

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

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)	CC Docket No. 96-45
)	
)	

ORDER

Adopted: May 16, 2005

Released: May 16, 2005

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a request from Sandwich Isles Communications, Inc. (Sandwich Isles) for waiver, *nunc pro tunc*,¹ of the study area boundary freeze codified in the Appendix-Glossary of Part 36, and sections 36.611 and 69.2(hh) of the Commission’s rules.² Sandwich Isles filed its Petition in response to the Commission’s recent decision reversing a decision by the Common Carrier Bureau (Bureau) that had granted Sandwich Isles a waiver to be treated as an incumbent local exchange carrier (LEC) serving previously “unserved” areas of the Hawaiian home lands for purposes of receiving high-cost universal service support.³ We also grant Sandwich Isles a waiver of the definition of incumbent

¹ The term *nunc pro tunc*, meaning “now for then,” refers to acts allowed to be done after the time when they should be done, with a retroactive effect. See BLACK’S LAW DICTIONARY 1069 (6th ed. 1990).

² 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, CC Docket No. 96-45, filed December 27, 2004 (Petition). On January 18, 2005, the Wireline Competition Bureau released a Public Notice seeking comment on the Petition. *Sandwich Isles Communications, Inc. Seeks Waiver Nunc Pro Tunc of the Definition of “Study Area” in Part 36 And Sections 36.611 and 69.2(hh) [of the] Commission’s Rules*, CC Docket No. 96-45, Public Notice, DA 05-105 (rel. Jan. 18, 2005). Comments were filed February 8, 2005, and reply comments were filed February 22, 2005.

³ *GTE Hawaiian Telephone Company, Inc.*, AAD 97-82, Memorandum Opinion and Order, FCC 04-256, 19 FCC Rcd 22268 (2004) (*Verizon Hawaii Order*), reversing *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission’s Rules and Request for Clarification*, Order, AAD 97-82, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) (*Sandwich Isles Order*). Verizon Hawaii was the successor to GTE, which previously provided telephone service in the state of Hawaii. The Carlyle Group’s Hawaiian Telcom Communication’s Inc. (Hawaiian Telcom) recently acquired Verizon Hawaii. (The Common Carrier Bureau subsequently became the Wireline Competition Bureau.) Prior to the Commission’s *Skyline Order*, discussed below, the Commission had not defined “unserved” areas for purposes of the study area waiver requirements or requests for waivers of 36.611, and the Bureau determined whether or not an area was unserved on a case-by-case basis. See *M&L Enterprises, Inc.*,

(continued....)

LEC in Part 36 and in section 54.5 of the Commission's rules to the limited extent necessary to permit Sandwich Isles to receive universal service support based on its own costs. These waivers will permit Sandwich Isles to continue being treated as an incumbent LEC for purposes of receiving universal service support and participating in the National Exchange Carrier Association (NECA) tariffs and pools.

II. BACKGROUND

A. Procedural History

2. Sandwich Isles is a native Hawaiian owned company licensed by the Department of Hawaiian Home Lands to construct and operate a modern telecommunications network serving the Hawaiian home lands.⁴ On July 8, 1997, Sandwich Isles filed a petition requesting a waiver of section 36.611 of the Commission's rules to permit it to receive high-cost loop support based on projected costs until historical costs became available.⁵ Sandwich Isles said that it was a new LEC that would be providing service to previously unserved portions of the Hawaiian home lands. Sandwich Isles also sought clarification or, to the extent necessary, waiver of the Commission's definition of incumbent LEC for purposes of calculating universal service support and Part 69 of the Commission's rules. Sandwich Isles claimed it was not required to seek a study area waiver.⁶

3. On February 3, 1998, the Bureau granted in large part Sandwich Isles' 1997 Petition.⁷ Specifically, the Bureau granted Sandwich Isles a waiver of section 36.611 of the Commission's rules to the extent necessary to permit it to receive high-cost loop support for the period January 1, 1998 through December 31, 1999 based initially on projected costs followed by quarterly true-ups using actual costs.⁸ In addition, the Bureau waived the incumbent LEC requirements of Part 36 and 69 of the Commission's rules to permit Sandwich Isles to receive high-cost loop support based on its costs and to become a

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d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules. CC Docket No. 96-45, Order, FCC 04-86, 19 FCC Rcd 6761 (*Skyline Order*); *see infra* para. 7. In the *Skyline Order*, the Commission determined that the area served by Skyline Telephone was within the Qwest and Verizon study areas and, therefore, a study area waiver request should have been filed. Qwest and Verizon had no facilities or customers in the area, but the Commission clarified that the area was not "unserved" for purposes of the study area waiver requirement. *See Skyline Order*, 19 FCC Rcd at 6766-68, paras. 11-18.

⁴ The Hawaiian home lands consist of approximately 70 non-contiguous parcels of land, which total 203,500 acres, on the six major Hawaiian Islands, and are administered by the State of Hawaii, Department of Hawaiian Home Lands. Petition at 2.

⁵ Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and request for Clarification, AAD 97-82, filed July 8, 1997 (1997 Petition).

⁶ *See id.* at 2 n.3. Sandwich Isles relied on a 1996 Bureau order that held that carriers are not required to seek study area waivers if a separately incorporated company is establishing a study area for a previously unserved area. *See Request for Clarification filed by the National Exchange Carrier Association, Inc., and Petitions for Waiver Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of "Study Area" in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD-96-51, 11 FCC Rcd 8156, 8160, para. 9 (Com. Car. Bur. 1996) (*Study Area Waiver Exceptions Order*), *erratum*, 11 FCC Rcd 8646 (Acct. Aud. Div. 1996).

⁷ The Bureau denied Sandwich Isles' request for a waiver to allow it to receive high-cost loop support for the period December 2, 1997 to December 31, 1997. *Sandwich Isles Order*, 13 FCC Rcd at 2411.

⁸ *Id.*

member of the NECA.⁹ In addition, the Bureau said that “for regulatory purposes we will recognize Sandwich Isles’ service territory in Hawaii as a study area”¹⁰

4. On October 29, 2004, the Commission reversed the Bureau’s decision.¹¹ The Commission concluded that the Bureau had erred by ignoring evidence in the record that the areas Sandwich Isles proposed to serve were not “unserved” for purposes of the study area waiver requirement.¹² The Commission found that the exchanges served by Sandwich Isles were within the study area of GTE Hawaiian Telephone Company (GTE) (subsequently Verizon Hawaii).¹³ Consistent with Commission precedent in its *Skyline Order*,¹⁴ the Commission required Sandwich Isles to seek and obtain a study area waiver in order to continue being treated as an incumbent LEC for purposes of receiving universal service support.¹⁵

5. On December 27, 2004, Sandwich Isles requested that the Commission “reestablish its study area as the Hawaiian home lands and grant related rule waivers necessary to allow it to receive interstate access and universal service support based on its own cost.”¹⁶ Sandwich Isles filed its Petition without prejudice to its position that no study area waiver is necessary, and argues that the Hawaiian home lands were not included in GTE’s study area and are not now included in Verizon Hawaii’s study area.¹⁷ Notwithstanding this claim, Sandwich Isles also requests a study waiver in accordance with the Commission’s *Verizon Hawaii Order*.

⁹ *Id.* at 2413.

¹⁰ *Id.* The Bureau apparently agreed with Sandwich Isles that a study area waiver was not necessary based on the *Study Area Waiver Exceptions Order*, but cited the *erratum*, not the underlying order. *See id.* at 2413 n. 36; *supra* note 6.

¹¹ *Verizon Hawaii Order*, 19 FCC Rcd 22268.

¹² *Id.* at 22270, para. 7. As noted above, the Commission had not defined “unserved” areas for purposes of the study area waiver requirements prior to its *Skyline Order*. In the *Skyline Order*, the Commission found that an area without facilities or customers was not “unserved” for these purposes, because it was within two other carriers’ study areas. *See supra* note 3.

¹³ *Id.* at 22272, para. 9.

¹⁴ *Skyline Order*, 19 FCC Rcd at 6766-67, paras. 11-13. In the *Skyline Order*, the Commission clarified that a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas. The Commission further provided that any such waiver request would be evaluated under the criteria set forth in the *PTI/Eagle Order*. *Id.* at 6766, para. 13. *See also infra* note 26 & accompanying text; *Verizon Hawaii Order*, 19 FCC Rcd at 22272, para. 9 & n.33.

¹⁵ *Verizon Hawaii Order*, 19 FCC Rcd at 22271-73, paras. 8-10. The Commission provided that Sandwich Isles would continue to be treated as an incumbent LEC for purposes of receiving universal service support until the Commission rules on the request for a study area waiver, provided that Sandwich Isles filed such request within sixty days of the effective date of the *Verizon Hawaii Order*. *Id.* at 22273, para. 10.

¹⁶ Petition at iii.

¹⁷ *Id.* at 1-14. Sandwich Isles asserts that the Bureau’s Order was correct, generally relying on the same arguments previously made to the Commission. To the extent that Sandwich Isles wanted the Commission to reconsider *Verizon Hawaii Order*, it should have sought reconsideration of that decision. The Bureau does not have the authority to alter the Commission’s finding that the exchanges served by Sandwich Isles were within GTE’s study area. *See Verizon Hawaii Order*, 19 FCC Rcd at 22272, para. 9. Sandwich Isles also states that it presents facts supporting its assertion that were not considered by the Commission. To the extent that certain arguments were not addressed by the Commission, they present new and novel issues that are beyond the scope of the Bureau’s delegated authority.

B. Commission Precedent

6. *Study Area.* A study area is a geographic segment of an incumbent LEC's telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state. The Commission froze all study area boundaries effective November 15, 1984.¹⁸ The Commission took this action to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-cost support. A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.¹⁹ In addition, as determined in the *Skyline Order*, a carrier must apply for a study area waiver if it seeks to create a new study area from within an existing study area.

7. *Skyline Order.* Skyline Telephone Company (Skyline) sought a waiver of the Commission's rules to enable it to receive accelerated high-cost loop support and to participate in NECA pools and tariffs.²⁰ The exchanges for which Skyline sought support were within the Qwest and Verizon study areas.²¹ Skyline asserted that it was not required to seek a study area waiver in order to receive support for a newly formed study area because its exchanges constituted a previously unserved area.²² The Commission rejected that argument, explaining that it had never enunciated an exception to its study area waiver requirements for unserved areas, nor had the term "unserved" been defined for purposes of the study area waiver requirements specifically, or Part 36 of the Commission's rules, more generally.²³ The Commission concluded that treating an area as unserved when it was previously within an existing study area would be inconsistent with the purpose of the study area freeze, and that Skyline required a study area waiver.²⁴ The Commission clarified that a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas.²⁵ The Commission further provided that any such waiver request will be evaluated under the criteria set forth in the *PTI/Eagle Order*²⁶ to ensure that the Commission has an opportunity to determine whether the creation of a new study area will have an adverse impact on the federal universal service fund.²⁷

¹⁸ See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*), adopting Recommended Decision and Order, 49 Fed. Reg. 48325 (1984). See also 47 C.F.R. Part 36, App.

¹⁹ *Part 67 Order* at para. 1.

²⁰ The Commission dismissed as moot Skyline's request for waiver of sections 36.611 and 36.612 of the Commission's rules. *Skyline Order*, 19 FCC Rcd at 10, paras. 22-23.

²¹ *Id.* at 6766-67, paras. 11-13.

²² Skyline relied on the *Study Area Waiver Exceptions Order*. *Id.* at 6765-66, para. 10 & n.33; *Study Area Waiver Exceptions Order*, 11 FCC Rcd at 8160, para. 9; see *supra* note 6.

²³ *Skyline Order*, 19 FCC Rcd at 6766, para. 11.

²⁴ *Id.*; see also *MTS and WATS Market Structure; Establishment of a Joint Board; Amendment*, Decision and Order, CC Docket Nos. 78-72, 80-286, FCC 84-637, 50 Fed. Reg. 939 (1985) (*1985 Order Adopting Joint Board Recommendation*); *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, CC Docket Nos. 78-72, 80-286, 49 Fed. Reg. 48325 (1984) (*1984 Joint Board Recommended Decision*); 47 C.F.R. Part 36 App.

²⁵ *Skyline Order*, 19 FCC Rcd at 6766-67, para. 13.

²⁶ *U S WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 para. 5 (1995) (*PTI/Eagle Order*).

²⁷ *Skyline Order*, 19 FCC Rcd at 6766-67, para. 13.

8. *Standards for Waiver.* Generally, the Commission may waive its rules for good cause shown.²⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³⁰ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission traditionally has applied a three-prong standard set forth in the *PTI/Eagle Order*: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the transferred exchanges opposes the transfer; and (3) the transfer must be in the public interest.³¹

9. In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, the Commission has considered whether a study area waiver will result in an annual aggregate shift in an amount equal to or greater than one percent of total annual high-cost support.³² The Commission began applying the one-percent guideline in 1995 to limit the potential adverse impact of exchange sales on the overall fund, also recognizing that, because high-cost loop support is capped, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund.³³ After adoption of section 54.305 of the Commission's rules, the one percent guideline was not, in practice, a necessary limitation for most study area waivers with respect to high-cost loop support and local switching support, because section 54.305 provides that a carrier purchasing exchanges from an unaffiliated carrier is permitted to receive only the same level of per-line high-cost support that the selling company was receiving for the exchanges prior to the transfer.³⁴ The Commission determined in the *Skyline Order*, however, that section 54.305 did not apply because there was no sale or transfer of facilities, and no customers were affected by the creation of a new study area.³⁵ As in the *Skyline Order*, Sandwich Isles has not acquired exchanges from another carrier and thus section 54.305 does not apply.

²⁸ 47 C.F.R. § 1.3.

²⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

³⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

³¹ See, e.g., *PTI/Eagle Order*, 10 FCC Rcd at 1772 para. 5; *Skyline Order*, 19 FCC Rcd at 6767, paras. 14-18.

³² *PTI/Eagle Order* at 1774, paras. 14-17. See *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Petition for Waiver of Section 61.41(c) of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644 (1997).

³³ See *PTI/Eagle Order* 10 FCC Rcd at 1773-74, paras. 13-15.

³⁴ See 47 C.F.R. § 54.305(b). By definition, section 54.305(b) ensures that there will be no adverse impact on the universal service fund with respect to high-cost loop support and local switching support. A carrier's acquired exchanges may receive additional support pursuant to the Commission's "safety valve" mechanism. See 47 C.F.R. § 54.305(d)-(f). Moreover, a carrier acquiring exchanges may be eligible to receive Interstate Common Line Support (ICLS), which is not subject to the limitations set forth in section 54.305(b). See 47 C.F.R. § 54.902. Accordingly, the Commission continues to apply the one-percent guideline to evaluate the potential impact safety valve support and ICLS on the universal service fund. See, e.g., *Sioux Valley Telephone Company and Hills Telephone Company, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Section 69.605(c) of the Commission's Rules*, CC Docket No. 96-45, DA 05-1097 (Wireline Comp. Bur., released April 19, 2005).

³⁵ *Skyline Order*, 19 FCC at 6767-68, para. 16.

C. The Petition For Waiver

10. Sandwich Isles argues that grant of its Petition would be consistent with the Commission's criteria set forth in the *PTI/Eagle Order*. First, based on the Universal Service Administrative Company's (USAC's) first quarter 2005 projections, Sandwich Isles states that its total high-cost support for the year will be less than four-tenths of one percent.³⁶ Second, Sandwich Isles states that the Department of Hawaiian Home Lands and the Hawaii Public Utilities Commission (Hawaii Commission) have not expressed any opposition to a grant of the waivers requested.³⁷ Third, Sandwich Isles argues that the Commission has repeatedly recognized a strong public interest benefit where a new carrier offers significant improvements in service. Sandwich Isles also claims that it has unique special circumstances.³⁸

11. With respect to special circumstances, Sandwich Isles states that it has been steadily investing large amounts of capital to construct state-of-the-art facilities to provide service on the Hawaiian home lands in reliance on the now-reversed Bureau order since 1998.³⁹ As a result of the combination of \$166 million in capital funding from the Rural Utilities (RUS), and cost recovery through participation in NECA access tariffs and pools, and universal service support, Sandwich Isles states that it has been able to extend service to over 4,000 new lots and almost 1,200 access lines in 20 new communities, and expects to expand service to an additional 14 communities during 2005.⁴⁰ Sandwich Isles recently submitted a multimillion dollar broadband loan application to RUS for new construction that "includes additional switching facilities to serve new [Hawaiian home lands] subdivisions; deploy additional [asymmetric digital subscriber line] ADSL equipment, and comply with the [Communications Assistance for Law Enforcement Act of 1994⁴¹] CALEA requirements; local outside distribution facilities estimated to pass another 2,500 lots; completion of the terrestrial underground fiber transport network; and a network operations and switching center complex."⁴² Sandwich Isles argues that these construction plans, along with the provision of telecommunications services to more than 1,000 existing customers that did not previously have service demonstrates that a study area waiver serves the public interest.⁴³ In addition, Sandwich Isles contends that its Petition presents unique public interest factors. In particular, Sandwich Isles claims that it plays a critical role in providing modern telecommunications to native Hawaiians on native land.⁴⁴

12. Sandwich Isles states that denial of its Petition would reduce it to competitive carrier status thereby eliminating most of its interstate access revenue and all of its universal service support,

³⁶ See Petition at 18 & n.57.

³⁷ *Id.* at 18.

³⁸ *Id.* at 19-22.

³⁹ *Id.* at 19.

⁴⁰ *Id.*

⁴¹ Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in 18 U.S.C. §§ 2522, 3121, and 47 U.S.C. §§ 229, 1001-1010).

⁴² Petition at 20.

⁴³ *Id.*

⁴⁴ *Id.* at 21. Sandwich Isles asserts that, although the state of Hawaii has primary responsibility as fiduciary for the Hawaiian home lands, the United States retains a duty to ensure that the state meets its trust responsibilities. The Bureau finds that a grant of the study area waiver would serve the public interest under the Commission's applicable test without needing to address this issue.

which would result in unaffordable rates in the Hawaiian home lands and create a serious risk of default on its RUS loans.⁴⁵

13. Hawaiian Telcom did not object to Sandwich Isles' Petition, but did identify several issues which we address below.⁴⁶ Verizon encouraged the Commission to limit any order on the waiver request to the facts of this case, and argued that certain issues, such as controlling the growth of the fund, should be addressed in the context of broader rulemaking proceedings.⁴⁷ The majority of other commenters, however, supported Sandwich Isles' Petition.⁴⁸

III. DISCUSSION

A. Study Area Waiver

14. We find that good cause exists to waive the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules as set forth herein. For the reasons discussed below, we conclude that the petitioners have satisfied the three-prong standard that the Commission applies to determine whether a study area waiver is warranted.

15. *Geographic Scope of the Study Area Waiver.* As a preliminary matter, we must identify the scope of the study area waiver we are granting.⁴⁹ We find that the study area we grant herein should be limited to only those areas where there were no facilities or service on the Hawaiian home lands in 1997, *i.e.*, the areas that Sandwich Isles claimed were unserved in its 1997 Petition.⁵⁰ First, the scope of

⁴⁵ *Id.* at 21-22. If Sandwich Isles were treated as a competitive ETC, it would receive the same per-line support that Verizon Hawaii receives, rather than support based on Sandwich Isles' own costs. *See* 47 C.F.R. § 54.307.

⁴⁶ Hawaiian Telcom Comments. Hawaiian Telcom's comments were filed prior to its acquisition of Verizon Hawaii and stated that it did not possess all the relevant information. Hawaiian Telcom "neither supports nor opposes the Petition at this time, but urges the Commission to rigorously evaluate the public policy implications of the Petition." *Id.* at 1-2.

⁴⁷ Verizon Comments. Because "[t]he Commission already has made findings regarding the relevant facts at issue in this petition," Verizon stated that it would not revisit them here. Several commenters supporting Sandwich Isles' Petition argue that the Bureau's order was correct, that the GTE study area never included the Hawaiian home lands, and that study areas are not required when carriers create new study areas to serve previously unserved areas. *See, e.g.*, CHR Solutions, Inc. Comments at 2; GVNW Consulting, Inc. Comments at 7; Pacific LightNet Inc. Comments at 2-3; TCA, Inc. – Telcom Consulting, Inc. Comments at 2; Western Telecommunications Alliance Comments at 4. The Commission's *Skyline Order* and *Verizon Hawaii Order* rejected these claims.

⁴⁸ *See, e.g.*, Fred Williamson and Associates, Inc. Comments; National Telecommunications Cooperative Association (NTCA) Comments; Organization for the Protection and Advancement of Small Telecommunications Companies (OPATSCO) Comments.

⁴⁹ Most study area waiver requests involve sales of exchanges and are jointly filed by the selling and acquiring carriers. In the *Skyline Order*, the Commission granted a study area waiver on its own motion, but Qwest and Verizon had filed study area boundary changes with the Washington Utilities and Transportation Commission to create a new study area for Skyline Telephone. *Skyline Order*, 19 FCC Rcd 6763-64, 6767, paras. 5-6, 14.

⁵⁰ *See* 1997 Petition at 5. Hawaiian Telcom contends that there is ambiguity as to whether the waiver request is for the entire Hawaiian home lands, or only the previously "unserved" portions of the Hawaiian home lands. Hawaiian Telcom Comments at 4-5. At times, Sandwich Isles seems to ask the Commission to reaffirm only its study area that had been previously recognized by the Bureau. *See, e.g.*, Petition at iii, 9. In other instances, however, Sandwich Isles asks that the study area boundaries encompass the entire Hawaiian home lands and that the Commission "adjust the study area of Verizon Hawaii, Inc. to the extent necessary." Petition at 2. Significantly, both the Bureau's 1998 order and the Commission's 2004 order related only to the areas that Sandwich Isles claimed were without facilities or service when Sandwich Isles filed its 1997 Petition. *See Sandwich Isles Order*, 13 FCC Rcd at 2409, 2411, paras. 5, 11; *Verizon Hawaii Order*, 19 FCC Rcd at 22270-71, para. 7.

this proceeding, and both the Bureau's 1998 order and the Commission's 2004 order, were limited to those areas. In fact, had Sandwich Isle's original 1997 Petition included areas actually served by another carrier, that would likely have affected the outcome of the Bureau order and all consequent Commission actions. Second, to grant Sandwich Isles a study area that encompasses territory that is already being served by an incumbent LEC would require the Commission to determine whether Sandwich Isles should be deemed an incumbent LEC under section 251(h)(2) of the Act, which raises issues that the Commission is addressing in another proceeding.⁵¹ In any event, we note that the portion of the Hawaiian home lands that falls outside the scope of our study area waiver appears to be less than one percent of the Hawaiian home lands.⁵²

16. *Impact on the Fund.* Applying the one-percent guideline, we conclude that the universal service fund will not be adversely affected. Based on USAC's most recent projections, Sandwich Isles' total high-cost support for the year is estimated to be 0.42 percent of total annualized high-cost support.⁵³ Hawaiian Telcom argues that we should also consider the impact on the fund resulting from Sandwich Isles' and the Department of Hawaiian Home Lands' future plans.⁵⁴ Hawaiian Telcom also argues that we should factor in support received by competitive eligible telecommunications carriers (ETCs) serving Sandwich Isles' service territory. According to Hawaiian Telcom, this would increase the impact on the fund to 0.67 percent of the total annual high-cost support.⁵⁵ Hawaiian Telcom claims that other competitive ETCs will no doubt seek support based on Sandwich Isles' costs and that the total impact will rapidly surpass the one percent threshold in the near future.⁵⁶ Parties must demonstrate "extraordinary public interest considerations" to warrant exceeding the one-percent guideline.⁵⁷

17. In applying the one-percent guideline, the Commission looks at the estimated support on an annualized basis at the time the waiver request is submitted, and does not attempt to estimate future support amounts.⁵⁸ Accordingly, we will not attempt to estimate the amount of universal support

⁵¹ See 47 U.S.C. § 251(h)(2); *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It To Be an Incumbent Local Exchange Carrier In Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Notice of Proposed Rulemaking, 19 FCC Rcd 23070 (2004) (*Mid-Rivers NPRM*) (considering, *inter alia*, whether to designate a carrier as an incumbent LEC in a territory where another incumbent LEC actually provides service).

⁵² See Sandwich Isles Reply Comments at 9. ("The fact that prior to the grant of Sandwich Isles['] license by [the Department of Hawaiian Home Lands], GTE was providing service to subscribers in a few areas near its existing exchanges comprising less than one percent of the total [Hawaiian home lands], is not evidence that it was ready, willing or able to serve the other 99% of the [Hawaiian home lands].").

⁵³ According to the Universal Service Administrative Company's (USAC's) most recent projections Sandwich Isles receives annually, approximately \$7.4 million in high-cost loop support, \$1.9 million in local switching support, and \$8 million in interstate common line support. Sandwich Isles serves 1,238 lines and its total high-cost support of almost \$17.3 million amounts to almost \$14,000 per loop, per year. Sandwich Isles' total annual support based on these estimates is 0.42 percent of total high-cost support. See USAC Quarterly Administrative Filing 2005, Third Quarter (3Q) Appendices, HC01, HC05, filed May 2, 2005, at <http://www.universalservice.org/overview/filings>.

⁵⁴ Hawaiian Telcom Comments at 7 n.26 (citing Petition's statement that the Department of Hawaiian Home Lands expects to increase the number of residents on the Hawaiian home lands to approximately 20,000).

⁵⁵ *Id.* at 7.

⁵⁶ *Id.*

⁵⁷ See *PTI/Eagle Order*, 10 FCC Rcd at 1774, para. 17.

⁵⁸ See *id.* The Commission has in the past, however, granted study area waivers subject to the condition that any increase in universal service associated with a sale of exchanges may not exceed the amount estimated at the time. See *e.g., id.* at 1774-75, para. 20. That limitation was subsequently removed, as were all remaining individual caps on high-cost loop support that had been imposed as part of the grant of study area waivers. See *Petitions for Waiver Concerning the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules*,

(continued....)

Sandwich Isles may receive in the future. Moreover, although the Commission has expressed its concern that multiple ETCs in high-cost areas could impose strains on the universal service fund in other contexts,⁵⁹ it has never included support to competitive ETCs in determining whether the requested study area waiver would have an adverse impact on the fund. While the Commission has found that high per-line support received by the incumbent LEC should be one consideration in designating additional ETCs,⁶⁰ it has not considered per-line support amounts in considering requests for study area waivers, and we therefore do not do so here. Accordingly, we find that, applying our existing guidelines, the requested study area waiver will not have an unacceptable adverse impact on the fund.

18. *Position of State Commission.* The state agencies with regulatory authority over Sandwich Isles do not oppose grant of the study area waiver. On December 23, 2004, the Department of Hawaiian Home Lands sent a letter to the Commission stating that it fully supports Sandwich Isles continuing to provide telecommunications services on Hawaiian home lands.⁶¹ The Hawaii Commission sent a letter to the Commission on January 7, 2005, stating that it does not oppose a grant of the waiver of the definition of “Study Area” requested by Sandwich Isles, consistent with actions previously taken in granting Sandwich Isles a Certificate of Authority, designating it an ETC, and annually certifying, since 2001, that it should continue to receive federal high-cost support funds.⁶²

19. *Public Interest Analysis.* The public interest is served by a waiver of the study area freeze rule to recognize Sandwich Isles’ service territory on the Hawaiian home lands as a study area for regulatory purposes because of the significant investment to provide service in areas and to customers that did not previously have service. According to the most recent information filed with the Commission, Sandwich Isles currently has telecommunications facilities passing 4,300 lots on the Hawaiian home lands and expects to pass another 1,500 lots over the next two years.⁶³ Sandwich Isles expects to have approximately 1,700 subscribers by the end of this year, and approximately 4,600 subscribers by the end of 2009.⁶⁴ Sandwich Isles’ construction schedule involves deploying backbone switching and transport infrastructure as well as local distribution facilities to serve the residents of the Hawaiian home lands.⁶⁵ Construction of backbone infrastructure began in earnest in 2000, with RUS approval of funding for a comprehensive network design that will connect all of the Hawaiian home lands on all six of the major

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Accent Communications, Inc. et al., Order, CC Docket 96-45, 15 FCC Rcd 23491 (Com. Car Bur. 2000); *Petitions for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.41(c)(2), 69.605(c), 69.3(e)(110 and the Definition of “Study Area” Contained in Part 36 Appendix-Glossary of the Commission’s Rules, Filed by Copper Valley Telephone Company, et al.*, Memorandum Opinion and Order on Reconsideration, DA 99-1845 (Com. Car. Bur. 1999).

⁵⁹ See *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 05-46, at para. 55 (rel. March 17, 2005) (*ETC Designation Framework Order*).

⁶⁰ See *id.*

⁶¹ Letter from Micah A. Kane, Chairman, Hawaiian Homes Commission, to Marlene H. Dortch, FCC, dated Dec. 23, 2004, Petition at Appendix D (Hawaiian Homes Commission letter).

⁶² Letter from Carlito P. Caliboso, Chairman, Hawaii Commission, to Marlene H. Dortch, FCC, dated Jan. 10, 2005. The Hawaii Commission designated Sandwich Isles an ETC on Dec. 9, 1998. See *id.* at 1. The Department of Hawaiian Home Lands granted Sandwich Isles ETC status on May 14, 1997. See Petition at 5. We need not decide the date on which Sandwich Isles received ETC designation in order to decide the study area waiver petition.

⁶³ Letter from David Cosson, Counsel to Sandwich Isles, to Marlene H. Dortch, FCC, dated April 25, 2005, at 1 (Sandwich Isles April 25, 2005 *ex parte*).

⁶⁴ *Id.*

⁶⁵ *Id.*

Hawaiian Islands.⁶⁶ With continued RUS loan funds, Sandwich Isles expects to complete the majority of its terrestrial network by the end of 2006.⁶⁷ Although Sandwich Isles does not have firm data on the number of potential subscribers, it notes that the Department of Hawaiian Home Lands has a waiting list of approximately 20,000 native Hawaiians who have applied for lots.⁶⁸

20. Hawaiian Telcom contends that it is far from clear that granting Sandwich Isles' Petition will serve the public interest because Sandwich Isles is not the only party capable of providing service to the Hawaiian home lands.⁶⁹ Hawaiian Telcom argues that the Commission should consider whether Sandwich Isles is the service provider best able to maximize the use of high-cost support for the public benefit.⁷⁰ In addition to the service currently provided by the competitive ETC, NPCR, Inc., d/b/a Nextel Partners, Hawaiian Telcom asserts that Verizon Hawaii has provided service to portions of the Hawaiian home lands and "apparently retains the capacity to provide such service today."⁷¹ Hawaiian Telcom disputes Sandwich Isles' claim that the Hawaiian home lands would have remained unserved if it were not for Sandwich Isles, and claims that GTE was ready, willing, and able to provide service to the Hawaiian home lands when the Bureau granted Sandwich Isles' 1997 Petition.⁷² Sandwich Isles claims that GTE had no authority to operate in any area of the Hawaiian home lands not authorized by the Department of Hawaiian Home Lands, and, therefore its study area could not have included the entire Hawaiian home lands.⁷³

21. We find that the fact that GTE (later Verizon) may have had authority to serve the Hawaiian home land does not demonstrate that it is not in the public interest to grant a study area waiver to Sandwich Isles. In fact, the record is clear that GTE was not offering service throughout much of the Hawaiian home lands. The record reflects that, at least in the 1990s, GTE was not providing service to residents, or was at best providing multi-party service in the Hawaiian home lands.⁷⁴

22. There is ample evidence to show that granting Sandwich Isles a study area waiver would serve the public interest. Sandwich Isles has demonstrated a commitment to build facilities and extend service throughout the Hawaiian home lands as the Department of Hawaiian home lands develops the area.⁷⁵ In evaluating the public interest, the Commission must consider whether the waiver applicant has

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2.

⁶⁹ Hawaiian Telcom Comments at 8.

⁷⁰ *Id.* at 10.

⁷¹ *Id.* at 8.

⁷² *Id.*

⁷³ Petition at 10.

⁷⁴ See, e.g., *id.* at 2-4; Hawaiian Homes Commission letter at 1-2 ("Prior to issuing [Sandwich Isles] the license, there were many beneficiaries living on [Hawaiian home lands] that did not have phone service due to the high cost either they or [the Department of Hawaiian Home Lands] would have to pay to install the infrastructure. Today these beneficiaries enjoy the same service that is available in urban areas."); Letter from Rep. Robert N. Herkes; Hawaii House of Representatives, to Marlene H. Dortch, FCC, dated Feb. 1, 2005, (noting his experience with the "unavailability and inadequacy" of service provided by GTE and the neglect of rural areas) (Rep. Herkes Letter); Letter from Pikake Pelekai, Ahupua'a o O'ahu, State Council of Hawaiian Homestead Associations, to Marlene H. Dortch, FCC, dated Feb. 1, 2005 at 1 (stating that Sandwich Isles has "helped turn the tide of years of neglect with no or less than adequate service") (Hawaiian Homestead Associations Letter).

⁷⁵ Petition at 19-20.

demonstrated that a grant of the requested waiver will benefit the public, not whether another party theoretically might provide a greater public benefit. Sandwich Isles' subscribers and beneficiaries of its telecommunications services, including many representatives of Hawaiian homestead associations, individual homesteaders, and Hawaiian community and political leaders, sent letters in support of Sandwich Isles' Petition and emphasized the importance of the continued deployment of modern telecommunications infrastructure and services to the residents of the Hawaiian home lands.⁷⁶ We find that Sandwich Isles has demonstrated that the grant of this waiver request will serve the public interest.

23. *Other Issues.* Hawaiian Telcom raises several collateral issues that we address below. Hawaiian Telcom argues that there is conflicting evidence in the record of whether or not Sandwich Isles has an "exclusive license" to provide telecommunications services on the Hawaiian home lands. Hawaiian Telcom argues that this raises concerns about whether such a license is a barrier to entry in violation of section 253 of the Communications Act.⁷⁷ The Bureau finds that any challenge to a so-called exclusive license is better addressed in the context of a section 253 proceeding. We conclude that this allegation does not affect our determination as to whether the requested study area waiver is in the public interest.

24. Hawaiian Telcom asks the Commission to explore whether Sandwich Isles is using its high-cost support for its intended purposes.⁷⁸ Hawaiian Telcom claims there is evidence that Sandwich Isles is using its support for non-core services, because it is constructing an advanced fiber optic network to provide, among other things, high-speed Internet and other advanced services. In the *Rural Task Force Order*, the Commission stated that "use of support to invest in infrastructure capable of providing access to advanced services does not violate section 245(e)."⁷⁹ We find no evidence in the record in this proceeding that Sandwich Isles is using universal service support for improper purposes.

⁷⁶ See, e.g., Hawaiian Homestead Associations Letter (stating that Sandwich Isles "is creating education, healthcare and economic development opportunities for our homestead communities"); Rep. Herkes Letter at 2 (claiming that Sandwich Isles' presence "has raised the service level bar for all telephone companies as citizens are no longer willing to accept excuses for poor service"); Letter from Vaughn G. A. Vasconcellos, Akimeka, A Native Hawaiian Company, to Commissioners, FCC, dated Jan. 20, 2005 at 1 (arguing the importance of Sandwich Isles' fiber-based backbone network for telemedicine applications in rural Hawaiian home land communities); Letter from Alice Richmond, homesteader, to Marlene H. Dortch, FCC, dated Feb. 1, 2005 (claiming that the availability of communications services is critical to the economic and social feasibility of rural Hawaiian home land communities); Letter from Robin Puanani Danner, Council for Native Hawaiian Advancement, to Marlene H. Dortch, FCC, dated Feb. 1, 2005 (stating that many Hawaiian home land communities are "still without service like high speed Internet connectivity, a basic communication need in a modern world and something with far reaching impacts (access to virtual libraries, telemedicine, educational programming . . .)"); Letter from Daniel K. Kaniho, Jr., to Marlene H. Dortch, FCC, (stating that he and his neighbors in a rural and remote part of the Big Island were without basic, reliable and affordable telephone service for over a decade, prior to 2001); Letter from Frances L. Brand, to Marlene H. Dortch, FCC, dated Jan. 31, 2005 (stating that she does not have access to modern utilities, except Sandwich Isles' telephone service; that she previously paid between \$100 and \$300 for cellular service; and currently pays a comfortable \$26.44); Letter from Raynard C. Soon, former chairman, Hawaiian Homes Commission, to FCC, dated Feb. 1, 2005, ("Before the Commission extended the telecommunications license assigned to Sandwich Isles Communications, single line party line service was not available to many of the Hawaiian Home Land communities and developments throughout the state of Hawaii. . . . Without Sandwich Isles Communications, many of the Hawaiian Home Lands communities that exist today or will be developed in the future would go unserved or be inadequately served.").

⁷⁷ Hawaiian Telcom Comments at 14-15; 47 U.S.C. § 253.

⁷⁸ Hawaiian Telcom Comments at 12-14.

⁷⁹ *Rural Task Force Order*, 16 FCC Rcd 11244, 11322 at para. 200 ("The public switched network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data,

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25. Hawaiian Telcom also suggests that Sandwich Isles is using its high-cost support to construct facilities that may in the future be used to provide service to customers outside the Hawaiian home lands and subsidize a competitive LEC affiliate. Hawaiian Telcom suggests further that Sandwich Isles does not comply with the Commission's accounting, reporting, and auditing rules. There is no evidence in the record of this proceeding to support these claims. Specifically, we note that the Hawaii Commission has certified annually, since such certification was required, that Sandwich Isles is using its support in accordance with section 254(e) of the Act.⁸⁰

B. Request to Receive Universal Service Support as an Incumbent LEC and to Participate in NECA Tariffs and Pools

26. The Commission's rules regarding participation in NECA tariffs and pools, and its rules regarding universal service support for incumbent LECs, do not specifically provide for companies, such as Sandwich Isles, that come into existence after the enactment of the Telecommunications Act of 1996.⁸¹ Sandwich Isles was a newly established carrier that began providing service in 1997, and it is neither a successor nor assign of an incumbent LEC.⁸² Therefore, Sandwich Isles does not meet the definition of an incumbent LEC as defined in sections 54.5 and 69.2(hh) of the Commission's Rules and 251(h)(1) of the Act.⁸³ The Commission's rules in Parts 36, 54, and 69 identify the amount of universal service support and access charges that incumbent LECs may receive. The purpose of the incumbent LEC restrictions in Parts 36, 54, and 69 is to distinguish competitive LECs from incumbent LECs for purposes of calculating universal service support and access charges, not to impose interconnection requirements pursuant to section 251 of the Act.⁸⁴ We find that it is consistent with the Commission's *Skyline Order*

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graphics, video, and other services. . . . Thus, although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services.”).

⁸⁰ See *supra* para. 18.

⁸¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Telecommunications Act of 1996 Act amended the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* Section 251(h)(1) of the Act defines an “incumbent local exchange carrier” as a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act, or a successor or assign of an incumbent LEC. See 47 U.S.C. § 251(h)(1). Incumbent LEC for purposes of Parts 54 and 69 of the Commission's rules has the same meaning as that term is defined in section 251(h)(1) of the Act. See 47 C.F.R. §§ 51.5, 54.5, 69.2(hh). Unlike Parts 54 and 69 of the Commission's rules, Part 36 does not include a definition of incumbent LEC. The term “incumbent local exchange carrier” is used throughout Part 36, however, and in some cases references the Commission's definition of rural incumbent LEC in section 54.5 of the Commission's rules. See, e.g., 47 C.F.R. § 36.622(a).

⁸² See *Sandwich Isles*, 13 FCC Rcd 2409, para. 5; Petition at 2-5. Sandwich Isles' 1997 Petition requested a waiver of section 36.611 of the Commission's rules to permit it to receive high-cost loop support based on projected costs until historical costs became available. See 1997 Petition at 7-12. Sandwich Isles also sought clarification or, to the extent necessary, waiver of the definition of incumbent LEC for purposes of calculating universal service support and Part 69 of the Commission's rules. See 1997 Petition at 12-14.

⁸³ Sandwich Isles' pending Petition specifically requests waiver of section 36.611, and 69.2(hh) of the Commission's rules, but also requests that the Commission grant related rule waivers necessary to allow it to receive interstate access and universal service support based on its own cost. See Petition at iii, 1, 22-23. Sandwich Isles states that the request for waiver of section 36.611 is moot as to waiver of the historical data requirement on a prospective basis, but requests waiver only to the extent the Commission may conclude that it is necessary to reinstate the Bureau's waiver for the initial period until historical data became available.

⁸⁴ For purposes of calculating universal service support, Part 36 of the Commission's rules applies to incumbent LECs, and Part 54 of the Commission's rules distinguishes between incumbent LECs and competitive ETCs. A carrier must be an rural incumbent LEC to receive support based on its own costs. For example, section 36.611 of

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and *Verizon Hawaii Order* to waive the definition of incumbent LEC in Part 36, and sections 54.5 and 69.2(hh) of the Commission's rules to the limited extent necessary to permit Sandwich Isles to continue being treated as an incumbent LEC for purposes of receiving universal service support and participating in the NECA tariffs and pools.⁸⁵

27. We grant Sandwich Isles a waiver of the definition of incumbent LEC in Part 36 and in section 54.5 of the Commission's rules to the limited extent necessary to permit Sandwich Isles to receive universal service support based on its own costs.⁸⁶ We also grant Sandwich Isles' request for waivers of section 36.611 of the Commission's rules to the extent necessary to reinstate the Bureau's waiver for the initial period until historical cost data became available, and of section 69.2(hh) of the Commission's rules in order to allow the carrier to participate the in NECA tariffs and pools.⁸⁷

28. We find that the public interest is served by waiver of the definition of incumbent LEC in Part 36 and in section 54.5 of the Commission's rules for the same reasons we find above that a granting Sandwich Isles a study area waiver serves the public interest.⁸⁸ We also conclude that Sandwich Isles has demonstrated that special circumstances warrant a waiver of section 69.2(hh) of the Commission's rules. Participation in NECA will allow Sandwich Isles to avoid the costs of filing and maintaining its own company-specific interstate tariffs. Because Sandwich Isles is a relatively small company, the costs of preparing company-specific tariffs could be disproportionately excessive. In addition, because Sandwich Isles has made large capital investments to provide service, its company-specific rates have the potential to be extremely high over the long term. Therefore, it is in the public interest to permit Sandwich Isles and its customers to benefit from the cost savings and lower rates available through NECA participation. Waivers of these incumbent LEC requirements will enable Sandwich Isles to continue being treated as an incumbent LEC for purposes of calculating universal service support. Accordingly, we waive the incumbent LEC requirements in Part 36 and sections 54.5 and 69.2(hh) of the Commission's rules to permit Sandwich Isles to participate in NECA pools and tariffs and to receive any high-cost universal service support that it may be eligible to receive.⁸⁹

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the Commission's rules governs the submission of data to NECA for purposes of calculating high-cost support and only applies to incumbent LECs. Competitive ETCs file line count data and their support is calculated pursuant to section 54.307 of the Commission's rules. *See* 47 C.F.R. §§ 36.611, 54.307. In order to be a member of NECA and to participate in the NECA tariffs and pools, a carrier must be an incumbent LEC. *See* 47 C.F.R. § 69.2(hh).

⁸⁵ *See Verizon Hawaii Order*, 19 FCC Rcd at 22273 ("we do not necessarily agree with Verizon Hawaii that Sandwich Isles should be treated as a competitive ETC, rather than as an incumbent LEC, for purposes of receiving universal service support and part 69 of the Commission's rules."). In the *Verizon Hawaii Order*, the Commission provided Sandwich Isles the opportunity to seek and obtain a study area waiver consistent with the *Skyline Order*. *See id.* at 22271. In the *Skyline Order*, the Commission also waived the definition of incumbent LEC in Parts, 36, 54, and 69 of the Commission's rules to permit Skyline Telephone to receive high-cost universal service support and to participate in NECA pools and tariffs. *Skyline Order*, 19 FCC Rcd at 6771-71, paras. 25-28.

⁸⁶ 47 C.F.R. Part 36, § 54.5.

⁸⁷ Sandwich Isles states that historical data has been regularly filed with NECA and USAC since 1998. Petition at 22.

⁸⁸ *See supra* paras. 19-22.

⁸⁹ Hawaiian Telcom argues that the Commission should consider whether, if the Petition is granted, Sandwich Isles should be reclassified as an incumbent LEC under section 251(h)(2) of the Act. Hawaiian Telcom Comments at 16-17. We reject that argument because it is beyond the scope of Sandwich Isles' petition for study area waiver. Moreover, we note that the instant waiver proceeding employs a substantially different legal standard and analysis than section 251(h)(2) proceedings. 47 U.S.C. § 251(h)(2). For example, in the Mid-Rivers proceeding the Commission is considering whether a provider competing against an incumbent LEC has, among other things,

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IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, and sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by Sandwich Isles Communications, Inc. on December 27, 2004, IS GRANTED, as described herein.

30. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of sections 36.611, 69.2(hh) of the Commission's rules, 47 C.F.R. §§ 36.611, 69.2(hh), filed by Sandwich Isles Communications, Inc. on December 27, 2004, and the waivers IS GRANTED, as described herein.

31. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that a waiver of the definition of "incumbent local exchange carrier" in Part 36 and section 54.5 of the Commission's rules to the limited extent necessary to permit calculation of universal service support based on its costs, 47 C.F.R. Part 36, §54.5, IS GRANTED, to Sandwich Isles Communications, Inc., as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Acting Chief, Wireline Competition Bureau

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substantially replaced that incumbent LEC in the relevant area. *Mid-Rivers NPRM*, 19 FCC Rcd 23070. The inquiry in the instant proceeding is quite different. Here, Sandwich Isles is not providing competing service, but rather was providing service in areas not actually served by the existing incumbent LEC. Accordingly, the factual scenario and applicable legal standard in this case are different from that in *Mid-Rivers*, and we need not decide whether Sandwich Isles is an incumbent LEC pursuant to section 251(h)(2) of the Act.