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**DEPARTMENT OF COMMERCE**

**National Telecommunications and Information Administration**

**First Responder Network Authority**

**Final Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012**

**Docket Number: 140821696-5908-04**

**RIN 0660-XC012**

**AGENCY:** First Responder Network Authority, National Telecommunications and Information Administration, U.S. Department of Commerce.

**ACTION:** Notice; final interpretations.

**SUMMARY:** The First Responder Network Authority (“FirstNet”) publishes this *Notice* to issue final interpretations of its enabling legislation that will inform, among other things, forthcoming requests for proposals, interpretive rules, and network policies. The purpose of this Notice is to provide stakeholders FirstNet’s interpretations on many of the key preliminary interpretations presented in the proposed interpretations published on September 24, 2014.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Eli Veenendaal, First Responder Network Authority, National Telecommunications and Information Administration, U.S. Department of Commerce, 12201 Sunrise Valley Drive, M/S 243, Reston, VA 20192; 703-648-4167; or [elijah.veenendaal@firstnet.gov](mailto:elijah.veenendaal@firstnet.gov).

**SUPPLEMENTARY INFORMATION:**

## I. INTRODUCTION AND BACKGROUND

The Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. No. 112-96, Title VI, 126 Stat. 256 (codified at 47 U.S.C. 1401 *et seq.*)) (the “Act”) established the First Responder Network Authority (“FirstNet”) as an independent authority within the National Telecommunications and Information Administration (“NTIA”). The Act establishes FirstNet’s duty and responsibility to take all actions necessary to ensure the building, deployment, and operation of a nationwide public safety broadband network (“NPSBN”).<sup>1</sup>

One of FirstNet’s initial steps in carrying out this responsibility under the Act is the issuance of open, transparent, and competitive requests for proposals (“RFPs”) for the purposes of building, operating, and maintaining the network. We have sought – and will continue to seek – public comments on many technical and economic aspects of these RFPs through traditional procurement processes, including requests for information (“RFIs”) and potential draft RFPs and Special Notices, prior to issuance of RFPs.<sup>2</sup>

As a newly created entity, however, we are also confronted with many complex legal issues of first impression under the Act that will have a material impact on the RFPs, responsive proposals, and our operations going forward. Generally, the Administrative Procedure Act (“APA”)<sup>3</sup> provides the basic framework of administrative law governing agency action, including the procedural steps that must precede the effective promulgation, amendment, or

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<sup>1</sup> 47 U.S.C. § 1426(b).

<sup>2</sup> The pronouns “we” or “our” throughout this *Notice* refer to “FirstNet” alone and not FirstNet, NTIA, and the U.S. Department of Commerce as a collective group.

<sup>3</sup> See 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

repeal of a rule by a federal agency.<sup>4</sup> However, 47 U.S.C. § 1426(d)(2) provides that any action taken or decision made by FirstNet is exempt from the requirements of the APA.

Nevertheless, although exempted from these procedural requirements, on September 24, 2014, FirstNet published a public notice entitled “Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012” (hereinafter “the *First Notice*”),<sup>5</sup> seeking public comments on preliminary interpretations, as well as technical and economic issues, on certain foundational legal issues to help guide our efforts in achieving our mission.

The purpose of this *Notice* is to provide stakeholders notice of the final legal interpretations on many of the key preliminary interpretations presented in the *First Notice*. Additional background and rationale for this action and explanations of FirstNet’s interpretations were included in the *First Notice* and are not repeated herein. The section immediately below labeled “Final Interpretations” summarizes FirstNet’s final interpretations with respect to the *First Notice*. Thereafter, the section labeled “Response to Comments” summarizes the comments received on the preliminary interpretations contained in the *First Notice* and provides FirstNet’s responses to such comments, including further explanations and any changes to FirstNet’s interpretations.

## **II. FINAL INTERPRETATIONS**

### **A. FirstNet Network**

#### *Final Definitions of Core Network and Radio Access Network*

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<sup>4</sup> See 5 U.S.C. §§ 551–559. The APA defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” 5 U.S.C. § 551(4).

<sup>5</sup> 79 Fed. Reg. 57058 (September 24, 2014).

1. FirstNet defines the core network in accordance with 47 U.S.C. § 1422(b) of the Act, relevant sections of the Interoperability Board Report, and commercial standards, as including, without limitation, the standard Evolved Packet Core elements under the 3rd Generation Partnership Project (“3GPP”) standards (including the Serving and Packet Data Network Gateways, Mobility Management Entity, Home Subscriber Server, and the Policy and Charging Rules Function), device services, location services, billing functions, and all other network elements and functions other than the radio access network.
2. FirstNet defines the radio access network in accordance with 47 U.S.C. § 1422(b) of the Act, commercial standards, and the relevant sections of the Interoperability Board Report, as consisting of the standard E-UTRAN elements (*e.g.*, the eNodeB) and including, but not limited to, backhaul to FirstNet designated consolidation points.
3. FirstNet concludes that a State choosing to conduct its own deployment of a radio access network under 47 U.S.C. § 1442(e) must use the FirstNet core network to provide public safety services within the State.

## **B. Users**

### *Network Users*

4. FirstNet defines a “secondary user” as any user that seeks access to or use of the NPSBN for non-public safety services.

### *Prohibition on Providing Commercial Services to Consumers*

5. The definition of “consumers” as used in 47 U.S.C. § 1432 does not include:
  - a. any public safety entity as defined in the Act;
  - b. States when seeking access to or use of the core network, equipment, or infrastructure; or

- c. entities when seeking access to or use of equipment or infrastructure.
- 6. The language of the Act under 47 U.S.C. § 1432 prohibiting FirstNet from directly serving “consumers” does not limit potential types of public safety entities that may use or access the NPSBN for commercial telecommunications or information services.
- 7. The Act under 47 U.S.C. § 1432 does not prohibit or act as a limit on secondary users with which FirstNet may enter into a covered leasing agreement.
- 8. The Act under 47 U.S.C. § 1432 does not limit the pool of secondary users that may gain access to or use of the network on a secondary basis.

### **C. Requests for Proposals**

#### *Requests for Proposals Process*

- 9. FirstNet, to the extent it utilizes the FAR, concludes that complying with the FAR satisfies the open, transparent, and competitive requirements of 47 U.S.C. § 1426(b)(1)(B).

#### *Minimum Technical Requirements*

- 10. FirstNet concludes that it may make non-material changes or additions/subtractions to the minimal technical requirements developed by the Interoperability Board, including as necessary to accommodate advancements in technology as required by the Act.

#### *Final Definition of “Rural”*

- 11. FirstNet defines “rural,” for the purposes of the Act, as having the same meaning as “rural area” in Section 601(b)(3) of the Rural Electrification Act of 1936, as amended (“Rural Electrification Act”). Section 601(b)(3) of the Rural Electrification Act provides that “[t]he term ‘rural area’ means any area other than—(i) an area described in clause (i) or (ii) of Section 1991(a)(13)(A) of this title [section 343(a)(13)(A) of the Consolidated Farm and Rural Development Act]; and (ii) a city, town, or incorporated area that has a population of

greater than 20,000 inhabitants.” In turn, the relevant portion of Section 343(a)(13)(A) of the Consolidated Farm and Rural Development Act explains that the “terms ‘rural’ and ‘rural area’ mean any area other than—(i) a city or town that has a population of greater than 50,000 inhabitants; and (ii) any urbanized area contiguous and adjacent to a city or town described in clause (i).” Thus, as defined herein, the term “rural” means any area that is *not*:

- a city, town, or incorporated area that has a population of greater than 20,000 inhabitants
- any urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants

12. FirstNet concludes that a lower boundary (*e.g.*, “wilderness,” “frontier”) is not necessary to satisfy its rural coverage requirements under the Act, and thus FirstNet does *not* intend to establish any such boundary.

#### *Existing Infrastructure*

13. FirstNet interprets that 47 U.S.C. § 1426(b)(1)(B) is intended to require FirstNet to encourage, through its requests, that responsive *proposals* leverage existing infrastructure in accordance with the provision.

14. FirstNet interprets 47 U.S.C. § 1426(b)(3) as requiring FirstNet to include in its RFPs that such proposals leverage partnerships with commercial mobile providers where economically desirable.

15. FirstNet concludes that factors other than, or in addition to, cost may be utilized in assessing whether existing infrastructure is “economically desirable,” including:

- a. infrastructure type/characteristics
- b. security (physical, network, cyber, etc.)
- c. suitability/viability (ability to readily use, upgrade, and maintain)

- d. readiness for reuse (*e.g.*, already in use for wireless communications)
- e. scope of use (*e.g.*, range of coverage)
- f. availability/accessibility (time/obstacles to acquiring access/use)
- g. any use restrictions (*e.g.*, prohibitions/limitations on commercial use)
- h. relationships with infrastructure owners/managers (*e.g.*, ease/difficulty in working with owners/managers)
- i. available alternatives in the area

## **D. Fees**

### *General*

16. FirstNet interprets each of the fees authorized by the Act, including user or subscription fees authorized by 47 U.S.C. § 1428(a)(1), covered leasing agreement fees authorized by 47 U.S.C. § 1428(a)(2), lease fees related to network equipment and infrastructure authorized by 47 U.S.C. § 1428(a)(3), and the fee for State use of elements of the core network authorized by 47 U.S.C. § 1442(f), as distinct and separate from each other and may be assessed individually or cumulatively, as applicable.

### *Network User Fees*

17. FirstNet concludes it may charge a user or subscription fee under 47 U.S.C. § 1428(a)(1) to any user that seeks access to or use of the NPSBN.

### *State Core Network User Fees*

18. FirstNet concludes that the fees assessed on States assuming RAN responsibilities for use of the core network authorized by 47 U.S.C. § 1442(f) are distinct from and can be assessed in addition to any other fees authorized under the Act.

*Lease Fees Related to Network Capacity and Covered Leasing Agreements*

19. FirstNet concludes that a covered leasing agreement under 47 U.S.C. § 1428(a)(2) does not require a secondary user to “construct, manage, and operate” the entire FirstNet network, either from a coverage perspective or exclusively within a specific location.
20. FirstNet concludes that multiple covered leasing agreement lessees could coexist and be permitted access to excess network capacity in a particular geographic area.
21. FirstNet interprets that a covered leasing agreement lessee satisfies the definition under 47 U.S.C. § 1428(a)(2) so long as the lessee does more than a nominal amount of constructing, managing, or operating the network.
22. FirstNet concludes that an entity entering into a covered leasing agreement under 47 U.S.C. § 1428(a)(2) is not required to perform all three functions of constructing, managing, and operating a portion of the network, so long as one of the three is performed as part of the covered leasing agreement.
23. FirstNet interprets the reference to “network capacity” in the definition of covered leasing agreement under 47 U.S.C. § 1428(a)(2)(B)(i) as a generic statement referring to the combination of spectrum and network elements, as defined by the Act, and including the core network as well as the radio access network of either FirstNet alone or that of the secondary user under a covered leasing agreement, whereby the core and radio access network are used for serving both FirstNet public safety entities and the secondary user’s commercial customers.
24. FirstNet interprets the term “secondary basis” under 47 U.S.C. § 1428(a)(2)(B)(i) to mean that network capacity will be available to the secondary user unless it is needed for public safety entities as defined in the Act.

25. FirstNet interprets the phrase “spectrum allocated to such entity” found in 47 U.S.C.

§ 1428(a)(2)(B)(ii) as allowing all or a portion of the spectrum licensed to FirstNet by the Federal Communications Commission (“FCC”) under call sign “WQQE234” to be allocated for use on a secondary basis under a covered leasing agreement.

26. FirstNet concludes that the reference to “dark fiber” in 47 U.S.C. § 1428(a)(2)(B)(ii) cannot literally be interpreted as such, and the reference should be interpreted to allow the covered leasing agreement lessee to transport such traffic on otherwise previously dark fiber facilities.

#### *Network Equipment and Infrastructure Fee*

27. FirstNet interprets 47 U.S.C. § 1428(a)(3) as being limited to the imposition of a fee for the use of static or isolated equipment or infrastructure, such as antennas or towers, rather than for use of FirstNet spectrum or access to network capacity.

28. FirstNet interprets the phrase “constructed or otherwise owned by [FirstNet]” under 47 U.S.C. § 1428(a)(3) as meaning that FirstNet ordered or required the construction of such equipment or infrastructure, paid for such construction, simply owns such equipment, or does not own but, through a contract has rights to sublease access to, or use of, such equipment or infrastructure.

### **III. RESPONSE TO COMMENTS**

FirstNet received 63 written comments to the *First Notice* from various stakeholders, including States, tribes, public safety organizations, commercial carriers, equipment vendors, utilities, and various associations. Comments on the *First Notice* included a large number of identical or similar written comments as well as oral statements made during meetings with FirstNet. FirstNet has carefully considered each of the comments submitted. It has grouped and summarized the comments according to common themes and has responded accordingly. All

written comments can be found at [www.regulations.gov](http://www.regulations.gov).

## **A. FirstNet Network**

### **1. *Final Definitions of Core Network and Radio Access Network***

The Act requires FirstNet to “ensure the establishment of a nationwide, interoperable public safety broadband network” that is “based on a single national network architecture.”<sup>6</sup> This national network architecture must be capable of evolving with technological advancements and initially consists of two primary network components: a *core network* and a *radio access network*.<sup>7</sup> The Act defines the “core network” as consisting of “the national and regional data centers, and other elements and functions that may be distributed geographically . . . and provid[ing] connectivity between (i) the radio access network; and (ii) the public Internet or public switched network, or both . . . .”<sup>8</sup> Comparably, the Act defines the “radio access network” as consisting of “all cell site equipment, antennas, and backhaul equipment . . . that are required to enable wireless communications with devices using the public safety broadband spectrum . . . .”<sup>9</sup>

In the *First Notice*, FirstNet made preliminary interpretations further describing the scope of the definitions of the core network and RAN. Although the vast majority of commenters agreed with the interpretations, some expressed concerns that many of the key elements of the network were either not referenced or did not meet the criteria described in the proposed definitions. In response to these comments, FirstNet has slightly modified its preliminary

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<sup>6</sup> 47 U.S.C. § 1422.

<sup>7</sup> 47 U.S.C. § 1422(b).

<sup>8</sup> 47 U.S.C. § 1422(b)(1).

<sup>9</sup> 47 U.S.C. § 1422(b)(2)(B).

interpretation of the “core network” to include the Mobility Management Entity within the Evolved Packet Core elements under the 3GPP standards and its preliminary interpretation of “radio access network” to include backhaul to FirstNet designated consolidation points.

Accordingly, FirstNet makes the following final interpretations related to the definitions of the core network and radio access network under the Act.

- 1) FirstNet defines the core network in accordance with 47 U.S.C. § 1422(b) of the Act, relevant sections of the Interoperability Board Report, and commercial standards, as including, without limitation, the standard Evolved Packet Core elements under the 3GPP standards (including the Serving and Packet Data Network Gateways, Mobility Management Entity, Home Subscriber Server, and the Policy and Charging Rules Function), device services, location services, billing functions, and all other network elements and functions other than the radio access network.**
- 2) FirstNet defines the radio access network in accordance with 47 U.S.C. § 1422(b) of the Act, commercial standards, and the relevant sections of the Interoperability Board Report, as consisting of the standard E-UTRAN elements (*e.g.*, the eNodeB) and including, but not limited to, backhaul to FirstNet designated consolidation points.**

Analysis of and Responses to Comments on Definition of Core Network and Radio Access Network

**Summary:** The majority of commenters agreed with FirstNet’s proposed definitions of “core network” and “radio access network” and supported FirstNet considering commercial standards, as well as the relevant sections of the Interoperability Board Report and relevant 3GPP standards, to provide further clarity around the elements and functions of the core network and radio access network.

**Comment # 1:** A few commenters suggested that FirstNet simply use the definitions of the terms “core network” and “radio access network” that are provided in the statute. For example, one commenter recommended FirstNet use its wide discretion to consider other interpretations as it carries out its responsibilities to implement these network components and not use the Interoperability Board Report to help derive any legal interpretations of the Act.

**Response:** FirstNet agrees that the Act provides it with broad discretion to carry out its mission. In view of that discretion, FirstNet has determined that it is important to provide additional clarity around certain delineation points between the core network and RAN as defined in the Act. These delineation points become especially important in light of the provisions of 47 U.S.C. § 1442(e) that allow a State the opportunity, under certain conditions, to conduct the deployment of a RAN within that State and require that State to pay a fee for use of elements of the core network. In response to the specific example, the Act commissioned the development of the Interoperability Board Report to provide recommended technical requirements to ensure a nationwide level of interoperability for the NPSBN.<sup>10</sup> Under the Act, these recommendations are intended to be used by FirstNet to help develop and maintain the NPSBN.<sup>11</sup> Moreover, a State choosing to assume RAN responsibilities must demonstrate compliance with the minimum technical interoperability requirements of the Interoperability Board Report in order to receive approval of an alternative RAN plan.<sup>12</sup> Based on these provisions, FirstNet believes that it is important to give credence to the relevant sections of the Interoperability Board Report that relate to the definitions of the core network and RAN.

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<sup>10</sup> See 47 U.S.C. § 1423(c).

<sup>11</sup> See *id.*

<sup>12</sup> See 47 U.S.C. § 1442(e)(3)(C)(i).

**Comment # 2:** One commenter suggested the proposed definition of the core network is too expansive and recommended that FirstNet remove the language “device services” and “all other network elements and functions other than the radio access network” from its proposed definition of the core network.

**Response:** FirstNet disagrees that the proposed definition of core network is too expansive and believes its proposed interpretation, including the language “device services” and “all other network elements and functions other than the radio access network,” is consistent with both the intent of the Act as well as commercially accepted standards for elements generally comprising a core network. Additionally, FirstNet’s inclusion of these terms and phrases in its interpretation assist in providing clarity relating to the definitions of core network and RAN that are critical to establishing the NPSBN and providing the scope of responsibility a State will assume should it decide to conduct its own RAN deployment. In delivering a plan to a Governor for a determination of whether to assume responsibilities for RAN construction, FirstNet must delineate between what elements of the network in the proposed plan comprise the core network versus the elements that comprise the RAN. Accordingly, an understanding of the elements that make up the core network and RAN are critical for a Governor to make an effective determination about whether the State should have FirstNet conduct the RAN deployment or seek to conduct its own RAN deployment.

**Comment # 3:** One commenter expressed concern that the proposed definitions conflate issues of policy and technology and suggested FirstNet avoid rigid definitions of “core network” or “radio access network” and align their technical and business development efforts with standards that evolve with the long term evolution (“LTE”) broadband network.

**Response:** FirstNet acknowledges the comment, but believes its proposed definitions of core

network and RAN provide additional certainty that is necessary in order to build, operate, and maintain the NPSBN, while, at the same time, preserving, as contemplated by the Act, the necessary flexibility to take into account new and evolving technological advancements. For example, FirstNet’s interpretations of both the core network and RAN are inclusive of the language of 47 U.S.C. § 1422(b) that specifically states the national architecture must “*evolve[] with technological advancements and initially consists of*” the stated core network and RAN components.<sup>13</sup> The use of the term “initially” and the phrase “evolve with technological advancements” in 47 U.S.C. § 1422(b) indicate that Congress understood that the definitions of the core network and RAN could not be static. Rather, the definitions of such terms would need to be modified throughout the life of the network in order to help ensure that public safety would have a network capable of supporting and providing access to new and evolving technologies.

**Comment # 4:** Several commenters, although not disagreeing with the proposed definitions, expressed concerns that many of the key elements of the network were either not referenced or did not meet the criteria described in the proposed core network and radio access network definitions. To illustrate this point, multiple commenters reasoned that backhaul transport connecting the radio access network with the core network or the backhaul connecting the core network with geographically distributed databases and application servers, which are critical components of network integration, need to be addressed in the definitions.

**Response:** FirstNet acknowledges the comments and has modified its interpretation of the “core network” to include the Mobility Management Entity within the Evolved Packet Core elements under the 3GPP standards and its interpretation of “radio access network” to include backhaul to FirstNet designated consolidation points. To the extent additional clarity is necessary to provide,

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<sup>13</sup> 47 U.S.C. § 1422(b) (emphasis added).

for example, more specific demarcation points or the services and facilities that will be provided by the various network elements, FirstNet intends to address such matters, as appropriate, in the development of relevant network policies.

## **2. State Radio Access Networks Must Use the FirstNet Core Network**

As discussed above, the Act charges FirstNet with the duty to “ensure the establishment of a nationwide, interoperable public safety broadband network . . . based on a single, national network architecture” and defines the architecture of the network as initially consisting of a “core network” and a “radio access network.”<sup>14</sup> In addition, FirstNet is required to take all actions necessary to ensure the building, deployment, and operation of the network, including issuing RFPs for the purposes of building, operating, and maintaining the network.<sup>15</sup> Thus, overall, FirstNet is responsible for ensuring the core network and radio access network – subject to a State’s ability to assume RAN responsibilities under 47 U.S.C. § 1442 – is built, deployed, and operated throughout the country.

As analyzed in the *First Notice*, the Act, although providing each State an opportunity to choose to conduct its own deployment of a RAN in such State, does not provide for State deployment of a core network separate from the core network that FirstNet is charged with deploying.<sup>16</sup> Rather, according to the express language of the Act, FirstNet, is the only entity responsible for constructing a core network. This interpretation is further supported by the mandate that States that choose to build their own RAN must pay any user fees associated with

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<sup>14</sup> 47 U.S.C. § 1422.

<sup>15</sup> 47 U.S.C. § 1426(b).

<sup>16</sup> See 47 U.S.C. §§ 1422, 1426.

such State's use of "the core network."<sup>17</sup> Thus, based on the language of and overall interoperability goals of the Act, FirstNet makes the following conclusion related to State use of the core network that is constructed, operated, and maintained by FirstNet.

**FirstNet concludes that a State choosing to conduct its own deployment of a radio access network under 47 U.S.C. § 1442(e) must use the FirstNet core network to provide public safety services within the State.**

Analysis of and Responses to Comments to conclusions that State Radio Access Networks Must Use the FirstNet Core Network

**Summary:** The majority of commenters agreed with FirstNet's proposed interpretation that a State choosing to conduct its own deployment of a radio access network must use the FirstNet core network to provide services to public safety entities.

**Comment # 5:** One commenter did not support FirstNet's preliminary conclusion, asserting that direct connectivity between the core network and the RAN is excluded from FirstNet's definitions and that such network element should be explicitly identified and included either in the definition of core network or radio access network.

**Response:** FirstNet acknowledges the comment and notes that, as detailed above, it has clarified the definition of RAN to include backhaul to FirstNet consolidation points.

**Comment # 6:** One commenter agreed with the interpretation, but suggested FirstNet should remain open to the concept of a local "back-up" core network, particularly for States or localities with a high population density, with this "back-up" core network being designed and purposed to protect against a total loss of connectivity to the FirstNet nationwide core network.

**Response:** The Act requires FirstNet to establish a network with adequate hardening, security,

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<sup>17</sup> 47 U.S.C. § 1442(f).

reliability, and resiliency requirements, including by addressing special considerations for areas and regions with unique homeland security or national security needs.<sup>18</sup> Accordingly, FirstNet intends to construct the core network taking into account these considerations and does not anticipate the need to utilize a local “back-up” core network to serve public safety, which, among other things, potentially creates interoperability complexities and increases network security risks.

## **B. Network Users**

### ***1. Final Definition of “Secondary Users”***

The Act in 47 U.S.C. § 1428(a)(1) authorizes FirstNet to charge “user or subscription” fees to a “secondary user . . . that seeks access to or use of the [NPSBN].” Additionally, under 47 U.S.C. § 1428(a)(2), FirstNet may enter into a covered leasing agreement with a “secondary user” that permits “access to network capacity on a secondary basis for non-public safety purposes.”<sup>19</sup> The Act does not expressly define the term “secondary user.” However, based on the plain language of 47 U.S.C. § 1428, FirstNet reaches the following conclusion with respect to the meaning of “secondary user”:

**FirstNet defines a “secondary user” as any user that seeks access to or use of the NPSBN for non-public safety services.**

#### Analysis of and Responses to Comments on Definition of Secondary User

**Summary:** The majority of commenters agreed with the interpretation of a “secondary user” as a user that accesses network capacity on a secondary basis for non-public safety services. One such commenter noted that while secondary users are not public safety entities, they are

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<sup>18</sup> See 47 U.S.C. § 1426(b)(2), (c)(2)(A).

<sup>19</sup> 47 U.S.C. § 1428(a)(2).

important to the financial sustainability of the network. Similarly, another commenter remarked that such non-public safety secondary users are necessary to implement a sophisticated and expansive network.

**Comment # 7:** One commenter expressed concern that FirstNet’s proposed definition, as formulated, could be misconstrued and sought to clarify that “secondary user” captures those using the NPSBN for services that are not related to public safety.

**Response:** FirstNet has attempted to clearly state in its final definition of “secondary user” (identified above) that such term refers to those users who access the NPSBN *only for non-public safety services*.

**Comment # 8:** One commenter expressed concern not about FirstNet’s definition of “secondary user,” but about the potential for secondary users to adversely impact the performance of the NPSBN at the expense of public safety.

**Response:** FirstNet is committed to ensuring the establishment of a network that meets the needs of public safety and believes that the 20 MHz of available spectrum along with the expected priority/preemption capabilities of the network will allow secondary users to access the NPSBN without negatively impacting public safety’s use of the NPSBN.

**Comment # 9:** One commenter asserted that any user of the NPSBN that is not a “public safety entity” should be considered a “consumer” rather than a “secondary user.” These “consumers” would use the network on a secondary basis and yield to the primary user public safety entities.

**Response:** While FirstNet certainly agrees with the general concept of public safety entities being the primary users of the NPSBN, we do not agree that the term “consumer” (which is also undefined in the Act) encompasses all other such users of the network on a secondary basis. First, the Act explicitly uses the term “secondary user” when referring to those entities or

individuals that access or use the network “on a secondary basis for non-public safety services.”<sup>20</sup> Secondly, this use of the term “consumer” is inconsistent with 47 U.S.C. § 1432, which prohibits FirstNet from providing “commercial telecommunications or information services directly to consumers.” Under 47 U.S.C. § 1428, FirstNet is expressly authorized to assess a network user fee on secondary users. Thus, given the Act prohibits FirstNet from providing certain services directly to consumers while it permits FirstNet to charge user fees to secondary users, by definition all secondary users cannot be consumers.

## ***2. Prohibition on Providing Commercial Services to Consumers***

The Act in 47 U.S.C. § 1432(a) specifies that FirstNet “shall not offer, provide, or market commercial telecommunications or information services directly to consumers.” The Act does not define the word “consumer” or indicate whether the word is limited to individuals or includes organizations and businesses. In addition, under the rule of construction specified in 47 U.S.C. § 1432(b), nothing in 47 U.S.C. § 1432(a) is intended to prohibit FirstNet from entering into covered leasing agreements with secondary users or to limit FirstNet from collecting lease fees for the use of network equipment and infrastructure. FirstNet makes the following conclusions with respect to these provisions of the Act:

- 1) The definition of “consumers” as used in 47 U.S.C. § 1432 does not include:**
  - a. any public safety entity as defined in the Act;**
  - b. States when seeking access to or use of the core network, equipment, or infrastructure; or**
  - c. entities when seeking access to or use of equipment and infrastructure.**

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<sup>20</sup> 47 U.S.C. § 1428(a).

- 2) **The language of the Act under 47 U.S.C. § 1432 prohibiting FirstNet from directly serving “consumers” does not limit potential types of public safety entities that may use or access the NPSBN for commercial telecommunications or information services.**
- 3) **The Act under 47 U.S.C. § 1432 does not prohibit or act as a limit on secondary users with which FirstNet may enter into a covered leasing agreement.**
- 4) **The Act under 47 U.S.C. § 1432 does not limit the pool of secondary users that may gain access to or use of the network on a secondary basis.**

Analysis of and Responses to Comments on Prohibition on Providing Commercial Services to Consumers

**Summary:** The vast majority of commenters supported FirstNet’s conclusions that the prohibition in 47 U.S.C. § 1432 on FirstNet offering, providing, or marketing commercial telecommunications or information services to consumers does not apply to public safety entities, secondary users, States seeking access to or use of the FirstNet core network, or entities or States seeking access to or use of network equipment and infrastructure. These commenters agreed that the intent of this provision, whether explicit or implicit, is to exclude these entities from the definition of consumer.

**Comment # 10:** One commenter, while not disagreeing with FirstNet’s conclusions, expressed concern regarding the potential for network capacity to become saturated from non-public safety use.

**Response:** As noted above, FirstNet is committed to ensuring the establishment of a network that meets the needs of public safety and believes that the 20 MHz of available spectrum along with the expected priority/preemption capabilities of the network will allow secondary users to

access the NPSBN without negatively impacting public safety's use of the NPSBN.

## **C. Requests for Proposals**

### **1. *Requests for Proposals Process***

The Act in 47 U.S.C. § 1426(b)(1)(B) requires FirstNet to issue “open, transparent, and competitive” RFPs. The procedural requirements for issuing such RFPs to meet the “open, transparent, and competitive” standard, however, are not defined in the Act. The Federal Acquisition Regulation (“FAR”), codified in 48 CFR Parts 1–99, is the primary regulation used by federal executive agencies in their acquisition of supplies and services with appropriated funds. Thus, FirstNet makes the following conclusion with respect to its compliance with this provision:

**FirstNet, to the extent it utilizes the FAR, concludes that complying with the FAR satisfies the open, transparent, and competitive requirements of 47 U.S.C. § 1426(b)(1)(B).**

#### Analysis of and Responses to Comments on Requests for Proposals

**Summary:** The overwhelming majority of commenters agreed with FirstNet's proposed interpretation that using the FAR satisfies FirstNet's statutory obligation to issue “open, transparent, and competitive requests for proposals to private sector entities for the purposes of building, operating, and maintaining the network . . .” In addition to commenting that compliance with the FAR is a reasonable way of meeting the Act's requirements for an “open, transparent, and competitive” RFP process, commenters noted that the FAR is a well understood process, and that by using it, FirstNet will save time by not having to develop a new process for issuing RFPs. Given the size and scope of FirstNet's task, commenters agreed that using the FAR was the most logical option. Some commenters agreed with using the FAR generally, but encouraged the use of only certain sections.

**Comment # 11:** Some commenters suggested that FirstNet exceed the FAR’s requirements and reminded FirstNet of its authority to make agreements with States to use existing infrastructure.

**Response:** FirstNet believes that using the FAR satisfies the Act’s requirements. FAR Part 1.102 provides guiding principles of the Federal Acquisition System, namely “promoting competition, and conducting business with integrity, fairness and openness.” The policies and procedures of the FAR embody these principles. Adherence to the FAR, therefore, ensures compliance with the Act’s mandate to issue “open, transparent, and competitive” RFPs. With respect to existing infrastructure, FirstNet plans to leverage such assets for the NPSBN to the extent it is economically desirable, as required by the Act (see below for a further discussion regarding existing infrastructure).

**Comment # 12:** One commenter disagreed with FirstNet’s proposed interpretation, observing that the guidance in 47 U.S.C. § 1426(b)(1)(B) would be unnecessary if Congress intended FirstNet to comply with the FAR, and that there is not a single reference to the FAR in the Act, despite the extensive statutory guidance the Act provides to FirstNet concerning the RFP process.

**Response:** FirstNet acknowledges this comment and notes that its final conclusion is *not* that FirstNet believes it is required to use the FAR. Rather, FirstNet’s interpretation merely is that by complying with the FAR, FirstNet is complying with this provision of the Act.

## **2. Minimum Technical Requirements**

47 U.S.C. § 1426(b)(1)(B) requires FirstNet to issue RFPs for the purposes of building, operating, and maintaining the network that use, *without materially changing*, the minimum technical requirements developed by the Interoperability Board. 47 U.S.C. § 1422(b) and 47

U.S.C. § 1426(c)(4) further obligate FirstNet to accommodate advancements in technology.<sup>21</sup>

With respect to these provisions, FirstNet makes the following final interpretation:

**FirstNet concludes that it may make non-material changes or additions/subtractions to the minimal technical requirements developed by the Interoperability Board, including as necessary to accommodate advancements in technology as required by the Act.**

Analysis of and Responses to Comments on Minimum Technical Requirements

**Summary:** Commenters were virtually unanimous in agreeing with FirstNet’s proposed interpretation regarding changes to the minimum technical requirements established by the Interoperability Board. Several commenters reasoned that such changes are necessary and fully contemplated (by Congress and the Interoperability Board itself) in order to keep pace with evolutions in technology, address issues that the Interoperability Board may not have considered, and fulfill requirements under the Act.

**Comment # 13:** One commenter maintained that the minimum technical requirements developed by the Interoperability Board are so fundamental that they should be utilized in their entirety regardless of advancements in technology.

**Response:** FirstNet fully appreciates the value of the minimum technical requirements developed by the Interoperability Board and the critical role such requirements will have in the development and maintenance of the NPSBN. However, at the same time, FirstNet seeks to

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<sup>21</sup> Note that the Interoperability Board Report states that “[g]iven that technology evolves rapidly, the network components and associated interfaces identified in the [Interoperability Board Report] . . . are also expected to evolve over time. As such, these aspects of the present document are intended to represent a state-of-the-art snapshot at the time of writing. In this context, the standards, functions, and interfaces referenced in the present document are intended to prescribe statements of intent. Variations or substitutions are expected to accommodate technological evolution consistent with the evolution of 3GPP and other applicable standards.” Interoperability Board, *Recommended Minimum Technical Requirements to Ensure Nationwide Interoperability for the Nationwide Public Safety Broadband Network* at 27 (May 22, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021919873>.

ensure that the most robust and technologically advanced network as possible is established for public safety in accordance with its statutory mission, and FirstNet is specifically directed by the Act to consider advancements in technology in the development and maintenance of the NPSBN.<sup>22</sup> Accordingly, FirstNet intends to operate with those principles and directives in mind in forming the technical requirements for the network.

**Comment # 14:** Multiple commenters urged FirstNet to use open standards in the implementation of advancements in technology, focusing on 3GPP architecture and interfaces that ensure operability, interoperability, and backwards compatibility. Some of these commenters pointed out that the Interoperability Board Report contemplates advancements in technology and supports the open standards process.

**Response:** This comment is outside the scope of this notice. However, FirstNet acknowledges this recommendation and will consider it as any applicable decisions are developed on the matter. We note that the Act requires that the NPSBN be based on commercial standards, including those developed by 3GPP and that comply with the Interoperability Board Report.

**Comment # 15:** A few commenters suggested that FirstNet rely on the Interoperability Board or a similar independent technical advisory board going forward to establish and maintain ongoing minimum technical requirements and compliance with those requirements, in light of technological advances.

**Response:** This comment is outside the scope of this notice. However, FirstNet acknowledges this recommendation and will consider it as any applicable decisions are developed on the matter.

**Comment # 16:** Some commenters offered input as to what delineates non-material versus

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<sup>22</sup> See 47 U.S.C. §§ 1422(b), 1426(c)(4).

material changes in the minimum technical requirements. Most commenters focused on critical features or functions being backwards compatible, as well as avoiding any reduction in the quality of mission critical service to end users.

**Response:** FirstNet acknowledges these recommendations and will consider them as any applicable decisions are developed on the matter. FirstNet’s goal is to ensure that the NPSBN operates in a manner that satisfies public safety’s critical communication needs and is consistent with the material terms of the Interoperability Board report.

### ***3. Final Definition of “Rural”***

The Act directs that FirstNet “shall require deployment phases with substantial *rural* coverage milestones as part of each phase of the construction and deployment of the network . . . [and] utilize cost-effective opportunities to speed deployment in *rural* areas.”<sup>23</sup> Additionally, the Act states, in relevant part, that FirstNet “shall develop . . . requests for proposals with appropriate . . . timetables for construction, including by taking into consideration the time needed to build out to *rural* areas.”<sup>24</sup> Finally, the Act explains that FirstNet “shall develop . . . requests for proposals with appropriate . . . coverage areas, including coverage in *rural* and nonurban areas.”<sup>25</sup>

Since the Act does not define “rural,” we found it necessary to define this term in order to fulfill our duties with respect to the above noted statutory rural coverage requirements.<sup>26</sup>

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<sup>23</sup> 47 U.S.C. § 1426(b)(3) (emphasis added).

<sup>24</sup> 47 U.S.C. § 1426(c)(1)(A)(i) (emphasis added).

<sup>25</sup> 47 U.S.C. § 1426(c)(1)(A)(ii) (emphasis added).

<sup>26</sup> We appreciate the position the FCC has taken in this regard, and we are committed to fulfill our duties in a way that will meet these rural coverage requirements. See Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012 et al., PS Docket 12-94 et al., Notice of Proposed Rulemaking, 28 FCC Rcd 2715, 2728-29 ¶ 46 (2013) (Band 14 NPRM) (noting that, “We do not believe the

Accordingly, FirstNet makes the following final interpretation regarding the definition of “rural” under the Act:

**1) FirstNet defines “rural,” for the purposes of the Act, as having the same meaning as “rural area” in Section 601(b)(3) of the Rural Electrification Act of 1936, as amended (“Rural Electrification Act” or “REA”). Section 601(b)(3) of the Rural Electrification Act provides that “[t]he term ‘rural area’ means any area other than—(i) an area described in clause (i) or (ii) of Section 1991(a)(13)(A) of this title [section 343(a)(13)(A) of the Consolidated Farm and Rural Development Act]; and (ii) a city, town, or incorporated area that has a population of greater than 20,000 inhabitants.” In turn, the relevant portion of Section 343(a)(13)(A) of the Consolidated Farm and Rural Development Act explains that the “terms ‘rural’ and ‘rural area’ mean any area other than—(i) a city or town that has a population of greater than 50,000 inhabitants; and (ii) any urbanized area contiguous and adjacent to a city or town described in clause (i).” Thus, as defined herein, the term “rural” means any area that is *not*:**

- a city, town, or incorporated area that has a population of greater than 20,000 inhabitants**
- any urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants**

FirstNet also inquired whether there should be a lower boundary separate from the definition of “rural,” such as “wilderness” or “frontier.” Based in part on the comments

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Commission should specify rural milestones as a condition of FirstNet’s license at this time. Rather, we recognize that at this early stage, the success of FirstNet requires flexibility with respect to deployment and planning, including deployment in rural areas. Moreover, FirstNet has an independent legal obligation under the Act to develop requests for proposals with appropriate timetables for construction, taking into account the time needed to build out in rural areas, and coverage areas, including coverage in rural and nonurban areas. In addition, in light of the Congressional oversight that will be exercised over FirstNet and its other transparency, reporting and consultation obligations, we do not believe it is necessary for the Commission to set specific benchmarks in this regard in these rules.”).

received, FirstNet has reached the following final conclusion:

- 2) FirstNet concludes that a lower boundary (e.g., “wilderness,” “frontier”) is not necessary to satisfy its rural coverage requirements under the Act, and thus FirstNet does *not* intend to establish any such boundary.**

Analysis of and Responses to Comments on Definition of Rural

**Summary:** Several commenters agreed with FirstNet’s proposed definition of “rural,” pointing to the logic in using the Rural Electrification Act definition. Many of these commenters noted that the Rural Electrification Act definition is widely known and used. Some specifically agreed that adopting the Rural Electrification Act definition makes sense in light of U.S. Department of Agriculture’s (“USDA”) use of the definition in the Rural Broadband Access Loan and Loan Guarantee Program.

However, several other commenters disagreed with FirstNet’s proposed definition of rural, suggesting that the Rural Electrification Act definition was inadequate. Multiple commenters expressed concerns that the Rural Electrification Act definition would not accurately measure or reflect the rural areas of a State.

**Comment # 17:** One commenter suggested that the geography of a State could complicate the Rural Electrification Act’s application due to many remote, small but densely populated communities and areas without any defined government or established limits.

**Response:** FirstNet acknowledges this comment and recognizes that certain States may not agree that the Rural Electrification Act definition (or any other definition for that matter) adequately defines rural areas for that State due to unique geographic or other circumstances. However, because FirstNet’s mission is to ensure the establishment of a *nationwide* public safety broadband network, it is necessary to formulate a single, objective definition that can be

reasonably applied on a national basis. By way of example, the Rural Electrification Act definition of “rural area” has been adopted by other federal agencies in determining rural areas on a national basis, including by the USDA in its Rural Broadband Access Loan and Loan Guarantee Program, for application nationwide.<sup>27</sup>

It is also important to note that the primary purpose of the definition of “rural” under the Act is to measure whether the statutory requirement to include “substantial rural coverage milestones” in each phase of network deployment has been met. The definition does not determine a state or territory’s ultimate coverage, which instead will be determined by the input obtained through the consultation process along with FirstNet’s available resources.<sup>28</sup>

**Comment # 18:** Some commenters suggested that FirstNet adopt a modified or simplified aggregate population-derived definition utilizing various alternative methodologies.

Specifically, a couple of commenters proposed the use of the U.S. Census Bureau’s definition of “rural” -- *i.e.*, all areas that are not “urban areas,” which consist of Urbanized Areas (50,000 or more people) and Urban Clusters (at least 2,500 and less than 50,000 people).

**Response:** FirstNet recognizes that there are alternative definitions of “rural” utilized by other federal and state government entities and acknowledges that such definitions could be applied in the context of the nationwide public safety broadband network. Consistent with its analysis in the *First Notice*, FirstNet continues to believe, however, that the Rural Electrification Act’s definition of “rural area” is sufficiently precise to allow for consistent application, as well as widely known and familiar to rural telecommunications providers, rural communities, and other stakeholders considering its utilization specifically with respect to rural broadband issues. In

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<sup>27</sup> The USDA was designated as the lead federal agency for rural development by the Rural Development Policy Act of 1980. *See* 7 U.S.C. § 2204b.

<sup>28</sup> *See* 47 U.S.C. § 1426(c)(2).

addition, other federal agencies have adopted the Rural Electrification Act definition. The USDA, in particular, utilizes this definition in a similar context through its implementation of the Rural Broadband Access Loan and Loan Guarantee Program, which funds the costs of construction, improvement, and acquisition of facilities and equipment to provide broadband service to eligible rural areas.

**Comment # 19:** Another commenter proposed the adoption of the definition used by USDA’s Rural Business Service, indicating that rural areas under such definition are those with 50,000 persons or less excluding areas adjacent to communities larger than 50,000 persons.

**Response:** See the response to Comment # 18 above.

**Comment # 20:** Based on concerns expressed regarding the omission of unincorporated areas and the potential confusion caused by the “adjacent and contiguous” clause in the definition, an additional commenter recommended that “rural” be defined as a city, town, incorporated area, or unincorporated area that has a population of 20,000 or less.

**Response:** FirstNet acknowledges the comment. To provide some additional clarity, we note that in identifying cities, towns, incorporated areas, and urbanized areas, FirstNet intends to leverage the U.S. Census definition of “places,” which is inclusive of towns, cities, villages, boroughs, and Census Designated Places (CDPs) (which in turn are inclusive, at least in part, of unincorporated areas).<sup>29</sup>

**Comment # 21:** A few commenters advocated for a definition based on population density on a per county basis, with varying formulations. For instance, one such commenter proposed to define rural as a county with a population density of less than 160 persons per square mile, while another commenter proffered any county (i) with a population density of 100 or fewer

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<sup>29</sup> See U.S. Census Bureau, *Geographic Terms and Concepts – Place*, [http://www.census.gov/geo/reference/gtc/gtc\\_place.html](http://www.census.gov/geo/reference/gtc/gtc_place.html).

inhabitants or (ii) of less than 225 square miles. A couple of other commenters suggested using a density of 5/7 to 159 persons per square mile on a county-by-county basis. Similarly, another commenter recommended adopting the definition used by the School-to-Work Opportunities program (*i.e.*, a county, block number area in a nonmetropolitan county, or consortium of counties or such block number areas with a population density of 20 or fewer persons per square mile), reasoning that the definition is simple, from a program with a comparable process and approach (grant eligibility based on an approved State plan, intergovernmental cooperation, seed money for initial planning and development of school-to-work transition system), more objective, and more accurate in identifying rural areas.

**Response:** See the response to Comment # 18 above.

**Comment # 22:** Multiple commenters maintained that instead of adopting the Rural Electrification Act (or any other single definition), the definition of “rural” should be determined on a state-by-state basis.

**Response:** FirstNet recognizes the Act strikes a balance between establishing a nationwide network and providing States an opportunity to make certain decisions about local implementation. As noted above, however, the primary purpose of the definition of “rural” is for measuring whether “substantial rural coverage milestones” have been included in each phase of deployment, which is required on a national basis. Thus, as a practical matter, there must be a single, uniform, and objective definition of “rural” that can be applied nationwide to assess whether such milestones have been met by FirstNet deployment.

#### ***4. Existing Infrastructure***

Multiple provisions of the Act direct FirstNet to leverage existing infrastructure when

“economically desirable.”<sup>30</sup> 47 U.S.C. § 1426(b)(1)(C) requires FirstNet in issuing RFPs to “encourag[e] that such requests leverage, to the maximum extent economically desirable, existing commercial wireless infrastructure to speed deployment of the network.”

Similarly, 47 U.S.C. § 1426(b)(3) – in addressing rural coverage and referring to FirstNet’s duty and responsibility to issue RFPs – requires that “[t]o the maximum extent economically desirable, such proposals shall include partnerships with existing commercial mobile providers to utilize cost-effective opportunities to speed deployments in rural areas.”

Finally, 47 U.S.C. § 1426(c)(3) requires that in carrying out its various requirements related to the deployment and operation of the NPSBN, “the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, State, tribal, or local infrastructure.” The Act, however, does not define or establish any criteria for determining economic desirability. FirstNet reaches the following conclusions regarding its obligations to leverage existing infrastructure under 47 U.S.C. § 1426:

- 1. FirstNet interprets that 47 U.S.C. § 1426(b)(1)(B) is intended to require FirstNet to encourage, through its requests, that responsive *proposals* leverage existing infrastructure in accordance with the provision.**
- 2. FirstNet interprets 47 U.S.C. § 1426(b)(3) as requiring FirstNet to include in its RFPs that such proposals leverage partnerships with commercial mobile providers where economically desirable.**
- 3. FirstNet concludes that factors other than, or in addition to, cost may be utilized in assessing whether existing infrastructure is “economically desirable,” including:**

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<sup>30</sup> See 47 U.S.C. § 1426(b)(1)(C), (b)(3), (c)(3).

- a. infrastructure type/characteristics
- b. security (physical, network, cyber, etc.)
- c. suitability/viability (ability to readily use, upgrade, and maintain)
- d. readiness for reuse (*e.g.*, already in use for wireless communications)
- e. scope of use (*e.g.*, range of coverage)
- f. availability/accessibility (time/obstacles to acquiring access/use)
- g. any use restrictions (*e.g.*, prohibitions/limitations on commercial use)
- h. relationships with infrastructure owners/managers (*e.g.*, ease/difficulty in working with owners/managers)
- i. available alternatives in the area

Analysis of and Responses to Comments on Leveraging Existing Infrastructure and Economic Desirability

**Summary:** All commenters on the subject agreed with FirstNet’s above interpretations of 47 U.S.C. § 1426(b)(1)(C) and (b)(3) that the provisions are intended to require FirstNet to encourage, through its RFPs, that such responsive *proposals* leverage existing infrastructure and partnerships where economically desirable. Many of these commenters emphasized the importance of utilizing the RFP process to leverage existing assets and partnerships to lower costs and increase speed to market.

**Comment # 23:** Some commenters provided input regarding the factors to be considered in making an economic desirability determination, focusing largely on cost.

**Response:** Although FirstNet agrees that cost is a major factor in assessing economic desirability, we do not believe it is the sole consideration. There are several other factors, as noted above, that are critical to making an informed determination as to whether the

infrastructure should be leveraged. For instance, it is essential to understand the infrastructure's suitability for FirstNet's purposes, as well as its availability and readiness for use. Likewise, FirstNet's financial sustainability model is based in large part on its ability to lease excess spectrum capacity to commercial entities for secondary use, and thus consideration of any limitations on commercial use of the infrastructure is imperative.

**Comment # 24:** A couple of commenters suggested other factors besides cost in making an economic desirability determination of whether to leverage infrastructure. One such commenter recommended the consideration of geography and breadth of coverage in addition to cost. Another commenter urged that the requirements of public safety should be considered as a factor.

**Response:** FirstNet acknowledges these recommendations and believes they are encompassed within FirstNet's final conclusion above regarding economic desirability factors.

#### **D. Fees**

FirstNet is required by the Act to be a self-funding entity and has been authorized to assess and collect certain fees for use of the network.<sup>31</sup> Specifically, FirstNet has been authorized to assess and collect a (1) network user fee; (2) lease fee related to network capacity (also known as covered leasing agreement); (3) lease fees related to network equipment and infrastructure; and (4) a fee for State use of elements of the core network.<sup>32</sup> In accordance with these provisions, FirstNet makes the following conclusions related to both the assessment and collection of fees authorized under the Act.

##### *General*

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<sup>31</sup> See 47 U.S.C. §§ 1428, 1442(f); 1426(b)(4)(C).

<sup>32</sup> 47 U.S.C. §§ 1428, 1442(f).

- 1) **FirstNet interprets each of the fees authorized by the Act, including user or subscription fees authorized by 47 U.S.C. § 1428(a)(1), covered leasing agreement fees authorized by 47 U.S.C. § 1428 (a)(2), lease fees related to network equipment and infrastructure authorized by 47 U.S.C. § 1428(a)(3), and the fee for State use of elements of the core network authorized by 47 U.S.C. § 1442(f), as distinct and separate from each other and may be assessed individually or cumulatively, as applicable.**

*Network User Fees*

- 2) **FirstNet concludes it may charge a user or subscription fee under 47 U.S.C. § 1428(a)(1) to any user that seeks access to or use of the nationwide public safety broadband network.**

*State Core Network User Fees*

- 3) **FirstNet concludes that the fees assessed on States assuming RAN responsibilities for use of the core network authorized by 47 U.S.C. § 1442(f) are distinct from and can be assessed in addition to any other fees authorized under the Act.**

*Lease Fees Related to Network Capacity and Covered Leasing Agreements*

- 4) **FirstNet concludes that a covered leasing agreement under 47 U.S.C. § 1428(a)(2) does not require a secondary user to “construct, manage, and operate” the entire FirstNet network, either from a coverage perspective or exclusively within a specific location.**
- 5) **FirstNet concludes that multiple covered leasing agreement lessees could coexist and be permitted access to excess network capacity in a particular geographic area.**
- 6) **FirstNet interprets that a covered leasing agreement lessee satisfies the definition under 47 U.S.C. § 1428(a)(2) so long as the lessee does more than a nominal amount of constructing, managing, or operating the network.**

- 7) FirstNet concludes that an entity entering into a covered leasing agreement under 47 U.S.C. § 1428(a)(2) is not required to perform all three functions of constructing, managing, and operating a portion of the network, so long as one of the three is performed as part of the covered leasing agreement.
- 8) FirstNet interprets the reference to “network capacity” in the definition of covered leasing agreement under 47 U.S.C. § 1428(a)(2)(B)(i) as a generic statement referring to the combination of spectrum and network elements, as defined by the Act, and includes the core network as well as the radio access network of either FirstNet alone or that of the secondary user under a covered leasing agreement whereby the core and radio access network are used for serving both FirstNet public safety entities and the secondary user’s commercial customers.
- 9) FirstNet interprets the term “secondary basis” under 47 U.S.C. § 1428(a)(2)(B)(i) to mean that network capacity will be available to the secondary user unless it is needed for public safety entities as defined in the Act.
- 10) FirstNet interprets the phrase “spectrum allocated to such entity” found in 47 U.S.C. § 1428(a)(3)(B)(ii) as allowing all or a portion of the spectrum licensed to FirstNet by the FCC under call sign “WQQE234” to be allocated for use on a secondary basis under a covered leasing agreement.
- 11) FirstNet concludes the reference to “dark fiber” in 47 U.S.C. § 1428(a)(2)(B)(ii) cannot literally be interpreted as such, and the reference should be interpreted to allow the covered leasing agreement lessee to transport such traffic on otherwise previously dark fiber facilities.

*Network Equipment and Infrastructure Fee*

**12) FirstNet interprets 47 U.S.C. § 1428(a)(3) as being limited to the imposition of a fee for the use of static or isolated equipment or infrastructure, such as antennas or towers, rather than for use of FirstNet spectrum or access to network capacity.**

**13) FirstNet interprets the phrase “constructed or otherwise owned by [FirstNet]” under 47 U.S.C. § 1428(a)(3) as meaning that FirstNet ordered or required the construction of such equipment or infrastructure, paid for such construction, simply owns such equipment, or does not own but, through a contract has rights to sublease access to, or use of, such equipment or infrastructure.**

#### Analysis of and Responses to Comments on Fees

**Summary:** The majority of commenters agreed with the various interpretations related to the assessment and collection of fees by FirstNet. The commenters generally understood the authority the Act gives FirstNet to assess and collect fees and the importance of such fees as a key funding resource necessary to build, operate, and maintain the NPSBN. However, a few commenters, as described and responded to below, either disagreed with certain interpretations or provided general comments relating to the assessment and collection of the various fees under the Act.

**Comment # 25:** Two commenters agreed that FirstNet is authorized to assess a fee for use of the core network, but suggested that States assuming RAN deployment responsibilities should only pay the costs associated with using the core network and spectrum lease; they should not have to pay a network user or subscription fee, and that FirstNet is not allowed to, or should not, impose ‘user’ fees on opt-out States in a cumulative manner as interpreted by FirstNet.

**Response:** FirstNet disagrees and believes the Act authorizes FirstNet to assess a user or subscription fee to each entity, including a State choosing to deploy its own radio access

network, that seeks access to or use of the network. Specifically, the Act authorizes FirstNet to collect a “user or subscription fee from *each* entity, including any public safety entity or secondary user, that seeks access to or use of the [NPSBN].”<sup>33</sup> Consequently, a plain reading of this provision does not appear to provide any exclusionary language that would limit which entities may be charged a fee for access to or use of the network. Rather, as discussed in the *First Notice*, the use of the term “including” rather than “consisting” when describing the scope of entities that may be charged a network user fee indicates that this group is not limited to only public safety entities or secondary users, but would include other entities such as a State. Thus, FirstNet believes the plain language of the Act supports the conclusion that FirstNet may charge a user or subscription fee to *any* eligible user who seeks access to or use of the nationwide public safety broadband network, including, as appropriate, a State assuming responsibilities for radio access network deployment.

**Comment # 26:** One commenter suggested that all public safety user fees should include nationwide coverage, and should be for unlimited use of the NPSBN. For example, a flat fee for unlimited usage (and no roaming fees) should be charged within each State, similar to today’s carrier billing model.

**Response:** This comment is outside the scope of this notice. However, FirstNet acknowledges the comment and will consider the recommendation as it continues planning for the deployment of the NPSBN.

**Comment # 27:** One commenter suggested that while the Act is unambiguous on allowing FirstNet to assess a fee to States assuming RAN responsibilities for use of the core network, it is important that this fee not be set so high so as to discourage States from opting out of the

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<sup>33</sup> 47 U.S.C. § 1428(a)(1) (emphasis added).

NPSBN. The commenter further noted that the ability of States to construct their own RAN is clearly permissive under the Act and, in fact, could enable significant growth and adoption of the NPSBN as long as the user fees for opt-out states are reasonable and contemplate the budgets of State and local public safety entities.

**Response:** This comment is outside the scope of this notice. However, FirstNet acknowledges the comment and will consider the recommendation as it continues planning for the deployment of the NPSBN.

**Comment # 28:** Two commenters disagreed that “all” of the FirstNet Band 14 spectrum can be allocated for secondary use under a covered leasing agreement.

**Response:** FirstNet believes its interpretation that the Act allows all or part of the spectrum licensed to FirstNet by the FCC under call sign “WQQE234” to be allocated for secondary use is supported by language of the Act. FirstNet is the entity created by the Act to ensure the establishment of the NPSBN, and as such has a duty to ensure the efficient use of the funding resources available to fulfill this duty, including the ability to permit access to spectrum capacity on a secondary basis. To best utilize these funding resources, the Act authorizes FirstNet to enter into covered leasing agreements which permit an entity entering into such an agreement to have access to, or use of, network capacity on a secondary basis for non-public safety services. The Act, as analyzed in the *First Notice*, does not provide any cap or limitation on how much of the network capacity may be allocated on a secondary basis. Thus, FirstNet believes the Act provides it flexibility to determine how best to utilize network capacity as a funding resource to ensure both the establishment and self-sustainability of the network. Despite this flexibility, however, it is important to note that public safety entities will always have priority use of the NPSBN over any non-public safety user that gains access to, or use of, the network on a

secondary basis.

**Comment # 29:** One commenter suggested that the States should determine how much capacity/spectrum is made available within its borders under a covered leasing agreement—rather than FirstNet making the determination.

**Response:** FirstNet is the entity created by the Act to ensure the establishment of the NPSBN and is also the sole licensee of the 700 MHz D block spectrum and the existing public safety broadband spectrum.<sup>34</sup> Thus, FirstNet is the sole entity responsible for determining how to allocate the spectrum under a covered leasing agreement.

**Comment # 30:** One commenter cautioned FirstNet to ensure there is not an undue expectation by the covered leasing agreement lessee that its lease of the spectrum supersedes public safety's access to, and use of, that spectrum as a priority in all cases, and at all times.

**Response:** FirstNet acknowledges the comment and reiterates that its primary mission is to ensure the establishment of a nationwide, interoperable network for public safety. Accordingly, public safety will always have priority use of the NPSBN over any non-public safety user that gains access to, or use of, the network on a secondary basis through a covered leasing agreement.

**Comment # 31:** One commenter recommended that FirstNet interpret 47 U.S.C § 1428(a)(3) to only apply to the RAN hardware in States that choose to participate in the NPSBN as proposed by FirstNet.

**Response:** FirstNet interprets the phrase “constructed or otherwise owned by [FirstNet]” under 47 U.S.C. § 1428(a)(3) as meaning that FirstNet ordered or required the construction of such equipment or infrastructure, paid for the construction, owns the equipment, or does not own the equipment, but, through a contract, has the right to sublease the equipment or infrastructure.

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<sup>34</sup> 47 U.S.C. §§ 1421, 1422.

Thus, unless the RAN hardware in any State falls within the criteria above, FirstNet would not have the authority to assess and collect a fee for use of such infrastructure or equipment.

Dated: \_\_October 15, 2015\_\_\_\_\_.

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Jason Karp,

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