APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2020-1446

[Filed: April 1, 2021]

SANDWICH ISLES COMMUNICATIONS, INC., *Plaintiff-Appellant*	)
v.	)
UNITED STATES, *Defendant-Appellee*	)

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

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 $4,063,294.39

of Hee's personal expenses, which he improperly designated as business expenses. *Id.*

Shortly after Hee's conviction, the FCC directed USAC "to suspend 'high-cost funding to [SIC] pending completion of further investigation and/or other ameliorative measures to ensure that any funding provided is used solely in a manner consistent with Commission rules and policies.'" *Id.* USAC subsequently suspended SIC's USF support and audited SIC's use of USF funds from 2002 to 2015. *Id.* The audit revealed that SIC received millions of dollars of USF funds that it should not have received.

In September 2015, while USAC's investigation was pending, the Hawaii Public Utilities Commission issued an order stating that it could not certify that all federal high-cost support provided to SIC was used in the preceding calendar year (2014), and would be used in the coming calendar year (2016), only for the facilities and services for which the support was intended, as required by 47 C.F.R. §54.314(a). SIC has not received funds from the USF since September 2015, because an eligibility certification is a prerequisite to receiving USF funds. *Decision on Appeal*, 145 Fed. Cl. at 572.

In 2015, SIC filed a petition with the FCC alleging that the FCC lacked authority to suspend its high-cost subsidies and requesting release of the funds. SIC's petition to rescind the suspension remains pending. *Id.* at 574. In 2017, SIC petitioned the D.C. Circuit for a writ of mandamus, asking the court to order the FCC to reinstate the USF support. The court denied the petition in February 2018. *Sandwich Isles Commc'ns,*

Inc., No. 17-1248, 2018 U.S. App. LEXIS 4139 (D.C. Cir. Feb. 16, 2018).

Following the USAC investigation, the FCC issued an order in December 2016, finding that SIC improperly received payments in the amount of $27,270,390 from the federal high-cost support mechanisms that were in place between 2002 and 2015. *Decision on Appeal*, 145 Fed. Cl. at 572. Specifically, the FCC found that the amounts paid to SIC were excessive. *In re Sandwich Isles Commc'ns*, 31 FCC Rcd. 12999, 13000, 2016 WL 7129743, at *1 (F.C.C. Dec. 5, 2016). The 2016 order required SIC to repay the over $27 million that it improperly received and continued the suspension of further USF payments to SIC.

SIC filed a petition for reconsideration of the 2016 order, which the FCC denied in January 2019. *Sandwich Isles Commc'ns, Inc.*, 34 FCC Rcd. 577, 579, 2019 WL 105385, at *2 (F.C.C. Jan. 3, 2019). The D.C. Circuit subsequently dismissed SIC's appeal of the reconsideration order on grounds that SIC missed its filing deadline by one day. *Sandwich Isles Commc'ns, Inc. v. FCC*, No. 19-1056, 2019 WL 2564087, at *1 (D.C. Cir. May 17, 2019).

C. Procedural History

In January 2019, SIC filed this suit in the Claims Court, alleging that the cumulative effect of the FCC's reductions in SIC's federal subsidies resulted in a

taking of property without just compensation.[1] SIC sought $200 million in damages.

The government moved to dismiss, arguing, among other things, that the court's Tucker Act jurisdiction is preempted by the comprehensive remedial scheme provided in the Communications Act. Specifically, the government argued that SIC's claims seek review of FCC decisions, which are within the exclusive jurisdiction of the courts of appeals. 28 U.S.C. § 2342; 47 U.S.C. § 402(a). The government further argued that SIC failed to allege a valid takings claim because it has no property interest in receiving support payments from FCC-administered funds.

On October 11, 2019, the Claims Court dismissed SIC's complaint for lack of subject matter jurisdiction. At the outset, the court recognized that the "Communications Act of 1934 and the Hobbs Act specify the process for judicial review of FCC orders." *Decision on Appeal*, 145 Fed. Cl. at 573. The court concluded that, although SIC characterized its claim as a Fifth Amendment taking, "the true nature of SIC's claims is targeted at invalidating the FCC orders." *Id.* at 575. The court explained that, by statute, only the D.C. Circuit—not the Claims Court—has jurisdiction over SIC's claims. *Id.* at 574. The Claims Court therefore dismissed SIC's claims pursuant to Rule 12(b)(1).

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[1] SIC's complaint also included claims relating to an alleged breach of an implied-in-fact contract and alleged violations of Federal statutes and regulations mandating compensation. SIC has not pursued those claims on appeal, however.

SIC moved for reconsideration, arguing that no takings claim was ripe at the time of the FCC proceedings, making the Claims Court the appropriate venue for its claims. The Claims Court denied that motion in January 2020, explaining that its jurisdiction under the Tucker Act had been preempted by the Communications Act and the Hobbs Act. Order at 1–2, *Sandwich Isles Commc'ns, Inc. v. United States*, No. 19-149 (Ct. Cl. Jan. 31, 2020), ECF. No. 15. The court further stated that, "[t]o the extent that a takings claim can arise out of the FCC orders at issue here, the Court agrees with the plaintiff's assertion that the Court cannot rule on a takings claim that is not yet ripe." *Id.* at 2. But because SIC has not "received a decision regarding its 2015 petition challenging the suspension of its high-cost subsidies, any takings claim, to the extent that one even exists, remain unripe." *Id.* The court therefore denied SIC's motion for reconsideration.

SIC timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

We review "whether the Court of Federal Claims possesses subject-matter jurisdiction de novo." *Biltmore Forest Broad. FM, Inc. v. United States*, 555 F.3d 1375, 1380 (Fed. Cir. 2009).

On appeal, SIC argues that it "has a takings claim for Constitutionally confiscatory rates where, as here, it has been denied a waiver and the rates cannot sustain continued service." Appellant's Br. 9. According to SIC, it "filed its takings claim at the right time and

in the right court" because it made a waiver request to the FCC, and that request was denied. *Id.* at 11.

The government responds that the Claims Court correctly dismissed SIC's complaint for lack of subject matter jurisdiction because Congress enacted a comprehensive regime governing judicial review of FCC orders that displaces Tucker Act jurisdiction. For the reasons explained below, we agree.[2]

Under the Tucker Act, the Claims Court has jurisdiction over cases "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Supreme Court has described the Tucker Act as serving a "gap-filling role" by allowing "for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable." *United States v. Bormes*, 568 U.S. 6, 12–13 (2012). Accordingly, the Supreme Court and this court have held that the Tucker Act does not apply in various circumstances

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[2] The government also argues that SIC cannot allege a valid takings claim because it has no vested property interest in receiving support from the high-cost universal support fund. The government may well be right. *See Members of the Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005) ("[T]he fact that [the plaintiffs] expected to continue to derive benefits from the program does not create rights to compensation from the government."). But, because we agree with the Claims Court that the Communications Act preempts its Tucker Act jurisdiction over SIC's takings claim, we need not address the that alternative argument.

where Congress has provided "a precisely drawn, detailed statute" that "contains its own judicial remedies." *Id.* at 12 (internal quotation marks omitted); *Folden v. United States*, 379 F.3d 1344, 1357 (Fed. Cir. 2004). "To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must 'examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes.'" *Horne v. Dep't of Agric.*, 569 U.S. 513, 527 (2013) (quoting *United States v. Fausto*, 484 U.S. 439, 444 (1988)).

"In the Communications Act, Congress enacted a comprehensive statutory and regulatory regime governing orders of the Commission." *Folden*, 379 F.3d at 1357. The Communications Act specifically provides for judicial review of FCC decisions in 47 U.S.C. § 402. Subsection 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by [the Hobbs Act]." 47 U.S.C. § 402(a). The Hobbs Act, in turn, provides for the courts of appeals to have "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" all final orders of the Commission made reviewable by subsection 402(a). 28 U.S.C. § 2342. Subsection 402(b), on the other hand, indicates that the D.C. Circuit has jurisdiction with respect to certain decisions and orders of the Commission, as set forth in subsections 402(b)(1)–(10). 47 U.S.C. § 402(b).

The Supreme Court has held that the statutory jurisdiction of the courts of appeals over claims that fall

within the scope of subsection 402(a) is exclusive. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Court of Appeals." (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)). Likewise, we have recognized that "the D.C. Circuit's jurisdiction over claims that fall within subsection 402(b) is exclusive." *Folden*, 379 F.3d at 1356.

In *Folden*, we examined the Communications Act in detail and explained that "subsections 402(a) and (b) comprise the entire statutory regime by which parties may obtain judicial review of Commission decisions." *Id.* We further explained that, "[b]y their plain language, subsections 402(a) and (b) are mutually exclusive." *Id.* As such, "[a]ppeals from all decisions of the Commission that do not fall within subsection 402(b) are encompassed by the procedures of subsection 402(a)." *Id.* And we reiterated that where, as here, a "specific and comprehensive scheme for administrative and judicial review is provided by Congress, the Court of Federal Claims' Tucker Act jurisdiction over the subject matter covered by the scheme is preempted." *Id.* at 1357 (quoting *Vereda, Ltda v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001)).

Because the "true nature" of the plaintiffs' claims in *Folden* involved denial of a license application, we found that they fell within the scope of subsection 402(b)(1). 379 F.3d at 1359 n. 13. As such, they were subject to the exclusive jurisdiction of the D.C. Circuit. *Id.* at 1363. We therefore affirmed the Claims Court's dismissal for lack of subject matter jurisdiction. *Id.*; *see*

also Biltmore Forest Broad. FM, Inc. v. United States, 555 F.3d 1375, 1384 (Fed. Cir. 2009) ("There is no jurisdiction in the Court of Federal Claims to initially adjudicate or to re-adjudicate the FCC's compliance with its rules and regulations in licensing proceedings. The District of Columbia Circuit's jurisdiction over those issues is exclusive.").

Although *Folden* expressly addressed claims under subsection 402(b), our reasoning applies with equal force to claims under subsection 402(a)—the jurisdictional provision at issue here—because such claims are part of the same comprehensive statutory scheme governing orders of the FCC. Indeed, it is well-established that courts of appeals have exclusive statutory jurisdiction to review claims that fall within subsection 402(a). *Folden*, 379 F.3d at 1356 (citing *FCC*, 466 U.S. at 468); *see also AT&T Corp. v. FCC*, 323 F.3d 1081, 1084 (D.C. Cir. 2003) ("Section 402(a), the Act's general review provision, vests in courts of appeals exclusive jurisdiction over '[a]ny proceeding to enjoin, set aside, annul or suspend' or determine the validity of final Commission orders, 47 U.S.C. § 402(a)[.]"); *U.S. West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999) ("The Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC." (citing 28 U.S.C. § 2342; 47 U.S.C. § 402(a)). Accordingly, the Communication Act's comprehensive scheme for review displaces Tucker Act jurisdiction for FCC orders and decisions falling within 47 U.S.C. § 402(a).

The Supreme Court has made clear that "a claim for just compensation under the Takings Clause must be filed in the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Horne*, 569 U.S. at 527 (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion)); *see also Vereda Ltda v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (holding Tucker Act jurisdiction over plaintiff's takings claim preempted by statutory scheme that provided for review with the agency and in district court). Accordingly, the relevant inquiry is whether the Communications Act withdraws Tucker Act jurisdiction over takings claims.

We recently determined that the Communication Act's comprehensive remedial scheme preempts and therefore displaces Tucker Act jurisdiction over takings claims. *Alpine PCS, Inc. v. United States*, 878 F.3d 1086, 1096 (Fed. Cir. 2018). In *Alpine*, the plaintiff alleged that the FCC's cancellation of two personal communications services licenses was a taking for which it was entitled just compensation. *Id.* at 1088. We explained that the judicial review scheme set forth in the Communications Act "squarely covers Alpine's grievance" because its "takings claim (like its contract claims) is based on the FCC's cancellation of the station licenses, a decision that falls squarely within the judicial-review provision, 47 U.S.C. § 402(b)(5)." *Id.* at 1097–98.

First, we examined the Communications Act and found that it provides a "comprehensive statutory scheme through which Alpine could present, and is

directed to present, its takings claim, to the exclusion of the Tucker Act under the *Horne* analysis." *Id.* at 1079. We noted that, "[a]s for relief at the agency level, there was no procedural impediment to Alpine's presenting a takings claim to the FCC. The FCC did not suggest that it lacked the authority to review the license cancellation and take steps to provide compensation." *Id.* at 1097. Indeed, both parties agreed that "the FCC had the power to grant Alpine adequate relief, by eliminating the taking, providing compensation, or some combination." *Id.* at 1096. We then explained that the D.C. Circuit was capable of ordering any appropriate relief with respect to the takings claim, whether on appeal or on remand to the agency. *Id.* at 1098. Accordingly, under "the comprehensive statutory scheme" provided by the Communications Act, "Alpine could have raised a constitutional takings claim; the FCC had the authority to grant relief; and the D.C. Circuit had jurisdiction to review whether a taking occurred and, if so, whether the FCC decision 'yield[ed] just compensation.'" *Id.* (citation omitted). Because the statutory scheme provided the plaintiff a "ready avenue" to bring its takings claim and displaced Tucker Act jurisdiction over that claim, we affirmed the Claims Court's judgment dismissing the plaintiff's claims for lack of jurisdiction. *Id.*

Although *Alpine* dealt specifically with subsection 402(b), as we explained before, our analysis and reasoning with respect to the statutory scheme set forth in the Communications Act applies with equal force in cases involving subsection 402(a). The relevant question is therefore whether SIC's alleged takings

claims challenge FCC actions and orders and thus are governed by subsection 402(a).[3] That subsection, as noted, provides the procedure "to enjoin, set aside, annul, or suspend any order of the [FCC]" except those appealable under subsection 402(b). 47 U.S.C. § 402(a).

In analyzing whether subsection 402(a) applies, we "must look to the true nature of [the plaintiff's] claim, not how plaintiff characterize[s] it." *Folden*, 379 F.3d at 1359 n.13. Here, SIC's takings claim is based on its disagreement with FCC decisions regarding the amount of subsidies SIC could receive from the USF and NECA pools. SIC also takes issue with the FCC's 2013 order, which denied SIC's petition for waiver of the $250 per-line, per-month cap on high-cost universal service support. These allegations take aim at FCC orders and seek to "enjoin, set aside, annul, or suspend" them. *See* 47 U.S.C. § 402(a). Because SIC's takings claim challenges FCC actions and orders governed by 47 U.S.C. § 402(a), the statutory scheme set forth in the Communications Act displaces the Claims Court's Tucker Act jurisdiction.

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[3] Although the Claims Court stated that SIC's claims fall within the scope of subsection 402(b), it did not identify a particular provision within that subsection. *Decision on Appeal*, 145 Fed. Cl. at 574 ("It seems clear to this Court that the 'true nature' of SIC's claims is focused on challenging the validity and propriety of FCC orders and actions, therefore bringing those claims under the purview of 47 U.S.C. § 402(b)."). Notably, the government does not contend that subsection 402(b) applies to SIC claims. Because SIC's claims do not appear to fall within the scope of a particular provision in subsection 402(b), we focus our inquiry on subsection 402(a). *See Folden*, 379 F.3d at 1356 ("Appeals from all decisions of the Commission that do not fall within subsection 402(b) are encompassed by the procedures of subsection 402(a).").

On appeal, SIC argues that it "did not plead its claims as challenges to FCC orders because the claims are not, in fact, facial challenges to FCC orders." Appellant's Br. 15. SIC maintains that the FCC's denial of its "waiver petition in 2013 established the rate in the FCC's 2011 Order as final," and that the "rate is confiscatory, resulting in an unconstitutional taking under the Fifth Amendment." *Id.* at 15–16. But SIC's claim, regardless of how it is characterized, is premised on its disagreement with the amount of subsidy funding it has received from FCC-administered funds, particularly the high-cost USF. Congress has given the courts of appeals exclusive jurisdiction over "[a]ny proceeding to enjoin, set aside, annul, or suspend" orders of the FCC—which includes FCC decisions relating to universal service support. 28 U.S.C. § 2342(a); 47 U.S.C. § 402(a). Accordingly, if SIC wanted to challenge the FCC orders, it was required to do so within the comprehensive statutory scheme established by the Communications Act—that is, by first filing an appeal with the FCC before pursuing a judicial remedy pursuant to section 402.

SIC also maintains that it could not have raised its takings claim as a challenge to any FCC order because "a takings claim asserted in an appeal from the FCC's order would be unripe." Appellant's Br. 12–13. At the same time, however, SIC alleges that "a confiscatory rate takings claim is ripe when its impacts are known" and the "impacts of the FCC's 2011 rates have been fully manifested." *Id.* at 14. Indeed, SIC alleges that its taking claim "was already ripe when SIC filed its 2015 petition." *Id.* SIC's ripeness allegations, which seem to be a moving target, miss the mark. The fact remains

that SIC has not raised its takings claim before the FCC, which it was required to do before seeking judicial review. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194–95 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019).

As we said in *Alpine*, there is no procedural impediment to presenting a takings claim to the FCC. 878 F.3d at 1097.[4] The proper procedure for doing so is set forth in the Communication Act's comprehensive statutory scheme: SIC could have raised a constitutional takings claim to the FCC, challenging the rate; the FCC had authority to grant relief, including waiver of the rate it set; and if the FCC denied the waiver, SIC could appeal that decision to the full commission and then to the court of appeals. Counsel for the government confirmed this procedure during oral argument. *See* Oral Arg. at 15:50–17:10, available at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1446_01072021.mp3.

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[4] As we explained in *Alpine*, we do not imply that all constitutional challenges to the FCC's actions must be presented to the FCC before they can be asserted. But, where, as here, the FCC is in the position to prevent an alleged taking in the course of its own proceedings, the agency must be made aware of any such claim. Any such claim is then subsumed into the agency's final decision and can be appealed only to the court of appeals. *See Alpine*, 878 F.3d at 1096–98.

SIC fails to identify any authority suggesting that the Claims Court has jurisdiction under the Tucker Act to consider takings claims based on FCC decisions regarding universal service support, and we have found none.[5] That is not surprising, given that Congress has granted the courts of appeals exclusive jurisdiction over challenges to FCC orders under 47 U.S.C. § 402(a). SIC cannot, on alleged ripeness grounds, bypass the comprehensive statutory scheme for judicial review established by Congress in the Communications Act. Accordingly, the Claims Court correctly determined that it lacked subject matter jurisdiction over SIC's takings claim.

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[5] SIC cites the Tenth Circuit's decision in *In re FCC 11-161*, 753 F.3d 1015, 1136 (10th Cir. 2014) for the proposition that "a takings claim brought as an appeal from the subject [FCC] order would be subject to dismissal for lack of ripeness." Appellant's Br. 13. There, the court explained that, "[w]hen a carrier faces an insufficient return, it can seek greater support under the Total Cost and Earnings Review Process. Until this process is invoked, the as-applied challenge is premature." *In re FCC*, 753 F.3d at 1136. The Tenth Circuit further stated that, "[i]f the FCC imposes confiscatory rates, carriers could then bring as-applied challenges." *Id.* (citing *Verizon Commc'n, Inc. v. FCC*, 535 U.S. 467, 526–27, 528 n. 39 (2002)). But nothing in *Verizon* or *In re FCC* alters the fact that the Communications Act provides the statutory scheme for judicial review of FCC orders and withdraws Tucker Act jurisdiction over SIC's takings claims.

III. CONCLUSION

We have considered SIC's remaining arguments and find them unpersuasive. For the reasons stated herein, we affirm the Claims Court's dismissal of SIC's takings claim for lack of subject matter jurisdiction.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1446

[Filed: April 1, 2021]

SANDWICH ISLES COMMUNICATIONS, INC., *Plaintiff-Appellant*	)
v.	)
UNITED STATES, *Defendant-Appellee*	)

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

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

April 1, 2021

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 19-149

[Filed: October 11, 2019]

SANDWICH ISLES COMMUNICATIONS, INC., Plaintiff,	)
v.	)
THE UNITED STATES, Defendant.	)

Lack of Subject–Matter Jurisdiction; RCFC 12(b)(1); Failure to State a Claim; RCFC 12(b)(6)

Lex R. Smith, Kobayashi, Sugita & Goda, Honolulu, HI, counsel for plaintiff.

Shari A. Rose, U.S. Department of Justice, Civil Division, Washington, DC, counsel for defendant.

OPINION AND ORDER

***SMITH*, Senior Judge**

On January 1, 2019, plaintiff, Sandwich Isles Communications, Inc. ("SIC"), filed its Complaint with

this Court. *See generally* Complaint (hereinafter "Compl."). Plaintiff alleges it was entitled to funding from the Universal Service Fund ("USF") and National Exchange Carriers Association ("NECA") pool for constructing and operating a telecommunications network that provides service to those living in the Hawaiian Home Lands. *Id.* at 1. Plaintiff further claims that the Federal Communications Commission ("FCC" or "Commission") breached an implied–in–fact contract; breached the duty of good faith and fair dealing; effected a taking under the Fifth Amendment; and violated federal statutes and regulations by revoking plaintiff's funding from the USF and NECA pool. *Id.* at 4–5. Plaintiff seeks monetary damages in the amount of $200 million. *Id.* at 27. On May 16, 2019, defendant filed its Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"). *See generally* Defendant's Motion to Dismiss (hereinafter "Def.'s MTD"). For the following reasons, the Court grants defendant's Motion to Dismiss.

I. Background

Congress enacted the Communications Act of 1934 ("Act") 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 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." *Id.* § 254(b)(5). To implement the Act, the FCC created the USF, which is administered by the Universal Service Administration 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 supports the provision of services in high-cost areas," is at issue in this case. *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 57 (D.C. Cir. 2011).

The high-cost support fund allows eligible telecommunications carriers to serve high-cost areas by providing federal funds "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). State commissions determine if a telecommunications carrier is eligible for the USF. 47 U.S.C. § 214(e). However, if a carrier is not subject to the jurisdiction of the state commission, the FCC will determine its eligibility. *Id.* If no carrier is willing to service a high-cost area, the FCC or state commission may "determine which common carrier or carriers are best able to provide such service to the requesting unserved community." *Id.* Any carrier that is ordered to provide such service "shall be designated as an eligible telecommunications carrier for that community or portion thereof." *Id.* Importantly, a "common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) *shall be eligible* to receive universal service support in accordance with section 254[.]" 47 U.S.C. § 214(e) (emphasis added).

Telecommunications carriers in high-cost areas may also receive support from the NECA pool, which is a

separate fund from the high-cost USF. *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.*

In 1995, the Department of Hawaiian Home Lands authorized SIC to provide telecommunications services to the Hawaiian Home Lands, which previously lacked reliable and affordable telecommunications. Compl. at 11. (citing *Sandwich Isles Commc'ns, Inc.*, 13 FCC Rcd. 2407, ¶ 5 (Feb. 3, 1998) (hereinafter "1998 Order")). The Hawaiian Home Lands consist 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." Sandwich Isles Commc'ns, Inc., 27 FCC Rcd. 470, n. 4 (2012). In 1997, SIC was designated as an eligible telecommunications carrier to provide service to customers in the Hawaiian Home Lands. *Sandwich Isles Commc'ns, Inc.*, 31 FCC Rcd. 12999, ¶ 16 (Dec. 5, 2016) (hereinafter "2016 Order"). On February 3, 1998, the FCC granted SIC's petition for waiver, allowing SIC to receive high-cost support funds and to participate in the NECA pool. 1998 Order ¶ 1.

In 2005, the FCC issued an order granting SIC's waiver to be treated as an incumbent local exchange carrier ("LEC") and confirmed that SIC's participation in the NECA pool and USF was necessary because of its large capital investment and the small population it was serving. *Sandwich Isles Commc'ns, Inc.*, 20 FCC Rcd. 8999, ¶ 1 (May 16, 2005) (hereinafter "2005

Order"). In that same order, the FCC concluded that continuing to waive the study area definition, thereby permitting SIC to be eligible to receive high-cost universal support funds, would "not have an unacceptable adverse impact on the [USF]." 2005 Order ¶ 17. Of note, SIC cites to 47 C.F.R. § 54.307 (emphasis added), which creates an exception in the limited circumstance where a *competitive eligible telecommunications carrier* "captures the subscriber lines of an incumbent [LEC] or serves new subscriber lines in the incumbent LEC's service area." *Compare* Compl. at 14–15 (emphasis added), *with* 47 C.F.R. § 54.307. The FCC expressly found that SIC should continue "to be treated as an *incumbent LEC* for purposes of receiving universal support." 2005 Order ¶ 1. As plaintiff was deemed an incumbent LEC, § 54.307 does not apply, the applicable regulation is 47 U.S.C. § 214(e), which is discretionary.

A. Cuts to SIC's NECA Funding for Paniolo Lease

In 2007, SIC informed NECA that it was considering a finance lease with Paniolo, LLC ("Paniolo"), to build an inter-island network. *Sandwich Isles Commc'ns, Inc.*, 25 FCC Rcd. 13647, ¶ 5 (Sept. 29, 2010) (hereinafter "2010 Order"). Paniolo, a different corporate vehicle of SIC's parent Waimana, was created for the sole purpose of building an inter-island network which SIC would then lease. *Compl.* at 16. Paniolo was formed in order to create an accommodation account with which it would receive

SIC's NECA payments. *Id.*[1] After receiving SIC's cost forecast, NECA sent SIC a letter, expressing "serious concerns about the amount of the proposed costs and requesting specific details of the proposed cable system." 2010 Order, ¶ 6. NECA then notified SIC that the costs for the undersea cable transaction "[did] not appear to meet the standards of the 'used and useful' doctrine," and that NECA may not accept SIC's proposed costs for the tariff filing or for pool reporting. *Id.* ¶ 6. SIC states that despite NECA's response in the 2010 Order, NECA approved SIC's proposal for leasing a new inter-island network from Paniolo, where SIC would "include the new cable lease costs ($15 million annually) in its NECA cost submissions." Compl. at 16.[2]

On September 29, 2010, the FCC issued the 2010 Order in which it determined that, under the "used and useful standard," SIC could not include 100% of the underwater cable lease costs in its NECA cost submissions. *Id.* ¶ 9. The FCC further found that because the cable was being increasingly "used for

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[1] Prior to building the new Paniolo underwater cable, SIC leased a pre-existing underwater cable from another company for $1.9 million annually. 2010 Order at ¶ 18.

[2] SIC's claim that NECA approved SIC's proposal to include 100% of the new cable lease in its costs submissions is inconsistent with the 2010 FCC Order. 2010 Order ¶ 10 ("[A]lthough the Division granted a waiver to allow Sandwich Isles to participate in the NECA pool, it did not find that it is in the public interest to include all of the cable leasing costs in the NECA revenue requirement; at best, this decision is an initial determination that Sandwich Isles, as a small, new carrier providing service to a previously unserved area, would benefit from participation in the NECA pool as a general matter.").

services provided outside of the NECA tariff, that associated portion of the lease costs [would] be ascertainable and [would] not be subject to inclusion in the NECA pool under the framework adopted in [the] order." *Id.* ¶ 25. However, the FCC allowed SIC to include 50% of the underwater cable leasing costs in SIC's future NECA cost submissions. *Id.* ¶ 9.

On December 5, 2016, the FCC directed NECA to "discontinue payment of the disputed amounts and to cease allowing SIC to include 50 percent of the disputed lease costs of the cable lease expenses, as well as certain other expenses in its revenue requirement." Compl. at 17 (citing *In the Matter of AT&T Application for Review; Sandwich Isles Commc'ns, Inc., Petition for Declaratory Ruling*, 31 FCC Rcd. 12977, ¶ 9 (Dec. 5, 2016) (hereinafter "AT&T Order"). The FCC made this decision to cut SIC's NECA funding because "the cost and capacity of the Paniolo cable system [were] far in excess of what [was] reasonably required." AT&T 2016 Order ¶ 38. However, the FCC permitted SIC to continue receiving the $1.9 million annual leasing costs for the existing cable, the amount SIC had been receiving prior to the construction of the Paniolo cable. *Id.* ¶ 46. SIC then filed an appeal challenging the FCC's order, which the United States Court of Appeals for the District of Columbia ("D.C. Circuit") denied. *See generally Sandwich Isles Commc'ns, Inc.*, 741 F. App'x 808.

B. Cuts to SIC's Universal Service Fund Support

In 2011, the FCC issued a new rule that capped USF high-cost support at $250 per line per month.

Compl. at 18 (citing *Connect Am. Fund et al.*, 26 F.C.C. Rcd. 17663 (Nov. 18, 2011) (hereinafter "USF/ICC Transformation Order"), *petition for review denied*, *In re FCC 11-161,* 753 F.3d 1015 (10th Cir. 2014)). The FCC noted in the final rule that the price cap could negatively affect carriers, so it implemented a procedure that allowed affected carriers "to file a petition for waiver that clearly demonstrated that good cause exists for exempting the carrier from some or all of the reforms." *Id.* (citing USF/ICC Transformation Order ¶ 193). Accordingly, SIC filed a petition for waiver, which the FCC denied on May 10, 2013, as SIC "ha[d] certain expenses that appear[ed] grossly excessive and unreasonable." *Connect Am. Fund*, 28 F.C.C. Rcd. 6553, 6558 (May 10, 2013) (hereinafter "2013 Order"); Compl. at 19.

SIC points out that in June of 2015, the FCC cut off SIC's USF support and directed USAC to discontinue distributing any USF payments. Compl. at 19–20. SIC filed a petition with the FCC, requesting that the FCC continue making USF payments. *Id.* The FCC has yet to rule on that petition. *Id.* at 20. In 2017, SIC filed a petition for writ of mandamus at the D.C. Circuit, asking the Court to order the FCC to reinstate the USF support, which the Court denied on February 16, 2018. *Sandwich Isles Commc'ns, Inc.*, No. 17-1248, 2018 U.S. App. LEXIS 4139 (D.C. Cir. Feb. 16, 2018).

On July 13, 2015, Albert Hee, manager of SIC and its holding company, Waimana Enterprises, Inc., was convicted of violating the tax code. Compl. at 20. Specifically, Mr. 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.* Mr. Hee was indicted and subsequently convicted on six counts of tax fraud and one count of corruptly impeding the administration of internal revenue laws. 2016 Order ¶ 32 (2016). Between 2002 and 2012, Waimana payed $4,063,294.39 of Mr. Hee's personal expenses, which he improperly designated as business expenses. *Id*. Mr. Hee personally instructed his assistant "on how to record and categorize the personal expenses and payments in Waimana's books as business expenses incurred by Waimana or an affiliate company." *Id*. ¶ 34. Among these expenses were: (1) $90,000 for personal massages as "consulting services," and (2) reimbursements totaling "at least $119,909.19, which included $55,232.23 for family vacations to France and Switzerland in 2008, Disney World in 2010, Tahiti in 2010, and the island of Hawaii in 2011." *Id.* ¶ 39. Furthermore, Mr. Hee instructed his personal assistant, Nancy Henderson, "to use company funds to make payments towards his three children's undergraduate and graduate education expenses and directed the payments to be recorded in corporate accounts as 'educational expenses.'" *Id.* ¶ 40. Additionally, in 2018, Mr. Hee directed Waimana to purchase a $43,000 SUV and a home in California for $1.3 million using funds from Waimana and an affiliate company. *Id.*[3] Mr. Hee also instructed his personal assistant to place Mr. Hee's wife and children on the payroll and dictated their salaries and benefits. 2016

[3] While enrolled in university, Mr. Hee's children, Charlton and Breanne, lived in the home and used the SUV for their personal use. 2016 Order ¶ 40.

Order ¶ 41.[4] Testimony from Mr. Hee's personal assistant and his children revealed that the children received "a salary and benefits from Waimana while attending school full-time on the mainland and while employed elsewhere." *Id*. The business records reflect that Mrs. Hee and the Hee children were payed $1,680,685.92 in salary and benefits from 2002 through 2012. *Id*. At the time of his testimony Charlton Hee, Mr. Hee's son, had been working for a Hawaiian state agency for four months while he continued to receive a salary from Waimana. *Id*. ¶ 38.

On July 28, 2015, following Mr. Hee's conviction, the FCC issued an order directing USAC to suspend "high-cost funding to Sandwich Isles pending completion of further investigation and/or other ameliorative measures to ensure that any funding provided is used solely in a manner consistent with Commission rules and policies." *Id.* ¶ 43. Consistent with that order, USAC suspended SIC's USF support and audited SIC's use of USF funds from 2002 to 2015. Compl. at 21. The audit revealed that "SIC received several millions of dollars of Universal Funds that it should not have received." *Id.* The FCC also directed USAC "to determine if there were sufficient assurances that the high-cost support amounts provided on a going forward basis would be used consistent with the Commission's rules." 2016 Order ¶ 44.

Following the USAC investigation, the FCC issued an order on December 5, 2016, directing USAC to

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[4] Mr. Hee's personal assistant testified "that [Mr. Hee's wife] was in the office 'occasionally' or 'every couple of months' and saw [her] do work in the office 'one time.'" 2016 Order ¶ 41.

recover $27,270,390 from SIC for the USF overpayments it received from 2002 to 2015. 2016 Order ¶ 2.[5] The FCC ordered SIC "to resubmit its cost studies for costs incurred in 2013, 2014 and 2015 . . . so that USAC [could] determine the proper amount of high-cost support to Sandwich Isles for 2015, 2016 and 2017 consistent with [FCC's] findings in [that same] Order." *Id.* ¶ 148. The 2016 Order further stipulated that, after SIC resubmitted its cost studies and the FCC formally determined how SIC would reimburse the USF, the FCC would direct USAC to lift the suspension of high-cost support. *Id.* Following the FCC's guidance, the Hawaii Public Utilities Commission ("HPUC") elected not to certify SIC as eligible for future USF funding. Compl. at 20. As a result, SIC has not received funds from the USF since September 2015, as an eligibility certification is a prerequisite to receiving USF funds. *See* 47 U.S.C. §214(e)(3).

On January 9, 2019, the FCC denied SIC's petition seeking a rehearing of the 2016 Order because the FCC's Order already addressed the underlying issues. *Sandwich Isles Commc'ns, Inc.*, No. 18-172, 2019 WL 105385, ¶ 4 (F.C.C. Jan. 3, 2019) (hereinafter "2019 Order on Reconsideration"). In response, SIC appealed the FCC's decision to the D.C. Circuit, which dismissed the appeal as untimely. *See generally Sandwich Isles Comm'ns Inc. v. FCC*, No. 19-1056, 2019 WL 2564087 (D.C. Cir. May 17, 2019).

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[5] The amount of $27,270,390 is the total amount of improper payments. The $26,320,270 amount is the improper payments associated with the Cable and Wire Facilities Costs. 2016 Order ¶ 57.

C. SIC's Claims

SIC's allegations are based on the cumulative effect of the FCC's actions. SIC alleges that the FCC's actions injured SIC because subsequent funding "[fell] short of covering the debt-service payments and operating costs [SIC] continues to bear in order to provide telecommunications services to native Hawaiians, much less allow for returns to meet SIC's reasonable investment-backed expectations." Compl. at 22.

Count One alleges that the FCC breached an implied-in-fact contract when the FCC "drastically reduce[d] SIC's compensation." Compl. at 23. In Count Two, SIC purports that the FCC effected a taking for public use when it reduced SIC's USF and NECA funding, depriving "SIC of its reasonable, investment-backed property interests." *Id.* at 23–24. Count Three alleges that the FCC's actions violated the Communications Acts of 1934 and 1996, which require that the FCC continue providing support while SIC was required to continue providing telecommunications services. *Id.* at 25–26 (citing 47 U.S.C. § 214(e)(1)). Finally, Count Four alleges that the FCC's 2015 suspension of USF funds violated 47 C.F.R. § 54.307(a), which states the following:

> A competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible telecommunications carrier captures the subscriber lines of an incumbent local exchange

> carrier (LEC) or serves new subscriber lines in the incumbent LEC's service area.

47 C.F.R. § 54.307(a); *see also* Compl. at 26–27.

II. Standard of Review

This Court's jurisdiction is primarily defined by the Tucker Act, which waives the sovereign immunity of the United States for claims not sounding in tort that are founded upon the Constitution, an Act of Congress, an executive department regulation, or an express or implied contract with the United States. *See* 28 U.S.C. § 1491(a)(1). The Tucker Act is merely a jurisdictional statute, and "does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, to fall within the scope of the Tucker Act, "a plaintiff must identify a separate source of the substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc* in relevant part).

A complaint will be dismissed for failure to state a claim upon which relief can be granted "when the facts asserted by the claimant do not entitle [them] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1256 (Fed. Cir. 2002) (citing *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000)). When deciding a motion to dismiss under RCFC 12(b)(6), the Court "must accept as true all the factual allegations in the complaint, and [the Court] must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F. 3d 1375, 1378 (Fed. Cir. 2001). To survive a motion to dismiss, the complaint

must also meet the plausibility standard, which means the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For a claim to be plausible, it must contain well-pleaded factual allegations "respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell*, 550 U.S. at 562. However, the Court is not obligated to "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994).

III. Discussion

In its Motion to Dismiss, defendant argues that the Court's jurisdiction over plaintiff's claim is preempted by the Communications Act of 1934 and the Hobbs Act, thereby displacing this Court's Tucker Act jurisdiction. *See generally* Def.'s MTD at 13–19. In determining whether a statutory scheme displaces Tucker Act jurisdiction, a court must "examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes." *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 444 (1988)). The Communications Act of 1934 and the Hobbs Act specify the process for judicial review of FCC orders. *Id.* at 14–15. The Communications Act of 1934 states, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter (except those appealable under subsection (b) of this section) shall be

brought as provided by and in the manner prescribed in [the Hobbs Act]." 47 U.S.C. § 402(a). The Hobbs Act states in relevant part:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
>
> . . .

28 U.S.C. § 2342(1). Section 402(b) of title 47 lists certain FCC decisions and orders that are exclusively reviewable by the D.C. Circuit. *See* 47 U.S.C. § 402(b). Importantly, subsections 402(a) and (b) are mutually exclusive, as "[a]ppeals from all decisions of the Commission that do not fall within subsection 402(b) are encompassed by the procedures of subsection 402(a)." *Folden v. United States*, 379 F.3d 1344, 1356 (Fed. Cir. 2004). In fact, "subsections 402(a) and (b) comprise the entire statutory regime by which parties may obtain judicial review of Commission decisions." *Id*. Thus, appeals of FCC decisions and orders are limited to the jurisdictions of the courts of appeals under subsection 402(a), or the D.C. Circuit under subsection 402(b). *Id.*

With this statutory framework in mind, the Court next must determine whether plaintiff's claims are challenges to FCC orders. Defendant contends that SIC's Complaint "plainly represents a challenge to FCC

actions and orders." Def.'s MTD at 17. Plaintiff, however, argues that its claims are not challenges to FCC orders, and that

> [n]o FCC order required that SIC's [USF] support be cut to zero. No FCC order dictated that the FCC endorse SIC's construction of its network as it stands today; assist SIC in borrowing hundreds of millions of dollars to construct the network; and then (after the investment has been made) reduce the rates SIC can charge to virtually nothing.

Pl.'s Resp. at 2.

In analyzing whether subsection 402(a) applies, the Court "must look to the true nature of [plaintiff's] claim, not how plaintiff characterize[s] it." *Folden,* 379 F.3d at 1359, n.13; *see also Son Broad., Inc. v. United States*, 42 Fed. Cl. 532, 534 (1998) ("The court, however, is not required to accept plaintiff's framing of the complaint and, instead, must look to plaintiff's factual allegations to ascertain the true nature of plaintiff's claims."). Similar to the plaintiffs in *Folden*, SIC frames its claim as a "breach of contract, breach of the duty of good faith and fair dealing, Fifth Amendment taking of property without just compensation, and violation of federal statutes and regulations mandating compensation." *Compare Folden*, 379 F.3d at 1359, *with* Compl. at 2. In *Folden*, though plaintiffs framed their cause of action against the FCC as a breach of contract claim, the Federal Circuit ultimately found that plaintiffs' claim was challenging an FCC decision. *Folden* at 1359 n.13. This brings the claim under the exclusive jurisdictional

purview of the D.C. Circuit pursuant to 47 U.S.C. § 402(b). *Id.*

The Federal Circuit in *Folden* also found that plaintiffs' breach of contract claim was a pretextual attack on the FCC's decision because the "true nature" of the claim targeted the FCC's procedural decisions that allegedly gave rise to plaintiffs' breach of contract claim. *Id.* ("At root, plaintiffs' action plainly represents a challenge to the Commission's failure to hold relotteries for the seven RSA licenses at issue. It is on those terms that we approach the question whether subsection 402(b) applies to it."); *cf. Shanbaum v. United States*, 1 Cl. Ct. 177, 178 (1982), *aff'd*, 723 F.2d 69 (Fed. Cir. 1983) ("plaintiffs do not challenge the validity or propriety of the FCC order concerned. Instead, plaintiffs argue that the order itself was a 'taking' . . . [so] the Claims Court has jurisdiction."). This Court has since clarified that "[r]eview of decisions ancillary to the FCC's licensing decisions and litigation that at its 'root' is a grievance against an FCC licensing determination must be brought in the D.C. Circuit." *Biltmore Forest Broad. FM, Inc. v. United States*, 80 Fed. Cl. 322, 330 (2008). It seems clear to this Court that the "true nature" of SIC's claims is focused on challenging the validity and propriety of FCC orders and actions, therefore bringing those claims under the purview of 47 U.S.C. § 402(b).

SIC points to several FCC actions to support its claims. First, SIC points to NECA funding reductions that resulted from the 2010 and 2016 FCC Orders. *See generally* Compl. In 2010, the FCC issued its first Order that reduced the amount SIC could include in its

NECA costs submissions for the Paniolo underwater cable lease from 100% to 50%. *See* 2010 Order at 13650. Then, in 2016, the FCC issued its second Order, reducing the reimbursement rate from 50% to 0%, but still allowing SIC to recover $1.9 million annually, the amount it recovered from the prior underwater cable lease. *See generally* 2016 Order. SIC appealed the 2016 Order, but the appeal was denied. *See generally Sandwich Isles Commc'ns*, 741 F. App'x 808.

Next, SIC objected to the FCC's May 10, 2013 denial of SIC's petition for a waiver of the $250 per line monthly cap on USF support. *See* Compl. 18–19; *see also* 2013 Order at 6558 (2013). Pursuant to 47 U.S.C. § 402(b) and 28 U.S.C. § 2342(1), however, only the D.C. Circuit (other than the United States Court of Appeals for the Federal Circuit) possesses jurisdiction over claims challenging the FCC's denial of this type of waiver.

Finally, SIC's challenge to the suspension of funding is currently pending before the FCC. Compl. at 19–20. A matter pending before the FCC does not divest the court of appeals of its exclusive jurisdiction over appeals of FCC orders. *See Pub. Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) ("[W]here a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review."). The FCC addressed the USF fund suspension in the 2016 Order, where it said it would "direct USAC to lift the suspension of the Company's high-cost support" once the FCC determines "how the Company will reimburse the Fund." 2016

¶ 148 (2016). SIC appealed the 2016 Order, but it was dismissed as untimely. *See generally Sandwich Isles* 2019 WL 2564087.

SIC's claims attempt to recover the funds cut by these FCC orders. While SIC characterizes its claims as a breach of contract, breach of duty of good faith and fair dealing, Fifth Amendment taking, and statutory violation, the true nature of SIC's claims is targeted at invalidating the FCC orders. Although SIC alleges it is not challenging the substance of the FCC orders, it is clear to the Court that plaintiff is attempting to circumvent those orders. As such, and pursuant to 47 U.S.C. § 402(b) and 28 U.S.C. § 2342(1), only the D.C. Circuit—not the Court of Federal Claims—has jurisdiction over plaintiff's causes of action. Thus, SIC's claims do not fall within this Court's jurisdiction and must be dismissed.

IV. Conclusion

For the reasons set forth above, defendant's Motion to Dismiss is **GRANTED** pursuant to Rules 12(b)(1) and 12(b)(6). The Clerk is hereby directed to enter judgment consistent with this opinion.

IT IS SO ORDERED.

s/ *Loren A. Smith*
Loren A. Smith,
Senior Judge

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 19-149 C

[Filed: October 15, 2019]

SANDWICH ISLES COMMUNICATIONS, INC., Plaintiff,	)
v.	)
THE UNITED STATES, Defendant.	)

JUDGMENT

Pursuant to the court's Oder, filed October 11, 2019, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed.

Lisa L. Reyes
Clerk of Court

By: Anthony Curry
Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 19-149

[Filed: January 31, 2020]

SANDWICH ISLES COMMUNICATIONS, INC., Plaintiff,	)
v.	)
THE UNITED STATES, Defendant.	)

Lex R. Smith, Kobayashi, Sugita & Goda, Honolulu, HI, counsel for plaintiff.

Shari A. Rose, U.S. Department of Justice, Civil Division, Washington, DC, counsel for defendant.

ORDER

On October 15, 2019, the Court granted defendant's Motion to Dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"). *See generally* Opinion and Order, No. 19-149, ECF 12 (hereinafter "Opinion"). On October 22, 2019, plaintiff, Sandwich Isles Communications, Inc. ("SIC"), filed a motion for

reconsideration under RCFC 59. *See generally* Plaintiff's Motion for Reconsideration of this Court's Opinion and Order Granting Defendant the United States Motion to Dismiss Plaintiff's Complaint, No. 19-149, ECF 14 (hereinafter "Pl.'s Mot."). For the following reasons, plaintiff's Motion for Reconsideration is denied.

In its Motion for Reconsideration, SIC centers its argument around when its alleged takings claim became ripe. Pl.'s Mot. 3. Plaintiff contends that the Court held that "SIC must present its taking claim at a time when the claim is not ripe," and that such a holding was a "manifest error of law." *Id.* at 1. Plaintiff further asserts that "the Court's Order denied SIC recourse altogether." *Id*. at 4. These assertions reflect a misunderstanding of the Court's Order and Opinion. The crux of the Court's holding is that review of Federal Communications Commission ("FCC") orders falls outside of this Court's jurisdiction. Opinion at 9.

In its October 11, 2019 Opinion, the Court explained that the Communications Act of 1934 and the Hobbs Act dictate the jurisdictional parameters surrounding the review of FCC orders. Opinion at 7. The Communications Act of 1934 states that, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [the Hobbs Act]." 47 U.S.C. § 402(a) (2018). Subsection 402(b) provides the Court of Appeals for the D.C. Circuit with jurisdiction over the appeal of specific FCC decisions and orders. *Id*. § 402(b). The Hobbs Act

states that "[t]he court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1) (2018). Read together, these two Acts provide a comprehensive jurisdictional framework for the review of FCC orders.

In both its Complaint and Memorandum opposing defendant's Motion to Dismiss, SIC categorized its claims as a breach of contract, a breach of duty of good faith and fair dealing, a Fifth Amendment Taking, and a statutory violation. *See* Complaint, No. 19-149, ECF 1 at 2; *see also* Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint, No. 19-149, ECF 10 at 4–5. However, in its Opinion and Order dismissing this case, the Court found that the true nature of plaintiff's case was a challenge to FCC orders. Opinion at 9. As a result, and for the reasons fully enumerated in the October 11, 2019 Opinion, the Court dismissed plaintiff's Complaint for lack of subject-matter jurisdiction pursuant to RCFC 12(b)(1). *Id*.

As the Court is jurisdictionally barred from reviewing challenges to FCC orders, the Court felt it would be superfluous to discuss additional grounds for dismissing plaintiff's Complaint. However, as the plaintiff raised the issue of ripeness in its Motion for Reconsideration, the Court will briefly address it now. To the extent that a takings claim can arise out of the FCC orders at issue here, the Court agrees with the plaintiff's assertion that the Court cannot rule on a

takings claim that is not yet ripe. However, as SIC has not yet received a decision regarding its 2015 petition challenging the suspension of its high-cost subsidies, any takings claim, to the extent that one even exists, remains unripe. After careful consideration, and for the foregoing reasons, the Court hereby **DENIES** plaintiff's Motion for Reconsideration.

IT IS SO ORDERED.

/s/Loren A. Smith
Loren A. Smith,
Senior Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1446

[Filed: June 16, 2021]

NOTE: This order is nonprecedential.

SANDWICH ISLES COMMUNICATIONS, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

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

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.[*]

PER CURIAM.

O R D E R

Sandwich Isles Communications, Inc. filed a combined for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on June 23, 2021.

FOR THE COURT

June 16, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

[*] Circuit Judge Evan J. Wallach assumed senior status on May 31, 2021 and did not participate in the decision on the petition for rehearing en banc.

APPENDIX G

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1491(a)

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or

Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

47 U.S.C. § 402(a)

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

28 U.S.C. § 2342

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.