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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Proposed Scope of NTIA's Authority Regarding FirstNet Fees

47 CFR Chapter V

[Docket Number: 151209999-5999-01]

RIN: 0660-AA30

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The National Telecommunications and Information Administration (NTIA) publishes this notice of proposed rulemaking to request public comment as it develops rules related to its review and approval of fees imposed by the First Responder Network Authority (FirstNet) as authorized by the Middle Class Tax Relief and Job Creation Act of 2012 (the Act).

DATES: Submit comments on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The public is invited to submit written comments to this proposed rule. Written comments may be submitted electronically through www.regulations.gov or by mail (to Office of Public Safety Communications; National Telecommunications and Information Administration; U.S. Department of Commerce; 1401 Constitution Avenue, NW; Washington, DC 20230.).

Comments received related to this proposed rule will be made a part of the public record and will be posted to www.regulations.gov without change. Comments should be machine readable and should not be copy-protected. Comments should include the name of the person or organization

filing the comment as well as a page number on each page of the submission. All personally identifiable information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Patrick Sullivan; Office of Public Safety Communications; National Telecommunications and Information Administration; U.S. Department of Commerce; 1401 Constitution Avenue, NW; Washington, DC 20230; psullivan@ntia.doc.gov; (202) 482-5948.

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I. Introduction, Summary of Proposed Rules.

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.)) (Act) established the First Responder Network Authority (FirstNet) as an independent authority within the National Telecommunications and Information Administration (NTIA).¹ Congress mandated FirstNet ensure the building, deployment, and operation of an interoperable nationwide public safety broadband network (Network).² In order to meet this critical directive and provide affordable, reliable, and sustainable broadband services for first responders across the United States, FirstNet must operate as a business enterprise. Today, public safety entities procure broadband services from numerous commercial service providers. When it enters the market, FirstNet will start with no market share and will have to compete for customers by distinguishing its product in terms of features, price, and reliability from products offered by commercial providers. To be successful,

¹ See 47 U.S.C. 1424(a).

² See 47 U.S.C. 1426(b)(1) (stating FirstNet shall “...take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network...”).

FirstNet will need to employ business strategies with flexibility and agility commonplace in the private sector.

This document proposes rules that will enable NTIA to execute its duty to review specific fees proposed by FirstNet in a manner compatible with FirstNet's need to operate as a business in a competitive marketplace. NTIA proposes to execute its statutory fee review duties to afford FirstNet as much flexibility as possible to establish its business and budgetary goals and to adjust those goals as necessary to respond to the day-to-day realities of the broader competitive marketplace in which FirstNet must operate. Ultimately, NTIA intends to implement a fee review process that allows FirstNet to respond to changing market conditions and the demands of its vital and dynamic customer base: first responders.

The Act requires FirstNet to be permanently self-funding and authorizes it to assess and collect certain types of fees to assure its sustainability. The Act requires that the total amount of FirstNet's annual fees must be sufficient to recoup FirstNet's total expenses, but such fees must not exceed the amount necessary to carry out its duties under the Act.³ As part of FirstNet's self-funding obligations, the Act directs NTIA to review these fees on an annual basis; they may only be assessed if approved by NTIA.⁴

This notice of proposed rulemaking describes NTIA's overarching scope, boundaries, and guidelines for NTIA's fee review and approval process as required by law. Section II of this notice of proposed rulemaking details relevant statutory provisions and makes clear that, while NTIA has a distinct role through the fee review and approval process to ensure that FirstNet is

³ See 47 U.S.C. 1428(b).

⁴ See 47 U.S.C. 1428(c).

self-funded, NTIA's role is a relatively limited part of broader statutory provisions designed to monitor FirstNet's financial condition and operational status.

Section III defines the scope of NTIA's proposed fee review and approval process. NTIA has determined that this process is for a particular and limited purpose: it must examine only whether the proposed fees of another federal entity – FirstNet – as set forth under Section 6208 of the Act, are, in aggregate and in combination with any FirstNet non-fee-based income, sufficient, but not in excess of, the projected funds that FirstNet needs to recoup the total expenses required to carry out its statutory obligations in a given year. NTIA acknowledges that, as authorized by the Act, FirstNet might receive income which is separate and distinct from the fee categories defined in Section 6208. NTIA recognizes that such income will impact NTIA's determination whether FirstNet's proposed fees, in aggregate and in combination with such non-fee-based income, will meet but not exceed the funds it needs on an annual basis. However, NTIA proposes that the Act affords NTIA no authority to review or approve as a "fee" any other form of income FirstNet may receive beyond those fees listed in Section 6208(a).

In Section IV, NTIA proposes a methodology for its fee review that must by law occur annually and prior to FirstNet's assessment of fees. Because NTIA's fee review process is for particular and limited purposes focusing on the financial sustainability of another federal entity within the Department of Commerce, NTIA will include in its review a review of FirstNet's projected expenses as set forth in its approved budgets as well as a review of FirstNet's prior-year actual expenses and revenues to facilitate FirstNet's compliance with Section 6208(b). To that end, NTIA proposes to utilize FirstNet's regular budget process and financial statements. NTIA also proposes to defer to FirstNet on any need for reserves, working capital, or similar fund categories. NTIA, however, will take such fund categories into consideration as part of its

determination of whether the total proposed fees under Section 6208(b) meet, but do not exceed, FirstNet's total expenses.

In Section V, NTIA discusses the fees that NTIA has specific jurisdiction to review; if, in its review of aggregate revenues and costs, it determines that FirstNet has not satisfied the legal standard, FirstNet must adjust its fees or otherwise make budgetary changes to ensure that the standard is met. Specifically, NTIA proposes to define the term "fee," for purposes of its statutory obligations under Section 6208(c) of the Act, to mean FirstNet's direct collection of money that is generated from the three categories established in Section 6208(a) of the Act: 1) network user fees; 2) lease fees pursuant to a covered leasing agreement (CLA); and 3) fees from entities seeking access to or use of any network equipment or infrastructure constructed or otherwise owned by FirstNet.⁵ Under this proposed rule, NTIA can direct FirstNet to address only those proposed fees that fall into one of these three categories. Further, NTIA proposes that it will not evaluate the reasonableness, or similar subjective attributes, of the specific fees assessed by FirstNet or its prospective partner or partners as contemplated in the Act. Specific NTIA rules are proposed in new 47 CFR Chapter V; Subchapter A will be utilized for NTIA rules that relate to FirstNet, and Subchapter B will be reserved for rules promulgated by FirstNet itself.

We seek comment on these preliminary proposals. We also look forward to FirstNet's progress in its procurement process, which may provide additional information relevant to NTIA's duties under Section 6208(c). With such information from stakeholders and FirstNet, NTIA will be better informed to solidify the scope of its fee review and approval process as appropriate.

⁵ See 47 U.S.C. 1428(a).

II. Background: Relevant Statutory Provisions.

A. FirstNet-Assessed Fees Must Ensure Self-Funding and be Approved by NTIA.

The Act established FirstNet as an independent authority within NTIA.⁶ The Act authorizes FirstNet to take all actions necessary to ensure the building, deployment, and operation of the Network.⁷ To achieve this significant and unprecedented task, FirstNet must operate in many respects as a private sector business enterprise.⁸

FirstNet's authority to operate as a business can and should further its ability to meet the Act's mandate that it become a self-sustaining enterprise. Section 6208 of the Act makes clear that FirstNet must establish permanent self-funding and is authorized to collect fees for specified uses of the Network or its components in furtherance of that obligation.

The Act established specific parameters for FirstNet's fee assessments described in Section 6208(a) to drive sustainability and continual reinvestment of FirstNet revenues into the Network. Section 6208(b), entitled, "Establishment of Fee Amounts; Permanent Self-Funding," requires that the total amount of the fees assessed under Section 6208(c) for each fiscal year shall

⁶ See 47 U.S.C. 1424(a).

⁷ See 47 U.S.C. 1426(b).

⁸ To that end, the Act set forth several key provisions establishing FirstNet as a business enterprise. For example, the Act requires the creation of the FirstNet Board, which has the fiduciary and operational functions assigned to boards of corporations. See 47 U.S.C. 1424(b). Furthermore, Board members appointed by the Secretary of Commerce must include individuals with various types of business experience, including expertise in building, deploying, and operating commercial telecommunications networks, and in financing and funding telecommunications networks. See *id.* FirstNet may only act as authorized by the Board to execute any powers granted by the Act to FirstNet, spend funds, or take other actions deemed necessary, appropriate, or advisable to accomplish the purposes of the Act. See 47 U.S.C. 1426(a)(1); see also 47 U.S.C. 1426(a)(5). As a business enterprise, FirstNet may contract with individuals; private companies; organizations; institutions; and Federal, State, regional, and local agencies. See 47 U.S.C. 1426(a)(3). The Act allows FirstNet to engage in other business activities, including selecting agents, consultants, or experts and hiring a program manager to carry out key aspects of deploying the NPSBN. See 47 U.S.C. 1425(b).

be sufficient, but cannot exceed, the amount necessary to recoup the total expenses of FirstNet as it carries out its duties under the Act.⁹ Moreover, FirstNet must reinvest amounts received from the assessment of fees under Section 6208 for constructing, maintaining, operating, or improving the Network.¹⁰ Specific to FirstNet’s authority to assess and collect these fees, Section 6208(c) requires that NTIA review such fees “on an annual basis, and such fees may only be assessed if approved by...NTIA.”¹¹

Additionally, the Act makes clear that FirstNet should consider public-private partnerships, affording it additional authority to creatively support the provision of a self-funded broadband network for use by public safety entities.¹² Such partnerships might result in FirstNet’s collection of income that does not fall within the fees specified in Section 6208(a).¹³

B. FirstNet’s Finances are Subject to Broader, Independent Review.

NTIA’s approach in this proposed rule reflects the scope of its fees review authority in the context of other supervision of FirstNet’s finances and operations, which taken together, ensure a high degree of oversight over FirstNet’s finances under the Act. The Act sets forth multiple methods of oversight of FirstNet well beyond the limited review and approval of fees required of NTIA under Section 6208(c). For example, FirstNet is subject to an independent

⁹ See 47 U.S.C. 1428(b).

¹⁰ See 47 U.S.C. 1428(d).

¹¹ 47 U.S.C. 1428(c).

¹² See, e.g., 47 U.S.C. 1428(a) (describing public-private arrangements to construct, manage, and operate the nationwide public safety broadband network between FirstNet and a secondary user); see also 47 U.S.C. 1426(b)(3) (requiring that FirstNet requests for proposals, to the maximum extent economically feasible, “include partnerships with existing commercial mobile providers to utilize cost- effective opportunities to speed deployment in rural areas”).

¹³ See, e.g., § 1426(a)(3) (referencing “grants and funds from...individuals, private companies, organizations, institutions, and Federal, State, regional, and local agencies”); § 1426(a)(4) (referencing “gifts, donations, and bequests of property, both real and personal”).

financial audit. Section 6209 of the Act requires that the Secretary of Commerce engage an independent auditor to conduct an annual audit of all of FirstNet’s commercial corporate transactions which the auditor will submit to Congress, the President, and FirstNet.¹⁴ In addition, the Act requires an annual, “comprehensive and detailed report of the operations, activities, financial condition, and accomplishments of [FirstNet],” to be submitted to Congress along with “recommendations or proposals for legislative or administrative action as [FirstNet] deems appropriate.”¹⁵ Furthermore, FirstNet must comply on a day-to-day basis with all other applicable federal financial laws and regulations. In light of these broader oversight provisions, NTIA’s narrow scoping of its fee review authority is appropriate.

III. NTIA’s Annual Fee Review Focuses on Whether FirstNet Fees and Other Income, In Aggregate, Are Sufficient, and Do Not Exceed the Amount Necessary, to Recoup FirstNet’s Total Expenses.

A. Standard of NTIA Fee Review and Approval.

The Act does not provide a specific standard of review for NTIA’s annual fee review and approval process under Section 6208(c).¹⁶ However, examination of other provisions in Section 6208 and the Act at large inform NTIA’s proposed approach to FirstNet fee review. FirstNet has a duty under Section 6208(b) to ensure that, during a given fiscal year, the fees it assesses are sufficient, and shall not exceed the amount necessary, to recoup the “total expenses” associated with carrying out its duties as specified under the Act.¹⁷

¹⁴ See 47 U.S.C. 1429.

¹⁵ 47 U.S.C. 1430.

¹⁶ See 47 U.S.C. 1428(c).

¹⁷ See 47 U.S.C. 1428(b).

Given this overarching directive in Section 6208(b), which immediately precedes the Act's assignment of fee review to NTIA in Section 6208(c), NTIA proposes that the Act's purpose for the fee review is solely to support FirstNet's obligation under Section 6208(b) to be self-funding. Thus, NTIA intends to base its decisions on FirstNet's proposed fees by only examining whether the fees are, in aggregate and combined with other non-fee-based income, sufficient, but not in excess, of the projected funds FirstNet needs to carry out its statutory obligations in a given fiscal year. In this way, NTIA's review and approval of FirstNet-proposed fees under Section 6208 will exclusively focus on FirstNet's projected income and expenses to further the self-funding requirements and limitations of Section 6208(b). We seek comment on this proposed approach.

B. NTIA's Fee Review and Approval Process Does Not Assess the Reasonableness of a Proposed Fee.

The scope of review of a fee is established by the statute.¹⁸ As a result, we propose that NTIA's fee review is scoped to self-sustainability and does not include review of the reasonableness of any fee assessed by FirstNet or its prospective partner or partners as contemplated in the Act.

The wording of the Act itself does not direct NTIA to perform a reasonableness review. Section 6208(b), entitled, "Establishment Of Fee Amounts; Permanent Self-Funding," requires that the total amount of the fees assessed by FirstNet for each fiscal year must be sufficient, but cannot exceed, the amount necessary to recoup the total expenses of FirstNet as it carries out its

¹⁸ See *Principles of Federal Appropriations Law, Volume III, Third Edition*, GAO, pp 12-140-12-181. GAO 08-978 SP (Washington, D.C., September 2008).

duties under the Act.¹⁹ NTIA’s mandate to review and approve FirstNet fees directly follows this fee structure requirement in Section 6208(c).²⁰ The Act provides no other direction regarding fee review, but the structure of the statute clearly indicates congressional intent to ensure that the assessed fees drive a self-funded network.

A review of other provisions of Title 47 demonstrates that when Congress intends for rates to be subject to a review for “reasonableness” or other subjective standards, it states this intention explicitly. For example, Section 201 of the Communications Act directs the Federal Communications Commission (FCC) to determine whether the charges of telecommunications carriers are “just and reasonable.”²¹ Similarly, Section 224 of the Communications Act directs the FCC to regulate the rates, terms, and conditions of pole attachments to ensure they are “just and reasonable.”²² Here, with respect to FirstNet’s assessment of fees under Section 6208, and NTIA’s review and approval of such fees, the Act established no such “just and reasonable” standard.

Moreover, a reasonableness review of FirstNet fees is unnecessary as a matter of policy. The Act does not mandate or require any public safety entity to purchase services from FirstNet. FirstNet must compete for subscribers by offering a compelling value proposition to prospective public safety customers. Public safety users themselves will determine whether FirstNet’s

¹⁹ See 47 U.S.C. 1428(b).

²⁰ See 47 U.S.C. 1428(c).

²¹ See 47 U.S.C. 201 (stating that, for common carrier services, “[a]ll charges... for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.”).

²² See 47 U.S.C. 224 (b)(1) (stating that “the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”)

proposed user fees are reasonable in comparison to the fees they are offered by competing providers.

Thus, NTIA proposes that it will not assess whether individual or total fees in any given category described in Section 6208(a) are reasonable, proportionate, or otherwise subjectively appropriate in light of individual or total fees in that category, or any other category of fees listed in Section 6208(a). With the proposed scope of its fee review, NTIA meets the intent of the self-funding provisions, but does not import “just and reasonable” review parameters that Congress clearly could have, but did not, include in the statute. We seek comment on these preliminary proposals.

IV. Methodology of NTIA Fee Review and Approval Process.

A. Focus of NTIA Fee Review Methodology.

Based on the preliminary conclusions above, NTIA proposes to base its approval of fees upon a determination of whether the proposed fees, in aggregate, when combined with any projected non-fee-based income that FirstNet receives, meet but do not exceed FirstNet’s anticipated total expenses associated with carrying out its duties as specified under the Act in a given year. As required by the Act, NTIA will conduct its fee review and approval process on an annual basis. Further, NTIA’s proposed fee review and approval process will occur before a fee is assessed as required by the Act, and NTIA expects that FirstNet will propose such fees to NTIA in writing. Because FirstNet must compete in a broader marketplace for the opportunity to provide broadband service to public safety entities, it will need the flexibility over the course of a fiscal year to adjust specific fees it wishes to assess pursuant to Section 6208(a).

Thus, to empower FirstNet with the flexibility needed to compete in the marketplace, NTIA proposes that, as part of its annual fee review, it will also review FirstNet’s actual fees and

expenses from the previous four fiscal quarters. This process will afford FirstNet the opportunity to describe any significant discrepancies between projected and actual expenses and revenue of that previous fiscal year and detail how its projected fees and revenues for the upcoming fiscal year have addressed these discrepancies. In doing so, FirstNet will have an opportunity on an annual basis to ensure that its duty under Section 6208(b) is met. To determine FirstNet's anticipated expenses, among the specific costs areas that NTIA may consider are: 1) Salaries and Benefits; 2) Travel; 3) Services: Federal Sources; 4) Services: Non-Federal Sources; (5) Facilities Rental; 6) Supplies, Materials, and Printing; 7) Equipment; and 8) Other expenses or obligations incurred for future contract award, capital reserves, or other permitted expenses or obligations. NTIA anticipates deferring to FirstNet to determine the reasonableness of projected obligations in the aforementioned or other categories.

Throughout the fee review and approval process, NTIA anticipates utilizing the budget documents and financial statements produced in the normal course of FirstNet's business. NTIA might also utilize FirstNet's annual budget reports as approved by the FirstNet Board and submitted as part of the President's Budget and FirstNet's mandated annual report to Congress.

Therefore, NTIA proposes that it will make, on an annual basis, one of three determinations with regard to proposed fees: 1) FirstNet's proposed fees, in aggregate, when combined with any projected non-fee-based income to be received by FirstNet, meet but do not exceed FirstNet's projected total expenses; 2) FirstNet's proposed fees, in aggregate, when combined with any projected non-fee-based income to be received by FirstNet, do not meet FirstNet's projected total expenses; or 3) FirstNet's proposed fees, in aggregate, when combined with any projected non-fee-based income to be received by FirstNet, exceed FirstNet's projected total expenses. Upon making any of these determinations, NTIA will communicate its

determination in writing to FirstNet. Should NTIA make the second or third determination listed above, NTIA will not approve FirstNet's proposed fees, and FirstNet may not assess them.

NTIA proposes that it will accept any revised proposed fees or FirstNet approved revised budgets when provided by FirstNet in writing and evaluate them consistent with the scope and methodology proposed above.

We seek comment on this proposed approach to NTIA's fee review and approval process. We also seek comment on alternative methodologies that will further our fee review and approval process consistent with the Act's directives.

B. NTIA's Fee Review and Approval Process Defers to FirstNet on Necessary Reserves.

NTIA proposes that it should defer to FirstNet, in the context of its budgetary planning process, regarding the use and retention of reserves or working capital funds. By doing so, NTIA will not, in its fee review and approval process, assess whether or what level of funds FirstNet should maintain in reserves, capital accounts, or other funding categories. FirstNet's routine budget, auditing, and accounting processes will presumably determine the need for such capital reserve funds. NTIA plans to defer to FirstNet's determination of need for such funds through these processes. We seek comment on this proposed approach to NTIA's fee review and approval process.

Moreover, NTIA proposes that, in its fee review and approval process, it will take into consideration reserve funds at the levels designated in FirstNet's budget, to determine whether FirstNet's proposed fees meet but not exceed FirstNet's total expenses. In doing so, NTIA will deem such funds to be a part of FirstNet's projected total expenses under Section 6208(b) of the Act. We seek comment on this proposal.

V. FirstNet-Proposed Fees Subject to NTIA Review Under Section 6208 Must be Addressed Upon NTIA Disapproval.

A. Fees Subject to NTIA Review and FirstNet Reconsideration Upon NTIA Disapproval.

The Act assigns a clear duty to NTIA under Section 6208: approve or disapprove the specific fees FirstNet aspires to assess under Section 6208. Under Section 6208(a) of the Act, FirstNet is authorized to assess and collect the following fees:

1. A Network User Fee: “A user or subscription fee from each entity, including any public safety entity or secondary user, that seeks access to or use of the [Network].”²³
2. Fees Pursuant to a Covered Leasing Agreement: “A fee from any entity that seeks to enter into a [CLA].”²⁴
3. Lease Fees Related to Network Equipment and Infrastructure: “A fee from any entity that seeks access to or use of any equipment or infrastructure, including antennas or towers, constructed or otherwise owned by the First Responder Network Authority resulting from a public-private arrangement to construct, manage, and operate the [Network]”²⁵

As a threshold matter for purposes of this proposed rule and NTIA’s duty under Section 6208 of the Act, the word “fee,” as used in Section 6208(c) of the Act, must be defined. By

²³ 47 U.S.C. 1428(a)(1).

²⁴ 47 U.S.C. 1428(a)(2)(A); *See also* 47 U.S.C. 1428(a)(2)(B) (stating that the Act defines a CLA as “a written agreement resulting from a public-private arrangement to construct, manage, and operate the nationwide public safety broadband network between the First Responder Network Authority and secondary user to permit— (i) access to network capacity on a secondary basis for non-public safety services; and (ii) the spectrum allocated to such entity to be used for commercial transmissions along the dark fiber of the long-haul network of such entity.”).

²⁵ 47 U.S.C. 1428(a)(3).

defining the fees NTIA is to review, NTIA identifies the specific fees FirstNet must address prior to NTIA approval in the event NTIA must disapprove FirstNet-approved fees under the standards set forth above.

To implement its fee review obligations under the Act, NTIA must determine the meaning of the term “fee” as used in Section 6208. In the case of the Act, the three sets of fees, which FirstNet may assess, and which NTIA must review if assessed, are clearly defined within Section 6208(a). Thus, NTIA proposes that a “fee” that will be subject to its review and approval under Section 6208(c) is FirstNet’s collection of money that falls within the three categories in Section 6208(a): 1) network user fees; 2) lease fees related to network capacity, pursuant to a covered leasing agreement; and 3) fees from entities seeking access to or use of any equipment or infrastructure constructed or otherwise owned by FirstNet.²⁶ Given the clear language in Section 6208(a) defining the fees that FirstNet may assess, and the corresponding language in Section 6208(c) directing NTIA to review fees “assessed under [Section 6208],” NTIA proposes that its fee review authority, and FirstNet’s obligation to address fees upon NTIA disapproval of proposed fees, is scoped to the three above-referenced categories. We seek comment on this preliminary proposal.

B. Income Other Than Fees is Not Subject to NTIA Fee Review.

As noted above, NTIA recognizes that, under the Act, FirstNet may receive income that is separate and distinct from the fees defined in Section 6208(a). Such income must be factored into NTIA’s determination of whether proposed fees, in aggregate, will meet but not exceed the funds needed by FirstNet on an annual basis. However, as the Act limits NTIA’s review and approval authority to “the fees assessed in [Section 6208],” NTIA proposes that the Act gives it

²⁶ See 47 U.S.C. 1428(a).

no authority to review or approve as a “fee” any other form of income FirstNet might receive. NTIA proposes that non-fee-based income, emanating from arrangements allowed by statute, is not a “fee” under Section 6208(a). Furthermore, NTIA proposes that it will consider any non-fee income only as part of its determination of whether such income, when combined in aggregate with the fees defined in Section 6208(a), will be sufficient to recoup FirstNet’s total expenses, but not exceed the amount necessary, to carry out its statutory duties and responsibilities for the fiscal year involved. Moreover, NTIA proposes that it will not analyze the terms and conditions of any CLA, or any other agreement between FirstNet and another entity, beyond those specific terms and conditions which establish any fees that meet the three categories described in Section 6208(a). We seek comment on these preliminary proposals.

VI. EX PARTE COMMUNICATIONS

Any non-public oral presentation to NTIA regarding the substance of this proposed rule will be considered an ex parte presentation, and the substance of the meeting will be placed on the public record and become part of this docket. No later than two (2) business days after an oral presentation or meeting, an interested party must submit a memorandum to NTIA summarizing the substance of the communication. NTIA reserves the right to supplement the memorandum with additional information as necessary, or to request that the party making the filing do so, if NTIA believes that important information was omitted or characterized incorrectly. Any written presentation provided in support of the oral communication or meeting will also be placed on the public record and become part of this docket. Such ex parte communications must be submitted to this docket as provided in the ADDRESSES section above and clearly labeled as an ex parte presentation. Federal entities are not subject to these procedures.

Classification

This rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

This proposed rulemaking, issued under the authority of the Act, will not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act (RFA). If implemented, this rule would establish regulations, as required under the Act, for NTIA and FirstNet regarding the process by which NTIA reviews and approves or disapproves fees FirstNet proposes to assess. The RFA requires federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a federal agency may certify, pursuant to 5 U.S.C. 605(b), that the action will not have a significant economic impact on a substantial number of small entities. The proposed regulations are for the particular and limited purpose of NTIA examining only whether the proposed fees of another federal entity – FirstNet – are, in aggregate and in combination with any FirstNet non-fee-based income, sufficient, but not in excess of, the projected funds that FirstNet needs to recoup the total expenses required to carry out its statutory obligations in a given year. No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this proposed rule. The only potential effect on any external entities, large or small, would likely be positive, as NTIA's proposed rules will assist in ensuring that FirstNet, as required under the Act, will sustain a nationwide public safety broadband network that provides broadband communications to first responders. Because this action, if adopted, would directly affect only federal entities – NTIA and FirstNet – and not any small entities, the Department of Commerce has concluded that the action would not result in a significant economic impact on a substantial

number of small entities. Thus, the Department of Commerce Chief Counsel for Regulations has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required and has not been prepared.

Executive Order 13132

It has been determined that this document does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

List of Subjects in 47 CFR Part 500

FirstNet, FirstNet Fees, Safety, Telecommunications.

Dated: December 10, 2015..

Lawrence E. Strickling,

Assistant Secretary for Communications and Information.

For the reasons set out in the preamble, the National Telecommunications and Information Administration proposes to add 47 CFR Chapter V to read as follows:

Chapter V – THE FIRST RESPONDER NETWORK AUTHORITY (Parts 500-599)

Subchapter A – NATIONAL TELECOMMUNICATIONS AND INFORMATION

ADMINISTRATION REGULATIONS (Parts 500-549)

Part 500—REVIEW AND APPROVAL OF FEES PROPOSED BY THE FIRST RESPONDER NETWORK AUTHORITY (FIRSTNET)

Sec.

500.1 Purpose and scope.

500.2 General definitions.

500.3 NTIA duty to review FirstNet proposed fees.

500.4 Scope of NTIA review of FirstNet proposed fees.

500.5 Methodology of NTIA fee review and approval process.

Authority: 47 U.S.C. 1401

§ 500.1 Purpose and scope.

Sections 500.2 through 500.5 implement 47 U.S.C. 1428(c) as codified pursuant to 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”), which requires the National Telecommunications and Information Administration to annually review fees the First Responder Network Authority (FirstNet) proposes to assess.

§ 500.2 General definitions.

Fee means FirstNet’s receipt of money from:

- (1) A Network User Fee;
- (2) Lease Fees Related To Network Capacity; or
- (3) Lease Fees Related To Network Equipment And Infrastructure, as those terms are

defined under 47 U.S.C. 1428(a).

FirstNet means the First Responder Network Authority.

Fiscal Year means the 12-month accounting period for the federal government, which begins on 1 October of a given year and ends on 30 September of the subsequent year.

Non-fee-based income received by FirstNet means FirstNet’s receipt of money from any source, transaction, entity, or any other means allowed under 47 U.S.C. 1401 et seq., other than those receipts described above in the definition of “*fee*.”

NTIA means the National Telecommunications and Information Administration.

NTIA's fee review and approval process means the process by which NTIA executes its duties under 47 U.S.C. 1428(c).

§ 500.3 NTIA's duty to review FirstNet proposed fees.

As required under 47 U.S.C. 1428(c), NTIA shall exclusively review fees, which must be proposed by FirstNet in writing, through NTIA's review and approval process conducted on an annual basis.

§ 500.4 Scope of NTIA review of FirstNet proposed fees.

NTIA shall approve FirstNet proposed fees only if such fees, when combined with any non-fee-based income projected to be received by FirstNet, are sufficient, but do not exceed the amount necessary, to recoup FirstNet's total expenses in carrying out its duties and responsibilities under 47 U.S.C. 1401 et seq. for the fiscal year involved.

§ 500.5 Methodology of NTIA fee review and approval process.

(a) *Fee review approach.* To execute NTIA's fee review and approval process, NTIA shall utilize FirstNet's standard financial documentation, which may include but is not limited to:

- (1) FirstNet's budget documents produced in the normal course of its business;
- (2) FirstNet's financial statements produced in the normal course of its business;
- (3) FirstNet's annual budget reports submitted as part of the President's Budget; and
- (4) FirstNet's annual report to Congress.

(b) *Deference to FirstNet on necessary reserves.* In executing NTIA's fee review and approval process, NTIA shall defer to FirstNet with respect to its use and retention of reserve or working capital funds. NTIA shall consider any such designated funds to be a part of FirstNet's total expenses in carrying out its duties and responsibilities under 47 U.S.C. 1401 et seq. for the fiscal year involved.

(c) *Determination of fee review:* NTIA shall make one of the following determinations annually upon review of FirstNet's proposed fees:

(1) FirstNet's proposed fees, in aggregate, when combined with any projected non-fee-based income to be received by FirstNet, meet but do not exceed FirstNet's projected total expenses;

(2) FirstNet's proposed fees, in aggregate, when combined with any projected non-fee-based income to be received by FirstNet, do not meet FirstNet's projected total expenses; or

(3) FirstNet's proposed fees, in aggregate, when combined with any projected non-fee-based income to be received by FirstNet, exceed FirstNet's projected total expenses. Upon making any of these determinations, NTIA will communicate its determination in writing to FirstNet.

(d) *Outcome of determination of fee review:*

(1) Should NTIA make the determination listed in paragraph (c)(1) of this section, FirstNet may assess the proposed fees.

(2) Should NTIA make one of the determinations listed in paragraph (c)(2) or

(3) of this section, NTIA will disapprove FirstNet's proposed fees, and FirstNet may not assess those proposed fees.

- (e) *Revision of Proposed Fees:* Upon a disapproval of FirstNet's proposed fees as described in paragraph (d)(2) of this section, or upon FirstNet's determination that it must revise NTIA-approved fees to ensure compliance with 47 U.S.C. 1428(b), FirstNet shall prepare a revised written submission to NTIA, which shall evaluate any proposed fees therein consistent with the rules in §§ 500.1-500.5.
- (f) *Communication of NTIA fee approval or disapproval.* Approval or disapproval of FirstNet-proposed fees shall be communicated in writing by the Assistant Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce, to the Chair of the FirstNet Board.

Subchapter B – [Reserved]

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