Before the Federal Communications Commission
Washington, DC 20554

In the Matter of

Request for Review of Decisions of the Universal Service Administrator by

Joseph M. Hill, Trustee in Bankruptcy for Lakehills Consulting, LP.

Schools and Libraries Universal Service Support Mechanism

ORDER

Adopted: November 28, 2011
Released: November 28, 2011

By the Commission:

I. INTRODUCTION

1. In this order, we deny the appeal filed by Joseph M. Hill, trustee in bankruptcy for Lakehills Consulting, LP (Lakehills) of the decision by the Universal Service Administrative Company (USAC) concerning Houston Independent School District’s (Houston ISD) applications for discounted services under the E-rate program (more formally known as the schools and libraries universal service support program) for funding years (FY) 2002-2004.1 USAC rescinded Houston ISD’s applications on the grounds that its competitive bidding processes violated the Commission’s rules.2 Specifically, USAC found that Houston ISD had pre-selected Lakehills’s predecessor Analytical Computer Services (ACS) for its contracts.3 USAC further found that Houston ISD had met with ACS during the bidding period and accepted gifts from ACS.4 Upon review of the record, we find that Houston ISD and ACS violated the Commission’s competitive bidding rules, and that E-rate funds should not have been committed or disbursed to ACS or its successors, including Lakehills.5 We therefore affirm USAC’s decision to rescind funding commitments for FYs 2002-2004 and deny Lakehills’s request for review.

1 See appendix; Request for Review of a Decision of the Universal Service Administrator/Waiver for Lakehills Consulting LP, CC Docket No. 02-6 (filed May 31, 2011) (regarding Houston ISD FY 2002 - 2004 FCC Form 471 application numbers 295389, 367296, 377451, 398823, and 398827) (Request for Review). In this order, we use the term “appeals” to generically refer to requests for review of decisions issued by USAC. Section 54.719(c) of the Commission’s rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).


3 See id.

4 See id.

II. BACKGROUND

2. E-rate Program Rules and Procedures. Under the E-rate program, eligible schools, libraries, and consortia may apply for discounts for eligible services.6 The Commission’s rules provide that these entities must seek competitive bids for all 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, such as tariffed telecommunications services, month-to-month Internet access, or any services for which the applicant is seeking a new contract.8 The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.9 The applicant must provide this description on its FCC Form 470 or indicate on the form that it has a request for proposal (RFP) available, providing detail about the requested services.10 The RFP must be available to all potential bidders.11 The applicant must consider all submitted bids prior to entering into a contract, and price must be the primary factor in selecting the winning bid.12

3. After submitting an FCC Form 470 or issuing an RFP, the applicant must wait 28 days before making commitments with the selected service providers13 and submitting an FCC Form 471.14 Section 54.504(a) of our rules also states that the FCC Form 471 requesting support for the services ordered by the applicant shall be submitted “upon signing a contract for eligible services.”15 Thus, applicants must have a “signed contract” or a “legally binding agreement” with the service provider “for all services” ordered on the FCC Form 471.16 USAC assigns a funding request number (FRN) to each request for discounted services and issues Funding Commitment Decision Letters (FCDL) approving or denying the requests for discounted services.17

7 Id. § 54.504(a) (2002).
8 Id. § 54.504(b) (2002).
9 Id.
11 Id.
13 47 C.F.R. § 54.503(c)(4)(2011). See also Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26408-09, para. 39 (2003) (Ysleta) (“To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days.”).
4. The Commission has consistently stated that 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.\(^{18}\) In essence, 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.\(^{19}\) The Commission has also made clear its intent to "recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission's competitive bidding requirements as set forth in section 54.504 and 54.511 of our rules and amplified in related Commission orders."\(^{20}\)

5. Houston ISD's Application Process. Our decision encompasses three different funding year requests from Houston ISD and its service providers. On September 24, 2001, Houston ISD submitted its FCC Form 470 application to USAC for posting on USAC's website.\(^{21}\) The FCC Form 470 sought bids for telecommunications services, Internet access, and internal connections for FY 2002.\(^{22}\) On December 7, 2001, Houston ISD released RFPs for network cabling, network development and network maintenance.\(^{23}\) In response, Houston ISD received bids from multiple vendors, including Texas Cooperative Purchasing Network at Region IV Educational Service Center (Region IV ESC).\(^{24}\) Region IV ESC's bid included ACS and Micro Systems Engineering (MSE) as resellers of equipment offered by Compaq Computers Inc. (Compaq) and Hewlett Packard Company (HP).\(^{25}\) On January 16, 2002, Houston ISD submitted its FCC Form 471 application certifying that it had a contract with Region IV ESC.

\(^{18}\) See, e.g., 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 (Schools and Libraries Third Report and Order) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources); Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket No. 96-45, Order, 16 FCC Rcd 4028 (2000) (Mastermind Order) (finding that the FCC Form 470 contact person influences an applicant’s competitive bidding process by controlling the dissemination of information regarding the services requested and, when an applicant delegates that power to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold a fair competitive bidding process); see also Request for Review by Dickenson County Public Schools, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 17 FCC Rcd 15747, 15748, para. 3 (2002); Request for Review by Approach Learning and Assessment Center, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 22 FCC Rcd 5296, 5303, para. 19 (Wireline Comp. Bur. 2007) (Approach Learning Order) (finding that service provider participation may have suppressed fair and open competitive bidding). More recently, 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 and A National Broadband Plan for Our Future, Sixth Report and Order, CC Docket 02-6, 25 FCC Rcd 18762, 18798-800, paras. 85-86 (2010) (Schools and Libraries Sixth Report and Order); 47 C.F.R. § 54.503.

\(^{19}\) See Mastermind Order, 16 FCC Rcd at 4033, para. 10.

\(^{20}\) Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15815, para. 21 (Schools and Libraries Fifth Report and Order).


\(^{22}\) See id.; see also Further Explanation of the Administrator’s Decisions at 4 & Tab 1.

\(^{23}\) See Further Explanation of the Administrator’s Decision at 4.

\(^{24}\) See Further Explanation of the Administrator’s Decision at Tabs, 11, 12, 13. For network cabling, Houston ISD received bids from five entities: Orius Corp., Network Cabling Division; MCA, Texas Cooperative Purchasing Network, Avatar Computer Solutions, Inc., and Inteleserv, Inc. See id. at Tab 11. For network development and maintenance, Houston ISD received bids from two entities: Computer Tech. and Texas Cooperative Purchasing Network. See id. at Tabs 12-13.

\(^{25}\) See Further Explanation of the Administrator’s Decision at 4 & Tabs 6, 7, 8. USAC notes that “Compaq Computers, Inc. merged with Hewlett Packard Company in the 2000/2001 timeframe.” See id. at 5, n. 20.
ESC as of January 10, 2002. However, Houston ISD’s documentation shows that it did not actually have a signed contract with Region IV ESC until February 6, 2002, which was later approved by its board on February 14, 2002.

6. For funding year 2003, Houston ISD issued RFPs for network cabling, network hardware and workstations, and network maintenance on November 15, 2002. On December 11, 2002, Houston ISD received three identical responses to the RFPs with three identical price lists: one from a group consisting of ACS, MSE and Region IV ESC, combined; a second response from Acclaim Professional Services, Inc.; and a third response from ACS, individually. On December 16, 2002, Houston ISD submitted its FCC Form 470 for posting, seeking bids on telecommunications services, Internet access, and internal connections for FY 2003. On December 19, 2002, ACS added MSE as a co-respondent on its individual proposal, and Houston ISD awarded one contract to ACS and MSE on the same day and the remaining contracts on the next day. On February 5, 2003, however, Houston ISD filed two FCC Form 471 applications, stating that the contracts were awarded on January 16, 2003, nearly one month after Houston ISD actually awarded the contracts to ACS and MSE. Also in January of 2003, Houston ISD requested that the service provider identification number (SPIN) for all funding requests involving Region IV ESC be changed to ACS. USAC granted Houston ISD’s request, and ACS became the eligible recipient for Houston ISD’s FY 2002 funding requests.

7. For funding year 2004, on October 10, 2003, Houston ISD submitted its FCC Form 470 application for telecommunications services, Internet access, and internal connections. On November 12, 2003, Houston ISD issued RFPs for network development, desktop computers, printers and related peripheral devices, network maintenance and network cabling. On the same day, ACS and MSE submitted a bid. Houston ISD also received bids from five other companies. On December 5, 2003,

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26 See Houston ISD FY 2002 FCC Form 471 application number 295389, Block 5 (filed Jan. 16, 2002) (stating that award date was January 10, 2002).
27 See Further Explanation of the Administrator’s Decision at Tabs 11-13.
28 See Further Explanation of the Administrator’s Decisions at 9.
29 See id.
31 See Further Explanation of the Administrator’s Decisions at Tab 44.
32 Further Explanation of the Administrator’s Decisions at 9 & Tabs 41-43 (awarding network cabling on December 20, 2002; network hardware and workstations on December 19, 2002; and network maintenance on December 20, 2002).
33 See Further Explanation of the Administrator’s Decisions at Tabs 46-47.
34 See id. at Tab 10 (Houston ISD SPIN Change Request) (requesting that all funding requests involving Region IV be changed to ACS); see also id. at Tab 9 (Original FCC Form 471 identifying Region IV as the SPIN associated with the FY 2002 funding requests).
36 See FCC Form 470, Houston Independent School District (posted Oct. 10, 2003); see also Further Explanation of the Administrator’s Decisions at Tab 79.
37 See Further Explanation of the Administrator’s Decisions at Tabs 80-82.
38 See id. at 16, & Tabs 83-85. While the bid appears to be submitted by ACS and MSE, the proposal states that ACS and MSE, “together with Lakehills ISC, LLC, U.S. Tech, Data Projections, Inc., and Anixter, Inc. have teamed to provide a superior offering to Houston” ISD. See id. at Tab 83 at 6.
39 For network development, desktop computers, printers and related peripheral devices, Houston ISD received bids from the following six vendors: ACS/MSE, Advancetech Systems 2, Inc., NetView Technologies, Tech Depot, (continued...
Houston ISD awarded all three contracts to ACS and MSE. On January 28, 2004, and February 4, 2004, Houston ISD filed its FCC Form 471 applications stating that it had awarded the contracts to ACS on December 11, 2003.

8. Lakehills’s Acquisition of ACS and USAC’s Funding Hold. On January 12, 2007, Lakehills acquired ACS. In a letter to Houston ISD, Lakehills stated that it had acquired all the assets and liabilities of ACS, including all of ACS’s contracts and employees. Lakehills assured Houston ISD that all of the products and services promised by the ACS contracts would be delivered by Lakehills. On March 8, 2007, Lakehills requested that USAC transfer all E-rate activity related to ACS’s SPINs to Lakehills’s SPIN. On March 9, 2007, USAC granted Lakehills’s SPIN request and as a result, Lakehills became the eligible service provider of all of the applications for which ACS had been the service provider.

9. While Lakehills was undertaking these changes, a news media outlet, the Houston Chronicle, published a news article on January 7, 2007, regarding Houston ISD’s selection of ACS, a reseller of HP products, as its service provider. The Houston Chronicle article called into question Houston ISD’s decision to select ACS due to ACS’s business relationship with MSE. The article alleged that MSE’s president, Mr. Wong, who had a management role in ACS, bribed employees of the Dallas Independent School District (Dallas ISD) to obtain contracts for MSE. Both ACS and MSE were resellers of HP products to Dallas ISD, as well as to Houston ISD, and HP decertified ACS as a reseller as a result of the allegations. The article also questioned the decision of ACS president, Mr. Trifilio, to

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make political donations to certain Houston ISD board members.50 On March 19, 2007, USAC sent a letter to ACS inquiring about its business ties with MSE, its involvement in Houston ISD’s competitive bidding process, and its alleged violations of HP’s ethics rules.51 Among other questions, USAC asked ACS to respond to the Houston Chronicle’s discussion of ACS’s alleged participation in “bribery and kickbacks.”52 In response, Mr. Trifilio, president of ACS and minority owner in Lakehills, denied any wrongdoing and stated HP did not offer a specific reason for severing its ties with ACS.53

10. In a letter dated September 27, 2007, USAC informed Lakehills that it would hold E-rate payments to Lakehills, successor to ACS, because of ACS’s business ties with MSE.54 In this second letter, this time addressed to Lakehills, USAC noted that ACS and MSE had co-signed contracts for Houston ISD, and that federal criminal charges had been filed against Mr. Wong, president of MSE, alleging bribery in connection with the awarding of E-rate contracts by the Dallas ISD.55 USAC asked Lakehills to explain MSE’s involvement with ACS’s contracts.56 USAC also asked Lakehills to identify the individuals employed by Lakehills and explain whether they had also been employed by ACS.57 On October 3, 2007, Lakehills responded to USAC’s letter and explained that Houston ISD had required MSE to be a part of ACS’s contracts.58 Lakehills also confirmed that all ACS personnel had become employees of Lakehills.59 After receiving this information, in November of 2007, USAC issued a letter stating that it would continue to hold payments to Lakehills because of the ties between ACS, Lakehills, and MSE, and because of the indictment of MSE’s president, Mr. Wong.60

11. Lakehills’s Bankruptcy and Court Proceedings. In June of 2009, Lakehills filed for Chapter 7 bankruptcy.61 Lakehills claims that USAC’s failure to pay for its E-rate work is the primary cause for its filing.62 Lakehills also claims the E-rate funds as assets in the bankruptcy proceeding.63 On December 2, 2009, the United States government filed a proof of claim for $225,182,370, an amount
equal to the sum of the ACS contracts, trebled as permitted by the False Claims Act (FCA). The United States stated that USAC is required to recover the full amount of funds disbursed for any funding requests in which the applicant or service provider failed to comply with Commission rules and order. The government contends that Lakehills “through its predecessor ACS and its joint venture partners provided extensive gratuities, including meals, tickets to sporting events, monetary loans and trips to Las Vegas and Miami to school district personnel in charge of technology purchasing at . . . [Houston ISD].” The United States noted that “the co-owner and president of ACS’s joint venture partner and the chief technology officer of the Dallas Independent School District were convicted of various charges, including bribery and defrauding a federal program.” The court has stayed the bankruptcy proceeding pending the Commission’s decision in this order.

12. In a separate action, on March 5, 2010, Houston ISD entered into a settlement agreement with the United States government. This agreement settled a Department of Justice investigation into Houston ISD’s competitive bidding processes. Specifically, the government again alleged that employees of Houston ISD had engaged in non-competitive bidding practices by accepting significant gratuities from Acclaim and others and, consequently, submitted false claims for payment to the United States in violation of the FCA. As part of the agreement, Houston ISD agreed to pay a settlement amount and relinquish all of its rights to funding requests from FY 2002-2004. The funding requests covered in the settlement agreement were those originally awarded to Region IV ESC; ACS, the predecessor of Lakehills; MSE; or Acclaim.

13. On December 22, 2010, the United States intervened in a *qui tam* action in the District Court for the Southern District of Texas. The United States claims that ACS and [Larry] Lehmann [de facto managing partner of Acclaim] colluded to rig the competitive bidding process for E-rate contracts by providing illegal gifts of goods and services to [Houston ISD] officials, including Laura Palmer and Steve Kim at [Houston ISD] in exchange for providing ACS and its business partners with inside information and/or favorable undue consideration in the bidding process for contracts to provide technology services under [Houston ISD's] E-rate programs.

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65 See id. at 2.
66 For purposes of this order, we use the term “government” to refer to the United States government.
67 See id.
68 See id.
69 See Request for Review at 15 n.10.
70 See Request for Review, Exhibit B; see also Further Explanation of the Administrator’s Decisions at Tab 34 (Settlement Agreement).
71 See generally Settlement Agreement.
72 See id.
73 See id. at 3 (requiring Houston ISD to pay $850,000 to the United States).
74 See id. at 2.
76 See id. at 13.
The United States also claims, among other things, that ACS entertained Houston ISD employees in its
suites at the Houston Reliant Stadium for football games including the Super Bowl,77 and that ACS
knowingly caused false statements to be made to the United States.78 As a result, the United States seeks
to recover treble damages under the FCA and under common law from ACS and Larry Lehmann for
payment by mistake and unjust enrichment.79

14. USAC Rescission of Houston ISD Funding Requests. In 2011, USAC rescinded numerous
funding requests for Houston ISD from funding years 2002-2004 because of competitive bidding
violations.80 For FY 2002, USAC found that Houston ISD selected Region IV ESC and its partners,
which included ACS, as the winning bidder before it concluded its competitive bidding process.81 To
support this finding, USAC relied on email correspondence between bidders and Houston ISD, in which
things of value were offered in exchange for Houston ISD selecting the bidder as the service provider.
For example, USAC cited to an email between MSE and an employee of Houston ISD in which MSE
offered to provide advance pricing information for Compaq and gifts to the employee in return for
business with Houston ISD.82 USAC noted that Region IV ESC’s bid included ACS and MSE as resellers
of Compaq equipment.83 USAC also relies on another example in which an employee of Houston ISD
instructed other employees involved in the competitive bidding process to give bidders the impression
that their bids were considered equally, even if the employee knew that Houston ISD was not interested in
using the particular bidder.84 A third email from Houston ISD’s principal E-rate employee, Jill Duncan,
to the Houston ISD employee responsible for selecting the winning bid, Steve Kim, informed Mr. Kim to
provide a potential bidder with information on equipment “like items we know we can get a better price
elsewhere…TCPN [i.e., Region IV ESC],” again showing a preference to Region IV ESC.85 USAC also
found that Houston ISD had filed an FCC Form 471 prior to signing any contracts for services.86 In
addition to the lack of signed contracts and the evidence that Houston ISD had predetermined the
outcome of its process, USAC found that Houston ISD accepted numerous gifts from ACS, MSE, and
HP, in violation of Commission rules that applicants conduct a fair and open competitive bidding process,
and in violation of Houston ISD’s own polices and RFPs.87 These gifts included meals, entertainment,88
and sponsorship in a golf tournament.89

77 See id. The government also lists the numerous meals, trips, loans, and other gifts given by ACS’s business
partners – MSE, HP, and Acclaim – in support of its pleading.
78 See id. at 1.
79 See id. at 1.
80 See Further Explanation of the Administrator’s Decisions at 1; see also Letter from USAC, Schools and Libraries
Division, to Kevin Killebrew, Lakehills Consulting, LP (Oct. 26, 2011) (regarding Houston ISD FY 2002 FCC
Form 471 application number 295389; FY 2003 FCC Form 471 application number 367296; FY 2003 FCC form
471 application number 377451).
81 See Further Explanation of the Administrator’s Decisions at 4-5 (describing an email from September 26, 2001,
between an HP representative and a Houston ISD employee, in which the HP representative thanked the Houston
ISD employee for meeting for lunch, noted enthusiasm towards strategizing for its future partnership with the
District, and offered dates to treat the Houston employee to a University of Texas game). This email was dated two
days after the posting of Houston’s FY 2002 FCC Form 470 on September 24, 2001.
82 See id. at 5.
83 See Further Explanation of the Administrator’s Decisions at Tab 7.
84 See id.
85 See id. at Tab 17.
86 See Further Explanation of the Administrator’s Decisions at 4.
87 See id. at 6-8.
15. For FY 2003 and 2004, USAC also found that Houston ISD awarded ACS and contracts before it completed its competitive bidding process.\(^9\) USAC provided detailed examples of meetings between Houston ISD employees, ACS and MSE prior to the completion of the competitive bidding process. For example, USAC found that a Houston ISD employee met with ACS, MSE, and Houston ISD procurement employees on December 18, 2002, to specifically discuss Houston ISD’s RFP two days before it posted its FCC Form 470.\(^9\) USAC also relied on an email between Houston ISD employees and HP in which HP asked Houston ISD if it had a preference in resellers for HP equipment and offered to “prepare a bid for MSE to submit.”\(^9\) USAC also found that Houston ISD accepted gifts from ACS, MSE, and HP in the form of meals,\(^9\) sporting events,\(^9\) and trips to places such as Las Vegas, Nevada and Seattle, Washington.\(^9\) For example, three days after Houston ISD posted its FCC Form 470 for FY 2003, ACS provided a restaurant lunch to seven Houston ISD employees.\(^9\) USAC notes that in 2004, ACS, MSE, HP, and Acclaim provided Houston ISD employees with meals, gift cards,\(^8\) monetary loans,\(^9\) and Super Bowl tickets worth between $400 and $600 each at Houston’s Reliant Stadium.\(^9\) In addition to the above violations, USAC also determined that for FY 2003, Houston ISD failed to wait 28 days to select a winner as required by Commission rules, and instead, selected ACS and MSE within four days of posting the FCC Form 470.\(^10\)

16. In the FY 2002-2004 commitment adjustment letters, USAC notes that it could not recover funds from Houston ISD due to the settlement agreement between the Houston ISD and the United States government.\(^10\) However, the Commission has stated that in instances where both the beneficiary and the service provider share responsibility for a statutory or rule violation, USAC may initiate recovery against both parties and shall pursue such claims until the amount is satisfied by one of the parties.\(^10\) In the

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\(^8\) See id. at 6-8. For example, ACS hosted a “Welcome to the Weekend” at Dave and Busters restaurant for Houston ISD employees and provided a buffet, drinks, pool and game tokens. See id. at 6. HP provided numerous dinners to Houston ISD employees at restaurants such as Tokyohana, P.F. Chang’s, and Paesanos Riverwalk Restaurant, among others. See id. 6-8.

\(^9\) HP sponsored Houston ISD employees in MSE’s annual golf tournament. See id. at 6-8.

\(^10\) See e.g. Letter from USAC, Schools and Libraries Division, to Lakehills Consulting, L.P. (regarding Houston ISD’s FY 2004 FCC Form 471 application number 398823) (Houston ISD Commitment Adjustment Letter for Form 471 Application Number 398823, FRN 1123651).
instant case, USAC found that ACS engaged in rule violations that should render Houston ISD, ACS and any successor to ACS ineligible for E-rate funds related to the Houston applications for FY 2002-2004.\(^{103}\)

17. **Lakehills's Request for Review.** On May 31, 2011, Lakehills filed the instant appeal with the Commission.\(^{104}\) In its Request for Review, Lakehills broadly argues that the Commission has wrongly expanded the scope of its rules regarding withholding and recovering E-rate funds to include full recovery for violations of Commission rules, rather than limiting such recovery to violations of statutes.\(^{105}\) Lakehills claims that the case *OPM v. Richmond*,\(^{106}\) relied upon by the Commission as a basis for its recovery mechanism, only supports recovery for statutory, not regulatory violations.\(^{107}\) Lakehills claims that the Telecommunications Act of 1996 does not require compliance with the Commission’s competitive bidding rules as a prerequisite to obtaining universal service funds, and that the Commission should not adopt a policy that does so either.\(^{108}\) To the extent that the Commission does not “confine[] . . . the FCC Rule to violations of statute only,” Lakehills requests that “the FCC . . . waive application of the Rule” here.\(^{109}\)

18. Lakehills also claims that all of its work for HISD was performed satisfactorily, and that notwithstanding the directives of the applicable Commission rule, USAC should have accounted for the benefits bestowed on HISD in determining the amount of recovery.\(^{110}\) Lakehills argues that principles under the False Claims Act, Federal Assignment of Claims Act (Assignment of Claims Act) and contract law should guide the Commission in this proceeding.\(^{111}\) Failure to consider the value of the services Lakehills provided, according to Lakehills, effectively amounts to issuing an invalid forfeiture.\(^{112}\) Alternatively, Lakehills argues that the Commission should waive its rules in light of the special circumstances in this case.\(^{113}\) Essentially, Lakehills claims that it was unaware of the settlement between Houston ISD and the United States government which cancelled and/or rescinded certain funding requests involving Lakehills.\(^{114}\) Lakehills also argues that MSE was compensated for its work despite its rule violations and criminal convictions and that it is unfair to decline to compensate Lakehills.\(^{115}\) Further, Lakehills claims that USAC should have informed it of the possible taint with the Houston ISD-ACS contracts.\(^{116}\) Lakehills complains that it undertook an expensive project to install switches in Houston ISD schools under the impression that payment was delayed for administrative reasons and that, ultimately, it is inequitable for Houston ISD to retain the benefit of the work done by Lakehills.\(^{117}\)

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\(^{103}\) See Further Explanation of the Administrator’s Decisions at 22.

\(^{104}\) See generally Request for Review.

\(^{105}\) See id. at 9-14.


\(^{107}\) See Request for Review at 12-13.

\(^{108}\) See id. at 13.

\(^{109}\) Request for Review at 3 n.4.

\(^{110}\) See e.g., id. at 15.

\(^{111}\) See id. at 14-17.

\(^{112}\) See id. at 17-19.

\(^{113}\) See id. at 19-24.

\(^{114}\) See id. at 20.

\(^{115}\) See id. at 22.

\(^{116}\) See id. at 23.

\(^{117}\) See id.
III. DISCUSSION

19. We deny Lakehills’s appeal. We find that Houston ISD decided to select ACS as its service provider prior to the conclusion of its funding year 2002, 2003 and 2004 competitive bidding processes and accepted extensive gifts from ACS in violation of Commission rules. We also find that for FY 2002, Houston ISD failed to have a signed contract at the time of its FCC Form 471 filing and that it failed to wait 28 days prior to selecting ACS as its winner for FY 2003. We reject Lakehills’s argument that the Commission cannot recover funds for regulatory violations, and we also deny Lakehills’s specific arguments as to the calculation of recovery in this case. Finally, we decline to grant a waiver in this case as requested by Lakehills.

A. USAC Correctly Found that the Applicants Violated the Competitive Bidding Rules.

20. The Commission has consistently required that the competitive bidding process for E-rate services be fair and open, and that no bidders receive an unfair advantage. The process cannot be compromised through improper conduct by the applicant, service provider, or both parties. Here, we find that USAC correctly determined that Houston ISD, ACS/Lakehills, MSE, and Acclaim violated the Commission’s competitive bidding rules for funding years 2002, 2003 and 2004. As an initial matter, for FY 2002, Houston ISD filed its FCC Form 471 on January 16, 2002, but did not have signed contracts until February 6, 2002, in violation of our rules. More significantly, however, the record is replete with examples demonstrating that Houston ISD selected Region IV ESC and its partners, including ACS, prior to the conclusion of the competitive bidding process. The email correspondence shows that Houston ISD tailored its process to reflect the services and products offered by Region IV ESC, ACS, and MSE. Also, the fact that Houston ISD selected ACS within four days of posting its FCC Form 470 for FY 2003 not only violates Commission rules requiring applicants to wait 28 days prior to making a selection, but also further demonstrates that Houston ISD’s competitive bidding process was not fair and open. Further, Houston ISD met with and accepted extensive gifts from ACS, HP, MSE, and Acclaim. The extensive list of examples from USAC includes meals, tickets to sporting events at Minute Maid Park, tickets to ACS’s suite for the Super Bowl at the Houston Reliant Stadium, monetary loans in the amount of $60,000, and trips to Las Vegas, Nevada, and Seattle, Washington. These gifts were

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118 See supra para 4.

119 Id.

120 See supra para. 2 (discussing Section 54.504 (a) and its requirement to file an FCC Form 471 “upon signing a contract for eligible services).

121 See supra para. 13; see also Further Explanation of the Administrator’s Decisions at 4-9.

122 See supra para. 13.

123 See supra para. 6.

124 See supra para. 13-14.

125 See, e.g., Further Explanation of the Administrator’s Decisions at 6 - 12 (discussing meals given by ACS, HP, or MSE to multiple employees of Houston ISD at venues such as, but not limited to: Dave and Busters, Quizno’s, Tokyohana, P.F. Chang’s, Little Pappasitos, Paesanos Riverwalk Restaurant, Collina’s Italina Cafe, Vietopia, UGO’s Italian Grill, HIDO Japanese Grill, Cafe Pappadeaux, Houston’s, Chachos, Hollister Grill, Champps Americana, Jason’s Deli).

126 See id. at 12-13.

127 See id. at 17.

128 See id. at 19.

129 See id. at 12-13.
given to various Houston ISD employees, including those with the authority to select the winning service provider. 131 Lakehills does not dispute any of these facts.

21. We are deeply concerned about practices such as these that undermine the framework of the competitive bidding process. Service provider actions of the type addressed here suppress fair and open competitive bidding and ultimately damage the integrity of the E-rate program. 132 The Universal Service Fund is a limited resource, and applicants and service providers who acquire funds by violating our rules reduce the amount available for compliant applicants. Based on our review of the record, we find that Houston ISD conducted a bidding process that was not fair and open and selected ACS in violation of the competitive bidding rules. 133 Universal service funding should not have been distributed to ACS, nor to any successor of ACS, including Lakehills.

B. Recovery for Regulatory Violations Is Allowable.

22. We reject Lakehills’s argument that the Commission cannot recover funds when violations of the Commission’s rules have occurred, as opposed to statutory violations. The Supreme Court has long held that the government can recover funds which have been wrongfully, erroneously, or illegally paid, and no statute is required to authorize the government to do so. 134 To the contrary, “properly promulgated, substantive agency regulations have the ‘force and effect of law.’” 135

23. Lakehills also argues that the Commission has impermissibly broadened the applicability of the holding of OPM v. Richmond 136 to include recovery for rule violations, and that the Telecommunications Act of 1996 does not require competitive bidding compliance before we commit funds to an applicant or service provider. 137 Lakehills misreads the cases. The Supreme Court precedent does not hold that agencies may only recover funds when a statute has been violated. In OPM v. Richmond, the Supreme Court held that money could not be disbursed from the Treasury without statutory authorization. 138 However, to arrive at this holding, the Supreme Court cited to Schweiker v.

(continued from previous page)
Hanson, which found that a violation of an agency rule also prohibited the expenditure of public funds.\textsuperscript{139} Furthermore, in Schweiker, the Supreme Court stated that while Congress had provided by statute that only one who had filed an application for benefits may receive them, the Social Security Administration was responsible for promulgating rules to determine the requisite manner of application.\textsuperscript{140} Similarly, in our case, the Telecommunications Act of 1996 directed the Commission to promulgate rules to preserve and advance universal service.\textsuperscript{141} To that end, the Commission’s competitive bidding rules ensure that the fund supports services that satisfy the needs of an institution at the lowest possible price.\textsuperscript{142} These rules further the Act’s substantive goals, and therefore must be adhered to by applicants and service providers.

24. Furthermore, if an entity receives government funds wrongfully, it is as if the government funds were given for an obligation that did not exist in the first instance.\textsuperscript{143} In the E-rate context, applicants must comply with the Commission’s rules requiring a fair and open competitive bidding process to be eligible to receive E-rate funding.\textsuperscript{144} By this order, we find that Lakehills, through its predecessor ACS, acquired the Houston ISD contracts in a manner that violated the Commission’s competitive bidding rules. Therefore, the universal service funds should not have been committed or disbursed to ACS in the first instance.\textsuperscript{145}

C. USAC Properly Sought Full Recovery from Lakehills.

25. We next reject Lakehills’s arguments that we must consider the value of the services given to Houston ISD as an offset to the amount of recovery for the government, as Lakehills claims would be done under the FCA, the Assignment of Claims Act, and contract law. First, under E-rate rules, which are the binding authority here, we find that whether the work was performed is not relevant to whether there was a violation of the competitive bidding rules.\textsuperscript{146} The contracts between Houston ISD

\textsuperscript{139} See OPM v. Richmond, 496 U.S. at 429; see also Schweiker v. Hansen, 450 U.S. 785, 790 (1981) ("A court is no more authorized to overlook a valid regulation... than it is to overlook any other valid requirement for the receipt of benefits"); Doe v. United States, 372 F. 3d 1347, 1356 (Fed. Cir. 2004).

\textsuperscript{140} See Schweiker, 450 U.S. at 790. See generally, Doe, 372 F. 3d at 1357 (finding that OPM was not limited by the statute to promulgate merely administrative directives, but was empowered to issue regulations setting forth substantive requirements); Contreras v. United States, 215 F.3d 1267 (Fed. Cir. 2000) (finding that Congress authorized OPM to issue regulations “necessary for the administration” of the Act, which meant that OPM could “fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program.”).

\textsuperscript{141} See 47 U.S.C. § 254(a)(2); see also 47 U.S.C. § 254(b)(1) & (6).

\textsuperscript{142} Federal-State Joint Board on Universal Service, CC Docket No 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5426, para. 185 (1997).

\textsuperscript{143} See Mt. Vernon Cooperative Bank v. Gleason, 367 F.2d 289, 291 (1st Cir. 1966); Cabel v. United States, 113 F.2d 998, 1000 (1st Cir. 1940) ("Persons receiving payments illegally made by a government disbursing officer are liable to refund them.").

\textsuperscript{144} See generally 47 C.F.R. §§ 54.504-511 (competitive bidding requirements); see also Mastermind Order, 16 FCC Rcd 4028 (2000) (affirming denial of applications for E-rate funding based on a finding that applicant violated the Commission’s competitive bidding rules).

\textsuperscript{145} Schools and Libraries Fifth Report and Order, 19 FCC Rcd at 15815-16, para. 21. The Commission has found that funds disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered in full. See id. at 15814-15.

and ASC were awarded outside of fair and open competitive bidding processes in violation of the Commission’s rules, and therefore neither ACS nor Lakehills is entitled to any E-rate funding.\footnote{47 C.F.R. §§ 54.503, 54.511; MasterMind Order, 16 FCC Rcd at 4032-35, para. 9-14 (E-rate funding properly denied due to competitive bidding violations); see also Ysleta, 18 FCC Rcd at 26408-09, paras. 1-4 (USAC properly denied funding due to competitive bidding violations); cf., Request for Immediate Relief filed by the State of Tennessee, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45, 97-21, 18 FCC Rcd 13581, 13587 para. 18 (2003) (Tennessee Order) (relief is appropriate only where there were no allegations of waste, fraud, abuse, or other wrongdoing relating to the award of the specific contract itself).}

26. Furthermore, we find unpersuasive Lakehills’s collateral attacks on the Commission’s rules as violating “the legal norms” established in the FCA, the Assignment of Claims Act, and contract law.\footnote{Request for Review at 3-4.} Although we do not find the other legal frameworks cited by Lakehills to be applicable here, even if they were, we are not persuaded that they would require a different result. In this case, Lakehills has not demonstrated that the FCA would prohibit full recovery of the universal service funding committed and disbursed. As explained in the \textit{SAIC} case relied upon by Lakehills,\footnote{Request for Review at 15 (citing United States v. Science Applications International Corporation, 626 F.3d 1257, 1278 (D.C. Cir. 2010) (SAIC)).} the fact-finder seeks to “set an award that puts the government in the same position as it would have been if the defendant’s claims had not been false” when calculating damages under the FCA.\footnote{\textit{See SAIC}, 626 F.3d at 1278 (emphasis added). The FCA imposes liability on a person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to the government. \textit{Id.} at 1266.} Moreover, in cases such as this where

the defendant fraudulently sought payments for participating in programs \textit{designed to benefit third-parties rather than the government itself}, the government can easily establish that it received nothing of value from the defendant and that all payments made are therefore recoverable as damages.\footnote{\textit{Id.} at 1279 (emphasis added). Courts have reached the same conclusion in different contexts. \textit{See id.} (citing United States v. TDC Management Corp., 288 F.3d 421, 428 (D.C. Cir. 2002); United States \textit{ex rel. Longhi v. Lithium Power Techs., Inc.}, 575 F.3d 438, 473 (5th Cir.2009); United States \textit{v. Rogan}, 517 F.3d 449, 453 (7th Cir.2008)).}

Although Lakehills alleges that a potential benefit to the United States was “a more technologically savvy and educated citizenry,” we find no cognizable benefit was conferred on the United States by Lakehills or its predecessors for purposes of the FCA.\footnote{\textit{Id.} at 1279 (emphasis added).} In this regard, we find the court’s decision under the FCA in \textit{U.S. v. Rogan} more analogous to the circumstances here than the cases cited by Lakehills.\footnote{\textit{See United States v. Rogan}, 517 F.3d 449, 453 (7th Cir. 2008) (finding that where the government offered a subsidy for the provision of medical services to patients, no service was provided to the United States).} In \textit{Rogan}, the court found that certain Medicaid funding conditions were not met because the patients had been referred to the defendant fraudulently, and thus “nothing is due.”\footnote{\textit{Id.}} Likewise here, Lakehills did not satisfy the conditions required under the Commission’s rules for receiving universal service support because it

\footnote{\textit{Id.}.}
violated the Commission’s competitive bidding rules. In *Rogan*, the court further found that regardless of whether or not medical services were provided to the patients, the defendant “did not furnish any medical service to the United States.”  

Likewise here, we find that Lakehills provided no services to the United States, and that the value of any goods or services provided by Lakehills benefited Houston ISD, not the United States. Thus, under *Rogan*, the FCA does not compel the Commission to offset any amount of E-rate payments for Lakehills’s provision of services or products at issue here. Indeed, Lakehills cites no cases where the government was precluded from recovering payments under the FCA on the basis that it received intangible benefits such as “a more technologically savvy and educated citizenry” that are speculative at best.  

27. Lakehills’s arguments under the Assignment of Claims Act and general contract law are equally unpersuasive.  

Essentially, the Assignment of Claims Act prohibits the assignment of claims against the United States, with an exception for monies due to financing institutions. Lakehills argues that under the Assignment of Claims Act, “the government still is obligated to pay the financial institution up to the value the contractor delivered to the government.”  

First, the provision cited by Lakehills applies to contracts for services or products provided to the government to which the government is a party, and Lakehills has not explained how it could apply in this case, where there is no such contract. E-rate funding is provided to eligible entities such as Houston ISD pursuant to government regulations, not through a contract. Moreover, we find the cases cited by Lakehills to be inapposite, because they involve goods and services received by the United States government under a contract with the United States government.  

Here, by contrast, Lakehills had a contract with Houston ISD, and the goods and services provided by Lakehills went to Houston ISD. We therefore reject Lakehills’s contention that the Assignment of Claims Act compels any payments to be made to Lakehills, or to any financial institution. Similarly, as to Lakehills’s arguments regarding general contract law, no contract exists between USAC and Lakehills or the Commission and Lakehills. Thus, Lakehills’s argument that it should receive funding from the Universal Service Fund for the work it completed under a tainted contract with Houston ISD is untenable.  

28. Additionally, we deny Lakehills’s forfeiture arguments. Lakehills claims that USAC’s denial of funding is a forfeiture that exceeds the Commission’s statutory authority. Specifically, Lakehills argues that the amount of recovery sought by USAC exceeds the maximum dollar amount, *i.e.*, $112,500, collectible under the Commission’s forfeiture rules. Lakehills also claims the time in which the Commission had to act, *i.e.* one year following discovery of a violation, has passed. First, we note

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155 Id.  
156 Lakehills also fails to quantify any value of this alleged intangible benefit. At most, only those benefits to the government that can be quantified could possibly be subtracted from sums recoverable under the FCA. See *Longhi v. Lithium Power Technologies, Inc.*, 575 F.3d 458, 473 (5th Cir. 2009) (holding that “[i]n a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants”).  

157 See Request for Review at 17.  
158 See *Delmarva Power and Light Co. v. United States*, 542 F.3d 889, 892 (Fed. Cir. 2008) (citations omitted).  
159 See Request for Review at 17.  
161 See Request for Review at 17.  
162 See id. at 18.  
163 See id. at 19.
that a forfeiture\textsuperscript{164} is far different from the denial of funding to which one has no entitlement, \textit{e.g.}, universal service funds.\textsuperscript{165} Neither ACS nor Lakehills has a right to funding from the Universal Service Fund. Furthermore, all applicants must certify on their FCC Form 471 applications that they have complied with all program rules and must acknowledge that the failure to do so may result in denial of discount funding and/or cancellation of funding commitments.\textsuperscript{166} Applicants who have received funding commitments are subject to audits and other reviews that USAC or the FCC may undertake. USAC may be required to reduce or cancel any amount of a funding commitment that was not issued in accordance with such requirements.\textsuperscript{167} Furthermore, USAC’s recovery of government funds paid to an applicant or service provider who has no just right to keep the funds is not barred by the passage of time.\textsuperscript{168}

Therefore, we find that USAC’s denial of funding to Lakehills is not a forfeiture action, and that USAC acted appropriately in seeking recovery from Lakehills.

\textbf{D. Waiver of Commission Rules Is Not Appropriate.}

29. After reviewing Lakehills’s arguments, we do not find that waiver is appropriate in the instant case.\textsuperscript{169} First, Lakehills mistakenly believes that MSE retained universal service funding for its work. Pursuant to the ruling in \textit{Lazo}, USAC was required to recover any money paid out to MSE and its consortium members.\textsuperscript{170} Next, USAC was not obliged to reveal its reasons for holding back funding to Lakehills. On the contrary, as part of its ongoing responsibility to protect against waste, fraud, and abuse, USAC sometimes cannot notify applicants that an application may be on hold when doing so might jeopardize nonpublic law enforcement investigations.\textsuperscript{171} In this case, as discussed above, the Department of Justice investigation involving Houston ISD was ongoing, as well as the federal criminal proceedings involving Mr. Wong, president of MSE.\textsuperscript{172}

30. Furthermore, waiver of the Commission’s rules is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.\textsuperscript{173} For example, the Commission has waived the rules in instances where applicants have committed minor errors in filling out their applications.\textsuperscript{174} The Commission has not found waiver appropriate in instances

\textsuperscript{164} See \textit{Black’s Law Dictionary}, Second Pocket Edition (2001) at 289 (defining a forfeiture, among other things, as the loss of a right, privilege or property because of a crime, breach of obligation, or neglect of duty).

\textsuperscript{165} Benefits are not considered protected entitlements “if government officials may grant or deny [them] in their discretion.” \textit{Town of Castle Rock v. Gonzales}, 545 U.S. 748, 756 (2005).

\textsuperscript{166} See FCC Form 471, Schools and Libraries Universal Service Description of Services Ordered and Certification Form, OMB 3060-0806, Block 6 (October 2010).

\textsuperscript{167} See the USAC website, Principles for Treating Entities Under Investigation, \url{http://www.usac.org/sl/tools/reference/principles-for-treating-entities.aspx} (last visited Nov. 17, 2011).

\textsuperscript{168} See \textit{Wurts}, 303 U.S. at 416.

\textsuperscript{169} The Commission’s rules may be waived when good cause is demonstrated. See 47 C.F.R. § 1.3; \textit{WAIT Radio v. FCC}, 418 F.2d 1153, 1159 (D.C. Cir. 1969). An applicant for waiver faces a “high hurdle,” and must plead the facts and circumstances of its case with particularity. See \textit{Wait Radio}, 418 F.2d at 1157 (citation omitted).

\textsuperscript{170} See \textit{Lazo}, 24 FCC Rcd at 10680.

\textsuperscript{171} See \textit{id}.

\textsuperscript{172} See \textit{supra} para. 10-11.


\textsuperscript{174} See \textit{Request for Review of a Decision of the Universal Service Administrator by Albert Lea Area Schools}, CC Docket No. 02-06, Order, 24 FCC Rcd 4533, 4537-4539 (Wireline Comp. Bur. 2009), citing \textit{Request for Review of (continued...)}
where, for example, the contract is signed more than a few days prior to the expiration of the 28-day period,175 or where there has not been a fair and open competitive bidding process.176 We also do not find that the public interest is served by waiving our rules when there is evidence of waste, fraud, and abuse in the record. In the instant case, the activities engaged in by Houston ISD, and ACS and its partners substantially undermined Houston ISD’s competitive bidding process. The public interest does not support Lakehills retaining funding obtained in violation of Commission rules under ACS’s tainted contracts. The concerns about waste, fraud, and abuse here also outweigh Lakehills’s speculation that a contrary holding could “discourage potential creditors from investing in E-rate projects,”177 particularly because this decision does not limit access to E-rate funds for companies that comply with the program requirements. Nor are we persuaded that a different balancing of interests should apply in the context of work performed between May and September 2007 based on claims that “USAC knew of allegations of competitive bidding violations by ACS” at that time.178 Well before Lakehills performed the work at issue—as early as 2005—entities financing its work appear likely to have known of the potential irregularities with some of the consortium vendors (such as MSE) and the investigation into wrongdoing involving the Dallas ISD, providing reason to suspect that USAC was likely to hold or deny funding for applications involving MSE not just in Dallas ISD but in Houston ISD as well.179 We therefore find waiver inappropriate in the instant matter. We deny Lakehills’s Request for Review and affirm USAC’s decision.

IV. ORDERING CLAUSES

31. ACCORDINGLY, IT IS ORDERED, pursuant to authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, that the requests for

(...continued from previous page)


175 See Request for Review of the Decision of the Universal Service Administrator by Sackets Harbor Central, CC Docket No. 96-45, Order, 15 FCC Rcd (Common Carrier Bur. 2000); c.f. Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District, CC 02-6, Order, 22 FCC Rcd 8757, 8763 para. 9 (2007) (granting waiver for a violation of the 28-day rule because the applicants only missed the deadline by one to three days, thereby allowing their requests for services to be competitively bid for a meaningful period of time). However, the Commission emphasized in Aberdeen that “[a]pplicants are not free to disregard the 28 day rule based on their own determination that only one service provider can provide the desired services—they must use the bidding process to determine whether this is the case.” Aberdeen, 22 FCC Rcd at 8764 para. 10.


177 Request for Review at 21.

178 Request for Review at 22-23.

review filed by Joseph Mr. Hill, Trustee in Bankruptcy for Lakehills Consulting, LP as listed in the appendix ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary
### APPENDIX

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