No. _____

In The
Supreme Court of the United States

BLANCA TELEPHONE COMPANY,

Petitioner,

v.

THE UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Chevron* and *Auer* required the appellate court to accord absolute deference to the Government's conflicting jurisdictional statements, made in successive cases, regarding the exhaustion status of Blanca's second agency reconsideration petition, and to dismiss both cases for lack of jurisdiction.

2. Whether, in an enforcement proceeding, *Chevron* and *Auer* deference properly support the FCC's inference of a binding Universal Service Fund (USF) funding "framework," and the FCC's inference that it can create a summary "framework" adjudication compliance procedure, where statutory and regulatory deference necessarily implicate ambiguity and, therefore, lack of notice of prohibited conduct.

3. Whether the Debt Collection Improvement Act of 1996, or any Act: a) nullifies the Communications Act's due process provisions in favor of a novel summary asset forfeiture procedure, adopted without notice and comment rulemaking, which ignored Blanca's 2013 USF accounting settlement; and b) limits Blanca's right to seek judicial review of the summary forfeiture order on exhaustion grounds where the Government: 1) reneged on its offer to provide financial relief if Blanca sought further agency review and 2) subsequently began seizing millions of dollars in forfeitures.

LIST OF PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

1. Petitioner, Blanca Telephone Company, is a non-public, closely held state regulated telecommunications corporation organized, and located, in rural Colorado and no owner is a publicly held company. There are no nonwholly owned subsidiaries.

2. Respondents are the Federal Communications Commission and the United States of America.

RELATED CASES

Blanca Telephone Company v. FCC & USA, No. 18-9587, United States Court of Appeals for the Tenth Circuit. Order dismissing case entered March 12, 2019, App. 1; Order denying rehearing and rehearing en banc entered April 30, 2019, App. 114.

Blanca Telephone Company v. FCC & USA, No. 18-9502, United States Court of Appeals for the Tenth Circuit. Order dismissing case entered October 25, 2018, App. 18; Order denying rehearing and rehearing en banc entered December 10, 2018, App. 9.

In re: Blanca Telephone Company, No. 17-1451, United States Court of Appeals for the Tenth Circuit. Order denying emergency motion for stay entered December 28, 2017, App. 26; Order denying petition for writ of mandamus entered December 29, 2017, App. 24.

In re: Blanca Telephone Company, No. 16-1216, United States Court of Appeals for the District of Columbia Circuit. Order denying petition for writ of prohibition entered October 21, 2016, App. 89; Order denying rehearing en banc entered December 12, 2016, App. 88.

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181025 *Blanca Telephone Company v. FCC & USA*, No. 18-9502, United States Court of Appeals for the Tenth Circuit, Order dismissing case (unpublished), 2018 U.S. App. LEXIS 30738. App. 18.

JURISDICTIONAL STATEMENT

The Tenth Circuit filed its Order in this case on March 12, 2019. App. 1. On April 17, 2019 Blanca Telephone Company (Blanca) timely filed a petition for rehearing within 45 days of March 12, 2019 as required by Fed. R. App. P. 40(a)(1)(A),(B), which petition was denied on April 30, 2019. App. 114.

Subject matter jurisdiction arises in this Court under 5 U.S.C. § 702, 28 U.S.C. § 1254(1), 28 U.S.C. § 2350, and 47 U.S.C. § 402(j). Pursuant to 28 U.S.C. § 2101(c), and Supreme Court Rules 13.1 and 13.3, the instant petition is timely filed within 90 days of the

April 30, 2019 rehearing denial order, on or before July 29, 2019.

The Tenth Circuit obtained jurisdiction over the subject matter of No. 18-9587 pursuant to the APA, 5 U.S.C. §§ 701-706, the FCA, 47 U.S.C. § 402(a), the Hobbs Act, 28 U.S.C. §§ 2341-2344, and the All Writs Act 28 U.S.C. § 1651. Moreover, because a "final" agency order is unnecessary to seek relief under *Leedom v. Kyne*, 358 U.S. 184 (1958) and the All Writs Act, Federal appellate jurisdiction may be invoked in an ongoing proceeding without regard to the date, finality, or the existence of a particular order. *See Bd. of Governors of the Fed. Res. Sys. v. MCorp Fin.*, 502 U.S. 32 (1991) (court access under *Kyne* when there is no meaningful agency review process); *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966) (injunctive relief under the All Writs Act).

RELEVANT PROVISIONS

47 U.S.C. § 503. Forfeitures (reproduced at App. 116)

47 C.F.R. § 1.1910 Effect of insufficient fee payment, delinquent debts, or debarment (reproduced at App. 123)

INTRODUCTION

A. Background Facts

1. In 2008 the FCC commenced an informal investigation of Blanca's USF fund use relating to

Blanca's provision of telecommunications services in rural, high-cost southern Colorado as the Incumbent Local Exchange Carrier (ILEC). App. 94. From 2009-2012 the FCC's OIG conducted a more formal investigation of Blanca, issuing a total of five subpoenas to Blanca, but no formal hearing was designated. From 2008-2012 Blanca continued to draw USF funding.

On June 2, 2016 a mid-level FCC staffer sent a letter to Blanca which summarily determined that Blanca had violated the USF funding requirements by purportedly violating an amalgamation of three accounting rule parts during the 2005-2010 time period. App. 93. The staffer ordered Blanca to pay an asset forfeiture of nearly $7 million for the violations. The full Commission affirmed the staff's summary asset forfeiture order, App. 30 ¶ 2, and determined that Blanca was not entitled to the due process protections specified at 47 U.S.C. § 503. App. 82 ¶ 54. The FCC Orders in this case do not rely upon any OIG findings, reports, conclusions, or summaries because the OIG issued none despite issuing five subpoenas to Blanca.

Since January 2018 the FCC has seized approximately $100,000 per month in USF funding from Blanca, approximately $2 million to date, without ever addressing the facts that Blanca settled the USF accounting issue in 2013 and that Blanca's USF use complied with plainly stated Part 54 USF rules. The USF funding being seized from Blanca represents about one-half of its annual revenue – this is not a pre-enforcement review case. The Government's enforcement action has crippled Blanca's ability to provision,

maintain, and upgrade its carrier of last resort telephone exchange operation and broadband Internet service, the facilities for which the USF funding is intended. Moreover, because Blanca is currently unable to provision, maintain, and upgrade its physical plant, and because future USF funding depends upon current capital budget expenditures, Blanca's USF funding going forward will decrease over time given the lapse of capital plant improvement and maintenance spending. *See* Response to Show Cause Order, Attachment at 00062-63, Certification of Alan Wehe, President, Blanca Telephone Company, filed January 8, 2019, No. 18-9587.

B. A Broken Administrative Process

2. The FCC asserts that it has authority under the Debt Collection Improvement Act of 1996 (DCIA) to collect a debt. App. 30 ¶ 2, 78-82 ¶¶ 51-54. Before addressing the FCC's authority to collect a debt, one must first address whether the FCC has authority to enter summary USF rule violation findings without regard to due process protections found at 47 U.S.C. § 503. Blanca's Petition for Reconsideration at 17-18, filed June 24, 2016, CC Docket No. 96-45.

Section 503 provides the FCC with explicit procedures it must follow before entering rule violations but in this case the FCC abandoned the Congressionally mandated procedures in favor of a novel summary forfeiture procedure which the FCC inferred from "the Act." App. 66 n.109. The Government cites no specific statutory text which authorizes a one-sided, summary

procedure. Instead, the Government infers a general grant of authority from the DCIA and 47 U.S.C. § 254 while ignoring the explicit due process protections found at § 503. App. 65 ¶ 40, 70-71 ¶ 43 (FCC disclaims having debt adjudication authority under § 503), 82 ¶ 54.

3. In this case the Government is not merely collecting on a "pre-existing debt" which is the purpose served by the DCIA. *See Astrue v. Ratliff*, 560 U.S. 586, 589 (2010). The FCC Orders determine that Blanca committed vaguely articulated USF "framework" violations and committed "fraud," App. 30 ¶ 2, 50 ¶ 25, 76 ¶ 48, 84, 85, using a novel summary procedure which the FCC never adopted in a rulemaking proceeding. There is nothing in the Communications Act which suggests that the FCC may adjudicate rule violations, summary or otherwise, outside of § 503. In fact, § 503(b)(1)(B) plainly requires that the FCC provide § 503(b)(3) or § 503(b)(4) due process protections to "any person who . . . willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter." App. 116-17. The statutory due process requirements require either an on the record hearing or the issuance of a timely notice of proposed liability which specifies the rule violated and provides an opportunity for the target to respond. 47 U.S.C. § 503(b)(3),(4); App. 120-21.

The Government does not cite a single example where the courts have upheld any agency summary violation adjudication procedure, without regard to

the due process protections of the agency's organic statute, for the purpose of imposing millions of dollars of forfeitures. The DCIA allows various Federal agencies to "collect" debts, it does not authorize agencies to issue summary rule violation orders or otherwise to ignore the due process protections contained in their organic statutes. The FCC explicitly stated that Blanca's due process right in the summary USF rule adjudication process the FCC created in this proceeding is "minimal" and limited to receiving notice about upcoming interrogations. App. 52 ¶ 29, 63 ¶ 39, 70 ¶ 43, 74-76 ¶¶ 46-47 & n.137 (Blanca's right to due process is "minimal"); *see* FCC Opposition to Petition for Writ of Prohibition at 18, No. 16-1216, filed August 26, 2016 (D.C. Cir.) (Blanca's right to due process is limited to notice of interrogations); Blanca's Response to Show Cause Order at 20, No. 18-9587, filed January 8, 2019.

The Government's position in this case is concocted out of whole cloth and is contradicted by the FCC's own decades-long application of § 503 due process to rule adjudications, including USF rule violation proceedings. Blanca's Opening Brief at 25-26, filed June 11, 2018, No. 18-9502. The FCC's adoption of a summary rule violation procedure, without prior rule making, and the FCC's explicit disavowal of the due process protections found in the Communications Act are structural defects which warrant appellate relief. *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (relief available where the agency acts beyond its statutory authority); Blanca's Response to Show Cause Order at 17, filed January 8, 2019, No. 18-9587.

The FCC's "power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The FCC has no choice: parties subjected to agency rule violation and asset forfeiture proceedings must be provided with baseline procedural protections. *See Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring) (in asset forfeiture cases the Government must proceed "according to written constitutional and statutory provisions" and must employ "some baseline procedures").

The Government's inference of procedural regularity, and the FCC's creation in this case of a USF regulatory "framework" which Blanca purportedly violated, given the absence of any direct grant of statutory or regulatory authority, depend completely upon receipt of *Chevron* and *Auer* deference.[1] The Government's imposition of penalties against Blanca based entirely upon statutory and regulatory inference deprives Blanca of its due process rights.

[1] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (courts defer to reasonable agency interpretations of ambiguous statutes); *Auer v. Robbins*, 519 U.S. 452 (1997) (courts defer to reasonable agency interpretations of its own ambiguous regulations).

STATEMENT

A. 1994-2019: Wireless Telephone Exchange Service Authorized

1. Prior to 1995 Blanca provided tariffed, state regulated telephone exchange service to hard-to-wire, rural, high-cost locations in southern Colorado using 150/450 MHz wireless BETRS (Basic Exchange Telephone Radio Service) frequencies. After 1995 Blanca replaced its obsolete 150/450 MHz BETRS technology in favor of 800 MHz cellular BETRS technology as authorized by the FCC in 1994. *See Notice of Proposed Rule Making*, 7 FCC Rcd. 3658, 3672 (1992); *Report and Order*, 9 FCC Rcd. 6513, 6571 (1994) (amending 47 C.F.R. § 22.901 to authorize 800 MHz cellular BETRS subject to state telephone exchange regulation). The FCC's USF rules provide funding for LEC provided, state regulated telephone exchange service even if the asset is also used for unregulated purposes. App. 33-34.

B. 2008-2013: The FCC Investigates Blanca's USF Use

As soon as the FCC began investigating Blanca's receipt of USF funds in March 2008, Blanca fully disclosed how it was using, and accounting for, its USF funding. App. 96. On November 12, 2009 the FCC's Office of Inspector General (OIG), based upon information provided by Blanca over the course of the preceding 1.75 years, issued the first of five subpoenas *duces tecum* which probed, in detail, Blanca's use of

USF money for its BETRS cellular service. App. 94. Ultimately, the OIG did not issue any adverse findings or any kind of report of its investigation.

C. 2013: Blanca's USF Accounting Issue Was Settled

2. In 2013 the National Exchange Carrier Association (NECA), the FCC's designated agent for processing carrier USF cost data, App. 37 ¶ 8, instructed Blanca to cease requesting USF funding for its tariffed, cellular-based telephone exchange service for rural, high-cost southern Colorado, and to return approximately $1 million to the USF fund. App. 95. Blanca promptly complied with NECA's instruction and the instant USF accounting dispute was settled at that time.

The FCC views settlement of USF accounting matters as between NECA and the carrier and the FCC will not involve itself in whether "look back" accounting adjustments are needed beyond the two year NECA settlement window nor will the FCC second guess NECA settlement decisions. *Farmers Telephone Company v. FCC*, 184 F.3d 1241, 1247 (10th Cir. 1999). Even with USF money, Blanca's tariffed, cellular-based BETRS operation was a marginal business operation and Blanca's best option "to avoid protracted litigation" was the 2013 settlement. The FCC Orders fail to discuss the fact that the instant USF funding issue was settled in 2013 and that the FCC Orders in this case constitute a breach of the 2013 settlement.

Petitioner's Opening Brief at 10-11, 23, 35-36, 48-49, 54, filed June 11, 2018, No. 18-9502. While the FCC Orders refer to a process of "recovery of USF funds outside of section 503 proceedings," App. 70 ¶ 43, the FCC Orders ignore the fact that this case was settled in 2013.

D. 2014: The FCC Revives The USF Issue And Refers It To The DOJ

3. In early 2014, nearly six years after the FCC began investigating Blanca's USF accounting practices, the FCC referred the USF accounting matter to the DOJ for prosecution of a False Claims Act case. *See* Civil Investigative Demand, No. 14-57, issued January 30, 2014. The referral was made even though the FCC had not entered any rule violation findings, or made any finding that Blanca had made any false statements, and despite the facts that the OIG had not issued any report and the USF accounting issue had been settled in 2013. No case has been filed yet, but the parties periodically execute tolling agreements to protect the DOJ's litigating position to the extent it is not barred by the statute of limitations. During the course of discussion between Blanca and the DOJ, Blanca informed the DOJ that there was no actionable False Claims Act claim because the FCC had not entered any USF-related rule violation findings and the doctrine of primary jurisdiction precluded the DOJ's threatened civil suit. *See Allnet Communication Serv., Inc. v. National Exch. Carrier Ass'n*, 965 F.2d 1118, 1120 (D.C.

Cir. 1992) (civil suit dismissed under the doctrine of primary jurisdiction).

E. 2016: The DOJ Refers The Revived USF Issue Back To The FCC

In early 2016 the DOJ orally informed Blanca that the DOJ was sending the matter back to the FCC. Blanca was not informed about the form or timing of any future FCC action. At that time the DOJ informed Blanca, incorrectly, that the FCC is not constrained by a statute of limitations such as the five-year statute of limitations which constrains the DOJ's ability to bring actions. However, as discussed below, Blanca promptly reminded the FCC that Congress imposed upon it a much shorter one-year statute of limitations regarding purported FCC rule violations. 47 U.S.C. § 503(b)(6)(B); App. 123.

F. 2016: The FCC's Summary Asset Forfeiture Letter

4. On June 2, 2016 the FCC issued its summary asset forfeiture order against Blanca via "**A DEMAND FOR PAYMENT OF A DEBT OWED TO THE UNITED STATES AND ORDER OF PAYMENT**" signed by a mid-level FCC staffer. App. 93 (caps, bold, and underlining in original). The FCC did not publish the novel June 2016 Order in its official reporter. The FCC's June 2016 Order determined that Blanca had violated various FCC accounting rule parts during the 2005-2010 accounting period, but no specific rule

violation was asserted and there is not even a reference to the FCC's Part 54 USF funding rules. The FCC's June 2016 Order further determined that a Federal debt obligation arose out of the purported ancient rule part violation determination and the FCC demanded immediate debt payment, "in full and without further demand," under threat of further penalties and prosecution. App. 108-09.

5. Blanca promptly filed for reconsideration asserting various due process violations including the lack of a notice of apparent liability, failure to specify a rule violation, failure to consider the Part 54 rules which explicitly authorized Blanca's USF funding for its 800 MHz cellular BETRS system, failure to comply with the one-year statute of limitations, lack of statutory authority to make debt determinations, adoption of USF funding and enforcement rules without conducting a rule making, and lack of statutory authority to enter summary forfeiture orders. Blanca obtained the FCC's assurance that the FCC would not start collection proceedings while Blanca contested the FCC's order. *See* June 22, 2016 Managing Director's Letter. App. 91.

G. 2016: Blanca Sought Writ of Prohibition – D.C. Cir. No. 16-1216

On June 29, 2016, Blanca sought relief via Petition for Writ of Prohibition in the D.C. Circuit, No. 16-1216, asserting: 1) a complete lack of statutory support for the FCC's June 2, 2016 summary asset forfeiture

order; 2) failure to follow the due process requirements specified at 47 U.S.C. § 503 and 47 C.F.R. § 1.80; and 3) clear violations of Blanca's Fifth Amendment right to due process. On August 26, 2016 the FCC opposed Blanca's request for appellate relief. The FCC determined that Blanca's due process right prior to issuance of the June 2016 Order was limited to receipt of "notice during the audits and investigations beginning in 2008 of the areas and subjects of the investigation." FCC Opposition to Petition for Writ of Prohibition, at 18, filed August 26, 2016, D.C. Circuit No. 16-1216.

The D.C. Circuit denied Blanca's request for relief and rehearing in generic orders dated October 21, 2016 and December 12, 2016 without discussion of the due process issues. App. 88-89. At that time, the FCC was not collecting on its June 2, 2016 summary asset forfeiture order as per the Managing Director's June 22, 2016 Letter. App. 91. In the absence of a concrete injury, Blanca followed the D.C. Circuit's direction and awaited FCC action on its then-pending mandatory first agency reconsideration petition filed pursuant to 47 U.S.C. § 405(a)(2), 47 C.F.R. § 1.115(k), and 47 C.F.R. § 1.106(m). *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (judicial review not available if agency exhaustion is mandatory and the order is not being enforced).

H. 2017: FCC 17-162 Affirms Summary Asset Forfeiture Letter

6. On December 8, 2017 FCC 17-162 affirmed "the factual, legal, and technical findings in the" June 2, 2016 summary forfeiture order and ordered that

collection of the asset forfeiture from Blanca commence "to protect the Universal Service Fund from waste, fraud and abuse." App. 50 ¶ 25. The FCC determined that it does not have to specify rule violations in forfeiture orders and determined that it can create a USF funding "framework" derived from three rule parts and impose penalties in 2016 for violations of that just announced "framework" which purportedly occurred during the 2005-2010 time period. App. 76 ¶ 48.[2]

The FCC determined that it was not required to comply with the due process protections written into the Communications Act at 47 U.S.C. § 503. App. 81-82 ¶ 54. The FCC does not cite any authority supporting the extraordinary claim that it can adjudicate rule

[2] The FCC Orders fail to discuss USF funding rules which reference the fact that USF funding is available for cellular carriers like Blanca: 47 C.F.R. § 54.5 (defining "telecommunications channel" as a "telephone line, or, in the case of wireless communications, a transmittal line or **cell site**") (emphasis added); 47 C.F.R. § 54.5 (defining "telecommunications carrier" to include "cellular mobile radio service (CMRS) providers"); 47 C.F.R. § 54.7(b) (USF funding available for "telecommunications and information services" without regard to delivery technology); 47 C.F.R. § 54.101 (USF funding broadly available for "voice" service without regard to delivery technology); 47 C.F.R. § 54.201(d) (a wireless carrier is eligible to receive USF funding "throughout" its "service area"); 47 C.F.R. § 54.307(b) ("service location" of a wireless subscriber is fixed as the subscriber's "billing address"); 47 C.F.R. § 54.500 ("voice services" include "wireless telephone service such as cellular"); *Public Notice*, 30 FCC Rcd. 11821 (2015) (USF funding is available for "fixed and mobile" services).

violations and debt claims without providing baseline due process protections.

The FCC Orders do not find that Blanca made any false statements of any kind or impeded the FCC's years-long investigation in any manner. The FCC Orders fail to explain why the OIG failed to issue any report, despite having issued five subpoenas to Blanca, and the FCC Orders do not explain why the FCC continued to pay Blanca USF money during the five-year 2008-2012 time period while the matter was being investigated by the FCC.

I. 2017: Blanca Sought Writ of Mandamus – 10th Cir. No. 17-1451

7. On December 18, 2017, because Blanca planned to contest the FCC Orders and because it appeared that the FCC was going to commence immediate collection even while Blanca contested the FCC's summary determination, Blanca filed a Petition for Writ of Mandamus and a Motion to Stay in the 10th Circuit, No. 17-1451. In No. 17-1451 Blanca sought an order directing the FCC to comply with 47 C.F.R. § 1.1910(b)(3)(i), App. 125, which prohibits forfeiture collection while the underlying violation order is contested at the FCC or a reviewing court. The FCC opposed Blanca's request and advised the court that Blanca could obtain financial relief "simply" by seeking further agency review. Respondent Federal Communications Commission's Opposition to Petitioner's Motion for Stay at 3, 18, filed December 27, 2017, No.

17-1451. On December 28 and 29, 2017 the Tenth Circuit denied Blanca's requests for relief, presumably because the Government had presented an avenue of relief outside of the mandamus case. App. 24, 26 (unpublished).

J. 2017: Blanca's Second Agency Reconsideration Petition

8. On December 29, 2017 Blanca accepted the FCC's invitation and Blanca "simply" filed its second agency reconsideration petition at the FCC to contest FCC 17-162 and Blanca specifically requested financial relief pursuant to 47 C.F.R. § 1.1910(b)(3)(i). *See* Petition for Reconsideration And Emergency Request for Immediate § 1.1910(b)(3)(i) Relief at 24, CC Docket 96-45. At that time it appeared that the FCC's December 27, 2017 assurance of financial relief would work like the financial relief extended in the Managing Director's June 22, 2016 Letter, App. 91, and the FCC would refrain collecting on the "debt" pending resolution of the litigation.

However, the FCC soon reneged on its offer of financial relief, without discussion. Beginning in January 2018, after Blanca had filed its second agency reconsideration petition, the FCC began to seize Blanca's monthly USF payments even though the USF funding issue is still being litigated. *See* January 10, 2018 Letter from Managing Director. App. 22. To date the FCC has seized approximately $2.0 million of Blanca's USF funding and the seizures continue

monthly at a rate of approximately $100,000 per month and the total amount seized is projected to be $10 million including interest and penalties. The FCC Orders do not explain the public interest benefits which accrue from defunding Blanca's carrier of last resort wireline telephone exchange service for the purpose of recouping USF money which Blanca used to provide wireless telephone exchange service in high-cost rural Colorado.

K. 2018: Blanca's Petition for Review I – 10th Cir. No. 18-9502

9. On January 24, 2018 Blanca filed No. 18-9502 because the FCC had reneged on its offer of financial relief required by the plain text of 47 C.F.R. § 1.1910(b)(3)(i). *See* January 10, 2018 Letter from Managing Director. App. 22 (commencing forfeiture collection). Blanca sought relief in No. 18-9502 because, *inter alia*, the FCC's summary asset forfeiture procedure violated Blanca's right to due process, the January 10, 2018 Letter from the Managing Director denied the financial relief which the FCC had been providing since June 2016, compare App. 22-23 to App. 91, and by imposing the ultimate sanction in the case the FCC was acting as if the case had ended. *See* Blanca's Jurisdictional Brief at 11, filed March 5, 2018, No. 18-9502. The forfeiture is being collected even though the FCC's financial computer shows that Blanca has no debt outstanding, delinquent or otherwise. *See* Blanca's Opening Brief at 47, filed June 11, 2018, No. 18-9502.

10. On October 25, 2018 the Tenth Circuit dismissed No. 18-9502 on jurisdictional grounds after reviewing jurisdictional and full merits briefing because Blanca had filed an agency reconsideration petition and the court concluded that it could not assert jurisdiction over the matter. App. 18. The court did not discuss the fact that Blanca had settled the USF accounting issue in 2013, or the statute of limitations, or any of Blanca's due process claims, or the fact that the FCC had reneged on its offer of, and had effectively denied, financial relief to Blanca, or the fact that the FCC is currently seizing $100,000 of Blanca's USF funding per month in violation of 47 C.F.R. § 1.1910(b)(3)(i). App. 125.

L. 2018: Blanca's Rehearing Petition I – 10th Cir. No. 18-9502

On November 6, 2018 Blanca sought rehearing under *Darby v. Cisneros*, 509 U.S. 137 (1993) and *Farrell Cooper Mining Co. v. Dept. of the Interior*, 864 F.3d 1105 (10th Cir. 2017). Blanca argued that its second agency reconsideration petition satisfied a mandatory exhaustion requirement and the FCC's enforcement of a forfeiture penalty during mandatory exhaustion caused jurisdiction to arise.

On November 20, 2018 the Government opposed Blanca's rehearing request in No. 18-9502 arguing that Blanca's reconsideration petition served an "elective," rather than a "mandatory," exhaustion function. In opposition the Government stated that:

> To be sure, *Farrell-Cooper* recognized a narrow exception for situations where, unlike here, a statute or agency rule *mandates* that a party pursue further administrative review even after the agency begins enforcing a decision against that party. 864 F.3d at 1107, 1115-16. [emphasis in the original]
>
> Nothing in the Communications Act or the Commission's rules required Blanca to seek administrative reconsideration.
>
> "The filing of a petition for reconsideration *shall not be a condition precedent to judicial review* of any [Commission] order," except in two specific circumstances not present here. 47 U.S.C. § 405(a) (emphasis added [by the FCC]). . . .
>
> By its plain terms, Blanca could obtain relief by pursuing judicial review; it was not required to remain before the agency. . . .
>
> [T]he panel correctly held, consistent with *Farrell-Cooper* and all other authority, that Blanca's elective decision to continue litigating before the agency precludes it from seeking judicial review at this time.

See Respondents' Opposition to Petition for Rehearing at 10-15, No. 18-9502, filed November 20, 2018, App. 13, 14, 14, 15, 16. The Government even advised Blanca to dismiss its agency appeal and file a new case in the appeals court. App. 16-17. As explained below, the Government later asserted in No. 18-9587 that Blanca sought mandatory agency review. The Government's positions lack consistency, but could

appear calculated to induce Blanca to make a fatal procedural error by dismissing an "elective" agency appeal which the Government actually considered as satisfying a mandatory exhaustion requirement, and this after inducing Blanca to seek further agency relief in the first place with the reneged-upon financial relief offer; a clear example of the Government maximizing its interpretive leeway to disastrous effect. *Compare Kisor v. Wilkie*, 204 L. Ed. 2d 841, 865 (2019), *with id.* at 886 (Gorsuch, J., concurring).

On December 10, 2018 the appeals court accepted the Government's determination that Blanca's petition was "elective" and denied rehearing, again without discussing the fact that the FCC had reneged on its offer of financial relief, which served to induce Blanca to file the second petition for reconsideration, and failing to discuss Blanca's due process and other claims. App. 9.

M. 2018: Blanca's Petition for Review II – 10th Cir. No. 18-9587

12. On December 21, 2018 Blanca promptly filed No. 18-9587 in response to the Government's November 20, 2018 determination that Blanca's second agency reconsideration petition did not raise any judicable issue under 47 U.S.C. § 405(a). On December 26, 2018 the Tenth Circuit issued a jurisdictional Show Cause Order in No. 18-9587. On January 8, 2019 Blanca responded to the Show Cause Order and demonstrated that the basis for the court's jurisdiction over Blanca's claims was the Government's November

20, 2018 determination, asserted in No. 18-9502, that Blanca's second agency reconsideration petition was "elective" and not "mandatory." App. 11-17. Neither the Communications Act nor the FCC's implementing regulations specify whether Blanca's second agency reconsideration petition is "elective" or "mandatory" and the reviewing court had deferred to the agency's determination that Blanca's second agency reconsideration petition did not raise any valid § 405(a) reconsideration issue which the FCC was required to consider under the FCC's exhaustion regulations.[3] The Government's merits determination regarding Blanca's second agency reconsideration proceeding gave rise to appellate jurisdiction over FCC 17-162 as of November 20, 2018. Blanca's Response to Show Cause Order at 5-11, filed January 8, 2019, No. 18-9587.

At that time the appeals court was required by the *Chevron* and *Auer* doctrines to defer to the Government's November 20, 2018 determination that Blanca's second reconsideration petition was elective. Because the Government's November 20, 2018 statements to the appeals court in No. 18-9502 constituted a merits determination regarding Blanca's second petition for reconsideration to which the Tenth Circuit had deferred, No. 18-9587 was properly filed within 60 days of November 20, 2018 pursuant to the APA, 5 U.S.C. §§ 701-706, the FCA, 47 U.S.C. § 402(a), the

[3] *See* 47 U.S.C. § 405(a), 47 C.F.R. § 1.106.

Hobbs Act, 28 U.S.C. §§ 2341-2344, and the All Writs Act 28 U.S.C. § 1651.[4]

13. Upon receipt of Blanca's January 8, 2019 Response to Show Cause Order, the appeals court directed the Government to respond. The Government's February 27, 2019 response completely reversed course compared to the position it took in No. 18-9502 and the Government now asserted that Blanca's second reconsideration petition was mandatory under § 405(a)'s exhaustion requirement, that Blanca had raised matters which were "fully preserved," and that the FCC had not yet ruled on Blanca's pleading. Respondents' Reply to Petitioner's Response to Order to Show Cause at 7-8, filed February 27, 2019, No. 18-9587.

On February 28, 2019 Blanca replied:

> Respondents now backtrack and argue that Blanca's reconsideration petition raises valid arguments. However, Respondents completely fail to discuss the blatant inconsistency with their earlier position that Blanca pursued an "elective" remedy at the FCC and Respondents' inconsistency unfairly prejudices Blanca. Jurisdictional analysis cannot turn upon fleeting positions taken by parties during the course of litigation.

See Blanca's Reply to Respondents' Response at 1, filed February 28, 2019, No. 18-9587; *Christopher v.*

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[4] *FTC v. Dean Foods Co*., 384 U.S. 597 (1966) (All Writs Act injunctive relief).

SmithKline Beecham Corp., 467 U.S. 142, 155 (2012) (discounting agency position appearing to be "nothing more than a convenient litigating position").

14. On March 12, 2019 the appeals court accepted the Government's statement that Blanca was pursuing mandatory agency review and dismissed No. 18-9587 for lack of jurisdiction. App. 1-8. The court's March 12, 2019 Order in No. 18-9587 does not discuss the Government's prior inconsistent statements in No. 18-9502 that Blanca's second agency reconsideration petition was elective, not mandatory or the fact that the Government had invited Blanca to file for agency relief only to renege on that offer, and without discussing Blanca's due process or property rights claims or the improper, and continuing, seizure of Blanca's USF money.

N. 2019: Blanca's Rehearing Petition II – 10th Cir. No. 18-9587

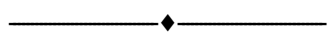
15. Blanca's April 17, 2019 rehearing petition in No. 18-9587 discusses that in successive cases the appeals court accepted, at face value, the Government's wholly contradictory statements regarding the exhaustion status of Blanca's second agency reconsideration petition. The Government's conflicting jurisdictional statements are "nothing more than a convenient litigating position" to obtain Blanca's dismissal on jurisdictional grounds. *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 154 (2012) (citing *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)). *See* Blanca's

Petition for Rehearing and Rehearing En Banc at 2-6, filed April 17, 2019, No. 18-9587. Blanca also reminded the court that the law of the case determined in No. 18-9502 was that Blanca's second agency reconsideration petition was "elective." *See* Blanca's Petition for Rehearing and Rehearing En Banc at 7-11, filed April 17, 2019, No 18-9587.

Blanca also brought to the appeals court's attention the fact that jurisdiction arose whether Blanca's second agency reconsideration petition was construed as elective or mandatory. If Blanca's second agency reconsideration petition was elective and non-compliant with 47 U.S.C. § 405(a) as the Government determined on November 20, 2018 in No. 18-9502, App. 11-17, then the court had jurisdiction because the Government had made a merits determination and there was nothing left for the FCC to decide. *See Sacket v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."). On the other hand, if Blanca's second agency reconsideration petition was mandatory under the FCC's exhaustion regulations, then jurisdiction attached under *Darby/Farrell-Cooper* in light of enforcement of the summary forfeiture order during mandatory exhaustion review. *See* Blanca's Petition for Rehearing and Rehearing En Banc at 16-17, filed April 17, 2019, No. 18-9587.

16. The appeals court's April 30, 2019 Order, App. 114, denied rehearing without addressing the

Government's conflicting jurisdictional statements, or the fact that the appeals court improperly afforded absolute *Chevron/Auer* deference to those conflicting statements, or any of Blanca's due process or property rights claims. The Court has recently explained that a searching analysis is required before according deference to an agency. *Kisor v. Wilkie*, 204 L. Ed. 2d 841 (2019). However, at the time the appeals court acted in this case, the deference doctrines cannot possibly have required that appellate courts accept an agency's conflicting statutory and regulatory interpretations uttered in successive cases, which interpretations bear directly on Federal jurisdiction. *Christopher v. SmithKline Beecham Corp*., 567 U.S. at 154.



REASONS FOR GRANTING THE PETITION

The appeals court's acceptance of the Government's conflicting exhaustion determinations regarding Blanca's second agency reconsideration petition cedes, to a party in the case, control of the court's Article III obligation to determine whether it has case jurisdiction. Moreover, the Government's conflicting jurisdictional statements have unfairly deprived Blanca of judicial review of the FCC's novel, years too late, summary asset forfeiture.

The FCC Orders on review rely upon agency deference to create a USF regulatory "framework" cobbled together with general references to three FCC rule parts, but not including the Part 54 USF funding rules

themselves, and then penalize Blanca for violating that "framework." The FCC's use of deference in this manner denied Blanca's due process right of notice of prohibited conduct. In this case mid-level Government staffers have assumed the power to adjudicate rule violations years after the alleged violations purportedly occurred, and to impose and collect millions of dollars in forfeitures via summary asset forfeiture order in an *ex parte* proceeding in which only the Government has notice and representation, in contravention of explicit due process protections written into the Communications Act and the FCC's rules. All of this has occurred without rule making and without judicial review.

A. *Chevron* And *Auer* Are Inapplicable To Jurisdictional Questions

1. *Chevron* And *Auer* Deference Generally

Courts of appeals afford deference to agency interpretations of ambiguous statutory and regulatory provisions. *See Kisor v. Wilkie*, 204 L. Ed. 2d 841 (2019) (agency accorded deference regarding ambiguous agency regulation); *PDR Network, LLC v. Carlton Harris Chiropractic, Inc.*, 204 L. Ed. 2d 433, 440 (2019) (Thomas, J., concurring) (questioning the constitutionality of agency deference); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deference accorded to the Federal agency administering an ambiguous regulation); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (deference accorded to a federal agency administering an ambiguous statute);

Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1145-46 (10th Cir. 2010) ("courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care . . . including statutory ambiguities affecting the agency's jurisdiction") (internal cites omitted). Blanca's Petition for Rehearing and Rehearing En Banc at 1, filed April 17, 2019, No. 18-9587.

Deference to agency interpretation is properly subject to criticism because it "frustrates the notice and predictability purposes of rulemaking and promotes arbitrary government," but according deference to agency regulatory interpretations is still required by the Supreme Court. *Graco Construction, Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (cert. den.) (Thomas, J., dissenting); *see also Kisor v. Wilkie*, 204 L. Ed. 2d 841 (2019). Blanca's Response to Show Cause Order at 10, filed January 8, 2019, No. 18-9587. The fact that the FCC made the conflicting jurisdictional determinations in an appellate brief, rather than in a formal order, is not a substantial issue. *See* March 12 Order, No. 18-9587, App. 5-6; *see also Auer v. Robbins*, 519 U.S. 452, 462 (1997) (agency interpretation provided in appellate brief accepted for deference purposes).

2. Agency Deference: Ceding The Court's Article III Function

The Communications Act, 47 U.S.C. § 405(a), and the FCC's implementing regulation, 47 C.F.R. § 1.106, are silent, and therefore ambiguous, on the issue of

whether Blanca's second agency reconsideration petition seeks "elective" or "mandatory" exhaustion. Accordingly, the appeals court deferred to the Government's determinations regarding the exhaustion status accorded to Blanca's second agency reconsideration petition. The problem is that the court uncritically accepted the Government's plainly contradictory jurisdictional statements in successive cases. *Kisor v. Wilkie*, 204 L. Ed. 2d 841, 858 (2019) (courts "must exhaust all the 'traditional tools' of construction" before granting *Auer* deference); *Kisor v. Wilkie*, 204 L. Ed. 2d at 895 (Kavanaugh, J., concurring) (umpires do not defer to the home team's in-game rules interpretations).

The Government's statements in No. 18-9502 that Blanca's second agency petition for reconsideration was "elective" clearly determined that Blanca's second effort at agency relief did not raise any substantial issue under the FCC's exhaustion rules. *See* Respondents' Opposition to Petition for Rehearing at 10-15, filed November 20, 2018, No. 18-9502; App. 11-17. Because the Government informed the appeals court in No. 18-9502 that Blanca's second agency reconsideration petition was meritless, and "elective," and not required by the FCC's exhaustion rules, the appeals court accorded deference to the Government, denied *Darby* relief to Blanca without discussion, and dismissed No. 18-9502. App. 9, 18.

Thereafter, Blanca was *required* to file a successive merits case in the Tenth Circuit, No. 18-9587, given the fact that the court accepted the Government's November 20, 2018 determination that Blanca's

second agency reconsideration petition raised no substantial issue which the FCC was required to consider. *See* Blanca's Petition For Review at 2-3, 8, filed December 21, 2018, No. 18-9587; Blanca's Response to Show Cause Order at 7-11, filed January 8, 2019, No. 18-9587 ("Blanca was required to respond to Respondents' November 20, 2018 determination, otherwise Blanca could have been subject to a finding of failure to prosecute, leading to a finding that Blanca had forfeited its right to seek judicial review."). However, the appeals court dismissed that case based upon the Government's determination that Blanca's second agency reconsideration petition was mandatory and the FCC was required to consider issues which were "fully preserved." App. 5.

1. The court's orders in No. 18-9587 do not explain how Blanca's second agency reconsideration petition can be "elective" for jurisdictional purposes in No. 18-9502, but "mandatory" for jurisdictional purposes in No. 18-9587. *See* Blanca's Response to Show Cause Order at 5-11, filed January 8, 2019, No. 18-9587; Blanca's Reply to Respondents' Response at 1, filed February 28, 2019, No. 18-9587; Blanca's Petition for Rehearing and Rehearing En Banc at 1-2, 5-6, filed April 17, 2019, No. 18-9587. The appeals court accepted the Government's conflicting jurisdictional statements at face value without consideration of any other information. This is deference run amok, even if the issue did not involve a critical Article III jurisdictional issue. Moreover, the appeals court orders in No. 18-9587, App. 1, 114, do not explain why *Darby* relief is not available

in No. 18-9587 if Blanca were seeking mandatory agency relief, when coupled with the FCC's monthly enforcement seizure of $100,000 from Blanca.

Agency deference in this case interferes with the Federal courts' "obligation to assure ourselves of jurisdiction under Article III," *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018), because it uncritically accords absolute deference to the Government's conflicting jurisdictional statements. A Federal court cannot cede its Article III jurisdiction finding obligation to a governmental agency by deferring to an agency's conflicting jurisdictional statements.

3. "Elective" or "Mandatory" Exhaustion – Jurisdiction Attaches

The appeals court deferred to the Government's conflicting statements regarding the exhaustion status of Blanca's second agency reconsideration petition:

> 1) In No. 18-9502 the appeals court accepted the Government's determination that Blanca's second reconsideration petition was "elective" thereby rendering *Darby/Farrell-Cooper* inapplicable and precluding judicial review.
>
> 2) In No. 18-9587 the appeals court accepted the Government's determination that Blanca's reconsideration petition was "mandatory," thereby rendering the FCC Orders non-final and precluding judicial review.

However, the appeals court failed to consider that appellate jurisdiction applies in this case regardless of whether Blanca's second agency reconsideration petition is construed as "elective" or "mandatory." *See* Blanca's Petition for Rehearing and Rehearing En Banc at 11-13, filed April 17, 2019, No. 18-9587.

2. If Blanca's reconsideration pleading is "mandatory" as the Government determined in No. 18-9587, then the court properly accepts jurisdiction of No. 18-9587 under the *Darby/Farrell-Cooper* rule which holds that agency enforcement during mandatory agency review renders the FCC Orders final for purposes of appellate review. If Blanca's reconsideration pleading is "elective," as the Government determined in No. 18-9502, then the Government made a merits determination that Blanca's reconsideration pleading does not raise any proper reconsideration issue, and the court properly asserts jurisdiction over the FCC Orders in No. 18-9587 in light of that merits determination.

There is no middle ground where Blanca's agency review pleading can be simultaneously "elective" and "mandatory" for exhaustion purposes. The appeals court plainly accepted two contradictory positions offered by the Government regarding the exhaustion status of Blanca's second agency reconsideration petition.

> If courts accord "controlling weight" to both the 2006 and 2010 interpretations, the regulated entities are subject to two opposite legal rules imposed under the same regulation. This practice turns on its head the principle

> that the United States is "a government of laws, and not of men."

Perez v. Mortg. Bankers Assoc., 135 S. Ct. 1199, 1224 (2015) (Thomas, J., concurring). *See also Sacket v. EPA*, 566 U.S. at 132 (Alito, J., concurring) (while agency imposed forfeitures are accumulating, access to courts cannot be made dependent upon agency legal action which might never occur).

B. *Chevron* And *Auer* Deference Deprive Blanca of Due Process

1. FCC 17-162 Asserts Deference Entitlement

The FCC claims that Blanca's purported USF violation is "clear." App. 76 ¶ 48. However, the FCC Orders do not specify any USF statute or USF rule, or any USF case law, of which Blanca ran astray, despite penalizing Blanca millions of dollars. Blanca was found to have violated the USF regulatory "framework" and, in the process, to have committed "waste, fraud, and abuse." App. 38-39 ¶ 10, 49-50 ¶ 25, 64 n.106, 84, 85. Rather than point to a rule, the FCC Orders consist of numerous pages of legal interpretation of various Federal and State statutes, FCC rules, a purportedly binding industry code,[5] and case law. App. 30-41 ¶¶ 2-11,

[5] The FCC Orders claim that "NECA guidance" has the force of law. App. 64 ¶ 39 & n.105. This aspect of the FCC Orders is troubling for reasons transcending *Chevron* and *Auer*. First, the FCC holds that NECA's USF rule interpretation is not entitled to deference. *Farmers Telephone*, 184 F.3d at 1247. Second, there is no indication that Congress authorized the FCC to adopt a

52-53 ¶ 29, 55-56 ¶ 33, 57-58 ¶ 35, 63-64 ¶ 39, 65-66 ¶ 40, 68-73 ¶ 42-45, 76 ¶ 48, 81-82 ¶ 54.

The FCC synthesizes from various legal citations that it has the authority 1) to announce a USF regulatory "framework" requirement in an adjudication order issued against Blanca, and 2) to enforce that interpretation via summary asset forfeiture order. The Government's entire case is premised upon the FCC's ability to interpret the law, to apply that interpretation to regulated parties, and to have that interpretation receive deference in the reviewing court.

A couple of references to the FCC's December 2017 order proves the point. First, the FCC asserts that its authority to issue summary asset forfeiture orders is "based on longstanding precedent and principles that Blanca had ample opportunity to review and incorporate into its timely filed Application and Petition." App. 52 ¶ 29. The FCC relies upon two Supreme Court cases, from 1938 and 1946, which have nothing to do with the USF, or even the FCC, and the FCC relies upon two of its own decisions from 2011 and 2014 which post-date the 2005-2010 USF accounting period at issue in this case. App. 53 ¶ 29. The FCC struggled to show that it had provided notice of a "clear" rule, but the FCC's reasoning that Blanca was supposed to infer

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standardless industry code, raising a *Schechter* issue, or that the FCC did, in fact, adopt an industry code. The problem with NECA's view is the same as with the FCC's view: no recognition of the facts that the FCC authorized state regulated cellular BETRS telephone exchange service in 1994 or that Part 54 explicitly authorizes the USF funding for that service.

the FCC's intended legislative "framework" rule from the entire body of Western law is, especially in the face of the FCC's actual Part 54 USF funding rules, nonsense. *See Perez v. Mortg. Bankers Assoc*., 135 S. Ct. 1199, 1224 (2015) (Thomas, J., concurring) ("Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.") (internal quote omitted).

Second, the FCC Orders refer numerous times to the FCC's general authority under "the Act" to enforce the "goals" of "the Act." App. 39 n.28, 50 ¶ 25, 53 ¶ 29, 55 ¶ 33, 60 n.94, 65-66 ¶ 40 (the FCC is authorized to find "implicated" violations), 66 n.106 ("we hold that the agency has direct statutory authority to make these determinations under the Act"), 69 ¶ 42 ("The Act gives the Commission broad authority"), 70 ¶ 43, 76 ¶ 48, 82 ¶ 54. The FCC's appeal to having a generalized authority under "the Act" further indicates an improper reliance upon *Chevron* and *Auer* deference in the context of a rule enforcement proceeding. 47 U.S.C. § 503(b)(4)(C), App. 121, requires specification of charges, it does not authorize "implied" summary violation determinations. Moreover, the very fact that the FCC held "that the agency has direct authority under the Act," App. 66 n.106, plainly means that the FCC had never made any such holding previously and the FCC points to absolutely nothing to support its purported "direct authority."

The FCC Orders do not assert a specific Part 54 USF funding rule violation, but instead fault Blanca

for violating the FCC's legal synthesis of what it views as the USF funding "framework" which were cobbled together out of three rule parts in 2016 by a mid-level FCC staffer, but which curiously excluded the Part 54 USF funding rule section. App. 95-96. *See* Blanca's Petition for Reconsideration, filed June 24, 2016 at 16-17, CC Docket No. 96-45. In the context of a rule enforcement proceeding, specificity and notice are required and agency deference of any type, *Chevron*, *Auer*, or *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), cannot substitute for specificity or notice. "An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment." *Kisor v. Wilkie*, 204 L. Ed. 2d 841, 864 (2019).

> Whether an agency issues its interpretation in a press release or something it chooses to call an "adjudication," all we have is the agency's opinion about what an existing rule means, something that the APA tells us is not binding in a court of law or on the American people.

Kisor v. Wilkie, 204 L. Ed. 2d at 880 (Gorsuch, J., concurring). In the instant rule enforcement action, the "framework" rule the FCC applied against Blanca was required to go through notice and comment rulemaking, but it never did, and the FCC improperly bound and sanctioned Blanca merely by "the agency's say-so."

2. Lack of Notice: The FCC's USF "Framework"

3. It took the FCC Orders about 30 pages (as released by the FCC) to explain Blanca's purported USF "framework" violation; the FCC could not merely point to a specific rule which Blanca purportedly violated. That is the exact opposite of "clear." Even if the FCC Orders could be construed as clarifying, there was certainly no "clear" rule which Blanca is charged with violating.[6] In fact, the FCC Orders are clear that Blanca was charged with violating the USF "framework." App. 30-41 ¶ 2-11, 52 ¶ 29, 76 ¶ 48. Before the FCC can withdraw the USF benefit, or impose a penalty, it must provide "fair warning" of the prohibited conduct. *Christopher v. SmithKline Beecham Corp*., 567 U.S. at 157-58 (agency cannot create new rules and penalties during the course of an adjudication). *See* Blanca's Petition for Reconsideration at 7-9, CC Docket No. 96-45, filed June 24, 2016.

The lack of notice of a prohibited USF accounting practice announced in this case is highlighted by the facts: 1) in 1994 the FCC authorized the state regulated BETRS wireless telephone exchange service which Blanca offered; 2) various Part 54 rules explicitly authorize USF funding for wireless services; 3) the FCC's OIG did not issue any report as required by 31

[6] The FCC Orders are not even "clarifying" because they fail to address the fact that in 1994 the FCC authorized the state regulated BETRS telephone exchange service Blanca provided nor do the FCC Orders address the specific Part 54 rules which authorize USF funding for wireless services.

U.S.C. § 3701(b)(1)(C), after issuing five subpoenas to Blanca; 4) Blanca was audited for years, but not a single audit report was issued by any of the various auditors; 5) over the years Blanca repeatedly explained how it was using its USF funding, including responding to subpoenas, attending depositions, and meeting with various FCC auditors; and 6) Blanca continued to receive USF funding for years while under USF audit and after Blanca explained how it was accounting for its BETRS wireless telephone exchange facility.[7] It was not until June 2016, eight years after commencing review of Blanca's USF funding, before the FCC expressed concern.

For years while Blanca was audited Blanca submitted accounting documentation and otherwise described the state regulated, tariffed, wireless telephone exchange service it provided. Over the course of those years the FCC did nothing while Blanca continued to receive USF funding. *Christopher v. SmithKline Beecham Corp*., 567 U.S. at 158 ("where, as

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[7] The FCC refused Blanca's request to examine the agency's records, App. 76 ¶ 49, despite noting the statutory record examination requirement. App. 75 ¶ 47. The first item in the agency record which the FCC compiled in No. 18-9502 was the FCC's June 2016 summary asset forfeiture order. Completely missing from the record on review was years of audit material. The FCC failed to create an administrative record for appellate review purposes. *DOC v. New York*, 204 L. Ed. 2d 978, 1002 (2019) (Roberts, C.J.) ("meaningful judicial review" requires an agency to "disclose the basis of its action"); *see also id*. at 1008 (Thomas, J., dissenting) ("the APA contemplates review of the administrative 'record' to determine whether an agency's 'action, findings, and conclusions' " are satisfactory).

here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute."). *See* Blanca's Petition for Reconsideration at 7-9, filed June 24, 2016, CC Docket No. 96-45.

The FCC's conclusion that Blanca's "clean hands" and lack of false statements are "irrelevant" in this proceeding is clearly erroneous. App. 67 ¶ 41. Blanca complied with the Part 54 USF funding rules and with the FCC's 1994 determination that cellular carriers could provide state regulated BETRS telephone exchange service using cellular wireless facilities. Blanca's good faith reliance upon the FCC's rules and the 1994 rulemaking demonstrate beyond question that the FCC's action in this case is wholly unjustified. *Christopher v. SmithKline Beecham Corp*., 567 U.S. at 156-67 ("an agency should not change an interpretation in an adjudicative proceeding where doing so would impose new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements or in a case involving fines or damages") (internal quotes omitted).[8]

3. Penalty Enforcement Requires Due Process

The FCC Orders impose a monetary penalty as defined in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) because

[8] Because Blanca did not violate any USF rule, and made no false statements, the FCC's 2014 DOJ referral is wholly unreasoned and the referral must be rescinded.

the FCC is punishing Blanca for a Federal rule violation rather than redressing a wrong to an individual. The FCC is not compensating a victim for a loss, it is pursuing a public purpose: "to detect and deter waste, fraud, and abuse." App. 50 ¶ 25, 64 n.106. Furthermore, the FCC is seizing Blanca's USF money for the public purpose of protecting ratepayers. FCC's Opposition to Petitioner's Motion for Stay at 21-23, filed December 27, 2017, No. 17-1451.

Moreover, the FCC Orders impose a forfeiture penalty far in excess of the USF fund amount which the FCC claims Blanca owes by collecting explicit penalties in addition to the amount which the FCC claims Blanca owes as a consequence of its purported "framework" violation, and by the FCC's referral to the DOJ seeking a duplicative, 3X False Claims Act recovery. Blanca's Response to Show Cause Order at 18, filed January 8, 2019, No. 18-9587; Blanca's Reply to Respondent's Response at 7-9, filed February 28, 2019, No. 18-9587. This case concerns agency penalty enforcement and Blanca is entitled to due process protections. *Kokesh*; *Timbs v. Indiana*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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