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To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – February and early March 2018

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### **Infrastructure Legislation**

The long-awaited Trump infrastructure plan was released on February 12, 2018. A high-level summary is below. As the focus now shifts to Congress, the Senate will be holding hearings the week of March 12 on the Trump plan. The House communications and technology subcommittee is reportedly going through the 25 broadband infrastructure-related bills that were the subject of a recent hearing<sup>1</sup> to try and craft a bi-partisan Congressional infrastructure package.

Senate Democrats unveiled their proposed \$1 trillion infrastructure package in early March which includes \$40 billion in direct spending for “universal, high-speed Internet.” The package would be paid for by reversing some of the recent tax cuts. House Democrats had released their \$1 trillion infrastructure plan in early February.

With respect to the Trump plan to give states discretion as to how much infrastructure funding will be devoted to broadband, Congressional Republicans have not yet suggested a different approach. In a recent House hearing on NTIA, Congressman Pallone (D-NJ) emphasized that Democrats strongly favor NTIA as the vehicle for distributing their proposed \$40 billion in direct broadband infrastructure funding.

Below is a high-level summary of the Trump plan:

- \$200 billion over 10 years – intended to leverage \$1.5 trillion in total investments over that period

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<sup>1</sup> We previously highlighted several of these bills:

- The “MAPPING NOW” Act, would resume and improve NTIA broadband mapping efforts;
- The “WIFI Study” Act, 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 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.

- \$100 billion for an “Incentives Program” to match dedicated funds from States, localities, and the private sector
- \$50 billion for a “Rural Infrastructure Program” to rebuild and modernized infrastructure
- \$20 billion for a “Transformative Projects Program” for “bold and innovative projects” that might not attract private investment (e.g., Airports)
- \$20 billion to expand existing credit and utility lending programs for infrastructure
- \$10 billion for a “Federal Capital Revolving Fund” to purchase real property for Federal government where more cost effective than leasing.
- The \$100 billion *Incentives Program* will be application-driven:
  - An addendum to the Trump 2019 budget proposal offers the following additional detail:
    - “The Department of Transportation (DOT), United States Army Corps of Engineers (USACE), and Environmental Protection Agency (EPA) will administer the [\$100 billion Infrastructure Incentives] program. Other Federal agencies seeking to issue grants under this program within their areas of jurisdiction may petition DOT, USACE, or EPA for a transfer of funds. Entities eligible include, but are not limited to, States, the District of Columbia, tribal governments, U.S. Territories, metropolitan planning organizations, units of local governments, special purpose districts or public authorities responsible for maintaining infrastructure, public-owned or -regulated water utilities, non-profit entities, and private entities with a public sponsor.”
    - “Each Federal agency will solicit applications as soon as practicable after enactment of the program, and every six months thereafter. Agencies will evaluate and score each application based on specific, quantifiable criteria. The primary criterion is how the applicant will secure and commit new, non-Federal revenue to create sustainable, long-term funding for infrastructure investments. An application's score (and grant) will also account for the percentage of non-Federal revenues that will be used to fund the eligible project(s). To ensure applicants may receive grants for actions that are consistent with the program's purposes, but occurred prior to the program's enactment, a look-back period of three years with an application rating sliding-scale is provided.”
- The \$50 billion *Rural Infrastructure Program* will be mostly (80% or \$40 billion) allocated to State governors. The remaining funds will be for rural performance grants “to encourage the best use of taxpayer dollars”.
  - Determining which states get how much of the \$40 billion will be based on a formula described in the budget addendum as follows:

- “The formula will consider the State's total rural population and rural lane miles. Governors, in consultation with a designated Federal agency and State directors of rural development, will have discretion to choose investments that respond to the unique rural needs of their States. There will be a minimum and a maximum amount of funding that a State may receive under the formula distribution.”
- For the remaining 20% (\$10 billion), the budget addendum explains: “Twenty percent of the funds made available to States will be reserved for competitive rural performance grants for additional funding for eligible asset classes and according to specified criteria. In order to qualify for rural performance grants, a State must publish a comprehensive rural infrastructure investment plan for the formula funds received that demonstrates how the identified projects align with specific evaluation criteria. Rural performance grants will be distributed as block grants without any Federal requirements attached. However, the grants must be used for core infrastructure projects in rural areas with a population of less than 50,000.”
- According to the White House, “[f]unds awarded to State and local authorities” under these two programs, “will be allocated to infrastructure projects they prioritize.”

### **NTIA Update**

A recent House NTIA oversight hearing was bi-partisan and supportive of NTIA’s mission, noting that the Trump administration had proposed to increase the NTIA annual budget by almost \$2 million while keeping staffing level. At least one Democrat used the hearing to express support for NTIA as the vehicle for distributing proposed broadband infrastructure spending (rather than the FCC). Republican comments included support for bringing the national broadband mapping function back under NTIA (from the FCC).

As noted previously, John Windhausen from the Schools Health & Libraries Broadband (SHLB) Coalition is organizing a meeting with Mr. Redl. We are also hopeful that The Quilt members will get a chance to meet with Mr. Redl in April in D.C.

The February NTIA BroadbandUSA Newsletter is available [here](#). Upcoming NTIA events include:

- [Tennessee Broadband Summit Conference](#); March 20, 2018, Nashville, TN. Agenda [here](#); registration information at the link above.
- Webinar: [Broadband Public-Private Partnerships: Delivering Solutions for America’s Communities](#); March 21, 2018. Register [here](#).
- The archive for previous webinars is available [here](#).

## **Federal Communications Commission**

### **Section 706 Inquiry**

The FCC approved the 2018 Broadband Deployment Report in early February on a split 3-2 party line vote. The report was controversial principally because it departed from prior Commission reports in two key respects: (1) concluding that the FCC *is* “now encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” and (2) concluding that the relevant inquiry is the state of the FCC’s efforts in encouraging broadband deployment relative to prior years, not the objective measure of that deployment. The draft report specifically found:

- 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.”

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

The next BDAC meeting will be April 25 here in DC at which report recommendations and model codes for states and municipalities will be considered. Details on that upcoming meeting can be found [here](#). Like prior meetings, it will be webcast. All the BDAC meetings and meeting materials are available [here](#).

### **E-rate**

One of the reasons E-rate has been very quiet at the FCC has been the commitment of this Chairman to focus on E-rate administration issues before considering significant program changes. This includes focus on stabilizing and improving USAC’s E-rate Productivity Center (EPC). As a result, problems and confusion with USAC’s review and approval of fiber and special

construction applications continues to be the main E-rate issue in the last 12 months. SHLB continues to spearhead dialogue and informal meetings with both the FCC and USAC addressing that issue. SHLB's most recent communication to the FCC can be found [here](#).

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**

Note the FY 2018 RHC filing window started February 1, 2018 and will close on May 31, 2018. More information is available [here](#).

USAC recently reported that release of the FY 2017 funding commitments is imminent. Meanwhile, concerns grow that the "haircut" for FY 2017 will be substantially greater than FY 2016, even with the extra money the FCC made available in December 2017. We have heard that there was only about \$9 million in "rollover" money available for FY 2017, and that increased demand will far outstrip this. If so, and if the Commission fails to make additional funding available for FY 2017, all program participants – but especially HCPs with very costly connections such as in Alaska – could face a crisis. We will be watching this closely.

At the end of January, the Commission released an enforcement action against a carrier called DataConnex for apparent violations of Rural Health Care program rules (in the legacy Telecommunications Program, not the Healthcare Connect Fund).<sup>2</sup> In that case, consultants working for health care providers apparently received financial kick-backs from a service provider, unbeknownst to the health care providers. The consultants were ostensibly representing the health care providers but were apparently receiving payments from DataConnex while selecting DataConnex as part of the bid process, without apparent regard to whether DataConnex was offering competitively priced services. The FCC has proposed a fine of over \$18 million for this alleged conduct.

Meanwhile, initial comments on the [Notice of Proposed Rulemaking \(NPRM\) and Order in the Rural Health Care program](#) were filed February 2, while replies were filed on March 5. Many commenters supported doubling the size of the program to \$800 million. Although AT&T opposed raising the cap until after program reforms are implemented, most of the other carrier

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<sup>2</sup> See *DataConnex, LLC*, Notice of Apparent Liability For Forfeiture And Order, FCC 18-19 (rel. Jan. 30, 2018) (*DataConnex NAL*) (apparently undisclosed financial relationship between service provider and consultant corrupted competitive bidding processes for numerous health care providers participating in lower 48 Telecom Program).

associations either did not address the cap or reserved their spending concerns for the Telecom Program in the lower 48, which has now been the subject of two recent enforcement actions.<sup>3</sup>

The SHLB health group's initial comments are [here](#). NECA has a list of initial comments available [here](#) (with clickable hyperlinks to each set of comments). Here are NECA's hyperlinks to reply comments (including SHLB's):

[AT&T](#)

[GCI](#)

[INCOMPAS](#)

[SHLB Coalition](#)

[Kellogg & Sovereign Consulting](#)

[Alaska Communications](#)

[Charter](#)

[Telequality Communications](#)

[ADS](#)

[New England Telehealth Consortium](#)

[Yukon-Kuskokwim Health Corporation](#)

[Canby Family Practice Clinic](#)

[Southern Ohio Healthcare Network](#)

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

Sprint met with the Chairman's office in early March reiterating its support for the 2014 industry consensus plan (see below). See recent *ex partes* in the [EBS docket](#).

**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.

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<sup>3</sup> See *DataConnex NAL*; *Network Services Solutions, LLC, Scott Madison*, Amendment to Notice of Apparent Liability for Forfeiture and Order, 32 FCC Rcd 5169 (2017) (*NSS Amended NAL*) (apparent violations of competitive bidding and rural and urban rate requirements in the lower 48 Telecom Program).

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**

### **Congress**

As we have discussed, the net neutrality battle shifts now to Congress and the Courts. In Congress, Democrats are working to force a vote on a Congressional Review Act resolution to nullify the FCC's action. In the Senate they have about 60 days to get 51 votes and they appear to have 50 so far (49 Dems plus Susan Collins, R-ME). While they do not have enough votes in the House to push this through, this effort could force some vulnerable Republicans to cast a vote against net neutrality in an election year.

The Republicans have introduced net neutrality legislation in both houses with a hearing on this legislation (the "Open Internet Preservation Act") upcoming on the House side. The proposed law would codify prohibitions on blocking and throttling and would expressly authorize the FCC to provide universal service support for broadband Internet access services. On paid priority, however, the proposed law would preempt the FCC from restricting such arrangements (among other things). The upcoming House hearing will focus on paid priority. Because Democrats likely see their position on net neutrality as stronger politically, they are unlikely to support the Republican proposal, at least before the election in November.

### **Courts**

In the courts, 15 separate appeals have been filed in two circuits (DC and the Ninth) challenging the FCC's reversal. The judicial lottery process recently assigned the Ninth Circuit to hear all of the cases. While the Ninth Circuit is viewed as a favorable venue for the challengers, cases in the Ninth Circuit can typically take three years to resolve. In contrast, the DC Circuit is probably a more favorable venue than it used to be for the challengers and typically resolves cases in a year or so. Thus, it is possible that some appellants may seek transfer to the DC Circuit.

### **States**

Washington State recently became the first state to enact net neutrality legislation to fill the void left by the FCC. Other states are considering such legislation or similar legislation that would require vendors in procurements to guarantee net neutrality. Some states, such as New York,

have already implemented net neutrality procurement requirements by executive order. Court challenges from ISPs of these state laws are inevitable.

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

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](#).

Microsoft's [most recent ex parte](#) at the FCC contains a short report with a nice overview of the technology and their proposed approach.