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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

First Responder Network Authority

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

Docket Number: 140821696-5909-05

RIN 0660-XC012

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

ACTION: Notice; final interpretations

SUMMARY: The First Responder Network Authority (“FirstNet”) publishes this *Notice* to issue final interpretations of its enabling legislation that will inform, among other things, forthcoming requests for proposals, interpretive rules, and network policies. The purpose of this Notice is to provide stakeholders FirstNet’s interpretations on many of the key preliminary interpretations presented in the proposed interpretations published on March 13, 2015.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. INTRODUCTION AND BACKGROUND

The Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. No. 112-96, Title VI, 126 Stat. 256 (codified at 47 U.S.C. 1401 *et seq.*)) (the “Act”) established the First Responder Network Authority (“FirstNet”) as an independent authority within the National Telecommunications and Information Administration (“NTIA”). The Act establishes FirstNet’s duty and responsibility to take all actions necessary to ensure the building, deployment, and operation of a nationwide public safety broadband network (“NPSBN”).¹

One of FirstNet’s initial steps in carrying out this responsibility pursuant to the Act is the issuance of open, transparent, and competitive requests for proposals (“RFPs”) for the purposes of building, operating, and maintaining the network. We have sought, and may continue to seek, public comments on many technical and economic aspects of these RFPs through traditional procurement processes, including requests for information (“RFIs”) and potential draft RFPs and Special Notices, prior to issuance of RFPs.²

As a newly created entity, however, we are also confronted with many complex legal issues of first impression pursuant to the Act that will have a material impact on the RFPs, responsive proposals, and our operations going forward. Generally, the Administrative Procedure Act (“APA”)³ provides the basic framework of administrative law governing agency action, including the procedural steps that must precede the effective promulgation, amendment,

¹ 47 U.S.C. § 1426(b).

² The pronouns “we” or “our” throughout this *Notice* refer to “FirstNet” alone and not FirstNet, NTIA, and the U.S. Department of Commerce as a collective group.

³ See 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

or repeal of a rule by a federal agency.⁴ However, section 1426(d)(2) of the Act provides that any action taken or decision made by FirstNet is exempt from the requirements of the APA.⁵

Nevertheless, although excluded from these procedural requirements, on March 13, 2015, FirstNet published a public notice entitled “Further Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012” (hereinafter “the Second Notice”),⁶ seeking public comments on preliminary interpretations on certain foundational legal issues, as well as technical and economic issues, to help guide FirstNet’s efforts in achieving its mission.

The purpose of this *Notice* is to provide stakeholders notice of the final legal interpretations on many of the key preliminary interpretations presented in the *Second Notice*. Additional background, rationale for this action, and explanations of FirstNet’s interpretations were included in the *Second Notice* and are not repeated herein. The section immediately below labeled “Final Interpretations” summarizes FirstNet’s final interpretations with respect to the *Second Notice*. Thereafter, the section labeled “Response to Comments” summarizes the comments received on the preliminary interpretations contained in the *Second Notice* and provides FirstNet’s responses to such comments, including further explanations to FirstNet’s interpretations.

II. FINAL INTERPRETATIONS

In sum, FirstNet makes the following final interpretations related to topics in the *Second Notice*:

⁴ See 5 U.S.C. § 551–559. The APA defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” 5 U.S.C. 551(4).

⁵ 47 U.S.C. § 1426(d)(2).

⁶ 80 Fed. Reg. 13336 (Mar. 13, 2015).

A. Technical Requirements Relating to Equipment for Use on the NPSBN

Promoting Competition in the Equipment Market Place

1. FirstNet interprets 47 U.S.C. § 1426(b)(2)(B) as applying to any equipment, including end user devices, used “on” (*i.e.*, to use or access) the network, but does not include any equipment that is used to constitute the network (*i.e.*, the core network or radio access network (“RAN”)).
2. FirstNet concludes that the Act’s goal of “promot[ing] competition in the equipment market” is satisfied by applying the requirements listed in 47 U.S.C. § 1426(b)(2)(B)(i) to only those parameters necessary to maintain interoperability (*i.e.*, “connectivity”) with the NPSBN, which are included in the Interoperability Board Report or otherwise in FirstNet network policies.
3. FirstNet concludes that 47 U.S.C. § 1426(b)(2)(B) applies regardless of whether the equipment will access or use the NPSBN via a FirstNet-deployed RAN or a State-deployed RAN.

B. FirstNet Network Policies

Network Policies

4. FirstNet concludes that the items listed in 47 U.S.C. § 1426(c)(1)(A) relating to RFPs are “policies” for purposes of 47 U.S.C. § 1426(c)(2) and as the term is generally used in 47 U.S.C. § 1426(c).
5. FirstNet concludes that the network policies developed pursuant to 47 U.S.C. § 1426(c)(1) apply to all elements of the network, including RANs deployed by individual States pursuant to 47 U.S.C. § 1442(e)(3).
6. FirstNet concludes that a required aspect of a State’s demonstrations of interoperability to

both the Federal Communications Commission (“FCC”) and NTIA under 47 U.S.C.

§ 1442(e)(3), is a commitment to adhering to FirstNet’s network policies implemented under 47 U.S.C. § 1426(c).

7. FirstNet concludes that it could require compliance with network policies essential to the deployment and interoperable operation of the network for public safety in all States as a condition of entering into a spectrum capacity lease pursuant to 47 U.S.C.

§ 1442(e)(3)(C)(iii)(II).

C. A State’s Opportunity to Assume Responsibility for RAN Deployment and Operation

Final Interpretations Regarding the Presentation of a State Plan and the Completion of Request for Proposal Process

8. FirstNet interprets 47 U.S.C. § 1442(e) to merely require completion of the request for proposal process for the State in question, rather than the nation as a whole, prior to presentation of the plan to the State, assuming that FirstNet can at that stage otherwise meet the requirements for presenting a plan (and its contents) to such State.
9. FirstNet concludes that “completion” of the request for proposal process occurs when FirstNet has obtained sufficient information to present the State plan with the details required pursuant to the Act for such plan, but not necessarily at any final award stage of such a process.

Final Interpretations Regarding the Content of a State Plan

10. FirstNet concludes that the details of the proposed State plan pursuant to 47 U.S.C. § 1442(e)(1)(B) should include at least certain outcomes of the RFP process.
11. FirstNet concludes that the FirstNet plan must contain sufficient information to enable NTIA to make comparisons of cost-effectiveness, security, coverage, and quality of service.

Governor’s Role in the State Plan Process

12. FirstNet concludes that the decision of the Governor pursuant to 47 U.S.C. § 1442(e)(2), for purposes of the Act, is binding on all jurisdictions within such State, and that such a decision must be made for the entire State, and not simply a subset of individual jurisdictions within such State.
13. FirstNet concludes that FirstNet and a State could agree that FirstNet and the State (or sub-State jurisdictions) work together to permit implementation of added RAN coverage, capacity, or other network components beyond the State plan to the extent the interoperability, quality of service, and other goals of the Act are met.

Final Interpretations Regarding the Timing and Nature of a State's Decision

14. FirstNet concludes that the Governor must await notice and presentation of the FirstNet plan prior to making the decision pursuant to 47 U.S.C. § 1442(e)(2).
15. FirstNet concludes that a State decision to participate in the FirstNet proposed deployment of the network in such State may be manifested by a State providing either (1) actual notice in writing to FirstNet within the 90-day decision period or (2) no notice within the 90-day period established pursuant to 47 U.S.C. § 1442(e)(2).
16. FirstNet interprets the requirement within 47 U.S.C. § 1442(e)(3) stating that the notice is to be provided to FirstNet, NTIA, and the FCC as being a contemporaneous (*i.e.*, same day) requirement.

The Nature of FirstNet's Proposed State Plan

17. FirstNet concludes that the presentation of a plan to a Governor and his/her decision to either participate in FirstNet's deployment or follow the necessary steps to build a State RAN does not create a contractual relationship between FirstNet and the State.

Final Interpretations Regarding the State's Development of an Alternative Plan

18. FirstNet concludes that the phrase “complete requests for proposals” means that a State has progressed in such a process to the extent necessary to submit an alternative plan for the construction, maintenance, operation, and improvements of the RAN, that demonstrates the technical and interoperability requirements in accordance with 47 U.S.C. § 1442(e)(3)(C)(i).
19. FirstNet concludes that where a State fails to “complete” its request for proposal within the 180-day period pursuant to the Act, the State forfeits its ability to submit an alternative plan pursuant to 47 U.S.C. § 1442(e)(3)(C), and the construction, maintenance, operations, and improvements of the RAN within the State shall proceed in accordance with the FirstNet proposed plan for such State.

Final Interpretations Regarding the Responsibilities of FirstNet and a State upon a State Decision to Assume Responsibility for the Construction and Operation of its Own RAN

20. FirstNet concludes that once a plan has been disapproved by the FCC, subject only to the additional review described in 47 U.S.C. § 1442(h), the opportunity for a State to conduct its own RAN deployment pursuant to 47 U.S.C. § 1442(e)(3) will be forfeited, and FirstNet shall proceed in accordance with its proposed plan for that State.
21. FirstNet concludes, following an FCC-approved alternative State RAN plan, it would have no obligation to construct, operate, maintain, or improve the RAN within such State.
22. FirstNet concludes that if a State, following FCC approval of its alternative plan, is unable or unwilling to implement its alternative plan in accordance with all applicable requirements, then FirstNet may assume, without obligation, RAN responsibilities in the State.

D. Customer, Operational and Funding Considerations Regarding State Assumption of RAN Construction and Operation

Customer Relationships in States Assuming RAN Construction and Operation

23. FirstNet concludes that the Act provides sufficient flexibility to accommodate many types of customer relationships with public safety entities for States assuming RAN responsibility so long as the relationships meet the interoperability and self-sustainment goals of the Act.
24. FirstNet concludes that the Act does not require that States assuming RAN deployment responsibilities be the customer-facing entity entering into agreements with and charging fees to public safety entities in such States.
25. FirstNet concludes that the Act does not preclude States assuming RAN deployment responsibilities from charging subscription fees to public safety entities if FirstNet and such States agree to such an arrangement in the spectrum capacity lease.
26. FirstNet concludes that the Act provides sufficient flexibility to allow the determination of whether FirstNet or a State plays a customer-facing role to public safety entities in a State assuming RAN responsibilities to be the subject of operational discussions between FirstNet and the State in negotiating the terms of the spectrum capacity lease.
27. FirstNet concludes that it will maintain a flexible approach to such functions and interactions in order to provide the best solutions to each State so long as the agreed upon approach meets the interoperability and self-sustainment goals of the Act.

Final Interpretation of FirstNet Analyzing Funding Considerations as Part of its Determination to Enter Into a Spectrum Capacity Lease

28. FirstNet concludes, in fulfilling its duties and responsibilities pursuant to the Act, it can and must take into account funding considerations, including the “cost-effectiveness” of an alternative state plan as it may impact the national deployment of the NPSBN, in

determining whether and under what terms to enter into a spectrum capacity lease with a State.⁷

29. FirstNet concludes as part of its cost-effectiveness analysis in determining whether and under what terms to enter into a spectrum capacity lease, it (i) must consider the impact of cost-inefficient alternative RAN plans, including inefficient use of scarce spectrum resources, on the NPSBN, and (ii) may require that amounts generated within a State in excess of those required to reasonably sustain the State RAN, be utilized to support the Act's requirement to deploy the NPSBN on a nationwide basis.

30. FirstNet concludes as part of its cost-effectiveness analysis, it must consider State reinvestment and distribution of any user fees assessed to public safety entities or spectrum capacity revenues in determining whether and under what terms to enter into a spectrum capacity lease.

Reinvestment of User or Subscriber Fees

31. FirstNet concludes that the Act requires that States assuming RAN deployment responsibilities and charging user or subscription fees to public safety entities must reinvest such fees into the network.

32. FirstNet concludes it could impose a reinvestment restriction within the terms of a spectrum capacity lease with a State.

Reinvestment of Revenues from State Covered Leasing Agreements/Public-Private Partnerships

33. FirstNet concludes that, in practical effect, the literal statutory differences between a covered leasing agreement and public-private partnership as used in the Act result in no

⁷ See 47 U.S.C. §1442(e)(3)(D).

substantive difference between the Act’s treatment of FirstNet and States that assume RAN responsibility.

34. FirstNet concludes that any revenues from public-private partnerships, to the extent such arrangements are permitted and different than covered leasing agreements, should be reinvested into the network and that the reinvestment provision of 47 U.S.C. § 1442(g) should be interpreted to require such reinvestment.

III. RESPONSE TO COMMENTS

FirstNet received 70 written comments in response to the *Second Notice* from various stakeholders, including States, tribes, public safety organizations, commercial carriers, equipment vendors, utilities, and various associations. Comments included the submission of a large number of identical or similar comments as well as oral statements made during meetings with FirstNet. FirstNet has carefully considered each of the comments submitted. FirstNet has grouped and summarized the comments according to common themes and has responded accordingly. All written comments can be found at www.regulations.gov.

A. Final Interpretations of Technical Requirements Relating to Equipment for Use on the NSPBN

Promoting Competition in the Equipment Market Place

The Act requires FirstNet to “promote competition in the equipment market, including devices for public safety communications, by requiring that equipment for use on the network be: (i) built to open, non-proprietary, commercially available standards; (ii) capable of being used by any public safety entity and by multiple vendors across all public safety broadband networks operating in the 700 MHz band; and (iii) backward-compatible with existing commercial networks to the extent that such capabilities are necessary and technically and

economically reasonable.”⁸ Given the interoperability goals of the Act, and the fact that end user devices will need to operate seamlessly across the network regardless of State decisions to assume RAN responsibilities, FirstNet makes the following final interpretations related to this provision:

- 1. FirstNet interprets 47 U.S.C. § 1426(b)(2)(B) as applying to any equipment, including end user devices, used “on” (*i.e.*, to use or access) the network, but does not include any equipment that is used to constitute the network (*i.e.*, the core network or RAN).**
- 2. FirstNet concludes that the Act’s goal of “promot[ing] competition in the equipment market” is satisfied by applying the requirements listed in 47 U.S.C. § 1426(b)(2)(B)(i) to only those parameters necessary to maintain interoperability (*i.e.*, “connectivity”) with the NPSBN, which are included in the Interoperability Board Report or otherwise in FirstNet network policies.**
- 3. FirstNet concludes that 47 U.S.C. § 1426(b)(2)(B) applies whether or not the equipment is to access or use the NPSBN via a FirstNet-deployed RAN or a State-deployed RAN.**

Analysis of and Responses to Comments on Technical Requirements Relating to Equipment for Use on the NPSBN

Summary: The majority of commenters supported FirstNet’s proposed interpretations regarding technical requirements relating to equipment for use on the NPSBN, emphasizing, for example, that a contrary interpretation could lead to incompatible equipment, thereby limiting interoperability and resulting in higher-priced end user equipment. In particular, all commenters agreed that 47 U.S.C. § 1426(b)(2)(B) applies regardless of whether the equipment will access or use the NPSBN via a FirstNet-deployed RAN or a State-deployed RAN. Interoperability of end-user devices across the entire network was the primary basis for this perspective. As

⁸ 47 U.S.C. § 1426(b)(2)(B)(i).

documented below, however, certain commenters disagreed or provided general comments on these interpretations.

Comment # 1: Several commenters stated the FirstNet proposed interpretation limiting the applicability of 47 U.S.C. § 1426(b)(2)(B) to subscriber equipment (*i.e.*, end-user devices) only and not system infrastructure (*i.e.*, the core network and RAN) is not supported by the plain language of the Act and should be interpreted to apply more broadly to all network equipment and infrastructure.

Response: FirstNet disagrees that its interpretation is not supported by the plain language of the Act or should be applied more broadly to include network components or equipment (*i.e.*, the core network and RAN). First, there is nothing in 47 U.S.C. § 1426(b)(2)(B) that directly indicates or references equipment or components constituting the core network or RAN. Rather, the Act expressly states that 47 U.S.C. § 1426(b)(2)(B) applies only to equipment “for use on” the NPSBN, rather than, for example, “equipment of” or “equipment constituting” the NPSBN. More specifically, the Act states that the range of equipment implicated in this provision must at least include “devices,” which, in the telecommunications market, is often a reference to end user devices, rather than equipment used inside the network to provide service to such devices.⁹

Second, the Act provides a separate standard when discussing equipment constituting the NPSBN versus equipment for use on the network. In particular, the *network components* of the NPSBN itself initially consists of a core network and RAN, both of which are required to be based on “commercial standards.”¹⁰ Conversely, when describing *equipment*, the Act requires that such equipment must be built not only to commercial standards, but also to “open, non-

⁹ See 47 U.S.C. § 1426(b)(2)(B).

¹⁰ See 47 U.S.C. § 1422(b).

proprietary” standards.¹¹ Consequently, a plain reading of the Act indicates that Congress intended for different standards to apply to the network components (*i.e.*, core network and RAN) and equipment for use on the network described in 47 U.S.C. § 1426(b)(2)(B).

Finally, this interpretation is supported by the other two elements appearing in 47 U.S.C. § 1426(b)(2)(B). For example, 47 U.S.C. § 1426(b)(2)(B)(ii) requires that such equipment be “capable of being used by any public safety entity,” which would seem inconsistent with a requirement applicable to complex network routing and other equipment used inside the network. Similarly, 47 U.S.C. § 1426(b)(2)(B)(iii) requires such equipment to be “backward-compatible with existing commercial networks” in certain circumstances, which would again make sense in the context of end user devices, but not equipment being used to construct the network. Thus, based on the analysis in the *Second Notice* and supporting comments, FirstNet interprets the plain language of the Act describing equipment in 47 U.S.C. § 1426(b)(2)(B) as referring to equipment using the services of the network, rather than equipment forming elements of the NPSBN (*i.e.*, core network or the RAN).

Comment # 2: One commenter stated that it is critical for FirstNet to understand that a paramount concern of the Act is to avoid a replication of the underlying conditions that led to limited participants in the public safety ecosystem, including the use of equipment that is not based on generally accepted commercial standards, but were in fact proprietary technologies that were, in most cases by design, not interoperable with other commercially available alternatives, resulting in limited competition and increased costs.

Response: FirstNet acknowledges the comment and understands the importance of promoting competition in the equipment marketplace as described in 47 U.S.C. § 1426(b)(2)(B), while at

¹¹ See 47 U.S.C. § 1426(b).

the same time allowing for the development of innovative technologies that will interoperate with the NPSBN and provide the best solutions for public safety.

Comment # 3: A few commenters disagreed with the interpretation and suggested further clarity was required around the specific elements that constitute the FirstNet core network and RAN in order to better understand the scope of the proposed interpretation.

Response: FirstNet refers the commenters to the final interpretations to the *First Notice*,¹² which discuss in detail the specific elements that constitute the FirstNet core network and RAN.

Comment # 4: One commenter encouraged FirstNet to focus on optimizing options, rather than defining network openness proscriptively. The commenter reasoned that FirstNet should take into consideration the fact that maximizing customer choice and vendor competition on handsets will also require an eye towards RAN equipment open standards to maximize the use of commercially available handsets already in development for commercial cellular networks, and also to ensure maximum interoperability and roaming on commercial cellular networks.

Response: See the response to Comment # 2 above.

Comment # 5: A few commenters recommended that the application of this provision be performed in full conformance with the recommendation and guidelines on open, non-proprietary, commercially available standards found in the Section 4.1.8 of the Interoperability Board Report.

Response: FirstNet acknowledges the comment and believes its interpretations of 47 U.S.C. § 1426(b)(2)(B) are consistent with the relevant Sections of the Interoperability Board Report.¹³

¹² *Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012*, 79 Fed. Reg. 57058 (September 24, 2014) (herein “*First Notice*”).

¹³ See Interoperability Board, *Recommended Minimum Technical Requirements to Ensure Nationwide Interoperability for the Nationwide Public Safety Broadband Network* (“Interoperability Board Report”) (May 22,

Comment # 6: One commenter suggested that characterizing satellite connectivity as equipment “for use on” the network could result in requirements that constrict use of satellite connectivity as a network element, as opposed to an end-user device.

Response: FirstNet acknowledges the comment and will take the suggestion into consideration as it further delineates which specific equipment falls within the network components constituting the core network and RAN.

Comment # 7: One commenter recommended that FirstNet should more clearly articulate what it means by “connectivity” so that interested parties can meaningfully evaluate whether the proposed scope of the requirement is reasonable and consistent with the Act’s requirements.

Response: FirstNet, as stated in the *Second Notice*, interprets “connectivity” for the purposes of this provision as being satisfied by applying the requirements of 47 U.S.C. § 1426(b)(2)(B) to only those parameters necessary to maintain interoperability and operational capability (*i.e.*, “connectivity”) with the NPSBN as detailed in the Interoperability Board Report or otherwise in FirstNet network policies.

Comment # 8: One commenter suggested that FirstNet, the National Institute of Standards and Technology (“NIST”), and the FCC should work to ensure that conformity with open, non-proprietary, commercially available standards—such as those developed by the 3rd Generation Partnership Project—is a prerequisite to appearing on the list of certified equipment that the Act instructs to be developed by NIST. The commenter also stated that NIST, FirstNet, and the FCC should work together to ensure rigorous interoperability verification when developing the list.

Response: FirstNet acknowledges the comment and intends to coordinate with NIST and the FCC as required by the Act.

2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021919873>.

Comment # 9: Several commenters stated that the definition of equipment, or its interoperability requirements, should not preclude commercially developed and potentially legally protected materials, such as existing operating systems, from being acceptable platforms for accessing applications and connecting to the NPSBN, but rather, innovation and existing capabilities should be encouraged among the vendor community to reduce device costs and speed to deployment, so long as interoperability among various devices remains.

Response: FirstNet believes its interpretations do not preclude or hinder existing operating systems from being acceptable platforms for accessing applications and connecting to the NPSBN so long as these systems meet the relevant requirements of 47 U.S.C. § 1426(b)(2)(B). Specifically, FirstNet concludes that the Act’s goal of “promot[ing] competition in the equipment market” is satisfied by applying these requirements to only those parameters necessary to maintain interoperability (*i.e.*, “connectivity”) with the NPSBN, which are included in the Interoperability Board Report or otherwise in FirstNet network policies. In reaching this conclusion, we recognized that in order for innovation to bring forth improved products for the NPSBN, and for FirstNet and public safety entities to benefit from competition, product differentiation must be allowed to thrive. However, such differentiation must be balanced with the interoperability goals of the Act. Thus, certain technical attributes of the network must be met by the equipment described pursuant to 47 U.S.C. § 1426(b)(2)(B), but other equipment attributes may be left to individual vendors to develop.

Comment # 10: One commenter stated that attributes and features of a particular product should, to the maximum extent possible, be traceable to a set of standard specifications.

Response: See the response to Comment # 8 above.

B. FirstNet Network Policies

Network Policies

Under the Act, FirstNet is tasked with developing “network policies” in carrying out various obligations related to its mission to ensure the establishment of the NPSBN.¹⁴ In particular, FirstNet must develop RFPs that appropriately address certain specified matters regarding building, operating, and maintaining the NPSBN, along with four other sets of policies covering technical and operational areas.¹⁵ In addition to items related to the RFPs, FirstNet must develop policies regarding the technical and operational requirements of the network; practices, procedures, and standards for the management and operation of the network; terms of service for the use of the network, including billing practices; and ongoing compliance reviews and monitoring.¹⁶ Taken as a whole, these policies, including the elements of the RFPs, form operating parameters for the NPSBN, addressing, for example, how the FirstNet core network will connect and operate with the RANs to ensure interoperability.

The Act does not expressly state whether only FirstNet, or both FirstNet and a State assuming RAN responsibilities, must follow the network policies required pursuant to 47 U.S.C. § 1426(c)(1). Rather, the Act only refers to the “nationwide public safety broadband network” or the “network,” without expressly indicating whether such State RANs are included in the term. Thus, given the provisions of the Act, the Interoperability Board Report, the overall interoperability goals of the Act, and the effect on interoperability of not having the network policies apply to States assuming RAN responsibilities, FirstNet makes the following conclusions relating to the nature and application of the network policies developed pursuant to

¹⁴ See 47 U.S.C. § 1426(c)(1).

¹⁵ See *id.*

¹⁶ 47 U.S.C. § 1426(c)(1).

47 U.S.C. § 1426(c)(1) to both FirstNet and States assuming RAN responsibilities:

1. **FirstNet concludes that the items listed in 47 U.S.C. § 1426(c)(1)(A) relating to RFPs are “policies” for purposes of 47 U.S.C. § 1426(c)(2) and as the term is generally used in 47 U.S.C. § 1426(c).**
2. **FirstNet concludes that the network policies developed pursuant to 47 U.S.C. § 1426(c)(1) apply to all elements of the network, including RANs deployed by individual States pursuant to 47 U.S.C. § 1442(e)(3).**
3. **FirstNet concludes that a required aspect of a State’s demonstrations of interoperability to both the FCC and NTIA under 47 U.S.C. § 1442(e)(3), is a commitment to adhering to FirstNet’s network policies implemented under 47 U.S.C. § 1426(c).**
4. **FirstNet concludes that it could require compliance with network policies essential to the deployment and interoperable operation of the network for public safety in all States as a condition of entering into a spectrum capacity lease pursuant to 47 U.S.C. § 1442(e)(3)(C)(iii)(II).**

Analysis of and Responses to Comments on Network Policies

RFPs Items as Network Policies

Summary: The majority of commenters agreed with FirstNet’s interpretation that the topics listed in 47 U.S.C. § 1426(c)(1) pertaining to RFPs, while not typically thought of as policies, nonetheless are “network policies” for purposes of 47 U.S.C. § 1426(c)(1).

Comment # 11: One commenter disagreed that the RFP-related items *should* be considered policies, but acknowledged that they would qualify as such pursuant to the Act as written.

Response: FirstNet acknowledges the comment, but believes its interpretation of this provision

as recognized by the commenter, is correct pursuant to the Act.

Applicability of Network Policies to States Assuming RAN Responsibilities

Summary: The vast majority of commenters also agreed with FirstNet’s interpretation that the network policies pursuant to 47 U.S.C. § 1426(c) apply regardless of whether FirstNet deploys the RAN or the State takes on that responsibility. These commenters agreed with FirstNet’s assessment that universal application of network policies, irrespective of who deploys the RAN, is critical to maintaining interoperability throughout the NPSBN.

Comment # 12: A few commenters disagreed with FirstNet’s interpretation that all States must comply with FirstNet’s network policies, generally arguing that States assuming responsibilities for deploying the RAN are not compelled pursuant to the Act to comply with FirstNet’s network policies and thus should have the authority to develop their own policies.

Response: FirstNet disagrees and believes the network policies required to be developed pursuant to 47 U.S.C. § 1426(c)(1) to be applicable to the entire NPSBN, including a RAN whether such RAN is deployed by FirstNet or a State.

First, the plain language of the Act suggests that network policies developed pursuant to 47 U.S.C. § 1426(c)(1) are intended to apply to all elements of the NPSBN. The Act defines the term “nationwide public safety broadband network” to mean the nationwide, interoperable public safety network described in 47 U.S.C. § 1422.¹⁷ Accordingly, the Act, in 47 U.S.C. § 1422(b), expressly defines the NPSBN as initially consisting of two primary components: the core network and the RAN. Although generally describing the elements and scope of these network components, the Act does not exclude or otherwise indicate that a State-deployed RAN is not part of the NPSBN. Thus, the plain language of the Act appears to indicate that a RAN,

¹⁷ 47 U.S.C. § 1401(21).

regardless of what entity actually deploys it, is a component of the overall NPSBN.

Consequently, it is reasonable to interpret that a RAN, as a component of the network, would be subject to all network requirements, regardless of what entity is responsible for deploying the RAN, including policies that apply to the network as a whole.

Second, the Act mandates that FirstNet, in carrying out the requirements of the Act, must establish *network* policies, but does not authorize any other entity to establish such policies.¹⁸ Specifically, FirstNet must develop the following policies: those related to technical and operational requirements of the *network*; practices, procedures, and standards for the management and operation of such *network*; terms of service for the use of such *network*, including billing practices; and ongoing compliance reviews and monitoring of the management and operation of the *network* and practices and procedures of entities operating on the *network* and the personnel using the *network*.¹⁹ This list of network policies described in 47 U.S.C. § 1426(c)(1) does not expressly contemplate that a separate set of network policies would be developed or apply to a RAN deployed by a State. In fact, the Act, by requiring FirstNet to consult with States on various matters, including network policies, suggests that the opposite conclusion is likely the case. For example, as stated in the *Second Notice*, the Act did not differentiate between States accepting the FirstNet RAN plan and States assuming RAN responsibility in the provisions of 47 U.S.C. § 1426(c)(2) requiring consultation with States on the network policies of 47 U.S.C. § 1426(c)(1). Consequently, such consultations presumably would not be required for States assuming RAN responsibility if the policies in question did not apply to the RAN in that State.

¹⁸ See 47 U.S.C. § 1426(c)(1).

¹⁹ See *id.*

Third, among other network considerations, the Act describes the process a State seeking to conduct its own RAN deployment must follow in order to receive approval of an alternative RAN plan, a grant for RAN construction, and authority to seek a spectrum capacity lease with FirstNet. These considerations include, among other things, a demonstration of initial and ongoing interoperability with the NPSBN.²⁰ From a practical perspective, such interoperability will largely depend, as is the case with FirstNet's deployed core network and RANs, on compliance with the network policies developed pursuant to 47 U.S.C. § 1426(c)(1). Thus, a necessary aspect of a State's demonstration of interoperability to both the FCC and NTIA is a commitment to adhering to FirstNet's network policies. This could be particularly important because such policies will likely evolve over time as the technology, capabilities, and operations of the network evolve, and an alternative interpretation could frustrate the interoperability goals of the Act.

In addition, States assuming RAN responsibilities must demonstrate "comparable security, coverage, and quality of service to that of the [NPSBN]."²¹ FirstNet's policies will establish requirements for security, coverage, and quality of service standards for the NPSBN, and thus States seeking to assume State RAN responsibilities would need to demonstrate "comparable" capabilities to those specified in these policies. As stated above, however, the Act requires FirstNet to engage in consultation with States regarding the network policies pursuant to 47 U.S.C. § 1426(c)(1), so while FirstNet will establish such policies, States will have meaningful opportunities to help inform the establishment of such policies.

Comment # 13: A few commenters recognized the importance of interoperability, but suggested

²⁰ 47 U.S.C. § 1422(e)(3).

²¹ 47 U.S.C. § 1442(e)(3)(D)(iii).

that States taking on RAN responsibilities should have the flexibility to tailor their policies to their unique circumstances unless it affected interoperability.

Response: FirstNet understands the unique needs of the States and believes the Act, through its extensive consultation requirements and processes regarding network policies developed pursuant to 47 U.S.C. § 1426(c)(1), provides a vehicle for States to have substantial opportunities to inform such policies and, as is discussed in the *Second Notice*, FirstNet will continue to work cooperatively with States in their establishment.

Comment # 14: One commenter advocated that, in order to avoid imposing unnecessary burdens, States assuming RAN responsibilities should be required to comply with only those policies necessary to maintain interoperability.

Response: FirstNet agrees that the primary goal of the Act is to ensure the interoperability of the NPSBN, and, accordingly, paramount among network policies are those that assist in meeting this requirement. However, the Act requires FirstNet to establish policies for other elements critical to establishing the NPSBN, such as those that govern the technical and operational requirements of the network.²² For example, such policies, as contemplated in the Act, will likely provide the criteria and processes for the implementation and monitoring of vital network features, including those related to priority and preemption or network security, both of which are essential to public safety. To that end, it is critical that public safety be afforded the same features, functionality, and level of service from State to State, particularly when there is a need to cross State boundaries in the case of an incident, to ensure no impact to vital communications. The Act's requirement pursuant to 47 U.S.C. § 1426(c)(1) for the implementation of network policies, we believe, was reasonably intended to apply to States assuming RAN responsibilities

²² See 47 U.S.C. § 1426(c)(1).

to ensure neither the public's safety nor the network are put at risk. Accordingly, FirstNet disagrees that States assuming RAN responsibilities should be required to comply with only those network policies necessary to maintain interoperability.

Compliance with FirstNet Network Policies as an Element to Demonstrating Interoperability

Summary: A majority of commenters agreed with FirstNet's related interpretation that adherence to FirstNet's network policies would be an important factor in demonstrating interoperability pursuant to 47 U.S.C. § 1442(e)(3) by a State that is seeking to assume RAN responsibilities. Several of these commenters focused on the need for uniformity and consistency in policies to ensure interoperability throughout the lifetime of the network. A few commenters disagreed with this approach, however, suggesting that the interpretation was not supported by the Act.

Comment # 15: One commenter contended that the Act neither expressly nor implicitly makes such a pronouncement regarding a State's interoperability demonstration, expressed concern that the interpretation could compromise a State's ability to have control over deployment of its RAN, and proposed instead that a State seeking to assume responsibility for deploying the RAN be required to demonstrate both current and future interoperability capability, but not necessarily be subject to FirstNet's network policies.

Response: See the responses to Comment # 1 and Comment # 2 above.

Compliance with FirstNet Network Policies as a Condition to Obtaining a Spectrum Capacity Lease

Summary: Commenters largely agreed with FirstNet's conclusion that it could require compliance with certain network policies essential to the deployment and interoperable operation of the NPSBN as a condition to entering into a spectrum capacity lease pursuant to 47 U.S.C.

§ 1442(e)(3)(C)(iii)(II). One commenter, for instance, encouraged FirstNet to use all the tools at its disposal to require compliance with network policies to ensure the central goal of the Act of creating a sustainable, interoperable, nationwide network. Another commenter noted that, as the license holder of the spectrum, FirstNet has the right to take measures that ensure the nationwide interoperability of the network. A few commenters disagreed with FirstNet's interpretation that compliance with FirstNet's network policies could be a condition within a State's eventual spectrum capacity lease with FirstNet, challenging FirstNet's authority pursuant to the Act to impose such a condition.

Comment # 16: One commenter argued that the only limitations allowed to be placed on access to a spectrum capacity lease are those expressly enumerated in 47 U.S.C. § 1442(e)(3)(D), indicating that compliance with FirstNet's network policies are not explicitly included in those requirements.

Response: FirstNet disagrees and notes that as the licensee of the spectrum it must ultimately determine the terms and conditions of a spectrum capacity lease entered into with a State assuming responsibility for RAN deployment.

Comment # 17: One commenter contended that requiring compliance with network policies as a condition to obtaining a spectrum capacity lease was a way for FirstNet to gain concessions not required pursuant to the Act from a State seeking to take on responsibilities for deploying the RAN.

Response: FirstNet recognizes the Act strikes a balance between establishing a nationwide network and providing States an opportunity, under certain conditions, to deploy a RAN within their respective State boundaries. One of those conditions explicitly stated within the Act is for

the State to obtain a spectrum capacity lease from FirstNet.²³ Accordingly, FirstNet intends to act in good faith with each of the States to explore “win-win” solutions with States desiring to assume RAN responsibilities consistent with all requirements in the Act mandating the deployment of an interoperable nationwide broadband network for public safety.

Comment # 18: A few commenters did not disagree with FirstNet’s interpretation, but noted the importance of providing clarity and transparency to the spectrum capacity leasing process.

Response: FirstNet acknowledges the comments and will consider them, as appropriate, in the development of any processes or requirements related to a spectrum capacity lease.

C. A State’s Opportunity to Assume Responsibility for RAN Deployment and Operations

Final Interpretations Regarding the Presentation of a State Plan and the Completion of Request for Proposal Process

The Act requires FirstNet to present its plan for a State to the Governor “[u]pon the completion of the request for proposal process conducted by FirstNet for the construction, operation, maintenance, and improvement of the [NPSBN]”²⁴ The Act does not further define the specific stage in the RFP process that would constitute being “complete.”

FirstNet, in accordance with its analysis in the *Second Notice*, makes the following conclusions regarding the completion of the RFP process and the definition of completion:

- 1. FirstNet interprets 47 U.S.C. § 1442(e) to merely require completion of the RFP process for a particular State, rather than the nation as a whole, prior to presentation of the plan to such State, assuming that FirstNet can at that stage otherwise meet the requirements for presenting a plan (and its contents) to such State.**

²³ See 47 U.S.C. § 1442(e)(3)(C)(iii)(II).

²⁴ 47 U.S.C. § 1442(e).

- 2. FirstNet concludes that “completion” of the RFP process occurs at such time that FirstNet has obtained sufficient information to present the State plan with the details required pursuant to the Act for such plan, but not necessarily at any final award stage of such a process.**

Analysis of and Responses to Comments on the Completion of the Request for Proposal Process

The majority of respondents agreed with FirstNet’s interpretation that, so long as FirstNet is able to provide the contents of, and meet the Act’s requirements for presenting, a plan to the State, FirstNet need only complete the RFP process for the specific State rather than the nation as a whole.²⁵ In addition, most commenters agreed that “completion” was not necessarily a final award stage of any RFP process, but simply the stage at which FirstNet has obtained sufficient information to present the State plan and its required details to the Governor. Commenters generally understood the complex economies of scale determinations that must be undertaken by potential offerors and agreed that, depending on final determinations by the States regarding their decision to assume responsibility to deploy their own RAN, such final award stages may come after the State plan presentation.

Several respondents disagreed, however, arguing that the RFP process must be completed nationwide prior to any State plan being presented to the Governor or his designee, while other commenters provided recommendations for implementing these interpretations.

Comment #19: Two commenters were concerned that FirstNet intended to issue individual RFPs for each State, and that such an approach would deprive FirstNet and NTIA of critical information and prevent States from making informed decisions. One commenter stated that whether FirstNet chooses to conduct a single nationwide RFP for the entire network, discrete

²⁵ We note that the FCC may provide further guidance with respect to the approval process for an alternative plan pursuant to 47 U.S.C. § 1242(e)(3).

nationwide RFPs for categories of network procurements, or multiple State or regional RFPs, FirstNet should complete all of its planned RFP processes across the nation before presenting individualized State plans.

Response: FirstNet disagrees that all RFP processes across the nation must be completed prior to presenting a single State plan, and believes that requiring such a process would have the potential to restrict the number and kind of RFPs that FirstNet issues, and could unduly delay the deployment of the NPSBN to the injury of public safety stakeholders and potential partner(s).

The Act provides FirstNet with flexibility in deciding how many and what type of RFPs to develop and issue by not specifying any such required number or type.²⁶ As discussed in the *Second Notice*, if 47 U.S.C. § 1426 is read to require all States to await the completion of all such RFP processes, FirstNet would likely constrain the range of RFPs it might otherwise conduct to avoid substantial delays nationwide, and in doing so constrain its ability to reflect the input from consultative parties as required by the Act.²⁷

Additionally, by requiring FirstNet to wait until all RFP processes are fully complete across the nation prior to issuing a State plan, a single protest regarding a single State or region could substantially delay implementation of the network in many or most States contrary to the Act's emphasis on "speed[ing] deployment of the network."²⁸

Comment #20: Another commenter focused on the potential for diminished spectrum value were FirstNet to issue individual State RFPs and was particularly concerned that there may be a lack of respondents to the RFPs in rural States with less overall spectrum value than those States

²⁶ See generally 47 U.S.C. § 1426(b).

²⁷ See 47 U.S.C. § 1426(c)(2)(A).

²⁸ See 47 U.S.C. § 1426(b)(1)(C).

that have larger, metropolitan areas within their respective borders. This commenter asserted that the only way to meet the Act's requirements to "build out the NPSBN to cover rural America" was to either partner with a large number of rural providers or to have a nationwide partner.

Response: FirstNet acknowledges the comment and will consider it, as appropriate, in the development of any processes or requirements related to RFP(s) regarding the build out of the NPSBN.

Comment # 21: An additional commenter was concerned that if complete nationwide data from the RFP process is not available to a State when FirstNet presents the State plan, any alternative plan developed by the State could not be fairly evaluated for its "'cost-effectiveness' based on a nationwide analysis."

Response: FirstNet disagrees that full nationwide data is necessary for a State to develop an alternative plan. FirstNet interprets that, in order to present a State plan, FirstNet must have obtained sufficient information to present the State plan with the details required pursuant to the Act for such a plan. The details of the State plan, as discussed in the *Second Notice*, must include sufficient information to enable NTIA to undertake comparisons of cost-effectiveness, security, coverage, and quality of service – exactly the type of cost-effectiveness comparisons about which the commenter is concerned. Therefore, FirstNet believes its final interpretation regarding what constitutes completion of the RFP process necessarily encapsulates and allays the commenter's concerns.

Comment # 22: Several commenters, while agreeing with FirstNet's legal interpretations that the RFP process is considered complete when FirstNet has enough information to present a State plan for the specific State in question, also suggested that FirstNet try to at least provide State

plans at a similar time to members of the surrounding FEMA region due to the close coordination that must take place within FEMA region States.

Response: FirstNet acknowledges this comment and will consider it, as appropriate, as it develops the process for the presentation of State plans.

Final Interpretations Regarding the Content of a State Plan

47 U.S.C. § 1442(e)(1) requires that FirstNet provide to the Governor of each State, or a Governor’s designee, “details of the proposed plan for build out of the [NPSBN] in such State.” Section 1442 does not include any express guidance as to the “details of the proposed plan” that must be provided.

Other provisions of the Act, however, provide some guidance in this regard and include provisions relating to the outcomes of the RFP process as well as the ability for NTIA to make comparisons of cost-effectiveness, security, coverage, and quality of service. In accordance with the structure and purposes of the Act, FirstNet makes the following interpretations regarding the content of a State plan:

- 1. FirstNet concludes that the details of the proposed State plan pursuant to 47 U.S.C. § 1442(e)(1)(B) should include at least certain outcomes of the RFP process.**
- 2. FirstNet concludes that the FirstNet plan must contain sufficient information to enable NTIA to make comparisons of cost-effectiveness, security, coverage, and quality of service.**

Analysis of and Responses to Comments on the Content of a State Plan

The majority of commenters agreed with FirstNet’s interpretations regarding the content of a State plan. Many agreed with FirstNet that its interpretations regarding the content of a State plan constituted only the minimum details that FirstNet should provide and that FirstNet

may decide to provide more specifics as it deems necessary. A few commenters, while generally agreeing with FirstNet’s conclusions, suggested additional details that FirstNet should take into consideration and provide upon the presentation of a State plan.

Comment # 23: One commenter suggested that any State plan must also contain information and assumptions regarding the core network, including capacity, accessibility, and interoperability, for a Governor to truly have enough information at hand to make an informed decision.

Response: FirstNet agrees that certain information, as determined by FirstNet, regarding the core network should be included in the State plan in order to enable the FCC and NTIA to effectively evaluate and compare the State’s alternative RAN plan should the State decide to deploy its own RAN and not participate in the FirstNet-proposed State plan pursuant to 47 U.S.C. § 1442(e)(2).

Comment # 24: Several commenters stated that any and all information, data, and analysis that FirstNet uses to develop the State plan must be fully and completely available for a State to completely understand all decisions that went into the State plan and make an informed decision.

Response: FirstNet disagrees and notes that the Act does not require that such information be provided in a State plan.²⁹

Governor’s Role in the State Plan Process

47 U.S.C. § 1442(e)(2), entitled “State decision,” establishes the Governor’s role in choosing how the State will proceed regarding FirstNet deployment. FirstNet makes the following interpretations regarding the Governor’s role in the State plan process and the ability of FirstNet and the States to implement additional State RAN deployment:

²⁹ See 47 U.S.C. § 1442(e)(1).

1. **FirstNet concludes that the decision of the Governor pursuant to 47 U.S.C. § 1442(e)(2), for purposes of the Act, is binding on all jurisdictions within such State, and that such a decision must be made for the entire State in question and not simply a subset of individual jurisdictions.**
2. **FirstNet concludes that FirstNet and a State could agree that FirstNet and the State (or sub-State jurisdictions) work together to permit implementation of added RAN coverage, capacity, or other network components beyond the State plan to the extent the interoperability, quality of service, and other goals of the Act are met.**

Analysis of and Responses to Comments on the Governor's Role in the State Plan Process

Summary: The majority of commenters agreed that the Act specifies the Governor as the State official who makes a final determination regarding FirstNet deployment in the State and agreed that the Governor's decision should be binding on all jurisdictions within the State. Commenters also generally agreed with FirstNet's interpretation that FirstNet and States could work together to potentially expand RAN coverage, capacity, or other network components so long as the goals of the Act were met. A few commenters, as described below, expressed some general concerns about a Governor's authority to make a decision related to RAN deployment within the State.

Comment # 25: Several commenters detailed, while agreeing with FirstNet's interpretation that the ultimate decision regarding FirstNet deployment in the State was that of the Governor, that many States may require legislative approval or coordination between political subdivisions or counties and the State before the Governor is able to make such decisions for the State.

Response: FirstNet acknowledges the comment and believes regardless of whether a Governor may need to seek certain approvals prior to making a decision for the State, pursuant to the Act, the final State decision regarding a FirstNet-proposed State plan continues to ultimately rest with

the Governor.³⁰

Comment # 26: One commenter suggested that plans for each State should be developed after appropriate consultation with tribal jurisdictions in order for the plan to be binding on tribal jurisdictions. The commenter stated that in the event of a tribal/State dispute, approval for the State plan should not be delayed for the rest of the State and coverage or level of service for the tribal jurisdiction could be “amended to the FirstNet or Commission approved plan.”

Response: Tribal jurisdictions are expressly included as part of the statutorily mandated consultation process.³¹ The Act specifies that such consultation regarding the development of State plans must occur between FirstNet and the State single point of contact (“SPOC”).³² FirstNet has endeavored, and will continue, to seek input in accordance with the Act from tribal jurisdictions in an effort to ensure that their needs are reflected in the State plan ultimately delivered to a Governor. While it is not entirely clear what the commenter means by having tribal coverage levels be “amended to the FirstNet or Commission approved plan,” FirstNet does agree that there may be opportunities for the State and FirstNet to agree to have FirstNet and the tribal jurisdictions work directly with one another to provide added RAN coverage, capacity, or other network components as necessary beyond the State plan so long as the interoperability, quality of service, and other goals of the Act are met.

Comment # 27: One commenter stated that FirstNet wrongly concludes that a Governor’s decision would prevent a city or county within the State from deploying its own RAN. The commenter asserts that if a jurisdiction chooses to fund and build its own RAN, it should be

³⁰ See 47 U.S.C. § 1442(e)(2).

³¹ See 47 U.S.C. § 1426(c)(2).

³² See *id.*

allowed to do so and mentions that, regardless, “the jurisdiction would be within its rights to seek licensure and operate a network within its jurisdiction.”

Response: FirstNet disagrees with the commenter’s assertions. 47 U.S.C. § 1442(e)(2) clearly states that “the Governor shall choose whether to participate in the deployment of the [NPSBN] as proposed by [FirstNet] or conduct its own deployment of a [RAN] in such State.”³³ As discussed in the *Second Notice*, such sub-State level decisions, if permitted, could create potential islands of RANs which do not meet the interoperability and other goals of the Act regarding a NSPBN.³⁴ The Act does not authorize anyone other than the Governor to make a respective State’s decision regarding the FirstNet-proposed State plan and, in fact, further supports the conclusion of a single decision point through the creation of a single point of contact for each State, directly appointed by the Governor.³⁵

In addition, the Act grants FirstNet the nationwide license for the 700 MHz D block spectrum and existing public safety broadband spectrum³⁶ and requires a “State” (not individual sub-State jurisdictions) that seeks to assume RAN responsibilities to “submit an alternative plan” to the FCC and apply to NTIA to lease spectrum capacity from FirstNet.³⁷ Nowhere does the Act contemplate sub-State jurisdictions operating their own RANs using FirstNet’s licensed spectrum – it is only a State that may develop an alternative plan for submission through the section 1442(e)(3)(C) approval process for eventual negotiation of a spectrum capacity lease

³³ 47 U.S.C. § 1442(e)(2)(1).

³⁴ See 47 U.S.C. § 1422(a).

³⁵ See 47 U.S.C. § 1442(d).

³⁶ See 47 U.S.C. 1421(a).

³⁷ See 47 U.S.C. § 1442(e)(3).

with FirstNet.

Comment # 28: One commenter suggested that, while agreeing with FirstNet’s conclusion that it could work with the State to permit State or sub-State implementation of added RAN coverage, capacity, or other network components beyond the FirstNet plan, FirstNet should not enter any agreement on a Statewide or sub-State basis without the concurrence of the State, or otherwise in a manner that would limit or restrict the Governor’s discretion and rights with regard to the State decision process pursuant to the Act.

Response: FirstNet agrees with this comment and, as indicated in the *Second Notice*, would work with the State prior to any such agreements.

Final Interpretations Regarding the Timing and Nature of a State’s Decision

The Act provides that the Governor must make a decision “[n]ot later than 90 days after the date on which the Governor of a State receives notice pursuant to [section 1442(e)(1)].”³⁸ As noted in the *Second Notice*, such phraseology raises the question as to whether a Governor could make such a decision prior to receiving the notice contemplated pursuant to section 1442(e)(1). Additionally, if the Governor decides to participate in the State plan, the Act does not specifically require the Governor to provide notice of the State’s decision to participate in the FirstNet-proposed network to FirstNet, or any other parties.³⁹

Finally, if the Governor decides to assume RAN responsibilities on behalf of the State and create an alternative plan for deployment of the RAN within its borders, the Act provides that “[u]pon making a decision . . . the Governor shall notify [FirstNet], the NTIA, and the [FCC]

³⁸ See 47 U.S.C. § 1442(e)(1).

³⁹ See 47 U.S.C. § 1442(e)(3)(A).

of such decision.”⁴⁰

After taking into consideration the analysis contained in the *Second Notice* and its associated comments, FirstNet makes the following interpretations regarding the timing and nature of a State’s decision:

- 1. FirstNet concludes that the Governor must await notice and presentation of the FirstNet plan prior to making the decision pursuant to 47 U.S.C. § 1442(e)(2).**
- 2. FirstNet concludes that a State decision to participate in the FirstNet-proposed deployment of the network in such State may be manifested by a State providing either (1) actual notice in writing to FirstNet within the 90-day decision period or (2) no notice within the 90-day period established pursuant to 47 U.S.C. § 1442(e)(2).**
- 3. FirstNet interprets the requirement within 47 U.S.C. § 1442(e)(3) stating that the notice is to be provided to FirstNet, NTIA, and the FCC as being an immediate (*i.e.*, same day) requirement.**

Analysis of and Responses to Comments Regarding the Timing and Nature of a State’s Decision

The majority of commenters agreed with FirstNet’s interpretations regarding the timing and nature of a State’s decision. Several commenters affirmed that the Act requires certain findings and comparisons to be made during the process under which a State assumes RAN responsibility and that such a comparison cannot be conducted until the FirstNet plan has been presented.

Some commenters, however, disagreed with FirstNet, stating that a Governor is free to make a decision at any time and should be allowed to make the decision to assume responsibility for the RAN early if the State so chooses, as well as be allowed the full 90 days to inform

⁴⁰ *Id.*

FirstNet, NTIA, and the FCC of the State's decision regardless of when a decision is actually made within a State. Additionally, some commenters asked that the Governor be allowed time beyond the 90-day limit to make such a decision. Others, while agreeing with FirstNet's legal conclusions, suggested that FirstNet try to provide the States with as much information as possible prior to the official 90-day clock to assist the Governors with their decision. Finally, some commenters disagreed with FirstNet's conclusion that only an affirmative opt-out notice would result in a State not accepting the State plan presented by FirstNet.

Comment # 29: Several commenters stated that FirstNet has no authority to instruct a Governor on his or her decision-making process. These commenters stated that FirstNet should not become an obstacle requiring States to wait to make a decision to assume RAN responsibility.

Response: To clarify, FirstNet acknowledges that it has no authority to instruct a Governor on his or her specific decision-making process, but rather only to interpret the requirements with respect to the process for submitting that ultimate decision as provided in the Act.

The Act provides that “[n]ot later than 90 days *after the date on which the Governor of a State receives notice* pursuant to [section 1442(e)(1)], the Governor shall choose whether to (A) participate in the deployment of the [NPSBN] as proposed by [FirstNet] or (B) conduct its own deployment of a [RAN] in such State.”⁴¹ While many commenters seemed to focus on the “*not later than 90 days*” phrase at the beginning of the sentence and assert this to mean that a Governor may choose to assume RAN responsibility at any time between the present day up to the 90-day time limit, the decision is expressly dependent on FirstNet having first provided the Governor the requisite notice pursuant to section 1442(e)(2).

For instance, it is logical to conclude that a Governor could wait the full 90 days after he

⁴¹ 47 U.S.C. § 1442(e)(2) (emphasis added).

or she receives notice of the State plan before making the decision to assume RAN responsibility and notify the proper parties. Similarly, a Governor could wait, for example, only 40 days after he or she receives notice, or even make the decision required pursuant to section 1442(e)(2) and notify the proper parties the same day as receiving notice of the State plan. By using the language “after the date on which the Governor of a State receives notice,” Congress indicated its intent that the State decision would occur *after* receipt of the notice from FirstNet. Thus, for purposes of the formal State decision pursuant to section 1442(e)(2), the Governor must wait until the FirstNet-proposed State plan is presented before he or she notifies FirstNet, NTIA, and the FCC of the State’s decision to assume RAN responsibility.

Furthermore, it would be counterproductive to notify FirstNet, NTIA, and the FCC of the State’s decision earlier than presentation by FirstNet of the State plan as that would necessarily start the 180-day clock regarding submission of an alternative plan without there being any FirstNet proposed plan against which the FCC and NTIA could evaluate and compare the State’s alternative plan.⁴² As such, these entities would be unable to fulfill their statutory responsibilities related to approving or rejecting the alternative plan as they would have insufficient information to make the necessary determinations as required under the Act.

Comment # 30: Some commenters suggested that FirstNet should work with States where there are opportunities for early deployment and allow the State to amend their alternative plans at a later stage in the process as needed once the State plan is presented by FirstNet, the goal of which would be to allow the States to move forward with deployment as soon as the State was ready.

Response: The Act explicitly requires a sequential process to be followed prior to any FirstNet

⁴² See 47 U.S.C. § 1442(e)(3)(C)-(D).

network deployment taking place.⁴³ It is not until the State has decided to participate in FirstNet's proposed State plan or has progressed through the entire alternative plan process provided in section 1442(e)(3) that any network deployment may begin. To proceed through the process required under section 1442(e)(3)(C)-(D), the FCC and NTIA must have access to the FirstNet-proposed State plan in order to compare it to the State's alternative plan.⁴⁴

The Act does not contemplate any type of retroactive amendment process within section 1442(e)(3) and requires comparisons and evaluations to take place between the FirstNet-proposed State plan and the State's alternative plan that simply cannot occur without the FirstNet-proposed State plan first being presented to the Governor as required by the Act. Without a FirstNet plan having been presented, the State's premature decision would not enable the FCC to make the assessments required to approve the State's alternate plan, or if such plan is approved, enable NTIA to review and determine whether to approve an application for grant funds and to seek a spectrum capacity lease from FirstNet.

Comment # 31: One commenter stated that FirstNet should make clear that Governors are not prohibited from beginning to develop alternative plans now and that the development of alternative plans in advance could also assist Governors in making informed choices regarding whether to assume RAN responsibility or participate in the FirstNet State plan.

Response: There is no statutory provision preventing States from using their own funds to begin developing alternative plans.

Comment # 32: A few commenters asserted that the State must respond in writing with its decision, regardless of the 90-day time limit prior to FirstNet taking any action.

⁴³ See 47 U.S.C. § 1442(e).

⁴⁴ See 47 U.S.C. § 1442(e)(3)(C)-(D).

Response: As stated in the *Second Notice*, the Act does not require the Governor of a State to provide notice of the State’s decision to participate in FirstNet’s proposed State plan pursuant to section 1442(e)(2)(A) to FirstNet, or any other parties. Rather, notice is only required should the Governor of a State decide that the State will assume responsibility for the buildout and operation of the RAN in the State.⁴⁵

Taking into consideration the Act’s emphasis on the need “to speed deployment” of the network for public safety,⁴⁶ the requirement for specific required affirmative notice for a decision to assume RAN deployment and operation, and no such explicit affirmative notice required for a decision to accept the proposed FirstNet plan, FirstNet concludes that notice is not required within the 90-day period established pursuant to section 1442(e)(2) in order for a Governor to choose to participate in the FirstNet-proposed State plan.

Comment # 33: Several commenters asked that States be given longer than the 90-day time limit established by the Act due to the complexity of the decision itself and the decision process that many Governors may have to go through prior to making a final determination regarding whether to choose to participate in the FirstNet-proposed State plan or conduct the deployment of the State’s own RAN. In addition, some commenters expressed frustration that FirstNet will have several years to decide its approach with the States, whereas the States must provide written notice of its intentions within 90 days.

Response: FirstNet was created by Congress and is bound by the statutory language contained within the Act. The Act explicitly provides for a 90-day period following the presentation of the State plan for a Governor to choose to participate in the State plan as presented by FirstNet or

⁴⁵ See 47 U.S.C. § 1442(e)(3)(A).

⁴⁶ See, e.g., 47 U.S.C. § 1426(b)(1)(C); see also, e.g., 47 U.S.C. § 1426(b)(3).

choose to conduct its own deployment of a RAN within the State.⁴⁷ FirstNet has no ability to change the plain language of the Act and therefore has no authority to extend the 90-day time period.

Comment # 34: Some commenters suggested that, while FirstNet is unable to provide the Governor with more time following the presentation of the FirstNet-proposed State plan, FirstNet should do everything in its power to provide the States with information that may be contained in the State plan as much in advance of the formal 90-day time clock as possible.

Response: FirstNet acknowledges the comment and plans to continue to coordinate with the States through its ongoing consultation efforts to share details of the proposed State plans as such information comes available as part of the RFP process.

The Nature of FirstNet’s Proposed State Plan

The Act pursuant to 47 U.S.C. § 1442(e)(1) requires FirstNet to present a “plan” to the Governor, or to the Governor’s designee, of each State. The Governor then must decide whether to participate in the deployment as proposed by FirstNet or to deploy the State’s own RAN that interoperates with the NPSBN.⁴⁸ While the presentation of such a plan is an important step in the deployment of the NPSBN, it is only one additional milestone within the ongoing relationship between FirstNet and the States, with significant collaboration between the parties still to take place prior to deployment.

Using the plain language of the Act, a “plan,” as defined by Oxford Dictionaries, is a “detailed proposal for doing or achieving something.”⁴⁹

⁴⁷ See 47 U.S.C. § 1442(e)(2).

⁴⁸ See 47 U.S.C. § 1442(e)(1)(B).

⁴⁹ See Oxford Dictionary of English (3 ed. 2014), <http://www.oxforddictionaries.com/definition/english/plan> (last visited Aug. 30, 2015).

Nowhere does the Act use contract terminology, such as “offer,” “execute,” or “acceptance,” in relationship to the FirstNet plan. In fact, the Act speaks only to a Governor’s decision to “participate” in the deployment as proposed by FirstNet.⁵⁰ Accordingly, FirstNet makes the following conclusion regarding the nature of FirstNet’s proposed State plan:

FirstNet concludes that the presentation of a plan to a Governor and his/her decision to either participate in FirstNet’s deployment or follow the necessary steps to build a State RAN do not create a contractual relationship between FirstNet and the State.

Analysis of and Responses to Comments Regarding the Nature of FirstNet’s Proposed State Plan

The majority of commenters agreed with FirstNet’s conclusion that the presentation of the State plan and the Governor’s decision to (or not to) participate in the plan do not constitute a contractual relationship between the parties. Several commenters expressed their sentiments that any network user fees associated with the network could not be binding on individual public safety entities at the time of the State plan because not all such fees will likely be known at the time a State plan is presented by FirstNet, and therefore a contract could not exist between the parties. Moreover, the vast majority of respondents agreed that it would not be until public safety entities actually subscribe to the NPSBN that contractual relationships would be established between the public safety entities themselves and FirstNet or the State, as applicable.

Comment # 35: Several commenters, while agreeing with FirstNet’s interpretation that the plan does not constitute a contract, stated that any material alteration of the State plan by FirstNet, such as priority or timing of build-out, should also allow a State to similarly alter its decision that was based on the previous plan.

Response: The Act does not provide for any mechanism whereby a Governor that decides to

⁵⁰ See 47 U.S.C. § 1442(e)(2)(A).

participate in the FirstNet-proposed State plan pursuant to 47 U.S.C. § 1442(e)(2) can then reverse his or her decision for the State and choose to assume RAN responsibility at some unspecified point in the future. Once a Governor is presented with the FirstNet-proposed State plan, he or she then has 90 days with which to make the decision to participate in FirstNet's proposed plan or to choose to conduct its own State RAN deployment.⁵¹ Congress struck a balance in the Act between a State's right to conduct its own RAN deployment and FirstNet and its potential partner(s)' needs for certainty as network deployment begins nationwide. Both FirstNet and its ultimate network partner(s) must be able to rely on State decisions in order to effectively and efficiently plan the nationwide deployment of the NPSBN.

FirstNet recognizes that after a Governor's decision, changes to the FirstNet State plan could arguably occur due to unforeseen circumstances or even based on further agreements between FirstNet and the impacted State. FirstNet intends to continue to coordinate closely with each State as it plans the deployment in accordance with the State plan to help ensure such plans meet the needs of public safety. It is important to note that as there is no mandate in the Act that public safety purchase services from FirstNet, FirstNet must offer an attractive value proposition to incentivize adoption of the NPSBN by its public safety stakeholders.

Comment # 36: One commenter expressed that the Act, specifically 47 U.S.C. § 1442(e)(3)(C)-(D), requires that the State demonstrate specific criteria in its alternative plan in order to be approved by the FCC and NTIA and to enter a spectrum capacity lease with FirstNet. Therefore, while the commenter agrees that the FirstNet-proposed State plan does not constitute a contract between the State and FirstNet, the commenter believes that the State should expect certainty regarding these specific criteria for an alternative plan. Without such a guarantee, the

⁵¹ See 47 U.S.C. § 1422(e)(2).

commenter asserts that States will not be provided with the information needed to make an appropriate RAN deployment decision.

Response: FirstNet, as discussed in the *Second Notice*, intends to include at least certain outcomes of the RFP process as well as sufficient information to enable NTIA to make comparisons of cost-effectiveness, security, coverage, and quality of service.

Comment # 38: Several commenters disagreed that FirstNet’s State plan does not form a contract between FirstNet and the State. A few commenters argued that FirstNet’s presentation of a State plan to a State constituted an “offer” to the Governor, with “acceptance” of such offer occurring when the Governor chooses to participate in the offered plan. One commenter suggested that FirstNet’s State plan in essence creates an “unconscionable contract of adhesion” by not containing what the commenter considered to be “material elements of the contract.” Furthermore, these commenters contended that without the State plan presentation and acceptance being considered a binding contract, the State cannot obtain the necessary certainty with which to make an informed decision pursuant to 47 U.S.C. § 1442(e)(2).

Response: FirstNet disagrees with this comment and concludes, as discussed in the *Second Notice*, that the presentation of a proposed plan to a State from FirstNet does not create any type of contract. First, the applicable provisions of the Act do not use, nor make any reference to, any contract terminology in describing the State plan, thus suggesting that Congress did not intend for such plans to create a contract between FirstNet and the States. Next, as analyzed in the *Second Notice*, the presentation of the State plan does not constitute the necessary elements of “offer and acceptance” to create a contract. Finally, unlike the plan itself that does not mandate any entity subscribe to any eventual FirstNet service offering, if public safety entities ultimately decide to purchase FirstNet services, at that time a contract will be established between the

parties with the typical terms and conditions of a contractual relationship.

Final Interpretations Regarding the State's Development of an Alternative Plan

47 U.S.C. § 1442(e)(3)(B) requires, not later than 180 days after a Governor provides notice to FirstNet, NTIA, and the FCC pursuant to 47 U.S.C. § 1442(e)(3)(A), that the Governor develop and complete RFPs for construction, maintenance, and operation of the RAN within the State. Similar to the requirement that FirstNet must notify the State upon the “completion” of the RFP process,⁵² section 1442(e)(3)(B) does not further define the phrase “complete requests for proposals” that the State must accomplish within the 180-day timeline.

As stated in the *Second Notice*, FirstNet understands that States, like FirstNet, will potentially have gaps in information at the time of their RFP process, and subsequently at the time of their submission of an alternative plan. For instance, because States will not have negotiated a spectrum capacity lease with FirstNet upon the initial submission of their alternative plan, certain final terms within the States' own covered leasing agreements with their respective partners will likely not have been fully negotiated. FirstNet believes this should not preclude a State from submitting an alternative plan, so long as within the 180-day time period the State has progressed to the extent necessary to submit an alternative plan in accordance with the requirements described in section 1442(e)(3)(C)(i).

Accordingly, FirstNet makes the following conclusions regarding the State's development of an alternative plan:

- 1. FirstNet concludes that the phrase “complete requests for proposals” means that a State has progressed in such a process to the extent necessary to submit an alternative plan for the construction, maintenance, operation, and improvements of the RAN that**

⁵² See 47 U.S.C. § 1442(e)(1).

demonstrates the technical and interoperability requirements in accordance with 47 U.S.C. § 1442(e)(3)(C)(i).

- 2. FirstNet concludes that where a State fails to “complete” its RFP within the 180-day period pursuant to the Act, the State forfeits its ability to submit an alternative plan pursuant to 47 U.S.C. § 1442(e)(3)(C), and the construction, maintenance, operations, and improvements of the RAN within the State shall proceed in accordance with the FirstNet proposed State plan for such State.**

Analysis of and Responses to Comments Regarding the State’s Development of an Alternative Plan

The majority of respondents agreed with FirstNet’s conclusion that, due to the similar nature of the States’ responsibility to “complete requests for proposals” and FirstNet’s requirement to notify the States upon “completion of the request for proposal process,” States should similarly only need to progress to the point in its RFP process to be able to submit an alternative plan for the construction, maintenance, operation, and improvements of the RAN that also demonstrates the technical and interoperability requirements described in the FCC’s evaluation criteria pursuant to section 1442(e)(3)(C)(i). Similarly, the majority of commenters agreed with FirstNet’s conclusion that the Act’s interest in timely network deployment compels the State and FirstNet to proceed in accordance with FirstNet’s proposed State plan if the State is unable to submit an alternative plan within 180 days as required pursuant to section 1442(e)(3)(C)(i).

Several commenters, however, maintained that the 180-day timeline is too short of a period for a State to realistically complete its RFP process and that the State should not have to forfeit its ability to submit an alternative plan if it does not complete the RFP process within the 180 days. Several commenters seemed to suggest that States must be “complete” enough in their

RFP process to provide information over and above that which FirstNet had concluded was required within the 180-day timeline.

Comment # 39: Numerous commenters expressed their frustration at the short time periods established by the Act, with several suggesting that FirstNet extend the 180-day deadline based on certain factors determined by FirstNet regarding consultation activities.

Response: FirstNet was created by Congress and is bound by the statutory language contained within the Act. The Act explicitly provides for a 180-day period following the Governor’s decision to opt-out to “develop and complete requests for proposals for the construction, maintenance, and operation of the [RAN] within the State.”⁵³ FirstNet has no ability to change the plain language of the Act and is not authorized to extend the 180-day time period.

FirstNet acknowledges the issues regarding timeframes raised in certain of the comments and therefore has concluded that such “completion” required pursuant to section 1442(e)(3)(B) is only required to the extent necessary to be able to submit an alternative plan for the construction, maintenance, operation, and improvements of the RAN that also demonstrates the technical and interoperability requirements in accordance with 47 U.S.C. § 1442(e)(3)(C)(i).

Comment # 40: Numerous respondents asserted that the State should not be required to forfeit its ability to submit an alternative plan if it fails to submit its alternative plan within the 180-day timeline.

Response: FirstNet disagrees with this statement based on the purpose and language of the Act. Throughout the Act, numerous references express the desire for timely network deployment.⁵⁴

⁵³ See 47 U.S.C. §1442(e)(3)(B).

⁵⁴ See, e.g., 47 U.S.C. § 1426(b)(1)(C) (describing the need for existing infrastructure to “speed deployment of the network”); see also e.g., 47 U.S.C. § 1426(b)(3) (including partnerships to “speed deployment” in rural areas).

In addition, the Act explicitly imposes timelines that a State must meet in order to proceed through the alternative plan process.⁵⁵

The Act weighs a State's right to conduct its own RAN deployment in the State with public safety's need to expeditiously gain the benefit of interoperable communications across State borders. In doing so, it established a clear process relating to State assumption of RAN deployment. FirstNet does not have the authority to alter this statutory process and must adhere to the express language and intent of the Act to speed deployment of a nationwide broadband network for public safety. In keeping with the language and purpose of the Act, FirstNet concludes that where a State fails to "complete" its RFP in the 180-day period pursuant to the Act, the State forfeits its ability to submit an alternative plan in accordance with section 1442(e)(3)(C), which results in the State proceeding in accordance with the FirstNet-proposed State plan.

Comment # 41: One commenter seems to confuse the State's forfeiture of its opportunity to assume RAN responsibilities with the supposition that FirstNet would be, in effect, forcing a State's first responders to subscribe to the NPSBN by proceeding with FirstNet's originally proposed State plan.

Response: FirstNet reiterates that the Act does not mandate public safety use of the NPSBN. Once FirstNet proceeds with the deployment of its proposed State plan, or a State takes on the RAN deployment and operation responsibility, all public safety entities across the country will have the choice whether to subscribe to the NPSBN.⁵⁶

Comment # 42: Several commenters maintained that FirstNet must continue to ensure it is

⁵⁵ See 47 U.S.C. §1442(e)(2)-(3).

⁵⁶ See generally 47 U.S.C. § 1428(a)(1).

providing States with as much information as possible as soon as possible due to the tight timeframes established within the Act.

Response: FirstNet, as previously stated, is committed to continuing its consultation activities and coordinating with the States as it develops and presents the State plans.

Comment # 43: One commenter suggested that a State should reasonably be required to sufficiently develop and complete the RFPs during the 180-day period and advance in such process to the extent necessary to not only enable the State to meet the requirements of section 1442(e)(3)(C), but also those of section 1442(e)(3)(D).

Response: FirstNet appreciates the tight timeframes included within the Act and has taken practical steps to help ensure that a State has a reasonable opportunity to proceed with deploying its own RAN in the State. States are not required to know all details of their alternative plan, but instead to have progressed to a point to be able to present an alternative plan for the construction, maintenance, operation, and improvements of the RAN that is also able to demonstrate the technical and interoperability obligations required pursuant to section 1442(e)(3)(C)(i). FirstNet agrees with the respondent that a State must provide information specified in section 1442(e)(3)(D) prior to NTIA being able to complete its section 1442(e)(3)(D) comparisons pursuant to the Act and for the State to seek to enter into a spectrum capacity lease with FirstNet.⁵⁷ FirstNet concludes, however, that within the 180-day timeframe, the State must only be able to submit an alternative plan for the construction, maintenance, operation, and improvements of the RAN that also demonstrates the technical and interoperability requirements within section 1442(e)(3)(C)(i).⁵⁸

⁵⁷ See 47 U.S.C. § 1442(e)(3)(D).

⁵⁸ See 47 U.S.C. § 1442(e)(3)(B), (C)(i).

Final Interpretations Regarding the Responsibilities of FirstNet and a State Upon a State Decision to Assume Responsibility for the Construction and Operation of its Own RAN

Under 47 U.S.C. § 1442(e)(3)(C)(iii), the FCC's decision to approve a State's alternative plan triggers the State's obligation to apply to NTIA to seek a spectrum capacity lease from FirstNet (while also allowing the State to apply for a grant to assist in the construction of the State's RAN). Several questions with respect to these provisions of the Act are discussed in the *Second Notice* regarding the implications and effects on FirstNet and a State of the FCC's decision to approve or disapprove a State's alternative plan.

Based on its analysis in the *Second Notice*, FirstNet makes the following conclusions regarding the responsibilities of FirstNet and a State upon a State's decision to assume responsibility for the construction and operation of its own RAN:

- 1. FirstNet concludes that once a plan has been disapproved by the FCC, subject only to the additional review described in 47 U.S.C. § 1442(h), the opportunity for a State to conduct its own RAN deployment pursuant to 47 U.S.C. § 1442(e) will be forfeited, and FirstNet shall proceed in accordance with its proposed plan for that State.**
- 2. FirstNet concludes, following an FCC-approved alternative State RAN plan, it would have no obligation to construct, operate, maintain, or improve the RAN within such State.**
- 3. FirstNet concludes that if a State, following FCC approval of its alternative plan, is unable or unwilling to implement its alternative plan in accordance with all applicable requirements, then FirstNet may assume, without obligation, RAN responsibilities in the State.**

Analysis of and Responses to Comments Regarding the Responsibilities of FirstNet and a State

Upon a State Decision to Assume Responsibility for the Construction and Operation of its Own RAN

Commenters generally agreed with FirstNet’s conclusions regarding the responsibilities of a State and FirstNet following the FCC’s decision to approve or disapprove a State’s alternative plan. Almost all respondents agreed that if the FCC were to disapprove a State’s alternative plan, subject to the judicial review allowed in section 1442(h), the State would proceed according to FirstNet’s proposed plan.⁵⁹ Most commenters agreed that once the FCC approves an alternative plan, the State itself must assume the obligation for the construction, operation, maintenance, and improvement of the RAN in such State, and acknowledged FirstNet’s rationale for concluding its obligation to deploy a State plan would be extinguished.

Additionally, several commenters stated that it was their belief that FirstNet should provide assurances that it will ensure every State has NPSBN service offerings, whether such State opts-in or fails in its attempt to deploy and operate the RAN. On the other hand, one commenter cautioned FirstNet against adopting interpretations that would allow for the “rescue of opt-out” States without clarifying that such a scenario should not be seen by the States as a “safety net.”

Comment # 44: One respondent maintained that the State should not be required to forfeit its ability to conduct its own RAN deployment and proceed with the FirstNet-proposed State plan following an FCC decision to disapprove the State’s alternative plan pursuant to section 1442(e)(3)(C)(iv).

Response: FirstNet disagrees with this statement based on the plain language of the Act. Section 1442(e)(3) explicitly states that “[i]f the [FCC] disapproves [a State’s alternative plan],

⁵⁹ See 47 U.S.C. § 1442(e)(3)(C)(iv).

the construction, maintenance, operation, and improvements of the network within the State *shall proceed in accordance with the plan proposed by [FirstNet]*.⁶⁰ A State does have the right to appeal the FCC’s decision to the U.S. District Court for the District of Columbia,⁶¹ but the Act’s language makes it clear that deployment within the State shall proceed according to FirstNet’s proposed State plan following FCC disapproval of the alternative plan.

Comment # 45: One commenter expressed that it would be beneficial to have an appeals process following the submission to the FCC, in instances where the State plan was not approved, through which the decision could be referred to an independent third party for adjudication.

Response: Section 1442(h) already specifically designates an appeals process with respect to the FCC’s disapproval of an alternative plan, whereby the “[t]he United States District Court for the District of Columbia shall have exclusive jurisdiction to review a decision of the [FCC] pursuant to subsection (e)(3)(C)(iv).”⁶² Any additional appeals processes would contradict the express language of the Act that the U.S. District Court for the District of Columbia has “exclusive jurisdiction” to review the FCC’s decision to disapprove a State’s alternative plan, as well as simply add to the likely substantial delays that would result in the NPSBN deployment within the respective States.

Comment # 46: Several commenters asserted that FirstNet’s central obligation pursuant to the Act is to ensure the deployment of the NPSBN in every State, and that, even if a State gains all necessary approvals to implement its alternative plan and eventually fails, FirstNet’s obligation

⁶⁰ 47 U.S.C. § 1442(e)(3)(C)(iv) (emphasis added).

⁶¹ See 47 U.S.C. § 1442(h).

⁶² See *id.*

to deploy the network nationwide is never extinguished and must proceed according to the FirstNet-proposed State plan.

Response: Each Governor is given the option to decide to participate in FirstNet’s proposed State plan or to progress through a statutorily-mandated process to assume the obligation for constructing, maintaining, operating, and improving its own State RAN.⁶³ This process can infuse significant delays in the deployment based on the statutorily-mandated timeframes for the Governor’s decision and the development of an alternative State plan by the State.⁶⁴ Further, the Act provides no explicit timelines for the FCC to review and approve or disapprove of an alternative plan, and affords an additional unspecified period of time to appeal any disapproval to the U.S. District Court for the District of Columbia.⁶⁵

Given the timeframes required by the Act to reach the point of the approval of an alternate plan by the FCC, it is critical that thereafter FirstNet and its eventual RFP partner(s) are able to rely on the State decision to proceed with RAN deployment so FirstNet can appropriately plan for the deployment throughout the rest of the nation. FirstNet cannot be in a position to further delay the nationwide availability of the NPSBN due to a single State’s inability or unwillingness to deploy the RAN within that State. In addition, the Act does not provide a mechanism requiring FirstNet to assume responsibility for local RAN deployment after a State has elected, and been approved, to do so. Indeed, to the contrary, Congress indicated its clear intent in requiring FirstNet to proceed with its State plan only in the case where a State’s alternative plan was disapproved by the FCC. Congress could have just as easily included a

⁶³ See 47 U.S.C. § 1442(e).

⁶⁴ See 47 U.S.C. § 1442(e)(2), (3)(C)(i) (providing that the Governor has 90 days to make a decision on State RAN deployment and 180 days to complete the RFP process if the State is seeking to conduct its own RAN deployment).

⁶⁵ See 47 U.S.C. § 1442(h).

requirement that FirstNet proceed with a State plan if a State was unable or unwilling to proceed under its alternative plan. However, we believe Congress created a balance in favor of certainty and speed to deployment, which is consistent with the detailed process and steps Congress implemented in the Act to ensure alternative State plans initially met the necessary criteria for State deployment and operation of the RAN.⁶⁶

Therefore, FirstNet reiterates its conclusion that, following an FCC-approved alternative plan, it would have no obligation to construct, operate, maintain, or improve the RAN within such State, but if the State becomes unable or unwilling to implement its alternative plan in accordance with all applicable requirements, then FirstNet may assume, without obligation, the RAN responsibilities in the State.

D. Customer, Operational, and Funding Considerations Regarding State Assumption of RAN Construction and Operation

Customer Relationships in States Assuming RAN Construction and Operation

The Act does not expressly define which customer-facing roles are assumed by a State or FirstNet with respect to public safety entities in States that have assumed responsibility for RAN construction and operation. Generally speaking, all wireless network services to public safety entities will require technical operation of both the RAN, operated by the State in this case, and the core network, operated by FirstNet. The Act charges FirstNet with ensuring the establishment of the NPSBN, including the deployment of the core network, but provides States an opportunity, subject to certain conditions, to conduct the deployment of a RAN in a State.⁶⁷ A

⁶⁶ See U.S.C. § 1442(e)(3)(C)(iv) (stating where the FCC disapproves an alternative plan, the State proceeds according to FirstNet's proposed plan); 47 U.S.C. § 1442(e)(3)(D) (failing to assert that a State must proceed with the FirstNet proposed plan when a FCC-approved plan subsequently fails to demonstrate the requirements to NTIA pursuant to Section 1442(e)(3)(D) to seek a spectrum capacity lease from FirstNet).

⁶⁷ See 47 U.S.C. § 1422(a), (e).

core network, for example, would typically control critical authentication, mobility, routing, security, prioritization rules, and support system functions, including billing and device services, along with connectivity to the Internet and public switched network. Conversely, the RAN would typically dictate, among other things, the coverage and capacity of last mile wireless communication to customer devices and certain priority and preemption enforcement points at the wireless interface of the network. The allocation of these technical and operational functions, however, does not entirely dictate who assumes 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. Thus, the conclusions below relate to FirstNet and the State's respective roles and approach with regard to customer relationships in States assuming responsibility for RAN construction and operation in that State.

- 1. FirstNet concludes that the Act provides sufficient flexibility to accommodate many types of customer relationships with public safety entities for States assuming RAN responsibility so long as the relationships meet the interoperability and self-sustainment goals of the Act.**
- 2. FirstNet concludes that the Act does not require that States assuming RAN deployment responsibilities be the customer-facing entity entering into agreements with and charging fees to public safety entities in such States.**
- 3. FirstNet concludes that the Act does not preclude States assuming RAN deployment responsibilities from charging subscription fees to public safety entities if FirstNet and such States agree to such an arrangement in the spectrum capacity lease.**
- 4. FirstNet concludes that the Act provides sufficient flexibility to allow the determination of whether FirstNet or a State plays a customer-facing role to public safety entities in a**

State assuming RAN responsibilities, to be the subject of operational discussions between FirstNet and the State in negotiating the terms of the spectrum capacity lease.

- 5. FirstNet concludes that it will maintain a flexible approach to such functions and interactions in order to provide the best solutions to each State so long as the agreed upon approach meets the interoperability and self-sustainment goals of the Act.**

Analysis of and Responses to Comments on Customer Relationships in States Assuming RAN Construction and Operation

Summary: All commenters generally agreed with FirstNet’s interpretations relating to the nature of customer relationships in States assuming RAN construction and operation.

Commenters concurred with the interpretation that by maintaining flexibility in determining whether FirstNet or States will be the customer-facing entity, it allows States to tailor their operations to meet their individual State public safety broadband needs, while still ensuring the achievement of the interoperability and self-sustainment goals of the Act.

Final Interpretation of FirstNet Analyzing Funding Considerations as Part of its Determination to Enter Into a Spectrum Capacity Lease

FirstNet has number of funding sources, including: (1) up to \$7 billion in cash; (2) user or subscriber fees; (3) fees from excess network capacity leases that allow FirstNet to lease capacity not being used by public safety to commercial entities under covered leasing agreements; and (4) lease fees related to network equipment and infrastructure.⁶⁸ Each of these funding sources is critical to offset the massive costs of building, operating, and maintaining the NSPBN envisioned in the Act and in meeting the self-sustainability requirements placed on FirstNet pursuant to the Act.

⁶⁸ See generally 47 U.S.C. §§ 1428(a), 1457(b)(3).

However, States seeking and receiving approval of alternative RAN plans could materially affect FirstNet’s funding sources and thus its ability to serve public safety, particularly in rural States. More precisely, a State that assumes RAN deployment responsibilities could benefit from, or supplant, these funding sources, by generating and retaining amounts in excess of that necessary to reasonably maintain the particular State RAN through monetization of FirstNet’s licensed spectrum. By doing so, the excess value above that reasonably needed to operate and maintain the RAN would no longer be available to help ensure that nationwide deployment, particularly in higher cost rural areas, will occur. This undermines the intent of the Act and the express requirement for FirstNet to deploy in rural areas as part of each phase of implementation.⁶⁹

Accordingly, FirstNet concludes, based on the language and the intent of the Act, that Congress did not intend to permit alternative RAN plans that inefficiently utilize scarce spectrum resources to hinder the nationwide deployment of the NPSBN by depriving it of needed financial support. FirstNet further concludes that it must thus consider the effect of any such material inefficiencies, among other things, on the NSPBN in determining whether, and under what terms, to enter into a spectrum capacity lease.

Congress’s intent in this regard is informed by 47 U.S.C. § 1442(e)(3)(D) requiring a State that wishes to assume RAN responsibilities to demonstrate “the cost-effectiveness of the State plan” when applying to NTIA not just for grant funds, but also for spectrum capacity leasing rights from FirstNet, which are necessary for the implementation of a State RAN. Independent of NTIA’s determination in assessing such an application, FirstNet, as the licensee of the spectrum and an independent authority within NTIA, must ultimately decide on what terms to

⁶⁹ See 47 U.S.C. § 1426(b)(3).

enter into a spectrum capacity lease with a State. The conclusions below relate to FirstNet's role and responsibilities in negotiating a spectrum capacity lease with a State seeking to assume responsibilities for deploying its RAN.

- 1. FirstNet concludes, in fulfilling its duties and responsibilities under the Act, it can and must take into account funding considerations, including the "cost-effectiveness" of an alternative state plan as it may impact the national deployment of the NPSBN, in determining whether and under what terms to enter into a spectrum capacity lease with a State.**
- 2. FirstNet concludes as part of its cost-effectiveness analysis in determining whether and under what terms to enter into a spectrum capacity lease, it (i) must consider the impact of cost-inefficient alternative RAN plans, including inefficient use of scarce spectrum resources, on the NPSBN, and (ii) may require that amounts generated within a State in excess of those required to reasonably sustain the State RAN, be utilized to support the Act's requirement to deploy the NPSBN on a nationwide basis.**
- 3. FirstNet concludes as part of its cost-effectiveness analysis it must consider State reinvestment and distribution of any user fees assessed to public safety entities or spectrum capacity revenues in determining whether and under what terms to enter into a spectrum capacity lease.**

Analysis of and Responses to Comments on Funding Considerations Part of Determination to Enter Into a Spectrum Capacity Lease

Summary: Commenters generally agreed with these interpretations emphasizing, for example, that it would be entirely consistent with the Act for FirstNet to take into account its funding considerations, among other things, and impose conditions on such spectrum capacity leases to

ensure that revenue from excess capacity arrangements and subscriber fees will be utilized in a manner that continues to facilitate the deployment of the NSPBN.

Certain commenters either disagreed with, or provided recommendations for, implementing these interpretations, particularly regarding whether and how FirstNet can and must take into account funding considerations, including the “cost-effectiveness” of the State plan, in order to guarantee the viability of a broadband network dedicated to public safety across the nation.

Comment # 47: One commenter reasoned that FirstNet’s proposed interpretation is unsupported by the Act’s plain language, and potentially conflicts with existing federal authority over States.

Response: FirstNet disagrees that the interpretation is unsupported by the plain language of the Act. The Act directs the FCC to reallocate and grant a license to FirstNet for the use of the 700 MHz D block spectrum and existing public safety broadband spectrum.⁷⁰ FirstNet, as the designated licensee of the spectrum pursuant to the Act, has a statutory obligation to ensure the establishment of an interoperable, *nationwide* public safety broadband network.⁷¹ To satisfy this obligation, FirstNet has been given broad authority to take actions it determines necessary, appropriate, or advisable to accomplish its mission.⁷² As discussed in the *Second Notice*, FirstNet has determined that it must ensure the efficient use of each of its limited funding resources in order to offset the massive costs to build, operate, and maintain the NSPBN envisioned in the Act and also to meet the statutory self-sustainability requirement imposed on FirstNet pursuant to the Act.

⁷⁰ See 47 U.S.C. § 1421.

⁷¹ *Id.*

⁷² See 47 U.S.C. § 1426(a)(6).

To assist FirstNet in protecting critical financial resources, the Act requires, among other things, a State seeking to assume RAN responsibilities to demonstrate “the cost-effectiveness of the State plan” when applying to NTIA for spectrum capacity leasing rights from FirstNet, which are necessary for the implementation of a State RAN.⁷³ Consistent with the intent of the Act to ensure the nationwide deployment, FirstNet must consider the cost-effectiveness of the alternative State plan on that nationwide deployment. Indeed, independent of NTIA’s determination in assessing such an application, FirstNet, as the designated licensee of the spectrum pursuant to the Act and an independent authority within NTIA, must ultimately decide whether and pursuant to what terms to enter into a spectrum capacity lease with a State.⁷⁴ Accordingly, FirstNet has determined that it is necessary to take into account funding considerations, including the “cost-effectiveness” of an alternative state plan, and its impact on FirstNet’s ability to deploy the national network, in determining whether and under what terms to enter into a spectrum capacity lease.

Comment # 48: Several commenters reasoned that the proposed interpretation either acts as a tax or assigns additional costs to a State that has assumed responsibility for RAN deployment.

Response: FirstNet disagrees that its interpretation acts as a tax or results in any actual or additional costs to a State that assumes deployment for a RAN in the State. Rather, as discussed in the *Second Notice*, FirstNet’s interpretations ensure that States are not able to retain excess

⁷³ See 47 U.S.C. § 1442(e)(3)(D).

⁷⁴ We note that FirstNet’s interpretation of this provision and its determination with regard to its duties based on the State’s proposed demonstration is independent of and does not limit NTIA. To the extent the “spectrum capacity lease” described in section 1442(e)(3)(C)(iii)(II) is a lease of the spectrum itself, rather than capacity on the network, under applicable FCC rules, the FCC “will allow parties to determine precise terms and provisions of their contract” consistent with FirstNet’s obligations as a licensee under such rules. See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113, 18 FCC Rcd 20604, 20637 (2003).

value not reasonably needed for the RAN in that State, and are intended to protect the limited resources provided by Congress to ensure the establishment of a *nationwide* broadband network for public safety.

Comment # 49: Several commenters noted generally that the terms of a spectrum capacity lease are vital to preserving the opportunity for a State to choose to conduct its own deployment of a RAN, and accordingly, the terms of the spectrum capacity lease agreement, although negotiated, should be conducted in an open and transparent manner. Such commenters also asserted that the terms should be reasonable and known at the same time FirstNet delivers its State plan in order to maintain a partnership between FirstNet and the States.

Response: FirstNet acknowledges the comments and will consider them, as appropriate, in the development of any processes or requirements related to a spectrum capacity lease.

Comment # 50: Three commenters expressed concern that FirstNet would abuse its authority under this interpretation by leveraging its control of the spectrum to demand virtually any concession it wanted during the negotiation of a spectrum capacity lease, thereby creating a set of circumstances in which the opportunity for a State to conduct its own RAN deployment pursuant to the Act is not a meaningful opportunity.

Response: FirstNet recognizes that the Act strikes a balance between establishing a nationwide network and providing States an opportunity, under certain conditions, to maintain and operate the RAN portion of the network in their States. Accordingly, FirstNet intends to act in good faith with each of the States to explore “win-win” solutions with States desiring to assume RAN responsibilities, including in scenarios where potential revenue would materially exceed RAN and related costs in a State consistent with the requirements and intent of the Act.

Comment # 51: One commenter, although recognizing FirstNet's responsibility to maximize the build out of a network in all States, disagreed that a State's alternative RAN plan, once approved by the FCC, should be subject to spectrum capacity lease considerations that are outside the geographical area of the State.

Response: The Act expressly charges FirstNet with ensuring the establishment of a *nationwide* public safety broadband network.⁷⁵ To satisfy this mandate, FirstNet must consider and account for the use of the limited resources provided it in order to accomplish this mission. This includes ensuring that the scarce spectrum resources provided for the nationwide network are not used in a materially inefficient manner that could negatively impact the deployment of the entire network. Specifically, FirstNet has a duty to consider the effect of any such inefficiencies on, among other things, more rural States, and on the larger FirstNet program, in determining whether, and under what terms, to enter into a spectrum capacity lease.

Comment # 52: One commenter stated that the benefit of requiring "opt-out" urban States to provide "excess" revenues to FirstNet for rural build out nationwide should not apply to a rural State that may want to take responsibility for its own RAN deployment.

Response: FirstNet's analysis of funding considerations must equally apply to all States that are able to generate value in excess of the reasonable costs of operating and maintaining the RAN when electing to assume RAN responsibility within the State, so as to ensure sufficient resources are available for the national deployment of the NPSBN. However, we acknowledge that likely only a limited number of jurisdictions will generate such excess value, which would be available to help support deployment, for example, in higher cost, rural areas.

⁷⁵ 47 U.S.C. § 1422(a).

Comment # 53: One commenter stated it does not support FirstNet’s interpretation and proposed that any “cost-effectiveness” evaluation of a State plan must begin and end with the effect on the State and argued that the Governor’s obligation is to provide the best possible, most cost-effective, solution for that State’s residents.

Response: FirstNet agrees that pursuant to the Act, a State Governor has the right to determine whether it is in the best interest of a State to participate in the State RAN plan as proposed by FirstNet, or instead seek to conduct the deployment of its own RAN within the State.

Accordingly, a Governor may choose to independently evaluate whether it is more cost-effective to participate in the State RAN plan as proposed by FirstNet or conduct its own deployment of a RAN in the State. In contrast, FirstNet has an obligation to ensure the establishment of a nationwide network and must take into consideration the interests of all States rather than only a single State. Accordingly, FirstNet, based on the reasoning in the *Second Notice*, has determined that as a part of its decision to enter into a spectrum capacity lease it must take into account the cost-effectiveness of the proposed alternative State plan, including the impact of the plan on the nationwide network.

Comment # 54: One commenter recommended that the reinvestment analysis should define more clearly the network to ensure RANs that service both public safety entities and secondary users should be targeted first for reinvestment instead of being limited to a RAN for public safety only.

Response: FirstNet acknowledges this recommendation and will consider it as any applicable decisions are developed on the matter.

Comment # 55: One commenter noted that any lease of excess capacity needs to recognize that the amount of such excess may very well vary by State and decrease over time, citing several

studies that indicated 20 MHz of spectrum will be needed, and in some very large incidents, may not be totally sufficient for public safety use. Therefore, the commenter suggested that the amount of supplemental funding that can be attained from covered leasing agreements should follow a determination of the spectrum capacity required by public safety instead of having the amount of spectrum available to public safety be determined by the additional funding beyond the \$7 billion needed for the network.

Response: FirstNet acknowledges this recommendation and will consider it as any applicable decisions are developed on the matter.

Comment # 56: One commenter requested clarification on whether the preliminary interpretation would mean that no excess revenues will ever be allowed to offset, in whole or part, public safety subscriber fees or if all of those revenues will only be reinvested back into the network to maintain or expand infrastructure.

Response: FirstNet's interpretation does not expressly foreclose the potential for excess revenues to offset, in whole or part, public safety user or subscriber fees provided such reinvestment comports with the requirements of 47 U.S.C. §§ 1428(d), 1442(g).

Comment # 57: Three commenters, although supporting the goal of ensuring build out in rural areas, requested more clarification on the general scope of the FirstNet spectrum capacity lease requirements, including the scope of the proposed "cost-effectiveness" analysis.

Response: FirstNet acknowledges the comments and will consider them, as appropriate, in the development of any processes or requirements related to a spectrum capacity lease.

Comment # 58: One commenter indicated that NTIA, and not FirstNet, has the ultimate decision-making authority over the entry of spectrum capacity leases with States assuming RAN responsibilities. As support, the commenter referenced 47 U.S.C. § 1442(e)(3)(C)(iii), which

provides that if the Commission approves a State plan, the State “shall apply to the NTIA to lease spectrum capacity from the First Responder Network Authority.” Accordingly, the Commenter contended that only NTIA has the authority to enter into spectrum capacity leases with opt-out States.

Response: FirstNet disagrees with the commenter and reiterates that independent of NTIA’s determination in assessing a spectrum capacity lease application, FirstNet, as the licensee of the spectrum pursuant to section 1421 and an independent authority within NTIA, must ultimately decide on what terms to enter into a spectrum capacity lease with a State, and in doing so, evaluate, for example, the State’s demonstration of cost-effectiveness of the State’s alternative plan on the national deployment per section 1442(e)(3)(D)(ii). The relevant language regarding spectrum capacity leases for States that assume RAN responsibility can be found at section 1442(e)(3)(C)(iii)(II), which provides that once the FCC approves an alternative State plan, the State “shall *apply* to the NTIA to lease spectrum capacity *from the First Responder Network Authority*.”⁷⁶ We emphasize language in this provision noting that the State would need to lease spectrum capacity *from* FirstNet. The Act is clear that the license for the public safety broadband spectrum has been granted exclusively to FirstNet.⁷⁷ As the exclusive licensee of the spectrum, FirstNet alone can negotiate and enter into an agreement to lease this spectrum. In addition, section 1442(e)(3)(D) sets forth the criteria a State must demonstrate in order to obtain spectrum capacity leasing rights. Accordingly, reading sections 1421, 1442(e)(3)(C), and 1442(e)(3)(D) of the Act together, the statute provides that a State assuming RAN responsibility must (1) submit an application to NTIA in order to lease spectrum capacity, (2) demonstrate to

⁷⁶ 47 U.S.C. § 1442(e)(3)(C)(iii) (emphasis added).

⁷⁷ 47 U.S.C. § 1421.

NTIA compliance with all applicable criteria, including the cost-effectiveness of the alternative plan on the nationwide deployment, and (3) negotiate an agreement to lease this spectrum capacity from FirstNet, prior to being authorized to conduct RAN deployment in that State.

Reinvestment of User or Subscriber Fees

FirstNet has interpreted that the Act provides flexibility for FirstNet and a State assuming RAN responsibilities to reach an agreement regarding who serves as the customer facing entity and ultimately receives such user or subscription fees under the spectrum capacity lease, with respect to the user fees generated from public safety customers in a State. In accordance with the structure and purposes of the Act, which requires that the NSPBN be self-funded, and includes specific provisions requiring reinvestment of revenues in the network, FirstNet makes the following conclusions relating to the use of user or subscription fees assessed and collected by a State assuming responsibility for deploying the RAN:

- 1. FirstNet concludes that the Act requires that States assuming RAN deployment responsibilities and charging user or subscription fees to public safety entities must reinvest such fees into the network.**
- 2. FirstNet concludes it could impose a reinvestment restriction within the terms of a spectrum capacity lease with a State.**

Analysis of and Responses to Comments on Reinvestment of User or Subscription Fees

Summary: Commenters generally agreed with the interpretation that user or subscriptions fees must be reinvested in the network, recognizing that to achieve network sustainment, all fees, revenues, etc. would need to be reinvested into the network. The dissenting commenters, as documented below, did not typically disagree that the funds must be reinvested in the network, but rather wanted to limit the reinvestment of the funds solely to RAN construction, operation,

and maintenance in the State where the fees were assessed rather than requiring reinvestment to include the nationwide network.

Comment # 59: One commenter disagreed with the proposed interpretation that FirstNet could consider or impose a reinvestment restriction as part of a spectrum capacity lease, stating that such a conclusion is not supported by the plain language of the Act.

Response: See the response to Comment # 47 discussing the ability of FirstNet to negotiate the specific terms and conditions of a spectrum capacity lease.

Comment # 60: One commenter disagreed with the proposed interpretation that a State choosing to conduct its own RAN deployment must pay a part of its subscriber fees to FirstNet, rather than retain and reinvest those funds directly in the State RAN.

Response: FirstNet's interpretations leave flexibility for a State to generate or receive user or subscription fees from public safety customers and reinvest such fees into the RAN in the State. However, the specific arrangement will ultimately depend on many factors, including both a State's proposed reinvestment of such fees and the cost-effectiveness considerations regarding the distribution of such fees that will be evaluated as part of any negotiation between FirstNet and a State seeking to enter into such a spectrum capacity lease. As discussed in the *Second Notice*, subscriber fees may ultimately exceed those amounts necessary to deploy a robust RAN in any one State. Accordingly, if the Act is interpreted to allow excess funds to be reinvested only in a specific State, there is a built-in incentive for a few States to conduct RAN deployment and retain, for reinvestment in that State, fees that could materially reduce FirstNet coverage and services in other States, including States with more rural areas. FirstNet believes, as a general matter, that Congress did not intend for a few States to be able to withhold material funding for all other States pursuant to the Act. Such an incentive structure, even if reinvestment in the State

network were always required in States assuming RAN responsibilities, could result in networks that greatly exceed public safety requirements in a few such States and networks that do not meet public safety requirements and the goals of the Act in the vast majority of States. Accordingly, as concluded above, FirstNet, as part of its cost-effectiveness analysis, must consider a State's reinvestment and distribution of any user fees assessed to public safety entities as part of the negotiated terms of any spectrum capacity lease between FirstNet and the State.

Comment # 61: One commenter suggested the provisions for reinvestment should define more clearly the network to ensure the RAN that services dual purposes (*i.e.*, both public safety entities and secondary users) should be targeted first for reinvestment.

Response: The RAN, whether deployed by FirstNet or a State, will be capable of being utilized by both public safety entities and secondary users. Thus, any funds reinvested in a State RAN will likely positively impact both public safety and secondary users. However, public safety entities are intended to be the primary users of the network. Therefore, to the extent that a RAN requires special modifications specifically for, or on behalf of public safety entities, such modifications will likely take priority over general investments in the RAN. Nevertheless, FirstNet anticipates gaining a better understanding of these specific needs and priorities as it continues both its ongoing consultation with its various stakeholders as well as part of any negotiation between FirstNet and a State to enter into a spectrum capacity lease.

Comment # 62: One commenter disagreed with FirstNet's interpretation of the Act, expressing concern that reinvestments of subscriber fees is a tax on public safety responders and stating that any charges above and beyond what is necessary to maintain and improve a State's RAN should be returned to that State's public safety community in the form of rate reductions, training, and better equipment.

Response: See the responses to Comment # 48 and Comment # 56 above.

Reinvestment of Revenues from State Covered Leasing Agreements/Public-Private Partnerships

The Act includes certain provisions addressing the reinvestment of covered leasing agreement fees for States assuming RAN deployment opportunities that have both received approval from NTIA and entered into a spectrum capacity lease with FirstNet.⁷⁸ We analyzed, in the *Second Notice*, the parallels between FirstNet and the State provisions addressing the reinvestment of such fees pursuant to the Act. For example, section 1428(d) requires FirstNet to reinvest those amounts received from the assessment of fees pursuant to section 1428 in the NPSBN by using such funds only for constructing, maintaining, operating, or improving the network.⁷⁹ Parallel to section 1428(d), section 1442(g)(2) requires that any amounts gained from a covered leasing agreement between a State conducting its own deployment of a RAN and a secondary user must be used only for constructing, maintaining, operating, or improving the RAN of the State.⁸⁰

Section 1428(a)(2) authorizes FirstNet to charge lease fees related to covered leasing agreements. Other than such agreements, however, FirstNet is not expressly authorized to enter into other arrangements involving the sale or lease of network capacity. In potential contrast, section 1442(g)(1) precludes States from providing “commercial service to consumers or offer[ing] wholesale leasing capacity of the network within the State *except directly through public-private partnerships for construction, maintenance, operation, and improvement of the*

⁷⁸ 47 U.S.C. § 1442(g).

⁷⁹ 47 U.S.C. § 1428(d).

⁸⁰ 47 U.S.C. § 1442(g)(2).

network within the State.”⁸¹ Section 1442(g)(2), entitled “Rule of construction,” provides that “[n]othing in this subsection shall be construed to prohibit the State and a secondary user from entering into a covered leasing agreement.”⁸²

To reconcile the differences in these provisions, FirstNet, in accordance with its analysis in the *Second Notice*, makes the following interpretations relating the potential treatment of a covered leasing agreement and a public-private partnership for construction, maintenance, operation, and improvement of the network:

- 1. FirstNet concludes that, in practical effect, the literal statutory differences between a covered leasing agreement and public-private partnership as used in the Act result in no substantive difference between the Act’s treatment of FirstNet and States that assume RAN responsibility.**
- 2. FirstNet concludes that any revenues from public-private partnerships, to the extent such arrangements are permitted and different than covered leasing agreements, should be reinvested into the network and that the reinvestment provision of 47 U.S.C. § 1442(g) should be interpreted to require such reinvestment.**

Analysis of and Responses to Comments on Reinvestment of Revenues from State Covered Leasing Agreements/Public-Private Partnerships

Commenters generally supported the interpretation, agreeing that through the provisions of and overall framework and policy goals of the Act, Congress intended that any revenues from public-private partnership, to the extent such arrangements are permitted and different than

⁸¹ 47 U.S.C. § 1442(g)(1) (emphasis added).

⁸² 47 U.S.C. § 1442(g)(2).

covered leasing agreements, should be subject to the reinvestment requirements of the Act.

However, a few commenters, as discussed below, disagreed with the interpretation.

Comment # 63: One commenter suggested the proposed interpretation regarding public-private partnerships is too narrow and will only serve to inhibit creative, customized solutions for RAN build out and maintenance within a State. Specifically, the commenter noted that the Act allows FirstNet to lease spectrum capacity to commercial providers who are free to offer commercial service and to profit from the arrangement, and likewise, the Act should be interpreted to permit opt-out States in connection with selected partners to have this same economic opportunity.

Response: FirstNet disagrees that its interpretation inhibits or limits customized solutions for RAN build out and maintenance within a State. The Act allows both FirstNet and States that have received approval of an alternative plan and entered into a spectrum capacity lease with FirstNet to enter into covered leasing agreements.⁸³ A covered leasing agreement, as the only instrument in the Act that permits access to network capacity on a secondary basis for non-public safety services, is a fundamental tool to attract entities to assist in the construction, management, and operation of the NPSBN, including State RANs. Consequently, a State that enters into a covered leasing agreement with a secondary user would be afforded the same benefits that are available to FirstNet pursuant to section 1428(a)(2)(B), including permitting the secondary user access to network capacity on a secondary basis for non-public safety services. Similarly, the only limitations on the covered leasing agreements between a State and secondary user would be those described in the Act, including reinvestment of such revenues in the RAN, and the terms and conditions agreed upon by FirstNet and the State as part of the spectrum capacity lease.⁸⁴

⁸³ See 47 U.S.C. §§ 1428(a), 1442(g)(2).

⁸⁴ See *id.*

Thus, the same potential economic opportunity exists for States assuming RAN responsibilities as for FirstNet nationally, including rural States, to develop partnerships with broadband providers, local telecommunications providers, or other private sector entities within such States.

Comment # 64: One commenter provided a general comment about covered leasing agreements and public-private partnerships, stating that the negotiating entity should seek to maximize the profit it can obtain from the 700 MHz spectrum allotted to public safety by leasing the spectrum capacity to secondary users on a statewide, regional, or national basis—whichever arrangement is most profitable.

Response: FirstNet agrees that it should evaluate various funding and deployment options in order to help speed deployment and ensure the establishment of a self-sustaining broadband network dedicated to public safety throughout the nation.

Comment # 65: One commenter suggested that, although revenue generated from a covered leasing agreement is an important financial contribution to the construction and maintenance of the nationwide network, FirstNet should not allow the promise of secondary leasing agreements to single-handedly drive its strategic decisions.

Response: FirstNet acknowledges the comment and intends to analyze and determine the most efficient and effective way to utilize its various funding streams to ensure the deployment and operation of a nationwide broadband network for public safety.

Comment # 66: One commenter suggested that State law, not FirstNet, should determine the ability of an opt-out State to profit from public-private partnerships or covered leasing agreements.

Response: The Act authorizes States to enter into covered leasing agreements with secondary users through public-private arrangements and establishes the parameters of those

arrangements.⁸⁵ Indeed, the Act explicitly limits the use of any revenue gained by a State through a covered leasing agreement to constructing, maintaining, operating, or improving the RAN of that State.⁸⁶ Similarly, FirstNet has also concluded that section 1428(d), authorizing a State to enter into public-private partnerships, was intended by Congress to be read consistently, to the extent such an arrangement is considered something different from a covered leasing agreement, so as to ensure ongoing reinvestment of all revenues into the network. This is consistent with the overall purpose and intent of the Act to ensure the deployment and operation of the NPSBN.

Dated: _October 15, 2015_____.

Jason Karp,

Chief Counsel (Acting), First Responder Network Authority.

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⁸⁵ See 47 U.S.C. § 1442(g)(2).

⁸⁶ See *id.*