

MEMORANDUM

TO: Martha A. Duggan; Senior Director, Regulatory Affairs
National Rural Electric Cooperative Association

FROM: Ernie Abbott, Wendy Ellard, and Nyka Scott; Baker Donelson

DATE: September 19, 2019

RE: Eligibility of FEMA Public Assistance Program Funding for Damage to
Broadband

I. QUESTION PRESENTED

The National Rural Electric Cooperative Association (NRECA) is comprised of more than 900 non-profit rural Electric Cooperatives (“Co-ops”). NRECA members provide electricity to 42 million people in 48 different states. In addition to providing electricity, Co-ops may also provide broadband/fiber optic services (collectively “Broadband”) to their consumer-members. Depending on state law, the Co-ops may own the Broadband, provide Broadband through a subsidiary owned by the Co-op, or lease their poles/infrastructure to a third party who then provides the Broadband services to the Co-op’s customers and others.

When a Co-op sustains damage to its electrical infrastructure, so long as the event is a major disaster declared by the President of the United States, the Co-op is generally eligible to receive public assistance funding from the Federal Emergency Management Administration (“FEMA”) for repairs/damages related to the event. However, because of the Federal Communications Commission’s (“FCC”) 2017 classification of Broadband as an “information service,” as opposed to a “communications service,” there is some uncertainty as to whether Broadband is among the communication services listed as “critical” services eligible for FEMA public assistance without first seeking a Small Business Association (“SBA”) loan.¹

NRECA has asked us to evaluate whether, and to what extent, a Co-op can receive reimbursement from FEMA’s Public Assistance Division for damage incurred to Broadband.

¹ The Circuit Court of Appeals for the District of Columbia heard oral arguments in February of 2019 in litigation filed by Motiva and others asking the courts to reverse the FCC’s decision to classify Broadband as an information service. No ruling has been issued.

II. EXECUTIVE SUMMARY

In 1996, Congress adopted the Telecommunications Act (“the Telecom Act”) to promote the continued development of the Internet and with the intent to “draw a line between lightly regulated information services and heavily regulated telecommunication services.”² The Telecom Act considered Broadband to be an information service. However, in 2015 the FCC reclassified Broadband as a telecommunications service.³ On December 14, 2017, the FCC issued a Declaratory Ruling, Report and Order, and Order reinstating the information service classification of Broadband, reversing the Commission’s 2015 Order classifying Broadband as a telecommunications service.⁴ The FCC held that it would “continue to define Broadband as a mass-market retail service by wire or radio that provides the capability to transmit data to and from all, or substantially all, Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access services.”⁵ The FCC found the classification of Broadband as a telecommunication service too restrictive, and the re-classification as an information service was necessary to lift the restrictions and promote Broadband investment and growth - furthering the FCC’s goal of making Broadband available to all Americans.⁶ When Broadband was deemed a telecom service, it was subjected to Title II regulation. The FCC found that Title II regulations imposed substantial costs on the internet system, that utility style regulation of Broadband was not appropriate, and that Consumer Protection and Competitions laws sufficiently protected the openness of the internet.⁷

The FCC is the only governmental entity that has classified Broadband as an information service. There are no prior FEMA appeal decisions, Civilian Board of Contractor Appeal decisions, or Judicial rulings that address whether damage to Broadband is eligible for public assistance. There is certainly anecdotal evidence that Broadband is an integral part of the country’s critical infrastructure, and multiple governmental entities, including FEMA, recognize the importance of Broadband in disaster and emergency response. The FCC specifically understands its importance, which is why it has increased its focus on expansion, especially in rural areas, and re-instituted its Task Force with a specific focus on disaster recovery.

Accordingly, and after reviewing the FCC’s Ruling, the Stafford Act, FEMA’s Public Assistance Program & Policy Guide (“PAPPG”), and other documentation from the Department of Homeland Security (“DHS”), we believe that despite the FCC’s classification of Broadband as

² See, Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order and Order, 30 FCC Rcd 17-166 (2017).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ The U.S. Supreme Court took a similar position in *National Cable Telecom. Assn. vs. Brand X Internet S*, 545 U.S. 967 (2005).

⁷ See, FCC Declaratory Ruling, Report and Order and Order, 30 FCC Rcd 17-166 (2017).

an information service, there is a legitimate argument that Co-ops providing Broadband service, or access to it, should be directly eligible for public assistance funding for damage incurred to Broadband infrastructure and related components during a declared disaster based on the eligibility guidance applicable to “critical” communications facilities/services. However, in the event FEMA denies reimbursement for Broadband as a critical communications service, Co-ops may, subject to additional eligibility rules and requirements, be eligible for public assistance under the essential social services qualification.

III. ELIGIBILITY: CRITICAL SERVICES VS. ESSENTIAL SOCIAL SERVICES

The application process and conditions precedent to a Co-op’s eligibility for public assistance funding will depend on whether Broadband is classified as a critical facility/service or a noncritical but still eligible essential social service.

A. Critical Services

FEMA has almost universally accepted that Co-ops are eligible private non-profit (“PNP”) applicants for public assistance funding.⁸ Section 406(a)(1)(B) of the Stafford Act allows PNP applicants that own or operate an eligible facility that has been damaged or destroyed by a major disaster, to receive funding for repair, restoration, reconstruction or replacement of the facility and for associated expenses incurred by the PNP.⁹ In order to apply directly to FEMA for funding, the PNP must provide critical services as defined by Section 406.¹⁰ Critical services include utility and communications services.¹¹ Alternatively, if a PNP provides something other than a critical service, but still an eligible social service, the PNP and facility may still be eligible but the PNP must first apply to the SBA for a Disaster Loan and any otherwise eligible funding is reduced according to the amount of loan proceeds approved.

FEMA’s PAPPG confirms that PNPs are eligible to receive public assistance funding as long as the PNP owns or operates an eligible facility.¹² A facility is directly eligible if it provides a critical service, which is defined as education, utility, emergency or medical.¹³ Services that are considered to be utilities include “communications transmission and switching,

⁸ As NRECA is aware, there have been a few occasions of confusion on FEMA’s part, whereby the revenue generating nature of the Co-op model has raised questions as to whether these entities are eligible “not for profit” entities. In each such occasion, proper education has supported FEMA’s confirmation of the eligible status of these entities.

⁹ See Stafford Act Sec. 406(a)(1)(B), Repair, Restoration, and Replacement of Damaged Facilities (42 U.S.C. § 5172).

¹⁰ See Stafford Act Sec. 406(a)(3)(B), Repair, Restoration, and Replacement of Damaged Facilities (42 U.S.C. § 5172).

¹¹ *Id.*

¹² *See*, FEMA’s PAPPG, pg. 11.

¹³ *Id.*

and distribution of telecommunications traffic.”¹⁴ Co-ops are clearly eligible for public assistance funding for damage to their utility infrastructure. However, there is nothing in the Stafford Act, FEMA’s PAPPG, or any other applicable document, ruling or decision specifically addressing the Broadband eligibility issue in light of the FCC’s re-classification as an information service.

FCC Ruling

In its 2017 ruling, the FCC expressly discusses the status and federal funding eligibility for Broadband providers. Specifically, the FCC states that providers are still eligible to receive federal high-cost-universal service support through the Universal Service Fund (USF), which is administered by the FCC. The USF was established to promote telecommunications services nationwide because of the need to provide a “vital link to emergency services, government services and surrounding communities.”¹⁵ Three of the four USF programs are for subsidizing broadband/internet services.¹⁶ The Lifeline/Link Up program provides discounted Broadband to low-income consumers.¹⁷ The Schools and Libraries program provides discounts to eligible schools and libraries for internet access.¹⁸ And, the Rural Health Care program “seeks to improve the quality of health care available to patients in rural communities by ensuring that health care providers serving those communities have access to telecom and broadband services.”¹⁹ These three programs combined with the FCC’s “intent to promote telecommunication services,” support an argument that, to some extent, Broadband is synonymous with telecommunication services.

Additionally, in its 2018 Broadband Deployment Report, the FCC noted that Section 706 of the Telecommunications Act of 1996 requires it to annually report on “advanced telecommunications capability.”²⁰ Notably, in the Telecommunications Act, Congress defined “advanced telecommunications capability as high-quality capability that allows users to originate and receive high-quality voice, data, graphics, and video services.”²¹ The FCC, in its 2018

¹⁴ *Id.* at pg. 12.

¹⁵ *See*, Federal Communications Commission, Universal Service Support Mechanical Guide (last visited June 25, 2019), <https://www.fcc.gov/consumers/guides/universal-service-support-mechanisms>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See*, Federal Communications Commission, 2018 Broadband Deployment Report (last visited June 22, 2019). <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report>.

²¹ *Id.*

Broadband Deployment Report, acknowledges that both fixed and mobile Broadband meet the statutory definition of “advanced telecommunications capability.”²²

The FCC has also “re-chartered” its Broadband Deployment Advisory Committee²³ for the purpose of accelerating the deployment of Broadband with a specific focus on disaster response and recovery. This Committee was formed to make recommendations to the FCC on how to accelerate the deployment of Broadband by reducing and/or removing regulatory barriers to infrastructure investment and to strengthen existing Broadband across the country.²⁴ The Committee is specifically tasked with how to “prepare for, respond to and recover from disasters that impact Broadband networks; discover new ways of encouraging deployment of high-speed broadband infrastructure and services to low-income communities; and other ways to accelerate deployment of Broadband to all Americans and to close the digital divide.”²⁵

The 2018 Broadband Deployment Report, issued after the FCC 2017 ruling defining Broadband as an information service, somewhat contradicts the Ruling, and at the very least gives strength to our argument, because it acknowledges that Broadband has telecommunications capability. These initiatives and programs are indicative of the FCC’s focus on expanding and funding Broadband, and specifically focus on disaster response and discovery. They also support our argument for public assistance funding eligibility when Broadband is damaged because a Co-ops inability to restore Broadband would significantly impact the FCC’s goal of expanding it.

The Stafford Act

The Stafford Act clearly considers communications to be a critical service; but, it doesn’t specifically state that Broadband is such a “communications” service. Congress acknowledges that the information revolution has transformed how government and the public operates, as well as the infrastructure upon which the country’s defense and security system rely.²⁶ The Stafford Act also emphasizes the importance of protecting critical infrastructure stating that “private business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, energy, ... and transportation sectors.” And, in order to support threat assessments to our critical infrastructure, “modeling, simulation and analysis of the systems

²² *Id.*

²³ NRECA CEO Jim Matheson is a member of the Committee.

²⁴ *See*, Federal Communications Commission, Broadband Deployment Advisory Committee Charter, Section 3.

²⁵ *Id.*

²⁶ *See* Stafford Act Sec. 603(b)(1), Administration of Title (42 U.S.C. § 5195c).

comprising cyber, telecommunications and physical infrastructure is required.”²⁷ The Stafford Act indicates that it’s the policy of the United States that “any physical or virtual disruption of the operation of the critical infrastructures of the United States should be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States” and that actions necessary to achieve that policy be carried out in a public-private partnership involving corporate and non-governmental organizations.²⁸

The Stafford Act does not distinguish between telecommunications and information services as the FCC did in its 2017 Ruling. It instead confirms only that “communications” is an eligible critical service. However, the Stafford Act is clear that Congress has a strong belief that we must prevent or minimize any disruption to critical infrastructure because of the impact on national security. Accordingly, there is a valid argument to be made that Broadband, a form of telecommunication service, is part of the Country’s interdependent network of critical infrastructure and therefore should be eligible for public assistance funding as a vital or “critical” service in the event of damage.

DHS Documentation

FEMA was absorbed by DHS in 2003 and become part of its Emergency Preparedness and Response program. Accordingly, DHS documentation or positions should influence FEMA’s consideration of Broadband’s eligibility for public assistance funding. DHS documentation directly speaks to the importance of interconnectivity of the country’s critical infrastructure - specifically Broadband.

In November 2011, the DHS confirmed the importance of Broadband in regard to emergency communications when it issued its “Interoperability Planning for Wireless Broadband (“the Report”)²⁹ The Report gives several examples of Broadband’s usefulness in emergency situations such as: a firefighter downloading a blueprint of a burning building while in the field, a police officer receiving surveillance video while on the scene of a crime and EMS personnel remotely accessing health records.³⁰ The Report discusses the funding opportunities for Broadband expansion, recognizing its impact. It specifically commends the FCC for creating an interoperable nationwide public safety broadband network, a portion of which was dedicated to broadband public safety communications. Later that year, the FCC established a single

²⁷ *Id.*

²⁸ *Id.*

²⁹ Department of Homeland Security, Interoperability Planning for Wireless Broadband (November 2011)(last visited June 28, 2019), https://www.dhs.gov/sites/default/files/publications/interoperability_planning_wireless_broadband_web_111711.pdf

³⁰ *Id.*

nationwide license - the Public Safety Broadband License.³¹ The FCC anticipated and desired that over time agencies would migrate all of their public safety communications to Broadband technology.³² The Report stated that FEMA had also embraced the importance of Broadband use in emergency management by offering grant opportunities that fund broadband activities allocating \$350,100,000 in grant funding.³³ And, DHS/FEMA offered other grant options as well, including an Interoperable Emergency Communications grant to improve interoperable emergency communications, including those in response to natural disasters.³⁴ Although this Report was issued in 2011, it is even more applicable today with the increased use of Broadband in all aspects of life, especially emergency response.

In June 2017, DHS issued its Power Outage Incident Annex to the Response and Recovery Federal Interagency Operational Plans: Managing the Cascading Impacts from a Long-Term Power Outage (“the Annex”), which addresses managing the cascading impacts from a long-term power outage and further confirms the importance of Broadband in regard to disasters.³⁵ The Annex recognizes that the nation’s energy sector “provides for and relies upon the Nation’s transportation, water, information technology, communications, finance, government and other critical infrastructure, and that likewise, critical infrastructure (“CI”) sectors reciprocally depend on energy”.³⁶ In other words, all sectors of CI are inter-related and dependent upon one another.

The Annex identifies specific sector interdependencies stating that the energy sector relies on communications CI for voice and data services for management, response and restoration activities.³⁷ The Annex also identifies “lifeline functions” essential to the operation of most CI sectors, which means they provide indispensable services that enable the continuous operations of critical business and government functions, and if not promptly restored, risk human health and safety or national security. These functions include communications.³⁸ The Annex identifies a communications network as wireline, wireless, cable, satellite and broadcast.³⁹ DHS acknowledged that there are multiple modeling and situational awareness tools

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Department of Homeland Security, Power Outage Incident Annex to the Response and Recovery Federal Interagency Operational Plans: Managing the Cascading Impacts from a Long-Term Power Outage, (June 2017) (last visited June 28, 2019), [https://www.fema.gov/media-library-data/1512398599047-7565406438d0820111177a9a2d4ee3c6/POIA_Final_7-2017v2_\(Compliant_pda\)_508.pdf](https://www.fema.gov/media-library-data/1512398599047-7565406438d0820111177a9a2d4ee3c6/POIA_Final_7-2017v2_(Compliant_pda)_508.pdf).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

that are impacted when Broadband is unavailable such as: EARSS, HHS employer Mapping Tool, EFPAT, EPRAM, and HAZUS-MH.⁴⁰

Further, the Annex confirms that the Federal Government may provide assistance, and it is anticipated that federal assistance under the Stafford Act will be sought.⁴¹ The Annex specifically discusses assistance provided under the Act to Co-Ops. It also extends assistance to for-profit utilities stating that “in extremely rare circumstances, a private, for-profit entity may be the beneficiary of federal assistance when it is determined that such assistance is necessary to enable that entity to continue to provide a critical service to the community at large.” The report specifically states that a for-profit utility may get federal support for a limited time period for life-saving or life-sustaining missions. So, to the extent that a Co-op’s Broadband usage is necessary to provide assistance to life saving and/or sustaining activities, it may be able to receive public assistance money even if FEMA somehow determined that the Broadband aspect of the Co-op’s services comes from a for-profit entity.⁴²

In sum, DHS has demonstrated that communications, particularly Broadband, is a lifeline function essential to the continuous operation of CI, which should further a Co-op’s argument in support of public assistance funding for Broadband damage.

FEMA Documentation

While the PAPPG doesn’t specifically address Broadband damage, it refers to payment for internet service. Specifically, FEMA will provide public assistance funding to “State, Territorial, Tribal and local government Applicants for costs related to emergency sheltering for survivors, which typically occur in schools, churches, community centers, etc.”⁴³ Eligible costs related to sheltering include internet services.⁴⁴ While providing internet service to shelters is not the same as restoring damaged Broadband provided by a Co-op, it nonetheless emphasizes the importance of Broadband to post-disaster communications and FEMA’s treatment of Broadband as an eligible critical service.

Broadband is also critical to FEMA for national emergency alerts through the Integrated Public Alert and Warning System (IPAWS) wherein FEMA is charged with communicating with the public regarding national emergencies before, during and after they occur. IPAWS uses wireless emergency alerts, and internet services as alert dissemination channels, which are private sector systems.⁴⁵ Additionally, IPAWS’ Emergency Alert System uses wireline services

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See, FEMA’s Public Assistance Program & Policy.

⁴⁴ *Id.*

⁴⁵ See, FEMA, IPAWS Architecture: “a National System for Local Alerting,” (last visited June 19, 2019),

to disseminate warnings and its Wireless Emergency Alert disseminates alerts/warnings to cell phones and other mobile devices. And, the IPAWS “All Hazards Feed,” known as the public feed, allows for services, applications and devices to monitor and retrieve alerts and warnings over an internet connection.⁴⁶

There are several other instances where FEMA information indirectly supports Broadband reimbursement. One article written about FEMA and its employee, Manny Centeno, discuss the importance of FEMA restoring internet communications after storm events.⁴⁷ Specifically, Mr. Centeno, project manager with FEMA’s IPAWS Program, was deployed to St. Thomas after Hurricane Irma and to Puerto Rico after Hurricane Maria in 2017. He stated that while Puerto Rico’s wireless providers and internet service providers (ISPs) did a very good job restoring communications, FEMA and the FCC are supporting rebuilding and enhancing Puerto Rico’s telecommunications infrastructure, indicating that public assistance dollars may flow to ISPs.⁴⁸

Additionally, FEMA’s emergency support function is to support and coordinate federal actions to assist industry in restoring communications infrastructure.⁴⁹ Specifically, Emergency Support Function #2 speaks to FEMA’s support, stating that FEMA will:

- Coordinate with telecommunications and information technology industries
- Restore and repair telecommunications infrastructure
- Protect, restore and sustain national cyber and information technology resources
- Oversee communications within the Federal incident management and response structures

FEMA’s own use of Broadband weighs heavily in support of it being a critical service eligible for public assistance.

Congress also recognized and confirmed the importance of Broadband use in emergencies when it enacted legislation establishing the First Responder Network Authority (“FirstNet”). FirstNet is an independent authority within the National Telecommunications and Information Administration focused on creating a nationwide public safety broadband network that will allow the quick exchange of large amounts of data across long distances, allowing access to video, mapping, GPS applications and more. FirstNet is also involved in telemedicine

<https://www.fema.gov/ipaws-components>

⁴⁶ *Id.*

⁴⁷ *See*, <https://www.hstoday.us/federal-pages/dhs/fema-dhs-federal-pages/hstoday-profile-femas-manny-centeno-resurrects-communications-after-catastrophe/>.

⁴⁸ *Id.*

⁴⁹ *See*, <https://emilms.fema.gov/IS230c/FEM0104160text.htm>.

services, which are being used in rural areas, where Broadband is most likely being supplied by Co-ops.⁵⁰

FirstNet came about as a result of the concern that first responders from different jurisdictions were not able to communicate during the September 11th attacks. The radio systems that police, fire, and paramedics relied on could not easily operate across agencies, and land and mobile phone lines were overwhelmed by a high volume of calls.⁵¹ The 9/11 Commission Report ultimately identified gaps in emergency communications.⁵² As a result, Congress created FirstNet. FirstNet consulted with regional, state and local jurisdictions to build out the network so that law enforcement, firefighters, paramedics and other emergency responders in every state will have a “single, interoperable platform.”⁵³ This is a further indication that Congress, and now multiple public agencies, understand the importance of Broadband, bolstering the argument for it being labeled a critical service.

B. Essential Social Services

In the event that FEMA were to determine Broadband as outside the definition of a directly eligible “critical” service, the Stafford Act may nonetheless allow Co-ops, as eligible PNP applicants, to receive public assistance funding for Broadband restoration based on designation as an eligible non-critical, but essential, social service available to the general public. In this instance, Co-ops would need to first apply for a Disaster Loan from the SBA and be denied or agree to a reduction in otherwise eligible funding in an amount equal to the maximum amount of any approved SBA loan.⁵⁴ In this situation, the Co-op would need to successfully substantiate that it is (or was) providing Broadband as an essential social services to the general public and meet several criteria, namely that the facility use is not:

- Limited to certain individuals or group of individuals who have a financial interest in the facility, such as a condo association;
- Limited to certain classes of individuals;

⁵⁰ See, <https://www.lawfareblog.com/state-firstnet-americas-public-safety-broadband-network>

⁵¹ <https://www.firstnet.gov/about/history>

⁵² <https://www.firstnet.gov/about/history>.

⁵³ Rozens, Tracy (2016-04-25). “FirstNet looks ahead to selecting private partner to build first public safety communications network” (<https://homelandprepnews.com/countermeasures/18680-firstnet-looks-ahead-selecting-private-partner-build-first-public-safety-communications-network/>).

⁵⁴ See, Stafford Act Sec. 406(a)(3)(A)(ii), Repair, Restoration, and Replacement of Damaged Facilities (42 U.S.C. § 5172).

- An unreasonably restrictive geographical area like a neighborhood within a community.⁵⁵

The facility access can't be restricted by using gates or other security systems. Additionally, if membership fees are charged they must be nominal, waived if someone can't pay, can't be so high that they preclude the use by a large part of the communication and don't exceed what's appropriate based on other facilities providing similar services.⁵⁶

The majority of these requirements would not technically apply to Broadband or presumably would be met by the fees charged by Co-ops. And, a review of the PNP eligible, non-critical, essential social-type services set forth in the PAPPG indicates that Broadband would almost certainly qualify; note one eligible non-critical service is "public broadcasting that monitors, receives, and distributes communication from the Emergency Alert System."⁵⁷

IV. OWNERSHIP OF INSTALLED BROADBAND

Note, a pre-requisite to public assistance funding eligibility, under either a critical service designation or non-critical but essential social service designation, is that an eligible applicant have legal responsibility for restoration of the facility following a declared disaster event. Ownership of Broadband is therefore relevant in the event there is a question of legal responsibility due to some type of shared ownership or lease arrangement, or can also be important if the ownership of it impacts the non-profit status of the Co-op. If a Co-op is leasing infrastructure space to a third party, or profiting by selling Broadband, the legal responsibility could be questioned or it may no longer qualify as an eligible non-profit applicant.

Additionally, if a Co-op's Broadband damage is for whatever reason determined by FEMA to be ineligible for public assistance funding, then the Co-op's application for funding of otherwise clearly eligible utility damages may be impacted because FEMA will look at "eligible activity" due to the mixed use of the infrastructure. Therefore, and to the extent possible, it is important that utility usage be the "primary use" of a Co-op's infrastructure/facilities - meaning that a Co-op dedicates over 50 percent of its infrastructure to utility-related services or can document that the infrastructure is used for at least 50% of the time for utility service. If so, FEMA will consider damages to the entire facility, not just to the portion occupied by the eligible service. However, assistance would be pro-rated based on the percentage of space used for eligible purposes.

If FEMA determines that Broadband is ineligible, there is some concern regarding mixed-use space and a space used by multiple entities. With mixed use, when some space is used for eligible and ineligible services, the primary use is the use dedicated to more than 50% of the operating time in the shared physical space. Here, if electricity and Broadband are equally

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See*, FEMA's Public Assistance Program & Policy.

sharing a Co-op's infrastructure, then the eligible service (utility) isn't using it more than 50%. So, FEMA won't include that infrastructure in evaluating the primary use. In other words, Broadband installation and use could cause the electrical use of the space to be ineligible.

In the event a Co-op leases its space to another entity that installs the Broadband, and especially if the other entity is for-profit or otherwise ineligible for public assistance funding, the multiple entity issue must be considered. The Co-op must still meet the primary use requirements to be eligible - more than 50% must be dedicated to the utility function. So, documentation of primary use is critical. In this situation, Co-ops must consider their lease language when leasing their infrastructure/facilities to third parties. Specifically, if the lease between the Co-op and the third party requires the Co-op to repair the damage to Broadband, or if it is silent, FEMA will consider the owner of the eligible facility responsible for restoration cost. However, if the partner is legally responsible for restoring the Broadband infrastructure, not only will that specific infrastructure be ineligible for public assistance funding, it could also impact eligibility of the otherwise eligible lines if primary use dips below the mandatory minimum threshold.

Also, as discussed in DHS' *Power Outage Incident Annex*, "Co-ops are private, independent, not-for-profit utilities owned by the customers they serve, and any revenue generated in excess of operating costs must be returned to the Co-op members."⁵⁸ Accordingly, if a Co-op was providing Broadband on a cooperative basis, then any excess operating revenue would be returned to the members, either in the form of patronage capital or stable rates, and the Co-op would remain a non-profit. Co-ops must consider this and document the extent to which and process used to assess and distribute amounts received for Broadband services.

V. CONCLUSION/RECOMMENDATIONS

In determining whether the FCC Ruling impacts a Co-op's ability to receive public assistance funding for Broadband damage, we reviewed the FCC Ruling, the Stafford Act, FEMA's PAPPG and documentation from DHS, among other documents. None of the documentation reviewed directly addresses the Broadband reimbursement issue. However, the documentation makes clear that Broadband and interconnectivity between critical infrastructure is very important to FEMA, DHS and the FCC, especially when it comes to disaster and emergency response. Accordingly, and while the FCC rule that Broadband is an information service gives FEMA room to decide that Broadband is not among the communications services listed as "critical" services eligible for FEMA assistance, we believe there is ample support for FEMA to take a broader view of Broadband and to confirm it is an eligible critical service. Specifically:

- Broadband is an indispensable part of electric utility operations.

⁵⁸ Department of Homeland Security, *Power Outage Incident Annex to the Response and Recovery Federal Interagency Operational Plans: Managing the Cascading Impacts from a Long-Term Power Outage*, (June 2017) (last visited June 28, 2019), [https://www.fema.gov/media-library-data/1512398599047-7565406438d0820111177a9a2d4ee3c6/POIA_Final_7-2017v2_\(Compliant_pda\)_508.pdf](https://www.fema.gov/media-library-data/1512398599047-7565406438d0820111177a9a2d4ee3c6/POIA_Final_7-2017v2_(Compliant_pda)_508.pdf).

- It is imperative to emergency operations – allowing FEMA, DHS and other emergency agencies, to maintain contact with residents during and after a disaster, by internet (the use of social media) and VOIP. It also allows hospitals to download medical records necessary for treatment and assists firefighters with fighting wildfires.
- Broadband can impact the education system because a lack of, or limited, Broadband can significantly impact children’s ability to learn.
- It is necessary for FEMA’s IPAWS, and other emergency alert programs.
- Eligibility for public assistance funding in the event of disaster will further the FCC’s goal of internet access to more people.

However, in light of the FCC’s ruling, and to be proactive in the event a public assistance request is denied, we recommend that Co-ops consider the following when determining whether to provide Broadband and to document the usage of Broadband on their systems:

1. Will the Co-op, a wholly-owned subsidiary of the Co-op, or a completely separate entity own the Broadband?
2. If the Broadband is owned by a Co-op subsidiary, is the subsidiary set up as a private, non-profit subsidiary, or as a “for-profit” subsidiary?
3. If the Broadband is owned by a completely separate entity, is that entity set up as a private, non-profit entity, or as a “for-profit” entity, separate from the Co-op?
4. Is any part of the Broadband leased by the Co-op and if so, who is responsible for maintenance and/or damages, and is that set forth in the lease?
5. Does the Co-op or its subsidiary provide internet/broadband/VOIP services directly to member-consumers; or are the internet/broadband/VOIP services provided to member-consumers by lessees of the Broadband deployment system?
6. If the Co-op only owns a percentage of the Broadband, what is that percentage?
7. What percentage of the Broadband is being used, or planned to be used, by the Co-op for its electric system purposes, or electric system communications purposes?
8. What percentage of the system, if any, is used for emergency broadcasting or other emergency communication services? For example, IPAWS, Amber Alert, other emergency communications services?

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