

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Wireline Competition Bureau Seeks)	WC Docket No. 18-89
Comment on Section 889 of the John S.)	
McCain National Defense Authorization)	
Act for Fiscal Year 2019)	

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

November 16, 2018

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I. INTRODUCTION & SUMMARY

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these comments in response to the Federal Communications Commission’s (“FCC’s” or the “Commission’s”) Public Notice² seeking comment on the applicability of provisions in the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (“2019 NDAA” or “the Act”)³ to the Commission’s Protecting Against National Security Threats to the Communications Supply Chain proceeding⁴ and to the programs the Commission oversees.

¹ NTCA represents more than 800 independent, community-based telecommunications companies. All NTCA members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, long-distance, and other competitive services to their communities.

² *Wireline Competition Bureau Seeks Comment on Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019*, Public Notice, WC-Docket No. 18-89 (rel. October 26, 2018).

³ *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”).

⁴ *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Notice of Proposed Rulemaking, WC Docket 18-89 (rel. Apr. 18, 2018).

Consistent with its previous comments in this docket, NTCA and its members remain committed to well-targeted proposals to address threats within the telecommunications supply chain.⁵ Despite their small size and remote locations, small network providers take matters of national security very seriously and recognize the important role they play in protecting public safety, and ensuring the confidentiality, availability, and integrity of the telecommunications network.

Given the broader purpose of and context by which the 2019 NDAA was created, and the plain language of the statute, Congress did not intend for the Commission specifically to prohibit the use of Universal Service support for covered telecommunications equipment and services.

Notwithstanding the clear legal boundaries of the NDAA, if the Commission independently determines that it must proceed forward in this proceeding with an equipment prohibition, then it must immediately shift its attention to its own compliance with the related statutory requirement under Section 889(b)(2) of the Act to prioritize financial and technical assistance for affected small businesses. In addition, prohibiting operators from using Universal Service support for targeted, covered suppliers will result in immediate harm to the affected small telecommunications operators and the rural consumers that they serve. Those small carriers that rely upon the selected manufacturers in question, typically operate on thin margins and cannot afford to wholesale “rip and replace” the equipment within their network without external support and recovery mechanisms. Therefore, if the Commission proceeds forward with a targeted equipment prohibition as it applies to Universal Service funds, then it also must identify how it will provide financial and technical resources for affected small businesses.

⁵ Comments of NTCA, WC Docket No. 18-89, at 5 (filed June 1, 2018).

II. SECTION 889(b)(1) OF THE 2019 NDAA DOES NOT APPLY TO THE COMMISSION'S UNIVERSAL SERVICE PROGRAMS

Within the Public Notice, the Commission questions whether Section 899(b)(1) of the 2019 NDAA applies to support provided by the Universal Service Fund and its relevance, if any, to the Protecting Against National Security Threats to the Communications Supply Chain rulemaking. To address that question, the Commission should refer to the purpose of the legislation and the framework within which Section 889(b)(1) was created, in addition to the language itself within Section(b)(1).

The annual NDAA specifies the Federal government's purchasing and acquisition to support our nation's defense activities for the next fiscal year. The first few lines of the 2019 NDAA asserts its 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."⁶ 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. However, the Universal Service program is not related to either department, the Federal government procurement process, or national defense activities specifically.

Against this backdrop, Section 889(b)(1) directs that "[t]he 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" covered telecom equipment and services.⁷ As a threshold matter, the Commission, through its

⁶ 2019 NDAA.

⁷ *Id.*, Section 889(b)(1), emphasis added.

Universal Service programs, does not “obligate or expend loan or grant funds...or procure or obtain, extend or renew a contract[.]” to enrich our nation’s defenses; Universal Service is classified as neither a loan nor a grant, and it does not serve as a contract with the Federal government to support our nation’s defenses. The Commission should not read more into the plain language of the Act and apply the stated prohibition beyond its intended boundaries.

In addition, Congress did not include Universal Service or, more generally, a reference to subsidy programs, within Section 889(a) or (b)(1) of the Act which provides more general direction to executive branch agencies regarding how to apply the covered equipment and service prohibition. Indeed, within the 2019 NDAA there is only *one* reference each to the “Federal Communications Commission” and the term “subsidy programs”; the terms are only included within Section 889 (b)(2) directing the “Federal Communications Commission”— alongside other Federal agencies —“to prioritize available funding and technical support to assist affected businesses.”⁸ Consistent with this interpretation, the Supreme Court has found that “where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”⁹ The Court also decreed that “[a] familiar principle of statutory

⁸ *Id.*, Section 889(b)(2).

⁹ *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). See also, *Bailey v. United States*, 516 U.S. 137, 146 (1995) (distinction in one provision between “used” and “intended to be used” creates implication that related provision’s reliance on “use” alone refers to actual and not intended use); *Merck v. Reynolds*, 559 U.S. 633 (2010) (Scalia, J., concurring) (use of “discovery” alone in one securities fraud statute of limitations provision and the use of “discovery, or after such discovery should have been made” in another securities fraud statute of limitations provision implies that “discovery” in the first provision means only “actual discovery” and does not include “constructive discovery”); and *Bates v. United States*, 522 U.S. 23, 29 (1997) (inclusion of “intent to defraud” language in one provision and exclusion in a parallel provision).

construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”¹⁰

Given the extremely narrow and singular inclusion referring to the Commission and “subsidy program” within Section 889(b)(2) the Act—and the broader purpose of the NDAA as it applies to specifying Federal defense spending—Congress did not intend for the Commission to prohibit the use of covered telecommunications equipment and services by Universal Service recipients through an expansive reading of the statute. Instead, Congress clearly intended in Section 889(b)(2) for the Commission to be among those agencies that could offer technical or financial assistance as needed to those small businesses affected by prohibitions implemented by other executive agencies in connection with loans, grants, and contracts pursuant to Section 889(b)(1).

III. THE RECORD AFFIRMS THAT AFFECTED SMALL CARRIERS WILL FACE SIGNIFICANT FINANCIAL CHALLENGES IF THE TARGETED EQUIPMENT IS PROHIBITED

The record in this proceeding provides clear evidence as to the repercussions of prohibiting the use of equipment from specified telecommunications suppliers: those small, rural providers that rely upon the equipment in question will be overwhelmed by the costs of compliance.

“Commenters agree that the rule would force many small rural carriers to replace network infrastructure, at enormous cost, because of a lack of interoperability between existing equipment purchased from targeted suppliers and new or upgraded equipment obtained from other suppliers.”¹¹ CCA further explains the problem: “The reality....is that even though the

¹⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006)

¹¹ Rural Wireless Broadband Coalition Reply Comments at 2 (filed July 2, 2018); *Also see* NTCA Comments at 9, 20–21; CCA Comments at 9–10 (filed June 1, 2018); ITTA Comments at

FCC intends its proposed rule to operate prospectively, it will have devastating and immediate retroactive effects,” as carriers would be forced to “rip and replace” because “mix and match” is not a realistic solution.”¹² Small carriers threatened by a prohibition attest that would have to spend millions of dollars—and in some cases, more than \$100 million—on just the immediate costs of removing and replacing targeted equipment.¹³

For instance, Pine Belt Cellular, Inc. (“Pine Belt”)—which along with its parent and affiliated companies provides advanced telecommunications services in rural Alabama—explains that the Commission’s proposed rule would force the operator to replace all of its existing equipment, which represents the vast majority of its network, as the operator “is very concerned about the long-term interoperability” if it was to continue using this equipment “in conjunction with newer equipment (including upgrades) from different manufacturers.”¹⁴ Pine Belt further “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 another \$1 to \$3 million in roaming fees from the service it provides to customers of the larger carriers.” In total, Pine Belt estimates that the proposed rule could cost the operator \$7 to \$13 million in direct costs.

Mark Twain Communications Company (“Mark Twain”), which provides telecom services to rural areas surrounding the city of Hurdland in Knox County, Missouri, states that the

6 (filed June 1, 2018); JAB Wireless, Inc., Comments at 4 (filed June 1, 2018); Mark Twain Comments at 4–5 (filed June 1, 2018); Puerto Rico Tel. Co. Comments at 6–7 (filed June 1, 2018); Rural Broadband Alliance Comments at 6 (filed June 1, 2018); WTA – Advocates for Rural Broadband Comments at 6 (filed June 1, 2018).

¹² CCA Comments at 9-11.

¹³ CCA Comments, Beehn Decl. at 2; *id.*, DiRico Decl. at 3; *id.*, Woody Decl. at 2–3; Pine Belt Comments (filed June 1, 2018); Mark Twain Comments; WTA-Advocates for Rural Broadband Comments; and Sagebrush Comments (filed June 1, 2018).

¹⁴ Pine Belt Comments at 6.

actual equipment costs are just the tip of the iceberg, as additional expenses will be incurred in “research and development and pre-deployment testing.”¹⁵ And if Mark Twain’s network is found to violate a new prohibition, the operator will “incur debilitating costs to purchase a new core for switching, base stations, CPE, etc.”¹⁶

In addition to the costs to replace network infrastructure, a targeted equipment prohibition will result in higher prices for equipment, and potentially longer wait times for order fulfillment. Within the United States, the equipment market is dominated by three firms: Nokia, Ericsson, and Samsung, that control nearly 91% of sales.¹⁷ However, the presence of other manufacturers ensures supplier diversity at competitive rates.

Sagebrush Cellular, Inc. (“Sagebrush”)—a wholly owned subsidiary of Nemont Telephone Cooperative, Inc., and a wireless provider which serves northeast and southcentral Montana, as well as portions of northwest North Dakota—explains how this works in practice; the proposed prohibition on targeted equipment manufacturers will require the operator to purchase more expensive equipment. When Sagebrush solicited bids in 2010 for its networks, it found the cost of Lucent equipment to be *twice* the cost, and Ericsson equipment to be *nearly four times* the cost of the selected, targeted supplier.¹⁸

Therefore, if Section 889(b)(1) were applied in the context of the Commission’s Universal Service programs, the prohibition would further narrow the scope of products and services available to rural operators, thereby increasing these operators’ costs for broadband deployment in rural and remote portions of the country. The equipment prohibition also will

¹⁵ Mark Twain Comments at 4

¹⁶ *Id.* at 5.

¹⁷ Comments of Allan L. Shampine, Ph.D. on *Competition and Consumer Protection in the 21st Century Hearings*, Project Number P181201 supra note 33 at ¶ 8, Aug. 20, 2018.

¹⁸ Sagebrush Comments at 2.

affect the availability of approved equipment, and therefore, buildout timelines; large national telecom operators are typically provided with priority in their equipment needs, relegating smaller companies to the “back of the line” while they wait for manufacturers to fulfill their needs.

The proposed rule also “would make it difficult for many small rural carriers to maintain their existing levels of service and overage, shrinking consumers’ access to voice and broadband services.”¹⁹ Sagebrush asserts that “such replacement is cost prohibitive without replacement funding”; if the carrier was to rely only upon its annual USF funding, then Sagebrush would be forced to substantially reduce its coverage.²⁰ The operator projects that “its network would be reduced by almost two-thirds, shrinking from 161 to 55 cell sites, while the size of its coverage area would be reduced by over two-thirds, a loss of 11,700 square miles of coverage.”²¹ Sagebrush further explains that most of its service area is not replicated by competing carriers, ensuring that any loss of coverage would have significant public safety implications. In areas where Sagebrush is the only wireless operator, “911 service as well as voice and mobile broadband service will be lost.”²²

Eastern Oregon Telecommunications similarly has expressed concern regarding the proposed equipment prohibition and its impact on the deployment of rural broadband.²³ NTCA urges the Commission to heed the warning signs: the proposed equipment prohibition from

¹⁹ Rural Wireless Broadband Coalition Reply Comments at 8 (filed July 2, 2018).

²⁰ Sagebrush Comments at 3.

²¹ *Id.*

²² *Id.*

²³ Eastern Oregon Telecom, *Ex Parte*, June 26, 2018.

targeted suppliers “risk[s] shifting the Commission’s universal service policy into reverse gear, contrary to the agency’s statutory mandate.”²⁴

IV. IF THE COMMISSION PROCEEDS FORWARD, CONSISTENT WITH THE RECORD AND ITS STATUTORY RESPONSIBILITIES UNDER SECTION 889(b)(2), IT MUST PRIORITIZE FINANCIAL AND TECHNICAL ASSISTANCE FOR AFFECTED SMALL BUSINESSES

Notwithstanding the arguments discussed above, to the extent the Commission determines that it will proceed forward with a targeted equipment prohibition as it applies to its Universal Service programs and proposed in this proceeding based upon Section 889(b)(1), then it must immediately turn its attention to its own compliance with Section 889(b)(2) of the statute that specifically directs the “Federal Communications Commission” to “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.”²⁵ The Commission has an obligation under Section (b)(2) to ensure that small carriers affected by this prohibition (and ultimately the rural consumers they serve) are not harmed by the process.

In that case, 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. Small carriers, which operate on extremely thin margins and rely upon the selected manufacturers in question, cannot afford to wholesale “rip and replace” functional equipment within their network

²⁴ Rural Wireless Broadband Coalition Reply Comments at 8.

²⁵ 2019 NDAA, Section 889(b)(2).

– which, at the time of purchase was lawfully installed – without external support and recovery mechanisms.

In addition, affected carriers should be afforded a reasonable time period to transition to new equipment to minimize any unintended consequences. For those companies that have embedded technology from the targeted suppliers, network equipment cannot be summarily removed and replaced overnight – despite an operator’s best efforts and an unequivocal commitment to network security. Rather, replacement equipment must be evaluated, selected, tested, deployed, and perhaps most importantly, paid for – a process that could take years, especially in extremely high-cost areas.

As supported by the record, small providers should be afforded a ten-year transition period which is tied to the economic or useful life of the specific, identified equipment.²⁶ Sagebrush 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.”²⁷ 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.”²⁸ Indeed, it is within the public interest to include a sufficient phase-in-period or delayed compliance date as the “longer the period before carriers have to comply, the greater ability they have to spread out costs to try to lessen the proposed rules’ crippling financial impact” on their operations and the resultant services used by rural and remote customers.²⁹

²⁶ Sagebrush Comments at 6-7; Rural Wireless Association Reply Comments at 37 (July 2, 2018); CCA Comments at 11 and 45.

²⁷ Sagebrush Comments at 6-7.

²⁸ *Id.*

²⁹ Rural Wireless Association Reply Comments at 37.

During this transition period, existing hardware and software will need to be maintained, patched, and repaired, or a telecommunications operator risks jeopardizing the quality of service it provides to its customers. Affected providers should be explicitly allowed to replace failing equipment, as required, with spare parts, including procuring additional spares as needed. Equipment and software also need to be patched on a regular basis. Ironically, if systems are not regularly patched, this poses a security risk by itself as out-of-date software is highly vulnerable to cyber-attack. As such, during the transition process, software updates also should be explicitly allowed. Similarly, multi-year contracts or service agreements should last for as long as the related equipment is permitted and should be explicitly grandfathered, or a clear change of law is required.

V. CONCLUSION

For the aforementioned reasons, NTCA urges the Commission to heed Congress' intent and refrain from applying Section 889(b)(1) of the 2019 NDAA to the Commission's Universal Service programs. However, if the Commission proceeds forward with an equipment and services prohibition, then it must ensure, consistent with the direction specified in Section 889(b)(2) of the Act, that affected small operators are provided with the required technical and financial assistance to transition to and replace covered communications equipment and services, while also ensuring that communications service to users and customers is sustained.

Respectfully submitted,



By: /s/ Jill Canfield
Jill Canfield
Vice President, Legal & Industry and Assistant
General Counsel
jcanfield@ntca.org

By: /s/ Jesse Ward
Jesse Ward
Director, Industry & Policy Analysis
jward@ntca.org

4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203
703-351-2000

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