

Before the
Federal Communications Commission
Washington, DC 20554

2001 NOV 15 A 8: 57

In the Matter of)
)
Request for Review of the)
Decision of the)
Universal Service Administrator by)
)
Folsom Cordova Unified School District)
Folsom, California)
)
Federal-State Joint Board on)
Universal Service)
)
Changes to the Board of Directors of the)
National Exchange Carrier Association, Inc.)

RECEIVED

File No. SLD-81646

CC Docket No. 96-45

CC Docket No. 97-21 ✓

ORDER

Adopted: November 13, 2001

Released: November 14, 2001

By the Common Carrier Bureau:

1. The Common Carrier Bureau (Bureau) has under consideration a Request for Review filed by the Folsom Cordova Unified School District (Folsom Cordova), Folsom, California.¹ Folsom Cordova seeks review of a decision by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) denying its request to change the service provider listed in its application for Year 1 funding under the schools and libraries universal service support mechanism.² This type of request is referred to as a Service Provider Identification Number (SPIN) change request.³ Because we find that the original funding commitment was made in violation of Commission regulations, we deny the Request for Review and direct SLD to cancel the existing commitment of discount funding to Folsom Cordova and pursue the appropriate funding adjustment procedures.

¹ Letter from Kelly J. Calhoun, Folsom Cordova Unified School District, to Federal Communications Commission, filed March 2, 2000 (Request for Review).

² Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

³ Request for Review by Copan Public Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., File No. SLD-26231, CC Dockets No. 96-45 and 97-21, 15 FCC Rcd 5498, ¶ 1 (rel. 2000) (Copan Order).

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access and internal connections.⁴ The Commission's rules require that the applicant make a bona fide request for services by filing with the Administrator an FCC Form 470, which is posted to the Administrator's website for all potential competing service providers to review.⁵ After the FCC Form 470 is posted, the applicant must wait at least 28 days and then enter into binding service agreements with its chosen providers before submitting an FCC Form 471, which requests support for eligible services.⁶ SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.⁷

3. On April 15, 1998, Folsom Cordova filed a Funding Year 1 FCC Form 471 application.⁸ The application listed only one funding request, Funding Request Number (FRN) 81437, seeking discounts on internal connections to be provided by River City Communications Corporation (River City Communications) to Mills Middle School.⁹ Folsom Cordova did not enter into a service agreement with River City Communications either before or after submitting the FCC Form 471.¹⁰

⁴ 47 C.F.R. §§ 54.502, 54.503.

⁵ Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (FCC Form 470); 47 C.F.R. § 54.504(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9078, para. 575 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S. Ct. 423 (Nov. 2, 2000).

⁶ 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (FCC Form 471).

⁷ *Request for Review by Metropolitan School District of Pike Township, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-120821, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd 13891, para. 2 (rel. 2000).

⁸ FCC Form 471, Folsom Cordova Unified School District, filed April 15, 1998.

⁹ *Id.* at 2.

¹⁰ Request for Review, at 1 (applicant indicated River City Communications as the vendor that it "would" select). The information provided in FRN 81437 indicates a contract number and award date. However, as confirmed in conversations between Commission staff and Folsom Cordova, this information refers to the "master contract" that River City Communications had with California to supply internal connections at specified prices. See <<http://www.pd.dgs.ca.gov/acqui/contract/itechr.asp#BOTTOMDOC>>. A "master contract" is a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to an eligible school, library, rural health care provider, or consortium that purchases directly from the service provider. 47 C.F.R. § 54.500(f). Thus, although the "master contract" establishes terms of service, it is not itself a mutually-binding agreement between the provider and the party that seeks the services.

4. Shortly after Folsom Cordova submitted its application, the State of California approved funding for a broader modernization project at Mills Middle School that included the internal connections involved in FRN 81437.¹¹ This modernization project was handled by Folsom Cordova's Director of Facilities, who was not aware of Folsom Cordova's FCC Form 471 application or even of the existence of the schools and libraries universal service mechanism.¹² This individual first developed an overall modernization plan and then, acting in accordance with California bidding procedures, put the plan out for bidding.¹³ The winner of the bidding process was Semans Communications (Semans), who commenced and completed the work by October of 1998.¹⁴ Folsom Cordova subsequently paid Semans the full price of the contract.¹⁵

5. On January 19, 1999, SLD issued a Funding Commitment Decision Letter (FCDL), granting Folsom Cordova's request for discounted internal connections at a pre-discount cost of \$146,203 to be provided by River City.¹⁶ In December of 1999, Folsom Cordova submitted an FCC Form 486 to SLD indicating that service had been completed and a Billed Entity Applicant Reimbursement (BEAR) Form requesting reimbursement in the amount of the approved discounts.¹⁷ On both the FCC Form 486 and the BEAR Form, Folsom Cordova named two service providers in connection with the funding award, River City Communications and Semans.¹⁸ To explain the reference to two providers, Folsom Cordova attached a clarifying letter, written by Kelly J. Calhoun, the Director of its Department of Technology and Information Systems.¹⁹

6. In the letter, Ms. Calhoun asked to have the funding sent to Semans instead of River City Communications.²⁰ She explained the circumstances discussed above with regard to the new modernization plan and the contract with Semans, and how Folsom Cordova had already

¹¹ *Id.*

¹² *Id.*; Letter from Kelly J. Calhoun, Folsom Cordova Unified School District, to Schools and Libraries Division, Universal Service Administrative Company, dated December 12, 1999 (First SPIN Change Request), at 1.

¹³ Request for Review, at 1.

¹⁴ See Letter from Kelly J. Calhoun, Folsom Cordova Unified School District, to Schools and Libraries Division, Universal Service Administrative Co., filed February 3, 2000 (Second SPIN-Change Request), at 1.

¹⁵ See *id.*

¹⁶ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Carole A. Pepito, Folsom-Cordova Unified School District, dated January 19, 1999 (Funding Commitment Decision Letter or FCDL).

¹⁷ See FCC Form 486, Folsom Cordova Unified School District, dated December 12, 1999; FCC Form 472 (BEAR Form), Folsom Cordova Unified School District, dated December 12, 1999.

¹⁸ FCC Form 486 at 2; BEAR Form at 1.

¹⁹ FCC Form 486 at 2; BEAR Form at 1.

²⁰ See First SPIN Change Request, at 1.

paid Semans to install the internal connections for which Folsom Cordova sought discounts in its FCC Form 471 application.²¹

7. Notwithstanding Ms. Calhoun's letter, SLD processed funding for the originally named service provider. By letter dated December 22, 1999, SLD notified River City Communications that it had reviewed and approved Folsom Cordova's Form 486 and BEAR Form.²² SLD indicated that River City Communications would soon receive a reimbursement check and indicated the procedures which the service provider should take upon receiving the check.²³

8. On February 3, 2000, Folsom Cordova filed a second letter with SLD repeating its request and attaching the first letter.²⁴ It noted that SLD had sent a funding check to River City Communications, and asserted that Semans, not River City Communications, had done the work and been paid in full for it.²⁵ It requested direction on how to proceed in order to get the funding sent to Semans.²⁶

9. In a letter issued February 18, 2000, SLD denied Folsom Cordova's request to change its service provider.²⁷ It stated that SPIN changes would be allowed in only three circumstances: where (1) the service provider refuses to participate in the E-rate program; (2) the service provider has gone out of business, or (3) the service provider has breached its contract with the applicant.²⁸ SLD found that Folsom Cordova's situation did not fall into any of these three categories and accordingly denied the request.²⁹ Folsom Cordova then filed the pending Request for Review.

10. In its Request for Review, Folsom Cordova asserts that its error in proceeding on the contract with a different vendor than the one it listed on its FCC Form 471 was an accident, and that it has satisfied the "spirit" of SLD program rules, in that the work was bid according to legal requirements, was done in a cost-effective manner and was otherwise in conformity with

²¹ *Id.*

²² Letter from Schools and Libraries Division, Universal Service Administrative Company, to River City Communication Corporation, dated December 22, 1999 (BEAR Form Approval Letter).

²³ BEAR Form Approval Letter at 1-2.

²⁴ *See* Second SPIN Change Request.

²⁵ *Id.* at 1.

²⁶ *Id.*

²⁷ Letter from Schools and Libraries Division, Universal Service Administrative Co., to Kelly J. Calhoun, Folsom Cordova Unified School District, dated February 18, 2000 (Administrator's Decision on SPIN Change).

²⁸ *Id.* at 1.

²⁹ *Id.*

program requirements.³⁰ Folsom Cordova thus requests that its SPIN-change be granted and reimbursement be granted for the work done by Semans.³¹

11. After reviewing the record, we find that the SPIN-change must be denied and the underlying funding commitment cancelled because the initial FCC Form 471 application violated our competitive bidding regulations. As noted above, the competitive bidding requirements set out in the Commission's regulations include the requirement that an applicant must have a signed contract for eligible services prior to submitting the FCC Form 471 application for funding.³² Requiring a signed contract for eligible services helps to avoid waste by ensuring that the applicant has a provider ready to offer discounted services before SLD invests the time to determine whether discounts are warranted. It also facilitates SLD's review process by fixing both the provider (which, pursuant to Commission rules, SLD must determine to be eligible to provide the requested service) and the terms of service, including the specific nature and type of services and the prices offered. Thus, the competitive bidding requirement serves the interests of efficient operation as well as protecting against waste, fraud and abuse.

12. Folsom-Cordova did not satisfy this requirement. In its Request for Review, Folsom-Cordova indicates that at the time the FCC Form 471 was filed, Folsom Cordova merely intended to select River City Communications as service provider but had not yet done so.³³ It is undisputed that Folsom-Cordova never, in fact, entered into a service contract with River City Communications. Indeed, it is undisputed that Folsom-Cordova later entered into a contract with Semans to perform the same services for which Folsom-Cordova sought to receive discounts in its application from River City Communications. Because the school district did not have a binding agreement with River City Communications prior to submitting its FCC Form 471, it violated the Commission's regulations.

13. Where a commitment of funds has been made for an application which violated our regulations, the commitment will ordinarily be cancelled and efforts made to recoup any funds already disbursed.³⁴ However, the application in question was filed in Funding Year 1 of the schools and libraries universal service mechanism, the funding year in which we waived certain rules, and thereby allowed applicants not in compliance with those rules to receive discounted services. In light of that decision, we consider whether Folsom-Cordova should also receive a waiver of section 54.504(c).

³⁰ Request for Review at 1-2.

³¹ Request for Review at 2.

³² 47 C.F.R. § 54.504(c).

³³ Request for Review at 1.

³⁴ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Dockets No. 96-45 and 97-21., Order, FCC 99-292, ¶ 3 (rel. October 8, 1999) (*Commitment Adjustment Waiver Order*) (regulatory violations warranting adjustment included "fail[ure] to secure a signed contract prior to filing the FCC Form 471"); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Dockets No. 96-45 and 97-21., Order, FCC 00-350 (rel. October 26, 2000) (*Commitment Adjustment Order*) (adopting adjustment procedures).

14. In the *Commitment Adjustment Waiver Order*, the Commission found good cause to waive the competitive bidding rules, thus allowing erroneous awards to stand, primarily because it concluded that “the affected applicants and providers in the first year of the schools and libraries support mechanism may have reasonably relied on the funding commitments applicants received from [the Administrator].”³⁵ The Commission noted that the application instructions did not expressly warn of the possibility that a funding commitment, once issued, might later be cancelled, and that because regulatory deadlines required the completion of Funding Year 1 internal connections by September 30, 1999 and recurring services by June 30, 1999, applicants may have “necessarily relied” on funding commitments in taking service and incurring costs to complete work within the prescribed regulatory time frame.³⁶ Thus, the applicants addressed by the *Commitment Adjustment Order* were those who at least *may have* incurred costs in reliance on their funding commitments.

15. Here, however, the record demonstrates with certainty that Folsom Cordova did not rely on its funding commitment letter in incurring the costs of its service. Folsom Cordova concedes that the employee of Folsom Cordova who awarded the contract to Semans and incurred the costs of the service did so without knowledge of the pending FCC Form 471 application or the schools and libraries universal service mechanism, let alone of a funding commitment from that mechanism, and that he acted solely in reliance on a funding grant from the State of California.³⁷

16. It is even more clear that neither Semans nor River City Communications performed any work in reliance on the funding commitment. Semans relied solely on its contract, which it fully performed prior to the issuance of any funding commitment and for which Folsom Cordova paid it in full, and River City Communications performed no work at all.³⁸ Therefore, we cannot find that either the applicant or the provider acted in reasonable reliance on the funding commitment decision letter, which was the primary basis for the waiver granted in the *Commitment Adjustment Waiver Order*. Because the *Commitment Adjustment Waiver Order* also emphasized that the waiver was “limited in scope” and restricted to the “special circumstances” described in the *Order*, we conclude that its waiver does not apply to the instant case.³⁹

17. We further find that Folsom Cordova has not demonstrated any other grounds for granting a waiver. The applicant argues that it should not be penalized for an innocent violation where it has largely complied with the requirements of the program. However, in light of the thousands of applications that SLD reviews and processes each funding year, it is

³⁵ See *Commitment Adjustment Waiver Order*, paras. 7, 10 (“inexperienced applicants . . . may have reasonably relied on USAC’s commitment letter as confirmation that their applications did in fact comply with Commission rules.”)

³⁶ *Id.*, para. 9.

³⁷ Request for Review, at 1.

³⁸ First SPIN Change Request, at 1; Second SPIN Change Request at 1.

³⁹ *Commitment Adjustment Waiver Order*, para. 6.

administratively necessary to place on the applicant the responsibility of understanding and complying with all of the relevant rules and procedures.⁴⁰ The unintentional nature of Folsom Cordova's violation thus provides no basis for deviating from the Commission's policy of placing on the applicant the responsibility for following program rules and procedures. We conclude that a waiver of the competitive bidding requirement should not be granted.

18. Since Folsom Cordova is not entitled to a waiver of the competitive bidding requirements, its funding award must be cancelled and any funding already distributed must be recaptured. As there is no longer any funding award, it follows that Folsom Cordova cannot be granted a change in the terms of that award, and that its SPIN-Change request must therefore be denied.

19. Accordingly, IT IS ORDERED, pursuant to 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 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Request for Review filed on March 2, 2000 by Folsom Cordova Unified School District, Folsom, California, is DENIED.

20. IT IS FURTHER ORDERED that this application be remanded to the Administrator for an adjustment of the funding commitment made to Folsom Cordova Unified School District in connection with FCC Form 471 Application No. 81646 in accordance with the Commission's rules and the *Commitment Adjustment Order*.

FEDERAL COMMUNICATIONS COMMISSION



Carol E. Matthey
Deputy Chief, Common Carrier Bureau

⁴⁰ See *Request for Review by Anderson School, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of National Exchange Carrier Association*, File No. SLD-13364, CC Dockets No. 96-45 and 97-21, Order, DA 00-2630, para. 8 (Com. Car. Bur. rel. Nov. 24, 2000).