

No. 17-1036

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SANDWICH ISLES COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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

BRIEF FOR RESPONDENTS

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

(A) **Parties and Amici.** All parties appearing in this Court are listed in the Brief for Petitioner.

(B) **Ruling under Review.** The petition for review challenges the following order of the Federal Communications Commission: *AT&T Application for Review; Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, 31 FCC Rcd 12977 (JA __) (2016). That order granted in part AT&T Inc.'s application for review and denied Sandwich Isles Communications, Inc.'s petition for reconsideration of the following decision of the FCC's Wireline Competition Bureau: *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, 25 FCC Rcd 13647 (JA __) (Wireline Comp. Bur. 2010).

(C) **Related Cases.** The order under review has not previously been before this Court or any other court. As indicated in the Brief for Petitioner, Sandwich Isles has filed a petition for mandamus concerning its petition for administrative reconsideration of a separate FCC order in which the agency found that Sandwich Isles had improperly collected federal high-cost subsidy payments and paid inflated fees to its parent company. *See In re Sandwich Isles Commc'ns, Inc.*, No. 17-1248 (D.C.

Cir.). In addition, the U.S. District Court for the District of Columbia previously dismissed a related suit by Sandwich Isles and others against the National Exchange Carrier Association. *See Sandwich Isles Communications, Inc. v. Nat'l Exch. Carrier Ass'n*, 779 F. Supp. 2d 44 (D.D.C. 2011).

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GLOSSARY

NECA National Exchange Carrier Association

RUS Rural Utilities Service

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BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

Petitioner Sandwich Isles Communications, Inc. seeks review of a final order of the Federal Communications Commission: *AT&T Application for Review; Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, 31 FCC Rcd 12977 (JA __) (2016) (*Order*). The *Order* was released on December 5, 2016. As required under 28 U.S.C. § 2344, Sandwich Isles filed its petition for review within 60 days. This Court has jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

QUESTIONS PRESENTED

In 2007, when Sandwich Isles was a fledgling telephone company serving fewer than 2,000 subscribers in rural areas of Hawaii, it commissioned the construction of the state's largest undersea communications cable and agreed to lease that cable from the company that built it at an initial price of \$15 million per year. Before doing so, Sandwich Isles notified the National Exchange Carrier Association (NECA), which administers a revenue-pooling program that reduces the costs and risks associated with operating small telephone companies nationwide. Mindful of the association's responsibility to protect the needs of *all* participating telephone companies and their ratepayers, NECA immediately warned Sandwich Isles not to count on recovering all of its proposed lease costs through pooling. Among other things, NECA was concerned that Sandwich Isles' small subscriber base did not require such a large and expensive cable. Disregarding NECA's warning, Sandwich Isles went ahead with its plan anyway.

NECA gave Sandwich Isles numerous opportunities to demonstrate why the full capacity of its new cable, the "Paniolo" cable, benefitted ratepayers. Ultimately, however, NECA found that only \$1.9 million of

the annual Paniolo lease costs were eligible for pooling. Sandwich Isles appealed to the FCC, seeking a ruling that the lease costs were pool-eligible in full. In 2010, the agency's Wireline Competition Bureau, acting under delegated authority, directed NECA to treat 50 percent of the disputed lease costs as pool-eligible, over and above the \$1.9 million allowance that was not disputed. That staff-level decision was based on predictions concerning how the Paniolo cable might serve the public interest that later proved wrong. When addressing administrative appeals of the staff's order in 2016, after two further rounds of public comment, the Commission found that the staff's prior predictions were not borne out by the updated record. Accordingly, the Commission held, the disputed lease costs were not pool-eligible going forward.

The petition for review presents the following questions:

1. Was it reasonable for the Commission to decide in the *Order* under review that, based on the record before the Commission in 2016, there was no longer reason to allow Sandwich Isles to recover through NECA pooling more than the \$1.9 million that approximates its baseline used and useful costs (unless and until Sandwich Isles provides NECA with new evidence that justifies a greater recovery)?

2. Was the Commission's decision reasonably explained?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

A. Sandwich Isles

In 1995, Hawaii licensed Sandwich Isles to construct and operate a modern telecommunications network serving the Hawaiian Home Lands.¹ Br. 7. Sandwich Isles began operations in December 1997 through the services of a wireless carrier. *Sandwich Isles Communications, Inc.*, 13 FCC Rcd 2407, 2409 ¶ 5 (JA __) (Common Carrier Bur. Accounting and Audits Div. 1998) (*1998 Division Order*), *reversed on other grounds by GTE Hawaiian Telephone Co.*, 19 FCC Rcd 22268 (JA __) (2004) (*2004 Commission Order*).

¹ The Hawaiian Home Lands are a land trust of over 200,000 mostly rural acres on the islands of Hawaii, Maui, Molokai, Lanai, Oahu, and Kauai. *See Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, 25 FCC Rcd 13647, 13647 ¶ 2 n.3 (JA __) (Wireline Comp. Bur. 2010) (*Staff Declaratory Ruling*); *About the Department of Hawaiian Home Lands*, Hawaii.gov, <http://dhhl.hawaii.gov/about/> (last visited Jan. 16, 2018).

As a “rate-of-return” carrier, *Staff Declaratory Ruling* ¶ 23 n.80 (JA __–__), Sandwich Isles must “charge rates no higher than necessary to obtain sufficient revenue to cover [its] costs and achieve a fair return on equity.” *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174, 177–78 (D.C. Cir. 1993) (internal quotation marks omitted). The company sets rates for its regulated services in “schedules of charges,” or tariffs, filed with the FCC. 47 U.S.C. § 203.

B. NECA Pooling

It can be costly for small telephone companies to prepare and maintain company-specific tariffs. *See Sandwich Isles Communications, Inc.*, 20 FCC Rcd 8999, 9011 ¶ 28 (JA __) (Wireline Competition Bur. 2005) (*Study Area Waiver Order*). To reduce small carriers’ administrative costs and allow them “to share the risks of providing interstate services,” the FCC has created a “pooling” process administered by the not-for-profit corporation NECA. *National Exchange Carrier Association, Inc.*, 12 FCC Rcd 3657, 3658 ¶ 3 n.4 (Common Carrier Bur. 1997); *see* 47 C.F.R. § 69.601(a); Comments of NECA 4 (JA __) (Aug. 31, 2009) (NECA 2009 Comments).

Carriers that participate in pooling must report cost, demand, and revenue data to NECA. *See* 47 C.F.R. § 69.605(a); *Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes*, 10 FCC Rcd 6243, 6244 ¶ 1 (1995) (*Safeguards Order*); NECA 2009 Comments 4–5 (JA __–__). NECA uses the data it receives to file its annual “traffic-sensitive” tariff with the FCC on behalf of participating small carriers,² *see* NECA 2009 Comments 4–5 (JA __–__), as well as to “calculate monthly pool revenue distributions” to participating carriers, “reimburse” member carriers “for access expenses to the extent their reported costs exceed their reported revenues,” “and distribute the pool ‘residue’ or return on investment[],” *id.* at 5 (JA __); *accord July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd 24937, 23878 ¶ 2 (2004).

² This covers usage-sensitive transport rates for Digital Subscriber Line “and other broadband services,” as well as “charges to [long-distance] carriers . . . for long-distance [voice] traffic” (known as “switched access charges”). *Telecom Terminology*, NECA.org, https://www.neca.org/Telecom_Terminology.aspx (last visited Jan. 16, 2018). End-user rates for voice telephone calls (as distinct from access charges that long-distance carriers pass through to their customers) are not part of the NECA traffic-sensitive pool.

Pooling is “a ‘zero sum’ proposition.” Comments of NECA on Refresh Public Notice 2 (JA __) (Apr. 28, 2016) (NECA 2016 Comments). “[I]f one company recovers too much money from the pool, other companies, and ultimately their ratepayers, have to pay the difference.” *Id.* It is thus a carrier’s burden to justify the cost, demand, and revenue data it submits to NECA. *See* 47 C.F.R. §§ 69.601(c), 69.605(a). When a carrier disagrees with NECA’s analysis of its data, it may seek a declaratory ruling from the FCC to resolve the dispute. *See Safeguards Order*, 10 FCC Rcd at 6260 ¶ 44.

In determining which carrier costs are eligible for inclusion in the pool’s rate base, both NECA and the Commission use a “traditional regulatory standard of valuation”: whether a given investment is “used and useful.” *Am. Tel. and Tel. Co.*, 64 F.C.C.2d 1, 46 ¶ 110 (1977) (*AT&T Phase II Order*); *see Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 779 (D.C. Cir. 1990); *Order* ¶ 10 (JA __); NECA 2009 Comments 13–18 (JA __–__). “Property is considered used and useful if it is ‘necessary to the efficient conduct of a utility’s business, presently or within a reasonable future period.’” *Order* ¶ 10 (JA __) (quoting *AT&T Phase II Order*, 64 F.C.C.2d at 47 ¶ 111).

Whether an investment is used and useful depends on “[t]he particular facts of each case.” *Order* ¶ 10 (JA __) (quoting *AT&T Phase II Order*, 64 F.C.C.2d at 48 ¶ 115). But the Commission has identified several generally applicable principles, including “1) the need to compensate the investor for capital devoted to serving ratepayers; 2) the need to charge ratepayers for only those investments which benefit them; and 3) the need for such benefit to be either immediate or realized within a reasonable future period of time.” *Id.* (citing *AT&T Phase II Order*, 64 F.C.C.2d at 47 ¶¶ 111–112); *see also Illinois Bell*, 911 F.2d at 782 (upholding the Commission’s decision to “match[] costs to ratepayers with benefits to ratepayers”). Consistent with those principles, the Commission has observed that “[o]verbuilt plant” will generally not satisfy the used and useful standard. *AT&T Phase II Order*, 64 F.C.C.2d at 48 ¶ 114.

C. *FCC Waiver Orders*

In July 1997, Sandwich Isles petitioned the FCC for a waiver permitting it to receive without delay a federal subsidy to promote the

provision of “universal service.”³ See *1998 Division Order* ¶ 1 (JA __). A division of the Commission’s Common Carrier Bureau, which later became the Wireline Competition Bureau, granted the requested waiver “to the extent necessary to permit [Sandwich Isles] to receive” the subsidy from January 1, 1998, through December 31, 1999. *Id.* ¶ 11 (JA __). In the same order, the staff determined that Sandwich Isles should be permitted “to become a member of NECA and to participate in NECA pools and tariffs.” *Id.* ¶ 15 (JA __). On review of that order, however, the full Commission required Sandwich Isles to seek a further waiver if it wanted to maintain its eligibility to receive federal universal service subsidies and participate in NECA pooling. *Study Area Waiver Order* ¶ 1 (JA __–__); *2004 Commission Order* ¶¶ 8–10 (JA __–__).

Sandwich Isles subsequently petitioned for the necessary waiver, which the Commission’s Wireline Competition Bureau granted in 2005. *Study Area Waiver Order* ¶ 1 (JA __). In doing so, the Bureau determined

³ Universal service means the availability of affordable, reliable telephone service throughout the nation. The FCC’s subsidy program “consists of four separate funds,” including a “high-cost” fund that subsidizes the provision of services in rural and other costly-to-serve areas. *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56–57 (D.C. Cir. 2011).

that, “[b]ecause Sandwich Isles [was] a relatively small company,” with “the potential” for high costs, allowing it to continue participating in NECA pooling served the public interest. *Id.* ¶ 28 (JA __). In reaching that general conclusion, the Bureau did not examine or approve any specific cost elements of Sandwich Isles’ contemplated telecommunications network, including any plans for an undersea cable. *See id.*; accord *Order* ¶ 51 (JA __–__); *Staff Declaratory Ruling* ¶ 10 (JA __–__).

D. Paniolo Cable Lease

Sandwich Isles originally planned to use funding from the Rural Utilities Service (RUS), a component of the U.S. Department of Agriculture, to finance the construction of its inter-island network. *Order* ¶ 3 (JA __). Sandwich Isles obtained a series of loan commitments from RUS, including loans approved in the fall of 2000 for Sandwich Isles to construct an inter-island undersea fiber optic cable. *See White Paper of Sandwich Isles Communications, Inc. in Support of Inclusion of Its Undersea Cable Costs in the NECA Pool* 9–10 (JA __–__) (June 3, 2010) (Sandwich Isles White Paper).

RUS subsequently rescinded its loan approval for the undersea cable—a decision that Sandwich Isles has represented was “based in part on uncertainty surrounding [the company’s] future customer base.” Sandwich Isles White Paper 10 (JA __). Sandwich Isles then sought alternative financing. *Order* ¶ 3 (JA __); *accord* Sandwich Isles White Paper 10 (JA __).

In mid-2007, Sandwich Isles informed NECA for the first time that it intended to seek recovery through the traffic-sensitive pool of costs associated with a proposed lease of undersea cable facilities from a newly formed company, Paniolo, LLC. *See Staff Declaratory Ruling* ¶ 5 (JA __–__); NECA 2009 Comments 9 (JA __); Sandwich Isles White Paper 3, 11 (JA __, __). Sandwich Isles told NECA that a third party would finance Paniolo’s construction of the undersea network, and that Paniolo would then recover its development and construction costs through an exclusive lease of the network to Sandwich Isles. *See Staff Declaratory Ruling* ¶ 5 (JA __); Sandwich Isles White Paper 11 (JA __).

NECA immediately cautioned Sandwich Isles, by correspondence in June 2007, that lease expenses for the Paniolo cable might not be eligible for pooling and recovery from ratepayers. NECA 2009 Comments 9–10

(JA __-__); *see* Sandwich Isles White Paper 11 n.17 (JA __). Despite NECA's express warning, Sandwich Isles entered into a lease with Paniolo on July 19, 2007. NECA 2009 Comments 10 (JA __). Under that agreement, initial lease costs were \$15 million annually, set to increase over time. Sandwich Isles White Paper 11-12 (JA __-__).

E. NECA's Review of the Paniolo Lease Costs

Once Sandwich Isles entered into the Paniolo lease, NECA and Sandwich Isles continued their discussions and correspondence concerning the appropriate treatment of the associated costs. *See* NECA 2009 Comments 10-12 & nn.36, 39 (JA __-__). In April 2008, for example, "NECA sent Sandwich Isles a letter" expressing "serious concerns about the amount of the proposed costs and requesting specific details of the proposed cable system in order to evaluate the Sandwich Isles proposal." *Id.* at 10 (JA __). In early May 2009, NECA reiterated its concerns, stating that the Paniolo lease costs "[did] not appear to meet the standards of the 'used and useful' doctrine." Comments of Sandwich Isles 7-8 (JA __-__) (Aug. 28, 2009) (internal quotation marks omitted). NECA offered at that time to meet jointly with Sandwich Isles and FCC staff to discuss related issues. NECA 2009 Comments 11 (JA __).

On May 18, 2009, NECA, Sandwich Isles, and members of the FCC's staff met to discuss the disputed Paniolo lease costs. *Staff Declaratory Ruling* ¶ 7 (JA __); NECA 2009 Comments 11–12 (JA __). After that meeting, NECA formally notified Sandwich Isles of its decision not to include the disputed costs when formulating the traffic-sensitive tariff or making disbursements from the traffic-sensitive pool. *Id.* at 12 (JA __).

F. *Staff Declaratory Ruling*

In response to NECA's decision, Sandwich Isles petitioned the FCC for a declaratory ruling that all of its Paniolo lease costs were “used and useful,” and thus eligible for inclusion in and settlement from NECA's traffic-sensitive pool. Petition for Declaratory Ruling 1 (JA __) (June 26, 2009). Addressing that petition on delegated authority, the agency's Wireline Competition Bureau declared in September 2010 that 50 percent of the disputed Paniolo lease expenses were reportable for pooling. *Staff Declaratory Ruling* ¶ 9 (JA __). That amount was in addition to the undisputed \$1.9 million—Sandwich Isles' pre-Paniolo lease expenses for transport capacity, plus an additional allowance to account for future growth—which the Bureau and NECA agreed was a

reasonable proxy of Sandwich Isles’ baseline used and useful lease expenses. *See id.* ¶ 18 (JA __).

In issuing that decision, the Bureau flatly rejected Sandwich Isles’ claim that the FCC had already determined that 100 percent of the annual Paniolo lease costs should be included in the NECA traffic-sensitive pool. *Staff Declaratory Ruling* ¶ 10 (JA __–__); *see* Sandwich Isles White Paper 20–25 (JA __–__). Neither the *Study Area Waiver Order* nor the *1998 Division Order*, the Bureau explained, addressed “what costs should ultimately be allowed in Sandwich Isles’ revenue requirement” for NECA pooling. *Staff Declaratory Ruling* ¶ 10 (JA __).

The Bureau next considered whether, and to what extent, the record supported a determination that the annual Paniolo lease expenses met the “used and useful” standard. *Staff Declaratory Ruling* ¶¶ 17–25 (JA __–__). The Bureau found that NECA’s proposal to pay Sandwich Isles \$1.9 million per year “reflect[ed] a reasonable application of the threshold ‘used and useful’ considerations”—concerning actual and reasonably foreseeable usage—that are “ordinarily . . . sufficient to resolve revenue requirement questions.” *Id.* ¶ 18 (JA __). But in resolving such questions, the Bureau explained, the FCC is not limited to

considering “actual usage alone.” *Id.* ¶ 28 (JA __). The agency may, in its discretion, also consider “exceptional, equitable” factors. *Id.*; *see id.* ¶ 18 (JA __).

On the record in 2010, based on certain predictive judgments, the Bureau decided that equitable considerations justified an upward adjustment to the ordinary used and useful determination for Sandwich Isles. *See Staff Declaratory Ruling* ¶¶ 17, 25 (JA __, __). In view of Hawaii’s unique geography, the Bureau predicted that the Paniolo cable would provide valuable backup capacity for existing undersea cables. *Id.* ¶ 19 (JA __). The Bureau also “expect[ed] that Sandwich Isles would offer improved service” to the Hawaiian Home Lands. *Id.* ¶ 20 (JA __). In addition, the Bureau found it “reasonable to anticipate some additional future demand for cable capacity,” *id.* ¶ 23 (JA __), and predicted that at least some portion of the Paniolo cable’s then “spare capacity” would come into use reasonably soon, *id.* ¶¶ 21, 23 (JA __, __). The Bureau’s decision to treat 50 percent of the disputed Paniolo lease expenses as eligible for NECA pooling rested on those predictions. *Id.* ¶ 25 (JA __).

G. Subsequent Administrative Proceedings

Less than one month later, AT&T Inc.—which, as a long-distance carrier, pays access charges subject to NECA’s traffic-sensitive tariff—sought review of the Bureau’s decision by the full Commission. AT&T Application for Review 1, 16 (JA __, __) (Oct. 28, 2010) (Application for Review). The following day, Sandwich Isles petitioned for reconsideration of the *Staff Declaratory Ruling*. Cover Letter to Sandwich Isles Petition for Reconsideration 1 (JA __) (Nov. 3, 2010). The FCC solicited comment on each of those submissions, first in 2010 and again in 2016.

1. Sandwich Isles’ Arguments

In its petition for reconsideration and two sets of comments, Sandwich Isles argued that 100 percent of its annual Paniolo lease expenses should be reportable for NECA pooling. Sandwich Isles stated that it now had “an understanding in principle” that annual Paniolo cable lease payments would drop from “approximately \$24 Million to \$8.1 Million.” Comments of Sandwich Isles 30 (JA __) (Apr. 29, 2016) (Sandwich Isles 2016 Comments). The \$8.1 million figure was derived through “a comparative market analysis” that Sandwich Isles stated it “performed using publicly available data for leased lines from other carriers . . . that offer service in the area.” *Id.*


2. NECA's Arguments

NECA emphasized that Sandwich Isles—although invited to do so as recently as April 2016⁴—still had not presented any evidence demonstrating what portion of the Paniolo cable's capacity was (or would reasonably soon be) used and useful. *See* NECA 2016 Reply Comments 1, 6–7, 11–14 (JA __, __–__, __–__); NECA 2016 Comments 17 n.58, 19, 21 (JA __, __, __). NECA further argued that “the application of the equitable factors [adopted by the Bureau] should be reconsidered in light of the . . . facts” developed since the Bureau's decision. *Id.* at 26 (JA __).

NECA identified with specificity the kind of information it needed, but lacked, to find that the used and useful costs of the Paniolo cable exceed \$1.9 million. Because of the nature of the traffic carried over the Paniolo cable, the most substantial effect of including additional costs for the cable in NECA's traffic-sensitive pool would be on Digital Subscriber Line rates. Thus, it was important to know how much capacity Sandwich Isles' broadband customers currently use or could realistically be expected to use “in the relatively near future”—and Sandwich Isles had

⁴ *See* NECA 2016 Comments 15–16 & n.53 (JA __–__); Reply Comments of NECA on Refresh Public Notice 14 (JA __) (May 9, 2016) (NECA 2016 Reply Comments).

not provided that data. NECA 2016 Comments 17 n.58 (JA __); *see* NECA 2016 Reply Comments 6–8 (JA __–__); *id.* at 13 n.46 (JA __). NECA also challenged the reliability of Sandwich Isles’ claim of an agreement in principle to reduce the Paniolo lease obligations to \$8.1 million per year. *See id.* at iii, 1–2, 11–14 (JA __, __–__, __–__).

NECA further questioned why the Paniolo cable, which could “provide broadband services to [every] wireline voice customer” in Hawaii, was necessary when Sandwich Isles serves less than 1 percent of Hawaii’s wireline voice subscribers—and *****BEGIN CONFIDENTIAL MATERIAL*****  *****END CONFIDENTIAL MATERIAL***** of Digital Subscriber Line customers. NECA 2016 Comments 21 n.70 (JA __); *see id.* at 17, 20–21 (Supp. JA __, JA __–__). It thus remained reasonable, NECA argued, to estimate Sandwich Isles’ used and useful costs at the amount Sandwich Isles “had been paying for broadband transport from third parties” before leasing the Paniolo cable, plus a sizeable increase “to address future growth”: a total of \$1.9 million. *Id.* at 16 (JA __).

3. AT&T's Arguments

AT&T's comments echoed NECA's. It argued that the Paniolo lease costs were grossly excessive for Sandwich Isles' small customer base. *E.g.*, Application for Review 1 (JA __). And it stressed that "the alleged restructure" of the Paniolo lease did not "miraculously convert" pool-ineligible costs into used and useful ones. Reply Comments of AT&T Services, Inc. 3 (JA __) (May 9, 2016) (AT&T 2016 Reply Comments).

H. Order under Review

In the *Order*, the Commission granted AT&T's application for review in part and denied Sandwich Isles' petition for reconsideration. *Order* ¶ 9 (JA __). As the Bureau had done, the Commission squarely rejected Sandwich Isles' claim that the *Study Area Waiver Order* and the *1998 Division Order* guaranteed Sandwich Isles full recovery of its Paniolo lease costs. *Id.* ¶ 51 (JA __-__). And the Commission did not disturb the Bureau's decision to allow Sandwich Isles to recover 50 percent of the disputed Paniolo lease costs, over and above the baseline used and useful amount, from the time of that decision in 2010 to the time of the Commission's *Order*. *See id.* ¶ 45 (JA __-__). It allowed Sandwich Isles to keep all pool disbursements received from NECA for the past six years under the *Staff Declaratory Ruling*. *See id.* But the

Commission concluded that, because the Bureau's decision was based on predictive judgments, "the Bureau erred in not providing for a timely review of the reasonableness of [the staff's] predictive judgments and [corresponding analysis of] the equities." *Id.* ¶ 17 (JA __); *see id.* ¶ 15 (JA __). And the record in 2016 showed that the staff's predictions had not come true (and did not seem poised to do so anytime soon). *See id.* ¶¶ 31–36, 40, 44 (JA __–__, __). The Commission therefore held there was no equitable basis to continue allowing Sandwich Isles to recover more than \$1.9 million of the annual Paniolo lease costs through the NECA traffic-sensitive pool. *See id.* ¶¶ 25–44 (JA __–__).

The Commission provided, however, that "Sandwich Isles may continue to receive the \$1.9 million a year that approximates the amount that it was paying to lease voice grade capacity prior to the [*Staff Declaratory Ruling*]." *Order* ¶ 46 (JA __). The Commission also made clear that "Sandwich Isles has the right to provide NECA with additional evidence of its current used and useful expenses beyond those previously provided for inclusion in [the company's] revenue requirement." *Id.*; *see id.* ¶ 45 (JA __). Should Sandwich Isles do so, the Commission "direct[ed] NECA to timely consider [the new information] and recalculate

[Sandwich Isles'] revenue requirement for compliance with the used and useful standard in accordance with . . . normal processes.” *Id.* ¶ 46 (JA __). The Commission emphasized, however, that “[t]he burden rests with [Sandwich Isles] to explain why any additional expenses are used and useful.” *Id.*⁵



STANDARD OF REVIEW

Sandwich Isles bears a heavy burden to establish that the *Order* under review is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). The arbitrary-and-capricious standard is “[h]ighly deferential,” and this Court “presumes the validity of agency action.”

⁵ On the day of the *Order*'s release, the Commission issued two additional items concerning Sandwich Isles. In one, the Commission found that Sandwich Isles had improperly collected over \$27 million in federal high-cost subsidy payments and paid inflated management fees to its parent company. *Sandwich Isles Communications, Inc.*, 31 FCC Rcd 12999, 13000 ¶ 2 (2016), *pet. for admin. recon. pending*, WC Docket No. 10-90, *pet. for writ of mandamus pending*, *In re Sandwich Isles Commc'ns, Inc.*, No. 17-1248 (D.C. Cir.). In the other, the Commission directed Sandwich Isles to respond to evidence that the company was apparently liable for a monetary forfeiture based on apparent violations of FCC accounting rules. *Sandwich Isles Communications, Inc.*, 31 FCC Rcd 12947, 12974–75 ¶¶ 86, 90 (2016). (The Commission has not yet taken final action concerning the proposed forfeiture.) Although AT&T argued in support of its application for review here that Sandwich Isles had “unclean hands,” Comments of AT&T Services, Inc. 5 (JA__) (Apr. 28, 2016) (AT&T 2016 Comments), the Commission did not rely on that premise in the *Order* under review, *Order* ¶ 22 n.75 (JA __).

E.g., City of Portland, Or. v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (internal quotation marks omitted). So long as the agency’s decision is “reasonable and reasonably explained,” the Court will “not substitute [its own policy] judgment for that of the agency.” *Nat’l Tel. Co-op. Ass’n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). Judicial intervention is unwarranted unless the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . , or is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When the “agency’s path” to its decision “may be reasonably discerned,” the “arbitrary and capricious” standard does not require “ideal clarity.” *E.g., Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *see, e.g., National Telephone Cooperative*, 563 F.3d at 541 (holding that, although the agency’s discussion of implementation costs was “not elaborate,” its chosen approach was “reasonable and reasonably explained in light of the record”).

SUMMARY OF THE ARGUMENT

To serve a very small customer base, Sandwich Isles leased the full capacity of an enormously costly cable—nearly *****BEGIN CONFIDENTIAL MATERIAL*****   *****END CONFIDENTIAL MATERIAL***** more expensive than the transport capacity it had previously leased from other carriers. Sandwich Isles decided to do so without any assurance from the Commission that its lease costs would be recoverable through NECA pooling, and over NECA's express warning that they might not be. It was the company's burden to show that the lease costs it chose to incur were necessary to the efficient provision of its regulated services. Yet Sandwich Isles has never shown that it requires all (or even a substantial part) of the Paniolo cable's capacity to provide regulated services. The Commission thus reasonably accepted NECA's estimate that Sandwich Isles' used and useful Paniolo lease costs are approximately \$1.9 million annually.

In doing so, the Commission did not disturb the staff's determination in 2010, based on the then-available record and corresponding predictive judgments, that equitable considerations justified including 50 percent of Sandwich Isles' disputed Paniolo lease

costs in NECA's traffic-sensitive pool. Under the *Order*, Sandwich Isles will retain all disbursements it has received from NECA pursuant to the *Staff Declaratory Ruling*. But this Court has repeatedly encouraged agencies to revise policies based on mistaken predictions. *E.g., Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004). And here, the benefits of the Paniolo cable predicted in 2010 have not materialized. Nor does the record show they will materialize soon. Limiting Sandwich Isles to recovering \$1.9 million annually through future pooling (absent a new and better cost showing) was thus a reasonable measure to protect other small telephone companies that participate in NECA pooling and their ratepayers.

Although Sandwich Isles peppers its Statement of the Case with argumentative assertions, it ultimately pursues only two narrow challenges to the *Order*—both unpersuasive. The Commission did not “ignore[] clear, undisputed evidence,” Br. 27, concerning the company's annual Paniolo lease costs. Rather, because Sandwich Isles did not adequately support its claim of “at least \$8.1 million” in costs eligible for pooling, *id.* at 31, the Commission reasonably rejected it. And the Commission did not unlawfully depart from the *Staff Declaratory Ruling*

“without reasoned explanation.” *Id.* at 32. It is well established that the FCC “is not bound by the actions of its staff if [the full Commission] has not endorsed those actions.” *E.g., Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). In any event, where the Commission in the *Order* differed from the staff’s findings in 2010, it reasonably explained why.

ARGUMENT

I. THE COMMISSION’S DECISION TO REEVALUATE THE STAFF’S PREDICTIONS WAS REASONABLE AND REASONABLY EXPLAINED.

1. This Court has long recognized “[t]he general rule . . . that expenditure for an item may be included in a public utility’s rate base only [to the extent that] the item is ‘used and useful’ in providing service.” *NEPCO Mun. Rate Comm. v. FERC*, 668 F.2d 1327, 1333 (D.C. Cir. 1981). In applying that standard, “[a]gencies . . . are free, within the ambit of their statutory authority[,] to make . . . pragmatic adjustments [that] may be called for by particular circumstances.” *Id.* (quoting *FPC v. Nat’l Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). But when an agency departs from the ordinary rule, it must “reasonably” account for “consumers’ interest in fair rates.” *La. Pub. Serv. Comm’n v. FERC*, 174 F.3d 218, 229 (D.C. Cir. 1999) (internal quotation marks omitted). At all times, the burden to justify including an investment in the rate base is on the

regulated firm. *See NEPCO*, 668 F.2d at 1342; 47 C.F.R. §§ 69.601(c), 69.605(a).

Here, the burden was on Sandwich Isles to show that all of the costs it was seeking to include in the NECA traffic-sensitive pool for leasing “the largest undersea cable in Hawaii,” NECA 2016 Comments 22 n.75 (JA __), were used and useful. NECA asserted (and Sandwich Isles does not dispute) that the Paniolo cable has “the capacity potential to provide broadband services to the entire combined wireline voice customer base in the State.” *Id.* at 21 n.70 (JA __). Yet, as of 2016, Sandwich Isles reported only 3,659 working “loops” (connections to end-user premises)—meaning it serves less than 1 percent of Hawaii’s wireline voice subscribers. *Id.* The company’s Digital Subscriber Line customer base

*****BEGIN CONFIDENTIAL MATERIAL***** 

*****END CONFIDENTIAL MATERIAL*****. *See id.* at 17 (Supp. JA __).

Sandwich Isles “present[ed] no concrete evidence to support the notion that the Paniolo cable network . . . [would] be . . . subject to greater demand within a reasonable period of time.” *Order* ¶ 44 (JA __).

On this record, the Commission reasonably determined that Sandwich Isles failed to show that 100 percent of its Paniolo lease costs were used

and useful as that standard traditionally applies. *See id.* ¶¶ 45–46, 54 & n.191 (JA __–__, __).

2. The Commission also reasonably found that equitable considerations no longer warrant allowing Sandwich Isles to recover 50 percent (let alone 100 percent) of the disputed lease costs. *See Order* ¶¶ 21–46, 51, 55–58 (JA __–__, __–__).

As the Commission explained, the staff’s decision in 2010 to permit Sandwich Isles to recover 50 percent of the disputed Paniolo costs was based on predictive judgments. *Order* ¶ 17 (JA __); *see id.* ¶ 15 (JA __). In 2016, the Commission found those predictions had not come to pass and were not likely to do so anytime soon. *See id.* ¶¶ 21–44 (JA __–__).

For example, the Commission explained, “since the release of the [Staff] *Declaratory Ruling*,” there was “[n]o evidence . . . to demonstrate that the Paniolo cable ha[d] been used when other providers’ cables were out of service.” *Order* ¶ 31 (JA __). In addition, “the record show[ed] that other providers continue to serve the residents of the Hawaiian Home Lands.” *Id.*; *see* AT&T 2016 Comments 6 (JA __) (“Hawaiian Telecom, Inc. has represented that it ‘is the carrier of last resort for the entire state of Hawaii’ and ‘that it can and will continue to serve all rural areas of

Hawaii, including the Hawaiian Home Lands.”). The Commission “thus [found] that the [staff’s] predictive judgments based on the unique geographic challenges” of serving the Hawaiian Home Lands “have not occurred.” *Order* ¶ 31 (JA __).

The Commission reached the same conclusion concerning the staff’s other predictions. *See Order* ¶¶ 32–44 (JA __–__). Sandwich Isles had furnished no evidence, for example, “that the Paniolo cable [now] offers technological advances over the pre-existing cables in the [Hawaiian Home Lands].” *Id.* ¶ 36 (JA __) (internal quotation marks omitted). There was likewise no evidence, the Commission explained, to substantiate prior predictions that there would be future increased use of the Paniolo cable’s spare capacity and that Sandwich Isles would gain additional subscribers. *See id.* ¶¶ 40, 44 (JA __, __).



This Court has repeatedly cautioned that “the FCC’s . . . latitude to make policy based on predictive judgments . . . implies a correlative duty to evaluate its policies over time,” and to revise them if the underlying “empirical predictions and premises . . . turn out to be erroneous.” *American Family Association*, 365 F.3d at 1166 (internal quotation marks omitted); *accord Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993).

That is exactly what the agency did here. The Commission responsibly evaluated its staff's predictions, found that the current record did not support them, and accordingly “terminate[d] inclusion of [the] disputed [Paniolo lease] amounts” going forward. *Order* ¶ 45 (JA __).

3. Although Sandwich Isles complains here (Br. 16) that there was “inordinate lag time between the Bureau’s 2010 decision” and the *Order* under review, this is not a case of inequitable delay. In fact, because the Commission allowed Sandwich Isles to keep all pool disbursements received from NECA under the *Staff Declaratory Ruling*, the passage of time between the Bureau’s decision and the Commission’s *Order* only benefitted Sandwich Isles.

Furthermore, insofar as Sandwich Isles now contends (*e.g.*, Br. 4, 6) that it reasonably relied on recovering 100 percent of the Paniolo lease costs through NECA pooling, that is wrong. The agency’s series of waiver orders from 1998 through 2005 clearly are not “a binding decision that all of [Sandwich Isles’] costs are used and useful and thus fully recoverable through the NECA pooling process”—let alone lease costs that Sandwich Isles did not agree to incur until 2007. *Order* ¶ 51 (JA __); *accord id.* ¶ 57 (JA __); *Staff Declaratory Ruling* ¶ 10 (JA __). Similarly,

Sandwich Isles could not have relied on the 2010 *Staff Declaratory Ruling* when deciding to incur “‘sunk’ and lumpy cost[s]” (Br. 20, 22) three years earlier, in 2007. In addition, the record showed that NECA warned Sandwich Isles, before the company signed the Paniolo lease in 2007, not to presume that all of the proposed lease costs were pool eligible. See NECA 2009 Comments 9–10 (JA __–__).

4. Finally, it was reasonable on the available record for the Commission to determine that \$1.9 million is a fair approximation of the used and useful costs of the Paniolo cable. See *Order* ¶ 46 (JA __). NECA derived that figure by taking the amount Sandwich Isles had paid to lease transport capacity from third parties prior to leasing the Paniolo cable, *****BEGIN CONFIDENTIAL MATERIAL***** 
*****END CONFIDENTIAL MATERIAL***** per year, and increasing that amount by nearly *****BEGIN CONFIDENTIAL MATERIAL*****
 *****END CONFIDENTIAL MATERIAL***** percent to account for potential growth. See NECA 2016 Comments 16 (Supp. JA __). That approach was reasonable when, as the Commission explained, Sandwich Isles failed to provide any “credible evidence as to how much of the Paniolo cable is [now] actually ‘in-use’,” *Order* ¶ 54 n.191 (JA __), or to

show that preexisting undersea cables “were inadequate to meet future demand,” *id.* ¶ 54 (JA __).

The Commission made clear that “Sandwich Isles has the right to provide NECA with additional evidence of its current used and useful expenses beyond” \$1.9 million. *Order* ¶ 46 (JA __); *see id.* ¶ 45 (JA __). But until the company does so, the Commission found, limiting its annual pool recovery to \$1.9 million is a reasonable measure to protect ratepayers. *See id.* ¶¶ 44, 46 (JA __, __).

II. THE COMMISSION DID NOT IGNORE “CLEAR” OR “UNDISPUTED” EVIDENCE.

Sandwich Isles argues that, in limiting its pool-eligible costs for the Paniolo cable to \$1.9 million annually, the Commission “ignore[d] clear, undisputed evidence in the record,” Br. 27, that the company’s annual used and useful Paniolo expenses are “at least \$8.1 million,” *id.* at 31.⁶ But far from “clear,” “substantial,” or “undisputed,” Br. 27, 31, the evidence before the Commission on this point was vague, thin, and hotly

⁶ As support for this claim, Sandwich Isles relies in its brief on assertions from its opening comments to the Commission in 2016. *See* Br. 29–30. Before the Commission, Sandwich Isles made similar assertions in its 2016 reply comments and sought to substantiate them with two confidential exhibits. *See* Sandwich Isles 2016 Reply Comments 3–4 & n.15, Confidential Ex. 1 & 2 (JA __–__; Supp. JA __–__).

contested. *See* NECA 2016 Reply Comments iii, 1–2, 11–14 (JA __, __–__, __–__); AT&T 2016 Reply Comments 3–4 (JA __–__). The Commission thus reasonably rejected it. *See Order* ¶¶ 45–46, 54 & n.191 (JA __–__, __).

1. To recover 100 percent of the Paniolo lease costs through NECA pooling—whether at the initial lease price or the allegedly “refinance[d]” lease price of \$8.1 million, Sandwich Isles 2016 Comments 5 (JA __)—Sandwich Isles bore the burden of showing that those costs were justified either (i) by actual (or reasonably foreseeable) usage of the cable’s full capacity, or (ii) by other, equitable considerations. *See Order* ¶¶ 10–14, 20, 46 (JA __–__, __, __). As already explained, *see supra* pp. 27–30, by 2016, equitable considerations no longer justified recovery beyond what actual or reasonably foreseeable usage required. Yet Sandwich Isles offered no evidence to show it needed the full capacity of the Paniolo cable to provide regulated services. For example, as NECA pointed out to the Commission, Sandwich Isles furnished no “data concerning the amount of capacity that [its] broadband subscribers currently use, how much such usage reasonably requires of the Paniolo cable system, how much of such usage is served by facilities purchased from third parties, [or] the

realistic expected trends in [Digital Subscriber Line] subscribers in the relatively near future.” NECA 2016 Comments 17 n.58 (JA __).

Indeed, Sandwich Isles appeared to concede (and seems to acknowledge here, *see* Br. 32) that its regulated services require substantially less than the full capacity of the Paniolo cable. In urging the Commission to approve recovery of 100 percent of its allegedly restructured Paniolo lease costs through NECA pooling, Sandwich Isles asserted that, if the agency approved that recovery, the company could use a portion of the Paniolo cable for nonregulated purposes, “*while retaining more than sufficient capacity to . . . meet present and future demand for*” the company’s regulated services. Sandwich Isles 2016 Comments 5 (JA __) (emphasis added). NECA flagged that admission for the agency. *See* NECA 2016 Reply Comments 13 (JA __).

On this record, there was no cause for the FCC to “refute” Sandwich Isles’ evidence (Br. 29) concerning the allegedly refinanced \$8.1 million lease costs. As AT&T put it, the “claimed restructure[]” did not “miraculously convert [the] formerly disallowed payments into used and useful investments.” AT&T 2016 Reply Comments 3 (JA __); *see id.* at 5 (JA __).

2. Moreover, the evidence Sandwich Isles did offer to support its desired annual recovery of \$8.1 million was unreliable.

For one, there was reason to question the existence of the claimed refinancing agreement. Sandwich Isles said it reached that agreement “in principle” in “late 2014.” Sandwich Isles 2016 Comments 30 (JA __). Why then, NECA “wonder[ed],” had the relevant parties not “finalized and implemented” that agreement “in the ensuing year and one half”? NECA 2016 Reply Comments 11 (JA __). Sandwich Isles’ assertions concerning the agreement, moreover, were vague and unsubstantiated. *See* AT&T 2016 Reply Comments 3 (JA __). For example, the company never said “who had the discussions regarding the lease restructuring, when the ‘understanding’ was reached, whether it was committed to writing, or with whom the ‘understanding’ was made.” NECA 2016 Reply Comments 12 (JA __).

In addition, although Sandwich Isles claimed to have reasonably derived the \$8.1 million figure from a comparative analysis of publicly available tariff data, *see* Sandwich Isles 2016 Comments 30 (JA __), its analysis lacked any explanatory declaration, or even a certification of the kind ordinarily required for submissions to NECA, *see* 47 C.F.R.

§ 69.601(c). NECA alerted the Commission to that evidentiary deficiency, stating that Sandwich Isles’ “assertion[s] that the \$8.1 million revised Paniolo cable system lease cost is reasonably priced” and the supporting exhibits were “not supported by a declarant” and “not of sufficient detail to be useful.” Ex Parte Letter from NECA Counsel 1 (JA __) (May 27, 2016) (internal quotation marks omitted).

Sandwich Isles sought to bolster the credibility of its analysis by asserting that RUS had “reviewed” it and “concurred.” Sandwich Isles 2016 Comments 30 (JA __); see Sandwich Isles 2016 Reply Comments 4, 10 (JA __). But as NECA pointed out, Sandwich Isles failed to “state who at RUS reviewed the comparability analysis, what the term ‘concurrence’ means, whether that individual [was] willing to testify on the record concerning the review, or when it was reviewed.” NECA 2016 Reply Comments 13 (JA __).

3. Contrary to Sandwich Isles’ claim, the Commission did not “ignore[]” the company’s evidence concerning the allegedly refinanced \$8.1 million annual lease costs. Br. 27. Indeed, the portion of Sandwich Isles’ 2016 comments on which it relies here (Br. 29–30) is expressly cited in the *Order*. *Order* ¶ 8 & nn.32–33 (JA __). Consistent with NECA and

AT&T's arguments, however, the Commission deemed the evidence that Sandwich Isles offered for its claimed \$8.1 million annual lease expenses insufficient to prove that those costs are used and useful. *Id.* ¶¶ 45–46, 54 & n.191 (JA __–__, __). In particular, the Commission found “no credible evidence as to how much of the Paniolo cable is actually . . . being used to provide regulated services.” *Id.* ¶ 54 n.191 (JA __).

The Commission notably invited Sandwich Isles, in the wake of the *Order*, to “provide NECA with the necessary support for its current revenue requirement to the extent that is more than the [\$1.9 million] allowed by NECA under its used and useful analysis.” *Order* ¶ 45 (JA __) (emphasis omitted); *accord id.* ¶ 46 (JA __). Sandwich Isles remains free to do so. But in holding that “new or additional factors and/or data” are necessary to satisfy Sandwich Isles’ evidentiary burden, the Commission plainly rejected the company’s existing showing. *Id.* ¶ 46 (JA __).⁷

III. THERE WAS NO UNEXPLAINED CHANGE OF COURSE.

Sandwich Isles also claims that the *Order* “abrupt[ly] revers[ed],” “without reasoned explanation,” certain findings in the *Staff Declaratory*

⁷ This case is thus unlike the district court cases on which Sandwich Isles relies (Br. 28) in which agencies rejected without explanation competent cost evidence.

Ruling based on which the Wireline Competition Bureau allowed Sandwich Isles to recover 50 percent of the disputed Paniolo lease costs. Br. 32. Sandwich Isles relies on an inapplicable rule of law, and its claim is in any event factually baseless.

The legal rule on which Sandwich Isles relies (Br. 31) requires “a satisfactory explanation” when the Commission changes course from prior, analogous Commission-level orders. *E.g.*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009). That principle does not apply to the Commission’s review of a staff-level action on administrative appeal in a still-open proceeding. Indeed, it is well settled “that an agency is not bound by the actions of its staff if the agency has not endorsed those actions.” *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004). The Commission thus need not discuss or justify alleged inconsistencies between its determinations and prior staff-level actions that the full Commission has never endorsed. *See, e.g.*, *Comcast*, 526 F.3d at 769 (recognizing that the Commission was not required to “express [an] opinion” on conclusions reached in allegedly inconsistent staff-level waiver orders). To be sure, all Commission action must be reasonable and

reasonably explained. But as shown above, the *Order* here easily meets that test. *See supra* Part I.

In any event, the Commission did not improperly depart from the *Staff Declaratory Ruling*. Although Sandwich Isles asserts that the Bureau “implicitly recognized that the incremental cost of any ‘excess capacity’ [in the Paniolo cable] was marginal,” Br. 32, that is not correct. As the Commission explained in the *Order*, “the Bureau did not find that the cost of the in-use fiber is 98 percent of the total.” *Order* ¶ 54 (JA __) (internal quotation marks and footnote omitted)). The Bureau did “nothing more” than “cite[] a statement by Sandwich Isles that the difference in construction cost between a 12 fiber system and a 48 fiber system . . . support[ed] inclusion of some amount of spare capacity when the cable was built.” *Id.*

Furthermore, as already explained, *see supra* pp. 19, 23–24, 29, the Commission did not disturb the Bureau’s 2010 determination that, on the then-available record, equitable considerations justified allowing Sandwich Isles to recover 50 percent of the disputed Paniolo lease costs when the cable “was not utilized at or near full capacity.” Br. 32. The Commission merely determined that, because those predictions were not

borne out by the record in 2016, equitable considerations no longer justified the same approach going forward. *See Order* ¶ 45 (JA __).

The Commission thus did not depart without explanation from the Bureau's conclusions concerning the "unique circumstances presented by Sandwich Isles' network and the geographic area it serviced." Br. 33. As the Commission explained, there was no evidence that between 2010 and 2016 "the Paniolo cable [had] been used when other providers' cables were out of service." *Order* ¶ 31 (JA __). The Commission further found "that other providers continue to serve the residents of the Hawaiian Home Lands." *Id.* Accordingly, the Commission reasonably concluded that the predicted benefits of the Paniolo cable given Hawaii's unique geography have not materialized. *See id.*

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Dated: January 18, 2018

Respectfully submitted,

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/s/ Sarah E. Citrin _____
Sarah E. Citrin
Counsel for Respondents

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I, Sarah E. Citrin, hereby certify that on January 18, 2018, I filed the foregoing Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ Sarah E. Citrin

Sarah E. Citrin

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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5 U.S.C. § 706(2)(A)**§ 706 – Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

47 C.F.R. § 69.601**§ 69.601 – Exchange carrier association**

(a) An association shall be established in order to prepare and file access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements.

(b) All telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line tariff participants, or receive payments from the transitional support fund administered by the association shall be deemed to be members of the association.

(c) All data submissions to the association required by this title shall be accompanied by the following certification statement signed by the officer or employee responsible for the overall preparation for the data submission:

Certification

I am (title of certifying officer or employee). I hereby certify that I have overall responsibility for the preparation of all data in the attached data submission for (name of carrier) and that I am authorized to execute this certification. Based on information known to me or provided to me by employees responsible for the preparation of the data in this submission, I hereby certify that the data have been examined and reviewed and are complete, accurate, and consistent with the rules of the Federal Communications Commission.

Date: _____

Name: _____

Title: _____

(Persons making willful false statements in this data submission can be punished by fine or imprisonment under the provisions of the U.S. Code, Title 18, Section 1001).

47 C.F.R. § 69.605(a)

§ 69.605 – Reporting and distribution of pool access revenues

(a) Access revenues and cost data shall be reported by participants in association tariffs to the association for computation of monthly pool revenues distributions in accordance with this subpart.