

**Before the
Federal Communications Commission
Washington, DC 20554**

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|---|---|-----------------------------|
| In the Matter of |) | |
| |) | |
| Petitions for Reconsideration by |) | |
| |) | |
| Falcon School District 49 |) | File Nos. SLD-466641 et al. |
| Falcon, CO |) | |
| |) | |
| Trillion Partners, Inc. |) | |
| Austin, TX |) | |
| |) | |
| Schools and Libraries Universal Service |) | CC Docket No. 02-6 |
| Support Mechanism |) | |

ORDER AND ORDER ON RECONSIDERATION

Adopted: July 8, 2013

Released: July 8, 2013

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent,¹ we deny two petitions for reconsideration filed by Falcon School District 49 (Falcon) and Trillion Partners, Inc. (Trillion) (collectively, petitioners)² of that portion of our *Charlton County Order* affirming the decision by the Universal Service Administrative Company

¹ See, e.g., *Petition for Reconsideration by Lake Pend Oreille School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order on Reconsideration, 28 FCC Rcd 1103, 1107, para. 5 (Wireline Comp. Bur. 2013) (finding that the service provider, Trillion, and the applicant engaged in numerous and substantive communications which provided Trillion with access to information not available to other bidders); *Requests for Review of Decisions of the Universal Service Administrator by Marana Unified School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 27 FCC Rcd 1525, 1529-30, para. 8 (Wireline Comp. Bur. 2012) (*Marana Order*) (finding that the service provider, Trillion, engaged in routine and numerous contacts with the applicant by discussing all aspects of the applicant’s technology needs and request for proposal in violation of the Commission’s competitive bidding rules, and assisted with the preparation of the applicant’s FCC Form 470 and request for proposal); *Requests for Review of Decisions of the Universal Service Administrator by Central Islip Free Union School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 8630, 8632, para. 3 (Wireline Comp. Bur. 2011) (*Central Islip Order*) (finding that “a service provider participating in the competitive bidding process cannot be involved in the preparation of the entity’s FCC Form 470”); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26939, para. 66 (2003) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources); *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.; Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033, para. 10 (2000) (*MasterMind Order*) (finding that an applicant impairs its ability to hold a fair competitive bidding process when it allows a service provider to provide assistance in the administration of the competitive bidding process and participate in the process as a bidder).

² Letter from Henry M. Rivera, Counsel to Trillion Partners, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Mar. 22, 2012) (Trillion Petition for Reconsideration); Letter from Brad A. Miller, Counsel, Falcon School District 49, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Mar. 22, 2012) (Falcon Petition for Reconsideration).

(USAC) denying funding to Falcon under the E-rate program (more formally known as the schools and libraries universal service support program) for funding years 2005 through 2010.³ Also consistent with precedent,⁴ we deny the requests for review filed by Falcon and Trillion of USAC's decision denying E-rate funding to Falcon for funding year 2012.⁵

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for universal service support for eligible services.⁶ E-rate program rules provide that these entities must seek competitive bids for services eligible for support.⁷ In accordance with the Commission's competitive bidding rules, applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services.⁸ The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁹ After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.¹⁰

3. The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and the price of eligible products and services must be the primary factor in selecting the winning bid.¹¹ The competitive bidding process must be fair and open, and must not have been compromised because of improper conduct by the applicant, service provider, or both parties.¹² Under the Commission's rules, a service provider participating in the competitive bidding process cannot be involved in the preparation of the entity's technology plan, FCC Form 470 or an associated request for

³ *Requests for Waiver and Review of Decisions of the Universal Service Administrator by Charlton County School System et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 27 FCC Rcd 2010, 2012, App. (Wireline Comp. Bur. 2012) (*Charlton County Order*) (finding that the petitioners, Falcon and Trillion, violated the Commission's competitive bidding requirements by engaging in improper communications and failed to demonstrate good cause justifying a waiver of the Commission's competitive bidding requirements).

⁴ *See supra* n.1.

⁵ Letter from Edgar Class, Counsel to Trillion Partners, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Jan. 18, 2013) (Trillion Request for Review); Letter from Brad A. Miller, Counsel, Falcon School District 49, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Jan. 28, 2013) (Falcon Request for Review).

⁶ *See* 47 C.F.R. §§ 54.501-54.502 (2013). *See also* 47 C.F.R. §§ 54.501-54.503 (2005). In this Order and Order on Reconsideration, we describe the requirements of the E-rate program as they currently exist, but because we address applications from funding years 2005 through 2010, and 2012, and the Commission has reorganized the E-rate rules in the interim, where the Commission's codification of the rules in the Code of Federal Regulations has changed, we also cite to the relevant rules as they existed during the relevant funding years.

⁷ *See* 47 C.F.R. § 54.503 (2013). *See also* 47 C.F.R. § 54.504 (2005).

⁸ *See* 47 C.F.R. § 54.503(c) (2013). *See also* 47 C.F.R. § 54.504(b) (2005).

⁹ *See id.*

¹⁰ *See id.* *See also, e.g., Requests for Review of Decisions of the Universal Service Administrator by Approach Learning and Assessment Centers et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 15510 (Wireline Comp. Bur. 2008).

¹¹ *See* 47 C.F.R. § 54.511(a) (2013). *See also* 47 C.F.R. § 54.511(a) (2005).

¹² *See supra* n.1. In the *Schools and Libraries Sixth Report and Order*, the Commission codified the existing requirement that the E-rate competitive bidding process be fair and open. *See Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18798-800, paras. 85-86 (2010) (*Schools and Libraries Sixth Report and Order*); 47 C.F.R. § 54.503.

proposals.¹³ In addition, all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process.¹⁴

4. In denying Falcon's and Trillion's appeals, in the *Charlton County Order*, we relied on Commission rules¹⁵ and precedent that requires that all potential bidders have access to the same information and must be treated in the same manner throughout the procurement process.¹⁶ The record shows that Falcon provided detailed information to Trillion about its needs and worked with Trillion on a proposal prior to beginning the competitive bidding process for funding year 2005.¹⁷ The record also specifically shows that, for funding year 2008, Trillion offered to reduce its rates for the wide area network (WAN) services it was currently providing Falcon, in exchange for winning the bid for voice over IP (VOIP) services.¹⁸ Thus, consistent with precedent, we correctly found in the *Charlton County*

¹³ See, e.g., 47 C.F.R. § 54.503(a) (note); *Marana Order*, 27 FCC Rcd at 1532-33, paras. 12-13; *Central Islip Order*, 26 FCC Rcd at 8636, para. 14; *MasterMind Order*, 16 FCC Rcd at 4033, para. 10.

¹⁴ See *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799, para. 86.

¹⁵ See 47 C.F.R. § 54.503(a) (2013). See also 47 C.F.R. § 54.504(a) (2004).

¹⁶ See *supra* n.1. See also *Charlton County Order*, 27 FCC Rcd at 2010, para. 1.

¹⁷ There were numerous communications from June through September of 2004 between Gary Gaessler from Trillion and Alfred Green from Falcon. We list a few of those communications here as examples. See, e.g., Email from Gary Gaessler, Trillion Partners, Inc., to Alfred Green, Technology Coordinator, Falcon School District 49 (dated Aug. 10, 2004) ("Subject: Trillion Falcon SD #49 proposal" stating "Attached is your Trillion WWAN and IP-Shortel proposal. I noticed we may be missing Ridgeview ES? Please confirm this and let me know if there are any other sites that need to be added. I hope this reaches you in time for your meeting with your manager this am. Roger and I are planning on attending your board meeting this Thursday."); Email from Gary Gaessler, Trillion Partners, Inc., to Alfred Green, Technology Coordinator, Falcon School District 49 (dated Jul. 28, 2004) (stating "Finishing up on your Trillion proposal and left you a voicemail for the items below . . . 1. Do you want your quote to include our bundled services: (portal, email, DNS, Firewall, Filtering and VPN)? We can quote with or without (erate eligible) 2. Current phone system questions: a. make/manufacturer b. # of trunks/ c. Trunk types? d. Phone system station count: analog? i. # multiline? ii. # display? iii.# wireless? iv. # e. Quest/LEC facilities/Type & quantity: POTS lines? i.# PRI's? ii. # Centrex? Iii. # 3. Do you want Airspace Wireless Lan quote also?"); Email from Alfred Green, Technology Coordinator, Falcon School District 49, to Gary Gaessler, Trillion Partners, Inc. (dated Jul. 14, 2004) (stating "Answers for some of your questions follow. Question 1. August 12th Question 2. Yes Question 3. Powers Corridor PTPs a. Central Admin to Evans Elem: \$402.43 b. Central Admin to Remington Elem: \$402.43 Central Admin to Springs Ranch Elem: \$492.00 d. Central Admin to Stetson Elem: \$402.43 e. Central Admin to Ridgeview Elem: \$492.00 g. Central Admin to Horizon Middle: \$402.43 g. Central Admin to Skyview Middle: \$402.43 Central Admin to Sand Creek High: \$402.43 Falcon Area PTPs i. Central Admin to Special Services: \$216.00 j. Central Admin to Falcon Elem: \$216.00 k. Central Admin to Woodmen Hills Elem: \$216.00 Central Admin to Meridian Ranch Elem: \$216.00 m. Central Admin to Falcon Middle: \$216.00 n. Central Admin to Falcon High: \$216.00 Question 4. Presently one T-1 from Central Administration to Quest POP Monthly recurring cost is \$1100. No term agreement to the best of my knowledge, but I'll follow-up on that. Question 5. Estimated number of students 9,250 (official count from last Oct. is 8,860) Number of teachers is approx. 550. Total staff include administrators, etc. is approx. 1,100. Question 6. Lets talk. Question 7. A. District avg: 15.4% b. Break down by school (1) Evans Elem: 37.8% (2) Falcon Elem: 27.7% (3) Horizon Middle: 19.3% (4) Ridg[e]view Elem: 18.7% (5) Remington Elem: 16.5% (6) Stetson Elem: 16.5% (7) Falcon Middle: 14.8% (8) Skyview Middle: 12.6 % (9) Sand Creek High: 10.5% (10) Falcon High: 10.4% (11) Springs Ranch Elem: 7.0% (12) Woodmen Hills Elem: 6.9% (13) Meridian Ranch Elem: 0.0% (New School...no data yet) Question 8. 20, Full question 9. Need to check on this. Question 10. Don't know of any that we have access too, but there appears to be two towers approx. 3-5 miles SSE of Central Admin. See attached graphic").

¹⁸ See, e.g., Email from David Bond, Falcon School District 49, to Barbara Cannan, Schools and Libraries Division, USAC (dated June 18, 2009) (stating that "We requested that Trillion respond to a bid solicited through the form 470 we submitted with a submission that year that would include services that would replace our existing wide-area network services and provide voice over IP phone service. If their proposal was the successful submission, we would void the existing contract for wide-area network services and internet connections services in lieu of the new

(continued...)

Order that Falcon violated the Commission's competitive bidding rules by providing information to Trillion that was not available to other bidders and demonstrating a preference towards Trillion by giving it an unfair advantage over other potential bidders.¹⁹ While Trillion argues that the *Charlton County Order* failed to provide a reasoned analysis,²⁰ we find that our denial was fully supported by cited precedent which clearly prohibits the actions taken by the petitioners here.²¹

5. We therefore deny Falcon's and Trillion's petitions for reconsideration on the merits. The petitioners agree that the E-rate competitive bidding process should be fair and open, and they do not dispute that they had communications with each other.²² The petitioners instead claim the communications were only to "clarify specifications and the existing infrastructure,"²³ and included information available to the broad public pursuant to Colorado state law.²⁴ Furthermore, Falcon claims that "Trillion did not have advance knowledge of project information."²⁵ We disagree with the petitioners' characterization of the breadth and nature of the communications. The record demonstrates that the petitioners discussed subjects that provided Trillion with information such as Falcon's exact technical requirements, infrastructure and solutions for specific school sites.²⁶ The petitioners also had discussions about what to include in Trillion's proposal for the district.²⁷ Moreover, the communications were between Trillion, a potential service provider, and Falcon's FCC Form 470 contact person who had influence in Falcon's competitive bidding process.²⁸ Falcon attempts to justify its communications with Trillion by arguing that its FCC Form 470 contact person also met with representatives of other services providers and provided them with the same information.²⁹ However, there is no evidence in the record

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contract for enhanced wide-area network services and voice over IP phone service. . . If Trillion was not the successful bidder, the existing contract would remain in place for the existing services. WE also evaluated the submission against alternative solutions that were not E-rate eligible"); Email from David Bond, Falcon School District 49, to Michael Deusinger, Schools and Libraries Division, USAC (dated June 12, 2010) ("Trillion had previously agreed to provide lower rates and enhanced quality of service for the WAN services for which they were already under contract if they were the successful bidder for VOIP services. In order to put the new rates and enhanced quality of service into effect and make them bidding, we signed a contract with the altered provisions. . . The District was and is not aware of any provisions of the E-rate program that precludes a service provider from making beneficial changes to the rates or quality of service provided within one category of service contingent on successfully securing a contract in another category of service.").

¹⁹ See *Charlton County Order*, 27 FCC Rcd at 2010, para. 1.

²⁰ See Trillion Petition for Reconsideration at 3-4.

²¹ See *Charlton County Order*, 27 FCC Rcd at 2010, para. 1.

²² See, e.g., Trillion Petition for Reconsideration at 6; Falcon Petition for Reconsideration at 2.

²³ See, e.g., Trillion Petition for Reconsideration at 5.

²⁴ See, e.g., Falcon Request for Review at 5-6; Trillion Petition for Reconsideration at 6.

²⁵ See Falcon Request for Review at 5.

²⁶ See *supra* n.17.

²⁷ See *id.*

²⁸ See FCC Form 470 Falcon School District 49 (posted Dec. 14, 2004) (listing "Al Green" as Falcon's contact person). The record includes emails which demonstrate Alfred Green's influence in Falcon's competitive bidding process. See, e.g., Email from Alfred Green, Technology Coordinator, Falcon School District 49, to Gary Gaessler, Trillion Partners, Inc. (dated Aug. 10, 2004) ("Subject: Re: Trillion Falcon SD #49 proposal" stating "Gary, got it! I'm prepping my presentation that I will be showing my boss this morning. I'll touch base with you this afternoon.").

²⁹ See Falcon Request for Review at 5.

demonstrating that Falcon's shared the same information with all other potential bidders as it shared with Trillion. Instead, the record shows that Falcon provided Trillion with information and preferential treatment that were not provided to all other potential bidders, in violation of the Commission's competitive bidding requirements.³⁰ Finally, Falcon failed to present any special circumstances that would justify a waiver of the Commission's rules.³¹ We, therefore, affirm our *Charlton County Order*, and deny the petitions for reconsideration from Falcon and Trillion.

6. For the same reasons discussed above, we also deny Falcon's and Trillion's requests for review related to Falcon's applications for funding years 2012.³² Falcon's funding year 2012 applications relied on the same competitive bidding process conducted for funding year 2008.³³ Thus, USAC, relying on our *Charlton County Order*, denied Falcon's funding year 2012 application.³⁴ Because we are now upholding our decision with respect to funding years 2008 through 2010, we also find it appropriate to deny Falcon's and Trillion's requests for review for funding year 2012.³⁵

7. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 1.3, 1.106, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 1.106 and 54.722(a), that the petitions for reconsideration and requests for review filed by Falcon School District 49 and Trillion Partners, Inc., as identified in Appendices A and B, ARE DENIED.

8. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.106, that USAC SHALL

³⁰ See *supra* n.1.

³¹ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

³² See Appendix B.

³³ See Falcon Request for Review at 4. See also FCC Form 471 Falcon School District 49 (dated Feb. 23, 2012) (identifying the FCC Form 470 Falcon School District 49 which was posted Nov. 29, 2007, as the applicable FCC Form 470 for funding request numbers (FRN) 2273728 and 2273735).

³⁴ See Letter from USAC, Schools and Libraries Division, to Virginia Bryant, Trillion Partners, Inc. (dated Nov. 29, 2012) (regarding Falcon School District 49 FY 2012 FCC Form 471 application number 838063, FRNs 2273728 and 2273735) (stating that "[c]onsistent with FCC Order DA 12-260, the FCC has determined that your competitive bidding process was flawed due to improper service provider involvement in the competitive bidding process that [led] to this contract. Therefore, funding is denied.").

³⁵ Falcon's funding year 2012 application relied on the same competitive bidding process conducted for funding years 2008-2010. See *supra* n.33.

CONTINUE its recovery actions against Falcon School District 49 and Trillion Partners, Inc., to the extent provided herein.³⁶

FEDERAL COMMUNICATIONS COMMISSION

Kimberly A. Scardino
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

³⁶ See Demand Payment Letter from USAC, Schools and Libraries Division, to Trillion Partners, Inc. (dated Feb. 28, 2012) (regarding funding year 2005 FCC Form 471 application number 466641, FRN 1299916, seeking recovery for \$60,366.60); Demand Payment Letter from USAC, Schools and Libraries Division, to Trillion Partners, Inc. (dated Feb. 28, 2012) (regarding funding year 2006 FCC Form 471 application number 532406, FRNs 1472041 and 1472101, seeking recovery for \$26,410.14 and \$117,356, respectively); Demand Payment Letter from USAC, Schools and Libraries Division, to Trillion Partners, Inc. (dated Feb. 28, 2012) (regarding funding year 2007 FCC Form 471 application number 577449, FRNs 1606490 and 1606940, seeking recovery for \$136,215.51 and \$38,377.80, respectively).

APPENDIX A

Petitions for Reconsideration Denied

| Petitioner | Application Numbers | Funding Years | Date Request for Review/Waiver Filed |
|--|--|--|--|
| Falcon School District 49 Falcon, CO | 466641 532406 577449 627866 662600 717469 | 2005 2006 2007 2008 2009 2010 | Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 |
| Trillion Partners, Inc. Austin, TX (Falcon School District 49 Falcon, CO) | 466641 532406 577449 627866 662600 717469 | 2005 2006 2007 2008 2009 2010 | Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 Mar. 22, 2012 |

APPENDIX B

Requests for Review Denied

| Petitioner | Application Number | Funding Year | Date Request for Review/Waiver Filed |
|--|---------------------------|---------------------|---|
| Falcon School District 49 Falcon, CO | 838063 | 2012 | Jan. 28, 2013 |
| Trillion Partners, Inc. Austin, TX (Falcon School District 49 Falcon, CO) | 828542 | 2012 | Jan. 18, 2013 |