

### States push back against preliminary FirstNet legal interpretations on opt-out alternative

Urgent Communications By Donny Jackson

April 30, 2015

Several states and territories were outspoken in their criticism of [FirstNet](#)'s preliminary legal interpretation of opt-out options, asking for detailed clarity in FirstNet's state plans and questioning whether the federal entity is legally authorized to take some of the stances its staff has proposed.

In its Second Public Notice that examines of the relationship between FirstNet and states, FirstNet acknowledges that states and territories have the option to "opt out," which means the state would be responsible for deploying the public-safety [LTE](#) radio access network (RAN) within its jurisdiction that would interoperate with the nationwide FirstNet system. If a state does not choose the opt-out route, FirstNet is obligated to deploy the public-safety broadband system in the state and assume all maintenance costs.

But several states and territories expressed concern that many of the preliminary legal interpretations proposed by FirstNet staff—the board has not made any policy decisions on the issues—effectively would preclude states from seriously considering the opt-out alternative.

Under the law, FirstNet is required to present its plan to deploy a public-safety LTE network within the jurisdiction of the state or territory to each governor, who then has 90 days to make the opt-in/opt-out decision. However, multiple state commenters expressed concern that the proposed FirstNet interpretation in the Second Public Notice would allow FirstNet to alter the plan after submitting it to the state.

"FirstNet must consider its state plan, when delivered, [to be] a binding contract rather than a simple promise," according to the State of Washington filing. "Unless FirstNet considers the state plan a binding contract, then the entire consultation process is relatively meaningless."

In addition, several states indicated they are worried that the proposed interpretation would let FirstNet submit its state plan without detailed pricing information. Such information should be a mandatory part of the FirstNet plan, so the governor can make an informed opt-in/opt-out

choice, according to the state commenters.

“Section 6302(e)(B) requires FirstNet to provide ‘details of the proposed plan,’ the Rhode Island filing states. “It is an elementary tenet of contract law that contract price is a not merely a detail, but a material element of the contract. FirstNet’s interpretation of the act, which forces a state to enter into a contract without knowledge of this material element, could likely result in a judicial finding that this section of the act is an unconscionable contract of adhesion.”

Multiple state comments noted that the sequence of steps a state must follow to exercise its opt-out should be revisited. If a governor chooses the opt-out route within the 90-day period, the state has 180 days to conduct an RFP and submit its RAN plan to the [FCC](#) for consideration. After clearing that hurdle, the potential opt-out state would ask the [National Telecommunications and Information Administration](#) (NTIA) for permission to apply for a spectrum-lease agreement from FirstNet.

However, multiple states noted that securing the terms of the spectrum lease should be done before FirstNet submits its state plan, because (1) the state cannot operate a RAN network without access to spectrum, and (2) the terms of the spectrum lease likely will impact whether choosing the opt-out alternative is a financially viable alternative.

In the public notice, [FirstNet](#) contends that a potential opt-out state must negotiate a spectrum lease with FirstNet. But the state of Texas notes that FirstNet is not mentioned in the opt-out approval progression and that [NTIA](#) must follow the criteria outlined in the law to determine whether a spectrum lease should be granted.

“FirstNet assumes that FirstNet—rather than NTIA has decision-making authority over the entry of spectrum leases with opt-out states, despite the clear indication in the Spectrum Act that opt-out states must apply to NTIA for a spectrum lease,” the Texas filing states. “FirstNet’s contention is contrary to the plain language of the statute that places the decision with NTIA.

“It should not be assumed by FirstNet that Congress’ specification of NTIA rather than FirstNet as the authority for entering spectrum capacity leases with opt-out states was merely an oversight or otherwise a mistake by Congress.”

Texas also disagreed with the arguably the most important legal interpretation proposed by FirstNet in the public notice—that opt-out states and territories should not be allowed to keep revenues generated within their jurisdictional boundaries.

FirstNet officials repeatedly have noted that the business model for the proposed nationwide public-safety broadband network is largely dependent on the ability to redistribute “excess” revenues—from user fees and/or secondary use of excess network capacity—from the handful of very densely populated states and territories to help fund the network in more sparsely populated areas of the country.

For the most part, states and territories agree that any revenues generated from the operation of the network should be reinvested in the network and should not be available for use in a state’s general-fund budget. However, several states noted that they should be allowed to keep any network revenues within their jurisdictions. In fact, Texas notes that the law stipulates such an approach when addressing covered leasing agreements (CLAs) enable a commercial operator to provide consumer services over network capacity not used by public safety.

“The act itself requires that revenues generated under a CLA entered by an opt-out state must be used only to support the RAN within the state: ‘Any *revenue gained by the state from such a leasing agreement shall be used only for constructing, maintaining, operating, or improving the radio access network of the State,*’ the Texas filing states.

“Certainly, if fees from any *secondary* CLA users should be used only within the state, it follows that fees from *primary* users should also be used within the state.”

Another point of contention noted by several state commenters is FirstNet’s proposed interpretation of what constitutes a “cost-effective” RAN plan by a potential opt-out state. FirstNet has indicated that it would rather see excess revenue from densely populated states be used to subsidize network efforts in more rural areas of the country instead of allowing an opt-out state to keep revenues within the state in a manner that would result in a “gold-plated” network and that cost effectiveness should be based on what is best for FirstNet overall, not just the opt-out state.

The District of Columbia—widely considered to be a prime candidate to choose the opt-out option, because of its extremely dense population and infrastructure assets—stated that [FirstNet](#) should listen to the input of the state or territory when evaluating whether a proposed network is cost effective.

“The District is not asking for more than its needs. We do, however, urge FirstNet to recognize that state requirements for the public safety network—especially in areas that are considered prime terrorist targets, such as the District of Columbia—are not efforts to ‘gold plate’ network services, but are real, essential public safety grade service requirements,” the District of Columbia’s filing states. “We urge FirstNet to consider such services a necessity, rather than a luxury, for an urban target such as the district.

“The District's track record indicates that we would understand how much funding is needed to fulfill our needs. If the District and FirstNet are able to have substantive conversations about FirstNet's business planning early in the consultation process, we believe both parties can agree on the District's funding needs.

This sentiment was echoed by the state of Nevada.

“States must decide what is interoperable and cost effective for their own agencies and populations,” the Nevada filing states. “Only the states have the necessary knowledge, expertise, and ability to clearly define their needs.”

Noting that “even an ‘independent’ agency [like FirstNet] cannot unilaterally impose policies, fees, or other conditions on states,” Nevada also questioned the authority of FirstNet to deploy its network in states that do not actively invite the entity into the state.

“We suggest that FirstNet is over-reaching and seeking to create difficulties for states who may exercise their right to opt-out,” according to the Nevada filing. “By stating, ‘...[I]f a state alternative plan is disapproved, the RAN in that state will proceed in accordance with FirstNet’s state plan,’ FirstNet essentially throws down the gauntlet to states, insisting that governors

accept Washington's terms, or FirstNet will enter a state unwelcome.

“This is the opposite of ‘working cooperatively,’ does little to engage stakeholders, and may lead to a situation where no network is built at all, or—if it is—no state-funded public-safety agencies use it. This is an unacceptable statement from FirstNet and reveals a troubling attitude towards states.”

[Link to Article](#)

[Link to Urgent Communications News Articles](#)