

**MEMORANDUM**

**To:** Rivada Networks, LLC  
**From:** John T. Nakahata  
**Date:** October 13, 2017  
**Re:** State Opt-Out Elections and Reversions to the FirstNet State Plan

You have asked whether, if a state notifies the FCC, NTIA, and FirstNet of its intent to opt-out, the state would then be precluded, prior to FCC approval of a state’s opt-out plan (“State Plan”), from having FirstNet assume responsibility for the construction, operation, maintenance, and improvement of the state radio access network (“RAN”) according to the final state plan submitted by the First Responder Network Authority (“FirstNet”) to the state (“FirstNet State Plan”). While the statute and FirstNet’s legal interpretations do not expressly address every eventuality prior to FCC approval of a State Plan, the only rational result, given the statute’s express terms and FirstNet’s legal interpretations, is that FirstNet would be required to assume construction, operation, maintenance and improvement of the state RAN in accordance with the FirstNet State Plan until such time as the FCC approves a State-submitted plan.

First, the Middle Class Tax Relief and Job Creation Act of 2012 (the “Act”)<sup>1</sup> expressly provides that if a state submits a State Plan, and the FCC disapproves that plan, “the construction, maintenance, operation, and improvements of the network within the State shall proceed in accordance with the plan proposed by [FirstNet].” 47 U.S.C. 1442(e)(3)(C)(iv). The Act does not define “disapproval,” so disapproval would have to include any final action by the Commission that was not approval.

Second, FirstNet has also issued a legal interpretation applying this same subsection to conclude that, if a state fails to “complete” its request for proposal within the 180-day period prescribed by the Act, “the construction, maintenance, operation, and improvements of the RAN within the State shall proceed in accordance with the FirstNet proposed plan for such State.” 80 Fed. Reg. 63504, 63506 ¶ 19 (October 20, 2015).

Two other scenarios are not expressly addressed in the statute or FirstNet legal interpretations, but must reach the same result in order to be rational, and thus not arbitrary or capricious:

- The FCC created a 60 day period after completion of the RFP within which the State must file the State Plan. In fact, the FCC’s timing rules merge the 180 day period for completion of the RFP with the 60 day period for filing the State Plan into a single 240-day period from the Governor’s opt-out notification to file the State Plan. Under these circumstances, the only rational result would be to treat a State’s failure to file a State Plan the same as either the failure to complete the RFP—which necessarily results in no filing of a State Plan—or FCC disapproval of such a Plan. In both cases, FirstNet assumes responsibility to construct the RAN in accordance with the FirstNet State Plan.
- A Governor might decide, after providing an opt-out notice but prior to the final national deadline for opt-out/opt-in elections, to change from an opt-out to an opt-in

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<sup>1</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 c§ 6001-6303, 6413 (codified at 47 U.S.C. §§ 1401-1443, 1457).

election, or to rescind the opt-out election. There is no reason to treat such a decision differently than a failure to complete the RFP process, which would be the result if the Governor simply suspended any further effort toward completing the RFP or filing a State Plan with the FCC.

It should be noted that the FCC's 240 day deadline to submit a State Plan begins to run from the date the Governor provides the state's opt-out notice to the FCC, FirstNet, and NTIA. Thus, if a Governor were to issue a state's opt-out notice on October 30, 2017, the deadline for submission of a State Plan would be June 27, 2018.<sup>2</sup> This is the case even though a state may opt-out until December 28, 2017, and a state opting out at that time would have until August 25, 2018 to submit its State Plan.

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<sup>2</sup> For purposes of this memo, we have ignored whether the terminal date falls on a weekend or other day when the FCC is not open. In such cases, the deadline falls on the next business day when the FCC is open.