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# LATHAM & WATKINS<sup>LLP</sup>

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October 21, 2011

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: ViaSat, Inc. and WildBlue Communications, Inc.; WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109

Dear Ms. Dortch:

ViaSat, Inc. and WildBlue Communications, Inc. (collectively, “ViaSat”) submit this letter to expand on certain points made by ViaSat during meetings with the Commissioners last week relating to the proposed structure of universal service reform. During those meetings, ViaSat questioned the legality of the Connect America Fund (“CAF”) structure that press reports indicate will be considered for a vote later this month. More specifically, those reports indicate that the Commission intends to establish one or more high-cost support mechanisms that would be used to distribute the vast majority of available support to incumbent wireline providers. These mechanisms would either direct support exclusively to those incumbents, or would incorporate restrictions that would make competitive providers eligible to compete for such support in only a narrow range of circumstances (*e.g.*, where incumbents choose not to exercise a “right of first refusal”). ViaSat urges the Commission to abandon this approach, which would be contrary to the requirements of the Communications Act and the broader public interest.

The Act establishes that all eligible telecommunications carriers (“ETCs”) qualify for available high-cost support, and precludes the Commission from categorically excluding a class of ETCs from seeking such support. More specifically, Section 214(e)(1) of the Act provides that a carrier designated as an ETC “*shall* be eligible to receive universal service support,” without qualification.<sup>1</sup> Consequently, the Commission may not preclude competitive ETCs from participating in a unified CAF if one is established, and may not exclude competitive ETCs from seeking support by establishing a “primary” funding mechanism that is heavily skewed in favor of incumbent wireline providers—even if the Commission also creates one or more “secondary” high-cost support mechanisms through which all providers, including competitive ETCs, could compete for support.

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<sup>1</sup> 47 U.S.C. § 214(e)(1) (emphasis added).

This approach is particularly problematic where, as here, the vast majority of available support would be distributed to incumbents through “primary” funding mechanisms, leaving competitors to fight for limited support available through “secondary” funding mechanisms. Simply put, the Act does not permit the Commission to treat competitive providers as “second class” ETCs. Nor does the Act provide a basis for the Commission to deny equal access to support to service providers and technologies—like satellite—that currently are eligible to receive support.<sup>2</sup>

This approach also would violate the Act’s competitive neutrality requirements. Section 254(b)(7) of the Act incorporates a clear principle of “competitive neutrality,” which requires the Commission to adopt “universal service support mechanisms and rules [that] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”<sup>3</sup> Underlying this principle is a strong commitment by the Commission to adopt rules to minimize competitive and technological bias, and “facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier.”<sup>4</sup> Allocating the vast majority of high-cost support through non-competitive, wireline-centric funding mechanisms, while relegating competitors to one or more secondary funding mechanisms (which are much smaller in the aggregate), would undermine these goals and thus not be legally sustainable. The mere fact that incumbents use wireline technology, or have a pre-existing dependency on government support, does not override the principle of competitive neutrality.

Notably, the Commission already has found that making a particular type of universal service support available to some ETCs but not others would violate the principle of competitive neutrality.<sup>5</sup> The Commission also has determined that allowing ETCs to compete with each other for support—*i.e.*, making support “portable”—is critical to ensure that support is distributed in a competitively neutral manner.<sup>6</sup> By definition, support is not “portable” where competitive ETCs are effectively excluded from competing for that support, as would be the case if the Commission were to create incumbent-only or incumbent-skewed funding mechanisms.

In addition, Sections 254(b)(1), (4) and (5) of the Act require the Commission to limit the universal service contribution burden placed on consumers to the greatest extent

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<sup>2</sup> *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, at ¶ 10 (1997) (concluding 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*”) (emphasis supplied).

<sup>3</sup> *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, at ¶ 48 (1997) (“*USF First Report and Order*”); see also 47 U.S.C. § 254(b)(7).

<sup>4</sup> *USF First Report and Order* ¶ 48.

<sup>5</sup> See *id.* at ¶ 751 (eliminating LTS after determining that it was an implicit support mechanism that benefitted only incumbent local exchange carriers).

<sup>6</sup> *Federal-State Joint Board on Universal Service*, Seventh Report and Order, 14 FCC Rcd 8078, at ¶ 73 (1999).

possible so as to ensure that support is sustainable and sufficient to ensure that consumer rates are affordable.<sup>7</sup> As the courts have recognized, excessive funding may itself violate the sufficiency requirements of the Act by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.<sup>8</sup> The record in this proceeding reflects that satellite broadband is the most cost-effective means of extending broadband service to about half of the unserved American households—more specifically, the 47 percent that are the most costly to serve.<sup>9</sup> Facilitating the portability of and encouraging competition for support through the use of a single, unified high-cost fund and funding mechanism is the best way to reduce the contribution burden on consumers, thus ensuring that universal service support is sustainable and that rates are affordable. In contrast, shielding incumbents from competition would unnecessarily increase the overall universal service contribution burden and harm consumers.

Reports suggest that the Commission may not address the mechanics of any “secondary,” competitive funding mechanisms in its forthcoming order, but instead may delay their implementation by seeking further public comment through a further notice of proposed rulemaking. Delaying implementation in this fashion, while allowing incumbents to receive support on an expedited timetable, would place competitive ETCs at a significant disadvantage. The record is extensive and sufficiently well established to enable the Commission to provide complete universal service reform now, without requiring certain service providers or technologies to wait longer than others to become eligible for funding.

Reports also suggest that the Commission may adopt a 100 millisecond latency requirement for participants in the “primary” funding mechanism. This approach *would not* ensure that consumers receive quality broadband service, but *would* limit their ability to benefit from certain competitive satellite and wireless technologies. The record of this proceeding demonstrates that the level of broadband service quality that an end user experiences is affected by a combination of network characteristics. Among those factors, speed is a predominant and critical factor, and one where satellite-delivered broadband will far exceed the performance of any incumbent DSL network. In contrast, latency is far less relevant to the end-user experience for the most popular broadband applications (including web surfing, e-mail, and video streaming). Establishing a 100 millisecond latency requirement would limit the ability of unserved consumers to access next-generation broadband services and technologies (including satellite broadband) that are especially well-suited to these applications, without ensuring that they receive high-quality service in a timely fashion through alternative providers/technologies. Because such a requirement would limit the ability of certain ETCs to obtain funding without any valid justification, it also would undermine the principle of competitive neutrality. Adopting such a requirement therefore would be bad policy, as well as arbitrary, capricious, and contrary to law.

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<sup>7</sup> 47 U.S.C. §§ 251(b)(1), (4), (5).

<sup>8</sup> *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000); *Qwest Commc'ns Int'l Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir 2005).

<sup>9</sup> *See* Dr. Charles L. Jackson, *Satellite Service Can Help to Effectively Close the Broadband Gap* (Apr. 18, 2011), attached as Exhibit A to Comments of ViaSat, Inc., WC Docket No. 10-90 (Apr. 18, 2011).

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Please contact the undersigned should you have any questions.

Respectfully submitted,

/s/ John P. Janka

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