

## Comments of the State of Washington

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

80 FR 13336

Docket Number 150306226-5226-01

#### Introduction

1. The State of Washington provides these comments in response to the First Responder Network Authority's ("FirstNet") Further Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012 ("Second Notice"). These comments are prepared by Washington's Office of the Chief Information Officer ("OCIO"). The Washington Chief Information Officer ("CIO"), under the Revised Code of Washington ("RCW") Title 43.41A.080<sup>1</sup> is charged to support and staff the Washington State Interoperability Executive Committee ("SIEC"). Washington Governor Jay Inslee designated the SIEC and its Chair, Bill Schrier, as the FirstNet State Point of Contact ("SPOC").
2. The word "Washington", when used in these comments, refers to the State of Washington, not the national capital, Washington, D.C. The word "responder", when used in these comments, refers to any individual or agency authorized to use the FirstNet-licensed Band 14 spectrum to protect the safety of the public.
3. FirstNet requested, in this Second Notice, comments on its proposed interpretation of several portions of the Middle Class Tax Relief and Job Creation Act of 2012<sup>2</sup> ("the Act") which created the First Responder Network Authority (FirstNet) and which directs and constrains its authority and actions.

#### Summary of Significant Comments

- The State of Washington ("State") generally agrees with FirstNet's interpretation of those sections of the act which require non-proprietary equipment, promoting competition and use of commercial standards for the network technology and user equipment.
- The State desires to collaborate with FirstNet in building a state plan for Washington which the Governor can decide to accept. But the decision must be informed by a valid and complete comparison to other options available to the State.

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<sup>1</sup> RCW establishing the SIEC under the authority of the CIO:

<http://app.leg.wa.gov/rcw/default.aspx?cite=43.41A.080>

<sup>2</sup> Public Law 112-96 - <http://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf>

- Washington strongly believes FirstNet should honor the words, spirit and intent of the Act, particularly in regards to protecting the meaningful right of States to opt-out of FirstNet’s plan to create the Radio Access Network (“RAN”) in a state.
- FirstNet and the National Telecommunications and Infrastructure Administration (“NTIA”) should support states in their research and exploration of options other than accepting FirstNet’s state plan. Such research will also inform and improve the development of FirstNet’s plan for each state.
- Washington believes FirstNet should consider its state plan, when delivered to the Governor, to be a binding contract, and with these comments the State specifies the major elements which need to be in that plan.
- FirstNet should engage states, in advance of delivering state plans, to develop the detailed provisions of a Spectrum Management and Lease Agreement (“SMLA”), Covered Leasing Agreement (“CLA”) and network policies. Such documents, especially including the financial provisions and implications, are essential to preserving Governors’ and states’ rights to deploy their own radio access network (“RAN”).
- FirstNet should not use its control of the spectrum to deny a state its right to deploy its own RAN, for example by extracting large fees for such use.

## Equipment

4. Washington generally agrees with FirstNet’s interpretation of the Act’s Section 6206(b)(2)(B) which requires FirstNet to “promote competition in the equipment market, including devices for public safety communications, by requiring that equipment for use on the network be: (a) built to open, non-proprietary, commercially available standards; (b) capable of being used by any public safety entity and by multiple vendors across all public safety broadband networks operating in the 700 MHz band; and (c) backward-compatible with existing commercial networks to the extent that such capabilities are necessary and technically and economically reasonable.”<sup>3</sup>
5. In particular, Washington believes a great deal of competition presently exists in the marketplace for commercial LTE equipment, e.g. smart phones and tablet computers. Many of these devices are proprietary in their hardware, operating systems and certain other characteristics such as an “app store” or its equivalent. Such proprietary devices include, for example, the iPhone, iPad and Windows phones. Even devices based on a more open operating system, e.g. Android, often have quite proprietary implementations such as the Amazon “Fire” smart phones and tablet computers. These devices are commonly and easily used by millions of responders today not only as a personal device, but also an official device. The business model of many responder

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<sup>3</sup> The Act: 47 U.S.C. § 1426(b)(2)(B)

agencies in Washington mandates the use of this equipment. The wide variety of such devices is clear indication that a competitive marketplace exists. Washington does not believe it was Congressional intent, in the Act, to prohibit public safety's use of such widely available and well-engineered equipment, as long as it connects to a standards-based long-term-evolution ("LTE") network built to "commercial standards".

6. The State believes "commercial standards" means widely accepted standards such as 3GPP's<sup>4</sup> standards for LTE releases. However FirstNet's deployment must be built to higher "public safety standards" in terms of security, site hardening and similar functionality, as specified in the National Public Safety Telecommunications Council ("NPSTC") Public Safety Grade report<sup>5</sup>.
  - a. The State of Washington notes FirstNet's "duties and responsibilities" as given in Sec. 6206(b)(2)(A)<sup>6</sup> require that it "shall ensure the safety, security, and resiliency of the network, including requirements for protecting and monitoring the network to protect against cyberattack." The other duties given in Sec. 6206(b)(2) give guidance that FirstNet shall "promote" or "address" certain other objectives, but only for safety, security and resiliency is FirstNet obliged to "ensure" this objective is met.
  - b. As a specific example, reports by the Congressional Commission to Assess the Threat to the United States of Attack by Electromagnetic Pulse (EMP) (EMP Commission)<sup>7</sup>, finds this is a credible threat as well as the threat of crippling solar storms. EMP is a threat to critical infrastructure that includes telecommunications. Efforts to protect and mitigate such infrastructure are strongly needed. The cost for such protections is estimated to be in the range of 3% to 10% of a total system project cost, and which is a small fraction of the costs in property and lives lost of not investing in the 'insurance' such mitigation efforts provide.
7. Washington generally agrees with FirstNet's interpretation of Section 6206(b)(2)(B)(ii) which requires that such equipment be "capable of being used by any public safety entity." Washington does not believe it was Congressional intent to prohibit the connection to the Nationwide Public Safety wireless Broadband Network ("NPSBN") of a specialized device such as an electronic handheld traffic ticket printing device or a

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<sup>4</sup> 3<sup>rd</sup> Generation Partnership Project: <http://www.3gpp.org/>

<sup>5</sup> See the NPSTC report at [http://www.npstc.org/download.jsp?tableId=37&column=217&id=3066&file=Public\\_Safety\\_Grade\\_Report\\_14052\\_2.pdf](http://www.npstc.org/download.jsp?tableId=37&column=217&id=3066&file=Public_Safety_Grade_Report_14052_2.pdf)

<sup>6</sup> The Act, Public Law 112-96 at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf>

<sup>7</sup> [www.empcommission.org](http://www.empcommission.org)

license plate reader simply because only a law enforcement entity would use such a device, rather than “any public safety entity”.

8. FirstNet should consider extending the open, non-proprietary requirement to the wireline connectivity and protocols which interconnect that RAN with its network components. This would allow seamless connection of databases, next-generation 911 systems and other local and state sources of public safety information via standard application programming interfaces (APIs) and similar standards.

### **A State’s Opportunity to Assume Responsibility for the Radio Access Network**

9. The State of Washington strongly believes FirstNet should honor the words, spirit and intent of the Act, particularly in regards to protecting the meaningful right of states to decide to build the Radio Access Network (“RAN”) themselves, rather than accept the FirstNet RAN plan. Many of FirstNet’s proposed interpretations of the Act in the Second Notice would allow it to pre-determine both the outcomes of the consultation process and to limit the Governor’s decision to a single outcome: opt-in. The State of Washington does not intend to opt-out and in particular desires to work with FirstNet to create a plan for the State of Washington which meets and exceeds the needs of public safety responders in Washington. Washington would prefer an option whereby local public safety entities and State agencies could actively participate in the FirstNet state plan, for example by operating deployable network elements or contributing fiber optic network-based backhaul, radio towers and other elements to the network. Furthermore, Washington understands the importance of nationwide, even international<sup>8</sup>, interoperability – in the event of a highly likely earthquake or terrorist event in Washington, public safety agencies from many states and Canada are likely to respond.
10. In order for the opt-in/out decision to be meaningful, the Washington SIEC must research and prepare a reasonable alternative or alternatives to opting-in to the FirstNet State Plan. In order to preserve the clear Congressional intent for each state Governor to have an option, FirstNet and the National Telecommunications and Information Administration (“NTIA”) must support the exploration of options. FirstNet recognized this duty in the Second Notice, stating “FirstNet ... has a duty to protect the meaningful right of States to opt-out under the Act.”<sup>9</sup> Beyond just an option for the Governor, research and preparation of alternative options will also inform and improve FirstNet’s own plan for the state. For example, a state might use a different coverage

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<sup>8</sup> Canada may deploy networks in the same spectrum: <http://www.firstnet.gov/newsroom/blog/canada-takes-key-step-toward-public-safety-broadband-network>

<sup>9</sup> Second Notice at 51-52.

modeling tool than FirstNet staff, thereby adding additional data sources and insights into the coverage proposed by FirstNet itself. Beyond the legal argument for the necessity of preserving Governors' options, in actual practice a Governor and public safety community in a state will be significantly more cooperative and willing to adopt FirstNet as a service provider, knowing that the alternative of the state itself deploying the RAN was thoroughly investigated, and, therefore, the FirstNet state plan is clearly superior. Unfortunately, NTIA arbitrarily decided on March 23, 2015<sup>10</sup>, to prohibit any use of State and Local Implementation Grant (SLIGP) funds for state activities of this type (e.g. "design, engineering and architecture" and "development of a state RAN business plan"), thereby subverting Congress' clear intent for Governors to have options in deployment of the NPSBN. FirstNet itself should not compound this error by placing additional obstacles in the path of states' research into options.

11. FirstNet must seriously consider not just the Act and its interpretation of that law, but also how it can actively engage the public safety community and state governments themselves as active partners in deploying and using the NPSBN. In its presentation of the draft RFP on April 24, 2015<sup>11</sup>, FirstNet has acknowledged that widespread adoption of the NPSBN by responder agencies is absolutely essential to its success. Active involvement of public safety agencies in each state during the present consultation phase (in advance of delivering a state plan) is essential, but is only one element of encouraging this adoption. Other methods FirstNet can use to encourage active involvement and adoption by local and state responders include:
  - a. Supporting states in complete research and investigation into other options (see paragraph above);
  - b. Actively engaging states in development and evaluation of responses to requests for proposals (RFPs) for the NPSBN;
  - c. Actively engaging states in development of network policies, spectrum lease agreements and covered leasing agreements (more information below).
12. FirstNet should also consider the requirement to renew its authority (and, indeed, its very existence) and the license to its spectrum in February, 2022. Of course such renewal depends heavily on political considerations, but an active, engaged, supportive community of local, state and federal responders will have significant influence on Congress.
13. A state which decides to opt-out and deploy the RAN itself faces many hurdles to successfully gaining permission to do so. These hurdles are already significant.

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<sup>10</sup> NTIA's revised guidance:

[http://www.ntia.doc.gov/files/ntia/publications/slignp\\_phase\\_2\\_stage\\_1\\_webinar\\_deck\\_-\\_final\\_-\\_04-07-2015.pdf](http://www.ntia.doc.gov/files/ntia/publications/slignp_phase_2_stage_1_webinar_deck_-_final_-_04-07-2015.pdf)

<sup>11</sup> See slides 21-26 here: <http://www.firstnet.gov/sites/default/files/firstnet-special-notice-and-draft-rfp-documents.pdf>

FirstNet should not interpret the Act in such a way as to increase the difficulties facing an opt-out state, e.g. by creating network policies arbitrarily and without ongoing consultation with states. The Act and Second Notice list these hurdles, which include:

- a. FCC approval of the state’s plan meeting technical interoperability requirements;
  - b. NTIA approval that the state’s plan is “comparable” to the FirstNet plan in deployment timeline, security, coverage and quality of service, and must demonstrate “cost-effectiveness”.
  - c. NTIA approval of the state’s application to lease spectrum capacity from FirstNet;
  - d. NTIA approval of a grant to support the state’s deployment of RAN (application for such a grant is not required by the Act, but such grant funding almost certainly will be required for any reasonable state deployment);
  - e. Negotiation of a spectrum lease with FirstNet;
  - f. Compliance with FirstNet’s network policies, for example, “practices, procedures, and standards for the management and operation of such network”.
14. The contents of the state plan FirstNet develops for each state are extraordinarily important not just to the Governor’s decision, but also to states’ development of other options and keeping the good will of the public safety community which is necessary for adoption after deployment<sup>12</sup>. Washington believes a state plan must include the following elements:
- a. Subscription prices and other costs of FirstNet’s service
  - b. Subscription terms and conditions such as the allowable and restricted uses for equipment (machine-to-machine, video and so forth)
  - c. Description of FirstNet subscriber provisioning service, including details on the State and local roles in such provisioning
  - d. Geographic service availability, including final coverage design
  - e. State and local roles in controlling access to and managing priority and pre-emption on the network (both RAN and core), e.g. a FirstNet-provided portal or console
  - f. Service Level Agreement(s), including throughput rates, acceptable downtime, trouble response window; technical and operational mechanisms employed to sustain the service level; and terms of remediation
  - g. Points of demarcation between the NPSBN and other public safety networks, for example land-mobile radio (“LMR”) networks operated by the State, cities, counties and other entities, both public and private, or interconnection to city, county, state and other land-line networks which provide access to internal databases, 9-1-1 centers and similar data sources and functionality
  - h. Security, including both physical and cyber security protections

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<sup>12</sup> See paragraph 9 of these comments.

- i. Device options, including device capabilities and device prices
  - j. Terms under which the State itself or another entity authorized by the State (city or county government) may expand coverage of the FirstNet RAN, either supported by FirstNet funding or by other funding, and how such expanded coverage might be operated, managed, expanded and upgraded
  - k. Service availability dates
  - l. Phased deployment plans
  - m. The proposed contract which FirstNet will execute with the apparent successful vendor(s) who will deploy the NPSBN on FirstNet's behalf
  - n. Other agreements specified in the next paragraph.
15. In addition to the information above, the FirstNet State Plan or accompanying plans must also include these documents, which need to be specified in a high degree of detail:
- a. Spectrum management and lease agreements (SMLAs) for the State use of FirstNet spectrum for public safety use should the Governor decide the State will build its own RAN instead of opting-in to the FirstNet plan;
  - b. Covered leasing agreements (CLAs) for use of the excess capacity of the FirstNet spectrum to serve consumers and businesses;
  - c. FirstNet's proposed network policies for the NPSBN, in particular any policies which control, manage or place requirements on RAN built by States which have opted-out.
16. Ideally, FirstNet will negotiate the agreements and policies specified in paragraph 12 *in advance* of delivering a state plan to any state. The details of these agreements and policies are vital to developing alternative plans for a state to deploy its own RAN, as well as evaluating the FirstNet State Plan for the state. For example:
- a. FirstNet has implied in its Second Notice that it might use the CLA as a mechanism to extract revenue from high-density states or states where the revenue expected from CLAs will exceed the cost to deploy a minimal public safety network. FirstNet has implied it would use such funds to deploy RAN in more rural or less densely populated states. Such details are vital to each state which develops options other than an opt-in to the FirstNet State Plan, as the amount of revenue to be expected from a CLA is, perhaps, the most significant portion of the business plan for an opt-out state, and is also undoubtedly material to NTIA's required determination of the cost-effectiveness of a decision by a Governor for a state to deploy a RAN itself.
  - b. Similarly, the terms of an SMLA are vital to any Governor in order to make an opt-in/out decision. If, for example, FirstNet restricts the term of an SMLA to three years, then a state's opt-out plan is almost undoubtedly infeasible financially, as a much longer term is undoubtedly required to recoup the costs of

an initial deployment<sup>13</sup>. Indeed, anecdotal evidence suggests a major difficulty with the inability of the City of Charlotte and the State of Mississippi to conclude an SMLA probably related to the short length of time FirstNet proposed for the SMLA in those two cases.

17. The terms of the SMLA or spectrum lease are particularly important. The ability to sign a reasonable lease of the FirstNet spectrum is vital to preserving the Governor's ability to make an opt-in/out decision. These terms must be reasonable, must be negotiated with (not dictated to) the State, and must be known at the same time FirstNet delivers its state plan.
18. Washington understands that CLAs and network policies will change over time. Washington suggests the FirstNet Board establish a formal Committee of state Governors or their designees to advise it on changes, updates and upgrades to such agreements and policies.
19. In particular, Washington disagrees with any interpretation of the Act which would allow FirstNet to interpret the Act to use its control of the spectrum, e.g. by extracting unjustified revenue from a CLA, to deny a state the right to opt-out. Indeed, FirstNet could use its authority over the spectrum to demand virtually any concession, whether required by the Act or not. Washington urges FirstNet to consider the implications of such an action on the trust in FirstNet from the public safety community, and therefore urges FirstNet to consider the recommendations above.
20. FirstNet must consider its State Plan, when delivered, a binding contract rather than a simple promise. Unless FirstNet considers the State Plan a binding contract, then the entire consultation process is relatively meaningless:
  - a. Congress clearly intended a Governor's opt-out plan to clear significant hurdles before execution. Many of these hurdles require significant commitment by a state to the FCC, NTIA and FirstNet. FirstNet's own state plans must mirror the same significant commitment expected of an opt-out state.
  - b. FirstNet has been very active in consulting with states, and has declared its intention to continue that consultation even after a State Plan is delivered to individual states. If states perform their roles under SLIGP and actively involve local, private and state responders in the consultation, the resulting FirstNet State Plan will reflect much of that input. Governors, prior to making an opt-in/out decision, will undoubtedly confer with responders inside the state. All of

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<sup>13</sup> This issue presents FirstNet and states a significant problem, as the law authorizing FirstNet limits its control of the spectrum to February, 2022.

this implies an expectation from the responder and elected official community that FirstNet will deliver on its promises in the State Plan for Washington.

- c. Furthermore, every state has a number of procurement regulations. Ideally an offering by FirstNet would constitute a sole-source procurement in most states because of the extensive consultation and the position of FirstNet as a Federal agency. A sole-source contract, is, of course, binding upon both the provider, FirstNet, and the state or local government. These facts further imply the State Plan should be considered a binding contract by FirstNet.
21. Some of the provisions of the Act grant NTIA and the FCC, rather than FirstNet itself, certain regulatory and approval authority, specifically when evaluating the plan by a state to construct the RAN itself rather than opting-in to FirstNet's state plan. In particular NTIA must evaluate the cost-effectiveness of an opt-out plan by a state. FirstNet has characterized some potential state investments in a state-deployed RAN as "gold-plated". Washington takes exception to this characterization, as no RAN deployment is ever complete or acceptable to protect the safety of the people of the United States. If a state believes it can gain additional revenue by opting-out and building its own RAN, both the Act and a state's own commitment to its responders will require it to re-invest such income in expansion of its RAN and its capacity. For examples:
- a. In every case, states will have areas with inadequate coverage which need improvement, such as basements of buildings, skyscraper canyons, remote forested areas, and tribal reservations.
  - b. In every case, states will have locations with inadequate capacity, e.g. stadiums, concert venues and similar gathering places.
  - c. In every case, states will have responder agencies which need financial support, e.g. volunteer firefighters and search-and-rescue organizations.
  - d. Technology improvements and changes will continue at a rapid pace, and such changes will require continuing and significant investment by opt-out states.
  - e. In short, no state is likely to "gold-plate" its network with income from CLAs.
22. However, that said, both NTIA and the FCC should determine and publish their criteria for evaluation of the plans by states to build their own RAN. Washington understands this is not directly addressed in the FirstNet Second Notice, but encourages FirstNet to work with these agencies toward this end.
23. FirstNet acknowledges that the Act does not require an opt-out State to serve in a customer-facing role including charging user fees to public safety customers,

and Washington agrees.<sup>14</sup> FirstNet’s analysis only reaches this question because the Act includes no provision *prohibiting* an opt-out State from serving in such a role, as FirstNet also acknowledges: “We preliminarily conclude, however, that ... a reasonable interpretation of all the provisions discussed above, including both operational and fee-related, would not preclude opt-out States, as sovereign entities, from charging subscription fees to public safety entities *if FirstNet and such States agreed to such an arrangement in the spectrum capacity lease with the States, and the arrangement was part of an alternative plan approved by the FCC and NTIA.*<sup>15</sup> (emphasis added).” Nowhere does the Act provide a basis for the proposition that an opt-out State is authorized to charge user fees only where explicitly permitted by FirstNet, the FCC, and NTIA. FirstNet’s preliminary conclusion in this regard cannot be reconciled with the explicit right of the Governor to choose *not* to “participate in the deployment ... proposed by” FirstNet.

24. The State of Washington strongly supports the concept of a wireless broadband network for responders, with priority to first responders. Washington emphasizes the need for officials at FirstNet, the FCC, NTIA and Congress to understand that a “first responder” can be almost anyone. Teachers can be first responders<sup>16</sup>. Citizens with first aid training can be first responders. Many, many citizens actively work as first responders by becoming search-and-rescue volunteers, joining volunteer fire departments, and joining the National Guard or Armed Forces Reserve.
  
25. Washington also strongly believes in the need for collaboration between local and state responders, state governments and FirstNet in order to achieve the goals and provisions of the Act. Far beyond the Governor’s opt-in/out decision, the ultimate success of FirstNet depends upon individual public safety entities “opting in” and adopting the nationwide public safety wireless broadband network. Interpretations of the Act which emphasize the legal authority of federal entities over such collaboration will have difficulty in achieving that goal.

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<sup>14</sup> *Second Notice* at 43 (“we also preliminarily conclude that the Act does not require that such States be the customer-facing entity”).

<sup>15</sup> *Second Notice* at 42-43 (emphasis added).

<sup>16</sup> A teacher at North Thurston High School in Washington tackled and subdued a shooter on April 27, 2015: <http://www.nbcnews.com/news/us-news/teacher-tackles-shooter-washington-high-school-no-injuries-reported-n349066>