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*VIA ELECTRONIC MAIL*

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: **Monthly Broadband Policy Update – through September 23, 2020**

**Capitol Hill**

Negotiations on a second large COVID-19 relief bill, with potential emergency funding dedicated to broadband, remain dead. Meanwhile, various Telecom Bills are moving forward though none establishing new programs to fund infrastructure. For example, Senate Republicans are working on [a bill to use spectrum auction proceeds](#) that would establish a fund the FCC could use to support broadband deployment through existing universal service mechanisms. Representative Doyle (D-PA), House Communications Subcommittee Chairman (whose office The Quilt met with over the summer), recently stated that a Biden Administration and a Democratic-controlled Congress will, among other things, restore net neutrality and “make historic investments in our broadband infrastructure.”

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

The monthly NTIA Webinar on October 21 will address: [Digital Inclusion and K-12 Education: The Impact of COVID-19 on Students and Educators](#); archived webinars are [here](#). The [September BroadbandUSA Newsletter](#) includes notable state broadband news items from Indiana (blimps to provide rural broadband), Kansas (state broadband grants available), Maine (surveying disparities), Ohio (waiving schools’ 50% match requirement for CARES Act funding), and Wyoming (using CARES Act funding for broadband infrastructure), 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 and provided legal immunities to online companies in order to incentivize them to remove offensive material. 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. Wikipedia's [overview of Section 230](#) provides historical context. While Section 230 has been criticized [by both parties](#) (see also [here](#) and [here](#)), the Administration's push is controversial, raising [First Amendment](#) concerns for many.

In the meantime, [Senate Republicans have introduced a bill](#) modifying Section 230 by, among other things, removing the term "otherwise objectionable" and replacing it with more specific language on promoting terrorism, otherwise unlawful content, and content promoting self-harm. The Republican bill would also condition the content moderation liability shield to cases where the moderation efforts were "objectively reasonable." (The Department of Justice (DOJ) on September 23, 2020, [also has released draft legislation to reform Section 230.](#))

### 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

NTIA's September webinar on precision agriculture is available [here](#). Government Technology's [reporting on the event](#) noted attention on middle mile:

In regard to connecting farms, the answer may not be as simple as identifying a last-mile solution. During the webinar, Chad Rupe, administrator of the Rural Utility Service for USDA, said that you can't get to the last mile without sufficient middle-mile infrastructure.

Rupe said he's been working with electric cooperatives to help provide middle-mile fiber. He pointed out that most farms lacked electricity until co-ops were able to help, with the implication being that co-ops may have to play a large role in bringing high-speed Internet to farms.

Rupe also talked about a new USDA rule that allows up to 10 percent of a grant or loan from a Rural Development program to be used for broadband infrastructure. This change could give states and local areas more flexibility in how they may fund rural broadband.

"Through this regulation, RD enables limited integration of broadband deployment with other rural investments funded through its broad suite of programs," the USDA rule states. "It does so without adding the burden of seeking funding through separate program areas."

The next virtual meeting of the FCC's [Precision Agriculture Connectivity Advisory Task Force](#) will be October 28 at 9:30 am ET. Background and links to prior meetings are available [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**

On September 15, 2020, [President Trump nominated Nathan A. Simington](#) to fill the Republican FCC seat being vacated by Commissioner O'Rielly whose nomination Trump withdrew this summer. Action on the nomination before the election is unlikely. On September 17, 2020, the Subcommittee on Communications and Technology of the House Energy & Commerce Committee held and FCC virtual oversight hearing entitled: Trump FCC: Four Years of Lost Opportunities. The Committee Memorandum, testimony, witness statements, and a link to the video of the hearing are available [here](#). The Commission's agenda for its [September 30 virtual open meeting](#) includes two spectrum matters: [Facilitating Shared Use in the 3.1-3.55 GHz Band](#) and [Expanding Access to and Investment in the 4.9 GHz Band](#). These are addressed briefly below.

## **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. 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.

## **National 5G Network?**

On September 18, the Department of Defense (DOD) issued a [Request for Information](#) (RFI) from industry concerning establishing a system to support widespread military and civilian spectrum sharing. Although the request mentions the 3.6 GHz band (see item below), the RFI is not limited to any particular spectrum band. Given military control of so much of the spectrum that is crucial for robust 5G, this is a potentially revolutionary development. However, some see [establishment of a governance body for all national 5G spectrum usage](#) as a potential first step toward [a controversial nationalized 5G system](#). Others see this as similar to FirstNet and an opportunity to increase the availability and lower the cost of 5G services. Large wireless carriers inevitably see a threat to the value of their existing spectrum holdings [and will hotly contest this move](#), while Google, Silicon Valley, and possibly defense contractor interests are pushing for it. For more, see this [WSJ article](#) (subscription required).

## **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. 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 had a limited opportunity to apply for licenses for available 2.5 GHz spectrum in their areas through a “rural tribal priority window.” With that window having closed on September 3, 2020, the [FCC is processing and accepting applications](#). (Once accepted, application are subject to further review and a public comment period before they are finally approved.) [Vogal’s Mark Colwell has an overview](#) of the Tribal priority results with a discussion of why educational users deserve the same accommodation. Meanwhile, T-Mobile, which is expected to be the dominant bidder in the 2.5 GHz auction, [on September 16 urged the Commission to move expeditiously](#).

### 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.

### 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 Commission is voting on an order and notice of rulemaking [proposing uses for the newly cleared 100 MHz](#) of spectrum on September 30. The speed at which this agreement was reached is unusual by historical standards, where the process typically takes 5-8 years. 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.

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

The FCC’s CBRS auction of Priority Access Licenses (PALs) [closed on August 24, netting over \\$4.5 billion](#), with all three major wireless carriers bidding. Verizon, the large carrier with the biggest mid-spectrum needs, was the big winner, bidding \$1.9 billion for 557 licenses in 157

counties. [According to TeleCompetitor](#): “The top 5 CBRS auction winners combined will spend about \$3.9 billion, representing nearly 87% of total auction proceeds. There were a total of 228 winners in the auction, including many small rural providers.” From the standpoint of enterprise bidders (including higher education), one analyst thinks the auction was a disappointment:

Yes, Deere & Company and Chevron won priority access licenses (PALs), but [the analyst] pointed out that only four universities got licenses, even though educational institutions around the country are active users of the unlicensed portion of the CBRS spectrum. ‘In that respect I think the CBRS PALs were a failure. I don’t think four universities was a success.’

He speculates that the reason more universities and enterprises didn’t participate in the CBRS Auction 105 was that the county-sized licenses covered too much geography and cost too much for these entities. Many organizations only need spectrum to cover their campuses, public venues or industrial locations. They couldn’t afford to buy a PAL for the entirety of LA County, for example

EBS General Authorized Access (GAA) allow 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](#). A good general non-legal web resource for CBRS [is available here](#).

#### 4.9 GHz Band [new for September 2020]

From the [Commission’s background on this new item](#):

Nearly two decades ago, the Commission designated the 4.9 GHz (4940-4990 MHz) band for use in support of public safety. Today, the 4.9 GHz band remains underused outside of major metropolitan areas, with stakeholders citing high equipment costs and limited availability of broadband equipment, among several barriers to its use. Currently, access to the 4.9 GHz band is restricted to certain entities and use of the spectrum is limited to public safety purposes. Licensees do not receive exclusive use licenses for the spectrum but rather operate pursuant to a coordination framework for shared use of the band. Although nearly 90,000 public safety entities are eligible under our rules to obtain licenses in the band, there are only 3,559 licenses currently issued to 2,090 individual licensees.

The order would, among other things, eliminate the exclusive public safety use requirement for the spectrum and “[p]ermit one statewide 4.9 GHz band licensee per state (the State Lessor) to lease some or all of its spectrum rights to third parties, including commercial, critical infrastructure, and other users, thus making up to 50 megahertz of mid-band spectrum available for more intensive use.” Public safety interests are upset with the item and the speed

at which it is proceeding, [with a petition circulating](#) to have the spectrum allocated instead to FirstNet.

### 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.) A Commission vote on the December 2019 NPRM is expected at the October or November 2020 open meeting.

### 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.

### 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. SHLB signed on to the [Broadband Connects America Coalition comments](#). Because Microsoft has been the leader in this area (their May 2020 comments [are here](#)), their [most recent ex parte](#) is always worth reviewing.



## **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.<sup>1</sup> SHLB and other groups [requested the waiver be extended](#) through June 30, 2021; [on September 3, the Commission granted](#) an extension until December 31, 2020. The extension included waivers of the information request deadlines in both programs, *but not deadlines for filing appeals and other matters*. (The Commission previously extended programmatic deadlines for filing funding applications, appeals, invoicing, service delivery, as well as waived certain rules regarding contract extensions in [E-rate](#) and [RHC](#).) *If you intend to take advantage of any waivers, please consult these orders very carefully.*

### **E-rate**

[On September 16, the Commission opened a new E-rate filing window](#) to support Category 1 Internet Access or data transmission only – allowing schools to seek additional funding for funding year 2020 (July 1, 2020 through June 30, 2021) *without further competitive bidding*. This [new filing window opened September 21 and will close October 16](#). The State E-rate Coordinators Alliance (SECA) [on August 3 had made this request](#) so schools could seek more bandwidth for the current funding year in order to accommodate greater bandwidth needs due to COVID-19. SECA indicated 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 and asking the FCC to allow RHC applicants similar relief. The Commission did not grant a new filing window for RHC.

On [September 17, 2020, 38 Democratic Senators](#) sent a letter to Chairman Pai urging him to use E-rate funding to support connectivity to students in their homes by recognizing those home

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<sup>1</sup> 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.



connections are the “virtual classrooms” of today. [Chairman Pai maintains](#) that E-rate statutory language directing the Commission to ensure access to advanced services for “[e]lementary and secondary schools and *classrooms*”<sup>2</sup> places inflexible legal limits on the Commission’s authority to provide such funding.

### **Rural Health Care**

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, which the Commission did not address when it granted SECA’s request (E-rate above). 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.

### **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. In addition to California and Vermont (litigation updates below), four other states have enacted some form of net neutrality

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<sup>2</sup> See [47 U.S.C. § 254\(h\)\(2\)\(A\)](#) (emphasis added).

law: [Colorado, Maine, Oregon, and Washington](#), none of which have yet been challenged by industry or the federal government.

#### 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 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 responded](#) on September 16. 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*. [Reports are](#) that DOJ and industry groups also renewed their challenges to the Vermont law after the stay expired.

#### 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.*