



## MEMORANDUM

June 19, 2020

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

RE: ***Federal Communications Commission Broadband and Telehealth Funding Opportunities for Tribes and Tribal Healthcare Providers***

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### ***Introduction***

This report discusses the Federal Communications Commission's (FCC) most recent broadband opportunities available to Tribes and tribal healthcare providers—the Rural Digital Opportunity Fund (RDOF) and the COVID-19 Telehealth Program. The RDOF will provide up to \$20.4 billion over 10 years to communications providers for communities that are unserved or underserved by broadband internet, including broadband across tribal lands. The COVID-19 Telehealth Program provides \$200 million in funding to help healthcare providers provide telehealth services to patients at their homes or mobile locations in response to the COVID-19 pandemic.

### ***Rural Digital Opportunity Fund***

On June 17, the National Congress of American Indians and officials from the FCC hosted a webinar to discuss the RDOF. On the call, they stated that RDOF funding will be made available in two phases. **Applications for Phase I open on Wednesday, July 1, 2020 and the deadline to apply is Wednesday, July 15, 2020.** *Please let us know if you are interested in additional guidance with the application process.*

FCC officials also briefly addressed the agency's plan to establish the 5G Fund for Rural America program, which will provide \$9 billion to bring voice and 5G broadband service to rural areas unlikely to see unsubsidized deployment of 5G-capable networks. They stated that the FCC is seeking official comments on its proposed 5G rule. **Comments are due by June 25, 2020.** *Please let us know if you are interested in additional guidance and if we can be of assistance to you in drafting official comments.*

### **Overview of RDOF Webinar**

Jonathan McCormack, Deputy Director of the Rural Broadband Auctions Task Force, provided an overview of the RDOF. He stated that RDOF is awarding up to \$20.4 billion dollars over a ten-year term. He said the FCC will award this funding in two phases. He explained that Phase I, or Auction 904, will award \$16 billion and is exclusively for

census blocks that entirely lack voice and broadband service with minimum speeds of 25/3 Mbps. Phase II, which will launch at a later date, will award the remaining \$4.4 billion to expand broadband to partially served areas, he said.

Mr. McCormack said that areas eligible for support include all census blocks that lack voice and 25/3 Mbps broadband. To help applicants determine whether a particular area is eligible for support, the FCC has issued a preliminary list and map of RDOF Phase I eligible areas.<sup>1</sup> However, he said, some areas are excluded from eligibility including census blocks in tribal areas that lack 10/1 Mbps broadband and have common area maintenance (CAM) costs of less than \$30. He also said that those census blocks that received Phase II support from the Connect America Fund (CAF) auction or those that were awarded funding through other federal or state programs to provide 25/3 Mbps are not eligible for RDOF support.

Mr. McCormack summarized the two-stage application process. He said applicants must complete a short-form application between July 1, 2020 and July 15, 2020. The short-form application determines which applicants are eligible to bid in Auction 904, he said. To that end, he outlined the documentation needed to complete the short form application, which includes financial statements, technical information, ownership information, and certifications.<sup>2</sup> He stated that applicants may apply as a consortium to bid as one single entity. When applying as a consortium, he said, only one lead entity is required to submit financial statements but each member of the consortium must still submit all other information.

The second stage of the application process will take place after the auction in late October, 2020 and requires a long-form application, he said. Mr. McCormack added that parties who file a short-form application are not required to bid in the auction. Accordingly, he encouraged everyone to apply.

Mr. McCormack described the auction process as a descending clock auction.<sup>3</sup> He stated that the FCC will select lower bids first and give preference to bids with higher

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<sup>1</sup> The FCC's list of eligible census blocks is available at <https://www.fcc.gov/reports-research/maps/auction-904-preliminary-eligible-areas/>. The FCC's official map of initial eligible census areas is available at <https://www.fcc.gov/reports-research/maps/auction-904-preliminary-eligible-areas/>. These areas may be subject to change based on the FCC's challenge process, which provided interested parties an opportunity to challenge the FCC's eligibility determinations. The FCC is no longer accepting challenges as this process expired on April 10, 2020.

<sup>2</sup> Auction 904 resources are available at <https://www.fcc.gov/auction/904>. The Auction 904 application tutorial is available at <https://www.fcc.gov/auction/904/education>. He added that applicants could also familiarize themselves with the Auction 904 process by reviewing Auction 903 resources available at <https://www.fcc.gov/auction/903>.

<sup>3</sup> A descending clock auction "is a mechanism for buying items from multiple potential sellers" where the auctioneer reduces "bidder-specific prices . . . over the course of the auction" and the bidders must either "accept or decline the offers." Tri-Dung Nguyen & Tuomas Sandholm, *Optimizing Prices in Descending Clock Auctions*, Ass'n for Computing Machinery 1 (June 2014), <https://www.cs.cmu.edu/~sandholm/DescendingClockAuction.ec14.pdf>.

speeds and lower latency. He said that the FCC will make a bidding tutorial available on the Auction 904 website by October 14, 2020 and that a mock auction will be held on October 26, 2020. He said the auction will begin on October 29, 2020.

Mr. McCormack outlined the service obligations for winning bidders, stating that they must deploy service to the number of locations won on a statewide basis. For example, he said, winners must deploy service to 40% of CAM locations by year three and continue deploying service to an additional 20% of locations each subsequent year.

Mr. McCormack emphasized that auction applicants are prohibited from communicating with any other applicant in any manner regarding the substance of its own, one another's, or any competing applicant's bids or bidding strategies. He stated that the rule takes effect at the application deadline and persists regardless of whether the applicant qualifies for a bid. He said that an applicant includes any entity submitting an application, any party with control of the entity, and any party controlled by the applicant entity or controlled by a party controlling the applicant entity. He cautioned applicants to take care regarding communications with third parties.

#### Tribal Leader Remarks

*Irrevocable Letter of Credit.* Tribal leaders noted that other programs had effectively excluded tribal nations because they required tribal leaders to submit irrevocable letters of credit. They asked whether Auction 904 would also require these letters. Mr. McCormack responded that some of the letter of credit requirements likely still apply to the RDOF.

*Access to Spectrum.* Tribal leaders expressed concern about whether tribal nations could apply if they do not yet have access to spectrum but will at a later date. Mr. McCormack said that the FCC understands that there are pending proceedings that will increase access to spectrum throughout Indian country and that the FCC will take this information into consideration when it evaluates applications.

*Capacity to Apply.* Tribal leaders asked Mr. McCormack whether completing the short-form application within such a limited timeframe is realistic. They also asked whether the FCC had considered extending the deadline in light of the COVID-19 public health emergency. Mr. McCormack stated that he believes tribal nations can realistically complete the short-form application so long as they are willing to dedicate the time and the resources. He recommended that tribal nations access the application tutorial now and gather the required documentation before July 1, 2020. He stated that he had no knowledge of any deadline extension.

*RDOF in Alaska.* Tribal leaders asked whether the program is available in Alaska. Mr. McCormack stated that the RDOF is not available in Alaska. Instead, he said, rural areas in Alaska are eligible for support through a separate FCC fund, but he did not elaborate on specific funding available for Alaska.

### ***COVID-19 Telehealth Program***

In March, Congress appropriated \$200 million for the FCC under the Coronavirus Aid, Relief, and Economic Support Act, or CARES Act. In early April, the agency announced that it would use this funding to support the COVID-19 Telehealth Program, which offers healthcare providers responding to COVID-19 financial assistance to “purchase telecommunications, broadband connectivity, and devices necessary for providing telehealth services.”<sup>4</sup> The FCC began accepting applications for funding on April 13, 2020. As of June 10, 2020, the FCC announced that approximately half of the funding was still available.<sup>5</sup>

The FCC has stated that the COVID-19 Telehealth Program is not a grant program. Instead, approved healthcare providers will be required to submit invoices and other supporting documentation for monthly reimbursement.<sup>6</sup> Providers may submit multiple applications for support.<sup>7</sup> However, the FCC has stated that it does not anticipate awarding more than \$1 million to any single applicant.<sup>8</sup>

Health Care Provider Eligibility. Only nonprofit and public healthcare providers that treat patients in rural or non-rural health clinics are eligible to receive COVID-19 Telehealth Program support. Private and for-profit health care providers are ineligible. The FCC has stated that eligible health care providers include the following:

- (1) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;
- (2) community health centers or health centers providing health care to migrants;
- (3) local health departments or agencies;
- (4) community mental health centers;
- (5) not-for-profit hospitals;
- (6) rural health clinics;
- (7) skilled nursing facilities; or

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<sup>4</sup> FCC Statement, *FCC Adopts \$200 million COVID-19 Telehealth Program*, FEDERAL COMMUNICATIONS COMMISSION (Apr. 2, 2020), <https://docs.fcc.gov/public/attachments/DOC-363498A1.pdf>.

<sup>5</sup> See FCC News, *FCC Surpasses \$100 Million in Approved COVID-19 Telehealth Program Applications*, FEDERAL COMMUNICATIONS COMMISSION (June 10, 2020), <https://docs.fcc.gov/public/attachments/DOC-364847A1.pdf>. On June 17, 2020, the FCC released a list of COVID-19 Telehealth Program awardees available at <https://www.fcc.gov/sites/default/files/covid-19-telehealth-program-recipients.pdf>.

<sup>6</sup> COVID-19 Telehealth Program—Frequently Asked Questions (FAQ), Question 41, <https://www.fcc.gov/covid-19-telehealth-program-frequently-asked-questions-faqs> (last updated May 2, 2020).

<sup>7</sup> COVID-19 Telehealth Program—Frequently Asked Questions (FAQ), Question 44, <https://www.fcc.gov/covid-19-telehealth-program-frequently-asked-questions-faqs> (last updated May 2, 2020).

<sup>8</sup> COVID-19 Telehealth Program—Frequently Asked Questions (FAQ), Question 39, <https://www.fcc.gov/covid-19-telehealth-program-frequently-asked-questions-faqs> (last updated May 2, 2020).

(8) consortia of health care providers consisting of one or more entities falling into the first seven categories.<sup>9</sup>

### Application Process.

Before applying, providers must create an FCC registration number. The FCC also requires providers to obtain an eligibility determination from the Universal Service Administrative Company (USAC) for each site that they include in their application and register with the System for Award Management (SAMS).<sup>10</sup> The FCC has emphasized that applicants may still file an application while their USAC eligibility determination is pending and if they are not yet registered with SAMS. The FCC has provided details on these steps and the application process in guidance that it published in April.<sup>11</sup>

Applicants are required to apply online through the FCC's application portal;<sup>12</sup> emailed applications will not be reviewed. Healthcare providers may apply as a consortium, but each provider must have its own eligibility determination and FCC Registration Number.

When applying, providers must be prepared to explain what medical services they will provide with the funding such as video consults, voice consults, and remote treatment as well as which conditions they will treat. The application requires providers to submit information concerning the provider's goals and objectives for the use of program funding, the timeline for deployment, and factors and metrics the provider will use for impact measurement.<sup>13</sup>

The FCC has stated that there is no deadline to apply, but it will stop reviewing applications once funding is exhausted or the COVID-19 public health emergency has ceased. The FCC's application tutorial is available via YouTube.<sup>14</sup>

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<sup>9</sup> FED. COMM'NS COMM'N, *COVID-19 Telehealth Program—Frequently Asked Questions (FAQ)*, Question 12, <https://www.fcc.gov/covid-19-telehealth-program-frequently-asked-questions-faqs> (last updated May 2, 2020) [hereinafter FAQ].

<sup>10</sup> Providers can register at <https://apps.fcc.gov/cores/userLogin.do>. Providers can obtain an eligibility determination by filing FCC Form 460 available at <https://www.usac.org/rural-health-care/resources/forms/>. Additional information on registration and form filing is available at <https://www.fcc.gov/covid-19-telehealth-program>.

<sup>11</sup> FED. COMM'NS COMM'N, *Wireline Competition Bureau Provides Guidance on the COVID-19 Telehealth Program Application Process* (Apr. 8, 2020), <https://docs.fcc.gov/public/attachments/DA-20-394A1.pdf> [hereinafter Guidance].

<sup>12</sup> The online application is available at <https://tinyurl.com/y7xopctv>.

<sup>13</sup> A complete list of information requested can be found in the FCC's Guidance, available at <https://docs.fcc.gov/public/attachments/DA-20-394A1.pdf>.

<sup>14</sup> FED. COMM'NS COMM'N, *COVID-19 Telehealth Program Application Process Webinar* (Apr. 13, 2020), <https://www.youtube.com/watch?v=iPFvt-ocC24>.

Services and Devices Eligible for Funding.

The FCC has stated that “telecommunications, information services, and connected devices necessary to provide telehealth services to patients in response to the coronavirus pandemic” are eligible for reimbursement.<sup>15</sup> However, these devices must be integral to patient care. The FCC has also stated that devices themselves must be connected and that providers will not be reimbursed for “unconnected devices that patients can use at home and then manually report the results to their medical professional.”<sup>16</sup> Further, personnel, IT, administrative and training costs, and website, platform, or systems development are ineligible for reimbursement.

Selection Process

The FCC has stated that it will review applications on a rolling basis until all funds are exhausted. It has also elaborated on the criteria it will consider when making funding determinations. The criteria include the types of conditions treated, the provider’s goals and objectives for funding use, the timeline for deployment, the factors and metrics the provider will use to measure the impact of the services and devices funded, the geographic area served, and whether the provider will serve high-risk and vulnerable populations with funding.

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If you have any questions or would like further information on the topics raised during these calls, please contact Elliott Milhollin ([emilhollin@hobbsstrauss.com](mailto:emilhollin@hobbsstrauss.com) or 202-822-8282); Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745); or Violet Rush ([vrush@hobbsstrauss.com](mailto:vrush@hobbsstrauss.com) or 202-822-8282).

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<sup>15</sup> FAQ, Question 26, <https://www.fcc.gov/covid-19-telehealth-program-frequently-asked-questions-faqs> (last updated May 2, 2020).

<sup>16</sup> *Id.*