

June 15, 2017

**VIA ECFS**

Marlene H. Dortch, Secretary

Federal Communications Commission

445 12th Street, S.W.

Washington, DC 20554

Re: *In the Matter of Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network*, PS Docket No. 16-269

Dear Ms. Dortch:

On June 13, 2017, Jason Karp, Chief Counsel (by phone), Kevin Green, Attorney, and the undersigned, all of the First Responder Network Authority (“FirstNet”) met with Zenji Nakazawa in the Office of Chairman Pai to discuss the draft FirstNet Opt-Out Procedures Report and Order.[[1]](#footnote-1) On June 14, 2017, Kevin Green and I met with Erin McGrath in the Office of Commissioner O’Rielly, and separately with Daudeline Meme and Jeremy Greenberg in the Office of Commissioner Clyburn to discuss the *Draft Order*.

In each meeting, we commended the Federal Communications Commission (“Commission” or “FCC”) for taking this important next step in its rulemaking proceeding and crafting a *Draft Order* that provides, on the whole, reasonable procedures for the State opt-out process. The FCC has an important role to play in ensuring the interoperability of the nationwide public safety broadband network (“NPSBN”) through its rigorous evaluation of any alternative plans, and we appreciate the Commission’s hard work on this proceeding.

FirstNet believes, however, that the Commission should not lose sight of public safety’s pressing need for the expeditious deployment of the NPSBN.[[2]](#footnote-2) FirstNet emphasized that one of the Middle Class Tax Relief and Job Creation Act of 2012’s (the “Act”) key mandates is to make efforts to speed NPSBN deployment.[[3]](#footnote-3) The first responder community has long advocated for a nationwide interoperable communications network, and FirstNet is concerned that the *Draft Order’s* lengthy, complex, and open-ended processes could result in substantial delay and uncertainty.[[4]](#footnote-4) During the meetings, FirstNet reiterated that the *Draft Order’s* decision not to require an opt-out State to have in place an executed contract with a vendor prior to submitting an alternative plan to the Commission could have disastrous consequences for the network, and ultimately, public safety.[[5]](#footnote-5)

FirstNet also highlighted that under no circumstances does the FCC have oversight authority over FirstNet’s network policies. The Act is clear that FirstNet, and solely FirstNet, has the authority to establish network policies for the NPSBN, including policies related to the technical and operational requirements of the network.[[6]](#footnote-6) Any attempt by the Commission to seek comment on, and thus potentially alter, FirstNet’s network policies would constitute significant overreach by the FCC and would undermine Chairman Pai’s approach to ensuring that the Commission does not exceed the authority granted to it by Congress.[[7]](#footnote-7) FirstNet has spent years consulting – and continues to consult through, for example, the upcoming State Plan review period – with all 56 states and territories and the Public Safety Advisory Committee in order to obtain feedback, guidance, information, recommendations, and subject matter expertise from a public safety perspective to ensure that user needs, requirements, and public safety operational capabilities are included in the network. It is highly inappropriate for the FCC to unilaterally decide to undue this work by seeking comment on FirstNet’s network policies. Indeed, Congress made clear that its intent was for only one entity, FirstNet, to be held solely accountable to public safety for establishing the NPSBN’s network policies. Any suggestion that the FCC was tasked with overseeing FirstNet’s establishment of network policies is entirely inconsistent with the Act and could jeopardize Congress’s vision for the deployment of a nationwide interoperable public safety broadband network.

**I. To Ensure Nationwide Interoperability for Public Safety, the Commission Must Require an Opt-Out State to Have In Place a Fully Executed and Binding Contract with a Vendor Prior to Submitting its Alternative Plan to the Commission**

During the meetings, we discussed the *Draft Order’s* decision not to require an opt-out State to have in place an executed contract with a vendor prior to submitting its alternative plan to the Commission.[[8]](#footnote-8) FirstNet made clear that this decision would put the Commission at significant risk of making an interoperability determination that does not in fact ensure interoperability. During the meetings, FirstNet explained that an opt-out State’s vendor would, in all likelihood, need to enter into numerous subcontracts to complete the work it could not perform itself.[[9]](#footnote-9) Under the *Draft Order*, however, the opt-out State, and its vendor, will not be required to enter into any binding agreements prior to submitting an alternative plan to the Commission. Thus, the Commission’s determination will be based on nothing more than promises that a State, its vendor, and its vendor’s subcontractors will work out the details at a later date – but FirstNet highlighted that public safety cannot wait for this unspecified later date. FirstNet made abundantly clear that should the Commission decide not to require an opt-out State to have a fully executed and binding agreement in place with its vendor, the Commission would be unable to effectively carry out its vital review responsibility under the Act.

Moreover, the *Draft Order* would have the unintended consequence of, following FCC approval of an opt-out State’s alternative plan, creating an indefinite period of time for an opt-out State to then execute a contract with a vendor. Beyond not ensuring interoperability, as discussed above, this approach could result in an unknown and potentially lengthy delay in the deployment of, and public safety access to, the NPSBN within the opt-out State. While the *Draft Order* claims that its “chosen approach creates the correct balance of incentives for all parties to the process,” it fails to explain how the Commission will account for the fact that its approach effectively eliminates the 180-day deadline imposed by Congress and instead creates an indeterminate period of time for an opt-out State and its vendor to finalize the terms of a contract before seeking National Telecommunications and Information Administration (“NTIA”) approval.[[10]](#footnote-10) During the meetings, FirstNet emphasized that the Commission will need to carefully consider how it will account for the *Draft Order’s* creation of this new and statutorily inconsistent indefinite period of time in the opt-out process and the potential effect it will have on the network and public safety.

**II. FirstNet is the Sole Entity Tasked by Congress with Establishing Network Policies for the NPSBN, Including Policies Related to the Technical and Operational Requirements of the Network**

We also discussed our concerns with the *Draft Order* instructing the Bureau to issue a Public Notice that seeks comment on FirstNet’s network policies and then having the Commission issue an order identifying those elements of FirstNet’s network policies that the Commission will consider as part of its interoperability review of an alternative plan.[[11]](#footnote-11) We reiterated that the Act is clear that FirstNet, and solely FirstNet, has the authority to establish network policies for the NPSBN, including policies related to the technical and operational requirements of the network.[[12]](#footnote-12) We noted that the *Draft Order* does not cite to any statutory authority for its decision to seek comment on FirstNet’s network policies. Rather, the *Draft Order* appears to be responding to a commenter’s argument suggesting that the Commission is relinquishing its rulemaking authority under the Administrative Procedure Act (“APA”) to FirstNet. This logic is flawed in that it assumes the Act tasks the Commission, rather than FirstNet, with the responsibility to establish network policies for the NPSBN. However, as previously noted, FirstNet is the only entity statutorily responsible for both ensuring the establishment of the NPBSN and the network policies that govern the technical and operational requirements of the network.[[13]](#footnote-13) Thus, FirstNet, not the FCC, would be the entity subject to any APA requirements related to establishing network policies. Congress, however, expressly exempted FirstNet from the procedural requirements of the APA, and thus FirstNet is not required to seek public comment on its network policies.[[14]](#footnote-14)

While not entirely clear in its wording, the *Draft Order* states that the Commission will serve as a “neutral arbiter of whether an alternative plan meets this requirement.”[[15]](#footnote-15) A recent ex parte filed by Rivada, however, misinterprets the Commission’s role as a “neutral arbiter” and incorrectly states that “the Commission’s review as to which FirstNet network policies are relevant to interoperability will be critical.”[[16]](#footnote-16) During the meetings, FirstNet made clear that under the Act, the Commission’s role is to serve as a “neutral arbiter” of whether an opt-out State’s alternative plan has demonstrated interoperability with the NPSBN, based on the interoperability criteria for the network established by FirstNet, and then either “approve” or “disapprove” the plan.[[17]](#footnote-17) The Act does not provide the Commission with the authority to play a role in overseeing FirstNet’s development of network policies.[[18]](#footnote-18) Indeed, Congress made clear that its intent was for only one entity, FirstNet, to be held solely accountable to public safety for establishing the NPSBN’s network policies. Any suggestion that the FCC was tasked with overseeing FirstNet’s establishment of network policies is entirely inconsistent with the Act and could jeopardize Congress’s vision for the deployment of a nationwide interoperable public safety broadband network.

**III. The Commission Must Ensure that the Governor Has In Fact Made the Decision to Opt-Out as Required by the Act**

Finally, we reiterated that the Act is clear that the Governor – and the Governor alone – must provide the opt-out notification to the FCC (as well as NTIA and FirstNet). While the *Draft Order* acknowledges that the statute “clearly assigns sole responsibility to the Governor,” it then permits “the Governor’s duly authorized designee to provide notification of the Governor’s decision.”[[19]](#footnote-19) During the meeting, we discussed that it will be critical for the Commission to ensure that the Governor has in fact authorized the designee to provide the opt-out notification. FirstNet reiterated that “at the very least, the Commission will need to require a Governor to provide a written declaration acknowledging that he or she has delegated his or her opt-out notice statutory responsibility to a designee, to ensure the Governor has made the decision as required by the Act.”[[20]](#footnote-20)

Pursuant to section 1.1206 of the Commission’s rules, this *ex parte* notification is being filed electronically for inclusion in the record of the above-referenced proceeding. If you have any questions, feel free to contact me at (202) 430-3090.

Respectfully submitted,

/s/ Patrick Donovan

Patrick Donovan

Attorney

1. Procedures for Commission Review of State Opt-Out Requests from the Radio Access Network, Report and Order (Draft), PS Docket No. 16-269 (rel. June 1, 2017) (*“Draft Order”*). [↑](#footnote-ref-1)
2. *See, e.g.*, *AT&T chosen to build nationwide public safety network to address issues raised by 9/11 rescue efforts*, Dallas Morning News, March 30, 2017, *available at* https://www.dallasnews.com/business/business/2017/03/30/att-hired-build-nationwide-broadband-network-first-responders. [↑](#footnote-ref-2)
3. *See, e.g.,* 47 U.S.C. §§ 1426(b)(1)(C), 1426(b)(3). [↑](#footnote-ref-3)
4. For example, the *Draft Order* extends the deadline for States to submit alternative plans to 240 days, despite the Notice of Proposed Rulemaking’s (“NPRM”) proposal for a 180-day timeframe. Since 180 days is the only deadline specified in the Act, the *Draft Order* then imposes a requirement on opt-out States to submit a certification providing evidence that the 180-day timeframe specified in the Act was met. The *Draft Order* also treats each State opt-out application as a separate restricted proceeding, similar in nature to spectrum license applications or adjudicatory proceedings, necessitating the issuing of Public Notices by the Bureau and the filing of comments, reply comments, and amendments by interested parties. The record does not appear to support this finding. *See, e.g.,* Comments of the Commonwealth of Pennsylvania at 7-9; Comments of the State of Indiana at 5; Comments of the State of Nevada at 6; Response of the State of Alabama at 7; Comments of the County of Fairfax, Virginia at 7; Comments of APCO at 6-7; Comments of the First Responder Network Authority at 7-8, (“FirstNet Comments”); Comments of DVA Consulting, LLC at 5; Comments of Rivada Network at 1. Finally, despite FirstNet’s requests for the Commission to implement a firm 60-day shot clock for its review, the *Draft Order* fails to impose a fixed deadline and instead establishes a 90-day aspirational shot clock. While the *Draft Order* notes that most commenters support a 90-day shot clock, itfails to acknowledge that the record was based on the NPRM’s proposed 180-day deadline to submit alternative plans. If commenters were aware that the Commission would be providing opt-out States with an additional 60 days to file alternative plans, 240 days total, the record would likely reflect a greater desire for the Commission to act more promptly and commit to a firm deadline. [↑](#footnote-ref-4)
5. *See* FirstNet Comments at 6; FirstNet Reply Comments at 2-3; FirstNet April 17 Ex Parte at 1; FirstNet May 26 Ex Parte at 6-8. [↑](#footnote-ref-5)
6. *See* 47 U.S.C. § 1426(c). [↑](#footnote-ref-6)
7. *See, e.g.*, FCC CHAIRMAN AJIT PAI’s Statement o*n the Latest D.C. Circuit Rebuke of FCC Overreach* (March 31, 2017), *available at* <https://apps.fcc.gov/edocs_public/attachmatch/DOC-344186A1.pdf> (“Today’s decision by the D.C. Circuit highlights the importance of the FCC adhering to the rule of law. I dissented from the FCC decision that the court has now overturned because, as I stated at the time, the agency’s approach to interpreting the law reflected ‘convoluted gymnastics.’ The court has now agreed that the FCC acted unlawfully. Going forward, the Commission will strive to follow the law and exercise only the authority that has been granted to us by Congress.”). [↑](#footnote-ref-7)
8. The *Draft Order* simply requires an opt-out State to (1) issue a request for proposals (“RFP”), (2) receive firm commitment bids on the RFP, and (3) select a winning bidder. [↑](#footnote-ref-8)
9. This is particularly the case should an opt-out State decide to partner with a vendor that possesses minimal staff or financial resources and does not have experience in building wireless networks. [↑](#footnote-ref-9)
10. *Draft Order* at ¶ 21. [↑](#footnote-ref-10)
11. *See Draft Order* at ¶ 61. [↑](#footnote-ref-11)
12. *See* 47 U.S.C. § 1426(b)(3). [↑](#footnote-ref-12)
13. We also discussed the practical implications of the Bureau seeking comment on FirstNet’s network policies. To illustrate, if the Commission were to seek comment on FirstNet’s network policies and then determine that it would not consider certain network policies, the Commission would thus be relying on criteria that were not established by FirstNet, the entity tasked by Congress with establishing the network policies for the NPSBN. Rather, the Commission would be creating and/or eliminating network policies (presumably based on feedback received from interested third-parties that filed comments in response to the Bureau’s Public Notice), which may fail to ensure that an opt-out State’s alternative RAN plan will actually be interoperable with the NPSBN. As a result, the Commission’s review would be superfluous. An opt-out State could receive FCC approval and be left with the false expectation that its alternative plan demonstrated interoperability with the NPSBN only to potentially discover at a later date in the opt-out process that its proposed RAN plan does not in fact demonstrate interoperability with the NPSBN. Accordingly, it is imperative for the Commission to carefully consider the practical implications of the *Draft Order’s* imposition of an FCC review and evaluation of FirstNet’s network policies. [↑](#footnote-ref-13)
14. *See* 47 U.S.C. § 1426(d)(2). [↑](#footnote-ref-14)
15. *Draft Order* at ¶ 60. FirstNet assumes that the *Draft Order* is referring to FirstNet’s network policies. [↑](#footnote-ref-15)
16. Rivada June 12 Ex Parte. [↑](#footnote-ref-16)
17. *See* 47 U.S.C. § 1442(e)(3)C). [↑](#footnote-ref-17)
18. *See* 47 U.S.C. § 1426(c)(1). [↑](#footnote-ref-18)
19. *Draft Order* at ¶ 12. [↑](#footnote-ref-19)
20. FirstNet May 26 Ex Parte at 10, fn 50. [↑](#footnote-ref-20)