

First Responder Network Authority Further Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012

Comments of APCO International

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The Association of Public-Safety Communications Officials-International, Inc. (APCO) submits the following comments in response to the Second Notice and request for comments issued by the First Responder Network Authority (FirstNet), National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce. Founded in 1935, APCO is the world's oldest and largest organization of public safety communications professionals. APCO's membership primarily consists of state and local government employees who manage and operate public safety communications systems – including Public Safety Answering Points (PSAPs), dispatch centers, emergency operations centers, radio networks, and information technology – for law enforcement, fire, emergency medical, and other public safety agencies.

As APCO described in its response to FirstNet's First Notice of proposed legal interpretations, APCO responds to this Request for Comments with the perspective of the collective goals that the public safety community sought to accomplish with FirstNet's enabling legislation.¹ In addition to its direct involvement in the advocacy efforts and understanding of the underlying public safety needs, APCO possesses knowledge of the process and insight into the lawmakers' specific decisions as the law was drafted. APCO thus brings a unique perspective to its comments, sharing what APCO understands to have been the intent of the lawmakers in crafting the Act.

I. Guiding Principles

The guiding principles concerning interpretations of the Act that APCO identified in its response to the First Notice are relevant to the issues raised in the Second Notice. We therefore reiterate them here.

First, the Act clearly grants FirstNet a wide berth in determining how best to proceed. Congress vested FirstNet with broad powers, responsibilities, and discretion throughout the Act.² For example, FirstNet "shall have the authority ... [t]o take such other actions as [FirstNet] may from time to time determine necessary, appropriate, or advisable to accomplish the purposes of this title,"³ is responsible for effectively managing the \$7 billion dollar network

¹ Middle Class Tax Relief and Job Creation Act of 2012 (the "Act").

² See generally Section 6206.

³ Section 6206(a)(6).

construction fund,⁴ and is otherwise tasked to “take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network.”⁵

Second, the complexity of the task before FirstNet is mirrored in the complexity of the legislation, which itself contains a network of interdependent sections. Accordingly, legal interpretations of the Act should not be based on examination of each particular section or term in isolation. Instead, FirstNet should be guided by the advocacy goals, the basis of those goals, and Congress’s intent to meet the needs of the public safety community by providing a dedicated network for first responders. FirstNet should look at the Act as a whole, considering the overarching themes of the legislation, to best understand the intent and expectations of those that crafted the Act.

The Second Notice explores technical requirements relating to equipment, network policies, and the procedural aspects and ramifications should a state seek to construct its own radio access network (“opt-out”). APCO will begin by addressing the opt-out issue, as this is a fundamentally misunderstood concept that is diverting attention and resources from the more pressing task at hand – providing our nation’s first responders with an advanced, nationwide, interoperable, public safety broadband network.

II. Opt-out Is a False Choice

There is simply no reason for any state to opt-out, which entails an arduous process and shifts the important responsibility to implement a radio access network (RAN) from FirstNet to the state. Compared to any state, FirstNet has significant advantages provided by Congress to achieve the best overall solution for the country. Yet a state that seeks to construct its own RAN introduces many serious risks to the communications capabilities of first responders within its own borders as well as those across the nation. Further, a state can benefit from welcoming the RAN build-out provided by FirstNet, and still augment the network itself provided it meets FirstNet’s technical requirements to ensure sustained interoperability. Finally, any notions that an opt-out choice can lead to new revenue-generating opportunities are baseless.

Prior to enactment of the groundbreaking FirstNet legislation, efforts were underway to deploy broadband networks with the same interoperability problems that have historically plagued first responders. Several jurisdictions were seeking to develop public safety broadband networks with a “network of networks” model. The FirstNet legislation was a complete repudiation of this model. While the opt-out provision of the Act, which was never supported by APCO, served as a compromise to achieve passage, the primary thrust of the Act was the creation of a nationwide network with a single governance body. As FirstNet has progressed, the disadvantages and risks associated with separate FirstNet and state RAN build-out efforts have become increasingly clear.

⁴ See Section 6206(e)(2)(A).

⁵ See Section 6206(b)(1).

In creating FirstNet, Congress completely reversed the way public safety networks have been traditionally implemented, with the full support of APCO and many other major public safety associations. FirstNet's inherent advantages include:

- An expert team that can deliver a sustainable and secure network design, including ongoing maintenance and coordinated upgrades across state borders and throughout the country;
- Ability to avoid differing state and local procurement and approval processes;
- National-level bargaining power and synergies with potential partners across a competitive, diverse, multiple vendor ecosystem;
- National-level economies of scale in network and device equipment costs; and
- Special focus on establishing and maintaining a seamless, nationwide level of interoperability for all first responders.

No single state can match these advantages. Further, there is no good answer when a state that has opted out faces a change in leadership or competing priorities that removes essential resources from the tasks of implementing, operating, maintaining, and sustaining an advanced, wireless broadband RAN. There is no rescue plan in the Act for a failed opt-out RAN, which would be a very complex and costly problem to fix. And the network as a whole, including the primary goal of achieving nationwide interoperability, would be at risk.

An opt-out state cannot provide commercial service to consumers. Any revenue derived from operation of an opt-out state RAN must be reinvested into the network. Revenue cannot be diverted to a state's general fund, cannot be spent on any other programs, or even used for other public safety-related expenses. The Act is quite clear on these points. While Congress may have sought to provide an option for a state to implement its own RAN in the furtherance of its goal to provide first responders with the network they require, Congress certainly did not intend to create a new source of state revenue. We have already seen examples of states diverting 9-1-1 fees to cover budget gaps or other priorities, and this cannot be replicated when it comes to the nationwide public safety broadband network.

Further, while Congress created the option of pursuing an opt-out, a state should not discount the fact that Congress strongly discouraged such a path. A state that seeks to opt out commits itself to a painstaking endeavor. It must confront a rigorous double-agency approval process designed to ensure interoperability and long-term sustainability. Hiring additional personnel, issuing an RFP, procuring network equipment, negotiating covered leasing agreements, and collaborating with FirstNet to ensure seamless integration will each be substantial undertakings.

To build, operate, and maintain the RAN will require substantial technical, contract, and grant management personnel. Why waste resources on duplicative efforts that lack FirstNet's economies of scale and invite additional risks to the network's success? Instead, a state can accept the RAN FirstNet offers to build and focus its resources on augmenting it without giving

up any benefits. FirstNet is subject to extensive consultation requirements with states regarding network policies. APCO commends FirstNet's staff for its outstanding consultation efforts to date. States will continue to have substantial opportunities to influence such policies. And, because LTE technology enables local control options and features, states accepting FirstNet's RAN build will not sacrifice control over the service for its users.

FirstNet has been taking the steps it needs to. Led by highly qualified and dedicated board members, it has been hiring expert staff, extensively consulting with state and local agencies, and readying its request for proposals. When FirstNet presents its plans to the states, they will reflect the full weight of its singular focus to carry out the goals of the Act. Each state should accept FirstNet's plans and direct available resources to augmenting the RAN as it desires. This is the most efficient and effective way to provide all first responders with the communications tools they need to protect the safety of life and property, including when they render assistance to other jurisdictions.

III. Technical Requirements Relating to Equipment for Use on the NPSBN

In a significant departure from the past, the Act seeks to free public safety from the proprietary, high-cost, static equipment technologies of a highly concentrated vendor market. The Act not only breaks this mold but finally places public safety on the same technology path as commercially available technologies that are more innovative, cost-effective, and, most importantly, interoperable. This will apply equally to FirstNet as a consumer of network equipment, and to individual public safety agencies in their purchases of user equipment.

Across the FirstNet network, it should not matter where the FirstNet user is located or what brand of device is being used to access the network. All equipment used to construct or use the network should be based upon "commercial standards" as defined in the Act and should not include proprietary features that interfere with seamless interoperability or entrench agencies with a particular vendor. This will produce an environment for multiple competing product vendors. For public safety users, the intended beneficiaries of the Act, this will ensure a diverse marketplace with nationally-scaled costs and will facilitate the nationwide interoperability that is critical for emergency response operations among and outside of their jurisdictions.

APCO agrees that backwards compatibility with existing commercial networks could prove very valuable. This requirement in the Act is a strong signal from Congress that both network and user equipment must permit seamless use with existing commercial networks. Backwards compatibility will make roaming onto other networks possible, which enhances the value of public-private partnerships and creates the opportunity for redundancy in times of user surge or network failure. Not only does this support APCO's previous comments on the importance of Congress' intent for public-private partnerships with commercial wireless service providers, it also supports an interpretation that the Act calls for strict adherence to the backward compatibility and non-proprietary/commercial standards provisions.

With regard to opt-out jurisdictions, the commercial standards and backwards compatibility requirements must apply to ensure nationwide interoperability is achieved and sustained.

IV. Network Policies

APCO agrees with FirstNet that a broader set of technical, business, and operational standards must be developed than the Interoperability Report provided. The Interoperability Board was tasked with “develop[ing] recommended minimum technical requirements.”⁶ These *recommendations*, while potentially useful, are not requirements for FirstNet. FirstNet is required to incorporate the Interoperability Report’s recommendations into its RFPs, but the responses and FirstNet’s ultimate network policies are not limited by them.

The significant discretion provided by Congress regarding network policies is a clear example of the overarching authority and responsibility Congress vested in FirstNet to achieve the goal of implementing an advanced, nationwide, interoperable, public safety broadband network for the benefit of the entire country. Thus, FirstNet is correct that all network policies established by FirstNet must apply to opt-out situations, and the separate interoperability showing required of a state seeking the opt-out option requires the state to demonstrate it will continually adhere to FirstNet network policies as they evolve.

V. A State’s Opportunity To Assume Responsibility for Radio Access Network Deployment and Operation

APCO reiterates that opt-out is a false choice. Whereas FirstNet is by design an expert body with the capability to design and implement an advanced wireless broadband network for public safety, state and local governments are inherently not well-positioned to do so. Examples continue to emerge of how local efforts to deploy public safety wireless networks can be overwhelmed by financial and political challenges. There are several potential downsides to a state’s decision to opt-out, not the least of which is failure to achieve a nationwide, interoperable, public safety broadband network.

a. Overview of Statutory Provisions on Deployment of State Networks

While Congress granted an opportunity for a state to pursue a RAN buildout of its own, it put forth a formidable, multi-stage process reflective of the serious consequences of a state wishing to take on such a responsibility. FirstNet is correct that vital elements of an advanced public safety network for the safety and security of the country are at stake: nationwide coverage (including rural areas and international borders), nationwide interoperability (which can only be achieved if a network is successfully deployed across all states), sustainability, and national economies of scale.

⁶ 47 USC 1423(c)(1).

b. FirstNet Presentation of a State Plan

APCO agrees that FirstNet may present state plans on a rolling basis, fully within its discretion. This will allow FirstNet to move more quickly on deployment which will mean public safety users benefit from the network and FirstNet begins generating user fees earlier.

FirstNet must retain flexibility in developing and presenting state plans. This includes the flexibility to consider the impact of a state's decision to build its own RAN on other states. As mentioned above, FirstNet may be correct that opt-out will detract funding from its nationwide pool, but the larger concerns are interoperability, coverage, and reliability.

c. Content of a State Plan

APCO agrees that FirstNet would have to provide sufficient details such that a state can have the information it needs to make the required showings to the FCC and NTIA. The Act describes the alternative plan approval process as including a comparison of timelines, cost-effectiveness, security, coverage, and quality of service. Thus, while FirstNet will be responsible for providing this information to the states, the states have an equal, if not greater, responsibility to develop detailed plans of their own. As explained above, states are not well-suited for constructing and maintaining advanced wireless networks and will face the challenge without the benefits of FirstNet's economies of scale, nationwide-level bargaining ability, and knowledge of how state RANs much be woven together to achieve an interoperable network across the country.

d. Governor's Role in the State Plan Process

APCO agrees that the Governor's decision, either way, determines whether FirstNet or the state will conduct a RAN deployment to serve all jurisdictions within that state. This is yet another example of the practical difficulties with a state electing to opt out. It must, in theory, have the buy-in of every local public safety agency within its borders.

Regarding opt-in states, APCO fully agrees that FirstNet may work with the state or individual localities to permit state or local enhancements to the RAN that FirstNet constructs, provided that any local enhancements are in accord with FirstNet's network policies. This again illustrates the false choice of opt-out.

e. Timing and Nature of State Decision

APCO agrees in substance that a Governor must wait until FirstNet presents its plan before making his or her decision. Of course, a Governor is free to make a decision at any time, but the decision does not serve its purpose in the Act until after FirstNet has presented its plan and the 90-day period begins.

f. Notification of State Decision

APCO agrees that the Governor must provide notice of its actual choice to FirstNet. APCO also agrees that if the Governor does not give notice, FirstNet should proceed as though the state has accepted FirstNet's plan. Given the importance of the network and the Act's presumption in favor of state opt-in, indecision should not delay FirstNet from its mission.

g. The Nature of FirstNet's Proposed State Plan

APCO agrees that FirstNet's presentation of a state plan does not constitute an offer to form a contract.

h. State Development of an Alternative Plan

States that submit alternative plans have a responsibility to provide greater details than FirstNet. APCO agrees with FirstNet that states will potentially have gaps in information at the time of their submission of an alternative plan, but the requirement of a state to complete requests for proposals means that it must have selected vendors and have a plan in place. Given the serious implications of a state decision to build its own RAN, Congress made clear that a state has to make a thorough showing that it will be able to preserve the overarching goals of the Act. If the state is not able to reach such an advanced stage, then it would not be possible for the FCC and NTIA to grant its request. FirstNet, by comparison, has many other considerations that it needs to take into account. Thus its plan to the state need not be as complete as an individual state's.

APCO agrees with FirstNet that the state must complete its RFP process, including selection of vendors, within 180 days, or forfeit its ability to seek to construct its own RAN. The Act sets an aggressive timeline for a reason. The need for a nationwide public safety broadband network is immediate; thus, its deployment cannot be delayed.

i. Responsibilities of FirstNet and a State Upon a State Decision To Assume Responsibility for the Construction and Operation of Its Own RAN

APCO agrees that if the FCC disapproves of the state's plan or the NTIA denies the state's request to lease FirstNet's spectrum, that state's opportunity to construct its own RAN is lost.

The Act gives FirstNet broad discretion to deploy a nationwide network. Thus, APCO agrees that FirstNet may work with a state to implement a RAN after opt-out regardless of whether a state gains the required approvals from the FCC and NTIA, despite the Act's lack of a mechanism for reinitiating an "opt-in" process. That said, APCO cautions FirstNet against adopting policies that allow for the rescue of opt-out state RANs without clarifying, for all

stakeholders, that this scenario should not be viewed as a safety net. States should be well-aware that, while FirstNet is committed to the success of a nationwide network, opting out is likely a decision made to the detriment of the nationwide network and, therefore, to the detriment of our nation's emergency response capabilities.

VI. Customer, Operational and Funding Considerations Regarding State Assumption of RAN Construction and Operation

a. Customer Relationships in States Assuming RAN Construction and Operation

States should be under no illusion that if they choose to pursue their own RAN buildout and meet all statutory requirements, they are taking on significant responsibilities impacting not only first responders in their own states, but across the country. It's possible that they will not be able to sustain quality of service or provide the applications that FirstNet, with its nationwide economies of scale, is able to provide. Additionally, FirstNet may not be able to provide needed services in opt-out states as quickly as it will for states that participate in the initial build plan. Thus, despite the Act's requirement that opt-out states present alternative plans with comparable service, public safety users in opt-out states may not have a comparable experience to other FirstNet users.

FirstNet should avoid overpromising how much support it will be able to offer to opt-out states with regard to customer-facing responsibilities, covered leasing agreements, or any other partnering or special relationships. As a practical matter, how would FirstNet handle customer-facing matters if it does not have full insight into the RAN? FirstNet will necessarily lack awareness and knowledge of the state's actions in implementing and operating the RAN. Dealing with RAN failures or disputes within opt-out states would be an unnecessary distraction that would impede the nationwide deployment. FirstNet could find its resources and funding drained by a single state matter, and its reputation could be harmed by serving as the customer-facing entity for customers in opt-out states, which would impede its ability to achieve nationwide buy-in from the public safety community.

b. State Use and Reinvestment of Funds Received From Building and Operating a RAN

There is no guarantee that a state will be able to obtain sufficient revenue from its own user fees or spectrum lease fees to cover the costs of RAN construction, maintenance, and operation. FirstNet could be correct that states with high-density populations may generate fees that exceed RAN costs and that funding for the nationwide build could be harmed should high-density states opt out, but the real harm to the network may be much worse than financial. Fragmented RAN builds threaten the overall success of the network.

FirstNet is not required to set a single price for public safety users or core access fees. Core network usage fees could be higher for opt-out states, either due to increased planning, coordination, and monitoring costs incurred by FirstNet or due to price discrimination in states capable of generating higher fees. This price discrimination could, therefore, negate the gains from excess fees anticipated by an opt-out state.

FirstNet also has wide and important discretion in making a determination of the “cost effectiveness” of a state plan, including as it evaluates whether to enter into a spectrum lease with a state seeking to construct its own RAN. Similarly, NTIA can take the needs of the entire country into account when determining the amount of funding that a state may receive if it meets all requirements to receive grant funding for the RAN as outlined by the Act.

As mentioned above, the Act does not allow fees generated for the nationwide public safety broadband network to be diverted for other purposes, as unfortunately occurs for 9-1-1 fees in some states. APCO fully agrees that “Congress intended that any revenues from PPPs, to the extent such arrangements are permitted and different than CLAs, should be reinvested into the network and that the reinvestment provision of Section 6302(g) should be read to require as such.”

VII. Conclusion

FirstNet's mission is the establishment of a nationwide, interoperable, public safety broadband network. The Act gives FirstNet broad discretion in accomplishing this mission so our nation's public safety professionals are safer and more efficient during emergencies, regardless of whether they're in rural or urban areas, or entail a local or multistate response. While individual agencies and states will have unique needs that shape their deployment and user experience of the network, we must not lose sight of nationwide interoperability and coverage as the ultimate goals. Opt-out threatens the ultimate success of the network. FirstNet's legal interpretations and network policies should reflect this reality and focus states on the nationwide mission.

Respectfully submitted,

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