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October 22, 2018

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – late September/first part of October 2018

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### **Legislative Highlights**

The 2018 Farm Bill was expected to include significant broadband provisions, including addressing the broadband needs for precision agriculture and allowing rural electric coops to obtain grants in addition to loans for provisioning broadband service. Unfortunately, negotiations broke down in early October leaving only a small window for negotiations to a final bill in the lame-duck session after the mid-terms. Although the quadrennial farm bill is considered a must-pass piece of legislation, Congress will be forced to enact a temporary extension of the 2014 Farm Bill which formally expired on October 1.

For standalone broadband legislation, John Windhausen continues to maintain there is a small but reasonable chance a bill could emerge in the lame-duck session as well.

### **NTIA Update**

In recent speeches Administrator David Redl has indicated that NTIA would be issuing a Request for Proposal addressing broadband mapping before the end of the year. In late September NTIA sought comments on protecting consumer privacy. According to the [news release](#), the request for comment (RFC) is designed to help the agency assess “a proposed approach to consumer data privacy designed to provide high levels of protection for individuals, while giving organizations legal clarity and the flexibility to innovate.” Comments are due October 26 and may be submitted via email. Although we have not been tracking privacy issues, this NTIA proceeding seen as a significant and welcome development in the Telecom industry.

On October 30 there will be an all-day broadband summit in Roanoke, Virginia, focused on “Partnerships for Connecting the Commonwealth.” Details and registration information are [here](#). The NTIA monthly webinar for November (Wednesday, November 14) is entitled “[Broadband Connectivity is Transforming Healthcare](#).” You can register [here](#). The October webinar was entitled “Federal Broadband Funding: Policies and Programs to Connect America” and featured representatives from NTIA, USDA, and FCC. The archive for previous webinars is available [here](#).

BroadbandUSA Newsletter for October focuses on making federal funding sources for broadband more accessible and is available [here](#). Previous newsletters and other news are available [here](#). The archive for previous webinars is available [here](#).

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

USDA has launched an [e-Connectivity webpage](#) where information about the \$600 million broadband pilot program will be announced. (This is the \$600 million authorized to Rural Utility Service (RUS\_ by Congress earlier this year in the 2018 Omnibus spending bill.) 257 comments were filed in response to the RUS request for public comment on the program. 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**

#### **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” have been filed (unofficial [list of initial](#) and [reply comments](#).) 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**

Carriers have always been allowed to recover from the E-rate program a portion of the costs to construct carrier-owned network facilities necessary to deliver eligible services to eligible schools

and libraries.<sup>1</sup> In the E-rate program these non-recurring capital charges are referred to as “special construction.”<sup>2</sup> Before FY 2015, the FCC required E-rate payments for such non-recurring special construction costs to be spread (“amortized”) evenly over at least a three-year period.<sup>3</sup> In 2014, the Second E-rate Modernization Order suspended this amortization requirement for a limited time, beginning for FY 2015 and continuing through FY 2018.<sup>4</sup> (In addition, schools and libraries were allowed starting in 2016 to pay their share of such special construction through an installment plan provided by a carrier.<sup>5</sup>) With FY 2018 upon us, SHLB is working with other groups to convince this FCC to extend this rule beyond FY 2018. Industry groups appear to be opposing the extension.

### **Rural Health Care Program**

The annual SHLB conference this year featured several panels and workshops devoted to the Rural Health Care (RHC) program. Some of the important themes discussed were:

1. Speculation about whether funding demand will stay below the increased funding cap approved by the FCC last summer (\$582 million this funding year);
2. Challenges with USAC program administration including lack of dialogue and transparency;

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<sup>1</sup> See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc. of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Order*, CC Docket Nos. 96-45, 97-21, 14 FCC Rcd 13734, 13749, ¶¶ 29, 39-40 (*Tennessee Order*) (1999) (holding that capital investment costs for service provider-owned hub sites and caching servers necessary to deliver Internet access services to eligible schools and libraries were eligible for E-rate support).

<sup>2</sup> See *Modernizing the E-rate Program for Schools and Libraries, Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, FCC 14-189, n.21 (2014) (*Second Modernization Order*) (“In the E-rate program, special construction (or installation) charges for category one broadband services include costs for design and engineering, project management, digging trenches, and laying fiber. . . . ‘[S]pecial construction’ for purposes of the E-rate program does not have the same meaning as it does in the tariffing context and should not be read to expand the term as used in other tariff situations.”) While the special construction examples provided refer to wireline facilities, there is no reason to believe analogous wireless facilities would be excluded. See 47 U.S.C. § 254(h)(1)(B) (“The Commission shall establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries . . .”).

<sup>3</sup> *Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, Order, 15 FCC Rcd 18598 (2000) (*Brooklyn Order*).

<sup>4</sup> See *Second Modernization Order*, ¶¶ 17-21.

<sup>5</sup> *Id.* at ¶¶ 22-28.

3. Confusion in the RHC Telecommunications Program over how to establish valid urban and rural rates;
4. Discussion about how non-rural HCP participation in the HCF program benefits rural;
5. Uncertainty about when the open RHC rulemaking will be concluded (address Telecom Program reforms and potential changes to the HCF including participation by

The final round of comments on the [Connected Care NOI](#) were submitted October 10 (unofficial list of reply comments [here](#)). 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. (The proposed program is notably *not* part of the Rural Health Care program.)

Several important issues are raised in the NOI including questions about the legal basis for the program, how much money will 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 (unofficial list of initial comments available [here](#)).

Finally, here are some interesting recent press articles about telemedicine which highlight the continue complexity of the issue: [Virtual doctor visits are getting more popular, but questions remain about who pays](#) (May 2018) and [Here's why telemedicine hasn't lived up to its early hype](#) (June 2018).

### **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. Representatives from [Northern](#)

[Michigan University](#) (NMU) in Marquette, MI met with Chairman Pai about the EBS proceeding, 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.<sup>6</sup>

A recently emerging issue is Commissioner Rosenworcel’s proposal to allow EBS licensees to auction their licenses to commercial entities and use the auction proceeds to address the homework gap. There is little support among Republicans for such a proposal and it is unclear whether it would require a change in the law (requiring Congress to act) to allow this. In addition, Rosenworcel’s proposal may make it harder to argue – as SHLB has – that consortia of anchor institutions should have a first-right to EBS licenses before they go to a general auction. Commissioners O’Rielly and Carr appear to support a proposal to auction EBS licenses directly to commercial entities. Pai appears sympathetic to the SHLB approach.

### **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. [Microsoft’s most recent](#) white paper

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<sup>6</sup> [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.

includes information about white spaces projects underway in Ohio, New York, Maine, Virginia, Maryland, Michigan and Wisconsin.

### **Universal Service Contributions**

In fourth quarter of 2018, for the first time, the federal universal service quarterly contribution factor is over 20 percent (20.1%). This represents an increase from 17.9% the previous quarter. 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, the FOSTA legislation was criticized by parties such as the Electronic Frontier Foundation (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. 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. TechDirt features an [anti-FOSTA/SESTA blog](#) with ongoing news and commentary (language warning).

On June 28, [EFF \(representing several other parties\) filed suit](#) in DC Federal Court to stop FOSTA enforcement and ultimately have it declared unconstitutional. EFF’s court brief can be found [here](#). On September 24<sup>th</sup>, the Court denied EFF’s motion for a preliminary injunction and dismissed the complaint on procedural grounds, without reaching the constitutional questions. EFF has not indicated yet whether it will appeal the case; updates from EFF can be found [here](#).

### **Net Neutrality**

On October 4, Representative Ro Khanna (D-CA) released [10 principles for an “Internet Bill of Rights.”](#) (Rep. Khanna’s congressional district covers Silicon Valley.) The principles address data privacy and net neutrality including: access and use of the internet without internet service providers blocking, throttling, engaging in paid prioritization, or otherwise unfairly favoring

content, applications, services or devices; access to and knowledge of all collection and uses of personal data by companies; and access to multiple viable, affordable internet platforms, services and providers with clear and transparent pricing. (If Democrats win the House, they will certainly propose net neutrality legislation.)

Meanwhile, [Chairman Pai has taken note](#) of a [USTelecom report](#) showing an uptick in broadband investment in 2017, claiming this demonstrates the positive impact of this Commission's deregulatory policies – including repeal of the 2015 net neutrality rules.

### Courts

- [Mozilla Corporation v. FCC, et al.](#) (challenge to the 2017 Restoring Internet Freedom Order) – Initial briefs were filed August 20 with Amici (friendly supporting briefs) filed August 27. The FCC's brief in opposition was filed October 11. Amici supporting the FCC were filed October 18 by the States of Texas and Nebraska (jointly), the Information Technology and Innovation Foundation (ITIF), and the Georgetown Center for Business and Public Policy, et al. Final briefs are due November 27; oral arguments are scheduled for February 1, 2019.
- [United States Telecom Ass'n., et al. v. FCC & USA](#) (challenge to the 2015 Open Internet Order) – A decision on petitions for *certiorari* is 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. If you are interested in learning more about this, [Benton Foundation has a detailed discussion of the issue here](#).

### States

The National Conference of State Legislators (NCSL) features an up-to-date summary of net neutrality actions by state [here](#).

In late September, California Governor Brown signed SB 822, the California Internet Consumer Protection and Net Neutrality Act of 2018, into law. Within days it was [challenged by the Department of Justice \(DOJ\) on preemption grounds](#), and by several industry groups (in a separate suit). DOJ is seeking a preliminary injunction in California federal district court; a hearing has been set for November 14. The industry groups – American Cable Association (ACA), CTIA - The Wireless Association (CTIA), NCTA - The Internet & Television Association (NCTA), and USTelecom – [are similarly seeking to block the law from coming into effect](#). These industry

groups have also [challenged Vermont's net neutrality law and executive order](#) in federal district court there.