

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

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

**MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION**

**Adopted: December 8, 2017**

**Released: December 8, 2017**

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

**I. INTRODUCTION**

1. The high-cost universal service support program (the high-cost program) supports the deployment of communications networks in high-cost, rural areas. In 1997, pursuant to section 254 of the Communications Act of 1934, as amended (Act),<sup>1</sup> the Colorado Public Utility Commission designated Blanca Telephone Company (Blanca) as an eligible telecommunications carrier (ETC) in parts of Alamosa and Costilla counties.<sup>2</sup> As a result, Blanca became eligible to receive high-cost support for providing local exchange telephone service in its designated study area.<sup>3</sup> As a rate-of-return incumbent local exchange carrier (incumbent LEC), the amount of high-cost support Blanca received was based on the costs it incurred in providing rate-regulated telephone service in its designated study area. Soon after its designation, Blanca began to offer commercial mobile radio service (CMRS), a nonregulated service, both within and outside of its study area. Thereafter, Blanca included the costs of this nonregulated service in the regulated cost accounts it submitted to the National Exchange Carriers Association (NECA) with respect to its designated study area, thus inflating the amount of high-cost support Blanca received from the Universal Service Fund (USF). In 2012, NECA discovered Blanca’s improper inclusion in its rate base of nonregulated costs. NECA directed Blanca to correct its cost accounting for 2011 and later years, and the Commission’s Office of the Managing Director (OMD) directed Blanca to return \$6,748,280 in improperly paid universal service support for 2005-2010 with respect to Blanca’s designated study area.

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<sup>1</sup> 47 U.S.C. § 254.

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

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

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

## II. BACKGROUND

### A. Regulatory Framework

3. The high-cost universal service support program is one of four universal service programs created by the Federal Communications Commission (FCC or Commission) to fulfill its statutory mandate to help ensure that consumers have access to modern communications networks at rates that are reasonably comparable to those in urban areas.<sup>5</sup> Under the Commission's rules governing the high-cost program, incumbent LECs and competitive carriers designated as ETCs may receive high-cost support, but the legal and administrative framework for determining how much support they receive is different.

#### 1. Rate-of-Return High-Cost Support

4. Pursuant to the Commission's rules in effect at the time in question, rate-of-return incumbent LECs designated as ETCs, like Blanca, received high-cost support based on their embedded costs in providing local exchange service to fixed locations in high-cost areas.<sup>6</sup> Such support was intended to ensure the availability of basic telephone service at reasonable rates.<sup>7</sup> To that end, the Commission's accounting and cost allocation rules worked to ensure that incumbent LECs received a reasonable return on investment in the deployment and offering of supported services in high-cost areas within their respective study areas.<sup>8</sup> By limiting the availability of such support to a rate-of-return incumbent LEC's regulated costs within its study area, the accounting and cost allocation methods countered the incentive to engage in anticompetitive practices, such as predatory cross-subsidization, that

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

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

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

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

<sup>8</sup> See *2000 Biennial Regulatory Review - Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers*, CC Docket Nos. 00-199 et al., Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19913, 19960-61, paras. 126-27 (2001) (modifying section 32.11 of the Commission's rules to make explicit that Part 32 accounting rules applied only to incumbent LECs, as that term is defined in section 251(h)(1) of the Act, and any other company deemed dominant); see also *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 4, para. 15 (1980) (explaining that dominant carriers have "substantial opportunity and incentive to subsidize the rates for [their] more competitive services with revenues obtained from [their] monopoly or near-monopoly services").

might dampen competitive markets for other forms of communication technology.<sup>9</sup> As the Commission has explained, “[t]hese rules ensure that carriers compete fairly in nonregulated markets and that regulated ratepayers do not bear the risks and burdens of the carriers’ competitive, or nonregulated, ventures.”<sup>10</sup>

5. Rate-of-return carriers record their investments, expenses, and other financial activity in the Part 32 uniform system of accounts (USOA), which is divided into two types of accounts: regulated and nonregulated accounts.<sup>11</sup> Investment and expenses entirely associated with the provision of a regulated activity, or that are used for both regulated and nonregulated services, are recorded in the regulated accounts.<sup>12</sup> Investment and expenses entirely associated with the provision of nonregulated activity are assigned to the nonregulated accounts and are not included when determining a carrier’s interstate rate base or revenue requirement.<sup>13</sup> Investment and expenses recorded in the regulated accounts of the USOA are then subdivided in accordance with procedures contained in Part 64 of the Commission’s rules.<sup>14</sup> Those rules generally provide that costs shall be directly assigned to either regulated or nonregulated activities where possible, and common costs associated with both regulated and nonregulated activities are allocated according to a hierarchy of principles.<sup>15</sup> To the extent costs cannot be allocated based on direct or indirect cost causation principles, they are allocated based on a ratio of all expenses directly assigned or attributed to regulated and nonregulated activities.<sup>16</sup> The investment and

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

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

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

<sup>12</sup> See 47 CFR § 32.14(c).

<sup>13</sup> See *id.* § 32.14(f).

<sup>14</sup> See *id.* §§ 64.901-905.

<sup>15</sup> See *id.* § 64.901.

<sup>16</sup> See *id.* § 64.901(b)(3)(iii).

expenses allocated to nonregulated services through this process are excluded from the development of the regulated interstate rate base and revenue requirement. The regulated investment and expenses remaining after the application of the Part 64 process are then split between the intrastate and interstate jurisdictions in accordance with the separations process described in Part 36.<sup>17</sup> The regulated interstate investment and expenses flowing from the separations process are the inputs to the development of cost-based rates and support programs.

## 2. Identical Support

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

7. The difference in the support calculation requirements for rate-of-return LECs and competitive ETCs reflected the different policy goals of the two kinds of support. The rate-of-return support mechanism worked to ensure that the incumbent LEC deemed to hold market power received a reasonable return on its investment in the provision of telecommunications services to fixed locations in high-cost areas. Identical support, in contrast, was intended to ensure that “the support flows” to the carrier “incurring the economic costs of serving that line,” “in order not to discourage competition in high-cost areas.”<sup>19</sup> Accordingly, the Commission made high-cost support “portable” on a per-line basis to any competitive ETC providing service through its “owned and constructed facilities.”<sup>20</sup> Moreover, because the Commission adopted the identical support mechanism in furtherance of efficient solutions, competitive ETCs could qualify for identical support, “regardless of the technology used.”<sup>21</sup>

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<sup>17</sup> See *id.* § 36.1 *et seq.*

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

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

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

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

### 3. Administration of Support and Collection Efforts

8. Rate-of-return incumbent LECs submit their cost data to NECA which is a membership organization of incumbent LECs. NECA is responsible for collecting its members' cost study data and filer certifications of that data, and any other information necessary for NECA to calculate the amount of High-Cost Loop Support (HCLS) which its members are eligible to receive.<sup>22</sup> NECA submits the results of its calculations to the Universal Service Administrative Company (USAC), which is responsible for day-to-day administration of the high-cost support program.<sup>23</sup> In addition to the information it receives from NECA, USAC collects carrier data and information relevant to the calculation of other forms of support.<sup>24</sup>

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

10. When submitting data to either NECA or USAC, carriers certify the accuracy of the data reported.<sup>26</sup> As administrator of the USF, USAC has the authority and responsibility to audit USF payments.<sup>27</sup> Pursuant to a separate statutory authority in the Inspector General Act of 1978, the FCC's Office of Inspector General (OIG) also initiates investigations of USF payments to beneficiaries to coordinate prosecutions for waste, fraud, and abuse.<sup>28</sup> The Commission has designated the Managing Director as the agency official responsible for ensuring "that systems for audit follow-up and resolution are documented and in place, that timely responses are made to all audit reports, and that corrective actions are taken."<sup>29</sup> The Commission resolves contested audit recommendations and findings, either on

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<sup>22</sup> See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4796, para. 476 (2011) (explaining that NECA collects data necessary for the calculation of HCLS while USAC administers other aspects of the fund, including identical support); 47 CFR §§ 36.611-613, 54.1305-1306 (detailing incumbent LEC submission of cost data to NECA), 54.1307 (detailing NECA's submission of cost data to USAC); 54.707(b) (establishing USAC's authority obtain all carrier submissions, and underlying information from NECA); see also *id.* § 69.601 *et seq.*

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

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

<sup>25</sup> 47 CFR §§ 54.307, 54.807, 54.901(b), 54.903(a)(2).

<sup>26</sup> See *id.* § 69.601(c) (requiring certification of the accuracy of USF data submitted to NECA); *id.* § 54.904(a) (requiring certification that all interstate common line support receive "will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended"); *id.* § 54.314 (requiring state commissions (or the rural telephone company itself when not subject to the jurisdiction of the state) to certify that the support received by a rural telephone company will only be used for its intended purpose); see also, e.g., Instructions for Completing Connect America Fund Broadband Loop Support, Actual Cost and Revenue Data, Form 509 (requiring certification of accuracy and compliance with Commission's cost allocation rules when submitting data for true up of interstate common line support), at <http://www.usac.org/res/documents/hc/pdf/forms/509i.pdf>.

<sup>27</sup> 47 CFR § 54.707 (endowing USAC with authority to audit carriers).

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

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

appeal from the Wireline Competition Bureau (WCB) or directly, if the challenge raises novel questions of fact, law, or policy.<sup>30</sup>

11. The Commission has also long emphasized its authority and obligation to recover USF sums disbursed contrary to Commission rules.<sup>31</sup> Under section 3701 of the Debt Collection Improvement Act (DCIA), the Commission has authority to determine whether a debt is owed to the Commission.<sup>32</sup> The DCIA and the Federal Claims Collection Standards (FCCS) promulgated by the Department of Treasury and the Department of Justice to implement the DCIA require the Commission to aggressively collect all debt owed to it.<sup>33</sup> The Commission has delegated to the Commission's Managing Director and the Managing Director's designee authority to make administrative determinations pursuant to the DCIA.<sup>34</sup>

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

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

13. In 2008, the FCC's OIG commenced an investigation into Blanca's receipt of high-cost support beginning with 2004. In 2012, during the pendency of the OIG investigation, and pursuant to its data reconciliation policies, NECA conducted a review of Blanca's 2011 Cost Study, and concluded that Blanca improperly included costs, loops, and revenues associated with providing CMRS, which is a non-regulated service, in its 2011 Cost Study.<sup>36</sup> NECA directed Blanca to revise its 2011 cost studies and all ensuing studies to remove such costs.<sup>37</sup> In response to NECA's request, Blanca retained a cost consultant

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

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

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

<sup>33</sup> 31 U.S.C. § 3711(a); 31 CFR § 901.1(a).

<sup>34</sup> 47 CFR § 0.231(f).

<sup>35</sup> *See* Application at 24 (acknowledging that Blanca sought support for mobile services).

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

<sup>37</sup> *See* NECA True Up Notice. NECA did not seek to recover past high-cost distributions from Blanca for the 2005-2010 period because NECA's cost pools operate within a 24-month settlement window. Under NECA's policies and procedures, member companies execute an agreement which specifies the existence of a window that allows

(continued....)

to review and revise Blanca's submissions because Blanca did not track or allocate expenses associated with providing local service to customers over its landline and cellular systems or the expenses associated with providing service to customers of other carriers roaming on Blanca's cellular system, both inside and outside of Blanca's study area.<sup>38</sup> At no point during this reconciliation process did Blanca contest NECA's determination that Blanca's wireless offerings should be excluded from the costs used to calculate Blanca's high-cost support.

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

15. As required by section 54.707(c) of the Commission's rules, USAC provided the Commission with copies of "Blanca's books and records obtained during the OIG investigation and Blanca's own revision of its cost study and other filings for the post 2011 period."<sup>40</sup> Based on its analysis of that information, OMD determined that Blanca owed the Commission \$6,748,280 in high-cost support overpayments received by Blanca between 2005 and 2010.<sup>41</sup>

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

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exchange carriers to update or correct data for up to 24 months after the data was initially reported. Pool Administration Procedure, § 1.3, at p.1.6 (2013); *Universal Service High-Cost Filing Deadlines*, WC Docket No. 08-71, Order, 30 FCC Rcd 1879, 1882 n.28 (2015) (This 24-month adjustment window is the product of a contractual agreement between NECA and its member companies and has been in place since NECA began operations in the early 1980s). NECA therefore directed Blanca to revise and refile its 2011 Cost Study to remove costs and revenues attributable to its wireless system so that any necessary adjustments could be made within the applicable window. NECA also informed that any support payments "accepted and processed by USAC corresponding to data corrections outside of the 24-month settlement window are the obligation of the company." Pool Administration Procedure, § 1.3, at p.1-9.

<sup>38</sup> See OMD Letter at 2.

<sup>39</sup> OMD Letter at 3.

<sup>40</sup> *Id.* at 7.

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

eligible for high-cost support its costs of providing nonregulated cellular mobile telephone service,<sup>42</sup> and demanded immediate repayment of the \$6,748,280 that Blanca had improperly received.<sup>43</sup>

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

### C. Blanca's Challenges to the OMD Letter

18. On June 16, 2016, Blanca filed an Emergency Application for Review of the OMD Letter.<sup>46</sup> On June 24, 2016, Blanca filed a Petition for Reconsideration of the OMD Letter.<sup>47</sup> The arguments advanced by Blanca in the Petition and the Application are substantially the same. Stripped to their essence, Blanca argues that: (1) USF support is available for wireless services;<sup>48</sup> (2) in areas outside of its rate-of-return study area, Blanca was entitled to receive identical support as a competitive ETC and so any USF overpayments for misallocating CMRS-related expenses are offset by the identical support it could have received if correctly reported;<sup>49</sup> (3) recovery against Blanca would be inequitable;<sup>50</sup> (4) seeking to recover USF payments in an "*ex parte* summary proceeding" violates Blanca's due process rights;<sup>51</sup> (5) OMD is improperly imposing a forfeiture penalty under section 503 of the Act;<sup>52</sup> (6) the Commission has no authority to act under the DCIA because it applies only to "executive, judicial, or legislative" agencies and does not apply to "independent agencies," such as the Commission;<sup>53</sup> and (7) the OMD Letter is fatally flawed because it does not provide Blanca with an opportunity for administrative review prior to a monetary deprivation and denies Blanca the opportunity to review the Commission's records pertaining to the debt determination.<sup>54</sup>

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

20. Blanca later filed four separate motions for leave to supplement its Application and Petition.<sup>56</sup> On December 19, 2016, Blanca filed its First Supplement claiming that two court decisions

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<sup>42</sup> OMD Letter at 2.

<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.* at 8.

<sup>45</sup> *Id.*

<sup>46</sup> Application.

<sup>47</sup> Petition.

<sup>48</sup> Application 5-6; Petition at 5-7.

<sup>49</sup> Application at 6; Petition at 17.

<sup>50</sup> Application at 23; Petition at 22.

<sup>51</sup> Application at 9-10.; Petition at 7-9 & n.4.

<sup>52</sup> Application at 15-18; Petition at 3, 14-17.

<sup>53</sup> Application at 19-20; Petition at 18-19.

<sup>54</sup> Application at 21-23; Petition at 20-21.

<sup>55</sup> Letter from Mark Stephens, Acting Managing Director, OMD, FCC to Timothy E. Welch, Counsel (dated June 22, 2016).

<sup>56</sup> Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Dec. 19, 2016) (First Supplement); Second Motion for Leave to Supplement Emergency Application for Review, CC Docket No.

(continued....)

involving the question of whether USF debt is federal debt for purposes of False Claims Act (FCA) prosecutions support its arguments.<sup>57</sup> In that supplement Blanca also expresses concern that that two newly released Commission Notices of Apparent Liability for Forfeiture (NALs) announce a new statute of limitations theory under section 503 of the Act, which the Commission could use against Blanca.<sup>58</sup>

21. On March 30, 2017, Blanca filed its Second Supplement, notifying the Commission that Blanca has discontinued offering CMRS as of March 28, 2017.<sup>59</sup> Blanca asserts that the disclosure is “factually useful in the Commission’s consideration of the USF funding issue current under review.”<sup>60</sup>

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

23. On July 5, 2017, Blanca filed its Fourth Supplement, arguing that a recent Supreme Court decision compels the Commission to treat this recovery action as a penalty time barred by the one-year statute of limitations in section 503 of the Act.<sup>63</sup> Blanca also notified the Commission that it has requested that NECA provide it with copies of all documents that NECA submitted to OIG in response to the April 20, 2017, OIG subpoena for information relating to the calculation of Blanca’s USF payments between January 1, 2005, and December 31, 2012, and “copies of any other subpoenas which the Commission might have served upon NECA.”<sup>64</sup>

### III. DISCUSSION

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

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

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

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

<sup>59</sup> Second Supplement.

<sup>60</sup> *Id.* at 1.

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

<sup>62</sup> Third Supplement at 5-10.

<sup>63</sup> See generally, Fourth Supplement (citing *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017)).

<sup>64</sup> See Fourth Supplement at 5-6.

support, and USAC paid Blanca more USF support with respect to this study area than the amount to which it was entitled based on such calculations.

25. In defending its actions, Blanca erroneously asserts that because it used high-cost support to deploy CMRS and because wireless service is a supported service, Blanca was entitled to the support that it received. But this argument is inconsistent with the plain language of Commission rules and orders requiring rate-of-return carriers such as Blanca to separate out their nonregulated costs from the rate base upon which high-cost support is based, to promote the competitive and other public interest goals of section 254 of the Act. Blanca also attacks the process used by OMD to seek repayment of the overpayments made to Blanca. In so doing, Blanca ignores Commission rules and precedent as well as the Commission's obligation to protect the Universal Service Fund from waste, fraud and abuse. We thus affirm the factual, legal, and technical findings in the OMD Letter and direct OMD to proceed with collection.

#### A. Consideration of Blanca's Late-Filed Supplements

26. As an initial matter, we address Blanca's motions to accept its four supplements, all filed by Blanca well after the 30-day deadline for an appeal of the OMD letter—July 5, 2016.<sup>65</sup> The Commission has explained that a strict enforcement of filing deadlines is “both necessary and desirable” to avert the “grave danger of the staff being overwhelmed by a seemingly never-ending flow of pleadings.”<sup>66</sup> In general, we will deny consideration of late-filed pleadings that raise arguments and facts that could have been presented within the 30-day deadline.<sup>67</sup> We have the discretion, however, to grant leave to file late pleadings where “equities so require and no party would be prejudiced thereby.”<sup>68</sup>

27. We grant Blanca's motion to accept its late-filed Second and Fourth Supplements. In each, Blanca has identified new facts and arguments that occurred after July 5, 2016. In the Second Supplement, Blanca points to the fact that it ceased offering nonregulated CMRS in March 2017.<sup>69</sup> In the Fourth Supplement, Blanca points to a 2017 United States Supreme Court decision that it claims is on

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

<sup>66</sup> *Pathfinder Communications Corporation*, Memorandum Opinion and Order, 3 FCC Rcd 4146, 4146, para. 5 (1988). The D.C. Circuit Court of Appeals has also generally discouraged the Commission from accepting late petitions in the absence of extremely unusual circumstances. *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951–52 (D.C. Cir. 1986); *cf. Gardner v. FCC*, 530 F.2d 1086, 1091–92 & n. 24 (D.C. Cir. 1976).

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

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

<sup>69</sup> *See* Second Supplement at 1.

point.<sup>70</sup> We find the public interest is served by considering the relevance of these arguments to the instant action.

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

29. Blanca's assertion in its First Supplement—that two NALs and the Commission's Writ Opposition filed with the D.C. Circuit constitute changes in the law or in the Commission's interpretation of the law—is specious.<sup>72</sup> The Commission's analysis of the relevant legal issues was based on long-standing precedent and principles that Blanca had ample opportunity to review and incorporate into its timely filed Application and Petition. For example, the legal position that the collection of debt is not a forfeiture barred by the passage of time, as raised in the two NALs cited by Blanca and issued after the issuance of the OMD Letter, is expressly based on long-standing precedent, including 1938 and 1946 decisions by the U.S. Supreme Court and orders by the Commission and the WCB released in 2011 and 2014, respectively, establishing that the denial of funding is not a forfeiture action and the statute of limitations in section 503 of the Act is therefore inapplicable to the recovery of government funds improperly paid.<sup>73</sup> Likewise, the applicability of the DCIA to the recovery of federal debts is supported by precedent almost 30 years old and did not involve any new interpretation of the relevant law.<sup>74</sup>

30. Further, we find unpersuasive Blanca's characterization of a new argument as “non-obvious” to justify a late filed supplement. The cases Blanca “discovered” were issued by the 10th Circuit in 1999 and the 5th Circuit in 2014, well in advance of the 30-day deadline.<sup>75</sup> Both of these cases, as with the instant action, involve USF support.<sup>76</sup> We thus find no reasonable basis, and Blanca proffers none, for concluding that Blanca could not, “through the exercise of ordinary diligence,” have learned of, and timely raised, the relevance of these cases prior to the deadline.<sup>77</sup>

31. Likewise, and contrary to Blanca's contentions, Blanca's arguments in its Third Supplement are not based on a new interpretation of the law by the Commission. The legal positions

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<sup>70</sup> See generally, Fourth Supplement (citing *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017)).

<sup>71</sup> See 47 CFR § 1.3.

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

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

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

<sup>75</sup> See First Supplement at 15-16.

<sup>76</sup> See *id.*; see also *Farmers*, 184 F.3d at 1250; *Shupe*, 759 F.3d at 377-88.

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

taken by the Commission in the *Sandwich Isles NAL* were based on long-standing precedent.<sup>78</sup> To the extent Blanca's arguments are about precedent for forfeiture proceedings, they are not relevant here, because this is not a forfeiture proceeding.<sup>79</sup> Moreover, the mere fact Blanca referenced a Public Notice in its original Application and Petition mentioning the Sandwich Isles proceeding and that the Sandwich Isles proceeding involved a fact pattern that Blanca claims is like its own does not justify, in this case, consideration of its late-filed supplement.

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

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

33. In order to implement its universal service obligations, section 254(k) of the Act requires the Commission to "establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." Section 254(b)(5) also requires the Commission to implement universal service mechanisms that are "specific, predictable and sufficient."<sup>80</sup> Parts 36, 64, and 69 of the Commission's rules are designed to ensure discharge of these statutory mandates.

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

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

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

<sup>80</sup> 47 U.S.C. § 254(b)(5).

<sup>81</sup> See OMD Letter at 2.

<sup>82</sup> See *id.*

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

<sup>84</sup> CMRS is classified as a nonregulated service for accounting and cost allocation purposes, because the Commission has chosen to forbear from rate regulation of these wireless services. See *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668, 15691, para. 33 n.102 (1997); *Implementation of the Telecommunications Act of 1996*, CC Docket No. 96-193, Report and Order, 12 FCC Rcd 8071, 8095, para. 53 (1997); *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, GN Docket No. 94-90, Report and Order, 10 FCC Rcd 6280, 6293-94 & n.77 (1995); *Implementation of Sections 3(n) and 332 of the*

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35. Blanca is a rural telephone company designated as an ETC for the provision of tariffed local exchange service in the relevant study area 462182, which as noted above covers portions of Alamosa and Costilla counties in Colorado.<sup>85</sup> Blanca joined NECA as a rate-of-return incumbent LEC and was treated for regulatory purposes as such.<sup>86</sup> As a rate-of-return incumbent LEC, Blanca was required by our Part 64 rules to allocate its costs between regulated services and nonregulated service so that NECA and USAC could correctly compute their eligibility for HCLS, Safety Net Additive Support (SNA), and Local Switching Support (LSS), but failed to do so.<sup>87</sup> Blanca also violated Part 36 of our rules, which requires rate-of-return incumbent LECs to identify the portion of their regulated expenses attributed to interstate jurisdiction so that USAC may correctly compute their eligibility for Interstate Common Line Support (ICLS).<sup>88</sup> Additionally, Blanca violated Part 69 of our rules, which require rate-of-return incumbent LECs to apportion regulated, interstate costs among the interexchange services and rate elements that form the cost basis for exchange access tariffs, so that NECA may set “just and reasonable” access rates.<sup>89</sup> Consequently, Blanca’s decision to report CMRS-related costs in regulated accounts with respect to study area 462182 resulted in an erroneous increase in the amount of high-cost support paid to Blanca and potentially distorted “just and reasonable” access rates.<sup>90</sup>

36. Blanca is also wrong when it claims it was entitled to support for its CMRS offerings as a competitive ETC.<sup>91</sup> Blanca does not qualify for identical support in areas where it is an incumbent LEC.<sup>92</sup> Blanca’s ETC designation is limited to a specific geographic area and does not encompass the offering of

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*Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1492, para. 218 (1994).

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

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

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

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

<sup>89</sup> See 47 CFR §§ 69.1 - 69.731; *id.* § 54.901 *et seq.*

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

<sup>91</sup> Application at 6, 8, 18; Petition at 5, 6, 17.

<sup>92</sup> 47 CFR § 54.5 (defining a “competitive eligible telecommunications carrier” as a carrier that meets the definition of an “eligible telecommunications carrier” below and does not meet the definition of an “incumbent local exchange carrier” in section 51.5 of the Commission’s rules).

a competitive nonregulated service, either inside or outside Blanca's designated study area.<sup>93</sup> Indeed, the state commission had no opportunity to evaluate, consistent with its obligation to make a public interest determination required by section 214(e), the relative burdens on federal or state support mechanisms of granting Blanca an ETC designation for its CMRS, including any conditions that might have been appropriate with respect thereto (such as forming a separate wireless subsidiary).<sup>94</sup> Accordingly, Blanca was not entitled to identical support for a competitive CMRS service offering within its study area absent a new designation or the modification of its existing designation.<sup>95</sup>

37. Further, while Blanca now asserts that it is a competitive ETC in areas served by a different incumbent LEC where it offered CMRS and, therefore, is entitled to support for such offering, the overpayments here related to study area 462182, in which Blanca was the incumbent LEC, not a competitive carrier. Moreover, Blanca has not produced any evidence that it has sought or obtained the requisite ETC designation for any other areas for, or expanded its existing designation to cover, these areas. Absent such designation, Blanca is not eligible for support in these areas. Tellingly, Blanca never sought identical support on a correctly calculated per-line basis from USAC for services provided outside its study area as a competitive ETC—indeed, it made no administrative filings to claim identical support at all—and it is not now entitled to have the overpaid rate-of-return support for study area 462182 offset against any speculative sum it might have received had it done so.<sup>96</sup>

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

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

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

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

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

<sup>97</sup> Application at 16-17; Petition at 7-8, 11-12.

<sup>98</sup> See, e.g., 47 CFR § 54.707 (establishing authority of USAC to audit carriers' data submissions); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 97-21, Order, 15 FCC Rcd 22975, 22981-82, para. 16 (2001) (establishing procedures for implementing commitment adjustment recovery actions); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 22975, 22982, para. 16 (2000) ("[C]onsistent with the Commission's obligations under the DCIA, following USAC referrals to the Commission, the Commission will issue letters demanding repayment from service providers that are obligated to pay erroneously disbursed funds"); cf. *Old Republic v. Fed. Crop Ins. Corp.*, 947 F.2d 269, 272 (7th Cir. 1991) (agencies have authority under contract, statute, and common law to recoup overpayments that result from agency error).

OMD did not adopt or apply a new requirement to past conduct or apply a new interpretation of our rules and precedent.<sup>99</sup> Rather, OMD applied our rules, which base rate-of-return high-cost support on an incumbent LEC's embedded costs in providing a regulated service.<sup>100</sup> Blanca's requests for payment with respect to study area 462182 were inconsistent with those rules and the underlying policy, as well as numerous other Commission orders cited herein.<sup>101</sup>

39. Nor did the continued funding of Blanca in accordance with its reported costs from 2005 until 2010 give rise to the kind of reliance interests that would make this debt adjudication a violation of due process. Contrary to Blanca's contentions, the holding in *Christopher v. SmithKline Beecham Corporation* does not suggest otherwise.<sup>102</sup> In *SmithKline*, the U.S. Supreme Court declined to defer to an agency's new interpretation of its long-standing but ambiguous statutes and rules where such new interpretation threatened "massive liability" for prior conduct affected parties could not have reasonably anticipated.<sup>103</sup> In so holding, the Court placed special emphasis on, among other things, the agency's clear and decades-long acquiescence to industry-wide noncompliance.<sup>104</sup> In contrast, in directing Blanca to repay amounts it had been overpaid, OMD did not adopt a new interpretation of ambiguous rules but merely applied explicit Commission rules widely accepted by the industry.<sup>105</sup> Moreover, contrary to Blanca's contentions, the mere continued funding of Blanca pending a factual investigation into Blanca's cost accounting methods is not equivalent to complicity in industry-wide noncompliance. Further, the Commission has consistently stated that it conditions all funding on proper use and receipt; relies on audits and other program safeguards to ensure compliance with its rules designed to implement the foregoing statutory mandates under section 254; and, has regularly and quite properly sought recovery for improper payments at the conclusions of audits and investigations that have found overpayment of universal service funds.<sup>106</sup>

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

<sup>100</sup> See 47 CFR Parts 64, 36, 69.

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

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

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

<sup>104</sup> *SmithKline*, 132 S. Ct. at 2167-68.

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

<sup>106</sup> See, e.g., *Comprehensive Report and Order*, 22 FCC Rcd at 16386, para. 30 ("Consistent with our conclusion regarding the schools and libraries program, funds disbursed from the high-cost, low-income, and rural health care support mechanisms in violation of a Commission rule that implements the statute or a substantive program goal should be recovered."); *id.* at 16382, para. 19 (explaining that "[a]udits are a tool for the Commission and the

(continued....)

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

40. The Commission has the statutory authority to review the results of USF audits and investigations, and where it determines that USF payments were sought and received in violation of the Commission's rules it has the authority to recover such funding regardless of fault, and to recover such funding. In section 254 of the Act, Congress created the USF and tasked the agency with overseeing it.<sup>107</sup> In doing so, Congress granted to the FCC the necessary authority to adjudicate and recover unauthorized funding.<sup>108</sup> Such authority is essential to the fair administration of the universal service support programs. In its absence, the Commission would be unable to effectively protect the USF and the contributors thereto from the kinds of market distortions arising from misuse or misallocation of USF support explicitly recognized by Congress in section 254(k) of the Act and directly implicated by Blanca's cost allocation errors.<sup>109</sup> Once the agency makes a final determination that certain payments were erroneous and/or illegal, the agency has the authority and obligation under the DCIA to treat these overpaid sums as federal claim subject to collection, including by offset.<sup>110</sup>

41. Blanca's argument that as a matter of equity we should limit our recovery of overpaid USF to "cases of misrepresentation, false statement, concealment, obstruction, or lack of cooperation," are unavailing.<sup>111</sup> The question of whether Blanca had "clean hands" or intentionally misreported its costs is irrelevant.<sup>112</sup> Blanca does not allege—nor could it—that the Commission's effort to collect improperly

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Administrator, as directed by the Commission, to ensure program integrity and to detect and deter waste, fraud, and abuse," and that "[a]udits can reveal violations of the Act or the Commission's rules").

<sup>107</sup> 47 U.S.C. § 254(e).

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

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

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

<sup>111</sup> Application at 23; Petition at 22.

<sup>112</sup> Contrary to Blanca's contentions, the Commission in its Writ Opposition did not concede that Blanca accepted the overpaid support with "clean hands;" rather, the Commission stressed merely that it had made no finding of fault (continued....)

disbursed USF support is dependent on any finding of specific intent.<sup>113</sup> So too do we find irrelevant Blanca's repeated emphasis on the fact that Blanca began a practice of misreporting costs to NECA in 2005.<sup>114</sup> Even if the agency could reasonably have discovered the underlying noncompliance earlier, Blanca would not have been relieved of the obligation to repay the funds.<sup>115</sup> Indeed, here the Commission has a specific statutory obligation to make sure that high-cost funds are used for their intended purposes, and seek repayment of improperly distributed funds.<sup>116</sup>

42. Blanca is incorrect when it asserts that the Commission is creating a "novel summary debt claim adjudication procedure" and applying it to Blanca without notice or opportunity challenge the Commission's findings.<sup>117</sup> When the Commission determines whether a specific set of USF payments is erroneous or illegal, it is making a fact-specific, individualized determination applying current laws to past conduct, i.e., an informal adjudication.<sup>118</sup> Such an action does not meet the definition of a rulemaking and no statute requires it to be conducted through "on the record" hearings.<sup>119</sup> The Act gives the Commission broad authority to delegate that adjudicatory authority and in this context, the Commission has delegated authority to both WCB and to OMD.<sup>120</sup> In any event, the Act also specifically provides that all persons aggrieved by an order, decision, report or action made or taken on delegated authority have rights of appeal within the agency, while sections 1.106 and 1.115 of the Commission's

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or intent because such a finding would have been irrelevant to the Commission's recoupment efforts. *Compare* First Supplement at 7 (citing Writ Opposition at 14 to support contention that the Commission concedes Blanca had "clean hands") *with* Writ Opposition at 14 (explaining that a finding of misconduct is not relevant to an action in recoupment).

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

<sup>114</sup> *See* Application at 9, 13; Petition at 8-9.

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

<sup>116</sup> 47 U.S.C. § 254(b)(5); *id.* § 254(e).

<sup>117</sup> *See* Application at 23; Petition at 21-22.

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

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

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

rules set the specific procedures and requirements for making such appeals and seeking reconsideration of agency actions.<sup>121</sup>

43. Also contrary to Blanca's assertion, section 503 forfeiture proceedings are not the exclusive means by and through which the Commission may make a determination that a rule has been violated and impose liability. The Commission or USAC has consistently sought recovery of USF funds outside of section 503 proceedings.<sup>122</sup> By its terms, section 503(b) imposes forfeiture liability for violation of any Commission rule, whether or not the violation has led to any improper payment by the Commission (or USAC). Neither the plain language of section 503 of the Act nor its legislative history indicates that Congress intended that section to govern debt determinations, and Blanca has provided no evidence to the contrary.<sup>123</sup> The legislative history of section 503 makes clear that the statute applies only to monetary forfeitures and that such forfeitures are an enforcement measure.<sup>124</sup>

44. We in turn disagree that the Supreme Court's *Kokesh* decision helps Blanca here.<sup>125</sup> The *Kokesh* Court held that a Security and Exchange Commission (SEC) disgorgement action was a penalty for violating federal securities law, and thus, subject to the APA's generally applicable five-year statute of limitations in section 2462 governing any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."<sup>126</sup> Key to that decision was its finding that a penalty is designed to punish and deter future violations rather than to compensate a "victim."<sup>127</sup> The Court reasoned that SEC disgorgement was an action that left the defendant "worse off," since a court could

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<sup>121</sup> See, e.g., 47 U.S.C. § 155(c)(4) ("[taken on delegated authority] may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission."); *id.* § 405(a) ("After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear."). See also 47 CFR §§ 1.106, 1.115.

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

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

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

<sup>125</sup> See *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1642 (2017).

<sup>126</sup> *Id.* at 1642 (quoting 28 U.S.C. § 2462).

<sup>127</sup> *Id.*

order disgorgement that “[exceeded] the profits gained as a result of the violation,” and that disregarded “a defendant’s expenses that reduced the amount of illegal profit.”<sup>128</sup> The Court emphasized that when a sanction “can only be explained as . . . serving either retributive or deterrent purposes,” it is a “punishment.”<sup>129</sup>

45. Here, the Commission is merely seeking to recover sums improperly paid in which Blanca held no entitlement under section 254 and the Commission’s implementing rules.<sup>130</sup> It is not a punitive measure that seeks to deter future misconduct by other carriers but merely returns Blanca to the *status quo ante*.<sup>131</sup> It does not punish Blanca for the potential public and market harm arising from Blanca’s improper cost accounting but merely recovers for the USF a windfall to which Blanca was not entitled under the foregoing statutory and regulatory scheme.<sup>132</sup> Any negative financial impact that Blanca may experience as a result of recovery of this improper payment cannot transform this action into a sanction or penalty.<sup>133</sup>

46. Nor do, as Blanca asserts, sections 1.1901(e) and 1.1905 of our rules indicate any contrary Commission intent to treat decisions underlying debt determinations as synonymous with forfeiture actions.<sup>134</sup> Consistent with the DCIA and contrary to Blanca’s assertions, section 1.1901(e) does not limit recovery actions to partially-paid or judicially-ordered forfeitures but includes any amount due the United States, including overpayments from USF.<sup>135</sup> Similarly, section 1.1905 does not suggest that recovery actions must follow the procedures for forfeiture liability. Rather, that section of our rules

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<sup>128</sup> *Id.* at 1644-45.

<sup>129</sup> *Id.* at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)).

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

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

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

<sup>133</sup> See, e.g., *United States v. Telluride Co.*, 146 F.3d 1241, 1246 (10th Cir. 1998) (determining that an injunction requiring the restoration of damaged wetlands was not a penal action even though it remedied “wrongs to the public,” i.e., “injuries to the public’s resources”); *United States v. Perry*, 431 F.2d 1020, 1025 (9th Cir. 1970) (ruling Government’s action to recover sums allegedly paid in violation of the Anti-Kickback Act was not time barred by the statute of limitations governing agency enforcement actions (28 U.S.C. § 2462) because the sums sought were designed to make the Government whole by recovering extra costs incurred when kickbacks were paid); *United States v. Doman*, 255 F.2d 865, 869 (3d Cir. 1958) (holding that the Government’s action under Surplus Property Act was not barred by section 2462 since the recovery was compensatory to the Government, not a penalty), *aff’d*, 359 U.S. 309 (1959).

<sup>134</sup> See Application at 15-16; 47 CFR §§ 1.1901(e); 1.905.

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

merely makes clear that such debt collection rules neither supersede such procedures nor require their duplication.<sup>136</sup>

#### E. The Commission Afforded Blanca Due Process

47. The Commission processes have afforded Blanca sufficient due process. Informal adjudications should provide notice to affected parties, opportunity to participate, and supporting reasons.<sup>137</sup> In adopting section 3716 of the DCIA, Congress explicitly preserved “all appropriate due process rights, including the ability to verify, challenge, and compromise claims” by requiring, prior to the initiation of offset, that the debtor be sent written notice describing the type and amount of the claim, the intention of the agency head to collect the claim by administrative offset, and an explanation of the rights of the debtor under section 3716, as well as opportunities to inspect and copy agency records related to the claim, to receive agency review of its claim-related decisions, and to enter into a repayment agreement with the agency head.<sup>138</sup> An agency need not, however, duplicate such notice and review opportunities in order to initiate offset.<sup>139</sup>

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

49. Blanca states that the OMD Letter deprived it of access to the underlying cost data upon which the Commission relied to calculate the overpayments, which were separately detailed on a per fund, per year basis in an accompanying attachment.<sup>140</sup> But Blanca did have access to the underlying costs data because OMD explicitly based its financial accounting on the cost studies Blanca itself commissioned in response to the demands by NECA and USAC to remove certain costs and revenues and wireless loops.<sup>141</sup> Blanca did not submit a request to the Commission for such records nor did it assert

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<sup>136</sup> 47 CFR § 1.1905. We note that this language is consistent with similar language in the Federal Claims Collection Standards (FCCS), 31 CFR parts 900-904, a set of rules jointly passed by the Treasury Department and the DOJ prescribing DCIA-related collection standards unless the program legislation under which the claim arises or some other statute provides otherwise. *Id.* § 900.1(a); 31 CFR § 901.2(a) (explaining that, with regard to notice of a governmental claim, “[g]enerally, one demand should suffice”); *id.* § 901.3(b)(4)(iv) (“When an agency previously has given a debtor any of the required notice and review opportunities with respect to a particular debt, the agency need not duplicate such notice and review opportunities before administrative offset may be initiated.”).

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

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

<sup>139</sup> 31 CFR §§ 901.2(a); 901.3(b)(4)(iv).

<sup>140</sup> See Application at 21-22.

<sup>141</sup> See OMD Letter, Attach. A.

that it could not adequately challenge the cost accounting because of a lack of access to such records.<sup>142</sup> Indeed, Blanca did not make any attempt to contest the accuracy of the accounting.

50. The OMD Letter also clearly stated that “[i]f you have evidence establishing that you do not owe the Debt, or if you have further verified evidence to substantiate your entitlement to receive payment for the disallowed USF payments, provide such evidence to the Commission within 14 days of the Due Date.”<sup>143</sup> The OMD Letter, therefore, clearly advised Blanca of the opportunity that it had to request a review, which Blanca took advantage of by filing the Application for Review and Request for Reconsideration. Contrary to Blanca’s assertion, nothing in the OMD Letter suggested that Blanca was precluded from raising legal arguments or conclusions of fact and law.<sup>144</sup> Further, to the extent that Blanca complains that the OMD Letter did not comport with the DCIA’s provisions concerning an offset letter, such complaint is unfounded as the OMD Letter is a demand letter not an offset letter.<sup>145</sup> We also note that Blanca filed both an Application for Review and a Petition for Reconsideration, and so was not harmed in any way by an alleged lack of due process.

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

51. In this case, we have chosen to use the collection tools made available under the DCIA and its implementing rules for the collection of debt. Blanca incorrectly argues that USF is not federal funding subject to the DCIA, and therefore, the agency lacks authority to initiate collection efforts, such as offset, to collect overpaid USF. As emphasized by the Commission in 2004, the DCIA’s definition of “debt” or “claim” was not “limited to funds that are owed to the Treasury,” but included all funds “owed the United States,” including “overpayments from any agency-administered program.”<sup>146</sup> When amending its debt collection rules to reflect the passage of the DCIA, the Commission made clear that it defined a “claim” to include debts arising from USF-related payments.<sup>147</sup> Indeed, both the U.S. Supreme Court, and the United States Senate have characterized USF as a form of federal funding.<sup>148</sup>

52. Blanca also incorrectly argues that the DCIA does not apply to independent agencies such as the Commission.<sup>149</sup> Blanca’s position is contrary to the only appellate decision directly on point, i.e., *Commonwealth Edison*.<sup>150</sup> In the 1996 DCIA amendments, Congress did not alter the relevant language and did nothing to express any disapproval of, or raise any doubts about, the correctness of the Seventh Circuit’s result.<sup>151</sup> That decision is consistent with the plain language of the statute. Section

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

<sup>143</sup> OMD Letter at 8.

<sup>144</sup> Application at 22.

<sup>145</sup> *Id.* at 22.

<sup>146</sup> *See Schools and Libraries Fourth Report and Order*, 19 FCC Rcd at 15261, para. 20.

<sup>147</sup> *See* 47 CFR § 1.1901(b) (specifying that references to the term “Commission” in rules implementing the DCIA includes the USF, TRS Fund, “and any other reporting components of the Commission.”).

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

<sup>149</sup> *See* Application at 19-20; Petition at 18-19.

<sup>150</sup> *See Commonwealth Edison*, 830 F.2d at 618-20.

<sup>151</sup> *See id.*

3701 of the DCIA defines an “executive, judicial, or legislative agency” to include any “department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of Government.”<sup>152</sup> The Commission clearly qualifies under this definition.<sup>153</sup> Indeed, the Commission is frequently described by courts as an independent, executive agency or as an independent agency within the executive branch.<sup>154</sup> To the extent that the DCIA was adopted to “maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools,” it makes little sense that Congress would have excluded several large federal agencies.<sup>155</sup> Accordingly, the most natural reading of the reference to the three branches in section 3701 is to presume Congressional intent to be inclusive of a broad range of federal entities.

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

54. In sum, we conclude that the Commission has authority under the DCIA to collect the overpayments Blanca received; that OMD lawfully acted on the Commission’s behalf in determining that Blanca owes the USF \$6,748,280 and in issuing the OMD Letter; that the overpayment determination is not a forfeiture and, therefore, section 503 of the Act and the Commission’s regulations implementing section 503 are not applicable; and, finally, that Blanca has not been deprived of due process. Accordingly, we affirm OMD’s determination that Blanca must repay \$6,748,280 to the USF, and we direct OMD to pursue collection of that amount from Blanca, whether by offset, recoupment, referral of

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<sup>152</sup> 31 U.S.C. § 3701(a)(4); *see also* 31 CFR § 900.1 (“Federal agencies include agencies of the executive, legislative, and judicial branches of the Government, including Government corporations.”).

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

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

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

<sup>156</sup> Application at 21.

<sup>157</sup> 41 CFR § 0.231.

<sup>158</sup> 47 U.S.C. § 155(c), (e).

<sup>159</sup> 31 U.S.C. § 3711(a)(1), (b).

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

the debt to the United States Department of Treasury for further collection efforts or by any other means authorized by the DCIA or common law.

#### IV. ORDERING CLAUSES

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

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

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

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

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

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

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

I remain fearful, however, about whatever else lies beneath. As a consistent spokesperson on the need to address waste, fraud, and abuse in our universal service outlays, I have seen too many instances — particularly during my time as a state commissioner — of companies using the USF high-cost fund as a piggy bank for all manner of inappropriate expenses. Unfortunately for the high-cost fund and for all of us, we remain slow in discovering wrongdoing and late in addressing it. As the agency considers further reforms to our high-cost fund, I am hopeful that we will also take a serious look at measures to stamp out waste, fraud, and abuse wherever we find it.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

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

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

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

At the same time, I have heard complaints that USAC has been attempting to recoup certain overpayments from a decade ago that reportedly resulted from ministerial errors rather than fraud – the type of situation where the steps to obtain recovery at this point may cost more than the funding at stake. Moreover, recipients that obtained funding that long ago may not have been under an obligation to retain records for that length of time, relevant personnel may no longer be found, and rules now in place may not have been applicable that far back in the past. Make no mistake: I abhor any waste, fraud or abuse caused by wrongdoers and fully support the recoupment of such funds. However, I am sympathetic to the view that the Commission generally should be required to recover funding within a defined timeframe, such as 7 years. Certain timing limitations imposed on the Commission, like those that exist in other areas, would not wholly prevent the exercise of oversight or imposition of enforcement actions when needed. To the extent that would require clarification or direction by Congress, that could be a welcome improvement.