

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

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**OPPOSITION OF AT&T CORP.**

AT&T Corp. (“AT&T”) submits this Opposition to the Motion For Stay submitted by Sandwich Isles Communications, Inc. (“Sandwich Isles”) on June 25, 2012 in WC Docket No. 09-133, in which Sandwich Isles asks the Wireline Competition Bureau (“Bureau”) to “stay” actions by National Exchange Carrier Association (“NECA”).<sup>1</sup>

Sandwich Isles’ motion for a “stay” is both procedurally improper and substantively baseless. In 2009, NECA properly prohibited Sandwich Isles from foisting on ratepayers the full \$15 million cost of a new undersea and terrestrial cable network that ratepayers neither needed nor wanted. Sandwich Isles now seeks to transform the Bureau’s subsequent Declaratory Ruling that authorized partial recovery of the disputed costs into a permanent windfall, notwithstanding the Bureau’s express recognition that the initial 50 percent allocation to regulated services could be reduced as circumstances changed.<sup>2</sup> There is no legitimate basis for the extraordinary

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<sup>1</sup> See Motion For Stay, *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, WC Docket No. 09-133 (filed Jan. 25, 2012) (“Motion”).

<sup>2</sup> Declaratory Ruling, *Sandwich Isles Communications petition for Declaratory Ruling*, WC Docket No. 09-133, ¶ 23 (WCB, Sep. 29, 2010) (“Declaratory Ruling”). Both AT&T and Sandwich Isles have sought review of the Declaratory Ruling, both of which are pending. AT&T filed an Application for Review demonstrating that the Bureau should have affirmed NECA’s initial determination. Sandwich Isles filed a Petition for Reconsideration arguing that

Commission intervention Sandwich Isles now urges in NECA's good faith efforts to apply the *Declaratory Ruling* in its ordinary course administration of settlements from its traffic sensitive pool – *i.e.*, by requiring Sandwich Isles appropriately to recognize the millions of dollars it receives from the provision of non-regulated services over the its cable network.

Although Sandwich Isles has styled its pleading as a motion seeking a “stay,” it fails to articulate what it wants the Bureau to stay. The rules Sandwich Isles cites as authority empower the Commission to stay its own orders and decisions, but Sandwich Isles does not identify any such decision it thinks should be stayed. But even apart from these fatal procedural infirmities, Sandwich Isles has not met the standards for a stay. To the extent Sandwich Isles receives smaller pool settlements, it can be made whole if it eventually prevails, and its suggestions of financial peril, loss of goodwill, and other “irreparable harm” are entirely unsupported and patently implausible. Sandwich Isles also has not demonstrated a likelihood of prevailing on the merits, because the Declaratory Ruling does not preclude NECA's actions here and Sandwich Isles' alternative cross-subsidization claim is frivolous.

**1. Sandwich Isles' Motion Is Procedurally Invalid.** Sandwich Isles' Motion is captioned as a “Motion for Stay” pursuant to Commission Rules 1.43 and 1.44.<sup>3</sup> But Sandwich Isles never explains what it wants the Bureau to “stay” – beyond its vague desire to stop “any and all adverse regulatory and quasi-regulatory actions related to the [Declaratory Ruling]” pending the Commission's consideration of Sandwich Isles' petition for reconsideration.<sup>4</sup> Rules 1.43 and 1.44, however, authorize the Bureau to stay its “order[s] or decision[s].” Sandwich

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the Bureau should have permitted Sandwich Isles to recover 100 percent of the disputed expenses from the NECA pool.

<sup>3</sup> 47 C.F.R. §§ 1.43, 1.44.

<sup>4</sup> Motion, at 1.

Isles is obviously not seeking a stay of any Bureau order or decision; indeed, a stay of the Declaratory Ruling would restore NECA's original decision limiting Sandwich Isles to a recovery of only \$1.9 million.

Instead, Sandwich Isles appears to be seeking an interpretation of the Declaratory Ruling and a further declaration that NECA has misapplied that Declaratory Ruling. The proper procedure for challenging NECA's interpretation of a Commission decision is a Petition for Clarification or a Petition for a Declaratory Ruling, not a motion for stay under Rules 1.43 and 1.44. To the extent that Sandwich Isles believes it has a valid basis to challenge NECA's application of the Declaratory Ruling, it should follow the rules and file such a petition –if it prevails, its interests can be fully protected. The “stay” it seeks here is procedurally improper and should be summarily rejected.

**2. The Motion Fails To Establish The Prerequisites For a Stay.** Even if Sandwich Isles' Motion were a valid request for a stay, it would have to be rejected. To obtain a stay, Sandwich Isles “must show (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of a stay.”<sup>5</sup> “[I]t is [Sandwich Isles'] obligation to justify the . . . exercise of such an extraordinary remedy.”<sup>6</sup> Sandwich Isles does not come close to establishing any of these prerequisites for a stay.

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<sup>5</sup> *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). See also Order, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd. 7792, ¶ 4 (2011).

<sup>6</sup> *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). See also Order, *Game Show Network, LLC, Complainant v. Cablevision Systems Corp., Defendant*, DA 11-1993, ¶ 10 (rel. Dec. 7, 2011).

*Balance Of Harms.* The *sine qua non* of a stay “has always been irreparable harm and inadequacy of legal remedies.”<sup>7</sup> “[T]o demonstrate irreparable harm, [Sandwich Isles] must provide proof indicating that the harm is certain to occur in the near future.”<sup>8</sup> “Bare allegations of what is likely to occur are not sufficient.”<sup>9</sup> “Furthermore, an alleged injury is not ‘irreparable’ if adequate compensatory or other corrective relief will be available at a later date” and thus “economic loss does not, in and of itself, constitute irreparable harm.”<sup>10</sup> Sandwich Isles’ irreparable harm arguments are, without exception, “bare allegations,” “speculative, unsubstantiated and of a nature which clearly does not warrant the issuance of a stay.”<sup>11</sup> By contrast, the harm to ratepayers and other customers would be substantial.

Sandwich Isles devotes a single paragraph to irreparable harm, in which it simply asserts that it is “likely” to suffer harm to its “finances, its operations and . . . business reputation” while its petition for reconsideration is pending.<sup>12</sup> “It is well settled,” however, that the loss of money is merely an “economic loss” that “does not . . . constitute irreparable harm,”<sup>13</sup> absent a showing that no “adequate compensatory or other corrective relief will be available at a later date.”<sup>14</sup> Sandwich Isles has not even alleged, let alone demonstrated, that it could not obtain corrective

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<sup>7</sup> *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>8</sup> *Id.* See also Order, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd. 7792, ¶ 6 (2011) (internal quotations omitted).

<sup>9</sup> Order, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd. 7792, ¶ 6 (2011) (internal quotations omitted); see also *Wisconsin Gas Co. v. FERC*, 758 F.2d at 674.

<sup>10</sup> *Wisconsin Gas Co.*, 758 F.2d at 674.

<sup>11</sup> *Id.* at 672.

<sup>12</sup> Motion, at 7.

<sup>13</sup> *Wisconsin Gas Co.*, 758 F.2d at 674.

<sup>14</sup> Order, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd. 7792, ¶ 6 (2011) (internal quotations omitted).

relief to the extent it prevails on a challenge to NECA's interpretation of the Declaratory Ruling, and in fact, the Bureau provided precisely that type of compensatory relief in the Declaratory Order itself.

Moreover, Sandwich Isles has not alleged or attempted to prove that these financial harms are of a magnitude that would threaten its ability to remain a going concern.<sup>15</sup> Sandwich Isles already receives some of the highest per-line high cost universal support in the country, and Sandwich Isles has not provided any evidence to support any of its implied assertions of financial ruin. Such "speculative" and "theoretical" and "bare allegations of what is likely to occur are of no value since the [Bureau] must decide whether the harm will in fact occur."<sup>16</sup>

In addition, Sandwich Isles' assertions that it will incur harm to its "operations" and "business reputation" are baseless.<sup>17</sup> Disputes like the one here would have no effect on Sandwich Isles' "reputation" and are typically invisible to consumers. Indeed, if Sandwich Isles had genuine concerns about its operations or goodwill, it would have promptly sought a stay of the Declaratory Ruling immediately after it was released more than a year ago. The Declaratory Ruling barred Sandwich Isles from including about \$7.5 million in the NECA pool, whereas the instant dispute relates only to \$1.1 million. The notion that the original Declaratory Ruling did not cause irreparable harm to Sandwich Isles' operations or goodwill, but the current much smaller dispute does, is simply not credible. As the Commission has previously explained, a

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<sup>15</sup> *Wisconsin Gas Co.*, 758 F.2d at 674.

<sup>16</sup> *Id.*; see also Order, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd. 7792, ¶ 6 (2011) (internal quotations omitted).

<sup>17</sup> Motion, at 7.

“delay of almost eleven months before [seeking a stay] causes us to question its claim of irreparable harm” and “suggests that a stay is not necessary to prevent irreparable harm.”<sup>18</sup>

In contrast to the complete lack of any irreparable harm to Sandwich Isles absent a stay, there clearly would be very substantial harm to other parties if the stay is granted. NECA is seeking to reduce Sandwich Isles’ requirement by an amount equal to half of that which Sandwich Isles is now recovering from non-regulated services. Prohibiting NECA from requiring such reductions will necessarily increase the settlements paid to Sandwich Isles. These increased settlement payments to Sandwich Isles must come from somewhere. Here, they would come from reduced settlements to other carriers in the NECA pool – mostly small rural carriers – and ultimately from increases to NECA’s tariffed rates, which are borne by customers of AT&T and other long-distance companies. Further, to the extent NECA’s tariff is deemed lawful, there is no assurance that ratepayers could be made whole for the harms associated with inflated rates caused by inflated revenue requirements.

*Likelihood Of Success.* Sandwich Isles also has failed to establish a likelihood of success in its challenge to NECA’s interpretation of the Declaratory Ruling, much less a “substantial” likelihood.<sup>19</sup> Sandwich Isles makes two legal arguments against NECA’s interpretation of the Declaratory Ruling, neither of which is likely to succeed.

First, Sandwich Isles argues (at 4) that NECA’s interpretation of the rules will violate 47 U.S.C. § 254(k) (“Section 254(k)”), which states that “a telecommunications company may not use services that are not competitive to subsidize services that are subject to competition.”

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<sup>18</sup> Order, *Game Show Network, LLC, Complainant, v. Cablevision Systems Corp., Defendant*, DA 11-1993, ¶ 6 (rel. Dec. 11, 2011).

<sup>19</sup> *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) (citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). See also Order, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd. 7792, ¶ 4 (2011).

Sandwich Isles has it exactly backwards. Sandwich Isles' position here is that NECA should continue to allow Sandwich Isles to *over*-recover the expenses for its regulated services in NECA rates. Accordingly, to the extent that Section 254(k) even applies here, it is Sandwich Isles' position that would lead to a violation of Section 254(k), because it would allow Sandwich Isles to use its regulated NECA rates to subsidize the non-regulated services that it provides over these facilities. To put it mildly, Sandwich Isles is exceedingly unlikely to prevail on this claim.

Second, Sandwich Isles asserts that the Bureau adopted an ironclad rule in the Declaratory Ruling that NECA must permit Sandwich Isles to include half of its expenses in the NECA pool, regardless of what subsequent facts reveal about Sandwich Isles' actual use of those facilities. In fact, the Declaratory Ruling expressly anticipates that Sandwich Isles may be permitted to recover less than half of those expenses from the NECA pool where, as here, Sandwich Isles is increasingly using those facilities to provide non-regulated services: "Sandwich Isles also plans to lease capacity to other carriers . . . which would reduce the portion of total cable lease expenses included in its revenue requirement."<sup>20</sup> The Declaratory Ruling thus does not bar NECA from performing its normal role in reviewing individual carriers' cost studies and adjusting the appropriate allocations to the NECA pool to ensure that they conform both to reality and the Commission's rules and orders.

*The Public Interest.* Sandwich Isles' Motion is contrary to the public interest. Forcing captive purchasers of regulated services to fund unneeded and extravagant networks, thus providing windfalls to the companies that build them, inflates the costs of telecommunications

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<sup>20</sup> Declaratory Ruling, n.100. *See also* Declaratory Ruling, n.30 ("in the future, the lease expenses [Sandwich Isles may include in its revenue requirement] would exclude those expenses associated with actual usage of the cable to provide services not encompassed by the NECA tariff, including, among other things, nonregulated services and intrastate services.").

services and produces strong incentives for the inefficient deployment of resources, in clear contravention of the public interest.

Finally, there is no merit to Sandwich Isles' claim that NECA's proposal will "undermine Sandwich Isles' efforts to provide broadband services and create a robust broadband platform to foster economic development and jobs for native Hawaiians."<sup>21</sup> These networks are already deployed, and Sandwich Isles is already operating them, and Sandwich Isles is earning millions of dollars in revenues from sales of non-regulated services over those facilities. Sandwich Isles provides no explanation as to why it should not be required to apply half of the revenues it earns from its provision of competitive services over these facilities to the costs of those facilities. Indeed, this latest dispute simply highlights the need for the Commission to address AT&T's pending Application for Review, and reverse the Bureau's decision to allow Sandwich Isles to recover more than \$1.9 million for these facilities in the first place.

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<sup>21</sup> Motion, at 8.

## CONCLUSION

For the foregoing reasons, the Bureau should reject Sandwich Isles' Motion.

Respectfully submitted,

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January 27, 2012

## CERTIFICATE OF SERVICE

I, Christopher T. Shenk, hereby certify that on this 27th day of January, 2012, a copy of the foregoing Opposition to AT&T Corp. was filed with the Commission and served on the following as indicated below.

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