Jeffrey A. Mitchell

8300 Greensboro Dr.
Suite 1200
Tysons, VA 22102

NOT ADMITTED IN VA

jmitchell@fcclaw.com
(703) 584-8685
WWW.FCCLAW.COM

LLGS | LUKAS LAFURIA GUTIERREZ & SACHS LLP

October 20, 2017

To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – September and the first part of October 2017

Congress

In late September, Senate and House Democrats released their "A Better Deal: Universal High-Speed Internet" legislative proposal. Highlights of the proposal include $40 billion in direct federal funding focused on the following:

(1) A universal Internet grant program that will close the 'last mile' gap. Support would be distributed on a technology- and provider-neutral basis. The program would have broad eligibility so that partners like rural co-ops, local governments, or other alternative entities could participate on equal footing with private sector providers.

(2) Creating complete and reliable service maps that accurately represent the real-world consumer availability of adequate, affordable high-speed internet service.

(3) Delivering "21st Century" Internet speeds to all Americans.

(4) Providing grants to upgrade the nation's critical safety infrastructure, including the aging 9-1-1 systems.

Legislators introducing the Democrat proposal included Senators Debbie Stabenow (D-MI), Jon Tester (D-MT), Joe Manchin (D-WV), and Ed Markey (D-MA), and Representatives Cheri Bustos (IL-17), Terri Sewell (AL-07), Rick Nolan (MN-08), and Ann Kuster (NH-02). While the Democrat proposal is unlikely to move forward on its own, it will obviously be important to ensure any eventual infrastructure plan, whether Republican or bi-partisan, includes the principle of provider neutrality in particular.

With respect to the Trump infrastructure plan, there is little news except that planning behind the scenes appears to be ongoing. In a speech October 10, Jonathon Adelstein, former FCC Commissioner and current President and CEO of the Wireless Infrastructure Association, noted: "We like what we've heard from the Trump Administration on infrastructure. We're working with his staff on their plans for a major infrastructure initiative. Nobody knows yet how that will be rolled out, or if it will really get enacted. But if it does, there's a growing consensus in both the Administration and Congress that wireless infrastructure should be included."

NTIA Update

David Redl, President Trump's nominee to lead NTIA, advanced out of committee but a final floor vote is being blocked by Sen. Cruz (R-TX) due to Cruz's concerns over Redl's position on the decision to transition oversight over the Internet Assigned Numbers Authority (IANA) to an international body. Redl apparently worked on the IANA transition as a congressional staffer and has refused in his confirmation hearings to criticize the transfer decision.

NTIA events:

- October 18, 2017 webinar: Understanding the Role of Broadband in Regional Economic Development. An archived version of this webinar will be available at the archive link below.

- The archive for previous webinars is available here.

NTIA's October Broadband newsletter is available here.

Federal Communications Commission

Hurricane Waivers Granted to E-rate and RHC Participants

The FCC granted a 150-day waiver to E-rate and RHC participants (as well as others) located in areas of Texas, Florida, Georgia, Puerto Rico, and the United States Virgin Islands that FEMA designated Major Disaster Areas. The waiver applies to certain program deadlines for applications, invoices, appeals, etc. If you have damaged sites that are in or near these disaster areas, please let me know. The order is available here.

Section 706 Inquiry

The FCC on August 8, 2017 released a Notice of Inquiry (NOI) on "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." This is the proceeding in which the Commission previously defined fixed broadband as 25 Mbps download and 3 Mbps upload ("25/3") for purposes of determining availability. Although proposing to keep this definition in place, the Commission seeks comment on "other potential benchmarks" for fixed broadband.

The Commission is considering, for the first time, concluding that mobile broadband is a substitute service for fixed broadband access to the Internet. Such a finding would show greater availability of broadband, possibly undermining the case for more universal service funding. SHLB's very good comments in this proceeding are available here. Among other things, SHLB explained:

> The NOI also seeks comment on incorporating measures of latency and consistency of service, as well as data allowances and other service limitations, into its evaluation of broadband deployment. [W]hile measuring speed is a good starting point, the transmission quality is as important as transmission speed. The SHLB Coalition supports the idea of incorporating benchmarks around latency, data consistency, and other quality of service metrics.

Broadband Deployment Advisory Committee (BDAC)

The work of the FCC's BDAC and four of its working groups (WGs) ([Competitive Access to Broadband Infrastructure, Removing State and Local Regulatory Barriers](#) (Mark Johnson member), [Model Code for Municipalities, and Model Code for States](#)) is underway. The first BDAC meeting was in April. The second meeting occurred in July and accompanying presentations can be viewed [here](#). There have been no public proceedings since July.

In early September Chairman Pai appointed Elizabeth Bowles, president of an Arkansas-based wireless Internet service provider, as chair of the BDAC. He also appointed Larry Hanson, city manager of Valdosta, Georgia, to the BDAC. Mr. Hanson had been on the Model Code for Municipalities WG. [Below is the previously announced BDAC timeline](#):

- July-Oct/Nov: WGs continue to develop and finalize their recommendations.
- Oct/Nov (Date TBD): End-of-year BDAC meeting
  - WGs present recommendations to the full BDAC.
  - Full BDAC deliberates and votes on final recommendations

E-rate

Bureau Seeks Comment on Category 2 Budgets and Approves FY 2018 Eligible Services List

In late September, the Wireline Competition Bureau (Bureau) requested comments on the sufficiency of current Category Two (C2) budgets. The current 5-year budget levels – $150 per student for schools and $2.30 or $5.00 per square foot for libraries (depending on their location) – are for a five-year test period only. The Bureau must issue a sufficiency report before the filing window opens for funding year 2019 (July 1, 2019 thru June 30, 2020) and the request for comments is for participants to provide data for that report. Initial comments are due October 23, with reply comments due November 7. More details are available in the Public Notice [here](#).

On October 5, the Bureau approved minor changes to the funding year 2018 Eligible Services List (ESL). The changes clarify that equipment that has both Category One (C1) and C2 functionality can be funded as C1 (and therefore not subject to C2 budgets) *if the equipment is "necessary to make the [C1] broadband service functional."* The Bureau declined to provide specific examples

as guidance, or to direct USAC to do so. The Bureau also clarified that wiring between two different schools located in a single building should be treated as C2 inside wiring. The Bureau also denied requests to make other services, such as network security and caching equipment. The Bureau Order which contains the new ESL as Appendix B is available here.

Verizon Settlement

The FCC and Department of Justice have settled with Verizon over an E-rate fraud scheme conducted by a consultant for the New York City Department of Education (NYC DOE) that was discovered a few years back. An NYC investigation had revealed that, from 2002-2008, the consultant had rigged the competitive bidding processes while reaping millions in improper consulting fees billed to NYC DOE. Although Verizon was not directly implicated in the fraud scheme, it agreed to repay $17.68 million to the universal service fund to resolve parallel investigations by the FCC and Department of Justice. Verizon further agreed to forego any right to hundreds of millions of dollars in undisbursed E-rate support, and will operate under an approved compliance plan for three years. (Although Commissioner Clyburn dissented and criticized the settlement, Chairman Pai responded that the terms of the deal were negotiated and agreed to by the Wheeler FCC.)

USAC Annual E-rate Training

USAC kicked off its annual applicant training road show on October 10 here in Washington. The next training events are:

- October 24, 2017 – Charlotte, NC
- November 2, 2017 – Minneapolis, MN
- November 14, 2017 – Portland, OR

The full set of training materials is available on the USAC website here. Notably, the afternoon session covering "fiber options" became testy with a near walk-out over USAC's seeming to avoid responding to questions posed directly from audience members (rather than screened questions pre-submitted in writing).

Rural Health Care Program

SHLB is working this fall to get a bi-partisan letter including key Senate Republicans to the FCC supporting an RHC cap increase. In early October, a significant Health IT trade group (The

Healthcare Information and Management Society or "HIMSS") called on Congress to support increasing the size of the RHC program.[1]

USAC should soon announce RHC funding demand for the 2017 funding year (July 1, 2017 through June 30, 2018), with the expectation that available funding ($400 million) will again be less than requested funding. If that occurs, USAC will divide available funding by requested funding to determine a pro-rata share to be applied to all applications. It is likely that that funding demand will be higher than last year which means the pro-rata reduction would be greater than last year's 7.5%.

FCC Connect2Health Task Force

In August and September the Connect2Health Task Forced conducted a series of separate "listening sessions" with health care providers, consumers, service providers, and policymakers. Recordings of these sessions are available here.

Educational Broadband Service (EBS)

The Wireless Communication Association (WCA) in September filed an *ex parte* notice in the EBS docket attaching a nationwide map overlaying where EBS spectrum has not been licensed against Form 477 reported fixed broadband availability.

EBS Background: Many school systems across the country hold spectrum licenses for EBS. Historically, this spectrum had been used for "wireless cable TV" but was later reconfigured for wireless broadband. School systems that hold such licenses in many cases lease spectrum to commercial providers in exchange for last-mile broadband Internet access and a revenue stream. Industry – Sprint in particular – uses the spectrum (in the 2.5 GHz range) to provide services. Unfortunately, the Commission stopped accepting new applications for EBS licenses in the mid-

---

[1] *See* Eric Wicklund, HIMSS Makes Its Pitch for Telehealth Legislation, Rural Broadband, MHEALTH INTELLIGENCE, Oct. 5, 2017:

> "Currently, many patients and providers in rural and underserved areas lack access to the affordable, quality broadband necessary to realize the full potential of health IT, including telehealth and remote patient monitoring, to support 21st-century healthcare," the organization said. "There continues to be a significant disparity in access across America, with more than 39 percent of Americans living in rural areas lacking access to advanced telecommunications services, compared to just 4 percent of Americans living in urban areas." "Research shows this lack of access is negatively affecting both patients' health status and clinicians' ability to provide the care needed to make their communities healthier," HIMSS added. "Based on December 2015 data, the least connected counties (generally) have the highest rates of chronic disease. Obesity prevalence is 25 percent higher and diabetes prevalence is 41 percent higher in these counties (an increase of 6 percent over the prior year) where 60 percent of households lack broadband access."

> To improve those percentages, HIMSS is asking Congress to "modernize" the Federal Communications Commission's Rural Health Care Program, which was established in 1997 with a $400 million cap and hasn't been upgraded since. This year, demand for funding exceeded the cap for the first time.

1990s. Apparently, where the FCC has issued licenses more recently, it did so on the condition that excess capacity spectrum *could not* be leased to commercial entities.

According to a recent letter to the Chairman filed by the WCA, approximately 4,000 mostly rural counties across the U.S. have at least one EBS channel available across the entire county. WCA is seeking issuance of a rulemaking that would implement a compromise reached in 2014 between industry and educational interests to make existing unused EBS spectrum available to educators with leasing once again to be allowed to commercial providers. Sprint has been active in the docket seeking the same.

Net Neutrality/Title II

The Commission's Notice of Proposed Rulemaking (NPRM) to reverse Title II regulation of broadband internet access services ("Restoring Internet Freedom") is available here. Initial and reply comments from higher education and research library associations are available here and here, while separate Association of Research Libraries reply comments are available here. Higher education and research library commenters recently met with FCC representatives – an *ex parte* describing that meeting is available here. We expect Chairman Pai to release a draft order soon in advance of a vote at the Commission's December open meeting.

Microsoft White Space Rural Broadband Initiative

We noted in July that Microsoft announced a $10 billion TV White Spaces initiative aimed at bringing broadband to two million rural residents over the next five years. Microsoft contends that a blended use of different technologies to include TV White Spaces is the most cost-effective way to bring robust broadband to 20 million rural residents. A Microsoft whitepaper describing the initiative is available here, with additional information from Microsoft available here. (*Disclosure*: Attorneys in our firm are representing Microsoft at the FCC seeking Connect America and spectrum policies that will support the initiative.)

In recent comments in the Connect America Phase II Auction proceeding, Microsoft explained that it will have 12 projects up and running in 12 states in the next 12 months. "Microsoft's goal is not to enter the telecommunications business itself or even to profit directly from these projects. Rather, Microsoft will invest in the upfront capital projects needed to expand broadband coverage, seek a revenue share from operators to recoup its investment, and then use these revenue proceeds to invest in additional projects to expand coverage further. As part of this effort, Microsoft will also license intellectual property for free and provide technical training." Microsoft also noted that it has TV White Spaces pilot projects underway now in rural areas of Virginia, Georgia, Maine, Kansas, and Michigan.