

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network)	PS Docket No. 16-269
)	
Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012)	PS Docket No. 12-94
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands)	WT Docket No. 06-150
)	

COMMENTS OF THE TEXAS PUBLIC SAFETY BROADBAND PROGRAM

The Texas Public Safety Broadband Program (hereafter, TXPSBP) submits these comments in response to the Commission’s Report and Order and Notice of Proposed Rulemaking in the above-captioned proceedings (released, August 26, 2016) (hereafter, the “Opt Out NPRM”).¹ The TXPSBP supports the Commission’s efforts to develop procedures for evaluation of opt out states’ alternative plan proposals, and appreciates the opportunity to provide these comments.

1. Timing and Procedure for Opt Out Notification.

The Commission proposes to require that a state electing to opt out of the NPSBN and build its own state RAN must file a notice with the Commission no later than 90 days after receiving electronic notice from FirstNet transmitting FirstNet’s proposed buildout

¹ The Report and Order was published at 81 FR 63714 (September 16, 2016) and the Notice of Proposed Rulemaking was published at 81 FR 64825 (September 21, 2016).

plan and funding level for the State (as required in Section 6302(e)(1)).² The TXPSBP concurs with this proposal. Accordingly, it is appropriate to require that an opt out state should not only make the decision to opt out within the 90-day statutory period, but should also notify the FCC, FirstNet and NTIA of its decision to opt out within the same 90 day period.

The Commission solicits comments on how the notification of a state's decision to opt out should be transmitted to the Commission. While the governor must make the decision for the state under the Spectrum Act, it should not be required that the governor *personally* provide notice to the FCC of the decision. It should be sufficient that the governor causes such notice to be provided to the FCC, with an indication that the decision has been made and the notice has been authorized by the governor. The opt out decision notice should be filed electronically in the public docket (Docket 16-269) so that it is available to the public for review.

2. Completing the RFP Process and Submitting an Alternative Plan

While the Spectrum Act requires an opt out state to “develop and complete” an RFP within 180 days of providing notice of its decision to opt out, the Act does not specify what constitutes completion of an RFP for this purpose. The Commission solicits comment on what should be required to meet this standard, and specifically how far an opt out state should be required to progress in the RFP process within the 180-day period.³ The TXPSBP concurs with FirstNet's *Final Interpretations* on this issue, i.e., that the statutory requirement is satisfied when the state has progressed sufficiently in the RFP process to submit an alternative plan meeting the requirements of the Act. This

² Opt Out NPRM at ¶49.

³ Opt Out NPRM at ¶51.

would include releasing an RFP, receiving responses, and choosing a winning bidder. These steps should be completed by the end of the 180-day period. The alternative plan prepared by the state would be based on the results of the RFP process and would include reference to the winning bidder. Entering a contract with the winning bidder and resolving any protests could take longer than 180 days and accordingly should not be required of the state within the 180-day period.

While the Spectrum Act requires that the RFP process be completed within 180 days and that an alternative state plan must thereafter be submitted to the Commission, the Act does not specify a time period for submission of an alternative plan. The Commission proposes to require that the alternative plan must be submitted within the 180-day period and proposes further that failure by a state to submit an alternative plan within that period would result in discontinuance of the opt out process and forfeiture by the state of the right to opt out.⁴ The TXPSBP concurs that the Commission should, as a policy matter, encourage opt out states to submit alternative plans within the 180-day period. This will help to facilitate proceeding with system deployment in an efficient and timely manner. However, since the 180-day period for submitting the alternative plan is not a *statutory* deadline, the Commission should approve requests from States for temporary waiver of the 180-day deadline upon a showing of sufficient cause, in accordance with the Commission's waiver standard.

3. Elements and Format of the Alternative Plan Submission

The TXPSBP concurs with the Commission's proposal that an alternative plan should, at a minimum:

- (1) address the four general subject areas identified in the Act

⁴ Opt Out NPRM at ¶52.

(construction, maintenance, operation, and improvements of the state RAN), (2) address the two interoperability requirements set forth in Sections 6302(e)(3)(C)(i)(I) and (II) of the Act, and (3) specifically address all of the requirements of the Technical Advisory Board for First Responder Interoperability.⁵

It should not be necessary for the Commission to establish a standardized format for an alternative plan, providing it is clear what elements the Commission requires be included.

An alternative plan should include a discussion of how the alternative plan meets the needs of the State as developed during the consultation process, in comparison to how the FirstNet proposal satisfied or failed to satisfy those needs. As established by Congress in Section 6202(b)(2)(B) of the Spectrum Act, the RAN within a state, “shall be developed, constructed, managed, maintained, and operated taking into account the plans developed in the State, local, and tribal planning and implementation grant program under section 6302(a).” Accordingly, a demonstration of how the alternative plan meets the state’s needs should be a critical part of an alternative plan submission in addressing the four general subject areas identified in the Act, and should be considered as part of the FCC’s evaluation of the alternative plan.

States should be allowed to amend and supplement their alternative plans after initial submission and prior to the Commission’s final decision on the plan. Review of the alternative plan by the Commission should be a cooperative and interactive process conducted in a manner aimed at facilitating development and approval of a plan that will best meet the needs of the state.

4. Time Period for Alternative Plan Review

While the Spectrum Act does not impose a deadline for Commission review of an alternative plan, the Commission proposes a 90-day period for completing review and

⁵ Opt Out NPRM at ¶53.

issuing a decision once a plan is submitted. It will be important to review alternative plans as quickly as possible so that deployment of RAN in opt out states will not be delayed. 90 days for the FCC to complete review seems an aggressive period, however it is an appropriate goal given that at the end of the 90-day period a full year will have passed since the state received the FirstNet proposed plan (90 days for state decision, plus 180 day period for completing RFP process, plus 90 days for Commission review of alternative plan). Moreover, additional time will be required even after the FCC approves an alternative plan before the state can deploy its own RAN, since the state will still have to apply to NTIA for use of the spectrum and funding to construct, and will need to negotiate a spectrum lease with FirstNet. Accordingly, the TXPSBP supports the FCC's desire to have a prompt and efficient review process.

The TXPSBP is concerned that a 90-day "shot clock" may not afford sufficient time to complete review in all cases. Rather than making the 90-day period a hard and fast requirement, there should be an opportunity for extension by agreement of the state, or for a temporary stopping of the shot clock, as may be needed for the FCC to complete review or to address issues that may arise during plan review. The Commission's initial shot clock period should be an interactive process that allows for free communication between the state and the Commission, and allows a state to amend and supplement its initial plan submission as needed to resolve any deficiencies that may be identified by the FCC, prior to FCC decision. Accordingly, there should be an opportunity to temporarily extend the review period or otherwise stop the shot clock to facilitate additional input from the state as may be needed to resolve such issues prior to issuance by the FCC of a decision rejecting the plan.

In the event the State is unable to resolve deficiencies within the initial shot clock period, the FCC, rather than issuing a decision rejecting a state’s alternative plan, should provide a deficiency letter to the state clearly identifying any remaining deficiencies in the plan and indicating what the FCC would require of the state in amending the plan in order to secure FCC approval. The initial shot clock period should apply to the FCC’s initial review and issuance of approval or a deficiency letter. Once the FCC issues a deficiency letter to a state, the state should have an additional period of time, e.g., 30 days, to remedy the deficiencies and to submit a revised plan. A deficiency letter would not constitute a final decision disapproving a state plan, and accordingly this process would not be prohibited by the Commission’s concern that it may be statutorily barred from considering an amended or alternative plan after it has issued a decision *disapproving* a state plan.⁶

5. Requirements of the Interoperability Showing

The Commission proposes that,

states seeking to opt out should be required to demonstrate to the Commission in their alternative plans that their state RANs will adhere to FirstNet’s network policies relating to interoperability, to the extent that FirstNet has published such policies at the time that states submit their plans to the Commission.⁷

The Commission observes further that FirstNet has announced it will develop an “interoperability compliance matrix” once it has chosen its commercial partner and will make the matrix available to states prior to providing the FirstNet state plans.

The Commission’s proposal is problematic from an administrative procedure standpoint. The FCC is proposing to require that opt out states “demonstrate to the

⁶ Opt Out NPRM at ¶59.

⁷ Opt Out NPRM at ¶63.

Commission ... that their state RANs will adhere to FirstNet’s network policies relating to interoperability,” but, as the FCC acknowledges, FirstNet’s network policies on interoperability have not yet been published or announced. Without knowing the substance of FirstNet’s network policies on interoperability, States cannot comment on whether those policies are acceptable and/or whether they should be adopted into the FCC’s rules as a requirement to be met by opt out states.

Accordingly, the Commission’s proposal does not meet the requirements of the Administrative Procedure Act. Section 553 (b) of the APA requires an administrative agency to publish the *substance* of a proposed rule and provide opportunity to comment thereon, prior to adopting a rule. Simply stating that the FCC will require something that FirstNet publishes in the future does not reveal the *substance* of those requirements, since it does not—and cannot--include the substance of the FirstNet future proposal. In essence, the FCC is proposing to relinquish FCC rulemaking authority to FirstNet, a Commission-regulated licensee, and to adopt into the FCC’s rules as a binding requirement whatever FirstNet might publish in the future regarding interoperability. This would violate the APA. Any rule promulgated in such a manner would be arbitrary and capricious.

Accordingly, the TXPSBP encourages the Commission to provide further opportunity to comment on this issue through a further NPRM once FirstNet has completed and provided its network policies relating to interoperability.

6. Review of the Alternative RAN Proposal

The Commission proposes that its evaluation of the opt out states’ alternative

proposals be limited to the RAN.⁸ The Commission observes that the RAN, as defined in the statute, consists of “all the cell site equipment, antennas, and backhaul equipment, based on commercial standards, that are required to enable wireless communications with devices using the public safety broadband spectrum.”⁹ In defining the RAN in Section 6202(b)(2), Congress not only enumerated the elements of the RAN that the FCC recites in the NPRM (6202(b)(2)(A)), but also clearly articulated the requirement that the RAN “shall be developed, constructed, managed, maintained, and operated taking into account the plans developed in the State, local, and tribal planning and implementation grant program under 6302(a).” This is an essential element of what defines an acceptable RAN—i.e., the RAN must satisfy the plans developed during the State consultation process.

Accordingly, part of the Commission’s evaluation should include a review of how the RAN deployment meets the requirements of Section 6201(b)(2)(B), i.e., how well it takes into account the State’s requirements as revealed through the SLIGP process. The issue of how well a RAN deployment satisfies the State’s requirements is critical to the evaluation of any proposed plan, including both FirstNet’s plan and the State’s alternative plan. This should be part of the showing that an opt out state submits to the FCC with its alternative plan—i.e., a comparison between how the state’s alternative plan satisfies the state’s needs as opposed to how the FirstNet plan would have satisfied the state’s needs. Congress made clear that a RAN deployment must satisfy the State’s requirements, and the FCC should not lightly reject a State’s alternative plan that meets those requirements in favor of a FirstNet plan that fails to do so. This should be an essential component of

⁸ Opt Out NPRM at ¶64.

⁹ Id.

the FCC's evaluation process.

In addition, the Commission should make clear that this issue, i.e., how well an alternative plan meets the state's needs developed during consultation, in comparison to how well the FirstNet proposed plan would meet those same needs, should be considered by NTIA in evaluating the *cost effectiveness* of a state's alternative plan under Section 6302(e)(3)(D)(ii).

7. User Equipment and Applications

The Commission tentatively concludes that user equipment and applications are outside the scope of the Commission's opt out evaluation. While the statutory definition of RAN does not list user equipment or applications as part of the RAN, it is possible that RAN-dependent compatibility issues may arise concerning user equipment and/or applications. To the extent such issues impact the RAN, then they would seem relevant to the FCC's decision.

8. FirstNet Accommodation of Alternative Plans

The Commission proposes that, "any alternate plan submitted by a state that would require alteration or changes to the FirstNet network to accommodate the state's proposed RAN would not meet the interoperability requirement under the Act."¹⁰ This restriction could be interpreted as being unworkably broad and therefore requires some clarification. It would seem that any alternative plan could require *some* change to the FirstNet proposed network to accommodate the state's alternative plan. For example, a state may choose an equipment vendor different from FirstNet's equipment vendor and despite the fact that each vendor's equipment is built to LTE standards some interfacing issues could arise that can be addressed through a relatively minor technical hardware or

¹⁰ Opt Out NPRM at ¶67.

software solution. A state's alternative plan should not be rejected for such reasons alone where a technical solution is feasible.

9. Documentation of Commission Decisions

The Commission solicits comment on how decisions approving or disapproving alternative plans should be documented and/or noticed.¹¹ Upon initial review (within 90 days of submission), if a plan is determined to meet the requirements, then it should be approved, and a simple notice of approval would suffice. Where a plan is found to be less than satisfactory upon initial review, a deficiency letter should be provided to the state, with detailed explanation of deficiencies in the plan and how such deficiencies could be remedied to secure plan approval. The state should be allowed a period of time to revise the plan accordingly. If the deficiencies are remedied by the state through a supplemental plan, then the plan should be approved through notice of approval. If a revised plan is not provided or if the revised plan continues to be deficient, the plan should be disapproved and the FCC should notify the state in a decision letter explaining the reasons for the disapproval.

CONCLUSION

The TXPSBP appreciates the Commission's efforts in developing rules for evaluating opt out states' alternative plans and encourages the Commission to consider the State's above comments in finalizing the rules.

¹¹ Opt Out NPRM at ¶73.