

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Protecting Against National Security)	WC Docket No. 18-89
Threats to the Communications Supply)	
Chain Through FCC Programs)	
)	

**COMMENTS OF
ITTA – THE VOICE OF AMERICA’S BROADBAND PROVIDERS**

ITTA – The Voice of America’s Broadband Providers (ITTA) hereby submits these comments in response to the Wireline Competition Bureau’s (Bureau) *Public Notice* seeking comment on the Commission’s role in implementing Section 889 of the *2019 NDAA*¹ and the interplay of Section 889 with the Commission’s pending rulemaking proceeding in which the Commission has proposed a rule to prohibit, going forward, the use of federal universal service fund (USF) support dollars to purchase equipment or services from any communications equipment or service providers identified as posing a national security risk to communications networks or the communications supply chain.²

I. BACKGROUND

As ITTA expressed in its comments on the *NPRM* urging the Commission to refrain from adopting its proposed rule, while the *NPRM*’s underlying goals are commendable, its proposed

¹ John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong., PL 115-232, 132 Stat 1636, Sec. 889 (2018) (*2019 NDAA*).

² *Wireline Competition Bureau Seeks Comment on Section 889 of John S. McCain National Defense Authorization Act for Fiscal Year 2019*, Public Notice, DA 18-1099 (WCB Oct. 26, 2018) (*Public Notice*); see *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Notice of Proposed Rulemaking, FCC 18-42 (Apr. 18, 2018) (*NPRM*).

rule is a misguided way to accomplish them.³ The reality is that the security risks the *NPRM* seeks to diminish are largely about cybersecurity, but the Commission's authority over cybersecurity is at best dubious, if not altogether spurious.⁴ Moreover, although couched as within the ambit of Section 254 of the Communications Act of 1934, as amended (Act), which governs USF policies and procedures, the proposed rule actually inhibits advancement of USF goals.⁵ And even if the Commission does have the requisite statutory authority to adopt its proposed rule, other governmental entities are better poised to address foreign cybersecurity threats than the Commission.⁶

ITTA also articulated that the withholding of USF disbursements in implementing the proposed rule would not achieve the Commission's national security objectives, because the national security risks the proposed rule is designed to reduce or eliminate are an issue throughout the communications ecosystem and not limited to USF recipients. Thus, approaching the issue in a manner that could only affect USF recipients would do little to protect communications networks or the communications supply chain.⁷ What it would do, however, is hinder the Commission's universal service aims by increasing demand on the USF due to increased equipment and services costs.⁸ ITTA emphasized that if the Commission adopts the

³ See Comments of ITTA, WC Docket No. 18-89, at 1 (June 1, 2018) (ITTA Supply Chain NPRM Comments).

⁴ See *id.* at 1-3; see also, e.g., *Hearing on Oversight of the Federal Communications Commission Before the S. Comm. on Commerce, Science, and Transportation*, 115th Cong. (Aug. 16, 2018), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=BD64E539-0863-41B5-AA8A-2B40D3FEF89C> (video of testimony of Ajit Pai, Chairman, Federal Communications Commission, beginning at 1:30:47) (under current FCC statutory authority, FCC limited to "consultative role" on cybersecurity).

⁵ See ITTA Supply Chain NPRM Comments at 7-9.

⁶ See *id.* at 3-4.

⁷ See *id.* at 4-5.

⁸ See *id.* As ITTA elaborated, constructively limiting the supply of equipment and services via the threat of withholding USF disbursements would drive up the costs of small, rural carriers by

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NPRM's proposal, it should provide additional USF funds to compensate for the increased compliance costs.⁹

Subsequent to adoption of the *NPRM*, Congress enacted the *2019 NDAA*. Section 889 generally prohibits executive agencies from procuring, extending contracts governing use of, or expending loan or grant funds towards procurement or extending the use of “covered” equipment, services, or systems.¹⁰ Covered equipment or services, in turn, are defined as telecommunications equipment or services produced or provided by Huawei Technologies Company, ZTE Corporation, their subsidiaries or affiliates, or other entities designated pursuant to Section 889.¹¹

The heading of subsection (b) of Section 889 is “Prohibition on Loan and Grant Funds.” Paragraph (1) of subsection (b) provides that the “head of an executive agency may not obligate or expend loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems described” in Section 889(a). Paragraph (2) of subsection (b) provides:

(2) In implementing the prohibition in paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs, including the heads of the Federal Communications Commission [and four other enumerated agencies] . . . shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure

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removing from the market vendors that typically price their offerings affordably. It would also lead to price crunches in cases where a carrier seeks to effectuate large deployments or needs to perform equipment upgrades in short order without the benefit of abundant advanced planning, and no longer may purchase from suppliers that commonly have greater inventory volumes readily available. *See id.* at 5.

⁹ *See id.* at 6.

¹⁰ *2019 NDAA*, Sec. 889(a),(b).

¹¹ *Id.* Sec. 889(f)(3).

replacement equipment and services, and to ensure that communications service to users and customers is sustained.

Paragraph (3)(B) of subsection (b) provides that nothing in subsection (b) shall be construed to “cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.”

II. DISCUSSION

The *Public Notice* seeks comment on Section 889(b)(1) “and on its relevance, if any,” to the *NPRM*.¹² Specifically, it seeks comment on whether the prohibition in Section 889(b)(1) applies to USF support, and whether that paragraph, standing alone or in conjunction with the rest of Section 889, supports or otherwise authorizes the Commission to adopt the *NPRM*’s proposed rule. Relatedly, it also asks how the Commission should interpret the prohibition in Section 889(b)(1) in light of Section 889(b)(2).¹³ ITTA maintains that Section 889(b)(1) has no relevance to the *NPRM*, does not apply to USF support, and does not support Commission adoption of the proposed rule. The plain text of Section 889(b)(2) illuminates why.

As noted above, the heading of Section 889(b)(1) is “Prohibition on Loan and Grant Funds.” Section 889(b)(1) provides that the “head of an executive agency may not obligate or expend *loan or grant funds*” (emphasis added) to procure or obtain covered equipment, services, or systems. In contrast, Section 889(b)(2) applies to “heads of executive agencies administering loan, grant, *or subsidy* programs” (emphasis added). The plain language of Section 889(b)(2) therefore distinguishes “subsidy” programs from “loan [or] grant” programs. Section 889(b)(1) specifically does not encompass subsidy programs.

It is well-grounded that USF support distributions are subsidies, not loan or grant funds. Underlying Congress’ enactment of Section 254 of the Act as part of the Telecommunications

¹² *Public Notice* at 2.

¹³ *See id.*

Act of 1996 was its mandate to make longstanding implicit universal service subsidies explicit.¹⁴ Courts and the Commission routinely recognize that USF support is a subsidy.¹⁵ Comparing and contrasting Rural Utilities Service (RUS) and Commission broadband deployment funding mechanisms, a 2012 Congressional Research Service (CRS) report succinctly demarcated USF subsidies from grants or loans:

The RUS broadband programs and the FCC’s Universal Service Fund (USF) share a common goal: increasing broadband infrastructure deployment and applications in rural areas. However, the way that each program addresses these goals is markedly different. RUS grants and loans are used as up-front capital to invest in broadband infrastructure, whereas the USF provides ongoing subsidies to keep the operation of telecommunications—and most recently broadband networks in high-cost areas—economically viable for providers. These subsidies, in turn, enable providers to invest in upgrading their telephone networks to make them broadband-capable.¹⁶

In sum, USF support is a subsidy program. As such, it does not fall within the ambit of Section 889(b)(1)’s prohibition on loan and grant funds. Therefore, Section 889(b)(1) provides no support for the *NPRM*’s proposed rule to prohibit use of USF support dollars to purchase equipment or services from any communications equipment or service providers identified as posing a national security risk to communications networks or the communications supply chain.¹⁷

¹⁴ See, e.g., *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8910, 9194, paras. 246, 817 (1996); see also 47 U.S.C. § 254(e).

¹⁵ See, e.g., *Rural Cellular Assn. v. FCC*, 588 F.3d 1095, 1098 (D.C. Cir. 2009) (USF is a “subsidy . . . intended to ensure adequate, reasonably priced service for residents of rural, sparsely populated, or hard-to reach areas”); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17673, 17731, 17767, paras. 24, 177, 281 (2011), *aff’d sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

¹⁶ Angele A. Gilroy and Lennard G. Kruger, Cong. Research Serv., R42524, Rural Broadband: The Roles of the Rural Utilities Service and the Universal Service Fund 18 (2012) (also noting that “[i]n addition to broadband deployment the USF has a broader mandate,” include Lifeline and E-rate program support). CRS prepares reports for Congress, providing policy and legal analysis to committees and Members of both the House and Senate.

¹⁷ ITTA further notes that to the extent that some wireless and wireline broadband providers obtain telecommunications equipment or services from Huawei, ZTE, or other providers targeted

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Finding that Section 889(b)(1) does not apply to USF support does not read Section 889(b)(2) out of the *2019 NDAA*. Section 889(b)(2) provides that “[i]n implementing the prohibition in paragraph (1),” heads of several enumerated executive agencies administering loan, grant, or subsidy programs – including the Commission, Department of Agriculture, DHS, SBA, and Department of Commerce – shall prioritize available funding and technical support to assist affected entities. The proper way to harmonize paragraphs (1) and (2) of Section 889(b) is that if implementation of Section 889(b)(1) by an executive agency that does administer loan or grant funds affects entities such that they must transition from covered equipment and services, the enumerated agencies collectively are responsible to ensure that they devote available funding and technical support to assist such entities in procuring replacement equipment and services in a manner that ensures that communications service is sustained and customers not disrupted. This reading is consistent with the Conference Report accompanying the *2019 NDAA*. Although its discussion of Section 889 largely describes the original House bill and the successive amendments that led to Section 889’s final form – including the House receding with an amendment that added paragraph (2) – the solitary substantive elaboration on the final iteration of Section 889 is that “[t]he conferees stress the importance of assisting rural communications service providers, anchor institutions, and public safety organizations in replacing covered equipment and associated support services contracts as soon as possible.”¹⁸

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by Section 889, much of it resides in outer layers of the network, and would not be subject to Section 889(b)(1) anyway pursuant to Section 889(b)(3), which exempts “telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.” Because Section 889(b)(1) does not apply to USF support, ITTA does not address further here how to implement Section 889(b)(3). *But see Public Notice* at 2 (seeking comment on how to implement Section 889(b)(3) to the extent that Section 889(b)(1) “might apply to support provided by the USF”).

¹⁸ H.R. Rep. No. 115-874, at 919 (2018).

In other words, paragraph (2) was added for the purpose of ensuring that affected rural entities, and their customers and users, are able to sustain communications service with the least disruption and financial upheaval possible. Therefore, specifically mentioning the Commission as having a role in implementing the prohibition in paragraph (1) means the Commission has a role, in conjunction with others, to remediate the effects of the paragraph (1) prohibition being triggered; it does not confer upon the Commission any substantive authority under paragraph (1) to adopt the *NPRM*'s proposed rule, insofar as USF disbursements are not loan or grant funds.

Consistent with its comments on the *NPRM*, ITTA urges the Commission to interpret Section 889(b)(2)'s call for the Commission to prioritize "available funding" to assist entities affected by implementation of paragraph (1) to not include USF funds. Although ITTA advocated that if the Commission adopts the *NPRM*'s proposal, it should provide additional USF funds to compensate for the increased compliance costs,¹⁹ as discussed above, implementation of Section 889(b)(1) is a matter wholly separate and apart from adopting the *NPRM*'s proposal and applying the adopted rule. As the Commission is well aware, there is no "available" USF funding to devote to this endeavor. Several Connect America Fund budgets are already set; the Commission is actively evaluating the going-forward high-cost program budgets for rate-of-return carriers without having provided notice that it would consider additional USF funding to compensate for extensive equipment changes due to any effective requirement for carriers to remove "covered" equipment or services from their networks;²⁰ and the Remote Areas Fund auction, which will provide support for deployment in the costliest price cap areas to serve,

¹⁹ See ITTA Supply Chain NPRM Comments at 6. That said, as noted above, one of the bases for ITTA's opposition to the *NPRM*'s proposed rule is that it would lead to increased demand on the USF due to increased equipment and services costs and the need to compensate providers for them. See *id.* at 4-5.

²⁰ See generally *Connect America Fund et al.*, Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking, FCC 18-29 (Mar. 23, 2018).

should now be only months away,²¹ and questions linger whether it will be adequately funded. Forcing ratepayers to fund replacement of covered equipment and associated support services contracts via USF contributions, due to another agency's implementation of Section 889(b)(1), would be tantamount to an unfunded mandate.

Therefore, rather than increasing demand on the USF to subsidize replacement of covered equipment and associated support services contracts, the Commission should build into future Congressional budget requests funding to assist with such replacement. Or, it may even be more appropriate for the Commission to coordinate with the other executive agencies enumerated in Section 889(b)(2) to ensure that one or more of these other agencies have and devote available funding for the endeavor, especially since they, unlike the Commission, do administer grants and loans, and thereby are in a position to consider the availability of remedial funding in guiding, and prior to taking, any action on their part in implementing Section 889(b)(1). In this regard, the Commission could also fulfill its requirements under Section 889(b)(2) by providing "technical support," as the expert communications regulatory agency, in helping to identify affected entities and the assistance they will need to ensure communications service continues with the least disruption possible.

Finally, no matter which of the enumerated executive agencies provides funding to assist affected entities, it would be especially helpful towards the goal of providing relief as soon as possible for the process for affected entities to secure such funding to correspondingly be as simple as possible. Here, too, the Commission could furnish valuable "technical support" in helping to craft a process that takes into account the particular needs and characteristics of rural

²¹ See *Connect America Fund; ETC Annual Reports and Certifications*, Report and Order and Order on Reconsideration, 32 FCC Rcd 1624, 1641, para. 43 (2017) ("reaffirm[ing] that the Commission will seek to commence the Remote Areas Fund auction no later than one year after the commencement of the Phase II auction," which occurred on July 24, 2018).

communications service providers, anchor institutions, and public safety organizations relative to communications equipment and services.

III. CONCLUSION

ITTA reiterates that the Commission's intentions in the *NPRM* proceeding to protect communications networks and the communications supply chain from national security threats are commendable. But its proposed rule to do so misses the mark, and Section 889 of the *2019 NDAA* provides no additional ballast for its proposed rule. Fundamentally, USF subsidies that provide critical support for broadband deployment, but which already are stretched too thin currently to realize the national broadband policy that "all people of the United States" have access to broadband capability,²² can ill afford to incur the further demands that would be borne from adoption of the *NPRM*'s proposed rule or from helping to remediate the effects of implementation of Section 889(b)(1) of the *2019 NDAA*. Therefore, the Commission must ensure that in fulfillment of its obligations under Section 889(b)(2) of the *2019 NDAA*, it devote sources of funding other than USF and/or emphasize its provision of technical support to assist affected entities.

Respectfully submitted,

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²² American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5, § (6001)(k)(2)(D), 123 Stat. 115, 516 (2009).