

**Before the
National Telecommunications and Information Administration
Washington, D.C. 20230**

Proposed Scope of NTIA’s Authority) Docket No.151209999-5999-01
Regarding FirstNet Fees) RIN 00660-AA30

**COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

I. INTRODUCTION AND SUMMARY

NTCA–The Rural Broadband Association¹ (“NTCA”) hereby submits comments in the above captioned proceeding,² in which the National Telecommunications and Information Administration (“NTIA”) seeks further comment on interpreting certain provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (“the Act”).³ The Notice seeks comment on the scope of NTIA’s authority to review fees assessed by the First Responder Network Authority (“FirstNet”) pursuant to Section 6208 of the Act.

NTCA herein urges NTIA to take a broad view of its oversight responsibilities consistent with the Act and its overall public safety aims. More specifically, NTIA must ensure that the fee scheme established by Section 6208 of the Act promotes the construction, maintenance, and upgrade of the National Public Safety Broadband Network (“NPSBN”) primarily for the purpose

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service rural local exchange carriers (“RLECs”) and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended.

² National Telecommunications and Information Administration, Proposed Scope of NTIA’s Authority Regarding FirstNet Fees, Docket No. 151209999-5999-01, 80 Fed. Reg. 77592 (rel. Dec. 15, 2015). (“Notice”).

³ Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96, Title VI, 126 Stat. 156, codified at 47 U.S.C. § 1401, *et seq.* (2012).

of serving public safety entities. NTIA’s public policy and statutory obligations require it to review the fees contained in Section 6208(a) to ensure that the entity ultimately chosen through the request for proposal (“RFP”) process to construct and operate the NPSBN (the “Offeror”) does not artificially drive public safety users away from the network and/or place existing commercial providers at a competitive disadvantage. Thus, contrary to NTIA’s assertion, a “reasonableness” review of the fees contained in Section 6208 is indeed necessary as matter of policy.

II. NTIA’S PROPOSED SCOPE OF AUTHORITY REGARDING FIRSTNET FEES IS BASED ON AN OVERLY NARROW INTERPRETATION OF THE STATUTE AND WOULD RUN COUNTER TO THE OVERALL GOALS OF THE NATIONWIDE PUBLIC SAFETY BROADBAND NETWORK

NTCA urges NTIA to broaden its proposed scope of review of FirstNet fees assessed pursuant to Section 6208 of the Act. The proposed scope of review discussed in the Notice is far too narrow, as it does not take into the account the Act as a whole and the purpose of the NPSBN, in general.

The Notice states that NTIA proposes to review the fees as listed in Section 6208(a) only to the extent that the total amount of fees collected each year is determinative of FirstNet’s ability to be self-funded;⁴ NTIA will not review the “reasonableness” of the specific fees falling into individual categories (user fees from public safety users, secondary users, or any fees associated with “covered leasing agreements”).⁵ As support for this interpretation of its authority, NTIA points to the title of Section 6208(b) (“Establishment of fee amounts; permanent

⁴ Notice, 80 Fed. Reg 77593.

⁵ *Id.*

self-funding”)⁶ as well as the absence of any other direction as to fee review contained in the Act. NTIA also argues that when Congress intends to include a “reasonableness” standard with respect to rate regulation it always does so explicitly and, at any rate, one is not needed here as a matter of policy.⁷ However, NTIA misreads the statute and fails to account for a critical factor that militates in favor a broader scope of its fee review authority.

To begin with, the reference to the title of Section 6208(b) and the assertion that it is determinative of NTIA’s authority pursuant to Section 6208(c) misses the mark. While courts have stated that “the title of a statute and the heading of a section” are “tools available for the resolution of a doubt” about the meaning of a statute⁸ NTCA is aware of no court ruling holding that the title of one subsection is determinative of the meaning of another. Section 6208(c) is not explicit as to the exact nature of the standard of review – it refers simply to “the fees” and notes that NTIA should review such “fees” on an annual basis – and it makes no reference to Section 6208(b) nor does it refer to that section’s directive to NTIA to ensure that FirstNet is “self-funding.” Indeed, a plain meaning reading of Section 6208(c) could, at the very least, provide the inference that the language “the fees” contained in Section 6208(c) – in the absence of any additional qualifying language or language referring to other subsections within Section 6208 – refers to the individual categories of fees contained in Section 6208(a). In other words, the absence of an explicit standard of review in Section 6208(c) offers no guidance to NTIA as to whether its authority is limited to the concept of “self-funding” or whether its scope is much

⁶ 47 U.S.C. § 1428(b).

⁷ Notice, 80 Fed. Reg. 77595.

⁸ *Trainmen v. Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947).

broader and includes the authority to review the individual categories of fees in 6208(a). In other words, it would appear that Section 6208 is *wholly silent* as to a standard of review at all.

Additional arguments advanced by NTIA in support of its proposed scope of review are unpersuasive. That Congress has included “just and reasonable” language in various other rate regulation sections of the Communications Act⁹ has no bearing on whether Congress intended the fees contained in Section 6208(a) to be subject to the narrow review as proposed by NTIA. It may simply mean that Congress in this instance neglected to include a standard of review at all; it certainly does not point to Section 6208(b) as the standard. Because 6208(c) is in fact silent on a standard of review, NTIA must look elsewhere.

In that regard, what *does* offer NTIA guidance as to how to interpret Section 6208(c) to determine its standard of review is the Act as a whole and whether any particular interpretation of the Act and Section 6208(c) furthers the statutory scheme put in place by Congress. Specifically, that scheme contemplated a NPSBN first and foremost for the benefit of public safety users, with the fees paid by public safety and other entities ultimately flowing back to the construction and maintenance of the network. Only by reviewing and approving the individual fee categories can that be possible. Indeed, the Notice at one point states that “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.*”¹⁰ Yet it strays from this commitment to first responders by failing to consider the fact that the fee structure and the fact that the Offeror will set the fees creates the perverse incentive to attract *fewer* public safety

⁹ Notice, 80 Fed. Reg. 77595.

¹⁰ *Id.*, at 77593. (emphasis added).

entity users. More specifically, the Offeror's ability to utilize excess spectrum for commercial purposes decreases as the number of public safety users increases. This introduces the perverse incentive to artificially set public entity user fees out of the reach of public safety entities. Such a result would run entirely counter to the very purpose of the Act and ignores the statutory scheme as a whole. The Act's overall goal is to promote the ultimate construction of the NPSBN primarily for the use of first responders. Yet, the incentives that exist above – if not eliminated or managed through a proper oversight process – could swallow up the very purposes of the Act. Under the proposed scope of review contained in the notice, NTIA would be powerless to remedy such a result. Thus, contrary to NTIA's assertion, a reasonableness review of the fees contained in Section 6208(a) is indeed necessary as matter of policy.

Ultimately, the fee scheme as established by Section 6208 must promote the use of the NPSBN first and foremost and not the creation of a network that enables the Offeror to place other providers at a competitive disadvantage. To be sure, Congress did intend that excess capacity be used for commercial purposes, yet the secondary user fees and fees paid by entities entering into covered leasing agreements were meant to feed into the construction and maintenance of the NPSBN, not to allow the commercial use of the network to engulf the public safety use of the network. Yet, NTIA's proposed standard of review would do just that by failing to counter the perverse incentive to drive public safety users elsewhere in the effort to leverage excess capacity.

Further, it should also be noted that the Offeror has a clear self-interest in setting the covered leasing agreement fees at a low rate, perhaps below market value – and disregarding these low fees, FirstNet may still be inclined to accept the proposal based upon its accompanying terms, such as its coverage objectives, speed of deployment, and the use of commercial network

facilities. It logically follows that if the Offeror was indeed able to access FirstNet's spectrum at an unreasonably low rate, the Offeror likely would then be able to offer a commercial wireless service at a comparably low rate – thereby unfairly skewing the commercial marketplace and placing existing service providers at a competitive disadvantage. Moreover, if the Offeror was allowed to set the covered leasing agreement fees at an unreasonably low threshold, FirstNet would miss out on the significant financial revenue source. Given the scope of FirstNet's mission and the limited \$6.5 Billion network construction budget allocated by Congress, it is vitally important that FirstNet assess and collect the most revenue that it can from its covered leasing agreement(s) and, moreover, all categories of its fees. In the end, public safety users and the consumers that will benefit from public safety entities' use of the NPSBN, as well existing commercial entities, will be shortchanged by NTIA's overly narrow view of its important oversight responsibilities. NTIA must hold FirstNet and its Offeror(s) accountable.

III. CONCLUSION

For the reasons discussed above, NTIA should reconsider its overly narrow proposed scope of review and adopt a reasonableness standard of review, assessing and evaluating each category of individual fees contained in Section 6208 of the Act.

Respectfully submitted



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