

**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	)	WC Docket No. 18-89
Programs	)	

To: Chief, Wireline Competition Bureau

**REPLY COMMENTS OF  
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”) hereby replies to the initial comments filed in response to the *Public Notice* concerning the Commission’s implementation of certain provisions of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (the “*2019 NDAA*”).<sup>1</sup> As detailed below, a considerable majority of the comments submitted conclude that the direct prohibition on use of government funding to purchase “covered telecommunications equipment” does not apply to private expenditures supported by the Universal Service Fund (“USF”).

Almost all the comments filed in this proceeding have been submitted by trade associations representing various segments of the telecommunications industry, from service providers of varying sizes to equipment manufacturers. A critical issue that all parties address is the meaning of the provisions of the *2019 NDAA* that place some limitations on the expenditure of government funds to procure equipment, services, or systems that would use “covered telecommunications equipment or services” as either a substantial or essential component of any system, or as critical technology as part of any system. Most of the commenters, many of which

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<sup>1</sup> See *Public Notice*, “Wireline Competition Bureau Seeks Comment on Section 889 of John S. McCain National Defense Authorization Act for Fiscal Year 2019,” WC Docket No. 18-89, DA 18-1099 (rel. Oct. 26, 2018) (“*Public Notice*”).

represent smaller service providers that bring broadband to consumers in rural and other underserved areas, reject the notion that the *2019 NDAA* is intended to prohibit the provision of subsidies to service providers that may deploy some “covered telecommunications equipment” as part of their networks.<sup>2</sup> This conclusion is based on the plain meaning of the relevant statutory provisions and the distinct language employed to define limitations upon different types of government and government-sponsored spending programs.

As WISPA demonstrated in its initial comments, the *2019 NDAA* makes a clear distinction between programs involving direct government expenditures for “loans and grants” (Section 889(b)(1)) – for which new outlays are prohibited – and government “subsidy programs” (Section 889(b)(2)) – for which the statute establishes only prospective preferences for future replacement of covered equipment.<sup>3</sup> The distinction is significant because the explicit prohibition on government funding applies only to the former, narrower category of “loans and grants.” Most other parties echo this logical inference. As noted by ITTA, “[i]t is well-grounded that USF support distributions are subsidies, not loan or grant funds.”<sup>4</sup> The Rural Wireless Broadband Coalition explains that for this reason, “[t]he § 889(b)(1) prohibition on ‘loan or grant funds’ does not apply to USF support because ... the Commission does not loan or grant congressionally appropriated funds under the USF support programs.”<sup>5</sup> Accordingly, as NTCA

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<sup>2</sup> See, e.g., Comments of Competitive Carriers Association, WC Docket No. 18-89 (filed Nov. 16, 2018), at 2; Comments of ITTA – The Voice of America’s Broadband Providers, WC Docket No. 18-89 (filed Nov. 16, 2018) (“ITTA Comments”), at 4 *et seq.*; Comments of NTCA–The Rural Broadband Association, WC Docket No. 18-89 (filed Nov. 16, 2018) (“NTCA Comments”), at 3-5; Comments of the Rural Wireless Broadband Coalition, WC Docket No. 18-89 (filed Nov. 16, 2018) (“RWBC Comments”), at 5-6; Comments of WTA – Advocates for Rural Broadband, WC Docket No. 18-89 (filed Nov. 16, 2018), at 3-4.

<sup>3</sup> See Comments of the Wireless Internet Service Providers Association, WC Docket No. 18-89 (filed Nov. 16, 2018), at 2-3.

<sup>4</sup> ITTA Comments at 4.

<sup>5</sup> RWBC Comments at 5.

concludes, “Congress did not intend for the Commission specifically to prohibit the use of Universal Service support for covered telecommunications equipment and services.”<sup>6</sup>

Only a few commenters take issue with this majority view, but none fully addresses or adequately explains the reason for the distinct language used in Sections 889(b)(1) and (b)(2) under accepted rules of statutory interpretation. TIA goes to great lengths endeavoring to support its strained assertion that one must read the distinct phrases “loans and grants” and “loans, grants and subsidy programs” as covering identical government expenditures.<sup>7</sup> But especially given the fact that these provisions are consecutive subsections of the same statute, the conclusion that the two distinct requirements cover different ranges of government action is inescapable. One cannot credibly accept the notion that the term “grants” in the first instance encompasses both grants and subsidies, but that in the very next section Congress chose to add the additional language regarding “subsidy programs” to cover identical government expenditures. It is an elementary canon of statutory interpretation that the use of distinct language in different provisions of the same enactment indicates a legislative intent to establish distinct legal requirements.<sup>8</sup>

TIA alone acknowledges the critical interpretive guideposts governing statutory interpretation but attempts to navigate around these hurdles via several dubious claims. For example, TIA contends that the overarching national security purpose of the *2019 NDAA* precludes allowing private sector use of government subsidy funds for covered equipment, as if

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<sup>6</sup> NTCA Comments at 2.

<sup>7</sup> See Comments of the Telecommunications Industry Association, WC Docket No. 18-89 (filed Nov. 16, 2018) (“TIA Comments”), at 7-9. See also Letter from Rick Chessen, NCTA – The Internet and Television Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89 (filed Nov. 16, 2018), at 4.

<sup>8</sup> See, e.g., NTCA Comments at 9-10, citing *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) and *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006).

any use of such equipment would inherently endanger national security.<sup>9</sup> But the statute clearly does not go that far, as it includes multiple exceptions, limitations and safety valves that allow some uses of covered equipment, even by government agencies under appropriate circumstances. The limitations apply only to certain types of government expenditures – direct procurement, loans, and grants.<sup>10</sup> In addition, equipment is considered “covered” in the first instance only if used as either a substantial or essential component of any system, or as critical technology as part of any system.<sup>11</sup> Moreover, even the direct government procurement limitations are subject to specific exclusions under Section 889(b)(3) “for service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements,” or for “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.”<sup>12</sup> Finally, the statute provides that waivers may be granted by the head of an executive agency for a period of up to “two years after the effective dates” or at any time by the Director of National Intelligence if determined to be “in the national security interests of the United States.”<sup>13</sup>

Given these multiple, substantive limitations on the scope of prohibited spending, it is entirely reasonable based on the distinct language used in Section 889(b)(1) and (b)(2) to conclude that Congress intended to distinguish between, on one hand, placing strict limitations on government procurement and direct expenditures though loans and grants and, on the other hand, providing greater latitude with respect to current spending by non-government actors that may receive some government funding through the USF to support expansion of existing and

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<sup>9</sup> See TIA Comments at 12-13.

<sup>10</sup> 2019 NDAA, Sec. 889(a) & (b).

<sup>11</sup> 2019 NDAA, Sec. 889(a)(1)(A) & (B).

<sup>12</sup> 2019 NDAA, Sec. 889(b)(3).

<sup>13</sup> 2019 NDAA, Sec. 889(d).

planned broadband networks. This distinction is especially relevant to service providers operating in rural and other underserved areas. Such providers may represent the only realistic option for consumers in such remote or insular communities that rely on USF-support to gain access to advanced telecommunications capability.

TIA further argues that the Legislative History of the *2019 NDAA* supports its arguments,<sup>14</sup> but this claim is also inaccurate. Indeed, TIA's observations regarding the interpretive import of the language in the Conference Report undermine its own claims. As ITTA explains, "the solitary substantive elaboration on the final iteration of Section 889 is that '[t]he conferees stress the importance of assisting rural communications service providers, anchor institutions, and public safety organizations in replacing covered equipment and associated support services contracts as soon as possible.'"<sup>15</sup> The fact that it was a stated desire to assist rural service providers eligible for USF funds to replace "covered telecommunications equipment" that led to the addition of the phrase "subsidy programs" in Section 889(b)(2) conclusively demonstrates that Congress construed the original reference to "loans and grants" as insufficient to cover the USF subsidy program, thereby leading to the insertion of the additional language – as well as the specific reference to the FCC – in order to include it within the scope of Section 889(b)(2). By doing so, Congress expanded the scope of government action from merely withholding direct expenditures on covered equipment (as provided for in Section 889(b)(1)) to encouraging private expenditures to replace such equipment at a future date, as necessary.

For the foregoing reasons, WISPA urges the Commission to reject an overbroad construction of the government procurement, loan and grant limitations established under the

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<sup>14</sup> See TIA Comments at 13-14.

<sup>15</sup> ITTA Comments at 6, *citing* H.R. Rep. No. 115-874, at 919 (2018).

2019 NDAA, and revise its proposed rule consistent with this appropriately narrow interpretation of Section 889(b)(1) of the statute.

Respectfully submitted,

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