

ALERT

FCC Establishes Framework for \$3.2 Billion Emergency Broadband Benefit Program and Announces Initial Milestones

March 5, 2021

On February 25, 2021, the Federal Communications Commission (FCC or Commission) unanimously adopted a Report and Order (EBB Order) that established the Emergency Broadband Benefit Program (EBB Program), a \$3.2 billion initiative to provide subsidized broadband services and devices to low-income households during the COVID-19 pandemic. The EBB Order follows the passage of the Consolidated Appropriations Act of 2021 (the Act), which obligated the funding for the EBB Program. The EBB Order establishes a rapid implementation timeline, with the FCC expecting to open the EBB Program to eligible households before the end of April 2021. The Commission's Wireline Competition Bureau issued a Public Notice (Initial Milestone PN) on March 4, 2021, announcing that providers interested in participating in the program may submit their election notices to the Universal Service Administrative Company (USAC) as early as March 8, 2021, and establishing a deadline of March 22, 2021, for non-ETCs to file applications to receive approval to participate in the program.

The following is an initial summary of the EBB Order and the EBB Program. For a more detailed analysis of the EBB Program, please reach out to a member of our team.

Broad Range of Providers May Participate in EBB Program, Including Non-ETCs.

Consistent with the Act, the EBB Order permits a broad range of broadband providers to participate in the EBB Program. Congress defined "participating provider" in the Act as either existing eligible

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telecommunications carriers (ETCs) or non-ETC providers approved by the Commission under an “expedited approval process.” As discussed below, existing ETCs will need to only file an election with the Universal Service Administrative Company (USAC), while non-ETCs will need to first apply and then obtain Bureau approval prior to filing their election with USAC. The EBB Order only requires that any such carrier must have provided broadband Internet access service to households as of December 1, 2020, in order to participate in the EBB Program.

Existing ETCs and Bureau-Approved Providers

Because the Act does not require existing ETCs to seek approval to participate in the EBB Program, existing ETCs must only “elect” to participate in the Program to be eligible for reimbursement under the EBB Program. Existing ETCs will be able to file these elections to participate in the EBB Program in the states or territories where they have already received an existing ETC designation. To ease administrative burdens, the FCC will allow an ETC to file an election for itself and its affiliates who provided broadband service as of December 1, 2020, within the states or territories where the provider was designated as an ETC.

Non-ETC Approval Tracks

Consistent with the Act, the FCC established both an automatic approval and an expedited approval process for non-ETC providers seeking to participate in the EBB Program. The Commission delegated to the Bureau the authority to establish the process by which providers seek these approvals, including through appropriate direction to USAC. Non-ETCs will need to first apply and then obtain Bureau approval prior to filing their election with USAC. Pursuant to this authority, the Bureau established a priority application window (March 8-22, 2021) during which non-ETC providers seeking approval to participate in the EBB Program through either of the established tracks will have the opportunity to obtain approval prior to commencement of consumer enrollments. Non-ETCs that file complete applications for approval, meeting the necessary criteria by the March 22 priority application deadline, will know of their status prior to the start date for the EBB Program. Applications from providers filed after the priority application deadline will be reviewed on an expedited, rolling basis.

(a) Automatic Approval Path for Non-ETCs

Any non-ETC broadband provider seeking to qualify through the automatic approval track must have an established low-income program as of April 1, 2020, that is widely available to consumers and maintains an eligibility verification system sufficient to avoid fraud, waste, and abuse. The non-ETC must also file an application describing: (1) the states and territories 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 ETC, and (3) a description, supported by documentation, of the established program with which the provider seeks to qualify for automatic admission to the EBB Program. The provider must also describe the established program (discounted rates based on means-tested eligibility criteria or bill forbearance or forgiveness programs) and the participation requirements. Under the automatic approval track, the provider’s application will be approved once the Bureau confirms all required information was submitted.

(b) Expedited Approval Path for Non-ETCs

The expedited approval process for non-ETCs applies to any such provider that does not meet the criteria established for the automatic approval process. The non-ETC provider must file an application describing: (1) the states and territories 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 ETC, and (3) certifications and documentation of the provider's plan to combat waste, fraud, and abuse.

Any such non-ETC provider must also certify that it will: (1) confirm household eligibility; (2) follow all enrollment requirements; (3) interact with the necessary USAC systems; (4) de-enroll ineligible subscribers; (5) comply with Program document retention requirements; and (6) agree to FCC enforcement authority. Applications submitted by the deadline will be processed before the start date of the EBB Program, and applications received thereafter will be "reviewed on an expedited, rolling basis."

Approval Track for Existing ETCs

The EBB Order requires ETCs seeking to participate in the EBB Program to file an election notice with USAC. Such election notices must include certain information, such as the states in which the provider plans to participate in the EBB Program, a list of states in which the provider is an existing ETC, a description of the services being offered, and a statement that in each state where it intends to participate in the EBB Program, the provider was a "broadband provider" as of December 1, 2020. Per the Initial Milestone PN, USAC has established a Provider Election Notice Inbox, which opens on March 11, 2021.

Determinations of Household Eligibility

Eligible households will enroll through participating broadband providers or directly with USAC. The FCC established five criteria for household eligibility under the EBB Program. A household will qualify for the EBB Program if at least one member of the household: (1) meets the qualifications for participation in the Lifeline program; (2) has applied for and been approved to receive benefits under the free and reduced-price lunch program or the school breakfast program; (3) has experienced a substantial loss of income since February 29, 2020 that can be documented (*e.g.*, by layoff or furlough notice, application for unemployment insurance benefits, etc.); (4) has received a Federal Pell Grant in the current award year; or (5) meets the eligibility criteria for a participating provider's existing low-income or COVID-19 program, subject to approval by the FCC and any other requirements deemed by the Commission to be necessary in the public interest. A household is eligible for the EBB Program regardless of whether any member of the household already receives a Lifeline benefit, and "regardless of whether any member of the household has any past or present arrearages with a broadband provider."

The EBB Order also provides that participating providers can use one of three methods to verify a household's eligibility for the EBB Program: (1) the National Verifier; (2) a Bureau-approved alternative verification process; or (3) through a school using the free and reduced-price lunch or the school breakfast program. Under the National Verifier framework, the FCC directed USAC to make available an EBB Program consumer portal and

application form leveraging the existing National Verifier infrastructure. Because the Act includes three additional eligibility bases for the EBB Program (e.g., receipt of a Pell Grant), the FCC also directs USAC to enable verification of those programs. Where the National Verifier cannot verify eligibility through its automated data sources, the FCC delegates to the Bureau to direct USAC to establish documentation criteria, such as “layoff or furlough notice, application for unemployment benefits, or similar documentation.

Consistent with the Act, the FCC will also permit participating providers to rely upon an alternative verification process for household eligibility. The FCC directs the Bureau to develop a process for submitting proposed alternative verification processes and to review and approve or reject such submissions within the seven days required by the Act. For ETCs, the FCC directs such providers to submit to the Bureau requests for approval describing their alternative verification process after submitting their notice of election to USAC.

Finally, the EBB Order permits households with members who qualify for free and reduced-price school lunch or the school breakfast program to enroll in the EBB Program. As a result, the FCC will permit qualifying households to apply for the EBB Program and will have USAC enable the National Verifier to approve the household based on participation in free and reduced lunch program or the school breakfast program.

Covered Services and Devices Under the EBB Program

The EBB Order concludes that eligible households can receive a discount on the cost of broadband service and certain connected devices, and participating providers can receive reimbursement for such discounts during the emergency period. Covered services and devices include the following: (1) up to \$50/month discount for broadband services; (2) up to \$75/month discount for broadband services for households on Tribal lands; and (3) a one-time discount of up to \$100 for a laptop, desktop computer, or tablet purchased through a participating provider. The FCC will also permit providers to apply the monthly discount of up to \$50 per month, or up to \$75 for Tribal lands, for bundled services.

The Act, however, narrowly defines a “connected device” eligible for one-time reimbursement as “a laptop or desktop computer or tablet.” The FCC declined to include mobile phones in its definition, and thus we find that the definition of a tablet does not include devices that can independently make cellular calls such as large phones or phablets. The EBB Program is limited to one monthly service discount and one device discount per eligible household.

Budget and Reimbursement for the EBB Program

The EBB Program is funded through the \$3.2 billion Emergency Broadband Connectivity Fund in the Act and does not rely on contributions to the Universal Service Fund. The Act further provides that no more than 2% of the fund for the EBB Program (approximately \$64 million) is to be used for its administration. Funding for the EBB Program will remain available until the Fund is expended or six months after the end of the emergency period defined in the Act, whichever comes first.

A provider will be entitled to reimbursement for a given month for every subscriber that is enrolled with that provider in the National Lifeline Accountability Database (NLAD) as of the first day of the following month. Providers will be able to obtain reimbursement by submitting certified reimbursement claims through the Lifeline Claims System by the 15th day of the month. Reimbursement claims must include 16 certifications by an officer of the broadband provider. The EBB Order requires that an authorized officer of the company must certify, among other things, that: (1) the provider is in compliance with EBB rules; (2) the provider has obtained the requisite certification and application forms for each subscriber; (3) the connected device meets FCC requirements, reflects the market value, and has been delivered to the household; (4) the provider did not receive or pay kickbacks in connection with the Program; and (5) the information contained in the form is true, complete, and accurate, and is based on information known or provided to the officer.

Providers Subject to Audits and Enforcement

The Act also requires the FCC to adopt audit requirements to ensure that participating providers are following the program rules and to prevent waste, fraud, and abuse in the EBB Program. Any such finding by the FCC or the Inspector General of the Commission must include various components, including (but not limited to) the name of the participating provider, the amount of funding made available from the EBB Program to the provider, and the amount of funding determined to be an improper payment to the provider. Within one year of the date of the enactment of the Act, the FCC's Office of Inspector General must conduct an audit of the disbursements made to a representative sample of participating providers.

Finally, and consistent with the Act, the FCC will use its existing, statutorily permitted enforcement powers to initiate investigations and impose administrative forfeitures. The FCC will also apply its suspension and debarment rules currently applicable to the USF program to EBB Program participating providers. It will also withhold EBB Program funds from participants found to be in violation of the EBB Program rules, if appropriate, and will also seek to recoup improperly disbursed funds, in addition to appropriate enforcement penalties.

For more information about the EBB Program or the contents of the Report and Order, please contact one of the authors listed on this alert.

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