July 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 response to AT&T Services, Inc.'s ("AT&T") *ex parte* letter of June 20, 2024.[1] At issue is the Public Safety Spectrum Alliance's ("PSSA") 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"—as an addition to the "FirstNet Network" that AT&T owns, operates, and uses to serve its FirstNet customers.[2] Over the past several months, CERCI has submitted two legal memoranda and one letter outlining the numerous constitutional and statutory problems with PSSA's proposal.[3] These—and other—fatal issues that have come to light regarding PSSA's proposal have finally prompted AT&T to weigh in with a last-ditch attempt to rescue its spectrum windfall, stating that it "supports the Commission making the 4.9 GHz

[1] *See generally Ex Parte* Letter from Michael P. Goggin, AT&T Services, Inc., to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 20, 2024) ("AT&T 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"); *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"); *see also generally 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").

[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, Sec'y, FCC, WP Docket No. 07-100 (Apr. 15, 2024) ("CERCI Letter I"); *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, Sec'y, FCC, WP Docket No. 07-100 (May 10, 2024) ("CERCI Letter II"); *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, Sec'y, FCC, WP Docket No. 07-100 (June 6, 2024) ("CERCI Letter III").

spectrum available to [FNA]."[4] But AT&T primarily recycles failed arguments previously advanced by PSSA and thoroughly refuted by CERCI. To the extent AT&T tries to produce any new arguments, those too fail to meaningfully address the numerous statutory, constitutional, and policy problems with assigning the 4.9 GHz band to FNA.

Before addressing AT&T's specific assertions, several basic corrections are in order.

First, AT&T states that the "best utilization of the 4.9 GHz band is a public safety issue, not an industry matter."[5] That statement rewrites the reality that it is AT&T that seeks to turn this serious public-safety policy into an "industry matter" by surreptitiously leveraging allocation of the 4.9 GHz band for its own, exclusive, commercial gain. Indeed, in practice, FNA effectively allows the operation of FirstNet as little more than a brand on AT&T's commercial network. For example, whenever AT&T's network goes down, so do FirstNet's services. That is because the latter are *not* provided using a standalone, public-safety broadband network that happens to be currently operated by AT&T.[6] As described further below, PSSA's proposal would therefore mean 4.9 GHz capacity would be used by AT&T's commercial mass market and business customers.[7]

Second, AT&T argues that PSSA's proposal is in the public interest because access to the 4.9 GHz band is "necessary" for FNA to expand its operations to 5G services under a multibillion-dollar deal with AT&T announced earlier this year.[8] But AT&T evidently did not represent to FNA prior to making that deal that it would need 4.9 GHz spectrum to enable 5G operations. The press release announcing the deal did not mention the 4.9 GHz band, stating instead that, in return for a payment of $6.3 billion to $8.3 billion from FNA, AT&T would, *inter alia*, "delive[r] full 5G capabilities on FirstNet" and "[p]rovide first responders on FirstNet with always-on priority and preemption across all AT&T 5G commercial spectrum bands," as well as "[b]uild thousands of new, purpose-built FirstNet cell sites across the country" to "support the transition of public safety's Band 14 [*i.e.*, 700 MHz] spectrum from LTE to 5G" and "[r]eady the network to evolve beyond 5G."[9] But if AT&T *needs* 4.9 GHz spectrum—in addition to the other spectrum bands that it is already using to provide 5G for other customers—to provide 5G to FirstNet customers, as it now asserts, then none of those claims are in fact true. As AT&T must have known this five

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[4] AT&T Letter at 1.
[5] *Id.*
[6] *See, e.g.*, Joe Wassel, Update on Feb. 22 Network Outage, First Responder Network Auth. (Feb. 29, 2024), https://www.firstnet.gov/newsroom/blog/update-february-22-network-outage.
[7] *See, e.g.*, AT&T, 2023 Annual Report at 37, https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/annual-reports/2023/2023-complete-annual-report.pdf ("These sustainability payments represent our commitment to fund FirstNet's operating expenses and future reinvestment in the network, *which we own and operate*." (emphasis added)); *but cf. Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) ("The public, not some private interest, convenience, or necessity governs the issuance of licenses under the [Communications] Act.").
[8] *See* AT&T Letter at 3; First Responder Network Auth., Press Release, *FirstNet Authority, AT&T Announce 10-Year Investment to Transform America's Public Safety Broadband Network* (Feb. 13, 2024), https://firstnet.gov/newsroom/press-releases/firstnet-authority-att-announce-10-year-investment-transform-americas ("5G Press Release").
[9] 5G Press Release (emphasis omitted).

months ago, it should not have committed to a multibillion-dollar deal that requires access to spectrum for which neither it nor FNA has a license.

Third, AT&T asserts that PSSA's proposal to assign the 4.9 GHz band to FNA "has been recommended by numerous public safety associations," and "has drawn broad support from the public safety community."[10] But it omits the fact that numerous other public-safety entities have *opposed* that proposal, including almost every entity representing state or local government interests.[11] In short, even if PSSA's proposal were not unconstitutional and unlawful, it *still* should not be adopted because it does not advance the public-safety interests it claims to promote.

Fourth, AT&T's insistence that it would not receive a "windfall"[12] from an assignment of the 4.9 GHz band to FNA is pure sophistry. Whatever the potential policy benefits of such an assignment to FNA—and those benefits are in no way apparent—the biggest winner would be AT&T. As AT&T concedes, only a fraction of the capacity of FNA's assigned spectrum is actually used for public safety; AT&T uses the rest to serve its commercial subscribers.[13] And because AT&T's contract with FNA will not expire until 2042,[14] AT&T would have exclusive access to the 4.9 GHz band and its capacity for commercial use unless the existing contract were terminated or breached and then rebid. Moreover, while AT&T's initial contract to provide services to FirstNet using 700 MHz Band 14 spectrum required it to pay FNA $18 billion after receiving initial

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[10] AT&T Letter at 1-2.

[11] *See generally, e.g.*, *Ex Parte* Letter from Matthew E. Carey, Emergency Commc'ns Manager, Dover Police Dep't, to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 20, 2024); *Ex Parte* Letter from Ferdinand Milanes, Chief, Office of Radio Commc'ns, Cal. Dep't of Transp., to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 19, 2024); *Ex Parte* Letter from Lenny Eliason, President, Athens Cnty. Ga. Comm'rs, to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 18, 2024); *Ex Parte* Letter from Gregory Kunkle, Counsel for Metro. Transp. Auth., to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 11, 2024) ("MTA Letter"); *Ex Parte* Letter from Santiago Garces, Chief Info. Officer, City of Boston, Mass., to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 10, 2024); *Ex Parte* Letter from Jerry Deschane, Exec. Dir., League of Wis. Muns., to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 4, 2024); *Ex Parte* Letter from Laura Cooper, Exec. Dir., Major Cities Chiefs Ass'n, and Johnathan F. Thompson, Exec. Dir. and CEO, Nat'l Sheriffs' Ass'n, to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (June 3, 2024); *Ex Parte* Letter from William Chapman, Statewide Interoperability Coordinator, Ore. Dep't of Emer. Mgmt., to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (May 31, 2024); *Ex Parte* Letter from Sharetta Smith, Mayor, City of Lima, Ohio to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (May 30, 2024); *Ex Parte* Letter from David Crowley, Cnty. Exec., Milwaukee Cnty., Wis., to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (May 29, 2024); *Ex Parte* Letter from Joey Spellerberg, Mayor, City of Fremont, Neb., *et al.* to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (May 24, 2024); *Ex Parte* Letter from Wade Kapszukiewicz, Mayor, City of Toledo, Ohio, to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (May 20, 2024); *Ex Parte* Letter from Jim Tymon, Exec. Dir., Am. Ass'n of State Highway and Transp. Offs., *et al.* to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (May 20, 2024); *Ex Parte* Letter from William "Clint" McDonald, Exec. Dir., Sw. Border Sheriffs' Coalition & Texas Border Sheriff's Coalition, to Marlene H. Dortch, Sec'y, FCC, WP Docket No. 07-100 (Apr. 26, 2024).

[12] *See* AT&T Letter at 13-15.

[13] *See id.* at 13-14.

[14] *See* First Responder Network Auth., Press Release, *FirstNet Partners with AT&T to Build $46.5 Billion Wireless Broadband Network for America's First Responders* (Mar. 30, 2017), https://2014-2018.firstnet.gov/news/firstnet-partners-att-build-wireless-broadband-network-americas-first-responders?_gl=1*14n8myq*_ga*MTExMjQ1NTY1Mi4xNzE5Mjg0MDM4*_ga_RMMG6T0VWC*MTcxOTI4NDAzNy4xLjAuMTcxOTI4NDAzNy4wLjAuMA

funding of $6.5 billion,[15] there is no suggestion that AT&T will make any further payments to FNA for access to the 4.9 GHz band under PSSA's proposal, which is the very definition of a windfall. It is easy to see why AT&T is eager for the Commission to make this 4.9 GHz assignment, and why its surrogates have tried to devise workarounds to the clear statutory bars preventing that outcome.

Fifth, AT&T addresses its arguments to the wrong entity. Only Congress can assign the 4.9 GHz band to FNA. Even setting aside the constitutional problems with FNA's structure, only Congress—not the FCC—can make exceptions to the Communications Act's typical division of allocation authority, and only Congress—not the FCC—can expand FNA's authority to operate on other bands of spectrum. At bottom, AT&T and PSSA ask the Commission not merely to exercise its allocation authority or to amend its own regulations, but to legislate. That the FCC cannot do.

CERCI offers detailed responses below to AT&T's specific claims regarding the numerous constitutional and statutory defects with PSSA's proposals.

The Commission Lacks Authority to Directly or Indirectly Assign the 4.9 GHz Band to a Federal Entity like FNA. As CERCI's submissions have previously explained, 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").[16] PSSA and now AT&T have conceded this point after CERCI raised this concern in its April 15 letter and accompanying legal analysis, pivoting instead to a proposal that would launder the assignment to FNA through a Band Manager under Section 2.103(b) of the Commission's rules.

AT&T's argument that Section 2.103(b) allows the Commission to implement PSSA's forced sharing proposal ignores the plain text of that regulation.[17] Even PSSA has conceded that amendments to the current text of Section 2.103 would be required to accomplish the indirect assignment that PSSA now proposes.[18] That is because, though Section 2.103(b) allows licensees in the 4.9 GHz band to share their spectrum with Federal entities, it does so only where, among other things, that use is "the subject of a mutual agreement between the Federal and non-Federal entities,"[19] and the former "obtains the approval" of the latter.[20] The Commission may *authorize* its licensees to share their spectrum with Federal entities in general, but where it *forces* all licensees in a particular band to share their spectrum with one specific Federal entity, it performs a function that Congress has expressly reserved for the NTIA instead.

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[15] *See* U.S. Gov't Accountability Off., GAO-22-104915, *Public-Safety Broadband Network: Congressional Action Required to Ensure Network Continuity*, at 1-2, 13 (2022).
[16] *See* CERCI Letter I at attachment 1-8; CERCI Letter II at attachment 2-4; CERCI Letter III at 2-3.
[17] CERCI Letter III at 4; *see* 47 C.F.R. § 2.103(b).
[18] *See* PSSA Letter I at 2 (suggesting assignment of a nationwide overlay license to a Band Manager "pursuant to Section 2.103 of the Commission's rules as modified in [Attachment] A"); *id.* at 3 (noting Section 2.103 "can be expanded to more clearly accommodate the [FNA's] proposed use of the spectrum"); *id.* at Attachment A (proposing revisions to Section 2.103).
[19] 47 C.F.R. § 2.103(b)(4).
[20] *Id.* § 2.103(b)(2).

In response, AT&T suggests two workarounds to Section 2.103(b)'s approval requirements, each of which would violate both the rule and the Communications Act. First, it asserts that the Band Manager could simply "provide approval on behalf of incumbent licensees," apparently without consulting those incumbents and despite many incumbents' strong opposition to ceding any spectrum to FNA.[21] Even setting aside the effect on incumbents' reliance interests in having their licenses altered in this summary fashion, this ruse would plainly circumvent the regulatory requirement of receiving approval from non-Federal entities before a sharing arrangement can proceed. Indeed, the Commission itself confirmed its understanding that Section 2.103(b) requires *actual* consent on the part of the non-Federal licensee when it issued the rule, explaining that, "if a state or local government 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."[22] Manufactured and forced "consent" through a third-party Band Manager is clearly not what the Commission had in mind. And were the Commission to amend Section 2.103(b) to allow the Band Manager to consent on incumbents' behalf and then direct the Band Manager to do so for all incumbents, that would once again amount to an outright Federal assignment by an entity other than the NTIA, in violation of the Communications Act.

Second, AT&T asserts that the Commission could "adopt license conditions for existing licenses in the band that require licensees to share any 4.9 GHz spectrum that is not in use with the FNA."[23] If the Commission could proceed in this fashion, that would render Section 2.103(b)'s approval requirements superfluous and allow the exception (Federal use) to swallow the rule (non-Federal use). Moreover, while the Commission may impose "restrictions and conditions" on licensee use under the Communications Act, it may do so only in a manner "not inconsistent with law."[24] As explained in CERCI's previous submissions and below, assignment of the 4.9 GHz band, or indeed any band other than the 700 MHz band, to FNA would be inconsistent with the 2012 Act. In sum, both proposed workarounds would confront the Commission with an impossible dilemma: either violate its own regulations or amend those regulations and openly violate one or more statutes.

AT&T also misses the significance of CERCI's observation "that the Band Manager will not 'itself be using the licensed spectrum'" under PSSA's proposal.[25] A Band Manager that does not use its licensed spectrum serves one purpose: assignment of that spectrum to others, based on a set of neutral and objective criteria. PSSA's proposal, however, would have the Commission assign allocation functions it does not have to a middleman with instructions to assign *all* of the licensed spectrum to a *single*, *prejudged* winner. Under PSSA's proposal, the Band Manager's

[21] AT&T Letter at 4; *see supra* note 11 (collecting *ex parte* letters).
[22] 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. 58645, 58647 ¶ 10 (Nov. 2, 1998) (emphasis added).
[23] AT&T Letter at 5.
[24] 47 U.S.C. § 303(r).
[25] AT&T Letter at 5 (quoting CERCI Letter II at attachment 4).

sole purpose is to end-run the Communications Act's division of authority between the FCC and the NTIA, deputizing the Band Manager less as a spectrum broker than a spectrum launderer.[26]

The 2012 Act Does Not Authorize FNA to Accept the 4.9 GHz Band. AT&T's statutory arguments concerning FNA's authority to expand its network are merely variations on the same points that PSSA and its allies have already made, and they fail for the same reasons. First, AT&T argues that FNA's "broad powers" under Sections 1426(b)(1) and (b)(4)(D) "plainly include the authority to operate on non-[700 MHz band] spectrum in furtherance of its statutory mission to build, operate, and maintain the NPSBN."[27] But those provisions say nothing about expansion of FNA's existing bandwidth: they authorize FNA generally to "take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network" ("NPSBN")[28] and to "take such other actions as may be necessary to accomplish the purposes set forth in this subsection,"[29] respectively. Just like the provisions that PSSA and its allies cited, Sections 1426(b)(1) and (b)(4)(D) simply "enable the FNA to fulfill its otherwise-provided statutory obligations to administer the 700 MHz band."[30]

Second, AT&T argues that three provisions allowing "the NPSBN [to] keep pace with technological advancements" overcome the restriction repeated in the statute's numerous references to operations on the 700 MHz band alone.[31] But CERCI's previous submissions have already explained why two of those provisions do not help FNA: Section 1422(b) "is plainly tied to 'network architecture,' *i.e.*, the hardware and software used to broadcast signals, not the frequencies of those signals,"[32] and Section 1426(c)(4) is an "incidental grant of authority to take new technologies into account" when "updat[ing] and revis[ing] any policies" for "operating in the 700 MHz band."[33] The only additional provision AT&T cites is Section 1428(d), which requires FNA to "reinvest amounts received from the assessment of fees … by using such funds only for constructing, maintaining, operating, or improving the [NPSBN]."[34] That provision fares no better. Reading the word "improving" to confer the authority to operate an entirely different band of spectrum mentioned nowhere in the Act is untenable—especially given that Section 1428(d) is a *restriction* on how FNA may spend its funds, not an independent grant of authority. Thus, even more so than the other two provisions, this provision cannot be read to authorize an expansion of the NPSBN beyond the bounds described in the Act. More broadly, AT&T attempts

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[26] Furthermore, the very FCC Order that AT&T cites for the proposition that allowing the Band Manager "to hold an overlay license for the purpose of sharing it is consistent with Commission precedent," AT&T Letter at 6, actually *rejected* such an arrangement due to commenters' "legitimate concerns about the costs to spectrum users, both in terms of financial costs and delays in making spectrum accessible, that may be associated with changing a licensing scheme in an existing service." *Implementation of Sections 309(j) & 337 of the Communications Act of 1934 as Amended*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22709, 22732 ¶ 44. (2000). Similar concerns of cost and delay militate against the needless introduction of a sham middleman for the 4.9 GHz band.
[27] AT&T Letter at 6 (citing 47 U.S.C. § 1426(b)(1); *id.* § 1426(b)(4)(D)).
[28] 47 U.S.C. § 1426(b)(1).
[29] *Id.* § 1426(b)(4)(D).
[30] CERCI Letter I at attachment 11; *see also* CERCI Letter III at 3-4.
[31] AT&T Letter at 7 (citing 47 U.S.C. § 1422(b); *id.* § 1426(c)(4); *id.* § 1428(d)).
[32] CERCI Letter I at attachment 12 (footnote omitted) (quoting 47 U.S.C. § 1422(b)).
[33] CERCI Letter III at 4 (alterations in original) (internal quotation marks omitted) (quoting 47 U.S.C. § 1426(c)(4)).
[34] 47 U.S.C. § 1428(d).

to blur the lines between two distinct concepts: technology and spectrum. While new technologies may open fruitful uses for bands of spectrum, state, local, and nonprofit public-safety licensees were already using the 4.9 GHz band for a decade before Congress created FNA.[35] Thus, use of that band cannot possibly be the sort of new technology that Congress intended FNA to adopt.[36]

The only original, specific argument that AT&T adds is that "[t]he Commission cannot and should not second guess the FNA's interpretation of its own enabling statute" as set forth in its comments in this proceeding, which AT&T contends is entitled to *Chevron* deference.[37] However, the Supreme Court recently overruled *Chevron*, holding that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative Procedure Act] requires."[38] Even if FNA's comments on this docket were the kind of agency action with the force of law that was once potentially subject to *Chevron* deference—and they are not—after the Supreme Court's decision, clearly FNA is due no special deference in its interpretation of the 2012 Act.

The true thrust of AT&T's statutory interpretation in this matter is revealed in its statement that granting the 4.9 GHz band to FNA is "[c]onsistent with [Congress's] vision" for the NPSBN.[39] Congress does not legislate by "vision." It passes statutes with actual text that agencies must respect. Vague appeals to a broad philosophical "vision" cannot override the plain meaning of the words Congress has actually written.[40] The question therefore is not whether Congress *would have wanted* FNA to have access to the 4.9 GHz band—and there is no evidence that it did—but whether Congress *said it wanted* FNA to be able to expand its spectrum beyond the 700 MHz band. It did not.

AT&T Retreads Old Ground on the Anti-Deficiency Act ("ADA"). AT&T adds nothing new to the National Registry of Emergency Medical Technicians' ("NREMT") justifications of PSSA's proposal under the ADA, which CERCI's most recent submission already addressed.[41] Like NREMT, AT&T simply argues that CERCI's "ADA argument is entirely dependent on its statutory-authority argument."[42] That is not a meaningful response. CERCI's ADA concerns need not be "independent" from its statutory-authority concerns in order to provide an additional reason to refuse PSSA's overtures.

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

[36] Furthermore, AT&T's suggestion that opponents of PSSA's proposal want FNA to "remain technologically static," AT&T Letter at 4, is inaccurate. Neither CERCI nor any of the proposal's opponents have suggested any such thing. Rather, we have explained that the law limits the scope of permissible policies the FCC, FNA, and other federal agencies can adopt with respect to the 4.9 GHz band. AT&T can and should continue to innovate and invest in the 700 MHz spectrum that Congress has assigned for FNA's use.

[37] AT&T Letter at 6 & n.37; *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984), *overruled*, *Loper Bright Ents. v. Raimondo*, No. 22-451, — S. Ct. —, 2024 WL 3208360 (June 28, 2024).

[38] *Loper Bright*, 2024 WL 3208360, at *22.

[39] AT&T Letter at 2.

[40] *See* Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts*, 56-58 (2012).

[41] *See* CERCI Letter III at 5.

[42] AT&T Letter at 8; *see* NREMT Letter at 4.

AT&T's Federal Advisory Committee Act ("FACA") Arguments Are Meritless and Misleading. An advisory committee exists under FACA when an agency either establishes *or* utilizes a committee. Under PSSA's proposal, the FCC would both establish *and* utilize the Band Manager Selection Committee, clearly subjecting it to FACA twice over. AT&T largely repeats NREMT's meritless argument that the Commission would not "establis[h]" or "utiliz[e]"[43] within the meaning of FACA a Selection Committee whose members the Commission would appoint, whose selection criteria the Commission would prescribe, and whose recommendation the Commission would presumably adopt.[44] Like NREMT, AT&T takes entirely out of context a D.C. Circuit decision stating that the term "utilized" has been "given a very narrow interpretation by the Supreme Court."[45] In both that decision and the Supreme Court decision it references, the putative advisory committee was "established" by a private third party, and the only real question was whether the government "utilized" it, *i.e.*, whether the government exercised management or control over the committee.[46] The same is true of the case that AT&T erroneously cites for the proposition that the government must "fund" a committee to "establish" it: the putative committee formed on its own as a collection of industry participants that later developed a "relationship" with the EPA, and the court emphasized the lack of funding to explain why the committee also was not "utilized" by the EPA.[47] Here, in contrast, it is indisputable that the Commission would "establish" the Selection Committee by literally selecting its members and directing them to render advice.[48] The frivolousness of AT&T's contention is underscored by the fact that PSSA itself proposes that the Commission direct the Selection Committee to select a Band Manager "within 60 days of the committee's *establishment*"[49]—establishment *by whom*? All this alone is fatal to AT&T's argument, as FACA applies to any committee "established *or* utilized" by an agency or the President,[50] not "established *and* utilized."[51]

What's more, the Commission would plainly "utilize" the Selection Committee. Under PSSA's proposal, the Commission would set out detailed criteria for the Selection Committee to

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[43] 5 U.S.C. § 1001(2)(A).
[44] AT&T Letter at 8-9; *see* CERCI Letter III at 5-6 (refuting same argument).
[45] *Byrd v. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999) (quoting *Animal Legal Def. Fund v. Shalala*, 104 F.3d 424, 427 (D.C. Cir. 1997)).
[46] *See id.* at 246-47; *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 452 (1989). Furthermore, in the underlying D.C. Circuit decision from which *Byrd* derives the "very narrow interpretation" language, the court actually found that the putative committee—which was created by a quasi-governmental entity—*was* utilized by the government within the meaning of FACA. *See Animal Legal Def. Fund*, 104 F.3d at 426-31.
[47] *Wash. Toxins Coal. v. EPA*, 357 F. Supp. 2d 1266, 1268-69, 1272-73 (W.D. Wash. 2004). To be clear, there simply is no requirement that the government fund a committee in order to "establish" it. To the contrary, the D.C. Circuit has found even an informal group of advisors from the private sector who met regularly to render general advice on agency reforms to be "established" by the government for purposes of FACA, even though there was no allegation that the government paid that group's members. *VoteVets Action Fund v. U.S. Dep't of Veterans Affs.*, 992 F.3d 1097, 1102, 1105-07 (D.C. Cir. 2021). It is therefore entirely irrelevant for "establishment" purposes that the Selection Committee's members would serve on a volunteer basis.
[48] PSSA Letter I at 3.
[49] *Id.* (emphasis added).
[50] 5 U.S.C. § 1001(2)(A) (emphasis added).
[51] *See Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 613 (D.C. Cir. 1996) ("In light of our holding that the Forest Service 'established' [the committee] … we do not reach [plaintiff's] alternative argument relying on the 'utilized' language of the statute.").

follow, it would give the Selection Committee a 60-day deadline to make a decision, and it would actually allow the Selection Committee to choose the entity to whom the Commission would award the Band Manager license.[52] Thus, the Commission would exercise *both* management *and* control over the Selection Committee's operations.

Finally, AT&T offers no meaningful response to CERCI's concern that the Selection Committee would not be "fairly balanced"[53] for purposes of FACA if only FNA's allies were appointed as members, asserting simply that those allies "represent" the public-safety community,[54] and ignoring that numerous other public-safety entities *oppose* FNA's expansion into the 4.9 GHz band, as demonstrated on the record in this proceeding.[55] An advisory committee is not "fairly balanced" if it comprises exclusively members who share a common viewpoint on a point of controversy with respect to the subject of the advice it renders.[56] Nor has AT&T or PSSA given any assurances that the Selection Committee would satisfy FACA's procedural requirements.[57]

AT&T Fails to Refute CERCI's Nondelegation Concerns. AT&T does not adequately respond to CERCI's concern that PSSA's proposal to outsource FNA's assignment of the 4.9 GHz band to a Band Manager would violate the private nondelegation doctrine. While AT&T faults CERCI for "cit[ing] nothing for [the] central premise to its claim"[58]—that the Commission would not retain "authority to approve, disapprove, or modify" the Band Manager's forced "sharing agreement" with FNA[59]—it is *PSSA* that should cite something to allay that concern. PSSA's proposal is devoid of details, and it does not specify any mechanism for challenging or overturning the Band Manager's decisions regarding the forced sharing agreement.[60] Moreover, "[p]rivate delegation to a Band Manager is especially problematic where, as PSSA proposes," the Commission would be delegating "an authority the Commission itself does not even possess."[61] Finally, AT&T offers no response to CERCI's public nondelegation doctrine concerns.[62]

Fundamentally, AT&T and PSSA cannot have it both ways. They have resorted to a Band Manager mechanism because they admit the Commission lacks statutory authority to allocate FNA the 4.9 GHz band directly. To now argue that there is no non-delegation issue because the Band Manager is essentially the Commission itself only confirms the illegality of PSSA's proposal.

PSSA's Proposal Would Not "Protect" Incumbent Users. AT&T suggests that PSSA's proposal to "freeze" new entrants from entering the band would "protect[] incumbent users."[63]

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[52] *See* PSSA Letter I at 3.
[53] 5 U.S.C. § 1004(b)(2).
[54] AT&T Letter at 10.
[55] *See supra* note 11 (collecting *ex parte* letters).
[56] *See NAACP Legal Def. & Educ. Fund, Inc. v. Barr*, 496 F. Supp. 3d 116, 143-44 (D.D.C. 2020).
[57] *See* 5 U.S.C. §§ 1008, 1009; CERCI Letter II at attachment 7.
[58] AT&T Letter at 10.
[59] CERCI Letter III at 6.
[60] *See* PSSA Letter I at 2-3.
[61] CERCI Letter II at attachment 9.
[62] *See* CERCI Letter I at attachment 13.
[63] AT&T Letter at 7.

But AT&T offers no explanation why. Indeed, the only support AT&T cites for this proposition explains how a freeze offers benefits *to the Commission*.[64] That is cold comfort to the incumbent state, local, and nonprofit public-safety licensees in the 4.9 GHz band. The forced sharing agreement would necessarily encroach upon these licensees' operations. PSSA's proposal would force every single incumbent in the country to coordinate constantly with FNA in every single geographic area. And even if FNA were given access only to specific licensed frequencies that incumbents are not currently using, that would still inhibit incumbents' expansion of operations within their already-licensed area. Such expansion may be operationally required. It is thus unsurprising that state and local governments have expressed near-universal opposition to PSSA's proposal.[65]

Moreover, a freeze on entrants would also bar geographic and frequency expansions of existing state, local, and nonprofit public-safety users, thereby "strand[ing] investment, upend[ing] strategic planning, and impos[ing] operational and legal uncertainties" on those entities.[66] For example, in New York City, the Metropolitan Transportation Authority ("MTA") plans to expand its "Q" line into Harlem,[67] and loss of access to 4.9 GHz spectrum in that area (where MTA is not yet using that spectrum as part of its existing system) would prevent MTA from reliably implementing critical emergency call and train control systems there.[68] And because the very concept of an overlay license contemplates that the overlay licensee will absorb underlying licenses as they lapse, PSSA's proposal would ensure that FNA "will eventually squeeze out incumbent licensees" nationwide.[69] In sum, incumbents would need protections *from FNA*. Without any detail on what form those protections would take, AT&T's vague assertions that they would exist rings hollow.

FNA's Structure, Funding Scheme, and Past Performance Counsel Against Any Expansion of its Authority. Finally, CERCI reiterates the numerous legal and practical problems with an expansion of FNA's responsibilities.

First, FNA has an unconstitutional structure that fails to comply with the Appointments Clause. AT&T's contention that FNA's Board Members are mere "employees" is mired in self-contradiction. AT&T concedes that FNA is an "agency"[70] and that "heads of agencies" are officers of the United States.[71] But who is the "head" of FNA if not its Board? AT&T appears to suggest that the Board does not exercise similar authority to a unitary agency head because it has 15

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[64] *See id.* (noting that a freeze "help[s] preserve the *options available to the Commission*…" (quoting *Temporary Freeze on Applications for New or Modified Fixed Satellite Service Earth Stations and Fixed Microwave Stations in the 3.7-4.2 GHz Band*, Public Notice, 33 FCC Rcd 3841, 3843 (2018))).

[65] *See supra* note 11 (collecting *ex parte* letters).

[66] CERCI Letter II at attachment 4.

[67] *See* Metro. Transp. Auth., *Second Ave. Subway, phase 2* (last updated Mar. 6, 2024), https://new.mta.info/project/second-avenue-subway-phase-2.

[68] *See* MTA Letter at 1.

[69] CERCI Letter II at attachment 4 & n.21 (citing *In re Transforming the 2.5 GHz Band*, Report & Order, 34 FCC Rcd. 5446, 5473 ¶ 77 (2019)).

[70] AT&T Letter at 14.

[71] *Id.* at 11-12.

members,[72] but it is well-established that individual members of a multimember body that heads an agency are themselves officers of the United States so long as in leading that agency, they "exercis[e] significant authority pursuant to the laws of the United States."[73] And AT&T cannot seriously contend that exercising final decision-making authority over the construction and operation of tens of billions of dollars of congressionally mandated critical infrastructure for the nation's first responders does not represent an exercise of significant authority on behalf of the United States.[74] AT&T's argument that "FNA's construction and management of a federal wireless network … is the government 'act[ing] in its commercial or proprietary capacity … rather than its sovereign capacity'"[75] is meritless, both because the case it cites for that proposition had nothing to do with the Appointments Clause,[76] and because, as AT&T itself concedes, "FNA's mandate is not commercial in nature"—"[i]t is to build, deploy, and operate the NPSBN for the benefit of public safety."[77]

AT&T's assertion that FNA's Board Members are merely inferior officers likewise fails. AT&T points out that FNA was nominally "established … within the NTIA,"[78] but it omits that FNA was established there as "an independent authority,"[79] and that "[i]t is not enough" for Appointments Clause purposes "that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude."[80] AT&T argues that the NTIA's limited "control over [FNA's] purse strings is a constitutionally meaningful form of supervision,"[81] but neither of the cases it cites for that proposition has anything to do with the Appointments Clause,[82] and one of the three purported control mechanisms—the authority to borrow money from the Treasury during FNA's initial funding period[83]—has already lapsed. Another of those purported control mechanisms, the power to audit FNA's finances,[84] does not entail control at all, merely oversight. The third control mechanism, the power to approve FNA's fees,[85] at most establishes NTIA supervision of one small aspect of FNA's operations. The NTIA still has no

[72] *See id.* at 12.
[73] *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); *see id.* at 124-37 (holding that Federal Election Commission's Commissioners are officers of the United States for Appointments Clause purposes).
[74] AT&T argues that "[a]n exercise of 'authority' *typically* involves 'the power to bind' others," AT&T Letter at 11 (emphasis added) (quoting *Lucia v. SEC*, 585 U.S. 237, 245-46 (2018)), but it cites no authority holding that the power to bind is always necessary. To the contrary, the Supreme Court has held that a special counsel—whose powers included investigating and prosecuting crimes rather than rendering binding judgments or regulations—was an officer and not a mere employee. *See Morrison v. Olson*, 487 U.S. 654, 671 n.12 (1988).
[75] AT&T Letter at 12 (quoting *Preston Hollow Cap., L.L.C. v. Cottonwood Dev. Corp.*, 23 F.4th 550, 553 (5th Cir. 2022)).
[76] *See generally Preston Hollow*, 23 F.4th 550.
[77] AT&T Letter at 14.
[78] 47 U.S.C. § 1424(a); *see* AT&T Letter at 12.
[79] 47 U.S.C. § 1424(a).
[80] *Edmond v. United States*, 520 U.S. 651, 662-63 (1997).
[81] AT&T Letter at 12.
[82] *See generally NFIB v. Sebelius*, 567 U.S. 519 (2012); *McCulloch v. Maryland*, 17 U.S. 316 (1819).
[83] *See* 47 U.S.C. § 1427(a).
[84] *See id.* § 1429(a).
[85] *See id.* § 1428(c).

control whatever over the vast majority of those operations, such as the building and maintenance of the NPSBN and the expenditure of the funds FNA raises through fees.

Second, FNA has a constitutionally suspect funding structure. Contrary to AT&T's argument, the Supreme Court's decision in *CFPB v. Community Financial Services Association of America*[86] does not establish that FNA's funding structure comports with the Appropriations Clause. In that case, the Court had no occasion to consider the constitutional limits of fee-based funding schemes. And as Justice Alito noted, founding-era fee systems were subject to important limitations. Most notably, if fee-based agencies' "fees exceeded the costs of providing [their] services, … these agencies were required to send the surplus to the Treasury, which oversaw the collection and use of such fees."[87] FNA, in contrast, is *prohibited* from returning excess fee revenues to the Treasury, for it must reinvest excess fees in the NPSBN.[88] At minimum, FNA's funding scheme raises novel questions that again counsel against an expansion of its responsibilities.[89]

Third, AT&T's exaltation of FNA's virtues ignores serious concerns of systemic mismanagement. While AT&T spends significant space praising FNA (and by extension itself) for the NPSBN's "success" to date,"[90] it omits that FNA's performance in some areas has been so deficient as to raise repeated alarms within the Department of Commerce, which audits FNA.[91] Specifically, multiple successive reports by Commerce's Office of the Inspector General ("OIG") have found that FNA has mismanaged its finances and performance. CERCI recently filed an *ex parte* letter in this proceeding highlighting two OIG reports just from this year that detailed problems with FNA's signal strength and its oversight of AT&T.[92] But similar problems have persisted for years, with earlier OIG reports criticizing FNA for, *inter alia*:

- Accepting prices from AT&T "without additional analysis or justification";[93]
- Failing to evaluate the need for or alternatives to certain investments;[94]

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[86] 601 U.S. 416 (2024).
[87] *Cmty. Fin. Servs.*, 601 U.S. at 461 (Alito, J., dissenting).
[88] *See* 47 U.S.C. § 1428(d).
[89] *See* CERCI Letter III at 6 (noting CERCI's constitutional concerns with FNA's structure are indeed germane to this proceeding "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").
[90] *See* AT&T Letter at 1-4, 15.
[91] *See* 47 U.S.C. § 1429.
[92] *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, Sec'y, FCC, WP Docket No. 07-100 (June 24, 2024) ("CERCI Letter IV"); U.S. Dep't of Com., Off. of Inspector Gen., OIG-24-027-A, *Report: FirstNet Authority's Lack of Contract Oversight for Device Connection Targets Puts the NPSBN at Risk of Impacting First Responders' Use of the Network* (June 12, 2024); U.S. Dep't of Commerce, Office of the Inspector General, OIG-24-024-A, *Management Alert: The NPSBN Band 14 Signal Strength Does Not Consistently Provide Adequate Band 14 Service for First Responders* (May 16, 2024).
[93] U.S. Dep't of Com., Off. of Inspector Gen., OIG-22-029-A, *Report: FirstNet Authority Did Not Have Reliable Cost Estimates to Ensure It Awarded Two Reinvestment Task Orders at Fair and Reasonable Prices*, 8 (Aug. 25, 2022).
[94] U.S. Dep't of Com., Off. of Inspector Gen., OIG-23-005-A, *Report: FirstNet Authority Could Not Demonstrate Investment Decisions Were the Best Use of Reinvestment Funds or Maximized the Benefits to Public Safety*, 5-8 (Nov. 28, 2022).

- Relying on biased information from AT&T with respect to certain reinvestment opportunities;[95] and
- Failing to independently verify AT&T's reports that its deployables were functioning properly for public-safety users.[96]

Whatever benefits FNA has provided to public-safety entities, it is clear from these OIG reports that FNA is currently failing to fulfill its statutory duties with respect to independence, oversight of AT&T, and the administration of its contract. As CERCI has previously noted, "[d]irectly or indirectly gifting the 4.9 GHz band to [FNA], which will merely regift it to AT&T to share among the company's commercial and public safety users, would not only be unlawful and unwise but, as these reports show, pose a major distraction from [FNA's] core mission."[97]

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AT&T has done nothing to solve the statutory, constitutional, and policy problems with PSSA's proposal to hand over the 4.9 GHz band to FNA. Instead, AT&T breaks its silence only to shy away from committing to any particular approach, noting vaguely and repeatedly that a "variety of approaches," or a "variety of pathways," or a "variety of means" perhaps could work. But PSSA and AT&T have not identified any constitutional and legal means to achieve their desired policy ends, likely because such means do not in fact exist. The Commission should therefore decline to grant FNA access 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.)
CERCI Chairman

Roger C. Sherman
CERCI Policy Advisor

[95] *Id.* at 8-10.
[96] U.S. Dep't of Com., Off. of Inspector Gen., OIG-23-012-A, *Report: FirstNet Authority Failed to Provide Adequate Contract Oversight for Its Initial Two Reinvestment Task Orders*, 7-9 (Mar. 1, 2023).
[97] CERCI Letter IV at 4.