



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 August 31, 2020**

### **Capitol Hill**

Negotiations on a second large COVID-19 relief legislation effectively broke down August 7. While the President responded with several stop-gap [executive actions](#), both parties seem to recognize relief legislation is urgently needed and there is speculation that [some kind of deal will be cut by mid-September](#). In the meantime, with the Senate technically still in session, new broadband-related bills continue to be introduced. Bi-partisan bills, such as [this one](#) (introduced in early August) sponsored by Sen. Manchin (D-WV) and Sen. Cornyn (R-TX), which [would allocate another \\$400 million](#) to the Federal Communications Commission's (FCC) [COVID-19 Telehealth program](#), have a reasonable chance of being part of a last-minute relief package.

### **National Telecommunications and Information Administration (NTIA)**

The next NTIA monthly webinar will be held September 16 and will address: [Smart Agriculture: Driving Innovation in Rural America](#). The July webinar addressed Cyberinfrastructure: Moving Beyond Broadband at HBCUs and TCUs; a recording and materials are available [here](#). There was no August webinar. The [August BroadbandUSA Newsletter](#) includes links to notable state broadband news items from Illinois, Missouri, Ohio, and Pennsylvania, among others.

NTIA hosts [a searchable database](#) featuring 50 federal broadband funding opportunities across a dozen federal agencies. The NTIA [Broadband USA main page](#) features a state-by-state summary of state broadband programs (scroll down to the map and click on a state). NTIA has released pilot results of its [National Broadband Availability Map \(NBAM\)](#) which was authorized by Congress in 2018. The NBAM initially covered eight states, but now includes 22 states total: California, Colorado, Georgia, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oregon, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. 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 (contact [nbam@ntia.gov](mailto:nbam@ntia.gov) for more info).

### Section 230 and Free Speech

Pursuant to President Trump’s May 28 [Executive Order](#) NTIA on July 27, 2020, filed a [petition for rulemaking](#) asking the FCC to clarify the scope of [Section 230 of the Communications Decency Act](#). Section 230 was promulgated by Congress in 1996 as part of the Communications Decency Act and provided legal immunities to online companies in order to incentivize them to remove offensive material. Wikipedia’s [overview of Section 230](#) provides historical context. While Section 230 has been criticized [by both parties](#), the Administration’s push here is controversial, raising [First Amendment](#) concerns for many.

The NTIA petition asks the FCC, among other things, to define certain terms of Section 230, such as “taken in good faith” and “otherwise objectionable” material, which presumably would influence how courts interpret the scope of Section 230 liability protections in cases against social media giants. Chairman Pai [announced on August 3](#) that he will seek public comment on NTIA’s petition. Republican FCC Commissioner O’Rielly, who recently questioned whether the FCC had authority to take action, saw the Trump Administration withdraw his re-nomination to another five-year FCC term (although the [nomination was generating Hill opposition for unrelated reasons](#)). (Unless re-nominated, O’Rielly’s term will end as soon as the new Congress is convened in January 2021.)

### USDA – Rural Utilities Service

As Congress struggles to pass appropriations bills prior to the end of the federal fiscal year on October 1, [the House in July passed an agricultural funding bill](#) with over \$1 billion for broadband in fiscal year 2021, including \$990 for the ReConnect Program (a \$435 million increase over 2020). Although [the Democrats’ bill is unlikely to gain bi-partisan support](#), it suggests the ReConnect program could continue to grow in size. Proposed ReConnect projects can be viewed [here](#); awardees are identified [here](#); proposed and funded projects are depicted on an interactive map [here](#). The [Distance Learning & Telemedicine Grant Program](#) received an [additional \\$25 million](#) in funding in the CARES Act although the application window is now closed. The RUS [Community Connect Grant](#) program is currently inactive.

### Precision Agriculture

The FCC’s [Precision Agriculture Connectivity Advisory Task Force](#) met virtually on July 22, 2020 – [you can view the meeting and meeting materials here](#). The April 2019 USDA report on rural

broadband infrastructure and next generation precision agriculture is available [here](#). As the precision agriculture market continues to explode, Purdue University [announced on August 10](#) that it was collaborating with the National Science Foundation-funded Engineering Research Center to develop the Internet of Things for Precision Agriculture.

### **Federal Communications Commission**

The FCC held open meetings on [July 16](#) and [August 6](#), respectively. The next open meeting will not be until September 30 (agenda not available yet). The August 6 meeting notably adopted [procedures for the C-band auction](#) which is scheduled to begin in December 2020. The most important broadband-related item out of the July 16 meeting was the establishment of the [Digital Opportunity Data Collection](#) program, implementing the [Broadband DATA Act](#) (which became law in March 2020), which will replace the current broadband mapping program based on the flawed FCC Form 477 data. We will have more on this new mapping effort soon, but in the meantime [here is an early take](#) that maintains skepticism of the FCC's efforts, despite the purported inclusion of crowdsourced data.

### **White Spaces**

The unused spectrum between TV station channels or in places where channels are vacant are called “white spaces.” This vacant broadcast spectrum represents a resource for mobile broadband, particularly in rural areas. [In March 2020](#) the FCC proposed updated rules to facilitate increased innovation in the white spaces area. [Comments are currently being filed](#) in this rulemaking. SHLB signed on to the [Broadband Connects America Coalition comments](#). Microsoft has been a leader in this area – their May 2020 comments [are here](#). The most recent Microsoft *ex parte* has [a detailed presentation on laboratory and field operational testing](#) of the white space devices.

### **Spectrum**

In this section of the monthly broadband policy update, we are maintaining short summaries of selected FCC spectrum proceedings that are active and which are expected to impact the public availability of broadband. If there is a specific proceeding that interests you, please let me know. Here is a short backgrounder on the importance of the different bands in the 5G era (courtesy of [Jeremy Horowitz at venturebeat.com](#)):

The . . . low band tier covers a lot of space, slowly, while the . . . mid band covers less space at faster speeds, and the . . . high band covers the least space at super-fast speeds. . . . One low band (600-700MHz) tower can cover hundreds of square miles with 5G service that ranges in

speed from 30 to 250 megabits per second (Mbps). A mid band (2.5/3.5GHz) tower covers a several-mile radius with 5G that currently ranges from 100 to 900Mbps. Lastly, a high band (millimeter wave/24-39GHz) tower covers a one-mile or lower radius while delivering roughly 1-3Gbps speeds. Each of these tiers will improve in performance over time.

### L-Band (1.0GHz to 2.0GHz)

The [FCC's unanimous decision in April](#) to approve a long-pending request by Ligado Networks (f.k.a. LightSquared) to utilize a portion of the L-band spectrum continues to generate opposition – reflected recently in the politics surrounding Republican Commissioner O'Rielly's [re-nomination for a second five-year term](#). Because Ligado's spectrum is close to spectrum reserved for GPS, the Department of Defense (DOD), Department of Transportation (DOT), and other interests strongly oppose this move. On May 22, NTIA (on behalf of DOD and DOT) formally challenged the FCC's decision through a [petition for reconsideration](#) and a petition for stay. On August 13 Congress's Government Accountability Office (GAO) determined the Congressional Review Act (CRA) (which you may remember was invoked in an attempt to overturn the FCC's 2017 net neutrality rules) could not be used to reverse the FCC because, [GAO found](#), the Ligado decision was an adjudication and not a rule promulgated after notice and comment.

### 2.5 GHz Rural Tribal Priority Window (formerly EBS)

The FCC in 2019 decided to auction remaining unlicensed [Educational Broadband Spectrum \(EBS\) \(2.5 GHz band\) to commercial users](#). This spectrum is suitable for mobile and fixed point-to-point wireless services. Prior to the auction, tribal entities in rural areas have a limited opportunity to apply for licenses for available 2.5 GHz spectrum in their areas. This “rural tribal priority window” was scheduled to close August 3, 2020 before the [FCC on July 31 extended](#) the deadline by 30 days to 6:00 p.m. EDT on September 2, 2020.

The FCC has made available a number of resources for the tribes including a mapping tool, information about the application process, and access to training materials. The general FCC website with links to these resources is here: <https://www.fcc.gov/25-ghz-rural-tribal-window>.

In response to the COVID-19 pandemic, the FCC has granted temporary (60-day) emergency access to 2.5 GHz spectrum for requesting tribal groups including the [Pueblo Zuni tribe in New Mexico](#) and [Navajo Nation in Arizona, New Mexico and Utah](#). Because of the unique [impact of COVID-19 in tribal areas](#), more such requests may be forthcoming. With the June 2, 2020, [waiver for Harlan County, Kentucky](#), at least one poor Appalachian community is also benefitting from temporary emergency use of the spectrum. These temporary spectrum access grants do not affect the availability of spectrum for the 2.5 GHz rural tribal priority window (see below).

### C-Band (3.7-4.2 GHz)

Broadcast satellite operations are the current licensed users of the mid-band C-Band spectrum. The FCC in February 2020 voted (along party lines) to approve two orders to reorganize and reclaim 280 MHz of the band for flexible-use and to facilitate public auctions of the newly available bands. The public auction is slated to commence [December 8, 2020](#), with the new spectrum slated to be in use by September 2025. Incentive payments to the incumbents – which will come from auction proceeds – exceed \$9 billion. On June 1, 2020, [Chairman Pai announced](#) that five of the major satellite operators had agreed on an [accelerated timeline](#) to vacate the first chunk of the airwaves they currently hold by December 2021. Smaller operators have sought two stays, [both of which were denied](#). On August 13, a cable TV industry group representing smaller operators [challenged](#) FCC rules governing how it classifies certain reimbursable costs; ultimately [filing suit on August 27 in court](#) to attempt to force the FCC to respond to its request for review before the approaching cost submission deadline).

### 3.1-3.55 GHz

[On August 10, 2020](#), the White House announced an intergovernmental agreement where the Department of Defense has agreed to vacate a [100 MHz band from 3.45 to 3.55 GHz to allow for 5G use](#). This agreement clears the way for an auction of this valuable spectrum in as soon as 15 months. The speed at which this agreement was reached is unusual by historical standards, where the process typically takes 5-8 years. The Commission in December 2019 approved an NPRM for [Facilitating Shared Use in the 3.1-3.55 GHz Band](#) (link fixed). The 3.1-3.55 GHz band is currently used by the Department of Defense (DOD) for fixed and mobile radar as well as secondary non-federal amateur and experimental users. The U.S. is handicapped in the 5G race in no small part due to the large government (DOD) holdings of mid-band spectrum.

### Citizens Broadband Radio Service (CBRS) (3.55-3.65 GHz)

This spectrum is being used for naval radar and so away from the coasts much of the spectrum is unused. In recently deciding to reorganize the spectrum, the Commission allowed licensed use (through PALs), and General Authorized Access (GAA), which allows unlicensed access to available channels managed by a frequency coordinator called a Spectrum Access System (SAS). More information about SAS functionality – which is critical to all future spectrum sharing applications – is available [here](#) and [here](#). An excellent general non-legal web resource for CBRS usage [is available here](#). There is growing interest in CBRS among [both K-12 and higher education](#) on CBRS' ability to provision private wide area wireless networks for education.

The FCC's CBRS auction of PALs [closed on August 24, netting over \\$4.5 billion](#), with all three major wireless carriers bidding. Notably, 10 counties in Alaska received no bids and 1915 blocks in 675 other counties also failed to sell, making these areas available for some degree of unlicensed use.

Each PAL consists of a 10-year renewable license for a county-wide 10 MHz unpaired channel (seven channels per county). [According to the FCC](#) this auction “will offer the greatest number of spectrum licenses ever made available for bidding in a single auction and is intended to further the deployment of fifth-generation (5G) wireless, the Internet of Things, and other advanced spectrum-based services for the benefit of the public.” The Commission [public notice](#) establishing the CBRS PALs auction procedures was approved at the February 2020 open meeting.

### 5.9 GHz Band

The Commission in December 2019 approved an NPRM for [Promoting Innovation in the 5.9 GHz Band](#) which would reorganize spectrum previously reserved for Dedicated Short Range Communications in order to support development of next generation “Cellular Vehicle to Everything” (C-V2X) technology as well as increase unlicensed utilization (*e.g.*, more Wi-Fi channels). The FCC proposes to make the lower 45 MHz of the 5850-5925 MHz band available for unlicensed use and allocate the upper 20 MHz for C-V2X. The DOT and [auto safety interests oppose](#) the FCC plan – while [WiFi interests support](#) it. New America Foundation's Open Technology Institute has a recent [ex parte on this](#) (with comments on the 6 GHz band and other bands as well.)

### 6 GHz Band

There are now two suits pending in DC Circuit court challenging the FCC's [April 2020 Order](#) opening the 6 GHz band to unlicensed indoor and some outdoor use. One suit was [filed by the National Association of Broadcasters \(NAB\)](#), the [other by several utility groups](#), with both alleging there will be unacceptable interference if the FCC's plan is allowed to move forward.

Here is an overview from C-NET highlighting industry estimates that allowing unlicensed use of 6 GHz spectrum will lead to supercharged Wi-Fi and [create billions in value for the economy](#). [Some claim](#) this is the most important decision the FCC has made on unlicensed spectrum use in 25 years. [Qualcomm recently released](#) its plans for new products later this year that will take advantage of the spectrum.

### **COVID-19: New Telehealth Program and E-rate & Rural Health Waivers**

The FCC in April 2020 established [the COVID-19 Telehealth Program](#) in response to Congress appropriating \$200 million in funding for telehealth to the FCC as part of the CARES Act. The FCC stopped accepting applications in late June and on July 8 announced it had fully committed the program. The final list of awardees are available here ([Excel](#); [PDF](#)).

The Commission on March 18, 2020, [waived the gift rules for both the E-rate and RHC programs](#) through September 30, 2020. SHLB and other groups [recently requested that the waiver be extended](#) through June 30, 2021. The scope of this waiver is broad, permitting (¶ 7):

service providers to offer [free of charge], and eligible RHC and E-Rate entities to solicit and accept, improved capacity, Wi-Fi hotspots, networking gear, or other things of value to assist health care providers, schools, and libraries as well as doctors and patients, teachers, students, school administrators, and librarians and patrons during the coronavirus outbreak. These gifts could include but are not limited to free upgrades to connections, connected devices, equipment, and other services for RHC program participants who provide care via telemedicine and free broadband connections, devices, or other services that support remote learning for students and teachers who will be taking classes at and providing instruction from home as a result of COVID-19.

The Commission in both [E-rate](#) and [RHC](#) extended programmatic deadlines for filing funding applications, appeals, invoicing, service delivery and information requests, as well as waived certain rules regarding contract extensions. *If you intend to take advantage of any of these extensions of waivers, please consult these orders carefully.*

#### **E-rate**

The State E-rate Coordinators Alliance (SECA) [on August 3 asked the Commission](#) to make options available for Schools and Libraries to seek more bandwidth for the current funding year (July 1, 2020 through June 30, 2021), in order to accommodate greater bandwidth needs due to COVID-19. SECA indicates that *on-campus* bandwidth demand has grown in order to support greater off-campus instruction. SECA [supplemented its request](#) on August 27 with specific cost estimates. SHLB [on August 28 filed a letter](#) in support of SECA's request but also asking the FCC to allow RHC applicants similar relief.

The [FCC on August 6 granted waivers](#) to a number of late-filed funding requests. The FCC had in March 2020 already extended the Form 471 filing deadline by 35 days to accommodate COVID-19. The latest order waived the deadline for applications filed within 60 days of that extended deadline in cases where applicants had indicated their inability to meet the extended



deadline was due to COVID-19. The FCC said it did not expect to grant further Form 471 deadline waivers for this funding year.

### **Rural Health Care**

As an aside, North Carolina’s Broadband Infrastructure Office and the NC Department of Health and Human Services recently [published a report](#) analyzing the state of healthcare and broadband access in Western North Carolina.

As noted above, [SHLB on August 28](#) asked the FCC to allow RHC applicants to re-open their FY 2020 funding applications and seek additional bandwidth to help deal with COVID-related demand. Among other things SHLB directed the FCC attention to a [recent Executive Order](#) by President Trump on Rural Health and Telehealth Access. As SHLB explained (footnotes omitted):

On August 3, 2020, President Trump issued an Executive Order (EO) to expand the availability of telehealth services, noting the “jump” in demand for telemedicine and calling for increased funding from the FCC for communications infrastructure. In particular, the EO directs the Secretary of Health and Human Services and the Secretary of Agriculture, “in coordination with the [FCC] . . . [to] develop and implement a strategy to improve rural health by improving the physical and communications healthcare infrastructure available to rural Americans.” We urge the Commission to grant this waiver request and establish a reasonable deadline for RHC applicants to seek this additional funding to comply with this Presidential directive and to enable healthcare providers to upgrade their broadband infrastructure as soon as possible to address the pandemic.

While USAC continues to make progress processing funding applications for 2019 (which ended June 30, 2020), it remains far behind where it was last year, and even farther behind E-rate. Consider the following comparison between the two programs as of the end of June:

	<b>E-RATE</b> <a href="#">June 26, 2020</a>	<b>RHC</b> <a href="#">June 30, 2020</a> <sup>1</sup>
<i>Funding Year 2019</i>	\$2.39 billion	\$310 million
<i>Funding Year 2020</i>	\$998 million	Zero

---

<sup>1</sup> See page 23 (Amount Authorized for Disbursement + Reserve for Outstanding Obligations).



This unacceptable situation was raised by several USAC board members during the last USAC quarterly meeting and has attracted the attention of USAC's CEO which has requested a meeting on September 1 with SHLB and program stakeholders to discuss the situation.

### **Net Neutrality**

In February 2020 the FCC [sought](#) public comment on the three narrow issues remanded by the DC Circuit: jurisdictional questions over pole attachment regulation, impacts on public safety, and funding broadband through the Lifeline Program ([comments here](#)).

No parties ultimately sought Supreme Court review of the October 2019 [DC Circuit decision upholding](#) the FCC's 2017 repeal of net neutrality rules (the deadline to seek review was in July after the DC Circuit in February had declined to re-hear the case *en banc*). As a result, voluntary stays in the state-specific federal litigation have lapsed. Recall the DC Circuit reversed the FCC in asserting blanket preemption of state-specific rules, but this did not preclude state-by-state preemption claims based on specific conflicts with federal law. See individual case updates:

#### **Federal Courts:**

- Eastern District of California. In October 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 had sought a preliminary injunction but the court agreed to a request by all parties to stay the case after California agreed not to enforce the law pending final resolution of *Mozilla v. FCC*. The [DOJ on August 5, 2020 filed a renewed motion](#) for a preliminary injunction; the state has until September 18, 2020 to respond. Industry groups also renewed their request for an injunction.
- Vermont District Court. In October 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*. The stay is apparently expired but there are no new filings in the proceeding as of yet.

#### **States**

The National Conference of State Legislators (NCSL) features a summary of net neutrality efforts by state for 2020 [here](#) (updated March 27, 2020). *Note this list does not identify current laws, only current efforts to pass new laws.*