

CHADBOURNE  
& PARKE LLP

1200 New Hampshire Avenue NW, Washington, DC 20036  
tel 202-974-5600 fax 202-974-5602

Megan E.L. Strand  
direct tel (202) 974-5782  
facsimile (202) 974-5602  
mstrand@chadbourne.com

December 21, 2010

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Sandwich Isles Communications, Inc. Petition for Declaratory Ruling  
WC Docket No. 09-133

Dear Ms. Dortch:

Sandwich Isles Communications, Inc. ("SIC"), through its undersigned counsel, hereby submits the Public Version of its Reply Comments, filed pursuant to the protective order in this proceeding, in support of SIC's Petition for Reconsideration. The Confidential Version of SIC's Comments is being sent to Commission staff under separate cover.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Respectfully submitted,



Megan E.L. Strand

Counsel to Sandwich Isles Communications, Inc.

Enclosure

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 )

To: Chief, Wireline Competition Bureau

REPLY COMMENTS  
OF SANDWICH ISLES COMMUNICATIONS, INC.  
IN SUPPORT OF PETITION FOR RECONSIDERATION

Dana Frix  
James A. Stenger  
Megan E.L. Strand  
**CHADBOURNE & PARKE LLP**  
1200 New Hampshire Ave., N.W.  
Suite 300  
Washington, D.C. 20036  
(202) 974-5600

*Counsel for Sandwich Isles  
Communications, Inc.*

Walter L. Raheb  
Roberts Raheb & Gradler, LLC  
1200 New Hampshire Avenue, N.W.  
Washington, D.C. 20036

December 21, 2010

**TABLE OF CONTENTS**

I. Introduction: Background, Legal Issues, Summary of Legal Error .....1

II. The Order's "Per Se" Used and Useful Analysis was in Error to the Extent it was Not Based Upon the Spare Fiber Guidelines and Commission Precedent .....6

A. The "Per Se" Analysis Should Have Been Based on the Spare Fiber Guidelines .....7

B. Commission Precedent Should Have Been Applied As Part of the "Per Se" Analysis of the Paniolo Lease Costs and When Applied Demonstrate that 100 Percent Inclusion of SIC's Paniolo Lease Costs is Appropriate .....10

i. It was Error for the Order to Have Ignored the Holding in the *AT&T Billing and Collections Case* by Failing to Consider SIC's Avoided Costs in Its Per Se Analysis .....11

ii. The *Separations Reform Order* Mandates that 100 Percent of SIC's Paniolo Lease Costs Be Included in Its Revenue Requirement.....12

iii. The Order Should Have Applied the Holding of *Amendment of Part 65* in its Per Se Analysis .....15

III. The Order's Equitable Analysis Failed to Include the Spare Fiber Guidelines and Misapplied Precedent .....16

A. The Bureau's Equitable Analysis Must Include the Spare Fiber Guidelines .....17

B. Three Cases Should Have Been Controlling Under the Equitable Analysis: *Comsat, PSV Cable, and SAW Cases*.....18

IV. SIC Demonstrated Anticipated Demand and Therefore Satisfied All of the Equitable Factors Identified by the Bureau .....20

V. SIC Properly Accounts for Its Costs and AT&T's Allegations to the Contrary are Incorrect .....23

VI. SIC's Reconsideration Petition is Procedurally Proper .....24

VII. Conclusion .....26

### Summary of Argument

The National Exchange Carrier Association ("NECA") and AT&T have shown no basis to reject Sandwich Isles Communications, Inc.'s ("SIC") Reconsideration Petition. As set forth herein, the Bureau should have used its "per se" analysis to determine that 100 percent of the Paniolo lease costs are "used and useful," which percentage is justifiable under an equitable analysis. Most fundamentally, the record shows that SIC's cost of building Paniolo was equal to or less than the other alternatives, and therefore the Paniolo costs are per se reasonable.

Moreover, NECA's own rules demonstrate that Paniolo costs are per se reasonable. For the last six years, NECA has had a rule that says where a carrier installs fiber and some is spare, the carrier is to include the costs of both the in-use and spare fiber in its so-called "revenue requirement" (its legitimate costs). The carrier is then supposed to apply the Commission's Part 36 and 64 separations rules to the revenue requirement to determine what portion of the revenue requirement the carrier is entitled to recover from the NECA traffic sensitive pool. This rule applies to each local exchange carrier that participates in the Pool.

NECA promulgated this rule, which it refers to as the "*Spare Fiber Guidelines*" (or "*Guidelines*"), after the FCC found that approximately two-thirds of all fiber is spare. This rule reflects that when fiber is installed, it is economically efficient to install more fiber than is immediately needed due to the fact that extra fiber carries only minor costs.

In this case, NECA declined to apply the *Guidelines* to SIC's costs of building the Paniolo undersea cable network (which connects SIC's network on five Hawaiian Islands) and instead determined that an older equitable doctrine, "used and useful," applies to the Paniolo costs. NECA concluded that no Paniolo costs were justified under "used and useful." NECA did not explain why the *Guidelines* do not apply, perhaps because NECA failed to identify their existence. (The

PUBLIC VERSION

*Guidelines* are confidential and non-public and NECA has refused SIC's counsel access to its rules. Counsel for SIC became aware of the *Guidelines* only after the Order was issued.)

Before the Order was issued, SIC argued that elsewhere NECA was "proudly trumpeting" the amount of fiber that rural LECS were installing, that it was irrational to believe that all fibers would be immediately used, and therefore it appeared that NECA was holding SIC to a different cost recovery standard than other carriers on the U.S. mainland.

Unaware of the *Guidelines*, the Bureau issued an Order finding that the "used and useful" equitable doctrine applied, and that it was not convinced that all Paniolo costs were "used and useful," partly because SIC had not proven its argument that NECA was allowing the cost of spare fiber to be recovered by all other carriers. As a result, the Order held that only certain minor costs not disputed by NECA are "used and useful." The Order also held that due to certain equitable considerations, such as the "special role" SIC plays in serving Hawaii and the unusually high cost of undersea cable, SIC would be allowed to recover 50 percent of disputed costs. The other 50 percent was disallowed because SIC could not demonstrate when all of the Paniolo fiber would be used. This standard, where a carrier must demonstrate that it is using all fiber (or will be using it shortly) in order to put its costs into its revenue requirement, is the "***Hawaii Rule.***"

Now that the *Guidelines* have come to light, several things are certain. First, the *Guidelines* are inconsistent with the *Hawaii Rule*, and therefore it is discriminatory to apply the onerous *Hawaii Rule* to SIC and the beneficial *Guidelines* to all other carriers. Second, shortly after putting Paniolo into service, SIC began using [REDACTED]. This is consistent with the Commission's finding that [REDACTED]. Therefore under any cost recovery standard that might be employed, SIC is entitled to include in its revenue requirement the same percentage of fiber costs that other carriers are entitled to recover. The *Guidelines* leave no doubt about the percentage. It is 100 percent. Third, the

PUBLIC VERSION

Order allows SIC to recover only slightly greater than 50 percent of its costs. Upon reconsideration, that percentage must be increased to 100 percent and the Bureau should affirm that the *Spare Fiber Guidelines* apply to all carriers unless and until a new rule is promulgated.

**SANDWICH ISLES COMMUNICATIONS, INC.**  
**REPLY COMMENTS**  
**IN SUPPORT OF PETITION FOR RECONSIDERATION**

SIC submits these Reply Comments in support of SIC's Petition for Reconsideration.<sup>1</sup> At issue in this case is what costs SIC may put into its so-called "revenue requirement,"<sup>2</sup> and therefore by extension, what costs may be recovered from the NECA traffic sensitive pool ("NECA Pool" or "Pool") after application of the Commission's Part 36 and Part 64 separation rules. Application of existing law unquestionably results in SIC being entitled to place all of its Paniolo cable network ("Paniolo") costs into its revenue requirement. As demonstrated herein, the Order<sup>3</sup> erred either by (a) applying a standard for determining the prudence of fiber costs that may be included in a revenue requirement that applies only to SIC and not the 1,000 or more other small and mid-sized local exchange carriers on the U.S. mainland (the "Hawaii Rule"), or (b) inadvertently establishing a new rule for determining the prudence of fiber deployment for rural local exchange carriers ("LECs") that reduces the costs that may be included in a carrier's revenue requirement by 50 percent without acknowledging having done so, and without conducting a rulemaking to establish a rule that could then only be applied prospectively.

**I. Introduction: Background, Legal Issues, Summary of Legal Error**

**Background.** In 1995, the Department of Hawaiian Homelands ("DHHL") issued SIC's parent company a license to provide telephone service to the Hawaiian Homelands ("HHL") by

---

<sup>1</sup> Sandwich Isles Communications, Inc. Petition for Reconsideration, WC Docket No. 09-133 (Oct. 29, 2010) ("Reconsideration Petition").

<sup>2</sup> The revenue requirement is a carrier's legitimate costs. Once legitimate costs are established, they are subject to the Commission's Part 36 and Part 64 separations processes, which determine how a carrier's legitimate costs may be recovered.

<sup>3</sup> *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, Declaratory Ruling, WC Docket No. 09-133, Wireline Competition Bureau (Sept. 29, 2010) ("Order").

PUBLIC VERSION

creating a network connecting the HHL on the Hawaiian Islands.<sup>4</sup> In 1998, and again in 2005, the Commission issued orders finding it in the public interest for SIC to build a network connecting the HHL on the Hawaiian Islands and to put the reasonable costs of doing so into the NECA Pool. In 2005, the Commission did this over specific objections that U.S. Rural Utilities Service ("RUS") loans, high-cost subsidy funds, and NECA Pool access revenues would "pick up the tab" for SIC's "half billion telecommunications network that would only be used by a few thousand people."<sup>5</sup> In that proceeding NECA supported SIC's participation in the NECA Pool.<sup>6</sup>

Between 1997 and 2000, SIC planned a network to meet the goals listed above, which plan called for a terrestrial fiber network on, and an undersea fiber cable connecting, six Hawaiian Islands. This undersea cable would supplement the two existing undersea cables serving the Hawaiian Islands, one owned by Hawaiian Telcom, Inc. ("HTI") and the other by Pacific LightNet, Inc. ("PLNI"). All of SIC's backbone network, both terrestrial and undersea, would consist of identical capacity (48 fibers). The RUS provided SIC an initial loan in 1997 for the build out of terrestrial network on the island of Oahu. The RUS provided additional loans thereafter for SIC's construction of its terrestrial network on Kauai, Maui, Molokai, and the Big Island, and the costs of those network deployments have since been put into the NECA Pool

---

<sup>4</sup> SIC was formed as a wholly-owned subsidiary to fulfill the license requirements, and the DHHL license was assigned to SIC in January 1996.

<sup>5</sup> See Comments of Hawaiian Telcom Merger Sub, Inc., CC Docket No. 96-45, at 16 (Feb. 8, 2005). SIC's position in this proceeding is that in 2005, SIC asked whether it could put the reasonable costs of its network plan in its revenue requirement for the NECA Pool, and now that it has built a network that cost \$100 million less than the Commission considered, the Commission has found that SIC is only entitled to half of its costs for a particular network segment even when SIC has demonstrated that 98% of the value of the network segment is in-use.

<sup>6</sup> See *In re Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, 13 F.C.C.R. 2407, 2420 at para. 9 (Feb. 3, 1998) ("SAW I").

PUBLIC VERSION

without objection.<sup>7</sup> In 1999 SIC submitted a network plan to the RUS who approved funding for the plan.<sup>8</sup> The network approved by RUS consisted of approximately 750 miles of terrestrial fiber on six Hawaiian Islands and 350 miles of undersea fiber connecting the terrestrial portions of SIC's network.<sup>9</sup> The undersea portion of the network is today referred to as Paniolo.<sup>10</sup>

The problem arises only with regard to Paniolo. Between 2007 and 2009, SIC caused the construction of Paniolo. Before constructing Paniolo, SIC undertook an avoided costs analysis. That analysis demonstrated that although SIC had been able to lease voice grade capacity on an undersea cable connecting SIC's terrestrial networks on the Hawaiian Islands on a short-term basis for approximately \$1.9 million per year, due to increased demand for undersea cable capacity by others, as well as because the two existing undersea cables were nearing their end of life, it would cost SIC more each year to secure a five-year term lease of undersea capacity on those cables than it would cost for SIC to cause Paniolo to be built and to lease Paniolo (the "Avoided Cost Analysis").<sup>11</sup> As a result, SIC caused Paniolo to be built and entered into a long-term lease for Paniolo.

---

<sup>7</sup> White Paper of Sandwich Isles Communications, Inc. In Support of Inclusion of Its Undersea Cable Costs In the NECA Pool, WC Docket No. 09-133 (June 4, 2010) ("SIC White Paper") at n. 11 (citing Mid-State Consultants, "RUS Loan Application for Sandwich Isles Communications, Inc. Hawaii 501-E Vol. I – Engineering Information" (Feb. 24, 2009)).

<sup>8</sup> SIC White Paper at 10.

<sup>9</sup> *Id.* at n.13 (citing Letter from Ken Chandler, Southwest Area Director, RUS, to Albert Hee, President, SIC (Nov. 30, 2000)).

<sup>10</sup> Note that as constructed, the Paniolo undersea cable does not link to Lanai, and thus, only connects five of the Hawaiian Islands, not six.

<sup>11</sup> See Comments of Sandwich Isles Communications, Inc., WC Docket 09-133, at 14-16, 18 (Aug. 31, 2009) ("SIC August 2009 Comments").

PUBLIC VERSION

At the end of Paniolo's construction, SIC submitted its lease costs to NECA for inclusion in SIC's revenue requirement. NECA initially accepted these costs, but in May 2009 rejected the costs on the basis that it "appeared" that Paniolo was not "used and useful."<sup>12</sup>

**The Order.** The Order finds that the Commission should evaluate SIC's revenue requirement pursuant to a "used and useful" analysis.<sup>13</sup> In conducting that analysis, the Order concludes that only a small part of Paniolo is in-use,<sup>14</sup> and that only \$1.9 million of Paniolo lease costs are not in dispute.<sup>15</sup> Therefore the Order "assumes" that this amount not in dispute represents the "per se" amount that is "baseline" "used and useful."<sup>16</sup> The Order then proceeds to examine additional "equitable factors beyond current actual usage in evaluating the costs that are 'used and useful' and appropriate for inclusion in [SIC's] revenue requirement."<sup>17</sup> There is no dispute in this case that "used and useful" is an equitable standard.<sup>18</sup>

**Brief Analysis of the Key Legal Issues on Reconsideration.** In rejecting SIC's costs, NECA did not provide an analysis, but it identified three summary concerns: (1) that there may not be enough demand to justify Paniolo; (2) that it cost more to build Paniolo than other undersea

---

<sup>12</sup> See Comments of the National Exchange Carrier Association, WC Docket No. 09-133 (Aug. 31, 2009) ("NECA August 2009 Comments") at Appendix M (Letter from James Frame, VP Operations, NECA, to Alan Pedersen, General Manager, SIC (May 5, 2009) ("NECA May 5 Letter")).

<sup>13</sup> Order at para. 11.

<sup>14</sup> Order at para. 17.

<sup>15</sup> Order at n.30

<sup>16</sup> Order at para. 18.

<sup>17</sup> Order at para. 9.

<sup>18</sup> See Order at n.36 and 44; Comments of AT&T Corp., WC Docket No. 09-133, at 10 (Dec. 7, 2010("AT&T Comments")) (citing *American Tel. and Tel. Co., Phase II Final Decision and Order*, 64 FCC 2d 1, at para. 112 (1977) ("AT&T Phase II Order") (holding that "used and useful" as a equitable standard.))

cables; and (3) that the "complex" contractual relationships permitting SIC to lease Paniolo rather than to own it.<sup>19</sup> In the end, NECA abandoned the last two concerns.

This case arises because NECA disputed SIC's Paniolo costs without support for its dispute or analysis of any kind, and since doing so has sought to rationalize its action. In fact, however, this case exists only because of NECA's failure to acknowledge the facts of this case -- such as the fact that SIC's Avoided Cost Analysis demonstrates that it was cheaper to construct Paniolo than to lease long-term capacity -- a problem which permeates the analysis in this case today.

Once issued, the Order's reasoning caused several considerations to come to the forefront. *First*, once Paniolo was put in service SIC transferred its existing traffic onto Paniolo and on each Paniolo route (*e.g.*, between islands) [REDACTED]

[REDACTED] Thus Paniolo is both "used" and "useful." (At all times NECA has been aware of these usage characteristics and has ignored them, suggesting that NECA's own "used and useful" analysis was intentionally flawed.<sup>20</sup>) *Second*, unknown to counsel for SIC, NECA has confidential, non-public "Spare Fiber Guidelines" which instruct carriers that they are to put the cost of spare fiber into their revenue requirement.<sup>21</sup> These Guidelines undermine entirely NECA's initial reasoning that Paniolo was not "used and useful" and reflect that NECA applied to SIC a different standard for including costs into SIC's revenue requirement than it applied to all other

---

<sup>19</sup> See NECA May 5 Letter.

<sup>20</sup> [REDACTED]

<sup>21</sup> NECA, Spare Fiber C&W Investment Cost Reporting Guidelines, at 1 (Mar. 5, 2004) ("Spare Fiber Guidelines" or "Guidelines") (instructing carriers to include the cost of spare fiber in their revenue requirements, and for separation purposes, that the cost of spare fiber should be assigned to the Pool in the same manner as in-use fiber). The Guidelines are attached as Exhibit A to the Reconsideration Petition.

carriers on the U.S. mainland -- the Hawaii Rule -- without identifying any basis for the differential treatment. For exactly these same reasons the Guidelines undermine entirely the Order's reasoning that it is equitable to compensate SIC for only half of its lease costs due to the existence of spare fiber capacity. It is not equitable precisely because all other carriers on the U.S. mainland are not subject to the Hawaii Rule and instead are authorized by the Guidelines to place 100 percent of their spare fiber costs in their revenue requirements.

NECA did not include the Guidelines in the record or identify them as being relevant law, and counsel for SIC did not learn of them until after the Order was issued. NECA's Guidelines are confidential and not public. Upon learning of their existence, NECA has refused to permit counsel for SIC access to NECA's guidelines (or precedent related thereto), of which the Spare Fiber Guidelines are a part.<sup>22</sup>

## **II. The Order's "Per Se" Used and Useful Analysis was in Error to the Extent it was Not Based Upon the Spare Fiber Guidelines and Commission Precedent**

AT&T and NECA argue that the Spare Fiber Guidelines are irrelevant to what Paniolo costs SIC can place in its revenue requirement.<sup>23</sup> In fact, the Guidelines are the signal law of this case and, if applied, direct that 100 percent of SIC's Paniolo costs are to be placed in SIC's revenue requirement. Application of other Commission precedent reaches the same conclusion.

The Order applies a "per se" used and useful analysis and finds, based upon applicable law, that as a "baseline" only \$1.9 million of SIC's Paniolo costs are "used and useful." To recap, the

---

<sup>22</sup> SIC filed an emergency motion requesting access to NECA's guidelines on December 16, 2010. The motion is still pending before the Commission. *See* Emergency Motion Requesting Access to NECA Rules, Regulations, Guidance and Precedent of Any Type Relied Upon by NECA, Carriers or Regulatory Personnel in Connection with the Access Charge Regime, WC Docket No. 09-133 (Dec. 16, 2010) ("SIC Emergency Motion").

<sup>23</sup> *See* AT&T Comments at 8-15; *see also* Comments of the National Exchange Carrier Association, WC Docket No. 09-133 (Dec. 6, 2010) at 2 ("NECA Comments").

Order's "per se" used and useful analysis is as follows. First, the Order finds that 100 percent of the lease costs are not "per se 'used and useful.'"<sup>24</sup> Second, the Order finds that "only a very small portion of the capacity leased on the cable currently is in-use by [SIC] to provide regulated services...."<sup>25</sup> Third, the Order finds, "as a baseline," that NECA is paying SIC \$1.9 million because that is the amount that SIC previously was paying to lease voice grade capacity on another cable and "interprets" "that amount as reflecting a reasonable application of the threshold 'used and useful' considerations, which we ordinarily expect to be sufficient to resolve revenue requirement questions."<sup>26</sup> This "per se" analysis is wrong in several respects.

**A. The "Per Se" Analysis Should Have Been Based on the Spare Fiber Guidelines**

The Order should have found that 100 percent of the Paniolo lease costs are per se "used and useful" and includable in the NECA Pool based upon the Spare Fiber Guidelines. The Order recognizes that NECA must comply with the "used and useful" standard as well as NECA's own "codified 'accounting, cost allocation, jurisdictional separations, and access charge rules.'"<sup>27</sup> The Order notes that simply applying NECA's rules, without first applying the "used and useful" standard to a carrier's revenue requirement, "could enable pooling carriers to undermine NECA's roles and evade Commission regulation."<sup>28</sup> Thus, the Order recognizes that NECA cannot simply apply its separations rules to an unreasonable revenue requirement. This may be true, but the important point is that NECA's rules only permit "used and useful" costs into the Pool and the Spare Fiber Guidelines clearly permit spare fiber costs into the Pool. The Guidelines cannot

---

<sup>24</sup> Order at para. 9.

<sup>25</sup> Order at para. 17.

<sup>26</sup> Order at para. 18.

<sup>27</sup> Order at para. 27.

<sup>28</sup> *Id.*

PUBLIC VERSION

separate costs that are not "used and useful." Thus, the Guidelines reflect that spare fiber is "used and useful" absent extenuating circumstances. There are no extenuating circumstances in this case, except those that favor SIC.<sup>29</sup>

By way of background, the Spare Fiber Guidelines were adopted by NECA under the Commission's oversight as part of its Part 36 separations rules and have been applied uniformly to carriers since 2004.<sup>30</sup> Thus, the Spare Fiber Guidelines are the only "per se" rule in this proceeding that deals with spare fiber. There is no legal basis to conclude that the Spare Fiber Guidelines are irrelevant to a "used and useful" analysis.

The Spare Fiber Guidelines were codified by NECA because the Commission determined that fiber deployments generally contain greater spare fiber capacity than did copper deployments and, as a result, there was legal uncertainty as to whether spare fiber could be included in the Pool (and, if so, under what conditions).<sup>31</sup> Based upon these concerns, NECA interpreted Commission rules and regulations to require that the cost of spare fiber be included in a carrier's revenue requirement in the same manner as in-use fiber. Such a rule necessarily presupposes that the spare fiber cost has been accepted into a carrier's revenue requirement. Thus, the Spare Fiber Guidelines dictate that the cost of spare fiber is to be accepted into a carrier's revenue requirements. There is simply no other way to read the Guidelines.<sup>32</sup> *Therefore, the Order should*

---

<sup>29</sup> See Order at paras. 19-21 (specifically, the unique geographic challenges in Hawaii; the special role of SIC; and the inclusion of spare capacity).

<sup>30</sup> See NECA Comments, at Appendix A.

<sup>31</sup> See Spare Fiber Guidelines at 1.

<sup>32</sup> NECA and AT&T contend that the Guidelines are irrelevant because they pertain only to the intrastate/interstate separations process under Part 36 (*i.e.*, that it only advises carriers whether they should list the costs of their spare fiber in the interstate column or the intrastate column of the NECA reporting form). NECA Comments at 2; AT&T Comments at 8-15. This contention defies common sense. In order to allocate the spare fiber costs, they must first be included in a carrier's revenue requirement.

PUBLIC VERSION

have found that both the cost of in-use fiber and the cost of spare fiber are "per se" "used and useful" according to the only relevant rule dealing with spare fiber, the Spare Fiber Guidelines.<sup>33</sup>

There is no justifiable reason to disregard the Guidelines in favor of the Hawaii Rule.

The Order wrongly holds that where Paniolo is concerned, only in-use fiber is "per se" used and useful or, as stated elsewhere in the Order, only in-use fiber meets the "threshold 'used and useful' considerations."<sup>34</sup> This "per se" or "threshold" analysis is thus inconsistent with the Spare Fiber Guidelines, and the Spare Fiber Guidelines have determined the cost recovery and allocation for all U.S. mainland carriers since at least 2004.

The Order also made a factual error with regard to Paniolo. The Order held that it could not "find 100 percent of Sandwich Isles' lease expenses per se 'used and useful'"<sup>35</sup> because the Bureau found that "only a very small portion of the capacity leased on the cable currently is in-use by Sandwich Isles...."<sup>36</sup> There is no basis for finding that "only a very small portion" of Paniolo is used by SIC. [REDACTED]

[REDACTED]. This is well within industry norms, based upon the Commission's own records reflecting that [REDACTED].<sup>37</sup> On reconsideration, the Bureau should find that 100 percent of the Sandwich Isles lease costs are "per se" "used and useful"

---

<sup>33</sup> SIC's counsel does not have access to the NECA rules. According to NECA, it is sufficient that SIC and its accounting consultant, GVNW, have access. NECA's confidentiality concerns have already been addressed in the Protective Order in this case and under those circumstances it is improper for NECA to deny counsel access to its rules. *See, e.g., In re Applications of Mobile Communications Holdings, Inc.*, 18 FCC Rcd 133, at para. 3 (Jan. 9, 2003); *Application of WorldCom, Inc.*, Order (DA 98-1072), CC Docket No. 97-211 (June 5, 1998) ("Worldcom"), available at: [http://www.fcc.gov/Bureaus/Common\\_Carrier/Orders/1998/da981072.txt](http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1998/da981072.txt); *Nova Cellular West*, Order (DA 00-1835), File No. ENF-00-002 (Aug. 11, 2000).

<sup>34</sup> Order at paras. 9 and 15.

<sup>35</sup> Order at para. 9.

<sup>36</sup> Order at para. 17.

<sup>37</sup> See Section II. B.ii, *infra*.

because a substantial portion of the Paniolo cable is in-use, the remainder is spare fiber, and the Spare Fiber Guidelines permit the cost of both in-use and spare fiber to be included in the SIC revenue requirement.

We note that the Order does not reference the Spare Fiber Guidelines and NECA has chosen not to identify the Guidelines as a source of authority in this case to be followed or distinguished. We further note that NECA has not challenged the fact that the Spare Fiber Guidelines apply to spare fiber in the manner described by SIC in its Reconsideration Petition. NECA has simply ignored the Guidelines in favor of the Hawaii Rule.

AT&T attempts to distinguish the Spare Fiber Guidelines on the grounds that they do not apply to undersea cable.<sup>38</sup> AT&T is clearly wrong. The Guidelines interpret rule Section 36.153, which *explicitly includes* "submarine cable" and "deep sea cable."<sup>39</sup>

Even if the Bureau finds that the Spare Fiber Guidelines are not dispositive or sufficient to conclude a "per se" analysis under the "used and useful" standard, the Bureau should find that SIC is "per se" entitled to 100 percent of its Paniolo lease costs when applicable Commission precedent is applied in addition to the Spare Fiber Guidelines, as discussed below.

**B. Commission Precedent Should Have Been Applied As Part of the "Per Se" Analysis of the Paniolo Lease Costs and When Applied Demonstrate that 100 Percent Inclusion of SIC's Paniolo Lease Costs is Appropriate**

As set forth below, the Spare Fiber Guidelines are consistent with Commission precedent cited in the Order. As applied, this precedent would result in 100 percent of SIC's Paniolo costs being included in its revenue requirement under a "per se" analysis. This precedent shows: (i) where costs that are incurred are less than costs that are avoided, the investment is "per se"

---

<sup>38</sup> AT&T Comments at 10.

<sup>39</sup> 47 C.F.R. § 36.153(a).

prudent; (ii) the cost of Paniolo spare fiber is "per se" prudent because it is consistent with industry norms; and (iii) it is not necessary to conduct a prudent "used and useful" analysis where the cost of spare facilities is *de minimis*.

**i. It was Error for the Order to Have Ignored the Holding in the AT&T Billing and Collections Case by Failing to Consider SIC's Avoided Costs in Its Per Se Analysis**

It was error for the Order exclude SIC's Avoided Cost Analysis from its "per se" analysis, and when SIC's Avoided Cost Analysis is factored in, any doubt about whether SIC is entitled to include 100 percent of its Paniolo costs in its revenue requirement dissipates.

The Bureau found that SIC is using a portion of Paniolo and therefore some amount of Paniolo is "used and useful."<sup>40</sup> Having made this determination, the Bureau had to place some value on the in-use portion in order to determine the costs to be included in the SIC revenue requirement. The Order failed to make that determination. Instead, the Order concluded that it would treat the costs not in dispute between SIC and NECA (\$1.9 million) as a "baseline" proxy for "used and useful."<sup>41</sup> In other words, since NECA did not dispute an amount equal to \$1.9 million of the cost of Paniolo that was a "baseline" amount that the Order could assume was "used and useful."

As noted in the factual statement above, SIC's Avoided Cost Analysis found Paniolo Lease costs were less than the avoided costs.<sup>42</sup> This is not in dispute.<sup>43</sup> In light of this undisputed

---

<sup>40</sup> Order at para. 17.

<sup>41</sup> Order at n. 30.

<sup>42</sup> See n.11, *supra*.

<sup>43</sup> At one point in time NECA asserted that it had obtained a quote of \$1.2 million for undersea capacity, but NECA ultimately failed to provide any specific evidence to substantiate the quote, or to demonstrate that such a quote was meaningful in the context of this case. See SIC August 2009 Comments at 7, n.19. Accordingly, the Order does not rely upon such assertion.

evidence it was not rational to find that the per se "used and useful" amount is \$1.9 million simply because the parties agree that SIC is entitled to *at least* that much compensation.

It is well-settled that avoided cost is a necessary part of the "used and useful" analysis. Indeed, AT&T agrees that avoided cost is part of the "used and useful" analysis and cites *AT&T Billing and Collections* as an example.<sup>44</sup> Thus, in determining what is "used and useful" in this case, the Commission must examine not only SIC's costs, but also those costs it avoided (particularly where, as here, SIC's very decision to construct Paniolo was based upon an avoided cost analysis that showed it to be cheaper to construct Paniolo than to lease capacity from the other undersea cable providers).<sup>45</sup> For all of these reasons, it was error for the Order to ignore SIC's Avoided Cost Analysis.

On reconsideration, the Bureau must independently find (i) that it is "per se" reasonable to include in the SIC revenue requirement the avoided cost of both in-use and spare facilities, (ii) that SIC has demonstrated that its avoided cost was equal to or greater than the Paniolo lease costs and, therefore, (iii) that the Paniolo lease costs are "per se" reasonable and properly included in SIC's revenue requirement.

**ii. The *Separations Reform Order* Mandates that 100 Percent of SIC's Paniolo Lease Costs Be Included in Its Revenue Requirement**

The Order should have followed the *Separations Reform Order* in its "per se" analysis. In the *Separations Reform Order*,<sup>46</sup> the Commission found that 68 percent of fiber nationwide is

---

<sup>44</sup> AT&T Comments at n.56 (citing *AT&T Communications Revisions to Tariff*, 5 FCC Rcd 5693 (1990) ("AT&T Billing and Collections") (holding that the AT&T billing and collection costs exceeded the avoided cost of obtaining such services from others)).

<sup>45</sup> SIC August 2009 Comments at 14-15, 18.

<sup>46</sup> *Separations Reform*, Notice of Proposed Rulemaking, 12 FCC Rcd 22120 (Oct. 7, 1997) ("Separations Reform Order").

PUBLIC VERSION

spare, based on reports from carriers that operate 95 percent of the access lines in the U.S.<sup>47</sup> The Commission has accepted this standard as reasonable for more than a decade and as a result has never found spare fiber to be *not* "used and useful," nor has the Commission excluded spare fiber from the NECA Pool. NECA explicitly promulgated its Spare Fiber Guidelines upon the spare fiber statistics in the *Separations Reform Order*.<sup>48</sup> Ironically, AT&T notes (accurately) that, "nothing in the [*Separations Reform Order*] suggests that these investments were excessive."<sup>49</sup> Indeed, the Commission did *not* object to 68 percent of fiber being spare, nor has it held that this amount of spare fiber is imprudent or inconsistent with the "used and useful" standard or should be excluded from a carrier's revenue requirement. Thus, the *Separations Reform Order* stands for the proposition that substantial amounts of spare fiber are industry norm and that it is appropriate to include the costs of substantial spare fiber in a carrier's revenue requirement. This holding must inform any "per se" analysis of whether Paniolo is "used and useful." Under this standard, SIC's costs of both spare and in-use fiber on Paniolo should clearly have been found "per se" reasonable.

The Order erred when it failed to apply the Guidelines. Perhaps the Order reasoned that, even though it found that 68 percent of fiber in the country is spare, that simply does not establish a legal standard in this case because the full cost of all spare fiber deployment is not always recovered from the NECA Pool. Specifically, in responding to SIC's concern that NECA was subjecting it to unequal treatment by applying the Hawaii Rule (because elsewhere NECA was releasing a report proudly trumpeting how much fiber is being deployed by rural LECs on the mainland), the Order notes that "the NECA report [cited by SIC] does not claim that the carriers'

---

<sup>47</sup> *Separations Reform Order* at para. 70.

<sup>48</sup> See Spare Fiber Guidelines at 1, n.4.

<sup>49</sup> AT&T Comments at n.35.

PUBLIC VERSION

fiber deployment costs were fully recovered through the NECA Pool."<sup>50</sup> This appears to respond to AT&T's comment that "as the Bureau has pointed out, nothing in the *Separations Reform Order* suggests that the large ILECs were permitted to recover the fully [sic] cost of their spare fiber through the NECA Pool."<sup>51</sup>

If this was the Order's reasoning, it was wrong. It is axiomatic that the *full cost* of spare fiber is *not* recovered through the NECA Pool, because a carrier's revenue requirement is not fully recovered through the NECA Pool. The revenue requirement is subject to the separations process under Parts 36 and 64, after which only part of the revenue requirement goes into the NECA Pool. SIC is not seeking to alter this<sup>52</sup> or to recover SIC's full costs from the NECA Pool. Thus, AT&T is incorrect that SIC is seeking to place 100 percent of the Paniolo lease costs in the NECA Pool.<sup>53</sup> SIC is simply seeking to include the Paniolo lease costs in its revenue requirement, which will then be subject to the normal application of the Part 36 (interstate and intrastate) and Part 64 (regulated and non-regulated) rules.

Based on the undisputed fact that [REDACTED], the Bureau should have concluded in its "per se" analysis that SIC is in compliance with the industry standards and practices found in the *Separations Reform Order*, and that the Paniolo lease costs are properly included in the SIC revenue requirement.<sup>54</sup>

---

<sup>50</sup> Order at n.71.

<sup>51</sup> AT&T Comments at n.35.

<sup>52</sup> See Petition for Declaratory Ruling of Sandwich Isles Communications, Inc., WC Docket No. 09-133, at 1 (June 26, 2009) (requesting that "certain circuit lease expenses" be included in the NECA Pool.)

<sup>53</sup> See, e.g., AT&T Comments at 3.

<sup>54</sup> AT&T also quibbles with application of the *Separations Reform Order* because, according to AT&T, "These ILECs were typically the first entrant into the marketplace and were therefore responsible for providing all or almost all of the fiber facilities needed for regulated services." AT&T Comments at

(Cont'd on following page)

**iii. The Order Should Have Applied the Holding of *Amendment of Part 65* in its Per Se Analysis**

In its Reconsideration Petition, SIC demonstrates that it was error for the Order to identify 13 percent of its annual Paniolo lease costs (\$1.9 million) as "used and useful" when the Order also finds that the cost of constructing the fiber that is in-use amounts to more than 98 percent of total Paniolo costs.<sup>55</sup> With regard to the remaining 2 percent of costs for fiber that is not currently in-use (spare), the Order errs when it fails to apply the Spare Fiber Guidelines. It separately errs when it cites, but fails to apply, Commission precedent holding that it is not necessary to undertake a "used and useful" analysis of telecommunications facilities held for future use where the cost to be reviewed comprises only a small percentage of the total cost.

The Order recognizes that the Commission "has allowed costs to be included in [a] revenue requirement to address inequities or avoid complications and burdens."<sup>56</sup> "Explaining that the cost of materials and supplies held for long-term construction projects are usually excluded from the rate base, the Commission in a rulemaking proceeding made an exception to allow such costs to be included, in part based on the relatively small (less than a tenth of a percent) impact to the rate base."<sup>57</sup> In *Amendment of Part 65*, the dollar value of the revenue requirement the Commission

---

(Cont'd from preceding page)

n.35. SIC is a new entrant, as the Bureau recognized in the *SAW Cases*, so AT&T's attempted distinction fails.

<sup>55</sup> The Order recognizes that, "[SIC] states that the cost difference between a 12-fiber system and a 48-fiber system is approximately 2%." Order at n.65. This is not in dispute. [REDACTED] Reconsideration Petition at 21-22, Harper Declaration at 3.

<sup>56</sup> Order at para. 16 (citing *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 4 FCC Rcd 1697, at paras. 42-47 (Jan. 30, 1989) ("*Amendment of Part 65*").

<sup>57</sup> Order at para. 16.

allowed into the rate base to avoid the "complications and burdens" of determining whether such costs are "used or useful" was \$70 million.<sup>58</sup>

The Order failed to apply the *Amendment of Part 65* holding in this case, and instead concluded, irrationally, that even though 98 percent of the costs of Paniolo are incurred in the first 12 fibers (which are in-use and are therefore useful)<sup>59</sup>, that it would discount the disputed amount of SIC's Paniolo lease costs by 50 percent. This was clear error and must be reconsidered. Applying the *Amendment of Part 65* holding to the facts here, the entire Paniolo lease costs should have been found to be "per se" used and useful and therefore included in the SIC revenue requirement.

### **III. The Order's Equitable Analysis Failed to Include the Spare Fiber Guidelines and Misapplied Precedent**

The Bureau considered "a variety of equitable factors beyond current actual usage in evaluating the [Paniolo] costs that are 'used and useful' and appropriate for inclusion in the revenue requirement."<sup>60</sup> As noted above, the Bureau erred, among other things, when it concluded that only a small part of Paniolo is being used and that only current actual usage could be considered under a "per se" analysis. However, even if the Bureau disagrees with SIC's suggested "per se" analysis, it is clear that all of the Paniolo lease costs should be included in the SIC revenue requirement by considering equitable factors.

---

<sup>58</sup> *Amendment of Part 65* at paras. 44-45. Here, 2 % of SIC's current annual lease costs are \$300,000 (\$15 million x 0.02).

<sup>59</sup> See n.55, *supra*.

<sup>60</sup> Order at para. 9.

**A. The Bureau's Equitable Analysis Must Include the Spare Fiber Guidelines**

Even if the Bureau accepts the contentions of NECA and AT&T that the Spare Fiber Guidelines only determine how to separate intrastate/interstate costs and do not determine, as a "per se" matter, what spare fiber costs to include in a carrier's revenue requirement, the Bureau nevertheless must consider the Spare Fiber Guidelines as part of its equitable analysis, and the Order failed to do so. NECA repeatedly characterizes the Spare Fiber Guidelines as "fact" and "evidence"<sup>61</sup> in a remarkable effort to exclude consideration of the Guidelines as late-filed evidence.<sup>62</sup> NECA's characterization of the Guidelines as factual evidence is wrong. The Guidelines are clearly law. Even if the Guidelines do not amount to a "per se" rule, they certainly hold that spare fiber is routinely accepted by NECA into carrier revenue requirements before application of the separations process under Parts 36 and 64.

A basic equitable principle is equal treatment of similarly situated parties. Thus, if the spare fiber of U.S. mainland carriers is routinely included in their revenue requirements then SIC is entitled to the same treatment, and not application of the Hawaii Rule. The Order expresses doubt that spare fiber costs are fully recovered through the NECA Pool, "as the NECA report [identified by SIC] does not claim that carriers' fiber costs were fully recovered through the NECA Pool."<sup>63</sup> The Guidelines illustrate that it is the policy of the U.S. to allow spare fiber costs in a carrier's revenue requirement. If nothing more, the Spare Fiber Guidelines are settled industry practice and under equitable principles SIC is entitled to equal application of the law.

---

<sup>61</sup> NECA Comments at 2.

<sup>62</sup> NECA's procedural arguments are dealt with in Section VI, below.

<sup>63</sup> Order at n.71. As clarified herein, the issue is not what costs are recovered through the NECA Pool, but what costs are allowed into each carrier's revenue requirement, to which the Parts 36 and 64 rules apply.

**B. Three Cases Should Have Been Controlling Under the Equitable Analysis: *Comsat*, *PSV Cable*, and *SAW Cases***

SIC showed in its Reconsideration Petition that the *Comsat* case and the *PSV Cable* cases support inclusion of 100 percent of the cost of spare fiber in the carrier revenue requirement. SIC also showed that the Order misinterpreted the *SAW Cases*. These three cases should have instructed the Order's equitable analysis as discussed below.

*Comsat*. Although the Bureau repeatedly cites the *AT&T Phase II* order<sup>64</sup> for the proposition that the "used and useful" standard applies, that case dealt with "institutional advertising and charitable contributions," neither of which is remotely relevant to this case.<sup>65</sup> Because this case deals with NECA's allegation that SIC's Paniolo lease costs are not "used and useful" due to the inclusion of spare capacity, the *Comsat* case is directly relevant. Unfortunately, the Bureau misinterpreted that case. *Comsat* held that 100 percent of the cost of both on-ground and in-orbit spare satellites is properly included in Comsat's revenue requirement, as well as the cost of spare circuits on in-use satellites.<sup>66</sup> AT&T argues that *Comsat* does not apply because the case involved the cost of satellites that were in-use and failed.<sup>67</sup> SIC is not seeking costs of capacity that was in-use and failed. SIC is relying, as is the Bureau, on the part of the decision that allows the cost of spare satellites. The Order erred when it did not apply *Comsat* and therefore allow 100 percent of SIC's spare fiber costs into the revenue requirement.

---

<sup>64</sup> Order at nn.36, 40 and 41.

<sup>65</sup> *AT&T Phase II Order* at para. 8. AT&T also relies upon this order without explanation as to its relevance to the facts of this case. AT&T Comments at n.27. Likewise, AT&T relies upon *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082 (1984), for a general statement of the "used and useful" standard with no apparent relevance to this case. AT&T Comments at n.27.

<sup>66</sup> *Communications Satellite Corporation, Investigation Into Charges, Practices, Classifications, Rates, and Regulations*, 56 FCC2d 1101, at paras. 14, 94 (1975) ("*Comsat*").

<sup>67</sup> AT&T Comments at 14.

PUBLIC VERSION

**PSV Cable.** Likewise, the *PSV Cable* cases also support 100 percent inclusion of the Paniolo lease costs in the SIC revenue requirement. As to that case the Bureau erred in applying *PSV II* instead of *PSV I*, as SIC explained in its Reconsideration Petition.<sup>68</sup> AT&T's purported distinction of the *PSV Cable* cases is also nonsense.<sup>69</sup> According to AT&T, the *PSV Cable* cases dealt with "circumstances that could not be predicted and that were outside the control of the carriers...."<sup>70</sup> As AT&T is aware, over the past several years the U.S. has experienced the greatest financial crisis since the Great Depression, the financial crisis is housing-related, has led to some of the highest foreclosure rates and steepest home price declines on record, has resulted in tighter mortgage application standards and has greatly reduced new home construction to the lowest levels in years. Under any reasonable equitable standard, this amounts to a change in circumstances beyond SIC's control, but for which SIC would currently have far more access lines than it currently has.<sup>71</sup> Under *PSV I* SIC is entitled to include in its revenue requirement 100 percent of the lease expenses that SIC incurred based upon the demand that SIC anticipated *before* this unprecedented change in circumstances occurred.

**SAW Cases.** SIC has made little headway in persuading the Bureau to simply follow the *SAW Cases*, despite the fact that those cases directly considered the very situation that the Bureau is re-examining here, namely, the equitable balancing of the costs and benefits of providing

---

<sup>68</sup> See SIC Reconsideration Petition at 5-6 (citing *Common Carrier Rate Structure Inquiry Tariff Investigation*, 88 FCC2d 1656 (Feb. 23, 1982) ("PSV Cable I"); *In the Matter of Special Access Tariffs of Local Exchange Carriers*, 1986 WL 291617 (Jan. 24, 1986) ("PSV Cable II")).

<sup>69</sup> AT&T Comments at 14.

<sup>70</sup> AT&T Comments at 14.

<sup>71</sup> Although the Order sets the size of the HHL waitlist at 20,000 applicants, in actuality the number of applicants has increased to over 25,000. See [http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31\\_07-Alpha\\_A-K\\_Waitlist\\_245pgs.pdf](http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31_07-Alpha_A-K_Waitlist_245pgs.pdf)

complete, modern communications services to the HHL. At a minimum, the *SAW Cases* should be re-examined on reconsideration with respect to one point. NECA determined to exclude the Paniolo lease costs from the NECA Pool on the grounds that "NECA's pooling mechanisms are not intended to support extreme costs of this nature."<sup>72</sup> The *SAW Cases*, among others, clearly explain that the purpose of the NECA Pooling mechanism is to spread the cost of high-cost carriers among all of the carriers participating in the Pool, which would result in cost savings and lower rates for SIC.<sup>73</sup> This necessarily results in regulated rate payers of low-cost carriers bearing some of the costs of services of high-cost carriers that do not benefit them directly. Nevertheless, the Commission found that such pooling does benefit all rate payers because without it we would not have universal phone (and broadband) service and rate payers of low-cost carriers would not be able to communicate with citizens in high-cost areas. Fundamentally, therefore, the *SAW Cases* illustrate NECA's inconsistent position, but more importantly, show that NECA was wrong in rejecting the SIC costs simply because they are high.<sup>74</sup>

#### **IV. SIC Demonstrated Anticipated Demand and Therefore Satisfied All of the Equitable Factors Identified by the Bureau**

The Bureau found that all of the equitable factors supported putting all of the Paniolo lease costs into SIC's revenue requirement, except for anticipated demand.<sup>75</sup> Thus, the Order's decision

---

<sup>72</sup> NECA May 5 Letter.

<sup>73</sup> See *SAWI* at para. 13. NECA supported SIC's inclusion in the NECA Pool. See *SAWI* at para. 9.

<sup>74</sup> AT&T contends that the *SAW Cases* are not controlling because the Bureau indicated it would consider SIC costs on an annualized basis. AT&T Comments at 16. AT&T is incorrect. *SAW III* says that the Commission would not include estimates of future costs in determining whether to grant SIC's petition. It does not say that the Bureau intended to engage in annual reviews of SIC's costs after granting the appropriate waivers. See *In the Matter of Sandwich Isles Communications, Inc.; 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*, 20 FCC Rcd 8999 (May 16, 2005) ("*SAW III*").

<sup>75</sup> See Order at 22.

PUBLIC VERSION

not to allow SIC to include all Paniolo costs in its revenue requirement rests upon the alleged failure to show anticipated demand.<sup>76</sup>

The Bureau reasoned that a showing of anticipated demand "for the near-term future is required because the 'used and useful' test requires a showing that ratepayers are only burdened with the cost of facilities that will be put into use in a reasonable period of time."<sup>77</sup> The Bureau should have found that SIC met the anticipated demand factor for two reasons.

First, the requirement for a showing that a benefit will be realized in a reasonable time or in "the near-term future" is certainly satisfied when the benefit is realized *immediately*. SIC showed that [REDACTED]. The Order recognizes that 12 fibers comprise 98 percent of the Paniolo lease costs.<sup>78</sup> Thus, ratepayers realized the benefit of 98 percent of the Paniolo cost immediately. Furthermore, SIC showed that carriers typically deploy one-third in-use and two-thirds spare fiber and therefore the spare fiber on the Paniolo cable is no different than what is in other transport backbones generally.<sup>79</sup> Therefore, the Order should have found that the anticipated demand test was fully satisfied [REDACTED] [REDACTED], and the remaining spare fiber (which only

---

<sup>76</sup> SIC argued in its Reconsideration Petition that unlike its application of the Hawaii Rule to SIC, NECA does not require other carriers on the U.S. mainland to demonstrate anticipated demand. Thus, by focusing on anticipated demand, the Order creates a new rule without due process. It is well-established that new rules can only be applied prospectively and not retroactively to a decision made by SIC in 2007. *See* Reconsideration Petition at 10-11.

<sup>77</sup> Order at para. 22 ("As NECA observes, the 'used and useful' analysis requires that regulated ratepayers realize the benefit from the investment be realized in a reasonable time.")

<sup>78</sup> Order at n.65.

<sup>79</sup> The Order supported this when it found that, "it was logical here to include some spare capacity in the cable" and the Order notes that, "NECA recognizes...some recovery for spare fiber is reasonable." *See* Order at para. 21.

comprises 2 percent of the cost) is no different than the amount of spare fiber that other carriers deploy.

Second, even if the Bureau had some basis to disagree with the foregoing and require that SIC make an additional showing of anticipated demand, SIC made the required showing. SIC showed that there is a waiting list for over 20,000 HHL home sites and, therefore, at least 20,000 access lines that SIC will have to serve. The Order engages in speculation that the Hawaiian Homes Commission ("HHC") may not award 20,000 home sites, or may not do so within a predictable timeframe.<sup>80</sup> The HHC could decide to award 20,000 home sites at any time or within any timeframe. The past rate of award of home sites is not predictive of the future rate of awards.

Third, the speculation engaged in by the Bureau is simply inappropriate as a matter of law. The Bureau recognized the "special role" of SIC in the Order.<sup>81</sup> Consistent with this special role, SIC had to plan and build its network in compliance with the HHL program. SIC was not free to speculate that the HHL program might fail and that a network capable of serving 20,000 access lines was not needed.<sup>82</sup> SIC was created and authorized to serve the HHL. SIC had to plan and build to serve the HHL waiting list or SIC could have undermined the HHL mission. These facts readily distinguish SIC from a carrier that might undertake imprudent network deployment as a matter of failed commercial investment. The Bureau recognized this in *SAW III*, where it found that "[t]here is ample evidence to show that granting [SIC] a study area waiver would serve the

---

<sup>80</sup> Order at n.74.

<sup>81</sup> Order at para. 20.

<sup>82</sup> The Bureau previously recognized the 20,000 person waitlist in *SAW III*. See *SAW III* at para. 19 ("Although [SIC] does not have firm data on the number of potential subscribers, it notes that the [DHHL] has a waiting list of approximately 20,000 native Hawaiians who have applied for lots.")

public interest. [SIC] has demonstrated a commitment to build facilities and extend service throughout the [HHL] as the [DHHL] develops the area."<sup>83</sup>

Fourth, the Bureau also erred in misapplying the *TAT-10* decision to the facts of this case. The Order recognizes that *TAT-10* supports the notion of route diversity.<sup>84</sup> However, on the issue of anticipated demand, the Order mischaracterizes SIC's position and misapplies the *TAT-10* decision. The Order describes SIC's argument as "speculation that the deployment of new cable would, in itself, lead to increased demand."<sup>85</sup> On the contrary, SIC showed anticipated demand based upon the HHL program and the obsolescence of the HTI cable. Based on those facts, SIC relied upon *TAT-10* for a simple proposition: construction of a new submarine cable is prudent where the capacity on existing cables is inadequate or will expire. Under the circumstances here, namely, the addition of new access lines under the HHL program and the growing obsolescence of the HTI cable, the Commission would have approved Paniolo under its prior undersea cable approval process as set forth in *TAT-10*. That process is the same as the former domestic 214 process. NECA claims it now must act as gatekeeper because the Commission deregulated the 214 process. Assuming *arguendo* that NECA has the right to act as gatekeeper, under *TAT-10* and the facts here there is no question that the construction of Paniolo was prudent.

**V. SIC Properly Accounts for Its Costs and AT&T's Allegations to the Contrary are Incorrect**

In its Comments, AT&T raises the specter that SIC is not complying with the Commission's cost separation and allocation rules or is otherwise seeking through this case a

---

<sup>83</sup> *SAW III* at para. 22.

<sup>84</sup> Order at para. 19 and n.54.

<sup>85</sup> Order at n.76.

modification of the separations rules.<sup>86</sup> This is incorrect. SIC has properly accounted for its costs under Parts 36 and 64 of the Rules and AT&T has no basis to suggest otherwise. SIC asks only that its Paniolo costs be allocated into SIC's revenue requirement so that the existing separations rules may apply to SIC's Paniolo costs.

As discussed above, the SIC revenue requirement (like that of all other carriers) is separated between the intrastate and interstate jurisdictions in accordance with Part 36.<sup>87</sup> Similarly, under Part 64, SIC (like all other carriers) separates its revenue requirement between regulated and non-regulated services. AT&T is merely attempting to sow confusion by mischaracterizing SIC's cost studies and the Commission's rules. The record and the law are clear. SIC is entitled to include 100 percent of the Paniolo lease costs in the SIC revenue requirement and then those costs will be subject to the normal separations process under Parts 36 and 64.

#### **VI. SIC's Reconsideration Petition is Procedurally Proper**

Both AT&T and NECA argue that SIC's Reconsideration Petition is procedurally infirm, relying on different sections of the Commission's rules to support their assertion. A careful reading of the rules indicates that the Reconsideration Petition is appropriate with regard to the issues raised above. Section 1.106(a)(1) of the Commission rules states that "[p]etitions requesting reconsideration of [] final actions taken pursuant to delegated authority will be acted on

---

<sup>86</sup> Specifically, AT&T claims that SIC is improperly seeking "to include 100 percent of Sandwich Isles' Paniolo lease expenses in its interstate revenue requirement, and to include those amounts through the NECA pool." AT&T further claims that "portions of [SIC's] Paniolo lease expenses relate to facilities that Sandwich Isles is using to provide non-interstate services (*i.e.*, intrastate services) and potentially non-regulated services (*e.g.*, video and Internet services)." *See* AT&T Comments at 7-8.

<sup>87</sup> *See* 47 C.F.R. § 36.2(b)(1) (requiring the revenue requirement to be separated between "interexchange plant" and "exchange plant.").

PUBLIC VERSION

by the designated authority."<sup>88</sup> Since the Order was a final action, the Reconsideration Petition is appropriate under this section.

In erroneously alleging that the Reconsideration Petition is procedurally infirm, AT&T relies upon Section 1.106(c).<sup>89</sup> This rule, however, deals with petitions that rely "upon facts not previously presented to the Commission or to the designated authority."<sup>90</sup> First, the information set forth in the Harper Declaration, *i.e.*, the number of Paniolo fibers in-use, has been on the record for over a year.<sup>91</sup> Second, although AT&T takes issue with SIC's use of the Spare Fiber Guidelines, the Guidelines are applicable law, not facts, and thus do not operate to preclude reconsideration in this case.<sup>92</sup> AT&T's claims challenging the foundation for the Reconsideration Petition are without merit. Previously, the specific issue of spare fiber had not been raised as an equitable consideration; therefore, the need to rely on the Spare Fiber Guidelines was not at issue prior to the Order, which specifically identified spare fiber capacity as an equitable consideration under the "used and useful" analysis.<sup>93</sup> Without the guidance as to NECA's treatment of spare fiber, the Order erroneously denied full recovery for Paniolo spare fiber. Thus, it was procedurally appropriate for SIC to introduce relevant law, *i.e.*, the Spare Fiber Guidelines, which bear directly on the issue by governing NECA's treatment of the spare fiber costs of the hundreds of other U.S.

---

<sup>88</sup> 47 C.F.R. § 1.106(a)(1).

<sup>89</sup> See AT&T Comments at 6-7.

<sup>90</sup> 47 C.F.R. § 1.106(c).

<sup>91</sup> See n. 55, *supra*.

<sup>92</sup> Compare *In the Matter of Intermedia Partners*, Petition for Reconsideration, 13 FCC Rcd 10180 (Jan. 12, 1998) (holding that petition for reconsideration premised upon introduction of revised and supplemental cost of service figures was precluded by Section 1.106(c)).

<sup>93</sup> Order at para. 21.

PUBLIC VERSION

mainland LECs placing costs into the NECA Pool. Accordingly, the Reconsideration Petition, which in part relies upon the Spare Fiber Guidelines, is properly before the Bureau in this case.<sup>94</sup>

**VII. Conclusion**

Whereby, for the foregoing reasons, the Bureau should reconsider the level of recovery afforded SIC under the Order and permit SIC to include 100 percent of SIC's Paniolo lease expenses in the SIC revenue requirement, subject to further application of the cost separations rules.

Respectfully submitted,

By:   
\_\_\_\_\_

Dana Frix  
James A. Stenger  
Megan E.L. Strand  
Chadbourne & Parke LLP  
1200 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 974-5600  
*Counsel for Sandwich Isles Communications Inc.*

Walter L. Raheb  
Roberts Raheb & Gradler, LLC  
1200 New Hampshire Avenue, NW  
Washington, DC 20036

December 21, 2010

---

<sup>94</sup> NECA also challenges the Reconsideration Petition under Rule 1.106(l). As set forth in SIC Emergency Motion, the Spare Fiber Guidelines are the law of this case, not newly introduced evidence. Thus, Rule 1.106(l) is inapplicable. *See* SIC Emergency Motion.

**CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2010, I caused a copy of of the foregoing *Reply Comments of Sandwich Isles Communications, Inc. In Support of Petition for Reconsideration* to be served to the following parties of record as indicated:

*Via ECFS*

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

*Via First Class Mail*

Christopher M. Miller  
Verizon  
1320 North Courthouse Road, 9th Floor  
Arlington, VA 22201  
*Counsel for Verizon*

*Via Electronic Mail*

Pamela Arluk  
Assistant Division Chief  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Room 5-A131  
Washington, DC 20554  
[pamela.arluk@fcc.gov](mailto:pamela.arluk@fcc.gov)

*Via First Class Mail*

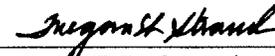
Joe A. Douglas  
NECA  
1634 I Street, NW, Suite 510  
Washington, DC 20006

*Via Electronic Mail*

Best Copy and Printing, Inc.  
Portals II  
445 12th Street, S.W., Suite CY-B402  
Washington, DC 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)

*Via Electronic Mail*

Robert B. McKenna  
Suite 950  
607 14th Street, NW  
Washington, DC 20005  
[robert.mckenna@qwest.com](mailto:robert.mckenna@qwest.com)  
*Counsel to Qwest Communications*



Meghan E.L. Strand

*Via Electronic Mail*

Gregory J. Vogt  
Law Offices of Gregory J. Vogt, LLC  
2121 Eisenhower Avenue, Suite 200  
Alexandria, VA 22314  
[gvogt@vogtlawfirm.com](mailto:gvogt@vogtlawfirm.com)  
*Counsel to NECA*

*Via Electronic Mail*

David L. Lawson  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, DC 20005  
[dlawson@sidley.com](mailto:dlawson@sidley.com)  
*Counsel to AT&T*