

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

In the Matter of)	
)	
GTE Hawaiian Telephone Company, Inc.)	
)	
Application for Review of a Decision by the Common Carrier Bureau)	
)	
)	
Sandwich Isles Communications, Inc.)	
)	
Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification)	AAD 97-82

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 2004

Released: October 29, 2004

By the Commission: Commissioner Cops concurring and issuing a statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant Verizon Hawaii, Inc.'s (Verizon Hawaii) (formerly GTE Hawaiian Telephone Company) (GTE) Application for Review of a decision by the Accounting and Audits Division of the Common Carrier Bureau (Bureau) made on delegated authority, granting Sandwich Isles Communications, Inc. (Sandwich Isles) a waiver to be treated as an incumbent local exchange carrier (LEC) serving a previously unserved area for purposes of receiving high-cost universal service support.¹ As explained below, we conclude that the Bureau erred by ignoring evidence in the record that the areas Sandwich Isles proposed to serve were not unserved. Consistent with Commission precedent, we require Sandwich Isles to seek and obtain a study area waiver in order to be treated as an incumbent LEC for purposes of receiving universal service support.

II. BACKGROUND

2. *Sandwich Isles Petition.* 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

¹ *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*); Application for Review of an Order Granting in Part a Petition for Waiver by Sandwich Isles Communications, Inc., by GTE Hawaiian Telephone Company Incorporated, filed March 5, 1998 (Application for Review). Verizon Hawaii is the successor to GTE. In this Memorandum Opinion and Order, we refer to Verizon Hawaii to identify the legal entity whose claims we address. We refer to GTE to identify the historical entity that was providing telephone service in Hawaii when the Application for Review was filed. The Accounting and Audits Division subsequently became the Accounting Policy Division. The Accounting Policy Division and the Common Carrier Bureau subsequently became the Telecommunications Access Policy Division and the Wireline Competition Bureau, respectively, pursuant to the Commission's reorganization in March 2002.

on projected costs until historical costs became available.² 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 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 because it was establishing a study area serving previously unserved areas.³

3. *Opposition and Reply.* After the comment period had closed, Verizon Hawaii filed an Opposition to Sandwich Isles' Petition arguing that the areas Sandwich Isles proposed to serve were not, in fact, "currently unserved," because they were within the serving territory of Verizon Hawaii's central offices.⁴ Although some areas currently had no telephone service, these were new subdivisions adjacent to areas served by GTE.⁵ Verizon Hawaii further stated that it is obligated to provide service throughout the state.⁶ In reply, Sandwich Isles argued that there was no overlap in the Hawaiian Home Lands service areas described in its Petition and areas served by GTE.⁷ Sandwich Isles argued that GTE could not provide service to the Hawaiian Home Lands described in its Petition because Sandwich Isles "is exclusively licensed to serve" those areas.⁸

4. *Bureau Order under Review.* On February 3, 1998, the Bureau granted in large part Sandwich Isles' Petition. 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.⁹ 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 member of the National Exchange Carriers Association (NECA).¹⁰ In addition, the Bureau said that "for regulatory purposes we will recognize Sandwich Isles' service territory in Hawaii as a study area."¹¹ Finally, the Bureau denied Verizon Hawaii's Petition to Accept Late-Filed Comments and did not consider the claims made in its Opposition.¹²

² 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 (Petition).

³ See Petition at n.3.

⁴ Opposition of GTE Hawaiian Telephone Company Incorporated to Sandwich Isles Communications, Inc.'s Petition for Waiver and Request for Clarification and Affidavit in Support of Opposition, filed Sept. 15, 1997 at 2 (Opposition to Petition). See also Petition to Accept Late-filed Comments and Opposition, by GTE Hawaiian Telephone Company Incorporated, filed Sept. 15, 1997.

⁵ See *id.*

⁶ See *id.* at 8-9. ("Under its charter, GTE Hawaiian Tel has an obligation to continue to provide service throughout the State to any resident who requests service unless the commission designates another carrier as the carrier of last resort") (citation omitted). See also *id.*, Affidavit of Susan Eichor at 1.

⁷ Reply to Late-Filed Comments and Opposition, by Sandwich Isles Communications, Inc., filed Oct. 2, 1997, at 5 (Reply).

⁸ Reply at 6.

⁹ *Sandwich Isles*, 13 FCC Rcd at 2411. 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. *Id.*

¹⁰ *Id.* at 2413.

¹¹ *Id.*

¹² *Id.*

5. *Application for Review.* On March 5, 1998, Verizon Hawaii filed an Application for Review of *Sandwich Isles*, making essentially the same arguments it made in its Opposition to the Sandwich Isles Petition.¹³ On March 27, 1998, Sandwich Isles filed an Opposition to the Application for Review, making essentially the same arguments it made in its Reply to the Opposition to its Petition.¹⁴ Both parties submitted additional information, but this information did not fundamentally change the pertinent underlying facts.¹⁵

III. DISCUSSION

6. Section 1.115 of the Commission's rules specify the factors that warrant Commission consideration of the issues presented in an application for review of action taken pursuant to delegated authority.¹⁶ The Commission considers, among other things, whether the action taken is in conflict with case precedent or established Commission policy;¹⁷ whether it was based upon an erroneous finding as to an important or material question of fact;¹⁸ or whether there was prejudicial procedural error.¹⁹

7. We conclude that the Bureau erred by failing to consider the facts presented by Verizon Hawaii in its late-filed Opposition to Sandwich Isles' Petition. Although the Commission does not routinely grant extensions of time,²⁰ we agree with Verizon Hawaii that the Bureau should have considered the facts presented in this case.²¹ In granting Sandwich Isles' request for waiver of 36.611 of the Commission's rules, the Bureau relied on *Border to Border* and *South Park*, explaining that in those

¹³ Application for Review.

¹⁴ Opposition to Application for Review, by Sandwich Isles Communications, Inc., filed March 27, 1998 (Opposition to Application for Review).

¹⁵ For example, both parties filed maps identifying the areas Sandwich Isles proposed to serve. See Letter from W. Scott Randolph, GTE, to Magalie Roman Salas, FCC, dated April 2, 1998; Supplement and Motion for Leave to File Supplement, by Sandwich Isles, filed June 1, 1998.

¹⁶ 47 C.F.R. § 1.115(b). Section 1.115(b)(2) provides that the application for review shall specify from among the factors listed, which factors warrant Commission consideration of the questions presented. *Id.* Verizon Hawaii claims that the Bureau's decision is premised upon an erroneous factual finding and is contrary to Commission precedent, and that the Bureau's refusal to consider Verizon Hawaii's proffered Opposition to Sandwich Isles' Petition resulted in prejudicial procedural error. See Application for Review at 2-4.

¹⁷ 47 C.F.R. § 1.115 (b)(2)(i).

¹⁸ 47 C.F.R. § 1.115 (b)(2)(ii).

¹⁹ 47 C.F.R. § 1.115 (b)(2)(v).

²⁰ 47 C.F.R. § 1.46(a). The case cited by the Bureau for the proposition that, "[g]enerally, it is not Commission policy to accept late-filed comments," are all tariff cases. *Sandwich Isles*, 13 FCC Rcd at 2413, para. 16. Tariff proceedings have statutory deadlines and the filing deadlines for petitions seeking investigation, suspension, or rejection of a new or revised tariff are governed by section 1.773(a)(2) of the Commission's rules, rather than section 1.46(a). See 47 U.S.C. § 204; 47 C.F.R. § 1.773(a)(2).

²¹ In this case, Verizon Hawaii's motion requested in the alternative that the Commission treat its late-filed Opposition as an ex parte filing, which the Bureau declined to do. However, the record in the proceeding was not closed, as three months thereafter the Bureau received from Sandwich Isles additional information that the Bureau itself had requested. See Letter from Sylvia Lesse and Margaret Nyland, Counsel for Sandwich Isles, to Magalie Roman Salas, dated Dec. 24, 1997. Therefore, because the Bureau in fact had ample time to consider the information contained in the Opposition, as well as Sandwich Isles' reply thereto, under these facts the Bureau should have treated that opposition as an ex parte filing. Finally, we note that Verizon Hawaii's failure to serve the National Exchange Carrier Association does not bar consideration of the Opposition as an ex parte filing because Verizon Hawaii did serve Sandwich Isles and, thus, had standing to file the ex parte.

cases it had “permitted immediate access to high cost support because the carriers were offering to serve previously unserved areas [that] would have likely remained without service if these carriers were unable to provide service.”²² The Bureau did not question Sandwich Isles’ claim that it would be providing service to previously unserved rural areas. Verizon Hawaii raised important facts with regard to Sandwich Isles’ claim that the areas it proposed to serve were previously unserved.²³ In particular, Verizon Hawaii states that the proposed areas were served by GTE central offices.²⁴ These facts were material to the Bureau’s decision to grant Sandwich Isles’ request for waiver and to treat it as an incumbent LEC for purposes of receiving universal service support.²⁵

8. Consistent with the Commission’s recent *Skyline* decision, we require Sandwich Isles to seek and obtain a study area waiver in order to be treated as an incumbent LEC for purposes of receiving universal service support.²⁶ In *Skyline*, the Commission found that the exchanges served by Skyline Telephone Company (Skyline) were within the Qwest and Verizon study areas and that a study area waiver was required in order for Skyline Telephone to receive support for a newly formed study area.²⁷ Skyline had sought waiver of the Commission’s rules to enable it to receive accelerated high-cost loop support and to participate in NECA pools and tariffs.²⁸ Skyline asserted that it was not required to seek a study area waiver because its exchanges constituted a previously unserved area.²⁹ The Commission

²² *Sandwich Isles*, 13 FCC Rcd at 2411, para. 10. See *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission’s Rules*, Memorandum Opinion and Order, AAD 94-61, 10 FCC Rcd 5055 (Com. Car. Bur. 1995) (*Border to Border*); *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission’s Rules*, Order, AAD 97-41, 13 FCC Rcd 198 (Acct. Aud. Div. 1997) (*South Park*).

²³ Verizon Hawaii also claims that the Bureau’s decision is contrary to Bureau precedent in *TelHawaii*. See Application for Review at 4-7; Opposition at 3-6; *Petition for Waivers Filed by TelAlaska, Inc. and TelHawaii, Inc. Concerning Sections 36.611, 36.612, 61.41(c)(2) and the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules*, Memorandum Opinion and Order, AAD 96-93, 12 FCC Rcd 10309, 10316, para. 17 (Acct. Aud. Div. 1997) (*TelHawaii*). We do not address this argument, because there now is clear Commission precedent on the issue. See *infra* para. 8.

²⁴ Verizon Hawaii indicates that some proposed areas were “located in the center of the city of Honolulu and – far from being “unserved” – are served by some of the largest central offices in the state of Hawaii.” See Application for Review at 9; see also Opposition to Petition at 7. Although Verizon Hawaii acknowledges that some proposed areas did not have telephone service, it states that these were planned Hawaiian Home Lands subdivisions that had not yet been built and were adjacent to subdivisions served by GTE. See Application for Review at 7 (“GTE Hawaiian Tel is presently providing service to subdivisions directly and immediately adjacent to those identified by [Sandwich Isles], and has every intention of providing service to the new subdivisions as well.”).

²⁵ Sandwich Isles concedes that the areas it proposed to serve were “in the vicinity of existing GTE facilities,” but argues that the proposed areas met the definition of “unserved” because there was no telephone service at the time of its Petition. Sandwich Isles Reply at 5.

²⁶ See *M&L Enterprises, Inc., 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 (rel. April 12, 2004) (*Skyline*).

²⁷ *Skyline*, FCC 04-86, at paras. 11-13.

²⁸ The Commission dismissed as moot Skyline’s request for waiver of sections 36.611 and 36.612 of the Commission’s rules. See *Skyline*, FCC 04-86, at paras. 22-23.

²⁹ Skyline 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 *Skyline*, FCC 04-86, at para. 10 & n.33; *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*,

(continued....)

explained 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.³⁰ 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 would require a study area waiver.³¹ The Commission’s primary objective in freezing study area boundaries was to prohibit companies from setting up high-cost exchanges within existing service territories as separate study areas to maximize high-cost support. The creation of a new study area has the effect of placing a new burden on the federal universal service fund.³² Accordingly, 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.³³

9. We find that the exchanges now served by Sandwich Isles were within the GTE study area (and are now within the Verizon Hawaii study area). The Hawaii Commission designated GTE as an eligible telecommunications carrier (ETC) for the State of Hawaii, effective Jan. 1, 1998.³⁴ Although Hawaii has the authority to designate ETCs within the state,³⁵ the designation of Sandwich Isles as eligible for support for serving the Hawaiian Home Lands resulted in the creation of a “high-cost” area that was previously within the study area of GTE in the State of Hawaii. The creation of a new study area has the effect of placing a new burden on the federal universal service fund. By requiring Sandwich Isles to seek a study area waiver, the Commission will have the opportunity to consider whether creating a

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Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD-96-51, 11 FCC Rcd 8156, 8160, at para. 9 (Com. Car. Bur. 1996) (*Study Area Waiver Exceptions Order*).

³⁰ *Skyline*, FCC 04-86, at para. 11.

³¹ See *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*). See also 47 C.F.R. § 36 App.

³² *Skyline*, FCC 04-86, at para. 11.

³³ *Id.* at para. 13. Any such waiver request will be evaluated under the criteria set forth in the *PTI/Eagle Order*. This will 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, consistent with section 254 of the Act. The Commission also clarified that a study area waiver request is not required when a company is combining previously unserved territory with one of its existing study areas in the same state, or when a holding company is consolidating existing study areas in the same state. See *Study Area Waiver Exceptions Order*, 11 FCC Rcd at 8160, para. 9.

³⁴ See GTE Dec. 9 *ex parte* at 3 & n.3. As an ETC, GTE was required to provide supported services throughout its designated service areas under section 214(e)(1) of the Act. See 47 U.S.C. § 214(e)(1). As an incumbent LEC, the designated service area for GTE was its study area. See *id.*; see also *supra* note 6.

³⁵ See 47 U.S.C. § 214(e)(2). At the time Sandwich Isles filed its Petition, Sandwich Isles had not been designated as an ETC by the Hawaii Public Utilities Commission (Hawaii Commission). Sandwich Isles claims that it did not need ETC designation by the Hawaii Commission, because the Department of Hawaiian Home Lands (DHHL) “exercises exclusive and independent jurisdiction over these trust lands.” See Letter from Sylvia Lesse, Counsel for Sandwich Isles, to Magalie Roman Salas, FCC, dated Nov. 12, 1998 (Sandwich Isles Nov. 12 *ex parte*) at 2. The Hawaii Commission disagreed. See Letter from Paul Shigenaga, Hawaii Commission, to Magalie Roman Salas, dated Aug. 10, 1998. Sandwich Isles subsequently sought designation as an ETC by the Hawaii Commission, which was granted on Dec. 9, 1998. See Sandwich Isles Nov. 12 *ex parte*, at 3 n.4; Letter from Sylvia Lesse, Counsel for Sandwich Isles, to Magalie Roman Salas, FCC, dated Dec. 22, 1998 (Sandwich Isles Dec. 22 *ex parte*) Exhibit 1 (Hawaii Commission Decision and Order granting Sandwich Isles ETC status).

high-cost study area in Hawaii would have an adverse effect on the universal service fund and whether or not it would serve the public interest.³⁶

10. Although we grant Verizon Hawaii's Application for Review and reverse the Bureau's decision in *Sandwich Isles*, 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.³⁷ Accordingly, we will provide Sandwich Isles the opportunity to seek a study area waiver. To ensure continued service to Sandwich Isles' customers, we will continue to treat Sandwich Isles as an incumbent LEC for purposes of receiving universal service support until the Commission rules on a request for a study area waiver, provided that Sandwich Isles file such request within 60 days of the effective date of this Order.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that this MEMORANDUM OPINION AND ORDER is ADOPTED.

12. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed by GTE Hawaiian Telephone Company Incorporated ON March 5, 1998 is GRANTED.

13. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 254, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the decision of the Common Carrier Bureau, *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) is REVERSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁶ According to USAC's most recent projections Sandwich Isles receives annually, approximately \$5.4 million in high-cost loop support, \$1.5 million in local switching support, and \$7 million in interstate common line support. Sandwich Isles serves 1,059 lines and its total high-cost support of almost \$13.9 million amounts to more than \$13,000 per loop, per year. See USAC Quarterly Administrative Filing 2004, Third Quarter (3Q) Appendices, HC01, HC05, at <http://www.universalservice.org/overview/filings>.

³⁷ See Application for Review at 12-13; Opposition to Petition at 8 n.4; 11-12.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING**

Re: *GTE Hawaiian Telephone Company, Inc. Application for Review of a Decision by the Common Carrier Bureau, Sandwich Isles Communications, Inc. Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification (AAD 97-82)*

In 1998, the Common Carrier Bureau concluded that for regulatory purposes it would treat Sandwich Isles Communications' service territory as a study area. Shortly after the Bureau released its decision, GTE Hawaiian Telephone Company filed an application for review by the full Commission, contending that the service area at issue was within its serving territory. Incomprehensibly, this dispute has sat in front of the Commission for six years. I support today's decision. But I limit my support to concurring because fairness requires that we resolve issues involving support for unserved areas and disputed territory with greater speed than we attempt to do here. I can only hope that a fuller record in a subsequent study area waiver proceeding will bring an equitable solution for all.