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To: Jen Leasure, The Quilt

From: Jeff Mitchell

Re: Monthly Broadband Policy Update – Covering April 2017

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### **Potential Broadband Infrastructure Investment Program**

There is no news to report on a potential infrastructure funding bill. However, an informal process is likely underway on the Hill assembling a “wish list” of projects for a potential bill. As previously reported, White House efforts on such a bill will be headed by the newly established Office of American Innovation, headed by the President’s son-in-law Jared Kushner.

On May 2, the Senate Commerce, Science, and Transportation Committee held a hearing on broadband infrastructure. The focus was local, state, and federal regulatory barriers to deployment (rights of way, easements, permitting, etc.) and facilitating deployment of 5G wireless. Witnesses included a representative from the National League of Cities (opposing any blanket preemption of local rules), a satellite provider (Space X), a wireless equipment provider (Nokia), a state representative from Arizona, and Larry Downs, from Georgetown University. Mr. Downs highlighted Blair Levin’s following eight recommendations to policy makers to facilitate infrastructure deployment:

1. Using funds only in areas not served by a provider
2. Making the FCC the administrator;
3. Limiting ongoing (*i.e.*, recurring) support;
4. Extending “dig once” policies;
5. Addressing unproductive barriers to local deployment, including addressing those policies that treat small cells as macro cells and establishing shot clocks;
6. Standardizing local government processes; making decisions technology neutral;
7. Addressing non-financial causes of the digital divide such as public education on the relevance of broadband;
8. Using the bully pulpit.

The hearing’s focus on regulatory barriers was in line with Chairman Pai’s [Gigabit Opportunity zones proposal](#) (briefly reviewed at The Quilt annual meeting in February). Notably, Senator Shelley Moore Capito (R-WV) has introduced a bill called the “Gigabit Opportunity Act” that

would seek to spur broadband deployment through federal tax breaks in certain opportunity areas to be designated by governors.

Finally, Rep. Kevin Cramer (R-ND) and over 100 signatories from the House Rural Broadband Caucus on May 2 sent a [letter](#) to the FCC urging, among other things, the Commission consider whether the size of the universal service fund was adequate to meet its objectives.

### **NTIA Update**

NTIA senior leadership posts continue to remain vacant. NTIA received a \$32 million appropriation for the remainder of fiscal year 2017 in the Omnibus Budget agreement reached at the end of April. May 15-19 is “Infrastructure Week” and there will be two NTIA-sponsored webinars addressing infrastructure issues:

- May 17: A Conversation on Next Generation Technology Deployment
- May 18: The Importance of Broadband in Building Smart Communities

Details and registration information for both events can found in NTIA’s May Broadband newsletter: <https://www2.ntia.doc.gov/NewsletterMay2017>

### **Business Data Services**

On April 20 the FCC approved Chairman Pai’s proposed Business Data Services (BDS) order on a 2-1 vote with Commissioner Clyburn dissenting. R&E networks’ concern with the BDS order as originally proposed under Chairman Wheeler was whether it would define “BDS” in such a way that services provided by R&E networks would be classified as “common carriage” and thus subject to the proposed regulations (among other things).

Pai’s draft BDS order contained language that expressly clarified the Commission would not change the definition of common carriage and that R&E networks – to the extent they represent “shared use arrangements” previously recognized by the Commission – would continue to be recognized as private carriage. The final approved BDS order was released on May 2 and contained this draft language.<sup>1</sup> While *status quo* regulatory treatment for R&E networks does not definitively resolve all potential questions in this area, explicit preservation

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<sup>1</sup> The final BDS order states: “Given that we do not depart here from our longstanding approach to evaluating private carriage and common carriage classification, we also continue to adhere to our precedent under which shared use arrangements typically were classified as private carriage. Consequently, this addresses the concerns of some commenters that research and education (R&E) networks that historically had been treated as private carriage under that framework might newly be classified as common carrier telecommunications services under a new approach to classification.” FCC 17-43 at ¶ 285 (footnotes omitted).

of the *status quo* with the naming of R&E networks was a notable win for The Quilt and its members and Internet2.

The larger substance of the final BDS order was to ease regulations for BDS services generally, and to continue regulations (including price caps) only for lower speed services (DS1 and DS3) in specific areas the FCC deems non-competitive.

### **FCC Broadband Deployment Advisory Committee (BDAC)**

The FCC BDAC began its formal work in April and is still staffing its five announced working groups (WGs). The two Model Code working groups were staffed in early May – still pending are staffing for Competitive Access to Broadband Infrastructure, Removing State and Local Regulatory Barriers, and Streamlining Federal Siting. Here is the rough timeline the BDAC released for its work:

- May: Start up WGs
- May-July: WGs begin initial work on recommendations
- July 20 (tentative): Mid-term BDAC meeting
  - WGs present and discuss progress to date.
  - Full committee discusses and provides input on each WG presentation.
- 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

Presentations from the first BDAC meeting are available here (hat tip NECA): [overview of BDAC](#); [wireline infrastructure](#); [wireless infrastructure](#). General information about the Committee is available at <http://www.fcc.gov/broadband-deployment-advisory-committee>.

In addition, the Commission approved a notice at the April meeting seeking comments on regulatory barriers to infrastructure deployment. The press release with a short summary can be found [here](#) – comments will be due 30 days after publication in the federal register.

### **Net Neutrality/Title II**

Net Neutrality hit the docket in April with Chairman Pai announcing and releasing a draft Notice of Proposed Rulemaking (NPRM) – Restoring Internet Freedom – that will be presented for a vote at the May 18, 2017, Commission meeting. The draft is available [here](#). According to the Commission's Fact Sheet, the NPRM proposes the following changes:

- Reclassify broadband Internet access service as an information service subject to “light-touch” regulation (rather than a telecommunications service subject to Title II);
- Reinstate the determination that mobile broadband Internet access is not commercial mobile service;
- Return privacy practices regulation authority to the Federal Trade Commission;
- Eliminate the Internet conduct standard (which allows the FCC to determine conduct violations retrospectively);
- Seek comment on whether to keep or modify “bright line” net neutrality rules (transparency, no blocking, no throttling, no paid prioritization);
- Re-evaluate whether *ex ante* (“before the fact”) market intervention is necessary at this time;
- Conduct a cost-benefit analysis as part of the proceeding.

Reaction in the industry and with consumer groups was predictably swift – with both condemnation and praise. Passage of the NPRM on a 2-1 party-line vote at the May meeting is a foregone conclusion, but then the battle will really begin. Calls for Congress to finally resolve this issue are growing – Congressional action could take this away from the FCC and avoid a situation where net neutrality rules change depending on which party controls the FCC.

Meanwhile, the DC Circuit on May 1 denied an *en banc* request for rehearing of its decision upholding the 2015 Open Internet Order. This clears the way for an appeal to the Supreme Court which, if accepted, could be heard as early as spring 2018. In addition, the 9<sup>th</sup> Circuit on May 10 granted a request for *en banc* review of a prior decision that had reduced the FTC’s authority to regulate non-common carrier services provided by companies that are common carriers. The case was Federal Trade Commission v. AT&T and involved a deceptive advertising case against AT&T for throttling mobile customers with “unlimited” data plans. Ars Technica has an overview of that original case [here](#). The ultimate outcome of this case will have large implications for privacy regulation.

### **Rural Health Care Program**

Karen Lee, the new Vice President of the Rural Health Division, hit the ground in April. She was formerly of the White House Office of Management and Budget (OMB) and has quickly become conversant regarding current issues facing the RHC program. Having a VP in place is crucial, so this is a welcome development (offset somewhat by the departure of Chris Henderson noted below in the E-rate section).

USAC in April issued pending FY 2016 funding commitments – all reflecting the 92.5% pro rata reduction necessary because of the cap overrun. There has been significant docket activity

from many Alaskan RHC program participants calling for a cap increase and inflation adjustments, but otherwise few filings addressing the cap. (Other than The Quilt *ex parte* notice where we generally referenced our discussion of the issue.)

The first filing window for FY 2017 opened March 1<sup>st</sup> and closes June 30<sup>th</sup>. Given expected funding demand, this will likely be the only filing window for FY 2017 RHC funding.

As mentioned last month, in March, NTCA - The Rural Broadband Association released a White Paper entitled [Anticipating Economic Returns of Rural Telehealth](#). NTCA is the trade association for rural “rate-of-return” carriers – generally the smallest and most rural providers. The paper included a significant conclusion (at page 21) that will be worth citing to the Commission in any proceeding on the Rural Health Care program:

*One particularly critical, but often overlooked, piece of the equation is the need for high-quality, reliable broadband service. Particularly in rural areas, with lower population densities, rugged topography and greater distances between customers, this can be challenging due to the higher costs to serve.*

*But more and more, fiber-based broadband is being deployed throughout the country, which will enable the adoption of such life-changing technologies as telemedicine. And if the myriad challenges to rural health outlined in this paper are to be addressed in any substantial manner, then telemedicine solutions, built upon a foundation of reliable, future-proof, fiber-based broadband infrastructure, will be a significant part of the solution. Further involvement in, and expansion of, that infrastructure is a critical need for our nation.*

### **FCC Connect2Health Task Force**

As noted last month, Chairman Pai extended the work of the Connect2Health Task Force which was started under Chairman Wheeler and is headed by Commissioner Clyburn. Previously, the Task Force produced a [broadband mapping tool](#) that overlays consumer wireline broadband availability with demographic data on the incidence of certain chronic health conditions such as obesity and diabetes. While the mapping tool was an ambitious and impressive endeavor, it has a significant flaw: it omits consumer wireless data, and does not address broadband availability at local anchor institutions. (We should discuss with SHLB whether it makes sense to request the Task Force to fix these issues with the tool.)

On April 24, the Task Force released a [Public Notice](#) seeking general comments about a host of issues related to the “adoption and accessibility of broadband-enabled health care solutions, especially in rural and other unserved areas of the country.” This Public Notice is information gathering only, does not propose any rule changes, and is not primarily focused on the Rural Health Care program. (The fact that the program cap was just hit is not even mentioned!)

Based on the topics covered in the notice, responses will help the Task Force essentially update and revise recommendations from Chapter 10 of the National Broadband Plan (addressing health care). Here are the general areas where comments are requested:

1. Policy and regulatory changes to encourage broadband adoption and health IT;
2. Identifying regulatory barriers to radio-frequency enabled advanced health technologies and devices;
3. Supporting telehealth infrastructure through Rural Health Care universal service (RHC) programs;
4. Raising consumer awareness of value of broadband and health and potential to reduce disparities of care;
5. Supporting development of broadband-enabled health care disparities for people with disabilities;
6. Highlighting projects and programs successfully deploying broadband-enabled health technologies and mHealth (lessons learned, best practices, regulatory challenges);
7. Involve a diverse array of stakeholders, traditional and non-traditional, to identify emerging issues in the broadband health space.

Comments in response to the notice are due May 24 with replies due June 8. Comments should be filed in docket GN 16-46 – if comments address the RHC program, they should also be filed in docket WC 02-60. [Here](#) is a link to the FCC’s comment filing system.

### **E-rate**

E-rate highlights for April included:

- Chairman Pai April 18 [letter](#) to Chris Henderson regarding EPC failures.
- SHLB April 27 [letter](#) responding to USAC apparently changing cost allocation policies for fiber construction.
- May 4 Resignation of Chris Henderson from USAC (reportedly pre-planned and not in response to Pai letter); General Counsel Vickie Robinson named acting CEO.
- May 4 Commissioner O’Rielly [statement](#) regarding departure of Chris Henderson as opportunity for USAC to “clean up its act” (among other things).

Regarding these developments, while a fresh start is welcome, this type of senior level turnover is always disruptive to some extent. Hopefully, there will not be an extended period of having an “acting” CEO like there was prior to the hiring of Chris Henderson.

### **E-rate Waiver Applications to Serve Residential Customers**

There is no news to report on the two pending petitions requesting approval to provide students with off-campus (*i.e.*, residential) access to E-rate funded connectivity in the evenings to help address the homework gap in their communities. The two requests were by [Boulder Valley School District](#) (Colorado) (BVSD), and by [Microsoft with two southern Virginia school districts](#), respectively.

### **Educational Broadband Service (EBS)**

Many school systems across the country hold spectrum licenses for EBS. Historically, this spectrum was 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-1990s. Apparently, where it has issued licenses more recently, this was done 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 Wireless Communications Association International](#) (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 again to be allowed to commercial providers. Sprint has been recently active in the docket seeking the same. In early May, the Fort Belknap Indian Community Council (NE Montana) filed a [letter](#) supporting the 2014 compromise plan and calling for the FCC to resume issuance of EBS licenses.