

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

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In the Matter of:)	
)	
The Petition of Telcordia Technologies, Inc.)	
To Reform Amendment 57 and to Order a)	WCB Docket No. 07-149
Competitive Bidding Process for Number)	
Portability Administration)	
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_____)	

REPLY OF TELCORDIA TECHNOLOGIES

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SUMMARY

Telcordia has asked the Commission to restore competition to the market for number portability services *and thereby save consumers at least \$60 million per year*. The Commission can do this simply by striking the anticompetitive provisions of Amendment 57 to the NeuStar/NAPM contract for number portability administration and reforming the contract process to require competitive bidding.

The anticompetitive provisions of Amendment 57 impose enormous financial penalties on both the telecommunications industry and consumers if NAPM either seeks or advocates competition. These provisions *clearly* violate the law and, along with the lack of an open competitive process, undermine Commission policy by effectively eliminating any possibility of competition in the market for number portability services until 2012 and perhaps beyond. Simply put, NeuStar and NAPM struck a deal to replace the Commission's and Congress' competitive framework with what is at heart a sole-source contract.

NeuStar and NAPM – the authors of Amendment 57 – defend their anticompetitive provisions essentially by arguing that no one is unhappy with the current lack of competition so the Commission need not worry about it. This argument is fundamentally flawed, because the current single vendor system enshrined by Amendment 57 causes substantial public harm. This proceeding is about far more than NeuStar, NAPM, and its members. It is about the hundreds of other carriers and millions of consumers paying inflated charges because of a closed-door anticompetitive deal.

From the start of number portability, the Commission has embraced competition and recognized that there are clear advantages to competition in number portability

administration – including lower prices and quality service. NeuStar’s hand-waving about Telcordia’s attempt to offer its services in 2005 and its self-congratulatory prose about its services cannot distract the Commission from the core issue. Amendment 57 is anticompetitive. *The sole purpose of the penalty provisions is to eliminate the possibility of competition.* NeuStar and NAPM have subverted Commission intent and, behind closed and confidential doors, effectively eliminated competition. The Commission, which has plenary authority over all numbering matters, has the power – and the obligation – to correct the situation and re-open the market for numbering portability administration to competition.

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INTRODUCTION

The record before the Commission strongly supports a decision to grant Telcordia’s Petition. NeuStar and North American Portability Management, LLC (NAPM) do not dispute the absence of a competitive process for number porting services since 1997 or that an open competitive process would be consistent with Commission policy. Instead, the thrust of their argument is wrongly to claim that no one is unhappy with the current lack of competition. NeuStar and NAPM would like the Commission to believe that this proceeding is about the narrow interests of the signatories of the anticompetitive “Amendment 57,” and attempt to minimize the impact of their actions by erroneously suggesting that Telcordia is trying to obtain a “private remedy.” The truth is that NeuStar’s single vendor system, enshrined by Amendment 57, does cause widespread public harm. Telcordia’s Petition seeks to address this harm by reinstating a competitive bidding process that will benefit hundreds of carriers, most of whom are not NAPM members, and the millions of consumers who were not invited to NeuStar’s

closed-door negotiations, but now bear the burden of the rates higher than a competitive market would produce. NeuStar's and NAPM's arguments therefore are factually incorrect and an insufficient excuse for eliminating competition.

Competition benefits the public because more competitors mean lower prices, better quality, and better service. The Commission has long stated that "competitive procedures best serve the public interest."¹ And, as the Commission has also acknowledged, the benefits of competition are just as applicable to the market for number portability administration as to other markets. The Commission has explicitly recognized "that there are clear advantages to having at least two experienced number portability database administrators that can compete with . . . each other."² Moreover, since the entire process of number administration has been established under the authority of the Commission, the Commission has a special responsibility to ensure that such competition is not undermined.

Contrary to the Commission's competitive framework, NeuStar used its contractual position as the sole vendor of number portability administration services to eliminate the possibility of competition until 2012 (and perhaps longer). It did this through the improper use of financial penalties forcing NAPM to rely only on the insufficient mechanism of unsolicited competitive proposals coupled with provisions that mandate that negotiations with NeuStar be held in secret. The result is that Amendment

¹ *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 7574, 7638-44 (2000) ("*Numbering Resource Optimization*").

² *Telephone Number Portability*, Second Report and Order, 12 FCC Rcd. 12281, 12306 (1997) ("*Second Report and Order*").

57 blocks any chance of an open competitive bidding process where the parties are provided a level playing field.

The provisions of Amendment 57 go far beyond a mere agreement to extend the contract term in exchange for volume discounts, as NeuStar would have the Commission believe. Amendment 57 forbids NAPM from seeking a competitor for NeuStar, asking NeuStar for lower rates, advocating for competition before the Commission, or looking for an alternative mechanism for number porting.

Neither NAPM nor NeuStar, in their combined sixty-seven pages of comments and opposition, even posit a non-exclusionary purpose for imposing a penalty on NAPM for seeking competitive options. There is none. The bottom line is really quite simple: by contract, and without any opportunity for prior review by NANC or the FCC, NeuStar and NAPM together eliminated competition and eviscerated the Commission's pro-competitive policy.

This is not merely a private, commercial contract, and NAPM and its member companies are not the only affected entities. To the contrary, *the Commission delegated the authority to contract for the public function of number portability database administration to NAPM, which is then paid for by an FCC-mandated fee assessed on all telecommunications carriers* – and hence to their customers – regardless of whether those carriers are members of NAPM or whether they or their customers use number portability. No carrier or its customers can obtain number portability except from NAPM's contractor. To claim now that the NAPM-NeuStar arrangement is merely a commercial contract is disingenuous at best. The Commission has properly asserted that

it will maintain oversight over this critical competition mechanism that is paid for by an assessment established by the FCC's rules.

Telcordia thus filed a Petition³ simply asking the Commission to eliminate those provisions in the NeuStar/NAPM contract amendment that effectively foreclose the possibility of competition, to instruct NAPM to conduct an open process, and to seek competitive bids for provision of number porting services (which Amendment 57 currently forbids). Telcordia has sought only to bring competition back into the Commission-authorized number portability system – competition that should never have been bargained away. To describe this as a “private remedy,” as NeuStar does, is simply wrong.

Amendment 57 costs consumers and the industry tens of millions of dollars a year. Reintroducing competition into the federally mandated and Commission-crafted number porting administration program will – and is the only way to – ensure that the services are offered at the lowest rate possible. Indeed, the re-introduction of competition would lead quickly to number porting administration services being offered at a rate at least 20% less than the cost now being charged. *Under this conservative estimate, eliminating the penalty provisions and conducting an open competitive bidding process for number portability administration would save consumers at least \$240 million between now and 2012.*⁴

As is clear from Telcordia's Petition, the financial penalty provisions of Amendment 57 are anticompetitive, unjust, unreasonable and violate public policy.

³ Petition of Telcordia Technologies, Inc., The Petition of Telcordia Technologies To Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, WC Docket No. 07-149 (June 13, 2007) (Telcordia Petition).

⁴ *Id.* at 14.

These provisions, which would penalize NAPM (thus the public) for taking steps even to *consider* competition, constitute exclusionary conduct by a vendor with market power and cannot be justified. While it is perfectly understandable that NeuStar and NAPM do all they can to justify their actions in adopting Amendment 57, for the Commission to live up to the 1996 Act and protect consumers from monopoly pricing as it originally intended when it delegated authority to NAPM, it must use its plenary authority over number portability to reestablish competition in the market for number porting administration.

I. THE BENEFITS OF COMPETITION OUTWEIGH THE SUPPOSED BENEFITS OF A SINGLE VENDOR SYSTEM CLAIMED BY NEUSTAR AND NAPM LLC

As the Commission has said, there are “clear advantages to having at least two experienced number portability database administrators that can compete with . . . each other.”⁵ Indeed, the Commission has recognized these advantages since the inception of the network database administration process. Specifically, the North American Numbering Council (NANC) – acting at the behest of the Commission – has recognized distinct advantages that would result from selecting two providers.⁶ In opposing Telcordia’s Petition to re-introduce competition into this process, NAPM and NeuStar have predictably ignored these detailed pro-competitive findings. Faced with Commission findings supporting competition, they quote the Commission out of context.

⁵ *Second Report and Order*, 12 FCC Rcd. at 12306.

⁶ *Id.* at 12305.

When read in context, the language they quote to disparage competition actually supports NANC's pro-competition recommendation to the Commission.⁷

Two advantages would result from the selection of multiple database administrators.⁸ First, multiple database administrators would create competition in both the competitive bidding and selection processes. “[H]aving multiple database administrators . . . should enable carriers to obtain *more favorable terms and conditions than if only one database administrator had been selected.*”⁹ Second, multiple administrators would provide a “back-up” system if one administrator could not or would not perform its obligations under its Master Agreement or declined to renew its Agreement. As a result, NANC said that “*the selection of two database administrators is consistent with the Commission’s directive that the NANC recommend the most cost-effective number portability methods.*”¹⁰ NeuStar and NAPM (and their one NAPM member company supporter) provide no evidence that the single vendor system maintained under Amendment 57 allows for either of these critical advantages.

Not surprisingly, the competitive bidding process has historically been used to select administrators in number administration matters. The Commission uses a fair and

⁷ NANC found it unnecessary to make a specific recommendation because two different administrators had already been selected, but it noted that if the regional LLCs had selected a single administrator, NANC would have reviewed the situation. *Second Report and Order*, 12 FCC Rcd. at 12306-7. Still, the Commission agreed with NANC's recommendation that there are clear advantages to having at least two number portability database administrators. *Id.* It was, therefore, unnecessary for the Commission to explicitly mandate that NANC select two administrators – because two administrators had already been accepted. In fact, the language “one or more [administrators]” allows for the flexibility that having two more administrators compete against each other creates. For example, the language allows one administrator to serve as a back-up for another administrator because of network failure or other disaster without action from the Commission.

⁸ *See Second Report and Order*, 12 FCC Rcd. at 12305.

⁹ *Id.* (emphasis added).

¹⁰ *Id.* (emphasis added).

open competitive bidding process to select the North American Numbering Plan Administrator and the national thousands-block Pooling Administrator, the two other major aspects of number administration under the Commission’s jurisdiction.¹¹ In Pooling Administration – where NANC wished to use sole source appointment to appoint an administrator – the Commission found the competitive bidding process was certainly in the public interest:

*We also conclude that seeking competitive bids in response to a request for a proposal or requirements for thousands-block number pooling administration, as we did with respect to NANP administration, furthers the competitive framework that Congress established in implementing the 1996 Act and is consistent with federal procurement law. We believe that a competitive bid process that is open and fair, and will include the opportunity for participation from all interested parties, will ensure the selection of the most qualified, cost-efficient Pooling Administrator.*¹²

NeuStar attempts to dismiss the Commission’s use of the competitive bidding process to select the two other major administrators as “discretionary” and therefore unimportant.¹³ Yet, NeuStar and NAPM cannot explain why the use of an open and competitive process for selection of a number portability database administrator would not provide the same benefits that accrue to the two other major aspects of number administration under the Commission’s jurisdiction. On the contrary, it is clear that the same public interest and pro-competitive policy determinations that apply to the NANP or Pooling Administration aspects of number administration also apply to the portability aspect of numbering administration. The Commission’s decision to use an open, fair and competitive bidding

¹¹ See *Administration of the North American Numbering Plan*, Report and Order, 11 FCC Rcd. 2588, 2615-2618 (1995) (“*North American Numbering Plan*”); *Numbering Resource Optimization*, 15 FCC Rcd. at 7637-7644.

¹² *Number Resource Optimization*, 15 FCC Rcd. at 7639-40 (*emphasis added*).

¹³ Opposition of NeuStar, Inc., WC Docket No. 07-149 (August 22, 2007) (NeuStar Opposition) at 22.

and selection process – and the success of that process in the two other major aspects of number porting – tells the Commission all it needs to know about the defects in the current system for selecting the number portability administrator.

In an attempt to change the discussion from the benefits of competition (and the lack of competition in the current system for number portability administration) NeuStar and NAPM dedicate the majority of their comments to a self-congratulatory description of NeuStar’s performance and the “economic benefits” that the parties receive under Amendment 57.¹⁴ But NeuStar’s performance is not the issue – the lack of a competitive bidding process is. And if its performance is as good as it claims, one would expect it to be far less afraid of a fair and open competitive process. Indeed, where there is only one provider it is difficult accurately to determine the quality of service – two or more providers could be even better and, in any event, the competitive process continually motivates providers to innovate and maintain a high quality of service.

NeuStar claims that Amendment 57 provides some benefits to NAPM – *i.e.*, a volume discount schedule exchanged for a contract extension. But this is a red herring. These provisions go far beyond the mere trade of an extended term for volume discounts, as NeuStar alleges. The supposed “discounts” still leave consumers and carriers with rates well in excess of competitive prices. NeuStar tries to justify the adoption of Amendment 57 as a “rational” decision.¹⁵ But this is not the right test – it is rational, for example, for a monopolist to charge a monopoly rate, but such a rate is not just and reasonable. Similarly, exclusionary conduct by a monopolist may be “rational” for the

¹⁴ Comments of the North American Portability Management, LLC, WC Docket No. 07-149 (August 22, 2007 (NAPM Comments) at 1-3; NeuStar Opposition at 11-12.

¹⁵ NeuStar Opposition at 9-10.

monopolist, but it will still be unjust and unreasonable or a violation of the antitrust laws if there is no reasonable non-exclusionary basis for the conduct. That is the case here. NeuStar and NAPM do not set forth a non-exclusionary rationale for the financial penalty clauses, or demonstrate that any legitimate interests could not have been safeguarded through other means that did not, as their primary purpose, exclude competition. The adoption of the financial penalty clauses of Amendment 57 deprived carriers and consumers of the benefits of competition with no apparent non-exclusionary justification.

A. WITHOUT AMENDMENT 57, OTHER VENDORS WOULD PARTICIPATE IN THE COMPETITIVE BIDDING PROCESS – JUST AS THEY DO IN OTHER COUNTRIES

Competition here is not just a theoretical possibility. Other companies have said they want to compete in the United States, and other companies routinely compete in open number administration markets overseas. Indeed, it is more than a little bizarre that it is in the United States, where competition in telecommunications was invented, that the market is closed to competition.

Telcordia, SAIC and Verisign have already said on the record they want the opportunity to compete in the number portability administration services in the United States.¹⁶ NeuStar became the sole number portability database administrator by happenstance, not by deliberate choice of the Commission or NANC. In 1998, when it became apparent that Perot Systems would be unable to begin operations on time, NeuStar became the sole number portability administrator in the United States by

¹⁶ Comments of Science Applications International Corporation, WC Docket No. 07-149 (August 22, 2007) (SAIC Comments) at 1; Support Statement of VeriSign, Inc., WC Docket No. 07-149 (June 25, 2007).

default.¹⁷ When Perot Systems was replaced, NANC (and the Commission) did not have an alternative administrator. Telcordia, for example, was still Bellcore and just in the beginning phases of being divested from the Bell Companies and therefore was not able to serve as a provider at that time. The replacement of Perot Systems with Lockheed Martin was not the implicit adoption of a single administrator system by the Commission that NeuStar and NAPM suggest,¹⁸ but the result of the limited options then available to the Commission and a desire for the initial implementation of number portability to remain on the time schedule mandated. Now, however, number portability has been implemented not just in the United States but around the world, and there are many more options, and the benefits of multiple administrators are not only possible but desirable.

The competitive bidding process is crucial to the selection of network database administrators in several other countries that mandated number porting in order to open telecommunications markets to competition. Telcordia competes for centralized number administration systems in many countries and has been awarded contracts in eight including Belgium, Greece, Pakistan, Saudi Arabia, Malaysia, Lithuania, Egypt, and South Africa. In some of those countries Telcordia competed successfully with several United States-based companies (including NeuStar). The United States, oddly, is one of the only countries to implement number portability where Telcordia has not even had the opportunity to compete in an open bidding process since entering the number portability administration business in 2000. It is the standard, in most countries, to have a competitive bidding process that results in a multi-year contract that is again put up for

¹⁷ *Telephone Number Portability*, Second Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd. 21204, 21208-9 (1998).

¹⁸ NAPM Comments at 24-25; NeuStar Opposition at 5-6.

bid at the end of the contract term. NAPM has made the United States an exception to the international norm.

B. THERE ARE NO DANGERS IN REQUIRING AN OPEN, COMPETITIVE PROCESS

In an attempt to scare the Commission into inaction, NeuStar and NAPM have suggested that the sky will fall and number administration will be disrupted if the anticompetitive provisions of Amendment 57 are eliminated.¹⁹ These comments echo the warnings about the supposed risks of competition unsuccessfully proffered by the old Ma Bell which argued that competition in customer premises equipment, network equipment, interexchange and local telecommunications would lead to the demise of the network. Of course, the competition created by *Carterfone*, the AT&T Modification of Final Judgment, and the Telecommunications Act of 1996 have not destroyed network reliability. Similarly, striking the penalty provisions in Amendment 57 and opening a competitive bidding process will not create any risks. Part of the competitive bidding process would, of course, be an evaluation of each bidder's ability to provide reliable, high quality number portability administration services. Neither consumers nor the industry would suffer from the requirement that NAPM openly consider and evaluate number portability administration alternatives. The only risk is that NeuStar would face competition.

In fact, it is the reliance on a single provider that endangers system reliability and survivability. Reliability and survivability are strengthened by the redundancy provided by multiple vendors. Moreover, critical systems like NPAC can be safely transitioned. In fact, Article 24 of the Master Agreements addresses the orderly transition to a new

¹⁹ NAPM Comments at n 2; NeuStar Opposition at 6-7.

administrator²⁰ – in the same way the Commission requires transition plans in its competitive procurement processes for NANPA and Pooling administration.²¹ Indeed, Telcordia has extensive experience in transitioning critical telecommunications systems. If critical defense systems can be transitioned safely and effectively, as they have been, certainly NPAC can as well.

Moreover, Telcordia's requested relief, that NAPM institute an open and competitive process, does not mean prices will rise since the Commission need not (and should not) eliminate the discount provisions of Amendment 57. NeuStar could, of course, be given the option to terminate its contract at the end of the competitive bidding and reasonable transition process if it felt that the current discount schedule without the financial penalties but with a term extending until 2015 was not likely to be sufficiently remunerative.

Finally, Telcordia is asking the Commission to open the competitive process, not to appoint a new administrator. Any concerns about potential competitors are premature. NAPM will still select the Administrator(s). Vendors only want the opportunity to join in a competitive bidding process and have a chance to make their case to NAPM.²² Telcordia trusts the market – it just wants the Commission to allow the market to exist; today it does not.

²⁰ Transition to a new administrator could be for individual NPAC regions or for multiple administrators in one or more regions.

²¹ The solicitation for the Pooling Administrator and NANPA both include references to 24. Space and Naval Warfare Systems Command (SPAWAR), Software Transition Plan (STrP), DI- IPSC-81429A, Jan. 10, 2000 (available at: <http://www.ihsengineering.com/>).

²² SAIC Comments at 1; *see also* Support Statement of VeriSign, Inc., WC Docket No. 07-149 (June 25, 2007).

NeuStar also claimed that in addition to creating “risks,” competition would not provide the cost savings Telcordia has promised. The essence of competition, however, is that competitors can find ways to offer a better service at a lower price than offered by an existing provider. This possibility drives all market participants to seek to lower costs and reduce prices. Telcordia is not alone in arguing that competition would reduce costs to the lowest possible level – an important benefit for the industry and, ultimately, consumers.²³ Moreover, Telcordia’s estimate is based on the rate at which Telcordia believes it could provide services and estimated future volume. The underlying assumptions behind the savings estimate are very conservative.²⁴ Because Telcordia provides these services in other countries, it knows first-hand the costs associated with number portability administration and knows that it can deliver and operate a system at a lower per transaction price than currently offered.

NeuStar boasts that it has reduced *per transaction* costs by 60% over the last decade. This is hardly an accomplishment. Over the last decade, number portability transactions have gone from zero to three hundred million annually. Because the costs of providing number portability database administration services are largely driven by fixed costs, a reduction in *per transaction* costs is exactly what would have occurred regardless of whether NeuStar was highly efficient or highly *inefficient*. NeuStar has not produced *an actual, aggregate cost savings* for industry or consumers. While the per transaction cost has lowered, the volume has increased more rapidly than any reduction, so NeuStar is making more money, and carriers are paying more under the Master Agreements

²³ SAIC Comments at 1.

²⁴ Other commenters, like SAIC, agree that Telcordia’s assumptions are conservative. *Id.*

despite the reduction in per transaction costs.²⁵ Telcordia believes that competition would reduce *both* the current overall spend and per transaction rates. Both consumers and the industry will benefit from these cost savings. Every day that Amendment 57 restricts competition consumers and the industry lose money as they pay rates higher than the rates that would result from a competitive bidding process.

II. AMENDMENT 57 IS MANIFESTLY ANTICOMPETITIVE AND THEREFORE UNJUST AND UNREASONABLE

A. AMENDMENT 57 RENDERS THE MASTER CONTRACTS EXCLUSIVE

NeuStar and NAPM do not – and cannot – assert that an exclusive contract would be pro-competitive. Instead they incorrectly assert that the Master Contracts, including Amendment 57, are not exclusive. NeuStar, for example, argues that Amendment 57 “continues the non-exclusivity of the [prior] Agreements.”²⁶ But these are word games – NeuStar exalts form over substance. NeuStar and NAPM cannot escape that Amendment 57 imposes crushing financial penalties if NAPM: (1) formally requests information from Telcordia (or anyone else) about its capability to provide porting administration services in competition with NeuStar; (2) seeks a quotation or bid from Telcordia (or anyone else); (3) approves a solicited or unsolicited offer from Telcordia (or anyone else); (4) endorses the idea of creating an alternative routing administration capability; (5) or even asks NeuStar for a lower rate. Amendment 57 also imposes the financial penalty if

²⁵ Based on NeuStar’s recent SEC filings, NeuStar’s reported costs of operations and revenue indicate that the current service is operating at extraordinarily high margins.

²⁶ NeuStar Opposition at 14.

NAPM merely makes a “public statement” (including even any statement to the Commission in this proceeding) about having an interest in competition or lower rates.²⁷

The NeuStar imposed penalty is triggered not just when a competitor begins service or even when NAPM actually signs an agreement with a competitor. The penalty provisions are much more aggressive; they impose a price increase on consumers and carriers at the very beginning of any competitive process. All NAPM needs to do is request an offer or even put out a request for information from a competitor, and the rates for porting transactions increase substantially. NAPM can only passively receive an unsolicited offer. It cannot take any official action with regard to the offer including engaging in the critical back-and-forth request for information about that offer without invoking the penalty. Because Amendment 57 *penalizes even the beginning of the competitive process*, the risk of seeking competition is enormous (somewhere between \$30 million and \$150 million or more). Therefore, while the contract includes a non-exclusivity clause, Amendment 57 effectively nullifies that clause. Put another way, the Master Agreement as amended by Amendment 57, while not an exclusive contract on its face, functions as an exclusive contract. If it costs NAPM \$150 million dollars simply to request information from another vendor, it is absurd to suggest that contract is non-

²⁷ In addition, the commenters opposed to Telcordia’s Petition ignore the fact that the penalty provision is designed to limit what the Commission is told. Amendment 57 also imposes the financial penalty if the Commission takes steps to require competition and NAPM, “including its co-chairs and members in their duly authorized, official capacity as members,” had had the temerity to “advocate, endorse, lobby, orchestrate, whether directly or indirectly” the Commission’s pro-competitive actions. Under the plain language of Amendment 57, NAPM would have faced these penalties if it had supported Telcordia’s Petition.

exclusive. Indeed, exclusivity until 2012 was the primary benefit NeuStar gained from the contract extension.²⁸

Instead of addressing these issues, NeuStar's Opposition argues that the Petition did not plead the elements of an antitrust claim.²⁹ In so doing, NeuStar simultaneously misunderstands the law and invents an irrelevant market in which it is not a monopolist. NeuStar suggests its conduct should survive antitrust scrutiny because it lacks market power in the relevant market. But as a matter of law, the relevant market is the *smallest* group of competitors that could prevent a hypothetical monopolist from imposing at least a small but significant and non-transitory price increase.³⁰ In other words, only when one service or service provider is reasonably interchangeable for the other in the eyes of consumers is it to be included in the relevant market.

NeuStar is currently the only active number portability administrator in the United States. It is the definition of a monopoly. NeuStar attempts to complicate this straightforward analysis by artificially expanding the market to include in the relevant market providers that are not, in fact, interchangeable and do not, in fact, have the same pricing power that NeuStar has.³¹ And Amendment 57 eloquently proves the point.

²⁸ The extension of a non-exclusive contract is simply an option contract – without further consideration, it benefits the buyer. But conversion of a non-exclusive contract to an exclusive contract benefits the seller, who now is assured of a buyer.

²⁹ NeuStar Opposition at 17 (“Telcordia Fails to State an Antitrust Claim.”).

³⁰ *United States v. E.I. du Pont de Nemours & Co.* 351 U.S. 377, 395 (1956) (relevant product market is composed of products that have reasonable interchangeability); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 52 (D.C. Cir. 2001), *cert. denied*, 530 U.S. 1301 (2001) (in determining reasonable substitutes, the court excluded “middleware” software from the definition of the relevant product market because of its present non-interchangeability with Windows notwithstanding its long-term future potential). NeuStar is imposing a rate increase both in its overall charges to carriers and in comparison to the rates that would result from a competitive process.

³¹ NeuStar Opposition at 19-20.

Courts define market power as the ability to (1) control prices; or (2) exclude competition.³² Market power is often demonstrated by a provider's ability to persist in maintaining prices above the competitive level while keeping new providers, which might price competitively, from entering.³³ Clearly, NeuStar has been able to accomplish both of these goals – keeping prices above competitive levels and competitors out. NeuStar was able to use its market power to extract a promise that NAPM would not even ask for a lower price until 2011!

NeuStar would have the Commission believe that the relevant market includes general data management providers. But general data management providers are not interchangeable alternatives for NPAC – and thus not part of the relevant market. NPAC database administrators use unique systems that must meet very specific requirements. General data management providers cannot meet these requirements and face several barriers to entry including the costs associated with designing a database system that could meet those requirements.

NeuStar does not dispute that maintaining a monopoly through an exclusionary contract violates Section 2 of the Sherman Act. *E.g.*, *LePage's, Inc. v. 3M*, 324 F.3d 141, 157-59 (3d Cir. 2003). Instead, NeuStar attempts to factually distinguish the monopoly in *LePage's* based on its unsupported fanciful relevant market. NeuStar does not address the real crux of *LePage's* – that penalty provisions like those in Amendment 57 are barred by the antitrust laws. *Id.* at 157. The antitrust law confirms the clear conclusion

³² See *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)); *E.I. du Pont de Nemours*, 351 U.S. at 395.

³³ See Herbert Hovenkamp, *Antitrust Law* § 501 (2005).

that Amendment 57 eliminates competition and, thus, leads to higher prices and harm to consumers.³⁴

B. THE COMMISSION HAS THE LEGAL AUTHORITY AND BASIS TO REFORM AMENDMENT 57

Astoundingly, NeuStar appears to contend that the Commission lacks the authority to reform and set aside the penalty provisions of Amendment 57 even if the Commission were to agree with Telcordia that those anticompetition provisions are unjust, unreasonable and contrary to the public interest. NeuStar argues that its number portability administration services are not common carrier services, and thus cannot be addressed by the Commission's authority under Section 201(b) of the Communications Act. This argument is wrong, ignores the Commission's plenary jurisdiction over numbering and numbering administration pursuant to Section 251(e), and the continued oversight the Commission reserved with respect to number portability administration.

In the first instance, the argument that portability database services are not common carrier services was squarely rejected by the Commission in the Commission's *800/SMS Database Order*.³⁵ In that order, the Commission rejected arguments that the SMS administrator provided "administrative services," not common carrier services.³⁶ The Commission concluded that access to the SMS database, including inputting changes to the SMS database, was a common carrier service because it was "incidental to the

³⁴ *E.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (newspaper's requirement that advertisers refrain from advertising with a competitor was anticompetitive and illegal). Of course, it is also well-settled that a contract need not be expressly exclusive in order to be exclusive in fact. *E.g., LePage's*, 324 F.3d at 157 (noting that the law recognizes that a contract need not be explicitly exclusive to be effectively exclusive).

³⁵ *Provision of Access for 800 Service Order*, 8 FCC Rcd. 1423, 1425-26 (1993).

³⁶ *Id.* at 1426.

provision of 800 access services.”³⁷ So too is local number portability incidental to the provision of telephone exchange service and CMRS.

In any event, the Commission independently has plenary authority over numbering issues pursuant to 251(e), which includes oversight of number portability administration.³⁸ Without the Commission’s imprimatur there would be no NAPM and no Master Contracts with NeuStar – indeed, the Commission could directly have conducted competitive bids for number portability administration as it did with both the NANPA and number pooling administration contracts. When the Commission delegated immediate responsibility of oversight of number portability administration to the LLCs, it did so only subject to NANC and Commission oversight.³⁹ Indeed, the Commission has a responsibility to maintain such oversight, particularly in matters that affect the amount to be paid and the potential for competition to reduce that amount, because, pursuant to its authority under Section 251(e)(2), it requires all common carriers to report revenues and to pay for these number portability administration costs.⁴⁰ This is not just a private contract for which each party to the contract bears the risks. Carriers that are not NAPM members (which includes the vast majority of Commission registered carriers) are directly required by FCC rule to bear a portion of NeuStar’s invoices. As Tom Koutksy, NANC Chair said:

³⁷ *Id.*

³⁸ *New York & Public Service Com'n of New York v. FCC*, 267 F.3d 91, 100 (2d Cir. 2001).

³⁹ *Second Report and Order*, 12 FCC Rcd. at 12345.

⁴⁰ 47 C.F.R. § 52.32; *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999) (citing *Telephone Number Portability*, First Report and Order, 11 FCC Rcd. 8352, 8421 (1996)); *Telephone Number Portability*, Third Report and Order, 13 FCC Rcd. 11701, 11724-25 (1998).

*I do want to stress that I don't view these as private contracts between private parties. I believe this is a contract that does the public's business, basically done at the authorization of the FCC to put in place a procedure of which will not just benefit the industry but it will also benefit consumers and businesses in the United States.*⁴¹

Oversight over number portability administration must necessarily include the ability to strike provisions of the NeuStar/NAPM contract that are unjust and unreasonable or would otherwise be contrary to the public interest. It would render the Commission's oversight role meaningless if it had no authority to alter the NeuStar/NAPM agreements under any circumstances.

Indeed, the Master Contracts themselves recognize that they are subject to Commission authority. As Article 25 of the Master Contracts state:

Contractor expressly recognizes that (i) Users and the NPAC/SMS are or may be subject to certain federal and state statutes and rules and regulations promulgated there under as well as rules, regulations, orders, opinions, decisions and possible approval of the FCC and other regulatory bodies having jurisdiction over Users and the NPAC/SMS, and (ii) this Agreement is subject to changes and modifications required as a result of any of the foregoing.

The NeuStar/NAPM Masters Contracts directly contemplate that the FCC may direct changes to the contract.

Further, nothing in the *Sierra-Mobile* cases precludes or limits Commission action here. As NeuStar concedes, *Sierra-Mobile* permits the Commission to overturn contractual provisions that, with respect to rates, are unjust and unreasonable, or, with respect to terms and conditions other than rates, are contrary to the public interest.⁴² That is exactly what Telcordia has demonstrated. NeuStar appears to suggest that in order for

⁴¹ North American Numbering Council Meeting Minutes April 17, 2007 at 31-32 (emphasis added).

⁴² NeuStar Opposition at 16; *Western Union Telegraph Co. v. FCC*. 815 F.2d 1495, 1501 (D.C. Cir. 1987)

a rate to be “unlawful,” something more is necessary than showing that the rate is unjust and reasonable. This is simply untrue. Section 201(b) makes clear that “any such charge, practice, classification, or regulation that is unjust and unreasonable is declared to be unlawful.”⁴³

NeuStar’s argument that reformation is not permitted because this is relief in the “private interest” rather than the “public interest” also ignores reality. This is not a case in which one party to a contract is asking to be relieved of its own bad deal.⁴⁴ This is a case in which the lack of competitive bidding and the anticompetitive financial penalty clauses are going to cost the industry as a whole, and therefore consumers, at least \$240 million over the next five years. The vast majority of telecommunications carriers had no input into the negotiation and execution of Amendment 57, but are required, by Commission rule, to pay its bills. It is harder to imagine a more public interest in a contract.

This extremely public dimension distinguishes this case substantially and materially from the cases cited by NeuStar in which the parties could not show that there was any public interest at stake in their disputes. For example, in *IDB Mobile*, the main case relied on by NeuStar, the Commission found that IDB did not offer any evidence that the contract provision “adversely affected the public” because striking the contract

⁴³ 47 U.S.C § 201(b). In fact, Congress stated that “the policies and purposes of this [Act]” include “vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”⁴³ Specifically, sections 257(a) and (b) of the Communications Act state that it is national policy to promote “vigorous economic competition, technological advancement and promotion of the public interest” in all aspects of the telecommunications market, *including in the provision of services to “providers of telecommunications services and information services.”* (emphasis supplied). Further, the Commission found that the rates in all the cases cited by NeuStar were just and reasonable and therefore lawful under section 201(b). *IDB Mobile*, 16 FCC Rcd. at 11475; *Ryder Communications, Inc. v. AT&T*, 18 FCC Rcd. 13603, 13603 (2003); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, 10 FCC Rcd. 654 (1994).

⁴⁴ Cf. *ACC Long Distance*, 10 FCC Rcd. at 654.

provision would not have any affect on end users.⁴⁵ Here the Master Agreements (including Amendment 57) intimately affect the public. The Commission further stated that if IDB had been able to prove that the contract provision was the result of an abuse of market power then the public interest could have been harmed.⁴⁶ Here there was a clear abuse of market power. Finally, none of the cases involved an eradication of a competitive bidding process and a limitation of competition. Simply put, the parties in the cases cited by NeuStar could not prove what Telcordia has proved – the contract provisions disserve the public interest.

Further, even with the opportunity to do so, NeuStar and NAPM failed to provide a cost basis for the penalty provisions under the traditional “just and reasonable” rates analysis that requires that rates must be determined on the “basis of cost.”⁴⁷ Specifically, NeuStar and NAPM fail to make any showing of a non-exclusionary explanation for the penalty provisions. It is not enough to assert that “it was part of a larger negotiation.” That is always going to be true. The Commission relies on competition to ensure that rates are just and reasonable and cost-based. But where there is only one supplier and that one supplier has demanded contractual terms to prevent competition, the Commission can no longer rely on competition to maintain just and reasonable rates. Neither the current transaction rates nor the discounts have a basis in cost; the rates have been lowered only when the volume increase has been such that the increased overall charges were obscenely high and NAPM would then use the threat of competition with

⁴⁵ *IDB Mobile*, 16 FCC Rcd. at 11483.

⁴⁶ *Id.*

⁴⁷ *MCI Telecom. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982).

the inducement of a non-competitive extension to obtain a slightly reduced rate. Moreover, the exclusionary nature of the penalty provision itself, in a contract by the sole provider of number portability database administration services, renders the penalty an unjust and unreasonable practice.⁴⁸

C. SUBMITTING AN UNSOLICITED BID IS INSUFFICIENT

NAPM and NeuStar seek to avoid responsibility for eliminating competition suggesting that the possibility of submitting an unsolicited bid is sufficient to permit robust competition. But they fail to show how this can be so. Amendment 57 limits NAPM to passively receiving unsolicited bids from potential competitors (and of course it cannot accept such a bid without the penalties being imposed). This simply is not a substitute for an open competitive process that allows the possibility of dialogue and full consideration of any bids. With Amendment 57 now in place and the ability of NAPM to accept such proposals constrained by enormous penalties, the likelihood of submitting a successful unsolicited bid must be as close to zero as can be.

Further, NeuStar and NAPM failed to address the effect of Section 9 on the bidding process. Section 9 of Amendment 57 provides that any “discussions or negotiations . . . concerning any amendment or proposed amendment” are confidential until completion or cessation. This means that if NAPM negotiated yet another contract extension with NeuStar, competitors would not know about it until after the extension was signed. This process could continue indefinitely, and other vendors could not even learn about the negotiations, let alone present bids, during the negotiations. Under Amendment 57, potential bidders are left taking shots in the dark.

⁴⁸ See also SAIC Comments at 1.

Despite NAPM’s insistence that there is enough information publicly available for a successful unsolicited bid, NAPM *itself* has recognized that “[o]nly a cursory vendor comparison is possible without defined requirements (*i.e.*, ‘level playing field’).”⁴⁹ The information that NAPM (and other commenters) identify as being “publicly available” does not provide the “defined requirements” sufficient to make a detailed, appropriately targeted bid. This fact is exacerbated by the restricted one-sided nature of the bidding process under Amendment 57. Specifically, NAPM, despite the non-exclusivity clause, does not provide any requirements for multiple vendors to provide NPAC services. While a potential vendor might guess at what would be required of the industry or NAPM, that is clearly not an adequate procedure for implementing competitive NPAC services.

Instead of substantively addressing these significant issues, NeuStar and NAPM attack Telcordia’s 2005 bid proposal to NAPM.⁵⁰ They omit key facts. First, several NeuStar representatives were present at the meeting granted to Telcordia to present its bid. In other bidding processes, parties can at least request confidentiality for portions of their proposal. Telcordia could not afford to reveal – directly to its main competitor – sensitive commercial information pertinent to an effective bid. The same would be said of any other vendor submitting a proposal to NAPM. This is not a debate over whether confidentiality was available (though it wasn’t); the NeuStar representative’s presence sent a powerful message about NAPM’s openness to change. NAPM cannot credibly

⁴⁹ See Telcordia Petition at 16 n. 20, Appendix C at 4.

⁵⁰ NAPM Comments at 20-21; NeuStar Opposition at 11-12.

argue that “it has always given, even after implementation of Amendment 57, consideration to all prospective vendors.”⁵¹

Second, Telcordia is not asking NAPM to ‘chase after it.’⁵² Telcordia offered to present more detailed information to NAPM at a time when NeuStar would not be present. NAPM never responded to Telcordia or requested additional substantive information. NAPM only requested neutrality information. Amendment 57 was adopted in September 2006 after six months of negotiations with NeuStar, at least suggesting a connection between the discounts granted in Amendment 57 and the threat of competition by Telcordia.

Both NAPM and NeuStar argue that NAPM adhered to its own internal procedures and suggest that this is important.⁵³ NAPM’s “adherence to its own internal procedures” is irrelevant. Indeed, it should trouble the Commission and NAPM that adherence to NAPM procedures has resulted in a number portability administration contract that has not been subject to competitive bidding since 1997. This only proves that NAPM’s processes need revision. And since, with Amendment 57, NAPM cannot make the needed revisions, the Commission must do so. The Commission has ultimate authority over number portability matters.⁵⁴ NAPM has explicitly accepted the Commission’s authority and directives and acknowledged that its contracts are subject to

⁵¹ NAPM Comments at 4.

⁵² *Id.* at 15.

⁵³ *Id.* at 19-22; NeuStar Opposition at 26.

⁵⁴ *Second Report and Order* at 12351.

Commission authority.⁵⁵ The Commission has complete authority over NAPM and Amendment 57.

III. NO FURTHER RESORT TO NANC IS NEEDED OR USEFUL

In one final bid to avert Commission action, NeuStar claims that NANC is the proper forum to raise these issues. It suggests that the Commission has no authority to act until Telcordia “exhausts its remedies” with NANC. There is no NANC “exhaustion requirement” – nor could there be. First, and critically, NANC has no authority to provide the requested relief. NANC is simply a federal advisory committee created by the Commission. It cannot take action; its authority is limited to providing advice and recommendations (which it is perfectly free to do in this proceeding).⁵⁶ There is not – cannot be – a requirement to seek relief from an entity that cannot lawfully provide that relief. Second, NANC’s dispute resolution procedures are not even applicable to the issues raised by the Telcordia Petition. Third, Telcordia did raise the issue with NANC which – properly – created a written record which is now available to the Commission. But it also recognized that its formal dispute resolution procedures had not been invoked. At the April 17, 2002 NANC meeting Chairman Koutsky addressed this issue:

So I do want to make that clear that this is the public’s business and that what I’ve tried to do here is try to bring this issue out into the open. *If somebody sends me a letter on this type of issue, any party has that right, and I’m going to make sure that that be discussed and debated fully, and commission rules do provide for specific dispute resolution and process,*

⁵⁵ See 5 U.S.C. Appx. § 9; *Second Report and Order* at 12345, 12346-47.

⁵⁶ See 5 U.S.C. Appx. § 9.

*which I don't believe has been invoked in this setting at this point in time.*⁵⁷

The issues raised by the Telcordia Petition cannot be resolved by an Advisory Committee. They are the Commission's responsibility. Just as an agency is free to accept or reject any recommendation from a federal advisory committee, it is free to consider any issue under its authority. The longer these issues languish, the more harm will come to consumers and the industry. This issue is ripe for Commission review now.

CONCLUSION

The practical effect of Amendment 57's penalty provisions is to eliminate any real possibility of competition for number porting services until at least 2012 and – because of the provision mandating that future negotiations be kept secret – probably well beyond 2012. The parties most harmed by Amendment 57 are not vendors but carriers and consumers.

In order for the Commission to uphold its pro-competitive policies and vindicate the public interest, it must fix the broken number portability services bidding system and reform Amendment 57 now, by eliminating its anticompetitive provisions.

Respectfully submitted,

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⁵⁷ North American Numbering Council Meeting Minutes April 17, 2007 at 31-32 (emphasis added).