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

In the Matter of Sandwich Isles Communications, Inc.	WC Docket No.: 10-90 File No.: EB-IHD-15-00019603 NAL/Acct. No.: 201732080004 FRN: 0001514090 FCC Order 16-165

To: The Commission

SANDWICH ISLES COMMUNICATIONS, INC.'S COMMENTS AND RESPONSE TO NOTICE OF APPARENT LIABILITY AND FORFEITURE ORDER (FCC ORDER 16-165) AND FCC ORDER 16-167

Sandwich Isles Communications, Inc. ("SIC"), by and through its undersigned counsel, hereby submits these Comments and Response to the Commission's December 20, 2016 Public Notice and Request for Comment[1], paragraphs 84 and 90 of the Commission's December 5, 2016 Notice of Apparent Liability for Forfeiture and Order ("NAL"), and paragraph 58 of the Commission's December 5, 2016 Order in WC Docket No. 10-90 ("the FCC 16-167 Order"). As demonstrated below, the NAL's proposed imposition of a forty-nine million dollar forfeiture is without merit, contrary to the record factual evidence, legally wrong and must be set aside.

I. OVERVIEW – THE NAL IS PREMISED ON A SERIES OF UNFOUNDED CLAIMS

The NAL is based on a series of interrelated premises resulting in a conclusion that SIC, its parent company and its former principal executive have engaged in conduct so "egregious" (*see* Dec. 5, 2016 Joint Statement of Commissioners Clyburn and Pai) as to warrant the imposition of a massive penalty of $49 million and threatened revocation of its status as a carrier under Section

[1] *See* Dec. 20, 2016 Public Notice, WC Docket No. 10-90, CC Docket No. 96-45, *Wireline Competition Bureau Seeks Comment on the 2005 Waiver that Allows Sandwich Isles to be Treated as an Incumbent Local Exchange Carrier for Purposes of Receiving High-Cost Universal Service Support*.

214 of the Act. The gravamen of the NAL proceeds from the premise that SIC deliberately: (a) "misclassified" $27 million worth of capital costs in order to inflate the Universal Service Fund ("USF") payments it received; (b) transferred a portion of the alleged USF overpayments to its parent corporation in the form of "excessive" management fees which were used as Mr. Hee's "personal piggy bank" to finance his expenditures, for which he was convicted of personal income tax violations (*see* October 19, 2015 Statement of Commissioner Ajit Pai, *re: Connect America Fund,* WC Docket No. 10-90, *ETC Annual Reports and Certifications,* WC Docket No. 14-58); and (c) deliberately and fraudulently failed to maintain or obscured its financial records in order to hide the alleged "self-dealing" from public scrutiny. *See* Dec. 5, 2016 Joint Statement of Commissioners Mignon Clyburn and Ajit Pai, *re: Sandwich Isles Communications, Inc., WC Docket No. 10-90*. These unfounded premises were manufactured to hide what this appears to be really about: the FCC leaping to a baseless conclusion that, because Mr. Hee was indicted and found guilty for ***personal*** income tax violations, SIC must have also been complicit in some sort of fraud ***even though the IRS audited SIC with no charges or findings of fraud.*** Everything that followed from this conclusion was designed to achieve a pre-determined end: to bankrupt SIC or put it out of business without regard for the customers in the Hawaiian Home Lands ("HHL"). Indeed, that this was the FCC's goal is evident from its conduct during this proceeding including, but not limited to, the unusual measure of cutting off funding to SIC without any hearing or due process. It also explains the fact that this audit has been one of the longest, most intense and excruciatingly detailed over the longest period of time in the history of the Universal Service Administrative Company ("USAC"), delving into the most irrelevant and infinitesimal of details, such as the individual costs of manhole covers.

When they are scrutinized, the conclusions in the NAL – like those in the accompanying FCC 16-167 Order – are shown to be fatally flawed. To reach the conclusions that the FCC believes justify the shuttering of SIC's doors, the FCC had to ignore hard and unrebutted evidence that would have reduced its claims by at least $22 million. Indeed, the FCC initially charged that SIC was overpaid over $61 million in allegedly misclassified Category 1 cable and wire facilities ("C&WF") costs until SIC and its industry cost consultant, GVNW Consulting Inc. ("GVNW"), pointed out how USAC (and the FCC) had misunderstood voluminous evidence provided by SIC over the course of a year-long audit. This resulted in USAC reducing the alleged Category 1 overpayment figure to just over $26 million. After this reduction, SIC again provided factual evidence demonstrating that this $26 million dollar figure remained artificially inflated and that, at the absolute upper limit, the alleged misclassification of Category 1 costs amounted to no more than $4.1 million over the more than 10 year period covered by the audit. USAC and the FCC ignored this evidence without explanation, with the latter opting to blindly bless the $26 million figure reached by USAC. This, alone, demonstrates that the NAL lacks sufficient factual grounding to justify the historical penalty that it seeks to levy.

The remaining premises upon which the NAL's conclusions are constructed are (a) the Commission's characterization of management fees and bonuses as "excessive" and (b) the claim that SIC either failed to maintain or sought to obscure its financial records. The first is incorrect because it rests upon a highly subjective, confused, internally inconsistent, and legally unsupported treatment of expenses, such as rent for shared office space and employee bonuses that were undeniably incurred and that even if completely disallowed cannot possibly support a forfeiture of the amount proposed here. The second is simply not supported by the facts, having no support in either or both the USAC Final Audit Report or the supposed "independent" review of the record.

The premises upon which the NAL rests simply do not withstand even the most cursory examination, and the proposed forfeiture of $49 million and the threats to forcibly remove SIC from the list of eligible ETCs are utterly without precedent and justification. In fact, the Commission's NAL does exactly what it is obligated to avoid: it violates the very purpose of the USF program and indeed the agency's own Rules and procedures. The actual facts confirm the FCC's failure to show that SIC had purposely inflated claims for USF funds as well as its failure to find enough mistaken classifications to achieve the FCC's desired objective to put SIC out of business.

II. THE CLAIMED MISCLASSIFICATION OF CAPITAL COSTS AND EXCESSSIVE EXPENSES IS BASELESS

The Commission attempts to justify the amount of the NAL's proposed penalty amount – $49 million – by relying upon the conclusion it reached in its companion FCC 16-167 Order that SIC received $27 million in alleged USF overpayments over a more than ten (10) year period. As demonstrated below, that reliance is vacuous because the FCC 16-167 Order ignored and, indeed, is directly contrary to, the unrebutted record evidence and is wrong as a matter of law. The record evidence confirms that the $27 million USF overpayment figure is artificially inflated by at least a factor of five (5), if not six (6) or more. Given this, there is no factual basis that can justify the imposition of a $49 million penalty.

A. The NAL Commits the Same Mistakes as Those Committed in the FCC 16-167 Order

Like the FCC 16-167 Order, the NAL relies exclusively on USAC's May 13, 2016 Final Audit Report as support for its conclusion that SIC allegedly "received improper payments of more than $27 million from the [Universal Service] Fund's high-cost program." *See* NAL, at 2 ¶ 3. The

lion's share of this $27 million is the $26,230,270 in improper Category 1 payments allegedly received by SIC "as a result of its misclassification of certain [cable and wire facilities costs ("C&WF")] as Category 1 C&WF in cost studies submitted from 2003 to 2013." NAL, at 15 ¶ 36; *see also* FCC 16-167 Order, at 16 ¶ 51. More specifically, USAC concluded that SIC "misallocated C&WF to CAT 1 where there were no subscriber premises (routes without subscribers)" (FCC 16-167 Order, at 23 ¶ 73), resulting in the alleged $26 million overpayment of Category 1 costs to SIC. *Id.* at 16 ¶ 51. As SIC's pending Petition for Reconsideration of the FCC 16-167 Order demonstrates, however, the USAC Final Audit Report and, in turn, the Commission, ignored unrebutted record evidence which confirms that this $26 million figure is, in reality, no more than $4.168 million. *See* SIC's January 4, 2017 Petition for Reconsideration, at 1-8.

In response to USAC's Final Audit Report, SIC submitted a detailed report from GVNW, an independent, third-party consulting firm that assists telecommunications companies with regulatory compliance including, but not limited to, compliance with USF requirements and the Uniform System of Accounts requirements prescribed by Part 32 of the Commission's Rules. *See* Declaration of Jeffry H. Smith ¶¶ 3, 4 (submitted with SIC's Petition for Reconsideration).[2] The GVNW Report (entitled "Sandwich Isles Communications, Inc. Response to Category Exceptions" and attached as Exhibit AA to SIC's Response to the USAC Final Audit Report) analyzed in detail the factual assumptions in, and data relied upon by, the USAC Final Audit Report, and concluded that, at most, the combined monetary recovery for reimbursements made to SIC from 2005 through 2015 is approximately $4,168,000. *See* Declaration of James A.

[2] The Declaration of Jeffry H. Smith, Chief Executive Officer of GVNW, explains the longstanding relationship between SIC and GVNW in the formulation of cost of service studies in connection with USF and NECA Pool ratemaking.

Rennard ("Rennard Decl.") ¶ 7 (submitted with SIC's Petition for Reconsideration); GVNW Report, at 9.

USAC and the Commission ignored the facts and data analysis in the GVNW Report which demonstrate that the $26,320,270 in alleged overpayment of high-cost support is erroneous. Instead, the Commission simply assumed that the USAC Final Audit Report, to which the GVNW Report was directed, was correct. *See* FCC 16-167 Order, at 25 ¶ 80.

The GVNW Report, however, relied on actual evidence to demonstrate that, with respect to several loops discussed in the USAC Final Audit Report, USAC's conclusion that there were no subscribers on those loops during the time periods being reviewed by USAC was factually incorrect. *See* Rennard Decl. ¶¶ 8-9; GVNW Report, at 4-5 (**[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**). Indeed, the GVNW Report attached documentation from SIC demonstrating that each of these loops had active subscribers during the time period that USAC contended they did not. *See* Rennard Decl. ¶¶ 11-12.

The Commission and USAC also summarily dismissed the segments that were built at the direction of the Department of Hawaiian Home Lands ("DHHL") as being qualified for Category 1 reimbursement. *See* SIC Petition for Reconsideration, at 7. There is no legal or factual basis for this. On the contrary, it is well established that a utility's business decisions regarding investment in plant which are plainly used and useful in the provision of service are entitled to deference and that is especially true when the construction of plant is directed by the local regulatory authority. In ignoring the mandate from DHHL, the FCC has overridden both the local regulator and SIC. That is, of itself, unlawful as beyond the Commission's authority. *See* 47 U.S.C. §152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986).

Neither USAC nor the Commission has ever considered or addressed the facts, documentation and data analysis contained in the GVNW Report nor sought to demonstrate that there were no subscribers on these loops during the relevant time period or that the plant should not be included as held for future use. USAC and, in turn, the Commission, simply ignored these facts and summarily concluded that the costs for these loops were misallocated as Category 1 costs by SIC. USAC's and the Commission's conclusion that SIC was overpaid $26,320,270 in Category 1 costs is therefore unsupported by, and contrary to, the record factual evidence, rendering the Commission's conclusions arbitrary and capricious.

The NAL suffers exactly the same vice as the USAC Final Audit Report and FCC 16-167 Order upon which it purports to rely – it also ignores the evidence adduced in the course of the audit, and, as the Petition for Reconsideration demonstrates, advances internally inconsistent theories of the costs that may properly be classified as Category 1. *See* SIC Petition for Reconsideration, at 4-12. It is the last domino that falls in the Commission's line of support, rendering the proposed $49 million penalty unsupported by and contrary to the unrebutted factual record.

B. The NAL Ignores the Statute of Limitations Issue

While the FCC 16-167 Order gets the statute of limitations issue wrong, the NAL completely ignores it. When read together – as they must be – the FCC 16-167 Order and the NAL attempt to construct the following tautology as justification for imposing the massive $49 million penalty: (1) SIC received $27 million in overpayments from the USF over a more than ten-year period as a result of submitting inaccurate cost studies and otherwise failing to maintain records in accordance with the Commission's ten year record-retention rules (*see* FCC 16-167 Order, at 30 ¶¶ 95-96; NAL, at 26-27 ¶¶ 78-81); (2) Congress has not enacted a specific statute of limitations

for the Debt Collection Improvements Act ("DCIA") and the four-year statute of limitations in 28 U.S.C. § 1658(a) only limits the Commission's judicial remedy "to sue [SIC] to recover the overpayments," it "does not bar or limit the Commission's administrative remedies to collect that debt" (FCC 16-167 Order, at 28 ¶ 91); and (3) the Commission is therefore justified in imposing a $49 million civil forfeiture penalty. *See* NAL, at 27 ¶ 81. The first two steps in this logic are factually and legally wrong, rendering the conclusion at the third step incorrect and unsupported.

First, as demonstrated above, the maximum amount of alleged Category 1 overpayments received by SIC is $4.1 million over the entire 10-year period, not $27 million.

Second, as SIC demonstrated in its Petition for Reconsideration of the FCC 16-167 Order, the Commission cannot avoid the statute limitations enacted by Congress in 28 U.S.C. § 1658(a) simply by unilaterally choosing to pursue its remedy in an administrative rather than judicial proceeding. *See* SIC Petition for Reconsideration, at 16-18. Indeed, in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016), the Consumer Financial Protection Bureau ("CFPB") made the very argument advanced by the FCC here: that there was no statute of limitations for enforcement actions brought by it "in an *administrative* proceeding, as opposed to in court." *PHH*, 839 F.3d at 50. The D.C. Circuit flatly rejected this argument (*see id.* at 54) as well as the other argument advanced by the FCC that no statute of limitations applies to the DCIA because Congress did not enact a specific one to govern actions brought under it. *See id.* ("'Congress does not, one might say, hide elephants in mouseholes.'" . . . [*W]e would expect Congress to* ***actually say that there is no statute of limitations*** *for CFPB administrative actions to enforce Section 8, especially given that the CFPB has full discretion to pursue administrative actions instead of court proceedings and can obtain all of the same remedies through*

administrative actions that it can obtain in court. But the text of [act] says no such thing.") (emphasis added).

The first two steps in the FCC's logical construct to support the imposition of the proposed $49 million penalty therefore do not withstand scrutiny and, as a result, there is no justification for that penalty.

But even assuming that the FCC's logic is legally correct, it would be irrelevant. SIC does not contest the rule that requires ETCs to maintain financial records for 10 years – indeed there has been no showing that SIC did not retain its records as required by USAC and the FCC. It is, rather, SIC's claim that there is a 4 year statute of limitations on the recovery of alleged "overpayments" (*see* 28 U.S.C. § 1658(a)). To the extent that the FCC wants recompense for alleged violations, it needs to recognize Congress' 4 year statute of limitations and only seek redress for the period covered by it.

Essentially, the NAL has, without foundation – and based entirely on a pre-conceived conclusion – inflated the dollar value of the alleged violations of Commission Rules in an attempt to justify the imposition of a mammoth, unprecedented forfeiture. This is not reasoned decision-making, but rather targeted action that is arbitrary, capricious and contrary to law.

C. There Was No Objective Standard for "Management Fees" and Bonuses

A similar artificial inflation occurs with respect to the allegedly excessive Management Fees and bonuses. To its credit, the NAL does not salt the analysis with red herrings such as payments that were reversed or as to which SIC conceded that it had made a mistake; indeed, the NAL, unlike the FCC 16-167 Order, does not mention the bonus paid to Rodney Kaulupali (*see* FCC 16-167 Order, at 39 ¶ 127) who was neither an officer nor high ranking employee. Nonetheless, the NAL, despite claims that it is based upon an independent review of the record,

simply parrots the same highly subjective USAC claims that SIC's Management Fees were "excessive," ignoring the fact that there were no *objective* standards in place to which SIC could have referred in making what appeared to it at the time to be reasonable and normal business decisions made in the ordinary course. Additionally, the claim that the Management Fees were "excessive" ignores the undisputed fact that a large portion of the contested management fees were not subject to USF reimbursement because of the cap on corporate operating expenses. *See* SIC Response to USAC's Final Audit Report, at 13-14. The NAL and FCC 16-167 Order seek to cure the arbitrary and subjective character of its determination by reference to a study purportedly done by the Commission of a very small number of ETCs who may or may not be comparable in size and operation to SIC. *See* FCC 16-167 Order, at 32 ¶ 103; NAL, at 16-17 ¶ 43. On the basis of this "study" – the details of which are not disclosed – the FCC 16-167 Order asserts that the Management Fees paid by SIC exceeded the "average" of the study group and were, therefore, excessive. *See* FCC 16-167 Order, at 32 ¶ 103; *see also* NAL, at 16-17 ¶ 43. The explanation of how the average was computed does not even afford a basis for determining whether the bundle of costs upon which the comparison was made correlates with the bundle of costs that are subsumed within SIC's use of the term "Management Fees." For example, in SIC's case, the Management Fees include rent paid to its parent company for shared space, and USAC's objection was not that the expense had been misallocated but, rather, that SIC's decision to relocate its offices costed more than it would have to remain in facilities shared with its parent company. *See* USAC Final Audit Report, at 59; FCC 16-167 Order, at 37-38 ¶¶ 121-123. This entirely ignores issues of consumer convenience and efficiency in the delivery of service to subscribers, and establishes a newly-minted "policy," under which reasoned and reasonable expenses are to be determined by USAC auditors solely on the basis of highly subjective and speculative cost considerations that are

untethered to *any* objective criteria. No authority is cited for the policy announced by USAC and rubber-stamped by the NAL. What's more is that USAC's *ex post* criticism of SIC's decision to relocate its offices ignores the factual evidence that SIC saved $500,000 as a result of its move. *See* Govt Ex. 11-053.0001 (cited at FCC 16-167 Order, at 38 ¶ 122). While SIC maintained during the audit that its business decision was reasonable, SIC did not contest the ultimate finding as to rent because, as USAC acknowledged, the total of alleged "overpayments" in the 2 years in which they occurred amounted to less than $25,000. As SIC has shown in its Petition for Reconsideration, the entirety of the NAL's assessment of Management Fees, although a slight improvement over the FCC 16-167 Order with which it conflicts, remains departed from any generally-accepted principles of reasoned decision-making. *See* SIC Petition for Reconsideration, at 13-15.

In sum, as SIC demonstrated in its Petition for Reconsideration, the total alleged "overpayments" to SIC, under the most unfavorable possible view of the actual *facts*, is approximately $4.9 million, more than 80% of which involves acceptance of USAC's arbitrary and unprecedented departure from the policies that have historically applied to the classification of Category 1 costs and a complete and indefensible disregard for the statute of limitations.

III. IN ALL MATERIAL RESPECTS THE COMPANY'S BOOKS AND RECORDS SATSIFY THE APPLICABLE RULES

Apparently recognizing that the massive forfeiture proposed and the other sanctions threatened against SIC cannot be sustained on the basis of the factual record, the NAL adds – for the first time – a new ground for the outcomes it reaches. It asserts, somewhat inconsistently, that SIC failed to maintain financial records of its receipt and application of USF funds or deliberately obscured the records in order to avoid disclosure of what it knew or should have known to be improper use of the USF payments. *See* NAL, at 26 ¶ 79. Neither of these claims has merit.

For starters, the NAL acknowledges that "[t]hroughout the examination, USAC made over 350 inquiries that resulted in SIC submitting over 3,200 files." NAL, at 12 ¶ 30. The NAL also acknowledges, as did USAC, that "SIC was responsive to most, but not all, of the requests for information." *See id.,* fn. 102. The lone example of an instance where SIC did not provide information requested by USAC that is identified by the NAL is where USAC allegedly "did not receive the financial information of affiliates to SIC, including those entities that had contractual relationships with SIC and receiving funds from SIC." *Id.; see also id.* at 22, ¶ 66. There is no allegation – nor could there be – that SIC failed to provide information in its own files relating to transactions with its affiliates. USAC and the FCC instead attempt to fault SIC for not producing information in the possession of its affiliates, companies that are not SIC.

What is dispositive, however, is that, despite the FCC's conclusory assertions that SIC did not maintain documents and business records as required by the Rules (*see, e.g.*, NAL, at 26 ¶ 79), the FCC never identifies the documents and records that SIC purportedly did not keep in violation of those Rules. This silence is deafening, especially given the amount of the proposed forfeiture sought to be imposed.

Even assuming that the FCC has shown that some records were not maintained as required, the massive fine levied here is unconstitutionally out of proportion with the administrative responsibility to maintain those records. This conclusion is buttressed by the fact that there is no finding of any intentional destruction of documents by SIC. Indeed, as SIC's Chief Financial Officer Randy Ho attests, SIC has followed robust internal document retention protocols during the time period covered by the audit, maintaining its financial records in accordance with Generally Accepted Accounting Principles (GAAP) and the FCC's Part 32-Uniform System of Accounts for

Telecommunications Companies (47 C.F.R. Part 32). *See* Declaration of Randall Y.C. Ho ("Ho Declaration") (attached hereto) ¶¶ 2-5.

Moreover, the only support cited by the FCC for its $49 million fine is four (4) cost studies that the FCC claims contained inaccurate data when submitted and subsequently amended by SIC. *See* NAL, at 26-27 ¶ 80. More specifically, based on the alleged inaccurate data in these four (4) cost studies, the FCC seeks to impose a $9,600.00 per day penalty on SIC from the date that each cost study was submitted to the Commission to July 31, 2016, and an $11,362.00 per day penalty for each day after August 1, 2016 "until these cost studies are corrected." *See id.* However, these per day penalties, the sum of which is $49 million, are being levied by the Commission prior to a final determination on the amount of alleged overpayments received by SIC as a result of the alleged inaccuracies in the four (4) studies. Indeed, the Commission is imposing this $49 million fine *before* SIC resubmits its cost studies for 2013-2015 to USAC for a determination of "the proper amount of high-cost support that should have been disbursed to Sandwich Isles in 2015 and 2016" and *before* USAC has had an opportunity to "calculate the total amount of improper payments for inflated management fees," as directed by the Commission's companion FCC 16-167 Order. *See* FCC 16-167 Order, at 2 ¶ 2. Further, to the extent that the Commission is relying upon the $26 million in alleged Category 1 overpayments to SIC as support for its $49 million fine, such reliance is not just misplaced, it is flat wrong. As SIC demonstrated in its Petition for Reconsideration of the FCC 16-167 Order, the maximum amount of alleged Category 1 overpayments to SIC is approximately $4.1 million, not $26 million. The Commission's imposition of a $49 million fine is, at best, premature and unsupported and contradicted by the actual record evidence and, at worst, a flagrant violation of fundamental Constitutional due process.

IV. CONCLUSION ON PROPOSED FORFEITURE

For the reasons stated above, the proposed imposition of a $49 Million forfeiture is absolutely without merit. It is indeed unprecedented. An examination of the forfeiture decisions the Commission has issued in recent years relying upon 47 U.S.C. § 220(d) as the authority for the imposed forfeiture shows none in which the amount of the forfeiture departed so profoundly from the alleged violation upon which it purported to be based. Indeed, the Commission's use of Section 220(d) as a basis for liability and calculating a forfeiture amount is unusual. In the limited number of cases where the Commission has used Section 220(d) as a basis for liability and calculating forfeiture, the Commission has not imposed the statutory per-day penalty because to do so would be excessive. *See e.g. In the Matter of Verizon Telephone Companies, Inc.,* Notice of Apparent Liability for Forfeiture, FCC 03-199, at 8 ¶ 17 (Sept. 8, 2003) ("We do not propose that the forfeiture amount for each of the 43 violations also include the $6,600 per day amount because, under the circumstances of this case, we believe the result would be excessive."); *IDT Corp.,* Notice of Apparent Liability for Forfeiture, FCC 08-165, at 12 ¶ 24 (July 9, 2008) ("If we were to apply strictly the per day forfeiture dictated by section 220(d) to each of IDT's apparent violations, our calculation would yield an amount that we find excessive under the circumstances."). The Commission's proposed imposition of the $49 million forfeiture penalty against SIC unjustifiably departs from this Commission precedent.

Indeed, under the Commission's use of Section 220(d) here, any *ex post* determination by the FCC that a carrier's data submitted three, four or five years prior that somehow alters the amount of re-imbursement (e.g., payment adjustments, amount owed, number of eligible consumers) could subject the carrier to enormous forfeiture liability, even where, as here, the

carrier believed in good faith that the data was accurate when submitted and further, as here, relied upon a third-party consultant in preparing its submissions.

Given the lack of any factual or legal basis for the Commission's proposed forfeiture and unexplained departure from its own precedent, it is difficult to escape the conclusion that the entirety of the NAL is an after-the fact attempt to justify an *a priori* decision to rid the FCC of SIC, regardless of the consequences of that action on the native Hawaiians who reside or may in the future reside in the HHL and utterly without any consideration of the purposes of the USF programs that have enabled these subscribers to receive the benefits of modern communications services.

V. THE SHOW CAUSE CLAUSES ARE SUBSTANTIVELY BASELESS AND PROCEDURALLY DEFECTIVE

In paragraphs 84 and 90, the NAL requires SIC to show cause why (a) its ETC should not be revoked and (b) why the Waiver granted by the Commission establishing the Study Areas now served by SIC should not be retroactively denied. Each of the paragraphs specifies that a Public Notice inviting comment from interested parties, including, specifically, the state public utility commission and the State agency with responsibility for the HHL, will be issued; one of the public notices has not yet been issued. The grounds for these proposed draconian actions is nowhere spelled out but is presumably predicated upon the alleged conduct of SIC and its former principal which underlie the NAL itself.

As we have shown, the conduct that is complained of will not support the massive forfeiture proposed; *a fortiori*, there is no basis for the imposition of even more severe penalties such as the loss of the 214 authorization or retroactive cancellation of the study area. But the substantive and procedural flaws of these Ordering Clauses go much further. Although the Orders pay lip service to the needs and interests of the subscribers who depend upon SIC's services for, *inter alia,*

contacting emergency services personnel, the Commission completely ignores the fact that: (a) there was NO service to the HHL areas served by SIC until, over the objections of the ILECs, the Commission granted SIC the study area and 214 authorization which enabled SIC to participate in the USF program and NECA pool; and (b) there will be no service or virtually no service if the Commission were to actually revoke either one of these authorizations. *See* April 29, 2016 Comments of Sandwich Isles Communications, Inc. *In the Matter of Sandwich Isles Communications, Inc. Petition for Declaratory Ruling,* Wireline Competition Bureau, Docket No. 09-133, at 3, 18, and 20.

The draconian sanctions of revocation of SIC's 214 authorization and retroactive cancellation of the study area is inapt for an additional, independent reason, namely that SIC was never put on notice *until issuance of the NAL* that its conduct was somehow unlawful. Indeed, since SIC first applied for the 214 authorization and study area waiver, through the Rural Utilities Service's ("RUS") loan approval process, through the NECA dispute, and through the USAC audit – all of which spans over a 15 year time period – SIC was never informed that the conduct now complained of in the NAL and the FCC 16-167 Order was unlawful and could lead to the severe, unprecedented penalties attempted to be imposed here. *See* Ho Declaration ¶¶ 4-12; Ho Declaration Exhibit "A." Indeed, since the 214 authorization and study area waiver were granted, SIC's files and conduct have been audited and investigated *ad nauseum* – over two dozen times by SIC's count – with not even a hint that it was committing the alleged wrongdoing complained of by the FCC here nor the possibility of the company-closing sanctions attempted to be levied here. The action proposed to be taken in the NAL and in the FCC 16-167 Order is not only a violation of the Commission's own rules and policies, it is, quite plainly, unconstitutional.

A. The HHL and History of SIC's Unmatched Service to It

The HHL region was established by Congress in 1921 for the benefit of native Hawaiians. It spans roughly 200,000 acres spread out over more than 70 non-contiguous parcels on six of the largest eight Hawaiian Islands. The vast majority of the HHL consists of remote and under-developed rural land, separated by undeveloped government property and open-ocean. The State of Hawaii in general – and even more acutely, the HHL – is a unique, difficult and expensive area for telecommunications providers to serve. Hawaii is the only state in the U.S. that is comprised entirely of islands – hundreds, in fact, scattered across more than 1500 miles. And it is located along a volcanic archipelago in the middle of the Pacific Ocean, over 2,500 miles from the nearest continental land-mass. Developing and maintaining adequate telecommunications infrastructure and operations to service this region is resource-intensive, to say the least.

Still, for more than two decades, SIC has been dedicated to providing residents of the HHL with modern, high-speed telecommunications service and infrastructure. In 1995, after unsuccessful attempts to get GTE to provide single-party service to HHL residents at reasonable cost, SIC was authorized to serve HHL through a license granted to its parent company by the DHHL. SIC undertook this role even though the pre-existing service providers, with the express approval of the Hawaii PUC, had not invested in adequate and reliable inter-island and terrestrial facilities to serve the outer islands and other rural areas of Hawaii, including the HHL.[3] SIC subsequently obtained financing from RUS and waivers of relevant FCC rules to allow it to participate in the NECA tariffs and pools, and to receive USF support as if it were an incumbent local exchange carrier.

[3] This lack of adequate service finally led the legislature to authorize the state commission to certify additional telephone companies. *See, e.g.*, June 29, 2005 Letter from R. Herkes, State Representative, 5th District, to M. Dortch, FCC, CC Doc. 96-45 (noting that "we passed Act 80 . . . opening the way for additional telephone companies to serve our neglected rural areas with modern infrastructure capable of delivering advanced services.").

From 1997 to the present, SIC has served only the HHL. Its study area presently consists solely and entirely of scattered, unserved and non-contiguous parcels on the islands of Oahu, Kauai, Molokai, Maui, Lanai and the Big Island. The company, working with RUS, quickly realized that the existing inter-island and terrestrial facilities could not provide HHL with the modern technology, reliable communications links, or the capacity for growth necessary to meet the needs of its small but undeniably deserving and growing subscriber base. In fact, the existing inter-island facilities of GTE wholly bypassed the island of Molokai, where native Hawaiians are in the majority, which has many eligible HHL beneficiaries, and which contains substantial areas of unserved HHL.

B. There is No Factual or Legal Basis for the Revocation of SIC's 214 Authorization

The apparent theory behind the threatened revocation of the 214 authorization is that SIC lacks the requisite character qualifications to be an authorized carrier; the only conceivable grounds for this theory is the fact that Mr. Hee was convicted of ***personal*** tax income violations. There are a number of defects to this theory, any one of which is fatal to the validity of the NAL. First, to the extent that there was misconduct, there is no claim – nor can there be – that the tax fraud was committed by SIC or by any of its 80 employees. The ETC was not convicted of any crime and neither was its corporate parent. Second, while the character qualifications of a principal for misconduct in execution of the affairs of the company might justify revocation in circumstances not present here, character is but one of the elements that the Commission is to consider under the "public interest" rubric of Section 214. Both of the Ordering Clauses completely ignore the uncontested evidence adduced by SIC that the public – the HHL subscribers who are the beneficiaries of this system – have been extremely well served by SIC. *See* Petition, "Keep Sandwich Isles Communications the Incumbent Local Exchange Carrier to Receive Funding to

Maintain and Upgrade Telecommunications System," filed in WC Docket No. 10-90. Numerous customers of SIC have submitted letters to the Commission indicating their satisfaction with the services SIC has provided to them and their need for continued services from SIC. *See, e.g.*, January 2017 Letter from B. Rivera to FCC filed in WC Docket No. 10-90 ("Because of our situation, no other telecommunications company wanted to provide us service because it was not profitable for them to do so. We appreciate the service that SIC has provided and ask that you ensure that they continue to operate so that we may receive uninterrupted service."); January 2017 Letter from C. Hiro to FCC filed in WC Docket No. 10-90 ("Sandwich Isles has served our community well since it began providing telephone service to our rural communities that were by-passed by other telephone companies. . . . We support Sandwich Isles and ask that you maintain its ability to continue its good work to provide telecommunications service."); January 2017 Letter from B. Kakihei to FCC filed in WC Docket No. 10-90 ("SIC has built telephone infrastructure for all homestead areas, even those places that were bypassed by the dominant telephone provider, Hawaiian Tel. SIC's service is critical to our island of Molokai. . . . SIC should be allowed to continue providing this critical service."); January 2017 Letter from V. Patcho to FCC filed in WC Docket No. 10-90 ("For the sake of Hawaii's people, I urge you to ensure that native Hawaiians are able to benefit from the federal programs that allow SIC to provide today's technology at affordable prices."). None of those subscribers complain about SIC nor contend that they have somehow been defrauded. Indeed, there is no finding of any harm to any of SIC's subscribers in either the NAL or the Commission's accompanying FCC 16-167 Order. Nor does the Commission identify a single complaint from any subscriber about the telecommunications service provided by SIC.

Mr. Hee's conviction is, if anything, even less relevant to the proposed retroactive rescission of the service area waiver. The waiver was based solely on the Commission's conclusion that the HHL did not have and was unable to obtain communications services from the ILECs and that therefore the SIC proposal to serve the area was in the public interest. *See In the Matter of Sandwich Isles Communications, Inc.'s 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, *Bureau Order on Waiver of Study Area Boundary,* 20 FCC Rcd 8999, 9007 ¶ 19 (May 16, 2005) ("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."). The qualifications of the proposed service provider simply did not and do not enter into the analysis. For the Commission to now decide that the waiver was improvidently granted because the growth of subscribers has been slower than SIC was informed by DHHL is essentially to conclude that the HHL did not need service in the first place. That conclusion finds absolutely no support in the facts, the law or any Commission precedent. The services provided by SIC were and are still needed, SIC committed to build a state-of-the-art telecommunications network and to provide service throughout the HHL, and it has delivered on its commitment and continues to do so through the provision of service that is needed, wanted and appreciated by its subscribers. There is thus no relevant ground upon which to contemplate a retroactive denial of a waiver that was granted nearly two decades ago, affirmed a decade ago, and which has been relied upon in good faith by the service provider and its subscribers.

VI. CONCLUSION FOR SHOW CAUSE SECTION

For the reasons stated above, the proposed sanctions set forth in paragraphs 84 and 90 must be categorically rejected. Indeed, the very threat is without precedent and arises in a procedural posture that gives rise to serious Constitutional Due Process concerns. SIC was given no notice of the proposed revocation sanctions until the issuance of the NAL, and has had no opportunity, until now, to address these issues. Since revocation of the FCC authorizations in this case is analogous to revocation for a radio license under 309 of the Act, the correct procedure should have been to refrain from raising these sanctions unless a final determination of the NAL was reached; the attempt to shortcut the process violates SIC's rights to a full and fair hearing.

Dated: February 3, 2017

Respectfully submitted,

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