

FirstNet Colorado
Response to the ‘State Alternative Plan Program (SAPP) and the First Responder Network Authority’
Docket Number 160706588-6588-01
August 18, 2016

The FirstNet Colorado Governing Body (FNCGB), representing public safety stakeholders throughout the state, appreciates the opportunity to respond to the notice regarding the State Alternative Plan Program (SAPP). The implementation of the National Public Safety Broadband Network (NPSBN) will have dramatic impacts on public safety communications in states and local jurisdictions for decades to come and the SAPP will play a critical role in ensuring states are able to implement the best solution to meet their unique needs.

Overarching Comments

Timing: In the Notice, the National Telecommunications and Information Administration (NTIA) states the final details of SAPP will not be available until the FirstNet state plan has been presented to states. Adopting this timeframe will significantly impair a state’s ability to exercise its statutory right to implement an alternative Radio Access Network (RAN) potentially making any decision by the Governor moot. In order for states to develop a practical alternative solution they must begin the process *now*. A key element of this process is understanding the procedural, operational and financial impacts of SAPP. Not having the specifics of this program until the time the state plans arrive places an artificial barrier on a state’s ability to make an informed decision. FNCGB believes NTIA should provide the complete details and parameters of SAPP to states no later than 90 days *before* the state plans are presented to a Governor. Additionally, we are concerned that NTIA requires that a state must apply for authority to enter into a spectrum lease and (if the state chooses) a construction funding grant within 60 days after FCC approval, NTIA places no similar obligation upon itself in which to process these applications. FNCGB believes that the NTIA should commit to acting upon all state applications within 30 days.

Transparency: One of the primary goals of the Administrative Procedures Act (APA) is to ensure openness, transparency and clarity in administrative proceedings within federal executive and regulatory agencies. Based on the information provided in the Notice, it appears the NTIA will not be following standard APA guidelines; potentially leading to an arbitrary and/or non-transparent process; this is not the intent of the APA or the Spectrum Act. As such, FNCGB requests specifics on how NTIA intends to comply with the APA while developing the SAPP. FNCGB believes the NTIA should follow formal rulemaking procedures, as defined by the APA with the opportunity to comment on the specific details of SAPP rather than the general ideas outlined in this notice.

Role of the NTIA: Based on the Spectrum Act the only agency that can approve or disapprove a state’s opt-out plan is the Federal Communications Commission (FCC). Once approved by

the FCC, the NTIA's role becomes transactional in regards to the process of applying for a construction grant and/or the process of applying for a spectrum lease. For further discussion, please see the comments from the state of Washington, Section II.

Support for the state of Washington's comments: In general, FNCGB supports and agrees with the full comments as filed by the state of Washington.

Specific Comments

Section II-D: Utilization of FirstNet's Statutory Interpretations

In this section, the NTIA states "NTIA will utilize FirstNet's relevant interpretations of provisions of the Act in carrying out its responsibilities on these matters". As the NTIA is subject to the APA, FNCGB believes any rules adopted or implemented must adhere to the standard rule-making process. The interpretations made by FirstNet, as NTIA proposes to use them, have the effect of rules as they dictate the requirements states must operate within. There has been no formal process to date regarding these interpretations. While FirstNet solicited public comment on the interpretations, its process fell short of what should be required by the NTIA under the APA. The responses to the FirstNet public notices were not made public, nor were other procedural requirements followed as required by the APA. Many of the interpretations taken by FirstNet have significant impact on the ability for a state to exercise its statutory right to opt-out and therefore materially impact the proposed SAPP process and outcomes. FNCGB believes that NTIA should provide further clarification addressing how it believes the adoption of these rules adheres to the APA.

Section III: Classifying Spectrum Lease as a 'Grant'

While the FNCGB agrees that the applications for construction funds would be considered a grant under the Federal Grant and Cooperative Agreement Act of 1977 Act (Grant Act); the process of granting authority to enter into a lease agreement does not fall into this category. In the notice the NTIA states that it makes this determination based on the language in Grant Act that states:

"an executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when -(1) the principal purpose of the relationship is to transfer a thing of value to the State of local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government...";

However this language is the same that is used to identify when to use a cooperative agreement. Therefore, the FNCGB requests additional information on the specific legal

authority the NTIA relied upon to conclude that spectrum lease agreements would be classified as a grant.

Additionally, the section of the Grant Act cited by NTIA references a “transfer of value” from the federal government to the state. However, with concern to the spectrum lease there is no “transfer” as the Spectrum Act is very clear that FirstNet is the license holder of the spectrum. A lease is not a transfer, rather the right to temporarily use. This fact further supports the argument that the lease agreement is not a grant.

Section III C - Determining Funding Levels

In Section III-C-2 the NTIA states that “NTIA may take into consideration cost increases FirstNet will incur should a state assume the responsibility to conduct its own RAN, and may reduce a final grant award accordingly.” FNCGB requests that the NTIA, follow the APA and publish the specifics of this analysis to allow state and local stakeholders to respond. The vague description of this requirement as presented in the SAPP leaves the FNCGB with many questions and concerns.

- What evidence of these ‘cost increases’ will the NTIA require of FirstNet?
- Will NTIA take into account increased ongoing and long-term costs to the **state** of opting-in versus opting-out?
- Is this analysis based solely on capital costs?
- Will NTIA take into account in-kind and existing assets that are provided by a state?
- What if the state’s plan provides better coverage than the FirstNet plan, how will the NTIA factor in the increased coverage into the overall cost comparison?
- Will NTIA factor in the opportunity costs that a state would potentially lose by opting-in?
- How will the NTIA develop a model that balances FirstNet’s perspective that state opt-out’s will impact the national effort with the fact that states may be able to develop more cost effective solutions on their own? States should not be forced to adopt a solution that is more expensive for their responders.

The NTIA further states that “a nationwide buildout can provide significant economies of scale...NTIA will take these cross-border economies into account in the context of a state opt-out plan’s cost effectiveness”. FNCGB requests further clarification on this statement:

- What are these “cross-border economies”?
- Based on the technical guidelines of 3GPP, the process of coordinating a state alternative plan RAN and the nationwide RAN should be minimal as long as they both adhere to the Minimum Technical Requirements as adopted by the FCC. What further costs is the NTIA referencing?

FNCGB believes The Spectrum Act clearly states that the NTIA is required to determine the ‘cost-effectiveness of the State plan’. This language is well defined, and requires that the analysis be based on the simple comparison of what would the **direct** costs of the opt-in plan versus the alternative state plan. As discussed, any inclusion of secondary or other costs is not

only difficult to quantify but outside authority granted to NTIA by the statute. FNCGB would welcome further discussion on this issue.

III-C-3 Environmental Compliance: Given the requirement that opt-out states who receive grant funding abide by the National Environmental Policy Act (NEPA), the FNCGB believes any alternative state plan should be governed by the same PEIS and categorical exclusions developed for opt-in states. If a state opts-in to the FirstNet plan, the vendor will be required to adhere to the PEIS. The vendor's relationship with FirstNet will be the same regardless of whether that state has opted-in or has opted-out. Consequently, the same PEIS and categorical exclusions should apply regardless of whether the state is operating under an alternative plan.

IV-A: Technical Capabilities to Operate: NTIA states it "... may require a state to provide information on each key staff member..." The FNCGB would like further information on how the NTIA will make this determination. For example, how will NTIA examine an individual's skill set? Will there be a list of minimum technical or management requirements? Are there a specific number of individuals required to maintain such a network? Does the NTIA use years of service as the baseline or technical qualifications? What if a state outsources the operation to a third-party as FirstNet intends to? Will that party be subject to this same requirement? If so, will FirstNet's partner be required to provide the same information and will the state be provided this information to make its own comparison?

Conclusion

In conclusion, the FNCGB is concerned that the current notice does not fully address the specifics of SAPP and potentially raises more questions than answers. FNCGB would request a much more thorough dialogue between the NTIA and local/state stakeholders to ensure the program meets the objectives of implementing the best network for each state.

The FNCGB appreciates the opportunity to submit these comments and hopes that the NTIA will find them helpful as it considers further action on its proposal.

Respectfully Submitted,

The FirstNet Colorado Governing Body