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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

First Responder Network Authority

Further Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012

Docket Number: 140821696-5400-03

RIN: 0660-XC012

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

ACTION: Notice and request for comments.

SUMMARY: The First Responder Network Authority (“FirstNet”) publishes this *Third Notice* to request public comment on certain proposed interpretations of its enabling legislation that will inform, among other things, consultation, forthcoming requests for proposals, interpretive rules, and network policies. This *Third Notice* responds to comments and further clarifies proposed interpretations related to the definition and scope of the term “public safety entity” as used in FirstNet’s enabling legislation and as discussed in a previous FirstNet *Notice* published on September 24, 2014. With the benefit of the comments received from this *Third Notice*, FirstNet

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may proceed to implement these or other interpretations with or without further administrative procedure.

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 *Third Notice*. Written comments may be submitted electronically through www.regulations.gov or by mail (to the address listed below). Comments received related to this *Notice* 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: 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.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

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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”).¹

As detailed in our *Notice* entitled “Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012” (79 FR 57058, September 24, 2014) (herein “the *First Notice*”),² we preliminary concluded that key issues relating to the responsibilities and opportunities of FirstNet, other federal agencies, States and territories, and state, federal local, and tribal public safety entities, among other stakeholders, turn on interpretation of the Act’s terms and provisions.

More specifically, we analyzed the complex definition of the term “public safety entity” under the Act.³ The primary ramification of falling within this definition is that a public safety entity is served by FirstNet directly, rather than as a commercial customer of a secondary user of FirstNet’s spectrum. In particular, under our preliminary interpretations of network elements in the *First Notice*, public safety entities would be served by the FirstNet core network, through

1 47 U.S.C. § 1426(b).

2 All responses to the *First Notice* are publically available at www.regulations.gov.

3 79 Fed. Reg. 57060 (September 24, 2014).

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either a FirstNet radio access network (“RAN”) or the RAN of a State that has chosen to assume responsibility for RAN buildout and operation.⁴

Generally speaking, the Act defines public safety entities by the types of services they provide (i.e., whether they provide public safety services).⁵ Those public safety services are further defined by, among other things, the nature of the services (such as the protection of life, health or property), but also the types of specific entities providing the services (such as emergency response providers).⁶ The end result is a complex, multi-layered definition of public safety entity.

Our analysis in the *First Notice* included the virtually self-evident preliminary conclusion that the definition of public safety entity includes traditional first responders – police, fire, and EMS.⁷ No commenter disagreed with this preliminary conclusion. The Act’s definition of public safety entity, however, is expressly not limited to such traditional first responders. Thus, in the *First Notice*, we also analyzed the definition with regard to which entities beyond traditional first responders would qualify as public safety entities.⁸

The Act’s public safety entity definition raises three primary interpretive questions regarding non-traditional first responders:

4 79 Fed. Reg. at 57059.

5 *See* 47 U.S.C. § 1401(26).

6 *See id.* § 1401(27).

7 79 Fed. Reg. 57061 (September 24, 2014).

8 79 Fed. Reg. at 57060-2.

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1. Whether an “entity” should be defined as a group or authority of a certain minimum size or nature (such as an entire government agency or department) or can an “entity” include a sub-group or an individual;
2. Whether and to what extent an “entity” that provides public safety services some, but not all the time, can qualify as a public safety entity; and
3. Whether and to what extent an “entity” that provides services close or related to, but not identical to traditional public safety services can qualify as a public safety entity.

These questions are not entirely severable from each other given the structure of the public safety entity definition in the Act.

In general, our preliminary interpretations in the *First Notice* permitted a wide variety of entities to qualify as public safety entities.⁹ Although our interpretations were met with strong support by the majority of respondents,¹⁰ some comments reflected a concern that we had expanded beyond the appropriate interpretation of the Act to include entities – such as utilities –

⁹ See 79 Fed. Reg. at 57060-2.

¹⁰ We note FirstNet’s preliminary interpretation that it has statutory discretion to consider a broad range of users including those that offer public safety services that satisfy the Communication Act or Homeland Security Act was strongly supported in responses to the *First Notice*. See e.g., National Public Safety Telecommunications Council (“NPSTC”) Comments at 6 available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0026>; see also e.g., National Association of State Chief Information Officers (“NASCIO”) Comments at 1 available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0066>; see also e.g., Comments of the State of Florida at 5 available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0013>; see also e.g., Comments of the State of California at 2 available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0037>.

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that should not be given direct access to the network as public safety entities.¹¹ While we continue to preliminarily conclude that the Act grants FirstNet discretion to consider a broad range of users consistent with FirstNet’s mission, given the complexity of the Act’s public safety entity definition and its importance to the functioning of the network and FirstNet’s financial sustainability under the Act, we, in this *Third Notice*, propose a refined preliminary interpretation and seek additional comments regarding the definition.¹²

II. Statutory Definition of Public Safety Entity

A “public safety entity” is defined in Section 6001(26) of the Act as an “entity that provides public safety services.”¹³ Further, under the Act, the term “public safety services”:

(A) ***has the meaning given the term in section 337(f)*** [of the Communications Act of 1934¹⁴ (“Communications Act”)]; ***and*** (B) ***includes services provided by emergency***

11 See AT&T Service, Inc. (“AT&T”), Comments, at 20, *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0034>; See also Association of Public Safety Communications Officials International (“APCO”) Comments, at 4-6 *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0029>.

12 We also note the definition of public safety entity is a critical component of both (1) the acquisition planning process as it provides key inputs into understanding the resources that will be derived from and available to qualifying public safety entities and (2) the successful implementation of our mission that, among other things, will require the promotion and adoption of the NPSBN by public safety entities.

13 47 U.S.C. § 1401(26).

14 *Id.* § 337(f).

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response providers, as that term is defined in [Section 2 of the Homeland Security Act of 2002¹⁵ (“HSA”)].¹⁶

Section 337(f) of the Communications Act defines “public safety services” to mean services:

(A) the sole or principal purpose of which is to protect the safety of life, health or property;

(B) that are provided by (i) State or local government entities, or (ii) by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.¹⁷

Under the HSA, “emergency response providers” include “Federal, State, and local governmental and nongovernmental emergency public safety, fire, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies, and authorities.”¹⁸

III. Legal Scope Versus Discretion in Implementing the Definition of Public Safety Entity

¹⁵ 6 U.S.C. § 101(6).

¹⁶ 47 U.S.C. § 1401(27) (emphasis added).

¹⁷ *Id.* § 337(f)(1).

¹⁸ 6 U.S.C. § 101(6).

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In the *First Notice*, we noted that, if we determine it is reasonable and appropriate to do so in support of our mission, we may as a policy matter decide to narrow the scope of users we actually serve relative to those we can legally serve under the definition of public safety entity.¹⁹ Some commenters were troubled by this concept, indicating concern that FirstNet might elevate policy goals above the text and purpose of the Act and that FirstNet must implement the Act as written.²⁰

We believe, however, that FirstNet’s discretion as to which entities to allow onto the network is contemplated by and important under the framework of the Act. For example, given the finite nature of spectrum resources, the exercise of such discretion is necessary to ensure the proper functioning of the network, in addition to FirstNet’s economic self-sustainability for the benefit of public safety. Moreover, such discretion is necessary to give meaning to, among other things, FirstNet’s obligation to consult with regional, State, tribal, and local jurisdictions regarding the “assignment of priority *and selection of* entities seeking access to or use of the [network].”²¹ If FirstNet did not possess this discretion, the stated consultation would be meaningless as FirstNet would simply be required to provide access to and use of the network to

19 79 Fed. Reg. 57060 (September 24, 2014).

20 See AT&T Comments, at 12, *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0034>.

21 47 U.S.C. § 1426(c)(2)(A)(vi) (emphasis added).

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any entity that met the public safety entity definition regardless of the views of the consulted-with parties.²²

Similarly, given the Act's express consultation obligations with respect to FirstNet's assignment of priority to entities using the network – which could effectively give FirstNet the ability to deprioritize entities even if they qualified under the definition – it would appear to make little sense for Congress to have intended a purely mechanical application of the public safety entity definition.²³ Nor does the wording of the Act appear to suggest that FirstNet's consultation obligations are solely with respect to its legal interpretation of the term public safety entity. For example, FirstNet is required to establish wide-ranging network policies, including regarding the “practices and procedures of the entities operating on and the personnel using” the network.²⁴

Finally, although we preliminarily conclude that FirstNet may have discretion within the bounds of the public safety entity definition, we did not mean to imply in the *First Notice* any intent or legal authority to expand beyond the definition of public safety entity. We merely

22 We note that, as is discussed *infra*, the Communications Act prong of the public safety entity definition does provide for governmental entities to designate nongovernmental entities as public safety entities under certain criteria. The consultation obligation of 47 U.S.C. § 1426(c)(2)(A)(vi) is not, however, limited to consultations on the selection of “nongovernmental” entities, but rather entities in general. Thus, we believe the consultation obligation must apply to all entities and that FirstNet must therefore have discretion with regard to all such entities.

23 See 47 U.S.C. § 1426(b)(1); see also *id.* § 1426(c)(2) (describing FirstNet's consultation requirements under the Act).

24 *Id.* § 1426(c)(1)(E)(ii).

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stated that FirstNet may “decide to *narrow* the scope of users it actually serves relative to those it can legally serve.”²⁵ We seek comments on the above interpretations.

IV. Public Safety Entity Definition Overview

The public safety entity definition is dependent on the definition of public safety services, which is in turn dependent on two separate definitions from statutes outside the Act. Before trying to draw precise boundaries around any of these terms it is helpful to look at the overall definitional structure, particularly how the two extra-Act definitions interact within the definition of public safety services.

The term “public safety services”:

(A) *has the meaning* given the term in section 337(f); *and*

(B) *includes services provided by emergency response providers*, as that term is defined in the HSA.²⁶

In the *First Notice*, we ultimately interpreted the language of the Act as creating an either-or test. That is, the two prongs (“(A)” and “(B)” above) of the definition create a combined list of services, and a service that appears on list “(B)” is a “public safety service” independent of those on list “(A).”²⁷ We continue to believe that the “and (B) includes” language in the Act necessitates this result. Regardless of whether the word between the two prongs is “and” or “or,”

²⁵ 79 Fed. Reg. 57060 (September 24, 2014) (emphasis added).

²⁶ 47 U.S.C. § 1401(27) (emphasis added).

²⁷ 79 Fed. Reg. 57060 (September 24, 2014).

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the preamble combined with the second prong reads: “The term ‘public safety services’ . . . includes services provided by emergency response providers”

Some commenters objected to this formulation, essentially arguing that the addition of the second prong “(B)” was merely to clarify the scope of prong “(A)” and did not expand it.²⁸ Other commenters thought that, although prong “(B)” did expand “(A)”, those services included in prong “(B)” were of a lesser, more supplementary nature than those in “(A)” as a result of the “has the meaning” language in “(A)” in contrast to the “includes” language in “(B)”.²⁹

We continue to preliminarily conclude, however, that the more natural reading of the definition is as we concluded in the *First Notice*. Among other reasons, there are services expressly included in the second prong of the definition that are not included in the first. The HSA definition of public safety services (prong “(B)”) includes “Federal . . . personnel, agencies, and authorities.”³⁰ The Section 337(f) definition of public safety services (prong “(A)”) includes only “State or local” governmental entities.³¹ Thus, the HSA definition adds an element – Federal personnel, agencies, and authorities – that is not contained within the Section 337(f) definition.

28 See AT&T Comments, at 16-7, *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0034>.

29 See APCO Comments, at 6, *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0029>.

30 6 U.S.C. § 101(6).

31 47 U.S.C. § 337(f)(1).

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There are other similar additions to the Section 337(f) definition provided by the HSA prong, such as “nongovernmental” entities that do not require separate authorization and hospital emergency facilities, which would not satisfy the Section 337(f) requirement that public safety services “are not made commercially available to the public by the provider.”³² In addition, the “sole and principle purpose” requirement of Section 337(f), as discussed below, is not included in the HSA prong. Accordingly, if Congress were merely clarifying the definition in the Section 337(f) prong, it would not have included an HSA prong that clearly expanded the definition beyond the boundary of the Section 337(f) prong.

With regard to supplementing the Section 337(f) definition, Congress did not qualitatively characterize services in the second prong other than to say that the definition “includes” services in that prong, and thus we cannot find justification for treating them differently or as lesser-included services.³³ That Congress used the phrase “has the meaning” with regard to Section 337(f) and not with the HSA prong does not sufficiently justify or guide us to such disparate treatment of the services under the HSA prong.

As a result, we preliminarily conclude that the two prongs form a combined list, as discussed above, and seek further comments on this preliminary conclusion.

V. Requirement to Provide Public Safety Services

³² See 6 U.S.C. § 101(6); 47 U.S.C. § 337(f)(1).

³³ 47 U.S.C. § 1401(27).

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A public safety entity is defined in Section 6001(26) of the Act as an “entity that provides public safety services.”³⁴ In the *First Notice*, we preliminarily concluded that the Act does not include any express language requiring a minimum amount or frequency of providing such services, but merely requires that an entity provide such services.³⁵

An example of where Congress required such a minimum amount of services is contained in the Communications Act prong of the definition of public safety services, where Congress used the phraseology “a governmental entity *whose primary mission* is the provision of such services.”³⁶ If Congress had used this phraseology in the Act – for example, “public safety entity means an entity whose primary mission is the provision of public safety services” – it would have been clear that the provision of a minimum amount of such services were necessary for an entity to qualify.³⁷

This contrast is actually evident entirely within the Communications Act definition of public safety services itself. In describing the entities under Section 337(f) of the Communications Act that must be providing a service for it to constitute a public safety service, Congress uses the phrase “that are provided by . . . State or local government entities.” In describing the entities that are permitted to authorize a nongovernmental entity to provide such services, however, Congress used the phrase “a governmental entity *whose primary mission* is

34 *Id.* § 1401(26).

35 *See* 79 Fed. Reg. 57060 (September 24, 2014).

36 47 U.S.C. § 337(f)(1).

37 It is generally implicit that if an organization’s primary mission is the provision of such services then the organization likely provides a great amount of such services.

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the provision of such services.”³⁸ Thus, Congress used the “primary mission” limitation to impose a higher standard to qualify those entities allowed to authorize nongovernmental entities, but imposed no such standard on the governmental entities that could provide public safety services.³⁹ No such higher standard was used in the Act with regard to public safety entities.

Some commenters, however, advocated that the public safety entity definition should be read more holistically under the Act, rather than treating each portion of the definition – such as each services prong – as a separate interpretation that flowed up to the next stage.⁴⁰ These comments reflect the difficulty in interpreting the public safety entity definition where the entity in question may not provide public safety services all the time or through all its personnel.

For example, in the context of the Communications Act definition of public safety services, we noted in the *First Notice* that the FCC interpreted the provision to qualify services provided by governmental entities, such as city planning or transportation departments, so long as the services being provided had as their sole or principal purpose the protection of life, safety,

38 47 U.S.C. § 337(f)(1) (emphasis added).

39 One commenter appears to mistakenly cite the “primary mission” limitation as applying to the nongovernmental organizations, rather than the governmental entities that are permitted to authorize nongovernmental organizations as described in 47 U.S.C. § 337(f)(1). See AT&T Comments, at 16, *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0034>.

40 We note that this does not have to be the case. For example, one entity could provide a service part time that another provides full time. In other words, even if Section 337(f) of the Communications Act imposed a primary mission requirement on the entity providing a service (which it does not), it is merely defining a service, and some other entity may only provide such a service part time.

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or property.⁴¹ That is, under the FCC’s interpretation of Section 337(f), with which we agree, an *entity* that does not always or even most of the time provide services whose sole or principal purpose is the protection of life, safety, or property, may nevertheless provide qualifying “public safety *services*” when such an entity provides services that meet the sole or principal purpose test.⁴² However, unlike the context of the Communications Act definition of public safety services – where services can vary day-to-day or employee-to-employee – FirstNet is faced with the question under the Act as to whether an entity ever qualifies as a public safety entity by virtue of providing a public safety service *in only some instances*. Further, FirstNet must then address the question of whether such entity should always have primary access to or use of the FirstNet network as a result. This question applies regardless of whether the entity in question is an organization or an individual.

In the context of an organization, FirstNet must also determine whether the organization qualifies as a public safety entity *as a whole* where in some or all instances the provision of public safety services is by only some employees or members of the organization. In other

41 See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Fourth Report and Order, 26 FCC Rcd. 10799 (F.C.C. July 21, 2011) (*Fourth Report and Order*).

42 79 Fed. Reg. 57061 (September 24, 2014) (stating “FirstNet gives deference to the conclusions reached by the Commission in its interpretation of Section 337(f)(1) and as independent entity owes no such deference) (emphasis added). In response to this preliminary interpretation, one commenter stated that “FirstNet’s reliance on an FCC Order interpreting Section 337 is misplaced, and FirstNet certainly need not afford the FCC ‘deference’ in its interpretation. As an ‘independent authority,’ FirstNet owes no such deference.” See APCO Comments, at 5, available at <http://www.regulations.gov/#/documentDetail;D=NTIA-2014-0001-0029>. However, as an independent authority, we simply agree with FCC interpretation. The FCC interpretation predated the Act and thus Congress is assumed to have been aware of the interpretation and could have limited the Act accordingly if it did not agree with the FCC interpretation.

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words, FirstNet must determine whether public safety entity status should apply to all employees or members of an organization if only some such employees or members provide public safety services.

In the *First Notice*, we preliminarily concluded that as long as an entity provided a non-*de minimis* amount of public safety services, even if it provides other services, it will qualify as a public safety entity under the Act.⁴³ We also preliminarily concluded that this interpretation resulted in the entity as a whole qualifying as a public safety entity even if only some employees of the entity provided such services.⁴⁴ After review of the responses to the *First Notice*, we clarify below our preliminary interpretation of the Act in this regard, and seek further comments.

1. Whether an Individual or Subgroup of an Organization Ever Qualifies as a Public Safety Entity

As an initial matter, we restate our preliminary conclusion from the *First Notice* here, for the reasons stated therein and below, that individuals such as volunteer firemen or employees of an organization (in addition to or rather than an organization as a whole) may qualify as public safety entities if they provide or are reasonably likely to provide public safety services. This preliminary interpretation applies whether the individual performs services that qualify under the Section 337(f) or the HSA prong of the definition of public safety services.

Under the HSA prong of the definition, “personnel” (as contrasted with “agencies . . . and authorities”) are expressly included as service providers, and thus we believe it is reasonable to

43 79 Fed. Reg. 57060 (September 24, 2014).

44 79 Fed. Reg. at 57062.

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conclude that an “entity” under the Act performing such services should be interpreted to include individual “personnel.”⁴⁵ Although an organization could theoretically perform the same services as individual personnel, we believe it is reasonable under the structure and purposes of the Act to include individual personnel such as volunteer firefighters within the term “entity.” This interpretation is also supported by the Act’s inclusion, via the HSA prong, of “hospital emergency facilities” but not hospitals in their entirety as emergency response providers. Congress contemplated that a group of employees smaller than a larger organization can provide public safety services, and thus in the context of the Act constitute public safety entities.

The Section 337(f) prong of the public safety services definition speaks only in terms of “State or local government entities” or “non-governmental organizations.” This raises the question as to whether an individual or group smaller than the whole “entity” or “organization” can provide qualifying services and thus constitute public safety entities under the Act via the Section 337(f) prong. In Section 337(f), however, Congress included services provided by entities or organizations whose mission was not “primar[ily]” the provision of services the sole or principle purposes of which is the protection of life, health, or property. That is, these entities or organizations by definition may sometimes have other primary missions, but occasionally as a whole or through only some employees provide qualifying services. As a result, we preliminarily conclude that under the Section 337(f) prong a public safety entity under the Act can include at least a group of employees smaller than a larger organization.⁴⁶ We seek

⁴⁵ 6 U.S.C. § 101(13) (stating the term means officers and employees).

⁴⁶ See Fourth Report and Order (discussing parts of organizations using services under the Section 337(f) prong).

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comments on the above interpretations and their collective effect on the definition of public safety entity.

2. Overall Framework for Determining Public Safety Entities

As an overall framework for qualifying public safety entities, we first preliminarily conclude that where an organization *as a whole* is charged with providing, and does provide public safety services, the organization qualifies as a public safety entity and all members of the organization can (following consultation and within the discretion discussed in Part III of this *Third Notice*) be given access to or use of the network under the Act. This preliminary conclusion is fairly clear under the Act and would apply to traditional first responder organizations, among others.

Next, with respect to organizations that do not meet the above criteria, we preliminarily conclude that those *members* of such an organization that provide or are reasonably likely to provide public safety services for a non-*de minimis* amount of time, qualify as public safety entities under the Act and can (following consultation and within the discretion discussed in Part III of this *Third Notice*) be given access to or use of the network under the Act. For purposes of this interpretation, we preliminarily conclude that those members of such an organization that materially contribute to or help enable or support the provision of such public safety services – including, for example, dispatchers, technicians, and supervisors – by other members of the organization would also qualify as public safety entities. Interoperable communications with these enabling or support personnel could be critically important to the provision of public safety

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services by the primary providers in the organization, and thus we believe it is reasonable to include the enabling and support personnel within the definition.

We note that our preliminary interpretations are by necessity made based on the specific language, context and purpose of the Act. We must therefore interpret the definition of public safety entity by reference to the aggregation of services defined both by the Section 337 and HSA prongs of the public safety services definition under the Act, rather than just either prong on a stand-alone basis, as may be required by other agencies in different contexts. In this regard, our interpretation as set forth above would apply regardless of whether the services provided qualified as public safety services under the Section 337(f) prong or the HSA prong of the definition in the Act. For example, under the Section 337(f) prong, those field and operations personnel of a governmental or authorized nongovernmental entity that provide emergency services the sole or principal purpose of which is to protect the safety of life, health or property would qualify as public safety entities, along with any necessary dispatchers etc.⁴⁷ Additionally, those same field and operations personnel would also qualify as a public safety entity under the HSA prong because the nature of services being provided in response to such an incident would typically be the type of services performed directly by an emergency response provider or, at minimum, related personnel supporting such a response provider. For example, utility personnel removing dangerous downed electrical wires to permit firefighters to access victims in a car would be deemed public safety entities.

⁴⁷ For a discussion of utilities as public safety entities under the Act, see Part VI *infra*.

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Under this refined preliminary interpretation, however, where an organization *as a whole*, such as a private utility, is not charged with providing public safety services, the entire organization would not necessarily qualify as a public safety entity. The extent to which the individuals or subgroups within the organization providing public safety services would qualify, or whether such individuals or subgroups are always permitted on the network, would be determined within FirstNet policies based on, among other factors, the advantages to the public and public safety of having such individuals always supported by and accessible on the network, the impact on FirstNet's financial sustainability as required by the Act and our consultations under the Act with the FirstNet Public Safety Advisory Committee, local first responders, and local jurisdictions.⁴⁸

We recognize that implementation of the above framework may require certifications or other evidence of eligibility of certain customers or groups within organizations. Customer eligibility requirements for specialized services, including communications services, exist and are managed today in the industry. Nevertheless, in addition to comments regarding the above refined preliminary interpretation itself, we seek comments on the appropriate mechanisms for implementing this interpretation assuming it is ultimately adopted.

48 Some commenters expressed concern that the spectrum and network capacity allocated to public safety under the Act could be diluted in some way because of the inclusion of non-traditional first responders. *See e.g.*, FirstNet Colorado Response to the Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012, at 9, *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0062>; State of Florida Comments, at 9, *available at* <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0013>. However, we believe the priority and preemption features of the network will ensure that traditional first responders will always have primary use of the network.

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VI. Non-Traditional First Responders as Public Safety Entities

In the *First Notice*, we preliminarily concluded that many types of non-traditional first responders could qualify as public safety entities because they provided public safety services.⁴⁹ For example, we generally agreed with the examples of public safety services cited by the FCC in its interpretation of Section 337(f) and thus the entities providing those services would, under our preliminary interpretation, qualify as public safety entities.⁵⁰ These examples included a range of services, provided by governmental entities, “the sole or principal purpose of which is to protect the safety of life, health or property,” including:

1. Entities supporting airport operations when “ensuring the routine safety of airline passengers, crews, and airport personnel and property in a complex air transportation environment.”⁵¹
2. Transportation departments in the design and maintenance of roadways, the installation and maintenance of traffic signals and signs, and other activities that affect the safety of motorists and passengers.⁵²

49 We recognize that separate priority and preemption parameters must be established even among the various entities, including traditional and non-traditional entities, which may qualify as a public safety entity under the Act and be allowed to use the NPSBN. We intend, as discussed in the *First Notice*, in the future and following appropriate consultations, to fully address the priority and preemptive use of and access to the NPSBN among the various user groups.

50 79 Fed. Reg. 57061 (2014).

51 Fourth Order and Report at 10808.

52 *Id.* at 10808.

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3. Entities protecting the safety of animals, homes, and city infrastructure, particularly in crisis situations.⁵³

The FCC's interpretation of Section 337(f) predated passage of the Act, and thus Congress is presumed to have knowledge of the interpretation and could have taken steps to modify the definition in the Act in light of the FCC's interpretation, but did not.⁵⁴ In the *First Notice*, we sought comment on other entities providing services that would qualify as public safety services under the Section 337(f) prong, and received examples such as:

1. Public Transit Agencies and Departments
2. Public Work Departments
3. Public electric and water utilities
4. Health Departments
5. Parks and Recreation Departments⁵⁵

⁵³ *Id.* at 10809.

⁵⁴ See *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-581 (U.S. 1978) (explaining that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920).

⁵⁵ See, e.g., Illinois Public Safety Broadband Working Group Comments, at 6-9, available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0004>; see also State of Idaho Comments, at 1-2, available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0063>; see also Vermont State Wireless Commission Comments, at 1, available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0061>.

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Because both the Section 337(f) and HSA prong of the public safety services definition include non-governmental entities in addition to governmental entities, we also sought comment on such non-governmental entities that would qualify and received similar examples such as:

1. Transportation Authorities
2. Electric and Water Utilities
3. Non-governmental and private, and non-profit and for-profit organizations (e.g., health care institutions, ambulance companies, independent firefighting corporations)
4. Non-government disaster relief and aid organizations (e.g., American Red Cross, Salvation Army)
5. Education Institutions⁵⁶

In all cases, however, as discussed above, FirstNet is obligated to consult with regional, State, tribal, and local jurisdictions regarding the “selection of entities seeking access to or use of the [network].”⁵⁷ Although the *First Notice* (and this *Third Notice*) contributes to such consultations, FirstNet intends to conduct additional, direct consultations with State points of contact (“SPOCs”) regarding the selection of entities permitted on the network. FirstNet can

⁵⁶ See, e.g., State of Washington Interoperability Executive Committee Comments, at 1-2, available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0055>; see also State of Maine ConnectME Authority Comments, at 2, available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0017>; see also e.g., State of Oregon Comments, at 2-3, available at <http://www.regulations.gov/#!documentDetail;D=NTIA-2014-0001-0065>.

⁵⁷ 47 U.S.C. § 1426(c)(2)(A)(vi).

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then exercise the discretion discussed in Part III of this *Notice* in light of such consultations within the outer legal boundaries FirstNet draws around the definition of public safety entity.

We preliminarily conclude, however, that subject to such consultation and in accordance with our above analyses in this *Third Notice*, the personnel or subgroups within a non-governmental organization qualify as public safety entities under the Act to the extent such personnel or subgroups provide public safety services as defined under either the Section 337(f) prong or the HSA prong of the public safety services definition. This is merely stating the statutory framework under the Act with the addition of our conclusions above regarding whether personnel or subgroups can qualify as “entities” under the Act.

Regarding the Section 337(f) prong, personnel, or subgroups of non-governmental organizations, if authorized under the terms of that Section, provide qualifying public safety services under the Act if they provide services “the sole or principal purpose of which is to protect the safety of life, health or property” and those services are not “made commercially available to the public.” We preliminarily conclude, for example, that private utility workers that remove a live electrical wire touching a car at an accident scene is performing a service the principal purpose of which is to protect the safety of life.⁵⁸ We also preliminarily conclude that such a service is not one that is typically “commercially available,” albeit incident to or as a result of a commercially available service of providing electricity. In the context of the Act, then, these services would qualify as public safety services, and therefor the workers providing

⁵⁸ We note that most utilities are non-governmental entities. As such, we anticipate relying heavily on the authorization of personnel from such entities by “primary mission” first responders under the Section 337(f) prong in determining which personnel should gain access to the network as public safety entities.

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such services would qualify as public safety entities as defined in the Act.⁵⁹ We seek comments on these preliminary conclusions.

As mentioned, however, under the Section 337(f) prong, such a private entity would have to be “authorized by a governmental entity whose primary mission is the provision of such services” to qualify as providing public safety services. We preliminarily conclude that in our State and local consultations under the Act regarding the “entities seeking access to or use of the [network],” traditional governmental fire, police, and EMS entities, as examples, may authorize non-governmental entity personnel and subgroups, and thus if such personnel or subgroups also meet the criteria described in Part V. of this *Third Notice*, they would be public safety entities under the Act.⁶⁰ We seek comments on this preliminary conclusion and the appropriate method and duration of such authorizations.

Under the HSA prong, no such authorizations of non-governmental entities are necessary. Thus, if personnel or subgroups of non-governmental organizations qualify under the HSA prong as “emergency response . . . personnel” or personnel “related” to such emergency response

59 We note that the FCC has not independently determined whether utilities provide “public safety services” under Section 337(f) for purposes of eligibility for direct licensing of spectrum in the 700 MHz public safety band, including the portion of that spectrum designated for public safety narrowband use. FirstNet’s interpretation of Section 337(f) and its determination with regard to “public safety entities” eligible as end users of the network, including utilities, is based on the specific requirements of the Act in their totality and is not intended to modify any interpretation or suggest any future treatment of Section 337(f) by the FCC.

60 *See also* First Report and Order and Third Notice of Proposed Rulemaking, 14 FCC Rcd. 152,187-188.

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personnel, they would also qualify as public safety entities under the Act. We thus preliminarily conclude, for example, that a private utility worker that removes a live electrical wire touching a car at an accident scene is performing a service typically provided by an emergency response provider, or , at a minimum, by related personnel supporting such a response provider. We also preliminarily conclude that, subject to further consultations mentioned above regarding entities seeking access to the network, non-governmental personnel involved in or supporting such emergency response activities, such as the utility worker described above removing an electrical wire, can legally qualify under the Act as public safety entities. We seek comments on these preliminary conclusions.

VII. EX PARTE COMMUNICATIONS

Any non-public oral presentation to FirstNet regarding the substance of this *Second Notice* 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 FirstNet summarizing the substance of the communication. FirstNet reserves the right to supplement the memorandum with additional information as necessary, or to request that the party making the filing do so, if FirstNet 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

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and clearly labeled as an ex parte presentation. Federal entities are not subject to these procedures.

Dated: _____.

Jason Karp,
Acting Chief Counsel, First Responder Network Authority.

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