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To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – late July/early August 2018

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### **Legislative Highlights**

Only July 23, the House passed a bill called the Advancing Critical Connectivity Expands Service, Small Business Resources, Opportunities, Access, and Data Based on Assessed Need and Demand (ACCESS BROADBAND) Act ([HR 3994](#)). Sponsored by Reps. Tonko (D-NY) and Lance (R-NJ), the Act would establish an Office of Internet Connectivity and Growth at NTIA to coordinate and track federal funding for broadband across all agencies. The bill is backed by US Telecom.

The House and Senate versions of the 2018 Farm Bill are in conference committee to reconcile differences. (The House version includes new work requirements for the Food Stamp program that may not be able to muster 60 votes in the Senate.) As noted previously, the Farm Bill includes continued authorization for the USDA Rural Utilities Service (RUS) telecom and broadband grant and loan programs and other broadband-related measures.

Both houses of Congress are considering versions of the Precision Agriculture Connectivity Act of 2018 ([H.R. 4881](#); S. 2343). The House version (for example) would create an FCC-appointed task force to bring together public and private stakeholders to evaluate current programs affecting broadband internet access on cropland and rangeland; identify and measure existing gaps in coverage; and develop policy recommendations to address that gap. The task force would also be responsible for developing specific steps the FCC, USDA and other federal agencies can take to address gaps in broadband coverage. On July 18, the National Association of Regulatory Utility Commissioners (NARUC) [approved a resolution](#) calling for passage of the Act and for appointment of state utility commissioners to the task force.

### **NTIA Update**

NTIA on July 19 filed a letter with the FCC addressing the FCC's recent report and order in the [Accelerating Wireline Broadband Deployment](#) proceeding. The order extended streamlined copper network retirement procedures to carriers seeking to discontinue data services at speeds below 25/3 Mbps (previously for speeds below 1.5 Mbps). [NTIA's letter](#) addresses the potential

impact of these changes on “critical national security and public safety communications functionality,” especially for federal users in “remote and less populated areas, or [that] receive services outside of [large GSA-negotiated contracts with carriers].” Among other things, NTIA specifically asked the FCC to “hold in abeyance any [planned] copper retirement if a federal user credibly alleges that the carrier’s proposed retirement date does not give the user ‘sufficient time to accommodate the transition to new network facilities such that key functionalities are not lost.’” (The NTIA letter was significant and came up in the July 25 House oversight hearing of the FCC, with Democrats expressing concern that the FCC was putting the interests of carriers above national security.)

The August BroadbandUSA Newsletter focuses on comments filed with NTIA addressing [the Quality and Accuracy of Broadband Availability Data](#). The newsletter contains a list of the over 50 comments filed including a summary and sampling of some filings, including those from state organizations in North Carolina and West Virginia. There is no NTIA webinar for August. The September webinar will address [Innovative and Emerging Broadband Technologies: Providing Economical Alternatives for Rural Broadband Access](#). Webinar registration is [here](#). Previous newsletters and other news is available [here](#). The archive for previous webinars is available [here](#).

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

The Rural Utility Service (RUS) has issued a [request for public comment on its Broadband e-Connectivity Pilot Program](#). (This is the \$600 million authorized to RUS by Congress earlier this year in the 2018 Omnibus spending bill.) The notice asks: (1) whether “affordability” should be considered in determining whether a rural area has “sufficient access” to 10/1 Mbps service for purposes of determining eligibility for funding; (2) whether there are alternative data sources for evaluating availability of 10/1 service; and (3) how RUS evaluate the potential economic benefit to rural areas, including where project partners are rural utilities or local telcos. Comments are due September 10, 2018.

### **Federal Communications Commission**

Commissioner Clyburn’s replacement Geoffrey Starks is still awaiting a vote of the full Senate. [At the August 2 Open meeting](#) the Commission approved one-touch make-ready (OTMR) for certain pole attachments and a Notice of Inquiry (NOI) on the proposed \$100 million Connect Care pilot program (addressed below). The next Open Commission meeting is [September 26](#).

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

The [FCC is seeking nominations for a new disaster response and recovery working group](#) of the BDAC. The group will look at disaster preparation as well as response and recovery. According

to TR Daily, the “FCC is seeking applications ‘from across a broad spectrum of public and private organizations, governmental units, and individuals involved with or interested in disaster response and recovery of broadband networks, including representatives from states and localities, industry, and consumer and community organizations,’ especially from individuals and organizations ‘that that have experience in efforts to improve resiliency of communications infrastructure, emergency management of communications networks, and/or homeland security matters,’ and that are drawn from federal, state, local, territorial, and tribal governments; consumer and community organizations; rural and urban broadband Internet service providers; independent network builders and networking equipment installers; industry trade associations; and qualified representatives of other stakeholders and interested parties.” Nominations are due Sept. 7 and can be e-mailed to [BDAC@fcc.gov](mailto:BDAC@fcc.gov).

The July 26 and 27 BDAC meeting is viewable [here](#). At that meeting the BDAC considered and voted on reports and recommendations from its Harmonization Working Group to harmonize the Model Code for Municipalities and Model Code for States adopted by the BDAC on April 25, 2018. In addition, the *Ad Hoc* Committee for Rates and Fees gave a presentation. All BDAC meetings and meeting materials including working papers are available [here](#).

### **E-rate**

The FCC recently sought comment regarding the submission of [FCC Forms 470 and 471 to the Office of Management and Budget \(OMB\)](#) for review and re-authorization pursuant to the Paperwork Reduction Act. This was alarming insofar as the OMB notice failed to acknowledge the extent to which USAC’s E-rate Productivity Center (EPC) and accompanying instructions have essentially replaced the forms. Indeed, the FCC included no information about the EPC interface and instructions in the submission to OMB. The Form 471 drop-down menu issue (described previously and below) is an excellent example of why failure to provide this information to OMB is problematic. In response, SHLB joined with the State E-rate Coordinators’ Alliance (SECA) [submitting comments to OMB elaborating on the overall problem and discussing the Form 471 drop down issue](#).

Recap of the Form 471 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 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. Concerns grew 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**

While not technically part of the Rural Health Care program, on August 2, 2018, the FCC adopted [a notice of inquiry \(NOI\)](#) proposing to use \$100 million in federal universal service funding for a connected-care pilot program. Under the proposal, 20 different health systems could qualify for an award of up to \$5 million each to provide connected care to low income households. There is a public comment period before the pilot program will begin with initial comments due September 10 and replies due October 10. (The proposed pilot looks somewhat like a Lifeline-for-healthcare program.)

Several important issues are raised in the NOI including questions about the legal authority the FCC has to do this, how much money will actually be awarded, which patient populations must be served, the types of broadband or other services (or equipment) that will be eligible for funding, how the application process will work, and what type of reporting obligations will be attached to the awards.

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

The pending [EBS NPRM](#) is considering major reforms to increase EBS spectrum utilization ([Transforming the 2.5 Ghz Band, WT Docket 18-120](#)). 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 were filed August 8; replies are due September 7. SHLB's [press release and comments are available here](#). Next month we will provide a summary of positions taken by some of the principal players in the proceeding.

### **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 most recent ex parte](#) (August 14), includes a recent white paper and information about white spaces projects underway in Ohio, New York, Maine, Virginia, Maryland, Michigan and Wisconsin.

### **FOSTA/SESTA**

FOSTA stands for the “Fight Online Sex Trafficking Act” which was passed by Congress and signed into law by President Trump in April 2018. FOSTA contained another law called the “Stop Enabling Sex Traffickers Act of 2017” (SESTA). While obviously worthy goals, FOSTA was criticized from the outset by parties such as the Electronic Frontier Foundations (EFF) that were worried about censorship and the unintended effects of the law. Among other things, FOSTA amended Section 230 of Communications Decency Act (47 U.S.C. § 230) which provided immunity for websites hosting third-party content. Under FOSTA, website operators now face 25 years in prison for violations.

FOSTA forced immediate changes at sites such as Craigslist and Reddit (among others), with Craigslist closing its personals and “Therapeutic Services” sections out of fear it could be liable for violations. On June 28, [EFF filed suit](#) in DC Federal Court to stop FOSTA enforcement and ultimately have it declared unconstitutional. EFF's court brief can be found [here](#).

### **Net Neutrality**

The FCC's repeal of the 2015 Open Internet rules became fully effective Monday, June 11, 2018. In Congress, Senate Democrats on May 16 successfully forced the Senate to vote on a Congressional Review Act (CRA) resolution formally disapproving of the FCC's December 2017 Restoring Internet Freedom order. The resolution passed 52-47 with Collins (R-ME), Murkowski (R-AK), and Kennedy (R-LA) joining with Democrats in supporting the measure.

On July 17, Rep. Mike Coffman (R-CO) introduced a bill called “The 21st Century Internet Act” that would codify into law the four pillars of net neutrality: no throttling, no blocking, no paid prioritization and oversight of interconnection. The bill also would create a new title for broadband and contains enhanced protections for both consumer and businesses. Rep. Coffman used the bill's introduction to announce his support for the CRA resolution in the House – the only Republican yet to do so publicly. However, with House leadership opposed to the CRA resolution, it is unlikely to ever be voted on.

## Courts

- Mozilla Corporation v. FCC, et al. (challenge to 2017 Restoring Internet Freedom Order) – Initial briefs were due August 20; final briefs due November 27; oral arguments not yet scheduled.
- United States Telecom Ass’n., et al. v. FCC & USA (challenge to 2015 Open Internet Order)<sup>1</sup> – Petitions for *certiorari* pending at the Supreme Court. The FCC filed its response to *cert.* petitions on August 15, 2018, asking the Court to vacate the 2016 DC Circuit decision as essentially moot – which would essentially prevent the decision from having precedential value in the challenge of the 2017 RIF order. Companies and groups supporting the 2015 Order have until September 15 to respond. If you are interested in learning more about this, [Benton Foundation has a detailed discussion of the issue here.](#)

## States

After the California Senate approved its proposed net neutrality bill, it was apparently modified (gutted some say) by the Communications Committee. An agreement on an amended bill was reached July 6. Whether to require net neutrality at the interconnection point or ban zero rating (where wireless providers don’t count certain types of content, such as music streaming, against customer data caps) have been points of contention. The California legislature has until August 31 to approve a bill. The California law, whether it comes in to effect or not, will be influential as the national debate over net neutrality continues.

The National Conference of State Legislators (NCSL) has an up-to-date summary of state activity on the issue [here](#). ISPs are expected to sue to stop these state laws from being enforced.

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<sup>1</sup> For those of you following these issues closely, you may recognize D.C. Circuit Judge Brett Kavanaugh, President Trump’s nominee to replace Justice Kennedy, as the author of the dissent in this case (*i.e.*, concluding the 2015 Open Internet Order should be reversed). If Judge Kavanaugh is confirmed and if the Supreme Court grants the petitions for *certiorari* and accepts this case, he would be forced to recuse himself. If the 2017 case ever makes it to the Supreme Court, however, he would not have to recuse from that.