



1300 NORTH 17th STREET, 11th FLOOR
ARLINGTON, VIRGINIA 22209

OFFICE: (703) 812-0400
FAX: (703) 812-0486
www.fhhlaw.com
www.commlawblog.com

JEFFREY A. MITCHELL
703-812-0450
MITCHELL@FHHLAW.COM

VIA ELECTRONIC MAIL

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – through November 26, 2019**

Capitol Hill

Attention on Capitol Hill remains on smaller pieces of bi-partisan legislation. The Broadband DATA bill (HR 4229), which would establish broadband mapping standards and require the Federal Communications Commission (FCC) to implement them, appears to be moving. The Schools Health Libraries & Broadband (SHLB) Coalition is pressing to have the term “location” in the bill defined to specifically require the mapping of broadband to community anchor institutions. Fiscal year 2020 spending bills still need to be negotiated and will determine funding to the United States Department of Agriculture (USDA) Rural Utilities Service (RUS) broadband loan and grant programs (including the ReConnect program). 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.

We are also following a draft bill on the House side called the Universal Broadband Act. Sponsored by Rep. Peterson (D-MN) and Rep. Young (R-AK), the bill would authorize the FCC to collect universal service fees from Broadband Internet Access Service (BIAS) providers and would make BIAS expressly eligible for universal service funding. This would broaden the contribution base for universal service as many would like to see. The current draft bill has some problematic language regarding “overbuilding” and bears careful monitoring as to the working definition of BIAS (currently uses the familiar “mass market retail” language). At the moment the bill is unlikely to become law, but its introduction would be a significant development.

The controversy (reported last month) regarding efforts to reorganize C-Band spectrum (3.7 to 4.2 gigahertz; currently used mostly by satellite operators) appears to have resolved with FCC [Chairman Pai announcing in late November](#) that, in January, [he would propose a public C-Band auction](#) to be completed before the end of 2020. This was a defeat for incumbent operators (acting through the C-Band Alliance) who had proposed a private re-auction of the spectrum.

Sen. Kennedy (R-LA) has been publicly pressuring the FCC and Senate Republicans on the Commerce Committee to reject the private auction route, citing estimates that a public auction could bring as much as \$60 billion into the U.S. Treasury.¹ Senators Roger Wicker (R-MS) and John Thune (R-SD) had introduced legislation (the “5G Spectrum Act”) to publicly auction a *portion* of the C-Band, but Sen. Kennedy placed a hold on the bill and Pai’s announcement appears to have mooted the Republican-led legislative effort.

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.

There is no NTIA webinar for December. The January webinar is [The Benefits of Smart Building Technology](#) and will be held on Wednesday, January 15, 2020. Information from past webinars is available in the [webinar archive](#). The [BroadbandUSA Newsletter for November](#) includes notable state news from Wyoming, Illinois, and Ohio (among others). There is also now a monthly roundup of links to Public Safety/FirstNet news.

NTIA 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](#). Recent ReConnect funding announcements include multi-million dollar projects in [Kansas, Utah/Western Colorado, New York, Iowa, South Dakota, Missouri, North Carolina, Oklahoma, and Virginia](#). We understand that once this year’s awards are complete (probably by December), the next round of ReConnect funding will be announced, with a budget expected of around \$550

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).

million. Also, on November 20, USDA [announced \\$42.5 million in Distance Learning and Telemedicine Program \(not ReConnect\) funding awards across many states.](#)

Precision Agriculture

In April, [USDA issued a report](#) on rural broadband infrastructure focused on next generation precision agriculture. The [New York Times in September](#) had short story highlighting some current precision agriculture use cases. The FCC has formed its previously announced advisory Task Force on precision agriculture – which will work in close coordination with the USDA. The first meeting will be December 9 here in DC – details and Task Force membership can be reviewed [here](#). The FCC is currently forming four Task Force working groups: (1) Mapping and Analyzing Connectivity on Agricultural Lands; (2) Examining Current and Future Connectivity Demand for Precision Agriculture; (3) Encouraging Adoption of Precision Agriculture and Availability of High-Quality Jobs on Connected Farms; (4) Accelerating Broadband Deployment on Unserved Agricultural Lands. [The FCC is accepting working group nominations through December 3.](#)

Federal Communications Commission

The agenda for the Commission’s December 12 Open meeting is available [here](#) and includes several spectrum rulemakings including [Promoting Innovation in the 5.9 GHz Band](#) (previously reserved for Dedicated Short Range Communications) and [Facilitating Shared Use in the 3.1-3.55 GHz Band](#). 5.9 GHz spectrum will be useful for autonomous vehicles; the 3.1-3.55 GHz band is to be cleared for flexible use, including 5G. The Commission will also be considering a rulemaking to establish a [national 988 number for suicide prevention and mental health crisis hotline](#). The November 22 meeting agenda and video is [here](#) with seven items that included an order addressing national security threats in the supply chain for communications networks and another to improve the location accuracy for E911 calls. The October 25 FCC Open meeting included an order modifying testing methodologies used to verify broadband deployments by carriers receiving “high cost” universal service support. 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. [Initial comments were due November 22, 2019](#); replies are due December 9.²

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 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.

\$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

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

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.

pregnancies, pediatric heart disease, mental health conditions, and cancer. Initial comments on the NPRM were [filed August 29, 2019](#), with [replies filed September 30](#).

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](#).

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. The Commission found that 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 Department of Justice had previously approved the merger in June, leaving fourteen states (down from 20 originally) and the District of Columbia in opposition. The states have asked a federal district court in DC to block the merger with the trial scheduled to begin next month.

E-rate

Category 2 Budgets

A draft order making Category 2 (Cat2) budgets permanent is [on circulation](#) at the Commission, meaning a decision is imminent. 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 Cat2 NPRM [was published](#) in July and comments were filed in August/September. Commenters were close to unanimous in supporting the Commission making Category 2 budgets permanent. SHLB's comments (filed jointly with the State E-rate Coordinators' Alliance (SECA)) [are here](#).

Texas Carriers' E-rate Rulemaking Petition on Overbuilding

At stake 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, [Valley TeleCom has replied at length](#) (with exhibits) to the [Cochise County \(AZ\) school superintendent](#) (who had previously responded to [an accusatory letter from Commission O’Rielly](#)). Valley TeleCom explains among other things why it declined to bid on the almost \$30 million regional WAN proposal and raises a host of concerns, including an allegation that only 17 of the 47 original consortium participants remain. If you are following this issue closely, this is an important filing.

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.

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 were filed October 31, 2019](#); [replies 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. SECA’s reply comments are [here](#).

Rural Health Care Program

2019 Funding Demand

USAC has not yet published gross funding demand information (*i.e.*, the gross amount of funding requested), 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 until next funding year (2020). USAC not releasing this information fits the pattern of prior years where USAC 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.

On November 12, a number of parties, including SHLB, filed petitions for reconsideration or clarification of the Order. [The SHLB petition](#) focused on the Commission's failure to consider major impacts the new prioritization system will have on consortia in the HCF, and problems with how "rural rates" are to be determined in the RHC Telecom Program. Other parties filing petitions included the [North Carolina Telehealth Network Association \(NCTNA\)](#) and [Southern Ohio Health Care Network \(SOHCN\)](#) (filing jointly), [US Telecom](#), the [Governor of Alaska](#), and [Alaska Communications](#). (On October 21, GCI (the other major carrier in Alaska) filed a petition for review in the DC Circuit Court of Appeals.) The NCTNA and SOHCN petition focused on the Commission's failure to consider raising the funding caps for the RHC program, especially after having strengthened rules that protect the program from potential waste, fraud and abuse.

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 and have requested more time from the Court 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 renounced 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, federal legislative 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.*

Closing Photo

With impeachment fever underway, here is another landmark in scenic Rosslyn, Virginia, right across the street from Arpanet plaque featured last month:

