



March 11, 2019

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Subject: *Petitions for Reconsideration of CAF-II Metrics Order (WC Docket No. 10-90)*

Dear Ms. Dortch:

In its February 25, 2019 letter in this docket,¹ Viasat vainly attempts once again to show that it would be reasonable and permissible for the Commission to grant its petition for reconsideration of the *Metrics Order's* requirement that high-latency bidders demonstrate that they meet a mean opinion score ("MOS") of 4 or better for voice quality using *only* the "conversational-opinion" test portion of the ITU-T P.800 standard, modified for use outside the laboratory context.²

This time, Viasat offers an analogy about the regulation of nail salons, arguing that if a city council changed the regulations applicable to the nail salon business—"such as the rules for the training and licensing of nail technicians, certification requirement, and the like"—no one "would claim that such an outcome involves some prohibited form of retroactivity."³ This may be true, as far as it goes, but Viasat's analogy bears no resemblance to the facts of this case.

To make Viasat's nail salon analogy work, it is necessary to imagine a scenario in which the city council holds an auction that will award to the highest bidder an exclusive license to operate the *only* nail salon within the city limits for a ten-year term. Participation in the auction is limited to people with diplomas from state-accredited cosmetology schools. The vast majority of skilled nail technicians that lack such a diploma wisely decline to participate in the auction. The auction is won, however, by a person *without* a diploma who nevertheless participated, and who immediately petitions the city council to eliminate the diploma requirement.

In this more pertinent hypothetical, the city council clearly should not eliminate the diploma requirement. To do so would be grossly unfair to the many skilled nail technicians who, consistent with the auction rules, declined to participate, and would change the past consequences of actions

¹ Letter from John P. Janka and Matthew T. Murchison, counsel to Viasat, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Feb. 25, 2019) ("Viasat February 2019 Ex Parte").

² *Connect America Fund*, WC Docket No. 10-90, Order, DA 18-710 (WCB, WTB, OET rel. July 6, 2018) ("*Metrics Order*").

³ Viasat February 2019 Ex Parte at 2.

those technicians took in the past.⁴ In other words, it would be a primarily retroactive, and thus unlawful, decision.

For the same reasons, the Commission should not grant Viasat's petition for reconsideration of the MOS testing framework. Hughes (and perhaps others) declined to bid in the CAF-II auction because an objective ITU-T estimator predicts that geostationary satellite broadband networks can achieve at best a MOS score of 3.72 using the conversational-opinion test.⁵ Although this is a strong score (better than many terrestrial wireless networks achieve), it does not satisfy the MOS 4 requirement. Now that the auction is over and there is no further opportunity for other broadband providers to access the CAF-II subsidies, the Commission should not and, indeed, may not change the consequences of parties' past actions by lowering a gating criterion for participation in the auction.

Just as Viasat's analogy is inapt, Viasat is simply beating a strawman when it asserts that "the upshot of Hughes's objection is that the FCC could never change previously announced rules governing auctioned services after the auction has taken place—a result that would significantly hamstring the Commission's flexibility to hone its rules in a manner that best serves the public interest."⁶ This is not just any "announced rule"—the requirement that high-latency bidders demonstrate a MOS of 4 or more using a conversational-opinion test is a specific quality of service standard that auction participants must certify that they can meet in order to place bids.⁷ Viasat asserts without support that "[s]ervice rules and buildout requirements for auctioned wireless services are no less 'gating criteria' for participation in spectrum auctions [than the MOS testing framework at issue here],"⁸ but this is incorrect. Indeed, both Hughes and Viasat warned the Commission that the MOS testing rules adopted in the *Metrics Order* raised significant concerns for satellite providers,⁹ and the Commission took no action. Moreover, the change the FCC had made

⁴ The parties agree on the legal principles that govern the dispute. "Courts have explained that 'primary retroactivity' occurs when an agency rule reaches back to alter the legal consequences of past actions." Viasat Further Ex Parte at 1, citing *Regents of the Univ. of Cal. V. Burwell*, 155 F. Supp. 3d 31, 47 (D.D.C. 2016), *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring). Primary retroactivity in agency regulations is unlawful. *Id.* By contrast, rule changes that merely upset parties' expectations, such as changes to service rules or buildout requirements, may result in at best "secondary retroactivity," which is permissible as long as it is "reasonable." See Viasat Further Ex Parte at 1-2 & n.7, citing *Mobile Relay Associates v. FCC*, 457 F.3d 1, 10 (D.C. Cir. 2006).

⁵ Letter from Jennifer A. Manner, Hughes, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Feb. 4, 2019) at 3-4 ("Whether the conversational-opinion test is required is crucial because, as Hughes has discussed, an objective ITU-T tool for estimating MOS scores based on network parameters predicts that a network with 600 ms round-trip latency (such as a geostationary satellite network) will achieve at best a MOS of 3.72.⁵ ... By requiring conversational-opinion testing, the *Metrics Order* effectively announced that geostationary satellite-based providers could not participate in the auction without taking a fundamental risk of not being able to meet the performance criteria required for such participation.").

⁶ *Id.* at 2.

⁷ As Hughes has explained, changing the gating criteria after the auction would reach back and nullify parties short-form certifications and their implicit certifications in submitting bids, thereby "alter[ing] the legal consequences of past actions." *Burwell*, *supra*, 155 F. Supp. 3d at 47.

⁸ Viasat February 2019 Ex Parte at 2.

⁹ See Letter from Jennifer A. Manner, Hughes, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed July 16, 2018); Letter from Jennifer A. Manner, Hughes, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed July 19, 2019) ("We emphasized that Hughes is capable of meeting a MOS 4 requirement under the ITU-T Recommendation P.800 standard adopted by the full Commission, and urged the Commission to recognize the listening-opinion test set out in that standard.") (internal citations omitted); Letter from John P. Janka, counsel to Viasat, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed July 23, 2019). It is important to

to the service rules in the case Viasat cites was unquestionably prospective, as it occurred years after the licensee had been operating in the band.¹⁰ Modifying the MOS testing framework per Viasat's Petition, by contrast, would change the legal consequences of the short-form certifications that satellite broadband providers had made in the past. This would be unlawful retroactive rulemaking.¹¹

As a result, denying Viasat's petition as to the MOS testing framework would not limit the Commission's flexibility to make reasonable, prospective changes to the rules governing auctioned services. Instead, it would affirm a foundational principle that would bolster the efficiency and effectiveness of future support auctions: That auction participants can count on the Commission not to change the fundamental rules for auction participation after the auction has ended.

Sincerely,

/s/

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Senior Vice President, Regulatory Affairs

cc: Chelsea Fallon
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bear in mind that the parties' filings during this period were constrained by the CAF-II auction rules restricting public statements that revealed bidding strategies.

¹⁰ See *Mobile Relay Associates*, 457 F.3d at 25.

¹¹ See *supra* note 4.