



## Summary

In establishing the Rural Broadband Experiments (“RBE”) program, the Commission urged applicants to make creative proposals that would use innovative technologies and business models to extend broadband service to rural areas of the country in a cost-effective manner. Notably, the Commission explicitly invited RBE applicants to seek waiver of any unnecessary program rules that would hinder their ability to provide such service.

In its RBE application, ViaSat answered the Commission’s call to arms and proposed a series of projects that: (i) in the near term, would allow the company to extend high-speed, high-quality, and affordable broadband service to the nation’s most unserved and underserved populations in an extremely cost-effective manner, and (ii) in the longer term, would serve as a proof-of-concept with respect to the inherent suitability of satellite broadband offerings like ViaSat’s Exede<sup>®</sup> services, which *already* provide broadband speeds in excess of 12/3 Mbps, to facilitate Commission policies. In doing so, ViaSat established that it would satisfy all applicable RBE program rules. Nevertheless, ViaSat also sought waiver of the 100 millisecond latency requirement, to the extent necessary, and also to afford the company greater flexibility in meeting the needs of consumers in the most effective and efficient manner possible.

By the Bureau’s own account, the preliminary results of the RBE auction indicate that ViaSat proposed the most cost-effective experiments in a number of geographic areas. Nevertheless, on December 5, 2014, the Wireline Competition Bureau summarily denied ViaSat’s RBE application and its related waiver request without providing *any* meaningful explanation for that action. As a result, absent corrective action by the full Commission, limited RBE funds will *not* be used in the most cost-effective manner possible, and the Commission will

be denied valuable information that could have been gleaned from the implementation of the innovative approach proposed by LightSquared.

In taking such action, the Bureau not only ignored that ViaSat's RBE application *actually did* establish that it would satisfy all applicable RBE program requirements, but also failed to give ViaSat's waiver request the "hard look" required by established *Commission* policy and well-established principles of administrative law. And while ViaSat believes that the adoption of any "no-waiver" policy would be problematic, neither the Commission nor the Bureau *ever* established such a policy or placed applicants on notice that waiver requests submitted as part of an RBE application simply would not be entertained. To the contrary, both the order establishing the Commission's RBE framework and the more general provisions in Section 1.3 of the Commission's rules invite parties to file waiver requests of this type. Simply stated, the ability to file waivers under such Commission guidance and rule were not limited or repudiated in setting final rules for the RBE auction.

To make matters worse, the Bureau subsequently decided to seek public comment with respect to waiver requests submitted by fifteen other provisionally winning bidders in the RBE auction—which collectively account for over one-half of the funds to be awarded through the RBE program. Those bidders sought waiver of a core and threshold RBE requirement (specifically, that they submit three years of audited financial statements in order to establish their financial qualifications). However, those bidders' waiver requests were not summarily denied, nor was the status of those bidders as provisional winners summarily terminated simply because they sought waivers. Rather, the Bureau preserved their status as provisional winners pending public review of and comment on their requests for waiver of a threshold RBE requirement.

It is unclear why the Bureau did not adopt a similar approach with respect to ViaSat's waiver request which, like the fifteen waiver requests the Bureau did place on public notice, was made in the context of an individual RBE application and would apply to a specific applicant based on individual circumstances. Indeed, the Bureau's treatment of those fifteen waiver requests demonstrates that it had a variety of procedural options with respect to ViaSat's waiver request that would have facilitated a full and fair evaluation of that request. For example, as in the case of those fifteen waiver requests, the Bureau could have designated ViaSat as a provisional winner pending public comment on ViaSat's request for waiver. Alternatively, the Bureau could have sought public comment on ViaSat's request before announcing any provisional winners and/or could have extended the filing window in order to afford other parties an opportunity to request similar waivers (although both the Commission's RBE framework and Section 1.3 of the Commission's rules already made clear that this opportunity was available to other applicants before the close of the filing window). Either approach would have facilitated the Bureau's ability to obtain public input without in any way threatening the integrity of the RBE competitive bidding process.

The Bureau's disparate treatment of ViaSat underscores the arbitrary and capricious nature of the Bureau's actions. At the same time, that treatment raises significant questions about whether the RBE reverse auction has been conducted in a fair and impartial manner consistent with longstanding universal service policies and established principles of federal procurement law. Accordingly, the Commission should reverse the Bureau's precipitous denial of ViaSat's RBE application, hold in abeyance any further action in connection with the RBE auction, and evaluate ViaSat's waiver request in a full and fair manner.

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denial of ViaSat’s waiver request is not. As explained below, the full Commission emphasized less than one year ago the *experimental* nature of the RBE program,<sup>3</sup> and specifically invited waiver requests to the extent an applicant “believe[d] compliance with a specific requirement is not necessary in the context of an experiment.” That is precisely what ViaSat did. Notably, neither the Commission nor the Bureau repudiated or limited this policy, or the general right to seek a waiver under Section 1.3 of the Commission’s rules, in the context of the RBE auction.

Thus, regardless of whether the Bureau believed that ViaSat’s application met the relevant RBE requirements, the Bureau’s failure to give ViaSat’s waiver request a “hard look” was contrary to explicit guidance provided by the full Commission and amounted to a *de facto* and impermissible “no-waiver” policy. Moreover, recent Bureau actions—including its decision to seek public comment with respect to *other* waiver requests filed by bidders that provisionally have been awarded *more than one-half of the total available RBE funds*—demonstrate that the Bureau could have and should have evaluated ViaSat’s waiver request fully on the merits without any threat of being “prejudicial to the integrity” of the RBE auction process.

At the same time, the Bureau’s disparate treatment of ViaSat raises significant questions about whether the RBE reverse auction has been conducted in a fair and impartial manner consistent with longstanding universal service policies and established principles of federal procurement law. At a minimum, the Commission should reverse the Bureau’s precipitous denial of ViaSat’s waiver request, hold the RBE auction in abeyance, and evaluate ViaSat’s waiver request in a full and fair manner. Such a result is warranted, particularly because ViaSat apparently was the most cost-effective bidder in many areas, and grant of its

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<sup>3</sup> See *Technology Transitions*, Order, 29 FCC Rcd 1433, at ¶¶ 99 *et seq.* (2014) (“*Technology Transitions Order*”).

application would result in far more cost-effective use of limited RBE resources.

## I. BACKGROUND

### A. ViaSat and Its Broadband Offerings

ViaSat is a leading provider of advanced satellite and other wireless communications solutions and services, as well as a leading provider of broadband Internet access through its Exede<sup>®</sup> service offerings. ViaSat's Exede<sup>®</sup> broadband services reliably provide speeds in excess of 12/3 Mbps, and the Commission has acknowledged that these services are meeting consumer needs.<sup>4</sup> ViaSat has proposed to make its Exede<sup>®</sup> services available to millions of additional consumers, including in rural and other underserved areas throughout the contiguous United States, Hawaii, and large parts of Alaska. By participating in the RBE program, ViaSat would be able to make available more attractive broadband and voice service plans with even more compelling bandwidth economics through a network that would be capable of supporting speeds of 100/25 Mbps and higher while providing consumers with service quality levels and usage allowances that more than satisfy any "reasonable comparability" benchmarks that may be adopted by the Commission. Thus, ViaSat's participation in the RBE program would advance a number of important Commission policies—including, as the Commission subsequently acknowledged, providing service at a significantly reduced level of support, compared to what would be provided under the Commission's cost model.<sup>5</sup>

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<sup>4</sup> The Commission has found that "during peak periods 90 percent of ViaSat consumers received 140 percent or better of the advertised speed of 12 Mbps" and that "both peak and non-peak performance was significantly higher than advertised rates." *See 2013 Measuring Broadband America: February Report*, at 8 (2013).

<sup>5</sup> *See* Jonathan Chambers, Chief, Office of Strategic Planning and Policy Analysis, *Notes from the Sandbox - The Rural Broadband Experiment Auction Results* (Dec. 24, 2014), at <http://www.fcc.gov/blog/notes-sandbox-rural-broadband-experiment-auction-results> ("For example, when we compared the bids to the amount of support calculated by the

## B. The 100 Millisecond Latency Requirement

The *Rural Broadband Experiments Order* requires recipients of Category 1 and Category 2 support to provide service with “latency no greater than 100 milliseconds (ms).”<sup>6</sup> The order suggests that the Commission intended to adopt the same latency requirement adopted in the *Phase II Service Obligations Order*, which was issued in the very same docket in which the RBE proceeding is being conducted. The *Phase II Service Obligations Order* makes clear that: (i) the 100 millisecond latency requirement was designed to implement the broader requirement that support recipients “provide latency sufficient for real-time applications, *such as VoIP*,”<sup>7</sup> (ii) the more specific 100 millisecond latency requirement was derived from ITU recommendations concerning the quality of VoIP calls; and (iii) the latency requirement was calibrated so that total “mouth-to-ear latency”—a concept that makes sense *only* in the voice context—would be low enough to ensure that consumers are “very satisfied” with the quality of VoIP calls.<sup>8</sup>

Notably, the *Rural Broadband Experiments Order* establishes, with respect to Category 3 support, that a satellite provider can provide voice service with a Mean Opinion Score (MOS) of four instead of satisfying the 100 millisecond latency requirement.<sup>9</sup> In doing so, the order implicitly acknowledges that: (i) satisfying the 100 millisecond latency requirement is not necessary to ensure that consumers receive high-quality broadband service and (ii) requiring

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FCC’s cost model, the total requested in the auction in the aggregate is less than half the model-based support for those census blocks. And the total from the group of lowest bidders is just ten percent of the model-based support for those particular blocks.”).

<sup>6</sup> *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769, at ¶ 26 (2014) (“*Rural Broadband Experiments Order*”).

<sup>7</sup> *Phase II Service Obligations Order* ¶ 19 (emphasis added).

<sup>8</sup> *Id.* ¶¶ 20-22.

<sup>9</sup> *Rural Broadband Experiments Order* ¶ 29.

support recipients to provide voice service meeting a MOS of four serves the same purpose while avoiding the undesirable, categorical exclusion of one type of broadband technology. Thus, the latency requirement in the RBE program reasonably can be read to apply only with respect to “latency-sensitive” or “real-time” applications.

### **C. ViaSat’s Latency Showing and Related Waiver Request**

ViaSat’s RBE application established that it would meet all applicable RBE program requirements if selected as a winning bidder.<sup>10</sup> Of particular note, ViaSat explained that it would use a variety of technologies “as necessary” to meet the 100 millisecond latency requirement for latency-sensitive (*i.e.*, “real-time”) applications, including voice applications.<sup>11</sup>

Although ViaSat was and is confident that a technological approach of this type would be effective, ViaSat also recognized that such an approach could be implemented more effectively if ViaSat were free to explore such solutions outside of the constraints imposed by any strict regulatory timetable.<sup>12</sup> For this reason, and consistent with the guidance provided by the full Commission in *Technology Transitions Order* (in which the Commission established the broad framework that would govern the RBE auction process), ViaSat sought waiver of the 100 millisecond latency requirement to the extent it otherwise would apply, subject to the condition that ViaSat instead provide voice service with a MOS of four.<sup>13</sup> ViaSat explained that the requested waiver would serve the public interest by facilitating its ability to: (i) in the near term,

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<sup>10</sup> See ViaSat, Inc., FCC Auction 501 Application, Project Information and Request for Waiver (Nov. 7, 2014) (“ViaSat RBE Application Narrative”).

<sup>11</sup> *Id.* at 4, 5.

<sup>12</sup> See *id.* at 7-8 (noting that waiver would facilitate ViaSat’s ability to explore the use of certain technologies).

<sup>13</sup> *Id.* at 4, 5, 7-9; see also *Technology Transitions Order* ¶ 102 (discussing the Commission’s desire to conduct experiments with respect to the “use of an application-based competitive bidding process with objective selection criteria on a limited scale”).

extend high-speed, high-quality, and affordable broadband services to consumers on terms and conditions that otherwise would not be possible and (ii) over time, deploy the use of additional network technologies.<sup>14</sup> ViaSat also explained that granting the requested waiver would not undermine the purposes of the 100 millisecond latency requirement because the MOS metric (which the Commission already had adopted for Category 3 service) is a more reliable predictor of perceived service quality than the latency metric and ViaSat’s commitment to meet a MOS of four would ensure that consumers actually receive what they perceive as a high-quality service.<sup>15</sup>

**D. The Bureau’s Denial of ViaSat’s Waiver Request**

On December 5, 2014, the Bureau released the December 5 Public Notice, which announces the bidders that had been provisionally selected as the winning bidders in the RBE reverse auction. The December 5 Public Notice also notes, in passing, that ViaSat had submitted an application and “initially appeared on the provisionally selected bidders list for funding category one” but had been removed from consideration because its bid allegedly was “facially non-compliant with the requirements for this category.”<sup>16</sup>

The December 5 Public Notice acknowledges that ViaSat had submitted a waiver request but proceeds to deny that request in perfunctory fashion. The public notice states that the Bureau was “not convinced” that ViaSat had met the relevant waiver standard and more specifically expresses the view that “waiving one of the core [RBE program] requirements for one bidder . . . without public input after the close of the filing window would be prejudicial to

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<sup>14</sup> ViaSat RBE Application Narrative at 7-8.

<sup>15</sup> *Id.* at 8-9.

<sup>16</sup> *See* December 5 Public Notice at 2-3.

the integrity of the competitive bidding process.”<sup>17</sup>

### **E. Subsequent Bureau Actions in the RBE Proceeding**

On December 23, 2014, the Bureau released a further public notice in the RBE proceeding (the “December 23 Public Notice”).<sup>18</sup> That public notice announces that, after the close of the filing window, fifteen bidders (which provisionally had been awarded more than one-half of the total funds available through the RBE program) had sought waivers related to a core and threshold requirement under the RBE rules—establishing their financial qualifications.<sup>19</sup> Namely, they seek a waiver of the requirement that they “submit three years of audited financial statements”—and instead be allowed to provide “alternative evidence in an attempt to demonstrate their financial qualifications to receive rural broadband experiments support.”<sup>20</sup> The public notice “seek[s] comment on whether these petitioners have met the standard for grant of a waiver” and asks whether they have submitted “sufficient alternative information to establish they are financially capable of fulfilling their rural broadband experiment obligations[.]”<sup>21</sup>

## **II. THE BUREAU’S PERFUNCTORY CONCLUSION THAT VIASAT’S APPLICATION WAS “FACIALLY NON-COMPLIANT” WITH APPLICABLE RBE PROGRAM REQUIREMENTS IS ARBITRARY AND CAPRICIOUS**

The December 5 Public Notice asserts that ViaSat’s RBE application was removed from consideration because it allegedly was “facially non-compliant with the

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<sup>17</sup> *Id.* at 3.

<sup>18</sup> *See Wireline Competition Bureau Announces Availability of Additional Funding for Rural Broadband Experiments; Seeks Comment on Waiver Petitions of Provisionally Selected Bidders*, WC Docket No. 10-90, DA 14-1889 (Dec. 23, 2014).

<sup>19</sup> *Id.* at 2 & Att. B.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

requirements” for Category 1 RBE support. This conclusion is without factual or legal foundation, as the plain text of ViaSat’s RBE application establishes that its proposal is consistent with the requirements for all three funding categories.

As noted above, ViaSat’s RBE application established that it would meet all applicable RBE program requirements if selected as a winning bidder and, in particular, that ViaSat would use a variety of technologies “as necessary” to meet the 100 millisecond latency requirement for latency-sensitive (*i.e.*, “real-time”) applications, including voice applications. As detailed above, a latency requirement logically can ensure the quality only of “latency-sensitive or “real-time” applications, and the December 5 Public Notice provides absolutely no explanation of why the Bureau believes ViaSat’s showing to be inadequate. Instead, the Bureau ignores this important element of ViaSat’s proposal and addresses only ViaSat’s waiver request (albeit in a perfunctory fashion that is itself problematic). The failure to address this aspect of ViaSat’s application renders the Bureau’s actions arbitrary and capricious and demands that the Commission take corrective action.<sup>22</sup>

### **III. THE BUREAU’S FAILURE TO GIVE VIASAT’S WAIVER REQUEST THE REQUISITE “HARD LOOK” IS ARBITRARY AND CAPRICIOUS**

Even if the Bureau were correct in concluding that ViaSat’s application was “facially non-compliant” with applicable RBE program requirements for Category 1, the Bureau’s actions still would be arbitrary and capricious because it failed to give ViaSat’s waiver request a “hard look” as required by established *Commission* policy and applicable precedent.

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<sup>22</sup> Although the arbitrary and capricious standard of review is deferential, the court will “intervene to ensure that the agency has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action. Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action.” *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

Action by the full Commission is appropriate and required to remedy this failure.

**A. In Denying ViaSat’s Waiver Request, the Bureau Contravened the Waiver Policy Established by the Commission in the *Technology Transitions Order* and Section 1.3 of Its Rules**

In the January 2014 *Technology Transitions Order*, the Commission established the broad framework that would govern the RBE auction process.<sup>23</sup> In doing so, the Commission emphasized the *experimental* nature of the RBE program and explained that although support would be “conditioned on complying with all relevant universal service rules that the Commission has adopted or may adopt in the future,”<sup>24</sup> there would be cases in which strict enforcement of those requirements would be contrary to the public interest. Therefore, the Commission invited RBE applicants that “believe compliance with a specific requirement is not necessary *in the context of an experiment*” to “identify with specificity those rules that should be waived or modified.”<sup>25</sup> The invitation to *applicants* to seek *waivers* could not have been clearer.<sup>26</sup> Notably, neither the Commission nor the Bureau repudiated or limited this policy, or the general right to seek a waiver embodied in Section 1.3 of the Commission’s rules, in setting the final rules for the RBE auction. Indeed, based on the December 23 Public Notice alone, it appears that provisionally winning bidders that have sought waivers of RBE program

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<sup>23</sup> See *Technology Transitions Order* ¶ 102 (discussing the Commission’s desire to conduct experiments with respect to the “use of an application-based competitive bidding process with objective selection criteria on a limited scale”).

<sup>24</sup> *Id.* ¶ 128.

<sup>25</sup> *Id.* ¶ 129 (emphasis added).

<sup>26</sup> Had the Commission intended only to invite proposed rule changes in the context of a rulemaking, it would have used different terms and phrases than “applicants” and “rules that should be waived.”

requirements account for over one-half of the support to be awarded through the RBE program.<sup>27</sup>

ViaSat’s waiver request is wholly consistent with this invitation in that it: (i) identifies a specific requirement—*i.e.*, the 100 millisecond latency requirement—that is not necessary in the context of ViaSat’s proposed projects under the Rural Broadband Experiments program and (ii) provides a detailed justification for waiving that requirement. More specifically, ViaSat’s waiver request establishes that grant of the requested waiver would serve the public interest without undermining the purposes for which the requirement was adopted. Notably, the Bureau itself appears to agree that ViaSat’s waiver request has substantive merit and acknowledges that “ViaSat’s petition raises issues that warrant further consideration with public input . . . .”<sup>28</sup>

But instead of evaluating ViaSat’s waiver request fully as required by established Commission policy, and in the manner with which it plans to proceed for fifteen other bidders that seek waivers, the Bureau simply “punted” those issues to another day and a broader rulemaking proceeding—without acknowledging or addressing the fact that this delay would: (i) direct limited RBE funds to other bidders that are *not* the most cost-effective—contrary to the policies and principles underlying the RBE program and (ii) delay the ability of consumers to obtain high-quality broadband services from ViaSat in the interim. Indeed, the December 5 Public Notice denied ViaSat’s waiver request in summary fashion, suggesting that it would be problematic to waive *any* “core” RBE program requirement after the close of the auction filing window. But this position flatly contradicts the framework established by the *Commission* in the *Technology Transitions Order*, which expressly invites parties to file waiver requests during the

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<sup>27</sup> See December 23 Public Notice, Att. B.

<sup>28</sup> December 5 Public Notice at 3.

RBE application process. Moreover, this inflexible approach is fundamentally inconsistent with the experimental nature of the RBE auction, which already has been acknowledged as having yielded valuable information to the Commission.<sup>29</sup> And this approach cannot be reconciled with the Bureau’s decision to seek comment on and consider requests from fifteen other bidders that seek waivers related to a core and threshold requirement under the RBE rules—namely, establishing their financial stability and wherewithal. For these reasons, the Bureau’s actions exceeded its delegated authority and should be reversed by the Commission.

**B. The Bureau Otherwise Failed to Give ViaSat’s Waiver Request the “Hard Look” to Which It Is Entitled**

As the courts have explained, the Commission’s “discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.”<sup>30</sup> Therefore, where the Commission receives a request for waiver that is “stated with clarity and accompanied by supporting data,” that request may not be subjected to “perfunctory treatment” but must be given a “hard look.”<sup>31</sup> This requirement ensures that a general rule will not be rigidly applied where its application would not be in the public interest.<sup>32</sup> As noted above, the Commission recognized as much in the RBE context in the *Technology Transitions Order*, in which the Commission invited RBE applicants that “believe compliance with a specific requirement is not

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<sup>29</sup> See Jonathan Chambers, Chief, Office of Strategic Planning and Policy Analysis, *Notes from the Sandbox - The Rural Broadband Experiment Auction Results* (Dec. 24, 2014), at <http://www.fcc.gov/blog/notes-sandbox-rural-broadband-experiment-auction-results>.

<sup>30</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

necessary” to seek a waiver in their applications.<sup>33</sup>

The text of the December 5 Public Notice makes clear that the Bureau did not afford ViaSat’s waiver request the “hard look” to which it is entitled. To the contrary, the public notice suggests that the Bureau: (i) denied the waiver request simply because it was made during the RBE auction and (ii) would have taken similar action with respect to *any* waiver request submitted in similar fashion. This position amounts to the type of “no-waiver” policy that the courts have suggested would raise significant due-process concerns,<sup>34</sup> and is particularly unjustifiable given the clear Commission policy specifically inviting waiver requests from RBE applicants and the Commission’s express acknowledgement before and after the RBE auction that it was commenced as part of an *experimental* process intended to elicit creative proposals from applicants.

#### **IV. RECENT BUREAU ACTIONS UNDERSCORE THE ARBITRARY AND CAPRICIOUS NATURE OF ITS DENIAL OF VIASAT’S WAIVER REQUEST**

##### **A. The Bureau’s Recent Actions Undermine the “Explanation” Provided in the December 5 Public Notice**

As discussed above, the December 5 Public Notice expresses the Bureau’s view that “waiving one of the core requirements for one bidder in the rural broadband experiments without public input after the close of the filing window would be prejudicial to the integrity of the competitive bidding process.” This reasoning is premised upon a false dichotomy that should be immediately apparent. In short, *nothing* compelled the Bureau to choose between granting ViaSat’s waiver request without public input and denying that request. Indeed, the Bureau

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<sup>33</sup> *Technology Transitions Order* ¶ 129.

<sup>34</sup> *See, e.g., Southwest Pennsylvania Cable TV, Inc. v. FCC*, 514 F.2d 1343, 1347 (D.C. Cir. 1975) (noting that “an effective waiver mechanism may be necessary to assure that . . . [a] rule affords due process”).

*always* had the option to seek public comment before acting. It is pretending otherwise that undermines the integrity of the Bureau's actions and the RBE program more generally—not full and fair consideration of ViaSat's request.

Recent Bureau actions demonstrate that the Bureau could have availed itself of a variety of procedural options to facilitate public consideration of ViaSat's waiver request. As noted above, the December 23 Public Notice seeks comment as to whether fifteen other provisionally winning bidders in the RBE auction—accounting for over one-half of the funds to be awarded in the RBE program—should be granted waivers of a core and threshold requirement that they establish their financial qualifications by submitting three years of audited financial statements. Notably, those waiver requests were submitted more than one month after those bidders submitted their bids. Yet, the Bureau did not summarily deny those waiver requests or terminate the petitioners' status as provisional winners—even though the *Rural Broadband Experiments Order* adopted by the full Commission expressly requires all winning bidders to establish their financial qualifications by submitting such audited financial statements,<sup>35</sup> and even though most (if not all) of the waiver requests were not submitted until after the close of the filing window.

It is unclear why the Bureau did not adopt a similar approach with respect to ViaSat's waiver request which, like the fifteen waiver requests addressed in the December 23 Public Notice, was made in the context of an individual RBE application and would apply to a specific applicant based on individual circumstances.<sup>36</sup> More specifically, the Bureau could have

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<sup>35</sup> See *Rural Broadband Experiments Order* ¶ 54.

<sup>36</sup> That ViaSat did not submit its waiver request in the public docket is irrelevant. ViaSat's submission of its waiver request as part of its application was entirely consistent with Section 1.3 of the Commission's rules, the RBE waiver policy established by the

designated ViaSat as a provisional winner pending public comment on ViaSat's request for waiver, which the Bureau could have sought in a fashion similar to the December 23 Public Notice. Alternatively, the Bureau could have sought public comment on ViaSat's request before announcing any provisional winners and/or could have extended the filing window in order to afford other parties an opportunity to request similar waivers (although both the *Technology Transitions Order* and Section 1.3 of the Commission's rules already made clear that this opportunity was available to other applicants before the close of the filing window). Either approach would have facilitated the Bureau's ability to obtain public input without affecting the integrity of the RBE competitive bidding process.

The Commission should reverse the Bureau's precipitous denial of ViaSat's waiver request, hold the RBE auction in abeyance, and evaluate ViaSat's waiver request in a full and fair manner—particularly as ViaSat apparently was the most cost-effective bidder in many areas, such that grant of its application would result in far more cost-effective use of limited RBE resources.

**B. The Bureau's Disparate Treatment of ViaSat Is Inconsistent with Longstanding Universal Service Policies and Established Principles of Federal Procurement Law**

The Bureau provides no explanation whatsoever for its inequitable and disparate treatment of ViaSat, which is contrary to the principles of competitive and technological neutrality that have formed the historical basis for the Commission's universal service policies<sup>37</sup>

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Commission in the *Technology Transitions Order*, and the confidential nature of all RBE bids. In any event, ViaSat would have submitted its waiver request in the public docket if it had been asked to do so and would not have objected to public scrutiny of that request (e.g., following issuance of an appropriate public notice by the Bureau) subject to suitable confidentiality protections being adopted.

<sup>37</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd

and which previously have facilitated the use of satellite technologies to provide supported services.<sup>38</sup> Such treatment also is inconsistent with established principles of federal procurement law to the extent the RBE auction process is viewed as a type of a procurement involving the use of federal funds. Simply stated, those principles require administrative agencies like the Commission to “[e]nsure that contractors receive impartial, fair, and equitable treatment” throughout the procurement process.<sup>39</sup> The Bureau’s summary refusal to entertain ViaSat’s waiver requests while entertaining the waiver requests of fifteen other applicants (which collectively account for more than one-half of the total funding available through the RBE program) is anything but impartial, fair, or equitable.

The courts also have explained that “the issuance of a competitive solicitation which generates responsive offers gives rise to an implied contract of fair dealing.”<sup>40</sup> This obligation necessarily extends to the equal and impartial evaluation of all proposals, for it is well established that a “contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria.”<sup>41</sup> The *Technology Transitions Order*, which explicitly invites waiver requests in the context of RBE applications, Section 1.3 of the Commission’s rules, and the Bureau’s subsequent implementing notices

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8776, at ¶ 47 (1997).

<sup>38</sup> *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, at ¶ 10 (1997) (finding that “the principles of competitive and technological neutrality” demand that “non-landline telecommunications providers should be eligible to receive universal service support even though their local calls are completed via satellite”).

<sup>39</sup> 48 C.F.R. § 1.602-2(b).

<sup>40</sup> *Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 273 (2004).

<sup>41</sup> *See Banknote Corp. of America v. United States*, 56 Fed. Cl. 377, 384 (2003), *aff’d* 365 F.3d 1345 (Fed. Cir. 2004); *see also Seattle Sec. Servs., Inc. v. United States*, 45 Fed. Cl. 560, 569 (2000); *Incident Catering Servs., LLC*, B-296435.2, Sept. 7, 2005, 2005 CPD P 193 at 4; *U.S. Prop. Mgmt. Serv. Corp.*, B-278727, March 6, 1998, 98-1 CPD P 88 at 4.

(which do not preclude parties from seeking such waivers in accordance with the Commission’s rules) establish the common “ground rules” under which bids must be submitted and evaluated. Stated another way, all bidders were on notice before the filing window opened and closed that they were free to present the same type of creative proposal as ViaSat made. The Bureau cannot simply abandon those ground rules after the filing window has closed—especially by considering the waiver requests of some applicants but not others.

## V. CONCLUSION

For the reasons set forth herein, ViaSat respectfully requests that the Commission reverse the Bureau’s summary rejection of ViaSat’s RBE application and summary denial of ViaSat’s waiver request. As detailed above, those actions are arbitrary, capricious, and contrary to law and undermine the integrity of the RBE process. First, ViaSat’s RBE application *did* establish that it would satisfy all applicable RBE program requirements (as, under Commission precedent, the latency requirement reasonably can be read to apply only with respect to “latency-sensitive” or “real-time” applications), and the December 5 Public Notice fails to provide any basis for reaching any other conclusion. But even if reaching a different conclusion were warranted, the Bureau failed to give ViaSat’s related waiver request a “hard look,” contrary to explicit guidance from the full Commission and general principles of administrative law prohibiting agencies from adopting “no-waiver” policies. The Bureau’s recent decision to seek public comment with respect to *fifteen other* waiver requests filed in connection with the RBE auction underscores that its summary denial of ViaSat’s waiver request was manifestly unreasonable, and its disparate treatment of ViaSat raises significant questions about whether the RBE reverse auction has been conducted in a fair and impartial manner consistent with longstanding universal service policies and established principles of federal procurement law.

The Commission should seize this opportunity to step in to correct the Bureau's errors and safeguard the integrity of the RBE program. And it should hold the RBE auction process in abeyance until it does so.

Respectfully submitted,

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