

ALERT

FCC Public Notices Seek Comment on Implementation of COVID-19 Broadband Stimulus Programs

January 13, 2021

During the first week of 2021, the Federal Communications Commission's (FCC's or Commission's) Wireline Competition Bureau (Bureau) released two Public Notices seeking comment on the Commission's implementation of the Emergency Broadband Benefit (EBB) Program established by the Consolidated Appropriations Act of 2020 (the Act) as well as the Act's injection of new funding to the Commission's COVID-19 Telehealth Program first established by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). As we previously explained, Section 904 of the Act appropriates \$3.2 billion for the EBB Program to provide subsidies for qualifying low-income households for broadband services and certain devices during the COVID-19 pandemic, while Section 903 of the Act provided an additional \$249.95 million into the telehealth program.

Implementation of the EBB Program

The Bureau's Public Notice for the EBB program seeks to fill in the gaps left by the statute, seeking public comment on proposed procedural mechanisms and statutory interpretations to implement the program. The EBB program is distinct from the FCC's Universal Service Fund (USF) and the Lifeline program, which uses USF funds to provide subsidies for low-income households for telecommunications and broadband services. However, to facilitate implementation of the EBB program, the legislation enables the Commission to leverage existing regulations and mechanisms used for administration of the USF and the Lifeline program, and the Bureau proposes to do exactly that. Specifically, the Bureau seeks to have the Universal Service Administrative Company (USAC) administer the EBB program and

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have participating providers use the Lifeline Program's National Eligibility Verifier, Lifeline Accountability Database (NLAD), Representative Accountability Database, and Lifeline Claims System.

An overview of the program logistics proposed by the Bureau is provided below, followed by a more detailed discussion of proposals, issues, and questions teed up in the Public Notice. Because this proceeding is exempt from typical rulemaking procedures under the Administrative Procedure Act, the Public Notice will provide the only opportunity for comment before the Bureau establishes the emergency program. **Comments are due January 25, 2021, and reply comments are due February 16, 2021.**

1. The EBB Application and Reimbursement Process at a Glance

- Obtain FCC Registration Number (FRN) and USAC Service Provider Identification Number (SPIN)
- Submit election notice to USAC, and, if not already an eligible telecommunications carrier, simultaneously submit application to the Commission
 - (Application is entitled to "automatic approval" by the Commission if the provider had an "established program" as of April 1, 2020; otherwise entitled to "expedited" approval)
- Register with the Representative Accountability Database; gain access to National Verifier/NLAD
- Verify eligible subscribers using one of the statutorily enumerated methods; use NLAD to track those subscribers and prevent duplicative enrollment
- Obtain reimbursement through the Lifeline Claims System

2. Overview of Specific Proposals and Issues Raised by the Public Notice

Eligible Providers. Because the legislation limits benefits under the EBB to "no more than the standard rate . . . as of December 1, 2020," the Bureau interprets the statute as limiting the universe of eligible providers to those that offered broadband services as of that date. "Draw[ing] on [the Bureau's] experience with the Lifeline program," the Bureau also proposes to require providers to make the program benefit available across all of the service areas in which they are approved to participate and to have in place compliance plans to combat waste, fraud, and abuse.

Election Form to USAC. The Public Notice proposes requiring all providers that seek to participate in the EBB program submit an "election notice" to USAC with the following information: (1) the states in which it plans to participate; (2) a statement that, in each such state, it was a "broadband provider" within the meaning of the Act as of December 1, 2020; (3) whether it seeks to participate in each state because it is either a designated eligible telecommunications carrier or is seeking designation by the Commission to participate (or both); (4) whether the provider intends to distribute connected devices in each such state; (5) a description of any Internet service offerings for which it plans to seek reimbursement in each state; and (6) documentation demonstrating the "standard rates" for the services for which it may claim reimbursement from the EBB program. The Bureau seeks comment on how "standard rate" should be interpreted and documented, including how to take into account promotional and contract rates. The Bureau proposes that USAC accept election forms on a rolling basis and seeks comment about the procedures for informing applicants and the

public about accepted applications.

Application to the Commission for Non-ETCs. The Bureau proposes that all providers that are not already designated as eligible telecommunications carriers submit an application to the Commission, which can be submitted simultaneously with the election form to USAC. That application would include the following information: (1) the states in which it plans to participate; (2) the service areas in which the provider has the authority, if needed, to operate in each state but has not been designated an eligible telecommunications carrier; (3) documentation of the provider's plan to combat waste, fraud, and abuse; (4) whether it seeks automatic approval because it offers an established program in each state; and (5) if seeking such automatic approval, documentation that the broadband provider has a qualifying established program in such states. Like the election forms, the FCC applications would be accepted on a rolling basis. The Bureau seeks comment on the appropriate application processing timeframes and having the Bureau review the applications on delegated authority. Finally, the Bureau seeks comment on how to implement the statute's requirement for the Commission to automatically approve a non-ETC broadband provider's participation in the program if it has an "established" program as of April 1, 2020 that is "widely available" and offers internet service offerings to eligible households and "maintains verification processes that are sufficient to avoid fraud, waste, and abuse."

Use of the National Verifier, NLAD, and the Lifeline Claim System. The Bureau proposes to grant EBB participants access to the National Verifier and NLAD to verify subscriber eligibility if they so choose, and to require providers to track enrollment of all of their subscribers in NLAD and seek reimbursement through the Lifeline Claim System. For providers that seek to verify subscribers by means other than the National Verifier and NLAD, including by participation in free and reduced school lunch and breakfast programs or by the providers' own verification processes, the Public Notice seeks comment on the logistics for substantiating subscriber eligibility.

Covered Services and Devices. The Public Notice seeks comment on whether additional clarification is needed from the Commission with respect to the services and devices eligible for reimbursement, including whether, for example, the monthly rental costs of modems and routers is covered as "associated equipment" and whether there is a commonly understood definition of "tablet." The Bureau states its "expect[ation]" that a covered device will support video conferencing and software for online learning given the connectivity needs of households during the pandemic and asks whether the Commission should impose minimum system requirements for connected devices.

Benefits for Subscribers on Tribal Lands. For purposes of the higher subsidy available for households on Tribal lands, the Bureau proposes to apply the definition of Tribal lands used in the Lifeline program and use USAC's existing process for verifying households on Tribal lands under that program. The Public Notice asks whether "other accommodations" are necessary to ensure participation by providers that serve customers on Tribal lands.

Promoting Awareness. The Public Notice seeks comment on how the availability of EBB program funds may be publicized or promoted, including by providers, the Commission, USAC, and other civic entities such as “schools, libraries and other local institutions.”

Auditing and Enforcement. The Public Notice poses questions about how the Commission can meet its obligation to audit the program, including whether the Commission should use the same or similar audit procedures currently used for Lifeline providers. The Bureau proposes that providers retain records for the length of time the subscriber receives support, but no less than three years. The Public Notice also seeks comment on how to interpret the provision of the Act establishing a safe harbor from enforcement for providers that relied “in good faith” on information they were provided to substantiate subscriber eligibility.

Application of Part 54 and Use of USAC. In addition to adopting specific requirements and mechanisms from the Lifeline program, the Bureau proposes to apply the Lifeline regulations (subpart E of part 54 of the FCC’s rules) to the EBB program “to the extent that those rules do not conflict with the Emergency Broadband Benefit Program parameters established by the Act.” In addition, the Public Notice seeks comment on applying regulations pertaining to USAC’s authority and functions to the program and asks whether USAC should administer additional functions of the program. The Bureau also asks whether subscribers should be able to initiate de-enrollments or provider transfers directly through USAC.

Revival of the COVID-19 Telehealth Program

For the newly revived COVID-19 Telehealth Program, in which Congress injected an additional \$249.95 million through the Act, the legislation requires the Commission to seek comment on “the metrics the Commission should use to evaluate application for funding” as well as how the Commission should treat applications filed during the initial, Round 1 of funding that were never chosen to be funded. On January 6, 2021, the Wireline Bureau issued a Public Notice addressing these and other implementation-related issues. **Comments are due January 19, 2021.**

More specifically, the Act directs the Commission to seek comment on application evaluation metrics and consider a set of specific factors when evaluating applications during the new round of funding. The Commission, to the extent feasible, must ensure an equitable distribution of funding by awarding funding to at least one applicant in each of the 50 states and the District of Columbia, and the Commission must allow an applicant who filed an application during the prior funding rounds of the program “the opportunity to update or amend that application as necessary.”

In response, the Bureau seeks comment on whether the Commission should continue to target funding to health care providers in areas hardest hit by COVID-19, as funding decisions during Round 1 had done, and whether the Commission should continue to recognize and prioritize applicant health care providers that may have been under pre-existing strain, as it had done during Round 1. The Bureau also asked whether it should limit the awards to \$1 million per applicant as per Round 1 and whether it should adopt other equitable limitations or prioritization metrics.

To address the Act's directive to the Commission to ensure that every state and the District of Columbia have at least one applicant receiving the telehealth program's grant funding, the Bureau proposes establishing an application foiling window rather than accepting applications on a rolling basis. The Public Notice reasons that such a window would allow the Bureau to prioritize applications using pre-defined evaluation metrics and ensure the funding is provided, to the extent feasible, to at least one applicant in each of the 50 states and the District of Columbia.

Treatment of Round 1 Applications. For Round 1 applications, the Bureau proposes that those that were not resubmitted during the filing window will not be considered for Round 2, since many of the remaining Round 1 applications need to be refreshed and some require substantial amendments. The Bureau also considers many of the applications filed between April and June 2020 to contain stale information, and the applicants may wish to request different amounts and types of connected devices and eligible services if given the opportunity. The Bureau is also seeking comments on whether the Commission should review Round 2 applications filed by Round 1 applicants before evaluating applications from new entities during the Round 2 review process, whether it should prioritize funding to applications submitted during Round 2 by applicants that applied but did not receive any or all of the requested funding during Round 1, and how it should treat applicants for Round 2 funding that received the full amount of their requested funding during Round 1.

Additional Program Improvements. The Public Notice seeks comment on directing USAC to include eligibility review as part of the application process, but not requiring applicants to file FCC Forms 460, since the Commission found that requiring health care providers to file FCC Forms 460 for each of the applicants' participating health care provider sites delayed the FCC's ability to move quickly on many applications, especially those applications with a large number of sites in need of eligibility determinations. The Notice also asks whether the Commission should maintain the flexibility for funded health care providers to substitute vendors, eligible services, and/or eligible connected devices as long as the substituted items are eligible and the total amount sought for reimbursement does not exceed the commitment amount, whether it should require additional certifications on applications and for each invoice to ensure applicants/awardees understand what is expected of them, and whether it should publish a list of eligible and ineligible equipment and services, in addition to other measures to guard against waste, fraud, or abuse.

For more information about this Public Notice or for assistance in filing comments, please contact the authors.

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