

Documents for the Record – 05.16.24 C&T Hearing

1. A May 14, 2024, letter to Subcommittee leadership from the U.S. Chamber of Commerce commending oversight of the NTIA.
2. A May 10, 2024, memo from CERCI in opposition to the Public Safety Spectrum Alliance (PSSA).
3. A May 15, 2024, letter to Committee leadership from ACA Connects, Fiber Broadband Association, and NCTA-The Rural Broadband Association.
4. A March 26, 2024, letter to Assistant Secretary Davidson from Democratic members of the Subcommittee on Communications and Technology.



May 14, 2024

The Honorable Robert Latta  
Chair  
Subcommittee on  
Communications and Technology  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Doris Matsui  
Ranking Member  
Subcommittee on  
Communications and Technology  
U.S. House of Representatives  
Washington, DC 20515

Dear Chair Latta and Ranking Member Matsui:

The U.S. Chamber of Commerce (“Chamber”) respectfully submits the following statement for the record for the House Energy and Commerce’s Subcommittee on Communications and Technology hearing titled “The Fiscal Year 2025 National Telecommunications and Information Administration Budget.” We appreciate the Subcommittee’s continued oversight of the National Telecommunications and Information Administration (“NTIA”) to ensure NTIA’s programs are effective in closing the digital divide, and maintaining American leadership in communications, connectivity, and AI.

America’s communications networks and platforms play an essential role in boosting economic growth, protecting national security, and revolutionizing the way that people are informed, communicate with friends and family, work, and learn. Since the passage of the 1996 Telecommunications Act, the private sector has invested \$2.1 trillion into our nation’s communications infrastructure. The Chamber encourages robust oversight over key NTIA areas of work including broadband deployment funding and spectrum management. The Chamber also has concerns with several NTIA policy activities which has contributed to the Federal Communications Commission (“FCC’s”) regulatory overreach.

### **I. Closing the Digital Divide**

The Infrastructure Investment and Jobs Act (“IIJA”) grants NTIA a leading role in implementing the IIJA’s broadband provisions to connect all Americans, primarily through the \$42 billion Broadband, Equity, Access, and Deployment (“BEAD”) Program. As NTIA continues to implement the program, the Chamber urges this Subcommittee to provide vigorous oversight to ensure taxpayer dollars are spent responsibly and that NTIA adheres to the IIJA’s statutory guardrails and Congressional intent.

Eligible entities (i.e. states and territories) are working to finalize their initial proposals for NTIA approval, and to date, a handful of states have met that objective, unlocking access to more

than \$2 billion in BEAD funding.<sup>1</sup> The Chamber applauds the progress made by NTIA and eligible entities to advance the program. However, we express strong concern that NTIA is reportedly requiring eligible entities to regulate rates by mandating a specific price point for an eligible entities' low-cost plan.<sup>2</sup> This clearly violates the IJJA, which prohibits NTIA from engaging in rate regulation.<sup>3</sup> Considering BEAD is a federal program and NTIA is required to review and approve eligible entity proposals, allowing or encouraging states to rate regulate also violates the statute. We appreciate the Subcommittee's previous oversight on this issue, and we encourage further investigation in light of more eligible entity initial proposals reaching completion.<sup>4</sup>

In addition, the Chamber is pleased the NTIA is taking steps to reduce broadband permitting barriers. These efforts include requiring eligible entities to create thirty new National Environmental Policy Act (NEPA) categorical exclusions, building a permitting mapping tool, and providing streamlined historical preservation review.<sup>5</sup> We encourage NTIA to build on this progress. Also, Congress should enact legislation to facilitate broadband permitting, by passing the American Broadband Deployment Act and closing the municipal and cooperative pole attachment loophole.

## II. Ensuring American Spectrum Leadership

Sound spectrum policy is critical to the business community and its consumers, as well as to fulfill important national objectives including national and homeland security, job creation and economic growth. In March, NTIA issued the *National Spectrum Strategy Implementation Plan*, which outlines the concrete steps needed to implement the *National Spectrum Strategy* ("NSS").<sup>6</sup> NTIA should continue engaging the business community on spectrum policy, be collaborative and creative in addressing the spectrum needs of all stakeholders and leverage the NSS to launch the next generation of spectrum innovation.

Spectrum planning, such as NTIA's NSS implementation plan, is instrumental to facilitating sound spectrum policy, which allows for the delivery of products and services that ensure public

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<sup>1</sup> Press Release, Nat'l Telecomm. and Info. Admin., Biden-Harris Administration Approves Kansas, Nevada, and West Virginia's "Internet for All" Initial Proposal (April 25, 2024), <https://broadbandusa.ntia.gov/news/latest-news/biden-harris-administration-approves-kansas-nevada-and-west-virginias-internet-all>.

<sup>2</sup> Jason Lee, ATR Leads Coalition Letter Opposing NTIA's Illegal Rate Regulation, AMERICANS FOR TAX REFORM (March 7, 2024), <https://www.atr.org/atr-leads-coalition-letter-opposing-ntias-illegal-rate-regulation/>.

<sup>3</sup> Infrastructure Investment and Jobs Act (IJJA), P.L. 117-158 § 60102(h)(5)(D) (2021).

<sup>4</sup> Letter from Robert Latta, Chairman, House Subcomm. on Commc'ns and Tech., to Alan Davidson, Assistant Sec'y, NTIA (Dec. 15, 2023), [https://d1dth6e84htgma.cloudfront.net/12\\_15\\_23\\_Letter\\_to\\_NTIA\\_re\\_Rate\\_Regulation\\_42bbb6fbf4.pdf](https://d1dth6e84htgma.cloudfront.net/12_15_23_Letter_to_NTIA_re_Rate_Regulation_42bbb6fbf4.pdf).

<sup>5</sup> Jill Springer, Permitting Progress to Support Internet for All, NAT'L TELECOMM. AND INFO. ADMIN. BLOG (April 16, 2024), <https://www.ntia.gov/blog/2024/permitting-progress-support-internet-all>.

<sup>6</sup> NAT'L TELECOMM. AND INFO ADMIN., UNITED STATES DEP'T OF COM., NATIONAL SPECTRUM STRATEGY IMPLEMENTATION PLAN (2024).

safety, protect national security, create economic opportunity, and support a free flow of ideas.<sup>7</sup> As NTIA executes the implementation plan, the Chamber encourages the Subcommittee to provide robust oversight over NTIA's spectrum activities to ensure continued progress and minimize delays. Further, Congress should provide the NTIA with the resources needed for NSS implementation.

### III. Addressing NTIA's Promotion of Regulatory Overreach

The NTIA, in its role as the President's telecommunications and information policy advisor, has actively encouraged and supported regulatory overreach at the FCC. For instance, the issuance of President Biden's 2021 *Promoting Competition in the American Economy* Executive Order ("Competition E.O.") led to the issuance of several FCC rulemakings, which raises a question about the FCC's independence.<sup>8</sup> Moreover, these regulatory efforts contradict NTIA and the Administration's stated objectives of effectively closing the digital divide and enabling pro-consumer public policies. We encourage the Subcommittee to closely scrutinize NTIA's role in facilitating the FCC to promote public-utility Title II classification of broadband, micromanagement of fees, and exceeding the FCC's regulatory authority under the IIA. We register our concerns with these examples of overreach below. Several examples include:

- Title II Reclassification: The Competition E.O. called on the FCC to reinstate Title II classification akin to the 2015 Open Internet Order.<sup>9</sup> NTIA filed *ex parte* comments on March 21<sup>st</sup> to the FCC praising the Title II rulemaking and noting that it aligns with the Biden Administration's Competition E.O. On April 25<sup>th</sup>, the FCC voted to classify broadband under Title II of the Communications Act largely based on the Open Internet Order and consistent with the NTIA position.<sup>10</sup>
- Administration Junk Fee Initiative: Since 2022, the Administration has been pursuing an economy-wide campaign to address so-called "junk fees" in the economy, including in the communications marketplace.<sup>11</sup> The Competition E.O. encouraged the FCC to ban early termination fees and regulate broadband pricing contracts in multi-tenant environments

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<sup>7</sup> Chamber of Com. of the U.S., Comment Letter on Request for Comments, National Telecommunications and Information Administration; Development of a National Spectrum Strategy (88 Fed. Reg. 16,244-16,247) (filed April 17, 2023).

<sup>8</sup> Exec. Order No. 14,036, 88 Fed. Reg. 36,987 (July 9, 2021) ("Competition E.O.")

<sup>9</sup> See Competition E.O., Sec. 5(l)(i).

<sup>10</sup> Nat'l Telecomm. and Info. Admin., Ex Parte Comment Letter on Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (filed March 20, 2024); David Shepardson, Net Neutrality Rules Restored by US Agency, Reversing Trump, REUTERS (April 25, 2024), <https://www.reuters.com/technology/us-agency-vote-restore-net-neutrality-rules-2024-04-25/>.

<sup>11</sup> Hannah Lang, Doina Chiacu and Trevor Hunnicutt, Biden targets hidden 'junk fees' from banks, cable TV, concert tickets, REUTERS (Oct. 22, 2022), <https://www.reuters.com/business/finance/surprise-overdraft-depositor-fees-are-likely-unlawful-us-consumer-agency-says-2022-10-26/>.

(i.e. apartments, condominiums), which were included in Administration Fact Sheets on junk fee accomplishments.<sup>12</sup> Subsequently, the FCC issued a notice of proposed rulemaking earlier this year to prohibit certain video service fees, including early termination fees, which will raise prices for all consumers. The FCC is also circulating a NPRM that would ban bulk billing arrangements in multi-tenant environments, which would violate landlord property and contractual rights.<sup>13</sup>

- Digital Discrimination Order: On October 6<sup>th</sup>, NTIA filed a proposal in the digital discrimination rulemaking docket encouraging the FCC to adopt broadband price controls and an application of a ‘disparate impact standard’ to evaluate digital discrimination claims, both of which the FCC adopted in the *Digital Discrimination Order*.<sup>14</sup> NTIA’s comment came just weeks away before the FCC’s completion of the rulemaking despite having ample opportunity to submit during the comment period, depriving stakeholders an sufficient opportunity to respond.<sup>15</sup> In sharp contrast to price controls, the Chamber has supported the Affordable Connectivity program which is designed to close the digital divide in economically disadvantaged communities and rural areas.

#### IV. Artificial Intelligence

The Chamber has been a strong advocate for the development of safe and trustworthy artificial intelligence. For this reason, we responded to NTIA’s request for comment on *Dual Use Foundation Artificial Intelligence Models with Widely Available Model Weights*.<sup>16</sup> Within those comments, the Chamber highlighted technology’s importance for small and medium-sized businesses. A recent Chamber report<sup>17</sup> highlighted that 87%” of small businesses believe that

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<sup>12</sup> See Competition E.O., Sec. 5(l)(iv) and (vii); Press Release, Exec. Off. of the President, Fact Sheet: President Biden Announces New Actions to Lower Costs for Americans by Fighting Corporate Rip-Offs (March 5, 2024).

<sup>13</sup> Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices, Notice of Proposed Rulemaking, MB Docket No. 23-405 (rel. Dec. 14, 2023); Press Release, Chairwoman Jessica Rosenworcel, FCC Chairwoman Announces Push to Lower Broadband Costs & Increase Choice for Families Living in Apartment Buildings (Mar. 5, 2024), <https://docs.fcc.gov/public/attachments/DOC-400915A1.pdf>.

<sup>14</sup> Nat’l Telecomm. and Info. Admin., Ex Parte Comment Letter on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (filed Oct. 6, 2023); Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, Report and Order, FCC 23-100 (rel. Nov. 20, 2023) (“Digital Discrimination Order”).

<sup>15</sup> Matt Furlow, Understanding NTIA’s Plan to Impose Command and Control Broadband Regulation, U.S. CHAMBER OF COM. ABOVE THE FOLD (Oct. 24, 2023), <https://www.uschamber.com/technology/broadband/understanding-ntias-plan-to-impose-command-and-control-broadband-regulation>.

<sup>16</sup> Federal Register Notice; Request for Comment; Dual Use Foundation Artificial Intelligence Models With Widely Available Model Weights; <https://www.federalregister.gov/documents/2024/02/26/2024-03763/dual-use-foundation-artificial-intelligence-models-with-widely-available-model-weights>

<sup>17</sup>U.S. Chamber of Commerce Technology Engagement Center; Empowering Small Business: The Impact of Technology on U.S. Small Business <https://www.uschamber.com/small-business/smallbusinessstech>

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technology platforms have helped their business operate more efficiently and that 71% plan to adopt the latest technology, including AI.

The Chamber also highlighted in our comments to NTIA that open-source “AI has many benefits, as the technology allows developers to build, create, and innovate in marketing, communication, cybersecurity, medicine, and other fields. We further highlighted that access to model weights can be a boon to driving safety and security improvements to artificial intelligence by providing greater transparency and allowing flaws to be quickly addressed.<sup>18</sup>” However, the Chamber is concerned that the short comment period provided to industry can lead to misinformed conclusions, which is why we along with other trades sent a letter asking for a 60-day extension.<sup>19</sup> We continue to express the need for NTIA to provide further opportunities for feedback and discussion on this critical issue.

## V. Conclusion

The Chamber appreciates the Subcommittee’s continued oversight of the NTIA. We look forward to working with Congress to provide for a policy environment that encourages the investment needed to close the digital divide and for the innovation necessary for the responsible deployment of AI.

Sincerely,



Tom Quaadman  
Executive Vice President  
Chamber Technology Engagement Center  
U.S. Chamber of Commerce

cc: Members of the Subcommittee on Communications and Technology

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<sup>18</sup>Chamber of Com. of the U.S., Comment Letter on Request for Comments, National Telecommunications and Information Administration; Dual Use Foundation Artificial Intelligence Models Widely Available Model Weights (89 Fed. Reg. 14,059-14,063, February 26, 2024) <https://americaninnovators.com/advocacy/u-s-chamber-files-comments-to-ntia-on-dual-used-foundation-open-models/>

<sup>19</sup> Multi-Trade Association Letter; Comment Extension Request on NTIA's Dual Use Open Model RFI; <https://www.uschamber.com/technology/u-s-chamber-multi-association-comment-extension-request-on-ntias-dual-use-open-model-rfi>



# COALITION FOR EMERGENCY RESPONSE AND CRITICAL INFRASTRUCTURE

May 10, 2024

## VIA ELECTRONIC FILING

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

**Re: *Ex Parte Letter* – Amendment of Part 90 of the Commission’s Rules,  
WP Docket No. 07-100**

The Coalition for Emergency Response and Critical Infrastructure (CERCI) submits this letter in opposition to the Public Safety Spectrum Alliance’s (PSSA) latest proposal calling for the Federal Communications Commission to issue a “nationwide overlay license” in the 4.9 GHz band to a Band Manager for the purpose of signing a sharing agreement to hand over the spectrum to the First Responder Network Authority (FNA).<sup>1</sup> For the reasons summarized below and as detailed in the attached legal memorandum, this proposal is ill-advised and unlawful.

At the outset, PSSA would have the Commission turn the Band Manager role on its head and in doing so would require the launch of a new lengthy, resource-intensive rulemaking. The 2023 4.9 GHz Order established “a single, nationwide framework for the 4.9 GHz band, that is centered around a new Band Manager ... empowered to work with public safety licensees to ensure efficient use of this spectrum and enable new, non-commercial operations on a secondary, preemptable basis.”<sup>2</sup> The 2023 4.9 GHz FNPRM focused on “two possible means of enabling Band Manager-coordinated *non-public safety leasing*.”<sup>3</sup> PSSA would nullify the Band Manager’s two roles to coordinate public safety use and enable non-public safety

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<sup>1</sup> See generally *Ex Parte Letter* of the Public Safety Spectrum Alliance, WP Docket No. 07-100 (Apr. 23, 2024) (“PSSA Letter”).

<sup>2</sup> See *Amendment of Part 90 of the Commission’s Rules*, Seventh Report and Order and Ninth Further Notice of Proposed Rulemaking, FCC 23-3 ¶ 20 (rel. Jan. 18, 2023) (“2023 4.9 GHz Order” and “2023 4.9 GHz FNPRM”).

<sup>3</sup> See *id.* ¶ 20 (emphasis added). Under Model 1, the Band Manager would “lease spectrum access rights directly from public safety licensees and would, in turn, be permitted to sublease those rights to non-public safety entities.” Under Model 2, “public safety licensees would be permitted to lease directly to non-public safety entities so long as those leases are coordinated through and approved by the Band Manager.” *Id.*

access, instead proposing to make the Band Manager a licensee only to share the 4.9 GHz spectrum with FNA. This is most definitely not the framework the Commission established in 2023. It would require the Commission to undo the Band Manager role set forth in the 2023 4.9 GHz Order and issue a new further notice. And this approach would fundamentally undermine the Commission’s commitment to maintaining local control of the 4.9 GHz band.

Indeed, as a matter of policy, the PSSA proposal would impede current 4.9 GHz public safety licensees, eliminate opportunities for compatible Critical Infrastructure Industry (CII) stakeholders to deploy non-interfering systems in the band and, with the FNA enabling AT&T commercial access to the band for free, it would upend the commercial wireless marketplace.

First, public safety and CII systems need assured access to the 4.9 GHz band to support mission-critical needs. CERCI last year called on the Commission to limit eligibility for 4.9 GHz band licenses to public safety and CII users and now asks the Commission to adopt a rule prohibiting commercial mobile radio service operations from the band.<sup>4</sup> The Commission’s 4.9 GHz policies “allow additional public safety use, especially to improve existing deployments” by expanding current systems and coverage.<sup>5</sup> But the PSSA’s proposal for FNA licensing or leasing would allow FNA’s sole-source commercial vendor to consume public safety and CII resources for commercial use instead. While the PSSA purports to stand up for the interests of incumbent licensees, its proposal would strip today’s 4.9 GHz public safety licensees’ right to expand their systems by forcing “incumbent licensees to surrender spectrum they are not using.”<sup>6</sup> The PSSA cannot claim to serve existing licensees’ interests *by taking away their rights to grow their capabilities by serving more public-safety users, covering more areas, and/or increasing capacity*. In order to maximize the potential use of the band by public safety and CII, the Commission should adopt a rule prohibiting CMRS use of the band under any arrangement.

Second, the PSSA calls for the Commission to “abandon its plans to allow non-public safety entities to gain access to the band”<sup>7</sup> – the heart of the Commission’s action in 2023 and the goal of CERCI’s CII members. CII users innovate and benefit from the ability to tailor their networks to their unique needs, and CII users have a compatible mission with public-safety and a record of coexistence with public-safety licensees in other spectrum bands. CII use of the 4.9 GHz band would expand use of the band and meet important CII needs.<sup>8</sup> PSSA would strike any such opportunities.

Third, in proposing to give a 4.9 GHz overlay license to a Band Manager to share the spectrum with FNA, the PSSA would provide AT&T free access to billions of dollars’ worth of

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<sup>4</sup> See Letter of the Coalition for Emergency Response and Critical Infrastructure to Marlene H. Dortch, FCC, WP Docket No. 07-100 (Nov. 16, 2023)(“Eligibility for non-public-safety use of the band should be limited to critical infrastructure industry ... systems operating on a non-interfering basis.”).

<sup>5</sup> See *Amendment of Part 90 of the Commission’s Rules*, Order on Reconsideration and Eighth Further Notice of Proposed Rulemaking, 36 FCC Rcd 15032, ¶ 25 (2021) (partially lifting the 4.9 GHz licensing freeze).

<sup>6</sup> PSSA Letter at 4.

<sup>7</sup> *Id.*

<sup>8</sup> See Ex Parte Letter of Coalition for Emergency Response and Critical Infrastructure, WP Docket No. 07-100, 1, 4-5 (filed Feb. 6, 2024).



spectrum, a step that would substantially harm and distort competition in the commercial wireless marketplace where spectrum access is premised on auctions and secondary market transactions. PSSA wants to integrate the 4.9 GHz band into the Nationwide Public Safety Broadband Network (“NPSBN”),<sup>9</sup> but as FirstNet officials have acknowledged, AT&T owns all of the equipment and infrastructure that comprise the NPSBN, it operates the NPSBN, and it provides services to public safety and commercial customers alike over NPSBN spectrum.<sup>10</sup> Giving the 4.9 GHz band to AT&T to serve public safety *and* commercial customers would disrupt the wireless marketplace. As a policy matter, it is unsound.

Fourth and finally, granting FNA control of the 4.9 GHz band is unlawful regardless of whether the Commission attempts that end directly or indirectly. As explained in the attached memorandum, the Commission lacks statutory authority under the Middle-Class Tax Relief and Job Creation Act of 2012 (the “2012 Act” or the “Act”) to award FNA the ability to operate beyond the 700 MHz band addressed in that Act, and no other statute authorizes such operation. PSSA’s proposal also disregards the reliance interests of incumbent licensees. Furthermore, PSSA’s proposal introduces new problems under the Anti-Deficiency Act and the Federal Advisory Commission Act and implicates numerous constitutional issues. Finally, expanding FNA’s authority in the manner PSSA proposes would be particularly unwise given that the very structure of FNA is constitutionally suspect.

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The Commission should—and, by law, must—operate within the limits of existing statutory authority to administer the 4.9 GHz band in an equitable, transparent manner that protects the reasonable reliance interests of incumbent public safety users while serving the broader public interest. The PSSA’s proposal fails that test.

Sincerely,

The Coalition for Emergency Response and  
Critical Infrastructure (CERCI)

*/s/ Roger C. Sherman*

Kenneth Corey  
NYPD Chief of Dept. (Ret.)  
CERCI Chairman

Roger C. Sherman  
CERCI Policy Advisor

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<sup>9</sup> See PSSA Letter at 2.

<sup>10</sup> See *Stephen Whitaker et al. v. U.S. Dep’t of Commerce, Declaration of Paul Madison*, Case No. 5:17-CV-192-GWC (U.S. Dist. Ct. Vt.) (Feb. 21, 2018).

Attachment

May 10, 2024

**From:** Jenner & Block LLP  
**Re:** Amendment of Part 90 of the Commission's Rules  
**Subject:** WP Docket No. 07-100

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### EXECUTIVE SUMMARY

This Memorandum considers the latest proposal by the Public Safety Spectrum Alliance (“PSSA”) that the Federal Communications Commission (the “Commission”) grant the First Responder Network Authority (“FNA”) control of the 4.9 GHz band. Initially, PSSA and FNA proposed that the Commission directly assign to FNA a nationwide license of that band for public-safety use.<sup>1</sup> More recently, PSSA and other organizations have suggested that the Commission make the assignment indirectly by granting a “nationwide overlay license” to a Band Manager that would, in turn, “engage in a sharing agreement” with FNA.<sup>2</sup>

For the reasons discussed in this Memorandum, granting FNA control of the 4.9 GHz band would be unlawful, regardless of whether the Commission attempts that end directly or indirectly. As our prior submission explained, the Commission lacks statutory authority under the Middle Class Tax Relief and Job Creation Act of 2012 (the “2012 Act” or the “Act”)<sup>3</sup> to award FNA the ability to operate beyond the 700 MHz band addressed in that Act, and no other statute authorizes such operation.<sup>4</sup> PSSA’s proposed “sharing agreement” between a Band Manager and FNA does not solve the fundamental problem that FNA is not statutorily authorized to operate beyond the 700 MHz band.

This lack of statutory authorization provides grounds enough to reject PSSA’s proposed “sharing agreement.” Yet PSSA’s proposal also disregards the reliance interests of incumbent licensees. Moreover, PSSA’s proposal introduces new problems under the Anti-Deficiency Act and the Federal Advisory Commission Act and implicates numerous constitutional issues. Finally,

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<sup>1</sup> See generally Comments of the First Responder Network Authority, WP Docket No. 07-100 (Apr. 13, 2023); Comments of the Public Safety Spectrum Alliance, WP Docket No. 07-100 (Apr. 12, 2023); Reply Comments of the Public Safety Spectrum Alliance, WP Docket No. 07-100 (May 14, 2023).

<sup>2</sup> See generally *Ex Parte* Letter from Chief Jeffrey D. Johnson (Ret.), Public Safety Spectrum Alliance, to the Honorable Jessica Rosenworcel, Chairwoman, FCC, WP Docket No. 07-100 (Apr. 23, 2024) (“PSSA Letter”); see also *Ex Parte* Letter from Patrick Yoes Wade, National President, the National Fraternal Order of Police *et al.*, to the Honorable Jessica Rosenworcel, Chairwoman, FCC at 1 (Apr. 25, 2024).

<sup>3</sup> See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156.

<sup>4</sup> See generally *Ex Parte* Letter from Kenneth Corey, NYPD Chief of Dept. (Ret.), CERCIC Chairman, and Roger C. Sherman, CERCIC Policy Advisor, the Coalition for Emergency Response and Critical Infrastructure, to Marlene H. Dortch, Secretary, FCC, WP Docket No. 07-100 (Apr. 15, 2024) (“CERCIC Letter”).

expanding FNA’s authority in the manner PSSA proposes would be particularly unwise given that the very structure of FNA is constitutionally suspect.

## **I. There Is No Statutory Authority For PSSA’s Proposed “Sharing Agreement.”**

As previously explained, neither the 2012 Act nor any other statute authorizes the Commission to assign a nationwide license of the 4.9 GHz band to FNA.<sup>5</sup> PSSA and its allies apparently concede this point, as they have made no attempt to dispute the legal analysis we previously provided. Pivoting, they now propose that the Commission instead “assign one, nationwide overlay license to a single Band Manager and adopt rules providing that the overlay licensee engage in a sharing agreement with [FNA] pursuant to Section 2.103 of the Commission’s rules” and certain proposed amendments to that regulation.<sup>6</sup> That proposal merely attempts to accomplish indirectly what PSSA and FNA previously proposed the Commission do directly: transfer control of the 4.9 GHz band to FNA at the expense of incumbent licensees. For the same reasons we previously identified, this arrangement is—and remains—unlawful.

At best, PSSA’s proposal purports to address only one issue identified in our prior analysis: the Commission’s lack of authority to directly assign a spectrum license to a federal entity. But every other bar to both the Commission’s authority to make this assignment and FNA’s authority to receive such an assignment remains operative and dooms this proposal. To recap, FNA was created by the 2012 Act solely to operate the 700 MHz band. The 2012 Act authorizes the Commission to allocate *only* the 700 MHz spectrum to FNA and cannot reasonably be read to authorize the Commission to undertake any further allocations to FNA, directly or indirectly.<sup>7</sup>

Moreover, as previously discussed, the 2012 Act places several important restrictions on FNA’s authority that forbid the proposed expansion of its responsibilities.<sup>8</sup> PSSA’s alternative “sharing agreement” does nothing to ameliorate these legal impediments. The Act empowers FNA to “hold *the single* public safety wireless license granted under section 1421.”<sup>9</sup> Section 1421, in turn, specifies a single band of spectrum for that license: “the 700 MHz D block spectrum and existing public safety broadband spectrum,”<sup>10</sup> which Section 1411 effectively consolidated into one band.<sup>11</sup> Section 2.103(c) of the Commission’s regulations itself confirms that FNA may authorize use of only “channels in the 758-769 MHz and 788-799 MHz public safety bands.”<sup>12</sup> As a matter of plain text, as well as under binding regulations, the Act authorizes FNA to receive and use only the 700 MHz band, to the exclusion of all other bands.

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<sup>5</sup> *Id.* at 1-8.

<sup>6</sup> PSSA Letter at 2.

<sup>7</sup> CERC Letter at attachment 1-8.

<sup>8</sup> *Id.* at 8-12.

<sup>9</sup> 47 U.S.C. § 1426(b)(1) (emphasis added).

<sup>10</sup> *Id.* § 1421(a).

<sup>11</sup> *See id.* § 1411(a).

<sup>12</sup> 47 C.F.R. § 2.103(c).

The Commission cannot circumvent the existing statutory and regulatory bars on either its or FNA’s authority by using a “Band Manager” with an overlay license to accomplish indirectly what PSSA and FNA previously proposed the Commission do directly. The proposed “sharing agreement” between the Band Manager and FNA would still have the effect of the Commission’s allocating spectrum to a federal entity, which, as we previously explained, the Commission cannot do.<sup>13</sup> PSSA nonetheless claims that the Commission can accomplish this otherwise unlawful result by simply “adopt[ing] rules providing that the overlay licensee engage in a sharing agreement with [FNA] pursuant to Section 2.103 of the Commission’s rules” with certain proposed amendments.<sup>14</sup>

As an initial matter, this proposal to amend Section 2.103 of the Commission’s rules highlights that the Commission *lacks* legal authority under Section 2.103, as written, to grant FNA access to the 4.9 GHz band. As Section 2.103 stands, it *allows* (but does not require) an incumbent licensee in the 4.9 GHz band to grant “approval” to a federal entity,<sup>15</sup> by “mutual agreement,”<sup>16</sup> “for interoperability or [as] part of a Federal/non-Federal shared or joint-use system.”<sup>17</sup> As the Commission summarized when it promulgated that regulation, “if a state or local governmental licensee *desires* for a Federal public safety entity to receive access to some or all of its licensed frequencies, the licensee can *join in the request*, under the NTIA/FCC process, to authorize Federal use of its non-government frequencies for noncommercial public safety services.”<sup>18</sup> In other words, Section 2.103 is a narrow rule intended to authorize mutual agreements whereby a licensee that would otherwise actually and exclusively use its licensed spectrum would instead *share* that spectrum with a federal entity. It was never intended as a backdoor for the Commission to create a license for a sham “Band Manager” that would itself never use the licensed spectrum.

PSSA’s proposed amendment to Section 2.103 would not solve this problem—to the contrary, it makes the lack of statutory authorization even more obvious. PSSA’s proposal would fundamentally alter the Commission’s role under Section 2.103 from merely approving mutual sharing agreements to mandating the allocation of federal spectrum by fiat. As noted, Section 2.103(c) currently references FNA’s ability to authorize federal stations to use channels in the 758-769 MHz and 788-799 MHz public-safety bands, which, of course, is the spectrum FNA has been statutorily authorized to operate. Without any statutory basis, PSSA now proposes that the Commission add a new subsection (d) to the rule providing that FNA “is authorized to use channels in the [4.9 GHz band] if the Commission finds such use necessary,” on a noninterference basis with incumbent licensees, and in accordance with “the Commission’s Rules” and “any conditions agreed upon by the Commission and NTIA.”<sup>19</sup> Crucially, the proposed subsection does not include the existing rule’s requirement that the non-federal licensee reach a mutual sharing agreement with

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<sup>13</sup> See CERC Letter at attachment 2-3.

<sup>14</sup> PSSA Letter at 2-3.

<sup>15</sup> 47 C.F.R. § 2.103(b)(2).

<sup>16</sup> *Id.* § 2.103(b)(4).

<sup>17</sup> *Id.* § 2.103(b)(1).

<sup>18</sup> The Development of Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, Establishment of Rules and Requirements for Priority Access Service, 63 Fed. Reg. 58650, 58647 ¶ 10 (Nov. 2, 1998) (emphasis added).

<sup>19</sup> PSSA Letter at 5.

the federal entity in question. Thus, rather than authorizing a true sharing agreement, as under the existing rule, this amendment would pave the way for the Commission to force an outright *allocation* of the 4.9 GHz band to FNA. That unlawful effect is especially glaring given that the licensee—the proposed Band Manager—would not itself be using the licensed spectrum at all.

However PSSA frames its proposal, at bottom, it asks the Commission to make an allocation of spectrum resources to FNA that only Congress can authorize. PSSA’s proposed “sharing agreement” cannot change the fact that FNA is limited by statute to operating in the 700 MHz band. No amendment to the Commission’s rules can overcome this fundamental, statutory obstacle to FNA operating in the 4.9 GHz band.

## **II. Limiting Incumbent Users To Existing Operations Upsets The Serious Reliance Interests Of Existing State And Local Public-Safety Licensees.**

Incumbent licensees will suffer under PSSA’s proposal. As the Commission has explained, “[w]ith overlay licenses, the licensees obtain the rights to geographic area licenses ‘overlaid’ on top of the existing incumbent licenses. As with an ordinary flexible use license, the overlay licensee may operate anywhere within its geographic area, subject to protecting the licensed areas ... of incumbent licensees.”<sup>20</sup> But PSSA’s proposal, which mandates a “freeze on new entrants into the [4.9 GHz] band” and requires “incumbent licensees to surrender spectrum they are not using,” contemplates that the overlay licensee will eventually squeeze out incumbent licensees.<sup>21</sup>

Adoption of PSSA’s proposal would disrupt the serious reliance interests of existing state and local 4.9 GHz public-safety licensees. In reliance on the Commission’s existing policies, these entities may have invested in fixed and mobile systems that they hoped to modify or expand as they secured additional funding or gained additional experience in operating within the 4.9 GHz band. For example, an existing 4.9 GHz public-safety licensee might have deployed a rudimentary fixed-link system in the 4.9 GHz band that connects one of its police stations to City Hall with the hope of expanding it in the future. If the Commission were to adopt PSSA’s proposal, the Commission would eliminate the ability of the existing licensee ever to expand its system to additional sites, such as the other police stations, fire stations, or hospitals within city limits, or to enhance the system for mobile performance throughout the municipality.

Changing the public-safety landscape can strand investment, upend strategic planning, and impose operational and legal uncertainties on state and local governments. Making such a change without consideration of the significant reliance interests of incumbent licensees is the very definition of arbitrary and capricious agency action. As the Supreme Court has held: “In explaining its changed position, an agency must ... be cognizant that longstanding policies may

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<sup>20</sup> *In re Transforming the 2.5 GHz Band*, Report & Order, 34 FCC Rcd. 5446, 5473 ¶ 77 (2019) (“2.5 GHz Order”).

<sup>21</sup> PSSA Letter at 4; *see also 2.5 GHz Order*, 34 FCC Rcd at 5473 ¶ 77 (“If an incumbent licensee ... cancels or terminates its license, the overlay licensee obtains the rights to operate in the geographic area and on the channel of the cancelled license. An overlay licensee may clear its geographic area by purchasing the incumbent licenses, but it does not have the exclusive right to negotiate with the incumbent licensee for its spectrum rights or to purchase an incumbent license in the geographic area in which it has the overlay rights.” (footnote omitted)).

have engendered serious reliance interests that must be taken into account.”<sup>22</sup> PSSA’s proposal does not take incumbent licensees’ reliance interests into account.

### III. PSSA’s Proposal Introduces Multiple Additional Problems.

Beyond the lack of any statutory authorization for the “sharing agreement” proposed by PSSA and the fact that the proposal disregards incumbent users’ reliance interests, the use of a “sharing agreement” to accomplish indirectly what the Commission cannot accomplish directly introduces a host of statutory and constitutional problems. Specifically, PSSA’s proposal conflicts with the Anti-Deficiency Act (“ADA”) and the Federal Advisory Commission Act (“FACA”) and would implicate numerous constitutional issues.

**Anti-Deficiency Act.** As a federal entity, FNA likely could not lease or otherwise receive usage rights for that band from a Band Manager without violating the ADA. The ADA provides, in relevant part, that “an officer or employee of the United States Government” may not “involve [the U.S.] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”<sup>23</sup> FNA’s officers and employees are subject to that prohibition.

PSSA’s proposal fails to contain any details of how an indirect allocation to FNA via a leasing agreement would accord with the ADA. Presumably FNA would have to pay a lease fee to the 4.9 GHz Band Manager. As the Commission has explained: “Band managers are a class of licensees that are specifically authorized to lease their licensed spectrum usage rights for use by third parties through private, contractual agreements, without having to secure prior approval by the Commission.”<sup>24</sup> In other words, they serve as spectrum brokers, selling access to spectrum that the Commission would otherwise license directly to users. And if, as PSSA proposes, the 4.9 GHz Band Manager is to be an entity “that does not own or operate infrastructure,”<sup>25</sup> and all future commercial use in the band is to be frozen,<sup>26</sup> it is unclear why any entity would have an incentive to seek the Band Manager license without receiving a lease fee from FNA in return. Even if the Band Manager were to enter a no-cost lease with FNA, FNA would incur an obligation to construct and operate facilities using the spectrum, which at a bare minimum would require it to expend significant funds on labor and materials.<sup>27</sup>

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<sup>22</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016) (internal quotation marks and citations omitted); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>23</sup> 31 U.S.C. § 1341(a)(1)(B).

<sup>24</sup> *In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd. 24203, 24209-10 ¶ 17 (2000).

<sup>25</sup> PSSA Letter at 3.

<sup>26</sup> See *id.* at 4.

<sup>27</sup> See, e.g., 47 C.F.R. § 90.1209(d) (requiring licenses to be placed into service within 12 months of grant). Whatever deployment schedule FNA might pursue, construction and operation of 4.9 GHz infrastructure will prove costly. By way of comparison, the buildout of FNA’s existing 700 MHz network has cost, and continues to cost, tens of billions of dollars. At the outset of its 700 MHz deployment, Congress committed the Treasury to giving FNA an interest-free loan of \$2 billion to start up its operations. See 47 U.S.C. § 1427. That is to say nothing of the \$6.5 billion that FNA committed to pay AT&T under its contract, or the \$15.6 billion in excess payments from AT&T that FNA

But Congress has not appropriated funds for FNA to lease a nationwide spectrum band worth approximately \$15 billion. Nor has Congress otherwise “authorized by law” that FNA may undertake such a leasing arrangement or commit itself to constructing and operating facilities using that spectrum. To the contrary, Congress specified that FNA receives all its funding from user fees and its own lease fees, and that the “total amount of the fees assessed for each fiscal year ... shall be sufficient, and shall not exceed the amount necessary, to recoup the total expenses of [FNA] in carrying out its duties and responsibilities described under [the 2012 Act] for the fiscal year involved.”<sup>28</sup> And Congress carefully specified in the 2012 Act what FNA should do with those funds.<sup>29</sup> Any lease fee paid to the 4.9 GHz Band Manager, or any expenditure of funds to integrate a massive band of spectrum not contemplated in the 2012 Act, is thus not “authorized by law” and raises significant ADA concerns. The Commission should not adopt a proposal that may aid and abet such a violation.<sup>30</sup>

Nor could the Commission avoid these concerns by arranging for FNA to accept a “gift” of spectrum usage rights from the Band Manager and buildout funding from AT&T. To be sure, the 2012 Act authorizes FNA “[t]o accept, hold, administer, and utilize gifts, donations, and bequests of property, both real and personal, for the purposes of aiding or facilitating the work of the First Responder Network Authority.”<sup>31</sup> But as we have previously explained, the “work of the First Responder Network Authority” is limited to administration of the National Public Safety Broadband Network (“NPSBN”) in the 700 MHz band.<sup>32</sup> There is no statutory authority for FNA

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expects to reinvest in the existing NPSBN over the life of that contract. See U.S. Gov’t Accountability Office, GAO-22-104915, *Public-Safety Broadband Network: Congressional Action Required to Ensure Network Continuity*, at 1-2, 13 n.37 (2022) (“GAO Report”).

<sup>28</sup> 47 U.S.C. § 1428(b).

<sup>29</sup> To be sure, the 2012 Act requires FNA to “reinvest amounts received from the assessment of fees under this section in the nationwide public safety interoperable broadband network by using such funds only for constructing, maintaining, operating, or improving the network.” *Id.* § 1428(d). But Congress expressly limited the *amount* FNA can assess in fees to that “necessary[] to recoup the total expenses of [FNA] in carrying out its duties and responsibilities described under” the 2012 Act. *Id.* § 1428(b). As previously explained, integration of the 4.9 GHz band is described nowhere in the 2012 Act as a duty or responsibility of FNA—to the contrary, the Act expressly and exclusively requires FNA to build and operate its network on the 700 MHz band. See CERC Letter at attachment 8-12. Thus, whatever FNA’s general authority to spend its funds on “improving” the NPSBN, any lease fee paid to the 4.9 GHz Band Manager, or any expenditure of funds to integrate the 4.9 GHz band (even without a lease fee), would necessarily exceed “an *amount* available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a)(1)(A) (emphasis added).

<sup>30</sup> The issue of FNA’s authority to pay a monetary lease fee is readily distinguishable from the licensing-related ADA objections that the Government Accountability Office (“GAO”) rejected in response to concerns Verizon raised in 2004. See *generally* Letter from Anthony H. Gamboa, General Counsel of the U.S. Gov’t Accountability Office, to Hon. Frank R. Lautenberg, U.S. Senate, B-303413 (Nov. 8, 2004), <https://www.gao.gov/assets/b-303413.pdf>. There, the GAO rejected ADA-related concerns because, while the Commission required Nextel to relinquish its spectrum in the 800 MHz band for public-safety use, the Commission “compensate[ed]” Nextel with *spectrum* in the 1.9 GHz band, not money. See *id.* at 7-8. As the GAO explained, “the FCC’s licensing of spectrum in the 1.9 GHz [band]” is not “akin to the obligation and expenditure of government money that is the concern of” the ADA. *Id.* at 11. Under PSSA’s proposal, in contrast, FNA would be spending actual money—not exchanging spectrum—for spectrum, and thus PSSA’s proposed arrangement would implicate the ADA.

<sup>31</sup> 47 U.S.C. § 1426(a)(4).

<sup>32</sup> See CERC Letter at attachment 8-12.



to operate beyond the 700 MHz band, and “a government agency may not accept for its own use (*i.e.*, for retention by the agency or credit to its own appropriations) gifts of money or other property in the absence of *specific* statutory authority.”<sup>33</sup> Once again, PSSA’s proposal would give the Commission and FNA tasks that they are powerless to perform absent further congressional authorization.

**Federal Advisory Commission Act.** Another problem with PSSA’s alternative proposal is the suggestion that the Commission create a “Band Manager [S]election [C]ommittee” “comprised of seven current or former first responder stakeholders that represent the public safety community, including the FOP, IACP, IAFF, NOBLE and IAFC.”<sup>34</sup> That Selection Committee would likely be subject to FACA, and, as proposed, it could not comply with that statute’s requirements.

FACA imposes myriad procedural and substantive requirements on advisory committees created by the federal government to “promote transparency, accountability, and open public participation in executive branch decisions and prevent informal advisory committees from exerting improper or one-sided influence.”<sup>35</sup> An advisory committee is subject to FACA if it has, “in large measure, [1] an organized structure, [2] a fixed membership, and [3] a specific purpose”; and “[4] render[s] advice or recommendations, *as a group*, and not as a collection of individuals.”<sup>36</sup>

While PSSA does not lay out every detail of its proposed Band Manager Selection Committee, it is clear enough from the proposal that that committee meets all four criteria and therefore must comply with FACA’s substantive and procedural requirements. For example, its establishment must be “determined as a matter of formal record, by [the Commission] after consultation with the Administrator [of General Services], with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on [the Commission] by law”;<sup>37</sup> and it could not meet without first filing a charter with the Commission, the relevant Senate and House committees, and the Library of Congress.<sup>38</sup> Its meetings would have to be “open to the public,”<sup>39</sup> with “timely notice ... published in the Federal Register,”<sup>40</sup> and an opportunity for “[i]nterested persons” to “attend, appear before, or file statements with” the Committee<sup>41</sup> Furthermore, “an officer or employee of the Federal Government” would have to “chair or attend each meeting.”<sup>42</sup>

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<sup>33</sup> U.S. Gov’t Accountability Office, GAO-06-382SP, *Principles of Federal Appropriations Law*, Vol. II, at 6-222–223 (3d ed. 2006) (emphasis added) (citing 16 Comp. Gen. 911 (1937)).

<sup>34</sup> PSSA Letter at 3.

<sup>35</sup> *VoteVets Action Fund v. U.S. Dept. of Veterans Affairs*, 992 F.3d 1097, 1101 (D.C. Cir. 2021).

<sup>36</sup> *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913-14 (emphasis in original).

<sup>37</sup> 5 U.S.C. § 1008(a)(2).

<sup>38</sup> *Id.* § 1008(c)(1)(B), (3).

<sup>39</sup> *Id.* § 1009(a)(1).

<sup>40</sup> *Id.* § 1009(a)(2).

<sup>41</sup> *Id.* § 1009(a)(3).

<sup>42</sup> *Id.* § 1009(e).

Most notably, under FACA, the Selection Committee would have to be “fairly balanced in terms of the points of view represented and the functions to be performed.”<sup>43</sup> PSSA’s proposal falls wide of that mark, as it reserves five of seven spots for nationwide public-safety organizations with close ties to FNA and its operator, AT&T.<sup>44</sup> Thus, no matter what process the Commission uses in creating the Selection Committee, it could not create that committee within PSSA’s proposed parameters without running afoul of at least one central requirement of FACA.

**Major Questions and Nondelegation.** For the reasons we previously explained, using the 2012 Act to effectuate a transfer of control of the 4.9 GHz band from state and local public-safety officials to FNA would implicate both the major questions doctrine and the nondelegation doctrine.<sup>45</sup> PSSA’s alternative proposal repeats and exacerbates these problems, as the very concept of a “Band Manager” in this context is constitutionally suspect.

Under the private non-delegation doctrine, “a private entity may wield government power only if it ‘functions subordinately’ to an agency with ‘authority and surveillance’ over it.”<sup>46</sup> More concretely, Congress or an agency may delegate governmental authority to a private entity only if that entity’s “role is merely ‘as an aid’ to a government agency that retains the discretion to ‘approve[], disapprove[], or modif[y]’ them.”<sup>47</sup> The allocation of spectrum rights is a quintessential government function—a licensee “is granted the free and exclusive use of a limited and valuable part of the public domain,”<sup>48</sup> a right that Congress has conferred on the Commission alone the authority to grant.<sup>49</sup> If a licensee must obtain Commission approval to lease its spectrum rights,<sup>50</sup> the Commission at least retains authority to approve, disapprove, or modify the proposed

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<sup>43</sup> *Id.* § 1004(b)(2); *see id.* § 1004(c) (making §§ 1004(a)-(b) applicable to “the President, agency heads, or other Federal officials [] creating an advisory committee”); *Nat’l Anti-Hunger Coalition v. Executive Cmte. of President’s Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983) (recognizing applicability of § 1004(b)(2)’s “fairly balanced” requirement to officials enumerated in § 1004(c)).

<sup>44</sup> *See* PSSA Letter at 3 (listing “FOP, IACP, IAFF, NOBLE, and IAFC” as five of seven members); *see also* AT&T, *The National Fraternal Order of Police and AT&T Form Alliance* (May 15, 2020), [https://about.att.com/story/2020/fn\\_national\\_fraternal\\_order\\_of\\_police.html](https://about.att.com/story/2020/fn_national_fraternal_order_of_police.html); Press Release, International Association of Fire Fighters, *International Association of Fire Fighters Joins AT&T to Educate Fire Fighters on FirstNet Mobile Broadband Services* (June 4, 2019), [https://www.iaff.org/wp-content/uploads/Press\\_Releases/44586\\_IAFF-FirstNet-Release.pdf](https://www.iaff.org/wp-content/uploads/Press_Releases/44586_IAFF-FirstNet-Release.pdf); News Release, FirstNet and IACP, *FirstNet Makes Long-Term Commitment to The IACP Officer Safety and Wellness Initiative* (Feb. 25, 2020), <https://www.theiacp.org/news/blog-post/firstnet-makes-long-term-commitment-to-the-iacp-officer-safety-and-wellness>; Press Release, International Association of Fire Chiefs, *IAFC and AT&T Strengthen Strategic Relationship for Fire Service* (Apr. 11, 2017), <https://www.iafc.org/press-releases/press-release/iafc-and-att-strengthen-strategic-relationship-for-fire-service>; *AT&T Receives the NOBLE Public Safety Award for It Can Wait*, N.J. Bus. Mag. (Aug. 29, 2016), <https://njbmagazine.com/njb-news-now/att-receives-noble-public-safety-award-can-wait/>.

<sup>45</sup> CERC Letter at attachment 12-13.

<sup>46</sup> *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 881 (5th Cir. 2022).

<sup>47</sup> *Ass’n of Am. R.R.s v. U.S. Dep’t of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)), *vacated and remanded on other grounds*, 575 U.S. 43 (2015).

<sup>48</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (internal quotation marks and citation omitted).

<sup>49</sup> *See* 47 U.S.C. § 301.

<sup>50</sup> Ordinarily, “authorizations in the Wireless Radio Services may be assigned by the licensee to another party, voluntarily or involuntarily, directly or indirectly, or the control of a licensee holding authorizations may be transferred, only upon application to and approval by the Commission.” 47 C.F.R. § 1.948(a).

reallocation of public-domain usage rights. But if the licensee may do so without the Commission’s permission, it “wield[s] government power” without “function[ing] subordinately’ to an agency.”<sup>51</sup> Private delegation to a Band Manager is especially problematic where, as PSSA proposes here, the Commission would be delegating the authority to transform the public-safety broadband landscape nationwide—an authority the Commission itself does not even possess.<sup>52</sup>

#### IV. FNA’s Suspect Constitutional Structure Counsels Against Providing FNA Further Responsibility.

Finally, PSSA’s proposal to give FNA authority to operate beyond the band of spectrum Congress authorized is particularly unwise given the shaky constitutional foundation on which FNA rests. As a *sui generis* creature of the administrative state, FNA has structural features that raise serious constitutional concerns under the Appointments Clause and Appropriations Clause.

**Appointments Clause.** The structure of the FNA Board violates the Appointments Clause. That clause provides that the President, “by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States ... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in Heads of Departments.”<sup>53</sup> It is beyond dispute that the Board’s members are “Officers of the United States” rather than mere employees.<sup>54</sup> And they are principal, not inferior, officers, because they lack any

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<sup>51</sup> *Black*, 53 F.4th at 881.

<sup>52</sup> Furthermore, the role of the “Band Manager” in PSSA’s latest proposal differs dramatically from the Band Manager contemplated in the Commission’s Ninth Further Notice of Proposed Rulemaking. *See generally In re Amendment of Part 90 of the Commission’s Rules*, Seventh Report and Order and Ninth Further Notice of Proposed Rulemaking, 38 FCC Rcd. 704 (2023) (“*Ninth Further Notice*”). Thus, were the Commission to adopt PSSA’s proposal at this stage, it would not give commenters the notice that the Administrative Procedure Act (“APA”) requires. “[A] final rule is a ‘logical outgrowth’ of a proposed rule,” and thus valid under the APA, “only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (internal quotation marks and citation omitted). Nowhere in its discussion of its proposed 4.9 GHz Band Manager’s rights and responsibilities does the Ninth Further Notice propose anything similar to a Band Manager holding an overlay license and leasing its usage rights wholesale to FNA. *See Ninth Further Notice*, 38 FCC Rcd at 732-45 ¶¶ 73-134. To the contrary, the Ninth Further Notice mentions the possibility of leasing to *multiple* “operators of broadband networks used by public safety” in a single paragraph, *id.* at 736 ¶ 87, before an extended discussion of leasing to *non-public-safety* users, *see id.* at 737-43 ¶¶ 94-123. Nor, for that matter, does the Ninth Further Notice mention the possibility of amending Section 2.103 to effectuate such a reassignment. “[I]nterested parties” reading the Ninth Further Notice therefore had no way of “anticipat[ing]” the “possib[ility]” of this “change” from a traditional Band Manager more in line with past Commission practice to one serving as a middleman for nationwide reassignment of the 4.9 GHz band to a federal entity. *United Mine Workers*, 407 F.3d at 1259 (internal quotation marks and citation omitted).

<sup>53</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>54</sup> *Id.*; *see Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (holding that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by” the Appointments Clause), *superseded by statute on other grounds as stated in McConnell v. FEC*, 540 U.S. 93 (2003). FNA’s Board Members are appointees, some of the President and others of the Secretary of Commerce. *See* 47 U.S.C. § 1424(b). And they unquestionably exercise significant authority on behalf of the United States—namely, administering the NPSBN.

meaningful supervision by a presidential appointee confirmed by the Senate.<sup>55</sup> Although the Secretary of Homeland Security, Attorney General, and Office of Management and Budget Director are all statutory members of the Board,<sup>56</sup> they have no special authority over the rest of the Board.<sup>57</sup> And although FNA is nominally housed within the NTIA, it was “established” there as “an *independent* authority.”<sup>58</sup> While the NTIA and Secretary of Commerce have limited oversight of FNA’s *finances*,<sup>59</sup> the statute makes no provision whatsoever for oversight of FNA’s *operations*.<sup>60</sup>

**Funding Structure.** The 2012 Act created a “permanent self-funding” system for FNA that may violate the Appropriations Clause by bypassing Congress’s constitutional power and duty to determine funding for federal programs.<sup>61</sup> The Supreme Court has held oral argument on and is currently weighing whether the Consumer Financial Protection Bureau’s perpetual self-funding mechanism violates the Appropriations Clause.<sup>62</sup> Respondents there argue—and the Fifth Circuit below held—that Congress may not grant an agency funding that simultaneously bypasses both Congress’s direct control (by allowing the agency to draw on funds without Congress making an appropriation of those funds) and indirect control (by allowing the agency to draw from a source that does not depend on congressional appropriations).<sup>63</sup>

Under the same logic, FNA’s self-funding mechanism is constitutionally suspect. The Act includes a provision titled “Permanent self-funding,” which provides that, after an initial period of funding by the Treasury, FNA will fund *all* of its operations through user and licensing fees, which “shall be” in an amount “sufficient, and shall not exceed the amount necessary, to recoup the total expenses of [FNA] in carrying out its duties and responsibilities described under [the Act] for the fiscal year involved.”<sup>64</sup> FNA’s funding is wholly insulated from congressional appropriations; Congress lacks direct control over the amount of funding FNA receives and indirect control over

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<sup>55</sup> See *Edmond v. United States*, 520 U.S. 651, 663 (1997) (“[I]nferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”).

<sup>56</sup> See 47 U.S.C. § 1424(b)(1)(A)-(C).

<sup>57</sup> See *id.* § 1424(b).

<sup>58</sup> *Id.* § 1424(a) (emphasis added).

<sup>59</sup> See *id.* § 1428(c) (requiring NTIA approval of fees imposed by FNA); *id.* § 1427(a) (allowing NTIA to borrow money from Treasury on FNA’s behalf during its initial funding period); *id.* § 1429(a)(1) (requiring Secretary of Commerce to hire contractor to conduct yearly audits of FNA).

<sup>60</sup> See generally 47 U.S.C. §§ 1401-1457; see also *Edmond*, 50 U.S. at 662-63 (“It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude.”). More broadly, the GAO notes that “NTIA officials noted that there has been no model or precedent of an independent authority placed within an executive agency, and as such, there has been some confusion on this current structure and the roles and responsibilities of FirstNet staff.” GAO Report at 17.

<sup>61</sup> 47 U.S.C. § 1428; see U.S. Const. art. I, § 9, cl. 7.

<sup>62</sup> See *CFPB v. Cmty. Fin. Servs. Ass’n of Am. Ltd.*, No. 21-50826 (argued Oct. 3, 2023); see also 143 S. Ct. 978 (Mem.) (2023) (granting certiorari).

<sup>63</sup> See *Cmty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB*, 51 F.4th 616, 638-39 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023).

<sup>64</sup> 47 U.S.C. § 1428.

the source from which it draws (fee payouts by state, local, and NGO users and licensees). It would be unwise for the Commission to greatly expand the responsibilities of FNA when its funding regime is constitutionally questionable.

### **CONCLUSION**

For the foregoing reasons, this Memorandum concludes that the Commission cannot accomplish indirectly what it apparently concedes cannot be accomplished directly. This Memorandum also raises additional problems with the proposed assignment.



May 15, 2024

The Honorable Cathy McMorris Rodgers  
Chair  
Energy & Commerce Committee  
U.S. House of Representative  
Washington, DC 20510-4105

The Honorable Frank Pallone  
Ranking Member  
Energy & Commerce Committee  
U.S. House of Representatives  
Washington, DC 20510-4105

The Honorable Bob Latta  
Chair  
Communications & Technology  
Subcommittee  
U.S. House of Representatives  
Washington, DC 20510-4105

The Honorable Doris Matsui  
Ranking Member  
Communications & Technology  
Subcommittee  
U.S. House of Representatives  
Washington, DC 20510-4105

Re: Letter for the Record, May 15, 2024, Hearing on "The Fiscal Year 2025 National Telecommunications And Information Administration Budget"

Dear Chair Rodgers and Ranking Member Pallone,

Today, ACA Connects, the Fiber Broadband Association, and NTCA – the Rural Broadband Association submit the attached letter for the NTIA budget hearing record regarding NTIA's ongoing implementation of the Broadband Equity, Access, and Deployment (BEAD) program. The letter was sent to Assistant Secretary Alan Davidson earlier this year emphasizing the need to remain consistent with the initiative to deliver high performance broadband to all areas of the country as directed by Congress in the Infrastructure Investment and Jobs Act. As the Committee continues its oversight responsibilities of NTIA and the BEAD program, we believe it is important to adhere to this clear and consistent guidance and avoid weakening standards for high performance technology that would hinder the goal of deploying the best broadband service – no matter where Americans live.

We appreciate your ongoing efforts to ensure high speed broadband connectivity for all.

Sincerely,

Grant Spellmeyer  
President & CEO  
ACA Connects

Gary Bolton  
President & CEO  
Fiber Broadband Association

Shirley Bloomfield  
CEO  
NTCA – The Rural Broadband Association

Attachment: ACA FBA NTCA Letter to Asst Secretary Davidson 020224



February 2, 2024

The Honorable Alan Davidson  
Assistant Secretary  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
Washington, DC 20230

Re: Achieving Lasting Success Through the Broadband Equity, Access, and Deployment  
("BEAD") Program

Dear Assistant Secretary Davidson:

As you review initial proposals from States and Territories related to implementation of the BEAD Program, we urge you to adhere to the vision of lasting success under this initiative – building scalable and sustainable fixed broadband networks that endure – as directed by Congress in the Infrastructure Investment and Jobs Act ("IIJA") and as articulated the National Telecommunications and Information Administration ("NTIA") in its Notice of Funding Opportunity ("NOFO") in May 2022. To ensure this goal is achieved, we also call upon NTIA to establish metrics going forward to track whether States and Territories have fulfilled their responsibilities to connect all eligible locations to high-performance broadband service and maximize all-fiber builds, the critical communications infrastructure for the 21<sup>st</sup> Century.

Too often, as federal broadband funding programs have moved from concept to implementation, there has been a tendency to seek to support broadband infrastructure that is "just good enough" for the moment. Under these prior programs, initial lofty goals of giving every American robust and affordable connectivity that will last for generations have given way to delivering the bare minimum to satisfy user demands here and now – leaving consumers and communities vexed and resulting in the need to establish yet more programs to address the needs left unaddressed.

In the IIJA, Congress sought to break from these past failings. The law could not be clearer that, with the historic level of funding provided, it seeks deployment of "priority broadband projects" that will represent lasting success and not require revisiting and rebuilding in just several years' time. In turn, NTIA fulfilled this vision by determining in its NOFO that a "priority broadband project" required the deployment of end-to-end fiber-optic architecture. In particular, your agency concluded:

End-to-end fiber networks can be updated by replacing equipment attached to the ends of the fiber-optic facilities, allowing for quick and relatively inexpensive network scaling as compared to other technologies. Moreover, new fiber deployments will facilitate the deployment and growth of 5G and other advanced wireless services, which rely extensively on fiber for essential backhaul.

Some are now calling upon NTIA to back away from this conclusion by rejecting or weakening initial proposals submitted by some States and Territories that are consistent with this vision. We urge NTIA to stand its ground. That does not mean requiring the use of BEAD funds exclusively for fiber; it means “priorit[izing]” fiber projects and maximizing the deployment of fiber networks. Abandoning these goals would not only flout the law but would disserve the public interest, relegating generations to less-capable broadband access.

Recent assessments prepared for ACA Connects by Cartesian, a consulting firm that specializes in telecommunications industry analysis, indicate that the vision of Congress for “priority broadband projects” – lasting fiber access – can be realized for the vast majority of, if not nearly all, unserved and underserved Americans in many States and Territories.<sup>1</sup> Projects funded under the auspices of the U.S. Departments of Treasury and Agriculture and the Federal Communications Commission (“FCC”) – and the ongoing efforts of private broadband providers to expand access as well – will likely only improve preliminary estimates of what can be reached through fiber, as locations that previously showed as eligible are slated to become served via other means. Indeed, it is worth noting that the Broadband Funding Map maintained by the FCC does not yet reflect many of the awards that States and Territories have issued pursuant to earlier Treasury funding, and the FCC is still providing States and Territories with additional information about the precise coverage that will be achieved through some of its universal service programs. Taken all together, this means that even the best estimates of how much BEAD funding is available to reach unserved and underserved locations likely understate how far this funding can go given what these other programs will “offload” from BEAD.

With each version of its analysis, Cartesian continues to refine its methodology for assessing how much fiber BEAD Program projects could deploy in each State under “baseline” and “maximum” fiber scenarios. We urge NTIA to follow a similar course. Using the best information and analysis at its disposal, NTIA should identify percentage ranges of eligible locations in each State and Territory that it would expect to receive fiber under a subgrantee selection process that is faithful to the NOFO’s fiber preference. As the saying goes, “if you can measure it, you can manage it.”<sup>2</sup> The undersigned associations and Cartesian all stand ready to assist NTIA in this endeavor.

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<sup>1</sup> For further detail see “BEAD Program: A Framework to Allocate Funding for Broadband Availability - Version 4.0,” ACA Connects/Cartesian (Ja. 17, 2024) available at <https://acaconnects.org/bead-program-framework/>.

<sup>2</sup> We note that NTIA is familiar with the importance of having good metrics to measure success. See “Shaping the Future of Digital Equity: Communicating Your Feedback,” BroadbandUSA, National Telecommunications and Information Administration (Oct. 4, 2023) (“Accurately defining metrics is critical. Defining metrics is crucial for monitoring and evaluating programs that create impact.”) available at <https://broadbandusa.ntia.doc.gov/news/latest-news/shaping-future-digital-equity-communicating-your-feedback>.



In sum, we urge NTIA to adhere to the vision articulated by Congress in the IJA and the data-driven approach to priority broadband projects adopted in the NOFO. The BEAD Program promises to achieve the kind of lasting success that so many programs before it have failed to realize, and we hope that NTIA will hold fast to this vision – and to ensure that the States and Territories will do the same – as it completes its review of initial proposals for BEAD implementation.

Thank you for your attention to this correspondence. We would be delighted to meet with you and your team further to discuss these issues or any matters related to implementation of the BEAD Program.



Grant Spellmeyer  
President & CEO  
ACA Connects



Gary Bolton  
President & CEO  
Fiber Broadband Association



Shirley Bloomfield  
Chief Executive Officer  
NTCA–The Rural Broadband Association

ONE HUNDRED EIGHTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-3641  
Minority (202) 225-2927

March 26, 2024

The Honorable Alan Davidson  
Assistant Secretary of Commerce for Communications and Information  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue NW  
Washington, DC 20230

Dear Administrator Davidson:

We write in support of your ongoing focus on internet affordability as you work to administer the Broadband Equity, Access, and Deployment (BEAD) Program enacted in the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law. For years, Democrats and Republicans expressed concern over the digital divide, and the \$42 billion investment in the BEAD Program gives us a real opportunity to finally bridge this divide and connect every American to high-speed, reliable, and affordable internet. As recently as 2021, just before enactment of the Bipartisan Infrastructure Law, research indicated that one quarter of the U.S. population (about 80 million Americans) were on the wrong side of digital opportunity because they lacked a reliable, high-speed internet connection.<sup>1</sup>

Access to internet service is meaningless to consumers if the cost of signing up is a barrier. Studies show that nearly half of all broadband non-adopters cited cost as the primary reason they did not have home internet service.<sup>2</sup> Congress has demonstrated a clear commitment to ensuring that internet service is available everywhere and also affordable, particularly for middle-class and low-income families. That's why we were proud to support the Bipartisan Infrastructure Law to address the digital divide holistically with programs to advance access, affordability, and adoption. In the findings section of the broadband title, Congress

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<sup>1</sup> Pew Research Center, *Mobile Technology and Home Broadband 2021* (June 3, 2021) (<https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021>).

<sup>2</sup> *Id.*

acknowledged that “access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States.”<sup>3</sup>

The law devotes an entire section to provisions that would help Americans afford this critical service, including the creation of the Affordable Connectivity Program.<sup>4</sup> Regrettably, unless Congress acts, the Affordable Connectivity Program will run out of funding soon, eliminating a monthly \$30 discount 23 million low- and middle-income American households have used to make broadband more affordable.

The Bipartisan Infrastructure Law also includes separate affordability provisions that are specific to the BEAD program. Congress decided to allocate BEAD funds to states and territories since they are best situated to determine the needs of their communities, but it did not change any existing authority to oversee broadband or pricing. The National Telecommunications and Information Administration (NTIA) was given administrative oversight and programmatic support responsibilities to ensure the funds would be spent consistent with Congressional intent, including the review and approval of proposals after significant consultation between the state or territory and NTIA.<sup>5</sup> These are critical procedures for NTIA to follow in determining whether low-cost plans are in fact affordable for the areas and markets where they are proposed. What is affordable in one community may not be considered affordable in another, so the Bipartisan Infrastructure Law gives NTIA the responsibility of reviewing and approving different approaches on a state-by-state basis.

As you will recall, Committee Democrats emphasized the importance of affordability in our March 2022 letter to you when we urged you to “make the low-cost offering requirement in the BEAD program as widely available as feasible,” empowering the agency to “ensure that as many people as possible benefit from these Congressional priorities.”<sup>6</sup> This is particularly important now as NTIA is currently reviewing state broadband plans. It would be a significant missed opportunity in the administration of BEAD if these affordability provisions are not exercised to their fullest to help middle-class and low-income Americans afford the cost of internet service, consistent with the statute.

Therefore, we urge you to continue to prioritize affordability in your administration of this bipartisan program and look forward to seeing it connect people in all communities across America to affordable, reliable internet service. If you have any questions concerning this letter, please contact Dan Miller with the Committee Democratic staff at (202) 225-2927.

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<sup>3</sup> Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58 § 60101.

<sup>4</sup> Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58 § 60502.

<sup>5</sup> Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58 § 60102(h)(5)(B).

<sup>6</sup> Letter from Rep. Frank Pallone, Jr., Ranking Member, House Committee on Energy and Commerce et al., to Alan Davidson, Administrator, National Telecommunications and Information Administration (Mar. 21, 2022).

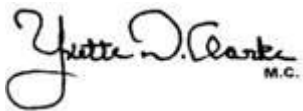
Sincerely,



Frank Pallone, Jr.  
Ranking Member



Doris Matsui  
Ranking Member  
Subcommittee on Communications  
and Technology



Yvette D. Clarke  
Member of Congress



Marc A. Veasey  
Member of Congress



Darren Soto  
Member of Congress



Anna Eshoo  
Member of Congress



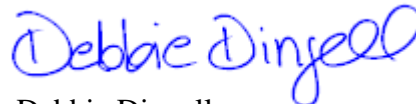
Tony Cardenas  
Member of Congress



Angie Craig  
Member of Congress



Lizzie Fletcher  
Member of Congress



Debbie Dingell  
Member of Congress



Ann M. Kuster  
Member of Congress



Robin Kelly  
Member of Congress