June 6, 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 response to the Public Safety Spectrum Alliance's ("PSSA") *ex parte* letter of May 24, 2024, and the National Registry of Emergency Medical Technicians' ("NREMT") *ex parte* letter of May 29, 2024.[1] At issue is PSSA's proposal to assign the 4.9 GHz band to the First Responder Network Authority ("FNA"), either directly through a nationwide license or indirectly through a forced "sharing agreement."[2] CERCI previously submitted two legal memoranda outlining the numerous constitutional and statutory problems with PSSA's proposal.[3]

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[1] *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 (May 24, 2024) ("PSSA Letter II"); *Ex Parte* Letter from Mike McEvoy, National Registry of Emergency Medical Technicians, to the Honorable Jessica Rosenworcel, Chairwoman, FCC, WP Docket No. 07-100 (May 29, 2024) ("NREMT Letter").

[2] *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 I").

[3] *See generally Ex Parte* Letter from Kenneth Corey, NYPD Chief of Dept. (Ret.), CERCI Chairman, and Roger C. Sherman, CERCI Policy Advisor, the Coalition for Emergency Response and Critical Infrastructure, to Marlene H. Dortch, Secretary, FCC, WP Docket No. 07-100 (Apr. 15, 2024) ("CERCI Letter I"); *see also Ex Parte* Letter from Kenneth Corey, NYPD Chief of Dept. (Ret.), CERCI Chairman, and Roger C. Sherman, CERCI Policy Advisor, the Coalition for Emergency Response and Critical Infrastructure, to Marlene H. Dortch, Secretary, FCC, WP Docket No. 07-100 (May 10, 2024) ("CERCI Letter II").

PSSA's latest letter purports to "provide clarity regarding the Commission's legal authority" to adopt PSSA's proposal, but it does no such thing.[4] Rather than engage meaningfully with the legal issues CERCI has raised, PSSA primarily responds with policy arguments.[5] As for NREMT's letter, to the extent it engages in any substantive legal analysis, it either misunderstands CERCI's concerns or rehashes arguments from prior comments that CERCI has already refuted.[6] Ultimately, although both PSSA and NREMT express their strong preference for FNA to control the 4.9 GHz band, neither PSSA nor NREMT is able to explain how that control would be lawful, regardless of whether the Federal Communications Commission ("Commission") attempts to accomplish it directly or indirectly.

Only NTIA May Assign Spectrum to Federal Entities. With respect to the Commission's statutory authority to "[f]acilitate" FNA's use of the 4.9 GHz spectrum, PSSA ignores the actual statutory text and instead resorts to invoking the Commission's purportedly "broad mandate" as expressed in the Communications Act's "purpose[s]."[7] But as CERCI's submissions have previously explained, those provisions "are general grants of authority that do not speak to the specific question at hand" and "say nothing whatever about the Commission's authority to assign

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[4] PSSA Letter II at 7.

[5] PSSA's policy arguments are misguided. PSSA, for example, has cited a four-page submission from Roberson and Associates purporting to analyze the intensity of use of the 4.9 GHz band. *See* PSSA Letter II at n.4, *citing* Roberson and Associates, LLC, *Utilization Analysis of 4.9 GHz Spectrum* (Feb. 1, 2024). The Commission has long recognized that measuring "utilization" is a complex, multidimensional, and technically challenging exercise. *See, e.g.*, *Advancing Understanding of Non-Federal Spectrum Usage*, WT Docket No. 23-232, Notice of Inquiry, __ FCC Rcd __ (Aug. 3, 2023). But PSSA compounded this well-known problem by ignoring the submission's various caveats, limitations, and cautionary notes. Roberson and Associates developed its so-called "utilization" estimate based on factors unrelated to actual spectrum use: the authors simply compared the number of public safety entities licensed against the total number of public safety entities. But comparing 1,912 unique 4.9 GHz licensees' FCC Registration Numbers against the nearly 23,000 geographically defined public safety agencies does not mean that the 4.9 GHz band is 8.3% utilized (1,912 / 22,944 = 8.3%). A different methodology could employ the same type of information to support the equally unwarranted conclusion that the 4.9 GHz band is 600% or more utilized. For example, two state-wide 4.9 GHz licenses cover all of California; two 4.9 GHz licenses cover Los Angeles County; and two 4.9 GHz licenses cover the city of Los Angeles. Based on a metric that compares licenses to geography, spectrum "utilization" in the city of Los Angeles is 600%, not 8.3%. Neither metric is representative of the actual intensity of use, of course. The point is simply that a "utilization" metric that does not account for actual operations simply cannot provide insight into actual use. It also says nothing about the relative value of meeting the needs of state and local public safety operators and critical infrastructure industries against satisfying the demands of FNA and its vendor, AT&T, to support a mix of FNA and commercial end-user traffic.

[6] *See* 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).

[7] PSSA Letter II at 2.

bandwidth to *Federal* entities as a category, or to the FNA in particular."[8] The Commission lacks authority, absent express statutory authorization, to assign spectrum to a *Federal* entity—a task reserved for the National Telecommunications and Information Administration ("NTIA")—whether through a license or via a forced "sharing agreement" with a Band Manager.[9] PSSA suggests that the Middle Class Tax Relief and Job Creation Act of 2012 (the "2012 Act") provides the required statutory authority, but CERCI has exhaustively explained how the text, structure, purpose, and regulatory context for the 2012 Act "categorically foreclose any argument that the Act authorizes the Commission to allocate the 4.9 GHz band to the FNA."[10]

Lack of Public Comment Cannot Wish Statutory Authority into Existence. PSSA also attempts to ground the Commission's authority in the fact that "[n]o one objected" to an aspect of the *Sixth Report and Order* that allowed states to lease 4.9 GHz spectrum. But the cited portions of the *Sixth Report and Order* allowed states to lease 4.9 GHz spectrum *in general*, not to FNA specifically.[11] A state's authority to lease spectrum to a Federal entity proves nothing about the *Commission*'s authority to force a licensee to do so: such a leasing arrangement, unlike PSSA's proposed mandatory "sharing agreement," would be voluntary.[12] In any case, PSSA's contortions to find meaning in silences related to prior Commission actions PSSA otherwise opposed refutes itself: statutory authority is not magically conferred by commenters' failure to object in a tangentially related prior proceeding.

The 2012 Act Granted FNA 700 MHz Spectrum (and Only 700 MHz Spectrum). With respect to FNA's authority to receive and integrate the 4.9 GHz band into the Nationwide Public Safety Broadband Network ("NPSBN"), PSSA notes that the Act's definition section does not mention the 700 MHz band when defining the NPSBN, and then argues that a number of general powers the Act grants to FNA authorize it to accept another band of spectrum.[13] But as previously explained, "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."[14] And none of the general-powers provisions that PSSA cites authorizes FNA to expand the NPSBN beyond the 700 MHz network specified in the Act.[15] Rather, for reasons

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[8] CERCI Letter I at attachment 7 (discussing 47 U.S.C. §§ 301, 303).

[9] *See* CERCI Letter I at attachment 1-8; CERCI Letter II at attachment 2-4.

[10] CERCI Letter I at attachment 3.

[11] PSSA Letter II at 3; *see generally In re Amendment of Part 90 of the Commission's Rules*, WP Docket No. 07-100, Sixth Report and Order and Seventh Further Notice of Proposed Rulemaking, 36 FCC Rcd 1958, 1964-72 ¶¶ 20-36 (2020) ("*Sixth Report and Order*").

[12] *Cf.* 47 C.F.R. § 2.103(b). Along similar lines, NREMT argues that "Section 2.103, today, would allow the FNA" or any Federal entity "to gain access to the 4.9 GHz band." NREMT Letter at 3. But that argument similarly misses CERCI's point. Even if the Commission has authority to *allow* licensees to *share* spectrum with Federal entities, it does not follow that the Commission has authority to *force* a sham Band Manager to grant a Federal entity virtually exclusive access to an entire nationwide license. The former is a sharing authorization; the latter is an outright allocation in all but name.

[13] *See* PSSA Letter II at 5-6; *see also* 47 U.S.C. § 1401(21).

[14] CERCI Letter I at attachment 9.

[15] *See* 47 U.S.C. § 1426(a), (b).

previously explained, those provisions "simply enable the FNA to fulfill its otherwise-provided statutory obligations to administer the 700 MHz band."[16] Contrary to PSSA's and NREMT's latest submissions, these numerous textual limitations on FNA's authority are not overcome by the provision permitting FNA to "tak[e] into account new and evolving technologies."[17] PSSA omits, and NREMT concedes, that this provision is confined to what FNA is permitted to do when "updat[ing] and revis[ing] any policies" it has established to operate the network.[18] This incidental grant of authority to take new technologies into account when operating in the 700 MHz band can hardly justify FNA taking over an entirely different band.[19]

FCC Rules and Rulings Confirm FNA's Statutory 700 MHz Limitation. PSSA incorrectly contends that CERCI "[m]isunderstands the [n]ature of [r]egulatory [a]ction" by "confus[ing] the status of statutes enacted by Congress with rules promulgated by the Commission."[20] Neither of CERCI's earlier submissions contended that the Commission is unable to change its own rules, but no amount of regulatory creativity can overcome statutory limitations regarding the Commission's and FNA's authority. CERCI's submissions cited the Commission's rules to show that the Commission itself has long understood the Act to limit the NPSBN to the 700 MHz band, and that PSSA's belated proposal to amend Section 2.103 of the Commission's rules would stray so far from anything contemplated in the *Ninth Further Notice* as to create logical outgrowth issues.[21] And, despite quoting the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*[22] at length, PSSA fails entirely to respond to CERCI's concerns about the significant reliance interests of existing state and local public-safety licensees that would be harmed by PSSA's proposed scheme.[23]

Ignoring Constitutional and Statutory Concerns Does Not Make Them Disappear. PSSA likewise fails to meaningfully respond to several other issues raised by CERCI. PSSA hardly attempts a response to CERCI's major questions and nondelegation concerns, nor to its

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[16] CERCI Letter I at attachment 11. PSSA also notes that a provision of the 2012 Act authorizes the Commission to "provide technical assistance to [FNA] and [to] take any action necessary to assist [FNA] in effectuating its duties and responsibilities under" the Act. 47 U.S.C. § 1433; *see* PSSA Letter II at 5. But again, the "duties and responsibilities" described in the Act do not include expansion of the NPSBN to the 4.9 GHz band. Moreover, it would be absurd to read the phrase "technical assistance" to include more than doubling the bandwidth FNA currently administers.
[17] *See* PSSA Letter II at 5 (quoting 47 U.S.C. § 1426(c)(4)); *see also* NREMT Letter at 2.
[18] 47 U.S.C. § 1426(c)(4).
[19] In any case, CERCI has already refuted the notion that references to "evolution" in the 2012 Act can plausibly be read 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.'" CERCI Letter I at attachment 12.
[20] PSSA Letter II at 6.
[21] *See* CERCI Letter II at attachment 2, 9 n.52; CERCI Letter I at attachment 5-7; *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).
[22] 556 U.S. 502 (2009).
[23] *See* CERCI Letter II at attachment 4-5.

Anti-Deficiency Act ("ADA") concerns.[24] And it offers *no* response to CERCI's Appointments Clause, funding structure, and Federal Advisory Committee Act ("FACA") concerns.[25] Only NREMT even attempts to address these additional statutory and constitutional concerns. And in each instance, NREMT's response is inadequate.

As to CERCI's ADA concerns, NREMT argues that "the PSSA proposal is necessarily 'authorized by law' for the purposes of the ADA because the FNA has express authority to 'spend funds' and 'take such other actions as may be necessary' to further its statutory mission," as well as to "'accept' and 'utilize gifts, donations, and bequests of property … for the purposes of aiding or facilitating the work of' the FNA."[26] But that argument is circular: as NREMT admits, its position rests entirely on the premise that the 2012 Act also "grants the FNA authority to use the 4.9 GHz band," which—for the reasons CERCI previously explained—it does not.[27] In any case, NREMT (and PSSA) fails to provide any additional details about the leasing arrangement between the Band Manager and FNA that could assuage concerns about a potentially unlawful lease fee or other unauthorized obligation to construct and operate facilities using the spectrum.

PSSA's Band Manager Selection Committee Qualifies as a Federal Advisory Committee. NREMT's response to CERCI's FACA argument likewise fails. NREMT contends that "[t]he proposed Band Manager Selection Committee is not an 'advisory committee' subject to FACA."[28] But as previously explained, the proposed Selection Committee has all the hallmarks of such an advisory committee: "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.'"[29] NREMT faults CERCI for not "explain[ing] how the Selection Committee is 'established' or 'utilized' by the Commission under the 'very narrow interpretation' of those terms as used in FACA," but NREMT takes that "very narrow interpretation" language out of context and fails to explain how the Selection Committee would not be "established" or "utilized" by the Commission.[30] Under PSSA's proposal, the Commission would itself form the Selection Committee and would exercise significant management and control over it—for example, prescribing the criteria it would use and selecting its membership.[31] And contrary to

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[24] *See id.* at attachment 5-6, 8-9.
[25] *See id.* at attachment 7-11.
[26] NREMT Letter at 4 (quoting 31 U.S.C. § 1341(a)(1)(B); 47 U.S.C. § 1426(a)(5); *id.* § 1426(a)(6); *id.* § 1426(a)(4)).
[27] NREMT Letter at 4.
[28] *Id.*
[29] CERCI Letter II at attachment 7 (quoting *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913-14 (D.C. Cir. 1993) (emphasis in original)).
[30] NREMT Letter at 4 (quoting *Byrd v. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999)). In the *Byrd* case, the putative advisory committee was established by a private contractor rather than an agency. *Byrd*, 174 F.3d at 241-42. The court's "very narrow interpretation" of FACA must be understood in that context. *See id.* at 246-47 (holding that "an agency 'establishes' a committee only if the agency forms the committee," and that "the utilized test … denot[es] something along the lines of actual management or control of the advisory committee" (internal quotation marks, citation, and emphasis omitted)).
[31] *See* PSSA Letter I at 3.

NREMT's argument, CERCI's concern that the proposed Selection Committee members are so close to FNA and AT&T as to flunk FACA's "fairly balanced" requirement[32] is not "vague" or "unsubstantiated."[33] CERCI's last submission collected numerous press releases and stories showing that PSSA has suggested members with close ties to FNA and/or AT&T.[34]

NREMT's Other Efforts to Defend Constitutionally Problematic Arrangements Are Unavailing. NREMT's response to CERCI's private non-delegation concerns likewise misses the point. NREMT focuses on the uncontroversial proposition that the proposed Band Manager would be subject to the Commission's rules.[35] Meanwhile, NREMT fails to address the problem that the Commission would not itself review the Band Manager's decisions, and thus would not "retai[n] authority to approve, disapprove, or modify the proposed reallocation of public-domain usage rights."[36]

NREMT's responses to CERCI's concerns with FNA's constitutional structure also fall flat. To start, contrary to NREMT's argument, those concerns are indeed "germane to PSSA's proposal,"[37] given that PSSA's proposal would have the Commission grant vast new resources and responsibilities to an entity whose constitutionality is suspect and has never been tested. With respect to the Appointments Clause, the opinion that NREMT cites for the proposition that the "vast majority of those who work for the Federal Government are not 'Officers of the United States'"[38] is a *dissent* from a case in which the Supreme Court held that even an administrative law judge for the Securities and Exchange Commission was an officer and not a mere employee.[39] Especially in light of that holding, NREMT cannot seriously contend that the Board members of a Federal "independent authority"[40] charged by statute with "tak[ing] all actions necessary to ensure the building, deployment, and operation" of a congressionally created "nationwide public safety broadband network"[41] do not "exercise significant authority pursuant to the laws of the United States."[42] Nor does NREMT explain how being nominally housed within NTIA and subject to limited supervision of *finances only* by the Secretary of Commerce and NTIA are "obvious indicators of meaningful supervision,"[43] given that the Secretary and NTIA do not otherwise "supervis[e]" the FNA Board's work nor "direct" that work *at all*.[44] Finally, contrary to NREMT's

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[32] *See* CERCI Letter II at attachment 8; 5 U.S.C. § 1004(b)(2).
[33] NREMT Letter at 4.
[34] *See* CERCI Letter II at attachment 8 n.44.
[35] *See* NREMT Letter at 5.
[36] CERCI Letter II at 8-9; *see Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), *vacated and remanded on other grounds*, 575 U.S. 43 (2015).
[37] NREMT Letter at 5.
[38] *Lucia v. SEC*, 585 U.S. 237, 269 (2018) (Sotomayor, J., dissenting); *see* NREMT Letter at 5.
[39] *See Lucia*, 585 U.S. at 244-51.
[40] 47 U.S.C. § 1424(a).
[41] *Id.* § 1424(b)(1).
[42] *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), *superseded by statute on other grounds as stated in McConnell v. FEC*, 540 U.S. 93 (2003).
[43] NREMT Letter at 5.
[44] *See Edmond v. United States*, 520 U.S. 651, 662-63 (1997).

argument,[45] the Supreme Court's recent decision in *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.*[46] does not alleviate CERCI's concerns about FNA's funding structure. Unlike the agency at issue in that case, FNA is funded by user fees and does not have a fixed, quantitative "statutory cap" on the funds it can raise. FNA therefore "exercis[es]" far more "discretion" with respect to "its own funding" than the organization at issue in the *Community Financial Services* decision.[47]

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In short, PSSA has yet to provide a coherent account of how its proposals are lawful, nor has NREMT adequately done so on PSSA's behalf. Although PSSA and NREMT may believe it is desirable for FNA to operate the 4.9 GHz band, neither has explained the constitutionality or legality of PSSA's proposal. The Commission should decline PSSA's invitation to act beyond the clear constitutional and statutory lines that limit the Commission's and FNA's authority with respect to the 4.9 GHz band.

Sincerely,

The Coalition for Emergency Response and Critical Infrastructure (CERCI)

/s/ Roger C. Sherman

Kenneth Corey
NYPD Chief of Dept. (Ret.)
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[45] *See* NREMT Letter at 6.
[46] 601 U.S. 416 (2024).
[47] *Cmty. Fin. Servs.*, 601 U.S. at 436 (citing 12 U.S.C. § 5497(a)(2)); *see* 47 U.S.C. § 1428(b) (authorizing FNA to raise fees up to "the amount necessary, to recoup [its] total expenses … in carrying out its duties and responsibilities described under" the 2012 Act).