¶25 (JA --).

Furthermore, the Commission has changed the Administrator several times before this *Order*, and never via a rulemaking. As Neustar acknowledges, in 1998, Perot was removed from its role due to “significant performance issues,” and in 1999, when Lockheed “was no longer impartial,” its role was transferred to Neustar. Br. at 12. The Commission deemed Neustar to be a different entity from Lockheed Martin and found that the transfer required Commission approval—but did not require a rulemaking. *Warburg Order*, 14 FCC Rcd at 19804-05 ¶17. This flexibility to modify the Administrator without conducting a rulemaking demonstrates that the specific vendors were not established by rule, and rulemaking was not necessary to modify them.

Neustar had no reason to expect that the Commission would conduct a rulemaking to select the next Local Number Portability Administrator. The Commission has other numbering administrators, in addition to the Local Number Portability Administrator, and it has used a competitive bidding process (not a rulemaking) to select successors to the Administrators under those initial contracts.³⁰

³⁰Other numbering administrators include the North American Numbering Plan Administrator and the Billing and Collection Agent. *See Administration of the North American Numbering Plan*, 12 FCC Rcd 23040 (1997). In choosing those administrators, the Commission used a process similar to the one it used to select

In fact, Neustar has successfully bid on such contracts, and currently serves as both the North American Numbering Plan Administrator and the Pooling Administrator. See <https://www.neustar.biz/about-us/our-history> (October 27, 2015).

Neustar contends that its selection was codified in 47 C.F.R. § 52.26. Br. at 53. That rule provides: “Local number portability administration shall comply with the recommendations of the North American Numbering Council ... as set forth in [an April 25, 1997 report of the Council’s Working Group,] [e]xcept that [certain specific portions of the report] are not incorporated herein.” 47 C.F.R. § 52.26(a). As we discussed above (p. 38), this provision does not support Neustar’s argument. The Commission explained that that language “refers to the standards and duties of the [Administrator] with respect to number portability, not the choice of administrator” *Order* ¶24 (JA --). As noted above, the Commission’s construction of its own regulations is “controlling unless plainly erroneous

the Local Number Portability Administrator. For the initial selection, the Commission asked the North American Numbering Council to evaluate bids and submit recommendations. The Commission then sought comment on the recommendations. See *North American Numbering Council (NANC) Issues Recommendations*, 13 FCC Rcd 1449 (1997). It issued an order and implementing rules that were published in the Federal Register. *North American Numbering Plan*, 12 FCC Rcd 23040, 62 Fed.Reg. 55179-01 (1997). Since the expiration of the initial contract terms, the Commission has issued requests for bids and selected the administrators through a competitive bidding process.

or inconsistent with the regulation.” *Auer*, 519 U.S. at 461 (internal quotes omitted). This is especially true in an arcane and technical area such as this. *MCI Cellular Tel. Co. v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984).

In addition, although the Commission did not engage in a notice-and-comment rulemaking proceeding here, it nonetheless provided ample notice and numerous opportunities to comment. *See Order* ¶30 (JA --). The Commission sought comment on the selection process. *Id.* ¶9 (JA --). It sought comment on the draft bid documents. *Id.* ¶10 (JA --). It sought comment on the [Advisory Committee’s] recommendation. *Id.* ¶13 (JA --). Neustar and numerous other parties commented throughout the multi-stage, multi-year proceeding. Neustar does not allege that it lacked an opportunity to comment, and it in fact participated extensively in the proceeding.³¹

Nor does Neustar identify any benefit that additional process might have afforded. As the Commission said in the *Order*, “except for the absence of Federal

³¹Neustar’s charge that the Commission “evade[d]” the Regulatory Flexibility Act’s requirements is entirely derivative of its general procedural challenge. Because the Commission was not required to conduct a rulemaking, it was not required to comply with the Regulatory Flexibility Act. *Int’l Internship Prog. v. Napolitano*, 718 F.3d 986, 988 (D.C. Cir. 2013) (“informal adjudications” “d[o] not trigger the Regulatory Flexibility Act.”). But in any case, Neustar does not allege that it is a small business subject to the Act’s protections, and thus lacks standing to raise a challenge under the Regulatory Flexibility Act. *See White Eagle Co-op. v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) (“small entities directly regulated by the proposed statute ... may bring a challenge to the RFA analysis or certification of an agency”).

Register publication of [a Notice of Proposed Rulemaking], this proceeding substantially satisfies the procedural requirements of APA rulemakings, as well.” *Order* n.108.³²

C. The Commission’s Approval Of The Recommendation In Favor Of Telcordia’s Bid Was Reasonable And Supported By The Record.

Finally, Neustar fails to show that the Commission’s approval of the Advisory Committee’s recommendation to negotiate with Telcordia as the next Administrator was unreasonable. In the first place, Neustar’s claim in its brief that Telcordia’s selection was based only on the substantial cost difference in the bids in favor of Telcordia’s bid is incorrect. *See* Br. at 60. **[BEGIN HIGHLY CONFIDENTIAL]**

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³²Neustar has no basis for objecting to the lack of Federal Register publication, as it had actual notice of the selection process and actively commented throughout the proceeding. 5 U.S.C. § 553 (requiring Federal Register publication *or* actual notice); *Brown and Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1174 (6th Cir. 1983) (“when the purposes of the procedural requirements have been fully met, there is no need for the courts to require rigid adherence to formalistic rules”). *See also Owensboro on the Air, Inc. v. FCC*, 262 F.2d 702, 707-08 (D.C. Cir. 1958) (finding that potential defect in notice was cured where objecting party had actual advance notice).

[REDACTED]

[REDACTED] [END HIGHLY CONFIDEN-

TIAL] *Order* ¶135 (JA --) (emphasis added).

Neustar's contention that the *Order* was arbitrary and capricious in evaluating the costs of the bids is based on two grounds: (1) that the Commission improperly refused to consider Neustar's second best and final offer [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL], and (2) that the Commission failed to properly account for the cost of transitioning to a new Administrator. Neither argument has any basis.

1. The Commission Reasonably Rejected Neustar's Effort To Submit An Unsolicited Second Best And Final Offer.

Neustar contends (Br. at 63) that the Commission "provided no reasoned explanation" for failing to consider Neustar's unsolicited second best and final offer. That is nonsense. As the Commission explained, "a 'best and final offer' is just that: *final*, and there was no need to stipulate that there would not be multiple opportunities to submit" best and final offers. *Order* ¶43 (JA --) (emphasis original). Moreover, the Commission found that there was "an ample record on which to proceed without another bidding round," noting that the Advisory Committee members "had invested substantial time and effort reviewing [the two rounds of bids], meeting among themselves, and conducting in-person interviews with Neustar and

Telcordia,” and concluding that the decision “not to seek further bids was reasonable” in balancing “another round of bidding and evaluation of those bids ... against the desire to keep the process moving forward ...” *Id.* ¶44 (JA --).³³

Neustar’s effort is a classic example of a disappointed bidder or applicant before an agency sitting back, thinking its initial proposal will win, and when it does not, attempting to counter with an improved offer. This Court has long rejected such an approach:

Appellant took its chance that the Commission, on the existing record, would [find in its favor]. Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir.1941); *see also WLIL, Inc. v. FCC*, 352 F.2d 722, 725 (D.C. Cir. 1965) (same). The Commission’s explanation that there were sound process reasons for declining to entertain yet another round of bidding is fully consistent with *Colorado Radio*. *See Order* ¶44 (JA --).

³³Neustar’s contention (Br. at 64) that the Commission “itself” should have considered Neustar’s second offer even though the Advisory Committee had declined to accept it is puzzling. Neustar’s argument completely ignores the Commission’s thorough explanation for refusing to consider that belated and unsolicited offer. *See Order* ¶¶ 44-46 and n.162 (JA --).

2. *The Commission's Evaluation of Transition Costs Was Reasonable And Supported In The Record.*

Neustar contends that the Commission erred in evaluating the costs related to a transition to a new Administrator in evaluating the bids by assuming that the transition in administrators would take only one year from July 2015. As a result, Neustar claims, the Commission's conclusion that Telcordia's bid was preferable on the basis of cost was erroneous. Br. at 62.

At the start, Neustar is challenging a straw man; the *Order* never suggests that the transition would be completed by July 2016. Rather, it posited a transition period of "up to 18 months from the date that the NAPM gives notice to terminate the Agreements." *Order* ¶146 (JA --) . Neustar's contract has been extended through September 2016, and no such termination notice has been given.

Furthermore, contrary to Neustar's argument, there was record evidence to which the Commission pointed that supported its conclusions with respect to the time it would take to transition to a new Administrator. The Commission addressed the record with respect to transition costs in detail below. *See Order* ¶¶152-157 (JA --).³⁴ It "independently reviewed and analyzed the risks and costs associated with

³⁴*See, e.g.,* Eric Burger, *Issues and Analysis of a Provider Transition for the NPAC*, S²ERC Technical Report (July 22, 2014) at 15 (concluding that transition poses "[m]odest complexity"); *see also id.* at 11 (noting that "[t]he largest risk of a transition falls on the carriers") (JA --); *see also* [Nakahata 2/18/15 ltr] (JA --) (Telcordia *ex parte* discussing transition costs and stating that the Smith & Ass-

the transition to a new” Administrator. *Id.* ¶157 (JA --). This record led the Commission to agree with the Advisory Committee’s assessment that “the potential risks and costs associated with that transition and with [its] conclusions that they can be mitigated appropriately” and ultimately to conclude that “we are confident that [transition costs] would not be so substantial [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] *Id.* ¶¶ 155, 157 (JA --).³⁵

Moreover, Neustar’s argument rests in large part on the costs that Neustar is being paid to be Administrator under the existing contract, which would be extended during the transition. The effect of Neustar’s argument is thus to give an incumbent Administrator a cost advantage in the selection process corresponding to the amount by which its rates exceed that of a subsequent competing bidder. “Of course,” as the Commission observed, “many of the transition costs would be avoided if Neustar remained the [Administrator]. But competitive selections bring opportunities for lower costs and innovation, and we do not agree that we should maintain the same [Administrator] indefinitely merely to avoid transition.” *Order*

soc. report on which Neustar relies in its brief (Br. --) “substantially overestimates the time needed for the transition” and criticizing the consultants who prepared Neustar’s report, especially in comparison to the advisory committee and industry groups who had recommended Telcordia’s selection. *Id.* at 2.).

³⁵In addition to its analysis of transition costs generally, the Commission specifically considered the implications of those costs in relation to the length of the transition and was not persuaded that any reasonable hypothetical extension of the transition affected its conclusion. *See Order* n.535 (JA --).

¶153 (JA --). Taken to its logical conclusion, Neustar’s argument would virtually guarantee that an incumbent Administrator would almost always win the bidding, thus eviscerating the benefits of competition. The Commission reasonably rejected this approach.

Furthermore, Neustar’s analysis of transition costs depends on [BEGIN

HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL]**

Thus, even accepting all of Neustar's assumptions, there is no evidence that the Commission erred in any significant way in assessing transition costs. And in light of the Advisory Committee's conclusions about Telcordia's management and technical qualifications, with which the Commission agreed, and its judgment that "opportunities for lower costs and innovation" from the competitive selection process are important, the Commission would have been justified in determining that transition costs did not outweigh the substantial benefits of Telcordia's bid, even if the potential for a second year contract extension made the costs a wash. In an area like this, the agency's predictive judgment is entitled to substantial deference. *In re Core Commc'ns, Inc.*, 455 F.3d 267, 282 (D.C.Cir.2006) ("[A]gency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review.").

It remains indisputable that once the transition takes place the cost of local number portability administration will be reduced **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]** over the seven-year period of the contract as a result of Telcordia's selection.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review because it seeks review of a non-final agency action. In the alternative, the Court should deny the petition for review.

Respectfully submitted,

William J. Baer
Assistant Attorney General

Jonathan B. Sallet
General Counsel

Robert B. Nicholson
Scott A. Westrich

David M. Gossett
Deputy General Counsel

Attorneys

Jacob M. Lewis
Associate General Counsel

United States Department
of Justice
Washington, D. C. 20530

/s/ C. Grey Pash, Jr.

Lisa S. Gelb
C. Grey Pash, Jr.
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740
Fax (202) 418-2819

October 28, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B), I hereby certify that the accompanying “Brief for Respondents” was prepared using a proportionally spaced 14 point typeface and contains **13944** words as measured by the word count function of Microsoft Office Word 2013.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

October 28, 2015

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47 U.S.C.A. § 251**§ 251. Interconnection**

Effective: October 26, 1999

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether-

-

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
- (ii) to avoid imposing a requirement that is unduly economically burdensome; or
- (iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) “Incumbent local exchange carrier” defined

(1) Definition

For purposes of this section, the term “incumbent local exchange carrier” means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission’s regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

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 for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 C.F.R. § 1.106

§ 1.106 Petitions for reconsideration in non-rulemaking proceedings.

Effective: June 1, 2011

(f) The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules, and shall be served upon parties to the proceeding. The petition for reconsideration shall not exceed 25 double spaced typewritten pages. No supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority, filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.

47 C.F.R. § 1.115

§ 1.115 Application for review of action taken pursuant to delegated authority.

Effective: November 16, 2011

(d) Except as provided in paragraph (e) of this section, the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

47 C.F.R. § 52.12

§ 52.12 North American Numbering Plan Administrator and B & C Agent.

Effective: March 24, 2008

The North American Numbering Plan Administrator ("NANPA") and the associated "B & C Agent" will conduct their respective operations in accordance with this section. The NANPA and the B & C Agent will conduct their respective operations with oversight from

(a)(1) Neutrality. The NANPA and the B & C Agent shall be non-governmental entities that are impartial and not aligned with any particular telecommunication industry segment. Accordingly, while conducting their respective operations under this section, the NANPA and B & C Agent shall ensure that they comply with the following neutrality criteria:

(i) The NANPA and B & C Agent may not be an affiliate of any telecommunications service provider(s) as defined in the Telecommunications Act of 1996, or an affiliate of any interconnected VoIP provider as that term is defined in § 52.21(h). “Affiliate” is a person who controls, is controlled by, or is under the direct or indirect common control with another person. A person shall be deemed to control another if such person possesses, directly or indirectly—

(A) An 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, or

(B) The power to vote ten (10%) percent or more of the securities (by stock, partnership (general or limited) interest, joint venture participation, or member interest) having ordinary voting power for the election of directors, general partner, or management of such other person, or

(C) The power to direct or cause the direction of the management and policies of such other person, whether through the ownership of or right to vote voting rights attributable to the stock, partnership (general or limited) interest, joint venture participation, or member interest) of such other person, by contract (including but not limited to stockholder agreement, partnership (general or limited) agreement, joint venture agreement, or operating agreement), or otherwise;

(ii) The NANPA and B & C Agent, and any affiliate thereof, may not issue a majority of its debt to, nor may it derive a majority of its revenues from, any telecommunications service provider. “Majority” shall mean greater than 50 percent, and “debt” shall mean stocks, bonds, securities, notes, loans or any other instrument of indebtedness; and

(iii) Notwithstanding the neutrality criteria set forth in paragraphs (a)(1) (i) and (ii) of this section, the NANPA and B & C Agent may be determined to be or not to be subject to undue influence by parties with a vested interest in the outcome of numbering administration and activities. NANC may conduct an evaluation to determine whether the NANPA and B & C Agent meet the undue influence criterion.

(2) Any subcontractor that performs—

(i) NANP administration and central office code administration, or

(ii) Billing and Collection functions, for the NANPA or for the B & C Agent must also meet the neutrality criteria described in paragraph (a)(1).

(b) Term of administration. The NANPA shall provide numbering administration, including central office code administration, for the United States portion of the North American Numbering Plan (“NANP”) for an initial period of five (5) years. At any time prior to the termination of the initial or subsequent term of administration, such term may be renewed for up to five (5) years with the approval of the Commission and the agreement of the NANPA. The B & C Agent shall provide billing and collection functions for an initial period of five (5) years. At any time prior to the termination of the initial or subsequent term of administration, such term may be renewed for up to five (5) years with the approval of the Commission and the agreement of the B & C Agent.

(c) Changes to regulations, rules, guidelines or directives. In the event that regulatory authorities or industry groups (including, for example, the Industry Numbering Committee—INC, or its successor) issue rules, requirements, guidelines or policy directives which may affect the functions performed by the NANPA and the B & C Agent, the NANPA and the B & C Agent shall, within 10 business days from the date of official notice of such rules, requirements, guidelines or policy directives, assess the impact on its operations and advise the Commission of any changes required. NANPA and the B & C Agent shall provide written explanation why such changes are required. To the extent the Commission deems such changes are necessary, the Commission will recommend to the NANP member countries appropriate cost recovery adjustments, if necessary.

(d) Performance review process. NANPA and the B & C Agent shall develop and implement an internal, documented performance monitoring mechanism and shall provide such performance review on request of the Commission on at least an annual basis. The annual assessment process will not preclude telecommunications industry participants from identifying performance problems to the NANPA, the B & C Agent and the NANC as they occur, and from seeking expeditious resolution. If performance problems are identified by a telecommunications industry participant, the NANC, B & C Agent or NANPA shall investigate and report within 10 business days of notice to the participant of corrective action, if any, taken or to be taken. The NANPA, B & C Agent or NANC (as appropriate) shall be permitted reasonable time to take corrective action, including the necessity of obtaining the required consent of the Commission.

(e) Termination. If the Commission determines at any time that the NANPA or the B & C Agent fails to comply with the neutrality criteria set forth in paragraph (a) of this section or substantially or materially defaults in the performance of its obligations, the Commission shall advise immediately the NANPA or the B & C Agent of said failure or default, request immediate corrective action, and permit the NANPA or B & C Agent reasonable time to correct such failure or default. If the NANPA or B & C Agent is unwilling or unable to take corrective action, the Commission may, in a manner consistent with the requirements of the Administrative Procedure Act and the Communications Act of 1934, as amended, take any action that it deems appropriate, including termination of the NANPA’s or B & C Agent’s term of administration.

(f) Required and optional enterprise services. Enterprise Services, which are services beyond those described in § 52.13 that may be provided by the new NANPA for specified fees, may be offered with prior approval of the Commission.

(1) Required Enterprise Services. At the request of a code holder, the NANPA shall, in accordance with industry standards and for reasonable fees, enter certain routing and rating information, into the industry-approved database(s) for dissemination of such information. This task shall include reviewing the information and assisting in its preparation.

(2) Optional Enterprise Services. The NANPA may, subject to prior approval and for reasonable fees, offer "Optional Enterprise Services" which are any services not described elsewhere in this section.

(3) Annual report. NANPA shall identify and record all direct costs associated with providing Enterprise Services separately from the costs associated with the non-enterprise NANPA functions. The NANPA shall submit an annual report to the NANC summarizing the revenues and costs for providing each Enterprise Service. NANPA shall be audited by an independent auditor after the first year of operations and every two years thereafter, and submit the report to the Commission for appropriate review and action.

47 C.F.R. § 52.21

§ 52.21 Definitions.

Effective: August 3, 2009

As used in this subpart:

(a) The term 100 largest MSAs includes the 100 largest MSAs as identified in the 1990 U.S. Census reports, as set forth in the Appendix to this part, as well as those areas identified as one of the largest 100 MSAs on subsequent updates to the U.S. Census reports.

(b) The term broadband PCS has the same meaning as that term is defined in § 24.5 of this chapter.

(c) The term cellular service has the same meaning as that term is defined in § 22.99 of this chapter.

(d) The term covered CMRS means broadband PCS, cellular, and 800/900 MHz SMR licensees that hold geographic area licenses or are incumbent SMR wide area licensees, and offer real-time, two-way switched voice service, are interconnected with the public switched network, and utilize an in-network switching facility that enables such CMRS systems to reuse frequencies and accomplish seamless hand-offs of subscriber calls.

(e) The term database method means a number portability method that utilizes one or more

(f) The term downstream database means a database owned and operated by an individual carrier for the purpose of providing number portability in conjunction with other functions and services.

(g) The term incumbent wide area SMR licensee has the same meaning as that term is defined in § 20.3 of this chapter.

(h) The term “interconnected VoIP provider” is an entity that provides interconnected VoIP service as that term is defined in 47 CFR 9.3.

(i) The term IP Relay provider means an entity that provides IP Relay as defined by 47 CFR 64.601.

(j) The term local exchange carrier means any person that is engaged in the provision of telephone exchange service or exchange access. For purposes of this subpart, such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under 47 U.S.C. 332(c).

(k) The term local number portability administrator (LNPA) means an independent, non-governmental entity, not aligned with any particular telecommunications industry segment, whose duties are determined by the NANC.

(l) The term location portability means the ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience when moving from one physical location to another.

(m) The term long-term database method means a database method that complies with the performance criteria set forth in § 52.3(a).

(n) The term number portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

(o) The term regional database means an SMS database or an SMS/SCP pair that contains information necessary for carriers to provide number portability in a region as determined by the NANC.

(p) The term Registered Internet-based TRS User has the meaning set forth in 47 CFR 64.601.

(q) The term service control point (SCP) means a database in the public switched network which contains information and call processing instructions needed to process and complete a telephone call. The network switches access an SCP to obtain such information.

(r) The term service management system (SMS) means a database or computer system not part of the public switched network that, among other things:

(1) Interconnects to an SCP and sends to that SCP the information and call processing instructions needed for a network switch to process and complete a telephone call; and

(2) Provides telecommunications carriers with the capability of entering and storing data regarding the processing and completing of a telephone call.

(s) The term service portability means the ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications service to another, without switching from one telecommunications carrier to another.

(t) The term service provider portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

(u) The term transitional number portability measure means a method that allows one local exchange carrier to transfer telephone numbers from its network to the network of another telecommunications carrier, but does not comply with the performance criteria set forth in 52.3(a). Transitional number portability measures are technically feasible methods of providing number portability including Remote Call Forwarding (RCF), Direct Inward Dialing (DID), Route Indexing—Portability Hub (RI-PH), Directory Number Route Indexing (DNRI) and other comparable methods.

(v) The term VRS provider means an entity that provides VRS as defined by 47 CFR 64.601.

(w) The term 2009 LNP Porting Intervals Order refers to In the Matters of Local Number Portability Porting Interval and Validation Requirements; Telephone Number Portability, WC Docket No. 07–244, CC Docket No. 95–116, Report and Order and Further Notice of Proposed Rulemaking, FCC 09–41 (2009).

47 C.F.R. § 52.26

§ 52.26 NANC Recommendations on Local Number Portability Administration.

Effective: July 22, 2010

(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 (Working Group Report) and its appendices, which are incorporated by reference pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. Except that: Section 7.10 of Appendix D and the following portions of Appendix E: Section 7, Issue Statement I of Appendix A, and Appendix B in the Working Group Report are not incorporated herein.

(b) In addition to the requirements set forth in the Working Group Report, the following requirements are established:

(1) If a telecommunications carrier transmits a telephone call to a local exchange carrier's switch that contains any ported numbers, and the telecommunications carrier has failed to perform a database query to determine if the telephone number has been ported to another local exchange carrier, the local exchange carrier may block the unqueried call only if performing the database query is likely to impair network reliability;

(2) The regional limited liability companies (LLCs), already established by telecommunications carriers in each of the original Bell Operating Company regions, shall manage and oversee the local number portability administrators, subject to review by the NANC, but only on an interim basis, until the conclusion of a rulemaking to examine the issue of local number portability administrator oversight and management and the question of whether the LLCs should continue to act in this capacity; and

(3) The NANC shall provide ongoing oversight of number portability administration, including oversight of the regional LLCs, subject to Commission review. Parties shall attempt to resolve issues regarding number portability deployment among themselves and, if necessary, under the auspices of the NANC. If any party objects to the NANC's proposed resolution, the NANC shall issue a written report summarizing the positions of the parties and the basis for the recommendation adopted by the NANC. The NANC Chair shall submit its proposed resolution of the disputed issue to the Chief of the Wireline Competition Bureau as a recommendation for Commission review. The Chief of the Wireline Competition Bureau will place the NANC's proposed resolution on public notice. Recommendations adopted by the NANC and forwarded to the Bureau may be implemented by the parties pending review of the recommendation. Within 90 days of the conclusion of the comment cycle, the Chief of the Wireline Competition Bureau may issue an order adopting, modifying, or rejecting the recommendation. If the Chief does not act within 90 days of the conclusion of the comment cycle, the recommendation will be deemed to have been adopted by the Bureau.

(c) The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the Working Group Report and its appendices can be obtained from the Commission's contract copier, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC

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20554, (202) 488-5300, or via e-mail at fcc@bcpiweb.com, and can be inspected during normal business hours at the following locations: Reference Information Center, 445 12th Street, SW., Room CY—A257, Washington, DC 20554 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>. The Working Group Report and its appendices are also available on the Internet at <http://www.fcc.gov/wcb/cpd/Nanc/Inpastuf.html>.

8 Del.C. § 102

§ 102. Contents of certificate of incorporation

Effective: August 1, 2015

* * *

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

* * *

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

15-1080

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Neustar, Inc., Petitioners

v.

Federal Communications Commission
and the United States of America, Respondents

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on October 28, 2015, I electronically filed the foregoing Public Copy—Sealed Material Deleted Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Kannon K. Shanmugam
Marcie R. Ziegler
Williams & Connolly LLP
725 12th Street, NW
Washington, DC 20005
Counsel for: Neustar, Inc.

Christopher J. Wright
John T. Nakahata
Timothy J. Simeone
Mark D. Davis
Harris Wiltshire & Grannis
1919 M Street, NW
Eighth Floor
Washington, DC 20036
Counsel for: Telcordia

Robert B. Nicholson
Scott A. Westrich
U.S. Department of Justice
Antitrust Division, Room 3224
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Counsel for: USA

Peter Karanjia
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, DC 20006
Counsel for: CTIA, et al.

/s/ C. Grey Pash