

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1036

September Term, 2018

FILED ON: OCTOBER 23, 2018

SANDWICH ISLES COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

AT&T, INC.,
INTERVENOR

On Petition for Review of an Order
of the Federal Communications Commission

Before: MILLETT and KATSAS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the Federal Communications Commission and on the briefs and arguments of the parties. The court has accorded the issues full consideration and determined that they do not warrant a published opinion. See D.C. CIR. R. 36(d). It is

ORDERED and ADJUDGED that the petition for review should be denied for the reasons explained in the memorandum accompanying this judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

MEMORANDUM

Sandwich Isles Communications is a small, regulated local exchange carrier serving fewer than 4,000 customers, as of 2016, in mostly rural areas of Hawaii. It petitioned for review of the Federal Communications Commission's order reversing the Commission's Wireline Bureau's determination that Sandwich Isles was entitled to recover half the lease expenses for a huge new submarine cable through the National Exchange Carrier Association's pooling process. The Commission argues that its decision was not arbitrary and capricious, but well-reasoned and properly explained. AT&T as intervenor also argues that the decision of the Commission was valid.

Sandwich Isles is a member of the National Exchange Carrier Association, a not-for-profit organization set up by the Federal Communications Commission 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. After having served rural communities in Hawaii for years by leasing capacity on an existing cable, Sandwich Isles entered into an exclusive, 20-year lease of a newly constructed cable, the Paniolo cable, owned by Paniolo, LLC. It is important to recognize that Paniolo, LLC is not before us, nor was it before the FCC. While Sandwich Isles' 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 the time of this appeal. Sandwich Isles sought to include the cost of the lease in its revenue requirement. The inclusion of lease expenses would allow Sandwich Isles to recover the cost of the lease from the Association's pool. In 2009, the Association found that the lease costs of the Paniolo cable were not "used and useful" and therefore Sandwich Isles was not entitled to recovery. Rather, the Association found that only \$1.9 million, an amount based upon Sandwich Isles' lease costs prior to entering the Paniolo cable lease, could be recovered by Sandwich Isles.

Sandwich Isles petitioned the Commission, and in 2010 the Commission's Wireline Bureau issued a Declaratory Ruling allowing 50 percent of Sandwich Isles' lease expenses to be included in its revenue requirement. Although the Bureau concluded that the Association's \$1.9 million figure was the product of a reasonable application of the "used and useful" standard, the Bureau also found that equitable considerations, primarily prospective future growth, justified the 50 percent figure. Both Petitioner and AT&T appealed to the full Commission, and the case sat and sat until 2016. The Commission's Wireline Bureau asked the parties for any additional comments in 2016, and at that time Petitioner suggested, without any supporting documentation, that its lease agreement had been renegotiated, calling for only \$8.1 million annual lease rent.

The Commission 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. The Commission allowed Sandwich Isles to keep the sums it had received in the past. Prospectively, the Commission found that, based on the evidence presented, Sandwich Isles could only recover \$1.9 million annually from the Association's pool.

Sandwich Isles argued that the Commission's order was arbitrary and capricious on several grounds, all unpersuasive. To the extent that Sandwich Isles questions the Commission's "used and useful" standard, which is used to determine whether a regulated company's expenses are justified, its argument can be quickly disposed of. Sandwich Isles is attacking a standard regulatory agencies have been using for decades. See, e.g., *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 779 (D.C. Cir. 1990). Nor does Petitioner identify any defect in the Commission's application of the standard in its order.

The primary argument of Sandwich Isles is the inappropriateness of the Commission's reversal of the Wireline Bureau. Sandwich Isles regards the Commission's actions as analogous to the Commission reversing its own position without any supporting reasoning. That simply misunderstands administrative law. The Commission is not bound by the decisions of a subordinate body. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). In any event, the Commission reasonably explained its decision to revisit the Bureau's ruling in light of intervening circumstances. And in this case, the FCC actually reopened the proceeding in part to determine if Petitioner's predictions of growth in subscribers had occurred – which it had not.

Sandwich Isles also argues that the Commission incorrectly ignored undisputed record evidence that the annual cost of leasing cable capacity is \$8.1 million. Sandwich Isles presented \$8.1 million to the Commission as the renegotiated cost of the Paniolo lease under an apparent offer of settlement, rather than the \$24 million it is obliged to pay annually under its current Paniolo lease. It argued that the cost under the new agreement was determined based upon comparative analyses, not that it would actually be able to obtain a different lease at that cost. In addition, since \$8.1 million supposedly represents the annual cost of leasing the capacity of the Paniolo cable, it does not accurately represent the cost of leasing "used and useful" cable capacity. Rather, it represents the cost of leasing excessive capacity. The Commission was correct not to rely upon the \$8.1 million figure.

To be sure, it is quite troubling, as Petitioner contends, that the Commission sat on its appeal, as well as AT&T's, for six years. But Petitioner was not injured by the delay – American ratepayers were. Indeed, since the Commission allowed Petitioner to keep the expenses authorized by the Wireline Bureau through 2016, it actually benefitted by the delay. In another situation such a delay might be intolerable but certainly not in this case, at least with regard to Petitioner.

Since Sandwich Isles fails to identify any defect in the Commission's order rendering it arbitrary and capricious, the petition for review is denied.