

SUMMARY

The Commission should grant Huawei’s application for review, vacate or reverse the Public Safety and Homeland Security Bureau’s (“Bureau”) final designation of Huawei as a national security threat to communications networks and the communications supply chain, and terminate these designation proceedings. Five reasons warrant Commission review.

First, the Bureau had no authority to enter the final designation or even conduct these proceedings. As Huawei explained at length in the prior rulemaking proceedings, the Commission’s underlying universal service fund (“USF”) rule (47 C.F.R. § 54.9) and initial designation are invalid. Most significantly, the Commission lacked statutory authority to promulgate the USF rule or conduct any designation proceedings under it. The recently enacted Secure Networks Act confirms as much by relegating the Commission to the ministerial role of keeping a list of *specific equipment* excluded from the USF program based exclusively on the determinations of *other entities*—rather than the USF rule’s identification of *companies* based on the Commission’s own independent judgments.

Second, the Bureau violated Commission precedent and the Administrative Procedure Act (“APA”) by failing to support its final designation by a preponderance of actual, reliable evidence in the administrative record. Although the APA required the Bureau to consider the entire record and address evidence contrary to its conclusions, the Bureau largely ignored or failed to meaningfully address extensive evidence that Huawei is a leader in developing and implementing cybersecurity measures, and that it is not controlled or unduly influenced by the Chinese government. Instead, the Bureau relied on nonevidence (like statutes and the opinions of policymakers, including those in other countries) and unreliable evidence (like uncorroborated reports) to conclude that Huawei is a national security threat. The Bureau also relied on a misunderstanding of Chinese law

and, alternatively, the unsupported assumption that the Chinese government will not respect the limits of Chinese law in this particular cybersecurity context.

Third, the Bureau violated the APA by irrationally singling out Huawei from a number of similarly situated companies. The APA requires agencies to provide reasoned analysis to justify the disparate treatment of parties that seem similarly situated. The Bureau did not do that. Instead, it stated only that the Commission could proceed incrementally. But that assertion provides no reasoned explanation at all for Huawei's disparate treatment, particularly in the face of record evidence that Huawei is not meaningfully different from numerous other companies with respect to the factors the Bureau appears to have relied on to enter the final designation against Huawei.

Fourth, the Bureau's final designation of Huawei was infected by unconstitutional congressional pressure and the Commission's unconstitutional prejudgment against Huawei. Despite claiming to assess the evidence, the Bureau essentially concedes that it rested its final designation on the Commission's initial designation. But that initial designation, as Huawei has shown, was infected by undue congressional pressure and the Commission's prejudgment of Huawei's case from the very beginning of the proceedings. The Bureau has no persuasive response.

Finally, the Bureau failed to afford Huawei procedural protections required by the Fifth Amendment Due Process Clause and the APA. The Bureau instead erroneously concluded that the final designation does not implicate constitutionally protected liberty and property interests.

For these reasons, the Commission should grant Huawei's application for review, vacate or reverse the Bureau's final designation of Huawei as a national security threat to communications networks and the communications supply chain, and terminate these designation proceedings.

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2. Whether the Bureau violated Commission precedent and the Administrative Procedure Act (“APA”) by failing to support the final designation with sufficient reliable evidence in the record.

3. Whether the Bureau violated the APA by irrationally singling out Huawei.

4. Whether the Bureau’s final designation of Huawei as a national security threat, which is expressly based on the Commission’s *USF Order*, was infected by unconstitutional congressional pressure and Commission prejudice against Huawei.

5. Whether the Bureau failed to afford Huawei procedural protections required by the APA and the Due Process Clause of the Fifth Amendment.

REASONS FOR GRANTING THE APPLICATION

I. The Bureau lacked authority to issue the final designation.

The Bureau purported to issue the final designation “pursuant to the Commission’s independent authority under the Communications Act.”⁴ But as Huawei has explained in these proceedings and the prior rulemaking proceeding, the Commission lacked authority to promulgate the *USF Order*, 47 C.F.R. § 54.9, and to conduct any “designations” under it.

The recently enacted SNA confirms that the Communications Act provides no authority for the final designation. “[S]ubsequent acts can shape or focus” the meaning of an ambiguous statute, especially “where the scope of the earlier statute is broad but the subsequent statute[] more specifically address[es] the topic at hand.”⁵ The SNA does just that. The SNA requires the Commission to maintain a list of equipment to be excluded by statute from the USF program because

⁴ *FD Order* ¶ 42.

⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

it poses an unacceptable risk to national security.⁶ But the SNA assigns responsibility for those national security determinations “exclusively” to Congress, the Department of Commerce, and executive branch agencies with national security expertise—not the Commission, which is an independent agency lacking national security expertise.⁷ The SNA thus establishes a more specific regime addressing the same subject in a manner inconsistent with the *USF Order*: While the *USF Order* targets *companies* based on *the Commission’s* national security determinations, the SNA authorizes prohibitions of *specific equipment* “based solely on” *other entities’* determinations.⁸ Reading the Communications Act in light of the SNA confirms that the Commission lacked authority for the *USF Order*.⁹

The Bureau also lacked authority for the final designation because the *USF Order* is invalid for all the reasons Huawei argued before the Commission in the prior rulemaking proceeding and before U.S. Court of Appeals for the Fifth Circuit (Docket No. 19-60896).

II. The Bureau violated Commission precedent and the APA by failing to support the final designation with sufficient record evidence.

A. Commission precedent and the APA required the Bureau to justify its final designation by a preponderance of actual and reliable evidence.

As Huawei explained,¹⁰ the Bureau bore the burden of justifying its final designation by a

⁶ 47 U.S.C. §§ 1601(b)(1), 1602(a).

⁷ 47 U.S.C. §§ 1601(b)(1), (c), 1608(2).

⁸ 47 U.S.C. § 1601(c).

⁹ Section 3(b) of the SNA does not “preserve” (*FD Order* ¶ 6 n.25) or otherwise ratify anything in the *USF Order*, because the *USF Order* is not “consistent with” the SNA, 47 U.S.C. § 1602(b), and section 3(b) contains no statement—let alone a clear statement—that Congress meant to retroactively ratify specific, unlawful Commission action. *See, e.g., Schism v. United States*, 316 F.3d 1259, 1289, 1294 (Fed. Cir. 2002); *EEOC v. CBS, Inc.*, 743 F.2d 969, 974 (2d Cir. 1984).

¹⁰ *See* Comments of Huawei, PS Docket No. 19-351, at 37-41 (filed Feb. 3, 2020) (“Huawei Designation Comments”).

preponderance of the evidence—“the traditional standard” for both informal and formal adjudications.¹¹ The Bureau was also required to consider the whole record and address evidence contrary to its conclusions.¹² And, as the Commission itself has recognized, the evidence it relies upon to carry its burden must be reliable and probative.¹³ Agency action that relies on nonevidence or unreliable evidence is arbitrary and capricious.¹⁴ Finally, agency action cannot rest on legal error.¹⁵ As set out below, the Bureau contravened all of these rules.

B. The reliable evidence before the Bureau demonstrated that Huawei does not pose a threat to national security.

The Bureau designated Huawei a national security threat based on its findings that Huawei is susceptible to Chinese government control and that Huawei’s equipment contains security risks and vulnerabilities.¹⁶ But the totality of the reliable evidence before the Bureau demonstrates that Huawei is a private company that is not controlled or influenced by the Chinese government as a legal or factual matter.¹⁷ The evidence also demonstrates that Huawei products are secure and reliable.¹⁸ The Bureau was required to account for this evidence.¹⁹ It did not.

1. Huawei is a private company that is not subject to Chinese government control.

The Bureau claimed that Huawei poses a national security threat in part because it is subject

¹¹ *Sea Island Broad. Corp. v. FCC*, 627 F.2d 240, 243-44 (D.C. Cir. 1980); *see also In re Universal Serv. Contribution Methodology*, 29 FCC Rcd. 9715, 9719-20 & n.35 (2014).

¹² *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

¹³ *See Universal Serv. Contribution Methodology*, 29 FCC Rcd. at 9720.

¹⁴ *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007).

¹⁵ *See* 5 U.S.C. 706(2)(a); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87-90, 94 (1943).

¹⁶ *FD Order* ¶¶ 13-27, 34-39.

¹⁷ *See* Huawei Designation Comments at pp. 42-46.

¹⁸ *See* Huawei Designation Comments at pp. 46-54.

¹⁹ *Universal Camera Corp.*, 340 U.S. at 488.

to Chinese government control. The Bureau relied largely on the supposed *absence* of evidence, stating that Huawei’s ownership and corporate governance “are largely not public.”²⁰ Yet Huawei submitted extensive affirmative evidence detailing Huawei’s ownership and corporate governance. Huawei is—and always has been—a private company. Huawei Technologies and Huawei’s three U.S. operating subsidiaries are all direct or indirect wholly owned subsidiaries of Huawei Investment & Holding Co., Ltd. (“Huawei Holding”).²¹ No Chinese government or military entity holds *any* shares of Huawei Holding²²—rather, it is a private company owned entirely by Huawei’s founder and Huawei’s employees.²³ Each Huawei company has its own Board of Directors (or, in the case of Huawei Device USA, a single director), and all board members are private citizens who have sworn not to receive employment or income from a source other than Huawei, including the Chinese government.²⁴ None of the current rotating chairs of Huawei or any of the directors for Huawei’s three U.S. operating subsidiaries holds any positions with the Chinese government or Huawei’s Party organization.²⁵ Huawei’s business and investment decisions, research and development priorities, profit distributions, and staffing decisions are made by the Board of Directors

²⁰ *FD Order* ¶ 17.

²¹ *See* Huawei Designation Comments at pp. 4-5, 43-45, 129; Huawei Designation Comments, Ex. 1-C, Declaration of Thomas Dowding ¶ 10 (“6/1/2018 Dowding Decl.”); Huawei Designation Comments, Ex. E, Declaration of Leon Wang ¶¶ 4-5, 15 (“Wang Decl.”); Huawei Designation Comments, Ex. QQ, 2018 Huawei Annual Report.

²² Wang Decl. ¶ 15; Huawei Designation Comments, Exhibit C, Declaration of Alan Fanzhiyong ¶ 16 (“Fanzhiyong Decl.”).

²³ Huawei Designation Comments, pp. 5; 6/1/2018 Dowding Decl. ¶ 10; Wang Decl. ¶ 5; Fanzhiyong Decl. ¶ 16.

²⁴ Wang Decl. ¶¶ 4, 8-10.

²⁵ Fanzhiyong Decl. ¶ 20; Wang Decl. ¶¶ 14-15.

and are not controlled or influenced by the Chinese government, the Chinese military, or the Chinese Communist Party.²⁶

The Bureau's response was to ignore Huawei's evidence. For instance, Huawei publicly filed declarations from three senior executives—Alan Fan Zhiyong,²⁷ Leon Wang,²⁸ and Wei Jiang²⁹—and expert analysis from third parties detailing Huawei's independence and corporate governance.³⁰ The Bureau did not cite or discuss these declarations even once, despite lamenting that information about Huawei's corporate governance and ownership are not public.³¹ Further, the Bureau overlooked other corporate governance documents confirming that Huawei is independent of the government,³² as well as evidence that Mr. Ren's "veto powers" do "not empower [Mr. Ren] to exercise unilateral control over Huawei" or provide him with "an absolute right to veto any company matter."³³ The Bureau also failed to acknowledge that Mr. Ren has never exercised the veto power.³⁴ And it ignored further evidence attesting to Huawei's independence from

²⁶ See Huawei Designation Comments at pp. 43-44 (citing 6/1/2018 Dowding Decl. ¶¶ 14-17; Exhibit 3, 8/6/2018 Huawei Ex Parte at 41-42 ("8/6/2018 Huawei Ex Parte")).

²⁷ Fanzhiyong Decl.

²⁸ Wang. Decl.

²⁹ Huawei Designation Comments, Ex. F, Declaration of Wei Jiang ("Jiang Decl.").

³⁰ See Huawei Designation Comments, Ex. G, Expert Report of Randall Peerenboom ("Peerenboom Report"); Huawei Designation Comments, Ex. H, Expert Report of Wei Jiang, Ph.D ("Jiang Report").

³¹ See *FD Order* ¶ 17.

³² See Huawei Designation Comments at p. 130; Fanzhiyong Decl. ¶ 17.

³³ See Huawei Designation Comments at pp. 133-34 (citing Fanzhiyong Decl. ¶¶ 21-22).

³⁴ See Huawei Designation Comments at pp. 133-34 (citing Fanzhiyong Decl. ¶ 23).

the Chinese government,³⁵ including declarations from Huawei cybersecurity executives³⁶ and public statements from Huawei's founder that Huawei would refuse any request from the Chinese government to access its customer data.³⁷

2. Far from threatening national security, Huawei adheres to leading cybersecurity practices and subjects its products to rigorous testing by independent oversight entities.

The Bureau also claimed, without support, that Huawei's equipment contains security risks and vulnerabilities.³⁸ Huawei has established and implemented an end-to-end global cybersecurity system that reflects international standards and guidelines; local laws and regulations; and feedback from vendors, employees, suppliers, and customers.³⁹ Huawei's cutting-edge cybersecurity initiatives reflect its industry leadership in risk assessment and management. For example, Huawei: (1) uses a comprehensive, ISO 28000-compliant supplier management system; (2) is the only 5G vendor in the industry to require all of its technology vendors to sign cybersecurity agreements; and (3) conducts laboratory testing independent from R&D teams.⁴⁰

Huawei showed that it does not have the ability to access data over customer networks in the United States without customer consent or control due to mandatory use of a Secure Network

³⁵ See Huawei Designation Comments at pp. 44-46; Exhibit 1-L, Huawei Cyber Security White Paper September 2012 at 12 ("2012 Huawei Cyber Security White Paper"); Hearing on National Security Threats Posed by Chinese Telecom Companies Working in the U.S. Before the H. (Select) Intelligence Committee, 112th Con. 26 (2012) ("HPSCI Hearing").

³⁶ See Huawei Designation Comments at pp. 45-46 (discussing declarations submitted by John Suffolk, Huawei's Global Cyber Security and Privacy Officer and Donald A. Purdy, Jr., Huawei's Chief Security Officer).

³⁷ See, e.g., Huawei Designation Comments, Exhibit 12, 5/10/2019 Huawei Ex Parte at 4 ("5/10/2019 Huawei Ex Parte").

³⁸ *FD Order* ¶¶ 35-39.

³⁹ See Huawei Designation Comments at pp. 7, 46-49.

⁴⁰ Huawei Designation Comments at pp. 46-47.

Access Solution designed to protect customer network equipment from unauthorized access.⁴¹ The Bureau ignored this evidence, not even acknowledging this solution (or other security solutions used by Huawei) or explaining why the solution is insufficient to address its concerns.

In addition to Huawei's internal processes to detect security vulnerabilities, third-party evaluators have performed rigorous testing on Huawei's products to ensure their integrity and protection against cybersecurity breaches from third parties or insiders.⁴² For example, Huawei USA uses EWA North America, an independent laboratory, to perform security evaluations and "Trusted Delivery" verifications.⁴³ The evidence shows that Huawei adheres to rigorous cybersecurity practices, subjects its products to rigorous testing, satisfies its customers' need for reliable and secure equipment, and "has not planted and will not plant back doors to assist the national intelligence work or engage in the espionage activities."⁴⁴

C. The final designation improperly rested on nonevidence and unreliable evidence, in violation of the APA.

The Bureau acknowledged that its final designation is not based on "concrete evidence."⁴⁵ Indeed, as Huawei explained in its Designation Comments,⁴⁶ the Bureau violated Commission precedent and the APA and raised serious due process concerns by relying on materials that either do not constitute evidence or, if evidence, are unreliable, including:

⁴¹ See Huawei Designation Comments at pp. 48-49, 145, 147-49.

⁴² See Huawei Designation Comments at pp. 49-51 (citing Exhibit 1-A, Declaration of John Suffolk at 9 ("Suffolk Decl.")).

⁴³ See Huawei Designation Comments at pp. 50-51 (citing Exhibit 1-B, Declaration of Donald A. Purdy, Jr. at ¶ 34 ("6/1/2018 Purdy Decl.")).

⁴⁴ Huawei Designation Comments, Exhibit 19-A, Rebuttal Report of Jihong Chen to Professor Donald Clarke's Memorandum ¶ 20 ("Chen Rebuttal to Clarke Memo").

⁴⁵ *FD Order* ¶ 43-44.

⁴⁶ Huawei Designation Comments at pp. 56-82.

- Statutes, which “are not evidence.”⁴⁷ The Bureau’s reliance on statutes also raises constitutional due process concerns because any factual assertions contained therein would have remained uncorroborated and untested.⁴⁸
- The HPSCI Report, which is unreliable both “because of [its] inherently political nature” and because it relied on untested and unreliable evidence.⁴⁹
- Indictments, which are not evidence because they contain untested “accusation[s] only,”⁵⁰ and thus are “quite consistent with innocence.”⁵¹
- Hearsay lacking indicia of reliability, such as congressional testimony and a congressional letter expressing “concerns” about Huawei.⁵²
- Outside expert reports—including the Finite State Report and RWR Advisory Group Report⁵³—on which the Bureau could not rely because it failed to perform its own

⁴⁷ *Porter v. Shineski*, 650 F. Supp. 2d 565, 568 (E.D. La. 2009).

⁴⁸ *See Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018).

⁴⁹ *See Richmond Med. Ctr. v. Hicks*, 301 F. Supp. 2d 499, 512 (E.D. Va. 2004), *rev’d on other grounds*, 570 F.3d 165 (4th Cir. 2009); Huawei Designation Comments at pp. 59-72.

⁵⁰ *United States v. Fattah*, 914 F.3d 112, 174 (3d Cir. 2019).

⁵¹ *Hurst v. United States*, 337 F.2d 678, 681 (5th Cir. 1964).

⁵² *See* Huawei Designation Comments at pp. 74-77; *see, e.g., Queen v. Hepburn*, 11 U.S. 290, 296 (1813) (Marshall, C.J.).

⁵³ A thorough and independent review of the Finite State Report, for example, would have revealed that the report is deeply flawed because, among other things, it: (1) was only a preliminary assessment; (2) evaluated *outdated* versions of Huawei’s products; (3) based some of its conclusions on the mistaken assumption that Huawei used Linux-based authentication; (4) failed to adhere to general practices of responsible security testing, which usually involve a dialogue between the security company and the vendor to ensure a full picture of any security vulnerabilities; (5) provided no explanation for how vendors were selected for the study or why it tested hundreds of Huawei products but only one product each of Juniper and Arista; and (6) incorrectly relied (among other things) on false reporting that Vodafone found a “backdoor” in Huawei’s equipment in Italy, even though Vodafone had itself explained that the alleged backdoor was no backdoor at all and the issue was resolved in 2011 and 2012. *See* Huawei Designation Comments at pp. 79-81.

thorough and independent review of the reports.⁵⁴

Further, the Bureau “look[ed] for guidance to the actions and statements of members of Congress and agencies with expertise in national security issues”⁵⁵ and to “similar risk assessments conducted by many of the United States’ allies.”⁵⁶ But “expert” guidance from other agencies or policy decisions of foreign countries are not themselves evidence and do not satisfy the need for the Bureau (and the Commission) to make a factual determination as to whether Huawei poses a security risk based on reliable evidence in the record before it.⁵⁷

D. The Bureau’s conclusions are unsupported by reliable evidence in the record or rely on legal error.

1. The Bureau did not support its assertion that the Chinese government and Communist Party control or exert influence over Huawei.

The Bureau concluded based on unreliable evidence and nonevidence that “Huawei is susceptible to coercion” due to “Huawei’s close ties to the Chinese government, both at the level of ownership and at the employee level, as well as its obligations under Chinese law.”⁵⁸ The Bureau stated that Huawei’s “corporate governance and ownership are largely not public,” that the “full weight” of Huawei’s labor union’s “financial and other influence over the company is unclear,” that the Chinese Communist Party “treats Huawei as a state-owned enterprise,” and that Huawei “has benefited from procurements funds, subsidized funding, and state funding for research.”⁵⁹

⁵⁴ *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 907 n.17 (5th Cir. 1983).

⁵⁵ *FD Order* ¶ 43.

⁵⁶ *FD Order* ¶ 31.

⁵⁷ Moreover, the Bureau’s reliance on other countries’ decisions about their 5G networks is misplaced because the designation applies well beyond 5G, and the equipment that Huawei supplies in the U.S. is *exclusively* 4G or older. Thus, even assuming the Bureau legitimately relied on the decisions of international policymakers, its reasoning fails to support the final designation.

⁵⁸ *FD Order* ¶ 13.

⁵⁹ *FD Order* ¶ 17.

The Bureau also concluded that either Chinese law obligates Huawei to comply with demands from the Chinese government, or China will force Huawei to comply with extra-legal demands. Huawei submitted thousands of pages of comments and evidence rebutting these allegations, demonstrating its independence from the Chinese government, and correcting the Commission’s misinterpretation of Chinese law.⁶⁰ The Bureau did not meaningfully respond to the vast majority of this evidence or rationally explain why the evidence could be disregarded.

a. The Bureau did not support its assertion that Huawei has “close ties” to China.

The Bureau claimed that Huawei has “demonstrably close ties to the Chinese military,” including “key mid-level technical personnel” with connections to the People’s Liberation Army and the Ministry of State Security.⁶¹ But the Bureau relied on an article whose author acknowledged that it was neither a peer-reviewed “academic paper” nor an “exhaustive study.”⁶² And Huawei could not rebut these allegations because their sources were not identified in the paper.

⁶⁰ Huawei Designation Comments, Suffolk Decl. at 8-10; 6/1/2018 Purdy Decl.; 6/1/2018 Dowding Decl.; Exhibit 1-D, Declaration of Ariel Ye (“Ye Decl.”); Exhibit 1-E, Declaration of Jihong Chen and Jianwei Fang at ¶ 14 (“6/1/2018 Chen & Fang Decl.”); Exhibit 1-I, Huawei Cyber Security White Paper June 2016 (“2016 Huawei Cyber Security White Paper”); Exhibit 1-J, Huawei Cyber Security White Paper December 2014 (“Huawei Cyber Security White Paper 2014”); Exhibit 1-K, Huawei Cyber Security White Paper October 2013 (“2013 Huawei Cyber Security White Paper”); 2012 Huawei Cyber Security White Paper; Exhibit 1-O, Certification and Testing of Huawei Products; Exhibit 2-A, Reply Declaration of Donald Purdy, Jr. at ¶¶ 20-25 (“7/2/2018 Purdy Supp. Decl.”); Exhibit 2-C, Reply Declaration of Thomas Dowding, ¶¶ 7-13 (“7/2/2018 Dowding Reply Decl.”); Exhibit 3-A, Expert Report of Jacques DeLisle at 7-10 (“deLisle Report”); Exhibit 3-B, Supplemental Expert Report of Jihong Chen and Jianwei Fang (“8/6/2018 Chen & Fang Supp. Decl.”); Exhibit 12-A, Expert Report of Dr. Hanhua Zhou at 16 (“5/10/2019 Zhou Report”); Exhibit 17-A, Supplemental Expert Report of Dr. Hanhua Zhou at ¶¶ 1, 3 (“11/1/2019 Zhou Suppl. Report”); Chen Rebuttal to Clarke Memo.

⁶¹ *FD Order* ¶ 18.

⁶² See Responses to Comments on Huawei CV Paper, Balding’s World (Jul. 7, 2019), <https://www.baldingsworld.com/2019/07/>.

The Bureau also failed to support with reliable evidence—and ignored Huawei’s evidence contradicting—its assertion that Mr. Ren’s experience with the Civilian Engineering Corps of the People’s Liberation Army means that Mr. Ren is susceptible to influence by the Chinese government.⁶³

b. The Bureau failed to support its assertion that Huawei’s receipt of government support evidences undue influence.

The Bureau claimed that Huawei’s receipt of “vast subsidies from the Chinese government” evidences that government’s undue influence.⁶⁴ But Huawei submitted an expansive expert report on precisely this topic that the Bureau entirely ignored.⁶⁵ And the Bureau otherwise failed to support its assertion with any reliable evidence. Indeed, the sources relied on by the Bureau and Commission provide no details regarding the amount of support that Huawei supposedly receives that warrants concerns of undue influence by the Chinese government. Where such data was provided, there is no evidence demonstrating that the support Huawei receives from the government is on terms more favorable than Huawei could have obtained from commercial sources.⁶⁶ And any loans between a foreign customer and a commercial bank that the Bureau claims benefit Huawei “are the result of negotiations between the foreign customer and the commercial bank.”⁶⁷

Further, the types of support in question are common across the industry.⁶⁸ Neither the Commission nor the Bureau has ever compared the government support received by Huawei to the

⁶³ See Huawei Designation Comments at pp. 131-34.

⁶⁴ *FD Order* ¶ 19.

⁶⁵ See Huawei Designation Comments at pp. 139-42 (citing Jiang Report) (asserting that removal of Chinese government grants from Huawei would result in a 0.6% or lower change in revenues and only a small change in operating profit, and that as of 2018, a large majority of Huawei’s debt (*i.e.*, 75 percent) came from institutions and markets outside of China).

⁶⁶ See Huawei Designation Comments at 139-40.

⁶⁷ Huawei Designation Comments at 142.

⁶⁸ Huawei Designation Comments at p. 84 (citing deLisle Report at 9).

similar support received by its competitors, or analyzed whether any such support is provided on terms more favorable than Huawei could have obtained from commercial sources. Without such evidence, there is simply no basis to conclude that Huawei would be beholden to the government solely because Huawei receives a marginal amount of “subsidies” from Chinese institutions.

c. The Bureau failed to show that China exerts coercive pressure on Huawei through its Party organization.

The Bureau also failed to support its assertion that Huawei is susceptible to Chinese government pressure just because it has an internal Communist Party organization.⁶⁹ Despite recognizing that all companies operating in China must have internal Communist Party committees, the Bureau claims that a Chinese-headquartered company would be more susceptible to Chinese government pressure than a Chinese affiliate of a non-Chinese company, and asserts that “the Chinese government’s coercive power over Chinese technology companies seems to be increasing.”⁷⁰ These statements are based on highly prejudicial and unreliable nonevidence, and ignore reliable evidence that “Communist Party committees in private companies ... do not and cannot exert influence over a company’s operations and decisions.”⁷¹ As Huawei has explained, “Communist Party committees do not have the right to interfere with company decisionmaking in a private company like Huawei”; “Chinese law specifically protects the autonomy of private businesses from government and third-party interference”; and there is nothing in Chinese law, the rules of

⁶⁹ *FD Order* ¶ 20.

⁷⁰ *FD Order* ¶ 20.

⁷¹ *See* Huawei Designation Comments at pp. 83-84, 100-02, 134-39; deLisle Report at 6-8, 17-19; Ye Decl. ¶¶ 29-30; *see also* Peerenboom Report (explaining that Party committees have a much more circumscribed role within private companies).

the Communist Party, or Huawei's own governing documents that would allow the Chinese government to intervene in Huawei's business decisionmaking either directly or indirectly.⁷² After setting aside the Bureau's unsupported inferences and unreliable evidence, the record lacks any evidence that the Chinese government controls (or could control) Huawei through its Party organization.⁷³

d. The Bureau relied on an erroneous view of Chinese law to assume that the Chinese government and Communist Party control or exert influence over Huawei.

A cornerstone of the Bureau's final designation is the assertion that Chinese laws obligate Huawei to cooperate with requests from the Chinese government.⁷⁴ But that assertion rests on a misunderstanding of Chinese law.⁷⁵

The Bureau claimed that Articles 7, 11, 14, and 17 of the Chinese National Intelligence Law ("NIL") enable the Chinese government to compel Chinese companies such as Huawei "to assist it in its espionage activities" and to compel Huawei USA "to carry out its directives in cyber-espionage or other actions contrary to U.S. national security interests."⁷⁶ But Chinese law does not empower the Chinese government to access Huawei's internal communications systems or plant

⁷² Huawei Designation Comments at p. 100-01; *see also* Ye Decl. ¶¶ 9-19, 23-24, 28-30, 35-50.

⁷³ *FD Order* ¶ 20 (noting concerns about the Party's ability to "exert pressure over Huawei").

⁷⁴ *FD Order* ¶¶ 10, 14.

⁷⁵ *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-90, 92-95 (1943). By expressly making its designation of Huawei turn on an interpretation of foreign law, the Bureau left open the possibility that its construction of foreign law could be reversed on judicial review because, "[j]ust like any question of law, '[t]he content of foreign law is a question of law and is subject to de novo review.'" *Iracheta v. Holder*, 730 F.3d 419, 423 (5th Cir. 2013).

⁷⁶ *See FD Order* ¶ 22.

backdoors or spyware in its telecommunications equipment.⁷⁷ Nor does Chinese law give the government authority to interfere in the operations of a privately owned company like Huawei.⁷⁸ Moreover, like other Chinese laws, the NIL does not apply to any Huawei subsidiaries located outside China, including Huawei USA.⁷⁹ Furthermore, any obligations that private companies might have under Articles 7, 14, and 17 of the NIL are purely defensive.⁸⁰ In any event, Huawei has never received a government request for customer data and has publicly committed to refuse any such request.⁸¹

e. The Bureau failed to support its foreign policy speculation that the Chinese government is not meaningfully constrained by its own laws.

Rather than engage with Huawei’s extensive expert submissions on Chinese law, the Bureau concluded that, even if Chinese law does not by its terms authorize government control over private companies, Huawei would be unable to refuse “excessive or extra-legal demands from the Chinese government” because the Chinese government is not meaningfully constrained by its own

⁷⁷ See Huawei Designation Comments at pp. 91-102; 6/1/2018 Chen & Fang Decl.; 5/10/2019 Zhou Report; 8/6/2018 Chen & Fang Supp. Decl.; Chen Rebuttal to Clarke Memo; 11/1/2019 Zhou Suppl. Report. Indeed, Huawei’s experts have explained that China’s “[n]ational security authorities and public security authorities do not have any statutory powers to plant backdoors, eavesdropping devices, or spyware in equipment manufactured by Huawei, and Huawei has no obligation to cooperate with any such government request,” 6/1/2018 Chen & Fang Decl. ¶ 65, and that such a requirement “would directly contradict” China’s Constitution, *id.* ¶ 80.

⁷⁸ See Huawei Designation Comments at pp. 93-102.

⁷⁹ The Bureau also ignored the fact that many Huawei engineers and other employees that serve U.S. customers, including those that receive USF support, are American citizens or permanent residents, or citizens of allies of the United States. See 6/1/2018 Purdy Decl. ¶ 6; 6/1/2018 Dowding Decl. ¶ 3; Huawei Designation Comments, Exhibit A, Declaration of Timothy Danks ¶ 4.

⁸⁰ See 5/10/2019 Zhou Report at 3, 7.

⁸¹ See Huawei Designation Comments at pp. 44-45; 5/10/2019 Huawei Ex Parte at 4 (stating that Huawei would refuse any request by the Chinese government to access customer data).

laws.⁸² But that is unsupported speculation. And the Bureau entirely ignored Huawei’s argument and expert evidence that Chinese state leaders would not use companies as vehicles for espionage, which would threaten China’s “multifaceted, high-priority, long-developing, much-invested-in agenda” for economic growth.⁸³ The Bureau thus failed to consider an important aspect of the problem, in violation of the APA.⁸⁴

2. The Bureau did not support its assertion that Huawei’s equipment contains security flaws, or explain why any alleged flaws make Huawei a national security risk.

The Bureau also found that Huawei is a security risk because its equipment contains security flaws.⁸⁵ But any claims that data transiting Huawei equipment in a U.S. communications network “are essentially at risk of falling in the hands of the Chinese government” are baseless.⁸⁶ The finding that Huawei’s equipment contains known security risks and vulnerabilities is based on information that is inaccurate, unsupported, or otherwise flawed.

More specifically, the Bureau claimed that “the security culture at Huawei is weak and, therefore, products that emerge from Huawei’s development environment cannot be trusted.”⁸⁷ But evidence shows that Huawei is an industry leader in developing and implementing robust cybersecurity standards and policies,⁸⁸ and that, contrary to the Bureau’s assumption, Huawei does

⁸² See *FD Order* ¶¶ 24-25.

⁸³ deLisle Report at 11-16.

⁸⁴ See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁵ *FD Order* ¶¶ 16-19.

⁸⁶ *FD Order* ¶ 38.

⁸⁷ *FD Order* ¶ 39.

⁸⁸ Huawei Designation Comments, Ex. 1, 6/1/2018 Huawei Comments at 6-9; 6/1/2018 Purdy Decl. ¶ 10-32; Suffolk Decl. at 6, 16; 7/2/2018 Purdy Reply Decl. ¶¶ 22; 7/2/2018 Dowding Reply Decl. ¶ 6-14; 2012 Huawei Cyber Security White Paper; 2013 Huawei Cyber Security White Pa-

not have access to “vast amounts of data gathered ... through its networks and communications equipment in the United States.”⁸⁹ And although the Bureau cited “expert” reports pertaining to product integrity, the assertions made in those reports lack reliability and are flawed in multiple ways that involve, for instance, testing the wrong equipment.⁹⁰

The Bureau cited no evidence that Huawei or Huawei USA has ever planted backdoors, eavesdropping devices, or spyware in its equipment, at the behest of the Chinese government or otherwise. Instead, the Bureau repeated tentative conclusions that Huawei already rebutted (without responding to Huawei’s rebuttals), raised new allegations about “reports of alleged espionage conducted on Huawei’s networks” (citing allegations from anonymous sources reported by the Wall Street Journal),⁹¹ and referred to *false* reporting about an alleged “backdoor” found by Vodafone (an incident resolved with no backdoor discovered at all).⁹²

In sum, the Bureau did not base the final designation on any reliable evidence of equipment security flaws, much less a preponderance of the evidence. Indeed, the Bureau failed to cite *any* reliable or probative evidence for the alleged security flaws and its supposed concerns about Huawei’s “poor security practices and corporate culture,” all the while avoiding Huawei’s extensive evidence demonstrating Huawei’s active commitment to cybersecurity and rigorous testing by oversight bodies.⁹³

per; 2014 Huawei Cyber Security White Paper; 2016 Huawei Cyber Security White Paper; Certification and Testing of Huawei’s Products; 7/2/2018 Huawei Reply Comments at 61-64; 8/23/2018 Huawei Ex Parte; 3/12/2019 Huawei Ex Parte; 10/31/2019 Huawei Ex Parte; Niemi Report.

⁸⁹ *FD Order* ¶ 38.

⁹⁰ *See* Huawei Designation Comments at pp. 27-28, 78-80, 88-89, 146, 171.

⁹¹ *FD Order* ¶ 35.

⁹² Huawei Designation Comments at p. 79.

⁹³ *See* Huawei Designation comments at pp. 37-38 (explaining that the Commission bears the burden of showing that designation of Huawei is warranted by a preponderance of the evidence).

III. The Bureau violated the APA by irrationally singling out Huawei.

Huawei argued that it would be arbitrary and capricious for the Bureau to designate Huawei but not other similarly situated companies.⁹⁴ The Bureau nonetheless justified its decision to finally designate only Huawei and ZTE on the grounds that “the Commission has chosen to proceed incrementally.”⁹⁵ That explanation is inadequate. The APA requires agencies to “give a *reasoned* analysis to justify the disparate treatment of regulated parties that seem similarly situated.”⁹⁶ The final designation is arbitrary and capricious because it fails to justify the Bureau’s disparate treatment of similarly situated parties by more than reference to administrative convenience.

The Bureau stated that it designated Huawei in part because of Huawei’s purportedly “close ties” to the Chinese government and military.⁹⁷ But even assuming the Bureau’s concerns rested on reliable evidence, the Bureau did not explain why it did not designate *other* telecommunications companies with dealings with the Chinese government—like Nokia Shanghai Bell, which has an actual joint venture with the Chinese government. Nor did the Bureau explain why it did not designate other Chinese-headquartered telecommunications companies with Party organizations or committees that receive government subsidies.⁹⁸

The Bureau also claimed that it designated Huawei given Huawei’s alleged obligations under Chinese law.⁹⁹ But nearly all other companies doing business in China are subject to those same Chinese laws, including companies whose telecommunications equipment the Commission

⁹⁴ See Huawei Designation Comments at pp. 124-25.

⁹⁵ *FD Order* ¶ 16.

⁹⁶ *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) (emphasis added).

⁹⁷ *FD Order* ¶ 17.

⁹⁸ See Huawei Designation Comments at pp. 110-12.

⁹⁹ *FD Order* ¶¶ 21-22.

would encourage USF recipients to use.¹⁰⁰ The Bureau’s rationale cannot support singling out Huawei for designation.¹⁰¹

Moreover, the Bureau never asserted—much less proved—that Huawei’s equipment contains more serious security flaws than equipment produced by any other major telecommunications company.¹⁰² Every telecommunications company that participates in the global supply chain faces cybersecurity risks. But the Bureau did not explain how or why Huawei is unique in this respect. And even if Huawei’s equipment had more security flaws than equipment produced by other participants in the global supply chain (a proposition for which there is no evidence), the Bureau did not explain why those hypothetical flaws would create a national security threat. Instead, the Bureau, without explanation, treated Huawei differently from other similarly situated companies.

By designating Huawei and failing either to designate other companies with Chinese subsidiaries and affiliates, security flaws, or “close ties” to the Chinese government, or to provide a reasoned explanation for the disparate treatment, the Bureau has violated the “fundamental norm of administrative procedure” that “an agency [must] treat like cases alike.”¹⁰³

IV. The Bureau’s final designation was infected by unconstitutional congressional pressure and the Commission’s unconstitutional prejudgment against Huawei.

By the Bureau’s own account, its final designation was “based on” the Commission’s initial

¹⁰⁰ See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).

¹⁰¹ See Huawei Designation Comments at pp. 43-44, 84, 134-39 (explaining the role of the Party committee within Huawei and all other private companies operating in China); Ye Decl. ¶¶ 9-19, 23-24, 28-30, 42-45, 46-49. See also Huawei Designation Comments at 111 (explaining that Huawei’s competitors have Party organization or committees (citing Exhibit 3-H, Enterprise Party Organization Oriented Toward Directing, Team Building, and Atmosphere Fostering)).

¹⁰² See Huawei Designation Comments at pp. 107-10.

¹⁰³ *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); see also *Melody Music*, 345 F.2d at 732 (agency’s “refusal at least to explain its different treatment” was error).

designation.¹⁰⁴ But the Commission’s initial designation was the product of congressional pressure and interference, as well as Commission prejudgment.¹⁰⁵ The evidence submitted by Huawei—and ignored by the Bureau—shows that several Commissioners either “reached their initial designation decision as a result of Congressional pressure or ... prejudged the outcome.”¹⁰⁶

First, the Commission unconstitutionally singled out Huawei for designation based on political demands from members of Congress. An administrative adjudication is “invalid if based in whole or in part on [congressional] pressures.”¹⁰⁷ Indeed, in judicial and quasi-judicial administrative proceedings, congressional “pressure is sufficient, standing alone, to invalidate [an agency’s] action,” regardless of whether that pressure actually affected the agency’s decision,¹⁰⁸ because it “sacrifices the appearance of impartiality—the sine qua non of American judicial justice.”¹⁰⁹ And in non-judicial contexts, congressional communications unconstitutionally infect agency proceedings if they “actually influence[] the agency’s decision.”¹¹⁰ Huawei identified compelling evidence of unconstitutional congressional pressure, including the December 20, 2017, letter from eighteen members of Congress that prompted these proceedings.¹¹¹ At the very least, the quasi-judicial designation proceeding appears to have been influenced by congressional pressure, and the Commission’s initial designation of Huawei is invalid for that reason alone.

¹⁰⁴ *FD Order* ¶ 48.

¹⁰⁵ *See* Huawei Designation Comments at pp. 116-20.

¹⁰⁶ *FD Order* ¶ 48.

¹⁰⁷ *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971).

¹⁰⁸ *Id.*

¹⁰⁹ *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966).

¹¹⁰ *DCP Farms v. Yeutter*, 957 F.2d 1183, 1188 (5th Cir. 1992) (quoting *D.C. Fed’n of Civic Ass’ns*, 459 F.2d at 1246)).

¹¹¹ *See* Huawei Designation Comments at pp. 115-120.

Second, the initial designation resulted from several Commissioners’ unlawful prejudgment of Huawei.¹¹² An adjudicatory proceeding has been infected by prejudgment bias, in violation of the APA and the Fifth Amendment, when “a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”¹¹³ Huawei detailed statements by Chairman Pai and Commissioners Carr and Starks evidencing that a majority of the Commission considered “Huawei’s designation ... a foregone conclusion.”¹¹⁴ Contrary to the Bureau’s argument, the evidence leaves no doubt that Huawei’s designation was a foregone conclusion, in violation of the APA and Huawei’s due process rights. That prejudgment deprived Huawei of any meaningful “opportunity to voice its opinions and affect the Commission’s decisions before the issuance of this final designation.”¹¹⁵

V. The Bureau committed prejudicial procedural error, and violated the Due Process Clause and APA, by failing to afford Huawei required procedural protections.

A. The final designation deprived Huawei of constitutionally protected liberty and property interests.

The Bureau expressed “skept[ic]ism” that the final designation denies Huawei “a cognizable property or liberty interest protected by the Due Process Clause.”¹¹⁶ But Huawei has already explained why the final designation satisfies the stigma-plus test for reputational injury by stigmatizing Huawei “in connection with the denial of ... some ‘more tangible’ interest”: The government indisputably imposes stigma when it designates an entity a national security threat, and the

¹¹² See *FD Order* ¶ 10 (Bureau’s conclusion “based on the evidence supporting the Commission’s initial designation and an assessment of the totality of evidence”).

¹¹³ *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quotation marks omitted) (due process); see also *Latecoere Int’l, Inc. v. U.S. Dep’t of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994), as amended (May 27, 1994) (APA).

¹¹⁴ *FD Order* ¶ 49; see Huawei Designation Comments at pp. 120-24.

¹¹⁵ *FD Order* ¶ 46.

¹¹⁶ *FD Order* ¶ 52.

denial of a more tangible interest need not amount to actual debarment. Debarment, moreover, need not be a formal action—it can result from the effects of reputational harm.¹¹⁷

The Bureau did not contest that its final designation of Huawei as a national security threat stigmatizes Huawei with a badge of infamy, altering its legal and practical ability to contract with USF recipients.¹¹⁸ Instead, the Bureau contended that Huawei has not made a sufficient showing on the “plus” prong. But the Bureau misunderstood the law. The final designation plainly excludes Huawei from the opportunity to market and sell equipment that will be purchased and maintained using USF funds—a government-created contracting opportunity. It also harms Huawei’s business in the United States more generally, because private companies—especially those subject to government regulation—will not transact with a government-designated national security threat. And Huawei has protected property interests in its existing contracts with USF recipients and suppliers to USF recipients that the final designation effectively has destroyed.¹¹⁹

The Bureau’s primary response is simply to assert that USF recipients can still do business with Huawei with non-USF money. For starters, that response ignores the rule’s breadth and stringent recordkeeping requirements.¹²⁰ Moreover, that assertion does not change the fact that Huawei was denied the opportunity to participate in the government-created market using USF funds, and it wholly ignores the broader effects of the final designation on Huawei’s business outside the USF

¹¹⁷ See Huawei Designation Comments at p. 163-67 (citing *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 204 (D.C. Cir. 2010); *Reeves Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993); *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643-44 (D.C. Cir. 2003)).

¹¹⁸ See *FD Order* ¶¶ 53-54; Huawei Designation Comments at p. 165.

¹¹⁹ See Huawei Designation Comments at pp. 166-67.

¹²⁰ See Huawei Designation Comments at p. 165 (noting Commission’s concession that it is “unlikely that many USF recipients will be able to show the detailed records necessary to demonstrate that no USF funds were used on equipment or services from a covered company on any part of the project” (quoting *USF Order* ¶ 72)).

context, and on its existing contracts. The Bureau also claims that *Kartseva v. Department of State*, 37 F.3d 1524 (D.C. Cir. 1994), which Huawei cites, recognized as a “plus” factor only the denial of “the opportunity to obtain a particular kind of employment.”¹²¹ But *Kartseva* clearly explained that the State Department’s disqualification of a translator had a qualifying tangible effect if it “either ... (a) automatically exclud[ed] her from a *definite range* of employment opportunities with State or other government agencies; or (b) broadly preclud[ed] her from continuing in her chosen career of a Russian translator.”¹²² The final designation excluded Huawei from the “definite range” of government-created opportunities to sell equipment for purchase with USF funds, and broadly disabled its business even outside the USF context. Indeed, the Bureau itself recognized that under *Phillips v. Vandygriff*, 711 F.2d 1217 (5th Cir. 1983), the practical, de facto impacts of government conduct must be considered in assessing whether due process–protected interests were harmed.

B. Huawei’s constitutionally protected interests trigger due process protections.

The Due Process Clause and APA required the Bureau to provide Huawei with certain procedural protections before issuing the final designation. Specifically, Huawei was entitled to formal adjudication procedures under the APA, which are triggered when, as here, the Due Process Clause requires a hearing.¹²³ Apart from the APA, the Due Process Clause independently required the Bureau to afford Huawei important procedural protections in the course of any adjudication leading to a final designation,¹²⁴ including: (1) notice of the evidence against it and the Bureau’s

¹²¹ *FD Order* ¶ 56.

¹²² *Kartseva*, 37 F.3d at 400 (emphasis added).

¹²³ See 5 U.S.C. §§ 554, 556-57; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950); see also *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting); *Collord v. U.S. Dep’t of Interior*, 154 F.3d 933, 936 (9th Cir. 1998).

¹²⁴ See *Wong Yang Sung*, 339 U.S. at 49; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

reasons for believing that the evidence warrants final designation; and (2) an opportunity to respond to the evidence, including the right to cross-examine any witnesses against it.

C. The Bureau failed to provide Huawei with legally required process.

The Bureau erred in concluding that, “[e]ven if ... th[e] final designation implicates Huawei’s due process interests, ... Huawei has received all protections that the Due Process Clause guarantees.”¹²⁵ First, the initial designation did not provide sufficient notice. The Bureau ignored Huawei’s arguments that the initial designation failed to provide Huawei with *meaningful* notice of the standard to be applied, how any criteria are to be measured, and what evidence the Commission or Bureau believed satisfy those criteria. Second, the Bureau was required to give Huawei a fair opportunity to respond to the evidence on which it might rely, including the right to cross-examine any witnesses against it.¹²⁶ The Bureau responded that it did not need to provide any opportunity for cross-examination because it relied *only* on “secondary sources produced at different times and for different purposes other [than] the proceeding at issue.”¹²⁷ But the Bureau failed to cite any authority holding that the Due Process Clause does not require cross-examination where “none of the sources ... were generated for the purposes of this proceeding.”¹²⁸ And the cases it does cite emphasize that cross examination was required to “protect against the risk of erroneous deprivation.”¹²⁹ The Bureau’s exclusive reliance on secondary sources originally generated for unrelated proceedings only *increases* the risk of erroneous deprivation and heightens the need for rigorous cross-examination. Moreover, the Bureau entirely ignored Huawei’s entitlement

¹²⁵ *FD Order* ¶ 58.

¹²⁶ *See* Huawei Designation Comments at pp. 167-70.

¹²⁷ *FD Order* ¶ 59.

¹²⁸ *FD Order* ¶ 59.

¹²⁹ *Bus Comme'ns, Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374, 380 (8th Cir. 2013).

to formal adjudication procedures under the APA.¹³⁰

CONCLUSION

For the foregoing reasons, the Commission should grant Huawei’s application for review, reverse or vacate the Bureau’s final designation, and terminate these designation proceedings.

Respectfully submitted,

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July 30, 2020

¹³⁰ The Bureau also improperly and prejudicially relied on ex parte contacts, in violation of Commission rules and the Due Process Clause. The Bureau’s response, *FD Order* ¶ 62, (1) ignored the simultaneous promulgation of the USF rule and initial designation, (2) failed to support the assertion that it could rely on ex parte contacts just because they occurred before the adjudication was announced, and (3) ignored the due process problems with relying on ex parte contacts regardless of *when* they occurred. Further, even if the Commission *could* properly convert a rule-making into a hybrid rulemaking and adjudication—and it cannot—the Bureau ignored the fact that, if “the switch [from rulemaking to adjudication] deprived [a party] of any right to which it would be entitled in an adjudication,” it must “assess that deprivation under conventional principles governing adjudications.” *Qwest Services Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).

CERTIFICATE OF SERVICE

I, Patricia Cave, an attorney at the law firm of Morgan, Lewis & Bockius LLP, certify that on this 30th day of July 2020, I caused the foregoing **Application for Review of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc.** to be served, as specified, upon each of the following:

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/s/ Patricia Cave

Patricia Cave