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November 21, 2018

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – Pre-Thanksgiving 2018 Edition

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### **Capitol Hill**

As many expected, Democrats gained control of the House of Representatives in the mid-term election this month, while Republicans slightly increased their majority in the Senate. Frank Pallone (D-NJ) will head the House Energy & Commerce committee and we can expect much more aggressive oversight of FCC activities as a result. Democrats have suggested they will re-propose a \$1 trillion infrastructure funding plan that included \$40 billion in direct spending for broadband. President Trump has suggested he might support the Democratic effort, however paying for it given current budget deficits will be difficult and will leave support from the Republican Senate in doubt.

Senator Wicker (R-MS) will be taking over leadership of the Senate Science & Transportation Committee (with FCC oversight) from Sen. Thune (R-SD) who was elected majority whip. It is possible Thune will remain active in communications by taking over the subcommittee on Communications, Technology, Innovation, and the Internet formerly led by Wicker.

Work on a Farm Bill (with possible broadband funding) continues with the possibility of a legislation emerging from the lame duck session (before seating of the new Congress in January). However, a government shutdown is possible in early December over funding for President Trump's border wall which could disrupt efforts to do anything in the lame duck session. As time passes it is more likely a short extension of expiring Farm Bill programs will be enacted giving Democrats a chance to propose their own bill in the new Congress.

Lastly, with lobbying restrictions associated with Gates Foundation funding behind it, SHLB has rechristened its infrastructure group the Broadband for Anchor Institutions Legislative Working Group (BAILWG). The group plans to draft legislative language that will support funding for broadband to (and through) anchor institutions with focus on Goal #4 from the [National Broadband Plan](#): Gigabit service to all anchors by 2020. The goal is to propose specific language to the incoming Congress in January and to find support and a bill sponsor.

## **NTIA**

Mapping. Congress in 2018 provided NTIA with \$7.5 million in funding for broadband mapping but the authorizing language seemed to discourage NTIA from collecting further data (rather than analyzing current data sets). SHLB among others argued that NTIA could and should gather additional data.

NTIA appears to have agreed with SHLB, [announcing](#) that it “intends to collect broadband availability data at a more granular level than that available via the FCC Form 477 process.” However, the NTIA Public Notice does not mention anchor institution data, which is a gap in the FCC's data collection and something SHLB had urged NTIA to collect.

NTIA says that it intends to collect broadband data from two types of entities:

- (1) Owners and operators of broadband networks; and
- (2) industry associations, data aggregators, and researchers that study or analyze broadband availability. Respondents may include private companies, non-profits, cooperatives, educational institutions, tribal governments, and local, regional, or state governments. This information collection includes the use of both wireline and wireless technologies to deliver broadband services.

Comments on whether this proposed information collection complies with the Paperwork Reduction Act are due December 24.

Workshops/Newsletter/Webinars. A Nevada Broadband Workshop will take place on January 11, 2019, in Carson City, Nevada. “The Workshop will provide information on topics including local broadband planning, funding, and engagement with service providers. Speakers and attendees from Nevada, federal agencies, and across the country will come together to explore ways to facilitate the expansion of broadband capacity, access, and utilization.” More details and registration information are [here](#).

The NTIA monthly webinar for January (Wednesday, January 16) is entitled “[Measuring the Digital Divide: Review of Recent Surveys and Data](#).” You can register [here](#). There is no webinar scheduled for December. The archive for previous webinars is available [here](#).

The BroadbandUSA Newsletter for November highlights the November 14 webinar on transforming rural healthcare through broadband, highlighting the tele-stroke program at University of Arkansas for Medical Sciences (UAMS), and is available [here](#). The November newsletter also has links to state broadband news from [Maine](#) (rural broadband), [Missouri](#) (broadband for agriculture), and [Arkansas](#) (K-12 broadband), among others. Previous newsletters and other news are available [here](#).

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

On November 13, USDA announced \$33 million in grants to e-connectivity projects located in the following states: KY, TN, MN, NC, GA, ND, OK, UT, and VA. The press release is [here](#); details on the individual grants can be found [here](#); \$58 million in loans were also announced. This funding appears to be under the Community Connect Grant and Rural Broadband Access programs, separate from the e-Connectivity program The Quilt, Internet2, and others filed comments on in September (below).

The USDA [e-Connectivity webpage](#) will feature information about the \$600 million broadband pilot program when it is 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](#). Benton Foundation reports that Agriculture Secretary Sonny Perdue [recently suggested](#) the program would be formally launched before the end of 2018.

### **Federal Communications Commission**

#### **October and November Monthly Meetings**

At its October 23, 2018 Open Meeting the Commission adopted the following items (among others): an [order, FNPRM, and a second FNPRM](#) affecting BDS services provided by certain Rural Local Exchange Carriers (RLECs); a [report and order](#) that makes changes to the Citizens Broadband Radio Service in 3.5 GHz band to increase incentives for innovation and investment, including for mobile 5G services; and an [NPRM](#) that proposes more spectrum for broadband by allowing new unlicensed uses of the 5.925-7.125 GHz band. At its November 15, 2018 [Open Meeting](#) the Commission focused almost entirely on space and satellite services.<sup>1</sup>

#### **E-rate**

Eligible Services List. On November 16, the FCC Wireline Bureau [approved the 2019 Eligible Services List](#) (ESL), reflecting minor changes from 2018. Among other things, the 2019 ESL

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<sup>1</sup> NECA in its [Washington Watch](#) summarized the space and satellite items as follows: “an [order](#) addressing waivers of certain satellite licensing requirements for receive-only earth stations operating with the Galileo radionavigation satellite service; an [NPRM](#) to update the orbital debris rules for all Commission-authorized satellites; an [NPRM](#) addressing rules to facilitate the deployment of non-geostationary orbit fixed-satellite service earth stations that transmit while in motion; a [memorandum opinion, order, and authorization](#) granting SpaceX’s request to deploy and operate a proposed non-geostationary constellation to provide broadband services around the world; an [order and declaratory ruling](#) granting Kepler’s request for U.S. market access to offer global connectivity for the Internet of Things using a proposed constellation of non-geostationary orbit satellites; an

removes reference to support for voice services as the end of the five-year phase out period (adopted in 2014) was reached in 2018. The Bureau also clarified that so-called “redundant” Category One services are not eligible for E-rate support.

Amortization Requirement for Non-Recurring Costs. 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>2</sup> In the E-rate program these non-recurring capital charges are referred to as “special construction.”<sup>3</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>4</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>5</sup> With FY 2018 upon us, SHLB is working with other groups to convince this FCC to extend this rule beyond FY 2018. SHLB’s October 30 *ex parte* notice on this issue is available [here](#).

### **Rural Health Care Program**

[This item is adopted from the client alert I sent to the group earlier this month, but reflects updated information from an FCC meeting on November 20.] This summer, in response to bipartisan pressure and a sustained outcry from health care providers in Alaska and the lower 48, the FCC increased the funding cap for the Rural Health Care program by over \$170 million

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[order and declaratory ruling](#) granting Telesat’s request to access the U.S. market to provide broadband services; an [order and declaratory ruling](#) granting LeoSat’s request for U.S. market access to provide satellite broadband services; an [NPRM](#) to streamline space and earth station licensing rules . . .”.

<sup>2</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>3</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.”)

<sup>4</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>5</sup> See *Second Modernization Order*, ¶¶ 17-21.

annually, and started inflation indexing for future years. This decision retroactively funded all 2017 funding requests (reversing previously announced *pro rata* reductions) and meant \$581 million in funding would be available for the 2018 funding year (July 1, 2018 to June 30, 2019). Since the June 30 deadline to submit 2018 requests, the question has loomed: *Would the increased RHC budget be sufficient to avoid reductions in 2018?*

[FCC Chairman Pai partially answered that question at a speech on healthcare last month in Boston](#) (emphasis added):

[O]n the subject of Rural Health Care Program funding for Funding Year 2018, I have some good news to share. Based on information provided by [USAC], we expect to fully fund out of the 2018 \$581 million budget all eligible amounts for **single-year** 2018 funding requests from participating rural health care providers. In English: Every rural clinic or hospital seeking to lower its cost of service for this next year is eligible for full funding.

This is great news for all applicants for single-year funding, which includes anyone participating in the RHC Telecommunications Program (which only allows single-year requests), and for those in the HCF seeking single-year funding for services (including up to \$5000 in installation costs).

Others in the HCF are facing possible *pro rata* reductions because of a \$150 million funding cap that exists within the HCF and which applies to commitments for multi-year funding and up-front costs. This \$150 million HCF “sub-cap” has never been hit before, but the careful wording in Chairman Pai’s announcement suggests this year it could be. (The HCF sub-cap was not raised by the FCC last summer or indexed to inflation, notwithstanding requests by [some](#) that the FCC do so).

If you are an HCF consortium that in 2018 sought (1) multi-year funding or (2) funding for up-front costs (*i.e.*, any type of equipment, carrier special construction costs in excess of \$5000, or self-construction), you could again be facing *pro rata* reductions. However, in a meeting Tuesday, November 20, addressing this issue, FCC staff suggested they should be able to avoid reductions this year by, for example, awarding 2/3 or 1/3 years of funding for three-year funding requests. We will be watching this closely.

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

Representatives from [Education Departments in Nebraska and Virginia, and SHLB](#) recently met with FCC staff to discuss EBS. Nebraska officials discussed their readiness to deploy a statewide wireless network using their existing network of fiber and towers to address the homework gap, and Virginia expressed similar interest. SHLB reiterated its opposition to auctions and support for granting EBS licenses to local entities, in partnership with states or other parties who have

the expertise to deploy such a network. According to John Windhausen, FCC staff seemed interested in these ideas but hinted it was going to be an uphill battle to prevent auctions. They encouraged members to file as much information in the record as possible.

Background. 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>

### **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

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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.

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

The Connect Americans Now coalition (which presented at the SHLB annual conference this year) now has 44 organizations and corporations as members and is supporting these efforts. [Its most recent \*ex parte\*](#) from early November is here.

### **Universal Service Contributions**

In a somewhat surprise announcement, FCC Wireline Bureau Chief Christ Monteith indicated recently that FCC staff is looking at possible reforms to the USF contribution mechanism. This was apparently news to the State-Federal Joint Board on universal service which typically is in the loop on potential contribution reform. There are no details yet on exactly what specific changes the Bureau is considering.

### **Net Neutrality**

Net Neutrality will be on the federal legislative agenda as Democrats take control of the House in January. 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.

### **Federal Courts**

- [Mozilla Corporation, et al. v. FCC](#) (DC Circuit Court of Appeals challenge to the 2017 Restoring Internet Freedom Order) – Final briefs are due November 27; oral arguments are scheduled for February 1, 2019.
- [United States Telecom Ass'n., et al. v. FCC](#) (Supreme Court challenge to the DC Circuit's upholding of the 2015 Open Internet Order) – On November 5, 2018, the Supreme Court denied the petitions for *certiorari*, leaving undisturbed the 2016 decision of the DC Circuit. The FCC had asked the Court to vacate the case as moot. The Court's decision to not hear the case should not be read to mean anything about the Court's view of the case merits or the merits of net neutrality itself.

## States

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

On October 3, 2018, SB 822, the California Internet Consumer Protection and Net Neutrality Act of 2018 was [challenged in federal district court in California by the Department of Justice \(DOJ\)](#) and several industry groups ([in a separate suit](#)). DOJ sought a preliminary injunction but on October 26 the court agreed to a request by all parties to stay the case after California agreed not to enforce the law pending outcome at the DC Circuit decision on the FCC's "Restoring Internet Freedom" order.

On October 18, 2018, the same industry groups – American Cable Association (ACA), CTIA - The Wireless Association (CTIA), NCTA - The Internet & Television Association (NCTA), and USTelecom [challenged Vermont's net neutrality law and executive order](#) in federal district court there.