APPENDIX INDEX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BLANCA TELEPHONE COMPANY, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, Respondents.	Nos. 20-9510 and 20-9524

PETITION FOR REVIEW FROM THE FEDERAL COMMUNICATIONS COMMISSION (NOS. FCC 17-162 and FCC 20-28)

(Filed Mar. 15, 2021)

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Robert B. Nicholson and Adam D. Chandler, Attorneys, United States Department of Justice, with him on the brief), Federal Communications Commission, Washington, D.C., for Respondents.

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **BACHARACH**, Circuit Judges.

TYMKOVICH, Chief Judge.

Blanca Telephone Company is a rural telecommunications carrier based in Alamosa, Colorado. Its business ensures its customers have access to a basic level of telephone services in rural Colorado. To make this business profitable, Blanca must rely in part upon subsidies from the Universal Service Fund (USF), a source of financial support governed by federal law and funded through fees on telephone customers. And in order to receive subsidies from the USF, Blanca must abide by a complex set of rules governing telecommunications carriers.

The Federal Communications Commission[1] administers and enforces the rules governing distribution of USF support. Through an investigation begun in 2008 by the FCC's Office of Inspector General into Blanca's accounting practices, the FCC identified

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[1] We also refer to the FCC as the "agency" throughout the opinion.

overpayments Blanca had received from the USF between 2005 and 2010. According to the FCC, Blanca improperly claimed roughly $6.75 million in USF support during this period for expenses related to providing mobile cellular services both within and outside Blanca's designated service area. As we describe in more detail below, Blanca was entitled only to support for "plain old telephone service," namely land lines, and not for mobile telephone services. Following the investigation, the FCC issued a demand letter to Blanca seeking repayment. The agency eventually used administrative offsets of payments owed to Blanca for new subsidies to begin collection of the debt.

Blanca objected to the FCC's demand letter and sought agency review of the debt collection determination. During agency proceedings, the FCC considered and rejected Blanca's objections. Now, in its petition for review before this court, Blanca challenges the FCC's demand letter and subsequent orders on a number of grounds. Blanca claims the FCC's decision should be set aside for three reasons: (1) it was barred by the relevant statute of limitations, (2) it violated due process, and (3) it was arbitrary and capricious.

On review of the agency's record, we AFFIRM the FCC's decision. We conclude the FCC's debt collection was not barred by any statute of limitations, Blanca was apprised of the relevant law and afforded adequate opportunity to respond to the FCC's decision, and the FCC was not arbitrary and capricious in its justifications for the debt collection.

I. Background

A. Factual Background

1. The Regime Governing Blanca

In this appeal we must decide whether Blanca, a local exchange carrier (LEC) under federal law, could receive USF support for costs associated with providing mobile telephone services.[2] In order to proceed, we first describe the laws governing Blanca as of 2005.

Blanca and other telecommunications carriers are governed by a vast regulatory scheme. As telecommunications technology has become more advanced and complex, the laws and regulations governing such technology have tried to keep pace. And as the country's population has shifted geographically, with many trading rural for urban living, the laws and regulations have tried to account for these demographic changes as well.

Throughout the latter-half of the twentieth century, it became less economically feasible for traditional phone companies to provide services to rural customers. Faced with rugged terrain across open expanses, telecommunications carriers were wary to invest in and maintain expensive infrastructure. And given the sparse populations of many of these areas, the limited economies of scale also weighed against such investments.

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[2] Throughout the opinion, we interchangeably use the terms "mobile," "cellular," and "wireless" to describe this type of service.

The Telecommunications Act of 1996 was passed to address this shortage of quality telecommunications services in rural parts of the country. 47 U.S.C. § 254(b)(3) ("Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."). The Act sought to ensure that "universal service" was available to customers, regardless of where they lived. *Id.* Under the Act, Congress intended to incentivize carriers to serve rural customers by providing subsidies from the USF for services provided and infrastructure built in such high-cost areas. *See generally WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1267 (10th Cir. 2007) (discussing why the USF was created).

The USF is overseen by the FCC and administered by two private organizations. It is funded by mandatory contributions from carriers. 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(a). The FCC sets the rules for distributing the funds. 47 U.S.C. § 254(k). The Universal Service Administrative Company (USAC) is an independent, non-profit corporation that is responsible for establishing the procedures for monitoring and distributing funds. *See generally United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 381 (5th Cir. 2014) (describing the structure and function of USAC). USAC is also responsible for auditing carriers and providing

reports to the FCC. 47 C.F.R. §§ 54.707(a), (c). The National Exchange Carriers Association (NECA) is a membership organization of telecommunications carriers that collects and audits accounting reports from carriers. *See generally Farmers Tel. Co., Inc. v. FCC*, 184 F.3d 1241, 1246–45 (10th Cir. 1999) (describing the structure and function of NECA). USAC can obtain any reports submitted to NECA. 47 C.F.R. § 54.707(b).

As of 2005, USF funds could be distributed to eligible telecommunications carriers (ETCs) for certain types of expenses. *See* 47 U.S.C. § 254(e) (2002). States were given the authority to designate which carriers qualified as ETCs. 47 U.S.C. § 214(e)(2) (1997). And states also designated a service area for each carrier. *Id.* at § 214(e)(5).[3] The service area was used to determine a carrier's universal service obligations and support. *Id.*

Within each service area, a state could designate one eligible carrier as the incumbent LEC. 47 C.F.R. § 51.5 (2005); *see also* 47 U.S.C. § 153(26) (1997) (defining LECs as companies "engaged in the provision of telephone exchange service or exchange access," but not "engaged in the provision of commercial mobile service . . . except to the extent that the Commission finds that such service should be included in the definition of such term"). Other carriers designated as ETCs by the state, but allowed to operate in an incumbent's

[3] The area in which a rural carrier operates is also referred to as a "study area." 47 U.S.C. § 214(e)(5). We use the two terms, service area and study area, interchangeably when discussing Blanca.

service area, were considered competitive ETCs. *Id.* at § 54.5 (2005).

Congress did not intend for the USF to act as an unrestricted fund for eligible carriers to be distributed for any conceivable expense incurred while providing telecommunications services. Rather, "[a] carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e) (2002). For instance, "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." *Id.* at § 254(k); *see also* 47 C.F.R. § 64.901(c) (2002) (reiterating the same prohibition on cross-subsidization specifically for incumbent LECs). To ensure USF support was only used for its intended purposes, the FCC implemented accounting rules for the various types of eligible carriers. 47 U.S.C. § 254(k) (2002) ("The Commission . . . and the States . . . shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.").

The FCC implemented one set of accounting rules for incumbent LECs. Under these rules, incumbent carriers had to differentiate between expenses related to regulated and unregulated activities in their accounting. *See* 47 C.F.R. § 32.14 (2002). Regulated accounts would include expenses incurred for providing services to which a tariff filing requirement applied. *Id.*

at § 32.14(a). And nonregulated accounts were for "[p]reemptively deregulated activities and activities . . . never subject to regulation." *Id.* at § 32.23(a) (1999). When an expense involved both regulated and nonregulated activities, the carrier still had to allocate the costs attributable to each for accounting purposes. *Id.* at § 32.23(c); *see also id.* at § 64.901(a) (describing method for separating regulated from nonregulated costs). The incumbent carrier's expenses were then reported to NECA, detailing what services it provided. *Id.* at § 36.611 (2001); *id.* at § 69.601(c) (1995) (requiring all incumbent carriers to certify the accuracy of their reports to NECA); *see also In re Jurisdictional Separations and Referral to the Federal-State Joint Bd.*, 16 FCC Rcd. 11382, 11384–85 (2001) (describing the accounting process for incumbent carriers). From the outset, the FCC made clear that these "cost allocation rules are designed to prevent cross-subsidization of non-regulated activities." *In the Matter of Implementation of the Telecomms. Act of 1996: Accounting Safeguards Under the Telecomms. Act of 1996*, 11 FCC Rcd. 17539, 17565 (1996).

By contrast, competitive ETCs were governed by different accounting rules. 47 C.F.R. § 54.307(b) (2005). These carriers could receive identical support to the local incumbent for services provided in an incumbent carrier's service area. And this included funding for both fixed and cellular services. *Id.* at § 54.307(a); *see also In re Federal-State Joint Bd. on Universal Serv.*, 16 FCC Rcd. 11244, 11314 (2001) (clarifying that competitive eligible telecommunications carriers providing

mobile services could use a subscriber's billing address for purposes of determining USF support); *In the Matter of High-Cost Universal Serv. Support*, 23 FCC Rcd. 8834, 8843–44 (2008) (explaining that the FCC never intended identical support to be used to subsidize wireless services, although that was how most competitive carriers used it). To receive USF support, competitive carriers needed to report to USAC the number of customers they served in an incumbent LEC's service area. 47 C.F.R. § 54.307(b) (2005). They did not need to allocate costs between regulated and nonregulated activities.

As of 2005, cellular services were considered nonregulated for accounting purposes. *See In the Matter of Amendment of the Comm'n Rule to Establish Competitive Serv. Safeguards for Local Exchange Carrier Provision of Com. Mobile Radio Servs.*, 12 FCC Rcd. 15668, 15691 (1997) ("The cost allocation rules, included in parts 32 and 64 of the Commission's rules, provide a basic framework for separating costs between LEC's regulated activities (such as provision of local exchange service) and nonregulated activities (such as provision of wireless service)."); *see id.* at 15691 n.102 ("The Commission has chosen to forbear from rate regulation of wireless services.").[4] As a result, incumbent

[4] Blanca insists cellular services were regulated because they were subject to mandatory tariff requirements under Colorado law. The Colorado law Blanca cites to, 4 CCR 723-2-2122, does not transform cellular services into a regulated service for federal accounting purposes. To be sure, the federal regulations say state tariff requirements can cause an account to be treated as regulated. 47 C.F.R. § 32.14(b) (2002). But such accounts will

LECs had to treat expenses associated with cellular services as nonregulated for accounting purposes.[5]

Incumbent LECs could receive USF support for one category of cellular services: basic exchange telecommunications radio services (BETRS). BETRS was a type of mobile radio service intended as a gap-filler for areas with particularly rough terrains. *See* 12 FCC Rcd. at 15710–11 ("We also believe that rural LECs may find it economical to use [commercial mobile radio services] licenses to provide fixed wireless services in remote areas as an alternative means of extending the local exchange network to unserved or hard to serve areas."). Rather than having a wired connection, the company would use BETRS to provide a customer with basic telephone service. The FCC's order made clear

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not be treated as regulated "where such treatment is proscribed or otherwise excluded from the requirements pertaining to regulated telecommunications products and services by this Commission." *Id.* Federal law explicitly preempts state rate-regulation of cellular services. *See* 47 U.S.C. § 332(c) (1996). And, as the cited orders make clear, the FCC intended cellular services to be treated as nonregulated. 12 FCC Rcd. at 15691.

[5] The prohibition on USF support for cellular services for incumbent LECs was more explicit for a subset of these carriers. Some incumbent LECs had to establish subsidiaries to handle their commercial mobile radio services. 12 FCC Rcd. at 15672. This subsidiary requirements was intended to further protect against cross-subsidization. *Id.* at 15689 ("Improper cost allocation occurs when a LEC subsidiary shifts costs from its [commercial mobile radio services] to its regulated local exchange service."). Blanca, as a rural carrier, was exempt from the subsidiary requirement. *Id.* at n.11. But Blanca was not exempt from the reporting requirements intended to prevent against such cross-subsidization.

that BETRS was considered a fixed service and distinct from other cellular services. *See In the Matter of Amendment of the Comm'n Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Servs.*, 11 FCC Rcd. 8965, 8987 (1996) ("[W]e have determined that BETRS is a fixed service, rather than mobile service, and therefore BETRS providers are not subject to [commercial mobile radio services] regulations under Section 332."). As a result, costs associated with BETRS were considered regulated for accounting purposes.

2. Blanca's Conduct

Blanca is a telecommunications provider based in Alamosa, Colorado. It was originally incorporated in 1926. In 1997, Colorado designated Blanca as an incumbent LEC for parts of Alamosa and Costilla counties. Neither the FCC nor the state ever designated Blanca as a competitive ETC. And Blanca never submitted any of the reports required of a competitive ETC to claim identical support from the USF.

Starting in 2005, Blanca claimed USF support for all of its services, both fixed and cellular. And Blanca claimed USF support for expenses incurred both within and outside its study area.[6]

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[6] There is some inconsistency regarding whether Blanca's services were BETRS. In its petition for reconsideration to the FCC, Blanca insisted that the FCC previously "authorized Blanca's BETRS service using cellular technology by rule." R., Vol. II at 334–35 (citing *In the Matter of Revision of Part 22 of the*

Blanca submitted its costs studies from 2005 onward to NECA. In 2012, NECA conducted a review of Blanca's 2011 cost study. And in 2013, NECA concluded that Blanca had impermissibly received USF support for costs incurred while providing nonregulated services, *i.e.*, cellular service. NECA advised Blanca to revise the 2011 cost study and any subsequent studies in which Blanca had failed to allocate its costs. Blanca then hired a cost consultant to review and revise Blanca's submissions from 2011 and 2012. Blanca eventually reached a settlement with NECA in 2013 based on overpayments identified in the revised cost studies.[7]

Commission's Rules Governing the Mobile Servs., Report and Order, 9 FCC Rcd. 6513, 6571 (1994)). But in its initial petition for agency review, Blanca claimed that it updated its previous BETRS system to new cellular technology and only continued using the term BETRS out of convenience. *See* R., Vol. I at 26 (explaining that, for its accounting, "Blanca continued use of the BETRS name merely for continuity purposes."). It also argued that "the BETRS discussion is a red herring" because "USF funding is available for mobile cellular services." *Id.*

Blanca misunderstands the FCC's position on BETRS. The FCC maintains it never authorized Blanca to treat all its cellular services as BETRS. It explains that Blanca improperly relied on an order that "only adopted a proposal to eliminate a prohibition on the offering of non-BETRS fixed service in cellular bands." R., Vol. II at 405. Leading up to 2005, the FCC's position was that BETRS was strictly a fixed service. *See* 11 FCC Rcd. at 8987.

[7] This settlement only covered a 24-month period from 2011 to 2012. By contract with its members, NECA is only authorized to conduct "true-up" processes for up to a 24-month window.

3. The FCC's Investigation into Blanca

The FCC first began investigating Blanca's accounting practices in 2008. The following year, the FCC's Office of Inspector General issued subpoenas to Blanca for reports, filings, and correspondence that Blanca filed with NECA and USAC regarding USF support. After Blanca's settlement with NECA, the FCC eventually concluded Blanca had improperly reported and received overpayments from the USF from 2005 to 2010.[8] In particular, Blanca claimed and received USF support for nonregulated services both within and outside of Blanca's study area. The FCC relied on the same methodology employed by Blanca's cost consultant in the NECA settlement to identify the amount of the overpayments.

In 2016,[9] the FCC's Office of Managing Director issued a demand letter to Blanca, identifying the overpayments and requesting repayment. In particular, it faulted Blanca for "charateriz[ing] its cellular stations as Basic Exchange Telephone Relay Service (BETRS) facilities in its [cost studies]" and, by including cellular

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[8] At one point, the FCC turned the case over to the Department of Justice to consider a possible claim under the False Claims Act. The Department never acted on this referral.

[9] While we affirm the FCC's decision, the agency has been far from exemplary throughout its investigation of and proceedings involving Blanca. For instance, the agency's commissioners acknowledged this action came far later than it should have. Commissioner O'Reilly said of the action against Blanca, "I am concerned . . . that the troubling conduct at issue here occurred between 2005 and 2010, was not discovered until 2012, and is only now being remedied. We must do better." R., Vol. II at 317.

service costs in its reports, "fail[ing] to comply with Parts 64, 36 and 69 of the FCC's rules." R., Vol. I at 2. These accounting practices "resulted in inflated disbursements to Blanca from [the USF]." *Id.* Reviewing books and records obtained through the earlier subpoenas, the FCC determined Blanca owed $6,748,280 from USF overpayments. The letter also indicated that Blanca could challenge the finding by submitting evidence to the FCC within 14 days of receiving the letter.

B. Procedural Background

Blanca petitioned the FCC for review of the Managing Director's demand letter. It challenged the letter's findings on multiple grounds. Most significantly, Blanca argued the FCC's demand letter did not afford it the due process required under law. In 2017, the FCC issued an order in response to Blanca's petition, rejecting Blanca's claims and affirming the demand letter. Following this order, the FCC initiated collection of the debt from Blanca through administrative offsets, withholding USF support to which Blanca was otherwise entitled.

At the end of 2017, Blanca petitioned the FCC again, this time for a reconsideration of the agency's order.[10] In January of 2020, Blanca brought a petition

[10] The current petition is not the first time Blanca has sought review from a federal court on this issue. In 2016, Blanca went to the D.C. Circuit, seeking a Writ of Prohibition. The D.C. Circuit denied Blanca's petition and did not retain jurisdiction. Blanca then sought a mandamus order and injunction from this court in 2017 to stop the FCC's debt collection through administrative

for review of the FCC's order to this court.[11] In March of 2020, the FCC affirmed the demand letter and order. Blanca then filed a new petition for review and a motion to supplement the record based on the FCC's final order.[12]

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offset. Both the mandamus order and injunction were denied. In 2018, Blanca then petitioned this court for review of the FCC's first order. A panel of this court dismissed the petition on jurisdictional grounds, concluding that because the FCC was still considering Blanca's petition on reconsideration, there was no final agency action to review. Later in 2018, the FCC petitioned this court for review again and the petition was again dismissed on jurisdictional grounds.

[11] We had asked Blanca and the FCC to brief the jurisdictional issues for Blanca's January 2020 petition, 20-9510. The parties completed briefing prior to the FCC's final order. Most of the issues raised in 20-9510 were mooted by the FCC's final order on reconsideration. *See N.M. Health Connections v. U.S. Health and Human Servs.*, 946 F.3d 1138, 1158 (10th Cir. 2019) (explaining that when an agency eliminates the issues on which petition for review is based, those issues are rendered moot). In particular, Blanca had sought to compel the FCC to act (issue the final order) and sought review of whether the FCC acted within its statutory authority in its collection efforts. With the FCC's final order and Blanca's new petition, 20-9524, we now have a final agency action and a full record to evaluate.

[12] We deny Blanca's motion to supplement the record. We presume the agency's record is complete absent clear evidence to the contrary. *See Citizens for Alts. to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007). We will allow extra-record evidence that the agency did not consider during proceedings in very limited circumstances, including where a party's standing is at issue. *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1165 (10th Cir. 2012). The FCC has conceded Blanca's standing, so it is unnecessary to consider Blanca's extra-record evidence.

II. Standard of Review

In evaluating the FCC's actions, we must bear in mind two different standards of review.

A. Arbitrary and Capricious Standard

In acting, the FCC must comply with the Administrative Procedure Act (APA). And the APA authorizes courts to review agency action. 5 U.S.C. § 704.

In particular, the APA directs courts to "set aside agency actions, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at § 706(2)(A). Arbitrary and capricious review by this court is narrow. *In re FCC 11-161*, 753 F.3d 1015, 1041 (10th Cir. 2014) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). We will not set aside the agency's action if it "is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *In re FCC 11-161*, 753 F.3d at 1041(internal quotation marks omitted). We must uphold the agency's decision as long as the agency's path may "reasonably be discerned." *Id.* (internal quotation marks omitted).

B. De Novo Standard

Blanca also contends the FCC violated its due process rights.

The APA requires us to "set aside agency actions, findings, and conclusions found to be . . . contrary to constitutional right." 5 U.S.C. § 706(2)(B). We review de novo any constitutional issues. *In re FCC 11-161*, 753 F.3d at 1041.

III. Analysis

Blanca suggests that we can reverse the FCC on any one of three grounds: (1) the agency did not act within the relevant statutes of limitations, (2) it violated Blanca's procedural rights established by statute and the Constitution, and (3) its orders were arbitrary and capricious. We address each issue in turn.

A. Did the FCC act within the applicable statute of limitations?

Blanca insists the FCC's action is time-barred. It points to two statutes that would preclude the FCC's action: 47 U.S.C. § 503 and 28 U.S.C. § 2462. According to Blanca, one of these statutes governs the FCC's action here and either statute would prevent the FCC from taking punitive actions against Blanca over a decade after the alleged violations occurred.

We do not agree. Rather, because the FCC's action is most properly characterized as debt collection, not punishment, the FCC had to comply with all requirements of the Debt Collection Improvement Act (DCIA), codified at 31 U.S.C. §§ 3711–17. The DCIA authorizes agencies to collect debts owed to the United States and

contains no limitations period preventing the FCC's debt collection.

1. Legal Standard

Our default rule is that the government claim will not be time-barred. *United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir. 1998). Congress must expressly set a statute of limitations to overcome this default rule. *Id.* When a party argues a government claim is barred by a statute of limitations, we must construe the statute in favor of the government. *Id.* at 1245.

The FCC and Blanca disagree about what statute should govern the agency's action. The FCC suggests its interpretation of the relevant statutes, and the applicability of those statutes to its decision, should control based on the deference owed to agencies under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

To determine whether an agency's interpretation of a statute is entitled to deference, we first determine whether the statute is ambiguous. *Chevron*, 467 U.S. at 842. If the statute is clear, we do not defer to the agency's interpretation. *Id.* at 842–43; *see also New Mexico v. U.S. Dep't of Interior*, 854 F.3d 1207, 1231 (10th Cir. 2017) (finding a statute clear, so declining to move to step two of the *Chevron* analysis). But if it is ambiguous or silent about the relevant issue, we defer to the agency's interpretation unless it is arbitrary, capricious, or manifestly opposed to the plain meaning of

the statute. *In re FCC 11-161*, 753 F.3d at 1041 (citing *Chevron*, 467 U.S. at 844).

We also do not give any *Chevron* deference to an agency's interpretation of statutes that are outside of the agency's expertise. *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145 (10th Cir. 2010) ("Courts do not . . . afford the same deference to an agency's interpretation of a statute lying outside the compass of its particular expertise and special charge to administer."). We review such statutes de novo. *Id.*

2. Application

Here, Blanca and the FCC each point to different statutes that they argue should apply here. Blanca insists the FCC must have acted under either 47 U.S.C. § 503 or 28 U.S.C. § 2462 in issuing the demand letter and initiating debt collection. The statutes require certain types of government actions to be brought either within one year, *see* 47 U.S.C. § 503(b)(6), or five years, *see* 28 U.S.C. § 2462, respectively—both of which would bar the FCC's actions toward Blanca. The FCC, though, says that its actions are authorized by the DCIA. And the DCIA contains no statute of limitations for administrative offsets. 31 U.S.C. § 3716(e)(1) ("Notwithstanding any other provision of law, regulation, or administrative limitation, no limitation on the period within which an offset may be initiated or taken pursuant to this section shall be effective.").

In its orders, the FCC interpreted each statute as it relates to recovering overpayments from Blanca. The

FCC argued it was not acting under 47 U.S.C. § 503. Rather, according to the orders, "[t]he commission or USAC has consistently sought recovery of USF funds outside of section 503 proceedings." R., Vol. II at 310. This is because "[n]either the plain language of section 503 of the Act nor its legislative history indicates that Congress intended that section to govern debt determinations." *Id.* The FCC also insists the collection is not pursuant to 28 U.S.C. § 2462, which governs penalties, not debt collection.

We do not afford the FCC any deference in interpreting the DCIA or 28 U.S.C. § 2462, because neither statute was specifically entrusted to the FCC to administer. *Hydro Res., Inc.*, 608 F.3d at 1146. Also, because 47 U.S.C. § 503 is not ambiguous about the type of agency action it covers, we do not afford the FCC's interpretation of it any deference. *New Mexico v. U.S. Dep't of Interior*, 854 F.3d at 1231. We review the statutes de novo.

Both 47 U.S.C. § 503 and 28 U.S.C. § 2462 authorize agencies to impose penalties against regulated entities that violate the law. Section 503 states that a person who willfully and repeatedly fails to comply with the FCC's rules or regulations "shall be liable to the United States for a forfeiture penalty." 47 U.S.C. § 503(b). Section 503 further clarifies that "[a] forfeiture penalty under this subsection shall be *in addition to* any other penalty provided for by this chapter." *Id.* (emphasis added). Section 503 is used to penalize above and beyond other remedies.

Section 2462 is not specific to any agency. It authorizes suits or proceedings by the United States to enforce civil fines, penalties, or forfeitures. 28 U.S.C. § 2462. The Supreme Court has made clear that § 2462 governs only actions that penalize. Fines, penalties, and forfeitures each "refer to something imposed in a punitive way for an infraction of public law." *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017) (internal quotation marks omitted).

The DCIA, by contrast, is aimed at pure debt collection. It authorizes agencies to collect "a claim of the United States government for money or property arising out of the activities of, or referred to, the agency." *See* 31 U.S.C. § 3711(a)(1). A claim is "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States." *Id.* at § 3701(b)(1). This includes overpayments, specifically "payments disallowed by audits performed by the Inspector General of the agency administering the program." *Id.* at § 3701(b)(1)(C). If the head of an agency attempts to collect a claim through the methods described in § 3711 to no avail, the agency may collect the debt through administrative offset. *Id.* at § 3716(a).

These statutes are not ambiguous. Sections 503 and 2462 apply to punitive agency action; the DCIA applies to debt collection of funds owed to the United States. In that light, we must answer two questions to determine which statute governs the FCC's collection efforts and which statute of limitations applies. First, do the FCC's actions constitute a penalty? Second, if

the action is not a penalty, are the overpayments from the USF "owed to the United States"?

a. Penalty or Debt Collection

The Supreme Court recently provided a framework for determining whether an agency action constitutes a penalty in *Kokesh*. *See* 137 S. Ct. 1635. The SEC had sought a disgorgement judgment against Kokesh for violations of federal law that occurred over an almost fifteen-year period. The district court ordered disgorgement of money illegally obtained during this time. On appeal, Kokesh argued the disgorgement operated as a penalty, so it should have been barred in part by the five-year statute of limitations in 28 U.S.C. § 2462. To decide whether the statute of limitations applied, the Court had to determine whether an SEC disgorgement was a penalty within the purview of § 2462.

To determine whether the SEC's disgorgement was punitive, the Court considered two guiding principles: (1) whether the agency's action is redressing a wrong to the public or to a private party and (2) whether the agency's action is taken for punitive purposes, *e.g.*, to deter others from committing a similar violation. *Id.* at 1642. The Court concluded the disgorgement was a penalty. The disgorgement was enforced against Kokesh for a violation of public laws, intended to deter future violators, and not strictly compensatory. *Id.* at 1643–44. Because the disgorgement carried the hallmark traits of a penalty, the SEC's

disgorgement was partially barred by the five-year statute of limitations in § 2462.

Blanca argues the FCC's action here is like the disgorgement in *Kokesh*. It asserts the collection effort is punitive because the violation was of a public accounting law and the FCC's ultimate purpose is deterrence. Blanca points to the demand letter and subsequent orders as proof of the action's true nature. The FCC identifies a goal of rooting out "fraud, waste, and abuse" throughout its orders. Opening Br. at 48. And the FCC identified the harms Blanca's actions caused the public and the marketplace.[13] The FCC also described the collection effort as "enforcement activity" in a later order. Reply Br. at 15 (citing *Memorandum and Opinion Order*, 34 FCC Rcd. 2590, 2600 (2019)).

In response, the FCC contends that it is not punishing Blanca. Rather, the debt collection is intended to do nothing more than return Blanca to "the status quo." Resp. Br. at 47. The FCC insists the mere "belief the sanction is costly or painful does not make it punitive." *Id.* (quoting *Telluride*, 146 F.3d at 1247).

We agree with the FCC that *Kokesh* does not compel us to conclude the reimbursements are a penalty.

First, we have previously concluded that just because a party violated a public law and because an

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[13] Blanca also argues that the FCC's referral of the matter to the Department of Justice in 2014 makes the action punitive. We do not agree. Simply because the FCC referred the matter to the Department to explore the possibility of an enforcement action does not make the debt collection punitive.

agency wants to protect the public through a subsequent action does not necessarily make that action a penalty. *See Telluride*, 146 F.3d at 1246 ("[W]e see no reason to include all wrongs to the public as penalties."). The Supreme Court's decision in *Kokesh* did not change that. The identity of the wronged party is just one guiding principle when deciding whether government action is punitive. The fact that Blanca's accounting violations wronged the public as opposed to a discrete private party does not decide the issue for us.

Looking to the second principle—the purposes underlying the FCC's actions—convinces us the collection efforts are not a penalty. The FCC's purpose was compensation for the overpayment. *Kokesh*, 137 S. Ct. at 1642 ("[A] pecuniary sanction operates as a penalty only if it is sought for the purpose of punishment . . . as opposed to compensating a victim for his loss.") (internal quotation marks omitted). In the orders, the FCC sought only repayment of the amount overpaid out of the USF to Blanca.[14] The fact that it also identified how its action might protect the public or marketplace from harm does not transform the underlying nature of the action. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 662–63 (1985) ("Although recovery of

[14] Blanca has drawn our attention to the fact that the FCC has increased the amount owed since litigation began, adding $3.5 million to the original $6.75 million debt. Blanca says this amount is made up of "explicit penalties." Opening Br. at 49. We do not think late fees or the inclusion of interest transforms the FCC's action into a penalty. The fact that the government assesses a late fee does not alter the underlying purpose of the FCC's action. It is simply a recognition of the time-value of money.

misused . . . funds clearly is intended to promote compliance with the requirements of the grant program, a demand for repayment is more in the nature of an effort to collect upon a debt than a penal sanction.").

Blanca's arguments about the FCC's self-description of the collection efforts as "enforcement activity" and as aimed at rooting out "waste, fraud, and abuse" are unavailing. A single, passing reference to the collection as an "enforcement activity" does not transform it into a penalty. And while the FCC used the phrase "waste, fraud, or abuse" at times to describe its justification for undertaking audits and investigations, it also stressed that the present action was solely to recover USF support improperly disbursed, *not* to punish for waste, fraud, or abuse. *See*, *e.g.*, R., Vol. II at 311 ("Here the Commission is merely seeking to recover sums improperly paid.").

b. Funds Owed to the United States

Even if the collection effort is not a penalty, we must ensure the FCC is collecting "funds . . . owed to the United States." 31 U.S.C. § 3701(b)(1).

The FCC has interpreted the DCIA to cover overpayments from the USF. *See* 47 C.F.R. § 1.1901(b). But the FCC has no particular experience in interpreting the DCIA, so we do not defer to the FCC's interpretation. Rather, we review de novo whether overpayments from the USF fall within the DCIA.

Blanca contends USF overpayments are not funds owed to the United States. According to Blanca, the DCIA does not apply here because the USF is funded by contributions from carriers. So, any overpayments out of the fund would be owed directly to the USF, not to the United States.

Blanca points to an out-of-circuit case to bolster its argument. *See United States ex rel. Shupe v. Cisco Sys.*, 759 F.3d 379 (5th Cir. 2014). In *Shupe*, the Fifth Circuit had to determine whether a party had violated a previous version of the False Claims Act, 31 U.S.C. § 3729 (2008), by lying on applications for USF support. A person violated the False Claims Act if he "knowingly ma[de], use[d], or cause[d] to be made or use[d], a false record or statement to get a false or fraudulent claim paid or approved by the government." 31 U.S.C. § 3729(a)(2) (2008). And it defined "claim" as "any request . . . for money . . . if the United States Government provides any portion of the money." *Id.* at § 3729(b) (2008).

In *Shupe*, the Fifth Circuit determined the United States government did not provide any portion of the money for the USF, so the defendant could not be prosecuted under the False Claims Act. In coming to this conclusion, the court emphasized the control USAC exercises over the USF and the fact that the statute did not extend to funds overseen by such private parties. 759 F.3d at 387–88. The FCC's regulatory supervision of the USF was insufficient to consider payments made from it as "provided by the United States." *Id.* at 388.

Shupe does not dictate our decision here. We face a different statutory scheme with different language. While the False Claims Act limited a claim to money that the United States provides any portion of, the DCIA defines claim more expansively. It expressly includes overpayments "disallowed by audits performed by the Inspector General of the agency administering the program." 31 U.S.C. § 3701(b)(1)(c). The overpayments at issue fall within that description.

Blanca asserts the DCIA does not apply because the FCC's Inspector General did not produce a formal audit or adverse finding. It faults the FCC for issuing the demand letter through the Managing Director rather than the Inspector General. But in both the demand letter and orders, the FCC claimed to be acting on an audit by the Office of Inspector General. *See* R., Vol. I at 1–2 ("Our determination follows an investigation by the FCC's Office of Inspector General."); *see also* R., Vol. II at 299 ("Based on its investigation and review of documentation provided by Blanca, [the Office of Inspector General] concluded that Blanca had misallocated costs between its CMRS and wireline services."). Here, the FCC's Office of Inspector General conducted an investigation and concluded Blanca had misallocated costs. This is enough to bring the overpayments within the scope of the DCIA.

* * *

The FCC's action is not barred by a statute of limitations. While Blanca argues the FCC was statutorily barred from collecting the overpayments, the statutes

on which it relies do not apply. Rather, the overpayments are covered by the DCIA, which has no statute of limitations for administrative offsets.

B. Did the FCC violate Blanca's due process rights?

Blanca also claims the FCC did not comply with statutory and constitutional procedural requirements in initiating the debt collection. Specifically, Blanca argues the FCC engaged in a summary adjudication that gave Blanca insufficient notice and no meaningful opportunity to respond. In addition, Blanca insists that the laws, regulations, and orders in place as of 2005 failed to give it fair notice that its conduct was prohibited.

Blanca fails to establish a due process violation. Although the underlying regime governing USF distributions is complex, Blanca had adequate notice that it could not receive USF funding for providing cellular services. Furthermore, in identifying the rules violated and starting the debt collection process, the FCC provided all the process required by statutes and the Constitution.

1. Legal Standard

a. Statutory Process

The APA "expressly provides for two categories of administrative hearing and decision: rulemaking and adjudication." *Phillips Petroleum Co. v. Federal Power*

Comm'n, 475 F.2d 842, 851 (10th Cir. 1973). And it identifies procedures agencies must provide for each type of action.

Here, the FCC acted through an informal adjudication. It has very broad discretion to decide whether to proceed through adjudication or rulemaking when "interpreting and administering its statutory obligations under the [Telecommunications Act]." *Conf. Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). It is appropriate for an agency to use informal adjudications in making individualized determinations. *See Sinclair Wyo. Refining Co. v. EPA*, 887 F.3d 986, 992 (10th Cir. 2017); *see also Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017–18 (D.C. Cir. 2017) (stating that adjudications characteristically are "highly fact-specific, case-by-case" proceedings).

Procedurally, the APA imposes "minimal requirements" on informal adjudications. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990). The agency must only notify a party that it is denying a petition and provide the grounds for denial. 5 U.S.C. § 555(e); *see also Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d. 1183, 1197 (10th Cir. 2014) ("When an agency undertakes an informal adjudication, we require only that the grounds upon which the agency acted be clearly disclosed in, and sustained by, the record.") (internal quotation marks omitted and alterations incorporated).

Beyond the APA, the DCIA also has its own procedural requirements.[15] In order to use administrative offsets to recover debt, the agency must give the debtor: (1) written notice of the type and amount of the claim, the intention to collect the claim by administrative offset, and an explanation of the debtor's rights; (2) an opportunity to inspect and copy the agency's records regarding the claim; (3) an opportunity for review by the agency of the claim decision; and (4) an opportunity to make a written agreement with the agency head to repay the claim. 31 U.S.C. § 3716(a). If an agency "previously has given a debtor any of the required notice and review opportunities with respect to a particular debt, the agency need not duplicate such notice and

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[15] Blanca also insists that the FCC failed to comply with the procedural requirements of 47 U.S.C. § 503(b)(4). Section 503 requires the FCC to provide notice of apparent liability prior to imposing a forfeiture penalty. This requirement is inapplicable here. As previously discussed, *see supra*, III.A, we believe Blanca's actions are governed by the DCIA, not § 503.

This also resolves another of Blanca's arguments: that the FCC treated it differently than similarly-situated telecommunications carriers, who received notices of apparent liability prior to FCC proceedings. Blanca is comparing apples and oranges. The other carriers were treated differently because they were subject to forfeiture proceedings under 47 U.S.C. § 503. The FCC has made clear that in the proceedings Blanca references, the FCC "invoked the forfeiture process only to seek penalties in addition to, and separate from, seeking repayment (and indeed after the companies at issue had already returned the improper payments)." Resp. Br. at 39. The differential treatment was appropriate.

review opportunities before administrative offset may be initiated." 31 C.F.R. § 901.3(b)(4)(iv).[16]

b. Constitutional Due Process

The Fifth Amendment also requires the federal government to provide a baseline level of due process when depriving a person of life, liberty, or property. U.S. Const. amend V. Procedural due process requires fair notice that conduct is prohibited and, prior to a deprivation, meaningful notice and opportunity to be heard. We discuss the contours of each aspect of due process below.

First, due process requires the government to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" before withdrawing a benefit. *United States v. Richter*, 796 F.3d 1173, 1188 (10th Cir. 2015) (internal quotation marks omitted). "A fundamental principle in our legal system

[16] We note that Blanca made brief reference to another alleged procedural deficiency through a one-line footnote in its opening brief. Specifically, Blanca insists the FCC violated its own rules by beginning debt collection prior to the end of litigation. *See* Opening Br. at 34 (citing 47 C.F.R. § 1.1910(b)(3)(i)). But Blanca does not explain why, on its theory, § 1.1910(b)(3)(I) should even apply in this case. This regulation applies only to debt collection made under the DCIA. And Blanca has specifically maintained throughout litigation that the FCC did *not* act pursuant to the DCIA. Blanca has not argued before us, even in the alternative, that the DCIA applies here. Therefore, we conclude that Blanca has waived this argument. *See Fuerschbach v. Sw. Airlines Co.*, 439 F.3d 1197, 1209–10 (10th Cir. 2006) (inadequately briefed and underdeveloped theories are waived).

is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Due process requires fair notice for two reasons. First, regulated parties need to know what is required of them so they may act accordingly. *Id.* Second, it prevents officers or agencies who enforce the law from acting in an arbitrary or discriminatory manner. *Id.*

Fair notice concerns will arise "when an agency advances a novel interpretation of its own regulation in the course of a civil enforcement action." *United States v. Magnesium Corp. of America*, 616 F.3d 1129, 1144 (10th Cir. 2010). It would be inappropriate for an agency, having long acquiesced in practice to one interpretation, to manufacture liability by retroactively applying a new interpretation. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) ("To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires.") (internal quotation marks and brackets omitted).

That being said, fair notice does not require an agency to publish an easily digestible, abridged version of its rules. Technical and complex regulations are often necessary to govern the conduct of parties involved in complex affairs. Thus, the requirements of due process are understood through the lens of parties with special knowledge because we refer to "the common understanding of that group" to measure whether the

party had fair notice. *Richter*, 796 F.3d at 1189. When regulations are addressed to such groups, "the standard is lowered and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them." *Id.* No one doubts the complexity of telecommunications regulations and the famously detailed rules that apply to carriers operating in that environment.

Second, due process requires the government to provide "notice and opportunity for hearing appropriate to the nature of the case" prior to deprivation. *Riggins v. Goodman*, 572 F.3d 1101, 1108 (10th Cir. 2009) (internal quotation marks omitted). Notice and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). "If the right to notice and a hearing is to serve its full purpose . . . it must be granted at a time when the deprivation can still be prevented." *Id.* at 81. But this does not mean a hearing must be held before the agency's *decision* to deprive. *See Riggins*, 572 F.3d at 1111 ("[D]ue process is required not before the initial decision or recommendation to terminate is made, but instead before the termination actually occurs.").

2. Application

a. Statutory Process

The FCC complied with the relevant procedural requirements of both the APA and the DCIA.

First, the FCC fulfilled the requirements for an informal adjudication by providing Blanca with notice of its intention to collect the repayments and grounds for that decision. The initial demand letter satisfied the APA by identifying the FCC's decision and the reasons for that decision. The demand letter pointed to the relevant accounting regulations and described Blanca's conduct that had violated those regulations. The FCC's subsequent orders did the same.

The FCC also fulfilled the procedural requirements of the DCIA. In the demand letter, the FCC informed Blanca of the type and amount of the debt and its intention to collect. It gave Blanca an opportunity for review and to make an agreement with the agency's head on repaying the claim. While the FCC did not give Blanca an opportunity to review the agency record in the FCC's possession, it informed Blanca it had relied only on documents Blanca itself had submitted. Blanca already had the entire record in its possession. Because these documents were in Blanca's possession, the FCC did not need to give Blanca an additional opportunity to review them.

b. Constitutional Due Process

Blanca also claims it did not have fair notice that its conduct was prohibited. And it insists the demand letter and subsequent orders did not provide the meaningful notice and opportunity to be heard that due process requires.

According to Blanca, the rules, orders, and regulations in place as of 2005 did not make clear that cellular services were ineligible for USF support. Rather, Blanca argues the demand letter and FCC orders were the first time the FCC interpreted the regulations in such a way to make Blanca's conduct illicit. As far as Blanca is concerned, the FCC's 2016 demand letter was a summary adjudication that in one fell swoop told Blanca its accounting practices were unlawful and that it was being punished for those practices. If Blanca's characterization was accurate, it would squarely implicate fair notice concerns.

But Blanca misconstrues the state of the law in 2005. The FCC's rules and orders were clear about limits on USF support for cellular services. As an incumbent LEC, Blanca had to allocate its costs between regulated and nonregulated accounts. 47 C.F.R. § 32.14 (2002). Cellular services were considered nonregulated, *see* 12 FCC Rcd. at 15691, so Blanca had to separate these costs from its other expenses. The FCC had previously explained that these accounting rules were intended to prevent carriers from using USF support to subsidize their nonregulated services. 11 FCC Rcd. at 17565. Yet Blanca failed to properly allocate its regulated and nonregulated expenses.

Furthermore, Blanca could only receive USF support for services provided in its designated service area. 47 U.S.C. § 214(e)(5) (2002). Competitive ETCs could receive identical support from the USF for providing services beyond a single study area. 47 C.F.R. § 54.307(a) (2005). But Blanca never separately

made the reports required of a competitive ETC and neither the FCC nor Colorado ever certified Blanca as a competitive ETC. *See* R., Vol. II at 306.

The statutes, regulations, and orders at issue here do not trigger fair notice concerns. It is undoubtedly inappropriate for agencies to create liability by advancing novel interpretations during administrative proceedings. *See Magnesium Corp. of America*, 616 F.3d at 1144. But, despite Blanca's contentions, the FCC did not engage in summary rule adjudication here. The demand letter and orders did not interpret any regulations for the first time. Rather, through the demand letter and proceedings, the FCC indicated why debt collection was appropriate under the relevant rules. The FCC's synthesis of the law to explain its decision to collect from Blanca does not require a separate adjudication or rulemaking.

The FCC's rules are, admittedly, labyrinthine and technical. But we attribute to Blanca the specialized knowledge of a telecommunications carrier. Blanca should have known cellular services were considered nonregulated under the FCC's orders. It should have known that the accounting guidelines had been put into place to prevent carriers from using support for noncompetitive services to support competitive services. And it should have known that it never submitted the reports required of a competitive ETC to receive identical support. Between the statutes governing the USF, the FCC's regulations, and previous FCC orders, Blanca had adequate notice that it could

not receive USF support for expenses related to cellular service either within or outside its study area.

Blanca also argues that the demand letter and subsequent FCC review did not provide meaningful notice and opportunity to be heard. First, Blanca insists the demand letter provided inadequate notice. It suggests the demand letter identified a regulatory "framework" Blanca had violated without identifying an actual rule violation. But the FCC did identify both the legal and factual underpinnings of its action. It identified three sections of accounting regulations Blanca had violated and thoroughly described what conduct it considered improper—claiming USF support for cellular services as an incumbent carrier.[17] This notice was sufficient.

Blanca also argues the post-decision, pre-deprivation review the FCC provided Blanca was deficient. According to Blanca, the FCC should have held a hearing before the demand letter was issued. But our cases are clear: due process requires only a pre-*deprivation* hearing. *See Riggins*, 572 F.3d at 1110. And Blanca received such a hearing from the FCC.

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[17] Admittedly, the three sections of accounting regulations are extensive and the FCC could have identified particular provisions of the accounting rules Blanca violated. But due process imposes a floor, not a ceiling. The notice provided in the demand letter was adequate, if not exemplary. This is aside from the fact that Blanca had recently reached a settlement with NECA over similar issues. The demand letter identified the precise issues dealt with in the settlement. The FCC provided Blanca adequate notice of the violations.

Blanca also points to the FCC's subsequent initiation of administrative offsets as evidence that the post-decision review was constitutionally inadequate.[18] But by seeking to forestall any deprivation until the end of litigation, Blanca asks more than the Constitution requires. The administrative offsets began *after* the FCC provided Blanca with a hearing and considered all its objections. Such agency action satisfies due process.

* * *

The FCC did not deprive Blanca of either the statutory or constitutional process it was entitled to. The agency followed the procedures required for informal adjudications under the APA and for initiating administrative offsets under the DCIA. The law as of 2005 apprised Blanca that its conduct was prohibited. And the FCC's demand letter and subsequent procedure afforded Blanca notice and a meaningful opportunity to be heard.

C. Did the FCC act arbitrarily and capriciously?

Finally, Blanca argues the FCC's decision to collect debt was arbitrary and capricious. It insists the FCC's

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[18] The FCC did begin collections prior to the end of litigation. Blanca claims this was contrary to the FCC's own regulations. But even if the FCC's initiation of debt collection action was contrary to the FCC's own regulations, an issue we take no position on, this does not make the FCC's collection practices constitutionally suspect. *See United States v. Caceres*, 440 U.S. 741, 749–750 (1979) (an agency's failure to follow its own rules does not necessarily raise constitutional issues).

demand letter and orders were inadequate in several ways. First, Blanca argues the FCC's decision to initiate debt collection deprived it of the benefits of its 2013 settlement with NECA. Second, Blanca argues the FCC ignored statutory provisions that allowed it to receive USF support for cellular service. And third, Blanca argues the record as a whole lacked substantial evidence to support the FCC's decision.

We do not consider the FCC's decisions on any of these issues to be arbitrary and capricious. Rather, the FCC's analysis is "reasoned and reasonable." *In re FCC 11-161*, 753 F.3d at 1071.

1. Legal Standard

Review under the arbitrary and capricious standard is narrow. *Id.* at 1041. In making its decision, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1254 (10th Cir. 2020) (internal quotation marks omitted), *cert. granted*, *HollyFrontier Cheyenne v. Renewable Fuels Ass'n*, ___ S. Ct. ___, 2021 WL 77244 (2021). The agency cannot rely on factors deemed irrelevant by Congress, fail to consider important aspects of a problem, or present an explanation that is either implausible or contrary to the evidence. *Renewable Fuels*, 948 F.3d at 1206. We will not set aside agency decisions that meet this baseline level of reasoning.

Beyond the agency's reasons for the decision, we are also authorized to evaluate the adequacy of the record supporting the decision. If the agency's decision is not supported by substantial evidence in the record, we must set it aside as arbitrary and capricious. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). For the evidence to be "substantial," the agency's record must contain enough facts supporting the decision that a "reasonable mind" could accept it as "adequate to support [the] conclusion." *Id.* at 1581. The evidence is inadequate if it is overwhelmed by other evidence or constitutes a mere conclusion. *Id.*

When determining whether the agency's decision was arbitrary and capricious, review is "generally based on the full administrative record that was before all decision makers." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). We assume the agency properly designated the record absent clear evidence to the contrary. *Id.* at 740. Even if the record is incomplete, "[t]he harmless error rule applies to judicial review of agency proceedings." *Id.* So, "errors in such administrative proceedings will not require reversal unless [the petitioners] can show they were prejudiced." *Id.*

2. Application

a. The 2013 NECA Settlement

Blanca asserts that the FCC's decision to pursue debt collection is arbitrary and capricious because it

failed to consider one of Blanca's arguments: the FCC's actions deprived Blanca of the benefit of its 2013 settlement with NECA. Blanca argues that it explicitly entered the settlement with NECA to "avoid protracted litigation." Opening Br. at 30. The FCC's orders, though, have resulted in just such costly and protracted litigation.

But the FCC did address the 2013 NECA settlement in its orders. There, the FCC explained that "NECA is a private association of wireline carriers, not a government entity, and accordingly has no authority to compromise or waive any claims on behalf of the government." R., Vol. II at 404. And the FCC noted that under Blanca's settlement with NECA, Blanca still had an obligation to make any repayments from funds received outside of NECA's 24-month settlement window.

In its orders, the FCC pointed to one of our cases, *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999), as support for this conclusion. In *Farmers*, we needed to determine whether NECA's interpretation of a regulation bound the FCC. We concluded that NECA "has no authority to perform any adjudicatory or governmental functions." *Id.* at 1246. Rather, "NECA is an agent of its members and has no authority to issue binding interpretations of FCC regulations." *Id.* at 1250. The FCC reasoned that if NECA's interpretations of regulations could not control the FCC, NECA's settlements were not binding on the FCC either.

We cannot say the FCC's decision to pursue debt collection after Blanca's 2013 settlement with NECA was arbitrary and capricious. In its orders, the FCC described NECA as a private entity, discussed the terms of the 2013 settlement between Blanca and NECA, and identified relevant precedent supporting its decision to pursue collection despite the settlement. The FCC's reasons are clear and cogent.

b. Regulations Concerning Cellular Service

Blanca also argues the FCC ignored numerous regulations supporting Blanca's position. In particular, Blanca points to a score of regulations and orders dealing with treatment of cellular services. *See*, *e.g.*, Opening Br. at 24–25 (citing 47 C.F.R. § 54.5 (2005) (defining "telecommunications carrier" to include those who provide wireless services); *id.* at § 54.101 (1998) (designating support for voice grade access to "public switched networks" with no reference to delivery method); *id.* at § 54.307(b) (2005) (fixing the service location of a wireless subscriber as the subscriber's billing address)). According to Blanca, these references to cellular services indicate that USF support was available for such services. If the FCC had ignored these various regulations in its orders, this would be grounds to set aside its decision as arbitrary and capricious.

In its orders and briefing, the FCC does not dispute that numerous regulations and orders make USF support available for certain cellular services. For

instance, competitive ETCs could receive identical support, regardless of the technology used. And BETRS, as a regulated cellular service, was also eligible for USF support.

But the fact that *some* carriers could claim USF support for *some* cellular services did not mean *all* carriers could claim support for *all* cellular services. In its orders, the FCC explained that the regulations and orders about cellular services did not pertain to Blanca, an incumbent LEC. *See* R., Vol. II at 405 n.103 ("Blanca's many citations to rules and related orders referring to cellular service as an eligible service does not pertain to rate-of-return high-cost universal service support, the kind of support Blanca received between 2005 and 2010."). So, according to the FCC, Blanca's reliance on these various regulations and orders is misplaced.

The FCC's treatment of these various regulations dealing with cellular service was not arbitrary and capricious.[19] It did not ignore the regulations and orders Blanca cited. Rather, the FCC considered the regulations but found them inapplicable.

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[19] Blanca also argues "[t]he FCC's 'regulated v. unregulated' distinction in the context of 'mobile services' is unreasoned." Opening Br. at 27. In its orders, the FCC did distinguish regulated and unregulated activities. But in doing so it cited a number of regulations and previous orders that explain the significance of the distinction. *See*, *e.g.*, R., Vol. II at 305 (citing 11 FCC Rcd. at 17572). This distinction was not unreasoned.

c. The Adequacy of the Record

Finally, Blanca argues the FCC's record is incomplete, making the agency's reliance upon it arbitrary and capricious.[20] It identifies various documents not included in the record, including the subpoenas from the FCC's Inspector General, Blanca's responses to those subpoenas, reports and papers from NECA, and Blanca's accounting records.

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.

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[20] We construe Blanca's aside in its opening brief as a separate arbitrary and capricious argument. While discussing the inadequacy of the record, Blanca argues that the FCC's refusal to give it access to the Office of Inspector General subpoenas of NECA records that Blanca requested "is the epitome of arbitrariness." Opening Br. at 23. The FCC acknowledged this request in its orders. In responding to Blanca, the FCC pointed out that "Blanca did have access to the underlying cost data because [the Office of the Managing Director] explicitly based its financial accounting on the cost studies Blanca itself commissioned." R., Vol. II at 313. And the FCC further noted that "Blanca does not state that such records request has any bearing on its ability to challenge the Commission's [demand] Letter." *Id.* at 314 n.152. Given that Blanca already had access to any of the underlying records, we cannot say that the FCC's refusal was arbitrary and capricious.

Blanca raises only one argument regarding prejudice, though, contending "[t]here is nothing in the record to support the FCC's Orders." Opening Br. at 23. We disagree.

First, the record provides an adequate factual basis for the FCC's decision. The record includes evidence that Blanca claimed USF support for cellular services both within and beyond its designated study area. It reflects that Blanca did not distinguish between regulated and nonregulated activities in its accounting. And the record establishes that Blanca was never designated as a competitive ETC and never submitted the reports necessary to receive identical support as a competitive ETC. Blanca does not deny these facts. The subpoenas, Blanca's responses, and Blanca's underlying accounting reports[21] would tell us little more than the record already does.

Second, the record provides an adequate legal basis for the decision. Blanca insists "[t]he FCC Orders

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[21] Blanca also insists the FCC's record is deficient because it does not include all the underlying accounting reports it relied on in reaching its decision. But Blanca has never argued the FCC miscalculated the overpayments. *See* R., Vol. II at 304 ("In reaching these conclusions, we emphasize that Blanca has conceded that it offered CMRS services and it has not challenged the accuracy of OMD's accounting of the aggregate high-cost support attributable to Blanca's inclusion of CMRS-related costs in regulated accounts between 2005 and 2010."). In fact, during oral arguments, Blanca's counsel conceded that it was not challenging the FCC's calculated debt amount. Blanca contests only the fact that *any* debt exists. Because Blanca does not dispute the FCC's calculations, Blanca has not convinced us that the failure to include the cost data is prejudicial.

rely upon a single, non-binding, non-record NECA cost allocation manual to support its view that Blanca's BETRS service is not eligible for USF funding." *Id.* at 29. But Blanca's characterization of the record is incorrect. Throughout the proceedings, the FCC provided much more than a single "NECA cost allocation manual" to support its view that Blanca had improperly received USF payments. *See*, *e.g.*, R., Vol. II at 304–07 (describing the regulations and orders that require proper cost allocation in order to determine USF support). Given that the FCC provided an adequate legal basis for its decision, any further NECA documents that the FCC relied on for its reasoning are not necessary. Inclusion of such documents in the record would not change our understanding of the underlying regulatory scheme or our decision.

Given that the administrative record supports the FCC's decision, the FCC's failure to include documents referred to in the record is harmless.

The foregoing analysis also leads us to conclude that the FCC's reliance on the record was supported by substantial evidence. The record contains undisputed facts about Blanca's conduct and accounting practices between 2005 and 2010. And these facts establish that Blanca requested USF support for cellular services during this time, that the cellular services were not fixed-BETRS, and that Blanca never submitted the reports necessary to claim USF support as a competitive ETC. A reasonable mind could accept this undisputed evidence in the record as adequate to support the FCC's decision.

* * *

The FCC did not act arbitrarily and capriciously. 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. And the record, though incomplete, is adequate to support the FCC's actions.

IV. Conclusion

We DENY Blanca's Motion to Supplement the Record. And we AFFIRM the FCC's decision to collect USF overpayments to Blanca through administrative offsets. We remand to the FCC for any further proceedings.

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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket 96-45
	)	
Blanca Telephone Company Seeking Relief from the June 22, 2016 Letter Issued by the Office of the Managing Director Demanding Repayment of a Universal Service Fund Debt Pursuant to the Debt Collection Improvement Act	)	

SECOND ORDER ON RECONSIDERATION AND ORDER

(Filed Mar. 6, 2020)

Adopted: March 4, 2020 **Released: March 5, 2020**

By the Commission:

I. INTRODUCTION

1. The Universal Service Fund's (USF) high-cost program supports the deployment of communications networks in high-cost, rural areas. As a rate-of-return incumbent local exchange carrier (incumbent LEC), Blanca Telephone Company (Blanca) is eligible to

receive high-cost support based on the costs it incurred in providing rate-regulated local exchange telephone service in its designated study area. From 2005 to 2010, however, Blanca sought universal service support to cover not only such costs but also costs for providing non-regulated commercial mobile radio service (CMRS) both within and outside its study area. In 2012, the National Exchange Carrier Association (NECA) discovered Blanca's improper inclusion in its rate base of nonregulated costs and directed Blanca to correct its cost accounting. In 2016, the Commission's Office of the Managing Director (OMD) demanded that Blanca repay $6,748,280 in high-cost universal service to which it was not entitled.[1] Blanca applied for review of that decision,[2] which the Commission upheld in the *Blanca Order*.[3]

2. In the Second Petition and Second Petition Supplement now before us (collectively, Amended Second Petition), Blanca seeks reconsideration of the *Blanca Order* as well as emergency relief from any withholding of universal service support payments

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[1] Letter from Dana Shaffer, Deputy Managing Director, FCC Office of Managing Director to Alan Wehe, General Manager, Blanca Telephone Company (June 2, 2016) (Demand Letter).

[2] Emergency Application for Review, CC Docket No. 96-45 (filed June 16, 2016) (Application); Petition for Reconsideration, CC Docket No. 96-45 (filed June 24, 2016) (First Petition).

[3] *Blanca Telephone Company*, Memorandum Opinion and Order and Order on Reconsideration, 32 FCC Rcd 10594 (2017) (*Blanca Order*).

otherwise payable to Blanca.[4] We dismiss the Amended Second Petition as procedurally defective and, in the alternative, independently deny it on the merits. Accordingly, Blanca must repay $6,748,280, and Commission staff should pursue collection of that amount from Blanca, whether by offset, recoupment, referral of the debt to the United States Department of Treasury for further collection efforts, or by any other means authorized by law.[5]

II. BACKGROUND

3. In 1997, pursuant to Section 254 of the Communications Act of 1934, as amended (Act),[6] the

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[4] Petition for Reconsideration and Emergency Request for Immediate 1.1910(b)(3)(i) Relief, CC Docket 96-45 (filed Dec. 29, 2017, erratum Jan. 5, 2018, erratum Jan. 8, 2018) (Second Petition), *as amended*, Motion for Leave to Supplement December 29, 2017 Petition for Reconsideration and Emergency Request for Immediate § 1.1910(b)(3)(i) Relief, CC Docket 96-45 (filed Jan. 8, 2018) (Second Petition Supplement). Although Blanca moved to have this supplement accepted, it was timely filed and accordingly, we will treat this supplement as an amendment to the Second Petition rather than as a separate filing.

[5] *See Blanca Order*, 32 FCC Rcd at 10615-16, para. 54; Letter from Mark Stephens, Managing Director, Office of Managing Director, FCC, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (Blanca Administrative Offset Notice) (notifying Blanca that the Commission "will pursue collection . . . by offset/recoupment of amounts otherwise payable to you," and that "as from the date of the [*Blanca Order*], . . . Blanca's monthly support from the Universal Service Fund will be offset/recouped against the Debt[ ] until the Debt is satisfied or until you have made acceptable arrangements for its satisfaction.").

[6] 47 U.S.C. § 254.

Colorado Public Utilities Commission (PUC) designated Blanca as an Eligible Telecommunications Carrier (ETC) in a study area comprised of parts of Alamosa and Costilla counties.[7] As a result, Blanca became eligible to receive high-cost USF support for providing local exchange telephone service in its designated study area.[8]

4. Pursuant to the Commission's rules in effect at the time, rate-of-return incumbent LECs designated as ETCs, like Blanca, received high-cost support based on their embedded costs in providing local exchange service to fixed locations in their high-cost areas.[9] Such support was intended to ensure the availability of

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[7] *See* Commission Order Granting Application for Designation as an Eligible Telecommunications Carrier, Docket No. 97A-506T, Decision No. C97-1389, at 3, para. 2 (Colo. Utilities Comm'n Dec. 17, 1997); 47 U.S.C. § 254(e).

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

[9] *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 9645, 00-256, Report and Order, 16 FCC Rcd 11244, 11248-49, paras. 8-10 (2001); *see also Special Access for Price Cap Local Exchange Carriers Order*, WC Docket No. 05-25, Report and Order, 27 FCC Rcd 10557, 10562, para. 8 (2012).

basic telephone service at reasonable rates.[10] To that end, the Commission's accounting and cost allocation rules worked to ensure that incumbent LECs received a reasonable return on investment in the deployment and offering of supported services in high-cost areas within their respective study areas.[11] By limiting the availability of such support to a rate-of-return incumbent LEC's regulated costs within its study area, the accounting and cost allocation methods countered the incentive to engage in anticompetitive practices, such as predatory cross-subsidization, that might dampen competitive markets for other forms of communication technology.[12] As the Commission has explained,

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

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

[12] *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539, 17550-51, para. 25 (1996) (explaining that the safeguards

"[t]hese rules ensure that carriers compete fairly in nonregulated markets and that regulated ratepayers do not bear the risks and burdens of the carriers' competitive, or nonregulated, ventures."[13]

5. As a member of NECA, a membership organization of incumbent LECs, Blanca submits its cost information to NECA.[14] Pursuant to our rules, NECA is responsible for collecting its members' cost study data and filer certifications of that data, and any other information necessary for NECA to calculate the amount

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

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

[14] Demand Letter at 2 (specifying that NECA initiated a "Loop" and "Non-Reg Review" focused on the underlying records for Blanca's 2011 Cost Study in the area of non-regulated operations).

of High-Cost Loop Support (HCLS), a subset of high-cost support, which its members are eligible to receive.[15] NECA submits the results of its calculations to the Universal Service Administrative Company (USAC), which is responsible for day-to-day administration of the high-cost support program.[16] In addition to the information it received from NECA, USAC collects carrier data and information relevant to the calculation of other forms of high-cost support.[17]

6. In addition to offering regulated wireline service within its study area, Blanca also offered CMRS, a nonregulated service, both within and outside its study area.[18] At least as of 2005, Blanca included the costs of this nonregulated service in the regulated cost

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

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

[17] *See* 47 CFR §§ 36.611, 36.612, 54.307, 54.903; *High-Cost Universal Service Support et al.*, WC Docket No. 05337 et al., Order, 23 FCC Rcd 8834, 8846, paras. 27-28 (2008).

[18] Demand Letter at 2.

accounts it submitted to NECA with respect to its designated study area.[19] By recording costs associated with both services as regulated costs between 2005 and 2010, Blanca received inflated amounts of high-cost support from the USF during this time frame.[20]

7. In 2008, the Commission's Office of Inspector General (OIG) began an investigation into Blanca's receipt of high-cost support beginning with 2004. In 2012, during the pendency of the OIG investigation, and pursuant to its data reconciliation policies, NECA conducted a review of Blanca's 2011 Cost Study, and concluded that Blanca improperly included costs, loops, and revenues associated with providing CMRS in its 2011 Cost Study.[21] NECA directed Blanca to revise its 2011 Cost Study and all ensuing studies to remove such costs.[22] Meanwhile, based on its investigation and review of documentation provided by Blanca, OIG concluded that Blanca had misallocated costs and began working with USAC to identify the resulting USF losses in earlier years.[23]

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[19] *Id.* at 3.

[20] *See Blanca Order*, 32 FCC Rcd at 10600, para. 14.

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

[22] *See* NECA True Up Notice.

[23] *See* Demand Letter at 1; *see also* 5 U.S.C. § App. 3 *App.*; *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1116 (D.D.C. 1994) (concluding that, based on the legislative history of the Inspector General Act of 1978, "Congress understood the Act to give the

8. Based on its analysis of information obtained during the OIG investigation and Blanca's own revisions to its cost studies and other filings, on June 2, 2016, OMD notified Blanca by letter that Blanca had violated Parts 36, 64, and 69 of the Commission's rules by incorrectly including in its calculation of costs eligible for high-cost support, costs of providing nonregulated cellular mobile telephone service and demanded immediate repayment of the $6,748,280 that Blanca had improperly received.[24] On June 16, 2016, Blanca filed an Emergency Application for Review of the Demand Letter.[25] On June 24, 2016, Blanca filed a Petition for Reconsideration of the Demand Letter.[26] Blanca later filed four separate motions for leave to supplement its Application and Petition.[27]

9. In the *Blanca Order*, the Commission upheld OMD's determination that Blanca improperly received $6,748,280 from the USF high-cost program between 2005-2010 by improperly including costs

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Inspector General the authority to investigate the recipients of federal funds").

[24] Demand Letter.

[25] Application.

[26] First Petition.

[27] Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Dec. 19, 2016) (First Supplement); Second Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Mar. 30, 2017) (Second Supplement); Third Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Apr. 10, 2017) (Third Supplement); Fourth Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed July 5, 2017) (Fourth Supplement).

associated with its provision of an unregulated service, i.e., CMRS, in its regulated accounts.[28] The Commission also upheld OMD's separate and independent determination that Blanca improperly included costs for service outside of its study area.[29] The Commission made clear that Blanca's nonregulated costs are not eligible for high-cost support provided to an incumbent LEC nor was Blanca eligible for support for its CMRS offerings as a competitive ETC either inside or outside its study area.[30] The Commission also fully considered and rejected Blanca's arguments that the Commission does not have authority to seek repayment of improperly disbursed universal service funds[31] and that the question of whether Blanca intentionally misrepresented its costs or had "clean hands" was irrelevant to the issue of whether the Commission should seek to collect overpayments of USF support.[32] The Commission also rejected Blanca's claims that it was not afforded due process.[33] The Commission further found that it has authority under the Debt Collection Improvement Act to collect a claim or to delegate authority to collect a claim to our managing director. In addition, the Commission granted Blanca's motion to accept two of four late-filed supplements (Second and Fourth Supplements) to the extent they raised new facts

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[28] *See Blanca Order*, 32 FCC Rcd at 10605-06, paras. 33-35.

[29] *See id.* at 10606-08, paras. 36-39.

[30] *Id.*

[31] *Id.* at 10609, para. 40.

[32] *Id* at 10609, para. 41.

[33] *Id* at 10613-10614, paras. 47-50.

and arguments occurring after Blanca's deadline for appealing OMD's Demand Letter.[34] The Commission denied Blanca's motions to accept two other late-filed supplements (First and Third Supplements) for failing to demonstrate good cause for waiving the filing deadline.[35]

10. On December 29, 2017, Blanca filed its Second Petition. In this filing, Blanca argues that Blanca offered CMRS as a supported service;[36] that the Commission's efforts to recover high-cost universal service support Blanca improperly received is inequitable because Blanca purportedly had clean hands;[37] that the recovery effort is a penalty that the Commission can impose only pursuant to its forfeiture authority in Section 503 of the Act;[38] that the Commission is retroactively applying new rule interpretations and new recovery procedures in a way that interferes with Blanca's reasonable reliance interests;[39] that the

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[34] *Id.* at 10603, para. 27; Second Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Mar. 30, 2017) (Second Supplement); Fourth Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 at 32 (filed July 5, 2017) (Fourth Supplement).

[35] *See Blanca Order*, 32 FCC Rcd at 10604, paras. 28-29; Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Dec. 19, 2016) (First Supplement); Third Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Apr. 10, 2017) (Third Supplement).

[36] Second Petition at 10-11, 12-13, 16.

[37] *Id.* at 8, 10, 20-22.

[38] *Id.* at 4-10.

[39] *Id.* at 1-2, 4, 6, 10-17, 19-20.

Commission's recovery efforts deprive Blanca of due process by denying Blanca notice and a reasonable opportunity to contest the Commission's findings;[40] that the Commission lacks authority under the Debt Collection Improvement Act of 1996 to recover support wrongfully or erroneously paid;[41] and that the Commission has denied Blanca access to the records upon which it based its determination.[42]

11. Blanca also challenges the Commission's denial of its motion to submit its First Supplement.[43] Blanca claims that this denial amounts to a denial of its right to address "relevant Commission statements and rulings in 'real time,' as the Commission makes them" and requires Blanca to "divin[e]" how the Commission will apply precedent in future cases.[44] Blanca also asserts that the Commission's ordering clause dismissing its Second and Fourth Supplements is inconsistent with the acceptance of Blanca's Second and Fourth Supplements in the text.[45]

12. Blanca also seeks emergency relief from any change in its "red light status" and any withholding of support payments after the issuance of the *Blanca*

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[40] *Id.* at 6 n.5, 9.

[41] *Id.* at 17-19.

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

[43] *Id.* at 3-4, 5, 23.

[44] *Id.* at 3-4, *5; see also Blanca Order*, 32 FCC Rcd at 10604, para. 29.

[45] *Id.* at 22-23; *Blanca Order*, 32 FCC Rcd at 10603-04, 10616, paras. 27, 57.

Order.[46] Specifically, Blanca contends that under the Commission's rules, the Commission cannot place Blanca in red light status or collect the outstanding debt pending resolution of its pending Second Petition and related appeals before the 10th Circuit Court of Appeals.[47] Accordingly, Blanca requests that it remain in green light status (and thus, be permitted to engage in business before the Commission); that the Commission grant its pending license assignment application; that the Commission direct USAC to make all USF payments pending appeal of its debt liability; and that the Commission direct USAC to pay any sums withheld as a consequence of the *Blanca Order*.[48]

13. On January 8, 2018, Blanca filed its Second Petition Supplement amending its Second Petition (together the Amended Second Petition).[49] In this filing, Blanca contends that the Commission uses more lenient procedures when investigating and recovering USF from larger corporations than when doing

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[46] Second Petition at 6-7, 24 (Emergency Request). Delinquent debt owed to the Commission triggers the "red light rule," which places a hold on the processing of pending applications, fee offsets, and pending disbursement payments. 47 CFR §§ 1.1910, 1.1911, 1.1912; *see also Amendment of Parts 0 and 1 of the Commission's Rules*, MD Docket No. 02-339, Report and Order, 19 FCC Rcd 6540 (2004) (implementing Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996)).

[47] Second Petition at 24 (citing 47 CFR § 1.1910(b)(3)(i)).

[48] *Id*.

[49] Because it was filed within 30 days of public notice of the *Blanca Order*, the Second Petition Supplement was timely filed. *See* 47 CFR § 1.106(f).

so from smaller corporations.[50] To support its argument, Blanca relies on five orders adopting negotiated settlements of forfeiture liability for violation of the Commission's Lifeline program rules (Lifeline consent decree orders) that the Commission released after Blanca's deadline for appealing the Demand Letter.[51] Blanca asserts that that the Commission's actions in its case constitute disparate treatment that violates its "constitutional right to equal protection" and its "administrative right to similar treatment."[52] Blanca asserts that such disparate treatment is evidenced by the Commission's investigation of Blanca's reporting practices for a longer period of time; the failure of the Commission to issue a Notice of Apparent Liability for

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[50] Second Petition Supplement at 1-5.

[51] *Id.* at 1 (citing *Cintex Wireless, LLC*, Order, 32 FCC Rcd 10920 (2017) (*Cintex Consent Decree*); *Easy Telephone Services*, Order, 32 FCC Rcd 10932 (2017) (*Easy Telephone Consent Decree*); *Global Connection Inc. of America*, Order, 32 FCC 10946 (2017) (*Global Connection Consent Decree*); *i-wireless, LLC*, Order and Consent Decree, 32 FCC Rcd 10960, 10960, para. 2 (2017) (*i-wireless Consent Decree*); *Telrite Corp.*, Order, 32 FCC Rcd 10974 (2017) (*Easy Telephone Consent Decree*)). Specifically, Blanca relies heavily on the separate opinions of then-Commissioner Clybum, dissenting in part, in these decisions, in which she argues these orders represent an apparent bias in forfeiture prosecutions and related settlements in favor of "large, well-known corporations." *See id.*; *see, e.g.*, *Cintex Consent Decree*, 32 FCC Rcd at 10931 (separate Statement of Commissioner Mignon L. Clybum, Approving in Part and Dissenting in Part) (expressing concern that Enforcement Bureau bias in favor of large, well-known corporations has resulted in forfeitures and negotiated settlements that are a mere "slap on the wrist" and stressing the importance of having Commission rules "vigorously and fairly enforced").

[52] Second Petition Supplement at 1.

Forfeiture giving rise to an opportunity to settle liability; and the Commission's selective referral of Blanca's case to the Department of Justice for possible prosecution under the False Claims Act.[53]

14. Blanca further asserts that the Commission committed material error when it failed to consider an argument that the Commission's recovery efforts violate the terms of a 2013 settlement agreement it reached with NECA to resolve "accounting issues" pursuant to the NECA true-up process.[54] Blanca contends that the Commission may recover improperly paid universal service funds only through one of two avenues: (1) pursuant to a forfeiture action where the overpayments result from rule violations, or (2) pursuant to the audit process, which is time-limited and "closes" upon settlement.[55]

15. On January 10, 2018, OMD issued a letter notifying Blanca that the Commission would begin recouping monies from Blanca's monthly universal service support against the debt specified in the Demand Letter and upheld in the *Blanca Order*, until the debt is satisfied or until Blanca made acceptable

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[53] *Id.* at 2-5.

[54] *Id.* at 5-6 (citing First Petition at 13 n.12, 15 & n.16).

[55] *Id.* at 5-6, n.4 (asserting that "[t]here are no rule violation findings entered after an audit is settled," that audit time frames and Commission review of audits are time limited and that "the auditing procedure the FCC discusses was concluded for Blanca years ago and the [*Blanca Order*] is unreasoned for failing to discuss this fact").

arrangements for its satisfaction.[56] On January 12, 2018, Blanca responded to the Commission's administrative offset notice, including in its response several arguments that are essentially identical to those raised in the Emergency Request.[57]

III. DISCUSSION

16. In 2016, the Commission determined that Blanca received $6,748,280 in high-cost universal service support between 2005 and 2010 to which it was not entitled and demanded that Blanca repay this sum.[58] In the intervening years, Blanca has made numerous filings, raising a myriad of procedural and substantive arguments. To date, while we have granted certain procedural requests, we have not found merit in any of Blanca's substantive arguments. Today's Order is no exception. In this Second Order, we dismiss

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[56] Letter from Mark Stephens, Managing Director, Office of Managing Director, FCC, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (Administrative Offset Notice).

[57] Letter from Timothy E. Welch, Counsel for Blanca Telephone Company to Mark Stephens, Managing Director, FCC Office of Managing Director, CC Docket 96-45 (filed Jan. 12, 2018) (responding to the Commission's administrative offset notice) (asserting that in changing Blanca's red light status to green, the Commission acknowledged that Blanca's debt was not delinquent and therefore, under section 1.1910(b)(3)(i) of the Commission's rules, 47 CFR 1.1910(b)(3)(i), could not begin recoupment or otherwise begin collections toward satisfaction of such debt) (Administrative Offset Notice Response).

[58] *See* Demand Letter; *Blanca Order* at 10596, 1060508, paras. 2, 33-39.

as defective, and, in the alternative, we independently deny on the merits, Blanca's Amended Second Petition.

17. Blanca seeks reconsideration of the *Blanca Order*, in which the Commission denied in part and dismissed in part Blanca's Application and Petition (and four supplements). We find that Blanca's Amended Second Petition is procedurally defective insofar as it fails to raise any arguments cognizable in a petition for reconsideration of the Commission's prior order denying Blanca's application for review. Namely, Blanca fails to show that the Commission made a material error or omission in the *Blanca Order* and has not raised additional material facts warranting reconsideration of the Commission's findings. As an alternative and independent basis for our decision, we find the Amended Second Petition to be meritless.

A. The Amended Second Petition is Procedurally Defective

18. We dismiss Blanca's Amended Second Petition as procedurally defective. Under section 405 of the Act, reconsideration of Commission orders is limited to "newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding."[59] In turn, the Commission's rules state that the

[59] 47 U.S.C. § 405.

Commission will entertain a petition for reconsideration of an order denying an application for review only if the petition relies on "facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission" or on facts or arguments unknown to the petitioner until after his last opportunity to present them to the Commission and that the petitioner "could not, through the exercise of ordinary diligence, have learned of the facts or arguments in question prior to such opportunity."[60] These procedural requirements ensure that appealing parties will not use the reconsideration process to rehash and relitigate legal issues already raised (or that should have been raised) earlier in the same proceeding.[61]

19. The Amended Second Petition contains no facts or arguments that meet these requirements.

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[60] *See* 47 CFR §§ 1.106(b)(2), 1.115(g) (slight variation in wording).

[61] *See Scott Malcolm Dsm Supply, LLC Somaticare, LLC, Order on Reconsideration*, 33 FCC Rcd 2410, 2412, para. 8 (2018) (explaining that "[n]either the Act nor Rules require the Commission to be administratively burdened by petitions for reconsideration that reargue issues that were already addressed, or that rely on facts or arguments that the petitioner could have – but did not – present to the Commission at an earlier stage"); *Holy Family Communications, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 15687, 15689-90, para. 6 (MB 2013) ("It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected, and reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has already deliberated and decided.").

Legal determinations and factual conclusions previously reached by the Commission in the same proceeding are not changed circumstances satisfying the requirements for appeal.[62] This is true even where the petitioner has embellished or expanded upon its original arguments by presenting additional supporting evidence in an attempt to reinforce its original contentions.[63] As the Commission has previously explained, "[n]ew facts that are not materially or significantly different from facts already before the Commission when it denied review raise matters that have already been fully considered."[64]

20. Yet, much of Blanca's Amended Second Petition is devoted to such claims. For example, the *Blanca Order* rejected Blanca's argument that the adjudication and collection of this debt is a penalty – and yet

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[62] *See Shaw Communications, Inc.*, Order on Reconsideration, 27 FCC Rcd 6995, 6996, para. 4 (MB 2012) ("[T]he Commission's rejection of a previously raised argument" does not satisfy the requirements of section 1.106(b)(2), "since of necessity the Commission's order in any case will have been released after the aggrieved party was last able to present its arguments in pleadings."); *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, 5100, para. 6 (CCB 1987) ("The Commission's disposition in a Review Order, of arguments raised in an Application for Review, does not constitute 'changed circumstances' pursuant to section 1.106(b)(2).").

[63] *See Carolyn Hagedorn*, Memorandum Opinion and Order, 11 FCC Rcd 1695, 1696, para. 11 (1996) (finding that staff did not err in refusing to consider new facts in applicant's petition for reconsideration, even when such facts arguably were an "expansion" of matters raised in initial application).

[64] *Skybridge Spectrum Foundation*, Memorandum Opinion and Order, 27 FCC Rcd 7701, 7703 & n.15 (2012).

Blanca tries to resuscitate it by pointing to a routine collection form issued after the release of the *Blanca Order*.[65] Notably, Blanca fails to explain the legal relevancy of the revised form given the information known to Blanca regarding the Commission's practice of imposing administrative fees and penalties for delinquent debt payments.[66] As another example, the *Blanca Order* rejected Blanca's argument that the debt collection was inequitable and a retroactive change in policy – and yet Blanca tries to vivify that claim by referencing questions in a 2009 subpoena issued by the FCC's Inspector General.[67] Similarly, the *Blanca Order* rejected the claim that Blanca was entitled to receive identical support based on its CMRS offerings both within and outside of its study area – and yet Blanca tries to resurrect such claim (and more generally, its claim that it is entitled to the support received because its interpretation of its eligibility for support is reasonable) by making a series of arguments about some regulations applying to CMRS services and about Blanca being a

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[65] *See* Second Petition at 7, 19; *Blanca Order*, 32 FCC Rcd at 10611-13, para. 44-46.

[66] *Compare, e.g.*, OMD Demand Letter at 7 (explaining that in the event of delinquency, the Commission may impose "administrative charges, interest, and penalties," and a "penalty of six percent per annum") *with* Second Petition, Attachment 00001, FCC Form 159-B (indicating penalty and administrative fee due).

[67] Second Petition at 20; *Blanca Order*, 32 FCC Rcd at 10607-608, paras. 38-39.

carrier of last resort.[68] We dismiss these and similar arguments as procedurally defective.

21. In its Amended Second Petition, Blanca also asserts that the Commission's ordering clause dismissing its Second and Fourth Supplements is inconsistent with the acceptance of Blanca's Second and Fourth Supplements in the text.[69] We disagree. The Commission made clear in its ordering clause that it was accepting Blanca motions to submit these supplemental pleadings only to the extent that they raised new facts and legal arguments not otherwise available to Blanca when its pleadings were originally due and otherwise denying these supplements.[70]

22. Blanca's attempts to revive the First and Third supplements are equally without merit. As the Commission explained, the Commission documents that Blanca sought to rely on in those supplements were based on long standing principles and precedent that "Blanca had ample opportunity to review and incorporate into its timely filed Application and Petition.[71] Blanca cannot escape dismissal by claiming (as it now does) that it should be allowed to address "relevant Commission statements and rulings in 'real time,' as the Commission makes them," regardless of whether the filing deadline for submitting an appeal

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[68] Second Petition at 10-16; *Blanca Order*, 32 FCC Rcd at 10606-607, paras. 36-37.

[69] Second Petition at 22-23; *Blanca Order*, 32 FCC Rcd at 10603-04, para. 28.

[70] *Blanca Order*, 32 FCC Rcd at 10616, para. 57.

[71] *Id.* at 10604,10604-05, para. 29 and 30-32.

has passed and regardless of whether such statements and rulings are derivative of prior precedent released before the filing deadline.[72]

23. Blanca also attempts to mischaracterize the Commission's procedural dismissal of its First Supplement as a substantive statement regarding the due process Blanca received and then to reintroduce dismissed arguments ostensibly as a rebuttal of the Commission's "conclusions?"[73] Blanca asserts that in the *Blanca Order*, the Commission cited precedent that was either too old, i.e., "70-80 year old Supreme Court cases," or too recent, i.e., "FCC determinations made in 2011 & 2014 which were released after Blanca's 2005 to 2010 challenged conduct," to support its conclusion that Blanca had adequate notice, in 2005, of the Commission's position on whether a debt collection was a forfeiture action subject to a statute of limitations.[74]

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[72] Second Petition at 3.

[73] *See id.* at 1-2 (arguing that in denying Blanca's motion to submit these filings after the 30 day deadline, the Commission "retroactively imposes the burden on Blanca in 2005 to guess what the FCC was going to say in 2016/2017 regarding USF rule violation proceedings based on what the FCC might subsequently view as 'longstanding' Supreme Court precedent"); *id.* at 4 ("The FCC tries to justify the lack of notice by asserting that prior to the release of the [*Blanca First Order*], there existed precedent from which Blanca could have understood what the Commission would do"); *id.* at 9 (asserting that the Commission's rejection of its late-filed First Supplement was an attempt to "explain what [the Commission] is doing to Blanca, but that explanation merely serves to highlight that the FCC is weaving a novel, generally applicable USF enforcement procedures out of whole cloth, on the fly and without notice").

[74] *Id.* at 4.

But the Commission had only cited such precedent indirectly, noting that such precedent was cited in Commission orders that Blanca itself had cited, to refute Blanca's contention that these orders introduced a novel interpretation of Commission collection authority that Blanca could not have reasonably challenged *before its July 5, 2016 filing deadline*.[75] The Commission did not make a substantive determination in this context as to the notice that Blanca received based on this precedent.

24. Blanca introduces, for the first time in its Amended Second Petition, a new equal protection argument that attempts to rely on five recently released consent decrees with five carriers that received improper USF payments in connection with their provision of Lifeline services, a separate universal service program.[76] Blanca asserts it was treated with disfavor

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[75] *Blanca Order*, 32 FCC Rcd at 10604, para. 29 (citing *Network Services NAL*, 31 FCC Rcd at 12284, para. 144 & n.334 (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *United States v. Wurts*, 303 U.S. 414, 415-16 (1938)); *BellSouth*, 31 FCC Rcd at 8525, para. 71 & n. 150 (citing *Review of Decisions of the Universal Service Administrator by Joseph M Hill Trustee in Bankruptcy for Lakehills Consulting, LP et al.*, CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16600-01, para. 28 (2011); *Request for Waiver or Review of a Decision of the Universal Service Administrator by Premio Computer, Inc.*, CC Docket No. 02-6, Order, 29 FCC Rcd 8185, 8186, para. 6 & n.16 (WCB 2014)).

[76] *See* Second Petition Supplement at 1 (referencing *Cintex Consent Decree*, 32 FCC Rcd 10920; *Easy Telephone Consent Decree*, 32 FCC Rcd 10932; *Global Connection Consent Decree*, 32 FCC 10946; *i-Wireless Consent Decree*, 32 FCC Rcd 10960; *Telrite Consent Decree*, 32 FCC Rcd 10974).

in comparison to these Lifeline carriers because of certain procedural differences in the investigation and collection of its debt and the pursuit of forfeiture liability against these Lifeline carriers. No doubt there were differences in how the Commission dealt with different carriers with different conduct in a different program and dealing with a different issue (the imposition of a penalty on top of the collection of improperly disbursed funds, which had already been recovered)—and all of these differences were readily apparent when the Commission in 2013 released the underlying notices of apparent liability against these carriers and the DOJ issued a Civil Investigation Demand indicating that the Commission had referred Blanca's case for possible prosecution under the False Claims Act.[77] While new orders can represent new or changed circumstances or reveal heretofore unknowable facts, these consent decrees do neither; and, to the extent the dissent to the consent decrees to which Blanca cites identifies disparate treatment between those five carriers and unidentified other carriers as a potential legal argument, Blanca has failed to even allege that it was unable to discover any such disparate treatment

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[77] *Cintex Wireless, LLC*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17124 (2013); *Easy Telephone Services d/b/a Easy Wireless*, Notice of Apparent Liability, 28 FCC Rcd 14433, 14436, para. 8 (2013); *Global Connection Inc., of America d/b/a Stand Up Wireless*, Notice of Apparent Liability, 28 FCC Rcd 17116 (2013); *i-wireless, LLC*, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 15381 (2013); *Telrite Corporation d/b/a Life Wireless*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17108 (2013); First Petition at 38-39, Attach. 4 (DOJ Civil Investigation Demand, No. 14-57 (Jan. 30, 2014)).

prior to the release of the consent orders.[78] In the absence of such contention, this argument fails to meet our procedural rules and must be dismissed.

25. Nor can Blanca avoid dismissal by claiming (as it now does) that the Commission should have inferred alternative legal arguments from its prior filings. In making such contentions, Blanca is attempting to use its Amended Second Petition to introduce potential arguments that it abandoned or failed to articulate in its early pleadings, or that at best were contradicted by other arguments. With respect to the latter category, the Commission cannot be expected to parse through inconsistent positions that are not clearly pleaded in the alternative.[79] To constitute new facts under our procedural rules, "the failure to have the evidence placed before the agency in the original proceeding must be of 'no fault' of the petitioner."[80] In circumstances where, as here, the petitioner has failed to clearly articulate its claims in the Application or First Petition, the petitioner assumes the risk that such

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[78] *See M & M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, n.5 (CCB 1987) (dismissing newly raised equal protection argument as noncompliant with section 1.106(b)(2), where petitioner failed to argue that the facts underlying the assertion are a recent occurrence or newly discovered factpreviously unknowable with reasonable due diligence).

[79] *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1461 (D.C. Cir. 1996) (finding that the party seeking review "seem[s] to abandon its argument . . . by taking inconsistent positions").

[80] *AT&T Corp. v. FCC*, 363 F.3d 504, 509-10 (D.C. Cir. 2004) (quoting *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 279 (1987)).

claims will be precluded under the Commission's administrative finality rules.[81] The Commission is not compelled—as Blanca now demands through its Amended Second Petition—to infer legal arguments that cannot be readily adduced or to marshal remote facts not specifically alleged in the Application or First Petition to support broad legal contentions.[82] Or to put it differently, the Commission is not required to make Blanca's case on its behalf.

26. For example, Blanca now points to language in the First Petition, claiming that the Commission should have ruled on whether Blanca's cellular offering should have been treated as a regulated service for cost-accounting purposes and should not have

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[81] *Time Warner Entertainment Center, LP v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998) (where issue is raised "in a less than complete way," the Commission is not afforded a fair opportunity to pass).

[82] *See FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 696 (D.C. Cir. 2015); *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997); *Nw. Ind. Tel. Co. v. FCC*, 824 F.2d 1205, 1210, n.8 (D.C. Cir. 1987) (no fair opportunity to pass on argument where appellant "point[ed] out" a circumstance but did not make an argument based on such circumstance); *see also, e.g., Tama Radio Licenses of Tampa, Florida, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588, 7589, para. 2 (2010) ("The Commission is not required to sift through an applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review."); *Red Hot Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745, n.63 (2004) ("Our rules do not allow for a 'kitchen sink' approach to an application for review, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review.").

"abandon[ed]" the distinction drawn in the OMD Demand Letter between mobile and fixed service.[83] But that language did not argue that Blanca's wireless offering should be treated as regulated for cost accounting purposes. Instead, Blanca characterized its service as a mobile service (CMRS),[84] said that any analogy between its wireless offering and traditional local exchange service was a "red herring," and invited the Commission to discount any such analogy.[85] In other words, the *Blanca Order* correctly concluded, consistent with OMD's findings and Blanca's own characterization of its service, that Blanca's service was CMRS, a non-rate-regulated mobile service.[86]

27. For another example, in its Amended Second Petition, Blanca now claims that the Commission should have ruled on whether Blanca's 2013 true-up with NECA covering payments in the 2011-2013 period should have foreclosed collection of overpayments for earlier years (2005-2010) relating to the same flaws

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[83] *See* Second Petition at 10-11 (citing First Petition at 1, 3, 5, 11, n.10).

[84] *Blanca Order*, 32 FCC Rcd at 10605, n.83.

[85] *See* Application at 12 (explaining that Blanca retained the use of the "BETRS name merely for continuity purposes" and "at the end of the day the BETRS discussion is a red herring because USF funding is available for mobile cellular services—Blanca's description of the mobile cellular service is irrelevant and Blanca's use of the mobile system is irrelevant") & n.9 (asserting that "even if the Commission completely discounts" the analogy between its service and [Plain Old Telephone Service (POTS)], the Act and the Commission's rules specifically permit "USF recovery for mobile cellular systems").

[86] *Blanca Order*, 32 FCC Rcd at 10605, para. 34.

in reporting.[87] But in its First Petition, Blanca never made such an argument; instead, it discusses the NECA true up process only to argue that it was not an admission or concession of wrongdoing or debt liability.[88] As explained in the *Blanca Order*, NECA did not seek to recover past high-cost distributions from Blanca for the 2005-2010 period because NECA's cost pools operate within a 24-month settlement window.[89] And so this is a new argument that Blanca failed to timely raise and that the Commission must accordingly dismiss.[90]

28. In sum, Blanca has failed to meet the Commission's procedural requirements for reconsideration of the *Blanca Order*. None of the arguments that Blanca raises in its Amended Second Petition constitutes new facts or legal arguments that could not have been raised on or before the deadline for filing its First Petition. These arguments merely reiterate what Blanca originally asserted or contended in its

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[87] *See* Second Petition Supplement at 2, 5-6 (citing First Petition at 13 n.12, 15 n.16).

[88] First Petition at 13 n.12, 15 n.16.

[89] Thus, this true-up process was limited, per a contractual arrangement with its members, to payments starting in 2011. *See Blanca Order*, 32 FCC Rcd at 10599-10600, n.37.

[90] *See GLH Communications, Inc.*, Order on Reconsideration, 33 FCC Rcd 5926, 5928-29, para. 8 & nn.27-28 (2018) ("We cannot allow [a party] to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.") (*quoting Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941))), *aff'd*, 930 F.3d 449 (D.C. Cir. 2019).

First Petition, arguments that the Commission fully considered and rejected, or consist of arguments that could have been timely raised but were not. Accordingly, we dismiss Blanca's Amended Second Petition.

B. The Amended Second Petition Is Meritless

29. As an alternative and independent basis for rejecting Blanca's Amended Second Petition, we also find that Blanca's new arguments—like those previously raised and addressed in the *Blanca Order—are* meritless.

30. For example, and contrary to Blanca's contentions, its true-up with NECA in 2013 was not and could not be reasonably construed as a settlement of all potential liability to the government arising from cost accounting errors.[91] NECA is a private association of wireline carriers, not a government entity, and accordingly has no authority to compromise or waive any claims on behalf of the government.[92] Furthermore, NECA's direction to Blanca to revise its 2011 and 2012

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[91] *See* Second Petition at 5-6 (stating that "Blanca settled its audit years ago") (citing First Petition at 13 n. 12, 15 & n.16) (all citations refer to the NECA true-up process); Second Petition Supplement at 5 (asserting that "Blanca settled its accounting matter with USAC years ago and the FCC's instant enforcement action breaches that settlement").

[92] *Cf. Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999) (NECA "has no authority" to interpret FCC regulations because it "is neither an independent federal agency nor a subagency of the FCC.").

cost studies does not speak to Blanca's responsibility for improper payments it obtained in earlier years or absolve Blanca of liability for those payments. In fact, when Blanca revised its cost studies, its contractual agreement with NECA specifically advised Blanca that Blanca remained responsible for any support adjustments outside NECA's two-year window.[93] In addition, the argument is foreclosed by the decision of the U.S. Court of Appeals for the 10th Circuit in *Farmers Telephone v. FCC*, which held that companies' reliance on NECA rules does not preclude the Commission from recovering all improper payments,[94] including payments outside NECA's two-year settlement window.[95]

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[93] *Blanca Order*, 32 FCC Rcd at 10559 & n.37 (2017); *see* NECA Pool Administration Procedures § 1.6.1, at 1-8 (2012) ("Any support adjustments accepted and processed by USAC corresponding to a company's data corrections outside of the 24-month settlement window become the obligation of the company."); *id.* § 2.1.4, at 2-3 ("While all data entry . . . is prohibited for months that have fallen out of the 24 month settlement window, adjustments to these months for other purposes (e.g. support fund true-ups) are performed to company settlements by NECA in order to comply with FCC rules.").

[94] *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250-52 (10th Cir. 1999).

[95] The case involved a 1997 order which found that NECA had misinterpreted an FCC regulation that took effect in 1993. *See id.* at 1243-47. NECA directed its members to correct their cost data, but only for a two-year window. *Id.* at 1246 & n.1. Yet the Commission went further and "required NECA to calculate and submit corrected data for *each year* in which NECA required its members to follow its faulty calculation." *Id.* at 1250 & n.6 (emphasis added). The 10th Circuit Court upheld the Commission's order in full.

31. Further, Blanca mischaracterizes the "history of cellular licensing" to support its contentions that its cellular service was both a "regulated" and/or "fixed" service and, therefore, that Blanca was entitled to the support it received.[96] Blanca asserts that, in its 1994 *Part 22 Rewrite Order*, the Commission adopted a proposal to eliminate the fixed service requirement for Basic Exchange Telephone Service (BETRS) (a regulated cellular service) in light of the Commission's history of routine waiver of such requirement, and therefore, a mobile cellular service can be treated as a regulated service for cost accounting purposes.[97] Blanca further contends that the Commission "fixed" the service location of cellular mobile subscribers at the subscriber's billing address.[98] Contrary to Blanca's contentions, however, the *Part 22 Rewrite Order* only adopted a proposal to eliminate a prohibition on the offering of non-BETRS fixed service in cellular bands based in part, on the routine waiver of this prohibition in the past.[99] Likewise, the fact that the Commission

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[96] *See* Second Petition at 13.

[97] *Id.* (citing *Revision of Part 22 of the Commissioner's Rules Governing the Public Mobile Services et al.*, Report and Order, 9 FCC Rcd 6513, 6571 (1994) (*Part 22 Rewrite Order*); *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services* et al., Notice of Proposed Rulemaking, 7 FCC Rcd 3658, 3672 (1992) (*Part 22 Rewrite NPRM*)).

[98] *Id.* at 12-13, 14 (citing 47 CFR § 54.307(b)).

[99] *Id.* at 13 (quoting *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services et al.*, Notice of Proposed Rulemaking, 7 FCC Rcd 3658, 3672 (1992)); *see Revision of Part 22 of the Commissioner's Rules Governing the Public Mobile Services et al.*, Report and Order, 9 FCC Rcd 6513, 6571 (1994)

defines a service location for CMRS providers offering competitive service in a LEC's study area for purposes of the now defunct identical support program is irrelevant to the determination of whether a service is fixed and subject to rate regulation for purposes of cost accounting and the recovery of rate regulated support by an incumbent LEC within its study area. Despite Blanca's arguments and as previously made clear in the *Blanca Order*, by definition, BETRS is a fixed service and CMRS is not.[100] BETRS is subject to Commission rate regulation and CMRS is not.[101]

32. Blanca also attempts to challenge these truisms by asserting that its CMRS resembles a fixed telecommunications service because Blanca offered its service as a common carrier subject to carrier of last resort obligations, charged prices for its service at rates equivalent to those set for wireline service under

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(eliminating restriction on the provision of incidental fixed service in cellular bands).

[100] *See Blanca Order*, 32 FCC Rcd at 10605 & n.84; *see also, e.g.*, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1425, para. 38 (1994) (generally distinguishing mobile service "provided through dual-use equipment . . . capable of transmitting while the platform is moving" from services "provided to or from a transportable platform that cannot move when the communications service is offered," and concluding that BETRS is not a mobile service) (*CMRS Second Report and Order*); *id.* at 1455, para.102 (finding that the Rural Radio Service, including BETRS, is a fixed service).

[101] *See* OMD Demand Letter at 3; *Blanca Order*, 32 FCC Rcd at 10605 & n.84.

its tariff, and reported costs only from those subscribers that chose CMRS in lieu of landline service.[102] But, a carrier's voluntary decision to offer CMRS service on terms defined by a tariff does not transform a mobile service into BETRS.[103] While Blanca acknowledges that states are preempted from setting rates for cellular service, Blanca alleges that it "regulated its own rates by offering cellular service under its state tariff' and notes that states may petition the FCC for rate regulation authority.[104] Blanca also alleges that it provides its service under NECA tariffs.[105] But CMRS is not eligible for inclusion under either state or federal tariffs, and thus, these tariffs have no bearing on whether a service is regulated for cost accounting purposes.[106] Moreover, the fact that cellular service is

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[102] Second Petition at 11 (citing First Petition at 1-3, 5, 11, & nn.7, 10), 12 (citing First Petition at 4-5, 6-7, 17), 15.

[103] Blanca's many citations to rules and related orders referring to cellular service as an eligible service do not pertain to rate-of-return high-cost universal service support, the kind of support Blanca received between 2005 and 2010. *See* Second Petition at 11-13.

[104] *See id.* at 11 n.7, 12 (citing 47 U.S.C. § 201, 202, Part 20, Part 22). In many ways, this contention is merely a different reiteration of its previously raised and rejected argument that wireless services are regulated services.

[105] *See id.*

[106] 47 U.S.C. § 332(c)(3) (preempting state and local rate and entry regulation of CMRS unless certain conditions, not applicable here, are met); *CMRS Second Report and Order*, 9 FCC Red at 1478, 1479, paras. 173, 177 (finding that tariffs are "not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates," and forbearing from imposing section 203 tariff filing obligations on CMRS); 47 CFR § 20.15(c).

subject to regulations other than federal rate regulation has no bearing on whether the service is considered to be a rate-regulated service for cost accounting purposes.

33. Blanca also asserts that it was eligible to receive support for services provided outside of its designated study area because the Colorado Public Utility Commission (PUC) did not "strictly regulate telephone exchange service boundaries."[107] Blanca suggests that because the Colorado PUC had not, prior to 2011, required an incumbent LEC to use a separate subsidiary to offer mobile service as a condition of receiving a competitive ETC designation, "Blanca's service offering was properly structured."[108] The issue of whether the Colorado PUC would have permitted Blanca to offer service outside of its designated service area as a competitive ETC had Blanca given the Colorado PUC the opportunity to evaluate its service offerings and certify Blanca as a competitive ETC, however, has nothing to do with Blanca's eligibility under the Act

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[107] Second Petition at 15-16 (arguing that "formal expansion of the Study Area is not required, because the goal is provision of service to rural, hard to serve subscribers . . . ") (citing 47 CFR § 54.201(d)). *See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services et al.,* Notice of Proposed Rulemaking, 7 FCC Rcd 3658, 3672 (1992).

[108] Second Petition at 15, n.10; *see Application of Union Telephone Company, dba Union Wireless, for Designation as an Eligible Telecommunications Carrier in Colorado*, Order Granting Exceptions, in Part, and Remanding with Directions, Colorado Public Utilities Commission, DA No. 09A-771T, at 13, paras. 29-30 (Colo. Pub. Utilities Comm'n rel. Apr. 26, 2011) (*Union Telephone Exceptions Order*).

and Commission's rules as a designated ETC to receive USF support for such areas.[109] As explained in the *Blanca Order*, Blanca was required under the Act and the Commission's rules to have been certified as an ETC in the relevant area in order to receive *any* support for such areas,[110] and Blanca does not challenge the Commission's conclusion that it did not obtain such a certification.[111] Similarly, even if the Colorado PUC had designated Blanca as a competitive ETC in these areas and permitted Blanca to offer CMRS without use of a separate subsidiary, and even if Blanca had used shared infrastructure to provide both fixed wireless

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[109] Second Petition at 15. Blanca quotes section 54.201(d) of the Commission's rules as support for this contention, but we note that the quoted section merely requires ETCs to meet certain service obligations in their designated area. It does not create, as Blanca appears to argue, an open-ended eligibility for support in any area. 47 CFR § 54.201(d); 47 U.S.C. § 214(e)(5) (defining "service area" as a "geographic area established by a State commission (or the Commission under [section 214(e)(6)] for the purpose of determining universal service obligations and support mechanisms").

[110] 47 U.S.C. §§ 214, 254; 47 CFR § 54.201.

[111] *See Blanca Order*, 32 FCC Rcd at 10607, paras. 36-37. We note that Blanca offers no evidence that the Colorado PUC had any opportunity to evaluate Blanca's mobile offering as a separate and competitive service potentially eligible to receive service under the (now-defunct) identical support rule. The Commission had cited the 2011 Colorado PUC decision in the *Blanca Order* to illustrate the kinds of conditions the PUC might have imposed had it been properly informed that Blanca was offering a competitive CMRS offering. *Blanca Order*, 32 FCC Rcd at 10607 & n.94. For this reason, the decision further underscores the importance of preventing this kind of "comingling across regulated, unregulated, and deregulated operations." *Union Telephone Exceptions Order* at 13, paras. 29-30.

and mobile services—despite the Commission's finding that "Blanca was providing only mobile cellular service" over its wireless infrastructure—Blanca would have been required by our accounting rules to divide shared costs between these services in order to determine how much support it was entitled to for offering regulated services as incumbent LEC and what it could receive as a competitive ETC.[112]

34. Blanca is also incorrect in its assertion that our authority to collect USF overpayments is limited to forfeiture actions or audit processes.[113] Rather, the Commission routinely resolves disputes regarding universal service mechanisms and payments through informal adjudication and collection procedures.[114] Throughout this proceeding, the Commission provided Blanca with notice, an opportunity to be heard, and an

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[112] *See Blanca Order*, 32 FCC Rcd at 10595-97, 10606, paras 4-5, 35; 47 CFR § 32.14(c).

[113] *See* Second Petition at 4-9; *see also Blanca Order*, 32 FCC Rcd at 10610-11, para. 42 (explaining that "[w]hen the Commission determines whether a specific set of USF payments is erroneous or illegal, it is making a fact-specific, individualized determination applying current laws to past conduct, i.e., an informal adjudication"); *see also id.* at 10611-13, paras. 43-46 (distinguishing such an action from a forfeiture action).

[114] *See Blanca Order*, 32 FCC Rcd at 10598-99, 10608, paras. 10-11, 39; *see also* 47 CFR Part 54 Subpt. I (providing for FCC review of USAC decisions); *id.* §§ 1.1901(e), 1.1911 (providing that the FCC may issue written demands for "amounts due the United States from . . . overpayments"); *see also N.J. Coal. for Fair Broad. v. FCC*, 580 F.2d 617, 618-19 (D.C. Cir. 1978) (per curiam) (explaining that Section 503(b) gives the Commission authority in certain situations to assess a forfeiture penalty in addition to other available remedies).

explanation for its decision: all the process to which Blanca is constitutionally and statutorily entitled.[115]

35. Contrary to Blanca's contentions and as discussed at length in the *Blanca Order*, this debt collection action is not subject to special procedures in section 503 of the Act governing the Commission's assessment of penalties.[116] The Commission is not imposing a penalty for Blanca's erroneous cost accounting practices but "merely seeking to recover sums improperly paid" because of those practices.[117] In contrast, the December 2017 negotiated settlements that Blanca cites in its Amended Second Petition were assessing forfeiture penalties in connection with a wholly unrelated USF program (Lifeline) imposed *in addition to, and separate from*, the recovery of USF overpayments.[118] In each of these cases, unlike this one, USAC

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[115] *Pension Ben. Guar. Corp. v. LW Corp.*, 496 U.S. 633, 653-55 (1990) ("[w]hen conducting informal adjudications, an agency need only comply with "the minimal requirements . . . set forth in the APA, 5 U.S.C. § 555"); *Riggins v. Goodman*, 572 F.3d 1101, 1110 (10th Cir. 2009) ("[D]ue process is required not before the initial decision or recommendation to terminate is made, but instead before the termination actually occurs.").

[116] Second Petition at 4-10; *Blanca Order*, 32 FCC Rcd at 10610-13, paras. 42-46.

[117] *See Blanca Order*, 32 FCC Rcd at 10612, para. 45.

[118] *See, e.g.*, *Cintex Wireless, LLC*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17124, 17126 & n.21 (2013) (directing USAC, when it determines that an ETC has sought support from the Fund for an intra-company duplicate, to require the ETC to report to USAC *all months* when the ETC received duplicative support for each such subscriber and to recover all duplicative support received) (emphasis added); *id.* at 17130-31, para. 16 (stating that the penalties that result from the NAL are separate

had already and separately "recovered the overpayments" sought by the Commission. Blanca's apparent reliance on then-Commissioner Clyburn's separate dissenting opinions in these cases is thus misplaced, since any supposed disparity in forfeiture penalties has no bearing on the investigation and collection of erroneously or wrongfully paid high-cost support where, as here, Blanca has resisted recovery of the overpayments and the Commission has not sought to assess any additional penalty or forfeiture.[119]

36. Finally, Blanca does not overcome the Commission's determination in the *Blanca Order* that USF is a form of federal funding subject to the Debt Collection Improvement Act by referencing the inapposite appellate court decisions, *United States ex rel. Shupe v. Cisco Systems, Inc.* and *Farmers Tel. Co. v.* FCC.[120] We stress that *Shupe* addressed a materially different statute—"an outdated version" of the False Claims Act—not the federal debt collection laws.[121] *Shupe* held

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from any amounts that the ETC is required to pay by USAC to make the USF whole).

[119] *See* Second Petition Supplement at 1.

[120] *See* Second Petition at 17 (citing *United States ex rel. Shupe v. Cisco Systems, Inc.*, 759 F.3d 379 (5th Cir. 2014) (per curiam); *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999)). We note that these cases and the associated arguments were raised in Blanca's late-filed First Supplement. *See* First Supplement at 15-16; *Blanca Order*, 32 FCC Rcd at 10604, para. 28 (denying Blanca's motions to accept its late-filed First and Third Supplements).

[121] *Shupe*, 759 F.3d at 383 (citing 31 U.S.C. § 3729 (2008)). We note that contributions to the USF are now made to and housed within the U.S. Treasury and that payments made to

that statements made to USAC before 2009 did not implicate the amended False Claims Act because USAC is not the government itself (although it administers USF at the government's direction) and because USF monies were not housed within the U.S. Treasury.[122] That holding has no bearing on this proceeding, which turns not on the False Claims Act, which addresses fraud claims, but instead on whether Blanca received over-payments.[123] Debts recoverable under the federal debt collection laws, in contrast to funds collected under the False Claims Act, are "not 'limited to funds that are owed to the Treasury,' but include[] all funds 'owed the United States,' including overpayments from any agency-administered program."[124] Blanca cites *Farmers* for the proposition that NECA/USAC performs no adjudicatory or governmental functions, but, contrary to Blanca's contention, this proposition does not mean that USF is not a federal program.[125] While USAC may

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USF recipients are now made from the U.S Treasury. *See* https://www.usac.org/cont/about/transfer-to-the-us-treasury.aspx. *See also Blanca Order*, 32 FCC Rcd at 10614-10616, paras. 51-54.

[122] *Shupe*, 759 F.3d at 384-88.

[123] 31 U.S.C. § 3701(b)(1)(C); *accord* 47 CFR § 1.1901(e) ("debt" includes "amounts due the United States from . . . overpayments").

[124] *Blanca Order*, 32 FCC Rcd at 10614, para. 51 (some internal quotation marks omitted). It has long been established that this provision extends to any program the government finances, *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1115 (D.D.C. 1994), and Congress did nothing to disturb that interpretation when it amended the federal debt collection laws in 1996.

[125] *See* Second Petition at 17-18 (citing *Farmers*, 184 F.3d at 1250).

handle day-to-day operations, the Commission is ultimately responsible for creating "specific, predictable, and sufficient . . . mechanisms to preserve and advance universal service,"[126] and "establish[ing] any necessary cost allocation rules, accounting safeguards, and guidelines."[127] As stressed in the *Blanca Order*, both the United States Supreme Court and Congress have accordingly described universal service programs as providing "federal assistance" or "federal funds."[128] The overpayments here are therefore recoverable as a debt owed to the United States under the federal debt collection laws.

C. Blanca's Emergency Request Is Procedurally Defective and Meritless

37. We separately dismiss Blanca's Emergency Request for stay of a Commission order.[129] Under the Commission's rules, such a request must be filed as a separate pleading.[130] Blanca filed its request as part of

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[126] 47 U.S.C. § 254(b)(5).

[127] *Id.* § 254(k). USAC has no control over how these funds are used but instead must collect and disburse them according to specific rules established by the FCC. *See* 47 CFR § 54.702(c) (providing that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress," and "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, [USAC] shall seek guidance from the Commission").

[128] *Blanca Order*, 32 FCC Rcd at 10614, para. 51 & n.148.

[129] Second Petition at 8.

[130] 47 CFR § 1.44(e).

its petition for reconsideration, so we dismiss this request as procedurally defective.[131]

38. Nor are we obligated to treat Blanca's Response to the Administrative Offset Notice as a separate request for stay simply because Blanca raised several arguments in its response challenging the timing of the collection as well as the collection itself, many of which Blanca had raised in its Amended Second Petition.[132] As already explained by the 10th Circuit Court of Appeals, the Commission's Administrative Offset Notice merely informed Blanca of the Commission's intent to pursue recoupment in accordance with its findings in the *Blanca Order* and the debt collection practices described in the Demand Letter.[133] Because the Administrative Offset Notice did not create legal obligations or impose legal consequences,

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[131] In addition, to the extent the Emergency Request seeks suspension of Blanca's red light status, the request is dismissed as moot. As Blanca has since recognized, its red light status was suspended on or about January 9, 2018. Motion for Immediate Action on Petition for Reconsideration and Emergency Request for Immediate § 1.1910(b)(3)(i) Relief at 5 n.10 & attachment p. 00003 (filed Nov. 25, 2019) (Motion for Immediate Action); Administrative Offset Notice Response at 2.

[132] *See* Response to Administrative Offset at 2 (referencing argument in its Emergency Request that under section 1.910(b)(3)(i) of the Commission's rules, the Commission cannot pursue collection of a debt during the pendency of an agency or judicial appeals); Second Petition at 24.

[133] *Blanca Tel. Co. v. FCC*, Case No. 18-9502, Order, at 2, n.1 (10th Cir. Oct. 25, 2018) (determining that the Blanca Administrative Office Notice did not constitute reviewable agency action).

there was nothing to stay as a consequence of this notice.

39. We also reject Blanca's Emergency requests (and similar arguments in the Response to the Notice of Administrative Offset) on the merits. Blanca seeks to stay the Commission's determination that the improper USF payments constitute a debt owed to the United States and its instruction to staff to pursue collection of the unpaid debt, arguing that it is entitled to such stay during the pendency of its agency or judicial appeals under the Commission's rules.[134] We reject that request for several reasons. *For one*, the rule cited only suspends application of the Commission's red light rule, which as noted above Blanca has since recognized has already been suspended. Thus, the rule has not prevented prosecution of any pending applications by Blanca,[135] or receipt by Blanca of credit for monthly payments due from the USF fund. We note that the rule offers no relief from other consequences of debt incurrence, including the administrative offset of future USF payments in accordance with the Commission's rules and the Debt Collection Improvement Act, after having accorded Blanca notice and an opportunity for review within the Commission of the

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[134] *See* Second Petition at 28; 47 CFR § 1.1910(b)(3)(i); *see also* Administrative Offset Notice Response at 1-2.

[135] In its Second Petition, Blanca expresses concern that its application to assign a license has not been processed or granted. Second Petition at 24. These delays are not associated with Blanca's red light status, which as noted above, has been suspended.

determination of indebtedness.[136] *For another*, a petitioner must show good cause for a stay,[137] and Blanca's filing does not even attempt to show that it has satisfied the traditional four-factor test for demonstrating such good cause.[138] We note that similar requests by Blanca to stay the *Blanca Order* have already been denied by the 10th Circuit Court of Appeals.[139]

40. For all these reasons, the *Blanca Order* and subsequent collection efforts remain in effect.[140]

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[136] *See* 31 U.S.C. § 3716; 47 CFR §§ 1.1911 *et seq.* Wholly apart from its remedies under the Debt Collection Improvement Act, "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'" *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *accord*, *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1112 (D.C. Cir. 1988).

[137] 47 CFR § 1.106(n).

[138] *See, e.g.*, *Rural Call Completion*, Third Report and Order and Order, 33 FCC Rcd 8400, 8417, para. 47 & n.155 (2018) (*Rural Call Completion Order*). *See also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Pursuant to this standard, the movant must show that (1) it is likely that it will prevail on the merits; (2) that it will suffer irreparable harm absent grant of the preliminary relief; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest would favor the grant. *Rural Call Completion Order*, 33 FCC Rcd at 8417, para. 47.

[139] *Blanca Tel. Co. v. FCC*, Case No. 17-1451, Order (10th Cir. Dec. 29, 2017) (denying motion for stay pending appeal); *Blanca Tel. Co. v. FCC*, Case No. 18-9502, Order (10th Cir. Apr. 5, 2018) (denying motion for injunction pending appeal).

[140] Based on action taken in this order, we dismiss as moot Blanca's recent Motion for Immediate Action.

IV. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 214, 254, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 214, 254, 405, and sections 1.106 and 1.115 of the Commission's rules, 47 CFR §§ 1.106, 1.115, the Amended Second Petition is hereby DISMISSED, or alternatively, DENIED.

42. IT IS FURTHER ORDERED that, pursuant to pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 5, 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 155, 214, 254, and sections 1.43 and 1.44 of the Commission's rules, 47 CFR §§ 1.43, 1.44, that the Emergency Request is DISMISSED, or alternatively, DENIED.

43. IT IS FURTHER ORDERED that the Motion for Immediate Action is DISMISSED AS MOOT.

44. IT IS FURTHER ORDERED that a copy of this Order on Reconsideration shall be sent by first class mail and certified mail, return receipt requested, to Blanca Telephone Company's attorney, Timothy E. Welch, Hill and Welch, 1116 Heartfields Drive, Silver Spring, MD 20904.

45. IT IS FURTHER ORDERED that, pursuant to section 1.103 of the Commission's rules, 47 CFR

§ 1.103, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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

In the Matter of Blanca Telephone Company Seeking Relief from the June 22 [sic], 2016 Letter Issued by the Office of the Managing Director Demanding Repayment of a Universal Service Fund Debt Pursuant to the Debt Collection Improvement Act	)	CC Docket No. 96-45 FCC 17-162

MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION

Adopted: **December 8, 2017**

Released: **December 8, 2017**

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

I. INTRODUCTION

1. The high-cost universal service support program (the high-cost program) supports the deployment of communications networks in high-cost, rural areas. In 1997, pursuant to section 254 of the Communications Act of 1934, as amended (Act),[1] the Colorado Public Utility Commission designated Blanca Telephone

[1] 47 U.S.C. § 254.

Company (Blanca) as an eligible telecommunications carrier (ETC) in parts of Alamosa and Costilla counties.[2] As a result, Blanca became eligible to receive high-cost support for providing local exchange telephone service in its designated study area.[3] As a rate-of-return incumbent local exchange carrier (incumbent LEC), the amount of high-cost support Blanca received was based on the costs it incurred in providing rate-regulated telephone service in its designated study area. Soon after its designation, Blanca began to offer commercial mobile radio service (CMRS), a nonregulated service, both within and outside of its study area. Thereafter, Blanca included the costs of this nonregulated service in the regulated cost accounts it submitted to the National Exchange Carriers Association (NECA) with respect to its designated study area, thus inflating the amount of high-cost support Blanca received from the Universal Service Fund (USF). In 2012, NECA discovered Blanca's improper inclusion in its rate base of nonregulated costs. NECA directed Blanca to correct its cost accounting for 2011 and later

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

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

years, and the Commission's Office of the Managing Director (OMD) directed Blanca to return $6,748,280 in improperly paid universal service support for 2005-2010 with respect to Blanca's designated study area.

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

II. Background

A. Regulatory Framework

3. The high-cost universal service support program is one of four universal service programs created by the Federal Communications Commission (FCC or Commission) to fulfill its statutory mandate to help ensure that consumers have access to modern communications networks at rates that are reasonably comparable to those in urban areas.[5] Under the

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

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

Commission's rules governing the high-cost program, incumbent LECs and competitive carriers designated as ETCs may receive high-cost support, but the legal and administrative framework for determining how much support they receive is different.

1. Rate-of-Return High-Cost Support

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

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

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

[8] *See 2000 Biennial Regulatory Review – Comprehensive Review of the Accounting Requirements and ARMIS Reporting*

By limiting the availability of such support to a rate-of-return incumbent LEC's regulated costs within its study area, the accounting and cost allocation methods countered the incentive to engage in anticompetitive practices, such as predatory cross-subsidization, that might dampen competitive markets for other forms of communication technology.[9] As the Commission has

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

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

explained, "[t]hese rules ensure that carriers compete fairly in nonregulated markets and that regulated ratepayers do not bear the risks and burdens of the carriers' competitive, or nonregulated, ventures."[10]

5. Rate-of-return carriers record their investments, expenses, and other financial activity in the Part 32 uniform system of accounts (USOA), which is divided into two types of accounts: regulated and nonregulated accounts.[11] Investment and expenses

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telecommunications rates and services and the sometimes perverse incentives arising therefrom).

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

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

entirely associated with the provision of a regulated activity, or that are used for both regulated and nonregulated services, are recorded in the regulated accounts.[12] Investment and expenses entirely associated with the provision of nonregulated activity are assigned to the nonregulated accounts and are not included when determining a carrier's interstate rate base or revenue requirement.[13] Investment and expenses recorded in the regulated accounts of the USOA are then subdivided in accordance with procedures contained in Part 64 of the Commission's rules.[14] Those rules generally provide that costs shall be directly assigned to either regulated or nonregulated activities where possible, and common costs associated with both regulated and nonregulated activities are allocated according to a hierarchy of principles.[15] To the extent costs cannot be allocated based on direct or indirect cost causation principles, they are allocated based on a ratio of all expenses directly assigned or attributed to regulated and nonregulated activities.[16] The investment and expenses allocated to nonregulated services through this process are excluded from the development of the regulated interstate rate base and revenue

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high-cost rules in Part 54, and make conforming changes throughout Part 54) (*April 2014 Connect America Report and Order*).

[12] *See* 47 CFR § 32.14(c).

[13] *See id.* § 32.14(f).

[14] *See id.* §§ 64.901-905.

[15] *See id.* § 64.901.

[16] *See id.* § 64.901(b)(3)(iii).

requirement. The regulated investment and expenses remaining after the application of the Part 64 process are then split between the intrastate and interstate jurisdictions in accordance with the separations process described in Part 36.[17] The regulated interstate investment and expenses flowing from the separations process are the inputs to the development of cost-based rates and support programs.

2. Identical Support

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

7. The difference in the support calculation requirements for rate-of-return LECs and competitive ETCs reflected the different policy goals of the two

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[17] *See id.* § 36.1 *et seq*.

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

kinds of support. The rate-of-return support mechanism worked to ensure that the incumbent LEC deemed to hold market power received a reasonable return on its investment in the provision of telecommunications services to fixed locations in high-cost areas. Identical support, in contrast, was intended to ensure that "the support flows" to the carrier "incurring the economic costs of serving that line," "in order not to discourage competition in high-cost areas."[19] Accordingly, the Commission made high-cost support "portable" on a per-line basis to any competitive ETC providing service through its "owned and constructed facilities."[20]

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

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

Moreover, because the Commission adopted the identical support mechanism in furtherance of efficient solutions, competitive ETCs could qualify for identical support, "regardless of the technology used."[21]

3. Administration of Support and Collection Efforts

8. Rate-of-return incumbent LECs submit their cost data to NECA which is a membership organization of incumbent LECs. NECA is responsible for collecting its members' cost study data and filer certifications of that data, and any other information necessary for NECA to calculate the amount of High-Cost Loop Support (HCLS) which its members are eligible to receive.[22] NECA submits the results of its

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

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

calculations to the Universal Service Administrative Company (USAC), which is responsible for day-to-day administration of the high-cost support program.[23] In addition to the information it receives from NECA, USAC collects carrier data and information relevant to the calculation of other forms of support.[24]

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

10. When submitting data to either NECA or USAC, carriers certify the accuracy of the data reported.[26] As administrator of the USF, USAC has the

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and underlying information from NECA); *see also id*. § 69.601 *et seq*.

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

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

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

[26] *See id*. § 69.601(c) (requiring certification of the accuracy of USF data submitted to NECA); *id*. § 54.904(a) (requiring certification that all interstate common line support receive [sic] "will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended"); *id*. § 54.314

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

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(requiring state commissions (or the rural telephone company itself when not subject to the jurisdiction of the state) to certify that the support received by a rural telephone company will only be used for its intended purpose); *see also*, *e.g.*, Instructions for Completing Connect America Fund Broadband Loop Support, Actual Cost and Revenue Data, Form 509 (requiring certification of accuracy and compliance with Commission's cost allocation rules when submitting data for true up of interstate common line support), at http://www.usac.org/_res/documents/hc/pdf/forms/509i.pdf.

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

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

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

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

11. The Commission has also long emphasized its authority and obligation to recover USF sums disbursed contrary to Commission rules.[31] Under section 3701 of the Debt Collection Improvement Act (DCIA), the Commission has authority to determine whether a

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

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

debt is owed to the Commission.[32] The DCIA and the Federal Claims Collection Standards (FCCS) promulgated by the Department of Treasury and the Department of Justice to implement the DCIA require the Commission to aggressively collect all debt owed to it.[33] The Commission has delegated to the Commission's Managing Director and the Managing Director's designee authority to make administrative determinations pursuant to the DCIA.[34]

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

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

13. In 2008, the FCC's OIG commenced an investigation into Blanca's receipt of high-cost support beginning with 2004. In 2012, during the pendency of the

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

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

[34] 47 CFR § 0.231(f).

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

OIG investigation, and pursuant to its data reconciliation policies, NECA conducted a review of Blanca's 2011 Cost Study, and concluded that Blanca improperly included costs, loops, and revenues associated with providing CMRS, which is a non-regulated service, in its 2011 Cost Study.[36] NECA directed Blanca to revise its 2011 cost studies and all ensuing studies to remove such costs.[37] In response to NECA's request, Blanca retained a cost consultant to review and revise Blanca's submissions because Blanca did not track or allocate expenses associated with providing local service to customers over its landline and cellular systems or the

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

[37] *See* NECA True Up Notice. NECA did not seek to recover past high-cost distributions from Blanca for the 2005-2010 period because NECA's cost pools operate within a 24-month settlement window. Under NECA's policies and procedures, member companies execute an agreement which specifies the existence of a window that allows exchange carriers to update or correct data for up to 24 months after the data was initially reported. Pool Administration Procedure, § 1.3, at p.1.6 (2013); *Universal Service High-Cost Filing Deadlines*, WC Docket No. 08-71, Order, 30 FCC Rcd 1879, 1882 n.28 (2015) (This 24-month adjustment window is the product of a contractual agreement between NECA and its member companies and has been in place since NECA began operations in the early 1980s). NECA therefore directed Blanca to revise and refile its 2011 Cost Study to remove costs and revenues attributable to its wireless system so that any necessary adjustments could be made within the applicable window. NECA also informed that any support payments "accepted and processed by USAC corresponding to data corrections outside of the 24-month settlement window are the obligation of the company." Pool Administration Procedure, § 1.3, at p.1-9.

expenses associated with providing service to customers of other carriers roaming on Blanca's cellular system, both inside and outside of Blanca's study area.[38] At no point during this reconciliation process did Blanca contest NECA's determination that Blanca's wireless offerings should be excluded from the costs used to calculate Blanca's high-cost support.

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

15. As required by section 54.707(c) of the Commission's rules, USAC provided the Commission with copies of "Blanca's books and records obtained during the OIG investigation and Blanca's own revision of its cost study and other filings for the post 2011

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[38] *See* OMD Letter at 2.

[39] OMD Letter at 3.

period."[40] Based on its analysis of that information, OMD determined that Blanca owed the Commission $6,748,280 in high-cost support overpayments received by Blanca between 2005 and 2010.[41]

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

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[40] *Id*. at 7.

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

cellular mobile telephone service,[42] and demanded immediate repayment of the $6,748,280 that Blanca had improperly received.[43]

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

C. Blanca's Challenges to the OMD Letter

18. On June 16, 2016, Blanca filed an Emergency Application for Review of the OMD Letter.[46] On June 24, 2016, Blanca filed a Petition for Reconsideration of the OMD Letter.[47] The arguments advanced by Blanca in the Petition and the Application are substantially the same. Stripped to their essence, Blanca argues that: (1) USF support is available for wireless services;[48] (2) in areas outside of its rate-of-return study area, Blanca was entitled to receive identical support as a competitive ETC and so any USF overpayments

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[42] OMD Letter at 2.

[43] *Id*. at 1.

[44] *Id*. at 8.

[45] *Id*.

[46] Application.

[47] Petition.

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

for misallocating CMRS-related expenses are offset by the identical support it could have received if correctly reported;[49] (3) recovery against Blanca would be inequitable;[50] (4) seeking to recover USF payments in an "*ex parte* summary proceeding" violates Blanca's due process rights;[51] (5) OMD is improperly imposing a forfeiture penalty under section 503 of the Act;[52] (6) the Commission has no authority to act under the DCIA because it applies only to "executive, judicial, or legislative" agencies and does not apply to "independent agencies," such as the Commission;[53] and (7) the OMD Letter is fatally flawed because it does not provide Blanca with an opportunity for administrative review prior to a monetary deprivation and denies Blanca the opportunity to review the Commission's records pertaining to the debt determination.[54]

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

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[49] Application at 6; Petition at 17.

[50] Application at 23; Petition at 22.

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

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

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

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

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

20. Blanca later filed four separate motions for leave to supplement its Application and Petition.[56] On December 19, 2016, Blanca filed its First Supplement claiming that two court decisions involving the question of whether USF debt is federal debt for purposes of False Claims Act (FCA) prosecutions support its arguments.[57] In that supplement Blanca also expresses concern that that [sic] two newly released Commission Notices of Apparent Liability for Forfeiture (NALs) announce a new statute of limitations theory under section 503 of the Act, which the Commission could use against Blanca.[58]

21. On March 30, 2017, Blanca filed its Second Supplement, notifying the Commission that Blanca has discontinued offering CMRS as of March 28,

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[56] Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Dec. 19, 2016) (First Supplement); Second Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Mar. 30, 2017) (Second Supplement); Third Motion for Leave to Supplement Emergency Application for Review,, CC Docket No. 96-45 (filed Apr. 10, 2017) (Third Supplement); Fourth Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed July 5, 2017) (Fourth Supplement).

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

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

2017.[59] Blanca asserts that the disclosure is "factually useful in the Commission's consideration of the USF funding issue current [sic] under review."[60]

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

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

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[59] Second Supplement.

[60] *Id.* at 1.

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

[62] Third Supplement at 5-10.

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

1, 2005, and December 31, 2012, and "copies of any other subpoenas which the Commission might have served upon NECA."[64]

III. DISCUSSION

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

25. In defending its actions, Blanca erroneously asserts that because it used high-cost support to deploy CMRS and because wireless service is a supported service, Blanca was entitled to the support that it received. But this argument is inconsistent with the plain language of Commission rules and orders

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

requiring rate-of-return carriers such as Blanca to separate out their nonregulated costs from the rate base upon which high-cost support is based, to promote the competitive and other public interest goals of section 254 of the Act. Blanca also attacks the process used by OMD to seek repayment of the overpayments made to Blanca. In so doing, Blanca ignores Commission rules and precedent as well as the Commission's obligation to protect the Universal Service Fund from waste, fraud and abuse. We thus affirm the factual, legal, and technical findings in the OMD Letter and direct OMD to proceed with collection.

A. Consideration of Blanca's Late-Filed Supplements

26. As an initial matter, we address Blanca's motions to accept its four supplements, all filed by Blanca well after the 30-day deadline for an appeal of the OMD letter—July 5, 2016.[65] The Commission has explained that a strict enforcement of filing deadlines is "both necessary and desirable" to avert the "grave danger of the staff being overwhelmed by a seemingly never-ending flow of pleadings."[66] In general, we will

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

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

deny consideration of late-filed pleadings that raise arguments and facts that could have been presented within the 30-day deadline.[67] We have the discretion, however, to grant leave to file late pleadings where "equities so require and no party would be prejudiced thereby."[68]

27. We grant Blanca's motion to accept its late-filed Second and Fourth Supplements. In each, Blanca has identified new facts and arguments that occurred after July 5, 2016. In the Second Supplement, Blanca

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F.2d 946, 951–52 (D.C. Cir. 1986); *cf. Gardner v. FCC*, 530 F.2d 1086, 1091–92 & n. 24 (D.C. Cir. 1976).

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

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

points to the fact that it ceased offering nonregulated CMRS in March 2017.[69] In the Fourth Supplement, Blanca points to a 2017 United States Supreme Court decision that it claims is on point.[70] We find the public interest is served by considering the relevance of these arguments to the instant action.

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

29. Blanca's assertion in its First Supplement—that two NALs and the Commission's Writ Opposition filed with the D.C. Circuit constitute changes in the law or in the Commission's interpretation of the law—is specious.[72] The Commission's analysis of the relevant legal issues was based on long-standing precedent and principles that Blanca had ample opportunity to review and incorporate into its timely filed Application and Petition. For example, the legal position that the collection of debt is not a forfeiture barred by the passage of time, as raised in the two NALs cited by Blanca and issued after the issuance of the OMD

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[69] *See* Second Supplement at 1.

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

[71] *See* 47 CFR § 1.3.

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

Letter, is expressly is [sic] based on long-standing precedent, including 1938 and 1946 decisions by the U.S. Supreme Court and orders by the Commission and the WCB released in 2011 and 2014, respectively, establishing that the denial of funding is not a forfeiture action and the statute of limitations in section 503 of the Act is therefore inapplicable to the recovery of government funds improperly paid.[73] Likewise, the applicability of the DCIA to the recovery of federal debts is supported by precedent almost 30 years old and did not involve any new interpretation of the relevant law.[74]

30. Further, we find unpersuasive Blanca's characterization of a new argument as "non-obvious" to justify a late filed supplement. The cases Blanca "discovered" were issued by the 10th Circuit in 1999 and the 5th Circuit in 2014, well in advance of the 30-day

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

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

deadline.[75] Both of these cases, as with the instant action, involve USF support.[76] We thus find no reasonable basis, and Blanca proffers none, for concluding that Blanca could not, "through the exercise of ordinary diligence," have learned of, and timely raised, the relevance of these cases prior to the deadline.[77]

31. Likewise, and contrary to Blanca's contentions, Blanca's arguments in its Third Supplement are not based on a new interpretation of the law by the Commission. The legal positions taken by the Commission in the *Sandwich Isles NAL* were based on long-standing precedent.[78] To the extent Blanca's arguments are about precedent for forfeiture proceedings, they are not relevant here, because this is not a

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

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

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

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

forfeiture proceeding.[79] Moreover, the mere fact Blanca referenced a Public Notice in its original Application and Petition mentioning the Sandwich Isles proceeding and that the Sandwich Isles proceeding involved a fact pattern that Blanca claims is like its own does not justify, in this case, consideration of its late-filed supplement.

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

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

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

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

[80] 47 U.S.C. § 254(b)(5).

and 69 of the Commission's rules are designed to ensure discharge of these statutory mandates.

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

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[81] *See* OMD Letter at 2.

[82] *See id*.

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

[84] CMRS is classified as a nonregulated service for accounting and cost allocation purposes, because the Commission has chosen to forbear from rate regulation of these wireless services. *See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162,

35. Blanca is a rural telephone company designated as an ETC for the provision of tariffed local exchange service in the relevant study area 462182, which as noted above covers portions of Alamosa and Costilla counties in Colorado.[85] Blanca joined NECA as a rate-of-return incumbent LEC and was treated for regulatory purposes as such.[86] As a rate-of-return incumbent LEC, Blanca was required by our Part 64 rules to allocate its costs between regulated services and nonregulated service so that NECA and USAC could correctly compute their eligibility for HCLS,

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Report and Order, 12 FCC Rcd 15668, 15691, para. 33 n.102 (1997); *Implementation of the Telecommunications Act of 1996*, CC Docket No. 96-193, Report and Order, 12 FCC Rcd 8071, 8095, para. 53 (1997); *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, GN Docket No. 94-90, Report and Order, 10 FCC Rcd 6280, 6293-94 & n.77 (1995); *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1492, para. 218 (1994).

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

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

Safety Net Additive Support (SNA), and Local Switching Support (LSS), but failed to do so.[87] Blanca also violated Part 36 of our rules, which requires rate-of-return incumbent LECs to identify the portion of their regulated expenses attributed to interstate jurisdiction so that USAC may correctly compute their eligibility for Interstate Common Line Support (ICLS).[88] Additionally, Blanca violated Part 69 of our rules, which require rate-of return incumbent LECs to apportion regulated, interstate costs among the interexchange services and rate elements that form the cost basis for exchange access tariffs, so that NECA may set "just and reasonable" access rates.[89] Consequently, Blanca's decision to report CMRS-related costs in regulated accounts with respect to study area 462182 resulted in an erroneous increase in the amount of

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

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

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

high-cost support paid to Blanca and potentially distorted "just and reasonable" access rates.[90]

36. Blanca is also wrong when it claims it was entitled to support for its CMRS offerings as a competitive ETC.[91] Blanca does not qualify for identical support in areas where it is an incumbent LEC.[92] Blanca's ETC designation is limited to a specific geographic area and does not encompass the offering of a competitive nonregulated service, either inside or outside Blanca's designated study area.[93] Indeed, the state commission had no opportunity to evaluate, consistent with its obligation to make a public interest determination required by section 214(e), the relative burdens on federal or state support mechanisms of granting Blanca an ETC designation for its CMRS, including any conditions that might have been appropriate with

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

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

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

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

respect thereto (such as forming a separate wireless subsidiary).[94] Accordingly, Blanca was not entitled to identical support for a competitive CMRS service offering within its study area absent a new designation or the modification of its existing designation.[95]

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

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

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

any other areas for, or expanded its existing designation to cover, these areas. Absent such designation, Blanca is not eligible for support in these areas. Tellingly, Blanca never sought identical support on a correctly calculated per-line basis from USAC for services provided outside its study area as a competitive ETC—indeed, it made no administrative filings to claim identical support at all—and it is not now entitled to have the overpaid rate-of-return support for study area 462182 offset against any speculative sum it might have received had it done so.[96]

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

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

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

[98] *See*, *e.g.*, 47 CFR § 54.707 (establishing authority of USAC to audit carriers' data submissions); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 97-21, Order, 15 FCC Rcd 22975, 22981-82, para. 16 (2001) (establishing procedures for implementing commitment adjustment recovery actions); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint*

apply a new requirement to past conduct or apply a new interpretation of our rules and precedent.[99] Rather, OMD applied our rules, which base rate-of-return high-cost support on an incumbent LEC's embedded costs in providing a regulated service.[100] Blanca's requests for payment with respect to study area 462182 were inconsistent with those rules and the underlying policy, as well as numerous other Commission orders cited herein.[101]

Board on Universal Service, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 22975, 22982, para. 16 (2000) ("[C]onsistent with the Commission's obligations under the DCIA, following USAC referrals to the Commission, the Commission will issue letters demanding repayment from service providers that are obligated to pay erroneously disbursed funds"); *cf. Old Republic v. Fed. Crop Ins. Corp*., 947 f. 2d 269, 272 (7th Cir. 1991) (agencies have authority under contract, statute, and common law to recoup overpayments that result from agency error).

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

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

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

39. Nor did the continued funding of Blanca in accordance with its reported costs from 2005 until 2010 give rise to the kind of reliance interests that would make this debt adjudication a violation of due process. Contrary to Blanca's contentions, the holding in *Christopher v. SmithKline Beecham Corporation* does not suggest otherwise.[102] In *SmithKline*, the U.S. Supreme Court declined to defer to an agency's new interpretation of its long-standing but ambiguous statutes and rules where such new interpretation threatened "massive liability" for prior conduct affected parties could not have reasonably anticipated.[103] In so holding, the Court placed special emphasis on, among other things, the agency's clear and decades-long acquiescence to industry-wide noncompliance.[104] In contrast, in directing Blanca to repay amounts it had been

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

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

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

overpaid, OMD did not adopt a new interpretation of ambiguous rules but merely applied explicit Commission rules widely accepted by the industry.[105] Moreover, contrary to Blanca's contentions, the mere continued funding of Blanca pending a factual investigation into Blanca's cost accounting methods is not equivalent to complicity in industry-wide noncompliance. Further, the Commission has consistently stated that it conditions all funding on proper use and receipt; relies on audits and other program safeguards to ensure compliance with its rules designed to implement the foregoing statutory mandates under section 254; and, has regularly and quite properly sought recovery for improper payments at the conclusions of audits and investigations that have found overpayment of universal service funds.[106]

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

[106] *See*, *e.g.*, *Comprehensive Report and Order*, 22 FCC Rcd at 16386, para. 30 ("Consistent with our conclusion regarding the schools and libraries program, funds disbursed from the high-cost, low-income, and rural health care support mechanisms in violation of a Commission rule that implements the statute or a substantive program goal should be recovered."); *id*. at 16382, para. 19 (explaining that "[a]udits are a tool for the Commission and the Administrator, as directed by the Commission, to ensure program integrity and to detect and deter waste, fraud, and abuse," and that "[a]udits can reveal violations of the Act or the Commission's rules").

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

40. The Commission has the statutory authority to review the results of USF audits and investigations, and where it determines that USF payments were sought and received in violation of the Commission's rules it has the authority to recover such funding regardless of fault, and to recover such funding. In section 254 of the Act, Congress created the USF and tasked the agency with overseeing it.[107] In doing so, Congress granted to the FCC the necessary authority to adjudicate and recover unauthorized funding.[108] Such authority is essential to the fair administration of the universal service support programs. In its

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[107] 47 U.S.C. § 254(e).

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

absence, the Commission would be unable to effectively protect the USF and the contributors thereto from the kinds of market distortions arising from misuse or misallocation of USF support explicitly recognized by Congress in section 254(k) of the Act and directly implicated by Blanca's cost allocation errors.[109] Once the agency makes a final determination that certain payments were erroneous and/or illegal, the agency has the authority and obligation under the DCIA to treat these overpaid sums as federal claim subject to collection, including by offset.[110]

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

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

41. Blanca's argument that as a matter of equity we should limit our recovery of overpaid USF to "cases of misrepresentation, false statement, concealment, obstruction, or lack of cooperation," are unavailing.[111] The question of whether Blanca had "clean hands" or intentionally misreported its costs is irrelevant.[112] Blanca does not allege—nor could it—that the Commission's effort to collect improperly disbursed USF support is dependent on any finding of specific intent.[113] So too do we find irrelevant Blanca's repeated emphasis on the fact that Blanca began a practice of

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[111] Application at 23; Petition at 22.

[112] Contrary to Blanca's contentions, the Commission in its Writ Opposition did not concede that Blanca accepted the overpaid support with "clean hands;" rather, the Commission stressed merely that it had made no finding of fault or intent because such a finding would have been irrelevant to the Commission's recoupment efforts. *Compare* First Supplement at 7 (citing Writ Opposition at 14 to support contention that the Commission concedes Blanca had "clean hands") *with* Writ Opposition at 14 (explaining that a finding of misconduct is not relevant to an action in recoupment).

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

misreporting costs to NECA in 2005.[114] Even if the agency could reasonably have discovered the underlying noncompliance earlier, Blanca would not have been relieved of the obligation to repay the funds.[115] Indeed, here the Commission has a specific statutory obligation to make sure that high-cost funds are used for their intended purposes, and seek repayment of improperly distributed funds.[116]

42. Blanca is incorrect when it asserts that the Commission is creating a "novel summary debt claim adjudication procedure" and applying it to Blanca without notice or opportunity challenge the Commission's findings.[117] When the Commission determines whether a specific set of USF payments is erroneous or illegal, it is making a fact-specific, individualized determination applying current laws to past conduct, i.e., an informal adjudication.[118] Such an action does not

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

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

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

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

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

meet the definition of a rulemaking and no statute requires it to be conducted through "on the record" hearings.[119] The Act gives the Commission broad authority to delegate that adjudicatory authority and in this context, the Commission has delegated authority to both WCB and to OMD.[120] In any event, the Act also specifically provides that all persons aggrieved by an order, decision, report or action made or taken on delegated authority have rights of appeal within the agency, while sections 1.106 and 1.115 of the Commission's rules set the specific procedures and requirements for making such appeals and seeking reconsideration of agency actions.[121]

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

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

[121] *See*, *e.g.*, 47 U.S.C. § 155(c)(4) ("[taken on delegated authority] may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission."); *id*. § 405(a) ("After an order, decision, report, or

43. Also contrary to Blanca's assertion, section 503 forfeiture proceedings are not the exclusive means by and through which the Commission may make a determination that a rule has been violated and impose liability. The Commission or USAC has consistently sought recovery of USF funds outside of section 503 proceedings.[122] By its terms, section 503(b) imposes forfeiture liability for violation of any Commission rule, whether or not the violation has led to any improper payment by the Commission (or USAC). Neither the plain language of section 503 of the Act nor its legislative history indicates that Congress intended that

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action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear."). *See also* 47 CFR §§ 1.106, 1.115.

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

section to govern debt determinations, and Blanca has provided no evidence to the contrary.[123] The legislative history of section 503 makes clear that the statute applies only to monetary forfeitures and that such forfeitures are an enforcement measure.[124]

44. We in turn disagree that the Supreme Court's *Kokesh* decision helps Blanca here.[125] The *Kokesh* Court held that a Security and Exchange Commission (SEC) disgorgement action was a penalty for violating federal securities law, and thus, subject to the APA's generally applicable five-year statute of limitations in section 2462 governing any "action, suit or proceeding for the enforcement of any civil fine, penalty, or

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

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

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

forfeiture, pecuniary or otherwise."[126] Key to that decision was its finding that a penalty is designed to punish and deter future violations rather than to compensate a "victim."[127] The Court reasoned that SEC disgorgement was an action that left the defendant "worse off," since a court could order disgorgement that "[exceeded] the profits gained as a result of the violation," and that disregarded "a defendant's expenses that reduced the amount of illegal profit."[128] The Court emphasized that when a sanction "can only be explained as . . . serving either retributive or deterrent purposes," it is a "punishment."[129]

45. Here, the Commission is merely seeking to recover sums improperly paid in which Blanca held no entitlement under section 254 and the Commission's implementing rules.[130] It is not a punitive measure that seeks to deter future misconduct by other carriers

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

[127] *Id.*

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

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

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

but merely returns Blanca to the *status quo ante*.[131] It does not punish Blanca for the potential public and market harm arising from Blanca's improper cost accounting but merely recovers for the USF a windfall to which Blanca was not entitled under the foregoing statutory and regulatory scheme.[132] Any negative financial impact that Blanca may experience as a result of recovery of this improper payment cannot transform this action into a sanction or penalty.[133]

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

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

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

46. Nor do, as Blanca asserts, sections 1.1901(e) and 1.1905 of our rules indicate any contrary Commission intent to treat decisions underlying debt determinations as synonymous with forfeiture actions.[134] Consistent with the DCIA and contrary to Blanca's assertions, section 1.1901(e) does not limit recovery actions to partially-paid or judicially-ordered forfeitures but includes any amount due the United States, including overpayments from USF.[135] Similarly, section 1.1905 does not suggest that recovery actions must follow the procedures for forfeiture liability. Rather, that section of our rules merely makes clear that such debt collection rules neither supersede such procedures nor require their duplication.[136]

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incurred when kickbacks were paid); *United States v. Doman*, 255 F.2d 865, 869 (3d. Cir. 1958) (holding that the Government's action under Surplus Property Act was not barred by section 2462 since the recovery was compensatory to the Government, not a penalty), *aff'd*, 359 U.S. 309 (1959).

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

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

[136] 47 CFR § 1.1905. We note that this language is consistent with similar language in the Federal Claims Collection Standards (FCCS), 31 CFR parts 900-904, a set of rules jointly passed by the Treasury Department and the DOJ prescribing DCIA-related collection standards unless the program legislation under which the claim arises or some other statute provides otherwise. *Id*. § 900.1(a); 31 CFR § 901.2(a) (explaining that, with regarding [sic] to notice of a governmental claim, "[g]enerally, one demand should suffice"); *id*. § 901.3(b)(4)(iv) ("When an agency previously has

E. The Commission Afforded Blanca Due Process

47. The Commission processes have afforded Blanca sufficient due process. Informal adjudications should provide notice to affected parties, opportunity to participate, and supporting reasons.[137] In adopting section 3716 of the DCIA, Congress explicitly preserved "all appropriate due process rights, including the ability to verify, challenge, and compromise claims" by requiring, prior to the initiation of offset, that the debtor be sent written notice describing the type and amount of the claim, the intention of the agency head to collect the claim by administrative offset, and an explanation of the rights of the debtor under section 3716, as well as opportunities to inspect and copy

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given a debtor any of the required notice and review opportunities with respect to a particular debt, the agency need not duplicate such notice and review opportunities before administrative offset may be initiated.").

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

agency records related to the claim, to receive agency review of its claim-related decisions, and to enter into a repayment agreement with the agency head.[138] An agency need not, however, duplicate such notice and review opportunities in order to initiate offset.[139]

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

49. Blanca states that the OMD Letter deprived it of access to the underlying cost data upon which the Commission relied to calculate the overpayments, which were separately detailed on a per fund, per year basis in an accompanying attachment.[140] But Blanca did have access to the underlying costs data because OMD explicitly based its financial accounting on the

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

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

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

cost studies Blanca itself commissioned in response to the demands by NECA and USAC to remove certain costs and revenues and wireless loops.[141] Blanca did not submit a request to the Commission for such records nor did it assert that it could not adequately challenge the cost accounting because of a lack of access to such records.[142] Indeed, Blanca did not make any attempt to contest the accuracy of the accounting.

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

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

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

[143] OMD Letter at 8.

[144] Application at 22.

an offset letter, such complaint is unfounded as the OMD Letter is a demand letter not an offset letter.[145] We also note that Blanca filed both an Application for Review and a Petition for Reconsideration, and so was not harmed in any way by an alleged lack of due process.

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

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

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[145] *Id*. at 22.

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

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

both the U.S. Supreme Court, and the United States Senate have characterized USF as a form of federal funding.[148]

52. Blanca also incorrectly argues that the DCIA does not apply to independent agencies such as the Commission.[149] Blanca's position is contrary to the only appellate decision directly on point, i.e., *Commonwealth Edison*.[150] In the 1996 DCIA amendments, Congress did not alter the relevant language and did nothing to express any disapproval of, or raise any doubts about, the correctness of the Seventh Circuit's result.[151] That decision is consistent with the plain language of the statute. Section 3701 of the DCIA defines an "executive, judicial, or legislative agency" to include any "department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of Government."[152] The Commission

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

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

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

[151] *See id*.

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

clearly qualifies under this definition.[153] Indeed, the Commission is frequently described by courts as an independent, executive agency or as an independent agency within the executive branch.[154] To the extent that the DCIA was adopted to "maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools," it makes little sense that Congress would have excluded several large federal agencies.[155] Accordingly, the most natural reading

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judicial branches of the Government, including Government corporations.").

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

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

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

of the reference to the three branches in section 3701 is to presume Congressional intent to be inclusive of a broad range of federal entities.

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

54. In sum, we conclude that the Commission has authority under the DCIA to collect the overpayments Blanca received; that OMD lawfully acted on the Commission's behalf in determining that Blanca

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that agencies play a more active role in the collection of delinquent claims than merely referring them to the Department of Justice.").

[156] Application at 21.

[157] 41 CFR § 0.231.

[158] 47 U.S.C. § 155(c), (e).

[159] 31 U.S.C.§ 3711(a)(1), (b).

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

owes the USF $6,748,280 and in issuing the OMD Letter; that the overpayment determination is not a forfeiture and, therefore, section 503 of the Act and the Commission's regulations implementing section 503 are not applicable; and, finally, that Blanca has not been deprived of due process. Accordingly, we affirm OMD's determination that Blanca must repay $6,748,280 to the USF, and we direct OMD to pursue collection of that amount from Blanca, whether by offset, recoupment, referral of the debt to the United States Department of Treasury for further collection efforts or by any other means authorized by the DCIA or common law.

IV. ORDERING CLAUSES

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

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

57. IT IS FURTHER ORDERED, that the following pleadings ARE DISMISSED as unauthorized

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

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

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

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

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

I remain fearful, however, about whatever else lies beneath. As a consistent spokesperson on the need to address waste, fraud, and abuse in our universal service outlays, I have seen too many instances—particularly during my time as a state commissioner—of companies using the USF high-cost fund as a piggy bank for all manner of inappropriate expenses. Unfortunately for the high-cost fund and for all of us, we remain slow in discovering wrongdoing and late in

addressing it. As the agency considers further reforms to our high-cost fund, I am hopeful that we will also take a serious look at measures to stamp out waste, fraud, and abuse wherever we find it.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

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

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

micromanagement of private companies, but instead reasonable limitations to prevent the most egregious practices. Hopefully that effort will soon bear fruit.

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

At the same time, I have heard complaints that USAC has been attempting to recoup certain overpayments from a decade ago that reportedly resulted from ministerial errors rather than fraud – the type of situation where the steps to obtain recovery at this point may cost more than the funding at stake. Moreover, recipients that obtained funding that long ago may not have been under an obligation to retain records for that length of time, relevant personnel may no longer be found, and rules now in place may not have been applicable that far back in the past. Make no mistake: I abhor any waste, fraud or abuse caused by wrongdoers and fully support the recoupment of such funds. However, I am sympathetic to the view that the Commission generally should be required to recover funding within a defined timeframe, such as 7 years.

Certain timing limitations imposed on the Commission, like those that exist in other areas, would not wholly prevent the exercise of oversight or imposition of enforcement actions when needed. To the extent that would require clarification or direction by Congress, that could be a welcome improvement.

[SEAL]

Federal Communications Commission

Washington, D.C. 20554

June 2, 2016

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

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

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

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

Dear Mr. Wehe:

This letter is to notify you that the Federal Communications Commission (the "FCC") has determined that the Blanca Telephone Company ("Blanca" or the "Company") has received improper payments from the Universal Service Fund's ("USF") high-cost program in the amount of $6,748,280, which was paid between 2005 and 2010. Our determination follows an investigation by the FCC's Office of Inspector General (OIG), the Universal Service Administrative Company (USAC), and the National Exchange Carrier Association (NECA).

The determination of an overpayment also constitutes a debt owed to the United States that must be recovered and is immediately due and payable without further demand. Additionally, this is a Demand for Payment which provides you with certain important information including: (a) the fact that payment is due immediately, in full, and without further demand, (b) the background of the debt, (c) important rights, and (d) instructions for payment.

Background

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

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

concluded Blanca impermissibly received USF high-cost support because its claims for support included costs and facilities for a *mobile* wireless system.

NECA required Blanca to substantially and materially revise its high-cost support filings beginning with the 2011 Cost Study. In response, Blanca retained Moss Adams to review and revise Blanca's submissions.[1] These revisions were required because Blanca did not track or allocate expenses associated with providing local service to customers over its landline and cellular systems or the expenses associated with providing service to customers of other carriers roaming on Blanca's cellular system. Blanca operated these cellular stations and its Local Exchange Carrier (LEC) telephone company under a single management structure without allocating costs and expenses between regulated and non-regulated services. In particular,

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

Blanca characterized its cellular stations as Basic Exchange Telephone Relay Service (BETRS) facilities in its CPRs, and by including all costs attributable to its mobile cellular system in its cost studies, failed to comply with Parts 64, 36 and 69 of the FCC's rules. The inclusion in cost studies of such cellular investment, expenses, and costs that were not used and useful to provide regulated telephone service is prohibited, and resulted in inflated disbursements to Blanca from ICLS, LSS, High Cost Loop Support, and Safety Net Additive Support.

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

received USF high-cost support to which it was not entitled as a LEC because it submitted claims for support based upon the provision of *mobile* cellular service both within and outside of its LEC study area.

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

Findings

Since as early as 2003, Blanca has claimed reimbursement from the high-cost program for the costs of providing telephone service as a rate of return, landline carrier. Blanca is authorized to provide landline telephone service as a LEC in portions of Alamosa and Costilla Counties, CO.[2] As a rural LEC, and based on

[2] Blanca was designated as an ETC by the Colorado Public Utilities Commission on December 17, 1997, which entitled it to

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

A BETRS system, whatever the frequency utilized, must be dedicated to the end user and fixed at a customer's premises in order to qualify for high-cost support as a regulated local exchange service.[3] The definition of BETRS specifically excludes the provision of cellular mobile telephone service as was provided by

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receive federal universal service support in accordance with 47 U.S.C. § 254 and implementing regulations by the FCC.

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

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

In particular, your argument misreads NECA's Paper 4.9, Use of Wireless Technology to Provide Regulated Local Exchange Service ("NECA Paper") as applied to Blanca's cellular system. There is nothing in the FCC's regulations or precedents, or in the

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

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

Communications Act of 1934, as amended, (the "Act") to support Blanca's position. Whether Blanca's service is "mobile" or "fixed" is not determined based on whether Blanca's LEC customers' signals are automatically handed off to *other* carriers in adjoining cellular service areas, and the NECA Paper makes no such distinction. Nor does the NECA Paper suggest that "fixed wireless' service may provide for geographic mobility to wireless subscribers within a broadcast area, as long as this mobility is not as extensive as the 'full' mobility provided by mobile wireless services."[6] While the NECA Paper notes that one of the characteristics of new wireless technology is that the subscriber "may have some degree of 'portability' within the broadcast area,"[7] the Paper in no way equates that "portability" to a cellular company's entire cellular service area.

Instead, the NECA Paper makes it clear, among other requirements, that a wireless system must be fixed, not mobile,[8] in order to qualify for high cost support as a rate of return company and that the LEC's radio equipment at the customer site must be a *fixed* radio station.[9] While explaining that wireless technology can be an effective means to provide a supported service to telephone customers where it is cost prohibitive or impractical over wireline facilities, NECA explicitly cautions its member companies that the costs

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[6] Settlement Letter at 2.

[7] NECA Paper at 9.

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

[9] *Id.* at 10.

for a system to provide mobile services are outside the scope of Title II and cannot be reported to the NECA pool or recognized in USF loop cost reporting,[10] which is exactly what Blanca did, contrary to NECA's admonitions.

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

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[10] *Id.* at 10.

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

accordance with the cost issue,[12] was consistent with the NECA Paper.

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

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

[13] According to Keith Hazlett, a Blanca engineer, Blanca's cellular system had five cell sites which handed off to each other, and there was no requirement to his knowledge that a cellular customer be located at a fixed location. Oral testimony of Keith Hazlett, Civil Investigative Demand, Tr., at 11. Blanca did not have any restriction in its application for wireless service or on its company website that a customer be located at a fixed location as

provides and the scope of the stations' operations are documented in the series of applications Blanca filed with the Commission, the FCC-issued authorizations to provide cellular mobile service and by other representations made to the Commission.[14]

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a condition of receiving cellular service. Alan Wehe also testified that a customer could use his or her cellular phone to make a call throughout Blanca's cellular network as well as roam on other carriers' systems with which Blanca had a roaming agreement. Oral testimony of Alan Wehe, Civil Investigative Demand, Tr. At 68-69.

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

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

Although during NECA's investigation Blanca professed to provide service to 146 customers who could not receive landline service because "many of BTC's customers lack[ed] access to commercial power,"[16] Blanca's

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Exhibit VI, Service Proposal, at 2. The application proposed to use Blanca's cellular switch (Station KNQ427) and represented that the switching expenses would therefore be nominal. Exhibit IX, Construction Costs & First Year Operating Expenses. Blanca represented it "[had] the ability to construct and to operate the proposed system." *Id.*

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

[16] NECA Report, Wireless Service Section at 1. Blanca also claimed that "[t]he Blanca Telephone Company has been using

operations as a cellular carrier were substantially more extensive than the representations made in the Settlement Letter that wireless service was provided to "remote" customers. Blanca provided its wireless service to any customer who requested it, whether or not the customer could receive wireline service or was located within an area where there was a source of electrical power, as Blanca represented to NECA. And, Blanca proactively upgraded its system and coordinated with other operators in the area to enable system handoff.[17]

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wireless technology since 1982 to provide basic service to approximately 150 customers in an unserved area (there are no land-line facilities available due to not being feasible and the installation would be cost prohibitive) and the area is sparsely populated." Response of A. Wehe to OIG Subpoena dated October 23, 2012, Questions 26 & 27.

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

Additionally, Blanca claimed USF high-cost support to provide service outside of its study area.[18] Section 214(e)(5) of the Act defines a service area as a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. In the case of a service area served by a rural telephone company, service area means a company's "study area." Only two of Blanca's cellular towers are located within Blanca's study area.[19] As a LEC, Blanca did not have authority to claim high-cost support for any costs to provide service for any of its cellular customers served outside of its study area or for customers of other cellular carriers roaming on Blanca's cellular system. Any costs and expenses attributable to such cellular services were disallowed.

As discussed above, NECA determined, and we agree, that the costs and line counts Blanca was utilizing to claim high-cost support were attributable to Blanca's non-regulated cellular operations, rather than to a BETRS fixed service and were therefore not entitled to High-Cost support. NECA's investigation resulted in the recoupment of USF high-cost support

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

[19] Fort Garland KNKQ427 Location 1 and Blanca KNKQ427 Location 4 are situated within Blanca's authorized study area.

only after 2011, which is only a small portion of the period during which Blanca improperly received these funds. Based on a review of Blanca's books and records obtained during the OIG investigation and Blanca's own revision of its cost study and other filings for the post 2011 period, we have determined Blanca owes the Fund an additional $6,748,280 (the "Debt"). Further details of the Debt may be found on Attachment A hereto.

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

(1) Making a recoupment or offset[20] against other requests for claims for USF minutes of use,

(2) Withholding payments otherwise due to Blanca, and

(3) Other action permitted by law.

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[20] An offset or recoupment means when any high-cost claim payment is due to you, the money will first be applied to any open debt followed by the pay out of any remaining balance. Such offset or recoupment does not stop interest, penalties, or other collection charges from accruing under 31 U.S.C. § 3717 and 31 C.F.R. § 901.9.

Important Notice Information

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

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[21] *See* 31 U.S.C. §§ 3716, *et seq.*; 47 C.F.R. §§ 1.1911 and 1.1901, *et seq.*

[22] *United States v. Munsey Trust Co.*, 332 U.S. 234, 239, 108 S.Ct. 1599, 91 L.Ed. 2022 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him.' ").

[23] 47 C.F.R. § 1.1940(c).

[24] Public Law 104-134, 110 Stat. 1321, 1358 Apr. 26, 1996). *See* also 31 C.F.R. § 900.1, *et seq*.; 47 C.F.R. § 1.1901, *et seq.*

[25] 31 U.S.C. § 3717(a)-(c).

[26] 31 U.S.C. § 3717(d) and 47 C.F.R. § 1.1940(g).

[27] 31 U.S.C. § 3717(e)(2).

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

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

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

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[28] 31 U.S.C. §§ 3711(g); 3716; 28 U.S.C. § 3001, *et seq*.; 47 C.F.R. § 1.1912.

[29] 31 U.S.C. § 3717(e); 31 C.F.R. § 285.12(j).

[30] 31 U.S.C. § 3716.

[31] 8 U.S.C. § 3011.

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

Sincerely,

/s/ Dana Shaffer

Dana Shaffer
Deputy Managing Director

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

Enclosures: Attachments A & B

Attachment A

BLANCA TELEPHONE COMPANY: HIGH COST ANALYSIS
HIGH COST SUPPORT 2005 - 2010
SUPPORT PAID VS. CORRECTED SUPPORT

FUND	ROW	SCENARIO	YEAR						TOTAL	
			2005	2006	2007	2008	2009	2010		
HCL	(1)	Support Actually Paid	$802,620	$787,644	$751,512	$837,624	$860,916	$993,096	$5,033,412	USAC Disbursement Records
	(2)	Government Calculation	$575,225	$595,364	$628,352	$729,442	$709,817	$779,550	$4,098,750	Gov't. Study Calculations
	(3)=(1)-(2)	Difference	$227,395	$192,280	$123,160	$108,182	$70,099	$213,546	$934,662	
LSS	(4)	Support Actually Paid	$946,136	$868,296	$954,312	$983,088	$832,868	$696,891	$5,381,591	USAC Disbursement Records
	(5)	Government Calculation	$116,660	$150,261	$170,321	$171,884	$166,471	$225,558	$1,001,155	Gov't. Study Calculations
	(6)=(4)-(5)	Difference	$829,476	$718,035	$783,991	$811,204	$766,397	$471,333	$4,380,436	
ICLS	(7)	Support Actually Paid	$437,352	$421,224	$472,206	$520,236	$545,652	$593,280	$2,989,950	USAC Disbursement Records
	(8)	Government Calculation	$235,616	$217,450	$275,442	$297,493	$308,808	$323,503	$1,658,312	Gov't. Study Calculations
	(9)=(7)-(8)	Difference	$201,736	$203,774	$196,764	$222,743	$236,844	$269,777	$1,331,638	
SNA	(10)	Support Actually Paid	$19,164	$19,164	$19,164	$19,164	$12,444	$12,444	$101,544	USAC Disbursement Records
	(11)	Government Calculation	$0	$0	$0	$0	$0	$0	$0	Totally Unregulated
	(12)=(10)-(11)	Difference	$19,164	$19,164	$19,164	$19,164	$12,444	$12,444	$101,544	
TOTAL	**(3)+(6)+(9)+(12)**	**Total Overpayment**	**$1,277,771**	**$1,133,253**	**$1,123,079**	**$1,161,293**	**$1,085,784**	**$967,100**	**$6,748,280**	

(USAC Confidential - Contains Investigatory Information)

ATTACHMENT B

Payment Instructions

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

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

ABA Routing Number: 021030004

Receiving Bank: TREAS NYC

33 Liberty Street

New York, NY 10045

ACCOUNT NAME: FCC

ACCOUNT NUMBER: 27000001

OBI Field: USF – High Cost Program

APPLICANT FRN: _____ (Blanca Telephone Company)

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

LOCKBOX NO.: #979088

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

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

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BLANCA TELEPHONE COMPANY, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, Respondents.	No. 20-9510 (FCC No. FCC 17-162) (Federal Communications Commission)
BLANCA TELEPHONE COMPANY, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, Respondents.	No. 20-9524 (FCC No. FCC 17-162) (Federal Communications Commission)

ORDER

(Filed May 6, 2021)

Before **TYMKOVICH,** Chief Judge, **BRISCOE,** and **BACHARACH,** Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

47 U.S.C. § 503. Forfeitures

(a) Rebates and offsets. Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this Act, shall in addition to any other penalty provided by this Act forfeit to the United States a sum of money three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period.

> (1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 508(a) of this Act [47 USCS § 317(c) or 509(a)]; or

(D) violated any provision of section 1304, 1343, 1464, or 2252 of title 18, United States Code [18 USCS § 1304, 1343, 1464, or 2252];

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act; except that this subsection shall not apply to any conduct which is subject to forfeiture under title II, part II or III of title III, or section 506 of this Act [47 USCS §§ 201 et seq., 351 et seq., 381 et seq., or 507].

(2) (A) If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of

any forfeiture penalty determined under this section shall not exceed $ 25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $ 250,000 for any single act or failure to act described in paragraph (1) of this subsection.

(B) If the violator is a common carrier subject to the provisions of this Act or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed $ 100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $ 1,000,000 for any single act or failure to act described in paragraph (1) of this subsection.

(C) Notwithstanding subparagraph (A), if the violator is –

(i)(I) a broadcast station licensee or permittee; or (II) an applicant for any broadcast license, permit, certificate, or other instrument or authorization issued by the Commission; and

(ii) determined by the Commission under paragraph (1) to have broadcast obscene, indecent, or profane language, the amount of any forfeiture penalty determined under this subsection shall not exceed $ 325,000 for each violation or each day of a continuing violation, except that

the amount assessed for any continuing violation shall not exceed a total of $ 3,000,000 for any single act or failure to act.

(D) In any case not covered in subparagraph (A), (B), or (C), the amount of any forfeiture penalty determined under this subsection shall not exceed $ 10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $ 75,000 for any single act or failure to act described in paragraph (1) of this subsection.

(E) The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(F) Subject to paragraph (5) of this section, if the violator is a manufacturer or service provider subject to the requirements of section 255, 716, or 718 [47 USCS § 255, 617, or 619], and is determined by the Commission to have violated any such requirement, the manufacturer or provider shall be liable to the United States for a forfeiture penalty of not more than $ 100,000 for each violation or each day of a continuing violation, except that the

amount assessed for any continuing violation shall not exceed a total of $ 1,000,000 for any single act or failure to act.

(3) (A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) [47 USCS § 402(a)].

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until –

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this Act [47 USCS § 504(a)].

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice

required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) [47 USCS § 307(e)], or in the case of violations of section 303(q) [47 USCS § 303(q)], if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) [47 USCS § 303(q)] from the Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under title III of this Act [47 USCS §§ 301 et seq.] and if the violation charged occurred—

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or (ii) prior to the date of commencement of the current term of such license, whichever is earlier; or

(B) such person does not hold a broadcast station license issued under title III of this Act [47 USCS §§ 301 et seq.] and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

For purposes of this paragraph, "date of commencement of the current term of such license" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) [47 USCS § 307(c)] pending decision on an application for renewal of the license.

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47 C.F.R. § 1.1910 Effect of insufficient fee payments, delinquent debts, or debarment.

(a) (1) An application (including a petition for reconsideration or any application for review of a fee determination) or request for authorization subject

to the FCC Registration Number (FRN) requirement set forth in subpart W of this chapter will be examined to determine if the applicant has paid the appropriate application fee, appropriate regulatory fees, is delinquent in its debts owed the Commission, or is debarred from receiving Federal benefits (see, e.g., 31 CFR 285.13; 47 CFR part 1, subpart P).

(2) Fee payments, delinquent debt, and debarment will be examined based on the entity's taxpayer identifying number (TIN), supplied when the entity acquired or was assigned an FRN. See 47 CFR 1.8002(b)(1).

(b) (1) Applications by any entity found not to have paid the proper application or regulatory fee will be handled pursuant to the rules set forth in 47 CFR part 1, subpart G.

(2) Action will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission (see § 1.1901(i)), unless otherwise provided for in this regulation, e.g., 47 CFR 1.1928 (employee petition for a hearing). The entity will be informed that action will be withheld on the application until full payment or arrangement to pay any non-tax delinquent debt owed to the Commission is made and/or that the application may be dismissed. See the provisions of §§ 1.1108, 1.1109, 1.1116, and 1.1118. Any Commission action taken prior to the payment of delinquent non-tax debt owed to the Commission is contingent and subject to

rescission. Failure to make payment on any delinquent debt is subject to collection of the debt, including interest thereon, any associated penalties, and the full cost of collection to the Federal government pursuant to the provisions of the Debt Collection Improvement Act, 31 U.S.C. 3717.

(3) If a delinquency has not been paid or the debtor has not made other satisfactory arrangements within 30 days of the date of the notice provided pursuant to paragraph (b)(2) of this section, the application or request for authorization will be dismissed.

(i) The provisions of paragraphs (b)(2) and (b)(3) of this section will not apply if the applicant has timely filed a challenge through an administrative appeal or a contested judicial proceeding either to the existence or amount of the non-tax delinquent debt owed the Commission.

(ii) The provisions of paragraphs (b)(2) and (b)(3) of this section will not apply where more restrictive rules govern treatment of delinquent debtors, such as 47 CFR 1.2105(a)(2)(xi) and (xii).

(c) (1) Applications for emergency or special temporary authority involving safety of life or property (including national security emergencies) or involving a brief transition period facilitating continuity of service to a substantial number of customers or end users, will not be subject to the provisions of paragraphs (a) and (b) of this section. However, paragraphs (a) and (b) will be applied to permanent authorizations for these services.

(2) The provisions of paragraphs (a) and (b) of this section will not apply to applications or requests for authorization to which 11 U.S.C. 525(a) is applicable.

31 U.S.C. § 3712. Time limitations for presenting certain claims of the Government

(a) Claims over forged or unauthorized endorsements.

(1) Period for claims. If the Secretary of the Treasury determines that a Treasury check has been paid over a forged or unauthorized endorsement, the Secretary may reclaim the amount of such check from the presenting bank or any other endorser that has breached its guarantee of endorsements prior to

(A) the end of the 1-year period beginning on the date of payment; or

(B) the expiration of the 180-day period beginning on the close of the period described in subparagraph (A) if a timely claim is received under section 3702 [31 USCS § 3702].

(2) Civil action.

(A) Except as provided in subparagraph (B), the United States may bring a civil action to enforce the liability of an endorser, transferor, depository, or fiscal agent on a forged or unauthorized signature or endorsement on, or a change in, a check or warrant issued by the Secretary of the Treasury, the United States Postal Service, or any disbursing official or agent not later than 1 year after a check or warrant is presented to the drawee for payment.

(B) If the United States has given an endorser written notice of a claim against the

endorser within the time allowed by subparagraph (A), the 1-year period for bringing a civil action on that claim under subparagraph (A) shall be extended by 3 years.

(3) Effect on agency authority. Nothing in this subsection shall be construed to limit the authority of any agency under subchapter II of chapter 37 of this title [31 USCS §§ 3711 et seq.].

(b) Notwithstanding subsection (a) of this section, a civil action may be brought within 2 years after the claim is discovered when an endorser, transferor, depositary, or fiscal agent fraudulently conceals the claim from an officer or employee of the Government entitled to bring the civil action.

(c) The Comptroller General shall credit the appropriate account of the Treasury for the amount of a check or warrant for which a civil action cannot be brought because notice was not given within the time required under subsection (a) of this section if the failure to give notice was not the result of negligence of the Secretary.

(d) The Government waives all claims against a person arising from dual pay from the Government if the dual pay is not reported to the Comptroller General for collection within 6 years from the last date of a period of dual pay.

(e) Treasury check offset.

(1) In general. To facilitate collection of amounts owed by presenting banks pursuant to subsection (a) or (b), upon the direction of the Secretary, a

Federal reserve bank shall withhold credit from banks presenting Treasury checks for ultimate charge to the account of the United States Treasury. By presenting Treasury checks for payment a presenting bank is deemed to authorize this offset.

(2) Attempt to collect required. Prior to directing offset under subsection (a)(1), the Secretary shall first attempt to collect amounts owed in the manner provided by sections 3711 and 3716 [31 USCS §§ 3711 and 3716].

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28 U.S.C. § 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.
