ORAL ARGUMENT NOT REQUESTED

Nos. 20-9510 & 20-9524

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 Petitions for Review of Orders of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C), respondents identify the following prior or related appeals involving petitioner Blanca Telephone Company:

- *In re Blanca Telephone Co.*, No. 16-1216 (D.C. Cir.) (*Blanca I*), in which Blanca 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 The D.C. Circuit issued an unpublished order on October 21, 2016, denying the writ. Blanca then filed a petition for panel rehearing or rehearing en banc, which the court denied in a pair of unpublished orders issued on December 12, 2016.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.) (*Blanca II*), in which Blanca sought a writ of mandamus and moved to stay the principal *Commission 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 A panel of this Court issued an unpublished order on December 28, 2017, denying the stay motion, and issued a second unpublished order the next day denying mandamus.
- *Blanca Telephone Co. v. FCC*, No. 18-9502 (10th Cir.) (*Blanca III*), in which Blanca filed a petition for review of the principal *Commission Order* challenged here while it was simultaneously pursuing administrative reconsideration of that order before the

agency. A panel of this Court issued an unpublished order on October 25, 2018, dismissing the petition for review for lack of jurisdiction because Blanca's request for agency reconsideration rendered the underlying order nonfinal for purposes of judicial review. Blanca then filed a petition for panel rehearing or rehearing en banc, which the Court denied in an unpublished order issued on December 10, 2018.

- *Blanca Telephone Co. v. FCC*, No. 18-9587 (10th Cir.) (*Blanca IV*), in which Blanca filed a second petition for review of the principal *Commission Order* challenged here while it was still pursuing administrative reconsideration of that order before the agency. A panel of this Court issued an unpublished order on March 12, 2019, dismissing the petition for review for lack of jurisdiction because the underlying order remained nonfinal while Blanca was still pursuing administrative reconsideration. Blanca then filed a petition for rehearing or rehearing en banc, which the Court denied in an unpublished order issued on April 30, 2019. Blanca then filed a petition for a writ of certiorari, which the Supreme Court denied on October 7, 2019. *Blanca Tel. Co. v. FCC*, 140 S. Ct. 225 (2019) (No. 19-134).

GLOSSARY

FCC or **Commission**	Federal Communications Commission
Blanca	Petitioner Blanca Telephone Company
Pet. Br.	Petitioner's Opening Brief (filed June 1, 2020)
ROA	Agency Record (filed Apr. 23, 2020)
Demand Letter	Letter from Dana Shaffer, Deputy Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (June 2, 2016) (1.ROA.1–10)
Commission Order	Memorandum Opinion & Order and Order on Reconsideration, *In re Blanca Tel. Co.*, 32 FCC Rcd. 10594 (2017) (2.ROA.293–317)
Reconsideration Order	Second Order on Reconsideration & Order, *In re Blanca Tel. Co.*, 35 FCC Rcd. 2641 (2020) (2.ROA.393–410)
USF or **Fund**	Universal Service Fund (*see* p. 5)
USAC	Universal Service Administrative Company, the administrator of the Fund (*see* pp. 12, 40–41)
NECA	National Exchange Carrier Association, the private association of wireline carriers responsible for processing members' cost data (*see* p. 12 & n.6)
OIG	The FCC's Office of Inspector General, which supervises the use of federal funds and investigates allegations of waste or misuse (*see* pp. 11–12)

GLOSSARY (continued)

ETC	Eligible Telecommunications Carrier, a telecommunications provider designated by the relevant state regulatory commission to receive USF subsidies in a given study area; one ETC in each study area is designated as the **incumbent carrier**, and other ETCs may be designated as **competitive carriers** (*see* pp. 6–9, 30–32)
study area	A geographic area in which a carrier is designated to serve as an ETC
regulated service	Under FCC accounting and cost-allocation rules, service for which rates are subject to mandatory tariffing requirements (*see* pp. 6–9, 32–33)
nonregulated service or **competitive service**	Service for which carriers need not file tariffs with federal or state regulators and may instead set rates freely, constrained only by market competition (*see* pp. 6–9)
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. 7, 13–14, 16, 28–31)
CMRS	Commercial Mobile Radio Service, a category of nonregulated services that includes mobile telephone service (*see* pp. 7)
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. 6–9)

GLOSSARY (continued)

cost-based support	A form of high-cost support available to incumbent carriers that are subject to rate-of-return regulation (*see* pp. 6–9)
identical support	A discontinued form of high-cost support formerly available to competitive carriers (*see* pp. 7–9)
APA	Administrative Procedure Act (*see* pp. 37–38)
DCIA	Debt Collection Improvement Act (*see* pp. 9–11)

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BRIEF FOR RESPONDENTS

INTRODUCTION

This case arises from a multi-year federal investigation which found that petitioner Blanca Telephone Company improperly claimed millions of dollars of public subsidies for which it was not eligible. As the designated incumbent telephone carrier in parts of rural Colorado, Blanca was eligible to receive federal subsidies based on the costs it incurred to provide basic local telephone service to fixed locations within a designated geographic area, known as its study area. But the investigation revealed that Blanca in fact provided *mobile* telephone service, for which it was not entitled to subsidies, while misreporting

that all of its costs were for *fixed* services. The investigation also revealed that although Blanca reported that all the costs listed in its cost studies were for service *within* its designated study area, Blanca in fact included costs for service *outside* the study area where it was eligible for subsidies.

The investigation culminated in a Demand Letter from Federal Communications Commission staff seeking repayment of roughly $6.75 million in improper subsidies Blanca received for the years 2005 to 2010 (out of roughly $13.5 million in total subsidies Blanca received for that period). *See* 1.ROA.1–10 (Demand Letter).[1] Blanca then sought review of the staff's Demand Letter by the full Commission. In December 2017, the Commission issued an order affirming that the improper payments 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. *See* 2.ROA.293–317 (*Commission Order*). Blanca then petitioned the agency for administrative reconsideration, which the Commission denied. *See* 2.ROA.393–410 (*Reconsideration Order*).

Blanca's challenges to the agency orders at issue here are meritless. Its assertions that it was entitled to all of the subsidies it received rest on continued mischaracterizations of the service it provided and of the longstanding rules governing those subsidies. Its procedural challenges fare

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[1] Citations of the form *x*.ROA.*yy* refer to volume *x*, page *yy* of the Agency Record filed with the Court on April 23, 2020.

no better: The Commission afforded Blanca due process by giving it ample notice and an opportunity to be heard before pursuing collection of Blanca's unpaid debt, and the agency fully complied with all applicable procedural requirements. Finally, no statute of limitation or any other obstacle bars the government from seeking return of the payments that Blanca improperly obtained. The petitions for review should therefore be dismissed or denied.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over final orders of the Commission under 28 U.S.C. §§ 2342(1) and 2344 and 47 U.S.C. § 402(a). The *Commission Order* was released on December 8, 2017. Blanca timely filed a petition for administrative reconsideration within 30 days of that order, which tolled the time for seeking judicial review. *See C.O.D.E., Inc. v. ICC*, 768 F.2d 1210, 1211–12 (10th Cir. 1985). The *Reconsideration Order* was released on March 5, 2020, and Blanca timely filed its petition for review in No. 20-9524 on March 18, 2020, within 60 days of the release of that order.[2]

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[2] The petition for review in No. 20-9510 was filed on January 21, 2020, while Blanca's petition for reconsideration was still pending. Because the petition for reconsideration rendered the *Commission Order* nonfinal at that time, and the *Reconsideration Order* had not yet issued, the petition for review in No. 20-9510 was incurably premature. *See* Resps.' Reply to Pet.'s Resp. to Order to Show Cause, No. 20-9510 (filed Mar. 4, 2020); Resps.' 3/10/20 Rule 28(j) Letter, No. 20-9510 (filed Mar. 10, 2020). The Court should therefore dismiss that petition for lack of jurisdiction or, in the alternative, dismiss it as moot or deny it on the merits in accordance with the Court's disposition of the petition in No. 20-9524.

STATEMENT OF THE ISSUES

1. 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 included costs for providing mobile telephone service (including service outside its study area), and thereby obtained federal subsidies for which it was not eligible.

2. 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.

3. Whether the Commission properly invoked its authority under the federal debt collection laws to recover overpayments to Blanca for the years 2005 to 2010 (after Blanca separately relinquished similar overpayments 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 subscribers through surcharges appearing on their 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 services in rural and insular areas where it is often more expensive to provide service due to low population density, unaccommodating 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 given geographic area, referred to as a "study area," a telecommunications provider must be designated 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 the carrier receives depends on whether it is designated 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, like Blanca, received federal subsidies based on the costs it incurred to provide rate-regulated services in high-cost areas.[3] *Commission Order* ¶ 4 (2.ROA.294); *Recon. Order* ¶ 4 (2.ROA.394–95). This includes basic local telephone service, also known as "exchange service." *Ibid.*; 47 U.S.C. § 153(54). In the vast majority of circumstances, local exchange service is provided over a traditional wireline connection, but in special circumstances

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[3] *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 Commission Order* ¶ 35 (2.ROA.305); Demand Letter at 2–3 & Attach. A (1.ROA.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 mandatory tariffing requirements. 47 C.F.R. § 32.14.

involving challenging terrain 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.[4]

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. *Commission Order* ¶¶ 4, 33–39 (2.ROA.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 has forborne from regulating rates for mobile telephone service and other forms of CMRS. *See Commission Order* n.84 (2.ROA.304); *Recon. Order* ¶ 31 & n.101 (2.ROA.405).

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[4] *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*).

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. *Commission Order* ¶¶ 4–5, 35 (2.ROA.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 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 Commission Order* ¶ 4 & nn.8–10 (2.ROA.294–95); *Recon. Order* ¶ 4 & nn.12–13 (2.ROA.394–95).

Competitive carriers, by contrast, do not receive the same cost-based subsidies as the incumbent carrier. Instead, during the years at issue here, telecommunications providers designated as competitive carriers in a given study area were eligible for a different support mechanism known as "identical support." *Commission Order* ¶ 6 (2.ROA.296); 47 C.F.R. § 54.307 (2005). Under that system, competitive carriers received a per-line subsidy amount for each telephone line they served identical to the per-line subsidy amount

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 subsidies both for local exchange service *and* for mobile telephone service. *Commission Order* ¶ 7 (2.ROA.296).[5]

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 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.

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[5] 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). 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.

6540 (2004). These FCC rules, which parallel the Federal Claims Collection Standards issued by the Department of Justice and the General Accounting Office, *see Commission Order* n.136 (2.ROA.312), are codified at 47 C.F.R. Part 1 Subpart O.

"Debt" is defined under these laws 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 given the Inspector General of each agency 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'x. 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); *see Recon. Order* ¶ 36 & n.124 (2.ROA.408).

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 universal service subsidies as the incumbent carrier in a single geographic study area covering parts of Alamosa and Costilla Counties. *Commission Order* ¶¶ 35 & nn.85–86 (2.ROA.305); *Recon. Order* ¶ 3 (2.ROA.394). 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 subsidies as a competitive carrier (either within or outside its study area). *Commission Order* ¶¶ 35–37 (2.ROA.305–06); *Recon. Order* ¶ 33 & n.111 (2.ROA.406). 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 to fixed locations 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. *Commission Order* ¶¶ 1, 4–5, 35–37 (2.ROA.293–95, 305–06); *Recon. Order* ¶¶ 1, 9 (2.ROA.393, 396).

A routine audit of universal service payments to Blanca by an independent auditor 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 in the FCC's universal service programs; the National Exchange Carrier Association (NECA), the private association of wireline carriers responsible for processing Blanca's cost data;[6] and the Universal Service Administrative Company (USAC), the administrator of the Fund. *Commission Order* ¶¶ 13–16 (2.ROA.298–300); *Recon. Order* ¶ 7 (2.ROA.396). These investigations revealed 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 subsidies for which it was not eligible. *Ibid.*

Blanca's cost studies reported that all its costs were for providing basic local telephone service within its designated study area. But the investigations revealed 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

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[6] *See Recon. Order* ¶ 5 (2.ROA.395); *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. 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); *see Commission Order* ¶ 10 & n.26 (2.ROA.297). The Commission and USAC then use the data in these cost studies to calculate the federal subsidies paid to each carrier. *Commission Order* ¶ 8 (2.ROA.297); *Recon. Order* ¶ 5 & n.15 (2.ROA.395).

(collected in 47 C.F.R. Parts 32, 36, 54, and 64) and NECA guidance advising its members of those rules. Once the improper reporting was discovered, Blanca corrected its cost studies for the years 2011 and 2012 and relinquished improper payments for those years. In the orders challenged here, the Commission found that Blanca received an additional $6.75 million in improper payments for the years 2005 to 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 Commission Order* ¶ 13 (2.ROA.298–99); Demand Letter at 2 & n.1 (1.ROA.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 to a fixed location and is eligible for cost-based support. Demand Letter at 2 (1.ROA.2). But NECA's investigation "determined that Blanca was not providing BETRS, and instead was providing only mobile cellular service." *Id.* at 2–3 (1.ROA.2–3); *see also Recon. Order* ¶ 31 (2.ROA.405).

NECA explained that including these costs in the cost studies violated FCC rules and longstanding NECA guidance reiterating those requirements. *See Commission Order* nn.36 & 105 (2.ROA.298, 307); Demand Letter at 4–5 (1.ROA.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 4). 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 challenge or appeal 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 portion of the subsidies it received for those years. *Commission Order* ¶ 13 (2.ROA.298–99); Demand Letter at 3 (1.ROA.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 Commission Order* n.37 (2.ROA.298–99); *see also* Demand Letter at 3 (1.ROA.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." *Commission Order* n.37 (2.ROA.299); *see Recon. Order* ¶ 30 & n.93 (2.ROA.404) (quoting NECA Pool Administration Procedures).

2. The FCC Staff's Demand Letter

The FCC's Office of Inspector General also conducted an extensive investigation, which culminated in a Demand Letter issued in June 2016 by agency staff acting under authority delegated by the Commission. *See* 1.ROA.1–10. The FCC's investigation included multiple subpoenas for Blanca's records and correspondence, *id.* at 2 (1.ROA.2); interviews with Blanca's general manager and its engineers, *id.* n.13 (1.ROA.5); and

consideration of arguments presented by Blanca's legal counsel, *id.* at 4 (1.ROA.4). The investigation found that the misreporting NECA identified in Blanca's 2011 and 2012 cost studies dated back to at least 2005, *id.* at 3 (1.ROA.3), and resulted in Blanca's receipt of another $6.75 million in improper subsidies (out of $13.5 million in total subsidies) between 2005 and 2010, *id.* at 7 & Attach. A (1.ROA.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 (1.ROA.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 (1.ROA.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 (1.ROA.3). Thus, by definition, "BETRS specifically excludes the provision of cellular mobile telephone service as was provided by Blanca." *Id.* at 4 (1.ROA.4); *see Recon. Order* ¶ 31 (2.ROA.405).

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 Blanca cell sites" while a customer traveled between them. Demand

Letter at 5 & n.13 (1.ROA.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 (1.ROA.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 (1.ROA.5).

The investigation also revealed that Blanca had improperly claimed subsidies for service outside its designated study area. *Id.* at 6–7 (1.ROA.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 (1.ROA.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 (1.ROA.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 (1.ROA.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 Commission Order* n.41 (2.ROA.299), FCC staff calculated that of the roughly $13.5 million in subsidies Blanca received for the years 2005 to 2010, roughly $6.75 million were improper. Demand Letter at 7 & Attach. A (1.ROA.7, 9). FCC staff therefore demanded that Blanca promptly repay those funds as a debt owed to the United States. *Id.* at 7–8 (1.ROA.7–8); *see* 31 U.S.C. § 3701(b)(1)(C).

3. The *Commission Order*

Blanca timely filed an application for review asking the full Commission to overturn the staff's Demand Letter.[7] *See* 1.ROA.11–81. In December 2017, the Commission issued an 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* 2.ROA.293–317.

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[7] 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.

"[F]or at least eight years," the Commission observed, "Blanca ignored Commission orders and NECA guidance making clear that it could include only [rate-]regulated costs in its cost studies." *Commission Order* ¶ 24 (2.ROA.301). Instead, "Blanca included costs associated with the provision of a nonregulated service"—mobile telephone service. *Id.* ¶ 34 (2.ROA.304); *see also id.* n.84 (2.ROA.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 (2.ROA.304).

The *Commission 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 (2.ROA.305) (citing 47 C.F.R. Part 64 Subpt. I). 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 (2.ROA.305–06). Blanca was never designated 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.* ¶ 36 (2.ROA.305–06); *see* 47 C.F.R. § 54.5 (defining competitive carrier to exclude the incumbent carrier). And even if Blanca potentially could have been designated as a competitive carrier outside the area where it was the incumbent carrier, it never obtained that required designation from the state utility commission. *Commission Order* ¶ 37 (2.ROA.306).

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 bases for seeking repayment of these funds, which came from 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 (2.ROA.312–13). The *Commission Order* further explained that the Commission is responsible for adjudicating disputes over universal service funding, *id.* ¶ 40 (2.ROA.308), and that these highly individualized and often fact-intensive disputes are properly addressed through informal adjudications, *id.* ¶ 42 (2.ROA.309); *see also id.* ¶¶ 10, 39 (2.ROA.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 forfeiture proceeding under Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), because

the agency seeks only to recover government funds which Blanca improperly obtained; it does not seek to assess any additional penalty or forfeiture. *Id.* ¶ 43 (2.ROA.310).

The *Commission Order* likewise rejected Blanca's challenges to the Commission's authority to recover the improper payments. The federal debt collection laws authorize the Commission to collect debts owed to the United States, *id.* ¶ 52 (2.ROA.313–14), and these laws broadly define such debts to include "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 Commission Order* ¶ 51 (2.ROA.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." *Commission Order* ¶¶ 44–45 (2.ROA.310–11).

Finally, having denied all of Blanca's objections to repaying the improper subsidies, 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 * * * law." *Commission Order* ¶ 54 (2.ROA.314–15).

4. Further Developments And The *Reconsideration Order*

Immediately following the *Commission Order*, Blanca petitioned this Court for a writ of mandamus and moved for a stay pending review. The Court denied Blanca's stay motion, Order, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. Dec. 28, 2017), and denied mandamus the following day, Order, *In re Blanca Tel. Co.*, No. 17-1451 (10th Cir. Dec. 29, 2017). Blanca then returned to the agency and filed a petition for administrative reconsideration of the *Commission Order*. *See* 2.ROA.317–351. While that petition was pending, Blanca moved in this Court for an injunction pending review, and the Court again denied relief. Order, *Blanca Tel. Co. v. FCC*, No. 18-9502 (10th Cir. Apr. 5, 2018).

As directed by the *Commission Order*, FCC staff notified Blanca that "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."[8] Pursuant to that administrative offset, USAC has been withholding new monthly disbursements to Blanca (which have amounted to around $100,000 each month) and instead credits each amount against the company's unpaid balance.

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[8] Letter from Mark Stephens, Managing Director, Federal Communications Commission, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (2.ROA.361–62) (Administrative Offset Notice).

In March 2020, the Commission issued a *Reconsideration Order* that both dismissed Blanca's petition for reconsideration as procedurally barred and alternatively denied it on the merits. *See* 2.ROA.393–410. Procedurally, the Commission explained that because Blanca failed to identify any facts or evidence that it could not have raised earlier, the petition for reconsideration contravened the Commission's rules precluding parties from "us[ing] the reconsideration process to rehash and relitigate legal issues already raised (or that should have been raised) earlier in the same proceeding." *Recon. Order* ¶ 18 (2.ROA.400); *see, e.g.*, *id.* ¶¶ 24–27 (ruling that various new arguments are procedurally barred because Blanca was required to raise those arguments during the initial proceedings before the Commission but did not do so).

In the alternative, as an independent basis for its decision, the Commission found that "Blanca's new arguments—like those previously raised and addressed in the *[Commission] Order*—are meritless." *Id.* ¶ 29 (2.ROA.404); *see id.* ¶¶ 29–39 (2.ROA.404–08). Among other things, the Commission rejected Blanca's argument that its separate agreement with NECA—to which the FCC was not a party—to relinquish to NECA the improper subsidies it received for 2011 and 2012 somehow prevents the government from seeking return of improper payments for 2005 to 2010. *Id.* ¶ 30 (2.ROA.404); *but see id.* ¶ 27 (2.ROA.403–04) (ruling that this new argument is procedurally barred). It likewise rejected Blanca's argument that

it was subject to greater penalties than the subjects of several recent consent decrees, explaining that those consent decrees "deal[t] with a different issue": the imposition of "forfeiture penalties * * * *in addition to, and separate from*, the recovery of USF overpayments," which "had already been recovered" in full. *Id.* ¶¶ 24, 35 (2.ROA.402, 407); *but see id.* ¶ 24 (2.ROA.402) (ruling that this new argument is procedurally barred).

The *Reconsideration Order* also reiterated that the Commission has authority to seek return of improper universal service payments under the federal debt collection laws, *id.* ¶ 36 (2.ROA.408), and that this debt-collection action is not a forfeiture proceeding subject to Section 503(b) of the Communications Act because "[t]he Commission is not imposing a penalty for Blanca's erroneous cost accounting practices but 'merely seeking to recover sums improperly paid,'" *id.* ¶ 35 (2.ROA.407). And the Commission again explained that Blanca, as a rate-of-return incumbent carrier, was not eligible to receive subsidies for its mobile telephone service, either within or outside of its study area. *Id.* ¶¶ 31–33 (2.ROA.405–07).

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 Commission's orders are reviewed under the standard 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 (applying *Chevron* to "the FCC's interpretation of the statute and its own authority"). Similarly, under *Auer* deference, courts must "defer 'to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief,'" if the interpretation is reasonable, authoritative, consistently applied, and rooted in the agency's expertise. *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1062 (10th Cir. 2014) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012)); *see also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (refining and narrowing *Auer* deference). Due regard for the agency's interpretations "'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) (upholding prior FCC

interpretation of its universal service rules). 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*, 567 U.S. at 159 (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)).[9]

SUMMARY OF THE ARGUMENT

I. Blanca's continued assertions that it was entitled to the improper subsidies it received are contrary to longstanding FCC rules and NECA guidance reiterating those requirements. Although Blanca repeatedly states that it provided basic local telephone service via BETRS, BETRS provides service only to *fixed* locations (such as homes or businesses), whereas Blanca in fact provided *mobile* telephone service. As a rate-of-return incumbent carrier, Blanca was eligible to receive subsidies only for the costs it incurred to provide basic local telephone service to fixed locations within its designated study area; it was not eligible to claim subsidies for its mobile telephone service

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[9] Blanca's assertion that the Commission is not entitled to deference because it acted through adjudication rather than rulemaking (Pet. Br. 20) is incorrect. It is well settled that when an agency is carrying out responsibilities conferred on it by Congress, both rulemakings and adjudications may receive judicial deference. *See*, *e.g.*, *Mead*, 533 U.S. at 229–31.

or for service outside its study area. By impermissibly including the costs of its mobile telephone service in its cost reports, as well as costs incurred outside its designated study area, Blanca improperly inflated the federal subsidies it received by millions of dollars.

II. Blanca's procedural challenges are equally meritless. The FCC complied with due process by giving Blanca ample notice and a meaningful opportunity to be heard before the government began collecting on Blanca's unpaid debt. The informal adjudication here likewise complied with all applicable procedural requirements under the Administrative Procedure Act and the federal debt collection laws.

III. The FCC has full authority to recover the improper subsidy payments under the federal debt collection laws. Blanca's surrender of the improper subsidies it received for 2011 and 2012 under an agreement with NECA does not bar the government from seeking recovery of the improper portion of the subsidy payments for 2005 through 2010, and no statute of limitations restricts the government's ability to recover government funds that were improperly obtained.

IV. Blanca's complaints about the record are immaterial, as it has forfeited any arguments or evidence that it did not present to the Commission in its application for review or its petition for reconsideration.

ARGUMENT

I. Blanca's Misreporting In Its Cost Studies Violated Longstanding FCC Rules And Improperly Inflated The Amount Of Federal Subsidies It Received.

Blanca's assertions that it was entitled to all the federal subsidies it received are wrong as a matter of both fact and law. Blanca repeatedly characterizes 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. *Commission Order* ¶¶ 24–25, 33–37 (2.ROA.301–06); *Recon. Order* ¶ 31 (2.ROA.405); Demand Letter at 2–7 (1.ROA.2–7). Blanca further maintains that mobile service can in certain circumstances be eligible for subsidies, but ignores that *it* was certified to receive subsidies only for basic local telephone service to fixed locations within its designated study area; Blanca was never authorized to receive federal subsidies for mobile service, either within or outside its study area. *Commission Order* ¶¶ 35–37 (2.ROA.305–06); *Recon. Order* ¶ 32 (2.ROA.406). And Blanca's claim that it lacked fair notice of these rules is both factually and legally unfounded.

1. 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 4, 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 4, 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); *see Recon. Order* ¶ 31 & n.100 (2.ROA.405).[10]

The FCC and NECA discovered, however, that Blanca in fact provided only *mobile* service, not fixed service—as Blanca has elsewhere conceded. Both Blanca's general manager and its engineers admitted that it did not require that a "customer be located at a fixed location." Demand Letter n.13 (1.ROA.5). When NECA concluded that Blanca's mobile telephone service was not BETRS,

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[10] *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).

see id. at 2–3 (1.ROA.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," *Commission Order* ¶ 13 (2.ROA.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 (2.ROA.304); *see* 1.ROA.11–39. Blanca's service therefore cannot be characterized as BETRS, because "by definition, BETRS is a fixed service." *Recon. Order* ¶ 31 (2.ROA.405).[11]

Blanca briefly suggests (Pet. Br. 7 n.4, 27) that its mobile service could be considered a "fixed" service based on a regulation providing that a mobile subscriber's location is treated for accounting purposes as the subscriber's billing address. But that accounting rule, which is used to determine identical support for competitive carriers rather than cost-based support for an incumbent carrier, "is irrelevant to the determination of whether a service is fixed and subject to rate regulation for * * * the recovery of rate regulated support by an incumbent [carrier]." *Recon. Order* ¶ 31 (2.ROA.405).

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[11] Even if Blanca had used shared infrastructure to provide both fixed-wireless and mobile services—despite the FCC's finding that "Blanca was providing only *mobile* cellular service" over its wireless infrastructure, Demand Letter at 3 (1.ROA.3)—Blanca would have had to divide shared costs between these services under the FCC's cost-allocation rules, which it did not do. *See Commission Order* ¶¶ 4–5, 35 (2.ROA.294–96, 305); *Recon. Order* ¶ 33 & n.112 (2.ROA.407); 47 C.F.R. § 32.14(c).

Blanca's claim that "[t]he States, not the FCC, determine BETRS eligibility" (Pet. Br. 24 n.9) is likewise incorrect. State regulatory commissions certify the "eligible telecommunications carriers" that may be eligible for universal service subsidies as the incumbent carrier or as a competitive carrier in a given study area, 47 U.S.C. § 214(e), but the FCC determines "the services that are supported," *id.* § 254. Under the Commission's rules, Blanca's mobile telephone service was not BETRS and was not eligible for cost-based support provided to an incumbent carrier. And Blanca's brief offers no response at all to the agency's "separate and independent" finding that Blanca improperly claimed subsidies for service outside its state-designated study area. *See Recon. Order* ¶¶ 9, 33 (2.ROA.396, 406) (citing *Commission Order* ¶¶ 36–37 (2.ROA.305–06)); Demand Letter at 6–7 (1.ROA.6–7).

2. Blanca also maintains (Pet. Br. 6–7, 24–25) that it was entitled to these subsidies because mobile services in certain circumstances can receive universal service support. It is true that at the times relevant here, *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 subsidies as a competitive carrier, it was not eligible to receive identical support for its mobile telephone service. *See Commission Order* ¶¶ 35–37 (2.ROA.305–06). Nor did Blanca's

cost studies ever in fact seek identical support (which would have been denied); instead, they claimed only high-cost support, for which mobile telephone service was not eligible. *See id.* ¶ 37 (2.ROA.306) ("Blanca never sought identical support on a correctly calculated per-line basis" and "indeed * * * made no administrative filings to claim identical support at all"). As the Commission explained, "Blanca's many citations to rules and related orders referring to cellular service as an eligible service do not pertain to rate-of-return high-cost universal service support, the kind of support Blanca received between 2005 and 2010." *Recon. Order* n.103 (2.ROA.405).

Blanca further insists (Pet. Br. 27) 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 mandatory tariffing requirements. *See* 47 C.F.R. § 32.14. Mobile telephone service is not subject to these requirements because the FCC has made a determination to forbear from rate regulation of that service. *Commission Order* n.84 (2.ROA.304); *Recon. Order* ¶ 32 (2.ROA.406) (mobile service "is not eligible for inclusion under either state or federal tariffs").

Nor does it matter that Blanca claims to have filed a state tariff specifying rates and terms for basic local telephone service and to have offered its mobile service on those same terms. First, a service is rate-regulated only

if it is subject to mandatory tariffing requirements, so "a carrier's *voluntary* decision to offer [mobile] service on terms defined by a tariff does not transform a mobile service into" a rate-regulated service and "ha[s] no bearing on whether a service is regulated for cost-accounting purposes." *Recon. Order* ¶ 32 (2.ROA.405–06) (emphasis added). Second, even if Blanca had a tariff covering BETRS service, the mobile telephone service it provided was not BETRS, and thus fell outside the scope of the tariff. *See, e.g.*, *All. Commc'ns Coop., Inc. v. Glob. 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).

3. Finally, Blanca's claim that it lacked fair notice of these requirements (Pet. Br. 35–41) is baseless. On the contrary, the orders here rest on longstanding FCC rules and NECA guidance regarding the same. *Commission Order* ¶¶ 38–39 (2.ROA.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 (2.ROA.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"—so any claim that it was confused about the rules is no defense here. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985).

II. The FCC Complied With All Applicable Procedural Requirements.

Blanca raises several procedural objections to the FCC's handling of this proceeding, but none of its objections is sound.

A. The FCC Afforded Blanca Due Process By Giving It Notice And An Opportunity To Be Heard.

Due process requires 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 agency gave Blanca detailed notice in the Demand Letter of the factual and legal basis for seeking repayment of the improper subsidies. *Commission Order* ¶ 48 (2.ROA.312). Blanca then had opportunity to raise any objections before the government commenced any collection efforts, and Blanca availed itself of that opportunity by filing its application for review objecting to the Demand Letter. *Id.* ¶ 50 (2.ROA.313); *see* 1.ROA.11–81. After considering Blanca's arguments, the full Commission issued a comprehensive order addressing each of Blanca's objections. *See* 2.ROA.293–317. Due process requires nothing more. *See Recon. Order* ¶ 34 (2.ROA.407).

Blanca nonetheless appears to argue (Pet. Br. 32–33) that the agency was required to give it official notice and opportunity to be heard before issuing the Demand Letter. That is incorrect. As this Court has held, "due process is required not before the initial decision or recommendation to terminate is made, but instead before the termination actually occurs." *Riggins v. Goodman*, 572 F.3d 1101, 1110 (10th Cir. 2009); *see Recon. Order* ¶ 34 & n.115 (2.ROA.407). That is because a due process claim arises "[o]nly after finding the deprivation of a protected interest," *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999), and the Demand Letter itself did not deprive Blanca of anything.

Here, the government did not commence any collection measures (such as the administrative offset) until after Blanca had opportunity to present its objections to the Demand Letter and the Commission gave its reasons for denying the objections.[12] 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

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[12] Nothing suggests that the Commission approached Blanca's objections to the staff's Demand Letter with an unalterably closed mind or refused to meaningfully consider its arguments. And to the extent Blanca objects to the institution of an administrative offset prior to judicial review, Blanca repeatedly exercised its right to seek a judicial stay or injunction pending review from this Court—yet simply failed to show that it was entitled to relief. *Cf. Recon. Order* ¶ 39 (2.ROA.409–10) (discussing Blanca's failure to show good cause for interim relief).

was due process satisfied when the agency gave notice in the Demand Letter of the basis for this action and then gave Blanca a meaningful opportunity to have any objections heard by the Commission before the government undertook any collection measures. Nothing further was required here.[13]

In any event, the Demand Letter 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 (1.ROA.2); *id.* nn.16 & 18 (1.ROA.6); its general manager and engineers provided oral testimony, *id.* n.13 (1.ROA.5); and it presented written arguments from legal counsel, *id.* at 4 (1.ROA.4). And because the agency relied on Blanca's own records and used the same accounting methodology as Blanca's own cost consultant, *see Commission Order* n.41 (2.ROA.299); *id.* ¶ 49 (2.ROA.312–13), Blanca had full access to the relevant facts and data throughout the investigation and ample opportunity to present additional evidence or argument at any time.

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[13] *Cf. 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."); *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.").

B. 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. *Commission Order* ¶ 40 (2.ROA.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 (2.ROA.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. *Commission Order* ¶ 42 (2.ROA.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.[14] *Commission Order* ¶ 47 (2.ROA.312); *Recon. Order* ¶ 34 (2.ROA.407). Blanca insists that the agency should have given it additional process (Pet. Br. 32–34, 42–44), 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. 2009) (internal quotation marks omitted). The informal adjudication here also fulfilled all applicable requirements under the federal debt collection laws. *See Commission Order* ¶ 47 (2.ROA.312).

Contrary to Blanca's contentions (Pet. Br. 34–35, 40, 42–43, 44–46), this debt-collection action is not subject to the special procedures governing assessments of "forfeiture penalties" 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 that Blanca improperly obtained; it does not seek to assess an additional forfeiture penalty. *Commission Order* ¶ 43 (2.ROA.310). As the D.C. Circuit has explained, Section 503(b) gives the Commission authority in certain situations to assess

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[14] 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.").

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 recent consent decrees in which the FCC settled forfeiture proceedings initiated under Section 503(b) for universal service violations (Pet. Br. 34 & n.14, 50–51, 53), but in those cases the FCC invoked the forfeiture process only to seek penalties *in addition to*, and separate from, seeking repayment (and indeed after the companies at issue had already returned the improper payments). *See Recon. Order* ¶¶ 24, 35 (2.ROA.402, 407). Here, by contrast, the Commission has not assessed any forfeiture penalty; the *Order* "merely seek[s] to recover sums improperly paid" rather than to impose "a sanction or penalty" or other "punitive measure." *Commission Order* ¶ 45 (2.ROA.311). The Commission's determination that Section 503 does not apply in these circumstances comports with the plain language of the statute.[15]

III. The FCC Has Authority To Recover The Improper Subsidies Blanca Obtained For 2005 To 2010.

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

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[15] Even if the Court found ambiguity in the statutory language, the Commission's interpretation of Section 503 is at least reasonable. *In re FCC 11-161*, 753 F.3d at 1122.

A. The FCC Can Recover Improper Subsidy Payments Under The Federal Debt Collection Laws.

There is no merit to Blanca's argument (Pet. Br. 49–50) that the improper subsidies paid to Blanca are not federal funds recoverable under the federal debt collection laws.

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." *Commission Order* ¶ 51 (2.ROA.313) (some internal quotation marks omitted); *see also Recon. Order* ¶ 36 & n.124 (2.ROA.408). 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 Commission Order* ¶ 33 (2.ROA.304); *Recon. Order* ¶ 36 (2.ROA.408). Indeed, 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." *Commission Order* ¶ 51 & n.148 (2.ROA.313).

Blanca instead points to a single 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, *see id.* at 383 (citing 31 U.S.C. § 3729 (2008)), not the federal debt collection laws. *Recon. Order* ¶ 36 (2.ROA.408). *Shupe* held that statements made to USAC before 2009 did not implicate the False Claims Act 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 False Claims Act, 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. *Recon. Order* n.94 (2.ROA.408). The overpayments here are therefore federal funds that are recoverable as a debt owed to the United States under the federal debt collection laws.[16]

B. Blanca's Surrender Of Improper Payments For 2011 And 2012 Does Not Prevent The Government From Recovering Improper Payments For 2005 To 2010.

Blanca further argues (Pet. Br. 10–11, 30–31) that the FCC should not be allowed to recover the improper payments Blanca obtained between 2005 and 2010 because any dispute was supposedly "settled" when Blanca agreed

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[16] Even if this case arose under the different language formerly in the False Claims Act, *Shupe* is unpersuasive and has repeatedly been rejected by other courts. *See Commission Order* n.77 (2.ROA.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 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 False Claims Act. 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 Commission Order* ¶ 51 & n.148 (2.ROA.313). In any event, because the FCC has since transferred the Universal Service Fund from a private banking account to the U.S. Treasury, the essential premise of the *Shupe* decision no longer applies to the Fund. *Recon. Order* n.121 (2.ROA.408).

with NECA to relinquish the improper subsidies it obtained in 2011 and 2012. That argument is forfeited, wrong, and foreclosed by precedent.

To begin with, the Commission explained, Blanca forfeited this argument by failing to raise it in the initial proceedings before the Commission and seeking to assert it for the first time in a petition for reconsideration. *Recon. Order* ¶¶ 18, 27 (2.ROA.399–400, 403–04); 47 C.F.R. §§ 1.106(b)(2), 1.115(g) (limiting reconsideration to evidence and arguments that could not reasonably have been raised earlier); *see also* 47 U.S.C. § 405(a) (similar); *Colo. Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) ("No judging process * * * could operate efficiently or accurately" if a party could "sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence."). Blanca nowhere acknowledges or offers any valid basis to overcome that procedural bar.

The argument is also meritless, as the Commission ruled in the alternative. *See Recon. Order* ¶ 30 (2.ROA.404). For one thing, "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. *Ibid.*; *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."). For another, the fact that NECA directed Blanca to revise its 2011 and 2012 cost studies "does not speak to

Blanca's responsibility for improper payments it obtained in earlier years or absolve Blanca of liability for those payments." *Recon. Order* ¶ 30 (2.ROA.404). 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. *Id.* ¶ 30 & n.93 (2.ROA.404) (quoting NECA Pool Administration Procedures (2012)); *see also Commission Order* n.37 (2.ROA.299).

Lastly, the argument is foreclosed by this Court's decision in *Farmers Telephone*. *See Recon. Order* ¶ 30 & n.95 (2.ROA.404–05). That case addressed a 1997 order which found that NECA had misinterpreted an FCC regulation that took effect in 1993. *Farmers Tel.*, 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.

C. No Statute Of Limitations Restricts The FCC's Ability To Recover Improper Payments.

Blanca also contends (Pet. Br. 44–50) 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, and 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 explicitly *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. 44–47) to the one-year limitations period for "forfeiture penalt[ies]" under 47 U.S.C. § 503(b)(6), but as previously explained, that provision does not apply because this debt-collection action is not a forfeiture proceeding. Blanca then points (Pet. Br. 47–50) to the five-year limitations period for civil penalties under Section 2462, 28 U.S.C. § 2462, but that provision likewise does not apply here.

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 because the *Order* does not seek to impose any fine, penalty, or forfeiture on Blanca, but instead "merely seek[s] to recover sums improperly paid." *Commission Order* ¶ 45 (2.ROA.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*." *Commission Order* ¶ 45 (2.ROA.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 steward of the funds and seeks only to recover the amount 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.[17]

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[17] When calculating the amount that Blanca must repay, the Commission allowed Blanca to retain all payments it received for legitimate costs it incurred to provide basic local telephone service to fixed locations. It has sought repayment only of the amount that Blanca misappropriated for other uses for which subsidies were not authorized. *See* Demand Letter Attach. A (1.ROA.9) (calculating the total amount of subsidies Blanca received, deducting the portion corresponding to legitimate expenses Blanca incurred to provide fixed service, and demanding repayment only of the net amount of improper subsidies Blanca obtained through its improper cost reporting).

Commission Order ¶¶ 44–45 (2.ROA.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.").[18]

IV. Blanca's Complaints About The Record Are Immaterial.

Finally, Blanca's myriad complaints about the record (Pet. Br. 22–23) are meritless. As the foregoing discussion shows, the record provides ample support for the Commission's rulings on all issues before the Court here. The record materials filed with the Court include all related documents lodged in the Commission's electronic docketing system, including all pleadings and all attached evidence submitted by Blanca in connection with its application for review and its petition for reconsideration (with one exception).[19]

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[18] Blanca also objects (Pet. Br. 51–52) to a supposed referral to the Department of Justice, but the Department of Justice has not commenced any action against Blanca, and a referral to open an investigation is not final agency action subject to judicial review in any event. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980).

[19] The sole exception is a document that Blanca sought to present to the Commission only after all agency proceedings had concluded (and after Blanca filed its petitions for review), and thus that was not part of the

Because a party forfeits any arguments or evidence not presented to the Commission in its application for review or in a petition for reconsideration, any other materials are irrelevant. *See*, *e.g.*, *FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 696 (D.C. Cir. 2015) (argument forfeited where the party "failed to make th[e] argument in its Application for Review to the Commission [nor] in its Petition for Reconsideration"); *Environmentel, LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011) ("raising an argument before [agency staff] is not enough to preserve it for review before this Court; a party must raise the issue before the Commission as a whole"); *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279–80 (D.C. Cir. 1997) ("The Commission 'need not sift documents and pleadings to identify' arguments that 'are not stated with clarity' by a petitioner," and "[t]he mere fact that the Commission discusses an issue" is not enough to overcome a forfeiture); *see also Recon. Order* ¶ 25 & nn.81–82 (2.ROA.402–03).[20]

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record before the agency when it issued the orders under review. *See* Resp. FCC's Opp. to Pet.'s Mot. to Correct & Supp. the Record, Nos. 20-9510 & 20-9524 (filed Apr. 2, 2020). That document is not relevant to any issues disputed in this appeal.

[20] *Cf. Nat. Resources Def. Council v. U.S. Nuclear Reg. Comm'n*, 879 F.3d 1202, 1209 (D.C. Cir. 2018) (Just as "a court is not required to plumb the record for 'novel arguments a litigant could have made but did not," there is "no reason agency officials engaged in adjudication should be any more obligated than judges to do counsels' work for them.") (citations omitted).

Thus, for example, Blanca forfeited any challenge to the factual finding that its wireless offerings were mobile rather than fixed service. Rather than challenge that finding before the Commission, Blanca conceded that it provided mobile service, with its application for review repeatedly describing its wireless offerings as a "mobile cellular system," "mobile cellular service," or "mobile service." *Commission Order* ¶ 34 & n.83 (2.ROA.304); *see* 1.ROA.11–39. Similarly, whereas Blanca now complains (Pet. Br. 23) that the Commission has not filed the reams of cost data underlying its calculation of the total repayment owed, Blanca never challenged the agency's accounting of the *amount* it must repay—only whether it must make any repayment at all. *See Commission Order* ¶ 34 (2.ROA.304) (Blanca "has not challenged the accuracy of [the agency]'s accounting"); *id.* ¶ 49 (2.ROA.313) ("Blanca did not make any attempt to contest the accuracy of the accounting."). Indeed, all of the cost data were already in Blanca's possession. *See Commission Order* n.41 (2.ROA.299); *id.* ¶ 49 (2.ROA.312–13). Blanca was free to submit any such material to the Commission in its application for review or petition for reconsideration, but it has now forfeited reliance on any evidence or arguments that it did not present in those filings.

Finally, as to Blanca's requests for additional information from the government or from NECA (which is a private association separate from the government), the Commission explained that those requests are not relevant

to the issues here and that Blanca itself "d[id] not state that such records request has any bearing on its ability to challenge the [Demand] Letter." *Commission Order* ¶ 49 & n.142 (2.ROA.312–13).

CONCLUSION

Blanca's petition for review in No. 20-9524 should be denied. The premature petition for review in No. 20-9510 should be dismissed for lack of jurisdiction or, in the alternative, dismissed as moot or denied on the merits in accordance with the Court's disposition of the petition in No. 20-9524. *See supra* note 2.

STATEMENT REGARDING ORAL ARGUMENT

Respondents submit that the facts and legal issues are adequately presented in the briefs and in the thorough agency orders on review, and the petitions for review can therefore be denied or dismissed without oral argument. Nevertheless, if the Court believes that oral argument is warranted, respondents stand ready to appear.

Dated: July 1, 2020

Respectfully submitted,

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I hereby certify that on July 1, 2020, 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 five 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.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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

§ 3701. Definitions and application

* * *

(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. § 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 U.S.C. § 503 provides in pertinent part:

§ 503. Forfeitures

* * *

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

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

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

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

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, 1464, or 2252 of title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II, part II or III of subchapter III, or section 507 of this title.

* * *

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

* * *

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

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

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

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

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

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required * * * . Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

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

(B) such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

* * *

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).