

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Blanca Telephone Company

**Seeking Relief From the June 2, 2016
Letter Issued by the Deputy Managing
Director Which Seeks to Enforce an
Interpretation of the Commission's Rules
Regarding the Use of USF High Cost
Funding for the Purpose of Operating a
Rural Mobile Cellular Telephone System
During the 2005-2010 Time Period**

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To: The Commission

**MOTION FOR LEAVE TO SUPPLEMENT
EMERGENCY APPLICATION FOR REVIEW**

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December 19, 2016**

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Summary

Since the time that Blanca Telephone Company filed for agency relief from the June 2 Letter which seeks to recover a Federal debt purportedly owed by Blanca, Blanca sought procedural relief in the D.C. Circuit Court of Appeals. That requested relief was recently denied in No. 16-1216, however, the FCC's Opposition to Petition for Writ of Prohibition contains several admissions, discussions, and arguments which warrant consideration by the Commission in this review proceeding as newly available information which is being presented after the last opportunity to file. For instance, the Opposition acknowledges that even though Blanca has clean hands, Blanca is not entitled to a hearing regarding the rule violations underlying the June 2 Letter. Blanca is as entitled to a hearing before its property is taken from it as is any other person/entity which is subject to the protection of the laws of the United States. The FCC's appellate opposition also discussed the Commission's position regarding the applicability of the Debt Control Acts to Independent Federal Agencies such as the FCC. The FCC Opposition incorrectly asserts that the Debt Control Acts can be read to authorize FCC debt collection despite statutory language which expressly lists affected agencies, but which pointedly omits reference to the FCC specifically or Independent Federal Agencies generally.

After Blanca filed for agency relief in June 2016 regarding the FCC's USF collection/forfeiture effort's violation of the FCA's one year statute of limitations, the Commission issued at least two NALF-related cases which seek to explain that the statute of limitations does not apply to the Commission's debt recovery actions pursued under the DCIA of 1996. Examination of this new information would serve the public interest. The Commission's analysis suffers from five

defects including: 1) improper retroactivity; 2) as a creature of statute the FCC does not sit as a court in equity dispensing equitable remedies; 3) the Commission's approach focuses on the timing of "recovery" when the initial focus must be upon the timing of the rule violation adjudication at issue in a particular case; 4) the USF payments to Blanca were not the product of error and Blanca took title to the USF money; and 5) Blanca had no reason to believe that the payments were made in error and properly took title to the USF money.

The public interest requires consideration of a non-obvious legal argument regarding the "ownership" of the USF fund monies at issue instantly. Fifth Circuit precedent holds that USF money is not Federal money for purposes of False Claims Act prosecutions, therefore, it is not Federal money for purposes of DCIA of 1996 "debt" recovery actions. Moreover, the 10th Circuit where Blanca is located holds that NECA/USAC do not perform any government functions, therefore, the distribution of USF money to Blanca did not create an interest in the Federal government in the transactions. That these arguments are non-obvious can be seen from the facts that neither the June 2 Letter nor the FCC's Opposition in No. 16-1216 discusses them as limitations on FCC authority to act.

Introduction

Blanca Telephone Company (Blanca), by its attorney, pursuant to 47 C.F.R. § 1.41, § 1.106(b)(2)(i) (changed circumstances or recent event requires supplement), § 1.106(b)(2)(ii) (supplement allowed for non-obvious argument developed since last opportunity to file), § 1.106(c) (the public interest requires consideration of supplement), § 1.106(f) (authorizing requests to supplement pleadings), § 1.115(g)(1) (recent events or changed circumstances since last filing), and § 1.115(g)(2) (facts could not have been learned through ordinary diligence) hereby seeks leave to supplement its June 16, 2016 Emergency Application for Review, or its June 24, 2016 Petition for Reconsideration in the event the Commission denies Blanca's exhaustion waiver request found at Application for Review, page 4. As discussed in the Petition for Reconsideration, at 1 n. 1, it appears that the Commission denied Blanca's exhaustion waiver request which necessitated the need to file the Petition for Reconsideration.¹ In support whereof, the following is respectfully submitted:

Justification for Submitting the Supplement

Since the time that Blanca Telephone Company filed for agency relief from the June 2 Letter which seeks to recover a Federal debt purportedly owed by Blanca, Blanca sought procedural relief in the D.C. Circuit Court of Appeals. That requested relief was recently denied in No. 16-1216,² however, the FCC's Opposition to Petition for Writ of Prohibition filed in that case contains several

¹ The Petition for Reconsideration is a reformatted version of the Application for Review to meet the filing requirements applicable to reconsideration petitions filed under § 1.106 and it was filed in response to the Commission's suggestion that Blanca's waiver request was denied. Otherwise, the pleadings are substantially similar. However, other than suggesting that Blanca's waiver request was denied, the Commission has not provided any further guidance regarding Blanca's waiver request.

² See *In re Blanca Telephone Company*, D.C. Cir. 16-1216, Order, filed December 12, 2016 (denying rehearing).

admissions, discussions, and arguments which warrant consideration by the Commission in this review proceeding. The public interest would be furthered by consideration of that information which was unavailable in June 2016 when Blanca sought agency relief.

The FCC's Opposition to Petition for Writ of Prohibition at 14 (*In re Blanca Telephone Company*, D.C. Cir. 16-1216) acknowledges that even though Blanca has clean hands, Blanca is not entitled to a hearing regarding the rule violations underlying the June 2 Letter. Blanca is as entitled to a hearing before its property is taken from it as is any other person/entity which is subject to the protection of the laws of the United States. The FCC's appellate opposition also discussed the Commission's position regarding the applicability of the Debt Control Acts to Independent Federal Agencies such as the FCC. The FCC Opposition at 16 incorrectly asserts that the Debt Control Acts can be read to authorize FCC debt collection despite statutory language which expressly lists affected agencies, but which pointedly omits reference to the FCC specifically or Independent Federal Agencies generally. Blanca is entitled to raise these matters at this time because they constitute changed circumstances/new facts which arose since the filing of Blanca's request for agency relief.

After Blanca filed for agency relief regarding the FCC's USF collection/forfeiture effort, the Commission issued at least two NALF-related cases which seek to explain that the statute of limitations does not apply to the Commission's debt recovery actions pursued under the DCIA of 1996. The Commission's analysis suffers from five defects including: 1) improper retroactivity; 2) as a creature of statute the FCC does not sit as a court in equity dispensing equitable remedies; 3) the Commission's approach focuses on the timing of "recovery" when the initial focus must be upon the timing of the rule violation adjudication at issue in a particular case; 4) the USF payments to Blanca were not the product of error and Blanca took title to the USF money; and 5) Blanca had no

reason to believe that the payments were made in error and properly took title to the USF money. Blanca is entitled to raise these matters at this time as they constitute changed circumstances/new facts which arose since the filing of Blanca's request for agency relief.

The public interest requires consideration of a non-obvious legal argument regarding the "ownership" of the USF fund monies at issue instantly. Fifth Circuit precedent holds that USF money is not Federal money for purposes of False Claims Act prosecutions, therefore, it is not Federal money for purposes of DCIA of 1996 "debt" recovery actions. Moreover, the 10th Circuit where Blanca is located holds that NECA/USAC do not perform any government functions. Accordingly, the distribution of USF money to Blanca by NECA/USAC did not create an interest in the Federal government in the transactions. That these arguments are non-obvious can be seen from the facts that neither the June 2 Letter nor the FCC's Opposition in No. 16-1216 discusses them as limitations on FCC authority to act.

New Circumstance—The FCC's Recent Statute of Limitations Discussions

One of the central arguments Blanca presents in its request for agency relief is that the determinations of rule violations contained in the Managing Director's June 2, 2016 Letter were improperly made after the running of the one year statute of limitations. Emergency Application for Review, pgs. 9-10, pg. 9 n. 4, pg. 11 n. 7, pgs. 16-17; Petition for Reconsideration, pgs. 8-9, pg. 8 n. 5, pg. 10 n. 8, pgs. 15-16. Since the time that the FCC issued the June 2 Letter assessing a nearly \$7 million penalty against Blanca, the FCC has issued multiple USF rule adjudications which assert that statutes of limitations do not apply to FCC rule enforcement cases. However, "forfeiture was intended to be rapid, with a short (one-year) limitation period" *N.J. Coal. for Fair Broad.*

v. *FCC*, 580 F.2d 617, 619 (1978).³

In the Commission's view, debt collection is an equitable endeavor and "statutes of limitation are not controlling measures of equitable relief" and the FCC is authorized to recover money which was "erroneously" paid except to the extent that "Congress has clearly manifested its intention to raise a statutory bar to recovery." *NSS*, 2016 FCC LEXIS 3697 pg. 52 of 67 n. 334 (FCC 16-158) (FCC Nov. 4, 2016).⁴ Footnote 334 claims support from *BellSouth*, 31 FCC Rcd. 8501 n. 150 (FCC July 27, 2016), but that case presents only a very brief limitations discussion.

As of 2013 Blanca thought it had settled the FCC's accounting issue only to have the June 2 Letter reopen the matter. *NSS* and *BellSouth* were issued *after* Blanca's 2013 settlement, years *after* the occurrence purported rules violations, *after* the June 2 Letter at issue instantly, and 20 years *after* the passage of the Debt Control Improvement Act (DCIA) of 1996. The first problem with the FCC's recently announced statute of limitations theory is that it retroactively applies a reconsidered rule interpretation to Blanca's past conduct. *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177, 2016 U.S. App. LEXIS 18332 (D.C. Cir. Oct. 11, 2016) ("CFPB therefore violated due process by retroactively applying its changed interpretation to PHH's past conduct and requiring

³ Recently the FCC requested Congress to increase the § 503(b)(6)(B) limitations period from one year to three years "to protect small businesses." *In the Matter of Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barriers For Entrepreneurs and other Small Businesses*, 2016 FCC LEXIS 3603 ¶ 145 (FCC 16-142) (Oct. 27, 2016). However, even that change to the limitations provision would not save the instant case for the Commission because the most recently charged rule violation in the June 2 Letter occurred in 2010, six years prior.

⁴ The FCC's orders are properly challenged here under the collateral-order exception to the finality requirement. The recent orders conclusively determine the instant procedural issue, the procedural determination is completely separate from the merits of the matter, and Blanca cannot control the litigation future of those proceedings, but will be bound by the results. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276-277 (1988).

PHH to pay \$109 million for that conduct”). The FCC has been utilizing its § 1.80 forfeiture procedures for decades in seeking USF fund recoveries. It is only 20+ years after passage of the Telecommunications Act of 1996 and the creation of USF funding that the FCC belatedly seeks to disclaim the applicability of the statute of limitations. Moreover, the Commission’s determinations in *NSS* and *BellSouth* were issued after Blanca filed for relief instantly and cannot serve as precedent to Blanca’s situation.

The second problem with the FCC’s recently promulgated reasoning is that Federal agencies are creatures of statute having only those powers which Congress conferred upon them and those which are “statutorily implicit.” *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) (NLRB does not have authority to issue bad faith litigation awards). The FCC does not sit as a court in equity, it must base its authority upon, and act according to, statutory authority. To the extent footnote 334 of *NSS* states that the FCC is able to provide non-rule-based equitable remedies, the FCC is claiming an authority in equity which not authorized or suggested by any statute.

Commissioner Pai’s dissents in *BellSouth* and *NSS* correctly discuss the third problem with the Commission’s new approach to debt collection: the Commission’s approach focuses on the timing of “recovery” when the initial focus must be upon the timing of the rule violation adjudication at issue in a particular case. *BellSouth*, 31 FCC Rcd. at 8528; *NSS*, 2016 FCC LEXIS 3697 pg. 66-67. The June 2 Letter issued against Blanca in the instant case is not merely a debt collection the letter finds multiple non-specific rule part violations, claims that USF payments to Blanca made as a consequence of those vague violations equals a Federal debt owed by Blanca, and then seeks to impose an offset for that newly created “debt.” Absent a finding of rule violation, the FCC could not assert an offset.

The most recent rule violation charged against Blanca in the June 2 Letter occurred in 2010, more than six years prior to release of the June 2 Letter, the most distant violations charged against Blanca occurred in 2005, eleven years prior to the release of the June 2 Letter. There is nothing in 31 U.S.C. § 3716(e) which remotely suggests that the FCC's § 503 one year limitation to commence a rule enforcement proceeding is altered. Nor does the DCIA of 1996 override the five year statute of limitations which is applicable to Federal agency rule enforcement proceedings. *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994). Absent an explicit statement from Congress, the statutes have to be read in a way which gives effect to all of them. Reading the statutes most favorably to the Commission, the statutes read that recovery can be made by an agency at any time after a timely rule violation finding is entered. Read together, *NSS*, *BellSouth*, and the instant case establish a pattern of the FCC acting beyond its temporal jurisdiction.

The fourth problem with the FCC's debt collection theory is that Blanca's receipt of the USF payments was not even remotely the product of "error." *NSS*, 2016 FCC LEXIS 3697 pg. 52 of 67 n. 334; *BellSouth*, 31 FCC Rcd. 8525 n. 150. After years of providing USF funding for Blanca's mobile service the FCC began auditing Blanca in 2008, but the FCC continued making USF payments to Blanca through 2011 even while Blanca was being audited. June 2 Letter at 2. After years of investigation the June 2 Letter does not find any misrepresentation, false statement, concealment, obstruction, or lack of cooperation, on Blanca's part. In fact, the June 2 Letter is clear that Blanca requested funding for a "mobile" service and USF money was paid to Blanca on the basis of that plain request—NECA could have said "no" if it thought there was a problem with Blanca's funding requests. There were no USF payment errors, this is not a case where a person receives a check mistakenly generated by the Social Security Administration—the FCC knew exactly what was

happening and Blanca properly took title to the USF money.

The fifth problem with the FCC's position is that the central theme of the June 2 Letter is that USF payments are not permitted for the mobile services for which Blanca used the USF money, but the FCC's rules clearly allow USF payments to support mobile services as evidenced by the Commission's plainly stated reminder *Public Notice*, 30 FCC Rcd. 11821 (FCC 2015). The FCC's reliance in *NSS and BellSouth* upon *United States v. Wurts*, 303 U.S. 414, 415-16 (1938) is plainly misplaced because Blanca not only had a right to receive the money under the FCC's rules, Blanca had no reason to believe that it was taking the money improperly – the FCC concedes that Blanca has “clean hands” in this matter. FCC Opposition to Petition for Writ of Prohibition at 14 (*In re Blanca Telephone Company*, D.C. Cir. No. 16-1216). It was only after the 2013 Blanca-NECA settlement that any question could reasonably be suggested to have existed in Blanca's mind, but no payments were made in or after 2013, and the instant case concerns payments made through 2010, years prior to that settlement and years beyond the statutes of limitations. Indeed, the FCC/NECA/USAC audit/investigation began in early 2008 and it was not until 2013 that Blanca received any guidance on the matter. USF money was paid to Blanca for years while the audit/investigation was underway, Blanca had no reason to believe the payments were improper, and Blanca properly took title to the USF money.

Because Blanca had no reason to believe that it was not entitled to the USF money, and because Blanca has clean hands, the payment of USF money to Blanca became final and Blanca changed its position in reliance upon a reasonable belief that the money was properly paid. *Norwest Bank Minn. Nat'l Ass'n v. FDIC*, 312 F.3d 447, 452 (D.C. Cir. 2002) (repose allows parties to a transaction to close their books). The FCC knows that Blanca changed its position upon receipt of

the USF money and “sunk” the USF money into improvements made for the enhancement of its provision of mobile telecommunications services. To the extent that the Commission expresses a concern about equitable remedies in its USF collection efforts, it is an “unfair surprise” for the FCC to find rule violations at this late date to try to recover that money.

The FCC’s rule violation findings are time barred by the one year statute of limitations found at § 503. Absent a finding of rule violation, the FCC could not assert an offset because absent the rule violation findings/text, the June 2 Letter would effectively state that “Blanca owes the government money for no reason in particular,” a wholly unreasoned proposition. The June 2 Letter’s rule violation findings also violate the generally applicable five year Federal statute of limitations which the D.C. Circuit determined is a jurisdictional bar to Federal agency rule violation proceedings. *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994). It is indisputable that the period from 2005-2010 is more than five years before the FCC’s June 2, 2016 rule violation findings.

New Circumstance—FCC’s View That Blanca Is Not Entitled to a Hearing

The FCC’s response to Blanca’s statute of limitations argument in *In re Blanca Telephone Company* was a very limited one. The FCC stated that its order requiring Blanca to forfeit nearly \$7 million dollars “is not a forfeiture proceeding,” FCC Opposition to Petition for Writ of Prohibition at 15-17 (*In re Blanca Telephone Company*, D.C. Cir. No. 16-1216), despite the fact that the June 2 Letter requires Blanca to forfeit nearly \$7 million. The FCC’s Opposition described the FCC’s effort as a debt collection to which the procedures of § 503 and § 1.80 do not apply. However, the FCC Opposition failed to explain the fact that the plain text of the FCC’s own debt collection rule, 47 C.F.R. § 1.1905, requires that the FCC follow those specific procedural requirements relating to forfeitures in its debt collection efforts. The rule states on its face that the

procedural protections must be followed at least once in a proceeding, but after being followed, they do not need to be followed in a subsequent review/collection proceeding. As discussed below, Blanca has a 5th Amendment right to a hearing before being deprived of its property, if the Commission interprets § 1.1905 as not requiring a hearing, then the Commission is violating Blanca's constitutionally protected right to a hearing.

47 U.S.C. § 503(b)(2)(B), implemented at 47 C.F.R. § 1.80, is the statutory hearing procedure whereby the FCC determines whether its rules have been violated and whether forfeitures should be entered against carriers. The FCC's June 2 Letter establishes a novel *ex parte* summary forfeiture procedure. With the exception of the instant case, the FCC exclusively utilizes the § 503 and § 1.80 procedures in USF debt collections. *See e.g., Notice of Apparent Liability for Forfeiture and Order, Total Call Mobile, Inc.*, 31 FCC Rcd. 4191, 4193 ¶ 6 (FCC 2016) (NALF issued which lists specific Part 54 USF rules purportedly violated and assessing a potential \$51 million penalty); *In the Matter of Network Services Solutions, LLC, Scott Madison NALF (NSS)*, 2016 FCC LEXIS 3697 pg. 52 of 67 ¶ 143 (FCC 16-158) (FCC Nov. 4, 2016) (NALF issued to determine whether more than \$22.5 million USF payments should be recouped "if we conclude that NSS has violated the Commission's Rules and Orders"); *BellSouth Telecommunications, LLC d/b/a AT&T Southeast, NALF*, 31 FCC Rcd. 8501 (FCC July 27, 2016) (NALF issued in USF E-rate rule violation proceeding).

The FCC's manner of proceeding against Blanca is a "significant departure from ordinary agency practice" which must be supported by "some fairly strong indication, backed by sound policy, that Congress meant for the Commission to act this way." *Textile & Apparel Group etc. v FTC*, 410 F.2d 1052, 1055-56 (D.C. Cir. 1969) (novel *ex parte* enforcement practice cannot be inferred from statutory silence); *see also Communs. & Control, Inc. v. FCC*, 374 F.3d 1329, 1335-36 (D.C. Cir.

2004) (agency's departure from usual practice 'with no explanation' is arbitrary and capricious)."

The FCC's June 2 Letter at 7 asserts that the FCC's authority to collect a debt in the *ex parte* summary manner expressed in the June 2 Letter is authorized by the DCIA of 1996. However, the FCC's DCIA of 1996 implementing regulation, 47 C.F.R. § 1.1905, plainly states that the FCC's debt collection efforts must comply with the long established procedural requirements of § 503 of the Federal Communications Act and § 1.80 of the FCC's rules.

The D.C. Circuit holds that "in an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause." *United States v. 8 Gilcrease Lane*, 638 F.3d 297, 300 (D.C. Cir. 2011) citing *Degen v. United States*, 517 U.S. 820, 822 (1996), *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993), *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); see also *Abdelfattah v. United States Dep't of Homeland Sec.*, 787 F.3d 524, 538 (D.C. Cir. 2015) ("a procedural due process violation occurs when an official deprives an individual of a liberty or property interest without providing appropriate procedural protections"). The FCC is seizing Blanca's property "without hearing or proper finding of rule violation" in violation of 5th Amendment Due Process.

Blanca's case is "an ordinary case" in the sense that the FCC agrees that through 8 years of investigation Blanca has "clean hands" and there are no extraordinary circumstances which required immediate FCC action. FCC Opposition to Petition for Writ of Prohibition at 14 (*In re Blanca Telephone Company*, D.C. Cir. No. 16-1216).⁵ The FCC's lengthy investigation involves a

⁵ Blanca's case is unusual from the perspective of lack of notice, hearing, and time compliance—some of the rule violations found by the FCC predate the June 2016 Letter by eleven years in a situation where the § 503 limitations period is one year and where all of the purported violations are beyond that time limitation.

non-emergency situation and an *ex parte* summary forfeiture order is wholly beyond the FCC's established forfeiture procedures. *Communs. & Control, Inc. v. FCC*, 374 F.3d 1329, 1335-36 (D.C. Cir. 2004) (agency's departure from usual practice 'with no explanation' is arbitrary and capricious) *Textile & Apparel Group etc. v FTC*, 410 F.2d 1052, 1055-56 (D.C. Cir. 1969) (novel *ex parte* enforcement practice cannot be inferred from statutory silence); *see also United States v E-Gold, Ltd*, 521 F.3d 411, 416, 418 (D.C. Cir. 2008) (absent an extraordinary circumstance, due process requires a pre-deprivation hearing with notice and an opportunity to be heard; *ex parte* forfeiture proceedings carry inherent risks of improper property deprivations). The FCC penalized Blanca for its use of USF money to provide a mobile telecommunications service without notice and without the opportunity to explain that the FCC's rules explicitly allow for USF fund use for that purpose. *See Public Notice*, 30 FCC Rcd. 11821 (FCC 2015); *see also Direct Communs. Cedar Valley, LLC v. FCC (In re FCC 11-161)*, 753 F.3d 1015, 1091 (10th Cir. 2014) (a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required").

The FCC informed the D.C. Circuit that the only Due Process to which Blanca is entitled is notice of, and the ability to respond to, various audits and investigations and the opportunity to file for review of the summary forfeiture order. FCC Opposition to Petition for Writ of Prohibition at 18 (*In re Blanca Telephone Company*, D.C. Cir. No. 16-1216) . However, the right to a hearing includes much more than the rights to be audited, to be investigated, and to complain *post facto* about an *ex parte* summary decision. Blanca has 5th Amendment and statutory rights to a hearing which allows Blanca to inform the agency's initial decision. 8 *Gilcrease Lane; E-Gold, Ltd.*

The FCC's Opposition to Petition for Writ of Prohibition provides no reason why the FCC

could not have followed its routine pre-deprivation forfeiture procedures including providing notice and a hearing and the June 2 Letter and the FCC's D.C. Circuit Opposition in No. 16-1216 fails to explain the FCC's departure from its standard practice. The FCC's failure to explain why it failed to comply with its statutorily required standard operating procedure constitutes an arbitrary and capricious denial of Blanca's right to a hearing. *Communs. & Control, Inc. v. FCC*, 374 F.3d at 1335-36; *Textile & Apparel Group etc. v FTC*, 410 F.2d 1052, 1055-56. Absent an explanation from the Commission, the only apparent reason that the Commission failed to provide either a pre- or post-deprivation hearing is that any such hearing would have been time barred by the statute of limitations.

Instead of following prescribed statutory procedures, and instead of conducting a rulemaking, the FCC's June 2 Letter utilizes an *ex parte* summary adjudicatory procedure to a novel forfeiture procedure. Blanca's clean hands are certainly entitled to the same level of protection of its hearing right, including a right to defend on statute of limitations grounds, as is available to the scofflaw, fugitive, money laundering, drug dealer class protected in the *Degen* case. *Degen*, 517 U.S. at 827.

The June 2 Letter at 7 finds the FCC's asserted limitless authority to recover USF overpayments in the DCIA of 1996. However, there is nothing in the DCIA of 1996 which suggests that an Independent Federal Agency can ignore its own standard enforcement procedures and invoke a novel *ex parte* summary forfeiture proceeding years after the purported rule violations occurred to create a 'debt' for the purpose of imposing an offset. The FCC's recent discovery of its newly claimed authority 20 years after passage of the DCIA of 1996, in the absence of any explanation from the FCC regarding its enforcement procedure choice, indicates that the FCC's action is motivated to gain a litigating advantage. In the instant case the FCC is not serving as a steward of its

regulations, it has gone far afield to subject Blanca to an enforcement process to which not even drug dealing money launderers are subject.

New Circumstance—The FCC’s View of the Applicability of the DCIA

The FCC’s Opposition to Petition to Writ of Prohibition at 16 (*In re Blanca Telephone Company*, D.C. Cir. No. 16-1216), cites *Commonwealth Edison Co. v. United States NRC*, 830 F.2d 610, 618-20 (7th Cir. 1987) case for the proposition that even though Independent Federal agencies are not included in the list of Federal agencies which are authorized to act under the Debt Control acts, that the FCC is, nevertheless, an authorized agency under the debt control acts. However, Seventh Circuit’s nearly thirty year-old reasoning has several apparent infirmities regarding statutory interpretation. Since the time that *Commonwealth Edison* was decided, the judiciary has endeavored to apply a more precise reading to legislative acts. The first problem with the reasoning provided in *Commonwealth Edison* is that it ignores the statute’s plain text which lists the affected agencies as being those agencies which are part of one of the coordinate branches of government,⁶ but utterly fails to mention Independent Federal Agencies in the list of affected agencies. Accordingly, *Commonwealth Edison* fails to follow the canon of statutory construction *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”). “The question . . . is not

⁶ 31 U.S.C. § 3711(a) provides that

The head of an executive, judicial, or legislative agency—(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;***

While 31 U.S.C. § 3701(a) provides that

“executive, judicial, or legislative agency” means a department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of Government, including government corporations.

what Congress ‘would have wanted’ but what Congress enacted.” *Argentina v. Weltover, Inc.* 504 U.S. 607, 618 (1992) (Scalia, J.).

The FCC’s position that Independent Federal Agencies must be authorized by the Debt Control acts, notwithstanding the fact that Congress did not include such agencies in the statutory definition, ignores the fact that Congress went through the bother of creating an agency definitions section for the Debt Control acts. The FCC’s position argues that the definitions section of the Debt Control acts must be ignored. However, the FCC’s view violates the rule of statutory construction that every word in the statute is to be given a plain meaning effect.

Congress specifically listed various affected agencies in the Debt Control acts and Congress did not list the FCC specifically or Independent Federal Agencies generally. Therefore, it must be concluded that Congress intended to exclude Independent Federal Agencies such as the FCC. If Congress had intended to include Federal Independent Agencies, it could have merely indicated that the Debt Control statutes applied to “Federal Agencies” generally, rather than creating the detailed, but incomplete authorized agency listing suggested in the FCC’s Opposition.

The second problem with the reasoning in *Commonwealth Edison* is that it assumes that the silence of the legislative history supports a reading of the statutes which is at odds with the plain text of the statute. In some instances legislative silence could constitute conclusive proof regarding statutory meaning. For instance, in a situation where Congress creates a list of affected agencies, the silence of the legislative history regarding the inclusion of other included Federal agencies could show that the unmentioned agencies are not to be included. However, it is not at all apparent how the absence of legislative history supports a reading of the Debt Control acts which is at odds with the plainly stated definitions section of that statute. Once again, “the question . . . is not what

Congress ‘would have wanted’ but what Congress enacted.” *Argentina v. Weltover, Inc.* 504 U.S. 607, 618 (1992) (Scalia, J.).⁷

The FCC’s Opposition to Petition for Writ of Prohibition (*In re Blanca Telephone Company*, D.C. Cir. No. 16-1216) at 19 asserts that § 0.231(f) authorizes the Managing Director to “perform all administrative determinations provided for by the Debt Collection Improvement Act” and that the June 2 Letter properly issued. However, USF rule adjudication is not an “administrative determination” authorized under the DCIA and § 0.231 does not authorize the Managing Director, to adjudicate USF rule violations. Moreover, there is nothing in the Deb Control acts which authorizes the Commission to adjudicate USF rule violations. The Commission’s authority to adjudicate USF rule violations arises solely from the Federal Communications Act generally and § 503 of that Act specifically. The Commission’s problem in this case is that § 503 requires a notice hearing before finding rule violations and such violation determinations are limited by a one year statute of limitations.

Non-Obvious Argument–The Purported USF “Debt” is Not a Federal Debt

U.S. ex rel Shupe v. Cisco Sys., 759 F.3d 379, 377-88 (5th Cir. 2014) holds that the FCC’s Universal Service Fund program does not contain any Federal money for purposes of False Claims Act prosecutions. The Fifth Circuit determined that the USF is administered by a private organization (USAC), that the USF is funded by private companies, and that the USF is not funded by Federal tax money. *Shupe*, 759 F.3d at 387-88. Instantly, the FCC seeks recovery of USF funds under the purported authority of the DCIA of 1996 relating to USF fund monies which were paid to

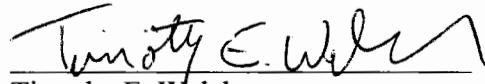
⁷ Resort to legislative history is not useful in determining legislative intent. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 369-90 (1st ed. 2012).

Blanca between the years 2005-2010. The FCC's June 2 Letter at issue instantly claims that USF monies were paid to Blanca in violation of the FCC's rules and are recoverable pursuant to the DCIA as a "Debt [] owed to the United States." June 2 Letter at 7. However, *Shupe* holds that the USF money the FCC seeks to recover from Blanca never belonged to the United States and those USF monies paid to Blanca, therefore, cannot constitute a "Debt [] owed to the United States." Because *Shupe* holds that USF monies are not Federal funds, the FCC is improperly utilizing the DCIA to recover non-Federal money from Blanca and the FCC's "debt" collection effort against Blanca is unauthorized.

Moreover, the 10th Circuit, Blanca's "home" Federal Appeals Court, holds that "NECA act[s] exclusively as an agent for its members and had no authority to perform any adjudicatory or governmental functions." *Farmers Telephone Company v FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999). Because NECA/USAC is not authorized to "perform any . . . governmental functions," NECA/USAC's disbursement of USF monies to Blanca by NECA/USAC cannot be considered as having been concerned with the distribution of Federal money. Because the disbursement of USF money to Blanca did not implicate any government function, the FCC's effort to recover that money under the DCIA of 1996 is unauthorized. The FCC was a party to the *Farmers* case and it is bound by the Court's determination in that case. The non-obviousness of the applicability of *Shupe* and *Farmers* cases to the instant case is evidenced from the fact that the FCC failed to consider those precedent in improperly concluding in its June 2 Letter and in its Opposition to Petition for Writ of Prohibition it filed in *In re Blanca Telephone Company* (D.C. Cir. 16-1216) that it was dealing with Federal funds.

WHEREFORE, the Commission should terminate the instant enforcement proceeding without action and without further effort to seek the forfeiture of money from Blanca and grant the other relief requested previously.

Respectfully submitted,
BLANCA TELEPHONE COMPANY

A handwritten signature in black ink, appearing to read "Timothy E. Welch", written over a horizontal line.

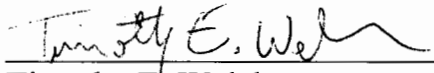
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Its Attorney

December 19, 2016

Certificate of Service

I hereby certify that I have this 19th day of December 2016 served a copy of the foregoing *Motion for Leave to Supplement Emergency Application for Review* by First Class United States Mail, postage prepaid, upon the following:

Mark Stephens
Managing Director
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554


Timothy E. Welch