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To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – November and early December 2017

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### **Infrastructure Legislation**

Expectations that the Trump Administration's infrastructure plan will propose significant direct investment in broadband took a hit recently when White House advisor Grace Koh (special assistant to the president for technology, telecom, and cybersecurity policy on the White House National Economic Council) suggested that the broadband component of the plan will focus mostly on removing regulatory barriers, such as streamlined permitting. She did not rule out the possibility of some direct funding for broadband infrastructure through the farm bill. Ms. Koh made her comments at a Telecom Policy event here in DC in early December. Ms. Koh also confirmed that the Administration's infrastructure plan is targeted for release in the first quarter of 2018 "or sooner."

### **NTIA Update**

NTIA administrator David Redl's first major speech since being confirmed focused on spectrum policies and 5G wireless broadband deployment. SHLB is exploring whether Mr. Redl would be interested in addressing SHLB membership.

Upcoming NTIA events:

- Wednesday, January 17, 2018, webinar: *Innovative Funding Solutions for Digital Inclusion Programs*. Registration [here](#).
- The archive for previous webinars is available [here](#).

NTIA's December Broadband newsletter has not yet been posted. The November newsletter is available [here](#).

## **Federal Communications Commission**

### **Section 706 Inquiry**

Comments have been submitted on the [Notice of Inquiry](#) (NOI) on “whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” This is the proceeding in which the Commission previously defined fixed broadband as 25 Mbps download and 3 Mbps upload (“25/3”) for purposes of determining availability. Although proposing to keep that definition in place, the Commission sought comment on “other potential benchmarks” for fixed broadband. SHLB’s comments are available [here](#).

Another issue in this proceeding is whether the Commission will find that Americans need access to both wireline and wireless advanced telecommunications capability, rather than one or the other. Democrats at the FCC and on Capitol Hill have expressed concern the Commission will find that 10 Mbps is an acceptable threshold for determining the availability of advanced telecommunications capability – a finding that might support a conclusion that *mobile*<sup>1</sup> wireless solutions meet that standard. Chairman Pai has responded to these concerns by asserting that the Commission is not considering whether to reduce the 25/3 availability benchmark to 10/1.

### **Broadband Deployment Advisory Committee (BDAC)**

Preliminary reports from each BDAC working group (WG) were presented at the November 9 BDAC meeting here in DC where Commissioners Clyburn and O’Rielly both spoke. An archived video of that meeting is available [here](#). Local governments continue to argue for greater role in BDAC deliberations reflecting concerns that the BDAC will recommend greater federal preemption of local rules. The next and final BDAC meeting will likely be January 23-24 here in DC at which report recommendations and model codes will be finalized.

You will recall the [BDAC](#) has four WGs: ([Competitive Access to Broadband Infrastructure; Removing State and Local Regulatory Barriers](#) (Mark Johnson member); [Model Code for Municipalities; and Model Code for States](#)).

### **E-rate**

SHLB held an E-rate fiber deployment workshop on December 14, 2017 at which the experiences of Missoula (MT) County Public School fiber project were highlighted. SHLB members can access the slides [here](#). SHLB is fostering dialogue with both USAC and FCC staff to better understand the

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<sup>1</sup> This represents a correction from previous versions of this memo which indicated that *fixed* wireless was feared as a potential replacement.

E-rate fiber policies being implemented under the new administration (which has yet to acknowledge that new policies are in effect).

With respect to the comment cycle this fall on the sufficiency of Category 2 (C2) budgets, in late November 11 Democrat Senators, led by Sen. Markey (D-MA), wrote Chairman Pai asking that no changes to E-rate C2 budgets be made prior to FY 2019. Among other things, they explained:

While we appreciate the Bureau's eagerness to begin this evaluation well in advance of the deadline [for reporting on C2 budgets by FY 2019 as required in the E-rate Modernization Order], we believe it is premature to evaluate the adequacy of the modernization, given its recent implementation and utilization. The expanded funding for category two services has only been available to schools and libraries for three filing periods. Applicants are given the flexibility to file for category two services anytime in the five-year period and may be planning to tap these resources later in the five-year window, making it impossible to evaluate the program's effectiveness at this time. We urge the Commission to not prematurely make modifications to this important source of funding, which helps ensure all Americans — whether urban or rural, rich or poor — remain connected and competitive in this global economy.

### **Rural Health Care Program**

The Commission on November 22 released a draft Notice of Proposed Rulemaking (NPRM) and Order in the Rural Health Care program. The Commission subsequently approved the item on 5-0 vote at its December 14, 2017 meeting. The NPRM seeks comment on numerous potential changes to the Rural Health Care program including a potential cap increase, and ways to improve the efficiency of the program with a focus on ensuring efficient purchasing in the Telecommunications Program. Initial comments to the NPRM will be due 30 days after the NPRM is published in the Federal Register; replies will be due 30 days after that.

The Order provides cap relief on a one-time basis for FY 2017 (July 1, 2017 to June 30, 2018) by making unused RHC funding from prior years (*i.e.*, "rollover" funds) available. It is unknown whether the amount of rollover funding available now is significant. Unfortunately, notwithstanding opposition from SHLB, MiCTA and others, the Commission ordered that individual applicants will receive the benefit of these rollover funds ahead of consortium applicants. Because we know that FY 2017 applications for support have exceeded the cap, that means any rollover funding will be used to offset coming *pro rata* reductions for individual applicants first. Only if there is money left over will consortium applicants have their *pro rata* reductions offset. The Commission also will allow service providers to reduce their pricing on a one time basis (if they choose) to cancel out any *pro rata* reductions. There will be a 30-day period

after the NPRM and Order is published in the Federal Register to ask the FCC to reconsider particular parts of either.

Next month we will include a more detailed summary of the NPRM to help you formulate potential comments you might wish to file.

### **FCC Connect2Health Task Force**

On December 7, 2017, Connect2Health Task Force announced a joint project with the National Cancer Institute (NCI) that will study how increasing broadband access and adoption in rural areas (looking at Appalachia) “can help address the burden of symptom management for cancer patients.” Details of the program, called L.A.U.N.C.H. (Linking & Amplifying User-Centered Networks through Connected Health): A Demonstration of Broadband-enabled Health for Rural Populations in Appalachia, can be found [here](#).

### **Educational Broadband Service (EBS)**

Sprint and several school districts recently filed separate *ex partes* in the [EBS docket](#). The Sprint filing detailed its plans for greater utilization of EBS spectrum bands and urged the Commission to support the WCA consensus plan from 2014 (see background below). School districts filing comments since mid-November include: Odin PSD, Marion County, IL; Hackett SD, Sebastian County, AR; East Lycoming SD, Lycoming County, PA; and Amelia County PS, Amelia County, VA.

**EBS Background:** Many school systems across the country hold spectrum licenses for EBS. Historically, this spectrum had been used for “wireless cable TV” but was later reconfigured for wireless broadband. School systems that hold such licenses in many cases lease spectrum to commercial providers in exchange for last-mile broadband Internet access and a revenue stream. Industry – Sprint in particular – uses the spectrum (in the 2.5 GHz range) to provide services. Unfortunately, the Commission stopped accepting new applications for EBS licenses in the mid-1990s. Apparently, where the FCC has issued licenses more recently, it did so on the condition that excess capacity spectrum *could not* be leased to commercial entities.

According to a [recent letter to the Chairman filed by the WCA](#), approximately 4,000 mostly rural counties across the U.S. have at least one EBS channel available across the entire county. WCA is seeking issuance of a rulemaking that would implement a compromise reached in 2014 between industry and educational interests to make existing unused EBS spectrum available to educators with leasing once again to be allowed to commercial providers.

## **Net Neutrality/Title II**

As widely expected, at its open meeting on December 14, the Commission on a 3-2 party-line vote, approved the “Restoring Internet Freedom” (RIF) Order which reversed the 2015 Open Internet decision, thereby eliminating existing net neutrality prohibitions against blocking, throttling, and paid prioritization. The RIF Order also eliminated the “general conduct rule” catch-all standard against unspecified harmful conduct. In eliminating these 2015 rules, the Commission concluded (1) it lacks legal authority to establish net neutrality rules and (2) even if it had such authority, the rules were unnecessary and counterproductive. In their place, the Commission implemented “transparency” rules that require ISPs to disclose their network management practices to consumers, and maintained that competition, and the Federal Trade Commission (and its state equivalents), were well-positioned to ensure ISPs do not harm consumers by engaging in anti-competitive or other harmful behavior (such as privacy violations).

More specifically, the Order:

- Reclassified broadband Internet access service (BIAS) as an “information service” (instead of a “telecommunications service”) subject only to “light touch” regulation pursuant to Title I of the Telecommunications Act of 1934 (“the Act”):
  - Similarly reclassified Mobile Broadband Internet Access as Private Mobile Service not subject to common carrier regulation under Title II of the Act;
  - Concluded that both of these reclassifications reflect the best reading of the text and structure of the Act;
  - Concluded that Section 706 of the Telecommunications Act of 1996 (the “1996 Act”) – which encourages the deployment of “advanced telecommunications capability to all Americans” – is merely “hortatory” and thus does not provide an alternative basis for authority to implement enforceable net neutrality rules;
  - Continues to preempt states from regulating BIAS or imposing their own net neutrality regimes (although states can enforce their own consumer protection and antitrust rules).
- Separately concluded that public policy considerations also support reclassification:
  - Paid prioritization can be beneficial; blocking and throttling are unlikely to occur; in either case, transparency and competition in the BIAS market place will constrain most potentially harmful conduct;

- To the extent harmful conduct does take place, existing consumer protection and antitrust laws (under the jurisdiction of the states and the FTC) are better suited to protecting the openness of the Internet;
- Title II classification of BIAS provides few benefits given the existence of these alternative enforcement mechanisms, while imposing substantial costs on the Internet ecosystem.

The focus now will shift to the courts, where opponents will seek to stay implementation of the Order, and to Congress which all parties recognize is the only entity that can definitively resolve this long-running issue.

### **Microsoft White Space Rural Broadband Initiative**

We noted in July that Microsoft announced a \$10 billion TV White Spaces initiative aimed at bringing broadband to two million rural residents over the next five years. Microsoft contends that a blended use of different technologies to include TV White Spaces is the most cost-effective way to bring robust broadband to 20 million rural residents. A Microsoft [whitepaper](#) describing the initiative is available [here](#), with additional information from Microsoft available [here](#). [Disclosure: Attorneys in our firm are representing Microsoft at the FCC seeking Connect America and spectrum policies that will support the initiative.]

In recent comments in the Connect America Phase II Auction proceeding, Microsoft explained that it will have 12 projects up and running in 12 states in the next 12 months. “Microsoft’s goal is not to enter the telecommunications business itself or even to profit directly from these projects. Rather, Microsoft will invest in the upfront capital projects needed to expand broadband coverage, seek a revenue share from operators to recoup its investment, and then use these revenue proceeds to invest in additional projects to expand coverage further. As part of this effort, Microsoft will also license intellectual property for free and provide technical training.” Microsoft also noted that it has TV White Spaces pilot projects underway now in rural areas of Virginia, Georgia, Maine, Kansas, and Michigan.