CASE NO. 22-1515

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
ex rel. TODD HEATH,

Plaintiff/Relator-Appellant,

v.

WISCONSIN BELL, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Lead Case No. 2:08-cv-00724-LA
The Honorable Lynn Adelman, District Court Judge

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF/RELATOR-APPELLANT TODD HEATH

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1515

Short Caption: Todd Heath, et al. v. Wisconsin Bell, Inc.

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ David J. Chizewer Date: 04/05/2022

Attorney's Printed Name: David J. Chizewer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on April 5, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ David J. Chizewer

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Attorney's Signature: /s/ Roger A. Lewis Date: 04/05/2022

Attorney's Printed Name: Roger A. Lewis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Douglas P. Dehler Date: April 20, 2022

Attorney's Printed Name: Douglas P. Dehler

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Christa D. Wittenberg Date: April 20, 2022

Attorney's Printed Name: Christa D. Wittenberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ Laura J. Lavey Date: April 20, 2022

Attorney's Printed Name: Laura J. Lavey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Joseph D. Newbold Date: April 22, 2022

Attorney's Printed Name: Joseph D. Newbold

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Wisconsin had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and the False Claims Act, 31 U.S.C. §§ 3729-3733. Defendant-Appellee Wisconsin Bell, Inc. ("WB") can be found, resides, and transacts business in the Eastern District of Wisconsin for purposes of 31 U.S.C. § 3732(a). Doc. 143[1], Answer to Second Amended Complaint, ¶ 10. WB is a corporation organized under the laws of the State of Wisconsin and has its principal place of business in Wisconsin. *Id.* ¶¶ 6, 9.

The United States Court of Appeals for the Seventh Circuit has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. Plaintiff/Relator-Appellant Todd Heath ("Heath" or "Relator") appeals from the Decision and Order (Doc. 323, SA. 1-9) and Judgment (Doc. 324, SA. 10) entered on March 23, 2022 by the United States District Court for the Eastern District of Wisconsin granting summary judgment to WB. The Judgment is a final judgment that adjudicates all claims with respect to all parties.

No motion for a new trial or for alteration of judgment has been filed, nor is it claimed that any motion tolled the time within which to appeal. The Notice of Appeal (Doc. 325) was timely filed on March 30, 2022. This case is not a direct appeal from the decision of a Magistrate Judge.

[1] "Doc." refers to an entry on the district court's docket. "SA." refers to the Short Appendix attached to this brief.

STATEMENT OF THE ISSUES

The False Claims Act ("FCA") protects federal programs from fraud by, *inter alia*, imposing civil liability on anybody who knowingly presents false claims for payment or makes false statements that are material to such claims. 31 U.S.C. § 3729(a). The federal E-rate program, which subsidizes payment of telecommunications expenses for schools and libraries across the country, requires service providers to charge no more than their "lowest corresponding price" ("LCP") for eligible services to qualify for E-rate reimbursement (the "LCP rule"). 47 U.S.C. § 254(h)(1)(B) (requiring that services be provided "at rates less than the amounts charged for similar services to other parties"). A service provider is permitted to charge an E-rate school or library more than LCP only if it can demonstrate that significantly higher internal costs to provide the service would make the LCP unprofitable. 47 C.F.R. §§ 54.500, 54.504(c)(2), 54.511(b) (authorizing prices above LCP only if the service provider can show the lower price is "not compensatory"). The questions presented are:

1. Where an FCA plaintiff has shown that a service provider made no effort to comply with the LCP rule and charged higher prices to hundreds of E-rate schools and libraries than it charged other customers for the same or similar services, whether it is error under the regulatory framework to impose an additional burden on the plaintiff to prove that the service provider's internal costs did not justify each higher price?

2. Regardless of the answer to the previous question, did the extensive data and expert analysis submitted in this case by the FCA plaintiff, which showed that cost factors did not justify the higher prices that WB charged to E-rate schools and libraries, create a genuine dispute of material fact as to falsity under the FCA?
3. Can a defendant that overcharged a federal program in conscious disregard of a statutory mandate escape a finding of FCA "scienter" if the defendant intentionally chose to do nothing to comply, never acting in accordance with any objectively reasonable interpretation of the mandate?

STATEMENT OF THE CASE

I. Nature of the Case

Heath alleges that WB intentionally chose to disregard a clear federal mandate requiring it to give preferential pricing to schools and libraries for services funded by the federal E-rate program – the LCP rule. Doc. 127, Second Amended Complaint, ¶¶ 4, 33-35. By making no effort to comply with the LCP rule until 2009, more than a decade after the E-rate program was created, while simultaneously negotiating the highest prices it could with E-rate schools and libraries to maximize profits, Heath alleges that WB knowingly caused thousands of false claims to be presented to the E-rate program for payment of federal subsidies. *Id.* at ¶ 54. After the United States declined intervention, Heath proceeded to litigate on the government's behalf on a non-intervened basis. Doc. 25, United States' Notice.

II. Course of Proceedings and Disposition in District Court

After years of discovery and motion practice, including lengthy briefs and a voluminous record on summary judgment, the district court granted summary judgment in WB's favor. SA. 1-9, Decision and Order.[2]

In its nine-page Decision and Order, with just seven pages devoted to its discussion of summary judgment, the district court held that Heath did not show "falsity" under the FCA because he failed to prove that the higher prices WB charged to schools and libraries were not justified by higher costs. SA. at 3, 4. The district court held that Heath "ma[de] no argument that any of [WB's] customers were similarly situated based on any factors related to cost," and thus did not show "that any E-rate customers were charged more than the lowest corresponding price." *Id.* In other words, the district court held it was Heath's burden, both under the applicable regulation and the FCA, to eliminate "cost" factors as a potential basis for each price differential. According to the district court's reading of the LCP rule, the concept of "similarly situated" requires Heath (or a school district or library) to prove and compare not only the *prices* that a service provider charges for products and services, but also the service provider's internal *costs* applicable to each such product or service for each potentially similar customer. *Id.* at 2-6. The district court acknowledged that "FCC guidance" grants a service provider the right to seek recourse from offering the LCP if *the service provider*

[2] This case has come before this Court once before in its long history. *See United States ex rel. Heath v. Wisconsin Bell, Inc.*, 760 F.3d 688 (7th Cir. 2014) (reversing dismissal on public disclosure grounds and remanding for further proceedings).

"can show that [it] face[s] demonstrably and significantly higher costs." *Id.* at 3, 4, quoting *Federal-State Joint Bd. on Universal Serv.*, Report and Order, FCC 97-157, 12 FCC Rcd. 8776 (May 7, 1997), ¶ 488. Nevertheless, the district court was not persuaded that this "guidance" places the burden of proving and comparing such costs on service providers (*e.g.*, WB), rather than on E-rate schools, libraries, or FCA plaintiffs like Heath. *Id.*

After placing the burden to prove and compare WB's internal costs on Heath, rather than WB, the district court held, in a footnote, that Heath's description of his expert witness's analysis of various cost factors was "[u]ndeveloped and perfunctory" and thus waived. *Id.* at 3, n1. The district court provided no further comment on the substantial summary judgment record that Heath submitted on the topic, including the expert's full report, with exhibits, and lengthy expert declaration exploring and eliminating, *inter alia*, the possibility that WB's LCP violations could be justified by cost factors. *Id.*

The district court also held that Heath did not show WB's "knowledge" (*e.g.*, scienter) under the FCA, providing a second basis for granting summary judgment against Heath. *Id.* at 6-7. Applying *United States ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455 (7th Cir. 2021) ("*SuperValu*"), the district court held that WB's purported interpretation of the LCP rule – *e.g.*, allowing it "to consider cost-based factors when determining which customers are similarly situated and to allow it offer different rates to different E-rate customers" – was objectively reasonable, and that WB was not warned away from the interpretation by any authoritative guidance. SA. at 6-7. The

Decision and Order does not include any finding or discussion as to whether WB actually acted on or complied with this (or any other) interpretation of the LCP rule to justify the conclusion that the application of *SuperValu* negates scienter.

III. Statement of Facts Relevant to the Issues Presented for Review

A. The E-rate Program's LCP Rule

The E-rate program has its genesis in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which was intended to promote universal telecommunications service for customers across the country, including schools and libraries. Under the program, the government pays up to 90% of the price of certain telecommunications and information services provided to eligible schools and libraries, with the percentage of government subsidy determined on a sliding scale based on "indicators of poverty and high cost" for each eligible school and library. 47 C.F.R. § 54.505. From the outset, Congress required that any service provider (like WB) wanting to benefit from the multi-billion-dollar subsidy of federal funds made available by Congress through this 1996 law would need to provide E-rate customers with its most favorable, preferential pricing. 47 U.S.C. § 254(h)(1)(B) (requiring that services be provided "at rates less than the amounts charged for similar services to other parties").

In 1997, after considering public comments, the FCC adopted regulations and issued administrative orders to implement the E-rate program. Universal Service, 62 Fed. Reg. 32,862 (June 17, 1997) (codified at 47 C.F.R. pts. 36, 54, 69). The FCC's regulations required all service providers to charge no more than the "lowest corresponding price" for any eligible services to be reimbursed by the E-rate program. 47 C.F.R. § 54.511(b).

The FCC defined "lowest corresponding price" to mean "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services." 47 C.F.R. § 54.500. Although the FCC did not define "similarly situated," the language closely tracks Congress' express language requiring all E-rate eligible services to be provided "at rates less than the amounts [the service provider] charged *for similar services to other parties*." 47 U.S.C. § 254(h)(1)(B) (emphasis added).

The 1997 regulations further instructed service providers by outlining their "recourse" if they wanted to sell E-rate eligible products but believed they could not do so *profitably* at the LCP. Universal Service, 62 Fed. Reg. 32,862, 32,955-56 (June 17, 1997) (codified at 47 C.F.R. pt. 54); 47 C.F.R. § 54.504(c). Specifically, the regulations provided that "[s]ervice providers may request higher rates *if they can show* that the lowest corresponding price is *not compensatory*, *because* the relevant school, library, or consortium including those entities is *not* similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price." 47 C.F.R. § 54.504(c)(2) (emphasis added). Thus, from the outset of the E-rate program, WB knew it was obligated to determine, and then charge, its most favorable pricing (the LCP) for E-rate eligible services unless it could demonstrate the LCP was "not compensatory." *Id.*

The FCC also issued two administrative orders in 1997 that provided additional guidance on the LCP rule. *Federal-State Joint Bd. on Universal Serv.*, Report and Order,

FCC 97-157, 12 FCC Rcd. 8776 (May 7, 1997) ("First Order") [3]; *Federal-State Joint Bd. on Universal Serv.*, 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, 13 FCC Rcd. 5318 (Dec. 30, 1997) ("Fourth Order") [4].

In the First Order, as relevant to this appeal, the FCC emphasized that because schools and libraries are typically unsophisticated consumers of telecommunications services, the burden is on service providers to provide E-rate customers their lowest corresponding prices upfront, rather than on schools and libraries to press for those prices in negotiations. *See* First Order, ¶ 484 ("[T]o ensure that a lack of experience in negotiating in a competitive telecommunications service market does not prevent some schools and libraries from receiving such offers, we should require that a carrier offer services to eligible schools and libraries at prices no higher than the lowest price it charges to similarly situated non-residential customers for similar services.") The FCC emphasized that the service provider's burden could not be simply ignored or sidestepped by arguing that no two customers were ever similarly situated:

> Providers may not avoid the obligation to offer the lowest corresponding price to schools and libraries . . . by arguing that none of their non-residential customers are identically situated to a school or library or that none of their service contracts cover services identical to those sought by a school or library.

Id. ¶ 488.

[3] A courtesy copy of the First Order was filed as Doc. 279-11.
[4] A courtesy copy of the Fourth Order was filed as Doc. 279-57.

The FCC further highlighted that the *only* justification for charging prices higher than the LCP would require a showing *by the service provider* on *costs*. As the FCC explained in the First Order, if a provider could show it would face "demonstrably and significantly higher costs" to provide services to an E-rate customer, then it could charge a price above LCP:

> [W]e will *only* permit providers to offer schools and libraries prices above the prices charged to other similarly situated customers when those *providers can show* that they face *demonstrably and significantly higher costs* to serve the school or library seeking service.

Id. (emphasis added); *see also id.* ¶ 489 (FCC will not "force the provider to offer services at a rate below Total-Service Long-Run Incremental Cost"); ¶ 490 (allowing providers to "seek recourse" from the FCC "regarding interstate rates" and a state commission "regarding intrastate rates" and obtain approval to charge "higher rates if they believe that the lowest corresponding price is not compensatory"). In its final rulemaking on these topics in 1997, the FCC formally adopted all of the above-cited guidance in the First Order. Universal Service, 62 Fed. Reg. 32,862 ¶¶ 290-297 (June 17, 1997).

In addition, in 1997, the FCC issued its Fourth Order, which clarified "the application of our lowest corresponding price requirement" by providing the following explanation of certain narrow circumstances that might justify a service provider's determination that two customers are not similarly situated:

> We conclude that, for purposes of calculating the lowest corresponding price, a provider will not be required to match a price it offered to a customer under a special regulatory subsidy or that appeared in a contract negotiated under very different conditions. For example, we previously concluded that service providers will be permitted to charge schools and libraries prices higher than those charged to other similarly situated

> customers if the services sought by a school or library include significantly different traffic volumes or the provision of such services is significantly different from that of another customer with respect to any other factor that the state public service commission has recognized as being a *significant cost factor*.

Fourth Order, ¶ 141 (emphasis added). This language did nothing to change the First Order, but only reinforced the FCC's position that it would only permit service providers to charge more than LCP by showing they faced higher costs that were sufficient to justify the higher price. First Order, ¶ 488.

B. WB Ignored the LCP Rule for More Than a Decade.

WB knew about the LCP rule when it was first enacted in 1997, with its parent company (Ameritech) joining in industry proposals on how it should be implemented. Doc. 319, WB's Responses to Relator's Statement of Additional Facts, SOF[5] 1, 2. After the FCC adopted some (but not all) of the industry's suggestions, industry representatives responsible for communicating with the FCC—which included Ernie Bond and Mary Henze, who later headed up WB's legal/regulatory group—made a strategic decision in 2001 to withdraw an industry petition that sought additional clarification of the LCP rule, with Mr. Bond explaining in an email to a representative of the industry trade association:

> *the LCP is a non-issue*. We support not raising the LCP issue – *Let a sleeping dog lie*; it needs to keep a low profile unless it starts to cause problems for us.

[5] "SOF" refers to a statement of fact contained in Relator's Statement of Additional Facts (Doc. 310) filed in opposition to summary judgment.

Id., SOF 3, 4 (emphasis added) (materially undisputed[6]); Doc. 305-146 at 1.

Thereafter, rather than take steps to comply with the Congressional and FCC mandate to offer schools and libraries its best pricing, WB chose to do absolutely nothing to comply with the LCP rule for more than a decade—not a single affirmative step, as WB's own corporate designees, E-rate Subject Matter Experts ("SMEs"), and other witnesses all admitted. Doc. 319, SOF 8, 9 (citing deposition testimony). WB established no policies designed to comply with the LCP rule during this period and provided no training to its employees on compliance with the rule, despite knowing the importance of having policies and training to ensure compliance with such rules. *Id.*, SOF 10 (undisputed), SOF 11 (citing deposition testimony), SOF 12-13 (undisputed).

Not surprisingly, given the lack of training or attention given to the LCP rule, WB salespeople responsible for E-rate customers, and the employees responsible for training those salespeople, never even heard of the rule until 2009:

> Q. So you'd never heard of lowest corresponding price while you were working at AT&T?
> A. That is correct.
>
> * * *
>
> Q. Okay. And prior to 2009 you had never heard of the LCP rule, right?
> A. I -- I don't remember ever hearing about it.
> Q. So --
> A. No.

[6] Many of Heath's proposed findings of fact were "not disputed for purposes of summary judgment" by WB. The term "undisputed" is used as shorthand for such admissions.

Id., SOF 14 (undisputed). An "E-Rate SME Organization Review" succinctly summed it up as follows: "2009 – was first time for obligation for LCP (Lowest Corresponding Price) – *Previously no one had heard of it*." *Id.*, SOF 15 (emphasis added) (undisputed).

C. WB's Pre-2009 Sales and Pricing Practices Precluded Compliance with the LCP Rule.

Because WB took no steps to implement an LCP policy or even inform its employees about the LCP rule prior to 2009, WB's school and library customers were subject to WB's existing sales and pricing practices for ordinary customers, which were designed to maximize—not minimize—pricing, and thus denied schools and libraries the preferential pricing to which they were entitled. *Id.*, SOF 12-14 (undisputed), SOF 16-17 (undisputed that WB sales employees were motivated to sell based on commissions, sales quotas, and sales contests, with an emphasis on "profitable revenue growth," and without regard for the LCP rule); *see also id.*, Doc. 305-46 at 7 (2007 pricing presentation).

WB's sales force was largely responsible for determining the prices each customer would be offered using four potential "pricing venues," which could result in vastly different prices being charged for the same services: (1) field authority rates; (2) the "state rate," which is the rate charged to authorized users of contracts between WB and the State of Wisconsin; (3) tariff pricing—the "rack rate"; and (4) individual case basis ("ICB") pricing through AT&T's ICB unit. Doc. 319, SOF 18 (materially undisputed), SOF 75-86 (example showing widely disparate prices for ISDN-PRI circuits in 2006), SOF 117 (undisputed). WB's practices with respect to these four pricing venues were not aimed at providing E-rate customers with preferential (or even low) pricing as required by the LCP rule. *Id.*, SOF 21 (undisputed that WB regularly instructed its sales

team *to avoid* offering customers the lowest price available to them), SOF 32-33 (undisputed that a 2008 WB presentation instructed sales employees to use "rack rates," which were the "highest rates" available, "whenever possible."); Doc. 305-107 at 14.

For example, in the field authority pricing venue, there were ranges of prices available for specific products and, prior to 2009, WB regularly instructed its sales team to avoid offering customers, including E-rate customers, the lowest price available to them, a practice known by the derogatory term "floor diving." Doc. 319, SOF 20-21 (undisputed). In fact, WB actively encouraged its sales employees to seek higher pricing. *Id.*, SOF 22 (undisputed; quoting 2007 presentation to sales team stating "Sell above price floors whenever possible"; "Seek opportunities to raise prices where we can" to "execute the strategy" of "Maximiz[ing] Revenue"), SOF 23 (citing deposition testimony). By mandating that sales employees avoid selling at "price floors," WB's practices resulted in E-rate schools and libraries (especially those lacking the sophisticated knowledge needed to negotiate) receiving inevitably higher pricing, thus precluding compliance with the LCP rule. *Id.*, SOF 59-65 (example of West Allis School District being charged substantially higher prices than the Janesville School District even though West Allis School District was purchasing the product in significantly larger quantities), SOF 24 (undisputed that WB sales manager sought "lower pricing" for Janesville School District only because WB's offer was "higher than [WB's] competition.").

Similarly, for the "state rate" pricing venue, there were contracts that WB entered into with the Wisconsin Department of Administration ("DOA") to provide certain

telecommunications services, such as basic voice services, to state agencies and municipalities. Doc. 277-1, WB SOF[7] 117. These state contracts allowed "authorized users," including schools and libraries, to purchase services at rates negotiated by the DOA. *Id.*, WB SOF 120; Doc. 319, SOF 25 (undisputed). These "state rates" were very favorable to customers. Doc. 319, SOF 25 (undisputed). Despite having agreed to provide these favorable rates to authorized users (including schools and libraries), WB did not require its sales force to inform schools or libraries about the availability of the favorable "state rates" or offer those rates to E-rate customers until late-2009. *Id.*, SOF 26 (undisputed), SOF 109 (undisputed). Accordingly, schools and libraries "may or may not have" been informed about the availability of the favorable state rates—it "depend[ed] upon the sales rep." *Id.*, SOF 26 (undisputed; quoting deposition testimony of WB's 30(b)(6) witness). And even those schools and libraries that were told about and permitted to buy services from WB as authorized users under a state contract could be and often were charged very different prices for the same services. *Id.*, SOF 27 (citing deposition testimony regarding 1999 state contract), SOF 54 (prices charged to "authorized users" for Centrex services under the 1999 state contract varied widely during relevant years); Doc. 310, SOF 54 (detailing price differences identified during internal WB pricing analysis).

WB also never discouraged its sales force from offering its highest tariff prices or "rack rates" to schools and libraries, even while other WB customers received far better

[7] "WB SOF" refers to a statement of fact contained in Wisconsin Bell Inc.'s Statement of Proposed Material Facts (Doc. 277-1).

pricing. *Id.*, SOF 32-33 (undisputed). For example, a 2008 presentation to WB employees responsible for sales to a wide variety of customers, including E-rate schools and libraries, included a slide entitled: "Tips for Winning Deals & Maximizing Revenue Using AT&T," which instructed the sales team to "Use rack rate, promo and field authority pricing, whenever possible." *Id.*, SOF 33 (undisputed); Doc. 305-107 at 14; Doc. 305-31 at 163:18-165:6. No exceptions were noted for E-rate schools and libraries. Doc. 305-107 (2008 presentation to sales team).

The availability of more favorable pricing through the ICB unit also demonstrated that those E-rate customers who received their pricing based on the other three venues—field authority, state rate, and tariff—were regularly denied the benefit of LCP pricing. Doc. 319, SOF 34 (undisputed that ICB pricing venue was used to obtain pricing "below what the sales team was otherwise authorized to offer to customers" through other pricing venues). Smaller customers, who spent less than $10,000 annually on phone services, and less than $30,000 annually by 2008, were generally not eligible for the lower pricing that the ICB group could offer. *Id.*, SOF 35 (materially undisputed). Many of WB's E-rate customers spent less than $10,000 annually on services from WB. *Id.*; Doc. 308, Webber Decl. ¶ 37. Also, customers in less competitive parts of the state who did not have more than one provider bidding for their business did not generally qualify for ICB pricing, as the sales force was instructed to "[u]se ICB only for the most competitive situations." Doc. 319, SOF 36 (undisputed).

Even those few E-rate schools and libraries that qualified for ICB pricing did not ordinarily receive the preferential pricing to which they were entitled under the LCP

rule because, as WB's corporate designee admitted, the ICB group did nothing to treat E-rate customers preferentially or differently than any other customer. *Id.*, SOF 37 ("Q: So there's no – there was no difference in the way pricing treated E-Rate customers from non-E-Rate customers prior to 2009, correct? A: Correct"). Instead, ICB pricing for E-rate customers, along with every other customer, was dependent on the specific price requested of ICB by the sales force in each case, as well as the judgment of ICB's pricing managers, who were evaluated by WB based on their ability to "grow revenues" and "maintain overall customer margins." *Id.*, SOF 38-39 (undisputed). The WB sales employees also had no metrics to use for seeking ICB pricing on a customer's behalf, and the ICB unit's pricers had no guidelines and received no written training from WB on how to identify or evaluate the prices charged to similarly situated customers, or how to assess whether one customer was similarly situated to another. *Id.*, SOF 40, 43-48 (undisputed).[8]

[8] For purposes of summary judgment, WB's conduct during the pre-2009 period, summarized above, is most relevant and sufficient for appellate review. Nevertheless, WB's conduct in 2009 and beyond is also at issue in this case. In February 2009, AT&T settled a Department of Justice and FCC investigation into its E-rate practices in Indiana by paying over $8 million and signing a compliance agreement. Doc. 319, SOF 87 (undisputed). Thereafter, WB, an AT&T subsidiary, began implementing new LCP policies and processes for at least two years, not reaching a "steady state" until 2011, although the LCP policy it ultimately used was flawed, confusing and incoherent. *Id.*, SOF 106 (citing deposition testimony), SOF 109-113 (undisputed), SOF 116 (citing deposition testimony), SOF 117 (undisputed), SOF 119 (citing deposition testimony).

D. WB's Failure to Address the LCP Rule and Its Reliance on Existing Sales and Pricing Practices Resulted in Millions in Overcharges to the E-rate Program.

The predictable result of WB's failure to take any steps to comply with the LCP rule until sometime after 2009, and instead to follow its pre-existing sales and pricing practices to maximize profits, was that schools and libraries were regularly overcharged by WB and received *ad hoc* pricing for the same services in the same timeframe, often at the *highest* rates offered to WB customers, not the lowest as required. Doc. 319, SOF 49-86 (citing evidence of WB violating the LCP rule and overcharging the E-rate program thousands of times, including specific examples of overcharges to numerous E-rate schools and libraries). The prices that WB charged schools and libraries were substantially higher than what WB charged other non-residential customers for the very same telecommunications services, a quintessential LCP violation. *Id.*; Doc. 308, Webber Decl. ¶ 41 (referring to "thousands of overcharges, and millions in damages to the E-Rate program," as reflected in detailed spreadsheets in Webber's expert report); Doc. 279-111, Webber Report at 7, 9, 75, 76, 81, 114 (identifying millions in LCP overcharges).

For example, as shown in the below table from an undisputed Heath SOF, in 2006, WB offered wildly disparate prices for Integrated Services Digital Network - Primary Rate Interface ("ISDN-PRI") circuits, a common telecommunications product that allows multiple voice and data channels to be carried over traditional phone lines:

Customer	E-rate %	Price/Circuit	Qty	Contract Term/ Agreement
Bruce Guadalupe Community School (Milwaukee)	90%	$1,160	2	Month-to-month (July 2006)
Bruce Guadalupe Community School (Milwaukee)	90%	$1,110	2	Month-to-month (January 2006)
Messmer High School (Milwaukee)	90%	$743	1	Month-to-month (January 2006)
Lake Geneva-Genoa City School District	64%	$459	1	36 months (November 2006)
Little Chute Area School District	46%	$400	1	36 months (February 2006)
Menomonee Falls Public School District	41%	$386	2	60 months (June 2006)
Oconomowoc Area School District	40%	$448	2	36 months (June 2006)
Hudson School District	40%	$400	1	36 months (July 2006)
Ministry Health	n/a	$386	7	36 months (November 2006)
Automatic Data	n/a	$337	1	36 months (January 2006)

Doc. 319, SOF 75 (undisputed), SOF 78-80 (undisputed). Again, under the E-rate program, the school districts serving communities with the greatest economic challenges receive the highest subsidies. 47 C.F.R. § 54.505. For example, the Bruce Guadalupe Community School ("BGCS") in Milwaukee received in 2006 a 90% E-rate subsidy, which is a reflection of the level of poverty in the community that BCGS serves. Doc. 319, SOF 76 (materially undisputed). Yet the prices WB charged BGCS were WB's highest month-to-month tariff prices (or "rack rates"), and more than three times higher than the price charged to Automatic Data, a non-residential (and non-E-rate) customer buying the same service. *Id.*, SOF 78-80 (undisputed), SOF 83 (undisputed). WB also overcharged Messmer High School in Milwaukee, another school that had a

90% E-rate subsidy in 2006, using month-to-month tariff prices after Messmer's five-year contract with WB ended in January 2006. *Id.*, SOF 81, 82; Doc. 308, Webber Decl. ¶¶ 7-13. WB charged BGCS and Messmer these excessive month-to-month prices even though both schools had shown they were willing to enter into long-term contracts. *Id.*, SOF 77 (undisputed), SOF 81, SOF 85 (undisputed); Doc. 308, Webber Decl. ¶¶ 7, 10, 12.

As another example of WB overcharging E-rate customers, WB entered into a three-year contract with Milwaukee Public Library ("MPL") for OPT-E-MAN Ethernet circuits for the total price of $26,500 per month. Doc. 319, SOF 66, 69; Doc. 308, Webber Decl. ¶¶ 14-17 (explaining that "OPT-E-MAN" is the AT&T brand name used to sell Ethernet services, which are priced on a "per circuit" basis). These prices were very high—nearly full tariff ("rack rate") pricing. ECF No. 319, SOF 69 (materially undisputed); Doc. 308, Webber Decl. ¶ 14 (full tariff price is "highest price" WB can charge without seeking regulatory approval to charge more). Indeed, the prices charged to MPL reflected only a 7.5% discount off WB's tariff pricing even though MPL was a large purchaser of WB's OPT-E-MAN product (spending $26,500 per month for fourteen circuits) and had entered into a multi-year contract for those services. Doc. 319, SOF 69 (materially undisputed); Doc. 308, Webber Decl. ¶¶ 14-17 (explaining pricing of WB's OPT-E-MAN Ethernet on a "per circuit" basis). By comparison, the Madison Metro School District ("Madison SD") was a much smaller purchaser of OPT-E-MAN, but received far better pricing—a 74% discount off of WB's tariff pricing—even though the evidence showed that WB incurred costs of more than $244,165 for new capital (approximately $35,000 per circuit) to provide Madison SD with its OPT-E-MAN

circuits, and there was no evidence of any comparable costs being incurred by WB to provide MPL with its OPT-E-MAN circuits. Doc. 319, SOF 70-73 (materially undisputed); Doc. 308, Webber Decl. ¶¶ 16, 37, 39 (detailing and evaluating limited cost evidence produced by WB).

Heath provided these and similar examples of overcharges on summary judgment, all supported by extensive data and analysis provided through the report of Heath's expert James Webber and his supporting declaration. *Id.*, SOF 49-51, 59-86 (citing evidence, including Webber expert report and exhibits and Webber's May 7, 2021 declaration); Doc. 308, Webber Decl. ¶¶ 8-25 (citing evidence of record, including specific contracts and prices charged under contracts).

Beyond these examples, Heath provided comprehensive evidence and damage calculations, supported by documents and data produced in discovery that was reviewed, analyzed and presented by his experts, showing WB's overcharges to hundreds of Wisconsin E-rate school and library customers[9], and thousands of overcharges presented to the E-Rate program through "funding requests," including the school districts' submissions of FCC Form 471s and 472s, and the submissions of FCC Form 474s whenever WB sought payment from the E-rate program directly. Doc.

[9] This case involves damages associated with WB's LCP violations in Wisconsin only. Doc. 127, Second Amended Complaint, ¶ 33. Heath brought a separate *qui tam* suit against AT&T, WB's parent company, and affiliates in the District Court for the District of Columbia seeking damages on behalf of the government for AT&T's *nationwide* LCP violations. *United States ex rel. Heath v. AT & T, Inc.*, No. 11-1897 (D.D.C. filed Oct. 28, 2011. *See also United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015) (explaining history of Heath's Wisconsin and D.C. suits and reversing district court's dismissal of D.C. case).

319, SOF 49-51 (citing Webber and Spencer expert reports). The collective amount of these overcharges totals tens of millions of dollars, by Heath's experts' analysis, including more than $32 million in overcharges out of $82 million in E-rate subsidies paid for certain products sold to a consortium of Wisconsin schools called "TEACH" and more than $7.5 million out of an additional $58 million in E-rate subsidies paid for other products and services sold to hundreds of Wisconsin schools and libraries between 2001 and 2015. Doc. 279-111, Webber Report at 114 (showing overcharges to TEACH of between $32 million and $44 million, depending on the LCP benchmark used); Doc. 308, Webber Decl. ¶ 34 (describing $7,538,686 in non-TEACH damages); Doc. 290, Dehler Decl. ¶ 5, Ex. 4, Webber Report Ex. U (showing disbursements of $82,340,405.02 for Ethernet circuits sold to TEACH); *see id*. at ¶ 2, attaching Webber Report Ex. H (detailing approved E-rate funding).

An Excel spreadsheet attached to Webber's report as Exhibit S, which is included in the summary judgment record at Doc. 308-1, identifies hundreds of prices that Webber identified based on his extensive review of thousands of documents (found within millions of pages) produced by WB in this case. Doc. 308, Webber Decl., ¶¶ 5, 6, 30-35, 37; Doc. 308-1.[10] As Webber explained in his declaration, he started his analysis by reviewing data obtained from the E-rate program itself about the specific WB products

[10] A working version of this Excel file was provided to WB's attorneys in November 2020, shortly after Webber's expert report was disclosed. Doc. 308, Webber Decl. ¶ 4. A working version of Exhibit S was also provided to the district court on a flash drive. *Id.* Static PDF versions of Exhibit S were also filed and made part of the summary judgment record. Doc. 308-1, Exhibit 1 to Webber Declaration; *see also* Doc. 290, Dehler Decl. ¶ 4, Exhibit S from Webber Report.

and services that the program funded for hundreds of Wisconsin s E-rate customers. *Id.* ¶ 30. Webber then reviewed thousands of contracts (to the extent WB had not lost or destroyed them) and other documents to determine how much each school was charged by WB *on a product-by-product basis* for various E-rate eligible products purchased over the years at issue. *Id.* ¶¶ 31-33, citing 47 C.F.R. § 54.516(a)(2009) (involving E-rate record-keeping).

Through this extensive work and analysis, Webber created a detailed database of hundreds of prices that WB charged over more than a decade to hundreds of E-rate schools and other non-residential customers for the many different E-rate eligible products and services that WB sold during that time. *Id.* ¶¶ 31-35, 37. This was an enormous undertaking, necessitated in large part by the fact that WB "by its own admission, did not develop or keep a database setting forth all the prices it charged its non-residential customers between 2001 and 2015" as required to identify LCPs, so Webber and his colleagues "spent hundreds of hours creating one." *Id.* ¶ 39.

Webber's analysis went even further, as described in greater detail below. Webber also considered various cost factors that might be relevant if WB were to argue that any particular LCP was not compensatory (*i.e.*, contract length/term, customer urban/rural location, customer size, and loop length where it was potentially relevant to the specific type of product at issue). *Id.* ¶ 40 (describing Webber's consideration of these cost factors).

In the end, Heath's experts identified thousands of false claims and millions of dollars in overcharges to the E-rate program. Doc. 319, SOF 49, 50; Doc. 308, Webber

Decl., ¶ 34. Not surprisingly given the sliding-scale nature of E-rate funding, many of these overcharges involved Wisconsin school districts and libraries in low-income communities that were most reliant on E-rate funding to pay for WB's services. Doc. 319, SOF 75-86 (describing overcharges to BGCS and Messmer, both receiving 90% E-rate funding, and Lake Geneva-Genoa City School District, receiving 64% E-rate funding in 2008, among other schools).

E. WB Made No Attempt to Determine LCPs for More Than a Decade and, on Summary Judgment, Did Not Counter Heath's Showing on Costs or Attempt to Show that Heath's Proposed LCPs Were Not Compensatory.

In response to Heath's detailed and extensive submission concerning lower prices (LCPs) that should have been, but were not, made available to hundreds of WB's E-rate customers, WB and its experts did not even attempt to show that WB's failure to offer these LCPs was justified by "demonstrably and significantly higher costs" such that the LCPs were "not compensatory." Doc. 319, SOF 51 (materially undisputed; WB generally does not dispute Relator's descriptions of Webber's work and opinions for purposes of summary judgment). Indeed, none of WB's 181 proposed findings of fact were supported by any evidence of WB's costs associated with providing services, and none attempted to demonstrate that the costs associated with providing a specific service to a specific E-rate customer were greater than the LCP identified by Heath's expert such that providing the service at that LCP would be "non-compensatory." Doc. 277-1, WB's Statement of Proposed Material Facts. Likewise, WB has provided no evidence that it attempted to "seek recourse" from the FCC or the Wisconsin Public Service Commission to get regulatory approval to charge a Wisconsin school or library a

higher-than-LCP price based on cost factors. Doc. 319, SOF 52 (materially undisputed); *see* 47 C.F.R. § 54.504); First Order, ¶ 490.

Although not tendered to establish "non-compensatory" facts for summary judgment, WB's expert, James Stegeman, opined in a rebuttal report that one set of LCPs identified by Heath's expert (associated with overcharges to TEACH for certain BadgerNet or "BCN" services) was "not compensatory," but WB did not put that issue forward as an undisputed fact (it is not), and Stegeman did not reach a similar conclusion, or purport to analyze the issue, for any of the hundreds of other specific LCP-to-school/library comparisons performed by Heath's expert. Doc. 279-44, Second Amended Rebuttal Expert Report of James W. Stegeman ("Stegeman Rebuttal Report") at 63-66. Rather, Stegeman pointed vaguely to *potential* cost factors to support WB's position that no two E-rate customers are *ever* similarly situated, which is directly contrary to clear FCC guidance, First Order ¶ 488, and never applied his hypothetical cost factors to the actual LCPs identified by Heath's telecommunications expert to attempt to show they were not compensatory. Doc. 279-44, Stegeman Rebuttal Report at 7-28.

In contrast, even though the regulatory burden to establish that prices are non-compensatory falls squarely on the service provider (not the E-rate school or library), Heath still presented evidence on summary judgment to show that various "cost factors" could *not* explain the higher prices offered to schools and libraries compared to the LCPs that Webber identified. Doc. 279-111, Webber Report at 76-81. Specifically, in a section of his report titled "Sensitivity of Overcharges to Potential Differentiators,"

Webber evaluated whether and to what extent his findings of overcharges between similarly situated customers were impacted by cost factors (or "filters") like contract term, urban/rural status of the contracting entity, size of the contracting entity, and the average loop length between the end-user customer's premises and WB's central office. *Id.* In this detailed set of calculations, Webber filtered his damages so that they were based *only* on prices charged to customers having a similar size, location, contract duration, and distance from a WB central switch. *Id.* This limitation was intended to eliminate any argument – one never actually offered by WB – that cost-related differences could justify the price differences that Webber found. Doc. 319, SOF 51 (materially undisputed; describing "cost factors" Webber considered, citing pages 76 to 81 of his expert report). Webber found that such cost factors could not (in almost all cases) even potentially justify the higher prices that WB charged; his overall findings of overcharges were reduced by just 10 percent (at most) when applying these potential cost filters. Doc. 279-111, Webber Report at 76-81 (including Table 13, showing damages ranging from $6,732,478 to $7,538,636 depending on how various cost factors might be applied); Doc. 308, Webber Decl. ¶ 40 (describing analysis underlying Table 13 in Webber's expert report):

Funding Year	Overcharges / Damages* (No Filter)	Limited by Term	Limited by Term and Area	Limited by Term, Area, and Size	Limited by Term, Area, Size and Loop Length
2001	$ 36,670	$ 7,685	$ 7,685	$ 7,685	$ 7,685
2002	$ 93,398	$ 49,199	$ 48,653	$ 48,348	$ 35,826
2003	$ 101,761	$ 61,089	$ 60,184	$ 57,224	$ 54,264
2004	$ 254,210	$ 220,576	$ 218,495	$ 216,050	$ 199,179
2005	$ 279,703	$ 228,175	$ 227,004	$ 219,968	$ 200,946
2006	$ 930,179	$ 860,588	$ 853,233	$ 843,820	$ 829,939
2007	$ 1,175,524	$ 1,117,373	$ 1,111,581	$ 1,107,346	$ 1,107,341
2008	$ 1,217,133	$ 1,171,096	$ 1,164,499	$ 1,151,834	$ 1,151,791
2009	$ 1,365,965	$ 1,332,701	$ 1,314,448	$ 1,275,892	$ 1,273,658
2010	$ 1,366,380	$ 1,342,966	$ 1,334,659	$ 1,292,395	$ 1,290,292
2011	$ 306,412	$ 294,787	$ 286,113	$ 255,821	$ 252,684
2012	$ 198,974	$ 193,534	$ 189,494	$ 172,909	$ 172,478
2013	$ 97,655	$ 90,202	$ 89,758	$ 69,641	$ 68,825
2014	$ 114,160	$ 94,550	$ 94,145	$ 87,969	$ 87,519
2015	$ 561	$ 560	$ 547	$ 52	$ 52
Total	**$ 7,538,686**	**$ 7,065,081**	**$ 7,000,498**	**$ 6,806,954**	**$ 6,732,478**

*Amounts exclude interest and penalties to the extent applicable

Underlying the above chart are detailed calculations and analyses that Heath provided to WB along with Webber's report and which Heath made part of the summary judgment record for each specific school/library that Webber determined was overcharged, including the specific price (including the contract and customer) that Webber deemed to constitute the LCP, as well as Webber's consideration of the enumerated cost factors for those two entities. Doc. 308, Webber Decl. ¶¶ 5, 6, 31-35, 37, 39, 40.

As discussed, Heath even marshaled several representative examples of Webber's work in his summary judgment presentation. *See* Doc. 319, SOF 59-86; Doc. 308, Webber Decl. ¶¶ 7-25. One such example involved the West Allis School District in Milwaukee, which received a price of $14.50 per line for 177 Centrex lines, *without* local calling, in January 2009, just one week after a school district in Janesville was charged just $9.25

per line for 100 Centrex lines, with *unlimited* local calling. Doc. 319, SOF 59-64; Doc. 308 ¶¶ 18-23. Both schools received this pricing under three-year contracts. Doc. 319, SOF 59, 60 (undisputed). The price that the West Allis School District received ($14.50) was 57% higher than the price the Janesville School District received ($9.25) even though (1) both schools were purchasing the same service ("Centrex lines") and, in fact, the Janesville School District was receiving a *better product* because its Centrex lines came with free local calling, (2) both had the same contract term (3 years, beginning in January 2009), and (3) the West Allis School District purchased a larger quantity of Centrex lines (177 lines) than the Janesville School District (100 lines). Doc. 319, SOF 59-64; Doc. 308 ¶¶ 18-23.

Thus, Webber's analysis and damages calculation for the West Allis/Janesville example indisputably considered "cost factors" like contract term, quantity of the service provided, and rural/urban setting, just as it did for the others, and found that those cost factors could not explain the price differential. *Id.*, SOF 59-65, citing specific lines of data within Exhibit S to Webber Report. As Webber explained in his declaration, he performed an extensive review of all the materials that WB produced in the case and found no indication that WB ever performed, at any time, the types of cost studies that would be necessary to show that the costs of providing services to the customers identified in his specific examples were greater than the costs of providing such services to any other customer. Doc. 308 at ¶ 8 (concerning BGCS), ¶ 9 (concerning Messmer), ¶ 16 (concerning MPL), and ¶ 37 (very few cost studies existed among the millions of pages produced by WB in this lawsuit). *See also* Doc. 319, SOF 52 (materially undisputed

that WB generally did not prepare any cost studies to evaluate or compare costs for E-rate customers and other non-residential customers, except in some cases where the ICB unit became involved).

In the face of Heath's evidence, on summary judgment, WB offered no explanation or any cost evidence to demonstrate that the lower price given to the Janesville School District for Centrex lines would have been "non-compensatory" if provided to the West Allis School District. Doc. 319, SOF 59-63 (materially undisputed and no citation to any cost evidence by WB); Doc. 279-44, Stegeman Rebuttal Report (Stegeman did not apply his hypothetical cost factors to the actual LCPs identified by Webber to attempt to show they were not compensatory). Nor did WB offer any evidence that the lower price given to Madison SD for OPT-E-MAN circuits would have been "non-compensatory" if provided to MPL, Doc. 319, SOF 72 (undisputed); or that the prices given to Automatic Data (or any of the other customers identified in paragraph 7 of Webber's May 7, 2021 declaration) for ISDN-PRI circuits would have been "non-compensatory" if given to any of the E-rate customers Webber identified there. *Id.*, SOF 75-86 (materially undisputed); Doc. 308, Webber Decl., ¶ 7. Indeed, for most of Relator's proposed findings of fact on these issues, WB simply responded as follows: "*Not disputed for purposes of summary judgment*." *See id.* at ¶¶ 59-63, 75, 77-80, 83-86 (emphasis added).

The district court did not refer to or acknowledge these extensive portions of the summary judgment record in finding Heath's showing on costs to have been "[u]ndeveloped and perfunctory," and thus waived. SA. at 3, n.1.

SUMMARY OF THE ARGUMENT

There can be no reasonable debate, given the express language of the Telecommunications Act of 1996 and the FCC regulations and guidance, what Congress and the FCC were trying to accomplish for schools and libraries: to get them the best prices that service providers like WB offer other customers. Thus, when data is marshaled by Heath that shows that WB was deliberately ignoring the LCP rule and charging many of its school and library customers higher prices than other non-residential customers for the same or similar services (*e.g.*, "similarly situated" customers), Heath has made his *prima facie* case that WB violated the LCP rule and submitted false claims to the government.

Certainly, one could imagine some technical arguments on the margins by a carrier that actually implemented a reasonable compliance process about why some price differentials might be justified. But that is not this case. The evidence is overwhelming that WB made no effort whatsoever to comply. Indeed, even with the benefit of years of litigation and after-the-fact experts, WB still has offered no justification for the thousands of instances where it charged E-rate customers higher prices than other customers for the same or similar services. The district court effectively gave WB the benefit of a presumption that its over-billing of E-rate customers was somehow, by random luck and without any affirmative showing, justified by hypothetical, unknown, and unquantified differences in the costs of services. That sort of presumption directly violates the express regulations, the well-understood policy behind the rule, and common sense.

The district court erred as a matter of law in holding that Heath's showing on summary judgment was insufficient to satisfy the "falsity" and "knowledge" elements of the FCA. The district court's error on falsity was premised on a clear misreading of the LCP rule – imposing a non-existent burden of proof on Heath, then failing to give weight to Heath's substantial showing on summary judgment that more than satisfied that false burden. The district court's error on scienter was in deciding that this Court's decision in *SuperValu* required the entry of summary judgment in WB's favor even though *WB did not actually act* on any interpretation of the applicable regulation, reasonable or otherwise, but instead totally ignored it. No application of *SuperValu* would justify summary judgment for WB on this record.

As reflected below in Argument Section I(A) at 33-41, the district court's first mistake on the "falsity" element was flipping the burden of proof under the LCP rule, foisting on Heath the obligation of establishing whether WB had some cost-related excuse to charge similarly situated customers differently. That is the exact inverse of the FCC's E-rate regulatory scheme. The LCP rule provides that it is *the service provider's* burden to establish that differences in cost render an LCP not compensatory if offered to the school or library. 47 C.F.R. § 54.504(c)(2); First Order, ¶¶ 488-490. The FCA's falsity requirement does not somehow flip the clear regulatory burden; it remains a defendant's obligation to prove an exception to a regulation, such as the cost exception to the LCP rule, not an FCA plaintiff's obligation to establish the absence of that exception.

But even if the district court had been correct in holding Heath to the burden of proving that each of the LCPs he identified was compensatory to WB, or requiring that he consider certain cost factors as part of his "similarly situated" analysis, Heath more than met that burden for purposes of summary judgment. Argument Section I(B) at 42-44. Notwithstanding WB's utter failure to submit *any* evidence on summary judgment to establish that its costs rendered LCPs non-compensatory, Heath's expert *did* perform significant analysis finding that various cost factors did not and could not have justified the higher prices that WB charged to E-rate schools and libraries. The analysis was not "[u]ndeveloped and perfunctory," as the district court held in deeming the argument "waived," SA. at 3, n. 1, but robust and specific. Heath included this work in his summary judgment submissions, and WB did not seriously dispute it. The district court thus further erred in failing to consider and give weight to Heath's showing.

As for the FCA element of scienter, the summary judgment record establishes that, rather than implementing what might be a reasonable interpretation of the law, WB did nothing whatsoever to comply with the LCP rule. Argument Section II at 45-51. WB's deliberate inaction takes this case outside the purview of *SuperValu* and this Court's more recent decision in *United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649 (7th Cir. 2022) ("*Safeway*"), both of which involved defendants that adopted what the Court determined to be reasonable interpretations of the relevant regulations and then *actually acted consistently with those interpretations*.

There is no dispute here that WB would have been entitled to consider costs in pricing services to schools and libraries and apply for departures from the LCP when it

could show that the lower prices were not compensatory. *But there also can be no dispute that WB did nothing of the sort*. WB did *not* apply for non-compensatory exemptions, and it took no affirmative steps to comply with the LCP rule. On the contrary, WB generally priced services to schools and libraries to maximize its own profits, the opposite of what Congress and the FCC intended when creating the E-rate program and enacting the LCP rule.

This appeal thus provides an opportunity for the Court to cabin *SuperValu* and *Safeway* to circumstances where FCA defendants actually act upon their objectively reasonable interpretations – a limitation that is entirely reasonable, consistent with those decisions, and necessary given the district court's incorrect application of this Court's precedent.

STANDARD OF REVIEW

Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and the motion should be granted only if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986). An award of summary judgment is reviewed *de novo* on appeal, with the appellate court "interpreting the facts and drawing all reasonable inferences in favor of the nonmoving party." *Turubchuk v. S. Ill. Asphalt Co.*, 958 F.3d 541, 548 (7th Cir. 2020). Thus, a district court's conclusions of law and application of law to fact on summary judgment are both reviewed anew, with the appellate court

"drawing [its] own legal and factual conclusions from the record." *Barnes v. City of Centralia, Ill.*, 943 F.3d 826, 828 (7th Cir. 2019). "[S]ince the review of summary judgment is plenary, errors of analysis by the district court are immaterial; we ask whether we would have granted summary judgment on this record." *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 386 (7th Cir. 2000).

ARGUMENT

I. The District Court Improperly Shifted to Heath the Burden of Establishing WB's Costs in Identifying Similarly Situated Customers, and Further Erred in Disregarding Heath's Showing on Costs.

WB's intentional thwarting of the LCP rule should result in classic FCA liability, not summary dismissal of Heath's claims. One of the problems that Congress enacted the FCA to combat was "charg[ing] exorbitant prices for goods delivered." *United States ex rel. Cimznhca, LLC v. UCB, Inc.*, 970 F.3d 835, 839 (7th Cir. 2020), *cert. denied sub nom., Cimznhca, LLC v. United States*, 141 S.Ct. 2878 (2021) (quoting *United States v. McNinch*, 356 U.S. 595, 599 (1958)). The very epitome of a false claim is one in which a claimant seeks more money than what the law allows—particularly when a price ceiling has been set by the government—because the very purpose of the FCA is to "combat fraud and *price-gouging*." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (emphasis added). "In an archetypal *qui tam* False Claims action, such as where a private company overcharges under a government contract, the claim for payment is itself *literally false* or fraudulent." *United States ex rel. Hendow v. Univ. of*

Phoenix, 461 F.3d 1166, 1170 (9th Cir. 2006) (emphasis added); *see also United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 303 (6th Cir. 1998).

Thus, a case like this one involving overcharges to a government program is a quintessentially "false" claims case under the FCA. By ignoring the LCP rule until 2009, and slowly rolling out an insufficient process thereafter, WB overcharged hundreds of its school and library customers, and caused thousands of overcharges to be submitted to the E-Rate program. Doc. 319, SOF 49, 50.[11]

The district court's holding that Heath failed to prove the falsity element of the FCA goes to the core of Heath's claim – whether WB's conduct caused overcharges at all. According to the district court, Heath failed to identify any violation by WB of the LCP rule – any overcharge at all – because he made no showing that "any of Wisconsin Bell's customers were similarly situated based on any factors related to cost." SA. at 3. To the district court, this meant that Heath had not established that WB failed to charge the LCP to any schools or libraries in Wisconsin, resulting in an absence of "falsity" under the FCA.

The district court's finding on falsity is fundamentally incorrect for two reasons. First, it was never Heath's burden to consider WB's internal costs or to establish that WB's costs would not render the LCP non-compensatory. That is and was WB's

[11] In addition to factually false claims, a claim can also be false "where a party merely falsely certifies compliance with a statute or regulation as a condition to government payment." *Hendow*, 461 F.3d at 1171. In this case, WB not only submitted factually false claims (demanding more money than was due), but also submitted, or caused to be submitted, both expressly and implicitly false certifications of compliance. Doc. 319, SOF 133, 134.

regulatory burden, one which WB made no effort to meet. Second, even if the burden were on Heath, he more than fulfilled that burden for purposes of summary judgment. For either or both of these reasons, the district court's holding on "falsity" should be reversed.

A. The District Court Erred in Placing the Burden on Heath to Consider WB's Costs in Identifying Violations of the LCP Rule.

Heath showed on summary judgment that hundreds of Wisconsin schools and libraries – among them many that were most reliant on E-rate funding and perhaps least capable of negotiating with WB for lower prices – were charged higher rates for the same or similar service by WB, and that WB did not even have a process in place to assure LCP compliance. Doc. 319, SOF 8-15, 50, 51, 75-86.

The LCP rule provides, expressly, that it is *the service provider's* burden to establish, if it wants to charge schools and libraries above LCP, that differences in cost render the lower price not compensatory. This was codified by the FCC through notice and comment rulemaking and published in the Code of Federal Regulations in clear, binding language:

> Service providers may request higher rates *if they can show* that the lowest corresponding price is *not compensatory*, because the relevant school, library, or consortium including those entities is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

47 C.F.R. § 54.504(c)(2) (emphasis added).

The FCC confirmed the service provider's burden in formal guidance published in the Federal Record: "[W]e will *only* permit providers to offer schools and libraries prices

above the prices charged to other similarly situated customers when those *providers can show* that they face *demonstrably and significantly higher costs* to serve the school or library seeking service." First Order, ¶ 488 (emphasis added); *see also id.* ¶ 489 (FCC will not "force the provider to offer services at a rate below Total-Service Long-Run Incremental Cost"); ¶ 490 (allowing providers to "seek recourse" from the FCC "regarding interstate rates" and a state commission "regarding intrastate rates" and obtain approval to charge "higher rates if they believe that the lowest corresponding price is not compensatory").

Accordingly, the district court erred as a matter of law in finding that it was Relator's burden to show that "Wisconsin Bell's customers were similarly situated based on any factors related to cost." SA. at 3. Based on the plain language of the FCC regulation, and as confirmed in the FCC's reports and orders, the burden lies with the service provider to establish that offering the LCP would be "non-compensatory" due to differences in costs between the school or library and otherwise similarly situated customers. Indeed, in support of its incorrect conclusion, the district court cited to a single passage of the First Order – Paragraph 488 – which expressly states the opposite of how the district court imposed the burden. *See supra* ("… when those *providers can show* …") (emphasis added).

Simply put, the district court confused Relator's burden of proof in this case with WB's regulatory burden to justify, at the time of E-rate reimbursement, any price to a school district or library that was higher than a price to another similar customer for the same service. The whole point of the LCP rule is to place that burden on WB, the service

provider. The district court removed that burden and thus gave life to not only an unreasonable interpretation of the LCP rule, but one that renders it completely toothless. Under the district court's view of the rule, no school or library (or FCA plaintiff) could establish "similarly situated" without first making a showing that the service provider had similar costs associated with providing services to the comparator customers, which requires information uniquely within the service provider's purview and not relevant under the regulation unless and until the service provider attempts to make a "not compensatory" showing.

The district court noted, without citation to the record, that Relator had "concede[d]" that cost factors are "relevant to the similarly situated analysis." SA. at 3. It is unclear what "concession" the district court was referring to, but Relator has *not* agreed that cost factors are part of his (or a school's or library's) "similarly situated" burden under the LCP rule. Of course, cost factors are *expressly* relevant to the LCP rule and the similarly situated analysis *if the service provider shows* that higher costs render the LCP non-compensatory. *See* 47 C.F.R. § 54.504(c)(2). There is no dispute on that point; if that is what the district court was referring to, Heath willingly concedes it. Costs *are* relevant, but *only if* the service provider establishes them to justify a departure from LCP.

Congress and the FCC did *not* incorporate a showing of costs *by the school or library* into the "similarly situated" analysis. To be sure, a school or library (or FCA plaintiff) retains the regulatory burden to establish that other customers received lower *prices*. *See* 47 C.F.R. § 54.504(c)(1 ("Schools, libraries, and consortia including those entities may

request lower rates if the rate offered by the carrier does not represent the lowest corresponding price"). And Heath fulfilled that burden, establishing on summary judgment that WB charged higher *prices* for the same or similar services to hundreds of WB's E-rate customers as compared to the *prices* that WB charged to similar, non-residential customers. Doc. 319, SOF 51 (materially undisputed); Doc. 308, Webber Decl. ¶¶ 30-43. This is, of course, exactly what Congress required in mandating that E-rate services be provided "at rates less than the amounts charged for *similar services to other parties*." 47 U.S.C. § 254(h)(1)(B) (emphasis added).

But the district court erred as a matter of law in holding that the school's, library's or FCA plaintiff's burden also includes showing that the internal *costs* to the service provider of providing such services were similar. That burden – or really, its converse, the burden of showing that costs are so "demonstrably and significantly higher" as to be not compensatory, thus an *exception* to the LCP rule – remains on the service provider, as set forth in the regulation and consistent with the clear statutory and regulatory intent of Congress and the FCC.

The district court's holding that it was Heath's, not WB's, burden to establish the cost exception to the LCP rule constitutes reversible error. "[T]he general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). *See also Gentry v. Harborage Cottages-Stuart, LLLP*, 654 F.3d 1247, 1258-59 (11th Cir. 2011) ("Generally, the party claiming an

exemption to a statute's requirements carries the burden of establishing its entitlement thereto."); *Whitney v. Astrue*, 889 F. Supp. 2d 1086, 1094-95 (N.D. Ill. 2012) ("That interpretive approach to deciding who bears the burden is well-established… The Supreme Court established this rule in the early nineteenth century and has continued to extend its application ever since.")

The rule is equally applicable when the statutory exception is established by regulation. In *United States v. An Article of Device*, 731 F.2d 1253, 1259-62 (7th Cir. 1984), this Court carefully parsed FDA regulations making "prescription devices one of several exemptions to the more general labeling requirements," finding that this regulatory structure imposed a burden on manufacturers to fit within the exclusion rather than on the government to negate it. Thus, "[t]he exemption framework [in the regulation] requires the makers of prescription devices to be able to prove that their devices do in fact work safely for their intended purposes when they are put on the market." *Id.* at 1261. Jury instructions placing the burden on the manufacturer, not the government, were upheld on the strength of the clear regulatory language. *Id.* at 1262-63. *See also United States v. Ameren Mo.*, 9 F.4th 989, 1005 (8th Cir. 2021) ("it is the source's burden to prove the applicability of the demand-growth exclusion," not the government's burden to prove that the exclusion does not apply); *Harry C. Crooker & Sons, Inc. v. Occupational Safety & Health Rev. Comm'n*, 537 F.3d 79, 85–86 (1st Cir. 2008) (where "text of the applicable regulation identifies the existence of insulation as an exception to the standard …, the Secretary's prima facie case was not vitiated by the absence of proof that the power lines were uninsulated").

The district court here compounded its error by suggesting that the cost exception to the LCP rule is set forth only in non-binding FCC "guidance." SA. at 4. This is also incorrect. The FCC codified the cost exception in Federal Record rulemaking after notice and comment, not in mere "guidance." *See* 47 C.F.R. § 54.504(c)(2). Moreover, even if the FCC's First Report cited by the district court was the only FCC statement on the subject, which it is not, it too "provide[s] important insights into the FCC's interpretation of the [Telecommunications] Act and of its own regulations," and is "entitled to considerable deference …." *MCI Telecomms. Corp. v. GTE Nw., Inc.*, 41 F. Supp. 2d 1157, 1173 n.10 (D. Or. 1999). *See also United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 644 (7th Cir. 2016) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)) ("An agency's interpretation of its own regulation is given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") Moreover, in its final Universal Service rulemaking in 1997, the FCC formally adopted all of the "guidance" set forth in the First Order on these topics within its "summary" of its "[f]inal rule." Universal Service, 62 Fed. Reg. 32,862 ¶¶ 290-297 (June 17, 1997). Accordingly, the district court erred by ignoring the FCC's formal rule on the cost exception to the LCP rule and in discounting the FCC's First Report on the subject, both of which are binding and clear.

Finally, contrary to the district court's suggestion, the FCA does not somehow reverse the burdens placed on service providers under the LCP rule. SA. at 4 (stating that "[a]gency guidance on the interpretation of a regulation cannot alter the burden of proof set out by the FCA"). In *United States ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 177 (3d Cir. 2019), the court rejected the defendants' argument that the FCA elements of

falsity and knowledge can turn "exceptions into prima facie elements." The court held that because the Stark Act, the operable statute in that case, placed the burden on defendants to "plead a Stark Act exception," it was not the relator's burden under the FCA "to plead that none exists." *Id.* Similarly, here, the FCA does not magically shift the burden of proving the cost exception to the LCP rule from the service provider to the FCA relator. That burden is expressly imposed on the service provider under binding FCC regulations, not on schools, libraries, or FCA plaintiffs acting on behalf of the government.

Indeed, the district court's interpretation subverts the FCC's caution that "[p]roviders may not avoid the obligation to offer the lowest corresponding price to schools and libraries … by arguing that none of their non-residential customers are identically situated to a school or library or that none of their service contracts cover services identical to those sought by a school or library." First Order, ¶ 488. The district court's holding effectively allows WB to escape liability simply by arguing that the costs of providing services to any two customers are never the same, or that none of its E-rate customers were *ever* similarly situated to any other non-residential customer, without even making a "non-compensatory" showing or seeking the recourse required of it by FCC regulation. This is exactly what Congress and the FCC sought to foreclose.

The district court's decision that Heath, not WB, had the burden of establishing and evaluating WB's costs to service similarly situated customers was reversible error.

B. The District Court Further Erred in Finding that the Summary Judgment Record on Costs Warrants Judgment for WB.

Heath showed on summary judgment that when WB verified compliance with E-rate program rules, it had done nothing—literally nothing—to try to identify and charge E-rate schools and libraries favorable prices as required by the LCP rule. Doc. 319, SOF 8-15. Nor did WB make any effort to establish through a petition to the Wisconsin Public Service Commission that, for example, the cost of offering BCGS the same service at the same price offered to Automatic Data would be so costly as to be non-compensatory to WB. *Id.*, SOF 52 (materially undisputed); Doc. 308, Webber Decl. ¶¶ 8, 9, 16. WB did not even attempt to make such a showing in this litigation. It did not identify or produce cost studies – historical or for purposes of litigation – comparing the costs of providing similar services to otherwise similar customers to show that the LCPs identified by Webber would have been "non-compensatory" if offered to the overcharged schools or libraries. *Id.*; *see also id.* ¶37. Nor did WB attempt to establish on summary judgment a cost-based exception to the LCP rule, devoting none of its 181 SOFs to the issue. Doc. 277-1, WB's Statement of Proposed Material Facts.

And the district court did not find otherwise, instead holding incorrectly that as a matter of law it was Heath's burden, not WB's, to make a showing on costs. As reflected above, that conclusion was in error.

WB's failure to discharge its burden of proving that the LCP rule's cost exception applied should have doomed its motion for summary judgment on FCA "falsity," even if Heath showed nothing at all on costs in his own summary judgment submissions.

Gerhartz v. Richert, 779 F.3d 682, 685-86 (7th Cir. 2015) ("A moving party who fails to discharge [its] burden is not entitled to summary judgment, even if the nonmovant entirely fails to respond.").

But Heath *did* present substantial evidence in the summary judgment record on costs, more than sufficient to discharge the district court's improper shifting of the burden to him. This was the district court's second fundamental mistake on FCA "falsity"– its incorrect finding that Heath did not develop for purposes of contesting WB's motion for summary judgment an evaluation of "factors related to cost," when Heath expressly marshaled the evaluation of his expert, Mr. Webber, on this exact issue, and WB did nothing to contest this showing for purposes of summary judgment.

Notwithstanding WB's utter failure to maintain the specific product pricing and cost-related data that would be necessary to demonstrate E-rate compliance (including compliance with the LCP rule), Webber created a pricing database that included significant analysis regarding cost factors (including contract length, customer location (urban vs. rural), customer size, and loop length between customer's premises and WB facilities), concluding that these cost factors did not and could not have justified the higher prices charged to E-rate schools and libraries. Doc. 279-111, Webber Report at 76-81. By comparing *only* customers of similar size, location, contract duration, and distance from WB facilities to rebut and remove any argument – one never actually offered by WB – Webber found that cost-related factors could not justify the differences in price. Doc. 319, SOF 51 (materially undisputed; describing "cost factors" Webber considered, citing pages 76 to 81 of his expert report); Doc. 279-111, Webber Report at

76-81 (including Table 13, showing non-TEACH damages ranging from $6,732,478 to $7,538,636 depending on how various cost factors might be applied); Doc. 308, Webber Decl. ¶ 40 (describing analysis underlying Table 13 in Webber's expert report).

These arguments and proposed findings were not "undeveloped and perfunctory," as the district court found – rather, they met any burden improperly placed on Heath to establish similarity of costs among similarly situated customers. The district court seems to have mostly ignored Heath's showing on costs, citing in footnote 1 of its Decision and Order, without specification, just "two references" made by Heath to Mr. Webber's work, but finding, incorrectly (and obliquely) that Heath "does [not][12] describe what factors Webber considered or which customers (if any) he found to be similarly situated." SA. at 3, n.1. In actuality, Heath included fulsome explanation of Webber's work on cost factors, even including Webber's full report, with exhibits, in the summary judgment record, which showed that Webber had painstakingly reviewed and evaluated, for every LCP comparison, cost factors like contract length, customer location, customer size, and loop length.

Heath's showing on summary judgment was more than sufficient to establish FCA "falsity" even if Heath had the burden of showing the absence of cost justifications for each of WB's LCP violations, a burden that was improperly foisted on him in the first instance by the district court. The district court erred in deciding otherwise.

[12] Heath assumes that the district court mistakenly omitted the word "not" from this sentence given the context and syntax in the rest of the sentence and in the remainder of footnote 1 of the Decision and Order.

II. The District Court Erred in Finding an Absence of FCA Scienter Despite WB Never Even Attempting to Comply with the LCP Rule or its Purported "Objectively Reasonable Interpretation" of It.

Under the FCA, the element of "scienter" is met if a defendant acts with actual knowledge, deliberate ignorance, or reckless disregard to the possibility that it is presenting, or causing the presentment of, a false claim. 31 U.S.C. § 3729(a)(1)(A), (b)(1); *United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013).

WB's behavior – doing absolutely nothing to comply with the LCP rule and instead deliberately "let[ting] a sleeping dog lie" – perfectly fits the classic "'ostrich-with-his-head-in-the-sand' problem where government contractors hide behind the fact they were not personally aware that such overcharges may have occurred," a level of scienter traditionally deemed more than sufficient in both FCA and non-FCA contexts. *United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997). *See also United States v. Molina Healthcare of Illinois, Inc.*, 17 F.4th 732, 744–45 (7th Cir. 2021) ("there is ample detail to support a finding that Molina either had actual knowledge that the government would view skilled nursing services as a critical part of the Nursing Facility rate cell (i.e., as material), or that it was deliberately ignorant on this point."); *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1211 (9th Cir. 2019) ("The deliberate ignorance standard can cover 'the ostrich type situation where an individual has buried his head in the sand and failed to make simple inquiries which would alert him that false claims are being submitted.'") (quoting *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1174 (9th Cir. 2016)); *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 674 (N.D. Ill. 2006) (*citing United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006) (scienter met where defendant

engaged in "a cutting off of one's normal curiosity by an effort of will")); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) ("Willful blindness is knowledge, in copyright law").

This is *not* a case where a defendant acted in accordance with an objectively reasonable interpretation of a law or regulation so as to excuse its conduct. As the district court correctly noted, in *SuperValu*, "the Seventh Circuit adopted the Supreme Court's scienter standard for the Fair Credit Reporting Act from *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007), and applied it to the FCA's scienter provision." SA. at 6 (citing *SuperValu*, 9 F.4th at 467). But the district court erred in ruling that *SuperValu* saves WB from the consequences of its total failure to even attempt compliance with the LCP rule.

The crux of *SuperValu* was the defendant's failure to give the government the benefit of price-matching under Medicare's "usual and customary" regulations. *SuperValu*, 9 F.4th at 461-62. Similarly, in this Court's more recent decision in *Safeway*, the defendant adopted an interpretation of "usual and customary" that excluded "discounted prices available only to program participants." *Safeway*, 30 F.4th at 660. In both cases, this Court decided, in 2-1 decisions, that the defendant's interpretation of the relevant regulation, while incorrect, was nevertheless "objectively reasonable." *SuperValu*, 9 F.4th at 468-70, *Safeway*, 30 F.4th at 659-60. Applying the Supreme Court's decision in *Safeco* to the FCA's scienter standard, this Court held that SuperValu and Safeway could not have acted with the requisite intent because the interpretations upon which they

acted were objectively unreasonable and no authoritative guidance warned them away from their interpretations. *SuperValu*, 9 F.4th at 472; *Safeway*, 30 F.4th at 659-63.

This appeal does not require relitigation of *SuperValu* or *Safeway*, or depend on Supreme Court review of their underlying rationale.[13] Rather, this case presents a different situation than those cases entirely. Instead of implementing what might be a reasonable interpretation of the law, WB did nothing whatsoever to comply with the regulation at issue—the LCP rule. WB never even attempted to adopt an interpretation of the LCP rule, reasonable or otherwise, during the relevant time period, and no *post-hoc* interpretation matches its actual conduct either. Instead, WB deliberately chose not to take *any* steps to comply with the LCP rule until at least 2009.

This Court was careful in *SuperValu*, in response to the dissent's critique, to state that the *Safeco* standard does not "excuse a company if its executive decisionmakers attempted to remain ignorant of the company's claims processes and internal policies," and that actual knowledge and deliberate ignorance, while indicating "higher degrees of culpability," "if implicated in a case, might render reckless disregard inapplicable." *SuperValu*, 9 F.4th at 468. That is precisely what is at issue here, not the fact patterns in *SuperValu* and *Safeway*. Those decisions do *not* stand in the way of an FCA claim premised on a defendant's outright failure to act on *any* reasonable interpretation of a regulation. Even if the ostrich's *subjective intent* is irrelevant under *SuperValu* in cases

[13] As of the filing of this brief, the United States Supreme Court is considering and has not ruled on the *Petition for a Writ of Certiorari* in the *SuperValu* case. *United States ex. rel. Schutte v. SuperValu Inc.*, No. 21-1326 (April 5, 2022).

involving reasonable interpretations of a regulatory scheme, its *objective conduct* in cases like this one – *e.g.*, failing to act on *any* reasonable interpretation – still subjects it to liability under the well-tread law of FCA and non-FCA scienter.

Attempting to squeeze its evaluation of this case into the precedent set by *SuperValu*, the district court adopted an interpretation of the LCP rule to justify summary judgment for WB on scienter – that WB was entitled to consider costs in setting pricing for schools and libraries. SA. at 7 ("Wisconsin Bell interprets the LCP rule to allow it to consider cost-based factors when determining which customers are similarly situated and to allow it to offer different rates to different E-rate customers."). But that interpretation is not in dispute. Relator agrees that the regulatory framework of the LCP rule expressly offers service providers like WB the opportunity to consider costs in setting prices and to depart from LCP *if* the service provider can show that providing a service to a school or library at the same price it provided to another customer would be "non-compensatory."

The district court erred when applying *SuperValu* because, here, WB did not *actually consider* costs when setting prices for the hundreds of E-rate customers at issue. The idea that "costs can be considered" is meaningless if WB never acted on it. *SuperValu* and *Safeway* require that a reasonable interpretation actually be acted upon to be relevant. Indeed, in summarizing and applying the Supreme Court's *Safeco* decision, this Court in *SuperValu* expressly incorporated the notion of *acting under an interpretation* into its discussion of the relevant standard:

> *A defendant who acted under an incorrect interpretation* of the relevant statute or regulation did not act with reckless disregard if (1) the interpretation was objectively reasonable and (2) no authoritative guidance cautioned defendants against it.

SuperValu, 9 F.4th at 464 (citing *Safeco*, 551 U.S. at 70) (emphasis added). The same essential language, with only slight variation, is repeated in *Safeway*, 30 F.4th at 652-53 ("a defendant *does not act* with reckless disregard as long as its interpretation of the relevant statute or regulation was objectively reasonable and no authoritative guidance warned the defendant away from that interpretation.") (emphasis added).

Here, there is essentially no dispute that WB did nothing to comply with the LCP rule throughout the pre-2009 period, including taking no action to determine, let alone show, that offering the LCP to a school or library would cause WB to charge non-compensatory prices for its services. WB made an intentional choice *not* to implement any policy, procedure, or training to comply with the LCP rule. Doc. 319, SOF 8-14, 49-86, 88-95. WB aggressively pushed its salespeople to achieve "profitable revenue growth," avoid the "price floor," and use pricing "venues" without any consideration of the LCP rule, effectively guaranteeing noncompliance. *Id.*, SOF 16-48. Thus, WB had no interpretation of the LCP rule at all, other than to "let a sleeping dog lie," deliberately allowing its ordinary business practices of maximizing profit dictate the pricing it offered to E-rate schools and libraries in direct violation of the LCP rule.

The interpretation offered by the district court – that WB was justified in considering "cost-based factors" in charging "different rates to different E-rate customers" – should have no relevance to this case. WB did *not* consider cost-based factors; it did not

consider anything.[14] WB's showing in litigation did not cure this deficiency, certainly not in a manner sufficient to award summary judgment. WB's experts never attempted to establish that the specific LCPs identified by the Relator through his expert would have resulted in WB being forced to charge non-compensatory prices. Moreover, Relator's expert reviewed whether cost factors could explain the disparities between LCPs and the prices charged to schools and libraries, and found that *they could not*. Doc. 279-111, Webber Report at 76-81. WB essentially did not contest this showing for purposes of summary judgment. Doc. 319, SOF 51 (materially undisputed; WB generally does not dispute Relator's descriptions of Webber's work and opinions for purposes of summary judgment); Doc. 277-1, WB's Statement of Proposed Material Facts (none of WB's 181 proposed material facts cite to cost studies or similar evidence to show Webber's hundreds of LCPs are non-compensatory).

So this appeal provides an opportunity to confirm that an FCA defendant does not escape FCA scienter where it may have held a reasonable interpretation, or might be able to articulate one after the fact, but failed to implement that interpretation in reality, instead sticking its head in the sand and avoiding any attempt at compliance with the law at issue. If there is no scienter under *SuperValu* and *Safeway* even when a defendant never acted on its objectively reasonable interpretation, then the concerns articulated by

[14] To the extent that the district court implied that it would have been reasonable for WB to interpret the LCP rule to allow it to do nothing to comply unless and until a school, library, or FCA plaintiff could establish that WB's internal costs to service similar customers were "compensatory," that interpretation would be unreasonable, for the reasons stated above in Argument, Section I.

the dissents in those decisions would be validated, specifically that the majority view has "create[d] a safe harbor for deliberate or reckless fraudsters," *SuperValu*, 9 F.4th at 473 (Hamilton, J., dissenting), and rendered the FCA unable to "deter [or] remedy many frauds that loot the federal treasury." *Safeway*, 30 F.4th at 664 (Hamilton, J., dissenting). If that *is* what was intended by the *SuperValu* and *Safeway* majorities, this case presents an opportunity for this Court to overrule *SuperValu* to undo such overreach.

But that cannot have been this Court's desire in those cases, or what the Supreme Court intended in *Safeco*. FCA defendants cannot escape liability by simply articulating objectively reasonable, albeit incorrect, interpretations of statutes and regulations, but failing to act accordingly. This Court was not faced with this circumstance in *SuperValu* or *Safeway*.

The district court's holding that Heath did not show scienter under the False Claims Act thus also constitutes reversible error. It is based on a misapplication of this Court's decision in *SuperValu*. Any "objectively reasonable interpretation" is irrelevant here, having never been acted upon by WB. Heath's showing that WB deliberately chose to do nothing to comply with the LCP rule while charging E-rate schools and libraries prices intended to maximize WB's profits is more than sufficient to establish scienter under the FCA.

CONCLUSION

For the reasons set forth herein, the district court's decision awarding summary judgment to WB on the purported absence of FCA falsity and scienter constitutes

reversible error.[15] The district court's Decision and Order should be reversed, and the case should be remanded so that it can proceed.

Dated: June 21, 2022

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[15] Because the district court's award of summary judgment was based solely on its narrow discussion of these two issues, Heath has confined his discussion in this opening brief to the district court's rationale on these issues. To the extent that WB seeks affirmance of the district court's Decision and Order on any ground not articulated therein, Heath reserves discussion of such ground(s) to his reply brief.

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. RULE 32(a)(7) AND CIRCUIT RULE 32(c)

The undersigned, counsel of record for Plaintiff/Relator-Appellant Todd Heath, furnishes the following in compliance with Fed. R. App. P. Rule 32(a)(7), Circuit Rule 32(c), and Fed. R. App. P. Rule 32(g):

I hereby certify that this brief conforms to the type-volume limitations contained in Fed. R. App. P. Rule 32(a)(7)(B)(i) as modified by Circuit Rule 32(c) for a brief with a proportionally spaced font. Excluding the parts of this brief exempted by Fed. R. App. P. 32(f), this brief contains 13,941 words.

Dated: June 21, 2022

By: */s/ David J. Chizewer*
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Attorney for Plaintiff/Relator-Appellant, Todd Heath

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2022, I electronically filed the foregoing Brief and Required Short Appendix of Plaintiff/Relator-Appellant with the Clerk of the Court for the Seventh Circuit Court of Appeals via the Court's Case Management/Electronic Case Filing (CM/ECF) system pursuant to Circuit Rule 25(a). Participants in the case who are registered CM/ECF users—which include counsel of record for Defendant-Appellee—were served electronically at the time of filing.

Dated: June 21, 2022

By: */s/ David J. Chizewer*
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Attorney for Plaintiff/Relator-Appellant, Todd Heath

CERTIFICATE OF COMPLIANCE REQUIRED BY CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), I hereby certify that all documents required by Circuit Rules 30(a) and 30(b) are included in this Required Short Appendix.

Dated: June 21, 2022

By: */s/ David J. Chizewer*
David J. Chizewer

Attorney for Plaintiff/Relator-Appellant, Todd Heath

CASE NO. 22-1515

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
ex rel. TODD HEATH,

Plaintiff/Relator-Appellant,

v.

WISCONSIN BELL, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Lead Case No. 2:08-cv-00724-LA
The Honorable Lynn Adelman, District Court Judge

REQUIRED SHORT APPENDIX OF PLAINTIFF/RELATOR-APPELLANT TODD HEATH

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Record cites from United States ex rel. Todd Heath v. Wisconsin Bell, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

v. **Case No. 08-cv-0724**

WISCONSIN BELL, INC.,
Defendant.

DECISION AND ORDER

Relator Todd Heath brings this *qui tam* action under the False Claims Act ("FCA") alleging that defendant Wisconsin Bell Inc. fraudulently obtained subsidies by falsely certifying that it was providing telecommunications services to schools and libraries at the lowest rate charged to similarly situated customers. *See* 47 U.S.C. § 254(h)(1)(B); 47 C.F.R. § 54.511(b). Wisconsin Bell moves for summary judgment. The parties have also brought motions for the exclusion of expert witnesses, motions to restrict documents, and a motion to set a briefing schedule for a possible motion for sanctions.

I. THE E-RATE PROGRAM

Wisconsin Bell is a common carrier that receives subsidies under the Education Rate ("E-rate") Program. Congress established the E-rate program as part of the Telecommunications Act of 1996. Under the program, the government pays 20-90% of the price of certain telecommunications and information services provided to eligible schools and libraries. 47 C.F.R. § 54.505. To receive a subsidy, a common carrier must annually certify that it is charging the school or library the lowest corresponding price.

The "Lowest corresponding price" or "LCP" is the lowest price that a service provider charges "similarly situated" nonresidential customers for "similar services," unless the Federal Communications Commission or equivalent state commission finds that the LCP is "not compensatory." 47 C.F.R. §§ 54.500, 54.511(b). "Similarly situated" is not a defined term in the regulations but the FCC has provided guidance on which customers are similarly situated. *See Meza Morales v. Barr*, 973 F.3d 656, 664-65 (7th Cir. 2020) (Deference to agency guidance is appropriate where regulation is ambiguous). In general, schools and libraries must be in a provider's geographic service area (i.e., "the area in which [it] is seeking to serve customers with any of its [E-rate] services") to be considered similarly situated. *In the Matter of Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C. Rcd. 8776, ¶ 487 (1997) ("First Report and Order"). Further, customers are not "similarly situated" when they are differentiated by factors "clearly and significantly" affecting cost, including but not limited to traffic volume, mileage from a switching facility, and length of contract. *Id.* at ¶ 488.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I view the evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

III. ANALYSIS

The FCA imposes civil liability on 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)(A). FCA civil claims thus require proof of two primary elements: (1) falsity and (2) scienter. The Supreme Court has also interpreted § 3729(a)(1)(A) to require that knowingly false claims be material to the government's payment decision for liability to attach. *Univ. Health Servs., Inc. v. U.S. ex real. Escobar*, 579 U.S. 176, 193 (2016).

A. Heath Does Not Show Falsity

Heath argues that Wisconsin Bell is liable under the FCA because it submitted claims for subsidies while falsely certifying compliance with the LCP rule. To show that any certification was false, Heath must first show that Wisconsin Bell violated the LCP rule. A provider violates the rule if it charges E-rate customers a higher rate than it charged similarly situated customers for similar services. 47 C.F.R. §§ 54.500, 54.511(b). Customers are similarly situated if they are within the same geographic service area and they are not significantly different based on factors related to cost including, but not limited to, traffic volume, mileage from a switching facility, and length of contract. First Report and Order, 12 F.C.C. Rcd. 8776, ¶ 488.

Heath makes no argument that any of Wisconsin Bell's customers were similarly situated based on any factors related to cost.[1] Heath concedes that cost factors are relevant to the similarly situated analysis but argues that Wisconsin Bell has the burden of showing customers were not similarly situated. The only authority Heath points to in

[1] Heath makes two references to his expert witness, James Webber, having evaluated factors related to cost, but does describe what factors Webber considered or which customers (if any) he found to be similarly situated. Undeveloped and perfunctory arguments are waived, and Heath's failure to develop this argument is sufficient to find waiver. *See Crespo v. Colvin*, 824 F.3d 667, 673 (7th Cir. 2016).

support of his argument is FCC guidance stating that providers are only permitted to charge prices "above the prices charged to other similarly situated customers when those providers can show that they face demonstrably and significantly higher costs." *Id.*

To begin with, this statement does not describe which party has the burden of proving which customers are similarly situated. Rather, by its terms, it applies only after similarly situated customers have been identified. Second, and more importantly, the FCA requires the relator—not the defendant—"to prove all essential elements of the cause of action." 31 U.S.C. § 3731(d). *See also U.S. ex rel. Crews v. NCS Healthcare of Ill., Inc.*, 460 F.3d 853, 857 (7th Cir. 2006) ("In effect, [relator] is arguing that [defendant] must prove that each and every claim it ever filed with the [government] was lawful, an argument that defies common sense and the plain language of the FCA"). Agency guidance on the interpretation of a regulation cannot alter the burden of proof set out by the FCA.

Because Heath does not show that any customers were similarly situated based on the relevant factors, he cannot show that any E-rate customers were charged more than the lowest corresponding price. However, Heath argues that Wisconsin Bell may have violated the LCP rule in three other ways: (1) it failed to "seek recourse" from the government before charging an E-rate customer a rate higher than the LCP; (2) it failed to offer E-rate customers the lowest prices available, including failing to offer negotiated state rates to customers who were eligible for those rates; and (3) it charged highly varied prices to different customers for similar services. For the reasons explained below, these arguments also fail.

1. Heath Does Not Show Wisconsin Bell Failed to Seek Recourse from the Government Before Charging Higher Than the LCP

Heath argues that Wisconsin Bell was obligated to "seek recourse" from either the FCC or the equivalent state agency before charging any E-rate customer a price higher than the LCP. *See* 47 C.F.R. §§ 54.504(c); First Report and Order, ¶ 490. The problem with this argument is that, for the reasons discussed above, Heath has failed to show Wisconsin Bell charged any E-rate customers a price higher than the LCP in the first place. Accordingly, this argument fails.

2. Heath Does Not Show Wisconsin Bell's Pricing Policies Violated the LCP Rule

Heath also argues that Wisconsin Bell's pricing policies precluded compliance with the LCP rule because they did not require salespeople to offer E-rate customers the lowest possible price. For instance, salespeople did not always inform customers that they were eligible for special, state negotiated rates and did not always offer customers equivalent, cheaper services. But the LCP rule does not require a provider to offer E-rate customers the *lowest* rate available; it requires providers to offer the lowest rate charged to *similarly situated customers*. Heath does not show that any customers that were charged the lower rates were similarly situated to those who were charged a higher rate. Without such a showing, a reasonable jury could not infer Wisconsin Bell violated the LCP rule. Accordingly, these arguments fail.

3. Price Variations Do Not Necessarily Violate the LCP Rule

Heath next argues the varied prices charged to E-rate customers necessarily demonstrate violations of the LCP. According to Heath, "given the price variation, [the charges] could not possibly all have been LCP compliant." ECF no. 311 p. 13. But the

LCP rule does not prohibit varied prices in and of themselves. Highly varied prices may be suspicious, but once again they do not demonstrate a violation of the LCP rule without a showing that the differently charged customers were similarly situated. Heath does not make that showing. Heath fares no better when he addresses specific price variations. For instance, Heath points to the Bruce Guadalupe Community School, which was charged a rate more than three times higher than the rate charged to Automatic Data, a non-residential customer buying the same service. But again, Heath makes no attempt to show that the two customers were similarly situated. Accordingly, this argument fails.

B. Relator Does Not Show Scienter

Even if Heath's interpretations of the LCP rule are correct, his claims would nonetheless fail on scienter. The FCA's scienter requirement is statutorily defined. A party who submits, or causes to be submitted, a false claim to the government is liable only if it acted knowingly. 31 U.S.C. § 3729(a)(1)(A). "Knowingly" means "that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(B). "The FCA levies significant consequences against parties found liable under the Act and balances the severity of its penalties by carefully circumscribing liability, in part through its scienter requirement." *U.S. ex rel. Schutte v. Supervalu Inc.*, 9 F.4th 455, 463 (7th Cir. 2021).

Recently, the Seventh Circuit adopted the Supreme Court's scienter standard for the Fair Credit Reporting Act from *Safeco Insurance Company of America v. Burr*, 551 U.S. 47, 127 (2007), and applied it to the FCA's scienter provision. *Id.* at 467. Under this standard, a finding of scienter is precluded if: (1) the defendant's interpretation of the

regulation was objectively reasonable and (2) no authoritative guidance cautioned defendant against it. *Id.* at 464.

Wisconsin Bell interprets the LCP rule to allow it to consider cost-based factors when determining which customers are similarly situated and to allow it to offer different rates to different E-rate customers. I agree with these interpretations. Even, however, if they are incorrect, they are objectively reasonable because they are consistent with the plain language of the LCP rule and the FCC guidance. Heath does not identify any authoritative guidance cautioning Wisconsin Bell against these interpretations. Accordingly, Heath does not show scienter.

Because Heath does not show falsity or scienter, I will grant Wisconsin Bell's motion for summary judgment.

IV. MOTIONS TO EXCLUDE

The parties have also filed three motions to exclude expert opinions and testimony. Because I have decided Wisconsin Bell's motion for summary judgment on grounds unrelated to the content of those experts' reports, I need not address the motions and will deny them as moot.

V. MOTIONS TO SEAL DOCUMENTS

The parties have filed several motions to restrict access to documents they have submitted in support of their motions. The motions to restrict are unopposed, but because I have an obligation to ensure that court filings remain open to public review unless good cause for restricting them is shown, I must still decide whether the materials may be restricted. *See, e.g., Baxter Int'l Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002). Most of the documents which the parties have moved to restrict did not inform my

decision. As such, these documents may remain restricted. *See Baxter*, 297 F.3d at 545 (only documents that "underpin the judicial decision" are open to public inspection); *see also City of Greenville, Ill. v. Sungenta Crop Protection, LLC,* 764 F.3d 695, 698 (7th Cir. 2014) (the public has no right to access documents that "cannot conceivably aid the understanding of judicial decision making").

Some of the documents the parties wish to restrict were relevant to my decision, and I cannot restrict access to them unless they contain trade secrets or other categories of bona fide long-term confidentiality. *Baxter*, 297 F,3d at 545 (7th Cir. 2002). The parties do not argue that the documents reveal trade secrets or other information that may be properly withheld from the public record. Accordingly, I will deny the motions to restrict as regards the following documents: ECF nos. 277, 310, 312, 314-1, 317, 318, and 319. I will grant the motions to restrict as regards the remaining documents.

VI. MOTION TO SET BRIEFING SCHEDULE

Wisconsin Bell has filed a motion for leave to set a briefing schedule on a possible forthcoming motion for sanctions. Wisconsin Bell explains that it is unsure if such a motion would qualify as a "dispositive motion" under this Court's scheduling order and therefore requests a separate schedule. I will clarify that I do not consider a motion for sanctions to be a dispositive motion under the scheduling order in this case, but I am not inclined to set a briefing schedule on a motion for sanctions at this time. I will deny this motion, and the briefing schedule for any subsequent motions will be controlled by the local rules.

VII. CONCLUSION

For the reasons stated, **IT IS ORDERED** that Wisconsin Bell's motion for summary judgment at ECF no. 276 is **GRANTED.** The Clerk of Court is directed to enter judgment in this case.

IT IS FURTHER ORDERED that the motions to exclude at ECF nos. 266, 274 and 278 are **DENIED AS MOOT.**

IT IS FURTHER ORDERED that the motions at ECF nos. 302 is **DENIED AS MOOT.**

IT IS FURTHER ORDERED that the motion to set a briefing schedule at ECF no. 272 is **DENIED.**

IT IS FURTHER ORDERED that the motions to restrict documents at ECF nos. 268, 283, 287, 289, 296, 300, and 303 are **GRANTED.**

IT IS FURTHER ORDERED that the motions to restrict documents at ECF no. 270, 307, 316 are **GRANTED IN PART** and **DENIED IN PART** as described in this order. The Clerk of Court is instructed to lift the restrictions on the following documents: ECF nos. 277, 310, 312, 314-1, 317, 318, and 319

Dated at Milwaukee, Wisconsin, this 23rd day of March, 2022.

s/Lynn Adelman
LYNN ADELMAN
United States District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

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

v.

CASE NUMBER: 08-cv-0724

WISCONSIN BELL, INC.,
Defendant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is DISMISSED WITH PREJUDICE and the plaintiff shall take nothing by his complaint.

3/23/22
Date

Gina M. Colletti
Clerk

s/J. Dreckmann
(By) Deputy Clerk