

BayRICS
JOINT POWERS AUTHORITY
BOARD OF DIRECTORS MEETING
STAFF REPORT

MEETING DATE:

Thursday November 14, 2013

AGENDA ITEM:

Item 9 - Staff Report Spectrum Lease Agreement with FirstNet

RECOMMENDATIONS:

Approve the SMLA and BOOM changes and authorize the BayRICS Chair to execute the modified BOOM and SMLA agreements.

SUMMARY/DISCUSSION

At its July 11, 2013 meeting, the BayRICS Board approved a tentative Spectrum Manager Lease Agreement (SMLA) and delegated authority to the BayRICS General Manager to execute the agreement and any amendments that do not substantially change the agreement terms. At its September 16, 2013 meeting, the Board approved additional revisions to that SMLA, and staff informed the Board that FirstNet had asked BayRICS and Motorola to amend the BOOM agreement to address several concerns identified by FirstNet. FirstNet expects the BOOM changes to be approved by BayRICS and Motorola prior to approval of the Spectrum Lease. FirstNet's current deadline to complete lease negotiations is November 15, 2013.

BayRICS' negotiations team, FirstNet and Motorola have tentatively agreed to several changes to the BOOM and additional changes to the SMLA. However, the parties remain apart on two key issues: (1) Proprietary technology/Push to Talk (PTT) and (2) Assumption of responsibility for costs to implement future changes required by FirstNet. Both issues raise concerns that FirstNet's current position is too open-ended and could result in potential uncapped costs to MSI/BayRICS. These concerns are described in more detail below. The parties continue to meet and discuss resolution of these outstanding issues, with the goal to complete negotiations before the November 14 Board meeting.

Except for these two outstanding issues, staff analysis indicates that the proposed changes would result in no increased user fees or costs for BayRICS or its Members. The following sections provide a detailed overview of staff's recommendations for changes to the SMLA and BOOM changes. Unresolved issues are highlighted in yellow.

I. Additional Changes to the SMLA that was Approved by BayRICS on September 16

1. Motorola designated as a "sublessee" of the spectrum (BayRICS remains the "lessee") and Motorola assumes specified responsibilities in Section II.A.3.

2. Language added to Section I that references BOOM Agreement and clarifies operational responsibilities between BayRICS and Motorola;
3. Section IV.C: Motorola's sublessee spectrum rights will terminate when the BOOM terminates;
4. Section II.H (Infrastructure): Two unresolved issues in this section: (1) Proprietary Solutions/Push to Talk (PTT) and (2) Assumption of responsibility for costs of future requirements adopted by FirstNet.

- **Proprietary Solutions/Push to Talk (PTT):** The BOOM requires MSI to provide a pre-standards based PTT functionality; however FirstNet is concerned that the application creates potential cost and interoperability risk. BayRICS and/or Motorola must agree to drop the application or cover all expenses to migrate the user base to any FirstNet-approved technology. FirstNet has proposed the following language in SMLA Section II.H:

If Motorola and Lessee include any proprietary equipment or solutions in the BayWEB Infrastructure, then they shall pay for the costs of for removing the proprietary equipment or solutions from the BayWEB Infrastructure. Motorola and Lessee shall not include a push to talk feature or any other features that could impact interoperability in the BayWEB Infrastructure. Motorola and Lessee shall pay the costs to implement changes required as a result of modifications to the FCC rules or regulations.”

MSI can agree to meet 3GPP open standards requirements, but believes that proposed language is too broad. The parties are looking at resolving this issue by agreement that LTE core and radio site equipment certified as meeting 3GPP standards is not “proprietary.” **This issue may be resolved, with agreement to keep the FirstNet language quoted above.**

- **Future Requirements adopted by FirstNet:** FirstNet's position is that Motorola/BayRICS should bear the costs of compliance with any FirstNet availability, capacity, performance, coverage requirements adopted prior to April 30, 2013. FirstNet's proposed language:

“To the extent allowable under 15 CFR Part 14 et seq., Motorola shall be responsible for the costs of ensuring that the BayWEB Infrastructure operating on the FirstNet Spectrum as of April 30, 2015, complies with any availability, capacity, performance, coverage requirements (such as, disaster management and recovery, network hardening, in-building coverage, service level agreements, key performance indicators, physical network, and cyber security) adopted by FirstNet for the NPSBN.”

MSI's believes that language amounts to a potentially uncapped cost liability. Motorola cannot accept additional, undefined requirements as part of its grant, and has proposed this language as alternative.

“FirstNet acknowledges that the BayWEB Infrastructure has been designed under the Grant to meet the current funding levels approved under the Grant, and that any change or additions thereto will constitute a change in scope of the Grant. If FirstNet has additional requirements during the period of the Grant through April 30, 2015 (such as availability, capacity, performance, coverage, disaster management and recovery, network hardening, in-building coverage, service level agreement, key performance indicators, physical network, and cybersecurity adopted by FirstNet for the NPPSBN), then FirstNet shall follow the grant procedures under 15 CFR Part 14 to change the scope of the Grant, if allowable.”

II. Proposed Changes to the BOOM

1. **Transfer of Title:** Transfer of Title of the BayWEB System to BayRICS must occur prior to the date of the State’s Decision to opt-in or opt out. This must be explicitly set forth in the BOOM agreement.

Current BOOM Language: The BOOM agreement currently allows Motorola to hold title of the assets until up to 10 years after the Systems Readiness Date.

Proposed Amendments: Change Section 5.5 to specify that title will transfer to BayRICS *“Ten full calendar years after the System Readiness date, or at the time of the State Decision, whichever occurs earlier.”*

Move several conditions currently in Section 5.5 to the Section 3.11 (Termination).

Add language to ensure that MSI will continue to operate the system and BayRICS will not be at risk for system costs after title transfer: *“If a transfer of title occurs pursuant to the State Decision prior to ten full calendar years after the System Readiness date, the Parties agree that all other terms and conditions of this Agreement shall remain in effect until the Agreement terminates as provided in Section 3.11 and be security to Motorola’s interest in this Agreement and Motorola will receive a purchase price for system assets to be paid upon termination of this Agreement in accordance with Section 3.11.3”*

2. **Buyout Provision:** Upon State Opt-in decision, FirstNet requires the ability to purchase the System and terminate the BOOM. FirstNet has asked Motorola to develop a buyout formula and non-binding schedule of costs and revenues, acceptable to FirstNet and BayRICS. This early buyout option must be reflected in the BOOM.

Current BOOM Language: No buyout provision. Unless parties agree to a different time frame, BOOM terminates ten (10) full calendar years after the System Readiness date.

Proposed Amendment: Add language to the Termination Section (3.11) that gives FirstNet the option to negotiate a buyout/termination after the State Decision:

3.11.2 *Early Termination Upon FirstNet Purchase Agreement.* If the State Decision is to “opt-in,” then at any time after the date of the State Decision, FirstNet may provide written notice to the Parties of its intent to purchase the System and state that funding appropriations are provided and authorized by FirstNet. An initial negotiations period of 30 days shall be established, running from the date of receipt of the written notice. This negotiations period may be extended by mutual agreement of the Parties. During such negotiations period or any extensions thereof, the Parties will continue to comply with all terms and conditions of this Agreement. Once a system purchase agreement has been executed by Motorola, the Authority and FirstNet, this Agreement will terminate, unless extended or modified under the terms of the purchase agreement.

3.11.3 *Buyout/Early Termination by FirstNet.* Upon FirstNet providing written notice of intent to purchase the System, and only to the extent allowable under federal law, Motorola shall offer, and the Authority shall agree, to an early termination buyout by FirstNet of this Agreement. The Parties agree the buyout price will be calculated according to the following formula: Total Capital and Operational Expenses incurred by Motorola (not including any portion of the federal BTOP funds) plus a reasonable rate of return, less a percentage of any revenues received by Motorola. The Parties acknowledge that the following schedule is only an estimate of Motorola’s projected expenses and return on investment and does not reflect projected revenues. This estimate is subject to all relevant provisions of the Federal Acquisition Regulation, including, but not limited to FAR Subpart 1.602, Parts 6 -7, and 12. The prices listed below are commercial prices under FAR Part 12, and do not constitute cost and pricing data. If for any reason this provision violates federal law, it shall be null and void

3. Revenue Share for Coverage Enhancements: The BayRICS network must meet the same/similar coverage requirements of the nationwide standards (not yet established). FirstNet believes additional sites will need to be added to the network. FirstNet investment will require revenue share in proportion to their investment for sustainability.

Current BOOM Language: No section addresses revenue sharing.

Proposed Amendment: BOOM language added to section 3.5.3 that if FirstNet contributes any investment toward System enhancements, expansion or functionality, it will be eligible to share in all System revenues: “*To the extent that the Parties agree and FirstNet contributes any investment toward System enhancements, expansion or functionality, it shall be eligible to share in all System revenues, as a proportion of the aggregate investment contributed by FirstNet, Motorola and the Authority. The Parties shall resolve any disagreements under the Section in accordance with Section 11 of this Agreement. Federal BTOP program funds shall be excluded from the calculation of the*

aggregate investment by the Parties; however, any revenue sharing shall be based on Motorola's business model as originally approved under Motorola's Grant."

4. BOOM Technical and Pricing terms: If the BOOM is assigned to FirstNet, FirstNet will likely require terms either not presently included in the BOOM or requiring different language. These areas include but are not limited to disaster recovery, Service Levels (SLA) Key Performance Indicators (KPI), maintenance, features, upgrades, and security. FirstNet has not developed these requirements for the nationwide network.

Current BOOM Language: Specified SLAs and requirements are included in Exhibits to the Agreement.

Proposed Amendment: Add "Most Favored Customer" condition, to enable BayRICS to take advantage of any terms, conditions, or pricing that FirstNet and Motorola may agree to elsewhere. Language of new Section 3.18:

MOST FAVORED CUSTOMER. During the term of this Agreement, Motorola agrees that during each calendar year the aggregate price (as calculated below) for infrastructure hardware, software and services sold, licensed or provided to the Authority under this Agreement, will be no less favorable than the prices provided by Motorola to its other United States state and local governmental customers who purchase equal or lesser volumes of the same infrastructure hardware, software and services on substantially equivalent terms and conditions and in a contemporaneous timeframe (i.e. from January 1 to December 31 of the same calendar year) ("Most Favored Customer Pricing"). The MFC pricing shall include operational scope and service levels allowing the Authority or their future assignee to adopt relevant contract terms from any future agreements that might later be struck between FirstNet and MSI.

Motorola's obligation to offer Most Favored Customer Pricing is subject to the following:

- a) Motorola's Most Favored Customer Pricing obligations exclude from comparison trial markets and Greenfield Systems. "Greenfield System" means a customer's initial deployment of a Motorola network; and*
- b) the pricing comparison described above shall take into account all factors that have an effect on the total amount paid for products, including by way of example, more favorable shipping and transportation charges, more favorable financing or payment terms, volume discounts or rebates, system discounts, trade-in credits, the granting of free products or services, reduced-price incentives or other incentives, and any other terms and conditions; and*
- c) the product comparison described above shall take into account functions, features and certification levels (if any) employed in the products. Versions of equipment with different certification levels, functions or features than those*

being purchased under this Agreement may be sold to other customers at lower prices; and

d) Motorola's Most Favored Customer Pricing obligations exclude prices offered to third-party distributors; and

e) Motorola's Most Favored Customer Pricing obligations are subject to purchaser's compliance with the terms and conditions of the purchase and sale agreement, including without limitation, compliance with all payment obligations and fulfillment of any applicable purchase commitments.

5. **Core Network:** Per the statute, the RAN networks, regardless of "opt" status must integrate to the FirstNet core. FirstNet seeks to minimize cost and risk to public safety by collaborating on design modifications, while recognizing the need to meet the BTOP grant requirements. FirstNet is reviewing design options and seeks Motorola's and BayRICS' suggested approach on how to best protect public safety and taxpayer interests long-term.

Current BOOM Language: Core to be located at Twin Peaks in San Francisco.

Proposed Amendment: None. As FirstNet has not yet defined the nationwide core design, we will defer this discussion and decision until the design has been closed. Given the possibility of increased migration complexity, FirstNet requests a change in the language in section K of the SMLA from "not result in" to "minimize". This section provides:

Upon FirstNet providing written notification to the Motorola and Lessee, the Parties shall enter into good faith negotiations for an agreement for the transfer of control and relocation of the Equipment consistent with the Motorola's obligations under 15 C.F.R. § 14.34 and the terms and conditions of its BTOP Award. Any relocation of Equipment will be done in a manner that will minimize any degradation of Lessee's provision of wireless communications services to Public Safety Entities, including availability, coverage, performance or functionality of service provided to Public Safety Entities. Motorola or Lessee will not be responsible for any costs associated with relocation of Equipment. FirstNet will also not seek to relocate Equipment that was acquired in part, with Motorola's or Lessee's funds, unless the Parties enter into a subsequent agreement.

6. **Other Changes to the BOOM:**

- **Throughout the Agreement:** References to "Public Safety Spectrum Trust (PSST)" are replaced and references to FirstNet added to reflect change in the holder of license to the spectrum.

- **Section 2.8:** BayRICS has agreed to a broader definition in the spectrum lease for eligible usage. This change adds the same definition of “eligible user” to the BOOM.
- **NEW Section 2.28:** Adds the same definition of “State Decision” found in the SMLA.
- ***Change date in Sections 2.28, 3.5.1, 2.9.4 and 8.1, from “April 30, 2013” to “April 30, 2015”:*** MSI agrees to comply with any System availability, capacity, performance, coverage requirements adopted **by FirstNet** for the NPSBN and applicable to the as-built System on April 30, 2015. **MSI has not agreed to comply with new requirements adopted by FirstNet prior to April 30, 2013. See SMLA discussion above.**
- **Section 3.3:** BTOP Grant funds may be used for site remediation costs when approved by the Grants Office.
- ***New Section 3.5.1(viii):*** MSI agrees to comply with applicable Spectrum Lease terms, the SMLA is incorporated by reference into BOOM as Exhibit W and takes precedence over the Agreement, except the SMLA shall not take precedence over any Site Access and Use Agreements (Exhibit V) unless approved by site owners.
- Add reference to FirstNet and make other minor changes to “meet and confer” language in Section 3.8 (Coverage) and 3.9.4 (Regulatory Changes)