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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

10	In the matter of	)	CC DOCKET NUMBER 02-6
11		)	
12	Request for Review by of the Decision of the	)	<b>SCHOOLS FOR INTERGRADED</b>
13	Universal Service Administrator by	)	<b>ACADEMICS AND TECHNOLOGIES &amp;</b>
14		)	<b>NEWCORP REQUEST FOR REVIEW</b>
15	SIATech	)	<b>OF USAC'S DENIAL OF E-RATE</b>
16	NEWCorp Charter Schools	)	<b>FUNDING AND BRIEF IN SUPPORT</b>
17	Oceanside, California	)	
18	Service Provider: Trillion Partners, Inc.	)	
19	Schools and Libraries Universal Service	)	
20	Support Mechanism	)	

20	FRN SIATech Number:	1877489; 1971060; 1908360; 1483818; 1619254; 1757276; 1756542; 1483818
21	FRN NEWCorp Number:	1618918; 1618542; 1618798; 1758214; 1758290; 1758160; 1905905; 1905998; 1907658; 1907687; 1907614; 1905746; 184051; 1983953; 1970863; 1970898; 1970878; 1984041; 1486990; 1485668; 1487203; 1486706
24	Form 471 Application No.	728534; 728420; 733636; 694690; 686078; 695002; 694279 686078; 584060; 635031; 635283; 536126; 537176; 537090; 537265; 536824
26	SPIN	143025872
27	Billed Entity FCC RN:	0013384730; 0013384789
28	Billed Entity Number:	16020467; 228867

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 2

II. STANDARD OF REVIEW ..... 4

III. PROCEDURAL AND FACTUAL HISTORY ..... 5

    A. The Procurement Process and E-Rate Funding ..... 5

    B. USAC’s Request for Information. .... 5

    C. USAC’s Funding Commitment Decision Letters. .... 6

IV. LEGAL ARGUMENT ..... 9

    1. APPLICANTS COMPLIED WITH THE REQUIREMENTS SET FORTH IN 47 C.F.R. § 54.511(a). .... 9

        A. Applicants Evaluated All Responsive Bidders in Compliance With Program Bid Rules and Regulations ..... 9

    2. APPLICANTS COMPLIED WITH THE REQUIREMENTS SET FORTH IN 47 C.F.R. § 54.504(b). .... 11

    3. THE APPLICANTS’ AND SERVICE PROVIDER’S COMMUNICATIONS DID NOT UNFAIRLY INFLUENCE THE OUTCOME OF THE BIDDING COMPETITION OR PROVIDE THE SERVICE PROVIDER WITH INSIDE INFORMATION. .... 14

        A. January 19, 2006 Email ..... 14

        B. January 8, 2008 Emails ..... 15

    4. APPLICANTS HAVE A REASONABLE JUSTIFICATION FOR IDENTIFYING “NC YR 10 TRILL” ON FORM 470 ..... 16

    5. THE INEXPENSIVE MEALS SHARED WITH TRILLION DID NOT CONSTITUTE GIFTS OR VIOLATE ANY FCC, STATE, OR LOCAL PROCUREMENT LAW, AND DID NOT COMPROMISE THE FAIR AND OPEN BIDDING PROCESS. .... 16

    6. USAC IMPROPERLY APPLIED A “PATTERN ANALYSIS” TO THE DETRIMENT OF THE APPLICANTS ..... 19

    7. APPLICANTS’ FUNDING REQUEST SHOULD BE PERMITTED UNDER THE EQUITABLE DOCTRINE OF LATCHES, ESTOPPEL AND WAIVER. THERE ARE SPECIAL CIRCUMSTANCES THAT WARRANT WAIVER BY THE FCC OF USAC’S COMPETITIVE BID RULES ..... 22

V. RELIEF SOUGHT BY APPLICANTS. .... 23

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Northeast Cellular Telephone Co. v. FCC</i> , 897 F.2d 1164 (D.C. Cir. 1990) . . . . .	22
<i>WAIT Radio v. FCC</i> , 418 F.2d 1153 (D.C. Cir. 1969). . . . .	23

### STATE CASES

Complaint of Petitioner <i>Arizona v. Tucson Unified School District</i> , No. CV2009-003035 (Ariz. January 29, 2009) . . . . .	19
Consent Judgment of <i>Arizona v. Tucson Unified School District</i> , No. CV2009-003035 (Ariz. March 11, 2009) . . . . .	20

### FCC CASES

<i>Academy of Careers and Technologies San Antonio, TX</i> , CC Docket No. 02-6, Order, 21 FCC Red 5348 (2006). . . . .	21
<i>Caldwell Parish Schools and Libraries Universal Service Support Mechanism</i> , CC Docket No. 02-6, Order, 23 FCC Red 2784 (2008). . . . .	13
<i>Federal-State Joint Board on Universal Service</i> , CC Docket No. 96-45, Report and Order, 12 FCC Red 8776 (1997) . . . . .	9
<i>Mastermind Internet Services</i> , CC Docket No. 96-45, Order, 16 FCC Red 4028, (2000) . . . . .	13
<i>Request for Review by Ysleta Independent School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.</i> , CC Docket Nos. 96-45, 97-21, Order, 18 FCC Red 26406 (2003) . . . . .	9,10
<i>Request for Review of the Universal Service Administrator by Bishop Perry Middle School</i> , CC Docket No. 02-6, Order, 21 FCC Red 5316 (2006). . . . .	13, 16
<i>School and Libraries Universal Service Support Mechanism</i> , CC Docket No. 02-6, Order, 25 FCC Red 6872 (2010) . . . . .	13

**UNITED STATES CODE**

47 U.S.C. § 254(h)(2)..... 21

**FEDERAL REGULATIONS**

47 C.F.R. § 1.3 ..... 22  
47 C.F.R. § 54.504(b)..... 11  
47 C.F.R. § 54.516(c)..... 21  
47 C.F.R. § 54.723(b) ..... 4  
5 C.F.R. § 2635.205(a)(1) ..... 18  
5 C.F.R. § 2635.205(a)(3) ..... 18

1 **TO THE FEDERAL COMMUNICATION COMMISSION:**

2 The School for Integrated Academics and Technologies and New Education for the  
3 Workplace respectfully submit this appeal of the Universal Service Administrator Company's  
4 Funding Commitment Denial Letters for E-Rate program years 2006 through 2010.

5 **I.**

6 **INTRODUCTION**

7 The School for Integrated Academics and Technologies ("SIATech") is a state accredited  
8 public charter high school with seven campus locations in California. All of the campuses are  
9 located on Job Corps sites. Job Corps is a federal program funded by the Department of Labor  
10 that provides vocational training to high school aged youth and young adults. SIATech schools at  
11 Job Corps serve a student population drawn entirely from households below the federally defined  
12 poverty line. Over 10,000 students have graduated from the nationwide school network – all of  
13 whom are former dropouts. SIATech schools in California participate in the E-Rate program and  
14 submit applications for program funding as members of the SIATech consortium.

15 New Education for the Workplace ("NEWCorp") is a not-for-profit entity closely  
16 affiliated with SIATech. NEWCorp has taken the SIATech school model and replicated it with  
17 public charter schools in states other than California. At present there are seven additional fully  
18 accredited SIATech schools operating under NEWCorp and submitting E-Rate funding requests  
19 as members of the NEWCorp consortium. The schools are located in Arizona, New Mexico and  
20 Florida. SIATech and NEWCorp (collectively, "Applicants") have retained Stutz Artiano  
21 Shinoff & Holtz APC law firm to submit this request for review on their behalf and in response  
22 to the October 12, 2010 and subsequent funding commitment decision letters ("FCDLs") from  
23 the Universal Service Administration Company ("USAC") denying the Applicants E-Rate  
24 funding request for Form 471 Applications in funding years 2006-2010.

25 Over the past eight years, Applicants have developed a unique and effective web based  
26 curriculum ("curriculum"). The design and implementation of the curriculum takes full  
27 advantage of workstations, server and WAN (wide area network) technology in allowing central  
28 development and management of the curriculum with direct online access available to all

1 students. The E-Rate program has provided tremendous support for this design and  
2 implementation by providing a subsidy for the network costs over the years. Without this  
3 support, it is unlikely Applicants could have developed this approach to deliver the curriculum  
4 on which the program depends.

5 The Applicants have participated in the E-Rate Funding Program ("E-Rate") since as  
6 early as 2003. The vast majority of the Applicants' costs for internet and telecommunications  
7 services qualify for reimbursement under E-Rate. In fact, 90% of such costs incurred by the  
8 Applicants are eligible for reimbursement under E-Rate. The E-Rate Program is critical to the  
9 very existence of the Applicants' entire education program. Therefore, the Applicants would not  
10 knowingly engage in any conduct that could jeopardize receipt of E-Rate funding.

11 All of the denials by USAC of Applicants' funding requests are associated with contracts  
12 entered into by Applicants with Trillion Partners ("Trillion"), an E-Rate listed network services  
13 vendor based in Austin, Texas. Prior to entering into E-Rate funded contracts with Trillion,  
14 Applicants had contracted with Trillion for non-E-Rate products.

15 Beginning in E-Rate funding year 2006, Applicants sought bids for the replacement of an  
16 existing Wide Area Network. During this and subsequent funding years, Applicants filed all of  
17 the required E-Rate forms and complied with all procurement rules published by the FCC and  
18 USAC. In all E-Rate contracting decisions, Applicants selected the vendor which offered the  
19 most cost-effective means of meeting educational and technological goals. For WAN services,  
20 that vendor was Trillion. (Attached hereto as "Exhibit A" is a true and correct copy of the  
21 "Trillion Contract")

22 During the five year period of submitting requests for E-Rate funding, Applicants were  
23 responsive to all funding application reviews conducted by USAC. These included annual  
24 Program Integrity Assurance ("PIA") reviews, periodic (and more comprehensive) Selective  
25 Reviews, and an onsite audit conducted in early 2009. None of these reviews identified any  
26 problems with Applicants' processes for bid reviews and service provider selection.

27 ///

28 ///

1 Starting in June 2009, USAC began sending Applicants new additional requests for  
2 information in connection with various Trillion funding requests. The Applicants made timely  
3 and complete responses to these requests for information; providing good faith answers to USAC  
4 based on the knowledge of the facts known to the person responding at the time. In September  
5 of 2009, Applicants received letters from USAC indicating a pending denial of multiple years of  
6 funding requests. Applicants again provided a timely response to USAC's examples of what it  
7 perceived as unfair bidding. In October 2010, without providing a response to any of the  
8 rebuttals offered by Applicants, USAC began issuing Funding Commitment Decision Letters  
9 ("FCDL") to the Applicants which denied E-Rate funding requests. Ultimately, for both  
10 Applicants combined, USAC denied E-Rate funding requests for five years 2006 to 2010 in the  
11 amount of \$3,825,482.

12 USAC's denial was predicated on a finding that the Applicants did not conduct a fair and  
13 open competitive bidding process in each of the respective years when it selected Trillion  
14 Partners, Inc. to be its service provider. The Applicants believe USAC's findings and  
15 subsequent denial were in error. As such, SIATech and NEWCorp request that the Federal  
16 Communication Commission ("FCC") reverse USAC's decisions to deny the Applicants'  
17 Funding Request for the funding years 2006-2010. Specifically, Applicants respectfully request  
18 a finding that: (1) At all times relevant hereto, SIATech and NEWCorp properly communicated  
19 with all responsive bidders, used price as a primary consideration, selected the vendor that  
20 offered the most cost effective offering, and such process was in full compliance with all  
21 applicable FCC regulations; and (2) The FCC overturn USAC's FCDL denials regarding  
22 Applicant's 2006-2010 funding years and reinstate funding under the E-Rate Program.

23 **II.**

24 **STANDARD OF REVIEW**

25 This review is guided by 47 C.F.R. § 54.723(b). Notably, 47 C.F.R. § 54.723(b) states in  
26 pertinent part, "The Federal Communications Commission shall conduct *de novo review* of  
27 requests for review of decisions by the Administrator that involve novel questions of fact, law, or  
28 policy..."

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**III.**

**PROCEDURAL AND FACTUAL HISTORY**

**A. The Procurement Process and E-Rate Funding**

In E-Rate Funding Year 2006 Applicants issued Form 470's and RFP's for an upgrade of their Wide Area Network ("WAN"). (Declaration of Halfaker, p. 4, ¶12.) Applicants' personnel developed Requests for Proposal and completed the FCC Forms 470 without the assistance of any service provider or E-Rate consultant. (Declaration of Halfaker, p. 4, ¶12.) The process of bidding and contract award for Fiscal Year 2006 was conducted in full accordance with E-Rate program rules in effect at the time. (Declaration of Halfaker, p.4, ¶12.) Trillion was selected as the vendor for SIATech's and NEWCorp's WANS, offering the most cost-effective solution with the price of the eligible products and services as the highest weighted factor. (Declaration of Halfaker, p. 4, ¶12.) In the subsequent years, the same process was followed and Trillion was again selected as the vendor. (Declaration of Halfaker, p. 4, ¶12.)

**B. USAC's Request for Information**

On or about June 12, 2009, USAC sent Applicants requests for information in connection with various Trillion funding requests. (Attached hereto as "Exhibit B" is a true and correct copy of the June 12, 2009 letter to Applicants from USAC.) Among other things, these requests for information inquired about any gifts or meals offered to Applicants by Trillion. On June 25, 2009, SIATech responded to USAC's request for information, in good faith, and based on the knowledge of the facts known to the person responding at the time. (Attached hereto as "Exhibit C" is a true and correct copy of the June 25, 2009 letters to USAC from SIATech and NEWCorp.)

On or about June 3, 2010, USAC sent NEWCorp a request to respond to questions and information concerning various Applicants funding requests. Among other things, the questions pertained to Form 470 and e-mail correspondence with Trillion. (Attached hereto as "Exhibit D" is a true and correct copy of the June 3, 2010 letter to NEWCorp from USAC.) On June 4, 2010, USAC sent SIATech a similar request. (Attached hereto as "Exhibit E" is a true and correct copy of the June 4, 2010 letter to SIATech from USAC.) On July 28, 2010 the Applicants responded

1 to USAC's request for information, in good faith, and based on the knowledge of the facts  
2 known to the person responding at the time. (Attached hereto as "Exhibit F" is a true and correct  
3 copy of the July 28, 2010 letter to USAC from Applicants.)

4 On or about September 9, 2010, USAC sent the Applicants requests to respond to  
5 questions and information concerning various Applicants funding requests. (Attached hereto as  
6 "Exhibit G" is a true and correct copy of the September 9, 2010 letters to the Applicants from  
7 USAC.) Among other things, the questions pertained to Form 470 and e-mail correspondence  
8 with Trillion. On September 15, 2010, USAC sent SIATech a letter stating, among other things,  
9 "based on the documentation that you have provided, the entire FRN 1619254 & 1756542 will  
10 be denied because you did not conduct a fair and open competitive bid process free from conflict  
11 of interest." (Attached hereto as "Exhibit H" is a true and correct copy of the September 15,  
12 2010 letter sent to SIATech from USAC). SIATech responded on September 28, 2010.  
13 (Attached hereto as "Exhibit I" is a true and correct copy of the September 28, 2010 letter USAC  
14 from SIATech.)

15 **C. USAC's Funding Commitment Decision Letters**

16 On October 12, 2010, USAC issued an FCDL (Funding Commitment Decision Letter)  
17 denying the Applicants' 471 Application for funding year 2010. (Attached hereto as "Exhibit J"  
18 are true and correct copy of the October 12, 2010 letters to Applicants from USAC.) The letters  
19 stated: "The FRN will be denied because you did not conduct a fair and open competitive  
20 bidding process. The documentation provided by you and/or the service provider indicates that  
21 the school district engaged in numerous meetings, e-mail discussions and/or verbal discussions  
22 with Trillion employees prior to the posting of the Form 470 and throughout the competitive  
23 bidding process which tainted the competitive bidding process. Trillion was consulted and  
24 offered details about services and products you were requesting on your FCC Form 470 and/or  
25 request for proposal (RFP). The competitive bidding process was influenced by Trillion when  
26 they assisted you in developing your services specifications for your FCC Form 470 or RFP.  
27 You failed to conduct a fair and open competitive bidding process free from conflicts of  
28 interest." *Id.*

1           On October 20, 2010, USAC issued an FCDL denying the Applicants' 471 Application  
2 for funding year 2009. (Attached hereto as "Exhibit K" is a true and correct copy of the October  
3 20, 2010 letter to Applicants from USAC). The letter stated, "The FRN will be denied because  
4 you did not conduct a fair and open competitive bidding process. The documentation provided  
5 by you and/or the service provider indicates that the school district engaged in numerous  
6 meetings, e-mail discussions, and/or verbal discussions with Trillion employees prior to the  
7 posting of the Form 470 and throughout the competitive bidding process which tainted the  
8 competitive bidding process. Trillion was consulted and offered details about services and  
9 products you were requesting on your FCC Form 470 and or request for proposal (RFP). The  
10 competitive bidding process was influenced by Trillion when they assisted you in developing  
11 your services specifications for your FCC Form 470 or RFP. You failed to conduct a fair and  
12 open competitive bidding process free from conflicts of interest." *Id.*

13           On October 21, 2010 USAC issued a Notification of Commitment Adjustment Letter  
14 denying the Applicants' 471 Application for funding years 2007 and 2008. (Attached hereto as  
15 "Exhibit L" is a true and correct copy of the October 21, 2010 letters to Applicants from USAC).  
16 The letter stated, "After a thorough investigation, it has been determined that this funding  
17 commitment must be rescinded in full. During the course of the review, documentation provided  
18 by you and/or your vendor indicated that there was not a fair and open competitive bid process  
19 free from conflicts of interest. The documents provided by you and/or your service provider,  
20 indicated that, prior to throughout your contractual relationship with the service provider listed  
21 on the FRN, you were offered and accepted gifts, meals, gratuities, or entertainment from the  
22 service provider, which resulted in a competitive process that was no longer fair and open.  
23 Therefore, the commitment has been rescinded in full and USAC will seek recovery of any  
24 disbursed funds from the applicant and service provider." *Id.*

25           On October 25, 2010, USAC issued an Administrator's Decision on FCC Remand for  
26 Funding Year 2006 denying the Applicants' 471 Application for funding year 2006 and 2007.  
27 (Attached hereto as "Exhibit M" is a true and correct copy of the October 25, 2010 letters to  
28 Applicants from USAC.) The letters state that funding will be denied because Applicants did not

1 conduct a fair and open competitive bidding process. *Id.* It further noted the documentation  
2 provided by the Applicants or the service provider indicated that the School District engaged in  
3 numerous meetings, e-mail discussions and/or verbal discussions with Trillion employees prior  
4 to the posting of the Form 470 and throughout the competitive bidding process which tainted the  
5 competitive bidding process. *Id.* Moreover, according to the letter Trillion was consulted and/or  
6 offered details about services and products Applicants were requesting on Form 470 and/or  
7 Request for Proposal (RFP). *Id.* It further states the competitive bidding process was influenced  
8 by Trillion when they assisted Applicants in developing new services specifications for Form  
9 470. *Id.*

10 On November 5, 2010, USAC issued a notification of commitment adjustment letter  
11 denying NEWCorp's 471 applications for funding years 2007-2008. (Attached hereto as "Exhibit  
12 N" is a true and correct copy of the November 5, 2010 letter to NEWCorp from USAC.) The  
13 letter stated, "After a thorough investigation, it has been determined that this funding  
14 commitment must be rescinded in full. During the course of the review, documentation provided  
15 by you and/or your vendor indicated that there was not a fair and open competitive bid process  
16 free from conflicts of interest. The documents provided by you and/or your service provider,  
17 indicated that, prior to throughout your contractual relationship with the service provider listed  
18 on the FRN, you were offered and accepted gifts, meals, gratuities, or entertainment from the  
19 service provider, which resulted in a competitive process that was no longer fair and open.  
20 Therefore, the commitment has been rescinded in full and USAC will seek recovery of any  
21 disbursed funds from the applicant and service provider." *Id.*

22 The Applicants now submit this Brief in support of its Request for Review of the denial  
23 of funding for years 2006-2010 in the amount of \$3,825,482.

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IV.

LEGAL ARGUMENT

1. APPLICANTS COMPLIED WITH THE REQUIREMENTS SET FORTH IN 47 C.F.R. § 54.511(a)

A. Applicants Evaluated All Responsive Bidders in Compliance with Program Bid Rules and Regulations

USAC's letter to Applicants dated September 9, 2010 cites as authority *Request for Review by Ysleta Independent School District, 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, Order, 18 FCC Rcd 26406 (2003) (*Ysleta Order*). In the *Ysleta Order* the school district filed Form 470 requesting every product and service eligible under the E-rate program with the hourly rates of the vendor's employee being the only prices listed. In denying the District's appeal, the FCC held Form 470 must be specific to services requested and price must be the primary factor in selecting a bid. *Id.*

The *Ysleta Order* also clarified that when permitted by state and local procurement laws, additional factors that may be considered by the Applicants include, *inter alia*, "prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives." *Ysleta Order*, 18 FCC Rcd at p. 26428; citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029-30, para. 481 (1997). In the *Ysleta Order* the district filed a Form 470 requesting every product and service eligible under the E-rate program. The district in that case selected IBM and then began negotiating for the cost of the services. *Id.* In the case of SIATech and NEWCorp, the Applicants' Form 470 was specific to the approved E-Rate products and services. The vendor was selected with the price determined, unlike in *Ysleta* when the District negotiated the price after the vendor was selected.

Applicants' Forms 470 requested specific services (WAN) and accepted the lowest bidder in selecting the service provider. As a result, the Applicants evaluated all responsive bidders and used price as a primary factor. (Declaration of Halfaker, p. 6, ¶25.) In addition, Applicants selected the service provider that offered the most cost effective means of meeting

1 educational and technology goals in compliance with program bid rules and regulations.  
2 (Declaration of Halfaker, p. 6, ¶25.) This is entirely consistent with the law established in the  
3 *Ysleta Order*.

4 All of the Forms 471 and related Applications have been subjected to Program Integrity  
5 Assurance (PIA) review by USAC. Many of the forms have also been identified for and have  
6 passed the more rigorous Selective Review performed on some applications by USAC. All of  
7 these reviews found that the nature of the services: Wide Area Network (WAN) and Voice over  
8 Internet Protocol (VoIP) were within the scope of E-Rate program support, were properly  
9 contracted, and were provided at reasonable costs.

10 In addition, in 2009, under the direction of the FCC Office of the Inspector General,  
11 auditors from KPMG conducted an onsite independent audit of Funding Years 2006 and 2007 E-  
12 Rate applications for funding and service provider selections. The audit was conducted to  
13 determine compliance with FCC regulations and orders. Two auditors were onsite at the  
14 Applicants' administrative offices full-time for three weeks and a third individual supervised the  
15 audit with multiple onsite visits. After their departure, the auditors continued the review at their  
16 offices for an unknown period of time.

17 The final audit report dated December 2, 2009, stated the KPMG auditors conducted a  
18 full review of the entire E-Rate service provider selections procedures used by SIATech in Fiscal  
19 Years 2006 and 2007 for E-Rate fund disbursements made in the Fiscal Year ended June 30,  
20 2008. The report stated the following:

21 ...in our opinion, except for the material noncompliance described in the third  
22 paragraph, SIATech complied in all material respects, with the aforementioned  
23 requirements relative to disbursements of \$785,493 made from the Universal  
24 Service Fund during the fiscal year ended June 30, 2008 and relative to its  
25 application process for Funding Year 2006 and 2007 applications for funding and  
26 service provider selections related to the Funding Request Numbers for which  
27 such disbursements were made.

28 (Attached hereto as "Exhibit O" is a true and correct copy of the 2009 KPMG Audit Report.)

KPMG recommended the following four findings:

F01: "Finding for not separating the basic maintenance services and the internal connections equipment on FCC Form 471 resulting in a monetary effect of \$48,006 pertaining to FRN 1480065. The nature of the material noncompliance (Lack of Internal

1 Controls) referenced by the auditor did not involve any aspect of the service provider  
2 selection process. On March 20, 2010, USAC issued a management response letter to  
3 SIA Tech concurring with the finding, effect and recommendation that recovery is not  
4 warranted.”

5 F02: “In considering bids received for internal connections funded by USAC through  
6 FRN 1480067, the beneficiary used incorrect data in its price comparison matrix which  
7 resulted in an incorrect score for the bid received from one of the bidders. There is no  
8 monetary effect as a result of this finding as the errors did not change the outcome of the  
9 selection of the service provider.”

10 F03: “At the time the FCC Form 471 was submitted to USAC, the beneficiary occupied  
11 an additional classroom provided by the Jobs Corps Program at Treasure Island and San  
12 Diego campuses. However, these classes were taken from the beneficiary by the Job  
13 Corps Program prior to the arrival of equipment. The equipment was then put into the  
14 warehouse as spare parts. The monetary effect of this finding is that \$11,225 disbursed  
15 under FRN 1480067 during the fiscal year ended June 30, 2008 for the two switches is  
16 subject to recovery by USAC.”

17 F04: “SIA Tech did not understand the reimbursement amount requested for the service  
18 substitution should be based on the lower of either the pre-discount price of the service  
19 for which support was originally requested or the pre-discount price of the new  
20 substituted service. The monetary effect of this finding is that \$1,116 disbursed under  
21 FRN and 1480067 during the fiscal year ended June 30, 2008 is subject to recovery by  
22 USAC.”

23 (See “Exhibit O”.)

24 Ultimately, the auditors, selected by USAC and the FCC, concluded the Applicants  
25 complied with the material requirements of FCC regulations in selecting Service Providers. (See  
26 “Exhibit O”.) Moreover, USAC issued a Management Response Letter dated March 10, 2010  
27 that “concur[s] with the finding, effect and recommendation” of KPMG. (Attached hereto as  
28 “Exhibit P” is a true and correct copy of the March 10, 2010, USAC Management Response  
Letter.) Notwithstanding this, seven months later, USAC denied the Applicants funding requests  
for the years audited by KPMG. This is a complete reversal of the KPMG audit findings and  
USAC’s acceptance of those findings. Applicants vigorously contend such action by USAC is  
not supported by the facts or legal authority and must be reversed.

**2. APPLICANTS COMPLIED WITH THE REQUIREMENTS SET FORTH IN 47  
C.F.R. § 54.504(b)**

Applicants were in full compliance during the funding years in question with FCC  
regulation 47 C.F.R. § 54.504(b), though it was not codified during this period of time. The  
FCDL states USAC denied the Applicants funding based on the violations of E-Rate program

1 rules for conducting a fair and open bidding process. Specifically, in the USAC FCDLs it states,  
2 in pertinent part:

3 Funding will be denied because you did not conduct a fair and open competitive  
4 bidding process. The documentation provided by you and or the service provider  
5 indicates that the school Applicants engaged in numerous meetings, e-mail  
6 discussions and or verbal discussions with Trillion employees prior to the posting  
7 of the Form 470 and throughout the competitive bidding process which tainted the  
8 competitive bidding process. Trillion was consulted and offered details about  
9 services and products you were requesting on Form 470. The competitive bidding  
process was influenced by Trillion when they assisted you in developing new  
services specifications for Form 470. You fail to conduct a fair and open  
competitive bidding process free from conflicts of interest.

10 (See "Exhibits K, L.")

11 On or about December 15, 2006, the Applicants filed their Forms 470 advising venders  
12 that they sought both increased WAN capacity and related equipment associated with the  
13 additional services. (Declaration of Halfaker, p. 7, ¶31.) The Form 470 was posted through  
14 USAC to all potential service providers as required by USAC regulation. (Declaration of  
15 Halfaker, p. 7, ¶31.) All potential bidders were treated the same and received the same  
16 information. (Declaration of Halfaker, p.7, ¶31.) The Applicants waited the mandatory 28 day  
17 period to select the vendor, providing all vendors the opportunity to present a proposal.  
18 (Declaration of Halfaker, p.7, ¶31.)

19 The Commission previously has addressed specific situations in which an applicant,  
20 service provider, or both have compromised the fairness of a competitive bidding process  
21 because of improper conduct. Although the Commission has held in numerous orders that the  
22 competitive bidding process must be fair and open, at the time of the funding requests by the  
23 applicant, there was not a codified Commission rule defining what constituted "fair and open  
24 competitive bidding process."

25 In response to the applicable bid requirements relating to a fair and open competitive  
26 procurement process being vague and overbroad, the FCC in May 2010, submitted the Notice of  
27 Proposed Rule Making. According to the FCC:

28 ...although the Commission has held in numerous orders that the competitive  
bidding process must be fair and opened, there is currently no codified

1 commission rule specifically requiring that the competitive bidding processed be  
2 conducted by an E-Rate application in a fair and open manner.

3 *School and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order,  
4 25 FCC Rcd 6872, 6883 (2010).

5 The FCC stated further that if competitive rules were to be codified, the FCC would  
6 provide illustrated guidance on conduct that would violate the rules. In September 2010, the  
7 FCC issued guidance as to what constitutes a violation of competitive bid practices. Prior to this  
8 date, neither the FCC nor USAC had issued any definitive rules on what constituted unfair  
9 bidding practices. The Applicants cannot be expected to adhere to a rule that did not exist when  
10 the alleged violation occurred. To enforce such a rule under the facts presented in this appeal  
11 violates any reasonable notion of fair play and substantial justice.

12 The Applicants conducted a fair and open procurement process. All potential vendors  
13 received the same information and had the same opportunity to respond. There was no violation  
14 of Program rules when the Applicants selected service providers with a ranking system that  
15 considered cost as the most important factor. (Halfaker Declaration, p. 7, ¶33.)

16 If it is found that Applicants committed any violations for filing an FCC Form 470 or  
17 FCC Form 471, they represent such violations to be minor errors resulting from historical rules  
18 and instructions being vague and unclear prior to the FCC Order of September 28, 2010.  
19 *Request for Review of the Universal Service Administrator by Bishop Perry Middle School*, CC  
20 Docket No. 02-6, Order, 21 FCC Rcd 5316, 5321, ¶ 10 (2006), *see also* fns. 30-31. In each of  
21 these cases it was found the Applicants did not violate the minimum processing standards at all.

22 USAC's letter dated September 9, 2010 (See "Exhibit G") relies on the FCC rulings in  
23 *Caldwell Parish Schools and Libraries Universal Service Support Mechanism*, CC Docket No.  
24 02-6, Order, 23 FCC Rcd 2784 (2008) (*Caldwell Order*) and *Mastermind Internet Services*, CC  
25 Docket No. 96-45, Order, 16 FCC Rcd 4028, 4032-33 (2000) (*Mastermind Order*). In these cited  
26 cases, the service providers had filled out the forms on behalf of the school districts, signed the  
27 forms on behalf of the school districts, and submitted RFPs to other potential bidders. All of  
28 these actions by a service provider on behalf an applicant are in violation of the competitive  
bidding process. There is no evidence to support such facts in the Applicants' appeal before the

1 Commission. There was no service provider involvement in Applicant's RFP or Form 470 filing  
2 processes as indicated by the Applicants' declaration and supporting documentation. Any  
3 application of the cases cited would be unfair as the facts supporting violations in these cases are  
4 not found in Applicants' case.

5 **3. THE APPLICANTS' AND SERVICE PROVIDER'S COMMUNICATIONS DID**  
6 **NOT UNFAIRLY INFLUENCE THE OUTCOME OF THE BIDDING**  
7 **COMPETITION OR PROVIDE THE SERVICE PROVIDER WITH INSIDE**  
8 **INFORMATION**

9 **A. January 19, 2006 Email**

10 USAC erred in finding communications with Trillion unfairly influenced the outcome of  
11 the bidding competition. The first communication in question took place on or about January 29,  
12 2006. The allegedly improper communication from Trillion to Applicants stated, "I would like  
13 to respond to the Form 470-however I don't see that WAN services are listed on your 470. Will  
14 you be requiring a quote for WAN services? If so then please file another 470 so we may  
15 respond to your request on your RFP." (Attached hereto as "Exhibit Q" is a true and correct  
16 copy of January 19, 2006, email from Trillion to SIATech.)

17 During the years of filing Form 470, the Applicants have been unsure what category of  
18 service is correct for their Priority I WAN services as these services cover both  
19 Telecommunications Services and Internet Access (separate E-Rate filing categories). The  
20 referred e-mail message states that the WAN services are more appropriately categorized in  
21 "Telecommunications Services." Thus, the e-mail message by Trillion was intended for the  
22 Applicants to understand the correct procedural steps in the Form 470 filing process to avoid any  
23 rule violations. The e-mail correspondence did not in any way influence the vendor selection  
24 process.

25 The above communication with the vendor did not unfairly influence the outcome of the  
26 bidding competition or furnish the service provider with inside information. The communication  
27 was simply to clarify the service category for the requested service. (Declaration of Halfaker, p.  
28 7, ¶35.)

///

1                   **B. January 8, 2008 Emails**

2                   USAC takes issue with an email dated January 8, 2008. In that email Trillion states, "In  
3 case we don't connect today--I suggest you consider the following small changes to ensure that  
4 nothing slips through the cracks regarding the E-Rate process to guarantee funding."

- 5                   1.                   Issue new 470's for NEWCorp and SIATech with Telco Services  
6                   (WAN) checked, as per your existing 470s. Reference the existing  
7                   RFP.
- 8                   2.                   Issue a WAN addendum/amendments to reference the new 470's in  
9                   addition to existing 470's.
- 10                  3.                   Include INet Bandwidth needs in RFP addendum/amendments if  
11                  you want bids on Internet access as part of this year's E-Rate  
12                  needs.
- 13                  4.                   Do not cancel any existing 470-keep them alive. "That way any  
14                  vendors responding will be able to address WAN and INET and  
15                  reference/connect to an applicable 470. All of you bases will be  
16                  covered. Then all you have to do is select, confirm contract and file  
17                  the Form 471 and you will be sent."

18 (Attached hereto as "Exhibit R" is a true and correct copy of the January 8, 2008, emails between  
19 Trillion and SIATech.)

20                  The Applicants' and Service Provider's communications did not unfairly influence the  
21 outcome of the bidding competition or provide the service provider with inside information.<sup>1</sup>  
22 Communications are allowable by an incumbent vendor with its customer as long as the  
23 communications would not unfairly influence the outcome of a competition or would furnish the  
24 service provider with inside information. The e-mail message by Trillion was intended for the  
25 Applicants to understand the correct procedural steps in the Form 470 filing process to avoid any  
26 rule violations. The e-mail correspondence did not in any way influence the vendor selection  
27 process.

28                  The Applicants contend that the above communications, if deemed improper, would  
warrant the complete rejection of all of the Applicants' E-rate applications for funding years  
2006 through 2010. The communications did not provide inside information or any bidding

<sup>1</sup> See <http://www.usac.org/sl/Applicants/step03/run-open-fair-competition.aspx>.

1 advantage to the service provider. There is no evidence the Applicants received more funding  
2 than was appropriate for the requested service and there is no evidence of waste, fraud or abuse,  
3 misuse of funds, or a failure to adhere to core program requirements. The Commission has  
4 previously been petitioned on the issue that "rigid compliance with the application procedures  
5 does not further the purposes of section 254(h) or serve the public interest." *Request for Review*  
6 *of the Universal Service Administrator by Bishop Perry Middle School*, CC Docket No. 02-6,  
7 Order, 21 FCC Red 5316, 5321, ¶ 11 (2006).

8 **4. APPLICANTS HAVE A REASONABLE JUSTIFICATION FOR IDENTIFYING**  
9 **"NC YR 10 TRILL" ON FORM 470**

10 In FY 2006, NEWCorp signed four contracts with and implemented a Wide Area  
11 Network (WAN) with Trillion being the service provider. From that point in time, SIATech  
12 internally referred to the WAN as the "Trillion WAN", in an effort to distinguish it from the  
13 WAN provided by the Applicants' former service provider. (Declaration of Halfaker, p 8, ¶38.)  
14 The Form 470 applications allow for an "internal identifier" to be created by the applicant for  
15 internal reference. (Declaration of Halfaker, p. 8, ¶38.) "Trill" was included in this identifier to  
16 allow the applicant internally to easily identify the application as being WAN related.  
17 (Declaration of Halfaker, p. 8, ¶38.) The identifier was not used to identify that Trillion was to  
18 be awarded the contract, did not compromise the bidding process and did not unfairly influence  
19 the outcome of the competition or provide a service provider with inside information.  
20 (Declaration of Halfaker, p. 8, ¶38.)

21 **5. THE INEXPENSIVE MEALS SHARED WITH TRILLION DID NOT**  
22 **CONSTITUTE GIFTS OR VIOLATE ANY FCC, STATE, OR LOCAL**  
23 **PROCUREMENT LAW, AND DID NOT COMPROMISE THE FAIR AND**  
24 **OPEN BIDDING PROCESS**

25 USAC's September 15, 2010 Proposed Denial of the E-Rate Funding is based on an  
26 Applicants' employee receiving "valuable meals" from Trillion. The following is a list of the  
27 "valuable meals" the Applicants' employees received from Trillion:

- 28 1. 2/12/2006 - Dinner - \$22.67 each, 2 attendees.
2. 2/13/2006 - Lunch - \$17.07 each, 4 attendees.
3. 4/15/2006 - Dinner - \$22.75, 1 attendee.

- 1 4. 5/9/2006 – Lunch - \$17.46, 1 attendee.
- 2 5. 12/5/2007 – Lunch - \$8.03 each, 2 attendees.
- 3 6. 1/14/2008 – Lunch - \$18.81, 1 attendee.
- 4 7. 1/31/2008 – Lunch - \$8.57, 1 attendee.
- 5 8. 5/01/2008 – Lunch - \$8.20, 2 attendees.
- 6 9. 7/17/2008 – Lunch - \$8.57 each, 3 attendees.
- 7 10. 9/25/2008 – Lunch - \$16.45, 1 attendee.
- 8 11. 9/25/2008 – Snack -\$3.54, 1 attendee.

9 The cost of the Applicants' average meal per person was roughly \$14.00. Each meal  
10 typically had one to two attendees.

11 Neither the Applicants nor Trillion received any improper benefit from these very modest  
12 meals. There is absolutely no evidence the meals resulted in the detriment of any other service  
13 provider and nor that the Applicants committed any fraud, waste, abuse or participated in any  
14 unfair bid process as a result of the meals. The meals were extensions of regular meetings  
15 between the Applicants and Trillion to discuss ongoing technical and business issues related to  
16 the major network services being provided to Applicants by Trillion. Allowing a vendor to pay  
17 for reasonable meals during business meetings was allowable within Applicants' governing,  
18 purchasing, and conflict of interest policies and is not a violation of the then published E-Rate  
19 program rules. (Declaration of Halfaker, p. 8, ¶40.)

20 The Applicants are unclear how these meals violated FCC procurement rules. The meals  
21 took place in calendar years 2006, 2007 and 2008 and the Applicants were not notified until June  
22 3, 2010 by USAC of any potential violation of any Program bid rule. The meals did not represent  
23 a "gift" as they were part of normal business meetings and Applicants are willing to fully  
24 reimburse Trillion for the value of the meals. No conflict of interest arose between the  
25 Applicants' employees attending meals with Trillion as the meals had no influence over the  
26 Applicants decision to select Trillion as its Service Provider. (Declaration of Halfaker, p. 9, ¶41.)  
27 Moreover, the meals in question would be in compliance with E-Rate program rules even if they  
28 were evaluated by the guidelines published by the Commission in the Sixth Report and Order  
issued on September 28, 2010.

The Applicants had ongoing technical discussions with Trillion concerning WAN  
performance issues as they were (and are) their WAN service provider. (Declaration of Halfaker,

1 p. 8, ¶42.) These discussions covered a large range of topics oriented to making sure the WAN  
2 architecture and implementation (including WAN design) were working as anticipated.  
3 (Declaration of Halfaker, p.9, ¶42.) These discussions whether in business meetings or meals  
4 were not held in any way to plan or influence the issuance of pending or future selection of  
5 vendors under E-Rate. (Declaration of Halfaker, p. 9, ¶42.)

6 Applicants contend the aforementioned meals do not violate FCC regulation in effect  
7 during the period of time the lunches took place, nor did they violate the recently enacted  
8 amended regulation relating to gift restrictions.<sup>2</sup> Furthermore, the Applicants were not provided  
9 an opportunity to reimburse Trillion as allowed under 5 C.F.R. §§ 2635.205(a)(1), (3). The  
10 Applicants are ready, willing and able to reimburse Trillion for the total amount of what USAC  
11 says the meals cost.

12 Information provided to USAC and the attached declaration of Halfaker provide support  
13 that Applicants did not accept the invitations from Trillion to attend the National Conference or  
14 Customer Council. An internal investigation found no evidence of any employee of the  
15 Applicants having accepted inappropriate travel expenses, meals, or gifts from Trillion or any  
16 other vendor associated with the E-Rate program. Nor did the Applicants find that Trillion  
17 provided any type of incentive, financial or otherwise, to either organizational entity as an  
18 inducement to give them preferential treatment. (Declaration of Halfaker, pp.9, ¶44.)

19 During all of the years of E-Rate program participation, Applicants maintained a Board  
20 of Directors approved conflict-of-interest policy. In addition, all administrators are required  
21 annually to complete and submit a State of California Form 700 which details any relationships

22 \_\_\_\_\_  
<sup>2</sup> Amend § 54.503 to read as follows: (d) Gift Restrictions.

23 (1) Subject to subparagraphs (3) and (4) of this paragraph, an eligible school, library, or consortium that includes an  
24 eligible school or library may not directly or indirectly solicit or accept any gift, gratuity, favor, entertainment, loan,  
25 or any other thing of value from a service provider participating in or seeking to participate in the schools and  
26 libraries universal service program. No such service provider shall offer or provide any such gift, gratuity, favor,  
27 entertainment, loan, or other thing of value except as otherwise provided herein. Modest refreshments not offered as  
28 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.  
The \$50 amount for any service provider shall be calculated as the aggregate value of all gifts provided during a  
funding year by the individuals specified in subparagraph (2)(ii).

1 which might indicate the existence of a conflict of interest. Applicants' employees or board  
2 members may not serve on any board of any type of telecommunications, Internet access, or  
3 internal connections service provider that participates in the E-Rate program in the same State.  
4 California Law requires that a disclosure statement is to be filed if a vendor or potential vendor  
5 has provided a local government office with one or more gifts that have an aggregate value of  
6 more than \$390 within one calendar year.<sup>3</sup>

7 Applicants during the funding period filed the required State of California Form 700.  
8 (Attached hereto as "Exhibit S" is a true and correct copy of the California Form 700.) A review  
9 of the Forms indicates Applicants did not report receiving gifts and were in full compliance with  
10 state and local conflict of interest requirements.

11 **6. USAC IMPROPERLY APPLIED A "PATTERN ANALYSIS" TO THE**  
12 **DETRIMENT OF THE APPLICANTS**

13 In June 2009 USAC sent detailed requests for information to Applicants and an estimated  
14 190 E-Rate applicants in at least 27 states who applied for funding of services provided by either  
15 Trillion Partners or Trillion Digital Communications in FY 2009 or earlier years. This large-scale  
16 effort has its roots in a procurement investigation of the Tucson Unified School District  
17 ("TUSD") that began in 2005 by the Arizona Attorney General. Complaint of Petitioner *Arizona*  
18 *v. Tucson Unified School District*, No. CV2009-003035 (Ariz. January 29, 2009). The  
19 investigation was expanded in 2006 to include the District's E-rate related procurement activities.  
20 *Id.*

21 As explained in USAC's letters to the Applicants of June 2009, the Arizona E-rate  
22 investigation led to a complaint "alleging antitrust, bid rigging, procurement fraud, and conflict  
23 of interest violations" involving TUSD, Trillion, and TUSD's consultant E-Rate Consulting  
24 Services ("ERC"). Complaint of Petitioner *Arizona v. Tucson Unified School District*, No.  
25 CV2009-003035 (Ariz. January 29, 2009). Both TUSD and Trillion settled the Arizona  
26

27 <sup>3</sup> <http://www.fppc.ca.gov/forms/700-06-07/Form700-06-07.pdf>  
28 Gifts received by most state and local officials, employees, and candidates are subject to a limit. For 2006-2007, the  
gift limit is \$390 from a single source during a calendar year.

1 complaint by entering into consent judgments. Consent Judgment of *Arizona v. Tucson Unified*  
2 *School District*, No. CV2009-003035 (Ariz. March 11, 2009). Although Arizona settled the  
3 complaint, USAC's 2009 letters express concern that E-rate rules may have been violated, not  
4 only with respect to TUSD, but to other Trillion clients. (See "Exhibit B".) To this end, the  
5 letters stated, "USAC is holding funding requests and invoices associated with Trillion pending  
6 USAC's investigation of these issues." *Id.*

7 USAC's Trillion client letter of June 2009 requested specific information from Trillion's  
8 past and present E-rate clients - even those who had been previously subjected to Selected  
9 Reviews and audits. (See "Exhibit B".) For each client Funding Request associated with  
10 Trillion, USAC requested the following:

11 1. Copies of any written agreement with an E-rate program consultant, together with  
12 a description of the assistance provided.

13 2. Copies of all correspondence between applicant staff members, Trillion  
14 employees, and/or consultant "starting prior to the posting of the relevant Form 470 through the  
15 signing of the agreement with Trillion."

16 3. List of all gifts offered or provided by Trillion to applicant staff members.

17 4. List of all meals, entertainment and/or trips offered or provided by Trillion to  
18 applicant staff members.

19 5. List of all Trillion-sponsored E-rate program seminars or workshops attended by  
20 applicant staff members, together with copies of agendas and all other material.

21 (See "Exhibit B".)

22 Among other things, USAC is responsible for administering the application process for  
23 the E-rate program. Pursuant to this authority, USAC developed a procedure to detect  
24 applications that may be in violation of the Commission's competitive bidding rules by searching  
25 for similar language used in FCC Forms 470 filed by other schools, libraries, and consortia that  
26 selected the same service provider through their competitive bidding processes. This procedure,  
27 described by USAC as "pattern analysis," contemplates the possibility that a group of applicants,  
28 all with the same service provider, violated the competitive bidding rules.

1           In the *Academy of Careers and Technologies San Antonio, TX*, CC Docket No. 02-6,  
2 Order, 21 FCC Red 5348 (2006), the Commission determined that USAC improperly denied  
3 requests for funding based on its “pattern analysis” procedure. The Commission found that  
4 USAC should not stop its review of funding request applications after identifying a pattern in  
5 certain applications without sufficiently examining whether the Commission's rules were  
6 actually violated due to improper third-party participation in the competitive bidding process. *Id.*  
7 Additionally, the Commission required USAC to conduct further investigation and analysis prior  
8 to denying funding where USAC suspects that a service provider has improperly participated in  
9 an applicant's bidding process due to the results of its pattern analysis procedure. *Id.* Applicants  
10 believe that in the denials associated with this appeal that USAC did not follow the Commission  
11 instructions on the use of “pattern analysis” and thus deprived Applicants of due process in the  
12 analysis of its applications.

13           USAC’s authority in performing audits is limited to compliance with the statutory and  
14 regulatory requirements, but does not extend to the application of finding in FCC rulings. (47  
15 C.F.R. § 54.516(c)) USAC’s letters to the Applicants dated June 12, 2010 and September 9, 2010  
16 lists numerous FCC rulings the Applicants allegedly violated. For USAC to request information  
17 and determine denial of funding based on FCC rulings exceeds their authority provided in the  
18 regulations. Applicants contend USAC has found them “guilty by association” due to selection  
19 of Trillion Partners as their service provider. Applicants contend that USAC’s findings were not  
20 based on an objective review of the facts and that the findings do not include any evidence of  
21 waste, fraud or misuse of federal funds, or violation of published program rules. To the contrary,  
22 Applicants would submit to the Commission that they have adhered to all applicable laws and  
23 published program rules from the outset and are seeking funding precisely for the purposes  
24 contemplated in the creation of the E-Rate program.

25 ///

26 ///

27 ///

28

1           **7. APPLICANTS' FUNDING REQUEST SHOULD BE PERMITTED UNDER THE**  
2           **EQUITABLE DOCTRINE OF LATCHES, ESTOPPEL AND WAIVER. THERE**  
3           **ARE SPECIAL CIRCUMSTANCES THAT WARRANT WAIVER BY THE FCC**  
4           **OF USAC'S COMPETITIVE BID RULES**

5           USAC authorized the OIG audit in 2009, received the final report on December 2, 2009,  
6           and issued their Management Letter Response on March 10, 2010. (See "Exhibits O and P".)  
7           USAC requested information from the Applicants on or about June 12, 2009 when they began  
8           their pattern analysis of applicants contracting with Trillion. On or about October 12-25, 2010,  
9           USAC informed Applicants that their funding requests previously approved years ago are now  
10          denied. (See "Exhibits J, K, L, M, N".) USAC's decision has placed the Applicants in a perilous  
11          financial situation and without a reversal of USAC's judgment the Applicants will be forced to  
12          incur expenses that have not been budgeted. The unanticipated expenses will jeopardize the  
13          continuing operation of the Applicants' schools which provide education to a population of  
14          students that all qualify for the Federal Free and Reduced Lunch Program. As such, USAC's  
15          decision in this case is contrary to the primary purpose in establishing the schools component of  
16          the E-Rate program in ensuring that educators, students, and school personnel have access to  
17          advanced telecommunications and information services for educational purposes. (47 U.S.C. §  
18          254(h)(2).)

19          USAC's FCDL sent in October 2010 denying Applicants' funding that was approved in  
20          years prior without regard of the previous approvals of this funding under USAC's Program  
21          Integrity Assurance (PIR) reviews, Selective Reviews, and the KPMG Audit (with associated  
22          USAC Management letter). All of the forgoing confirmed the compliance of Applicants'  
23          processes and found no evidence of waste, fraud or abuse, misuse of funds or failure to adhere to  
24          core program requirements. Applicants submit that there was neither a basis in fact nor in law or  
25          equity for the denial of its E-Rate funding requests by USAC.

26          Notwithstanding the above, should the Commission hold that USAC made a proper  
27          interpretation of program rules, the Commission may waive any provision of its rules on its own  
28          motion and for good cause shown. (47 C.F.R. § 1.3.) A rule may be waived where the particular  
                facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone*

1 *Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In addition, the Commission may take into  
2 account considerations of hardship, equity, or more effective implementation of overall policy on  
3 an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *affirmed by*  
4 *WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972). In  
5 sum, the Commission has found historically that waiver is appropriate if special circumstances  
6 warrant a deviation from the general rule, and such deviation would better serve the public  
7 interest than strict adherence to the general rule. *Northeast Cellular, supra*, 897 F.2d at 1166.

8 V.

9 RELIEF SOUGHT BY APPLICANTS

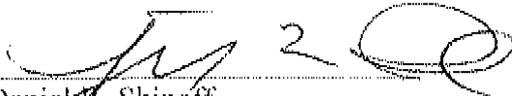
10 Applicants respectfully request a finding that:

11 1. At all times relevant hereto, SIATech and NEWCorp properly evaluated the  
12 responsive bidders, used price as a primary consideration, selected the vendor that offered the  
13 most cost of means of meeting educational and technology goals, and such process was in  
14 compliance with all applicable FCC rules and regulations; and

15 2. The FCC overturn USAC's FCDL denials regarding Applicants' 2006-2010  
16 funding years, reinstate all denied funding, and direct USAC to release all payments due to  
17 Applicants associated with the applications referenced within this appeal.

18 Dated: December 9, 2010

19 STUTZ ARTIANO SHINOFF & HOLTZ  
A Professional Corporation

20  
21 By: 

22 Daniel R. Shinoff  
23 Arthur M. Palkowitz  
24 Patrice M. Coady  
25 Ryan L. Church  
26 Attorneys for SIATech and NEWCorp  
27  
28