

FirstNet board initiates public-notice proceeding on relationship with 'opt-out' states

Urgent Communications By Donny Jackson

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[FirstNet](#) board members today approved a public notice that seeks input the relationship between FirstNet and states/territories that choose the “opt-out” option, including how revenues generated by opt-out states can be used. Policies associated with these topics could have a significant impact on FirstNet’s efforts to establish a business model that ensures long-term sustainability, according to FirstNet Chairwoman Sue Swenson.

Under the [2012 law that created FirstNet](#), each of the 50 states and six territories will have the choice of (1) adopting the public-safety broadband plan proposed by FirstNet, or (2) it “opt out” and can deploy its own radio access network (RAN) that meets FirstNet standards and interoperates with the rest of the nationwide system. Despite the “opt-out” moniker in the law, there is no option that allows a state to not be part of the FirstNet system in some way.

While “opt-out” alternative is clear in the law, there are many questions surrounding the details of FirstNet’s relationship with an “opt-out” state. Perhaps the most important of these is whether revenue generated from subscriber fees in an ‘opt-out” state must remain in the state, or whether it can be distributed to other states and territories in FirstNet.

“FirstNet has three primary sources of funding: \$7 billion in cash, fees from selling excess spectrum capacity, and subscriber fees,” FirstNet Chairwoman Sue Swenson said during the special board meeting. “In general, the better job we do leveraging the first two sources, the more we can lower subscriber fees for public safety. As you know, this is very, very important to the overall program.”

If subscriber-fee revenues from densely populated states and territories—the most likely candidates to choose the “opt-out” path—were kept within the jurisdiction, it would have a negative impact on FirstNet’s ability to pay for the deployment of services in other parts of the country, Swenson said.

“As we have said from the beginning, \$7 billion will not deploy the nationwide network that

public safety needs,” Swenson said. “Most states will need the revenue generated by a few high-density states.”

With this in mind, FirstNet’s initial legal interpretation of the “opt-out” clause in the act is that “Congress intended to give states the option to customize the radio access network to meet local needs but did not intend the exercise of that option to deny funding to other states substantial funding to many other states, particularly rural states,” Swenson said.

“Instead, we are seeking comment on our interpretation that will maintain the appropriate balance between the funding for all states and a particular state’s rights under the act. We believe our interpretation in this regard is reasonable and particularly important, given the act’s requirements regarding rural-deployment milestones and our duty to ensure the deployment of a nationwide network.”

In addition to subscriber-fee revenue, the public notice also seeks input on the use of revenue from covered leasing agreements, which allow FirstNet or an “opt-out” state to lease excess network capacity to a partner—perhaps a commercial carrier—on a secondary basis.

One stipulation in the law for is that “any revenue gained by [an “opt-out”] state from such a leasing agreement shall be used only for constructing, maintaining, operating, or improving the radio access network of the state.”

Of course, before a state or territory can build its own RAN, it must reach a spectrum-lease agreement with FirstNet. That spectrum-lease arrangement can be structured to ensure that FirstNet does not suffer significant funding losses that could impact its service in the rest of the nation, according to FirstNet Chief Counsel Stuart Kupinsky.

“There are actually a number of ways that can be addressed,” Kupinsky said during a press conference after the board meeting.

As described in a [FirstNet](#) press release, other non-funding issues addressed in the public notice include:

- “Technical requirements for equipment to be used on the network, including open standards for connectivity and device competition;
- The nature and application of FirstNet network policies, including those that aim to preserve [interoperability](#) in states and territories that assume responsibility for building and operating a RAN;
- The governor’s decision to assume RAN responsibility, and the roles and responsibilities of states and FirstNet throughout the process; and
- Customer and operational considerations regarding state or territory assumption of RAN responsibility.”

As with FirstNet’s public-notice proceeding last fall, the preliminary legal interpretations are those of the FirstNet staff and do not represent the opinion of the FirstNet board, which ultimately will make the policy decisions on the matters.

“I want to emphasize very clearly that this is the beginning of the discussion and not the final pronouncement of a decision,” Swenson said.

FirstNet’s web site includes [a copy of the public notice](#) and a list of [frequently asked questions](#) about the proceeding.

FirstNet hopes that the public notice will be published in the Federal Register “in the next couple of days,” after which commenters will have 30 days to submit filings, Swenson said. Comments in this proceeding will be made public, according to FirstNet officials.

During the press conference, Kupinsky declined to speculate when the FirstNet board would make a decision about policies associated with questions associated with the second notice. However, such policies need to be in place before FirstNet issues its final request for proposal (RFP), he said

FirstNet Acting Executive Director TJ Kennedy reiterated FirstNet’s plan to release its draft RFP by the end of the month but declined to comment when the final RFP would be issued.

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