

New Enhanced ACP Benefit Will Support More Broadband Services in Rural And High-Cost Areas

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On August 4, 2023, the Federal Communications Commission (FCC or Commission) released a Sixth Report and Order (Order) in its Affordable Connectivity Program (ACP) docket. The Order adopts rules to establish an enhanced benefit in the form of a discount that may be applied to monthly charges for broadband service provided to ACP participants in high-cost areas. This enhanced benefit will make available up to \$75 per month to eligible households for broadband services provided in high-cost areas, where providers can demonstrate they would experience particularized economic hardship if they were to provide such service at the standard up-to-\$30 monthly ACP benefit level. A summary of the Order is provided below.

Overview of the ACP Benefits

The Infrastructure Investment and Jobs Act of 2021 established the ACP to support discounted broadband service for qualified low-income households by providing a monthly benefit of up to: (1) \$30 per month; (2) \$75 per month for eligible households on Tribal lands; or (3) \$75 per month for eligible households in a high-cost area, defined as an area in which the cost of building out broadband service is higher compared to the average cost of building out in unserved areas in the United States. Congress directed that a mechanism for the high-cost area benefit be established to provide a benefit up to \$75, where a participating provider can show that the applicability of the lower \$30 benefit limit “would cause particularized economic hardship to the provider such that the provider may not be able to maintain the operation of part or all of its broadband network.”

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Rules to establish the standard and Tribal lands benefits were adopted in January 2022. This Order explains that the areas in which the high-cost area benefit will apply are the same high-cost areas that the National Telecommunications and Information Administration (NTIA) is charged with establishing for its Broadband Equity, Access, and Deployment (BEAD) grant program, described in more detail here. This additional benefit, coupled with funding now available through the BEAD program, is intended to spur more ACP participation by providers in rural and insular areas where the high cost of building and maintaining a broadband network has discouraged investment.

Provider Eligibility and Program Administration

The Order explains that only facilities-based providers are eligible to offer the high-cost area benefit, and only where they can demonstrate a particularized economic hardship that would impair their ability to offer ACP service without the high-cost area benefit. A participating provider can demonstrate such harm through documentation, in the form of an affidavit supported by an income statement and tax filings, showing that it is operating at a loss, or unable to cover the costs of maintaining the operation of its broadband network in the applicable high-cost area, using a reasonable cost allocation method.

To minimize the burden of demonstrating a particularized economic hardship, providers will be allowed to submit a single application with supporting documentation for all high-cost areas in which they wish to offer the high-cost area benefit. Provider submissions must be certified by an officer, under penalty of perjury, and must include disclosures related to any loans applied for and/or received from the U.S. Department of Agriculture Rural Utility Service (RUS) and related financial reports. The Order further clarifies that a participating provider may seek reimbursement for either the enhanced Tribal lands or the enhanced High-cost area benefit for each eligible household up to the maximum \$75 benefit, but not both.

USAC Oversight of ACP Applications

All provider submissions will be reviewed by the Universal Service Administrative Company (USAC), which is directed to develop a mechanism to enable participating providers to electronically submit their application. While the actual content of the provider filings will remain confidential, USAC must publicly issue information identifying which providers are approved to offer the high-cost area benefit and the high-cost areas where they are approved to offer it. To account for changing financial circumstances, participating providers approved to offer the high-cost area benefit must annually resubmit a showing of particularized economic hardship to demonstrate continued eligibility to offer the high-cost area benefit.

Annual Resubmission Requirement

To account for changing financial circumstances, participating providers approved to offer the high-cost area benefit must annually resubmit a showing of particularized economic hardship to demonstrate continued eligibility to offer the high-cost area benefit. The Order directs USAC to issue reminders to providers with current approvals of the renewal submission requirements within at least 30 days and at least 15 days ahead of the deadline for resubmissions. These reminders shall also inform providers that failure to make a resubmission will result in the loss of their approval to offer the high-cost area benefit and the date on which

the provider must cease offering and can no longer claim the high-cost area benefit if it does not timely make a renewal submission.

Maintaining Program Integrity

To ensure that providers are only seeking reimbursement for households that are eligible to receive the ACP high-cost area benefit, the Order directs USAC to conduct program integrity reviews of claims related to the high-cost area benefit on an annual basis, in addition to targeted reviews of providers approved to offer the high-cost area benefit as needed. The Order reminds providers that they are required to offer the same services to ACP households on the same terms and conditions as non-ACP households, and that inappropriate upselling is a violation of the ACP rules. The Order also clarifies that, as with the standard benefit and the enhanced Tribal benefit, providers are required to pass through the entire benefit to ACP eligible households.

Wiley's Telecom, Media, and Technology Team has helped entities of all sizes with issues relating to broadband infrastructure deployment and funding opportunities, and our experts regularly handle federal and state issues relating to such opportunities. If you have any questions about the ACP or next steps, please contact one of the attorneys listed on this alert or your usual Wiley contact.