

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

In the Matter of)	
)	
Viasat Auction 904 Application for Review)	GN Docket No. 21-231
)	
The Rural Digital Opportunity Fund (Auction 904))	AU Docket No. 20-34
)	
Rural Digital Opportunity Fund)	WC Docket No. 19-126

**OPPOSITION
OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits this Opposition² to the Application for Review filed by Viasat (“Viasat AFR” or “AFR”)³ in the Federal Communications Commission’s (“Commission”) Rural Digital Opportunity Fund (“RDOF”) proceeding. The Viasat AFR seeks a reversal by the full Commission of a Rural Broadband Auctions Task Force, Office of Economics and Analytics, and Wireline Competition Bureau (collectively, the “Bureaus”) determination that Viasat was precluded from bidding a low-latency low-Earth orbit (“LEO”) service in the RDOF Phase I auction. As discussed further below, while use of a case-by-case review in the RDOF process was itself a highly questionable policy to adopt in the first instance as a matter of substance or good government, there is nothing procedurally improper with respect to the execution of that policy in this

¹ NTCA represents approximately 850 providers of high-quality voice and broadband services in the most rural parts of the United States. In addition to voice and broadband, many NTCA members provide wireless, video, and other advanced services in their communities.

² Procedures and Other Requirements Regarding Application for Review Filed by Viasat in Rural Digital Opportunity Fund Phase I (Auction 904), Public Notice, GN Docket No. 21-231, AU Docket No. 20-34, WC Docket No. 19-126, DA 21-624 (fil. May 28, 2021).

³ Application for Review of Viasat, Inc., GN Docket No. 21-231, AU Docket No. 20-34, WC Docket No. 19-126 (public version fil. May 28, 2021) (“Viasat AFR”).

instance, and Viasat’s AFR should therefore be denied. The decision made by the Bureaus utilizing the case-by-case process as adopted by the Commission ultimately found Viasat to be differently situated than other LEO providers, and was not “arbitrary and capricious,” beyond the delegated authority of the Bureaus, or impermissible under the Administrative Procedure Act (“APA”). This all compels rejection of the Viasat AFR even as the AFR again highlights the question of whether the use of a case-by-case review was itself a sound substantive policy in the first instance.

I. THE VIASAT AFR FAILS TO DEMONSTRATE THAT THE BUREAUS TREATED SIMILARLY SITUATED ENTITIES DIFFERENTLY, OR OTHERWISE ACTED INCONSISTENT WITH DELEGATED AUTHORITY, THE LAW, OR COMMISSION POLICY.

Central to Viasat’s arguments here are its assertions that the provider was subjected to a “novel, real-world performance example”⁴ standard – this charge underlies its assertions that the Bureaus exceeded their delegated authority⁵ and acted in a manner inconsistent with the APA.⁶ Viasat also repeatedly alleges throughout the AFR that it was not treated in the same manner as “similarly situated” entities,⁷ and further argues the Bureaus acted in an “arbitrary and capricious” manner⁸ and failed to follow universal service principles.⁹ These arguments all miss the mark for several reasons, and the Commission should therefore dismiss the Viasat AFR.

To begin with, Viasat itself undermines its “failure to treat similarly situated entities the same” assertions when it acknowledges that the “Commission decided to allow low-latency LEO applicants to bid notwithstanding the lack of such a real-world performance example *if*

⁴ *Id.*, pp. 5-6.

⁵ *Id.*, pp. 8-11.

⁶ *Id.*, pp. 11-13.

⁷ *Id.*, pp. ii, 14, 18.

⁸ *Id.*, p. 13.

⁹ *Id.*, pp. 14-16.

*they could demonstrate, through their answers to the Commission’s technical questions, that their planned networks would satisfy applicable performance requirements once constructed.”*¹⁰ As discussed further below, the Commission’s decision to depart from a “real-world performance example” and open the door for case-by-case review of bespoke claims of capability through “answers to the Commission’s technical questions” was itself questionable, eviscerating the greater certainty of capabilities found in the prior high-cost universal service auction. But Viasat’s argument itself highlights that the Commission did *not* apply this policy in this instance and did *not* hold Viasat (or any other would-be bidder) to that more sensible standard. Instead, what Viasat seems to want the Commission to breeze past now is that the Bureaus found that Viasat in fact failed to make even this lesser showing – that is, to “demonstrate, through [its] answers to the Commission’s technical questions” that it could perform as promised *despite* the “real world.” The Bureaus in fact found that “Viasat did not demonstrate that its proposed network could meet the ‘substantial challenge’ of overcoming the Commission’s ‘skeptic[ism]’ about the ability of LEO networks to satisfy the Commission’s low latency requirements [and] staff could not conclude that Viasat’s LEO network would be reasonably capable of meeting the Commission’s low latency requirements.”¹¹

Ultimately, as to its repeated “failure to treat similarly situated entities the same” claims, the fact that Viasat could not make the same showing as another provider proposing to use the same technology does not mean it was a similarly situated provider treated differently – rather, it means the same case-by-case analysis was applied, for better or for worse, across the

¹⁰ *Id.*, p. 10 (emphasis added).

¹¹ *Id.*, Exhibit I, Letter from Jonathan M. Campbell Chief, Auctions Division Office of Economics and Analytics to Christopher Murphy, Viasat, (October 27, 2020) (“October 27 Letter”), p. 3.

board, and some providers were found to have met it while others, like Viasat apparently, did not. It should be emphasized as well that it is neither “arbitrary” nor “capricious” to find that two applicants are differently situated after a case-by-case analysis finds only one meets the clearly set forth standard.

Viasat also fails to demonstrate that the Bureaus exceeded their delegated authority or otherwise engaged in an unauthorized departure from the RDOF auction rules.¹² Rather, the analysis and rejection of Viasat’s application to bid to offer LEO-based service in the low-latency tier, completed by the Bureaus, appears on its face consistent with the direction set forth by the Commission in the *RDOF Procedures Public Notice*.¹³ More specifically, the *RDOF Procedures Public Notice* directed the Bureaus to conduct a case-by-case approach intended to give “service providers the opportunity to make a case based on *their specific plans* that they [could] meet the relevant performance obligations even if they themselves have not necessarily deployed broadband yet at those speeds.”¹⁴ With this direction, the Bureaus, in exercising their delegated authority while conducting these case-by-case reviews, determined that Viasat was unable to “provide any actual LEO latency test data”¹⁵ or show “significant steps to deploy successfully a LEO network serving mass-market retail customers.”¹⁶ In other words, there is no evidence to refute that the Bureaus looked at Viasat’s *specific plans* and found them lacking. The references made by the Bureaus to “LEO latency test data” and “significant steps to deploy successfully a LEO network” were not a new standard beyond their delegated authority – rather, they were simply *reasons and evidence relied upon* as they

¹² Viasat AFR, pp. 8-11, 16-18.

¹³ Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020, Notice and Filing Requirements and Other Procedures for Auction 904, AU Docket No. 20-34, WC Docket No. 19-126, WC Docket No. 10-90, FCC 20-77 (rel. Jun. 11, 2020) (“*RDOF Procedures Public Notice*”).

¹⁴ *Id.*, ¶97. (emphasis added).

¹⁵ Oct. 27 Letter, p. 3.

¹⁶ *Id.*

apparently found Viasat’s application lacking in demonstrating the provider could meet the asserted performance standards. Viasat simply taking this standard adopted in the *RDOF Procedures Public Notice* (that it failed *based on its specific plans*) and taking the *reasoning and evidence* used by the Bureaus to rebrand this as a “novel, real-world performance example”¹⁷ standard provides insufficient cause to overturn the determination made or to support the notion that delegated authority strayed in any way from the direction given by the full Commission.

Nor is Viasat’s rebranding of the standard as set forth by the Commission in the *RDOF Procedures Public Notice* sufficient to sustain the APA claim found in the Viasat AFR.¹⁸ As noted above, the Commission made abundantly clear in the *RDOF Procedures Public Notice* that the Bureaus would review providers’ specific plans. The apparent failure of Viasat to devise one does not mean it lacked notice as it asserts.¹⁹

Finally, the AFR misses the mark in complaining that the determination made by the Bureaus precluding Viasat from bidding a low-latency LEO service in RDOF Phase I failed to account for “universal service” principles.²⁰ To the contrary, at least in this instance, the Bureaus were (pursuant to the very standards the full Commission itself set in the *RDOF Procedures Public Notice*) *safeguarding* universal service by declining to take a risky bet with universal service dollars. Indeed, the Commission specifically indicated the case-by-case review process was motivated by such a desire:

The risk of default—and therefore leaving an area unserved longer than necessary—is significantly greater if Commission staff, in making its determinations, cannot rely on concrete examples of the technology being used to offer high speed or low latency service directly to residential consumers or to

¹⁷ Viasat AFR, pp. 5-6.

¹⁸ *Id.*, pp. 11-13.

¹⁹ *Id.*, p. 12.

²⁰ *Id.*, pp. 14-16.

demonstrate a reasonable increment in the speeds that service providers have already reported deploying using those technologies. *We are guided by our obligation to preserve the Universal Service Fund* and do not want winning bidders and support recipients to default and strand consumers with no service, unreliable service, or with service that is not reasonably comparable to service offered in urban areas.²¹

In the case of Viasat, it would appear that the Bureaus merely acted under this guidance with respect to universal service as set forth by the Commission. Nothing in Section 254 of the Communications Act of 1934, as amended (or any of the Commission’s actions implementing that provision), indicates that the Bureaus must reach a conclusion that universal service policy requires granting any provider the opportunity to bid at any performance tier it wishes simply upon a stated desire to do so and unsupported beliefs that it is capable of doing so.

Finally, beyond the question of the specific process by which the AFR was considered, it is worth noting that the AFR highlights an important underlying issue – the departure in the first instance from a more bright-line technologically neutral approach utilized in the Connect America Fund Phase II competitive bidding proceeding in favor of a less transparent case-by-case review. This approach opened the door for applications from providers asserting the ability to do things that had never been achieved before, at least on a widespread basis in rural areas, if ever. With such review occurring largely behind closed doors through confidential filings and determinations not visible to the public eye, there remains serious question with respect to whether many approved through this process will be capable of performing as promised – even as they had a significant effect on the auction and ended up prevailing in many cases. If these bets turn out badly now upon long-form review, this equates to time wasted and broadband denied – all of which could have been avoided had the Commission held more closely to the “real-world” standard that *was* employed in the prior auction.

²¹ *RDOF Procedures Public Notice*, ¶ 98 (internal citations omitted).

To address these concerns and help ensure that the problems arising out of this approach do not compound, NTCA renews its request for the Commission to inject greater transparency and accountability into the long-form application review process. As NTCA has suggested, the long-form review process should include:²² (1) published objective technical standards governing the review of all providers' long-form applications; (2) third-party review on an expedited basis from engineers/experts with field experience in network design and from state and local stakeholders most familiar with the areas to be served; and (3) published rationales for the final determinations made with respect to each application. These steps will assist the Commission in ensuring the most effective use of RDOF resources moving forward and ultimately in fulfilling the statutory mandate for the availability of reasonably comparable broadband and voice services at reasonably comparable rates in rural and urban America.

Respectfully submitted,

NTCA–The Rural Broadband Association

By: /s/ Michael R. Romano

Michael R. Romano

Senior Vice President –

Industry Affairs & Business Development

mromano@ntca.org

By: /s/ Brian J. Ford

Brian J. Ford

Director of Industry Affairs

bford@ntca.org

4121 Wilson Boulevard, Suite 1000

Arlington, VA 22203

703-351-2000

June 28, 2021

²² Letter from Michael R. Romano Senior Vice President – Industry Affairs & Business Development, NTCA to The Honorable Jessica Rosenworcel, Acting Chairwoman, Federal Communications Commission, WC Docket No. 19-126, WC Docket No. 10-90, AU Docket No. 20-34 (fil. Feb. 5, 2021).