

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Emergency Broadband Benefit Program) WC Docket No. 20-445
)
)

ORDER

Adopted: July 7, 2021

Released: July 7, 2021

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) addresses the petition of SPITwSPOTS, Inc. (SPITwSPOTS or Petitioner) seeking an expedited grant of a limited waiver of the Emergency Broadband Benefit Program (EBB Program) rules (Petition) as they apply to service offerings participating providers may claim for EBB Program reimbursement.¹ The Petitioner seeks a waiver that would allow it to claim reimbursement for a service offering that was not offered as of December 1, 2020.²

2. Based on the Commission’s established waiver standard, we deny the Petition. We conclude that Petitioner has failed to show that good cause exists to allow it to receive reimbursement from the Emergency Broadband Connectivity Fund for an internet service offering that was not offered as of December 1, 2020. The requirement that an internet service offering be offered as of December 1, 2020 is a statutory requirement that the Commission cannot waive.

II. BACKGROUND

3. On December 27, 2020, the Consolidated Appropriations Act of 2021 (Consolidated Appropriations Act) became law³ and established an Emergency Broadband Connectivity Fund of \$3.2 billion in the United States Treasury to help Americans afford Internet service during the COVID-19 pandemic.⁴ The Act directed the Federal Communications Commission (Commission) to use that fund to establish the EBB Program, under which eligible households may receive a discount off the cost of broadband service and certain connected devices during an emergency period relating to the COVID-19 pandemic, and participating providers can receive a reimbursement for providing such discounts.⁵ On February 25, 2021, the Commission adopted rules and policies creating and governing the EBB Program pursuant to the Consolidated Appropriations Act in the *EBB Program Order*.⁶

¹ Petition of SPITwSPOTS, Inc. for Limited Waiver, WC Docket No. 20-445 (filed June 7, 2021), <https://ecfsapi.fcc.gov/file/1060774901882/SPITwSPOTS%20Petition%20for%20Limited%20Waiver%3B%20Request%20for%20Expedited%20Grant%20-%20Copy.pdf> (SPITwSPOTS EBB Waiver Petition).

² *Id.* at 1.

³ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), *available at* <https://www.congress.gov/bill/116th-congress/house-bill/133/text> (Consolidated Appropriations Act).

⁴ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. IX, § 904(i), 134 Stat. 2130, 2135.

⁵ *Id.* §§ 904(b)(1), (4), (5).

4. The Consolidated Appropriations Act defined an eligible internet service offering as “broadband internet access service provided by such provider to a household, offered in the same manner, and on the same terms, as described in any of such provider’s offerings for broadband internet access service to such household, as on December 1, 2020.”⁷⁷ In the *EBB Program Order*, the Commission reiterated that “providers who participate in the EBB Program are only eligible to receive reimbursement for offerings that were available on and include the same terms as those available as of December 1, 2020.”⁷⁸ It further explained that the December 1, 2020 restriction “is best understood as a method of avoiding arbitrage opportunities and waste in the Program by allowing unscrupulous providers to take advantage of the increased subsidy available,” and that restricting offerings to those available prior to the enactment of the Consolidated Appropriations Act would prevent “participating providers from increasing prices above the usual market rate for their services for the purpose of claiming the maximum reimbursement amount.”⁷⁹ Participating providers will receive reimbursement from the EBB Program for the discounts passed through to eligible households for eligible internet service offerings.¹⁰

III. DISCUSSION

5. We deny the waiver request, finding that allowing SPITwSPOTS to receive reimbursement for an internet service offering that was not available as of December 1, 2020 is inconsistent with the statutory requirements of the Consolidated Appropriations Act. We understand that Petitioner received approval for six service plans that were available to customers as of December 1, 2020, and it is now seeking to add the last remaining plan that it currently offers that was not available as of December 1, 2020.¹¹ Waiving the EBB Program rules in this instance, however, is both inconsistent with the Program’s governing statute and increases the risk of waste in the Program by potentially permitting participating providers to submit internet service offerings that would claim the maximum reimbursement allowable even if such plans were not offered at the market rate.

6. As a general matter, “an agency must adhere to its own rules and regulations.”¹² Although strict application of a rule may be justified “to preserve incentives for compliance and to realize the benefits of easy administration that the rule was designed to achieve,”¹³ the Commission’s rules may be waived for “good cause shown.”¹⁴ The Commission may exercise its discretion to waive a rule where special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.¹⁵ The Commission may take into account considerations of hardship, equity, or more effective implementation of policy on an overall basis.¹⁶ The Bureau, under delegated authority, may act on requests for waiver of rules.¹⁷

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⁶ *Emergency Broadband Benefit Program*, WC Docket No. 20-445, Report and Order, 36 FCC Rcd 4612, 4661, para. 98 (2021) (*EBB Program Order*).

⁷ Consolidated Appropriations Act, 2021, div. N, tit. IX, § 904(a)(9); 47 CFR § 54.1600(n).

⁸ *EBB Program Order*, 36 FCC Rcd at 4647, para. 72.

⁹ *Id.*

¹⁰ 47 CFR §§ 54.1603, 54.1608.

¹¹ SPITwSPOTS EBB Waiver Petition at 1-2.

¹² *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

¹³ *Mary v. Harris Found. v. FCC*, 776 F.3d 21, 28 (D.C. Cir. 2015).

¹⁴ 47 CFR § 1.3.

¹⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁶ *Id.*; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹⁷ 47 CFR § 0.291(b).

7. In its Petition, SPITwSPOTS requests a waiver of the EBB Program requirement that internet service offerings eligible for EBB reimbursement must have been available as of December 1, 2020.¹⁸ Specifically, SPITwSPOTS seeks to add a 6 Mbps service plan for \$69/month that was not available as of December 1, 2020.¹⁹ It explains that its 6 Mbps plan would “be optimal for many of our customers in terms of the combination of broadband speeds provided and the cost of service,” and that it is “the only plan for which SPITwSPOTS does not have EBB approval, and there is risk of customer confusion, and possibly frustration, by having this plan subject to different treatment under EBB than the other plans.”²⁰ SPITwSPOTS argues that their waiver request is in the public interest and must be granted because it “would advance the goals of the EBB plan to help more Americans, particularly here in rural Alaska, have better access to affordable broadband,” and that “grant of this relief would provide additional choices and benefits for closing the broadband gap in our communities.”²¹

8. However, the Consolidated Appropriations Act explicitly defined an internet service offering as “broadband internet access service provided by such provider to a household, offered in the same manner, and on the same terms, as described in any of such provider’s offerings for broadband internet access service to such household, as on December 1, 2020.”²² Because the EBB Program’s governing statute specifically requires that internet service offerings reimbursed by the Program were available as of December 1, 2020, we cannot waive that requirement to provide reimbursement for offerings that are not eligible under the statute.

9. Further, we understand that service providers may want to offer internet service offerings that were not available as of December 1, 2020 to increase consumer choice. As the *EBB Program Order* explained, however, the statutory requirement that an internet service offering was available as of December 1, 2020 is an important program integrity measure that “prevents participating providers from increasing prices above the usual market rate for their services for the purpose of claiming the maximum reimbursement amount.”²³ In addition, although Petitioner argues that adding the 6 Mbps plan would help increase consumer choice, Petitioner already has six other internet service offerings that are available for consumers to choose from.²⁴ On balance, the Bureau is not convinced that permitting EBB reimbursement for internet service offerings that were not available as of December 1, 2020 warrants a waiver of the EBB Program’s requirements, particularly in light of the potential for waste that could result from such waiver

¹⁸ SPITwSPOTS EBB Waiver Petition at 1-2; *see also* 47 CFR §§ 54.1600(n), (s).

¹⁹ SPITwSPOTS EBB Waiver Petition at 1-2.

²⁰ *Id.* at 2 & n.4.

²¹ *Id.* at 2.

²² Consolidated Appropriations Act, 2021, div. N, tit. IX, §§ 904(a)(9); 47 CFR § 54.1600(n).

²³ *EBB Program Order*, 36 FCC Rcd at 4647, para. 72.

²⁴ SPITwSPOTS EBB Waiver Petition at 1.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED THAT pursuant to the authority contained in in Section 904 of Division N, Title IX of the Consolidated Appropriations Act, 2021, Pub. L. No 116-260, 134 Stat. 1182, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, that the Petition for Limited Waiver filed by SPITwSPOTS is DENIED. This Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau