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September 18, 2018

To: Jen Leasure, The Quilt

From: Jeff Mitchell

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

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### **Legislative Highlights**

No legislative updates this month. There is speculation about whether broadband funding legislation is a possibility during the post-election lame-duck session this legislative year. John Windhausen has indicated he thinks there is a reasonable chance that broadband legislation emerges after the mid-terms.

### **NTIA Update**

The September BroadbandUSA Newsletter focuses on [Innovative Broadband Technologies](#), such as high-throughput satellites and laser-chip based optical networks. There was no NTIA webinar for August. The monthly webinar for September (Wednesday, September 19) 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**

USDA has launched an [e-Connectivity webpage here](#). 257 comments were filed in response to the Rural Utility Service (RUS) [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 asked: (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. Higher education comments were filed by [The Quilt](#), [Internet2](#), [Sun Corridor Network](#), and [MOREnet](#). FCC Commissioner O’Rielly filed comments urging RUS to avoid providing funding for overbuilds.

### **Federal Communications Commission**

The FCC recently updated the National Broadband Map to include data submitted by providers on Form 477 as of June 30, 2017. The map is available at [broadbandmap.fcc.gov](http://broadbandmap.fcc.gov).

The Government Accountability Office (GAO) has released [a report](#) finding FCC data collected on broadband availability from providers does not accurately or completely capture broadband access on tribal lands. GAO suggested the FCC, among other things, develop and implement methods for collecting and reporting accurate and complete data on broadband access specific to tribal lands and develop a formal process to obtain tribal input on the accuracy of provider-submitted broadband data.

The FCC is seeking [nominations for the USAC Board of Directors](#), specifically seats designated for representatives of E-rate eligible schools, information service providers, eligible rural health care providers, state telecommunications regulators, incumbent local exchange carriers, and interexchange carriers with annual operating revenues of more than \$3 billion. Nominations are due by Oct. 8.

On September 12, in an unprecedented move, Sen. Sullivan (R-AK) placed a public hold on the re-nomination of current FCC Commissioner Carr. Sen. Sullivan has indicated the hold on Commissioner Carr will remain until Chairman Pai resolves issues related to how the Rural Health Care program is being administered in Alaska. Sen. Sullivan had raised these concerns at the Senate FCC oversight hearing on August 16 where he pressed Chairman Pai directly as to when the FCC would resolve questions with respect to RHC disbursements in Alaska. Senate confirmation of Commissioner Clyburn's replacement Geoffrey Starks is part of package with the Carr re-nomination, so the hold on Carr effectively stops Starks' confirmation as well.

### **Section 706 Inquiry**

Comments on the FCC's [Notice of Inquiry \(NOI\)](#) on "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion" are due September 17, 2018; replies are due October 1, 2018. This is an annual inquiry and you may recall in February 2018 the Commission concluded (with two dissents), that deployment was "reasonable and timely." To reach this conclusion the Commission changed focus away from the objective question of whether Americans have sufficient access to advanced telecommunications capability, to whether the Commission's efforts to encourage deployment were sufficient. The Commission concluded in February 2018 that its de-regulatory actions, including repeal of net

neutrality rules, were sufficiently encouraging more rapid deployment of advanced telecommunications.

The current NOI maintains the 25 Mbps/3 Mbps benchmark for fixed broadband services, which triggered a dissent from Commissioner Rosenworcel. The NOI also asks again whether fixed and mobile services “of similar functionality are substitutes for each other.” Regarding schools and classrooms, the NOI continues to measure the availability of advanced telecommunications using the Commission’s short-term goal of 100 Mbps per 1,000 students and staff and the long-term goal of 1 Gbps per 1,000 students and staff.

### **E-rate**

Comments have been filed in response to the Public Notice seeking approval of this year’s Eligible Services List (ESL). The only proposed change to the ESL was the elimination of any support for voice services pursuant to the five-year phaseout of voice approved in the last modernization order. SHLB continues to work with FCC and USAC staff seeking clarification on policies and procedures related to evaluation and approval special construction funding requests, and the impact of certain USAC modifications to the E-rate Productivity Center (EPC) interface that appear to implement substantive policy changes without prior notice and comment.

### **Rural Health Care Program**

The first round of comments on the [Connected Care NOI](#) were submitted September 10. While not technically part of the Rural Health Care program, the NOI proposes to use \$100 million in federal universal service funding for a pilot program that will provide broadband for home-based healthcare to low income patients and veterans. 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.

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. Comments from industry groups and AT&T generally urged the Commission not to use the money for broadband deployment and to instead focus on reducing the cost of existing services and gathering data on the impacts of telehealth. SHLB urged the Commission to consider using pilot funding for joint projects that also utilize E-rate and RHC funding. Reply comments are due October 10.

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

The [EBS NPRM](#) is considering major reforms to increase EBS spectrum utilization ([Transforming the 2.5 Ghz Band, WT Docket 18-120](#)). The FCC has said there is fallow EBS spectrum across about half of the U.S., mainly in rural areas. The NPRM proposes, among other things, methods to rationalize geographic service areas and asks whether existing EBS licensees should be allowed to transfer their spectrum to commercial entities (rather than simply lease that spectrum as they do now). Comments and replies have now been filed.

During the initial round of comments, industry was generally supportive of the item while existing licensees, tribes, and educational interests expressed concerns. Notably, representatives from [Northern Michigan University](#) (NMU) in Marquette, MI met with Chairman Pai about the EBS proceeding in August, discussing “how effective collaborations between Universities and local community partners are bringing affordable broadband to unserved and underserved communities in this region and the important role that appropriate planning plays in designing wireless broadband projects that are viable and sustainable over the long-term.” NMU’s comments in the proceeding, with a detailed overview of its Educational Access Network are [here](#). [Northern Arizona University](#) also filed comments discussing its use of EBS spectrum to create an “Extended Campuses” program, now called NAU online, in 30 locations, including rural areas in the state.

Following is a summary from some of the other EBS comments. [SHLB](#) summarized its comments as follows:

1. Adopt an alternative, non-auction approach for issuing new EBS licenses so that rural schools and anchor institutions are not disadvantaged.
2. Replace the outdated educational use requirements with a requirement that new EBS licensees offer an affordable mobile broadband service, similar to the \$10/month service offered by Mobile Beacon and Mobile Citizen.
3. Make EBS licenses available to anchor institutions and nonprofit providers who have the best incentive and experience to serve the public interest.
4. Forbid eligible entities from transferring or assigning their licenses to commercial providers.
5. Foster public-private partnerships by allowing licensees to enter leases with commercial providers.
6. Encourage eligible applicants to form consortia in order to submit a single application for a license.

[The National EBS Association \(NEBSA\)](#) and the [Catholic Technology Network \(CTN\)](#), which have been proposing EBS reforms for years said: “While unassigned EBS spectrum should be licensed and some modernization of EBS rules may be warranted, a ‘transformation’ of the band is neither necessary nor in the public interest. EBS does not need fixing. It needs finishing.” They also supported expanding the geographic areas of licenses, prioritizing new EBS licenses, not disrupting existing EBS leasing arrangements, retaining 30-year limits on lease terms, and preserving EBS spectrum’s educational nature. They opposed selling EBS spectrum to commercial wireless carriers. [The North American Catholic Educational Programming Foundation, Inc., and Mobile Beacon](#) supported the proceeding but also opposed commercializing EBS spectrum and eliminating educational use requirements from the EBS band. Support for retaining the educational use requirement also came from the [School Superintendents Association \(AASA\)](#) and the [Association of Educational Service Agencies \(AESA\)](#). AASA and AESA also observed the Commission was seeking comment on utilizing newly available “white spaces” that have yet to be mapped: “Nowhere in the NPRM is there even a hint that state-sized geographic areas will be awarded to large, existing licensees. Tracts the size of Indiana, Maryland, and Massachusetts may be handed out to a single incumbent.” [The State Educational Technology Directors Association \(SEDTA\)](#) comments echoed similar concerns, and argued that the “local mailing address” eligibility requirement for holding an EBS license should include entities with a “local presence” such as state education agencies, educational service agencies, and community anchor institutions that “deeply understand local needs and have a strong direct interest in serving students [in those areas].”

Public broadcasting groups filed comments as did several Tribal and Native American groups. The [American Indian Higher Education Consortium](#) (AIHEC) supported priority windows and requested that tribal colleges and universities “be specifically included in the higher education priority window” and that “participation by new higher education licensees be limited to accredited institutions with a local presence.”

The [Wireless Communications Association International](#) argued strongly for commercial utilization of the 2.5 GHz spectrum, observing:

[T]he overwhelming majority of EBS licensees lease the maximum capacity of their spectrum permitted under Commission rules (95 percent) for commercial use, allow commercial operators to construct networks using all of their spectrum and have no facilities of their own, and meet their educational requirements merely by riding “over the top” of the commercial network. These actions speak loudly and clearly – educators have moved from the facilities[-]based video distribution of the 1960s to broadband-based over-the-top distribution of educational content and, as such, they do not require a spectrum set-aside. With the widespread availability of broadband

(to be augmented by the steps the Commission is taking in other proceedings to promote rural deployments and expand access in schools and libraries), educators no longer have a compelling need for reserved access to the 2.5 GHz band. Yet, every day, commercial operators face unnecessary operational and financial burdens because critical 2.5 GHz spectrum is only available to them by leasing from a middleman (the educator who was fortunate enough to secure spectrum decades ago to serve a need that no longer exists)

[AT&T](#) proposed allocating EBS licenses via two simultaneous auctions: “(1) a regular auction of all of the currently unlicensed EBS spectrum, and (2) an incentive auction in which current EBS licensees would have the opportunity to sell their spectrum rights. There would be huge benefits to this auctions-based approach.” [T-Mobile](#) and the [Wireless Internet Service Providers Association](#) (WISPA) also supported eliminating the “educational use” requirements. All comments filed in the proceeding are available [here](#).

#### **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.

#### **Universal Service Contributions**

The FCC announced Friday September 14 that the proposed fourth quarter federal universal service contribution factor will be 20.1%. This represents an increase from the current 17.9% contribution factor and represents the first time the quarterly contribution factor has moved above 20%. The increase in part reflects erosion of the universal service contribution base (*i.e.*, interstate telecommunications revenues).

#### **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](#). If you are interested in reading more about the pros and cons of FOSTA/SESTA, [this recent article in Reason](#) takes the con perspective, while the [Martha’s Vineyard Times](#) highlights two proponents of the law.

## **Net Neutrality**

### **Courts**

- [Mozilla Corporation v. FCC, et al.](#) (challenge to the 2017 Restoring Internet Freedom Order) – Initial briefs were filed August 20 by [Mozilla, et al.](#) and the [state of New York, et al.](#) Thirteen intervenor briefs were filed on August 27, 2018. Notable intervenors include the [American Council on Education, et al.](#), [Professors Scott Jordan and Jon Phea, Professors of Administrative, Communications, Energy, Antitrust and Contract Law and Policy](#), the [Electronic Frontier Foundation](#), [Professors of Communications Law](#), [103 members of Congress](#), the [Internet Association, et al.](#), and the [Digital Justice Foundation](#). Final briefs are due November 27; oral arguments not yet scheduled.
- [United States Telecom Ass’n., et al. v. FCC & USA](#) (challenge to the 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](#).

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<sup>1</sup> D.C. Circuit Judge Brett Kavanaugh, President Trump’s nominee to replace Justice Kennedy, authored 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.

## States

In early September the California legislature sent SB 822, the California Internet Consumer Protection and Net Neutrality Act of 2018, to Governor Brown's desk for signature. The bill "would prohibit fixed and mobile Internet service providers, as defined, that provide broadband Internet access service, as defined, from engaging in specified actions concerning the treatment of Internet traffic." The bill would specifically prohibit "blocking lawful content, applications, services, or nonharmful devices, impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device, and specified practices relating to zero-rating." It would prohibit fixed and mobile Internet service providers from "offering or providing services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service, if those services have the purpose or effect of evading the above-described prohibitions or negatively affect the performance of broadband Internet access service." The telecom industry opposed the bill, arguing it goes far beyond the FCC's 2015 net neutrality order.

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 state net neutrality laws from being enforced.