

**Before the
Federal Communications Commission
Washington, DC 20554**

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

COMMENTS OF APCO

The Association of Public-Safety Communications Officials-International, Inc. (APCO) hereby submits the following comments in response to the Commission’s Notice of Proposed Rulemaking (Notice) in the above-captioned proceeding.¹

Founded in 1935, APCO is the nation’s oldest and largest organization of public safety communications professionals. APCO is a non-profit association with over 26,000 members, primarily consisting of state and local government employees who manage and operate public safety communications systems – including 9-1-1 Public Safety Answering Points (PSAPs), radio networks, and information technology – for law enforcement, fire, emergency medical, and other public safety agencies. APCO’s members are the public safety communications professionals that will be among the primary users of the nationwide public safety broadband network (NPSBN).

¹ Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network, PS Docket No. 16-269, Notice of Proposed Rulemaking, FCC 16-117 (rel. Aug. 26, 2016) (Notice).

APCO appreciates the opportunity to comment on the Commission's proposed procedures for administering the state opt-out process as provided under the Public Safety Spectrum Act (Act). In these comments, APCO explains why opt-out is a false choice that likely would negatively impact the NPSBN. APCO then provides specific feedback to the Commission's proposals.

I. Opt-out is a False Choice

There is simply no reason for any state to opt-out, which entails an arduous process and shifts the important responsibility to implement a radio access network (RAN) from FirstNet to the state. Compared to any state, FirstNet has significant advantages provided by Congress to achieve the best overall solution for the country. Yet a state that seeks to construct its own RAN introduces many serious risks to the communications capabilities of first responders within its own borders as well as those across the nation. Further, a state can benefit from welcoming the RAN build-out provided by FirstNet, and still augment the network itself, provided it meets FirstNet's technical requirements to ensure sustained interoperability. Finally, any notions that opt-out can lead to new revenue-generating opportunities for a state are baseless.

Prior to enactment of the groundbreaking FirstNet legislation, efforts were underway to deploy broadband networks with the same interoperability problems that have historically plagued first responders. Several jurisdictions were seeking to develop public safety broadband networks with a "network of networks" model. The FirstNet legislation was a complete repudiation of this model. While the opt-out provision of the Act, which was never supported by APCO, served as a compromise to achieve passage, the primary thrust of the Act was the creation of a nationwide network with a single governance body. As FirstNet has progressed, the disadvantages and risks associated with separate FirstNet and state RAN build-out efforts have become increasingly clear. In creating FirstNet, Congress completely reversed the way public safety networks have been traditionally implemented, with the full

support of APCO and many other major public safety associations. FirstNet's inherent advantages include:

- An expert team that can deliver a sustainable and secure network design, including ongoing maintenance and coordinated upgrades across state borders and throughout the country;
- The ability to avoid differing state and local procurement and approval processes;
- National-level bargaining power and synergies with potential partners across a competitive, diverse, multiple-vendor ecosystem;
- National-level economies of scale in network and device equipment costs; and
- A special focus on establishing and maintaining a seamless, nationwide level of interoperability for all first responders.

No single state can match these advantages. Further, there is no recourse for a state that has opted out and then faces a change in leadership or competing priorities that removes essential resources from the responsibilities of implementing, operating, maintaining, and sustaining an advanced, wireless broadband RAN. There is no rescue plan in the Act for a failed opt-out RAN, which would be a very complex and costly problem to fix. And the network as a whole, including the primary goal of achieving nationwide interoperability, would be at risk.

An opt-out state cannot provide commercial service to consumers. Any revenue derived from operation of an opt-out state RAN must be reinvested into the public safety network. Revenue cannot be diverted to a state's general fund, cannot be spent on any other programs, or even used for other public safety-related expenses. The Act is quite clear on these points. We have already seen examples of states diverting 9-1-1 fees to cover budget gaps or other priorities, and this cannot be replicated when it comes to the NPSBN.

Further, while Congress created an option for states to pursue their own RAN builds, a state should not discount the fact that Congress strongly discouraged such a path. A state that seeks to opt

out commits itself to a painstaking endeavor. It must confront a rigorous double-agency approval process designed to ensure interoperability and long-term sustainability. Hiring additional personnel, issuing an RFP, procuring network equipment, negotiating covered leasing agreements, and collaborating with FirstNet to ensure seamless integration will each be substantial undertakings.

To build, operate, and maintain the RAN will require significant technical, contract, and grant management personnel. Why waste resources on duplicative efforts that lack FirstNet's economies of scale and invite additional risks to the network's success? Instead, a state can accept the RAN FirstNet offers to build and focus its resources on augmenting it without giving up any benefits. FirstNet is subject to extensive consultation requirements with states regarding network policies. APCO commends FirstNet's staff for its outstanding consultation efforts to date. And, because LTE technology enables local control options and features, states accepting FirstNet's RAN build will not sacrifice control for service for users within their borders.

FirstNet has been taking the steps it needs to. Led by highly qualified and dedicated board members, it has been hiring expert staff, extensively consulting with state and local agencies, and evaluating responses to its request for proposals. When FirstNet presents its plans to the states, they will reflect the full weight of its singular focus to carry out the goals of the Act. Each state should accept FirstNet's plans and direct available resources to augmenting the RAN as it desires. This is the most efficient and effective way to provide all first responders with the communications tools they need to protect the safety of life and property, including when they render assistance to other jurisdictions.

II. APCO's Responses to the Commission's Proposed Procedures

APCO strongly agrees with the Commission that "The Public Safety Spectrum Act closely circumscribes the review that the Commission is to undertake with respect to States that choose to 'opt out' of the nationwide network and to build their own state-wide RAN."² The statute defines a clear,

² Notice at para. 58.

specific, and limited role in which the Commission “shall either approve or disapprove” an alternative state plan. Congress did not direct the Commission to conduct a rulemaking. Thus, the Commission need not and should not adopt rules or seek further public comment.

Given the straightforward and itemized nature of Congress’s direction, APCO offers the following responses to the Commission’s proposals organized by Notice paragraph:

Paragraph 49

APCO agrees that a state must notify the Commission of its intent to opt out no later than 90 days after receiving the electronic notice from FirstNet. Failure to timely do so means that a state forfeits its right to submit an alternative plan to the Commission. Notice must be made by the governor as the plain language of the Act says, not her designee, and should be made directly to the Chairman of the Commission. The Act makes no provision for including any additional information with the notice.

Paragraph 51

A state’s alternative plan must be based on a completed RFP, meaning that a final contract has been awarded and signed. APCO agrees that a state forfeits its right for consideration of its opt-out request if it fails to meet this requirement within 180 days as set by the statute.

Paragraph 53

The Commission seeks comment on its tentative view that “the plan as filed with the Commission must, at a minimum, (1) address the four general subject areas identified in the Act (construction, maintenance, operation, and improvements of the state RAN), (2) address the two interoperability requirements set forth in Sections 6302(e)(3)(C)(i)(I) and (II) of the Act, and (3) specifically address all of the requirements of the Technical Advisory Board for First Responder Interoperability.” To be more precise in terms of what the state is required to demonstrate, the Commission’s role is limited to an evaluation of interoperability, and the state’s plan must focus on making the particular showings required under Sections 6302(e)(3)(C)(i)(I) and (II) of the Act: compliance

with the minimum technical interoperability requirements under section 6203 and interoperability with the NPSBN.³ This would be consistent with the Commission’s subsequent statements that “the statute provides a two-pronged standard by which the Commission must evaluate a state’s submission,”⁴ and “Congress intended the scope of [its] review to be limited solely to these two factors.”⁵

The Commission may not permit amendments or supplements to the alternative plans. This is not part of the statute and would be inconsistent with the requirement that an RFP is completed. APCO therefore disagrees with the premise of the Commission’s question, “If a plan is deemed sufficient for our purposes before a state awards a contract pursuant to its RFP, should we condition approval on substantial compliance with the approved plan under the awarded contract, or should this be addressed by NTIA under its ‘ongoing’ interoperability evaluation?” Congress clearly intended that if a state cannot provide a complete alternative plan within the statutory timeframe, it should not take on responsibility for the RAN.

Paragraphs 54 and 55

The Act makes no provision for the Commission to seek public comment on alternative state plans. Doing so would not be consistent with its limited role – “approve or disapprove” – and would lead to delay in deployment of this much-needed network. The only party that would be qualified to assess interoperability with the NPSBN is FirstNet. Accordingly, in carrying out its limited statutory duty, the Commission should only consult with and accord substantial weight to FirstNet’s assessments.

The Commission asks, “Should state plans be treated as confidential, with public notice limited to identifying which states have elected to opt out and filed an alternative plan?” As noted above, the Commission should not be seeking public comment on state alternative plans. Furthermore, as with the plans FirstNet provides to states, access to alternative plans must remain extremely limited to protect

³ Spectrum Act, Section 6302 (e)(3)(C)(i)(I) and (II).

⁴ Notice at para. 58.

⁵ *Id.* at para. 60.

the confidentiality and security of the network. The Commission should not undermine FirstNet's efforts to protect sensitive information. Instead, the Commission should not only maintain the confidentiality of the alternate state plans, it should consider leveraging the secure method FirstNet uses to provide state plans to enable comparable security for the review of alternative state plans.

Paragraph 57

APCO agrees that state plans should receive expeditious review, and thus believes that a more appropriate timeframe for a "shot clock" is 30 days rather than the proposed 90 days. A state seeking to present an alternate plan must be able to make a clear case – "shall demonstrate" – that it satisfies the interoperability showings required by Congress. The Commission has a limited role in reviewing plans. In the meantime, deployment of the NPSBN is being held up. Accordingly, there should be a firm time limit for the Commission to act, without permitting suspension or pausing of the shot clock. Importantly, there should be a presumption against approval if the shot clock is exceeded. This would be consistent with the burden of proof Congress imposed on the state ("shall demonstrate"), and Congress's clearly delineated, rigorous, multi-step process imposed on states seeking to implement alternate plans.

Paragraph 59

APCO agrees that "the Commission is barred from entertaining any amended or different alternative plan if it has issued a decision disapproving a state's alternative plan." Congress made no such provision.

Paragraph 62

APCO agrees that the Commission should "evaluate state opt-out plans based solely on whether they comply with the requirements for interoperability at the time the plan is submitted, and that its evaluation would not extend to issues that the Act reserves for NTIA's review, such as the state's technical capabilities to operate the RAN, funding support, or the state's ability to maintain 'ongoing'

interoperability with the NPSBN.” APCO also agrees that “the Commission’s approval of a state opt out plan as meeting the interoperability criteria in Section 6302(e)(3)(C) of the Act would not create a presumption that the state plan meets any of the criteria that NTIA is responsible for evaluating under Section 6302(e)(3)(D) of the Act.”

Paragraph 63

APCO agrees that “state alternative plans submitted to the Commission should, consistent with the scope of the Commission’s review under the Act, include a showing that the state will adhere to those FirstNet network policies that relate to interoperability with respect to the FirstNet nationwide network.” The establishment of network policies is solely the responsibility of FirstNet.⁶

Paragraphs 64 and 65

APCO agrees that “the Commission’s evaluation of the opt-out states’ alternative plans be limited to the RAN.” The evaluation should be limited to the RAN as that term is defined by FirstNet. APCO also agrees with the Commission’s proposed elements to exclude from consideration because they are not part of the RAN.

Paragraph 67

APCO agrees that “any alternate plan submitted by a state that would require alteration or changes to the FirstNet network to accommodate the state’s proposed RAN would not meet the interoperability requirement under the Act.”

Paragraphs 69 and 70

With regard to compliance with the interoperability board’s recommendations and interoperability with the NPSBN, the Commission should completely defer to FirstNet’s judgement on which factors to consider. APCO agrees with the Commission’s proposal “to require a showing solely with respect to the state’s compliance with those RAN-related network requirements specified by

⁶ See Spectrum Act, Section 6206(c).

FirstNet that are necessary to ensure interoperability with the FirstNet network, and not to extend the scope of the Commission’s review to issues other than such RAN-related interoperability.” APCO also agrees that the Act “does not empower the Commission to impose network policies or interoperability requirements on FirstNet.”

Paragraphs 71 and 72

The Commission should defer to FirstNet’s guidance on what information a state should provide in its alternative plan to demonstrate that it will be interoperable. APCO does not oppose allowing states to self-certify, provided that such certifications are subject to verification by FirstNet. Certification by a third party such as an industry association with interoperability expertise, however, would be inappropriate. Congress was specific as to the requirements of the state and the Commission, and made no provision for a third-party certification. Further, third-party certification would not add value to the process. Again, the only party qualified to assess interoperability with the NPSBN is FirstNet, with whom Commission should consult.

Paragraph 73

With regard to documentation of the Commission’s decisions for opt-out requests, APCO reiterates that the Act only requires the Commission to “approve or disapprove” an alternative plan. Providing a written explanation for its decisions would be beyond the scope of the statute, and would impose delays. Further, an explanation of the Commission’s decision would be of no import or relevance to the standard of review of a Commission decision set by Section 6302(h) of the Act. Accordingly, the Commission should only provide a limited notice of approval or disapproval back to the state.

CONCLUSION

APCO supports the Commission's proposal to adopt a closely circumscribed role to evaluating state op-out applications, consistent with the comments herein.

Respectfully submitted,

APCO INTERNATIONAL

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