

September 6, 2023

Virgin Islands Next Generation Network, Inc. (VINGN)  
9015 Havensight Mall Ste 7  
St Thomas, VI 00802

Mr. Stephan Adams, [sadams@vingn.com](mailto:sadams@vingn.com)

Re: Petition for Reconsideration of Affordable Connectivity Outreach Grant Program Final Eligibility Determination and Request for Waiver (Award Number: ACOGP2340006-00)

Dear Mr. Adams:

We have before us a letter dated August 18, 2023, from Virgin Islands Next Generation Network, Inc. (VINGN)<sup>1</sup> seeking reconsideration of the Affordable Connectivity Outreach Grant Program final eligibility determination that was issued by the Consumer and Governmental Affairs Bureau on August 15, 2023.<sup>2</sup> VINGN's submission additionally requests a waiver of the Commission's rule rendering "contractors of broadband providers" ineligible for the grant program.<sup>3</sup> For the reasons discussed below we deny the Petition for Reconsideration and grant the waiver request.

## I. BACKGROUND

VINGN submitted a grant application under the Federal Communications Commission's (FCC) Affordable Connectivity Outreach Grant Program-National Competitive Outreach Program (NCOP). Based on that application, VINGN was selected to receive a federal grant in the amount of \$250,000 and a Notice of Award was issued on April 13, 2023. On June 21, 2023, the Bureau sent a letter requesting additional information from VINGN to confirm eligibility status.<sup>4</sup> Pursuant to that request, on July 29, 2023, VINGN submitted additional information to the Bureau.<sup>5</sup> Based on the information received, on August 15, 2023, the Bureau issued an eligibility determination concluding that VINGN is considered a "contractor of broadband

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<sup>1</sup> Letter from Stephan Adams, President and CEO, VINGN, Inc. to Miriam Montgomery, Grants Management Policy Advisor, FCC Consumer and Governmental Affairs Bureau (Aug. 18, 2023) (VINGN Aug. 18 Letter).

<sup>2</sup> Letter from Miriam Montgomery, Grants Management Policy Advisor, FCC Consumer Governmental Affairs Bureau to Stephan Adams, President and CEO, VINGN, Inc. (Aug. 15, 2023) (FCC Aug. 15 Letter).

<sup>3</sup> VINGN Aug. 18 Letter; *see also* 47 CFR § 54.1903 (providing that broadband providers and their contractors, among other entities, "may not receive awards, either as Grantees, Pass-through Entities, or Subrecipients under the Outreach Grant Program").

<sup>4</sup> Letter from Miriam Montgomery, Grants Management Policy Advisor, FCC Consumer Governmental Affairs Bureau to Stephan Adams, President and CEO, VINGN, Inc. (June 21, 2023).

<sup>5</sup> Letter from Stephan Adams, President and CEO, VINGN, Inc. to Miriam Montgomery, Grants Management Policy Advisor, FCC Consumer and Governmental Affairs Bureau (July 29, 2023) (VINGN June 29 Letter).

providers” and therefore ineligible to participate in the ACP Outreach Grant Program pursuant to the requirements of section 54.1903 of the Commission’s rules.<sup>6</sup>

On August 18, 2023, VINGN submitted a “Petition for Reconsideration,” stating that it disagreed “with the final eligibility determination as it would disadvantage the USVI and be contrary to the spirit and intent of the ACP’s mission.”<sup>7</sup> In addition, VINGN requested “a waiver of program rules regarding ‘contractors’ based on unique circumstances applicable to the U.S. Virgin Islands.”<sup>8</sup> In support of its waiver request, VINGN explained the following:

1. VINGN states that its “main objective, with approval from the Governor of the USVI, is to ensure that the citizens of the U.S. Virgin Islands can continue to be made aware of and to benefit from the ACP.” According to VINGN, “[a]lthough VINGN appears to meet the definition of a contractor as outlined in the FCC rules, as an instrumentality of the Government of the USVI, VINGN is an anomaly and is NOT technically a contractor.” VINGN explains that it is “an extension of the government providing services bound by legislation to provide” and that its “legislative mandate as an open access carrier is to provide middle mile wholesale broadband services to ALL Internet Service Providers (ISPs) in an open and neutral manner.” VINGN further states that for “administrative purposes,” it manages its services through contracts, but emphasizes that VINGN “provides the same service to all ISPs” and is “not an agent of ISPs” nor is it affiliated with any ISP.<sup>9</sup>
2. VINGN further points to the *Second Report and Order* and NOFO’s focus on “geographic considerations,” the limited applicant pool in the U.S. Virgin Islands, and the fact that there are “serious doubts” that there is another U.S. Virgin Islands entity, including its partners the Department of Human Services and the Virgin Islands Housing Authority, that could “assume the leading role of a grantee and execute the expected and approved activities, with minimal scope and budget amendments.”<sup>10</sup>
3. VINGN maintains that “[c]onsistent with the FCC mandate to ensure each State and U.S. Territory funding minimums are met to remain compliant with the ACP Grant Program Second Report and Order, if the grant award does not have a viable Administrator, then the

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<sup>6</sup> 47 CFR § 54.1903(a) (making ineligible broadband providers and their contractors, among others, to receive awards under the Affordable Connectivity Outreach Grant Program); *see also* FCC Aug. 15 Letter. The FCC Aug. 15 Letter explained that the ineligibility criteria not only covers “broadband providers” but also their “contractors,” among other entities, and that while the term “contractor” is not defined in the FCC’s ACP rules or order, the NOFO defines “contractor” very broadly to cover “any entity that has a mutually binding agreement with a broadband provider to provide goods or services to or on behalf of a broadband provider.” *Id.* (citing FCC, *Affordable Connectivity Outreach Grant Program*, Funding Opportunity No. FCC-ACOGP-23-001, Notice of Funding Opportunity at 11 & note 7 (Nov. 10. 2022) (“NOFO”). Because the submitted materials showed that VINGN provides wholesale broadband middle mile service to Internet Service Providers in the U.S. Virgin Islands through agreements with broadband providers, the Bureau found that the “ineligible entities” rule contained in section 54.1903(a) applied. *See* FCC Aug. 15 Letter.

<sup>7</sup> VINGN Aug. 18 Letter.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* VINGN claims that “recent public testimonies, before the local Legislature,” by the Department of Human Services and the Virgin Islands Housing Authority indicate that these partners “are challenged and stretched for resources [ ] to meet their statutory programs current goals and objectives.” *Id.*

USVI will not meet the established funding minimum to ensure ACP outreach and application enrollment assistance funding is as geographically distributed as possible.” VINGN further claims that “there is an urgent need for financial resources, complete with the backing of the FCC, to adequately promote the ACP in the territory to benefit its residents,” and without another entity able or willing to assume responsibility for the ACP, the residents of the USVI will be unfairly penalized.” VINGN also explained that it “administers NTIA’s Digital Equity (DE) grant in the territory,” which has provided “valuable information beneficial to the successful implementation of the ACP as DE dovetails with the ACP, and they target similar covered populations.”<sup>11</sup>

## II. DISCUSSION

We deny the Petition for Reconsideration. VINGN has failed to identify any error in the Bureau’s August 15, 2023 eligibility determination. As we explained in that decision, evidence shows that VINGN meets the definition of a “contractor” of a broadband provider and, therefore, is ineligible to participate in the ACP Outreach Grant Program under Commission rules.<sup>12</sup> VINGN does not dispute that fact and, indeed, concedes that it “appears to meet the definition of a contractor as outlined in the FCC rules.”<sup>13</sup> Thus, VINGN has provided no basis to grant its Petition for Reconsideration.

We will, however, grant VINGN’s request for waiver of section 54.1903 of the Commission’s rules. The Commission’s rules may be waived only for good cause shown.<sup>14</sup> An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.<sup>15</sup> The Commission must give waiver requests “a hard look,” but a petitioner for waiver “faces a high hurdle even at the starting gate.”<sup>16</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>17</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>18</sup> However,

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<sup>11</sup> *Id.*

<sup>12</sup> FCC Aug. 15 Letter; 47 CFR § 54.1903(a). Based on information contained in the VINGN June 29 Letter, we find that VINGN’s provision of middle mile wholesale broadband services to ISPs does not render it a “broadband provider” within the meaning of the grant program’s definition. For purposes of the ACP grant program, the *Second Report and Order* defines “broadband provider” by reference to the definition found in 47 CFR § 54.1800(d), which defines “broadband provider” as “a provider of broadband internet access service.” See *Affordable Connectivity Program*, Second Report and Order, WC Docket No. 21-450, FCC 22-64 at note 150 (2022) (“*Second Report and Order*”); 47 CFR § 54.1800(d) (defining “broadband provider”). The term “broadband internet access service” is defined in section 54.1800(c), which, in turn, refers to 47 CFR § 8.1(b), and which defines that term as a “mass-market retail service” that “provides the capability to transmit data to and receive data from all or substantially all internet endpoints . . . .” 47 CFR §§ 8.1(b), 54.1800(c). Accordingly, in providing middle mile wholesale broadband services to ISPs, VINGN is not engaged in a “mass-market retail service” and, therefore, is not considered a “broadband provider” for purposes of the grant program’s “ineligible entities” rule.

<sup>13</sup> VINGN Aug. 18 Letter.

<sup>14</sup> 47 CFR § 1.3.

<sup>15</sup> See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

<sup>16</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (*WAIT Radio*).

<sup>17</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>18</sup> *WAIT Radio*, 418 F.2d at 1159.

waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.<sup>19</sup>

We find that VINGN's request presents good cause for waiver of section 54.1903 by demonstrating unique "special" circumstances and that a waiver will serve the public interest. First, the evidence provided by VINGN shows that waiving the rule under these special circumstances will not undermine the purpose of the "ineligible entities" rule, i.e., to promote the integrity of the grant program.<sup>20</sup> VINGN explained that although it may meet the definition of "contractor" under FCC rules, it is an "instrumentality of the Government of the USVI, a public corporation, and a wholly owned subsidiary of the Virgin Islands Public Finance Authority formed to provide middle mile service in the U.S. Virgin Islands" and is bound to provide such services pursuant to legislation.<sup>21</sup> VINGN stated that although it manages its services "through contracts," it does so only for "administrative purposes" and that it "provides the same service to all ISPs" "in an open and neutral manner," which it is required to do by legislative mandate.<sup>22</sup> Accordingly, as an instrumentality of the government of the U.S. Virgin Islands, VINGN does not present the same conflict of interest concerns that a private contractor, for instance, would by possibly favoring a broadband provider with which it has contracted. Thus, although as a contractor, VINGN would not be eligible for the grant, because of its special circumstances, granting a waiver here does not undermine the concerns that prompted the Commission to adopt the "ineligible entities" rule.

Second, granting a waiver under these circumstances will serve the public interest. As the Commission explained, the "Affordable Connectivity Program plays an integral role in helping to bridge the digital divide, which is an ongoing top priority for Congress and the Commission."<sup>23</sup> The Commission has further "recognized that to achieve the program's full potential and reach as many eligible households as possible, households must be clearly informed of the program's existence, benefits, and eligibility qualifications, and how to apply."<sup>24</sup> Thus, through the Outreach Grant Program, the Commission seeks to enlist partners around the country to help inform ACP-eligible households about the program in their local communities, and to provide those partners with the funding and resources needed to increase participation among those citizens most in need of affordable connectivity.<sup>25</sup> Granting a waiver here will promote these goals and objectives of the grant program. Specifically, VINGN explained that its "main objective, with approval from the Governor of the USVI, is to ensure that the citizens of the U.S. Virgin Islands can continue to be made aware of and to benefit from the ACP," and that it has prior experience that will help reach the targeted households.<sup>26</sup> Moreover, there is a limited applicant pool in the U.S. Virgin Islands and waiver here would help to fulfill the Commission's goal of ensuring that ACP outreach and application enrollment assistance funding is as geographically distributed as possible,<sup>27</sup> including to ensure adequate funding to help

<sup>19</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>20</sup> See *Second Report and Order* at para. 40.

<sup>21</sup> VINGN Aug. 18 Letter at 1; see also *id.* Attach. Articles of Incorporation of VINGN, Inc. (Oct. 8, 2010), at 1.

<sup>22</sup> *Id.*

<sup>23</sup> See *Second Report and Order* at para. 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See NOFO at 28-29; *Second Report and Order* at paras. 46, 56.

promote the ACP in the U.S. Virgin Islands. Thus, granting the waiver to allow VINGN to receive an FCC grant to conduct ACP outreach in the U.S. Virgin Islands is in the public interest.

In granting this waiver request, we remind VINGN that as a grantee, it must remain neutral with respect to participating providers and it is prohibited from favoring any particular service provider in performing outreach activities funded by this Outreach Grant Program<sup>28</sup> or from using Outreach Grant Program dollars in a manner intended to specifically increase a particular provider's program enrollment.<sup>29</sup> Specifically, as required under Commission rules, VINGN is prohibited from directing, steering, incentivizing or otherwise encouraging eligible households to enroll with a particular ACP provider when conducting grant-funded outreach activities, and must make clear that eligible households may enroll with the ACP provider of their choice.<sup>30</sup> In addition, when conducting grant-funded outreach activities, VINGN is prohibited from using service provider-branded items such as outreach materials, gifts, or incentives;<sup>31</sup> from offering or providing consumers gifts or incentives provided by service providers;<sup>32</sup> and from otherwise accepting funding in any form, including in-kind contributions, from a participating provider for the purpose of conducting grant-funded outreach activities.<sup>33</sup>

Accordingly, under these restrictions and pursuant to the requirements set forth in the Commission's rules, the Bureau grants VINGN's request for waiver and allows VINGN to continue participating in the ACP Outreach Grant Program as a grant recipient under Award Number ACOGP2340006-00. The Bureau will remove funding holds that were in place while VINGN's eligibility was being considered.

### III. ORDERING CLAUSES

**IT IS ORDERED** that the Petition for Reconsideration filed by Virgin Islands Next Generation Network, Inc. on August 18, 2023, **IS DENIED**.

**IT IS FURTHER ORDERED** that the Request for Waiver filed by Virgin Islands Next Generation Network, Inc. on August 18, 2023, **IS GRANTED** to the extent discussed herein and is otherwise denied.

Sincerely,

Miriam Montgomery

Miriam Montgomery  
Grants Management Policy Advisor  
Consumer and Governmental Affairs Bureau

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<sup>28</sup> 47 CFR §§ 54.1901 (Neutrality requirement); 54.1902(a) (Prohibition against steering consumers to particular participating providers).

<sup>29</sup> *Second Report and Order* at para. 28.

<sup>30</sup> 47 CFR § 54.1902(a).

<sup>31</sup> 47 CFR § 54.1902(b); *see also Second Report and Order* at para. 29.

<sup>32</sup> 47 CFR § 54.1902(c)(1).

<sup>33</sup> 47 CFR § 54.1902(c)(2).