

FCC Order Details the Competitive Application Rules and Selection Criteria for Rural Broadband Experiments

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On Monday, July 14, 2014, the Federal Communication Commission released its Report and Order and Further Notice of Proposed Rulemaking (FCC 14-98), detailing the application selection methodology for its forthcoming rural broadband experiments. The FCC will provide \$100 million of financial support for rural broadband experiments in regions where the incumbent provider of voice services is a price cap local exchange carrier ("price cap LEC"). Baskets of funding will be available for cost-effective proposals in three categories: projects with very high performance standards, projects with minimum performance standards, and projects in extremely high cost areas.

Proposals from traditional and non-traditional eligible broadband providers will be accepted through Tuesday October 14, 2014, at either the census block or the census tract level as selected by the applicant. Winning applicants, which will all be selected at one time, will receive ten years of recurring support, rather than one-time support.

The following sections summarize the requirements and stipulations detailed in the Commission's Report and Order. (A minor erratum to the Report and Order was released on July 17, 2014, which is reflected in the summary.)

Funding Available

The FCC will distribute the available funding across three project categories as follows:

- **Category 1: Projects with very high performance standards.** The Commission has budgeted \$75 million for proposals (limited to \$20 million per project) to deploy a network capable of delivering 100 Mbps downstream and 25 Mbps upstream, while offering at least one service plan that delivers 25 Mbps downstream and 5 Mbps upstream *to all price cap LEC locations within the designated experiment area*. These projects must include usage and pricing that is reasonably comparable to usage and pricing for comparable wireline offerings *in urban areas*, and ensure latency no greater than 100 milliseconds ("ms").
- **Category 2: Projects with minimum performance standards.** The Commission has budgeted \$15 million for projects (limited to \$7.5 million per project) offering at least one service plan achieving minimums of 10 Mbps download speeds and 1Mbps upload speeds *to all price cap LEC locations within the experiment area*, including 100 GB usage allowance, no more than 100 ms latency, and "reasonable comparability" to urban offerings.
- **Category 3: Projects in extremely high cost areas.** The Commission has budgeted \$10

million for projects (limited to \$5 million per project) that exclusively serve extremely high cost areas offering 10 Mbps download speeds and 1 Mbps upload speeds *to all price cap LEC locations within the experiment area*, including 100 GB usage allowance, no more than 100 ms latency, and reasonable comparability to urban offerings.

The FCC will not consider funding requests that exceed the amount of Connect America Fund Cost Model support calculated for a given census block.

The Commission also set a total \$20 million per entity limit, covering all three Categories, which includes an entity and its affiliates.

Eligibility for Funding

Eligible Areas

Applicants may submit proposals at either the census block or the census tract level for locations that are served by price cap LECs. To be eligible, census blocks must have a cost per location that exceeds the Connect America Fund Phase II funding threshold (\$52.50) but is below the extremely high-cost threshold (\$207.81). Census blocks to be served in an application for funding must not be currently served by an unsubsidized carrier offering both voice and Internet services achieving download speeds of at least 3 Mbps and upload speeds of 768 kbps, as listed on the National Broadband Map.

An applicant must commit to serving all locations served by the price cap LEC within a given census block covered by its application. The Order also sets out rules applicable to scenarios involving additional locations in adjacent census blocks and restrictions in partially-served census blocks.

Applicants may submit multiple proposals under the same Category, as well as different proposals in multiple Categories. However, proposals will only be compared to proposals in the same Category.

Eligible Applicants

The Commission encouraged participation from “as many different entities as possible,” including, but not limited to, incumbent and competitive local exchange carriers, cable operators, electric utilities, fixed and mobile wireless providers, wireless Internet service providers (“WISPs”), State and regional authorities, Tribal governments, research and education networks, and partnerships among interested entities. Applicants for rural broadband experiment funds need not be eligible telecommunications carriers (“ETCs”), but winning applicants must obtain and confirm such designation within 90 days of winning funding. An entity may apply for a waiver if the company has engaged in good faith efforts to obtain ETC designation in a timely fashion which will be considered in the totality of the circumstances. Further, if a state fails to act within 90 days, the applicant may request the FCC to administer the ETC designation under Section 214(e)(6) of the Communications Act, as amended.

Proposal Selection Methodology and Winning Bidder Obligations

Funds will be awarded by the Commission after a single-round auction where bids will be judged by a straightforward numerical indicator of cost-effectiveness pursuant to a methodology adopted in the Report and Order tailored to each of the three funding Categories discussed earlier:

- **Categories 1 and 2:** The Commission will divide requested dollars per location by CAF Phase II

model-based support per location to yield a ratio. The lowest ratios indicate the projects with the greatest, geo-standardized, cost effectiveness.

- **Category 3:** The proposal with the lowest cost per location will be deemed the most cost effective.

Proposed projects that will serve Tribal areas identified in a list to be released by the Wireline Competition Bureau will receive a 25% increase to their cost-effectiveness score.

Winning bids will be subject to a challenge process similar to the process used for determining eligible areas for CAF Phase II model-based support.

The Commission will also, through resource sharing (not network structure or security alterations), assist winning bidders in voluntary efforts to integrate cybersecurity in their networks, including training resources and guidance to enhance network security, especially for smaller service providers.

Application Requirements

While winning applicants will be selected solely on the criterion of cost-effectiveness, as outlined above, each applicant is required to submit certain information with its formal proposal. Applicant's proposals will be treated as confidential and must request a certain amount of support to serve the census blocks or tracts identified in the proposal. Proposals must include a number of categories of information, where applicable including:

- Information regarding any agreements or joint bidding arrangements with other parties;
- Ownership interests in or by Commission-regulated companies;
- A non-confidential overview of the project;
- The applicant's qualifications to provide voice and broadband service;
- A description of the proposed project, service area, planned voice and broadband service offerings, whether or not it intends to provide a broadband option for low-income consumers, and technology to be used;
- The number of locations, including community anchor institutions, within the proposed project area; and
- What, if any, Lifeline services the applicant offers and whether it will permit qualifying customers to apply Lifeline discounts to bundled voice and data services.

The formal applications of winning bidders will be released to the public.

Winning Bidder Obligations

Immediate Post Selection Requirements

Winning bidders must:

- Within 10 business days after selection by the FCC, submit to the FCC the most recent three consecutive years of its audited financial statements as well as a description of technology and

system design certified by a professional engineer.

- Within 60 days of selection by the FCC, furnish the FCC with a stand-by letter of credit (equal to the amount of the first disbursement) from one of a limited number of banks meeting certain requirements spelled out in the Order, along with an opinion letter from legal counsel regarding the status of the letter of credit in a proceeding under Bankruptcy Code (as spelled out in further detail in the Order), which will serve as a financial guarantee for the Commission should the carrier default on its service or other commitments made under the terms of the experimental program. (As additional support is dispersed, the letter of credit must be modified concurrently to cover the total amount of support.)

Build Out Requirements

Winning bidders must achieve provision of access to 85% of all locations within a winning block by the end of the third year following the first disbursement of support and 100% coverage by the conclusion of the fifth year after the first disbursement of support.

Note that winning bidders that commit to extend service to at least 25% of block locations within the first 15 months after the first disbursement of support can collect 30% of the total ten-year support amount upfront.

Reporting Requirements

All winning bidders must submit an interim report on the November 1st following the first support distribution and annual reports by July 1st of each year containing information current as of June 1st of that year. (Winning bidders are thus exempt from filing five-year service quality plans as these would be redundant given specific reporting requirements for participating companies.) The annual reports must specify community anchor institutions served with broadband in the preceding year and provide information on the number of served locations in the winning block(s) and pricing, broadband speed(s), and data usage allowances.

Reports must also demonstrate that at least 95% of all peak period measurements indicate latency of 100 ms or less.

Data Gathering and Reporting

Winning bidders must agree to cooperate with any Commission efforts to gather data that the agency believes may help inform future decisions regarding the impact of technology transitions.

When winning bidders submit such data to either the Commission or the FCC's third party evaluator, which the FCC intends to hire, they should ensure that these submissions are consistent with applicable privacy laws and regulations.

Enforcement Measures

The Commission intends to recover support from recipients that do not comply with the FCC's terms and conditions of awarding support. If the winning bidder begins receiving support and thereafter fails to abide by the terms and conditions or build-out obligations, it will result in a performance default.

In the event of default, the Universal Service Administration Company ("USAC") will withhold a portion of the entity's total monthly support under the award, up to the full amount if noncompliance

continues beyond one year. However, if at any time the noncompliant entity comes back into compliance, it will be entitled to full restoration of support. If a recipient believes that the Commission has unfairly drawn on the letter of credit described earlier, the recipient will have the opportunity to appeal to the Commission through the standard review process. In the event that a recipient is unable to meet the agreed upon terms and conditions due to exogenous factors, it may petition for a waiver.

Noncompliance may also result in revocation of the entity's ETC designation and disqualification from future competitive bidding for universal service support.

Further Notice of Proposed Rulemaking

The Order also includes a Further Notice of Proposed Rulemaking ("FNPRM"), which seeks comment on how to induce states to assist in broadband expansion as the Commission implements Phase II of the Connect America Fund program. Specifically, the Commission seeks comment on providing a bidding credit to any bidder in Phase II that is leveraging governmental support from non-Federal sources as a means of lowering the amount of funding requested from the Connect America Fund. Among other issues, the Commission asks what documentation the bidder would need to provide to confirm its eligibility for the credit, and proposes to consider all forms of non-Federal assistance, including state universal service support, state broadband authority, and other institutions. Comments on the FNPRM are due thirty (30) days after publication of the Order and FNPRM in the Federal Register. Please be advised that attorneys in Kelley Drye & Warren's [Communications Practice Group](#) are experienced in assisting clients with universal service issues and are available to assist clients with any questions related to the Commission's rural broadband experiments. If you have any questions regarding this client advisory or the Commission's Rural Broadband Experiments Order discussed here, please contact your usual Kelley Drye attorney or any member of the Communications Practice Group.