

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Sandwich Isles Communications, Inc.) WC Docket No. 09-133
Petition for Declaratory Ruling)

**REPLY COMMENTS OF NATIONAL EXCHANGE CARRIER ASSOCIATION
ON REFRESH PUBLIC NOTICE**

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SUMMARY

The National Exchange Carrier Association, Inc. (“NECA”) understands the serious challenges confronting rural rate-of-return carriers in providing broadband service to rural Americans, including in insular areas. NECA thus supports its member companies seeking recovery for prudently incurred investment. NECA does not dispute that the Paniolo cable system may be beneficial to communications services available to all residents of the State of Hawaii, and particularly to Hawaii natives. Notwithstanding, these public interest considerations for constructing the Paniolo cable in the first instances do not also justify inclusion of the entire cost of the Paniolo cable system in NECA’s traffic-sensitive pool.

The used and useful standard is a robust and well-defined rule of regulatory law that every regulated carrier must meet in order to include any investment in its ratebase. Precedent does not support Sandwich Isles Communications, Inc.’s (“SIC’s”) claim that the doctrine is “not a binding rule.” The careful balancing between ratepayers and investors regarding investment funding is necessary to protect ratepayers from paying for imprudent investment. Neither the government nor NECA approved or encouraged Paniolo Cable to construct the cable or for SIC to lease 100 percent of its capacity.

SIC incorrectly claims that NECA excluded the Paniolo lease costs entirely based on the fact that there was too much excess capacity. NECA based its decision both on the overall cost and the excessive capacity of the Paniolo cable system lease. SIC ignores the first component of the evaluation. The Bureau was correct in concluding that leasing the entire Paniolo cable system was not used and useful, even allowing for reasonable reserve capacity for future use.

SIC has done little to shore up its inadequate demand projections. The market study submitted is based on 2008 data not focused on the needs of SIC customers or entails high demand projections that have not come to pass. SIC’s original customer projection of 20,000

homes in the HHL has never materialized, and potential new funding for the HHL is too uncertain on which to base ratemaking decisions.

SIC's description of the "cable system" appears to be for the entire SIC network, not just the Paniolo cable system at issue here. SIC's redundancy and route diversity benefit is in the interest of other undersea cable providers, not SIC customers. SIC's claim that emergency communications, e.g., E911 communications, are improved is vague, but appears to relate to a capability of SIC's network as a whole. In any event, neither argument justifies the lease of 100 percent of the capacity of the cable system. In the end, it is difficult to rely on SIC's apparent statements of fact because they are frequently vague, internally inconsistent, and are unsupported by a declarant who has attested to the truth of the statements made.

SIC claims that in "late 2014" it settled "in principle" its dispute with the RUS regarding the restructuring of RUS loan repayments, with a condition that the Paniolo lease be revised downward to \$8.1 million for an unspecified portion of the Paniolo cable capacity. SIC's proposal is unclear, has not actually been implemented, and does not take into account the substantial additional costs associated with the Paniolo cable system that are part of the "lease expenses subject to dispute." Even the proposed revised lease cost of \$8.1 million for the Paniolo cable system is unsupported either as to cost or demand. SIC's alleged "comparable" cost analysis is not submitted for evaluation. SIC has failed to meet its burden of justifying its inclusion of the lease expenses in its revenue requirements. Therefore, NECA's conclusion that the Paniolo cable system lease cost is not used and useful is still valid, even at the lower level.

The Commission should promptly resolve the open issues in this docket based on existing and verifiable facts.

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The National Exchange Carrier Association, Inc. (“NECA”) files this reply to the comments in the above-captioned proceeding.¹ Sandwich Isles Communications, Inc. (“SIC”), continues to take the position that 100 percent of its lease and related costs for the Paniolo cable system should be included in its NECA traffic-sensitive pool revenue requirement, although it proposes to reduce lease costs to \$8.1 million annually at some unspecified time in the future. Although NECA remains open to new information submitted on the record, nothing contained in the comments justify the entire costs of the SIC lease of the Paniolo cable system,² either

¹ Reply comments are now due on May 9. *Sandwich Isles Petition for Declaratory Ruling*, WC Docket No. 09-133, DA 16-417 (rel. Apr. 15, 2016).

² The Paniolo cable system subject to the lease has been described as “approximately a 358 mile undersea and overland fiber optic cable system linking the islands of Kauai, Oahu, Molokai, Maui and Hawaii in the State of Hawaii. The Paniolo Cable Network consists of four (4) Undersea Components and six (6) Overland Components, including but not limited to beach landings, terminal buildings and central office electronics.” Comments of Sandwich Isles Communications, Inc., WC Docket No. 09-133, 17 (dated Aug. 28, 2009). SIC more precisely described the Paniolo cable system to NECA as consisting of **

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Comments of the National Exchange Carrier Association, Inc. (NECA), WC Docket No. 09-133, Exhibit G (Letter from Alan W. Pederson, SIC, to Carol Brennan, NECA, 2 (dated Mar. 11, 2009) (filed Aug. 31, 2009) (“NECA PDR Comments”). The “cable network” described in SIC’s Refresh Comments, on the other hand, is described as “roughly 350 miles of undersea cable” plus “approximately 780 miles of terrestrial fiber running from the landing stations on

currently or as proposed. NECA urges the Commission to promptly resolve the open issues in this proceeding in order to protect broadband ratepayers in rural America.

NECA understands the serious challenges confronting rural rate-of-return carriers in providing broadband service to rural Americans, including in insular areas. NECA thus supports its member companies that seek sufficient ratemaking treatment for prudently incurred investment. NECA does not dispute that the Paniolo Cable may be beneficial to communications services available to all residents of the State of Hawaii, and particularly to Hawaii natives. Notwithstanding, these public interest considerations for constructing the Paniolo cable in the first instances do not also justify inclusion of the entire cost of the Paniolo cable system in NECA's traffic-sensitive pool. Rather, Paniolo Cable, a closely related company to SIC, should seek other cable users to rectify the apparent low-level use of its cable system instead of pressing the Commission to fund 100 percent of the investment through SIC's regulated operations.

I. SIC'S APPLICATION OF THE USED AND USEFUL STANDARD IS CONTRARY TO LAW.

A. SIC's Description of the Legal Standard is Erroneous.

SIC argues that the used and useful standard is a "flexible" concept, "not a binding rule," and is used by regulators to make an equitable "risk allocation" between investors and ratepayers.³ The used and useful doctrine, as demonstrated in the cases cited in NECA's refresh

each island to points of presence on SIC's terrestrial fiber network." *See, e.g.*, Comments of Sandwich Isles Communications, Inc., WC Docket No. 09-133, 8 (filed Apr. 28, 2016) ("SIC Refresh Comments"). The Refresh Comments description appears to be more extensive than the original description of the Paniolo cable system, and thus apparently includes the entire SIC terrestrial transport network. The Paniolo lease only relates to the Paniolo cable system.

³ SIC Refresh Comments at 21-23. In fact, the only authority SIC cites in support of its "flexible" concept conclusion is the concurring opinion of one circuit judge. *Jersey Cent. Power & Light v. FERC*, 810 F.2d 1168, 1191 (D.C. Cir. 1987) (Starr, J., concurring). Other cited cases only discuss (1) how to balance risk between ratepayers and investors in setting rates, (2)

comments, and in the *Declaratory Ruling*,⁴ is a robust and well-defined rule of regulatory law that every regulated carrier must meet in order to include any investment in its ratebase. The careful balancing between ratepayers and investors is necessary to protect ratepayers from paying for imprudent investment. The Commission's consideration of "equitable" factors as part of the standard has been strictly limited in the past based on clear ratepayer benefits justifying inclusion of investment in ratebase. Here, in addition to the issues existing as of 2010, SIC has not been paying the entire cost of the Paniolo cable system as required by SIC's exclusive lease of the entire capacity of the undersea cable, and therefore has further tipped the balance in the carrier's favor, to the further detriment of the ratepayers.⁵

Although SIC wastes pages rehashing arguments that SIC's project would not have been built without the "explicit encouragement and support from the federal government,"⁶ the Bureau has already rejected these arguments.⁷ It would have been prudent for Waimana Enterprises to secure a firm commitment for funding the Paniolo cable system, either from the RUS or on the

whether ratemakers may include abandoned or obsolete property in ratebase, and (3) whether excess capacity is includible in ratebase. These cases do not support SIC's notion that the used and useful concept is "not a binding rule" and do not alter the traditional application of the test.

⁴ *Sandwich Isles Communications, Inc.*, 25 FCC Rcd. 13647, ¶¶ 12-13 (Wir. Comp. Bur. 2010), *pet. for recon. and app. for rev. pending* ("Declaratory Ruling" or "Ruling"). See also *Connect America Fund*, WC Docket Nos. 10-90, *et al.*, FCC 16-33, ¶¶ 334-35 (rel. Mar. 30, 2016) ("CAF II ROR Order & FNPRM").

⁵ See National Exchange Carrier Association, Inc., Petition for Clarification and/or Declaratory Ruling, WC Docket No. 09-133 (filed Feb. 6, 2015) ("NECA Clarification Petition").

⁶ SIC Refresh Comments at 8. SIC also argues that NECA and SIC initially "discussed at length" the project, but NECA later opposed it only once SIC had submitted the project for inclusion in the NECA tariff. SIC Refresh Comments at 14-15. NECA never encouraged or approved the construction of the Paniolo cable system. It raised serious questions concerning the costs, and denied inclusion of the lease costs once SIC finally submitted full cost details. Reply Comments of the National Exchange Carrier Association, Inc., WC Docket No. 09-133, 4-5 (filed Sept. 10, 2009).

⁷ *Declaratory Ruling* at ¶ 10.

basis of its subsidiary SIC's participation in NECA pools, prior to beginning construction.⁸ SIC has presented nothing new to justify reversing the Bureau's rejection of these arguments.

SIC tries to buttress its argument that SIC's terrestrial legs of the transport network were "well on their way to completion by fall 2004" and it and the Paniolo cable system are "a single integrated unit and that any change in the specifications for the submarine leg" would have added to the total cost and would have entailed delay.⁹ This conclusion is not supported by any attested-to facts or financial figures that can be used to evaluate whether it would have been prudent to begin construction of the Paniolo cable system. This argument does nothing to justify the exorbitant level of investment for the small number of expected customers.

SIC does state that the SIC network overall provides facilities where no other telecommunications company would.¹⁰ But whether the lease of the Paniolo cable system was necessary is highly questionable given the existence of other undersea cable systems connecting the Hawaiian islands.¹¹ And SIC's claims regarding the unwillingness of other carriers to serve

⁸ SIC admits that the undersea cable was not yet built once RUS funding was withdrawn, but asserts that building the entire system "was the only way forward." SIC Refresh Comments at 18. This argument makes no sense. Further consideration of the construction of the Paniolo cable system could have ceased and cut off the incursion of hundreds of millions of dollars. Or SIC could have independently refused to enter into the lease for the full capacity of the cable system. A regulated carrier is not free to make an investment in the face of uncertainty, then try to bootstrap regulatory approval based on a *fait accompli*. What is more, although SIC argues that re-engineering of SIC's then-existing terrestrial network would have been required, SIC has never submitted such costs to regulators for an evaluation whether another option than constructing the undersea cable was more prudent. *See id.* at 13-14.

⁹ *Id.* at 13. *See* note 2, *supra*.

¹⁰ SIC Refresh Comments at 3.

¹¹ Although SIC claims GTE "wholly bypassed the island of Molokai," SIC Refresh Comments at 3, this is dated history. The Hawaii Island Fibre Network undersea cable was authorized in 1996, *GST Interisland Order*, 11 FCC Rcd. 3024 (Chief Int'l Bur., 1996), which by 2000 connected six of the islands including Molokai. *GST Telecom Hawaii, Inc. & time warner of hawaii, L.P.: Application for Modification of the License to Land and Operate the GST*

the HHL go more to a justification for SIC's terrestrial network as a whole, not the Paniolo cable system, and all predate SIC's commencement of operations in 1997.¹² It should also be noted that SIC has taken the position that since 1997, SIC has the exclusive right to serve customers in its HHL service territory, which would explain why others do not currently serve these areas.¹³

B. The Paniolo Cable System Lease Costs are Grossly Excessive to Meet Expected Demand.

SIC claims that NECA improperly evaluated the cost of the Paniolo cable system's excess capacity. It argues that, since the initial cost of deployment represented the brunt of the costs, all of the additional capacity represented only two percent of lease costs.¹⁴ It then argues that NECA's refusal to include the lease costs "rest[ed] entirely on the proposition that there is too much excess capacity. . . ."¹⁵ This argument misrepresents NECA's position. As indicated in its Refresh Comments, NECA's decision rested on two principles: (1) the overall cost of the Paniolo cable system lease was excessive for the subscribers to be served in the relatively near future, and (2) the capacity was far in excess of expected demand for regulated services offered by SIC. The essence of SIC's argument ignores the first component of the evaluation. SIC essentially argues that even if only one strand were required, virtually the entire cost of the project was justified. NECA's conclusion rejected that proposition, concluding that the overall

Interisland Cable System, 16 FCC Rcd. 869 (Chief, Int'l Bur., 2001); <http://submarinecablemap.com/#/submarine-cable/hifn-hawaii-island-fibre-network>.

¹² See, e.g., SIC Refresh Comments, Exhibit 1.

¹³ *Declaratory Ruling* at ¶ 18 n.53. This statement also ignores that Hawaiian Telcom serves a significant number of HHL residents today. See also NECA PDR Comments at 19-20 n. 65.

¹⁴ SIC Refresh Comments at 6, 14.

¹⁵ *Id.* at 24. NECA has always made a reasonable allowance for excess capacity to serve reasonably foreseeable and near term demand increases. In fact, NECA's \$1.9 million allowance to SIC was generous and designed for just such a purpose.

cost of the cable was too much for any part of it to be approved because alternative facilities were available to provide the service.¹⁶ The Bureau was correct that inclusion of 100 percent of the Paniolo cable system lease was not consistent with used and useful principles and Commission precedent, even with a reasonable reserve for capacity for future use.¹⁷

SIC seeks to justify the overall cost and capacity of the Paniolo cable system based on a CHR market study.¹⁸ This study was performed for **** CONFIDENTIAL **** in 2008 and evaluated whether the investment in the Paniolo cable was necessary ***** CONFIDENTIAL**

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******.¹⁹ To support its claimed need for the Paniolo

¹⁶ The Bureau noted rightfully that other users of the cable should fund the Paniolo Cable system, *Declaratory Ruling* at ¶ 25, which would minimize the costs that SIC subscribers (and NECA pool members and their customers) should bear. At one point SIC admits that it did not do so except for one specifically identified “temporary emergency use” of the cable system. SIC Refresh Comments at 26.

¹⁷ *Declaratory Ruling* at ¶¶ 22-23. Commission determinations of the level of investment that should be supported through universal service payments will limit the amount of investment based on other carrier investment levels. *See, e.g., CAF II ROR Order & FNPRM*, at ¶¶ 105, *et seq.* (investment limitations for new Broadband Loop Support mechanism). The Commission itself placed strict limits on the inclusion of inter-island and inter-continental undersea cable facilities in developing the price cap carrier cost model (“CAM”) for universal service support provided to price cap carriers under CAF II. *Connect America Fund*, WC Docket No. 10-90, *et al.*, Report and Order, 29 FCC Rcd. 3964, ¶¶ 129. *et seq.* (WCB 2014). Facility sharing was an integral component of such modeling. Because multiple changes to the CAM occurred at the same time that the undersea cable modeling capability was added to CAM (and modifications to that modeling changed over time), it is difficult to isolate the annual dollar impact of such addition for undersea cabling. From a comparison of illustrative inputs for Hawaii, the changes made in total appeared to be roughly \$1 million annually, far below the annual compensation SIC seeks for its Paniolo cable system lease.

¹⁸ SIC Refresh Comments at 24 & Exhibit 5.

¹⁹ *Id.*, Exhibit 5, CHR Solutions, Inter-Island Bandwidth Projection Study, 3 (Feb. 8, 2008).

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cable, SIC also quotes a 2008 white paper written by Discovery Institute, which only analyzes in general nationwide Internet usage without specific reference to Hawaii or the HHL.²⁰ These references hardly constitute evidence that the Paniolo cable system was cost and capacity appropriate to provide DSL service to SIC customers. Rather, at most it suggests the potential that other users may benefit from the Paniolo cable system, a benefit they should also pay for.

SIC has done little to shore up its inadequate demand projections. SIC now admits that its initial estimate that there would be 20,000 homes in the HHL “has been optimistic,” but now argues that the housing construction was adversely impacted by the Great Recession.²¹ It then cites a Hawaii state court decision that in 2015 ordered the Hawaiian government to better fund HHL developments, but admits that there is no minimum figure attached to such order.²² SIC then cites Governor Ige’s proposal to increase DHHL funding from \$9.6 to \$17.4 million, which “jumps to \$23.5 million” next year.²³ Apparently, this proposal has not been passed by the legislature and we do not know whether it will ever receive legislative approval. And once again, even if approved and continued annually into the distant future, SIC provides no documentation about how many additional HHL residences this amount would fund, whether Hawaiian Telcom would serve any new residences, whether any DHHL timetable for new deployments has been set based on such increased funding, or whether new deployment will translate into new broadband usage applicable to SIC’s service area within the HHL. NECA understands the difficulty of relying on government commitments to fund large scale projects.

²⁰ Discovery Institute, *Estimating the Exaflood* (Jan. 2008), *available at* <http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=1475> (last viewed May 6, 2016).

²¹ SIC Refresh Comments at 6.

²² *Id.* at 20-21.

²³ *Id.* at 21.

But rates cannot be set based on political promises and native Hawaiian hopes, the proverbial wing and a prayer.

SIC claims that the Paniolo cable is necessary to provide redundancy and route diversity for other inter-island cable facilities.²⁴ NECA does not dispute the wisdom of including redundancy of facilities in infrastructure design. But NECA does not believe it is consistent with used and useful principles to include excessive costs in ratebase, and thus receive pool payments, given that more reasonably priced alternatives exist. In any event, NECA questions whether Paniolo Cable, or SIC, which leases 100 percent of the cable's capacity, have made substantial efforts over the last six years to lease capacity on the Paniolo cable in furtherance of such redundancy and route diversity benefits.²⁵

SIC claims that the Paniolo cable is “indispensable to the public safety and security of HHL residents.”²⁶ No explanation of this expansive statement is provided.²⁷ For example,

²⁴ *Id.* at 25. Although SIC argues that its cable is connected at different landing locations from other cable systems, this assertion still does not address whether the facility is necessary or whether the costs are reasonable under the used and useful standard.

²⁵ SIC cites two recent cable outages in Hawaii to demonstrate the redundancy need. *Id.* at 17 n.41. But SIC stops short of stating that the Paniolo cable was actually used during these outages. SIC also complains that NECA continues to deduct \$700,000 per year from the Paniolo lease special allowance because of a one-time emergency use of the cable by a third party. *Id.* at 26. Once regulated facilities are used to provide unregulated service, Commission rules require that the facilities remain allocated to non-regulated use and cannot be returned to regulated use absent prior Commission approval. *Separation of costs of regulated telephone service from costs of nonregulated activities*, CC Docket No. 86-111, Report & Order, 2 FCC Rcd. 1298, ¶ 172 (1986) (“*Joint Cost Order*”), *on reconsideration*, Order on Reconsideration, 2 FCC Rcd. 6283 (1987) (“*Joint Cost Reconsideration Order*”), *on further reconsideration*, Order on Further Reconsideration, 3 FCC Rcd. 6701 (1988) (“*Joint Cost Order Second Reconsideration Order*”). Further, SIC fails to note that it raised its concerns about this issue with the FCC in 2012 via a Motion for Stay which was promptly dismissed. *See Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, WC Docket No. 09-133, Order, 27 FCC Rcd. 470 (Jan. 30, 2012). SIC did not appeal that decision or otherwise pursue the issue at the Commission.

²⁶ SIC Refresh Comments at 25.

public safety involving 911 communications could be provided without the lease of 100 percent of the capacity of the Paniolo cable system.²⁸ Perhaps confusion regarding this issue can be explained because SIC seems to intermingle its justifications of the Paniolo cable system lease with the SIC network in its entirety.²⁹

SIC claims that NECA has “persistently ignored” that undersea cable costs are lumpy, i.e., must be incurred at once to be paid for over time.³⁰ This make-weight argument is incorrect. NECA has never made a judgment that the Paniolo cable system should never have been built or that the brunt of costs are incurred during construction. Whether to construct the Paniolo cable system is a business judgment that is up to the sound discretion of Paniolo Cable, an unregulated company. Rather, as the Commission rules recognize, a company that makes investment in facilities that are not immediately or in the near future used and useful in the provision of regulated service, Paniolo Cable, if it were a regulated carrier, should account for the investment as plant held for future use, not as current operating assets.³¹ In any event, SIC as a regulated carrier does not need to lease 100 percent of these unused assets, and ratepayers should only pay for what they require.

²⁷ SIC states that the cable “has enhanced both public and private security by connecting the homelands regions with the rest of the Hawaiian archipelago and the US national and regional security systems that are based throughout the Pacific region.” *Id.* at 7. This vague statement is never explained, and thus cannot be credited as a statement regarding the need of SIC subscribers for the Paniolo cable system.

²⁸ In the same curious vein, SIC discusses the need for “phone service” in Maui. *Id.* at 27 n.66.

²⁹ See note 2, *supra*.

³⁰ SIC Refresh Comments at 27-28.

³¹ See, e.g., 47 C.F.R. § 32.2002 (The Property Held for Future Telecommunication Use rule only permits a carrier such as SIC to hold property under a “definite plan for use” for up to two years, and if not used by that time, exclude the investment from ratebase) .

In the end, it is difficult to rely on the apparent statements of fact in the SIC Refresh Comments because they are frequently vague, internally inconsistent,³² and are unsupported by a declarant who has attested to the truth of the statements made. The FCC has often stated how important it is for it to have reliable facts on which to base its decisions.³³ Consistent with its policies, the FCC should base its decision in this proceeding only on verifiable facts.

II. SIC’S FAILURE TO ADDRESS NONPAYMENT OF THE LEASE RAISES SERIOUS QUESTIONS CONCERNING THE WISDOM OF THE SPECIAL 50 PERCENT ALLOWANCE.

Now that it has become known that SIC is not paying the full lease cost, SIC continues to refuse to identify on the record in this proceeding (1) the actual amount of lease payments made to Paniolo Cable, (2) the time when lease payments will be made in full, if at all, and (3) a date certain when its claimed lease restructuring will occur. Although SIC has argued in the past that it is entitled to receive pool payments based on accrual accounting,³⁴ SIC does not again attempt to reassert this argument in its Refresh Comments. SIC does state that “SIC’s payments on its Paniolo lease have substantially exceeded the total support payments that it has received from NECA with respect to the lease.”³⁵ Although no specific amounts, pool calculations, and payment dates are provided, this assertion completely ignores the fact that the *Declaratory Ruling* only permits “50 percent of the disputed lease amounts” to be included in SIC’s revenue requirement. Only unbridled chutzpah can describe SIC’s flagrant disregard of Commission rules to justify why it should now receive 100 percent of a potential revised lease amount of \$8.1

³² See Appendix A.

³³ *July 1, 2004 Annual Access Charge Tariff Filings*, WC Docket No. 04-372, 19 FCC Rcd. 23877, ¶ 24 (2004).

³⁴ Sandwich Isles Communications Opposition to NECA Petition for Declaratory Ruling, WC Docket No. 09-133, at ii (dated Mar. 12, 2015) (“SIC Opposition”).

³⁵ SIC Refresh Comments at 31 n.68

million. This failure underscores the need for the Commission to promptly rule on the outstanding issues.

III. NECA CANNOT CONCLUDE THAT A REVISED PANIOLO LEASE PAYMENT OF \$8.1 MILLION IS USED AND USEFUL.

SIC claims that in “late 2014” it settled “in principle” its dispute with the RUS regarding the restructuring of RUS loan repayments.³⁶ Part of this “in principle” restructuring was based on the condition that the Paniolo lease be revised downward to \$8.1 million.³⁷ SIC’s proposal is unclear, and does not take into account the substantial maintenance, insurance, and engineering costs (**CONF**in 2014) associated with the Paniolo cable system that are part of the 50 percent allowance based on “lease expenses subject to dispute.”³⁸ Because SIC has the burden of proving that its revenue requirements are justified, NECA cannot conclude, based on the record, that the Paniolo cable system lease is used and useful even at the \$8.1 million level.³⁹ Given that no proposal has been finalized and no supporting data provided, the Commission should proceed immediately to reach a decision on all matters in the record. There is absolutely no justification for continuing NECA pool payments based on the existing Paniolo cable system lease expense, which is not actually being paid in full.

From SIC’s one paragraph description, one wonders why the agreement “in principle” has not yet been finalized and implemented in the ensuing year and one half, all the while SIC continued to obtain pool payments as if it were paying the entire lease costs. SIC does not say

³⁶ Pursuant to SIC’s 2014 audit report, apparently ** CONFIDENTIAL
**. See AKT Auditor’s Report, Financial Statements and RUS Letters, Years Ended Dec. 31, 2014 and 2013, note 6 (May 14, 2015), attached as Appendix B.

³⁷ SIC Refresh Comments at 30.

³⁸ *Declaratory Ruling* at ¶ 9 n.30.

³⁹ See Comments of National Exchange Carrier Association on Refresh Public Notice, WC Docket No. 09-133, 20 & n.65 (filed Apr. 28, 2016) (“NECA Refresh Comments”).

who had the discussions regarding the lease restructuring, when the “understanding” was reached, whether it was committed to writing, or with whom the “understanding” was made. Were the discussions and understanding reached between SIC and RUS? Between Paniolo Cable and SIC? Between Paniolo Cable and DeutscheBank? Or is it someone else? The current record provides no way for interested parties to evaluate such a vague proposal in order to provide the Commission input regarding the used and useful nature of the revised annual lease figure.

SIC does claim that the new restructured lease payment “will reduce the annual pool cost recovery.”⁴⁰ Given that SIC should have only been receiving 50 percent of actually paid lease costs in the past, NECA is at a loss to evaluate the significance of this assertion based on supporting projections and calculations.

NECA is unable to conclude that even the lower lease amount of \$8.1 million complies with the used and useful standard. First, SIC has not identified when and how the “in principle” understanding will be implemented. Second, SIC needs to justify why \$8.1 million is now used and useful in the provision of service to its end users, but it has not yet done so. Third, SIC needs to identify the portion of the Paniolo cable system it intends to lease under this “understanding” and to remove from the SIC ratebase.⁴¹ Fourth, SIC has not stated how or whether it will address past non-payment of lease costs that it used to draw funds from the NECA traffic sensitive pool.

SIC also makes a vague statement that the revised lease cost of \$8.1 million for the Paniolo cable system are comparable to publicly available data “for lease lines” from other

⁴⁰ SIC Refresh Comments at 32, 4, 30.

⁴¹ *Id.* at 31.

carriers, including Hawaiian Telephone, “obtained from the LATTIS system.”⁴² These statements are not supported by a declarant, are not of sufficient detail to be useful, and are not verifiable because the analysis was not included in its comments.⁴³ SIC also alleges that “RUS, which reviewed the analysis, concurred that the fair market value cost of the submarine cable” was \$8.1 million.⁴⁴ Again, SIC does not state who at RUS reviewed the comparability analysis, what the term “concurrence” means, whether that individual is willing to testify on the record concerning the review, or when it was reviewed. Even if these statements could be credited, they do nothing to justify the level of investment even at \$8.1 million, based on the number of subscribers served or expected in the near future.

\$8.1 million, plus annual maintenance, insurance, and engineering costs,⁴⁵ is still an excessive cost based on the number of lines currently served, and expected to be served in the near future, even at the higher bandwidths identified in SIC’s pleading.⁴⁶ SIC itself admits that the reduced capacity, whatever that might be, is “more than sufficient capacity” for its service needs.⁴⁷ SIC does make some casual allusions to providing service to businesses and schools,⁴⁸

⁴² *Id.* at 30.

⁴³ *Id.* at 29. Exhibit 6 attached to the SIC Refresh Comments, which purports to justify the level of the proposed, revised lease costs, is ** CONFIDENTIAL **, which also seems to be far beyond SIC’s requirements.

⁴⁴ *Id.* at 30.

⁴⁵ SIC identifies \$6 million as “annual operating expenses” but it is not clear what this figure references or its significance to any used and useful analysis. *Id.* at 30.

⁴⁶ *Id.* at 26. For instance, since SIC does not present actual data usage over the last five years, the higher bandwidths cited are only a theoretical capacity figure, not an actual demand figure that could justify the capacity leased. *See Declaratory Ruling* at ¶ 22.

⁴⁷ SIC Refresh Comments at 5.

⁴⁸ *Id.* at 5-6, 25. If the vast majority of schools and businesses that SIC serves are located on the Island of Oahu, for instance, such entities do not need inter-island cable to provide their DSL needs.

but has failed to identify the number of such institutions, the lines they use, and where they are located.

SIC claims that a “primary obstacle to implementation of [the proposed restructuring] is NECA’s refusal to recognize the Paniolo Cable lease as eligible for cost recovery from the NECA traffic-sensitive pool under the used and useful principles.”⁴⁹ This statement is nonsensical. First, the new \$8.1 million lease payment “proposal” was presented to NECA for the first time in March 2016, and was for the first time placed in the record of this proceeding in SIC’s Refresh Comments. Second, NECA requested in writing that SIC justify this new lease cost figure under the used and useful standard, and SIC refused to respond to that request.⁵⁰ Third, the Bureau in the *Declaratory Ruling* made a finding in accordance with the used and useful standard, which trumps any NECA determination. Fourth, as indicated in this pleading, SIC has done nothing to now justify the level of such lease costs, even though the Commission has invited it to refresh the record in this proceeding. SIC should stop blaming NECA for its current circumstances and adequately respond to NECA and Commission inquiries.

IV. CONCLUSION

NECA’s legal position continues to be that, based both on the facts that existed prior to the *Declaratory Ruling*, and today, the cost and the capacity of the Paniolo cable system are far in excess of what is reasonable to serve SIC’s regulated broadband customer service requirements from 2010 through the near future. The proposed revised lease figure of \$8.1 million lacks sufficient support justification to alter this conclusion. Although NECA does not dispute that the Paniolo Cable may be beneficial to the island of Hawaii, and Hawaii natives,

⁴⁹ *Id.* at 31.

⁵⁰ *See* NECA Refresh Comments at 16 n.53.

such justification for constructing the Paniolo cable system does not also justify that the entire cost be funded by NECA traffic-sensitive pool members and their ratepayers. The Commission should promptly resolve the open issues in this docket.

Respectfully submitted,

By: /s/ Gregory J. Vogt

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Of Counsel

Counsel for National Exchange Carrier Association, Inc.

May 9, 2016

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

In the Matter of)
)
Sandwich Isles Communications, Inc.) WC Docket No. 09-133
Petition for Declaratory Ruling)

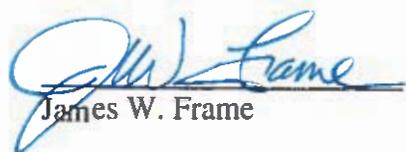
DECLARATION OF JAMES W. FRAME

I, James W. Frame, am Vice President of Operations for the National Exchange Carrier Association, Inc. (“NECA”). I have held my current position since October 1, 1997. I hereby declare as follows:

1. I am familiar with the Declaratory Ruling issued by the Wireline Competition Bureau (“WCB”) of the Federal Communications Commission (“FCC”) issued in *Sandwich Isles Communications, Inc*, 25 FCC Rcd. 13647 (WCB 2010), *pet. for recon. and app. for rev. pending* (“*Declaratory Ruling*” or “*Ruling*”), as well as the implementation steps that NECA has taken in order to comply with that Order.

2. I am familiar with the National Exchange Carrier Association, Inc., Petition for Clarification and-or Declaratory Ruling, WC Docket No. 09-133 (dated Feb. 6, 2015) (“*Petition*”), as well as the pleadings that have been filed with respect to that Petition.

3. I have reviewed NECA’s May 9 reply comments, to which this Declaration is attached. I declare under penalty of perjury that these facts are true and correct to the best of my knowledge, information and belief.


James W. Frame

Dated: May 9, 2016

Appendix A

The SIC Refresh Comments are frequently internally inconsistent, e.g.:

- SIC argues that island-wide redundancy is a benefit of the Paniolo cable (SIC Refresh Comments at 25) and states that the cable “has been used by other service providers during periods when their networks have been out of service” (*id.* at 7), but only identifies one use by an outside party (*id.* at 26).
- SIC states that in mid-2007 it informed NECA that it was in the process of arranging the lease of the Paniolo Cable system, “after which NECA informed SIC that its costs would be covered” (*id.* at 14-15). It then cites to a letter dated seven years prior (*id.* at 14, n. 33), ignoring statements in the record that during these 2007 discussions NECA advised SIC in writing, prior to SIC’s execution of the lease, that “all of the costs related to Sandwich Isles’ proposal might not be eligible for inclusion in the NECA pools” and further advised a cost consultant hired by DeutscheBank, financier of the cable, that “NECA had not approved the inclusion of the lease costs to the NECA pool.” (NECA PDR Comments at 9-10).
- SIC states that “SIC and its submarine cable” is “exclusively” used to serve Hawaiian natives (*id.* at 20) yet claims it is used for island-wide redundancy (*id.* at 25).
- SIC claims its petition for reconsideration of the *Declaratory Ruling* is “moot” (*id.* at 5), although it continues to ask that 100 percent of its lease costs be reimbursed (*id.* at 31).

APPENDIX B

This document contains privileged and confidential information and has therefore been withheld from the public copy of this document pursuant to Federal Communications Commission Protective Order in WC Docket No. 09-133.