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VIA ELECTRONIC MAIL

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – March 15, 2019**

Capitol Hill

We understand from our recent (March 6) meetings between The Quilt representatives and a Democratic majority staffer for the House Energy & Commerce Committee that House Democrats are working on a revised trillion dollar infrastructure proposal that would again include as much as \$40 billion in direct broadband infrastructure spending. If you have thoughts on how to improve [last year's proposed legislation](#), there is a limited window to offer comments or suggestions directly to committee staff.

The Quilt representatives also had productive meetings on March 6 with Republican and Democratic staffers, respectively, for the Senate Commerce Committee. These House and Senate committees have jurisdiction over the FCC and NTIA (but not USDA where the Rural Utilities Service is located).

While there is [reason for cautious optimism](#) that an infrastructure deal could be struck between the Democratic House and Republican Senate which could be signed by President Trump, this must be tempered by political realities here in DC. Although we can expect hearings on rural broadband this year, the [March 12 Senate hearing on rural broadband](#) focused on removing barriers to deployment rather than on additional investment. We anticipate SHLB releasing its proposed broadband legislation soon and hope that it will help shift the focus to the funding side of the equation.

Lastly, a bi-partisan group of four Senators introduced a bill that would allow the E-rate program to fund Wi-Fi on school buses as a way to address the homework gap. The Senators are Udall (D-NM), Gardner (R-CO), Cortez Masto (D-NV), and Whitehouse (D-RI).

NTIA

[NTIA announced](#) on February 12 that it was partnering with eight geographically diverse states to update the United States broadband map: "The eight states – California, Maine, Massachusetts, Minnesota, North Carolina, Tennessee, Utah, and West Virginia – will contribute data and other inputs to the map."

NTIA released its American Broadband Initiatives [milestone report](#) in February which focuses on strategies for spurring wireless and wireline broadband deployment on federal lands. The report incorporates some suggestions from the FCC's recent [report on this subject](#). Among other things, the NTIA report outlines a timeline for streamlining commercial access to federal assets in rural areas including 7,000 tower locations to further rural broadband deployment.

The next NTIA broadband webinar is March 20 and will discuss the [American Broadband Initiatives milestone report](#) linked above. The April webinar will be on April 17 and will address “[Model Programs and Practices for Building a Competitive Cybersecurity Workforce: The HBCU Story](#).” The archive for previous webinars is available [here](#).

The BroadbandUSA Newsletter for February is available [here](#) with state news items from Missouri, North Carolina, and Oregon (among others); the March newsletter is [here](#) with state news items from Ohio, Arkansas, and North Carolina (there was no January newsletter).

USDA – Rural Utilities Service

ReConnect Program

Due to the government shutdowns, the original ReConnect filing deadlines were extended with the deadline for 100% grant applications moving from April 29 to **May 31, 2019**. The formal announcement for this change is available [here](#). Electronic application submissions will be accepted through <https://www.usda.gov/reconnect> although the date they will start accepting them has not yet been announced. Important application forms are available [here](#). A summary of the ReConnect program is available in the January broadband update. Formal detailed rules and application requirements are set forth in [this important Federal Register notice](#).

Note the USDA [recently clarified](#) that only the Governor of a state can provide the certification for states with pro-broadband policies (e.g., an up-to-date state broadband plan, expedited rights of way and environmental permitting requirements, utilities allowed to provide broadband).

The schedule for upcoming webinars and training for the ReConnect Program can be found [here](#). Six two-day in-person technical workshops are planned for the ReConnect Program around the country. The first is April 2-3 in Pittsburgh, PA ([registration and details available here](#)). The five remaining workshops will be announced in the next few weeks at locations in the Southeast, Southwest, Midwest, and Pacific Northwest.

Federal Communications Commission

Streamlined broadband deployment on federal lands will be a focus of the FCC in coming months, coming in response to Broadband Deployment Advisory Committee [recommendations last year on this issue](#). This issue is significant for many rural broadband providers. The full agenda for

the Commission’s next meeting on March 15 can be found [here](#) (no items that we are following are under consideration this month).

BDAC Reauthorization

The FCC in December [announced its intent to re-charter the Broadband Deployment Advisory Committee](#) (BDAC) for another two-year period (nominations closed in early February). 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.

On March 7 the FCC [announced](#) the formation of a BDAC working group focused on “increasing broadband investment in low-income communities.” *Nominations for this working group are due March 19* (details at the previous link).

Federal Universal Service Contribution Base

The Federal-State Joint Board on Universal Service (Joint Board) met in February after a long-period of inactivity. Joint Board membership includes a mix of state and FCC commissioners. FCC Commissioner O’Rielly is currently chair. The Joint Board has been attempting to reach consensus on contributions reform for some time, however, Commissioner O’Rielly is adamantly opposed to assessing broadband to shore up the contribution base. He instead is focused on fiscal discipline including establishing an overall USF budget. Commissioner O’Rielly recently acknowledged “a spirited conversation” as the Joint Board commenced its work again on the issue.

In a recent investor note, Blair Levin acknowledged that USF contribution politics remain “tricky” and suggested the best chance at reform was in the three months between a presidential election and an inauguration.

E-rate

Commissioner O’Rielly Seeks Information from USAC Concerning Reported Overbuilding

On March 7, 2019 Commissioner O’Rielly sent [a public letter to USAC](#) seeking information about several large E-rate funding requests in Texas, and about funding approvals for large WAN projects generally. O’Rielly’s inquiry is partly in response to a November 2018 filing [on behalf of several carriers in Texas](#) asserting USAC is approving E-rate funding for fiber to schools that already have fiber connectivity. There are too few details in the public record to jump to

conclusions about what is going on here, but generally speaking, the cost effectiveness rules are supposed to protect against this. We will keep an eye on this situation and the issue generally.

Wireline Bureau Releases [Report on Category 2 Budgets](#)

Before the 2014 E-rate reforms, applicants were eligible for E-rate funding for internal connections (then called Priority 2 or “P2”) in two out of every five years (the two-in-five rule). Unfortunately, due to growth in Priority 1 demand, P2 funding was often unavailable. In years when funding was available, only schools and libraries at the highest discount levels – usually urban – received funding.

In 2014, the Commission rechristened P2 funding as Category 2 (C2) funding and, for an initial test period, instituted five-year budgets to ensure more equitable distribution of support among schools and libraries at different discount levels. These C2 budgets applied to pre-discount expenditures and were established based on the number of students (\$150 per student) or library square footage (\$2.30 or \$5.00 per square foot, depending on location) – with a minimum budget floor of \$9,200 per site. Applicants could use their budgeted C2 funds at any time during the five-year cycle which started in the first year they received a commitment.

Before the FCC could consider whether to make the C2 five-year budget system permanent, the Wireline Competition Bureau (Bureau) was required to analyze and report on the effectiveness of the budget approach. The Bureau sought comments on C2 budgets in September 2017 and commenters universally supported the approach, albeit with many suggested modifications. In February 2019 [the Bureau released its long-awaited report](#).

In concluding that C2 budgeting was more effective than the two-in-five approach (“a clear improvement”), the Bureau cited four reasons:

1. Better availability of funding during test period;
2. Funding more widely dispersed to a greater number of schools and libraries;
3. Better distribution among urban and rural and among different discount tiers;
4. More flexibility for applicants to spend funding when they need it.

The Bureau did note that applicants at or near the budget floor were the least likely to utilize C2 funding. The Bureau report recommended the Commission retain C2 budgets while considering targeted reforms, including possibly raising the budget floor.

Until and unless the Commission acts, however, the C2 budget process is scheduled to sunset after FY 2019. One ambiguity is whether sunset occurs for everyone after FY 2019 or after five years from their first commitment under their C2 budget. [SHLB recently sought clarification on this specific issue](#).

E-rate Program Amortization Requirement (for Non-Recurring Costs). The FCC on January 29, 2019 issued a [Notice of Proposed Rulemaking](#) (NPRM) to make permanent the temporary suspension of the requirement that carriers amortize special construction project costs across three years. The temporary suspension will remain in effect during the rulemaking proceeding. *Comments are due March 18 with replies due April 1, 2019.*

Background: Carriers have long 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.¹ These non-recurring capital charges are referred to as “special construction.”² 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.³ In 2014, the Second E-rate Modernization Order suspended this amortization requirement for a limited time, beginning for FY 2015 and continuing through FY 2018.⁴ As noted above, the amortization requirement will remain suspended until the rulemaking announced in January 2019 is complete.

Rural Health Care Program

We are nine months into funding year (FY) 2018 (which started July 1, 2018) and most Healthcare Connect Fund (HCF) consortium funding commitments have yet to be released (single-site requests began to be released in December). The few consortium commitments that have been released allow one-year of support out of three-years requested. This truncation reflects the fact that the \$150 million HCF sub-cap that applies to one-time support and multi-year funding requests has been triggered. While truncated multi-year funding requests is undoubtedly better than *pro rata* reductions, the truncation creates administrative problems for consortium

¹ 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).

² 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.”)

³ *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*).

⁴ See *Second Modernization Order*, ¶¶ 17-21.

applicants who now must seek FY 2019 funding based on contracts that USAC has not approved yet. The delays and uncertainty for next year will also cause substantial problems. SHLB is preparing a letter on behalf of its health members to identify these problems to the FCC and USAC and explain that the HCF program is becoming unmanageable for many large and well-established consortia – despite the fact that one of the principle FCC goals for the HCF was to encourage consortia.⁵

[The FCC on March 8, 2019 announced](#) the inflation-adjusted caps for the Rural Health Care and E-rate programs. The RHC cap increased from \$581 million for FY 2018 to \$593.8 million for FY 2019, a 2.2 percent increase. E-rate increased from \$581 million to \$593.8 million. (The \$150 million HCF sub-cap is unaffected by these increases.)

The FCC in December [sought further comment](#) on the issues around 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](#).⁶ Utah Education and Telehealth Network’s comments in response to the public notice are available [here](#); SHLB’s initial and reply comments are [here](#) and [here](#).

Educational Broadband Service (EBS)

On March 7, 2019, EBS stakeholders including SHLB participated in a briefing on Capitol Hill that positioned EBS as an important resource to address the digital divide, opposing auctioning EBS spectrum to commercial entities not already serving rural areas. [SHLB with educational representatives from Northern Michigan University](#) (among others) and [public TV and educational programming advocates](#) filed respective *ex partes* making the case against commercial auctions. Also see recent filings from [Michigan educators](#) and the [Education Departments in Nebraska and Virginia, and SHLB](#).

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 unlicensed EBS

⁵ See, e.g., *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16699 at ¶ 45 (2012) (*HCF Order*) (“a primary focus of the Healthcare Connect Fund will be encouraging the growth or formation of statewide, regional, or Tribal broadband health care networks that will expand the benefits we observed in the Pilot Program. Benefits of such networks include access to specialists; cost savings from bulk buying capability and aggregation of administrative functions; efficient network design; and the transfer of medical, technical, and financial resources to smaller HCPs.”).

⁶ That carrier, GCI, appealed the FCC’s decision and the FCC sought public comments on this appeal in February.

spectrum could be auctioned, and 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

Multiple Net Neutrality bills have been introduced in the House this legislative session (one by Democrats and three by Republicans) but there is no compromise in sight as House Democrats refuse to consider any proposals that do not re-establish Title II authority over broadband (all Republican proposals avoid re-imposing Title II). The Democrats' proposed "[Save the Internet Act](#)" does not create Net Neutrality rules but rather would rescind recent FCC actions reversing the 2015 Open Internet Order. Democrats hope their legislation can create momentum that would garner the 13 Republican votes it would need in the Senate, thereby creating pressure on President Trump to support it. [A hearing on the Democratic bill was March 12.](#)

Ranking member Walden (R-OR) has suggested the way to a net neutrality compromise is to open up Section 230 of the Communications Act which currently protects edge providers from liability for content on their platforms. Some argue these content providers increasingly look like common carriers and should be subject to the same type of regulatory treatment as ISPs.

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 occurred in early February. [Here is a link to the Amicus Brief](#) filed in August 2018 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 and in January 2019 [sought summary judgment](#).

States

The National Conference of State Legislators (NCSL) features a summary of state net neutrality actions by state [here](#) however it does not appear to have been updated since January 2019. Since then, Connecticut, Colorado, and Hawaii are all considering state net neutrality legislation.