

BEFORE THE
FIRST RESPONDER NETWORK AUTHORITY

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

Dkt. No. 150306226–5226–01

COMMENTS OF THE STATE OF MINNESOTA



April 28, 2015



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The State of Minnesota provides these comments in response to FirstNet’s *Further Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012* (“Second Notice”).¹

I. Introduction

Minnesota is a strong supporter of FirstNet’s efforts to deploy the nationwide public safety wireless broadband network, and it desires to be a close partner with FirstNet in that effort. The State ascribes only the best of intentions to FirstNet in issuing the Second Notice and proposing the statutory interpretations it describes. The wording and presentation of those interpretations in the Second Notice, however, suggest an aggression and antagonism toward states that FirstNet neither intends nor possesses. FirstNet and the public safety community would have been better served by a Notice of Inquiry asking for help in solving some of difficult problems posed by FirstNet’s authorizing legislation, rather than the Second Notice as published. While Minnesota has endeavored in these comments to communicate its support for FirstNet and positive view of its efforts, the State does address FirstNet’s legal interpretations head-on. Our directness is intended to help FirstNet interpret its statutory authority in a way that will strengthen its footing for the challenges ahead.

Through the consultation process, FirstNet will learn the features, performance, and pricing Minnesota’s public safety community requires of a wireless broadband service. The State’s desired outcome is a successful consultation where FirstNet’s proposal details and commits to a sustainable balance of investment, costs, and revenue while meeting responder needs sufficiently to encourage a very high level of adoption. Minnesota would consider a scenario where it is compelled to opt out to be a failure of that consultation process.

Though we do not believe that FirstNet intends to undermine the consultation process, Minnesota’s program leaders and stakeholders are concerned that FirstNet’s interpretation of the Act as expressed in

¹ *First Responder Network Authority Further Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012*, Notice and Request for Comments, National Telecommunications and Information Administration, 80 FR 13336 (March 13, 2015) (“Second Notice”). Citations to the Second Notice hereafter refer to page numbers in the document posted on FirstNet’s website following the Special Meeting of the FirstNet Board on March 9, 2015 (available at http://www.firstnet.gov/sites/default/files/FirstNet_Second_Public_Notice_0.pdf).



the Second Public Notice relieves FirstNet of the responsibility to make firm commitments to each state to justify an opt-in recommendation. Furthermore, our program leaders are concerned that publishing this interpretation in the Second Notice communicates—*incorrectly*—that FirstNet may not seriously consider the needs of the public safety community in developing its plan in the State.

Minnesota anticipates that the best possible scenario is one where all states opt-in to a single, nationwide program with a unified vision that leverages broad economies of scale. However, Minnesota takes the opt-in/out decision very seriously and will weigh carefully both alternatives based on the FirstNet State plan and the commitment it reflects to the objectives of the Act.

The Second Notice states: “FirstNet ... has a duty to protect the meaningful right of States to opt-out under the Act.”² It is in the spirit of helping FirstNet protect the value and meaning of that statutory right, the State of Minnesota submits these comments.

II. Summary of Key Points

Key Point 1: Congress Intentionally Created a Meaningful Choice between Two Alternatives to Best Serve Each State’s Emergency Responders.

Congress explicitly gave each State the statutory right to opt-out and thereby select an alternative option rather than “participate” in FirstNet’s nationwide deployment.³ A Governor will elect to opt-out only if an unsuccessful consultation leads to a state determining it can, within parameters required for nationwide interoperability, provide a better service for its public safety stakeholders. Congress could have omitted the opt-out alternative because of its potential to complicate FirstNet’s ability to meet the Act’s interoperability and self-sustainability goals, but it did not; for better or worse, Congress accepted that trade-off. Indeed, inclusion of the opt-out provision was a central element of the legislative compromise that enabled passage of the Act. In these comments, the State of Minnesota explains that the Act does not permit FirstNet to infringe upon the statutory right to “opt-out”, and that the best way to ensure that States do not exercise that right is to promise and provide public safety broadband service of sufficient quality and affordability that all States will opt-in. However, if a State does elect to opt out, it must allow open usage of its RAN to subscribers and partners nationwide.

Key Point 2: To Give Meaning to the Governor’s Decision, FirstNet Must Provide States Enough Detail and Certainty in the State Plan to Enable Governors to Weigh the Alternatives.

Under the Act, the Governor has a limited period of time to decide whether to opt-in or opt-out, a timeframe triggered by FirstNet’s presentation of the State plan. In order for the Governor to make a meaningful decision (*i.e.*, an informed one), FirstNet must in the State plan or some other document

² Second Notice at 51-52.

³ 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”), Sec. 6302(e)(2).



then available provide detailed commitments as to the features, performance, and terms of service that FirstNet will provide public safety subscribers in the State if the Governor opts in.

Key Point 3: The State’s “Meaningful Right” to Opt Out Includes the Right to Retain the Fruits of Its Successful Opt-out Implementation.

In the Second Notice, FirstNet expresses its concern that an opt-out State may generate revenues that would otherwise accrue to FirstNet if the State opted in, thus complicating FirstNet’s task in meeting the Act’s requirement that FirstNet be “self-funding.” Minnesota recognizes the possibility that a State’s decision to opt out may pose difficulties for FirstNet, but that possibility was clear at the time Congress provided States the ability to opt-out. The State and FirstNet are free, in fair and voluntary negotiations, to discuss and agree to provisions on revenue sharing, reinvestment of revenue, and other matters. FirstNet should establish the framework of the key negotiation topics, terms and conditions well in advance of the delivery of the State plan to provide greater clarity to States regarding the opt out obligations of both parties.

Key Point 4: FirstNet Is Not Authorized to Leverage Its Control of the Spectrum to Hinder Opt-out States’ Efforts to Provide Better Service at Better Prices than FirstNet.

In order to avoid the potential loss of revenue that may result from a State’s decision to opt out, FirstNet proposes statutory interpretations that would allow it to require an opt-out State to relinquish revenue to FirstNet. Because the State must obtain spectrum access to implement an opt-out deployment, however, requirements of this sort in a spectrum lease, if imposed over State objections, may be unenforceable. FirstNet and the opt-out State should instead address such provisions in a fair and equitable negotiation separate from the spectrum lease agreement.

Key Point 5: The Act Also Does Not Permit FirstNet to Leverage “Network Policies” or NTIA’s “Cost-Effectiveness” Inquiry to Force States to Relinquish Opt-out Benefits.

In considering the “cost-effectiveness” of the opt-out State’s plan, NTIA cannot require that the plan be cost-effective for FirstNet or the nation as a whole; the inquiry is intended to ensure that the plan is cost-effective (*i.e.* sustainable) for the opt-out State. Many “network policies” FirstNet must develop under the Act will surely apply to all deployments, especially those related to technical and operational standards. Others, however—such as revenue sharing and “terms of service” that may include subscriber pricing—cannot apply to opt-out States because they would run counter to the Governor’s statutory right to opt-out

Key Point 6: FirstNet Must Deploy the Network Nationwide, Even in Failed Opt-out States.

In the Second Notice, FirstNet suggests that where a State opts out but fails to deploy its network, FirstNet possesses discretion whether to deploy in that State. However, FirstNet’s central obligation under the Act is to ensure the deployment of the network nationwide in every State. Even if a State elects to opt-out and gains the necessary FCC approvals, but ultimately fails to deploy the opt-out network, FirstNet must ensure deployment of the nationwide network in that State.



Key Point 7: Interpretations Presented in the Second Notice are Damaging to the FirstNet Brand and May Ultimately Reduce Adoption.

The Second Notice does an injustice to FirstNet’s sincere intent to build a network that meets public safety’s requirements and give meaning to the Governor’s right to opt out. The Second Notice has given many stakeholders the impression that FirstNet intends to force States to make an opt-in/out decision without first providing firm commitments to meet public safety needs in the State. The Second Notice feeds the mistaken perception that FirstNet is not listening to the stakeholder community and does not plan to make any guarantees. These perceptions may negatively affect FirstNet’s brand and may threaten FirstNet’s future sustainability.

III. Congress Intentionally Created a Meaningful Choice between Two Alternatives to Best Serve Each State’s Emergency Responders.

In the Second Notice, FirstNet adopts preliminary conclusions that define the meaning of a State decision to opt-out of the FirstNet-deployed RAN. As described further below, the overarching effect of those preliminary conclusions is to devalue the State decision to the point that FirstNet effectively interprets it out of the Act. The ability for a State to deploy, control, and benefit from its own RAN, however, is a key feature of the Act that was critical to passage of the legislation.

During development and consideration of legislation to provide additional spectrum and funding for public safety wireless broadband communications, key leaders in the House of Representatives and in the Senate advocated two major—and very different—approaches. The legislation the President signed into law is a compromise between those two clear and distinct visions for nationwide interoperability.

Sen. Rockefeller (D-WV), Chairman of the Senate Commerce Committee, led the Senate majority’s work on wireless broadband for public safety. He advocated the approach reflected in S. 911, the Public Safety Spectrum and Wireless Innovation Act, which proposed a single nationwide network constructed by a centralized entity. Under S. 911, states would help plan the nationwide network via a state and local implementation grant program, but S. 911 had no provision for individual states to deploy their own networks; it contained no opt-out alternative at all. On June 8, 2011, the Senate Commerce Committee considered, amended and approved S. 911, adopting this centralized approach.

The House majority approach was reflected in the Jumpstarting Opportunity with Broadband Spectrum (“JOBS”) Act of 2011 championed by Rep. Walden (R-OR), Chairman of the House Energy and Commerce subcommittee on communications and technology. Under this approach, each state, subject to nationwide interoperability requirements, would procure and deploy its own network. It did not provide for a single nationwide network with a central core; it envisioned disparate state or local networks interoperating to provide nationwide coverage. The House approach was contained in H.R. 3630, the Middle Class Tax Relief and Job Creation Act of 2011, that passed by the House on Dec. 13, 2011.



On Dec. 17, 2011, the Senate considered the House version of H.R. 3630 and deleted all of the House language, including the JOBS Act, replacing it with provisions that did not include public safety wireless broadband. In conference, faced with two competing visions for nationwide interoperability, the House and Senate conferees agreed to the compromise language that became law: a centralized, federally constructed network with an option for States to opt-out and deploy their own portion of the nationwide network, integrated to a single federal core, subject to interoperability requirements.

Congress could have selected either approach—the Senate majority’s solely centralized approach or the House majority’s solely distributed approach—to the exclusion of the other, but it did not. In an effort to gain critical support and come away at the end of the day with a bill that would pass, advocates for the two visions compromised and merged the two into a compromise approach with two alternatives: opt-in and opt-out. As the Senate Commerce Committee Report states: “With some modifications, the provisions of S. 911 were enacted into law as title VI of the Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112–96), which was signed into law on February 22, 2012.”⁴ Those “modifications” included the opt-out provision, a reasonable compromise among lawmakers to bridge the gap between two very different visions for nationwide interoperability.

In interpreting the Act, FirstNet must accord all of its provisions—including the ones such as the opt-out provision that were so critical to the compromise that enabled its passage—appropriate weight and meaning. As Minnesota explains in detail below, FirstNet’s preliminary conclusions in the Second Notice would deprive the Act’s opt-out provision of meaning and thus would be beyond FirstNet’s authority.

IV. To Give Meaning to the Governor’s Decision, FirstNet Must Provide States Enough Detail and Certainty in the State Plan to Enable Governors to Weigh the Alternatives.

Under the Act, the Governor of each State must “choose” between two alternatives: to “participate in the deployment of the ... network as proposed by” FirstNet, or to “conduct its own deployment.”⁵ In order to make a responsible, “informed decision,”⁶ the Governor must understand in adequate detail what FirstNet has proposed and must be able to rely upon that understanding.

⁴ U.S. Senate. Committee on Commerce, Science, and Transportation. *Public Safety Spectrum and Wireless Innovation Act, (to Accompany S. 911)*, Report 112-260 (Dec. 21, 2012) at 12.

⁵ Act, Sec. 6302(c)(2).

⁶ Second Notice at 28 n.62.



A. State Plans Must Include Details Adequate for a Governor to Compare against an Alternative Plan and Make an Informed Decision.

FirstNet does not define with clarity the level of detail it must include in State plans. Rather, FirstNet focuses upon the requirement that an opt-out State must obtain approval from both the FCC and NTIA for its alternative plan, reasoning that if the FCC and NTIA are to perform their statutory consideration of an opt-out State's alternative plan, FirstNet must have given the State certain information to enable the State to make the showings required for federal approval.

1. *The Act's FCC and NTIA Approval Provisions Offer Little Guidance.*

Starting with the requirement that the alternative plan demonstrate to the FCC that the opt-out RAN will comply with the Technical Advisory Board's minimum technical interoperability requirements and will interoperate with the NPSBN, FirstNet reasons that the State could not make the interoperability showing if FirstNet had not provided the State at least some interoperability information "either through ... FirstNet network policies or the FirstNet plan for the State, or both."⁷ FirstNet's observation does not define the requisite level of detail that must be included in its State plans: the Technical Advisory Board's report was published three years ago and is well-known to the public safety community. As for details on how an opt-out State may ensure interoperability with the NPSBN, FirstNet is correct that the State must have that information no later than the presentation of the State plan, but that should not be a difficult matter: FirstNet should specify those interoperability criteria in its RFP to the vendor community and should publish them to the States when available.

Similarly problematic is FirstNet's suggested view that it need include no greater specificity in State plans than that required for NTIA to determine whether the alternative plan is comparable in terms of deployment timeline, security, coverage, and quality of service.⁸ FirstNet's approach creates the potential for a circular comparability analysis where an opt-out State's alternative plan may simply recite the generalities set forth in the FirstNet State plan. A comparison of generalities would accomplish little to advance any underlying policy Congress may have intended, such as ensuring that first responders in opt-out States benefit from mobile broadband service in the same time frame (or sooner) with similar (or better) levels of security, coverage and quality of service than they would have enjoyed had the Governor elected to opt in.

2. *The Provisions Regarding the Governor's Decision Are More Instructive.*

A far better approach to determining the minimum level of specificity the Act requires FirstNet to include in the State plan would be to accord the Governor's decision the level of importance and meaning Congress intended, and to thus interpret the Act to require State plans that provide the detail necessary to enable the Governor to make a deliberate, well-informed, responsible opt-in/out decision.

⁷ *Id.* at 24.

⁸ *Id.* at 25.



To determine whether to opt-in or opt-out, the Governor will need to compare the FirstNet State plan to an alternative plan of the State’s own development, considering at least the following factors:

- a. Subscription prices and other costs of FirstNet’s service
- b. Subscription terms and conditions
- c. Description of FirstNet subscriber provisioning service, including details on the State and local roles in such provisioning
- d. Geographic service availability, including final coverage design and the coverage roll out strategy
- e. State and local roles in controlling access to the RAN and method of such control, including list of State and local capabilities through any FirstNet-provided portal or control console interface
- f. Service Level Agreement, including throughput rates, acceptable downtime, trouble response window; technical and operational mechanisms employed to sustain the service level; and terms of remediation
- g. Points of demarcation between the NPSBN and public safety networks
- h. Security, including both physical and cyber security protections
- i. Current device options, including device capabilities and device prices, with provision for evolution and change over time
- j. Terms under which State may expand coverage of the FirstNet RAN
- k. Service availability dates
- l. Overview of the FirstNet commercial partner relationship indicating the projected revenues and underlying network sustainability strategy
- m. Commercial roaming agreements and the underlying details of these agreements, such as the handoff between commercial and FirstNet cores

The above list is not comprehensive, but through the consultation process FirstNet certainly is well-positioned to identify those items that the Governor will need to know in order to make the opt-in/out decision. The State recommends that FirstNet clarify that the “state decision process” element of its SLIGP Phase Two data collection request includes a list of those specific data elements each State’s governor will require by the time of the presentation of the State plan in order to enable the Governor’s decision. Similarly, NTIA should specifically authorize States to use SLIGP funds to develop that list and to do the work necessary for each State to develop an alternative plan upon which the Governor may base the opt-in/out decision.

3. SLIGP Should Support the Governor’s Decision

The list of SLIGP “unallowable activities” that NTIA presented in FirstNet’s March 23 data collection webinar makes it more difficult for States to perform the research needed to evaluate the features of the State plan. Congress created SLIGP to:



assist State, regional, tribal, and local jurisdictions to identify, plan, and implement the most efficient and effective way ... to utilize and integrate the nationwide public safety broadband network to satisfy the wireless communications and data services needs of that jurisdiction, including with regards to coverage, siting, and other needs.⁹

By prohibiting use of SLIGP funds for activities that would inform the Governor’s decision, such as “[RAN] design, engineering, and architecture” and “Development of a state RAN business plan,” for example, NTIA makes it difficult for a State to perform the research needed to support a finding that the final State plan is the “most efficient and effective way” to deploy the network in the State. Such research additionally would provide valuable information to FirstNet regarding the critical coverage needs of the State and will help forge a greater partnership between the Governor and FirstNet.

B. The Act Requires That State Plans Contain Reliable Commitments from FirstNet

As noted above, FirstNet recognizes that the States possess a “meaningful right to opt-out under the Act.”¹⁰ FirstNet also recognizes that the Governor’s decision whether to exercise that right “is clearly designed to be informed by the FirstNet plan.”¹¹ Thus, it seems FirstNet appreciates that its State plan is important to the statutory structure and matters to the Governor’s decision. This conclusion is hard to reconcile, however, with FirstNet’s preliminary conclusions that its State plans need include neither detail (as described above) nor binding commitments. Minnesota urges FirstNet to consider whether a Governor can make an informed, confident decision to opt-in without at least some level of reliable commitment that FirstNet will, indeed, provide an opt-in State’s first responders a service that meets their performance, coverage, and financial requirements.

1. FirstNet’s Proposed Interpretation of the State Plan’s Minimum Requirements Is Unreasonable.

In a commercial context, a buyer decides whether to accept a carrier’s offer of service, thereby (in most cases) effectively rejecting the service offerings from other carriers. The Act provides a similar decision point with similar (though more permanent) implications: the Governor’s decision to accept FirstNet’s State plan, thereby forfeiting the “meaningful right to opt-out” and rejecting the opportunity to entertain offers of service from other vendors (those that would bid on an opt-out State’s RAN RFP). Nonetheless, FirstNet suggests that it need not provide “contract-like promises” in the State plan, not even on very basic commitments such as the price of service.¹² Instead, FirstNet states that the “levels of subscriber adoption and fees across the network overall will not be known at the State plan stage and

⁹ Act, Sec. 6302(a).

¹⁰ Second Notice at 51-52.

¹¹ *Id.* at 27.

¹² *Id.* at 30.



will likely be express assumptions thereunder.”¹³ In other words, FirstNet suggests that the Act permits it to require the Governor to choose whether to exercise a “meaningful right” based only upon assumptions.

The lack of commitment is especially important to Minnesota, where the State is particularly concerned to ensure that it is able to expand on its own initiative beyond FirstNet’s proposed coverage area.¹⁴ FirstNet’s statement that “FirstNet and a State could agree that, as part of FirstNet’s plan, FirstNet and the State (or sub-State jurisdictions) could work together to permit” the State to extend the FirstNet RAN beyond FirstNet’s coverage¹⁵ is encouraging but still falls short of the needed commitment. Without a solid FirstNet commitment on this point, a Governor determined and capable to cover the State’s rural areas will be forced to weigh the State plan’s assumptions against the certainty of opting out and thus “assum[ing] responsibility for deployment of the State’s RAN.”¹⁶

FirstNet’s reading of the Act’s minimum requirements for the content of State plans is not a reasonable one. Congress would not have explicitly provided the Governor a choice (between opting in and opting out) based upon the content of a State plan if the Governor could not rely upon the commitments of that State plan in making the decision to opt-in.

2. The State Plan Is an Offer, the Governor’s Choice to Opt-in Is Acceptance, and the Result Is a Binding Agreement Under the Act.

The State appreciates FirstNet’s decision to consider whether the presentation of the State plan and the Governor’s choosing to participate in that plan result in the creation of a contract between the State and FirstNet—certainly, the statutory structure bears a strong resemblance to traditional “offer and acceptance” that results in the formation of a binding agreement. FirstNet’s reasoning to the contrary—that the Act does not “use the words of contract, such as ‘offer,’ ‘execute,’ or ‘acceptance’ in relationship to the FirstNet plan”¹⁷—does not recognize the basic elements of contracts, such as the exchange of consideration and a “meeting of the minds,” regardless of the presence of specific terms such as those recited in the Second Notice.

Under the Act, FirstNet must provide “details of the proposed plan” to the Governor,¹⁸ in effect describing what the State will get if the Governor accepts the proposal by opting in. The Governor must

¹³ *Id.*

¹⁴ In its response to the First Notice, Minnesota urged FirstNet to provide opt-in States and political subdivisions a more substantive role in managing and having the flexibility to invest in the RAN; Minnesota is pleased that in this Second Notice, FirstNet indicates its willingness to consider such a role. Comments of the State of Minnesota (Oct. 27, 2014) at 8 (commenting on *First Responder Network Authority Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012*, Notice and Request for Comments, National Telecommunications and Information Administration, 79 FR 57058 (Sept. 24, 2014) (“First Notice”).

¹⁵ Second Notice at 24.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 30.

¹⁸ Act, Sec. 6302(e)(1)(B).



“choose whether to ... participate ... as proposed.”¹⁹ Upon making that decision to opt-in, the Governor may either affirmatively accept FirstNet’s proposal or simply wait for 90 days to pass after the date FirstNet provided the State plan²⁰—either action provides FirstNet notice of the Governor’s opt-in decision, as FirstNet suggests.²¹

In the context of the statute, FirstNet’s presentation of the State plan fits the traditional definition of an offer: “A proposal to do a thing or pay an amount, usually accompanied by an expected acceptance, counter-offer, return promise or act.”²² FirstNet’s offer in the State plan is “If you forego your right to opt-out, I will provide the following service in your state.” Similarly, the Governor’s communication to FirstNet of the opt-in decision, whether affirmatively or constructively by letting the 90-day opt-out window expire, fits the definition of acceptance: “Compliance by offeree with terms and conditions of offer constitute an ‘acceptance.’”²³ By foregoing the right to opt-out, the Governor accepts FirstNet’s offer. The result is a contract.

The foregoing analysis of offer and acceptance applies only if there is an exchange of consideration—in other words, both parties must provide something of value. Under the Act, the Governor is providing consideration to FirstNet by foregoing the opt-out alternative and thereby committing that public safety entities in the State will not purchase 700 MHz public safety wireless broadband services from any vendor other than FirstNet. Also under the Act, FirstNet is providing consideration by promising to make a service available in the State. If FirstNet makes no promises or otherwise provides consideration in the State plan, then the Governor’s acceptance of the State plan would not result in a contract. As described in Sec. IV, the Act requires FirstNet to provide details and commitments in the State plan or some other vehicle at least concurrent to the State plan, thereby providing the consideration required to form a contract.

In addition to its overly restrictive argument that there is no contract without the presence of specific “words of contract” in the Act, FirstNet also declines to find a contract because “the process prescribed in the Act itself may make contract-like promises at the plan stage difficult.”²⁴ However difficult it may be for FirstNet to make such critical commitments, each governor needs a reliable, detailed State plan sufficient to serve as the basis for the governor’s statutory opt-in/out decision.

3. *Sound Procurement Policy Requires Reliable Commitments*

From a State procurement perspective, FirstNet is a service provider. Typically, a State agency wishing to procure a service defines the service and identifies the general community of entities that can provide

¹⁹ Act, Sec. 6302(e)(2)(A).

²⁰ *Id.*

²¹ Second Notice at 28.

²² *Black’s Law Dictionary* 976 (5th ed. 1979).

²³ *Id.* at 12 (citing *Davis & Clanton v. C. I. T. Corporation*, 190 S.C. 151, 2 S.E.2d 382, 383), 976 (“In a unilateral contract, the acceptance is generally the act or performance of the offeree ...”).

²⁴ Second Notice at 30.



the service. If there are multiple entities that can provide the service, the agency must implement a competitive process to determine the entity from which it will purchase the service.²⁵ The agency may avoid the time and expense of a competitive procurement by directing the purchase to a single entity in compliance with sole source procedures.²⁶ In order to prevent abuse of the sole source process, agencies must ensure that the prices are fair and reasonable.²⁷

If a Governor opts out, the State will proceed with a procurement process in which it may consider competing proposals from the entire community of public safety communications vendors, including FirstNet. At the time the Governor opts out, the eventual winner of the State RFP and the terms, conditions, and prices of the service cannot be known. At the time that winner is selected and all other vendors are excluded, however, the terms, conditions, and prices for the winner's service will be known and enforceable via the State contract award.

By contrast, a Governor's decision to opt in is tantamount to the award of an open, effectively perpetual sole source contract. By foregoing the right to opt-out, the Governor ensures that no agency in the State will be able to purchase public safety broadband service using the FirstNet spectrum from any vendor other than FirstNet.

In the Second Notice, FirstNet proposes an interpretation of the Act that would force a conflict with States' long-standing policies on sole source procurements. FirstNet's suggestion that it need not provide "contract-like promises" or pricing information in the State plan appears incompatible with a State's responsibility to ensure the fairness and reasonableness of a vendor's prices prior to guaranteeing that vendor all of the sales in the State. In order to avoid this conflict, Minnesota urges FirstNet to provide adequate detail and binding commitment in the State plan (or a concurrent document) that States may show, as required in the Minnesota sole source statute, that "there is clearly and legitimately only a single source for the goods and services and ... that the price has been fairly and reasonably established."²⁸

C. The Timing of the State Plans Is Driven by FirstNet's Ability to Provide the Required Plan Detail and Commitments.

The Act states that FirstNet shall notify the Governor and present the State plan "upon the completion of the request for proposal process."²⁹ The Act does not define "completion." As explained above, in

²⁵ See, e.g., MINN. STAT. 16C.06 (2014) ("A formal solicitation must be used to acquire all goods, service contracts, and utilities estimated at or more than \$50,000, or in the case of a Department of Transportation solicitation, at or more than \$100,000, unless otherwise provided for.").

²⁶ See, e.g., MINN. STAT. 16C.10 (2014) ("The solicitation process described in this chapter is not required when there is clearly and legitimately only a single source for the goods and services and the commissioner determines that the price has been fairly and reasonably established.").

²⁷ *Id.*

²⁸ *Id.*

²⁹ Act, Sec. 6302(e)(1).



order to appropriately implement the Act’s specific requirements for the Governor’s decision, the State plan must include details and commitments sufficient to enable that decision to be well-informed and meaningful. Accordingly, Minnesota does not dispute FirstNet’s preliminary interpretation of “completion” as “such time that FirstNet has obtained sufficient information to present the State plan with the details required under the Act for such plan.”³⁰ The State does, however, dispute FirstNet’s interpretation of the level of detail the Act requires, as explained in Sec. IV.A, above.

Even as it recognizes that the availability of information must drive the date upon which FirstNet presents the State plan to the Governor, however, FirstNet proposes an alternative approach that would not ensure the Governor has the information needed for an informed decision. In an effort to resolve an apparent circularity in the ideal order of steps, FirstNet reasons:

States will, of course, want their plans to provide as much specificity regarding FirstNet’s coverage and services as possible, which would ideally be determined on the basis of the final outcomes of the request for proposal process (which, as is discussed above, ideally requires the State opt-out decisions). Accordingly, because of the circularity of these information needs, FirstNet may not be able to provide the level of certainty in State plans that would ordinarily be assumed to emerge from the final award of a contract to a vendor to deploy in a State.³¹

Rather than adopt an approach requiring bidders to address a variety of potential opt-in/out scenarios in their RFP responses, FirstNet suggests that it is authorized to include in the State plan less information than the Governor may need to make the informed decision required by the Act, as described above. Thus, rather than letting the availability of information drive the timing of the State plan as appropriate, FirstNet instead proposes that the “ideal” timing of the State plan will determine the information it contains. Though Minnesota is eager for its first responders to gain the benefits of the network as soon as possible, the State urges FirstNet not to rush the State plan process at the expense of the Governor’s statutory right to make a meaningful and well-informed opt-in/out decision.

³⁰ Second Notice at 23. Similarly, Minnesota agrees that the meaning of the word “complete” in regard to an opt-out States RFP is driven by the State’s ability to make the required showings for alternative plan approval by the FCC and NTIA, as described in the Second Notice. *Id.* at 31. Notably, though the Act requires presentation of the State plan upon completion of FirstNet’s “request for proposals *process*,” the statute provides 180 days for an opt-out Governor to “develop and complete requests for proposals” without reference to the full RFP *process*, thus suggesting greater flexibility in the latter date than in the former. Act, Sec. 6302(e) (emphasis added).

³¹ Second Notice at 23.



V. FirstNet Is Not Authorized to Leverage Its Control of the Spectrum to Hinder Opt-out States' Efforts to Provide Better Service at Better Prices than FirstNet.

A central theme of the Second Notice is the notion that FirstNet may require an opt-out State to relinquish the benefits of its RAN implementation in exchange for access to the FirstNet spectrum. Though the Second Notice specifically raises this suggestion in relation to sharing of revenues earned by opt-out States,³² compliance with FirstNet network policies,³³ permitting opt-out States to charge subscriber fees and serve in a customer-facing role,³⁴ reinvestment of subscriber fees in the opt-out network,³⁵ and the cost-effectiveness for the nationwide network of enabling an opt-out RAN,³⁶ it also proposes that the lease negotiation can be used as a catch-all mechanism to gain concessions from opt-out States not necessarily required by the Act.³⁷ Minnesota disagrees with these interpretations of the Act; the Act does not permit FirstNet to leverage its control of the spectrum to deny States the benefits of exercising the statutory right to opt out.

A. Opt-out States Are Free to Pursue the Best RAN Arrangement for the State, per the Governor's Discretion.

Under the Act, States that elect to opt-out and make the required showings to the FCC and NTIA stand in the shoes of FirstNet with regard to the RAN. In Congress's compromise, the Governor's "decision to opt out" of "participat[ion] in the deployment of the nationwide, interoperable broadband network as proposed by the First Responder Network Authority"³⁸ is just what it sounds like: an election not to participate in FirstNet's nationwide effort, to take responsibility only for the RAN in the State. Thus, as a matter of statute, the opt-out State may, if it so chooses, limit its involvement with FirstNet to usage of and payment for FirstNet core services and maintenance of interoperability with the NPSBN pursuant to FirstNet technical and operational specifications necessary for interoperability.

By providing Governors the right to opt out, Congress intended and expected that each Governor would make that decision based on that Governor's determination of the most beneficial course *for that Governor's own State*. As FirstNet states in the Second Notice, the Governor will decide "whether the State would receive a greater benefit from either participating in the FirstNet proposed network plan for

³² *Id.* at 51, 54, 58.

³³ *Id.* at 16.

³⁴ *Id.* at 42-43.

³⁵ *Id.* at 53.

³⁶ *Id.*

³⁷ *Id.* at 52 ("We preliminarily conclude that FirstNet, in the exercise of such duties, can and must take into account, among other things, the considerations discussed above in whether and under what terms to enter into a spectrum capacity lease with a State.")

³⁸ Act, Sec. 6302(e)(3)(A), (2)(B).



such State or by conducting its own deployment of the RAN in such State.”³⁹ The opt-in/out decision by its very nature is a weighing of competing proposals—the FirstNet proposal on one hand, and the State’s own “alternative” proposal on the other—and the winning proposal will be the one the Governor believes offers the greatest benefit to the State.⁴⁰

B. The Act Does Not Permit FirstNet to Force Opt-out States to Relinquish the Fruits of Their Success.

As explained above, Congress intended that a State will opt out if the Governor believes that alternative will provide greater benefit to the State than “participating” in the FirstNet deployment. The Second Notice identifies two general areas in which the State may realize that benefit, but it describes them as areas in which FirstNet is concerned about States electing to opt out: (1) complexities that would arise if the opt-out State rather than FirstNet served “public safety customer-facing roles, such as marketing, execution of customer agreements, billing, maintaining service responsibility, and generating and using fees from public safety customers,”⁴¹ and (2) a risk that an opt-out State would retain, rather than share with FirstNet, excess revenues generated in the State, such that “funding for all other States could decline.”⁴²

Though FirstNet recognizes that it could address and overcome these challenges by “work[ing] together [with opt-out States] over many years with the best interests of public safety in mind to address myriad operational issues,”⁴³ it proposes a statutory interpretation that would simply eliminate them, eliminating the value and meaning of the Governor’s right to opt out at the same time. FirstNet preliminarily concludes that it may make virtually any opt-out benefit (such as opt-out revenues) a subject of spectrum lease negotiations.⁴⁴ Such a position could be interpreted to mean that if the State insists upon retaining the benefit in a way that is objectionable to FirstNet, FirstNet may deny the State access to the spectrum, thus hampering its opt-out plan.⁴⁵

³⁹ Second Notice at 28 n.62.

⁴⁰ A Governor’s decision to reject the FirstNet proposal in favor of an alternative, opt-out proposal is not necessarily a reflection of any deficiency in the FirstNet offering. Rather, FirstNet and the State are in two different positions with varying capabilities. For example, State governments control assets in the State, may be more willing than FirstNet to accept risk in a public-private partnership, and may have recourse to recurring State appropriations.

⁴¹ Second Notice at 38.

⁴² *Id.* at 47.

⁴³ *Id.* at 45.

⁴⁴ *Id.* at 52.

⁴⁵ *Id.* at 33 (“if the sequence of events ended with a State receiving approval of its alternative plan by the FCC but being unable to reach agreement on a spectrum capacity lease with FirstNet or being denied approval of such spectrum capacity leasing rights or needed grant funds by NTIA, the State subsequently would be unable to operate the RAN in the State.”)



1. *FirstNet Cannot Dictate the Extent to Which an Opt-out State Serves in a Customer-Facing Role.*

FirstNet acknowledges that the Act does not require an opt-out State to serve in a customer-facing role including charging user fees to public safety customers, and Minnesota agrees.⁴⁶ FirstNet’s analysis reaches this question because the Act includes no provision *prohibiting* an opt-out State from serving in such a role, as FirstNet also acknowledges, albeit with an unsupported caveat:

We preliminarily conclude, however, that ... a reasonable interpretation of all the provisions discussed above, including both operational and fee-related, would not preclude opt-out States, as sovereign entities, from charging subscription fees to public safety entities *if FirstNet and such States agreed to such an arrangement in the spectrum capacity lease with the States, and the arrangement was part of an alternative plan approved by the FCC and NTIA.*⁴⁷

Nowhere does the Act provide a basis for the proposition that an opt-out State is authorized to charge user fees only where explicitly permitted by FirstNet, the FCC, and NTIA.⁴⁸ FirstNet’s preliminary conclusion in this regard cannot be reconciled with the explicit right of the Governor to choose *not* to “participate in the deployment ... proposed by” FirstNet. If an opt-out State has no right to charge fees to those using the RAN it deployed, the Governor really has no choice to make at all. Congress neither intended nor permitted this result.

If FirstNet wishes to gain an enforceable commitment from an opt-out State with regard to its serving in a customer-facing role, FirstNet may in a fair negotiation undertake to win that commitment. As explained below, FirstNet cannot use the opt-out State’s required application for access to the FirstNet spectrum to obtain that commitment—nor can it use application of FirstNet’s “network policies” or NTIA’s “cost-effectiveness” inquiry.

2. *FirstNet Is Not Authorized to Require an Opt-out State to Share RAN Revenues*

FirstNet is correct that it is at least theoretically possible that an opt-out State may be able to generate revenues equal to or greater than the costs of providing service, including the payment to FirstNet of

⁴⁶ *Id.* at 43 (“we also preliminarily conclude that the Act does not require that such States be the customer-facing entity”).

⁴⁷ *Id.* at 42-43 (emphasis added).

⁴⁸ The scope of the FCC’s approval inquiry is limited to two line items in the Act related to interoperability; subjects such as the decision to charge fees that have only *de minimis* if any bearing upon interoperability are not within the FCC’s statutory purview. Act, Sec. 6302(e)(3)(C). Likewise, the scope of NTIA’s approval inquiry is limited to reviewing those demonstrations required under Sec. 6302(e)(3)(D), none of which include the charging of fees, though such fees could be included in the opt-out State’s funding demonstration under Sec. 6302(e)(3)(D)(i)(I), at the State’s discretion. The scope of provisions FirstNet may require in a spectrum lease for an opt-out State is addressed in this section, below.



core usage fees, perhaps even equal to or greater than the amount of excess revenues FirstNet would have generated in the State had the Governor opted in.⁴⁹ The level of the State’s success is of its own making as a result of the Governor’s decision to opt out, and the State is free to do with those excess revenues anything the Act and other laws do not prohibit.

Minnesota does not dispute that Congress required FirstNet to be self-funding,⁵⁰ nor does it dispute that the decision of a commercially desirable State to opt-out may make meeting that requirement more difficult. Nonetheless, Congress specifically included—as part of a compromise central to the legislation’s approval—a provision for a Governor to opt out of FirstNet’s deployment of the NPSBN. FirstNet cannot interpret the self-funding requirement or the Governor’s right out of the Act; both must be implemented, even if honoring the Governor’s right makes it harder to achieve financial self-sufficiency. That is not to say that opt-out States that generate excess revenue should not share that revenue; rather, they should enter into fair and equitable negotiations with FirstNet to determine the extent to which they will share. Congress designed the Act this way so that FirstNet’s best approach would be to promise and provide a service of such quality and affordability that no Governor would exercise the statutory right to opt out.

In the Second Notice, FirstNet asserts that Congress did not intend that an opt-out State could keep the fruits of its success to itself if those funds would be useful to support the network in other States:

We believe as a general matter that Congress did not intend for a few, high-density States to be able to withhold material funding for all other States under the Act. Such an incentive structure ... could result in networks that greatly exceed public safety requirements in a few opt-out States ..., and networks that do not meet public safety requirements and the goals of the Act in the vast majority of States.⁵¹

By the plain language of the Act, however, this appears to be what Congress intended, for better or worse. The Act provides that the Governor may choose to abstain from “participat[ing] in the deployment of the [NPSBN] proposed by [FirstNet].”⁵² Likewise, the Act allows the opt-out State to “conduct its own deployment of a [RAN] in the State.” Though it may make FirstNet’s job harder, Congress gave the Governor the right to try to build a better mousetrap, and may negotiate with FirstNet over the amount of benefit it retains from any opt-out success. For example, a Governor may

⁴⁹ Second Notice at 51 (“for some reason a State or group of States may be able to generate more fees from a CLA than FirstNet”).

⁵⁰ Act, Sec. 6208(b) (“The total amount of the fees assessed for each fiscal year pursuant to this section shall be sufficient, and shall not exceed the amount necessary, to recoup the total expenses of the First Responder Network Authority in carrying out its duties and responsibilities described under this subtitle for the fiscal year involved.”)

⁵¹ Second Notice at 48.

⁵² Act, Sec. 6203(e)(2).



elect to opt out to implement a creative business model that would generate revenues to support better coverage for the State’s rural areas than FirstNet would otherwise provide.

Minnesota hopes and expects that FirstNet will be able to convince all States to opt in, and that even if some States do opt out, FirstNet will still be able to provide the remaining opt-in States with public safety-grade service at affordable prices while meeting the Act’s self-funding requirement. However, it is not reasonable to conclude that Congress provided a State the opportunity to build its own RAN only to see the benefits of its success appropriated for other states in exchange for access to the spectrum essential to that success.

An opt-out State may, however, agree in a fair negotiation to share revenue with FirstNet.⁵³ As explained below, neither the opt-out State’s required application for access to the FirstNet spectrum, the application of FirstNet “network policies,” nor NTIA’s “cost-effectiveness” inquiry ensures such a fair negotiation.

3. The Act Does Not Require Opt-Out States to Reinvest User Fee Revenues in the Network, but It Is Good Policy.

FirstNet explicitly recognizes in the Second Notice that Congress did not include in the Act a requirement that opt-out States reinvest in the opt-out RAN revenues gained from fees charged to public safety subscribers.⁵⁴ Nonetheless, FirstNet proposes to read such a requirement into the Act and “that FirstNet has a duty to consider both the reinvestment of such fees ... in entering into such a spectrum capacity lease.”⁵⁵

Reinvestment of network-generated revenues into the public safety network is good policy, and one that Minnesota supports, whether in an opt-in or an opt-out scenario. Indeed, the Minnesota Statewide Emergency Communications Board recently adopted a resolution stating that it will not approve an Opt-Out Plan that “diverts [user fee] revenues to ANY purposes except for sustaining construction, operations and maintenance of the Nationwide Public Safety Broadband Network in Minnesota.”⁵⁶

⁵³ Minnesota disagrees with FirstNet’s statement that if a State successfully opts out “all public safety subscriber and excess network capacity fees generated in the State would go to and remain in the State other than any core network fees assessed by FirstNet.” Second Notice at 46. That result is a possibility that could be avoided through fair negotiations among FirstNet and the State.

⁵⁴ Second Notice at 42 (pointing out “the existence of provisions under the Act, more fully discussed below, requiring FirstNet to reinvest subscriber fees as well as excess network capacity fees into the network, whereas the only reinvestment provision expressly applicable to States assuming RAN responsibilities concerns excess network capacity fees.”)

⁵⁵ *Id.* at 53.

⁵⁶ Resolution made at April 27, 2015 meeting of the Minnesota Statewide Emergency Communications Board in St. Cloud, Minnesota. Last retrieved 4/27/2015 at: <https://dps.mn.gov/entity/srb/Pages/meeting-materials.aspx>.



Recognizing good policy, however, is not grounds for FirstNet to find a statutory requirement where Congress did not include one. Rather, if FirstNet believes it necessary to gain an enforceable commitment that an opt-out State will reinvest public safety subscriber fees into the network, FirstNet may in a fair negotiation undertake to win that commitment from the opt-out State. Accordingly, an opt-out State may agree in a fair negotiation to share that revenue with FirstNet.

C. FirstNet Cannot Use the Spectrum Lease, NTIA’s “Cost-Effectiveness” Inquiry, or Its Own “Network Policies” to Diminish the Governor’s Right to Opt-out.

The above section demonstrates that in the Second Notice, FirstNet identifies areas in which it would like control over opt-out States that Congress did not authorize. In order to obtain that control, FirstNet proposes to leverage at least two points in which an opt-out State must gain federal approval (spectrum lease and NTIA “cost-effectiveness” inquiry), and one where the Act is vague as to the extent of the provision’s application to opt-out States (FirstNet “network policies”). Though Minnesota supports and encourages FirstNet’s desire to identify “‘win-win’ solutions” that benefit both opt-out States and FirstNet,⁵⁷ such solutions must be the result of fair negotiations within the bounds of the Act and not forced upon opt-out States.

1. FirstNet Cannot Use the Spectrum Lease to Impose Requirements That Impinge upon the Governor’s Opt-out Choice.

Under the Act, an opt-out State that has received approval from the FCC “shall apply to the NTIA to lease spectrum capacity from the First Responder Network Authority.”⁵⁸ As FirstNet recognizes in the Second Notice, if an opt-out State fails to obtain access to the FirstNet spectrum, “the State subsequently would be unable to operate the RAN in the State.”⁵⁹ Thus, the spectrum lease is essential to the Governor’s ability to exercise the right to opt out: opting out without access to the spectrum leads nowhere.

Minnesota does not anticipate that FirstNet would seek to extract unfair concessions from opt-out States in exchange for a spectrum lease. Such a contractual provision, in addition to being contrary to the intent of the Act, may be unenforceable because the State had no choice but to accept it.⁶⁰ Minnesota’s Supreme Court, for example, has embraced a fairly common definition of a contract of

⁵⁷ Second Notice at 52-53 (“A variety of approaches could achieve ‘win-win’ solutions, and FirstNet would be committed to exploring them within the bounds of the Act.”), 54 (“FirstNet would explore ‘win-win’ solutions with [opt-out] States ... if subscriber fees with or without CLA fees would materially exceed RAN and related costs in a State.”).

⁵⁸ Act, Sec. 6302(e)(3)(C)(iii)(II).

⁵⁹ Second Notice at 33.

⁶⁰ See, e.g., *Black’s Law Dictionary* 38 (5th ed. 1979) (“Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms.”).

adhesion, requiring a showing that “the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation and that the services could not be obtained elsewhere.”⁶¹ The court has determined that such provisions, where one party has no real ability to negotiate, are not valid.

In considering the case of an oil company attempting to enforce a contract provision against a service station operator, the Minnesota court quoted with approval the observation of the Supreme Court of New Jersey:

[I]t becomes apparent that Shell is the dominant party and that the relationship lacks equality in the respective bargaining positions of the parties. For all practical purposes Shell can dictate its own terms. The dealer ... cannot afford to risk confrontation with the oil company. He just signs on the dotted line.⁶²

The New Jersey court continued:

Where there is grossly disproportionate bargaining power, the principle of freedom to contract is nonexistent and unilateral terms result. *In such a situation courts will not hesitate to declare void as against public policy grossly unfair contractual provisions which clearly tend to the injury of the public in some way.*⁶³

Though it is not yet clear how a spectrum lease negotiation between FirstNet and an opt-out State might proceed, it is quite clear that FirstNet would enjoy disproportionate bargaining position in regard to a service (public safety broadband spectrum access) that cannot be obtained elsewhere, wielding power not unlike that of an oil company over its service station operators. FirstNet holds the license to the spectrum⁶⁴ and thus controls access to the spectrum. Though Minnesota does not expect FirstNet would use its bargaining power in such a way, reaching agreement must be in a fair negotiation; there can be no meaningful agreement by the State to additional terms of the spectrum lease required by FirstNet over State objection, because the State must either sign the lease or forego the network, a result that would not just diminish but eliminate the Governor’s right to opt out.⁶⁵ Thus, the State and

⁶¹ *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924-25 (1982) (citing *Clinic Masters, Inc. v. District Court*, 556 P.2d 473, 475-76 (1976)).

⁶² *Pickerign v. Pasco Marketing, Inc.*, 228 N.W.2d 562, 565 (1975) (citing *Shell Oil Co. v. Marinello*, 307 A.2d 598, 601 (1973), *certiorari denied*, 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed.2d 475 (1974)).

⁶³ *Shell Oil Co.*, 307 A.2d at 601 (citing *Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 403-04 (1960)) (emphasis added).

⁶⁴ Act, Sec. 6206(b)(1).

⁶⁵ Perhaps in recognition of the impossibility of meaningful negotiations among parties of such disparate bargaining power, Congress did not require the opt-out State to “negotiate” with FirstNet for a lease. Rather, it required the State to “apply” to FirstNet for the lease, suggesting that providing the lease is at most a ministerial step with terms related to the spectrum itself, such as preventing harmful interference and meeting FCC regulatory requirements. Act, Sec. 6302(e)(3)(C)(iii)(II).



FirstNet must develop a framework for these negotiations to work out in a fair and equitable manner how the opt-out State will, for example, share its excess revenues.

In a closely analogous situation, the FCC confronted this imbalance in bargaining power and moved to protect against it, limiting the spectrum license holder's ability to impose terms, including fees, in a spectrum lease because the exclusive nationwide licensee enjoyed an unduly controlling bargaining position. In the 2010 *Waiver Order*, the FCC granted individual state and local jurisdictions permission to lease and use the public safety broadband spectrum licensed to the Public Safety Spectrum Trust ("PSST") for early deployments, stating:

We also recognize the unique circumstance that the PSST has an exclusive nationwide license and is accordingly the only entity from which an entity seeking early deployment can obtain a lease. This results in a potential imbalance in bargaining positions, and accordingly we find it appropriate to limit any fee that the [PSST] may assess in conjunction with these leases.⁶⁶

The FCC did not stop at limiting fees—it specified the lease itself, providing a Standard Lease for this purpose.⁶⁷ The FCC considered the relative bargaining position of the lessor and lessee and took the proactive step of specifying the terms of the lease in order to avoid the possibility that the lessor would unfairly force a concession from the lessee.

2. *FirstNet and NTIA Cannot Use NTIA's "Cost-Effectiveness" Inquiry to Force Opt-out States to Fund FirstNet.*

The Act requires that after an opt-out State's alternative plan is approved by the FCC, the State must apply to NTIA for a spectrum lease, and "in order to obtain ... spectrum capacity leasing rights ... [the] State shall demonstrate ... the cost-effectiveness of the [alternative] State plan."⁶⁸ In the Second Notice, FirstNet interprets the required "cost-effectiveness" demonstration to suggest that an opt-out plan must be cost-effective not for the opt-out State, but for the national "network as a whole."⁶⁹

⁶⁶ *In the Matter of Requests for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Wireless Broadband Networks*, PS Docket No. 06-229, FCC 10-79 (May 12, 2010) ("*Waiver Order*"), ¶ 31.

⁶⁷ *Id.* at ¶ 25, App. B.

⁶⁸ Act, Sec. 6302(e)(3)(D).

⁶⁹ Second Notice at 49. Curiously, in its discussion of the minimum requirements for the FirstNet State plan, FirstNet states that NTIA must be able "to make comparisons of cost-effectiveness." *Id.* at 25. Thus, it is unclear whether FirstNet believes that NTIA must consider the "cost-effectiveness" of the alternative plan for the whole country, or must consider whether the alternative plan is as cost-effective for the opt-out State as the FirstNet plan would be for that State. Both interpretations are incorrect, as explained below: NTIA's inquiry is whether the alternative plan is cost-effective (*i.e.* sustainable) for the opt-out State.



However, in order to retain any reasonable meaning to the Governor’s right to opt-out, the opt-out State must be able to negotiate over the extent to which it retains the fruits of its opt-out success and cross-subsidizes FirstNet’s deployment; reading the “cost-effectiveness” provision to allow NTIA to withhold spectrum access unless the opt-out State agrees to relinquish its opt-out earnings and thus make the opt-out plan “cost-effective” for the whole country would defeat the Governor’s statutory right to opt out in the first place.

Congress included the “cost-effectiveness” provision to ensure the opt-out State’s alternative plan would not lead to an unsustainable deployment in the State. Just as Congress required that FirstNet’s deployment be self-sustaining, it also wanted opt-out States to be able to sustain their own networks, and it placed NTIA in a position of evaluating the State’s plan for that purpose.

3. FirstNet Cannot Use Its “Network Policies” to Diminish the Value to a State of the Governor’s Opt-out Decision.

The Act requires FirstNet to “develop requests for proposals” covering various topics, as well as “requirements,” “practices, procedures, and standards,” “terms of service,” and other specifications related to the “network.”⁷⁰ FirstNet follows the lead of the title of the paragraph and refers to the items developed under this paragraph as “network policies” and “preliminarily conclude[s] that FirstNet’s network policies will either directly or indirectly apply to any State RAN deployment.”⁷¹

It is reasonable and necessary for FirstNet to develop appropriate policies. Some of those policies—such as those central to technical interoperability, for example—must apply to both FirstNet and opt-out States, regardless of the Governor’s decision. Others, however—such as revenue sharing and “terms of service” that may include subscriber pricing—cannot apply to opt-out States because they would run counter to the Governor’s statutory right to opt-out, as explained above.

As a general rule, Minnesota does not dispute FirstNet’s preliminary conclusion that it “could require compliance with network policies essential to the deployment and interoperable operation of the network for public safety.”⁷² Minnesota has argued for a nationwide governance structure for the NPSBN since well before the establishment of FirstNet,⁷³ and the State generally supports that FirstNet adopt and enforce technical and operational standards necessary to foster a high level of interoperability.

FirstNet states that the required State “consultations would presumably not be required for States assuming RAN responsibility if the policies in question (at least those applicable to RANs following opt-

⁷⁰ Act, Sec. 6206(c)(1).

⁷¹ Second Notice at 17.

⁷² *Id.* at 16.

⁷³ *In the Matter of Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, FCC 11-6 (Jan. 26, 2011), Comments of the State of Minnesota (April 11, 2011) at 1.



out) did not apply to their RAN deployment.”⁷⁴ At the time of consultation, however, FirstNet has not yet presented the State plan, so the Governor has not yet had the opportunity to decide whether to opt out.⁷⁵ Thus, consultation regarding the network policies makes perfect sense because *they will* apply to the State if the State opts in, a possibility that is still alive at the time of consultation.

In implementing the “network policies” provision of the Act, FirstNet must be careful not to apply such policies to opt-out States if such application would infringe upon the Governor’s decision not to participate in the FirstNet deployment of the nationwide network. It is therefore critical that FirstNet and the States establish a framework to determine which policies will apply to opt-out States.

VI. FirstNet Must Provide Service in Failed Opt-out States.

Minnesota does not assume FirstNet will “abandon” a failed opt-out State such as a State that has not secured a spectrum lease or for some other reason has failed to successfully deploy its own RAN. However, we are concerned that FirstNet’s interpretation of the Act gives FirstNet discretion over whether to deploy in such a State. Accordingly, we recommend that FirstNet provide firm assurance to the public safety community that it *will* ensure every State has service: whether it is an opt-in or failed opt-out State.

The Act provides that when a Governor chooses to opt out, the State submits its alternative plan to the FCC for approval based on the FCC’s inquiry into the planned interoperability of the State RAN with the NPSBN.⁷⁶ According to the Act,

If the Commission disapproves a plan under this subparagraph, the construction, maintenance, operation, and improvements of the network within the State shall proceed in accordance with the plan proposed by the First Responder Network Authority.⁷⁷

If the FCC approves the opt-out State’s alternative plan, however, the State *must* apply to NTIA for a spectrum lease and *may* apply for a grant to fund the opt-out deployment.⁷⁸

In the Second Notice, FirstNet suggests that if an FCC-approved opt-out State cannot proceed to implement its alternative plan because it does not obtain spectrum access or necessary funds from NTIA and FirstNet, FirstNet has discretion not to deploy the NPSBN in the State. Specifically, FirstNet states that such an event “would then *permit FirstNet to implement* a plan in the State,” and “a State may ultimately seek to have FirstNet, *assuming mutually acceptable terms*, take over some or all RAN

⁷⁴ Second Notice at 15.

⁷⁵ Act, Sec. 6206(c)(2)(A), 6302(e).

⁷⁶ Act, Sec. 6302(e).

⁷⁷ Act, Sec. 6302(e)(3)(C)(iv).

⁷⁸ Act, Sec. 6302(e)(3)(C)(iii).

responsibilities in the State through a contractual agreement,” but the Second Notice stops there, leaving the matter to FirstNet’s discretion.⁷⁹

FirstNet’s central mandate is “to take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network.”⁸⁰ The Governor’s right to opt-out provides a State the opportunity to take over responsibility for deploying and operating the RAN in the State, but failure of that effort cannot relieve FirstNet of its duty to the nation’s public safety community, even in failed opt-out States.

VII. Interpretations Presented in the Second Notice are Damaging to the FirstNet Brand and May Ultimately Reduce Adoption.

The Second Notice describes FirstNet’s preliminary conclusions as to the extent of its authority under the Act; it does not state what policy decisions FirstNet will make within that authority. Though it does not agree with some of those preliminary conclusions, as described above, Minnesota recognizes that FirstNet intends to act in the best interest of public safety by deploying a mission critical, public safety broadband network in every state that meets first responder needs and will save lives. However, some of the interpretations presented in the Act may be negatively interpreted by stakeholders, potentially damaging FirstNet’s brand, losing future customers and threatening sustainability.

As FirstNet’s outreach team will surely attest, stakeholders’ perceptions of FirstNet are very important. Even if FirstNet ultimately offers an excellent service, adoption will be slow if first responders do not *believe* the network meets public safety’s needs. Many public safety agencies have observed this phenomenon in the roll-out of multi-agency digital radio systems constructed over the last two decades where perception issues negatively impact adoption of the service, even if the radio system provides better service at lower cost than individual agencies would be able to realize.

A. The Second Notice Suggests the Consultation Process May Be Meaningless.

FirstNet clearly places great value in the consultation process. However, conclusions presented in the Second Notice may lead stakeholders to determine otherwise.

FirstNet preliminarily concludes that an accepted State plan will not be a contract and thus will not constitute a binding commitment for a definite level of service from FirstNet.⁸¹ Under this interpretation of the Act (addressed in Section IV.B, above), the States will have expended well over one hundred

⁷⁹ Second Notice at 34, 35 (emphasis added).

⁸⁰ Act, Sec. 6206(b)(1).

⁸¹ Second Notice at 29-31.



million dollars of effort⁸² to gather input for and spread awareness about FirstNet in pursuit of a State plan that may not achieve the intended outcome, because it may omit a commitment to deliver a service, much less a detailed description of that service. FirstNet proposes, rather, that after a State has opted in, it will enter into binding contracts with one public safety entity at a time. The true consultation—the one that will have a material impact—thus would occur after and independent of the development of the State plan. Some stakeholders may then read the Second Notice’s conclusions to mean the consultation process and the resulting State plan are expensive, time-consuming efforts from which they may not gain a solution on which they can rely.

The consultation is the single major opportunity built into the Act for the States and their stakeholders to have any meaningful impact on the level of service FirstNet will provide, and in particular, how it will compare to commercial service. The NPSBN will have to provide a service that is more attractive on a cost-benefit basis than a commercial option.

If stakeholders do not *perceive* that public safety has had a key and influential role in the way the NPSBN is built, they may not believe that it is any better than their current commercial service and will not subscribe to FirstNet’s service. Further, if stakeholders have nothing to point to as evidence that FirstNet will *definitely* provide superior service—for example, a State plan representing a binding commitment of service—they will have a hard time supporting a decision to opt-in and convincing their elected officials to support any funding required to migrate to the NPSBN.

B. State Officials Are Responsible for Most of FirstNet’s Customer Outreach and Their Support Is Vital to FirstNet’s Long-Term Success.

FirstNet values the support of State officials in building a collaborative program for implementing the NPSBN. However, some of the preliminary conclusions included in the Notice may lead some State officials to conclude otherwise. These State officials are individual people, with their own individual opinions and perceptions. If FirstNet loses a State official’s support or does not cultivate a positive perception with these individual people, FirstNet may have a hard time ultimately being successful in that official’s home State.

Under SLIGP, State officials are responsible for most of FirstNet’s customer outreach. According to NTIA reports, over 60,000 individual stakeholders have been reached by State officials at nearly 1,000 individual meetings.⁸³ It is at these State workshops that decision-makers at the local and county level ask questions such as:

“How will states and agencies participate in the buildout of FirstNet?”⁸⁴

⁸² Under SLIGP, NTIA awarded \$116.5 million to States and Territories; total effort also includes a 20 percent State match. Details available at <http://www.ntia.doc.gov/category/state-and-local-implementation-grant-program>.

⁸³ NTIA Quarter 6 metrics, retrieved 04/06/2015 at

http://www.ntia.doc.gov/files/ntia/publications/slignp_q6_metrics_for_website.pdf.

⁸⁴ FirstNet in Oregon, <http://firstnetinoregon.org/firstnet/index.php/faqs>.



“What is FirstNet’s State plan?”⁸⁵

“How is public safety LTE different from what AT&T and Verizon Wireless are offering?”⁸⁶

“Am I forced to adopt FirstNet’s services?”⁸⁷

“What is this network for?”⁸⁸

These are all important questions, and FirstNet’s primary representative answering them is a State official. FirstNet does not usually get the first opportunity to answer these questions—State officials do—and their answers will be FirstNet’s first impression on most of the public safety community.

The support of State officials is absolutely vital to FirstNet’s success. If a State official feels that FirstNet is mandating the State to adopt a certain course of action, or that FirstNet will not listen to them, they may not perceive their role as meaningful and may not support the program.

Even worse, an alienated State official could use SLIGP as a bully pulpit to spread negative perception of the brand amongst his or her constituency. FirstNet must carefully manage negative perception issues, including how State officials judge FirstNet’s *apparent* motivations. Even negative perceptions that are misguided or based on incorrect assumptions can set up FirstNet’s brand for failure.

Minnesota’s officials strongly support FirstNet’s program; these warnings are not meant to communicate any negative perception or intent on Minnesota’s part. However, the relationship between FirstNet and individual State officials is critical to the program’s success—and some of the interpretations proposed in the Second Notice may damage that relationship.

⁸⁵ Washington State Chief Information Officer FAQ for FirstNet and OneNet, <https://ocio.wa.gov/initiatives/washington-onenet-firstnet/onenet-resources/faq-firstnet-and-onenet>.

⁸⁶ Texas Department of Public Safety Frequently Asked Questions, <http://www.txdps.state.tx.us/LTE/faq.htm>.

⁸⁷ Minnesota Department of Public Safety, Emergency Communications Networks, Frequently Asked Questions, <https://dps.mn.gov/divisions/ecn/programs/wireless-broadband/Pages/frequently-asked-questions.aspx>.

⁸⁸ OhioFirst.Net Frequently Asked Questions, <http://firstnet.ohio.gov/Publications/FAQs>.



VIII. Conclusion

For the reasons set forth above, the State of Minnesota urges FirstNet to reconsider the preliminary conclusions described in the Second Notice, and adopt an interpretation of the Act that preserves the Governor's statutory rights under the Act and better communicates FirstNet's intentions to stakeholders.

Respectfully submitted,

A handwritten signature in black ink that reads 'Jackie Mines'. The signature is written in a cursive, flowing style.

Jackie Mines

Director, Emergency Communications Network

Minnesota Department of Public Safety