

authorized the use of millions of dollars in corporate funds to pay his personal and family expenses. In light of that evidence, and pursuant to FCC regulations, the Commission directed the administrator of the Universal Service Fund to suspend the disbursement of universal service subsidies to SIC pending an investigation to ensure that the company was using those subsidies for their intended purpose—to provide telecommunications service to customers on the Hawaiian Home Lands.

After the investigation was completed, the FCC determined that SIC had improperly received more than \$27 million in universal service payments between 2002 and 2015. *Sandwich Isles Commc'ns, Inc.*, 31 FCC Rcd 12999, 13000 ¶ 2 (2016) (App. 45, 46) (“*Improper Payments Order*”). The Commission also concluded that excessive “management fees” paid by SIC to its affiliates had been used to purchase goods and services for Albert Hee and his family—including massages for Hee and an automobile and house for his children—and to pay salaries to members of the Hee family who performed little or no work for SIC. *See id.* ¶¶ 102-117 (App. 76-80). The FCC found that SIC improperly recouped those inflated fees from the Universal Service Fund. After further investigation, it was recently determined that those fees totaled more than \$6.7 million. *See* Letter from Charles Salvator, USAC, to Breanne Hee, SIC, January 16, 2018 (“January 2018 Demand Letter”) (copy attached).

“Given the breadth of improper payments” that SIC had received, the Commission said that it would “lift the suspension” of universal service payments to SIC only after “it is determined how the Company will reimburse the [Universal Service] Fund.” *Improper Payments Order* ¶ 148 (App. 89). SIC has not yet indicated how it intends to reimburse the Fund. Nevertheless, it seeks a writ of mandamus directing the FCC to disburse the universal service subsidies that have been withheld from the company.

SIC is not entitled to this “drastic” remedy unless it can “demonstrate (1) a clear and indisputable right to relief, (2) that the [FCC] is violating a clear duty to act, and (3) that no adequate alternative remedy exists.” *See Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (internal quotation marks omitted). SIC has not satisfied any of these three jurisdictional prerequisites. Accordingly, the petition should be dismissed for lack of jurisdiction. In the alternative, the petition should be denied because there are no “compelling equitable grounds” for mandamus in this case. *See ibid.* (internal quotation marks omitted).

BACKGROUND

A. High-Cost Universal Service Subsidies

“Universal service”—the availability of affordable, reliable telephone service throughout the nation—“has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of

1934.” *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000).

Section 254, which Congress added to the Communications Act in 1996, directs the FCC to “base policies for the preservation and advancement of universal service” on six statutory principles. 47 U.S.C. § 254(b). As relevant here, the fifth of these principles states that “[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.” *Id.* § 254(b)(5).

To implement section 254, the FCC established a Universal Service Fund to subsidize telecommunications services provided to low-income consumers, rural health care providers, schools and libraries, and consumers in “high-cost” areas (*i.e.*, remote or sparsely populated regions such as rural communities). *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56-57 (D.C. Cir. 2011). The Fund is financed by fees charged to telecommunications carriers, who typically pass on those fees to their customers. “Thus, nearly every purchaser of telephone services in America helps support the [Fund].” *Id.* at 57. In 1998, the FCC appointed the Universal Service Administrative Company (“USAC”) as the administrator of the Universal Service Fund. *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 13 FCC Rcd 25058 (1998); 47 C.F.R. § 54.701.

This case concerns “high-cost” universal service subsidies. Before a telecommunications carrier can receive such payments, it must be designated as an

“eligible telecommunications carrier” (or “ETC”) by a State commission. 47 U.S.C. § 214(e)(2). To qualify for ETC status, a carrier must “offer the services that are supported by Federal universal service support mechanisms” throughout its designated service area, *id.* § 214(e)(1)(A), and must “advertise the availability of such services and the charges therefor using media of general distribution.” *Id.* § 214(e)(1)(B).

After an ETC begins receiving federal high-cost subsidies in a State, the continued receipt of such payments is contingent on the State filing “an annual certification” with USAC and the FCC “stating that all federal high-cost support provided to [the ETC] was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 C.F.R. § 54.314(a). “High-cost support shall only be provided to the extent that the State has filed the requisite certification” under the FCC’s rules. *Ibid.*

B. The Suspension Of High-Cost Payments To SIC

SIC, a Hawaii corporation, is a wholly owned subsidiary of Waimana Enterprises, Inc. Waimana and its affiliated companies are owned and/or controlled by Albert Hee and three separate irrevocable trusts for the benefit of Hee’s three adult children. *Improper Payments Order* ¶¶ 16-17 (App. 51).

In 1997, the State of Hawaii designated SIC as an ETC to provide telephone service to customers on the Hawaiian Home Lands. *Improper Payments Order* ¶ 16 (App. 51). Since that designation, USAC has disbursed hundreds of millions of dollars in federal high-cost subsidies to SIC. Between 2002 and June 2015, SIC “had received approximately \$249,227,589 from the [Universal Service] Fund’s high-cost support program.” *Id.* ¶ 18 (App. 51).

On March 25, 2015, a federal grand jury indicted Albert Hee, charging him with six counts of criminal tax fraud and one count of corruptly impeding the administration of the internal revenue laws. The indictment alleged that “Hee caused Waimana to pay personal and family expenses on his behalf and to falsely deduct the payments as legitimate business expenses.” *Improper Payments Order* ¶ 32 (App. 55).

At Hee’s trial, the Government presented substantial testimonial and documentary evidence “that Albert Hee directed Waimana, as well as its subsidiaries, to pay personal expenses for the sole benefit of him and his family from 2000 through 2013.” *Improper Payments Order* ¶ 33 (App. 56). “For example, from at least 2003 through 2012, Hee approved payments to his personal masseuse totaling more than \$90,000 for personal massages and directed the payments to be recorded as ‘consulting services.’” *Id.* ¶ 39 (App. 57). In addition, Hee directed Waimana and its affiliates to reimburse him for cash advances, meals,

and personal travel, including family vacations to France and Switzerland in 2008 and Disney World and Tahiti in 2010. These reimbursements totaled more than \$100,000. *Ibid.*

The Government further demonstrated that at Hee's direction, Waimana paid over \$630,000 toward the undergraduate and graduate education expenses of Hee's children. And in 2008, Hee directed Waimana to purchase a \$43,000 automobile and a \$1.3 million house. Two of Hee's children used the automobile and lived in the house while they attended a university in California. *Improper Payments Order* ¶ 40 (App. 57-58).

Finally, the Government proffered evidence that Hee arranged for Waimana to place his wife and children on the payroll, even though they performed little or no work for Waimana or its affiliates. While she was on Waimana's payroll, Hee's wife Wendy principally stayed at home to care for her family. And Hee's children received "a salary and benefits from Waimana while attending school full-time on the mainland and while employed elsewhere." *Improper Payments Order* ¶ 41 (App. 58). "[B]usiness records show that Wendy Hee and the children were paid \$1,680,685.92 in salary and benefits from 2002 through 2012." *Ibid.*

On July 13, 2015, after an 11-day trial, a jury found Hee guilty on all counts. He was later sentenced to 46 months in federal prison and remains there today. *Improper Payments Order* ¶ 32 (App. 56).

Shortly after Hee’s conviction, the FCC directed USAC to suspend high-cost funding to SIC “pending completion of a further investigation and possible other ameliorative measures to ensure that any [high-cost] support provided is used solely in a manner consistent with Commission rules and policies.” Letter from Karen Majcher, USAC, to Abby Tawahara, SIC, Aug. 7, 2015 (App. 17) (“USAC Letter”). In a letter informing SIC of the suspension, USAC explained that Hee’s “conviction and the facts surrounding the case” had raised “questions about the nature of many of [SIC’s] expenses as well as whether [SIC’s] affiliate transactions are consistent with FCC rules and policies” governing the Universal Service Fund. *Ibid.*

That same month, the FCC’s Wireline Competition Bureau requested that USAC “investigate whether [SIC] received any improper payments from the federal high-cost support mechanism from 2002 to June 2015.” *Improper Payments Order* ¶ 43 (App. 58). “The Bureau also directed USAC to determine if there were sufficient assurances” that any high-cost payments made to SIC “on a going forward basis would be used consistent with the Commission’s rules.” *Id.* ¶ 44 (App. 58).

In September 2015, while USAC’s investigation was pending, the Hawaii Public Utilities Commission (“PUC”) issued an order stating that it could not certify under 47 C.F.R. § 54.314(a) that SIC had used high-cost support in 2014—

and would use any such support in 2016—only for the provision, maintenance, and upgrading of facilities and services for which the support was intended. *Improper Payments Order* ¶ 45 (App. 59).¹

In December 2015—four months after receiving notice that its high-cost subsidies were being suspended—SIC filed an “Emergency Petition for Review” with the FCC. *See* App. 20. Asserting that the FCC lacked authority to suspend the payments, SIC requested rescission of the suspension and immediate disbursement of all subsidies that had been withheld from SIC since July 2015. SIC’s petition to rescind the suspension remains pending.

USAC’s investigation of SIC was thorough and meticulous. From August 2015 until April 2016, “USAC and Commission staff held weekly meetings by telephone with [SIC] to discuss inquiries and documentation needed for the investigation.” *Improper Payments Order* ¶ 44 (App. 58-59). USAC submitted

¹ Similarly, in September 2016, the Hawaii PUC determined that it could not make the certification required by 47 C.F.R. § 54.314(a) with respect to SIC’s past use of high-cost support in 2015 or its future use of such support in 2017. *Improper Payments Order* ¶ 50 (App. 60). SIC then filed suit against the Hawaii PUC in Hawaii Circuit Court, claiming that the PUC had improperly withheld certification. *See id.* n.112 (App. 60). That lawsuit was dismissed in January 2017 for lack of jurisdiction. *See* <http://governor.hawaii.gov/newsroom/latest-news/atg-news-release-court-dismisses-sandwich-isles-communications-lawsuit-against-the-public-utilities-commission/>.

more than 350 inquiries to SIC. In response, SIC produced over 3,200 files. *Ibid.* (App. 59).

After giving SIC an opportunity to review a draft report, USAC requested further documentation from SIC concerning matters raised by SIC's response to the draft report. Then on May 13, 2016, USAC submitted a final report on its investigation to both the Bureau and SIC. *Improper Payments Order* ¶ 47 (App. 59). "USAC identified eight exceptions that it concluded resulted in \$27,270,390 in overpayments in the past, or could result in overpayments at some point in the future, from the high-cost program" to SIC. *Id.* ¶ 48 (App. 59).

On June 13, 2016, SIC filed comments with the Bureau regarding USAC's final report. While the company conceded that there had been some overpayment of high-cost subsidies, it maintained that USAC's report overstated the amount of the overpayment. *Improper Payments Order* ¶ 49 (App. 60); *see also* SIC Petition for Reconsideration at 13 (App. 112); Rennard Decl. ¶¶ 6, 14 (App. 122, 126).

Based on USAC's report and its own review of the record, the FCC concluded in December 2016 that SIC "improperly received payments in excess of \$27,270,390 from the federal high-cost support mechanisms from 2002 to June 2015." *Improper Payments Order* ¶ 51 (App. 60). The Commission found that most of these overpayments—more than \$26 million—stemmed from SIC's misclassification of cable and wire facilities. SIC "effectively claimed money for

building facilities to serve customers, when in fact those facilities were not connected to customer premises.” *Id.* ¶ 70 (App. 66); *see id.* ¶¶ 70-96 (App. 66-74).

The FCC also directed USAC “to initiate actions to recover all amounts paid from [SIC] to Waimana above ... the average of what similarly-situated companies pay in management fees for the period 2002 to 2015.” *Improper Payments Order* ¶ 106 (App. 77). Citing the evidence presented by the Government at Albert Hee’s trial, *id.* ¶ 111 (App. 79), the Commission concluded that the inflated management fees paid by SIC “effectively were a scheme that provided additional funding to Waimana for the personal benefit of the Hee family.” *Id.* ¶ 112 (App. 79). It further noted that the “excessive management fees” SIC paid to Waimana “enabled SIC to recover higher amounts than it would otherwise have been entitled to [receive] from the high-cost program.” *Ibid.* To “address this pervasive pattern of abuse of public funds,” the FCC declared that these “excessive expenses” must be “disallowed.” *Ibid.*

USAC determined earlier this month that SIC improperly received reimbursement from the Universal Service Fund “for excessive management fees paid to Waimana from 2002 through 2015 in the amount of \$6,770,938.00.” January 2018 Demand Letter. This amount was in addition to the \$27,270,390 in overpayments that the FCC identified in the *Improper Payments Order*.

The Commission also directed USAC “to conduct an investigation of [SIC’s] affiliate transactions for 2016” in order to “ensure that high-cost support provided to [SIC] on a going forward basis is used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” *Improper Payments Order* ¶ 139 (App. 87). This investigation is ongoing.

“Given the breadth of improper payments that [SIC] received for past amounts of high-cost support,” the Commission decided that it would “direct USAC to lift the suspension of the Company’s high-cost support” only after “it is determined how the Company will reimburse the [Universal Service] Fund.”

Improper Payments Order ¶ 148 (App. 89).²

On January 4, 2017, SIC filed a petition for reconsideration of the *Improper Payments Order*. *See* App. 100. That petition remains pending.

In 2017, as in the prior two years, the Hawaii PUC declined to certify that SIC had previously used—and would continue to use—high-cost support for its

² On the same day that it released the *Improper Payments Order*, the Commission issued a notice of apparent liability for forfeiture (“NAL”), finding that SIC apparently violated 47 U.S.C. § 220 and certain FCC rules by failing to keep accurate accounts and falsely certifying inaccurate data in cost studies it submitted to obtain high-cost subsidies. *See* App. 140. Based on these apparent violations, the NAL proposed a forfeiture in the amount of \$49,598,448, for which SIC, Waimana, and Albert Hee would be jointly and severally liable. In its response to the NAL, SIC maintained that the proposed forfeiture was unjustified. *See* App. 171. The FCC has not yet decided whether to impose the proposed forfeiture.

intended purpose. Therefore, under 47 C.F.R. § 54.314(a), SIC is not currently eligible to receive high-cost subsidies.

ARGUMENT

The “drastic” remedy of mandamus “is available only in extraordinary situations” and “is hardly ever granted.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc) (internal quotation marks omitted). “The party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable.” *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (internal quotation marks omitted).

In this case, SIC bears an especially heavy burden because it seeks a writ of mandamus directing the FCC to take a specific action—*i.e.*, ordering the disbursement of universal service payments that have been withheld since July 2015. To show that it is entitled to such extraordinary relief, SIC “must demonstrate (1) a clear and indisputable right to relief, (2) that [the FCC] is violating a clear duty to act, and (3) that no adequate alternative remedy exists.” *Am. Hosp. Ass’n*, 812 F.3d at 189. “These three threshold requirements are jurisdictional”; if SIC fails to satisfy any one of them, its mandamus petition must be dismissed “for lack of jurisdiction.” *Ibid.* SIC has not met any of these prerequisites. Therefore, the Court should dismiss SIC’s petition.

In the alternative, the Court should deny the petition. Even if SIC could satisfy “the legal requirements for mandamus jurisdiction,” mandamus is not warranted here because there are no “compelling equitable grounds” for the extraordinary relief SIC seeks. *Am. Hosp. Ass’n*, 812 F.3d at 189 (internal quotation marks omitted).

I. SIC Has No Clear And Indisputable Right To The Relief It Seeks

SIC argues that “[u]nder the 1996 Telecommunications Act and the FCC’s implementing regulations,” the company is “clearly and indisputably entitled to receive the Universal Service Fund support” that has been withheld since July 2015. Pet. 14. SIC is wrong.

Section 54.314(a) of the FCC’s rules makes clear that if a State wishes a designated ETC to continue receiving high-cost subsidies, it “must file an annual certification” with USAC and the FCC “stating that all federal high-cost support provided to [that ETC] was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 C.F.R. § 54.314(a). Without such a certification, a carrier is ineligible to receive high-cost subsidies. *See ibid.* (“High-cost support shall only be provided to the extent that the State has filed the requisite certification pursuant to this section.”).

For the past three years, the Hawaii PUC has declined to make the required certification under 47 C.F.R. § 54.314(a) with respect to SIC. *See Improper Payments Order* ¶¶ 45, 50 (App. 59-60). Thus, under the plain terms of section 54.314(a), SIC is currently barred from receiving high-cost subsidies. Without the certification of the Hawaii PUC, SIC has *no* right—let alone a “clear and indisputable” right—to receive high-cost payments. On that basis alone, the Court should dismiss the mandamus petition.

Even if SIC were currently eligible for high-cost subsidies—and it is not—eligibility is not the same as entitlement. As one court of appeals has rightly recognized, a carrier’s designation as an eligible telecommunications carrier (or “ETC”) under 47 U.S.C. § 214(e) does not “entitle[]” the carrier to universal service funding. *In re FCC 11-161*, 753 F.3d 1015, 1088 (10th Cir. 2014). The court explained that “ETC designation simply makes a carrier eligible for [universal service subsidies]. Nothing in the language of § 214(e) entitles an ETC to [universal service] funding.” *Ibid.* This Court should reach the same conclusion.

Although SIC argues that “an eligible telecommunications carrier has a statutory right to receive Universal Service Fund support” (Pet. 12), it fails to cite a single statute establishing any such right. It appears to stake its claim to high-cost subsidies on section 254(b)(5) of the Communications Act, 47 U.S.C. § 254(b)(5).

See Pet. 12. But that provision does not give SIC or any other ETC a “clear and indisputable right” to receive universal service subsidies.

Section 254(b)(5) states: “There should be specific, predictable and sufficient Federal ... mechanisms to preserve and advance universal service.” 47 U.S.C. § 254(b)(5). That provision is one of several statutory “principles” on which “the Commission shall base policies for the preservation and advancement of universal service.” *See* 47 U.S.C. § 254(b)(1)-(7). Those principles—which are described in “vague, general,” and “aspirational language”—do not constitute “specific statutory commands.” *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999) (“*TOPUC*”). “Rather than setting up specific conditions or requirements, [section] 254(b) reflects a Congressional intent to delegate ... difficult policy choices to agency discretion.” *Id.* at 411. As this Court has held, the Commission “enjoys broad discretion” to “balance the principles [in § 254(b)] against one another when they conflict.” *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (internal quotation marks omitted). That holding defeats SIC’s claim that section 254(b)(5) requires the FCC to subsidize SIC.

In *Rural Cellular*, 588 F.3d at 1102-03, the Court concluded that the “sufficiency” principle of section 254(b)(5) did not preclude the FCC from placing limits on the disbursement of universal service subsidies. The Court held that it

was “entirely reasonable” for the Commission to impose a cap on high-cost subsidies for wireless carriers to prevent “excessive funding” that would result in higher telecommunications service rates for most consumers. *Id.* at 1103. The Court found that the agency’s action struck a reasonable balance between the sufficiency principle of section 254(b)(5) and “the principle of affordability for consumers” under 47 U.S.C. § 254(b)(1). *Rural Cellular*, 588 F.3d at 1103.

As the Court recognized in *Rural Cellular*, section 254(b)(5) does not give carriers an “indisputable” right to universal service subsidies that supersedes any efforts by the FCC to guard against wasteful expenditures. Here, as in *Rural Cellular*, the agency found evidence of excessive subsidization and took measures to stop it. In this case, where SIC has received substantial overpayments from the Universal Service Fund and has yet to reimburse the Fund for those improper payments, SIC is not now entitled to any additional payments.

II. The Commission Has No Clear Duty To Act

Where (as here) a petitioner seeks a writ of mandamus to compel an agency to take a specific action, “mandamus is inappropriate except where a public official has violated a ‘ministerial’ duty.” *Consol. Edison Co. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002). “Such a duty must be ‘so plainly prescribed as to be free from doubt and equivalent to a positive command.’” *Ibid.* (quoting *Wilbur v. United States*, 281 U.S. 206, 218 (1930)); *see also Oglala Sioux Tribe v. U.S. Army*

Corp of Eng'rs, 570 F.3d 327, 333-34 (D.C. Cir. 2009). “[W]here the duty is not thus plainly prescribed, but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.” *Wilbur*, 281 U.S. at 219.

Mandamus is inappropriate in this case because the FCC has no clear duty to order disbursement of the subsidies that have been withheld from SIC since Albert Hee’s conviction in July 2015. SIC asserts that the agency has a duty to disburse the funds under sections 1 and 254(b)(5) of the Communications Act, 47 U.S.C. §§ 151, 254(b)(5). Pet. 20. Neither provision creates any such duty.

By its terms, section 1 of the Act “does not impose an affirmative obligation on the FCC to take any particular action.” *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 936 (D.C. Cir. 2017), *petition for reh’g pending*. Section 1 is essentially a policy statement; and “policy statements, ‘by themselves, do not create statutorily mandated responsibilities.’” *Ibid.* (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010)).

Likewise, as we explained in Part I above, section 254(b)(5) does not contain any “specific statutory commands.” *TOPUC*, 183 F.3d at 421. That provision is just one of several principles on which the FCC must base its universal service policies. *See* 47 U.S.C. § 254(b)(1)-(7). In crafting those policies, the

Commission “enjoys broad discretion” to balance the various statutory principles. *Rural Cellular*, 588 F.3d at 1103. This sort of policy “judgment or discretion ... cannot be controlled by mandamus” because there is no “plainly prescribed” statutory “duty” that the agency must perform. *Consol. Edison*, 286 F.3d at 605 (quoting *Wilbur*, 281 U.S. at 219).

SIC also argues that the FCC lacked authority to suspend the company’s high-cost subsidies. Pet. 15-18. To the contrary, section 54.707 of the Commission’s rules provides that USAC “may suspend or delay ... support amounts provided to a carrier ... *if directed by the Commission to do so.*” 47 C.F.R. § 54.707 (emphasis added). Pursuant to this rule, USAC was authorized to suspend high-cost payments to SIC because it was directed by the Commission to do so. *See* USAC Letter (App. 17) (“the FCC has directed USAC to initiate this suspension”); *see also Improper Payments Order* ¶ 42 & n.100 (App. 58) (citing 47 C.F.R. § 54.707).³

The Commission had good reason to direct USAC to suspend SIC’s subsidies in July 2015. SIC’s chief executive, Albert Hee, had just been convicted

³ In addition, as SIC acknowledges (Pet. 16), section 54.8 of the FCC’s rules authorizes the agency to suspend a person from participating in the universal service program if the person is convicted of “fraud or criminal offense arising out of activities associated with or related to ... the high-cost support mechanism.” 47 C.F.R. § 54.8(c). SIC maintains that this rule does not apply here because SIC “has never been convicted of any crime.” Pet. 16. But SIC’s chief executive has been convicted of precisely the sort of fraud to which section 54.8 applies.

of tax fraud; and the conviction was based on evidence that Hee had used corporate funds to pay personal and family expenses (including massages for Hee, family vacations, and an automobile and a house for Hee's college-age children). *See Improper Payments Order* ¶¶ 32-41 (App. 55-58). This evidence raised serious "questions about the nature of many of [SIC's] expenses as well as whether [SIC's] affiliate transactions are consistent with FCC rules and policies" governing the Universal Service Fund. USAC Letter (App. 17). Under these circumstances, the Commission reasonably decided to suspend high-cost payments to SIC "pending completion of a further investigation and possible other ameliorative measures to ensure that any [universal service] support provided is used solely in a manner consistent with Commission rules and policies." *Ibid.* The agency's action was fully consistent with its "responsibility to be a prudent guardian of the public's resources." *Vt. Pub. Serv. Bd.*, 661 F.3d at 65 (internal quotation marks omitted).

Hoping to bolster its case for mandamus, SIC accuses the FCC and its Chairman of being "biased" against the company. Pet. 20-27. That assertion is false. In particular, there is no basis for SIC's claim that Chairman Pai "prejudged the outcome of the [USAC] investigation." Pet. 23-24.

SIC claims that a statement issued by then-Commissioner Pai in October 2015 "[c]onfirm[s] his bias against [SIC] and prejudgment of the outcome of this proceeding." Pet. 24. The statement in question (App. 202-03) accompanied an

FCC public notice reminding all recipients of high-cost payments to use such subsidies only for their intended purpose—*not* to cover the “[p]ersonal expenses of employees, board members, [or] family members of employees and board members.”⁴ In his statement, then-Commissioner Pai observed that the public notice appeared to be issued in “reaction to [Albert Hee’s] conviction” three months earlier. App. 203. Then-Commissioner Pai discussed the evidence presented at Hee’s trial that Hee “apparently used [SIC] as his family’s personal piggy bank” to pay for massages, family vacations, and various other personal expenses. App. 202. Citing this and other evidence of apparent malfeasance, then-Commissioner Pai called for “a full investigation” of SIC, and he urged the Commission to take “immediate action to recover whatever funds we can for the American taxpayer.” App. 203.

Nothing in his October 2015 statement indicated that then-Commissioner Pai had “demonstrably made up [his] mind about important and specific factual questions” regarding SIC and was “impervious to contrary evidence.” *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (internal quotation marks omitted). Indeed, he was careful to state that SIC had “apparently” engaged in misconduct. App. 202. His observations about SIC did

⁴ See Public Notice, *All Universal Service High-Cost Support Recipients Are Reminded That Support Must Be Used For Its Intended Purpose*, 30 FCC Rcd 11821, 11822 (2015).

not reflect any bias or prejudice. He was simply making the entirely proper suggestion that the FCC should subject SIC's operations to rigorous scrutiny in order "to protect the public fisc." App. 203.

SIC complains that Chairman Pai and the Commission have treated SIC differently from other carriers. Pet. 24-25. But there has been no disparate treatment here for the simple reason that SIC is uniquely situated by virtue of its flagrant disregard for Commission rules. No other carrier receiving high-cost subsidies is owned or controlled by a convicted felon, currently incarcerated, who has diverted millions of dollars in corporate funds to pay for personal expenses such as massages, vacations, and college tuition.

Even by SIC's own admission, the company has received millions of dollars in improper payments from the Universal Service Fund. *See* SIC Petition for Reconsideration at 13 (App. 112); Rennard Decl. ¶¶ 6, 14 (App. 122, 126). After USAC's investigation uncovered substantial evidence of overpayments to SIC, the Commission voted unanimously to seek reimbursement from SIC for tens of millions of dollars in federal subsidies. As Commissioners Pai and Clyburn observed in a joint statement accompanying the *Improper Payments Order*, those subsidies "were intended to benefit" consumers in the Hawaiian Home Lands "but instead lined the pockets of [SIC's] owner." *Improper Payments Order*, 31 FCC Rcd at 13052 (joint statement of Commissioners Clyburn and Pai) (App. 98). The

agency also directed USAC to extend its investigation to other types of potential overpayments. *See id.* ¶¶ 146-147 (App. 89). Given SIC’s troubling history of waste, fraud, and abuse, the FCC is under no obligation to make high-cost payments to SIC.

III. Adequate Alternative Remedies Exist

Mandamus “is not available unless no adequate alternative remedy exists.” *In re al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015) (internal quotation marks omitted). “[T]he alternative remedies that might call for refusal to resort to writ of mandamus encompass judicial remedies ... as well as administrative ones.” *Power*, 292 F.3d at 786. Mandamus may not “be used as a substitute for the regular appeals process.” *In re al-Nashiri*, 791 F.3d at 78 (quoting *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004)).

Mandamus is unnecessary here because adequate alternative remedies are available to SIC. The company has not yet exhausted its administrative remedies. In the *Improper Payments Order*, the FCC stated that it would “direct USAC to lift the suspension of [SIC’s] high-cost support” only after “it is determined how [SIC] will reimburse the [Universal Service] Fund.” *Improper Payments Order* ¶ 148

(App. 89). SIC has petitioned for reconsideration of that order. *See* App. 100.

That petition is under active consideration by the FCC.⁵

If the Commission denies SIC's petition for reconsideration, the company will have an opportunity to seek judicial review of the agency's action under 47 U.S.C. § 402(a).

The availability of these administrative and judicial remedies precludes mandamus in this case. *See Fornaro v. James*, 416 F.3d 63, 69-70 (D.C. Cir. 2005). To the extent that SIC argues that such remedies are inadequate because SIC will in the interim be driven out of business or because service to consumers will be disrupted, *see* Pet. 8, those arguments are without merit for the reasons stated in Section IV below.

In sum, none of the three jurisdictional preconditions for mandamus are met in this case. First, SIC has no clear and indisputable right to relief. Second, the

⁵ SIC complains that “the FCC has never responded” to its petition for reconsideration. Pet. 27. But that petition was filed only a year ago, and the FCC's staff is drafting a reconsideration order for consideration by the Commission. In its mandamus petition, SIC does not appear to contend that the agency has unreasonably delayed action on the petition for reconsideration, nor does it ask the Court to direct the FCC to issue an order resolving the reconsideration petition. At this juncture, SIC cannot plausibly claim that the FCC's delay in addressing the January 2017 reconsideration petition has been “so egregious as to warrant mandamus.” *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984).

FCC has no clear duty to act. Third, adequate alternative remedies exist. For all these reasons, the Court should dismiss the mandamus petition for lack of jurisdiction.

IV. There Are No Compelling Equitable Grounds For Mandamus

Even if SIC could satisfy “the legal requirements for mandamus jurisdiction”—and as we have shown above, it has not—this Court may not issue a writ of mandamus unless “it finds compelling equitable grounds” for the extraordinary relief SIC seeks. *See Am. Hosp. Ass’n*, 812 F.3d at 189 (internal quotation marks omitted). Although SIC claims otherwise (Pet. 28-33), there are no compelling equitable grounds for mandamus in this case.

SIC contends that unless the suspension of its high-cost subsidies is lifted immediately, the company will be “driven out of business,” and its customers will be left without any access to telecommunications service. Pet. 32; *see also* Pet. 19. These claims cannot withstand scrutiny.

To begin with, there is reason to doubt SIC’s forecast that its demise is imminent. The company made similar dire projections when it petitioned the Commission to lift the suspension in December 2015. *See* App. 21 (continued withholding of high-cost payments will “require SIC to shut down its operations” and “soon cause substantial harm to native Hawaiians”); App. 28 (“[b]efore long, the continued withholding of support will require SIC to shut down its

operations”). More than two years later, SIC is still providing service to the Hawaiian Home Lands. And as a licensed telecommunications carrier, SIC is legally obligated to continue providing service until it requests and receives FCC authorization under 47 U.S.C. § 214(a) to discontinue service.

In any event, even if SIC went out of business, its customers could obtain telecommunications service from another carrier. SIC “is not the only service provider authorized in the Hawaiian Home Lands.” *Connect America Fund*, 28 FCC Rcd 6553, 6557 ¶ 9 (Wireline Comp. Bur. 2013). In comments filed with the FCC in 2012, Hawaiian Telcom, Inc. stated that it provides service “throughout the Hawaiian Home Lands,” 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.” *Ibid.*

Furthermore, in the unlikely event that no carrier was willing to serve any areas currently served by SIC, the Communications Act authorizes the FCC and the Hawaii PUC to order a carrier (or carriers) to serve any areas left unserved if SIC ceases operations. *See* 47 U.S.C. § 214(e)(3). In addition, according to the analysis of Form 477 data compiled by the FCC’s Wireless Telecommunications Bureau, almost all the customers currently served by SIC are also covered by mobile wireless telecommunications service. Thus, there is no basis for SIC’s contention that residents of the Hawaiian Home Lands would be left without

telephone service (or that they would, for example, be unable to call 911 to obtain emergency assistance) if the mandamus petition were denied.

Moreover, SIC's one-sided analysis of the equities completely ignores the significant equitable factors weighing *against* mandamus. In evaluating the sufficiency of universal service funding, the Commission "seeks to strike an appropriate balance between" the interests of "those benefited" by universal service subsidies and "those burdened" by contributions to the Universal Service Fund. *Rural Cellular*, 588 F.3d at 1102. Ratepayers throughout the nation contribute to the Fund every time they pay their phone bills. *Vt. Pub. Serv. Bd.*, 661 F.3d at 57. As this Court has recognized, the FCC owes a duty to those ratepayers "to be a prudent guardian of the public's resources" by ensuring that any money disbursed from the Fund is used for its intended purpose. *Id.* at 65 (internal quotation marks omitted).

The Commission has long understood that "excessive expenditures" on universal service subsidies could have the unintended consequence of "detract[ing] from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market." *Rural Cellular*, 588 F.3d at 1103 (quoting *Alenco*, 201 F.3d at 620). For that reason, the agency has taken sensible steps to guard against the unchecked growth of the Universal Service Fund. *See id.* at 1100-08; *Alenco*, 201 F.3d at 620-24. Given the Fund's limited size, the Commission's

efforts to prevent waste, fraud, and abuse not only protect ratepayers; they also ensure that the Fund's limited resources are properly dedicated to carriers that genuinely need universal service subsidies to provide service.

The evidence produced during Albert Hee's criminal trial and USAC's subsequent investigation showed that SIC has used universal service subsidies to "line[]j the pockets" of Hee and his family. *Improper Payments Order*, 31 FCC Rcd at 13052 (joint statement of Commissioners Clyburn and Pai) (App. 98). Among other things, Hee used company funds to pay for massages for himself, lavish vacations for his family, and an automobile and a \$1.3 million house for his children to use while attending college. *Id.* ¶¶ 39-40 (App. 57-58). American consumers should not have to foot the bill for this sort of "wretched excess." *See Rural Cellular*, 588 F.3d at 1102.

To date, SIC has neither reimbursed the Universal Service Fund for past overpayments nor demonstrated that it will properly use universal service subsidies in the future. Yet the company now contends that it is entitled to an extraordinary writ mandating the immediate disbursement of subsidies that have been withheld since Albert Hee's conviction for tax fraud.

Under these circumstances, a writ of mandamus would force ratepayers throughout the nation to pay for subsidies to SIC—a company with a history of waste, fraud, and abuse—before the FCC has established safeguards to ensure that

SIC will use those subsidies for their intended purpose. There is no good reason to impose such an inequitable burden on virtually every user of telecommunications service in the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be dismissed for lack of jurisdiction or, in the alternative, denied.

Respectfully submitted,

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
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January 23, 2018

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s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
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CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on January 23, 2018, I filed the foregoing Opposition of the Federal Communications Commission to Petition for a Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
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Via FedEx and Email

January 16, 2018

Ms. Breanne Hee, Director of Corporate Services
Sandwich Isles Communications, Inc.
77-808 Kamehameha Hwy.
Mililani, HI 96789

Re: Demand for Repayment of Improperly Disbursed Federal Universal Service High Cost Program Support

Dear Ms. Hee:

On December 5, 2016, the Federal Communications Commission (Commission) issued the *SIC Improper Payments Order*, which directed USAC to take action to determine the amount of inflated management fees paid by SIC to its parent company, Waimana Enterprises, Inc. (Waimana) from 2002 through 2015, and to recover the resultant excess support received by SIC.¹ After review, USAC has determined that SIC improperly requested and received reimbursement from the federal Universal Service High-Cost Support Mechanism (High Cost) for excessive management fees paid to Waimana from 2002 through 2015 in the amount of \$6,770,938.00. Accordingly, this demand letter is for recovery of \$6,770,938.00.²

Results Summary

In Paragraph 2 of the *SIC Improper Payments Order* the Commission found that the management fees SIC paid to Waimana were excessive and disallowed all annual management fees in excess of \$1,237,355 per year (the Cap) that SIC paid to Waimana from 2002 through 2015.³ The Commission directed USAC to calculate and recover the High Cost funds SIC received for annual

¹ *Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order, 31 FCC Rcd 12999, at 13000, para. 2 & n.3 (2016) (“*SIC Improper Payments Order*”).

² We note that this amount is separate from, and in addition to, the demand letter USAC issue to SIC on Dec. 29, 2016 for \$27,270,390 related to overpayments from the High Cost program for the time period 2002 through 2015. Letter from Charles Salvator, Vice President and Chief Financial Officer, USAC, to Breanne Hee, Director of Corporate Services, SIC (Dec. 29, 2016). See also SIC Petition for Reconsideration, WC Docket No. 10-90 (filed Jan. 4, 2017)(requesting that the Commission reduce the amount of this finding).

³ *SIC Improper Payments Order* at para. 2, note 3 (the Cap “is the average amount of the comparable entities’ average management fees for 2012, 2013, and 2014”).

Ms. Breanne Hee
Sandwich Isles Communications, Inc.
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management fees in excess of the Cap during that period.⁴

On December 29, 2016, and again on February 22, 2017, USAC requested SIC provide 2002-2011 management fee documentation and identify the total amount of management fees SIC expensed in the applicable year.⁵ SIC submitted the requested documentation on March 23, 2017. USAC examined the documentation, and conducted multiple follow-up inquiries with SIC. USAC removed the excess management fee amounts from the applicable general ledger accounts by the same prorated percentage by which SIC recorded its management fees in those general ledger accounts. USAC then calculated that, as a result of the excessive management fees, SIC received a total of \$6,770,938.00 in overpayment of support.

This \$6,770,938.00 overpayment is a debt owed to the United States (the “Debt”) pursuant to Section 3701, *et seq.* of the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701, *et seq.*). The Debt is immediately due and payable as of the date of this letter (the “Due Date”) without further demand. If not paid on or before thirty (30) days from the date of this letter (the “Date of Delinquency”) the Debt will begin accruing interest at the rate of 7.25 percent per annum, inclusive of administrative charges, until paid in full. In addition, a penalty of six percent (6%) per annum will begin accruing on the Date of Delinquency on any portion of the Debt that remains unpaid ninety (90) days after the Due Date. The Commission will waive all accrued interest and administrative charges if the Debt is paid in full within thirty (30) days of the Due Date.

In addition, if the Debt is not paid in full within thirty (30) days of the Due Date, the Commission will instruct USAC to recoup and/or set off any monies owed to SIC, including current and future High Cost program payments, against the Debt, until the Debt and all accrued interest, penalties and costs associated with the Debt are paid in full.

Payment of the Debt should be made as follows:

Payment sent by U.S. Postal Service and Standard Mail:

USAC
PO Box 105056
Atlanta, GA 30348-5056

Payment sent by Courier or Overnight Delivery:

USAC

⁴ *Id.* at paras. 2, 149. The *SIC Improper Payments Order* also directed USAC to undertake a separate investigation of SIC’s affiliate transactions for costs incurred in calendar year 2016 to ensure that SIC accurately reports its costs going forward. USAC is currently conducting that affiliate transactions investigation and this demand letter does not include any amounts that may be determined as owed by SIC as a result of that review.

⁵ Although the investigation period included 2002–2015, USAC did not include management fee documentation for 2012–2013 (for 2014–2015 disbursements) in the December 2016 and February 2017 requests as this information was previously requested and received during USAC’s investigation of SIC and included in the recalculation of support for the 2002–2015 investigation period.

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Lockbox 105056
1075 Loop Road
Atlanta, GA 30337
(404) 209-6377

Payment by Wire Transfer:

ACH payment must be sent in CCD+ format to
ABA Routing #071000039,
Account#5590045653

The Commission may instruct USAC to refer the Debt to the United States Treasury or to the Department of Justice for further collection action, including litigation. After referral and until paid in full, the Debt will continue to accrue interest, penalties and administrative charges as described above, in addition to the administrative collection charges and costs of litigation that the United States Treasury and/or the Department of Justice may impose. The United States Treasury may also offset the Debt against funds owed by the United States to SIC.

SIC may request a written agreement to repay the Debt, but only if it makes the request within fifteen (15) days of the date of this letter. An explanation of the process by which a company may request a repayment agreement can be found at <http://usac.org/cont/making-payments/payment-plans.aspx>. All payment plan requests are subject to Commission approval. SIC has fifteen (15) days from the date of this letter to request an opportunity to review and copy USAC's records related to the mechanism USAC used to calculate the Debt.

If SIC wishes to appeal this demand letter, it must do so within sixty (60) days of the date of this letter. Further information regarding your right to appeal this decision and the process for filing an appeal can be found at 47 C.F.R. §54.719, *et seq.* and at the USAC Website, <http://usac.org/about/about/program-integrity/appeals.aspx>.

The Commission and USAC continue to examine this matter and reserve the right to review additional records, to verify the Debt amount as well as the accuracy and integrity of other High Cost support payments to SIC and to take appropriate action to protect the interests of the United States.

Sincerely,



//s// Charles Salvator
Vice President and Chief Financial Officer

Ms. Breanne Hee
Sandwich Isles Communications, Inc.
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cc: Ms. Abby Tawarahara, Controller, SIC (*via electronic mail*)

Adm. James Arden Barnett, Jr., Counsel to SIC, Venable LLP (*via electronic mail*)

Kris A. Monteith, Chief, Wireline Competition Bureau, Federal Communications Commission (*via electronic mail*)

Thomas M. Johnson Jr., General Counsel, Federal Communications Commission (*via electronic mail*)

Michele Ellison, Deputy General Counsel, Federal Communications Commission (*via electronic mail*)

Mark Stephens, Managing Director, Federal Communications Commission (*via electronic mail*)

Ernesto Beckford, Acting General Counsel, USAC (*via electronic mail*)

Radha Sekar, Chief Executive Officer, USAC (*via electronic mail*)