

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

Comments of APCO International

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The Association of Public-Safety Communications Officials-International, Inc. (APCO) submits the following comments in response to the *Third 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

The *Third Notice* proposes a refined preliminary interpretation of the definition of “public safety entity” as used in FirstNet's enabling legislation, the Spectrum Act (“Act”). APCO responds to this *Third Notice* with a unique perspective of the legislation at issue. As one of the primary organizations that spearheaded the public safety-driven advocacy campaign to pass the Act, APCO understands the underlying needs that FirstNet was created to meet. Further, APCO possesses intimate knowledge of the process and insight into the lawmakers' decisions as the law was drafted.

APCO continues to strongly disagree with FirstNet's interpretation of “public safety entity.” While the *Third Notice* is a step in the right direction, APCO holds to the legal analysis included in its response to FirstNet's original proposal.¹ Public safety entities include first responders and the personnel, agencies, and authorities who share their mission, not those entities that occasionally provide support to first responders. An alternative, broader interpretation would violate the plain language of the law and ignore Congress' clear intent to establish a network for first responders.

II. Interpreting “Public Safety Entity”

An overbroad interpretation of “public safety entity” would defeat 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. The nation's leading public safety organizations, with the support of public safety communications professionals and first responders across the country, spent significant resources convincing Congress that 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

¹ APCO incorporates its prior comments by reference.

do not share the mission of first responders 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.

Sufficient spectrum capacity and nationwide interoperability were necessities fresh in the minds of first responders at the time, in the wake of major national emergencies. The Act is Congress’ response to calls by national public safety organizations, and their supporters, to overcome the tragic communications difficulties encountered by first responders on 9/11 and after Hurricane Katrina. The Act also contains provisions intended to meet the specific requirements of first responders (security, resiliency, rural coverage, integration with public safety answering points, etc.). These provisions further point to a narrow definition of public safety entities. The only way to reach a contrary result is to stretch the statutory language beyond reasonable limits, ignore the larger statutory framework, and depart from Congress’ clear intent to solve the communications problems faced by the nations’ first responders.

a. Section 337 and the HSA must be read in concert

We agree with FirstNet that interpretations must be based on “the specific language, context and purpose of the Act,” and with the sentiment that the definition of “public safety entity” must be derived from Section 337 and the Homeland Security Act (“HSA”) together, “rather than just either prong on a stand-alone basis.”² However, FirstNet does not appear to be following this approach. Rather, FirstNet continues to base its interpretation of “public safety entity” on examination of particular sections and terms in isolation, ignoring the overarching themes of the legislation and the intent of Congress.

The Section 337 definition and its limiting “sole or principal purpose” language, read in concert with the HSA’s focus on *emergency* response providers and related personnel, demonstrate clear congressional intent to establish a network for the benefit of first responders and those entities that are closely related to first responders.³ This means personnel, agencies, and authorities who share the fundamental mission of emergency response providers (i.e. protecting the safety of life, health, or property), not those entities that occasionally provide support to first responders.

Electric utilities and other entities that only occasionally communicate with first responders are not public safety entities. If Congress intended a broad definition of “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.” Any conclusion to the contrary would be a plainly wrong reading of the Act’s provisions.

² *Third Notice*.

³ As a basis for proposing an impermissibly expansive definition of “public safety entity,” FirstNet suggests in the *Third Notice* (footnote 42) that Congress is assumed to have been aware of the Federal Communications Commission’s expansive interpretation of Section 337. In fact, this would serve as further evidence that Congress intended to limit the definition of “public safety entity” by including the HSA’s focus on emergency services.

- b. An overbroad definition of “public safety entity” threatens the NPSBN’s viability by undermining public-private partnerships

Congress’ clear intent that FirstNet pursue public-private partnerships (especially with wireless service providers)⁴ is additional evidence against an overbroad definition of “public safety entity,” but FirstNet does not consider this in the *Third Notice*. Broadly defining “public safety entity” would reduce the value of public-private partnerships, and wireless service providers may determine not to partner with FirstNet if it means a further reduction to their commercial customer base. FirstNet must avoid any such outcome.

The Act includes multiple provisions that enable FirstNet to pursue public-private partnerships and leverage private assets in exchange for secondary access to FirstNet’s spectrum. The value of these partnerships for establishing and sustaining the Nationwide Public Safety Broadband Network (“NPSBN”) is a substantial asset at FirstNet’s disposal. Particularly as FirstNet enters into the procurement stage, FirstNet must be clear that its mission is providing an otherwise unobtainable service for first responders, not competing with wireless carriers. Furthermore, many in the public safety community, including APCO, supported the concept of covered lease agreements resulting from public-private partnerships on the condition that access by non-public safety entities would be secondary to any first responder communications.

- c. The NPSBN is intended for first responder communications, not a broad collection of users

In crafting a law to support a nationwide network dedicated for use by first responders, Congress appropriated \$7B in public funding. This evidences clear congressional intent to support first responders, not a broad collection of entities. There is a qualitative difference between first responders and other entities described in the *Third Notice* that occasionally provide support during public safety operations. First responders are uniquely characterized by their emergency response training, acceptance of personal risk, and dedication to a protective mission. They retain a unique status, even when they’re not actively providing public safety services. Indeed, first responders are often prepared to aid others even while off-duty, and many law enforcement officers carry firearms 24/7.

FirstNet is incorrect to ignore this qualitative difference, focusing instead on a “*de minimis*” standard that does not exist within the bounds of the law. FirstNet repeats an illustrative example in the *Third Notice* of utility personnel removing downed electrical wires to permit firefighters to access victims in a car. Although it may be appropriate to allow access to the NPSBN while providing such assistance, the utility personnel are not public safety entities. Removing a live wire from a car is a utility operation that occurs within an emergency response. Merely providing assistance to first responders does not generally qualify them as public safety entity under the Act.⁵

⁴ 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 – signal Congress’ intent that FirstNet pursue partnerships with the commercial wireless industry.

⁵ This applies to entities other than utilities that occasionally render assistance to first responders, such as highway departments. FirstNet’s “*de minimis*” standard will lead to a blurred, unworkable spectrum of eligibility. By way of another example, consider a bystander providing CPR until paramedics arrive. This citizen is making a potentially

FirstNet’s concept of recognizing “subgroups” of non-public safety entities that qualify as public safety entities under the Act is also problematic. There is no basis for this concept in the law, and determining the extent to which entities may be formed into “subgroups” would be an exercise in futility. FirstNet would need to make potentially thousands of separate decisions concerning how and which “subgroups” would qualify, expending significant resources managing eligibility disputes in nearly every jurisdiction across the country.

As an operational matter, during emergencies when first responder use of the network is paramount, FirstNet should not be distracted by the communications needs of utilities, animal control, educational institutions, health departments, parks and recreation departments, and an expansive collection of other entities that achieve eligibility status for daily use of the NPSBN alongside first responders. Those entities should continue being served by commercial service providers so FirstNet can focus on public safety operations.

Simply put, the law leaves little room for expansion of the definition of “public safety entity” beyond first responders and the personnel, agencies, and authorities who share their mission. Alternative legal theories cannot withstand scrutiny. An expanded definition would conflict with and threaten the vital importance of achieving successful public-private partnerships that the Spectrum Act requires of FirstNet. APCO thus disagrees with FirstNet’s preliminary conclusion that it has “discretion to consider a broad range of users consistent with FirstNet’s mission, given the complexity of the Act’s public safety entity definition and its importance to the functioning of the network and FirstNet’s financial sustainability under the Act.”⁶ On the contrary, the law and intent of Congress dictate a narrow and specific definition that FirstNet must abide by.⁷

III. FirstNet’s Consultation Requirement

APCO disagrees with FirstNet’s interpretation that the requirement to consult with regional, State, tribal, and local jurisdictions on the “assignment of priority and selection of entities seeking access to or use of the [network]” informs the definition of “public safety entities.”⁸ This provision is in the context of FirstNet’s responsibility “in developing requests for proposals” and establishing network policies.⁹ The required consultation ensures local input into how entities should be prioritized and authenticated, not whether they meet the definition of “public safety entity.”

Congress did not intend for states to have different definitions of public safety entities. States may, through consultation with FirstNet identify network policies that fit with the unique needs of their jurisdictions. For example, emergency medical technicians and SWAT officers are public safety entities

lifesaving contribution to the emergency response, but there is no doubt that the citizen does not qualify as a public safety entity under the Act. The narrower definition of “public safety entity” required under the law’s plain language and congressional intent is much simpler to apply because it avoids arguments over what constitutes a “*de minimis*” amount.

⁶ *Third Notice*.

⁷ Consideration of “financial sustainability” is especially inappropriate in a legal interpretation of the term “public safety entity.” See also *Third Notice* (stating that the extent to which individuals or subgroups qualify would be determined based on, among other factors, the impact on FirstNet’s financial sustainability).

⁸ *Third Notice*, interpreting 47 U.S.C. 1426(c)(2)(A)(vi).

⁹ 47 U.S.C. 1426(c)(1).

regardless of which state they're in. However, jurisdictions may have different standard operating procedures that inform the selection and prioritization of such officials' use of the NPSBN, depending on the nature of the incident. Consultation will ensure FirstNet's network policies comply with such preferences, but this is separate from the question of what constitutes a "public safety entity" under the law.

IV. Collaboration with Non-Public Safety Entities

An overbroad interpretation of the Act is not required to enable interoperable communications with a variety of entities. While it is true that during emergencies, certain non-public safety entities may provide assistance to first responders and, thus, benefit from the ability to connect with first responders via the NPSBN, communication may be achieved at the discretion of the incident commander through pre-arranged MOUs.¹⁰ Again, under the law non-public safety entities' (such as electric utilities) use of the spectrum for day-to-day operations is only permitted on a secondary basis through covered lease agreements, which require an entity to enter into a public-private partnership with FirstNet to contribute to network construction, operation, or maintenance.¹¹

V. Conclusion

The definition of "public safety entity" is clear. Eligibility was a significant topic during the lobbying and negotiations leading to enactment, and the issue is no longer open for debate. FirstNet should promptly declare that "public safety entities" are first responders and the personnel, agencies, and authorities who share their mission, not those entities that occasionally provide support to first responders. Then FirstNet can focus on issuing a request for proposals that maximizes the potential for public-private partnerships and establishing a network dedicated to our nation's first responders.

¹⁰ FirstNet may set network policies that simplify the collaborative arrangements that have historically been enabled by individual MOUs.

¹¹ FirstNet oversimplifies when it states that an important ramification of falling within the public safety entity definition is that a "public safety entity is served by FirstNet directly, rather than as a commercial customer of a secondary user of FirstNet's spectrum." It is important to note that a non-public safety entity such as an electric utility can make direct use of the spectrum by entering into a public-private partnership with FirstNet itself, in addition to becoming a commercial customer of a secondary user.