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VIA ELECTRONIC MAIL

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – April 19, 2019**

Capitol Hill

On April 2, The Quilt provided informal written recommendations for federal broadband funding to Democratic staff for the House Energy & Commerce Committee. The Quilt's comments were based on Democrats' 2018 LIFT America Act proposals and were solicited by committee staff during a meeting with Quilt representatives here in DC in March. Among other things, The Quilt suggested broadening program objectives to include serving community anchor institutions and focusing on both unserved and underserved communities. The Quilt suggested competitive grants to both commercial and non-commercial entities rather than reverse auctions for carriers as the preferred funding disbursement mechanism. The Quilt also proposed allowing local communities and states, in consultations with broadband providers and consumers, to determine unserved and underserved areas.

Cautious optimism remains as we wait to see if an infrastructure funding bill will move this year. Reports this week are that Senate Minority Leader Schumer (D-NY) and House Speaker Pelosi (D-CA) plan to meet with President Trump soon to discuss infrastructure legislation, with both noting that real expenditures are needed, not simply incentives. Schumer recently said that an overall infrastructure plan (including broadband and traditional infrastructure such as roads and bridges) would need to be "at least \$1 trillion." Pelosi has said she would like to see funding "closer to \$2 trillion." Where that type of funding will come from is the issue we heard frequently during our recent visits on Capitol Hill.

Lastly, Senators Masto (D-NV) and Gardner (R-CO) and Reps. Tonko (D-NY) and Brooks (R-IN) have reintroduced the "Access Broadband Act" to establish the "Office of Internet Connectivity and Growth" within NTIA. This bill passed the House last year. Senators Blackburn (R-TN) and Baldwin (D-WI) have introduced the "Internet Exchange Act" to provide NTIA administered matching grants for internet exchange (IX) facilities in certain core-based statistical areas and would permit USF E-rate and Rural Health Care (RHC) program recipients to use their funding to contract with an ISP to connect to an IX facility or pay the costs of maintaining a point of presence at a facility.

NTIA

[NTIA announced](#) in February that it was partnering with eight states (California, Maine, Massachusetts, Minnesota, North Carolina, Tennessee, Utah, and West Virginia) for a limited update of the United States broadband map. That NTIA effort received scrutiny from the two West Virginia senators in a recent Senate appropriations hearing with both Senators expressing skepticism about the accuracy of ISP-provided data. NTIA Administrator Redl acknowledged those concerns and indicated the NTIA mapping effort (which is coordinating with the FCC and USDA) would collect information from non-ISP sources. The Trump administration's proposed NTIA fiscal year 2020 budget of \$42.4 million is significantly greater than the \$33 million proposed last year.

The next NTIA broadband webinar is Wednesday, May 15 and will discuss [Leveraging Public Assets to Accelerate Broadband Deployment](#). The archive for the April webinar [Model Programs and Practices for Building a Competitive Cybersecurity Workforce: The HBCU Story](#) and previous webinars are available [here](#).

The BroadbandUSA Newsletter for April has an article about cybersecurity programs in historically black colleges and is available [here](#). Linked are notable state news items from Missouri, [North Carolina](#), Washington, and Ohio (among others). Note there is a much activity (beyond the scope of this memorandum) at the state level concerning rural electrical co-ops – the BroadbandUSA Newsletter state news links are a good resource for this.

USDA – Rural Utilities Service

ReConnect Program

The filing deadline for ReConnect Program 100% grant applications is **May 31, 2019**. Electronic application submissions will be accepted through <https://www.usda.gov/reconnect> beginning **April 29, 2019**. Important application forms are available [here](#). Formal detailed rules and application requirements are set forth in [this important Federal Register notice](#).

USDA [has 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). [USDA has also corrected](#) the definition of “broadband loan” (for purposes of determining unserved areas) to ensure it excludes loans that were approved but subsequently de-obligated.

Upcoming two-day ReConnect Program Regional Workshops are planned for Oregon, Alabama, and Minnesota. Registration links can be found [here](#).

Federal Communications Commission

The tentative agenda for the Commission’s next meeting on May 9 can be found [here](#) (no items that we are following are under consideration this month). A recording of the April 12, 2019, open meeting can be streamed [here](#). Among other things, the Commission adopted a [public notice](#) seeking comments on auction procedures for the upcoming 5G auction and [proposed changes to its rules](#) for deploying certain types of fixed wireless infrastructure (so-called hub and relay antennas).

Rural Digital Opportunity Fund

Chairman Pai announced a \$20.4 billion “[Rural Digital Opportunity Fund](#)” at a White House event on Friday, April 12. The new fund will apparently repurpose a portion of existing High Cost program universal service funding (*i.e.*, the Connect America and Mobility Funds) over a ten-year period in order to connect up to 4 million rural homes and businesses to high-speed internet. Beyond that, details remain sparse. With no new expenditures planned, this could simply be a re-brand an existing program. There are also concerns the new program could be a vehicle to take funding away from the Lifeline or E-rate programs – although there is no basis yet to suggest that is a possibility. This could also be part of an effort to rethink the entire USF funding model – presaged last year by the proposed Connected Care pilot program which is completely outside of the traditional Rural Health Care funding mechanism. The next step for the Rural Digital Opportunity Fund will be release of a Notice of Proposed Rulemaking later this year.

USF Spending Cap NPRM

News broke in late March that an NPRM is circulating at the FCC that would propose rules to cap overall USF spending – in other words a cap that would apply to all four programs together, in addition to any program-specific caps. The idea of an overall USF budget has been championed by Commissioner O’Rielly for years and [he is the item’s proponent](#). The proposed cap would be set above current disbursement levels though many question how a cap for all four programs can be set without regard to whether statutory objectives for each program are being met. The two Democratic Commissioners (Stark and Rosenworcel) have expressed opposition to the item but it is unclear where remaining Republicans (Chairman Pai and Commissioner Carr) are. Unlike items on the Commission’s open meeting agenda, an NPRM that is “circulating” is not made public before a vote and can be adopted at any time. In the meantime, a rhetorical war rages in the press, on [twitter](#) and in the [public square](#) regarding [the wisdom](#) of O’Rielly’s proposal. Note that even if the NPRM is adopted, it is only a proposal and public comment would have to be considered before vote on an actual cap could occur.

E-rate

Commissioner O’Rielly Seeks Information from USAC Concerning Reported Overbuilding

On April 2, [USAC’s CEO responded](#) to Commissioner O’Rielly’s March 7 [letter to USAC](#) expressing overbuilding concerns and seeking information about several large E-rate funding requests in Texas, and about funding approvals for large WAN projects generally. Among other things, USAC observed that it strictly follows E-rate rules which require evaluation of special construction projects for cost-effectiveness and that information about where existing carriers have facilities is not public information that USAC has access to. O’Rielly’s inquiry was 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.

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. The FCC has clarified that budgets expire after five years from their first commitment under their C2 budget. (In response to [this SHLB request for clarification](#).)

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. Commenters generally supported elimination of the amortization requirement. NECA has compiled links to initial comments [here](#) (including from Illinois Dept. of Innovation and Technology and SHLB Coalition) and reply comments [here](#) (including from Wisconsin Department of Public Instruction and the SHLB Coalition).

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

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*).

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 ten 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). Neither the FCC nor USAC have disclosed a reason for the delay, but the reason is most likely that demand has exceeded the \$150 million HCF sub-cap which applies to multi-year funding requests and so-called upfront payments (basically, special construction or self-construction). This delay creates administrative problems for consortium applicants who now must either seek FY 2019 funding based on contracts that USAC has not approved yet or rebid those contracts. This is just one example of the problems these commitment delays cause.

[SHLB sent a letter](#) to the FCC addressing many of these concerns and, on April 5th along with many SHLB Health Group members, met separately with USAC and the FCC's Wireline Competition Bureau staff to discuss. While the meetings were frank and productive, there have been no developments yet toward a resolution of these concerns. FCC Wireline Bureau staff did indicate that a reform order for the Rural Health Care program is expected this summer. While a reform order will be welcome, there is little optimism the reform order will resolve funding shortages. (One issue is whether the priority is legitimate growth in funding demand, or out-of-control waste, fraud or abuse.) Many stakeholders are concluding a legislative fix to the program is needed and turning efforts more toward Congress.

[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 \$4.062 billion to \$4.15 billion. (The \$150 million HCF sub-cap is unaffected by these increases.)

Educational Broadband Service (EBS)

A recording of the excellent March 7, 2019, Capitol Hill briefing by SHLB and EBS stakeholders including Northern Michigan University is now available [here](#). SHLB and many current users of EBS oppose auctioning EBS spectrum to commercial entities not already serving rural areas. SHLB recently [filed a thorough rebuttal](#) to a recent filing by Tech Knowledge that purported to show the economic benefits of auctions. In March [SHLB with educational representatives from Northern Michigan University](#) (among others) and [public TV and educational programming](#)

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

[advocates](#) filed respective *ex partes* making the case against commercial auctions. Also see 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 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.

On March 20, 2019, the [FCC in a 5-0 decision issued a Report and Order](#) reforming rules to further the use of TV White Spaces in part by requiring technologies that address interference. Among other things, the new rules require fixed white space devices to include a "geo-location capability such as GPS and eliminate the option that permitted the geographic coordinates of a fixed device to be determined by a professional installer." The rules require devices to recheck geographic coordinates at least once a day and report the coordinates to the white spaces database. Recent filings in the docket suggest Microsoft and the National Association of Broadcasters (NAB), which have been in conflict on many TV White Spaces issues, are beginning to reach consensus on key issues. SHLB's press release regarding the order is available [here](#).

Net Neutrality

On April 10, the House passed the "[Save the Internet Act](#)" legislation on a mostly party-line vote (one Republican supported it; no Democrats opposed). The bill would restore the FCC's 2015 net

neutrality rules including classifying broadband as a regulated telecommunications service under Title II of the Communications Act. House Republicans have pushed alternatives that would codify net neutrality rules without reinstating Title II classification for broadband. Whether paid priority should be banned continues to be debated among Republicans. It is unlikely the Republican-controlled Senate will take up the House bill however House Democrats may attempt to attach the bill to unrelated appropriations legislation.

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](#). The [parties in March 2019 agreed to stay further proceedings](#) pending a decision in the DC Circuit case (above).

States

The National Conference of State Legislators (NCSL) features a summary of state net neutrality actions by state in 2019 [here](#) (must recently updated in February 2019).