

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

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| 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 Commission’s Notice of Proposed Rulemaking proposing and seeking comment on 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.¹ While the *NPRM*’s underlying goals are commendable, its proposed rule is a misguided way to accomplish them. ITTA urges the Commission to refrain from adopting its proposed rule.

I. DISCUSSION

A. Other Governmental Entities are Better Poised to Address Foreign Cybersecurity Threats

The *NPRM* begins with the following axiom: “A critical element of our national security is the security of America’s communications networks.”² ITTA recognizes that it is not only worthwhile for the government to be concerned with cybersecurity vulnerability of

¹*Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Notice of Proposed Rulemaking, FCC 18-42 (Apr. 18, 2018) (*NPRM*).

² *Id.* at 1, para. 1.

telecommunications networks, concern by the federal government is *essential*. As the *NPRM* recounts, security threats to the nation’s telecommunications networks posed by certain communications equipment providers “have long been a matter of concern in the Executive Branch and Congress.”³ Although the Commission’s intentions in initiating the instant proceeding are laudable and ITTA supports intentions and efforts on the part of the federal government to reduce or eliminate national security threats to communications networks or the communications supply chain, addressing these concerns should continue to be left to governmental departments and agencies with expertise on national security matters rather than the FCC.

The Commission cobbles together several sources of authority within the Communications Act of 1934, as amended (Act), to support its claim that the *NPRM*’s proposal resides within its wheelhouse.⁴ Remarkably in the year 2018, only once within the entirety of an *NPRM* devoted to addressing security risks to communications networks does it reference the word “cybersecurity.”⁵ This is for good reason: the Commission’s authority over cybersecurity is at best dubious, if not altogether spurious. As Commissioner O’Rielly “many times” has astutely observed, “the Commission has no authority to adopt cybersecurity requirements.”⁶ Furthermore, “cybersecurity is an important issue and Congress has assigned authority to oversee

³ *Id.*

⁴ *See id.* at 3-5, 11-12, paras. 7-12, 34-35.

⁵ *See id.* at 1, para. 3 n.1.

⁶ *Technology Transitions, USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283, 8403, Statement of Commissioner Michael O’Rielly Approving in Part and Dissenting in Part (2016).*

it to other agencies.”⁷ The elephant in the *NPRM* is the reality that the security risks it seeks to diminish are largely about cybersecurity. To illustrate, Executive Order 13800, which the *NPRM* cites as support for this Administration’s “emphasizing the importance of the security of federal networks and critical communications infrastructure,”⁸ is actually titled “Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure.”⁹

The reality is that the Commission has far less expertise on national security matters, including problematic actors or technologies, than do other federal departments or agencies.¹⁰ The *NPRM* tacitly concedes as much. In a section captioned “Identifying Companies that Pose a National Security Threat to the Integrity of Communications Networks or the Communications Supply Chain,” all three of the suggested approaches for identifying companies that should be subject to the proposed rule ultimately are reliant on determinations made by other departments or agencies, or Congress.¹¹ This is especially true with the potential approach involving “a federal agency other than the Commission” to maintain a list of communications equipment or service providers that raise national security concerns regarding the integrity of communications networks or the communications supply chain.¹² Although not directly stated in the *NPRM*,

⁷ *Id.*

⁸ *NPRM* at 1, para. 3.

⁹ *See id.* at n.1 (citing Executive Order 13800 § 2(b), 82 Fed. Reg. 22391, Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure (May 11, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executiveorder-strengthening-cybersecurity-federal-networks-critical-infrastructure/>). The Executive Order’s title is the *NPRM*’s solitary reference to “cybersecurity.”

¹⁰ Notably, in contrast to multiple direct references to several other departments and agencies, the Commission is merely mentioned once directly in Executive Order 13800, in a consultative role at that. *See* Executive Order 13800 § 2(d).

¹¹ *See NPRM* at 7-10, Sec. III.B.; *See also id.* at 6, para. 15 (seeking comment on whether the Department of Homeland Security or another Federal entity test communications equipment for supply chain risk).

¹² *Id.* at 8-9, paras. 22-23.

matters of foreign trade policy also are inextricably intertwined with the *NPRM*'s proposal, rendering its proposed measure beyond the Commission's ken and best addressed, in coordination with governmental entities with national security expertise, by other departments or agencies whose core missions include jurisdiction over foreign trade.

B. The Withholding of USF Disbursements Would Not Achieve the Commission's National Security Objectives but Would Hinder its Universal Service Aims

The *NPRM* seeks comment on whether the proposed rule promotes the Commission's goals of ensuring that USF funds are used consistently with its national security interests while simultaneously continuing its universal service mission of making communications services available to all Americans.¹³ ITTA believes that it does not.

Holding USF disbursements hostage as the means to inhibit the purchase of equipment or services from targeted foreign providers would have a *de minimis* impact on accomplishing the Commission's goals in this proceeding of reducing or eliminating national security risks to communications networks or the communications supply chain. This is because such risks are an issue throughout the communications ecosystem. Security vulnerabilities in the communications network are not limited to USF recipients. For instance, non-USF recipients, including Internet entities, may purchase equipment or services from targeted providers, and their traffic traverses communications networks. Risks that include "the capacity to maliciously modify or steal information" and "conduct undetected espionage"¹⁴ not only emanate from within the network; they may also be facilitated by equipment or services interfacing with the

¹³ *See id.* at 11, para. 33.

¹⁴ *Id.* at 41, Statement of Chairman Ajit Pai (quoting Hearing before the Senate Select Committee on Intelligence, "Worldwide Threat Assessment of the U.S. Intelligence Community," 115th Cong. (Feb. 13, 2018) (statement of Christopher Wray, Director, FBI), <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-hearing-1> at 02:06:50 – 02:08:00).

network. Therefore, approaching the issue in a manner that could only affect USF recipients would do little to protect communications networks or the communications supply chain.

What it would do, however, is increase demand on the USF due to increased equipment and services costs.¹⁵ In this regard, the *NPRM* seeks comment on “the impact of [the] proposed rule on small businesses, as well as any modifications or alternatives that might ease the burden of this proposed rule on small businesses” and on “the impact of [the] proposed rule on small and rural carriers in particular.”¹⁶ The challenges experienced by carriers serving rural America, the vast majority of whom are small carriers, are well documented.¹⁷

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 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. The Commission is currently considering the budgets going forward both for rural carriers receiving model-based (A-CAM) high-cost support and those receiving high-cost support based on legacy mechanisms.¹⁸ Implementing the proposed rule in this proceeding could

¹⁵ *See id.* at 11, para. 34 (seeking comment on the potential costs associated with the proposed rule to numerous entities, such as USF recipients, the USF, end users, and consumers); *see also id.* at 42, Statement of Commissioner Mignon L. Clyburn (Commissioner Clyburn *NPRM* Statement) (“we must consider whether this proposal could ultimately increase equipment or service costs for consumers and providers benefitting from USF funds”).

¹⁶ *Id.* at 12, para. 34.

¹⁷ *See, e.g., Connect America Fund et al., Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking, FCC 18-29, at 2, para. 1 (Mar. 23, 2018)* (“Though we have made progress for rural Americans living in areas served by our nation’s largest telecommunications companies, the rules governing smaller, community-based providers—rate-of-return carriers—appear to make it more difficult for these providers to serve rural America.”).

¹⁸ *See generally id.*

skew the cost accuracy of the A-CAM as well as exacerbate the effects of the budget control mechanism on legacy carriers.

As Commissioner Clyburn concluded succinctly, “we can ill afford . . . to raise the cost of deployment or adoption of services for those who need connectivity the most.”¹⁹ At a minimum, if the Commission adopts its proposal, it should provide additional USF funds to compensate for the increased compliance costs.

Adoption by the Commission of its proposal could also lead to other harms that would have a particular impact on rural carriers. Because of the contemplated dynamic nature of who constitutes a “covered company” under the proposed rule,²⁰ once the rule were to become effective any purchase of equipment or services from a foreign vendor would be fraught with uncertainty, insofar as such investment could lead to a denial of USF support should the vendor ultimately be deemed a covered company. Such uncertainty, in turn, will lead to an increase in rural carriers’ financing costs. Similar uncertainty surrounds the effects of the proposed rule on current equipment and services. For instance, the Commission states that it “expect[s] that the proposed rule would extend to upgrades of existing equipment or services.”²¹ The prospect of a software update triggering the proposed rule could either force carriers to prematurely and inefficiently purchase new equipment or services from non-targeted suppliers, or it could freeze into place utilization of inefficient equipment or services that cannot be upgraded without loss of USF support.

Finally, implementing the proposed rule could create a perverse incentive for carriers to stockpile more affordable equipment supplied by covered companies before the rule becomes

¹⁹ *NPRM* at 43, Commissioner Clyburn *NPRM* Statement; *cf. id.* at 8, para. 21 (referencing Commission’s “desire to minimize compliance costs for recipients of USF support”).

²⁰ *See id.* at 7-9, paras. 19-23.

²¹ *Id.* at 6, para. 15.

effective. For all of the foregoing reasons, the proposed rule presents the possibility of a double-whammy whereby it would do little to promote the Commission’s national security objectives, but would hamper its universal service goals.

C. Although Couched as Within the Ambit of Section 254 of the Act, the Proposed Rule Does Not Help Advance Section 254’s Goals

The *NPRM* asserts the following as the predicate for its proposed rule: “Given the Commission’s oversight rule with respect to the [USF] and increasing concerns about ensuring communications supply chain integrity, we propose to take targeted action to ensure that USF funds are not used in a way that undermines or poses a threat to our national security.”²² It explains that the Commission oversees the USF consistent with the principles set forth in Section 254(b) of the Act.²³ Rather than advance the principles of Section 254(b), however, the proposed rule threatens to thwart them.

Section 254(b) provides that the Commission “shall base policies *for the preservation and advancement of universal service*” on seven enumerated principles.²⁴ As the *NPRM* recounts, in the *USF/ICC Transformation Order*, the Commission interpreted Section 254(e) of the Act,²⁵ which provides that carriers receiving USF support “shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,” as providing the Commission the authority to “encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b).”²⁶ The *NPRM* also

²² *Id.* at 5, para. 12.

²³ *See id.* at para. 11; 47 U.S.C. § 254(b).

²⁴ 47 U.S.C. § 254(b) (emphasis added).

²⁵ 47 U.S.C. § 254(e).

²⁶ *NPRM* at 12, para. 35 (quoting *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17685-86, para. 64 (2011) (*USF/ICC Transformation Order*), and noting that the Tenth Circuit affirmed this interpretation in *In re FCC 11-161*, 753 F.3d 1015, 1046-47 (10th Cir. 2014)).

particularly focuses on the principles enunciated in Section 254(b)(1), (2), and (7) -- “[q]uality services . . . available at just, reasonable, and affordable rates,” “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation,” and “other principles” that are “necessary and appropriate for the protection of the public interest, convenience, and necessity”²⁷ – and expresses the Commission’s “belie[f] that the promotion of national security is consistent with the public interest, and that USF funds should be used to deploy infrastructure and provide services that do not undermine our national security.”²⁸

While ITTA agrees that promoting national security is consistent with the public interest, not only is the *NPRM*’s reliance on Section 254(b) to establish national security as a core universal service principle classic bootstrapping, it also ignores the underlying purpose of Section 254(b), which is the “preservation and advancement of universal service.” As discussed above,²⁹ implementation of the proposed rule would undermine the principles of “[q]uality services . . . be[ing] available at just, reasonable, and affordable rates,” as well as “[a]ccess to advanced telecommunications and information services . . . be[ing] provided in all regions of the Nation.” Moreover, it would thwart Section 254(b)’s emphasis on “Access in Rural and High Cost Areas.”³⁰ In other words, the proposed rule would lead to increased costs and less access to telecommunications and information services, especially in rural and high-cost areas, all in contravention of the first three principles of Section 254(b), which are designed to preserve and

²⁷ *Id.* (quoting from Section 254(b)(1), (2), and (7)).

²⁸ *Id.* at 13, para. 36.

²⁹ *See supra* Section I.B.

³⁰ 47 U.S.C. § 254(b)(3).

advance universal service. Therefore, the proposed rule actually inhibits advancement of USF goals.³¹

II. CONCLUSION

The Commission's intention in this proceeding to protect communications networks and the communications supply chain from national security threats is commendable. But its proposed rule to do so misses the mark. Rather than promote universal service principles, the proposed withholding of USF disbursements from carriers that use equipment or services from targeted foreign suppliers would defeat universal service goals, and thus undermines the very section of the Act that it purports to promote. In pursuing the national security risk prevention motives underlying this proceeding, the Commission instead should defer to the directives of other federal government entities with greater expertise in national security and foreign trade matters.

Respectfully submitted,

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³¹ Cf. *NPRM* at 43, Commissioner Clyburn *NPRM* Statement (recognizing the impact of the proposed rule not only on national security, but also on “the goals of USF, to include network deployment and services offered by small and rural businesses that receive USF support”).