

**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** )

To: Chief, Wireline Competition Bureau

**Reply to NECA's Opposition to Emergency Motion  
Requesting Access to NECA Rules**

Sandwich Isles Communications, Inc. ("SIC") hereby replies to the Opposition filed by the National Exchange Carrier Association ("NECA") on December 21, 2010 ("Opposition"). NECA characterizes SIC's December 16, 2010 motion requesting access to the NECA's rules and related precedent upon which NECA decided to exclude SIC's Paniolo costs from the NECA traffic sensitive pool ("Pool") as a request for "discovery" and complains that the request is burdensome, that SIC doesn't need the information requested, and that it is "too late" for SIC to make use of the NECA rules.

**I. Importance of this Motion to SIC and the HHL**

SIC's claim in this proceeding has been that NECA's decision to exclude SIC's Paniolo costs was unprincipled, and that NECA's argument that Paniolo is not "used and useful" is a makeweight rationale. More recently, it has come to the attention of counsel for SIC that NECA's decision to exclude SIC's Paniolo costs is inconsistent with NECA's own codified rules – rules that are confidential and not available to counsel for SIC. As a result, it appears

clear that NECA's decision discriminates against Hawaii and the Hawaiian Homelands ("HHL"),<sup>1</sup> and discriminates by treating SIC differently than NECA treats all other rural LECs. The high costs associated with interisland, undersea transport (costs that are not borne by rural LECs on the U.S. mainland) may seem out of the ordinary, but they are no basis for discriminating against valid Hawaiian interests.<sup>2</sup>

NECA's Opposition embodies its reckless disregard for legitimate and well-established Hawaiian public policies and interests. SIC has advised NECA and this Commission that NECA's denial – and even the Order in this proceeding – will result in the bankruptcy of SIC.<sup>3</sup> Even in light of this, NECA proffers deeply unserious arguments. These arguments should be summarily rejected. Consideration of this motion should not delay a decision on the pending petition for reconsideration.

## **II. The Legal Basis for the Motion is Unchallenged by NECA**

Most critically, NECA argues that since SIC and its accountants have access to NECA's rules, therefore counsel for SIC need not be granted access. This blindfolded approach to justice

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<sup>1</sup> The HHL were established by federal statute as a land trust for homesteading by Native Hawaiians. The HHL are important enough to Hawaii to have been enshrined in the Hawaii Constitution. *See* Haw. Const., art. XII.

<sup>2</sup> Two of NECA's three rationales for denial were directly related to the unusual nature of the Paniolo fiber built – undersea and between islands. Those two were immediately abandoned by NECA. The third was "used and useful." *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>3</sup> There is nothing new about this concern. In the Study Area Waiver proceeding SIC advised the Commission that without the requested waivers and ability to place its reasonable costs in the Pool that SIC's revenues would decline so severely it would be unable to continue operations. *See* Sandwich Isles Communications, Inc. Petition for Waiver, CC Docket No. 96-45, at vii (Dec. 27, 2004).

has been uniformly rejected by the Commission and NECA offers no precedent to support denial of information to counsel. The Commission consistently has held that counsel is entitled to information and that any concerns regarding confidentiality or burdensomeness can be addressed in a protective order.<sup>4</sup> Moreover, there is no question at this point in the case that NECA had an obligation to raise the existence of the Spare Fiber Guidelines ("Guidelines") as controlling precedent and did not do so.<sup>5</sup> NECA's argument that it is too late in this proceeding for SIC counsel to review NECA's rules also is inconsistent with Commission precedent, including the controlling law in this case. The Commission has already ruled in this case that mere technicalities provide no basis to ignore relevant information. The Commission made this ruling in favor of Hawaiian Telcom and contrary to the interests of SIC at the time.<sup>6</sup> SIC unquestionably is entitled to have the same legal standard applied to SIC.<sup>7</sup>

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<sup>4</sup> The cases cited by SIC in its motion are controlling. *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); *Nova Cellular West*, Order (DA 00-1835), File No. ENF-00-002 (Aug. 11, 2000).

<sup>5</sup> *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, Declaratory Ruling, WC Docket No. 09-133, Wireline Competition Bureau (Sept. 29, 2010) ("Order") at para. 27 and n. 94 ("NECA's efforts to understand a rule's meaning should not focus on developing either an industry consensus regarding that meaning or an interpretation that accommodates divergent LEC viewpoints. Such efforts are unlikely to lead to a correct interpretation. Instead, NECA must exercise its own independent interpretive judgment and then implement its interpretation.") The Spare Fiber Guidelines constitute NECA's interpretation of FCC rules as they apply to the spare fiber being deployed by the LECs. Here, NECA failed to inform the Bureau that NECA was declining to implement its interpretation and failed to offer any valid reasons for not implementing its interpretation.

<sup>6</sup> *In the Matter of GTE Hawaiian Telephone Company, Inc.*, 19 FCC Rcd 22268 at para. 7 (Oct. 29, 2004).

<sup>7</sup> Throughout this proceeding SIC has argued that NECA was treating SIC differently than U.S. mainland rural LECS, with the obvious proof being that NECA has not publicly denied a rural LEC's fiber deployment costs based upon the fact that the LEC didn't demonstrate sufficient future demand. Now that SIC has proof that NECA is holding SIC to a different standard than other LECs, NECA

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### **III. SIC is Entitled to Have the Bureau Consider the Record Based Upon Complete Information as to NECA's Rules**

NECA's Opposition to SIC's motion contends that "the basic facts have been agreed on in this case" and that "there are no disputed facts in this case."<sup>8</sup> On the contrary, the facts about NECA's rules (and equal application of them) are entirely in dispute, and the Order shows that it is critical for the Bureau to have complete information as to what standards NECA applies and whether NECA treated SIC differently than NECA treats other carriers. For example, the Order notes that the Bureau lacks the information necessary to determine whether the cost of spare fiber deployed by other carriers is accepted by NECA as part of carriers' revenue requirements.<sup>9</sup> NECA should be compelled to provide the requested information. It will enable the Bureau to determine whether NECA routinely accepts the cost of spare fiber and whether NECA's arguments treat SIC differently without justification.

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argues that it is too late for SIC to have access to the NECA rules which will likely document the extent of the disparate treatment (and possibly the basis for the disparate treatment).

<sup>8</sup> NECA Opposition at 3 and n. 6. It is difficult to understand how NECA can belittle the dispute herein when the Order notes that only \$1.9 million of the \$15 million in Paniolo lease expenses is not in dispute. Order at para. 18 ("As a baseline, we note that 'NECA has proposed paying [Sandwich Isles] \$1.9 million a year, approximating the amount that [Sandwich Isles] was previously paying . . . to lease voice grade capacity' on another undersea cable.") and n. 30 ("[W]e exclude from the lease expenses subject to dispute here those expenses related to the actual usage of the Paniolo cable network for the provision of services covered by the NECA tariff....")

<sup>9</sup> Order at para. 71 ("We are unpersuaded by Sandwich Isles' claim that NECA inherently is behaving inconsistently by denying particular lease costs for inclusion in the pool while simultaneously issuing a report that 'proudly trumpets the large amount of fiber being installed by rural LECs on the U.S. mainland.' As an initial matter, the NECA report does not claim that the carriers' fiber deployment costs were fully recovered through the NECA pool.") (internal citations omitted). SIC only had access to information in NECA's public reports to the Commission. It would be unfair for the Bureau to find the public information insufficient and deny SIC access to rules that NECA claims is "proprietary." Either the Bureau should find that NECA routinely accepts the cost of spare fiber into carriers' revenue requirements, or SIC should be given access to the rules necessary for the Bureau to determine how NECA is handling spare fiber costs.

This motion is critical to enable the Bureau to review the record in this case in light of complete information as to NECA's rules. The importance of obtaining information as to NECA's rules is illustrated by how the Spare Fiber Guidelines put the information in the record into a new light. The record shows that before denying SIC's Paniolo costs, NECA asked SIC how many Paniolo fibers SIC would be using and for what services.<sup>10</sup> Those questions suggest that NECA personnel were evaluating the legal impact of the Guidelines in drafting those questions. SIC's answers showed NECA that SIC was no different from other carriers whose costs are routinely accepted by NECA.<sup>11</sup> It can only be concluded that after asking questions based on the Guidelines and getting information that was inconsistent with NECA's chosen path, NECA deliberately ignored the Guidelines and instead based its denial of SIC's Paniolo costs actions upon vague "concerns" arising from the "used and useful" doctrine, high per mile costs and affiliate relationships.<sup>12</sup>

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<sup>10</sup> *E.g.*, NECA August 2009 Comments at Appendix E (Letter from Carol Brennan, Vice President, NECA, to Alan Pedersen, General Manager, SIC (Apr. 28, 2008)) and Appendix F (Letter from Alan Pedersen, General Manager, SIC, to Carol Brennan, Vice President, NECA (May 7, 2008) at questions and answers nos. 11 through 14). These questions were part of what amounted to extensive interrogatories and document requests from NECA that SIC promptly and fully responded to without objection that the information requested was proprietary or that providing it would be too burdensome.

<sup>11</sup> *Id.*

<sup>12</sup> NECA August 2009 Comments at Appendix B (NECA letter dated May 20, 2009) and Appendix M (NECA May 5 Letter).

**IV. Conclusion**

WHEREFORE, for the foregoing reasons, the Bureau should grant SIC's motion or, in the alternative, summarily find (a) that Paniolo is, as a matter of fact, used and therefore "used and useful," and (b) that all Paniolo costs are recoverable as consistent with NECA's Spare Fiber Guidelines.

Respectfully submitted,

By: 

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January 4, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2011, I caused a copy of the foregoing *Reply to NECA's Opposition to Emergency Motion Requesting Access to NECA Rules* to be served to the following parties of record as indicated:

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