IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VIRGIN MOBILE USA, L.P., **Plaintiff,** **v.** **DWIGHT D. KEEN, SHARI FEIST ALBRECHT, and SUSAN K. DUFFY, in their official capacities as Commissioners of the Kansas Corporation Commission,** **Defendants.**	**Case No. 2:17-CV-2524-JAR**

MEMORANDUM AND ORDER

Plaintiff Virgin Mobile, USA, L.P. filed this action against the Commissioners of the Kansas Corporation Commission to prevent them from enforcing a Kansas Corporation Commission ("KCC") administrative order that requires Plaintiff to report as retail revenue the subsidies that it received from the Federal Universal Service Fund ("FUSF")'s Lifeline Program, and subjects those subsidies to assessment by the KCC, on the basis that the order is preempted by federal statute. Before the Court are cross-motions for summary judgment (Docs. 81 and 91) and Plaintiff's Motions to Exclude Expert Testimony of Sandra K. Reams (Doc. 85) and Robert Loube (Doc. 88). These motions are fully briefed, and the Court is prepared to rule. For the reasons stated in this opinion, the Court grants in part Plaintiff's Motion to Exclude Expert Testimony of Robert Loube, grants in part Plaintiff's Motion to Exclude Expert Testimony of Sandra K. Reams, denies Defendants' Motion for Summary Judgment, and grants Plaintiff's Motion for Summary Judgment.

I. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.[1] In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[2] "There is no genuine issue of material fact unless the evidence, construed in the light most favorable to the nonmoving party, is such that a reasonable jury could return a verdict for the nonmoving party."[3] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim."[4] An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party."[5]

To prevail on a motion for summary judgment on a claim upon which the moving party also bears the burden of proof at trial, the moving party must demonstrate "no reasonable trier of fact could find other than for the moving party."[6] The facts "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein."[7] Rule 56(c)(4) provides that opposing affidavits must be made on personal knowledge and shall set forth such facts as would be admissible in evidence.[8] The non-moving party cannot avoid summary judgment by repeating conclusory opinions, allegations unsupported by specific facts, or

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[1] Fed. R. Civ. P. 56(a); *see also Grynberg v. Total*, 538 F.3d 1336, 1346 (10th Cir. 2008).

[2] *City of Harriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010).

[3] *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

[4] *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)).

[5] *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[6] *Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015).

[7] *Adams v. Am. Guar. & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000).

[8] Fed. R. Civ. P. 56(c)(4).

speculation.[9] "Where, as here, the parties file cross-motions for summary judgment, we are entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts."[10]

Finally, summary judgment is not a "disfavored procedural shortcut;" on the contrary, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[11] In responding to a motion for summary judgment, "a party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial."[12]

II. Evidentiary Objections

Before setting forth a summary of uncontroverted facts, the Court must rule on Plaintiff's motions to exclude defense experts, and Plaintiff's objections to Defendants' statements of fact.

A. Motions to Exclude—*Daubert*

Plaintiff moves to exclude experts Robert Loube and Sandra Reams. Defendants offer Reams as both a lay and expert witness. She has served as the KCC's Assistant Chief of Telecommunications since 2011 and has been employed by the KCC since 1996. Reams oversees the Kansas Universal Service Fund ("KUSF") administration and audits of companies that report to the KUSF.

Defendants offer Loube only as an expert witness. Loube is currently a vice-president and principal owner of Rolka Loube Associates in Harrisburg, Pennsylvania. He has worked in

[9] *Id.*; *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006) (citation omitted).

[10] *James Barlow Family Ltd. P'ship v. David M Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997) (citation omitted).

[11] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (quoting Fed. R. Civ. P. 1).

[12] *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

telecommunications regulation for the Federal Communications Commission ("FCC"), the District of Columbia Public Service Commission, and the Indiana Utilities Regulator Commission, and has advised boards related to universal service administration.

Plaintiff challenges the admissibility of Reams' and Loube's expert testimony on the basis that they (1) offer improper legal conclusions on the meanings of pertinent statutes, rules and orders, and improperly apply those legal conclusions to facts, (2) offer opinions that are not credible because they rely on reading of ordinary documents which requires no expertise and is therefore not helpful to the trier of fact, and (3) offer certain opinions that are unreliable speculation. Additionally, Plaintiff objects to Loube's opinion challenging Plaintiff's credibility. For reasons discussed below, several portions of the expert opinions of Loube and Reams are excluded.

The Court has broad discretion in deciding whether to admit expert testimony.[13] The proponent of expert testimony must show "a grounding in the methods and procedures of science which must be based on actual knowledge and not subjective belief or unaccepted speculation."[14] First, the Court must determine whether the expert is "qualified by 'knowledge, skill, experience, training, or education' to render an opinion."[15] "[A] district court must [next] determine if the expert's proffered testimony . . . has 'a reliable basis in the knowledge and experience of his discipline.'"[16] To determine reliability, the Court must assess "whether the reasoning or

[13] *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir. 1996).

[14] *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 780 (10th Cir. 1999).

[15] *Milne v. USA Cycling, Inc.*, 575 F.3d 1120, 1133 (10th Cir. 2009) (quoting *Ralston v. Smtih & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir. 2001)).

[16] *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 (10th Cir. 2005) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)).

methodology underlying the testimony is scientifically valid."[17] The district court must further inquire into whether the proposed testimony is sufficiently "relevant to the task at hand."[18]

It is within the discretion of the trial court to determine how to perform its gatekeeping function under *Daubert*.[19] The most common method for fulfilling this function is a *Daubert* hearing, although such a process is not specifically mandated.[20] In this case, the parties do not request a hearing. The Court has carefully reviewed the submissions filed with the motions, which include deposition testimony, affidavits, and expert reports by both offered experts, and believes this review is sufficient to render a decision for purposes of summary judgment.

1. Legal Opinion

To the extent Reams and Loube offer a legal opinion about the meaning of federal or state statutes and regulations, or any other legal matter, it is inadmissible under Fed. R. Evid. 704(a). That rule provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[21] Still, "testimony on ultimate questions of law, i.e., legal opinions or conclusions, is not favored."[22] Nor may a witness "state legal conclusions drawn by applying the law to the facts."[23]

Reams and Loube express legal opinions throughout their reports that the Court does not consider. For example, Reams discusses the meaning of the phrases "rely on or burden" under 47 U.S.C. § 254(f), whether K.S.A. § 66-2008(a) is consistent with § 254(f), and whether the

[17] *BG Tech., Inc. v. Ensil Int'l Corp.*, 464 F. App'x 689, 703 (10th Cir. 2012).

[18] *Id.* (quoting *Daubert*, 509 U.S. at 597).

[19] *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

[20] *Id*.

[21] Fed. R. Evid. 704(a).

[22] *Anderson v. Suiters*, 499 F.3d 1228, 1237 (10th Cir. 2007); *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (en banc).

[23] *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1283 (10th Cir. 2003).

KCC's conduct violates § 254(f) and FCC rules. Loube, for example, opines that the KUSF does not "rely on or burden" the FUSF under § 254(f). The Court does not consider such opinions that amount to legal conclusions. Further, the Court does not consider Reams' opinions that Defendants refer to as "background discussion" or Loube's opinions that Defendants refer to as "principles" of FCC rules and orders to the extent they merely point to or interpret federal or state statutes and regulations.

Defendants' argument that an expert may refer to law in expressing an opinion is not persuasive here. Reams does more than refer to the law, she purports to interpret and define it. Similarly, Defendants' argument that Reams is not offering legal conclusions, but rather her "personal understanding" of the law does not change the analysis; Reams personal thoughts on the law are not relevant and not helpful to the trier of fact. Therefore, legal conclusions asserted by Reams about the interpretations of federal or state statutes and regulations, application of those statutes and regulations to fact, or any other legal matter, are inadmissible.

Similarly, Defendants' argument that Plaintiff mostly objects to statements of fact, not law, is invalid. Although Defendants cite the Loube report in its statement of facts section, the content is largely conclusory determinations of ultimate legal questions in this case, including the meaning and application of statutory and regulatory language.

Loube's testimony is not, as Defendants argue, similar to expert testimony in *United States v. Wade*[24] that was deemed admissible. In *Wade*, an IRS agent's expert testimony about tax consequences that included "the agent's understanding of the applicable law as a backdrop to explaining how the government analyzed the transaction" was admissible.[25] There, the expert's

[24] 203 F. App'x 920 (10th Cir. 2006).

[25] *Id.* at 930.

testimony aided the fact-finder in understanding "how the government analyzed the transaction" in a tax-fraud case.[26] Expert testimony of the particular administrative transaction at issue in *Wade* is not like Loube's testimony that purports to define and explain the overarching meaning and application of state law, federal law, and interactions between the two. The Tenth Circuit explained the distinction between inadmissible and admissible legal references as the difference between "discoursing broadly over the entire range of applicable law" and "focus[ing] on a specific question of fact."[27] Loube's opinion does the former; it draws conclusions over a particular area of administrative law, how state and federal law interact, definitions within federal and state statutes and regulations, and application of those legal conclusions to facts of this case. Moreover, *Wade* analyzed admissibility of expert testimony only in the narrow context of "permissible testimony by an IRS witness acting as an expert," and is therefore not instructive here.[28]

Next, *MCC Management of Naples, Inc. v. International Bancshares Corp.*,[29] does not, as Defendants argue, stand for the proposition that the Tenth Circuit generally upholds admission of expert testimony that outlines the expert's own understanding of technical industry terms, even when it touches on ultimate legal issues. While the tax-attorney expert in *Management of Naples* permissibly testified to "common methodology" that tax lawyers use to interpret phrases like the one at issue in the case, "[the expert] never told the jury what legal standards applied or which interpretation was correct as a matter of law."[30] Unlike "common methodology" discussed by

[26] *Id.* at 930.

[27] *Id.* (citing *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988)).

[28] *Id.* at 930.

[29] 468 F. Appx. 816, 821-22 (10th Cir. 2012).

[30] *Id.* at 822.

the *Management of Naples* expert, here Loube testifies to ultimate legal issues including legal definitions, interaction between state and federal regulations, and meaning and application of those regulations in this case.

Finally, Defendants argue that because expert testimony on contract interpretation is admissible, so too is Loube's testimony admissible. Yet, Defendants' reliance on *Cargill Meat Solutions Corp. v. Premium Beef Feeders, LLC*,[31] for this proposition is misplaced. In *Cargill*, the court admitted testimony about parties' intent as to a specific industry term that appeared in a contract at issue in order to properly analyze the meaning of the contract. It reasoned that "parties' intent [] is an issue of fact."[32] The Court excluded testimony that applied law to specific facts in the case. Although Defendants refer to portions of Loube's testimony as defining "industry terms," those terms are statutory and regulatory language, not pertinent contract terms. Accordingly, Loube's legal conclusions are excluded.

2. Helpfulness to the Trier of Fact & Speculation

Plaintiff objects to Reams' and Loube's expert opinion that merely points to public webpages and draws conclusions from those webpages. One of Defendants' arguments against Plaintiff's preemption claims is that the KCC assessment of "retail revenues" (including the FUSF Lifeline subsidy) does not violate federal statute because wireless carriers such as Plaintiff can pass the cost of this assessment on to its customers. In support of this argument, Reams and Loube opine that such collection of fees is possible. They point to language on Plaintiff's webpages that states it collects 911 fees[33] from customers in Alabama and Kentucky. They opine this language shows (1) Plaintiff has payment systems in place that make it possible to

[31] 168 F. Supp. 3d 1334, 1346 (D. Kan. 2016).

[32] *Id.*

[33] The 911 fees are used to fund emergency calling services.

collect fees from customers, and (2) Plaintiff actually collects these fees from customers. They conclude that because Plaintiff collects 911 fees from telecommunication customers in other states, it is possible for Plaintiff to collect a surcharge on Lifeline subsidies from its Lifeline customers in Kansas. Yet, "[t]he 'touchstone' of admissibility of expert testimony is its helpfulness to the trier of fact."[34] "When the normal experiences and qualifications of laymen jurors are sufficient for them to draw a proper conclusion from given facts and circumstances, an expert witness is not necessary and is improper."[35] Accordingly, Reams' and Loube's expert testimony that reiterates information that appears on Plaintiff's webpages is inadmissible because a juror is capable of reading and understanding a public webpage.

As far as Reams' and Loube's expert opinion that it is possible for Plaintiff to collect payment from low-income subscribers, it is admissible. Here, "a logical basis exists for [the] expert's opinion . . . the weaknesses in the underpinnings of the opinion [ ] go to the weight and not the admissibility of the testimony."[36] That Plaintiff has payment systems in place in other states, such as PayPal and debit and credit card capability, is some evidence that it is possible for Plaintiff to collect Lifeline surcharges in Kansas because payment systems between Plaintiff and Kansas customers exist. The strength of that opinion, however, goes to weight, rather than admissibility of the evidence.

However, any portion of Reams' and Loube's expert opinions that Plaintiff actually succeeds in collecting fees from customers in Alabama and Kentucky to support an argument

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[34] *Wilson v. Muckala*, 303 F.3d 1207, 1218 (10th Cir. 2002) (citing *Werth v. Makita Elec. Works*, 950 F.2d 643, 648 (10th Cir. 1991)).

[35] *Id.* at 1219 (10th Cir. 2002) (citing *Frase v. Henry*, 444 F.2d 1228, 1231 (10th Cir. 1971)).

[36] *Compton v. Subaru of Am., Inc.*, 82 F. 3d 1513, 1519–20 (10th Cir. 1996), *overruled in part by Kumho Tire Co. v. Carmichael* , 526 U.S. 137, 145 (1999); *see also, e.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

that it can also collect fees from Kansas customers is inadmissible as unreliable speculation as neither opinion points to evidence of actual collection of such fees.

This *Daubert* exclusion does not apply to Reams' lay opinion.[37] Reams' testimony regarding statements on Plaintiff's website and her opinions on that material is admissible to the extent it is relevant, helpful to the trier of fact, and based on her own perceptions. Ultimately, however, this is a moot point: factual findings based on this testimony is not material to resolution of this case.

Additionally, Plaintiff objects to Loube's opinion that it can recover KUSF contributions from its customers as unreliable speculation. Specifically, Plaintiff argues his opinion is based on a misstatement of a figure in one of Plaintiff's interrogatory answers. Loube opined that a "substantial portion" of customers who received basic Lifeline service from Plaintiff without purchasing additional services had credit cards: [redacted]%.[38] He reasoned if [redacted]% of customers who purchase additional services from Plaintiff have credit cards, then perhaps [redacted]% of customers who do not purchase additional services also have credit cards.[39] This is a misstatement of Plaintiff's interrogatory answer which states: "In 2017, approximately [redacted]% of dollars spent on such additional services were paid by credit card." The figure [redacted]% of *dollars* spent on additional services were paid with credit card is not the same as Loube's statement that [redacted]% of *customers* paid with credit card. The Court agrees with Plaintiff that this portion of Loube's report is inadmissible as unreliable.

[37] A lay witness' testimony "is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

[38] Doc. 90-1 at 27 (sealed).

[39] *Id.* "Virgin Mobile reports [redacted]% of its Lifeline customers that purchase top-off services pay for those services using credit cards." *Id.* "If [redacted]% of one group of its Lifeline customers have credit cards, it may be true that a substantial portion of other Lifeline customers have credit cards." *Id.*

3. Attack on Credibility

Plaintiff objects that Loube inappropriately challenges its credibility when he opines that Plaintiff's interrogatory answers are contradicted by other actions it has taken. "The credibility of witnesses is generally not an appropriate subject for expert testimony."[40] Such testimony "may not be addressed by an expert testifying under Rule 702."[41] Thus, to the extent Loube challenges Plaintiff's credibility, his opinion is excluded.

B. Objections to Statements of Fact

Plaintiff makes Fed. R. Civ. P. 56, Fed. R. Civ. P. 26(e), and hearsay objections to several of Defendants' statements of fact and argues for their exclusion. Summary judgment evidence need not be "submitted 'in a form that would be admissible at trial.'"[42] But "the content or substance of the evidence must be admissible."[43] Under Fed. R. Civ. P. 56(c)(2), a party may object on this basis—that the material "cannot be presented in a form that would be admissible in evidence."[44] Indeed, as the advisory committee notes to the 2010 Federal Rule amendments explain: "The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated."[45] The Court addresses each of Plaintiff's objections in turn.

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[40] *United States v. Hill*, 749 F. 3d 1250, 1258 (10th Cir. 2014) (citing *United States v. Toledo*, 985 F.2d 1462, 1470 (10th Cir. 1993)).

[41] *Id.* at 1258.

[42] *Brown v. Perez*, 835 F.3d 1223, 1232 (10th Cir. 2016) (quoting *Trevizo v. Adams*, 455 F.3d 1155, 1160 (10th Cir. 2006)).

[43] *Id.* (quoting *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006)).

[44] Fed. R. Civ. P. 56(c)(2).

[45] Fed. R. Civ. P. 56 advisory committee's note to 2010 amendment; *see also Brown*, 835 F.3d at 1232 ("The requirement is that the party submitting the evidence show that it will be possible to put the information, the substance or content of the evidence, into an admissible form." (quoting 11 James Wm. Moore et al., Moore's Federal Practice–Civil § 56.91 (3d ed. 2015))); *O'Connor v. Williams*, 640 F. App'x 747, 750 (10th Cir. 2016).

First, Plaintiff objects to several of Defendants' statements of fact on grounds they lack factual support under Fed. R. Civ. P. 56. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."[46] "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."[47] "Where facts referred to in an affidavit or declaration are contained in another document, such as a deposition, interrogatory answer, or admission, a copy of the relevant excerpt from the document must be attached."[48] Accordingly, to the extent that Defendants' factual assertions lack support, the Court does not consider them.

Next, Plaintiff objects to Defendants' Statements of Fact 45 and 46 because the evidence cited in these facts was not identified in discovery in response to specific requests as Fed. R. Civ. P. 26(e) requires.[49] Accordingly, it argues, Fed. R. Civ. P. 37 requires these references be excluded.[50] Plaintiff alternatively objects that Statement of Fact 46 is inadmissible hearsay. Because Defendants do not respond to either objection, the Court sustains the objection and does not consider Defendants' Statement of Fact 45 or 46 for purposes of summary judgment.

[46] Fed. R. Civ. P. 56(1).

[47] *Id.* at 56(2).

[48] D. Kan. R. 56.1(d).

[49] Fed. R. Civ. P. 26(e) requires a party who responds to an interrogatory, or request for production or admission, to timely supplement or correct it's disclosure "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e).

[50] "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

III. Uncontroverted Facts

The following material facts are either stipulated or uncontroverted.

Universal Service Funds

The FCC created the FUSF to provide individuals, including those who live in rural and high-cost areas, and those who meet certain low-income criteria, with access to telecommunications services at affordable rates. The FCC has described the federal Lifeline program as one of four mechanisms of the FUSF. The other three programs are "High Cost," "Schools and Libraries," and "Rural Health Care." The FUSF Lifeline program enables low-income consumers to access telecommunication services. The High Cost program incentivizes telecommunication carriers to commit to building and maintaining networks in rural and other high-cost areas. The remaining two programs help enable communication services to schools and libraries, and healthcare communication services in rural areas, respectively.

The FUSF does not assess the interstate portions of subsidies from the FUSF High Cost program, or the FUSF Lifeline program. Neither does the FUSF assess the KUSF High Cost or KUSF Lifeline programs. The FUSF does, however, provide subsidies to carriers who provide services under the FUSF Lifeline program to qualifying customers in Kansas; it pays carriers $9.25 per low-income customer served, per month.

The KUSF has its own High Cost and Lifeline programs that distribute subsidies to carriers who fulfill program requirements. The KUSF Lifeline program reimburses carriers $7.77 per month to provide low-income Kansas with wireless service. This amount is in addition

to the $9.25 per customer, per month subsidy from the FUSF Lifeline program if a carrier is designated as eligible under both the Kansas and federal programs.[51]

The KCC requires certain assessments on wireless carriers be paid to fund the KUSF. The KUSF does not assess disbursements to providers from the FUSF High Cost Program, "de minimis" revenues earned by carriers, or revenues earned selling calling cards to military customers. But the KUSF does assess other types of income from carriers; the KUSF contribution factor has risen from about 6% in 2010 through 2016, to about 7%, beginning in 2017.

KCC's contractor, GVNW Consulting, Inc., administers the KUSF and conducts audits of the telecommunications providers that contribute to the KUSF.

Virgin Mobile

Plaintiff is a wireless carrier and Sprint subsidiary that operates several brands in Kansas, including the brand "Assurance Wireless." Plaintiff markets its Assurance Wireless brand to low-income Kansans who qualify for the FUSF Lifeline program. In October 2011, the KCC designated Plaintiff as an Eligible Telecommunications Carrier ("ETC") to receive support from the FUSF Lifeline program for providing service in Kansas to eligible low-income customers. Plaintiff has neither applied to, nor participated in the KUSF Lifeline program, the Kansas High Cost program, or the federal High Cost program; it only participates in the FUSF Lifeline program. As a Lifeline-only ETC, Plaintiff does not receive disbursements from the FCC's High Cost program. Other participating telecommunications carriers in Kansas do receive such disbursements.

[51] Plaintiff only participates in the FUSF Lifeline program and receives the federal $9.25 per customer, per month subsidy. It does not participate in the KUSF Lifeline program, and accordingly does not receive the Kansas $7.77 per customer per month subsidy.

A portion of the $9.25 per customer, per month FUSF Lifeline subsidy is for intrastate telecommunications service. Since 2012, Plaintiff has offered FUSF Lifeline plans in Kansas with the following provisions:

- low-income Kansans eligible for the FUSF Lifeline Program receive a certain number of voice minutes, a certain number of text messages and sometimes a certain number of broadband data transmissions per month
- Plaintiff accepts the $9.25 FUSF Lifeline subsidy as full payment for the monthly service provided to each low-income subscriber, meaning the subscriber does not pay any monies directly to Plaintiff
- low-income consumers may purchase additional calling minutes or other increments of service above Lifeline service plan quantities by prepaying Plaintiff for additional service. These customer purchases are called "Top Ups."[52]

Plaintiff markets its Lifeline plan as free to customers. Further, it does not recover surcharges from its Lifeline customers to cover the cost of any potential assessments on FUSF Lifeline subsidies it receives. Unsubsidized plans advertised on Plaintiff's website charge more than $9.25 per month. For example, Plaintiff's website advertises an unsubsidized "payLo" plan at a cost of $20 per month for 400 minutes of calling.

Under 47 C.F.R. 54.410(d)(2)(ii), Plaintiff must track the home addresses of its customers as part of the Lifeline eligibility certification process. Therefore, it has the ability to mail bills to its Lifeline customers, even those who do not purchase services beyond those included in their Lifeline plan.

[52] Doc. 84 at 9.

Plaintiff either collects or attempts to collect 911 fees from Lifeline customers in Alabama and Kentucky. It either collects or attempts to collect $1.75 and $0.70 per customer per month from these states, respectively, for the 911 fees. Plaintiff allows 911 customers to pay by check, money order, credit card, debit card, or PayPal on the phone or online. Further, it allows customers to pay in different billing periods, such as monthly, annually, or other periods.

The 2017 KCC Order

As directed by the KCC, GVNW conducted an audit of Plaintiff and filed a report of its findings with the KCC on January 1, 2017. Plaintiff complied with GVNW's data requests during the audit, and GVNW used that information to calculate an amount that Plaintiff purportedly was required to report as KUSF-assessable retail revenues. GVNW's report recommended the KCC require Plaintiff to (1) revise its intrastate revenue reports to the KUSF, effective January 1, 2012; (2) include monies recovered by Plaintiff from the FUSF Lifeline program for intrastate calling; and (3) pay the resulting additional KUSF assessment, which GVNW estimated to be $227,000 for January 1, 2011, through February 2017. GVNW determined Plaintiff should have reported as revenue the subsidies it receives from the FUSF Lifeline program. The KCC adopted GVNW's recommendations in a July 11, 2017 administrative order ("The KCC Order").[53]

The KCC Order requires Plaintiff to contribute a portion of all FUSF Lifeline revenue to the KUSF as assessable revenue, including the $9.25 per customer FUSF Lifeline subsidies, regardless of whether Plaintiff surcharges its customers for the service.

Plaintiff timely petitioned the KCC to reconsider the order, but the KCC denied that petition in a second order on August 15, 2017. Plaintiff did not make a written claim to the KCC

[53] Doc. 1-1.

that its FUSF Lifeline subsidies were not assessable until it learned of GVNW and KCC's view that they were assessable.

Plaintiff had been provided with the Carrier Remittance Worksheet Instructions ("Instructions")—which include revenue-reporting requirements for carriers—prior to the 2017 audit and the KCC Order. On behalf of KCC, GVNW mailed the March 2013–February 2014 Instructions to Plaintiff and other carriers in February 2013. GVNW mailed revised instructions in June 2013. GVNW continued to mail the Instructions each year from 2014–2019.

KCC has entered orders in separate audit proceedings requiring three other wireless carriers to pay KUSF assessments on intrastate revenues recovered from the FUSF Lifeline Program on behalf of Lifeline customers. These other carriers paid the amounts they were ordered to pay in those orders.

Plaintiff filed this action, praying for: (1) a declaration that the KCC Order violates federal law and is invalid to the extent that it requires it to contribute to the KUSF portions of its disbursements from the FUSF[54]; (2) injunctive relief enjoining Defendants from enforcing the Order; and (3) all other relief as the Court may deem just and proper.

IV. Discussion

The parties move for summary judgment on Plaintiff's sole claim in this case that the KCC Order is preempted by the FCA. Plaintiff argues the KCC Order is preempted by federal law in four ways: (1) the KCC Order relies on and burdens a mechanism of the FUSF in violation of 47 U.S.C. § 254(f) (the "Relies-On-Or-Burdens-the-FUSF Claim"); (2) the KCC

[54] The Parties were granted leave to jointly file a stipulation after the pre-trial order was entered; they stipulated that Plaintiff's KUSF assessments for the period January 2012 through February 2013 are no longer at issue. Defendants maintain their claims for FUSF assessments under the KCC Order from Plaintiff for dates after March 2013. (Doc. 125). The order would require Plaintiff to include the $9.25 per customer Federal Lifeline payments in its calculation of assessable revenues. This would require Plaintiff to recalculate its revenues from March 2013 forward.

Order is inequitable and discriminates against Plaintiff by requiring it to contribute at a greater rate to the KUSF than carriers that do not serve Kansas Lifeline consumers in violation of 47 U.S.C. § 254(f) (the "Inequitable and Discriminatory Claim"); (3) the KCC Order is inconsistent with the FCC's rules to preserve and advance universal service in violation of § 254(f) (the "Consistency Claim"); and (4) the KCC Order is not a predictable state regulation because it employs a different methodology than the FCC in determining contributions to the universal service fund in violation of 47 U.S.C. § 254(f) (the "Non-predictability Claim").[55] For the reasons discussed below, the Court finds the KCC Order is preempted by § 254(f) because it relies on and burdens a mechanism of the FUSF, and because it is inequitable and discriminatory. Because the Court finds the KCC Order is preempted on both of these grounds, it is unnecessary for the Court to address the remaining grounds for preemption.

A. Statutory and Regulatory Framework

Congress enacted the Telecommunications Act of 1996, amending the Federal Communications Act of 1934 ("FCA"), to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States . . . a rapid, efficient. . . communication service with adequate facilities at reasonable charges."[56] The FCC was created to execute and enforce the FCA.[57] The FCA empowers the FCC to create programs to advance universal telecommunications services in the United States.[58] "Universal service is an evolving level of telecommunications services that the [FCC] shall establish periodically under this section, taking into account advances in telecommunications and

[55] Plaintiff no longer claims, as it did in its original complaint, that the Order violates 47 U.S.C. § 253(a), and has stricken that claim from the complaint. (Doc. 1).

[56] 47 U.S.C. § 151.

[57] *Id.*

[58] 47 U.S.C. § 151; 47 C.F.R. § 54.1.

information technologies and services."[59] In defining universal services, the FCC must consider "the extent to which such telecommunications services [] are essential to education, public health, or public safety;" are "subscribed to by a substantial majority of residential customers; [] are being deployed in public telecommunications networks by telecommunications carriers; and [] are consistent with the public interest, convenience, and necessity."[60] The FUSF Lifeline program is one such program that aims to further universal service among low-income households.[61]

The FCA requires the federal government to create a universal service fund to provide the support necessary to ensure affordable telecommunications services to rural and low-income areas.[62] Telecommunications service providers contribute a percentage of their revenues to this fund.[63] Providers of *interstate* telecommunication services "must contribute to the universal service support mechanisms."[64] A provider must contribute "on the basis of its projected collected interstate and international end-user telecommunications revenues."[65] Specifically, "the quarterly universal service contribution factor shall be determined by the [FCC] based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions."[66] The carrier can pass a portion of this cost on to the end-user:

[59] 47 U.S.C. § 254(c)(1).

[60] 47 U.S.C. § 254(c)(1)(A)–(D).

[61] 47 U.S.C. § 254(j).

[62] 47 U.S.C. § 254(b).

[63] 47 U.S.C. § 254(b)(3).

[64] 47 C.F.R. § 54.706.

[65] *Id.*

[66] 47 C.F.R. § 54.709.

> Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.[67]

FUSF assessments are not based on carriers' revenue from provision of *intrastate* services.[68] However, the FUSF Lifeline program subsidizes provision of interstate and intrastate services to low-income customers in the amount of $9.25 per month per qualifying low-income customer.[69] This FUSF subsidy is conditioned on the carrier passing on "the full amount of support to the qualifying low-income consumer."[70] This means the low-income customer pays, at most, $9.25 less than the carrier's least-expensive plan offered on the market.[71]

The FCA specifically allows states to create their own universal service funds ("USFs") and to impose state USF surcharges on telecommunications carriers who provide *intrastate* services, provided that those surcharges do not "rely on or burden" a FUSF mechanism, are "equitable and nondiscriminatory," are "predictable," and "not inconsistent with the Commission's rules to preserve and advance universal service."[72] Specifically:

> A State may adopt regulations *not inconsistent* with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an *equitable and nondiscriminatory* basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional, specific, *predictable*, and sufficient mechanisms to support such definitions or standards that *do not*

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[67] 47 C.F.R. § 54.712.

[68] *Id.*

[69] 47 C.F.R. § 54.407(a); 47 C.F.R. § 54.403(a).

[70] 47 C.F.R. § 54.403(a).

[71] *Id.*

[72] 47 U.S.C. § 254(f).

rely on or burden Federal Universal service support mechanisms.[73]

The Kansas legislature passed the Kansas Telecommunications Act ("KTA") in 1996,[74] with the goal of ensuring that every Kansan had access to the first-class telecommunications service at an affordable price while at the same time promoting consumer access in all areas of the state.[75] The KCC created its own universal service fund, the KUSF.[76] The KCC generates revenue for the KUSF through assessing wireless carriers who provide *intrastate* telecommunication services in Kansas. The KCC requires every telecommunications carrier, public utility, and wireless service provider that provides intrastate telecommunication services in Kansas "to contribute to the KUSF based upon the provider's intrastate telecommunications services net retail revenues on an equitable and nondiscriminatory basis."[77]

The Telecommunications Act allocates authority over the USFs by the services provided: The [FCC], with respect to *interstate* services, and the States, with respect to *intrastate* services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.[78]

B. Statutory Interpretation

The Court must interpret the meaning of § 254(f) to determine if it preempts the KCC Order. "Courts determine Congress's intent by employing the traditional tools of statutory

[73] *Id.* (emphasis added).

[74] K.S.A. §§ 66-2001–20.

[75] *Id.* § 66-2001, et seq.

[76] *Id.* § 66-2002.

[77] *Id.* § 66-2008(a).

[78] 47 U.S.C. § 254(k) (emphasis added).

interpretation, beginning—as always—with an examination of the statute's text,"[79] reading "the words of the statute in their context and with a view to their place in the overall statutory scheme."[80] The tools of statutory construction "include examination of the statute's text, structure, purpose, history and relationship to other statutes."[81] The plain meaning of a statute should be given meaning unless it "will produce a result demonstrably at odds with the intention of its drafters."[82] If the words in the statute are clear, the Court's analysis ends and the plain meaning controls.[83] If, instead, the Court finds that the words in the statute are ambiguous, the Court can look beyond the terms of the statute to determine legislative intent.[84] "A statute is ambiguous if 'it is capable of being understood by reasonable well-informed persons in two or more different senses.'"[85] "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[86] "Courts have a 'duty to construe statutes, not isolated provisions,'"[87] because "[s]tatutory language has meaning only in context."[88]

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[79] *Sinclair Wyo. Ref. Co. v. U.S. Envtl. Prot. Agency*, 887 F.3d 986, 990 (10th Cir. 2017).

[80] *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir. 2011) (quoting *Wright v. Fed. Bureau of Prisons*, 451 F.3d 1231, 1234 (10th Cir. 2006)).

[81] *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004).

[82] *Rajala v. Gardner*, 709 F.3d 1031, 1038 (10th Cir. 2013) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

[83] *Thomas*, 631 F.3d at 1161 (quoting *Wright*, 451 F.3d at 1234.)

[84] *Id.*

[85] *Id.* (quoting *United States v. Hinckley*, 550 F.3d 926, 932 (10th Cir. 2008)).

[86] *Keller Tank Servs. II, Inc. v. Comm'r*, 854 F.3d 1178, 1196 (10th Cir. 2017).

[87] *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

[88] *Id.* at 289 (citing *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005)).

1. Relies-On-Or-Burdens-the-FUSF Claim

The FCA allows states to "adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that *do not rely on or burden* Federal universal support mechanisms."[89] Plaintiff argues the KCC Order relies on and burdens the FUSF Lifeline program, which is undisputedly a mechanism of the FUSF, by assessing federal subsidies to help fund the KUSF.[90] Defendants argue they are not assessing a federal subsidy, but instead "retail revenue." The federal subsidy is only assessed, they argue, because it falls within the larger category of retail revenue.

The terms "rely" and "burden" are not defined in the Telecommunications Act, nor has the Tenth Circuit interpreted these statutory terms in this context. Accordingly, the Court identifies the meaning of each term in this context using the tools of statutory interpretation.

a. "Rely"

Plaintiff argues for a definition of rely that includes a relatively small degree of reliance. Defendants assign the word a more extreme connotation or "disproportionate or heavy use flavor."[91] Yet, the definitions cited by the parties are not in conflict; Plaintiff's "depends on,"[92]

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[89] 47 U.S.C. § 254(f) (emphasis added).

[90] Neither do Defendants dispute that Plaintiff's provision of services under the FUSF Lifeline program is a mechanism of the FUSF.

[91] Doc. 111 at 31. Defendants cite three dictionary definitions: "'Rely' means to be 'dependent for support, help, or supply'" from the Third Edition of The American Heritage Dictionary published in 1992; "'Rely' means to "depend confidently'" from the Random House Dictionary of the English Language published in 1966; and "'Rely' means 'to depend,' for example, to depend 'on a well for all their water needs.'" From Webster's Third New International Dictionary published in 2002. Doc. 111 at 31.

[92] Doc. 95 at 11. Plaintiff does not cite directly to a dictionary definition, but to the definition of "rely" adopted by two other federal district courts in the context of § 254(f). *AT&T Corp. v. Pub. Util. Comm'n of Tex.*, 252 F. Supp. 2d 347, 352 (W.D. Tex. 2003);S *AT&T Commc'ns, Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1124 (D. Or.

definition does not meaningfully differ from Defendants' "dependent for support, help, or supply,"[93] or "depend confidently"[94] definitions. In fact, Defendants cite a definition of "rely" that means "to depend," and the disproportionate connotation they urge only appears in an illustrative example from a 2002 version of Webster's Dictionary: "to depend . . . on a well for all their water needs."[95] Neither Plaintiff nor Defendants' interpretation of "rely," that lie at either extreme, appear in § 254(f), nor in the dictionary definitions. Indeed, the current Webster's Dictionary definition of "rely" as "to be dependent" [96] and American Heritage's definition "to be dependent for support, help, or supply"[97] leaves no ambiguity, and the plain meaning of "rely" controls.

Applying this unambiguous, ordinary meaning, the KCC Order relies on the FUSF Lifeline mechanism by depending on it for a portion of KUSF assessable revenue. The KCC Order requires assessments based on the amount of the FUSF Lifeline subsidy, and ultimately reduces that federal funding. The FUSF pays Lifeline carriers in Kansas $9.25 per customer served, per month. The KUSF assessment has a direct proportional relationship to this FUSF Lifeline subsidy, even if that amount were included in a carrier's assessable revenues. If the FUSF subsidy increases, so would a carrier's "revenue," and in turn the KUSF assessment. If

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2001). Additionally, Plaintiff refers to the definition of "rely" cited by Defendants. Doc. 120 at 25 (citing Doc. 114 at 6).

[93] Doc. 111 at 29 (citing *Rely*, *The American Heritage Dictionary of the English Language* (3rd ed. 1992)).

[94] *Id.* (citing *Rely*, *The Random House Dictionary of the English Language* (1966)).

[95] *Id.* (citing *Rely*, *Webster's Third New International Dictionary of the English Language Unabridged* (2002)). Defendants do not cite other definitions listed in this entry, such as "hold, cleave, belong," "lean, rest," and "to find support." *Id.*

[96] *Rely*, Merriam-Webster.com Dictionary (https://www.merriam-webster.com/dictionary/rely) (last updated Feb 4, 2020); *accord*, *Eachus*, 174 F. Supp. 2d at 1124 (finding that "depend on" is "the only plausible definition offered" when the FCC failed to give the language an alternative definition").

[97] *Rely*, The American Heritage Dictionary of the English Language, 5th ed. (https://ahdictionary.com/word/search.html?q=rely) (Last updated Feb 4, 2020).

the FUSF subsidy decreases, a carrier receives less, and the KUSF's assessable amount also decreases. Further, if the FUSF Lifeline subsidy were discontinued, this portion of KUSF's assessment would also vanish. The assessment required by the KCC Order thus relies on the FUSF Lifeline mechanism because it is "dependent" on the FUSF Lifeline subsidy.[98]

b. "Burden"

Plaintiff casts a "burden" as "something that is carried,"[99] while Defendants frame it as a "heavy" or "oppressive" load.[100] Defendants contend "burden," just like "rely" has a "disproportionate or heavy use flavor."[101] Given that the degrees of burden the parties urge are in conflict, the Court considers the plain meaning of the term "burden," and its placement within the statutory context of § 254 to determine its meaning. "Burden" is defined by American Heritage Dictionary as "[s]omething that is carried," and "[a] responsibility or duty."[102] Webster's Dictionary defines burden as "something that is carried: load," "duty, responsibility," "something oppressive or worrisome," and "the bearing of a load."[103] Finally, Black's Law Dictionary defines "burden" as "[a] duty or responsibility," "[s]omething that hinders or

[98] *Rely*, Merriam-Webster.com Dictionary (https://www.merriam-webster.com/dictionary/rely) (last updated Feb 4, 2020); *accord*, *Eachus*, 174 F. Supp. 2d at 1124.

[99] Doc. 95 at 13 (citing *Burden, Webster's New Collegiate Dictionary* (10th ed. 1996)).

[100] Doc. 111 at 31.

[101] Doc. 111 at 31 (citing *Burden, The American Heritage Dictionary of the English Language* (3rd ed. 1992) ("a source of great worry or stress; weight," "to weigh down, oppress," or "load or overload"); *Burden, The Random House Dictionary of the English Language* (1966) ("to load heavily," or "to load oppressively; trouble"); *Burden, Webster's Third New International Dictionary of the English Language Unabridged* (2002) ("to load with or as if with something heavy, grievous, unwieldy, difficult, or unmanageable" as a verb or "something that weighs down, oppresses, or causes worry" as a noun)).

[102] *Burden*, The American Heritage Dictionary of the English Language, 5th ed. (https://ahdictionary.com/word/search.html?q=burden) (Last updated Feb 4, 2020). The Court does not consider this dictionary's definitions of "burden" that are inapplicable in this context such as "[s]omething that is emotionally difficult to bear." *Id.*

[103] *Burden*, Merriam-Webster.com Dictionary (https://www.merriam-webster.com/dictionary/burden) (last updated Feb 4, 2020).

oppresses," such as "a burden on interstate commerce."[104] Based on these definitions, the Court finds "burden" in the context of § 254(f) is something that places a load on FUSF support mechanisms. Specifically, state regulations may not place a load on FUSF support mechanisms. Still, this term does not introduce a degree of "burden" or "load," and the Court must determine the degree of burden contemplated by § 254(f).

Although some degree of burden is contemplated by requiring carriers to contribute to both the FUSF and state USF,[105] the Court turns to legislative purpose found in surrounding language of § 254 to determine what would place an impermissible load on an FUSF mechanism. For reasons discussed below, the Court finds an impermissible amount of "burden" is one that places a load on the legislative goals of preserving and advancing universal service.

The Court first considers the entirety of § 254(f), then examines this section in the context of other portions of the Telecommunications Act that govern universal service. Under § 254(f), Congress's express purpose of allowing states to create their own USF is "to preserve and advance universal service." This language appears twice in § 254(f), in addition to the language "to the preservation and advancement of universal service in that State."[106] States may create their own rules to govern State USFs so long as they are "not inconsistent with the [FCC]'s rules" to further this goal.[107] State USF regulations must, therefore, not inhibit the federal goal of preserving and advancing universal service.

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[104] *Burden*, Black's Law Dictionary (11th ed. 2019).

[105] *Eachus*, 174 F. Supp. 2d at 1124. "The Act intended for carriers to contribute to the universal service fund, both state and federal. Thus, a certain burden must be permitted. However, allowing a state to assess services already assessed by the federal government increases that burden." *Id.*

[106] 47 U.S.C. § 254(f).

[107] *Id.*

Congressional purpose "to preserve and advance universal service" appears throughout other portions of § 254. For instance, § 254(b) says "the [FCC] shall base polices for the preservation and advancement of universal service" on the enumerated principles including of quality services, and access to advanced service.[108] Additionally, § 254(d) requires that interstate telecommunication carriers contribute to the FUSF "to preserve and advance universal service."[109] Advancement of universal service occurs when more carriers engage in universal service programs, thus expanding the scope of telecommunication coverage in underserved areas and populations. It is consistent with federal goals, therefore, to incentivize engagement in FUSF programs. Conversely, it is inconsistent with federal goals to disincentivize engagement in FUSF programs, because such disincentives decrease provision of telecommunication services and ultimately customer access to those services, absent another carrier participating in the place of the disincentivized carrier. State regulations may not, therefore, place a load on carriers that would disincentivize them from participation in a FUSF program that furthers these goals of preservation and advancement of universal service.

This definition of "burden" is reinforced by § 254(j) which states "[n]othing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission" under certain provided regulations. Disincentivizing engagement in the Lifeline program would certainly interfere with collection, distribution and administration of the Lifeline program. A reading of § 254(f) that allowed such disincentives would, therefore, conflict with § 254(j).

[108] 47 U.S.C. § 254(b).

[109] 47 U.S.C. § 254(d).

Finally, § 254(e) also supports this definition of "burden." This section governs how carriers may use funds received from a universal service program. "A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services *for which the support is intended*."[110] FUSF Lifeline subsidies are intended to induce provision of telecommunication services to low-income Lifeline customers. FUSF Lifeline subsidies are not intended to fund other programs, such as the FUSF High Cost, Schools and Libraries or Rural Health Care programs. Similarly, they are not intended to fund a state USF's programs. It is against Congressional purpose, therefore, for a carrier to use FUSF Lifeline monies to pay for a state USF program, because those monies are intended to support Lifeline customers.

A state regulation requiring the expenditure of FUSF Lifeline monies for a state USF program is also contrary to Congressional purpose for the same reason. Because § 254(e) prohibits use of FUSF funds for services other than services for which it is intended, it follows that violating this prohibition is a burden on the FUSF. A § 254(f) burden, therefore, includes a state regulation that diverts support from its intended facility or service.

Here, the KCC Order burdens the FUSF because it disincentivizes the carrier from participating in the FUSF Lifeline program. The purpose of § 254 is to encourage carriers to provide universal services to create a greater breadth of access to telecommunication services. Carriers who have the greatest effect on promoting the statutory purposes of § 254 through the FUSF Lifeline program may have a relatively lower contribution to the state USF; a carrier whose non-subsidy revenue is significantly less than their percentage of subsidy-based revenue relative to a carrier whose customers are more profit-based than subsidized low-income may

[110] 47 U.S.C. § 254(e) (emphasis added).

contribute less. Yet, this contribution scheme furthers the statutory purposes of § 254. The KCC Order, however, thwarts the realization of these statutory purposes by assessing subsidies. To a high-volume subsidy carrier, assessment of FUSF Lifeline subsidies can be a real disincentive to participating in the program instead of catering to non-low-income customers.

Plaintiff's ability to surcharge low-income customers for the KCC assessment does not prevent the assessment from burdening the FUSF. Plaintiff already incurs a burden of its own to participate in the FUSF Lifeline program because it provides telecommunication services far below market value. Even if Plaintiff were to pass the cost of the KCC subsidy on to its customers—$0.32 per customer, per month, according to Defendants—it would still provide these services at far less than market value. The KCC assessment disincentivizes a program that is already less profitable to Plaintiff than provision of services to non-Lifeline customers. The assessment is, therefore, a burden on the Lifeline program, and is expressly preempted by § 254(f).

This application of "burden" in § 254(f) to the KCC Order complies with § 254(j)'s requirement that other sections of the FCA must not affect Lifeline administration. The Definition of "burden" urged by Defendants, however, violates this section; if the KCC assessment did not burden an FUSF mechanism, its effect on the administration of Lifeline programs would nonetheless violate § 254(j) because disincentivizing carriers from providing Lifeline services does "affect the collection, distribution, or administration of the Lifeline Assistance Program" that § 254(j) prohibits.[111]

Further, Defendant's reading of burden that allows state USFs to assess FUSF funding would violate § 254(e)'s requirement that FUSF funds be used for the services "for which the

[111] 47 U.S.C. § 254(j).

support is intended."[112] The KCC assessment diverts a portion of the FUSF Lifeline subsidy intended for Lifeline "facilities and services" into the KUSF. Although the KUSF has a Lifeline program of its own, the analysis is unchanged. KUSF also has other universal services programs for which these funds may be used. And, even if the totality of the KCC assessment of the FUSF Lifeline subsidy were funneled in the KUSF Lifeline program, the support is still not used for the "facilities and services for which the support is intended"—which is provision of *federal* Lifeline support.

Interpreting "burden" in this context to include disincentivizing carrier participation in FUSF programs is consistent with other federal district court decisions. In *Eachus*, an Oregon universal service fund's assessment burdened a FUSF mechanism because it assessed the same revenues as the FUSF taxed. [113] There, an Oregon public utility commission ("OPUC") order required assessment of surcharges on the sale of intrastate, interstate and international telecommunications services sold in Oregon to fund its own USF. The order burdened the FUSF because its surcharge on interstate services made providing those services less profitable to carriers.[114] The Court reasoned this state assessment would discourage carriers from providing those interstate services in Oregon because carriers were assessed for those services at the federal level too.[115] Although the court's finding pertained to interstate, not intrastate, revenues, the court said "[t]here can be no question that taxing interstate telecommunications burdens communications carriers. The same can be true of taxing intrastate telecommunications."[116]

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[112] 47 U.S.C. § 254(e).

[113] *Eachus*, 174 F. Supp. 2d at 1124.

[114] *Id.* at 1121.

[115] *Id.* at 1124.

[116] *Id.*

Although "a certain burden must be permitted" because the FCA intended for carriers to contribute to both state and federal USFs, ". . . allowing a state to assess services already assessed by the federal government increases that burden."[117]

Similarly, in *AT&T Corporation v. Public Utility Commission of Texas*,[118] a Texas Universal Service Fund ("TUSF") regulation impermissibly burdened a FUSF mechanism when it required carriers to pay a percentage of total taxable telecommunication revenue into the TUSF. The regulation required carriers to pay a percentage of total telecommunication revenues from international, interstate, and intrastate revenues, into the TUSF. The regulation burdened the FUSF by incentivizing carriers to provide only intrastate services.[119] The Court reasoned carriers were incentivized to provide only intrastate services because interstate and international services were effectively double-taxed by the federal and state governments, while intrastate services were only assessed by the state.[120] In other words, the carrier would only be incentivized to provide services for which it was taxed once, not services for which it was taxed twice. "This disincentive translates into lower interstate and international revenues, which results in the generation of fewer dollars for the FUSF. In other words, the Regulation imposes a burden."[121]

[117] *Id.*

[118] 252 F. Supp. 2d at 347.

[119] *Id.* at 352.

[120] *Id.*

[121] *Id.*

c. Defendants' Alternative "Rely On Or Burden" Arguments

i. Intergovernmental Immunity Doctrine

The Constitutional doctrine of intergovernmental immunity, as codified in 4 U.S.C. § 111, prohibits, in part, states from imposing discriminatory taxes against federal employees.[122] Defendants argue the Court need not reach the issue of whether the KCC Order relies on or burdens a mechanism of the FUSF because the KCC Order does not violate the intergovernmental immunity doctrine. The intergovernmental immunity doctrine provides that "in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions."[123] Defendants argue that the KCC Order complies with this doctrine and is thus valid because it (1) imposes the legal duty to comply on a private party—Plaintiff—rather than the United States, and (2) treats Plaintiff and other parties who do business with the United States no less favorably than other parties.[124] Even if Defendants' contention is correct that the KCC Order does not violate the intergovernmental immunity doctrine, that does not end the analysis; state action can conflict with federal law in other ways, such as express preemption. The Court need not consider the doctrine here because there is no "absence of congressional consent." Instead, Congress has expressly prohibited state universal service standards that "rely on or burden Federal universal service support

[122] *Dawson v. Steager*, 139 S. Ct. 698, 702 (2019).

[123] *Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 269 (1943).

[124] *United States v. New Mexico*, 455 U.S. 720, 730–38 (1982); *Washington v. United States*, 460 U.S. 536, 546 (1983); *North Dakota v. United States*, 495 U.S. 423, 436–38 (1990).

mechanisms."[125] An analysis of Congress's express preemptive language is the proper one, and the Court does not reach a Constitutional intergovernmental immunity doctrine analysis.

ii. Compliance with § 254(f) will not Burden the KUSF

Defendants argue the burden runs the other way because if the KCC Order is unenforceable, the FUSF would burden the KUSF. The Court disagrees. A Federal subsidy intended to promote provision of telecommunication services to low-income Kansans does not burden a state universal service fund with similar goals merely because the state fund cannot assess the federal subsidy. Further, complying with federal law can hardly constitute a burden on a state universal service fund, especially when that federal law simultaneously bestowed and limited state power to create their own USFs. There is no express prohibition of federal laws that rely on or burden a state USF. Accordingly, the Court does not consider whether the FUSF burdens the KUSF.

iii. Defendants' "Full Pass-Through" Argument

Defendants argue that the KCC Order does not rely on or burden a FUSF mechanism because it complies with 47 C.F.R. § 54.403(b). That regulation requires carriers to pass through the full $9.25 per month FUSF Lifeline subsidy to the customer by charging at least $9.25 less than "any generally available residential service plan or package offered by such carriers."[126] It argues that even if Plaintiff collects this cost from its customers it would not violate § 54.403(b).[127] Defendants reason that low-income customers would still receive $9.25 worth of a benefit because Plaintiff offers a plan to non low-income customers at a cost of $20 per month; Plaintiff could charge its low-income customers as much as $10.75 per month, and they would

[125] 47 U.S.C. § 254(f).

[126] 47 C.F.R. § 54.403(b).

[127] Defendants contend this is a cost of $0.32 per customer, per month.

still receive $9.25 worth of benefit. Thus, Defendants argue the KCC Order complies with § 54.403(b) and is therefore valid. Yet, even if the assessment complies with § 54.403(b), compliance with a federal regulation does not automatically mean the KCC Order does not violate another federal statutory provision. Accordingly, compliance with § 54.403(b) does not change the analysis that the KCC Order relies on and burdens a FUSF mechanism, regardless of whether the carrier surcharges its customers.

iv. Defendants' "Retail Revenue" Argument

Defendants argue the KCC Order does not rely on or burden the FUSF because it is not assessing the FUSF subsidy directly. Instead, Defendants argue it assesses only "retail revenue" of which the subsidy happens to be a part. This classification does not save the assessment from relying on or burdening the FUSF. Whether the KCC assesses the federal subsidy alone, or whether the federal subsidy is assessed by its inclusion within the larger category of "retail revenue" does not alter the assessment's reliance or burden on the FUSF Lifeline Program.

2. The Inequitable and Discriminatory Claim

Section 254(f) provides that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an *equitable and nondiscriminatory* basis, in a manner determined by the State to the preservation and advancement of universal service in that State."[128] Plaintiff claims the KCC Order is inequitable and discriminatory as prohibited by § 254(f) because it requires Plaintiff, as a participating Lifeline carrier, to contribute to the KUSF at a greater rate than other non-Lifeline carriers are required to contribute. Plaintiff further argues this is inequitable and discriminatory because it impermissibly distinguishes between

[128] 47 U.S.C. § 254(f) (emphasis added).

FUSF programs: The KCC Order requires assessment of Lifeline subsidies, but not High Cost program subsidies.

Plaintiff argues the FCC does not make this distinction because it assesses neither the Lifeline nor the High Cost program. In fact, Plaintiff argues, the FCC has stated that payments received from any universal service support mechanism do not qualify as revenues and are not assessable.

Defendants argue the two programs are treated equitably, even though they are not administered in exactly the same way. The KCC only assesses the Lifeline program, Defendants argue, because it yields a different type of revenue than the High Cost program. They argue the Lifeline program yields "retail revenue" because Lifeline revenue comes from a retail customer. This revenue is nonetheless "retail," they argue, even though the Lifeline customer's bill is paid through a federal subsidy and not by the customer because the subsidies are applied to the retail customer's account.[129] On the other hand, Defendants argue High Cost revenue is not "retail revenue" because High Cost revenue comes from subsidies paid to build or maintain network facilities. After all, Defendants argue, K.S.A. § 66-2008(a) only gives the KCC authority to assess "retail revenue," so assessing the High Cost program is outside of the KCC's authority.[130] In support, Defendants cite 47 C.F.R. § 54.401(a),[131] which declares Lifeline a "retail service,"

[129] That FUSF subsidies are applied to a retail customer's account is a contested fact.

[130] K.S.A. § 66-2008(a) reads in pertinent part: "The commission shall require every telecommunications carrier . . . to the extent not prohibited by federal law . . . to contribute to the KUSF based upon the provider's intrastate telecommunications services net *retail revenues* on an equitable and nondiscriminatory basis." K.S.A. § 66-2008(a) (emphasis added).

[131] 47 C.F.R. § 54.401(a)(1) describes Lifeline, in part, as a service "[f]or which qualifying low-income customers pay reduced charges as a result of application of the Lifeline support amount described in § 54.403."

and 47 C.F.R. § 54.403(b)[132] for the proposition that carriers, including Plaintiff, must apply Lifeline subsidies to individual retail customer accounts.

It is not necessary for the Court to determine whether the Lifeline subsidies that the KCC Order seeks to assess are deemed "retail revenue" because even an assessment of retail revenue must comply with § 254(f), including the "equitable and nondiscriminatory" clause. Accordingly, the Court begins its analysis with statutory interpretation of the "equitable and nondiscriminatory" clause.

a. "Equitable and Nondiscriminatory" Statutory Interpretation

Equitable is defined as "[j]ust; consistent with principles of justice and right,"[133] and "just (fair to all parties as dictated by reason and conscience)."[134] Equitable, therefore, does not generally mean "equal."[135] Discrimination is defined as "prejudiced or prejudicial outlook, action, or treatment,"[136] "unfair treatment of a person or group on the basis of prejudice,"[137] and "[t]he effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or

[132] 47 C.F.R. § 54.403(b)(1) requires "[e]ligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges must apply federal Lifeline support to waive the federal End User Common Line charges for Lifeline subscribers if the carrier is seeking Lifeline reimbursement for eligible voice telephony service provided to those subscribers." 47 C.F.R. § 54.403(b)(1).

[133] *Equitable*, Black's Law Dictionary (11th ed. 2019).

[134] *Equitable*, Princeton University WordNet (http://wordnetweb.princeton.edu/perl /webwn?s=equitable&sub=Search+WordNet&o2=&o0=1&o8=1&o1=1&o7= &o5=&o9=&o6=&o3=&o4=&h=) (last updated Feb 4, 2020).

[135] *But see, equitable*, Merriam-Webster.com Dictionary (https://www.merriam-webster.com/dictionary/equitable) (last updated Feb 4, 2020) ("dealing fairly and equally with all concerned").

[136] *Discrimination*, Merriam-Webster.com Dictionary (https://www.merriam-webster.com/dictionary/discrimination) (last updated Feb 4, 2020).

[137] *Discrimination*, Princeton University WordNet (http://wordnetweb.princeton.edu/perl/webwn?s= discrimination&sub=Search+WordNet&o2=&o0=1&o8=1&o1=1&o7=&o5=&o9=&o6=&o3=&o4=&h=) (last updated Feb 4, 2020).

disability."[138] Applying these definitions in the context of universal service, in consideration of the language in this clause that contributions shall be "equitable and nondiscriminatory . . . in a manner determined by the State *to the preservation and advancement of universal service in that State*," the Court finds "equitable and nondiscriminatory" means fair among carriers in a way that furthers provision of universal services.

Both § 254(f) and the surrounding provisions of § 254 support such a definition. Section 254(f) begins by granting states authority to adopt regulations, so long as those regulations are "not inconsistent with the [FCC]'s rules *to preserve and advance universal service.*"[139] Further, these regulations may be "determined by the State *to the preservation and advancement of universal service in that state*." And, as discussed above, those regulations may "not rely on or burden *Federal universal service support mechanisms.*" Congress stated three times in § 254(f) its purpose in granting states' authority to regulate intrastate telecommunications: state regulations must preserve and advance universal service. Applying the Congressional purpose articulated within this section, state regulations must be "equitable and nondiscriminatory" for the purpose of furthering universal service. Regulations may not discriminate between FUSF programs or between carriers in a way that hinders this goal.

Section § 254(b), (d), (e), and (j), discussed in detail above, also make clear Congress's purpose in creating this section to further universal service. Just as states may not create regulations that rely on or burden universal service, states may not create regulations that are inequitable or discriminate in a way that hinders this goal.

[138] *Discrimination*, Black's Law Dictionary (11th ed. 2019).

[139] 47 U.S.C. § 254(f) (emphasis added).

The Court's finding that Congressional purpose to further universal service applies to the "equitable and nondiscriminatory" clause is reinforced by § 254(d), which contains identical language. Section 254(d) pertains to *interstate* service contributions, while § 254(f) pertains to *intrastate* service contributions. Both subsections 254(d) and (f) require that contributions be equitable and nondiscriminatory. And, Congressional purpose "to preserve and advance universal service" in § 254(f) is also captured § 254(d).[140] The Court reads the statute as a whole and does not interpret the operative phrase in isolation. It is significant, therefore, that the "equitable and nondiscriminatory" clauses appear in the same manner in both § 254(d) and § 254(f): "Every telecommunications carrier that provides interstate[/intrastate] telecommunications services shall contribute, on an equitable and nondiscriminatory basis."[141] Both sentences conclude by stating these contributions are for the purpose of preserving and advancing universal service. Nearly identical language in § 254(d) and § 254(f) reinforces the conclusion that whether a regulation is "equitable and nondiscriminatory" is measured by its effect on universal service.

The KCC Order inequitably discriminates between intrastate telecommunication carriers through its assessment on FUSF Lifeline subsidies. In its discussion of the "Relies-On-and-Burdens-the-FUSF-Claim," the Court found that the KCC Order disincentivizes carriers from providing FUSF Lifeline services which impermissibly relies on and burdens a FUSF mechanism. For the same reason—disincentivizing provision of universal service—the distinction the KCC Order draws between Lifeline and non-Lifeline carriers is discriminatory. The differential treatment of Lifeline and non-Lifeline carriers disincentivizes provision of FUSF

[140] 47 U.S.C. § 254(d).

[141] 47 U.S.C. § 254(d)-(f).

Lifeline service because the KCC Order imposes an additional cost on providing Lifeline services.

This inequity and discrimination is further evidenced by the distinction the KCC Order makes between the FUSF Lifeline and FUSF High Cost programs: Lifeline subsidies are assessed while High Cost subsidies are not. The Order, therefore, disincentivizes provision of Lifeline services while incentivizing High Cost subsidies. States, however, may not disincentivize either under the statute.

b. Defendant's Alternative Arguments

i. Scope of State/KCC Authority

Defendants argue the KCC Order is within state power authorized by Congress, and therefore is not inequitable or discriminatory. Specifically, they argue Congress authorized states to create their own rules regarding *intrastate* services "in a manner determined by the State," and thus the KCC has the authority to create any rules governing intrastate service. Defendants further argue the KCC Order is equitable and nondiscriminatory because the state acted within its discretion under 47 U.S.C. § 254(f) by mandating contributions to the KUSF based solely on "retail revenues" in K.S.A. § 66-2008(a). In turn, it argues, the KCC Order that requires assessment of the FUSF Lifeline Subsidy as part of that pool of "retail revenues" is valid because it complies with the Kansas statute.

This proposition again ignores the limitations Congress placed on state authority to create rules to regulate intrastate services. Such rules must not "rely on or burden Federal universal support mechanisms," and contributions to the fund must be "equitable and nondiscriminatory." Further, these rules created by the state must be for the purpose of "preservation and advancement of universal service in that State." While the KCC's assessment of the FUSF

Lifeline subsidy would create more revenue streams for the KUSF, it would also disincentivize provision of Lifeline services within Kansas. Disincentivizing universal services in Kansas violates § 254(f)'s requirement to preserve and advance those services in Kansas.

States do not have blanket authority under § 254(f) to create *any* regulations to govern intrastate service. Such state regulations are still subject to the limitations of that statute, and compliance with K.S.A. § 66-2008(a) is not dispositive.

ii. Double-Assessment

Defendants argue it is impossible for the KCC to treat the High Cost and Lifeline programs the same; if the High Cost program were also assessed, that would create a risk of double-assessment. Defendants reason that if the KCC assesses both programs, it will assess network facilities and assess retail services that use those facilities. Additionally, Defendants point out that they do assess other retail revenue earned by carriers that participate in the High Cost program, just not the High Cost subsidies themselves. Plaintiff could participate in the High Cost program, too, and revenue received from High Cost subsidies would not be assessed.

This argument does not prevent the KCC's Lifeline assessments from being inequitable and discriminatory. Independent of any KCC assessment on High Cost subsidies, the Lifeline assessment is inequitable and discriminates between carriers because it has the effect of hindering universal service. Further, Defendants are not forced to choose between assessing both the High Cost and Lifeline program or only the Lifeline program; they could assess neither program, as does the FCC, and be in compliance with § 254(f).

iii. Differential Carrier Treatment

Next, Defendants argue that Plaintiff's reading of the "equitable and nondiscriminatory" clause of § 254(f) would discriminate in favor of Plaintiff, and against carriers that receive retail

revenue from non-low-income sources. Defendants reason that an exclusive Lifeline provider would pay nothing to the KUSF, which would violate § 254(f)'s requirement that "every" carrier contribute in a manner determined by the state, thus creating a statutory conflict.

As already discussed, the definition of "equitable and nondiscriminatory" requires regulations to further universal service goals. Congressional purpose to enhance provision of universal services allows disparate treatment of carriers' contribution requirements as long as such treatment preserves and advances universal service. Giving carriers an incentive to provide Lifeline services is precisely what § 254 is designed to do.

iv. "Valid Considerations"

Finally, Defendants cite a Third Circuit case for the proposition that state regulations are nondiscriminatory if they are justified by "valid considerations."[142] Defendants argue there are indeed valid considerations behind the distinction K.S.A. § 66-2008(a) draws between retail and non-retail revenue: assessing an intrastate call only once and avoiding a risk of double assessment.

In *New Jersey Payphone*, the Third Circuit considered a wholly different provision of the Telecommunications Act: § 253(c).[143] This provision is unrelated to universal service. Rather, § 253 governs "[r]emoval of barriers to entry." The "competitively neutral and nondiscriminatory basis" language cited by Defendants, while similar to the "equitable and nondiscriminatory" language in § 254(f) is therefore not instructive in interpreting the section governing universal service. Congressional purpose regarding removal of barriers to entry to entities wishing to

[142] *N.J. Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 247 (3d Cir. 2002).

[143] 47 U.S.C. § 253(c). "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." *Id.*

provide interstate or intrastate telecommunications services is not analogous to Congressional purpose regarding provision of services to low-income customers, rural areas, high-cost areas, and schools and libraries. The dissimilar meaning is further evidenced by the fact that the language chosen is facially different: although both clauses contain the word "non-discriminatory," the phrase "competitively neutral" is not the same as "equitable." One clause contemplates removing barriers of entry into the telecommunication industry, and the other contemplates limitations on State authority to create rules governing intrastate telecommunication services. Accordingly, the Court does not consider *New Jersey Payphone* as it is not instructive here.

C. Consistency & Non-Predictability Claims

Plaintiff also argues the KCC Order is invalid because it is inconsistent with the FCC's rules to preserve and advance universal service and is not a predictable state regulation because it employs a different methodology than the FCC in determining contributions to the universal service, both in violation of 47 U.S.C. § 254(f). Given that the Court finds the KCC Order is preempted by Plaintiff's "Relies-On-Or-Burdens-the-FUSF" and "Inequitable and Discriminatory" claims, it is unnecessary to address these remaining claims of preemption.

V. Conclusion

In sum, Plaintiff is entitled to summary judgment because the KCC Order it seeks to enjoin is preempted by federal law, and no genuine disputes of material fact remain.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion to Exclude Expert Testimony of Sandra K. Reams (Doc. 85) is **granted in part and denied in part** as described in this order, and Plaintiff's Motion to Exclude Expert Testimony of Robert Loube (Doc. 88) is **granted in part and denied in part** as described in this order.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Doc. 81) is **denied**, and Plaintiff's Motion for Summary Judgment (Doc. 91) is **granted**.

IT IS SO ORDERED.

Dated: February 7, 2020

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE