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

In the Matter of Sandwich Isles Communications, Inc.	FCC Order 16-167 in WC Docket 10-90

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the Commission's rules, Venable LLP, on behalf of Sandwich Isles Communications Inc. ("SIC"), hereby petitions the Commission to reconsider and set aside its December 5, 2016 Order in WC Docket No. 10-90 ("the FCC 16-167 Order"). For the reasons that follow, SIC respectfully requests that its Petition be granted, the FCC 16-167 Order set aside, and public comment be permitted to address the potential effects of the FCC 16-167 Order on end user subscribers. Because of the interrelationship of this Order with the Notice of Apparent Liability for Forfeiture and Order, FCC 16-165 ("NAL") issued on the same day, considerations of fundamental due process require that the Commission allow interested parties to comment on the issues and implications of this Petition for Reconsideration in the context of, and at the same time as, the comments due under the NAL.

I. SUMMARY OF POSITION

The Commission must set aside and reconsider the FCC 16-167 Order because it is directly contrary to the unrebutted factual evidence submitted by SIC and constitutes administrative action that is arbitrary, capricious and contrary to law. The FCC 16-167 Order concludes that SIC misallocated cable and wire facilities costs ("C&WF") to Category 1 for over ten years, resulting in alleged overpayments to SIC of $26,320,270 in Category 1 costs. The lone "support" for the Commission's finding is a final audit report prepared by the Universal Service Administrative

Company ("USAC"). This report, however, entirely ignored the unrebutted factual *evidence* submitted by SIC that demonstrates that the $26,320,270 in alleged overpayments is wildly overblown. In reality, the maximum amount of alleged Category 1 overpayments received by SIC is only $4.1 million, as established by an independent professional telecommunications consulting firm in a detailed report and in SIC documentation submitted to USAC in response to its final audit report. Neither USAC nor the Commission ever considered or addressed these facts and evidence, nor challenged the consulting firm's methodology in concluding that the amount of alleged overpayment of Category 1 costs is $4.1 million. By ignoring this evidence, the Commission acted arbitrarily and capriciously:

First, USAC, and, in turn, the Commission, concluded that there were no subscribers on several of the routes for which SIC received re-imbursement and that, therefore, SIC was overpaid for those routes. USAC and the Commission got it wrong. The unrebutted factual evidence in the independent consulting firm's report and in SIC documentation confirms that there were, in fact, subscribers on these routes during the time period being evaluated by USAC during its audit. USAC and the Commission failed to address this evidence, much less refute it. For this reason alone, the FCC 16-167 Order must be set aside and reconsidered.

Second, USAC, and, in turn, the Commission, concluded that Category 1 payments made to SIC for costs incurred in constructing routes that SIC was obligated to build by the Department of Hawaiian Home Lands ("DHHL") were improper. There is no factual basis for this conclusion in the record, nor is there any legal justification for it. In fact, the Commission's conclusion that SIC was not entitled to Category 1 re-imbursement for these costs amounts to an unlawful administrative override of DHHL's authority. For this additional, independent reason, the FCC 16-167 Order should be set aside and reconsidered.

Third, the standard employed by the Commission in determining what are and what are not reimbursable costs under Category 1 in the FCC 16-167 Order cannot be reconciled with the standard employed by the Commission for making this same determination in its companion NAL, FCC 16-165. Indeed, the two orders appear to employ opposite standards. Simply put, this is not reasoned decision-making, and reconsideration is required.

Further, the $27 million alleged overpayment reached by USAC and the Commission is also based, in part, on the conclusion that SIC violated the Commission's "affiliate transaction rules" by obtaining re-imbursement for management fees and bonuses paid by SIC to its parent company. This conclusion is based on a lurid fantasy, as there are no FCC "affiliate transaction rules." If the Commission believes that such rules should exist, then the lawful way to adopt them is through notice-and-comment rulemaking, not through administrative adjudication. This provides a further, independent justification for setting aside the FCC 16-167 Order and granting reconsideration.

The Commission also takes the position that, because it has unilaterally elected to pursue SIC through the administrative rather than judicial process, the four-year statute of limitations does not apply, and the Commission therefore may seek to recover all $27 million in alleged overpayments to SIC spanning over a ten-year period. This position has been rejected by the courts, most recently by the D.C. Circuit just this past fall in *PHH Corp. v. Consumer Financial Protection Bureau,* 839 F.3d 1 (D.C. Cir. 2016). The four-year statute of limitations applies, and the FCC is barred from attempting to collect alleged overpayments beyond it. The $27 million calculated by USAC and the Commission is therefore wrong for this additional, independent reason, warranting reconsideration of the FCC 16-167 Order.

Finally, the equities and fundamental due process mandate reconsideration. Despite USAC's and the Commission's attempt to portray SIC as a sinister operation, neither USAC nor the Commission identify any harm to any consumer nor a single complaint about SIC's telecommunications services. On the other hand, the Commission's conclusion that SIC is obligated to repay $26 million in alleged improper Category 1 costs ignores, and is contrary to, the record evidence and is legally wrong. On balance, reconsideration is necessary here. Additionally, given the potential wide-sweeping impact of the FCC 16-167 Order on an entire industry, the inconsistencies between that Order and the FCC 16-165 Order, the fact that the FCC 16-165 Order is dependent upon the conclusions in the FCC 16-167 Order, as well as the fact that the public is already permitted to submit comments on the FCC 16-165 Order, SIC respectfully requests that the Commission withhold ruling on this Petition until after interested members of the public, including SIC, are permitted to comment on both Orders.

II. THE MAJORITY OF THE CATEGORY 1 COSTS WERE ***NOT*** MISSALLOCATED

A. USAC Ignored the Facts and, Therefore, So Did the Commission

The Commission concluded that SIC was "only permitted to place C&WF costs in account 2410 when the facilities are in use, serving subscribers." FCC 16-167 Order, at 20 ¶ 64. According to the Commission, SIC "included facilities that are not in use in account 2410." *Id.* at 22 ¶ 70. More specifically, the Commission found that SIC "misallocated C&WF to CAT 1 where there were no subscriber premises (routes without subscribers)" (*id.* at 23 ¶ 73), resulting in an alleged overpayment of $26,320,270 of Category 1 costs to SIC. *Id.* at 22 ¶ 70. The Commission's lone support for this conclusion is USAC's findings in its May 13, 2016 Final Audit Report. *Id.* at 22 ¶ 70 ("Based on USAC's investigation and our own review of the record, we find that Sandwich Isles misclassified its C&WF under the high-cost program rules, resulting in $26,320,270 of improper payments over the course of more than ten years."). Indeed, the amount of the alleged overpayment reached by the Commission is identical to that reached by USAC. But USAC turned a blind eye to the *facts* in reaching its conclusion as to the alleged Category 1 overpayment and, as a result, so did the Commission.

In response to USAC's Final Audit Report, SIC submitted a detailed report from GVNW Consulting, Inc. ("GVNW"), an independent, third-party consulting firm that assists telecommunications companies with regulatory compliance including, but not limited to, compliance with Universal Service Fund ("USF") requirements and the Uniform System of Accounts ("USOA") requirements prescribed by Part 32 of the Commission's Rules. *See* Declaration of Jeffry H. Smith ¶¶ 3, 4, submitted herewith. 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. The GVNW Report (entitled "Sandwich Isles Communications, Inc. Response to Category 1 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. Rennard ("Rennard Decl.") ¶ 7 submitted herewith; GVNW Report, at 9.

Both USAC and the Commission have simply ignored the facts and the data analysis contained in the GVNW Report to demonstrate that the $26,320,270 in alleged overpayment of high-cost support is erroneous as matter of fact. Instead, the Commission simply assumed that the USAC Final Audit Report, to which the GVNW Report was directed, was correct:

> In its comments on the final USAC Report, Sandwich Isles indicated that its consultant, GVNW Consulting, Inc. (GVNW), provided

> certain, but not all, working pair reports that highlighted end users and their locations. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Based on our review of the documentation and USAC's Report, we find that costs were incurred for multiple C&WF that were not working loops for several years, and as a result, should not have been classified as CAT 1 for those years. The monetary finding associated with CAT 1 excludes any subsidies paid once the loops became working loops as defined by the Commission rules.

FCC 16-167 Order, at 25 ¶ 80 (emphasis added).

The GVNW Report, however, specifically disputed USAC's conclusion that there were no subscribers on several of SIC's loops during the time periods being analyzed by USAC. *See* Rennard Decl. ¶ 8. Relying on actual evidence, the GVNW Report demonstrated 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]**. 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.

FCC 16-167 Order also purports to deal with certain of the loops at issue.

> When USAC provided Sandwich Isles with its initial exceptions noting which routes USAC believed did not serve any subscribers as of the relevant time period, **Sandwich Isles agreed, in part, with USAC's analysis.** Sandwich Isles identified certain routes it agreed

> were improperly classified as CAT 1. Specifically, Sandwich Isles agreed that **"[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** route did not service any subscriber premises during the 2007-2013 time period when it was in service" and that "one segment of the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** route did not serve subscribers during the 2009-2013 period." We make the same conclusion and find that Sandwich Isles misclassified these facilities as CAT 1 during the time periods in question.

FCC 16-167 Order, at 23 ¶ 74 (emphasis added).

It is not clear whether the two paragraphs deal with the same routes or indeed with SIC's response to the final USAC Report. In any event, the conclusions are factually incorrect.

Both the Commission and USAC equally dismiss, without adequate justification, the treatment of the route segments that were covered by the DHHL letter of December 13, 2002, implicitly concluding that route segments built at the direction of the DHHL simply do not count. 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. Essentially, in ignoring the DHHL letter 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 or 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 the facts and summarily concluded that the costs for these loops were misallocated as Category 1 costs by SIC. This renders USAC's and the Commission's conclusion that SIC was overpaid $26,320,270 in Category 1 costs as unsupported by, and contrary to, the record factual evidence. This also renders the Commission's conclusions arbitrary and capricious as both the Commission and USAC failed to consider essential aspects of the matter: the regulated entity's submissions. The Commission should grant the Petition, set aside the FCC 16-167 Order, and reconsider the amount of alleged overpayment for this reason alone. *See, e.g. Allen Mach Sales & Serv. Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998); *Morall v. DEA*, 412 F .3d 165, 179-80 (D.C. Cir. 2005); and *Consumers Union of the U.S. Inc. v. FTC*, 801 F .2d 417, 422 (D.C. Cir. 1982).

B. The FCC 16-167 Order is Inconsistent with the NAL Order

There is an independent reason for the Commission to set aside and reconsider the FCC 16-167 Order: the Commission's treatment of Category 1 costs in the FCC 16-167 Order appears to be inconsistent with the position on Category 1 costs taken by the Commission in its NAL FCC Order 16-165. Certainly, taken together, the two Orders contradict each other and make it impossible to understand the ratemaking criteria that the Commission has applied, and thus fail to meet the standards for reasoned decision-making.

The NAL is premised on the Commission's position that costs of interexchange routes can never be allocated to Category 1, even when the route is also used to serve subscribers without the local central office directly connecting to subscriber premises. *See* NAL, at 18 ¶ 50 ("Thus, based on our review of the record, the facilities connecting central offices could not, under program Rules, be exchange line Category 1 C&WF because they did not connect a local central office to subscriber premises."). In its investigation, USAC originally took this same position, but subsequently abandoned it, reducing the alleged SIC overpayments from $58 million to the $26 million adopted by the Commission. *See* USAC Final Audit Report, at 7-8. So, at the threshold of the analysis, the standards which purportedly support the conclusion reached in the FCC 16-167 Order are, at best, confused.

Moreover, in the FCC 16-167 Order, the Commission appears to take an entirely different view of the governing rule: "facilities used to provision traffic from one subscriber located in one exchange through a central office and out to another central office connecting with subscriber premises in a different exchange were interexchange in nature, and as a result, do not qualify as CAT 1 facilities." FCC 16-167 Order, at 24 ¶ 79. If this stance can be reconciled with the allocation rule set forth in the USAC Final Audit Report or the NAL, it is certainly not readily apparent. Indeed, the only consistency among the various Orders is the conclusion that the total alleged overpayment is the same in all three determinations.

The inconsistencies between the two Orders alone provides an independent reason to set aside and reconsider the FCC 16-167 Order, because the determination whether the costs for routes between central offices that are servicing customers may or may not be included as Category 1 costs impacts the amount of any alleged overpayment to SIC.

Further, the FCC 16-167 Order and the NAL fundamentally misunderstand the findings in USAC's Final Audit Report. USAC concluded that "facilities between central offices inherently cannot carry local traffic, as local traffic is exclusively between the central office and subscriber premises." USAC Final Audit Report, at 13. This is factually incorrect, as SIC demonstrated. As the GVNW Report confirmed, "[i]n significant numbers of rural areas, it is common for interoffice facilities to contain circuits that branch off along the route to serve individual customers, clusters of customers, and/or digital loop carriers ('DLCs') (that, in turn, serve groups of customers)." GVNW Report, at 1. "SIC's network is engineered in an efficient manner, and includes the connection of local subscriber carrier systems into existing interoffice routes consistent with standard industry practice." *Id.* at 1-2. Indeed, SIC demonstrated that 99.95% of the facilities that USAC claimed should have been classified as Category 3 were, in fact, properly classified by SIC as Category 1, as those facilities were "actually used for local exchange purposes to connect and serve subscriber premises." *Id.* at 4. What the GVNW Report establishes is that standard industry practice is to recognize that the costs at issue here are joint and common costs and that the proper way to allocate the costs is exactly as GVNW has done. *See* Rennard Decl. ¶ 11. If, in defiance of considerations of economic efficiency and standard industry economics, the Commission chooses to change the rules regarding treatment of joint and common costs, it cannot do so retroactively in the context of this proceeding. This provides yet another independent reason for the Commission to set aside and reconsider the FCC 16-167 Order.

Finally, the Orders even confuse the difference between the classification costs and the allocation of costs for jurisdictional separation. The FCC 16-167 Order states that "[a]llocating costs based on the number of working loops in each subcategory presumes that the only costs included are those associated with 'working loops.'" FCC 16-167 Order, at 22 ¶ 68; *see also id.* ¶ 69 ("Only costs associated with 'working loops' (thus defined) are to be included in the calculation of HCLS."). This completely confuses classification with jurisdictional allocation: the costs to be allocated are *those included in account 2410*, not only those associated with working loops; the allocation of those costs is based on the number of working loops in each subcategory. *See* Rennard Decl. ¶ 12. Contrary to the Commission's conclusion in the FCC 16-167 Order, the total eligible costs remain the same regardless of the number of "working loops." *See id.* The allocation of those costs between the subcategories will change as the ratio of working loops changes. *See id.*

The Commission compounded its error on the role of working loops, costs and the operation of the allocation methodologies under the cost separations rules in declaring in the NAL that "SIC acted in contravention of Section 36.154(a)" of the Commission's Rules. NAL, at 19 ¶ 52. This statement is apparently based on the flawed reasoning in paragraphs 68 and 69 of the FCC 16-167 Order discussed above. In any event, Section 36.154 of the Commission's rules addresses apportionment procedures, not includible investment. *See* Rennard Decl. ¶ 12.

Put simply, SIC complied with Section 36.154, as it allocated the total Category 1 C&WF cost by the number of working loops in each subcategory as described in the rule. *See* Rennard Decl. ¶ 12. The FCC 16-167 Order does not contest GVNW's method of allocating Category 1 costs, it simply uses the wrong test by concluding that only costs associated with working loops are includable. As demonstrated above, the Commission's position is factually unfounded. It is also nonsensical: if the Commission's interpretation of the role of "working loops" were correct, then C&WF investment would need to be removed from inclusion as allowable costs whenever a customer disconnects service, as there would no longer be a "working loop." *See* Rennard Decl. ¶ 12. Additionally, the Commission's position that SIC cannot be reimbursed under Category 1 for costs incurred in building routes in advance of planned residential construction is contrary to the position taken by the Commission in its March 30, 2016 USF Order, which emphatically required the buildout of networks without waiting for the construction of subscriber residences. *See In the Matter of Connect America Fund et al.*, Report and Order, Order and order on Reconsideration, Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 and 14-58 and CC Docket No. 01-92, FCC 16-33, Released March 30, 2016 ("USF Order").

This would be a radical shift from the current industry practice and a completely new interpretation of the separations rules. Such an interpretation would have wide-ranging implications for the entire rate-of-return ILEC industry.

Because the Commission has not even considered or addressed the methodology used by GVNW to calculate Category 1 costs, the Commission has failed to consider an indispensable part of the facts in the record, and therefore the GVNW analysis must be adopted as the maximum amount of Category 1 overpayment. For this additional reason, the Commission should set aside and reconsider the FCC 16-167 Order.

C. The Commission Applied the Wrong Test for "Plants in Service" for Four of SIC's Routes

In response to the USAC Final Audit Report, SIC submitted detailed factual information demonstrating that plants for four (4) of its routes, while not having subscribers during the years being analyzed by USAC, were carefully planned with the DHHL in anticipation of significant housing development and were, in fact, completed, ready, and available to provide telecommunications service during the relevant time periods that SIC allocated costs for the construction of these plants under Category 1. *See* GVNW Report, at 5 **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**. Indeed, SIC was obligated by DHHL to provide telecommunications services to these planned housing developments, as the Commission has acknowledged. *See* FCC 16-167 Order, at 23-24 ¶¶ 75-76. According to the Commission, however, "[i]f there is no subscriber loop as specified under Commission rules – a connection to an actual home or business – the costs for such facilities cannot be allocated under CAT 1 C&WF." *Id.* at 24 ¶ 76; *see also id.* ("Mere plans that future subscribers could be located in such areas is not enough to justify allocation of costs for such facilities under CAT 1 C&WF."). This is the wrong test for "plant-in-service." *Compare with* USF Order, ¶ 156 *et seq.*; *See, e.g. New England Power Company*, 42 F.E.R.C. P61, 016 (January 15, 1988). As demonstrated above, if the Commission's interpretation of working loop were accepted, then C&WF investment would need to be removed from inclusion as allowable costs whenever a customer disconnects service, as there would no longer be a "working loop."

When the costs for these four routes are removed from the alleged $26 million overpayment to SIC along with the other routes identified above that actually served subscribers, the alleged overpayment to SIC shrinks to $4.1 million, as found by GVNW. *See* Rennard Decl. ¶¶ 6, 14; GVNW Report, at 9. For this additional, independent reason, the Commission should grant the Petition, set aside the FCC 16-167 Order and reconsider the amount of alleged overpayment.

III. THE COMMISSION'S TREATMENT OF AFFILIATE TRANSACTION COSTS IS ARBITRARY AND UNLAWFUL

A. There is No Affiliation Rule

The Commission concluded that "[t]hrough the guise of management fees that [its parent company] Waimana invoiced to [SIC]," SIC "violated the Commission's affiliate transactions rules which require that services purchased by a carrier from an affiliate be recorded at the lower of fair market value or fully distributed cost." FCC 16-167 Order, at 16-17 ¶ 52. Further, according to the Commission, when SIC "received high-cost support for these inflated management fees, [SIC] violated section 54.7 of the Commission's rules which require 'carriers to use federal universal support only [f]or the provision, maintenance, and upgrading of facilities and services for which the support is intended." *Id.* The amount of the alleged overpayment for management fees is yet-to-be-determined.

Here again, the Commission simply accepted the findings in the USAC Final Audit Report without conducting any substantive analysis. *See id.* at 32 ¶¶ 102-103. This is fatal to the

Commission's conclusion as to the alleged improper management fees, because that conclusion is based on an alleged violation of the Commission's "Affiliation Rule," a rule that does not exist. Indeed, no such rules are cited in the FCC 16-167 Order because – as USAC itself has conceded – they do not exist. Neither USAC nor the FCC has provided an objective standard to evaluate these "potential concerns". *See* USF Order ¶. *See also Indiana and Michigan Municipal Distributors Association v. Indiana Michigan Power Company*, 62 F.E.R.C. P61, 189 (March 2, 1993).

Because the legal basis upon which the Commission's conclusion is based does not exist, the Petition must be granted, the FCC 16-167 Order set aside, and the analysis of alleged improper inclusion of management fees reconsidered.

The arbitrary character of the FCC 16-167 Order's treatment of the management fees and bonuses is exemplified by the Order itself. It simply ignores the Commission's March 30, 2016 USF Order in which it explicitly sought comment on "how to address potential concerns" regarding expenses that might be considered to contravene the "reasonable and necessary" standard which has been used for decades to evaluate management fees, bonuses and the like. *See* USF Order ¶ 345. We know of no case, and the Commission does not cite one in the FCC 16-167 Order, in which a standard for deciding what is reasonable and necessary in the way of management fees (which, in this case, includes rents, and other joint and common costs mischaracterized or misunderstood by the Order) has been spelled out. The terms "reasonable" and "necessary" are not self-defining, and the March 30 USF Order admits as much. If the Commission has decided to "address" the "potential" concerns about excessive compensation and joint and common costs related to rent and similar expenditures, it should do so only through rulemaking: these standards have industry-wide application and are utterly unsuited for case-by-case adjudication; and the Commission certainly cannot do so by applying these newly-minted (and as yet undefined) standards of excessive expenses to bonus plans which were adopted in 2003 and were reviewed in prior USAC audits without comment or criticism.

The FCC 16-167 Order compounds the *ad ho*c character of the affiliate payment issue by reference to conduct which the Order itself concedes is irrelevant and did not enter into the computations.. The Order admits that the ClearCom payment was reversed when it was questioned by USAC and that the $60,000 employee bonus was not paid during the relevant period; indeed, the NAL makes no mention of the employee bonus for the obvious reason that bonuses to employees who are not high-ranking company officers do not even fall within the "potential" concerns identified in the March 30 USF Order. *See* NAL, at 15 ¶ 40.

This is not reasoned decision-making by any standard that is acceptable under the APA, especially because of its industry-wide and retroactive effects and the reliance on irrelevant considerations that do not alter the result. *See Consumers Union of the U.S. Inc. v. FTC,* 801 F 2.d 417, 422 (D.C. Cir. 1982); *Block v. Pitney Bowes Inc.*, 952 F .2d 1450 (D.C. Cir. 1992); *Allen Mach Sales & Serv. Inc. v. NLRB*, 522 U.S. 359 (1998). The entirety of the Commission's finding with respect to Affiliate Payments should be rescinded and dealt with, prospectively, on an industry-wide basis.

IV. THE COMMISSION'S TREATMENT OF THE STATUTE OF LIMITATIONS HAS BEEN REJECTED BY THE COURTS

The Commission's conclusion that SIC has allegedly received Category 1 overpayments of $26 million is the cumulative sum over the time period from 2004-2015. *See* FCC 16-167 Order, at 17-18 ¶ 57. In reaching this conclusion, the Commission conveniently ignores the fact that none of these issues relating to classification of costs were questioned or raised in two prior audits of SIC by USAC and the Commission's Office of Inspector General. *See* SIC Response to Final Audit Report, at 4. What the Commission now claims are obvious violations based on a review of SIC's classification filings should have been obvious all along and, had the FCC acted sooner on these alleged violations, SIC could have taken appropriate corrective action (even though SIC disagrees, in the first instance, that there are any violations warranting the penalties attempted to be levied).

In response to the USAC Final Audit Report, SIC demonstrated that the four-year statute of limitations under 28 U.S.C. § 1658(a) applies to the FCC's claim that SIC received Category 1 overpayments. *See* SIC Response to Final Audit Report, at 10. In the FCC 16-167 Order, the Commission agrees that Section 1658(a) "may limit the Commission's judicial remedy, that is, its ability to sue [SIC] to recover the overpayments." FCC 16-167 Order, at 28 ¶ 91. Nonetheless, the FCC concludes that Section 1658(a) "does not bar or limit the Commission's administrative remedies to collect that debt." *Id.* This notion that the FCC can ignore the statute of limitations established by Congress through administrative proceedings is not merely lawless on its own, it has been soundly rejected by the DC Circuit.

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:

> "'Congress does not, one might say, hide elephants in mouseholes.'" *Puerto Rico v. Franklin California Tax–Free Trust*, ––U.S. ––, 136 S.Ct. 1938, 1947, 195 L.Ed.2d 298 (2016) (quoting *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001)). If by means of the Dodd–Frank Act [one of the statutes enforced by the CFPB], "Congress intended to alter" the fundamental details of the statutes of limitations for enforcement of this critical consumer protection law, "we would expect the text of the amended" statute "to say so." *Id.* (internal quotation marks omitted). *In other words, we 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 Dodd–Frank says no such thing. Nor, moreover, has the CFPB cited any legislative history that says anything like that.

Id. at 54. The same is true here: the FCC cannot avoid the statute limitations simply by unilaterally choosing to pursue its remedy in an administrative rather than judicial proceeding.

The FCC's position that no statute of limitations applies to its ability to collect, through administrative proceedings, a debt allegedly owed to it would, if accepted, permit the FCC to bring an administrative proceeding 100 years from now for the debt SIC allegedly owes today. This is the very position that the D.C. Circuit characterized as "absurd" in rejecting the CFPB's assertion that no statute of limitations applied to its administrative powers:

> The absurdity of the CFPB's position is illustrated by its response to a hypothetical question about the CFPB's bringing an administrative enforcement action 100 years after the allegedly unlawful conduct. Presented with that question, the CFPB referenced its prosecutorial discretion. But "trust us" is ordinarily not good enough. *Cf. McDonnell v. United States*, —– U.S. ——, 136 S.Ct. 2355, 2372–73, 195 L.Ed.2d 639 (2016) (declining to construe a statute "on the assumption that the Government will use it responsibly") (internal quotation marks omitted). The CFPB also suggested that the equitable defense of laches might apply to such a case, and that "a court would look askance at a proceeding" initiated 100 years after the challenged conduct occurred. CFPB Br. 38 n.28. We need not wait for an enforcement action 100 years after the fact. This Court looks askance now at the idea that the CFPB is free to pursue an administrative enforcement action for an indefinite period of time after the relevant conduct took place. A much more logical, predictable interpretation of the agency's authority is that the three-year limitations period in Section 2614 applies equally to CFPB court actions and CFPB administrative actions. And most importantly for our purposes, that is what the relevant statutes actually say.

Id. at 55. As in *PHH,* the "much more logical, predictable interpretation of" the FCC's authority is that the four-year statute of limitations in 28 U.S.C. § 1658(a) – which applies to federal statutes enacted after December 1, 1990, like Section 254 at issue here – applies to the FCC's administrative enforcement authority to recoup alleged overpayments made to SIC.

However, the $26 million in alleged overpayments reached by the Commission includes amounts received by SIC prior to 2012 (i.e., beyond the four-year statute of limitations). For this additional, independent reason, the FCC 16-167 Order must be set aside and reconsidered.

V. CONCLUSION

While the Commission attempts to portray SIC as having concocted some elaborate fraudulent scheme, what is missing from the FCC 16-167 Order is that which is most telling: not one finding of any harm to any consumers nor a single complaint about the telecommunications service provided by SIC. Nor was there even a finding by USAC of fraud, waste and abuse. The overwhelming majority of the alleged overpayments ($26 million out of $27 million) is based on very technical (and flawed) alleged misclassifications -- certainly not waste, fraud or abuse.

Moreover, as established above, in SIC's Response to USAC's Final Audit Report and in the GVNW Report, there is simply no basis for the Commission's musings that SIC attempted to obscure its accounting and cost of service submissions. Under these circumstances, and given the glaring factual errors in the Commission's $27 million conclusion, the equities clearly favor the grant of this Petition, the setting aside of the FCC 16-167 Order and a reconsideration of the amount of alleged overpayments. Indeed, there is a difference between alleged misclassification of certain expenses by SIC and the FCC 16-167 Order's insinuation, made express in the NAL, that the legal structure and the accounting systems employed by SIC were designed purposefully to "milk" the USF Fund. The USAC Final Audit Report – the lone "evidence" relied upon by the Commission – contains not a single word that holds or even implies that the accounting records maintained by SIC were obscured or unreadable or somehow intentionally buried in regulatory paperwork with the intentional aim of their being lost or overlooked in bureaucratic red tape for a more than ten-year period. The factual reality, which has not been contested by the Commission, is that SIC's cost of service submissions were prepared by experts with a deep, historic understanding of high-cost support rules.

Moreover, since the FCC 16-167 Order is the foundation for the NAL, the Commission must, as a matter of fundamental due process, engage in reasoned analysis and decision-making in its assessment of the USAC Report. As shown herein, the Commission has not done so, and the FCC 16-167 Order must be reconsidered and set aside. The record evidence, ignored by the Commission, shows that the maximum overpayment the FCC can find is the $4.1 Million computed by GVNW. Clearly, the funds currently being withheld from distribution to SIC by the Commission pursuant to the highly irregular and unlawful suspension of payments to SIC is sufficient to offset this alleged $4.1 million overpayment.

Finally, the Commission's Rules regarding Petitions for Reconsideration in Non-Rulemaking Proceedings (Sec. 1.106) do not deal with a case like this. The Commission has issued two separate Orders (the FCC 16-167 Order and the NAL) which are entirely interrelated and inseparable, one of which – the FCC 16-167 Order that is the subject of this Petition – purports to be final whereas the NAL is not, and cannot as a matter of law be final. Further, the NAL specifically calls for Comments by interested parties on matters which are inextricably related to the issues raised in this Petition. *See* NAL, at 28 ¶ 84. Manifestly, as a matter of fundamental Due Process, the Commission can only act upon this Petition for Reconsideration after interested parties, including SIC itself, have had the opportunity to comment on the issues raised in the NAL and FCC 16-167 Orders, including, without limitation, the specific matters addressed at paragraph

58 of FCC 16-167 and paragraph of 84 of the NAL. *See* NAL, at 28 ¶ 84 & FCC 16-167, at 18 ¶ 58 (directing the Wireline Competition Bureau to issue notice and comment proceedings regarding potential measures against SIC to revoke certain Commission authorizations and waivers granted for the purpose of receiving high-cost universal service support.)

We respectfully but strenuously submit, therefore, that the Commission must defer action on this Petition until the conclusion of proceedings under FCC Order 16-167 and that it issue a public notice clarifying that comments submitted in response to the NAL shall include comments on this Petition as appropriate.

Dated: January 4, 2017

Respectfully submitted,

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