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
	)	

REPLY COMMENTS OF HUAWEI TECHNOLOGIES CO., LTD. AND HUAWEI TECHNOLOGIES USA, INC.

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SUMMARY

The comments submitted in response to the Commission's recent Public Notice confirm, as Huawei argued in its initial comments, that section 889(b)(1) of the National Defense Authorization Act for Fiscal Year 2019 does not provide a basis for the Commission to take any action in this rulemaking.

As a threshold matter, section 889(b)(1) by its own terms only applies to Federal loan and grant programs, but the Universal Service Fund ("USF") is neither of those. Both the contrast in language between subsections 889(b)(1) and (b)(2), and past Congressional and administrative use of the term "grants," make it clear that this term does not encompass subsidy programs like the USF. The USF does not constitute a procurement or a procurement contract that is subject to the prohibition in section 889(b)(1). Furthermore, the Universal Service Administrative Company, which is not a Federal executive agency, obligates or expends USF funds, so for that reason as well these funds are not subject to section 889(b)(1).

A few parties argue either that the statutory language means something other than what it plainly says, or that it is sufficiently ambiguous that the Commission can interpret it to bring USF funds within its ambit. Neither argument is persuasive. Courts applying the canons of statutory construction must give weight to every word and phrase of a statute, not treat certain words (such as "subsidy" in section 889(b)(2)) as mere surplusage. Nor may they ignore the plain language of the law to implement a presumed Congressional "purpose" that is not explicitly stated. While these principles are true in general, they apply with extra force in the case of conditions on Federal expenditures, which the *Pennhurst* principle requires must be stated unambiguously. And even if section 889(b)(1) were ambiguous, which it is not, the Commission is not free to interpret it as it

wishes, because Congress has expressly delegated implementation of statutes affecting Government procurement to other agencies.

Furthermore, even if section 889(b)(1) did apply to the USF, it would be arbitrary and capricious for the Commission to rely upon it as a basis for its proposed rule banning expenditure of any USF support funds on equipment and services manufactured by specified companies. Section 889 does not impose such a blanket prohibition, and also would require the Commission to take further action to assist companies affected by the proposed ban. It would also be unwise to take such action independently of the other agencies of the Government that are primarily responsible for cybersecurity. The telecommunications supply chain is both complex and global, and can only be protected through a risk-based solution developed in collaboration with the private sector. Huawei agrees with industry and government experts that cybersecurity threats require looking beyond banning specific vendors and instead adopting a holistic, forward-looking risk mitigation strategy.

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REPLY COMMENTS 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 these reply comments in response to comments recently filed relating to the Public Notice issued by the Wireline Competition Bureau on October 26, 2018 (DA 18-1099), seeking comment on the applicability of section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("2019 NDAA") to the above-captioned proceeding and to programs the Commission oversees.

I. SECTION 889 OF THE 2019 NDAA NEITHER REQUIRES NOR AUTHORIZES THE COMMISSION TO RESTRICT THE USE OF UNIVERSAL SERVICE SUPPORT

There is broad agreement among most commenting parties that section 889 of the 2019 NDAA neither requires nor authorizes the Commission to restrict the use of USF support. As discussed in Huawei's initial comments (at 3-11) and by most commenting parties, the text of the statute forecloses its application to USF. "For the Commission to interpret the text otherwise would be impermissible and *ultra vires*." Rural Wireless Broadband Coalition ("Rural Wireless") Comments at 6.

A. Most Commenting Parties Agree that Section 889(b)(1), by its Terms, Does Not Apply to the USF.

All but four commenting parties agree that section 889(b)(1), by its terms, does not apply to USF.[1] More specifically, the prohibitions in section 889 do not apply to the USF because: (a) USF funds are subsidies not within the scope of section 889(b)(1); (b) the USF does not constitute a procurement or a procurement contract that is subject to the prohibition in section 889(b)(1); and (c) the Commission does not obligate or expend USF funds.

1. Section 889(b)(1) Applies to Grants and Loans, Not Subsidies.

As Huawei's opening comments argued in detail, section 889(b)(1)'s prohibition applies to grants and loans, but not to subsidies. *See* Huawei PN Comments at 3-8. Many commenters likewise observe correctly that the prohibition in section 889(b)(1) applies only to grants and loans, not to subsidies. CCA Comments at 3; ITTA Comments at 4 (stating that "Section 889(b)(1) … does not apply to USF support, and does not support Commission adoption of the proposed rule"); WTA Comments at 3. Because section 889(b)(1) does not reference subsidies, but only loans and grants, it "does not appear that this provision is intended to apply to USF support" nor does it appear that this provision mandates the Commission specifically to withhold USF support. WISPA Comments at 2. *See also* WTA Comments at 4 (because Congress did not include "subsidies" under section 889(b)(1), it is not clear from the text that Congress wanted USF to be impacted.).

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[1] CCIA submitted comments in response to the Public Notice but did not specifically address whether section 889(b)(1) applies to the USF support programs overseen by the Commission. NCTA, USTelecom, and TIA submitted comments urging the Commission to interpret section 889(b)(1) as applicable to the USF; however, as discussed in Section I.B below, these arguments are not persuasive. All other commenters agree that section 889(b)(1) does not apply to the USF.

Moreover, the record further demonstrates that the context of section 889(b)(2) compared to section 889(b)(1) supports a finding that only section 889(b)(2)—*i.e.*, the paragraph directing agencies to provide remedial assistance to affected entities—is applicable to the USF. *See* WISPA Comments at 3; ITTA Comments at 4 (noting that the plain language of section 889(b)(2) distinguishes between subsidy and "loan [or] grant" programs and that section 889(b)(1) specifically does not encompass subsidy programs). The use of "subsidy" in section 889(b)(2) but not section 889(b)(1) indicates that Congress was aware of "subsidies as a distinct form of expenditure from loans or grants." CCA Comments at 3. *See also* ITTA Comments at 3; NTCA Comments at 4. WTA notes that inclusion of "subsidies" in section 889(b)(2) but not section 889(b)(1) "is conspicuous, and it could be argued that as a result, Congress did not intend to include USF under the ban." WTA Comments at 3. As WTA urges, "the Commission must reconcile the statutory language, as strict application of the statute conspicuously separates grants and loans from USF subsidies." WTA Comments at 3. Instead of the sweeping interpretation urged by a small minority of commenters, the text of section 889 makes clear that the Commission's role in implementing the 2019 NDAA is limited to remediating the effects of section 889 on affected entities pursuant to section 889(b)(2), and does not include implementing the prohibition in section 889(b)(1). ITTA Comments at 7.

The *Pennhurst* principle further supports the position of Huawei and most commenting parties that section 889(b)(1)'s prohibition does not extend to USF funds. As Huawei previously explained in detail, *Pennhurst* principles instruct that, if Congress wishes to impose a funding condition, "it must do so unambiguously." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *see* Huawei NPRM Reply Comments at 5-9. In section 889 of the 2019 NDAA,

Congress did not clearly impose a condition on the use of USF funds; on the contrary, the plain meaning of the statute makes clear that section 889(b)(1)'s prohibition does not extend to subsidies such as the USF. *See* Section I.A.2 below; Huawei PN Comments at 3-10.

2. USF Funds Are Subsidies, Not Grants or Loans.

A majority of commenters likewise echo Huawei's argument that support from USF funds constitutes a "subsidy," not a grant. *See* Huawei PN Comments at 8-10; CCA Comments at 3; ITTA Comments at 4 (stating that "[i]t is well-grounded that USF support distributions are subsidies, not loan or grant funds"); NTCA Comments at 4 (stating that USF "is classified as neither a loan nor a grant"); Rural Wireless Comments at 5 (stating that "the Commission does not loan or grant congressionally appropriated funds under the USF support programs"); WISPA Comments at 2 (stating that funding from the USF is generally understood to constitute a subsidy); WTA Comments at 3-4. ITTA cites to a persuasive Congressional Research Service report from 2012 which distinguishes the USF from grant and/or loan programs for broadband deployment and specifically refers to USF support as "subsidies." ITTA Comments at 4 (*citing* Angele A. Gilroy and Lennard G. Kruger, Cong. Research Serv., R42524, *Rural Broadband: The Roles of the Rural Utilities Service and the Universal Service Fund* 18 (2012)).

As Huawei noted in its initial comments (at 8-10) and as acknowledged by other commenting parties, Congress and the Commission have historically referred to grants and subsidies differently, and the Commission has never used "grants" or "loans" to describe USF support. *See, e.g.*, WTA Comments at 3-4. As WTA notes, Congress understood this terminology, and Congress could have easily added "subsidies" under section 889(b)(1) if it wanted the prohibition to include USF funds within the scope of section 889(b)(1). *Id.* at 4. Huawei agrees that the Commission

should honor Congress's deliberate choice of language in section 889, in particular in light of the fact that Congress was aware of both the Commission's pending NPRM when it adopted the 2019 NDAA and historic references to the USF as a subsidy—and not a grant—program.

3. The Award of USF Support Does Not Constitute a "Procurement" or "Contract" Targeted by Section 889(b)(1).

CCA correctly notes that the Commission does not in fact "procure" or enter into a contract to procure anything when it awards USF support to telecommunications carriers, and for this reason as well section 889(b)(1) does not apply to the USF. CCA Comments at 2-3. *See also* Rural Wireless Comments at 4 (noting that "the Commission simply does not procure, obtain, enter into, extend or renew any contracts in conjunction with any of the USF support programs"). As CCA further explains, "[a] natural reading of [section 889(b)(1)] indicates that Congress was focused on agencies' procurement processes, and accordingly prohibited executive agencies from using funds in their own procurement." CCA Comments at 2. The Commission is not procuring *anything* for itself in the context of distributing USF support. *Id.* at 2. Instead, the USF provides ongoing financial assistance to defray the telecommunications costs of private parties (*e.g.*, rural telecommunications carriers, community anchor institutions, rural health care facilities, low-income consumers).

Similarly, NTCA notes that "Section 889 of the 2019 NDAA is intended to apply only to the Federal government procurement process, including companies that support the Departments of Defense and Energy via Federal contracts" or national defense activities, none of which are related to the USF. NTCA Comments at 3. *See also* Rural Wireless Comments at 4 (stating that the words used by Congress "suggest[] that Congress intended that the § 889 prohibitions apply to

government contracts that entail the expenditure of appropriated funds for covered telecommunications equipment or services"). As NTCA recognizes, the broader purpose of the 2019 NDAA as it applies to specifying Federal defense spending and the inclusion of references to the Commission and subsidies exclusively within section 889(b)(2) indicates that Congress did not intend for the Commission to prohibit the use of covered telecommunications equipment and services by USF recipients. NTCA Comments at 5. The plain language, purpose, and context of section 889 limit the Commission's role to offering financial and technical assistance to affected entities pursuant to section 889(b)(2). *See id.* at 5; ITTA Comments at 6; Rural Wireless Comments at 5-6; WISPA Comments at 3.

4. The Universal Service Administrative Company, not the Commission, Obligates or Expends USF Funds.

Section 889(b)(1) of the 2019 NDAA restricts the "head of an executive agency" from "obligat[ing] or expend[ing] loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain" covered telecommunications equipment or services. As Rural Wireless correctly notes, the USF is not administered by an "executive agency" covered by section 889(b). Rural Wireless Comments at 3-4. Rather, Rural Wireless accurately explains that (a) the Universal Service Administrative Company ("USAC")—not the Commission—is the entity that obligates or expends USF funds and (b) USAC is not an "executive agency." *Id.* at 5.

The Commission need look no further than the USF regulations and precedent to determine which entity obligates or expends USF funds.[2] Specifically, section 54.701(a) of the Commission's rules appoints USAC as "permanent Administrator of the federal universal service support mechanisms" while USAC's responsibilities as the Administrator of USF, including responsibility for collection of USF contributions and disbursement of USF funds, are further outlined in Section 54.702. Moreover, as a practical matter, USF participants interface directly with USAC—not the Commission—to remit contributions, submit requests for support, and as the subject of audits conducted by USAC in connection with the USF program. Therefore, although the Commission adopts policies and regulations for the USF, and considers appeals from funding decisions made by USAC, USAC administers the USF and obligates and expends USF funds. Notably, the few commenters supporting application of section 889(b)(1) to the USF omit any reference to USAC as Administrator of the USF.

USAC is a not an organ of the Commission, but rather is a subsidiary of the National Exchange Carriers Association ("NECA"),[3] an independent association of local exchange carriers.[4] Prior to the creation of USAC following enactment of the Telecommunications Act of 1996,

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[2] *See, e.g.*, *In re Modernizing the E-Rate Program*, 29 FCC Rcd. 15538, ¶ 154 (2014) (recognizing that USAC obligates USF funds); *In re Connect America Fund, et al.*, 26 FCC Rcd. 17663, 17705, n.177 (2011) (noting that USAC is a "private not-for-profit corporation created to serve as Administrator of the Fund").

[3] USAC, Who We Are, https://tinyurl.com/y86vm8xg (USAC is a nonprofit subsidiary of the National Exchange Carrier Association).

[4] *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1246 (10th Cir. 1999) (noting that, although it was established by the FCC, NECA's board of directors and membership "consist entirely of industry participants, … and it has no authority to perform any adjudicatory or governmental functions"). *See also* 47 C.F.R. §§ 69.601 *et seq*. (outlining NECA's role and structure).

NECA—not the Commission—was responsible for administering the system of implicit subsidies distributed among carriers. Although the Telecommunications Act of 1996 established an explicit USF mechanism, the Commission has *never* been responsible for obligation or expenditure of USF support. Instead, such activities have historically been performed by private, non-governmental entities (*i.e.*, NECA and USAC). Because the Commission does not obligate or expend USF support, section 889(b)(1) by its terms cannot apply to the USF.

Moreover, USAC is not an "executive agency" as such term is used in section 889. "Executive agency" in section 889 includes: (1) an executive department; (2) a military department; (3) an independent establishment; and (4) a wholly owned Government corporation. Courts have recognized that USAC is "an independent, not-for-profit corporation." *See United States ex. Rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 381 (5th Cir. 2014). Moreover, USAC's website states that USAC "is not a federal government agency or department or a government controlled corporation[.]"[5] Because section 889 applies only to executive agencies and USAC is not an executive agency under section 889, section 889(b)(1) cannot apply to the USF.

B. Those Few Parties Who Take the Opposing View Ignore the Plain Language and Structure of the Statute.

Only three commenters (NCTA, USTelecom, and TIA) expressed support for interpreting section 889(b)(1) to include USF support. However, their arguments ignore the plain language and structure of the 2019 NDAA and therefore are not persuasive.

[5] USAC, Procurement, https://www.usac.org/about/tools/procurement/default.aspx.

TIA's assertion that the "plain meaning" of *subsidy* is "synonymous" with *grant* ignores the principle that "in the absence of explicit language showing a contrary congressional intent, [an interpreter] must give technical words … their usual technical meaning." *Barber v. Gonzales*, 347 U.S. 637, 643 (1954). As Huawei's opening comments explained, a long history of Congressional and regulatory precedent establishes that subsidies and grants are technical concepts with mutually exclusive meanings. *See* Huawei PN Comments at 7-8. The conventional, technical meaning of a subsidy fully aligns with the notion that the USF is a subsidy, not a grant. *See id.* at 8-10. The fact that both words have conventionally understood and longstanding distinct meanings in legislative and regulatory contexts undercuts TIA's unsupported assertion that the Commission should assume that these two terms are synonyms in this context.

Furthermore, although TIA argues that "the term 'subsidy' is synonymous with 'grant' *within the context of Section 889*," TIA promptly disregards "the context of Section 889." TIA Comments at 8 (emphasis added). For example, TIA urges the Commission to ignore Congress's disparate inclusion of "subsidy" in section 889(b)(2) and its exclusion of that term from section 889(b)(1). *Id.* at 9. The canon against surplusage undermines TIA's suggestion that "subsidy" and "grant" mean the same thing. The Supreme Court has stated that the canon against surplusage "assists only where a competing interpretation gives effect to every clause and word of a statute." *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). That condition exists here: the interpretation urged by Huawei and a majority of commenting parties gives effect to every clause and word of section 889, while TIA's interpretation would render the word "subsidy" in section 889(b)(2) entirely superfluous. Each term in the list of the types of government funding subject to section 889(b) should be read to convey some distinct meaning. *See Microsoft*, 564 U.S. at 106.

See also McDonnell v. United States, 136 S. Ct. 2355, 2369 (2016) (stating that the words '"question' and 'matter' may refer to a formal exercise of government power that is similar in nature to a 'cause, suit, proceeding or controversy,' but that does not necessarily fall into one of those prescribed categories"). The canon against surplusage cautions against assuming that grants and subsidies are identical, particularly in light of statutory precedent which distinguishes between the two concepts. Contrary to TIA's urgings, the Commission simply cannot interpret section 889(b) in a way that ignores Congress's historic recognition of a distinction between "grant" and "subsidy". The principle that statutory terms must be interpreted in context "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

TIA's claim that it would be "illogical" to exclude the USF from section 889(b)(1) presumes that it knows what Congress meant to do, based on its own opinions rather than the language actually passed by Congress. TIA Comments at 11. Contrary to TIA's assumption, it is perfectly logical for Congress to have instructed the Commission (in section 889(b)(2)) to use USF funds to help affected entities with their transition costs, even though section 889(b)(1)'s prohibition doesn't encompass USF funds. There is nothing "illogical" about creating a prohibition on the use of certain funds, while creating a remedial provision that commands agencies to use a somewhat different set of funds to help with transition costs. Likewise, TIA's contention that it would have been "illogical" for Congress to have carved USF funds out from section 889(b)(1)'s prohibition is inconsistent with the Supreme Court's repeated acknowledgment that Congress often decides to go only so far—but no further—when reaching legislative compromises. *See, e.g., Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 461 (2002) (recognizing that "[d]issatisfaction … is often

the cost of legislative compromise"); *Preseault v. ICC*, 494 U.S. 1, 19 (1990) ("The process of legislating often involves tradeoffs, compromises, and imperfect solutions."); *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 617 (1981) (noting that Congress necessarily balances conflicting interests in reaching legislative compromises and stating that "the wisest course is to adhere closely to what Congress has written"); *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980) (the Court "must respect the compromise embodied in the words chosen by Congress").

Moreover, TIA's legislative history argument provides no additional support. As an initial matter, there is no need to resort to legislative history here, because the meaning of the statutory text is clear. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n. 3 (2010) ("reliance on legislative history is unnecessary in light of the statute's unambiguous language"). Although TIA argues that the late addition of section 889(b)(2) shows that Congress intended to include "subsidies" within the scope of the statute, it actually shows only that Congress intended to include subsidies within that particular paragraph of section 889. If Congress had meant to include subsidies in section 889(b)(1), it would have been quite easy for the drafters to have used the same wording in both paragraphs. The fact that paragraph (b)(2) was added late in the drafting process undermines, rather than supports, TIA's argument, since the authors of that paragraph (which was added at the conference committee stage) had the earlier-drafted language of paragraph (b)(1) before them as they wrote, and must have consciously decided to use different wording.

NCTA urges an expansive reading of the text of the 2019 NDAA, despite conceding that a number of terms within section 889 require additional guidance, in the name of "a coordinated, whole-of-government approach to supply chain security." NCTA Comments at 3-4. However,

NCTA's argument that applying section 889 to USF would best effectuate the "statutory purpose" assumes a purpose that is not explicitly stated in the statute, and ignores the actual language of the law. NCTA makes no effort to reconcile the "purpose" it claims to have discerned with the plain words of the statute.

Similarly, USTelecom argues that the Commission should interpret section 889 broadly as applying to the USF, apparently based purely on policy grounds, and without regard to the actual language of the statute. USTelecom expressly declined in its comments to address the key question of whether the USF program is a "grant" or "subsidy" program, instead stating that Congress must have recognized the USF as either a "grant" or "subsidy" program. USTelecom Comments at 3-4. Contrary to USTelecom's assertion that the 2019 NDAA's directive "would have no meaning if it did not apply in the USF context" (USTelecom Comments at 4), the plain language and context make the meaning clear: Section 889(b) applies to the Commission and the USF only to the extent that USF funding can be used under section 889(b)(2) to ameliorate the adverse impacts of section 889(b)(1).

C. Arguments That the Commission Should Interpret Purportedly Ambiguous Language in Section 889 to Expand its Application to USF Ignore the Limits on *Chevron* Deference.

Two commenters, TIA and USTelecom, suggest that supposed ambiguity in section 889 and principles of *Chevron* deference allow the Commission to give section 889 a broad interpretation that would extend its prohibitions to the USF program. *See* TIA Comments 10; USTelecom Comments 3. These suggestions are fundamentally mistaken, however, for two primary reasons. First, *Chevron* has no application here because Congress has not delegated interpretive authority

to the Commission. And, second, the statutory language clearly forecloses the proposed interpretation of section 889 and so it would fail at *Chevron* step one. *See, e.g.*, *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1450 (D.C. Cir. 1994) ("An agency can neither adopt regulations contrary to statute, nor exercise powers not delegated to it by Congress.").

On the first point, TIA and USTelecom fail to identify any basis on which to presume that Congress has empowered the Commission to resolve any ambiguities that might be found in section 889. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). It therefore follows that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also, e.g.*, *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 650 (1990) ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (citation omitted)).

The Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997), illustrates this principle. In *Rambo*, the Court refused to grant *Chevron* deference to the Director of the Office of Workers' Compensation Programs' interpretation of a provision in the Administrative Procedure Act ("APA") because the Director was not responsible for administering the APA, though of course he was bound by it. The Court explained that the APA "is not a statute that the Director is charged with administering." *Id.* at 137 n.9.

The Supreme Court's reasoning in *Rambo* applies beyond the context of the APA itself. The D.C. Circuit has explained that, "for generic statutes like the APA, FOIA, and FACA, the broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretive questions de novo." *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003).

This principle defeats any attempt to resort to Chevron deference here. Much like the APA, section 889 of the 2019 NDAA is a generic statute. It applies across the board to federal executive agencies. Even TIA recognizes that "Section 889 is a far-reaching statute whose core purpose is to prohibit the procurement of certain equipment by every executive agency of the federal government." TIA Comments 25. That "undermines any basis for deference." *Collins*, 351 F.3d at 1253.

Moreover, section 889 does not grant the Commission any special authority to administer the statute. Quite the contrary, Congress has vested interpretive authority in *other* federal agencies. Congress has given the General Services Administration ("GSA"), Department of Defense, and National Aeronautics and Space Administration ("NASA") responsibility for creating "a single Government-wide procurement regulation." 41 U.S.C. § 1303(a)(1). And other agencies are generally obligated to comply with that procurement regulation. *Id.* § 1121(c). It follows that the Commission may not engage in its own independent interpretation of the 2019 NDAA, particularly when the GSA, Defense Department, and NASA are already in the process of issuing procurement regulations to implement it. *See* Huawei PN Comments 16. In such circumstances, courts would have no reason to afford deference to any interpretations that the Commission might issue on its own. *See, e.g.*, *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084-85 (11th

Cir. 2013) ("Even if it were not axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegate to it by Congress, we would be hard-pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency." (citation omitted)).

In any event, *Chevron* would not help the Commission here, even if the Commission could lay claim to some measure of deference, because "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). For all the reasons discussed in Huawei's opening comments and above, section 889(b)(1)'s prohibition does not extend to subsidies like the USF program. *See* Huawei Opening Comments 3-10; *supra* Sections I.A.1 and I.A.2. In addition, the USF falls outside of section 889(b)(1)'s prohibition because it is not administered by an executive agency covered by section 889 and because it does not involve the Commission's procurement of anything. *See supra* Sections I.A.3 and I.A.4.

TIA erroneously suggests that traditional tools of statutory interpretation (such as the canon *expressio unius est exclusio alterius*) do not apply in the context of *Chevron* deference. *See* TIA Comments 10. That claim is incorrect. In *Chevron* itself, the Supreme Court explained that a court must first ascertain "whether Congress has directly spoken to the precise question at issue," and, if not, only then ask whether "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The first step—ascertaining whether "Congress had an intention on the precise question at issue"—requires a court to "emplo[y] traditional tools of statutory construction." *Id.* at 843 n.9. The Supreme Court and lower courts have repeatedly recognized this limit on *Chevron*'s scope. *See, e.g.*, *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018)

(quoting *Chevron*, 467 U.S. at 843 n.9) ("Even under *Chevron*, [courts] owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' [the court remains] unable to discern Congress's meaning"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("Deference comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles."); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("Where … the canons supply an answer, '*Chevron* leaves the stage.'").

Unsurprisingly, then, courts regularly use *expressio unius* and the interpretive principles on which Huawei relies (*see* Huawei PN Comments 3-5) at *Chevron* step one. *See, e.g.*, *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1076 (D.C. Cir. 2008) (rejecting agency interpretation in part based on *expressio unius*); *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 594–95 (D.C. Cir. 2015) (rejecting agency interpretation in part based on *Russello* principle that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (citation omitted)); *Fla. Pub. Telecomms. Ass'n, Inc. v. FCC*, 54 F.3d 857, 860-61 (D.C. Cir. 1995) ("The FCC's argument … inverts the usual canon that when Congress uses different language in different sections of a statute, it does so intentionally.").

For both these reasons, if the Commission were to interpret section 889 to extend to USF subsidies, that interpretation would not be entitled to deference. The Commission may not manufacture authority to adopt the proposed rule by purporting to interpret ambiguous provisions of section 889.

II. <u>IT WOULD BE ARBITRARY AND CAPRICIOUS FOR THE COMMISSION TO RELY ON SECTION 889 TO UNILATERALLY ADOPT ITS PROPOSED RULE</u>

A. <u>Relying on Section 889(b)(1) as a Basis for the Commission's Proposed Rule Would be Arbitrary and Capricious.</u>

As Huawei's opening comments argued, it would arbitrary and capricious for the Commission to rely on section 889 to adopt its proposal to prohibit *all* use of USF support to purchase *any* equipment or service produced or provided by a blacklisted company. *See* Huawei PN Comments at 14-15. Other commenters agree. For example, CCIA urges the Commission to "recognize that Congress wrote Sec. 889 not as a blanket and absolute restriction on any use of covered equipment, but with exceptions," for example by limiting the prohibition to "covered telecommunications equipment or services" that are "a substantial or essential component" or a "critical technology" of a system related to a federal contract. CCIA Comments at 2. Commenters further note exemptions within the 2019 NDAA related to connecting to the facilities of third-parties (*e.g.*, through backhaul, roaming or interconnection arrangements) and use of equipment that "cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles." *See id.* at 3; Rural Wireless Comments at 9 (detailing the inconsistencies in scope between the Commission's proposed rule and section 889); WTA Comments at 5-6 (noting "significant differences" between section 889 and the proposed rule and arguing that the Commission must consider the exemptions in section 889 for passive equipment and connections to third-party facilities).

In addition to the overly broad scope of the equipment and services that would be affected by the Commission's proposed rule in contrast to the more limited scope of section 889, the proposed rule altogether fails to provide for assistance to affected entities as specifically required by section 889(b)(2). *See* NTCA Comments at 9 (urging the Commission to provide the "required transition path for affected small businesses"); WISPA Comments at 4 (noting that the Commission's proposed rule "does not capture the 2019 NDAA's provision for affirmatively directing USF funds to assist in transitioning away from [blacklisted providers] through procurement of replacement equipment"); WTA Comments at 7-9 (proposing ways for the Commission to assist affected entities).

Moreover, implementation of section 889(b)(1) (even assuming *arguendo* that it applies to USF support at all) is the responsibility of the GSA, Secretary of Defense, and NASA Administrator under the Federal Acquisition Regulation ("FAR"), not of the Commission. Huawei PN Comments at 15-16. None of the comments filed in the record disagree. For example, NCTA—one of the few parties who supported the proposition that section 889 applies to USF programs—asks the Commission to defer moving forward with its rulemaking "pending further coordination with, or clarification from" the appropriate Federal government actors responsible for implementation of section 889. NCTA Comments at 3-4. Similarly, TIA notes that "the FAR rule implementing Section 889 would provide greater clarity on various provisions in Section 889 that are currently undefined or ambiguous" and urges the Commission to work with the Department of Defense to "ensure that the final FAR rule provides the guidance that commission stakeholders need, while also enabling the Commission to avoid potential pitfalls as it seeks to implement Section 889 itself." TIA Comments at 26-27.

Thus, even the few commenters who believe the Commission can and should implement section 889 recognize that it cannot meaningfully do so outside the context of the applicable FAR rule. NCTA and TIA cannot have it both ways by conceding that other government agencies are responsible for implementing and resolving ambiguities within section 889, yet still urging the Commission to go forward with rules purporting to implement that section. If anything, their comments directly support Huawei's previously raised contention that the GSA, Department of Defense, and NASA are the federal agencies best equipped to interpret section 889. *See* Huawei PN Comments at 15-16. Moreover, they are the *only* agencies with the statutory authority to do so, because the FAR confers exclusive jurisdiction to the GSA, Secretary of Defense, and NASA administrator in implementing section 889. *See* 41 U.S.C. § 1303(a)(1)-(2) (prohibiting executive agencies from issuing additional procurement regulations).

B. Cybersecurity Risks Require a Comprehensive Government-wide Approach, Rather than Unilateral Commission Action.

Huawei agrees with the numerous commenters who urge the Commission not to act unilaterally as a matter of policy, and who advocate for a Government-wide approach to cybersecurity. As Huawei has repeatedly noted, the telecommunications supply chain is both complex and global, and can only be protected through a risk-based solution developed in collaboration with the private sector.[6] *See, e.g.,* Huawei NPRM Reply Comments at 26-29; Written *Ex Parte* Submission of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc., WC Docket No. 18-

[6] *See, e.g.,* Farai Mudzingwa, "Are Huawei & ZTE Really Spying On Consumers And Should You Be Afraid?", TechZim (Mar. 5, 2018), *available at* https://www.techzim.co.zw/2018/03/huawei-zte-really-spying-consumers-afraid/ ("There's not a phone in the world that doesn't use at least some Chinese-made

89 (filed Aug. 23, 2018). As such, Huawei has long advocated for a comprehensive, holistic approach to addressing cybersecurity threats in the telecommunications sphere, involving other arms of the U.S. Government that are better equipped to recognize and understand these concerns.

The comments indicate that Huawei is not alone: for example, USTelecom "continues to encourage the FCC to participate in other cross-governmental efforts with respect to the supply chain." USTelecom Comments at 2. CCIA likewise urges the Commission to coordinate with other agencies such as DHS as part of a wider effort "to understand the extent to which there are problems or vulnerabilities on networks in the U.S." CCIA Comments at 1-2. Even TIA acknowledges that U.S. agencies are conducting "critical work developing guidance for federal supply chain security," and encourages the Commission to participate in "cross-sector government and industry collaboration" to reduce cybersecurity risk. TIA Comments at 27-28.

This approach is consistent with the position taken by experts in the industry, many of whom have noted the inefficacy of a ban,[7] as well as government officials involved in U.S. cybersecurity policies. For example, Wayne Jones, Chief Information Officer at the National Nuclear

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components. So if espionage interference is what the US is afraid of why not consider the fact that the devices sourcing other components from China could be vulnerable.").

[7] *See, e.g.*, Daniel Ikenson, "Cybersecurity of Protectionism? Defusing the Most Volatile Issue in the U.S.-China Relationship," CATO INSTITUTE POLICY ANALYSIS 815 (Jul. 13, 2017), *available at* https://object.cato.org/sites/cato.org/files/pubs/pdf/pa815.pdf ("If cybersecurity is the real objective, there are far less intrusive approaches that are much more likely to keep us secure. A cybersecurity regime that weds best business practices with valid statistical methods and implements the right combination of carrots and sticks could be the right solution."); Bruce Schneier, "Banning Chinese phones won't fix security problems with our electronic supply chain," THE WASHINGTON POST (May 8, 2018), *available at* https://www.washingtonpost.com/news/posteverything/wp/2018/05/08/banning-chinese-phones-wont-fix-security-problems-with-our-electronic-supply-chain (security technologist noting that "[i]t's doubtful this ban will have any real effect"); John C. Tanner, "Supply chain security is a major issue that vendor bans won't fix," DISRUPTIVE ASIA (Oct. 8, 2018), *available at* https://disruptive.asia/supply-chain-security-major-issue/

Security Administration, recently commented that "instead of banning software with a connection to China or other U.S. cyber adversaries, government tech shops should focus on installing safeguards that mitigate any risk the software poses for foreign spying or sabotage."[8] Similarly, DHS and NSTAC leaders have noted that a closer examination of ICT products is preferable to excluding products based on their country of origin.[9] In September of this year, Rep. Greg Walden, Chairman of the Energy and Commerce Committee, spoke at the White House 5G Summit, where he dismissed the notion that "we can simply ban vendors from American markets" and labeled some proposed solutions to mitigating cybersecurity risks to communications equipment and services as "alarming."[10] Rep. Walden stated:

> It's critical we continue to focus on mitigating risks to the global supply chain of communications equipment and services. There have been alarm bells at all levels of government about potential risks to the supply chain. But some of the proposed solutions can be just as alarming.
>
> There are some who think we can simply ban vendors from American markets. But the marketplace for hardware and software is global. Without a forward-looking

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("[T]he political posturing over Huawei, ZTE and national security is not only paranoid populist pandering, it's also a distraction from a much larger problem that it doesn't come anywhere close to solving.").

[8] Joseph Marks, "The government should be focused on mitigating the danger any software can pose, rather than banning software from China and elsewhere, the NNSA CIO says," NEXTGOV (Jun. 28, 2018), *available at* https://www.nextgov.com/cybersecurity/2018/06/banning-software-isnt-route-cybersecurity-nuclear-security-agency-official-says/149385/.

[9] Mariam Baksh, "Leader on presidential panel says telecom equipment should be tested, certified to manage supply-chain risks," INSIDE CYBERSECURITY (Nov. 20, 2018), *available at* https://insidecybersecurity.com/daily-news/leader-presidential-panel-says-telecom-equipment-should-be-tested-certified-manage-supply.

[10] Chairman Walden Delivers Remarks at White House 5G Summit, U.S. HOUSE OF REPRESENTATIVES ENERGY AND COMMERCE COMMITTEE (Oct. 1, 2018), *available at* https://energycommerce.house.gov/news/in-the-news/icymi-chairman-walden-delivers-remarks-at-white-house-5g-summit/.

strategy, it will be increasingly difficult for our domestic communications providers to obtain their equipment from trusted vendors.[11]

Huawei agrees with Rep. Walden's analysis and urges the Commission to participate in efforts towards developing a comprehensive cybersecurity strategy.

Other countries that adopt a holistic approach to cybersecurity have far less concern, if any, about suppliers such as Huawei—and, resultantly, can reap the benefits of Huawei's sophisticated technology, dedication to innovation, international presence, and ability to facilitate 5G deployment.[12] Major telecommunications companies across the globe, including in Italy and South Africa, have been vocal in their praise of Huawei's products and service.[13] America's ally and

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[11] *Id.*

[12] *See, e.g.,* Ray Le Maistre, "BT's McRae: Huawei Is 'the Only True 5G Supplier Right now,'" LightReading (Nov. 21, 2018), *available at* https://www.lightreading.com/mobile/5g/bts-mcrae-huawei-is-the-only-true-5g-supplier-right-now/d/d-id/747734 (quoting an executive from the owner of the UK's largest mobile network operator that outside of Huawei's headquarters, "there's nowhere else in the world where you can see the kind of 5G technology developments that Huawei has achieved"); "Huawei US ban a sign of its 'growing strength,'" THE EXPRESS TRIBUNE (Mar. 6, 2018), *available at* https://tribune.com.pk/story/1652371/8-huawei-us-ban-sign-growing-strength/ (noting that Huawei is "in a prime position to lead the global race for next-generation 5G networks"); Sam Fenwick, "Huawei claims to have released the world's first 3GPP Release 14 based commercial NB-IoT solution, eRAN13.1.," LANDMOBILE (Jun. 7, 2018), *available at* http://www.landmobile.co.uk/news/huawei-nb-iot-iot-3gpp-release-14/ (discuassing Huawei's 3gPP solution offering a seven-fold improvement in data rates); Vlad Savov, "Despite being shunned in America, Huawei is flourishing in Europe," The Verge (Aug. 22, 2018), *available at* https://www.theverge.com/2018/8/22/17768966/huawei-xiaomi-idc-smartphone-market-europe-statistics (analyzing smartphone market share in Western Europe, where Huawei now ranks second behind Samsung and above Apple); Kevin Sebastian, "Huawei features in BrandZ Most Valuable Global Brands Top 50 for the third consecutive year," PCMAG (Jun. 4, 2018), *available at* https://me.pcmag.com/huawei/11114/huawei-features-in-brandz-most-valuable-global-brands-top-50 ("Huawei is bucking the international industry trends as it gradually moves towards becoming a global iconic technology brand.").

[13] *See, e.g.,* Jamie Davies, "Italians clearly aren't that suspicious of Huawei," TELECOMS.COM (Nov. 12, 2018), *available at* http://telecoms.com/493515/italians-clearly-arent-that-suspicious-of-huawei/; Chris Kelly, "Huawei and MTN switch on fixed wireless 5G trial in S Africa," TOTAL TELECOM (May 9, 2018),

neighbor, Canada, has publicly indicated its intent to continue use of Huawei equipment in its telecommunications infrastructure; indeed, Canada's largest telecommunications providers use Huawei equipment.[14] Scott Jones, who heads the Canadian Center for Cyber Security, recently emphasized to Canadian legislative officials the necessity to view network security as "an entire system" and to undertake an approach that focuses on increasing the "broader resilience" of telecommunications networks.[15] In doing so, Jones noted that a country-based vendor ban does not account for the reality of the telecommunications supply chain, where "almost everything" is manufactured "around the globe."[16] Instead, Canada, similar to the U.K., implements a rigorous and comprehensive program that addresses "the full risks across the telecommunications sector."[17] The Commission should take a similar approach.

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available at https://www.totaltele.com/500031/Huawei-and-MTN-switch-on-fixed-wireless-5G-trial-in-S-Africa.

[14] Robert Fife and Stephen Chase, "No need to ban Huawei in light of Canada's robust cybersecurity safeguards, top official says," THE GLOBE AND MAIL (Sep. 23, 2018), *available at* https://www.theglobeandmail.com/politics/article-no-need-to-ban-huawei-in-light-of-canadas-robust-cybersecurity/.

[15] *See* Richard Chirgwin, "Canadian security boss ain't afraid of no Huawei, sees no reason for ban," THE REGISTER (Sep. 26, 2018), *available at* https://www.theregister.co.uk/2018/09/26/canadian_security_boss_says_theres_no_reason_to_ban_huawei/; Juan Pedro Tomas, "No need to ban Huawei in 5G contracts, Canada's top cyber official says," RCRWIRELESS (Sep. 27, 2018), *available at* https://www.rcrwireless.com/20180927/5g/no-need-ban-huawei-5g-contracts-canada-top-cyber-official-says.

[16] *Id.*

[17] *Id.*

III. CONCLUSION

For the foregoing reasons and those in Huawei's initial comments, the enactment of section 889 of the 2019 NDAA does not alter Huawei's previous conclusion that the Commission should terminate this proceeding without adopting any rule.

Respectfully submitted,

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