

No. 21-719

In the
Supreme Court of the United States

SANDWICH ISLES COMMUNICATIONS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii
REPLY BRIEF 1
CONCLUSION..... 3

TABLE OF AUTHORITIES

CASES

Duquesne Light Co. v. Barash,
488 U.S. 299 (1989)..... 2

Verizon Commc'ns, Inc. v. FCC,
535 U.S. 467 (2002)..... 2

REPLY BRIEF

This case is on all fours with the precedents of this Court and others, holding that where a rate-making authority sets confiscatory rates, a public utility's property has been taken without just compensation. Up to now, the United States of America ("USA") has taken the position that Sandwich Isles Communications, Inc. ("SIC") brought its takings claim to the wrong court and should file its takings claim in the FCC. *See* App.9. Now, in a complete about-face, the USA claims SIC is too late to make a takings claim; that the takings claim should have been raised, on appeal from previous FCC orders regarding rates, even though the precedents are clear that the effects of the rate were not, and could not have been, known at time of the orders the USA claims should have been appealed as takings violations. Moreover, there was no opportunity to present evidence, anywhere, regarding the impact on the public utility of the orders. In essence, the USA now argues that the first tribunal to consider a taking claim is the Court of Appeals, with no evidence presented regarding the impacts of the rates. The USA's new position confirms that the Tucker Act provides the only place a public utility can vindicate its Constitutional right not to have its property taken without just compensation. The USA's new position is even more outrageous due to the fact that SIC had never received any ruling on its 2015 FCC petition. *See* App.10.

The utter confusion in the USA's own briefing on this subject confirms that the only place where SIC can

get a determination on the merits of the takings claim¹ SIC is constitutionally entitled to make is in the Court of Federal Claims. It makes no sense to make a takings claim with the agency that created the unconstitutional taking and has refused to make a decision on SIC's 2015 rate petition.

The USA now, in essence, acknowledges that the FCC provides no proceeding in which a takings claim could be made after the effects of a rate are known. Their new theory, that the claim should be made before the effects are known is not only contrary to the governing law requiring that the effect of the rate be known but also wrong because the FCC has no procedure for making a takings claim before the rate is set.

This Court has consistently maintained that a plaintiff bringing a confiscatory rate takings claim must have hard and fast numbers in hand in order to avoid dismissal on ripeness grounds. *See, e.g., Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 497 (2002); *Duquesne Light Co. v. Barash*, 488 U.S. 299, 314 (1989).

¹ The United States extensive background statement alleging "misuse of funds" purposely fails to mention SIC was audited more than once each year for 20 years and each audit was reviewed and/or performed by the United States or its contractors each audit concluding no significant findings, the conviction of Albert Hee did not involve or implicate SIC and the after conviction finding by the Universal Service Administrative Company ("USAC") that SIC received \$27 million that it should not have was contrary to a pre-conviction review by USAC.

The USA's brief ignores this precedent and instead urges that SIC should have presented its taking claim for the first time in the Court of Appeals, appealing from the order setting the rate in the first place. This new interpretation would obviously deny SIC any forum in which to present evidence of how the rate effected a taking; as the Court of Appeals does not receive new evidence.

The FCC set the rates SIC could charge so low that most of SIC's assets have all been foreclosed and sold by SIC's lender. The FCC's decision to include subsidies in the rate changes nothing. The authorities are absolutely clear that when the government does this, it is the textbook definition of a taking without just compensation. SIC has a right under the U.S. Constitution to make this claim. The USA's effort to deny it deprives SIC of its Constitutional right to due process of law.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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