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 the Federal Communications Commission ("FCC" or "Commission") to supplement the record in the above-captioned docket. In particular, Huawei responds to the Commission's claim that its *Draft Report and Order*'s prohibition against expenditure of Universal Service Fund ("USF") support on equipment or services produced or provided by certain companies that allegedly pose national security threats to the integrity of communications networks or the communications supply chain "implements section 105" of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1004.[1] Huawei also sets forth several additional reasons that the Commission's actions in the *Draft Report and Order* are unlawful.

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[1] *See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Draft Report and Order, Order, and Further Notice of Proposed Rulemaking, WC Docket No. 18-89, FCC-CIRC1911-01, paras. 35-36 (circulated Oct. 29, 2019) ("*Draft Report and Order*") (*citing Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, 14992-97, paras. 9-14 (2005) ("*2005 CALEA Order*"), *pet. for rev. denied, American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006)).

I. The Commission May Not Invoke CALEA as Authority for the Rule

The Commission's reliance on section 105 of CALEA is misplaced for numerous reasons. *First*, the draft rule is not a logical outgrowth of the Notice of Proposed Rulemaking ("NPRM").[2] *Second*, the interpretation of the statute, including the term "switching premises," in the *Draft Report and Order* departs from CALEA's plain text; ignores statutory structure, purpose, and legislative history; is unauthorized by CALEA's rulemaking authority; and otherwise is unreasonable and lacks any meaningful limiting principle. *Third*, this overly expansive interpretation of "switching premises" contradicts the specific terms of CALEA and unreasonably and impermissibly expands its reach. *Finally*, there is no nexus between CALEA, which applies generally to all telecommunications carriers, and eligibility for USF support.

A. The Draft Rule Is Not a Logical Outgrowth of the Proposed Rule

As an initial matter, the Commission cannot rely on CALEA as a source of authority for its rule because it never proposed to rely on CALEA in its NPRM. Thus, a rule based on CALEA would not be a logical outgrowth of the rule proposed in the NPRM. A rule is a logical outgrowth of its notice only if parties "should have anticipated that the change [in approach from the notice] was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citation and internal quotation marks omitted). But a rule flunks that test if "interested parties would have had to divine [the agency's] unspoken thoughts." *Id.* (citation and internal quotation marks omitted).

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[2] *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Notice of Proposed Rulemaking, WC Docket No. 18-89, 33 FCC Rcd. 4058 (rel. Apr. 18, 2018).

The Commission cannot meet that test here with respect to its invocation of CALEA. In the *Draft Report and Order*, the Commission cites two provisions of CALEA, 47 U.S.C. §§ 229 and 1004. But the Commission cited § 229 *nowhere* in the NPRM and cited § 1004 only in a footnote with no explanation or context whatsoever. NPRM, ¶ 36 n.64. Moreover, the Commission never cited *any* provision of CALEA as authority for the rule. NPRM, Appendix A (listing other purported sources of authority for the proposed rule). If the Commission wanted to rely on CALEA, it had to provide notice and an opportunity for comment. Had it done so, it would have learned at least the reasons set forth in detail below why such an interpretation exceeds the terms of the statute and otherwise makes no sense. But the Commission failed to put anyone on notice that it might attempt to base its USF rule on CALEA. Huawei and other commenters thus were deprived of the opportunity to develop and submit expert testimony on the issue—such as evidence to affirmatively contradict the FCC's unsupported speculation about eligible telecommunications carriers' using USF funds to facilitate unauthorized surveillance (*infra* pp. 14-15). A rule purportedly based on CALEA cannot be considered a logical outgrowth of the NPRM and is defective for that reason alone, quite apart from its substantive invalidity.

B. The FCC's Proposed Interpretation of CALEA Departs from the Statute's Plain Text, Ignores Statutory Structure, Purpose, and Legislative History, and Is Otherwise Patently Unreasonable

Section 105 of CALEA provides as follows:

> A telecommunications carrier shall ensure that any interception of communications or access to call-identifying information *effected within its switching premises* can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.[3]

[3] 47 U.S.C. § 1004 (emphasis added).

In the *Draft Report and Order*, the Commission interprets the term "switching premises" "as including all points in a carrier's network where an interception might be activated." *Draft Report and Order*, ¶ 35. This interpretation is patently unreasonable and ignores all ordinary tools of statutory construction.

1. CALEA's plain text cannot sustain the draft rule

The cardinal rule of statutory construction is "that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "[E]very clause and word of a statute" must be given effect, and, "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted). Consequently, when section 105 states that it applies to communications interceptions "effected within [a carrier's] switching premises," 47 U.S.C. § 1004, that is exactly what the statute means: the statute covers communications interceptions only when they are effected within a carrier's switching premises. There is no ambiguity to sort out.

The Commission acknowledges that "the statutory language uses the term 'switching premises.'" *Draft Report and Order*, ¶ 35. The Commission nonetheless claims that it can interpret section 105 to apply to "*all points* in a carrier's network where an interception might be activated"—regardless, apparently, of whether any particular point is actually within the carrier's switching premises. *Id.* (emphasis added). Arrogating to itself the power to legislate, the Commission reads "switching premises" right out of the statute. The Commission has no authority to do so, especially when, as explained below, Congress' "switching premises" language is not a mere technicality but is a central component of CALEA's scheme.

2. CALEA's structure, purpose, and context likewise forbid the Commission to interpret CALEA to authorize the draft rule

CALEA's structure and purpose make clear that the statute applies only to interception of communications by law enforcement or via tools created by carriers to permit interception of communications by law enforcement—*not* to any and all attempts by other actors (such as foreign governments) to intercept communications. Yet the *Draft Report and Order* does not so much as acknowledge CALEA's focus—which is evident in the statute's very name. In addition, the Commission cannot reconcile CALEA's applicability to all carriers with a regulation limited to the USF context, which is governed by different statutory provisions. And even if it could, CALEA would prohibit precisely the type of rule the Commission has drafted.

a. CALEA's several provisions make clear that the statute enables *the government* to intercept communications, and that the restrictions on interception are, consequently, targeted at *the government* or the capabilities the statute requires carriers to implement in order to enable *the government* to effect interception. The draft rule, however, is entirely unrelated to enabling the government to effect communications interceptions or preventing the abuse of those capabilities.

To begin, CALEA requires telecommunications carriers to make tools available to "enabl[e] *the government*" to intercept communications "pursuant to a court order or other lawful authorization." 47 U.S.C. § 1002(a) (emphasis added) (listing the four interception capabilities required by the government); *see also id.* § 1001(5) ("The term 'government' means the government of the United States and any agency or instrumentality thereof, the District of Columbia, any commonwealth, territory, or possession of the United States, and any State or political subdivision thereof *authorized by law to conduct electronic surveillance*." (emphasis added)). The subject of the statute is authorized interception of communications by the government, and "authorization"

under CALEA plainly refers to authorization by law or a court for the government to intercept communications.

This context also shows why § 1004 does not reach beyond a carrier's "switching premises" and why it requires "the affirmative intervention of an individual officer or employee of the carrier." A carrier is required by law to be capable of "delivering intercepted communications . . . *to the government*, pursuant to a court order or other lawful information, . . . to a location *other than the premises of the carrier*." 47 U.S.C. § 1002(a)(3) (emphases added). The carrier must have the capability of intercepting communications *on its premises* and sending them to the government; consequently, the carrier must guard against the improper use of those statutorily required capabilities. And by requiring the affirmative participation of a carrier employee, Congress placed the controls in the carrier's hands to protect against law enforcement abuse. But the statute does not impose any requirement of interception capabilities on a carrier beyond its switching premises, and, correspondingly, does not impose any requirements for preventing interception *beyond* the carrier's switching premises. *See id.* § 1004.

b. If that were not enough, CALEA gives the Commission no rulemaking authority in the USF context. CALEA applies to *all* telecommunications carriers. *See id.* § 1004 ("A telecommunications carrier . . . ."); *id.* § 1001(8) (definition of a telecommunications carrier). But the principles governing carriers that receive USF funds are set forth in the more specific provisions of 47 U.S.C. § 254. And there is no justification for imposing a requirement under CALEA on just a subset of carriers, because CALEA applies by its very terms to *all* telecommunications carriers, not just those that share some attribute (like USF funding) entirely unrelated to CALEA. *See infra* Part I.D. Indeed, the Commission offers no rationale under which CALEA should be interpreted

to guard against unauthorized surveillance allegedly resulting from use of covered entities' equipment in USF recipients' networks but not use of that same equipment in carriers that do not receive USF. Nothing in CALEA would justify that distinction.

3. CALEA's legislative history likewise undermines the Commission's interpretation

The statute's legislative history makes clear that the purpose of CALEA is to impose requirements on carriers to assist law enforcement and corresponding protections against *law enforcement* abuse. Signal interception can occur almost anywhere, and that was true when CALEA is adopted. It is thus significant that CALEA focuses on "switching premises," because such premises are a place where a carrier employee can provide access for law enforcement, and for which law enforcement needs carrier cooperation. *Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: J. Hearings on H.R. 4922 and S. 2375 Before the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary and the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 28 (1994) (Mar. 18 Statement of Louis J. Freeh, Director of FBI) ("Since communication interceptions and dialing information acquisitions increasingly will be facilitated from within common carrier premises, including switching facilities and network elements, it is critical that these facilities remain highly secure. . . . [C]ommon carriers will designate individuals who exclusively will have the ability to activate all such interceptions for law enforcement."). Indeed, the legislative history makes clear that government agencies do not have the authority to activate remotely interceptions within the switching premises of a telecommunications carrier: The Commission itself has quoted the legislative history of § 1004, which states that the provision was enacted to "make clear that government agencies do not have the authority to activate remotely interceptions *within the switching premises*

of a telecommunications carrier. Nor may law enforcement enter *onto a telecommunications carrier's switching office premises* to effect an interception without the carrier's prior knowledge and consent when executing a wiretap under exigent or emergency circumstances. . . All executions of court orders or authorizations requiring access to the switching facilities will be made through individuals authorized and designated by the telecommunications carrier."[4] Similarly, as discussed below, § 229(b)(1) centers on preventing employees from permitting the abuse of the tools CALEA requires carriers to install and maintain as part of ensuring law enforcement's ability to intercept communications.

What is more, the legislative history confirms that even as to law enforcement, § 1004 does not reach communications interceptions that do not occur on carrier "switching premises." *Compare* H.R. Rep. 103-827, at 26 ("All executions of court orders or authorizations requiring access to the switching facilities will be made through individuals authorized and designated by the telecommunications carrier.") *with id.* ("Activation of interception orders or authorizations originating in local loop wiring or cabling can be effected by government personnel"—that is, not on carrier switching premises and not by carrier employees.).

4. The Commission's rulemaking authority under § 229 does not authorize the Draft Order's USF rule either

The Commission also purports to rely on 47 U.S.C. § 229 for the draft rule. Notably, the actual draft rule does not cite § 229 as authority. *Draft Report and Order*, Appendix A. That is not

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[4] *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Report and Order, 14 FCC Rcd. 4151, 4158, ¶ 17 ("*1999 CALEA Order*") (alterations in original) (emphasis added) (*quoting* H.R. Rep. No. 103-837, at 26 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489), *recon. sua. sponte, Order on Reconsideration*, 15 FCC Rcd. 20735 (2000).

surprising, because § 229(a) merely requires the Commission to "prescribe such rules as are necessary to implement the requirements of [CALEA]"—it does not authorize the Commission to *expand* the requirements of CALEA.

The Commission also points to section § 229(b)(1). That provision states, in full:

> **(b) Systems security and integrity**
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> The rules prescribed pursuant to subsection (a) shall include rules to implement section 105 of the Communications Assistance for Law Enforcement Act that require common carriers—
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> (1) to establish appropriate policies and procedures for the supervision and control of its officers and employees—
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> (A) to require appropriate authorization to activate interception of communications or access to call-identifying information; and
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> (B) to prevent any such interception or access without such authorization;
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> (2) to maintain secure and accurate records of any interception or access with or without such authorization; and
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> (3) to submit to the Commission the policies and procedures adopted to comply with the requirements established under paragraphs (1) and (2).

47 U.S.C. § 229(b)(1).

Section 229(b)(1) by its terms refers to policies and procedures "for the supervision and control of [a carrier's] officers and employees." But the rule here is manifestly not about supervising or controlling officers and employees. Moreover, the rules the Commission prescribes must "implement section 105"—which requires not only authorization for interception of communications, but also "the affirmative intervention of an individual officer or employee of the carrier." *Id.* § 1004. Thus, § 229(b)(1) makes clear that employee involvement helps ensure that interception of communications occurs only with proper authorization.

5. The Commission's interpretation of CALEA is absurd and ignores the Commission's own prior understanding of CALEA

Under the interpretation proposed in the *Draft Report and Order*, as noted, CALEA would require every telecommunications carrier to ensure that no unauthorized interceptions can occur at any "point[] in [its] network where an interception might be activated." In other words, it would interpret the statute as applying to any interception anywhere on a carrier's network, as if the words "effected within its switching premises" were not in the statute. Under this absurd interpretation, a carrier would be liable if (for example) it failed to prevent an unauthorized person from climbing a telephone pole and attaching alligator clips to a pair of copper wires. If an interception "might be activated" at the top of a telephone pole, then that pole becomes a "switching premises" under the proposed interpretation.

Besides twisting the language of the statute beyond recognition, the proposed interpretation ignores past Commission precedent and its own understanding of Congressional intent. In first adopting rules under section 105 of CALEA, the Commission recognized that the primary purpose of this section was to prevent unauthorized interception of communications *by law enforcement agents*.[5] Moreover, the Commission found that commenters in that proceeding "generally agree with our tentative conclusions that section 105 of CALEA imposes a duty upon each carrier to ensure that only lawful interceptions will occur *on its premises*[.]"[6]

The Commission's interpretation of "switching premises" in the *Draft Report and Order* is akin to its interpretation of the term "automatic telephone dialing system" ("ATDS") that was struck down by the D.C. Circuit in 2018 as an unreasonable reading of the Telephone Consumer

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[5] *1999 CALEA Order*, 14 FCC Rcd. at 4159, ¶ 20 (emphasis added).

[6] *1999 CALEA Order*, 14 FCC Rcd. at 4163, ¶ 27 (emphasis added).

Protection Act ("TCPA").[7] In that case, the D.C. Circuit rejected the Commission's interpretation of "capacity" in the statutory definition of ATDS as encompassing "potential functionalities" and "future possibility,"[8] which the Commission conceded could include smartphones used by everyday Americans. In holding the Commission's reading to be unreasonable, the D.C. Circuit held that "[t]he TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."[9] The court further proclaimed that "it is untenable to construe the term 'capacity' in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."[10]

So too here, it cannot be the case that section 105 extends to all points of a carrier's network (whether on the carrier's premises or not) where an interception *might* be activated. Just as the Commission's interpretation of ATDS relied too heavily on the theoretical, the Commission's assertion of its authority here relies on potential functionalities and future possibilities. For example,

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7 *See ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

8 *ACA Int'l*, 885 F.3d at 695.

9 *ACA Int'l*, 885 F.3d at 697.

10 *ACA Int'l*, 885 F.3d at 698.

the Commission cites to the "*possibility*" that untrusted suppliers "will maintain the ability to illegally activate interceptions or other forms of surveillance"[11] but provides no evidence of the likelihood of this possibility occurring or that it has already occurred. Moreover, the Commission's interpretation in the *Draft Report and Order* is inconsistent with 2005 interpretation of "switching" as including "routers, softswitches, and other equipment that may provide addressing and intelligence functions to packet-based communications to manage and direct the communications along to their intended destinations."[12] At that time, the Commission found that this interpretation describes "a function that Congress intended to be covered" and is "most consistent with the purpose of the statute."[13]

The D.C. Circuit in 2018 considered similar disconnects between the legislative history and the Commission's interpretation of ATDS, noting that "a several-fold gulf between congressional findings and a statute's suggested reach can call into doubt the permissibility of the interpretation in consideration."[14] As the court explained,

> "even if the [statute] does not foreclose the Commission's interpretation, the interpretation [can] fall[] outside the bounds of reasonableness" at *Chevron's* second step. *Goldstein v. SEC*, 451 F.3d 873, 880-81 (D.C. Cir. 2006). That is because an "agency['s] construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority." *Id*. (quoting *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003)).[15]

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11 *Draft Report and Order*, para. 35.

12 *2005 CALEA Order*, 20 FCC Rcd. at 14994, para. 11.

13 *2005 CALEA Order*, 20 FCC Rcd. at 14994, para. 11.

14 *ACA Int'l*, 885 F.3d at 698.

15 *ACA Int'l*, 885 F.3d at 698-99.

The court rejected the Commission's ATDS definition, holding that "the Commission's expansive understanding of 'capacity' in the TCPA is incompatible with a statute grounded in concerns about hundreds of thousands of 'solicitors' making 'telemarketing' calls on behalf of tens of thousands of 'businesses'" and that "[t]he Commission's interpretation would extend a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers."[16] The D.C. Circuit also recalled the Supreme Court's rejection of an interpretation of the term "disability" as used in the Americans with Disabilities Act that would have treated some 160 million persons as disabled in the face of congressional findings contemplating the population of disabled persons as numbering only 43 million.[17]

Similarly, the reach of CALEA – as the *Draft Report and Order* admits – is confined to carriers' "switching premises."[18] However, the *Draft Report and Order* concedes that the definition of "switching premises" adopted for purposes of the instant rule extends well beyond what could reasonably be construed as switching premises and provides the Commission with virtually unlimited regulatory authority to prohibit carriers from using equipment from certain manufacturers under the theory that such equipment could lead to the possibility of illegal interception or other forms of surveillance. Such an expansive reading is at odds with the legislative history of section 105 and CALEA and vastly exceeds the delegation of authority by Congress to the Commission under section 105 and CALEA.

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[16] *ACA Int'l*, 885 F.3d at 698.

[17] *ACA Int'l*, 885 F.3d at 698 (*citing Sutton v. United Air Lines, Inc.*, 527 U.S.C. 471, 494-95 (1999) (Ginsburg, J., concurring)).

[18] 47 U.S.C. § 1004 (requiring a telecommunications carrier to "ensure that any interception of communications or access to call-identifying information effected *within its switching premises* can be activated only in accordance" with lawful authorization and affirmative intervention by the carrier's officers or employees) (emphasis added).

Unlike the Commission's 2005 interpretation, the interpretation advanced in the *Draft Report and Order* has no meaningful limiting principle and leads to the conclusion that section 105 of CALEA extends to *any point* in all telecommunications carriers' networks. This is an unreasonable and untenable interpretation of section 105.

C. The Commission's Expansive Interpretation of "Switching Premises" Unreasonably and Impermissibly Expands the Reach of CALEA

The Commission's broad view of its authority under section 105 of CALEA also is an unreasonable and impermissible expansion of the scope and reach of CALEA.

Section 103(b)(1) of CALEA denies any law enforcement agency the power "to prohibit the adoption of *any equipment*, facility, service, or feature by any provider of a wire or electronic communication service[.]"[19] The Commission's rulemaking authority under Section 107(b) of CALEA[20] allows it to prescribe standards to "meet the assistance capability standards of [section 103]," but a rule prohibiting carriers from adopting particular equipment is expressly prohibited by Section 103. The Commission cannot reasonably interpret CALEA to authorize a rule that is directly contrary to the specific terms of the statute.

Even if the Commission did have authority to prohibit specific equipment under CALEA, the proposed rule would nonetheless be arbitrary and capricious. The *Draft Report and Order* asserts that the rule implements section 105 of CALEA "by reducing the likelihood that [eligible telecommunications carriers] use USF funds to facilitate unauthorized surveillance."[21] The *Draft Report and Order* relies solely on unsupported speculation that equipment produced by certain

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[19] 47 USC § 1002(b)(1) (emphasis supplied).

[20] 47 USC § 1006(b).

[21] *Draft Report and Order*, para. 36.

entities results in "the possibility that those suppliers will maintain the ability to illegally activate interceptions or other forms of surveillance within that equipment without the carrier's knowledge, whether through the insertion of malicious hardware or software implants, remote network access maintained by providers of managed services, or otherwise."[22] There is no evidence in the record or otherwise that Huawei equipment has been involved in any unauthorized interception, whether on the networks of USF support recipients or those of other providers. Even if there were such evidence, the Commission's concern with "reducing the likelihood" of such unauthorized surveillance falls short of prohibiting unauthorized interception as is required by section 105.

Indeed, if section 105 of CALEA is interpreted as prohibiting telecommunications carriers from using any equipment that has *any* possibility, no matter how remote, of being subject to unauthorized access for purposes of intercepting communications, then *every* telecommunications carrier is currently in violation of CALEA. There is no such thing as telecommunications equipment that is absolutely secure against unauthorized access under all circumstances. A statutory interpretation that would impose impossible requirements is surely arbitrary and capricious.

D. There is No Nexus Between CALEA and Eligibility for USF Support

Finally, the Commission acknowledges that the rule adopted in the *Draft Report and Order* applies "only to [eligible telecommunications carriers'] use of USF funds" and "disagree[s] with Huawei's argument that the link between this obligation and the prohibition … is 'remote.'"[23] The Commission's position on this point is illogical.

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[22] *Draft Report and Order*, para. 35.

[23] *Draft Report and Order*, para. 36 (citing Huawei Comments at 31-32).

As the *Draft Report and Order* acknowledges, CALEA (including section 105) imposes obligations on all telecommunications carriers, not just USF recipients.[24] Section 105 was enacted as part of a broader statutory scheme to address concerns regarding the ability for telecommunications carriers to cooperate in the interception of communications for law enforcement purposes as communications evolved to include advanced technologies and features. By contrast, section 254 was adopted to address a specific concern of Congress regarding making advanced communications services available to all Americans. By way of illustration, section 105 does not apply to private networks,[25] which may include Wide Area Networks deployed by schools using support from the E-rate program that would be subject to the rule adopted in the *Draft Report and Order*. Under the statutory interpretation principle that a specific provision governs a more general one,[26] requirements imposed on carriers (and others) participating in the USF program are governed by the specific principles outlined in section 254, not the general provisions of CALEA. Congress

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[24] *Draft Report and Order*, para. 35 & n. 100.

[25] The term "telecommunications carrier" "(A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier *for hire*; and (B) includes— (i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of this title); or (ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter; but (C) does not include— (i) persons or entities insofar as they are engaged in providing information services; and (ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General." 47 U.S.C. § 1001(8).

[26] *See Nitro-Lift Techs. L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (acknowledging that the interpretive principle that the specific governs the general (*generalia specialibus non derogant*) applies to conflict between laws of equal dignity).

surely did not intend for the Commission to use section 105 to extend its authority over networks and providers that were not intended to be covered by CALEA.

Moreover, if the Commission's position were accurate (which as discussed above, it is not), the Commission ostensibly could dictate what equipment carriers – an even non-carriers that are not subject to CALEA – may use in any network, regardless of whether USF support is used to support the network. This is precisely the type of result that Congress sought to avoid by limiting the ability for law enforcement to dictate the system design of telecommunications carriers subject to CALEA[27] and limiting its application to carriers' switching premises.

II. The Rule and Designation Proceeding Are Unlawful for a Number of Additional Reasons

CALEA aside, the draft rule and proposed designation proceeding are unlawful for several additional reasons:

- The draft rule is not a logical outgrowth of the proposed rule insofar as it relies on invocation of "public safety" under 47 U.S.C. § 254(c)(1)(A). The Commission provided no notice in the NPRM that its proposed rule might rest on a public-safety rationale under § 254(c)(1)(A), and Huawei and other commenters were deprived of the opportunity to contest that reading of the statute or to develop and submit expert testimony on the issue. Yet the Commission now claims that its "decision here to limit the services that will be supported by USF is especially consistent with public safety, under section 254(c)(1)(A)," *Draft Report and Order*, ¶ 31, with no notice or opportunity for comment. In any event, the Commission is wrong on the merits, because § 254(c)(1)(A) gives it no authority for the draft rule.

- Neither the designation process nor the initiation of designation proceedings against Huawei is a logical outgrowth of the proposed rule. The Commission made no proposal in the NPRM about a process for designating companies as "national security

[27] *See* H. Rep. No. 103-837 at 19 (stating that "[t]he bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies" and "establishes a reasonableness standard for compliance of carriers an manufacturers").

threat[s] to the integrity of communications networks or the communications supply chain," *Draft Report and Order*, ¶ 39, yet now purports to create and apply such a process with no notice or opportunity for comment.

- If the draft rule contains any ascertainable criteria for determining whether "a company poses a national security threat to the integrity of communications networks or the communications supply chain," *Draft Report and Order*, ¶ 39, they did not appear in the NPRM and are not a logical outgrowth of the proposed rule; indeed, the NPRM itself noted that, at the time, the FCC had no proposal yet to make about the proper criteria to use. Moreover, since the draft order fails to state meaningful and ascertainable criteria, the rule is in all events void for vagueness: The draft rule gives companies no way of knowing what is required to avoid designation and provides no guidance to ensure that its enforcement is not arbitrary or discriminatory.

- The Commission's draft order is impermissibly retroactive. The order announces a new rule that alters both past and future legal consequences of past actions of Huawei and others—by, among other things, announcing a new legal standard and designating Huawei as in violation of it, because of alleged pre-promulgation conduct and associations, in the same *Draft Report and Order*, with no prior notice, with imposition of serious stigmatic injury, and with disruptive consequences and potential economic and legal exposure from past actions. It is thus both invalid as a "rule" and also "arbitrary and capricious."

- The draft rule is arbitrary and capricious because, among other things, the *Draft Report and Order* fails to address many material comments and proposed alternatives submitted by Huawei and other parties. For example, the Commission failed to respond to the many comments urging it to address the global nature of the supply chain and failed meaningfully to address proposals to adopt a risk-based approach, which would provide greater security while exacting fewer costs.

- The Commission's decision to convert the proceeding from a rulemaking—the only type of proceeding contemplated by the Notice of Proposed *Rulemaking*—to a rulemaking accompanied by an adjudicatory decision (*i.e.*, Huawei's initial designation) is unlawful and prejudicial. Not only is Huawei's designation not a logical outgrowth of the NPRM, but it denies Huawei a meaningful opportunity for comment and pre-deprivation due process. By making such an adjudicatory decision without appropriate notice, the Commission has denied Huawei the opportunity to make a full record for the Commission and the courts. Moreover, neither the proposed rule nor even the initial designation specifies the criteria that will be followed in applying the proposed rule: the proposed rule is silent on the matter and the purported basis for Huawei's initial designation is just an assortment of alleged facts and legal conclusions. As a result, Huawei has not been provided a meaningful opportunity, before the initial designation will take effect, to know what criteria the Commission is relying on, or the standards against which any rebuttal or response will be measured—much less to address the Commission's "facts" or underlying reasoning and/or to provide an appropriate response. In addition, Huawei has had no opportunity to address the harm that such an initial designation will cause to

Huawei, Huawei's reputation, and Huawei's business goodwill. Huawei urges the Commission to remove the initial designation from any final order, and instead to provide Huawei with a meaningful opportunity to be heard and to make an appropriate record on the pertinent issues, and also to provide to Huawei, the Public Safety and Homeland Security Bureau, and all others the criteria upon which a designation is to be based.

- The proposed rule provided no notice regarding what procedural protections the Commission intends to afford initially designated companies, and the *Draft Report and Order* does nothing more than allow Huawei to provide a written submission in response to the accompanying report and initial designation. The Commission did not give Huawei notice of the factual allegations against it or a meaningful opportunity to respond prior to the initial designation, bases the minimal procedures provided on an erroneous understanding of the liberty and property interests at issue, and does not afford Huawei the process to which it is constitutionally entitled for challenging the initial designation. The designation procedures that the Commission has proposed are also legally deficient insofar as they do not foreclose ex parte contacts. *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 539-41 (D.C. Cir. 1978); *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 242-45 (1973). Indeed, Huawei has already explained that it is entitled to the full panoply of protections guaranteed by the Due Process Clause of the Fifth Amendment and the formal adjudication provisions of the Administrative Procedure Act and Communications Act. *See* Huawei Opening Comments 61-86 (June 1, 2018). And even if the Commission denies Huawei these required protections, it is obligated to provide prompt and transparent guidance on the designation proceeding procedures and to indicate with particularity what process will be afforded, for example, to resolve disputed factual issues.

- The designation process that the Commission has proposed is invalid because, among other things, neither the Chief of the Public Safety and Homeland Security Bureau nor any of the Bureau's staff that are responsible for making final designations are properly appointed officers of the United States in accordance with the Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2. *See generally Lucia v. SEC*, 138 S. Ct. 2044, 2051-55 (2018); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511-12 (2010).

- Even assuming that an independent agency may constitutionally make national security judgments, the nondelegation doctrine forbids Congress to confer anything more than gap-filling authority on an agency when it delegates law-making power, especially on a policy matter so significant as national security. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 426 (1935); *Gundy v. United States*, 139 S. Ct. 2116, 2136-39 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *id.* at 2130-31 (Alito, J., concurring in the judgment), *petition for reh'g pending*, No. 17-6086. At a bare minimum, Congress must provide an intelligible principle to guide the agency's actions. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Consequently, under interpretive principles of constitutional avoidance, the Commission may not read 47 U.S.C. § 254 (or any other statute) to give it the power

to place restrictions on USF funds in the name of national security. *See, e.g.*, *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) ("the hurdles revealed in [the Supreme Court's nondelegation] decisions lead us to read the Act narrowly to avoid constitutional problems" regarding Congress' delegation of taxing authority to the FCC); *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (construing statute to render an agency's interpretation of the statute void in order to avoid a constitutional nondelegation question); *Indus. Union Dep't*, 448 U.S. at 672-76 (Rehnquist, J., concurring in the judgment).

For the foregoing reasons and those stated in Huawei's earlier submissions, the Commission should not adopt the *Draft Report and Order*.

Respectfully submitted,

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