

**Before the  
National Telecommunications  
and Information Administration**

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State Alternative Plan Program )  
(SAPP) and the First Responder ) Dkt. No. 160706588–6588–01  
Network Authority Nationwide Public )  
Safety Broadband Network )  
)

**COMMENTS OF THE STATE OF WASHINGTON**

The State of Washington (“State” or “Washington”) submits these comments in response to the above-captioned National Telecommunications and Information Administration (“NTIA”) notice and request for comments (“Notice”)<sup>1</sup> addressing NTIA’s authority, role, and process relating to the “opt out” provisions of the federal law (“Act”)<sup>2</sup> creating the First Responder Network Authority (“FirstNet”).

**I. Introduction**

In creating FirstNet and mandating that it deploy and operate a nationwide public safety broadband network (“NPSBN”), Congress obligated each state governor to decide whether to “participate in the deployment of the [NPSBN] as proposed by [FirstNet]” or else to “conduct its own deployment of a radio access network [(“RAN”)] in such State,” an alternative commonly referred to as “opt-out.”<sup>3</sup> Congress also specified a process for states that choose to opt out, a process that includes a role for NTIA and is the subject of the Notice.

Deciding whether to opt out is not just an obligation—it is also the governor’s right, a statutory benefit that was a key piece of the bargain that enabled passage of the Act in 2012. It is the provision that injected into the otherwise centralized, federal approach favored by Senate Democrats (introduced as S. 911) the distributed, state-centric approach favored by

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<sup>1</sup> Department of Commerce, National Telecommunications and Information Administration, *State Alternative Plan Program (SAPP) and the First Responder Network Authority Nationwide Public Safety Broadband Network*, Notice and Request for Comments, Dkt. No. 160706588–6588–01, 81 FR 46907 (July 19, 2016) (“Notice”).

<sup>2</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, Title VI, 126 Stat. 256 (codified at 47 U.S.C. 1401 et seq.) (“Act”).

<sup>3</sup> Act, Sec. 6302(e)(2).

House Republicans (and as reflected in H.R. 3630, the version of the Act first passed by the House), thus forming a compromise both factions were willing to approve.<sup>4</sup>

Given the importance of the opt-out provision both to Congress and to the quality of public safety communications capabilities in a state, governors take their decisional role very seriously, and NTIA should do the same. NTIA should endeavor to fulfill its role under the Act by supporting an opt-out process that is as efficient and predictable as possible for the opt-out state; it should avoid imposing unnecessary burdens upon the state or injecting unnecessary uncertainty into an already cumbersome statutory opt-out process.

As demonstrated below, Congress tightly defined and constrained both NTIA's statutory role in the opt-out process as well as NTIA's implementation of that role. Thus, not only would the unduly burdensome or unworkable NTIA review process described in the Notice be a poor policy choice, but it would also violate the Act by restricting the governor's statutory right and obligation to make an opt-out decision and by asserting authority NTIA does not possess to thwart a governor's election to opt out.

Washington supports an independent FirstNet acting in its statutory role as lessor of spectrum and developer of NPSBN policy. The State objects, however, to NTIA's *ultra vires* claim to a role in the opt-out process that Congress neither intended nor authorized.

## **II. NTIA Overstates Its Role and Authority in the Opt-out Process Under the Act**

However strong a state's opt-out plan, that plan cannot succeed unless the state obtains a lease from FirstNet for use of the Band Class 14 spectrum licensed to FirstNet for use in the NPSBN. In the Notice, NTIA places itself in the role of arbiter wielding veto authority over a state's ability to obtain such a lease and thus over the state's opt-out decision itself. NTIA has no authority to claim such a role. Rather, if a state's opt-out plan is approved by the Federal Communications Commission ("FCC"), the state is entitled to a lease; NTIA has no authority to obstruct execution of the lease between FirstNet and the state.

Similarly, through its proposed process for reviewing applications for grant funds, NTIA claims authority to make policy and exercise discretion that it does not legally possess. The Act assigns NTIA the role of fact-finder in reviewing an opt-out state's application for funds; it does not authorize NTIA to create policy or otherwise reduce the amount of a grant during the opt-out review process to achieve a policy goal. In short, if NTIA finds the opt-out state has made

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<sup>4</sup> See, U.S. Senate. Committee on Commerce, Science, and Transportation. *Public Safety Spectrum and Wireless Innovation Act, (to Accompany S. 911)*, Report 112-260 (Dec. 21, 2012) at 12 ("With some modifications, the provisions of S. 911 were enacted into law as title VI of the Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112-96), which was signed into law on February 22, 2012.").

the required factual showing,<sup>5</sup> the state is entitled to a grant in the amount of the “funding level for the State as determined by NTIA” and revealed to the governor by FirstNet along with the FirstNet proposed state plan.<sup>6</sup>

**A. Congress Designated and Authorized the FCC—Not NTIA—to Approve or Disapprove an Opt-out Plan.**

By any measure, Congress imposed a burdensome process upon any state that chooses to opt out, but it was deliberate in how it designed that process, being careful to protect the governor’s decision to opt-out from undue obstruction. Specifically, Congress recognized that FirstNet and NTIA would generally oppose opt-out proposals, so it identified the FCC as the independent agency specifically authorized to provide “approval or disapproval” of the state’s alternative plan.<sup>7</sup> Congress also recognized the importance to FirstNet and the states of finality in the FCC’s decision, so it provided limitations on judicial review<sup>8</sup> and explicitly stated that in the case of FCC disapproval, FirstNet shall proceed with its proposed plan to deploy the RAN in the state.<sup>9</sup>

In contrast to its specific treatment of the FCC’s authority, Congress did not reference any NTIA “approval or disapproval” authority. It also did not describe the effect of any NTIA “decision” or protect such a “decision” from judicial review. Congress knew how to provide such authority with clarity and specificity in its specific description of the FCC’s role; it did not include such a description of NTIA’s role, because it did not intend—and did not provide—such authority for NTIA.

**B. After the FCC Approves a State’s Opt-out Plan and the State Submits a Spectrum Lease Request to NTIA, the State Is Entitled to Obtain a Lease.**

NTIA infers an authority to “grant or reject applications” for “Lease Authority”<sup>10</sup> from two provisions in the Act, neither of which is adequate to support the claimed authority. NTIA has no authority to obstruct a state’s effort to obtain a spectrum lease.

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<sup>5</sup> Act, Sec. 6302(e)(3)(D).

<sup>6</sup> Act, Sec. 6302(e)(1).

<sup>7</sup> Act, Sec. 6302(e)(3)(C)(ii) (“[T]he Commission shall either approve or disapprove the plan.”).

<sup>8</sup> Act, Sec. 6302(h).

<sup>9</sup> Act, Sec. 6302(e)(3)(C)(iv).

<sup>10</sup> Notice at 46910.

**1. NTIA Serves as the Mechanism for a State to Request a Lease from FirstNet, But Congress Gave NTIA No Authority to Obstruct That Request.**

The Act provides that “[i]f the Commission approves [an opt-out] plan ... the State ... shall apply to the NTIA to lease spectrum capacity from [FirstNet].”<sup>11</sup> The Act also specifies, however, that only FirstNet, not NTIA, holds the spectrum license and can therefore enter into a spectrum lease with the state, and that FirstNet is independent of NTIA.<sup>12</sup> Faced with ascribing some meaning to the Act’s requirement that an opt-out state “apply to NTIA to lease spectrum capacity from FirstNet,” NTIA reads a few new words into the Act, contending that the opt-out state must seek from NTIA “*authority to enter into a spectrum capacity lease with FirstNet.*”<sup>13</sup> In taking this step, NTIA creates a new hurdle for the opt-out state (the need to obtain “Lease Authority”), as well as a new authority for itself—discretion to deny “Lease Authority,” thus effectively killing the state’s opt-out effort.

NTIA’s self-empowering interpretation arbitrarily ignores the straightforward reading that effectuates the statutory structure instead of overriding it. Congress did not use the phrase “apply to the NTIA” as an oblique way to create a new authority for NTIA; rather, Congress used the phrase simply to denote a transactional mechanism, indicating only that NTIA is the entity through which the State must submit its request for a FirstNet spectrum lease.

As explained above, Congress knew how to be clear and specific when bestowing upon the FCC the authority to “approve or disapprove” a state’s opt-out plan, including explicit use of that language and detailed limitations on judicial review of an FCC decision to disapprove.<sup>14</sup> By contrast, Congress made no reference to any NTIA authority that would allow it to “grant or reject applications” for “Lease Authority.”<sup>15</sup> The difference is no accident: Congress did not use clear language to bestow such authority on NTIA because it did not mean for NTIA to serve in that role.

Further confirming that Congress had no intention of putting NTIA in a position where it could obstruct an opt-out state from obtaining a spectrum lease, the Act is devoid of language specifying any standard NTIA should apply in implementing NTIA’s claimed authority. Congress

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<sup>11</sup> Act, Sec. 6302(e)(3)(C)(iii).

<sup>12</sup> Act, Secs. 6201(a) (“the Commission shall reallocate and grant a license to the First Responder Network Authority for the use of the 700 MHz D block spectrum and existing public safety broadband spectrum”), and 6204(a) (“There is established as an independent authority within the NTIA the ‘First Responder Network Authority’ or ‘FirstNet.’”).

<sup>13</sup> Notice at 46908.

<sup>14</sup> Act, Secs. 6302(e)(3)(C)(ii), 6302(h).

<sup>15</sup> Notice at 46910.

explicitly provided that if an opt-out state applies to NTIA for a grant of funds, the state must make the “showing described in subparagraph (D),”<sup>16</sup> entitled “Funding Requirements” (hereinafter the “Funding Requirements Showing”).<sup>17</sup> In that same clause, however, Congress chose not to require that showing if a state were to “apply to the NTIA to lease spectrum capacity.”<sup>18</sup> Again, Congress knew how to impose a showing on states applying for grant funds; it omitted such a requirement in relation to a request for a spectrum lease, because it did not provide or intend to provide NTIA authority to obstruct the lease request in any event.

Because NTIA’s claimed ability to bestow (or deny) “Lease Authority” upon a state is unsupported by the Act, so too is its proposal that a “state must file its application” for “Lease Authority” within 60 days of FCC approval of the state’s opt-out plan.<sup>19</sup> Though the state would have every incentive to request the lease as soon as possible, the Act does not authorize NTIA to reject or otherwise obstruct an opt-out state’s request for a spectrum lease for failure to file by an NTIA-adopted deadline.

## **2. The Funding Requirements Showing Applies Only to an Application for Grant Funds**

NTIA also bases its claim to authority to “grant the ... [r]equired authorization to enter into a spectrum capacity lease” upon this language in the Act: “In order to obtain grant funds *and* spectrum capacity leasing rights under subparagraph (C)(iii), a State shall demonstrate” the five criteria in the Funding Requirements Showing.<sup>20</sup> In common legal usage, however, the word “and” means “[a]dded to; together with; joined with; as well as; including.”<sup>21</sup> Thus, by the plain language of this provision, Congress required the Funding Requirements Showing only for a state to receive *both* a grant *and* a lease—it did not require such a showing for a state to receive only a lease.<sup>22</sup>

In this subparagraph entitled “Funding Requirements” that sets forth the criteria of the Funding Requirements Showing, it makes perfect sense that Congress would refer to

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<sup>16</sup> Act, Sec. 6302(e)(3)(C)(iii)(I).

<sup>17</sup> Act, Sec. 6302(e)(3)(D).

<sup>18</sup> Act, Sec. 6302(e)(3)(C)(iii)(II).

<sup>19</sup> Notice at 46910.

<sup>20</sup> Notice at 46909; Act, Sec. 6302(e)(3)(D) (*italics added*).

<sup>21</sup> Black’s Law Dictionary, 5th Ed., 1979.

<sup>22</sup> *See also*, Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 357 n.75 (2010) (quoting 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 21:14 (6th ed. 2002) (“Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive ‘and’ should be used. Statutory phrases separated by the word ‘and’ are usually to be interpreted in the conjunctive. Where a failure to comply with any requirement imposes liability, the disjunctive ‘or’ should be used.”)).

“obtain[ing] grant funds and spectrum capacity leasing rights” as a single package subject to a single showing, because there is no scenario where a state could apply for a grant without also requesting a lease. If Congress meant to require the showing even if the state requested only a lease, it would not have had to include the “in order to obtain...” clause at all, since it had already made clear that a lease was required of all states that gain FCC approval for their opt-out plans.<sup>23</sup> If Congress had intended to require the Funding Requirements Showing for *either* a grant *or* a lease, it would have used the disjunctive “or” instead of “and.” Further supporting this plain-language reading, as noted above, Congress explicitly required the Funding Requirements Showing in connection with an optional request for a funding grant, but it omitted that requirement for the required request for a spectrum lease,<sup>24</sup> demonstrating that Congress did not require and did not intend to require an opt-out state to make that showing in order to obtain a spectrum lease.

Confusingly, NTIA takes the view that “Lease Authority ... [g]rants are considered discretionary grants” and that “NTIA is authorized to grant or reject applications” because “the Act did not establish mandatory funding levels for each eligible grantee.”<sup>25</sup> Not only is the rationale incorrect (the mandatory funding level is the funding level disclosed to the governor with the FirstNet state plan, as explained in Sec. II.C.2, below) but it also makes no sense: the establishment of mandatory funding levels has no relevance to whether NTIA “is authorized to grant or reject” a state’s request for a spectrum lease.

### **3. An Application for “Lease Authority” Is Not a Grant Application**

NTIA recites the Act’s provision that if an opt-out state’s alternative plan is approved by the FCC, the state is required to request a spectrum lease and may, optionally, request “RAN construction grant funding” from NTIA.<sup>26</sup> Though the former is a request for a lease and not a grant of funds, the Notice nonetheless provides that “NTIA has determined that each of these requests are grant requests under federal regulations,” and that “NTIA will evaluate a state’s request for Lease Authority, or its request for Lease Authority plus an optional RAN Construction Grant, as a single grant application.”<sup>27</sup>

NTIA bases this approach upon the misplaced view that a request for “Lease Authority” is a request for “something of value provided by NTIA” and thus is the appropriate subject of a “type of grant agreement” under the Federal Grants and Cooperative Agreement Act of 1977.<sup>28</sup>

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<sup>23</sup> Act, Sec. 6302(e)(3)(C)(iii)(I).

<sup>24</sup> Act, Sec. 6302(e)(3)(C)(iii).

<sup>25</sup> Notice at 46910.

<sup>26</sup> Notice at 46909 (citing Act, Sec. 6302(e)(3)(C)(iii)).

<sup>27</sup> Notice at 46909.

<sup>28</sup> *Id.* (citing Federal Grants and Cooperative Agreement Act of 1977, sec. 5, Public Law 95–224, 92 Stat. 3, 4 (Feb. 3, 1978) (codified at 31 U.S.C. 6304) (“Grants Statute”).

Even if NTIA were to possess the authority to provide or deny “Lease Authority” (which it does not, as demonstrated above), NTIA’s authority and procedures related to the provision of funding grants would be inappropriate for that purpose.

The Federal Grants and Cooperative Agreement Act of 1977 provides:

Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever ... the principal purpose of the relationship is the *transfer of money, property, services, or anything of value* to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute.<sup>29</sup>

“Lease Authority”—the term NTIA has assigned to “the non-monetary grant of authority by NTIA to a state to enter into a spectrum capacity lease”<sup>30</sup>—is neither a “thing of value” nor is it “transferred” to the opt-out state, so the Grants Statute does not require that NTIA use a “grant agreement” to provide “Lease Authority.”

In common legal usage, “transfer” means “to change over the possession or control of.”<sup>31</sup> Because NTIA does not itself possess authority to lease spectrum in the opt-out state from FirstNet, it cannot “transfer” such authority to an opt-out state. And even if NTIA did have authority to lease spectrum from FirstNet, providing “Lease Authority” to the state would not constitute a “transfer” because NTIA would not be “changing over” or *giving up* such authority—it would still retain that ability.

Similarly, the Grants Statute does not require NTIA to use a “grant agreement” to provide the “Lease Authority” NTIA contemplates because such authority is not a “thing of value.” The “Lease Authority” would have no value to NTIA, unlike the examples of “money, property, [or] services” listed in the Grants Statute; “Lease Authority” is qualitatively different from these items that are appropriately the subject of grant agreements. An Office of Management and Budget regulation implementing the Federal Grants statute defines “grant agreement” as a “legal instrument of financial assistance,”<sup>32</sup> confirming that a grant agreement would not be an appropriate vehicle for “transferring” NTIA’s “Leasing Authority” to an opt-out state because such authority, if it existed, would not be a form of *financial* assistance. Accordingly, a Federal Funding Opportunity (“FFO”) notice, while perhaps appropriate for a

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<sup>29</sup> Grants Statute, Sec. 5 (italics added)).

<sup>30</sup> Notice at 46909 n.23.

<sup>31</sup> Black’s Law Dictionary, 5<sup>th</sup> Ed., 1979.

<sup>32</sup> 2 C.F.R. § 200.51.

grant program, would not be an appropriate mechanism for announcing or adopting any rules or procedures related to the provision of “Lease Authority.”

### **C. The Award of Grant Funds Is Not Discretionary to NTIA**

NTIA states that it will “grant or reject applications and determine final award amounts based on an assessment against the statutory demonstration criteria and *other factors* that will be detailed in the FFO.”<sup>33</sup> To the contrary, NTIA must award a grant of funds if the opt-out state makes the statutorily defined showing; NTIA has no authority to deny or reduce a grant of funds because of any “other factors.”

#### **1. The Grant Amount Is Set When FirstNet Presents Its State Plan to the Governor**

NTIA claims wide latitude to exercise discretion in awarding or denying grant funds to opt-out states that request such funds:

Because the Act did not establish mandatory funding levels for each eligible grantee ... RAN Construction Grants are considered discretionary grants. Therefore, NTIA is authorized to grant or reject applications and determine final award amounts, based on an assessment against the statutory demonstration criteria and *other factors* that will be detailed in the FFO.<sup>34</sup>

NTIA’s claim of such discretionary authority is mistaken at its foundation, the proposition that “the Act did not establish mandatory funding levels for each eligible grantee.” Rather, the Act does indeed require a mandatory funding level for each state. Specifically, the Act requires FirstNet, upon completion of its request for proposals (“RFP”), to “provide to the Governor, or his designee ... the funding level for the State as determined by the NTIA.”<sup>35</sup> This funding level is the mandatory amount of the grant that NTIA must award to each opt-out state that makes the Funding Requirements Showing.

Congress required NTIA to establish and FirstNet to disclose to the governor the “funding level for the State” in order to inform the governor of the value of grant funds NTIA would provide if the governor elected to opt out. This is the only reasonable rationale for requiring such disclosure; if the governor were to opt in and leave it to FirstNet to build the RAN, there would be no need for the governor to understand the “funding level for the State” because that money would be spent by FirstNet as part of its national deployment. But in order to make a decision, to compare an opt-in scenario where FirstNet pays for construction to an

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<sup>33</sup> Notice at 46910 (*italics added*).

<sup>34</sup> *Id.* (*italics added*).

<sup>35</sup> Act, Sec. 6302(e)(1).



opt-out scenario where the state carries that cost, the governor needs to know how much NTIA will provide the state in grant funds. Congress understood this basic fact and required NTIA to determine how much that grant would be and mandated that FirstNet disclose that amount to the governor coincident with presentation of the FirstNet state plan.

Further, “the funding level for the State as determined by the NTIA” must be the amount of the NTIA grant in an opt-out scenario and cannot be the amount that FirstNet would spend in the state if it opts in, because FirstNet is an independent authority that will “determine” the amount it will spend in the state. NTIA will not determine the amount FirstNet will spend in the any opt-in state. The only “funding level for the State” that NTIA could legally determine would be the amount of the grant NTIA will provide. Thus, “the funding level for the State as determined by the NTIA” is the “mandatory funding level[]” that NTIA claims the Act does not establish.

Because the Act requires that the amount of the grant be established when FirstNet presents its state plan to the governor, NTIA would violate the Act if NTIA reduced the amount of the grant as it suggests in the Notice:

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. ... [T]he final grant award amount to a state may be impacted by financial factors, such as how efficiently FirstNet and its partner(s) can build the RAN for that state and the projected income from that state’s partnership agreement(s) and all other revenue sources.<sup>36</sup>

Similarly, NTIA would violate the Act if it reduced the amount of the grant in the opt-out review process to offset any

increased costs [FirstNet may incur] to mitigate additional operational risks to the NPSBN, and losses of cost efficiencies, if a state assumes responsibility for the construction and operation of the RAN within its boundaries. Additionally, should a state conduct its own RAN, FirstNet may bear increased expenses related to interconnection of the state RAN to the NPSBN and mitigation of potential interference by the state RAN to the NPSBN operations in a bordering state.<sup>37</sup>

NTIA has no authority to reduce the grant award amount after it has set that amount as the “funding level for the State” disclosed by FirstNet to the governor with the presentation of the state plan.

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<sup>36</sup> Notice at 46910.

<sup>37</sup> *Id.*

## 2. NTIA Must Award the Grant If the State Makes the Funding Requirements Showing

When it considers whether to award grant funding to an opt-out state, NTIA has only one standard to apply: it must determine whether the state has made the Funding Requirements Showing by demonstrating the existence of each of the five facts specified in the Act.<sup>38</sup> If the answer is “yes,” NTIA must award the grant funds. The Funding Requirements Showing includes only any “required technical, financial, interoperability, programmatic, and qualitative criteria”<sup>39</sup> that NTIA is specifically authorized to apply in considering whether to award a grant of funds to an opt-out state. Congress has not provided NTIA authority to consider any “other factors.”<sup>40</sup> To do so would violate the Act.<sup>41</sup>

### a. The Technical Capabilities to Operate, and the Funding to Support, the State RAN

The Funding Requirements Showing includes a demonstration that the State has the “technical capabilities to operate” the state opt-out RAN.<sup>42</sup> NTIA incorrectly suggests that based on this provision, NTIA is authorized to require a state to “be compliant with the RAN-specific network policies established by FirstNet.”<sup>43</sup> The Act requires only that the state demonstrate to NTIA that the state is technically *capable*, not that it is compliant with any FirstNet policy. Though compliance with appropriate FirstNet policies is certainly important, it is not NTIA’s role to serve as enforcer of FirstNet policies. NTIA’s interpretation would illegally expand NTIA’s authority from the grant-making role Congress provided to that of a regulator of opt-out states.

Likewise proposing to exceed its authority, NTIA states that it “may require surety bonds to ensure RAN construction completion in the event of default by the state’s RFP partner.”<sup>44</sup> NTIA’s role is not to ensure that the RAN is built—that falls to the opt-out state or FirstNet;

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<sup>38</sup> Act, Sec. 6302(e)(3)(D).

<sup>39</sup> Notice at 46910.

<sup>40</sup> *Id.*

<sup>41</sup> NTIA suggests that it “may require a state to provide information on each key staff member,” perhaps including curriculum vitae. Notice at 46911 n.34. NTIA should be careful not to impose requirements that could only be met if the state’s alternative plan had already been implemented—at the stage the state applies for a funding grant, the Act requires only that the state have a plan, not that it have already implemented that plan or even identified personnel to implement it.

<sup>42</sup> Act, Sec. 6302(e)(3)(C).

<sup>43</sup> Notice at 46911.

<sup>44</sup> *Id.*

NTIA's role is only to determine whether the state made the Funding Requirements Showing, including whether the state has "the funding to support" the State RAN.<sup>45</sup>

Certainly, NTIA is not prohibited from requiring an opt-out state to disclose certain information in connection with its request for a grant of funds. For example, NTIA states that it intends to require states applying for funding grants to "disclose the value of any partnering agreement that will enable and support the state in the construction and/or operation of the state RAN."<sup>46</sup> Such a requirement would be appropriate as long as it compelled disclosures only to the extent necessary to reach the threshold required in the Act, such as a demonstration that the state has "funding to support" the state RAN.<sup>47</sup> NTIA has no authority to require information not necessary to make the Funding Requirements Showing.

#### **b. The Ability to Maintain Ongoing Interoperability**

Consistent with its overreach related to the opt-out state's demonstration of technical capabilities (described in Sec. II.C.2.a, above), NTIA also goes too far in asserting its authority regarding the interoperability of the opt-out state RAN. Specifically, NTIA states that "a state must demonstrate that its RAN and other network attributes *will be interoperable* with the NPSBN on an 'ongoing' basis,"<sup>48</sup> and that

NTIA will require that any state partnership agreement ensures the RAN *will be interoperable* with the NPSBN from deployment onward. Such a requirement may include demonstration of a partner's commitment to complying with FirstNet's evolving interoperability-based network policies."<sup>49</sup>

According to NTIA, it will require opt-out states to convince NTIA that the state RAN will maintain a level of interoperability into the future, without end. Obviously, such a showing would be unworkable, and Congress did not impose it. Rather, the Act requires only that a state demonstrate "the *ability* to maintain ongoing interoperability."<sup>50</sup> Congress did not intend and did not provide for NTIA to enforce a state RAN's interoperability with the NPSBN, neither at the time the state requests the grant nor at any time in the future. NTIA's inquiry is limited in the statute solely to the state's *ability* and does not include the state's *compliance*.

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<sup>45</sup> Act, Sec. 6302(e)(3)(D)(i)(I).

<sup>46</sup> Notice at 46910.

<sup>47</sup> Act, Sec. 6302(e)(3)(D)(i)(I).

<sup>48</sup> Notice at 46911 (*italics added*).

<sup>49</sup> Notice at 46912 (*italics added*).

<sup>50</sup> Sec. 6302(e)(3)(D)(i)(II) (*italics added*).

**c. Cost-Effectiveness of the State Plan Submitted to the FCC**

The Funding Requirements Showing includes a requirement that the opt-out state demonstrate the “cost-effectiveness of the State plan submitted [to the FCC].”<sup>51</sup> NTIA mistakenly suggests that this provision requires a demonstration of the “cost-effectiveness” of the opt-out plan for FirstNet, the federal government, or the nation as a whole. To the contrary, Congress required that the state demonstrate the “cost-effectiveness” of the plan for the opt-out state.<sup>52</sup>

In program evaluation, cost-effectiveness analysis “seeks to identify and place dollars on the costs of a program. It then relates these costs to specific measures of program effectiveness.”<sup>53</sup> So, for example, the cost-effectiveness of a state opt-out plan might be stated as “\$27 per public safety adopter of broadband in the state.” The “cost-effectiveness” element of the Funding Requirements Showing in the Act requires that the opt-out state demonstrate such a formulation.

NTIA, however, takes a far more expansive view of the scope of the “cost-effectiveness” demonstration, contemplating a nationwide inquiry. For example, the Notice states that

a nationwide buildout can provide significant economies of scale across state boundaries that can leverage existing infrastructure when feasible and reduce the cost of NPSBN RAN construction in any given state or territory. NTIA will take these cross-border economies into account in the context of a state opt-out plan’s cost effectiveness.<sup>54</sup>

Similarly, NTIA states that in determining whether an opt-out state has demonstrated the “cost-effectiveness of the State plan,” it

may assess areas, including but not limited to, the proposed federal and state partner share of the RAN cost; the value, use, and revenue return of

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<sup>51</sup> Sec. 6302(e)(3)(D)(ii).

<sup>52</sup> NTIA states that it “will utilize FirstNet’s relevant interpretations of provisions of the Act in carrying out its responsibilities on these matters.” Notice at 46909. This is a mistake: in connection with its interpretation of the meaning of “cost-effectiveness” and any other provision of the Act, NTIA should make and support its own interpretations of the Act as necessary to fulfill its limited statutory role. NTIA’s decision to adopt FirstNet’s interpretations, as well as NTIA’s implementation in reliance upon those interpretations, will be subject to the Administrative Procedures Act (“APA”). “[I]n the absence of a statutorily defined standard of review for action under [the relevant statute], the APA supplies the applicable standard.” United States et al. v. Bean, 537 U. S. 71, 77 (2002) (citing 5 U. S. C. § 701(a)).

<sup>53</sup> JS WHOLEY, HP HATRY, & KE NEWCOMER, HANDBOOK OF PRACTICAL PROGRAM EVALUATION (2010) at 493.

<sup>54</sup> Notice at 46912.

spectrum and other assets; and overall financial value of the proposed plan.<sup>55</sup>

In both of these examples, NTIA adopts an unreasonable interpretation of the Act, suggesting a national scope for the “cost-effectiveness” showing.

Congress required the opt-out state, not NTIA, to demonstrate each of the elements of the Funding Requirements Showing. If the correct scope of the “cost-effectiveness” showing were nationwide, it would be an impossible showing to make: no opt-out state would be privy on a nationwide scale to the kind of information that NTIA suggests it will consider. By contrast, an opt-out state would have access to information about the costs and beneficial effects its plan will have for the state; this is the scope of the “cost-effectiveness” showing Congress required.

### **III. NTIA’s Suggested Timetable Would Render the Governor’s Right to Opt-out Meaningless**

As described in Section I above, Congress deliberately included a statutory right for a state to opt out of the NPSBN—it was a key part of the compromise between the congressional factions supporting competing federal- and state-centric visions for the NPSBN. NTIA must be careful to avoid devaluing the opt-out alternative through its role in the opt-out review process; rather, it should endeavor to honor the legislative compromise by making that process as predictable, efficient, and smooth as possible. Unfortunately, as described in the Notice, NTIA’s proposed process would render the governor’s statutory right to opt-out a virtually impossible alternative, overriding Congress’s explicit mandate that states be able to choose not to “participate in the deployment of the [NPSBN] as proposed” by FirstNet.<sup>56</sup>

#### **A. NTIA Should Provide Full Opt-out Process Details at Least 90 Days Before FirstNet Presents Final State Plans**

Throughout the Notice, NTIA acknowledges the insufficiency of the information it has provided on its opt-out review process, stating its intent to provide additional details in a future FFO notice no later than FirstNet’s first state plan delivery.<sup>57</sup> Because of the timeframes established in the Act, however, some states’ opt-out decision planning must begin well before delivery of the state plan and may even be effectively completed based on the content of a draft plan. To enable states to make their decisions as early as possible—and to prevent unnecessary delay in decisions to *opt in*, NTIA should provide any additional details at least three months before FirstNet delivers state plans.

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<sup>55</sup> *Id.*

<sup>56</sup> Act, Sec. 6302(e)(2).

<sup>57</sup> Notice at 46908 n.5.

This timing is particularly important because of its ability to impact the state’s ability to perform its due diligence in considering an opt-out alternative and make an informed decision within an already restrictive timeline. Just as FirstNet highlights the importance of its control of spectrum in its efforts to find a private partner to help finance the NPSBN, so, too, must a would-be opt-out state be able to show prospective partners with certainty that it controls—or will promptly control upon making the required demonstration to NTIA—the spectrum necessary for its opt-out RAN. By withholding the details of its process until the presentation of the FirstNet state plan, NTIA would inject crippling uncertainty into the opt-out process and thus deny states the ability to cement the financial partner necessary to make opting out a meaningful alternative.

**B. NTIA Should Complete Its Portion of the Opt-out Process in 30 Days**

NTIA tentatively sets 60 days as the period after FCC approval that states must “file their applications,” but it is far less prescriptive with regard to its own review process, stating only that it will consider applications on a rolling basis as states submit them following FCC approval, moving “as expeditiously as possible.”<sup>58</sup> As described above, NTIA’s review under the Act is solely factual: did the state make each of the specific demonstrations listed in the Funding Requirements Showing? NTIA should certainly be able to accomplish the review in 30 days. To provide governors the certainty they need to make an informed opt-in/out decision, NTIA should commit to final decisions on applications within 30 days of submission.

**C. NTIA Should Make Grant Awards Upon Final Decision on Grant Applications, with First Distribution of Funds Contingent upon Execution of a Spectrum Lease.**

According to the Notice, “NTIA will not award RAN Construction Grant funding until that state has fully executed a spectrum capacity lease agreement with FirstNet.”<sup>59</sup> As explained above in Sec. II.C.1, if the opt-out state makes the Funding Requirements Showing, the award and its amount are automatic: NTIA must award a grant in an amount equivalent to the “funding level for the State as determined by NTIA” and revealed to the Governor along with the state plan.<sup>60</sup> Delaying the award of funds until after FirstNet executes the lease adds unnecessary and counter-productive uncertainty to the governor’s decision process. Instead, NTIA should make the grant funding award when it finds that the state has made the required Funding Requirements Showing, specifying that the first distribution of funds will be contingent upon execution of a spectrum lease with FirstNet.

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<sup>58</sup> Notice at 46910.

<sup>59</sup> *Id.*

<sup>60</sup> Act, Sec. 6302(e)(1).

