Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90

REPLY OF VIASAT, INC. IN SUPPORT OF ITS PETITION FOR RECONSIDERATION

Viasat, Inc. ("Viasat") submits this reply in connection with its Petition for Reconsideration[1] of the *Order* adopted by the Wireline Competition Bureau, Wireless Telecommunications Bureau, and Office of Engineering and Technology (the "Bureaus") on July 6, 2018 in the above-captioned proceeding.[2] Viasat's Petition requests that the Bureaus "(i) reconsider their decision to require that a satellite broadband provider conduct third-party [mean opinion score ('MOS')] testing and instead allow the self-testing that all other CAF II recipients are allowed to conduct; and (ii) eliminate the requirement that 'real-world' conversational-opinion testing proceed under ITU-T Recommendation P.800 and instead develop a workable testing methodology from the ground up."[3] Significantly, both of these proposals find strong support in the opening round from ADTRAN,[4] the party whose earlier petition led the Bureaus to adopt the MOS testing approach described in the *Order*.[5]

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[1] *See* Petition for Reconsideration of Viasat, Inc., WC Docket No. 10-90 (filed Sept. 19, 2018) ("Viasat Petition").

[2] *See Connect America Fund*, Order, WC Docket No. 10-90, DA 18-710 (2018) ("*Order*").

[3] Viasat Petition at 6.

[4] *See* Comments of ADTRAN, Inc., WC Docket No. 10-90, at 8-9 (filed Nov. 7, 2018) ("ADTRAN Comments").

[5] *See Order* ¶ 42.

The only objections to these requests come from Hughes Network Systems, LLC ("Hughes")[6] and from NTCA–The Rural Broadband Association, National Rural Electric Cooperative Association, and Utilities Technology Council (collectively, the "Rural Associations").[7] As discussed below, the objections raised by these parties are meritless. Hughes's contention that reconsideration would upset its subjective "expectations" provides no basis for denying the Petition, and the Rural Associations' unconstructive effort to deepen unwarranted regulatory distinctions between classes of CAF recipients flouts core principles of competitive and technological neutrality. The Bureaus should grant Viasat's Petition.

I. HUGHES'S CLAIMS ABOUT "SETTLED EXPECTATIONS" ARE WRONG ON THE FACTS AND THE LAW

Hughes contends that the Bureaus may not even consider Viasat's Petition because reconsideration "would upset bidders' settled expectations of the requirements for the auction and nullify the auction's results."[8] But that overblown and erroneous claim rests not only on mischaracterizations of the *Order* and the record in this proceeding but also on a profound misunderstanding of applicable precedent.

As an initial matter, Hughes cannot credibly claim to have had any "settled expectations" as to the implementation of the "conversational-opinion test" discussed in the *Order*. The *Order* itself states that the Wireline Competition Bureau "will provide further guidance by public notice" on details related to the implementation of the test.[9] Moreover, as to the implementation

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[6] *See* Opposition of Hughes Network Systems, LLC, WC Docket No. 10-90, at 1-4 (filed Nov. 7, 2018) ("Hughes Opposition").

[7] *See* Opposition of NTCA–The Rural Broadband Association, National Rural Electric Cooperative Association, and Utilities Technology Council, WC Docket No. 10-90, at 10-12 ("Rural Associations' Opposition").

[8] Hughes Opposition at 2.

[9] *Order* ¶ 45 n.130.

issues that are the subject of Viasat's Petition, both Hughes and Viasat filed ex parte letters shortly after the adoption of the *Order* (and before the auction) specifically identifying critical flaws in the *Order*'s discussion of the conversational-opinion test. In an ex parte letter filed on July 16, 2018, Hughes itself asked the Commission to "clarify" various aspects of the conversational-opinion test, based in large part on the observation that the *Order*'s characterization of the test, if left unchanged, would "impose[] an unnecessary burden that violates the Commission's principle of competitive neutrality."[10] Viasat filed an ex parte letter on July 23, 2018 explaining that the *Order*'s discussion of the standards to be applied in the conversational-opinion test created substantial "uncertainty as to what those standards are and how parties impacted by them will be required to comply."[11] Viasat's letter went on to identify, with specificity, two aspects of the *Order*'s discussion of the test that required further review: (1) the *Order*'s incongruous reliance on the laboratory testing protocol in ITU-T Rec. P.800 as a standard for real world testing, and (2) the *Order*'s arbitrary singling-out of satellite for a third-party testing requirement.[12] Thus, far from establishing "settled expectations," the *Order* and the record developed in its immediate aftermath reflect an ongoing lack of clarity regarding key

[10] Letter of Jennifer Manner, Hughes, to Marlene Dortch, FCC, WC Docket No. 10-90, at 1-3 (filed July 16, 2018).

[11] Letter of John P. Janka, Counsel for Viasat, to Marlene Dortch, FCC, WC Docket No. 10-90, at 1 (filed July 23, 2018); *see also id.* at 2 ("[A]t this point in time, anyone using satellite broadband to provide CAF II supported services, in whole or in part, cannot fully know what set of measurement standards will be used to evaluate their services.").

[12] *See id.* at 2 ("The Bureau Order requires testing of the Mean Opinion Score ('MOS') associated with satellite voice service using 'conversational' protocols under real-world conditions and in accordance with ITU-T Rec. P.800. However, ITU-T Rec. P.800 was designed for a controlled laboratory environment and was *not* intended for 'real world' conversational testing."); *id.* ("[T]he Bureau Order calls for third-party measurement of the MOS—even though third-party measurement is not required for any metric other than the MOS, or for any technology other than satellite.").

details surrounding the conversational-opinion test—including the very issues that are the subject of Viasat's Petition.

Despite this uncertainty, Viasat chose to participate in the auction in an effort to ensure the widespread availability of high-quality voice and broadband services in accordance with the Commission's goals.[13] Hughes qualified to participate in the auction. Hughes's unilateral decision to refrain from actually bidding in the auction cannot serve as a basis for denying Viasat's request for reconsideration of the issues raised in the Petition. If Hughes truly believed it was necessary to resolve this uncertainty *before* the auction started, it could have asked for a stay of the auction; tellingly, however, Hughes did not. Moreover, Hughes's suggestion that reconsideration of these issues would lead to "inequities among applicants" is absurd.[14] Viasat's Petition is based on a desire to *ensure* "competitive and technological neutrality" in the treatment of CAF support recipients.[15] If anyone is seeking special treatment, it is Hughes, whose own petition asks the Commission to grant a wholesale exemption from the conversational-opinion test to a single provider (Hughes) in a single state (New York).[16]

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[13] Viasat noted as follows in connection with its short-form application: "As reflected in Viasat's July 23, 2018 letter in WC Docket No. 10-90, a number of issues exist with respect to the July 6, 2018 Order that established a framework for measuring the service performance of CAF II recipients. The adoption of that framework a mere two-and-a-half weeks before the auction, and the recognition that it is incomplete, requires that Viasat participate in the auction without knowing all of the rules that apply to it, and without being able to fully verify compliance. Although Viasat has a good-faith basis for participating in the auction based on the limited testing that Viasat has successfully completed in the past few weeks, its ability to satisfy those rules necessarily depends on matters that are not knowable today."

[14] Hughes Opposition at 4 (internal quotation marks and citations omitted).

[15] Viasat Petition at 2.

[16] *See* Petition for Reconsideration of Hughes Network Systems, LLC, WC Docket No. 10-90, at 1 (filed Sept. 19, 2018).

In any event, even if it were plausible that the *Order* created any "settled expectations," that alone does not preclude the Bureaus from reconsidering their rulings on a going-forward basis. For all its hand-wringing on this topic, Hughes fails to cite a single case or Commission decision supporting the notion that a party's subjective "expectations" with respect to a particular ruling forever prevents the agency from reconsidering that ruling. To the contrary, the D.C. Circuit has long held that *even* a regulatory change "that upsets expectations . . . may be sustained 'if it is reasonable,'" and that "[t]he Commission 'is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest' . . . if it gives a reasoned explanation for the revision."[17]

In fact, the D.C. Circuit has applied these principles in the context of a post-auction rule change and rejected the very argument that Hughes advances here. In *Mobile Relay Associates v. FCC*, a party challenged the Commission's decision to amend the service rules for the 800 MHz band well after the auction for licenses took place, on the grounds that its bidding strategy at auction was based on "the expectation that [the licenses] could be used for a number of operations" that the amendments later prohibited.[18] The court rejected that argument and upheld the Commission's order, noting that "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes," and that "most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect."[19] Indeed, it is not uncommon for the Commission to change its rules governing auctioned services after the auction has occurred; just

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[17] *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (quoting *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983)).

[18] *Mobile Relay Associates v. FCC*, 457 F.3d 1, 10 (D.C. Cir. 2006).

[19] *Id.* (quoting *Chemical Waste Management v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989)).

last year, for example, the Commission adopted a uniform renewal framework for wireless services even as it acknowledged that the framework represented a "significant change" for holders of wireless licenses (including auctioned licenses).[20] For all these reasons, Hughes's objections to Viasat's Petition based on its own asserted "expectations" about the workings of the conversational-opinion test are entirely without merit.

II. THE RURAL ASSOCIATIONS' OBJECTIONS TO VIASAT'S PETITION ARE CONCLUSORY AND OFF-TARGET

The Rural Associations' cursory objections to the substance of Viasat's requests for reconsideration are similarly unavailing. The Rural Associations begin by arguing that allowing other CAF support recipients to engage in self-testing is reasonable because data from other providers "can be verified through *post hoc* investigation of processes and results," whereas a third-party testing regime for Viasat is somehow necessary to "assur[e] an objective assessment that has no shade of partiality."[21] But the Rural Associations make no effort to explain why the testing applicable to Viasat cannot also be "verified through *post hoc* investigation of processes and results"—nor do they explain why it is reasonable to assume that self-testing by other support recipients would necessarily be free of any "partiality." As ADTRAN correctly notes in its comments, "[t]o the extent the Commission is concerned that Viasat (or any other CAF recipient) might not conduct the necessary tests in a forthright manner, presumably the Commission has the authority to review the underlying testing results" and "to penalize any false submissions."[22] But given that "[t]he Commission allows other CAF recipients to conduct self-

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[20] *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, Second Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 8874 ¶ 35 (2017).

[21] Rural Associations' Opposition at 11.

[22] ADTRAN Comments at 8-9.

testing, . . . there is no good reason to prohibit satellite broadband providers [from having] that same option."[23]

The Rural Associations also miss the mark in addressing the application of ITU-T Rec. P.800. They criticize the Petition as calling only for "laboratory testing,"[24] but the Petition does no such thing. The Petition points out that ITU-T Rec. P.800 "expressly specifies procedures for laboratory testing under carefully controlled circumstances" and therefore "provides insufficient guidance as to how 'real-world' latency testing should proceed in the CAF context," and accordingly asks the agency to reconsider its reliance on ITU-T Rec. P.800 "and instead [to] develop a workable testing methodology from the ground up."[25] As the Petition explains, Viasat is "more than willing to work closely with the Bureaus to achieve this objective on an expedited timetable."[26] If the Rural Associations have an alternative proposal that does not involve the self-contradictory application of ITU-T Rec. P.800 to real-world testing, they should make the same commitment to finding a workable solution. But their current approach of stonewalling on this issue is, regrettably, predictable. These are the same associations whose members abandoned consumers in many of the areas in which Viasat was awarded CAF support, first by declining a right of first refusal for support, and then by declining to bid at auction in those areas. Particularly given that Viasat was the *only* bidder in many of these areas, it is unfortunate that the Rural Associations continue to raise unwarranted objections to Viasat's efforts to bridge the digital divide. The Bureaus should reject these cynical objections to Viasat's reconsideration request.

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[23] *Id.* at 8.

[24] Rural Associations' Opposition at 12.

[25] Viasat Petition at 2, 6.

[26] *Id.* at 6.

CONCLUSION

For the foregoing reasons and those discussed in Viasat's Petition, the Bureaus should grant reconsideration on the issues raised in the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kayla Ernst, hereby certify that on this 19th day of November, 2018, I served a true copy of the foregoing Reply of Viasat, Inc. in Support of Its Petition for Reconsideration via first-class mail upon the following:

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