No. 18-9502

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLANCA TELEPHONE COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S COMBINED OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL AND BRIEF ADDRESSING JURISDICTION

INTRODUCTION

The Federal Communications Commission (FCC or Commission) submits this response to Blanca Telephone Company's motion for an injunction pending appeal. As directed by the Court, we also address this Court's jurisdiction over Blanca's petition for review. As we explain, the motion for an injunction pending appeal should be denied and the petition for review should be dismissed for lack of jurisdiction.

Following a multi-year investigation, the Federal Communications Commission issued an *Order* finding that Blanca improperly claimed

millions of dollars of public support for which it was not eligible. *In re Blanca Tel. Co.*, 32 FCC Rcd. 10594 (2017) (*Order*) (Add. 4–28). The Commission determined that Blanca must repay these improper payments as a debt owed to the United States, and it directed agency staff to pursue collection of Blanca's unpaid debt. *Ibid.* Blanca then filed a mandamus petition and stay motion asking this Court to stop the agency from initiating any collection efforts pending further administrative or judicial review, but the Court denied relief.[1] After mandamus was denied, Blanca petitioned for reconsideration by the Commission, and then—while Blanca's petition for reconsideration was (and remains) pending before the agency—filed a petition for review in this Court purporting to seek review of various agency actions.

As a threshold matter, the Court lacks jurisdiction over Blanca's petition for review—and this case must therefore be dismissed—because there is no final Commission order subject to judicial review. Blanca cannot yet pursue review of the *Order* because its petition for reconsideration renders the *Order* nonfinal.

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[1] *See* Order, *In re Blanca Tel Co.*, No. 17-1451 (10th Cir. Dec. 28, 2017) (*Stay Denial*) (Add. 1); Order, *In re Blanca Tel Co.*, No. 17-1451 (10th Cir. Dec. 29, 2017) (*Mandamus Denial*) (Add. 2–3). These and other relevant materials are reproduced in the addendum to this filing.

Blanca suggests that the agency denied reconsideration through a staff letter stating that new subsidy payments are being withheld as an offset against its unpaid debt. But that letter does not even mention (much less resolve) the petition for reconsideration, which remains pending. Nor can Blanca seek direct review of the offset letter, because that letter is at most staff action, which must be appealed to and disposed of by the Commission before review can be obtained in this Court.

Even if the Court had jurisdiction, Blanca's arguments fail on the merits. Blanca first seeks to renew its argument that an FCC regulation, 47 C.F.R. § 1.1910(b)(3)(i), automatically suspends all debt-collection efforts—including the administrative offset imposed here—until Blanca has exhausted every possible avenue for further administrative or judicial review. But Blanca already vigorously pressed that same argument in the mandamus proceeding, and this Court denied relief. And as we explained in that proceeding, the argument is wrong: The provision that Blanca cites merely suspends operation of the Commission's "red light" rule, 47 C.F.R. § 1.1910, which restricts parties with delinquent debts from conducting certain business before the Commission; it offers no relief from the government's separate authority

to withhold future payments as an offset against Blanca's unpaid debt or its right to commence a judicial action against Blanca to collect the outstanding balance.

Blanca also argues, for the first time, that the administrative offset constitutes a "preliminary injunction" that in Blanca's view supposedly "terminated * * * as a matter of law" after 14 days under the Federal Rules of Civil Procedure. Because Blanca never advanced that argument before the agency, it is barred by statute. *See* 47 U.S.C. § 405(a). But even if Blanca had preserved this argument, it is wrong thrice over: The administrative offset is not a form of "preliminary" relief; the 14-day limit on which Blanca relies is limited to temporary restraining orders; and in any event administrative proceedings before the FCC are not governed by the Federal Rules of Civil Procedure.

Finally, Blanca does not satisfy the other requirements for an injunction pending appeal: Blanca has not demonstrated that it will suffer irreparable harm unless relief is granted, and its requested relief would harm contributors to the Universal Service Fund and is otherwise contrary to the public interest.

BACKGROUND

1. Blanca Telephone Company is a telecommunications carrier that receives support from the federal Universal Service Fund to provide wireline telephone service in portions of rural Colorado. *Order* ¶ 1 (Add. 4). An audit by the FCC's Office of Inspector General—in conjunction with investigations by the Universal Service Administrative Company (USAC), the administrator of the Fund, and the National Exchange Carrier Association (NECA), the association of wireline carriers responsible for processing Blanca's cost data—determined that Blanca mischaracterized certain costs to claim greater amounts of support than it was eligible for. *Id.* ¶¶ 14–15 (Add. 10). Blanca was eligible for federal subsidies based on the costs it incurred to provide wireline telephone service within its designated area, *id.* ¶¶ 4–5, 35 (Add. 5–6, 16), but Blanca improperly included costs for its *mobile* telephone service (including costs for service outside its designated area) in its cost reports, *id.* ¶¶ 13–16 (Add. 9–10). The audit found that Blanca's improper reporting inflated the amount of support it received between 2005 and 2010 by roughly $6.75 million. *Id.* ¶ 15 (Add. 10).

Based on these findings, FCC staff issued a Demand Letter to Blanca in June 2016 demanding that the company repay the excess

federal subsidies that it had improperly claimed.[2] Blanca then sought review by the full Commission and asked the agency to refrain from acting on the demand letter while the Commission reviewed the matter. The FCC's acting managing director sent Blanca's counsel an Appeal Acknowledgment Letter stating that Blanca's appeal "will be dealt with expeditiously" and that, until the Commission ruled on the application for review, the agency "will not activate a RED Light on your client's account," which would restrict Blanca's ability to conduct business before the Commission, and "neither will an offset be instituted."[3]

On December 8, 2017, the Commission issued a comprehensive *Order* denying Blanca's application for review and affirming that Blanca must repay the improper support that it claimed. Add. 4–28. The Commission found that "for at least eight years, Blanca ignored Commission orders and NECA guidance" and violated multiple FCC rules, which "resulted in an erroneous increase in the amount of high-

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[2] Letter from Dana Shaffer, Deputy Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (June 2, 2016) (Demand Letter) (Add. 29–38).

[3] Letter from Mark Stephens, Acting Managing Director, Federal Communications Commission, to Timothy E. Welch, Counsel to Blanca Telephone Company (June 22, 2016) (Appeal Acknowledgment Letter) (App. 39); *accord Order* ¶ 19 (Add. 11).

cost support paid to Blanca" that Blanca must repay as a debt owed to the United States. *Order* ¶¶ 24, 35 (Add. 12, 16); *see also id.* ¶ 34 (Add. 15) ("[A]s a result of treating nonregulated costs as regulated costs in its cost studies, Blanca received inflated USF disbursements * * * that it now must repay.").

Based on these findings, the Commission "direct[ed] [agency staff] to pursue collection of [the improper payments] from Blanca, whether by offset, recoupment, referral of the debt to the United States Department of Treasury for further collection efforts[,] or by any other means authorized by [statute] or common law." *Order* ¶ 54 (Add. 25–26). Three days later, USAC notified Blanca that it had begun withholding future subsidy payments to Blanca until Blanca's debt is satisfied.

2. After USAC notified Blanca that future subsidy payments were being withheld as an offset against its unpaid debt, Blanca petitioned this Court for mandamus and asked the Court to stay the *Order*.

As relevant here, Blanca asked the Court (1) to grant it relief from the FCC's red-light rule, 47 C.F.R. § 1.1910, which restricts parties with delinquent debts from conducting certain business before the Commission, pending the completion of further administrative or judicial review; and

(2) to require the government to continue making new universal service payments to Blanca pending further review and to distribute any payments that have been withheld. *See*, *e.g.*, Pet. for Mandamus 19–20, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. filed Dec. 18, 2017).

In response, the FCC noted that the red-light rule would automatically be suspended under 47 U.S.C. § 1.1910(b)(3)(i) if Blanca filed a timely request for further review on the merits (which Blanca had not yet done). *See* Resp.'s Opp. to Pet.'s Mot. for Stay 2–3, 14, 18, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. filed Dec. 27, 2017) (Stay Opp.). However, the agency explained, suspension of the red-light rule would *not* lift the administrative offset, which rests on separate authority independent of the red-light rule. *Id.* at 2–3, 15–17. The FCC maintained that the government is entitled to withhold future subsidy payments as an offset against Blanca's unpaid debt until Blanca makes acceptable arrangements to satisfy the outstanding balance. *Id.* at 9, 16–17.

A panel of this Court denied Blanca's stay motion on December 28 and denied Blanca's mandamus petition the following day. Add. 1–3.

3. On the same day that this Court denied mandamus, Blanca filed a petition for reconsideration of the Commission's *Order*. *See* Add. 43–75. As of this filing, that petition for reconsideration remains pending

before the agency. Meanwhile, given Blanca's failure to attain a stay from the Commission or the Court, the *Order* remains in effect. *See* 47 C.F.R. § 1.106(n) (a petition for reconsideration does not suspend the effect of an order unless the Commission finds good cause for a stay). Accordingly, on January 10, FCC staff sent Blanca an Administrative Offset Notice reiterating that, "as directed by the Commission in the *Order*, we will pursue collection * * * by offset/recoupment of amounts otherwise payable to you," and that "as from the date of the *Order* * * * Blanca's monthly support from the Universal Service Fund will be offset/recouped against the Debt[] until the Debt is satisfied or until you have made acceptable arrangements for its satisfaction."[4]

On January 24, without waiting for the Commission to resolve the petition for reconsideration, Blanca filed a petition for review in this Court, and on February 12 it filed a "Motion to Dissolve Preliminary Injunction"—which this Court has construed as a motion for injunction pending appeal—seeking substantially the same relief that the Court denied in the mandamus proceeding.

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[4] Letter from Mark Stephens, Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (Administrative Offset Notice) (Add. 40–41).

ARGUMENT

The Court lacks jurisdiction over Blanca's petition for review. This case must therefore be dismissed and Blanca's request for an injunction pending appeal must be denied. But even if the Court had jurisdiction, Blanca still would not be entitled to relief because its motion does not satisfy the stringent requirements for an injunction pending review.

I. THE COURT LACKS JURISDICTION, AND THIS CASE MUST BE DISMISSED, BECAUSE BLANCA DOES NOT CHALLENGE A FINAL COMMISSION ORDER.

As a threshold matter, this case must be dismissed because the Court lacks jurisdiction to review any of the purported agency actions that Blanca seeks to challenge. The exclusive means for seeking direct review of the FCC actions at issue are set forth in the Administrative Orders Review Act, 28 U.S.C. §§ 2341–2353, commonly known as the Hobbs Act. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Under the Hobbs Act, the Court has jurisdiction to review only "final orders" of the Commission. 28 U.S.C. §§ 2342(1), 2344. In addition, when the Commission delegates authority to agency staff, *see* 47 U.S.C. § 155(c)(1), the Communications Act directs that "an application for review [by the full Commission] shall be a condition precedent to judicial review of any order, decision, report, or action made or taken [by FCC staff] pursuant

to a delegation," *id.* § 155(c)(7).

Blanca's petition for review seeks judicial review of the Commission's *Order*, along with related staff letters, but the Court lacks jurisdiction to review the *Order* at this time because it is not subject to judicial review while Blanca's petition for reconsideration remains pending. Under the Hobbs Act, "a motion to reconsider renders the underlying order nonfinal for purposes of judicial review," so "a party who has sought rehearing cannot seek judicial review until the rehearing has concluded." *Stone v. INS*, 514 U.S. 386, 392 (1995). "[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party," *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489–90 (D.C. Cir. 1994), and any petition for review filed by that party "is incurably premature," *Council Tree Commc'ns v. FCC*, 503 F.3d 284, 287 (3d Cir. 2007). As a result, "a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order; a petition for judicial review filed during the pendency of a request for agency reconsideration will be dismissed for lack of jurisdiction." *Wade v. FCC*, 986 F.2d 1433, 1433 (D.C. Cir. 1993) (per curiam); *see also Reppy v. Dep't of Interior*, 874 F.2d 728, 730 (10th Cir. 1989) (collecting cases "hold[ing] that parties are *precluded* from seeking

judicial review of agency action during the pendency of a petition for reconsideration").

Blanca at times appears to suggest that the Administrative Offset Notice issued in January 2018 (Add. 40–41) "denied" its petition for reconsideration, at least in part. *E.g.*, Mot. 2, 8, 14. That is incorrect: The Administrative Offset Notice does not say that it is taking any action on the petition for reconsideration—indeed, it does not even *mention* the petition for reconsideration—and it does not purport to address the various arguments Blanca made in its petition. The Notice simply informs Blanca that the agency is exercising its right of offset in line with the *Order*'s direction. In short, contrary to Blanca's suggestion, its petition for reconsideration remains pending before the Commission.[5]

Blanca elsewhere appears to seek review of the Administrative Offset Notice itself. *E.g.*, Mot. 3, 8–9, 12, 19. But the Court lacks jurisdiction to review that letter because it was issued by the FCC's managing

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[5] Even if the Notice were construed to deny the portion of Blanca's petition seeking relief from the administrative offset, Blanca still could not seek judicial review of that portion of the *Order* while other portions remain under reconsideration. *See Bellsouth*, 17 F.3d at 1488–89 ("[A]n agency action cannot be considered nonfinal for one purpose and final for another," so "once a party petitions the agency for reconsideration of an order *or any part thereof*, the *entire order* is rendered nonfinal as to that party.") (emphasis added).

director, not by the Commission itself. Even if the Administrative Offset Notice constituted independent agency action, which it is not,[6] it would at most be staff action, which must be appealed to and disposed of by the full Commission before judicial review can be obtained. 47 U.S.C. § 155(c)(7); *see*, *e.g.*, *NTCH, Inc. v. FCC*, 877 F.3d 408, 409, 412–13 (D.C. Cir. 2017).

Blanca's petition for review also points to two other agency communications—the initial Demand Letter issued by the FCC's deputy managing director on June 2, 2016 (Add. 29–38) and the Appeal Acknowledgment Letter issued by the FCC's acting managing director on June 22, 2016 (Add. 39)—but the Court likewise lacks jurisdiction to review these documents. Both documents were issued by FCC staff, not by the Commission itself, so the Court cannot review these staff actions unless and until Blanca seeks and obtains a final order from the Commission. Blanca did appeal the Demand Letter to the Commission, but that Letter was superseded by the *Order*, for which Blanca has

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[6] Because the Administrative Offset Notice merely notified Blanca about measures that the Commission's *Order* had already directed agency staff to initiate (and that had already been initiated before the Notice was issued), it had no new or independent legal consequences. *Cf. Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1031–32 (10th Cir. 2017) (letter that merely acknowledged preexisting rights was not reviewable agency action because it did not have independent legal consequences).

sought reconsideration. *See*, *e.g.*, *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002) (judicial review is not available while the Commission is still reviewing staff action); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 386–87 (D.C. Cir. 1999) (per curiam) (same). Blanca cannot avoid the jurisdictional bar to judicial review of a nonfinal Commission order by instead purporting to seek review of underlying staff action.[7]

In sum, because the Court lacks jurisdiction over any of the agency actions that Blanca challenges, this case must be dismissed for lack of jurisdiction, and Blanca's motion for injunction pending appeal must accordingly be denied. Absent a final Commission order, Blanca may pursue interim relief only under the All Writs Act—but the Court already made clear in denying Blanca's mandamus petition that Blanca has not satisfied the requirements for an extraordinary writ. Blanca cannot evade that ruling here by seeking the same relief under the guise of a premature petition for review.

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[7] The Court also lacks jurisdiction over the Appeal Acknowledgment Letter for the additional reason that it is moot. That Letter acknowledged receipt of Blanca's application for review of the Demand Letter and stated that certain actions would not be taken "while the Application is pending." Add. 39. The undertakings in the Letter thus expired once the Commission issued its *Order* denying the application for review.

II. BLANCA HAS NOT SATISFIED THE STRINGENT REQUIREMENTS FOR AN INJUNCTION PENDING REVIEW.

Even if the Court had jurisdiction, Blanca would not be entitled to relief. To obtain an injunction pending appeal, Blanca "must show: (1) a substantial likelihood of success on the merits; (2) irreparable injury will result if the injunction does not issue; (3) the threatened injury outweighs any damage the injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest." *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302, at *1 (10th Cir.) (per curiam) (footnote omitted), *aff'd*, 568 U.S. 1401 (2012) (Sotomayor, J., in chambers) (affirming denial of injunction pending review); *see* 10th Cir. R. 8.1, 18.1. Blanca cannot satisfy any of these requirements, let alone all of them.[8]

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[8] Blanca's motion for an injunction pending appeal must meet an even more demanding standard than that which applied to its stay motion. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) ("injunctions that alter the status quo" are "specifically disfavored" and "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course"), *aff'd*, 546 U.S. 418 (2006). Once this Court declined to stay the *Order*, *see* Add. 1, agency staff were obliged "to pursue collection" of Blanca's unpaid debt "by offset, recoupment, * * * or by any other means," *Order* ¶ 54 (Add. 25–26). Blanca's motion to enjoin those efforts seeks to disturb what has now become the status quo.

A. Blanca Has Not Established A Likelihood Of Success On The Merits.

Blanca has not shown a likelihood of success on the merits, much less a substantial likelihood. Blanca's motion does not even attempt to argue the merits of the FCC's ruling that it must repay the improper subsidies. Instead, Blanca insists that the government may not yet pursue those funds through an administrative offset, even though the *Order* specifically "direct[s] [agency staff] to pursue collection * * * by offset," *Order* ¶ 54 (Add. 25), and even though this Court denied Blanca's request to stay the *Order*. This is so, Blanca contends, either because the administrative offset is inconsistent with the FCC's red-light rule or because the offset should have automatically expired after 14 days. Neither argument is correct.

1. Nothing in the FCC's red-light rule immunizes Blanca from an administrative offset.

Blanca first renews its argument (Mot. 10–12) that 47 C.F.R. § 1.1910(b)(3)(i), which is part of the FCC's red-light rule, prevents any debt-collection efforts—including the administrative offset imposed here—until it has exhausted every possible avenue for further administrative or judicial review. But Blanca already vigorously pressed this very argument in its mandamus petition and stay motion, and the

Court denied relief. Having failed on this argument before, Blanca is unlikely to prevail by making the same argument again. In any event, as we explained in the mandamus proceeding, *see* Stay Opp. 15–17, Blanca's argument is incorrect.

The FCC's red-light rule, 47 C.F.R. § 1.1910, states that the FCC will not act on any application filed by an entity that owes a delinquent debt to the Commission, *id.* § 1.1910(b)(2). It further provides that, if the entity does not make acceptable arrangements to satisfy its debt within 30 days of receiving notice that action is being withheld, the application will be automatically dismissed. *Id.* § 1.1910(b)(3). These provisions restrict entities with delinquent debts from generally conducting business before the Commission.

Blanca relies on 47 C.F.R. § 1.1910(b)(3)(i), which states that "[t]he provisions of paragraphs (b)(2) and (b)(3) * * * will not apply if the applicant has timely filed a challenge through an administrative appeal or contested judicial proceeding." This provision suspends operation of the red-light rule while an entity disputing its debt pursues further review on the merits. Because Blanca has petitioned for reconsideration of the *Order*, the FCC's Red Light Display System currently reports

Blanca's status as "Green," and Blanca is at this time permitted to conduct business before the Commission. Red Light Display System, Current Status for FRN 0003766201 (Mar. 5, 2018) (Add. 42).[9]

Blanca asserts that this provision further "provides * * * that the FCC *will not collect debt*," Mot. 5 (emphasis added), and "cannot enforce a debt decision while the existence of the debt is litigated," Mot. 17 n.10. That is incorrect. By its terms, the cited provision suspends only "paragraphs (b)(2) and (b)(3) of this section," 47 C.F.R. § 1.1910(b)(3)(i), which are portions of the red-light rule that restrict parties with delinquent debts from conducting certain business before the Commission. The provision offers no relief from *other* debt-collection efforts, such as an administrative offset.[10]

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[9] Blanca briefly refers to a license assignment application that it says the FCC is "refusing" to process. Mot. 14, 19. Contrary to Blanca's claim, that application remains under review.

[10] The final sentence of 47 C.F.R. § 1.1910(b)(2) warns that, in addition to the restrictions on conducting business before the Commission, delinquent debts are "subject to collection * * * pursuant to * * * the Debt Collection Improvement Act." This sentence specifically advises regulated parties that the government has additional debt-collection authority under other laws. But it is not the source of that authority, so suspension of the red-light rule does not deprive the government of its ability to engage in those measures.

The government's ability to withhold future payments as an offset against an entity's unpaid debt rests on separate statutory, regulatory, and common-law authority that are independent of the red-light rule. *See* 31 U.S.C. § 3716 (authorizing collection of debts owed to the United States through administrative offset); 47 C.F.R. § 1.1912 (same); *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'"). Thus, when the FCC's acting managing director wrote in the Appeal Acknowledgment Letter that the agency "will not activate a RED Light on your client's account, [and] neither will an offset be instituted" until the Commission ruled on the application for review, he explicitly distinguished between the red-light rule and the government's ability to impose an administrative offset. Add. 39. And the Commission's *Order* likewise distinguished between "the Commission's Red Light process" and "the Commission institut[ing] an offset." *Order* ¶ 19 (Add. 11).

The only support Blanca offers for its position are screenshots from the Red Light Display System (RLDS) showing Blanca's status as "Green," but those offer it little help. The language at the top of each page informs

Blanca that it "has no delinquent bills *which would restrict you from doing business with the FCC*," Add. 42 (emphasis added); it does not state that Blanca is exempt from *other* consequences of it unpaid debts, such as the administrative offset challenged here.[11]

2. The administrative offset is not a preliminary injunction and does not automatically expire.

Blanca's motion also argues, for the first time, that the administrative offset is a "preliminary injunction" that supposedly "terminated * * * as a matter of law" after 14 days under the Federal Rules of Civil Procedure. Mot. 16–19. But Blanca never presented that argument to the Commission, so it is barred by 47 U.S.C. § 405(a), which precludes judicial review of any "questions of fact or law upon which the [Commission] has been afforded no opportunity to pass." *In re FCC 11-161*,

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[11] Blanca argues that other language in the RLDS system could be read to suggest that it does not "owe[] any USF debt at all" and that the FCC is attempting "to offset a non-existing, non-delinquent debt." Mot. 13–16. In doing so, Blanca ignores the main language at the top of the page that correctly describes Blanca's status, and none of the fine print that Blanca points to purports to say anything different. And even if the fine print were susceptible to Blanca's interpretation, the prospect that some peripheral text in a computer system operated by agency staff might contain imprecise or inaccurate language cannot override the express terms of a Commission *Order* authoritatively ruling that Blanca must repay the improper subsidies and directing agency staff to pursue collection of those funds through an administrative offset.

753 F.3d 1015, 1063–64 (10th Cir. 2014).

Even if this argument were preserved, however, it is wrong at every step. *First*, the administrative offset is not a form of preliminary relief pending further adjudication, but instead flows directly from a Commission *Order* that fully adjudicated Blanca's application for review and, after full administrative process, concluded that Blanca must repay the improper subsidies that it claimed. The fact that Blanca has now petitioned the Commission to reconsider that ruling does not transform the relief imposed following full adjudication into "preliminary" relief. *Cf.* 47 C.F.R. § 1.106(n) (a petition for reconsideration does not suspend the effect of a Commission order).

Second, the 14-day limit that Blanca points to in Rule 65(b)(2) applies only to temporary restraining orders. Fed. R. Civ. P. 65(b)(2). It does not apply to preliminary injunctions, which are governed by Rule 65(a)—not Rule 65(b)—and are not subject to any automatic time limits. *Compare* Fed. R. Civ. P. 65(a) *with* Fed. R. Civ. P. 65(b). Thus, even if Blanca were subject to a preliminary injunction, no 14-day limit would apply.

Third, and most fundamentally, administrative proceedings before the Commission are not governed by the Federal Rules of Civil Procedure in any event. The Commission precedent cited by Blanca (Mot. 17) explains that "the Federal Rules of Civil Procedure govern the judicial proceedings of the federal district courts, not the administrative proceedings of the FCC," which crafts its own procedures "that are 'adapted to the peculiarities of the industry and the tasks of the agency.'" *In re Stale or Moot Docketed Proceedings*, 19 FCC Rcd. 2527, 2534 (2004) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)). Blanca's only other citation is to a staff decision stating merely that the agency "look[s] to the Federal Rules of Civil Procedure for procedural guidance." *APCC Servs., Inc. v. Intelco Commc'ns, Inc.*, 28 FCC Rcd. 1911, 1916 n.39 (Enf. Bur. 2013). No authority supports Blanca's premise that the Federal Rules of Civil Procedure control here.

B. Blanca Has Not Satisfied The Other Requirements For An Injunction Pending Appeal.

Finally, Blanca does not satisfy the other requirements necessary to obtain an injunction pending appeal.

Irreparable Injury. Blanca has not shown that it faces any imminent threat of irreparable harm. "To constitute irreparable harm,

an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). In addition, the party seeking relief "must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Ibid.* (internal quotation marks omitted).

Blanca states (Mot. 9) that much of its revenue come from universal service subsidies. But "[i]t is well established that 'economic loss is usually insufficient to constitute irreparable harm,'" *Coal. of Concerned Citizens to Make Art Smart v. FTA*, 843 F.3d 886, 913 (10th Cir. 2016), because "such losses are compensable by monetary damages." *Heideman*, 348 F.3d at 1189. If Blanca succeeds in overturning the *Order*, it could pursue disbursement of any withheld funds at that time.

Notably, Blanca does not attempt to show that withholding these funds will imminently drive it out of business while it pursues further administrative or judicial review. As with its stay motion, Blanca's latest motion offers no evidence of the company's financial condition, nor does it present specific and reliable projections of anticipated revenues and costs. *See* Stay Opp. 19–21.

Balance of Harms and the Public Interest. The balance of the equities weighs heavily against Blanca because any injunction would harm other ratepayers and would be contrary to the public interest.

The Universal Service Fund is financed through mandatory contributions by telecommunications carriers, who "almost always pass their contribution assessments through to their customers." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1099 (D.C. Cir. 2009); *accord Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 57 (D.C. Cir. 2011) ("nearly every purchaser of telephone services in America helps support" the Fund). Requiring the government to continue disbursing additional federal subsidies to Blanca without offset, when Blanca has yet to repay millions of dollars of improper subsidies it procured, would harm the millions of American telephone customers who ultimately pay for these subsidies. *See Alenco Commc'ns v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("Because universal service is funded by a general pool subsidized by all telecommunications providers—and thus indirectly by the customers—excess subsidization * * * caus[es] rates unnecessarily to rise"); *accord Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (recognizing that "excess subsidization arguably may affect the affordability of telecommunications services"). Likewise, continuing to

make universal service payments to a carrier that already owes millions of dollars in delinquent debt would be contrary to the Commission's "responsibility to be a prudent guardian of the public's resources." *Vt. Pub. Serv. Bd.*, 661 F.3d at 65 (internal quotation marks omitted).

CONCLUSION

Blanca's motion should be denied, and its petition for review should be dismissed for lack of jurisdiction.

Dated: March 5, 2018

Respectfully submitted,

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/s/ *Scott M. Noveck*
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 5, 2018, I caused the foregoing Combined Opposition to Motion for Injunction Pending Appeal and Brief Addressing Jurisdiction to be filed with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit using the electronic CM/ECF system. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

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ADDENDUM

ADDENDUM CONTENTS

Page

FILED
United States Court of Appeals
Tenth Circuit

December 28, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: BLANCA TELEPHONE COMPANY, Petitioner.	No. 17-1451 (No. FCC 17-162)

ORDER

Before **HARTZ**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

Blanca Telephone Company filed a petition for writ of mandamus, asking this court to intervene in a proceeding before the FCC. It also filed an emergency motion for stay of an FCC order pending a ruling on the mandamus petition, as well as two motions to supplement its filings. The FCC responded to the stay motion, and Blanca replied.

Because petitioner has not made showings sufficient to obtain a stay pending a ruling on the mandamus petition, we deny the stay motion. *See Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015) (identifying stay requirements). The emergency motion for stay is denied, the motions to supplement are granted, and the mandamus petition remains under consideration.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

December 29, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: BLANCA TELEPHONE COMPANY, Petitioner.	No. 17-1451 (No. FCC 17-162)

ORDER

Before **HARTZ**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

Blanca Telephone Company filed a petition for writ of mandamus, asking this court to intervene in a proceeding before the FCC. It also filed an emergency motion for stay of an FCC order pending a ruling on the mandamus petition; we denied the emergency stay motion by order dated December 28, 2017. We now deny mandamus relief.

Mandamus is a drastic remedy that should be invoked only in extraordinary circumstances. *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009). And "[a]lthough a simple showing of error may suffice to obtain reversal on direct appeal, a greater showing must be made to obtain a writ of mandamus." *Id.* (internal quotation marks omitted). Before this court grants this drastic remedy, we must be satisfied, at a minimum, that there is no adequate alternative means for the relief Blanca seeks, that its right to mandamus relief is clear and indisputable, and that issuance of the writ is appropriate. *Id.* at 1187. After reviewing all the materials, we determine that

Blanca has not met these requirements. Accordingly, the petition for writ of mandamus is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Blanca Telephone Company	)	CC Docket No. 96-45
Seeking Relief from the June 22, 2016 Letter	)	
Issued by the Office of the Managing Director	)	
Demanding Repayment of a Universal Service	)	
Fund Debt Pursuant to the Debt Collection	)	
Improvement Act	)	
	)	

MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION

Adopted: December 8, 2017 **Released: December 8, 2017**

By the Commission: Commissioners Clyburn and O'Rielly issuing separate statements; Commissioner Rosenworcel concurring.

I. INTRODUCTION

1. The high-cost universal service support program (the high-cost program) supports the deployment of communications networks in high-cost, rural areas. In 1997, pursuant to section 254 of the Communications Act of 1934, as amended (Act),[1] the Colorado Public Utility Commission designated Blanca Telephone Company (Blanca) as an eligible telecommunications carrier (ETC) in parts of Alamosa and Costilla counties.[2] As a result, Blanca became eligible to receive high-cost support for providing local exchange telephone service in its designated study area.[3] As a rate-of-return incumbent local exchange carrier (incumbent LEC), the amount of high-cost support Blanca received was based on the costs it incurred in providing rate-regulated telephone service in its designated study area. Soon after its designation, Blanca began to offer commercial mobile radio service (CMRS), a nonregulated service, both within and outside of its study area. Thereafter, Blanca included the costs of this nonregulated service in the regulated cost accounts it submitted to the National Exchange Carriers Association (NECA) with respect to its designated study area, thus inflating the amount of high-cost support Blanca received from the Universal Service Fund (USF). In 2012, NECA discovered Blanca's improper inclusion in its rate base of nonregulated costs. NECA directed Blanca to correct its cost accounting for 2011 and later years, and the Commission's Office of the Managing Director (OMD) directed Blanca to return $6,748,280 in improperly paid universal service support for 2005-2010 with respect to Blanca's designated study area.

[1] 47 U.S.C. § 254.

[2] *See* Public Utilities Commission of the State of Colorado, Commission Order Granting Application for Designation as an Eligible Telecommunications Carrier, Docket No. 97A-506T, Decision No. C97-1389, at 3, para. 2 (Dec. 17, 1997); 47 U.S.C. § 254(e).

[3] A study area is a geographic segment in which an incumbent local exchange carrier is designated as an ETC. Such segment generally corresponds to the carrier's "entire service territory within a state." *See Petitions for Waivers Filed by San Carlos Apache Telecomms. Util., Inc., & U S W. Commc'ns, Inc*., AAD 96-52, Memorandum Opinion and Order, 11 FCC Rcd 14591, 14592, para. 4 (Acct. & Aud. Div. 1996).

2. Blanca now challenges the Commission's efforts to collect universal service overpayments from 2005 to 2010.[4] We affirm OMD's directive that Blanca must repay the $6,748,280 in universal service support to which it was not entitled.

II. BACKGROUND

A. Regulatory Framework

3. The high-cost universal service support program is one of four universal service programs created by the Federal Communications Commission (FCC or Commission) to fulfill its statutory mandate to help ensure that consumers have access to modern communications networks at rates that are reasonably comparable to those in urban areas.[5] Under the Commission's rules governing the high-cost program, incumbent LECs and competitive carriers designated as ETCs may receive high-cost support, but the legal and administrative framework for determining how much support they receive is different.

1. Rate-of-Return High-Cost Support

4. Pursuant to the Commission's rules in effect at the time in question, rate-of-return incumbent LECs designated as ETCs, like Blanca, received high-cost support based on their embedded costs in providing local exchange service to fixed locations in high-cost areas.[6] Such support was intended to ensure the availability of basic telephone service at reasonable rates.[7] To that end, the Commission's accounting and cost allocation rules worked to ensure that incumbent LECs received a reasonable return on investment in the deployment and offering of supported services in high-cost areas within their respective study areas.[8] By limiting the availability of such support to a rate-of-return incumbent LEC's regulated costs within its study area, the accounting and cost allocation methods countered the incentive to engage in anticompetitive practices, such as predatory cross-subsidization, that

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[4] *See* Emergency Application for Review, CC Docket No. 96-45 (filed June 16, 2016) (Application); Petition for Reconsideration, CC Docket No. 96-45 (filed June 24, 2016) (Petition). The two petitions raise substantially similar issues, and therefore, in the interest of expediency, we consider these petitions at the same time. *See* Letter from Dana Shaffer, Deputy Managing Director, FCC Office of Managing Director, to Alan Wehe, General Manager, Blanca Telephone Company (June 2, 2016) (OMD Letter).

[5] *See* 47 U.S.C. § 151 (directing the Commission "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . .").

[6] *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Report and Order, 16 FCC Rcd 11244, 11248-49, paras. 8-10 (2001); *see also Special Access for Price Cap Local Exchange Carriers Order*, WC Docket No. 05-25, Report and Order, 27 FCC Rcd 10557, 10562, para. 8 (2012).

[7] 47 U.S.C. § 254(b)(3); *see also, e.g., Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4572, para 46 (2011).

[8] *See 2000 Biennial Regulatory Review - Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers*, CC Docket Nos. 00-199 et al., Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19913, 19960-61, paras. 126-27 (2001) (modifying section 32.11 of the Commission's rules to make explicit that Part 32 accounting rules applied only to incumbent LECs, as that term is defined in section 251(h)(1) of the Act, and any other company deemed dominant); *see also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 4, para. 15 (1980) (explaining that dominant carriers have "substantial opportunity and incentive to subsidize the rates for [their] more competitive services with revenues obtained from [their] monopoly or near-monopoly services").

might dampen competitive markets for other forms of communication technology.[9] As the Commission has explained, "[t]hese rules ensure that carriers compete fairly in nonregulated markets and that regulated ratepayers do not bear the risks and burdens of the carriers' competitive, or nonregulated, ventures."[10]

5. Rate-of-return carriers record their investments, expenses, and other financial activity in the Part 32 uniform system of accounts (USOA), which is divided into two types of accounts: regulated and nonregulated accounts.[11] Investment and expenses entirely associated with the provision of a regulated activity, or that are used for both regulated and nonregulated services, are recorded in the regulated accounts.[12] Investment and expenses entirely associated with the provision of nonregulated activity are assigned to the nonregulated accounts and are not included when determining a carrier's interstate rate base or revenue requirement.[13] Investment and expenses recorded in the regulated accounts of the USOA are then subdivided in accordance with procedures contained in Part 64 of the Commission's rules.[14] Those rules generally provide that costs shall be directly assigned to either regulated or nonregulated activities where possible, and common costs associated with both regulated and nonregulated activities are allocated according to a hierarchy of principles.[15] To the extent costs cannot be allocated based on direct or indirect cost causation principles, they are allocated based on a ratio of all

[9] *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539, 17550-51, para. 25 (1996) (explaining that the safeguards "were designed to keep incumbent local exchange carriers from imposing the costs and risks of their competitive ventures on interstate telephone ratepayers, and to ensure that interstate ratepayers share in the economies of scope realized by incumbent local exchange carriers"); *see also Policy & Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 2934, para. 117 (1989) (explaining a "natural tension . . . exists between competition and rate of return, which surfaces in the practice of cost shifting, can be avoided through the use of incentive regulation, which blunts the incentives to shift costs from more competitive services to less competitive services"); *Verizon Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 535 U.S. 467, 487 (2002) (reciting history of various methods of regulating telecommunications rates and services and the sometimes perverse incentives arising therefrom).

[10] Wireline Competition Bureau Biennial Regulatory Review, WC Docket No. 04-179, Staff Report, 20 FCC Rcd 263, 318 (2005); *See Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order, 31 FCC Rcd 12999, 13002, para. 8 (2016) (*Sandwich Isles Order*).

[11] 47 CFR § 32.14 (defining "regulated accounts" to include "the investments, revenues and expenses associated with those telecommunications products and services to which the tariff filing requirements contained in Title II of the [Act], are applied, except as may be otherwise provided by the Commission," and "those telecommunications products and services to which the tariff filing requirements of the several state jurisdictions are applied . . . , except where such treatment is proscribed or otherwise excluded from the requirements pertaining to regulated telecommunications products and services by this Commission"); *see also generally* 47 CFR Parts 32 (collecting cost data and separation into various accounts in accordance with the USOA); 36, Subpart F (costs and revenues are divided between those that are regulated and nonregulated, interstate and intrastate); and 64, Subpart I (assignment or allocation of costs and revenues associated with regulated and nonregulated activities); *see also Connect America Fund et al*., WC Docket No. 10-90 et al., Report and Order et al., 29 FCC Rcd 7051, 7069, para. 58 (2014) (moving the rules regarding high-cost loop support and safety net additive from Part 36, subpart F, to Part 54, subpart M, to consolidate all high-cost rules in Part 54, and make conforming changes throughout Part 54) (*April 2014 Connect America Report and Order*).

[12] *See* 47 CFR § 32.14(c).

[13] *See id.* § 32.14(f).

[14] *See id.* §§ 64.901-905.

[15] *See id.* § 64.901.

expenses directly assigned or attributed to regulated and nonregulated activities.[16] The investment and expenses allocated to nonregulated services through this process are excluded from the development of the regulated interstate rate base and revenue requirement. The regulated investment and expenses remaining after the application of the Part 64 process are then split between the intrastate and interstate jurisdictions in accordance with the separations process described in Part 36.[17] The regulated interstate investment and expenses flowing from the separations process are the inputs to the development of cost-based rates and support programs.

2. Identical Support

6. During the relevant time frame, carriers designated by the relevant state or the Commission as competitive ETCs were eligible to receive the same per-line amount of high-cost universal service support as the incumbent LEC serving the same area.[18] As a result, competitive ETCs were not required to conduct cost studies or to allocate costs between regulated and nonregulated services.

7. The difference in the support calculation requirements for rate-of-return LECs and competitive ETCs reflected the different policy goals of the two kinds of support. The rate-of-return support mechanism worked to ensure that the incumbent LEC deemed to hold market power received a reasonable return on its investment in the provision of telecommunications services to fixed locations in high-cost areas. Identical support, in contrast, was intended to ensure that "the support flows" to the carrier "incurring the economic costs of serving that line," "in order not to discourage competition in high-cost areas."[19] Accordingly, the Commission made high-cost support "portable" on a per-line basis to any competitive ETC providing service through its "owned and constructed facilities."[20] Moreover, because the Commission adopted the identical support mechanism in furtherance of efficient solutions, competitive ETCs could qualify for identical support, "regardless of the technology used."[21]

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[16] *See id.* § 64.901(b)(3)(iii).

[17] *See id.* § 36.1 *et seq*.

[18] *See Connect America Fund et al*., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17825, para. 498 (2011) (explaining that identical support provides competitive ETCs the same per-line amount of high-cost universal service support as the incumbent LEC serving the same area) (*USF/ICC Transformation Order*), *pets. for review denied sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

[19] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8932-33, paras. 286-287 (1997) (*First Report and Order*) (subsequent history omitted).

[20] *Id.*; *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20480, para. 90 (1999) (explaining that the identical support rule is consistent with principle of competitive neutrality where a competitive ETC would compete directly against incumbent LECs for existing customers). In May 2008, the Commission adopted an "interim, emergency cap" on identical support which reduced the total amount of identical support available to ETCs serving the state by a fixed percentage on a statewide basis, unless the recipient demonstrated, on an individual basis, and before the Commission "that its costs met the support threshold in the same manner as the [incumbent LEC serving the designated area]." *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, 8837-50, paras. 6-39 (2008). In 2011, the Commission eliminated identical support. *See also USF/ICC Transformation Order* 26 FCC Rcd at 17825, para. 498, 17830–31, paras. 502, 513–14.

[21] *See First Report and Order*. 12 FCC Rcd at 8842, para. 48 (explaining that the newly adopted competitive neutrality principle would "facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier" and prevent disparities in funding that would give an unfair competitive advantage by restricting the entry of potential service providers); *Rural Cellular Ass'n v. Fed. Commc'ns Comm'n*, 588 F.3d 1095, 1104-05 (D.C. Cir. 2009) (emphasizing that the competitive neutrality principle "does not require the Commission to provide the exact same levels of support to all ETCs").

3. Administration of Support and Collection Efforts

8. Rate-of-return incumbent LECs submit their cost data to NECA which is a membership organization of incumbent LECs. NECA is responsible for collecting its members' cost study data and filer certifications of that data, and any other information necessary for NECA to calculate the amount of High-Cost Loop Support (HCLS) which its members are eligible to receive.[22] NECA submits the results of its calculations to the Universal Service Administrative Company (USAC), which is responsible for day-to-day administration of the high-cost support program.[23] In addition to the information it receives from NECA, USAC collects carrier data and information relevant to the calculation of other forms of support.[24]

9. By contrast, to initiate the identical support process, during the period that it was available, a competitive ETC would submit line count data to USAC, which in turn, would trigger a corresponding obligation from the incumbent LEC serving the designated area to submit quarterly line count data to USAC to determine both projected and actual trued-up identical support for competitive ETCs.[25]

10. When submitting data to either NECA or USAC, carriers certify the accuracy of the data reported.[26] As administrator of the USF, USAC has the authority and responsibility to audit USF payments.[27] Pursuant to a separate statutory authority in the Inspector General Act of 1978, the FCC's Office of Inspector General (OIG) also initiates investigations of USF payments to beneficiaries to coordinate prosecutions for waste, fraud, and abuse.[28] The Commission has designated the Managing Director as the agency official responsible for ensuring "that systems for audit follow-up and resolution are documented and in place, that timely responses are made to all audit reports, and that corrective actions are taken."[29] The Commission resolves contested audit recommendations and findings, either on

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[22] *See Connect America Fund et al.,* WC Docket No. 10-90 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4796, para. 476 (2011) (explaining that NECA collects data necessary for the calculation of HCLS while USAC administers other aspects of the fund, including identical support); 47 CFR §§ 36.611-613, 54.1305-1306 (detailing incumbent LEC submission of cost data to NECA), 54.1307 (detailing NECA's submission of cost data to USAC); 54.707(b) (establishing USAC's authority obtain all carrier submissions, and underlying information from NECA); *see also id*. § 69.601 *et seq*.

[23] *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal State Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18412, para. 18 (1997).

[24] *See* 47 CFR §§ 36.611, 36.612, 54.307, 54.903; *High-Cost Universal Service Support et al.,* WC Docket No. 05-337 et al., Order, 23 FCC Rcd 8834, 8846, paras. 27-28 (2008).

[25] 47 CFR §§ 54.307, 54.807, 54.901(b), 54.903(a)(2).

[26] *See id*. § 69.601(c) (requiring certification of the accuracy of USF data submitted to NECA); *id*. § 54.904(a) (requiring certification that all interstate common line support receive "will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended"); *id*. § 54.314 (requiring state commissions (or the rural telephone company itself when not subject to the jurisdiction of the state) to certify that the support received by a rural telephone company will only be used for its intended purpose); *see also, e.g.,* Instructions for Completing Connect America Fund Broadband Loop Support, Actual Cost and Revenue Data, Form 509 (requiring certification of accuracy and compliance with Commission's cost allocation rules when submitting data for true up of interstate common line support), at http://www.usac.org/_res/documents/hc/pdf/forms/509i.pdf.

[27] 47 CFR § 54.707 (endowing USAC with authority to audit carriers).

[28] 5 U.S.C. § App. 3 *App.; Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1116 (D.D.C. 1994) (concluding that, based on the legislative history of the Inspector General Act of 1978, "Congress understood the Act to give the Inspector General the authority to investigate the recipients of federal funds").

[29] *See Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15834, para. 76 (2004).

appeal from the Wireline Competition Bureau (WCB) or directly, if the challenge raises novel questions of fact, law, or policy.[30]

11. The Commission has also long emphasized its authority and obligation to recover USF sums disbursed contrary to Commission rules.[31] Under section 3701 of the Debt Collection Improvement Act (DCIA), the Commission has authority to determine whether a debt is owed to the Commission.[32] The DCIA and the Federal Claims Collection Standards (FCCS) promulgated by the Department of Treasury and the Department of Justice to implement the DCIA require the Commission to aggressively collect all debt owed to it.[33] The Commission has delegated to the Commission's Managing Director and the Managing Director's designee authority to make administrative determinations pursuant to the DCIA.[34]

B. The Investigations of Blanca's Cost Accounting and the OMD Letter

12. Between 2005 until 2013, as a rate-of-return incumbent LEC, Blanca self-reported what it represented to be the costs and revenues of providing fixed local exchange service in its study area to NECA and USAC. NECA and USAC relied upon the accuracy and completeness of Blanca's reporting to calculate the specific disbursements Blanca received over this time frame.[35]

13. In 2008, the FCC's OIG commenced an investigation into Blanca's receipt of high-cost support beginning with 2004. In 2012, during the pendency of the OIG investigation, and pursuant to its data reconciliation policies, NECA conducted a review of Blanca's 2011 Cost Study, and concluded that Blanca improperly included costs, loops, and revenues associated with providing CMRS, which is a non-regulated service, in its 2011 Cost Study.[36] NECA directed Blanca to revise its 2011 cost studies and all ensuing studies to remove such costs.[37] In response to NECA's request, Blanca retained a cost consultant

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[30] 47 CFR § 54.722(a) ("Requests for review of Administrator decisions that are submitted to the Federal Communications Commission shall be considered and acted upon by the Wireline Competition Bureau; provided, however, that requests for review that raise novel questions of fact, law or policy shall be considered by the full Commission."); 47 U.S.C. § 155(c)(4) ("Any person aggrieved by any such order, decision, report or action [taken on delegated authority] may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission."); *id*. § 405(a) ("After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear.").

[31] *See*, *e.g.*, *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, et al*., CC Docket No. 96-45 et al., Report and Order, 22 FCC Rcd 16372, 16386, para. 30 (2007) (*Comprehensive Report and Order*); *see generally*, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 22975 (2000).

[32] 31 U.S.C. §3701(b); *see also* 31 CFR §900.2(a) (A debt is "an amount of money, funds, or property that has been determined by an agency official to be due to the United States…"); 47 CFR §1.1901(e).

[33] 31 U.S.C. §3711(a); 31 CFR § 901.1(a).

[34] 47 CFR § 0.231(f).

[35] *See* Application at 24 (acknowledging that Blanca sought support for mobile services).

[36] *See id*.; *see also* Letter from Brandon Gardner, Manager, Member Services, NECA to Alan Wehe, Blanca Telephone Company (Jan. 28, 2013) (NECA True Up Notice) (citing NECA Cost Issue 4.9).

[37] *See* NECA True Up Notice. NECA did not seek to recover past high-cost distributions from Blanca for the 2005-2010 period because NECA's cost pools operate within a 24-month settlement window. Under NECA's policies and procedures, member companies execute an agreement which specifies the existence of a window that allows

(continued….)

to review and revise Blanca's submissions because Blanca did not track or allocate expenses associated with providing local service to customers over its landline and cellular systems or the expenses associated with providing service to customers of other carriers roaming on Blanca's cellular system, both inside and outside of Blanca's study area.[38] At no point during this reconciliation process did Blanca contest NECA's determination that Blanca's wireless offerings should be excluded from the costs used to calculate Blanca's high-cost support.

14. Based on its investigation and review of documentation provided by Blanca, OIG concluded that Blanca had misallocated costs between its CMRS and its wireline service. And, based on the outcome of its investigation and NECA's review, OIG also began working with USAC to identify USF losses resulting from Blanca's misallocation of costs in prior years. USAC found that, from at least 2005 until 2011, when NECA directed Blanca to revise its cost allocation methods to exclude costs associated with the provision of its wireless service, Blanca had "improperly included costs and facilities attributable to nonregulated CMRS, as well as wireless loop counts, in its cost studies that served as the basis for filing for USF high-cost funds."[39] As a result, Blanca received overpayments of high-cost support during this entire period.

15. As required by section 54.707(c) of the Commission's rules, USAC provided the Commission with copies of "Blanca's books and records obtained during the OIG investigation and Blanca's own revision of its cost study and other filings for the post 2011 period."[40] Based on its analysis of that information, OMD determined that Blanca owed the Commission $6,748,280 in high-cost support overpayments received by Blanca between 2005 and 2010.[41]

16. On June 2, 2016, OMD issued the OMD Letter in which it informed Blanca that it had violated Parts 36, 64, and 69 of the Commission's rules by incorrectly including in its calculation of costs

(Continued from previous page)
exchange carriers to update or correct data for up to 24 months after the data was initially reported. Pool Administration Procedure, § 1.3, at p.1.6 (2013); *Universal Service High-Cost Filing Deadlines*, WC Docket No. 08-71, Order, 30 FCC Rcd 1879, 1882 n.28 (2015) (This 24-month adjustment window is the product of a contractual agreement between NECA and its member companies and has been in place since NECA began operations in the early 1980s). NECA therefore directed Blanca to revise and refile its 2011 Cost Study to remove costs and revenues attributable to its wireless system so that any necessary adjustments could be made within the applicable window. NECA also informed that any support payments "accepted and processed by USAC corresponding to data corrections outside of the 24-month settlement window are the obligation of the company." Pool Administration Procedure, § 1.3, at p.1-9.

[38] *See* OMD Letter at 2.

[39] OMD Letter at 3.

[40] *Id*. at 7.

[41] OMD, USAC and the OIG used documents prepared by Blanca's consultant, Moss Adams LLP, for Blanca's revised 2011 and its 2012 Cost Studies as a blueprint to determine the excess of high-cost distributions Blanca received for the 2005-2010 period attributable to Blanca's wireless system. These documents, which were obtained by the OIG from Moss Adams LLP in 2014 pursuant to a subpoena, contained factors used for the preparation of the revision of the 2011 Cost Study as well as the 2012 Cost Study Blanca submitted to NECA. These factors specifically served as the basis for USAC to identify relevant costs which should have been excluded from Blanca's cost studies and other filings establishing Blanca's entitlement to high-cost funds for 2005-2010. The non-regulated factors used by Blanca for 2011 and 2012 Cost Studies, which were virtually the same, were adopted by USAC to recalculate Interstate Common Line Support (ICLS), HCLS, and Safety Net Additive Support (SNA) for 2005-2010. These factors were also adopted for Local Switching Support (LSS), except that the allocation of costs of the switches used to provide wireless service, which were responsible for a large portion of the distributions Blanca received, was greater for the 2005-2010 period. Therefore, the non-regulated factor attributable to those costs was used, rather than the factor used for the costs in the 2011 and 2012 Cost Studies. The precise amount of the overages based on Blanca's own non-regulated factors developed by its consultant were set out on Attachment A of the OMD Letter. *Id*. at 7.

eligible for high-cost support its costs of providing nonregulated cellular mobile telephone service,[42] and demanded immediate repayment of the $6,748,280 that Blanca had improperly received.[43]

17. The OMD Letter informed Blanca that it could challenge OMD's findings by providing evidence that it did not owe all or part of the debt if it did so within 14 days of the OMD Letter.[44] The OMD Letter also notified Blanca that the Commission might exercise any one or more of the debt collection remedies available to it pursuant to the DCIA and the Commission's debt collection rules.[45]

C. Blanca's Challenges to the OMD Letter

18. On June 16, 2016, Blanca filed an Emergency Application for Review of the OMD Letter.[46] On June 24, 2016, Blanca filed a Petition for Reconsideration of the OMD Letter.[47] The arguments advanced by Blanca in the Petition and the Application are substantially the same. Stripped to their essence, Blanca argues that: (1) USF support is available for wireless services;[48] (2) in areas outside of its rate-of-return study area, Blanca was entitled to receive identical support as a competitive ETC and so any USF overpayments for misallocating CMRS-related expenses are offset by the identical support it could have received if correctly reported;[49] (3) recovery against Blanca would be inequitable;[50] (4) seeking to recover USF payments in an "*ex parte* summary proceeding" violates Blanca's due process rights;[51] (5) OMD is improperly imposing a forfeiture penalty under section 503 of the Act;[52] (6) the Commission has no authority to act under the DCIA because it applies only to "executive, judicial, or legislative" agencies and does not apply to "independent agencies," such as the Commission;[53] and (7) the OMD Letter is fatally flawed because it does not provide Blanca with an opportunity for administrative review prior to a monetary deprivation and denies Blanca the opportunity to review the Commission's records pertaining to the debt determination.[54]

19. Upon receipt of the Application, the Commission informed Blanca that, pending review of its submissions, it would not be subjected to the Commission's Red Light process nor would the Commission institute an offset to recover any of the proposed debt.[55]

20. Blanca later filed four separate motions for leave to supplement its Application and Petition.[56] On December 19, 2016, Blanca filed its First Supplement claiming that two court decisions

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[42] OMD Letter at 2.

[43] *Id*. at 1.

[44] *Id*. at 8.

[45] *Id*.

[46] Application.

[47] Petition.

[48] Application 5-6; Petition at 5-7.

[49] Application at 6; Petition at 17.

[50] Application at 23; Petition at 22.

[51] Application at 9-10.; Petition at 7-9 & n.4.

[52] Application at 15-18; Petition at 3, 14-17.

[53] Application at 19-20; Petition at 18-19.

[54] Application at 21-23; Petition at 20-21.

[55] Letter from Mark Stephens, Acting Managing Director, OMD, FCC to Timothy E. Welch, Counsel (dated June 22, 2016).

[56] Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Dec. 19, 2016) (First Supplement); Second Motion for Leave to Supplement Emergency Application for Review, CC Docket No.

(continued….)

involving the question of whether USF debt is federal debt for purposes of False Claims Act (FCA) prosecutions support its arguments.[57] In that supplement Blanca also expresses concern that that two newly released Commission Notices of Apparent Liability for Forfeiture (NALs) announce a new statute of limitations theory under section 503 of the Act, which the Commission could use against Blanca.[58]

21. On March 30, 2017, Blanca filed its Second Supplement, notifying the Commission that Blanca has discontinued offering CMRS as of March 28, 2017.[59] Blanca asserts that the disclosure is "factually useful in the Commission's consideration of the USF funding issue current under review."[60]

22. On April 10, 2017, Blanca filed its third supplement raising arguments about the Commission's decisions regarding another rate-of-return incumbent LEC, Sandwich Isles Telephone Company, in the *Sandwich Isles Order* and the *Sandwich Isles NAL*, both adopted in December 2016.[61] Blanca also attempts to factually distinguish its situation from that of Sandwich Isles.[62]

23. On July 5, 2017, Blanca filed its Fourth Supplement, arguing that a recent Supreme Court decision compels the Commission to treat this recovery action as a penalty time barred by the one-year statute of limitations in section 503 of the Act.[63] Blanca also notified the Commission that it has requested that NECA provide it with copies of all documents that NECA submitted to OIG in response to the April 20, 2017, OIG subpoena for information relating to the calculation of Blanca's USF payments between January 1, 2005, and December 31, 2012, and "copies of any other subpoenas which the Commission might have served upon NECA."[64]

III. DISCUSSION

24. Between 2005 and 2010, Blanca received high-cost support intended to partially reimburse Blanca as a rate-of-return incumbent LEC for the provision of regulated service within high-cost areas of its designated study area. In seeking high-cost support, for at least eight years, Blanca ignored Commission orders and NECA guidance making clear that it could only include regulated costs in its cost studies. During those years, despite the fact that CMRS is not a regulated service, Blanca reported CMRS-related costs, including costs incurred outside of its study area, as regulated costs incurred to provide service within the single study area in Colorado for which it sought high-cost support. NECA and USAC relied on Blanca's cost studies when calculating Blanca's eligibility for high-cost

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96-45 (filed Mar. 30, 2017) (Second Supplement); Third Motion for Leave to Supplement Emergency Application for Review, , CC Docket No. 96-45 (filed Apr. 10, 2017) (Third Supplement); Fourth Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed July 5, 2017) (Fourth Supplement).

[57] *Id*. at 15-16 (citing *Farmers Tel. Co. v FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999); *US ex rel Shupe v. Cisco Sys*., 759 F.3d 379, 377-88 (5th Cir. 2014)).

[58] First Supplement at 2, 3-8 (citing *Network Services Solutions, LLC, Scott Madison*, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd 12238, 12284, para. 144 and n.334 (2016) (*Network Services Solutions*); *BellSouth Telecommunications, LLC d/b/a AT&T Southeast*, Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 8501, 8525, para. 71 & n. 150 (2016) (*BellSouth*)).

[59] Second Supplement.

[60] *Id.* at 1.

[61] Third Supplement at 2. *See Sandwich Isles Order,* 31 FCC Rcd 12999; *Sandwich Isles Communications, Inc., Waimana Enterprises, Inc., Albert S.N. Hee*, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd 12947 (2016) (*Sandwich Isles NAL*).

[62] Third Supplement at 5-10.

[63] *See generally*, Fourth Supplement (citing *Kokesh v. S.E.C*., 137 S. Ct. 1635 (2017)).

[64] *See* Fourth Supplement at 5-6.

support, and USAC paid Blanca more USF support with respect to this study area than the amount to which it was entitled based on such calculations.

25. In defending its actions, Blanca erroneously asserts that because it used high-cost support to deploy CMRS and because wireless service is a supported service, Blanca was entitled to the support that it received. But this argument is inconsistent with the plain language of Commission rules and orders requiring rate-of-return carriers such as Blanca to separate out their nonregulated costs from the rate base upon which high-cost support is based, to promote the competitive and other public interest goals of section 254 of the Act. Blanca also attacks the process used by OMD to seek repayment of the overpayments made to Blanca. In so doing, Blanca ignores Commission rules and precedent as well as the Commission's obligation to protect the Universal Service Fund from waste, fraud and abuse. We thus affirm the factual, legal, and technical findings in the OMD Letter and direct OMD to proceed with collection.

A. Consideration of Blanca's Late-Filed Supplements

26. As an initial matter, we address Blanca's motions to accept its four supplements, all filed by Blanca well after the 30-day deadline for an appeal of the OMD letter—July 5, 2016.[65] The Commission has explained that a strict enforcement of filing deadlines is "both necessary and desirable" to avert the "grave danger of the staff being overwhelmed by a seemingly never-ending flow of pleadings."[66] In general, we will deny consideration of late-filed pleadings that raise arguments and facts that could have been presented within the 30-day deadline.[67] We have the discretion, however, to grant leave to file late pleadings where "equities so require and no party would be prejudiced thereby."[68]

27. We grant Blanca's motion to accept its late-filed Second and Fourth Supplements. In each, Blanca has identified new facts and arguments that occurred after July 5, 2016. In the Second Supplement, Blanca points to the fact that it ceased offering nonregulated CMRS in March 2017.[69] In the Fourth Supplement, Blanca points to a 2017 United States Supreme Court decision that it claims is on

[65] Because the 30th day fell on a weekend preceding the 4th of July, the Application and Petition and any supplements were due by July 5, 2016. 47 CFR §§ 1.4(b)(5), 1.106(f), 1.115(d).

[66] *Pathfinder Communications Corporation*, Memorandum Opinion and Order, 3 FCC Rcd 4146, 4146, para. 5 (1988). The D.C. Circuit Court of Appeals has also generally discouraged the Commission from accepting late petitions in the absence of extremely unusual circumstances. *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951–52 (D.C. Cir. 1986); *cf. Gardner v. FCC*, 530 F.2d 1086, 1091–92 & n. 24 (D.C. Cir. 1976).

[67] *See*, *e.g., Alpine PCS, Inc*., Memorandum Opinion and Order, 25 FCC Rcd 469, 479–80, para. 16 (2010) (dismissing untimely filed supplements that sought to raise new questions of law not previously presented); *see also 21st Century Telesis Joint Venture v. Fed. Commc'ns Comm'n*, 318 F.3d 192, 199-200 (D.C. Cir. 2003) (affirming the Commission's decision not to exercise its discretion to hear late-filed supplements when the petitioner offered no plausible explanation for why supplemental arguments were not made in its initial petition); *cf*. 47 CFR § 1.115(g)(1)-(2) (stating when a petition requesting reconsideration of a denied application for review will be entertained, i.e., the occurrence of new facts, changed circumstances, or the learning of facts unknown – notwithstanding the exercise of ordinary diligence – since the last opportunity to present such matters).

[68] *Crystal Broadcasting Partners,* Memorandum Opinion and Order, 11 FCC Rcd 4680, 4681 (1996); *see also, e.g., Amendment of Section 73.202(B) Table of Allotments, FM Broadcast Stations (Genoa, CO)*, MM Docket No. 01-21; RM-10050, Report and Order, 18 FCC Rcd 1465 n.2 (MB 2003) (granting motions for the acceptance of late-filed pleadings that "facilitate resolution of this case based upon a full and complete factual record"); *cf*. 47 CFR § 1.115(g)(1) (allowing for reconsideration of the Commission's denial of an application for review based on events occurring after last opportunity to present).

[69] *See* Second Supplement at 1.

point.[70] We find the public interest is served by considering the relevance of these arguments to the instant action.

28. In contrast, we deny Blanca's motions to accept its late-filed First and Third Supplements for failing to demonstrate good cause to waive the 30-day filing window for such filings.[71]

29. Blanca's assertion in its First Supplement—that two NALs and the Commission's Writ Opposition filed with the D.C. Circuit constitute changes in the law or in the Commission's interpretation of the law—is specious.[72] The Commission's analysis of the relevant legal issues was based on long-standing precedent and principles that Blanca had ample opportunity to review and incorporate into its timely filed Application and Petition. For example, the legal position that the collection of debt is not a forfeiture barred by the passage of time, as raised in the two NALs cited by Blanca and issued after the issuance of the OMD Letter, is expressly is based on long-standing precedent, including 1938 and 1946 decisions by the U.S. Supreme Court and orders by the Commission and the WCB released in 2011 and 2014, respectively, establishing that the denial of funding is not a forfeiture action and the statute of limitations in section 503 of the Act is therefore inapplicable to the recovery of government funds improperly paid.[73] Likewise, the applicability of the DCIA to the recovery of federal debts is supported by precedent almost 30 years old and did not involve any new interpretation of the relevant law.[74]

30. Further, we find unpersuasive Blanca's characterization of a new argument as "non-obvious" to justify a late filed supplement. The cases Blanca "discovered" were issued by the 10th Circuit in 1999 and the 5th Circuit in 2014, well in advance of the 30-day deadline.[75] Both of these cases, as with the instant action, involve USF support.[76] We thus find no reasonable basis, and Blanca proffers none, for concluding that Blanca could not, "through the exercise of ordinary diligence," have learned of, and timely raised, the relevance of these cases prior to the deadline.[77]

31. Likewise, and contrary to Blanca's contentions, Blanca's arguments in its Third Supplement are not based on a new interpretation of the law by the Commission. The legal positions

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[70] *See generally*, Fourth Supplement (citing *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017)).

[71] *See* 47 CFR § 1.3.

[72] *See* First Supplement at 6-7; *see also* FCC Opposition to Writ of Prohibition, United States Court of Appeals for the District of Columbia Circuit, No. 16-1216 (Aug. 31, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-341047A1.pdf (Writ Opposition).

[73] *See Network Services Solutions,* 31 FCC Rcd at 12284, para. 144 and n.334 (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *United States v. Wurts*, 303 U.S. 414, 415-16 (1938)); *Bellsouth*, 31 FCC Rcd at 8525, para. 71 & n. 150 (2016) (citing *Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP et al.*, CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16600-01, para. 28 (2011) (*Lakehills*); *Request for Waiver or Review of a Decision of the Universal Service Administrator by Premio Computer, Inc*., CC Docket No. 02-6, Order, 29 FCC Rcd 8185, 8186, para. 6 and n.16 (WCB 2014) (*Premio*))

[74] *See, e.g.,* First Supplement at 13-14 (challenging the Commission's partial reliance in its Opposition on the Ninth Seventh Circuit Court's decision in *Commonwealth Edison Co. v. United States NRC*, 830 F.2d 610 (7th Cir. 1987), to support its contention that "independent" agencies are covered by the DCIA).

[75] *See* First Supplement at 15-16.

[76] *See id*.; *see also Farmers*, 184 F.3d at 1250; *Shupe*, 759 F.3d at 377-88.

[77] In addition to the untimeliness of Blanca's argument based on cases under the False Claims Act, and as an alternative and independent ground, we note that the provisions of the FCA on which the cases Blanca cites rely are substantially different from the relevant provisions of the DCIA, *see Sandwich Isles Order*, 31 FCC Rcd at 13029, para. 95, and that more recent cases interpreting the FCA have held that USF payments are federal monies under that Act. *See U.S.ex rel.Heath v. Wisconsin Bell, Inc*., No. 08-cv-0724-LA, Decision and Order, (E.D. Wis., filed July 1, 2015); *U.S, ex rel. Futrell v. E-Rate Program LLC*, No .4:14-CV-02063-ERW (filed August 23, 2017, E.D. MO).

taken by the Commission in the *Sandwich Isles NAL* were based on long-standing precedent.[78] To the extent Blanca's arguments are about precedent for forfeiture proceedings, they are not relevant here, because this is not a forfeiture proceeding.[79] Moreover, the mere fact Blanca referenced a Public Notice in its original Application and Petition mentioning the Sandwich Isles proceeding and that the Sandwich Isles proceeding involved a fact pattern that Blanca claims is like its own does not justify, in this case, consideration of its late-filed supplement.

32. For these reasons, we find acceptance of the First and Third Supplements is not in the public interest. Below, we address arguments raised by Blanca in the Petition, Application and Second and Fourth Supplements.

B. Nonregulated Costs Are Not Eligible for High-Cost Support Provided to an Incumbent LEC

33. In order to implement its universal service obligations, section 254(k) of the Act requires the Commission to "establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." Section 254(b)(5) also requires the Commission to implement universal service mechanisms that are "specific, predictable and sufficient."[80] Parts 36, 64, and 69 of the Commission's rules are designed to ensure discharge of these statutory mandates.

34. We affirm OMD's determinations that Blanca included costs associated with the provision of a nonregulated service—both within and outside its study area—within its cost studies for the Colorado service area in which it is the incumbent LEC, and in so doing Blanca violated Parts 36, 64, and 69 of the Commission's rules.[81] We also agree with the findings of OIG, USAC, and NECA upon which OMD based its conclusion that as a result of treating nonregulated costs as regulated costs in its cost studies, Blanca received inflated USF disbursements with respect to this study area that it now must repay.[82] In reaching these conclusions, we emphasize that Blanca has conceded that it offered CMRS services[83] and it has not challenged the accuracy of OMD's accounting of the aggregate high-cost support attributable to Blanca's inclusion of CMRS-related costs in regulated accounts between 2005 and 2010.[84]

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[78] *See, e.g., Sandwich Isle Order*, 31 FCC Rcd at 13026-27, para. 92 (finding that Congress has not imposed a statutory limitations period on the collection of debt under section 254 or the DCIA) (citing *Premio*, 29 FCC Rcd at 8186, para. 6; *Lakehills*, 26 FCC Rcd at 16601, para. 28).

[79] *See* Third Supplement at 4 (referencing the Sandwich Isles proceedings); 5-6 (arguing that Blanca's misreporting was not a continuing violation).

[80] 47 U.S.C. § 254(b)(5).

[81] *See* OMD Letter at 2.

[82] *See id*.

[83] *See generally* Application (repeatedly referring to its cellular system as "mobile"); *see also* Third Supplement at 9-10 (distinguishing the obligations for discontinuance of CMRS from obligations for discontinuance of local exchange service).

[84] CMRS is classified as a nonregulated service for accounting and cost allocation purposes, because the Commission has chosen to forbear from rate regulation of these wireless services. *See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services,* WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668, 15691, para. 33 n.102 (1997); *Implementation of the Telecommunications Act of 1996,* CC Docket No. 96-193, Report and Order, 12 FCC Rcd 8071, 8095, para. 53 (1997); *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications,* GN Docket No. 94-90, Report and Order, 10 FCC Rcd 6280, 6293-94 & n.77 (1995); *Implementation of Sections 3(n) and 332 of the*

(continued….)

35. Blanca is a rural telephone company designated as an ETC for the provision of tariffed local exchange service in the relevant study area 462182, which as noted above covers portions of Alamosa and Costilla counties in Colorado.[85] Blanca joined NECA as a rate-of-return incumbent LEC and was treated for regulatory purposes as such.[86] As a rate-of-return incumbent LEC, Blanca was required by our Part 64 rules to allocate its costs between regulated services and nonregulated service so that NECA and USAC could correctly compute their eligibility for HCLS, Safety Net Additive Support (SNA), and Local Switching Support (LSS), but failed to do so.[87] Blanca also violated Part 36 of our rules, which requires rate-of-return incumbent LECs to identify the portion of their regulated expenses attributed to interstate jurisdiction so that USAC may correctly compute their eligibility for Interstate Common Line Support (ICLS).[88] Additionally, Blanca violated Part 69 of our rules, which require rate-of return incumbent LECs to apportion regulated, interstate costs among the interexchange services and rate elements that form the cost basis for exchange access tariffs, so that NECA may set "just and reasonable" access rates.[89] Consequently, Blanca's decision to report CMRS-related costs in regulated accounts with respect to study area 462182 resulted in an erroneous increase in the amount of high-cost support paid to Blanca and potentially distorted "just and reasonable" access rates.[90]

36. Blanca is also wrong when it claims it was entitled to support for its CMRS offerings as a competitive ETC.[91] Blanca does not qualify for identical support in areas where it is an incumbent LEC.[92] Blanca's ETC designation is limited to a specific geographic area and does not encompass the offering of

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Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1492, para. 218 (1994).

[85] *See* Commission Order Granting Application for Designation as an Eligible Telecommunications Carrier, Public Utilities Commission of the State of Colorado, Docket No. 97A-506t, Decision No. C97-1389, at 3, para. 2 (adopted December 17, 1997), available at http://www.dora.state.co.us/puc/docketsdecisions/1997.htm (limiting the scope of the ETC designation to the Study Area Code 462182).

[86] *See, e.g.,* Letter from Doug Dean, Director, Colorado Public Utility Commission to Marlene K. Dortch, Secretary, FCC, CC Docket 96-45, Attach. A (filed Oct. 1, 2016) (listing Blanca as an incumbent LEC but not as a competitive ETC for purposes of the ETC's annual certification of support as required by section 54.314 of the Commission's rules, 47 CFR § 54.314) (Col. PUC Oct. 1, 2016 Letter)

[87] *See* 47 CFR §§ 64.901-905; *see also id*. § 64.901 (codifying the prohibition in section 254(k) of the Act as it applied to incumbent LECs); *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539, 17572, para. 50 (1996) (finding that the accounting safeguards adopted are sufficient to implement the prohibition in 254(k) of the Act against using "services that are not competitive to subsidize services that are subject to competition").

[88] *See* 47 CFR §§ 36.1-36.741; *id.* § 54.901 *et seq*.; *USF/ICC Transformation Order*, 26 FCC Rcd at 17761, para. 257 (eliminating LLS effective July 1, 2012, but allowing for limited recovery of the costs previously covered pursuant to our ICC reform). In 2014, the Commission moved the Part 36 rules at issue to Part 54. *See April 2014 Connect America Report and Order*, 29 FCC Rcd at 7069, para. 58.

[89] *See* 47 CFR §§ 69.1 - 69.731; *id*. § 54.901 et seq.

[90] *See* OMD Letter at 2 (explaining that "[t]he inclusion in cost studies of such cellular investment, expenses, and costs that were not used and useful to provide regulated telephone service is prohibited, and resulted in inflated disbursements to Blanca from ICLS, LSS, [HCLS], and [SNA]"); *see also id*. at Attach. A (listing specific disbursements by fund type and year and the differences between the support received and the support to which Blanca was entitled based on its regulated costs).

[91] Application at 6, 8, 18; Petition at 5, 6, 17.

[92] 47 CFR § 54.5 (defining a "competitive eligible telecommunications carrier" as a carrier that meets the definition of an "eligible telecommunications carrier" below and does not meet the definition of an "incumbent local exchange carrier" in section 51.5 of the Commission's rules).

a competitive nonregulated service, either inside or outside Blanca's designated study area.[93] Indeed, the state commission had no opportunity to evaluate, consistent with its obligation to make a public interest determination required by section 214(e), the relative burdens on federal or state support mechanisms of granting Blanca an ETC designation for its CMRS, including any conditions that might have been appropriate with respect thereto (such as forming a separate wireless subsidiary).[94] Accordingly, Blanca was not entitled to identical support for a competitive CMRS service offering within its study area absent a new designation or the modification of its existing designation.[95]

37. Further, while Blanca now asserts that it is a competitive ETC in areas served by a different incumbent LEC where it offered CMRS and, therefore, is entitled to support for such offering, the overpayments here related to study area 462182, in which Blanca was the incumbent LEC, not a competitive carrier. Moreover, Blanca has not produced any evidence that it has sought or obtained the requisite ETC designation for any other areas for, or expanded its existing designation to cover, these areas. Absent such designation, Blanca is not eligible for support in these areas. Tellingly, Blanca never sought identical support on a correctly calculated per-line basis from USAC for services provided outside its study area as a competitive ETC—indeed, it made no administrative filings to claim identical support at all—and it is not now entitled to have the overpaid rate-of-return support for study area 462182 offset against any speculative sum it might have received had it done so.[96]

38. Having reached these conclusions, we find no basis to Blanca's contentions that OMD's recovery efforts here retroactively alter the terms and conditions under which it was entitled to high-cost support.[97] The mere disbursement of USF does not ratify its legality, and any claim Blanca can assert to USF support is conditioned on Blanca having met the eligibility and use criteria, long codified in our rules and reiterated in NECA guidance, and subject to audit and recovery action.[98] In making its finding,

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[93] *See, e.g.,* Col. PUC Oct. 1, 2016 Letter, Attach. A (listing Blanca as an incumbent LEC but not as a competitive ETC for purposes of the ETC's annual certification of support as required by section 54.314 of the Commission's rules, 47 CFR § 54.314).

[94] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371, 6392-6397, paras. 48-57, 60 (2005); *id*. at 6396-97, paras. 58, 60 (encouraging state commissions to adopt the same public interest analysis as conducted by the Commission and to apply the test "in a manner that will best promote the universal service goals found in section 254(b) [of the Act]").

[95] In 2011, the Colorado PUC required a designated ETC offering LEC services, as a condition of receiving an ETC designation to offer CMRS services, to form a separate wireless subsidiary. *See Application of Union Tel. Co., DBA Union Wireless, for Designation as an Eligible Telecommunications Carrier in Colorado*., 09A-771T, 2011 WL 5056338, at *8, para. 30 (Apr. 26, 2011) (recognizing that while "no statute or rule requires formation of a separate wireless subsidiary as a condition of receiving an ETC designation for wireless operations," the condition served the public interest where a LEC offers CMRS services given a "high risk of comingling and cross-subsidization (regulated, deregulated, and unregulated services in four states and common facilities)").

[96] Blanca never filed quarterly line counts on FCC Form 525, a requirement for recovering support as a competitive ETC pursuant to section 54.307(c). 47 CFR § 54.307(c).

[97] Application at 16-17; Petition at 7-8, 11-12.

[98] *See, e.g.,* 47 CFR § 54.707 (establishing authority of USAC to audit carriers' data submissions); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 97-21, Order, 15 FCC Rcd 22975, 22981-82, para. 16 (2001) (establishing procedures for implementing commitment adjustment recovery actions); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 22975, 22982, para. 16 (2000) ("[C]onsistent with the Commission's obligations under the DCIA, following USAC referrals to the Commission, the Commission will issue letters demanding repayment from service providers that are obligated to pay erroneously disbursed funds"); *cf. Old Republic v. Fed. Crop Ins. Corp*., 947 f. 2d 269, 272 (7th Cir. 1991) (agencies have authority under contract, statute, and common law to recoup overpayments that result from agency error).

OMD did not adopt or apply a new requirement to past conduct or apply a new interpretation of our rules and precedent.[99] Rather, OMD applied our rules, which base rate-of-return high-cost support on an incumbent LEC's embedded costs in providing a regulated service.[100] Blanca's requests for payment with respect to study area 462182 were inconsistent with those rules and the underlying policy, as well as numerous other Commission orders cited herein.[101]

39. Nor did the continued funding of Blanca in accordance with its reported costs from 2005 until 2010 give rise to the kind of reliance interests that would make this debt adjudication a violation of due process. Contrary to Blanca's contentions, the holding in *Christopher v. SmithKline Beecham Corporation* does not suggest otherwise.[102] In *SmithKline*, the U.S. Supreme Court declined to defer to an agency's new interpretation of its long-standing but ambiguous statutes and rules where such new interpretation threatened "massive liability" for prior conduct affected parties could not have reasonably anticipated.[103] In so holding, the Court placed special emphasis on, among other things, the agency's clear and decades-long acquiescence to industry-wide noncompliance.[104] In contrast, in directing Blanca to repay amounts it had been overpaid, OMD did not adopt a new interpretation of ambiguous rules but merely applied explicit Commission rules widely accepted by the industry.[105] Moreover, contrary to Blanca's contentions, the mere continued funding of Blanca pending a factual investigation into Blanca's cost accounting methods is not equivalent to complicity in industry-wide noncompliance. Further, the Commission has consistently stated that it conditions all funding on proper use and receipt; relies on audits and other program safeguards to ensure compliance with its rules designed to implement the foregoing statutory mandates under section 254; and, has regularly and quite properly sought recovery for improper payments at the conclusions of audits and investigations that have found overpayment of universal service funds.[106]

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[99] *See, e.g., Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999) (explaining that a rule operates retroactively if it "'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'") (quoting *Ass'n of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992) (citation omitted)).

[100] *See* 47 CFR Parts 64, 36, 69.

[101] *See, e.g., Verizon Tel. Cos. v. Fed. Commc'ns Comm'n*, 269 F.3d 1098, 1110 (D.C. Cir. 2001) (explaining that despite numerous tests for manifest injustice among the circuits, the D.C. Circuit Court of Appeals has generally held questions of manifest injustice "boil down to a question of concerns grounded in notions of equity and fairness" and "detrimental reliance") (citations omitted).

[102] *See* Application at 9 (citing *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2168 (2012); *see also, e.g., Qwest v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007) (holding that manifest injustice results when the affected party's reliance is "reasonably based on settled law contrary to the rule established in the adjudication").

[103] *See SmithKline*, 132 S. Ct. at 2166-68. More specifically, the Court explained that the highly deferential standard generally applicable to agency interpretations of its own statutes and regulations did not apply where the agency advanced an interpretation that was "plainly erroneous or inconsistent with regulation," and/or "not reflect[ive] [of] the agency's fair and considered judgment." *Id.* at 2166 (quoting *Auer v. Robbins*, 518 U.S. 452, 461-62 (1997)). Accordingly, the Court reviewed the agency's interpretation under the less deferential *Skidmore* standard, ultimately finding the agency's interpretation to be "unpersuasive." *See id*. at 2169-70.

[104] *SmithKline*, 132 S. Ct. at 2167–68.

[105] Indeed, NECA guidance made clear that the industry had adopted the same interpretation of funding eligibility as set forth in the OMD Letter. *See* OMD Letter at 4 (citing NECA Paper 4.9, Use of Wireless Technology to Provide Regulated Local Exchange Service).

[106] *See, e.g*., *Comprehensive Report and Order*, 22 FCC Rcd at 16386, para. 30 ("Consistent with our conclusion regarding the schools and libraries program, funds disbursed from the high-cost, low-income, and rural health care support mechanisms in violation of a Commission rule that implements the statute or a substantive program goal should be recovered."); *id*. at 16382, para. 19 (explaining that "[a]udits are a tool for the Commission and the (continued….)

C. The Commission Has Authority to Seek Repayment of Improperly Disbursed Universal Service Funds

40. The Commission has the statutory authority to review the results of USF audits and investigations, and where it determines that USF payments were sought and received in violation of the Commission's rules it has the authority to recover such funding regardless of fault, and to recover such funding. In section 254 of the Act, Congress created the USF and tasked the agency with overseeing it.[107] In doing so, Congress granted to the FCC the necessary authority to adjudicate and recover unauthorized funding.[108] Such authority is essential to the fair administration of the universal service support programs. In its absence, the Commission would be unable to effectively protect the USF and the contributors thereto from the kinds of market distortions arising from misuse or misallocation of USF support explicitly recognized by Congress in section 254(k) of the Act and directly implicated by Blanca's cost allocation errors.[109] Once the agency makes a final determination that certain payments were erroneous and/or illegal, the agency has the authority and obligation under the DCIA to treat these overpaid sums as federal claim subject to collection, including by offset.[110]

41. Blanca's argument that as a matter of equity we should limit our recovery of overpaid USF to "cases of misrepresentation, false statement, concealment, obstruction, or lack of cooperation," are unavailing.[111] The question of whether Blanca had "clean hands" or intentionally misreported its costs is irrelevant.[112] Blanca does not allege—nor could it—that the Commission's effort to collect improperly

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Administrator, as directed by the Commission, to ensure program integrity and to detect and deter waste, fraud, and abuse," and that "[a]udits can reveal violations of the Act or the Commission's rules").

[107] 47 U.S.C. § 254(e).

[108] *See, e.g., Bechtel v. Pension Benefit Guar. Corp*., 781 F.2d 906, 907 (D.C. Cir. 1986) (finding that the "government's right to recoup funds owing to it is beyond dispute and will not be deemed to have been abandoned unless Congress has clearly manifested its intention to raise a statutory barrier"); *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 377 (5th Cir. 1975), *modified on other grounds*, 522 F.2d 179 (5th Cir. 1975) (finding that the statutory prohibition against any Medicare payments or services which are medically unnecessary implicitly limits the authority of Department of Health, Education and Welfare officials to make payments under Medicare and is exactly the type of limitation which creates both a legal claim in the government and a remedy by way of setoff against the recipient of any such improper payment); *cf. Bennett v. Ky. Dep't of Educ*., 470 U.S. 656, 663 (1985) ("The State gave certain assurances as a condition for receiving the federal funds, and if those assurances were not complied with, the Federal Government is entitled to recover amounts spent contrary to the terms of the grant agreement.").

[109] Because we hold that the agency has direct statutory authority to make these determinations under the Act, we need not address the question of whether the Commission possesses direct common law authority to recover such sums by standing in the shoes of a contracting party. *Compare Bell v. New Jersey*, 461 U.S. 773, 782 n.7 (1983) (in finding express authority to pursue recovery of misused grant funds, declining to address alternative argument that the government has a common law right to collect funds whenever a grant recipient fails to comply with conditions on the grant) *with Mt. Sinai Hosp.*, 517 F.2d at 337 (holding that independent of specific statutory authority, an agency may recover funds which are granted for specific purposes and misspent in contradiction of those purposes); *cf. Pennhurst State Sch. & Hosp. v. Halderman*, 101 S. Ct. 1531, 1540 (1981) ("[L]egislation enacted pursuant to the [S]pending [P]ower is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

[110] The DCIA authorizes appropriate agency officials to determine that a debt is owed to the United States and defines debt to include "over-payments, including payments disallowed by audits performed by the Inspector General of the agency administering the program" and "any "other amounts of money or property owed to the Government." 31 U.S.C. § 3701(b)(1); 31 CFR §900.2(a).

[111] Application at 23; Petition at 22.

[112] Contrary to Blanca's contentions, the Commission in its Writ Opposition did not concede that Blanca accepted the overpaid support with "clean hands;" rather, the Commission stressed merely that it had made no finding of fault (continued….)

disbursed USF support is dependent on any finding of specific intent.[113] So too do we find irrelevant Blanca's repeated emphasis on the fact that Blanca began a practice of misreporting costs to NECA in 2005.[114] Even if the agency could reasonably have discovered the underlying noncompliance earlier, Blanca would not have been relieved of the obligation to repay the funds.[115] Indeed, here the Commission has a specific statutory obligation to make sure that high-cost funds are used for their intended purposes, and seek repayment of improperly distributed funds.[116]

42. Blanca is incorrect when it asserts that the Commission is creating a "novel summary debt claim adjudication procedure" and applying it to Blanca without notice or opportunity challenge the Commission's findings.[117] When the Commission determines whether a specific set of USF payments is erroneous or illegal, it is making a fact-specific, individualized determination applying current laws to past conduct, i.e., an informal adjudication.[118] Such an action does not meet the definition of a rulemaking and no statute requires it to be conducted through "on the record" hearings.[119] The Act gives the Commission broad authority to delegate that adjudicatory authority and in this context, the Commission has delegated authority to both WCB and to OMD.[120] In any event, the Act also specifically provides that all persons aggrieved by an order, decision, report or action made or taken on delegated authority have rights of appeal within the agency, while sections 1.106 and 1.115 of the Commission's

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or intent because such a finding would have been irrelevant to the Commission's recoupment efforts. *Compare* First Supplement at 7 (citing Writ Opposition at 14 to support contention that the Commission concedes Blanca had "clean hands") *with* Writ Opposition at 14 (explaining that a finding of misconduct is not relevant to an action in recoupment).

[113] Recovery of overpaid USF support, unlike the recovery of some other forms of governmental support, such as social security or Medicaid benefits, is not subject to specific statutory bars based on equity or fault. *See, e.g.,* 42 U.S.C. § 404(b) (prohibiting the recovery of overpaid social security benefits from "any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."); *id*. § 1395gg(b) (prohibiting offset or recoupment of overpaid Medicare benefits where a supplier or provider is "without fault"); *see also Bennett*, 470 U.S. at 656–57 (finding that "recovery of the misused funds was not barred on the asserted ground that the State did not accept the grant with "knowing acceptance" of its terms).

[114] *See* Application at 9, 13; Petition at 8-9.

[115] *See, e.g., Mt. Sinai Hosp*., 517 F.2d at 337 ("where the payments would be authorized but for erroneous understandings of fact, the government may recover, even where its own employees and agents were partly responsible for failing to discover the correct facts") (citing *United States v. Barlow*, 132 U.S. 271, 279-280, 281-282 (1889)).

[116] 47 U.S.C. § 254(b)(5); *id*. § 254(e).

[117] *See* Application at 23; Petition at 21-22.

[118] *See, e.g., Conference Grp.*, 720 F.3d at 965 (finding that the Commission's decision to uphold a USAC determination regarding audio bridging provider's contribution obligation was an informal adjudication); *AT&T v. FCC*, 454 F.3d 329, 333 (D.C. Cir. 2006) (finding that the Commission's order classifying AT&T's prepaid calling cards for the first time to be an adjudication).

[119] *See Izaak Walton League v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981) ("The APA itself does not use the term 'informal adjudication.' Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings."); *see also, e.g., Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017-18 (D.C. Cir. 2016) (reasoning that informal adjudications may be used in highly fact-specific contexts).

[120] 47 U.S.C. § 155(c)(1) (allowing the Commission, "by published rule or by order, [to] delegate any of its functions"); 47 CFR § 0.91(m) (authorizing WCB to "[c]arry out the functions of the Commission under the Communications Act of 1934, as amended, except as reserved to the Commission"); *id*. § 0.291 (reserving the power to "decide issues of first impression, described as "any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines"); *id*. § 0.231.

rules set the specific procedures and requirements for making such appeals and seeking reconsideration of agency actions.[121]

43. Also contrary to Blanca's assertion, section 503 forfeiture proceedings are not the exclusive means by and through which the Commission may make a determination that a rule has been violated and impose liability. The Commission or USAC has consistently sought recovery of USF funds outside of section 503 proceedings.[122] By its terms, section 503(b) imposes forfeiture liability for violation of any Commission rule, whether or not the violation has led to any improper payment by the Commission (or USAC). Neither the plain language of section 503 of the Act nor its legislative history indicates that Congress intended that section to govern debt determinations, and Blanca has provided no evidence to the contrary.[123] The legislative history of section 503 makes clear that the statute applies only to monetary forfeitures and that such forfeitures are an enforcement measure.[124]

44. We in turn disagree that the Supreme Court's *Kokesh* decision helps Blanca here.[125] The *Kokesh* Court held that a Security and Exchange Commission (SEC) disgorgement action was a penalty for violating federal securities law, and thus, subject to the APA's generally applicable five-year statute of limitations in section 2462 governing any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."[126] Key to that decision was its finding that a penalty is designed to punish and deter future violations rather than to compensate a "victim."[127] The Court reasoned that SEC disgorgement was an action that left the defendant "worse off," since a court could

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[121] *See, e.g.,* 47 U.S.C. § 155(c)(4) ("[taken on delegated authority] may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission."); *id*. § 405(a) ("After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear."). *See also* 47 CFR §§ 1.106, 1.115.

[122] *See, e.g., Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight,* WC Docket No. 05-195, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308, 11338, para. 70 (2005) (describing USAC audit program that had led to the recommended recovery of USF in various programs, including $6,243,223 for the high-cost support mechanism); *Requests for Review or Waiver of Decisions of the Universal Service Administrator by Academia Avance, et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 28 FCC Rcd 12859 (WCB 2013) *(*affirming USAC decision seeking to recover funds disbursed from the schools and libraries universal service support program).

[123] *See*, *e.g., Liability of Sonderling Broadcasting Corporation*, 69 FCC 2d 289, 292, para. 10 (1977) (finding that "the statutory purpose of the forfeiture provisions is that the Congress intended that forfeitures be a method of civil punishment") (citing Hearings, Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce on Proposed Amendments to the FCC Act of 1934 (S 1898), 86th Congress, 2nd Session, p. 76); *Bennett*, 470 U.S. at 662–63 (holding that the recovery of misused grant funding is "more in the nature of an effort to collect upon a debt than a penal sanction," where the recipient gave "certain assurances as a condition for receiving the federal funds," and was aware at the time funds were received that the federal government was "entitled to recover amounts spent contrary to the terms of the grant agreement").

[124] *See N.J. Coal. for Fair Broad. v. Fed. Commc'ns Comm'n*, 580 F.2d 617, 619 (D.C. Cir. 1978) (emphasizing that [section 503] created only one of several possible enforcement actions and that the legislative history made clear that, "the FCC will not be precluded from ordering a forfeiture merely because another type of sanction or penalty has been or may be applied to the licensee or permittee.") (citations omitted).

[125] *See Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1642 (2017).

[126] *Id.* at 1642 (quoting 28 U.S.C. § 2462).

[127] *Id.*

order disgorgement that "[exceeded] the profits gained as a result of the violation," and that disregarded "a defendant's expenses that reduced the amount of illegal profit."[128] The Court emphasized that when a sanction "can only be explained as . . . serving either retributive or deterrent purposes," it is a "punishment."[129]

45. Here, the Commission is merely seeking to recover sums improperly paid in which Blanca held no entitlement under section 254 and the Commission's implementing rules.[130] It is not a punitive measure that seeks to deter future misconduct by other carriers but merely returns Blanca to the *status quo ante*.[131] It does not punish Blanca for the potential public and market harm arising from Blanca's improper cost accounting but merely recovers for the USF a windfall to which Blanca was not entitled under the foregoing statutory and regulatory scheme.[132] Any negative financial impact that Blanca may experience as a result of recovery of this improper payment cannot transform this action into a sanction or penalty.[133]

46. Nor do, as Blanca asserts, sections 1.1901(e) and 1.1905 of our rules indicate any contrary Commission intent to treat decisions underlying debt determinations as synonymous with forfeiture actions.[134] Consistent with the DCIA and contrary to Blanca's assertions, section 1.1901(e) does not limit recovery actions to partially-paid or judicially-ordered forfeitures but includes any amount due the United States, including overpayments from USF.[135] Similarly, section 1.1905 does not suggest that recovery actions must follow the procedures for forfeiture liability. Rather, that section of our rules

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[128] *Id.* at 1644-45.

[129] *Id*. at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)).

[130] *See Comprehensive Report and Order*, 22 FCC Rcd at 16386, para. 30 (distinguishing the recovery of USF support disbursed in violation of Commission rule from enforcement actions reserved for cases of fraud, waste, and abuse); *see also, e.g.*, *Universal Service Contribution Methodology*, WC Docket No. 06-122, Order, 32 FCC Rcd 4094, 4098, para. 14 (WCB 2017) (upholding USAC decision to collect outstanding contribution obligations against claims by the carrier that the statute of limitations in section 503(b)(6) of the Act imposes a time bar by distinguishing forfeitures from outstanding debts accruing due to the failure to fulfill contribution obligations).

[131] *See Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, Memorandum Opinion and Order, 31 FCC Rcd 12012, 12017, para. 15 (2016) (determining that a reduction in support could not be analogized to a forfeiture since "a forfeiture requires a carrier to pay its own funds to the U.S. Treasury while in contrast a universal service support reduction requires USAC to withhold or recover the public's funds from the carrier").

[132] *Compare, e.g., Kokesh*, 192 S. Ct. at 1642-43 (citing with approval distinction made by the U.S. Supreme Court in *Meeker* between the recovery of overcharges and a penalty for the public offense giving rise to the overcharges) (citing *Meeker v. Lehigh Valley R. Co*., 236 U.S. 412, 421–422 (1915)) *with S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) (explaining that a disgorgement obligation is not a "'a mere money judgment or debt'" or a form of restitution but rather more akin to 'an injunction in the public interest,'" enforceable through contempt, and therefore, is not a federal debt for DCA purposes).

[133] *See, e.g.*, *United States v. Telluride Co*., 146 F.3d 1241, 1246 (10th Cir. 1998) (determining that an injunction requiring the restoration of damaged wetlands was not a penal action even though it remedied "wrongs to the public," i.e., "injuries to the public's resources"); *United States v. Perry*, 431 F.2d 1020, 1025 (9th Cir. 1970) (ruling Government's action to recover sums allegedly paid in violation of the Anti-Kickback Act was not time barred by the statute of limitations governing agency enforcement actions (28 U.S.C. § 2462) because the sums sought were designed to make the Government whole by recovering extra costs incurred when kickbacks were paid); *United States v. Doman*, 255 F.2d 865, 869 (3d. Cir. 1958) (holding that the Government's action under Surplus Property Act was not barred by section 2462 since the recovery was compensatory to the Government, not a penalty), *aff'd*, 359 U.S. 309 (1959).

[134] *See* Application at 15-16; 47 CFR §§ 1.1901(e); 1.905.

[135] 31 U.S.C. § 3701(b)(1) (defining "claim" or "debt," as "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency.").

merely makes clear that such debt collection rules neither supersede such procedures nor require their duplication.[136]

E. The Commission Afforded Blanca Due Process

47. The Commission processes have afforded Blanca sufficient due process. Informal adjudications should provide notice to affected parties, opportunity to participate, and supporting reasons.[137] In adopting section 3716 of the DCIA, Congress explicitly preserved "all appropriate due process rights, including the ability to verify, challenge, and compromise claims" by requiring, prior to the initiation of offset, that the debtor be sent written notice describing the type and amount of the claim, the intention of the agency head to collect the claim by administrative offset, and an explanation of the rights of the debtor under section 3716, as well as opportunities to inspect and copy agency records related to the claim, to receive agency review of its claim-related decisions, and to enter into a repayment agreement with the agency head.[138] An agency need not, however, duplicate such notice and review opportunities in order to initiate offset.[139]

48. In the OMD Letter, OMD provided Blanca with specific notice of the factual and legal predicates for its conclusion that Blanca received $6,748,280 in high-cost USF support in error. The OMD Letter did not fall short of the requisite notice by citing rule parts rather than specific sections. The cost accounting framework embodied in the rule parts cited by OMD, i.e., Parts 36, 64, and 69 of the Commission's rules, make clear that under the Act and the Commission's rules, CMRS-related expenses are nonregulated expenses that could not be included in regulated accounts for purposes of NECA cost reporting.

49. Blanca states that the OMD Letter deprived it of access to the underlying cost data upon which the Commission relied to calculate the overpayments, which were separately detailed on a per fund, per year basis in an accompanying attachment.[140] But Blanca did have access to the underlying costs data because OMD explicitly based its financial accounting on the cost studies Blanca itself commissioned in response to the demands by NECA and USAC to remove certain costs and revenues and wireless loops.[141] Blanca did not submit a request to the Commission for such records nor did it assert

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[136] 47 CFR § 1.1905. We note that this language is consistent with similar language in the Federal Claims Collection Standards (FCCS), 31 CFR parts 900-904, a set of rules jointly passed by the Treasury Department and the DOJ prescribing DCIA-related collection standards unless the program legislation under which the claim arises or some other statute provides otherwise. *Id*. § 900.1(a); 31 CFR § 901.2(a) (explaining that, with regarding to notice of a governmental claim, "[g]enerally, one demand should suffice"); *id*. § 901.3(b)(4)(iv) ("When an agency previously has given a debtor any of the required notice and review opportunities with respect to a particular debt, the agency need not duplicate such notice and review opportunities before administrative offset may be initiated.").

[137] *See Pension Benefit Guar. Corp. v. LTV Corp., Inc.,* 496 U.S. 633, 655 (1990) (citation omitted) ("The determination in this case, however, was lawfully made by informal adjudication, the minimal requirements for which are set forth in the APA."); *Sw. Airlines Co. v. Transp. Sec. Admin*., 650 F.3d 752, 757 (D.C. Cir. 2011) ("In informal adjudications like these, agencies must satisfy only minimal procedural requirements." (internal quotation marks and brackets omitted)); 5 U.S.C. § 555(e) (2000) (requiring each agency, "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, [to] proceed to conclude a matter presented to it," and to give "[p]rompt notice . . . of the denial of a written application, petition, or other request of an interested person made in connection with any agency proceeding . . . [with] a brief statement of the grounds for denial").

[138] 31 U.S.C. § 3716(a); *see also* 31 CFR §§ 901, 1.1912. Agencies referring delinquent debts to the Treasury must certify that the debts are past due and legally enforceable and that the Agency has complied with all due process requirements as set forth in 31 U.S.C. § 3716(a); 31 CFR § 901.3(b)(5).

[139] 31 CFR §§ 901.2(a); 901.3(b)(4)(iv).

[140] *See* Application at 21-22.

[141] *See* OMD Letter, Attach. A.

that it could not adequately challenge the cost accounting because of a lack of access to such records.[142] Indeed, Blanca did not make any attempt to contest the accuracy of the accounting.

50. The OMD Letter also clearly stated that "[i]f you have evidence establishing that you do not owe the Debt, or if you have further verified evidence to substantiate your entitlement to receive payment for the disallowed USF payments, provide such evidence to the Commission within 14 days of the Due Date."[143] The OMD Letter, therefore, clearly advised Blanca of the opportunity that it had to request a review, which Blanca took advantage of by filing the Application for Review and Request for Reconsideration. Contrary to Blanca's assertion, nothing in the OMD Letter suggested that Blanca was precluded from raising legal arguments or conclusions of fact and law.[144] Further, to the extent that Blanca complains that the OMD Letter did not comport with the DCIA's provisions concerning an offset letter, such complaint is unfounded as the OMD Letter is a demand letter not an offset letter.[145] We also note that Blanca filed both an Application for Review and a Petition for Reconsideration, and so was not harmed in any way by an alleged lack of due process.

D. The Commission Has Authority Under the DCIA to Collect a Claim

51. In this case, we have chosen to use the collection tools made available under the DCIA and its implementing rules for the collection of debt. Blanca incorrectly argues that USF is not federal funding subject to the DCIA, and therefore, the agency lacks authority to initiate collection efforts, such as offset, to collect overpaid USF. As emphasized by the Commission in 2004, the DCIA's definition of "debt" or "claim" was not "limited to funds that are owed to the Treasury," but included all funds "'owed the United States,'" including "overpayments from any agency-administered program."[146] When amending its debt collection rules to reflect the passage of the DCIA, the Commission made clear that it defined a "claim" to include debts arising from USF-related payments.[147] Indeed, both the U.S. Supreme Court, and the United States Senate have characterized USF as a form of federal funding.[148]

52. Blanca also incorrectly argues that the DCIA does not apply to independent agencies such as the Commission.[149] Blanca's position is contrary to the only appellate decision directly on point, i.e., *Commonwealth Edison*.[150] In the 1996 DCIA amendments, Congress did not alter the relevant language and did nothing to express any disapproval of, or raise any doubts about, the correctness of the Seventh Circuit's result.[151] That decision is consistent with the plain language of the statute. Section

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[142] We note that while, in its Fourth Supplement, Blanca disclosed that it had pending requests for all records relating to OIG subpoenas of NECA records relating to Blanca's overpayments, Blanca does not state that such records request has any bearing on its ability to challenge the Commission's OMD Letter.

[143] OMD Letter at 8.

[144] Application at 22.

[145] *Id*. at 22.

[146] *See Schools and Libraries Fourth Report and Order*, 19 FCC Rcd at 15261, para. 20.

[147] *See* 47 CFR § 1.1901(b) (specifying that references to the term "Commission" in rules implementing the DCIA includes the USF, TRS Fund, "and any other reporting components of the Commission.").

[148] *See United States v. American Library Assoc., Inc.,* 539 U.S. 194, 199 (2003) (characterizing the E-rate program as a form of "financial assistance"); S. Rep. 105–226, 1998 WL 413894 (referring to the E-rate program as a "federal universal service assistance," which is administered in the "form of a subsidy undertaken as part of the spending power of Congress," and describing the Children's Internet Protection Act as an "exercise of Congress's power "to see that federal funds are appropriately used" and as providing "clear notice of the conditions placed on the acceptance of the federal funds.").

[149] *See* Application at 19-20; Petition at 18-19.

[150] *See Commonwealth Edison*, 830 F.2d at 618-20.

[151] *See id*.

3701 of the DCIA defines an "executive, judicial, or legislative agency" to include any "department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of Government."[152] The Commission clearly qualifies under this definition.[153] Indeed, the Commission is frequently described by courts as an independent, executive agency or as an independent agency within the executive branch.[154] To the extent that the DCIA was adopted to "maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools," it makes little sense that Congress would have excluded several large federal agencies.[155] Accordingly, the most natural reading of the reference to the three branches in section 3701 is to presume Congressional intent to be inclusive of a broad range of federal entities.

53. Blanca also argues incorrectly that OMD lacks authority to act under the DCIA and that therefore, the OMD Letter is *ultra vires*.[156] The Commission has delegated to the managing director of OMD or his designee the power to perform all "administrative determinations provided for in the Debt Collection Improvement Act,"[157] as it is entitled to do under the Communications Act.[158] And the DCIA specifically authorizes the head of any agency to collect debts pursuant to the agency's own regulations.[159] Accordingly, we reject Blanca's contentions that such delegation is impermissible.[160]

54. In sum, we conclude that the Commission has authority under the DCIA to collect the overpayments Blanca received; that OMD lawfully acted on the Commission's behalf in determining that Blanca owes the USF $6,748,280 and in issuing the OMD Letter; that the overpayment determination is not a forfeiture and, therefore, section 503 of the Act and the Commission's regulations implementing section 503 are not applicable; and, finally, that Blanca has not been deprived of due process. Accordingly, we affirm OMD's determination that Blanca must repay $6,748,280 to the USF, and we direct OMD to pursue collection of that amount from Blanca, whether by offset, recoupment, referral of

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[152] 31 U.S.C. § 3701(a)(4); *see also* 31 CFR § 900.1 ("Federal agencies include agencies of the executive, legislative, and judicial branches of the Government, including Government corporations.").

[153] *See, e.g., In re Aiken Cty*., 645 F.3d 428, 439 (D.C. Cir. 2011) ("As a result of the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), there are two kinds of agencies in the Executive Branch: executive agencies and independent agencies.").

[154] *See, e.g., FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 526 (2009) (referring to the Commission as an executive agency); *CTIA–The Wireless Ass'n v. Fed. Commc'ns Comm'n*, 530 F.3d 984, 989 (D.C. Cir. 2008) (emphasizing that Commission officials are "executive agency officials"); *Cal. Ass'n of the Physically Handicapped, Inc. v. Fed. Commc'ns Comm'n,* 840 F.2d 88, 93 (D.C. Cir. 1988) (finding that a federal statute applicable to any "program or activity conducted by any Executive agency" applied to the "FCC's own activities")..

[155] *See* Debt Collection Improvement Act of 1996, Pub.L. No. 104–134, § 31001(b)(1), 110 Stat. 1321, 1321–358 (1996) ("Purposes of 1996 Amendments" note following 31 U.S.C. § 3701); *see also* Exec. Order No. 13,019, 61 F.R. 51,763 (Sept. 28, 1996) ("[T]he primary purpose of the Debt Collection Improvement Act is to increase the collection of nontax debts owed to the Federal Government. . . ."); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 772 (9th Cir. 1985) ("The provisions of the [Federal Claims Collections Act of 1966] and the amendments in the Debt Collection Act of 1982 express a Congressional mandate that agencies play a more active role in the collection of delinquent claims than merely referring them to the Department of Justice.").

[156] Application at 21.

[157] 41 CFR § 0.231.

[158] 47 U.S.C. § 155(c), (e).

[159] 31 U.S.C.§ 3711(a)(1), (b).

[160] 47 CFR § 0.231(f); *United States v. Giordano*, 416 U.S. 505, 512–13 (1974) (reasoning that when a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent).

the debt to the United States Department of Treasury for further collection efforts or by any other means authorized by the DCIA or common law.

IV. ORDERING CLAUSES

55. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 5, 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 155, 214, 254, and sections 1.106 and 1.115 of the Commission's rules, 47 CFR §§ 1.106, 1.115, that this Memorandum Opinion and Order is ADOPTED.

56. IT IS FURTHER ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(6), and section 1.115(g) of the Commission's rules, 47 CFR § 1.115(g), the Application for Review of Blanca Telephone Company IS DENIED.

57. IT IS FURTHER ORDERED, that the following pleadings ARE DISMISSED as unauthorized pursuant to 47 C.F.R. § 1.115(d) and 47 C.F.R. § 1.45(c) to the extent that the pleadings address arguments that could have been timely raised in the Application for Review: Motion for Leave to Supplement Emergency Application for Review; Second Motion for Leave to Supplement Emergency Application for Review; Third Motion for Leave to Supplement Emergency Application for Review; Fourth Motion for Leave to Supplement Emergency Application for Review. Otherwise, these pleadings ARE DENIED, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(6), and section 1.115(g) of the Commission's rules, 47 CFR § 1.115(g).

58. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 5, 214, 254, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 155, 214, 254, 303(r), and section 1.106(a)(1) of the Commission's rules, 47 CFR § 1.106(a)(1), the Petition for Reconsideration filed by Blanca Telephone Company IS DENIED.

59. IT IS FURTHER ORDERED that, pursuant to section 1.103 of the Commission's rules, 47 CFR § 1.103, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: *Blanca Telephone Company, Seeking Relief from the June 22, 2016 Letter Issued by the Office of the Managing Director Demanding Repayment of a Universal Service Fund Debt Pursuant to the Debt Collection Improvement Act*, WC Docket No. 96-45

The FCC is about to confront what can best be described as an unfortunate situation: A company that should have known better, and an agency that should have figured it out sooner. Blanca Telephone Company should have known that it was impermissible to claim that costs for both their wireline and wireless network were compensable. The FCC should have quickly discovered this wrongdoing, and addressed it with swift enforcement action. Sadly, it was too little, too late, on both accounts.

At least today we can make clear that at a minimum the Universal Service Fund (USF) is due the money that was wrongfully spent. For that, I vote to approve.

I remain fearful, however, about whatever else lies beneath. As a consistent spokesperson on the need to address waste, fraud, and abuse in our universal service outlays, I have seen too many instances — particularly during my time as a state commissioner — of companies using the USF high-cost fund as a piggy bank for all manner of inappropriate expenses. Unfortunately for the high-cost fund and for all of us, we remain slow in discovering wrongdoing and late in addressing it. As the agency considers further reforms to our high-cost fund, I am hopeful that we will also take a serious look at measures to stamp out waste, fraud, and abuse wherever we find it.

STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Blanca Telephone Company, Seeking Relief from the June 22, 2016 Letter Issued by the Office of the Managing Director Demanding Repayment of a Universal Service Fund Debt Pursuant to the Debt Collection Improvement Act,* WC Docket No. 96-45

As the steward of federal universal service funds collected from American consumers and businesses, the FCC must do everything within its authority to root out waste, fraud, and abuse. Part of that responsibility is fulfilled by enacting clear rules and appropriate limits or "guardrails," as I've called them, to ensure that funds are being used as efficiently as possible for their intended purposes. As the Commission has reformed parts of the high-cost program, I have worked to improve oversight and accountability. Most recently, I have been working with Commissioner Clyburn to update the rate-of-return rules to delineate what types of expenses cannot be funded through universal service or allowed in the rate base. For instance, I am aware of no one that supports the notion that these precious dollars could be used for such purposes as personal yachts or country club golf memberships. To be clear, this is not an attempt to enact unnecessary micromanagement of private companies, but instead reasonable limitations to prevent the most egregious practices. Hopefully that effort will soon bear fruit.

The other key component is taking swift action to recoup funding once the Commission becomes aware of problems. I am concerned, therefore, that the troubling conduct at issue here occurred between 2005 and 2010, was not discovered until 2012, and is only now being remedied. We must do better. The longer the delay, the greater the risk that we will lack the evidence and ability to pursue even the most fraudulent of behavior. In this instance, the rules were sufficiently clear, the misconduct was egregious, and the proof is adequately documented that I am willing to collect the overpayments, notwithstanding the delay.

At the same time, I have heard complaints that USAC has been attempting to recoup certain overpayments from a decade ago that reportedly resulted from ministerial errors rather than fraud – the type of situation where the steps to obtain recovery at this point may cost more than the funding at stake. Moreover, recipients that obtained funding that long ago may not have been under an obligation to retain records for that length of time, relevant personnel may no longer be found, and rules now in place may not have been applicable that far back in the past. Make no mistake: I abhor any waste, fraud or abuse caused by wrongdoers and fully support the recoupment of such funds. However, I am sympathetic to the view that the Commission generally should be required to recover funding within a defined timeframe, such as 7 years. Certain timing limitations imposed on the Commission, like those that exist in other areas, would not wholly prevent the exercise of oversight or imposition of enforcement actions when needed. To the extent that would require clarification or direction by Congress, that could be a welcome improvement.

Federal Communications Commission

Washington, D.C. 20554

June 2, 2016

By UPS Overnight
And E-Mail to alanwehe@fone.net
alanwehe@GoJade.Org

Mr. Alan Wehe
General Manager
Blanca Telephone Company
129 Santa Fe Ave.
Alamosa, CO 81101

Re: The Blanca Telephone Company
Demand for Repayment of USF High-Cost Funds

DO NOT DISCARD THIS IMPORTANT NOTICE
OF A DEMAND FOR PAYMENT
OF A DEBT OWED TO THE UNITED STATES AND ORDER OF PAYMENT

Dear Mr. Wehe:

This letter is to notify you that the Federal Communications Commission (the "FCC") has determined that the Blanca Telephone Company ("Blanca" or the "Company") has received improper payments from the Universal Service Fund's ("USF") high-cost program in the amount of $6,748,280, which was paid between 2005 and 2010. Our determination follows an investigation by the FCC's Office of Inspector General (OIG), the Universal Service Administrative Company (USAC), and the National Exchange Carrier Association (NECA). The determination of an overpayment also constitutes a debt owed to the United States that must be recovered and is immediately due and payable without further demand. Additionally, this is a Demand for Payment which provides you with certain important information including: (a) the fact that payment is due immediately, in full, and without further demand, (b) the background of the debt, (c) important rights, and (d) instructions for payment.

Background

On March 17, 2008, KPMG LLP initiated an audit of Blanca in connection with Blanca's receipt of USF high-cost program support. Thereafter, the OIG issued five administrative subpoenas for, among other things, reports, filings, and correspondence that Blanca filed with NECA and USAC regarding USF high-cost support.

On August 24, 2012, NECA initiated a "Loop" and "Non-Reg Review" focused on the underlying records for Blanca's 2011 Cost Study in the area of non-regulated operations. NECA undertook the Loop review to provide assurance the loop counts used for the 2012-1 USF filing (December 2011 loops) were properly counted and categorized in accordance with FCC rules. NECA provided Blanca with questionnaires to which Blanca responded. NECA also conducted an on-site investigation of Blanca's headquarters in Alamosa, CO. Based on Blanca's submission and NECA's on-site inspection, NECA issued a report on January 29, 2013, which concluded Blanca impermissibly received USF high-cost support because its claims for support included costs and facilities for a *mobile* wireless system.

NECA required Blanca to substantially and materially revise its high-cost support filings beginning with the 2011 Cost Study. In response, Blanca retained Moss Adams to review and revise Blanca's submissions.[1] These revisions were required because Blanca did not track or allocate expenses associated with providing local service to customers over its landline and cellular systems or the expenses associated with providing service to customers of other carriers roaming on Blanca's cellular system. Blanca operated these cellular stations and its Local Exchange Carrier (LEC) telephone company under a single management structure without allocating costs and expenses between regulated and non-regulated services. In particular, Blanca characterized its cellular stations as Basic Exchange Telephone Relay Service (BETRS) facilities in its CPRs, and by including all costs attributable to its mobile cellular system in its cost studies, failed to comply with Parts 64, 36 and 69 of the FCC's rules. The inclusion in cost studies of such cellular investment, expenses, and costs that were not used and useful to provide regulated telephone service is prohibited, and resulted in inflated disbursements to Blanca from ICLS, LSS, High Cost Loop Support, and Safety Net Additive Support.

In Blanca's responses to the OIG subpoenas and during NECA's investigation, Blanca claimed it was providing fixed wireless service, *i.e.*, BETRS, for which it was entitled to receive high-cost support as a LEC. This was not the case. In particular, NECA determined that Blanca was not providing BETRS,

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[1] In addition to the Report's other findings, and in the section of NECA's report titled "Review Findings Report," NECA directed Blanca to remove from the 2011 cost study all costs and revenues associated with the wireless service, including but not limited to, towers, Blanca's ZTE wireless switch and radio equipment, including associated depreciation and expense, as well as ICLS, LLS and the 2012-1 cost loop filings. Additionally, Blanca was directed to remove all access lines and pool revenue associated with the wireless service from settlements for all months remaining in the pooling window (minutes, lines, SLCs, ARCs (starting July 2012), FUSC and switched access revenue). Blanca was also directed to remove 146 loops associated with the wireless service from the 2011 cost study, the 2012-1 high cost loop filing, and the January 2012 pool reporting. Additionally, 149 loops were to be removed from 2010 for cost study averaging. Blanca Telephone Company, 28th Access Year Review, Review Findings Report, January 28, 2013.

and instead was providing only mobile cellular service throughout its entire Eligible Telecommunications Carrier (ETC) study area. As such, Blanca improperly included costs and facilities attributable to non-regulated mobile cellular service, as well as wireless loop counts, in its cost studies that served as the basis for filing for USF high-cost funds. Although not addressed in NECA's report, Blanca's claims for USF support were also based in part on its costs to provide cellular services outside of its designated LEC study area, as demonstrated by a comparison of Blanca's LEC and cellular operating areas, a review of Blanca's billing records, and as confirmed by testimony provided during interviews of Blanca personnel as discussed below. Blanca therefore received USF high-cost support to which it was not entitled as a LEC because it submitted claims for support based upon the provision of *mobile* cellular service both within and outside of its LEC study area.

By correspondence to you on January 28, 2013, NECA directed Blanca to remove all costs attributable to its wireless service and provide documentation of the adjustments to NECA no later than February 22, 2012. Specifically, NECA directed Blanca to refile its cost study for 2011, removing all costs attributable to the wireless system, as well as revised Interstate Common Line Support (ICLS), Local Switching Support (LSS), and the 2012-1 High Cost loop filings. Blanca completed these revisions in a series of filings with NECA and USAC, and the funds for USF high-cost support for the post-2011 period have been recovered through charge backs and recoupments. Any improperly received USF high-cost support for periods prior to 2011 have not been recouped.

Findings

Since as early as 2003, Blanca has claimed reimbursement from the high-cost program for the costs of providing telephone service as a rate of return, landline carrier. Blanca is authorized to provide landline telephone service as a LEC in portions of Alamosa and Costilla Counties, CO.[2] As a rural LEC, and based on the services Blanca provided during the relevant period, the Company could be reimbursed from the high-cost program for only the costs of providing regulated local exchange service within its authorized ETC study area. However, our investigation found that from at least 2005, Blanca claimed all of the costs it incurred to provide telephone service as a LEC were for landline and fixed wireless service, *i.e.*, BETRS, within its authorized study area even though Blanca was providing only *mobile* cellular service. In other words, the conduct that led Blanca to repay USF high-cost support payments after 2011 began as early as 2005. As such, Blanca received improper payments from the USF high-cost support program beginning in at least 2005.

A BETRS system, whatever the frequency utilized, must be dedicated to the end user and fixed at a customer's premises in order to qualify for high-cost support as a regulated local exchange service.[3]

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[2] Blanca was designated as an ETC by the Colorado Public Utilities Commission on December 17, 1997, which entitled it to receive federal universal service support in accordance with 47 U.S.C. § 254 and implementing regulations by the FCC.

[3] "BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas. It is intended to be an extension of intrastate basic exchange service." *Basic Exchange Telecommunications Radio Service, Report and Order*, 3 FCC Rcd. 214, 217 (1988). In the 1988 *Order*, the Commission made clear that it intended "that wire and radio basic exchange service [would] be treated similarly with regard to eligibility for high cost assistance." *Id.* at note 10. We also note that BETRS is treated the same as landline basic exchange facilities and service, rather than cellular or another mobile service, for purposes of the FCC's Uniform System of Accounts.

The definition of BETRS specifically excludes the provision of cellular mobile telephone service as was provided by Blanca.[4] In so concluding, we find unavailing your argument that for the purposes of receiving high cost support as an incumbent landline carrier, "the definition of 'fixed' includes wireless service that is provided to a defined, limited geographic area where it can be received by a device that is *not nailed or screwed down*."[5]

In particular, your argument misreads NECA's Paper 4.9, Use of Wireless Technology to Provide Regulated Local Exchange Service ("NECA Paper") as applied to Blanca's cellular system. There is nothing in the FCC's regulations or precedents, or in the Communications Act of 1934, as amended, (the "Act") to support Blanca's position. Whether Blanca's service is "mobile" or "fixed" is not determined based on whether Blanca's LEC customers' signals are automatically handed off to *other* carriers in adjoining cellular service areas, and the NECA Paper makes no such distinction. Nor does the NECA Paper suggest that "'fixed wireless' service may provide for geographic mobility to wireless subscribers within a broadcast area, as long as this mobility is not as extensive as the 'full' mobility provided by mobile wireless services."[6] While the NECA Paper notes that one of the characteristics of new wireless technology is that the subscriber "may have some degree of 'portability' within the broadcast area,"[7] the Paper in no way equates that "portability" to a cellular company's entire cellular service area.

Instead, the NECA Paper makes it clear, among other requirements, that a wireless system must be fixed, not mobile,[8] in order to qualify for high cost support as a rate of return company and that the LEC's radio equipment at the customer site must be a *fixed* radio station.[9] While explaining that wireless technology can be an effective means to provide a supported service to telephone customers where it is cost prohibitive or impractical over wireline facilities, NECA explicitly cautions its member companies that the costs for a system to provide mobile services are outside the scope of Title II and cannot be reported to the NECA pool or recognized in USF loop cost reporting,[10] which is exactly what Blanca did, contrary to NECA's admonitions.

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[4] The Commission recognized the use of cellular frequencies on a *fixed* basis to provide BETRS was appropriate and "in the public interest since it is intended to be an extension of basic exchange service in areas where there is inadequate or no basic exchange telephone service offered." *In the Matter of Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service* in GEN. Docket No. 87–390, 3 FCC Rcd. 7033 (1988); *Reconsideration Granted in Part by In the Matter of Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 5 FCC Rcd. 1138 (1990) (BETRS is a radio service that can be used to provide local exchange service in rural areas. It has no specified technology, but involves the use of mobile frequencies in radio loops between a basic exchange telephone subscriber and a telephone company central office.). *Id.* at note 2.

[5] Letter from Richard L. Tegtmeier, counsel for Blanca Telephone Company, dated October 30, 2015 in response to J. Chris Larson, Assistant United States Attorney, letter of August 10, 2015 regarding 408 Rule of Evidence Settlement Communication ("Settlement Letter").

[6] Settlement Letter at 2.

[7] NECA Paper at 9.

[8] *Id.* at n.11.

[9] *Id.* at 10.

[10] *Id.* at 10.

As noted below, Blanca customers purchase service that allows them to use their cell phones throughout Blanca's cellular service area with handoff between multiple Blanca cell sites. They also can continue to use their phones by redialing and roaming on other cellular systems, and customers from other carriers have the ability to roam on Blanca's system when they make or receive calls in Blanca's cellular service area.[11] Thus, NECA's conclusion in its January 29, 2013 report (the "NECA Report"), that "[i]n order to include these costs in further filings Blanca would need to provide a wireless service that is fixed to the customer location in accordance with the cost issue,"[12] was consistent with the NECA Paper.

Our review of Blanca's operations further makes clear that Blanca was not providing BETRS or fixed telephone service to its customers over its cellular facilities. Blanca operates pursuant to two mobile cellular licenses, KNKQ427 serving CMA356- Colorado 9 – Costilla and KNKR288, serving CMA354 - Colorado 7 – Saguache, which provide mobile cellular service to Blanca's own customers as well as customers roaming on its cellular system serving Costilla, Alamosa, and Conejos Counties. Blanca provides mobile cellular service to customers via five cell sites which hand off to each other.[13] The nature of the cellular service Blanca provides and the scope of the stations' operations are documented in the series of applications Blanca filed with the Commission, the FCC-issued authorizations to provide cellular mobile service and by other representations made to the Commission.[14]

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[11] At one point Blanca conducted testing of its system because Verizon customers were having difficulty making and receiving calls within Blanca's service area. Deposition of A. Wehe in Cellular Network Inc. Corporation, individually and derivatively on behalf of Colorado 7-Saguache Limited Partnership vs. Sand Dunes Cellular of Colorado Limited Partnership, Colorado 7-Saguache Limited Partnership (Nominal Defendant) and Cellco Partnership and Comnet Cellular (Additional Counterclaim Defendants), Case No. 03CV4096, District Count, Arapahoe County, Colorado, October 26, 2006, at 124. Wehe also provided oral testimony that Blanca obtained roaming revenue from other carriers for their customers roaming on Blanca's system. *Id.* at 211.

[12] Cover letter to the NECA Report, at 1. This conclusion is also consistent with the discussion of new wireless technologies in the NECA Paper. While these new technologies allow for some mobility within the range of their antennas, the operator can prevent mobile operations by fixing the receiver at the customer's location. ("Use of a permanently installed transceiver at the customer premises by the telephone company or by the customer can be effective at disabling or significantly limiting any portable or mobile capability of the radio system.") *Id.* at 9. And, when the NECA Paper referred to Commercial Mobile Radio Service (CMRS) leased capacity to provide regulated exchange telephone service by local exchange carriers such as Blanca, NECA conditioned the service being fixed without regard to any "broadcast area." *Id.* at 8.

[13] According to Keith Hazlett, a Blanca engineer, Blanca's cellular system had five cell sites which handed off to each other, and there was no requirement to his knowledge that a cellular customer be located at a fixed location. Oral testimony of Keith Hazlett, Civil Investigative Demand, Tr., at 11. Blanca did not have any restriction in its application for wireless service or on its company website that a customer be located at a fixed location as a condition of receiving cellular service. Alan Wehe also testified that a customer could use his or her cellular phone to make a call throughout Blanca's cellular network as well as roam on other carriers' systems with which Blanca had a roaming agreement. Oral testimony of Alan Wehe, Civil Investigative Demand, Tr. At 68-69.

[14] That Blanca's cellular system was designed and operated to provide cellular mobile service to its customers and those traveling through Blanca's cellular service area is evident from the application filed for a new cellular station at Antonito, CO. On November 20, 1995, Colorado RSA 7(B) (2) Limited Partnership (the "Partnership"), filed an application seeking to construct a new cellular system at Antonito. When the application was filed, Blanca owned 50% of the Partnership and later acquired the remainder partnership interests on September 11, 2000. The Partnership represented the station, later licensed under call sign KNKR288, would be operated in conjunction with Blanca's adjacent cellular station KNKQ427, Costilla, CO. The application proposed to cover more than 50 square miles of unserved areas in Conejos County in southeastern RSA No. 354B, and Costilla County in southwestern RSA No. 2356B, which was outside of Blanca's study area. The application represented that the cellular system would provide direct dial mobile and portable service to the public. "The cellular system will be interconnected so that local customers and roamers are able to place and receive calls to and from any telephone or terminal connected to the public

Blanca has participated in Commission proceedings as a mobile cellular carrier in WT Docket No. 05-265. In a Petition for Reconsideration, Blanca described itself as a "wireline company … which expanded its operations to provide mobile wireless service."[15] As Blanca explained, it was having difficulty obtaining roaming agreements for voice and data services from national wireless carriers so it could provide seamless coverage for its customers who traveled outside of its service areas. Consistent with Blanca's representations in its Reconsideration Petition, records obtained from Blanca demonstrate the Company has negotiated dozens of roaming agreements. These agreements provided Blanca with revenues from other carriers' customers roaming on its cellular system and also enabled Blanca's mobile cellular customers to travel to other areas of the country and use their mobile cellular phones.

Although during NECA's investigation Blanca professed to provide service to 146 customers who could not receive landline service because "many of BTC's customers lack[ed] access to commercial power,"[16] Blanca's operations as a cellular carrier were substantially more extensive than the representations made in the Settlement Letter that wireless service was provided to "remote" customers. Blanca provided its wireless service to any customer who requested it, whether or not the customer could receive wireline service or was located within an area where there was a source of electrical power, as Blanca represented to NECA. And, Blanca proactively upgraded its system and coordinated with other operators in the area to enable system handoff.[17]

Additionally, Blanca claimed USF high-cost support to provide service outside of its study area.[18] Section 214(e)(5) of the Act defines a service area as a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. In the case of a service area served by a rural telephone company, service area means a company's "study area." Only

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switched telephone network, and to and from networks on other cellular or interconnected mobile systems. (Application, Exhibit VI, Colorado RSA 7B (2) Limited Partnership, Antonito, Colorado.) The Service Proposal noted that "[c]ustomers with complaints relating to their mobile or portable unit will be able to take it to the applicant's service facility for repairs or call for a repairman to service it in the system's service area where it is located." Exhibit VI, Service Proposal, at 2. The application proposed to use Blanca's cellular switch (Station KNQ427) and represented that the switching expenses would therefore be nominal. Exhibit IX, Construction Costs & First Year Operating Expenses. Blanca represented it "[had] the ability to construct and to operate the proposed system." *Id.*

[15] Petition for Reconsideration filed by Blanca Telephone Company in WT Docket No 05-265, at 1 (June 6, 2011).

[16] NECA Report, Wireless Service Section at 1. Blanca also claimed that "[t]he Blanca Telephone Company has been using wireless technology since 1982 to provide basic service to approximately 150 customers in an unserved area (there are no land-line facilities available due to not being feasible and the installation would be cost prohibitive) and the area is sparsely populated." Response of A. Wehe to OIG Subpoena dated October 23, 2012, Questions 26 & 27.

[17] In this regard, Blanca also took measures to ensure that its cellular system would be compatible with other systems. Blanca installed Evolution Data Only (EVDO) equipment for its cellular system in 2007, which Blanca described as "BETRS EVDO" in its cumulative property record (CPR), to add at its five cell sites. Blanca coordinated installation of the EVDO equipment with the adjoining cellular system in which Wehe and Verizon Wireless hold ownership interests. "Verizon Wireless suggests that Blanca move to a 41 channel spacing configuration to enable inter-system hand-off. If you have any questions, let us know. Please reply with your concurrence to the plan above and dates for implementation." (Email from M. Sandoval, Director-System Performance, Mountain Region, Verizon Wireless to T. Welch, Blanca's FCC counsel; cc to A. Wehe, and L. Stevens, D. Sisneros, and M. Skelton of Verizon Wireless, dated July 5, 2007.)

[18] Blanca provided cellular service to customers outside of Blanca's LEC study area. For example, a review of billing records provided by Blanca reflects that customers received what it called its BETRS service in the city of Alamosa, outside of Blanca's LEC study area, as well as in areas in which Blanca was not authorized to provide telephone service as a LEC. Response of A. Wehe to OIG Subpoena dated November 12, 2009, Question 24.

two of Blanca's cellular towers are located within Blanca's study area.[19] As a LEC, Blanca did not have authority to claim high-cost support for any costs to provide service for any of its cellular customers served outside of its study area or for customers of other cellular carriers roaming on Blanca's cellular system. Any costs and expenses attributable to such cellular services were disallowed.

As discussed above, NECA determined, and we agree, that the costs and line counts Blanca was utilizing to claim high-cost support were attributable to Blanca's non-regulated cellular operations, rather than to a BETRS fixed service and were therefore not entitled to High-Cost support. NECA's investigation resulted in the recoupment of USF high-cost support only after 2011, which is only a small portion of the period during which Blanca improperly received these funds. Based on a review of Blanca's books and records obtained during the OIG investigation and Blanca's own revision of its cost study and other filings for the post 2011 period, we have determined Blanca owes the Fund an additional $6,748,280 (the "Debt"). Further details of the Debt may be found on Attachment A hereto.

Accordingly, this letter has notified you of the Debt and it demands payment, in full, and without further demand, in accordance with the **Notice Information** provided below and Payment Instructions at Attachment B. Furthermore, you are notified that the Commission may reduce the Debt by:

(1) Making a recoupment or offset[20] against other requests for claims for USF minutes of use,
(2) Withholding payments otherwise due to Blanca, and
(3) Other action permitted by law.

Important Notice Information

The following provides notification of procedures and information required by the Debt Collection Improvement Act of 1996.[21] The Debt is owed to the United States. It is payable (the date of this letter is the Due Date) immediately, in full and without further demand. The Commission may apply any amount of undisbursed USF payments for minutes of use to offset or recoup the Debt.[22] Any portion of the Debt unpaid at the end of the Due Date is Delinquent on that date ("Date of Delinquency") and administrative charges,[23] interest, and penalties will accrue thereafter.[24] The amount of interest that accrues[25] from the Date of Delinquency and the administrative charges are waived if the complete amount of the Debt is paid within 30 days of the Due Date.[26] Additionally, a penalty of six percent per annum accrues from the Date of Delinquency on any portion of the Debt that remains unpaid 90 days after the Due Date.[27] Furthermore, the Commission may refer a delinquent Debt to the United States Treasury or

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[19] Fort Garland KNKQ427 Location 1 and Blanca KNKQ427 Location 4 are situated within Blanca's authorized study area.
[20] An offset or recoupment means when any high-cost claim payment is due to you, the money will first be applied to any open debt followed by the pay out of any remaining balance. Such offset or recoupment does not stop interest, penalties, or other collection charges from accruing under 31 U.S.C. § 3717 and 31 C.F.R. § 901.9.
[21] *See* 31 U.S.C. §§ 3716, *et seq.*; 47 C.F.R. §§ 1.1911 and 1.1901, *et seq.*
[22] *United States v. Munsey Trust Co.*, 332 U.S. 234, 239, 108 S.Ct. 1599, 91 L.Ed. 2022 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him.'").
[23] 47 C.F.R. § 1.1940(c).
[24] Public Law 104-134, 110 Stat. 1321, 1358 Apr. 26, 1996). *See* also 31 C.F.R. § 900.1, *et seq.*; 47 C.F.R. § 1.1901, *et seq.*
[25] 31 U.S.C. § 3717(a)-(c).
[26] 31 U.S.C. § 3717(d) and 47 C.F.R. § 1.1940(g).
[27] 31 U.S.C. § 3717(e)(2).

the Department of Justice for further collection action.[28] The United States Treasury will impose an additional administrative collection charge,[29] and it may commence administrative offset.[30] An additional surcharge may be imposed in connection with certain judicial actions to recover judgment.[31]

If you have evidence establishing that you do not owe the Debt, or if you have further verified evidence to substantiate your entitlement to receive payment for the disallowed USF payments, provide such evidence to the Commission within 14 days of the Due Date. Because our determination is based on the information you either provided or were unable to provide, there is no apparent reason for you to inspect and copy those same records. Finally, you may request the opportunity to repay the debt under the terms of a written agreement; however, such request must be made with 14 days of the date of this notice, and you must execute the Commission's form of the agreement within thirty days of the date of this notice.

This letter is sent by overnight delivery service and by e-mail.

The points of contact on this letter are Neil Dellar, who may be reached at (202) 418-8214 and Thomas Buckley, who can be reached at (202) 418-0725.

Sincerely,

Dana Shaffer
Deputy Managing Director

Copies:
Jonathan Sallet – General Counsel
Richard L. Tegtmeier, Esq.

Enclosures: Attachments A & B

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[28] 31 U.S.C. §§ 3711(g); 3716; 28 U.S.C. § 3001, *et seq.*; 47 C.F.R. § 1.1912.
[29] 31 U.S.C. § 3717(e); 31 C.F.R. § 285.12 (j).
[30] 31 U.S.C. § 3716.
[31] 28 U.S.C. § 3011.

Attachment A

BLANCA TELEPHONE COMPANY: HIGH COST ANALYSIS HIGH COST SUPPORT 2005 - 2010 SUPPORT PAID VS. CORRECTED SUPPORT									
FUND	ROW	SCENARIO	YEAR						TOTAL	
			2005	2006	2007	2008	2009	2010		
HCL	(1)	Support Actually Paid	$802,620	$787,644	$751,512	$837,624	$860,916	$993,096	$5,033,412	USAC Disbursement Records
	(2)	Government Calculation	$575,225	$595,364	$628,352	$729,442	$790,817	$779,550	$4,098,750	Gov't. Study Calculations
	(3)=(1)-(2)	Difference	$227,395	$192,280	$123,160	$108,182	$70,099	$213,546	$934,662	
LSS	(4)	Support Actually Paid	$946,136	$868,296	$954,312	$983,088	$932,868	$696,891	$5,381,591	USAC Disbursement Records
	(5)	Government Calculation	$116,660	$150,261	$170,321	$171,884	$166,471	$225,558	$1,001,155	Gov't. Study Calculations
	(6)=(4)-(5)	Difference	$829,476	$718,035	$783,991	$811,204	$766,397	$471,333	$4,380,436	
ICLS	(7)	Support Actually Paid	$437,352	$421,224	$472,206	$520,236	$545,652	$593,280	$2,989,950	USAC Disbursement Records
	(8)	Government Calculation	$235,616	$217,450	$275,442	$297,493	$308,808	$323,503	$1,658,312	Gov't. Study Calculations
	(9)=(7)-(8)	Difference	$201,736	$203,774	$196,764	$222,743	$236,844	$269,777	$1,331,638	
SNA	(10)	Support Actually Paid	$19,164	$19,164	$19,164	$19,164	$12,444	$12,444	$101,544	USAC Disbursement Records
	(11)	Government Calculation	$0	$0	$0	$0	$0	$0	$0	Totally Unregulated
	(12)=(10)-(11)	Difference	$19,164	$19,164	$19,164	$19,164	$12,444	$12,444	$101,544	
TOTAL	(3)+(6)+(9)+(12)	Total Overpayment	$1,277,771	$1,133,253	$1,123,079	$1,161,293	$1,085,784	$967,100	$6,748,280	

(USAC Confidential - Contains Investigatory Information)

ATTACHMENT B

Payment Instructions

The following information is being provided to assist you in making your payment.

All payments must be made in U.S. currency in the form of a wire transfer. No personal checks, cashier's checks or other forms of payment will be accepted. Payment should be wired, pursuant to the following instructions:

ABA Routing Number: 021030004

Receiving Bank: TREAS NYC

33 Liberty Street

New York, NY 10045

ACCOUNT NAME: FCC

ACCOUNT NUMBER: 27000001

OBI Field: USF – High Cost Program

APPLICANT FRN: _____ (Blanca Telephone Company)

DEBTOR NAME: (same as FCC Form 159, Block 2)

LOCKBOX NO.: #979088

Please fax a completed remittance advice (Form 159) to U.S. Bank, St. Louis, Missouri at (314) 418-4232 at least one hour before initiating the wire transfer (but on the same business day).

For questions regarding the submission of payment, contact Gail Glasser, Office of the Managing Director, Financial Operations, at (202) 418-0578.

Federal Communications Commission
Office of General Counsel
Washington, D.C. 20554

June 22, 2016

By Email and USPS
Timothy E. Welch, Esq.
Hill and Welch
1116 Heartfields Drive
Silver Spring, MD 20904

Re: Blanca Telephone Company – Emergency Application for Review

Dear Mr. Welch,

We have received the Emergency Application for Review filed on behalf of the Blanca Telephone Company on June 16, 2016 (the "Application"). In accordance with our normal procedures, the Application will be considered and an order prepared adjudicating your claims on behalf of your client. In the Application, you express concern that the Commission will immediately "RED Light" your client and institute an offset of monies paid to it by the Universal Service Fund. The purpose of this letter is to assure you that, as your client timely filed the Application, the Managing Director's Office will not activate a RED Light on your client's account, neither will an offset be instituted, while the Application is pending.

We anticipate that the Application will be dealt with expeditiously and, in the interim, we are available to continue the settlement discussions previously started by your client's attorney, Mr. Tegtmeier, with the Department of Justice. If you wish to discuss settlement, please contact Neil Dellar at (202) 418-8214 or neil.dellar@fcc.gov.

Sincerely yours,

Mark Stephens
Acting Managing Director

Copies:
Suzanne Tetreault, Deputy GC

Federal Communications Commission
Washington, D.C. 20554

January 10, 2018

By U.S. Postal service
And E-Mail to alanwehe@fone.net
alanwehe@GoJade.Org

Mr. Alan Wehe
General Manager
Blanca Telephone Company
129 Santa Fe Ave.
Alamosa, CO 81101

Re: The Blanca Telephone Company ("Blanca"): Offset Notification

Dear Sir,

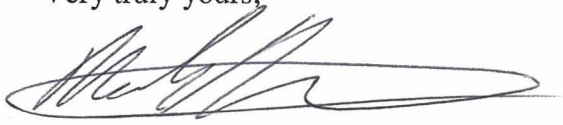
As you are aware, on December 8, 2017, the Federal Communications Commission ("Commission") released a Memorandum Opinion and Order, and Order on Reconsideration, relating to Blanca under number FCC 17-162 ("Order").[1] The Order affirmed the conclusion and directive of the Commission's Office of Managing Director that Blanca owes and must repay the Universal Service Fund $6,748,280 (the "Debt"), the amount of universal service support Blanca received to which it was not entitled. The purpose of this letter is to advise you that, as directed by the Commission in the Order, we will pursue collection of this amount, *inter alia,* by offset/recoupment of amounts otherwise payable to you by the Universal Service Fund.

Accordingly, as from the date of the Order, December 8, 2017, Blanca's monthly support from the Universal Service Fund will be offset/recouped against the Debt, until the Debt is satisfied or until you have made acceptable arrangements for its satisfaction. In this regard, we reiterate our willingness to continue the settlement discussions that were originated with your attorney, Mr. Tegtmeier, and the Department of Justice.

[1] *In the Matter of Blanca Telephone Company Seeking Relief from the June 22, 2016 Letter Issued by the Office of the Managing Director Demanding Repayment of a Universal Service Fund Debt Pursuant to the Debt Collection Improvement Act,* CC Docket No. 96-45, Memorandum Opinion and Order and Order on Reconsideration, (rel. December 8, 2017).

If you have any questions, your attorney may contact Neil Dellar on (202) 418-8214.

Very truly yours,



Mark Stephens
Managing Director

Copies:
Michele Ellison – Deputy GC
Mike Pond -- USAC

Federal Communications Commission

Red Light Display System (RLDS)

Red Light Display System

3/5/2018 11:03 AM

Current Status of FRN 0003766201

STATUS: Green

You have no delinquent bills which would restrict you from doing business with the FCC.

The Red Light Display System checks all FRNs associated with the same Taxpayer Identification Number (TIN). A green light means that there are no outstanding delinquent non-tax debts owed to the Commission by any FRN associated with the requestor's TIN. The Red Light Display System was last updated on 03/05/2018 at 6:34 AM; it is updated once each business day at about 7 a.m., ET.

Customer Service			
Red Light Help	FCC Debt Collection	FCC Fees	Web Policies / Privacy Policy
Red Light Display System Help Line: (877) 480-3201, option 6; TTY (202) 414-1255 (Mon.-Fri. 8 a.m.-6:00 p.m. ET)			
Red Light Display System has a dedicated staff of customer service representatives standing by to answer your questions or concerns. You can email us at arinquiries@fcc.gov or fax us at (202) 418-7869.			

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Blanca Telephone Company	)	**CC Docket 96-45**
	)	
Seeking Relief From the June 2, 2016	)	
Letter Issued by the Deputy Managing	)	
Director Which Seeks to Enforce an	)	
Interpretation of the Commission's Rules	)	
Regarding the Use of USF High Cost	)	
Funding for the Purpose of Operating a	)	
Rural Mobile Cellular Telephone System	)	
During the 2005-2010 Time Period	)	

To: The Secretary
For Distribution to the Commissioners

PETITION FOR RECONSIDERATION AND EMERGENCY REQUEST FOR IMMEDIATE § 1.1910(b)(3)(i) RELIEF

Blanca Telephone Company
Timothy E. Welch, Esq.
Hill and Welch
1116 Heartfields Drive
Silver Spring, MD 20904
(202) 321-1448
(301) 622-2864 (FAX)
welchlaw@earthlink.net
December 29, 2017

Table of Contents

Summary

The administrative process is a two sided coin: On one side of the coin Federal agencies such as the FCC are required to engage in reasoned decision making. This requires the agency to give clear notice about requirements and to discuss important matters and the reasoned decision making requirement precludes the FCC from reaching decisions which are not supported by the record or which are not adequately explained. On the other side of the coin Blanca, as the regulated entity, is required to exhaust its administrative remedies. Exhaustion of administrative remedies does not require Blanca to guess beforehand what the agency might determine is a requirement sometime in the future, the FCC is required to provide reasoned notice in advance of the enforcement of its requirements. The exhaustion requirement allows Blanca to comment upon, and object to, statements the FCC makes which can serve as rationale in Blanca's case, especially if the FCC's statements are made after the reconsideration deadline has passed.

The December 8 Order explains that Blanca's Due Process rights were not violated even though Blanca was not afforded any notice of the possibility that the FCC would reach back years to examine its accounting and summarily determine that there were accounting rule violations; and even though Blanca was not afforded an opportunity to defend itself before the FCC reached factual and legal conclusions. Blanca is entitled to a fair hearing procedure in which Blanca is allowed to inform the decision maker before the ultimate decision is made. The opportunity to try to reverse an already predetermined decision on review is not remotely the same thing.

The December 8 Order ¶ 19 acknowledges this significant problem with the FCC's approach by attempting to transform the staff's June 2, 2016 "**DEMAND FOR PAYMENT OF A DEBT OWED TO THE UNITED STATES AND ORDER OF PAYMENT** (bold, caps, underscore in

original) into a notice of "proposed debt" payable to the FCC and which tries, but fails, to comply with procedural requirements. While "a rose by any other name would smell as sweet," it would still have thorns, and changing the name of the June 2 Letter does not change the nature of that document, it remains an *ex parte* summary forfeiture order.

Blanca asserts the protection afforded by 47 C.F.R. § 1.1910(b)(3)(i) and seeks to have its applications processed and debt collection forestalled during litigation regarding the existence of the purported "proposed debt" or "pre-existing debt" or "proposed pre-existing debt" as the FCC may determine to be the case. This relief should be provided immediately.

The Blanca Telephone Company (Blanca), by its attorney, pursuant to §§ 1.106(a)(1), (b)(1),(2), (c)(1),(2), (d)(2), (f), and § 1.115(g), hereby seeks reconsideration of the FCC's December 8, 2017 *Memorandum Opinion and Order*, FCC 17-162, released December 8, 2017 (December 8 Order).[1] In support whereof, the following is respectfully submitted:

A. The APA's Reasoned Decision Making Requirement

With all due respect the December 8 Order misapprehends and misapplies basic Federal administrative procedure requirements. December 8 Order ¶ 29 states that

> Blanca's assertion in its First Supplement—that two NALs and the Commission's Writ Opposition filed with the D.C. Circuit constitute changes in the law or in the Commission's interpretation of the law—is specious. The Commission's analysis of the relevant legal issues was based on longstanding precedent and principles that Blanca had ample opportunity to review and incorporate into its timely filed Application and Petition. For example, the legal position that the collection of debt is not a forfeiture barred by the passage of time, as raised in the two NALs cited by Blanca and issued after the issuance of the OMD Letter, is expressly is based on long-standing precedent, including 1938 and 1946 decisions by the U.S. Supreme Court and orders by the Commission and the WCB released in 2011 and 2014, respectively, establishing that the denial of funding is not a forfeiture action and the statute of limitations in section 503 of the Act is therefore inapplicable to the recovery of government funds improperly paid. Likewise, the applicability of the DCIA to the recovery of federal debts is supported by precedent almost 30 years old and did not involve any new interpretation of the relevant law.

1. Reasoned Decision Making is an Agency Obligation

It is not the public's burden to guess what rule or statutory interpretation the FCC might promulgate in the future. It is the FCC's obligation to explain its reasoning for its actions. In administrative law parlance, an agency is required to engage in reasoned decision making. *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674, 707 (D.C. Cir. 2016). However, rather than point to the FCC's own reasoned decision making, the December 8 Order ¶ 29 retroactively imposes the burden upon Blanca in 2005 to guess what the FCC was going say in 2016/2017 regarding USF rule

[1] Collectively, the December 8 Order and the staff's June 2, 2016 Letter forfeiture order are referred to herein as the "FCC Orders."

violation proceedings based upon what the FCC might subsequently view as "long-standing" Supreme Court precedent. Moreover, as discussed more fully below, the FCC holds Blanca to comply with a vague "cost accounting framework" which contradicts expressly stated USF rules. December 8 Order ¶ 48. Reasoned decision making is the agency's obligation, Blanca's obligation in this administrative proceeding is to exhaust its administrative remedies, not divine FCC policy before it is announced.

2. Reasoned Decision Making Requires Discussion of Important Issues

The FCC must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1335 (D.C. Cir. 2004) (internal quotes omitted); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("arbitrary and capricious if the agency has 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 before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 43 (D.C. Cir. 2004); *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (reversal when agency fails to provide a reasoned explanation and when the record is contrary to the agency's conclusion). The FCC's interpretation of its regulations is entitled to deference unless plainly erroneous or inconsistent with the regulation. *S.A. Storer & Sons Co. v. Sec'y of Labor*, 360 F.3d 1363, 1368 (D.C. Cir. 2004). Discussed below are numerous instances of significant FCC failures to provide reasoning or consider record evidence.

3. Blanca's Obligation to Exhaust Administrative Remedies

The December 8 Order ¶ 29 states that it is improper for Blanca to comment upon the FCC's legal position after the Commission announces its position. The FCC would have Blanca sit quietly while the FCC issued relevant determinations regarding the FCC's view of USF rule violations and associated proceedings. However, Blanca is required to raise arguments at the FCC before it can raise them on review in an appeals court. *Environmentel, LLC v. FCC*, 661 F.3d 80, 83-84 (D.C. Cir. 2011). The exhaustion requirement is not optional on Blanca's part, it is mandatory and the consequences of failing to exhaust are harsh, including loss of appellate litigation rights. A party exhausting its remedies before an administrative agency in good faith is not required to guess beforehand whether the agency might find a review petition repetitious. *Southwestern Bell Telephone Company v. FCC*, 116 F.3d 593, 597-98 (D.C. Cir. 1997).

If the FCC means to provide Blanca with a waiver of the exhaustion requirement via the December 8 Order ¶ 29, then it should clearly state the waiver because an exhaustion waiver is not something a regulated entity can infer. Blanca would gladly accept a clear statement from the FCC that the FCC is waiving the exhaustion requirement. However, because such a waiver would put the FCC in a bind during appellate litigation,[2] Blanca cannot assume that the FCC means to waive the exhaustion requirement. Because the FCC is not likely waiving the exhaustion requirement, it is unclear why the December 8 Order ¶ 29 instructs Blanca that it cannot comment on relevant FCC statements and rulings in real time as the FCC makes them and the FCC's view is unreasoned.

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[2] Reviewing courts must rely upon the FCC's statements contained in its orders and rationale cannot be supplied by FCC counsel in argument to the court. *See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given."); *Panamsat Corporation v. FCC*, 198 F.3d 890, 897 (D.C. Cir. 1999) ("we do not ordinarily consider agency reasoning that 'appears nowhere in the [agency's] order'") quoting *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997).

B. A Case of First Impression and Lack of Notice

One of Blanca's central arguments is that the FCC's action in this case employed a novel *ex parte* summary enforcement procedure which failed to follow the Notice of Apparent Liability requirements found at 47 U.S.C. § 503, 47 C.F.R. § 1.80, and 47 C.F.R. §1.1905. *See e.g.*, June 24, 2016 Petition for Reconsideration at 3, 7-8 & n. 4. Blanca had no prior notice of the *ex parte* summary debt adjudication and collection procedure used in this case, no notice of how to proceed in such a proceeding, no notice that the FCC could find USF rule violations years and years after the occurrence of the purported USF rule violations, and no notice that the FCC could issue a forfeiture based upon those ancient rule violation determinations. "Elementary fairness compels clarity in the statements and regulations setting forth the actions with which the agency expects the public to comply." *Gen. Elec. Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) *citing Radio Athens, Inc. v. FCC*, 401 F.2d 398 (D.C. Cir. 1968).

The FCC tries to justify the lack of notice by asserting that prior to the release of the December 8 Order there existed precedent from which Blanca could have ascertained what the FCC would do in the FCC Orders, but the December 8 Order, ¶ 29, merely serves to highlight the lack of notice endemic to this case. The December 8 Order does not describe an existing procedure which the FCC employed prior to 2005-2010 from which Blanca could glean probable FCC action. December 8 Order, ¶ 29 determines that as of 2005 Blanca should have figured out what the FCC would do in 2016 based upon two 70-80 year old Supreme Court cases as informed by FCC determinations made in 2011 & 2014 which were released after Blanca's 2005-2010 challenged conduct.

This is not reasoned decision making. First, FCC decisions issued in 2011 and 2014 were issued after the occurrence of Blanca's challenged 2005-2010 conduct and obviously did not inform anyone of anything during the period of time before they were issued. Second, expecting the public

to consider every existing appellate precedent, and then divining how the FCC will apply certain of those precedent, but not others, in some future decision is not the agency providing clarity in guidance, it is a regulated entity guessing at what unannounced FCC rules might be.

47 U.S.C. § 503(b)(2)(B), implemented at 47 C.F.R. § 1.80, is the statutory procedure whereby the FCC determines whether its rules have been violated and whether forfeitures should be entered against carriers. 47 C.F.R. § 1.1905 explicitly provides that forfeiture orders entered against carriers, subsequently to be classified as Federal debt, must comply with the requirements of § 503 and § 1.80. June 24, 2016 Petition for Reconsideration, at 14. The FCC's statutory, and routine, method for entering USF rule violation findings and collecting USF debt is to issue a notice of apparent liability pursuant to § 503 and § 1.80. June 24, 2016 Petition for Reconsideration, at 16. The FCC even provides a notice of apparent liability in cases involving serious fraud.[3]

> The FCC seeks to avoid the statutorily required rule violation procedure by claiming that
>
> section 503 forfeiture proceedings are not the exclusive means by and through which the Commission may make a determination that a rule has been violated and impose liability. The Commission or USAC has consistently sought recovery of USF funds outside of section 503 proceedings.

December 8 Order, ¶ 43. The FCC continues to explain that it in addition to § 503 rule violation proceedings, the FCC can conduct audits to enforce its rules. December 8 Order, ¶ 39, nn. 106, 122.

However, Blanca settled its audit years ago by returning USF money and adjusting its accounting procedures and Blanca's rural cellular system withered on the vine. June 24, 2016

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[3] *In the Matter of Sandwich Isles Communications, Inc., Waimana Enterprises, Inc., Albert S.N. Hee, Notice of Apparent Liability for Forfeiture and Order*, FCC 16-165 (imposing a $49+ million forfeiture for falsely certifying the accuracy of the USF data provided to the Commission/NECA during the years 2010-2013 (¶¶ 46-47, 55, 59, 79, 81)). The Commission's December 6, 2016 *Daily Digest*, Vol. 35 No. 234 states that "Sandwich Isles Communications must repay the USF and may pay fines totaling over $76 million for apparent violations related to USF compensation." This decision was released after the June 2 Letter was issued against Blanca.

Petition for Reconsideration, at 12-13, 14, 15 n. 16.[4] While the FCC has a choice between audit and rule violation adjudication, Blanca's audit was closed years ago. The December 8 Order fails to discuss this important fact and is unreasoned as a result. Moreover, the FCC acknowledges that this proceeding is not an audit, the FCC refers to this review proceeding as an "informal adjudication" in which the FCC is "applying current laws to past conduct." December 8 Order ¶ 42.[5] The FCC's procedures for adjudicating rule violations regarding past conduct are found at § 503 of the FCA and § 1.80 of the rules. Moreover, to the extent the FCC is applying newly created agency law to Blanca's past conduct, the FCC is engaging in retroactive rule making because it would be "attach[ing] new legal consequences to events completed before its enactment" as guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf v. Usi Film Products*, 511 U.S. 244, 255 (1994).

The indispensability of the rules adjudication to the FCC's debt creation/collection position is readily apparent by viewing the June 2 Letter as if the rule violation text were excised from the order. Absent the rule violation text, the June 2 Letter would effectively state that "Blanca owes the government money for no reason in particular," a wholly unreasoned proposition. This case is not an accounting audit, this case is a rule adjudication proceeding in which the FCC has failed to follow its long established rule violation adjudication procedures including § 503' one year statute of

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[4] There are no rule violation findings entered after an audit is settled. The audit period is limited, it is not an open-ended. June 2 Letter at 2 (acknowledging an audit time limitation); June 24, 2016 Petition for Reconsideration, at 15 (one year limitation); 47 C.F.R. § 54.701(a) (FCC review of auditing results limited to one year). The auditing procedure the FCC discusses was concluded for Blanca years ago and the December 8 Order is unreasoned for failing to discuss the fact.

[5] The FCC must explain how the June 2 Letter can be considered an informal adjudication when the face of the document asserts that it is a **DEMAND FOR PAYMENT OF A DEBT OWED TO THE UNITED STATES AND ORDER OF PAYMENT** (bold, caps, underscore in original) and where Blanca was not provided any opportunity to present a case before issuance of the ultimate decision. If this case is an informal adjudication, it represents a classic case of Due Process violating prejudgment.

limitations.

The December 8 Order ¶ 39 states that this proceeding is a "debt adjudication." There is nothing in the FCC rules which authorizes "debt adjudications." Moreover, the FCC's statement implicitly recognizes that it is not merely collecting a debt, it is adjudicating a debt claim and creating the existence of a debt. Prior to June 2, 2016 there was no debt and this proceeding is not merely a "debt collection" action. June 24, 2016 Petition for Reconsideration, at 17-18. The FCC states that there is no statute of limitations issue regarding debt collection under the DCIA, December 8 Order n. 78, however, since this case is not merely a debt collection proceeding to collect an existing debt, the DCIA limitations exception does not apply. June 24, 2016 Petition for Reconsideration, at 16.

December 8 Order ¶ 31 states that "this is not a forfeiture proceeding," yet the December 8 Order requires Blanca to forfeit nearly $7 million of its own money as a consequence of the summarily adjudicated rule violations. If this is not a forfeiture proceeding, then one can only wonder why the FCC adjudicated USF rule violations. The FCC's determination that this is not a forfeiture proceeding is unreasoned.

December 8 Order ¶ 45 asserts that the Commission is not penalizing Blanca because it is "merely seeking to recover sums improperly paid in which Blanca held no entitlement under section 254." The FCC's statement is factually incorrect. Attachment at 00001 is a copy of the FCC Form 159-B which the FCC has prepared for Blanca to pay the forfeiture which shows that the FCC is extracting an interest penalty (DCIA), a generic penalty (PEN), and administrative charges. These are clearly penalties under anyone's definition of a penalty. Moreover, the imposition of any penalty at this time is improper if the June 2 Letter were merely a "proposed debt." December 8 Order ¶ 19. A debt is not considered delinquent if the existence of the debt is challenged. 47 C.F.R. § 1.1910(b)(3)(i). Moreover, the Commission will not attempt debt collection while the existence

of the debt is litigated. 47 C.F.R. §§ 1.1910(b)(2), (3)(i).

The FCC needs to decide: was the June 2 Letter notice of a pre-existing debt, or was the June 2 Letter an informal, albeit summary, adjudication of a debt claim, or was the June 2 Letter a notice of a proposed debt which triggered an ongoing debt adjudication which attempts, but fails, to provide Blanca with procedural relief? The June 2 Letter cannot be at the same time 1) a demand for payment of a pre-existing debt which triggered penalties; 2) an "informal adjudication" of a debt claim; and 3) a mere "proposed debt" in the form of a notice of proposed liability for forfeiture.

Regarding the FCC's assertion that Blanca is not entitled to the money, title to the USF money properly passed to Blanca years ago in light of Blanca's "clean hands." Because Blanca obtained legal title to the USF money, assertion of a debt recovery procedure against Blanca is improper and is at odds with the underlying "debt" collection purpose of the Debt Control Improvement Act of 1996 (DCIA). The USF money became Blanca's property years ago, that money is not a "debt" owed by Blanca to the Federal government. Blanca had no reason to believe that it was not entitled to the USF money, and because Blanca has clean hands, the payment of USF money to Blanca became final and Blanca changed its position in reliance upon a reasonable belief that the money was properly paid. *Norwest Bank Minn. Nat'l Ass'n v. FDIC*, 312 F.3d 447, 452 (D.C. Cir. 2002) (repose allows parties to a transaction to close their books).

The FCC must explain more fully the purpose served by its informal adjudication of purported USF rule violations in this "informal adjudication." Alternative, the FCC could delete the rule violation findings entered in this proceeding and either: 1) assert that the money is owed to the Federal government because that's just the way it is; thereafter we can check with an appeals court to see if the FCC can assert a debt claim without having a reason to do so or 2) the FCC could try to develop another debt creation theory which does not rely upon rule violations to justify taking Blanca's money and Blanca will address that new theory after it is released.

The fact is, the FCC cannot point to a single pre-2005 or a pre-2010 FCC decision, adjudication, or rule making which provides clear notice that: the FCC will employ an *ex parte* summary USF rule violation and debt collection procedure, ignore the FCA's one year statute of limitations, and issue a forfeiture based upon those ancient rule violation determinations. The patchwork explanation in December 8 Order ¶ 29 tries to explain what it is doing to Blanca, but that explanation merely serves to highlight that the FCC is weaving a novel, generally applicable USF enforcement procedure out of whole cloth, on the fly and without notice, in this proceeding. The FCC's decision to implement a new *ex parte* summary enforcement procedure to process its USF rule violation claims against Blanca, without prior notice, violates "basic hornbook law in the administrative context." *Gen. Elec. Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

C. Blanca's Due Process Rights

December 8 Order ¶ 47 states that

> The Commission processes have afforded Blanca sufficient due process. Informal adjudications should provide notice to affected parties, opportunity to participate, and supporting reasons.

The June 2 Letter was not an "informal adjudication," it was an *ex parte* summary forfeiture order which "demanded" immediate payment to the U.S. Treasury of a purported Federal debt upon pain of additional penalties. There was no "adjudication" because Blanca was not afforded an opportunity to present a case before the ultimate decision was made. Blanca was presented with a *fait accompli* and the burden was placed upon Blanca to overturn that decision on appeal. That's not due process, that's being ridden out of town on a rail. If the Commission means to say that the June 2 Letter served as a notice of apparent liability as part of an effort to collect money for rule violations, then there is a statute of limitations problem with the FCC's position.

47 C.F.R. § 1.1905 requires that the FCC follow the procedures found at § 503 of the FCA and § 1.80 of the rules in debt collections before forfeiture penalties can be imposed. Blanca has

a 5th Amendment right to a hearing before being deprived of its property. December 8 Order ¶ 29 states "that the collection of debt is not a forfeiture barred by the passage of time" and that the FCC is authorized to collect "Federal funds" from Blanca because, in the FCC's view, Blanca is not "entitled" to the money. December 8 Order ¶¶ 2, 24, 36-38, 45, 51 & nn. 28, 90, 108, 109, 123, 148. However, the monies the FCC seeks to collect from Blanca are not Federal funds. Blanca had no reason to believe that it was not entitled to the USF money. Therefore, the payment of USF money to Blanca became final and title to the money passed to Blanca. *Norwest Bank Minn. Nat'l Ass'n v. FDIC*, 312 F.3d 447, 452 (D.C. Cir. 2002) (repose allows parties to a transaction to close their books). The FCC is trying to obtain Blanca's money from Blanca, the FCC's action is not one which is recovering Federal funds. The FCC proceeding via forfeiture, this is not a debt collection.

D. Regulated v. Unregulated Costs

The central topic of the June 2 Letter's attempt to penalize Blanca for purported ancient accounting violations was the assertion that Blanca obtained USF funding for a mobile service and that mobile services are not eligible for USF funding. June 24, 2016 Petition for Reconsideration at 22-23 & n. 18. However, that rationale is plainly wrong because in addition to various rules which indicate that mobile service is eligible for USF funding, June 24 Petition for Reconsideration at 4-5, 6, 17, the FCC issued the October 19, 2015 *Public Notice*, FCC 15-133, which plainly states that USF funding is available for mobile service. June 24, 2016 Petition for Reconsideration at 23.

The December 8 Order seems to abandon the staff's rationale that "mobile" service is excluded from USF funding, *sub silentio*, in favor of a "regulated v. unregulated" view of the USF funding requirement. The December 8 Order makes the point that only "regulated" services are eligible to receive USF funding at least 69 times and serves as the FCC's new central rationale to

find that Blanca violated USF funding rules years ago.[6] The FCC's "regulated v. regulated" rationale is as unreasoned as the staff's "mobile" rationale.

First, the FCC ignores the fact that Blanca is a regulated common carrier of last resort providing local exchange service pursuant to tariff in Southern Colorado and that Blanca offered its wireless service as a regulated service under its tariff.[7] June 24, 2016 Petition for Reconsideration, at 1-3, 5, 11 & n. 10; *see also* Blanca's Response 34 to the IG's November 12, 2009 *Subpoena* (Blanca provided its wireless services under tariff). Attachment at 00002.[8] Blanca used its wireless service to provide carrier of last resort services to hard to serve areas which was more economical USF funding-wise than laying wire. June 24, 2016 Petition for Reconsideration at 11; June 2 Letter at 6; *see also* June 2 Letter n. 16 (Blanca served 150 exchange subscribers using wireless technology because it was not feasible to install landline service). As a common carrier Blanca was required to offer its wireless service indiscriminately, 47 U.S.C. § 202 (requirement of nondiscrimination), but that does not change the fact that Blanca properly accounted for its cellular system costs as a

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[6] The December 8 Order refers to "mobile" only 8 times in a 22 page order where the June 2 Letter referred to "mobile" 27 times in a 6+ page order.

[7] While States are preempted from regulating the rates charged for mobile services, there is nothing in the Communications Act or the FCC's rules which prohibits a carrier of last resort from regulating its own rates by offering cellular service under its state tariff. *See* June 24, 2016 Petition for Reconsideration at 14 n. 15 citing 47 U.S.C. § 332(c)(3); *see also* 47 C.F.R. § 20.15(c) (ordering cancellation of interstate and international mobile service tariffs, but not state tariffs). The Colorado PUC authorizes wireless provision of carrier of last resort services. 4 C.C.R. 723-2 § 2001(a) ("'Access line' means the connection of a customer's premises to the public switched telephone network regardless of the type of technology used to connect the customer to the network."); *see also* 4 C.C.R. 723-2 § 2821(a) (similar); 4 C.C.R. 723-2 § 2185 (providers of last resort must provide service "regardless of the availability of facilities").

[8] December 8 Order ¶ 49 denies Blanca the opportunity to examine the evidence before the FCC because Blanca produced the information. This ruling ignores 47 C.F.R. § 1.10 which explicitly provides that Blanca has a "right . . . to procure a copy of any document submitted by" Blanca. The attached copies of Blanca's Item 34 response, the 1988 US Letter, and Blanca's Item 2 response is the best evidence available to Blanca.

regulated service.

Second, in addition to being wrong as a factual matter regarding whether Blanca's cellular service was regulated, the FCC is incorrect as a matter of law by holding that Blanca's cellular service was unregulated. 47 C.F.R. § 20.15(a) explicitly provides that cellular carriers must comply with a number of statutory common carrier regulations including 47 U.S.C. § 201 (just and reasonable rates & practices regulation) and § 202 (nondiscrimination in charges and practices). Moreover, the FCC regulates cellular carriers under Parts 20 (e.g. E911; hearing aid compatibility) and Part 22 (cellular licensing and service rules). While states are preempted from regulating cellular rates, States can regulate rates as necessary to promote universal service and States can petition the FCC for rate regulation authority. 47 U.S.C. § 332(c)(3)(A). Cellular rates and services are regulated as a matter of law.

Third, the December 8 Order ignores the fact that the FCC's USF rules are filled with references to mobile systems being eligible for USF funding and there is no distinction drawn between "regulated" and "unregulated" assets. June 24, 2016 Petition for Reconsideration, at 4-5, 6-7, 17. Thus, Blanca's cellular service was a "regulated" service, but the FCC's rules do not contain a "regulated" asset limitation on receipt regarding the receipt of USF funds.

Fourth, the December 8 Order ¶ 4 states that Blanca is only entitled to receive USF "high-cost support based on their embedded costs in providing local exchange service to fixed locations in high-cost areas." The FCC does not directly respond to Blanca's argument that "there is no USF funding rule in the C.F.R. which limits USF funding to 'fixed' wireless service." June 24, 2016 Petition for Reconsideration at 4. The December 8 Order at fn. 6 points to two FCC decisions in support, however, neither of the cited cases discuss a "fixed location" requirement; one of the cases was released in 2012 and is not relevant to an examination of the rules in place during the 2005-2010 time period. Moreover, the FCC ignores 47 C.F.R. § 54.307(b) which provides that

for purposes of USF funding for mobile systems "the 'service location' for a wireless/mobile subscriber for the purpose of USF funding calculation is the subscriber's billing address. 47 C.F.R. § 54.307(b)." June 24, 2016 Petition for Reconsideration at 5, 7, 17. For USF funding purposes, a wireless subscriber's service location is considered by rule to be a fixed location, namely the subscriber's billing address, by operation of the FCC's plainly stated rule. The FCC's failure to consider the fact that the FCC's USF rules "fix" the wireless subscriber to a specific fixed location renders the December 8 Order unreasoned.

Moreover, the December 8 Order fails to consider the FCC's history of cellular licensing. In 1992 the FCC proposed "to eliminate the restriction limiting fixed service to Basic Exchange Telecommunications Radio systems (BETRS)" to allow cellular to provide fixed BETRS service. Carriers were required to "comply with state certification requirements, if any." *In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, *Notice of Proposed Rule Making*,7 FCC Rcd. 3658, 3672 (1992); *see also* 47 C.F.R. § 54.207(a) (state commissions determine USF service areas). This rule change was adopted because the FCC had previously routinely granted waivers to provide the BETRS service using cellular technology. *In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, *Report and Order*, 9 FCC Rcd. 6513, 6571 (1994). The FCC recognized that "changes in technology have also made it desirable to provide carriers with greater flexibility to deal with new and changing circumstances while, at the same time, promoting the public interest." *In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, *Notice of Proposed Rule Making*,7 FCC Rcd. 3658 (1992).[9] The FCC clearly authorized Blanca's BETRS

[9] December 8 Order n. 35 "*See* Application at 24 (acknowledging that Blanca sought support for mobile services)." It is not clear what the FCC means by this reference. Cellular facilities are licensed under Part 22 entitled "Public Mobile Services," but as explained above, the FCC allows (continued...)

service using cellular technology by rule.

The FCC's rules do not require that the cellular/mobile handset be nailed to a wall to provide the BETRS service and for USF purposes § 54.307(b) subsequently fixed the "service location" of a cellular mobile subscriber at the subscriber's billing address. At that time Blanca was providing BETRS service using 150MHz/450 MHz BETRS licenses and commencing about 1995 Blanca began providing BETRS service using cellular technology. June 24, 2016 Petition for Reconsideration, at 11.

Fifth, December 8 Order ¶ 37 states that

> Blanca now asserts that it is a competitive ETC in areas served by a different incumbent LEC where it offered CMRS and, therefore, is entitled to support for such offering, the overpayments here related to study area 462182, in which Blanca was the incumbent LEC, not a competitive carrier. Moreover, Blanca has not produced any evidence that it has sought or obtained the requisite ETC designation for any other areas for, or expanded its existing designation to cover, these areas.

The December 8 Order ignores 47 C.F.R. § 54.201(d) which provides that as an ETC Blanca is

> eligible to receive universal service support in accordance with section 254 of the Act and, except as described in paragraph (d)(3) of this section, shall throughout the service area for which the designation is received***

June 24, 2016 Petition for Reconsideration, at 4 n. 3, 5, 7, 17. As discussed above, there is no rule prohibition against Blanca's provision of carrier of last resort services using CMRS facilities. Blanca's cell system was designed to provide service to its telephone exchange area and the FCC acknowledges that the cell system, in fact, provided exchange service to approximately 150 rural exchange subscribers, June 2 Letter at 2 n. 1, but these subscribers were incorrectly excluded from USF funding because they were classified as "mobile" subscribers. June 2 Letter at 3 ("Blanca was

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[9](...continued)
cellular service providers to provide BETRS service using mobile service technology and licensing using the subscriber's billing address as the "service location" without a requirement that the cellular handset be nailed to the subscriber's billing address.

only providing *mobile* cellular service") (emphasis in original).

During the relevant time Blanca's cellular system served under 300 subscribers. Petition for Reconsideration, FCC 08-67, WT Docket No. 01-309, filed March 28, 2008, at 1. Blanca did not claim support for all subscriber loops, Blanca claimed support for those subscribers who used the cellular service in lieu of wireline telephone exchange service. However, the FCC has completely discounted Blanca's provision of common carrier of last resort service in withholding USF support relating to Blanca's telephone exchange service and is penalizing Blanca for its provision of that exchange service.[10]

Historically the Colorado the PUC did not strictly regulate telephone exchange service boundaries. *See e.g.*, Attachment at 00003, a 1998 letter from USWest to Blanca requesting that Blanca provide radio service to USWest's hard to serve subscribers in USWest's exchange area. Blanca provided the 1988 USWest letter to the Inspector General in 2009 in response to the *Subpoena*. Attachment at 0004. Therefore, the fact that Blanca has cellular coverage which extends beyond its Study Area is neither unusual nor a concern of the Colorado PUC, and a formal expansion of the Study Area is not required, because the goal is provision of service to rural, hard to serve subscribers and that is exactly what Blanca was doing. The FCC left it to state discretion regarding certification of exchange carrier services using cellular mobile technology. *In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, *Report and Order*, 9 FCC Rcd. 6513, 6571 (1994).

Sixth, December 8 Order ¶ 48 asserts that

the cost accounting framework embodied in the rule parts cited by OMD, i.e., Parts 36, 64,

[10] December 8 Order n. 95 discusses that in 2011 the Colorado PUC required LECs to form a separate wireless subsidiary to offer CMRS services. However, the time period involved in Blanca's case is 2005-2010 and predates that requirement – Colorado's 2011 separate subsidiary decision has no relevance except to show that prior to 2011 Blanca's service offering was properly structured.

> and 69 of the Commission's rules, make clear that under the Act and the Commission's rules, CMRS-related expenses are nonregulated expenses that could not be included in regulated accounts for purposes of NECA cost reporting.

Blanca criticized the June 2 Letter because it vaguely referred to rule part violations rather than citing specific rule violations. June 24, 2016 Petition for Reconsideration, at 1, 8 n. 4, 16-18, 22. December 8 Order ¶ 48's reference to Blanca's purported violation of a "framework" is just as vague, especially in light of the specific USF rule provisions Blanca cited which demonstrate that CMRS is eligible for USF funding. June 24, 2016 Petition for Reconsideration, at 4-5, 6-7, 17.

If the FCC intends to hold a company's feet to the fire, its rules need to clearly express what is required. However, the only explanation the FCC can muster is a reference to some vague "framework," a purported "framework" which is contradicted by the text of a number of the FCC's USF rules, USF rules which the December 8 Order fails to address. The FCC failed to provide clear notice of the purported "framework" prior to the 2005-2010 time period at issue.

Moreover, Blanca acted reasonably under the rules years before the issuance of the FCC's "framework" guidance announced in this case, a guidance which fails to discuss the relevant rules which Blanca cited and relied upon, June 24, 2016 Petition for Reconsideration, at 4-5, and which allow a common carrier of last resort to utilize cellular radio technology to promote universal voice service in a rural area. When Blanca was informed, circa 2012, to change the way it accounted for its cellular system it did so immediately, June 24, 2016 Petition for Reconsideration, at 13, 15, but absent guidance Blanca had no reason to believe in 2005-2010 that its position was incorrect and every reason to believe it was acting reasonably especially since USAC continued to issue USF payments to Blanca for years even while the FCC was auditing Blanca and after Blanca explained what it was doing. In the absence of an agency's pre-enforcement explanation of a regulation, a regulated entity's reasonable interpretation precludes the finding of a rule violation. *Gen. Elec. Co. v. United States EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

E. USF Is Not Federal Funding

The December 8 Order variously, and incorrectly, asserts that USF funding is either Federal funding, or Federal grant money, or Federal money paid under contract using the Federal Spending Power. December 8 Order ¶ 51 & nn. 28, 98, 108, 109, 113, 123, 148. USF money is none of these things. *U.S. ex rel Shupe v. Cisco Sys.*, 759 F.3d 379, 377-88 (5th Cir. 2014) holds that the FCC's Universal Service Fund program does not contain any Federal money for purposes of False Claims Act prosecutions. The Fifth Circuit determined that the USF is administered by a private organization (USAC), that the USF is funded by private companies, and that the USF is not funded by Federal tax money. *Shupe*, 759 F.3d at 387-88. Instantly, the FCC seeks recovery of USF funds under the purported authority of the DCIA of 1996 relating to USF fund monies which were paid to Blanca between the years 2005-2010. The FCC's June 2 Letter at issue instantly claims that USF monies were paid to Blanca in violation of the FCC's rules and are recoverable pursuant to the DCIA as a "Debt [] owed to the United States." June 2 Letter at 7. However, *Shupe* holds that the USF money the FCC seeks to recover from Blanca never belonged to the United States and those USF monies paid to Blanca, therefore, cannot constitute a "Debt [] owed to the United States." Because *Shupe* holds that USF monies are not Federal funds, the FCC is improperly utilizing the DCIA to recover non-Federal money from Blanca and the FCC's "debt" collection effort against Blanca is unauthorized.

Moreover, the 10th Circuit holds that "NECA act[s] exclusively as an agent for its members and had no authority to perform any adjudicatory or governmental functions." *Farmers Telephone Company v FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999). Because NECA/USAC are not authorized to "perform any . . . governmental functions," NECA/USAC's disbursement of USF monies to Blanca by NECA/USAC cannot be considered as having been concerned with the distribution of

Federal money. Because the disbursement of USF money to Blanca did not implicate any government function, the FCC's effort to recover that money under the DCIA of 1996 is unauthorized. The FCC was a party to the *Farmers* case and it is bound by the Court's determination in that case, more recent Federal District Court decisions are not better precedent.

In No. 17-1451, *In Re Blanca Telephone Company*, the FCC's December 27, 2017 Response at 8-9, claims that the subject matter of this case involves "a debt owed to the Commission." That is incorrect. The purported debt is not owed to the FCC/Commission, it is a "**DEBT OWED TO THE UNITED STATES**." June 2 Letter, at 1 (caps, bold and underscore in original).[11] There are at least two problems with the FCC asserting authority to collect debts on behalf of the United States. First, 47 C.F.R. § 1.1910(b)(2) authorizes the FCC to collect debts owed to "the Commission." The FCC has no authority under its rules to collect debts owed to the United States. The FCC must explain why its position regarding the entity receiving the purported USF debt has changed.

Second, Blanca's Fourth Supplement argues that the FCC is in a box. If the Commission were to order that Blanca must reimburse the USF through USAC, rather than make payment to the U.S. Treasury as ordered in the June 2 Letter, Attachment B, in an effort to make the USF fund a "victim" for the purpose of avoiding the statutes of limitations problem, that would effectively concede that there is no debt owed to the United States. In that scenario the FCC's DCIA of 1996 debt collection effort would be voided because the FCC would be determining that compensation is owed to a third party rather than determining the existence of a Federal debt. The DCIA of 1996 exists to collect debts owed to the United States, the statute is not a victim compensation statute and

[11] The last page of the June 2 Letter is a set of contains instructions regarding how to make payment to the US Treasury rather than the FCC.

FCC use of the DCIA of 1996 for third party compensation would be improper.

On the other hand, if the FCC adhered to its position in the June 2 Letter that USF money is Federal money payable to the U.S. treasury, then the Commission is seeking recovery of public money rather than seeking to compensate a victim, and the Commission is clearly involved in a penal rule enforcement effort which is subject to the statute of limitations. Furthermore, the punitive nature of the Commission's actions against Blanca would be highlighted were the Commission to amend the June 2 Letter and enter an order asserting that Blanca's purported rule violations were "continuing" in nature until the "debt" were paid. In fact, Attachment at 00001, FCC Form 159-B prepared by the FCC for Blanca, shows that the FCC is imposing additional penalties on Blanca and highlighting the penal nature of its action while ignoring the statute of limitations.[12]

In No. 17-1451 the FCC claims that the USF money is payable to the FCC, but no theory of direct agency recovery of USF funds was provided. The FCC does not collect USF funds and the FCC does not disburse USF funds. In any event, the FCC is a governmental unit and the penal nature of a USF collection by a governmental unit, i.e., there is no compensable victim, remains.

F. The Failure to Address the Record–Blanca's Accounting Disclosures

1. From the Investigation's Outset Blanca Told Investigators What it Was Doing

The lack of FCC reasoned decision making in this case is clearly exemplified by the fact that USAC paid out USF monies for Blanca's cellular system even while the FCC was auditing Blanca. If the purported cost accounting violations were "clear," December 8 Order ¶ 24, it would not have taken the FCC 11 years to issue a decision. In an effort to impute some level of wrong doing to Blanca to try to disappear this glaring hole in the FCC's analysis, the December 8 Order, ¶ 1 states that "in 2012, NECA *discovered* Blanca's improper inclusion in its rate base of nonregulated costs"

[12] 47 C.F.R. § 1.1910(b)(2) is penal on its face because it provides for the imposition of interest, costs, and other undefined "penalties."

(emphasis added) as if Blanca were concealing how it was accounting for cellular-related costs and that NECA's "discovery" was, therefore, profound.

Blanca was open about its accounting practices beginning in early 2008, a fact which is easily discernible examination of the FCC staff's own work product which was reproduced for the FCC's examination in the June 24 Petition for Reconsideration. The December 8 Order ignores information in the Inspector General's (IG) November 12, 2009 *Subpoena Duces Tecum*, especially Items 25-48, which reveals that the IG was probing, in minute detail, Blanca's cellular system cost accounting. Blanca was clearly telling the various auditors and investigators exactly what it was doing which, in turn, allowed the IG to probe the issue deeply. More than one-half of the IG's November 2009 *Subpoena* was devoted to covering Blanca's explanation that Blanca was including cellular system costs in its USF cost accounting reports. June 24, 2016 Petition for Reconsideration, Attachment 3 at 14-17 (the IG's November 2009 Subpoena). Blanca was open about its accounting procedures and that led to the IG's numerous inquiries and requests for a multitude of documents regarding how Blanca handled the cost accounting for the cellular system. In this case USAC was not the Matthew Henson of accounting and USAC "discovered" nothing in 2012, by then Blanca had been explaining its accounting methods to the FCC and its auditors and investigators for FOUR YEARS. The FCC's effort to paint this case as one where the FCC encountered difficulty obtaining relevant information from a reluctant company is unsupported by the record and is contradicted by information created by the FCC's own staff who examined the issue and the information Blanca provided.

2. Purported Waste, Fraud, and Abuse

In response to Blanca's observation that "the June 2 Letter does not find that Blanca made a single false statement or misrepresentation in more than eight years of investigation covering the

eleven years back to 2005," June 24, 2016 Petition for Reconsideration, at 10, the December 8 Order ¶ 41 makes the absurd statement that "we find irrelevant Blanca's repeated emphasis on the fact that Blanca began a practice of misreporting costs to NECA in 2005." The December 8 Order then refers to certain pages of Blanca's Application for Review and Petition for Reconsideration as if Blanca's pleadings actually, and repeatedly, admit to misreporting costs. Blanca never emphasized that it had "a practice of misreporting costs to NECA;" the FCC's word play does not serve the public interest.

As discussed above, and in the earlier filed review pleadings, Blanca truthfully reported its costs in accordance with the text of the FCC's USF rules. Blanca hid nothing and Blanca was completely candid with its accounting practices from the outset of the FCC's investigation. Now, years later, the FCC tries to fault Blanca's accounting methods based upon a vague "cost accounting framework," December 8 Order ¶ 48, which the FCC opines that Blanca should have inferred even though the inference runs contrary to the text of the FCC's USF rules. Noteworthy is the fact that the FCC still does not assert that Blanca submitted any false information in any report or made any false statement in any oral or written response.[13]

Notwithstanding the fact that the December 8 Order completely fails to show that Blanca engaged in any wrongdoing over the course of the past 10+ years the FCC has been investigating Blanca, and notwithstanding the fact that the December 8 Order does not assign any error to the June 2 Letter for failing to even reference waste, fraud, abuse, or egregious wrongdoing, the December 8 Order states, without any support whatsoever, that this case involves waste, fraud, abuse, and

[13] December 8 Order fn. 96 reports that "Blanca never filed quarterly line counts on FCC Form 525, a requirement for recovering support as a competitive ETC pursuant to section 54.307(c)." The actual filing or non-filing of a report is not a content driven determination and it is assumed that if this were a significant issue then USF money would not have been paid to Blanca and the December 8 Order would do more than footnote the point. *See* 47 C.F.R. § 1.80(b)(8) (base forfeiture for failing to file a required form is $3000).

"egregious" wrongdoing by Blanca. December 8 Order, ¶¶ 10, 25, n. 106, n. 130, Statement of Commissioner Clyburn, Statement of Commissioner O'Rielly. In the absence of any evidence supporting these very serious charges, the FCC's statements are unreasoned at best. These words are not talismans which guide decision making in the absence of reasoning. The FCC is required to explain what it is doing, it cannot rule by fiat. At most, and in the FCC's own words, the FCC's case against Blanca amounts to the application of a "cost accounting framework," a profoundly vague proposition. December 8 Order ¶ 48. Blanca followed the express text of the FCC's USF rules during 2005-2010 regardless of what the FCC announces today as the "cost accounting framework."

It is contrary to the public interest for the FCC to make extremely serious charges against a carrier and then utterly fail to support those charges. The FCC must explain how Blanca's provision of wireless common carrier of last resort service to rural Colorado, a service which clearly serves the USF's statutory purpose, constitutes waste, fraud, abuse, and amounts to "egregious" wrongdoing on a par with using USF funds to buy a vacation mansion in Southern France. Absent any such explanation, and in addition to amounting to an unreasoned, abusive, and outrageous finding by a Federal agency, it appears that the FCC is merely trying to serve a plate to the DoJ in support of its hitherto utterly unsupported false claims claim which is waiting in the wings as part of an abusive governmental tag team effort, albeit one which is now subject to claim preclusion in view of the FCC's action. June 24, 2016 Petition for Reconsideration, at 10, 12 n. 11.

G. Blanca's Supplemental Pleadings
1. Blanca's Second Supplement and Fourth Supplement

The December 8 Order ¶ 27 accepts Blanca's Second Supplement (cellular service discontinuation notice) and Fourth Supplement (discussing the Supreme Court's *Kokesh* decision). However, the ordering clauses at December 8 Order ¶ 57 dismiss these pleadings as untimely.

Blanca assumes that the ordering clause ¶ 57 contains a drafting error, but reserves the right to respond if the FCC determines that it is ¶ 27 which is in error and the pleadings are, in fact, rejected.

2. Blanca's First Supplement and Third Supplement

The December 8 Order ¶ 28 rejects as untimely Blanca's First Supplement (discussing relevant FCC statements made after Blanca filed its FCC review pleadings and a non-obvious argument about the legal status of USF money) and Third Supplement (discussing USF cases which were released after Blanca filed its FCC review pleadings). With all due respect, the FCC's quibble about Blanca taking a little extra time to defend itself in a novel summary forfeiture proceeding which has no published procedures and which afforded Blanca no opportunity to present a case before the decision was made, and after subjecting Blanca to 10 years of investigation, is unfair and seems designed to reach a predetermined result. Certainly, there was no urgency on the FCC's part to process any debt claim against Blanca, and no prejudice resulted to the FCC, or to its ability to review this matter, or to the public interest, from Blanca's manner of proceeding.

From Blanca's perspective, on the other hand, this isn't a routine matter. The FCC is attempting to create a new kind of summary forfeiture proceeding and affording some procedural leeway in Blanca's favor, rather than draconian application of procedures, would be appropriate. Under these circumstances, it appears that the FCC is trying to hide its novel procedures from scrutiny. Blanca has a right to respond to the FCC rulings and statements which might be applied against Blanca. The FCC might wish to proceed in this case without subjecting its approach to examination, but Blanca is certainly within its administrative rights to challenge the FCC's reasoning while the instant case is pending. Blanca is not responsible for the circumstance that the FCC is issuing relevant statements after Blanca's petition for reconsideration filing deadline had passed. That said, even if the FCC is determined to have properly excluded Blanca's supplements,

to the extent that the December 8 Order touches upon the matters Blanca raised in the supplements, Blanca is able to address those matters to exhaust its administrative remedies. *See Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997) (issue properly reviewed by appeals court where the FCC rejected the supplement, but addresses the issue anyway).

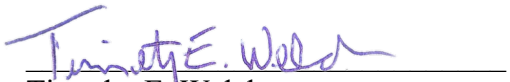
H. Emergency Relief During Litigation Over the Existence of the Debt

47 C.F.R. § 1.1910(b)(3)(i) provides that the FCC will not use the §§ 1.1910(b)(2),(3) enforcement action of withholding action on applications or attempt to collect the debt while the existence of the debt is being litigated either at the FCC or in a "contested judicial proceeding." Blanca has received notices from USAC that its USF payments are being withheld even though the December 8 Order is not final and the existence of the debt is still being litigated. Blanca requests that its Red Light be turned back to green, that USAC be directed to make all USF payments to Blanca until there is a final order, no longer subject to administrative or judicial review, which imposes a payment obligation upon Blanca, that USAC be directed to pay Blanca any USF monies which might have been withheld upon issuance of the December 8 Order and thereafter. As previously discussed, and as the FCC is able to see from Blanca's USF accounting, USF funding is critical to Blanca's provision of wireline carrier of last resort services to rural Colorado. Moreover, Blanca requests that its long pending license assignment application to AT&T (WPWU906 ULS File No. 0006996338) be processed and granted. The relief requested here should be provided immediately pursuant to the clear language of 47 C.F.R. § 1.1910(b)(3)(i).

I. Conclusion

WHEREFORE, the Commission should reconsider FCC 17-162, terminate the multi-year investigation of Blanca, and grant the financial and other relief Blanca has previously requested.

Respectfully submitted,
BLANCA TELEPHONE COMPANY



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December 29, 2017

FEDERAL COMMUNICATIONS COMMISSION

REMITTANCE ADVICE
BILL FOR COLLECTION

Approved by OMB
3060- 0589
Page 1 of 1

Bill Number	Applicant FRN	Current Bill Date
6USFBLANCATE	0003766201	06/02/2016

FOR INQUIRIES CALL
1-202-418-1995
(Revenue and Receivable Operations Group)

Application Information:

Blanca Telephone Company
1025 Connecticut Ave., N.W.
Suite 1000
WASHINGTON, DC 20036

Payable to:
Federal Communications Commission

Send a copy of this bill to:
Federal Communications Commission
Revenue & Receivables Operations Group
P.O. Box 979088
St. Louis, MO 63197-9000

Total Amount Due		Due Date
$6,903,165.53	**TOTAL AMOUNT DUE MUST BE RECEIVED BY**	07/05/2016

Payer FRN No. **Please Complete The Payer Information, FCC Registration Number (FRN) is required**

Payer Name (if paying by credit card enter name as it appears on the card)

Address Line No. 1

Address Line No. 2

City State Zip Code

Daytime Phone Number (include area code)

Reason For Bill:

Call Sign/Other FCC ID	Payment Type Code	Quantity	Fee Due For (PTC)	Total Fee	FCC Code 1	FCC Code 2
	USF	1	0.00000	$6,748,280.00		
	DCIA			$22,119.36		
	PEN			$132,716.17		
	ADM			$50.00		

TOTAL DUE $6,903,165.53

Please choose a method of Payment and complete the section if paying by Credit Card

Payment Method:

CREDIT CARD ☐ CHECK ☐ WIRE ☐ IPAC ☐ MIPR ☐

MASTERCARD ☐ DISCOVER ☐ VISA ☐ AMEX ☐

ACCOUNT NUMBER_____ EXPIRATION DATE_____

I hereby authorize the FCC to charge my Credit Card for the service(s) / authorization(s) herein described.

AUTHORIZED SIGNATURE_____ DATE_____

FCC FORM 159B JULY 2005

IF PAYING BY CHECK, PLEASE WRITE YOUR BILL NUMBER ON YOUR REMITTANCE AND ATTACH A COPY OF THIS BILL TO YOUR PAYMENT TO ENSURE PROPER CREDIT.

RESPONSE 33: There are no contracts.

Question 34: All documents constituting, referring or relating to tariffs under which Blanca undertook to provide services utilizing BETRS to customers.

RESPONSE 34: Blanca uses a Colorado tariff and is a member of NECA, thus using the NECA tariff. The NECA tariff may be found at neca.org.

Response34attachment has the following files:
"CostIssuesManual.pdf" –Cost manual created by NECA.
"Tariff1-4.pdf" – Blanca Tariff
"Tariff4b-6.pdf" – Blanca Tariff continue
"Tariff6a-9c.pdf" – Blanca tariff continue
"Tariff10-24.pdf" – Blanca tariff continue
"Tariff25-35.pdf" – Blanca Tariff continue

Question 35: All documents constituting a listing of customers of Blanca utilizing BETRS as of 12/31/06, 12/31/07, and 12/31/08. In lieu of such listing, the company may provide the billing records of customers of Blanca utilizing BETRS for the billing cycles that include 12/31/06, 12/31/07, and 12/31/08.

RESPONSE 35: See Response35Attachments-DVD for the list of customers:
The file " ListCustomersFtrs12-200YFtr11.pdf" contains Business customers for 200Y. The values for "Y" maybe 6, 7, and 8 designated the appropriate year.

The file "ListCustomersFtrs12-200YFtr1.pdf" contains Residential customers for 200Y. The values for "Y" maybe 6, 7, and 8 designated the appropriate year.

Question 36: All documents constituting, referring to, or relating to customer premises equipment which Blanca offered for sale or lease to its customers for BETRS, however such equipment was categorized or promoted by Blanca to the public, including, but not limited to: all invoices, bills of sale, service warranties, and any service agreements from equipment vendors or manufactures for each type of customer premises equipment.

RESPONSE 36: See Response36attachment for each check and invoice. The attachments have file name "CheckNumber.pdf". The number is the check number.

Question 37: All documents constituting all advertising in any form, including print, broadcast or web-based, for or including the service(s) categorized in the "current features count" provided by Blanca as "BETRS high Speed Internet".

RESPONSE 37: No documents exist.

Question 38: All documents constituting, or referring to contracts or other agreements to which Blanca is a party under which it undertook to provide the service(s) categorized in the "Current Features Count" provided by Blanca as "BETRS high Speed internet"

REPONSE 38: There are no such contracts.

Question 39: All documents constituting customer records of Blanca for those customers who received the service categorized in the "Current features count" provided by "Blanca as BETRS high speed internet".

Colorado 80202

USWEST

May 5, 1988

Mr. Alan Wehe
Blanca Telephone Company
P.O. Box 1031
Alamosa, CO 81101

Dear Alan,

I'm writing in response to our conversation last Friday regarding Rural Radio customers.

I am aware of several customers located in the Blanca exchange who have telephone service via a Mountain Bell radio tower located near you.

I am also aware there are customers located within a Mountain Bell exchange who could benefit from telephone service provided from your nearby tower. Any of these customers may choose to obtain local telephone service from the Blanca Telephone Company using you Rural Radio technology.

This letter is not intended to authorize any boundary changes or the construction of any facilities that cross the exchange boundary.

Please call if you have any questions.

Sincerely,

Ray Kent

Ray Kent

"FortGarland1024308.pdf" – Blanca Antenna Structure Registration
"Sanford1237700.pdf" – Blanca Antenna Structure Registration
"SanLuis1024241.pdf" – Blanca Antenna Structure Registration
"SanLuis1024309.pdf" – Blanca Antenna Structure Registration

Please refer to the FCC's ULS system for location information, system maps, and other licensing documents."

Question #2: All Documents constituting maps indicating Blanca's study area boundaries.

RESPONSE 2: Blanca does not maintain maps. Blanca's study area is:
The North boundary is the Northern county line for Costilla County
The Southern boundary is Road 19.5 also know as Cervantes Road in Costilla County
The Western boundary is 1 mile west of Valley Vista Road Boulevard in Alamosa County
The Eastern boundary is the eastern county line for Costilla County

Please see Response2Attachments-DVD:
"StudyAreaMaps.pdf" – A very old study area map that is on file at the PUC.
"USwest.pdf" – Letter from USWEST dated 1988
"CapulinContourMap.pdf" – contour map for Capulin
"SanLuisContourMap.pdf" – contour map for San Luis

Question #3: All Documents reflecting FCC approval(s) granted to Blanca (e.g. a study area waiver) relating to changes to the study area boundaries.

RESPONSE 3: Blanca has not asked for a study area boundary change.

Please see Response3Attachements – DVD
"RadioStationAuthorization.pdf" – Radio Station Authorization from the FCC
"RadioStationAuthorization1.pdf" – Radio Station Authorization from the FCC
"RadioStationAuthorization2.pdf"– Radio Station Authorization from the FCC
"RadioStationAuthorization3.pdf" – Radio Station Authorization from the FCC
"RadioStationAuthorization4.pdf" – Radio Station Authorization from the FCC
"RadioStationAuthorization5.pdf" – Radio Station Authorization from the FCC
"RadioStationAuthorization6.pdf" – Radio Station Authorization from the FCC
"RadioStationCapulin.pdf" – Radio Station Authorization from the FCC
"RadioStationcostilla1.pdf" – Radio Station Authorization from the FCC
"RadioStationcostilla.pdf" – Radio Station Authorization from the FCC
"RadioStationLaJara.pdf" – Radio Station Authorization from the FCC

Please refer to the FCC's ULS system for location information, system maps, and other licensing documents.

Question #4: All Documents constituting maps indicating the ETC boundaries approved by the appropriate regulatory authority in Blanca's application for ETC authorization.

RESPONSE 4: Blanca does not maintain maps.

Please see Response4Attachments-DVD
"StudyAreaMaps.pdf" – A very old study area map that is on file at the PUC.