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To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – January 2019

Capitol Hill

A government shutdown caused by a partial lapse in spending authority has no end in sight. Speculation had been that negotiations between President Trump and Democratic House Leadership would start again until after the President Trump gave his State of the Union address on January 29, however, it now appears the State of the Union itself may be delayed. The shutdown is already the longest in history.

Even without the shutdown, reports are that the Democratic leadership in the House will not turn to broadband legislation until May. With that timeframe in mind, the SHLB Broadband for Anchor Institutions Legislative Working Group (BAILWG) continues its work drafting 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. As mentioned last month, Chip Byers was recently tapped to co-chair the group.

NTIA

With many agency webpages such as NTIA's showing a shutdown disclaimer¹ there are no NTIA updates this month. The [Nevada Broadband Workshop](#) presumably did not occur on January 11, 2019 and will be rescheduled. Similarly, the January 16 NTIA webinar "[Measuring the Digital Divide: Review of Recent Surveys and Data](#)" presumably did not occur. The archive for previous webinars is available [here](#).

The BroadbandUSA Newsletter for December is available [here](#). Among other things the December newsletter mentions a webinar on rural health put on by the NIST Global City Teams Challenge Smart Agriculture and Rural SuperCluster. More information is available from Jean Rice at NTIA (jrice@ntia.doc.gov). (Jean Rice was an invited speaker at the recent Quilt 2018 Fall

¹ "Due to the lapse in Congressional Appropriations for Fiscal Year 2019, the U.S. Department of Commerce is closed. Commerce Department websites will not be updated until further notice."

Member Meeting at the University of Maryland.) Note that the NIST Global City Teams [2019 Exposition](#) addressing the “Smart and Secure Cities and Communities Challenge” is here in Washington, DC, February 20-22, 2019. There is no registration fee required to attend, but [registration is required](#). Previous Broadband USA newsletters and other news are available [here](#).

USDA – Rural Utilities Service

ReConnect Program

Webinars and training for the ReConnect Program were originally scheduled for January per the following schedule:

| | |
|-----------------------|-----------------------|
| Tuesday, January 8 | Thursday, January 10 |
| Tuesday, January 15 | Thursday, January 17 |
| Wednesday, January 23 | Wednesday, January 30 |

It is presumed they will be rescheduled once the government reopens.

Following is the background and summary of the ReConnect reported previously: USDA in December formally launched the \$600 million broadband pilot program authorized earlier this year in the 2018 Omnibus spending bill. Re-christened the “ReConnect Program,” it will make \$200 million available each for grants, combined grants and loans, and loans only. Non-profit entities and state agencies, subdivisions or “instrumentalities” (among others) are eligible to apply. The maximum grant size will be \$25 million and will have a 25% match requirement (which funds must be expended first). Certain “pre-application” expenses may be eligible up to 5% of the award total. The required buildout period will be five years and grant awardees must commit to provide service for the useful life of the funded facilities.

To protect against overbuilds, USDA has excluded certain areas from eligibility, but eligible areas will ultimately be determined by USDA after proposed projects have been submitted, mapped, posted through a public notice, and service providers given a 30-day opportunity to respond if they serve locations that are proposed to be served (this is discussed further below). Grant applications are due April 29; loan/grants applications are due May 29; loan-only applications will have a 2% interest rate and will be distributed on a rolling, first-come, first-serve basis with an application deadline of June 29.

As described by USDA:

Projects funded through this initiative must serve communities with fewer than 20,000 people with no broadband service or where service is slower than 10 megabits per second (mbps) download and 1 mbps upload.

Approved projects must create access speeds of at least 25 mbps download and 3 mbps upload. Priority will be awarded for projects that propose to deliver higher-capacity connections to rural homes, businesses and farms. USDA seeks to stretch these funds as far as possible by leveraging existing networks and systems without overbuilding existing services greater than 10/1 mbps.

Evaluation criteria include connecting agricultural production and marketing, e-Commerce, health care and education facilities.

FCC Connect America Fund (CAF) recipients are only eligible for loans, but in areas that receive CAF support – to address overbuilding concerns – only the CAF recipient will be eligible for funding. In addition, pure grants are available only in areas where 100% of the households are unserved by 10/1 broadband, whereas loan and loan/grants are available in areas where 90% of the households are unserved.

Detailed application scoring criteria are located [here](#) and include nine separate categories with a total maximum available points of 150. Generally, one point is awarded for each anchor institution served up to a maximum for each category, specifically including farms, businesses, “educational facilities,” “healthcare centers,” and “critical community centers.” Additional point categories include how rural the area is, the speed/quality of the service, serving tribal lands, and whether the state has a broadband plan, allows utilities to provide broadband, and has committed to expedite rights-of-way environmental permitting. Notably, up to 20 points are available for projects that commit to build a network supporting 100 Mbps symmetrical connection speeds.

As noted, determining eligible areas is essentially a two-step process. First, *ineligible* areas have already been identified on the USDA mapping tool (see below). Then, after applications are filed, USDA will map them and post each on the USDA website, after which existing service providers have 30 calendar days to file maps showing where they are already serving specific locations. USDA will consider this information (and any additional information) to determine whether an area is eligible for funding.

The USDA mapping tool is accessible [here](#). Ineligible areas reflected on the map (you may need to zoom in) include: CAF II Auction 903 winners, non-rural areas (any city, town, or incorporated area that has a population of greater than 20,000 inhabitants or an urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants), pending RUS borrower applications, protected broadband borrower service areas (any entity that has received a Telecommunications Infrastructure loan, Farm Bill Broadband loan or Broadband Initiatives Program (BIP) loan any time after the beginning of Fiscal Year 2000 – also includes Community Connect Grant projects still under construction).

Detailed rules and application requirements are formally set forth in [this Federal Register notice](#).

Federal Communications Commission

The Senate on January 2, 2019 confirmed Geoffrey Starks as FCC Commissioner for a five-year term that expires June 30, 2022. The Senate also confirmed Commissioner Carr for a second term that expires June 30, 2023. The FCC now has its full complement of Commissioners (3 Rs, 2 Ds).

Assuming the government reopens, the next FCC meeting is scheduled for [Wednesday, January 30, 2019](#). Note FCC comment filing deadlines occurring during the shutdown are suspended. If the FCC takes no further action, comments due during the shutdown are due the day after the FCC recommences operations.²

BDAC Reauthorization

The FCC in December [announced its intent to re-charter the Broadband Deployment Advisory Committee](#) (BDAC) for another two-year period and is seeking nominations. The FCC noted:

Issues to be considered by the BDAC will include, but are not limited to, measures to prepare for, respond to, and recover from disasters that impact broadband networks; new ways of encouraging deployment of high-speed broadband infrastructure and services to low-income communities; and other ways to accelerate deployment of broadband infrastructure to all Americans and to close the digital divide

Nominations for membership to the BDAC were due January 10, 2019 (but see above about filing deadlines occurring during the shutdown).

E-rate

Do Product Demonstrations Violate Competitive Bidding Requirements? Having vendors come in and demonstrate products has long-been a permissible and important part of the E-rate procurement process for schools and libraries. The general rule has been that such demonstrations should not occur during the 28-day bid evaluation period, however even those were permissible if an RFP requires a demonstration and all vendors are given the opportunity to present.

Recently USAC changed its website to explain that product demonstrations may constitute prohibited gifts.³ Notwithstanding, in recent training events, USAC staff have said that product

² See <https://docs.fcc.gov/public/attachments/DA-19-10A1.pdf> at 2-3.

³ See <https://www.usac.org/sl/applicants/step01/gift-rules.aspx> (last visited Dec. 16, 2018) (“Applicants may not accept gifts with a retail value greater than \$20, which include but are not limited to gifts for attending seminars;

demonstrations may still be permissible *in some cases*. SHLB has joined with other E-rate stakeholders on [a letter to the FCC's Wireline Bureau](#) seeking clarification and pointing out (among other things) that such demonstrations are important to ensuring the applicants can determine the most cost-effective services that will meet their educational needs.

MAXIMUS Transition. USAC has always relied partly on 3rd-party vendors to process E-rate applications. Since the start of the program in 1998, that vendor was Solix (based in Whippany, NJ). While USAC recompeted this work over the years, the incumbent Solix had always been the winner. This year a new 3rd-party vendor, [MAXIMUS Federal Services, Inc.](#), a federal contractor based in Reston, VA, won the procurement. According to USAC, while price was the primary factor, past performance with a similar size contract within the past three years was significant. The changeover to MAXIMUS occurred January 1, 2019.

E-rate Program Amortization Requirement (for Non-Recurring Costs). The FCC on January 2, 2019 opened docket 19-2 to address this issue. The government shutdown interrupted further action. Below is the background from last month on this issue:

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.⁴ In the E-rate program these non-recurring capital charges are referred to as “special construction.”⁵ 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.⁶ In 2014, the Second E-rate Modernization Order suspended this amortization requirement for a

marketing calls; loans of products, including those characterized as on-site product demonstrations; services or equipment; or trainings.”).

⁴ 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).

⁵ 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.”)

⁶ *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*).

limited time, beginning for FY 2015 and continuing through FY 2018.⁷ 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

On a January 15 conference call with SHLB, USAC CEO Radha Sekar confirmed that funding year (FY) 2018⁸ requests for upfront and multi-year funding have exceeded the Healthcare Connect Fund's \$150 million sub-cap for such requests.⁹ FY 2018 single-year funding requests have been fully funded. We have confirmed that USAC is issuing single-year funding commitments and has been issuing funding denials for some multi-year requests. It is not clear yet whether USAC will pro-rate FY 2018 upfront and multi-year request or whether – per our meeting with FCC staff in November – multi-year requests will be reduced from three to two or one-year in order to get below the cap.¹⁰

The FCC in December released a [public notice](#) seeking further comment on the issues of urban and rural rates in the Telecommunications Program. Comments on urban and rural rates were filed last spring as part of the RHC Notice of Proposed Rulemaking but there have been considerable developments since then – among other things, USAC and the FCC providing “heightened scrutiny” to all urban and rural rates for FY 2017, and the [FCC unilaterally and retroactively setting 2017 rural rates for at least one Alaskan carrier](#). These further comments were due January 7, 2019, with replies due January 21 (but see footnote 2 above about the impact of the shutdown on filing deadlines). Chairman Pai has signaled a desire to complete the RHC rulemaking in the first half of 2019. Obviously, this government shutdown is going to affect this timetable.

This public notice is part of the apparent resolution between Chairman Pai and the Alaskan Senators whom, upset with Pai's handling of the Rural Health Care program in Alaska, had placed a hold on Commissioner Carr's re-nomination to a full five-year term. Chairman Pai on November 30 [sent a letter to the Senators](#) committing to these actions.

⁷ See *Second Modernization Order*, ¶¶ 17-21.

⁸ Services delivered July 1, 2018 through June 30, 2019.

⁹ 47 C.F.R. § 54.675(a).

¹⁰ See *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, ¶ 298, n.717 (2012) (“If an applicant signs a multi-year contract but funds are no longer available for the funding year for a multi-year commitment, the applicant may choose to simply seek a one-year funding commitment, have the contract designated as ‘evergreen,’ and apply for a multiyear funding commitment in the next funding year.”).

Educational Broadband Service (EBS)

In late November representatives from [Michigan state higher-educational institutions](#) met with the FCC to discuss EBS, providing a presentation on Northern Michigan University's experience with EBS and identifying areas in lower Michigan that could benefit from new EBS licenses.

In early November, representatives from [Education Departments in Nebraska and Virginia, and SHLB](#) 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 would 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.

Microsoft White Space Rural Broadband Initiative

Microsoft recently showcased their own national broadband data that is based on usage of Microsoft cloud services. While the FCC Form 477 data indicates almost 28 million Americans do not have access to broadband, the Microsoft data suggests the number could be over 162 million. Microsoft's data is available [here](#) (scroll down to "United States broadband availability and usage analysis").

In July 2017 Microsoft announced a \$10 billion TV White Spaces initiative (now called the "Microsoft Airband 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 recently announced that it has active deployments in 17 states and has increased its commitment to reaching three million rural residents in five years.* [Microsoft's most recent](#) white paper includes information about white spaces projects underway in Ohio, New York, Maine, Virginia, Maryland, Michigan and Wisconsin.

Net Neutrality

Net Neutrality is on the federal legislative agenda now that Democrats have taken control of the House. Representative Ro Khanna's (D-CA) [10 principles for an "Internet Bill of Rights"](#) provides a good starting point for the Democratic position. (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 have been filed and oral arguments are scheduled for February 1, 2019. (On January 17, 2019, the Court denied an FCC request to delay oral argument due to the government shutdown.) [Here is a link to the Amicus Brief](#) filed last August by the American Council on Education and 19 other education and library associations in support of those challenging the FCC repeal.
- Eastern District of California. 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.
- Vermont District Court. 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.

States

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