

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF THE RURAL WIRELESS ASSOCIATION, INC.**

**RURAL WIRELESS ASSOCIATION, INC.**

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## SUMMARY

The Rural Wireless Association, Inc. (“RWA”) replies to the comments filed in response to the Federal Communications Commission (“FCC” or “Commission”) Wireline Competition Bureau’s (“WCB” or “Bureau”) Public Notice in which the Bureau seeks comment on the applicability of provisions in the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (“2019 NDAA”) to the Commission’s *Protecting Against National Security Threats to the Communications Supply Chain* rulemaking and to the programs the Commission oversees.

Section 889(b)(1) of the 2019 NDAA does not apply to USF programs because the section applies only to “loan” or “grant” funds, and therefore does not apply to Universal Service Fund (“USF”) subsidies. Further, Section 889 is intended to apply only to the federal government procurement process, of which the USF is not a part. Notwithstanding these statutory limitations, to the extent the Commission determines that it will proceed with applying a targeted equipment prohibition to Universal Service programs as proposed in this proceeding, based upon Section 889(b)(1), the Commission must comply with Section 889(b)(2)’s mandate to “prioritize available funding and technical support to assist affected businesses, institutions and organizations...to ensure that communications service to users and customers is sustained.” As such, it should provide transitional funding and an extended compliance period to affected small businesses. The Commission should then adopt a Further Notice of Proposed Rulemaking that seeks comment on such changes.

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**REPLY COMMENTS OF THE RURAL WIRELESS ASSOCIATION, INC.**

The Rural Wireless Association, Inc. (“RWA”)<sup>1</sup> replies to the comments filed in response to the Federal Communications Commission (“FCC” or “Commission”) Wireline Competition Bureau’s (“WCB” or “Bureau”) *Public Notice*<sup>2</sup> in which the Bureau seeks comment on the applicability of provisions in the John S. McCain National Defense Authorization Act for Fiscal Year 2019<sup>3</sup> to the Commission’s *Protecting Against National Security Threats to the Communications Supply Chain* rulemaking<sup>4</sup> and to the programs the Commission oversees.

**I. INTRODUCTION AND SUMMARY.**

In April 2018, the Commission released an *NPRM* in which it proposed and sought comment on a rule to prohibit, going forward, the use of universal service funds to purchase

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<sup>1</sup> RWA is a Washington, DC – based trade association that ensures wireless carriers with fewer than 100,000 subscribers have a strong voice in our nation’s capital. RWA’s members have joined together to speed the delivery of new, efficient, and innovative communications technologies to underserved rural communities across the United States of America. RWA’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone/broadband companies that are passionate about ensuring rural America is not left behind.

<sup>2</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Public Notice](#), WC Docket No. 18-89, DA 18-1099 (rel. Oct. 26, 2018) (“*Public Notice*”).

<sup>3</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong., PL 115-232, 132 Stat. 1636 (2018) (“*2019 NDAA*”).

<sup>4</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Notice of Proposed Rulemaking](#), WC Docket No. 18-89, FCC 18-42 (rel. Apr. 18, 2018) (“*NPRM*”).

equipment or services “from any communications equipment or service providers identified as posing a national security risk to communications networks or the communications supply chain.”<sup>5</sup> The Commission’s proposed rule stated that “[n]o universal service support may be used to purchase or obtain any equipment or services produced or provided by any company posing a national security threat to the integrity of communications networks or the communications supply chain.”<sup>6</sup> While the proposed rule text did not specifically refer to Huawei or ZTE, the *NPRM* discussed the two companies in detail<sup>7</sup> and left little doubt that, if adopted, the rule would prohibit Universal Service Fund (“USF”) support recipients from using USF funds to purchase equipment or services from either company. In response to the *NPRM*, RWA expressed concern that, if adopted, the proposed rule would irreparably damage existing rural wireless broadband networks, inhibit future wireless broadband deployment in many rural and remote areas throughout the country, and fundamentally fail to effectively protect national security.<sup>8</sup> In addition, RWA noted that the FCC lacked the requisite authority to adopt such rules because the Communications Act of 1934, as amended (“the Act”) does not authorize the Commission to regulate issues related to national security.<sup>9</sup>

Nearly four months after the Commission released its *NPRM*, the *2019 NDAA* was signed into law. The Bureau is seeking comment on whether the provisions of Section 889 of the *2019 NDAA* are relevant to the Commission’s proposed rule. Section 889 includes the following provisions:

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<sup>5</sup> *NPRM* at ¶ 2.

<sup>6</sup> *Id.* at Appendix A.

<sup>7</sup> *Id.* at ¶¶ 4-6.

<sup>8</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Reply Comments of the Rural Wireless Association, Inc.](#), WC Docket No. 18-89 (July 2, 2018) (“*RWA Reply Comments*”).

<sup>9</sup> *Id.* at Section III.

(a) PROHIBITION ON USE OR PROCUREMENT.—(1) The head of an executive agency may not—

(A) procure or obtain or extend or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or

(B) enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.<sup>10</sup>

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(b) PROHIBITION ON LOAN AND GRANT FUNDS.—(1) The head of an executive agency may not obligate or expend 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 the equipment, services, or systems described in subsection (a).

(2) In implementing the prohibition in paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs, including the heads of the Federal Communications Commission, the Department of Agriculture, the Department of Homeland Security, the Small Business Administration, and the Department of Commerce, shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.<sup>11</sup>

(3) Nothing in this subsection shall be construed to—

(A) prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(B) cover telecommunications 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.

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<sup>10</sup> 2019 NDAA § 889(a).

<sup>11</sup> 2019 NDAA § 889(b).

As discussed below, Section 889(b)(1) of the 2019 NDAA does not apply to USF programs because the section applies only to “loan” or “grant” funds, and therefore does not apply to USF subsidies, and Section 889 is intended to apply only to the federal government procurement process, of which the USF is not a part. Nonetheless, if the Commission proceeds, it must more narrowly tailor the proposed rule because Section 889 is significantly different and more narrowly tailored than the much broader rule proposed by the Commission. Further, if the Commission proceeds, it must prioritize financial and technical assistance for affected small businesses as required by Section 889(b)(2).

**II. SECTION 889(B)(1) OF THE 2019 NATIONAL DEFENSE AUTHORIZATION ACT DOES NOT APPLY TO UNIVERSAL SERVICE FUND PROGRAMS.**

Section 889(b)(1) of the 2019 NDAA does not apply to USF programs because the section applies only to “loan” or “grant” funds, and therefore does not apply to USF subsidies, and Section 889 is intended to apply only to the federal government procurement process, of which the USF is not a part.

**a. Section 889(b)(1) Applies Only to Loan or Grant Funds, and Therefore Does Not Apply to Universal Service Fund Subsidies.**

The Bureau asks whether the prohibition in Section 889(b)(1) applies to support provided by USF programs, and whether or not the Section is relevant to the Commission’s pending *NPRM*. RWA agrees with the majority of commenters that Section 889(b)(1) does not apply to USF support.<sup>12</sup>

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<sup>12</sup> See e.g., *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of Competitive Carriers Association](#), WC Docket No. 18-89, at p. 3 (Nov. 16, 2018) (“*CCA Comments*”); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of WTA – Advocates for Rural Broadband](#), WC Docket No. 18-89, at pp. 3-4 (Nov. 16, 2018) (“*WTA Comments*”); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of NTCA – The Rural Broadband Association](#), WC Docket No. 18-

**i. Section 889 distinguishes between loans, grants, and subsidies.**

Section 889(b)(1) provides that the “head of an executive agency may not obligate or expend *loan or grant funds*” to procure or obtain covered equipment, services, or systems.<sup>13</sup> In contrast, Section 889(b)(2) applies to “heads of executive agencies administering loan, grant, or subsidy programs.”<sup>14</sup> Section 889(b)(1) restricts only the obligation or expenditure of “loan or grant funds,” but section 889(b)(2) refers separately to “loan, grant, or subsidy programs.” RWA agrees that the plain language of Section 889(b)(2) therefore distinguishes “subsidy” programs from “loan [or] grant” programs.<sup>15</sup>

Further, the inclusion of the term “subsidy” in (b)(2) but not in (b)(1) shows that Congress deliberately chose not to cover subsidies in (b)(1) because “[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.”<sup>16</sup> RWA agrees that “Congress’ simultaneous enactment of neighboring clauses

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89, at pp. 3-5 (Nov. 16, 2018) (“*NTCA Comments*”); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of the Wireless Internet Service Providers Association](#), WC Docket No. 18-89, at pp. 2-3 (Nov. 16, 2018) (“*WISPA Comments*”); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of ITTA – The Voice of America’s Broadband Providers](#), WC Docket No. 18-89, at pp. 4-5 (Nov. 16, 2018) (“*ITTA Comments*”); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of Rural Wireless Broadband Coalition](#), WC Docket No. 18-89, at p. 5 (Nov. 16, 2018) (“*Coalition Comments*”); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of Huawei Technologies Co., LTD. and Huawei Technologies USA, Inc.](#), WC Docket No. 18-89, at pp. 3-8 (Nov. 16, 2018) (“*Huawei Comments*”).

<sup>13</sup> 2019 NDAA § 889(b)(1) (emphasis added).

<sup>14</sup> 2019 NDAA § 889(b)(2) (emphasis added).

<sup>15</sup> *ITTA Comments* at p. 4; see also *WTA Comments* at p. 3 (stating that “Congress has distinguished grants from subsidies in the statute”).

<sup>16</sup> *Russello v. United States*, 464 U.S. 16, 23 (1983); see also *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 583 (D.C. Cir. 1990) (“When Congress employs the same word, it normally means the same thing, when it employs different words, it usually means



within the very same statutory section—one referring to loans and grants, but the next referring to loans, grants, and subsidies—shows that Congress deliberately intended that section 889(b)(1) apply to loans and grants alone.”<sup>17</sup>

**ii. USF funds are subsidies, not loans or grants.**

As discussed above, Section 889(b)(1) applies to “loan or grant” funds and specifically does not encompass subsidy programs. RWA agrees with multiple commenters that USF support is a subsidy, and not a loan or grant.<sup>18</sup> By definition, loans are required to be paid back.<sup>19</sup> There is no requirement to pay back Universal Service support. Rather, the recipient is obligated to support the operation and/or buildout of supported network infrastructure or related programs with Universal Service funds.<sup>20</sup>

Nor has Congress characterized USF funds as grants in the Communications Act,<sup>21</sup> though it *has* referred to a multitude of *other* federal programs as grant programs.<sup>22</sup> As noted by

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different things”) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 224 (1967)).

<sup>17</sup> *Huawei Comments* at p. 4.

<sup>18</sup> *CCA Comments* at p. 3; *WTA Comments* at p. 3; *WISPA Comments* at p. 2; *ITTA Comments* at pp. 4-5.

<sup>19</sup> Merriam-Webster defines a “loan” as “money lent at interest.” See Merriam-Webster Dictionary, available at [www.merriam-webster.com/dictionary/loan](http://www.merriam-webster.com/dictionary/loan) (last visited Dec. 6, 2018).

<sup>20</sup> See generally Federal Communications Commission, *Universal Service*, available at <https://www.fcc.gov/general/universal-service> (last visited Dec. 6, 2018).

<sup>21</sup> 47 U.S.C. § 254.

<sup>22</sup> See, e.g., 34 U.S.C. § 10108(c) (“In this section, the term ‘DOJ grant funds’ means, for a fiscal year, amounts appropriated for activities of the Department of Justice in carrying out grant programs for that fiscal year.”); 42 U.S.C. § 5106a(f)(1)(B) (“The term ‘grant funds’ means the amount appropriated under section 5106h of this title for a fiscal year and not reserved under section 5106h(a)(2) of this title.”); 12 U.S.C. § 4719(b)(1) (“The Fund shall make grants to community development financial institutions ...”); 34 U.S.C. § 10479(c) (“A State, unit of local government, territory, Indian Tribe, or nonprofit agency that receives a grant under this section shall, in accordance with subsection (b)(2), use grant funds for the expenses of a treatment program ...”); 34 U.S.C. § 10651(h)(1) (“The Attorney General is authorized to make grants under this section to States, units of local government, Indian tribes, and tribal organizations for the following purposes ...”); 42 U.S.C. § 1397m(b)(2) (“Funds provided under grants under this

WTA, “Congress regularly refers to loans and grants in the telecom space for other matters. For example, in this year’s Consolidated Appropriations Act, Congress established a new broadband pilot program under the Rural Utilities Service by referring to both grants and loans.”<sup>23</sup>

USF support is fundamentally different from a loan or grant. As correctly noted by one commenter, “USF support was understood to be a system of implicit subsidies among carriers before the passage of the Telecommunications Act of 1996, and the Act’s provisions merely serve to codify that system explicitly, not to change the system’s fundamental nature.”<sup>24</sup> Further, a 2012 Congressional Research Service (“CRS”) report<sup>25</sup> that compared and contrasted Rural Utilities Service (“RUS”) and Commission broadband deployment funding mechanisms clearly differentiated USF subsidies from grants or loans:

The RUS broadband programs and the FCC’s Universal Service Fund (USF) share a common goal: increasing broadband infrastructure deployment and applications in rural areas. However, the way that each program addresses these goals is markedly different. RUS grants and loans are used as up-front capital to invest in broadband infrastructure, whereas the USF provides ongoing subsidies to keep the operation of telecommunications—and most recently broadband networks in high-cost areas—economically viable for providers. These subsidies, in turn, enable providers to invest in upgrading their telephone networks to make them broadband-capable.<sup>26</sup>

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subsection may be used for any of the following ...”); 47 U.S.C. § 1305 (“grants” and “grant funds” under the Broadband Technology Opportunities Program).

<sup>23</sup> *WTA Comments* at p. 4; *see also The Consolidated Appropriations Act of 2018*, Section 779, Public Law No: 115-141, signed into law March 23, 2018. “\$600,000,000, to remain available until expended, for the Secretary of Agriculture to conduct a new broadband loan and grant pilot program under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.)”

<sup>24</sup> *Huawei Comments* at p. 8; *See ITTA Comments* at pp. 4-5 (“[u]nderlying Congress’ enactment of Section 254 of the Act as part of the Telecommunications Act of 1996 was its mandate to make longstanding implicit universal service subsidies explicit”); *see also e.g., Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8910, 9194, paras. 246, 817 (1996); *see also* 47 U.S.C. § 254(e).

<sup>25</sup> CRS prepares reports for Congress, providing policy and legal analysis to committees and Members of both the House and Senate.

<sup>26</sup> 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) (also noting that “[i]n addition to broadband deployment the USF has a broader mandate,” include Lifeline and E-rate program support). RUS specifically refers to its funding programs as grant, loan, and

In addition, court decisions refer to USF funds as subsidies. For instance, the U.S. Court of Appeals for the District of Columbia Circuit has called USF support a “subsidy . . . intended to ensure adequate, reasonably priced service for residents of rural, sparsely populated, or hard-to reach areas.”<sup>27</sup> Further, the FCC has consistently referred to USF funds as subsidies<sup>28</sup> and distinguished them from loans or grants.<sup>29</sup> RWA agrees that the correct terminology was already established when Congress drafted Section 889, and if Congress wanted the prohibition in Section 889(b)(1) to include USF support, it could have easily added the term “subsidies.” The Commission should recognize and honor Congress’ choice and decline to extend the prohibition in Section 889(b)(1) to USF support.<sup>30</sup>

**b. Section 889 is Intended to Apply Only to the Federal Government Procurement Process, of Which the Universal Service Fund is Not a Part.**

In addition to the prohibition in Section 889(b)(1) being applicable only to “loan or

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loan guarantee programs. *See, e.g., Notice of Funds Availability*, 74 Fed. Reg. 33104 (July 9, 2009) (procedures for applying for RUS Broadband Initiatives Program and award of grants, loans, and loan/grant combinations).

<sup>27</sup> *Rural Cellular Assn. v. FCC*, 588 F.3d 1095, 1098 (D.C. Cir. 2009); *see also Qwest Commc’ns Int’l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (“excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)”) (citing *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001)); *Alenco Commc’ns Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000) (concluding that “[t]he methodology governing subsidy disbursements” was predictable because it was “plainly stated and made available to” carriers); *In re FCC 11-161*, 753 F.3d 1015, 1103 (10th Cir. 2014) (“By way of the Order, the FCC explained its reasoning for each of the subsidies and initiatives that it chose to promote telecommunications access on Tribal lands.”).

<sup>28</sup> *See, e.g., Connect America Fund*, 29 FCC Rcd. 7051, 7092–93, at ¶¶ 120, 123 (2014) (“federal universal service subsidies”); *Connect America Fund*, 26 FCC Rcd 17663, 17673 (¶ 24) (2011) (“Importantly, the CAF will only provide support in those areas where a federal subsidy is necessary to ensure the build-out and operation of broadband networks.”); *US West Communications, Inc. and Wiggins Telephone Association*, 8 FCC Rcd 6229, 6230 (¶6) (1993) (also referring to USF as “the subsidy fund”).

<sup>29</sup> *See In re A Nat’l Broadband Plan for Our Future*, 24 FCC Rcd. 4342, 4350 (2009) (asking “[h]ow would speed definitions and other regulations attached to grants, loans and universal service distributions affect affordability and pricing of services?”).

<sup>30</sup> *CCA Comments* at p. 3; *WTA Comments* at p. 4; *Huawei Comments* at p. 10.

grant” funds, Section 889 of the 2019 NDAA is intended to apply only to the federal government procurement process, of which the USF is not a part. The introductory paragraph of the 2019 NDAA states the legislation’s purpose: “To authorize appropriations for fiscal year 2019 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.”<sup>31</sup> Section 889 is intended to apply only to the federal government procurement process, including companies that support the Departments of Defense and Energy through federal contracts. The Rural Wireless Broadband Coalition agrees, stating that the text of Section 889, including the incorporation of the definition of “executive agency” given in Title 41 (Public Contracts) of the United States Code,<sup>32</sup> “suggests that Congress intended that the [Section] 889 prohibitions apply to government contracts that entail the expenditure of appropriated funds for covered telecommunications equipment or services”<sup>33</sup> – and *not* to USF support.

More specifically, Section 889(b)(1) applies only to the use of 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” certain “equipment, services, or systems.”<sup>34</sup> The Commission does not procure anything for itself while engaged in its USF oversight responsibilities. It does not “procure” or “obtain,” or “enter into a contract to procure or obtain,” any service or equipment when it distributes USF support, but instead *provides* support for qualified recipients to provide necessary communications services to consumers that would

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<sup>31</sup> 2019 NDAA.

<sup>32</sup> Section 889(f)(4) of the 2019 NDAA provides that the term “executive agency” has the meaning given the term in 41 U.S.C. § 133. That definition is given in the “Federal Procurement Policy” provisions of Subtitle I of Title 41. *See* 41 U.S.C. § 133.

<sup>33</sup> *Coalition Comments* at p. 4.

<sup>34</sup> 2019 NDAA § 889(b)(1).

otherwise lack access to them. RWA agrees that USF distribution does not implicate the concerns that Congress sought to address in Section 889(b)(1), and it is not relevant to the Commission's pending *NPRM*.<sup>35</sup>

**c. Section 889(b)(2)'s Requirement That the FCC and Other Agencies Prioritize Available Funding and Technical Support to Assist Affected Entities Does Not Necessitate a Finding that Section 889(b)(1) Applies to USF Support.**

Section 889(b)(2) requires that, in implementing the prohibition in Section 889(b)(1), the “heads of executive agencies administering loan, grant, or subsidy programs, including the heads of the Federal Communications Commission...shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.”<sup>36</sup> However, contrary to NCTA's contention that “subsection (b)(2) manifests Congressional intent for this restriction to cover any type of federal executive agency ‘loan, grant, or subsidy program’ administered by the Commission,”<sup>37</sup> the fact that Section 889(b)(2) applies to, among other entities, agencies that administer subsidy programs, does not necessitate a finding that Section 889(b)(2) applies to USF support.

RWA agrees with ITTA that the appropriate way to read paragraph (1) in conjunction with paragraph (2) of Section 889(b) is that “if implementation of Section 889(b)(1) by an executive agency that *does* administer loan or grant funds affects entities such that they must transition from covered equipment and services, the enumerated agencies collectively are

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<sup>35</sup> *CCA Comments* at p. 3; *see also Coalition Comments* at p. 4.

<sup>36</sup> 2019 NDAA § 889(b).

<sup>37</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, [Comments of NCTA – The Internet & Television Association](#), WC Docket No. 18-89, at p. 4 (Nov. 16, 2018).

responsible to ensure that they devote available funding and technical support to assist such entities in procuring replacement equipment and services in a manner that ensures that communications service is sustained and customers not disrupted.”<sup>38</sup>

The Rural Wireless Broadband Coalition explains that “if a carrier participating in the USDA’s Community Connect Grant Program were required to replace equipment, § 889(b)(2) would authorize the Commission to prioritize USF support to assist in ensuring that rural consumers continue to have service.” To be clear, USF subsidies are only distributed to those entities deemed qualified to receive them, and the FCC must prioritize how those funds are used in conjunction with Section (b)(2). In a situation where Section (b)(1) is triggered in relation to loans or grants, then the Commission – pursuant to Section (b)(2) – can prioritize the use of universal service support subsidies to rip and replace targeted equipment for those that qualify for universal service support under the Communications Act.

**III. IF THE COMMISSION PROCEEDS, IT SHOULD PROVIDE TRANSITIONAL FUNDING AND AN EXTENDED COMPLIANCE PERIOD FOR AFFECTED SMALL BUSINESSES.**

Notwithstanding the arguments discussed above, to the extent the Commission determines that it will proceed with applying a targeted equipment prohibition to Universal Service programs as proposed in this proceeding, based upon Section 889(b)(1), the Commission should comply with Section 889(b)(2)’s mandate to “prioritize available funding and technical support to assist affected businesses, institutions and organizations...to ensure that

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<sup>38</sup> *ITTA Comments* at p. 6. This is consistent with the 2019 NDAA Conference Report, which discusses the final version of Section 889: “[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.” *See* H.R. Rep. No. 115-874, at 919 (2018).

communications service to users and customers is sustained”<sup>39</sup> and modify its proposed rule to provide for transitional funding and an extended compliance period for affected small entities. Given that the Commission has not quantified the cost to rip and replace Huawei and ZTE equipment, nor considered the time and work involved in a rip and replace program, RWA urges the Commission to hold a workshop consisting of equipment vendors, network service providers, and network engineers to assist in evaluating the cost and time involved in changing out impacted network equipment. The information gleaned from such a workshop will inform the FCC on the amount of money and time needed to implement a rip and replace program. The Commission should then adopt an updated Further Notice of Proposed Rulemaking that seeks comment on these findings.

**a. Section 889 is More Narrowly Tailored Than The Broad Prohibition Proposed by the Commission.**

RWA agrees with the Rural Wireless Broadband Coalition that the language in Section 889 is more narrowly tailored than the broad prohibition proposed by the Commission. In particular, Section 889(b)(1) applies only with respect to “covered telecommunications equipment and services,” a term defined to include “telecommunications equipment” and “telecommunications ... services” produced by Huawei, ZTE, and other manufacturers subject to certain exemptions.<sup>40</sup> In contrast, the Commission’s rule proposed in the *NPRM* would preclude the use of USF funds to buy products and services irrespective of whether the product or service

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<sup>39</sup> Further, the Commission’s *NPRM* appears largely to focus on the Universal Service Fund’s High Cost Program. However, the Universal Service Fund is comprised of four distinct programs – High Cost Support, Low Income Support, Rural Health Care Support, and Schools and Libraries Support. RWA urges the Commission to consider how its proposals would impact each of the programs.

<sup>40</sup> 2019 NDAA § 889(f)(3)(A), (C).

is “telecommunications equipment” or a “telecommunications service” within the meaning of the 2019 NDAA.<sup>41</sup>

In addition, Section 889(b)(1)’s prohibition applies only with respect to the use of covered telecommunications equipment or services “as a substantial or essential component” or “as critical technology.” In contrast, the Commission’s proposed rule would preclude the use of USF funds to buy products or services from a prohibited company irrespective of whether telecommunications equipment is used as a “substantial or essential component” or as “critical technology.”<sup>42</sup>

Further, Section 889(b)(3) exempts from Section 889(b)(1)’s prohibition the procurement of “a service that connects to the facility of a third-party, such as backhaul, roaming, or interconnection arrangements,” as well as the procurement of “telecommunications equipment that cannot route or redirect user data or traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.” The Commission’s proposed rule includes no comparable exemptions.<sup>43</sup> If the Commission proceeds with applying a targeted equipment prohibition to Universal Service programs as proposed in this proceeding, based upon Section 889(b)(1), it must more narrowly tailor its proposed rule in order for it to meet its obligation to conform to Section 889. In order to be valid, a Commission rule must “carry into effect the will of Congress as expressed in [a] statute,” and a rule that “operates out of harmony with the statute is a mere nullity.”<sup>44</sup>

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<sup>41</sup> *Coalition Comments* at p. 9; *Huawei Comments* at p. 12.

<sup>42</sup> *Coalition Comments* at p. 9; *Huawei Comments* at p. 12.

<sup>43</sup> *Coalition Comments* at p. 9; *Huawei Comments* at p. 12.

<sup>44</sup> *United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977) (quoting *Manhattan General Equipment Co.*, 297 U.S. 129, 134 (1936)) (internal punctuation omitted). Therefore, it is the Commission’s responsibility “to conform its rules to any pertinent new laws.” *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689, 693-94 (7th Cir. 1998) (citing *Larionoff*, 431 U.S. at 873 & n.12).



**b. If the Commission Proceeds with Applying a Targeted Equipment Prohibition to Universal Service Programs as Proposed in this Proceeding, Based Upon Section 889(b)(1), the Commission Must Prioritize Financial and Technical Assistance for Affected Small Businesses Consistent With Its Statutory Responsibilities Under Section 889(B)(2).**

As initially proposed, the Commission’s rule does not include any sort of financial support to assist affected small carriers in removing and replacing prohibited equipment.<sup>45</sup> If the Commission proceeds with applying a targeted equipment prohibition to Universal Service programs as proposed in this proceeding, based upon Section 889(b)(1), it must “prioritize available funding and technical support” for affected small businesses in order to comply with its statutory responsibility in Section 889(b)(2).

**i. Affected Small Carriers Will Face Significant Financial Challenges If the Targeted Equipment is Prohibited.**

RWA and other commenters have discussed in great detail the substantial harm that the Commission’s proposed rule would cause to rural wireless carriers and their customers.<sup>46</sup> RWA agrees that the record in this proceeding clearly demonstrates that the Commission’s proposed rule would significantly and negatively impact small and rural wireless carriers’ ability to operate – that “those small, rural providers that rely upon the equipment in question will be

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The 2019 NDAA constitutes a new law that is pertinent to the rule that the Commission is proposing in this proceeding. *See Coalition Comments* at pp. 9-10.

<sup>45</sup> *See Coalition Comments* at p. 9; *WISPA Comments* at pp. 3-4.

<sup>46</sup> *See, e.g., RWA Reply Comments* at pp. 7-12; *Protecting Against National Security Threats To the Communications Supply Chain Through FCC Programs*, [Comments of Competitive Carriers Association](#), WC Docket No. 18-89, Declarations of Michael Beehn, Frank DiRico, James Groft, Todd Houseman, Michael Kilgore, John Nettles, and Eric Woody (June 1, 2018); *Protecting Against National Security Threats To the Communications Supply Chain Through FCC Programs*, [Comments of Pine Belt Cellular, Inc.](#), WC Docket No. 18-89 (June 1, 2018); *Protecting Against National Security Threats To the Communications Supply Chain Through FCC Programs* (“Pine Belt Comments”), [Comments of Mark Twain Communications Company](#), WC Docket No. 18-89 (June 1, 2018); *Protecting Against National Security Threats To the Communications Supply Chain Through FCC Programs*, [Comments of Sagebrush Cellular, Inc.](#), WC Docket No. 18-89 (June 1, 2018) (“Sagebrush Comments”).

overwhelmed by the costs of compliance.”<sup>47</sup> RWA estimates that at least 25 percent of its carrier members would be impacted. Estimated rip-and-replace costs vary by carrier, but are significant across the board. Pine Belt estimates that the purchase price of replacement equipment “would be from \$6 million to \$10 million, and the downtime from installing new equipment would likely cause Pine Belt to forego [sic] another \$1 to 3 million in roaming fees.” In total, the proposed rule could easily result in \$7 to \$13 million in direct costs to Pine Belt.<sup>48</sup> Sagebrush estimates the cost of replacing its network at around \$57 million, and notes that such replacement cost for a small rural carrier is prohibitive without replacement funding.<sup>49</sup>

**ii. The Commission Should Provide Adequate Transitional Funding.**

The Commission should not take any action to implement Section 889(b)(1) without a clear plan to reimburse affected carriers and ensure that consumers do not face any adverse impact to their service.<sup>50</sup> NTCA agrees, noting that “[t]o the extent that the 2019 NDAA could be deemed relevant to Universal Service Fund support, the FCC should heed Congress’ instructions in Section 889(b)(2) to ‘prioritize available funding and technical support to assist affected businesses, institutions, and organizations’ that are affected by Section 889(b)(1), ‘and to ensure that communications service to users and customers is sustained.’”<sup>51</sup> RWA looks forward to working with Commission staff on a workable solution.

The Commission should establish a fund from which USF recipients that have installed equipment later deemed to pose a national security threat can seek reimbursement to offset the replacement costs of compliant equipment. Requiring providers to foot the bill for

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<sup>47</sup> *NTCA Comments* at p. 5.

<sup>48</sup> *Pine Belt Comments* at pp. 6-7.

<sup>49</sup> *Sagebrush Comments* at pp. 2-3.

<sup>50</sup> *CCA Comments* at pp. 3-4.

<sup>51</sup> *NTCA Comments* at p. 9.

revamping ongoing USF-supported network construction, for maintaining networks at added cost without original manufacturer-supplied compatible parts and/or support, and/or for replacing “banned” equipment, would be patently unreasonable – and would run afoul of Section 889(b)(2)’s requirement that the Commission assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

**iii. The Commission Should Allow For a Sufficient Compliance Period.**

Any rule that the Commission ultimately adopts must be prospective. Network equipment has a lengthy lifespan, and this must be addressed and accommodated in any rule which seeks to prohibit the use of universal funds for restricted suppliers. As such, the Commission should provide a sufficient phase-in period and/or delayed compliance date. Replacing an entire network’s worth of equipment takes time.<sup>52</sup> RWA member Sagebrush Cellular estimates that “transition to a new network will require approximately two years of planning, including research and negotiation with vendors, network planning, and developing a financial plan for the new network.”<sup>53</sup> And once this stage is completed “and a new vendor is chosen, the buildout, core turn up, configuration of the new network, and optimization are all likely to take at least an additional eight years.”<sup>54</sup> Accordingly, affected RWA members and other small and rural wireless carriers need at least 10 years to replace network equipment and ensure a smooth transition. NTCA agrees, noting that “small providers should be afforded a ten-year transition period which is tied to the economic or useful life of the specific, identified

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<sup>52</sup> See *RWA Reply Comments* at pp. 36-37.

<sup>53</sup> *Sagebrush Comments* at pp. 6-7.

<sup>54</sup> *Id.*

equipment.”<sup>55</sup> The longer the period before carriers have to comply, the greater ability they have to spread out costs to try to lessen the proposed rule’s crippling financial impact.

RWA also notes that the Commission is in the midst of a transition of support for mobile wireless carriers from legacy USF support to the Mobility Fund Phase II (“MFII”) support mechanism. The Commission should postpone action on the MFII reverse auction until the Commission concludes this rulemaking proceeding. If rural carriers are required to rip and replace Huawei or ZTE equipment, they will need to know this fact before participating in the MFII auction. Without such prior knowledge, their auction participation will be purely speculative, and is likely to result in diminished auction participation, to the detriment of the public.

**c. If the Commission Proceeds with Applying a Targeted Equipment Prohibition to Universal Service Programs as Proposed in this Proceeding, Based Upon Section 889(b)(1), the Commission Should Adopt a Further Notice of Proposed Rulemaking.**

The *NPRM* lacked clarity and definition and introduced threshold questions that require further study and discussion. RWA agrees that “the Commission should develop a clearer and more focused policy that addresses real harms; limit uncertainty and compliance burdens for USF recipients; and coordinate with other agencies, like [Department of Homeland Security], on a wider effort to understand the extent to which there are problems or vulnerabilities on networks in the United States.”<sup>56</sup>

Passage of the *2019 NDAA* and adoption of the *Public Notice* have not provided clarity – and, in fact, have only confused matters. To the extent the Commission proceeds with applying a targeted equipment prohibition to Universal Service programs as proposed in this

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<sup>55</sup> *NTCA Comments* at p. 10.

<sup>56</sup> *CCIA* 4-5.

proceeding, based upon Section 889(b)(1), the Commission should revise its proposed rule and then adopt a Further Notice of Proposed Rulemaking that seeks comment on such changes. NTCA agrees, stating that “as a procedural next step, the Commission should issue an updated Further Notice of Proposed Rulemaking to provide much-needed clarity and definition to the targeted equipment prohibition, including a required transition path for affected small businesses.”<sup>57</sup> WTA, too, notes that “in a Further Notice of Proposed Rulemaking, the FCC must establish how it will assist the small carrier transition under Section 889.”<sup>58</sup> If the Commission decides to proceed with applying a targeted equipment prohibition to Universal Service programs as proposed in this proceeding, based upon Section 889(b)(1), RWA joins other commenters in urging the Commission to adopt a Further Notice of Proposed Rulemaking.

#### **IV. CONCLUSION.**

As discussed above, Section 889(b)(1) of the *2019 NDAA* applies only to loan or grant funds and therefore does not apply to USF subsidies. Further, Section 889 is intended to apply only to the federal government’s procurement process, of which the Universal Service Fund is not a part. Notwithstanding these statutory limitations, to the extent the Commission determines that it apply a targeted equipment prohibition to Universal Service programs as proposed in this proceeding, based upon Section 889(b)(1), RWA urges the Commission to comply with Section 889(b)(2)’s mandate to “prioritize available funding and technical support to assist affected businesses, institutions and organizations...to ensure that communications service to users and customers is sustained” and provide transitional funding and an extended compliance period to affected small carriers. The Commission should then adopt a Further

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<sup>57</sup> *NTCA Comments* at p. 9.

<sup>58</sup> *WTA Comments* at p. 7.

Notice of Proposed Rulemaking that seeks comment on such changes. RWA looks forward to its continued work with the Chairman, Commissioners, and Commission staff in this proceeding.

Respectfully submitted,

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