No. 23-1127

IN THE

Supreme Court of the United States

WISCONSIN BELL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES, ex rel. TODD HEATH, Plaintiff, v. WISCONSIN BELL, INC., Defendant.	CIVIL ACTION No. 2:08-CV-00876 (Lead Case No. 2:08-CV-00724-LA) Judge Lynn Adelman

UNITED STATES' STATEMENT OF INTEREST IN RESPONSE TO WISCONSIN BELL, INC.'S MOTION TO DISMISS RELATOR'S COMPLAINT

I. INTRODUCTION

The United States files this statement of interest in response to Wisconsin Bell's Motion to Dismiss (Dkt. No. 97). Specifically, Wisconsin Bell argues that the money in the Universal Service Fund (USF), a federal telephone subsidy support mechanism, was not "provided by" the United States Government and, therefore, the instant False Claims Act (FCA) lawsuit alleging fraud on the schools and libraries of Wisconsin and the Federal Communications Commission (FCC), must be dismissed. Defendant invites this Court to follow the recent decision of the Fifth Circuit Court of Appeals in United States ex rel. Shupe v. Cisco Sys., Inc., 759 F.3d 379 (5th Cir. 2014), which held that E-rate funds were not "provided by" the United States. That decision, however, was wrongly decided and this Court should decline to follow the Fifth Circuit's misplaced reasoning. The USF holds

federal funds that are provided by a federal agency, the FCC, and accordingly, the Court should apply the FCA to those funds.

The FCC, indisputably a federal government agency, was created as part of the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., to regulate interstate and foreign commerce in communication and to "make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges. . . ."[1] In turn, the FCC established the current USF to hold funds that are used today to subsidize four universal service[2] subsidy programs, including a program to provide discounted internet and telephone services to schools and libraries, known as the E-Rate Program.[3] USF monies exist and are available for use only because the United States Government requires them to

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[1] In 1996, Congress amended the Communications Act of 1934, to include, among other provisions, a more specific universal service provision. 47 U.S.C. § 254.

[2] Universal Service is a policy goal of making sure all Americans have access to a baseline level of telecommunications at reasonable rates. Currently, the FCC is in the process of reforming the High Cost Program by changing the name to the Connect America Fund and changing the focus from providing rural telephone service to providing universal access to broadband. See FCC 11-161 Order, Adopted October 27, 2011.

[3] The four universal service subsidy programs are the E-Rate Program; the High-Cost Program, which subsidizes affordable phone service for rural, hard-to-serve areas; the Lifeline Program, which subsidizes telephone service for extremely poor individuals; and the Rural Health Program, which subsidizes internet and telephone service for the provision of rural health care.

be available, and then requires that they be paid out for a specified governmental purpose.

To fund the USF, the FCC mandates, pursuant to statute, that telecommunications companies (Contributors) pay a portion of their revenues into the fund. 47 U.S.C. § 254(d) ("[e]very telecommunications carrier that provides interstate telecommunications services shall contribute to the . . . mechanisms established by the Commission to preserve and advance universal service"). These funds, totaling more than $2 billion annually for just the E-Rate Program, are then used to reimburse cabling companies, networking companies, and telecommunications companies (Service Providers) for eligible services provided to schools and libraries at discounted prices. Although day-to-day management of the USF is handled by an entity designated by the FCC, the Universal Services Administrative Company (USAC), USAC administers the USF solely at the direction of the FCC. Appeals of USAC funding decisions and interpretations of E-rate regulations are left to the FCC. Violations of E-rate rules and false statements on E-rate forms can be punished under Title 18 U.S.C. § 1001. The funds are not owned by USAC. They are federal funds, provided by the United States and dedicated to a federal mission, and should be treated as such by the Court, with all statutory protections intact.

II. PROCEDURAL HISTORY

Relator Todd Heath (Relator) filed a qui tam complaint under 31 U.S.C. § 3730(b) (Dkt. Nos. 1, 64). After investigating the Relator's allegations, the United States filed a notice that it would not intervene at that

time (Dkt. No. 2).[4] The Relator's Complaint alleges that Wisconsin Bell submitted false claims in connection with the FCC's E-rate Program in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733. Specifically, the Relator alleges that the defendant failed to provide the lowest corresponding price (LCP) to schools in Wisconsin for phone service, as required, which caused the E-rate Program to pay too much for Wisconsin Bell's services on behalf of those schools. Under the LCP Rule imposed by the FCC, 47 C.F.R. 54.511, E-rate providers are required to sell their services to schools at rates that are no higher than the rates the provider gives to similarly situated customers for similar services. The Relator alleged that Wisconsin Bell gave lower telephone rates to other agencies of the State of Wisconsin than it did to Wisconsin schools, even though the schools were eligible for the lower rates Wisconsin Bell provided to the State. See United States ex rel. Heath v. Wisconsin Bell, Inc., 760 F.3d 688-89, 2014 WL 3704023, *1-2 (7th Cir. July 28, 2014) (summarizing Relator's allegations).

Defendant Wisconsin Bell filed a motion to dismiss in October 2011 based upon public disclosure grounds (Dkt. Nos. 49, 50, 68, 69). That motion was granted by this Court and Relator appealed (Dkt. Nos. 84, 86). The Seventh Circuit Court of Appeals found that the Relator's case was not based upon a public disclosure and reversed. See Heath, 2014 WL 3704023, at *4. Subsequently, Wisconsin Bell filed this motion to dismiss on the federal funds issue (Dkt. Nos. 96, 97). In this motion, Wisconsin Bell argues

[4] Although the United States has not intervened in this action, it remains the real party in interest. See, e.g., United States ex rel. McCready v. Columbia, HCA/Healthcare Corp., 251 F. Supp. 2d 114, 119-120 (D.C. 2003).

that the claims it submitted to the FCC's E-rate Program are not "claims" within the meaning of the False Claims Act because the E-rate funds are "private" funds. This argument is incorrect: E-rate funds are part of a dedicated federal fund controlled by the United States Government, and spent only at the direction of the United States Government. Accordingly, Wisconsin Bell's Motion to Dismiss should be denied.

III. BACKGROUND

A. The Universal Service Fund

Congress required the FCC to create the USF, a dedicated "Federal universal service support mechanism[]," as part of efforts to de-monopolize local telephone markets in the 1990s. 47 U.S.C. § 254(a)(1)(emphasis added). The FCC sought both to promote competition and also to continue to ensure that all Americans had access to telephone service. See Ex. 1, at 7-8 (FCC Chairman Hundt's Letter, attached to the Declaration of Jennifer Chorpening, filed concurrently with this Statement of Interest.) To ensure that, in the free market, telephone companies would continue to provide services to more expensive-to-serve rural areas, the FCC determined that it had to create "a system of explicit payments that targets the subsidy to the intended beneficiaries." Id. Furthermore, the FCC required, pursuant to statute, that the money to fund the subsidies be raised from all telecommunications carriers. Id. The mechanism settled on by Congress and the FCC was the USF: to require telecommunications companies to make "an equitable and nondiscriminatory contribution to the preservation and advancement of universal service" that would be "specific, predictable and sufficient." 47 U.S.C. § 254(b)(4), (5) and (d). Indeed, last year, more

than $2 billion from the USF was made available to the E-rate Program, and more than $8 billion was made available to all four USF subsidy programs. See Ex. 2, at 19 (2014 FCC Universal Service Monitoring Report). Of those amounts, more than $18 million went to schools and libraries in Wisconsin, and more than $185 million was used to support all four USF subsidy programs in Wisconsin. Id. at 18.

Each quarter, the FCC sets the percentage to be applied to telephone companies' interstate end-user revenues to determine the amount they must pay into the USF, or be subject to statutory penalties and potential lawsuits by the FCC. See 47 C.F.R. §§ 54.709(a) and 54.713 ("The Commission may also pursue enforcement action against delinquent contributors and late filers, and assess costs for collection activities in addition to those imposed by the Administrator."). The FCC determines this percentage every quarter by a formula that includes both projected costs of the USF programs and the interstate telephone companies' projected end-user revenues. See 47 C.F.R. § 54.709(a). Fraud on the USF means that the FCC has less money to subsidize schools that have requested funds, or that the FCC must require more money from telephone companies in future quarters. In turn, those telephone companies may pass on, and most do, the contributions requirement by billing their telephone customers a USF fee. 47 C.F.R. §§ 54.712. USAC is paid from the USF itself to collect all contributions and to process on behalf of the FCC the thousands of requests annually for subsidies by schools and libraries under the E-rate Program. See 47 C.F.R. §§ 54.701, 54.702(b) and (c).

The FCC provides all governing regulations, audits USAC's records, and makes final decisions as to

applications for subsidies if USAC denies the support. See 47 C.F.R. §§ 54.702(b) and (c); 54.719 ("Any person aggrieved by an action taken by a division of the Administrator . . . may seek review from the Federal Communications Commission . . ."). [5] See, e.g., Ex. 3 (In re Requests for Waiver by the Puerto Rico Department of Education San Juan, PR (granting waiver of USAC denial for failure to have a signed contract in place prior to filing an application for E-rate support)); Ex. 4 (Streamlined Resolution of Requests Related to Actions by the Universal Serv. Admin. Co. (granting and denying various petitions for reconsideration or applications for review from USAC funding decisions)).

[5] USAC's history is also instructive because USAC did not exist until the FCC required its creation for a specific federal purpose, namely, to administer the USF. Prior to enactment of the Telecommunications Act of 1996 (the "1996 Act"), the FCC instituted by regulation a universal service system to subsidize telephone service in high cost areas and for low income subscribers. Under this structure, the FCC used the National Exchange Carrier Association ("NECA") to collect and disburse funds. See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8784 (1997) (May 1997 Order); GAO, Telecommunications: Greater Involvement Needed by FCC in the Management and Oversight of the E-rate Program, GAO-05-151 (Washington, D.C., Feb. 9, 2005) at 54. The 1996 Act extended the reach of universal service support to schools and libraries and mandated carrier contribution and disbursement of funds in furtherance of the goal of universal service. May 1997 Order, 12 FCC Rcd at 8780. Thereafter, the FCC implemented the 1996 Act's provisions on universal service in which it appointed NECA as the temporary universal service administrator. 12 FCC Rcd 8776, 9216-9217 (1997). The FCC later directed NECA to create and incorporate a separate entity, USAC, to administer the USF. 12 FCC Rcd 18400, 18418 (1997).

B. The False Claims Act

The FCA, 31 U.S.C. §§ 3729-3733, is "the Government's primary litigative tool for combating fraud." S. Rep. No. 345, 99th Cong., 2d Sess. 21 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. The FCA protects federal funds from certain acts, including from any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1), or from a person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). The FCA defines a claim as "any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (2008).[6]

The reach of the FCA is not limited to funds flowing from the U.S. Treasury. While many cases under the FCA involve funds that came from the U.S. Treasury, nothing in the FCA requires that funds come from the U.S. Treasury to be actionable. Respectfully, the Fifth Circuit's contrary decision in United States ex rel. Shupe v. Cisco Systems, Inc., 759 F.3d 379 (5th Cir. 2014), is mistaken and should not be followed.

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[6] Although the False Claims Act's definition of a "claim" was amended in 2009, that new definition is not retroactive and thus does not currently apply to the instant case. Accordingly, unless otherwise indicated, references to the FCA's definition of a "claim" will refer to the pre-2009 version of that definition.

IV. ARGUMENT

A. E-rate Funds are "Provided By" the United States.

The FCA imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3730(a)(1). A "claim" under the FCA includes any request or demand for money or property "made to a contractor, grantee, or other recipient if the United States Government "provides" any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c)(2008).

The plain meaning of the term "provide" is "to make available." The American Heritage Dictionary 1411 (4th Ed. 2000); see also United States ex rel. Sanders v. American-Amicable Life Ins. Co. of Tex., 545 F.3d 256 (3d Cir. 2008) (defining the term "provide" in the FCA as having its plain meaning of "furnish" or "make available"). In Sanders, the Third Circuit considered whether the United States "provided" money paid out of military service members' salaries to a fraudulent savings plan. Id. at 260. The Sanders Court reasoned that the United States did not "provide" those funds, as "it was the defrauded military personnel who furnished or made money available to the defendants—and not the federal government—because it was those personnel who decided to participate in the fraudulent savings programs." Id. According to the Third Circuit, then, the term "provide" in the FCA should be given its plain meaning of "furnish" or "make available," and the applicable test is the federal nature of the entity that made the decision to pay or reimburse the claim. While the soldiers had discretion whether or not to make their funds available to

the program, USAC has no such discretion with respect to USF funds. USF funds are provided as required by the FCC regulations, with the FCC as the final arbiter. Thus, the United States unquestionably "provides" the money requested by E-rate applicants like the Milwaukee Public Schools, which received more than $3.5 million last year, and more than $90 million dollars since the E-rate Program began in 1998. If USAC had denied that funding, the Wisconsin schools would have had recourse to request that the FCC decide whether the money should be disbursed. And, if the FCC did not mandate contributions into the USF, there would be no funds available in the first place.

Notably, prior to the Fifth Circuit's recent decision in Cisco Systems, courts almost uniformly treated E-rate Program funds as federal funds, including the U.S. Supreme Court. In United States v. Am. Library Ass'n., 539 U.S. 194 (2003), the Supreme Court held that the Children's Internet Protection Act (CIPA), which requires public libraries to use internet filters as a condition of receipt of E-rate Program funds, is a valid exercise of Congress' spending power. Id. at 212-14. As the Court explained, CIPA does not penalize public libraries that do not use internet filters, it "simply reflects Congress' decision not to subsidize their doing so" with E-rate Program funds. Id. at 212. The Seventh Circuit has similarly treated E-rate funds as federal funds. See United States v. Bokhari, 430 F.3d 861, 862 (7th Cir. 2005) (reviewing and reversing a sentencing determination but noting that "Defendants were indicted for defrauding the federal

government's E-rate Program, which provides funding for economically disadvantaged schools to obtain or upgrade computer systems for students").[7]

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[7] See also FCC v. AT&T Inc., 131 S. Ct. 1177, 1180 (2011) ("AT&T voluntarily reported to the FCC that it might have overcharged the Government for services it provided as part of the [E-rate Program]"); United States v. Hornsby, 666 F.3d 296, 301 (4th Cir. 2012) ("The E-rate program is a federally subsidized program that provides discounts to schools on their telecommunications, internet access, and computer networking"); United States v. Bohuchot, 625 F.3d 892, 894 (5th Cir. 2010) ("The second contract involved E-rate, a federal program that provides money and technology to school districts that subsidize student lunches"); United States v. Green, 592 F.3d 1057, 1060 (9th Cir. 2010) ("That Green's E-rate scheme involved millions of dollars in federal funds was sufficient to bring it squarely within the heartland of the federal fraud statutes"); United States v. Weaver, 175 F. App'x 506, 507 (3d Cir. 2006) ("A majority of the funds for the computers came from a federally funded program operated through the Federal Communications Commission, commonly referred to as "E-rate""); Valesky v. Aquinas Acad., CIV.A. 09-800, 2011 WL 4102584 (W.D. Pa. Sept. 14, 2011) (finding that participation in the E-rate Program constitutes "the receipt of Federal financial assistance"); United States v. Curtis, 2011 WL 8197682, at *11 (W.D. La. Aug. 9, 2011) ("the Form 471 was filed on January 17, 2002 by the school with the E-rate Program to apply for federal funding . . . the federal funding commitment for the Westside Alternative School contract was dated October 8, 2002"); Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 619 (E.D.N.Y. 2011) (defendant was a recipient of "federal E-rate funds"); United States v. Hansen, 2010 WL 431436, at *1 (W.D. Mich. Jan. 27, 2010) ("The contract at issue involved federal funding through the E-rate Program, which provides subsidies to schools and libraries for Internet access and other telecommunications services"); Bradburn v. N. Cent. Reg'l Library Dist., 2008 WL 4460018, at*3 (E.D. Wash. Sept. 30, 2008) ("NCRL receives federal assistance through the E-rate program, which provides for discounted Internet access and other

B. The Courts and Congress do not Limit FCA Protections to Funds Held in the U.S. Treasury

The conclusion that E-rate funds are provided by the United States is not affected by the fact that such funds do not reside in the Treasury. First and foremost, nothing in the FCA's text limits the applicability of the Act to federal funds that reside in the Treasury. To the contrary, the FCA broadly defines a claim to include a request for any money that is "provided by the United States" without any further limitation.

The Supreme Court has long stated that the False Claims Act "does not make the extent of [government funds'] safeguard dependent on the bookkeeping devices used for their distribution." United States ex rel. Marcus v. Hess, 317 U.S. 537, 544 (1943); see also United States v. Neifert-White Co., 390 U.S. 228, 232 (1968) (noting that the FCA was originally passed because of the "fraudulent use of Government funds" during the Civil War); Rainwater v. United States, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made."). Simply stated, the United States spends money in a multitude of ways, including

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telecommunications services"); Epic Communications, Inc. v. Progressive Communications, Inc., 2008 WL 1930419, at *4 (N.D. Ohio Apr. 30, 2008) (the defendant informed school districts "of federal grants, referred to as E-rate grants, available to them for the acquisition of technology equipment by school districts"); but cf. United States ex rel. Lyttle v. AT&T Corp., No. 2:10-1376 (W.D. Pa. Nov. 15, 2012)(discussing telecommunications relay services funding mechanism, a funding mechanism similar in some respects to that utilized by E-rate program).

expenditures that do not originate from the U.S. Treasury. The manner in which those expenditures are structured is simply not determinative of the applicability of the FCA to federal funds that the United States chooses to spend through other parties.

Courts have not hesitated to say that the United States has "provided" funds, and therefore, to apply the FCA to a multitude of other scenarios where the funds did not come from the U.S. Treasury. For example, false claims for United States Postal Service funds are actionable under the FCA even though the Postal Service is a "self-funding" agency whose funds do not pass through the Treasury. See, e.g., United States v. Hicks, 2008 WL 1990436, at *2-3 (S.D. Ill. May 5, 2008) (citing Baker v. Runyon, 114 F.3d 668, 670 (7th Cir. 1997)). In Hicks, the court focused on the question whether Postal Service funds were "Government Funds" because they do not pass through the U.S. Treasury. The court concluded that the Postal Service is "self-funding only in the sense that Congress has appropriated to it all of the Postal Service's own revenues. It nevertheless is 'operated as a basic and fundamental service provided to the people by the Government of the United States." Id., quoting Baker, 114 F.3d at 672.

Similarly, the Department of Housing and Urban Development's Federal Housing Administration (FHA) is completely self-sufficient and its funds are raised from, and paid to, premium-paying homeowners without any assistance from the U.S. Treasury. Nevertheless, the FCA has consistently been found to apply to the fraudulent inducement of FHA insurance payments. See, e.g., United States v. Eghbal, 548 F.3d 1281 (9th Cir. 2008); United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977); United States v. Ridglea State

Bank, 357 F.2d 495 (5th Cir. 1966). The same analysis applies to the USF.[8]

Any doubt that Congress never intended such the parsimonious reading in Cisco Systems is dispelled by a change that Congress added to the definition of a claim in 2009, a clarification which is entitled to great weight in construing the prior version of the FCA's definition of a "claim." See Loving v. United States, 517 U.S. 748, 770 (1996) ("Subsequent legislation clarifying the intent of an earlier statute is entitled to great weight in statutory construction."). In the new definition, Congress expressly stated that a claim may exist "whether or not the United States has title to the money or property" that is provided. 31 U.S.C. 3729(b)(2)(A) (2010) (emphasis added). This language was intended to clarify that a claim may exist even if the United States only administered, and did not own,

[8] United States Grain Corp. v. Phillips, 261 U.S. 106 (1923), is also instructive as to when the U.S. Supreme Court has considered non-appropriated funds to be federal funds. In that case, a Navy officer was asked to transport back from Bulgaria gold that came from the sale of grain by the American Relief Administration. The gold belonged to the U.S. Grain Corporation, a corporation wholly owned by the United States Government that was created by Executive Order to buy, store, and sell wheat. Navy regulations permitted the commander of the ship to keep a small percentage of the gold transported in this manner, if the gold did not belong to the United States Government. The court found that the gold was, in actuality, the property of the United States: "It is true that the legal title was in the Corporation, that the property of the Corporation might have been taken to pay a judgment against it, and that in other ways the difference of personality would be recognized. But for purposes like the present imponderables have weight. When as here the question is whether the property was clothed with such a public interest that the transportation of it no more could be charged for by a public officer than the carrying of a gun, we must look not at the legal title only but at the facts beneath forms." Id. at 286.

the funds that were provided. See S. Rep. 111-10 at 12 ("False claims made against Government-administered funds harm the ultimate goals and U.S. interests and reflect negatively on the United States. The FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term 'claim' . . ."). It would be bizarre indeed to conclude that Congress intended the FCA to apply only to federal funds maintained in the Treasury, when it did not require the funds at issue to be owned by the United States at all.

In addition to the new language concerning the title of the funds, Congress also modified the definition of "obligation" in the FCA. As previously mentioned, the FCA imposes liability not only on affirmative false claims for payment, but also from a person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). Congress defined "obligation" to mean "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. 3729(b)(3) (2010). Funds collected by USAC from telecommunications companies as mandated by the FCC, pursuant to its statutory authority, 47 U.S.C. § 254(d), squarely fall into the definition of an "obligation" under the FCA. It would be an incongruous result to allow an FCA case against a telecommunications company that fails to submit the proper payments to the USF, but not against the telecommunications company that seeks

payment for services provided in a fraudulent manner to schools and libraries under the E-rate Program.

Wisconsin Bell cites Rainwater, 356 U.S. 590 (1958) and several other cases for the proposition that the most important consideration in determining whether a request for money is a "claim" under the FCA is whether the money comes from the Treasury. None of those cases, however, state that the funds must come from the Federal Treasury. These cases stand only for the proposition that if an entity's funds **do** come from the Federal Treasury, then that may be dispositive as to whether a request for money is a "claim" under the FCA. Indeed, these cases provide a host of other highly relevant factors, all of which cut against defendant's argument here. Those factors include whether the entity is "supervis[ed] and direct[ed]" by a federal agency or whether the entity "is simply an administrative device established by [the government] for the purpose of carrying out federal [] programs with public funds." Rainwater, 356 U.S. at 591. Other courts have considered whether "[i]n normal usage or understanding [the request] would [] be thought of as a "claim against the Government," United States v. McNinch, 356 U.S. 595, 598-99 (1958), or whether the government "was administering a specific pool of funds on behalf of the federal government, such as a federally-funded highway project or assistance program." Garg v. Covanta Holding Corp., 478 Fed. Appx. 736, 742 (3d Cir. 2012). The USF meets all of these tests, because while administered by USAC, the FCC ultimately directs all fund disbursals for a distinct federal purpose: the provision of universal service.

Finally, the defendant's argument that the USF consists of "private funds" and, therefore, do not qualify as federal funds defies common sense. The fact that the federal funds in the USF (1) were raised from private parties (users of interstate telecommunications services), and (2) are ultimately paid to other private parties (E-rate applicants), simply means that the USF is like virtually any other government spending program. The fees imposed on interstate telecommunications providers are no more voluntary than the taxes imposed on private citizens. Thus, if E-rate funds are deemed to be "provided" by the telecommunications companies, the same logic would render all federal outlays as funds "provided" by taxpayers rather than the United States Government, placing these funds outside the purview of the FCA.

C. The President of the United States Considers USF Funds to Constitute a Permanent Appropriation and Part of the Federal Budget

While not held in the U.S. Treasury, E-rate funds are a permanent appropriation accounted for in the United States' budget as federal funds. The President's proposed budget for each fiscal year notes the USF's remaining balance from the prior year and sets forth its budget authority for the coming year. Ex. 5 (OMB, Budget of the United States Government, Other Independent Agencies, Fiscal Year 2015). The FCC includes USF contributions in its financial statements, and considers them to be "appropriated and dedicated collections and are accounted for as a budgetary financing source." See Ex. 6, at 34 (FCC FY 2013 Financial Statement Audit). This treatment is in accordance with the Government Accountability Office's (GAO's) Principles of Federal Appropriations

Law, which explains that a "permanent appropriation" occurs when Congress makes funds available "for specified purposes and does not require repeated action by Congress to authorize its use." GAO, Principles of Federal Appropriations Law, Vol. 1 at 2-14 (3rd Ed. Jan. 2004). The Comptroller General has "long held that statutes which authorize the collection of fees and their deposit into a particular fund and which make the fund available for expenditure for a specified purpose, constitute a continuing or permanent appropriation." B-228777, 1988 WL 227937 (Comp. Gen.).

Permanent appropriations are a common way for federal agencies to fund federal programs without resorting to the U.S. Treasury. See Ex. 7 (May 1996 GAO Report, Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations). The GAO report refers to this type of account as "backdoor authority,"[9] and states that "[o]f the 173 departments and agencies in the President's fiscal year 1996 budget, 82 used or had authority to use spending authority or permanent appropriations to finance all or part of their programs and activities." This permanent appropriation activity accounted for more than $1,165 billion in 1994. Id. at 2. Of that amount, $124 billion was from "offsetting collections from the public . . . credited to appropriation or fund accounts." Id. Thus, the USF is just a small part of a

[9] The GAO defines "backdoor authority" as the authority to obligate federal funds that is not controlled through the appropriations process. "Basically, it represents mandatory spending that is provided and controlled indirectly through other forms of legislation." Ex. 7, at 4.

common federal funding mechanism created by Congress and entitled to protection from fraud, just like funds that come from the U.S. Treasury.

D. The USF is Similar to a Nonappropriated Fund Instrumentality and is Covered Under the False Claims Act

A particular subspecies of what the GAO defines as a permanent appropriation is the Nonappropriated Fund Instrumentality (NAFI). NAFIs are defined as federal entities that do not receive funds from congressional appropriations, but rather are funded primarily from the entities' own activities, services, and product sales. See AINS, Inc. v. United States, 56 Fed. Cl. 522, 529, n. 7 (May 23, 2003), abrogated on other grounds Slattery v. United States, 635 F.3d 1298 (Fed. Cir. Jan. 28, 2011). Examples of NAFIs include the U.S. Postal Service and the U.S. Mint. Id. NAFIs may be subject to suit in the Court of Federal Claims under the Tucker Act, with the U.S. Treasury potentially liable for claims against a NAFI. See Slattery, 635 F.3d at 1301 ("the jurisdictional criterion is not how the government entity is funded or its obligations met, but whether the government entity was acting on behalf of the government."). Notably, some NAFIs store their funds in special accounts in the U.S. Treasury, but most do not. See Furash & Co. v. United States, 252 F.3d 1336, 1341 (Fed. Cir. 2001), abrogated on other grounds Slattery v. United States, 635 F.3d 1298 (Fed. Cir. Jan. 28, 2011).

The USF is similar to NAFI-type funds. Clearly, Congress intended that NAFI-type funds, such as the USF, be protected by the FCA. The 1986 Senate Report expressly states that "a claim upon any Government agency or instrumentality, quasi-governmental corporation, or nonappropriated fund activity is a

claim upon the United States under the act." S. Rep. No. 99-345 at 10, reprinted in 1986 U.S.C.C.A.N. 5266, 5275 (emphasis added).

E. The FCC Treats USF Funds as Federal Funds

In addition to including the USF in the FCC's budget, further Congressional actions show that USF monies are federal funds. Congress has tapped the USF to pay for federal government oversight of the fund. *See* H.R. 2764—110th Congress: Consolidated Appropriations Act, 2008. (2007) (providing for $21,480,000 to be transferred from the Universal Service Fund to the FCC Office of Inspector General for audits and investigations to prevent and remedy waste, fraud and abuse).

In addition to investigating fraud and abuse on the USF, the FCC has the authority, and the responsibility, to recoup E-rate funds that are improperly disbursed. Both the Debt Collection Improvement Act (DCIA), Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996), and the FCC's rules, FCC No. 04-72 (April 13, 2004), require and authorize the Commission to collect debts owed to the United States for which it is responsible, including amounts improperly disbursed under the E-rate Program. See 31 U.S.C. § 3701(b)(1) (defining "claim" 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"); 47 C.F.R. §§ 1.1901; In re Changes to the Bd. of Dirs. of the Nat'l. Exch. Carrier Ass'n., 1999 WL 809695, 17 Communications Reg. (P&F) 1192 (providing that the FCC is both required and permitted to recoup E-rate money that is improperly disbursed pursuant to the DCIA); In re Changes

to the Bd. of Dirs. of the Nat'l. Exch. Carrier Ass'n., 15 FCC Rcd. 22975, 2000 WL 1593332 (F.C.C.).

F. The Fact that E-rate Claims are Made to the FCC's Designated Administrator Does Not Alter the Conclusion that the Funds are Provided by the United States

The fact that the alleged false claims in this case were paid by USAC does not negate the conclusion that the funds used to pay these claims were provided by the United States. A "claim" under the FCA includes any request or demand for money or property "made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (2008). Under the plain text of the statute, nothing requires the government to actually pay the claim—only provide the money. Indeed, the text expressly envisions FCA protection for claims on federal funds that are paid out by third parties. Thus, the fact that USAC pays out E-rate funds is facially irrelevant to determining whether E-rate funds are federal funds.

As Congress has made clear, a false claim is actionable although the claims or false statements were made to a party other than the Government, "if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345, at 10 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266; see also United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). A prime example is Medicare. Under Medicare, private parties (individual tax payers) pay mandatory FICA contributions into the Medicare Trust Fund and the government furnishes those funds to nongovernmental intermediaries (typically insurance

companies) for payment to other private parties (healthcare providers). See, e.g., United States v. Mackby, 261 F.3d 821, 825 (9th Cir. 2001) (explaining Medicare payment structure); United States v. Carell, 782 F. Supp. 2d 553, 559 (M.D. Tenn. 2011) (holding United States stated a plausible claim even though the false cost reports were submitted to Medicare intermediary). As with the E-rate Program, that private parties are involved on either end of the Medicare program does not change the federal character of Medicare funds after their collection or the conclusion that they are provided by the federal government. Indeed, it is long settled that claims for payment from Medicare are actionable under the FCA.

Here, the fact that the claims were paid by USAC is particularly irrelevant because USAC is no more than an agent of the United States. Although USAC is a private non-profit organization, and it is not a part of the FCC, it has no ability or authority to exercise discretionary, non-administrative functions, and all of its actions are subject to FCC control and oversight. For example, the FCC determines the composition of USAC's Board of Directors, and the manner in which those members are selected. 47 C.F.R. §54.703. Moreover, the FCC dictates USAC's functions, and in fact, removed from USAC any ability to "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the [FCC's] rules are unclear, or do not address a particular situation, [USAC] shall seek guidance from the [FCC]." 47 C.F.R. §54.702(c). Indeed, USAC did not even exist until after the FCC directed its creation, and the FCC instructs USAC on how to administer the USF. All USAC decisions relating to administrative functions, i.e., its decisions on whether to deny re-

quests for E-rate funding, are subject to potential review by the FCC. See 47 C.F.R. §§ 54.719, 54.722, and 54.725.

But even if USAC was not a mere agent, that would not alter the fact that the funds at issue are federal funds. As the foregoing discussion makes clear, a false claim to any third party recipient of federal funds is actionable under the FCA, whether or not the third party is an agent of the United States, so long as the funds used by the third party to pay the claims were provided by the United States.

G. Cisco Systems was Wrongly Decided

Cisco Systems contrary conclusions about E-rate funds should be rejected. First, the Fifth Circuit read into the FCA the requirement that funds come from the U.S. Treasury which, as discussed, is found nowhere in the statute and runs contrary to the decisions of other courts that have imposed no such requirement. See, e.g., Hicks, 2008 WL 1990436, at *2-3. Second, the Fifth Circuit ignored rulings of the U.S. Supreme Court and by the district court in that case concerning the "broad definition" of a claim and the legislative history of the act that supports a "broad application" of the FCA to "protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made." See Rainwater, 356 U.S. at 592; Cisco Systems, 759 F.3d at 382. Third, the Fifth Circuit tied FCA liability to whether the United States has a "financial stake" in its fraudulent losses, and determined that the United States had no financial stake because the money did not come from the U.S. Treasury. Cisco Systems, 759 F.3d at 385. However, the FCA requires only that the United States "provide"

the funds, not that it have a "financial stake." Moreover, to the extent that a "financial stake" means that the money must come from the U.S. Treasury, then such a requirement clearly goes too far, because it would exclude permanent appropriations and NAFIs, which the Act's legislative history makes clear are covered by the FCA. Fourth, the Fifth Circuit relied on the fact that the FCC cannot directly seize USF funds for discretionary funding for other FCC programs. Id. at 386. However, the Fifth Circuit ignored the fact that, as discussed above, Congress can, and in fact, has done so, such as to pay for FCC Office of Inspector General audits and investigations to prevent fraud and abuse on the USF.

Fifth, and importantly, the Fifth Circuit downplayed the important role of the FCC concerning the control of disbursements that involve the USF, in favor of emphasizing the administrative role of USAC. See Cisco Systems, 759 F.3d at 387 ("Although USAC came about through the actions of Congress and the FCC, and the FCC retains some oversight and regulation, it is explicitly a private corporation owned by an industry trade group.") (emphasis added). In fact, the FCC retains full oversight of the USF, from determining how much goes into the fund, to making the final call for when money goes out of the fund. Thus, the USF actually meets the very test laid down by the Fifth Circuit for determining whether monies are federal funds covered by the FCA—that the funds must either be from the U.S. Treasury, or the agency administering the program must be a government entity. Cisco Systems, 759 F.3d at 388. The FCC is indisputably a federal government entity.

Finally, the cases cited by the Fifth Circuit actually undercut rather than support its conclusion. For

example, the Fifth Circuit cited U.S. ex rel. Shank v. Lewis Enterprises, Inc., No. 04-CV-4105-JPG, 2006 WL 1207005 (S.D. Ill. May 3, 2006) for the statement that "any drop" of government funds satisfies the FCA as support for its conclusion that money must come from the Treasury. However, the court in that case actually rejected a definition of "provides" that restricted FCA-protected funds to those from the U.S. Treasury. The Shank court considered a funding situation very similar to the E-rate Program and found it to constitute federal funds. For one of the insurance programs at issue, the government funded it by requiring assessments on coal mines of 35 cents per ton of coal produced. Id. at *7. Defendants there argued these assessments did not constitute federal funds. In response, the Court wrote that "[t]his argument must be rejected; for if it were not, taken to its logical conclusion, federal income taxes would not be federal funds." Id.

Similarly, the Fifth Circuit cited to U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 303-04 (4th Cir. 2009), as supporting its opinion requiring that funds may only come from the U.S. Treasury. In fact, a key determination by the Custer Battles court was that the United States had provided the funds, even though they were not funds appropriated from the U.S. Treasury. In Custer Battles, the court considered whether $210 million of Iraqi funds that were held in bank accounts in the United States and that were legally confiscated by Executive Order, thereby becoming property of the United States, and that were then provided to the Development Fund for Iraq and intermingled with Iraqi and other coalition funds, remained federal funds under the FCA. Id. at 302-03. The Fourth Circuit determined that these $210 million of "vested funds," which were never appropriated

by Congress, were "provided" by the U.S. government and that the FCA should apply to those funds. Id. at 304.

V. CONCLUSION

For the preceding reasons, Wisconsin Bell's motion to dismiss Relator's complaint should be denied.

Dated: January 7, 2015

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES, *ex rel*. TODD HEATH, Plaintiff, v. WISCONSIN BELL, INC., Defendant.	CIVIL ACTION No. 2:08-CV-00876 (Lead Case No. 2:08-CV-00724-LA) Judge Lynn Adelman

SUPPLEMENTAL FILING TO THE UNITED STATES' STATEMENT OF INTEREST IN RESPONSE TO WISCONSIN BELL, INC.'S MOTION TO DISMISS RELATOR'S COMPLAINT

I. INTRODUCTION

The United States files this supplement to its Statement of Interest (Dkt. No. 106) in response to Wisconsin Bell's Motion to Dismiss (Dkt. No. 97) to address two points: (1) the common misconception that no money from the U.S. Treasury is to be found in the Universal Service Fund (USF), a federal telephone subsidy support mechanism; and, (2) to clarify that in addition to retaining full oversight of the fund, the Federal Communications Commission (FCC) and the U.S. Treasury also collects the debts of telecommunications companies (Contributors) who fail to pay a portion of their revenues into the USF. See Statement of Interest, at 16, 20; see also 1647 U.S.C. § 254(d).

Since July 2003, about $100 million in Contributor debt, criminal restitution, and civil settlement

payments has passed through either the FCC Treasury accounts or the U.S. Treasury itself before being deposited into the USF. See Declaration of David Case, at ¶¶ 9, 10 ("Case Decl."); Declaration of Mark Stephens, at ¶¶ 2-8 ("Stephens Decl."). These facts show that the United States "provides" all the money that is part of the USF, because like all other federal funds, the United States uses federal resources to ensure their proper collection and disbursal.

II. BACKGROUND

In addition to the day-to-day management of the USF for the FCC, the Universal Services Administrative Company (USAC) starts the process of collecting debts on behalf of the FCC when Contributors fail to make payments into the USF or when funds are improperly disbursed pursuant to the FCC's rules and the Debt Collection Improvement Act (DCIA), Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996). See Statement of Interest, at 16, 20; Case Decl. ¶¶ 2-6; Stephens Decl. ¶¶ 4-8. When Contributors do not make quarterly filings and payments concerning their projected revenues on FCC Form 499-Q, USAC bills them for the missing payment. Case Decl. ¶ 3. Similarly, when Contributors do not make annual filings and payments concerning actual revenue for the prior calendar year on FCC Form 499-A, USAC bills them for the missing payment. Case Decl. ¶ 4. Contributors who fail to make these payments are subject to interest and penalties. Case Decl. ¶ 5.

While this process has changed over time, if these amounts remain unpaid, USAC refers Contributors' USF debts to either the FCC or to the U.S. Treasury for collection. Case Decl. ¶¶ 6-8 (describing changes to the process between July 2003 and today from

USAC's perspective); Stephens Decl. ¶¶ 5-8 (describing changes to the process between July 2003 and today from the FCC's perspective). Once a referral is made, the FCC and the U.S. Treasury work to collect these debts. Id. The FCC or the U.S. Treasury remits any collected Contributors' debts to USAC on a regular basis, and that money is deposited into the USF. Id. Since July 2003, the FCC and the U.S. Treasury have together collected and deposited into the USF approximately $50 million from Contributors' debt payments. Case Decl. ¶ 9.

Additionally, federal law enforcement efforts in USF cases, such as civil settlements by the U.S. Department of Justice or restitution paid by criminal defendants, has resulted in another $50 million being deposited into the USF. Case Decl. ¶ 10. Before being deposited into the USF, this money was stored in U.S. Treasury accounts. Id. Stephens Decl. ¶ 8.

III. ARGUMENT

As discussed in detail in the United States' Statement of Interest, all the funds collected by USAC, held by the USF, and expended at the direction of the FCC in support of the E-rate program are federal funds "provided by" the United States for the reasons stated therein. Moreover, in contrast to the mistaken findings of the Fifth Circuit Court of Appeals in United States ex rel. Shupe v. Cisco Sys., Inc., 759 F.3d 379 (5th Cir. 2014), money from the U.S. Treasury has also been deposited into the Fund. Since July 2003, approximately $100 million has been collected either by the FCC directly, or after a debt referral to the U.S. Treasury, from delinquent Contributors or via criminal restitution and civil settlement payments. See Case Decl. ¶¶ 9-10; Stephens Decl. ¶ 5 (stating that money collected directly by the FCC goes through the

Treasury's General Account to USF); see also 47 C.F.R. §§ 1.1901; In re Changes to the Bd. of Dirs. of the Nat'l. Exch. Carrier Ass'n., 1999 WL 809695, 17 Communications Reg. (P&F) 1192 (providing that the FCC is both required and permitted to recoup E-rate money that is improperly disbursed pursuant to the DCIA); In re Changes to the Bd. of Dirs. of the Nat'l. Exch. Carrier Ass'n., 15 FCC Rcd. 22975, 2000 WL 1593332 (F.C.C.). This money, held in Treasury accounts, is transferred to USAC and deposited into the USF where it is once again paid out to provide discounts for technology services that further federal interests.

As a general matter, when the Government "provides any portion" of the money requested, including "even a drop" of U.S. Treasury money to the defrauded entity, that entire Fund is considered covered by the False Claims Act. See United States ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 303-04 (4th Cir. 2009); United States ex rel. Shank v. Lewis Enters., Inc., No. 04-CV-4105-JPG, 2006 WL 1207005, at *7 (S.D. Ill. May 3, 2006). The Fifth Circuit in Shupe agreed with this analysis and cited it favorably. See Shupe, 759 F.3d at 383-84. However, in determining that E-rate funds were not "provided by" the United States, the Fifth Circuit failed to consider that approximately $100 million has passed through FCC and U.S. Treasury accounts before being deposited into the USF, thus making it even clearer that all the losses to the USF "result in financial loss to the Government." See United States ex rel. Sanders v. Am.-Amicable Life Insur. Co. of Tex., 545 F.3d 256, 259 (3d Cir. 2008). Like all other federal funds, when Contributors do not pay or funds are wrongly disbursed from the USF, the United States uses its federal debt collection resources to get those funds back into the

proper place, the USF, thereby furthering its federal interests of providing universal service.[1]

IV. CONCLUSION

For the preceding additional reasons, in addition to the other arguments set forth in the United States' Statement of Interest, Wisconsin Bell's motion to dismiss Relator's complaint should be denied.[2]

Dated: February 18, 2015

[1] Moreover, these facts show that if every Contributor refused to make all of its statutorily-required payments, requiring the FCC and the U.S. Treasury to collect every dollar from debtors in the first instance, all USF funds would thereby flow through the Treasury. While this scenario is unlikely, it further points out the problems with the Fifth Circuit's mistaken analysis in United States ex rel. Shupe v. Cisco Sys., Inc., 759 F.3d 379 (5th Cir. 2014).

[2] The United States understands that the Chamber of Commerce may file an amicus brief in this matter. The United States reserves the right to respond to any new arguments raised therein.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, *ex rel.* TODD HEATH, Plaintiff, v. WISCONSIN BELL, INC., Defendant.	CIVIL ACTION NO. 2:08-CV-00876 (Lead Case No. 2:08-CV-00724-LA) Judge Lynn Adelman

DECLARATION OF DAVID CASE

I, David Case, do hereby state and declare:

1. I am the Chief Financial Officer ("CFO") and Vice President of Finance at the Universal Service Administrative Company ("USAC"), having its principal offices at 2000 L Street, NW, Suite 200, Washington, DC 20036. I have been in this position since August 30, 2010. By reason of my position, I am authorized and qualified to make this declaration. I am of sound mind, capable of making this declaration, and personally acquainted with the facts detailed below.

2. USAC is a private, not-for-profit corporation, organized under the laws of Delaware. In 1998, the Federal Communications Commission ("FCC") designated USAC by federal regulation as the permanent Administrator of the federal Universal Service Fund ("USF") and the four federal Universal Service Support Mechanisms the USF supports, including the High-Cost, Low-Income ("Lifeline"), Schools and Libraries ("E-Rate"), and Rural Health Care programs. Among its duties as the Administrator of the USF,

and on behalf of and subject to FCC rules and oversight, USAC is responsible for billing contributors to the USF, collecting USF contributions, and disbursing Universal Service support funds to program beneficiaries. The debt collection and repayment process for the USF and these programs is conducted pursuant to the FCC's rules and the Debt Collection Improvement Act ("DCIA").[1]

3. Under FCC rules, and subject to very limited exceptions, every provider of interstate telecommunications services and certain other providers of telecommunications must contribute to the USF (hereafter, "Contributors"). Contributors submit to USAC on a quarterly basis statements of their projected interstate and international end user telecommunications revenues on Telecommunications Reporting Worksheet ("FCC Form 499-Q"). USAC, in turn, reports the total quarterly projected contribution base to the FCC. The FCC uses the ratio of projected program expenses to the projected contribution base to establish the quarterly contribution factor. USAC then bills Contributors monthly for their Universal Service contributions based on this factor.

4. Contributors are also required to report their annual historical revenues for the prior calendar year on the FCC Form 499-A, which is generally due on April 1 of each year. USAC uses the information reported on the annual FCC Forms 499-A to reconcile

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[1] *See generally* 47 C.F.R. pt. 54, subpt. H; Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996), as amended, and codified at 31 U.S.C. §§ 3711, 3716, 3717; 31 C.F.R. § 285.12, 31 C.F.R. §§ 900-904; and 47 C.F.R. § 1.1901, *et seq.* ("DCIA"). Congress enacted the DCIA to strengthen federal debt collection procedures.

billings for the previous year that were based on revenue projections reported on the FCC Forms 499-Q.

5. Contributors that fail to comply with their Universal Service contribution obligations are subject to certain penalties pursuant to the FCC rules. For example, if a Contributor fails to pay a contribution amount assessed on the basis of FCC Form 499-Q or 499-A, USAC bills the Contributor the amount due, plus interest and penalties.[2] These unpaid amounts are considered delinquent and a debt owed to the United States.[3] Under the FCC's DCIA rules, entities or individuals doing business with the FCC must pay their debts in a timely manner. Any debt over 120 days delinquent must be transferred to the United States Department of Treasury ("Treasury") for collection.[4] However, in accordance with FCC's rules, USAC currently transfers any Contributor debt that is 90 days or more delinquent directly to Treasury for

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[2] *See* 47 C.F.R. § 54.713(b) ("If a universal service fund contributor fails to make full payment on or before the date due of the monthly amount established by the contributor's applicable Form 499-A or Form 499-Q, or the monthly invoice provided by the Administrator, the payment is delinquent. All such delinquent amounts shall incur from the date of delinquency, and until all charges and costs are paid in full, interest at the rate equal to the U.S. prime rate (in effect on the date of the delinquency) plus 3.5 percent, as well as administrative charges of collection and/or penalties and charges permitted by the applicable law . . . .").

[3] *See* 31 U.S.C. § 3701; 31 C.F.R. § 901.2; 47 C.F.R. § 1.1911; *see, e.g.*, USAC Invoice ("**DEMAND FOR PAYMENT, DUE DATE & DELINQUENCY**. Under 31 U.S.C. § 3701, C.F.R. § 901.2 and 47 C.F.R. § 1.1911, this is a First Demand for Payment of your **BALANCE DUE,** which is a DEBT owed to the United States." (emphasis in original)).

[4] 31 U.S.C. § 3716(c)(6)(A).

collection.[5] This debt collection and repayment process, its origins, and changes to the process that have been made over time, is described in further detail below.

6. Pursuant to the DCIA and in accordance with detailed procedures developed by USAC and FCC staff, in July 2003 and continuing through April 2011, USAC began transferring Contributors' debts to the FCC for collection on a monthly basis. In November 2005, USAC also began transferring USF program recovery debts (i.e., previously disbursed amounts, for which USAC sought recovery due to updated data or as a result of audits) to the FCC for collection. Based on discussions with the FCC, it is USAC's understanding that the FCC issued letters, demanding payment for these debts, and would attempt to collect payment from the debtors. If the debtors remitted payment to the FCC for the debts, the FCC would send the payment to USAC by sending a lump sum payment to USAC on a periodic basis. For debts that remained unpaid, the FCC would transfer the unpaid debts to the U.S. Secretary of the Treasury for further collection. Subsequently, the Treasury issued letters, demanded payment for these debts, and would attempt to collect payment from the debtors. If the debtors remitted payment to Treasury for the debts, Treasury would remit those payments to the FCC. The FCC would then include those payments in a lump sum payment to USAC.

7. In early May 2011, due to problems with the FCC's financial system, and continuing through March 2012, USAC did not transfer debts to the FCC

[5] *See* USAC website, *Late Payments DCIA, Red Light*, *available at* http://www.usac.org/cont/late-payments/default.aspx (last visited Feb. 6, 2015).

for collection. The FCC continued to remit payments to USAC for any previously transferred debts.

8. In March 2012, the FCC directed USAC to begin transferring debts directly to Treasury, rather than first transferring the debt to the FCC as USAC had previously done. Between March 2012 and March 2014, Contributors' debt payments went first to Treasury, which then sent them to the FCC, which in turn sent them to USAC for the USF. In March 2014, that process was streamlined and USAC now receives payments for debts transferred to Treasury directly from Treasury, approximately three times per month.

9. The total amount of payments received by the FCC and Treasury for delinquent Contributor and USF program recovery debts that were transferred back into the USF by USAC from July 2003 through January 2015 is approximately $50 million.

10. In addition to receiving delinquent USF contributions from Treasury, according to USAC records, USAC has also received restitution and/or settlement payments from criminal and civil proceedings from Treasury. From September 2004 through January 2015, USAC has received approximately $50 million from Treasury for these matters.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the United States and that this declaration was executed at Washington, D.C. on February 18, 2015.

s/ David Case
DAVID CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, *ex rel.* TODD HEATH, Plaintiff, v. WISCONSIN BELL, INC., Defendant.	CIVIL ACTION NO. 2:08-CV-00876 (Lead Case No. 2:08-CV-00724-LA) Judge Lynn Adelman

DECLARATION OF MARK STEPHENS

I, Mark Stephens, do hereby state and declare:

1. I am the Chief Financial Officer ("CFO") of the Federal Communications Commission ("FCC") and have held this position since 2006. By reason of my position, I am authorized and qualified to make this declaration. I am of sound mind, capable of making this declaration, and personally acquainted with the facts detailed below.

2. My duties include responsibility for the collection of debts on behalf of the FCC, the federal Universal Service Fund ("USF"), and any other reporting components of the FCC pursuant to the FCC's debt collection rules, 47 CFR §§1.1901-1.1953, the Federal Claims Collection Standards, 31 CFR §§901-904 and the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996), as amended, and codified at 31 U.S.C. §§ 3711, 3716, 3717; 31 C.F.R. § 285.12, 31 C.F.R. §§ 900-904; and 47 C.F.R. § 1.1901, *et seq*. ("DCIA"). This responsibility

includes working with USAC in the collection of debts arising from the USF.

3. USAC is a private, not-for-profit corporation, organized under the laws of Delaware. In 1998, the FCC designated USAC by federal regulation as the permanent administrator of the USF and the four federal Universal Service Support Mechanisms the USF supports, including the High-Cost, Low-Income ("Lifeline"), Schools and Libraries ("E-Rate"), and Rural Health Care programs. Among its duties as the administrator of the USF, on behalf of, and subject to FCC rules and oversight, USAC is responsible for billing parties that are obligated to make contributions to the USF ("Contributors"), collecting USF contributions, and disbursing Universal Service support funds to program beneficiaries.

4. Since 2003 the FCC and USAC have worked closely together to ensure that debts arising under these programs are collected and repaid pursuant to the FCC's rules and the DCIA. Debts in these programs arise from (1) the failure of Contributors to comply with their obligation to contribute to the USF ("Contributor Debts") and (2) efforts to recover previously disbursed amounts that subsequent information or audit show to have been unwarranted (i.e. "Program Recovery Debts"). Under the FCC's DCIA rules, entities or individuals doing business with the FCC must pay their debts in a timely manner. Any debt over 120-days delinquent must be transferred to the United States Department of the Treasury ("Treasury") for collection. The collection procedures for recovering such delinquent debts have changed over time as described in further detail below.

5. USAC began transferring Contributor Debts to the FCC for collection in 2003 followed by USF Program Recovery Debts in 2005. From 2003 through July 2011, the FCC handled all of those debts by the following process. After USAC transferred to the FCC debts that were over 90-days delinquent with the required documentation, the FCC forwarded final demand letters to the debtors demanding payment within 30-days. The FCC directed debtors to submit payments to the FCC's lockbox provided by US Bank. The lockbox is a collection and processing service provided by a financial agent that accelerates the flow of funds to Treasury's General Account, processes associated data, and credits the funds to the proper Agency Location Code ("ALC").[1] In providing lockbox service, US Bank, which is authorized under Treasury

[1] *See* Treasury Financial Manual (TFM), Vol. I, Part 5, Chapter 4600 (Section 4620) at http://tfm.fiscal.treasury.gov/v1/p5/c460.pdf. (concerning a lockbox). The Treasury General Account, also known as the Federal Reserve Account or the U.S. Government's checking account, is used by the Treasury to make interest and redemption payments on Government obligations and to pay Government checks and other items drawn on this account. *See* TFM, Vol. 2, Part 5, Chapter 3000, http://tfm.fiscal.treasury.gov/v2/p5/c300.pdf. An ALC is an identifier assigned by the Treasury's Financial Management Service (FMS) for reporting purposes. *See* TFM, Vol. I, Part 6, Chapter 4000 (Section 4020) at http://tfm.fiscal.treasury.gov/v1/p6/c400.pdf. FMS is a bureau of the Treasury that provides central payment services to Federal Program Agencies and operates the federal government's collections and deposit systems. FMS provides government-wide accounting and reporting services, and manages the collection of delinquent debt owed to the government. FMS also supports federal agencies' financial management improvement efforts in the areas of education, consulting, and accounting operations. *See* https://www.fms.treas.gov/aboutfms/index.html.

regulations to handle government money,[2] provided a Post Office box to which debtors were instructed to forward their payments, and also retrieved the payments, processed them, and credited them to the FCC's ALC in the Treasury's General Account.[3] Periodically thereafter, the FCC disbursed funds to USAC from the accumulated amounts in the FCC's ALC in the Treasury's General Account. If the FCC did not receive payment within the 30-day period, it forwarded the debt to the Treasury for further collection activity. The Treasury processed any collections received (less applicable fees) back to the FCC's ALC in the Treasury and the FCC then periodically (generally once a month or more) transferred the funds back to USAC for repayment of the USF fund.

6. In early May 2011, the FCC temporarily stopped transferring all debts to Treasury and directed USAC to stop transferring debts to the FCC for collection. These actions stemmed from problems with the FCC's financial system and the lengthy process required to enable USAC to submit USF debts directly to Treasury. During this period, ending in March 2012, the FCC continued to remit to USAC any payments that the FCC received directly or from Treasury for any previously transferred debts.

7. In March 2012, the FCC directed USAC to begin transferring debts directly to Treasury, rather than first transferring them to the FCC as USAC had done previously. Between March 2012 and March

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[2] Banks that are designated by Treasury as depositaries and financial agents of the U.S. Government pursuant to 31 C.F.R. Part 202 may provide lockbox services.

[3] TFM, Vol. III, Part 2, Chapter 2000 at http://tfm.fiscal.treasury.gov/v3/p2/c2000.pdf.and Vol. I, Part 5, Chapter 4600 (Section 4625) at http://tfm.fiscal.treasury.gov/v1/p5/c460.pdf.

2014, Contributors Debt payments went first to Treasury, which then sent them to the FCC. The FCC, in turn, sent the payments to USAC for the USF. Around March 2014, Treasury began directly transmitting payments of USF-related debt to USAC approximately three or four times per month.

8. In addition to delinquent USF contributions from Treasury, the USF also receives amounts resulting from federal law enforcement efforts on USF cases, such as civil settlements by the U.S. Department of Justice or restitution paid by criminal defendants. Those funds are held first in Treasury accounts (e.g., those of the Department of Justice) before they are put back into the USF.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the United States and that this declaration was executed at Washington, D.C. on February 18, 2015.

s/ Mark Stephens
MARK STEPHENS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, *ex rel.* TODD HEATH,

Plaintiff/Relator,

v.

Case No. 08-cv-0724

WISCONSIN BELL, INC.,

Defendant.

DECISION AND ORDER

Relator Todd Heath brings this *qui tam* action against defendant Wisconsin Bell alleging that defendant violated the False Claims Act ("FCA") by fraudulently obtaining subsidies by falsely certifying that it was providing telecommunications services to schools and libraries at the lowest rate charged to similarly situated customers (the "lowest corresponding price" or "LCP"). *See* 47 U.S.C. § 254(h)(1)(B); 47 C.F.R. § 54.511(b). Before me now is defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6) and relator's motion for leave to file a second amended complaint.[1]

I. Background

Defendant is a common carrier that receives subsidies under the Education Rate ("E-Rate") Program. Congress established the E-Rate program as part of

[1] The United States has not intervened but has filed a statement of interest opposing the motion to dismiss. The United States Chamber of Commerce has filed an amicus brief supporting the motion.

the Telecommunications Act of 1996. The program provides subsidies to common carriers which provide telecommunications services, including telephone and internet services, to schools and libraries in need. To receive a subsidy, a common carrier must certify that it is charging the school or library the LCP. Relator audits the telecommunications records and bills of various school districts and businesses, and he claims that defendant falsely certified that it charged the LCP to one or more of the schools that he audits.

E-Rate subsidies are paid out of the Universal Service Fund (the "Fund"), which is funded by payments from telecommunications carriers which are mandated by the Federal Communications Commission ("FCC"). 47 C.F.R. §§ 54.706, 54.709. The FCC also created and oversees an entity known as the Universal Service Administrative Company ("USAC") which administers the Fund.

II. Motion to Dismiss

To survive a Rule 12(b)(6) motion, relator's complaint must "state a claim to relief that is plausible on its face." *Bell. Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). I accept the complaint's factual allegations as true, but allegations in the form of legal conclusions are insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The FCA seeks "to protect the funds and property of the Government from fraudulent claims." *Rainwater v. United States*, 356 U.S. 590, 592 (1958). It does this by imposing civil liability on an individual or entity that makes such a claim. *See* 31 U.S.C. § 3729(a)(1). Prior to 2009, the FCA defined a "claim" as "any request or demand . . . for money or property" of which "the United States Government provides any

portion. . . ." § 3729(c) (2008). In 2009, Congress amended the definition of claim, clarifying that there can be a claim without the government having "title to the money or property," and that a request or demand can be a claim if it is "presented to an . . . agent of the United States" even if the government didn't provide any of the money sought.

Defendant contends that plaintiff's case fails because defendant did not make a claim within the meaning of the statute because the government did not "provide" any of the money it sought. The FCA does not define the term "provide," therefore I assume that Congress intended the ordinary meaning of the term when interpreting the statute. *U.S. v. Ye*, 588 F.3d 411, 414-15 (7th Cir. 2009). In common usage, "provide" is a broad term meaning "to furnish" or "to make available." *See United States ex rel. Sanders v. Am.-Amicable Life Ins. Co. of Tex.*, 545 F.3d 256, 260 (3d Cir. 2008) (concluding there was no claim under the FCA because the government did not "furnish[ ] or ma[k]e money available to the defendants"); American Heritage Dictionary 1411 (4th ed. 2000) (defining "provide" as "to make available"). This definition supports the conclusion that the federal government provided the Fund money. The federal government required the common carriers to pay into the Fund; in the absence of such a requirement, the carriers would not have made any payments. Thus, the federal government made the funds available. Moreover, the Fund is little more than a mechanism to pay for a federal program. 47 C.F.R. §§ 54.706, 54.709; *see also* 47 U.S.C. § 254(h)(1)(B) (creating the E-Rate program). The fact that Fund money does not pass through the Treasury does not make the government any less its source.

The purpose of the FCA also supports a broad interpretation of provide. Congress has twice amended the FCA to broaden liability under the FCA to correct what it viewed as incorrect, narrow court interpretations of the statute. *See* S. Rep. No. 99-345, 99th Cong., 2d Sess., at 4, 10-12 (1986), *reprinted in* 1986 U.S.S.C.A.N. 5266, 5269, 5275-77 (stating that the 1986 amendments, which added the pre-2009 definition of claim, were "aimed at correcting restrictive interpretations of the act's liability standard"); S. Rep. No. 111-10, 111th Cong., 1st Sess., at 10-13 (2009), *reprinted in* 2009 U.S.S.C.A.N. 430, 438-40 (stating that the 2009 amendments, which redefined claim, were intended "to clarify and correct erroneous interpretations of the law" to reflect "Congress's original intent in passing the law"). If I were to interpret "provides" narrowly, the effect would be to allow telecommunications companies to fraudulently obtain funds made available by the federal government, a result contrary to what Congress intended. *King v. Burwell*, 576 U.S. ___, at ___ (2015) ("But in every case we must respect the role of the Legislature, and take care not to undo what it has done."); *see also N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes."); *Rainwater*, 356 U.S. at 592 (The FCA seeks "broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.").

Courts have held that to satisfy the "provides" requirement, a request or demand must have the potential to cause the government a financial loss. *United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 385 (5th Cir. 2014) *see also United States v. Neifert-*

White Co., 390 U.S. 228, 233 (1968); *Sanders*, 545 F.3d at 259; *United States ex rel. Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998); *United States ex rel. Fellhoelter v. Valley Milk Prods., LLC*, 617 F. Supp. 2d 723 (E.D. Tenn. 2008); *Lyttle v. AT&T Corp.*, No. 10-1376, 2012 WL 6738242, at *20 (W.D. Pa. Nov. 15, 2012). This does not defeat the conclusion that the government provided the money at issue in this case despite the fact that the money is held in a private fund and administered by a private company. A financial loss to the government does not require a direct loss to the Treasury. *See, e.g.*, *United States ex rel. Shank v. Lewis Enterprises, Inc.*, No. 04-CV-4105, 2006 WL 1207005, at *7 (S.D. III. May 3, 2006) (concluding that fraudulent claims paid out by the Abandoned Mine Reclamation Fund constitute federal funds); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998) (concluding that a claim submitted to a university receiving federal grant money was a claim within the FCA) *United States ex rel. Luther v. Consol. Indus., Inc.*, 720 F. Supp. 919 (N.D. Ala. 1989) (concluding that a claim submitted to a private contractor receiving federal money pursuant to a contract could constitute a claim within the FCA). Rather, it means that "there must be a sufficiently close nexus between the two such that a loss to the [Fund] is effectively a loss to the [government]." *Yesudian*, 153 F.3d at 738 (D.C. Cir. 1998).

Here, the nexus between the Fund and the government is sufficiently close. This conclusion is supported by the mandatory nature of payments into the fund, 47 C.F.R. §§ 54.706, 54.709, the regulatory relationship between the FCC and the Fund, 47 C.F.R. §§ 54.702 (requiring the USAC to seek FCC guidance on policy and interpretation questions), 54.719 (maintaining FCC authority to review all USAC decisions),

the fact that the FCC considers Fund money a federal appropriation, Chorpening Decl. Ex. 6, at 34 (ECF No. 106-7) (FCC financial statement audit, stating that Fund "contributions represent appropriated and dedicated collections and are accounted for as a budgetary financing source"), the fact that Fund money is listed as a part of the federal budget, Chorpening Decl. Ex. 5 (ECF No. 106-6) (copy of the Office of Management and Budget 2015 Budget, listing the Fund's balance and setting forth its budget authority for the coming year), and the fact that the Treasury handles collections for the Fund and then returns any money collected to the Fund, Case Decl. (ECF No. 112) (detailing the procedures by which the FCC and Treasury collect debt owed to the Fund and then transfer to money back to the Fund); Stephens Decl. (ECF No. 113) (same). The fact that the government requires entities to contribute directly to the Fund rather than using a two-step process of collecting money through taxes and transferring it to the Fund should not be a basis for enabling a party who attempts to defraud the Fund to escape liability. *See Brotherhood of R.R. Signalmen v. I.C.C.*, 63 F.3d 638, 641-42 (7th Cir. 1995) ("stating that it is permissible "to penetrate form to substance where necessary to prevent a [party] from defeating [a] regulation by the facile expedient of doing in two steps what could as easily have been done in one"); *Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.) ("[T]here is no canon against using common sense in constructing laws . . ."); *see also* Richard A. Posner, *The Problematics of Moral and Legal Theory* 208-09 (1999) (urging that judges focus on "the actual interests at stake, the purposes of the participants, the policies behind the precedents, and the consequences of alternative decisions"). Thus, relator may proceed with his suit because he has adequately

pled that the government "provided" the money within the meaning of the FCA.

Even if the "provides" requirement is not met, relator may still proceed with that part of his suit directed at defendant's post-2009 conduct.[2] This is so because he has adequately alleged that the USAC is an "agent" of the United States as required by the 2009 amendment. As noted above, to state a claim under the post-2009 FCA, relator need only allege that defendant requested money from "an officer, employee, or *agent* of the United States." § 3729(a)(2)(A)(I) (2009) An agent is an entity that "acts on behalf and subject to the principal's control . . . ." The Restatement (Third) of Agency § 1.01 (2006).

Relator alleges that the USAC administered the Fund at the direction of the FCC and that it's operations were carried out pursuant to FCC regulations. Further, the FCC authorizes the USAC to administer the E-Rate program, making it responsible for billing contributors, collecting contributions, and disbursing subsidies, 47 C.F.R. § 54.702(a)-(b), but it maintains control of it by requiring it to seek guidance on policy and interpretation questions, § 54.702(c), determining the composition of it's board of directors, § 54.703, and maintaining the authority to review it's decisions, § 54.719. This is sufficient to allege an agency relationship, and relator is able to proceed with his suit regarding post-2009 conduct for this independent reason.

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[2] Defendant contests whether relator's current complaint alleges post-2009 conduct. As discussed below, I conclude that it does.

III. Motion for Leave to File Second Amended Complaint

After defendant filed its pending motion to dismiss, relator moved for leave to file a second amended complaint. I freely give leave to amend, Fed. R. Civ. P. 15, but may deny leave if the amendment is "for undue delay, bad faith, dilatory motive, prejudice, or futility." *Ind. Funeral Dirs. Ins. Trust v. Trustmark Ins. Corp.*, 347 F.3d 652, 655 (7th Cir. 2003). Defendant contends that relator's motion for leave for leave to amend suffers from all of these defects.

I will allow the amended complaint. Although the motion was filed three years after the filing of the current complaint, much of that time was spent litigating a previous decision. Thus, I do not find undue delay. I also do not find bad faith or a dilatory motive. Contrary to defendant's assertion, the proposed amended complaint does not contradict the current complaint because the current complaint does not allege that defendant corrected its conduct and does allege post-2009 violations. *See* Compl. at 14-15 (ECF No. 64) (alleging that "Wisconsin Bell did not comply with LCP until at least 2009"); *id.* at 19 (alleging that "[f]rom 1997 through the present, Wisconsin Bell knowingly made or used, and caused to be made or used, false statements including, but not limited to, false representations, material omissions, and/or false certifications relating to prices charged under the E-Rate Program"); *id.* at 3-4 (defining the scope of the complaint as "concern[ing] Wisconsin Bell's acts and practices throughout the State of Wisconsin over the ten years prior to the filing of Relator's initial Complaint in this matter to the present"). Although relator's proposed amended complaint provides additional examples of

post-2009 conduct, these allegations merely add details about the post-2010 conduct alleged in the current complaint. Additionally, many of relator's new allegations appear to be aimed at addressing legal issues raised in *Shupe*, which was decided while relator's appeal was pending and thus could not have been anticipated when it filed the current complaint.

Further, based on my conclusion that relator's current complaint states a claim, amendment would not be futile. Finally, the amendment will not prejudice defendant. Though defendant argues that it will be required to file another motion to dismiss, it does not specify what the grounds might be. The proposed amendment simply adds detail rather than new allegations.

IV. Conclusion

THEREFORE, IT IS ORDERED that defendant's motion to dismiss (ECF No. 96) is **DENIED**.

IT IS FURTHER ORDERED that relator's motion for leave to file second amended complaint (ECF No. 105) is **GRANTED**. The Clerk of Court shall file relator's amended complaint (found at ECF No. 105-1).

Dated at Milwaukee, Wisconsin, this 1st day of July, 2015.

s/ Lynn Adelman
LYNN ADELMAN
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, *ex rel.* TODD HEATH,	
Plaintiff-Relator,	Civil Case No. 2:08-CV-00724-LA
v.	
WISCONSIN BELL, INC.,	
Defendant.	

SECOND AMENDED COMPLAINT

Relator, Todd Heath, on behalf of the United States of America, for his Second Amended Complaint against Wisconsin Bell, Inc., alleges as follows:

I. NATURE OF THE CASE

1. By passing the Telecommunications Act of 1996 (the "Act"), Congress intended, in part, to speed the introduction of advanced telecommunications services (including internet access) throughout the nation. In conjunction with the Act, and in an effort to meet this objective, four new government programs were created under the umbrella of the Universal Service Fund ("USF"). One of those programs is the "Schools and Libraries Program of the Universal Service Fund," commonly known as the E-Rate Program (or "E-Rate"). The E-Rate Program provides federal subsidies for telecommunications, internet and related services provided to schools and libraries throughout the nation. The E-Rate Program is administered by the Universal Service Administrative Company ("USAC") under the direction and control of the Federal Communications Commission ("FCC").

2. More than $2 billion has been paid for telecommunications services annually under the E-Rate Program, with a large portion of those funds being paid directly to telecommunications companies (rather than to the schools and libraries themselves). Until recently, E-Rate funding was capped nationwide at $2.25 billion per year. In December 2014, that cap was increased to $3.9 billion annually. In total, since E-Rate funding began to be paid in 1997, more than $50 billion has been paid by the E-Rate Program for telecommunications services provided to schools and libraries. This spending has benefited the telecommunications industry, which has experienced substantial growth since 1996. Given the E-Rate Program's popularity with schools and libraries, and the high need levels of these recipients, "[r]equests for E-Rate funding consistently exceed the annual funding cap." *Telecommunications: Long Term Strategic Vision Would Help Ensure Targeting of E-Rate Funds to Highest-Priority Uses*, GAO-09-253, Washington, D.C., Mar. 27, 2009. To ensure that these scarce federal monies are spent appropriately and that the available funds are stretched as far as possible, the E-Rate Program depends on adherence to the regulations governing this federal program. In this regard, none of those regulations are more important than those governing the *pricing* of eligible services.

3. When Congress passed the Act, it specifically mandated that all telecommunications service providers participating in E-Rate must "provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates *less than the amounts charged for similar services to other parties*." 47 U.S.C. § 254(h)(1)(B) (emphasis added). The FCC recognized the importance of this requirement to the

success of the E-Rate Program, and the need for telecommunications service providers to charge schools and libraries at discounted prices was a fundamental objective of Congress.

> [T]o achieve the goal of allowing schools and libraries to obtain telecommunications services at discounted rates, Congress designed a system by which common carriers, in the course of providing service to the public generally, are required to offer discounted rates to those eligible entities.

In the Matter of Federal-State Joint Board on Universal Service, FCC Docket No. 96-45, Jan. 29, 1999 (Declaratory Order), 14 F.C.C.R. 3040, at 3043.

4. Despite knowing of E-Rate favored pricing requirements, Defendant Wisconsin Bell, Inc. ("Wisconsin Bell" or "Defendant"), an E-Rate service provider, unlawfully and secretly refused to abide by these requirements and routinely failed to bid, offer or charge Wisconsin schools and libraries at the favorable, discounted pricing required under federal law. In the process, Defendant unlawfully obtained funding commitments for its own benefit, and knowingly overcharged the E-Rate Program and falsely certified its compliance with E-Rate's pricing requirements in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733.

II. THE PARTIES

5. Relator, Todd Heath ("Relator" or "Heath"), is an adult resident and citizen of Waupun, Wisconsin. Heath is the owner of "The Telephone Company," a business through which he performs for-hire audits of the telecommunications records and bills of schools,

school districts, and other entities. Through these audits and subsequent investigations conducted by Heath and his attorneys, and based upon Heath's own professional experience and industry knowledge, Heath discovered the unlawful acts and practices described herein.

6. Defendant Wisconsin Bell is a corporation organized under the laws of Wisconsin with its headquarters and principal place of business located at 722 North Broadway, Milwaukee, Wisconsin.

III. SOURCE AND SCOPE OF RELATOR'S ALLEGATIONS

7. The information set forth herein and related to the United States Government before the filing of this case was derived from the original and first-hand knowledge, professional experience and detailed phone billing records that Relator obtained through his work auditing phone bills for schools and libraries. This information was supplemented with additional factual investigation conducted by Heath and his counsel. Prior to the filing of his initial Complaint, Relator, through his counsel, advised the United States that he would be filing a complaint and apprised the United States of his allegations. The claims set forth herein concern Wisconsin Bell's acts and practices throughout the State of Wisconsin over the ten years prior to the filing of Relator's initial Complaint and up to the present day.

IV. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and the False Claims Act, 31 U.S.C. §§ 3729-3733.

9. This Court has personal jurisdiction over the parties because Wisconsin Bell is a Wisconsin corporation that does substantial business in Wisconsin and provided a substantial portion, if not all, of the telecommunications services at issue to schools and libraries located within Wisconsin.

10. Venue is proper within the Eastern District of Wisconsin pursuant to 28 U.S.C. §§ 1391(b)(1) and (2) because Relator resides in this District, Defendant is a Wisconsin corporation that does business and has headquarters in this District, and many of the acts and practices complained of herein occurred in this District.

V. FRAUDULENT CONCEALMENT - TOLLING OF STATUTE OF LIMITATIONS

11. To cover up the scheme and actions described in this Complaint, Wisconsin Bell took affirmative actions to conceal its overbilling of the E-Rate Program, remained silent when required to speak, and failed to disclose material facts despite its duty to do so under the terms of its contracts and applicable law, including but not limited to the statutes and regulations governing the USF and the E-Rate Program, and the False Claims Act.

12. Because Defendant withheld and concealed information about its overcharges and illegal billing practices, the FCC was prevented from discovering Defendant's malfeasance, despite its exercise of reasonable care and diligence.

13. At all material times, Defendant had knowledge of its own wrongful actions and of the facts giving rise to the claims asserted herein.

14. At all material times, Defendant concealed material facts from the United States Government, including the FCC, by withholding information about its billing practices, falsely representing that it was billing the E-Rate program and schools and libraries consistent with the law, making affirmative representations and certifications that Defendant knew were false, and failing to disclose its routine overbilling of the E-Rate Program, despite having an obligation to disclose these material facts under applicable law.

15. Until this unlawful conduct was disclosed to the United States Government in connection with the filing of Relator's initial Complaint in this matter, the United States Government did not know the material facts of Defendant's routine overbilling of the E-Rate Program and schools and libraries, and in the exercise of reasonable care and diligence it could not have known of the material facts of Defendant's unlawful conduct.

16. Until Heath's disclosure of Defendant's misconduct in connection with this lawsuit, no facts were known to the FCC sufficient to put the United States Government on notice of the harm sustained as a direct result of the Defendant's wrongful conduct.

VI. AGENCY ALLEGATIONS

17. Wisconsin Bell and its employees and any others carrying out the scheme alleged in this Complaint (and each of them) were the agents and employees of Wisconsin Bell, and each was acting within the course, scope and authority of said agency and employment, with the full consent, permission and authorization of Wisconsin Bell. Wisconsin Bell ratified and approved all actions in furtherance of the scheme alleged herein by such it agents and employees.

VII. SUBSTANTIVE ALLEGATIONS

A. The Telecommunications Act of 1996

18. Congress passed the Act, in relevant part, to speed the introduction of advanced telecommunications and information services (including internet) for schools and libraries.

19. When Congress passed the Act in 1996 and authorized the E-Rate Program, it required that telecommunications carriers and others provide the telecommunications services at issue "at rates *less than* the amounts charged for *similar services* to other parties." 47 U.S.C. § 254(h)(1)(B) (emphasis added). The Act also gave the FCC authority to determine the appropriate amount of the reduced rates. *Id.* Thus, Wisconsin Bell has known, since 1996, that it would need to charge favorable prices to schools and libraries participating in the E-Rate Program.

20. The Act further required the FCC to convene a Federal-State Joint Board ("Joint Board") to recommend changes to the FCC's existing universal support mechanisms. In particular, the Act directed the Joint Board to recommend, and the FCC to adopt, a new set of universal support regulations to advance the universal service principles enumerated in the Act. 47 U.S.C. § 254(a). Pursuant to this directive, the FCC created the Joint Board, which released its *Recommended Decision* on November 8, 1996. FCC Docket No. 96-45, Nov. 8, 1996.

21. Thereafter, after further hearings, the FCC issued its final decision and order on May 8, 1997. *In the Matter of Federal-State Joint Board on Universal Service*, FCC Docket No. 96-45, May 8, 1997 ("Universal Service Order").

22. Among other things, the Universal Service Order implemented the E-Rate Program, making it clear that this federal program was to be administered by USAC under the direction and control of the FCC. The Universal Service Order established that schools and libraries would receive substantial federal subsidies on their telecommunications services, including internet access. These subsidies were to be paid with funds that Congress and the FCC mandated that telecommunications companies pay into the USF, a government fund administered by USAC in its capacity as an agent of the United States charged by Congress and the FCC with the responsibility for administering the E-Rate Program.

23. Under the Act and the FCC's Universal Service Order, each telecommunications carrier was required to make regular payments to the USF based on the carrier's interstate and international telecommunications revenue pursuant to a formula devised by the FCC. Under the Act, telecommunications companies also could choose to pass this cost through to their subscribers; thus, the charge frequently appears on consumers' telephone bills as a separate line item such as "Universal Service" fee.

24. Pursuant to the authority granted by the Act, the FCC authorized USAC to collect, pool and disburse the USF funds contributed by carriers, all under the direction and control of the FCC. All of USAC's operations are carried out pursuant to regulations promulgated by the FCC and under the FCC's supervision. When it administers the E-Rate Program, USAC acts on behalf of, and under the direction and control of, the FCC, such that it as an agent of the FCC.

B. The E-Rate Program

25. E-Rate provides discounts and federal subsidies to assist schools and libraries throughout the United States to obtain affordable telecommunications and internet access.

26. Subsidies available to schools and libraries depend on the level of poverty and the urban/rural nature of the population that the school or library serves. These subsidies are substantial, ranging from 20% to 90% of the costs of eligible services. Eligible schools, school districts and libraries may apply for these subsidies individually or as part of a consortium.

27. The actual percentage of the subsidy available to any given school or library is determined by a formula created by the FCC. The principal consideration under this formula is the school district's rate of participation in the federal school lunch program. Schools and libraries located in school districts at the highest rates of lunch program participation receive a 90% subsidy, while those with the lowest rates of lunch program participation receive a 20% subsidy.

28. These subsidies are funded through the E-Rate Program, with the subsidy typically being paid directly to the telecommunications carrier on behalf of an E-Rate beneficiary (the school or library), thus reducing the amount the beneficiary must pay to the telecommunications carrier on its bill. *See* 47 C.F.R. § 54.515.

C. Pricing Under the E-Rate Program

29. Wisconsin Bell and all other service providers participating in the E-Rate Program are required to abide by FCC regulations, including regulations governing the prices they can charge for their services when participating in the E-Rate Program.

30. The E-Rate Program requires telecommunications carriers to offer their "lowest corresponding price" ("LCP") to schools and libraries to be eligible for E-Rate reimbursement. 47 C.F.R. § 54.511(b). The FCC adopted regulations in 1997 requiring Wisconsin Bell and other telecommunications service providers to charge no more than LCP. *Id.*; *see also* 47 C.F.R. § 54.500(f).

31. This LCP requirement, defined at ¶¶ 484-491 of the Universal Service Order, at 47 C.F.R. § 54.511, and further refined in response to telecommunications carriers' concerns in the FCC's *Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72*, FCC 97-420 (Dec. 30, 1997), protects and saves money for both the school and libraries (on their portions of the telecommunications bill) and the E-Rate Program (on the portion of the telecommunications bill it pays).

32. The Universal Service Order also requires service providers, as a condition of receiving E-Rate funding, to certify that the prices they offer and charge to schools and libraries are no more than the LCP. *See* Universal Service Order at ¶ 487. Telecommunications charges that do not satisfy the LCP requirement are ineligible for reimbursement.

D. Wisconsin Bell's Failure to Offer LCP

33. Wisconsin Bell for many years has offered E-Rate eligible services to hundreds of Wisconsin schools and libraries. Indeed, Wisconsin Bell sells millions of dollars of its services and products to E-Rate beneficiaries around the state each year. Between 1996 and the present, Wisconsin Bell has ben-

efitted from not less than $150 million in E-Rate reimbursements. In the process of selling these services and seeking E-Rate reimbursement, Wisconsin Bell must repeatedly certify that it is charging schools and libraries no more than LCP. *See* Universal Service Order at ¶ 487.

34. As described above, federal law requires Wisconsin Bell to charge E-Rate beneficiaries the LCP for all covered telecommunications services. However, when Heath asked Wisconsin Bell to comply with its LCP obligations under E-Rate for several of his school district customers, Wisconsin Bell employees either claimed not to know of the requirement or refused to admit that Wisconsin Bell had a duty to comply. Even after this lawsuit was filed, Wisconsin Bell persisted in denying that it had a duty to provide schools and libraries with the LCP. In 2009, Wisconsin Bell demanded that Heath (who was consulting for school districts on various types of overcharges) communicate *only* with Bevan, Mosca, Giuditta & Zarillo, PC, a K Street law firm in Washington, D.C. In 2009 and 2010, this K Street law firm wrote numerous letters to Heath disputing that Wisconsin Bell had any duty to comply with the LCP requirement. Given Wisconsin Bell's persistent refusal to admit that it owed any duty to charge no more than LCP, it is unsurprising that Wisconsin Bell chose not to comply with E-Rate's LCP requirement.

35. Notwithstanding the clear mandates of the E-Rate Program, Wisconsin Bell knowingly chose not to implement the LCP requirement. It failed to create a system to offer, *or even calculate*, LCP. Never did it make any effort, prior to learning about the Relator's initial Complaint, to determine LCP, or to offer LCP to school districts and libraries in Wisconsin. As set

forth herein, even after learning of this lawsuit, Wisconsin Bell continued to deny its obligations under E-Rate and still refuses to comply with its LCP obligations.

36. At all relevant times, Wisconsin Bell and its sales force were motivated to deny that Wisconsin Bell had any LCP obligations because they did not want to sell Wisconsin Bell's services to customers at these relatively low prices. Wisconsin Bell and its sales force were financially motivated to sell to schools at higher "retail" rates, which offered more profit to Wisconsin Bell. Furthermore, Wisconsin Bell and its sales force knew that most E-Rate beneficiaries (schools and libraries) are unsophisticated with respect to telecommunications services, the E-Rate Program, and E-Rate's pricing requirements, and that the schools and libraries could not determine what Wisconsin Bell's best prices were. Wisconsin Bell clearly had superior knowledge concerning the prices it was offering to similarly situated customers, as well as its pricing structure generally. Despite having this superior knowledge, Wisconsin Bell made no effort to develop any method to determine LCP, and it did not train its sales force to offer, or even calculate, LCP. Even after it learned of this lawsuit, Wisconsin Bell continued to overcharge many schools and libraries for their E-Rate eligible services and falsely certified its compliance with the LCP requirement.

37. Instead of offering or attempting to calculate LCP, Wisconsin Bell generally offered rates to schools on an individual case basis (ICB), which resulted in disparate, non-LCP pricing. For example, in 2005, Heath reviewed information obtained from his school district clients when consulting for them, from which he determined based on his professional knowledge

and industry experience that, on an ICB basis, Fond du Lac School District paid $13.00 per month for each Centrex (central office exchange) line, while Burlington School District paid $13.25, Grafton School District paid $16.44, Cudahy schools paid $20.24 and Altoona schools paid $22.06 for the identical service. All of these school districts were E-Rate Program participants. The prices offered to them by Wisconsin Bell were not LCP, a fact that the school districts had no way of knowing. Rather, these prices were at least 140 to 240 percent of Wisconsin Bell's actual LCP. Throughout the relevant period of time, Wisconsin Bell similarly overcharged many other Wisconsin school districts, and Defendant has never complied with its LCP obligations under the E-Rate Program.

E. Wisconsin Bell's VNS Agreements as One Measure of LCP

38. Beginning in approximately 1996, Wisconsin Bell began entering into Voice Network Services Agreements ("VNS Agreement(s)" or "Agreement(s)") with the State of Wisconsin Department of Administration ("DOA"). These VNS Agreements continue to be negotiated by Wisconsin Bell and the DOA periodically, and they set Wisconsin Bell's price for telecommunications services provided to state departments and agencies during the term of the Agreement. On or about June 1, 2006, Wisconsin Bell and the DOA entered into a five-year VNS Agreement ("2006 VNS Agreement"), which arose from a DOA Request for Proposals ("RFP") dated July 1, 2005. In June 2011, the 2006 VNS Agreement was extended for another five years, effective July 1, 2011.

39. Under the VNS Agreements, Wisconsin Bell agrees to provide telephone services, including Centrex services, to state departments, agencies, universities and other users at specified rates and charges.

40. Under these Agreements, public school districts have been identified as "authorized users" entitled to the favorable pricing provided. For example, the 2006 VNS Agreement states, at paragraph 1.7, that all government-related organizations are "authorized users" entitled to enjoy the favorable rates and terms set forth in the Agreement. In fact, the July 1, 2005 RFP, which was the basis for the 2006 VNS Agreement, specifically required that Wisconsin Bell and other bidders agree to provide these favorable rates to public school districts.

41. Given that Wisconsin schools and libraries are entitled to the favorable rates set forth in the VNS Agreements, the prices set forth therein may be considered Wisconsin Bell's LCP for E-Rate Program purposes. Furthermore, even if the rates set forth in the VNS Agreements were not considered to be the LCP for some reason, Wisconsin Bell still has routinely failed to charge Wisconsin schools the LCP in violation of E-Rate law. Indeed, as alleged herein, Wisconsin Bell completely refused even to acknowledge that it owes any duty to charge schools and libraries the LCP and, therefore, it made no effort for many years even to determine what the appropriate LCP was for any school or library. Given that Wisconsin Bell never put processes in place to determine what LCP was, it is clear that Wisconsin Bell and its employees and sales agents made no effort whatsoever to comply with the LCP requirement.

42. Notwithstanding the provisions of the Wisconsin Bell/DOA VNS Agreements, and the E-Rate

LCP requirement, Wisconsin Bell routinely withheld information about the rates available to schools and libraries under the 2006 VNS Agreement, and it continues to withhold that information under the 2011 extension of that Agreement. Instead of providing schools and libraries with bids, quotes, or charges based on the favorable pricing that should have been provided under the 2006 VNS Agreement and 2011 extension, Wisconsin Bell regularly bills schools and libraries at much higher rates (sometimes more than three times greater than LCP) than the amounts allowed under the E-Rate Program. In approximately 2009, after considerable effort by Heath acting on behalf of his school district clients, Wisconsin Bell began to bill some, but far from all, of its Wisconsin E-Rate customers at the substantially lower rates pursuant to the 2006 VNS Agreement. However, as alleged in greater detail below, even then, Wisconsin Bell continued to overcharge Wisconsin schools and libraries routinely for telecommunications services, and it still refuses to acknowledge even that it had a duty to offer and bill these customers at prices that were no more than LCP.

43. As a result of Wisconsin Bell's failure and refusal to offer the LCP pricing to schools and libraries, many of those schools and libraries paid vastly more for telecommunications services than was necessary. For instance, in 2005, the Milwaukee School District paid $13.84 per Centrex line per month, West Bend paid $16.14, and Sheboygan paid $17.61, all while the available rate under the 2006 VNS Agreement was either $9.25 or $9.45, depending on certain circumstances. All of these school districts were E-Rate Program participants, and none of them were offered or charged Wisconsin Bell's LCP.

44. When Heath began to ask Wisconsin Bell about the 2006 VNS Agreement, Wisconsin Bell originally stonewalled and refused to admit that the Agreement existed. Then, it refused to provide a copy of the Agreement to Heath, even though Heath made it clear he was working on behalf of school districts that he believed were entitled to whatever favorable rates might be contained in the Agreement. In addition, Wisconsin Bell refused to disclose to Heath the prices it was charging similar customers. Despite Wisconsin Bell's stonewalling, Heath eventually learned that the City of Waupaca library (a relatively small customer in a rural area) was receiving during 2007 far more favorable prices on its telecommunication service (specifically, PRI service) than any of Heath's school district customers. The amount being charged to the City of Waupaca library for this PRI service was another possible measure of LCP for Heath's school district clients. Again, Wisconsin Bell was in the best position to determine the LCP for its customers, but it made no effort to do so.

45. Despite Heath's best efforts, Wisconsin Bell never explained why it allowed some school and library customers to benefit from the favorable pricing under the DOA Agreements, without offering or providing those favorable rates to others. Given Wisconsin Bell's unwillingness to disclose the LCP to schools and libraries (or even admit that it owed a duty to charge them no more than LCP), the fact that most schools and libraries did not know they were being overcharged is unsurprising. When it adopted the lowest corresponding price requirement, the FCC explained that schools and libraries are relatively unsophisticated and lack the telecommunications knowledge necessary to negotiate favorable rates. As

a result, even though the VNS Agreements were supposed to benefit schools and libraries, many did not know that the rates were available, or how to demand or obtain them. Even when school district customers asked Wisconsin Bell for its most favorable rates (some even specifically inquiring about the VNS Agreements), Wisconsin Bell sales representatives falsely told them that they were already getting the best rates, and falsely told them they were not authorized to get the favorable pricing under the VNS Agreement.

46. The VNS Agreements, which date back to approximately 1996 or 1997, first became known to certain Wisconsin schools when Heath told them about the Agreements in connection with his consulting work. This knowledge was then passed among some of the school districts, a number of which later obtained the prices that should have been made available to them years earlier under the VNS Agreements. Still, many other schools and libraries never received the favorable pricing under the 2006 VNS Agreement because Wisconsin Bell never told them that such pricing was available.

47. Even the schools and libraries that eventually received favorable rates under the 2006 VNS Agreement often still were overcharged by Wisconsin Bell for telecommunications services, as Wisconsin Bell continued to take advantage of their lack of sophistication in such matters. In some cases, even after Heath corrected certain overcharging on his school and library clients' telephone bills, Wisconsin Bell later began overcharging these schools and libraries again several months or years later, making it necessary for Heath to continue auditing phone bills to de-

termine if Wisconsin Bell's improper billing had resumed. In other cases, Wisconsin Bell provided schools and libraries with the LCP available under the VNS Agreements for some services (*i.e.* Centrex services), but not others. For example, the 2006 VNS Agreement provided that ISDN Prime lines—a service that consolidates multiple voice and data services onto a single circuit terminating in the school's PBX or host computer—were to be billed to authorized users at a rate of $390.00 per month. Wisconsin Bell was aware that these ISDN Prime lines (also known as "PRI Service") are covered by the VNS agreement, but it decided to treat this PRI Service as though it was never covered by the VNS Agreement. Thus, Wisconsin Bell billed schools and libraries for this telecommunications service at much higher rates, notwithstanding the VNS Agreement and the LCP requirement. By way of example, prior to 2009, in the Fond du Lac, Hartford Joint 1, Kaukauna and Kimberly School Districts, ISDN Prime lines were billed at $640.00, $760.00, $820.00 and $845.00 per month, respectively. The West Bend School District had four ISDN Prime Lines, all of which were billed at different rates averaging $1,268.19 per month.

48. Wisconsin Bell's pattern of overbilling Wisconsin schools, without regard for its obligation to charge them the LCP, continued even after this lawsuit was filed and after the government began issuing civil investigative demands as part of the investigation that followed. For example, even though the 2006 VNS Agreement promised that ISDN Prime Lines would be billed at $390.00 per month (including local calling), *during 2010 and thereafter*, Wisconsin Bell regularly billed school districts significantly more than this amount, including the following amounts for ISDN Prime Lines:

- Hartford Joint I: $686/month
- Kaukauna: $460/month
- West Bend: $500+/month
- Fond du Lac: $460/month
- Kimberly: $460/month

In some cases, this overcharging was exacerbated by the fact that Wisconsin Bell continued to bill for local calls, even though the $390 per month rate for ISDN Prime lines under the 2006 VNS Agreement included unlimited local calls, meaning that these schools never should have been charged for local calling once they purchased these lines. Thus, *during 2010 and after*, Wisconsin Bell was billing for local calling services that never should have been billed, including local calls as high as *$2,000 per month* in some cases (specifically, for the West bend School District).

49. Based on his knowledge, education, professional experience and careful analysis of the telecommunications charges and supporting documentation provided to him by his school and library clients as part of his consulting work, Heath determined that, *during 2010 and thereafter*, Wisconsin Bell has continued to engage in its practice of overbilling schools and libraries, notwithstanding the VNS Agreements and the LCP requirement of the E-Rate Program.

F. Wisconsin Bell's False Certifications

50. At all times between 1997 and the present, Wisconsin Bell's obligation to certify that it was charging no more than LCP was an express requirement of the E-Rate Program. In addition, by seeking and accepting reimbursement under the E-Rate Program, Wisconsin Bell was certifying its compliance with the LCP requirement.

51. Wisconsin Bell's compliance with the LCP requirement is a material condition for reimbursement under the E-Rate Program.

52. As set forth above, Wisconsin Bell still has not complied with its LCP obligations, resulting in substantial overcharges to Wisconsin schools and libraries and the E-Rate Program. At most, Wisconsin Bell might have made some token effort to comply with the LCP requirement after it learned that Heath filed this lawsuit. However, documents obtained by Heath from his clients after this lawsuit was filed show that Wisconsin Bell still failed and refused to comply with the LCP requirement *during 2010 and thereafter*.

53. Despite learning of this lawsuit, Wisconsin Bell has withheld and continues to withhold from the FCC all pertinent information about its past noncompliance with LCP.

54. At all relevant times, from 1996 to the present, Wisconsin Bell has known that LCP is an express requirement of the E-Rate Program and that LCP compliance is a material condition for E-Rate reimbursement. Each request for payment from the E-Rate Program is a certification by Wisconsin Bell that it is complying with the E-Rate Program requirements, and not charging more than LCP. *See* Universal Service Order at ¶ 487. Despite knowing this, Wisconsin Bell sought funding from E-Rate many thousands of times between 1996 and the present, thus certifying that it was complying with E-Rate's LCP requirement many thousands of times. When these certifications were made, Defendant knew it had no processes in place to determine what the LCP was for any given school or library, that it had not trained its employees and sales representatives on how to determine

LCP, and that it was not complying (or even attempting to comply) with E-Rate's LCP requirement. Thus, Wisconsin Bell made knowingly false certifications to the E-Rate Program many thousands of times between 1996 and the present. Indeed, *every single one* of the certifications of E-Rate/LCP compliance ever made by Wisconsin Bell was knowingly false when made, as Wisconsin Bell has always known that it never complied with the LCP requirement and never even made a significant effort to comply with the LCP requirement.

55. **FCC Form 473** is the E-Rate Program's "Service Provider Annual Certification Form" (referred to in E-Rate terminology as a "SPAC"), which every service provider must fill out annually.

> The Form 473 must be completed by each service provider, for each separate service provider Identification Number (SPIN), to confirm that the invoice forms submitted by each service provider are in compliance with the FCC's rules governing the schools and libraries universal support mechanism.

Instructions for FCC Form 473, p. 1.

56. Additionally, service providers must fill out and submit FCC **Form 474** ("Service Provider Invoice Form," or "SPIF") with each invoice they submit to the E-Rate Program administrators for reimbursement. Form 474 notes that, as a prerequisite to any Form 474 request, a SPAC certification of compliance with E-Rate rules must be on file:

> Service Provider Annual Certification Form
>
> The FCC Form 473, Service Provider Annual Certification Form, is used by the service provider and confirms that the service provider's

> invoice forms are completed in compliance with FCC rules governing the schools and libraries Universal Service support mechanism. The Form 473 must be completed and submitted by the service provider prior to the service provider submitting its first invoice to USAC. No invoices will be paid without a Form 473 filed for the pertinent year. If you have not done so already, please be sure to complete and submit the Form 473.

Instructions to Form 474, p. 2.

57. Wisconsin Bell executed Forms 473 every year since 1997, and each separate request it made for E-Rate reimbursement included an executed Form 474.

58. In every Form 473 it signed, Wisconsin Bell certified that the invoice forms it submitted to USAC:

> contain requests for Universal Service support for services which have been billed to the service customers on behalf of schools, libraries, and consortia of those entities, **as deemed eligible for Universal Support by the fund administrator**.

Form 473, line 10 (emphasis added).

59. Wisconsin Bell further certified that its invoices:

> are based on bills or invoices issued by the service provider to the service provider's customers on behalf of schools, libraries and consortia of those entities, **as deemed eligible for Universal Service support by the fund administrator**.

Form 473, line 11 (emphasis added).

60. Each and every Form 473 submitted by Wisconsin Bell since 1997 was false, as Wisconsin Bell has never undertaken the steps necessary to identify and charge LCP.

61. Each and every Form 473 submitted by Wisconsin Bell since 1997 violated the False Claims Act.

62. Each and every Form 473 submitted by Wisconsin Bell since 1997 subjects Wisconsin Bell to potential False Claim Act liability.

63. In addition, each and every Form 473 submitted by Wisconsin Bell since 1997: (1) covered up Wisconsin Bell's scheme; (2) contained false, fictitious or fraudulent statements or representations; and (3) made use of a false writing, all in violation of federal law, including but not limited to the False Claims Act.

64. E-Rate Program recipients must execute and file two other FCC forms. Each school and library participating in E-Rate must execute and file **FCC Form 471**, which requests discounts from E-Rate on eligible services. In it, the signer must certify compliance with bidding requirements, including that the most cost-effective service was selected (Line 27), that all competitive bidding requirements have been complied with (Line 28), and that the school or library has "complied with all program rules." (Line 30).

65. **FCC Form 472**, the "Billed Entity Applicant Reimbursement Form" (known as a "BEAR"), is the form used to invoice USAC for E-Rate discounts on a retroactive basis (when the service provider does not discount applicant bills directly). **Form 472 is jointly submitted by the applicant and the service provider.** On it, the school or library must certify that the amounts listed on the BEAR "represent

charges for eligible services delivered to and used by eligible schools, libraries . . ." FCC Form 472, Block 3, Section A. The service provider must sign the Form 472 in Block 4.

66. The Forms 471 submitted to USAC by Wisconsin Bell's customers since 1997, and the Forms 472 jointly submitted by Wisconsin Bell and Wisconsin Bell's customers since 1997, were false because of Wisconsin Bell's failure to offer LCP during that time period. Wisconsin Bell's certifications of compliance with E-Rate rules for procurement, pricing, and eligibility of services were knowingly false when made by Wisconsin Bell, inasmuch as they were premised on certifications of E-Rate compliance and the legitimacy of Wisconsin Bell's offers. With regard to the Forms 471 submitted by Wisconsin Bell's school and library clients, the false certifications made by the schools and libraries were inadvertent and *not* knowingly made by the schools and libraries, as these Wisconsin Bell customers were the victims of Wisconsin Bell's overbilling and related misconduct, not the perpetrators. However, Wisconsin Bell was fully aware of the E-Rate Program rules, fully familiar with Forms 471 and Forms 472, fully aware that the schools' and libraries' certifications on the Forms 471 were false, and fully aware that USAC relied on these certifications as a condition of payment. Wisconsin Bell caused, jointly submitted (in the case of the Forms 472), benefitted from, and is responsible for the schools' and libraries' false certifications.

67. Wisconsin Bell's causing, and using, the false certifications by the schools and libraries on FCC Forms 471 violated the False Claims Act. Wisconsin Bell's joint submission of FCC Forms 472, and its causing and using the false certifications by the

schools and libraries on FCC Forms 472, also violated the False Claims Act.

G. USAC Acts as an Agent of the United States When Administering E-Rate

68. At all relevant times, while USAC has been administering the E-Rate Program, it has acted on behalf of the United States. In this regard, the USF and E-Rate funds distributed by USAC to telecommunications service providers, schools and libraries are funds that were provided and made available to USAC by the United States Government and only because USAC is acting as the administrator of the E-Rate Program, appointed by the FCC on behalf of the United States Government. Absent the governmental authority provided to USAC by Congress and the FCC, USAC would have no power to obtain, collect or distribute the billions of dollars that it pays out annually as the administrator of E-Rate.

69. At all relevant times, USAC acted at the direction and under the supervision of the FCC when administering the E-Rate Program. *See* 47 C.F.R. §§ 54.500-54.523, 54.701-.725.

70. The amount that telecommunications providers must contribute to fund the E-Rate Program is determined quarterly by the FCC. *See* 47 C.F.R. § 54.709(a). If the amount of the contributions is insufficient in any given quarter, USAC cannot seek commercial loans unless it first obtains the permission of the FCC to do so. *See* 47 C.F.R. § 54.709(c).

71. Telecommunications carriers may pass through to consumers the amounts that they contribute to the USF, and they often do so under a heading such as "Universal Service" fee that is included on the customers' phone bills. In such cases, the ultimate

cost of the E-Rate Program is borne by consumers generally, rather than the telecommunications companies.

72. USAC was appointed by the FCC to administer the E-Rate Program. Without the government's authority, USAC would not have the ability or right to collect the billions of dollars that the telecommunications providers contribute to E-Rate annually. *See* 47 C.F.R. § 54.701, *et seq.*

73. USAC has no independent legal right or authority to pay E-Rate funds to schools, libraries or telecommunications service providers. *Id.*

74. The FCC is intimately involved in the auditing of USAC, given that the auditor appointed to review USAC's finances and operations is required to file its final audit report with the FCC. *See* 47 C.F.R. § 54.717(j). The FCC is then allowed, after receiving the audit report, to take any action necessary to ensure that USAC is operating consistent with regulatory requirements. *See* 47 C.F.R. § 54.717(k).

75. USAC is prohibited from making public policy, interpreting statutes or rules, or interpreting the intent of Congress. In all such situations, USAC must seek guidance from the FCC. *See* 47 C.F.R. § 54.702(c).

76. To assist the FCC in overseeing the E-Rate Program, USAC must regularly provide the FCC with a wide range of information, including: (1) annual reports detailing USAC's operations, activities, and accomplishments for the prior year; (2) quarterly reporting on E-Rate disbursements; (3) full access to all data collected by USAC when administering E-Rate; (4) an accounting of USAC's financial transactions in accordance with generally accepted principles for federal

agencies; (5) performance measurement reports when requested by the FCC; and (6) projected quarterly budgets that must be approved by the FCC before USAC can disburse any E-Rate funds. *See* 47 C.F.R. §§ 54.702(g), (h), (j), (n), (o), 54.715(c).

77. The annual compensation for USAC officers and employees may not exceed the basic rate of pay in effect for "Level I of the Executive Schedule" for federal government employees. 47 C.F.R. § 54.715(b).

78. Without the authority provided by the federal government, USAC could not collect E-Rate contributions, administer the E-Rate Program, or pay billions of dollars for telecommunications services annually.

79. The FCC closely supervises and retains ultimate control over USAC's activities.

80. When USAC is administering the E-Rate Program, it is acting as an agent of the United States.

VIII. DAMAGES AND CIVIL PENALTIES

81. Because Wisconsin Bell never calculated LCP, and all information about Wisconsin Bell's pricing is entirely within Wisconsin Bell's control, Relator cannot posit a damages estimate at this time. However, given that all of Wisconsin Bell's certifications and submissions to the E-Rate Program have been false and unlawful, Relator alleges that damages to the United States are, at least, in the millions of dollars. In addition, civil penalties are available under the False Claims Act in amounts ranging from $5,500 to $11,000 per violation. Given that Wisconsin Bell has had hundreds of E-Rate-eligible school and library customers in Wisconsin, and that it ordinarily requested reimbursement from E-Rate quarterly (if not more frequently) for each school or library, there have been many thousands of false claims submitted by

Wisconsin Bell to the E-Rate Program during the relevant time period.

COUNT I
United States False Claims Act

82. Relator realleges paragraphs 1 through 81 of this Complaint.

83. From 1997 through the present, Wisconsin Bell knowingly made or used, and caused to be made or used, false statements including, but not limited to, false representations, material omissions, and/or false certifications relating to prices charged under the E-Rate Program, and its compliance with the E-Rate Program requirements as a condition of eligibility to participate in E-Rate, in order to cause false or fraudulent claims to be presented to and paid by USAC as the agent of the United States responsible for administering the E-Rate Program, in violation of the False Claims Act. Defendant knowingly and willfully has violated the False Claims Act by submitting, and causing the submission of, false claims, and accepting payment pursuant to those false claims.

84. Defendant knowingly has caused school districts and libraries to submit false claims for payment to USAC, knowing that such false claims would be submitted to USAC for reimbursement, and knowing that such school districts and libraries were unaware that they were submitting claims for reimbursement with prices that violated the rules of the E-Rate Program. By virtue of the acts alleged herein, Defendant knowingly presented, or caused to be presented, false or fraudulent claims to the United States Government, including its agent, USAC, for payment or approval, in violation of the False Claims Act, including 31 U.S.C. § 3729(a)(1)(A) and (B).

85. Compliance with E-Rate Program rules and regulations, including LCP, is an express condition of eligibility for reimbursement by the USF. If it were not for Wisconsin Bell's certifications of compliance, USAC would not have issued E-Rate reimbursement payments to Wisconsin Bell or the schools and libraries to which it provided telecommunications services.

86. In addition, Defendant violated and continues to violate 31 U.S.C. § 3729(a)(1)(G), because it knowingly has concealed and knowingly and improperly avoided or decreased its obligation to pay or transmit money to the USF. As set forth herein, Defendant knowingly has failed to comply with its statutory obligation to offer its telecommunications services at LCP to schools and libraries since the inception of the E-Rate Program, and it has concealed the fact that it failed to comply with this obligation. Moreover, at various times since 1997, Wisconsin Bell's wrongdoing was highlighted, or in the exercise of reasonable diligence should have been apparent to Wisconsin Bell management and compliance personnel, and it failed to furnish information about its noncompliance with the E-Rate Program to the officials responsible for investigating such wrongdoing, in violation of the False Claims Act.

87. The United States is entitled to three times the amount by which it has been damaged, to be determined at trial, plus a civil penalty of not less than $5,500 and not more than $11,000 for each false claim presented or caused to be presented. Defendant has been aware of its failure to calculate LCP and the other wrongdoing alleged herein since the inception of the E-Rate Program in 1997. Defendant is not entitled to the benefit of any of the reduced damages pro-

visions of 31 U.S.C. § 3729(a)(2) because it did not provide the United States with information, promptly or otherwise, upon discovering the violations. To the contrary, Wisconsin Bell actively has withheld such information since the inception of the E-Rate Program.

88. The FCC and USAC, unaware of the foregoing circumstances and conduct of Wisconsin Bell, approved ineligible transactions and funding requests for schools and libraries in Wisconsin and subsequently paid claims to Defendant and its customers out of the USF that were ineligible and either should not have been paid at all, or should only have been paid at lesser amounts than those sought. By reason of these payments, the United States Government has been damaged in an undetermined amount.

PRAYER FOR RELIEF

WHEREFORE, Relator prays for judgment against Wisconsin Bell as follows:

a. that Wisconsin Bell be ordered to cease and desist from submitting false claims to the E-Rate Program;

b. that judgment be entered in favor of the United States and against Wisconsin Bell in the amount of each and every false or fraudulent claim, multiplied as provided for in 31 U.S.C. § 3729(a), plus civil penalties and statutory damages to the maximum extent allowed under the False Claims Act;

c. for all damages suffered by the United States, together with costs and all available pre- and post-judgment interest;

d. that Relator be awarded the maximum amount allowed pursuant to the False Claims Act;

e. that judgment be granted for Relator and the United States and against Wisconsin Bell for all costs, including, but not limited to, court costs, expert fees, investigative expenses, other costs incurred in investigating and prosecuting this matter, and all attorneys' fees incurred by Relator and the United States in the prosecution of this suit; and

f. that the United States be granted such other and further relief as the Court deems just and proper.

JURY TRIAL DEMAND

Relator, on behalf of the United States of America, hereby demands a jury trial on all claims so triable.

Respectfully submitted this 7th day of January, 2015.

O'NEIL, CANNON, HOLLMAN, DEJONG & LAING S.C.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
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FINAL JUDGMENT

August 2, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*

No. 22-1515	UNITED STATES OF AMERICA, ex. rel. TODD HEATH Relator-Appellant v. WISCONSIN BELL, INC., Defendant-Appellee

Originating Case Information:
District Court No: 2:08-cv-00724-LA
Eastern District of Wisconsin
District Judge Lynn Adelman

The judgment of the district court is **REVERSED**, with costs, and the case is **REMANDED** to the district court for further proceedings consistent with this opinion. The above is in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722
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Chicago, Illinois 60604

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AMENDED FINAL JUDGMENT

Original Judgment Issued on August 2, 2023
Amended on January 16, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*

No. 22-1515	UNITED STATES OF AMERICA, ex. rel. TODD HEATH Relator-Appellant v. WISCONSIN BELL, INC., Defendant-Appellee

Originating Case Information:
District Court No: 2:08-cv-00724-LA
Eastern District of Wisconsin
District Judge Lynn Adelman

The judgment of the district court is **REVERSED**, with costs, and the case is **REMANDED** to the district court for further proceedings consistent with the amended opinion issued January 16, 2024. The above is in accordance with the amended decision of this court entered on this date.