

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**Comments of
WTA – Advocates for Rural Broadband**

WTA – Advocates for Rural Broadband¹ (“WTA”) files these comments in response to the Public Notice,² released by the Wireline Competition Bureau on October 26, 2018, seeking comment on the applicability of provisions in the John S. McCain National Defense Authorization Act for Fiscal Year 2019³ (“NDAA”) to the Commission’s earlier Notice of Proposed Rulemaking⁴ (“NPRM”) in this proceeding.

WTA’s members are small rural local exchange carriers (“RLECs”), and they rely on Universal Service Fund (“USF”) support to help build and maintain communications networks in high cost rural areas. Without these carriers, a significant portion of rural America would not have affordable, reliable, and quality communications services. WTA primarily represents the

¹ *WTA - Advocates for Rural Broadband* is a national trade association that represents more than 340 rural telecommunications providers offering voice, broadband, and video-related services in rural America. Its members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

² *Public Notice*, WC Docket No. 18-89, released October 26, 2018.

³ John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong., PL 115-232, 132 Stat. 1636 (2018) (2019 NDAA).

⁴ *In re Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Notice of Proposed Rulemaking, released April 18, 2018 (“NPRM”), available at <https://www.fcc.gov/document/fcc-proposes-protect-national-security-through-fcc-programs-0>.

wireline interests of its members. However, many WTA members also have mobile wireless offerings for their customers. In its original comments relating to the NPRM, WTA noted that some of its members use Huawei equipment and have had generally positive experiences with the company in terms of price, product quality, and customer experience.⁵

Clearly, the recently enacted NDAA looks, among other things, to prevent countries and international companies from posing a threat to U.S. national security and our communications networks – something that WTA fully supports. It does however raise a number of questions regarding applicability to the use of USF dollars on banned equipment and services. While there appears to be Congressional intent to ban the use of Huawei and ZTE equipment, the NDAA language does not specifically ban USF funds from going to those companies, and it can be argued that strict statutory construction prevents the Commission from putting a ban in place. More importantly, the NDAA adds more uncertainty to the rural telecommunications industry, and a Further Notice of Proposed Rulemaking will be needed to implement any new rule in this proceeding. Should the Commission proceed with a ban, then it should also take steps to help affected carriers transition to new equipment. However, before making that determination, the Commission should undertake an additional study of the matter outlining which equipment and services are affected and their costs. The Commission should also grant waivers, which allow affected carriers to transition in a manner that poses limited service disruption to them and, more importantly, to their customers.

⁵ Comments of WTA – Advocates for Rural Broadband, WC Docket No. 18-89, filed on June 1, 2018, at 3-5.

**THE COMMISSION MUST RECONCILE THE STRICT STATUTORY
INTERPRETATION OF SECTION 889 AND THE FACT THAT “SUBSIDIES” IS
SEPARATED FROM “GRANTS AND LOANS”**

The Public Notice requests comment on Section 889(b)(1), which states:

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 subsection (a).”

The Public Notice requests specifically whether or not the prohibition in this section applies to the Universal Service Fund. Without a doubt, the passage of the NDAA greatly impacts United States’ carriers’ abilities to use equipment from Huawei and ZTE, and other companies identified in the law, as it blocks federal procurement from U.S. agencies and businesses. However, Section 889 does not speak directly to the issue of USF, and if the Commission chooses to move forward with a ban as a result of the NDAA, it is WTA’s position that the Commission must reconcile the statutory language, as strict application of the statute conspicuously separates grants and loans from USF subsidies.

Section 889(b)(1) notes that the head of an executive agency “may not obligate or expend loan or grant funds” on covered equipment. However, Section 889(b)(2) subsequently refers to the “heads of executive agencies administering loan, grant, or *subsidy* programs, including the heads of the Federal Communications Commission...” In WTA’s opinion, Congress has distinguished grants from subsidies in the statute. The inclusion of the term “subsidies” in (b)(2) but not (b)(1) is conspicuous, and it could be argued that as a result, Congress did not intend to include USF under the ban.

This is also significant since Congress and the Commission have historically referred to grants and subsidies differently. In fact, no USF provisions throughout Section 254 of the

Communications Act, which the Commission cites for the authority in its NPRM, refer to USF funds as grants. On the other hand, Congress regularly refers to loans and grants in the telecom space for other matters. For example, in this year's *Consolidated Appropriations Act*, Congress established a new broadband pilot program under the Rural Utilities Service by referring to both grants and loans.⁶

Meanwhile, the Commission has never used the terms grants or loans to describe USF funds. Rather, the Commission has on occasion used the term “subsidies.” In *In re Connect America Fund*, the Commission mentioned “federal universal service subsidies.”⁷ The Commission also differentiated subsidies from grants in the National Broadband Plan when it stated “How would speed definitions and other regulations attached to grants, loans, and universal service distributions affect affordability and pricing of services?”⁸ Therefore, the correct terminology was already established when Congress was drafting Section 889, and if it wanted the prohibition to include USF funds they could have easily added “subsidies” under Section 889(b)(1) as a prohibition. Therefore, the Commission must reckon with this statutory language, as it is not clear from the text that Congress wanted USF to be impacted.

⁶ *The Consolidated Appropriations Act* of 2018, Section 779, Public Law No: 115-141, signed into law March 23, 2018. “\$600,000,000, to remain available until expended, for the Secretary of Agriculture to conduct a new broadband loan and grant pilot program under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.)”

⁷ *In re Connect Am. Fund*, 29 F.C.C. Rcd. 7051, 7092–93, at ¶¶ 120, 123 (2014).

⁸ *In re A National Broadband Plan for Our Future*, 24 F.C.C. Rcd. 4342, 4350 (2009).

THE FCC MUST RELEASE A FURTHER NOTICE OF PROPOSED RULEMAKING IF IT CHOOSES TO MOVE FORWARD WITH A USF PROHIBITION

The Commission’s earlier NPRM in this docket was rather unique and unusual in that its broad language read more like a Notice of Inquiry.⁹ The resulting uncertainty as to the specific rules that the Commission is considering for adoption remains a problem. While the potential end results of the NDAA and the proposed rule may seem similar, there are significant differences that require the Commission to further explain its reasoning and to provide additional detail regarding its prospective rules via a Further Notice of Proposed Rulemaking.

For example, the NPRM asserted that Sections “201(b) and 254 of the Act provide ample legal authority” for the Commission to act in the public interest and define what services best meet that public interest. The Commission added that the Tenth Circuit gave it broad authority when it held that “nothing in the statute limits the FCC’s authority to place conditions . . . on the use of USF funds.”¹⁰ In response to the NPRM, some commenters disputed the nature and extent of the Commission’s Section 201(b) and 254 authority, countering that it was wrongly venturing into unfamiliar territory reserved for other agencies focused on national security issues.¹¹

Now, the Commission requests comment on Section 889 as to how it impacts the proceeding. However, Section 889 did not even exist when the Commission approved the NPRM

⁹ WTA notes there were previous concerns regarding the Commission’s decision in the NPRM to propose broad rules and then seek comment similar in fashion to a Notice of Inquiry. For example, NTCA noted “the Notice of Proposed Rulemaking . . . poses a series of initial questions that require extensive study and discussion—more in the nature of a Notice of Inquiry than an NPRM.” Comments of NTCA – The Rural Broadband Association, WC Docket No. 18-89, filed on June 1, 2018, at 1. The Rural Wireless Broadband Coalition argued that the Commission “has advanced a controversial proposal with virtually no support or explanation,” where a Notice of Inquiry “would have been a more prudent step.” Reply Comments of the Rural Wireless Broadband Coalition, WC Docket No. 18-89, filed on July 2, 2018, at 20.

¹⁰ NPRM at para. 35, quoting *In re FCC 11-161*, 753 F.3d 1015, 1046- 47 (10th Cir. 2014).

¹¹ Reply Comments of the Rural Wireless Association, WC Docket No. 18-89, filed on July 2, 2018, at 17-19.

as it would not be signed into law until four months later. The Administrative Procedure Act requires the Commission to comply with notice and comment procedures so that the final rule is the “logical outgrowth” of the notice.¹² In CSX Transportation, the DC Circuit held that a final rule “violates the APA’s notice requirement where interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”¹³ While the NPRM did reference the still pending 2019 NDAA and many original commenters undoubtedly lobbied for or against Section 889 in Congress, it does not replace the fact that the Commission did not cite it as its authority in the NPRM and commenters were unable to challenge that cited authority.

Further, the Public Notice asks only for input from commenters on Section 889 and its “relevance to the Protecting Against National Security Threats to the Communications Supply Chain rulemaking” and does not propose any additional or revised rules. It is not clear whether the passage of Section 889 would require the Commission to adopt new or additional rules different from those that may have been contemplated by the NPRM. For example, the Commission must consider what equipment “cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.”¹⁴ The Commission must also consider implementing the provision that the head of an executive agency is not prohibited from “procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.” Therefore, due to the facts that Section 889 did not exist at the time of the NPRM’s approval and that Section 889 contains provisions that the Commission must implement, the Commission

¹² *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1079 (D.C. Cir. 2009).

¹³ *Id.*

¹⁴ Public Notice at 2.

should issue a Further Notice of Proposed Rulemaking before it proceeds further towards an Order in this proceeding. This FNPRM must, at minimum, indicate grounds and reasoning beyond what was included in the NPRM for any proposed ban of the use of USF dollars for procuring and using affected equipment and services.

**IN A FURTHER NOTICE OF PROPOSED RULEMAKING, THE FCC MUST
ESTABLISH HOW IT WILL ASSIST THE SMALL CARRIER TRANSITION UNDER
SECTION 889**

In response to the NPRM, WTA noted that some of its members with wireless interests use Huawei equipment and cited cost, customer service, and reliability as their primary reasons for choosing to procure equipment from the company. This was in step with many entities of the rural telecommunications industry who argued that the cost of the proposed rule greatly outweighed the perceived threat of the foreign equipment. Of note, the Rural Wireless Association discussed at length the negative impact a ban would have on rural America - including reduced coverage and investment.¹⁵ Likely recognizing this and the widespread use of such equipment in rural America, Congress included Section 889(b)(2), which states:

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, the Department of Agriculture, the Department of Homeland Security, the Small Business Administration, and the Department of Commerce, 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 replacement equipment and services, and to ensure that communications service to users and customers is sustained.

This was echoed in the Conference Report, which stressed “the importance of assisting rural communications service providers...in replacing covered equipment and associated support

¹⁵ Reply Comments of the Rural Wireless Association at 5-11.

services contracts as soon as practicable.”¹⁶ Therefore, if the Commission decides to implement a ban, it must take steps to smooth a transition for companies affected by a prohibition. One way the Commission could do this is by using its expertise to study the projected costs and the time it will take for affected rural carriers to transition from the prohibited communications equipment and services to approved equipment and services. Upon its completion, the Commission should then release a public report with its findings. The report should consider details such as how much of the foreign equipment was paid for by USF support versus the private funds of the affected companies. It should also consider what types of equipment actually impact national security and should be banned versus what types of equipment are deemed to not be a threat. Further, the report should take into account the current loans of small companies, both from the government and private sector, which would be impacted by a transition.

WTA also believes this type of assessment would help in outlining how much money is needed to fund the transition from banned to approved equipment and services. This will also help provide a better understanding of how long a transition might take. It is WTA’s position that the most effective way to fund the transition would be through a Congressional appropriation as opposed to drawing money from USF – these funds are already limited due to previously needed hurricane relief and the general demand from the existing USF programs. Additional funding from contributions will result in further strain on ratepayers and will likely result in another increase in the contributions factor, which is already above 20%. WTA also believes that since this is a matter of national security, funding to address the issue should come in the form of a national security appropriation from Congress. After all, as WTA noted previously in the NPRM,

¹⁶ Conference Report, John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong., PL 115-232, 132 Stat. 1636 (2018), available at <https://www.congress.gov/115/crpt/hrpt874/CRPT-115hrpt874.pdf>.

it is through no fault of the impacted carriers that they may now have to tear out existing equipment.¹⁷

If the Commission finds that a ban is necessary or required under Section 889(b), it should also consider granting waivers to affected parties. WTA understands that Section 889(d), which grants waiver authority, does not also include Section 889(b). However, it is clear from the statute and the conference report that Congress wants the Commission to smooth the transition for carriers that use covered equipment. It is not clear whether an additional two years will be enough time for current equipment to run through most, if not all, of its natural lifespan. Other relief may be necessary to address the costs and service disruptions that will result from the removing and replacing of equipment. For many carriers, additional time to consider their future plans will make it much easier to comply with the rule and will also prevent a mad rush of carriers trying to replace their equipment at the same time, resulting in delays and increased prices – all of which come at a detriment to consumers.

CONCLUSION

If the Commission chooses to move forward with a USF prohibition, there are statutory issues that it must grapple with first. Specifically, the Commission must explain why USF subsidies should be included in the ban when they were specifically separated from “grants and loans” in Section 889(b). Further, and perhaps more importantly, if the Commission decides the ban applies then it must help small carriers transition to approved equipment and services. WTA believes for this to happen effectively the Commission should conduct an in-depth study of the

¹⁷ WTA Comments at 6.

costs and dollars needed to transition, and the Commission should also grant waivers to affected parties.

Respectfully submitted,

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