

**First Responder Network Authority Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012**

**Comments of APCO International**

**October 27, 2014**

**Docket Number: 140821696-4696-01**

The Association of Public-Safety Communications Officials-International, Inc. (APCO) submits the following comments in response to the Notice and request for comments issued by the First Responder Network Authority (FirstNet), National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce. Founded in 1935, APCO is the nation's oldest and largest organization of public safety communications professionals. APCO's membership primarily consists of state and local government employees who manage and operate public safety communications systems – including Public Safety Answering Points (PSAPs), dispatch centers, emergency operations centers, radio networks, and information technology – for law enforcement, fire, emergency medical, and other public safety agencies.

**I. Statement of Interest**

APCO spearheaded the intensive public safety-driven advocacy campaign to achieve the legislation that created FirstNet. APCO therefore responds to this Request for Comments with the unique perspective of the collective goals that the public safety community sought to accomplish with enactment of FirstNet's enabling legislation.<sup>1</sup>

Prior to the passage of the Act, APCO established the Public Safety Alliance (PSA), an unprecedented grouping of the major national public safety organizations that joined forces to advocate for the funding, spectrum, and governance body necessary to implement a nationwide, interoperable broadband network for the benefit of public safety agencies across the country.<sup>2</sup>

At the time, APCO recognized the value that reallocation of the former 700 MHz "D Block" would bring to public safety. APCO organized the PSA partners around a core concept: public safety communications professionals and first responders should have the most modern communications tools at their disposal in order to protect and serve the public and achieve a

---

<sup>1</sup> Middle Class Tax Relief and Job Creation Act of 2012 (the "Act").

<sup>2</sup> In addition to APCO, the PSA consisted of the International Association of Chiefs of Police, International Association of Fire Chiefs, Major Cities Chiefs Association, Major County Sheriffs' Association, Metropolitan Fire Chiefs Association, National Association of State EMS Officials, National Emergency Management Association, and the National Sheriffs' Association.

nationwide level of interoperability. These tools required sufficient dedicated spectrum, which reallocation of the D Block would deliver.

Through APCO, the individual associations comprising the PSA enlisted the help of their members who engaged in a grassroots effort to urge members of Congress to support legislation that would create a nationwide, interoperable public safety broadband network. In parallel with these efforts, key stakeholders from the nine public safety organizations held rallies on Capitol Hill, and organized fly-ins to meet with members of Congress and their staff. APCO and the PSA also hosted events in Washington, D.C., that attracted industry leaders as well as state, local, and federal government officials, and featured presentations from leaders in the public safety community who spoke about the importance of broadband for public safety. In the end, APCO and the PSA achieved their main objectives with passage of the Act.

In addition to its direct involvement in these advocacy efforts and understanding of the underlying public safety needs, APCO possesses intimate knowledge of the process and insight into the lawmakers' specific decisions as the law was drafted. APCO thus brings a unique perspective to its comments, sharing what APCO understands to have been the intent of the lawmakers in crafting the Act. Below, APCO begins by describing two overarching principles that should guide FirstNet's legal interpretations, and then focuses on particular elements of the Notice.

## **II. Guiding Principles**

APCO believes that there are two basic principles that should guide FirstNet as it implements the Act. First, the Act clearly grants FirstNet a wide berth in determining how best to proceed. Congress vested FirstNet with broad powers, responsibilities, and discretion throughout the Act.<sup>3</sup> For example, FirstNet "shall have the authority ... [t]o take such other actions as [FirstNet] may from time to time determine necessary, appropriate, or advisable to accomplish the purposes of this title,"<sup>4</sup> is responsible for effectively managing the \$7 billion dollar network construction fund,<sup>5</sup> and is otherwise tasked to "take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network."<sup>6</sup>

Second, the complexity of the task before FirstNet is mirrored in the complexity of the legislation, which itself contains a network of interdependent sections. Accordingly, legal interpretations of the Act should not be based on examination of each particular section or

---

<sup>3</sup> See generally Section 6206.

<sup>4</sup> Section 6206(a)(6).

<sup>5</sup> See Section 6206(e)(2)(A).

<sup>6</sup> See Section 6206(b)(1).

term in isolation. Instead, FirstNet should be guided by the advocacy goals described above, the basis of those goals, and Congress's intent to meet the needs of the public safety community by providing a dedicated network for first responders. FirstNet should look at the Act as a whole, considering the overarching themes of the legislation, to best understand the intent and expectations of those that crafted the Act.

### **III. Elements of the Network**

APCO agrees that "opt-out State radio access networks must use FirstNet's core network to provide services to public safety entities." This is supported by a plain reading of the statutory language. With respect to the definitions of "core network" and "radio access network," FirstNet should simply use the definitions of these terms (as well as for the important, related term "commercial standards"<sup>7</sup>) that are provided in the statute, and use the wide discretion it possesses to consider other interpretations as it carries out its responsibility to implement these network components. FirstNet should not use the Interoperability Board Report to derive any legal interpretations of the Act. The stated purpose of the Interoperability Board is clear, specific, and limited,<sup>8</sup> and thus its work should not be considered for legal interpretations of the Act.

### **IV. Public Safety Entities**

APCO strongly disagrees with FirstNet's analysis of the types of nationwide public safety broadband network (NPSBN) users that would fall under the definition of a "public safety entity." FirstNet's interpretation focuses on determining the broadest legally defensible interpretation at the cost of overlooking the fundamental premise of the Act itself. While recognizing that FirstNet seeks to define its legal boundaries as a prerequisite to developing policies, APCO is concerned that an overbroad interpretation risks defeating the purpose of the act: serving our nation's first responders.

First responders, and those they are trying to protect, have endured additional risks – and in some cases harm – because first responders did not, and still do not, have a network with sufficient spectrum capacity and a nationwide level of interoperability. Leaders throughout the public safety community, from *all* public safety disciplines, along with the support of their individual membership bases of public safety communications professionals and first responders across the country, spent significant resources convincing Congress that

---

<sup>7</sup> The importance of the term "commercial standards" should not be overlooked. It is a specifically defined term in the Act, and used in multiple provisions. The effect is to require that commercial, standards-based technology be integral to the NPSBN design, and thereby signal a full departure from the proprietary, high-cost, and siloed nature of legacy land mobile radio networks.

<sup>8</sup> See Section 6203(c).

the public safety community needed the D Block for mission-critical operations. They did not carry this fight to the Capitol, with the support of the Administration, key members of Congress from both parties and houses, and many other notable figures such as the 9/11 Commissioners, to have those who do not share the mission of police, fire, and EMS professionals to be labeled as “public safety entities,” and thus entitled to access and use of this spectrum alongside a police officer, firefighter, or EMT. With the Act, Congress signaled agreement with national public safety organizations that reallocation of the D Block to and for the benefit of public safety was justified and necessary.

Congress’s intent to serve first responders is apparent throughout the Act. For a start, the governance body charged with this important endeavor is called the *First Responder Network Authority*. The FirstNet Board is to have at least three public safety representatives. The Act contains numerous provisions intended to meet the needs of first responders specifically (security, resiliency, interoperability, rural coverage, integration with public safety answering points, etc.). These provisions point to a narrow definition of public safety entities.

The strong emphasis in the Act on establishing public-private partnerships (especially with wireless service providers) would be at odds with an interpretation that too narrowly defines “consumer” and too broadly defines “public safety entity.” Major communications carriers supported public safety’s efforts in part because they intended their efforts to result in a network that serves first responders, and not, for example, other customers of their commercial services, such as individual consumers and utilities. The prohibition in the Act against offering services directly to consumers supports this view. The term “consumers” in this case is intended to be read broadly – essentially any of those typical customers of wireless service providers that are not first responders. FirstNet’s mission is providing an otherwise unobtainable service for first responders, not competing with wireless carriers.

FirstNet is incorrect to conclude that the lack of a definition of “consumer” lends further support for defining public safety entity broadly. If anything, the opposite should be true – the term “consumer” is commonly and easily understood in the wireless industry context, and is not included in the legislation other than to make the related prohibition clear. The term “public safety entity,” on the other hand, is at the crux of the legislation and deserving of a more restrictive definition, as evidenced by how the term is defined in Section 6001 of the Act by the pairing of Section 337 of the Communications Act and Section 2 of the Homeland Security Act (HSA).

Section 337 can be parsed in many ways, as FirstNet’s extensive analysis demonstrates. Yet there would be no purpose for even having this provision in the Act if not to narrowly reserve spectrum for public safety use. Similarly, why else would the Act define a term called

“public safety entity” if not to capture what the national public safety organizations and their supporters sought – a network dedicated to first responders – in reaction to the tragic communications difficulties of 9/11 and Hurricane Katrina? Who else but first responders are the intended beneficiaries of the primary objective of the Act: achieving a nationwide level of interoperability?

More specifically, APCO disagrees with FirstNet’s interpretation that an “entity may offer other services in addition to a non-de minimis amount of public safety services and still qualify as a public safety entity.” Given the complexity of the definition for “public safety services” in Section 6001(27) and that the types of entities providing such services are elements of each of the definitional parts, it makes sense to read the definitions for entities and services together, rather than conjure the “non-de minimis” concept. Additionally, FirstNet’s conclusion is at odds with the language in Section 337 stating that public safety services are services “the sole or principal purpose of which is to protect the safety of life, health or property.” FirstNet’s creation of the “non-de minimis” standard cannot be reconciled with the inclusion of this “sole or principal purpose” element.

FirstNet compounds this overbroad interpretation by concluding that “an electric utility could come within the definition of public safety entity.” APCO must strongly disagree. An electric utility, or any equivalent entity, does not fall within the definition of public safety entity. Any conclusion to the contrary would be a plainly wrong reading of the Act’s provisions, and a stark departure from Congress’s intent to create a dedicated network for first responders.

Further, FirstNet’s reliance on an FCC Order interpreting Section 337 is misplaced, and FirstNet certainly need not afford the FCC “deference” in its interpretation. As an “independent authority,” FirstNet owes no such deference. With regard to treating the FCC’s Order as a source of reference, FirstNet should consider that the Order was adopted in July 2011, well before enactment of the Act and under a very different set of circumstances. In July 2011, the prospect of federal legislation was tentative at best, FirstNet did not exist (and thus was not yet the Congressionally-mandated licensee of the spectrum in question), and the FCC was engaged in rulemakings and proceedings involving waiver requests filed by individual jurisdictions to deploy public safety broadband networks. Thus, the FCC’s Order is irrelevant and quite possibly based on considerations at odds with underlying assumptions of the Act.

APCO believes that the FCC’s Order is flawed, even under the circumstances in 2011. FirstNet would undermine its basic mission if, as it proposes, it not only adopts the FCC’s reasoning, but also overextends the definition of “public safety services” with regard to services provided by non-governmental entities, something the FCC stopped short of. Such a result risks

breaking faith with public safety's expectation that this would be a dedicated network that meets first responders' unique needs, and it would substantially limit the value of the public-private partnerships that are essential for the network build.

In addition to the obvious objectives and intent of the Act to provide public safety – first responders – with sufficient spectrum, if Congress intended a broad definition of the kinds of entities that would be considered “public safety entities,” it certainly could have mentioned groups like utilities, highway departments, or building inspectors, etc., rather than reference existing statutes with language like “sole or principal purpose of which is to protect the safety of life, health or property” and “emergency response providers.” Moreover, Congress had first responders in mind when it committed \$7 billion in public funds for this network, indicating that Congress intended a narrow definition of public safety entities. As mentioned at the outset, FirstNet would stand to benefit from a holistic view of the Act with an eye toward the advocacy driving it, rather than stretching the reasonable limits of the statute.

Supporting APCO's position that “public safety entities” means first responders, the Act's definition is based upon both Section 337(f) and the definition of “emergency response providers” from the HSA. It is incorrect for FirstNet to substitute “or” for “and” in its analysis. The fact that the word “and” is shortly followed by the word “includes” is perhaps redundant, but it certainly does not support an analysis that “and includes” means “or.” Once corrected on this point, there is no room left for interpreting public safety entity in the broad manner FirstNet proposes. By combining the statutory definition of “public safety services” with the HSA definition of “emergency response providers,” it is simply not possible to conclude that the Act requires anything other than a narrow interpretation of “public safety entities.” It follows that FirstNet's later conclusion that the “sole or principal purpose” limitation of Section 337 is independent from the HSA definition is also incorrect.

APCO emphasizes that an overbroad interpretation of “public safety entities” would conflict with important dictates of the Act. The Act provides for public-private partnerships, which are clearly essential for FirstNet to have any chance of success in carrying out its mission to implement the NPSBN. Broadly defining “public safety entities” would make these public-private partnerships increasingly difficult to achieve by either removing potential partners altogether or providing significant disincentives to wireless service providers. Given the Act's mandate that the network be based on commercial standards, prohibition on providing commercial service to consumers, and dictate to partner with existing commercial mobile providers to “the maximum extent economically desirable,” Congress could not have intended for FirstNet to compete with wireless service providers, which is a natural consequence of broadly defining public safety entities.

Changing course, APCO agrees with FirstNet in one respect of its interpretation of the “emergency response providers” definition – that volunteer firefighters, and the agencies they work for, meet the definition of public safety entities. However, APCO further cautions FirstNet to narrowly interpret the HSA’s inclusion of “related personnel, agencies, and authorities.” The HSA definition specifies that “emergency response providers” include: “Federal, State, and local governmental and nongovernmental emergency public safety, fire, law enforcement, emergency response, emergency medical (including hospital emergency facilities).” Read in concert with the Section 337 definition and its limiting “sole or principal purpose” language, Congress clearly intended to establish a network for the sole or principal benefit of first responders and those entities that are closely “related” to first responders. This means personnel, agencies, and authorities who share the mission of “emergency response providers,” i.e. protecting the safety of life, health, or property, and not those entities that occasionally “provide support” to first responders.

## **V. Secondary Users**

The basic construct of the Act is clear: first responders are the intended beneficiaries and users of this new public safety broadband network. The funding and spectrum Congress put towards this purpose is intended to provide incentives for the necessary public-private partnerships to implement a highly technical and expansive network. In return for their wireless broadband expertise, infrastructure to support a wireless network, or both, these private partners, who would fall under the construct of a “covered lease agreement,” would receive some form of payment or access to the FirstNet spectrum on a secondary basis.

Such access would clearly be by non-public safety entities under the Act, and APCO supported this approach on the condition that such access would be secondary to any first responder communications. APCO also understood that LTE technology permits levels of spectrum access by adjusting quality of service. A secondary user would be below the lowest priority level of the (primary) public safety entity users. The secondary user concept also is consistent with the Section 337 “sole or principal use” requirement, as a “secondary use” is not a “principal use.” Thus, for example, an electric utility may be a secondary user if it enters into a covered lease agreement with FirstNet.

FirstNet also inquires about a potential category of entities other than public safety entities and secondary users seeking access to or use of the NPSBN. The only way for a non-public safety entity to gain access to the NPSBN is through a covered lease agreement, which, in turn, requires that entity to enter into a public-private partnership with FirstNet to contribute to network construction, operation, or maintenance.

Concerning the prohibition on offering services directly to consumers, APCO agrees with FirstNet that “Section 6212 was not intended to limit the pool of secondary users seeking access to or use of the network on a secondary basis.” At the same time, the Act clearly intended that commercial wireless service providers who enter into covered lease agreements with FirstNet may use FirstNet’s spectrum on a secondary basis to offer their services directly to consumers. We also agree that “a ‘consumer’ under the Act is neither a public safety entity nor a secondary user,” and that opt-out States and entities that seek access to or use of equipment or infrastructure also are not “consumers.”<sup>9</sup> Further, we agree that opt-out states “cannot offer commercial services to consumers and can only lease network capacity through a public-private partnership for the purposes of in-state construction, maintenance, operation and improvement.”

## **VI. Applicability of the FAR**

APCO believes that as a general matter, the primary advocates for the Act in the public safety community, the Administration, and in Congress all intended for FirstNet to act as a truly independent entity. FirstNet was to be entrepreneur-like, in order to act freely and quickly to carry out its important and unprecedented responsibilities. At the same time, a number of transparency provisions were included to ensure that while having independent and quick-acting authority, FirstNet’s activities would be essentially open to the public with appropriate exceptions.

FirstNet was granted a number of important exemptions from federal laws that would normally not apply at all to an independent, non-governmental body, especially one with FirstNet’s mission. Although the list of these exemptions was incomplete and without a “savings provision” to eliminate potential applicability of other federal laws that were not intended to apply to FirstNet, APCO believes that FirstNet should be free of limiting laws and regulations that apply to federal agencies, such as for acquisition and hiring. FirstNet’s placement as an independent entity within NTIA was not intended to place FirstNet within the federal government, but rather to benefit from the resources that NTIA could provide in terms of staff and offices. Flexibility was the intent all along. Considered within the context of all of the provisions of the Act granting FirstNet extensive responsibilities, authorities, and discretion,

---

<sup>9</sup> FirstNet also asks “whether this provision [presumably, Section 6212] implicitly outlines additional services that FirstNet may offer.” APCO is unclear on what FirstNet is contemplating, but cautions FirstNet to remain focused on those first responder users they are charged with serving, and those entities entering into covered lease agreements that will be key to successful network implementation.



as well as the transparency and reporting requirements, APCO believes that FirstNet should not be subject to any other federal laws normally applied to federal agencies.<sup>10</sup>

## **VII. Minimum Technical Requirements**

We agree that under Section 6206(b)(1)(B), FirstNet may make non-material changes or additions/subtractions to the minimal technical requirements established by the Interoperability Board. Further, all that this section requires is that FirstNet simply *include* the material aspects of these recommendations into the RFPs. FirstNet may otherwise describe and draft its RFPs in any manner it determines appropriate.

## **VIII. Defining the Term “Rural”**

Ensuring coverage in rural areas is an important requirement of the Act, and an aspect that APCO fully supported. However, consistent with APCO’s view of the breadth of the authority that Congress vested in FirstNet, we believe that while FirstNet may look to other sources for defining “rural,” it should use these for guidance only, and otherwise draw its own conclusions. We further recommend that the state and local consultation process is a good opportunity for FirstNet to determine how it should carry out its responsibilities to ensure coverage in rural areas. Achieving rural coverage is even more likely if the RFPs also encourage joint responses where, for example, wireless service providers or infrastructure owners in rural or traditionally unserved areas can contribute to a more complete build-out.

## **IX. Existing Infrastructure**

Leveraging existing infrastructure is essential to a successful network build. As FirstNet points out, the Act describes how to do so in a variety of ways. APCO generally agrees with FirstNet’s interpretations of these various provisions. Further, APCO believes that the Act’s multiple references to the commercial wireless industry – leverage “existing commercial wireless infrastructure,” “include partnerships with existing commercial mobile providers,” “utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure,” RFPs “shall include partnerships with existing commercial mobile providers,” and other examples,<sup>11</sup> – signal Congress’s intent that FirstNet pursue partnerships with the commercial wireless industry. This makes sense as FirstNet is charged

---

<sup>10</sup> APCO also notes that the provision in Section 6206(b)(1)(B), which requires FirstNet to issue “open, transparent, and competitive” RFPs would be unnecessary if Congress intended FirstNet to comply with the Federal Acquisition Regulations. There is not a single reference in the act to FAR, despite the extensive statutory guidance the Act provides to FirstNet concerning the RFP process. Further, to conclude that FirstNet is subject to FAR would require an assumption that Congress intended to create a discrepancy between Section 6206 and the FAR, which has led FirstNet to ask questions about how to interpret the conflicting language. Accordingly, APCO believes that FirstNet is not subject to the FAR.

<sup>11</sup> See Section 6206(b)(2)(B).

with implementing an advanced, wireless broadband network, and thus would benefit significantly from the experience, expertise, and assets that the commercial wireless industry inherently holds.

## **X. Fees**

APCO generally agrees with FirstNet's preliminary conclusions concerning the fees the Act authorizes FirstNet to assess. In particular, we believe FirstNet is completely correct when it states:

"Therefore, FirstNet's preliminary conclusion is that there is no minimum amount, other than a de minimis amount, of constructing, managing, and operating that a CLA lessee must do in order to satisfy the definition. We believe this interpretation provides us with the ability to leverage our excess network capacity to the maximum extent the market will bear, ultimately benefitting public safety by helping us achieve additional efficiencies of scale and increasing revenues for further investment in the network. Any alternative interpretation requiring more than this would artificially constrain the potential pool of purchasers of excess capacity, such as to those who could partner with FirstNet only on a national basis, potentially constraining additional funding. We also preliminarily conclude that if the highest value is created by leveraging a partner on a national basis, this portion of the definition of CLA would not constrain FirstNet in entering into such an arrangement."

FirstNet's interpretations are consistent with the wide discretion the Act affords FirstNet. Further, APCO recommends that FirstNet interpret these authorities flexibly, in order to promote the underlying purpose to create effective public-private partnerships.

## **XI. Integration with Public Safety Answering Points**

Section 6206(b)(2)(C) of the Act states that FirstNet "shall promote integration of the network with public safety answering points or their equivalent." As there appears to be no mention in the Notice of this provision, APCO wishes to provide guidance regarding the importance of integration with PSAPs.

Much like FirstNet, IP-based Next Generation 9-1-1 (NG9-1-1) networks are on the horizon. NG9-1-1 will be a network of networks providing connectivity among PSAPs locally, regionally, and nationally. NG9-1-1 systems will make it possible for PSAPs and authorized agencies to interoperate with one another over "ESINets" or Emergency Services IP Networks. NG9-1-1 will also enable the public to interact with the 9-1-1 system using multi-media technology (voice, data, video).

In APCO's view, NG9-1-1 and FirstNet will essentially represent the two sides of emergency response, with the PSAP serving as a "nerve center" connecting them. On one side, the public sends voice or data via NG9-1-1 to request emergency services; on the other side, first responders receive information from the PSAP and exchange mission-critical communications via FirstNet. Together, FirstNet and next generation PSAPs will enable multi-media data sharing from the PSAP to responders (whether generated from the general public, or retrieved from other public safety systems or databases), among responders, and from responders back to the PSAP. A successful integration of NG9-1-1 and FirstNet requires a standards-based open architecture, and APCO is actively working with FirstNet and other stakeholders to develop such standards and best practices. Accordingly, FirstNet's effort to define the scope of its legal authority should incorporate a forward-thinking vision of PSAPs and a fully integrated emergency response system.

## **XII. Conclusion**

APCO continues to strongly support FirstNet as it implements its responsibilities under the Act. By remaining focused on its mission, APCO is confident that FirstNet will take the actions necessary as entrusted by Congress to deliver a dedicated network for the benefit of the nation's public safety communications professionals and first responders.

Respectfully submitted,

By:               /s/  
John Wright  
President  
APCO International

Jeffrey S. Cohen  
Chief Counsel, Law & Policy  
1426 Prince Street  
Alexandria, VA 22314  
(571) 312-4400 ext. 7005  
[cohenj@apcointl.org](mailto:cohenj@apcointl.org)

October 27, 2014