

ALERT

Tenth Circuit Finds That Actions by the FCC to Collect USF Overpayments Are Not Subject to Any Statute of Limitations

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A recent decision by the U.S. Court of Appeals for the Tenth Circuit addressed the applicable statute of limitations that applies to efforts by the Federal Communications Commission (FCC or Commission) to recover the overpayment of universal service funds from an eligible telecommunications carrier. In *Blanca Telephone Co. v. FCC*, the Tenth Circuit held that such actions involve the collection of a debt owed to the FCC to which no limitations period applies. In so doing, the Tenth Circuit found that overpayments from the Universal Service Fund (USF) represent funds owed to the United States.

The Tenth Circuit's decision may present significant compliance challenges for entities receiving USF support, as explained in greater detail below.

Summary of *Blanca Telephone Co. v. FCC*, Nos. 20-9510 and 20-9524 (10th Cir. March 15, 2021)

Procedural Background

Blanca Telephone Co. v. FCC, Nos. 20-9510 and 20-9524 (10th Cir. March 15, 2021), involved an incumbent local exchange carrier in Colorado (Blanca) that received high-cost support from the federal Universal Service Fund (USF). Through an investigation begun in 2008 by the FCC's Office of Inspector General into Blanca's accounting practices, the FCC identified approximately \$6.75 million in USF support that Blanca improperly received from the USF between 2005 and 2010 for expenses related to providing mobile cellular services both within and outside Blanca's designated service area. As an

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incumbent local exchange carrier (ILEC), Blanca was not entitled to USF support for mobile cellular services or for services provided outside its service area.

In 2016, the FCC's Office of Managing Director issued a demand letter to Blanca, identifying the overpayments and requesting repayment of the approximately \$6.75 million improperly paid to Blanca. The letter also indicated that Blanca could challenge the finding by submitting evidence to the FCC within 14 days.

Blanca petitioned the FCC for review of the Managing Director's demand letter. In 2017, the FCC issued an order in response to Blanca's petition, rejecting Blanca's claims and affirming the demand letter. The FCC subsequently initiated collection of the debt from Blanca by withholding USF support to which Blanca was otherwise entitled. In 2020, after unsuccessfully seeking reconsideration by the FCC, Blanca filed a petition for review with the Tenth Circuit.

Tenth Circuit Decision

In its petition for review, Blanca challenged the FCC's demand letter and subsequent orders, arguing that the agency's action: (1) was barred by the relevant statute of limitations, (2) violated due process, and (3) was arbitrary and capricious. The Tenth Circuit upheld the FCC's action, finding that the agency's debt collection was not barred by any statute of limitations. The court also found that Blanca was apprised of the relevant law and afforded adequate opportunity to respond to the FCC's decision and that the FCC was not arbitrary and capricious in its justifications for the debt collection.

1. Statute of Limitations

Blanca argued that the FCC's action was time-barred based on two statutes: 47 U.S.C. § 503 and 28 U.S.C. § 2462. These statutes require certain types of government actions to be brought either within one year, *see* 47 U.S.C. § 503(b)(6), or five years, *see* 28 U.S.C. § 2462, respectively. According to Blanca, the FCC action was governed by one of these statutes that would prevent the FCC from taking punitive actions against Blanca over a decade after the alleged violations occurred.

The Tenth Circuit rejected Blanca's argument, finding that neither 47 U.S.C. § 503 nor 28 U.S.C. § 2462, which authorize agencies to impose penalties against regulated entities that violate the law, applied to the FCC's action against Blanca. First, according to the Tenth Circuit, because a party violated a public law and because an agency wants to protect the public through a subsequent action does not necessarily make that action a penalty. Second, because the FCC sought only repayment of the amount overpaid to Blanca from the USF, the purpose of the FCC's action was compensation for the overpayment, not to punish Blanca.

Instead, the Tenth Circuit found that the FCC's action to recover overpayments from the USF is properly characterized as a debt collection subject to the Debt Collection Improvement Act (DCIA), 31 U.S.C. §§ 3711-17. The DCIA contains no limitations period preventing the FCC's debt collection.

In finding that the FCC's collection action against Blanca was governed by the DCIA – and thus not subject to any statute of limitations – the Tenth Circuit concluded that USF overpayments are amounts “owed to the United States.” The court rejected Blanca's argument that the DCIA was inapplicable because the USF is funded by contributions from carriers and thus any overpayments out of the fund would be owed directly to the USF, not to the United States.

The Tenth Circuit concluded that Blanca's reliance upon the Fifth Circuit's decision in *United States ex rel. Shupe v. Cisco Sys.*, 759 F.3d 379 (5th Cir. 2014), was misplaced. In *Shupe*, the Fifth Circuit dismissed an action under the False Claims Act (FCA) against a telecommunications carrier that had bid for and was awarded contracts to install services under the Schools and Libraries program of the USF. Because of the control exercised by the Universal Service Administrative Company (USAC) over the USF and because the FCA does not extend to funds overseen by private parties such as USAC, the Fifth Circuit held that payments made from the USF were not “provided by the United States” for FCA purposes.

The Tenth Circuit distinguished *Shupe* because it involved a “different statutory scheme with different language.” While the FCA limits a claim to money provided by the United States, the DCIA expressly includes overpayments “disallowed by audits performed by the Inspector General of the agency administering the program.” 31 U.S.C. § 3701(b)(1)(c). According to the Tenth Circuit, the overpayments the FCC sought to collect from Blanca fell within that provision.

2. Due Process

Blanca also claimed that the FCC did not comply with statutory and constitutional procedural requirements in initiating the debt collection. Specifically, according to Blanca, the FCC engaged in a summary adjudication that gave Blanca insufficient notice and no meaningful opportunity to respond. In addition, Blanca insisted that the laws, regulations, and orders in place as of 2005 failed to give it fair notice that its conduct was prohibited.

The Tenth Circuit held that Blanca failed to establish a due process violation. Although the underlying USF regime is complex, the court concluded that Blanca had adequate notice that it could not receive USF funding for providing mobile cellular services. Furthermore, in identifying the rules violated and starting the debt collection process, the FCC provided all the process required by the DCIA, the Administrative Procedure Act, and the Constitution.

3. Arbitrary and Capricious

Finally, Blanca argued that the FCC's decision to collect the debt was arbitrary and capricious because of inadequacies in the FCC's demand letter and orders. The Tenth Circuit rejected this argument, concluding that the FCC supported its decision to initiate debt collection with an explanation of the rules Blanca had violated and a calculation of the overpayments Blanca had received. And, according to the court, the record was adequate to support the FCC's actions.

Conclusion

Although *Blanca Telephone Co. v. FCC* involved high-cost support, the Tenth Circuit's holding that actions to collect overpayments from the USF are not subject to any statute of limitations extends to every USF program. Thus, the court's decision may present significant compliance challenges for every entity receiving USF support.

Under the FCC's rules, USF participants are subject to recordkeeping requirements that vary depending upon the USF program. These requirements range from three years for Lifeline (47 C.F.R. § 54.417(a)) to ten years for the Schools and Libraries program (47 C.F.R. § 54.516(a)) and the Connect America Fund program (47 C.F.R. § 54.320(b)). In the absence of an applicable statute of limitations period governing the recovery of overpayments from the USF, a participant that adheres strictly to the FCC's recordkeeping requirements may not have the records necessary to contest a collection action commenced years after payment of the USF support.

Furthermore, the Tenth Circuit's finding that overpayments from the USF represent funds owed to the United States may have implications beyond the USF. In particular, the Fifth Circuit's *Shupe* decision has largely shielded defendants from potential liability under the FCA resulting from their participation in the USF. Although the DCIA at issue in *Blanca Telephone* and the FCA at issue in *Shupe* are different statutory schemes, another court may decide to revisit *Shupe* based on the Tenth Circuit's reasoning in *Blanca Telephone*.