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STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Representative Stephen Carr, Chair, House Committee on Energy and Technology

From: Maria Royle, Legislative Counsel

Date: November 16, 2017

Subject: Legislative Role Regarding Governor's FirstNet Opt-in/Opt-out Decision

Question Presented

Does the General Assembly have approval authority with respect to the Governor's decision to either opt in or opt out of the FirstNet State Plan to build a statewide LTE radio access network in Vermont to support wireless, public safety communications?

Brief Answer

Based on State statute and the legal principles embedded within the constitutional doctrines of separation of powers and federalism, an argument can be made that any decision by the Governor to either opt in or opt out of the FirstNet State Plan implicates legislative approval authority. There is no explicit delegation of decision-making power to the Governor in either the Vermont statutes or the Vermont Constitution authorizing him to act unilaterally here. On the contrary, State statute establishes a mechanism for legislative review of such policy decisions. This mechanism aligns with the Vermont Supreme Court's interpretation of the proper roles of the Legislative and Executive Branches of government. Therefore, a decision by the Governor to either opt in or opt out, without the opportunity for legislative review, would unconstitutionally contravene the legislative authority of the General Assembly. The fact that federal law tasks the Governor, not the General Assembly, with making the FirstNet decision would not likely change this legal outcome.

Background

Under the Middle Class Tax Relief and Job Creation Act of 2012 (the Spectrum Act), Congress established the First Responder Network Authority (FirstNet) within the U.S. Department of Commerce.[1] The Spectrum Act authorized FirstNet to enter into a public-private partnership with a telecommunications service provider to build a national public safety broadband network with prioritized and preemptive coverage for first responders using radio frequency spectrum set aside for that purpose. The two components of the

[1] Pub.L. 112-96; 47 U.S.C.A. chapter 13.

national network include a core network and also an LTE[2] radio access network (RAN) in each state. The core network consists of national and regional data centers, and it will provide connectivity between a state's RAN and the Internet and the public switched telephone network.[3] The RAN consists of the cell site equipment, antennas, and backhaul equipment needed to enable wireless communications with devices using the dedicated public safety spectrum.

In March 2017, FirstNet entered into a 25-year contract with AT&T to build the core network, as well as the RAN in each state. Pursuant to the federal contract, AT&T has provided each state with a coverage plan, detailing its obligations for building its intrastate RAN (FirstNet State Plan). The Spectrum Act requires the governor of each state either to participate in the FirstNet State Plan (at no cost to the state and with no requirement that first responders subscribe to the wireless service) or to opt out and build, operate, and manage its own alternative RAN.[4] A state-built network must comply with interoperability rules created by FirstNet and approved by the FCC, and it would be subject to a Spectrum Manager Lease Agreement with FirstNet to access the dedicated spectrum (Spectrum Agreement).[5] If the FCC disapproves of an alternative state plan, the original FirstNet State Plan would proceed in that state.[6]

It is not clear at this point what the precise terms of a Vermont-specific Spectrum Agreement would be. Thus, the full range of financial and regulatory risks of pursuing an alternative solution to the FirstNet State Plan is not known. The Spectrum Act does specify, however, that opt-out states are eligible for federal grant money to pay for the construction costs of a state-operated RAN. The amount varies by state. FirstNet has indicated that Vermont would be eligible for up to $25 million in federal RAN construction grant funding.

In 2013, then Governor Shumlin established by executive order the Vermont Public Safety Broadband Network Commission (the Commission) to advise the Governor on FirstNet issues.[7] The Commission comprises executive officials and first responder representatives. The Commission issued an RFP seeking alternatives to the FirstNet State Plan. At this time, the Commission is actively considering one bid in particular submitted by Rivada Networks.

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[2] Long-Term Evolution (LTE) is a standard for high-speed wireless communication for mobile devices and data terminals.

[3] Public switched telephone network is the term used to describe the landline telephone system, also known as plain old telephone service (POTS).

[4] 47 U.S.C.A. § 1442(e)(2) (Not later than 90 days after the date on which the governor receives the FirstNet State Plan and the funding level for the state, the governor shall choose whether to participate in the deployment of the nationwide, interoperable broadband network as proposed by FirstNet or conduct its own deployment of a RAN.).

[5] Under any alternative plan, a state would apply to the NTIA (National Telecommunications and Information Administration) to lease spectrum capacity from FirstNet. The precise terms of a Spectrum Agreement would be negotiated only after an alternative state plan is approved by the FCC.

[6] Id. at § 1442(e)(3)(C)(iv) (If the FCC disapproves an alternative state plan, the construction, maintenance, operation, and improvements of the network within the State shall proceed in accordance with the plan proposed by FirstNet.).

[7] E.O. No. 05-13.

In addition to any financial and regulatory risks associated with both the FirstNet State Plan and the competing bid submitted by Rivada Networks, key elements relevant to a decision on which option is best for Vermont include: network reliability, security, interoperability, cost, governance, access management and prioritization, and coverage and capacity capabilities. The policy implications of either option, therefore, are quite extensive.

Also, while not the primary purpose of the network, which is premised on enhancing public safety communications, there is the secondary potential for expanded telecommunications coverage throughout Vermont, generally. Both AT&T and any alternative vendor that enters into a State public-private partnership would be permitted to make commercial use of excess capacity on the public safety spectrum and thereby bring greater broadband and mobile voice services to the Vermont public, generally.

After reviewing the costs, benefits, and risks associated with the two proposals, the Commission will make a recommendation to the Governor in mid-November on the best option for Vermont. The Governor, in turn, is required under federal law to make his decision by December 28, 2017.

Legal Analysis

The question presented implicates primarily two constitutional doctrines: separation of powers and federalism. This analysis begins with the separation of powers doctrine because, if the Governor *is* legally authorized to act unilaterally under State law in this instance, then there is no need to analyze further. The Spectrum Act would not in any way undermine State law and thereby contravene principles of federalism. There simply would be no affirmative, legislative role with respect to the decision. On the other hand, if the Governor is *not* authorized under State law to act as the sovereign on behalf of the State without legislative review, then the question turns to whether Congress has authority to essentially reallocate Vermont's legislative decision-making power exclusively to the Executive Branch.

Separation of Powers

The Vermont Constitution contains a separation of powers provision: "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."[8]

In terms of legislative authority, "[t]he Supreme Legislative power shall be exercised by a Senate and a House of Representatives."[9] Executive authority, on the other hand, rests with the Governor who must "take care that the laws be faithfully executed."[10]

Public officers are limited to exercising only such powers as are conferred to them by statute or the Constitution. No current State statute specifically authorizes the Governor to make the decision presented here. On the contrary, the General Assembly has developed a statutory process for reviewing this decision.

[8] Vt. Const. ch. II, § 5
[9] Id. § 2.
[10] Id. § 20.

Specifically, 32 V.S.A. § 5 provides a mechanism for legislative oversight of the Governor's acceptance or rejection of a grant or other thing of value, provided its value exceeds $5,000.00.[11] This law requires, in relevant part, that any original grant or thing of value may not be accepted by an executive entity without first being submitted to the Governor who must then send a copy of his or her approval or rejection to the Joint Fiscal Committee.[12] Among other things, the Governor must include with his or her approval or rejection: the purpose of the grant; the costs, direct and indirect, for the present and future years related to the grant; and the impact on existing programs if the grant is not accepted.

Once the approval or rejection is submitted, a member of the Joint Fiscal Committee (JFC) has the opportunity to request that any decision be held for approval by the General Assembly or, when the General Assembly is not in session, the JFC. If a member of the JFC does not make such a request within 30 days of receipt of the relevant information, then the Governor's approval or rejection is final.[13]

The two options presented here are inextricably linked. The acceptance of one amounts to the rejection of the other. Because the law applies to both acceptances and rejections, if either option is a "thing of value" or "grant" under the meaning of the statute, the legislative review process is triggered.

The statute does not define a "thing of value."[14] It only specifies that it must have a value that exceeds $5,000.00. It is reasonable to presume that the value of the FirstNet State Plan is $25 million because that is the amount the federal government is offering Vermont to build its own RAN. Also, as a condition of participating in the FirstNet State Plan, the State forfeits its right to pursue the $25 million grant for a State-run network. Even though the State technically is not eligible for a federal construction grant until after an alternative State plan is approved by the FCC, which could be up to 240 days from an opt-out decision,[15] the Governor needs to decide by December 28, 2017 which path to go down. Therefore, the time for legislative review is when the Governor makes his initial opt-in or opt-out decision, not after the Governor has already committed the State to pursuing one or the other.

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[11] If the thing of value or grant does not exceed $5,000.00, section-5 review still applies if the acceptance of the thing of value or grant would "incur additional expense to the State or create an ongoing requirement for funds, services, or facilities." 32 V.S.A. § 5(a)(3)(A).

[12] 32 V.S.A. § 5.

[13] The 30-day review period may be reduced where expedited consideration is warranted in accordance with adopted Joint Fiscal Committee policies. 32 V.S.A. § 5(a)(2).

[14] "Thing of value" is not defined elsewhere in Vermont law either. There is, however, a definition of "anything of value" under Vermont's election laws, 17 V.S.A. § 2103(3), which provides that "'Anything of value' means, without limitation, tangible or intangible property, money, commercial interests, or governmental employment. A promise to pay or deliver such property is a thing of value even if the promise is unenforceable or impossible to perform." A similarly broad definition of "value" can be found in Black's Law Dictionary, which, in one respect, defines "value" to mean "any consideration sufficient to support a simple contract." (Black's Law Dictionary, Abridged Sixth Edition (1991)).

[15] 47 U.S.C.A. § 1442(e)(3)(B); FCC Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network, 47 CFR Part 90 (States have 180 days after an opt-out decision to develop and complete an RFP for an alternative RAN and shall have an additional 60 days to submit the plan to the FCC.)

These interpretations of "thing of value" and "grant" are supported by the Vermont canons of statutory construction, which strive to construe and effectuate the legislative intent behind a statute .[16]

> [The Court will] construe statutes to avoid unreasonable consequences that are at odds with the Legislature's apparent intent. If the literal meaning of the words is inconsistent with legislative intent, the intent must prevail. Such inconsistency occurs if applying the precise wording of a statute produces results which are manifestly unjust, absurd, unreasonable or unintended, or conflicts with other expressions of legislative intent.[17]

What is more, because the policy implications of either decision are wide-ranging, constitutional doctrine likely would require legislative review even if a statutory process were not already in place. As explained by the Vermont Supreme Court, "[the] focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch's power as to usurp from that branch its constitutionally defined function."[18]

The potential advantages and disadvantages of either opting in or opting out invoke broader policy questions that exceed, for example, the considerations generally relevant when the Executive Branch solicits and chooses from among bids under a standard government procurement contract for goods or services, and instead speak to the essence of the legislative role. Certainly under an opt-out scenario, there may be significant, State financial liabilities associated with an alternative State plan requiring appropriations by the General Assembly. The extent of State financial exposure would depend, in part, on the terms of a Spectrum Agreement with FirstNet and the State's ability to meet its obligations. Regardless, "appropriations necessarily represent legislative determinations of policy,"[19] and, therefore, the General Assembly should review any decision that could have a sizeable bearing on State funds.

In analyzing the balance between the Legislature's law-making power and the Governor's power to manage spending, the Vermont Supreme Court has held that under the Vermont Constitution: "If the Governor has a free hand to refuse to spend any appropriated funds, he or she can totally negate a legislative policy decision that lies at the core of the legislative function."[20]

Here, Vermont essentially is being offered $25 million to build a RAN. The decision to forgo this grant opportunity is a policy decision. It involves a legislative determination of whether the rejection would compromise or contravene the achievement of legislative purposes and goals. Relevant legislative goals and purposes might include: statewide broadband deployment;[21] the use of telecommunications technology to maintain and

[16] State v. Hurley, 198 Vt. 552, 558 (2015).
[17] Id. at 559 (internal quotations and citation omitted).
[18] Hunter v. State, 177 Vt 339, 350 (2004) (internal quotation and citation omitted).
[19] Id. at 347.
[20] Id.
[21] 30 V.S.A. § 202c(b) (State telecommunications policy and planning).

improve public safety;[22] and the use of federal radio frequency licenses held by instrumentalities of the State to enable broadband service in unserved areas of Vermont.[23]

Accordingly, both State statute and constitutional doctrine bring this FirstNet matter into the purview of the General Assembly.

Federalism

As mentioned at the outset, the legal analysis does not end with separation of powers. Having determined that there is a statutory procedure for legislative review, it is now appropriate to consider whether Congress has preempted such review in this instance. This question raises principles of federalism.

Federalism is a form of government in which sovereign power is divided across at least two political units. Principles of dual sovereignty are reflected in the U.S. Constitution, which divides power among the national and state governments, giving each government some independent, as well as concurrent authority.

Our federal government is one of enumerated powers. Under the Tenth Amendment,"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[24] The powers retained by the several states extend "to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the state."[25]

In terms of its enumerated powers, the U.S. Constitution vests Congress with the federal government's legislative powers.[26] For example, Congressional legislative authority includes "the power to regulate Commerce . . . among the several states." Establishing a nationwide, interoperable, wireless broadband network dedicated to public safety, as authorized by the Spectrum Act, falls within Congress's power to regulate interstate commerce. In exercising its legislative power, Congress may supersede and preempt a state law.[27]

Congressional preemption of a state law may be either express or implied. The Spectrum Act explicitly directs the Governor to decide whether to opt in or opt out.[28] However, the federal law is silent with respect to any state law constraints on the Governor's authority to act unilaterally. Thus, because explicit preemption is not at issue here, the question turns to whether the federal law implicitly preempts legislative review of the Governor's decision.

There are two types of implied preemption: conflict preemption and field preemption. Under conflict preemption, a state law is preempted if it is impossible to comply with both the state and federal regulations, or when the state law interposes an obstacle to the

[22] Id.
[23] 30 V.S.A. § 202e (duties of the Division for Telecommunications and Connectivity).
[24] U.S. Const., amend 10.
[25] Madison, James, *The Federalist No*. 45, pp. 2920293 (C. Rossiter ed. 1961), as quoted in Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).
[26] U.S. Const., Art. I, § 1.
[27] U.S. Const. Art. VI, cl 2.
[28] 47 U.S.C.A. § 1442(e)(2)

achievement of Congress's discernable objectives.[29] Here, legislative review would not conflict with or undermine Congressional intent. The Joint Fiscal Committee could review and approve the Governor's decision prior to the December 28th deadline.

Under field preemption, courts will infer an intention to preempt state law if the federal regulatory scheme is so pervasive as to "occupy the field" in that area of the law without supplemental regulation by the states.[30] Nothing in the federal law at issue here suggests that Congressional occupation of the field of national wireless communications systems extends to the allocation of authority between the branches of government in each state. If "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute."[31] There is no clear statement here.

That said, even if there were a clear statement of Congressional intent to bypass state legislative review, the anti-commandeering doctrine would prohibit such application of the law. The anti-commandeering doctrine prohibits the federal government from commandeering state government by imposing targeted, affirmative, coercive duties upon state legislators or executive officials.

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by case weighing of the burdens or benefits is necessary, such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[32]

In other words, Congress cannot require the Governor to act where he or she does not have the authority to act under state law or constitution. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[33]

In conclusion, State statute and constitutional law support the argument that any decision by the Governor to either opt in or opt out of the FirstNet State Plan implicates legislative approval authority, and that legislative authority cannot be preempted by act of Congress. Any other reading of the Spectrum Act would invade the province of state sovereignty reserved by the Tenth Amendment.

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[29] Gade v. National Solid Waste Mgmt. Ass'n. 505 U.S. 88, 98 (1992).
[30] Id.
[31] Gregory at 460 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)).
[32] Printz v. U.S., 521 U.S. 898, 935 (1997).
[33] New York v. U.S., 505 U.S. 144, 162 (1992).