

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

In the Matter of
Sandwich Isles Communications, Inc.
On Request for Inspection of Records
FOIA Control No. 2012-116

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 2013

Released: October 30, 2013

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order dismisses in part and denies in part an application for review (AFR) filed by Sandwich Isles Communications, Inc. (Sandwich Isles), which seeks review of a decision by the Wireline Communications Bureau (WCB) that would release certain documents submitted to the Commission by Sandwich Isles. The Decision addresses a Freedom of Information Act (FOIA) request filed by David Burstein (Burstein) seeking an unredacted version of Sandwich Isles' petition for waiver of section 54.302 and other provisions of the Commission's rules, as revised by the USF/ICC Transformation Order. The AFR seeks Commission review of WCB's Decision insofar as it would disclose three types of Sandwich Isles' waiver documents in response to Burstein's request: (1) List of Outstanding Loans; (2) Audited Financial Statements and Notes; and (3) Summary of Corporate Operating Expenses. Among other things, the AFR asserts that the documents should not be disclosed pursuant to FOIA Exemption 4, which protects "commercial or financial information obtained from a person [that is] privileged or confidential." As explained below, we deny the AFR to the extent it challenges the Bureau's Decision to disclose the List of Outstanding Loans in Sandwich Isles' waiver petition. We also dismiss as moot the AFR's challenges to the Bureau's decision to release document types (2) and (3) above, to the extent that the Bureau's Supplemental Decision determined that these documents should be withheld under Exemption 4.

II. BACKGROUND

2. The USF/ICC Transformation Order, adopted by the Commission on November 18, 2011, comprehensively reformed and modernized the universal service and intercarrier compensation systems to promote the availability of broadband service nationwide. For any carrier negatively impacted by its reforms, the Transformation Order provided guidance on the showing that must be made to obtain a waiver, including a listing of specific types of financial data and other information. In addition, the Transformation Order revised reporting requirements for all eligible telecommunications carriers (ETCs), requiring, among other things, all privately-held rate-of-return carriers to file a full and

1 5 U.S.C. § 552(b)(4).

2 See USF/ICC Transformation Order, 26 FCC Rcd 17663 (2011).

3 Id. at 17839-42, paras. 539-44.

4 A common carrier designated to receive universal service support under Part 54, Subpart C of the Commission's rules is an "eligible telecommunications carrier." See 47 C.F.R. §§ 54.5, 54.201.

complete annual report on their financial condition and operations, and specifying types of information to be included.⁵ The *Transformation Order* determined that the annual reports would be made publicly available, because the public has a legitimate interest in being able to verify the efficient use of support funds and because the Commission would be assisted in its oversight duties by public interest watchdogs, consumer advocates, and others who seek to ensure that recipients receive support funding that is sufficient, but not excessive.⁶

3. On December 30, 2011, Sandwich Isles, a privately-held rate-of-return carrier, filed a petition for waiver of section 54.302 and other provisions of the Commission's rules, as revised by the *Transformation Order*.⁷ Along with the waiver petition, Sandwich Isles filed a request for confidential treatment of certain portions of the petition,⁸ as well as a public version of the petition from which it had redacted certain information. On January 4, 2012, the Commission received a FOIA request filed by David Burstein, seeking release of an unredacted version of Sandwich Isles' waiver petition.⁹ On January 23, 2012, Sandwich Isles objected to Burstein's FOIA request on a number of grounds and reasserted its request for confidential treatment of its waiver petition,¹⁰ to which Burstein responded on the same day.¹¹

4. The Wireline Competition Bureau issued a decision on Burstein's FOIA request on July 3, 2012, denying it in part and granting in part.¹² The Decision relied on FOIA Exemption 4 in denying release of certain portions of Sandwich Isles' waiver petition.¹³ Among the portions of Sandwich Isles' waiver petition designated for release, the Bureau determined that the List of Outstanding Loans contained some information that was already publicly available and, where it was not public, the information did not appear likely to cause substantial competitive harm to Sandwich Isles.¹⁴ As to the Audited Financial Statements and Notes, however, the Bureau declined to address the applicability of FOIA Exemption 4, and instead determined that discretionary release was appropriate pursuant to the *Transformation Order's* finding that privately-held rate-of-return carriers, such as Sandwich Isles, must submit comparable information to the Commission annually and that such submissions would be made publicly available.¹⁵ Noting that the Summary of Corporate Operating Expenses comprises information that is contained in the Audited Financial Statements and Notes, the Bureau determined to disclose this record for the same reasons.¹⁶ We also note that the Bureau "anticipate[d] that any application for review of this [Decision] would be held in abeyance pending Commission action on the petitions for

⁵ *Id.* at 17856-58, paras. 595-602.

⁶ *Id.* at 17857-58, para. 602.

⁷ Sandwich Isles Communications, Inc. Petition for Waiver of 47 C.F.R. 54.302 (filed Dec. 30, 2011).

⁸ Letter from Albert Hee, Sandwich Isles Communications, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90, WT Docket No. 10-208 (filed Dec. 30, 2011) (Sandwich Isles Request for Confidential Treatment).

⁹ E-mail from David Burstein to FOIA, FCC (Jan. 3, 2012). Mr. Burstein subsequently modified his request to withdraw "any request for the company's future estimates other than the amounts of public subsidies requested." E-mail from David Burstein, DSL Prime, to Mark Wigfield, Public Affairs Specialist, Wireline Competition Bureau, Federal Communications Commission (Feb. 9, 2012).

¹⁰ Letter from Frederick Joyce, on behalf of Sandwich Isles Communications, to Patricia Quartey, Federal Communications Commission (Jan. 23, 2012) (Sandwich Isles FOIA Objection).

¹¹ E-mail from Dave Burstein to Frederick Joyce, Counsel for Sandwich Isles, Kesha Woodward, Federal Communications Commission, and Patricia Quartey, Federal Communications Commission (Jan. 23, 2012).

¹² Decision.

¹³ *Id.* at 3-5.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 6.

reconsideration” that had been filed of the *Transformation Order*’s determination to make publicly available these annual reports.¹⁷

5. On July 18, 2012, Sandwich Isles filed an AFR, challenging the Bureau’s Decision to disclose the three sets of documents listed above (*i.e.*, List of Outstanding Loans, Audited Financial Statements and Notes, and Summary of Corporate Operating Expenses).¹⁸ Sandwich Isles’ AFR makes two general arguments: (1) the Bureau was not required under the *Transformation Order* to make publicly available the waiver petition documents at issue here;¹⁹ and (2) under the FOIA and Commission precedents, the Bureau should not disclose the documents at issue here. With respect to the List of Outstanding Loans, Sandwich Isles specifically argues that “[t]he mere fact that there have been ‘public [press] reports about the fact that Sandwich Isles has obtained loans to finance its activities’” does not justify the release of the List itself, which Sandwich Isles states is “commercially sensitive.”²⁰

6. On November 16, 2012, the Commission issued the *USF/ICC Fifth Order on Reconsideration*,²¹ resolving various petitions for reconsideration and/or clarification of the *Transformation Order*. Among other things, the *Fifth Reconsideration Order* revised its determination in the *USF/ICC Transformation Order* that annual financial reports filed by privately-held rate-of-return carriers should be made available to the public and concluded that, in some instances, there could be a potential for competitors to use the submitted financial data of these carriers in an anti-competitive manner.²² Privately-held ETCs thus were permitted to file their annual reports subject to the terms of the Bureau’s *USF/ICC Protective Order*, pursuant to which the annual reports would not be made publicly available.²³

7. On September 26, 2013, the Wireline Competition Bureau issued a Supplemental Decision addressing Burstein’s FOIA request.²⁴ Consistent with the *Fifth Reconsideration Order*, the Supplemental Decision revised the previous decision to release the Audited Financial Statements and Notes and Summary of Corporate Operating Expenses.²⁵ In the Supplemental Decision, the Bureau found that the financial information contained in the Audited Financial Statements and Notes and the Summary of Corporate Operating Expenses should be withheld, because this material is competitively sensitive and therefore confidential under Exemption 4. The Bureau further found that other portions of these documents should be released, because they are not competitively sensitive.²⁶ The Supplemental Decision did not address the List of Outstanding Loans, because the basis for releasing this document was not affected by the Commission’s reconsideration of the *Transformation Order*.

III. DISCUSSION

8. We first address Sandwich Isles’ request to overturn the Bureau’s decision to disclose the List of Outstanding Loans. As an initial matter, we disagree with any suggestion by Sandwich Isles that

¹⁷ *Id.* at 7.

¹⁸ We refer to the second and third groups of documents collectively as Sandwich Isles’ “Audited Financials.” *See* AFR at 1.

¹⁹ *See id.* at 3-6.

²⁰ AFR at 8.

²¹ *USF/ICC Fifth Order on Reconsideration*, 27 FCC Rcd 14549 (2012).

²² *Id.* at 14549, 14555, para. 15.

²³ *See id.* at 14555, para. 15; *Connect America Fund et al.*, Protective Order, 27 FCC Rcd 14231 (WCB 2012).

²⁴ Letter from Kirk S. Burgee, Chief of Staff, Wireline Competition Bureau to David Burstein, Editor and Publisher of DSL Prime (dated September 26, 2013) (Supplemental Decision).

²⁵ *Id.* at 4-6.

²⁶ *Id.* at 6.

the Bureau relied either on the *Transformation Order* or the fact that there were public press reports about Sandwich Isles' loans to justify the release of the List.²⁷ In its decision, the Bureau analyzed whether it should withhold the documents under FOIA Exemption 4. Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."²⁸ When a FOIA request is filed for information that may be confidential, the Commission's rules provide that the original submitter may object to disclosure by submitting "a detailed written statement specifying all grounds for withholding any portion of the information" requested.²⁹

9. The Bureau found in its decision that the List of Outstanding Loans did not fall within Exemption 4, given that the List contains information that is either publicly available or does not appear likely to cause substantial competitive harm to Sandwich Isles. Specifically, the Bureau found that the List "contains general details about Sandwich Isles' loan obligations, and does not appear to provide information that competitors could exploit to harm Sandwich Isles."³⁰ We agree with the Bureau's findings. Sandwich Isles generally argued that disclosure of the information for which it sought confidentiality would "enable competitors to accurately determine Sandwich Isles' operating costs, revenues, and customer penetration, thus giving them an undue advantage in determining where to invest, price setting, and market targeting efforts."³¹ It did not, however, in either its objection to the FOIA disclosure or in the subsequent AFR, demonstrate or clarify how releasing the List of Loans, which only contains the amounts, terms, and outstanding balances (as of December 31, 2011) of notes issued by the Rural Utilities Service (RUS) and the Rural Telephone Bank (RTB), would result in the alleged harms.³² In any event, however, given the fact that the information in the List of Loans was originally generated by RUS and RTB, which are government agencies, in conjunction with their loan programs, it is difficult to envision how Sandwich Isles could have made a showing of competitive harm. Courts have held that Exemption 4 is not applicable to loan documents generated by an agency, because they were not "obtained from a person."³³ This indicates that RUS and RTB would probably be required to release the information in the List of Loans in response to a FOIA request. Given the likelihood that the loan information would be freely available from RUS and RTB, we find that this agency has no basis to withhold the information as confidential.³⁴ Accordingly, we uphold the Bureau's decision to release the List of Outstanding Loans and deny the AFR in this regard.

²⁷ See AFR at 2-3 ("[T]he Bureau determined to release various confidential and commercially sensitive documents . . . based on a mistaken interpretation of Paragraph 602 in the *USF/ICC Transformation Order*") and *id.* at 8 ("The mere fact that there have been 'public reports about the fact that Sandwich Isles has obtained loans to finance its activities' does not mean that this commercially sensitive information should be disclosed to the public").

²⁸ 5 U.S.C. § 552(b)(4).

²⁹ 47 C.F.R. § 0.461(d)(3).

³⁰ Decision at 6.

³¹ See Sandwich Isles FOIA Objection, *supra* n.13; see also Sandwich Isles Request for Confidential Treatment, *supra* n.11.

³² This case thus differs from *Lakin Law Firm*, 19 FCC Rcd 12727 (2004), cited by Sandwich Isles, in which the submitter of information made a persuasive showing that disclosure of information would cause competitive harm.

³³ See *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143, 148-49 (2d Cir. 2010) (information about loans made by the Federal Reserve Banks not protected by Exemption 4); *Board of Trade of the City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403-04 (D.C. Cir. 1980) (courts have restricted application of Exemption 4 to data which have not been generated within the Government).

³⁴ See *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51-53 (D.C. Cir. 1981) ("If the information is freely or cheaply available from other sources, it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm"); *Niagara Mohawk Power Corp. v. U.S. Dept. of Energy*, 169 F.3d 16, 20 (D.C. Cir. 1999) (performance data to be made publicly available pursuant to state PSC decision may not be withheld by DOE under Exemption 4).

10. As an additional matter, we find that the Bureau's Supplemental Decision moots Sandwich Isles' AFR to the extent that the AFR asks us to withhold the portions of the Audited Financial Statements and Notes and the Summary of Corporate Operating Expenses that the Supplemental Decision withholds, inasmuch as the Supplemental Decision grants the relief that Sandwich Isles seeks with respect to this material. We do not reach the question of whether the Supplemental Decision correctly determined to release other portions of these documents as non-confidential. We do not know whether Sandwich Isles objects to the narrowed disclosures ordered by the Supplemental Decision and, if it does so, why it objects. For this reason, we dismiss Sandwich Isles' challenge to the Bureau's now-superseded decision to release in their entirety the Audited Financial Statements and Notes and the Summary of Corporate Operating Expenses. If Sandwich Isles objects to the narrowed release in the Supplemental Decision, it may seek review of the Supplemental Decision, as may Burstein, if he objects to the withholding of the portions of the documents that the Bureau deems confidential. We will defer any review of the Supplemental Decision, until if and when the parties seek review and set forth any objections they may have to the analysis contained in the Supplemental Decision.

IV. ORDERING CLAUSES

11. IT IS ORDERED that the application for review filed by Sandwich Isles IS DISMISSED IN PART and DENIED IN PART as set forth herein. If Sandwich Isles does not seek a judicial stay within ten (10) working days of the date of release of this decision, the List of Outstanding Loans will be produced to Burstein as indicated. *See* 47 C.F.R. § 0.461(i)(4).³⁵

12. The officials responsible for this action are the following: Acting Chairwoman Clyburn and Commissioners Rosenworcel and Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁵ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Sandwich Isles' right to pursue litigation. Sandwich Isles may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.