

United States Court of Appeals for the Federal Circuit

SANDWICH ISLES COMMUNICATIONS, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2020-1446

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00149-LAS, Senior Judge Loren A. Smith.

Decided: April 1, 2021

LEX RICHARD SMITH, Kobayashi Sugita & Goda, Honolulu, HI, argued for plaintiff-appellant.

SHARI A. ROSE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR., LOREN MISHA PREHEIM.

Before LOURIE, O'MALLEY, and REYNA, *Circuit Judges*.
O'MALLEY, *Circuit Judge*.

Sandwich Isles Communications, Inc. (“SIC”) appeals the decision of the United States Court of Federal Claims (“Claims Court”) granting the United States’ motion to dismiss for lack of subject matter jurisdiction. *Sandwich Isles Commc’ns, Inc. v. United States*, 145 Fed. Cl. 566 (2019) (“*Decision on Appeal*”). Because we agree with the Claims Court that its Tucker Act jurisdiction over SIC’s takings claim is displaced by the comprehensive scheme for review set forth in the Communications Act of 1934, 47 U.S.C. § 402(a), we affirm.

I. BACKGROUND

A. Statutory and Regulatory Framework

Congress enacted the Communications Act of 1934 (“Communications Act”) and created the Federal Communications Commission (“FCC”) to make “available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. In 1996, Congress amended the Communications Act to specify that it applies to all “rural, insular, and high cost areas.” 47 U.S.C. § 254(b)(3). The amendment further required the FCC to provide “specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.” 47 U.S.C. § 254(b)(5).

To implement the Communications Act and fulfill its mandate to provide universal service, the FCC created the Universal Service Fund (“USF”), which is administered by the Universal Service Administrative Company (“USAC”) and overseen by the FCC. *See* 47 C.F.R. § 54.701(a). The USF consists of four separate funds, but only the high-cost support fund, which is designed to support rural providers serving high-cost areas, is at issue in this appeal. *See Vermont Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 57 (D.C. Cir. 2011) (describing the four funds).

High-cost universal service support is designed to ensure that consumers in “all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas,” have access to telecommunications services at rates that are reasonably comparable to those in urban areas. 47 U.S.C. § 254(b). The high-cost support programs fulfill these goals by allowing certain eligible carriers that serve rural, insular, and high-cost areas to recover certain reasonable costs of providing service. Eligible telecommunication carriers receiving high-cost universal service support must use it “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 U.S.C. § 254(e).

Telecommunications carriers in high-cost areas may also receive support from the National Exchange Carrier Association (“NECA”) pool, which is a separate fund from the high-cost Universal Service Fund. *Sandwich Isles Commc’ns, Inc., v. FCC*, 741 F. App’x 808, 809 (D.C. Cir. 2018). NECA is “a not-for-profit organization set up by the [FCC] that provides various services for small carriers, including filing of tariffs and operating a pooling process that averages the access charges billed to long-distance carriers.” *Id.*

B. Factual Background

SIC was formed in the mid-1990s to provide telecommunications services to native Hawaiians. SIC is a wholly-owned subsidiary of Waimana Enterprises, which is a Hawaiian corporation. Albert Hee was the president of SIC until sometime in 2013. Hee was also the sole owner of Waimana until December 2012, at which point he began to share ownership with trusts benefitting his three adult children.

In 1997, SIC was designated as an eligible telecommunications carrier to provide service to customers in the Hawaiian home lands, which consists of “roughly 200,000 acres [of land] spread out over more than 70 non-

contiguous parcels on six of the largest eight Hawaiian [I]slands.” *Decision on Appeal*, 145 Fed. Cl. at 569. SIC subsequently began receiving high-cost support funds and participating in the NECA pool. *Id.*

1. The Paniolo Lease

After initially serving rural communities in Hawaii by leasing capacity on an existing undersea cable, SIC entered into an exclusive, 20-year lease of a newly constructed cable owned by Paniolo, LLC, a different corporate vehicle of Waimana. *Sandwich Isles Commc’ns*, 741 F. App’x at 809. “While [SIC’s] subscriber base is relatively small, the Paniolo cable that it leased is massive, with the capacity to provide broadband service to the entire state of Hawaii. It was also expensive. The variable lease began at \$15 million annually and had risen to \$24 million annually by [2018].” *Id.*

SIC sought to include the cost of the lease in its revenue requirement, which would have allowed it to recover the cost of the lease from NECA’s revenue pool. In 2010, the Commission’s Wireline Competition Bureau issued a Declaratory Ruling allowing 50 percent of SIC’s lease expenses to be included in its revenue requirement. *Id.* at 810. The Wireline Bureau found that “equitable considerations, primarily prospective future growth, justified the 50 percent figure.” *Id.* SIC appealed that decision to the FCC.

In December 2016, the FCC “found that the equitable considerations relied upon by the Wireline Bureau’s decision no longer justified recovery of 50 percent of the Paniolo cable costs—the projected growth never materialized.” *Id.* The FCC permitted SIC to keep the sums it received in the past. But moving forward, the FCC determined that SIC could only recover \$1.9 million per year from the NECA pool. *Id.* SIC filed an appeal challenging the FCC’s order, which the United States Court of Appeals for the District of Columbia (“D.C. Circuit”) denied. *Sandwich Isles Commc’ns*, 741 F. App’x at 809–11.

2. Changes to SIC's USF Support

In 2011, the FCC comprehensively reformed its existing regulatory system for telephone service. *In re FCC 11-161*, 753 F.3d 1015, 1035 (10th Cir. 2014). As a result, the FCC reformed the manner and amount of USF payouts made to rural carriers. In relevant part, the FCC instituted a \$250 per-line, per-month cap on USF support, effective July 2014. See 47 C.F.R. § 54.302(a). This was a significant reduction from the \$14,000 per line per year that SIC had been receiving. *United States v. Sandwich Isles Commc'ns, Inc.*, 398 F. Supp. 3d 757, 766 (D. Hawaii 2019).

The FCC, recognizing that its reforms could impact particular recipients differently, established a waiver mechanism under which a carrier could seek relief from some or all of the reforms if the carrier could demonstrate that the reduction in existing high-cost support would put consumers at risk of losing service. *Id.* SIC sought a waiver, but the Wireline Competition Bureau denied its request in May 2013. *Decision on Appeal*, 145 Fed. Cl. at 571. Specifically, the Wireline Competition Bureau found that SIC failed to show good cause for a waiver and explained that SIC sought “a waiver that would allow it to retain a number of significant and wasteful expenses, totaling many millions of dollars, including significant payments to a number of affiliated and closely-related companies.” *In re Connect Am. Fund*, 28 FCC Rcd. 6553, 2013 WL 1962345, at *1 (Wireline Comp. Bur. May 10, 2013). SIC did not appeal that order.

In July 2015, Albert Hee—manager of SIC and its parent company, Waimana—was convicted of violating the tax code. *Decision on Appeal*, 145 Fed. Cl. at 571. Specifically, Hee was found guilty of improperly categorizing certain personal expenses as business expenses from 2002 through 2012, and for failing to report personal expense payments as income. *Id.* Between 2002 and 2012, Waimana paid

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