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

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

WRITTEN *EX PARTE* SUBMISSION OF HUAWEI TECHNOLOGIES CO., LTD AND HUAWEI TECHNOLOGIES USA, INC.

Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc. (collectively, "Huawei"), by their undersigned counsel, submit this *ex parte* presentation to supplement the record in the above-captioned docket.

I. Introduction

The reply comments filed in this proceeding confirm that the Commission's proposed "national security blacklist" rule is legally infirm, is arbitrary and capricious, has costs that outweigh any purported benefits, is procedurally deficient, and lacks any factual foundation.

The only reply commenter that even tries to defend the Commission's proposal in any detail is the Telecommunications Industry Association ("TIA"). Its Reply Comments, though, misrepresent the record, are full of distortions and unproven accusations against Huawei, and fail to confront the statutory, administrative, constitutional, and factual deficiencies in the Commission's proposed rule. As an example, TIA's hodgepodge of reasons that the Chinese Government allegedly has undue influence over Huawei arbitrarily rests on speculation and is belied by both the law and the facts. As another example, TIA completely ignores both the statutory limits on the Commission's USF authority and the lack of expertise in and responsibility for national-security issues

that are necessary for any rulemaking in this context. Huawei makes this submission primarily to respond to TIA's Reply Comments and demonstrate that TIA's arguments are factually flawed, internally inconsistent and irrational, and legally unsound.

As a preliminary matter, however, it is important to stress that TIA's Opening Comments and Reply Comments ("Reply") do not represent the views of its membership or its board, but only the "views of the TIA Policy Committee." TIA Reply 1, n.3; *see also* TIA Comments 1, n.3. The composition of that committee is undisclosed. Even Huawei, which is a member of TIA and has a representative on the board, has not been informed of the identity of the committee members. The comments filed in the name of the Association were not reviewed or approved by all of its members, or even by all members of its board. While TIA claims that it submitted comments "on behalf of its membership comprising hundreds of global manufacturers and vendors of ICT equipment and services," TIA Comments, Executive Summary at i, this contradicts its own statements in the footnotes cited above, and it is not clear that its comments here are supported by more than a handful of such companies. TIA continues to refuse to disclose the identity of its members or other entities backing its Comments, who may be competitors of Huawei.[1] This possibility is supported by the statement of Cinnamon Rogers (Senior Vice President of Government Affairs at TIA) that she and her staff received and used information and proprietary data from companies closely tracking Huawei and ZTE's sales information for intelligence purposes. TIA Reply, Declaration of Cinnamon Rogers ("Rogers Decl.") ¶ 5.

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[1] Exhibit C, Huawei Letter to TIA, June 15, 2018. To date, TIA has not disclosed the names of members and entities that influenced its Comments in response to Huawei's requests in the letter.

II. TIA Fails to Establish the Commission's Statutory Authority to Adopt the Proposed Rule

Huawei has previously explained that the Communications Act denies the Commission the power to make national-security determinations dispositive in the context of the USF program. Huawei Opening Comments ("Huawei Comments") 13–25. As Huawei has shown, the Act enumerates a list of principles that must guide the Commission's USF decisions, and neither those principles nor any additional principles established by the Commission in accordance with the Act's mandatory procedures authorize consideration of national-security concerns. *Id.* at 14–17. Further, many other provisions in the Communications Act *do* refer to national-security concerns, which confirms that Congress' refusal to include any similar reference in the universal-service provisions was deliberate. *Id.* at 17–19. Interpreting the Act to empower the Commission to base USF decisions on national-security concerns would also violate bedrock principles of administrative law—such as the principle that Congress should not be presumed to grant an agency the power to make important decisions in an area where it has neither constitutional responsibility nor policy expertise. *Id.* at 19–25.

TIA ignores most of these arguments, and offers no response to most of Huawei's cases. Instead, TIA identifies a handful of purported reasons to interpret the Communications Act as authorizing the Commission to base USF decisions on national-security concerns. Although Huawei has already refuted most of the arguments put forward by TIA in its reply comments, these arguments remain flawed and, Huawei believes, must be unraveled again to expose their failings.

First, TIA asserts that the proposed rule "will advance … the universal service principles articulated in Section 254(b)." TIA Reply 77. The glaring flaw in this argument is that the "uni-

versal service principles articulated in Section 254(b)" nowhere refer to national-security considerations. Yet TIA claims—without citing a single case or interpretive principle—that the authority to consider national-security concerns is buried in the Commission's "obligation … to ensure the availability of '*quality* services,'" reasoning that "consumers are unlikely to believe they are receiving 'quality services' if those services are subject to disruption by foreign powers." *Id.* (emphasis added).[2] TIA also contends that foreign interference would "jeopardiz[e] the Commission's goal of promoting '*access* to advanced telecommunications and information services.'" *Id.* (emphasis added). That reading of the statute is incorrect.

To begin with, TIA's interpretation departs from the natural meaning of the statute. "Quality" means "degree of excellence" or "grade," and "access" means "freedom or ability to obtain or make use of something." *Merriam-Webster Online Dictionary*. Ordinarily, one who refers to a "quality" telecommunications service means that he can use the service easily, that the participants at each end of the line can hear one another clearly, that the telephone line is uncluttered with static noise, and so on. Similarly, one who says that he has "access" to a telecommunications service means simply that he has the freedom or ability to use that service. Few who refer to "quality" or "access" would be thinking about national security. If Congress had meant to refer to protecting a service against foreign interference, it would have used a different term—say, "security"—rather than attempting the bank shot of using "quality" or "access" to refer to security issues.

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[2] It is also irrational to suggest that the universal service principles would be furthered by a policy that simply makes consumers *believe* that services are of higher quality, without any actual change in quality.

In addition, as Huawei has already explained, Congress "does not … hide elephants in mouseholes." *E.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see* Huawei Comments 22. Congress does not use "modest words," "vague terms," and "ancillary provisions" to confer a "highly significant" power on an agency—particularly where that power "has elsewhere, and so often, been expressly granted." *Whitman*, 531 U.S. at 467–68. The phrase "quality" and "access" are quintessential examples of "modest" terms. And the power to make decisions on the basis of national security is a quintessential example of a "highly significant" power. *See* Huawei Comments 22. That power, moreover, has elsewhere and often been expressly granted. *See id.* at 17–19. Under these circumstances, it is improper to infer that the modest phrases "quality services" and "access" encompass the significant power to make national-security decisions.

Further, courts and agencies must read statutory provisions "in a way that renders them compatible, not contradictory." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 27 (2012); *see, e.g.*, *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959) (interpreter must "fit, if possible, all parts into an harmonious whole"). TIA's reading violates this principle, because it needlessly allows the proposed rule to undermine many of the other universal-service principles enumerated in the statute, such as the principles directing the Commission to ensure that rates be "reasonable" and that services be available to consumers in "rural, insular, and high cost areas." § 254(b); *see* Huawei Comments 16; CCA Comments 36. TIA responds that some "section 254(b) principles 'can be trumped' by others." TIA Reply 77, n.247. The case that TIA cites for this proposition, however, holds that the Commission "must work to achieve each [principle] unless there is a direct conflict between it and … another listed principle." *Qwest Corp.* v. *FCC*, 258 F.3d 1191 (10th Cir. 2001). Here, however, the proposed rule does not resolve a preexisting "direct conflict" between one listed principle and another. Quite the contrary, the proposed

rule *creates* a new conflict where none existed before—giving the "quality services" and "access" principles unnaturally broad interpretations in order to justify undercutting the other principles. "There can be no justification for needlessly rendering [these] provisions in conflict [where] they can be interpreted harmoniously." Scalia & Garner § 27.

Second, TIA argues that the Commission may consider national security because doing so "would clearly be in the public interest." TIA Reply 74. The Supreme Court, however, has "consistently held" that "the words 'public interest' in a regulatory statute" grant an agency only a bounded authority to promote "the purposes of the regulatory legislation," not "a broad license to promote the general public welfare." *NAACP* v. *FPC*, 425 U.S. 662, 670 (1976). There is no doubt that promoting national security is consistent with "the general public welfare." The question here, however, is whether the promotion of national security is a purpose of this particular "regulatory legislation." It is not. Congress set out the objectives of the USF program in § 254(b), and that list of objectives conspicuously excludes any mention of national security. Notably, Huawei made these points in its Opening Comments (Huawei Comments 25), but TIA neither addresses the substance of the argument nor distinguishes the Supreme Court cases on which it rests.

Third, TIA argues that the Commission may consider national security because "the Tenth Circuit [has] specifically upheld the Commission's authority to impose … condition[s] on the receipt of USF funds." TIA Reply 72 (citing *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014)). Once more, Huawei has already addressed TIA's overreading of Tenth Circuit precedent. Huawei Comments 27. As Huawei has explained, the Tenth Circuit's decision expressly reaffirms the rule that "the FCC may exercise its discretion to balance the [universal-service] principles against one another when they conflict, but may not depart from them altogether to achieve some *other* goal." *In re FCC 11-161*, 753 F.3d at 1055 (emphasis added). The Tenth Circuit emphasized that it was

upholding the funding conditions imposed in that case only because they were "consistent … with § 254(b)'s express charge to the FCC to 'base policies for the preservation and advancement of universal services' on a specific set of controlling principles outlined by Congress." *Id.* at 1047. The Tenth Circuit never approved funding directives that go beyond those principles. *Id.* Yet that is precisely what the proposed rule does here.

Fourth, TIA argues that the Commission may consider national security because "any Commission action here would and should be quite narrow." TIA Reply 73. That argument is both incorrect and irrelevant. The argument is incorrect, because the proposed rule can hardly be described as "narrow." The proposed rule threatens to devastate the business of covered enterprises by branding them threats to national security. Huawei Comments 23. It would cause "irreparable and immeasurable harm" to "millions of Americans who … depend on carriers who in turn depend on USF support." CCA Comments 3. It poses "an existential threat to the entire business" of carriers that would be forced to tear out and replace blacklisted equipment. Rural Broadband Alliance Comments 14. The proposed rule also may have unintended political consequences in the form of reciprocal treatment to U.S. companies by foreign governments. Huawei Comments 23.

In addition, the breadth or narrowness of the rule is irrelevant. An agency does not get to exercise a power simply because it does so "narrow[ly]." *Cf. McCulloch* v. *Maryland*, 4 Wheat. 316, 407–08 (1819) ("It can never be pretended, that … vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced."). Rather, an agency exercises only the powers that Congress has granted it. *City of Arlington* v. *FCC*, 569 U.S. 290, 297–98 (2013). Thus, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*" *Id.* at 297 (emphasis in original). Here, Congress has not

granted the Commission the power to make USF decisions on the basis of national security—period.

Fifth, TIA argues that the Commission may consider national-security concerns notwithstanding its lack of policy expertise in national security, because the Commission can always "coordinat[e] with … agencies specifically charged with protecting national security, such as DHS." TIA Reply 72. This argument is unpersuasive. In the first place, it proves too much. An agency can *always* consult with other agencies in areas that lie beyond its area of expertise. If the mere possibility of consultation solved the problem, there would be nothing left of the principle that Congress should not be presumed to "delegate[e] [a] decision" to an agency that "has no expertise" in making that kind of decision. Huawei Comments 19.

In the second place, nothing in TIA's reading of the statute *requires* the Commission to consult with other agencies. Unlike § 214(b), which requires the Commission to hear from the Secretaries of Defense and State before licensing the construction of new telecommunications lines, § 254(b) includes no comparable requirement that the Commission coordinate with agencies charged with protecting national security. As a result, any decision to coordinate with other agencies in this context would be a matter of the Commission's discretion. But Congress cannot be presumed to have silently granted the Commission the power to rest USF decisions on national-security concerns, because it hoped that the Commission might *choose* to coordinate its activities with national-security experts in other agencies.

Finally, TIA contends that the Commission may base USF policies on national-security concerns because "there can be no meaningful universal service" in the absence of "national security." TIA Reply 74. This contention, too, proves too much. Just about *every* government program presupposes national security. *No* government program could "meaningful[ly]" operate if exposed

to disruption by foreign governments. On TIA's reasoning, every single government agency could therefore make its own national-security decisions—even in the face of a statutorily enumerated list of factors that make no mention of national security—on the premise that its activities "presume national security." *Id.* Worse yet, under TIA's approach, an agency's mere incantation of the phrase "national security" would allow it to *undermine* the statutorily enumerated principles. That result would flatten the bedrock principle that an agency must consider only "factors which Congress has … intended it to consider." *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). That result also would replace the constitutional design (which confers certain national-security policymaking responsibilities on Congress and the President) with a constitutional cacophony (in which each agency may pursue its own vision of national-security policy, irrespective of whether Congress has authorized it to do so).

III. TIA's Proposed Approach For Identifying Companies That Pose A "Threat" Is Arbitrary and Capricious

TIA proposes that the Commission should deem an equipment supplier to be a "threat" to national security if there is a risk that a hostile foreign power could "exploi[t]" that supplier in order to "conduct cyberespionage or disrupt U.S. networks." TIA Reply 10. In other words, TIA proposes that the Commission should blacklist a supplier because *someone else*—a foreign country—might use that supplier as a pawn to engage in spying or sabotage. The supplier's own record and conduct would be irrelevant.

TIA's position, however, is riddled with flaws and contradictions. Indeed, even if the Commission had statutory authority to promulgate the proposed rule (which it does *not*), TIA's proposed approach is arbitrary and capricious in at least three distinct ways. First, TIA fails to identify exactly *who* would evaluate the risk posed by foreign states—the Commission or some other

agency. Second, TIA's criteria for deeming a company a threat to national security are impermissible. Finally, TIA's application of its proposed approach to the Chinese Government is deeply flawed, resting on speculation and factual errors rather than on well-reasoned arguments.

A. TIA's proposed approach fails to identify the entity responsible for assessing the supposed "threat" to national security

Huawei has previously explained that the Communications Act may not be interpreted to implicitly empower the Commission to base USF decisions on national-security concerns, in part because the Commission lacks constitutional responsibility and expertise in the field of national security. Courts presume that Congress does not intend to "involve [an agency]" that lacks both responsibility and expertise for national security in making "national security determinations." *MCI Telecomm. Corp.* v. *AT&T Co.*, 512 U.S. 218, 231 (1994). And the Commission plainly lacks both national-security responsibility and national-security expertise. Huawei Comments 19–22.

Huawei has also explained that, if the Communications Act *were* interpreted to empower the Commission to base USF decisions on national-security concerns, the Commission would have to exercise that power itself. The Commission could not simply subdelegate the authority of compiling a list of blacklisted equipment providers to another agency. To do so would violate the presumption against subdelegation, would contravene the Due Process Clause, and would be arbitrary and capricious. Huawei Comments 83–86.

TIA ties itself in knots in trying to address these problems. At first, TIA insists that the Commission itself would make blacklisting decisions. It asserts that, "[c]onsistent with delegation principles, … the Commission retains complete, independent authority in determining whether or not" to blacklist a company. TIA Reply 84. TIA adds that, far from being reduced to "a ventriloquist's puppet," the Commission would exercise its "own authority and expertise in this context,"

and would "retain oversight and accountability over [its] final decision-making." *Id.* In the next breath, however, TIA insists that the Commission would simply copy decisions already made by other agencies. It states that "the Commission should not attempt to make national security determinations of its own, as such matters are outside of its core expertise." *Id.* at 81; *see also id.* at 45 ("TIA, along with virtually every commenter, believes that the Commission should not make independent determinations regarding the security threat posed by particular companies"). Instead, it suggests that the Commission should give conclusive effect to determinations made by "other agencies." *Id.* at 91. TIA cannot have it both ways. Either the Commission exercises ultimate authority to decide whether a company poses a threat to national security (in which case the Commission would be acting in an area in which all agree that it lacks competence), or the Commission hands off that ultimate authority to some other agency (in which case the Commission would violate the presumption against subdelegation, the Due Process Clause, and the prohibition on arbitrary agency action). *See Business Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011) ("internally inconsistent" reasoning is "arbitrary").

TIA attempts to escape this bind by insisting that the Commission can treat the decisions of other agencies "merely [as] evidence that inform and provide context for the Commission's ultimate findings." TIA Reply 83. That does not help. The Commission has two alternatives: It can either evaluate the "evidence" that other agencies put before it and reach its own independent judgments, or it can treat that "evidence" as conclusive without judging that evidence for itself. The first alternative mires the Commission in an area in which it lacks expertise: In TIA's words, the Commission would have to make its "own" determinations about the persuasiveness of other agencies' evidence regarding national security, even though "such matters are outside of its core expertise." *Id.* at 84. The second alternative, by contrast, mires the Commission in a different set

of problems: If the Commission treats the other agencies' findings as conclusive determinations rather than simply as evidence to be weighed, it would be handing off its responsibilities to other federal agencies, thereby contravening subdelegation, due-process, and arbitrariness limits.

B. TIA's proposed approach rests on impermissible criteria for identifying supposed national-security threats

Although the NPRM proposes to identify *suppliers* that pose a threat to national security, TIA now argues that the purpose of the rule should be to "address the risks posed by *state-sponsored actors* with the incentive and ability to conduct cyberespionage or disrupt U.S. networks by exploiting specific suppliers of concern." *Id.* at 10 (emphasis added). In other words, TIA defines the problem as the hypothetical ability of a hostile state to exploit a supplier; the conduct and intentions of the supplier become irrelevant. *Id.* at 69–70 ("Huawei's statements regarding its corporate conduct are immaterial in the proceeding at hand."). TIA offers no persuasive justification for defining the problem this way. Instead, TIA's standard appears to be gerrymandered to capture the particular companies that it wishes to have the Commission target.

TIA's proposed approach impermissibly imposes restrictions on the basis of a supplier's country of origin. TIA itself professes that it "does not support and does not understand the Commission to be proposing a country-of-origin ban." *Id.* at 11. Rightly so; a country-of-origin ban would be arbitrary and capricious, and indeed unconstitutional. Huawei Comments 44–45. Yet TIA's proposed approach would amount precisely to a country-of-origin ban. Under that approach, after all, a supplier would be deemed a threat to national security solely because its home country could supposedly exploit the supplier to engage in espionage or sabotage. The supplier's own intentions, its past record, and its willingness to implement safeguards against state interference all

would be irrelevant. Put simply, the difference between one company's freedom to sell its equipment and another's blacklisting "would result, not from anything [the company] did, said, or thought, different than [the other], but only in that it [originated in a supposedly hostile country]." *Korematsu* v. *United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting). That is a country-of-origin ban, no more, no less.

TIA's proposed approach is also impermissible because it requires the Commission to sit in judgment of a foreign state's propensity and ability somehow to exploit the equipment of a supplier based in its own country to the detriment of another. Huawei has explained that the Constitution specifically confers various powers to make decisions about foreign policy and national security in Congress and the President—not in independent agencies such as the Commission. Huawei Comments 20. For an independent agency, free from presidential control, to make its own national-security determinations would raise serious constitutional doubts. *Id.* at 21.

TIA's proposal only magnifies those serious doubts. The Supreme Court has ruled that a State—such as Oregon or Massachusetts—impermissibly intrudes into the field of foreign affairs reserved to Congress and the President when it engages in official "criticism of [foreign] nations." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968). Such criticism carries "great potential for disruption and embarrassment" and interferes with Congress's and the President's authority to conduct "foreign affairs and international relations." *Id.* at 435–36; *see also American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 440 (2003) (Ginsburg, J., dissenting) (acknowledging that, under *Zschernig*, a state's action can violate the Constitution if it "takes [a] position on [a] contemporary foreign regime [or] requires assessment of [an] existing foreign regime"); Louis Henkin, *Foreign Affairs and the United States Constitution* 164 (2d ed. 1996) (explaining that, under *Zschernig*, state action

violates the Constitution when it "reflect[s] a state policy critical of foreign governments and involve[s] sitting in judgment on them"). *Zschernig* involved a state's action, but its reasoning applies to independent federal agencies. After all, the Constitution expressly contemplates at least *some* state involvement in foreign relations—*see, e.g.*, U.S. Const. art. I § 10, cl. 3 (states may enter into compacts with foreign powers with congressional consent; states may engage in war if actually invaded)—but contemplates no foreign-relations role at all for independent executive agencies. TIA's proposal, however, requires the Commission to engage in the very kinds of activities that the Court in *Zschernig* reserved to Congress and the President: The Commission would sit in judgment of foreign regimes, and would engage in official criticism of foreign nations, by declaring that certain countries are likely to exploit telecommunications companies in order to spy on or sabotage American networks.

C. TIA's application of its proposed approach to the Chinese Government is deeply flawed

TIA's proposed approach is more than flawed in its conception; it is also flawed in its application. TIA contends that there is a risk that the Chinese Government would exploit Chinese manufacturers of telecommunications equipment to engage in espionage or disruption of American telecommunications networks. TIA Reply 49. This claim, however, rests not on evidence but on innuendo and speculation.

Huawei has already identified a number of reasons to doubt that the Chinese Government would engage in the kind of conduct that TIA hypothesizes. For example, the record of this proceeding contains no evidence that the Chinese Government has *ever* directed Chinese telecommunications equipment manufacturers such as Huawei to tamper with their equipment. *See* Huawei Comments 87. Nor is there any evidence that it has *ever* instructed Huawei to alter its software.

Id. Further, Huawei's experts have testified that Chinese law does not authorize the Chinese Government to issue such directives. They have explained that, under the Chinese Constitution and precedent, companies enjoy the "inviolable right" to "manage their own affairs." *Id.* at 88. They have further explained that no Chinese statutory law permits the Government or public officials to interfere with a private company's operations. *Id.* at 87. And they have shown that the Chinese Communist Party's ("CCP" or the "Party") Rules recognize that Chinese law protects the autonomy of business enterprises. *Id.* at 88.

The scattershot responses that TIA offers in its Reply Comments amount to unpersuasive speculation unsupported by any expert testimony or evidence. *First*, TIA all-too-conveniently sweeps aside Huawei's evidence as irrelevant. TIA seems to assume that the Party is both all-powerful and malevolent. Thus, in TIA's view, it does not matter what the Chinese Constitution, Chinese law, and the Party's own rules say, because the Party will override every obstacle that stands in the way of conducting the espionage and sabotage operations that it supposedly desires to conduct. TIA Reply 52–55.

This view of the Party rests on stereotype, not fact. For one thing, as described by Professor Jacques DeLisle—a distinguished expert in Chinese law and politics—the Party is hardly as all-controlling as TIA asserts. Professor DeLisle's report shows that TIA greatly overstates the extent of Party involvement in the operation of the Government. Exhibit A, Expert Report of Jacques DeLisle ("DeLisle Report") 2-54. His report likewise shows that TIA overstates the extent of Party involvement in the operation of companies, particularly a private company like Huawei. *Id.* at 9. Contrary to TIA's claims, Professor Jacques DeLisle has explained that companies in China enjoy a significant degree of autonomy. *Id.* at 2-3. Additionally, TIA's reference to a proposal allowing

the Government to take a 1% ownership share in some Internet companies (not including manufacturers) is implausibly portrayed as a significant level of influence. *Id.* at 3-4.

For another thing, Professor DeLisle has demonstrated the error of TIA's assumption that the Party has a monomaniacal focus on espionage. Professor DeLisle's report explains that a core goal of Chinese policy—especially Chinese foreign policy—has been to promote economic growth through a strategy of economic engagement with the outside world on market-oriented terms. *Id.* at 10-14. Even TIA's own sources confirm this point. For example, one of the authors on whom TIA relies, Mark Wu, portrays Chinese policies, including relations among the Chinese Government, Party and companies, as a unique *economic* structure, instead of a security framework. *See id.* at 11. As Professor DeLisle notes, the evident goal of this purported behavior is to reap economic benefits—not to undermine American national security. *Id.* Similarly, TIA cites programs such as the Chinese Export-Import Bank, the Made in China 2025 program, and the allegedly unfair use of regulations to benefit Chinese companies. *Id.* at 16. These programs, too, aim to achieve economic benefits rather than to undermine American national security. *Id.*; *see also infra* at § IV.B (discussing Huawei-specific facts relating to alleged financial support). But Professor DeLisle explains that, if China were to use companies such as Huawei as instruments for espionage, and thereby undermine (and perhaps destroy) those companies' commercial reputation, it would put significant parts of this economic agenda at risk. DeLisle Report 12-14. As Professor DeLisle's report makes clear, TIA identifies no good reason to believe that the Party or the Chinese Government would jeopardize its own economic interests in this way.

In all events, if TIA's portrayal of the Party were accurate, it still would not justify a focus on companies such as Huawei. If the Party were really as powerful and as malevolent as TIA claims, it presumably could impose its will on *any* company that is headquartered in China or that

has extensive operations in China. *Any* such company would be vulnerable to the same (hypothetical) "exploitation" by a Chinese Government bent on espionage. As Professor DeLisle explains, "[n]on-Chinese firms in the telecommunications equipment sector" that "operate in China" and that "operate through joint-ventures with Chinese partner firms" are "subject to Chinese laws and regulatory authority" and are "not immune from" political influences. DeLisle Report 17, 19. TIA's logic would thus require the Commission to evaluate the risk to national security supposedly posed by *any* company with operations in China that makes equipment for use in the telecom sector. Indeed, because TIA concedes that the Commission has to consider the risk for *components* of such equipment as well (*see, e.g.*, TIA Reply 11, 25), TIA's logic would apply to just about any company that incorporates any substantial component of telecommunications equipment made in China or by a Chinese company. DeLisle Expert Report 17.[3]

TIA, however, appears to have no such outcome in mind. Rather, TIA artificially restricts its focus to companies such as Huawei—ignoring the many other companies that, according to its own criteria, pose threats to national security because of vulnerability to exploitation by a supposedly hostile foreign government. This regulatory gerrymander—which treats similar companies in a dissimilar manner—is arbitrary and capricious. Huawei has already raised this problem in its

[3] Of course, if it is not feasible for the Commission to perform this holistic, manufacturer-by-manufacturer assessment, that fact simply underscores that the rational approach is supply chain risk management rather than the creation of a supplier blacklist. Huawei Comments 39–40, 51–52, 55. TIA argues that blacklisting companies headquartered in China is superior to the alternative of using risk management techniques such as testing and equipment verification because they allegedly cannot address potential compromises by a state actor. *See, e.g.*, TIA Reply 18. But TIA undermines its own argument when it acknowledges that the FCC is *not* qualified to determine whether testing or verification is adequate. *Id.* at 17 ("[I]t would be inappropriate for the Commission to evaluate whether use of an industry standard or obtaining an industry certification negates a national security threat identified by the U.S. federal government").

Opening Comments (Huawei Comments 39–41), but TIA conspicuously fails to address it in its reply.

Second, TIA asserts—again without any expert testimony or evidence—that Chinese law enables rather than constrains the Chinese Government's supposed efforts to use private companies as instruments of espionage. However, as demonstrated by Huawei's experts in Chinese law, TIA "has misunderstood [the] Chinese legal framework and has formed opinions without [a] legal or factual basis." Exhibit B, Supplemental Expert Report of Jihong Chen & Jianwei Fang ("Chen & Fang Supplemental Expert Report") 2. For example, Huawei's experts explain that, contrary to TIA's understanding, China's *National Intelligence Law* does not authorize intelligence agencies to compel private companies to help conduct espionage; the conduct of such agencies is "subject to strict legal restrictions," and these restrictions preclude the agencies from "compel[ling] telecommunication equipment manufacturers to hack into products they make to spy on or disable communications of other countries." *Id.* at 3. Similarly, "TIA's conclusion that [China's] *Anti-Terrorism Law* 'allows for the maximum exercise of state power' is groundless"; that law "limits state authority" in important ways. *Id.* at 4. So too, TIA is wrong to argue that Huawei is subject to China's *Cyber Security Law*. *Id.* at 5.

Moreover, TIA addresses only Chinese law, while ignoring United States law entirely. Huawei has already explained that Huawei equipment sold in the United States is sold through Huawei's U.S. subsidiary, Huawei USA. Huawei Comments 89. Huawei USA, which is headquartered in Plano, Texas, is governed by United States law—not by Chinese law. Irrespective of what Chinese law allows and disallows, United States law independently protects against the kinds of cyberespionage and sabotage that TIA claims to fear. *Id.* Huawei USA complies with applicable

United States laws with respect to equipment that it sells to American customers—and TIA presents no evidence to the contrary.

Third, TIA asserts that Chinese telecommunications companies pose a national-security threat because some of them have "received extensive government support" and benefit from Chinese state policies that "designate the development of the Chinese telecom sector as a strategic priority." TIA Reply 62. As discussed in Section VI below, this argument is misleading and overstated. But, in any event, this point undermines rather than supports TIA's conclusion. The Chinese Government has spent vast sums of money to pursue an agenda of economic improvement. Professor DeLisle demonstrates that the Chinese Government would undercut these goals, and undermine its own investments, if it were to use Huawei and other companies as instruments of espionage—thereby sabotaging those companies' reputations, and most likely all other Chinese companies' reputations, in markets worldwide. DeLisle Expert Report 12-14

Fourth, TIA muses that companies with "sophisticated global R&D facilities and research partnerships … are in a position to serve as important conduits for Beijing to acquire and assimilate technical knowledge." TIA Reply 69. But TIA submits no evidence that Huawei has ever shared any of its technologies, developed inside or outside of China, with the Chinese Government. Furthermore, even if TIA's baseless accusations were true, TIA continues to miss the point. Although Huawei's business model does not include a component of developing technologies for any third parties—let alone the Chinese Government—other companies regularly help governments acquire technical knowledge, and do so as part of a legitimate business model. Indeed, companies in the United States routinely work with the Federal Government to develop new computers, new robots, new medical drugs, new airplanes, and so on. That being so, the United States surely cannot expect that companies in other countries will refrain from helping their governments acquire technical

knowledge, or other countries will categorically deny U.S. companies' products because they are U.S. government contractors. Put simply, even if a Chinese company could potentially help the Chinese Government "acquire … technical knowledge," that would be no reason to exclude companies with Chinese headquarters from participating fully in the U.S. market. The economy is global.

Finally, TIA says that "Chinese government spies and would-be saboteurs would of course prefer to work with Chinese-speaking Chinese nationals who are employees of a Chinese communications company with Chinese supply chains and engineers, rather than a company with characteristics less suitable for clandestine espionage operations." *Id.* at 57 (emphasis added). This argument is merely uninformed speculation about what foreign spies and saboteurs would prefer. Even worse, this argument assumes that a person's nationality and language are grounds for treating the person as a threat to national security—on the hypothesis that a hostile foreign power is more likely to want to work with someone who shares that nationality and speaks that language. That kind of assumption has no place under our constitutional system. One may as well argue that the now-overruled *Korematsu*—which notoriously upheld the internment of Americans of Japanese descent—was rightly decided because "Japanese government spies and would-be saboteurs would of course prefer to work with Japanese-speaking Japanese nationals, rather than an individual with characteristics less suitable for clandestine espionage operations."

IV. TIA's Cost-Benefit Analysis Ignores Relevant Facts

TIA yet again argues that the benefits of the proposed rule outweigh any potential costs, but fails to undertake an accurate analysis of the actual costs or benefits. Instead, TIA errs by continuing to tout the proposed rule's illusory benefits while declining to acknowledge the immediate and substantial costs that the rule would impose on American carriers and consumers alike.

A. An Agency Cannot Abdicate its Duty to Consider Costs and Benefits

TIA acknowledges that the Commission has a "responsibility for balancing the competing considerations of any given USF policy choice." TIA Reply at 23. Yet, in the same paragraph, TIA appears cursorily to dismiss that responsibility by reiterating that, "when it comes to national security, there is less room—and perhaps no room—for tradeoffs." *Id.* at 23. In doing so, TIA implies that merely invoking "national security" overcomes the deficiencies of a proposed rule—and, moreover, that it negates the Commission's statutorily mandated obligation to analyze the costs of those deficiencies. But it is well-settled that, in the absence of a statutory exception, federal agencies are required under the "rationality" requirement of the Administrative Procedure Act ("APA") to conduct an appropriate cost-benefit analysis. Contrary to TIA's claims, because there is no special statutory exception here, the Commission cannot shirk its APA-prescribed duty and decline to rationally weigh the costs and benefits of the proposed rule and instead focus on ostensible national-security benefits alone. *See* Huawei Comments 54; Huawei Reply Comments 30; *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015); *Bus. Roundtable* v. *SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011).

B. TIA Erroneously Alleges that the Rule Will Produce Substantial Benefits

TIA continues to assert that the proposed rule would yield substantial benefits while failing to provide any evidence of how these benefits would arise. Once again, TIA attempts to obfuscate the lack of tangible evidentiary support for its arguments by waving the banner of national security, remarking that "not a single commenter" can question "the benefits of ensuring the security of communications equipment and networks supported by universal service dollars." TIA Reply 21. Further, TIA argues, "[i]t is unchallengeable that individual consumers, businesses, schools, libraries, and health care providers will benefit from a policy that protects them – and those they

interconnect with – from purchasing equipment or services from companies that have been identified as posing a substantial cybersecurity risk and who threaten U.S. national security." *Id.* at 21.

Huawei appreciates the importance of ensuring that American carriers and consumers have access to equipment adhering to strict cybersecurity protocols. As demonstrated in Huawei's Opening Comments and Reply Comments, it is the recognition of the importance of security that drives Huawei's enduring commitment to designing, developing, and manufacturing secure products. Although TIA repeats its unsupported claims that Huawei has already been determined to pose cybersecurity risks, it remains predictably unable to point to any harm caused to anyone by any of the Huawei products targeted by the rule, or the existence of any latent defect, backdoor, or compromise in even one Huawei product. Indeed, it argues that the Commission does not need to worry about such details —

> TIA agrees that a determination as to whether a company is a national security risk is not a decision for the FCC to make, but TIA has demonstrated that such a decision has quite clearly already been made by the relevant expert agencies with respect to Huawei and ZTE.[4]

Contrary to this bald assertion, as noted in detail in Huawei's due-process discussion, there is no specific or adequate finding by any "relevant expert agenc[y]" that identifies Huawei as a threat to the security of U.S. telecommunications networks or systems. *See* Section V.B below. TIA cites an eight-page section of its opening comments as support for this claim, but the only sources cited in that section that refer specifically to Huawei are the House Permanent Select Committee on Intelligence's 2012 Report ("2012 HPSCI Report"), congressional testimony that was not subject to cross-examination or rebuttal, media articles, and certain administrative actions for which no

[4] TIA Reply 22 (footnotes omitted).

reason was stated (and certainly did not include any specific findings that Huawei posed a national security threat to U.S. telecommunications networks or systems), which were taken without notice or hearing and without any opportunity for Huawei to present its position. For the Commission to enshrine those actions into its rules without examining the underlying evidence would be an endorsement of Star Chamber proceedings and an abandonment of due process. *See* Section V below.

Moreover, any benefits that TIA alleges the proposed rule would confer are illusory. As numerous commenters have pointed out, the Commission lacks the resources to determine whether the proposed rule will in fact protect entities like consumers, business, schools, libraries, and health care providers; whether less harmful measures could be employed to achieve the Commission's intended protections; or whether the identified companies actually do pose the risks that TIA identifies. *See, e.g.*, Comments of ITTA 2-3; Comments of NTCA 19; Reply Comments of Rural Wireless Broadband Coalition 15-18; Reply Comments of Rural Wireless Association, Inc. 21-23. Thus, the Commission cannot actually ascertain the benefits of the proposed rule.

C. TIA Ignores Evidence that the Proposed Rule Will Impose Substantial Costs

Similarly, TIA disregards substantial evidence offered by numerous commenters of the prohibitive costs of the proposed rule, in particular relating to its impact on competition in the U.S. telecommunications infrastructure market. Here, TIA asserts that commenters have erred by focusing on the market for wireless radio access network ("RAN") equipment, where the market concentration is the highest. TIA Reply 31-32. But TIA itself acknowledges that wireless RAN equipment comprises an "important market segment" that forms "one portion of the equipment *necessary* to deploy a mobile network." *Id.* at 32 (emphasis added). TIA does not dispute that the wireless RAN equipment market is one of the fastest-growing segments in the telecommunications

infrastructure industry. More importantly, wireless RAN equipment remains critical for low-density rural areas in need of telecommunications access. Thus, it is unclear why TIA believes commenters have erred by *also* placing importance on this market segment.

TIA labels concerns from Huawei and other commenters that the U.S. telecommunications infrastructure market is dominated by two major suppliers as "clearly erroneous." TIA Reply 32-33. As evidence, TIA cites only to a footnote in its own previous comments where it listed a number of companies that offer comparable products for sale on a global basis. *Id.* at 32, n.100. But the mere existence of these companies does not refute the duopolistic nature of the wireless infrastructure market *in the U.S.* As noted in expert testimony submitted along with Huawei's Opening Comments, market research indicates that Nokia and Ericsson hold a combined 80% share of U.S. wireless infrastructure sales, with Samsung holding an additional 11%. Huawei Comments, Exhibit F, Declaration of Allan L. Shampine ("Shampine Decl.") ¶ 13.

TIA's conclusion that the core and wireline equipment market are "robustly" competitive is substantiated only by defective evidence—where evidence is presented at all. To begin with, TIA ignores a critical step of competition analysis: market definition. For example, it refers to both routing and switching systems in discussion of "core" equipment market without explaining why routing and switching product markets can be combined together. In fact, they can't—because routing and switching products are not substitutes for one another. They provide different features, suit different networks, price differently and are supplied by overlapping but different manufacturers. This is reflected by market data reports that regularly offer separate analysis for routing and switching systems. Circumventing traditional competition analysis and combining different markets together allows TIA to present a misleadingly long list of alternative suppliers, when in reality no such list exists.

Unsurprisingly, TIA submits no market data to support its conclusion. The reason is obvious: actual market data only supports the opposite. For example, market data shows that the U.S. market for routing products has a Herfindahl-Hirschman Index ("HHI") of 3,838—substantially higher than the DOJ and FTC's HHI threshold for "highly concentrated" markets, currently defined at 2,500 HHI. Exhibit D, 2017 Market Share and Concentrated Data: Selected Excerpts. Conversely, the marketplace in the rest of the world for the exact same products are much less concentrated, with an HHI of merely 2,552. *Id.* The U.S. switching market is similarly highly concentrated at an HHI of 3.919, which can be contrasted with HHI in the rest of the world of 2,132. *Id.* at 2. In both instances, Huawei holds the second greatest market share outside of the U.S.—for example, 34.6% for routing products—and the benefits for consumers and competition alike are palpable. *Id.* at 1-2.

Huawei's presence in the U.S. could provide even more benefits to the American wireline access market, as well as the Backbone WDM market. Contrary to TIA's submission, the American wireline access market is not just highly concentrated, but also dominated by second class suppliers because of restrictions on Chinese vendors. The optical (PON) and twist wires (DSL and G.fast) markets hold a HHI of 4,649 and 3,514 in North America, respectively. *Id.* at 3. But the HHIs for global market are merely 2,492 and 2,649. *Id.* at 4. Similarly, market data for the Backbone WDM market shows a high HHI of at least 3,469 in North America and a modest global HHI of 1,817. *Id.* at 5. For both of these markets, Huawei is a prominent market leader outside of the U.S.

Moreover, TIA ignores two critical points. First, even if alternative equipment exists, the proposed rule would still require carriers to incur burdensome, possibly crippling costs to *replace* their existing Huawei equipment. *See* Huawei Reply Comments 25; *see also* CCA Comments,

Declaration of Steven Berry ("Berry Decl.") ¶ 11 (proposed rule would, "as a practical matter," "likely require many carriers to rip and replace equipment purchased from targeted companies"); *id.* ¶ 13 (cost of replacement would be "devastating"); Rural Broadband Alliance Comments 14 ("tearing out" existing networks would be "an enormous physical and economic challenge," "heretofore unthinkable," "an existential threat to the entire business," and "potentially catastrophic"). Second, the mere presence of companies like Huawei, despite their low market share, serves to constrain the pricing of other vendors because Huawei can offer quality equipment at lower average price points in the North American market. *See* Huawei Comments, Shampine Decl. ¶ 20. TIA cannot, and does not, justify the tangible harms that excluding Huawei from the telecommunications infrastructure equipment market would cause to carriers and ultimately American consumers, whether directly through financial burden or indirectly through decreased competition.

V. TIA Fails To Establish That The Commission's Proposed Rule Comports With Due Process

Huawei has shown that, even if the Commission has statutory authority to issue the proposed rule (which it does *not*), the proposed rule nonetheless violates the Due Process Clause because it includes no process for companies that would be labeled "national security threats" and whose equipment USF recipients could no longer buy using USF support. Huawei Comments 59–86. Originally, TIA agreed. In its Opening Comments, TIA acknowledged that the Commission "should afford targeted companies some measure of due process." TIA Comments 81. It added that "such due process may also be legally required," and that, under "D.C. Circuit" precedent, due process guarantees notice, "the right to receive any non-classified evidence," and "the right to challenge [the] determination." *Id.* at 82. In reply comments, however, TIA has changed its tune.

It now contends that blacklisted companies lack a cognizable liberty interest, and that a rulemaking in all events satisfies due-process requirements. TIA Reply 91–96. TIA's new position is incorrect.

A. The Proposed Rule Deprives Targeted Companies of "Liberty"

Huawei has shown that the proposed rule deprives targeted companies of "liberty" in at least three ways. On each score, TIA lacks a persuasive response.

To begin with, Huawei has shown that the proposed rule deprives companies of the liberty to engage in their chosen trade or business. Huawei Comments 61–62. TIA's only response is to assert in a footnote that "[one] case Huawei cites for this proposition"—*Sekhar* v. *United States*, 570 U.S. 729, 733 (2013)—"did not address due process issues." TIA Reply 92, n.304. Huawei, however, cited a number of cases beyond *Sekhar*: *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959) (which holds that liberty includes the "freedom to practice [one's] chosen profession"), *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238 (1957) (which holds that the government must provide notice and a meaningful hearing before excluding a lawyer from the bar on account of bad character), *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 572 (1972) (which holds that the government must provide notice and a meaningful hearing before abridging a person's "freedom to take advantage of [private] employment opportunities"), and *Trifax Corp.* v. *District of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003) (which holds that the government must provide notice and a meaningful hearing before taking action that "broadly precludes individuals or corporations from a chosen trade or business"). Huawei Comments 61–62. TIA ignores all of these authorities, even though Huawei brought them to TIA's attention in its opening comments.

Next, Huawei and Professor Emily Hammond have shown that official action that imposes a "stigma" upon a person amounts to a deprivation of liberty, if that stigma is sufficiently serious

to "alte[r]" the person's legal "status." *Paul* v. *Davis*, 424 U.S. 693, 708 (1976); *see* Huawei Comments 62; Huawei Comments, Exhibit H, Declaration and Export Report of Emily Hammond 7. TIA apparently agrees, conceding that a company "make[s] out a due process claim" by showing "stigma plus the distinct altering or extinguishing of [a company's] 'legal status.'" TIA Reply 92. TIA also "presum[es] that the adoption of a USF-related restriction here would result in … stigma" (TIA Reply 92)—a sensible concession, since the accusation that a company threatens the security of the United States imposes a "deep" "stain," *Wieman* v. *Updegraff*, 344 U.S. 183, 191 (1952). TIA insists, however, that the restriction here "does not result in a distinct alteration … of Huawei's legal status." TIA Reply 92. That claim is doubly wrong. For one, the designation of a company as a "national security risk" would have the *legal* effect of barring the use of universal-service funds to buy the company's equipment. For another, the designation has the *practical* effect of discouraging all Americans from buying that company's equipment. Huawei Comments 63–64. TIA has no response to either of these points.

Finally, Huawei has also explained that courts have consistently held that the Government deprives a business of liberty by debarring it from serving the Government. Huawei Comments 64. TIA seemingly concedes that a debarment is a deprivation of liberty, but insists that "a USF-related restriction … would not be the equivalent of a 'debarment.'" TIA Reply 92. TIA is mistaken. Huawei has shown that the proposed blacklisting would amount to a debarment under the Commission's own regulations. Those regulations define "debarment" to encompass "any action … to exclude a person from activities associated with or relating to" universal-service support (47 C.F.R. § 54.8)—a definition that encompasses the exclusion of a company from selling equipment to USF recipients. Huawei Comments 64. Huawei has also shown that the proposed blacklisting is in any event practically equivalent to a debarment: Just like a formal debarment, it precludes a

given company from selling its products to specified buyers. Huawei Comments 65; *see also id.* (explaining that "debarring a company from transacting with recipients of federal funds … amounts to a deprivation of liberty," and that "courts have understandably held that the due-process guarantee of a hearing also covers debarment of subcontractors"). Once more, TIA has no good response.

B. The Proposed Rule Deprives Targeted Companies of Liberty Without Notice And A Meaningful Hearing

Huawei has demonstrated that, before the Commission may deprive a company of liberty as contemplated in the proposed rule, the Due Process Clause requires it to provide the company notice and a meaningful hearing. Huawei Comments 65–70. In particular, the Commission must at a minimum disclose the factual basis of its proposed action and give the targeted company a meaningful opportunity to review and rebut its factual assertions. *Id.* at 66.

1. TIA first responds that the Government may discharge its obligations under the Due Process Clause simply by holding a notice-and-comment rulemaking. TIA Reply 94. This is an about-face. In its original comments, TIA had emphasized that "the Commission should not insert company names into the Code of Federal Regulations," that "any action by a regulatory agency to restrict a single company by name in a rule is an extremely rare practice," and that "the Commission should not go down this path." TIA Comments 60–62.

Huawei has already explained why TIA was right the first time and why TIA's new position is legally incorrect. Huawei has shown that—under *Londoner* v. *Denver*, 210 U.S. 373 (1908), *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915), and other cases interpreting the Due Process Clause—the Government may use a rulemaking when adopting a "general" "rule of conduct," but must use an adjudication when "a relatively small number of persons

[are] concerned, who [are] exceptionally affected, in each case upon individual grounds." *Bi-Metallic*, 239 U.S. at 446; *see* Huawei Comments 77. That is the case here: The proposed rule announces no general rule of conduct, but instead deprives a tiny handful of companies of liberty on individual grounds. Huawei Comments 78. That means that an individualized adjudication is required; a notice-and-comment rulemaking is not enough. TIA never responds to these watershed Supreme Court cases.

Instead, TIA cites the First Circuit's decision in *Law Motor Freight, Inc.* v. *Civil Aeronautics Board*, 364 F.2d 139 (1st Cir. 1966), for the proposition that due process allows an agency to use rulemaking even where its action "*de facto* affects only a single business." TIA Reply 95. The First Circuit, however, said no such thing. In that case, an agency approved a freight carrier's rates through rulemaking, but a second freight carrier challenged the rule on the grounds that these rates exposed it to increased competition. The First Circuit held that the second freight carrier had no due-process claim, because "freedom from competition" is not a "constitutionally protected" liberty interest. 364 F.2d at 144. The First Circuit's decision thus establishes that an agency may use rulemaking when liberty is not at stake in the first place. It does not establish (as TIA claims) that an agency may use rulemaking when liberty *is* at stake and when only a small number of persons are affected. In short, the First Circuit case is irrelevant because it never even addressed the issue for which TIA cites it.

TIA also cites cases stating that an agency enjoys "very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking." TIA Reply 94. An agency, however, must exercise its discretion within the bounds established by the Due Process Clause. That is why the Supreme Court has stated that an agency may "exercise its administrative discretion" to fashion appropriate "procedure[s] and … methods of inquiry" only "*absent constitutional constraints.*"

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 543 (1978) (emphasis added). One of those constitutional constraints is that, when an agency takes action "by which a very small number of persons are exceptionally affected, in each case upon individual grounds," the agency must proceed by adjudication rather than rulemaking. *Id.* at 542; *see also Bi-Metallic*, 239 U.S. at 446 (same); *Safari Club Int'l* v. *Zinke*, 878 F.3d 316, 332 (D.C. Cir. 2017) (reaffirming the same "basic distinction" between rulemaking and adjudication). The Commission has no discretion to ignore that constraint.

TIA next cites *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1973), to argue that "a rulemaking can be sufficient to satisfy due process requirements." TIA Reply 94. The question here, however, is not whether rulemaking *can* in some circumstances be sufficient to satisfy due process requirements; the question is whether rulemaking is sufficient in the circumstances at issue here. The very case TIA cites, *Florida East Coast Railway*, states that rulemaking does *not* suffice where "a small number of persons [are] exceptionally affected, in each case upon individual grounds." 410 U.S. at 245. Thus, the very case that TIA cites demonstrates that its position is wrong.

Finally, TIA asserts that this notice-and-comment rulemaking provides the soon-to-be blacklisted companies with all the process they need anyway. TIA Reply 94. When the Due Process Clause requires a hearing, however, it requires an "individualized" one. *Demore* v. *Kim*, 538 U.S. 510, 525 (2003); *see also id.* at 531 (Kennedy, J., concurring) ("due process requires individualized procedures …"). A rulemaking, by definition, cannot satisfy that requirement, for it is not "individualized." To insist otherwise is to elide "the basic distinction between rulemaking and adjudication." *Florida East Coast Ry.*, 410 U.S. at 244. Further, this notice-and-comment rule-

making does not provide the procedural safeguards that due process demands. Under the Due Process Clause, the Government must disclose the unclassified material that underlies its proposed action and give the party to be deprived of liberty a meaningful opportunity to rebut the Government's factual assertions. Huawei Comments 67–68. The Commission has not yet made any such disclosure. TIA asserts that this disclosure "will be [present] once a final order is issued" (TIA Reply 94)—but even if that were true, it would by then be too late. The Due Process Clause protects the "right to be heard *before* being condemned" (*Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976)); the Government violates that right by waiting to disclose the basis of its decision until the issuance of a "final order," by which time the affected party no longer has any opportunity to respond.

2. TIA also argues that the Commission need not give targeted companies a hearing because its decisions would be "guided by determinations [already] made by Congress or by other agencies." TIA Reply 91. This argument, too, is mistaken.

Huawei has already shown that, under both the common law of preclusion and the Due Process Clause, an agency may give an earlier determination preclusive effect only if that earlier determination was reached after a proper adjudication. The preclusive effect of agency decisions is generally governed by the same rules as the preclusive effect of court judgments. *See B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015). One of those rules is that preclusion is appropriate only if the party to be bound "had an adequate opportunity to litigate" the case in the earlier proceeding. *Id.* Indeed, applying preclusion in the absence of such an opportunity would be "inconsistent with the due process of law." *Taylor* v. *Sturgell*, 553 U.S. 880, 897 (2008). *See* Huawei Comments 85.

Huawei has further shown that, under both the common law of preclusion and the Due Process Clause, the preclusive effect of a previous adjudication covers only the issues actually decided in the original proceeding. Under the common law, an agency's decision is "conclusive" only with respect to "an issue of fact or law [that] is actually litigated and determined." *B&B Hardware*, 135 S. Ct. at 1303. The Due Process Clause imposes the same limitation. *Fayerweather* v. *Ritch*, 195 U.S. 276, 298–99 (1904). *See* Huawei Comments 84.

Under these principles, none of the previous determinations on which TIA relies (TIA Comments 15–18; TIA Reply 46) is entitled to preclusive effect before the Commission:

- *Statutes*. TIA cites the 2012 Spectrum Act; the 2013 Commerce, Justice, Science and Related Agencies Appropriations Act; and the 2018 NDAA. TIA Comments 15–16; TIA Reply 46. These statutes, however, resulted from congressional proceedings, not from adjudications in which the affected companies had notice or a meaningful opportunity to be heard. Indeed, the entity that enacted these statutes—Congress—*could not* constitutionally have held an adjudication, because the Constitution forbids "trial by legislature." *United States* v. *Brown*, 381 U.S. 437, 442 (1965). In addition, these statutes include no findings that purport to determine, in the USF context, that any particular "company pos[es] a national security threat to the integrity of the communications networks or the communications supply chain," which is the standard articulated in the Commission's proposed rule. Instead, these statutes address spectrum auctions, use of certain IT systems in the Commerce and Justice Departments, and use of certain telecommunications equipment in nuclear-defense and ballistic-missile facilities.

- *Committee Reports.* TIA also cites the House Armed Services Committee's 2011 Report on the 2012 NDAA and the 2012 HPSCI Report. TIA Comments 15–16; TIA Reply 46. These committees, however, held only legislative proceedings; they never held (and, constitutionally, could not have held) adjudications that provided affected companies notice and a meaningful opportunity to be heard. Nor do these committee proceedings reflect the judgment of Congress as a whole, or even the judgment of one entire house of Congress. Moreover, these committee reports include no findings addressing which companies "pos[e] a national security threat to the integrity of the communications networks or the communications supply chain" in the USF context. Instead, as TIA's own citations of the reports show, the Armed Services Committee's report includes general statements about the "potential threat" allegedly posed by certain "Chinese firms," and the Intelligence Committee's report makes vague recommendations about use of Chinese equipment in "sensitive systems." TIA Comments 15–16. The Intelligence Committee's report suffers from myriad further flaws that Huawei has already detailed. *See* Huawei Comments 87–91.
- *Agency action:* TIA states that, in 2011, CFIUS informed Huawei of its intent to recommend that a supposed acquisition of a small technology firm by Huawei's U.S. subsidiary be unwound; that, in 2011, the Department of Commerce prohibited Huawei from participating in a program that operates a public-safety broadband network; and that, in May 2018, the Department of Defense ordered retail stores on military bases to stop selling Huawei products. TIA Comments 16–18. Yet none of these agencies' "general … statements of concern" (*id.* at 18) involved any findings regarding the USF

program; instead, their actions concerned the distinct contexts of an acquisition of a technology firm, the FirstNet program, and sales on military bases.

In sum, nobody else has ever made the finding that TIA wants the Commission now to make—much less in an adjudication that satisfied the Due Process Clause. Under both the common law of preclusion and the Due Process Clause, therefore, the Commission may not use previous determinations by Congress and agencies as an excuse to forgo an adjudication here. TIA's exhortation for the Commission to take a shortcut by pointing to other governmental reports or actions—none of which involved the same factual question at issue here, let alone a constitutionally appropriate adjudication—thus runs afoul of bedrock procedural protections afforded by the Due Process Clause. Huawei made these points in its initial comments (Huawei Comments 84–85), but TIA has yet to respond to them.

TIA persists that an agency may "rel[y] on adjudications of wrongdoing made in other arenas"—for example, when "the Commission pursues debarment against a USF participant," it may rely on a "conviction or civil judgment" "rendered elsewhere." TIA Reply 84. TIA asserts that the debarment process "offers a useful analogy that informs and legitimizes the Commission's intention to proceed based on security-related determinations made by expert agencies." *Id.* at 84. But this analogy is deeply flawed: In the first place, even under TIA's own reasoning, an agency may rely on previous "*adjudications* of wrongdoing." *Id.* (emphasis added). That previous adjudication—for example, the previous criminal or civil trial—already provides the debarred company with due-process protections. In this case, by contrast, there was no previous "adjudication," and thus no previous provision of due-process protections—and this is so particularly with regard to distinct facts that were not at issue in a previous forum. *See* Huawei Comments 85. In the second place, the debarment process is itself an adjudication; indeed, under the Due Process Clause, it is

required to be. *Id.* at 64–65. In this case, by contrast, the blacklisting process would be accomplished by rulemaking, not by adjudication. In sum, the debarred contractor receives two hearings and two sets of due-process protections (the initial criminal or civil trial and the subsequent debarment hearing); the blacklisted company, by contrast, receives no hearing and no due-process protections at all.

VI. TIA Presents Unfounded, False, And Misleading Accusations Against Huawei

TIA concedes "that the Commission should not make independent determinations regarding the security threat posed by particular companies," and acknowledges that virtually every other commenter agrees with this concession. TIA Reply 45. Nevertheless, TIA alleges an extensive record of U.S. and allied government "concerns and actions" related to Huawei and ZTE. *Id.* at 46. These allegations reflect TIA's preference for elevating suspicions above evidence; they are founded on rumor, insinuation, and assumption, and as discussed below are contradicted by the facts. Nonetheless, these allegations are instructive, if only as an illustration of the "fear, uncertainty, and doubt" tactics being used by some elements within the political branches of the Government to cast Huawei in the worst possible light. They also show why it is legally and constitutionally necessary for the issues to be adjudicated by a truly neutral factfinder in a proceeding subject to proper procedural and evidentiary rules—and with Huawei having the opportunity to review the evidence and rebut it. *See* Section V above. Here, Huawei simply responds to these allegations so that the Commission can understand that it would not be reasonable or justifiable—much less lawful—for it to rely on the suspicions of other components of the Government to generate its proposed blacklist.

TIA argues that Huawei can be singled out because it has been named in pending legislation that is still under consideration by Congress, TIA Reply 47-48, although of course legislation that

has not yet been adopted can have no legal effect. It also asserts that Huawei "is reportedly under investigation" by the U.S. Government, *Id.* at 49, evidently believing that either verifying this hearsay or waiting for any such investigation to be completed would be a waste of time. As the Queen of Hearts said to Alice, "Sentence first—verdict afterwards." Lewis Carroll, *Alice in Wonderland*. Fortunately, American constitutional law—including the Bill of Attainder Clause and the Due Process Clause—does not countenance such an approach.

TIA further contends that Huawei:

- has strong connections to and/or is controlled by the Chinese Government, military and the Party;
- is aided by state subsidies and financing; and
- benefits from Chinese state industrial plans and policies.

It must be noted, however, that TIA's litany of allegations addresses, and at times conflates, the Chinese Government, the Party, Huawei, and ZTE, all of which are separate and distinct entities. Huawei responds in this section only to those allegations that directly concern Huawei or Huawei's alleged relationships with the Government and Party. In particular, Huawei will not comment on any allegations relating to ZTE (but no implication should be drawn from this silence). ZTE is not only a separate company; it is a direct and fierce competitor of Huawei.[5] Any allegation relating to ZTE, whether true or false, cannot fairly be imputed to Huawei.

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[5] *See, e.g.*, K. Hall, "Chinese rivals: ZTE to take on Huawei... in the UK", *The Register*, https://www.theregister.co.uk/2016/09/09/zte_to_take_on_huawei_in_the_uk/. Indeed, the two companies have been opponents in litigation. European Court of Justice, judgment of 16 July 2015, case no. C-170/13 – *Huawei v. ZTE*.

In addition, each of TIA's allegations could just as easily be aimed against Nokia, a telecommunications infrastructure equipment giant with ties to the Chinese Government. Nokia currently oversees all activities in Nokia Shanghai Bell, its joint-venture with state-owned China Huaxin, including research and development ("R&D"), sales, and production. Exhibit E, Nokia Annual Report on Form 20-F 2017 ("Nokia 2017 Annual Report") 4. Nokia Shanghai Bell is one of the 96 state-owned companies under the supervision of the State Council of China. Exhibit F, "List of State-Owned Enterprises." Moreover, it has an operating profit of 83 million Euros in 2017—more than 5 times Nokia's operating profit at the corporate level. Nokia 2017 Annual Report 204. As Huawei has previously stated, Nokia's deep ties to the Chinese Government do not necessarily indicate that its products pose a national security issue. *See* Huawei Comments 41; Huawei Reply Comments 21-22. But Nokia's continued success in the U.S. market, as facilitated by the U.S. government, only provides further evidence that TIA's arguments are overreaching and flawed. And TIA has yet to provide any basis, other than suspicion and speculation, for the Commission to distinguish between Huawei's connections with China and Nokia's (at least) equally strong connections.

A. Connections to the Chinese Government, Military, and the CCP

TIA argues that the information Huawei provided in its original comments is "immaterial in the proceeding at hand" because Huawei is "subordinate to direction from the Chinese state or the CCP." TIA Reply 49, 69-70. TIA claims that "the relevant issue is that [Huawei is] beholden to an institution – the Party – under whose guidance China seems inclined to act in ways counter to the interests of the United States." *Id.* at 70. Indeed, TIA explicitly argues that it does not matter what Huawei says or does, because Huawei cannot act independently of the CCP, saying that Huawei's "submissions have no bearing on the Commission's consideration in this proceeding, as

they are all subordinate to direction from the Chinese state or CCP." *Id.* at 70. This argument has no factual basis and makes a mockery of TIA's professed respect for due process, TIA Comments 61, 81-82, since there cannot be a meaningful hearing if the accused's guilt is not based on evidence and if the accused's evidence is ruled irrelevant before the hearing even takes place. This argument would have been well-received at the Salem Witch Trials, but it should be repudiated here.

In any event, as Huawei has discussed in Section III above, and as the DeLisle Expert Report further demonstrates, the twin assumptions that the CCP both can, and would want to, direct private companies to subvert their own products to serve Party interests are false, and are based on selective out-of-context quotations from the one source cited by TIA. Contrary to TIA's suggestions, the Party is far from all-controlling; private companies enjoy a significant degree of autonomy. DeLisle Report 1-2. Further, again contrary to TIA's suggestions, the Party's goals do not include using private companies as instruments of espionage; in fact, doing so would undermine the reputations of Chinese companies and would defeat the country's economic agenda.

Apart from its generally misleading claim that the CCP effectively controls any nominally private business operating in China, TIA also includes allegations of specific "close connections" between Huawei and the Chinese state, the military, and the CCP. TIA Reply 3, 45, 52, 55, 56-58, 61, 66, 70. TIA fails to mention Nokia Shanghai Bell's provision of telecommunications services to national ministries, the Chinese military, and the Party. Exhibit G, "People-oriented Science and Technology Nokia-Bell Takes the Lead in 5G Technology." Instead, TIA contends that the CCP "plays a critical role within Huawei's elite leadership and is in a position to exert influence over its personnel appointments and operations." TIA Reply 61. And it asserts that Huawei's top leadership includes members of the CCP, the company benefits from the CCP and "ultimately answers"

to the CCP. TIA Reply 58, 61, 69. On examination, however, these sweeping allegations are based on tiny bits of evidence that do not support the facts TIA asserts. Furthermore, even if these claims were true, they would provide no basis for treating Huawei differently than Nokia. Nokia Shanghai Bell, unlike Huawei, codifies Party involvement in its Articles of Association. Exhibit H, "Enterprise Party Organization Oriented Toward Directing, Team Building, and Atmosphere Fostering." Nokia Shanghai Bell's Chairman—who is also its Party Secretary—notes that "under the correct leadership of the State-owned Assets Supervision and Administration Commission of the State Council, the company learned and carried through the spirit of the 19th CPC National Congress in an in-depth manner." Exhibit I, Nokia Shanghai Bell 2017 Corporate Social Responsibility Report ("Nokia 2017 CSR Report") 7. By contrast, neither Chinese law nor Huawei's corporate governing documents permit Party interference in Huawei's business operations.

TIA makes much of the fact that Zhou Daiqi is Huawei's Party Committee Secretary and has several senior operational roles at Huawei. TIA Reply 59. TIA then asserts that "Zhou is identified *in the press* by his affiliation as Party Committee Secretary …" and "only occasionally" as senior vice president of Huawei (a title he does not actually hold).[6] *Id.* at 59-60 (emphasis added). But TIA's selective quotations prove nothing more than a putative trend in press coverage, and

[6] Mr. Zhou's actual roles within Huawei, in addition to serving as secretary of the Party Committee, are Chief Ethics and Compliance Officer, Director of the Corporate Committee of Ethics and Compliance, and member of the Audit Committee and the Supervisory Board. Huawei Investment & Holding Co., Ltd. 2017 Annual Report at 118 (available at https://www-file.huawei.com/-/media/CORPORATE/PDF/annual-report/annual_report2017_en.pdf?la=en-US&source=corp_comm) ("Huawei 2017 Annual Report").

nothing about Huawei. Mr. Zhou was selected to his executive roles by the company's management and stockholders, not by the Party.[7] This can be contrasted with Nokia Shanghai Bell, whose key executives—including its chairman—are appointed *by* the Communist Party Organization Department. *See* Exhibit J, WTO Report WT/GC/W/745; Exhibit K, "State-owned Enterprise Staffing Adjustment."

As explained in the DeLisle Report, every company operating in China—including foreign-owned companies—is required to permit the operation of a Party committee by its employees. DeLisle Report 18. There is nothing special about Huawei in this regard. The Party organization is not involved in management or decision-making of the company. Rather, it focuses on promoting professional ethics and caring for employees that are members of the CCP and participate in the Party organization. TIA speculates that "undoubtedly many other managers at Huawei participate in its internal Party Committee and other Party organizations in addition to fulfilling their corporate roles…. [I]t is impossible to know how wide the network may be. But … presumably the numbers are significant." TIA Reply 60–61. Again, this is pure speculation, and even if true proves nothing more than that Huawei operates within the Chinese social and political system.

Huawei "has always been, and remains today, a private company wholly owned by its founder and its employees through an Employee Stock Ownership Plan, in which 80,818 employees participated at the end of 2017." Huawei Comments 4. Neither the Chinese Government, the

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[7] Specifically, Mr. Zhou was appointed to his ethics and compliance roles by Huawei's CEO; he was appointed to the Audit Committee by the Chairman of the Board of Directors; and he was elected to the Supervisory Board by the stockholders at their annual meeting.

Chinese military, nor the CCP have any ownership interest, influence or control of Huawei's daily operations, business and investment decisions, R&D priorities, profit distributions, or staffing.

B. State Subsidies and Financing

TIA alleges that Huawei has accepted "significant state aid and financing" worth "billions of dollars" in the forms of "credit lines, export credits, grants and subsidies and preferential tax treatment," which have allegedly contributed to its domestic and international expansion. TIA Reply 62, 65. TIA also cites remarks by the former Chairman and President of the Export-Import ("EX-IM") Bank of the United States alleging that Huawei has benefitted from financial support from the "[state-backed] Chinese Development Bank."[8] *Id.* at 63.

Contrary to TIA's allegations, Huawei is not, and never has been, dependent on the Chinese Government for financial support. To support its business growth, Huawei relies (and has always relied) on equity through its Employee Stock Ownership Program ("ESOP"); investment returns; and borrowing from commercial banks for capital funding and financing. Huawei has relationships with more than two dozen commercial banks based in and outside of China, including in the United States. All terms and conditions of Huawei's bank loans follow globally-accepted market practices in compliance with international financial regulations.

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[8] Huawei was aware of the comments made by former EX-IM Bank President and CEO Hochberg when he delivered the speech cited by TIA. Huawei subsequently met with officials of the EX-IM Bank to correct the record about the company's relationship with the Chinese Development Bank ("CDB") and to clarify that CDB only extended credit to communications operators that were Huawei customers, and not to Huawei itself, in order to purchase equipment and construct network infrastructure. As a consequence, Chairman Hochberg made no further speeches or statements in his remaining nearly six years in office alleging that Huawei is or was backed by the CDB.

Any loans or credits extended to Huawei by Chinese banks were commercial loans on market-based terms, and cannot plausibly be a ground for suspicion. Both Chinese and non-Chinese financial institutions, in addition, offer industry-compliant export-buyer credits to Huawei's customers. These financial institutions include ABN AMRO Bank, BNP Paribas, Bank of China, Bank of Tokyo-Mitsubishi UFJ, Citibank, China Development Bank, Export-Import Bank of China, Deutsche Bank, Development Bank of Singapore, Industrial & Commercial Bank of China, ING GROEP, Standard Chartered Bank, and Societe Generale. Each bank makes its own decision on whether to accept customers and project risks based on independent and internal credit judgments. Huawei is not involved in customer decisions on whether or not to accept financing conditions of the banks. Banks and customers negotiate and sign financing contracts directly, with no participation or involvement by Huawei in the financing or decision-making processes.

Such customer financing is a common practice across the telecommunications industry. For example, Nokia Shanghai Bell has long made "good use of national finance," utilizing support from Sinosure, Exim Bank of China, and others in order to develop their overseas markets. Nokia 2017 CSR Report 18. This includes over $175 million in credits from Sinosure to build a wireless network for Togo. *Id.* Similarly, Ericsson's customers "can benefit from the support of two Swedish government backed organisations, The Swedish Export Credit Agency, EKN, and The Swedish Export Credit Corporation, SEK. EKN offers guarantees for payments and financing. The guarantees give international customers competitive financing terms, while lowering the risk for Swedish exporting companies and commercial banks. SEK provides long term funding for Swedish export-related transactions. Enjoying a high credit rating, SEK can offer favourable loans to

facilitate export deals."[9] Other countries, including the United States through the EX-IM Bank, offer similar financing programs for their exports.[10]

TIA also claims that Huawei has received unspecified "subsidies" from the Chinese Government. TIA Reply 62. The term "subsidy" has a specific meaning in respect to international trade, under the "Agreement on Subsidies and Countervailing Measures" administered by the WTO.[11] "The definition contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist."[12] Quite simply, TIA does not identify any arrangement in which Huawei has participated that meets these criteria. No WTO member has ever claimed, and the WTO has never made a determination, that Huawei has received any "subsidy" under this definition.

TIA further alleges that a European Commission ("EC") report, which it says was "published in 2011" but then in the next sentence says "was never publicly released," concluded that Huawei had received "massive" credit lines from China's export credit agencies. TIA Reply 65.

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[9] "A Guide to the Swedish Export Credit System," available at http://www.sek.se/en/wp-content/uploads/sites/2/2016/02/Guide_to_the_Swedish_export_credit_system.pdf (spelling and capitalization as in original).

[10] "The Export-Import Bank of the United States …, a wholly owned federal government corporation, is the official export credit agency (ECA) of the U.S. government. Its mission is to assist in financing and facilitating U.S. exports of goods and services to support U.S. employment." Congressional Research Service, "Export-Import Bank: Frequently Asked Questions" (April 13, 2016), available at https://fas.org/sgp/crs/misc/R43671.pdf.

[11] World Trade Organization, "Subsidies And Countervailing Measures: Overview", available at https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

[12] *Id.*

The EC never initiated any formal subsidy investigation against Huawei and never issued any formal report alleging such a subsidy. TIA's only citation is to a newspaper article, not to an EC document. This is just more hearsay, and outdated hearsay to boot.

Finally, TIA argues in a footnote that Huawei has received direct grants from the Chinese Government to support research and development. *Id.* at 63, n.196. The insinuation that this evidence somehow proves a "threat to national security," though, is absurd. Government R&D grants received by Huawei in 2017 constituted about 1.3% of the company's total R&D expenditures,[13] with the overwhelming majority of R&D financed by the company's internal resources. These grants came from Government innovation programs that are open to all companies and institutions registered in China, including foreign owned enterprises operating in China. Numerous universities, R&D institutions, and private companies — including Chinese affiliates of Nokia and Ericsson — participated in and benefitted from these programs. For example, Nokia's annual report indicates that it received over $160 million (EUR 140 million) in government grants and tax deductions for its R&D alone, or over 2.8% of its total R&D expenditure, substantially more than Huawei. Nokia 2017 Annual Report 47, 154. Although Nokia doesn't disclose how much of its government grants are from Chinese Government, it's inferably significant—Nokia Shanghai Bell has over 10,000 R&D employees in China, which accounts for approximately a third of its global R&D staff.[14] Nokia 2017 CSR Report 4. As China sponsors a substantial amount of R&D, non-

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[13] *See* Huawei 2017 Annual Report, *supra*, at 82 (government grants of RMB 1,178 million) and 50 (total R&D expenditures of RMB 89,860).

[14] More than a third of Nokia's 103,000 employees work on R&D, 2017 Nokia People and Planet Report at 5, https://www.nokia.com/sites/default/files/nokia_people_and_planet_report_2017.pdf.

Chinese companies can receive grants from the Chinese Government in the same way as Chinese companies. DeLisle Report 7. Nokia actively participates in research for China's 5G 863 National Program, as well as other major national special projects. Exhibit L, "Zhang Qi from Nokia-Bell China Will Certainly Lead the 5G Era." There is absolutely no relationship between this public research program and any conceivable "threat to national security."[15]

C. State Industrial Policies and Plans

TIA asserts, without any evidence, that Huawei is involved in, benefits from, and is "expected to accept and implement" strategic state industrial development plans, policies and strategy. TIA Reply 66-67. It also claims Huawei serves as a "conduit" to channel advanced commercial technologies to, and is "well positioned" to assist the Chinese military, while likewise serving "a fitting channel for China to project its digital ambitions." *Id.* at 67-69.

TIA cannot cite any evidence for these claims, other than general statements from the Chinese Government confirming that it has an economic strategy to improve the country's networking sector, because they are entirely imaginary. Conversely, Nokia Shanghai Bell is undisputedly in "active" cooperation with the Chinese Government to further its national strategies. With 15,000 employees in over 50 countries, and operations spanning industries such as 5G, Internet of Things ("IoT") and cloud computing, Nokia Shanghai Bell responds "to the 'Belt and Road' initiative …

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[15] Such R&D incentive programs are hardly unique to China. Both the EU and the United States offer similar grants. Huawei has participated in the EU's Horizon 2020 Framework Programme for Research and Innovation (2014–2020) (2013/743/EU), which is designed to enable the EU to lead in several industrial fields. The National Science Foundation, National Institutes for Health, Department of Energy, and other agencies administer comparable grant programs in this country.

and explores a development path unique to central government-led enterprises." Nokia 2017 CSR Report 1. Nokia Shanghai Bell is also actively cooperating China's national strategies of "Made in China 2025" and "Internet Plus." Exhibit M, "Why Nokia Chooses Hangzhou to Build Its Largest R&D Center in China." In addition, Nokia Shanghai Bell has 43,700 square meters of production facilities in China alone, and controls the *only* Chinese production facility for fixed access systems. Nokia 2017 Annual Report 139. Notably, Risto Kalevi Siilasmaa,[16] Chairman of Nokia Corporation, has stated "by taking advantage of technological superiority, [Nokia] take[s] the initiative to participate in construction of the "Belt and Road" initiative." Nokia 2017 CSR Report 11.

In sum, none of the evidence TIA submitted supports the notion that Huawei differs from any other company when it comes to national security concerns. Rather, the facts demonstrate further that the proposed rule is arbitrary and capricious in drawing an irrational line and singling out specific suppliers.

VII. Conclusion

In the final analysis, the appropriate forum for resolving these factual disputes about Huawei is an adjudication, not a rulemaking. Traditionally, agencies use rulemaking to determine "legislative" facts—"general" facts that have no "reference to specific parties." *Association of Nat'l Advertisers, Inc.* v. *FTC*, 627 F.2d 1151, 1161 (D.C. Cir. 1979). In contrast, agencies ordinarily use adjudications to determine "adjudicative" facts—"facts concerning the immediate parties." *Id.*; *see also Independent Bankers Ass'n* v. *Board of Governors*, 516 F.2d 1206, 1215 n.26

[16] Also goes by Chinese name Li Situo, or 李思拓.

(D.C. Cir. 1975) ("Adjudicative facts are the facts about the parties and their activities, businesses, and properties"); *Heartland Regional Medical Ctr.* v. *Leavitt*, 511 F. Supp. 2d 46, 52 (D.D.C. 2007) (stressing "the time-honored distinction between rulemaking and adjudication, the former based on legislative facts and the latter based on adjudicative facts"). Indeed, while the Due Process Clause allows agencies to use rulemakings to reach "*general* [factual] determinations]," it requires them to use adjudications to resolve factual disputes in which "a relatively small number of persons [are] concerned, who [are] exceptionally affected, in each case upon individual grounds." *Bi-Metallic*, 239 U.S. at 446 (emphasis added); *supra* Part V.

Facts about Huawei are adjudicative facts. They concern an individual party and its business; they are not general facts about the world at large. Under both the Due Process Clause and the American legal tradition, these factual disputes must be resolved in a hearing, before a neutral factfinder, through procedural and evidentiary rules designed to promote accuracy and fairness in the search for truth. TIA's factual allegations against Huawei have never, to our knowledge, been put before an adjudicative body. Nor may these factual questions be resolved in a rulemaking, which lacks the legally appropriate procedural safeguards discussed above. Thus, TIA's allegations against Huawei are both factually unsupported and procedurally deficient.

Respectfully submitted,
___/s/_____

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LIST OF EXHIBITS

Exhibit A	Expert Report of Jacques DeLisle
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Exhibit D	2017 Market Share and Concentrated Data: Selected Excerpts
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