

**Before the
National Telecommunications and Information Administration
First Responder Network Authority**

In the Matter of)
) Docket No. 150306226-5226-01
)
Further Proposed Interpretations of Parts of the)
Middle Class Tax Relief and Job Creation Act)
of 2012)

**COMMENTS OF
THE BAY AREA REGIONAL INTEROPERABLE COMMUNICATIONS SYSTEM
AUTHORITY (“BayRICS”)**

I. Introduction and Summary of Comments

The Bay Area Regional Interoperable Communications System Joint Powers Authority (“BayRICS”) submits these Comments in response to the First Responder Network Authority (“FirstNet”) Second Public Notice (“Second Notice”) in the above-captioned proceeding.¹ BayRICS welcomes the opportunity to comment on FirstNet’s preliminary conclusions and interpretations of the Middle Class Tax Relief and Job Creation Act of 2012 (“Act”).

BayRICS was established in August 2011 to oversee public safety communications projects in the San Francisco Bay Area.² BayRICS supports the operation of wireless voice and data networks used by over 40,000 Bay Area public safety professionals serving 7.5 million Bay Area residents and over 16 million visitors annually.

BayRICS provides limited comments and recommendations on three subject areas: (1) encouraging open, nonproprietary standards for network equipment; (2) ensuring that local jurisdictions have a role in State consultation and decision-making; (3) “win-win” State plans that encourage States to opt in. These comments are based in large part upon our extensive

¹ Second Notice and Request for Comments on Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012 (“Act”), Docket No. 140821696-4696-01, 80 FR 13336, Friday March 13, 2015.

² Members of the BayRICS Authority include the State of California, City and County of San Francisco, City of Oakland, City of San Jose, Counties of Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Sonoma, and “hub” cities in the East Bay and South Bay.

experience in developing the groundwork and planning for “BayWEB,” an early-build broadband public safety network in the Bay Area, and on the hundreds of consultations with our members and public safety stakeholders during the three-plus years of planning for that network.³

BayRICS generally expresses no opinion on interpretations offered by FirstNet in other Sections of the Second Notice. However, as we point out below, several proposed positions and conclusions offered by FirstNet might be interpreted as restricting the scope of local entities in the State consultation process. BayRICS cautions FirstNet to avoid relying on these conclusions to strip away key network decisions that the Act properly delegates to State, local and Tribal entities.

In addition, BayRICS urges FirstNet to consult with its Public Safety Advisory Committee (PSAC) as it develops final positions on these issues. The PSAC represents a wide range of public safety and government organizations and is working to develop recommendations for FirstNet based on generally accepted practices of the public safety community. BayRICS encourages FirstNet to make every effort to ensure that its final determinations are consistent with PSAC’s recommendations.

II. FirstNet Should Express a Strong Preference for Network Equipment that Meets Open, Non-Proprietary Standards

FirstNet preliminarily concludes that the “open, non-proprietary, commercially available standards” requirement in Section 6206(b)(2)(B) of the Act applies to end user devices, but does not extend to “any equipment that is used to *constitute* the network.” (Second Notice, Section II(A), emphasis added) FirstNet goes on to conclude that this requirement should apply only to “those parameters necessary to maintain interoperability with the NPSBN – that is, ‘connectivity’ – and which are included in the Interoperability Board Report or otherwise in FirstNet network policies.”

BayRICS believes that Congress intended for Section 6206(b)(2)(B) to apply to all network elements, not just to end user devices. BayRICS agrees that all commercially available user

³ BayRICS initially partnered with the private sector to build BayWEB, an independent public safety broadband network for Bay Area first responders. The subsequent creation of FirstNet ended the regional project before it was completed. However, extensive work on BayWEB has laid the groundwork for implementing the FirstNet network in the Bay Area.

devices, including those with proprietary operating systems, should be allowed on the network, so long as they demonstrate full connectivity. However, we are concerned that FirstNet’s interpretation implies that anything that is not “end-user equipment” can be proprietary, so long as it can functionally interconnect with the network.

BayRICS, and its members, have always supported and endorsed standards-based, non-proprietary network requirements, but with the understanding that certain services and applications required by public safety users may include proprietary elements (Computer-Aided Dispatch (CAD) systems are a good example). We expressed this position throughout the course of negotiations with FirstNet for a spectrum lease for BayWEB—the Bay Area’s “early build” project. In fact, FirstNet’s position was quite clear throughout those negotiations, requiring language in the lease stating that “no proprietary, nonstandards-based applications, services or functions . . . shall be offered or enabled on the network, including, but not limited to, LTE/LMR interworking, push-to-talk, priority and/or preemption, or quality of service capabilities.”

FirstNet’s preliminary conclusions in the Second Notice regard seem somewhat vague and ambiguous, as well as inconsistent with previous positions taken with BayRICS and other early builders. At the very least, FirstNet should clearly specify in its RFPs that proprietary network elements are discouraged, and if proprietary elements are included in a proposal, a process for licensing or otherwise providing access by third-party applications and services developers must also be included.

FirstNet has the opportunity to influence vendors to develop open standards solutions that will encourage interoperability and spur development of innovative applications and services. Innovative applications will be critical to the success of FirstNet, but such innovation may be stifled if FirstNet relies too heavily on proprietary network solutions.

III. Cities And Counties Must be Included in State Planning and Decision-Making, Including a State’s Decision to Build Out a Radio Access Network

FirstNet preliminarily concludes that the decision of the Governor of each State as to “whether a State participates in the FirstNet proposed plan or conducts its own deployment of a RAN . . . will, for purposes of the Act, be binding on all jurisdictions within such State.” (Second Notice,

Section II(C)(iv)) Although the language of the Act⁴ seems to support this conclusion, BayRICS strongly cautions FirstNet against assuming that a Governor’s decision will have the support of all jurisdictions in the State. A legislative requirement that a Governor make a choice on an issue does not imply that every local jurisdiction within the State automatically concurs in that decision, or will therefore consent to allow anything to be built, either by FirstNet or by the State, within that jurisdiction.

The Act provides a substantial role for local governments in the State consultation and decision-making process. Section 6206 (c)(2), for example, requires Cities and Counties to be consulted about many issues—including the placement of towers, local coverage, network hardening, eligible users, and training needs of local users—directly related to RAN deployment. The Act⁵ provides that local consultation should flow through each State’s single point of contact (SPOC), but some States may be doing a better job than others in engaging local stakeholders within their State.⁶ Unfortunately, reports have surfaced that some local agencies have expressed concerns that they are being left out of their State’s planning process.⁷

The Act and the Second Notice say almost nothing⁸ about how FirstNet should deal with such concerns or with any other disputes between a State and jurisdictions within the State. However, the timely resolution of any such disputes will be essential to the success of the network. We do not suggest that FirstNet is responsible for, or will be able to resolve all differences between State and local jurisdictions. However, FirstNet should prepare for the reality that the consultative process envisioned by Congress will undoubtedly result in disputes between the States and localities.

⁴ Section 6302(e)(2).

⁵ Section 6206(c)(2)(B).

⁶ BayRICS commends the State of California for its outreach approach, most notably the ongoing series of “FirstNet in California” town hall meetings held in small, medium and large cities across the State.

⁷ See, for example, a letter expressing such concerns, dated April 28, 2015 from the National Association of Counties (NACo) and National Association of Telecommunications Officers and Advisors (NATOA), filed in this proceeding.

⁸ FirstNet does acknowledge the State-local collaborative potential of the consultation process when it notes that “FirstNet and a State could agree that, as part of FirstNet’s plan, FirstNet and the State (or sub-State jurisdictions) could work together to permit, for example, State implementation of added RAN coverage, capacity, or other network components beyond the FirstNet plan to the extent the interoperability, quality of service, and other goals of the Act were met.” Second Notice, Section II(C)(iv). However, the context of this example implies that such an arrangement would occur *only at the sole discretion* of the State.

From a practical standpoint, FirstNet should be intensely motivated to ensure that local jurisdictions are actively engaged in the decision-making process. The deployment of a RAN, either by FirstNet or by a State, will necessarily require many decisions by local governments, including local zoning and environmental approvals, approving access to locally-owned infrastructure, ensuring connectivity to local public safety dispatch centers and data warehouses, determining local coverage, capacity and service level requirements, and the ultimate decision of whether to purchase the service. It will be in FirstNet's best interest to develop proactive mechanisms to identify and resolve local government concerns quickly and cooperatively.

BayRICS respectfully offers two recommendations that may be helpful in encouraging cooperation and minimizing disputes between States and local jurisdictions. First, we recommend that FirstNet conduct (or direct the States to conduct) at least one consultation meeting in each State and territory that is specifically targeted to local government stakeholders.

For States with big cities or regional urban areas, we recommend specific outreach events or activities targeted to such jurisdictions to solicit the specific needs of those high-risk areas.

These meetings would be an opportunity to develop initial lines of communication between State and local agencies, as well as an opportunity for FirstNet and the State to provide early outreach and education about proposed planning within each State. BayRICS is confident that a number of national associations that represent local stakeholders would be eager to work with FirstNet to help organize and promote such meetings to local agencies.

Second, FirstNet should establish a third party mediation process, as a dispute resolution tool available throughout the State planning process, both between FirstNet and the States and between State and local jurisdictions. As discussed in more detail below, non-binding mediation process could serve to diffuse many of the differences that will inevitably arise in a complex Federal-State-local partnership of this nature.

IV. FirstNet Must Encourage “Win-Win” Opt-In Decisions Through Transparent State Plans, Consistent and Uniform Options for States, and an Effective Method for Resolving Disputes

In the Second Notice Sections II(C) & (D), FirstNet offers a series of preliminary conclusions governing the State opt-out process, which FirstNet acknowledges “will have substantial effects on the operation, funding and potentially the viability of the FirstNet program.” (Second Notice

Section II(D)(i)). BayRICS applauds FirstNet for seeking comments on these fundamental and somewhat controversial questions, and we agree that the State opt-out opportunity raises several concerns that could undermine the viability of the entire program. To this point, BayRICS highlights five concerns with the State planning process that illustrate the importance of encouraging States to opt-in:

1. In Section II(C)(ii), FirstNet rightly argues that a “wait for all” approach (i.e. waiting to deliver all State plans until the last plan is complete) would be unworkable. However, releasing State plans on a rolling basis, especially if combined with closed and non-transparent State plan negotiations, could lead to gamesmanship by States and to demands for “most-favored nations” status to allow early plan recipients to adopt any favorable conditions subsequently negotiated by States later in the State plan process. Closed negotiations with a few States could potentially delay finalizing plans for all other States, or force States, under the 90-day decision deadline, to accept a less-favorable plan than those offered to States that have delayed the process.
2. FirstNet tentatively concludes in Section II(C)(vii) that State plans do not constitute “offer and acceptance” and thus are not binding (not contracts) between States and FirstNet. While the justifications for this conclusion are legitimate, it seems to give FirstNet *carte blanche* to make material changes to the terms of a State’s plan even after the Governor’s approval. Can the Governor withdraw an opt-in decision if FirstNet later makes material changes to the plan? The State would appear to be bound after the 90-day opt-out deadline, but the tentative conclusion implies that FirstNet may make changes to the plan after that deadline.
3. According to FirstNet’s preliminary conclusions in Section II(C)(vi), States seem to have no third choice – only a decision to opt in or opt out⁹. This “all or nothing” process could prompt a State to opt-out simply because it perceives no “middle ground” to work with. A “win-win” approach requires a broad range of options, ranging from full acceptance of FirstNet’s plan to the full opt-out decision by the State to build its own RAN.
4. FirstNet tentatively concludes in Sections II(C) and (D) that it will have discretion over a broad range of conditions in the terms of “spectrum capacity lease” arrangements that opt-out States must obtain in order to use FirstNet spectrum. Opaque spectrum lease negotiations might raise the perception that FirstNet could force a State to opt in by demanding unreasonable terms and conditions or creating unreasonable delays in awarding the lease.

⁹ Although FirstNet might consider a “do-over” if an opt-out State cannot obtain State plan approval or funding, see Second Notice Section II(C)(vi).

5. Finally, FirstNet develops persuasive arguments that self-sustainment of the nationwide network should be a primary consideration when evaluating a State opt-out plan. Specifically, FirstNet points out that a densely populated State may opt out and thereby capture revenues (through subscriber fees or covered leasing arrangements for excess capacity) that should be reinvested in the network and allocated to less populous States.

BayRICS agrees that the Act should not be interpreted to give opt-out States the right to use network revenues to fill gaps in the State's general fund. However, FirstNet's preliminary conclusions do not account for the potentially higher costs of serving densely populated areas with greater risk of loss to life and property. FirstNet's conclusions effectively place a greater burden on local public safety agencies in big cities to bear the overall costs of nationwide network build out. In fact, revenue reinvestment will require a complex analysis of the specific needs, costs, revenues of each State, balanced by the infrastructure and operational support each State is willing to contribute.

Given these and other complex and somewhat inflexible provisions in the Act, BayRICS suggests that the best way to avoid the challenges of opting out is simply to encourage as many States as possible to opt in. To accomplish this, FirstNet must develop a transparent State plan process, consistently applied to all States, that is designed to encourage opt-in decisions.

In the Second Notice, Section II(D)(iii), FirstNet discusses flexible "win-win arrangements" with respect to spectrum lease agreements with opt-out States. We urge FirstNet to strive for "win-win" throughout the State plan process, not just when negotiating spectrum agreements at the opt-out stage. BayRICS offers the following recommendations to help establish a win-win framework and to mitigate the concerns identified above:

- 1. FirstNet should develop transparent, consistent and pre-defined State plan options for all States (or perhaps for groups of similarly situated States), and allow States to choose from those options.**

Fixed, pre-defined options will minimize competition among States for more favorable State plan terms and conditions and provide some measure of economic and operational certainty for FirstNet prior to the States' decisions. Every State plan should include uniform standards to ensure interoperability, security, coverage, minimum service quality and sustainability, but should also allow States to pick and choose from a diverse range of optional business relationships, build out plans and network policies not affecting interoperability (e.g., billing, customer service, eligible users, local infrastructure, enhanced network capacity and resiliency,

etc.). States should understand that these options will be uniform for all States and will not be subject to re-negotiation or modification on a state-by-state basis.¹⁰

State plan elements must be identified as early as possible through State and local consultation efforts to allow FirstNet time to develop the greatest possible range of pre-plan options. We recommend that FirstNet release the State plan options in draft form and solicit public comments prior to delivering final plans to any State, similar to the process FirstNet has established with its Request for Proposal (RFP). This approach would allow maximum possible flexibility for States, while providing FirstNet and vendors with some economic certainty going into the State plan process.

2. FirstNet should incorporate “revenue reinvestment incentives” into every State plan.

BayRICS shares the concerns of FirstNet that improper or unfair use of revenues by States may harm the sustainability of the nationwide network. We believe that these concerns can be mitigated by creating revenue-based incentives for a State to opt in. Specifically, the pre-defined options described in the previous section should include a variety of “revenue reinvestment” models for the State designed to allocate revenues back to the State, based on the State’s needs and also its contributions to the system, including:

- Anticipated high numbers of local subscribers
- State and local infrastructure contributions
- Coverage and capacity needs (or willingness to reduce coverage/capacity costs where feasible)
- State partnership arrangements for RAN deployment or other services (potentially allocating costs of RAN build-out/management, customer service, billing, etc.)

One simple model for allocating a State’s revenue reinvestment could consist of a credit or discount on FirstNet subscriber accounts in the State, in the amount determined by an analysis of the above factors. There are many other reinvestment scenarios that could be incorporated into the State plan options.

¹⁰ We acknowledge that many States will raise certain individual concerns and needs that might require modification of the uniform options. However, it is likely that other similarly-situated States will have related needs. Most of these concerns can be identified in the consultation process, built into pre-defined options, and made available to every State as a series of standard choices. This approach has the benefit of allowing every State to leverage the cumulative information collected and solutions developed throughout the consultation process.

3. FirstNet should develop transparent and uniform spectrum capacity lease terms and conditions applicable to all opt-out States, made public before any opt-out decisions occur, and not subject to re-negotiation.

BayRICS recommends that the terms and conditions for States to make use of the FirstNet spectrum upon exercising an opt-out decision should be pre-defined and disclosed prior to the issuance of any State plan. States must understand these conditions prior to making the opt-out decision. Again, we recommend that FirstNet release the proposed terms and conditions of these spectrum lease arrangements in draft form and solicit public comments prior to finalization.

4. As disputes arise in the State plan process, the States and FirstNet should agree to third party mediation, as described in Section II above.

A non-binding alternative dispute resolution process should be available at the request of any interested party throughout the State planning process. In the First Notice, BayRICS and others suggested a similar mediation process in the context of determining the economic desirability of using existing infrastructure: “FirstNet should be allowed to bring in an independent third party (government, non-profit or commercial) to mediate questions of economic desirability or to develop standard agreements and pricing models to facilitate the use of such infrastructure.” (BayRICS Comments to First Notice, p. 10). We propose that this process can be effective in resolving a wide range of disputes involving State, Tribal and local entities, occurring before, during, and after the State opt-out decision.¹¹

IV. Conclusion

BayRICS appreciates the opportunity to provide FirstNet with comments on some of the key questions raised in the Second Notice and requests that FirstNet consider the recommendations provided herein.

Respectfully submitted,

Dated: April 28, 2015

/s/
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¹¹ For example, since the FCC must approve any alternative State RAN plan, the need may arise for mediation of State differences with local agencies under that agency’s decision-making process.