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*Via E-mail: [gshah@sl.universalservice.org](mailto:gshah@sl.universalservice.org)*

Ms. Gaurangi Shah  
USAC, Schools and Libraries Division

Dear Ms. Shah:

We are in receipt of your letter dated June 4, 2010. In consultation with our general counsel, Caplan and Earnest LLC, we are happy to respond to the concerns that you raised in your letter, and to answer your questions. We thank you, again, for your courtesy in extending the time for our response.

### **Unrelated Funding Request Numbers Are Referenced.**

First, it is important that we understand which Funding Request Numbers (FRNs) you are challenging. Your letter states, "FY 2006 App 520538, FRN 1482638; FY 2007 App 552505, FRN 1536942; FY597967, FRN 1699625; FY 2009 App 653357, FRN 1804971; FY 2007 App 550941, FRN 1555019 and FY 2010 App 728369, FRN 2058334 will be denied or rescinded because you did not conduct a fair and open competitive bid process free from conflicts of interest."

We assume that where you write "FY597967," you mean "FY 2008 App 597967." Accordingly, you list a total of six FRNs. However, only four of the FRNs that you list apply to the Form 470 that you challenge (#383320000607969). The other two FRNs (FRNs 1482638 and 1536942) apply to an entirely different Form 470 (#788110000581938). We assume that if you meant to challenge this entirely different Form 470, you would have specified it. If it is your intention to deny or rescind FRN 1482638 or FRN 1536942, please provide us with your basis for that proposed action so that we may respond to your concerns.

### **The Federal Gifts Standards Do Not Apply, but Were Nevertheless Met.**

You assert, “In 2004, 2005, and 2006, the value of the gifts that individuals received exceeds the federal gifts standards of \$20/person/occasion not to exceed \$50/person/per calendaryear.” The federal gifts standards do not apply to our employees.<sup>1</sup> However, even if they did, the total value of any alleged “gifts” received in 2004 was \$8.61. This was actually reported as a “Business Lunch with Customer.” The total received in 2005 was \$9.97 by one individual described as a “Business Breakfast with Customer,” and “Christmas Gift Cards, Restaurant,” which we believe were received by multiple individuals, not exceeding either the \$20 or the \$50 limits. We cannot confirm who received any such card, if anyone. Further, these were long before the posting of the Form 470 referred to in your letter. The only gifts received in 2006 were ten \$10 Starbucks gift cards to different individuals and two \$25 Target gift cards to different individuals. Accordingly, although the federal standards do not apply, all gifts complied with the standards or exceeded the standards by an insignificant amount (*i.e.*, \$5). Moreover, even if the federal standards applied, the remedy is return of the gift,<sup>2</sup> not an assumption of conflict of interest.

In your letter, you seem to include, “meals, gift cards and travel” in your definition of “valuable gifts.” The expenditures made in July 2006 relating to meals, lodging, and transportation were not “gifts.” They were instead expenses paid in the normal course of business for the training of ECBOCES’ newly-hired technology employee, Jarred Masterson, pursuant to the contract we have with Trillion that was signed in February 2006 for the provision of a wide area network, which we refer to as the Video Networking Education Technology System (VNETS). These expenses had nothing at all to do with the subsequent Form 470 that was filed for Centrex telephone services months later. You will note that our status at the time of all the 2006 disbursements was that of an “existing customer,” as shown on the Expense Summary attached to your letter.

### **There Was No Disbursement of \$325 in Gift Cards to ECBOCES.**

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<sup>1</sup> 5 C.F.R. § 2635.204 provides:

“(a) Gifts of \$20 or less. An employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed \$50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds \$20, the employee may not pay the excess value over \$20 in order to accept that portion of the gift or those gifts worth \$20. Where the aggregate value of tangible items offered on a single occasion exceeds \$20, the employee may decline any distinct and separate item in order to accept those items aggregating \$20 or less.”

5 C.F.R. § 2635.102 provides:

“(h) Employee means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. It includes employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, et seq. For purposes other than subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.”

<sup>2</sup> 5 C.F.R. § 2635.205.

Your letter states:

Finally, we note that according to Trillion's records, four days prior to the posting of your Form 470 # 383320000607969, which resulted in the award of a multi-year contract with Trillion, you received \$325 in gift cards from the company.

The amount of the gifts that you reference is incorrect. If you check the "Total \$ to the Customer" column on the Expense Summary that was attached to your letter, you will note that the ECBOCES allegedly received only two \$25 gift cards, totaling \$50, not \$325. We do not know whether these two \$25 cards were actually received, which employees may have received them, or whether they were even used. However, these would have been provided because we were a current, existing customer of Trillion at the time and it was the holiday season. In fact, all expenses in 2006 were consistent with the ongoing contractual relationship that we already had with Trillion. They had absolutely nothing whatsoever to do with the Form 470 that was filed in December of 2006.

**Acceptance of Gifts Does Not Necessarily Create a Conflict of Interest and Did Not in Our Relationship.**

Again, referring to your letter, you assert:

Although these gifts may be acceptable under state law or local regulation, the Federal Communications Commission has specifically determined that for another applicant [sic] that the offer and acceptance of gifts while allowable under local law does not mitigate the conflict of interest that is created when you accepted the gifts, and therefore, you did not run a fair and open competitive bidding process, free from conflicts of interest as required by FCC rules.

Based upon this, we believe that you are asserting that the FCC has "specifically determined" that the acceptance of gifts automatically creates a conflict of interest. There is no such guidance from the FCC, as far as we have been able to ascertain.

In addition, the USAC website nowhere provides such guidance. As you likely know, USAC has a PowerPoint presentation on its website that specifically provides, "know and follow your state and local rules regarding acceptance of gifts."<sup>3</sup> This statement specifically contemplates that gifts may be received under certain conditions.

We understand that compliance with state and local rules in the receipt of gifts is not dispositive, but as further indication of our commitment to ethical standards and conduct in all

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<sup>3</sup> [http://www.usac.org/\\_res/documents/sl/ppt/2009-training/2009%20Issues%20in%20Competitive%20Bidding.ppt](http://www.usac.org/_res/documents/sl/ppt/2009-training/2009%20Issues%20in%20Competitive%20Bidding.ppt).

matters, including the competitive bidding process, we would like to point out that the following are not considered gifts of substantial value, and thus can be accepted by a local government employee under Colorado law: “an occasional nonpecuniary gift, insignificant in value;” “reimbursement for actual and necessary expenditures for travel and subsistence for attendance at a convention or other meeting at which the . . . employee is scheduled to participate;” “acceptance of an opportunity to participate in a . . . meeting which is offered to such . . . employee which is not extraordinary when viewed in light of the position held by such . . . employee;” and “items of perishable or nonpermanent value, including, but not limited to, meals, lodging, [and] travel expenses.”<sup>4</sup>

As described above and in the sections below, no gifts were received by the ECBOCES that tainted any competitive bidding process.

### **There Was a Competitive Bidding Process.**

At the conclusion of your letter, you state, “Finally, based on the pattern of gifts received, the entire competitive bidding process based on Form 470 #383320000607969 is tainted and all FRNs referencing that Form 470 will be denied.”

The above statement has no factual basis. The competitive bidding process was not tainted, but instead complied with all terms and conditions associated with a bona fide competitive bidding process.

First, we understand that 47 C.F.R. § 54.504 provides, “an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart.”<sup>5</sup> Accordingly, we filed Form 470, and timely filed Form 471. We complied with all of the terms and conditions associated with those forms, and certified twice under oath, “All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals.”<sup>6</sup> We note that there is no provision in the regulations prohibiting the receipt of de minimis gifts or any gifts at all for that matter.

Second, we understand that “[a] fundamental requirement of the E-rate program is that solicitation for services be based on a fair and open competitive bidding process that is free from conflicts of interest.”<sup>7</sup> Accordingly, we know that the USAC’s website provides, “‘Fair’ means

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<sup>4</sup> COLO. REV. STAT. §§ 24-18-104(1)(b) and (3)(b) - (f).

<sup>5</sup> 47 C.F.R. § 54.504(a).

<sup>6</sup> 47 C.F.R. § 54.504(b)(2)(vii), (b)(3)(xi); *see also* 47 C.F.R. § 54.511(a).

<sup>7</sup> *Request for Review of a Decision of the Universal Service Administrator by Lazo Technologies, Inc., et al.*, File Nos. SLD-360412, *et al.*, CC Docket No. 02-6, Para. 5.

that all bidders are treated the same and that no bidder has advance knowledge of the project information. ‘Open’ means there are no secrets in the process – such as information shared with one bidder but not with others – and that all bidders know what is required of them.”<sup>8</sup> “[T]he applicant should not have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with ‘inside’ information or allow it to unfairly compete in any way. For example, a conflict of interest exists when the applicant’s consultant is associated with a service provider that is selected and is involved in determining the services sought by the applicant and the selection of the applicant’s service provider(s).”<sup>9</sup>

Trillion did not have advance knowledge of the project information, and all bidders were treated the same. Accordingly, the competitive bidding process was “fair.” There were no secrets in the process, and all bidders knew what was required of them; all requirements were listed on the Form 470. Accordingly, the competitive bidding process was “open.” Our relationship with Trillion was, and remains, a professional contractual relationship. It is not the type of relationship that would allow Trillion to unfairly compete in any way. Trillion was not at all involved in determining the services we sought or in the selection of our providers.

Our E-rate program contact person did not and does not have any affiliation with any of our providers. Our requirements on Form 470 were not at all adjusted to meet Trillion’s needs, and Trillion played absolutely no role whatsoever in the development of those requirements. The parties remained at arm’s-length throughout the competitive bidding process. E-mails confirm that arm’s-length negotiations regarding the terms of the contract with Trillion took place. “As the Commission found in the *Aberdeen School District Order*, the goal of the competitive bidding process is to ensure that E-rate funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available.”<sup>10</sup> Our competitive bidding process ensured that E-rate funding would not be wasted.

### **The Cited FCC Orders Are Entirely Distinguishable.**

You list four FCC orders to stand for the proposition that “FCC rules require applicants to conduct a fair and open competitive bidding process free from conflicts of interest.” As outlined below, those orders each have material facts that are totally different from the facts surrounding our Form 470. None of these involved alleged gifts, much less that gifts or meals of inconsequential value to an existing customer could automatically result in denial or rescission of FRNs.

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<sup>8</sup> <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx>.

<sup>9</sup> <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx>.

<sup>10</sup> *Request for Review of a Decision of the Universal Service Administrator by Albert Lea Area Schools, Albert Lea, Minnesota, et al.*, File Nos. SLD-517274, et al., CC Docket No. 02-6, para. 8 (*internal citation omitted*).

1. *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.* [SLD Nos. omitted], CC Docket Nos. 95-45, 97-21, Order, 10 FCC Rcd 6858, ¶ 60 (2003).

This appeal was denied because the school district did not list with any particularity the services that it required. Accordingly, potential bidders had to contact the school district directly to figure out what it was looking for. Our Form 470 listed with particularity the services that we required. You have not accused us of failing to provide sufficient information on Form 470.

2. *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. 94-45, Order, 16 FCC Rcd 4028-4032-33, ¶10 (2000).

This appeal was denied because Form 470 was signed by a MasterMind employee who was also listed as the contact person for the competitive bidding process. As discussed above, our E-rate program contact person did not and does not have any affiliation with any of our providers.

3. *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007).

In this case, the appeal was denied because the contact person was a 15% owner in the service provider. Again, our contact person did not and does not have any affiliation with any of our providers.

4. *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008).

Here, the appeal was denied because the service provider completed Forms 470 for a number of potential clients and sent all the forms to USAC from the same address. Trillion did not complete our Form 470, and, as you know, it was sent from us.

Again, none of the cases cited in your letter provide any hint of the proposition that receipt of de minimis gifts removes eligibility for the E-rate program.

#### **Responses to Your Questions:**

Listed below are our responses to the additional questions contained in your letter:

- *“Based on the documentation provided to USAC in its review, Sadie Walley issued an invitation to Jarred Masterson to the 2008 VTEC conference, hosted*

*and paid by Trillion. Did a representative from ECBOCES attend that event? If so, was the travel paid for by Trillion? Please provide supporting documentation with your answer. (See Save the Date.pdf)”*

Response: Neither Mr. Masterson nor anyone else from our staff attended the 2008 VTEC conference. In light of the fact that we were and are a current and ongoing customer of Trillion, however, we do not believe that attendance at such a conference could in any way “taint” previous competitive bidding processes.

- *“In December 2006 through February 2007, ECBOCES and Trillion engaged in a [sic] conversations about the posting of the Form 470 for the phone services as well as the bid. Examples of these emails are attached in Phone bid.pdf. Please explain why you thought that it was appropriate for Trillion to provide advice on the filing of the Form 470 and if, during the negotiations of the contract, you provided similar detailed feedback to other potential bidders.”*

Response: The cited information was sent by Gary Gasseler on behalf of Trillion as a follow up to a conversation in which Trillion’s managed Centrex service was mentioned. As is evident from the document, Mr. Gasseler’s e-mail contained actual, selected clips of public information available for download and review from multiple pages on USAC’s Schools and Libraries website. This information was of interest to us at the time as the existing phone private branch exchange (PBX) was nearing the end of its usable life. Mr. Gasseler’s reference to schedules and information on USAC’s website was in no way advice on what or how we should complete or file Form 470. It was instead simply forwarded excerpts of information publically available on USAC’s website, which was provided as a professional courtesy. The information contained in Form 470 was developed by our staff including me; Jarred Masterson, Director of Technology; and Dale Kanack, E-rate program coordinator.

We were and continue to be committed to a fair and open competitive bidding process that will result in the most effective use of funding available for any project. After the filing of the Form 470 (#383320000607969), we received only Trillion’s bid. Had there been other bidders, we would have provided similar detailed feedback to ensure that we obtained the best price possible.

- *“In an email dated January 23, 2008, Scott Smyth indicates that VoIP Product Addendum allows ECBOCES to offer the VoIP services to all of its members but that ECBOCES is under no financial obligation until it submits a Service Order Request to Trillion, and that ECBOCES can “just wait for one of its school district to let you know they’re ready for services.” (see VoIP Agreement.pdf) This appears to indicate that all of the member schools in the consortium had not agreed to purchase the VoIP services that ECBOCES applied for. Please provide documentation for each of your members that specifically authorized the filing of for VoIP services prior to the filing of the application. This documentation at a minimum, must include the Name and Title of Consortium Leader, Name of Consortium Member, Printed Name, Dated Signature and Title of authorized*

*person at member entity, Dates that indicate the agreement is/was/will be in effect either during the Form 471 application process or the actual funding year and the services that the consortium member authorized you to seek discounts on.”*

Response: Form 470 # 919850000655187 was filed based on input from our Technology Advisory Group, comprised of employees of various member school districts. It was filed on December 26, 2007. You will note that we have a number of FRNs for FY 2008: 1699625, 1728649, 1726367, 1728723, 1699536, 1726540, 1726561, 1699575, and 1726494. None of the FRNs relate to the referenced Form 470. The Technology Advisory Group continued discussions with their home districts and decided that most districts were not interested in doing VoIP on a BOCES-wide basis. Accordingly, no Form 471 was filed, and no FRNs were issued relating to the referenced Form 470. (See also, USAC/SLC website where Form 471 Application 612490 is listed as incomplete.)

- *“Regarding FY 2010 Application 762509, FRN 2059865, USAC’s records indicate that this FRN is based [sic] the posting of Form 470 # 640850000798499, which was posted on 12/16/2009. Furthermore, Trillion FRNs on applications 728341 and 759165 are based on the posting of Form 470 # 176170000781773, which was posted on 12/16/2009. For both competitive processes, please indicate if Trillion was involved in the development of the specifications sought on the Form 470 and subsequent contract awarded to Trillion. Please indicate if you intended to entertain bids and have a fair and open competitive bidding process or if the School District intended to select Trillion for this new contract without use of a fair and open competition. Please provide detailed support for your responses, including any supporting documentation you can provide. Furthermore, please also indicate if any gifts were offered or received, other than those indicated on the ECBOCES Expenses.pdf document (attached), during the time leading up to the award of this contract.”*

Response: Trillion was not associated with any of the applications that you reference. Trillion was not involved in the development of the specifications sought on Form 470 and was not awarded any contract under the applications listed. We intended to entertain bids and have a fair and open competitive bidding process and we did just that. We obviously did not intend to select Trillion, which is confirmed by the fact that we did not select Trillion for any of the referenced applications. To the best of our knowledge, no gifts were offered to or received by our employees during the time leading up to these contracts.

Application 762509 (FRN 2059865) relates to a contract that we have with Qwest Corporation (SPIN # 143005231).

Application 728341 (FRNs 2050665, 2050619, 2050626, 2050653, and 2050637) relates to contracts that we have with: Qwest Communications Company, LLC (SPIN # 143001157); Qwest Corporation (SPIN # 143005231); CenturyLink CenturyTel of Eagle, Inc. (SPIN # 143002487); Verizon Wireless (SPIN # 143000677); and Bijou Telephone Co-op Association (SPIN # 143002484) respectively.

Application 759165 (FRN 2050759) relates to a contract that we have with Qwest Corporation (SPIN # 143005231).

**Conclusion**

We trust that we have sufficiently responded to your questions and concerns. We have always and will continue to conduct a competitive bidding process relating to Forms 470. Please confirm that the referenced FRNs will not be denied or rescinded.

Thank you for your kind consideration of our response.

Sincerely,



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