

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Procedures for Commission Review of State Opt-) PS Docket No. 16-269
Out Requests from the FirstNet Radio Access)
Network)

ORDER

Adopted: March 6, 2019

Released: March 6 2019

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Order, we delete certain of the Commission’s rules related to the opt-out provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (Public Safety Spectrum Act or Act)1 that have been rendered moot by the passage of time. Specifically, we delete those rules adopted to implement the “opt-out” provisions of the Act, in light of the fact that no state or territory chose to exercise this option within the statutory timeframe.

II. BACKGROUND

2. The Public Safety Spectrum Act established the First Responder Network Authority (FirstNet) to oversee the construction and operation of a nationwide public safety broadband network (NPSBN) in the 700 MHz band.2 The Act established FirstNet as an independent authority within the National Telecommunications and Information Administration (NTIA)3 and required the Commission to grant a license to FirstNet for the 758-769/788-799 MHz band.4 Pursuant to Section 6202(b) of the Act, the NPSBN must be based on a “single national network architecture that evolves with technological advancements” that consists of a core network and a radio access network (RAN).5 FirstNet is tasked with developing a plan to deploy the RAN within each state.6 The Act also gives each state the option to “opt out” of FirstNet’s RAN deployment within that state and conduct its own RAN deployment.7

3. Specifically, the Act provides that “the Governor shall choose whether to . . . participate in the deployment of the nationwide, interoperable broadband network as proposed by [FirstNet,] or . . .

1 See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156.

2 See generally Public Safety Spectrum Act § 6001 et seq.

3 Id. § 6204(a).

4 Id. §§ 6101(a), 6201(a), 6204(a).

5 Id. § 6202(b).

6 See id. § 6302(e)(1).

7 Id. § 6302(e)(2).

conduct its own deployment of a radio access network in such State.”⁸ Under Section 6302(e)(2) of the Act, each Governor has 90 days from the receipt of notice by FirstNet under Section 6302(e)(1) to choose whether to participate in the NPSBN or elect for the state to conduct its own RAN deployment.⁹ If a Governor chooses not to participate in the NPSBN, Section 6302(e)(3)(A) of the Act requires the Governor to “notify [FirstNet], the NTIA, and the Commission of such decision.”¹⁰ The Act also states that an opt-out state “shall submit” to the Commission an “alternative plan” for “the construction, maintenance, operation, and improvements” of the RAN within the state.¹¹

4. On June 22, 2017, the Commission adopted a *Report and Order* establishing procedures for administering the state opt-out process as provided under the Public Safety Spectrum Act.¹² In the *Report and Order* the Commission directed FirstNet to notify the Bureau when it had provided states the requisite “notice” under the Act.¹³ The Commission also directed the Bureau to issue a Public Notice announcing the commencement of the 90-day period and specifying the deadline for states to file opt-out notifications with the Commission, FirstNet, and NTIA.¹⁴ In the event a state elected to opt out, the Commission adopted procedures for interested parties to intervene in a particular state’s proceeding, procedures for filing alternative state plans and for the content of such plans, and for filing comments addressing the plans.¹⁵

5. The Bureau issued three such Public Notices. On October 2, 2017, the Bureau notified the Governors of 52 states and territories that their deadline would be December 28, 2017, to submit an opt-out notification.¹⁶ On November 1, 2017, the Bureau issued a Public Notice setting the same deadline for Puerto Rico’s Governor to make his election.¹⁷ On December 15, 2017, the Bureau issued a final Public Notice setting a March 12, 2018 deadline for the remaining three territories (American Samoa,

⁸ *Id.*

⁹ *Id.* § 6203(e)(2).

¹⁰ *Id.* § 6302(e)(3)(A).

¹¹ *Id.* § 6302(e)(3)(C)(i).

¹² See *Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network*, PS Docket No. 16-269, Report and Order, 32 FCC Rcd 5311 (2017) (*Report and Order*); see also *Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network*, PS Docket No. 16-269, Order, 32 FCC Rcd 7189 (2017).

¹³ *Report and Order*, 32 FCC Rcd at 5315, para. 11.

¹⁴ *Id.*

¹⁵ *Report and Order*, 32 FCC Rcd at 5316-5319, paras. 13-28; 47 C.F.R. §§ 90.532(c)-(f).

¹⁶ *Public Safety and Homeland Security Bureau Announces 90-Day Deadline for Governors to Elect Whether to Opt Out of the FirstNet Radio Access Network*, PS Docket No. 16-269, Public Notice, 32 FCC Rcd 7348, 7349 (PSHSB 2017). This Public Notice covered the 50 states, the District of Columbia, and the U.S. Virgin Islands.

¹⁷ *Public Safety and Homeland Security Bureau Announces 90-Day Deadline for Governor of Puerto Rico to Elect Whether to Opt Out of the FirstNet Radio Access Network*, PS Docket No. 16-269, Public Notice, 32 FCC Rcd 9288, 9289 (PSHSB 2017). Due to Hurricane Maria, FirstNet was delayed in confirming Puerto Rico’s receipt of the (continued....)

Guam, and the Northern Mariana Islands).¹⁸ Subsequent to the issuance of these Public Notices, no state or territory filed an opt-out notification with the Commission within the statutory timeframe or otherwise.

III. ORDER

6. In light of the fact that no state or territory elected to opt out within the statutory timeframe, there is no continued need for the rules that the Commission adopted to administer the opt-out process (*i.e.*, 47 C.F.R. § 90.532(b)-(f)), and we therefore delete those rules. An agency may forego notice and comment rulemaking “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹⁹ We find here that notice and comment rulemaking is unnecessary and contrary to the public interest because the lack of any opt-out election by any state or territory has rendered the opt-out rules moot. As the opt-out rules no longer have any practical or legal effect, expunging them from the Code of Federal Regulations will avoid any potential confusion about their continuing applicability. Such expungement is also inconsequential to the industry and the public, and conducting additional processes would be a waste of public resources and otherwise contrary to the public interest.

IV. PROCEDURAL MATTERS

7. *Regulatory Flexibility Act.* Under Section 604(a) of the Regulatory Flexibility Act, the Bureau is not required to prepare a final regulatory flexibility analysis because the Order does not require notice-and-comment rulemaking.²⁰

8. *Paperwork Reduction Act of 1995.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

9. *Congressional Review Act.* The Bureau will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

10. *Accessible Formats.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that part 90 of the Commission’s rules IS AMENDED, as set forth in the attached Appendix, pursuant to the authority contained in Sections 4(i), 4(j), 301, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303, Title VI, Sections 6003, 6203, and 6302(e), of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-

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notice, but subsequently confirmed that the Puerto Rico governor’s office received FirstNet’s notice on September 29, 2017, the same day as the other initial 52 states and territories receiving notice. *Id.* at 9288-89.

¹⁸ *Public Safety and Homeland Security Bureau Announces 90-Day Deadline for Governors of American Samoa, Guam, and the Northern Mariana Islands to Elect Whether to Opt Out of the FirstNet Radio Access Network*, PS Docket No. 16-269, Public Notice, 32 FCC Rcd 10337, 10338 (PSHSB 2017).

¹⁹ 5 U.S.C. § 553(b)(B); *see Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (stating that notice and comment is “unnecessary” when it involves a “routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public” (internal quotation marks omitted)); S. Doc. No. 79-248, at 200, 258 (indicating that notice and comment is “contrary to the public interest” when the public lacks interest in a rulemaking).

²⁰ *See* 5 U.S.C. § 604(a).

96, §§ 6003, 6302(e), 126 Stat. 156, 204-05, 219-21, and Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392, and that this Order in PS Docket No. 16-269 IS ADOPTED. This Order and the amended rules will become effective thirty days after publication in the Federal Register.

12. IT IS FURTHER ORDERED that the Secretary shall cause this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Lisa M. Fowlkes
Chief, Public Safety and Homeland Security Bureau

APPENDIX A**Final Rules**

For the reasons discussed above, the Federal Communications Commission amends 47 CFR part 90 as follows:

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), and 332(c)(7), and Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156.

2. Amend Section 90.532 by revising the section heading, removing paragraphs (b)-(f), and redesignating paragraph (a) as follows:

§ 90.532 Licensing of the 758-769 MHz and 788-799 MHz Bands; First Responder Network Authority License and Renewal. Pursuant to Section 6201 of the Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96, 126 Stat. 156 (2012), a nationwide license for use of the 758-769 MHz and 788-799 MHz bands shall be issued to the First Responder Network Authority for an initial license term of ten years from the date of the initial issuance of the license. Prior to expiration of the term of such initial license, the First Responder Network Authority shall submit to the Commission an application for the renewal of such license. Such renewal application shall demonstrate that, during the preceding license term, the First Responder Network Authority has met the duties and obligations set forth under the foregoing Act. A renewal license shall be for a term not to exceed ten years.