

Jeffrey A. Mitchell
8300 Greensboro Dr.
Suite 1200
Tysons, VA 22102

NOT ADMITTED IN VA
jmittell@fcclaw.com
(703) 584-8685
WWW.FCCLAW.COM

LLGS | LUKAS
LAFURIA
GUTIERREZ
& SACHS LLP

January 19, 2018

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – December and early January 2018

Infrastructure Legislation

We expect the long-awaited Trump infrastructure plan will be discussed during the state of the union address on January 30. On January 17 a bi-partisan letter (from Senators Amy Klobuchar (D-MN), Shelley Moore Capito (R-WV), Angus King (I-ME), John Boozman (R-AR), and Heidi Heitkamp (D-ND) – co-chairs of the bipartisan Senate Broadband Caucus) urged the President to include dedicated, stand-alone funding for broadband deployment in its infrastructure proposal. As we have discussed previously, whether the Trump plan will include dedicated funding for broadband, or instead general infrastructure funding that states *can* use for broadband, is one of the unknowns.

On the Hill, House Subcommittee on Communications and Technology members recently introduced a host of infrastructure bills, many of them “message” bills designed to garner support and stake out positions for eventual negotiations. These include:

- Several bills that would reduce regulatory barriers to broadband deployment, including helping streamline obtaining rights-of-way through federal lands and property (details [here](#));
- Three bills focused on rural broadband deployment (details [here](#)):
 - The “MAPPING NOW” Act, which would resume and improve NTIA broadband mapping efforts;
 - The “WIFI Study” Act, which would study using unlicensed spectrum to help support internet traffic management and the potential for gigabit WiFi using spectrum below 6 Ghz; and
 - The “PEERING” Act – noted by Quilt members earlier this week – which would support building or expanding Internet peering locations in underserved areas. This bill would also allow E-rate and RHC funding for connections to, or maintaining a point of presence at, one of these peering locations.

NTIA Update

In remarks at the Consumer Electronics Show in Las Vegas in early January, NTIA administrator David Redl focused on spectrum issues but also noted the importance of physical infrastructure to support wireless networks, including fiber backhaul and infrastructure for deploying small cells, such as utility poles and rooftops. In discussing the important federal role in infrastructure deployment, he noted, among other things, that “the federal government is the single largest land owner in the country, and it can boost deployment immensely by actively reducing barriers to deploying on public lands and government-owned buildings”.

John Windhausen from the Schools Health & Libraries Broadband (SHLB) Coalition is organizing a meeting soon with Mr. Redl and has asked whether any SHLB members would like to accompany him for that meeting.

NTIA public facing events and newsletters appear to have paused, which is not unusual as the new administrator is likely inventorying priorities. The November newsletter is available [here](#). Recent NTIA events:

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

Federal Communications Commission

Section 706 Inquiry

On January 18 the Chairman’s office announced circulation of a draft 2018 Broadband Deployment report (in response to the [Notice of Inquiry](#) (NOI) on “whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”). According to the Chairman’s summary, the draft report concludes:

- 25 Mbps/3 Mbps remains an appropriate measure by which to assess whether a fixed service provides advanced telecommunications capability;
- Mobile services are not a full substitute for fixed services;
- As a result, the Commission must review progress in both the mobile broadband and fixed broadband markets;
- The FCC has taken many steps to encourage broadband deployment since the last Section 706 report, including:
 - high-cost universal service reforms;
 - business data services modernization;
 - authorizing new uses for wireless spectrum;

- reversing the Title II Order (aka net neutrality).
- Based on these efforts, the FCC concludes it is meeting its statutory mandate to encourage the deployment of broadband on a reasonable and timely basis;
- This finding does not undermine the FCC's continued commitment to closing the digital divide and broadband deployment remains a "top priority."

The finding that the FCC is meeting its statutory mandate for deploying advanced telecommunications is a reversal from the prior Commission. Commissioners Rosenworcel and Clyburn criticized the draft, each noting the Commission's own data shows that 24 million Americans do not have access to a minimum of 25/3 broadband. The new report will likely be voted on at the February open meeting.

Broadband Deployment Advisory Committee (BDAC)

The next BDAC meetings will be January 23-24 here in DC at which report recommendations and model codes from each of the four working groups (WGs) are expected to be finalized. Details on the meeting can be found [here](#). Like prior meetings, it will be webcast. Preliminary reports from each WG were presented at the November 9 BDAC meeting (archived video available [here](#)).

E-rate

SHLB has secured a small meeting with FCC staff in late January to help staff better understand the issues facing E-rate applicants pursuing funding for fiber. This is a smaller meeting than had originally been sought, but it is an opportunity to ensure staff appreciates the issues from applicants' perspectives. While a companion USAC meeting was planned, the timing of the USAC quarterly board meetings makes a meeting with USAC staff is unlikely, at least in conjunction with the FCC meeting.

The FY 2018 E-rate window for filing FCC Form 471s (funding requests) opened January 11 and will close March 22.

Rural Health Care Program

On December 14, 2017, the Commission approved a [Notice of Proposed Rulemaking \(NPRM\) and Order in the Rural Health Care program](#). 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 on the NPRM are due Friday, February 2, with replies due Monday, March 5.*

The Order provided limited cap relief for FY 2017 (July 1, 2017 to June 30, 2018) by making unused RHC funding from prior years (*i.e.*, “rollover” funds) available. USAC has still not announced when FY 2017 funding decisions will be released, and we do not know how much rollover funding is available. As noted last month, notwithstanding opposition from SHLB, MiCTA and others, the Commission ordered that individual health care provider applicants get the benefit of rollover funds ahead of health care providers that applied as part of consortia.

This issue of “priority” is very important and is also addressed in the NPRM. (E-rate participants will remember the priority system in that program where, as Priority 1 funding requests grew, Priority 2 applicants eventually received little if any funding.) Under current RHC rules, in the event of a funding shortfall, all applicants receive an equal *pro rata* reduction in their funding requests (a “haircut”), based on the percentage difference between total approved funding requests and available funds. If FCC implements priority in the RHC program, based on questions in the NPRM, they are considering the following (or some combination thereof):

- rural over non-rural
- extreme rural over less rural
- Tribal over non-tribal
- Telecom Program over Healthcare Connect Fund
- Individual applicant over consortium applicant

Prioritized applications could get funded at 100% or perhaps be limited to a maximum “haircut” – for example, no more than 5%. They are also considering adopting a different definition of “rural” that might include a new category of extreme or frontier rural. In addition, to these issues, the Commission is seeking comment on (among other things):

- raising the overall program cap from the current \$400 million (including the \$150 million HCF cap);
- making changes to the Telecom Program to ensure more efficient purchasing decisions;
- applying E-rate gift and consultant rules to the RHC program;
- changing the definition of “cost effectiveness” which could affect the bid evaluation and selection process;
- requiring more data to be submitted to USAC on usage and having more data transparency for the program;
- streamlining the program application process.

SHLB will be filing comments on behalf of several HCF consortia, including MCNC and Arkansas. (I have been retained by SHLB to help with this effort.)

FCC Connect2Health Task Force

As reported last month, 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)

Also as reported last month, in early December, Sprint and several school districts 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 [letter to Chairman Pai 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

The next steps on net neutrality will be in Congress and the Courts. In Congress, Democrats have enough support in the Senate to force a vote on a Congressional Review Act resolution to nullify the FCC’s action. Although this would force Senators in an election year to go on record concerning the Commission’s net neutrality action, without the votes in the House, the effort will

likely not succeed in reversing the FCC action. This effort could also spur the Republicans to try to pass their own Net Neutrality legislation.

In the House, just before the holidays, Marsha Blackburn (R-TN), chair of the communications and technology subcommittee introduced the “Open Internet Preservation Act” which would codify prohibitions on blocking and throttling, would expressly authorize universal service support for broadband Internet access services, but would effectively preempt the FCC from restricting paid priority arrangements (among other things). This bill is unlikely to garner enough support to move forward, but it is the Republican starting point for negotiations.

In the courts, parties opposing the Commission’s net neutrality reversal – including attorneys general for 21 states, Mozilla and several nonprofit groups – have filed several “protective” petitions for review with the DC Circuit Court of Appeals. Technically, the appeal deadline is triggered by publication of the Commission’s order in the Federal Register and the parties will likely file again once that occurs. (It is unknown when Federal Register publication will occur.) Ultimately, there will be a judicial “lottery” to determine which Court of Appeals will hear the case.

States such as California and New York are considering enacting their own net neutrality legislation, something clearly pre-empted in the Commission’s order. If these laws pass, ISPs would likely challenge them in court on those grounds.

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](#).

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.