

On June 2, the Federal Communications Commission (FCC) released a draft [Report and Order](#) outlining the procedures for FCC review and approval of alternative plans for any State that intends to “opt-out” of the FirstNet-AT&T State Plan. This Order follows a [Notice of Proposed Ruling Making \(NPRM\)](#) released by the FCC on August 26, 2016 that sought comments on proposed procedures for administering the state opt-out process and evaluating state opt-out applications, as provided under the Middle Class Tax Relief and Job Creation Act of 2012 (Act). See [September 1, 2016 BayRICS Blog](#). The Commission is scheduled to vote to adopt the Order at its June 22 meeting.

The tentative ruling addresses three key components of the opt-out process: (1) procedures that an opt-out State must follow to initiate the FCC review process; (2) the FCC evaluation process and criteria, including a “shot clock” or time limit for FCC decision; and (3) content and review of state plan elements, including demonstration of compliance with interoperability requirements, interoperability with the FirstNet core, and notice and documentation of the FCC final decision.

One important result of the proposed Order is to provide additional time and flexibility for States considering opt-out, as well as a series of Public Notices that help ensure that all parties are aware of statutory deadlines and process requirements. BayRICS has prepared the following process matrix based on the FCC’s proposed Order:

Illustration of Timing for FirstNet and FCC Opt-Out Decision and Alternative Plan Development and Review Process

NOTE: All dates are illustrative and based on completion of prior tasks with no delays

DATE	PROCESS	STATE ACTION REQUIRED
June 19, 2017	FirstNet Provides Draft State Plans to States via online portal	
June 19 – July 31, 2017	State Stakeholders Review and Comment on Draft Plans	States may solicit comments from stakeholders and provide them to FirstNet
October 1, 2017 90-Day Opt-Out Period Begins	FirstNet Delivers Final State Plans via Online Portal	
	FirstNet Provides Notice of Final Plan Delivery to FCC	
	FCC Issues Public Notice of Commencement of 90-Day Period and Last Day to File Opt-Out Notice	
December 30, 2017 180-Day RFP Period Begins	State must Opt-In <u>or</u> file opt-out notice with FirstNet, NTIA and FCC	If State chooses to opt-out, it must file notice with FCC, NTIA and FirstNet
	FCC Issues Public Notice Identifying States that have filed Opt-Out Notice	

DATE	PROCESS	STATE ACTION REQUIRED
June 30, 2018 60-Day Alternative Plan Development Period Begins	States Must Have “Developed and Completed” RFP	States must have (1) issued an RFP providing for full deployment of the state RAN (not merely development of a plan); (2) received firm commitment bids; and (3) selected a winning bidder.
August 30, 2018	States Must File Alternate Plan with FCC	States must file Alternative Plan With FCC
September 10, 2018 FCC 90-Day Shot Clock Begins	Within 10 business days, FCC Issues “Accepted for Filing” Public Notice and individual Docket for each State; FCC 90-day “shot clock” begins	
September 25, 2018	15-Day Comment Period	
October 10, 2018	15-day reply Comment/Amendment Period	States may provide Comments/Amendments to Alternative Plan
December 10, 2018	FCC will issue separate Order for each State accepting or rejecting the State’s Alternative Plan	If rejected, State’s only option is to file a lawsuit to appeal the FCC’s decision with the U.S. District Court for the District of Columbia. If accepted, State must obtain a spectrum lease form NTIA and may apply for grant funding.

The FCC notes that a state will now have 12 months to review the FirstNet State Plan (90 days) complete the RFP process (180 days), develop and file the alternate plan (60 days) and make limited changes to the plans during the pleading cycle (30 days). In addition, FirstNet stated in an *ex parte* filing that it anticipates that states will have additional opportunities to comment on the draft state plans before final state plans are provided to the states, triggering the statutory timing related to opt-out decision making. The combination of FirstNet and FCC timelines and opportunities for comment result in a 16-month window from the time a state first receives FirstNet’s draft state plan until the final alternative plan is locked for changes by the FCC.

Here are ten notable elements of the FCC Draft Order:

1. Public Notice of the 90-Day Review Period

The Order affirms that the Act provides every Governor with 90 days from the time FirstNet provides the state with its final state plan to decide whether to opt out of the NPSBN, and, if the Governor chooses to opt-out, the state then has 180 days to “develop and complete requests for proposals for the construction, maintenance, and operation of the radio access network within the State.”

The Order adds that “FirstNet stated in an *ex parte* filing that it intends to issue draft plans to the states by means of a dedicated web portal for each state. FirstNet will provide an opportunity for each state to provide feedback, after which it will use the same web portal mechanism to deliver the final plans to each state. *FirstNet indicated that the delivery of these final plans would provide the statutory “notice” that would trigger the 90-day clock.*” (emphasis added)

Therefore, to ensure that all parties clearly understand when the 90-day clock begins and ends, the FCC has directed FirstNet “to immediately notify the [FCC] Public Safety and Homeland Security Bureau (Bureau) when it provides such notice to a state. The Bureau will promptly issue a Public Notice announcing the commencement of the 90-day period and specifying the deadline for states to file opt-out notifications with FirstNet, NTIA, and the Commission. The FCC also clarified that the governor or the Governor’s duly appointed designee may provide this opt out notification.

2. Requirements for 180-Day “Develop and Complete RFP” Process

Next, the FCC addresses how a State may demonstrate that it has met the Act’s requirement to “develop and complete requests for proposals for the construction, maintenance, and operation of the radio access network within the State” within 180 days of the filing of the opt-out notification. The FCC states that, while the Act is “unclear” as to how far states must have progressed in the RFP process to meet the 180-day “develop and complete” requirement, the FCC concludes “that it is appropriate to require states to “develop and complete” RFPs within this time period by (1) issuing an RFP providing for full deployment of the state RAN (*i.e.*, the RFP must cover the actual network build, not merely development of a plan) and (2) receiving firm commitment bids on the RFP; and (3) selecting a winning bidder.

The Commission indicates that the “develop and complete” requirement is necessary to ensure that the alternative plans are complete and final. “Different bidders may respond to RFPs with different designs, and these differences may lead to amendments to the RFP or refinements in the final project or otherwise prove to be significant for the interoperability plan required to be submitted for Commission review.”

3. Additional 60 Days to Complete the Alternative Plan

Although the RFP process must be complete within 180 days, the FCC will give states an additional 60 days to develop and submit the alternative plan to the FCC. The FCC concludes that

States should have some additional time beyond the 180-day RFP completion period to assess RFP bids and finalize their alternative plans for Commission consideration. . . we believe providing this additional time will provide states flexibility to complete their alternative plans without significant delay, and will assist in ensuring that the plans filed with the Commission are robust and fully realized. The 60-day window will also allow an opt-out state to focus, within the

180-day period, on efforts to develop and complete its RFP without having to develop its alternative plan in parallel, possibly taxing finite state resources.

The FCC will require states to certify and provide evidence in its alternative plan that the 180-day timeframe was met.

4. Nature of the Proceeding, Parties, Comment Period and Amendments After Filing

Next, the FCC concludes that it will treat each state opt-out application as a “separate restricted proceeding” with the parties initially limited to the state, FirstNet and the NTIA. The FCC notes that “these proceedings are similar in nature to specific spectrum license applications or adjudicatory proceedings, rather than rulemakings, so it is appropriate to initially limit immediate participation to those directly impacted.” Other persons or entities seeking to participate in a proceeding may petition the Commission for leave to intervene based on a demonstrated showing of interest.

After the opt-out notification period, the Bureau will issue a Public Notice identifying the states that have filed opt-out notifications with the Commission and establishing individual dockets for each opt-out proceeding. The Public Safety Bureau will initially review each plan and make an initial determination whether the plan meets relevant filing criteria, and to issue a public notice identifying each application that has been “accepted for filing.” The Bureau should issue such public notice as soon as practicable, within 10 business days of receipt of the alternative plan if possible.

After the “accepted for filing” public notice is issued, the FCC will allow NTIA and FirstNet, as well as any others granted party status, 15 days to comment on the alternative plan and file comments. States will then have 15 days to amend their plans and/or file reply comments, again with a request for confidential treatment as appropriate. “This 30-day pleading cycle allows for some iterative discussion between a state, FirstNet, and interested parties, while still providing a firm deadline and certainty of process.”

5. The Shot Clock

While the Act does not require the FCC to act on an alternative plan within any specified timeframe, the FCC has set a 90-day “aspirational” shot clock for Commission action, which will start upon issuance of the “accepted for filing” public notice for each alternative plan. The 90-day shot clock “will establish clear expectations for the Commission and for the parties involved to encourage prompt action and avoid delay.” Although the shot clock is aspirational, the FCC states that it only anticipates suspending it under special circumstances, such as a national, state, or local emergency that requires diversion of Commission staff resources to address the situation.

6. The Scope of Alternative Plan Review

The FCC will limit its scope of review to the RAN elements of state alternative plans, defined as

All the cell site equipment, antennas, and backhaul equipment, based on commercial standards, that are required to enable wireless communications with devices using the

public safety broadband spectrum including standard E-UTRAN elements (*e.g.*, the eNodeB) and including, but not limited to, backhaul to FirstNet designated consolidation points. Thus, we will not examine plan elements pertaining to equipment or applications, or issues related to coverage/financing, etc. These elements are more appropriately the focus of NTIA's subsequent review of the plan as directed by the Act.

7. Content and Review of State Plan Elements

The Act limits scope of Commission review to the two specified elements, (1) compliance with the minimum technical interoperability requirements and (2) interoperability with the nationwide public safety broadband network. In addition, the Act established a "Technical Advisory Board for First Responder Interoperability" (Interoperability Board). The Interoperability Board was required to develop "recommended minimum technical requirements to ensure a nationwide level of interoperability" for the NPSBN ("Board Report"). The Board Report included 46 requirements ("SHALLS") and 55 considerations ("SHOULD") for a nationwide interoperable public safety broadband network.

The FCC concludes that it will limit its review under the first prong to the "SHALL" criteria originally proposed by the Interoperability Board. Alternative plans only need address technical interoperability criteria relating to the RAN as defined in the Interoperability Board's Requirements (1)–(3), (7)–(10), (20)–(25), (29), (39), and (41)–(42) .

As for the second prong (actual interoperability with the FirstNet network), the FCC will limit its review solely to compliance with "those RAN-related network requirements specified by FirstNet in its forthcoming network policies that are necessary to ensure interoperability with the FirstNet network." The FCC will require only a "paper" compliance showing, and will not require states to demonstrate interoperability in the field, which would be "overly prescriptive and unachievable in the timeframes given."

The FCC acknowledges that the FirstNet's network policies are not yet publicly available. Once FirstNet has made its network policies available and has identified those network policies that it determines to be relevant to interoperability, the Public Safety Bureau is directed to issue a Public Notice that will seek expedited comment on those network policies relevant to interoperability. The Commission will then issue an order specifically identifying those elements of FirstNet's network policies that it will consider in evaluating state compliance with the second prong of the statutory test.

8. Interoperability Self-Certification

The FCC will require states to include a self-certification by the Governor or their designee confirming the state's adherence to FirstNet network policies identified by FirstNet as relating to technical interoperability. The certification should be supported with specific references to the RFP and/or bid responses supporting the specified requirements. However, the FCC will not require third party review of certifications.

9. State Core Network Proposals

Some states requested that the FCC affirmatively conclude that a state may include a separate state network core in its alternative plan. However, FCC found this issue to be outside the scope of its statutory review responsibility. Although the FCC will not reject an otherwise qualified alternative plan that includes a proposed state core, it will limit its review solely to the interoperability of the state RAN with the FirstNet network, and will not examine possible RAN interconnection with non-FirstNet networks or cores.

10. Documentation of the FCC's Final Decision

The full Commission will issue a separate Order for each opt-out request. Each order will provide a brief explanation of the Commission's decision based on the statutory criteria as applied to the information submitted in the record. The FCC states that this approach will provide a sufficient basis for judicial review under the narrow scope provided by the Act.