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VIA ELECTRONIC MAIL

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – as of October 24, 2019**

Capitol Hill

As the year's legislative calendar winds down, a large new infrastructure spending program with dedicated funding for broadband appears dead. Attention is on smaller pieces of bi-partisan legislation addressing unwanted robocalls, narrowly targeted funding for "digital dead zones," and mapping. Targeted infrastructure funding is partly addressed by a Senate appropriations bill that devotes \$690 million in fiscal year (FY) 2020 funding for the United States Department of Agriculture (USDA) Rural Utilities Service (RUS) broadband loan and grant programs (presumably including the ReConnect program). The House bill it would replace includes \$605 million in FY 2020 funding specifically for ReConnect. Many rural interest groups have publicly called for continued funding for the program. \$550 million was appropriated to ReConnect for FY 2019 which will be available in 2020.

More generally, at an October 17 Senate hearing on FCC appropriations there was a verbal skirmish between Sen. Kennedy (R-LA) and FCC Chairman Pai regarding a potential auction of reorganized C-Band spectrum (3.7 to 4.2 gigahertz) used currently by satellite operators. Back in May Sen. Kennedy [questioned](#) a proposal from C-Band incumbent operators (acting through the C-Band Alliance) to privately re-auction the spectrum. They claim substantial public interest benefits would accrue because they could do the auction faster and more efficiently than the FCC. That this private auction proposal is getting serious FCC consideration has upset Sen. Kennedy, citing estimates that a public auction could bring as much as \$60 billion into the U.S. Treasury.¹ The C-Band Alliance has responded that its members currently have enforceable legal rights to much of the spectrum through existing long-term arrangements and that a portion of any private auction proceeds would be returned to the government. Sen. Kennedy is seeking

¹ As a point of reference (and as reported last month), the Fiber Broadband Association [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).

non-binding language in the FCC funding authorization bill but is opposed by other Senate Republicans on jurisdictional grounds: Appropriations traditionally lacks jurisdiction over policy. Sen. Kennedy has threatened to take his concerns directly to President Trump.

NTIA

On October 2, NTIA released the pilot results of its [National Broadband Availability Map \(NBAM\)](#) which was authorized by Congress in 2018. Initially, the NBAM covers eight states: California, Utah, Minnesota, Tennessee, North Carolina, West Virginia, Massachusetts, and Maine. The NBAM incorporates FCC Form 477 data along with broadband data from third-party sources including other federal agencies. Because the NBAM includes both public and proprietary data, coverage details are available only to state and federal “partners” and not the general public.

The November NTIA webinar is [Building Digital Skills at the Local Level](#) and will be held on Wednesday, November 20. Information from past webinars is available in the [webinar archive](#). The [BroadbandUSA Newsletter for October](#) includes notable state news from Arkansas, Maine, North Carolina, Kentucky, and Kansas (among others).

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. Lastly, Acting NTIA Director Dianne Rinaldo spoke at SHLB’s annual conference in Arlington, Virginia, on October 18. Her remarks are available [here](#).

USDA – Rural Utilities Service

ReConnect Program

A map showing all proposed and approved ReConnect projects is available [here](#). Two grant approvals were recently announced: [\\$2.86 million to a Tennessee electric Co-Op](#) and [\\$9.75 million to Orangeburg County, SC](#). We understand from a recent meeting with RUS staff that once this year’s awards are complete, it will clear the way to the expected announcement of a new round of ReConnect funding comparable to last year’s \$600 million. As a result, we expect a slew of award announcements in the coming weeks. (On October 7, USDA [announced \\$152 million in awards in its other \(i.e., non-ReConnect\) telecommunications loan/grant programs](#).)

Federal Communications Commission

The agenda for the Commission’s October 25 Open meeting is available [here](#). 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](#).

Annual Broadband Deployment Notice of Inquiry

On October 23, [the Commission issued its annual statutorily required inquiry](#) into “whether advanced telecommunications [*i.e.*, broadband] capability is being deployed to all Americans in a reasonable and timely fashion.” See [Section 706\(b\) of the Telecommunications Act of 1996](#). Both Democratic Commissioners (Rosenworcel and Starks) dissented arguing the Commission is continuing a flawed methodology based on flawed Form 477 data. Comments are due November 22, 2019; replies are due December 9.

T-Mobile/Sprint Merger Approved

The Commission on October 16, 2019 voted 3-2 to approve the T-Mobile/Sprint Merger, with both Democratic Commissioners voting against approval. Although the text of the final order has not yet been released, the Commission apparently agreed consumers would likely be harmed by the merger through higher prices, but that these negative effects would be mitigated or outweighed by benefits associated with increased service deployments including 5G. The recent investigation by the Oregon Public Utility Commission uncovering major problems with Sprint’s compliance with the Lifeline program complicated but did not derail the FCC’s decision to approve the merger. (The [FCC announced](#) 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).) Former Commissioner Clyburn, who became advisor to T-Mobile, praised the final outcome which included the new T-Mobile signing a memorandum of understanding with the National Urban League and a coalition of civil rights groups committing to diversity in hiring, procurement, and philanthropic efforts to organizations serving disadvantaged and underrepresented communities.

\$100 Million Connected Care Pilot Program

The Connected Care Pilot program [notice of proposed rulemaking](#) remains pending. 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 [filed August 29, 2019](#), with [replies filed September 30](#).²

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 [are here](#); [replies 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](#) with [replies filed October 21](#).

USF Spending Cap NPRM and USF Contributions

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](#). (SHLB's

² All links to unofficial compilations of comments in this memorandum are courtesy [NECA Washington Watch](#).

comments are [here](#); Utah Education and Telehealth Network (UETN) comments are [here](#).) Meanwhile, on September 12, the [Commission announced](#) the contribution factor³ 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.

Indeed, on October 15, in an unprecedented development, state members of the Federal-State Joint Board on Universal Service⁴ [unilaterally issued recommendations for expanding the universal service fund \(USF\) contribution base](#). The state Joint-Board members expressed frustration with their federal colleagues for not working diligently with them to complete a set of recommendations on contributions reform (stemming from the FCC’s formal referral of the issue to the Joint Board in 2014), noting that the contribution factor had grown from 15.7% in 2014 to 25% today. The state member reform recommendation supported expanding the contribution base to include Broadband Internet Access Service (BIAS). It also supported the establishment of a “firm budget” for each of the four USF programs to grow no faster than the Consumer Price Index.

E-rate

Improving USAC’s E-rate Form 470 Drop Down Menu

The FCC’s Wireline Bureau is [seeking comment on improving USAC’s Form 470 drop-down selections](#) in USAC’s web-based application portal. Stakeholders have long asserted that ambiguous or confusing instructions on how to make these selections lead to unwarranted funding denials by USAC. Comments are due October 31, 2019; replies by November 15. At the same time, [the FCC has issued guidance for USAC](#) not to deny funding applications solely based on failure to select the correct drop-down option where the applicant has otherwise complied with competitive bidding rules.

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](#)

³ This is the “tax rate” at which interstate telecommunications providers must pay into the universal service fund.

⁴ The [Federal-State Joint Board on Universal Service](#) was established in 1996 to make recommendations regarding the universal service provisions of the Telecommunications Act of 1996. It is comprised of both FCC Commissioners and State Utility Commissioners.

[accusatory letter from Commission O’Rielly](#) has [responded](#) with a polite and thorough rebuttal (*recommended reading*). [At a speech on October 2](#), O’Rielly again pressed his complaint regarding “duplicative” USF funding although he seemed unaware of some of the rebuttal points that are now in the record.

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.⁵ 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

⁵ [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.

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. At the SHLB conference this year, a USAC panelist indicated that the delay this year is for reasons similar to last year when the \$150 million Healthcare Connect Fund (HCF) sub-cap was exceeded. Potentially available program-wide funding this year is \$677 million ([\\$594 million plus \\$83 million in rolled-over funding unused in prior years](#)).

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 a new funding prioritization system that, when the program cap is exceeded, will hit 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. [Formal publication of the new rules occurred on October 11](#) with an effective date of November 12. November 12 is the deadline for petitions for reconsideration or clarification, more than one of which are likely. (HCF consortia had separate meetings during SHLB's annual conference in Arlington, Virginia, in October and have undertaken with SHLB to prepare a petition for reconsideration of certain aspects of the RHC Reform Order. Efforts are also underway to perform a data-driven funding demand analysis as a precursor to seeking a larger RHC program.)

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 blanket state preemption and remanded several issues including jurisdictional questions over pole attachment regulation and funding broadband through the Lifeline Program. Parties could still seek rehearing *en banc* at the DC Circuit or appeal to the Supreme Court; no one has yet said they intend to do this.

With the Court's reversal on blanket preemption, the question now is what will happen to states that regulate net neutrality? Parties on both sides have confirmed that the pending federal court

cases in California and Vermont (see below) remain stayed until all judicial remedies are exhausted, including potential Supreme Court review. In addition, [Washington State is actively enforcing its net neutrality rules against Internet providers in that state. Oregon has a law similar to Vermont's that prohibits state procurements from ISPs that violate net neutrality principles. Executive orders on net neutrality exist in other jurisdictions.](#)

[One view](#) is the feds can still knock these laws out, but will have to proceed on a case-by-case basis. They argue that, while the FCC has no statutory authority to *preempt* these laws (*i.e.*, to prevent them from happening), the federal government has general authority under the Constitution's [Supremacy Clause](#) to strike down (after-the-fact) state laws that *conflict* with a federal legal regime – in this case the comprehensive light touch approach to BIAS which relies on “transparency and disclosure requirements against a backdrop of consumer protection and antitrust.” [Others maintain](#) that, because the *Mozilla* Court held that the FCC abdicated its authority to regulate BIAS and all but eliminated potentially conflicting federal rules, state net neutrality efforts will survive. While the prospect of a patchwork of different state net neutrality rules should prompt Congress to act, action is highly unlikely until after the 2020 election.

Federal Courts:

- [Mozilla Corporation, et al. v. FCC](#) (DC Circuit Court of Appeals challenge to the 2017 Restoring Internet Freedom Order) – [decided October 1, 2019](#).
- [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 a final resolution of *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 final resolution of *Mozilla v. FCC*.

States

The National Conference of State Legislators (NCSL) features a summary of net neutrality efforts by state for 2019 [here](#) (updated October 1, 2019). Note this list does not identify current laws, only current efforts to pass new laws.

Lastly, one more month of the Arpanet plaque front of the building across the street from our offices here in Rosslyn, Virginia. There is another famous plaque nearby I will share next month!

