

**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)	
)	

ORDER

Adopted: January 30, 2012

Released: January 30, 2012

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we address a motion by Sandwich Isles Communications, Inc. (Sandwich Isles) to stay potential NECA action implementing the Wireline Competition Bureau's (Bureau) *Declaratory Ruling* in the above-captioned proceeding.¹ In the *Declaratory Ruling*, the Bureau concluded that 50 percent of Sandwich Isles' submarine cable lease expenses subject to dispute, and certain one-time engineering costs, should be included in the revenue requirement for recovery through the NECA pooling process.² Recently, NECA has stated its intention to "override" Sandwich Isles 2010 cost studies unless Sandwich Isles submits corrected information.³ Because a motion for stay is not the correct vehicle for review of NECA's action, we dismiss the Sandwich Isles Motion without prejudice to it filing an appropriate petition for declaratory ruling.

II. BACKGROUND

2. Sandwich Isles provides telephone service to a study area consisting of most of the Hawaiian Home Lands (HHL),⁴ and functions as an incumbent local exchange carrier (incumbent LEC)

¹ Sandwich Isles Communications, Inc. Motion for Stay, WC Docket No. 09-133 at 3 (filed January 25, 2012) (Motion). See *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, WC Docket No. 09-133, Declaratory Ruling, 25 FCC Rcd 13647 (Sept. 29, 2010) (*Declaratory Ruling*). See also Sandwich Isles Communications, Inc. Petition for Reconsideration, WC Docket No. 09-133 (filed Oct. 29, 2010) (Sandwich Isles Petition); Application for Review of AT&T Inc., WC Docket No. 09-133 (filed Oct. 28, 2010) (AT&T Application). The Sandwich Isles Petition and the AT&T Application are pending before the Commission. On January 27, 2012, the National Exchange Carrier Association (NECA) filed an opposition to the Motion. National Exchange Carrier Association Opposition to Sandwich Isles Inc. Motion for Stay, WC Docket No. 09-133 (filed Jan. 27, 2012) (NECA Opposition).

² NECA is an intra-industry, not-for-profit corporation charged by the Commission with administering the Commission's interstate access charge system and associated revenue pools. See *Declaratory Ruling*, 25 FCC Rcd at 13647, n.1.

³ Motion at 3 and Exhibits 1 and 2.

⁴ *Declaratory Ruling*, 25 FCC Rcd at 13647, para. 2, n.3. The HHL, created by Congress in 1921 for the benefit of native Hawaiians, consists of a total of 203,000 acres in seventy non-contiguous areas. Ninety-eight percent of this area, which is spread out over the six major islands of Hawaii, is rural. Sandwich Isles is licensed by the Department of Hawaiian Home Lands and is subject to regulation by the Hawaii Public Utilities Commission (HPUC). *Id.*

for access charge and universal service purposes, serving approximately 2000 lines.⁵ In mid-2007, Sandwich Isles informed NECA that it was considering a finance lease arrangement with a third party, Paniolo, LLC, that would obtain financing to build an inter-island submarine cable network that would be leased to Sandwich Isles.⁶ In addition, Sandwich Isles advised NECA of its intention to include new cable lease costs in its NECA cost submissions.⁷ NECA and Sandwich Isles discussed a number of factors bearing on the extent to which the lease payments could be included in the cost study.⁸ Sandwich Isles ultimately entered into the lease agreement; its base lease costs initially were \$15 million annually.⁹ After more than a year of discussions between the parties, on May 20, 2009, NECA formally notified Sandwich Isles of its decision not to include the disputed costs in the upcoming tariff filing or for NECA pool reporting.¹⁰ In response, Sandwich Isles filed a petition on June 26, 2009 requesting that the Commission issue a declaratory ruling that certain circuit lease expenses incurred by Sandwich Isles for the inter-island submarine cable system are “used and useful.”¹¹

3. On September 29, 2010, the Bureau issued the *Declaratory Ruling*, concluding that 50 percent of Sandwich Isles’ lease expenses subject to dispute, as well as certain one-time engineering expenses, should be included in the revenue requirement for recovery in the NECA pool.¹² In reaching its decision, the Bureau applied the “used and useful” standard and concluded that in this situation, there were a number of factors that required consideration. Specifically, the Bureau considered the current lack of use of the cable and the lack of substantial record evidence concerning future demand as well as a number of countervailing factors including the unique geographic conditions of Hawaii requiring reliance on submarine cable transmission to serve the five Hawaiian islands, the special role that Sandwich Isles plays in providing telecommunications services to rural areas of Hawaii, and the general permissibility of including reasonable spare capacity in the revenue requirement.¹³ Importantly, the Commission also

⁵ See *id.* at 13647, para. 2.

⁶ See *id.* at 13648, para. 5. The Paniolo cable network “is approximately a 358 mile undersea and overland fiber optic cable system linking the islands of Kauai, Oahu, Molokai, Maui and Hawaii in the State of Hawaii. The Paniolo network consists of four (4) Undersea Components and six (6) Overland Components, including but not limited to beach landings, terminal buildings and central office electronics.” *Id.*

⁷ See *Declaratory Ruling*, 25 FCC Rcd at 13648-49, para. 5.

⁸ See *id.*

⁹ See, e.g., Letter from Megan Strand, counsel for Sandwich Isles, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-133 at 3 (filed June 4, 2010) (Sandwich Isles White Paper). These base lease costs increase over time, see *id.* at 12, and Sandwich Isles also is responsible under the lease for maintenance and insurance costs. Sandwich Isles August 31, 2009 Comments at 17; Letter from Dana Frix, counsel for Sandwich Isles, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-133 at 1 (filed Aug. 27, 2010) (Sandwich Isles Aug. 27, 2010 *Ex Parte* Letter) (discussing engineering, operating, and maintenance costs associated with the Paniolo cable network).

¹⁰ *Declaratory Ruling*, 25 FCC Rcd at 13649, para. 7.

¹¹ See Petition for Declaratory Ruling of Sandwich Isles Communications, Inc., WC Docket No. 09-133, at 1 (filed June 26, 2009) (Initial Petition). The “used and useful” standard provides the foundation of Commission decisions evaluating whether particular investments can be included in a carrier’s revenue requirement. Property is considered “used and useful” for regulatory ratemaking if it is “necessary to the efficient conduct of a utility’s business, presently or within a reasonable future period.” *Declaratory Ruling*, 25 FCC Rcd at 13651-52, para. 12 (citing *American Tel. and Tel. Co.*, Phase II Final Decision and Order, 64 FCC 2d 1, at 38, para. 111 (1977) (*AT&T Phase II Order*)).

¹² *Declaratory Ruling*, 25 FCC Rcd at 13650, para. 9, n.30.

¹³ *Id.* at 13654, para. 17.

recognized that to the extent the Sandwich Isles cable facilities were used in the future to provide unregulated services, “lease expenses subject to dispute would exclude those expenses associated with the actual usage of the cable to provide services not encompassed by the NECA tariff, including, among other things, non-regulated services and intrastate services.”¹⁴

4. In its Motion, Sandwich Isles claims that NECA’s assertion that “any non-regulated revenues received for use of the Paniolo [cable] facilities are to be treated as a reduction to the lease expenses pursuant to the framework established in the FCC’s Declaratory Ruling” are contrary to Commission regulations and the *Declaratory Ruling*.¹⁵ Sandwich Isles “ask[s] the FCC to stay NECA from its inappropriate course of conduct.”¹⁶

III. DISCUSSION

5. We dismiss the Sandwich Isles Motion without prejudice to its filing of an appropriate petition for declaratory ruling. Sections 1.43 and 1.44 of the Commission’s rules, cited by Sandwich Isles as authority for the Commission action sought in its Motion, contain rules applicable to “requests for stay of any order or decision” and “any request to stay the effectiveness of any decision or order of the Commission”¹⁷ Here, Sandwich Isles does not seek a stay of any action or order by the Commission and thus its request is not validly filed under sections 1.43 and 1.44 of the Commission’s rules. Rather, Sandwich Isles asks the Commission to “order NECA to cease and desist from taking any actions adverse to” Sandwich Isles.¹⁸ Although its Motion is procedurally improper, Sandwich Isles has alternatives for seeking Commission consideration of the issues it raised. In particular, as the Commission has repeatedly explained, and the *Declaratory Ruling* in this proceeding explicitly states: “LECs that disagree with NECA’s interpretation of our rules are free to present their arguments to the Commission, either in comments on those filings or in petitions for declaratory ruling.”¹⁹ If it prefers, Sandwich Isles also is free to work with the Wireline Competition Bureau staff to informally assist the parties in attempting to resolve their dispute. As such, the Sandwich Isles Motion is dismissed; however, consistent with Commission rules and precedent, Sandwich Isles may file a petition for declaratory ruling if it is unable to resolve its dispute with NECA.

¹⁴ *Id.* at 13650, para. 9, n.30.

¹⁵ Motion at 3 (citing *id.* at Exhibit 1).

¹⁶ *Id.*

¹⁷ 47 CFR §§ 1.43, 1.44(e). *See also* NECA Opposition at 2.

¹⁸ Motion at 9.

¹⁹ *Declaratory Ruling*, 25 FCC Rcd at 13662, para. 28 (citing *NECA Safeguards Order*, 10 FCC Rcd at 6260-61, para. 44).

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, sections 1.43 and 1.44 of the Commission's rules, 47 C.F.R. §§ 1.43, 1.44, and the authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that Sandwich Isles Communications, Inc.'s Motion for Stay is DISMISSED.

7. IT IS FURTHER ORDERED that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett
Chief, Wireline Competition Bureau