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*VIA ELECTRONIC MAIL*

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – May 24, 2019**

**Capitol Hill**

House Democrats have unveiled their \$2 trillion dollar infrastructure package called the “[Leading Infrastructure for Tomorrow’s America Act](#)” (LIFT America Act). [A House hearing was held May 22 with testimony from, among others, former FCC Commissioner Clyburn](#). The legislation includes \$45 billion in broadband funding – \$30 billion in reverse auction funds to be administered by the FCC, \$10 billion in reverse auction funds to be administered by the states, and \$5 billion in federal loans and loan guarantees to be administered by NTIA. The FCC auctions would not require recipients to be Eligible Telecommunications Carriers (ETCs) in order to receive funds. Although President Trump has expressed support for the package, political volatility between House Democrats and the President makes passage very uncertain.

There are too many broadband bills right now to track all of them, but here are a few we are watching: On May 2, 2019, Senator Wicker (R-MS) introduced the “[Broadband Interagency Coordination Act](#).” Co-sponsored by Senator Klobuchar (D-MN), the bill would require NTIA, FCC, and USDA to coordinate broadband funding through a standardized set of broadband coverage data – but would give FCC primary responsibility for that data. A similar measure – [the ACCESS BROADBAND Act](#) – would establish an Office of Internet Connectivity and Growth within NTIA and passed the House by voice-vote on May 9. This bill would place NTIA in a formal advisory role regarding coordination of all federal broadband spending.

Also on May 2, 2019, Senators Blackburn (R-TN) and Baldwin (D-WI) 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. One concern about this bill is that it would create greater demand for RHC funding at a time when the program is oversubscribed (see RHC item below).

Finally, on May 22, Reps. Mullin (R-OK) and Peterson (D-MN) introduced the “[Rural Broadband Network Advancement Act](#)” (RBNA). The RBNA establishes a new FCC program outside of the existing universal service mechanisms that would collect network user fees from edge providers

based on the data transported over the last mile of networks and these fees would be invested by rural broadband providers to help build, maintain and operate robust broadband networks in high-cost rural areas. It is an interesting model that perhaps attempts to bypass heated debate about whether we need to “tax the Internet” in order to broaden the existing universal service contribution base.

## **NTIA**

On May 9, 2019, NTIA Administrator David Redl resigned suddenly. Although Redl has had some policy disagreements with the FCC and State Department in his 18 months in the position, no obvious reason for his departure has emerged. Deputy Administrator Diane Rinaldo will be interim Administrator with no replacement nominee likely before the 2020 election cycle.

The next NTIA broadband webinar is Wednesday, June 19, and will discuss [Building Smart Cities and Communities at the Regional Level](#). The archive for previous webinars are available [here](#). The BroadbandUSA Newsletter for May is available [here](#). Linked are notable state news items from Arkansas, Missouri, North Carolina, Pennsylvania, and Wisconsin (among others).

## **USDA – Rural Utilities Service**

### **ReConnect Program**

ReConnect Program has come up for some withering criticism from some who have concluded the application process is too complex and not worth the effort given restrictions on where funding is available. OTELCO, which owns a number independent carriers in several states, is taking a hard pass. [Its VP explained their problems with the program in Broadband Communities Magazine this month](#) (hat-tip to John Windhausen). The article is short and worth reading, but he concludes:

*Identifying an area that has a population of only six per square mile but has a high enough density of community anchor institutions, farms and other businesses to score well on the first three criteria will be challenging indeed. It will also likely require service areas to be large, which will be problematic for community networks and small ISPs. Finding these things in an area that is 90 to 100 percent unserved by at least 10 Mbps/1 Mbps and is not funded by CAF is virtually impossible.*

The filing deadline for ReConnect Program 100% grant applications is **May 31, 2019** at <https://www.usda.gov/reconnect>. 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.

There is one remaining ReConnect training event on May 28. A registration link can be found [here](#).

### **Federal Communications Commission**

The big news is that Chairman Pai has announced the terms with under which he is willing to recommend approval of the Sprint/T-Mobile merger. That issue is beyond the scope of this memorandum but it has large implications for the country. The approval is largely being driven by the purported benefits the merger will have toward 5G rollout. It also will have implications on the EBS proceeding (see below) given the large number of EBS licenses held by Sprint.

The tentative agenda for the Commission’s next meeting on June 9 can be found [here](#) (no items that we are following are under consideration this month). A recording of the May 9, 2019, open meeting can be streamed [here](#). Among other things, the Commission unanimously voted to deny on national security grounds an application by China Mobile Telecom to provide international telecommunications services in the U.S.

### **Rural Digital Opportunity Fund**

No new details regarding the \$20.4 billion “[Rural Digital Opportunity Fund](#)” (RDOF) have emerged since it was announced by Chairman Pai in April. 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. With no new proposed expenditures, RDOF could simply be a re-brand the existing High Cost programs. A draft NPRM on the RDOF is expected to emerge 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’s War on Overbuilding**

Commissioner O’Rielly continues to press the issue of overbuilding in the E-rate program. On May 15 he made the following statement [in written testimony to before the House Communications and Technology Subcommittee](#) (Committee on Energy and Commerce):

*It recently came to my attention that new E-Rate-subsidized fiber networks were overbuilding local USF-funded Texas broadband providers and stealing their core anchor customers. By manipulating the contracting process to favor the bids of particular providers or self-provisioned service, some local school districts have been actively undermining local USF-supported providers’ existing investments, and as a result, making it even more difficult to serve surrounding communities where some households may lack any Internet access at all.*

In addition, on May 22, 2019, the Texas telcos that started it all (previous filings bulleted below) filed [a petition for rulemaking in the E-rate program to address this issue](#). Their petition provides more on the factual background for their grievance.<sup>1</sup> Among other things, they propose the following language be added to the rules: “Category One services shall not include special construction costs for the construction of fiber where it has been demonstrated that fiber already exists, unless the existing fiber owner is unwilling to negotiate in good faith to lease that fiber at reasonable market-based prices.” See Petition at 4.

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<sup>1</sup> Here is how they describe the problem:

*The Texas Carriers [petitioners] are particularly concerned about region-based consortia groups in Texas that have issued [RFPs], through the E-Rate program, for the construction of Wide Area Networks (“WANs”) to provide broadband services to each school within the region, even though many of those schools are already served by fiber. Because the regions include hundreds of schools and cover thousands of square miles, only select, large service providers have been able to respond to the RFPs. Smaller providers that are already serving individual schools within the region, via their USF-supported fiber networks, were unable to respond to the RFPs due to the sheer size of the requested WANs. Accordingly, only a few providers actually responded to the RFPs and the providers that responded did not necessarily propose the most cost-effective solutions. In at least three cases, the selected provider for these RFPs sought special construction costs, totaling over \$100 million dollars, to lay fiber to schools that already have fiber connections which were at least partially subsidized by USF.*

- 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.
- Commissioner O’Rielly’s March 7 [letter to USAC](#)
- [USAC’s CEO response](#)

### **Rural Health Care Program**

On May 20, 2019, the [FCC finally released an expected order](#) that sets the stage for release of Healthcare Connect Fund (HCF) consortium funding commitments being held by USAC. The commitments were held because multi-year requests and upfront costs (*i.e.*, fiber and special construction) in funding year (FY) 2018 (July 1, 2018 through June 30, 2019) exceeded the \$150 million HCF sub-cap (FY 2018 funding demand details [here](#)). The FCC’s order reduces all three-year funding requests to a single-year and fully funds them along with request for upfront costs. The alternative would have been drastic pro-rata funding reductions for affected HCF applicants. The order also extends the FY 2018 filing deadline but only for those health care providers affected by the cap-related delays. While the overall program demand was below the overall program cap for FY 2018, the trend suggests the overall cap may be exceeded in FY 2019.

SHLB is sponsoring an [event in Dirksen Senate Office Building](#) on June 10, 2019, entitled “Improving Rural Healthcare with Broadband and Telehealth.” The effort is intended to educate Hill staffers and make it easier to keep pressure on the FCC to implement effective reforms in the RHC rulemaking that is still expected this summer.

On May 20, 2019, Alaska Communications submitted an interesting report entitled “[Tele-Health Requirements and Bandwidth Utilization: Evaluating Demands for Rural Health Care Support Over Time](#)” into the Rural Health Care docket at the FCC. Focused on data and case studies from the Alaska Native Tribal Health Consortium, the report documents exponential increases in bandwidth utilization for a major Alaskan health care system in the last 20 years. This type of data helps make the case that last-year’s inflation-based increase in the Rural Health Care program is not enough because it did not take into account fundamental changes in the demand for health broadband.

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

We are past the one-year anniversary of the FCC’s EBS notice of proposed rulemaking (NPRM) (background at the end of this item) and, with an order expected soon, Chairman Pai is reportedly leaning toward endorsing auctions of the remaining unused EBS spectrum. This is an alarming development for those that want to see this spectrum continue to be prioritized for educational use. Education stakeholders are considering whether to seek to stay the proceeding in order to have more time to demonstrate the economic benefits of allowing continued educational use of

current and new EBS spectrum. Lastly, if you are interested in the potential effects of the Sprint/T-Mobile merger on EBS, [this ex parte filing provides a good overview](#).

In the meantime, on May 8, 2019, over 800 groups representing schools, rural operators, libraries, nonprofit organizations, anchor institutions and public interest groups from 48 states and the District of Columbia [signed a letter to FCC Chairman Pai](#) urging that new EBS licenses be awarded to educational entities and Tribal Nations – and that this would have important impacts on the “homework gap” among other things.

On May 15, SHLB in partnership with Telecom Advisory Services released a report on the relative benefits – in quantitative terms – of awarding more EBS licenses to educational institutions and Tribal Nations vs. auctions. An overview of the report and findings is available [here](#).

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 – with 4,000 new EBS licenses potentially available. 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 “Airband” TV White Space Broadband Initiative**

On May 3, 2019, [Microsoft filed a petition for rulemaking](#) asking the FCC to modify further rules to support using TV whitespaces to provide broadband, especially in rural areas. Among others, sometime white spaces adversary, the National Association of Broadcasters (NAB), has indicated support for the questions Microsoft proposes addressing.

Background: In July 2017 Microsoft announced a \$10 billion TV White Spaces initiative (the “Airband Initiative”) aimed at bringing broadband to three 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 has active deployments in 17 states. [Microsoft’s most recent](#) white paper includes information about white spaces projects underway in Ohio, New York, Maine, Virginia, Maryland, Michigan and Wisconsin.

Microsoft recently showcased their 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”).



## **Net Neutrality**

The House passed the “[Save the Internet Act](#)” legislation in April which would restore the FCC’s 2015 net neutrality rules including classifying broadband as a regulated telecommunications service under Title II of the Communications Act. With no chance of that bill passing the Republican-controlled Senate, Republicans and some Democrats are focusing on potential compromises. Sen. Wicker (R-MS) and Sen. Sinema (D-AZ) formed a bi-partisan working group in March on the Senate side to focus on creating legislation capable of passing both houses – although Sen. Sinema [came under fire from pro-neutrality groups](#) for doing this. Now reports are that a draft letter to Democratic House leadership is circulating proposing to create a similar working group on the House side – again prompting opposition among public interest groups seeking restoration of Title II regulation.

### **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**

A number of recent state net neutrality efforts have stumbled including in Montana, Connecticut, and New Hampshire. Colorado is the largest state to advance a bill which is now waiting for the Governor’s signature. The National Conference of State Legislators (NCSL) features an up-to-date summary of state net neutrality efforts by state for 2019 [here](#) (updated May 6, 2019).