April 15, 2024

VIA ELECTRONIC FILING

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

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

The Coalition for Emergency Response and Critical Infrastructure (CERCI) has noted repeatedly in the above-captioned proceeding that a proposal to reallocate the 4.9 GHz band from state and local first responders to the First Responder Network Authority (the FNA) is not currently before the Commission for consideration and, even if it were, such a proposal would be unlawful.[1] In response to ongoing assertions to the contrary,[2] CERCI commissioned the attached legal analysis of the FNA's reallocation proposal.

As the attached analysis explains, the FNA's proposed reallocation would be unlawful for several reasons. First, the Commission lacks statutory authority under the Middle Class Tax Relief and Job Creation Act of 2012 to award the FNA a license beyond the 700 MHz band addressed by that Act, and no other statute authorizes such a transfer. Second, even if the FCC had statutory authority to make this grant, which it does not, the FNA is not statutorily authorized to receive it. Third, attempting to undertake this grant based on existing statutory authorities would violate the major questions doctrine and the nondelegation doctrine.

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[1] *See* Letter from Roger C. Sherman, Policy Advisor, CERCI, to Marlene H. Dortch, Secretary, FCC, WP Docket No. 07-100, at 1-2 (Feb. 8, 2024); Letter from Roger C. Sherman, Policy Advisor, CERCI, to Marlene H. Dortch, Secretary, FCC, WP Docket No. 07-100, at 2-4, 6 (Feb. 6, 2024); Letter from Roger C. Sherman, Policy Advisor, CERCI, to Marlene H. Dortch, Secretary, FCC, WP Docket No. 07-100, at 2-3 (Nov. 16, 2023).

[2] *See generally* Letter from Jeffrey D. Johnson, Executive Director, Western Fire Chiefs Association, to Marlene H. Dortch, Secretary, FCC, WP Docket No. 07-100 (Dec. 6, 2023); Reply Comments of the Public Safety Spectrum Alliance, WP Docket No. 07-100 (May 14, 2023); 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).

For these reasons, CERCI respectfully reiterates that the proposal by the Public Safety Spectrum Alliance and the FNA to reallocate the 4.9 GHz band is unlawful and should be rejected.

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

Attachment

MEMORANDUM

JENNER & BLOCK LLP

April 15, 2024

From: Jenner & Block LLP

Re: Amendment of Part 90 of the Commission's Rules

Subject: WP Docket No. 07-100

EXECUTIVE SUMMARY

This Memorandum considers the proposal that the Federal Communications Commission (the "FCC" or "Commission") grant the First Responder Network Authority (the "FNA") control of the 4.9 GHz band.[1] For the reasons discussed below, such a grant would be unlawful for several reasons. First, the Commission lacks statutory authority under the Middle Class Tax Relief and Job Creation Act of 2012 (the "2012 Act" or "Act") to award the FNA a license beyond the 700 MHz band addressed by that Act, and no other statute authorizes such a transfer.[2] Second, even if the FCC were authorized to make this grant, the FNA is not statutorily authorized to receive it. Third, attempting to undertake this grant based on existing statutory authorities would, in any case, violate the major questions doctrine and raise nondelegation issues. In light of these numerous and fundamental issues, the Commission should decline to grant the FNA control of the 4.9 GHz band.

I. The Commission Lacks Statutory Authority to Assign the 4.9 GHz Band to the FNA.

In its Seventh Report and Order, the Commission solicited comment as to whether there is any "existing statutory authority that would permit the integration of the 4.9 GHz band into public safety broadband networks."[3] With respect to the FNA and its national public safety broadband network ("NPSBN"), the answer is no: neither the 2012 Act nor any other statute authorizes the Commission to integrate the 4.9 GHz band into the public safety broadband network and thereby provide the FNA with control of the 4.9 GHz band.

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[1] *See generally* Comments of the First Responder Network Authority, WP Docket No. 07-100 (Apr. 13, 2023) ("FNA Comments"); Comments of the Public Safety Spectrum Alliance, WP Docket No. 07-100 (Apr. 12, 2023) ("PSSA Comments"); Reply Comments of the Public Safety Spectrum Alliance, WP Docket No. 07-100 (May 14, 2023) ("PSSA Reply Comments").

[2] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156.

[3] *Amendment of Part 90 of the Commission's Rules*, Seventh Report and Order and Ninth Further Notice of Proposed Rulemaking, 38 FCC Rcd 704, 736 ¶ 88 (2023) ("*Seventh Report and Order*").

A. The 2012 Act Does Not Authorize the Commission to Assign a Nationwide License of the 4.9 GHz Band to the FNA.

Both the FNA and the Public Safety Spectrum Alliance ("PSSA") suggest that the 2012 Act—which created the FNA and directed the Commission to reallocate the 700 MHz spectrum to the FNA —also authorizes the Commission to grant the FNA access to the 4.9 GHz band. According to the FNA, the "Commission should consider permitting the FirstNet Authority access to and use of the 4.9 GHz spectrum for the NPSBN under its current license."[4] For its part, PSSA suggests that "[t]aken to its natural conclusion, the FirstNet Authority's existing license could be expanded, or a new license should be issued, to include use and oversight of the 4.9 GHz Public Safety Band consistent with the regulatory framework established under the 2012 Act that already governs the FirstNet Authority's mission."[5] But the 2012 Act is clear that the Commission cannot rely on that limited grant of authority to award the 4.9 GHz band to the FNA.

In authorizing the Commission to reallocate the 700 MHz band to the FNA, Congress created a narrow carve-out to the established division of authority between the National Telecommunications and Information Administration ("NTIA")—which oversees Federal spectrum use—and the Commission—which regulates non-Federal spectrum use. That division of authority is set forth in both the Communications Act and the NTIA Act. Sections 301 and 303 of the Communications Act grant the Commission general licensing authority "over all the channels of radio transmission."[6] However, under Section 305(a), "[r]adio stations belonging to and operated by the United States shall *not* be subject to the provisions of sections 301 and 303," and "[a]ll such Government stations shall use such frequencies as shall be assigned to each or to each class by the President."[7] Section 902, which establishes NTIA, meanwhile delegates to NTIA "[t]he authority delegated [to] the President" under Section 305 "to assign frequencies to radio stations or classes of radio stations belonging to and operated by the United States, including the authority to amend, modify, or revoke such assignments, but not including the authority to make final disposition of appeals from frequency assignments."[8] This statutory division of authority is also set forth in a memorandum of understanding wherein the Commission and NTIA have jointly recognized that "[t]he FCC is an independent agency that is the exclusive regulator of non-Federal spectrum use," while "NTIA is the sole agency responsible for authorizing Federal spectrum use."[9]

Against this backdrop, the 2012 Act represents a one-time exception that allowed the Commission to assign a specific, enumerated spectrum (the 700 MHz band) to the FNA, which

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[4] FNA Comments at 4.

[5] PSSA Reply Comments at 5 (footnote omitted).

[6] 47 U.S.C. § 301; *see also generally id.* § 303 (listing the Commission's powers and duties, some of which are related to licensing).

[7] *Id.* § 305(a) (emphasis added).

[8] *Id.* § 901(b)(2)(A). All of these provisions apply to broadband as well as voice radio because the Communications Act defines "radio communication" to include "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds," *id.* § 153(40), and "radio station" as any "station equipped to engage in radio communication or radio transmission of energy," *id.* § 153(42).

[9] *Memorandum of Understanding Between the FCC and the NTIA* ("MOU") at 2 (Aug. 1, 2022), https://www.ntia.gov/sites/default/files/publications/ntia-fcc-spectrum_mou-8.2022.pdf.

was expressly created in the same Act as a limited-purpose Federal entity to receive and administer this spectrum. The FNA's status as a Federal entity is clear from the text of the Act, which establishes the FNA as an "independent authority within the NTIA"[10] and exempts it from three statutes otherwise applicable to federal agencies—the Paperwork Reduction Act, the Administrative Procedure Act, and the Regulatory Flexibility Act[11]—all of which would be unnecessary were the FNA not a Federal entity. Moreover, the Commission's website lists the FNA's licensee type as "Governmental Entity – Independent Authority,"[12] courts have consistently treated the FNA as a Federal entity,[13] and the FNA has published rulemaking documents in the Federal Register.[14]

To effect its departure from the existing statutory division of authority, the 2012 Act authorized the Commission to grant the FNA the 700 MHz spectrum "[n]otwithstanding any other provision of law."[15] But Congress repeatedly made clear that the Commission's ability to grant a license to the FNA was highly circumscribed. The Commission cannot now rely on this narrow and specific grant of authority to award the FNA additional spectrum contemplated nowhere in the 2012 Act itself.

To the contrary, the text, structure, purpose, and regulatory context of the 2012 Act categorically foreclose any argument that the Act authorizes the Commission to allocate the 4.9 GHz band to the FNA:

Text. The text authorizes the Commission to allocate only the 700 MHz spectrum to the FNA; it cannot reasonably be read to authorize the Commission to undertake any further allocations to the FNA. In the first substantive provision of the Act, Congress directed that the "Commission shall reallocate the 700 MHz D block spectrum for use by public safety entities in accordance with the provisions of this chapter."[16] Section 1421(a) additionally directs that, "subject to the provisions of this chapter," the Commission "shall reallocate and grant a license to [the FNA] for the use of the 700 MHz D block spectrum and existing public safety broadband spectrum,"[17] the latter of which includes exclusively other portions of the 700 MHz band.[18] The

[10] 47 U.S.C. § 1424(a).

[11] *See id.* § 1426(d).

[12] *See* FCC, *Universal Licensing System, 700 MHz Public Safety Broadband Nationwide License – WQQE234 – First Responder Network Authority*, https://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=3422973.

[13] *See, e.g.*, *Whitaker v. Dep't of Com.*, 970 F.3d 200, 204-06 (2d Cir. 2020) (holding that the FNA is exempt from FOIA, but only because of APA exemption in 47 U.S.C. § 1426(d)(2), signaling that FNA records would otherwise be subject to FOIA requests); *Rivada Mercury, LLC v. United States*, 131 Fed. Cl. 663, 678-82 (2017) (analyzing FNA contract for FAR compliance); *United States v. Story Cnty.*, 28 F. Supp. 3d 861, 868-69 (S.D. Iowa 2014) (holding that FNA Board member was subject to the Hatch Act).

[14] *See generally, e.g.*, *Final Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012*, 80 Fed. Reg. 63504 (Oct. 20, 2015) ("*Final Interpretations of 2012 Act*").

[15] 47 U.S.C. § 1421(a).

[16] *Id.* § 1411(a).

[17] *Id.* § 1421(a).

[18] *See id.* § 1401(14).

700 MHz spectrum is the *only* spectrum band the Act discusses when authorizing the Commission to grant a license to the FNA—and it is thus the only spectrum band for which the 2012 Act supplies any grant of authority to the Commission.

To avoid any doubt, Congress specifically enumerated the precise frequencies covered by the 2012 Act's grant of authority. The Act defines the "700 MHz D block spectrum" as the "the frequencies from 758 megahertz to 763 megahertz and between the frequencies from 788 megahertz to 793 megahertz."[19] It defines "existing public safety broadband spectrum" as "the frequencies—(A) from 763 megahertz to 768 megahertz; (B) from 793 megahertz to 798 megahertz; (C) from 768 megahertz to 769 megahertz; and (D) from 798 megahertz to 799 megahertz."[20] The Act also contains a "[r]ule of construction" providing that "[e]ach range of frequencies described in this chapter shall be construed to be inclusive of the upper and lower frequencies in the range."[21]

This bounded authority—textually cabined to specific 700 MHz frequencies across multiple provisions and specified down to the individual frequencies—cannot be read to tacitly authorize the Commission to allocate an entirely different band mentioned nowhere in the Act. That is particularly true in light of the Act's departure from the statutory division of authority between NTIA and the Commission that generally bars the Commission from assigning spectrum for Federal use.

Structure. The statutory structure further shows that the Commission's authority to allocate spectrum to the FNA was exceedingly narrow. In directing the Commission to grant a license to the FNA over the 700 MHz spectrum band, Congress used mandatory language and repeatedly admonished the Commission to act in accordance with the provisions of the Act: "[T]he Commission *shall* reallocate the 700 MHz D block spectrum . . . *in accordance with the provisions of this chapter*," and "*subject to the provisions of this chapter, the Commission shall* reallocate and grant a license to [the FNA] for the use of the 700 MHz D block spectrum and existing public safety broadband spectrum."[22] That language can be contrasted, for example, with an adjacent provision of the Act conferring some measure of discretion to the Commission: the "Commission *may* allow the narrowband spectrum to be used in a *flexible* manner."[23] Congress's intentional choice of mandatory language when authorizing the Commission to allocate the 700 MHz band to the FNA is a strong indication that the Commission's authority is cabined strictly to the tasks

[19] *Id.* § 1401(2).

[20] *Id.* § 1401(14). Thus, in combination with the D block, the resulting license covered the spectrum from 758-769 MHz and 788-799 MHz. Notably, earlier drafts of the statute omitted the word "existing" and referred to the non-D block portions simply as the "public safety broadband spectrum." H.R. 3630, 112th Cong. §§ 4002(21), 4201(a) (Dec. 13, 2011). That the final version added the word "existing" is further evidence that Congress wanted to be as clear as possible about *precisely* what band of spectrum it was directing the Commission to assign to the FNA.

[21] 47 U.S.C. § 1402.

[22] *Id.* §§ 1411(a), 1421(a).

[23] *Id.* § 1412. As defined in the Act, the "narrowband spectrum" is "the portion of the electromagnetic spectrum between the frequences from 769 megahertz to 775 megahertz and between the frequences for 799 megahertz to 805 megahertz." *Id.* § 1401(20).

specified in the statute. Put otherwise, Congress was clear that the Commission must reallocate the 700 MHz band—and only the 700 MHz band. The Act otherwise provides the Commission with *no* residual authority to grant additional licenses to the FNA or expand the license specifically provided for in the Act.

Purpose. Reading the 2012 Act as limited to the 700 MHz band is also consistent with Congress's purpose in enacting the statute. Congress set out in the 2012 Act to establish the NPSBN in response to recommendations by the 9/11 Commission regarding the need to facilitate first responders' communications in large buildings and dense urban areas.[24] The 700 MHz band is tailored to that purpose because its frequencies are low enough to penetrate large buildings and dense areas.[25] By contrast, the 4.9 GHz band does not serve this particular purpose. The 2012 Act therefore cannot be used as a basis to justify the reallocation of a different spectrum band serving different public-safety ends than those purposes underlying the 2012 Act.

Regulatory Context. Finally, the broader regulatory context confirms that the 2012 Act's grant of authority to the Commission must be read narrowly. The Commission's regulations consistently treat the 4.9 GHz band as reserved specifically for state, local, and nongovernmental organization ("NGO")—not Federal—public safety users.

Binding FCC regulations provide that the 4.9 GHz band, in particular, may only be assigned to "[s]tate or local government entities" or "[n]ongovernmental organizations."[26] The FNA is neither. And, in fact, in 2002, the 4.9 GHz band was specifically transferred from Federal use for public safety use by *non*-Federal entities.[27] In its explanation for so doing, the FCC noted that "the Commission does not license Federal entities to use non-Federal spectrum."[28] And it relied specifically on a definition of "public safety services" in another statute directing it to allocate a portion of the *700 MHz* band to providers of such services, which that statute defined to include only "State or local government entities" and "nongovernmental organizations."[29] That

[24] *See* 158 Cong. Rec. 2088 (2012) (Statement of Sen. Leahy) (stating that the Act was inspired by "a key recommendation of the 9/11 Commission"); *The 9/11 Commission Report* at 280 (2004) ("Rescue efforts by the Fire Department of New York . . . were hampered by the inability of its radios to function in buildings as large as the Twin Towers.").

[25] *See* 158 Cong. Rec. 2087-88 (2012) (Statement of Sen. Rockefeller) ("As to public safety provisions, [the Act] provides for the construction of a nationwide, interoperable public safety wireless broadband network. It does this using the D-Block spectrum, which is ideally located for fostering seamless communication among first responders. It will allow them to take full advantage of broadband functions in emergencies e.g., allowing firefighters to download floor plans to see inside buildings before they enter.").

[26] 47 C.F.R. § 90.523. That requirement comes from a definition of "public safety services" that the regulation setting eligibility requirements for the 4.9 GHz band incorporates by cross-reference. *See id.* § 90.1203(a) ("Entities providing public safety services (as defined in § 90.523 are eligible to hold a Commission license for systems operating in the 4940-4990 MHz band."). A Federal entity like the FNA by definition cannot be a provider of "public safety services" within the meaning of the current regulations and therefore cannot hold a license for the 4.9 GHz band.

[27] *See generally 4.9 GHz Band Transferred from Federal Government Use,* Second Report and Order and Further Notice of Proposed Rulemaking, 17 FCC Rcd 3955 (2002) ("*Second Report and Order*").

[28] *Id.* at 3973 ¶ 38.

[29] 47 U.S.C. § 337(f)(1)(B); *see Second Report and Order*, 17 FCC Rcd at 3970-71 ¶ 31 & n.92.

latter point again underscores the statutorily required and longstanding division of authority between the Commission and NTIA, according to which the Commission should assign frequencies for public safety use only by state, local, or NGO entities absent some express congressional authorization to the contrary.[30]

In addition, immediately following the 2012 Act's passage, the Commission initiated a rulemaking regarding licenses for 4.9 GHz spectrum that described the 4.9 GHz spectrum as outside the Act's ambit. Specifically, the Commission noted that, "given directives in [the 2012 Act] to develop a nationwide interoperable safety broadband network," it "invit[ed] comment on how the 4.9 GHz band can best be used to *complement* this network."[31] The Commission thus took the contemporaneous position that the 4.9 GHz band was *outside* the network the FNA administers under the 2012 Act. And the Commission continues to take that position to this day, including in the recent Seventh Report and Order. There, the Commission acknowledged that the "current licensing and regulatory regime for the 4.9 GHz band is significantly *different* from other public safety bands."[32] Given the longstanding and starkly different regulatory treatment of the 4.9 GHz spectrum, Congress could not have intended to silently authorize the Commission to reallocate it to the FNA.

Additional regulations limiting Federal use of the 4.9 GHz band raise still further difficulties. For example, a Commission regulation makes any Federal use of the 4.9 GHz spectrum contingent upon "approval of the non-Federal (State/local government) licensee(s) or applicant(s) involved" for a "joint-use system."[33] This regulation has existed in materially identical form since 1998—well before Congress created the FNA—supporting the conclusion that the Act did not somehow eviscerate the prevailing framework governing the 4.9 GHz band.[34] Similarly, the Commission's spectrum allocation table designates the 4.9 GHz band for non-Federal use, with a limited exception for use "on a non-interference basis to authorized non-Federal

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[30] *See supra* notes 6-11 and accompanying text; 47 U.S.C. §§ 301, 303, 305(a), 902(b)(2)(A).

[31] *4.9 GHz Band*, 77 Fed. Reg. 45558, 45559 (Aug. 1, 2012) (emphasis added).

[32] Those differences include, *inter alia*: (1) the "4.9 GHz band is shared among eligible licensees—no licensee has a right to exclusive, or interference free, access to the band"; (2) "unlike other public safety bands that only authorize operations on specific frequencies and in clearly delineated geographic areas, 4.9 GHz band licenses authorize operation on any channel over the entire 50 megahertz of the band and are generally issued for the geographic area encompassing the legal jurisdiction of the licensees"; and (3) a "4.9 GHz licensee has blanket authority to operate base stations and mobile units . . . and/or temporary (one year or less) fixed stations anywhere within its authorized area," though licensees are "also permitted to operate base stations with mobile units and temporary fixed stations outside their authorized area with the permission of the jurisdiction in which they will operate." *Seventh Report and Order*, 38 FCC Rcd at 705-06 ¶¶ 3-5 (citing 47 U.S.C. § 337(f)(1)(B); 47 C.F.R. §§ 90.20, 90.1209(a), 90.1207(a), (b)).

In any event, current regulations do not allow the FCC to authorize public safety use of the 4.9 GHz band by Federal entities. They define "public safety services," including in the 4.9 GHz band, to include use only by state, local, and NGO entities. *See supra* note 30; 47 C.F.R. §§ 90.1203(a), 90.523; 47 U.S.C. § 337(f)(1)(B).

[33] 47 C.F.R. § 2.103(b).

[34] *See 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 (Nov. 2, 1998).

operations, [which] shall not constrain the implementation of any non-Federal operations."[35] The upshot is that, to reallocate this spectrum band to the FNA, the Commission would have to extinguish the existing non-Federal primary public licenses. The 2012 Act plainly cannot be read to authorize such an extraordinary result.

B. No Other Congressional Authorization Exists that Would Empower the FCC to Assign Nationwide License of the 4.9 GHz Band to the FNA.

No other statutory provision authorizes the Commission to reallocate the 4.9 GHz band to the FNA. The FNA's comments identify no authority beyond the 2012 Act. As for PSSA, its comments include a single paragraph referencing three provisions of the Communications Act, which purportedly establish that the "Commission clearly has the statutory authority to establish a nationwide framework for the 4.9 GHz Band, and to issue a nationwide license."[36] But the cited provisions do no such thing.

The three provisions are general grants of authority that do not speak to the specific question at hand. Section 151 establishes the Commission "for the purpose of promoting safety of life and property through the use of wire and radio communications," among other purposes.[37] Section 301 grants the Commission its licensing authority, including the authority to set the "terms, conditions, and periods of the license."[38] And Section 303 grants the Commission several general powers and duties, some of which have to do with licensing.[39]

"When statutes intersect, the specific statutes . . . trump the general," and this is "'particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'"[40] These provisions may confer "broad authority to license spectrum rights," as PSSA contends,[41] but they say nothing whatever about the Commission's authority to assign bandwidth to *Federal* entities as a category, or to the FNA in particular.[42] Indeed, as discussed above, Section 305(a) of the Communications Act provides that "[r]adio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303."[43] Accordingly, the cited provisions are of no help.

PSSA additionally suggests that the provisions are relevant because, pursuant to these authorities, the "Commission has also exercised its authority to protect public safety

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[35] 47 C.F.R. §§ 2.106(a), (e)(122).

[36] PSSA Comments at 12 (citing 47 U.S.C. §§ 151, 301, 303).

[37] 47 U.S.C. § 151.

[38] *Id.* § 301.

[39] *Id.* § 303.

[40] *Loving v. IRS*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013) (quoting *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

[41] *See* PSSA Comments at 12.

[42] *See supra* Part I.A; 47 C.F.R. §§ 90.523, 90.1203.

[43] 47 U.S.C. § 305(a).

communications by modifying licenses after they have been assigned."[44] But PSSA identifies just a single example of such a modification, and it is completely disanalogous to the present situation. In that instance, which occurred 20 years ago, the Commission modified licenses to protect state, local, and NGO public safety uses—not Federal public safety uses.[45] The fact that the Commission has some general authority to grant and modify licenses for public safety purposes does not authorize the grant of a nationwide license to a Federal entity that Congress created for a different purpose. Indeed, if the Commission had such sweeping authority, there would be nothing limiting the Commission to reallocating just the 4.9 GHz band to the FNA. Such authority would presumably empower the Commission to transfer any and all public safety spectrum to the FNA, which is clearly not what Congress intended.

II. The FNA Lacks Statutory Authority to Receive the 4.9 GHz Band.

In any case, even if the Commission had statutory authority to assign the 4.9 GHz band to the FNA (it does not), the FNA would not be allowed to receive it. The 2012 Act places several important restrictions on its authority that forbid the proposed expansion of the FNA's responsibilities. The FNA's arguments to the contrary are not persuasive.

A. The 2012 Act Cannot Be Read to Authorize the FNA to Accept the 4.9 GHz Band.

The 2012 Act confirms that the FNA's license cannot extend to the 4.9 GHz band. The Act empowers the FNA to "hold *the single* public safety wireless license granted under section 1421."[46] Section 1421, in turn, specifies a single band of spectrum for that license to encompass: "the 700 MHz D block spectrum and existing public safety broadband spectrum,"[47] which Section 1411 effectively consolidated into one band.[48] Current regulations confirm that the FNA may authorize use of only "channels in the 758-769 MHz and 788-799 MHz public safety bands."[49] As a matter of plain text under the negative-implication canon, as well as under these binding regulations, the Act can only be read to authorize the FNA to receive and use the 700 MHz band, to the exclusion of all other bands. At least four important features of the statute confirm this construction:

First, Congress established the FNA, the consolidated 700 MHz public safety band, the single public safety license, and the NPSBN contemporaneously in a single statute. In other words, Congress created the FNA as a Federal entity *for the purpose* of holding the 700 MHz license and

[44] PSSA Comments at 12.

[45] *See id.* at 12-13 (citing *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 14971 ¶ 1 (2004) ("*Fifth Report and Order*")).

[46] 47 U.S.C. § 1426(b)(1).

[47] *Id.* § 1421(a).

[48] *See id.* § 1411(a).

[49] 47 C.F.R. § 2.103(c).

operating the NPSBN on the frequencies that came with that license. Administering the 700 MHz public safety band is the sole purpose for which the FNA exists.

Second, Section 1426(b)—which governs the FNA's operation of the NPSBN—includes multiple references to the 700 MHz band and its corresponding license, confirming that the two are coextensive. That subsection opens by directing the FNA to "hold the single public safety wireless license granted under section 1421. . . and take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network."[50] By mentioning the NPSBN and the 700 MHz license—alone—in the same sentence, this subsection implies that the former's bandwidth is coextensive with the latter. Section 1426(b) goes on to direct the FNA, "[i]n carrying out the duties and responsibilities of this subsection," to "requir[e] that equipment for use on the network be. . . capable of being used by any public safety entity and by multiple vendors across all public safety broadband networks *operating in the 700 MHz band*."[51] If Congress had contemplated an expansion of the network's bandwidth, it would have required the equipment to be functional on any additional frequencies, not just the 700 MHz band. Moreover, Section 1426(b) provides that the NPSBN, "consistent with *the license granted under section 1421 of this title*, shall require deployment phases with substantial rural coverage milestones as part of each phase of the construction and deployment of the network."[52] If Congress intended the FNA eventually to hold another license, it would have required rural coverage consistent with all FNA licenses, not just the 700 MHz license.

Third, Congress created a special licensing scheme just for the FNA and just for the 700 MHz band. An ordinary FCC license lasts for a defined term, and applications to renew those licenses (like applications to initiate them) must demonstrate "that public interests, convenience, and necessity would be served thereby."[53] In contrast, the FNA's license for "the 700 MHz D block spectrum and existing public safety broadband spectrum," *i.e.*, the 700 MHz band,[54] "shall be for an initial term of 10 years,"[55] and the Commission may renew that license only if the FNA "demonstrate[s] that, during the preceding license term, [the FNA] has met the duties and obligations set forth under" the Act.[56] If Congress intended the FNA to obtain another license, it would not have created a special licensing scheme for the FNA and specified that that scheme applies *only* to the 700 MHz band.

Fourth, Congress included a sunset provision that will terminate *all* of the FNA's authorizations on February 22, 2027, absent reauthorization,[57] and a provision requiring the

[50] 47 U.S.C. § 1426(b)(1).

[51] *Id.* § 1426(b)(2)(B)(ii) (emphasis added).

[52] *Id.* § 1426(b)(3) (emphasis added).

[53] *Id.* § 307(c)(1).

[54] *Id.* § 1421(a).

[55] *Id.* § 1421(b)(1).

[56] *Id.* § 1421(b)(2).

[57] *See id.* § 1426(f). In the last Congress, a bill that would have eliminated the sunset provision and indefinitely reauthorized the FNA failed. *See* H.R. 6768, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/6768/all-actions?s=1&r=4.

Government Accountability Office to make a recommendation as to reauthorization by February 22, 2022.[58] This required reauthorization is compelling evidence that Congress intended to constrain and manage the FNA's statutorily-defined responsibilities, including by requiring Congress itself to affirmatively approve of the FNA's continued existence after fifteen years. It would be unwise to attempt to transform the FNA's responsibilities beyond the Act's scope less than three years before the entire entity is set to terminate absent congressional action. The FNA has itself urged Congress that "[s]tatutory [i]ssues" regarding its continued existence must be resolved for it to continue even with its current responsibilities.[59]

In short, the 2012 Act makes clear that the FNA was always intended to be a limited-purpose and time-limited Federal entity whose continuing viability would be tightly controlled by Congress and reevaluated by Congress in a relatively short timeframe. Congress could not have intended to authorize a licensee who holds a "single" license with a statutorily imposed expiration date to receive additional bands to administer on the eve of its potential expiration.

B. The FNA's Arguments to the Contrary Lack Merit.

The FNA has argued that it "would have the authority under the 2012 Act to access and use the 4.9 GHz band spectrum for the NPSBN given the band is designated as public safety spectrum."[60] But the provisions the FNA cites for that proposition—Sections 1426(a)(1), 1426(a)(6), and 1422(b)—are ancillary provisions related to the FNA's administration of the 700 MHz band, and they do not expand the FNA's powers so fundamentally.

Section 1426(a) enumerates the FNA's "[g]eneral powers," which include, in Section 1426(a)(1), the ability to "exercise, through the actions of its Board, all powers specifically granted by the provisions of this subchapter, *and such incidental powers as shall be necessary*."[61] The "incidental powers" referred to must be "necessary" to further the "powers specifically granted." But the FNA has identified no specific power granted that would authorize the FNA to receive the 4.9 GHz spectrum band. For the reasons described in the previous section, no such power exists. Receiving an allocation of spectrum that would more than double the bandwidth the FNA administers cannot be merely "incidental" to the FNA's extant responsibilities.

Section 1426(a)(6)—the final subsection in a list of the FNA's general powers—authorizes the FNA to take "other actions" that it (through its Board) "may from time to time determine

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[58] *See* 47 U.S.C. § 1426(g); *see also* U.S. Gov't Accountability Office, GAO-22-104915, *Public-Safety Broadband Network: Congressional Action Required to Ensure Network Continuity* ("GAO Report"), at 16-22 (2022) (outlining potential options for Congress to consider in reauthorizing the FNA, including fundamental changes to the organizational structure of the FNA and the possibility of "transfer[ring] FirstNet's responsibilities to one or more other agencies" (capitalization omitted)).

[59] FirstNet Authority Fiscal Year 2023 Annual Report to Congress, at 39 (Feb. 2024), https://www.firstnet.gov/sites/default/files/FirstNetAuthority_AnnualReport_FY2023.pdf ("Under the Act, the FirstNet authority is scheduled to terminate in February 2027, which would create a risk for continued network operations and result in a loss of service for public safety users.").

[60] FNA Comments at 2 n.9 (citing 47 U.S.C. §§ 1422(b), 1426(a)(1), (a)(6)).

[61] 47 U.S.C. § 1426(a)(1).

necessary, appropriate or advisable to accomplish the purposes of this chapter."[62] The scope of that power must be read in conjunction with the other enumerated responsibilities, not as an independent authorization. Indeed, subsection (a)(1) expressly states that it is tied only to the provisions of the Act.[63] The powers referenced in subsections (a)(2)-(5)—to hold hearings,[64] obtain grants and make contracts,[65] accept and use gifts,[66] and spend its funds[67]—similarly enable the FNA to fulfill its otherwise-provided statutory obligations to administer the 700 MHz band. To the extent this residual provision confers some additional discretion on the FNA—for example, by referencing the "purposes of this chapter"—that discretion must be exercised only "from time to time" and to further the previously specified powers. This provision cannot be read to authorize the FNA to incorporate a new band of spectrum that had been designated for other public safety uses more than a decade before the 2012 Act and that Congress nowhere mentioned in the Act. Reading this catch-all provision as the FNA suggests would place the veritable elephant of all other spectrum in the mousehole of a residual provision of a statute about the 700 MHz band.[68]

Finally, Section 1422(b) provides in relevant part that the NPSBN will "evolv[e] with technological advancements," and that its radio access network must include the equipment "required to enable wireless communications with devices using the public safety broadband

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[62] Section 1426(a)(6) is situated at the end of a list of the FNA's "[g]eneral powers":

> (1) To exercise, through the actions of its Board, all powers specifically granted by the provisions of this subchapter, and such incidental powers as shall be necessary.
>
> (2) To hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the First Responder Network Authority considers necessary to carry out its responsibilities and duties.
>
> (3) To obtain grants and funds from and make contracts with individuals, private companies, organizations, institutions, and Federal, State, regional, and local agencies.
>
> (4) To 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.
>
> (5) To spend funds under paragraph (3) in a manner authorized by the Board, but only for purposes that will advance or enhance public safety communications consistent with this chapter.
>
> (6) To take such other actions as the First Responder Network Authority (through the Board) may from time to time determine necessary, appropriate, or advisable to accomplish the purposes of this chapter.

47 U.S.C. § 1426(a).

[63] *See id.* § 1426(a)(1).

[64] *See id.* § 1426(a)(2).

[65] *See id.* § 1426(a)(3).

[66] *See id.* § 1426(a)(4).

[67] *See id.* § 1426(a)(5).

[68] "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In context, it is apparent that § 1426(a)(6) is a classic "residual clause," and as such, "takes its meaning from, and is limited by, the rest of" the subsection in which it sits. *See, e.g.*, *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1036 (9th Cir. 2022).

spectrum."[69] The FNA essentially asks the Commission to read this "evolution" to refer to any change anywhere and to authorize any response—including the incorporation of any other spectrum that the FNA may deem consistent with "technological advancements." But, in context, the "evol[ution]" to which the provision refers is plainly tied to "network architecture,"[70] *i.e.*, the hardware and software used to broadcast signals, not the frequencies of those signals. The subsection's passing reference to "devices using the public safety broadband spectrum"[71] cannot be read—as the FNA urges—to mean the NPSBN may include *every single frequency* those devices can receive.

The FNA's position is essentially that it is free to accept the 4.9 GHz band without any specific statutory authorization or limitations. If that were true, the FNA's compliance with the requirements of the Act would be a matter of grace rather than statutory compulsion: "Should the Commission decide to allow the 4.9 GHz band to be used in conjunction with the NPSBN, to the extent the FirstNet Authority uses the spectrum it would do so in accordance with the regulatory framework established under the 2012 Act."[72] And ultimately the FNA appeals to an atextual reliance on its "mission," explaining that the "foundation of the FirstNet Authority's mission is advancing public safety communications, *regardless of the particular spectrum bands leveraged for FirstNet*."[73] But references to "mission" cannot overcome the basic obligation to identify some authority to receive the spectrum band in question. An appeal to "mission" cannot override Congress's express text.

III. The FCC's Reliance on the 2012 Act to Grant a Nationwide License to the FNA Would Violate the Major Questions Doctrine and the Nondelegation Doctrine.

Even if some of the FNA's and PSSA's cited authorities could be read to implicitly authorize the Commission to allocate the 4.9 GHz band to the FNA, that allocation would violate the major questions doctrine and implicate the nondelegation doctrine.

As to major questions, the FNA's proposal would change how emergency response communications work nationwide by unilaterally reassigning an enormous band of spectrum. That is a question of "vast 'economic and political significance.'"[74] The last time this occurred, *Congress* addressed this problem directly—in response to national debate regarding the difficulties of first response during the 9/11 attacks. The suggestion that the Commission reallocate the 4.9 GHz band nationwide would entail the Commission's impermissibly stepping into the shoes Congress has until now filled. Moreover, the 4.9 GHz band comprises more than twice the bandwidth of the spectrum Congress allocated to the FNA in 2012. And that spectrum is worth

[69] 47 U.S.C. § 1422(b)(2)(A).

[70] *Id.* § 1422(b).

[71] *Id.* § 1422(b)(2)(A).

[72] FNA Comments at 2-3 (footnote omitted).

[73] *Id.* at 3.

[74] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

approximately $15 billion, dwarfing the 700 MHz band's value.[75] In other words, the proposed assignment would more than double the FNA's bandwidth and would dramatically increase the value of that bandwidth overnight. Moreover, this allocation would strip autonomy from over 3,500 state, local, and NGO licensees,[76] and thereby fundamentally reorder the public-safety broadband landscape in favor of federal control. That kind of seismic shift is permissible only if the agency can "point to 'clear congressional authorization' for the power it claims."[77] As discussed, there is no such authorization here. The general catch-all and ancillary power provisions that the FNA and PSSA cite are precisely the kinds of terms the Supreme Court has rejected under the major questions doctrine.[78]

In any case, a statutory construction allowing the Commission to reallocate other spectrum via catch-all provisions would create a nondelegation problem. That is, were the Commission empowered to take literally any "other actions" it saw as "necessary, appropriate, or advisable to accomplish the purposes of," the Act's public-safety provisions,[79] that delegation would lack an "intelligible principle,"[80] and therefore violate the nondelegation doctrine. Under the canon of constitutional avoidance—which holds that a statute should be construed, where possible, in a manner that does not create a conflict with the Constitution—the Act should not be read to allow the Commission to expand the bandwidth the FNA administers whenever and however the Commission wants, without further congressional authorization.[81]

CONCLUSION

For the foregoing reasons, this Memorandum concludes that the Commission lacks the authority to license the 4.9 GHz band to the FNA, and the FNA lacks the authority to incorporate

[75] This $15 billion estimate is based on recent auctions of nearly comparable spectrum, specifically Auctions 107 (C-band) and 110 (3.45-3.55 GHz). This $15 billion figure falls well within the range of economic impacts that courts have held to trigger the major questions doctrine. *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (calling "$50 billion" a "reasonable proxy" for eviction moratorium's economic impact and holding that that triggered the major questions doctrine); *Texas v. Biden*, No. 22-cv-00004, — F. Supp. 3d —, 2023 WL 6281319, at *12 (S.D. Tex. Sept. 26, 2023) (citing $1.7 billion impact of minimum wage for federal contractors as reason to apply major questions doctrine), *appeal docketed*, No. 23-40671 (5th Cir. Nov. 24, 2023).

[76] *See Seventh Report and Order*, 38 FCC Rcd at 707 ¶ 6.

[77] *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quoting *Util. Air*, 573 U.S. at 324).

[78] In fact, one of the FNA's chosen provisions, the catchall contained in Section 1426(a)(6), has never been cited in a court decision, and it appears only one time in the entire Federal Register, when the FNA cited it as authority for the far more mundane question of whether to take funding considerations into account when deciding whether to enter into a spectrum capacity lease. *See Final Interpretations of 2012 Act*, 80 Fed. Reg. at 63519 & n.72. In other words, this subsection "was designed to function as a gap filler and ha[s] rarely been used in the preceding decad[e]," and as such, cannot supply an adequately clear statement under the major questions doctrine. *See West Virginia*, 597 U.S. at 724.

[79] 47 U.S.C. § 1426(a)(6).

[80] *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

[81] *See Cargill v. Garland*, 57 F.4th 447, 471-72 (5th Cir. 2023) (reasoning that statutes should not be read in such a way as to create a delegation problem), *cert. granted*, 144 S. Ct. 374 (2023).

the 4.9 GHz band into the NPSBN. The Memorandum also raises additional problems with the proposed assignment.