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***Please Respond to Quincy***
**Via Overnight Mail**

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

June 24, 2010

Re: CC Docket No. 96-45
CC Docket No. 02-6
Request for Review

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Billed Entity Name: Brockton Public Schools
Billed Entity Number: 120639
Form 471 Application Number: 575224 (FY 07)

Dear Ms. Dortch:

This office represents the Brockton Public School District ("Brockton"). This is a letter of appeal and is submitted in response to the Universal Service Administrative

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Company's ("USAC") April 26, 2010 letter, entitled "Administrator's Decision on Appeal- Funding Year 2007-2008."

On September 8, 2008 USAC issued a Notification of Commitment Adjustment Letter ("COMAD") to Brockton, stating that a routine review of Schools and Libraries Program funding commitments revealed certain applications where funds were committed in violation of program rules. Specifically, USAC determined that Achieve Telecom (Achieve), Brockton's E-Rate service provider, marketed its services at no cost because Achieve guaranteed applicants grants from the United States Distance Learning Association (USDLA) to cover the applicants' share of Achieve's services. In the September 8, 2008 COMAD the USAC determined that Brockton was responsible for all or some of the program rule violations and that it was responsible to repay all or some of the funds disbursed in error.

Brockton appealed this COMAD to USAC on November 7, 2008. That appeal was filed by Jason Gesing, a former attorney from this law firm, on behalf of Brockton. On April 26, 2010 USAC issued an "Administrator's Decision on Appeal- Funding Year 2007-2008," denying Brockton's November 7, 2008 appeal in full. At this time, Brockton appeals USAC's April 26, 2010 "Administrator's Decision on Appeal- Funding Year 2007-2008" (Decision on Appeal). Specifically, Brockton appeals the following:

1. the determination of USAC that "Brockton was not able to conduct a fair and open competitive bidding process."

2. the determination of USAC that the assignment of a SPIN number to Achieve by SLD and acceptance of Achieve's annual service provider certifications "do not mean that Achieve was approved or endorsed by USAC."

3. the determination of USAC that Brockton is responsible for program rule violations even though it had no knowledge of any partnership between Achieve and USDLA because "intent is not a relevant factor when determining whether program rules were violated."

4. the implied determination of USAC that Achieve guaranteed USDLA grants to Brockton

5. the determination of USAC that "Brockton failed to pay its non-discounted portion of service because Achieve provided its services at no-cost to Brockton"

6. the determination of USAC that "program rule violations have occurred" such that Brockton's appeal is denied in full and that Brockton is responsible for these rule violations.

In support of this appeal, Brockton offers the following detailed responses to the six determinations of USAC listed above:

**A. <u>Brockton Was Able To Conduct A Fair And Open Competitive Bidding Process</u>**

As was explained to USAC in Brockton's November 7, 2008 appeal, Brockton did fully conduct a fair and open competitive bidding process in accordance with FCC/USAC rules. In furtherance of, and in order to ensure compliance with FCC/USAC procurement rules, the District engaged the services of a third-party consultant whose area of consultancy is concentrated in E-Rate funding, filing and compliance. In accordance with FCC/USAC requirements, the District filed its Form 470 application describing the services it was seeking to procure. All certifications made therein, to the best of the District's knowledge information and belief, were true and accurate as of the date of filing. A copy of Brockton's November 7, 2008 appeal to USAC is attached hereto as Attachment A and a copy of the Form 470 application is Exhibit 1 within Attachment A.

Following the submission of Form 470, the District did, in fact, post the same and make it available for the full requisite 28 day period required by FCC/USAC rules and regulations before considering any bid received and before selecting a service provider. At the end of the 28 day waiting period, only one bid was received by the District in response to its Form 470 and that bid belonged to Achieve Telecom Network of Massachusetts, LLC ("Achieve"). A copy of the Achieve bid is attached hereto as Exhibit 2 within Attachment A.

Despite this evidence of compliance with FCC/USAC rules and of a fair and open bidding process, in its April 26, 2010 Decision on Appeal USAC found that "Brockton was not able to conduct a fair and open competitive bidding process based on Achieve's no-cost guarantee and that Achieve gained an unfair competitive advantage by guaranteeing grants designed to cover Brockton's non-discounted portion of costs of Achieve's services." Specifically, USAC explained that its Special Compliance Review (SCR) team conducted an investigation into Achieve's business practices and determined that Achieve was marketing its services as fully funded and guaranteeing that USDLA would provide grants to applicants selecting Achieve's services to cover the non-discounted portion of the costs. A copy of the April 26, 2010 Decision on Appeal is attached hereto as Attachment B.

Brockton appeals this determination as it relates to Brockton because there was/is no evidence to support a finding that Achieve marketed its services to Brockton as fully funded or that Achieve guaranteed Brockton grants designed to cover the non-discounted portion of Achieve's services. Further, Brockton appeals USAC's determination because there was/is evidence to show that Achieve did not make a "no-cost guarantee" to Brockton and that Achieve did not guarantee grants to Brockton.

USAC's April 26th Decision on Appeal acknowledges that "Brockton and Achieve did not provide any documentation to SLD regarding Achieve's practice of offering fully funded services." However, USAC determined that Brockton violated the bidding rules based on representations that Achieve made to "other E-Rate applicants who selected Achieve as their service provider." Notwithstanding the fact that USAC did not offer the names of those applicants or describe the documentation they provided, even if other E-Rate applicants did offer representations to show that Achieve made a "no-cost guarantee" to them, USAC

had/has no evidence that Achieve made a "no-cost guarantee" to Brockton. To the contrary, USAC did/does have evidence showing that Achieve did not make a "no-cost guarantee" to Brockton. Specifically, Brockton provided USAC with affidavits of Anne Thompson (Brockton's Technology Coordinator/Director from January 1997 through January 2007) and Daniel Vigeant (Brockton's Director of Technology Services immediately following Ms. Thompson through the present), which state that Ms. Thompson and Mr. Vigeant oversaw the E-Rate program in Brockton, that they met and spoke with representatives from Achieve, and that Achieve never represented to them that it was offering a service that would be of no cost to the District. While Ms. Thompson acknowledged that Achieve did inform her of the possibility of applying for a grant for the non-discounted portion through USDLA, Achieve also informed her of other sources for grants and did not guarantee any grant from USDLA. Copies of Ms. Thompson's and Mr. Vigeant's affidavits are attached hereto as Exhibits 4 and Exhibits 5 within Attachment A.

USAC determined that Brockton violated the SLD rules related to a fair and open bidding process "because of Achieve offering to provide fully funded services by using USDLA grants to cover Brockton's share of the costs." However, such a determination is unfair and wrong given that there is no evidence that Achieve made such an offer to Brockton and given that there is evidence that proves the contrary.

As a result, the FCC should find that Brockton did conduct a fair and open bidding process because Brockton complied with FCC/USAC's rules for filing and posting form 470 and waiting before considering and selecting a service provider and because Achieve did not offer to provide fully funded services to Brockton or guarantee USDLA grants to Brockton.

**B. <u>Brockton Should Not Have Been Expected To Know That The Assignment Of A SPIN Number To Achieve By SLD And Acceptance Of Achieve's Annual Service Provider Certifications Did "Not Mean That Achieve Was Approved Or Endorsed By USAC."</u>**

In its November 7, 2008 appeal to USAC, Brockton pointed out that Achieve's bid identified Achieve as a "certified Eligible Telecommunications Service Provider (ETP) with the Schools and Libraries Division" (SLD) of USAC and that, as of November 5, 2008 – nearly two months *after* the September 8, 2008 COMAD was issued – Achieve was listed as an approved telecommunications vendor on the SLD web site and had appropriately filed the necessary Service Provider Annual Certification (SPAC) form each year for their SLD issued Service Provider Identification Number (SPIN). Brockton also noted that this information was verified under the SLD issued case number of 21-804432 on November 5, 2008. Further, Brockton pointed out that Achieve filed a tariff with the Department of Telecommunications and Energy for the Commonwealth of Massachusetts (MDTE) dated and effective September 22, 2003 in which Achieve represents, among other things, that: "discounts are available only to the extent that they are funded by the federal Universal Service fund;" "to be eligible for discount, schools and libraries will be required to comply with the terms and conditions set forth in the Rules" and; "schools and libraries and consortia shall participate in a competitive bidding process for all services eligible for discounts, in accordance with any state and local procurement rules and in accordance with both FCC and USAC rules." A copy of Section 2.2.B.5 of the tariff is attached hereto as Exhibit 3 within Attachment A.

As a result, Brockton argued that it should not be penalized for using Achieve because Achieve was clearly fully-vetted by USAC, because Achieve was in good standing with USAC, because Achieve was vetted by MDTE and because it was determined that Achieve's qualifications, procedures and requirements were in compliance with MTDE standards.

In its April 26, 2010 Decision on Appeal, USAC acknowledged that Achieve has been assigned a SPIN number and has filed its annual service provider certifications as required under program rules. However, USAC determined that these actions do not mean that Achieve was approved or endorsed by USAC. In support of its determination, USAC argues that its web site clearly states that USAC and SLD do not evaluate, approve or endorse service providers and that SLD's comments in case number 21-804432 indicate that SLD does not determine eligibility of service providers to participate in the E-Rate program. USAC's Decision on Appeal lists the exact internet location where this information is stated.

Before filing this appeal, Brockton accessed the internet location cited in USAC's April 26th Decision on Appeal. While Brockton acknowledges that the internet location cited by USAC does provide a notification that USAC does not evaluate, approve, or endorse particular service providers and that the allocation of a SPIN does not imply a measure of approval or endorsement by USAC, Brockton points out that this notification was posted on USAC's website in 2001 and is not readily accessible or clearly available on USAC's website. Rather, this notification is likely only accessed by those who know of the notification, those who have read all of USAC's thousands of archived notifications from 1998 to the present, or those who come across the notification by accident. Given that the notification cited by USAC acknowledges that many districts believed that a SPIN implied approval of the service

provider by USAC, it would have been reasonable for USAC to make this notification more visible to Brockton when it joined the E-Rate program. However, this was not done.

In addition to the fact that Achieve appeared to be approved by USAC and MDTE, Achieve also appeared to be a qualified candidate for Brockton because in the Proposer Qualifications section of its bid, Achieve represented itself as a highly-qualified provider of telecommunications services and identified existing E-rate funded projects in school districts across Massachusetts and the United States. USAC did not address this argument in its April 26, 2010 Decision on Appeal.

### C. Brockton Should Not Be Held Responsible For Program Rule Violations Because It Had No Knowledge Of Any Partnership Between Achieve And USDLA

In its November 7, 2008 appeal to USAC, Brockton argued that it should not be responsible for any rule violation based upon the alleged inappropriate arrangement between Achieve and USDLA because no such arrangement was ever disclosed to Brockton and because Brockton was never aware of any such arrangement. Although Brockton acknowledged that Achieve informed Brockton of the opportunity to apply for a grant from USDLA, Brockton was also informed that other potential sources of grants were available to cover the District's share of the cost of the services. See Attachment A, Section C for specific facts supporting this argument.

In its April 26, 2010 Decision on Appeal, USAC acknowledged that "Brockton maintains that it had no knowledge of any partnership between Achieve and USDLA and that Brockton did not know Achieve solicited funds on behalf of USDLA." However, USAC wrote, "intent is not a relevant factor when determining whether program rules were

violated." USAC then went on to imply that Brockton should have known about the partnership between Achieve and USDLA because, "information about the partnership…was publicly available on USDLA's website." USAC then determined that "it is clear from USDLA's annual reports that the partnership with Achieve was beneficial to USDLA and that it was improving USDLA's revenue flow" and that "the fact that Brockton was not aware of this information is not relevant since intent is not a factor for determining whether program rules were violated."

Brockton appeals USAC's April 26, 2010 determination because information regarding any partnership between Achieve and USDLA is not readily available on USDLA's website, because it is unreasonable to expect that Brockton would have researched the annual reports of USDLA before applying for a grant from them, because the evidence available to USAC clearly shows that Brockton had no information about any partnership or relationship between Achieve and USDLA, and because it is inequitable to find that Brockton violated program rules without intent or to hold Brockton responsible for an inappropriate relationship between Achieve and USDLA when Brockton did not know about the relationship. In this case, if an inappropriate relationship did exist between Achieve and USDLA it should be Achieve or USDLA who is held responsible for that rule violation, because Brockton had no knowledge of any inappropriate relationship and because Brockton did not receive any money directly from USAC.

i. A Partnership Between Achieve And USDLA Is Not Publicly Available And It Is Unreasonable To Expect That Brockton Would Have Read USDLA's Annual Reports

USAC's April 26, 2010 Decision on Appeal implies that Brockton should have been aware of a relationship between Achieve and USDLA because "information about the partnership...was publicly available on USDLA's website." Specifically, USAC says that information about the partnership was revealed in three "annual reports" available on the USDLA website at www.usdla.org. However, USAC does not provide a specific link to where these reports can be located within USDLA's general website. Additionally, prior to filing this appeal, Brockton conducted a search of USDLA's website and was not able to find any information that would suggest a relationship between Achieve and USDLA. Further, Brockton was not able to find the three annual reports cited by USAC as evidence of such a relationship. Although Brockton was able to locate a link for the FY 07 annual report, that link was not active and Brockton was not able to access that annual report.

Even if the link to the FY 07 annual report was active, it is not reasonable to expect that Brockton would have read that report prior to applying for a grant for FY 07 (which is the subject of this appeal) because the report, presumably, would not have been available at the time the application was made. Additionally, although USAC implies that Brockton should have been aware of a relationship between Achieve and USDLA because the FY 04 and FY 06 annual reports were available on USDLA's website and because those reports allegedly revealed such a relationship, Brockton has no evidence that those reports were ever publicly available. Even if they were, it is not reasonable to expect that Brockton would have read

those reports and investigated a relationship between Achieve and USDLA prior to applying for a grant with USDLA because Brockton had no reason to suspect any such relationship.

ii. Evidence Available To USAC Clearly Shows That Brockton Had No Information About Any Partnership Or Relationship Between Achieve And USDLA

As was argued in Brockton's November 7, 2008 appeal to USAC, Achieve's bid to Brockton did not offer any indication or suggestion that Achieve was in any way affiliated with or in partnership with USDLA. Brockton also explained that USDLA was not mentioned anywhere in the Achieve bid. Additionally, Brockton explained that, if there were any partnership between Achieve and USDLA, the District would have expected to find a disclosure to that effect in the bid, particularly where Achieve disclosed at least one other partnership. Specifically, in the Proposer Qualifications section of its bid, Achieve disclosed a partnership with Roberts Communications Network, Inc. (RCN). It did not disclose any relationship or partnership with USDLA in its narrative description of its Proposer Qualifications nor anywhere else in its bid. Achieve's Bid is Attached hereto as Exhibit 2 within Attachment A.

As Brockton also explained to USAC, the first suggestion made to the District that a relationship might exist between Achieve and USDLA appeared in the USAC Funding Commitment Adjustment Report appended to the September 8, 2008 COMAD. Notably, the report cites "information obtained" during the course of its investigation that indicated Achieve "has a partnership with USDLA and solicits donations of behalf of USDLA." A copy of the September 8, 2008 COMAD is attached hereto as Attachment C. Again, this information did not come from Brockton, Brockton is not in possession of any such

information and Brockton does not know what information was obtained during the course of USAC's investigation or from whom. As Brockton explained to USAC in its November 7, 2008 appeal, both Anne Thompson and Dan Vigeant attested to the fact that no one from either Achieve or USDLA ever suggested a partnership or relationship between USDLA and Achieve. To the extent that such a relationship existed or exists today, it is one of which the District was never made aware. See Exhibits 4 and 5 of Attachment A.

iii. It Is Unfair And Inequitable To Hold Brockton Responsible For A Rule Violation When Brockton Did Not Violate Any Program Rule And Brockton Had No Knowledge Of A Relationship Between Achieve And USDLA. If A Relationship Did Exist Between Achieve And USDLA, Achieve Should Be Held Responsible, Not Brockton.

In its November 7, 2008 appeal to USAC, Brockton argued that it should not be responsible for any rule violation based upon the alleged inappropriate arrangement between Achieve and USDLA because no such arrangement was ever disclosed to Brockton and because Brockton was never aware of any such arrangement. In its April 26, 2010 Decision on Appeal, USAC acknowledged that "Brockton maintains that it had no knowledge of any partnership between Achieve and USDLA and that Brockton did not know Achieve solicited funds on behalf of USDLA." However, USAC wrote, "intent is not a relevant factor when determining whether program rules were violated."

It is not clear what USAC relies upon in making the determination that intent is not relevant in determining whether program rules were violated. Brockton assumes that USAC implied its ability to determine program violations without intent based upon the lack of the word "knowingly" in FCC rule 54.504 (c)(viii) (i.e. 47 C.F.R. §54.504 (c)(viii)). However, FCC's regulations, the *Schools & Libraries Service Support Mechanism Fifth Report and*

*Order*, and case law acknowledge that the Commission may waive any provision of its rules for good cause. Specifically, a rule may be waived where the particular facts make strict compliance inconsistent with public interest. Additionally, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. 47 CFR 1.3, *Schools & Libraries Service Support Mechanism Fifth Report and Order* (citing *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 116 (D.C. Cir. 1990); *WIAT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972))(*Fifth Report and Order*). See also, *Exigent Technologies*, CC Docket No. 02-6, DA 09-2245 (FCC 10/20/09). While Brockton can comprehend situations in which it may be fair or equitable to hold an entity responsible for a rule violation without intent, this is not one of those situations. In this case, Brockton did not violate any FCC rule, Brockton had no way of knowing that Achieve may have violated a program rule, and Brockton did not benefit from any alleged violation. Therefore, in this case equity, hardship and more effective implementation of overall policy favor a finding that intent should be considered and favor a finding that Brockton's responsibility for any rule violation due to a relationship between Achieve and USDLA should be waived.

In this case it would be inequitable to hold Brockton responsible for a violation of FCC/USAC rules because, as described in Sections A and B above, Brockton conducted a fair and open competitive bidding process in compliance with FCC/USAC rules. After posting its Form 470 for the appropriate amount of time, Brockton selected a service provider that appeared to be approved by USAC and that appeared qualified to perform the contracted services. This service provider was Achieve and it was also the only service provider to submit a bid in response to Brockton's Form 470. In this case USAC alleges that Brockton violated a program rule because Achieve had a relationship with USDLA, the organization

from which Brockton received a grant for the non-discounted portion of Achieve's services. However, any rule violation due to an alleged relationship between Achieve and USDLA was beyond Brockton's control because Achieve never informed Brockton that it had a relationship with USDLA and, for reasons described above in this section, Brockton had no reason to suspect that there was such a relationship and had no way to reasonably discover such a relationship.

If a relationship did exist between Achieve and USDLA, holding Brockton responsible for such a relationship would also be inequitable because Brockton did not benefit from that relationship. Specifically, Brockton would have selected Achieve as its service provider regardless of whether it received a grant from USDLA because Achieve was the only response it received to its Form 470 and because Achieve appeared to be a reputable and qualified candidate. Additionally, Brockton did not directly receive any of the funds USAC distributed. Rather, Achieve was the recipient of the funds from USAC. In addition to being inequitable, holding Brockton responsible for a rule violation committed by Achieve would place an enormous financial hardship on Brockton, given that Brockton's financial situation qualified the District for an 82% discount rate from USAC.

In at least one prior Commission decision, the FCC stated that "in terms of who to recover from… 'recovery actions should be directed to the party or parties that committed the rule or statutory violation in question.'" *Exigent Technologies*, CC Docket No. 02-6, DA 09-2245 (10/20/09)(citing *Federal-State joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Schools and Libraries Universal Service Support Mechanism,* CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15255, para. 10 (2004)). In *Exigent*

*Technologies*, the Commission found that USAC should pursue recovery of funds from the service provider because the service provider violated multiple, fundamental E-Rate program rules and because there were no special circumstances to warrant the granting of a waiver to the service provider. In the present case, the Commission should also find that recovery of funds, if any, should come from the service provider because if there was a relationship between Achieve and USDLA it was Achieve who was aware of and committed the rule violation, not Brockton.

Therefore, if an inappropriate relationship did exist such that USAC's rules were violated and such that funds are to be recovered, the fact that Brockton did not know of and had no way of knowing about such a relationship should be taken into consideration. Further, if a relationship did exist between Achieve and USDLA did exist it is equitable and a more effective implementation of the rules for Achieve, not Brockton, to be held responsible.

### D. Achieve Did Not Guarantee USDLA Grants To Brockton and Brockton Had No Knowledge Of Funds Earmarked For Achieve

In its November 7, 2008 appeal to USAC, Brockton argued that it should not be responsible for any violation of USAC's rules because Achieve never represented, or even suggested, that its services would be provided to the District at no cost and because Achieve did not guarantee that USDLA would award grants to Brockton if Achieve was selected as its service provider.

In its April 26, 2010 Decision on Appeal, USAC stated that it "disagrees with the assertion that Achieve did not guarantee USDLA grants to applicants who selected Achieve's services and that the USDLA grants were not earmarked for Achieve's services."

Brockton appeals this determination because while Achieve may have guaranteed grants to other applicants who selected Achieves services, it did not guarantee grants to Brockton. Additionally, to the extent, if any, that USDLA grants were earmarked for Achieve's services, Brockton should not be penalized because it had no knowledge of this fact, it would be unreasonable for Brockton to have discovered that fact, and because to do so would be inequitable.

i. Achieve Did Not Guarantee a No-cost Service or Grants to Brockton.

Nowhere in its bid does Achieve offer any indication or suggestion that its services would be provided to the District at no cost. In fact, Section 4.2 of Achieve's bid, captioned "Technology Overview" states in part that "Schools and Libraries are eligible for funding discounts by the Federal E-rate program that provides between 20% and 90% of the total cost to eligible k-12 schools and libraries." Section 5.0 of Achieve's bid contains information on pricing. That section too does not suggest the possibility (let alone guarantee) that Achieve's services would or could be offered to the District at no cost. Additionally, in Affidavits appended to Attachment A of this appeal, both Anne Thompson and her successor, Dan Vigeant have attested to the fact that Achieve never represented that it was offering a service that would be at "no cost" to the District.

Further, Achieve never represented, either orally or in writing to the District, that if the District selected Achieve as its service provider and applied for such a grant from USLDA, that approval of the grant by USDLA was guaranteed. Achieve did not present an automatic grant from USLDA as part of its proposal to the District.

In this case, Brockton had sufficient funds in its overall technology budget to cover the District Share for its E-Rate Program supported services, including the services ultimately obtained from Achieve. In support of this point is an email dated October 24, 2006 from Jon D. Geniuch who, prior to assuming his present position as Assistant Principal within the District, held the position of Instruction Technology Curriculum Specialist for the District. In the email, Geniuch emphasized the need to ensure that monies were in fact available, and not already otherwise earmarked for telephone bills or other telecommunications costs, in order to cover the District's share of the cost of digital transmission and delivery services. A copy of this email is attached hereto as Exhibit 6 within Attachment A.

ii. <u>If USDLA Grants Were Earmarked For Achieve's Services, Brockton Should Not Be Penalized</u>

In its April 26, 2010 Decision on Appeal, USAC determined that USDLA grants were earmarked for Achieve's services and implied that this is part of the reason why USAC believes Brockton is responsible for a rule violation. USAC based this determination on two factors: first, the wording used in the USDLA letter reaffirming the grant to Brockton, which USAC pointed out, did not include the name of the actual project but, rather, referred to the "Achieve Xpress Telecommunications distance learning project"; and second, the fact that USDLA's tax returns for 2007 did not account for the grant it awarded to Brockton. However, Brockton does not believe it should be responsible for a rule violation based on either of these factors because: the fact that USDLA referred to the "Achieve Xpress" project rather than the "Brockton" project does not imply an inappropriate relationship between Achieve and USDLA; Brockton received copies of checks written from USDLA to Achieve for the FY 07

grant; and it is not reasonable to assume that Brockton would have checked USDLA's tax returns.

a. Brockton Had No Knowledge Of Earmarked Funds

In its April 26, 2010 Decision on Appeal, when determining that USDLA grants were earmarked for Achieve's services, USAC noted that it was "telling that the USDLA letter reaffirming the grant to Brockton failed to include the name of the actual project." Specifically, Brockton's application to USDLA referred to the project as the "Brockton Public Schools Distance Learning Initiative" and the USDLA approval letter referred to the project as "the Achieve Xpress Telecommunications distance-learning project." USAC argues that USDLA's use of the "Achieve" title rather than title from Brockton's application implies that USDLA uses a standard form letter, which "adds further support to the finding that the USDLA grants are earmarked for Achieve's services."

However, USDLA's choice of language does not prove that USDLA earmarks its funds for Achieve's services. Brockton's application specified that it would be using the Achieve Telecom Network. Additionally, because USDLA approved the grant that meant USDLA would be making payments directly to Achieve, not to Brockton. For these reasons, it is reasonable that USDLA would have referred Achieve rather than Brockton in the name of the project title.

b. Brockton Received Confirmation That USDLA Did Pay Its Grant And It Is Unreasonable To Expect That Brockton Would Have Discovered USDLA's Tax Returns

In its April 26, 2010 Decision on Appeal, USAC states, "there is also evidence that USDLA did not provide the funding for the grant awarded to Brockton." As support for this statement USAC says that it reviewed USDLA's IRS Form 990 for 2007, which did not indicate that USDLA used any of its revenues to provide grants. While Brockton acknowledges USAC's statements about USDLA's tax form, Brockton did receive proof of USDLA's payment to Achieve.

Prior to USAC's April 26th letter, Brockton had no knowledge of what USDLA's tax forms did or did not report for FY 2007. However, following its receipt of the April 26th Decision on Appeal and prior to filing this appeal, Brockton did access USDLA's IRS Form 990 for 2007 via the internet link provided by USAC in the April 26th Decision on Appeal. Having reviewed that document, Brockton acknowledges that Line 22 of the form is blank. However, it is not clear to Brockton whether USDLA filed its Form 990 for 2007 based on the calendar year or based on 7/1/07 to 6/30/08. Notwithstanding these facts, Brockton does have evidence that USDLA provided funding for the grant it awarded to Brockton for Brockton's FY 07 (7/1/07-6/30/08). Specifically, Brockton received copies of eight (8) checks issued by USDLA to Achieve on June 3, 2008 in the amount of fourteen thousand, one hundred and seventy-five dollars ($14,175.00) each, all of which were stamped for deposit by Achieve. Brockton also received copies of three (3) checks issued by USDLA to Achieve in the amount of ($14,175.00) each, which were dated June 3, 2003 and stamped for deposit by Achieve. Although three (3) of the checks are dated 2003, Brockton believes that those three (3) checks were incorrectly dated and should have read "6/3/08" because the invoice numbers on the

subject lines of those checks and the numbers of those checks go in sequential order with the eight (8) checks issued by USDLA to Achieve on June 3, 2008. Copies of all eleven checks are attached hereto as Attachment D.

Notwithstanding the fact that Brockton did receive confirmation that USDLA paid its grant for the 2007-2008 year, Brockton believes that it would be unreasonable to expect that Brockton would have had access to or requested access to review USDLA's tax forms for 2007, as USAC seems to imply.

c. It Is Inequitable To Hold Brockton Responsible If USDLA Funds Were Earmarked For Achieve Services.

If the FCC finds that USDLA funds were earmarked for Achieve's Services, Brockton should not be held responsible for this action because to do so would be inequitable. As stated in Section C. (III) above, the Commission may grant a waiver of its rules for good cause. Equity and more effective implementation of overall policy are factors to be considered in deciding if a waiver should be granted. 47 CFR 1.3, *Schools & Libraries Service Support Mechanism Fifth Report and Order* (citing *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 116 (D.C. Cir. 1990); *WIAT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In this case, waiver is appropriate so that, if funds were earmarked by USDLA for Achieve, Brockton is not held responsible because Brockton had no knowledge of any earmarked funds and Brockton had no reason to suspect that funds were earmarked. Additionally, Brockton received copies of checks from USDLA to Achieve and assumed that the grant was funded.

In addition to these reasons, it would also be inequitable to penalize Brockton for any earmarking of funds because Brockton did not receive any of the funds that USAC seeks to recover. Rather, funds went directly from USAC to Achieve. As a result Achieve, not Brockton, should be held responsible for any violation of FCC's/USAC's rules.

### E. Brockton Did Not Violate FCC Rules By Failing To Fund The Non-Discounted Portion Of Achieve's Services

In its April 26, 2010 Decision on Appeal, USAC notes that FCC rules require applicants to pay the non-discounted portion of the costs associated with the E-rate program and found "it is clear that Brockton failed to pay its discounted portion of service because Achieve provided its services at no-cost to Brockton."

Brockton appeals this finding because although FCC rules require applicants to pay the non-discounted portion of the costs associated with the E-Rate program, FCC rules do not prohibit applicants from applying for grants to cover the non-discounted portion from sources unrelated to the selected service provider. Specifically, Step 11 of the USAC application process explains that "service providers may offer to help applicants locate grants to pay for their non-discount portion. Program rules do not restrict applicants from accepting grants from bona fide organizations, nor do they restrict service providers from attempting to help applicants obtain grants from such organizations, so long as the grants or organizations are independent of the service provider." See Attachment E. USAC has published documents containing similar language since at least 2003. See Attachment F.

In this case, Achieve mentioned to Brockton that it could seek a grant for the non-discounted portion of Achieve's services from USDLA or other grant organizations. Brockton

then applied for a grant from USDLA, which appeared to be a bona fide organization that was independent of Achieve. If Achieve and USDLA were related organizations, that information was never provided to Brockton, Brockton had no reason to suspect such a relationship and Brockton had no way of discovering that relationship. Therefore, for these reasons and for reasons stated in Section C, above, Brockton should not be held responsible.

Additionally, as noted in USAC's April 26th Decision on Appeal, the theory behind the FCC rule requiring applicants to pay the non-discounted portion of costs is that such a requirement will encourage applicants to avoid unnecessary and wasteful expenditures. In this case, there is no allegation that Brockton made an unnecessary or wasteful expenditure. Further, as early as October 2006, there is proof that Brockton was budgeting for the non-discounted portion of Achieve's services. See Exhibit 6 within Attachment A. Had Brockton known that a relationship existed between Achieve and USDLA, it would have used its budgeted funds for the non-discounted portion of Achieve's service.

### F. Brockton Did Not Violate Program Rules And Its Appeal Should Not Have Been Denied

Lastly, in its April 26, 2010 Decision on Appeal, USAC "determined that program rule violations have occurred and as a result [Brockton's] appeal [for FY 2007] is denied in full." USAC then noted the FCC rules requiring USAC to rescind funding commitments in all or part, and recover funds when USAC learns that funding commitments and/or disbursement of funds were inconsistent with program rules. USAC wrote "[i]n particular, FCC rules require USAC to 'recover the full amount disbursed for any funding request in which the beneficiary failed to comply with the Commission's competitive bidding requirements as set

forth in section 54.504 and 54.511 of [FCC's'] rules and amplified in related Commission orders.'" USAC went on to determine that Brockton was responsible for these program rule violations.

Generally, for the reasons stated in sections A through E above, Brockton appeals USAC's determination that it is it responsible for any program rule violation. In summary, these sections explain that Brockton was able to conduct a fair and open competitive bidding process consistent with FCC/USAC rules, Brockton was not aware of any relationship between Achieve and USDLA, there is no reason to expect that Brockton would have been aware of any relationship between Achieve and USDLA, had Brockton known about any relationship between Achieve and USDLA it would have paid the non-discounted portion of Achieve's services with its own funds, and to hold Brockton responsible for any program rule violation would be inequitable. Most notably, Brockton appeals this determination because Brockton was able to conduct a fair and open competitive bidding process in compliance with FCC rules 54.504 and 54.511.

As support for its position that Brockton did violate FCC rules, USAC cited paragraph 21 of the *Schools & Libraries Service Support Mechanism Fifth Report and Order*. See Attachment B, p.7, footnote 16. (*Fifth Report and Order*). Paragraph 21 of the *Fifth Report and Order* explains that USAC "should recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission's competitive bidding requirements as set forth in section 54.504 and 54.511 ...and amplified in related Commission orders." However, Brockton again argues that this is a situation where a waiver of the Commission's rules is appropriate based on equity, hardship and more effective implementation of policy.

In this case, it is important to note that Brockton did not "fail to comply with the Commission's competitive bidding requirements as set forth in section 54.504 and 54.511 ...and amplified in related Commission orders." In fact, as described in Sections A and B, above, there is ample evidence to show that Brockton did comply. Additionally, paragraph 21 of the *Fifth Report and Order* provides some examples of failures to comply with sections "54.504 and 54.511 ...and amplified in related Commission orders." Although Brockton does not argue that this list of examples is exhaustive, Brockton does point out that the examples described in Paragraph 21 are situations in which a school or library took or failed to take a particular action in violation of the rules. The list does not provide any example of where an applicant could be held responsible for a rule violation where the applicant complied with the rules but the service provider with whom it contracted violated the rules.

As Brockton argues in Section C. (iii) of this appeal, like in *Exigent Technologies*, if recovery is warranted, the Commission should not look to Brockton because Brockton did commit the violation of the rule in question. Rather, if there was a relationship between Achieve and USDLA, it was Achieve who committed to violation and from whom recovery should be directed.

Again, in this case, Brockton did not take or fail to take an action in violation of the FCC's bidding process rules and there is ample evidence to show that it did comply with the rules. If any rule violation occurred it was a violation made by Achieve without the knowledge of Brockton. As a result, if any program rule was violated, Brockton should not be held responsible and, if any funds are to be recovered, they should not be recovered from

Brockton. To hold Brockton responsible for a rule violation committed by Achieve would be inconsistent with Commission policy, inequitable, and a financial hardship on Brockton.

## CONCLUSION

To the extent that Achieve has engaged in any impropriety by promising other applicants that it would provide services at no cost, it never made any such promise, representation or suggestion to Brockton. To the extent that any partnership existed between Achieve and USDLA as alleged by USAC, then it was a partnership that Brockton had no knowledge of. Where any such partnership between USDLA and Achieve also apparently escaped the scrutiny of both USAC and MDTE officials it would seem unfair and unjust to expect Brockton to discover it sooner or to levy the severe consequence of funding reimbursement from Brockton where it performed reasonable due diligence, engaged in an honest and open bidding process and selected the only vendor to respond to its Form 470 – one that held itself out as highly qualified, experienced, and both familiar with, and in compliance with, USAC and FCC rules.

To the extent that any wrongdoing has occurred, Brockton denies any responsibility for, or complicity in it. Had the District known of any relationship between Achieve and USDLA, the District would have paid for the non-discounted portion of Achieve's services without assistance from USDLA or any other source. This was always the case and, at this time, this is the case. During the 2009-2010 year, Brockton is working with another service provider and does fund the non-discounted portion of that provider's services.

The initial determination of USAC to provide an 82% discount to the Brockton Public School District for telecommunications services underscores the poverty that pervades its