NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 15-1080

In the United States Court of Appeals for the District of Columbia Circuit

NEUSTAR, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS

AND

CTIA–THE WIRELESS ASSOCIATION, ET AL.,
INTERVENORS

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION
(WC DOCKET NOS. 07-149 & 09-109; CC DOCKET NO. 95-116)

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GLOSSARY OF ABBREVIATIONS

Commission .... Federal Communications Commission

Administrator ....Local Number Portability Administrator

Numbering Council ....North American Numbering Council

NAPM ....North American Portability Management LLC

INTRODUCTION

The Telecommunications Act's fundamental requirement that a numbering administrator be an "impartial entity," and the Commission's regulations implementing that requirement, are critical to fair and open competition in the telecommunications market. Congress demanded strict, structural impartiality to ensure that a numbering administrator will have no incentive to use its control over numbering resources to tilt the competitive playing field. In implementing that congressional mandate, the Commission specifically prohibited an entity "aligned with any particular telecommunications industry segment" from serving as the Local Number Portability Administrator.

The Commission violated both the Telecommunications Act and its own regulations when it took the unprecedented step of selecting the wholly owned subsidiary of a biased entity as a numbering administrator. The Commission never disputed—and, indeed, acknowledged for purposes of its order—that Telcordia's 100% owner, Ericsson, was aligned with the wireless segment of the telecommunications industry. As Ericsson's wholly owned subsidiary, Telcordia shares the identical disqualifying alignment as a matter of law. The Commission's contrary conclusion was based on a fundamental misapprehension of Delaware corporate law and warrants no deference from this Court. Indeed, even before this Court, both the Commission and intervenors ignore the dispositive Delaware authority cited by Neustar on the

critical point that the interests of a parent and a wholly owned subsidiary are indistinguishable under Delaware law.

In selecting Telcordia, the Commission acted improperly in other important respects. Telcordia should have been disqualified because it is an affiliate of a telecommunications equipment manufacturer, and because its 100% owner, Ericsson, has an interest in numbering administration by virtue of its extensive business relationships with wireless carriers. The Commission's refusal carefully to evaluate Ericsson's neutrality is indefensible in light of its rules and precedent, and the safeguards the Commission proposed to address Ericsson's influence over its wholly owned subsidiary are entirely ineffectual. Those safeguards do nothing to alter the fact that Telcordia's corporate purpose is to serve Ericsson's economic interests, and they have no effect on the duties of Telcordia's directors to Ericsson under Delaware law. What is more, the Commission violated the rulemaking requirements of the Administrative Procedure Act and arbitrarily and capriciously miscalculated the costs of the competing bids.

Unable to defend the Commission's order on its own merits, both the Commission and intervenors resort to a series of new arguments, asserting that the order should stand on grounds not enumerated in the order itself. But it is one of the most familiar principles of administrative law that "an agency's action must be upheld, if at all, on the basis articulated by the agen-

cy." *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983). The Commission's selection of Telcordia cannot stand, and this Court should vacate the Commission's order.

ARGUMENT

I. THE ORDER UNDER REVIEW CONSTITUTED FINAL AGENCY ACTION

The Commission asserts (Br. 28) that its order is not final because the Commission must still approve a contract between the NAPM and Telcordia. But "[f]inal orders are not limited to the last order issued in a proceeding." *Reuters Ltd.* v. *FCC*, 781 F.2d 946, 947 n.1 (D.C. Cir. 1986). The Commission's order determines "rights or obligations." *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997). Specifically, it "determines *immediately* which entity is authorized to negotiate [the Administrator] contract"; rejects all of Neustar's challenges to the selection of Telcordia; and "direct[s]" the NAPM to negotiate a contract with Telcordia "in accordance with this Order." *Order* ¶¶ 20, 193. The order also requires the immediate commencement of a transition to Telcordia and requires Neustar to participate in the transition process. *Id.* ¶¶ 193-194.

The Commission admits that "it is reasonable to assume that Telcordia and the NAPM will negotiate a contract that is acceptable to the Commission." FCC Br. 28. The remote possibility that the NAPM and Telcordia may fail to negotiate an acceptable contract does not render the Commis-

sion's decision non-final. "If the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule" would be final. *General Electric Co.* v. *EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

The Commission's reliance on *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015), FCC Br. 28-29, is misplaced. *Murray Energy* involved an effort to challenge a "*proposed* rule," which this Court had no authority to review. 788 F.3d at 333-334. The Commission's order is not a proposed rule (or an interlocutory order in an ongoing adjudication process); instead, it requires the immediate commencement of a transition to Telcordia, and thus "has a direct effect on the day-to-day business" of Neustar and the many other parties involved in the transition. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967). In light of its "direct and immediate" impact, the order is ripe for review. *Id.*

II. THE ORDER MUST BE VACATED BECAUSE TELCORDIA IS NOT 'IMPARTIAL' OR 'NEUTRAL'

The Commission's selection of Telcordia was contrary to law and arbitrary and capricious because Telcordia is not "impartial" or "neutral." In attempting to defend Telcordia's selection, the Commission and intervenors misstate fundamental principles of controlling Delaware law and misconstrue the Commission's own regulations.

A. The Commission Acted Contrary To Law And Arbitrarily And Capriciously By Concluding That Ericsson's Undisputed Alignment With The Wireless Industry Did Not Disqualify Telcordia

1. The Telecommunications Act requires a numbering administrator (including the Local Number Portability Administrator) to be an "impartial entit[y]." 47 U.S.C. § 251(e)(1). Where the potential Administrator is a wholly owned subsidiary, the statutory requirement of an "impartial entity" requires consideration of the corporate parent's partiality, because the parent and subsidiary share the same biases as a matter of law.

The Commission did not dispute—and, indeed, seemingly acknowledged—that Ericsson is aligned with the wireless segment of the industry (and thus ineligible to serve as Administrator) because it earns billions each year managing the networks of, and selling network equipment to, the major American wireless providers. *See Order* ¶ 172 & n.593. But the Commission went astray in concluding that "it does not follow that Telcordia is so aligned." *Id.* ¶ 172 n.593. Ericsson's alignment with the wireless segment disqualifies Telcordia because the "corporate purposes" of a parent and its wholly owned subsidiary are "one and the same" under controlling Delaware law. *Blish* v. *Thompson Automatic Arms Corp.*, 64 A.2d 581, 605 (Del. 1948); *accord Quadrant Structured Products Co.* v. *Vertin*, 102 A.3d 155, 184 (Del. Ch. 2014); *Grace Bros.* v. *Uniholding Corp.*, No. 17612, 2000 WL 982401, at *12 (Del. Ch. July 12, 2000). Neither the Commission nor intervenors ad-

dress the authorities supporting that proposition, which belie the Commission's assertion that Telcordia and Ericsson do not have a "unity of interest," FCC Br. 39, as well as intervenors' assertion that Telcordia and Ericsson merely "sometimes have common interests," Intervenors Br. 13.

Intervenors contend (Br. 3, 12-13) that Telcordia and Ericsson are separate legal entities. The pertinent question, however, is not whether Telcordia and Ericsson are "the same entity under the law" (Br. 13), or whether the corporate veil should be pierced (*id.*), but whether Telcordia is aligned with the wireless segment by virtue of Ericsson's alignment. The answer to that question is yes. Where, as here, a corporate parent is aligned with a particular industry segment, its wholly owned subsidiary will necessarily share that same bias because their interests are "fully aligned." *Quadrant*, 102 A.3d at 184; *accord Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (actions of parent and wholly owned subsidiary "are guided or determined not by two separate corporate consciousnesses, but one"). Thus, regardless of whether Telcordia is the relevant "entity," *see* Intervenors Br. 14, Ericsson's alignment with the wireless segment necessarily infects and disqualifies Telcordia, because Telcordia and Ericsson share the same interests as a matter of law.

2. The Commission's conclusion that Ericsson's undisputed alignment does not "spill[] over to Telcordia," *Order* ¶ 172 & n.593, was premised

on the erroneous notion that Telcordia is independent of Ericsson because it has a "separate independent board of directors" who "owe[] fiduciary duties to Telcordia." *Id.* But the Delaware Supreme Court has held that the directors of a wholly owned subsidiary "are obligated *only* to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Anadarko Petroleum Corp.* v. *Panhandle Eastern Corp.*, 545 A.2d 1171, 1174 (Del. 1988) (emphasis added). Numerous courts applying Delaware law have reiterated that principle, describing it as a "long settled rule." *Trenwick America Litigation Trust* v. *Ernst & Young, LLP*, 906 A.2d 168, 200 (Del. Ch. 2006) (internal quotation mark omitted), *aff'd sub nom.*, *Trenwick America Litigation Trust* v. *Billett*, 931 A.2d 438 (Del. 2007); *see also Quadrant*, 102 A.3d at 184; *Hamilton Partners, L.P.* v. *Englard*, 11 A.3d 1180, 1208 (Del. Ch. 2010); *Grace Bros.*, 2000 WL 982401, at *12 & n.31; *VFB LLC* v. *Campbell Soup Co.*, 482 F.3d 624, 635 (3d Cir. 2007).

The Commission's conclusion that Telcordia's board owes fiduciary duties to Telcordia, *Order* ¶ 172, is incorrect. The Delaware Supreme Court authoritatively construed Delaware law in *Anadarko*, and "the highest court of the state is the final arbiter of what is state law." *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940). In light of *Anadarko* (and the numerous decisions reiterating its principle), this Court should reject the Commission's and intervenors' reliance on (i) inapposite bankruptcy cases

that apply an exception to the *Anadarko* principle where the wholly owned subsidiary is insolvent, *see* FCC Br. 33; (ii) fiduciary duty cases that do not involve wholly owned subsidiaries, *see* Intervenors Br. 22; and (iii) decisions by non-Delaware courts, *see* FCC Br. 33; Intervenors Br. 23.

3. Perhaps recognizing the force of Delaware law, intervenors contend in the alternative (Br. 13) that Telcordia's neutrality presents a purely *federal* question. In its order, however, the Commission did not purport to displace Delaware law concerning the fiduciary duties of corporate directors. Quite the opposite. The Commission applied, but fundamentally misconstrued, Delaware corporate-law principles, having been affirmatively misled by an opinion letter from Telcordia's counsel that misstated the law. *Order* ¶¶ 172, 178-179; *see* Letter from John T. Nakahata, Counsel, Telcordia, to the NAPM and NAPM Subcommittee, at Telcordia06081-06082 (Apr. 4, 2013) (asserting that, "[u]nder generally accepted corporate law principles, the directors will have fiduciary duties of both care and loyalty to Telcordia itself, as well as to its shareholders").

The Commission also contends that "nothing in the language or legislative history of the statute" shows that Congress considered corporate-law principles when it enacted Section 251(e)(1). FCC Br. 32. But that contention misses the point. The Commission's order purported to apply corporate-law principles in concluding that Telcordia could be impartial even though

Ericsson is not; its mistaken understanding of Delaware law thus fatally undermines the order on its own terms. Moreover, absent any contrary indication of congressional intent, this Court should presume that Congress considered corporate-law principles when it enacted Section 251(e)(1). *See International Brotherhood of Painters & Allied Trades Union* v. *George A. Kracher, Inc.*, 856 F.2d 1546, 1550 (D.C. Cir. 1988).

4. The "impartial entity" requirement must also be read in light of the "background of th[e] regulatory history" that preceded Congress's passage of the Telecommunications Act. *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967, 992-993 (2005). At the time it passed the statute, Congress was aware of the Commission's "ongoing proceeding on numbering administration" related to Bellcore, S. Rep. No. 104-23, at 52 (1995), including the Commission's determination that Bellcore's 100% ownership by the Bell companies raised a "potential conflict of interest" that should be addressed by the "selection of a new" administrator, *Administration Report and Order* ¶ 31. The Commission's selection of the wholly owned subsidiary of a biased entity "frustrate[s] the policy that Congress sought to implement" in Section 251(e)(1). *Shays* v. *FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (citation omitted). Indeed, following the passage of the Telecommunications Act, the Commission itself recognized that an entity owned by the Bell companies cannot be impartial. *Third Report and Order*,

12 FCC Rcd. 23040, ¶¶ 99-110 (1997). Tellingly, the Commission's order here contains "no assessment of statutory objectives [or] weighing of congressional policy." *Alarm Industry Communications Committee* v. *FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997).

5. Unable to rebut the proposition that Telcordia should be disqualified because it shares Ericsson's alignment with the wireless segment as a matter of law, the Commission and intervenors attempt to conflate that question with the *separate* question whether Telcordia should be disqualified under the specific neutrality criteria enumerated in 47 C.F.R. § 52.12(a)(1)(i)-(iii). *See* FCC Br. 39-40; Intervenors Br. 7-9, 21. But that attempt disregards the plain language of the regulations and the Commission's regulatory history.

The three subsections of Section 52.12(a)(1) are not, and do not purport to be, the exclusive criteria for determining whether an entity is disqualified from serving as a numbering administrator. To the contrary, as the Commission has explained (with express reference to Section 52.12(a)(1)), "*[i]n addition to* meeting the Commission's requirements set forth in the regulations," a numbering administrator "must be impartial[] and may not be aligned with any particular telecommunications industry segment." *Warburg Transfer Order*, 14 FCC Rcd. 19792, ¶ 18 & n.81 (1999) (emphasis added). Similarly, 47 C.F.R. § 52.21(k) defines the Local Number Portability

Administrator as "an independent, non-governmental entity, not aligned with any particular telecommunications industry segment," without any reference to Section 52.12.

Consistent with the Commission's rules and binding regulatory precedent, the Commission's order treated alignment as a separate neutrality criterion. *See Order* ¶¶ 160 & n.565, 172. The Commission's contrary position before this Court is entitled to no deference. An entity that fails the alignment requirement is ineligible to serve as Administrator, regardless of the criteria enumerated in the three subsections of Section 52.12(a)(1). *See Warburg Transfer Order* ¶¶ 3, 18. In addition, an Administrator aligned with a particular industry segment is disqualified because it lacks the "appearance" or "perception" of impartiality, *id.* ¶ 3; *Administration Report and Order*, 11 FCC Rcd. 2588, ¶ 57 (1995)—an important consideration that the Commission wholly ignores in both its order and brief.

6. Finally, the Commission claims (Br. 21) that its "safeguards" ensure Telcordia's impartiality. But the Commission did not purport to use safeguards in order to cure Telcordia's alignment problem. Instead, the Commission simply asserted that Telcordia had no alignment problem at all—because the Commission erroneously concluded, based on its misunderstanding of Delaware corporate law, that Ericsson's alignment with the wireless segment did not infect Telcordia. *Order* ¶ 172 & n.593.

Even if the Commission had attempted to use safeguards to address Telcordia's alignment problem, they would be ineffectual. Safeguards cannot alter the fundamental principle that a wholly owned subsidiary shares the interests—and alignment—of its parent as a matter of law. The Commission has recognized that "it would be very difficult, if not impossible[,] for a[n] [a]dministrator closely associated with a particular segment of the telecommunications industry to be impartial." *Administration Report and Order* ¶ 57. And even if such an administrator were impartial, "there would still likely be the perception and accusations that it was not," *id.*; *Warburg Transfer Order* ¶ 3. Because the Commission does not dispute that Ericsson is aligned with the wireless segment of the industry, and Telcordia shares that alignment as a matter of law as Ericsson's wholly owned subsidiary, Telcordia is disqualified from serving as Administrator.

B. The Commission Acted Arbitrarily and Capriciously By Selecting The Affiliate Of A Telecommunications Equipment Manufacturer As Administrator

As the Commission acknowledges, "[t]here is no dispute that Ericsson is an equipment manufacturer," FCC Br. 37, or that Telcordia is an affiliate of Ericsson. The Commission's refusal to disqualify Telcordia on that basis was arbitrary and capricious.

The Commission contends (Br. 38) that 47 C.F.R. § 52.26(a), the regulation incorporating the recommendations of the Numbering Council, did not

incorporate the recommended equipment-manufacturer prohibition. But Section 52.26(a) broadly incorporates "the recommendations . . . set forth" in the Numbering Council's Selection Working Group Report. One of those "recommendations" was that the Commission "adopt[] . . . the process used to make [Administrator] vendor selections" "extensively discussed in [s]ection 4." *Selection Working Group Report* §§ 6.4.4, 6.4.5. For its part, section 4 provides that, in order to prevent a "conflict of interest," the Administrator cannot be "any entity with a *direct material financial interest* in manufacturing telecommunications network equipment" or "any entity affiliated in other than a de[] minim[i]s way" with such an entity. *Id.* § 4.2.2(B)(2)-(3).

The Commission's contention that Section 52.26(a) only "addresses 'local number portability administration,' not the selection of the Administrator," FCC Br. 38 n.27, cannot be reconciled with its contemporaneous interpretation at the time it adopted the rule in 1997. The Working Group Report was the product of the Commission's express request for, *inter alia*, "recommendations regarding the administration selection process." *Second Report and Order*, 12 FCC Rcd. 12281, ¶ 10 (1997). The Commission explained that the Report, whose recommendations were incorporated into the rule, provided "[the Numbering Council's] recommendations on number portabil-

ity administration," including recommendations regarding "how the local number portability administrator(s) should be selected." *Id.* ¶ 15.

Thus, when the Commission adopted Section 52.26(a) in 1997, it unambiguously incorporated the Working Group Report's recommendations concerning the process for selecting the Administrator. Because the Working Group Report recommended "adoption of the process used to make [Administrator] vendor selections," as "extensively discussed in [s]ection 4," *Selection Working Group Report* §§ 6.4.4, 6.4.5, the Rule's incorporation included section 4's ban on equipment manufacturers and their affiliates.

The Commission contends (Br. 38) that its interpretation of Section 52.26(a) is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). As a preliminary matter, *Auer* was wrongly decided. *See Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). But even assuming the continued validity of *Auer*, Section 52.26(a) unambiguously incorporates the equipment manufacturer (and affiliate) ban, rendering *Auer* inapplicable. *See Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000).

Furthermore, several exceptions to *Auer* deference apply here. The Commission's current interpretation of its rule, which is nothing more than a "convenient litigating position," is diametrically opposed to its "fair and considered judgment" on the matter in 1997. *Christopher* v. *SmithKline Bee-*

cham Corp., 132 S. Ct. 2156, 2166 (2012) (citations omitted). It also is "plainly erroneous," *Auer*, 519 U.S. at 461, for the reasons set forth above. The Commission provides no reasoned explanation for its claim that it rejected the Numbering Council's conclusion that telecommunications equipment manufacturers and their affiliates should not be Administrators because they have an inherent "conflict of interest." *Selection Working Group Report* § 4.2.2. That conclusion was well-founded, because the Working Group recognized that equipment manufacturers (such as Ericsson) would naturally tend to favor their customers. Finally, the Commission's current interpretation would create "unfair surprise," *Christopher*, 132 S. Ct. at 2167, because it leaves the public in the dark about which of the Report's recommendations have been incorporated.

The Commission violated its own regulation and acted arbitrarily and capriciously when it refused to disqualify Telcordia as an affiliate of a telecommunications equipment manufacturer.

C. The Commission Acted Arbitrarily And Capriciously By Disregarding Ericsson's Lack of Neutrality

The Commission also acted arbitrarily and capriciously when it refused to undertake a meaningful evaluation of Ericsson's neutrality before determining whether Ericsson's wholly owned subsidiary should be disqualified under 47 C.F.R. § 52.12(a)(1). Insofar as the Commission contends (Br. 40) that it had no obligation to evaluate Ericsson's neutrality because Telcordia

is purportedly an independent entity, that contention rests on a fundamental misunderstanding of Delaware law. *See* pp. 5-8, *supra*. The Commission offers no explanation for its refusal to inquire into Ericsson's entanglements with wireless providers **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**.

The Commission's contention that the Warburg Transfer Order is "strongly supportive of the Commission's actions here," FCC Br. 41, is incorrect. In that order, the Commission thoroughly evaluated the affiliations of Warburg, the private-equity firm that was Neustar's proposed majority owner, even though Neustar, not Warburg, was the proposed administrator. *See Warburg Transfer Order* ¶¶ 8, 28-30. The Commission's refusal to do the same here with Telcordia's 100% owner—an entity that bills itself as "the largest telecom services provider in the world"—was arbitrary and capricious. Unlike Warburg, which had small investments in a number of different telecommunications entities, Ericsson's extensive ties with major wireless carriers give it a strong interest in ensuring that Telcordia's numbering-related activities advantage Ericsson's customers. The Commission itself recognized that Ericsson may be "tempted to prioritize" its significant contracts and sales with its wireless customers "over the [Administrator] contract." *Order* ¶ 181.

The Commission's attempt to address Ericsson's influence over Telcordia with "safeguards" is ineffectual. Because, as discussed above, Telcordia and Ericsson share the same interests as a matter of Delaware law, it is nonsensical for the Commission to suggest that it can employ safeguards to insulate Telcordia from Ericsson's influence. The Commission cites no previous instance in which it has used safeguards to address a parent corporation's undue influence on a wholly owned subsidiary serving as a numbering administrator, and we are aware of none. To the contrary, the Commission previously disqualified Bellcore's wholly owned subsidiary precisely because of Bellcore's lack of impartiality. *See Third Report and Order* ¶¶ 99, 109-110 (determining that, "as presently structured, toll free number database administration" was "inconsistent with section 251(e)(1)" and directing the Numbering Council to recommend a new entity to serve as administrator).

In light of the Commission's mistaken belief that Telcordia's directors owe "fiduciary duties to Telcordia," *Order* ¶ 172, the Commission's order did not consider how Telcordia could conduct itself in a neutral manner through "safeguards" with directors whose fiduciary duties run solely to Ericsson. The Commission now asserts that Telcordia's directors are required to ensure that Telcordia follows the law—and that, as a result, Telcordia's directors must "comply with the Commission's neutrality mandates." FCC Br. 36.

But the Commission did not rely on any such duty in its order. Instead, it relied on the erroneous assumption that Telcordia's directors were "independent" and owed fiduciary duties to Telcordia. *Order* ¶¶ 172, 179, 181.

Nor is the Commission helped by cases recognizing a duty to follow generally applicable civil or criminal law. FCC Br. 35. The safeguards negotiated between the Commission and Telcordia are not generally applicable law. And the statutory burden of ensuring "impartial" numbering administration falls not on Telcordia's directors, but rather on the *Commission*, which is required to select only an "impartial entity" as an Administrator. In any event, the Commission's argument proves far too much. In the Commission's view, even the most partial entity could be deemed neutral by a requirement that it "comply with the Commission's neutrality mandates." Under that view, the Commission could have selected Ericsson itself as the Administrator—or Verizon or AT&T—through the simple expedient of imposing a condition that its directors comply with the Commission's neutrality demands, effectively nullifying both Section 251(e) and its own regulations.

Ericsson's offer to the Commission to take steps to address any neutrality concerns (Intervenors Br. 24) does not alter the analysis. In response to Ericsson's offer, the Commission required Ericsson to transfer its voting stock in Telcordia into a voting trust, of which Ericsson is the sole beneficiary. *Order* ¶ 182. But the creation of a voting trust does nothing to ensure

Telcordia's neutrality or to change Telcordia's obligation to serve the economic interests of its 100% owner. And the limited powers of the voting trustee have no effect on the "constant" and "unremitting" fiduciary duties of Telcordia's directors, which continue to run to Ericsson under Delaware law. *Malone* v. *Brincat*, 722 A.2d 5, 10 (Del. 1998) (en banc); *accord Paramount Communications Inc.* v. *QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994).

The Warburg Transfer Order does not support the claimed efficacy of the Commission's proposed safeguards, either. In approving the use of a voting trust there, the Commission expressly relied on the presence of additional shareholders; at least 25 individual trust beneficiaries; and "unaffiliated directors and trustees, who owe fiduciary duties to parties other than Warburg." *Warburg Transfer Order* ¶¶ 10-11, 32. Here, in sharp contrast, Ericsson remains Telcordia's sole owner and the only trust beneficiary, and there are no Telcordia directors who owe fiduciary duties to parties other than Ericsson. The safeguards do not and cannot cure either Ericsson's bias or its influence on its wholly owned subsidiary.

III. THE COMMISSION VIOLATED THE ADMINISTRATIVE PROCEDURE ACT BY FAILING TO ENGAGE IN NOTICE-AND-COMMENT RULEMAKING

The Commission provides no valid justification for its conceded failure to comply with the notice-and-comment procedures in the Administrative

Procedure Act. The Commission's order should be vacated on that basis as well.

A. Neustar Did Not Forfeit Its Claim That Rulemaking Was Required

The Commission's contention (Br. 44) that Neustar forfeited its claim that rulemaking was required is meritless. Forfeiture is premised on a party's failure to object when a claim is "fully known." *JEM Broadcasting Co.* v. *FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994). A claim based on an agency's failure to proceed by notice-and-comment rulemaking is not "fully known" until the agency acts without a rulemaking. *Id.* Further, "when a party complains of an agency's failure to provide notice and comment prior to acting, it is that failure which causes 'injury'; and interested parties are 'aggrieved' by the order promulgating the rules." *Id.* The challenged APA violation here did not occur until March 2015, when the Commission issued its order selecting Telcordia and making significant policy determinations without a rulemaking. Neustar asserted the need for rulemaking as early as April 2014 and continued to object thereafter.

The Commission's Wireline Competition Bureau's May 2011 order, which authorized the Numbering Council to recommend the selection of the next Administrator, did not state or even suggest that the Commission would abandon the rulemaking procedures that it followed in selecting Neustar's predecessor-in-interest in 1997. And as in 1997, the appropriate time for a

rulemaking would have been *after* the Commission received the Numbering Council's recommendation.

There is likewise no basis for estoppel. Neustar's support for the selection process outlined in the May 2011 order cannot be read as support for the Commission's subsequent decision not to engage in rulemaking, because the May 2011 order says nothing about the subject. The Commission's thirty-day deadlines for objecting to an order presuppose that a party has been "aggrieved" by the order. 47 C.F.R. § 1.115(a); *see* 47 C.F.R. § 1.106(b)(1). Neustar was not aggrieved by the May 2011 order, and its claim did not ripen until the Commission acted without a rulemaking in March 2015. *See JEM Broadcasting*, 22 F.3d at 326.

B. The Commission's Order Constituted An Exercise In Rulemaking

The selection of Telcordia as the next Administrator involved an exercise of the Commission's legislative authority and therefore required compliance with the APA's notice-and-comment procedures.

As a preliminary matter, the Commission entirely fails to address the fact that its order addressed—only prospectively, and in many instances for the first time—numerous issues of public importance relating to Telcordia's selection, including (a) transition costs and risks; (b) public-safety and law-enforcement issues arising from a transition; (c) national-security issues; (d) cybersecurity concerns; and (e) issues concerning Telcordia's neutrality.

All of those issues indisputably implicate important policy considerations and "affect[] the rights of broad classes of unspecified individuals." *City of Arlington* v. *FCC*, 668 F.3d 229, 242 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013). For that reason alone, the Commission was required to comply with the APA's notice-and-comment rulemaking procedures.

Further, the Commission's order repealed and amended an existing legislative rule designating the Administrator that was adopted pursuant to notice-and-comment rulemaking. It also altered the Commission's neutrality rules. Because agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance," *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015), the Commission could not proceed by adjudication in selecting the Administrator or modifying its neutrality requirements.

The Commission does not dispute the foregoing principle. Instead, it argues that, when it adopted Section 52.26(a) in 1997, only "the standards and duties of the [Administrator] with respect to number portability, not the choice of administrator," were accomplished through rulemaking. FCC Br. 50. But that argument is at odds with the plain text of Section 52.26(a). *See* pp. 12-13, *supra*. It is also belied by the Commission's contemporaneous statement in 1997 that the selection of the Administrator was one of the "recommendations on number portability administration" in the Working Group

Report that the Commission adopted by rule. *See Second Report and Order* ¶¶ 15, 33. Indeed, the choice of the Administrator was the *primary* recommendation highlighted in the proposed rule that was the forerunner of Section 52.26(a). *See NANC Issues Recommendations Regarding the Implementation of Telephone Number Portability*, 62 Fed. Reg. 25,157 (1997).

As part of its 1997 order adopting Section 52.26(a), moreover, the Commission conducted a Regulatory Flexibility Act analysis—which is required only in connection with rulemaking, as the Commission acknowledges. *See* FCC Br. 51 n.31. In describing the subject matter of its assessment, the Commission referred to its decision to "adopt the recommendations of the [Numbering Council] regarding the selection of local number portability administrators" and other matters. *Second Report and Order*, app. C, ¶ B (p. C-2). The Commission plainly understood both that the recommendations concerning the selection of the Administrator stood on the same footing as other recommendations concerning portability administration, and that all of those recommendations were encompassed by the new rule.

Nor is there any merit to intervenors' argument (Br. 33) that, even if the Commission codified the original selection of the Administrator in its regulation, that selection expired upon the termination of the Lockheed contract. Intervenors' argument is based on a misunderstanding, because the original Lockheed contract never expired but was instead assigned to

Neustar; indeed, it remains in effect, as amended, to this day. Similarly, the fact that Lockheed IMS, Neustar's predecessor-in-interest, was authorized to act as sole Administrator after Perot Systems experienced performance issues did not require a rulemaking, because Lockheed had already been selected by rule.

Further, Section 251 itself requires the Commission to proceed by rulemaking when selecting an "impartial entity" as the numbering administrator. The Commission argues that Section 251(d)(1) and *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), at most speak to the *initial* regulations that the Commission was required to adopt after the 1996 Act, and do not "resolve[] the question whether the designation of an administrator under Section 251(e) must always be done via rulemaking." FCC Br. 47-48. But that point supports Neustar's argument: if the initial selection had to be done via rulemaking, any change to that selection must be accomplished by rulemaking as well. *See Perez*, 135 S. Ct. at 1206.

The Commission's attempt to compare this proceeding to licensing proceedings (Br. 46) similarly undermines its argument. The APA states that an order—the outcome of an adjudication—consists of an agency's disposition "in a matter other than rule making *but including licensing*." 5 U.S.C. § 551(6) (emphasis added). There would have been no reason to in-

clude the final phrase unless licensing would otherwise qualify as rulemaking, not adjudication.

The Commission's assertion that the selection of Telcordia affects only "specific individuals," FCC Br. 45, ignores the effects of its order on the thousands of service providers that rely on and pay for the Administrator's services and the costs of the transition, as well as the millions of customers served by those providers. And in maintaining that the order's solely prospective effect does not preclude it from being an adjudication rather than a rule, *see* FCC Br. 46, the Commission ignores this Court's statement to the contrary. *See Catholic Health Initiatives Iowa Corp.* v. *Sebelius*, 718 F.3d 914, 921-22 (D.C. Cir. 2013). Adjudications *may* have prospective effects, but they *must* have retrospective effects. *See*, *e.g.*, *Goodman* v. *FCC*, 182 F.3d 987, 994-995 (D.C. Cir. 1999). Because the selection of Telcordia indisputably has no retrospective effect, it cannot be an adjudication.

C. The Commission's Failure To Conduct Notice-And-Comment Rulemaking Was Not Harmless

The Commission invokes the harmless-error doctrine in substance, if not in name. *See* FCC Br. 51-52. That circumspect wording is for good reason, because this Court has "not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice." *Allina Health Services* v. *Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014). "The most egregious are cases in which a gov-

ernment agency seeks to promulgate a rule by another name—evading altogether the notice and comment requirements." *Id.* The Court should not excuse the Commission's evasion of those requirements here.

Neustar has shown that it suffered considerable prejudice from the Commission's APA violation; the Commission's terse response fails to contradict Neustar's showing. The Commission emphasizes that it "sought comment" on the Numbering Council's recommendation, FCC Br. 51, and that Neustar "had actual notice of the selection process," *id.* at 52 n.32. But the public notice contained no hint of the Commission's ultimate resolution of the many significant policy issues addressed in the order, nor did it provide any notice that the Commission was considering altering its neutrality requirements to select Telcordia. And the mere fact that Neustar understandably attempted to anticipate certain issues in its comments does not render the APA violation harmless. The Commission provided no opportunity to comment on the actual reasoning behind its decision; as a result, Neustar and other interested parties were left to speculate when preparing their comments.

While the Commission contends that Neustar has not "identif[ied] any benefit" from notice-and-comment rulemaking, FCC Br. 51, the Commission ignores the possibility that a proper notice would, among other things, have alerted it to its fundamental misunderstanding of Delaware corporate law,

provided a broader record on which to evaluate likely transition costs, and sought comment on potential consideration of Neustar's revised offer. And although the Commission faults Neustar for challenging the absence of a Regulatory Flexibility Act analysis because Neustar is not a small business itself, *see* FCC Br. 51 n.31, the Commission has no response to the point that small businesses were, in fact, negatively affected by the Commission's error. Because the Commission's violation of the APA was not harmless, its order should be vacated.

IV. THE COMMISSION'S EVALUATION OF THE COMPETING PROPOSALS WAS ARBITRARY AND CAPRICIOUS

The Commission asserts that "choosing the lower bidder made sense." FCC Br. 52. But the lower-cost option here was Neustar, not Telcordia. The Commission's contrary conclusion was based on its arbitrary and capricious miscalculation of the costs associated with a transition to Telcordia and its unfounded refusal to consider Neustar's best offer.

A. The Commission's Selection Was Based On Its Assessment Of The Costs Of The Two Bids

In an effort to minimize the significance of its fundamental miscalculation of transition costs, the Commission contends (Br. 52-53, 58) that its selection decision was not based entirely on its assessment of the costs of the two bids **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].

That contention cannot be squared with the findings in the Commission's order. In describing the process that led to the Numbering Council's recommendation, the Commission noted that, "[w]hile both bidders had similar evaluation results with respect to Technical and Management capabilities," **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. But the Commission's order expressly *disavowed* any reliance on that consideration; instead, the Commission concluded, based on "the bidders' considerable experience in numbering administration and database management," that it was "confident that both Telcordia and Neustar are qualified to be the [Administrator]." *Id.* ¶ 81. The Commission emphasized that it had "fully considered the complete record and exercised [its] independent judgment" and that it was not "simply rubber-stamping the recommendation" of the Numbering Council." *Id.* ¶ 33. This Court should therefore disregard the Commission's current claim that other factors supported Telcordia's selection. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

B. The Commission's Assessment Of Costs Was Based On An Unsupported And Erroneous Assumption About Transition Costs

The Commission has no valid response to Neustar's showing that the Commission fundamentally miscalculated the expected costs of transition.

First, the Commission claims that the order "never suggests that the transition would be completed by July 2016." FCC Br. 55. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**. While the Commission asserts that it "posited a transition period of up to 18 months," FCC Br. 55, the paragraph of the order it cites merely explains a term of Neustar's existing contract; it says nothing about the expected duration of the transition. *See Order* ¶ 146.

Second, the Commission ignores uncontradicted record evidence (including the NAPM's own estimate) that a transition would take at least two and a half years. The materials cited by the Commission, *see* FCC Br. 55 n.34, do not support the assumption in the order concerning the anticipated duration of the transition. After the Commission issued the order, the NAPM extended Neustar's existing contract for fifteen months, with the

possibility for renewal, *see* FCC Br. 7 n.7, 55—confirming that the transition would take longer than the Commission assumed in the order.

Third, the Commission attempts to redo its calculation of transition costs. *See* FCC Br. 57-58. But the Commission's new math fares no better than its old math. The Commission asserts (Br. 58) that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** and that the appropriate cost comparison is between the one-year price of Neustar's extended contract and the first-year price in Telcordia's bid. But the Commission is incorrect in both respects. The relevant comparison is between the cost of the two potential contracts over the next seven years, because Neustar's new seven-year contract would have begun immediately. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Thus, even without considering Neustar's best offer, the Commission's assessment of costs was arbitrary and capricious.

Fourth, the Commission argues that Neustar's estimate of industry transition costs may have been too high. *See* FCC Br. 57. But the Commission made no such finding in its order. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**.

Fifth, the Commission pays lip service to the notion that "competitive selections bring opportunities for lower costs and innovation." FCC Br. 56. If Telcordia's proposal had offered superior technology or "innovation," its bid might have been selected on that basis. But that was not the case. Selecting the lower-cost proposal does not "eviscerate" the benefits of competition, it reaps them—and the lower-cost bid, when all of the relevant costs are considered, was Neustar's.

C. The Commission Provided No Reasoned Explanation For Refusing To Consider Neustar's Best Offer

Neither the Commission nor intervenors contest that, if the Commission had considered Neustar's best offer, it could not reasonably have selected Telcordia.

The Commission suggests (Br. 53-54) that the NAPM subcommittee decided to end the bidding because of concern over delay, but the Court should not be misled. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] Nor is there any merit to the Commission's suggestion (Br. 25, 53) that Neustar's effort to submit a further bid was inconsistent with the rules of the bidding process. Although the *draft* request for proposal reserved to the NAPM the right to request a single "best-and-final" offer, that language was removed from the final request, indicating that NAPM anticipated the possibility of multiple rounds of best-and-final offers. *Compare* Draft RFP § 13.6 *with* Final RFP § 13.6.

Finally, while the Commission claimed in its order that, "[u]ntil recently, the Commission was not presented with details about Neustar's second

[best and final offer]," *Order* ¶ 145, the record belies that statement, and the Commission does not defend it. And it is hardly "absurd" (FCC Br. 25) to challenge the Commission's failure to take into account the information most relevant to the issue on which its selection decision turned. That error, like the many others infecting this proceeding, warrants vacatur of the Commission's order.

CONCLUSION

The order of the Federal Communications Commission should be vacated.

Respectfully submitted,

s/ Kannon K. Shanmugam

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NOVEMBER 25, 2015

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for petitioner and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Reply Brief of Petitioner Neustar, Inc., is proportionately spaced, has a typeface of 14 points or more, and contains 6,998 words.

s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

NOVEMBER 25, 2015

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for petitioner and a member of the bar of this Court, certify that, on November 25, 2015, a public copy of the attached Reply Brief of Petitioner Neustar, Inc., was filed with the Clerk through the Court's electronic filing system. The brief was delivered to the Clerk to be filed under seal on the same day. I further certify that all parties required to be served have been served the public copy of the brief through the Court's electronic filing system and will be served two copies of the brief under seal by third-party commercial carrier for delivery within three days, pursuant to Federal Rule of Appellate Procedure 25(c)(1) and Circuit Rules 25(f), 31(b), and 47.1(d)(2).

s/ Kannon K. Shanmugam
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