

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**

---

TIMOTHY E. WELCH, Esq.  
*Counsel of Record*  
HILL AND WELCH  
1116 Heartfields Drive  
Silver Spring, MD 20904  
(202) 321-1448 (cell)  
welchlaw@earthlink.net  
*Counsel for Petitioner*

## QUESTIONS PRESENTED

1. Whether FCC staff seizure of Universal Service Fund funding via civil forfeiture, a procedure unsupported by rulemaking, is “pure debt collection” under the Debt Collection Improvement Act of 1996, *Slip Op.* App. 21, where the Record shows no outstanding Federal debt and where other circuit courts hold that: the DCIA does not authorize agency debt adjudication; the FCC cannot seize USF funding; the FCC is not directly involved in USF administration; and the USF contains no Federal funds.
2. Whether civil forfeiture is punitive and time barred, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Liu v. SEC*, 140 S. Ct. 1936 (2020), when it is undisputed that: the Record shows no outstanding Federal debt; the forfeiture serves multiple law enforcement purposes; excessive financial penalties beyond the purported debt are collected; and the forfeiture exceeds profits.
3. Whether deference to a civil forfeiture which fails to specify a legislative rule prohibition, *Slip Op.* App. 36, 37 n.17 is proper where the forfeiture order furthers False Claims Act litigation and where uniform appellate precedent holds that deference in rule adjudications denies fair notice.

## **PARTIES TO THE PROCEEDINGS BELOW**

All parties are disclosed in the case caption.

## **RULE 29.6 DISCLOSURE STATEMENT**

Petitioner, Blanca Telephone Company, is a non-public, closely held, Incumbent Local Exchange Carrier (ILEC), with no publicly owned subsidiaries, and is organized, and located, in Colorado. The sole owner is a citizen of the United States.

## **RELATED CASES**

*Blanca Tel. Co. v. FCC & USA*, Nos. 20-9510 & 20-9524, order denying review entered March 15, 2021, 991 F.3d 1097 (CA10 2021), *Slip Op.* App. 1; unpublished order denying rehearing and rehearing en banc entered May 6, 2021; App. 174.

*Blanca Tel. Co. v. FCC & USA*, No. 18-9587, United States Court of Appeals for the Tenth Circuit; unpublished order dismissing case for a jurisdictional defect entered March 12, 2019; unpublished order denying rehearing and rehearing en banc entered April 30, 2019; *Blanca Tel. Co. v. FCC*, 140 S. Ct. 225 (2019) (No. 19-134) (denying interlocutory cert petition).

*Blanca Tel. Co. v. FCC & USA*, No. 18-9502, United States Court of Appeals for the Tenth Circuit; unpublished order dismissing case for jurisdictional defect entered October 25, 2018; unpublished order denying rehearing and rehearing en banc entered December 10, 2018.

**RELATED CASES – Continued**

*In re: Blanca Tel. Co. v. FCC & USA*, No. 17-1451, United States Court of Appeals for the Tenth Circuit; unpublished order denying petition for extraordinary writ of mandamus relief entered December 29, 2017; unpublished order denying stay pending ruling on mandamus petition entered December 28, 2017.

*In re: Blanca Tel. Co. v. FCC & USA*, No. 16-1216, United States Court of Appeals for the District of Columbia Circuit; unpublished order denying petition for extraordinary writ of prohibition relief entered October 21, 2016; unpublished order denying rehearing and rehearing en banc entered December 12, 2016.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDINGS BELOW .....	ii
RULE 29.6 DISCLOSURE STATEMENT .....	ii
RELATED CASES .....	ii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vii
PETITION FOR A WRIT OF CERTIORARI .....	1
OPINIONS BELOW .....	2
JURISDICTION .....	2
STATUTORY PROVISIONS AND RULES .....	2
STATEMENT .....	3
A. Blanca’s Wireless Exchange Service .....	3
1. Provider of Last Resort .....	3
2. Wireless Exchange Service .....	3
3. USF Created .....	5
B. The FCC’s Civil Forfeiture .....	6
1. USF Audit And Settlement .....	6
2. FCC Refers Blanca To The DOJ .....	8
3. <i>FCC1</i> Imposes Civil Forfeiture .....	9
a. No Comment Opportunity .....	9
b. Significant Omissions .....	10
c. “Framework” Violation .....	13

## TABLE OF CONTENTS – Continued

	Page
4. <i>FCC2</i> Affirms Civil Forfeiture.....	14
5. <i>FCC3</i> Reaffirms Civil Forfeiture.....	15
C. The Tenth Circuit’s Decision .....	16
1. Appellate Jurisdiction .....	16
2. Standard of Review .....	17
3. No CFR Violation Charged.....	18
4. Fair Notice .....	18
5. Punitive Purpose Discounted .....	20
6. Statute of Limitations .....	21
7. Defective Agency Record .....	21
8. “Pure Debt Collection”.....	23
9. The FCC-USF Conundrum.....	23
REASONS FOR GRANTING THE PETITION ...	24
I. RULE ADJUDICATION DEFERENCE ....	24
A. Deference Means No Notice .....	24
1. Rule Explanation Violation .....	25
2. Conflict with Eleven Circuits.....	28
3. FCC Conceded Lack of Notice .....	31
4. The OIG’s Silence .....	32
B. Improper Burden Shifting.....	33
II. AGENCY DEBT ADJUDICATION: CIRCUIT CONFLICT.....	33
III. LIMITATIONS: <i>KOKESH &amp; LIU</i> .....	34

## TABLE OF CONTENTS – Continued

	Page
IV. NATIONAL IMPORTANCE .....	36
A. FCC Admits USF Error .....	36
B. Rural Wireless Rendered Illegal .....	38
C. Inconsistent Appellate Review .....	39
CONCLUSION.....	42

## APPENDIX INDEX

210315 Order Denying Petition for Review CA10 20-9510 & 20-9524 .....	App. 1
200305 FCC Second Order on Reconsideration and Order (FCC 20-28) ( <i>FCC3</i> ) .....	App. 48
171208 FCC Memorandum Opinion and Order ( <i>FCC 17-162</i> ) ( <i>FCC2</i> ) .....	App. 93
160602 FCC Forfeiture Order ( <i>FCC1</i> ) .....	App. 153
210506 Order Denying Rehearing & Rehearing En Banc CA10 20-9510 & 20-9524 .....	App. 174
47 U.S.C. § 503 Forfeitures .....	App. 176
47 C.F.R. § 1.1910 Effect of insufficient fee pay- ment delinquent debts, or debarment .....	App. 183
31 U.S.C. § 3712 Time limitations for presenting certain claims of the Government .....	App. 187
28 U.S.C. § 2462 Time for commencing proceed- ings .....	App. 189

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Agility Public Warehousing v. U.S.</i> , 969 F.3d 1355 (CAFC 2020) .....	33
<i>Astrue v. Ratliff</i> , 560 U.S. 586 (2010) .....	11
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997) .....	24, 26
<i>Blanca Tel. Co. v. FCC &amp; USA</i> , 991 F.3d 1097 (CA10 2021) .....	2
<i>Blanca Tel. Co. v. FCC</i> , 140 S. Ct. 225 (2019) .....	ii
<i>Bush v. U.S.</i> , 717 F.3d 920 (CAFC 2013), <i>cert. den.</i> , 571 U.S. 1132 (2014) .....	29
<i>Cellco P'ship v. FCC</i> , 700 F.3d 534 (CADC 2012) .....	4
<i>Chevron U.S.A., Inc. v. Nat. Res. Def. Council</i> , 467 U.S. 837 (1984) .....	24
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142, 183 L.Ed.2d 153 (2012) .....	12, 27
<i>Citizens United v. Schneiderman</i> , 882 F.3d 374 (CA2 2017) .....	29
<i>Cummings v. AT&amp;T Corp.</i> , 619 F.3d 1188 (CA10 2010) .....	4
<i>ExxonMobil Pipeline Co. v. USDOT</i> , 867 F.3d 564 (CA5 2017) .....	29
<i>Farmers Tel. Co. v. FCC</i> , 184 F.3d 1241 (CA10 1999) .....	7, 34
<i>FCC v. Fox TV Stations, Inc.</i> , 567 U.S. 239 (2012) .....	28
<i>General Electric Co. v. EPA</i> , 53 F.3d 1324 (CADC 1995) .....	28, 30

## TABLE OF AUTHORITIES – Continued

	Page
<i>Global Green, Inc. v. SEC</i> , 631 Fed. Appx. 868 (CA11 2015).....	29
<i>Gutierrez-Brizuela v. Lynch</i> , 834 F.3d 1142 (CA10 2016).....	30
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019) .....	26, 40
<i>Kokesh v. SEC</i> , 137 S. Ct. 1635 (2017).....	24, 34, 36
<i>Kokesh v. SEC</i> , 834 F.3d 1158 (CA10 2016), <i>rev’d</i> , <i>Kokesh v. SEC</i> , 137 S. Ct. 1635 (2017) .....	24, 34, 36
<i>Liu v. SEC</i> , 140 S. Ct. 1936 (2020) .....	34, 36
<i>Perez v. Mortg. Bankers Ass’n</i> , 575 U.S. 92 (2015).....	26
<i>Qwest Corp. v. Minn. PUC</i> , 427 F.3d 1061 (CA8 2005) .....	29
<i>Rocky Mt. Radar, Inc. v. FCC</i> , 158 F.3d 1118 (CA10 1998), <i>cert. den.</i> , 525 U.S. 1147 (1999).....	28, 30, 40
<i>Safeco Insurance Co. of America v. Burr</i> , 551 U.S. 47 (2007) .....	27
<i>Salzer v. FCC</i> , 778 F.2d 869 (CADC 1985).....	29
<i>Satellite Broadcasting Co. v. FCC</i> , 824 F.2d 1 (CADC 1987) .....	28
<i>Schechter Poultry Corp. v. U.S.</i> , 295 U.S. 495 (1935).....	13
<i>Skidmore v. Swift</i> , 323 U.S. 134 (1944) .....	24
<i>SNR Wireless Licensco, LLC v. FCC</i> , 868 F.3d 1021 (CADC 2016), <i>cert. den.</i> , 138 S. Ct. 2674 (2017).....	37

## TABLE OF AUTHORITIES – Continued

	Page
<i>U.S. ex rel. Purcell v. MWI Corp.</i> , 807 F.3d 281 (CADC 2015) .....	27
<i>U.S. ex rel. Shupe v. Cisco Sys.</i> , 759 F.3d 379 (CA5 2014).....	5, 23, 34
<i>U.S. v. Ancient Coin Collectors Guild</i> , 899 F.3d 295 (CA4 2018).....	29
<i>U.S. v. Approx. 64,695 Pounds of Shark Fins</i> , 520 F.3d. 976 (CA9 2008).....	29
<i>U.S. v. Bank</i> , 965 F.3d 287 (CA4 2020).....	36
<i>U.S. v. Harra</i> , 985 F.3d 196 (CA3 2021) .....	28
<i>U.S. v. Mead Corp.</i> , 533 U.S. 218 (2001) .....	17
<i>U.S. v. Reed</i> , 908 F.3d 102 (CA5 2018).....	36
<i>U.S. v. Telluride Co.</i> , 146 F.3d 1241 (CA10 1998).....	24
<i>USAC v. Post-Confirm. Comm. of Unsec. Cred. (In re Incomnet)</i> , 463 F.3d 1064 (CA9 2006).....	5, 23, 34
<i>Western Union Tel. Co. v. FCC</i> , 773 F.2d 375 (CADC 1985) .....	17
<i>Wisc. Res. Prot. Council v. Flambeau Mining Co.</i> , 727 F.3d 700 (CA7 2013) .....	29

## ADMINISTRATIVE DECISIONS

<i>Basic Universal Service Offering Provided by Western Wireless</i> , 17 FCC Rcd. 14802 (2002), <i>vacated as moot</i> , 22 FCC Rcd. 12015 (2007).....	<i>passim</i>
<i>Notice of Prop. Rule.</i> , 17 FCC Rcd. 23096 (2002) .....	10, 11
<i>Report and Order</i> , 9 FCC Rcd. 6513 (1994) .....	4, 11

## TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
5 U.S.C. § 555(c) .....	22
5 U.S.C. § 702 .....	17
5 U.S.C. § 704 .....	17
5 U.S.C. § 706(2).....	17
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 2342(1).....	17
28 U.S.C. § 2343 .....	17
28 U.S.C. § 2344 .....	17
28 U.S.C. § 2347(b).....	17
28 U.S.C. § 2462 .....	3, 8, 21, 36, App. 189
31 U.S.C. § 3701(b)(1)(C) .....	7, 32
31 U.S.C. § 3711 <i>et seq.</i> .....	21
31 U.S.C. § 3712 .....	2, 21, App. 187
47 U.S.C. § 151 .....	36
47 U.S.C. § 201 .....	4
47 U.S.C. § 202 .....	4
47 U.S.C. § 254 .....	5, 36
47 U.S.C. § 332(c)(1)(A).....	4
47 U.S.C. § 332(c)(3)(A).....	3, 11
47 U.S.C. § 402(a).....	17
47 U.S.C. § 503 .....	2, 10, 21, App. 176
47 U.S.C. § 503(b)(6)(B) .....	8, App. 182

## TABLE OF AUTHORITIES – Continued

	Page
REGULATIONS	
4 C.C.R. 723-2-2821(a).....	4, 11, 37
47 C.F.R. § 1.10 .....	22
47 C.F.R. § 1.1901(e) .....	10, 33
47 C.F.R. § 1.1910 .....	2
47 C.F.R. § 1.1910(b)(3)(i) .....	16, 20
47 C.F.R. § 1.1912(c) .....	10
47 C.F.R. § 1.1940 .....	16
47 C.F.R. § 36.126(a)(3).....	5
47 C.F.R. § 54.1 <i>et seq.</i> .....	5
47 C.F.R. § 54.201(d).....	12
47 C.F.R. § 54.5 .....	5, 12
47 C.F.R. § 54.7(b) .....	5, 12
47 C.F.R. § 69.601(b) .....	7

**PETITION FOR A WRIT OF CERTIORARI**

The essential facts of this case are undisputed. In December 2007 the FCC's OIG mailed a Universal Service Fund (USF) audit notice informing Blanca Telephone Company that it had been randomly selected for USF audit. Blanca promptly disclosed its accounting practices. The FCC audited Blanca's USF accounting for the next five years, but otherwise sat on its hands enforcement-wise, all the while approving Blanca's monthly USF reimbursement payments.

In June 2016 a mid-level FCC staffer inferred a civil forfeiture authority under the Debt Collection Improvement Act of 1996 (DCIA); made findings of fact; cited no USF rule prohibition, but found a violation of a synthesis of three accounting rule parts, *Slip Op.* App. 36, 37 n.17; converted that violation into debt; and ordered recovery of about \$7 million in 2005-2010 USF disbursements, plus penalties. *FCC1* App. 153, 168. The civil forfeiture issued without any type of hearing. Record 1, 15, 23 (case begins with the civil forfeiture).

Petitioner Blanca Telephone Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit which affirmed the FCC's novel civil forfeiture.

---

## OPINIONS BELOW

*Blanca Tel. Co. v. FCC*, 991 F.3d 1097 (CA10 2021), Nos. 20-9510, 20-9524, entered March 15, 2021, affirming FCC; *Slip Op.* App. 1; unpublished Order denying rehearing and rehearing en banc entered May 6, 2021; App. 174.

---

## JURISDICTION

The Tenth Circuit's judgment was entered on March 15, 2021. *Slip Op.* App. 1. Petitioner timely sought rehearing and rehearing en banc on April 26, 2021, within the 45 day limit specified at F.R.A.P. 35(c), 40(a)(1)(A), (B). The Tenth Circuit denied rehearing and rehearing en banc on May 6, 2021, App. 174, and the instant petition is timely filed within 150 days thereafter. *See* Guidance Concerning Clerk's Office Operations issued July 19, 2021. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

---

## STATUTORY PROVISIONS AND RULES

47 U.S.C. § 503 Forfeitures .....	App. 176
47 C.F.R. § 1.1910 Effect of insufficient fee payment, delinquent debts, or debarment .....	App. 183
31 U.S.C. § 3712 Time limitations for presenting certain claims of the Government .....	App. 187

28 U.S.C. § 2462 Time for commencing proceedings .....	App. 189
--	----------

---

## **STATEMENT**

### **A. Blanca's Wireless Exchange Service**

#### **1. Provider of Last Resort**

Blanca is a “provider of last resort” telephone exchange service in Colorado, required to provide telephone exchange service upon request. It is undisputed that Blanca’s service area is high cost and that Blanca is an Eligible Telecommunications Carrier (ETC) authorized to receive Universal Service Fund (USF) support. *FCC1* App. 157 n.2.

In 1980 Blanca began providing telephone exchange service to hard to serve subscribers using the radio technology available at the time: Basic Exchange Telephone Radio Service (BETRS, pronounced “beters”). A significant number of Blanca’s subscribers used radio technology because the cost to provide wire service was, and remains, cost prohibitive owing to mountainous terrain and lack of electricity. *FCC2* App. 164-65 & n.16; Record 26.

#### **2. Wireless Exchange Service**

In 1993 Congress enacted 47 U.S.C. § 332(c)(3)(A) which expanded the use of wireless for telephone exchange service and directly authorized the states to regulate wireless used as “a substitute for land line

telephone exchange service . . . necessary to ensure the universal availability of telecommunications service at affordable rates.” Colorado authorizes any technology to provide subscriber voice service. 4 C.C.R. 723-2-2821(a) (defining “telephone access line” to include voice service provided by any technology). The FCC implemented this Congressional directive in 1994 when it authorized state regulated telephone exchange carriers to use cellular frequencies to provide telephone exchange service. *Report and Order*, 9 FCC Rcd. 6513, 6571 (1994).

In 1995 Blanca upgraded its radio telephone exchange service to provide cutting edge cellular radio technology to its high cost area. Blanca’s cellular telephone exchange service was tariffed with the Colorado PUC and provided upon request without discrimination; Blanca charged the same tariff regulated price regardless of the underlying transmission technology. Record 26. The Colorado PUC never expressed any concern regarding Blanca’s cellular telephone exchange service.

Cellular carriers are statutory common carriers. *Cellco P’ship v. FCC*, 700 F.3d 534, 538 (CADC 2012); *Cummings v. AT&T Corp.*, 619 F.3d 1188, 1199 (CA10 2010). Record 333 (47 U.S.C. §§ 201-202, 332(c)(1)(A) require just and reasonable rates and practices). Blanca’s CA10 Brief 17, 27.

### 3. USF Created

In 1997 the FCC implemented Part 54 USF funding rules as authorized by Congress in the Telecommunications Act of 1996. 47 U.S.C. § 254 Universal Service; 47 C.F.R. § 54.1 *et seq.* The USF is funded by carrier contributions and not by tax receipts and the USF does not contain any federal funds. *U.S. ex rel. Shupe v. Cisco Sys.*, 759 F.3d 379, 381, 388 (CA5 2014); *USAC v. Post-Confirm. Comm. of Unsec. Cred. (In re Incomnet)*, 463 F.3d 1064, 1066 (CA9 2006). The FCC “has no ability to control the USF through direct seizure.” *USAC*, 463 F.3d at 1071. The Universal Service Administrative Company (USAC) “is responsible for day-to-day administration of the [USF’s] high-cost support program.” *FCC3* App. 54 ¶ 5.

Various FCC rules explicitly provide that USF funding is available for cellular telephone exchange service. For instance, 47 C.F.R. § 54.5 defines a “telecommunications channel” as a “telephone line, or, in the case of wireless communications, a transmittal line or **cell site**.” (Emphasis added.) The § 54.5 definition of “telecommunications carrier” explicitly “includes cellular mobile radio service (CMRS) providers.” USF funding is available for “telecommunications and information services” without any technology or carrier class limitation. 47 C.F.R. § 54.7(b). Record 19-20. Regulated carriers are authorized to include “radio equipment” in their rate base. 47 C.F.R. § 36.126(a)(3) (“Radio transmitters, receivers, repeaters and other radio central office equipment”). The FCC’s accounting rules require that “investment and expenses \* \* \* that

are used for both regulated and nonregulated services, are recorded in the regulated accounts.” *FCC2 App. 98-99 ¶ 5.*

In 2002 the FCC affirmed that USF funding was available to “a telecommunications carrier \* \* \* designated by a state or the Commission as an ETC whether it provides a fixed or a mobile universal service.” *Basic Universal Service Offering Provided by Western Wireless*, 17 FCC Rcd. 14802, 14812, 14816 ¶¶ 18, 24 (2002), *vacated as moot*, 22 FCC Rcd. 12015 (2007).<sup>1</sup> *Western Wireless* holds that USF funding is available to cellular carriers without regard to whether the wireless service is regulated, provided under tariff, provided roaming service, provided cell-to-cell handoff, or otherwise had mobile service characteristics.

## **B. The FCC’s Civil Forfeiture**

### **1. USF Audit And Settlement**

Between 2005-2012 Blanca claimed USF reimbursement for its wireless telephone exchange service. In December 2007 the FCC’s Office of Inspector General (OIG) sent randomly selected carriers like Blanca generic USF audit notices which did not provide notice of any rule violation. The FCC’s purpose in conducting random USF audits is “to coordinate prosecutions for waste, fraud, and abuse.” *FCC2 App. 104 ¶ 10.* The audit notice is not part of the agency Record; except for

---

<sup>1</sup> Respondents’ CA10 Brief 29 n.10 relied upon this agency case and revived it.

documents Blanca submitted as part of its agency relief filings, the Record compiled by the FCC contains no documents the FCC relied upon in its forfeiture order. Blanca's CA10 Brief 22-30.

During 2008 Blanca disclosed its USF accounting practices to the FCC. The information Blanca provided permitted the OIG, in November 2009, to formulate the first of five detailed subpoenas regarding Blanca's USF accounting practices. Record 59-78 (copy of the OIG's November 2009 subpoena). Blanca timely and fully responded to each subpoena, *FCC1* App. 154, producing about 1.5 terabytes of documentation for the OIG.

The DCIA designates the OIG as the FCC official authorized to audit and disallow USF funding. 31 U.S.C. § 3701(b)(1)(C). While Blanca was being audited between 2007-2012, monthly USF payments were disbursed to Blanca notwithstanding Blanca's disclosure of its USF accounting practices. At no time did the OIG disclose that there was an audit problem or take issue with Blanca's accounting practices. The OIG never issued any report faulting Blanca.

In 2013, after five years of auditing, Blanca received notice through the National Exchange Carrier Association (NECA) that the FCC objected to Blanca's USF accounting practices.<sup>2</sup> Promptly upon receiving notice, and to avoid protracted litigation, Blanca

---

<sup>2</sup> NECA is an association of high cost carriers; Blanca's membership is mandatory. 47 C.F.R. § 69.601(b). NECA provides various services for the FCC. *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1245 (CA10 1999).

settled the USF accounting matter through NECA, adjusted its accounting for two years, returned approximately \$1 million to the USF, and ceased claiming reimbursement for its cellular telephone exchange.<sup>3</sup> No violation findings were entered and no enforcement notice was issued. Record 27-28 & n.11, 30 n.15, 40 (discussing the 2013 settlement and arguing that the civil forfeiture constituted a settlement breach).

## **2. FCC Refers Blanca To The DOJ**

By January 2014, without notice to Blanca, the FCC referred Blanca to Respondent Department of Justice (DOJ) for prosecution under the False Claims Act. Record 79 (copy of the DOJ's January 30, 2014 Civil Investigative Demand); Record 53 (*Public Notice*, October 19, 2015 – USF cases are referred to the DOJ for “prosecution under the False Claims Act”). The FCC’s referral was unsupported by any rule violation findings. Under the “doctrine of primary jurisdiction” the DOJ did not have a colorable false claims case because the FCC had not entered any rule violation or false statement findings relating to the USF. Record 25 & n.6.

The DOJ subsequently informed Blanca that it was referring the case back to the FCC because of

---

<sup>3</sup> The FCC operates under a one-year statute of limitation. 47 U.S.C. § 503(b)(6)(B). Relative to the June 2016 civil forfeiture, the 2005-2010 accounting period is beyond that limitation, NECA’s two-year accounting period, *FCC2* App. 107 n.37, and the five-year limitation at 28 U.S.C. § 2462.

statute of limitations concerns which purportedly did not constrain the FCC. Record 25 n.7. Respondents' False Claim Act case remains live by execution of a series of statute of limitations tolling agreements, most recently through December 2021. Blanca's CA10 Brief 3. Respondents have never commented upon the DOJ referral made in the absence of any FCC finding of rule violation or false statement, or upon the DOJ's referral back to the FCC, or explained why the FCC instituted two enforcement proceedings against Blanca to "tag team" a small company to obtain multiple recoveries of the "same pile of USF money." Record 27 n.10, 32, 36.

### **3. *FCC1* Imposes Civil Forfeiture**

#### **a. No Comment Opportunity**

The June 2016 civil forfeiture issued without prior notice or opportunity to comment. *FCC1* App. 153; Record 1 (the forfeiture order is the first Record document). The June 2016 civil forfeiture does not address the Managing Director's lack of delegated authority to issue the novel civil forfeiture. Blanca's CA10 Brief 8, 35-36; Blanca's CA10 Reply Brief 20-21. Blanca was faulted because

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.

*FCC1* App. 154-55 (emphasis in original). The NECA report is not part of the Record.

The forfeiture order does not point to any USF funding rule which prohibited LECs like Blanca from claiming USF reimbursement for cellular telephone exchange costs. *Slip Op.* App. 36, 37 n.17. The FCC separated itself from USF administration: NECA's USF settlement with Blanca did not bind the Government and USF administration does not implicate the exercise of governmental power. *Slip Op.* App. 41; *FCC3* App. 76 ¶ 30. The FCC does not control day-to-day USF administration. *FCC3* App. 54 ¶ 5.

### **b. Significant Omissions**

The civil forfeiture fails to consider a myriad of procedural and substantive issues. For example:

#### **(a) The DCIA**

authorizes the establishment of offsets to pay down pre-existing debt that has been established by order of court or that has been acknowledged by a debtor by partial payment of a forfeiture issued after a notice of apparent liability. The DCIA does not rewrite Section 503 of the Communications Act and it does not authorize the FCC to enter rule violation findings years after the FCC knew about the underlying facts.

Record 14-16, 30 & n.15, 31, 33, 37; 47 C.F.R. § 1.1901(e) (valid claim or debt requires either payment on a notice of apparent liability or a “final” court debt adjudication); 47 C.F.R. § 1.1912(c) (administrative offset applies to “delinquent” debt); *Notice of Prop.*

*Rule.*, 17 FCC Rcd. 23096 ¶ 1 (2002) (DCIA exists to collect “delinquent” debt owed to the United States). *See also Astrue v. Ratliff*, 560 U.S. 586, 589 (2010) (offset is used “to satisfy a pre-existing debt that the litigant owes to the United States”).

(b) The FCC failed to provide Blanca with any type of hearing, but instead issued a civil forfeiture finding an interpretive rule violation which failed to cite any legislative rule violation. Record 13, 14, 16, 23 & n.3, 24, 30 & n.15, 31-33.

(c) 47 U.S.C. § 332(c)(3)(A) expanded the use of wireless for telephone exchange service and directly authorized the States to regulate wireless services used as “a substitute for land line telephone exchange service . . . necessary to ensure the universal availability of telecommunications service at affordable rates.”

(d) Colorado authorizes last resort providers to use any technology for voice service. 4 C.C.R. § 723-2-2821(a).

(e) The FCC implemented § 332(c)(3)(A) in 1994 and authorized state regulated LECs like Blanca to use cellular frequencies to provide telephone exchange service. *Report and Order*, 9 FCC Rcd. 6513, 6571 (1994).

(f) The FCC completely discounted Blanca’s wireless service to a significant portion of Blanca’s subscriber base which lacked electricity and/or resided in the mountains, *FCC1* App. 164-65, when the FCC’s accounting rules plainly require that “investment and

expenses \*\*\* that are used for both regulated and nonregulated services, are recorded in the regulated accounts.” *FCC2 App. 98-99 ¶ 5.*

(g) USF funding rules explicitly provide that USF funding is available for wireless exchange service without carrier class limitation. For instance, 47 C.F.R. § 54.5 defines a “telecommunications channel” as a “telephone line, or, in the case of wireless communications, a \*\*\* **cell site.**” (Emphasis added). The § 54.5 definition of “telecommunications carrier” explicitly “includes cellular mobile radio service (CMRS) providers.” USF funding is available for “telecommunications and information services” without any technology or carrier class limitation. 47 C.F.R. § 54.7(b). A carrier is eligible to receive USF funding “throughout” its wireless service area. 47 C.F.R. § 54.201(d). Record 19-20, 22, 32.

(h) The FCC’s 2002 *Western Wireless* decision holds that USF funding is available to cellular carriers without regard to whether the wireless service is regulated or provides a mobile service including roaming and cell-to-cell handoff. *Western Wireless*, 17 FCC Rcd. at 14812, 14816 ¶¶ 18, 24.

(i) The forfeiture order does not discuss the fact that it promoted the False Claims Act case initiated against Blanca years earlier. Record 13, 23-24 n.4, 27 & n.10 citing *Christopher v. SmithKline Beecham Corp.*, 183 L.Ed.2d 153, 170 (2012) (discounting rule interpretations advancing agency litigation).

### **c. “Framework” Violation**

The 2016 civil forfeiture does not cite a specific rule prohibition, Blanca is faulted for violating a “regulatory framework” informed by “truisms” and pieced together via passing reference to three FCC rule parts: Part 36 Jurisdictional Separations; Part 64 Miscellaneous Rules Affecting Common Carriers; and Part 69 Access Charges. *Slip Op.* App. 36, 37 n.17; *FCC2* App. 95-106 ¶¶ 3-11; *FCC3* 79 ¶ 32; *FCC1* 152. Excluded from the FCC’s synthesis is reference to the Part 54 Universal Service funding rules, even though Blanca is faulted for improperly using USF funding. Record 13, 14, 31-32, 37, 38.

The FCC adopted an industrial code purportedly “widely accepted by the industry” and enforced by NECA. *FCC3* App. 55 ¶ 7; *FCC2* 129 ¶ 39; *FCC1* 153-54, 156. Respondents failed to explain how industrial code enforcement passes muster under *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935). Blanca’s CA10 Brief 40.

The FCC determined that the civil forfeiture issued against Blanca constituted a “debt adjudication” authorized by the Communications Act and the DCIA. *FCC2* App. 105-06 ¶ 11, 128-31 ¶¶ 39-40. However, it cites no specific statutory authorization supporting its novel view.

Since January 2018 the FCC has been seizing Blanca’s 2005-2010 USF reimbursements because Blanca used that funding to provide “mobile cellular service.” *FCC1* App. 156-59, 162-64. The FCC improperly used

the 2013 NECA settlement as proof of rule violation over Blanca’s objection to misuse of settlement information. *FCC1* App. 159-60, 164-65; Record 24 n.5, 30 n.15.

The civil forfeiture assessed \$150,000+ in explicit “DCIA” and “PEN” penalties. Record 348 (FCC June 2016 “Bill for Collection”). USAC’s April 2018 statement assessed an additional “DCIA Penalty Adjustment” of \$754,328.28 and a “Late Payment Fee Adjustment” of \$125,721.38, while noting that Blanca’s “Account is in good standing.” That’s over \$1 million in Federal penalties even though Record 367 (FCC generated financial statement) continues to show that no Federal debt is outstanding. Despite the FCC’s assertion that USAC does not exercise governmental power, *Slip Op.* App. 5, 41, USAC continues to impose monthly “HC Penalty” and “HC Interest” penalties for the Government.<sup>4</sup>

#### **4. FCC2 Affirms Civil Forfeiture**

In June 2016 Blanca timely filed for administrative review of the civil forfeiture order. Blanca raised numerous due process objections to the FCC’s belated entry of vague rule part violations in a novel civil forfeiture proceeding. Blanca cited “a score” of USF

---

<sup>4</sup> The lower court rejected Blanca’s motion to supplement the Record with damage calculation information; Blanca’s ability to show the extent of its injury was improperly limited by Respondents’ concession that it had caused a courthouse door opening minimal injury. *Slip Op.* App. 15 n.12. Blanca’s CA10 Reply at 4, filed May 8, 2020.

funding rules which authorized Blanca's receipt of USF funding. *Slip Op.* App. 42.

The FCC's December 2017 order affirmed its earlier order, *FCC2* App. 95 ¶ 2 (FCC 17-162), but did not discuss the "score" of rules Blanca cited. More than two years later the FCC explained that those rules did not apply to regulated carriers. *FCC3* App. 54 ¶ 6. No rule was cited which prohibited a regulated carrier from providing USF funded telephone exchange service using wireless technology and no justification is provided for making such funding available to non-LECs to the disadvantage of LECs.

In response to Blanca's argument that *FCC1* had failed to assert any false statements, *FCC2* asserted "fraud," "wrongdoing," and "egregious" misconduct, but failed to point to any supporting evidence or any false statement. *FCC2* App. 104, 115, 129 n.106, 149, 151. The civil forfeiture faults Blanca's provision of "barely break even telecommunications service," Record 28, as misusing the USF as "a piggy bank for all manner of inappropriate expenses" and equates provision of public telecom service, Record 211-13, to buying "yachts or country club golf memberships." *FCC2* App. 149, 150. The FCC found Blanca's "clean hands" and lack of false statements irrelevant even though it asserted fraud. *FCC3* App. 57 ¶ 9; *FCC2* App. 132 ¶ 41.

## **5. FCC3 Reaffirms Civil Forfeiture**

Shortly after Blanca timely filed for further administrative review, January 2018, the FCC directed

USAC to seize Blanca's monthly USF reimbursements even though collection is prohibited during case review. Blanca's CA10 Brief xii, 3, 15 & n.7, 34 n.13, 49 citing 47 C.F.R. § 1.1910(b)(3)(i) (App. 185). As of August 2021 USAC had seized approximately \$4,492,348 from Blanca: \$3,330,259 as debt reduction and \$1,162,089 as penalties. Respondents do not explain how interest accumulates when Record 367 shows no Federal debt outstanding or how financial penalties are non-punitive under 47 C.F.R. § 1.1940 (penalties imposed without regard to compensatory considerations). *FCC1* App. 168.

*FCC3* App. 48 (FCC 20-28) reaffirmed the "framework" violation and rejected Blanca's "attempts to challenge these truisms." *FCC3* App. 79 ¶ 32. *FCC3* found that NECA "discovered" Blanca's accounting procedure in 2012, *FCC3* App. 49 ¶ 1, ignoring the OIG's five year audit and the FCC's admission that NECA does not exercise governmental power. *FCC3* does not explain the four year gap between NECA's "discovery" and the June 2016 civil forfeiture.

## **C. The Tenth Circuit's Decision**

### **1. Appellate Jurisdiction**

On January 21, 2020, because the FCC had not acted on Blanca's December 2017 reconsideration pleading for more than two years, Blanca filed No. 20-9510 with the Tenth Circuit. Thereafter, on March 5, 2020 the FCC denied Blanca's request for further administrative review. *FCC3* App. 48 (FCC 20-28). On March

18, 2020 Blanca timely filed No. 20-9524 with the Tenth Circuit as a protective and supplemental review petition as authorized by *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 380 (CADC 1985) and sought review of all FCC orders. The Tenth Circuit consolidated No. 20-9524 with No. 20-9510.

The Tenth Circuit's jurisdiction was invoked pursuant to 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1); 28 U.S.C. § 2343; 28 U.S.C. § 2344; and 28 U.S.C. § 2347(b). Blanca requested that the FCC's forfeiture order be set aside, and that other relief be granted, pursuant to 5 U.S.C. §§ 702, 704, 706(2).

## **2. Standard of Review**

The lower court used the deferential "arbitrary and capricious" standard to review most of the case. *Slip Op.* App. 16-18, 38-47. Respondents and the lower court did not comment upon Blanca's argument that the FCC's novel civil forfeiture procedure was unsupported by a rulemaking and *de novo* review was the appropriate review standard. Blanca's CA10 Brief 20-21 citing *U.S. v. Mead Corp.*, 533 U.S. 218, 227-29 (2001).

### **3. No CFR Violation Charged**

The lower court determined that the FCC never pointed to any legislative rule prohibition. *Slip Op.* App. 36, 37 n.17.<sup>5</sup> However, the Tenth Circuit discounted “a score of regulations and orders dealing with treatment of cellular services” Blanca had cited as authorizing USF funding because “the FCC considered the regulations but found them inapplicable.” The court adopted the FCC’s explanation that while some carriers could obtain USF funding for mobile exchange service, Blanca could not, even though there was no rule prohibition. *Slip Op.* App. 36, 37 n.17, 42-43.

The lower court did not address the fact that Blanca had updated its tariffed radio telephone exchange service to new cellular technology to serve its remote, electricity deprived, hard to serve, high cost radio telephone exchange subscribers. Blanca did not discriminate among customers, the customer selected the technology suited to their situation. Blanca’s CA10 Brief 26-27.

### **4. Fair Notice**

Despite acknowledging the FCC’s failure to charge a specific a rule prohibition, *Slip Op.* App. 36, 37 n.17,

---

<sup>5</sup> At an appropriate time during oral argument undersigned counsel asked the lower court to “point” to a specific rule that Blanca violated; no rule was cited.

the lower court limited the FCC's notice responsibility to explaining its USF funding "framework":

The FCC supported its decision to initiate debt collection with an explanation of the rules Blanca had violated and a calculation of the overpayments Blanca had received.

*Slip Op.* App. 47. The lower court accepted the FCC's "explanation of the rules" even though, after twelve years, the FCC had never cited a specific rule prohibition.

The lower court found that the 2013 NECA settlement was contemporaneous with the 2016 forfeiture order and served as a rule violation notice to Blanca. *Slip Op.* App. 37 n.17. The lower court leaves unexplained how NECA provided "fair notice" for the Government when it does not exercise governmental power. *Slip Op.* App. 41; *FCC3 App.* 76 ¶ 30. The lower court did not address Blanca's argument that notice in 2013 was not "fair notice" regarding Blanca's 2005-2010 conduct. Moreover, the lower court ignored the fact that Blanca settled to avoid "protracted litigation" and that the FCC misused settlement as an admission. Blanca's CA10 Brief 30-31. Record 24 n.5, 27-28 & n.11, 30 n.15, 40.

The lower court found that Blanca was responsible "to correctly apply" complex FCC rules, *Slip Op.* App. 33, notwithstanding its recognition that the FCC failed to specify any rule prohibition which Blanca could apply. *Slip Op.* App. 36, 37 n.17. The lower court did not address Blanca's argument that the forfeiture order

“concedes that there was no legislative rule and that Blanca was authorized to interpret USF funding rules in the absence of a written rule” and that “this case is about the FCC’s belated disagreement with Blanca’s reasonable” good faith rule application. *FCC2* App. 117-18 ¶ 29. Blanca’s CA10 Brief 17, 25-26, 36, 41-42.

### **5. Punitive Purpose Discounted**

The lower court discounted various Record items regarding the punitive nature of the FCC’s civil forfeiture order. For example, the FCC’s punitive 2014 False Claims Act referral is discounted because the DOJ “never acted on this referral.” However, this nod to noblesse oblige ignores the fact that the Government has prosecuted the case and the forfeiture order relies upon information obtained from that still live prosecution. *FCC1* App. 162-63 n.13.

The lower court justified Respondents’ imposition of increased financial penalties as “simply a recognition of the time-value of money.” *Slip Op.* App. 24 n.14. However, Respondents did not offer that justification and the reasoning does not consider that: 1) the FCC is collecting when the Record shows that Blanca has no debt; 2) collection is occurring during debt litigation in violation of 47 C.F.R. § 1.1910(b)(3)(i), App. 185; and 3) an excessive penalty was imposed on the day that the forfeiture order issued. Record 348; Blanca’s CA10 Brief 3 & n.2, 15 & n.7, 16, 49, 54.

The lower court dismissed multiple agency admissions of law enforcement purpose expressed over multiple years as “a single, passing reference.” *Slip Op.* App. 25. Blanca’s CA10 Brief 14, 28, 31, 35, 39, 48 & n.22, 49.

## **6. Statute of Limitations**

The lower court found that two statutes of limitations, 47 U.S.C. § 503 and 28 U.S.C. § 2462, do not apply because “pure debt collection” is not punishment. *Slip Op.* App. 17, 21. While the lower court found that the FCC complied with the DCIA, 31 U.S.C. §§ 3711 *et seq.*, *Slip Op.* App. 17, the lower court’s decision, like Respondents’ CA10 Brief, failed to discuss 31 U.S.C. § 3712’s recognition that the statute of limitations applies to DCIA-related debt adjudications. Blanca’s CA10 Brief 46.

## **7. Defective Agency Record**

The lower court found that it had a “full record to evaluate,” that it “presume[s] the agency’s record is complete,” and that “Blanca had the entire record in its possession.” *Slip Op.* App. 15 n.12, 34. The lower court also found:

Blanca has presented clear and convincing evidence that the record before us is not the full administrative record the FCC had before it throughout the proceedings. The FCC references documents throughout the demand letter and subsequent orders that it did not

include in the record presented to this court. To be sure, the FCC erred by depriving this court of the full administrative record.

*Slip Op.* App. 44.

The lower court rejected Blanca's argument that the FCC improperly withheld records finding that Blanca did not provide a specific objection regarding the records to which it was denied access. *Slip Op.* App. 44 n.20. The lower court did not discuss how Blanca could comment upon documents it had not seen. Blanca's CA10 Brief 23.

Also unaddressed is Blanca's argument that

The Record's incompleteness is not a theoretical concern. \*\*\* central to Respondents' case is their argument that Blanca provided a "mobile" service, but that Blanca "misreport[ed] that all of its costs were for fixed services." \*\*\* Moreover, Respondents' Brief does not point to any Record item contradicting the fact that in the mid-1990s Blanca upgraded its obsolete BETRS technology serving 150 BETRS subscribers, but only after the FCC had released the 1994 cellular BETRS rule-making which aimed to advance technology improvements in rural areas.

Blanca's CA10 Reply Brief 3-4 citing 47 C.F.R. § 1.10 & 5 U.S.C. § 555(c) (statutory right to record review). Blanca "reported" telecom costs, nothing in the record shows that Blanca "misreported" anything.

### **8. “Pure Debt Collection”**

While the lower court found civil forfeiture to be “pure debt collection,” *Slip Op.* App. 21, it failed to discuss that “the FCC is not merely collecting a debt, it is finding rule violations and adjudicating a debt claim” in a proceeding “which did not afford Blanca any process whatsoever.” The lower court does not discuss the Ninth Circuit’s holding that the FCC cannot seize USF funding. *USAC*, 463 F.3d at 1066. Blanca’s CA10 Brief 7-8, 38, 40, 44, 46.

### **9. The FCC-USF Conundrum**

The lower court found that USF administration is not governmental activity and that NECA’s 2013 USF settlement with Blanca did not bind the Government. *Slip Op.* App. 41; *FCC3* App. 76 ¶ 30. The FCC acknowledged that USAC is responsible for day-to-day USF administration. *FCC3* App. 54 ¶ 5. Moreover, the USF is funded by carrier contributions, not by tax receipts; the FCC does not administer distribution of USF funds; the FCC “has no ability to control the USF through direct seizure;” and USF funds are not federal funds. *Shupe*, 759 F.3d at 381, 388; *USAC*, 463 F.3d at 1066, 1071. Blanca’s CA10 Brief 7-8, 50.

The lower court recognized the FCC-USF disconnect, but found that the 2013 NECA settlement provided “adequate notice of the violations,” *Slip Op.* App. 37 n.17, without explaining how a non-governmental entity provided “adequate notice” for the Government. Also unexplained is how the FCC

properly used the DCIA, or how USAC properly collects “DCIA penalties,” where USF administration is not governmental activity and USF funds are carrier money, not public money.

*Slip Op.* App. 24 relies upon *U.S. v. Telluride Co.*, 146 F.3d 1241, 1246 (CA10 1998) to support a non-punitive view of law enforcement. However, *Kokesh v. SEC*, 834 F.3d 1158, 1162, 1164, 1167-68 (CA10 2016) relied extensively on *Telluride* and the lower court was unanimously reversed in *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017) because “sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive.” USF rule enforcement used against Blanca sought, *inter alia*, to detect and deter fraud, FCC2 App. 129 n.106, yet the lower court determined that the civil forfeiture was not penal. Blanca’s CA10 Brief 8, 14, 31-32, 36-38, 40-41, 46-47, 47-50; Blanca Reply Brief at 21-23; Blanca’s CA10 Petition for Rehearing and Rehearing En Banc 8-9. Record 277-78.



## REASONS FOR GRANTING THE PETITION

### I. RULE ADJUDICATION DEFERENCE

#### A. Deference Means No Notice

The lower court failed to explain how the FCC’s June 2016 explanation of its “complex and highly technical” USF funding “framework,” for which the FCC sought *Chevron*, *Auer*, and *Skidmore* deference,<sup>6</sup>

---

<sup>6</sup> Respondents’ CA10 Brief 24-26 & n.9.

provided timely notice of what was required prior to the 2005-2010 accounting period. Respondents' CA10 Brief asserted eight times that Blanca violated "longstanding" FCC rules, but failed to cite any rule which prohibited Blanca's accounting practice. *Slip Op.* App. 36, 37 n.17. The FCC's forfeiture order is fatally defective because it does not cite any rule prohibition which provided notice, it merely discusses a rule "framework" concocted for this case. Record 13-15, 18, 23 & n.3, 31-33.

### **1. Rule Explanation Violation**

The lower court determined that Blanca had the responsibility "to correctly apply" complex FCC rules, *Slip Op.* App. 33, but also recognized that the FCC failed to specify any legislative rule prohibition. *Slip Op.* App. 36, 37 n.17. The lower court excused the FCC's failure to cite a legislative rule prohibition because the FCC

supported its decision to initiate debt collection with an explanation of the rules Blanca had violated and a calculation of the overpayments Blanca had received.

*Slip Op.* App. 47.

The lower court's finding that the FCC explained "the rules Blanca had violated" not only contradicts the court's finding that the FCC did not cite any rule prohibition, it faults Blanca for violating a rule explanation. However,

interpretive rules, even when given *Auer* deference, do *not* have the force of law. . . . An interpretive rule itself never forms “the basis for an enforcement action”. . . . An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment.

*Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality) (emphasis in original). Blanca’s CA10 Brief 42.

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*, 139 S. Ct. at 2435 (Gorsuch, 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.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 130-31 (2015) (Thomas, J., concurring) (internal quote omitted). The lower court ignored the fact that after a five year audit “the OIG did not glean a prohibition from anything the FCC had issued and it is unreasonable to expect more from Blanca.” Blanca’s CA10 Brief 20-21, 35-37, 42; Blanca’s CA10 Petition for Rehearing and Rehearing En Banc 16.

The task the FCC assigned to Blanca in this novel rule violation proceeding was proving the consistency of its past conduct to the FCC’s recent rule “synthesis”.

*Slip Op.* App. 36; *FCC2* App. 141 ¶ 48; *FCC1* App. 156. Blanca demonstrated that its conduct complied with the FCC’s legislative rules in effect during the 2005-2010 accounting period and that: 1) the OIG failed to fault Blanca; 2) the FCC did not cite a rule prohibition; 3) Blanca provided a reasonable rule-based explanation for its accounting practice citing “a score” of rules which on their face authorized Blanca, *Slip Op.* App. 42; 4) the FCC approved Blanca’s USF reimbursement requests for years with full knowledge of Blanca’s accounting practice; 5) the FCC’s financial records show that Blanca does not have any outstanding Federal debt; 6) the FCC determined that the USF program was flawed; and 7) Blanca has “clean hands.”

This case concerns the FCC’s belated disagreement with Blanca’s reasonable “good faith” rule compliance in the absence of contrary guidance. Neither Respondents nor the lower court discussed the permissive sphere within which Blanca operated given the FCC’s lack of guidance – Blanca’s past conduct was improperly adjudicated through the lens of today. *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69-70 (2007) (absent timely regulatory guidance, parties cannot be penalized for reasonable rule interpretation even if later shown to be incorrect); *SmithKline*, 567 U.S. 142, 156-57 (2012) (agency should not issue rule interpretation in a case determining damages); *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288-89 (CADC 2015). Blanca’s CA10 Brief 8, 10, 11, 15-19, 21-22, 25-26, 36-37, 39, 41-42, 44, 49, 51; Blanca’s CA10 Reply Brief 10.

## 2. Conflict with Eleven Circuits

The lower court’s deference conflicts with eleven circuit court decisions, including the Tenth Circuit’s own precedent. For example, *General Electric Co. v. EPA*, 53 F.3d 1324, 1330 (CADC 1995) rejects deference in agency enforcement proceedings and holds that the “face” of the regulation must provide “fair notice” of the prohibition. Explicit pre-enforcement notice is also required in non-enforcement adjudications. *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 2 (CADC 1987) (notice required before application dismissal for interpretive rule violation).

The Tenth Circuit holds that “suspected violators” are entitled to pre-enforcement notice and an opportunity to come into compliance, facing liability on a going forward basis only if the guidance is ignored. *Rocky Mt. Radar, Inc. v. FCC*, 158 F.3d 1118, 1122 n.7 (CA10 1998), *cert. den.*, 525 U.S. 1147 (1999). Blanca’s CA10 Brief 42-43; Blanca’s CA10 Reply Brief 17-18 (noting Respondents’ failure to address *Rocky Mt. Radar*); Blanca’s CA10 Petition for Rehearing and Rehearing En Banc at 2-3. The court below completely ignored its own decisionally significant precedent, stretching deference well beyond the breaking point.

*See also FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 257 (2012) (FCC must be able to “point” to a regulation which provides “affirmative notice” of the legal requirement); *U.S. v. Harra*, 985 F.3d 196, 213 (CA3 2021) (“fair warning requires that government agencies communicate their interpretation of their own regulations

with ‘ascertainable certainty’ before subjecting private parties to punishment under that interpretation”); *U.S. v. Ancient Coin Collectors Guild*, 899 F.3d 295, 321-22 (CA4 2018) (“a regulation provides fair notice if it is ‘reasonably comprehensible to people of good faith’”); *Citizens United v. Schneiderman*, 882 F.3d 374, 389 (CA2 2017) (“when an executive agency changes which behavior violates its regulations, it must provide notice that it has done so, before faulting” a regulated entity); *ExxonMobil Pipeline Co. v. USDOT*, 867 F.3d 564, 578 (CA5 2017) (an agency “may not deprive a party of property by imposing civil or criminal liability” unless the prohibition can be discerned “by reading the regulations”); *Global Green, Inc. v. SEC*, 631 Fed. Appx. 868, 870 (CA11 2015) (unpublished) (“fair notice” is lacking when civil penalties are imposed upon a change in regulatory enforcement); *Wisc. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 708 (CA7 2013) (the fair notice requirement is “thoroughly incorporated into administrative law” and does not exist when the agency previously approved the conduct now found to be a problem); *Bush v. U.S.*, 717 F.3d 920, 924 n.4 (CAFC 2013), *cert. den.*, 571 U.S. 1132 (2014) (government accounting form must provide fair notice of legal obligations); *U.S. v. Approx. 64,695 Pounds of Shark Fins*, 520 F.3d. 976, 980 (CA9 2008) (a regulation must provide “fair notice” before property is taken); *Qwest Corp. v. Minn. PUC*, 427 F.3d 1061, 1068 (CA8 2005) (“application of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited”); *Salzer v. FCC*, 778 F.2d 869, 871-72 (CADC 1985) (“fundamental

fairness” requires “full and explicit notice of all prerequisites” before an application is dismissed). Blanca’s CA10 Brief 35-42.

Clear USF rules and *Western Wireless* authorized Blanca’s wireless exchange cost accounting and the FCC approved Blanca’s USF funding for years after accounting practice disclosure. There is nothing in the Record which shows that any of Blanca’s accounting forms limited the technology which Blanca could use in providing telephone exchange service. After directing Blanca down a path regarding USF accounting, the rug was abruptly pulled out from underneath. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148 (CA10 2016).

The lower court seeks to avoid the notice issue by “attribut[ing] to Blanca the specialized knowledge of a telecommunications carrier,” *Slip Op.* App. 36, finding that Blanca should have found the same “framework” prohibition as the FCC. Imputed expertise did not limit the pre-enforcement notice requirement in *Rocky Mt. Radar* or *General Electric*. Moreover, the lower court leaves unexplained why Blanca’s expert rule interpretation, based upon “a score” of plain text rules, *Slip Op.* App. 42, was ignored merely because it conflicted with the agency’s recently articulated “framework” rule issued to promote Respondents’ False Claims Act litigation.

### **3. FCC Conceded Lack of Notice**

The FCC weakly attempted to show timely rule notice, but instead demonstrated a lack of notice while conceding that there was no legislative rule violation and acknowledging that Blanca was authorized to interpret the USF rules. *FCC2* App. 117-18 ¶ 29 & n.73. Each of the four agency cases that *FCC2* relied upon were issued *after* Blanca's 2005-2010 accounting period and could not possibly have provided notice. The FCC also relied upon two mid-Twentieth Century Supreme Court cases, but both cases predate the USF by decades. Blanca's CA10 Brief 36-37. Respondents' CA10 Brief 9 n.5 conceded that from 1997-2011, covering the entire 2005-2010 accounting period at issue, the USF rules allowed wireless cost reimbursement to LECs like Blanca.

The lower court determined that the 2013 NECA settlement provided notice to Blanca, *Slip Op.* App. 37 n.17, despite finding that USAC and NECA are private parties which are unable to speak for the FCC or settle Government claims, *Slip Op.* App. 41, and failing to address the fact that notice in 2013 was not notice prior to 2005. Moreover, the lower court failed to explain why it was proper for the FCC to sit on its hands for five years after Blanca's 2008 accounting practice disclosure, as Blanca continued to receive USF reimbursement, and for another three years after the 2013 NECA settlement.

#### **4. The OIG's Silence**

The Government attempted to create an OIG-based USF funding disallowance, where none exists, when “the FCC claimed to be acting on an audit by the Office of Inspector General.” *Slip Op.* App. 27. The FCC’s “claim” notwithstanding, it is undisputed that the OIG issued no audit report and there is no OIG audit report in the Record. The lower court does not explain how the FCC could have relied and acted upon, literally, nothing. Moreover, the civil forfeiture plainly disclaims OIG reliance stating that the “determination is based on the information you [Blanca] either provided or were unable to provide,” and on that basis the FCC preemptively and improperly denied Blanca access to the FCC’s records. *FCC1* App. 169. The Record is clear that the civil forfeiture is not supported by the OIG.

The OIG is the only FCC official designated by the DCIA to audit and disallow Blanca’s USF funding. 31 U.S.C. § 3701(b)(1)(C). The OIG’s five year audit did not disallow a single penny of Blanca’s USF funding and the only reasonable assumption is that the OIG found nothing wrong. Even if the USF funding had been properly disallowed by OIG, mid-level FCC staff employees are not authorized by the DCIA to issue civil forfeitures and it was plain error for the reviewing court to have found otherwise. *FCC2* App. 146 ¶ 53; Blanca’s CA10 Brief 8, 22, 28, 37, 38, 44, 51.

### **B. Improper Burden Shifting**

Rule enforcement deference improperly shifts the burden from the agency proving a past rule violation, to the target proving an unreasonable agency rule interpretation. The FCC’s novel rule enforcement procedure required Blanca to prove the unreasonableness of the FCC’s “framework” explanation. *Slip Op.* App. 46-47. Rule violation proceedings do not measure the reasonableness of new rule interpretations, they point to a specific rule violation.

## **II. AGENCY DEBT ADJUDICATION: CIRCUIT CONFLICT**

The lower court affirmed civil forfeiture as “pure debt collection.” *Slip Op.* App. 21. However, the DCIA

authorizes the establishment of offsets to pay down pre-existing debt that has been established by order of court or that has been acknowledged by a debtor by partial payment of a forfeiture issued after a notice of apparent liability. The DCIA does not rewrite Section 503 of the Communications Act. . . .

Record 14-16, 30-33, 100-01; 47 C.F.R. § 1.1901(e).

Two circuits hold that Federal agencies lack authority to issue money judgments. The Federal Circuit holds that the DCIA “does not give the United States a freestanding mechanism to create a debt.” *Agility Public Warehousing v. U.S.*, 969 F.3d 1355, 1364 (CAFC 2020). The Ninth Circuit holds that the FCC “has no ability to control the USF through direct seizure.”

*USAC*, 463 F.3d at 1071. The DCIA does not authorize the FCC to adjudicate USF debt claims using any type of procedure. Record 32-33, 171-72, 277-78, 338-39.

The USF is funded by carrier contributions, not by tax receipts, the FCC does not directly administer distribution of USF funds, and USF funds are not federal funds. *Shupe*, 759 F.3d at 381, 388; *USAC*, 463 F.3d at 1066. USF administration does not implicate governmental power because USAC and NECA are private parties and they cannot settle Government debt claims. *Slip Op.* App. 41; *Farmers Tel. Co.*, 184 F.3d at 1250. However, USAC and NECA routinely resolve USF financial claims. *FCC2* App. 151 (“USAC has been attempting to recoup certain overpayments from a decade ago”). Even if the DCIA authorized civil forfeiture, given the lower court’s reasoning that USAC and NECA lack authority to act on behalf of the Government, but also given that USAC and NECA routinely resolve USF financial claims, USF financial claim resolution is a private affair which cannot implicate the DCIA. Record at 277-78.

### **III. LIMITATIONS: *KOKESH & LIU***

The June 2016 civil forfeiture assesses \$150,000+ in explicit penalties. Record 348 (the FCC’s June 2, 2016 “Bill for Collection” assessing “DCIA” and “PEN” penalties). On April 20, 2018 USAC assessed a “DCIA Penalty Adjustment” of \$754,328.28 and a “Late Payment Fee Adjustment” of \$125,721.38. USAC is imposing monthly “HC Penalty” and “HC Interest” charges.

That's over \$1 million in Federal financial penalties. Blanca's CA10 Motion to Correct and Supplement the Record Pacer pages 15, 40. These penalties were assessed even though the FCC's financial records show no outstanding debt, Record 367, and even though the FCC asserts that USAC does not act on behalf of the Government. *Slip Op.* App. 41.

The FCC's USF audits "detect and deter waste, fraud, and abuse" and uncover statutory and rule violations "for prosecution under the False Claims Act." FCC2 App. 129 n.106; Record 53 (October 2015 Public Notice). Even with USF funding, Blanca's wireless exchange was only "marginally" profitable, yet the civil forfeiture disgorges all USF funding. Blanca's CA10 Brief 10; Blanca's CA10 Reply Brief 12 citing Record 28.

Blanca produced numerous FCC statements made over the course of years evidencing multiple law enforcement purposes served by the civil forfeiture, including rooting out "waste, fraud, and abuse" and otherwise protecting the public and competitors. Blanca's CA10 Brief 14, 28, 31, 35, 39, 48 & n.22, 49. The FCC explicitly acknowledged that Blanca's civil forfeiture constituted "enforcement activity." Blanca's CA10 Reply Brief 15. The lower court dismissed these multiple admissions as "a single, passing reference" without explaining why even a single acknowledgment of law enforcement purpose should be ignored. *Slip Op.* App. 25.

The FCC’s action against Blanca is plainly punitive and the lower court erred by holding the statute of limitations inapplicable. *Kokesh*, 137 S. Ct. at 1643 (“sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive”); *Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020) (disgorgement is punitive if it fails to account for legitimate expenses and extracts more than net profits); *U.S. v. Bank*, 965 F.3d 287, 294 (CA4 2020) (“disgorgement is a penalty for statute of limitations purposes”); *U.S. v. Reed*, 908 F.3d 102, 126 (CA5 2018) (“§ 2462 governs *civil* forfeitures”) (emphasis in original). Blanca’s CA10 Brief 47-50; Blanca’s CA10 Reply Brief 21-23; Blanca’s CA10 Petition for Rehearing and Rehearing En Banc 8-14.

#### **IV. NATIONAL IMPORTANCE**

##### **A. FCC Admits USF Error**

Universal service is a foundation of the Communications Act. 47 U.S.C. §§ 151, 254(b). Direct beneficiaries of USF funded telecom and broadband services include high cost areas, schools, libraries, and rural health care clinics. More than 9 million people and organizations receive telecom and information services from USF reimbursed carriers. In 2020 the USF reimbursed carriers approximately \$8.3 billion, approximately \$5 billion of that funding was for the high cost program.<sup>7</sup> The FCC’s view is that everyone benefits from universal service.

---

<sup>7</sup> <https://www.usac.org/about/universal-service/faqs/general/>

With limited exception, all telecommunications companies pay into the USF. However, only state or FCC designated entities (Eligible Telecommunications Carriers – ETCs) receive funds from the USF. Colorado granted Blanca ETC status in 1997. *FCC1* App. 157-58 n.2. There is no technology limitation associated with Blanca’s ETC designation and Colorado authorizes Blanca to provide service using any available technology. 4 C.C.R. 723-2-2821(a).

The FCC has stated on at least three occasions that the USF program did not work as intended. “Confusion at the ground level” evidences the lack of “fair notice”. *SNR Wireless Licensco, LLC v. FCC*, 868 F.3d 1021, 1045 (CAFC 2016), *cert. den.*, 138 S. Ct. 2674 (2017). First, the FCC determined in 2011, after the 2005-2010 period at issue in this case, that its high cost “identical support” USF funding was misused by funding cellular carriers rather than to LECs. Respondents’ CA10 Brief 9 n.5 (“this rule ‘has not functioned as intended’”). Blanca is both a LEC and a cellular carrier and remained eligible for wireless exchange cost reimbursement even after the clarification.

Second, in October 2015, several months before the FCC issued the civil forfeiture in this case, the FCC issued a *Public Notice* which “clarified” that USF reimbursement was for “fixed and mobile” services, Record 53-58, and not for personal travel, political and charitable contributions, scholarships, etc. While Blanca did not rely upon a 2015 *Public Notice* in 2005, the point is that the FCC plainly acknowledged

retroactive USF policy concerns after Blanca's 2005-2010 accounting period had concluded.

Third, the FCC admitted, even as it penalized Blanca's purported rule violations, the FCC was still attempting to update its USF funding rules "to delineate what types of expenses cannot be funded through universal service or allowed in the rate base." *FCC2* App. 150. This admission concedes the FCC's confusion sown by its USF rules and *Western Wireless*.

The OIG's five year audit didn't find any problem with Blanca's accounting during which time Blanca continued to receive USF reimbursements. The FCC's belated, over the top forfeiture order charged Blanca with "fraud" and criminal activity without a scintilla of supporting evidence. Respondents' CA10 Brief 47 n.17 (asserting "misappropriation"). Blanca has learned from the communications bar that civil forfeiture is routinely used to resolve USF accounting issues. *FCC2* App. 151 ("USAC has been attempting to recoup certain overpayments from a decade ago").

## **B. Rural Wireless Rendered Illegal**

Blanca isn't accused of using USF reimbursement for personal travel, or political or charitable contributions, or scholarships, or yachts, or golf memberships, etc. Blanca is faulted for using USF reimbursement to provide wireless exchange service to a high cost, remotely located, very poor area in southern Colorado. The lower court approved the FCC's conflation of

apparently fraudulent USF fund use with legitimate telecom related use.

The FCC did not conduct a rule violation proceeding before ordering a civil forfeiture for a decade-old accounting issue, but it knew eight years earlier how Blanca was using USF funding after it commenced a five year USF audit. Then one day, after approving Blanca's accounting practices for years in conformance with a "score" of rules and *Western Wireless*, a mid-level FCC staffer outside of the OIG's office decided that rural "last resort" wireless exchange service was no longer needed and issued a "ruinous" forfeiture order. *FCC1* App. 153. Record 15-16. No rulemaking proceeding supported the exercise of civil forfeiture authority. Blanca eventually terminated its wireless exchange service.

The FCC's "remedy" for Blanca's provision of *wireless* last resort telephone exchange service in 2005-2010 is an ongoing seizure of all of Blanca's current USF funding used for its *wireline* last resort telephone exchange service. In the FCC's haste to seize Blanca's property without procedure, the FCC utterly failed to consider to "the public interest harm which results when the FCC shuts down the carrier of last resort including its provision of 911 service." Record 15.

### **C. Inconsistent Appellate Review**

The lower court agreed that the novel civil forfeiture was "too little, too late," *FCC2* App. 149, finding that the FCC was "far from exemplary throughout its

investigation of and proceedings involving Blanca.” *Slip Op.* App. 13 n.9. However, the lower court’s deferential review failed to properly consider significant legal and factual flaws. *Kisor*. For instance, the lower court 1) ignored its own long established *Rocky Mt. Radar* precedent and failed to require fair notice of the “framework,” “truisms,” and industrial code applied to the 2005-2010 accounting period even after acknowledging the FCC’s failure to cite a legislative rule violation; 2) discounted numerous FCC assertions of public law enforcement/punitive purpose; 3) upheld the law enforcement purpose of preventing unfair competition via LEC cross-subsidization. *Slip Op.* App. 7-8, even though the same wireless USF funding was available to Blanca’s competitors under *Western Wireless* and it is Blanca who is being treated unfairly funding-wise; 4) ignored numerous FCC admissions that the USF program was materially flawed while holding Blanca responsible for corrective USF policy changes; 5) acknowledged a defective Record, but failed to require that the FCC produce record evidence of USF cost “misreporting;” 6) found that the forfeiture order was based upon a DCIA authorized OIG audit even though the Record does not contain any OIG report; 7) ignored the fact that monthly USF disbursals were remitted to Blanca for years after Blanca disclosed its accounting practice to the OIG, 8) attributed rule expertise to Blanca, *Slip Op.* App. 36, but discounted that expertise merely because Blanca’s view conflicted with the FCC’s rule interpretation issued years later to fix its False Claims Act case; 9) found that NECA is a private party with no governmental power, but found that NECA

could provide rule notice for the government; 10) allowed the FCC to misuse settlement information as admission of wrong doing; and 11) found that the DCIA authorizes USF claim adjudication even though A) the Record shows that there is \$0 of Federal debt, B) the FCC distanced itself from USF administration by disavowing the 2013 NECA settlement as private activity, C) USAC and NECA are private entities, not arms of the government, and day-to-day USF administration, including USF-related financial settlement, is not governmental action, and D) the DCIA exists to collect delinquent debt, it does not authorize debt adjudication.

---

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY E. WELCH, ESQ.

*Counsel of Record*

HILL AND WELCH

1116 Heartfields Drive

Silver Spring, MD 20904

welchlaw@earthlink.net

(202) 321-1448

*Counsel for Petitioner*