

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Rural Broadband Experiments)	WC Docket No. 14-259

COMMENTS OF VIASAT, INC.

ViaSat, Inc. submits these comments in response to the public notice released by the Wireline Competition Bureau on December 23, 2014 (the “December 23 Public Notice”).¹ That public notice seeks comment with respect to petitions filed by fifteen provisionally winning bidders in the rural broadband experiments (“RBE”) auction, which request waiver of the specified mechanism through which they otherwise must satisfy a core, threshold requirement in the RBE rules—demonstrating their financial qualifications. Rather than utilizing that mechanism and providing their “most recent three consecutive years of audited financial statements, including balance sheets, net income, and cash flow,”² those bidders instead propose to demonstrate their financial *bona fides* through other means.

This is far from a situation in which a single bidder seeks a “one-off” waiver of a burdensome procedural rule that is unlikely to impact the program as a whole. To the contrary, the projects to which those waiver requests relate account for approximately one-half of the total funds to be awarded through the RBE program (and at least three of those bidders also seek

¹ 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) (“December 23 Public Notice”).

² *Id.* at 2; *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769, at ¶ 54 (2014) (“*Rural Broadband Experiments Order*”).

waiver of separate program requirements related to their technical qualifications³). And each of those waivers was sought only *after* the RBE auction filing window closed, instead of up front in the relevant RBE applications.

As explained below, the Bureau’s decision to entertain those waiver requests through the issuance of the December 23 Public Notice is inconsistent with the Bureau’s earlier determination that it would not entertain waiver requests submitted in connection with individual RBE auction applications—in particular, the waiver request submitted by ViaSat.⁴ This disparate treatment is the epitome of arbitrary and capricious agency action and anathema to: (i) the requirements of the Administrative Procedure Act (“APA”); (ii) the principles of competitive and technological neutrality that have formed the historical basis for the Commission’s universal service policies; and (iii) established principles of federal procurement law, which apply to the extent the RBE auction process is viewed as a type of a procurement involving the use of federal funds. Simply stated, the Commission *must* treat parties to the RBE auction in a fair and impartial manner and it has failed to do so.

This disparate treatment also is misguided as a matter of policy, as summarily denying one waiver request submitted *up front during* the RBE auction filing window, but entertaining fifteen (or more) other waiver requests submitted *after* the auction window has closed and provisional winners have been selected, creates perverse incentives. Specifically, such an approach discourages candor and encourages applicants to “seek forgiveness” after being

³ See Request for Waiver of Last Mile Broadband LLC, WC Docket No. 10-90 (filed Dec. 19, 2014); Request for Waiver of Agile Network Builders, WC Docket No. 10-90 (filed Dec. 19, 2014); Request for Waiver of Cricelli, Inc., WC Docket No. 10-90 (filed Dec. 19, 2014).

⁴ See *Wireline Competition Bureau Announces Entities Provisionally Selected for Rural Broadband Experiments; Sets Deadlines for Submission of Additional Information*, WC Docket No. 10-90, DA 14-1772, at 2-3 (Dec. 5, 2014) (“December 5 Public Notice”).

selected, rather than “seeking permission” as part of their bids.

For these reasons, the Bureau should hold in abeyance the waiver requests that are the subject of the December 23 Public Notice, as well as any other waivers sought by provisionally winning bidders, *unless and until* ViaSat’s waiver request is reinstated and similarly entertained (either through *sua sponte* action by the Bureau or through grant of ViaSat’s pending Application for Review⁵).

BACKGROUND

ViaSat’s RBE Application and Related Waiver Request. 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[®] service offerings (which reliably provide speeds in excess of 12/3 Mbps).⁶ In its RBE application, ViaSat demonstrated how it 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.

ViaSat’s RBE application established that it would meet all applicable RBE program requirements if selected as a winning bidder.⁷ Among other things, ViaSat proposed to

⁵ See ViaSat, Inc., Application for Review, WC Docket No. 10-90 (filed Jan. 5, 2015).

⁶ 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).

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

use a variety of technologies to meet the 100 millisecond latency requirement for latency-sensitive (*i.e.*, “real-time”) applications, including voice applications,⁸ and indicated that it could implement its proposed program more effectively if it were not constrained by a near-term requirement that it provide latency of less than 100 milliseconds. For this reason, and consistent with Commission rules and guidance on waivers in the RBE context,⁹ ViaSat sought waiver of the 100 millisecond latency requirement to the extent it otherwise would apply.¹⁰

The Bureau’s Denial of ViaSat’s Waiver Request. On December 5, 2014, the Bureau released a public notice announcing the bidders that had been provisionally selected as the winning bidders in the RBE reverse auction (the “December 5 Public Notice”). In doing so, the Bureau noted, in passing, that ViaSat had “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”—apparently because ViaSat had requested a waiver of the 100 millisecond latency requirement.¹¹ The Bureau proceeded to deny that request in perfunctory fashion, alleging that ViaSat had not met the relevant waiver standard because “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 the integrity of the competitive bidding process.”¹²

⁸ *Id.* at 4, 5, 7-8.

⁹ *See Technology Transitions*, Order, 29 FCC Rcd 1433, at ¶ 129 (2014) (inviting RBE applicants that “believe compliance with a specific requirement is not necessary” to seek a waiver in their applications) (“*Technology Transitions Order*”); *see also* 47 C.F.R. § 1.3.

¹⁰ ViaSat RBE Application Narrative at 4, 5, 7-9.

¹¹ *See* December 5 Public Notice at 2-3.

¹² *Id.* at 3.

The December 23 Public Notice. A few weeks after summarily rejecting ViaSat’s waiver request, the Bureau released the December 23 Public Notice, which announces that, *after the close of the RBE auction*, fifteen provisionally winning bidders (collectively accounting for more than 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 through the submission of audited financial statements.¹³ Specifically, those bidders ask the Commission to waive the requirement that they provide “the most recent three consecutive years of audited financial statements, including balance sheets, net income, and cash flow.”¹⁴ The public notice “seek[s] comment on whether these petitioners have met the standard for grant of a waiver” while also acknowledging that the required financial statements “would enable the Bureau to undertake a thorough review to determine the ability of the provisionally selected bidders to satisfy the service obligations for their selected projects.”¹⁵

DISCUSSION

The petitions that are the subject of the December 23 Public Notice seek waiver of a core RBE program requirement established by the full Commission—namely, that applicants establish their financial qualifications by submitting audited financial statements.¹⁶ Notably, each of the fifteen petitioners was required to certify, as part of its RBE application, that it was “financially . . . capable”—*i.e.*, financially qualified.¹⁷ To the extent that a given petitioner

¹³ December 23 Public Notice at 2 and Att. B.

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ See *Rural Broadband Experiments Order* ¶ 54.

¹⁷ See FCC Form 5610 Screen Shots at 25 (Sep. 23, 2014), *available at* <http://www.fcc.gov/encyclopedia/rural-broadband-experiments> (requiring RBE

believed that it would have *any* difficulty demonstrating its financial qualifications in the manner specified in the Commission’s rules, or wished to demonstrate its financial qualifications in some other manner, it would have been appropriate for it to seek a waiver at that time (or, at a minimum, qualify its certification with a suitable explanation). Instead, each of those bidders apparently provided a “clean” certification as part of its application, waited until it had been awarded funds, and then sought a waiver (more than one month after the close of the filing window had closed).

In contrast, and even though ViaSat’s application demonstrated that it would satisfy all applicable RBE program rules, ViaSat requested the waiver it desired (of the 100 millisecond latency requirement) *within* its application itself—instead of waiting until after it was awarded funds to seek additional flexibility from the Commission. One would expect the Commission to consider ViaSat’s request in earnest so as to incent future bidders to “seek permission” in their applications rather than “seek forgiveness” later. It therefore came as a surprise that the December 5 Public Notice denied not only ViaSat’s waiver request but also its entire RBE application—apparently because ViaSat had sought a waiver in connection with its participation in the RBE auction.

Indeed, the December 5 Public Notice broadly established that the Bureau would not entertain waiver requests filed in the context of the RBE auction. The Bureau concluded 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.”¹⁸ The Bureau reached this conclusion in ViaSat’s case even

applicants to certify that they are “financially and technically capable”).

¹⁸ December 5 Public Notice at 3.

though it could have designated ViaSat as a provisional winner pending public comment on ViaSat’s request for waiver (and thus avoided any prejudicial result).

In fact, this is the approach the Bureau plans to use in the case of those bidders identified in the December 23 Public Notice, which: (i) seek waivers related to a core and threshold requirement under the RBE rules—establishing their financial qualifications; (ii) have been awarded approximately one-half of the funds to be awarded through the RBE program on a provisional basis; but (iii) did not request waivers in their applications in an up-front manner. That approach is wholly inconsistent with the approach the Bureau took a mere eighteen days earlier in the December 5 Public Notice. Instead of *denying* the waiver requests, the December 23 Public Notice seeks comment on them and suggests that it would be appropriate to grant them if the petitioning bidders have “submitted sufficient alternative information” to establish their financial qualifications.¹⁹ The public notice fails to acknowledge or provide any explanation whatsoever for this inconsistency—perhaps because there is no principled basis for the disparate treatment it effects. Indeed, the *only* salient distinction between the waiver requests described in the December 23 Public Notice and ViaSat’s waiver request is that the Bureau chose to seek public comment with respect to the former but not the latter. But that distinction cannot justify the disparate treatment of ViaSat.

To the extent the Bureau wishes to entertain the RBE waiver requests that are the subject of the December 23 Public Notice, it first must reverse the policy reflected in the December 5 Public Notice by vacating it and reinstating ViaSat’s waiver request (either *sua sponte* or by facilitating grant of ViaSat’s pending Application for Review). Any other approach—*e.g.*, entertaining the waiver requests that are the subject of the December 23 Public

¹⁹ December 23 Public Notice at 2.

Notice *without* entertaining ViaSat’s waiver request—not only would be contrary to established Bureau policy, but also would exacerbate the inequitable and disparate treatment to which ViaSat already has been subjected. Among other things, this result would be contrary to the requirements of the APA and contrary to the principles of competitive and technological neutrality that have formed the historical basis for the Commission’s universal service policies²⁰ and which previously have facilitated the use of satellite technologies to provide supported services.²¹

Furthermore, the continued disparate treatment of ViaSat would undermine the integrity of the RBE auction and raise significant questions about whether it has been conducted in a fair and impartial manner consistent with established principles of federal procurement law (which apply 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.²² 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.”²³ 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

²⁰ See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, at ¶ 47 (1997).

²¹ *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”).

²² 48 C.F.R. § 1.602-2(b).

²³ *Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 273 (2004).

offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria.”²⁴ Entertaining the waiver requests that are the subject of the December 23 Public Notice *without* entertaining ViaSat’s waiver request would be anything but impartial, fair, or equitable.

CONCLUSION

For the reasons set forth herein, ViaSat respectfully requests that the Bureau hold in abeyance the waiver requests that are the subject of the December 23 Public Notice, as well as any other waivers sought by provisionally winning bidders, *unless and until* ViaSat’s waiver request is reinstated and similarly entertained (either through *sua sponte* action by the Bureau or through grant of ViaSat’s pending Application for Review). Any other approach would be fundamentally unfair, as well as arbitrary, capricious, and contrary to law.

Respectfully submitted,

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²⁴ 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.