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VIA ELECTRONIC MAIL

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – as of September 30, 2019**
        (featuring October 1 Addendum on Net Neutrality)

Capitol Hill

As the year's legislative calendar winds down, a large new infrastructure spending program with dedicated funding for broadband appears dead. Attention now is on smaller but important pieces of bi-partisan broadband legislation such as the Secure and Trusted Communications Act, introduced in the House on September 24. The bill would prohibit the use of federal funds to purchase communications equipment or services that pose a national security risk, and appropriates $1 billion for the FCC to establish a $1 billion "Secure and Trusted Communications Reimbursement Program" to assist small communications providers in removing and replacing compromised equipment (so-called "rip and replace"). Broadband mapping also continues to be a focus with a number of bills circulating in both the House and Senate.

While a significant new federal broadband program is unlikely this year, Congress reportedly authorized $550 million in USDA ReConnect funding in 2019 (as compared to $600 million in 2018). Meanwhile, the Fiber Broadband Association has released a study finding that half of all households will be passed by all-fiber networks by 2025, and that it will cost $52 billion to reach 80%, and another $18 billion to reach 90% by 2029. The study is available here (registration required).

Earlier this month, 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 is available for streaming at the link.

NTIA

The October NTIA webinar is on "Broadband's Role in Revitalizing Main Street" and will be held on Wednesday, October 16. The September webinar on "Measuring the Economic Impact of Broadband" was held on September 18, 2019, with speakers from Purdue and Oklahoma State; more information here. Information from past webinars is available in the webinar archive.

The BroadbandUSA Newsletter for September 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. For those of you interested in learning more about how the Community Reinvestment Act (CRA) supports broadband investments, the report 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. CRA-incentivized funding can include grants. On that note, the Federal Reserve Bank of Richmond is hosting a workshop entitled "Investing in Rural America" on October 2, 2019, in Harrisonburg, VA, with a morning session on solving the last mile broadband problem featuring a distinguished panel including Karen Hanson, from NTIA, and Harold Feld from Public Knowledge.

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

USDA – Rural Utilities Service

ReConnect Program

A map showing all proposed and approved ReConnect projects is available here. We are expecting a new ReConnect funding opportunity announcement later this year with funding expected to be comparable to last year's $600 million. USDA will have a day-long workshop on the ReConnect program in Casper, Wyoming on October 10, 2019 (registration link). The workshop will provide an overview of the ReConnect application process.

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 October 25 Open meeting has not yet been posted. The September 26 FCC Open meeting included an order allocating $950 million to rebuild and harden communications infrastructure in Puerto Rico and the U.S. Virgin Islands, items on the upcoming 3.5 GHz auction and access fee arbitrage, and several broadcast-related items. The meeting video and links to all items considered is available here.

T-Mobile/Sprint Merger Approval

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. Meanwhile, an investigation by the Oregon Public Utility Commission has uncovered problems with Sprint's compliance with the Lifeline program, leading the FCC to announce (on September 24) that 885,000 of Sprint's Lifeline customers – 30% of its Lifeline subscriber base – were apparently violating the "non-usage" rule (requiring lines to show service usage at least once per month). Whether this will impact the Commission's merger decision is unclear.

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.[1] (SHLB's comments are here; Utah Education and Telehealth Network (UETN) comments are here.) Most recently, 30 Democratic Senators led by Sen. Markey (D-MA) have sent a letter to Chairman Pai opposing the cap. Meanwhile, on September 12, the Commission announced the contribution factor[2] for next quarter will reach 25% – a record high – with the increase driven increasingly by an eroding contribution base rather than programmatic spending. How much longer the FCC can avoid the issue of eroding contribution base is the biggest question facing universal service.

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[1] All links to unofficial compilations of comments in this memorandum are courtesy NECA Washington Watch.

[2] This is the "tax rate" at which interstate telecommunications providers must pay into the universal service fund.

$100 Million Connected Care Pilot Program

The Connected Care Pilot program continues to move forward at the FCC with the 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. Initial comments on the NPRM were due August 29, 2019, with replies due September 30. An unofficial compilation of initial comments are available here.

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. If you are interested in following the "Digital Opportunity Data Collection" NPRM – which will be the basis of reforming the Form 477 process – an unofficial compilation of initial comments is available here.

Rural Digital Opportunity Fund

The Commission in August 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 NPRM is available here. Initial comments were filed September 20 and an unofficial compilation is available here; replies are due October 21.

E-rate

Texas Carriers' E-rate Rulemaking Petition on Overbuilding

At stake here is whether the FCC should open a rulemaking to consider changes to program rules governing fiber construction. Links to the main filings are below while dueling filings by interested parties continue; most recently, the Cochise County school superintendent targeted by an accusatory letter from Commission O'Rielly has responded with a polite and thorough rebuttal (*recommended reading*). As we noted last month, UETN has been dragged into this by allegations from a local telco of overbuilding in Utah and Wyoming facilitated by both E-rate and USDA's ReConnect program. UETN's response is here.

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. 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 question whether the objecting carriers made good faith efforts to participate in the bid process, and expressed concern incumbents were, effectively, trying to establish bid preferences.

Category 2 Budgets

On July 17, the NPRM proposing to make Category 2 (Cat2) 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 Cat2 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. Note some commenters are requesting the Commission increase the per-student budget for Cat2 to $250 from the current $159. Many

commenters also support adding cybersecurity as an eligible Cat2 service.[3]   With FY 2020 procurements underway, uncertainty about when the FCC will act is now impacting applicants.

Rural Health Care Program

2019 Funding Demand

USAC has not yet published gross funding demand information (the gross number of funding applications) even though this information is knowable in July, soon after the annual application window closes. This leads to speculation that demand again exceeds available funding. And while the RHC Reform Order creates new mechanics for when funding demand exceeds the funding cap (see item below), those rules are not in effect for this funding year. Not releasing this information fits the pattern of prior years where USAC has held back gross demand information while using the time to cull applications and perhaps bring demand below the cap. USAC's explanation this year is that it is taking time to eliminate duplicate funding requests – but the fact that it is doing this itself tells us gross demand is above again the cap. And this is despite the fact that potentially available funding this year is $677 million ($594 million plus $83 million in rolled-over funding unused in prior years). We will be watching this very closely.

RHC Reform Order

The Commission on August 20 released a comprehensive Report and Order in the Rural Health Care program that reflects the most thorough reform and restatement of the RHC program since its inception in 1997. While many of the new rules were expected and reflect needed improvements, the Commission made fundamental and controversial changes to the RHC Telecom Program and instituted new prioritization system that could hit Healthcare Connect Fund (HCF) consortia particularly hard. Some of the new rules are scheduled to go into effect for the next funding year (FY 2020), while others will wait until FY 2021. The next procedural step is formal publication of the new rules in the Federal Register with that publication date starting the clock on petitions for reconsideration or clarification, or judicial appeals – all of which are possible.

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

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[3] Cox Communications and Aruba have made similar requests in recent FCC comments on the annual Eligible Services List, arguing that the threat analysis has changed significantly for schools and libraries since 2014 when the Commission last considered this issue.

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. To get an idea of how this would work in practice, the FCC provided a breakdown of the priority tiers with HCP-counts and funding amounts from 2017:

Table 3: Allocation of Funding Year 2017 Commitments in Prioritization Categories[385]

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 ($)
Extremely Rural Tier	Priority 1	2,782	$139,495,781	Priority 4	701	$20,254,621
Rural Tier	Priority 2	955	$27,694,946	Priority 5	716	$17,789,469
Less Rural Tier	Priority 3	1,200	$36,501,369	Priority 6	828	$20,283,456
Non-Rural Areas	Priority 7	831	$47,308,989	Priority 8	1,311	$70,544,242

In addition to the new priority system, in any year that the program exceeds the cap, HCF consortium applicants would have their maximum percentage of allowable *non-rural* 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%; this increase in the minimum rural percentage could go as high as 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 FY 2020 (July 1, 2020 through June 30, 2021).

For 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 delegated 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 new 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 should 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.) Subsequently, the FCC in August sought emergency approval from the Office of Management & Budget for information collection requirements for implementing the priority window for Tribal Nations to obtain EBS licenses. Interestingly, SHLB is opposing this request on the grounds that the FCC is underestimating the time burdens of its information collection which will effectively exclude some Tribes from participating.

Net Neutrality

On October 1, the DC Circuit upheld in significant part the FCC's 2017 repeal of net neutrality rules, as well as the so-called transparency rule which requires carriers to disclose changes in their terms of service. The decision in *Mozilla vs. FCC* was not a complete win for the FCC however, as the Court reversed the FCC on state preemption, opening the door for states to implement their own net neutrality restrictions. These are the headlines; we are still reviewing the 186-page decision and will have further observations in our next memo.

Below are two relevant links regarding an eventual federal legislative solution to this problem. This latest DC Circuit decision could create conditions favorable to a negotiated legislative solution, however the aggrieved *Mozilla* parties could still appeal to the Supreme Court.

- The House "Save the Internet Act" passed in April 2019 would restore the FCC's 2015 net neutrality rules including classifying broadband as a regulated telecommunications service under Title II of the Communications Act.

- The Internet Society's Net Neutrality Experts' Roundtable process report seeking to 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. . . .”

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

In California, a dispute has erupted about whether the state Public Utilities Commission (PUC) has authority to study the affordability of broadband services in the state. Cable and telecom providers are arguing the PUC has no jurisdiction because broadband is an "information service" and not a public utility. This debate is an obvious byproduct of the FCC's 2017 net neutrality order. While the PUC is attempting to go in one direction, the California legislature came close to going in another direction, nearly passing an industry-supported bill that would deregulate VoIP and IP-enabled services. The legislature will likely take the issue up again next session.

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).

Lastly, this building is across the street from our offices here in good old Rosslyn, Virginia (I sent this to everyone previously via email but was concerned it might have been treated as spam):