



# 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.