

**FCC FACT SHEET\***  
**FirstNet Opt-out Procedures**  
Report and Order - PS Docket No. 16-269

**Background:**

The Middle Class Tax Relief and Job Creation Act of 2012 created the First Responder Network Authority (FirstNet) within the National Telecommunications and Information Administration (NTIA) to build and operate a nationwide broadband network for use by public safety officials. FirstNet holds a spectrum license in the 700 MHz band and is charged with constructing, deploying, and operating the nationwide network, which will consist of a network core and a radio access network (RAN) that connects with the core to enable wireless communications.

The statute requires FirstNet to develop a national plan to deploy the RAN within each state, but also gives each state the right to “opt out” and build its own RAN, provided the state’s RAN will be fully interoperable with the FirstNet network. The statute requires any state that chooses to opt out to submit an alternative plan for its proposed state RAN to the FCC. To obtain FCC approval, the state must demonstrate that its plan meets the interoperability requirements of the statute. If the FCC approves the plan, the state must then apply to NTIA for a spectrum lease and, if it chooses, for grant funding. If the FCC disapproves the plan, the state must accept FirstNet’s plan, but may appeal to the U.S. District Court for the District of Columbia.

**What the Report and Order Would Do:**

- Establish the procedural timeline for states to notify the FCC, FirstNet, and NTIA of their opt-out elections and to file their alternative state plans with the FCC.
- Identify information states should include in their alternative state plans to demonstrate compliance with the statutory criteria for interoperability with FirstNet’s network.
- Specify the technical criteria and standards that the FCC will use in evaluating alternative state plans.
- Provide the details of the FCC’s review process, including participation by interested parties, treatment of confidential information, and the timing of FCC action.
- Describe how the FCC will document its decisions to approve or disapprove alternative state plans.

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\* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in PS Docket No. 16-269, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR § 1.1200 et seq.

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

In the Matter of )
)
Procedures for Commission Review of State Opt- ) PS Docket 16-269
Out Requests from the FirstNet Radio Access )
Network )

REPORT AND ORDER\*

Adopted: []

Released: []

By the Commission:

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\* This document has been circulated for tentative consideration by the Commission at its June open meeting. The issues referenced in this document and the Commission’s ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

## I. INTRODUCTION AND BACKGROUND

1. This *Report and Order* addresses the 758-769/788-799 MHz band, which the Commission licensed to the First Responder Network Authority (FirstNet) on a nationwide basis pursuant to the provisions of the Middle Class Tax Relief and Job Creation Act of 2012.<sup>1</sup> The *Report and Order* adopts procedures for administering the state opt-out process as provided under the Public Safety Spectrum Act, as well delineating the specific standards by which the Commission will evaluate state opt-out applications.

2. The Public Safety Spectrum Act provides for the deployment of a nationwide public safety broadband network (NPSBN) in the 700 MHz band.<sup>2</sup> The Act established FirstNet as an independent authority within the National Telecommunications and Information Administration (NTIA)<sup>3</sup> and required the Commission to grant a license to FirstNet for the 758-769/788-799 MHz band.<sup>4</sup> The Act charges FirstNet with responsibility for establishing and overseeing “a nationwide, interoperable public safety broadband network”<sup>5</sup> operated in this spectrum by taking “all actions necessary to ensure the building, deployment, and operation of the . . . network, in consultation with Federal, State, tribal, and local public safety entities, the Director of NIST, the Commission, and the public safety advisory committee [that section 6205 of the Act requires FirstNet to establish].”<sup>6</sup>

3. Pursuant to Section 6202(b) of the Act, the NPSBN must be based on a “single national network architecture that evolves with technological advancements” that consists of a core network and a radio access network (RAN).<sup>7</sup> FirstNet is tasked with developing a plan to deploy the RAN within each state.<sup>8</sup> The RAN, as defined in Section 6202(b)(2)(A), “consists of all cell site equipment, antennas, and backhaul equipment, based on commercial standards, that are required to enable wireless communications with devices using the public safety broadband spectrum.”<sup>9</sup> The Act gives each state the option to “opt out” of FirstNet’s RAN deployment within that state and conduct its own RAN deployment.<sup>10</sup>

4. Specifically, the Act provides that “the Governor shall choose whether to participate in the deployment of the nationwide, interoperable broadband network as proposed by [FirstNet,] or conduct its own deployment of a radio access network in such State.”<sup>11</sup> If a Governor chooses not to participate in the NPSBN, Section 6302(e)(3)(A) of the Act requires the Governor to “notify [FirstNet], the NTIA, and

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<sup>1</sup> See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 §§ 6001-6303, 6413 (codified at 47 U.S.C. §§ 1401-1443, 1457) (“Public Safety Spectrum Act” or “Act”).

<sup>2</sup> See generally Public Safety Spectrum Act § 6001 *et. seq.*

<sup>3</sup> *Id.* § 6204(a).

<sup>4</sup> *Id.* §§ 6101(a), 6201(a), 6204(a).

<sup>5</sup> *Id.* § 6202(a). See generally *id.* § 6206 (setting out FirstNet’s powers, duties and responsibilities).

<sup>6</sup> *Id.* § 6206(b).

<sup>7</sup> *Id.* § 6202(b).

<sup>8</sup> See *id.* § 6302(e)(1). The Definitions section of the Act provides that the term “State” has the meaning given such term in section 3 of the Communications Act of 1934 (47 U.S.C. § 153), *i.e.*, the term includes the District of Columbia and the Territories and possessions. *Id.* § 6001(31).

<sup>9</sup> *Id.* § 6202(b)(2)(A). The Definitions section of the Act does not contain the definition for “radio access network” and instead refers to the reader to this section (“radio access network” means the radio access network described in section 6202(b)(2)). *Id.* § 6001(29).

<sup>10</sup> *Id.* § 6302(e)(2).

<sup>11</sup> *Id.* § 6302(e)(2).

(continued....)

the Commission of such decision.”<sup>12</sup> The Act also states that an opt-out state “shall submit” to the Commission an “alternative plan” for “the construction, maintenance, operation, and improvements” of the RAN within the state. Section 3(C)(ii) of the Act mandates that “upon submission of this plan, the Commission shall approve or disapprove of the plan.”<sup>13</sup> The Act provides that if the Commission approves the plan the State “may apply to the NTIA for a grant to construct the radio access network within the State”<sup>14</sup> and “shall apply to the NTIA to lease spectrum capacity from the First Responder Network Authority.”<sup>15</sup> If the Commission disapproves the plan, the Act provides that “the construction, maintenance, operation, and improvements of the network within the State shall proceed in accordance with the plan proposed by the First Responder Network Authority.”<sup>16</sup> The Act also allows for a State to seek judicial review of the Commission’s disapproval in the United States District Court for the District of Columbia.<sup>17</sup>

5. The Act requires the Commission to “implement and enforce this title as if this title is a part of the Communications Act of 1934.”<sup>18</sup> As such, the Commission issued a *Notice of Proposed Rulemaking* seeking comment on the following aspects of the opt-out review process to be conducted by the Commission:

- The procedures and timing for states to notify FirstNet, NTIA, and the Commission of their opt-out elections, completing their RFPs, and for filing their alternative state plans with the Commission;
- The Commission review process, including timing, defining the scope of participation by interested parties, and treatment of confidential information;
- What criteria that Commission will use in evaluating alternative state plans;
- What elements states should include in their alternative state plans to demonstrate compliance with the relevant statutory criteria; and
- How the Commission’s decisions to approve or disapprove alternative state plans will be documented.<sup>19</sup>

6. Comments were filed on October 21, 2016, and reply comments were filed on November 21, 2016.<sup>20</sup> Eighteen parties filed comments and five parties filed reply comments.<sup>21</sup>

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<sup>12</sup> *Id.* § 6302(e)(3)(A).

<sup>13</sup> *Id.* § 6302(e)(3)(C)(ii) (emphasis added).

<sup>14</sup> *Id.* § 6302(e)(3)(C)(iii) (I).

<sup>15</sup> *Id.* § 6302(e)(3)(C)(iii) (II).

<sup>16</sup> *Id.* § 6302(e)(3)(C)(iv).

<sup>17</sup> *Id.* § 6302(h).

<sup>18</sup> *Id.* § 6003(a)(1).

<sup>19</sup> *Procedures for Commission Review of State Opt-Out Request from the FirstNet Radio Access Network et. al.*, PS Docket 16-269, Report and Order and Notice of Proposed Rulemaking, 31 FCC Rcd 10253, 10269-77, paras. 46-73 (2016) (*NPRM*).

<sup>20</sup> *Public Safety and Homeland Security Bureau Announces Comment and Reply Comment Dates for Notice of Proposed Rulemaking on Procedures for Commission Review of State Opt-Out Request from the FirstNet Radio Access Network*, PS Docket 16-269, Public Notice, DA 16-1060 (PSHSB 2016).

<sup>21</sup> We attach a list of commenting parties as Appendix D.

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## II. DISCUSSION

### A. Opt-Out Procedures

7. The Act provides every Governor 90 days from the time FirstNet provides the state with its final state plan to decide whether to opt out of the NPSBN.<sup>22</sup> The Act also states that an opt-out state has 180 days after it provides its opt-out notice to “develop and complete requests for proposals for the construction, maintenance, and operation of the radio access network within the State.”<sup>23</sup>

#### 1. Notification Procedures

8. *NPRM*. In the *NPRM*, the Commission tentatively concluded that Congress did not intend to permit states to delay their notification to the Commission beyond the 90 days provided for states to determine whether or not to opt out.<sup>24</sup> The Commission therefore proposed to require states electing to opt out of the NPSBN to file a notification with the Commission no later than 90 days after the date they receive electronic notice of the final state plan from FirstNet.<sup>25</sup> The Commission also proposed to require that the state’s opt-out notice to the Commission contain a certification that the state has also notified FirstNet and NTIA of its opt-out decision.<sup>26</sup> The Commission also sought comment on how states should provide notice to the Commission and who could file such notice.<sup>27</sup>

9. *Comments*. Commenting parties generally agree with the tentative conclusion that states should not be permitted to delay their notification to the Commission beyond the 90 days provided for states to determine whether or not to opt out.<sup>28</sup> A few parties, however, contend that the 90-day clock should reset if FirstNet makes any changes to a state plan.<sup>29</sup> Commenters also generally agree that a state’s opt-out notice to the Commission should include a certification that the state has also notified FirstNet and NTIA of its opt-out decision.<sup>30</sup> Commenters split on whether only the Governor could provide the opt-out notice<sup>31</sup> or whether a designee could provide the notice.<sup>32</sup> Commenters support allowing states to provide notice via a dedicated email address.<sup>33</sup>

10. On March 22, 2017, FirstNet stated in an *ex parte* filing that it intends to issue draft plans to

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<sup>22</sup> Public Safety Spectrum Act § 6302(e)(3)(A).

<sup>23</sup> *Id.* § 6302(e)(3)(B).

<sup>24</sup> *NPRM*, 31 FCC Red at 10269, para. 47.

<sup>25</sup> *Id.* at 10270, para. 49.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> APCO Comments at 5, FirstNet Comments at 4-5, Illinois Comments at 5, Indiana Comments at 3; *but see* Stephen Whitaker Comments at 1 (“90 days is NOT an adequate time frame for any thorough review and assessment...”)

<sup>29</sup> Nevada Comments at 2, Pennsylvania Comments at 2, Fairfax Comments at 3-4.

<sup>30</sup> DVA Comments at 2, Indiana Comments at 3, NASCIO Comments at 2, TXPSBP Comments at 2.

<sup>31</sup> APCO Comments at 5, FirstNet Comments at 5, Illinois Comments at 5, Dr. Michael Myers Comments at 5.

<sup>32</sup> TXPSBP Comments at 2, Florida Comments at 2, FNCGB Reply Comments at 2, SouthernLinc Reply Comments at 6.

<sup>33</sup> Nevada Comments at 2, Pennsylvania Comments at 3, FNCGB Comments at 3, Fairfax Comments at 4; *but see* TXPSBP Comments at 2 (arguing a decision must be filed in the docket).

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the states by means of a dedicated web portal for each state.<sup>34</sup> FirstNet will provide an opportunity for each state to provide feedback, after which it will use the same web portal mechanism to deliver the final plans to each state.<sup>35</sup> FirstNet indicated that the delivery of these final plans would provide the statutory “notice” that would trigger the 90-day clock.<sup>36</sup>

11. *Decision.* Under Section 6302(e)(2) of the Act, a Governor has 90 days from the receipt of notice of the final state plan by FirstNet under Section 6302(e)(1) to “choose” whether to participate in the NPSBN or elect for the state to conduct its own RAN deployment. Upon making the decision to opt out, the Governor “shall notify” FirstNet, NTIA, and the Commission.<sup>37</sup> We agree with commenters that in establishing the 90-day period, Congress did not intend for a lapse in time between the state exercising its choice to opt out and providing notice of its decision which would artificially, and potentially indefinitely, delay the process.<sup>38</sup> We further find, consistent with comments, that the 90-day period shall commence when a state has received statutory “notice” from FirstNet of the final plan for that state. For these purposes, we direct FirstNet to immediately notify the Public Safety and Homeland Security Bureau (Bureau) when it provides such notice to a state, and we direct the Bureau to promptly issue a Public Notice announcing the commencement of the 90-day period and specifying the deadline for the relevant state or states to file opt-out notifications with FirstNet, NTIA, and the Commission.

12. With respect to the process for states to submit opt-out notifications to the Commission, we require that either the Governor or the Governor’s duly authorized designee provide notification of the Governor’s decision. While the statute clearly assigns sole responsibility to the Governor for the decision whether to opt in or opt out, we do not believe Congress intended for the Governor to be responsible for the purely ministerial act of transmitting notice of the decision to the Commission. Moreover, we do not believe Congress intended to override the Governor’s ability to delegate assessment and evaluation of the state plan, so long as the Governor remains accountable for the ultimate decision. As FNCGB notes, requiring the Governor to personally notify the Commission the decision serves no practical purpose, and allowing a designee to transmit the decision decreases the state’s administrative burden.<sup>39</sup> We also require the opt-out notification to the Commission to include a certification that the state is providing simultaneous notice of its opt-out decision to both to NTIA and FirstNet in accordance with the statute. To facilitate the electronic filing of opt-out notifications, we will establish a dedicated e-mail address for this purpose, to be announced in connection with the Public Notice described below that will identify those states making an opt-out election. The use of an e-mail address will enable notification filers to use delivery/read receipts to verify their filings.

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<sup>34</sup> Letter, dated March 22, 2017 from Patrick Donovan, First Responder Network Authority to Marlene H Dortch, Secretary, Federal Communications Commission and “State Plans and Governor’s Decision”, Power Point presentation (filed March 22, 2017 in PS Docket 16-269) (FirstNet March 22 *Ex Parte*).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Public Safety Spectrum Act, §6203(e)(2)-(3). If the Governor elects to opt in, the statute does not require notification.

<sup>38</sup> There is no prohibition or penalty for filing an opt-out election prior to the 90-day deadline.

<sup>39</sup> FNCGB Reply Comment at 2; *see also*, SouthernLinc Comments at 6 (arguing that simply communicating the Governor’s decision via designee does not in any way mean that the Governor had not made the relevant decision or imitated the communication with the Commission). *But see*, FirstNet Comments at 5 (arguing that only Governor may provide opt-out notice); APCO Comments at 5 (asserting only the Governor may provide notice, which must be made directly to the Chairman of the Commission).

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## 2. Alternative Plan Submission

13. *NPRM*. In the *NPRM*, the Commission noted that Section 6302(e)(3)(B) of the Act states that once a state provides notice of its decision to opt out, that state has 180 days to “develop and complete” requests for proposals for the construction, maintenance, and operation of the radio access network within the State. The Commission further noted that Section 6302(e)(3)(C) of the Act, which governs submission of state alternative plans, does not provide a deadline for the state to submit such plans to the Commission.<sup>40</sup>

14. The Commission sought comment on how a state could demonstrate that it has developed and completed its RFP within 180 days.<sup>41</sup> The Commission proposed that if an opt-out state fails to meet this requirement it forfeits its right to further consideration of its opt-out application by the Commission.<sup>42</sup> The Commission also proposed that, if a state notifies the Commission of its intention to opt out of the NPSBN, the electing state will have 180 days from the date it provides such notification to submit its alternative plan to the Commission, *i.e.*, it must submit the plan within the same timeframe applicable to completion of the state RFP.<sup>43</sup>

15. *Comments*. Commenting parties predominately fall into two camps: those contending that a state need only issue an RFP within 180 days to satisfy the statutory requirement,<sup>44</sup> and those contending that a state must have awarded a contract within 180 days to satisfy the requirement.<sup>45</sup> Parties arguing that the statute only requires issuance of an RFP within the 180-day period contend that a stricter reading would place opt-out states at a competitive disadvantage with FirstNet and would be practically impossible to accomplish.<sup>46</sup> Parties supporting the stricter interpretation argue that it would be nearly impossible for the Commission to evaluate a plan if it does not have specific and contractually binding information relative to a state’s selected vendor.<sup>47</sup> These parties also argue that states that fail to satisfy the requirement within 180 days should forfeit their rights to have the Commission consider their alternative plans.<sup>48</sup> Illinois argues that this approach is the only viable option for ensuring that nationwide standards can be achieved within the prescribed time frame.<sup>49</sup> DVA proposes an intermediate approach: that “[w]ithin the 180 days required by the Act, a state should have developed and released an RFP, received responses with firm commitments from a potential partner or partners and will have incorporated those response commitments into its alternative plan.”<sup>50</sup>

16. With respect to submission timeframe for alternative plans, some support submission of alternative plans to the Commission within the same 180-day timeframe prescribed by the statute for

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<sup>40</sup> *NPRM*, 31 FCC Rcd at 10270, para. 50.

<sup>41</sup> *Id.* at para. 51.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 10271, para. 52.

<sup>44</sup> Alabama Comments at 5-6; FNCGB Comments at 4-5; Florida Comments at 3.

<sup>45</sup> APCO Comments at 5; FirstNet Comments at 6; Illinois Comments at 6; Indiana Comments at 3-4.

<sup>46</sup> FNCGB Comments at 4-5; Florida Comments at 3.

<sup>47</sup> FirstNet Comments at 6.

<sup>48</sup> APCO Comments at 5; Illinois Comments at 6-7.

<sup>49</sup> Illinois Comments at 7.

<sup>50</sup> DVA Comments at 3; *see also* Florida Comments at 5 (arguing that States should be granted reasonable time extensions, on a case-by-case basis, when circumstances hinder the timely completion of the RFP).

(continued....)

development and completion of the RFP, and proposed in the *NPRM*.<sup>51</sup> Several, however, also note that the statute is silent as to the timeframe to submit an alternative plan to the Commission, implying that the Commission could uncouple the filing timeframe from the RFP completion timeframe.<sup>52</sup>

17. *Decision.* APCO has described the state's opt-out process as a "false choice."<sup>53</sup> AT&T also characterizes the process as "exceptionally difficult and costly...by statutory design" which requires passage through a "daunting gauntlet of interoperability requirements."<sup>54</sup> While we acknowledge that the statutory process may be exacting, we also believe that Congress intended to establish a process that affords states a meaningful opportunity to "develop and complete requests for proposals," as well as to prepare and file the required opt-out plan with the Commission. States are entitled to make a deliberate, informed choice to opt-out of the network, so long as the statutory requirements are met.

18. We find that whether an opt-out state has developed and completed an RFP within the meaning of Section 6302(e)(3)(B) is a threshold matter for determination before the Commission can consider its alternative plan under Section 6302(e)(3)(C). Sequentially, the statute makes RFP completion a prerequisite to the state's filing its alternative plan with the Commission, reflecting the practical reality that it would be an empty exercise for the Commission to consider the plan of a state that has failed to take this basic preliminary step.

19. The statute is unclear as to how far states must have progressed in the RFP process to meet the 180-day "develop and complete" requirement. As noted above, the parties' comments advocate views on this question that range from the mere issuance of the RFP to the actual execution of the final terms of a contract with the winning bidder. While the statute can reasonably be read to support a number of different points on this continuum, we believe that it is appropriate to require states to "develop and complete" RFPs within this time period by (1) issuing an RFP providing for full deployment of the state RAN (*i.e.*, the RFP must cover the actual network build, not merely development of a plan) and (2) receiving firm commitment bids on the RFP; and (3) selecting a winning bidder. Different bidders may respond to RFPs with different designs, and these differences may lead to amendments to the RFP or refinements in the final project or otherwise prove to be significant for the interoperability plan required to be submitted for Commission review.

20. With respect to the timing of submission of state alternative plans, we conclude that states should have some additional time beyond the 180-day RFP completion period to assess RFP bids and finalize their alternative plans for Commission consideration. Just as the Act recognizes that FirstNet itself will "develop" an RFP, then complete the RFP "process," and then deliver to states the "proposed plan for buildout of the nationwide, interoperable broadband network in such State"<sup>55</sup>—and just as FirstNet did not deliver the state plans immediately upon completion of the RFP process—we believe it reasonable to afford states that have developed and completed RFPs an additional 60-day period to submit alternative state plans to the Commission. We recognize that *NPRM* proposed to require states to submit their plans within the same 180-day timeframe applicable to completion of the state RFP, but after

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<sup>51</sup> Fairfax Comments at 5; FirstNet Comments at 7; NASCIO Comments at 2; Nevada Comments at 3; Pennsylvania Comments at 7.

<sup>52</sup> *See*, TXPSBP Comments at 3 (arguing if 180-days is set as a deadline, waivers should be available); Fairfax Comments at 5 (noting no statutory timeframe is required but still supporting the 180-day timeframe); Pennsylvania Comments at 4-5 (also noting no statutory timeframe for submission and supporting the 180-day timeframe).

<sup>53</sup> APCO Comments at 2

<sup>54</sup> Attachment to Letter, dated May 22, 2017 from Joseph P. Marx, Assistant Vice President, AT&T Services Inc., to Marlene H Dortch, Secretary, Federal Communications Commission at 1-2 (filed May 22, 2017 in PS Docket 16-269) (AT&T May 22 *Ex Parte*).

<sup>55</sup> Public Safety Spectrum Act, § 6302(e)(1).



considering some of the timing concerns expressed by commenters, we believe providing this additional time will provide states flexibility to complete their alternative plans without significant delay, and will assist in ensuring that the plans filed with the Commission are robust and fully realized. The 60-day window will also allow an opt-out state to focus, within the 180-day period, on efforts to develop and complete its RFP without having to develop its alternative plan in parallel, possibly taxing finite state resources.

21. While we will provide states an additional 60 days for submission of alternative plans, and thereby a total of 240 days from their opt-out notification date, we reject arguments in favor of giving states more time.<sup>56</sup> We also reject suggestions that a state should be allowed to resubmit its alternative plan should the Commission disapprove of that plan.<sup>57</sup> Such approaches would potentially allow indefinite delay on the part of the state or result in a multi-year process before any RAN buildout could occur in an opt-out state, thus undermining the goal of timely achieving an interoperable public safety network with nationwide coverage. Given the prescribed timelines for action associated with the various opt-out steps, we find our chosen approach creates the correct balance of incentives for all parties to the process, allowing for meaningful exercise of options by the state while declining to jeopardize the NPSBN as a whole.

### 3. Alternative Plan Contents

22. *NPRM*. The Commission sought comment on its tentative view that plans 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.<sup>58</sup> The Commission sought comment on whether the Commission should require a standardized organization scheme or format for alternative plans to ease their evaluation.<sup>59</sup>

23. *Comments*. Parties that opined on the matter generally agree with the tentative view that alternative plans must contain the three minimum items the Commission set out in the *NPRM*.<sup>60</sup> Parties also generally support a standard organization scheme or format.

24. *Decision*. We adopt the tentative conclusion proposed in the *NPRM*. Plans 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

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<sup>56</sup> FNCGB Comments at 5, Florida Comments at 4.

<sup>57</sup> See, e.g., Alabama Comments at 6 (arguing states should have the ability to dispute a rejected alternative plan and be afforded the ability to cure).

<sup>58</sup> *NPRM*, 31 FCC Rcd at 10271, para. 53. Specifically, Section 6302(e)(3)(C)(i) states that states making a timely opt-out decision shall:

...submit an alternative plan for the construction, maintenance, operation, and improvements of the radio access network within the State to the Commission, and such plan shall demonstrate—

- (I) that the State will be in compliance with the minimum technical interoperability requirements developed under section 6203; and
- (II) interoperability with the nationwide public safety broadband network.

Public Safety Spectrum Act, § 6302(e)(3)(C)(i).

<sup>59</sup>*NPRM*, 31 FCC Rcd at 10271, para. 53.

<sup>60</sup> DVA Comments at 4-5; Fairfax Comments at 6; Pennsylvania Comments at 6.

(continued....)

(3) specifically address all of the requirements of the Technical Advisory Board for First Responder Interoperability. In finding that the 180-day “develop and complete” requirement is also a threshold determination for Commission consideration of an alternative plan, we also determine that a state alternative plan must certify and provide evidence that the 180-day timeframe was met.

25. Although we decline to prescribe a specific organization scheme or format for alternative plans, a plan should clearly track the statute and provide clear headers organizing content<sup>61</sup> to include:

- Construction
- Maintenance
- Operation
- Improvements “of the Radio Access Network”

26. We expect that much of this information will be directly responsive and presented in the alternative to the state plan developed by FirstNet. Although the Commission’s review is limited to interoperability, all these elements must be included by statute. In addition, a plan should demonstrate compliance with the two statutory “interoperability” prongs as well as adherence to the Interoperability Board Report.<sup>62</sup> Elements of an alternative plan addressing these two statutory elements should also be clearly labelled with headers as well. We stress that the state is responsible for clearly identifying elements of its plan responsive to each requirement. Simply appending or providing the state’s RFP or bids responsive to the RFP will not be sufficient.

#### 4. Confidentiality, Accessibility, and Amendments

27. *NPRM*. The Commission sought comment on who should have access to state plans, who should be able to comment on state plans, whether plans should be treated as confidential, and what protective measures the Commission should use to ensure confidentiality.<sup>63</sup> In particular, the Commission sought comment on the extent to which FirstNet and NITIA should have access to and the ability to comment on state plans.<sup>64</sup> The Commission also sought comment on whether the Commission should allow a state to file amendments or provide supplemental information to the plan once it is filed with the Commission but prior to the Commission’s decision, and whether Commission staff should be permitted to discuss or seek clarification of the alternative plan contents with the filer.<sup>65</sup>

28. *Comments*. Most parties support limiting public access to state alternative plans due to the fact that such plans will likely contain confidential or sensitive information that could compromise the security of public safety networks.<sup>66</sup> However, some parties find merit in allowing other states to access the plans.<sup>67</sup> Parties generally support treating plans as confidential.<sup>68</sup> There is also limited support for use

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<sup>61</sup> See, e.g., TXPSBP Comments at 4 (asserting a standard format should not be necessary provided it is clear what elements should be included).

<sup>62</sup> We will discuss the specific requirements for these showings below.

<sup>63</sup> *NPRM*, 31 FCC Red at 10272, para. 54.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at para 53.

<sup>66</sup> Alabama Comments at 7, Illinois Comments at 8. APCO and FirstNet believe access should be extremely limited. FirstNet Comments at 8, APCO Comments at 6-7.

<sup>67</sup> DVA Comments at 6, Florida Comments at 7.

<sup>68</sup> DVA Comments at 5, Indiana Comments at 5, NASCIO Comments at 3.

of secure portals to maintain the confidentiality of alternative plans.<sup>69</sup>

29. Parties take differing positions on who the Commission should allow to comment on alternative plans. Some parties argue that full public comment should be allowed<sup>70</sup> while others argue for limiting the right to comment to a narrowly defined set of stakeholders.<sup>71</sup> APCO contends that only FirstNet should be able to comment on plans,<sup>72</sup> while other parties contend that only the Commission should review alternative plans.<sup>73</sup> On the issue of plan amendments FirstNet and APCO argue that states should not be able to amend or supplement their alternative plans.<sup>74</sup> State commenters, however, generally argue they should be allowed to amend their plans,<sup>75</sup> especially in response to Commission inquiries or potential objections/comments from FirstNet.<sup>76</sup>

30. *Decision.* In light of the state-specific nature of the opt-out process, we will treat each state opt-out application as a separate restricted proceeding under our rules.<sup>77</sup> In this respect, we note that these proceedings are similar in nature to specific spectrum license applications or adjudicatory proceedings, rather than rulemakings, so it is appropriate to initially limit immediate participation to those directly impacted. The parties to these proceedings will initially include the state filing the application, FirstNet, and NTIA. We find that the opt-out state is in a position to adequately represent the interests of its public, public safety entities in the state, and similar constituencies, while FirstNet and NTIA can adequately represent those interests favoring nationwide network implementation. Although some parties question the inclusion of NTIA, others recognize that both NTIA and FirstNet have roles to play subsequent to the Commission's processes, meriting inclusion at this stage.<sup>78</sup> We agree with those arguing for inclusion. Moreover, treating these proceedings as restricted with this initial set of parties will aid in focusing the record before the Commission, while providing a broad perspective of interests.

31. At the conclusion of the opt-out notification period, the Bureau will issue a Public Notice identifying the states that have filed opt-out notifications with the Commission and establishing individual dockets for each opt-out proceeding. Other persons or entities seeking to participate in a proceeding may petition the Commission for leave to intervene based on a demonstrated showing of interest. Such a petition must be filed within 30 days of the Public Notice, identify the specific docket in which the filer wishes to participate, and clearly detail the filer's interest in the proceeding. The petition must include an explanation of the filer's interest in the outcome of the particular state's application, as well as an explanation of how the filer's interests are not otherwise represented by the state, FirstNet, or NTIA or

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<sup>69</sup> APCO Comments at 7, Florida Comments at 5. *But see* SouthernLinc Comments at 12 (arguing that the Commission should protect the proprietary and confidential information through the use of protective orders comparable to those implemented in merger proceedings).

<sup>70</sup> Stephen Whitaker Comments at 3, Dr. Michael Myers Comments at 11.

<sup>71</sup> Illinois Comments at 9, FirstNet Comments at 7 (asserting there is no need for the Commission's decision to involve any entity other than the FCC, the opt-out state/territory, and FirstNet).

<sup>72</sup> APCO Comments at 6.

<sup>73</sup> Nevada Comments at 6; Fairfax Comments at 7.

<sup>74</sup> APCO Comments at 5; FirstNet Reply Comments at 6.

<sup>75</sup> Alabama Comments at 6; FNCGB Comments at 5, 8; TXPSBP Comments at 4.

<sup>76</sup> Nevada Comments at 5,7; NASCIO Comments at 2; Pennsylvania Comments at 6.

<sup>77</sup> *See* 47 C.F.R. § 1.1208.

<sup>78</sup> *See* DVA Comments at 5 (supporting inclusion of NTIA and FirstNet in the Commission process, but advocating ensuring that the NTIA and Commission processes remain separate); Florida Comments at 5 (supporting inclusion of FirstNet and NTIA so long as states have an opportunity to respond to comments); NASCIO Comments at 3 (same); Illinois Comments at 9.

(continued....)

how its participation would otherwise aid the Commission in a full evaluation of the facts.

32. Each opt-out state will have 240 days from the date of its opt-out notification to the Commission to file an alternative state plan in the docketed proceeding established for that state. States may file the plans, and those with party status to each proceeding may file comments on the plan, in the specified docket via the designated secure e-mail address, or via certified mail to the Secretary's office.

33. We agree with commenters that alternative state plans are very likely to contain proprietary information as well as information whose disclosure could compromise the security of the NPSBN and/or the state RAN.<sup>79</sup> However, we believe that our existing rules for seeking confidential treatment will provide sufficient protection.<sup>80</sup> Parties may therefore seek confidential treatment of any filing under our Part 0 rules, including the use of a protective order process to allow those granted party status to the restricted proceeding access to the information on a confidential basis.<sup>81</sup>

34. Upon each state filing of an alternative plan, we direct the Bureau to review the plan and make an initial determination whether the plan meets relevant filing criteria described herein. This determination will prevent gaming or "placeholder" filings and ensure that each application is compliant with the minimum threshold requirements for consideration. Further, we direct the Bureau to issue one or more public notices identifying each application that has been "accepted for filing," which will trigger the relevant "shot clock" as described below. Recognizing that we cannot predict how many applications may be filed, we direct the Bureau to issue such public notice as soon as practicable, within 10 business days of receipt of the alternative plan if possible.

35. After the "accepted for filing" public notice is issued, we will allow NTIA and FirstNet, as well as any others granted party status, 15 days to comment on the alternative plan and file comments in the relevant docket, confidentially or otherwise. States will then have 15 days to amend their plans and/or file reply comments, again with a request for confidential treatment as appropriate. This 30-day pleading cycle allows for some iterative discussion between a state, FirstNet, and interested parties, while still providing a firm deadline and certainty of process.

36. Although some commenters urge the Commission to prohibit amendments, citing possible delays to the deployment of the NPSBN,<sup>82</sup> we do not believe the 30-day pleading cycle allowed here will cause undue delay. Moreover, as this is a first-of-its-kind proceeding, parties should be allowed a limited means of correction. Ultimately, we anticipate that the process will benefit both the parties and the Commission's understanding of the request, allowing for a full and thoughtful evaluation of the alternative plan.<sup>83</sup> All told, including statutory timeframes, our decisions today regarding Commission processes and timing provide 12 months from FirstNet's delivery of final state plans for states to make their opt-out decision, develop and submit alternative plans, and complete the 30-day pleading cycle once plans are filed. We believe this provides adequate time for notice and evaluation and to demonstrate interoperability in the context of the Commission's alternative plan evaluation process. Moreover, as described below, we are establishing an aspirational shot clock for Commission action, providing additional certainty as to speed of decision-making.

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<sup>79</sup> See, e.g., DVA Comments at 5; Illinois Comments at 8; Indiana Comments at 5; Nevada Comments at 6.

<sup>80</sup> See NASCIO Comments at 3.

<sup>81</sup> See generally 47 C.F.R. § 0.459.

<sup>82</sup> FirstNet Reply Comments at 6.

<sup>83</sup> See, e.g., Florida Comments at 10 (urging an "open dialogue" between the applicant and Commission staff); Illinois Comments at 8 (arguing the Commission should accept amendment to ensure accurate and up to date information); Nevada Comments at 5 (urging the ability for states to correct deficiencies); SouthernLinc Comments at 15-16); TXPSBP Comments at 4 (asserting the process should be cooperative and interactive).

(continued....)

## B. Evaluation Process and Criteria

### 1. Shot Clock

37. *NPRM*. In the *NPRM*, the Commission proposed establishing a “shot clock” for Commission action on alternative plans to provide a measure of certainty and expedience to the process.<sup>84</sup> The Commission sought comment on whether 90 days would be an appropriate timeframe,<sup>85</sup> whether the Commission could adjust the timeframe upwards or downwards based on the number of state alternative plans submitted for review,<sup>86</sup> when the shot clock should commence,<sup>87</sup> and whether the Commission should announce the commencement of the clock.<sup>88</sup>

38. *Comments*. No party opposes a shot clock, and most commenters that address the issue support a 90-day shot clock,<sup>89</sup> although one party supports setting the shot clock at 10 business days.<sup>90</sup> There is support for public notification of when the shot clock commences<sup>91</sup> as well as only notifying the states that the clock has started.<sup>92</sup> Some commenters support firm deadlines, with no ability for the Commission to suspend or pause the clock.<sup>93</sup> Other commenters advocate allowing the Commission to suspend the clock so that it can address issues or questions arising from the alternative plan,<sup>94</sup> although some would allow suspension only in national, regional, or state level declared emergency situations, not in instances where the “urgency” is caused by lack of staffing or planning.<sup>95</sup>

39. *Decision*. While there is no requirement that the Commission place a shot clock on itself for action, we find it appropriate to establish a 90-day aspirational shot clock for Commission action, which will start upon issuance of the “accepted for filing” public notice for each alternative plan. The 90-day shot clock will establish clear expectations for the Commission and for the parties involved to encourage prompt action and avoid delay. We do not agree with the suggestion that the Commission establish a much shorter shot clock that would require a decision within 10 business days. This underestimates the potential complexity of these technical filings, could inhibit the Commission’s ability to evaluate fully all material relevant to a decision, and would clearly impede the ability of the Commission, NTIA, and FirstNet to consider the application and for the state to respond to any concerns.

40. Although the shot clock is aspirational, we intend to apply it in the ordinary course and only anticipate suspending it under special circumstances, such as a national, state, or local emergency that requires diversion of Commission staff resources to address the situation. We reject the suggestion that no suspension of the shot clock should be allowed. To do so would tie the Commission’s hands in times of crisis with respect to allocation of resources, which is clearly contrary to the public interest. We also

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<sup>84</sup> *NPRM*, 31 FCC Rcd at 10272, para. 57.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> FNCGB Comments at 11, NASCIO Comments at 3, Nevada Comments at 6, Pennsylvania Comments at 8, SouthernLinc Comments at 12.

<sup>90</sup> Illinois Comments at 10

<sup>91</sup> FNCGB Comments at 11, Illinois Comments at 11.

<sup>92</sup> Nevada Comments at 6, Pennsylvania Comments at 8.

<sup>93</sup> APCO Comments at 7, FirstNet Comments at 9-10

<sup>94</sup> Alabama Comments at 8; Florida Comments at 8; TXPSBP Comments at 5-6.

<sup>95</sup> Illinois Comments at 11.

(continued....)

disagree with APCO and Florida and decline to impose a default “consequence” (*i.e.*, either automatic approval or automatic disapproval) if the Commission exceeds its self-imposed deadline.<sup>96</sup> Establishing such a consequence would be contrary to the Act, which requires affirmative action by the Commission,<sup>97</sup> and automatic approval of a plan triggered by exceeding the shot clock would risk allowing the construction of a non-interoperable state RAN—an outcome clearly at odds with the intent of the Act. Since these opt-out evaluations are unique proceedings, we believe our decision balances the need for thoroughness with speed, while ensuring that the Commission hear and evaluate all evidence pertinent and material to its decision.<sup>98</sup>

## 2. Scope of Review

41. *NPRM*. In the *NPRM*, the Commission proposed limiting its evaluation of the opt-out states’ alternative plans to the RAN, which the Act defines as consisting of “all the cell site equipment, antennas, and backhaul equipment, based on commercial standards, which are required to enable wireless communications with devices using the public safety broadband spectrum.”<sup>99</sup> The Commission noted that FirstNet interpreted this definition to include “standard E-UTRAN elements (*e.g.*, the eNodeB) and including, but not limited to, backhaul to FirstNet designated consolidation points” and sought comment on how to apply this RAN definition in its analysis and whether there are any elements of the definition that should not be considered as part of the Commission’s interoperability review.<sup>100</sup>

42. The Commission also sought comment on its proposal to exclude certain components of the NSPBN from review because the Commission regarded them as not included within the statutory definition of RAN as interpreted by FirstNet, specifically noting exclusion of user equipment (UE) and applications from Commission consideration.<sup>101</sup> In addition, the Commission sought comment on its view that once the Commission disapproves a state’s plan, the state forfeits the ability to conduct its own RAN deployment.<sup>102</sup>

43. *Comments*. Parties generally concur that the Commission should confine its evaluation of the alternative plans to the RAN.<sup>103</sup> No party offered a definition of RAN diametrically opposed to the definition proposed by FirstNet.<sup>104</sup> Parties generally agreed with the Commission’s decision to limit its analysis to only those interoperability elements pertaining to the RAN and to exclude UE and application related interoperability considerations.<sup>105</sup>

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<sup>96</sup> APCO Comments at 7; Florida Comments at 8.

<sup>97</sup> Public Safety Spectrum Act, § 6302(e)(2)(C)(ii).

<sup>98</sup> *See id.* § 6302(h)(2)(C).

<sup>99</sup> *NPRM*, 31 FCC Rcd at 10275, para. 64.

<sup>100</sup> *Id.*, para. 64.

<sup>101</sup> *Id.*, para. 65.

<sup>102</sup> *Id.* at 10273, para. 59.

<sup>103</sup> APCO Comments at 8; Fairfax Comments at 9; Illinois Comments at 14.

<sup>104</sup> FirstNet Comments at 12-13. *But see* Illinois Comments at 14 (arguing that all the demarcation points between the FirstNet infrastructure and state’s RAN responsibilities must be clearly defined and documented before alternate plans are submitted).

<sup>105</sup> DVA Comments at 9, Fairfax Comments at 9; *but see* TXPSBP Comments at 9 (asserting that while the statutory definition of RAN does not list user equipment or applications as part of the RAN, it is possible that RAN-dependent compatibility issues may arise concerning user equipment and/or applications. To the extent such issues impact the RAN, then they would seem relevant to the FCC’s decision).

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44. Parties also generally agree with the Commission that once the Commission has disapproved an alternative plan the Commission is barred from entertaining any amended or different alternative plan and the state forfeits the ability to pursue its own RAN deployment.<sup>106</sup> Several states disagreed with the Commission's contention that approval of a state opt-out plan would not create a presumption that the plan meets the criteria NTIA is responsible for evaluating. These states argue that Commission approval of a plan obviates the need for NTIA review of the plan.<sup>107</sup>

45. *Decision.* We adopt the proposal set out in the *NPRM* and will confine our review to the RAN elements of state alternative plans, which we define as all the cell site equipment, antennas, and backhaul equipment, based on commercial standards, that are required to enable wireless communications with devices using the public safety broadband spectrum including standard E-UTRAN elements (*e.g.*, the eNodeB) and including, but not limited to, backhaul to FirstNet designated consolidation points. Thus, we will not examine plan elements pertaining to equipment or applications, or issues related to coverage/financing, etc. These elements are more appropriately the focus of NTIA's subsequent review of the plan as directed by the Act. We also agree with commenters that if the Commission disapproves an alternative plan, there is no opportunity to refile with the Commission. The statutory remedy of appeal to the U.S. District Court for the District of Columbia is the only remedy available at that point.<sup>108</sup>

### C. Content and Review of State Plan Elements

46. In the *NPRM*, the Commission tentatively concluded that Congress intended to limit the scope of Commission review to the two specified elements of Section 6302(e)(3)(C)(i) of the Act, *i.e.*, compliance with the minimum technical interoperability requirements and interoperability with the nationwide public safety broadband network.<sup>109</sup>

47. The *NPRM* noted that the Commission's review of opt-out requests is only the first step in a multi-step process and that states whose requests are approved by the Commission must go through additional review by NTIA and FirstNet.<sup>110</sup> The Commission also noted that NTIA will evaluate, *inter alia*, a state's ability to maintain "ongoing" interoperability with the nationwide public safety broadband network.<sup>111</sup> The Commission proposed to 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 Commission's approval of a state opt-out plan would not create a presumption that the state plan meets any of the criteria that NTIA is responsible for evaluating.<sup>112</sup>

48. The *NPRM* further proposed that state alternative plans include a showing that the state will adhere to those FirstNet network policies that relate to interoperability with respect to the FirstNet nationwide network, to the extent that FirstNet has published such policies at the time that the state

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<sup>106</sup> APCO Comments at 7; FirstNet Comments at 10; Illinois Comments at 11; NASCIO Comments at 3. *But see* Stephen Whitaker Comments at 6 (stating that it is both unwise and counterproductive to unnecessarily wield the heavy-hand when the goal is to build both local and national capacity to build, manage and oversee such a complex, first of its kind, national, interoperable infrastructure).

<sup>107</sup> Florida Comments at 11; Nevada Comments at 5; Pennsylvania Comments at 6. *But see* APCO Comments at 7 (arguing that the Commission should evaluate state opt 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 review).

<sup>108</sup> Public Safety Spectrum Act at § 6302(e)(2)(C)(iv)

<sup>109</sup> *NPRM*, 31 FCC Rcd at 10272-73, paras. 58-60.

<sup>110</sup> *Id.* at 10273, para. 60.

<sup>111</sup> *Id.* at 10273, para. 61.

<sup>112</sup> *Id.* at 10274, para. 62.

(continued...)

submits its plan to the Commission.<sup>113</sup>

### 1. Interoperability Board Requirements

49. *NPRM*. Under the terms of the Act, the Commission was required to appoint members with specific technical, operational, and public safety backgrounds to the “Technical Advisory Board for First Responder Interoperability” (Interoperability Board).<sup>114</sup> The Interoperability Board was required to develop “recommended minimum technical requirements to ensure a nationwide level of interoperability” for the NPSBN (“Board Report”).<sup>115</sup> On May 22, 2012 the Interoperability Board delivered its report to the Commission.<sup>116</sup> The Board Report included 46 requirements (“SHALLS”) and 55 considerations (“SHOULD”) for a nationwide interoperable public safety broadband network. On June 21, 2012, the Commission in turn transmitted the recommendations to NTIA, as required by the Act.<sup>117</sup>

50. Under the first prong of the statutory evaluation by the Commission, a state alternative plan must demonstrate “compliance” with the Interoperability Board’s “requirements.”<sup>118</sup> The *NPRM* proposed that the Commission’s review in this regard should solely address technical interoperability criteria (those “SHALL” recommendations”), and further recommended limiting those requirements to elements relating to the RAN as defined in the Interoperability Board’s Report,<sup>119</sup> specifically requirements (1)–(3), (7)–(10), (20)–(25), (29), (39), and (41)–(42).<sup>120</sup>

51. *Comments*. Parties generally supported confining first-prong review to requirements (1)–(3), (7)–(10), (20)–(25), (29), (39), and (41)–(42) as proposed in the *NPRM*.<sup>121</sup> DVA, however, recommends the Commission also include requirements (4)–(6) and (11) pertaining to 3GPP LTE Standards and Interfaces as well as requirement (38).<sup>122</sup> Illinois opines that the Commission should make the additional 55 considerations that are currently listed as “SHOULD” mandatory as well.<sup>123</sup>

52. *Decision*. For the reasons stated in the *NPRM*, we will limit our review under the first prong to the “SHALL” criteria originally proposed. In particular, we reject the suggestions of DVA and Illinois to expand the scope of the Commission’s review under the first prong. Although DVA recommends consideration of requirements (4)–(6), (11), and (38), it fails to explain how their inclusion would contribute to the Commission’s limited review related to technical interoperability of the proposed state

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<sup>113</sup> *Id.* at para. 63.

<sup>114</sup> Public Safety Spectrum Act § 6203(a)-(b).

<sup>115</sup> *Id.* at § 6203(c).

<sup>116</sup> *Recommendations of the Technical Advisory Board for First Responder Interoperability*, PS Docket 12-74, Order of Transmittal, 27 FCC Rcd 7733 (2012).

<sup>117</sup> *Id.* Given that the FirstNet Board had not yet been constituted, the Commission delivered the Report to the Administrator of the National Telecommunications and Information Administration (NTIA), pending the formation of the FirstNet Board.

<sup>118</sup> Public Safety Spectrum Act § 6302(e)(3)(C)(i)(I).

<sup>119</sup> *Id.* § 6302(e)(3)(C)(i)(I).

<sup>120</sup> *NPRM*, 31 FCC Rcd at 10276, paras. 68-69. The Commission included the Interoperability Board Report as Appendix B to the *NPRM* and we include it as Appendix B to this Report and Order.

<sup>121</sup> Alabama Comments at 10.

<sup>122</sup> DVA Comments at 10. Requirement 38 relates to the security of the NPSBN, recommending a nationwide common security profile for user plane and control plane traffic based on 3GPP standards. *See* Interoperability Board Report at 1.3.7.

<sup>123</sup> Illinois Comments at 16.

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RAN.<sup>124</sup> Illinois' suggestion that the Commission review alternative plans for compliance with all "should" recommendations of the Board ignores the statutory language cited in the *NPRM* linking review to "requirements." Accordingly, we find that alternative plans should address technical interoperability criteria relating to the RAN as defined in the Interoperability Board's Report, specifically requirements (1)–(3), (7)–(10), (20)–(25), (29), (39), and (41)–(42). We find that demonstrating compliance with these requirements supports the Commission's obligation under this prong of the statutory test, while similarly recognizing the Act's scope of Commission review (*i.e.*, focusing on state RAN). We attach these requirements as Appendix B.

## 2. Interoperability with the NPSBN

53. *NPRM*. In the *NPRM*, the Commission proposed reviewing a state alternative plan's compliance with the second prong of the statutory test relating to "interoperability" with the NPSBN<sup>125</sup> solely with respect to the state's compliance with those RAN-related network requirements specified by FirstNet that are necessary to ensure interoperability with the FirstNet network. Thus, the Commission proposed not to extend the scope of the Commission's review to issues other than such RAN-related interoperability.<sup>126</sup> The Commission also stated its view that the statute calls for the Commission to independently and impartially evaluate whether alternative plans comply with the interoperability-related requirements established by FirstNet, but does not empower the Commission to impose network policies or interoperability requirements on FirstNet.<sup>127</sup> The Commission tentatively concluded that any state plan that required alteration or changes to the FirstNet network would not meet the interoperability requirement of the Act.<sup>128</sup>

54. *Comments*. Parties generally agree that the Commission should confine its review to RAN-related technical interoperability.<sup>129</sup> Parties also generally agree that the Act does not empower the Commission to impose network policies or interoperability requirements on FirstNet.<sup>130</sup> Some parties believe the Commission should not approve any plan that requires any changes to the FirstNet network.<sup>131</sup> Others believe this requirement is too strict and that the Commission could employ a *de minimis* test.<sup>132</sup>

55. While FirstNet states it is developing a network interoperability matrix,<sup>133</sup> parties express concern that the delivery of this matrix may be too late to allow a state to address it in its alternative plan or for the Commission to reasonably include its contents in the Commission's alternative plan review.<sup>134</sup>

56. Texas argues that the Commission's proposal does not meet the requirements of Section 553(b) of the Administrative Procedure Act, which requires an administrative agency to publish the substance of a proposed rule and provide opportunity to comment thereon, prior to adopting a rule. Texas

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<sup>124</sup> For example, one of the referenced requirement would place obligations on FirstNet's sharing agreement. This does not relate to technical interoperability of the state RAN within the Commission's scope of review.

<sup>125</sup> Public Safety Spectrum Act § 6302(e)(3)(C)(i)(I).

<sup>126</sup> *NPRM*, 31 FCC Rcd at 10276, para 70.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at para. 67.

<sup>129</sup> FNCGB Comments at 15; Fairfax Comments at 10; SouthernLinc Comments at 14.

<sup>130</sup> APCO Comments at 8-9; NASCIO Comments at 4.

<sup>131</sup> APCO Comments at 8; DVA Comments at 9; Illinois Comments at 15-16.

<sup>132</sup> Alabama Comments at 10; FNCGB Comments at 14-15; TXPSBP Comments at 9-10.

<sup>133</sup> FirstNet Comments at 12.

<sup>134</sup> FNCGB Comments at 14; Illinois Comments at 14; NASCIO Comments at 4; TXPSBP Comments at 6-7.

further contends that the Commission is proposing to relinquish its rulemaking authority to FirstNet, a Commission-regulated licensee, rendering any rules adopted arbitrary and capricious.<sup>135</sup>

57. In an issue not raised in the *NPRM*, Alabama, Colorado, and SouthernLinc have asked the Commission to affirmatively conclude that a state plan can include a separate state network core.<sup>136</sup>

58. *Decision.* We adopt the proposal the Commission made in the *NPRM* and will confine our review of a state alternative plan's compliance with the second prong of the statutory test solely to compliance with those RAN-related network requirements specified by FirstNet in its forthcoming network policies that are necessary to ensure interoperability with the FirstNet network. Our review will be a purely technical review, consisting of a snapshot evaluation based on the application. We find the best means of conducting our review within the terms of the statute is to require a "paper" compliance showing only. Therefore, we will not require states to demonstrate interoperability in the field, which would be overly prescriptive and unachievable in the timeframes given.

59. We also affirm our view stated in the *NPRM* that state plans that would require FirstNet to alter its network by definition do not meet the second interoperability prong of the statutory test. To find otherwise creates opportunities for delay and increased costs.

60. In requiring states to demonstrate compliance with FirstNet's network policies relating to interoperability, we are cognizant that FirstNet has not yet advised the Commission or the states as to what its network policies will be, although it intends to do so as part of its delivery of state plans.<sup>137</sup> We are also mindful of Texas' argument that failure to have timely access to this information may implicate the APA and would render compliance with this requirement practically challenging for the states. Nevertheless, we also note the unique statutory responsibilities placed upon FirstNet as a government entity to develop and deploy a nationwide interoperable public safety network. As the network architect and steward of this national resource, FirstNet has particular insight into the means and manner by which interconnection with a state-built RAN would achieve interoperability with its network. We also recognize the potentially competing interests that FirstNet and opt-out states may have with respect to this issue, which was further acknowledged in the *NPRM*'s proposal that the Commission, while utilizing FirstNet's assessment of interoperability relative to its network, would act as a neutral arbiter of whether an alternative plan meets this requirement.

61. In light of these considerations and the states' lack of current access to FirstNet's network policies, we direct the Bureau to issue and publish in the Federal Register a Public Notice once FirstNet has made its network policies available to the Commission and the states and has identified those network policies that it deems relevant to interoperability. The Public Notice will seek expedited comment on those network policies relevant to interoperability and the Commission's statutory review. Upon close of the record, the Commission will issue a subsequent order specifically identifying those elements of FirstNet's network policies that we will consider in evaluating state compliance with the second prong of the statutory test.

62. Finally, with respect to the request from Alabama, Colorado, and SouthernLINC that we affirmatively conclude that a state may include a separate state network core in its alternative plan, we find this issue to be outside the scope of our statutory review responsibility and we decline to consider it further. Accordingly, although we will not reject an otherwise qualified alternative plan that includes a proposed state core, we will limit our review solely to the interoperability of the state RAN with the FirstNet network as directed by the Act and will not examine possible RAN interconnection with non-

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<sup>135</sup> Texas Comments at 7.

<sup>136</sup> Alabama Comments at 9-10, FNCGB Reply Comments at 8, and SouthernLinc Comments at 5.

<sup>137</sup> FirstNet March 22 *Ex Parte*.

FirstNet networks or cores.

### 3. Interoperability Certification

63. *NPRM*. In the *NPRM*, the Commission sought comment on what specific information a state should provide in its alternative plan to demonstrate that it will be interoperable with the FirstNet network two-prong statutory test as well as what standards and measurements of compliance the Commission should adopt with respect to evaluating a state's submission.<sup>138</sup> Specifically, the Commission asked whether opt-out states should:

- certify compliance with the interoperability-related elements of FirstNet's network plan and policies;<sup>139</sup>
- provide additional documentation regarding specific elements in their alternative plans that could affect interoperability;<sup>140</sup> or
- submit relevant test plans to demonstrate how they intend to meet the interoperability requirements.<sup>141</sup>

64. Assuming ultimate adoption of a certification regime, the Commission also sought comment on what level of certification should be deemed sufficient.<sup>142</sup> The Commission asked whether self-certification by the Governor or his/her designee would be sufficient or whether a third party should certify the plan, and who would be an appropriate third party in the latter case.<sup>143</sup>

65. *Comments*. Parties generally support allowing states to certify compliance but contend that they should also provide sufficient information to demonstrate that compliance is achievable.<sup>144</sup> Parties variously support self-certification, (*i.e.*, certification without providing additional information),<sup>145</sup> requiring independent third party review of the state's compliance demonstration,<sup>146</sup> or relying on the Commission to conduct a technical review.<sup>147</sup>

66. *Decision*. We will require states to include a self-certification by the Governor or their designee confirming the state's adherence to FirstNet network policies identified by FirstNet as relating to technical interoperability. We expect the certification to be supported where appropriate with specific references to the RFP and/or bid responses supporting the requirement identified. However, we will not require third party review of certifications. We agree with those commenters that objected to such a requirement on the grounds that it could introduce delay and conflicts of interest. Moreover, we decline to require submission of test plans, as such action more appropriately falls under the purview of the "ongoing" interoperability to be assessed by NTIA.

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<sup>138</sup> *NPRM*, 31 FCC Rcd at 10276, para 71.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*, at 10277, para 72.

<sup>143</sup> *Id.*

<sup>144</sup> Alabama Comments at 11; DVA Comments at 10; Fairfax Comments at 10; Illinois Comments at 17.

<sup>145</sup> FNCGB Comments at 16; DVA Comments at 11; NASCIO Comments at 4 (self-certification limited to those situations where a factual showing is not currently feasible.)

<sup>146</sup> Illinois Comments at 17-18. However, there is opposition to 3<sup>rd</sup> party certification. See Nevada Comments at 9; Pennsylvania Comments at 9.

<sup>147</sup> FirstNet Comments at 14-15.

(continued....)

67. Based upon FirstNet's *ex parte*, we note that FirstNet anticipates a process whereby states will have an opportunity to comment on the draft state plans, including network policies, before final state plans are provided to the states, triggering the statutory timing related to opt-out decision making. We believe this provides sufficient time, coupled with the process timelines for Commission submissions described herein, for such a certification to be made.

#### 4. Documentation of the Commission Decision

68. *NPRM*. The Commission sought comment on how it should document its decisions to approve or disapprove state opt-out requests under the statutory criteria, given that Section 6302(h) of the Act provides for only limited judicial review of the Commission decisions based on a showing that: (1) the decision "was procured by corruption, fraud, or undue means"; (2) there was "actual partiality of corruption"; or (3) there was "misconduct in refusing to hear evidence pertinent and material to the decision or of any other misbehavior by which the rights of any party have been prejudiced."<sup>148</sup>

69. *Comments*. Most parties agree that the Commission should provide a written decision that explains the rationale behind each decision to approve or disapprove a state's alternative plan.<sup>149</sup>

70. *Decision*. The full Commission will issue a separate Order for each opt-out request. Each order will provide a brief explanation of the Commission's decision based on the statutory criteria as applied to the information submitted in the record. In addition, if any decision relies on confidential information, we will redact the public order as necessary. We believe this approach will provide a sufficient basis for judicial review under the narrow scope provided by Section 6302(h).

### III. PROCEDURAL MATTERS

#### A. Regulatory Flexibility Analysis

71. Pursuant to the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>150</sup> the Commission's Final Regulatory Flexibility Certification in this *Report and Order* is attached as Appendix C.

#### B. Paperwork Reduction Act

72. The *Report and Order* document contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. The requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the Federal Register at a later date seeking these comments. However, the *Report and Order* does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.<sup>151</sup>

#### C. Congressional Review Act

73. The Commission will send a copy of this document to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>152</sup>

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<sup>148</sup> *NPRM*, 31 FCC Rcd at 10277, para. 73 citing Pub. L. No. 112-96 § 6302(h)(2).

<sup>149</sup> Alabama Comments at 11; FNCGB Comments at 17; DVA Comments at 12. *But see* APCO Comments at 9 (arguing that providing a written explanation of the Commission's decision would be of no import or relevance to the standard of review set by Section 6302(h) of the Act and would impose delays).

<sup>150</sup> 5 U.S.C. § 601 *et seq.*

<sup>151</sup> *See* 44 U.S.C. § 3506(c)(4).

<sup>152</sup> *See* 5 U.S.C. § 801(a)(1)(A).

**D. Further Information**

74. For further information, contact Roberto Mussenden of the Public Safety and Homeland Security Bureau, Policy and Licensing Division, at (202) 418-1428, or by e-mail at roberto.mussenden@fcc.gov.

**IV. ORDERING CLAUSES**

75. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 301, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303, as well as Title VI, Sections 6003, 6203, and 6302(e), of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, §§ 6003, 6203, 6302(e), that this *Report and Order* is hereby ADOPTED.

76. IT IS FURTHER ORDERED that the rules and requirements adopted herein WILL BECOME EFFECTIVE [thirty days from the date of publication in the Federal Register], except for new sections 90.532(b) and (c) that contain new or modified information collection requirements that require review by the OMB under the PRA, which WILL BECOME EFFECTIVE after OMB review and approval, on the effective date specified in a notice that the Commission will publish in the Federal Register announcing such approval and effective date.”

77. IT IS FURTHER ORDERED that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Rules

For the reasons discussed above, the Federal Communications Commission amends 47 CFR Part 90 as follows:

**PART 90 – PRIVATE LAND MOBILE RADIO SERVICES**

Section 90.532 is amended by revising title of the subsection and the redesignating the existing text as subparagraph (a) First Responder Network Authority License and Renewal, and adding additional subsections (b)-(e) as follows:

**§ 90.532 Licensing of the 758-769 MHz and 788-799 MHz Bands; State Opt-Out Election and Alternative Plans**

(a) *First Responder Network Authority License and Renewal.* Pursuant to Section 6201 of the Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, 126 Stat. 156 (2012), a nationwide license for use of the 758–769 MHz and 788–799 MHz bands shall be issued to the First Responder Network Authority for an initial license term of ten years from the date of the initial issuance of the license. Prior to expiration of the term of such initial license, the First Responder Network Authority shall submit to the Commission an application for the renewal of such license. Such renewal application shall demonstrate that, during the preceding license term, the First Responder Network Authority has met the duties and obligations set forth under the foregoing Act. A renewal license shall be for a term not to exceed ten years.

(b) *State election to opt out of the First Responder Network Authority Nationwide Network.* No later than 90 days after receipt of notice from the First Responder Network Authority under Section 6302(e)(1) of the Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, 126 Stat. 156 (Spectrum Act), any State Governor or the Governor’s designee shall file with the Commission a notification of the Governor’s election to opt out and conduct its own deployment of a State radio access network pursuant to Section 6302(e)(2)(B) of the Middle Class Tax Relief and Job Creation Act of 2012. Such notification shall also certify that the State has notified the First Responder Network Authority and the National Telecommunications and Information Administration of its election. This notification shall be sent a dedicated e-mail address specified by the Commission or via certified mail to the Secretary’s office. At the conclusion of the opt-out notification period, the Public Safety and Homeland Security Bureau shall issue one or more Public Notice denoting which states have elected to opt out.

(c) *Petitions for leave to intervene.* Entities other than The First Responder Network Authority, the National Telecommunications and Information Administration, and the relevant state may petition the Commission for leave to intervene. Such a petition must be made within 30 days of the Public Notice issued in conformance with subparagraph (b) of this section. The petition must note the specific plan on which they wish to comment and clearly detail the filer’s interest in the proceeding. This includes an explanation of the filer’s interest in the outcome of the particular state’s application, as well as an explanation of how the filer’s interests are not otherwise represented by the state, FirstNet, or NTIA, or how its participation would otherwise aid the Commission in a full evaluation of the facts.

(d) *Filing of alternative state plans by states electing to opt out.* No later than 240 days after filing notice of a State’s election with the Commission under subparagraph (b) of this section, the State Governor or the Governor’s designee shall file an alternative plan with the Commission for the construction, maintenance, operation, and improvements of the State radio access network. Alternative plans may be sent a dedicated e-mail address specified by the Commission or via certified mail to the Office of the Secretary.

(e) *Contents of alternative state plans.* An alternative state plan shall include:

- (1) An interoperability showing, demonstrating:
  - (i) compliance with the minimum technical interoperability requirements developed under section 6203 of the Middle Class Tax Relief and Job Creation Act of 2012; and
  - (ii) interoperability with the nationwide public safety broadband network.
- (2) Certifications by the State Governor or the Governor's designee, attesting:
  - (i) adherence to FirstNet network policies identified by FirstNet as relating to technical interoperability; and
  - (ii) completion of the state's request for proposal within 180-days of receipt of notice of the State Plan furnished by the First Responder Network Authority. Such certification may only be made if the state has:
    - (A) Issued a request for proposal for the state's Radio Access Network;
    - (B) Received bids for such network; and
    - (C) Selected a vendor(s).

(f) *Commenting on alternative state plans.* Within ten business days of the submission of an alternative state plan the Public Safety and Homeland Security Bureau shall determine whether the plan is acceptable for filing under the criteria set forth under subparagraph (d) and (e) of this section. The Bureau shall issue a Public Notice identifying each plan that has been accepted for filing and initiating an abbreviated comment cycle.

- (1) The First Responder Network Authority, the National Telecommunications and Information Administration, and any entity granted party status under subparagraph (c) of this subsection may file comments within 15 days of the issuance of the Public Notice set forth in this subparagraph.
- (2) The relevant state may file reply comments within 30 days of the issuance of the Public Notice set forth in this subparagraph.
- (3) States can file the plans, and those granted party status to each proceeding may file comments on the plan, in the specified state docket via a dedicated e-mail address specified by the Commission or via certified mail to the Office of the Secretary.

## APPENDIX B

### Opt-out Technical Interoperability Requirements Based on the Board Document

The requirements in this appendix are based on the Board document “Recommended Requirements” (“SHALLs”). Requirements attributable to the NPSBN or FirstNet shall be deemed for these purposes to refer to the applicable state RAN. The numbering is based on the original Board document numbering.

- [1] Hardware and software systems comprising the NPSBN SHALL implement interfaces consistent with Table 2: Standards Implementation Methodology.
- [2] Hardware and software systems comprising the NPSBN SHALL support the interfaces enumerated in Table 1: Minimum Interoperable Interfaces.
- [3] Hardware and software systems comprising the NPSBN SHALL support management functions.
- [7] The NPSBN SHALL support IPv4, IPv6, and IPv4/v6 PDN types defined in 3GPP TS 23.401.
- [8] The NPSBN SHALL support IPv4 and/or IPv6 transport for the EPS interfaces enumerated in Table 1: Minimum Interoperable Interfaces, consistent with the FirstNet design.
- [9] Any sharing agreement that FirstNet enters into SHALL implement network sharing according to 3GPP TS 23.251 and SHALL NOT impact public safety operations.
- [10] The NPSBN SHALL include the capability to collect and convey UE location data to applications using a standardized interface in near real time.
- [20] Prior to operational deployment on the NPSBN, infrastructure equipment SHALL have passed FirstNet required Interface Conformance Testing (e.g. testing S1-MME conformance to 3GPP) on the interfaces specified by FirstNet.
- [21] Prior to operational deployment on the NPSBN, infrastructure equipment SHALL have passed FirstNet required Interoperability Testing at a system level as per the specific IOT requirements for the NPSBN.
- [22] Infrastructure deployed on the NPSBN SHALL be included in the FirstNet-required FOA process as part of the NPSBN deployment.
- [23] The equipment comprising the NPSBN SHALL provide backwards compatibility of interfaces, from time of deprecation, for a minimum of two full major release/upgrades of the network. This requirement may be waived (i.e., interface obsolescence accelerated) if FirstNet can ascertain from the user community that there are no dependencies on a given interface.
- [24] The NPSBN SHALL support user mobility across the entire NPSBN (including Opt-out states).
- [25] The NPSBN SHALL support S1 and SHALL preferentially support X2 handover between adjacent NPSBN cells (including cells owned by opt-out states) whose proximity supports a handover opportunity.
- [29] The NPSBN SHALL support the use of mobile VPN technology to support mobility between the NPSBN and other networks.
- [30] The NPSBN SHALL provide the ability for national, regional, and local applications to dynamically change a UE’s prioritization and QoS using the 3GPP ‘\_Rx’ interface.
- [31] The NPSBN SHALL support all 9 QCI classes specified in table 6.1.7 of 3GPP 23.203 v9.11 or future equivalents.



- [32] QoS mechanisms in the NPSBN SHALL comply with 3GPP TS 23.203.
- [33] The NPSBN SHALL support the usage of all 15 ARP values defined in 3GPP 23.203.
- [34] The NPSBN SHALL support the ARP pre-emption capability and vulnerability functions as defined in 3GPP 23.203.
- [35] The NPSBN SHALL implement a nationwide scheme for assigning Access Classes to public safety users and secondary users following the 3GPP recommendations in TS 22.011, Section 4.2.
- [36] The NPSBN SHALL implement a nationwide scheme for assigning QoS Class Identifier priority to IP network and backhaul priority across the entire NPSBN.
- [37] The NPSBN SHALL support the use of industry standard VPN and MVPN technology, while providing priority and Quality of Service for encapsulated applications.
- [38] The NPSBN SHALL use a nationwide common security profile for user plane and control plane traffic between UEs, eNBs and MMEs, in accordance with 3GPP LTE Network Access Domain protocols. The profile SHALL be based on 3GPP TS 33.401, and will be determined by FirstNet based on a system design and other considerations as it deals with evolving cyber threats. As a minimum, the profile SHALL include specification of ciphering algorithms (for example, use of AES-128 vs. SNOW 3G).
- [39] The nationwide common security profile SHALL include ciphering of control plane traffic in order to provide for interoperable cyber protection of the network. Ciphering of user plane traffic is optional and is based on policy decisions that involve FirstNet and user agencies.
- [41] Network Domain Security SHALL be implemented in accordance with 3GPP TS 33.210, which stipulates the use of IPSec to protect IP communication between administrative domains (including all network connections used to interconnect the domains).
- [42] The NPSBN SHALL comply with TS 33.310 as the authentication framework for Public Key Infrastructure to authenticate these network interfaces.

## APPENDIX C

## Final Regulatory Flexibility Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>2</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>3</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>4</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>5</sup>

2. As required by the RFA, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice of Proposed Rulemaking* in this proceeding,<sup>6</sup> which the Commission launched in 2016 to seek comment on how it should administer the state opt-out process as provided under the Public Safety Spectrum Act, as well as on its implementation of the specific statutory standards by which the Commission is obligated to evaluate state opt-out applications.<sup>7</sup> Additionally, the Commission sought written public comment on the IRFA.<sup>8</sup> No comments specifically addressed the IRFA. This Final Regulatory Flexibility Certification conforms to the RFA.<sup>9</sup>

3. In this *Report and Order*, the Commission implements provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (“Public Safety Spectrum Act” or “Act”) governing deployment of a nationwide public safety broadband network in the 700 MHz band.<sup>10</sup>

4. The Public Safety Spectrum Act establishes the First Responder Network Authority (FirstNet) to oversee the construction and operation of this network as licensee of both the existing public safety broadband spectrum (763-769/793-799 MHz) and the spectrally adjacent D Block spectrum (758-763/788-793 MHz).<sup>11</sup> The Act directs the Commission to reallocate the D Block for public safety

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> 5 U.S.C. § 605(b).

<sup>3</sup> 5 U.S.C. § 601(6).

<sup>4</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>5</sup> 15 U.S.C. § 632.

<sup>6</sup> See *Procedures for Commission Review of State Opt-Out Request from the FirstNet Radio Access Network et. al.*, PS Docket 16-269, Report and Order and Notice of Proposed Rulemaking, 31 FCC Rcd 10253 at 10284, Appendix C.

<sup>7</sup> *Id.* at 10254, para 2.

<sup>8</sup> *Id.* at 10284.

<sup>9</sup> See 5 U.S.C. § 605(b).

<sup>10</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012).

<sup>11</sup> See *id.* § 6204.

(continued....)

services,<sup>12</sup> to license the D Block and the existing public safety broadband spectrum to FirstNet,<sup>13</sup> and to take other actions necessary to “facilitate the transition” of such existing spectrum to FirstNet.<sup>14</sup>

5. The Public Safety Spectrum Act charges a single entity, FirstNet, with constructing, operating, and maintaining a 700 MHz public safety broadband network on a nationwide basis. It also authorizes states to elect to deploy radio access networks (RAN) within their states that are interoperable with FirstNet’s network. States therefore have the option to opt out of FirstNet’s RAN deployment and conduct their own RAN deployment.<sup>15</sup> In contrast, “small governmental jurisdictions” are not authorized to construct, operate, or maintain networks.<sup>16</sup>

6. The rules promulgated in this *Report and Order* are intended to provide states with clarity as to the steps they must take in order to opt out of FirstNet’s RAN deployment within the state and conduct their own RAN deployment. Accordingly, we conclude the rules adopted in the *Report and Order* will not directly affect a substantial number of small entities. Therefore, we certify that the requirements of the *Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.<sup>17</sup> In addition, the *Report and Order* and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.<sup>18</sup>

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<sup>12</sup> See *id.* § 6101.

<sup>13</sup> See *id.* § 6201(a).

<sup>14</sup> See *id.* § 6201(c).

<sup>15</sup> See *id.* § 6302(e)(2).

<sup>16</sup> See Spectrum Act § 6206(b). The statute contemplates that portions of the network may be deployed by State governments, see Spectrum Act § 6302(e), which are categorically excluded from the definition of “small governmental jurisdictions” for purposes of RFA.

<sup>17</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>18</sup> See *id.* § 605(b).

**APPENDIX D****List of Commenting Parties**

Department of Management Services, Division of Telecommunications, The State of Alabama (Alabama)  
The State of Nevada Department of Public Safety, Division of Emergency Management/Homeland Security (Nevada)  
Southern Communications Services, Inc. d/b/a SouthernLinc (SouthernLinc)  
The FirstNet Colorado Governing Body (FNCGB)  
Stephen Whitaker (Whitaker)  
Texas Public Safety Broadband Program (Texas)  
Rivada Networks (Rivada)  
APCO International (APCO)  
Commonwealth of Pennsylvania  
NTIA on behalf of the First Responder Network Authority (FirstNet)  
The County of Fairfax, Virginia Department of Information Technology (Fairfax)  
National Association of State Chief Information Officers (NASCIO)  
State of Indiana - Integrated Public Safety Commission (Indiana)  
Illinois Public Safety Broadband Network Working Group, Illinois Emergency Management Agency (Illinois)  
Dr. Michael Myers  
DVA Consulting, LLC (DVA)  
Sam Leslie, W4PK  
AT&T  
National Regional Planning Council (NRPC)