

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

In the Matter of)	
)	
Request for Review of a Decision of the Universal)	WC Docket No. 10-90
Service Administrator by Rural Telephone Service)	
Company, Inc.)	

ORDER

Adopted: September 10, 2025

Released: September 10, 2025

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny a request filed by Rural Telephone Service Company, Inc. (Rural Telephone) seeking review of a decision of the Universal Service Administrative Company (USAC).¹ We conclude that USAC properly sought recovery of Universal Service Fund (USF or Fund) high-cost support provided to Rural Telephone. We further find that Rural Telephone failed to establish good cause to alternatively waive the Commission's rules. Accordingly, we direct USAC to recover approximately \$3 million in improperly paid support. In neither its Petition for Review nor its Request for Waiver does Rural Telephone directly contest USAC's findings that it violated specific cost accounting rules or the specific determination of the amount recoverable based on these rule violations but instead concentrates on certain procedural and constitutional claims that we address one-by-one.

II. BACKGROUND

2. Rural Telephone, a section 501(c)(12) non-profit cooperative, is an incumbent rate-of-return local exchange carrier offering broadband and voice services with approximately 5,000 access lines in rural western Kansas in study area code 411826.² Until 2019, Rural Telephone received full legacy cost-based support.³ During the relevant audit review period, Rural Telephone received more than \$19.2

¹ Request for Review by Rural Telephone Company, Inc. of Decision of Universal Service Administrator, Petition for Appeal or Alternatively, Request for Waiver, WC Docket No. 10-90 (filed October 13, 2023) (FCC Review and Waiver Petition); Rural Telephone Service Company, Inc., Limited Review Performance Audit on Compliance with the Federal Universal Service Fund High Cost Support Mechanism Rules, USAC Audit No. HC2016BE001 - CONF (issued Jan. 11, 2023, as modified, Mar. 13, 2023) (Audit Report).

² See FCC Review and Waiver Petition at 1-2.

³ *Id.* at 3. Legacy support is provided through three primary support mechanisms, 1) the high-cost loop support (HCLS) mechanism, 2) the Connect America Fund broadband loop support (CAF-BLS) mechanism, and 3) the Connect America Fund Intercarrier Compensation (CAF-ICC) mechanism. HCLS provides support to rate-of-return carriers that experience high loop-related costs by deducting costs in excess of a specified benchmark from the state jurisdiction and adding them to the interstate jurisdiction. See 47 CFR § 54.1301(a). CAF-BLS subsidizes carriers with high local loop costs in the interstate jurisdiction for both voice and consumer broadband-only loops. See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3091, 3119-20, paras. 5, 86-87 (2016) (*2016 Rate-of-Return Reform Order*). CAF ICC support provides support to the extent otherwise-eligible revenue cannot be recovered through the carrier's Access Recovery Charge. *Connect America Fund et al.*, Report and Order and

(continued....)

million in legacy high-cost support.⁴ In 2019, Rural Telephone voluntarily elected to receive support awarded on a fixed basis determined by a model through the Alternative Connect America Model II (A-CAM II) program in lieu of the receipt of cost-based support.⁵ In 2023, Rural Telephone accepted the Commission's offer of Enhanced A-CAM support, which provided additional funding in exchange for a commitment to deploy robust broadband to more locations.⁶

3. Incumbent local exchange carriers subject to rate-of-return regulation develop their revenue requirements, used to calculate both rates and high-cost universal service support, in accordance with a four-step regulatory process. First, carriers record their costs, including investments and expenses, into various accounts in accordance with the Uniform System of Accounts (USOA) prescribed by Part 32 of the Commission's rules.⁷ Second, carriers assign the costs in those accounts to regulated and nonregulated activities in accordance with Part 64 of the Commission's rules to ensure that the costs of nonregulated activities will not be recovered by regulated service rates or through universal service support.⁸ Third, carriers separate the regulated costs between the interstate and intrastate jurisdictions, as well as among cost categories, in accordance with the Commission's Part 36 separations rules.⁹ Finally,

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Further Notice of Proposed Rulemaking, WC Docket No. 10- 90 et al., 26 FCC Rcd 17663, 17760, para. 257 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

⁴ Audit Report at 8. In 2011, Rural Telephone received legacy support through the following mechanisms: CAF-ICC, HCLS, Interstate Common Line Support (ICLS), Safety Value Support (SVS), and Local Switching Support (LSS). ICLS supported high local loop costs by providing rate-of-return carriers with the difference between their interstate common line costs (i.e., the portion of the local loop assigned to the interstate jurisdiction) and their interstate common line end-user revenues, which are limited due to the cap on subscriber line charges. In 2016, the Commission transformed ICLS into the CAF-BLS mechanism. *See 2016 Rate-of-Return Reform Order*, 31 FCC Rcd at 3119-20, paras. 5, 86-87. In limited circumstances, certain support recipients may continue to be eligible to receive additional HCLS pursuant to the Safety Valve Support mechanism. *See* 47 CFR § 54.305(d)-(e). LSS, however, was eliminated effective July 1, 2012, with all switching investments incorporated into the Commission's 2011 CAF-ICC reforms. *USF/ICC Transformation Order*, 26 FCC Rcd at 17760, para. 257.

⁵ FCC Review and Waiver Petition at 3; *Wireline Competition Bureau Authorizes 171 Rate-of-Return Companies to Receive \$491 Million Annually in Alternative Connect America Cost Model II Support to Expand Rural Broadband*, Public Notice, 34 FCC Rcd 7271 (2019); Authorization Report 6.0, <https://docs.fcc.gov/public/attachments/DOC-359222A1.xlsx> (showing the authorized support amount and deployment obligations for each carrier that elected an offer, including the authorization of Rural Telephone to receive an annual \$10,938,499 in A-CAM II support over a 10-year term). We note that, pursuant to the terms of the ACAM-II program, Rural Telephone continued to receive legacy support in the form of "transition payments" based on the difference between its model support and its 2015 legacy support, from 2019 through 2021. *See 2016 Rate-of-Return Reform Order*, 31 FCC Rcd at 3115-16, paras. 72-76; Authorization Report 6.0.

⁶ FCC Review and Waiver Petition at 4 and Attach. E—Rural Telephone Letters Accepting FCC Offers of A-CAM II and Enhanced A-CAM Support; *See Connect America Fund; ETC Annual Reports and Certifications; Telecommunications Carriers Eligible to Receive Universal Service Support; Connect America fund — Alaska Plan; Expanding Broadband Service Through the ACAM Program*, WC Docket Nos. 10-90, 14-58, 09-197, and 16-271; RM-1168, Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 38 FCC Rcd 7040, 7073, para. 77 (2023) (*Enhanced A-CAM Order*); *Wireline Competition Bureau Authorizes 368 Companies in 44 States to Receive Enhanced Alternative Connect America Cost Model Support to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, 39 FCC Rcd 11737 (WCB 2023); Enhanced A-CAM Authorization Report 1.2, <https://docs.fcc.gov/public/attachments/DOC-412953A1.xlsx> (showing the authorized support amount and deployment obligations for each carriers that elected an offer, including the authorization of Rural Telephone to receive an annual \$12,528,086 in Enhanced A-CAM support over a 10-year term).

⁷ 47 CFR Part 32.

⁸ *Id.* § 64.901-64.904.

⁹ *Id.* Part 36.

carriers apportion the interstate regulated costs among the interexchange services and rate elements that form the cost basis for their interstate access tariffs pursuant to the Commission's Part 69 rules, as well as for high-cost universal service support pursuant to Part 54.¹⁰

4. When Rural Telephone received cost-based support, it was subject to the Commission's Part 32 financial accounting rules for recording costs, investments and expenses. Under section 64.901 of the Commission's rules, it was required to "separate [its] regulated costs from nonregulated costs" and to use an "attributable cost method of cost allocation for such purpose."¹¹ Additionally, as an eligible telecommunications carrier (ETC), under section 54.320(a) of the Commission's rules, Rural Telephone is "subject to random compliance audits and other investigations to ensure compliance."¹² Under section 54.320(b), ETCs like Rural Telephone must retain all records required to demonstrate to auditors that the support received was consistent with the universal service high-cost program rules "for at least ten years from the receipt of funding," and shall make "[a]ll such documents . . . available upon request."¹³ We further note that in addition to this document retention rule, there are other document retention obligations and requirements relating to the receipt of support and that also requires that this information be made available to USAC and the Commission, including rules that may apply longer document retention periods.¹⁴ As the Commission has previously explained, "[t]he burden is on recipients of high-cost funding to retain records sufficient to demonstrate that the funding they receive is consistent with the rules of the high-cost programs."¹⁵

5. In 2016, USAC's Audit and Assurance Division (AAD) commenced an audit of the legacy support Rural Telephone received in 2013 based on data reported by the carrier in 2011 and 2012 (Reporting Period).¹⁶ On January 11, 2023, Rural Telephone received the results of this audit.¹⁷ The

¹⁰ 47 CFR Parts 54 and 69.

¹¹ *Id.* § 64.901(a); *see also Separation of Costs of Regulated Telephone Service from Costs of Non-Regulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1317, para. 148 (1987) ("Under this methodology, all costs with either a direct or an indirect causal link to either regulated or nonregulated activities will be directly assigned to the appropriate activity. The remaining costs will then be apportioned between the regulated and nonregulated activities. Cost causational attribution factors will be used whenever possible, and the remaining costs will be apportioned on the basis of a general allocator.").

¹² 47 CFR § 54.320(a).

¹³ *Id.* § 54.320(b). *Compare* 47 CFR § 54.202(e) (2011) (imposing a five year document retention requirement for all records substantiating that the ETC received support consistent with the Communications Act of 1934, as amended (Communications Act) and the Commission's rules from the date that the support was received) *with* 47 CFR § 54.320(a) (recodified and amended at section 54.320(a), effective 2012) (imposing a ten year document retention requirement from the date that the support was received). Below, we discuss which of these rules is applicable to Rural Telephone's reporting period. *See infra* Paragraph 13.

¹⁴ *See Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195 et al., Report and Order, 22 FCC Rcd 16372, 16385, para. 24 (2007) ("To the extent other rules or any other law require or necessitate documents be kept for longer periods of time (e.g., to support the account balances in the Part 32 Uniform System of Accounts, continuing property records, pole attachment calculations, plant equipment age, cost, or useful life, depreciation rates), we do not alter, amend, or supplant such rule or law.") (2007 *Comprehensive Review Order*).

¹⁵ *Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order on Reconsideration, 34 FCC Rcd 577, 598, para. 43 (2019) (*Sandwich Isles Recon*).

¹⁶ FCC Review and Waiver Petition at 5. Although Rural Telephone identifies the Reporting Period as year 2011, the administrative schedule for the true-up of projected cost and revenue data and line count data with actual data spans more than one year. Accordingly, the Reporting Period was completed in 2012. *See Connect America Fund*, 31 FCC Rcd at 3157, para. 187; 47 CFR §§ 54.901-54.904.

Audit Report made 16 findings of non-compliance with the Commission's rules.¹⁸ The Audit Report further recommended the recovery of \$3,010,269 against Rural Telephone for the overpayment of support.¹⁹ On January 12, 2023, USAC notified Rural Telephone that it would commence withholding of its high-cost support payments for a period of four months to recover the funds that Rural Telephone owed the U.S. Government.²⁰ The Audit Report was adjusted on January 17, 2023, after USAC had completed its evaluation of Rural Telephone's responses.²¹ On March 13, 2023, the Audit Report was then revised to make minor adjustments to a table totaling the audit results. The January 11, 2023 report, however, correctly reported individual findings. Both revised reports, i.e., the January 17, 2023 and the March 13, 2023 revised reports, were treated and marked as confidential.²²

6. On March 24, 2023, Rural Telephone filed with USAC a Request for Review and Motion for Stay (Review Petition), partially appealing the audit findings and seeking to enjoin the recovery of support.²³ USAC denied this request on August 16, 2023.²⁴ On October 13, 2023, Rural Telephone filed its Request for Review and Waiver Petition with the Commission, seeking dismissal of the audit findings and enjoinder of support recovery or, in the alternative, waiver of the Commission's rules to permit Rural Telephone to receive uninterrupted A-CAM II and Enhanced A-CAM support. Pending this review process, USAC did not initiate withholding of Rural Telephone's support payments for the purpose of support recovery.

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¹⁷ FCC Review and Waiver Petition at 5 and Attach. B, Audit Report (confidential, filed under seal). Rural Telephone states that the Audit Report was issued on January 11, 2023, revised and reissued on January 17, 2023 (to comply with confidentiality requirements), and reissued on March 13, 2023, to reduce USAC's proposed "forfeiture," which we explain below, is a mischaracterization of the support recovery. FCC Review and Waiver Petition at 5 n.21. See *infra* at Paragraphs 41-43.

¹⁸ Audit Report at 3-6.

¹⁹ *Id.* at 1.

²⁰ *Id.* at 5 and Attach. A, Letter from USAC to R. Goddard, January 12, 2023 (confidential, filed under seal). This letter references the total amount recoverable as \$3,041,165, the original amount reported in the initial Audit Report. A revised Audit Report, issued March 13, 2023, correcting the total amount recoverable to \$3,010,269 but made no changes to the individual amounts recoverable under each separate finding.

²¹ Rural Telephone incorrectly interprets certain dates associated with the Audit Report. See FCC Review Petition at 11, n.21. The date on the executive summary of July 7, 2022, represents the date of when AAD received the Beneficiary's responses to the findings. That date does not represent when the report is issued/released as final. FCC Review and Waiver Petition at 5, n.21 ("The executive summary included with the report is dated July 7, 2022, which is approximately six (6) months before the audit report was actually sent to Rural Telephone.").

²² We make this point to correct the petitioner's incorrect assertion that the January 17, 2023 revision was issued to "comply with the requirement that the report be kept confidential." FCC Review and Waiver Petition at 5 n.21.

²³ See Appeal of the High Cost Beneficiary: Rural Telephone Service Company, Inc., HC2016BE001, Study Area Code (SAC) (March 24, 2023). Rural Telephone submitted its initial appeal on January 20, 2023, which it then rescinded before filing the March 24, 2023 appeal. It took this step, consistent with the Commission's guidance, to revise its appeal to reflect the correct Audit Report ID: HC2016BE001 and the recovery amount, consistent with the revisions made to the audit report on March 13, 2023. USAC further indicated that it would still consider the appeal timely filed in compliance with 47 CFR § 54.720(b). Letter from Joshua Levitats, Manager and Associate General Counsel, Universal Service Administrative Company to James U. Troup, Esq. and Tony. S. Lee, Esq., Counsel for Rural Telephone Service Company, Inc. d/b/a Nex-Tech.

²⁴ FCC Review and Waiver Petition at Attach. C, Administrator's Decision on High Cost Appeal, Appeal of the High Cost Beneficiary: Rural Telephone Company Service Company, Inc., HC2016BE001, Study Area Code (SAC) 411826 (Aug. 16, 2023) (USAC Decision on Appeal).

7. In its Request for Review and Waiver Petition, Rural Telephone challenges AAD's findings in the Audit Report based on claims that the support recovery violates Commission rules, common law, and certain clauses of the U.S. Constitution. In brief, Rural Telephone asserts that the Commission should reverse the audit findings for the following reasons: (1) USAC violated the Paperwork Reduction Act (PRA) by charging Rural Telephone with the failure to meet information collection requirements that were not yet effective;²⁵ (2) an uncodified Commission rule limits the timeframe over which an audit may be conducted to "within five years of the final delivery of service for the funding year in question," and the Audit Report was finalized more than a decade after the 2011 Reporting Period;²⁶ (3) the timeline over which USAC completed its audit violated the Administrative Procedure Act (APA)'s proscription against unreasonable delays in agency action;²⁷ (4) the Audit Report demands unjustified "forfeit" of all USF support paid and is not limited to improperly claimed support; (5) the Commission cannot withhold, modify, or impose penalties relating to the receipt of A-CAM support except in accordance with section 54.320(d) of the Commission's rules, and any attempt to do so through offset would constitute a breach of contract;²⁸ (6) the process followed by USAC in completing its audit and addressing its appeal deprived Rural Telephone of procedural due process protections guaranteed by the Fifth Amendment to the U.S. Constitution;²⁹ (7) the "forfeit" of the full amount of support associated with each of the audit findings constitutes an Excessive Fine prohibited by the Eighth Amendment of the U.S. Constitution;³⁰ and (8) the imposition of such a forfeiture violates the Commission's limitations period set forth in section 1.80(c)(2) of the Commission's rules.³¹

8. Rural Telephone alternatively seeks waiver of the rules that USAC finds it violated in its Audit Report and the associated support recovery.³²

III. DISCUSSION

9. Requests for review of USAC decisions are subject to *de novo* review by the Bureau.³³ A recipient of high-cost support must prove compliance by a preponderance of the evidence, consistent with the methodology set forth in Part 32, including the production of requisite documentation.³⁴ We reject each of the contentions made by Rural Telephone in its Petition for Review and reject Rural Telephone's request for waiver. We affirm AAD's findings.

²⁵ FCC Review and Waiver Petition a 6, 10-11.

²⁶ FCC Review and Waiver Petition at 6 (citing *2007 Comprehensive Review Order*, 22 FCC Rcd at 16385, para. 28).

²⁷ *Id.* at 6; 5 U.S.C. § 555(b).

²⁸ *Id.* at 6; 47 CFR § 54.320(d).

²⁹ *Id.* at 6-7; U.S. Const, amend. V.

³⁰ FCC Review and Waiver Petition at 7.

³¹ *Id.* at 7; 47 CFR § 1.80(c)(2).

³² FCC Review and Waiver Petition at 9.

³³ 47 CFR § 54.723(a).

³⁴ See *Sandwich Isles Recon*, 34 FCC Rcd at 598, para. 43 ("The burden is on recipients of high-cost funding to retain records sufficient to demonstrate that the funding they receive is consistent with the rules of the high-cost programs. And as stated previously by the Commission, '[a]bsent statutory requirements to the contrary or factors warranting a heightened standard, the Commission generally applies the "preponderance of the evidence" standard in informal agency adjudications.') (quoting *Universal Service Contribution Methodology, Petition for Clarification and Partial Reconsideration by XO Communications Services, LLC*, WC Docket No. 06-122, 29 FCC Rcd 9715, 9719-20, para. 12 (2014)).

A. Petition for Review**1. The Paperwork Reduction Act Does Not Prohibit Support Recovery**

10. We reject Rural Telephone's contention that AAD's findings that Rural Telephone failed to produce sufficient documentation of its compliance during the Reporting Period under section 54.320(b) of the Commission's rules, and the associated recovery of support, is barred by the PRA.³⁵ We also find that AAD in its Audit Report properly found that Rural Telephone violated section 54.320(b).

11. Section 54.202(e) of the Commission's rules, which preceded the adoption of section 54.320(b) and which went into effect on January 23, 2008, set forth record retention requirements for ETCs participating in high-cost programs.³⁶ In the 2011 *USF/ICC Transformation Order*, the Commission re-designated section 54.202(e) as new section 54.320(b) and extended the retention requirement from five to ten years, a rule which became effective on May 8, 2012.³⁷ Rural Telephone asserts that as of February 1, 2011, the Office of Management and Budget (OMB)'s approval of the information collection in section 54.202(e) had expired, and therefore, any consequences relating to the failure to retain documents associated with cost studies completed after February 1, 2011 and preceding May 8, 2012 (the date that section 54.320(b)'s information collection requirement received OMB approval) cannot be given legal effect.³⁸

12. Rural Telephone is incorrect in its assertion that no document retention requirement applied to the Reporting Period. On November 30, 2010, the Commission received an extension of its OMB approval without change of the then currently approved information collection for, inter alia, section 54.202(e) (OMB 3060-1112), until November 30, 2013,³⁹ and on November 26, 2013, it received an emergency extension of this approval until November 30, 2014.⁴⁰ Section 54.202(e) required retention of all records necessary to demonstrate that support received was consistent with Commission rules, for a

³⁵ FCC Review and Waiver Petition at 10-11.

³⁶ 73 Fed. Reg. 11837-01 (Mar. 5, 2008). On January 23, 2008, OMB approved the information collection requirements contained in section 54.202(e) pursuant to OMB Control Number: 3060-1112, with an initial expiration date of January 31, 2011.

³⁷ 47 CFR § 54.202(e) (2011); *USF/ICC Transformation Order*, 26 FCC Rcd at 17846, para. 621. The rule change became effective on May 8, 2012. See 47 CFR Parts 51 and 54, 77 Fed. Reg. 26987 (May 8, 2012). The Commission submitted revisions to information collections under OMB Control Number 3060-0986 for review and approval, which were approved by the OMB on April 16, 2012. Pursuant to the amendment and recodification of this rule, the Commission deleted the recordkeeping requirement (i.e., 47 CFR § 54.202(e)) from OMB Control Numbers 3060-1081 and 3060-0774 but not OMB Control Number 3060-1112.

³⁸ FCC Review and Waiver Petition at 11 (citing 77 Fed. Reg. 26987 (May 8, 2012), 73 Fed. Reg. 11837-01 (Mar. 5, 2008)).

³⁹ Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, Extension without change of a currently approved collection, OMB Control No. 3060-1112, Notice of Office and Management Budget Action, ICR Reference No: 201009-3060-006 (Nov. 30, 2010) (granting approval of an extension of the collection, without change, until November 30, 2013); see *id.* at Supporting Statement A, Control No. 3060-1112, at page 3 (describing the collection requirements set forth in 47 CFR § 54.202(e)).

⁴⁰ Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, Emergency Extension without change of a currently approved collection, OMB Control No. 3060-1112 (November 26, 2013) (granting an emergency extension of the collection (OMB Control No. 3060-1112) until May 31, 2014). We note that the Commission obtained approval for the deletion of section 54.202(e) information requirements from OMB Control Numbers 3060-1081 and 3060-0774, but not OMB Control Number 3060-1112. This amendment, however, was not approved by OMB until 2012, so even if this deletion were to control, the collection set forth in section 54.202(e) was still effective in 2011.

five year period, *from the receipt of support*.⁴¹ In this case, the payments associated with the Reporting Period occurred in 2013.⁴² At *minimum*, Rural Telephone was required to keep records associated with the Reporting Period through 2018, marking five years from 2013 when Rural Telephone received payment based on its cost study for 2011. The Audit was initiated in 2016, at which time Rural Telephone was required to produce all documentation supporting payments received in 2013, well within the five-year document retention period set by section 54.202(e) of the Commission's rules.

13. Although the information collection requirements of section 54.202(e) were in effect for the duration of 2011, section 54.320(b) applied to those documents associated with payments received in 2013. More relevantly, we find that the application of section 54.320(b) of the Commission's rules to the 2013 payment year (which was after the effective date of the rule), is not a retroactive application of a rule simply because the records associated with the 2013 payments preceded the adoption of the rule.⁴³ Courts have held that a rule is impermissibly retroactive if it directly alters the "*past* legal consequences of past actions,"⁴⁴ but section 54.320(b), when applied to payments received in 2013, only changes the prospective consequences of not retaining records that carriers were required to retain as of the effective date of the rule (May 8, 2012) and that should have been retained in accordance with section 54.202(e). Moreover, the application of section 54.320(b) in this instance is not "secondarily retroactive" by affecting carrier expectations or impairing rights associated with section 54.202(e) because there was no vested right or reasonable expectation in 2013 that Rural Telephone could dispose of records associated with the Reporting Period in 2016 without consequence.⁴⁵ Accordingly, we find that the PRA does not bar the recovery of support received in 2013, and we uphold the Audit Report findings that Rural Telephone failed to maintain adequate documentation in several separate instances as required by section 54.320(b), which was in effect at the time the payments were made.⁴⁶

2. The Audit Was Timely Completed

14. Next, we reject Rural Telephone's arguments that the audit was untimely and therefore cannot be sustained. Rural Telephone first claims that the audit was "unlawful" because under an uncodified Commission rule, such an audit must be initiated and completed within five years of the violation.⁴⁷ Rural Telephone then asserts that the extended timeline over which the audit was completed violates section 555(b) of the APA which provides that "[w]ith due regard for the convenience and

⁴¹ 47 CFR § 54.202(e) (2011).

⁴² See *Connect America Fund*, 31 FCC Rcd at 3157, para. 187; 47 CFR §§ 54.901-54.904.

⁴³ In making this determination, we do not decide the permissibility of applying section 54.320(b) to payment years more than five years prior to the effective date of section 54.320(b).

⁴⁴ *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

⁴⁵ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (explaining that a secondarily retroactive law will arguably "upset[] expectations based on prior law"); *National Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (explaining that a secondarily retroactive law would "impair[] the future value of past bargains").

⁴⁶ We also note that when adopting section 54.202(e) of the Commission's rules, the Commission specifically noted that the rule would not alter preexisting document retention obligations and requirements to make such documentation available, including rules that applied longer document retention periods. See *2007 Comprehensive Review Order*, 22 FCC Rcd at 16385, para. 24 ("To the extent other rules or any other law require or necessitate documents be kept for longer periods of time (e.g., to support the account balances in the Part 32 Uniform System of Accounts, continuing property records, pole attachment calculations, plant equipment age, cost, or useful life, depreciation rates), we do not alter, amend, or supplant such rule or law.").

⁴⁷ See FCC Review and Waiver Petition at 12-17.

necessity of the parties ... and within a reasonable time each agency shall proceed to conclude a matter presented to it.”⁴⁸ Below, we reject each of these arguments.

a. No Commission Rule Limits the Audit Timeline

15. Rural Telephone asserts that AAD’s audit findings are invalid because it was required by Commission rules to complete its audit by December 31, 2017, within five years, but instead did not complete this audit until January 2023.⁴⁹ Rural Telephone claims that in its *2007 Comprehensive Review Order*, the Commission adopted a rule that limited the timeframe for completion of USAC audits to five years after “final delivery of service for the funding year in question,” despite any language in that *Order* or in subsequent releases that appears to characterize this rule as a policy statement.⁵⁰ Rural Telephone argues that the Commission has demonstrated a clear intent to so bind itself through the use of obligatory language to describe this rule,⁵¹ use of the APA-required rulemaking process to adopt this “rule,” and publication of the “rule” in Federal Register,⁵² and that subsequent attempts to characterize this “rule” as a policy statement are post hoc rationalizations for more discretion without following APA rule repeal requirements.⁵³ Rural Telephone thus asserts that USAC lacked the authority to issue audit findings in 2023 and to institute the process for recovery of support at that time.⁵⁴

16. We disagree with Rural Telephone’s assertions.⁵⁵ In contrast to legislative rules, agency policy statements lack the force of law. Such statements “announc[e] motivating factors the agency will consider, or tentative goals toward which it will aim, in determining the resolution of a substantive question of regulation,”⁵⁶ including how it will enforce agency actions.⁵⁷ In contrast, rules impose

⁴⁸ See *id.* at 17-29; 47 U.S.C. § 555(b).

⁴⁹ FCC Review and Waiver Petition at 17.

⁵⁰ See *id.* at 14 (citing *2007 Comprehensive Review Order*, 22 FCC Rcd at 16372, 16385, para. 28 (2007)).

⁵¹ See *id.* at 13-15; see also *id.* at 13 (asserting that “if a ‘so called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is – a binding rule of substantive law’”) (quoting *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987)). In addition to referring to language in the *2007 Comprehensive Review Order*, Rural Telephone points to language in the Commission’s 2004 *Schools and Libraries Fifth Report and Order*, that Rural Telephone states was the precursor and basis for the five-year time limit applicable to the high-cost support program. *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15819 (2004) (*Schools and Libraries Fifth Report and Order*).

⁵² See FCC Review and Waiver Petition at 15-16.

⁵³ See *id.* at 16.

⁵⁴ See *id.* at 12 (asserting that agency actions must be set aside if arbitrary and capricious, exceed statutory authority, or fail to observe procedures required by law) (citing 5 U.S.C. § 706); *id.* at 17 (asserting that “USAC’s failure to comply with the Commission’s five-year time limit on USAC’s authority to make decisions regarding violations is arbitrary and capricious, exceeds the authority that the Commission delegated to USAC, and is unlawful in violation of the APA”).

⁵⁵ *The Wilderness Society v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (explaining that when determining whether an agency pronouncement is a binding rule or policy statement, courts have recognized two lines of inquiry: 1) whether the agency’s actual language identifies “rights or obligations” or indicates agency discretion, or 2) whether the “agency’s expressed intentions” indicate that the agency meant to characterize the pronouncement as a rule). As indicated above, we find that under either line of inquiry, the Commission squarely pronounced a policy.

⁵⁶ *Texas v. United States*, 50 F.4th 498, 522 (5th Cir. 2022) (quoting *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 601 (5th Cir. 1995) (quoting *Phillips Petrol. Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994))).

“binding norms,” restrict agency discretion, impose specific standards, and are treated by agencies as controlling.⁵⁸ Courts have explained that “an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding,”⁵⁹ including situations where parties “‘can rely on [the pronouncement] as a norm or safe harbor by which to shape their actions.’”⁶⁰

17. We acknowledge that certain language in the *2007 Comprehensive Review Order* and the *Schools and Libraries Fifth Report and Order*,⁶¹ has a compulsory undertone by describing the administrative limitations period as a timeframe “in which the Commission or the Administrator *will* determine that a violation has occurred among recipients of [support],”⁶² or in which “USAC and the Commission *shall* carry out any audit or investigation,”⁶³ respectively. The *Schools and Libraries Fifth Report and Order* also describes the underlying reasons for adopting its administrative limitations policy

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⁵⁷ *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 358 (D.C. Cir. 2017); *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (explaining that the agency’s Manual instructions “merely explain[] how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion.”). FCC Review and Waiver Petition at 12 (explaining that a “*general statement of policy* is agency action that merely describes how the agency will enforce a statute or regulation - in other words, how it will ‘exercise its broad enforcement discretion’ under some extant statute or rule”) (quoting *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d at 251 (italics added)).

⁵⁸ See FCC Review and Waiver Petition at 13. In these and other respects, the cases cited by Rural Telephone in support of its position are distinguishable. See *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 379 (D.C. Cir. 2002) (explaining agency guidance “imposes binding obligations upon applicants . . . and upon the Agency not to question an applicant’s [use of obligated standards],” and that “the Agency’s application of the Document does nothing to demonstrate that the Document has any lesser effect in practice”); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987) (explaining that the action level imposed presently binding norms, supported not only by specific language “‘defin[ing]’ and ‘prohibit [ing]’ certain substances, but also by the fact that the agency required an exception to the action level and issued several statements indicating that the action level was a binding norm”) (quoting 21 CFR § 109.4 (1986)); *Chamber of Commerce v. Dep’t of Labor*, 174 F.3d 206, 213 (D.C. Cir. 1999) (distinguishing situations where the “effect of the rule is . . . not to ‘announce[] the agency’s tentative intentions for the future,’ from situations where the rule operated to inform regulated entities of a decision already made, and noting that the agency itself had admitted that the rule “leave[s] no room for discretionary choices by inspectors in the field”) (quoting *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1980) (determining that one possible model adopted constituted a rule where it constituted a “norm with ‘present-day binding effect’ on the rights” of interested parties, where the model was used by the agency in every case, and where a statutory direction appeared to require the selection of one model) (quoting *Cnty Nutrition Inst. v. Young*, 818 F.2d 943, 946 & n.4 (D.C. Cir. 1987)); *Am. Bus. Ass’n v. United States*, 627 F.2d 525, 531-32 (D.C. Cir. 1980) (holding that the purported policy statement did not operate only prospectively; it was a “‘flat rule of eligibility’” rather than “‘a general pronouncement of the broad policy considerations which will motivate the Commission as it addresses itself to its appointed tasks’”) (quoting *United States ex rel. Parco v. Morris*, 426 F.Supp. 976, 984 (E.D. Pa. 1977) and *Nat’l Motor Freight Traffic Ass’n v. United States*, 268 F.Supp. 90, 96 (D.D.C. 1967) (three-judge court)).

⁵⁹ *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002).

⁶⁰ *Id.* (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1328-29 (1992)).

⁶¹ *Sandwich Isles Order*, 31 FCC Rcd at 13026, n.192 (explaining that the “[2007 Comprehensive Review Order] simply extended to the high-cost program the same policy preferences that the Commission previously applied to the E-rate program” in the *Schools and Libraries Fifth Report and Order*).

⁶² *2007 Comprehensive Review Order*, 22 FCC Rcd at 16383–84, para. 24 (emphasis added).

⁶³ See *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15808, 16819 (emphasis added); FCC Review and Waiver Petition at 14-15.

for the E-Rate program in more definitive terms, i.e., the policy operates “to provide beneficiaries with certainty and closure in the E-rate applications and funding processes,” and “strikes an appropriate balance between preserving the Commission’s fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries’ need for certainty and closure.”⁶⁴ Nonetheless, both the *Schools and Libraries Fifth Report and Order* and the *2007 Comprehensive Review Order* also refer to the statement as being “a policy,”⁶⁵ and the *2007 Comprehensive Review Order* specifically explains that such a “general policy ... would provide [support recipients] with some [rather than absolute] certainty of the time within which an audit or further review of funding may occur.”⁶⁶ Accordingly, when placed in the greater and proper context, neither the language in the *2007 Comprehensive Review Order* nor the language in the *Schools and Libraries Fifth Report and Order* give rise to the conclusion that the administrative limitations period was intended to be an uncodified rule.

18. Further, the administrative limitations period was closely tied with the five-year period associated with the document retention rule that was in effect at the time.⁶⁷ The Commission made clear that the document retention rule would not alter, amend, or supplant any rules that required or necessitated documents be kept for longer periods of time (e.g., to support the account balances in the Part 32 Uniform System of Accounts, continuing property records, pole attachment calculations, plant equipment age, cost, or useful life, depreciation rates) and to provide those documents upon request.⁷⁵ If those documents could not be utilized to demonstrate compliance, however, after the five-year term ended, the requirement that they be maintained for longer periods of time would have little to no legal purpose.

19. From a practical standpoint, while the Commission has some control on the timing in which an audit is initiated, it has much less control over when an audit is completed, as it is dependent on several factors, unique to the level of complexity associated with the carrier’s cost reporting, the nature of its record maintenance and organization, and the carrier’s participation in the audit process. Such factors simply cannot be fully evaluated in advance of an audit’s initiation. Although Rural Telephone places special emphasis on the publication of the pronouncement in the Federal Register, the APA requires publication of both rules and general statements of policy, and thus such publication cannot serve as “evidence” of the agency’s intentions.⁶⁸ For all these reasons, the Commission’s discussions regarding the administrative limitations policy do not clearly and unambiguously indicate an intent to place rigid limits on its broad authority to investigate noncompliance with the Communications Act and the Commission’s rules.⁶⁹

⁶⁴ *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15819, para. 32.

⁶⁵ *2007 Comprehensive Review Order*, 22 FCC Rcd at 16385, para. 28 (citing *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15818-19, para. 32).

⁶⁶ *2007 Comprehensive Review Order*, 22 FCC Rcd at 16385, para. 28. See also *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, 11343, para. 86 (2005) (seeking comment on whether the Commission should “establish[] a general policy in this area ... because it would provide these USF support mechanism participants with some certainty of the time within which an audit or further review of funding may occur”).

⁶⁷ In this regard, the reasonableness of any reliance interests that Rural Telephone might assert under this “rule” is undermined by the completion of the audit within 10 years of 2013.

⁶⁸ *Wilderness Society*, 434 F.3d at 596; *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986).

⁶⁹ *Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order, 31 FCC Rcd 12999, 13026-27, para. 92 (2016) (“the Commission’s direction to USAC to initiate and complete investigations within five years is a policy preference, not an absolute bar to recovery”) (quoting *Request for Waiver of Review of a Decision of the Universal*

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20. Further, the Commission has not established any norm, safe harbor, or even reasonable expectation that the administrative limitations period would insulate a carrier from overpayment of support. On multiple occasions, dating back to the 2011 Reporting Period, the Commission has completed audit investigations and/or ordered the recovery of support more than five years after it was paid.⁷⁰ The Commission has also stated that its statutory and constitutional obligation to recover support overpaid transcends any purported rule that would limit the Commission's investigatory authority. Even assuming *arguendo* that the Commission had intended to bind itself to a rule limiting investigations and audits of overpaid support to five years, the Commission has asserted that it would have lacked the authority to impose such a rule.⁷¹

b. The Audit Timeline Did Not Violate the APA

21. Rural Telephone further asserts that the “ten-year delay” in completing its audit violates the proscription in section 555(b) of the APA against unreasonable delays in agency action.⁷² In addition to stating that the duration of the audit is inherently unreasonable, Rural Telephone makes two primary contentions relating to the delay: 1) the public interest policies underlying the Enhanced A-CAM program would be undermined if USAC were allowed to continue with offset measures directed at future Enhanced A-CAM support payments⁷³ and 2) the passage of time has prejudiced Rural Telephone's ability to defend itself against the audit findings.⁷⁴ We reject these arguments and find that Rural Telephone has failed to demonstrate that the timespan over which the audit was conducted breaches the Commission's administrative duties under Section 555(b) of the APA.

22. The Commission recognizes its duty and responsibility to take timely action to identify, resolve and recover support. Whether a delay is unreasonable for section 555 purposes, however, is contextual and can only be evaluated based on a several factors, including, *inter alia*, the “rule of

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Service Administrator by Premio Computer, Inc. et al., Order, 29 FCC Rcd 8185, 8186, para. 6 (WCB 2014) (*Premio Computer, Inc.*) (emphasis added in *Sandwich Isles Order*)) (*Sandwich Isles Order*).

⁷⁰ See, e.g., *id.* at 12999 (ordering recovery of support more than five years after the carrier was paid and rejecting an absolute five-year bar on the recovery of support); *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP*, CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16601, para. 28 (2011) (upholding USAC's rescission of funding requests even though the five-year document retention period had lapsed because “USAC's recovery of government funds paid to an applicant or service provider who has no just right to keep the funds is not barred by the passage of time”); *Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc. Palatine, Illinois*, Memorandum Opinion and Order, 32 FCC Rcd 963, 967, para. 11 (2017) (*Net56*) (noting that the Commission has proceeded with support recovery “when more than five years has lapsed between final delivery of services for a specific funding year and the conclusion of an investigation”); *Premio Computer, Inc.*, 29 Rcd at 1886-87, para. 6 (“consistent with its general obligation to recover funds improperly disbursed, the Commission has elected to proceed with recovery even when more than five years has elapsed”) (citations omitted).

⁷¹ *Sandwich Isles Order*, 31 FCC Rcd at 13026-27, para. 92 (holding that “only Congress may impose such absolute [time] limitations”); *id.* at 13026-27, para. 91-92 & n.191 (explaining that constitutional constraints on agency-imposed limitations on the collection of support, including limitations on audit periods reside in the United States Property Clause and the Appropriations Clause, U.S. Const. Art. I, § 9); *id.* at 13027, n.191 (citing *Fansteel Metallurgical Corp. v. U.S.*, 172 F. Supp. 268, 270 (1959) (holding that the Property Clause requires collection of payments improperly made)); *id.* (noting that an agency's failure to seek repayment also creates tension with the Appropriations Clause, cl. 7). Cf. *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 733 (D.C. Cir. 1992) (in dicta, stating that where an agency has an undisputable indication that its rule is illegal, it may be required not to apply it).

⁷² See FCC Review and Waiver Petition at 17-29; 5 U.S.C. § 555(b).

⁷³ See *id.* at 24-27.

⁷⁴ See *id.* at 19-24.

reason,”⁷⁵ the kind of timeline in which Congress has indicated the Commission should act, the effect of delays on public welfare (with delays in the “sphere of economic regulation” being more tolerable), and the nature and effect on interests potentially prejudiced.⁷⁶ The “rule of reason” must take into consideration the number and complexity of issues involved, the limited resources the agency has to complete this kind of evaluation, and the number of entities that must be evaluated.⁷⁷

23. As the Commission has previously explained, there are no Congressionally imposed time limits on the investigation and recovery of support.⁷⁸ The Commission’s cost accounting rules can be complex, requiring both legal and technical accounting expertise, and the audit process is inherently iterative and interactive. In 2010, the Commission provided approximately \$3 billion in legacy support to support telecommunications services in high-cost areas.⁷⁹ Audits may be conducted randomly or based on indications of fraud, waste or abuse but are conducted on a carrier-by-carrier basis. In 2011, in response to a report issued by the Government Accounting Office, the Commission began to ramp up the depth and number of audits for the high-cost program.⁸⁰ The financial harm to Rural Telephone caused

⁷⁵ *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (“The first and most important factor is that the time agencies take to make decisions must be governed by a rule of reason.” (internal quotation marks omitted)). *Mashpee Wampanoag v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (the rule of reason cannot be decided “in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency”). In this regard, we find unpersuasive Rural Telephone’s references to timelines of different agency actions. See FCC Review and Waiver Petition at 19 (citing *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 344 (D.C. Cir. 1980) (10-year delay); *Am. Broad. Co. v. FCC*, 191 F.2d at 501 (10-year delay); *Casewell v. Califano*, 583 F.2d 9, 15 (1st Cr. 1978) (one-year delay); *Houston v. Nimmo*, 670 F.2d 1375, 1378 (9th Cir. 1982) (16-month delay)).

⁷⁶ The D.C. Circuit Court of Appeals has identified as “useful guidance” in assessing whether delayed agency action is unreasonable for purposes of section 555 of the APA: “(1) the time agencies take to make decisions must be governed by a ‘rule of reason’; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not ‘find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’” See *Telecommunications Research & Action Center v. F.C.C.*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (internal citations omitted) (explaining that the factors identified listed are not “ironclad”) (*TRAC*).

⁷⁷ See, e.g., *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (explaining that the process of addressing an unreasonable delay claim is “ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court”); *Reddy v. CFTC*, 191 F.3d 109, 120 (2d Cir. 1999) (reasonableness should be evaluated first based on the “the source of delay — e.g., the complexity of the investigation as well as the extent to which the defendant participated in delaying the proceeding”).

⁷⁸ *Sandwich Isles Order*, 31 FCC Rcd at 13026, para. 91 (stating that “Congress has not enacted a statute of limitations constraining the agency’s ability to recover funds under either section 254 . . . and this agency lacks the authority to self-impose an absolute bar on its ability to recover funds wrongfully disbursed).

⁷⁹ More precisely, USAC disbursed \$1,185,464,069 in HCLS and \$1,600,214,252 in ICLS for a total of \$2,785,678,321. See 2011 Monitoring Report, Supplementary Material, High Cost, High Cost Disbursements by Study Area, at <https://www.fcc.gov/general/federal-state-joint-board-monitoring-reports>.

⁸⁰ *USF/ICC Transformation Order*, 26 FCC Rcd at 17865 paras. 623-25 (explaining that in 2011, the Commission, in conjunction with USAC, created the Beneficiary/Contributor Compliance Audit Program (BCAP) and the Payment Quality Assurance Program to address certain shortcomings of its audit processes identified in a 2008 Government Accountability Office (GAO) High-Cost Report and in a December 2010 Final Report issued by USAC).

by the delay is limited because there was no withholding or modification of support payments pending the outcome of the audit. Rather, Rural Telephone has received a benefit from a delayed recovery by retaining these funds during the audit without accounting for inflation or payment of interest.⁸¹ In contrast, the proposed relief that Rural Telephone seeks would cause direct harm to the public interest. As the Commission has explained, audits are designed to prevent the kinds of “market distortions arising from misuse or misallocation of USF support explicitly recognized by Congress in section 254(k) of the [Communications Act] and directly implicated by cost allocation errors.”⁸² For these reasons, the time span between the Reporting Period and the initiation of the audit does not cross the reasonableness threshold warranting invalidation of the audit findings.⁸³

24. Further, the resolution Rural Telephone seeks—the invalidation of the audit findings and enjoinder of support recovery—is likely not cognizable under section 555(b). Judicial precedent suggests that the APA permits a suit to compel agency action but does not provide an independent ground for dismissing agency action.⁸⁴ Relatedly, a significant body of precedent holds that undue prejudice caused by even inexcusable delay cannot be asserted against the United States when protecting a public interest.⁸⁵ While a few courts have declined to enforce an agency action due to delay, it appears that these cases are limited to situations where delayed action calls into question the efficacy and reasonableness of permitting the agency action to move forward, such as might occur when the agency’s remedy of injunctive relief proscribes future conduct that could not possibly occur because of changed

⁸¹ Letter from Joshua Levitats, Manager and Associate General Counsel, Universal Service Administrative Company to James U. Troup, Esq. and Tony. S. Lee, Esq., Counsel for Rural Telephone Service Company, Inc. d/b/a Nex-Tech (indicating that USAC would not recover support pending resolution of appeals before USAC, the FCC, and the courts).

⁸² *Blanca Reconsideration Order*, 32 FCC Rcd at 10609, para. 40.

⁸³ FCC Review and Waiver Petition at 17 (referring to a “ten-year old” audit, which must include the 2011 Reporting Period for payment received in 2013 as well as the timeframe over which USAC initiated the audit (2016) and concluded it (2023), a period of seven years). In this regard, we note that the Commission could not even *begin* to evaluate whether the payments associated with the 2011 Reporting Period were issued in accordance with the Communications Act and associated Commission rules until the end of 2013, the year in which such payments were received because of the administrative timeline for the true-up of projections.

⁸⁴ *Solenex LLC v. Bernhardt*, 962 F.3d 520, 527 (D.C. Cir. 2020) (asserting that “the law is well settled that ‘[d]elay alone is not enough’ to strip the agency of its ability to act or to justify setting aside agency action”) (citing *Dayton Tire v. Secretary of Labor*, 671 F.3d 1249, 1253 (D.C. Cir. 2012); see also *General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990) (holding agency’s failure to act on an implementation plan within a reasonable period of time did not itself preclude enforcement of the plan); *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1304 (D.C. Cir. 1991) (“We are especially reluctant to * * * curb [an agency’s] substantive authority in light of Supreme Court decisions declining to restrict agencies’ powers when Congress has not indicated any intent to do so and has crafted less drastic remedies for the agency’s failure to act.”); *United States v. Popovich*, 820 F.2d 134, 138 (5th Cir. 1987) (“Today we squarely face whether section 706 and 555 of the APA may be used not only to compel but also to bar agency action unreasonably delayed. We conclude that the plain language of the statute provides no authority for dismissing the action of the [agency].”)).

⁸⁵ *U.S. v. Popovich*, 820 F.2d at 136 (stating that the laches defense may not be asserted against United States “when it is acting in its sovereign capacity to . . . protect the public interest”); *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (“It is well settled that the United States is not . . . subject to the defense of laches in enforcing its rights”). Cf. *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir.1978) (reserving APA issue; affirming dismissal based on laches); *United States v. Menatos*, 925.2d 333, 335 (9th Cir.1991) (rejecting the use of laches defense in an action to collect on defaulted federal student loans). But see *SER Jobs for Progress, Inc. v. U.S.*, 759 F.2d 1 (1st Cir.1985) (speculating that the defense of laches might be available in the limited context of contract claims).

circumstances or undoes agreements and policies, independently undertaken by parties, that have essentially remedied or resolved the concern during the extended delay.⁸⁶

25. Rural Telephone generally puts forth a different and significantly broader interpretation of when a delay might warrant a decision to deny enforcement of an agency action, asserting that such denial is appropriate “when the passage of time between the events in question and the agency’s remedy have so changed the underlying situation that enforcement of an order would undermine more government policies than it would advance.”⁸⁷ Rural Telephone then asserts that under this broad reading, the Commission cannot reasonably proceed with an offset that targets payments receivable through different fixed-support programs, such as payments to be received through the Enhanced A-CAM program.⁸⁸ It argues that offset of fixed support payments received through a program that has different policy objectives and parameters undermines the program’s objectives, including the goals of preserving and advancing voice and broadband service in areas served by rate-of-return carriers and extending certainty and predictability of support.⁸⁹ It further characterizes legacy support as an “obsolete” and “outdated” program.⁹⁰

26. We disagree with the Rural Telephone’s interpretation of when agency action should not be enforced due to the passage of time. The audit findings and the related recovery simply returns Rural Telephone to the status quo ante but for its rule violations. Unlike those few exceptional situations giving rise to the invalidation of agency action, the audit findings and support recovery do not proscribe *future* conduct that can no longer possibly occur, even if offset would potentially affect future payments.⁹¹ Rural Telephone has not experienced, due to the timeline over which the audit was completed, compounding injuries in the form of continuously withheld support,⁹² nor has it been denied other

⁸⁶ See, e.g., *Emhart*, 907 F.2d at 379-80 (stating that “enforcement of the order now not only would undermine more labor policies that it would advance, but also would mock reality,” as two intervening collective bargaining agreements adopted and reinstated the procedures that the agency had found objectionable because such procedures were previously based on unilateral decisions, and where the ordered remedy would only apply to a plant that had closed years earlier); *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21, 22 (8th Cir. 1991) (holding that enforcing an order directing an employer to permit union members to pass out handbills at its stores would be meaningless because the union had since been decertified, one of the stores at issue had been relocated, and the number of affected employees had changed) (*Mountain County*).

⁸⁷ FCC Review Petition at 24 (citing *Brit. Airways Bd. v. Port Auth.*, 564 F.2d at 1010; *Emhart*, 907 F.2d at 379 (2d Cir. 1990); *Olivetti*, 926 F.2d at 189-90, *Mountain County*, 931 F.2d at 22). We note that while Rural Telephone cites the *British Airways Board vs. Port Authority* case for the proposition that delays “can threaten introduction of new technology,” it does not tie this proposition specifically to its subsequent arguments that recovery of support through offset should be disallowed. We note that this case invalidated a local ban on certain federally-authorized test flights resulting from a local authority’s failure to promulgate certain noise standards. While the basis for the decision is a bit unclear, it focuses on preemption, the scope of the local authority’s delegated power, and the impact of the authority’s behavior on commerce. See generally *British Airways Bd. v. Port Auth.*, 564 F.2d 1002.

⁸⁸ See FCC Review and Waiver Petition at 25-29.

⁸⁹ See *id.* at 26.

⁹⁰ See *id.* at 27.

⁹¹ See *id.* at 3-4. Rural Telephone cites *Emhart* for the very broad the proposition that delayed agency action should not be enforced when such enforcement has become largely ineffectual in promoting “any reasonable policy” but this is clearly not the case here. See *infra* Paragraph 50 and n.174.

⁹² See, e.g., *Dayton Tire v. Secretary of Labor*, 671 F.3d 1249, 1253 (D.C. Cir. 2012) (distinguishing delayed liability from increasing liability due to delay, and noting that “[i]f anything, [the delay] decreased [the liability by giving the party] more than a decade to earn interest on the money it would have to use to pay the penalty”). Rural Telephone cites *Olivetti* for the general proposition that delayed enforcement can become penal or confiscatory when the remedy would exceed any remedial purpose, but this decision specifically focused on the fact that the

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opportunities, such as participation in the Enhanced A-CAM program. The offset of payments is only one method available to recover support, and therefore, the argument that offset somehow undermines Enhanced A-CAM objectives is a red herring. For these reasons, we cannot conclude that the facts at hand necessitate the relief Rural Telephone is seeking under the judicial precedent.

27. We also reject Rural Telephone's contention that the Commission should not enforce the audit findings because the timeline of the audit has resulted in undue prejudice. Rural Telephone's primary contention is that due to the passage of time, its ability to defend itself against USAC's allegations has been impaired by the unavailability of witnesses, the dimming of memories, changed personnel, death of personnel, changes in ownership of affiliates, and the loss of pertinent records.⁹³ More specifically, Rural Telephone states that "[l]ocating old paper records ... is difficult, if not impossible," since it had "gradually digitized its records since 2009;"⁹⁴ that it had migrated to a new financial accounting system in 2013 and had, in 2020, decommissioned the server for the initial system "due to cyber-security concerns;"⁹⁵ that four "key individuals . . . have either retired, died, or no longer work at Rural Telephone;"⁹⁶ that USAC demanded access to records that were never in its possession;⁹⁷ and that it is being unfairly penalized for following guidance that was provided as part of a 2008-2009 audit conducted by USAC's external audit team, KPMG LLC (KPMG audits), on USAC's behalf and approved by USAC.⁹⁸

28. These circumstances, however, do not demonstrate *actual* prejudice *caused* by the duration of the audit. Rural Telephone describes issues it has had with obtaining or producing relevant records but does not provide details that specifically tie these issues to the length of the audit process. Moreover, it has failed to demonstrate that it took all due precautions to prevent the loss of records it possessed. And while Rural Telephone states that it might have received and submitted testimonial evidence from key personnel, it does not explain whether such information would have been appropriately confined to its proper role of "interpreting or corroborating documentary or physical information" nor does Rural Telephone contend that such interpretation and corroboration would likely have been considered sufficient by USAC to support its cost accounting.⁹⁹

29. While Rural Telephone asserts that it should not be penalized for not having records originally held by third party entities and associated with certain transactions, which it asserts it could neither obtain at the time of the transaction nor obtain during the audit process, and which might not ever have existed, we disagree.¹⁰⁰ In support of this argument, Rural Telephone suggests that the record

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ordered remedy was significantly overbroad and would have required significant compensation caused by the delay (salary payments). *See* FCC Review and Waiver Petition at 26; *Olivetti*, 926 F.2d at 190.

⁹³ FCC Review and Waiver Petition at 20.

⁹⁴ *See id.* at 24.

⁹⁵ *See id.* at 24.

⁹⁶ *See id.* at 24.

⁹⁷ *See id.* at 23 (citing *AKM LLC v. Sec'y of Labor*, 676 F.3d 752, 756 (D.C. Cir. 2012)).

⁹⁸ *See* FCC Review and Waiver Petition at 22.

⁹⁹ *See, e.g., Request for Review of a Decision of the Universal Service Administrator by Big Bend Telephone Company, Inc.*, WC Docket 10-90, Order, DA 25-489 at 12, para. 33 (WCB June 6, 2025) (*Big Bend Order*).

¹⁰⁰ In support of its contention that it cannot be held accountable for records it never held, Rural Telephone cites a case involving two separate statutory limitations period for the issuance of citations for the failure to create a record and the failure to maintain a record, and a "strained" attempt to conflate the two types of violations by treating the failure to create a record as a continuing violation. *See AKM LLC*, 676 F.3d at 756. In making its finding, USAC is

(continued....)

“retention” requirement in section 54.320(b) cannot be interpreted to include records never held.¹⁰¹ We find this argument to be specious. USAC auditors must conduct audits in accordance with generally accepted auditing standards, which requires USAC to obtain sufficient and appropriate evidence to substantiate the audit findings. If Rural Telephone submitted data that cannot be substantiated by its records as the proper amount or assigned to the appropriate ledger under the Commission rules, Rural Telephone has not demonstrated “to auditors that the support received was consistent with the universal service high-cost program rules.”¹⁰²

30. Rural Telephone also asserts that in 2011, it had reasonably relied on USAC guidance received as part of the prior KPMG audits and it should not have been required to defend this reliance 15 years later.¹⁰³ Rural Telephone, however, has not specifically shown that its reliance on the guidance and findings of the KPMG audits caused it to destroy or lose records that it would have otherwise retained, thus tying this claim into the assertion that the audit delay specifically prejudiced Rural Telephone. AAD has clarified that the scope of its testing differed from the scope of KPMG’s audit testing, and that AAD identified issues under the rules that were not examined or commented on as part of the KPMG audit.¹⁰⁴ Because AAD examined different issues than those identified through the KPMG audit, even if related to similar transactions, Rural Telephone had no reasonable basis to assume it need not retain records specifically relating to these issues. As the Bureau recently held, reporting carriers cannot reasonably rely on earlier audit findings to bind subsequent determinations, nor would it limit the Commission’s *de novo* review; audits differ in scope and depth and as a result USAC can identify issues that it failed to identify previously.¹⁰⁵ Accordingly, we find no basis for invalidating AAD’s findings and forgiving the associated amounts based solely on the timeline over which the audit was initiated and concluded.

c. Rural Telephone was not prejudiced by AAD’s actions while conducting the audit

31. Rural Telephone claims that the administrator had the obligation, under section 213(c) of the Communications Act to “calculate a reasonable estimate of overpayment over regulated cost rather than recover all support” when original costs are not known or cannot be known.¹⁰⁶ Rural Telephone also

(Continued from previous page)

not undermining statutory limits nor is it offering an interpretation of Commission accounting rules that is inconsistent with time-limited consequences of two actions clearly differentiated by statute.

¹⁰¹ FCC Review and Waiver Petition at 44.

¹⁰² 47 CFR § 54.320(b).

¹⁰³ See FCC Review and Waiver Petition at 22.

¹⁰⁴ See USAC Decision on Appeal at 2-3, 5. More specifically, under Finding No. 1 and Finding No. 3, the AAD finds that Rural Telephone had failed to demonstrate that it had properly capitalized a fiber lease where annual rent expenses were substantial, as required by section 36.2(c) of the Commission’s rules, 47 CFR § 36.2(c), and had failed to properly record the transaction at the lower of cost in comparison to the costs of other fiber leases in effect during the Reporting Period, as required by section § 32.27(b)(2) of the Commission’s rules, 47 CFR § 32.27(b)(2). AAD found that the two findings overlapped, and therefore, concluded that Finding #3 should have no monetary effect. See Audit Report at 10-12, 18-21.

¹⁰⁵ See, e.g., *Big Bend Order*, DA 25-489 at 5, paras. 13; *Sandwich Isles Order*, 31 FCC Rcd at 13025, para. 89 (“The Commission is not precluded from undertaking a more in-depth examination of these issues based on a more fully developed factual record.”).

¹⁰⁶ FCC Review and Waiver Petition at 21 (citing 47 U.S.C. § 213(c)). We address these arguments, as raised by the petitioner, as part of the claim that the duration of the audit violated section 555 of the APA, although these arguments are only loosely tied to the duration of the audit. Instead, these arguments challenge the approaches taken by USAC when evaluating and completing its audit.

points to several part 32 Commission rules that allow for the reporting carrier to submit estimates.¹⁰⁷ Rural Telephone states that after it provided USAC with “all the data that was reasonably available,” USAC bore the burden of presenting a methodology by which it determined that Rural Telephone’s submissions were insufficient to provide a reasonable estimate, the method by which it made its own estimate, and the evidence it used to make such estimate.¹⁰⁸ The failure of USAC to provide such estimate and methodology, asserts Rural Telephone, is prejudicial to Rural Telephone’s ability to challenge several findings in the Audit Report. It stresses that USAC carried the burden of “adducing a reasoned presentation supporting the reliability of its methodology.”¹⁰⁹

32. Rural Telephone cites section 213(c) of the Communications Act as requiring the Commission to estimate costs when original costs cannot be determined. Rural Telephone is misinterpreting section 213(c), a subsection of a statutory provision that is a reservation of Commission discretion to gather information related to the original valuation of common carrier property at the time of “its dedication to public use,” and which has primarily been invoked by the Commission in the context of its authority to govern the rates, terms, and conditions of interstate communications to allow a return on investment in capital and assets.¹¹⁰ Section 213(c) is not only inapposite here but also does not require the Commission to take any action, nor does it provide a carrier any specific relief from its obligation to exercise due diligence in identifying, maintaining, and locating the requisite records because of its self-determined “reasonable” efforts. Similarly, the rules that Rural Telephone cites in further support of its contention that USAC was required to make estimates and furnish a methodology for making such estimates, only permit the reporting carrier to submit estimates of original costs. We note that one of these rules even specifically provides that “when estimates are used, the company shall be prepared to furnish the Commission with the particulars of such estimates.”¹¹¹ Accordingly, Rural Telephone was not prejudiced by AAD’s failure to produce estimates on behalf of Rural Telephone or provide a methodology by which it had done so.

33. Rural Telephone more generally states that it has been prejudiced by the inability to access AAD’s calculations and methodology despite repeated requests.¹¹² Although it does not specifically describe the calculations and methodology requested that resulted in an inability to respond to USAC Findings, it does provide citations to the Audit Report where it made certain challenges to two audit findings: 1) Finding No. 1: Improper Accounting of Affiliate Lease, and 2) Finding No. 8: Improper Affiliate Transactions.¹¹³ More specifically, Rural Telephone asserted that before determining improper

¹⁰⁷ See FCC Review and Waiver Petition at 21 (citing 47 CFR § 32.2000(b)(2)(ii), 32.2000(f)(4), 32.2005(a)).

¹⁰⁸ *Id.* at 21 (citing 47 U.S.C. § 213(c); 47 CFR §§ 32.2000(b)(2)(ii), 32.2000(f)(4), 32.2005(a)).

¹⁰⁹ *Id.* at 21 (citing *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973)).

¹¹⁰ The statute permits the Commission to require carriers to produce a statement showing the original cost of property at the time of its “dedication to public use,” and in the event that such cost data cannot be provided through accounting records or other sources, to require, at its discretion, that carriers provide estimates in the manner it proscribes. 47 U.S.C. § 213(e). *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket 79-252, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 458, para. 39 (1981) (“Section 213, for example, invests the Commission with the power to investigate the carrier’s rate base to assure that the rates charged reflect accurately the cost of the property used to provide the service.”)

¹¹¹ 47 CFR §§ 32.2000(b)(2)(ii) (permitting for estimates of original costs “if not known” provided that “when the actual original cost cannot be determined and estimates are used, the company shall be prepared to furnish the Commission with the particulars of such estimates”), 32.2000(f)(4) (permitting estimates of original costs where “original costs cannot be ascertained”), 32.2005(a) (providing that “[i]f the actual original cost is not known, the entries in this account shall be based upon an estimate of such costs”).

¹¹² FCC Review and Waiver Petition at 21.

¹¹³ See *id.* at 21.

reporting of a substantial affiliate lease transaction as an operating lease in contradiction to section 36.2(c) of the Commission's rules, USAC was required to define when a lease should be considered an operating or capital lease and clarify what a "substantial" intercarrier contract is with reference to either a "dollar amount and/or percentage of revenue and/or expense in the rules."¹¹⁴ We disagree. As recently affirmed by the Bureau, "an affiliate transaction should be considered substantial when the amount of investment involved in the affiliate transaction skews the separations results to sizably increase the amount of support received by the beneficiary."¹¹⁵ Improper reporting resulting in overpayment of millions clearly skews and distorts a cost study,¹¹⁶ and in this case, the cost of the asset, the face value of the transaction, and the effect of not capitalizing the transaction¹¹⁷ all lead to the irrefutable conclusion that the transaction was substantial. Given these circumstances, the audit findings are consistent with the Commission's interpretation of section 36.2(c) and fully supported by the record, and Rural Telephone is entitled to no further explanation.

34. Finding Number 8 determined that Rural Telephone failed to properly account for certain lease payments for motor vehicles that Rural Telephone leased from its affiliate under section 32.27(b)(1)-(3) of the Commission's rules.¹¹⁸ Rural Telephone responded to the audit findings with the assertion that it was not "supplied with the detail behind the analysis completed by the USAC audit team related to the number of employees per position related to the number of assigned vehicles per position."¹¹⁹ USAC explains that despite receiving certain information from Rural Telephone, it was "unable to conclude that the multiple vehicles assigned to one employee should be considered used and useful as there are 47 more vehicles than actual employees," and "there were two individuals assigned to a vehicle that were not listed on the employee listing."¹²⁰ We find that this determination is reasonable under a case-specific analysis as it cannot be determined whether the payments were necessary for the provision of regulated service and otherwise prudent.¹²¹

35. USAC must determine whether Rural Telephone has *demonstrated* compliance, consistent with the methodology set forth in Part 32, including the production of requisite documentation but need not provide specific estimates to accommodate the financial interests of Rural Telephone or any other party in the absence of such proof.¹²² Such assertion would push the burden to USAC to determine what portion of support should be deemed recoverable. As recently restated by the Bureau in its *Big Bend Order*, it is "not the responsibility of the auditors or within the scope of the audit for the auditors to recalculate, reconstruct, or correct [the carrier's] records, or examine financial records from years outside

¹¹⁴ Audit Report at 11.

¹¹⁵ See *Big Bend Order*, DA 25-489 at 7, paras. 18 (citing *Moultrie Indep. Tel. Co.*, Order, CC Docket No. 96-45, 16 FCC Rcd 18242 (2001)).

¹¹⁶ See *id.* at 7, para. 19.

¹¹⁷ USAC explains that it made its determination based on the cost of the asset {[]}, the face value of the transaction {[]}, and the effect of not capitalizing the transaction, which equated to an overpayment of more than one million dollars (\$1.3M) of high cost support. Material that is set off by double brackets {[]} is subject to a request for confidential treatment and is redacted from the public version of this document..

¹¹⁸ See Audit Report at 36-41; 47 CFR § 32.27(b)(1)-(3).

¹¹⁹ See Audit Report at 39.

¹²⁰ See *id.* at 41.

¹²¹ 2016 *Rate-of-Return Reform Order*, 31 FCC Rcd at 3214-15, para. 335. We note that AAD stated that this finding was made "as an aside," and had "limited effect," on the support recoverable. See Audit Report at 37.

¹²² See *supra* Paragraph 9.

of the audited year to determine what [the carrier's] support levels should have been.”¹²³ Accordingly, AAD has demonstrated that Rural Telephone failed to adequately meet its burden of proof.

B. Support Recovery is Not a Breach of Contract

36. Rural Telephone next asserts that the offsetting of its overpaid support by withholding Enhanced A-CAM support payments is a breach of the Commission's contractual offer and undermines the program's goals.¹²⁴ Rural Telephone states that the Commission entered into a contractual relationship with rate-of-return carriers that accepted Enhanced A-CAM in lieu of other forms of support through an unambiguous agreement with mutuality of consideration.¹²⁵ Rural Telephone asserts that pursuant to this agreement, support may only be withheld or reduced for the failure to meet program requirements in accordance with section 54.320(d) of the Commission's rules and cannot be used to offset any overpayments made in other programs.¹²⁶

37. We reject these contentions. Support may be recovered through various methods including direct payments and payment plans in addition to offsets. We have already explained several times that having the authority to recover support is necessary for the Commission to fulfill its statutory mandate to fairly administer the universal service program.¹²⁷ So too has the Commission long held that ETCs have “no property interest in or right to continued support, nor any right to support other than provided for by our rules.”¹²⁸ Further, long-standing precedent has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that “a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.”¹²⁹ Accordingly, “because the Commission has direct statutory authority to administer support and to recover such support . . . , the Commission need not even reach the

¹²³ See, e.g., *Big Bend*, DA 25-489 at 12, paras. 34 (quoting *Request for Review of a Decision of the Universal Service Administrator by Nemont Telephone Cooperative, Inc.*, Order, WC Docket No. 08-71, 29 FCC Rcd 11780, 11784, para. 13 (WCB 2014)).

¹²⁴ FCC Review and Waiver Petition at 29-33.

¹²⁵ See *id.* at 29-33. Rural Telephone argues that the Commission made a binding offer to all rate-of-return carriers in its *2016 Rate-of-Return Reform Order* when it states that “rate-of-return carriers may [voluntarily] elect model-based support for a term of 10 years in exchange for meeting defined buildout obligations.” See *id.* at 31 (quoting *2016 Rate-of-Return Reform Order*, 31 FCC Rcd at 3090, para. 4).

¹²⁶ See FCC Review and Waiver Petition at 6; 47 CFR § 54.320(d).

¹²⁷ 47 U.S.C. § 254(e); *Blanca Telephone Company Seeking Relief from the June 22, 2016, Letter Issued by the Office of the Managing Director*, CC Docket No. 96-45, Memorandum Opinion and Order and Order on Reconsideration, 32 FCC Rcd 10594, 10609, para. 40 (2017) (“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.”) (*Blanca Reconsideration Order*).

¹²⁸ *Petitions for Waiver of Universal Service High-Cost Filing Deadlines; SureWest Telephone Petition for Waiver of Section 54.314(d) Filing Deadlines for a Submission of State Certification of Federal High-Cost Support*, WC Docket No. 08-71, Memorandum Opinion and Order, 31 FCC Rcd 12012, 12017, para.15 (2016).

¹²⁹ *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) (quoting *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937)). Cf. *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005) (“The government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses.”).

question of whether the Commission possesses direct common law authority to recover such sums by standing in the shoes of a contracting party.”¹³⁰

1. The Length of the Audit Did Not Violate Procedural Due Process Rights Guaranteed by the Fifth Amendment to the US Constitution

38. Rural Telephone next asserts that the length of the audit violates the procedural protections set forth in the Due Process Clause of the Fifth Amendment to the United States Constitution.¹³¹ Rural Telephone asserts that it has a property interest and statutory entitlement to receive A-CAM II and Enhanced A-CAM support that it has been authorized to receive in accordance with Commission rules, and that these interests are paramount to other public and governmental interests in the expedited resolution of these audit findings and recovery of support.¹³² It identifies the Commission’s primary interest as the fulfillment of its statutory requirement to make available communications services with adequate facilities at reasonable charges, which is directly advanced by Rural Telephone’s uninterrupted receipt of universal service support.¹³³ Rural Telephone explains that USAC’s processes pose “a profound possibility of erroneous deprivation,” and any increased administrative burdens on USAC to increase the speed of its audits do not outweigh these interests.¹³⁴

39. Rural Telephone is invoking a balancing test that courts use to determine the level and extent of procedural protections that must be afforded before a governmental deprivation of life, liberty or property.¹³⁵ In order for the Fifth Amendment due process protections to be available to Rural Telephone, however, it must first establish that the audit results and subsequent recovery action deprive it of entitlements to life, liberty, or property.¹³⁶ We hold that they do not, and on this basis alone, we reject Rural Telephone’s due process claims. The Commission and courts have held that there is no entitlement to universal service support, and especially to such support that is improperly paid.¹³⁷ The Commission

¹³⁰ *Blanca Reconsideration Order*, 32 FCC Rcd at 10609, n.109 (comparing *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 *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329, 337 (5th Cir. 1975) (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)).

¹³¹ See FCC Review and Waiver Petition at 33-36; U.S. Const. amend. V.

¹³² See FCC Review and Waiver Petition at 35.

¹³³ See *id.* at 35-36 (citing 47 U.S.C. § 151).

¹³⁴ See *id.* at 36.

¹³⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (providing that a determination of how much procedural due process is required is determined through a three-factor balancing test that weighs (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation with the procedures presently used; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens associated with additional procedures).

¹³⁶ See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (“[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures”); *Shanks v. Dressel*, 540 F.3d 1082, 1091 (9th Cir. 2008) (stating that identifying a protected interest is the threshold inquiry).

¹³⁷ See *In Re: FCC 11-161*, 753 F. 3d 1015, 1098 (10th Cir. 2014) (“Ultimately, petitioners’ arguments rest on the faulty assumption that ETC designation by a State entitles an entity to USF funding.”). See also *Petitions for Waiver of Universal Service High-Cost filing Deadlines; SureWest Telephone Petition for Waiver of Section 54.314(d) Filing Deadlines for a Submission of State Certification of Federal High-Cost Support*, WC Docket No. 08-71, Memorandum Opinion and Order, 31 FCC Rcd 12012, 12017, para.15 (2016) (holding that there is no entitlement or property rights in the continued receipt of support “nor any right to support other than as provided for

(continued....)

has recognized that, unlike the those benefits which the courts have stated are a protected statutory entitlement, there are no specific statutory bars to the recovery of USF support based on equity or fault that might indicate Congressional intent to create an entitlement.¹³⁸ Further, USF support is dissimilar to other entitlements as it is directed to, and must be used, only in accordance with the public welfare purposes for which it is disbursed, and in accordance with several statutory and regulatory prescriptions and policies.¹³⁹

40. Nonetheless, even assuming *arguendo* that Rural Telephone had a protected property right or other entitlement in the receipt of cost-based USF support, Rural Telephone has received adequate due process. The essence of such process is having notice and opportunity to be heard, proportionate to the potential deprivation.¹⁴⁰ We reject any notion that the audit process and this *de novo* appeal process do not provide Rural Telephone a meaningful opportunity to be heard. The Commission and judicial precedent have already determined that the audit process and the informal adjudication of audit findings provides sufficient due process under the Constitution and the APA.¹⁴¹ Accordingly, based on the above analysis, and based on our conclusion below that the USAC and the Commission are not required to provide estimates to fill in the gaps in documentation, we find that Rural Telephone received all process due.

C. Identification of Recoverable Support in Certain Audit Findings Does Not Constitute a Civil Forfeiture Nor Does it Constitute an Excessive Fine

41. Rural Telephone characterizes the audit findings as a civil forfeiture to the extent that they are “neither solely remedial nor repayment of a debt.”¹⁴² Rural Telephone asserts that the ordered recovery is not “merely remedial but punitive,” since USAC is divesting Rural Telephone of support

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by our rules”); *USF/ICC Transformation Order*, 26 FCC Rcd at 17771, para. 293 (“Indeed, there is no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and we are not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support.”).

¹³⁸ See *Blanca Reconsideration Order*, 32 FCC Rcd at 11609-10, para 41 n.113 (citing 42 U.S.C. § 404(b) (determining that 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”)).

¹³⁹ *Consumers’ Research, et al., v. FCC, et al.*, No. 24-354, Slip. Op. at 23-25 (U.S. June 27, 2025) at *11 (“The [Communications] Act identifies the beneficiaries that may receive subsidies and the ways in which the subsidies may be used”) (citing 47 U.S.C. § 254(e) (“[O]nly an eligible telecommunications carrier designated under [47 U.S.C. 214(e)] shall be eligible to receive specific Federal universal service support.”)); 47 U.S.C. § 214(e) (specifying criteria for designating telecommunications carriers eligible to receive universal-service funding); 47 U.S.C. § 254(e) (providing that a carrier may use the funds “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”)); *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (the “purpose of universal service is to benefit the customer, not the carrier”) (quoting *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000)).

¹⁴⁰ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

¹⁴¹ See, e.g., *Blanca Tel. Co. v. Fed. Commc’ns Comm’n*, 991 F.3d 1097, 1119 (10th Cir. 2021) (holding that through its informal adjudication process for determining noncompliance with accounting requirements, the FCC satisfied all statutory or constitutional process requirements); see also *Blanca Reconsideration Order*, 32 FCC Rcd at 10613, para. 47 (explaining that “[i]nformal adjudications should provide notice to affected parties, opportunity to participate, and supporting reasons” and holding that such process satisfied the statutory requirements for due process required by the APA).

¹⁴² FCC Review and Waiver Petition at 38.

associated with costs properly recoverable.¹⁴³ Any recovery of support that the Commission was required to provide to meet its mandate to provide support that is both “explicit and sufficient” to preserve and advance universal service, asserts Rural Telephone, is “unlawful.”¹⁴⁴ More specifically, Rural Telephone contends that in failing to provide a “reasonable estimate of any over-payment,” and instead including in the total of overpaid support, “expenses that are properly recoverable,” USAC is taking punitive action.¹⁴⁵ Rural Telephone asserts, consistent with its arguments above, that under section 213(c) of the Communications Act and sections 32.2005(a), 32.2000(b)(2)(ii), and 32.2000(f)(4) of the Commission’s rules, “[i]f USAC was unable to determine any excess above regulated costs, it had an obligation to calculate a reasonable estimate.”¹⁴⁶ Rural Telephone then identifies findings where it alleges that USAC failed to provide such estimates.¹⁴⁷ Rural Telephone asserts that requiring recovery of support received in excess of the amount that is not recoverable under the Commission’s USF rules violates the Excessive Fines Clause of the Eighth Amendment because it is uncorrelated to the specific harm associated with such overpayment.¹⁴⁸

42. In recovering all support that Rural Telephone could not adequately document rather than recovering some portion of this support based on an estimate, the Commission is not recovering more support than owed. Pursuant to the requirements of Part 32, support recipients carry the burden of demonstrating reported costs are accurate and consistent with requirements; unless such burden is successfully carried, the support recipient is not eligible to receive the support regardless of whether certain costs would otherwise be compensable.¹⁴⁹ While USF should be explicit, sufficient and predictable, the sufficiency principle does “*not* guarantee all local telephone service providers a sufficient return on investment,” only that there will be “sufficient funding of *customers*, not *providers*”; the “[p]redictability principle ... requires only predictable rules that govern distribution of universal service subsidies, and not predictable funding amounts”¹⁵⁰ Under these circumstances, full support recovery associated with potentially recoverable costs does not constitute a fine, penalty or forfeiture because it

¹⁴³ *Id.* at 37.

¹⁴⁴ *Id.* at 38 (quoting 47 U.S.C. § 254(e)); 47 U.S.C. § 254(e) (“[Universal Service support] should be explicit and sufficient to achieve the purposes of this section.”)

¹⁴⁵ *Id.* at 37-38.

¹⁴⁶ *Id.* at 38.

¹⁴⁷ *Id.* at 37-40. Rural Telephone identifies Findings 2, 4, 5, 6 and 7 as audit findings requiring repayment of support that was not properly recoverable. *See id.* at 40. Rural Telephone provides slightly more detail supporting arguments challenging Findings No. 2 and 4. With respect to Finding No. 2, Rural Telephone asserts that USAC was required to estimate the excess over cost or fair market value as excludable from recoverable cost rather than all amounts paid to affiliates. *See id.* at 39. With respect to Finding No. 4, Rural Telephone asserts that USAC failed to estimate the amounts “related to providing regulated telephone service,” when identifying amounts improperly claimed for non-regulated assets. *See id.*

¹⁴⁸ FCC Review and Waiver Petition at 40.

¹⁴⁹ *See, e.g., Big Bend Order*, DA 25-489 at 11-12, paras. 31 (holding that where a carrier failed to produce necessary supporting documentation that should have been “readily available,” USAC could not determine the proper amount related to certain costs received the proper amount of universal service support related to these costs and is unable to guard against waste, fraud, and abuse in the Universal Service Fund) (citing *Request for Review of a Decision of the Universal Service Administrator by Nemont Telephone Cooperative, Inc.*, Order, WC Docket No. 08-71, 29 FCC Rcd 11780, 11782, para. 8 (WCB 2014); *Request for Review of a Decision of the Universal Service Administrator by New Lisbon Tel. Co.*, CC Docket No. 96-45, Order, 34 FCC Rcd 6352, 6354, para. 5 (WCB 2019); *see also Sandwich Isles Order*, 31 FCC Rcd at 13036-37, para. 124 (disallowing the recovery of \$3 million in expenditures due to lack of sufficient documentation)).

¹⁵⁰ *See Alenco*, 201 F.3d at 620 (emphasis in original).

does not deprive a carrier of support that it would otherwise be eligible to receive but merely returns a support recipient to the status quo ante;¹⁵¹ the payments are not Rural Telephone's "own funds," but rather public funds to which Rural Telephone was not entitled.¹⁵² The Commission has rejected claims that recovery of support constitutes a fine, penalty, or forfeiture, distinguishing sanctions that serve a retributive or deterrent purposes from those that merely return an overpaid support recipient to the status quo ante.¹⁵³

43. Because support recovery is not a penalty or punishment for improper cost accounting even where such recovery might include costs that would otherwise be recoverable if properly supported, the Eighth Amendment's Excessive Fines Clause is not applicable. In order to violate the Eighth Amendment's prescription against excessive fines, a civil action must both constitute a penalty and be disproportionate to the harm caused.¹⁵⁴ The Commission has limited support recovery to that which Rural Telephone has been unable to demonstrate that it may receive in accordance with Commission rules and requirements, consistent with the burden of proof standards set well in advance of Rural Telephone's receipt of support.¹⁵⁵

44. Finally, consistent with the findings that recovery of overpaid support in accordance with USAC audit findings is not a forfeiture, we find that the statute of limitations set forth in section 1.80(c)(2) of the Commission's rules,¹⁵⁶ which prohibits forfeitures imposed under section 220(d)¹⁵⁷ when a violation occurs more than five years prior to the issuance of a notice of apparent liability, does not

¹⁵¹ *Blanca Recon*, 32 FCC Rcd at 10611-12, para. 44-45; *2007 Comprehensive Review 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).

¹⁵² *See Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, Memorandum Opinion and Order, 31 FCC Rcd 12012, 12017, para. 15 (2016) (holding that support recovery cannot 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").

¹⁵³ *Blanca Reconsideration Order*, 32 FCC Rcd at 10611-12, paras. 44-45.

¹⁵⁴ *See Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989); *Austin v. United States*, 509 U.S. 602, 622, n.14 (1993) ("The [Excessive Fines Clause] prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event."); *Petitions for Waiver of Universal Service High-Cost filing Deadlines; SureWest Telephone Petition for Waiver of Section 54.314(d) Filing Deadlines for a Submission of State Certification of Federal High-Cost Support*, WC Docket No. 08-71, Memorandum Opinion and Order, 31 FCC Rcd 12012, 12017, para.15 (2016) (holding that "the reduction of an ETC's universal service support payment does not constitute a payment by the ETC to the government that is subject to the Excessive Fines clause of the Eighth Amendment"); *cf. United States v. Doman*, 255 F.2d 865, 869 (3d. Cir. 1958) (holding that the Government's action under the 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).

¹⁵⁵ *See supra* Paragraph 9.

¹⁵⁶ 47 CFR § 1.80(c)(2) (providing that, "in the case of a forfeiture imposed against a carrier under sections ... 220(d), no forfeiture will be imposed if the violation occurred more than 5 years prior to the issuance of a notice of apparent liability"). *See 2007 Comprehensive Review Order*, 22 FCC Rcd at 16383-84 & 16385-86, para. 24, n.71 & para. 28, n.84 (acknowledging "the five-year statute of limitations for violations of section 220(d) of the Act" and noting "that under our rules a notice of apparent liability must be issued within five years of a violation of sections 202(c), 203(e), and 220(d) of the Act.").

¹⁵⁷ Under section 220(d), where a carrier fails to "keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission," as required by section 220(g) of the Communications Act, 47 U.S.C. § 220(g), a per day penalty of \$6,000 for a continuing violation is proscribed. 47 U.S.C. § 220(d).

apply to recovery of overpaid support. Provisions relating to forfeiture liability, whether or not resulting in improper payments by the Commission (or USAC), do not govern debt determinations.¹⁵⁸

D. Conclusion

45. As noted above, upon *de novo* review, we agree with and uphold AAD's several findings in the Audit Report and independently find that Rural Telephone has failed to demonstrate compliance with the Commission's rules for high-cost program disbursements for calendar year 2011. In so holding, we address and reject each of Rural Telephone's claims that the Audit Report has violated Commission rules, statutory procedural requirements, and Constitutional rights. For all the foregoing reasons, we find that, by a preponderance of the evidence, Rural Telephone has received support to which it was not entitled and that it must now repay.¹⁵⁹

IV. RURAL TELEPHONE HAS NOT DEMONSTRATED GOOD CAUSE FOR WAIVER

46. We next consider Rural Telephone's petition for waiver of the Commission's rules cited in support of the audit findings,¹⁶⁰ and find that Rural Telephone has failed to demonstrate "good cause" to grant the requested waiver relief. Petitioners seeking waiver under section 1.3 of the Commission's rules must establish "good cause" for such waiver by demonstrating that special circumstances warrant deviation from the rule when applied to the petitioner(s) and that such deviation better serves the public interest than strict adherence to the rule.¹⁶¹ In assessing waiver requests, the Commission considers whether particular facts make strict compliance with the rule inconsistent with the public interest as well as questions of hardship, equity, or more effective implementation of overall policy *on an individual basis*.¹⁶²

47. As an initial matter, to the extent that Rural Telephone repeats arguments to demonstrate special circumstances that are based on factual claims or legal theories that are addressed and denied above, we reject them as grounds for a waiver. For example, Rural Telephone argues that special circumstances include reliance on cost accounting guidance provided in the KPMG audits, prejudicial delay, including the inability to access certain records, breach of contract, and violations of the PRA.¹⁶³ Each of these arguments were addressed and rejected above, and we find no reason to reconsider these contentions here.

¹⁵⁸ *Blanca Recon*, 32 FCC Rcd at 10611, paras. 43 (citing *2007 Comprehensive Review 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's decision to collect outstanding contribution obligations against claims by the carrier that the statute of limitations in section 503(b)(6) imposed a time bar by distinguishing forfeitures from amounts owed accruing due to the failure to fulfill contribution obligations).

¹⁵⁹ *See supra* note Paragraph 9.

¹⁶⁰ *See* FCC Review and Waiver Petition at 42-49.

¹⁶¹ 47 CFR § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). *See WAIT Radio v. F.C.C.*, 418 F.C.C.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*); *Ne. Cellular Tel. Co. v. FCC*, 897 F.C.C.2d 1164, 1166 (D.C. Cir. 1990) (holding that a good cause finding requires the FCC to "explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation").

¹⁶² *See WAIT Radio*, 418 F.C.C.2d at 1159.

¹⁶³ *Compare* FCC Review and Waiver Petition at 43-44, 47-49, 50-51 *with supra* Paragraphs 11, 29, 30, 31, 36.

48. Rural Telephone asserts that “special circumstances” warrant a waiver because the audit “purports to administer” a cost-based USF mechanism that has been replaced.¹⁶⁴ Rural Telephone cites other cases where the Commission has granted waivers when its methodology for calculating USF support has changed.¹⁶⁵ While it is true that the Commission has waived certain rules when proposed or contemplated rule modifications could make administrative requirements obsolete or could compound administrative burdens unnecessarily,¹⁶⁶ the fact that Rural Telephone no longer participates in legacy support mechanisms does not render its past conduct unimportant. Although A-CAM programs are based on different policy considerations and have different objectives, those differences do not invalidate the legitimacy of legacy support programs nor do they make meaningless any review of cost accounting practices.

49. Similarly, while the Commission at times has granted waivers—often temporary—to alleviate “financial strain” on small companies,¹⁶⁷ it has not done so where the result would be a party receiving or keeping support that it should not receive under our rules. Rather than seeking temporary relief from unexpected financial circumstances or relief from unique circumstances outside its control, Rural Telephone is seeking an unjustified windfall in the form of relief from the obligation to repay support that was erroneously disbursed.¹⁶⁸ Any negative consequences arising from reliance on such

¹⁶⁴ See FCC Review and Waiver Petition at 45.

¹⁶⁵ See *id.* at 45-46 (citing *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order on Reconsideration, Second Report and Order, Order, and Second Further Notice of Proposed Rulemaking, 38 FCC Rcd 827, 834, para. 18 (2023); *Connect America Fund*, WC Docket No. 10-90, Order, 38 FCC Rcd 5479, 5482, para. 11 (2023)).

¹⁶⁶ This context is true in the cases cited by Rural Telephone. See *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order on Reconsideration, Second Report and Order, Order, and Second Further Notice of Proposed Rulemaking, 38 FCC Rcd 827, 834, para. 18 (2023) (granting waiver of the budget control mechanism; stating that “[a]lthough there are significant program integrity benefits to rural rate reviews. . . . two years of such benefits is outweighed . . . by the administrative burdens on both program applications and the Commission to prepare and approve cost studies,” and noted that it would not be in the public interest to “require service providers to absorb these burdens [for a temporary two year timeframe] given that the Commission is considering additional [rural rate] changes”); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, Order, 38 FCC Rcd 6096, 6100, para. 12 (WCB 2023) (extending a pause in the scheduled phase-out of Lifeline support for voice-only service based on an apparent heightened reliance on the program for voice service, a need for further understanding of how a different program impacts the market for this service, a consideration of new policy findings, and prevention of forced subscriptions to bundled plans).

¹⁶⁷ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 03-123 and 10-51, 38 FCC Rcd 7551, 7557-7559, paras. 16-22 (CGB 2023) (waiving certain rules on a temporary basis to allow the petitioner to access support sooner because the petitioner had experienced unanticipated increases in the expenses); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, 35 FCC Rcd 6556, 6659, para. 9 (WCB 2020) (waiving, until December 31, 2021, the letter of credit rules for CAF Phase II and RBE support recipients and applying instead to these recipients the letter of credit rules for RDOF) (finding special circumstances justifying waiver because the “COVID-19 pandemic’s impact on the markets and company financials will impede access to credit and increase the already difficult financial challenges companies currently are experiencing”); *id.* at 6559, para. 10 (noting that waiver serves the public interest because “the impact of the COVID-19 pandemic on financial markets and economic conditions . . . has resulted in the tightening of credit availability”); *id.* at 6559-60, para. 10 (finding that a “temporary waiver to these companies would alleviate the economic effects on these companies’ investment in broadband both during the current public health crisis and through the period of economic disruption that is likely to continue after the crisis has passed”).

¹⁶⁸ See, e.g., *Connect America Fund et al.*, Docket No. 10-90 et al., Order, 37 FCC Rcd 115, 120, para. 12 (WCB 2022) (emphasizing that waiver of the consequences for meeting deployment obligations when such locations did

(continued....)

overpayment, particularly when caused by Rural Telephone's own cost accounting and data retention practices, cannot justify waiver. If it were to so justify waiver, the exception would subsume the rule.¹⁶⁹

50. Finally, Rural Telephone asserts that a waiver would serve the public interest because offsets would cause support payments to be redirected from providing service to underserved and unserved areas, could cause it to {[]} and inhibit its ability to provide continued service in its service area.¹⁷⁰ Rural Telephone, however, is conflating its own interest with the public interest.¹⁷¹ Offsetting support may interfere with Rural Telephone's business plans and overall liquidity, but the consequences for errors in cost accounting must be borne by the support recipient receiving support.¹⁷² Indeed, to consider any financial consequences associated with the recovery of overpaid support as contrary to the public interest because such consequences could potentially divert a support recipient from fulfilling its current public interest obligations would selectively limit a carrier's accountability and undermine the Commission's stewardship obligations in the management and administration of the Universal Service Fund.¹⁷³ Accordingly, for all of the reasons described above, we find that Rural Telephone has failed to show good cause for waiver.

V. ORDERING CLAUSES

51. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act, 47 U.S.C. §§ 151-154, and 254, and pursuant to sections 0.91, 0.291, and 54.722 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 54.722, the request for review filed by Rural Telephone Service Company, Inc. is DENIED.

52. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 4(i), 5(c), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 254, and pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.3, that the petition for waiver filed by Rural Telephone Service Company, Inc. is DENIED..

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not exist, on an equitable basis, did not compel the Bureau to extend a windfall to Skybeam by permitting retention of all awarded support).

¹⁶⁹ *Connect America Fund et al.*, WC Docket 10-90, Order, DA 25-436, at 29, para. 29 (WCB May 21, 2025) (holding that when placing bids, petitioners "in general assume the risk of certain market vicissitudes that might increase the costs compliance," including general changes to economic marketplace that may result in some unexpected and unpredictable hardship, where due diligence would have likely exposed an inability to comply with such requirements).

¹⁷⁰ See FCC Review and Waiver Order at 49-51.

¹⁷¹ See, e.g., *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999) ("BellSouth has never explained how the public interest would be served by granting its waiver request; instead it merely equates its own business interest with the public interest.").

¹⁷² See *id.*

¹⁷³ See *Coral Wireless D/B/A Mobi PCS Request for Review of the Decision of the Universal Service Administrator*, CC Docket No. 96-45, Order, 29 FCC Rcd 9540, 9542, para. 8 (WCB 2014) ("[h]olding that the public interest prong of the waiver standard is met whenever a carrier is faced with a reduction in support would effectively negate the public interest requirement, as this criterion would be met any time application of a rule resulted in reduced support"); *P. Lunderville, College Creek Broadband, Inc., & Cumulus Licensing LLC*, Memorandum § Opinion and Order, 28 FCC Rcd 665, 671 (2013) ("Because the essential premise of a waiver is the 'assumed validity of the general rule,' 'grant of a waiver must 'not undermine the policy served by the rule.'" (citations omitted)).

53. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Joseph S. Calascione
Chief, Wireline Competition Bureau