



Miller 2011 Appeal Dec USAC
FRN 2209152

Schools and Libraries Division

Administrator's Decision on Appeal – Funding Year 2011

May 24, 2017

Danielle Frappier
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006-3401

RE: Applicant Name: Miller County School District
 Billed Entity Number: 127512
 Form 471 Application No.: 813142
 Funding Request Number(s): 2209152
 Your Correspondence Dated: August 20, 2015

Dear Ms. Frappier:

After thorough review and investigation of relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of USAC's Commitment Adjustment Letter ("COMAD") to Miller County School District ("MCSD") and United Data Technologies, Inc. ("UDT") for Funding Year 2011 for Application Number 813142. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC").

Funding Request Number: 2209152
Decision on Appeal: **Denied**
Explanation:

- On appeal, UDT proffers several arguments as to why USAC erred in its decision to issue a COMAD decision and seek recovery of funds that have been disbursed in Funding Year 2011 for FRN 2209152. First, UDT argues that USAC erred in finding that the bidding process was "not fair and open."¹ Specifically, UDT argues that the hotel stay, dinner, and two lunches received by an MCSD employee were not gifts because the MCSD employee was traveling on MCSD related business.² Although a UDT employee scheduled a nearby Cisco demonstration for the MCSD employee and paid for the MCSD employee's hotel room and meals, UDT argues this was done as a matter of

¹ UDT Appeal at 2-3.

² *Id.* at 2.

“courtesy and convenience” and the MCSD employee received no direct benefit because he would have otherwise been reimbursed by MCSD.³

- USAC does not agree that UDT’s payment of an MCSD employee’s hotel stay and meals were not gifts. In order to provide for a fair and open competitive bidding process, the Federal Communications Commission (FCC) rules prohibit the direct or indirect solicitation or acceptance of gifts, gratuities, favors, entertainment, loans or any other thing of value by E-rate applicants from service providers or prospective service providers.⁴ These rules also restrict the gifts, gratuities, favors, entertainment or any other thing of value that E-rate service providers or prospective service providers can offer or provide to applicants.⁵ Specifically, section 54.503(d)(1) of the FCC’s rules state:

No such service provider shall offer or provide any such gift, gratuity, favor, entertainment, loan, or other thing of value except as otherwise provided herein. Modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth \$20 or less, including meals, may be offered or provided, and accepted by any individuals or entities subject to this rule, if the value of these items received by any individual does not exceed \$50 from any one service provider per funding year. 47 C.F.R. § 54.503(d)(1).

USAC determined that UDT and MCSD violated the FCC’s gift rules for Funding Year 2011 when it received documentation from UDT indicating that a UDT employee paid for an MCSD employee’s hotel expense of \$106.12, a dinner expense of \$29.79, and two \$10.60 lunch expenses in February and August of 2011. Although the two lunches were under \$20, the hotel expense and dinner expense exceeded the \$20 maximum and the hotel expense is outside the limited list of allowable things of value that can be offered by a service provider and/or accepted by an applicant. USAC does not agree with UDT’s argument that the MCSD employee received no direct benefit and therefore was not influenced by the payments. FCC rules expressly limit gifts,

³ *Id.* at 3.

⁴ 47 C.F.R. 54.503(a); 54.503(d)(1) (2011); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Sixth Report and Order, 25 FCC Rcd 18762 (2010) (*Sixth Report and Order*); Prior to the FCC’s Sixth Report and Order, which codified § 54.503(a), applicants were required to conduct a fair and open competitive bidding process pursuant to FCC decisions and USAC guidance. See *Request for Review of Decisions of Universal Serv. Adm’r by Mastermind Internet Servs., Inc., et al.*, CC Docket No. 96-45, Order, 16 F.C.C. Rcd. 4028 at paras. 10-11 (2000) (*Mastermind Order*); *Request for Review of Decisions of the Universal Serv. Adm’r by SEND Technologies LLC, et al.*, CC Docket No. 02-6, Order, 22 FCC Rcd. 4950 at para. 6 (2007) (*SEND Order*); and *Request for Review of the Decision of Universal Serv. Adm’r by Ysleta Indep. Sch. Dist., et al.*, CC Docket No. 96-45, Order, 19 FCC Rcd 6858 at paras. 55-56 (2003) (*Ysleta Order*).

⁵ 47 C.F.R. 54.503(d)(1).

gratuities, favors, loans or any other things of value to those listed in 47 C.F.R. 54.503(d)(1) and whether an applicant received a direct benefit is not a requirement of the FCC rules.

- UDT next argues that USAC improperly applied the E-rate gift rules because the FCC previously found that a competitive bidding process was fair and open despite the existence of gifts of larger value than the ones at issue.⁶ Although these prior FCC decisions were decided under the previous version of the FCC's gift rules, UDT argues that the decisions demonstrate how the FCC considers the overall context of the competitive bidding process when applying the FCC's gift rule. UDT also points out that the FCC characterized gifts of several hundred dollars as "small" or "minimal."⁷ In sum, UDT asserts that USAC's application of the E-rate gift rule without consideration of additional context is improper and erroneous.⁸
- USAC does not agree that it improperly applied the FCC's gift rules. The compensated hotel room, dinner, and two lunches took place after the FCC's gift rules became effective. The rules which were codified in the FCC's *Sixth Report and Order* and effective January 3, 2011, explicitly prohibits the offering or solicitation of a thing of value unless it is a modest refreshment not offered as part of a meal, an item with little intrinsic value intended solely for presentation, or an item worth \$20 or less. The compensated hotel room and the dinner payment of \$29.79 do not fall within any of the three limited categories of exempt gifts and do not comply with the requirements of 47 C.F.R. § 54.503(d)(1).
- UDT next argues that USAC erred in rescinding the commitment in full because there is no precedent for rescinding a large amount of funding over minor rule violations and the rescinded amount is a penalty that constitutes an excessive fine under the U.S. Constitution and a regulatory taking without just compensation. UDT proffers that the FCC has only rescinded all funding in situations involving egregious behavior and has never rescinded an enormous amount of funding as the result of a minor infraction.⁹ UDT also characterizes USAC's COMAD decision as an unconstitutional penalty under the Excessive Fines Clause of the Eighth Amendment which bans "excessive fines" and the Substantive Due Process Clause of the Fifth Amendment of the United States Constitution which prohibits punitive sanctions from exceeding a "single-digit multiplier" of actual damages.¹⁰ UDT further claims that the COMAD constitutes a "regulatory taking" without just compensation because the economic impact on UDT would be substantial and endanger its ability to

⁶ UDT Appeal at 4.

⁷ *Id.* at 4-5.

⁸ *Id.* at 5.

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 6.

continue operations.¹¹ Finally, UDT argues that it should not be required to unilaterally bear the cost of providing equipment to MCSD at its own expense.¹²

- USAC does not agree that it erred in rescinding MCSD's funding in full. The FCC has explained that "in order for there to be a cognizable property right subject to the Due Process Clause, there must be 'a legitimate claim of entitlement created by law, not a unilateral expectation.' Benefits are not considered protected entitlements 'if government officials may grant or deny [them] in their discretion.'" ¹³ The FCC has also found that neither applicants nor service providers "[have] a right to funding from the Universal Service Fund ... 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."¹⁴ 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.¹⁵ USAC was required to rescind the commitment and seek recovery of the full amount disbursed as MCSD and UDT did not comply with the FCC gift rules.¹⁶
- USAC finds that MCSD and UDT are both responsible for these rule violations because an MCSD employee accepted gifts in violation of the FCC's gift rules and a UDT employee offered gifts in violation of the FCC's gift rules. FCC rules clearly prohibit service providers from offering or accepting gifts that are not modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, or items worth \$20 or less. For the reasons discussed above, this appeal is denied.

¹¹ *Id.* at 7.

¹² *Id.* at 8.

¹³ *Request for Review of a Decision of the Universal Serv. Adm'r by Integrity Commc'ns, Ltd.*, CC Docket No. 02-6, Order, 27 FCC Rcd 772 at para. 26 (2012) (*Integrity Order*). See also *Pet. for Reconsideration of a Decision of the Wireline Competition Bureau by Lazo Tech. Inc., et al.*, CC Docket No. 02-6, Order, 26 FCC Rcd 1661 at para. 14 (2011) (rejecting service providers' argument that the nonpayment of invoices was a "taking" of their property).

¹⁴ See *Request for Review of Decisions of Universal Serv. Adm'r by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting*, CC Docket No. 02-6, Order, 26 FCC Rcd. 16586 at para. 28 (2011) (*Lakehills Order*).

¹⁵ *Id.* See also *Schools and Libraries Universal Service Description of Services Ordered and Certification Form*, FCC Form 471, OMB 3060-0806 at Block 6 (October 2010).

¹⁶ See *Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, et al.*, CC Docket Nos. 97-21, Order, 17 Commc'ns Reg. (P&F) 1192 (1999); *Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, et al.*, CC Docket Nos. 97-21, (2000); *Federal-State Joint Bd. on Universal Serv.*, Order on Reconsideration and Fourth Report and Order, CC Docket Nos. 96-45, 19 FCC Rcd 15252 (2004) (*Fourth Report and Order*). See also *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808 at para. 21 (2004) (requiring USAC to seek full recovery when applicants do not comply with FCC competitive bid rules).

Since your appeal was denied in full, partially approved, dismissed or canceled, you may file an appeal with the FCC. Your appeal must be postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street, S.W., Washington, D.C. 20554. Further information and options for filing an appeal directly with the FCC can be found under the Reference Area "Appeals Procedure" posted on the SLD section of the USAC web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We also thank you for your continued support, patience and cooperation during this appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Hugh D. Manning
Miller County School District
5245 Williams Drive
Fort Myers Beach, FL 33931

Gerard Amaro
United Data Technologies, Inc.
8825 N.W. 21st Terrace
Doral, FL 33172

Hugh D. Manning
Miller County School District
5245 Williams Drive
Fort Myers Beach, FL 33931