UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

v.

CIVIL ACTION NO. 2:08-CV-00876
(Lead Case No. 2:08-CV-00724-LA)

WISCONSIN BELL, INC.,

Judge Lynn Adelman

Defendant.

RESPONSE OF THE UNITED STATES TO THE CHAMBER OF COMMERCE'S AMICUS BRIEF IN SUPPORT OF DEFENDANT WISCONSIN BELL

I. INTRODUCTION

The Universal Service Fund (USF) is not an $8 billion annual charity set up by the telecommunications industry for its members. Yet that is the impression the Chamber of Commerce's amicus brief leaves when it claims this fundamental federal government program to provide all Americans access to telecommunications is private money, or a charity equivalent to the American Red Cross or the Boy Scouts. COC Brief, at 17 (Dkt. No. 118). As explained in the United States' Statement of Interest (Dkt. No. 106) (SOI Brief) and Supplemental Statement of Interest (Dkt. No. 111) (Supplemental SOI Brief), the USF is a permanent federal appropriation, provided by the U.S. Congress for the Federal Communications Commission (FCC), which in turn carefully regulates and controls disbursements from the USF to create universal service. Not only does a portion of the USF money flow through the U.S. Treasury into the USF, the alleged sine qua non of "federal funds" as defined by the Fifth Circuit Court of

Appeals in United States ex rel. Shupe v. Cisco Sys., Inc., 759 F.3d 379 (5th Cir. 2014),[1] the FCC "provides" all of the funds as evidenced by its authority over the disbursement of these funds and responsibility to recover funds improperly disbursed from the USF.

Unable to refute the federal nature of USF funds, the Chamber argues instead that this Court should impose an additional requirement found nowhere in the text of the False Claims Act, 31 U.S.C. §§ 3729-3733 (FCA), holding that the statute only protects money housed in or flowing directly from the United States Treasury. The Chamber nowhere explains why the FCA should be construed narrowly—contrary to established precedent, see, e.g., United States v. Neifert-White Co., 390 U.S. 228, 232 (1968) (stating that the FCA must be construed expansively)—to foreclose the United States from recovering for fraud against the USF when it is undisputed that the FCC itself can recover USF funds improperly disbursed and that at least some USF Funds flow through the Treasury.

Thus, even under the narrow construction of the FCA adopted in Shupe, claims for USF funds should properly be understood as "claims" within the meaning of the FCA. For this reason, the Chamber's parsimonious construction of the FCA is forced even to reject Shupe, arguing that it is "immaterial" that USF funds pass through the Treasury. Under any reasonable construction of the FCA, however, this is sufficient (if not necessary) for FCA coverage.

The United States files this Response to the Chamber of Commerce's Amicus Brief in support of Defendant Wisconsin Bell to address several misimpressions created by the Chamber

[1] To be clear, the United States believes that Shupe was wrongly decided as to the larger question of whether E-rate funds are protected by the FCA and that holding should not be followed by this Court. See SOI Brief, at 19-20. However, the United States agrees with Shupe that one indicator of whether funds are provided by the United States is that they flow through the U.S. Treasury. However, that is not the only indicator, nor does it mean that money the Congress permanently appropriates through Funds that are not in the U.S. Treasury do not constitute federal funds.

and to reiterate to the Court why it should find that money in the USF is protected from fraud by the FCA.[2]

II. ARGUMENT

The Chamber's "central question[] in this case" showcases how implausible its later conclusions are concerning the allegedly "private" nature of the USF. The Chamber asserts that a central question is whether the Government "provides" funds that "a private corporation pays under E-Rate using contributions from private companies." COC Brief, at 2. The Chamber then claims that to find USF funds to be provided by the federal government would be asking this Court to be "the first in the [FCA's] 152-year history to extend the FCA to a private corporation disbursing private funds." COC Brief, at 3. Neither statement is accurate.

Money held in the USF constitutes a permanent federal appropriation, collected under a Federal mandate and subject to extensive federal regulations concerning their collection into the USF and their subsequent disbursement. See, e.g., In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014) (affirming updated FCC rules concerning the High Cost program that is funded by the USF and discussing the creation of additional Fund programs to provide Universal Service). The money held in the USF is not private funds or charitable donations. In general, private corporations do not get to mandate contributions from other private parties that are then re-distributed to unrelated third parties at the direction of the FCC.[3]

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[2] The United States hereby incorporates all of the arguments made in the SOI Brief and the Supplemental SOI Brief.

[3] While telecommunications companies that contribute to the USF are usually also recipients of the funding based on their provision of services under the programs, other third party companies that never contributed to the USF, including internet access companies and cabling companies, receive subsidy payments as well. See Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 443-44 (5th Cir. 1999). This funding is not an impermissible tax that violates the Origination clause of the U.S. Constitution because all telecommunications providers benefit from increased

It is uncontested that the FCC's designated Administrator of the USF, the Universal Service Administrative Company (USAC), without the direct and routine actions of the FCC and Congress, would have no funding to provide at all. The Chamber in its brief never details by what legal authority a private company with only private funds at issue could forcibly take money from other private companies, and if they do not pay up, have the FCC and the U.S. Treasury collect the debts on its behalf. See Supplemental SOI, at 2-4; COC Brief, at 16, n. 13. And the Chamber simply disregards the path money takes through the U.S. Treasury to return to the USF as a result of the government's debt collection activities. The only logical conclusion is that USF funds are federal funds, just as they were described by Congress in the statute that originated the Fund in 1996: a dedicated "Federal universal service support mechanism[]." 47 U.S.C. § 254(c)(1) (emphasis added)[4]; see also U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 491-92 (D.C. Cir. 2004) (looking to originating statute for guidance about the non-federal nature of Amtrak).

The Chamber's statutory construction fails when it insists that this Court must read words into the FCA in order to countenance the Government's unexceptional reading of the term "provides." To the contrary, the Government's reading of the term is the most natural and reasonable interpretation. The Chamber also fails to acknowledge the oversight by Congress and the FCC over the USF itself under the Antideficiency Act, Pub. L. 97-258, 96 Stat. 923; it ignores Congress' power to re-appropriate USF funds; it misconstrues the Miscellaneous

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public access to telecommunications. Id. at 427-428; see also U.S. v. Munoz-Flores, 495 U.S. 385, 399-401 (1990) (denying a Constitutional challenge of the Crime Victims Fund, 98 Stat. 2170, 42 U.S.C. § 10601(a), as a federal source of funds for programs that compensate and assist crime victims). Moreover, telecommunications companies are authorized to, and do, get reimbursed from end-users for their contributions.

[4] 47 U.S.C § 254 refers to the program seven times as either "Federal support mechanisms," "Federal … mechanisms" or "Federal universal service support."

Receipts Act, 31 U.S.C. § 3302; and it misstates agency law as applied to the federal government. Finally, a finding by this Court that the protections provided by the FCA apply to the USF would neither greatly expand the FCA nor provide a "windfall" to the United States. The United States will address each of the Chamber's arguments in turn.

A. The United States' "Provides" USF Funds Within the Plain Meaning of the FCA's Definition of "Claim"

The provision of the FCA applicable to this case defines the term "claim" non-exhaustively, stating that it "includes 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)(emphasis added). 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. Am.-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"). Thus, there is no meaningful dispute between the United States and the Chamber as to the definition of "provides," whatever dictionary is used. Compare COC Brief, at 6.

The Chamber advances two arguments to support its counter-intuitive view that the government does not "provide" USF funds within the plain meaning of the FCA. First, the Chamber insists that the term "provides" should not be construed as written but instead should be understood to mean "directly provides." See COC Brief, at 6 (arguing that "'Provides' Connotes Direct Provision of Government Funds"). Second, the Chamber contends that the government's

reading of the term "provides" renders the FCA's additional use of the term "reimburses" mere surplusage. Id. Neither argument has any merit.

Contrary to the Chamber's argument, the FCA does not require the United States to "directly provide" the funds at issue in order to satisfy the definition of the term "claim." Instead, the statute unqualifiedly requires only that the United States "provides any portion of the money or property requested or demanded." 31 U.S.C. § 3729(c). This requirement is readily satisfied with respect to USF funds.

As described in detail in the Statement of Interest, USAC functions much like a bank for the federal USF. SOI Brief, at 4-6. It collects payments prescribed by the FCC, see 47 C.F.R. §§ 54.709(a) and 54.713, and disburses them again at the direction of the FCC. See 47 C.F.R. §§ 54.702(b) and (c); 54.719. At the direction of the FCC, it recoups funds that were improperly disbursed, and, if necessary, refers debt collection actions to the FCC and to the U.S. Treasury. Supplemental SOI Brief, at 2-4. USAC does not make decisions regarding suspension or debarment from the programs funded through the USF because of fraud, the FCC does. See 47 C.F.R. § 54.8. USAC maintains the USF account in accordance with the United States Government Standard General Ledger for the FCC. See 47 C.F.R. § 54.702(c); Letter from D. Scott Barash, Acting Chief Executive Officer, USAC, to Steven VanRoekel, FCC Managing Director, 2-3 (Mar. 15, 2011) (Barash Letter) (attached to COC Brief as Ex. A). "The USF is a set of accounting entries on USAC's books and financial statements. . . . USAC holds funds collected from these contributors in an account titled: 'Universal Service Administrative Company for the benefit of the USF.'" Barash Letter, at 2. While USAC is a private company, it has no discretion when it comes to administering the USF. 47 C.F.R. § 54.702(c).

In the context of USAC as the USF's bank, it makes perfect sense to use the word "provides," not, as the Chamber insists, "provides for" or "provides by law for." See Barash Letter; COC Brief, at 7. When an individual who owes a debt directs his bank to make a payment on that debt from his account, it is common to say that the individual "provides" the money, rather than that the bank "provides" the money, even though it, and not the individual, is making the payment. It is the federal nature of the Executive branch decision maker for the payment that matters, not the technical mechanism for how payment is fulfilled. See 47 C.F.R. § 54.719(b)("Any party aggrieved by an action taken by the Administrator, after seeking review from the Administrator, may then seek review from the [FCC], as set forth in §54.722."); United States ex rel. Sanders v. Am.-Amicable Life Ins. Co. of Tex., 545 F.3d 256 (3d Cir. 2008). As laid out in the United States' Statement of Interest, the FCC is the final decision maker as to all USF payments. SOI, at 7-8. Thus, the FCC (and Congress) provides the USF, not USAC. Fraud on the E-rate Program is committed against the FCC and the USF, not against USAC.[5]

Second, as the Chamber admits, the term "reimburse" does not itself directly connote that the payment is coming from any particular source. COC Brief, at 6. Rather than render "provides" surplusage, use of the term "reimburse" in the FCA makes it clear that the timing of

[5] It is this distinction that moots out the Chamber's arguments concerning USAC's own procurements. COC Brief, at 13. When USAC procures office equipment or the like for its operations, those assets are titled in USAC's name, and USAC bills the USF for the funds. See 47 C.F.R. § 54.716; Barash Letter, at 3. Under the FCA, if a company defrauded USAC for that office equipment (i.e., knowingly failed to deliver a desk but invoiced for it anyway), under the pre-2009 FCA that transaction may not be covered under the FCA if the defendant did not know of the Government's role in paying or approving the claim from the USF because of USAC's representations that it is not a "federal agency." See Allison Engine v. United States ex rel. Sanders, 553 U.S. 662, 669 (2008) ("Under § 3729(a)(2), a defendant must intend that the Government itself pay the claim."). However, post-2009, that same transaction would likely be covered by the FCA if the falsity was shown to be "material" to the FCC's decision to reimburse USAC for that claim from the USF, because of the elimination of Allison's intent requirement by removal from the FCA of the words "to get."

the United States' payment of the claim is immaterial. "Provides" describes a payment that is made prior to or contingent with the "claim" upon the United States, while "reimburse" describes a payment that is made by the United States after the "claim" is paid by the contractor, grantee, or other recipient. There is no conflict in the statute.

Finally, despite all this discussion over the meaning of the word "provides," the Chamber never directly addresses the United States' central point in its Statement of Interest that nothing in the FCA states that funds must come from the U.S. Treasury to be actionable. Indeed, in its recent revisions to the FCA, Congress clarified that for the FCA to apply, the United States need not even hold title to the money or property. See 31 U.S.C. § 3729(b)(2)(A).

B. The USF is a Permanent Indefinite Federal Appropriation and Such Funds are Subject to the FCA

As discussed in the Statement of Interest and acknowledged in the Chamber's citations, COC Brief, at 12, fn. 8, the USF is a permanent indefinite federal appropriation. See SOI, at 13-15; Telecommunications: Application of the Antideficiency Act and Other Fiscal Controls to FCC's E-Rate Program: Testimony Before the S. Comm. on Commerce, Science and Transportation, 109th Cong. 6, at 2 (2005) (statement of Patricia A. Dalton, Managing Director Physical Infrastructure Issues) ("Dalton Statement"). It is a funding mechanism authorized by Congress, deposited into a particular fund, and made available for expenditure for a specified purpose without further action by Congress. Id. at 8-9 (finding the USF meets both elements of the definition of a permanent appropriation).

Permanent indefinite federal appropriations are subject to the FCA. See, e.g., 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."); 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) (applying the FCA to the U.S. Postal Service); United States v. Eghbal, 548 F.3d 1281 (9th Cir. 2008) (applying the FCA to Federal Housing Authority money).

Notably, none of the cases cited by the Chamber in support of its position (save the wrongly decided Shupe and U.S. ex rel. Lyttle v. AT&T, No. 2:10-1376, 2012 WL 6738242 (W.D. Pa. Nov. 15, 2012) cases, which both address FCC programs) concern permanent indefinite appropriations. See COC Brief, at 8. Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 183 (3d Cir. 2001) addresses claims made to a bankruptcy court. U.S. ex rel. Costner v. URS Consultants, Inc., 153 F.3d 667, 671 (8th Cir. 1998) looks at claims made against a trust fund established to meet a private party's environmental cleanup responsibilities. U.S. ex rel. Fellhoelter v. Valley Milk Prods., 617 F. Supp. 2d 723, 729-30 (E.D. Tenn. 2008) examines a U.S.D.A. program that establishes minimum prices for milk.

Garg v. Covanta Holding Corp., 478 Fed. Appx. 736, 739 (3rd Cir. 2012) concerns the deductibility of interest on federal tax-exempt bonds. There, the court determined that the federal government did not "lose out" from the fraud; rather the county utilities authority and the people of New Jersey lost their money. Id. at 742. The court in U.S. ex rel. Adams v. Wells Fargo Bank, N.A., No. 2:11-cv-535, 2013 WL 6506732, at *1 (D. Nev. Dec. 11, 2013) looked at Fannie Mae and Freddy Mac, and determined that Congress clearly defined these entities as not agencies of the United States with no federal employees, similar to Amtrak. Id. at 7. "If [Fannie Mae or Freddie Mac] were agencies of the United States, there would be no need for Congress to have created the [Federal Housing Finance Agency] to take conservatorship of them, because the President could have directed their activities through whichever agency to which they ostensibly

belonged." Id. at *6. As discussed, the FCC directs all of USAC's activities concerning the USF. 47 C.F.R. §§ 54.701 et. seq. Thus, despite this list of cases, a closer look shows that none of the Chamber's citations concern money that was disbursed at the direction of a federal agency from a permanent appropriation.

In addition to the case law, federal appropriations law supports the treatment of the USF as federal funds, such as the Antideficiency Act and the 1986 Senate Report concerning the FCA and Nonappropriated Fund Activities (NAFIs).

1. The Antideficiency Act Supports the Determination That USF Monies Are "Provided" by the United States

The Antideficiency Act, an important federal appropriation statute, applies to the USF and shows that the Government "provides" these funds. See Dalton Statement, at 1. The GAO, the FCC, and the OMB have all determined that USF funds are subject to the Antideficiency Act, 31 U.S.C. §§ 1341, 1342 and 1517. The Antideficiency Act, inter alia, prevents the "obligation and expenditure of federal funds in excess of the amounts available in an appropriation or in advance of the appropriation of funds." GAO, Principles of Federal Appropriations Law, 3rd ed. (Jan. 2004) at vol. II, chapt. 6, p.39. The Antideficiency Act and related statutes "[restrict] in every possible way the expenditures and expenses and liabilities of the government, so far as executive offices are concerned, to the specific appropriations for each fiscal year." Wilder's Case, 16 Ct. Cl. 528, 543 (1880) (emphasis added). In order to protect the federal fisc, 31 U.S.C. § 1341(a)(1)(A) requires funds to be on hand not just when payment is due, but much earlier, at the time the government makes a commitment to pay funds. Hopkins & Nutt, Funding Federal Contracts: Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51, 56 (1978) as quoted in GAO, Principles of Federal Appropriations Law, 3rd ed. (Jan. 2004) at vol. II, chapt. 6, p.34.

In early 2005, the FCC, after consultation with OMB, notified the President that in Fiscal Year 2004, the Antideficiency Act was violated because "obligations from the [Universal Service] Fund exceeded the total amount of budgetary resources in the Fund…." Letter from Michael Powell, Chairman of the FCC to the President of the United States (Feb. 25, 2005) at 1 ("Powell Letter") (Ex. 1).[6] The violation arose when USAC issued Funding Commitment Decision Letters (FCDLs) notifying program applicants of their monetary awards for the year long before payments were actually to be made to the program applicants. Powell Letter at 1-2. Because the FCDLs constituted commitments for Antideficiency Act purposes and the amounts on hand at the time the commitments were made were not sufficient to cover the FCDLs, the Commission was in violation of the Antideficiency Act. See GAO, Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program, GAO-05-151 (Feb. 2005) at 51-53.

The GAO agreed with the FCC that the Antideficiency Act was violated:

> As discussed above, the Universal Service Fund is an 'appropriation or fund.' Even though USAC—a private entity whose employees are not federal officers or employees—is the administrator of the program and the entity that obligates and disburses money from the fund, application of the act is not negated. This is because, as recognized by FCC, it, and not USAC, is the entity that is legally responsible for the management and oversight of the E-rate program and because FCC's employees are federal officers and employees of the United States subject to the Antideficiency Act.

Dalton Statement, at 10 (emphasis added).

[6] Violations of the ADA must be immediately reported to the President and Congress pursuant to 31 U.S.C. §§1351, 1517(b), signed by the agency head and forwarded to the President through the Director of OMB. See OMB Circular A-11, Preparation, Submission and Execution of the Budget, § 145.7 (July 2014) (Revised Nov. 2104), available at https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2014.pdf. In certain circumstances, violations of the ADA carry criminal penalties. See 31 U.S.C. §§ 1350, 1519.

Subsequently, the GAO recommended to Congress that it consider "either granting the Universal Service Fund a two- or three-year exemption from the Antideficiency Act or crafting a limited exception that would provide management flexibility." See Dalton Statement, at 2. Congress then passed a bill granting the Universal Service Fund a one-year exemption from the Antideficiency Act for calendar year 2005. Universal Service Antideficiency Temporary Suspension Act, Pub. L. No. 108-494, § 302, 118 Stat. 3986 (2004). Congress has continued to temporarily suspend the Antideficiency Act's applicability to USF to the present day in one or two year increments.[7]

Notably, the GAO has determined that the Antideficiency Act applies to government corporations to the extent they are operated with funds regarded as appropriated, such as the Commodity Credit Corporation, whose employees are federal government employees. See GAO-14-163SP, at p. 6-5; see also B-223857, Feb. 27, 1987 (Commodity Credit Corp.) Similarly, the FCA applies to the Commodity Credit Corporation. See Rainwater v. United States, 356 U.S. 590, 592 (1958) (finding the FCA applies to the Commodity Credit Corporation). On the flip side, the GAO has determined that the Antideficiency Act does not apply to government corporations, established by federal statute, that are not deemed by Congress an agency of the United States government and do not have federal government employees, such as Amtrak. See GAO-14-163SP, at p. 6-5; see also B-175155-O.M., July 26, 1976 (Amtrak). The pre-2009 FCA has been determined not to apply to Amtrak. See U.S. ex

[7] See, e.g., Consolidated Appropriations Act, 2008, Pub. L. 110-161. 121 Stat. 1877 (2007) at § 510 ("Section 302 of the Universal Service Antideficiency Temporary Suspension Act is amended by striking "December 31, 2007," each place it appears and inserting "December 31, 2008."); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 128 Stat. 2130 (2014) at § 501 ("Section 302 of the Universal Service Antideficiency Temporary Suspension Act is amended by striking "December 31, 2015," each place it appears and inserting "December 31, 2016.")

rel. Totten v. Bombardier Corp., 380 F.3d 488, 491-92 (D.C. Cir. 2004) (finding under pre-2009 FCA statute the FCA did not apply to Amtrak). Thus, like the Commodity Credit Corporation, both the Antideficiency Act and the FCA apply to the USF, because a federal agency, the FCC, with federal officers and employees, manages and oversees the Fund.

2. NAFIs Are Covered By the FCA

Congress intended that even Nonappropriated Fund Activity (NAFI)-type funds be protected by the FCA. NAFIs are federal entities that do not receive funds from congressional appropriations beyond the congressional authorization to collect funds, but rather are funded primarily from the entities' own activities, services and product sales. See May 1996 GAO Report, Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations (Ex. 7 to the SOI).

The 1986 Senate Report on the FCA 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). See also U.S. ex rel. Sequoia Orange Co. v. Oxnard Lemon Co., et al., 1992 WL 795477, at *5 (E.D. Cal. 1992).

The Chamber effectively concedes this argument by failing to address the 1986 Senate Report and its statement that claims against nonappropriated fund activities are claims against the United States under the FCA. Instead, the Chamber focuses on the fact that the USF is not from or otherwise available for use as "appropriations" for other purposes than those designated in Section 254 of the Telecommunications Act or does not constitute, as the Senate Minority Leader stated, "federal tax dollars." COC Brief, at 12 (emphasis added). Permanent appropriations, by definition, are not available for unrestricted agency funding and may or may

not flow from federal tax dollars. Nothing in the FCA restricts "claims" to money coming from unrestricted agency funding or from federal tax dollars. Thus, the Chamber's straw man argument is unavailing, because even nonappropriated fund activity was intended to be covered by the FCA.

3. Congress Has Direct Control of the USF Through Direct Seizure or Discretionary Spending

The Chamber quotes Shupe for the fact that the FCC has no ability to control the USF through direct seizure or discretionary spending for other FCC purposes, COC Brief, at 15. Of course it does not—no federal agency has the power to divert appropriated funds to a purpose different than Congress directed. 31 U.S.C. § 1301. Congress, however, certainly does have such power, and has used it, because the USF is federal funds.

As indicated in the Statement of Interest, Congress has exercised its discretion to transfer funds from one appropriation to another—by moving money out of the USF to pay FCC staff. SOI Brief, at 16. In the appropriations legislation for the FCC for fiscal years 2008 and 2009, Congress transferred funds from the USF to the FCC, specifying that the funds would remain available to the FCC until expended "to monitor the Universal Service Fund program to prevent and remedy, waste, fraud, and abuse, and to conduct audits and investigations by the Office of Inspector General." P.L. 110-161, 121 Stat. 1844, 1998 (2007); P.L. 111-8, 123 Stat. 657-658 (2009).

This transfer would not have been possible if the USF constituted "private" funds as the Chamber argues. This transfer, in turn, authorized the FCC and its Office of Inspector General to use the USF funds to pay for the salaries and expenses they would incur in carrying out the programmatic purposes Congress listed in the appropriations statute—i.e., to pay the salaries of federal employees. Since Congress, in its discretion, can choose whether to appropriate the USF

to provide subsidies or to pay the salaries of Government employees, there can be no question that the funds are "provided by the government." Furthermore, any reduction in the funds in the USF (e.g., because of fraud) would decrease the amount of funds available to Congress to shift to another appropriation, thereby causing "harm" to the government.

None of the arguments raised by the Chamber in response presents a remotely analogous situation. The Chamber claims it is unremarkable that the FCC was authorized by Congress to collect fees from the USF for auditing the USF, because the Securities and Exchange Commission collects fees when private stocks are sold to recover the costs incurred by the government for supervising and regulating the securities markets. See COC Brief at 17, see also http://www.sec.gov/answers/sec31.htm (last visited April 1, 2015). The Chamber does not assert, however, that after the SEC collects this money it remains "private funds," nor could it. These funds collected by the SEC are returned to the U.S. Treasury and are "designed to recover the costs to the Government of the annual appropriation to the Commission by Congress." See 15 U.S.C. § 78ee (a) & (i). So too with the USF.

The Chamber also cites to a "Sense of the Senate" resolution to claim that members of Congress have confirmed the status of the USF. A Sense of the Senate resolution cannot and, in fact, does not determine whether the United States "provides" the USF as "provide" is used by the FCA. First, and in general, "Sense of the Senate" bills have no legal weight. See Orkin v. Taylor, 487 F.3d 734,739 (9th Cir. 2007) ("'Sense of Congress' provisions are precatory provision, which do not in themselves create individual rights or, for that matter, any enforceable law."). Second, rather than confirming that USF funds are not "federal" in nature as the Chamber asserts, this Sense of the Senate resolution was to "respond to an attempt to withhold USF payments as a means to balance the federal budget or achieve budget savings." Dalton

Statement, at 28 n. 14. "Our interpretation of USF as a permanent appropriation is consistent with the intent that USF is only available for universal service and could only be changed if Congress amended the law to permit USF to be used for other purposes." Id. (emphasis added). Thus, the citation to the Sense of the Senate resolution merely reconfirms that USF funds are not unearmarked federal receipts that can be used to pay for anything Congress wants to fund in a given year, but rather previously dedicated appropriations available only for specific USF purposes until Congress says otherwise by amending the Universal Service statute, 47 U.S.C. §§ 254 et seq. The resolution does not address whether USF funds are federal dollars more generally, much less for the purposes of the FCA.

4. The Miscellaneous Receipts Act Does Not Apply to the USF Because it is a Permanent Indefinite Appropriation

The Chamber argues that the USF must consist of "private" funds because USAC deposits the funds into a private bank account, which the Chamber insists should be prohibited by the Miscellaneous Receipts Act, 31 U.S.C. § 3302(a), (b) (MRA). COC Brief, at 4, 13. This argument is a red herring, however, because the MRA has no bearing upon the questions faced here as to whether the appropriated funds available to the Universal Service programs are "provided by" the Government and are subject to actions to protect the public from fraud under the False Claims Act. Indeed, the MRA contains no generally applicable definition of public money, nor does it purport to do more than ensure that money received from sources other than appropriations are returned to the Treasury. The USF, as discussed supra, is considered a permanent appropriation.[8] Accordingly, the Chamber's attempt to graft a narrow holding from

[8] See also, B-228777 (Aug. 26, 1988), 1988 WL 227937 ("We have 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-218441 (Aug. 8, 1985), 1985 WL 50765 ("Where Congress has authorized

one statutory context to a very different statutory context is both inappropriate and, on these facts, misguided.

The MRA implements the Appropriations Clause of the Constitution by ensuring that a federal agency only spends money which Congress has made available to the agency through an appropriation. To this end, the MRA requires that, unless otherwise authorized by law, an agency may not keep for itself money it receives from sources other than congressional appropriations, but must deposit any such money in the Treasury. [9] Thus, if an agency receives funds from "miscellaneous" sources that are not authorized by Congress through an appropriation, those "miscellaneous" receipts must flow back to the General Fund of the Treasury so that Congress may appropriate those receipts for whatever purpose it chooses. In the case of the USF, however, Congress envisioned an explicit and special fund devoted to universal service purposes.[10] As a result, separately maintaining the fund for those purposes for which the monies were appropriated was not an improper augmentation of the FCC's appropriation in violation of the MRA.

Thus, not surprisingly, in evaluating the special fund established by Congress for receipt of mandatory fees for universal service activities, through a permanent indefinite appropriation,

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the collection or receipt of certain funds by an agency and has specified or limited the purposes of those funds, the authorization constitutes a 'continuing appropriation' regardless of the fund's private origin."); Edye v. Robertson (Head Money Cases), 112 U.S. 580, 596 (1884) (Fees do not require an appropriation separate from their authorizing statutes because they are "appropriated in advance to the uses of the statute.")

[9] See, e.g., B-247644 (April 9, 1993) ("Allowing an agency to exceed this [appropriated] level with funds derived from some other source would usurp congressional prerogative and undercut the congressional power of the purse.")

[10] See S. CONF. REP. 104-230 (Feb 1, 1996), at 100-102 ("to the extent possible, the conferees intend that any support mechanisms continued or created under new section 254 should be explicit, rather than implicit as many support mechanisms are today.")

OMB determined that the cash deposited in this special fund could be maintained outside the General Fund of the Treasury. That conclusion in the limited context of the MRA hardly suggests, as the Chamber argues, that these funds were not provided by the Government when, in fact, the authority to charge and spend the fees was established by Congressional action. Indeed, to find otherwise would have required the FCC to deposit all of the USF money into the Treasury's General Fund, where it could not have been spent for the congressionally-mandated purpose for which it was collected—a clearly nonsensical result.

C. Post-2009 Changes to the FCA Confirm That the USF is Federal Funding

Post-2009 changes to the FCA have only clarified the analysis that funds in the USF constitute federal funds for purposes of the FCA.[11] In 2009, Congress amended the FCA's definition of "claim" to include two alternative tests: first, any "request or demand . . . for money" that is "presented to an officer, employee, or agent of the United States," and second, any "request or demand . . . for money" that is "made to a contractor, grantee, or other recipient," if the money is to be spent or used on the Government's behalf or to advance a Government program or interest, and the United States Government "provides" any portion of that money or property. 31 U.S.C. § 3729(b)(2)(A). Under either of these new definitions of "claim" the money in the USF falls under the FCA.

[11] The United States did not specifically address post-2009 changes to the FCA in its Statement of Interest, except to discuss Congress' view that certain changes "clarified" the statute rather than revised the statute, because the Relator's qui tam complaint, at that point, did not contain post-2009 claims. However, because the Chamber addresses post-2009 FCA language, the United States responds to the Chamber's allegations in this brief.

1. USAC is an Agent of the United States

The term "agent of the United States" is not specifically defined in the FCA, but in analogous situations, courts turn to the common law, as reflected in the Restatement, to determine whether an entity is an "agent" of the government in a particular context. See, e.g., Servis v. Hiller Syst., Inc., 54 F.3d 203, 207 (4th Cir. 1995). An agency relationship arises out of two parties' manifestation of their intent for the agent to act (1) "on the principal's behalf," and (2) "subject to the principal's control." Restatement (Third) of Agency § 1.01. Agents working for the federal government, however, cannot bind the government beyond their actual authority. See Restatement (Third) of Agency § 2.03, cmt. g (agents serving governmental principals can act only within their actual authority); § 3.04, cmt. d (the "legally operative actions that may be taken by governments and subdivisions of governments are often specified by statute, constitution, or charter. This in turn limits a governmental principal's capacity to authorize agents.")

As the Chamber acknowledges, COC Brief at 22, n. 15, the only Court to look squarely at the issue of a fund comparable to the USF administered by a corporation similar to USAC determined that the corporation was an "agent" of the United States under the FCA for purposes of administering that fund. See Lyttle v. AT&T Corp., 2012 WL 6738242, *18 (W.D. Pa.). For the Lyttle court, it was significant that the corporation at issue collected and disbursed funds on behalf of the FCC, pursuant to federal law, and acted on the FCC's behalf and subject to its control. Id. In short, the corporation at issue bound the government as to payments within its "actual authority," but not as to issues outside of it, such as making policy. Accordingly, while the United States disagrees with other parts of the analysis in Lyttle, the court correctly

determined that post-2009, funds similar to the USF were covered by the protections of the FCA under this definition of "claim."

Indeed, the Lyttle court squarely rejected an argument identical to the Chamber's argument that to be an "agent" for the federal government under the context of the FCA requires that the agent must be able to bind the government in all aspects. "Defendant's position creates the greater problem of eliminating the possibility of an 'agent' because no non-governmental entity has the power to 'bind' the United States, yet the FCA specifically applies to 'agents.'" Lyttle, 2012 WL 6738242, at *18. As the Chamber itself notes, a court should not construe a statute in a way that makes words . . . redundant, or superfluous." Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1272 (7th Cir. 1993).

The Chamber's citation to Cent. Freight Lines, Inc. v. United States, 87 Fed. Cl. 104, 110 (2009), that the Government previously argued that the power to bind is an essential aspect of being a governmental "agent," is both unexceptional and unavailing. COC Brief, at 19. As that court discussed, the government had no contract with the plaintiff that demonstrated any agency relationship, there was no showing of "clear contractual consent," nor was the plaintiff even an authorized broker for the United States. Cent. Freight, 87 Fed. Cl. at 110. In contrast, the Administrator of the USF, currently USAC, "shall be responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal support funds." 47 C.F.R. § 54.702. An agency relationship is more than implied by this language.

2. The United States Provides the USF

Under the 2009 Amendments to the FCA, a "claim" is also defined as any "request or demand . . . for money" that is "made to a contractor, grantee, or other recipient," if the money is

to be spent or used on the Government's behalf or to advance a Government program or interest, and the United States Government "provides" any portion of that money or property. 31 U.S.C. § 3729(b)(2)(A). USAC clearly fits the definition, at a minimum, of "other recipient." And, as discussed at great length, the United States "provides" the money that is stored within the USF, both indirectly, by mandating contributions, and directly, by returning money from the U.S. Treasury to the USF from delinquent contributors. See Supplemental SOI Brief, at 2-4.

D. A Finding that the USF is Provided by the United States Will Not Provide a "Windfall" to the United States or Expand the Reach of the FCA

The Chamber tries to add a public policy argument that to find for the Government on this issue of the USF as federal funds would somehow "sweep in a host of private transactions undertaken by private entities in regulated industries that have no connection to the public fisc and have never been considered subject to FCA enforcement." COC Brief, at 16. However, the Chamber never specifically identifies any plausible increase in FCA enforcement, and on that basis, the Court should disregard this specter it raises.

Moreover, the Chamber suggests that to hold USF funds protected by the FCA would provide a "windfall" to the United States. Nothing is further from the truth. Any single damages money that has been recovered under the FCA that is attributed to fraud on the Fund is returned to the USF itself. Supplemental SOI Brief, at 2-4. While the United States puts recovered funds exceeding single damages into the U.S. Treasury, as the Supreme Court has recognized, that recovery not only serves to "punish past, and to deter future, unlawful conduct," it serves to make sure the government is made whole for the "costs, delays, and inconveniences occasioned by fraudulent claims." Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 786 (2000) quoting Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981); U.S. v. Bornstein, 423 U.S. 303, 315 (1976).

IV. CONCLUSION

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

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