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VIA ELECTRONIC MAIL

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – as of September 5, 2019**

Capitol Hill

House Democrats' "[Leading Infrastructure for Tomorrow's America Act](#)" (LIFT America Act) – containing \$40 billion dedicated for broadband, largely through reverse auctions – [remains pending](#). While prospects for it moving this year are dim, bi-partisan support for new broadband infrastructure investment remains evident. In early August, two podcasts highlighted support from [Rep. Abby Finkenauer](#) (D-IA), and [Rep. Bill Johnson](#) (R-OH), respectively. While any significant new federal broadband program remains in limbo, Congress has increased funding for existing broadband programs. For example, another round of USDA ReConnect funding is expected to be announced last this year – probably at the same level as last year (\$600 million) (see item below).

On Thursday, September 5, Senator Thune (R-SD) (chairman of the Subcommittee on Communications, Technology, Innovation, and the Internet) held a field hearing on rural broadband at the Southeast Technical Institute, in Sioux Falls, South Dakota. The witness list and testimonies [are available here](#). A recording of the event may be available for streaming afterward.

NTIA

The September NTIA webinar is on "Measuring the Economic Impact of Broadband" and will be held on September 18, 2019, with speakers from Purdue and Oklahoma State. More [information here](#). There was no August webinar; past webinars are available in the [webinar archive](#).

The next NTIA/state broadband workshop that is open for registration will be in Reno, September 27, 2019. [Details here](#). Also in September, the Global Cities Team Challance (GCTC) will be holding a three-day long "Global Tech Jam" in Portland, Oregon, on Tuesday, September 10. According to the summary: "Global Tech Jam brings together research institutions, private

sector companies, grass roots organizations, and public entities to explore deployment of data-driven decisions and to benefit communities. This international consortium will discuss deploying emerging technologies to improve infrastructure and create conditions for economic growth and long-term resiliency. The three-day meeting will convene project teams from cities, towns and rural communities.” Registration [available here](#).

The BroadbandUSA Newsletter for September was just released but for some reason is not available online (as of September 5). It includes notable state news from Arkansas, Maine, North Carolina, and Wisconsin (among others). Of particular note from the August newsletter (available [here](#)) is a [link to a recent report by the Federal Reserve Bank of Kansas City on the digital divide](#). It is a timely report generally, with data on the economic benefits of broadband availability. However, for those of you interested in learning more about how the Community Reinvestment Act (CRA) supports broadband investments, it addresses how that works (mostly by incentives to the banks to increase their CRA score through investments in essential community infrastructure), and provides links to additional resources. Note CRA-incentivized funding can include grants.

NTIA now hosts [a searchable database](#) featuring 50 federal broadband funding opportunities across a dozen federal agencies. The NTIA [Broadband USA main page](#) also features a state-by-state summary of state broadband funding opportunities.

USDA – Rural Utilities Service

ReConnect Program

USDA will have a day-long workshop on the ReConnect program in Fort Wayne, Indiana (at Ivy Tech Community College) on September 19, 2019 ([registration link](#)). The workshop will provide an overview of the Re-Connect application process. The meeting notice indicates a ReConnect funding opportunity announcement is coming later this year. We expect funding in 2020 will be comparable to 2019 (\$600 million).

Precision Agriculture

In April, USDA issued a [report on rural broadband infrastructure focused on next generation precision agriculture](#). Meanwhile, the [FCC announced](#) formation of a federal advisory committee on precision agriculture. Communications Daily (August 19) featured interviews on precision agriculture, signaling growing awareness among industry and policy makers about this important segment of the rural market. The usual debates and jockeying between satellite, fiber, fixed wireless, and LTE are taking place as the agricultural tech evolves.

Federal Communications Commission

The agenda for the Commission's next monthly open meeting on September 26 does not have any times we are following, however it is available [here](#). Meanwhile:

T-Mobile/Sprint Merger Approval on Circulation

On August 14, 2019, Commissioner Pai [announced](#) circulation of a draft order approving the T-Mobile/Sprint Merger. The primary rationale is to advance 5G deployment with competition being protected (in part) by DISH Network's planned acquisition of Boost Mobile.

FCC Streamlined 5G Deployment Defeat at the DC Circuit

Folks may remember that one of the outcomes of the Broadband Deployment Advisory Committee (BDAC) process was a controversial decision by the FCC to preempt certain types of local decisions in order to streamline (mostly small cell) 5G deployment. Tribal groups sued and, in early August, [the Court reversed the FCC in part](#), finding "the Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the Order will principally affect small cells that require new construction." It is difficult to convince a Court that an agency has acted arbitrarily and capriciously – which the Court found here – so this represents a significant defeat for this FCC. That said, the Court upheld some elements of the FCC order. As Commissioner Carr explained: "Most importantly, the court affirmed our decision that parties cannot demand upfront fees before reviewing any cell sites, large or small. These fees, which had grown exponentially in the last few years, created incentives for frivolous reviews unrelated to any potential impact on historic sites. Those financial incentives are gone, and we expect our fee restrictions to continue greatly diminishing unnecessary and costly delays."

USF Spending Cap NPRM

The [USF spending cap Noticed of Proposed Rulemaking \(NPRM\)](#) proposes an overall spending cap to all four universal service programs in the aggregate, in addition to any program-specific caps or budgets that currently exist. Initial comments were filed July 29 and replies August 26 ([unofficial compilation of principal comments here](#), [replies here](#); courtesy [NECA Washington Watch](#)). SHLB's comments are [here](#); Utah Education and Telehealth Network comments are [here](#). Educational groups in particular are opposed to the item as are rural carriers that depend on high cost support. Many commenters opposed an overall cap, arguing it was unnecessary due to the fact that each separate program already has either a budget or a cap, and that an overall cap

would only add complexity to already complex cap mechanics. Chairman Pai has noted recently that the proposed cap will be over \$3 billion greater than the existing total disbursements for the programs.

\$100 Million Connected Care Pilot Program

The Connected Care Pilot program continues to move forward at the FCC with [the recent release of the notice of proposed rulemaking](#). The proposed pilot would award an unspecified number of projects across the country funding to defray the broadband costs associated with providing “connected care” to low income Americans and veterans. Connected care is generally remote patient monitoring and telehealth services that provide care for chronic health conditions to patients in their homes. Connected care is increasingly being deployed to address diabetes management, opioid dependency, high-risk pregnancies, pediatric heart disease, mental health conditions, and cancer.

One of the more interesting questions in the Connected Care Pilot NPRM is whether the FCC can fund anything other than just the broadband component of the cost:

The Commission also seeks comment on whether there are packages or suites of services that health care providers use to provide connected care services (such as a turnkey solution that includes software, remote patient monitoring and remote monitoring devices, and patient broadband internet access) that are not currently funded under the existing [Rural Health Care universal service] support programs that could be funded through the Pilot program as information services. . . .

Whatever the pilot ends up supporting, in exchange for the funding, the FCC will seek data to “help the Commission understand whether and how [universal service] funds can be used to promote health care provider and consumer adoption and use of connected care services,” as well as data that might help improve health care delivery more generally. Assuming the NPRM leads to an order, which could happen as early as spring 2020, we expect a wide variety of health care systems to apply for funding, including academic medical centers. Initial comments on the NPRM are due August 29, 2019, with replies due September 30. An unofficial compilation of initial comments are [available here](#) (courtesy [NECA Washington Watch](#)).

Broadband Deployment and Mapping

USTelecom and major industry groups have filed [a summary of their pilot efforts](#) (in Virginia and Missouri) to establish new mapping protocols. The pilot showed that as many as 38% of additional rural locations in Virginia and Missouri are unserved by participating providers in census blocks that would have been reported as served in today’s FCC Form 477 reporting

approach. Filings in the FCC’s newly established mapping docket (Establishing the Digital Opportunity Data Collection, WC Docket No. 19-195) are available [here](#).

Rural Digital Opportunity Fund

At the August 1 meeting, the Commission approved an NPRM for a proposed \$20.4 billion Rural Digital Opportunity Fund (RDOF). The new fund would use reverse auctions to allocate a portion of High Cost program universal service funding (*i.e.*, the Connect America Fund) over a ten-year period to deliver a minimum of 25/3 Mbps broadband service to 4 million rural homes and businesses. Priority would be given to faster speeds. Phase I of the RDOF would allocate \$16 billion for “wholly unserved” census blocks through a multi-round auction. Phase II would allocate the balance to partially unserved census blocks and wholly unserved areas not awarded in Phase 1. The \$20.4 billion in RDOF funding is coming out of current High Cost support mechanisms such as unused or termed-out CAF funding and the never-deployed Remote Areas Fund – with the money targeted to eligible telecommunications carriers (ETCs). The RDOF draft NPRM is available [here](#); comments are due September 20; replies October 21.

E-rate

Texas Carriers’ E-rate Rulemaking Petition on Overbuilding

The E-rate “overbuilding” saga continues, at stake being whether the FCC opens a rulemaking to consider changes to E-rate program rules governing the construction of new fiber. Links to the main filings are below, although dueling filings by interested parties are continuing – with UETN being dragged into it directly by [allegations from a local telco of overbuilding in Utah and Wyoming facilitated by both E-rate and ReConnect](#). [UETN’s response is here](#).

The other big development was [a letter by Commissioner O’Rielly](#) on August 26 to a school superintendent (Cochise County Schools in Bisbee, Arizona) requesting information and implying bad faith on the part of the school district in its RFP and procurement process. According to the Commissioner:

The awarded contract—which would allocate \$29 million of ratepayers’ hard-earned dollars to this project—appears to lead to wasteful and duplicative spending. After all, the USF High Cost program already helped pay for the installation of existing fiber infrastructure to 18 of the smallest and most costly to serve rural schools and libraries that are included in the [school consortium] RFP. Further, over the course of its ten-year term, the awarded contract will cost ratepayers exponentially more than if the existing rural provider were to continue to serve existing school and library customers at current rates, largely due to the new construction charges. And, this only accounts

for a portion of schools and libraries in the RFP: most of the other locations in the RFP are also served by existing fiber-based providers and will similarly be subject to ratepayer-funded subsidized overbuilding.

Background: On May 30 the [FCC sought comment](#) on [a petition for rulemaking in the E-rate program](#) filed by several small Texas telcos that claimed E-rate rules are supporting improper overbuilding of their networks. [Comments were filed](#) on July 1 with [replies filed](#) on July 16 (links direct to an unofficial list maintained by NECA Washington Watch). [SHLB joined with the Consortium for School Networking \(CoSN\)](#), the Texas Association of School Administrators (TASA), the Texas Association of School Boards (TASB), the Texas Association of School Business Officials (TASBO), the Texas Computer Education Association (TCEA), and the Texas K-12 CTO Council in opposing the petition. Among other things, commenters opposing the petition questioned whether the objecting carriers had made good faith efforts to participate in the bid process, and whether this was about bid preferences for incumbents rather than an actual problem with the E-rate program rules.

Texas Education Services Centers (ESC) Regions 10, 11, and 15, most recent (August 30, 2019) rebuttal filing is [available here](#). They explain:

[T]he fact that some fiber exists in an area is not a guarantee that it can serve the population of that area effectively and efficiently. As the country's population grew, our nation built interstate highways to accommodate our economic growth and transportation needs. In many cases, those interstate highways "overbuilt" state roads because our nation's infrastructure had to expand as demand grows. The same is true for our broadband infrastructure. Residents in rural areas should not be required to use existing two-lane roads simply because they are already there. They should have access to the interstate highways of the Internet.

Category 2 Budgets

On July 17, the NPRM proposing to make Category 2 budgets a permanent feature of the E-rate program [was published in the Federal Register](#) (establishing comment deadlines of August 16 and September 3). This NPRM was expected after the Wireline Bureau issued its report earlier this year finding that the Category 2 budget approach was working well. The 2014 E-rate Modernization Order had adopted a five-year interim approach for the budget approach – with that five-year period over this year. The NPRM also requests comments on further ways to improve E-rate administrative burdens. Commenters have been close to unanimous in supporting the Commission making Category 2 budgets permanent. SHLB's comments (filed jointly with the State E-rate Coordinators Alliance) [are here](#).

GAO Report on Supporting “Off-School Premises Access” through E-rate

On July 29, 2019, the Government Accountability Office (GAO) released a report entitled [FCC Should Assess Making Off-School Premises Access Eligible for Additional Federal Support](#). The GAO found that rules for the FCC’s E-rate program rules may limit schools’ ability to provide wireless access off-premises and that schools that provide such access using services supported by E-rate must reduce their E-rate discounts. The GAO recommended the FCC take steps to assess the potential benefits, costs and challenges of making off-premises wireless access eligible for E-rate support. The FCC apparently agreed with the GAO’s recommendation.

Rural Health Care Program

The Commission on August 1 voted to approve a [Report and Order in the Rural Health Care program](#) that implements substantial changes to that program. Democratic Commissioners dissented in part. (An 11th hour letter from 11 Senators obtained by SHLB and others seeking a delay in the vote failed.) At 220 paragraphs (100 pages) of Report and Order, 30 pages of restated rules, 25 pages of statutorily required regulatory impact analysis, and 15 pages of appendices and commissioner voting statements, this represents the most thorough reform and restatement of the RHC program since its inception in 1997.

The most significant overall change to the program is a prioritization system for when program demand exceeds the cap (replacing the system of across-the-board *pro rata* reductions). There are now eight priority tiers, four based on whether an area is urban or one of three classifications of rural, and then on whether that area is classified as a Medically Underserved Area/Population (MUA/P) by the Health Resources and Services Administration (HRSA). Each priority tier will be fully funded in descending order until a tier is reached that cannot be fully funded. That tier will then be *pro-rated* based on remaining support with additional tiers receiving zero funding.

An example provided by the FCC of where the cuts would likely occur in the event the cap is hit again, is a breakdown of the priority tiers and the HCP-counts and amounts of funding overlaid on 2017:

Table 3: Allocation of Funding Year 2017 Commitments in Prioritization Categories³⁸⁵

| HCP Site is located in: | MUA/P | Number of HCP Sites | Committed Funding Amount | Not in MUA/P | Number of HCP Sites | Committed Funding Amount (\$) |
|-----------------------------|-------------------|---------------------|--------------------------|-------------------|---------------------|-------------------------------|
| <i>Extremely Rural Tier</i> | <i>Priority 1</i> | 2,782 | \$139,495,781 | <i>Priority 4</i> | 701 | \$20,254,621 |
| <i>Rural Tier</i> | <i>Priority 2</i> | 955 | \$27,694,946 | <i>Priority 5</i> | 716 | \$17,789,469 |
| <i>Less Rural Tier</i> | <i>Priority 3</i> | 1,200 | \$36,501,369 | <i>Priority 6</i> | 828 | \$20,283,456 |
| <i>Non-Rural Areas</i> | <i>Priority 7</i> | 831 | \$47,308,989 | <i>Priority 8</i> | 1,311 | \$70,544,242 |

In addition to this new priority system, in any year that the program exceeds the cap, HCF consortium applicants would have their maximum percentage of allowable *urban* sites reduced in 5% steps. For example, the current percentage of minimum rural is more than 50%. In the year following when the cap is hit, that minimum rural percentage would go to 55%. That 5% increase of minimum rural would stop at 75%. The Commission also eliminated the current three-year period during which HCF consortia can come into compliance with their urban/rural percentage requirement – the applicable percentage must now be met in year one. These changes will all be effective beginning funding year (FY) 2020 (July 1, 2020 through June 30, 2021).

With respect to the Telecom Program, the Commission fundamentally changed how “rural” and equivalent “urban” rates are established. (Recall that funding in the Telecom Program is calculated based on the difference between those two rates.) Among other things, the Commission delegates responsibility to USAC to survey and compile urban and rural rates to be used by HCPs and service providers in the Telecom Program. Rural rates will be established for each of the three rural tiers (see table above). In a last-minute change from the draft, for Alaska only, the Commission agreed to create a Frontier Rural category consisting of those areas of the Extremely Rural tier that are classified by the state of Alaska as off-road. (This Alaska-only frontier rural category is for rural rate determinations only, not for funding priority purposes.)

Other changes enacted include numerous changes to the competitive bidding rules, new invoicing deadlines, and rules for when services must be delivered by, all effective for FY 2020. *All Healthcare Connect Fund consortia need to take a close look at this order to ensure they are ready to comply with all these programmatic changes.*

Educational Broadband Service (EBS)

On a party-line vote at its July 10 meeting, the Commission voted 3-2 [to approve its EBS reform order](#), removing the educational use requirements for the spectrum and making unassigned spectrum available for commercial acquisition without priority to educational institutions. The order does give Tribal entities priority to obtain licenses before any commercial auction takes

place and, as the next item makes clear, does not disturb existing EBS licensees. (That said, there is considerable debate about the eventual impact of this order on existing EBS licensees.)

On July 22 the Commission granted a waiver request to Northern Michigan University (NMU) that had sought to add new EBS licenses to expand new service. In granting the waiver, [the Commission noted](#): “NMU is unique among EBS licensees—while most EBS licensees have not built their own facilities and have leased their spectrum to commercial providers, NMU has built and operates its own LTE broadband network that covers a significant portion of the rugged, underserved territory in Michigan’s Upper Peninsula. The network is used extensively by NMU’s students and faculty, students of partner institutions, and other members of the community.” The NMU waiver order provides a great overview of the history of the network and discusses its ambitious plans for the future (at para. 14, footnotes omitted):

NMU envisions extending its EAN in areas of Michigan’s northern Lower Peninsula to support its own distance learning activities and to provide broadband access to other K-12 school and community college students through the proposed service areas. NMU has successfully used cooperative agreements with local educational institutions throughout its Upper Peninsula license areas because using shared facilities is an efficient way of sustaining costly LTE technology and infrastructure. NMU reports that it is prepared to assume a new level of responsibility and accountability in wireless broadband construction and management, and it is now working with communities and educational entities in the northern Lower Peninsula to ensure that the network will be used to support the needs of local students and the communities in which they live. Construction of the network will be paid for by NMU, the State of Michigan, and charges to individual users. As it has done with previous network builds, NMU intends to develop this construction project in such a way that network services can be traded for space on existing city infrastructure such as building rooftops, water towers, and other community high-rise assets that are suitable for LTE antennas and transmitters.

Net Neutrality

Again no substantive updates on Net Neutrality this month – except to say the DC Circuit decision on *Mozilla vs. FCC* could come any day (or months from now). The following is a repeat of what we reported in June: Federal legislative efforts to address net neutrality appear to have reached a stalemate. 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. Subsequent efforts to create a bi-partisan House-Senate working group are likely dead due to lack of support from House Democrat leaders who believe the House’s Save the Internet Act would pass the Senate if

allowed to come up for a vote. Senate Majority Leader McConnell (R-KY) has refused to allow such a vote, stating the House bill was dead on arrival. Even if the Senate passed the House bill, President Trump would likely veto; however, the Democrats nevertheless want Senate Republicans to have to vote up or down on their bill.

In the meantime, The Internet Society's Net Neutrality Experts' Roundtable has released a [process report](#) addressing its attempts to convene and facilitate a workable consensus. Among other things, the report indicated: "Any legislation should make clear that no party, including edge providers, shall be permitted to intentionally block or throttle consumer access to any lawful content based on the [broadband internet access service (BIAS)] provider used by the consumer, subject to reasonable network management, nor should any party be permitted to block or throttle access to any lawful content that harms competition in the transmission of BIAS. . . ." No consensus was reached on the appropriate federal agency to enforce net neutrality rules.

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 2019. [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, 2018, 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 (*Mozilla v. FCC*).
- 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 *Mozilla v. FCC*.

States

The National Conference of State Legislators (NCSL) features a summary of net neutrality efforts by state for 2019 [here](#) (still not updated since May 6, 2019).