ORAL ARGUMENT NOT REQUESTED

No. 18-9502

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLANCA TELEPHONE COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

Makan Delrahim
Assistant Attorney General

Andrew C. Finch
Principal Deputy Assistant Attorney General

Robert B. Nicholson
Adam D. Chandler
Attorneys

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave. NW
Washington, DC 20530

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

Scott M. Noveck
Counsel

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Administrative Materials:

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes And Regulations:

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities:

STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C), Respondents identify the following prior or related appeals:

- *In re Blanca Telephone Co.*, No. 16-1216 (D.C. Cir.), in which Petitioner sought a writ of prohibition to enjoin the agency proceedings below based on many of the same arguments that it advances here. The D.C. Circuit issued an unpublished order on October 21, 2016, denying the writ. Petitioner then filed a petition for panel rehearing or rehearing en banc, which the court denied in a pair of unpublished orders issued on December 12, 2016.
- *In re Blanca Telephone Co.*, No. 17-1451 (10th Cir.), in which Petitioner sought a writ of mandamus and moved to stay the principal agency order challenged here. A panel of this Court issued an unpublished order on December 28, 2017, denying the stay motion, and issued a second unpublished order the next day denying mandamus.

GLOSSARY

FCC or **Commission**	Federal Communications Commission
Blanca	Petitioner Blanca Telephone Company
Pet. Br.	Petitioner's Opening Brief (June 11, 2018)
Pet. Juris. Br.	Petitioner's Jurisdictional Brief (Mar. 5, 2018)
R.	Agency Record (filed June 7, 2018)
Order	*In re Blanca Tel. Co.*, 32 FCC Rcd. 10594 (2017) (R.293–317)
Demand Letter	Letter from Dana Shaffer, Deputy Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (June 2, 2016) (R.1–10)
Appeal Acknowledgment Letter	Letter from Mark Stephens, Acting Managing Director, Federal Communications Commission, to Timothy E. Welch, Counsel to Blanca Telephone Company (June 22, 2016) (R.82)
Administrative Offset Notice	Letter from Mark Stephens, Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (R.361–62)
USF or **Fund**	Universal Service Fund (*see* pp. 6–7)
USAC	Universal Service Administrative Company, the administrator of the Fund (*see* pp. 13, 47–48)

GLOSSARY
(continued)

NECA	National Exchange Carrier Association, the private association of wireline carriers responsible for processing members' cost data (*see* p. 13 & n.5)
OIG	The FCC's Office of Inspector General, which supervises the use of federal funds and investigates allegations of waste or misuse (*see* p. 13)
ETC	Eligible Telecommunications Carrier, a telecommunications provider certified by the relevant state regulatory commission to receive USF support in a given geographic study area; one ETC in each study area is designated as the **incumbent carrier**, and other ETCs may be certified as **competitive carriers** (*see* pp. 7–10, 38)
regulated service	Under FCC accounting and cost-allocation rules, service for which rates are subject to federal or state tariffing requirements (*see* pp. 7–9, 38–39)
nonregulated service or **competitive service**	Service for which carriers need not file tariffs with federal or state regulators and instead set rates freely, constrained only by market competition (*see* pp. 8–9)
BETRS	Basic Exchange Telephone Radio Service, a technology that provides local telephone service to fixed locations, such as homes or businesses, using wireless communication links between fixed points (*see* pp. 8, 36–37)

GLOSSARY
(continued)

CMRS	Commercial Mobile Radio Service, a category of nonregulated services that includes mobile telephone service (*see* pp. 8–9)
high-cost support	A universal service program that subsidizes telecommunications in rural and insular areas, where it is often more expensive to provide service (*see* pp. 6–10)
cost-based support	A form of high-cost support available to incumbent ETCs that are subject to rate-of-return regulation (*see* pp. 7–9)
identical support	A form of high-cost support formerly available to competitive ETCs (*see* pp. 9–10)
Hobbs Act	Common name for the Administrative Orders Review Act (*see* pp. 30–31)
APA	Administrative Procedure Act (*see* pp. 42–44)
DCIA	Debt Collection Improvement Act (*see* pp. 10–12)
FCA	False Claims Act (*see* pp. 48–49)

No. 18-9502

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLANCA TELEPHONE COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

INTRODUCTION

This case arises from the Federal Communications Commission's determination that Petitioner Blanca Telephone Company improperly claimed millions of dollars of public support for which it was not eligible. *In re Blanca Tel. Co.*, 32 FCC Rcd. 10594 (2017) (*Order*) (R.293–317). As the designated incumbent carrier in parts of rural Colorado, Blanca was eligible to receive federal subsidies for providing basic local telephone service to fixed locations within a designated area. But after a multi-year

investigation, the FCC discovered that Blanca provided *mobile* telephone service—for which it was not entitled to subsidies—while misreporting that all its costs were for eligible *fixed* services. The investigation also discovered that Blanca obtained subsidies for service *outside* the single designated study area where it was eligible for subsidies by misreporting that all its costs were for service *within* its single study area.

In the *Order* challenged here, the Commission found that Blanca's erroneous cost reports improperly inflated the amount of federal support Blanca received between 2005 and 2010 by roughly $6.75 million. The Commission further determined that these overpayments constitute a debt to the United States that Blanca must repay, and it directed agency staff to pursue collection of Blanca's unpaid debt under the federal debt collection laws and applicable regulations.

This Court then denied Blanca's repeated requests to stay the *Order* or to enjoin the agency from initiating any collection efforts. *See* Order, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. Dec. 28, 2017) (denying stay); Order, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. Dec. 29, 2017) (denying mandamus); Order, *In re Blanca Tel. Co.*, No. 18-9502 (10th Cir. Apr. 5, 2018) (denying injunction pending review); *see also* Order, *In re*

Blanca Tel. Co., No. 16-1216 (D.C. Cir. Oct. 21, 2016) (denying petition for a writ of prohibition seeking relief prior to the *Order*).

Blanca now impermissibly seeks to attack the *Order* in two different forums at the same time. It first filed an administrative petition for reconsideration of the *Order* by the Commission. *See* R.318–51. That petition currently remains pending before the agency. Then, without waiting for the Commission to rule on the petition for reconsideration, Blanca also filed a petition for review of the *Order* in this Court. But Blanca's attempt to pursue simultaneous administrative and judicial review of the *Order* is prohibited by the rule that "parties are *precluded* from seeking judicial review of agency action during the pendency of a petition for reconsideration." *Reppy v. Dep't of Interior*, 874 F.2d 728, 730 (10th Cir. 1989).

Simply put, this Court lacks jurisdiction over Blanca's petition for review—and this case must therefore be dismissed—because there is no final Commission order subject to judicial review at this time. Blanca cannot yet pursue judicial review of the *Order* because its pending petition for reconsideration by the Commission renders the *Order* nonfinal. Should the Court nonetheless find that it has jurisdiction and reach the merits,

however, it should deny Blanca's petition for review.[1]

JURISDICTIONAL STATEMENT

As discussed below, the Court lacks jurisdiction over Blanca's petition for review at this time. *See infra* Part I. The Administrative Orders Review Act, commonly known as the Hobbs Act, grants this Court jurisdiction to review only "final orders" of the Commission. 28 U.S.C. §§ 2342(1), 2344. But Blanca's petition for reconsideration of the *Order*—which remains pending before the Commission—renders the *Order* nonfinal for purposes of judicial review until the Commission issues a final order resolving that petition. Blanca's petition for review also points to related letters from FCC staff, but as explained below, staff letters are not final orders of the Commission and are not subject to judicial review unless appealed to and decided by the Commission itself. *See* 47 U.S.C. § 155(c)(4), (7). The Court therefore should dismiss the petition for review for lack of jurisdiction.

---

[1] We stress that the agency's litigation counsel cannot prejudge how the Commission will rule on the petition for reconsideration, and nothing in this brief should be construed as taking an official position on behalf of the Commission on any pending matter. Agency counsel submit this brief solely in response to the Court's order deferring consideration of the jurisdictional issue and directing the parties to submit full merits briefs. Given the Court's directive, we defend the conclusions reached by the Commission in the *Order*—but emphasize that those conclusions remain subject to change on reconsideration.

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction to review the Commission's *Order* at this time because Blanca's petition for reconsideration, which remains pending before the Commission, renders the *Order* nonfinal until the Commission issues a final order resolving that petition.

2. Whether Blanca violated longstanding FCC rules by misreporting in its cost studies that all its costs were incurred for providing basic local telephone service within its single study area, when in fact it was providing mobile telephone service (including service outside its study area), and thereby obtained federal subsidies for which it was not eligible.

3. Whether the Commission afforded Blanca due process by providing it with notice and an opportunity to be heard and by complying with all applicable procedural requirements.

4. Whether the Commission properly invoked its authority under the federal debt collection laws to recover overpayments to Blanca for the years 2005 to 2010, in addition to the overpayments Blanca previously relinquished for the years 2011 and 2012, when there is no statute of limitations for claims seeking return of the government's own funds and Congress has expressly exempted administrative offsets from any limitations period that would otherwise apply.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Federal Universal Service Funding

Congress has charged the Federal Communications Commission with ensuring the availability of reasonably priced telecommunications service throughout the nation, a goal known as "universal service." *See* 47 U.S.C. §§ 151, 254. To that end, the FCC in 1997 established the Universal Service Fund (USF or Fund). *Federal–State Joint Board on Universal Service*, 12 FCC Rcd. 8776 (1997). The Fund is financed through mandatory contributions by all telecommunications carriers, and carriers typically recoup these charges from their customers through surcharges appearing on customers' bills. *See* 47 U.S.C. § 254(d); 47 C.F.R. §§ 54.706, 54.712; *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1099 (2009).

The FCC oversees several universal service programs supported by the Fund. One of these programs, known as "high-cost support," subsidizes telecommunications in rural and insular areas, where it is often more expensive to provide service due to low population density, challenging terrain, and other factors. *See Federal–State Joint Board on Universal*

Service, 18 FCC Rcd. 22559, 22616–22 ¶¶ 97–107 (2003); *Rural Cellular Ass'n*, 588 F.3d at 1098–99; *Alenco Commc'ns v. FCC*, 201 F.3d 608, 617 (5th Cir. 2000).

To receive high-cost support for service in a particular geographic study area, a telecommunications provider must be certified by the relevant state regulatory commission as an "eligible telecommunications carrier" in that study area. 47 U.S.C. § 214(e); 47 C.F.R. § 54.201. The type and amount of support that the carrier receives will then depend on whether it is certified as the "incumbent" carrier in that study area or instead as a "competitive" carrier. *See* 47 C.F.R. §§ 51.5, 54.5 (defining terms).

At all times relevant here, an incumbent carrier subject to "rate-of-return" regulation was eligible to receive federal subsidies based on the costs it incurred to provide rate-regulated services in high-cost areas.[2] *Order* ¶ 4 (R.294). This includes basic local telephone service, also known

[2] *See Federal–State Joint Board on Universal Service*, 16 FCC Rcd. 11244 (2001) (establishing the high-cost support framework for rural carriers that applied here). Under the rules in effect between 2005 and 2010, these subsidies included high-cost loop support, 47 C.F.R. § 36.631 (2004); safety net additive support, 47 C.F.R. § 36.605 (2002); local switching support, 47 C.F.R. § 54.301 (2003); and interstate common line support, 47 C.F.R. § 54.901 (2002). *See Order* ¶ 35 (R.305); Demand Letter at 2–3 & Attach. A (R.2–3, 9). These forms of cost-based support are available only for costs attributable to "regulated" services, defined as services for which rates are subject to federal or state tariffing requirements. 47 C.F.R. § 32.14.

as "exchange service." *Ibid.*; 47 U.S.C. § 153(54). Local exchange service is typically provided over a traditional wireline connection, but it can also be provided through certain fixed-wireless technologies, including a technology known as Basic Exchange Telephone Radio Service (BETRS). BETRS provides local telephone service to fixed locations (such as homes or businesses) using wireless radio-communication links between fixed points where it would otherwise be too costly or cumbersome to build and maintain a wired connection.[3]

Under this system, incumbent carriers were *not* eligible to receive subsidies for non-rate-regulated services—also referred to as "competitive" or "nonregulated" services—for which carriers need not file tariffs with federal or state regulators and instead set rates freely, constrained only by market competition. *Order* ¶¶ 4, 33–39 (R.294–95, 304–07). In particular, an incumbent carrier could not receive subsidies for providing mobile telephone service, which is a form of "commercial mobile radio service" (CMRS), 47 C.F.R. § 20.3; *id.* Part 22 Subpt. H, because the Commission

---

[3] *See Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 3 FCC Rcd. 7033, 7041 ¶¶ 61–66 (1988) (*Auxiliary Services Order*); *Basic Exchange Telecommunications Radio Service*, 3 FCC Rcd. 214 (1988) (*BETRS Order*).

has forborne from regulating rates for mobile telephone service and other forms of CMRS. *See Order* n.84 (R.304).

If the incumbent carrier provides both rate-regulated services and competitive (*i.e.*, non-rate-regulated) services, the carrier must follow accounting and cost-allocation rules set forth in FCC regulations to ensure that subsidy payments are based only on the costs the carrier incurs to provide rate-regulated service and not on any costs it incurs to provide competitive services. *Order* ¶¶ 4–5, 35 (R.294–96, 305) (citing rules collected in 47 C.F.R. Parts 32, 36, 54, and 64); *see* 47 U.S.C. § 254(k) (authorizing "any necessary cost allocation rules, accounting safeguards, and guidelines" to ensure that "services that are not competitive [shall not] subsidize services that are subject to competition"). Otherwise, an incumbent carrier could use public support of its regulated services to cross-subsidize its competitive offerings, giving it an unfair advantage over unsubsidized competitors and forcing the public to bear some of the risk incurred by its competitive ventures. *See Order* ¶ 4 & nn.8–10 (R.294–95).

Competitive carriers, by contrast, do not receive the same cost-based support as the incumbent carrier. Instead, during the years at issue here, telecommunications providers certified as competitive carriers in a given study area were eligible for a different support mechanism known as

"identical support." *Order* ¶ 6 (R.296); 47 C.F.R. § 54.307 (2005). Under that system, competitive carriers received the same per-line subsidy for each telephone line they served as the per-line subsidy received by the incumbent carrier in that study area. *Ibid.* Notably, competitive carriers were eligible to receive this identical support for any given telephone line "regardless of the technology used"—so competitive carriers, unlike the incumbent carrier, could receive support both for local exchange service *and* for mobile telephone service. *Order* ¶ 7 (R.296).[4]

2. The Federal Debt Collection Laws

Following Congress's adoption of the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, and the Deficit Reduction Act of 1984, Pub. L. No. 98-369 § 2653, 98 Stat. 494, 1153, the Commission promulgated rules establishing procedures for the collection of debts owed to the United States. *Implementation of the Debt Collection Act of 1982 and Related*

---

[4] When the identical support rule was adopted in 1997, the Commission assumed that competitive carriers would be traditional wireline telephone providers; it did not anticipate that identical support would come to be used for mobile telephone service. *See Connect America Fund*, 26 FCC Rcd. 17663, 17825 n.826 (2011), *pets. for review denied*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). In 2011, finding that this rule "has not functioned as intended," the Commission eliminated the identical support rule, *id.* at 17825–30 ¶¶ 498–511, and that decision was then upheld by this Court, *In re FCC 11-161*, 753 F.3d at 1095–98.

Statutory Provisions, 4 FCC Rcd. 441 (1988). In 1996, Congress revised federal debt collection procedures by enacting the Debt Collection Improvement Act (DCIA), Pub. L. No. 104-134 § 31001, 110 Stat. 1321-358 (1996). The FCC subsequently updated its rules to implement the DCIA's revisions. *Implementation of the Debt Collection Improvement Act of 1996*, 19 FCC Rcd. 6540 (2004). These FCC rules, which parallel the Federal Claims Collection Standards issued by the Department of Justice and the General Accounting Office, are codified at 47 C.F.R. Part 1 Subpart O.

"Debt" is defined under these acts to include any "over-payments, including payments disallowed by audits performed by the Inspector General of the agency administering the program." 31 U.S.C. § 3701(b)(1)(C); *accord* 47 C.F.R. § 1.1901(e) ("debt" includes "amounts due the United States from * * * overpayments"). Congress has endowed the Inspector General of each agency with broad authority "to conduct, supervise, and coordinate audits and investigations relating to" federal programs. Inspector General Act of 1978 § 4(a)(1), *codified as amended at* 5 U.S.C. App. This authority "extends to conducting audits and investigations of programs that the agency finances, including investigations into alleged fraud, abuse and waste by * * * recipients of government funds in connection with those programs." *Adair v. Rose Law*

Firm, 867 F. Supp. 1111, 1115 (D.D.C. 1994).

The federal debt collection laws and their implementing regulations set forth procedures for collecting debts owed to the federal government. Among other things, they authorize the government to withhold new payments to a delinquent debtor as an offset against the unpaid debt, 31 U.S.C. § 3716; 31 C.F.R. § 901.3; 47 C.F.R. § 1.1912, and permit an agency to refer unpaid debts to the Department of Justice, 31 C.F.R. Part 904; 47 C.F.R. § 1.1917, which may commence a judicial action to collect the debt, *see* 28 U.S.C. §§ 3001 *et seq.*

B. Factual Background and Proceedings Below

Blanca Telephone Company is a telecommunications provider certified by the Colorado Public Utilities Commission to receive support as the incumbent carrier in a single geographic study area covering parts of Alamosa and Costilla Counties. *Order* ¶¶ 35 & nn.85–86 (R.305). Blanca's state certification was limited to serving as the incumbent carrier in this single study area, and it never sought or obtained certification to receive support as a competitive carrier (either within or outside its study area). *Id.* ¶¶ 35–37 (R.305–06). As a rate-of-return incumbent carrier, Blanca was eligible for federal subsidies based on the costs it incurred for providing basic local telephone service within its study area, but was not

eligible to claim subsidies for providing mobile telephone service or for any service outside its single study area. *Id.* ¶¶ 1, 4–5, 35–37 (R.293–95, 305–06).

A 2008 audit of universal service payments to Blanca gave rise to multi-year investigations by the FCC's Office of Inspector General (OIG), which supervises the use of federal funds and investigates allegations of waste or misuse; the National Exchange Carrier Association (NECA), the private association of wireline carriers responsible for processing Blanca's cost data;[5] and the Universal Service Administrative Company (USAC), the administrator of the Fund. *Order* ¶¶ 13–16 (R.298–300). These investigations discovered that Blanca had mischaracterized certain costs in the cost studies used to calculate its subsidy payments and that, as a result, Blanca obtained millions of dollars of federal support for which it was not eligible. *Ibid.*

---

[5] *See Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1245–46 (10th Cir. 1999) (describing NECA). NECA's primary functions are to prepare and file tariffs for wireline carriers that participate in joint tariffs and to distribute pooled revenues among its members based on certain cost information. *Ibid.* Carriers must certify that the detailed cost studies they submit to NECA "are complete, accurate, and consistent with the rules of the Federal Communications Commission." 47 C.F.R. § 69.601(c). The Commission, in turn, then uses the data in these cost studies to calculate the federal support paid to each carrier. *Order* ¶ 8 (R.297).

Blanca's cost studies reported that all its costs were for providing basic local telephone service within its designated study area. But the investigations discovered that Blanca in fact provided mobile telephone service (including service outside its study area), for which Blanca was not eligible to receive any subsidies. Blanca's improper reporting violated longstanding FCC rules and NECA guidance. Once the improper reporting was discovered, Blanca corrected its cost studies for the years 2011 and 2012 and relinquished the improper payments for those years. In the principal *Order* challenged here, the Commission found that Blanca received an additional $6.75 million in improper payments for the years 2005 through 2010; determined that those overpayments constitute a debt to the United States that Blanca must repay; and directed agency staff to pursue collection of Blanca's unpaid debt.

1. The 2013 NECA Report

After reviewing Blanca's cost studies and conducting an on-site investigation of Blanca's facilities, NECA issued a report in January 2013 concluding that Blanca received improper subsidies because its cost studies misreported that all its costs were for rate-regulated services, when in fact many of these costs were for mobile telephone service. *See Order* ¶ 13 (R.298–99); Demand Letter at 2 & n.1 (R.2). In the cost

studies, Blanca represented that it used cellular stations and other wireless facilities for BETRS, a fixed-wireless technology that provides basic local telephone service and is eligible for cost-based support. Demand Letter at 2 (R.2). But NECA's investigation "determined that Blanca was not providing BETRS, and instead was providing only mobile cellular service." *Id.* at 2–3 (R.2–3).

NECA explained that including these costs in the cost studies violated FCC rules and longstanding NECA guidance. *See Order* nn.36 & 105 (R.298, 307); Demand Letter at 4–5 (R.4–5). Section 4.9 of the *NECA Cost Issues Manual*, originally issued in 1993, advised members that the FCC's rules define BETRS as providing service to "fixed subscribers," and it explained that while cellular frequencies can be used for BETRS, they must be used only "to provide basic exchange service * * * between the fixed subscriber and the cellular switch." *NECA Cost Issues Manual* § 4.9, at 1–2 (1993) (citing 47 C.F.R. § 22.2 (1989) and *Auxiliary Services Order*, *supra* note 3). In a November 2005 update to Section 4.9, NECA further emphasized that BETRS is a "fixed (non-mobile)" service, that it uses "a fixed radio transmitter * * * as a replacement for the 'last mile' of copper wire" used in traditional wireline service, and that the carrier's "radio connection facility must be dedicated to the subscriber and fixed at or near

the customer's premises." *NECA Cost Issues Manual* § 4.9, at 1–2 & n.5 (rev. 2005). Because Blanca's cellular system was used to provide mobile telephone service, not fixed service, it did not qualify as BETRS; nor was Blanca, as an incumbent carrier, eligible to receive federal subsidies for providing competitive services like mobile telephone service.

Blanca did not dispute any of NECA's determinations; it instead revised its cost studies for 2011 and 2012 to remove all costs associated with its wireless facilities and relinquished the improper subsidies it received for those years. *Order* ¶ 13 (R.298–99); Demand Letter at 3 (R.3). Under the contractual agreement that NECA uses to distribute pooled access charges among its members, members must update and correct any information provided to NECA for 24 months after it is initially reported, so NECA did not require Blanca to update its cost studies for earlier years. *See Order* n.37 (R.298–99); *see also* Demand Letter at 3 (R.3) ("Any improperly received USF high-cost support for periods prior to 2011 have not been recouped" through NECA.). Member companies are specifically advised in the NECA pooling agreement, however, that "any support payments * * * corresponding to data corrections outside of the 24-month settlement window are the obligation of the company." *Order* n.37 (R.299).

2. The FCC Staff's Demand Letter

The FCC's Office of Inspector General also conducted an extensive investigation, culminating in a Demand Letter issued in June 2016 by agency staff. *See* Letter from Dana Shaffer, Deputy Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (June 2, 2016) (Demand Letter) (R.1–10). The FCC's investigation included multiple subpoenas for Blanca's records and correspondence, *id.* at 2 (R.2); interviews with Blanca's general manager and its engineers, *id.* n.13 (R.5); and consideration of arguments presented by Blanca's legal counsel, *id.* at 4 (R.4). The FCC's investigation found that the misreporting NECA identified in Blanca's 2011 and 2012 cost studies dated back to at least 2005, *id.* at 3 (R.3), and resulted in Blanca's receipt of another $6.75 million in improper subsidies between 2005 and 2010, *id.* at 7 & Attach. A (R.7, 9).

Although Blanca's cost studies "claimed [that] all of the costs it incurred * * * were for landline and fixed wireless service," the FCC's investigation found that "Blanca was providing only *mobile* cellular service" over its wireless facilities. *Id.* at 3 (R.3). This finding undercut Blanca's claim that "it was providing fixed wireless service, *i.e.*, BETRS, for which it was entitled to receive high-cost support," *id.* at 2 (R.2). As

the Demand Letter explains, "[a] BETRS system * * * must be dedicated to the end user and fixed at a customer's premises in order to qualify for high-cost support" for an incumbent carrier. *Id.* at 3 (R.3). Thus, by definition, "BETRS specifically excludes the provision of cellular mobile telephone service as was provided by Blanca." *Id.* at 4 (R.4).

The FCC's investigation showed that Blanca provided mobile telephone service. Blanca "allow[ed] [customers] to use their cell phones throughout Blanca's cellular service area" and, in addition, enabled "handoff between multiple cell sites" while a customer traveled between them. *Id.* at 5 & n.13 (R.5). Blanca also negotiated roaming agreements that allowed its customers to use their phones in other carriers' territory (and vice versa). *Id.* at 5, 6 (R.5, 6). None of these features would be needed if Blanca in fact provided only fixed service to a customer's home or business. Blanca's employees confirmed that there was no requirement "that a customer be located at a fixed location," and that customers could use their phones anywhere in Blanca's cellular territory or where it had a roaming agreement with another carrier. *Id.* n.13 (R.5).

The investigation also discovered that Blanca had improperly claimed support for service outside its designated study area. *Id.* at 6–7 (R.6–7). Of the five cellular towers operated by Blanca, FCC staff found that "[o]nly

two * * * are located within Blanca's study area," *ibid.*, and "a review of [Blanca's] billing records" confirmed that "Blanca provided cellular service to customers outside of [its] study area," *id.* at 6 n.18 (R.6). Under FCC rules, "Blanca did not have authority to claim high-cost support for any costs to provide service * * * outside of its study area." *Id.* at 7 (R.7).

FCC staff thus concluded "that the costs and line counts Blanca was utilizing to claim high-cost support were attributable to Blanca's non-regulated cellular operations, rather than to a BETRS fixed service[,] and were therefore not entitled to High-Cost support." *Id.* at 7 (R.7). While Blanca previously relinquished the improper payments it received for 2011 and 2012 in response to NECA's investigation, it has not returned the overpayments it received in earlier years. Using Blanca's own records and applying the same methodology Blanca used to revise its 2011 and 2012 cost reports, *see Order* n.41 (R.299), FCC staff calculated that Blanca received roughly $6.75 million in improper subsidies from 2005 to 2010 and demanded that Blanca repay those funds as a debt owed to the United States. Demand Letter at 7–8 & Attach. A (R.7–9); *see* 31 U.S.C. § 3701(b)(1)(C).

3. The Commission's *Order*

Blanca timely filed an application for review of the agency staff's Demand Letter by the full Commission. *See* R.11–81. Upon receiving the application, the FCC's acting managing director sent Blanca's counsel an Appeal Acknowledgment Letter stating that Blanca's application "will be dealt with expeditiously" and advising that no action would be taken under the Demand Letter "while the Application is pending." Letter from Mark Stephens, Acting Managing Director, Federal Communications Commission, to Timothy E. Welch, Counsel to Blanca Telephone Company (June 22, 2016) (Appeal Acknowledgment Letter) (R.82).[6]

On December 8, 2017, the Commission issued its *Order* denying the application for review and ruling that Blanca must repay the $6.75 million in improper subsidies it received between 2005 and 2010. *See* R.293–317. "[F]or at least eight years," the Commission observed, "Blanca ignored

---

[6] Also in June 2016, after FCC staff issued the Demand Letter but before the Commission acted on Blanca's application for review, Blanca filed a petition for a writ of prohibition in the D.C. Circuit seeking to enjoin the agency proceedings and to prevent the FCC from taking any action concerning the improper subsidies paid to Blanca. That petition was based on many of the same arguments that Blanca now advances in this Court. That court denied Blanca's petition. Order, *In re Blanca Tel. Co.*, No. 16-1216 (D.C. Cir. Oct. 21, 2016). Blanca then filed a petition for rehearing or rehearing en banc, which the court likewise denied.

Commission orders and NECA guidance making clear that it could include only [rate-]regulated costs in its cost studies." *Order* ¶ 24 (R.301). Instead, "Blanca included costs associated with the provision of a nonregulated service"—mobile telephone service. *Id.* ¶ 34 (R.304); *see also id.* n.84 (R.304) (explaining that mobile telephone service, a form of commercial mobile radio service, "is classified as a nonregulated service for accounting and cost allocation purposes, because the Commission has chosen to forbear from rate regulation"). "[A]s a result of treating nonregulated costs as regulated costs in its cost studies," the Commission concluded, "Blanca received inflated USF disbursements * * * that it now must repay." *Id.* ¶ 34 (R.304).

The *Order* explained that Blanca's improper reporting violated FCC rules because, "[a]s a rate-of-return incumbent [carrier], Blanca was required by our [47 C.F.R.] Part 64 rules to allocate its costs between regulated services and nonregulated services * * * but failed to do so." *Id.* ¶ 35 (R.305) (citing 47 C.F.R. §§ 64.901–.905). The Commission rejected Blanca's argument that its mobile telephone service was eligible for subsidies under the identical-support rule for competitive carriers. *See id.* ¶¶ 36–37 (R.305–06). Blanca was never certified to receive support as a competitive carrier, so it was not eligible to receive identical support. *Ibid.*

Indeed, Blanca *could not* have been certified as a competitive carrier in its study area because it was designated as the incumbent carrier. *Id.* ¶ 35 & n.92 (R.305); *see* 47 C.F.R. § 54.5 (defining competitive carrier to exclude the incumbent carrier). And even if Blanca potentially could have been certified as a competitive carrier outside the area where it was the incumbent carrier, it never obtained that certification from the state utility commission. *Order* ¶ 37 (R.306); *but see id.* n.95 (R.306) (observing that Blanca likely could not have obtained the required certification because its competitive offerings did not operate under a separate subsidiary).

The Commission also denied various procedural challenges raised by Blanca. It explained that the agency afforded Blanca due process by giving ample notice in the Demand Letter of the factual and legal basis for the *Order* here, which is based on longstanding FCC rules and Blanca's own corporate records, and by providing an opportunity to have any objections heard by the Commission before any action was taken. *Id.* ¶¶ 48–50 (R.312–13). The *Order* further explained that the Commission is responsible for adjudicating disputes over universal service funding, *id.* ¶ 40 (R.308), and that these highly individualized and often fact-intensive disputes are properly addressed through informal adjudications, *id.* ¶ 42 (R.309); *see also id.* ¶¶ 10, 39 (R.297–98, 307) (noting that the FCC

routinely "resolves contested audit recommendations and findings" through this process). The Commission rejected Blanca's contention that the agency must pursue any improper payments through a Section 503 forfeiture proceeding, explaining that the *Order* seeks only the return of the government's own funds which Blanca improperly obtained; it does not seek to assess any additional penalty or forfeiture. *Id.* ¶ 43 (R.310).

The *Order* likewise rejected Blanca's challenges to the Commission's authority to recover the improper payments. The text, context, and past judicial interpretations of the federal debt collection laws confirm that the Commission has authority to collect debts owed to the United States, *id.* ¶ 52 (R.313–14), and these laws broadly define such debts as "any amount of funds or property that has been determined * * * to be owed to the United States * * * includ[ing] * * * over-payments [and] payments disallowed by audits performed by the Inspector General of the agency administering the program," 31 U.S.C. § 3701(b)(1)(C); *see Order* ¶ 51 (R.313). This debt-collection action also is not subject to the statute of limitations governing "proceeding[s] for the enforcement of any civil fine, penalty or forfeiture," 28 U.S.C. § 2462, because the Commission "is merely seeking to recover sums improperly paid" rather than to impose "a sanction or penalty" or other "punitive measure." *Order* ¶¶ 44–45 (R.310–11).

Finally, having denied all of Blanca's objections to repaying the improper payments, the Commission "direct[ed] [agency staff] to pursue collection * * * whether by offset, recoupment, referral of the debt to the United States Department of Treasury for further collection efforts[,] or by any other means authorized by [statute] or common law." *Id.* ¶ 54 (R.314–15).

C. Post-*Order* Developments

Three days after entry of the *Order*, USAC notified Blanca that it had begun withholding future subsidy payments until Blanca makes acceptable arrangements to satisfy its debt. *See* R.245 ("Blanca has received notices from USAC that its USF payments are being withheld"). USAC continues to withhold new disbursements to Blanca and instead credits each amount against the company's unpaid balance.

One week later, on December 18, Blanca petitioned this Court for a writ of mandamus and moved to stay the *Order*. The Court denied Blanca's stay motion on December 28, Order, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. Dec. 28, 2017), and denied Blanca's mandamus petition the following day, Order, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. Dec. 29, 2017).

On the same day this Court denied mandamus, Blanca returned to the agency and filed a petition for administrative reconsideration of the Commission's *Order*. *See* R.318–351. The Commission has not yet ruled on Blanca's petition for reconsideration, and the matter remains pending before the agency.

Because it has not been stayed, the *Order* remains in effect while Blanca's petition for reconsideration is pending. *See* 47 C.F.R. § 1.106(n) (a petition for reconsideration does not suspend the effect of an order unless the Commission finds good cause for a stay). Accordingly, on January 10, 2018, FCC staff sent Blanca an Administrative Offset Notice reiterating that, "as directed by the Commission in the *Order*, we will pursue collection * * * by offset/recoupment of amounts otherwise payable to you," and that "as from the date of the *Order* * * * Blanca's monthly support from the Universal Service Fund will be offset/recouped against the Debt[] until the Debt is satisfied or until you have made acceptable arrangements for its satisfaction." Letter from Mark Stephens, Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (Administrative Offset Notice) (R.361–62). The Administrative Offset Notice did not mention or address the pending petition for reconsideration. *Ibid.*

On January 24, 2018, without waiting for the Commission to rule on its petition for reconsideration, Blanca filed the petition for review at issue here; it also filed a "Motion to Dissolve Preliminary Injunction," which the Court construed as a motion for injunction pending appeal. On February 16, a motions panel directed the FCC to file a response to the motion and directed both parties to submit memorandum briefs addressing the Court's jurisdiction. The motions panel then denied Blanca's motion for injunction pending appeal on April 5, and the Court issued a separate order on April 27 deferring consideration of the jurisdictional issues to a merits panel and directing the parties to file full merits briefs.

STANDARD OF REVIEW

A court may overturn agency action only if it is arbitrary, capricious or otherwise contrary to law. 5 U.S.C. § 706(2). "The scope of review under the arbitrary and capricious standard is narrow," and "'a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by statute.'" *In re FCC 11-161*, 753 F.3d 1015, 1041 (10th Cir. 2014). The agency's decision "is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious." *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035,

1046 (10th Cir. 2011) (internal quotation marks omitted).

To the extent Blanca challenges the FCC's interpretations of the Communications Act, the Court reviews the *Order* according to the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See In re FCC 11-161*, 753 F.3d at 1114 ("[W]e apply *Chevron* deference to the FCC's interpretation of the statute and its own authority."). Under *Chevron*, "[t]his court gives deference to the agency's interpretation so long as that interpretation is not arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 1041. Similarly, under *Auer v. Robbins*, 519 U.S. 452 (1997), courts must "defer 'to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief,' unless the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1062 (10th Cir. 2014) (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)). Indeed, as this Court opined in a previous case involving the FCC's universal service rules, "broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program." *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1248 (10th Cir. 1999) (internal quotation marks omitted). And even when *Chevron*

and *Auer* do not apply, an agency's interpretation is still entitled to "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Christopher*, 132 S. Ct. at 2168–69 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), quoting in turn *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[7]

SUMMARY OF THE ARGUMENT

The Court lacks jurisdiction over Blanca's petition for review, and this case must therefore be dismissed, because Blanca does not challenge a final Commission order. The Hobbs Act gives this Court jurisdiction to review only "final orders" of the Commission. 28 U.S.C. §§ 2342(1), 2344. But the principal *Order* challenged here is not final because Blanca has filed a petition for administrative reconsideration, which deprives the Court of jurisdiction to hear any challenge to the *Order* at this time. The Commission has not yet ruled on that petition, which remains pending

[7] Blanca's assertion that the FCC is not entitled to deference because the *Order* was issued in an adjudication rather than a rulemaking (Pet. Br. 18–19) is incorrect. It is well settled that, when an agency is carrying out the responsibilities conferred on it by Congress, both rulemakings and adjudications can be entitled to judicial deference. *See*, *e.g.*, *Mead*, 533 U.S. at 229–31.

before the agency. Blanca also purports to challenge several related letters issued by FCC staff, but the Court likewise cannot review those letters because the Communications Act requires that any staff action be appealed to and decided by the full Commission as "a condition precedent to judicial review." 47 U.S.C. § 155(c)(7).

If the Court nonetheless reaches the merits, it should deny the petition for review because Blanca's scattershot arguments provide no basis for disturbing the *Order*. Blanca has failed to adequately develop any challenge to the *Order*'s conclusion that Blanca violated longstanding FCC rules and NECA guidance, and in any event, Blanca's unsupported assertions that it was entitled to the improper subsidies it received are meritless. The agency proceedings here afforded Blanca due process by giving it ample notice and an opportunity to be heard, and the agency likewise complied with all applicable procedural requirements under the Administrative Procedure Act and the federal debt collection laws. The FCC has full authority to recover improper payments of federal subsidies as debts owed to the federal government, and recovery of the overpayments Blanca obtained from 2005 through 2010 is not barred by any statute of limitations or by Blanca's separate agreement with NECA to relinquish the improper subsidies it received in 2011 and 2012. The government is

therefore entitled to seek repayment of all improper subsidies Blanca obtained.

ARGUMENT

I. The Court Lacks Jurisdiction, And This Case Must Be Dismissed, Because Blanca Does Not Challenge A Final Commission Order.

As a threshold matter, this case must be dismissed because the Court lacks jurisdiction to review any of the agency actions that Blanca seeks to challenge. The exclusive means for seeking direct review of the FCC actions at issue are set forth in the Administrative Orders Review Act, 28 U.S.C. §§ 2341–2353, commonly known as the Hobbs Act. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Under the Hobbs Act, the Court has jurisdiction to review only "final orders" of the Commission. 28 U.S.C. §§ 2342(1), 2344. In addition, when the Commission delegates authority to agency staff, *see* 47 U.S.C. § 155(c)(1), the Communications Act directs that "an application for review [by the full Commission] shall be a condition precedent to judicial review of any order, decision, report, or action made or taken [by FCC staff] pursuant to a delegation," *id.* § 155(c)(7).

The Court lacks jurisdiction to review the *Order* at this time because it is not subject to judicial review while Blanca's petition for administrative reconsideration remains pending. Under the Hobbs Act, "a motion to

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

Blanca at times asserts that the Administrative Offset Notice sent by agency staff "denie[d]" its petition for reconsideration, at least in part. Pet. Br. 5; Pet. Juris. Br. 4–8, 12–13. That is incorrect. The Administrative Offset Notice did not take any action on the petition for reconsideration—

indeed, it did not even *mention* the petition for reconsideration—and it did not purport to address the various arguments Blanca made in its petition; it simply informed Blanca that new subsidy payments are being withheld as an offset against its unpaid debt, in line with the *Order*'s direction. Contrary to Blanca's assertions, its petition for reconsideration remains pending before the agency.[8]

Blanca elsewhere appears to seek review of the Administrative Offset Notice itself. Pet. Juris. Br. 6–7, 12–18. But even if that Notice were an independent agency action separate from the underlying *Order*, which it is not,[9] the Court still would lack jurisdiction to review it because the Administrative Offset Notice was issued by the FCC's managing director—

---

[8] Even if the Notice were construed to deny the portion of Blanca's petition seeking relief from the administrative offset, Blanca still could not seek judicial review of that portion of the *Order* while other portions remain under reconsideration. *See Bellsouth*, 17 F.3d at 1489–90 ("[A]n agency action cannot be considered nonfinal for one purpose and final for another," so "once a party petitions the agency for reconsideration of an order *or any part thereof*, the *entire order* is rendered nonfinal as to that party.") (emphasis added).

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

not by the Commission itself. The Communications Act is clear that staff action must be appealed to and decided by the full Commission as "a condition precedent to judicial review." 47 U.S.C. § 155(c)(7). But Blanca admits (Pet. Br. 8–9) that it did not appeal the Administrative Offset Notice to the full Commission by filing an application for review; it instead sent the agency's managing director what it labeled a "Notice of Intent to Seek Appellate Review"[10] and then proceeded directly to court. Because Blanca concededly did not seek review of the Administrative Offset Notice by the full Commission, as required by 47 U.S.C. § 155(c)(7), the Court lacks jurisdiction to review it. *See*, *e.g.*, *NTCH, Inc. v. FCC*, 877 F.3d 408, 409, 412–13 (D.C. Cir. 2017).[11]

---

[10] *See* Letter from Timothy E. Welch, Counsel to Blanca Telephone Co., to Mark Stephens, Managing Director, Federal Communications Commission (Jan. 12, 2018) (Supplemental Letter) (R.363–39).

[11] For similar reasons, Blanca misses the mark when it observes (Pet. Juris. Br. 9) that, under 47 C.F.R. § 1.106(b)(3) and (p)(3), a filing addressed to the Commission can be dismissed at the staff level if agency staff determine that it is entirely repetitious and raises no new arguments. The Administrative Offset Notice did not invoke that authority or purport to dismiss Blanca's petition for reconsideration—but even if it had done so, Blanca would still need to exhaust its administrative remedies by appealing *that* staff dismissal to the full Commission as "a condition precedent to judicial review," 47 U.S.C. § 155(c)(7).

Blanca also points (Pet. Br. 2–4, Pet. Juris. Br. 5–6) to two other agency communications—the initial Demand Letter issued by the FCC's deputy managing director in June 2016 and the Appeal Acknowledgment Letter issued by the FCC's acting managing director later that month—but the Court likewise lacks jurisdiction to review these documents. Both documents were issued by FCC staff, not by the Commission itself, so the Court cannot review these staff actions unless and until Blanca seeks and obtains a final order from the Commission. Blanca did appeal the Demand Letter to the Commission, which led to the *Order*; but Blanca has sought reconsideration of that *Order*, so there is no final Commission order to review. *See*, *e.g.*, *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002) (judicial review is not available while the Commission is still reviewing staff action); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 387–88 (D.C. Cir. 1999) (per curiam) (same). Blanca cannot avoid the jurisdictional bar to judicial review of a nonfinal Commission order by instead purporting to seek review of the underlying staff action.

In sum, because the Court lacks jurisdiction over any of the agency actions that Blanca seeks to challenge, Blanca's petition for review must be dismissed. Absent a final Commission order, Blanca is limited to seeking interim relief under the All Writs Act—but this Court has already thrice

ruled that Blanca has not made the required showing to obtain that relief, having denied Blanca's mandamus petition, its associated stay request, and its motion for injunction pending review.

II. Blanca Provides No Valid Basis For Disturbing The Commission's *Order*.

Even if the Court finds jurisdiction, Blanca does not provide any valid basis for disturbing the Commission's *Order*.

A. Blanca's improper reporting in its cost studies violated longstanding FCC rules and improperly inflated the amount of federal support it received.

Blanca's brief repeatedly asserts that that it was entitled to all the federal subsidies it received, *e.g.*, Pet. Br. 8–10, 15–17, 32–39, but it never actually engages with the FCC's detailed discussion of how the cost studies it used to obtain those subsidies violated FCC rules and NECA guidance, *see Order* ¶¶ 24–25, 33–37 (R.301–06); Demand Letter at 2–7 (R.2–7). Because Blanca has failed to adequately develop any argument challenging these conclusions, any tacit attempt to dispute its underlying violations through these bare assertions has been forfeited. *See*, *e.g.*, *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1137 n.7 (10th Cir. 2010) (Gorsuch, J.); *Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994).

In any event, Blanca is wrong when it asserts that it was eligible for all the subsidies it obtained. Those assertions rest largely on Blanca's characterization of its service as BETRS, but that characterization is false. BETRS provides basic local telephone service to *fixed* locations, whereas the record reflects that Blanca in fact provided *mobile* telephone service. *Order* ¶¶ 24–25, 33–37 (R.301–06); Demand Letter at 2–7 (R.2–7).

When the FCC first authorized BETRS in 1988, it was addressing a proposal "to construct radio loops between subscribers at *fixed locations* and [carriers'] central offices," and it concluded that "the public interest will best be served by expanding *fixed service* options" in this way. *BETRS Order*, *supra* note 3, 3 FCC Rcd. at 214 ¶ 2, 215 ¶ 14 (emphasis added). When it authorized the use of cellular frequencies for BETRS later that year, the Commission repeatedly described BETRS as "fixed service," "fixed cellular service," and "fixed point-to-point service." *Auxiliary Services Order*, *supra* note 3, 3 FCC Rcd. at 7041 ¶¶ 61–66; *see also* 47 C.F.R. § 22.2 (1989) (defining BETRS as a "service [that] provides public message communications service between a central office and fixed subscribers"). And the FCC has continued to distinguish "fixed service"—"including BETRS"—from "mobile services" that "are capable of transmitting while * * * moving." *Implementation of Sections 3(n) and 332 of the*

Communications Act: Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, 1425 ¶ 38, 1455 ¶ 102 (1994).[12]

The FCC and NECA discovered, however, that Blanca in fact provided *mobile* service, not fixed service—as Blanca has elsewhere conceded. Blanca's general manager and its engineers both admitted that it did not require that a "customer be located at a fixed location." Demand Letter n.13 (R.5). When NECA concluded that Blanca's mobile telephone service was not BETRS, *see id.* at 2–3 (R.2–3), "[a]t no point * * * did Blanca contest NECA's determination that Blanca's wireless offerings should be excluded from the costs used to calculate Blanca's high-cost support," *Order* ¶ 13 (R.299). And in its application for review, Blanca repeatedly described its wireless offerings to the Commission as a "mobile cellular system," "mobile cellular service," or "mobile service." *Id.* ¶ 34 & n.83 (R.304); *see* R.11–39.[13]

---

[12] *Accord*, *e.g.*, *Basic Universal Service Offering Provided by Western Wireless*, 17 FCC Rcd. 14802, 14811 ¶ 17 (2002) (*BUS Order*) ("[T]he key difference between BETRS and [mobile service] is that the radio equipment used to provide BETRS is limited to a specific location and can only operate at that location," and thus cannot, for example, "be picked up, placed in a car, rolled down the road and taken to the barn."), *vacated as moot*, 22 FCC Rcd. 12015 (2007).

[13] Even if Blanca had used shared infrastructure to provide *both* fixed-wireless and mobile services—despite the FCC's finding that "Blanca

Blanca also maintains (Pet. Br. 32–33, 37–38) that it was entitled to these subsidies because mobile services in certain circumstances can receive universal service support. It is true that *competitive* carriers could receive subsidies for mobile service under the (now-defunct) identical-support rule, but Blanca at all times was designated to receive support only as an *incumbent* carrier. Because Blanca was never certified by the Colorado Public Utilities Commission to receive support as a competitive carrier, it was not eligible to receive identical support for its mobile telephone service. *See Order* ¶¶ 35–37 (R.305–06).

Blanca further insists (Pet. Br. 39) that its mobile service should be considered a "regulated" service eligible for subsidies because the FCC regulates certain non-rate aspects of wireless services. But this overlooks that FCC rules define "regulated" in this context to mean services for which rates are subject to federal or state tariffing requirements. *See* 47 C.F.R. § 32.14. Mobile telephone service is not subject to these requirements because the FCC has forborne from rate regulation. *Order*

---

was providing only *mobile* cellular service" over its wireless infrastructure, Demand Letter at 3 (R.3)—Blanca would have had to divide shared costs between these services under the FCC's cost-allocation rules. *See Order* ¶¶ 4–5, 35 (R.294–96, 305); 47 C.F.R. § 32.14(c).

n.84 (R.304).[14]

Equally meritless are Blanca's complaints (Pet. Br. 29–32) that it lacked fair notice of the relevant requirements. On the contrary, the *Order* rests on longstanding FCC rules and NECA guidance. *Order* ¶¶ 38–39 (R.306–07). The agency "did not adopt a new interpretation of ambiguous rules but merely applied explicit Commission rules widely accepted by the industry." *Id.* ¶ 39 & n.105 (R.307). And "[g]iven the structure of the grant program," if Blanca was uncertain about any of these rules, Blanca was obligated "to seek clarification of the program requirements." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985).

B. The FCC complied with all applicable procedural requirements.

Blanca raises several procedural objections to the FCC's handling of this matter, but the agency proceedings below fully complied with constitutional due process and all applicable procedural requirements.

---

[14] Nor does it matter whether Blanca ever filed a tariff for BETRS service, because the mobile telephone service it provided was not BETRS, and thus fell outside the scope of any tariff. *See*, *e.g.*, *All. Commc'ns Coop., Inc. v. Global Crossing Telecomms.*, 663 F. Supp. 2d 807, 825–27 (D.S.D. 2009); *ITC Deltacom Commc'ns, Inc. v. U.S. LEC Corp.*, 2004 WL 3709999, at *4–6 (N.D. Ga. Mar. 15, 2004).

1. The FCC afforded Blanca due process by giving it notice and an opportunity to be heard.

The record does not support Blanca's claim that it did not receive constitutionally adequate process. Due process requires only that the government provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Here, the Commission afforded Blanca ample notice and opportunity to be heard.

The FCC gave Blanca detailed notice in the Demand Letter of the factual and legal basis for this proceeding. *Order* ¶ 48 (R.312). It then gave Blanca the opportunity to have any objections heard by the Commission, and Blanca availed itself of that opportunity by filing a lengthy application for review. *Id.* ¶ 50 (R.313); *see* R.11–81. After considering Blanca's arguments, the full Commission issued a comprehensive *Order* addressing each of Blanca's objections. *See* R.293–317. The agency thereby afforded Blanca all of the process it is due.

Blanca appears to argue (Pet. Br. 27–29) that the agency was required not only to provide an opportunity for Blanca's objections to the Demand Letter to be heard by the Commission, but *also* to hold some sort

of preliminary hearing before it notified Blanca in the Demand Letter of what agency staff learned in their initial investigation. But nothing requires multiple rounds of notice and hearings; it is enough that, before commencing collection of the debt, the agency gave Blanca notice of what staff learned in their investigation and provided the opportunity to have any objections heard by the Commission. *See Riggins v. Goodman*, 572 F.3d 1101, 1110 (10th Cir. 2009) ("[D]ue process is required not before the initial decision or recommendation to terminate is made, but instead before the termination actually occurs.").[15] Nor is there any indication that the Commission approached Blanca's objections to the Demand Letter with a closed mind or refused to fairly consider its arguments. Just as due process is not violated in rulemaking proceedings when an agency issues proposed rules and then considers public comment, *see In re FCC 11-161*, 753 F.3d 1015, 1091 (10th Cir. 2014), so too due process was satisfied here when the agency gave notice in the Demand Letter of the basis for this action and then allowed Blanca to have any objections considered by the Commission.

---

[15] *See also Crum v. Vincent*, 493 F.3d 988, 993 (8th Cir. 2007) ("So long as one hearing will provide * * * a meaningful opportunity to be heard, due process does not require two hearings on the same issue."); *Blackout Sealcoating, Inc. v. Peterson*, 733 F.3d 688, 691 (7th Cir. 2013) ("The due process clause * * * does not require an extended to-and-fro * * * . One opportunity to respond was enough.").

In all events, the record reflects that Blanca *did* in fact participate in the FCC's initial investigation and presented its views at that time. Among other things, Blanca responded to multiple subpoenas, Demand Letter at 2 (R.2); *id.* nn.16 & 18 (R.6); its general manager and engineers gave oral testimony, *id.* n.13 (R.5); and it presented written arguments from legal counsel, *id.* at 4 (R.4). And because the agency relied on Blanca's own records and used the same accounting methodology as Blanca's own cost consultant, *see Order* n.41 (R.299); *id.* ¶ 49 (R.312–13), Blanca had full access to all underlying facts and data throughout the investigation and had ample opportunity to present additional facts or argument at any time.

2. The FCC properly addresses universal service disputes through informal adjudications.

Congress has tasked the FCC with maintaining specific, predictable, and sufficient mechanisms to support universal service. *Order* ¶ 40 (R.308) (citing 47 U.S.C. § 254). The FCC accordingly must resolve disputes that arise over the application of its universal service rules. *Ibid.* The FCC routinely addresses these disputes through informal adjudications under the Administrative Procedure Act (APA). *Id.* ¶¶ 10, 39 (R.297–98, 307); *see also* 47 C.F.R. Part 54 Subpt. I (providing for FCC review of USAC

decisions); *id.* §§ 1.1901(e), 1.1911 (FCC may issue written demands for "amounts due the United States from * * * overpayments").

Informal adjudications are appropriate for making "fact-specific, individualized determination[s] applying current laws to past conduct," as the agency did here. *Order* ¶ 42 (R.309) (citing *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013), and *Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017–18 (D.C. Cir. 2016)). When conducting informal adjudications, an agency need only comply with "the minimal requirements * * * set forth in the APA, 5 U.S.C. § 555." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–55 (1990).

The FCC satisfied the APA's requirements by giving Blanca notice, an opportunity to be heard, and an explanation for its decision.[16] *Order* ¶ 47 (R.312). Blanca insists that the agency should have given it additional process (Pet. Br. 27–29, 40–42), but "the APA establishes the maximum procedural requirements a reviewing court may impose on agencies." *City of Colo. Springs v. Solis*, 589 F.3d 1121, 1134 (10th Cir.

[16] Upon examining the application for review, the agency reasonably determined that this case involves "issues of a kind that can be adequately resolved on written submissions." *Sw. Airlines Co. v. Transp. Sec. Admin.*, 554 F.3d 1065, 1075 (D.C. Cir. 2009); *see Mathews v. Eldridge*, 424 U.S. 319, 343 (1976) ("[T]he ordinary principle [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action.").

2009) (internal quotation marks omitted). The informal adjudication here also fulfilled all applicable requirements under the federal debt collection laws. *See Order* ¶ 47 (R.312).

Contrary to Blanca's contentions (Pet. Br. 25–26, 40–41, 43–46), this debt-collection action is not subject to the special procedures governing assessments of forfeitures under Section 503(b) of the Communications Act. Section 503(b) does not apply here because the *Order* seeks only the return of the government's own funds, which Blanca improperly obtained; it does not seek to assess any additional penalty or forfeiture. *Order* ¶ 43 (R.310). As the D.C. Circuit has explained, Section 503(b) gives the Commission authority in certain situations to assess a forfeiture penalty *in addition to* other available remedies. *N.J. Coal. for Fair Broad. v. FCC*, 580 F.2d 617, 618–19 (D.C. Cir. 1978) (per curiam). Blanca points to other cases where the FCC assessed a forfeiture penalty under Section 503(b) when it found universal service violations (Pet. Br. 25–26), but in those cases the FCC used the forfeiture process only to assess penalties *in addition to*, and separate from, seeking repayment. Here, by contrast, the Commission has not assessed any forfeiture; the *Order* "merely seek[s] to recover sums improperly paid" rather than to impose "a sanction or

penalty" or other "punitive measure." *Order* ¶ 45 (R.311). Section 503(b) does not apply in these circumstances.

C. The FCC has authority to recover the improper subsidies Blanca obtained between 2005 and 2010.

Blanca also raises a series of challenges to the Commission's legal authority to recovery the improper subsidies Blanca obtained between 2005 and 2010, but these challenges likewise lack merit.

1. The FCC can recover improper payments under the federal debt collection laws.

Blanca's contention that the FCC lacks authority to recover improper payments and other debts under the federal debt collection laws because the FCC is an independent agency (Pet. Br. 50–51) is contrary to statutory text, judicial precedent, and common sense. Congress defined the "executive, judicial, or legislative agenc[ies]" authorized to recover these debts broadly to encompass any "department, agency, [or] instrumentality in the executive, judicial, or legislative branch of government." 31 U.S.C. § 3701(a)(4). Courts have "frequently described [the FCC] as an independent, executive agency or an independent agency within the executive branch," and it thus "clearly qualifies under this definition." *Order* ¶ 52 (R.313–14).

Indeed, applying this statutory definition, the Seventh Circuit held in 1987 that the "plain meaning" of this statutory language encompasses

independent agencies (like the FCC) and that "nothing in the statute or its legislative history suggests that Congress intended to carve out a special exception for * * * 'independent' agencies." *Commonwealth Edison Co. v. U.S. Nuclear Reg. Comm'n*, 830 F.2d 610, 619–20 (7th Cir. 1987). And when Congress amended the federal debt collection laws in 1996, it left this understanding in place. *Order* ¶ 52 (R.313).

The Seventh Circuit further explained that excluding independent agencies from collecting federal debts would make little sense. "The intent of Congress was quite clearly to do all it could" to ensure collection of federal debts, which "[o]bviously[] * * * would be better served by providing these tools to the independent agencies." *Commonwealth Edison*, 830 F.2d at 620. Because Congress's intent was to make debt collection more efficient, "it makes little sense that Congress would have excluded several large federal agencies."[17] *Order* ¶ 52 (R.314). Blanca cites two unrelated statutes that distinguish between "independent regulatory agenc[ies]" and "executive department[s]" (Pet. Br. 50), but those statutes have little

[17] In addition to the FCC, independent agencies that have promulgated regulations implementing the federal debt collection laws include the Federal Trade Commission, 16 C.F.R. § 1.110; the Securities and Exchange Commission, 17 C.F.R. Part 204; the National Labor Relations Board, 29 C.F.R. §§ 100.601 *et seq.*; and the Federal Deposit Insurance Corporation, 12 C.F.R. Part 313.

relevance here because they employ different language, arise in very different contexts, and cannot overcome the capacious definition for the federal debt collection laws that Congress enacted in 31 U.S.C. § 3701(a)(4).

Equally unavailing is Blanca's argument (Pet. Br. 52–53) that the improper subsidies paid to Blanca are not federal funds because the government does not administer the Fund directly, but instead has appointed USAC to collect and disburse universal service payments according to FCC rules. Debts recoverable under the federal debt collection laws are "not 'limited to funds that are owed to the Treasury,' but include[] all funds 'owed the United States,' including overpayments from any agency-administered program." *Order* ¶ 51 (R.313) (some internal quotation marks omitted). The Universal Service Fund is a federal program, and while USAC may handle day-to-day operation of the Fund, it is the FCC that is ultimately responsible for creating "specific, predictable, and sufficient * * * mechanisms to preserve and advance universal service," 47 U.S.C. § 254(b)(5), and "establish[ing] any necessary cost allocation rules, accounting safeguards, and guidelines," *id.* § 254(k); *see Order* ¶ 33 (R.304). USAC has no control over how these funds are used, but instead must collect and disburse them according to specific rules established by the FCC. *See* 47 C.F.R. § 54.702(c) (USAC "may not make policy, interpret

unclear provisions of the statute or rules, or interpret the intent of Congress," and "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, [USAC] shall seek guidance from the Commission."). Both the Supreme Court and Congress have accordingly described universal service programs as providing "federal assistance" or "federal funds." *Order* ¶ 51 & n.148 (R.313).

Against all this, Blanca points only to a single inapposite case, *United States ex rel. Shupe v. Cisco Systems, Inc.*, 759 F.3d 379 (5th Cir. 2014) (per curiam). *Shupe* addressed a materially different statutory scheme and is otherwise unpersuasive. In *Shupe*, the Fifth Circuit examined "an outdated version" of the False Claims Act (FCA), *see id.* at 383 (citing 31 U.S.C. § 3729 (2008)), not the federal debt collection laws. *Shupe* held that statements made to USAC before 2009 did not implicate the FCA because USAC is not the government itself (although it administers the Fund at the government's direction) and because the Fund was not housed within the U.S. Treasury.

That holding has no bearing on this case, which turns not on the FCA, but instead on whether Blanca received "over-payments, including payments disallowed by audits performed by the Inspector General of the agency administering the program," 31 U.S.C. § 3701(b)(1)(C); *accord* 47

C.F.R. § 1.1901(e) ("debt" includes "amounts due the United States from * * * overpayments"). It has long been established that this provision extends to any program the government finances, *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1115 (D.D.C. 1994), and Congress did nothing to disturb that interpretation when it amended the federal debt collection laws in 1996, *cf. Order* ¶ 52 (R.313). The overpayments here are therefore recoverable as a debt owed to the United States under the federal debt collection laws.[18]

---

[18] Even if this case arose under the different language formerly in the FCA, *Shupe* is unpersuasive and has repeatedly been rejected by other courts. *See Order* n.77 (R.303) (citing *United States ex rel. Heath v. Wis. Bell, Inc.*, 111 F. Supp. 3d 923, 925–28 (E.D. Wis. 2015), and *United States ex rel. Futrell v. E-Rate Program, LLC*, 2017 WL 3621368, at *3–4 (E.D. Mo. Aug. 23, 2017)). It turns on a wholly formalistic inquiry into whether federal funds reside in the U.S. Treasury or whether the government itself has a "financial stake" in the funds, even though neither requirement is found in the text of the FCA. It also ignores that USAC itself has no control over how universal service funds are used, and instead must collect and disburse them according to specific rules established by the FCC, *see* 47 C.F.R. § 54.702(c); that to receive universal service funds, carriers must expressly certify that their cost studies comply with all FCC rules, *see id.* § 69.601(c); and that the Supreme Court and Congress accordingly have both described universal service payments as federal funds, *see Order* ¶ 51 & n.148 (R.313). In any event, because the FCC recently transferred the Universal Service Fund from a private banking account to the U.S. Treasury, the essential premise of the *Shupe* court's decision no longer holds.

2. No statute of limitations restricts the FCC's ability to recover improper payments.

Blanca next contends (Pet. Br. 42–48) that the FCC's effort to recover the improper payments Blanca obtained between 2005 and 2010 is barred by various statutes of limitations. But "an action on behalf of the United States in its governmental capacity * * * is subject to no time limitation[] in the absence of congressional enactment clearly imposing it," and thus "[s]tatutes of limitation sought to be applied to bar rights of the government[] must receive a strict construction in favor of the government." *United States v. Telluride Co.*, 146 F.3d 1241, 1244–45 (10th Cir. 1998) (quoting *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)); *see also id.* at 1246 & n.7. Blanca therefore cannot prevail absent an express statutory limitations period that clearly applies here, but it has identified no such statute.

Blanca's statute-of-limitations defense fails at the outset because the government has sought to collect its debt only through administrative offset, and Congress has expressly *exempted* administrative offsets from any statute of limitations that would otherwise apply. "Notwithstanding any other provision of law," Congress has provided, "no limitation on the period within which an [administrative] offset may be initiated or taken

* * * shall be effective." 31 U.S.C. § 3716(e)(1); *see*, *e.g.*, *ACH Props. Inc. v. Contreras-Sweet*, 2017 WL 1396093, at *5–6 (S.D. Tex. Jan. 19, 2017). Because the only debt-collection measure currently at issue is an administrative offset, this provision forecloses Blanca's limitations defense.

Even if Blanca could challenge other possible debt-collection measures that the government has not undertaken, *but see ACH Props.*, 2017 WL 1396093, at *4–5, it has not identified any limitations provision that applies here. Blanca first points (Pet. Br. 42–43) to the one-year limitations period for forfeitures under 47 U.S.C. § 503(b)(6), but as we have shown, that provision does not apply because this debt-collection action is not a forfeiture proceeding. It then points (Pet. Br. 43–48) to the five-year limitations period for civil penalties under 28 U.S.C. § 2462, but that provision likewise does not apply.

Section 2462 creates a five-year limitations period "for the enforcement of any civil fine, penalty, or forfeiture." 28 U.S.C. § 2462. That provision does not apply here because the *Order* does not seek to impose any penalty or forfeiture on Blanca, but instead "merely seek[s] to recover sums improperly paid." *Order* ¶ 45 (R.311). As the Supreme Court has explained, "a demand for repayment is more in the nature of an effort to collect upon a debt than a penal sanction." *Bennett*, 470 U.S. at

662–63; *see also Miss. Dep't of Econ. & Cmty. Dev. v. U.S. Dep't of Labor*, 90 F.3d 110, 113 (5th Cir. 1996) (an action "to collect on a debt" is "not * * * a claim for a civil fine, penalty, or forfeiture under § 2462"). Recovering improper payments to which Blanca was not entitled, without assessing any additional sanction or penalty, "is not a punitive measure" but instead "merely returns Blanca to the *status quo ante*." *Order* ¶ 45 (R.311); *see also Telluride*, 146 F.3d at 1247 (mere "belief the sanction is costly or painful does not make it punitive").

This case is therefore unlike *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). *Kokesh* held that disgorgement claims brought by the SEC are penalties subject to Section 2462 because "in many cases, SEC disgorgement is not compensatory," since any recovery need not go to the victims, and because "SEC disgorgement sometimes exceeds the profits gained as a result of the violation." *Id.* at 1644; *see also id.* at 1645 ("In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off."). Here, by contrast, the *Order* is compensatory rather than punitive because the government itself was the victim and seeks only to recover the funds that Blanca improperly obtained from it; it does not seek to impose any additional penalty or forfeiture that Blanca must pay from its own funds. *Order* ¶¶ 44–45 (R.310–11). In other words, the *Order* is not a penalty

subject to Section 2462 because it does not "go[] beyond remedying the damage caused to the harmed parties." *Telluride*, 146 F.3d at 1246 (quoting *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996)); *accord Gonzalez v. Sessions*, 894 F.3d 131, 138 (4th Cir. 2018) ("[C]ourts generally refuse to treat a monetary assessment as a punishment or penalty when the assessment solely reflects the costs of compensating * * * the government for losses resulting from the wrongdoing.").

3. Blanca's surrender of improper payments for 2011 and 2012 does not prevent the government from recovering improper payments for 2005 to 2010.

Finally, Blanca contends (Pet. Br. 10–11, 23) that the FCC should not be allowed to recover the improper payments it obtained between 2005 and 2010 because Blanca supposedly "settled the USF accounting matter" with NECA when it relinquished the improper subsidies it received in 2011 and 2012. That argument is both forfeited and wrong.

This argument is forfeited because Blanca failed to raise it in its application for review (apart from two cursory and undeveloped references to "settlement breach," R.30 n.15, 39), and the Commission thus had no occasion to address it in the *Order*. It is therefore barred by 47 U.S.C. § 405(a), which precludes judicial review of any "questions of fact or law upon which the FCC has been afforded no opportunity to pass." *In re FCC*

11-161, 753 F.3d at 1063 (alterations omitted); *see also id.* at 1064; *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998) (collecting cases). Blanca's pending petition for reconsideration might arguably be read to raise this issue, *see* R.326–27 & n.4, but the Commission has not yet ruled on that petition; nor must the Commission entertain new arguments raised on reconsideration if they could reasonably have been raised earlier, *see* 47 C.F.R. §§ 1.106(b)(2), 1.115(g).

The argument is also meritless. For starters, NECA is a private association of wireline carriers, not a government entity, so it could not compromise or waive any claims on behalf of the government. *Cf. Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999) (NECA "has no authority" to interpret FCC regulations because it "is neither an independent federal agency nor a subagency of the FCC."). Nor does the fact that NECA directed Blanca to revise its 2011 and 2012 cost studies speak to Blanca's responsibility for improper payments it obtained in earlier years or absolve Blanca of liability for those payments. In fact, when Blanca revised its cost studies, its contractual agreement with NECA specifically advised Blanca that Blanca remained responsible for any support adjustments outside NECA's two-year window. *Order* n.37 (R.299); *see* NECA Pool Administration Procedures § 1.6.1, at 1-8 (2012)

("Any support adjustments accepted and processed by USAC corresponding to a company's data corrections outside of the 24-month settlement window become the obligation of the company."); *id.* § 2.1.4, at 2-3 ("While all data entry * * * is prohibited for months that have fallen out of the 24 month settlement window, adjustments to these months for other purposes (e.g. support fund true-ups) are performed to company settlements by NECA in order to comply with FCC rules.").

Lastly, the argument is foreclosed by this Court's decision in *Farmers Telephone*. That case addressed a 1997 order which found that NECA had misinterpreted an FCC regulation that took effect in 1993. *See* 184 F.3d at 1243–47. NECA directed its members to correct their cost data, but only for a two-year window. *Id.* at 1246 & n.1. Yet the Commission went further and "required NECA to calculate and submit corrected data for *each year* in which NECA required its members to follow its faulty calculation." *Id.* at 1250 n.6 (emphasis added). This Court upheld the Commission's order in full, holding that companies' reliance on NECA rules does not preclude the Commission from recovering all improper payments, *id.* at 1250–52, including payments outside NECA's two-year settlement window.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction.[19] Alternatively, should the Court conclude it has jurisdiction, the petition for review should be denied.

Dated: July 26, 2018

Respectfully submitted,

/s/ *Scott M. Noveck*

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

Scott M. Noveck
Counsel

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

Counsel for Respondent Federal Communications Commission

Makan Delrahim
Assistant Attorney General

Andrew C. Finch
Principal Deputy Assistant Attorney General

Robert B. Nicholson
Adam D. Chandler
Attorneys

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave. NW
Washington, DC 20530

Counsel for Respondent United States of America

[19] Accordingly, Respondents do not believe that oral argument is warranted here.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b):

   ☒ this document contains 12,312 words, *or*

   ☐ this document uses a monospaced typeface and contains ____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and 10th Cir. 32(a) because:

   ☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook, *or*

   ☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondents

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing document:

1. All required privacy redactions have been made per Tenth Circuit Rule 25.5.

2. If required to file additional hard copies, the ECF submission is an exact copy of those documents.

3. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Cylance PROTECT Version 2.0.1490.27, and according to the program are free of viruses.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondents

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 26, 2018, I caused the foregoing Brief for Respondents to be filed with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit using the electronic CM/ECF system and by causing seven paper copies to be dispatched to a third-party commercial carrier for delivery to the Clerk within two business days. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondents

Service List:

Timothy Edward Welch
HILL & WELCH
1116 Heartfields Drive
Silver Spring, MD 20904
welchlaw@earthlink.net

Counsel for Petitioner
Blanca Telephone Company

Robert Nicholson
Adam D. Chandler
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION, APPELLATE SECTION
950 Pennsylvania Avenue, NW
Washington, DC 20530
robert.nicholson@usdoj.gov
adam.chandler@usdoj.gov

Counsel for Respondent
United States of America

STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

Page

28 U.S.C. § 2342 provides in pertinent part:

> **§ 2342. Jurisdiction of court of appeals**
>
> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communication[s] Commission made reviewable by section 402(a) of title 47; * * *

28 U.S.C. § 2344 provides in pertinent part:

> **§ 2344. Review of orders; time; notice; contents of petition; service**
>
> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. * * *

28 U.S.C. § 2462 provides:

> **§ 2462. Time for commencing proceedings**
>
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

31 U.S.C. § 3701 provides in pertinent part:

> **§ 3701. Definitions and application**
>
> (a) In this chapter— * * *
>
> (4) "executive, judicial, or legislative agency" means a department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of Government, including government corporations.

* * *

(b)(1) In subchapter II of this chapter and subsection (a)(8) of this section, the term "claim" or "debt" means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency. A claim includes, without limitation— * * *

(C) over-payments, including payments disallowed by audits performed by the Inspector General of the agency administering the program,

* * *

31 U.S.C. § 3716 provides in pertinent part:

§ 3716. Administrative offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive, judicial, or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

* * *

(e)(1) Notwithstanding any other provision of law, regulation, or administrative limitation, no limitation on the period within which an offset may be initiated or taken pursuant to this section shall be effective.

* * *

47 U.S.C. § 155 provides in pertinent part:

§ 155. Commission

* * *

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions * * * to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; * * *

* * *

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission * * * , and every such application shall be passed upon by the Commission. * * *

* * *

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. * * *

* * *

47 U.S.C. § 214 provides in pertinent part:

§ 214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

* * *

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

* * *

(5) "Service area" defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal–State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

* * *

47 U.S.C. § 254 provides in pertinent part:

§ 254. Universal service

* * *

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

* * *

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

* * *

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

* * *

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

* * *

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

* * *

47 C.F.R. § 1.1901 provides in pertinent part:

§ 1.1901 Definitions and construction.

For purposes of this subpart: * * *

(e) The terms claim and debt are deemed synonymous and interchangeable. They refer to an amount of money, funds, or property that has been determined by an agency official to be due to the United States from any person, organization, or entity, except another Federal agency. * * * "Claim" and "debt" include amounts owed to the United States on account of extension of credit or loans made by, insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, taxes, and forfeitures * * * and other similar sources. * * *

47 C.F.R. § 22.2 (1989) provided in pertinent part:

§ 22.2 Definitions.

* * *

Basic Exchange Telecommunications Radio Service. In the Rural Radio Service this service provides public message communication service between a central office and fixed subscribers located in rural areas. In the Domestic Public Cellular Radio Telecommunications Service, this service provides public message communication service to fixed subscribers in Rural Service areas and in rural parts of Metropolitan Statistical Areas.

* * *

47 C.F.R. § 32.14 provides in pertinent part:

§ 32.14 Regulated accounts.

(a) In the context of this part, the regulated accounts shall be interpreted to include the investments, revenues and expenses associated with those telecommunications products and services to which the tariff filing requirements contained in Title II of the Communications Act of 1934, as amended, are applied, except as may be otherwise provided by the Commission. * * *

(b) In addition to those amounts considered to be regulated by the provisions of paragraph (a) of this section, those telecommunications products and services to which the tariff filing requirements of the several state jurisdictions are applied shall be accounted for as regulated, except where such treatment is proscribed or otherwise excluded from the requirements pertaining to regulated telecommunications products and services by this Commission.

(c) In the application of detailed accounting requirements contained in this part, when a regulated activity involves the common or joint use of assets and resources in the provision of regulated and nonregulated products and services, companies shall account for these activities within the accounts prescribed in this system for telephone company operations. Assets and expenses shall be subdivided in subsidiary records among amounts solely assignable to nonregulated activities, amounts solely assignable to regulated

activities, and amounts related to assets used and expenses incurred jointly or in common, which will be allocated between regulated and nonregulated activities. Companies shall submit reports identifying regulated and nonregulated amounts in the manner and at the times prescribed by this Commission. Nonregulated revenue items not qualifying for incidental treatment, as provided in § 32.4999(l), shall be recorded in Account 5280, Nonregulated operating revenue.

* * *

47 C.F.R. § 51.5 provides in pertinent part:

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * *

Incumbent Local Exchange Carrier (Incumbent LEC). With respect to an area, the local exchange carrier that:

(1) On February 8, 1996, provided telephone exchange service in such area; and

(2)(i) On February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (2)(i) of this section.

* * *

47 C.F.R. § 54.5 provides in pertinent part:

§ 54.5 Terms and definitions.

Terms used in this part have the following meanings:

* * *

Competitive eligible telecommunications carrier. A "competitive eligible telecommunications carrier" is a carrier that meets the definition of an "eligible telecommunications carrier" below [under 47 C.F.R. §§ 54.201 *et seq.*] and does not meet the definition of an "incumbent local exchange carrier" in § 51.5 of this chapter.

* * *

Incumbent local exchange carrier. "Incumbent local exchange carrier" or "ILEC" has the same meaning as that term is defined in § 51.5 of this chapter.

* * *

47 C.F.R. § 54.201 provides in pertinent part:

§ 54.201 Definition of eligible telecommunications carriers, generally.

(a) *Carriers eligible to receive support.*

(1) Only eligible telecommunications carriers designated under this subpart shall receive universal service support distributed pursuant to subparts D and E of this part. * * *

* * *

(b) A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission.

(c) Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the state commission shall find that the designation is in the public interest.

(d) A common carrier designated as an eligible telecommunications carrier under this section shall be eligible to receive universal service support in accordance with section 254 of the Act * * * .

* * *

47 C.F.R. § 54.702 provides in pertinent part:

§ 54.702 Administrator's functions and responsibilities.

* * *

(c) The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.

* * *

47 C.F.R. § 69.601 provides in pertinent part:

§ 69.601 Exchange carrier association.

* * *

(c) All data submissions to the [National Exchange Carrier Association] shall be accompanied by the following certification statement signed by the officer or employee responsible for the overall preparation for the data submission:

CERTIFICATION

I am (title of certifying officer or employee). I hereby certify that I have overall responsibility for the preparation of all data in the attached data submission for (name of carrier) and that I am authorized to execute this certification. Based on information known to me or provided to me by employees responsible for the preparation of the data in this submission, I hereby certify that the data have been examined and reviewed and are complete, accurate, and consistent with the rules of the Federal Communications Commission.

Date: _____

Name: _____

Title: _____

(Persons making willful false statements in this data submission can be punished by fine or imprisonment under the provisions of the U.S. Code, Title 18, Section 1001).