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To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – April and early May 2018

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### **Infrastructure Legislation**

It is now doubtful the Trump infrastructure plan (released in February 2018) or a congressional alternative will move forward before the midterm elections in November. In the meantime, Congress in the recent Omnibus budget bill allocated \$600 million to the United States Department of Agriculture (USDA) Rural Utilities Service (RUS) for a distance learning, telemedicine, and broadband pilot program. USDA has not yet released specifics on this pilot program however USDA officials indicated during our meetings with them in April that the program would include a mixture of both grants and loans. Interest in a comprehensive infrastructure spending package that includes broadband could revive after the November midterms.

### **NTIA Update**

The most recent BroadbandUSA Newsletter is from [March](#). On April 19, 2018, NTIA released the [36<sup>th</sup> quarterly BTOP status report](#). The BroadbandUSA web-portal has undergone a re-design, with a new BroadbandUSA [FAQ available](#). Upcoming NTIA events include the following webinars:

- [Successful Models and Best Practices for Rural Broadband Deployment](#), Wednesday, May 16, 2018. Register [here](#).
- [Smart Agriculture: Increasing Productivity Through Technology](#), Wednesday, June 20, 2018.

The archive for previous webinars is available [here](#).

### **USDA – Rural Utilities Service**

The application deadline for this year's Distance Learning and Telemedicine (DLT) Loans and Grants is June 4, 2018. Basic information on the program and application process is available [here](#). The application deadline for [Community Connect Grants](#) was May 14, 2018. According to our meetings with USDA staff in April, each of those programs was allotted about \$30 million in

2018. Further details regarding the \$600 million DLT pilot program are not yet available. We expect details when they are announced to be linked [here](#) on the USDA RUS website.

### **Federal Communications Commission**

Commissioner Clyburn's has left the FCC effective May 9 leaving one open spot on the Commission. Although a replacement has not been officially announced, Politico reports that Senate Minority Leader Chuck Schumer will recommend Geoffrey Starks, currently an FCC staffer, for the post. Typically, the President defers to the Senate Minority Leader's recommendation in nominating commissioners for the agency's minority-party seats.

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

The most recent BDAC meeting was April 25, 2018. Presentations and the video feed from that meeting are available [here](#). BDAC working group documents from the April meeting included:

- Competitive Access to Broadband Infrastructure
- Model Code for States (adopted)
- Model Code for States – Ballot Form Comments Summary
- Model Code for Municipalities (adopted)
- Ad Hoc Committee on Rates and Fees – Presentation
- Ad Hoc Committee on Rates and Fees – Survey of Rates and Fees

All BDAC meetings and meeting materials are available [here](#).

The BDAC process continues to face criticism for favoring industry positions over those of localities. Recently, for example, Blair Levin criticized the FCC's excessive focus on lowering carrier deployment costs while discounting the concerns of local officials. Levin argues that localities and industry have shown they can reach mutually beneficial arrangements that require industry to deploy facilities in areas they might not otherwise deploy in – and that establishing rules which take away local leverage to reach such arrangements undermines important deployment policy objectives. Levin did offer praise for the BDAC recommendation of a one-touch-make-ready pole attachment policy.

### **E-rate**

This Chairman previously said he would focus on E-rate administration issues – such as improving USAC's E-rate Productivity Center (EPC) – before considering significant program changes. Two recent developments with respect to EPC challenges and problems and confusion with USAC's review and approval of fiber and special construction include FCC actions (1) granting a special construction deadline waiver to the Utah Education and Telehealth Network (UETN), and (2)

providing written direction to USAC concerning the changes to the EPC input fields affecting requests for fiber special construction (also known as the “drop-down menu” issue).

In the case of the [UETN waiver](#), the issue concerned the requirement that E-rate funded fiber be lit before the end of the funding year. USAC had initially granted UETN a deadline waiver until June 30, 2018, due to USAC’s failure to timely issue the funding commitment decision letter (FCDL). When USAC finally issued a funding denial in September 2017, UETN appealed. USAC reversed itself in December 2017, but this left insufficient time for UETN’s vendor to complete the anticipated build by the June 30, 2018 deadline. This was because the build was through mountainous terrain and faced a short annual construction window due to severe weather conditions. USAC did not have authority to provide a further extension, so UETN sought a waiver from the FCC. The FCC granted the UETN request and established a new deadline of October 1, 2020, noting particularly the unique circumstances of the build.

On the drop-down menu issue, SHLB Coalition and others have been raising concerns at the FCC that USAC was poised to deny a significant number of FY 2018 fiber service funding requests because of apparent confusion on the part of applicants about which EPC drop-down menu item to select as part of their Form 470 application process. In August 2017 USAC had instructed applicants to no longer utilize several EPC menu options related to Internet access and transport services in cases where fiber services were being sought. Rumors were circulating that failure to follow USAC’s EPC drop-down guidance would result in automatic funding denials – notwithstanding whether the Form 470 itself was clear enough for vendors to submit responsive and otherwise valid bids. Because USAC would not confirm that it would not issue automatic denials, SHLB and others sought written assurances from the Commission. On [May 1, 2018, FCC Managing Director Mark Stephens and Wireline Competition Bureau Chief Kris Monteith in a letter to USAC](#) directed that, for FY 2018, USAC not issue denials based solely on the EPC menu selection, and that for FY 2019, USAC make clear in the EPC whether menu options are for fiber or non-fiber services.

### **Rural Health Care Program**

Note the FY 2018 RHC filing window started February 1, 2018 and will close on June 30, 2018. More information is available [here](#).

In March [USAC announced](#) drastic, steeper-than-expected funding cuts in the Rural Health Care program for funding year (FY) 2017 (July 1 2017 thru June 30 2018). As a result, for FY 2017 the program subsidy for consortia applicants is being applied to 74.5% of the costs that would

otherwise be eligible for the subsidy. This was more than double what we saw in FY 2016.<sup>1</sup> The cuts are also essentially retroactive back to July 1, 2017 and are causing substantial hardship for applicants and great uncertainty regarding future funding. The cuts are caused by demand exceeding the cap on program spending imposed by the FCC back in 1997 – based on assumptions then that every health care provider eligible to participate in the program needed a T1 (1.5 Mbps) circuit.

In response, SHLB filed an [emergency cap waiver petition](#) asking the FCC to reverse the funding cuts and fully fund the program until the FCC completes the open [Rural Health Care program notice of proposed rulemaking](#) (NPRM). While the FCC has not formally put the SHLB emergency petition out for public comments, many comments are being filed in support. In addition, on March 14, a bi-partisan group of 31 senators sent a [letter to FCC Chairman Pai supporting an RHC program cap increase](#). While it was helpful that some Republicans joined the letter, they were greatly outnumbered by Democrat supporters. Notable signatories of the letter include: Sen. Blunt (R-MO), Sen. McCaskill (D-MO), Sen. King (I-ME), Sen. Collins (R-ME), and Sen. Peters (D-MI). Overall this is a significant development that could influence the FCC in a positive direction.

Finally, in early May Chairman Pai issued a testy public reprimand to Alaska Communications System (ACS) for apparently suggesting that, due to delayed RHC funding decisions and continued uncertainty, ACS was reconsidering participation in the RHC Telecommunications Program. [The Chairman's letter](#) stated that ACS was obligated by law to provide services through the Telecommunications Program in response to any *bona fide* request for services from an eligible health care provider. Sadly, the letter failed to acknowledge statutory language establishing reciprocal Commission obligations under the program: ensuring carriers are compensated for the discounts they provide.<sup>2</sup>

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<sup>1</sup> For FY 2016, 92.5% of costs were eligible for the subsidy. For individual applicants in FY 2017, 84% of costs are subsidy eligible.

<sup>2</sup> [47 U.S.C. Section 254\(h\)\(1\)\(A\)](#) provides (emphasis added): “A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. **A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.**”

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

The FCC at its May meeting [unanimously approved an NPRM](#) to consider major reforms to increase EBS spectrum utilization. Chairman Pai explained:

Currently, a large portion of the 2.5 GHz band in approximately half of the United States lies fallow. And it's been that way for more than 20 years. This must change. We need to get this valuable spectrum into the hands of those who will provide service, including 5G, to Americans across the country, particularly in rural areas where the spectrum is currently mostly unused. So today, we take the first step toward putting that asset to work . . . .

Among other things, the NPRM proposes methods to rationalize geographic service areas and asks whether EBS licensees should be allowed to transfer their spectrum to commercial entities (rather than simply lease that spectrum as they do now). Comments will be due 30 days after publication of the NPRM in the Federal Register. The item terminates the old EBS docket and creates a new docket, [Transforming the 2.5 Ghz Band, WT Docket 18-120](#).

**EBS Background:** Many school systems across the country currently 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.

### **Net Neutrality/Title II**

With final approval of the FCC’s new transparency rules in early May, on June 11 the FCC’s repeal of the 2015 Open Internet rules will become fully effective. No parties have yet asked a Court to stay those rules.

In Congress, Senate Democrats on May 8 filed a “discharge petition” which is the first step toward forcing a Senate vote on a Congressional Review Act (CRA) resolution to nullify the FCC’s action. It is expected Democrats will call for a vote as soon as May 16. They need 51 votes to succeed and appear to have 50 so far (49 Democrats plus Susan Collins, R-ME). Lisa Murkowski, R-AK – who has not indicated her position yet – may be their most likely Republican pick-up. While there are not enough votes in the House to push this through, the effort will force some Republicans to cast a vote against net neutrality in an election year. Notwithstanding, some parties have questioned whether the CRA can overturn an agency adjudicatory decision (Title II reclassification in this case), or whether CRA can be used to reimplement repealed rules (as is the case here) rather than to reverse newly implemented rules, which was the CRA’s original purpose.

The Republicans have proposed net neutrality legislation in both houses. The proposed approach 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). 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.

The Information Technology & Innovation Foundation (ITIF) recently sought to break this deadlock by offering a proposal that would include direct funding for broadband adoption and digital-literacy programs within a legislative package with net neutrality. The ITIF proposal is otherwise similar to Republican proposals in that it would “avoid[] an overbroad flat ban on prioritization.”

In late March, the Ninth Circuit approved a motion to transfer all pending appeals of the 2017 Restoring Internet Freedom Order to the DC Circuit. No briefing schedule has yet been announced.

### 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 similar legislation. There are concerns, however, that the Washington law does not provide an explicit carve-out for private networks such as R&E networks (which the FCC provided in its 2015 Open Internet Order). California is considering a similar bill, but we understand that it is more carefully crafted than Washington’s. Other states, such as New York, have 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 2017 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](#) (executive summary [here](#)), with additional information from Microsoft available [here](#). Microsoft’s [March 2018 ex parte](#) at the FCC contains a short report with a nice overview of the technology and their proposed approach.