Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Sandwich Isles Communications, Inc.	)	CC Docket No. 96-45
Petition for Waiver of the Definition of "Study	)	
Area" Contained in Part 36, Appendix-Glossary	)	
And Sections 36.611 and 69.2(hh) of the	)	
Commission's Rules	)	
	)	
Sandwich Isles 214 Authorization	)	WC 16-405
	)	

MOTION TO REVISE PROTECTIVE ORDER

Sandwich Isles Communications, Inc., ("SIC") by its attorneys respectfully but strenuously maintains that the Commission must clarify and as necessary amend the "Sandwich Isles Protective Order" issued by the Commission *sua sponte* in the above captioned Dockets. We wish to emphasize at the outset that SIC does not object to the inclusion in the record in the newly designated Docket 16-405 of documents filed with USAC or the Commission relating to the USAC audit that is the subject of the Order FCC 16-167. On the contrary, we have assumed that these documents are already in the record in WC Docket 10-90 since they were ostensibly relied upon by the Commission in the issuance of FCC16-167, and subject to the Freedom of Information Act ("FOIA").

Nor do we object to the intent of the March 13 Order which is to allow parties with a legitimate and bona fide interest in the proceeding access to that record through a Protective Order which protect SIC's rights under the Freedom of Information Act. We insist, however, that the March 13 Order and --- to the extent that it is meant to have legal effect --- the

accompanying Public Notice must be clarified because they (a) utterly fail to define the scope of materials subject to protection and seemingly involve materials that are no longer subject to the Commission's jurisdiction, (b) establish procedures that have no meaningful application in the present situation, and (c) set up a process that makes it virtually impossible for SIC to object to the disclosure of a particular document or documents. The Order, in a word, transgresses orderly procedure as mandated by the Administrative Procedure Act ("APA") and the Constitution. It must therefore be revised and, as appropriate, amended as outlined below.

THE SCOPE OF THE PROTECTIVE ORDER IS SO VAGUE AS TO BE INCOHERENT

At the threshold, the Protective Order is internally inconsistent. Paragraph 14 of the Order states that persons obtaining information under the Protective Order may use that information "solely for the preparation and conduct of the USAC Investigation Proceeding and the Related Proceedings." Paragraph 3 of the Order states, however, that the Protective Order "does **not** apply to the USAC Investigation Proceeding or the Related Proceedings." (Emphasis added). This is incoherent: If the Protective Order does not apply to the USAC Investigation Proceeding what proceeding does it apply to? It is true that the Caption of the Protective Order adds the recently designated WC 16-405 Docket, but there have been no filings in that Docket to date, and the Order purporting to establish the Protective Order specifically refers to the "USAC Investigation Proceeding" which was carried and putatively completed long before Docket WC16-405 was established. Perhaps the "not" is a typographical error. At all events, the Scope of the Order must be clarified.

Nor is it enough to resolve the internal inconsistency in the text itself. The Order refers to "Related Cases" but that term is nowhere defined. That term would arguably include the FCC

Decision *In the Matter of AT&T Application for Review; Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, WC Docket No. 09-133 (Dec. 5, 2016) (The "NECA Order"); but that case is now pending on appeal to the D.C. Circuit and no longer subject to the Commission's jurisdiction. It is possible that Public Notice DA 17-242 (which actually was released before the March 13 Order) is meant to resolve the confusion created by the terms of the March 13 Order, it recites that:

> "[P]ersons seeking to review the unredacted versions of these materials may do so only for purposes of participating in proceedings with respect to (i) the Universal Service Administrative Company (USAC) investigation concerning Sandwich Isles receipt of universal service fund (USF) support (USAC Investigation); (ii) the 2005 waiver Sandwich Isles received to be treated as an incumbent local exchange carrier serving the Hawaiian Home Lands for purposes of receiving universal service support; (iii) Sandwich Isles' Commission authorizations; and (iv) whether Sandwich Isles' exclusive license to serve the Hawaiian Home Lands conflicts with section 253(a) of the Communications Act5 (collectively, the "Related Proceedings"). Public Notice, DA 17-242 p.1-2 (Dated March 13, 20016; released March 14, 20016).

The confusion is compounded by the statement that "persons seeking to review unredacted version of materials" may do so only for purposes of participating in the enumerated Dockets. But the Dockets referenced in the Public Notice does not include the newly created Docket that ostensibly deals with the issues raised in Paragraph 58 of FCC 16-167. Moreover, the deadline for filing Comments related to the 214 Authorization was March 16, 2017. The Public Notice thus implies that a further pleading cycle is to be established in one or perhaps more of the Dockets enumerated in the Protective Order. The Commission cannot lawfully do this through the issuance of a Protective Order. If the Commission really intends to re-open the record in WC 10-90 it can only do so by granting SIC's Petition for Reconsideration and not through a Protective Order issued after the fact.

In short, the scope of the Protective Order is fatally undefined and unintelligible. The Commission must therefore issue a revised Order which specifies precisely what documents in

what docket are protected, and the Commission must make clear that documents in the record that are not covered by the Protective Order are subject to the full protection of the Freedom of Information Act and the procedures specified in Sections 0.459 and 0.461 of the Commission Rules. That may be the intended purpose of Paragraph 19 of the March 13 Order, but that conclusion is hardly self-evident given the incoherence of the defined terms.

THE PROCEDURES SPECIFIED IN THE ORDER CANNOT BE APPLIED BECAUSE THE DOCUMENTS ARE ALREADY IN THE RECORD

The second and equally fatal problem with this Order is that its terms are simply unworkable in this context because the documents at issue are already a part of a fully protected record. This Order contemplates that the "Submitting Party" --- almost invariably SIC --- will "stamp" documents as Confidential and Highly Confidential in accordance with the standards embodied in the March 13 Order and its appendix. In the normal case, "stamping" occurs at the time the documents are submitted to the Commission and the failure to stamp is generally treated as a concession that protection under the FOIA is not sought. *See, e.g.* 47 CFR Sec. 0.457(d)(2).

But, in this case the vast majority of the documents covered by the Protective Order were submitted in response to an investigation that was categorically exempt from third party disclosure and therefore did not require stamping at the time of submission. *See* 5 U.S.C. 552(b)(7)(B). This Protective Order is nothing more than a relaxation of the protections to which SIC was entitled at the time it submitted its documents to allow certain "interested parties" access to those documents for specific purposes. The application of the "stamping rules" in this case would retroactively deprive SIC entirely of its FOIA protections and thereby raise fundamental due process concerns. The only viable solution is for the Commission to declare all of the documents it has placed into the record and subject to the Protective Order (once its scope

has been defined) "Highly Confidential" unless the original Submitting Party elects to waive that designation upon a specific request.

THE PROCEDURAL SCHEDULE EFFECTIVELY DEPRIVES SIC OF ANY PROTECTIONS AGAINST IMPROPER OR UNWARRANTED ACCESS TO SENSITIVE AND CONFIDENTIAL MATERIALS

Entirely without explanation or justification, the Order provides that any objection to the release of documents to a third party must be filed within three business days after "receiving a copy of that person's Acknowledgment." March 13 Order at paragraph 11. There are several problems with this procedure. First, the structure of the Order makes the Acknowledgment presumptively valid, shifting the burden of objecting to disclosure to the "Submitting Party" which, as the Order implicitly admits, is almost always going to be SIC. Second, SIC is given only 3 business days within which to file an objection. Essentially, for the purposes of this case, the Commission has discarded Section 0.461 of its Rules which, in an analogous setting allows 10 days for the filing of any objection by the Submitting Party and plainly contemplates that objection can be made on the grounds that the Requesting Party does not have a bona fide interest in the documents sought. Both the presumption that parties seeking documents have a valid and legitimate reason for access and the extreme limits on the time for submission of an objection make it extremely difficult if not impossible for SIC to protect the integrity of the data it submitted to USAC and the Commission. At the minimum, the 10 day rule should be applied and the Submitting Party, whether SIC or a third party, should be specifically notified that a request for access has been received; and the notice should identify the specific documents sought.

It is SIC's hope that it will not be necessary for it to object to any requests for access to the record that may be made under the Protective Order. But, to be very clear and straightforward: If access is sought by competitors or potential competitors or their representatives (such as US Telecom), SIC will object. The Commission simply cannot, consistent with basic notions of Due Process, construct a process that is designed to defeat any such objection by gerrymandering the process to assure results that ignore the public interest.

CONCLUSION

So long as that Protective Order and the process by which it is implemented do not leave SIC exposed to misuse of the data and documents it has submitted, we have no objection to a retroactive relaxation of the standards of protection that SIC relied upon in its submission of materials in the USAC Investigation. Unfortunately, the Order and Public Notice fall well short of that standard. Indeed, the definitional ambiguities and procedural evasions of the Order leave the distinct impression that the Commission is uninterested in an objective and fair outcome on the merits; the Order and the procedures to be applied once again suggest that the Commission is pursuing a predetermined outcome regardless of fact or law. *See*, Comments of SIC in Docket WC 10-90 (filed March 16, 2015). For all of these reasons, the Order must be withdrawn and redrafted.

Dated: March 21, 2017

Respectfully submitted,

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