

ARKANSAS REGISTER

Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



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For Office

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Effective Date _____ Code Number _____

Name of Agency _____

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Contact _____ E-mail _____ Phone _____

Statutory Authority for Promulgating Rules _____

Rule Title: _____

Intended Effective Date

(Check One)

Date

☐

Emergency (ACA 25-15-204)

Legal Notice Published _____

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10 Days After Filing (ACA 25-15-204)

Final Date for Public Comment _____

☐

Other _____

(Must be more than 10 days after filing date.)

Reviewed by Legislative Council _____

Adopted by State Agency _____

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Contact Person

E-mail Address

Date

CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)

Renée M. Doty
Signature

Phone Number

E-mail Address

Title

Date

Addendum 2 to Arkansas Rural Connect – ARPA

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SECTION 1. BACKGROUND

The Director of the Arkansas Economic Development Commission (“Director”) issues this Rule to respond to urgent, telecommunication needs in this State for communities impacted by the COVID-19 pandemic. On or about February 21, 2020, the Director issued the Arkansas Rural Connect Broadband Rule (hereafter, the “Broadband Rule”) to implement the Arkansas Rural Connect Program (hereafter, “Arkansas Rural Connect,” or “Arkansas Rural Connect Program,” or “ARC”). This Broadband Rule was promulgated prior to the issuance of State and Federal public health guidelines responding to the COVID-19 pandemic.

The COVID-19 pandemic has severely impacted the citizens of this State. COVID-19 has brought about an urgent and immediate need for broadband internet access. Broadband enables workers to telework, patients to use telemedicine services, K-12 and college students and unemployed workers in need of reskilling to participate in distance education, religious people to participate in online worship services, and all citizens to shop online, interact with friends through Skype and other video chat tools, and keep up with the latest news and public health guidelines.

In response to the pandemic, Arkansas has received federal funds under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and State and Local Fiscal Recovery Funds (SLFRF) under the American Rescue Plan Act (ARPA). These funds allowed states to broaden and strengthen their broadband infrastructure in unserved or underserved areas. All ARPA funds must be obligated by December 31, 2024. The period of performance will run until December 31, 2026.

The need still exists for broadband infrastructures that directly enable work, education and health monitoring in response to the effects of COVID-19. ARPA federal guidance was modified April 1, 2022, adding significant requirements. The AEDC Broadband Office is modifying its rule through this addendum to harmonize with the changed federal guidance. Additionally, the AEDC Broadband Office has submitted an application to the U.S. Department of Treasury for up to \$158 million in funding for broadband projects through the Coronavirus Capital Projects Fund (CPF). The CPF is a distinct funding program under ARPA and has requirements that differ from SLFRF.

The Arkansas Rural Connect program promotes broadband deployment in rural areas of Arkansas that lack meaningful and efficient broadband services. The ARC program and its purposes align with allowable uses of SLFRF and CPF.

Due to the urgent need for broadband for distance learning, telemedicine and the need for telework necessitated by the COVID-19 pandemic, there is a need to issue this new ARPA rule to disburse funds immediately and to accelerate the continued deployment of broadband network infrastructure.

Additionally, on April 18, 2022, the Arkansas Broadband Master Plan: Assessment and Recommendations (the “Broadband Master Plan”) was published by Broadband Development Group pursuant to a study commissioned by the AEDC Broadband Office and requested by the Arkansas General Assembly. Changes to the rule also incorporate recommendations made by the Broadband Master Plan.

SECTION 2. AUTHORITY

This Rule is authorized to be issued by the Director of the Arkansas Economic Development Commission (“AEDC”) under Ark. Code Ann. § 15-4-209(b) (5) which provides that AEDC may promulgate rules necessary to implement the programs and services offered by AEDC. On or about August 9, 2019, Governor Asa Hutchinson authorized a transfer of funding for the implementation and administration of the ARC Program to AEDC. Pursuant to Ark. Code Ann. § 15-4-209(a)(1), AEDC is authorized to administer grants to assist with the economic development in the State. AEDC is therefore authorized to administer the ARC grant program and further authorized to issue administrative rules under Ark. Code Ann. § 15-4-209(b) (5).

SECTION 3. PURPOSE AND QUALIFICATION FOR RECEIVING ARPA FUNDS

This purpose of this addendum is to harmonize with recent federal guidance as it relates to dispensing ARPA funds, including funding through SLFRF and CPF, for the expansion of broadband network infrastructure for the unserved and underserved areas of Arkansas. Unserved and underserved areas are locations without access to a reliable wireline connection of 100Mbps/20Mbps.

All ARPA approved projects funded through SLFRF must be able to provide synchronous bandwidths of 100mbps download and 100mbps upload. Where impractical, due to geographical, topographical or financial constraints the upload speed can be as low as 20mbps but must be scalable to 100mbps in such instances. Whenever bandwidths are asynchronous, the internet service provider (“ISP”) must submit a letter detailing why the upload speeds cannot be obtained at 100mbps and the Department of Commerce AEDC Broadband Office (“AEDC Broadband Office”) will determine if the ISP letter is approved for the requested bandwidth modification.

All ARPA approved projects funded through CPF must be able to provide synchronous bandwidths of 100mbps download and 100mbps upload. Projects funded through CPF will not permit temporary, asynchronous speeds allowed under SLFRF.

Priority will be given to fiber-optic infrastructures where feasible, as such advanced technology better supports scalability to meet expected increases in bandwidth demand. Regardless of technology infrastructure deployed, the ISP must demonstrate that it will reliably deliver a minimum of 100/20mbps in the case of SLFRF funded projects, and 100/100mbps in the case of CPF funded service throughout the service area. The ARPA program also requires the ISP to submit its customer pricing list with its project application. The ISP is also required to participate in the FCC's Affordable Connectivity Program. As indicated below, affordability of broadband service will be a significant factor in determining grant awards. Applications that include at least one low-cost option (less than \$50 per month), at speeds of at least 100/20 mbps, without data usage caps or the obligation to purchase bundled services, will be awarded extra points in the scoring rubric. Applicants must include with their application a narrative demonstrating that their proposed pricing is affordable for consumers in the proposed project service area.

The AEDC Broadband Office, or its designee, will define project areas available for grant awards, funding source (i.e., SLFRF or CPF) and deadlines for submitting applications. Each project area will be comprised of full and partial census blocks identified as unserved and underserved areas in the Broadband Master Plan defined by a set of polygons in a GIS shapefile. It is anticipated that multiple applicants will submit applications for each project area.

All applicants must have a System for Award Management (SAM) number issued by the federal government to participate in the ARC program. ISPs must submit with their applications (i) audited financial statements made by an independent certified public accountant for the past two years, or, in the absence of audited financial statements, such other financial and operational documentation reasonably acceptable to the ASBO that demonstrates the financial stability of the applicant and its ability to fulfill the obligations under the grant agreement, and (ii) the endorsement of the application by each mayor or county judge within the proposed project area. It is expected that each mayor and county judge may endorse multiple applications. If the ISP is unable to secure the endorsement of a mayor or the county judge, then it must submit with its application a statement to that effect along with a description of its efforts to obtain an endorsement, and the reason, if any, that was given as to why an endorsement was not provided by the mayor or county judge.

Each project will be scored using 8 different scoring metrics: 1.) speed of service (10% of total score), 2.) future-proof (10% of total score), 3.) quality of coverage, i.e. reliability and scalability of service (15% of total score), 4.) time to deploy (15% of total score), 5.) qualifications/experience/financial strength of applicant (10% of total score), 6.) applicant's contribution toward project costs (10% of score), 7.) cost of project (15% of total score), and 8.) affordability of service to the consumer (15% of total score). The maximum score for this rubric is 100 points. All projects will be scored individually, with the highest scored applications receiving ARC grant funding awards. There is no minimum or maximum limit on project size or dollar amount requested for ARC grant program applications. But overall project cost is a key factor of consideration. Where there is a tie for project awards the AEDC Broadband Office, or its' designee, will make an administrative decision as to which project it will award. The AEDC Broadband Office, or its' designee, will consider the scores for the most important factors such as project price, quality of service, deployment timeline and affordability of service to the

consumer to break ties. Next, if the tie is not resolved, the AEDC Broadband Office, or its designee, will consider the Mayor and County Judge project preferences and customer service complaints made to the AEDC Broadband Office, or its designee. Please keep in mind that verified customer complaints, depending on nature or frequency, from prior or present ARC projects could result in an application not being awarded an ARC grant no matter the project score. This is also true if the AEDC Broadband Office learns of verified complaints from customers from an ISPs pre-existing network(s). All projects for application submissions will be subject to a challenge process. **See Section 8.**

Qualified project areas subject to ARC grant funding must not have a federal commitment, i.e., a grant from the Rural Digital Opportunity Fund that will provide a reliable wireline connection of at least 100/20 Mbps. Each ISP applicant receiving a grant using ARPA funds will guarantee broadband service to the citizens of Arkansas, within its project footprint, for a minimum of 10 years from the time of completed infrastructure deployment. Grant awardees who fail to reliably deliver service within the project footprint for the required 10-year period will be subject to the penalty provisions of Arkansas Rural Connect Broadband Grant Program Rule.

SECTION 4. PROJECT FUNDING

The AEDC Broadband Office will fund up to 75% percent of the total cost of the project. The applicant shall fund a minimum of 25% of the project costs. Internet service providers shall maintain an irrevocable standby letter of credit equal to 100% of the grant award amounts disbursed to the internet service provider. The irrevocable standby letter of credit shall follow the same standards found in 47 C.F.R. §54.804(c)(2) and will be accompanied by an opinion letter from applicant's legal counsel stating that the irrevocable standby letter of credit and its proceeds will **not** be subject to a Chapter 11 bankruptcy proceeding. The AEDC Broadband Office may allow the letter of credit amount to be reduced to no less than 25% of the grant award as the project progresses and defined milestones in the project deployment plan are met. The letter of credit must remain in place until the project is completed and acceptance testing by the Broadband Office is satisfactorily concluded.

In lieu of a letter of credit the internet service provider will be required to furnish a performance bond in an amount equal to the grant award. The performance bond will be in the form of a surety bond issued by a surety company as a guarantee of delivery of goods/services in accordance with the specifications and within the time period established in the grant agreement. Surety bonds must be issued by a surety company authorized to do business in Arkansas and must be signed by a resident local agent licensed by the Arkansas State Insurance Commissioner to represent the surety company. The resident agent's power-of-attorney must accompany the surety bond. The company issuing the surety bond must comply with all stipulations herein and must be named in the U.S. Treasury listing of companies holding certificates of authority as acceptable sureties on Federal Bonds and as acceptable reinsuring companies. Any excess between the face amount of the bond and the underwriting limitation of the bonding company shall be protected by reinsurance provided by an acceptable reinsuring company.

Please note, the AEDC Broadband Office, or its' designee, reserves the right to stop funding should it learn that grantee's vendors or subcontractors are not getting paid for work performed on ARC projects. Funding will resume when the AEDC Broadband Office, or its' designee, is satisfied the matter has been resolved.

SECTION 5. DEADLINES, UNSERVED AND UNDERSERVED AREAS

ARPA funds must be obligated by December 31, 2024, and all broadband network deployments completed by December 31, 2026. The AEDC Broadband Office will determine the dates by which awarded projects shall be completed within these allowed deadlines.

SECTION 6. MAPS AND RULE OBLIGATIONS

The AEDC Broadband Office, at its discretion, may request from the applicants maps and other information necessary to make informed decisions as to the proper unserved or underserved locations in Arkansas to expend grant funds. Applicants that accept funding under this Rule shall follow all the requirements under the State and Local Fiscal Recovery Fund Guidance and the Capital Projects Fund Guidance, as applicable, and ARC rules. Every applicant is responsible for knowing both the state rules and federal guidelines without exception. In the event of any conflict between this rule and the federal rules and guidance applicable to broadband deployments funded with ARPA funds, the federal rules and guidance will control.

SECTION 7. EFFECTIVE DATE; COORDINATION WITH ARC GRANT PROGRAM RULE

This Rule is effective ten days after filing with the Secretary of State of the final rule that has been reviewed and approved by the Arkansas Legislative Council. The Rule is incorporated into and made a part of the Arkansas Rural Connect Broadband Grant Program Rule, as amended effective February 7, 2022. In the event of any conflict between the terms of this Rule and Arkansas Rural Connect Broadband Grant Program Rule, the terms of this Rule shall control.

SECTION 8. ARKANSAS RURAL CONNECT REQUEST FOR PROJECT CHALLENGE INFORMATION

Definitions.

The following definitions were added:

Point Shapefiles – shapefiles that show each proposed passing in the application area as a singular mapped point, in the application or challenged area containing attribute data showing the addresses of each point.

Polygon Shapefiles - shapefiles delineating the general project area(s).

RSSI - Received Signal Strength Indicator (“RSSI”), is an estimated measure of power level that a wireless client device is receiving from an access point or router.

Challengers – A unit of local government, a nonprofit organization, or Broadband Service Provider (“ISP”).

Project Challenge Information Request Process

The purpose of this process is to ensure the Arkansas Economic Development Commission Broadband Office (“AEDC Broadband Office”), or its’ designee, select the best projects that truly bridge the digital divide in Arkansas. This process is to gather additional information before making a final award. To streamline this process, challengers must provide point and polygon shapefiles as defined in this document. All shapefiles or KMZs must be functional. In addition, if someone submits information regarding a wireless project, the challenger is required to include shapefiles of heat maps indicating RSSI measures in the challenged area. The AEDC Broadband Office, or its’ designee, may, at its’ discretion, require any other kind of file to complete its analysis.

Planned service to a proposed project area is eligible for the purpose of a submission to the AEDC Broadband Office, or its’ designee, if state or federal funds have been awarded or private funds will be used within a reasonable period of time. Additionally, the provider must be committed to providing service to the areas using private, state or federal funds. Areas adjacent to private, state or federally funded areas may be eligible to submit information to the AEDC Broadband Office, or its’ designee, if the challenger demonstrates, to AEDC’s Broadband Office or to its designee’s satisfaction, existing awards or a self-funded project will cover the adjacent area. The challenger must commit to serving the adjacent areas, in writing, at speeds 100mbps/100mbps symmetrical or greater. The challenger may be required to enter into a written agreement with the State to complete the adjacent project within a certain time frame. The State will not issue awards in the adjacent area as consideration for the agreement.

The AEDC Broadband Office recognizes the nature of wireless projects has an inherent potential for overlap. Recognizing the unique circumstances of this technology, wireless projects will be allowed to exceed the 25% overlap allowance of existing networks, provided the wireless signal strength, measured in RSSI, is less than -90 in those areas. It is the determination of the AEDC Broadband Office that RSSI measures below -90 are unable to reliably deliver broadband. AEDC Broadband Office, or its’ designee, will post ARC projects, for challenges, twenty business days following the announcement of the challenge information request. The announcement will be on the AEDC Broadband Office website or its’ designee’s website. Challengers wishing to submit information to the AEDC Broadband Office, or its’ designee, must provide the required information, in this section, no later than 5:00 p.m., 20 business days after posting ARC projects – no exceptions.

Providers wishing to submit information to the AEDC Broadband Office, or its’ designee, on multiple applications must submit information separately for each application. Challengers can submit information to the AEDC Broadband Office, or its’ designee, concerning portions of a proposed project area without invalidating the entire project. AEDC Broadband Office, or its’ designee, reserves the right to invalidate a portion(s) of a proposed project area, aggregate

challenges by different providers to determine the percentage of serviceable units served in a proposed project area and invalidate insufficient submissions. Challengers must demonstrate that more than 10%, for wireline projects, or 25%, for wireless projects, of serviceable units in the project area have access to speeds at or above 100/20 mbps as of the date of the application or that the application is ineligible because of committed state or federal funding subject to the conditions described above. These percentages may be changed, by the AEDC Broadband Office, or its' designee, based on the funding source and federal guidance.

AEDC Broadband Office, or its designee, must receive all the information detailed below or the submission will be deemed incomplete and invalid. Challengers must provide:

1. A signed, and notarized affidavit affirming the attached information is true.
2. Current Federal Communications Commission (FCC) Form 477 or equivalent.
3. Minimum/maximum speeds available for residents and businesses in the proposed project area.
4. Number of serviceable units within the proposed project area. Provide the speeds those serviceable units can receive, including the technology, i.e., fiber, fixed wireless, etc.
5. Street level data of customers receiving service within the proposed project area.
6. Point shapefiles that show each proposed passing in the questioned area, designated by a singular mapped point, in the questioned area containing attribute data showing the addresses of each point. Polygon shapefiles delineating the area(s) of concern.
7. For wireless providers: Heat maps indicating RSSI in the challenged area.
8. Using the project area map submitted by the applicant, create a map indicating where the challenger's serviceable units are in the proposed project area. Challengers are encouraged to submit additional maps and information if necessary.
9. If submitting due to planned private, state or federal funding, documentation detailing commitment to provide service in or adjacent to the proposed project area is required.

AEDC Broadband Office, or its' designee, reserves the right to request verified speed tests on all or portion(s) of the questioned area. The AEDC Broadband Office, or its' designee reserves the right to require any awardee to re-scope their ARC application/project footprint and amend funding request post award. The AEDC Broadband Office, or its' designee, may also require any applicant to alter its' project and funding request if it is in the best interest of the state. After all information have been submitted and reviewed, the AEDC Broadband Office or its' designee will evaluate the additional information to determine if it will let the project footprint stand, be altered, or be removed. The AEDC Broadband Office or its' designee, after administrative review, will post the final project areas no later than 5:00pm two weeks after all

information has been evaluated. Due to the volume of applications and submissions there can be necessary delays to this timeline.