

September 30, 2011

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation (CC Docket No. 02-6)

Dear Ms. Dortch:

On September 29, 2011, the following met with Angela Kronenberg, Wireline Legal Advisor to Commissioner Mignon Clyburn: (1) Les Miller, Superintendent, Dimmitt Independent School District (“Dimmitt”); (2) Sharron Bills, Director of Federal Programs, Dimmitt; (3) Floyd Beard, Executive Director, East Central Board of Cooperative Educational Services (“ECBOCES”); (4) Byron Smyl, Receiver for Trillion Partners, Inc.; (5) John Cardinal Parks of Horowitz & Burnett, P.C., counsel to Byron Smyl; and (6) Edgar Class and Henry M. Rivera, both of Wiley Rein LLP, counsel to Byron Smyl, Receiver for Trillion Partners, Inc.

The purpose of the meeting was to discuss appeals of adverse decisions by the Universal Service Administrative Company filed by Dimmitt, ECBOCES and Trillion Partners, Inc. The appeals and issues discussed are described in the attached presentations, which were distributed at the meeting.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, 47 C.F.R. § 1.1206, a copy of this letter is being filed electronically for inclusion in connection with the above-captioned docket.

Respectfully submitted,

/s/ Les Miller
Les Miller
Superintendent
Dimmitt Independent School District

/s/ Floyd Beard
Floyd Beard
Executive Director
*East Central Board of Cooperative
Educational Services*

/s/ Henry M. Rivera
Henry M. Rivera
*Counsel for Byron Smyl, Receiver for
Trillion Partners, Inc.*

Attachments

cc: Angela Kronenberg (via e-mail)



E-Rate Appeals

Byron Smyl, Receiver Trillion Partners, Inc.

Presentation to:

Angela Kronenberg, Wireline Legal Advisor

Hon. Commissioner Mignon Clyburn

September 29, 2011

Who we Are

- Dimmitt Independent School District
 - Represented by Les Miller, Superintendent, and Sharron Bills, Director of Federal Programs
- East Central Board of Cooperative Educational Services (“ECBOCES”)
 - Represented by Floyd Beard, Executive Director
- Byron Smyl, Receiver Trillion Partners, Inc.
 - Represented by Byron Smyl and John Parks, Counsel for the Receiver
 - On July 27, 2011, Judge Krieger of the U.S. District Court for the District of Colorado appointed Byron Smyl as receiver of Trillion (Civil Action No. 11-cv-01787-MSK-MJW)
 - As Federal receiver, Mr. Smyl is in complete control of Trillion’s management, assets and all business aspects of the company

Why we are here

- Introduce you to Dimmitt Independent School District, East Central Board of Cooperative Educational Services and the Federal receiver for Trillion Partners, Inc
- Familiarize you with the issues raised by the E-Rate appeals pending before the Telecommunications Access Policy Division
 - If the appeals are denied, the applicants and Trillion will likely appeal to the Commission
- Urge you to encourage the Division to process the appeals expeditiously

Overview of appeals

- The appeals filed by the two parties represented here will impact the availability of high-speed Internet access to over 10,600 students over 9 predominately rural counties in Colorado and Texas
- These appeals raise two basic issues:
 - Whether Trillion provided, and the applicants accepted, “valuable gifts” that were prohibited the FCC’s rules, thus tainting the competitive bidding process; and
 - Whether certain communications between Trillion and the applicants tainted the competitive bidding process
- The answers to these questions for both applicants is “no”

Overview of appeals

- The applicants and Trillion concede that certain inexpensive gratuities were given and that certain communications took place between the parties. However:
 - None of these were given to employees with authority or influence over the decision to award contracts
 - None of these tainted the competitive bidding processes
 - None of these violated the FCC's rules regarding gratuities and communications – which have historically been vague or missing until the *Sixth R&O* (released in Sept. 2010) – that were in place at the time the events occurred
 - None of these violated state and local procurement laws

Overview of appeals

- Dimmitt and ECBOCES appeals are representative of other appeals by Trillion customers and Trillion pending before the Division that raise the same issues (*i.e.*, gifts and applicant-vendor communications)
 - 28 of Trillion's 90 customers, representing approximately 300,000 students, have had applications denied by USAC
- To date, Trillion has done its best to prevent any outages from occurring in its customer base that would impact the education the students receive
- But Trillion has \$16 million tied up in appeals for FY 2008, FY2009 and FY2010, and \$13.3 million in new applications for FY2011 that USAC has yet to process
 - The company, which without the ~ \$4 million in USAC payments on the denied contracts produces only \$13 million/yr in revenue, will not be able to continue to subsidize the schools much longer

Overview of appeals

- Why has USAC rescinded/denied such a massive number of funding requests? The Receiver can only speculate that it is because USAC had unfairly attributed the alleged, but unsubstantiated, wrong doing that had been previously investigated by the Arizona Attorney General to any application/customer with which Trillion was associated.
 - In April 2009, Trillion entered into a consent decree with the Arizona AG dismissing all allegations against Trillion. Trillion admitted no wrong doing and paid the AG's expenses in conducting the investigation. Trillion received no E-Rate funds from the contract investigated by the Arizona AG.
 - The settled investigation is completely unrelated to the appeals currently pending before the Division.
 - As will be discussed, in the aftermath of its experience with the Arizona AG, Trillion has taken significant steps to avoid the appearance of impropriety re the E-Rate program, including adoption of the strictest code of conduct in the industry.

Trillion Partners, Inc.

- Trillion has taken significant steps to avoid the appearance of impropriety:
 - Instituted a Code of Conduct in February 2009 prohibiting Trillion employees from giving anything of value to any governmental employee (no exceptions), regardless of whether such items are permitted under state and local rules and procurement policies
 - Continued requirement for comprehensive, mandatory E-Rate training sessions (in-house) for its employees involved in the competitive bid process every year
 - Requires those same employees to participate in E-Rate training provided by USAC in September and October
 - Staffing includes regulatory counsel and an E-Rate specialist to ensure compliance with the E-Rate rules. Ensured all employees have access to these resources

Conclusion

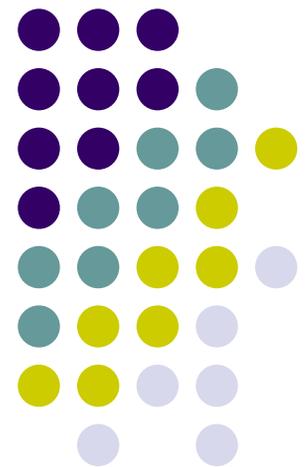
- Applicants and Trillion concede that certain inexpensive gratuities were given and that certain communications took place between the parties. However:
 - None of these were given to employees with authority or influence over the decision to award contracts
 - None of these tainted the competitive bidding processes
 - None of these violated the FCC's rules regarding gratuities and communications – which have historically been vague or missing until the *Sixth R&O* (released in Sept. 2010) – that were in place at the time the events occurred
 - None of these violated state procurement laws or local procurement rules

Conclusion (cont'd)

- USAC erred in rescinding/denying the applications because
 - The FCC did not provide specific guidance regarding gifts and gratuities until it issued the *Sixth R&O* released in September 2010
 - USAC cannot expect applicants and service providers to know about or adhere to a rule that did not exist at the time the alleged violations occurred
- Applicants and Trillion appreciate USAC's need to investigate potential violations of the competitive bidding rules, but USAC has been overzealous in its application of the FCC's rules and has disregarded the specific facts in these cases and has significantly harmed applicants and Trillion
- USAC's punishments do not fit the alleged, but unfounded, violations and are unfair in the extreme
- Applicants and Trillion are in urgent need of resolution of the pending appeals

E-Rate Appeal Dimmitt Independent School District

Presentation to:
Angela Kronenberg, Wireline Legal Advisor
Hon. Commissioner Mignon Clyburn
September 29, 2011





Dimmitt

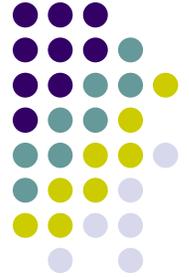
- Independent School District in Castro County, Texas, a rural area
- Dimmitt serves approximately 1,200 students in three schools
- Dimmitt's discount rate is 86% – 87%
- E-rate funding is essential to the District
- Dimmitt has been a Trillion customer since 2004



Dimmitt (cont'd)

- Because three Dimmitt employees accepted a meal at a Trillion Customer Appreciation Dinner valued *by USAC* at **\$32.32** per person, USAC rescinded funding for FY2008, and denied funding for FY2009 and FY2010 in the aggregate amount of **\$684,243**
- USAC indicates funding was rescinded/denied because Dimmitt “accepted meals from the service provider, which resulted in a competitive process that was no longer fair and open and therefore funding is denied.”
- The “meals” refer to a Customer Appreciation Dinner that Trillion hosted for some of its customers during the widely attended Texas Computer Education Association Conference
 - Three Dimmitt employees attended the dinner and USAC alleges that the cost per person was \$32.32

Dimmitt (cont'd)



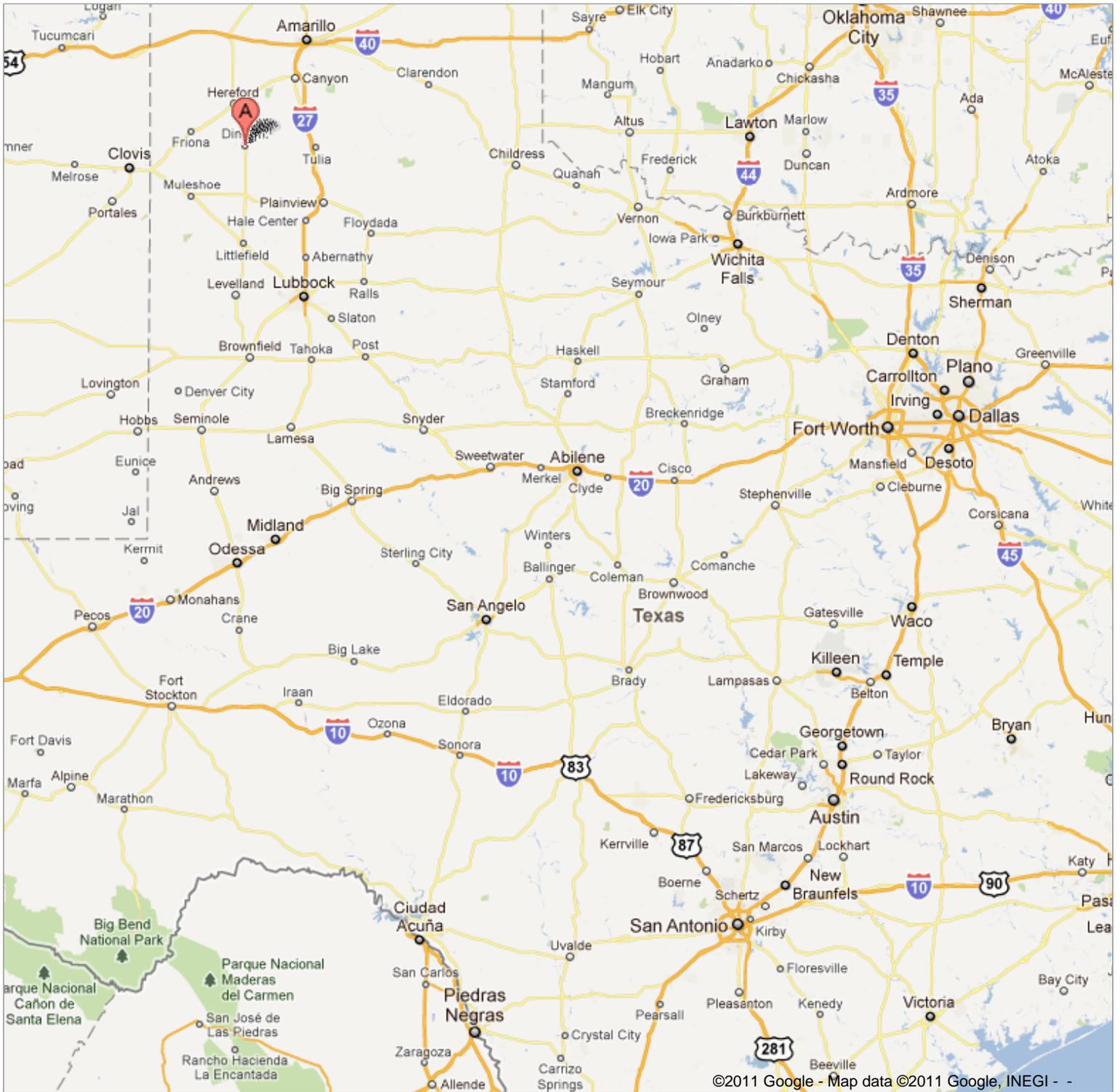
- **Dinner:**

- Dimmitt was already a Trillion customer and the dinner was held in appreciation of a past customer/vendor relationship, not in anticipation of a future relationship
- Dimmitt employees attending the dinner had no authority or influence over Dimmitt's decision to select Trillion as its service provider
- No other vendors submitted a competing bid, thus, no vendor was disadvantaged by the award of the contract to Trillion
- Attendance by Dimmitt employees at the dinner was permissible under Texas law and local procurement rules
- Dimmitt complied with all FCC rules in effect at the time of the dinner

Dimmitt (cont'd)



- USAC's actions are especially egregious when one considers that:
 - The FCC rule in place at the time such meals were received only speaks in terms of the competitive bidding process being "open and fair" and there was no prohibition on gifts
 - Dimmitt has shown that it complied with all FCC rules and Texas laws in effect at the time of the "customer appreciation dinner" regarding the acceptance of gifts
 - The only proposal Dimmitt received came from Trillion and, thus, acceptance of the \$32.32 meals did not cause actual harm or inured to the detriment of any other service provider



E-Rate Appeal

East Central Board of Cooperative Educational Services

Presentation to:

Angela Kronenberg, Wireline Legal Advisor

Hon. Commissioner Mignon Clyburn

September 29, 2011



ECBOCES

- Local Education Agency for 21 member school districts
- School districts served by BOCES serve 9,400 students
- Districts are small, rural, isolated and predominately serve a low-income student population
- E-Rate funds are used to support the Video Networking for Education and Training System (VNET), which connects 26 classrooms in 17 school districts and a central site to provide distance learning opportunities for students



Rescission/Denial Letters

- ECBOCES assumes that because ECBOCES employees accepted gratuities that total no more than \$674 over a five-year period, USAC rescinded funding for FY2006, FY2007 and FY2008, and denied funding for FY2009 and FY2010 in the aggregate amount of \$3,370,018.77
- USAC indicates funding was rescinded/denied because:
 - “...you were offered and accepted either gifts, meals, gratuities, entertainment from the service provider, which resulted in a competitive process that was no longer fair and open and therefore funding is denied.”



Gift Cards

- ❑ The nominal amounts of the gift cards did not violate the rule regarding maintaining an open and fair competitive bidding process
- ❑ ECBOCES has no record of ever having received some of the gift cards
- ❑ Of the gift cards that ECBOCES did receive, none were used and, in fact, one was returned
- ❑ Even if ECBOCES employees had used these gift cards, which they did not, they would have been in compliance with Colorado law, local procurement rules and with the training material and guidelines for gifting posted on the USAC website at the time



Meals

- There were only 4 meals of insignificant amounts (each under \$10) over a three year period
- None of the employees that accepted the meals had authority or influence over ECBOCES' E-Rate procurement decisions
- Meals did not violate the rule regarding maintaining a competitive bidding process
- Meals were in full compliance with Colorado law and local procurement rules



Technology Conference

- ❑ ECBOCES employee attended a technology conference and accepted meals, lodging and transportation that totaled less than \$450
- ❑ Conference took place nearly six months after the Form 471 for the contract in question was submitted in February of 2006 and did not affect the bidding process
- ❑ Employee that attended the conference was employed by ECBOCES nearly five months after the vendor selection process in question had been completed so his attendance at the conference could not and did not affect the vendor selection process
- ❑ Acceptance of the meals, lodging and transportation did not violate the rule regarding maintaining a fair and open competitive bidding process and was in full compliance with Colorado law and local procurement rules



Correspondence with Trillion

- Trillion sent an email to ECBOCES to follow up a conversation in which Trillion's Centrex service was mentioned (copy of the email was submitted with ECBOCES' appeal)
 - Information consisted of selected clips of *public information from USAC's website*, which was provided as a professional courtesy
 - Information did not constitute advice on what or how ECBOCES should complete its Form 470 and did not contain "inside information"
 - Thus, the information was publicly available and could not and did not impact the competitive bidding process



Conclusion

- USAC erred in rescinding/denying the applications because ECBOCES complied with all of the competitive bidding rules:
 - ECBOCES posted the 470 through USAC to all potential service providers
 - All potential bidders were treated the same and received the same information
- USAC's actions have placed ECBOCES' education program in jeopardy
 - Loss of over \$3.3 million will have devastating consequences for ECBOCES, likely forcing its dissolution and, with that, the termination of all manner of services to its member school districts

